No. 25-

IN THE

Supreme Court of the United States

THE VISIONARY, BOOKS + CAFÉ, LLC,

Petitioner,

v.

BANK OZK,

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

ARTHUR A. GARDNER
Counsel of Record
CHARLENA L. THORPE
GARDNER THORPE
2300 Windy Ridge Parkway, SE
Suite 1135 South
Atlanta, GA 30339
(770) 984-2300
artg@gardnerip.com

Counsel for Petitioner

389066

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

This petition concerns the proper scope of judicial review under §10(a)(4) of the Federal Arbitration Act, which permits a court to vacate an arbitral award where "the arbitrators exceeded their powers." This Court has held that arbitrators possess only the authority the parties confer by contract. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

In applying 9 U.S.C. §10(a)(4) after *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013), lower courts have differed on whether a court must examine arbitral authority if an arbitrator purports to interpret a contract.

1. After *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, does 9 U.S.C. §10(a)(4) require a court to compare an arbitral award with the scope of an arbitrator's powers to determine whether the arbitrator exceeded his or her powers, even where the arbitrator purported to interpret the contract?

2. Does a court of appeals violate the party-presentation principle by affirming a judgment on multiple dispositive *sua sponte* grounds that were neither raised nor briefed by the parties, without providing the parties advance notice or an opportunity to be heard, contrary to this Court's precedent, including *United States v. Sineneng-Smith*, 590 U.S. 371 (2020)?

CORPORATE DISCLOSURE STATEMENT

Petitioner The Visionary, Books + Café, LLC is a limited liability company. There is no parent corporation or publicly held company owning 10% or more of the company's units.

RELATED PROCEEDINGS

The Visionary, Books + Café, LLC v. Bank OZK, No. 25-10674, United States Court of Appeals for the Eleventh Circuit. Judgment entered on August 18, 2025. A petition for rehearing was denied on October 16, 2025.

The Visionary, Books + Café, LLC v. Bank OZK, No. 1:24-CV-14-SEG, United States District Court for the Northern District of Georgia. Judgment entered on January 30, 2025.

The Visionary, Books + Café, LLC v. Bank OZK, No. 2023CV390213, Superior Court of Fulton County, State of Georgia. No judgment entered in this case; instead, this case was removed to the United States District Court for the Northern District of Georgia.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES:

Cited Authorities

Page

Page

STATUTES AND OTHER AUTHORITIES:

Petitioner The Visionary, Books + Café, LLC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App. 23a-24a) denying a petition for rehearing is available at 2025 U.S. App. LEXIS 27082. The unpublished opinion of the court of appeals (App. 1a-7a) is available at 2025 U.S. App. LEXIS 21022. The opinion of the district court (App. 8a-22a) is available at 2024 U.S. Dist. LEXIS 68938. The award of the arbitrators (App. 25a-65a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 2025. App. 1a. A petition for rehearing en banc was denied on October 16, 2025. App. 23a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 10 of the Federal Arbitration Act, 9 U.S.C. §10.

> *§ 10. Same; vacation; grounds; rehearing*
>
> *(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—*

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

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

STATEMENT OF THE CASE

I. Introduction

Petitioner seeks judicial review of an arbitral award under the Federal Arbitration Act, 9 U.S.C. §10(a)(4), which provides that an arbitral award may be vacated when "the arbitrators exceeded their powers". Under *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the only powers an arbitrator has are those given by contract between the parties.

The Account Agreement between the Petitioner The Visionary, Books + Cafe, LLC ("Visionary") and Respondent Bank OZK indicated that the parties "may"

choose to arbitrate some or all issues that arose under the Account Agreement, thus allowing for the possibility that some issues could be resolved in the courts. (Doc. 13-2 at 20.)[1] The parties did not enter into a separate "arbitration agreement" and the Account Agreement does not state that the arbitrators would have the power to interpret the Account Agreement. There is no evidence of record that the parties agreed to empower the arbitrators to interpret the Account Agreement at all.

Both the district court and the court of appeals found that the arbitrators had interpreted the contract at issue and neither court evaluated whether the arbitrators had exceeded the powers they were given. *See generally*, App. 1a-22a. The court of appeals rested its ruling atop two *sua sponte* grounds, including that Petitioner is estopped from asserting that the parties did not agree to have the arbitrators interpret the contract because Petitioner asserted breach of the contract claim in the arbitration. App. 7a. Further, the court of appeals has taken the position that because the arbitrators interpreted the contract, there is no relief available under §10(a)(4). App. 6a (citing *Oxford Health Plans LLC v Sutter*, 569 U.S. 564, 569).

II. The Arbitration Award

In 2020 and 2021, restaurants and food-service businesses nationwide suffered severe economic hardship due to the COVID-19 pandemic. Congress responded by establishing the Restaurant Revitalization Fund ("RRF")

1. Reference to the court of appeals record is in the format Doc. # at #.

in March 2021 to provide emergency assistance to eligible restaurants, including those that had not yet opened due to pandemic-related disruptions. App. 36a; *see also* U.S. Gov't Accountability Office, GAO-22-105442, Restaurant Revitalization Fund: Opportunities Exist to Improve Oversight, at 1, 20 n.b, 30 n.38 (2022).

Petitioner Visionary was a planned restaurant whose opening was delayed by pandemic-related shutdowns. After years of planning, Petitioner Visionary incorporated in January 2020, before the pandemic, and in March 2021 applied for RRF assistance using the SBA's designated application process for restaurants that had not yet opened due to the COVID-19 pandemic. (*See* Doc. 13-1 at 108, 115, 118.) The SBA subjected such applications to heightened review, including banking and address verification, background checks, and multi-level review. GAO-22-105442 at 31–34. After completing that process, the SBA determined Petitioner Visionary was eligible and awarded it an RRF grant of $2.86 million, which was transmitted to Visionary via an ACH credit and deposited in Visionary's account by Respondent Bank OZK. App. 36a, 52a.

In 2021, Respondent Bank OZK confiscated the $2.86M from Petitioner Visionary's account without a court order or other judicial process. App. 47a nn.12-13.

Petitioner Visionary initiated arbitration seeking recovery of the funds and pressed several legal claims, including non-contract claims such as violation of Georgia's Uniform Commercial Code governing funds transfers (O.C.G.A. 11-4A-101 et seq.), theft and conversion, as well as contract claims for breach of the "Account Agreement". App. 2a-3a.

The arbitration panel expressly declined to make any finding that Petitioner Visionary committed fraud or was ineligible to receive RRF funds. App. 41a. The panel emphasized that Petitioner's eligibility for RRF funds and the propriety of its application were not issues before the panel and were unnecessary to resolve the claims in arbitration. *Id.* The panel further stated that any references in the award to a fraud investigation, fraud hold, or similar fraud-related terminology "must not be construed to suggest that the Panel has determined that any fraud or fraudulent conduct occurred." App. 41a-42a. Instead, the arbitration panel limited its analysis to whether Bank OZK had a suspicion of fraud. App. 42a.

The Account Agreement included several clauses providing that Respondent would *freeze* Petitioner's funds, not *seize* them, without a court order. (Doc. 13-2 at 9¶10, 15¶30, 17¶37.) The arbitration panel nevertheless ruled in favor of Respondent Bank OZK, concluding that the bank had "acted in a commercially reasonable manner" and declining to order return of the funds. App. 47a.

III. The District Court Ruling

Petitioner filed a petition to vacate in state court and Respondent removed the matter to federal court on diversity of citizenship jurisdiction pursuant to 28 U.S. Code § 1332.

In reaching its judgment, the district court first had to choose between reviewing the arbitral award under the Georgia Arbitration Code ("GAC") or the Federal Arbitration Act ("FAA"). App. 12a-14a. The district court noted that "the parties have not agreed, explicitly or implicitly, to displace the FAA's default regime for

reviewing arbitration awards." App. 14a. The district court also noted that the contract's generic choice of law provisions did not require the application of the GAC over the FAA and then concluded that "[t]he Court will therefore review the arbitral award under the FAA." App. 18a.

In reviewing Petitioner Visionary's motion to vacate the award, the district court found that the three-arbitrator panel squarely "interpreted the parties' contract . . . ." App. 20a (citing *Sutter*, 569 U.S. at 569). The district court did not evaluate what powers the arbitration panel had, nor whether the award exceeded those powers. *See* App. 19a-21a.

Ultimately, the district court, having evaluated the award under the FAA statute, ruled as follows:

> Visionary has failed to satisfy any of the statutory grounds for vacatur under the FAA's highly deferential standard.[5] Accordingly, the arbitration award must be confirmed. App. 21a.

In the district court's footnote "5" referenced in the above passage, the district court described in *dicta* its firmness in its FAA-based judgment by noting that even if the district court were to use one of the less deferential standards borrowed from the GAC (a "manifest disregard for the law"), the district court "would also confirm the arbitration award". App. 21a n.5. The district court did not articulate a separate basis for its judgment based on the GAC, as it had chosen the FAA statute and had rejected the suggestion that the GAC controlled.

IV. The Court of Appeals Ruling

The court of appeals did not find sufficient reasons in Respondent's appellate briefing to affirm the district court's order. Accordingly, as discussed below, the court of appeals raised two dispositive *sua sponte* reasons for affirming the district court. The two grounds raised *sua sponte* by the court of appeals were not raised or briefed by either party. (*See* Docs. 12, 14, 15.) Petitioner was not afforded any advance notice of either of these *sua sponte* issues and was not afforded any opportunity to respond to them prior to the court of appeals issuing its ruling.

One of the dispositive *sua sponte* rulings announced by the court of appeals was a new pronouncement that arbitrators have inherent power to construe contracts at issue even when the parties had not agreed to empower the arbitrators to construe the contract. App. 7a.

According to this newly pronounced rule by the court of appeals, since Petitioner submitted the question of breach of the Account Agreement to arbitration, Petitioner was barred or estopped from raising as an issue that the arbitrators had no power to interpret the Account Agreement. *Id.* (holding, "Having relied on the account agreement for its breach of contract claim, Visionary cannot now claim that the arbitrators had no authority to interpret that document.") The court of appeals cites no case law or other authority for such a proposition. *Id.*

The other dispositive ruling raised by the court of appeals *sua sponte* is that, in the court's view, the district court based its judgment on two grounds: one being under the FAA and the other being under the GAC. App. 3a-

4a. Finding that Visionary allegedly did not address the GAC-based alleged basis for the district court's judgment, the court of appeals held that affirmance of the district court's judgment is warranted. App. 4a-5a.

The court of appeals identified no reasons why it needed to intrude on the adversarial process and issue two dispositive *sua sponte* rulings, and no reasons for not providing the parties with notice and an opportunity to be heard on the surprise issues. App. 1a-7a.

Lastly, according to the court of appeals, the arbitration Award cannot be set aside under §10(a)(4) of the FAA solely because the three-arbitrator panel "interpreted" the parties' contract. App. 6a (citing *Oxford Health Plans LLC v Sutter*, 569 U.S. at 569) (emphasis added). The "contract-interpretation-is-enough" approach taken by the court of appeals is the same approach that the district court took, that merely finding that the arbitrators had interpreted the contract was enough to compel a court to affirm an award under §10(a)(4). App. 20a.

The court of appeals recognized that Petitioner raised a non-contract claim argument. App. 5a-6a ("Visionary also contends that, under Georgia's version of Article 4A of the UCC, the RRF funds belonged to it, and not to Bank OZK"). However, the court of appeals applied the same "contract-interpretation-is-enough" standard to evaluate §10(a)(4) with respect to this non-contract claim. *Id.*

REASONS FOR GRANTING THE PETITION

I. The Court's precedents governing vacatur under 9 U.S.C. §10(a)(4) would benefit from clarification

The petition should be granted because lower courts are divided and uncertain about whether 9 U.S.C. §10(a)(4) continues to require courts to police arbitral authority after this Court's decision in *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013).

As explained in the Statement of the Case, the arbitration panel made no finding that Petitioner Visionary engaged in fraud and confined its analysis to Respondent Bank OZK's asserted belief of potential fraud (App. 41a-42a), yet nonetheless approved a disposition of funds beyond what the Account Agreement authorized (*see, e.g.*, Doc. 13-2 at 9 ¶10), highlighting the need for judicial review under §10(a)(4) to determine whether the arbitrators exceeded their powers.

Further, as explained in the Statement of the Case, the court of appeals treated the arbitrators' purported "interpretation" of the Account Agreement as dispositive of the entire award, including Petitioner Visionary's non-contract claims, highlighting the need for judicial review under §10(a)(4) to determine whether the arbitrators exceeded their powers.

Some courts have treated *Sutter* as establishing a categorical rule that once a court determines that an arbitrator "interprets" a contract, judicial review under §10(a)(4) must end. Other courts, including panels within the same circuit, have continued to apply this Court's

longstanding arbitral power inquiry by examining whether the award exceeded the authority actually conferred by the parties, even where the arbitrator purported to interpret the contract. The decision below adopts the former approach, effectively collapsing §10(a)(4) review into a single threshold inquiry and departing from this Court's precedents in *First Options*, 514 U.S. 938, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), and *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987). This intra- and inter-circuit disarray warrants this Court's intervention to clarify the proper application of §10(a)(4) and to restore uniformity to federal arbitration law.

Part of the post-*Sutter* confusion may stem from uncertainty over what it means for an arbitrator to have "interpreted" a contract. Some courts appear to treat that determination as a purely factual inquiry, satisfied whenever an arbitrator references or discusses the contract in the award. Other courts treat it as a legal conclusion, requiring an assessment of whether the arbitrator actually construed the contract in a manner tethered to its text and within the scope of the authority conferred. Conflating these distinct inquiries collapses §10(a)(4) review into a mechanical fact-finding exercise and eliminates the statute's command that courts determine whether arbitrators exceeded their powers.

According to the court of appeals below, an arbitral award cannot be set aside under §10(a)(4) of the FAA once a court determines that the arbitrators "interpreted" the parties' contract. App. 6 (citing *Sutter*, 569 U.S. at 569). Under that view, the mere finding of contract interpretation ends the judicial inquiry, regardless of

whether the arbitrators exceeded the authority conferred by the parties.

In the years since *Sutter* was decided, however, lower courts have taken divergent approaches to its application. Some courts treat *Sutter* as foreclosing traditional arbitral power review under §10(a)(4) whenever an arbitrator has interpreted a contract. Other courts continue to conduct an arbitral power inquiry even after acknowledging that the arbitrator interpreted the agreement. The result is substantial doctrinal dispersion regarding the scope of §10(a)(4) review after *Sutter*.

This divergence may stem from uncertainty about *Sutter's* reach. One reading confines *Sutter* to its narrow factual context: a class-arbitration dispute in which the arbitrator was expressly tasked with answering a single, binary interpretive question. Under that reading, *Sutter* does not displace the traditional requirement that courts compare an arbitral award to the powers actually conferred by the parties. Another reading treats *Sutter* as establishing a broad rule applicable to all §10(a)(4) cases, under which contract interpretation alone categorically forecloses vacatur.

Lower courts have adopted both approaches.

A. Divergent Methodologies in the Lower Courts

The Eleventh Circuit itself illustrates this inconsistency. Several panels have cited *Sutter* while nonetheless applying an arbitral power test that examines whether the award exceeded the authority granted to the arbitrator:

- *Johnson v. Directory Assistants Inc.*, 797 F.3d 1294 (11th Cir. 2015);

- *Wiregrass Metal Trades Council AFL-CIO v. Shaw Envtl. & Infrastructure, Inc.*, 837 F.3d 1083, 1088 (11th Cir. 2016)("The second guiding principle is that an arbitrator may not ignore the plain language of the contract.");

- *Gherardi v. Citigroup Global Mkts., Inc.*, 975 F.3d 1232 (11th Cir. 2020);

- *Warrior Met Coal Mining, LLC v. UMW*, 28 F.4th 1073, 1081 (11th Cir. 2022)("an arbitrator may not ignore the plain language of the contract."); and

- *Hidroelectrica Santa Rita S.A. v. Corporacion AIC, S.A.*, 119 F.4th 920, 925 (11th Cir. 2024). Interestingly, *Hidroelectrica* acknowledged *Sutter* as foreclosing traditional arbitral power review, but still evaluated whether the arbitrator exceeded the scope of authority. *Hidroelectrica,* 119 F.4th at 926-929.

By contrast, other Eleventh Circuit panels (and district courts) have cited *Sutter* to affirm awards solely on the ground that the arbitrator interpreted the contract, without conducting any arbitral power analysis:

- *Southern Communications Services, Inc. v. Thomas*, 720 F.3d 1352 (11th Cir. 2013);

- *DirecTV, LLC v. Arndt*, 546 F. App'x 836 (11th Cir. 2013);

- *Blake v. Rocklyn Homes, Inc.*, 2024 U.S. App. LEXIS 30570 (11th Cir. 2024);

- *Visionary, Books + Café, LLC v. Bank OZK*, 2024 U.S. Dist. LEXIS 68938 (N.D. Ga. 2024); and

- *Visionary, Books + Café, LLC v. Bank OZK*, 2025 U.S. App. LEXIS 21022 (11th Cir. 2025).

Adding to the inconsistency, some post-*Sutter* decisions have applied a traditional arbitral power test without citing *Sutter*, despite the arbitrator having interpreted the contract. *See, e.g.*, *Nalco Co. LLC v. Bonday*, 142 F.4th 1336 (11th Cir. 2025).

B. The Consequences of Uncertainty under §10(a)(4)

Traditionally, the meaning of "exceeded their powers" under §10(a)(4) has been well established. In labor arbitration, an award "is legitimate only so long as it draws its essence" from the agreement. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). In commercial arbitration, courts have vacated awards that contradict or ignore unambiguous contract language, modify the agreement, or reflect the arbitrator's own sense of justice rather than the parties' agreement. *See, e.g.*, *Wiregrass*, 837 F.3d at 1088.

While courts do not vacate awards merely because an arbitrator committed legal error, §10(a)(4) has long preserved a narrow but meaningful check against arbitrators exceeding the authority granted by contract.

In the wake of *Sutter*, however, it remains unsettled whether those traditional defects remain cognizable. If courts are categorically barred from conducting any arbitral power inquiry once contract interpretation is identified, §10(a)(4) is effectively reduced to a single threshold question, and longstanding limits on arbitral authority become unenforceable. If, by contrast, *Sutter* does not displace arbitral power review, then courts must continue to compare the award to the scope of authority conferred.

This case squarely presents that unresolved question. Clarification from this Court is warranted to ensure uniform application of §10(a)(4) and to preserve the statutory balance between arbitral finality and contractual consent.

Although unpublished, the decision of the court of appeals is citable as persuasive authority under 11th Cir. R. 36-2 and thus can impact and influence FAA cases going forward.

II. The court of appeals' reliance on multiple dispositive *sua sponte* grounds so far departed from the accepted and usual course of judicial proceedings as to warrant this Court's supervisory review

As shown in reasons II-IV below, this petition presents a compelling case for review because the court of appeals affirmed a judgment that could not be sustained on the grounds presented by the parties by repeatedly departing from settled procedural and substantive constraints governing appellate review and arbitration law. Rather than resolving the appeal within

the adversarial framework, the court of appeals relied on multiple dispositive grounds raised *sua sponte*, without notice or an opportunity to be heard, thereby disregarding the party-presentation principle that is foundational to this Court's jurisprudence.

In doing so, the court of appeals announced a novel estoppel rule that insulates arbitral assertions of authority from judicial review, in direct conflict with this Court's arbitration precedents and the text of §10(a)(4) of the Federal Arbitration Act. The court of appeals further compounded these errors by affirming on an abandonment theory that treated dicta in a district court footnote as a binding alternative ground for judgment, contrary to this Court's repeated admonition that appellate courts review judgments, not statements in opinions. Taken together, these departures reflect a marked deviation from the accepted and usual course of judicial proceedings, present important and recurring questions concerning the limits of arbitral authority and appellate adjudication, and warrant the exercise of this Court's supervisory review.

Turning more particularly now to reason II, the petition should be granted because the court of appeals affirmed the judgment on multiple dispositive grounds that were neither raised nor briefed by the parties, without providing notice or an opportunity to be heard, and without identifying any exceptional circumstances justifying departure from the adversarial process. This Court has repeatedly exercised its supervisory authority where lower courts have so far departed from the accepted and usual course of judicial proceedings by resolving cases on unbriefed, outcome-determinative grounds without notice or an opportunity to be heard. *See United States v.*

Sineneng-Smith, 590 U.S. 371 (2020); *Day v. McDonough*, 547 U.S. 198 (2006); *Wood v. Milyard*, 566 U.S. 463 (2012).

The Court has long emphasized that the American judicial system is built on the party-presentation principle: parties frame the issues for decision, and courts act as neutral arbiters of those issues. *Sineneng-Smith*, 590 U.S. at 375–76; *Greenlaw v. United States*, 554 U.S. 237, 243–44 (2008). Although courts possess limited authority to raise issues *sua sponte*, that authority is tightly constrained. Before acting on an unpresented ground, a court must provide fair notice and an opportunity to be heard, *Day*, 547 U.S. at 210, and only in extraordinary circumstances justifying departure from the adversarial process, *Wood*, 566 U.S. at 463.

The court of appeals did none of those things here.

Instead, the court of appeals affirmed on two dispositive theories raised *sua sponte* for the first time in its opinion. First, it announced a new estoppel rule barring a party who submits a breach of contract claim to arbitration from contesting whether the arbitrators were empowered to interpret the contract. Second, it treated dicta in a footnote of the district court's opinion as an alternative ground for judgment and faulted Petitioner for failing to challenge it on appeal. Neither theory was raised by Respondent, briefed by the parties, or subjected to adversarial testing. The court of appeals provided no notice, no opportunity to respond, and no explanation for why this case warranted resolution on unpresented grounds.

This Court has cautioned that affirming on unbriefed, outcome-determinative grounds risks transforming appellate courts from neutral arbiters into active participants in the litigation and undermines confidence in the fairness of judicial proceedings. *Sineneng-Smith*, 590 U.S. at 375. That concern is acute here, where both *sua sponte* rulings were dispositive and outcome-determinative. It is of even greater concern where *sua sponte* grounds create new rules of law, such as here.

By resolving the appeal on unbriefed dispositive grounds without notice or an opportunity to be heard, the court of appeals also implicated basic principles of procedural due process, which require that civil litigants be afforded a meaningful opportunity to be heard on controlling legal issues before judgment is rendered. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-432 (1982).

Before the court of appeals issued its decision, Petitioner expressly cautioned against affirmance on unbriefed grounds and requested that the court of appeals confine its decision to the issues raised by the parties. (Doc. 15 at 24 n.5.) The court of appeals nonetheless affirmed on multiple dispositive grounds raised *sua sponte*, without notice or an opportunity to be heard.

If permitted to stand, the approach taken below would authorize appellate courts to supply their own theories for affirmance without notice, deprive parties of the opportunity to be heard on dispositive issues, and insulate novel legal rules from adversarial scrutiny. Because the decision below departs so sharply from this Court's precedents governing *sua sponte* decision-making

and the party-presentation principle, review is warranted to restore uniformity and reaffirm the limits of appellate authority.

III. The court of appeals' *sua sponte* estoppel ruling created new law with no authority and without briefing or argument

The decision below warrants this Court's review because the court of appeals announced a new rule of federal arbitration law without statutory basis, precedential support, or adversarial testing.

Acting *sua sponte*, the court of appeals held that a party who submits a breach of contract claim to arbitration is estopped from arguing that the parties did not empower the arbitrators to interpret the contract. The court of appeals stated the rule this way: "Having relied on the account agreement for its breach of contract claim, Visionary cannot now claim that the arbitrators had no authority to interpret that document." App. 7a.

That rule was never raised, briefed, or argued by either party. Nor did the court of appeals provide advance notice or an opportunity to be heard before announcing it. The rule is outcome-determinative: without it, the case would have been decided in Petitioner's favor. Without the new estoppel rule and with no evidence of any agreement to empower arbitral interpretation of the Account Agreement, any contract interpretation by the arbitrators would inherently exceed their powers. Yet the court of appeals identified no justification for intruding on the adversarial process in this manner, contrary to this Court's precedent. *See, e.g.*, *Sineneng-Smith*, 590 U.S. 371.

The court of appeals cited no statutory text, no decision of this Court, and no circuit precedent supporting its estoppel rule.

The rule is also substantively unsound. Arbitrators are not courts. They do not possess inherent or plenary authority over all issues touching a contract merely because a breach claim is before them. A court adjudicating a breach of contract claim may address validity, enforceability, defenses, and interpretation as a matter of course. An arbitrator may do so only to the extent the parties have agreed.

As this Court has repeatedly held, "[a]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options,* 514 U.S. at 943 (emphasis added); *see also Stolt-Nielsen*, 559 U.S. at 682. Arbitrators therefore possess only the powers the parties expressly confer by agreement.

In many commercial contracts, arbitration provisions are mandatory and exclusive, conferring authority over all disputes arising from the contractual relationship. That is not this case. The Account Agreement here was permissive. It allowed the parties to choose particular issues to be arbitrated while others could be resolved in court. (Doc. 13-2 at 20 ("You or we may require that any controversy or claim relating to this agreement, or breach of it be resolved through arbitration . . . .").) Nothing in the agreement empowered arbitrators to interpret the Account Agreement as such. Nor did the parties enter into any separate or subsequent agreement conferring such authority.

The estoppel rule announced by the court of appeals converts the submission of a breach claim into consent to arbitral self-definition of power. That rule conflicts with this Court's insistence that arbitral authority must be grounded in actual agreement, not inferred consent or litigation posture. *See Stolt-Nielsen*, 559 U.S. at 684.

By insulating arbitral assertions of authority from judicial review under §10(a)(4), the estoppel rule rule announced by the court of appeals effectively nullifies the statutory limitation on arbitral power. The creation of such a rule without briefing, argument, or notice raises an important federal question concerning the limits of arbitral authority and the proper role of courts under the Federal Arbitration Act.

Doctrinally, the rule announced by the court of appeals is irreconcilable with this Court's arbitration framework. This Court's decisions establish a clear sequence: courts must identify the scope of arbitral authority conferred by agreement and then determine whether the award exceeds that authority. *First Options* defines the source of arbitral power and *Stolt-Nielsen* confirms that interpretation alone does not immunize an award from review if the arbitrator acts beyond the powers granted. The *sua sponte* estoppel rule announced by the court of appeals short-circuits that inquiry altogether. By holding that when a party submits a contract claim to arbitration, that party is estopped from contesting arbitral authority, the court of appeals transformed consent into forfeiture and replaced contractual delegation with procedural happenstance. That doctrinal move finds no support in the FAA or this Court's cases.

If allowed to stand, the estoppel rule announced by the court of appeals will have significant and recurring consequences. Under the rule announced below, the mere assertion of a breach claim would automatically confer interpretive authority on arbitrators, regardless of contractual limits, and would bar any later challenge to that authority. That result would expand arbitral power beyond the parties' agreement and substantially curtail judicial review under §10(a)(4), contrary to the statutory design and this Court's precedent. This could affect many parties going forward.

IV. The court of appeals' *sua sponte* estoppel rule conflicts with this Court's arbitration precedent

The petition should be granted because the court of appeals adopted a new rule of federal arbitration law that squarely conflicts with this Court's precedent. Acting *sua sponte*, the court of appeals held that a party who submits a breach of contract claim to arbitration is estopped from arguing that the parties did not empower the arbitrators to interpret the contract. That rule finds no support in this Court's decisions and cannot be reconciled with the foundational principle that arbitral authority derives solely from the parties' consent.

This Court has repeatedly emphasized that arbitration is simply a matter of contract between the parties, and that arbitrators possess only the powers the parties have agreed to confer. *First Options*, 514 U.S. at 943. Judges adjudicating breach of contract claims exercise plenary judicial authority. Arbitrators do not. They are not courts, and they may decide only those issues the parties have agreed to submit to them. Nothing in this Court's

precedent supports the proposition that submitting a contract claim to arbitration automatically confers authority to interpret the contract itself.

The estoppel rule announced by the court of appeals directly conflicts with this Court's decisions interpreting §10(a)(4) of the Federal Arbitration Act. Under that provision, courts must vacate arbitral awards where the arbitrators exceeded their powers. This Court's cases, including *Misco,* 484 U.S. 29 and *Stolt-Nielsen,* 559 U.S. 662, require courts to compare the arbitral award with the authority actually conferred by the parties and to vacate awards that exceed those limits, even where the arbitrator purported to interpret the contract. By barring any inquiry into arbitral authority once a breach of contract claim is submitted, the court of appeals eliminated that required analysis.

If allowed to stand, the estoppel rule announced below would dramatically expand arbitral authority, particularly in contracts of adhesion, by converting participation in arbitration into implied consent to arbitral self-definition of power. That result is irreconcilable with this Court's insistence that arbitral authority must be grounded in agreement, not inferred from arbitral action.

This case presents a clean vehicle for addressing the conflict. The parties entered into a single agreement, the Account Agreement, which contained a permissive, not mandatory, arbitration provision. It allowed individual issues to be arbitrated while preserving the ability to resolve others in court. The parties did not enter into a separate arbitration agreement, nor did they agree to delegate authority to interpret the Account Agreement

to the arbitrators. In such circumstances, submission of a breach of contract claim does not, under this Court's precedent, supply the missing consent.

Because the estoppel rule adopted below conflicts with this Court's arbitration jurisprudence, alters the balance between courts and arbitrators established by Congress and this Court, and threatens to insulate excess exercises of arbitral authority from judicial review, the petition should be granted.

V. The court of appeals' *sua sponte* abandonment ruling conflicts with this Court's precedent that appellate review is of judgments, not of dicta

The petition should be granted because the court of appeals affirmed on an abandonment theory that conflicts with this Court's settled precedent that appellate courts review judgments, not dicta or hypothetical reasoning contained in lower court opinions. The court of appeals held that Petitioner was required to challenge an alleged "alternative ground" for the district court's judgment derived from a footnote, and that failure to do so compelled affirmance. That holding is incompatible with this Court's precedent and represents a departure from accepted principles of appellate review.

The abandonment ruling announced by the court of appeals rested on its conclusion that a footnote in the district court's opinion constituted an independent alternative ground for judgment under Georgia's arbitration law (the GAC). App. 3a-4a. That premise is incorrect. The district court expressly rejected the application of the GAC and held that the FAA governed

its review of the arbitral award. The footnote did not apply the GAC or adopt it as a basis for decision. It stated only that the court would reach the same result under one hypothetical GAC vacatur standard, after concluding that the GAC did not apply at all.

Furthermore, the court of appeals' *sua sponte* abandonment ruling does not dispose of Petitioner's non-contract claims, including under Georgia's Uniform Commercial Code governing funds transfers, which does not depend on the GAC and was never addressed under the court of appeals' abandonment theory.

The court of appeals faulted Petitioner for failing to address O.C.G.A. § 9-9-13 on appeal and deemed the appeal abandoned. That conclusion was reached *sua sponte* and without adversarial testing.

The premise is incorrect as a matter of appellate doctrine. The district court expressly rejected the application of the GAC and held that the FAA governed its review of the arbitral award. The judgment rested on a single ground: confirmation of the award under the FAA. The footnote relied upon by the court of appeals was explicitly conditional and hypothetical. It stated *subjunctively* that the court "would" reach the same result if a different legal standard applied, after having already concluded that it did not.

This Court has long made clear that general, conditional, or hypothetical statements in an opinion do not constitute grounds of decision and do not control appellate review. As the Court explained in *Black v. Cutter Laboratories*, it "reviews judgments, not statements in

opinions," and it is the appellate court's duty to determine "precisely the ground on which the judgment rests." 351 U.S. 292, 297-98 (1956) Treating dicta as a binding alternative holding directly contradicts that instruction.

The abandonment rule applied below disregards these principles by converting a footnote hypothetical into a dispositive ground of decision that Petitioner allegedly was required to anticipate and refute on appeal. An appellant cannot abandon a ground that the district court did not adopt. Federal Rule of Appellate Procedure 28 requires appellants to challenge the rulings that support the judgment, not to negate every speculative or conditional observation in a district court's opinion.

If allowed to stand, the decision below would have sweeping consequences. It would require appellants to brief and negate every hypothetical or protective footnote in a lower court opinion on pain of automatic affirmance. Such a rule undermines clarity in judicial decision-making, incentivizes the inclusion of dicta, and erodes meaningful appellate review.

Because the abandonment ruling conflicts with this Court's precedent distinguishing judgments from dicta and departs from the accepted and usual course of appellate proceedings, review is warranted.

This petition presents a clean vehicle for answering the questions presented, in part because the court of appeals resolved the case below on pure questions of law, without disputed facts, and on grounds that will recur in FAA cases nationwide.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR A. GARDNER
Counsel of Record
CHARLENA L. THORPE
GARDNER THORPE
2300 Windy Ridge Parkway, SE
Suite 1135 South
Atlanta, GA 30339
(770) 984-2300
artg@gardnerip.com

Counsel for Petitioner

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED AUGUST 18, 2025

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 25-10674
Non-Argument Calendar

THE VISIONARY, BOOKS + CAFE, LLC,

Plaintiff-Counter Defendant-Appellant,

versus

BANK OZK,

Defendant-Counter Claimant-Appellee.

Filed August 18, 2025

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:24-cv-00014-SEG

Before JORDAN, BRANCH, and ANDERSON, Circuit Judges.

PER CURIAM:

In early May of 2021, The Visionary, Books + Café filed an application for a grant under the Restaurant Revitalization Fund administered by the U.S. Small

Business Administration. Soon thereafter, the SBA approved the application and awarded Visionary a grant of $2.86 million. The U.S. Treasury transmitted the money to Visionary through a government automated clearing house (ACH) transaction to Bank OZK, Visionary's financial institution. Bank OZK received the ACH credit entry for the funds on May 24, 2021.

Due to the size of the transaction, Bank OZK initiated an investigation and determined that the ACH credit entry might be fraudulent because Visionary's account had almost no activity; the account information listed Visionary as a financial consultancy and not a restaurant; and Visionary's address was a box at a UPS store. Bank OZK placed a hold on the RRF funds in Visionary's account and returned those funds to the U.S. Treasury on May 26, 2021. Visionary tried to have the SBA send the funds back to its account but was unsuccessful.

Visionary instituted an arbitration proceeding against Bank OZK in March of 2022 under the Commercial Arbitration Rules of the American Arbitration Association. Visionary asserted a number of claims under Georgia law, including claims for computer invasion of privacy, computer theft, computer forgery, account takeover, breach of privacy and security, tortious interference, theft, conversion, check/negotiable instrument fraud, breach of contract, breach of implied duty of good faith and fair dealing, defamation, identity theft, negligence, negligent misrepresentation, and fraudulent misrepresentation. Visionary also asserted claims for violations of the Georgia UCC, the Georgia Fair Business Practices Act,

42 U.S.C. § 1981, and the Fourteenth Amendment to the U.S. Constitution. Visionary sought over $10 million in compensatory damages (including treble damages), and over $45 million in punitive damages, plus attorney's fees and costs

After hearing evidence from the parties in May and July of 2023, a AAA panel comprised of three arbitrators issued a 31-page award in favor of Bank OZK on all of Visionary's claims. As relevant here, the panel found that Bank OZK "acted in good faith, in a commercially reasonable manner, and in accordance with the applicable laws and regulations" in connection with the ACH credit entry, and in accordance with the parties" account agreement and all other applicable laws, regulations, and agency guidance.

Visionary filed suit in Georgia state court seeking to vacate the arbitral award. Bank OZK removed the case to federal court and moved to confirm the award.

The district court entered an order granting Bank OZK's motion to confirm the arbitral award and denying Visionary's motion to vacate the award. It reasoned as follows. First, the Federal Arbitration Act, and not the Georgia Arbitration Code, governed. Second, the arbitration was binding on the parties.

Third, Visionary's argument that the arbitrators "exceeded their powers" under 9 U.S.C. § 10(a)(4) failed. The arbitral award demonstrated that the arbitrators had interpreted Visionary's account agreement, and

Visionary's disagreement with that interpretation was insufficient to overcome the FAA's presumption that arbitral awards should be confirmed. Fourth, and alternatively, the arbitral award would still be confirmed under the Georgia Arbitration Code's lesser "manifest disregard of the law" standard, *see* O.C.G.A. § 9-9-13, because the arbitrators "did not manifestly ignore the law."

This is Visionary's appeal. Exercising de novo review, *see Gherardi v. Citigroup Global Mkts., Inc.* 975 F.3d 1232, 1236 (11th Cir. 2020), we affirm the district court's well-reasoned order. [1]

As an initial matter, Visionary does not address the district court's alternative ruling that the arbitral award would be confirmed even under the Georgia Arbitration Code's lesser "manifest disregard of the law" standard. It does not cite to, much less discuss, O.C.G.A. § 9-9-13 in its brief. We have explained that when a district court bases its judgment on several alternative grounds, a party seeking to reverse that judgment must show that each of the alternative grounds constituted error: "To obtain reversal of a district court judgment that is based on multiple, independent grounds, an appellant must convince us that every stated ground for the judgment against him is incorrect. When an appellant fails to challenge properly on appeal one of the grounds on which the district court

1. On appeal Visionary appears to challenge only the arbitrators' resolution of its breach of contract claim, as it does not address any of the other claims. We therefore limit our discussion to the breach of contract claim.

based its judgment, he is deemed to have abandoned any challenge of that ground, and it follows that the judgment is due to be affirmed." *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014). Visionary's failure to challenge the district court's alternative ruling means that affirmance is in order.

Even if we address Visionary's arguments under the FAA, we reach the same result. Visionary contends that Bank OZK had "no right under the [a]ccount [a]greement to confiscate the funds" sent by the SBA, *see* Appellant's Br. at 20, but its arguments in support of that proposition fail. [2]

For example, Visionary argues that the arbitrators exceeded their powers under 9 U.S.C. § 10(a)(4) because they did not have the authority to interpret the account agreement in the way that they did. As Visionary sees things, the arbitral award contradicted the plain language of the account agreement, and the arbitrators should not have used the NACHA clearinghouse rules in interpreting the agreement and in evaluating Bank OZK's conduct. Visionary also contends that, under Georgia's version of Article 4A of the UCC, the RRF funds belonged to it, and not to Bank OZK, at the time Bank OZK returned them to

2. We note that Visionary and Bank OZK arranged for a stenographic record of the evidentiary hearing before the arbitrators, and later provided the arbitrators with transcripts of that hearing. *See* D.E. 12-1 at 8. The transcripts, however, were not included in the record in the district court and are not available to us. Our decision, therefore, is based on the four corners of the arbitral award.

the SBA. *See* Appellant's Br. at 21-36, 40-50. These merits arguments, however, are premised on a misunderstanding of the limited judicial review permitted by § 10(a)(4).

"A party seeking relief under [§ 10(a)(4)] bears a heavy burden. 'It is not enough . . . to show that the [arbitrator] committed an error—or even a serious error.' 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." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013) (citations omitted). That the arbitrators disagreed with Visionary's theory, and concluded that Bank OZK acted in accordance with the account agreement, *see* D.E. 12-1 at 18, does not mean that they exceeded their powers.

As the district court correctly explained, and as we have held, an arbitrator's incorrect interpretation of a contract does not permit vacatur under § 10(a)(4):

> AICSA contends that the Tribunal's interpretation was a misreading of the contract that effectively nullified that contract term, but the Tribunal explained exactly how it derived its ruling from the contractual language. Even if we were to accept that this interpretation is a misreading of the contract, "a court should not reject an award on the ground that the arbitrator misread the contract." That is because an arbitrator does not exceed his power when he makes errors. To vacate an arbitral

> award on the merits of the arbitrator's contract interpretation would make meaningless the parties' bargained-for provisions establishing the finality of the arbitrator's interpretation. And although AICSA disagrees, the Tribunal *did* interpret the contract.

Hidroelectrica Santa Rita S.A. v. Corporacion AIC S.A., 119 F. 4th 920, 928 (11th Cir. 2024) (citations omitted).

To the extent that Visionary asserts that the arbitrators had no power whatsoever to construe the account agreement, *see* Appellant's Br. at 37-40, that contention also lacks merit. Visionary asserted a breach of contract claim premised on Bank OZK's alleged failure to comply with the account agreement, and it was Visionary which introduced the agreement into evidence at the evidentiary hearing before the arbitrators. *See* D.E. 12-1 at 7. Visionary understandably wanted the arbitrators to apply the agreement in a certain way (i.e., in a way which showed that Bank OZK had acted wrongfully in returning the RRF funds to the SBA), but the breach of contract claim squarely placed the meaning (i.e., the construction) of the agreement before the arbitrators. Having relied on the account agreement for its breach of contract claim, Visionary cannot now claim that the arbitrators had no authority to interpret that document.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED JANUARY 30, 2025

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. 1:24-CV-14-SEG

THE VISIONARY, BOOKS + CAFE, LLC,

Plaintiff, Counter-Defendant,

v.

BANK OZK,

Defendant, Counter-Plaintiff.

Filed January 30, 2025

ORDER

This matter is before the Court on Plaintiff/Counter-Defendant The Visionary, Books + Cafe, LLC's ("Visionary") motion to vacate arbitration award (Doc. 7) and Defendant/Counter-Plaintiff Bank OZK's cross-motion to confirm arbitration award (Doc. 8). After careful consideration, the Court enters the following order.

Appendix B

I. Background

The underlying dispute in this case concerns a banking transaction. Visionary opened a business checking account with Bank OZK in 2020. (Award of Arbitrators, Doc. 12-1 at 8.) On May 3, 2021, Visionary applied for a grant under the federal Restaurant Revitalization Fund ("RRF") administered by the U.S. Small Business Administration ("SBA"). (*Id.* at 9.) Soon after, the SBA approved Visionary's application, awarding a grant of $2.86 million. (*Id.*) The United States Treasury then transmitted the $2.86 million grant to Visionary through a government automated clearing house ("ACH") transaction to Bank OZK. (*Id.*)

On May 24, 2021, Bank OZK received the ACH "credit entry" ("V-ACH"). (*Id.*) The Treasury's transmittal of such a large sum to a small business checking account set off red flags at Bank OZK, which began investigating the transaction. (*Id.*) Based on its investigation, Bank OZK determined that the V-ACH might be fraudulent because, *inter alia*, Visionary's account had almost no previous activity; Visionary's account information listed it as a financial consultancy, not a restaurant; and Visionary's address was a box at a UPS store. (*Id.* at 9-10.) As a result, Bank OZK placed a hold on the RRF funds in Visionary's account. (*Id.* at 10.) Bank OZK then returned the RRF funds to the U.S. Treasury on May 26, 2021. (*Id.* at 11.)

On March 16, 2022, Visionary filed an arbitration demand with the American Arbitration Association ("AAA") alleging that Bank OZK's return of the RRF funds was improper. (*Id.* at 1-2, 11.) After several amendments,

Visionary's operative demand brought twenty-three claims[1] and sought $7,433,333.33 in compensatory damages, plus attorney's fees, interest, arbitration costs, and punitive damages. (*Id.* at 3.) Following a lengthy arbitration proceeding, a three-arbitrator panel entered an award for Bank OZK and against Visionary on all claims. (*Id.* at 28-31.)

Visionary later filed suit in the Superior Court of Fulton County seeking to vacate the arbitration award. (Doc. 1-1.) Bank OZK removed the case to this Court. (Doc. 1.) Visionary has moved to vacate the arbitration award (Doc. 7), while Bank OZK has moved to confirm the

---

1. Visionary asserted the following claims:

> computer invasion of privacy (O.C.G.A. § 16-9-93(c)), computer theft (O.C.G.A. § 16-9-93(a)), computer forgery (O.C.G.A. § 16-9-93(d)) under the Georgia Computer Systems Protection Act (OCGA § 16-9-90 et seq.); account takeover, breach of privacy & security; violation of Reg. CC (Expedited Funds Availability Act); violation of Georgia's Uniform Commercial Code—Funds Transfers (O.C.G.A. § 11-4A-101 et seq.); Georgia's Fair Business Practices Act (O.C.G.A. § 10-1-390 et seq.); tortious interference, theft, conversion, check fraud/fraudulent negotiable instrument paid; ACH fund transfer fraud, breach of contract, breach of implied duty of good faith and fair dealing; breach of fiduciary duty, defamation, identity theft, negligence, negligent misrepresentation, fraudulent misrepresentation; violation of 14th Amendment; and discrimination (42 U.S.C. § 1981, Title VI, 42 U.S.C. § 2000d et seq.).

(Doc. 12-1 at 2-3.)

arbitration award (Doc. 8). The parties have extensively briefed their respective motions. (Doc. 7, 8, 11, 16, 17, 19, 22, 25, 26.)

II. Legal Standard

The Federal Arbitration Act ("FAA") "imposes a heavy presumption in favor of confirming arbitration awards; therefore, a court's confirmation of an arbitration award is usually routine or summary." *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 842 (11th Cir. 2011) (cleaned up). Section 9 of the FAA provides that where a party to an arbitration applies to a court for an order to confirm an arbitration award, "the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." 9 U.S.C. § 9. "Judicial review of arbitration awards is 'narrowly limited,' and the FAA presumes that arbitration awards will be confirmed." *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998); *see AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 508 F.3d 995, 1001 (11th Cir. 2007) ("[J]udicial review of arbitration decisions is among the narrowest known to the law." (cleaned up)).

Section 10 of the FAA permits vacatur of an arbitration award in four narrow circumstances:

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

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). In the Eleventh Circuit, these are the exclusive grounds for vacating an arbitral award; "judicially-created" bases for vacatur are no longer recognized. *See Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1324 (11th Cir. 2010) ("We hold that our judicially-created bases for vacatur are no longer valid."); *see also DIRECTV, LLC v. Arndt*, 546 F. App'x 836, 839 (11th Cir. 2013) ("Section 10 enumerates the exclusive grounds for vacatur of an arbitration award.").

III. Application of the Federal Arbitration Act

As a threshold matter, Visionary argues that that the Georgia Arbitration Code ("GAC")—not the Federal Arbitration Act ("FAA")—governs review of the arbitration award in this case. (Doc. 11 at 5.) First, Visionary asserts that the parties contracted for Georgia law to apply. (*Id.*) Second, Visionary contends that the arbitration between the parties was nonbinding, rendering the FAA inapplicable. (Doc. 25 at 1-4.) Neither argument is persuasive.

The parties' contract does not point to the application of Georgia law for the review of arbitral awards. Visionary selectively quotes the contract as suggesting that "[t]his agreement is subject to . . . the laws of the State of Georgia. . . ." (Doc. 11 at 2 (quoting Ex. C-62, Doc. 13-8 at 2).) However, that provision states that the "agreement is subject to *applicable federal laws*, the laws of the state of Georgia and other applicable rules such as the operating letters of the Federal Reserve Banks and payment processing system rules. . . ." (Doc. 13-8 at 2 (emphasis added).)[2]Thus, the agreement references *both* federal law and Georgia law, and does not indicate which body of law should apply to arbitration awards.

Moreover, any doubts over which law should apply are resolved in favor of the FAA. As the Eleventh Circuit has instructed, "[l]ong story, short: if you want certain rules to apply to the handling of your arbitration, the contract must say so clearly and unmistakably. Otherwise, the Federal Arbitration Act ("FAA") will apply." *Gulfstream Aerospace Corp. v. Oceltip Aviation 1 Pty Ltd.*, 31 F.4th 1323, 1325 (11th Cir. 2022). *Gulfstream* squarely held that an agreement's general Georgia choice-of-law provision "does not evidence a clear intent by the parties that the Georgia Arbitration Code—as opposed to federal arbitral-award vacatur standards—control" the review of arbitration awards. *Id.* at 1331; *see also Cooper v. WestEnd Cap. Mgmt., L.L.C.*, 832 F.3d 534, 544 (5th Cir.

2. Another provision of the agreement that the parties do not cite states that "[t]his agreement is governed by federal law and the laws of the state where the account is located." (Ex. C-63, Doc. 13-9 at 1.)

2016) ("A choice-of-law provision is insufficient, by itself, to demonstrate the parties' clear intent to depart from the FAA's default rules." (cleaned up)). In addition, because the parties' contract in *Gulfstream* required arbitration "by the American Arbitration Association ("AAA") in accordance with the provisions of its Commercial Arbitration Rules," and never mentioned the Georgia Arbitration Code, the court found that "the parties at least implicitly chose not to have the Georgia Arbitration Code cover the arbitration itself." *Gulfstream*, 31 F.4th at 1329.

So too here. Visionary and Bank OZK's contract specifically calls for "arbitration administered by the American Arbitration Association under its commercial rules." (Ex. C-63, Doc. 13-9 at 1.) The agreement never refers to the GAC. As such, the parties have not agreed, explicitly or implicitly, to displace the FAA's default regime for reviewing arbitration awards.

Second, Visionary's argument that the arbitration proceeding between the parties was nonbinding is unavailing. The parties' agreement states that

> You or we may *require* that any controversy or claim relating to this agreement, or breach of it be resolved through arbitration administered by the American Arbitration Association under its commercial rules. Judgment on any award rendered by the arbitrator may be entered in any court having jurisdiction.

(Doc. 13-9 at 1 (emphasis added).) This language plainly evinces an intent to submit disputes relating to the agreement to arbitration, upon election of one of the parties. Here, Visionary voluntarily elected to seek arbitration, pursuant to the agreement, by filing an arbitration demand with the AAA. (Doc. 12-1 at 1-2.) Now that the arbitration has resulted in an unfavorable award, Visionary cannot claim that the arbitration was nonbinding. *See Env't Barrier Co., LLC v. Slurry Sys., Inc.*, 540 F.3d 598, 606 (7th Cir. 2008) (holding that a party could not claim that a dispute was nonarbitrable after it "voluntarily submitted to the arbitrator's authority, [and] filed a counterclaim").

Visionary argues that the use of the word "may" twice in the contract's arbitration clause suggests that the arbitration was nonbinding. (Doc. 25 at 2-3.) But the clause's first use of "may" must be read in conjunction with the word "require." Under the agreement, it was clear that either Visionary or Bank OZK could "require" that a dispute be resolved through arbitration. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 204 n. 1 (1985) ("The use of the permissive 'may' is not sufficient to overcome the presumption that parties are not free to avoid [a] contract's arbitration procedures."); *Nemitz v. Norfolk & W. Ry. Co.*, 436 F.2d 841, 849 (6th Cir. 1971) (finding that an arbitration clause which provided that disputes "may" be referred to arbitration was mandatory if either party to the agreement invoked arbitration); Fundamentals of construction, 1 *Domke on Commercial Arbitration* § 8:7 (rev. ed. 2025) ("The use of the word 'may' in an arbitration clause means that arbitration is

mandatory if either party demands it within a reasonable time."). In this case, Visionary filed an arbitration demand with the AAA, which clearly triggered the parties' arbitration clause and *required* the parties to arbitrate.

Similarly, the arbitration clause's second use of "may" does not suggest that arbitration was nonbinding. To the contrary, the relevant language—"[j]udgment on any award rendered by the arbitrator may be entered in any court having jurisdiction"—indicates that an arbitration award *is binding* because it can be entered as a *judgment* by a court. *See*, *e.g.*, *McKee v. Home Buyers Warranty Corp. II*, 45 F.3d 981, 985 (5th Cir. 1995) ("Arbitration is binding . . . if a court may enter judgment on the award made pursuant to the arbitration."); JUDGMENT, *Black's Law Dictionary* (12th ed. 2024) ("A court or other tribunal's final determination of the rights and obligations of the parties in a case[.]"). This language, which is standard in many arbitration clauses, conforms with the FAA's provision that "[i]f no court is specified in the agreement of the parties, then such application *may* be made to the United States court in and for the district within which such award was made." 9 U.S.C. § 9 (emphasis added). Indeed, the AAA and at least one leading treatise on arbitration explicitly instruct parties to include this entry-of-judgment language in arbitration clauses to indicate that an arbitration is binding and may be enforced through a judicial proceeding. Standard Arbitration Clause, *Commercial Arbitration Rules*, American Arbitration Association 8 (suggesting the use of standard language that a "judgment on the award rendered by the arbitrator(s) may be entered in any court

having jurisdiction thereof");[3] Entry-of-judgment clause, 1 *Domke on Commercial Arbitration* § 9:14 (rev. ed. 2025) ("Many arbitration agreements . . . provide expressly that an award *may be entered in any court having jurisdiction* over a party. . . . It is advisable to incorporate th[is] entry-of-judgment provision in the arbitration agreement in order to avoid the challenge that its omission indicated the parties' intent to exclude any court procedure on the award." (emphasis added)).

In addition, as several courts have held, an arbitration proceeding conducted pursuant to AAA rules is binding unless otherwise stated. *See McKee*, 45 F.3d at 983-84 ("The arbitration was conducted under AAA rules and those rules provided for binding arbitration unless the applicable law or the terms of the warranty specified otherwise."); *Rainwater v. National Home Ins. Co.*, 944 F.2d 190 (4th Cir. 1991) (holding that an arbitration in accordance with AAA rules is a binding arbitration); *see also Centurion Air Cargo, Inc. v. United Parcel Serv. Co.*, 300 F. Supp. 2d 1281, 1286 (S.D. Fla. 2004), *aff'd*, 420 F.3d 1146 (11th Cir. 2005) ("While the Settlement Agreement did not contain the terms 'binding arbitral decision,' implicit in the agreement to arbitrate are the parties' expectations to receive a binding directive."). The AAA's commercial arbitration rules, which the parties' agreement called for here, specify that "[p]arties to an arbitration under these Rules shall be deemed to have consented that judgment upon the arbitration award

3. Available at https://adr.org/sites/default/files/Commercial%20Rules.pdf (last accessed on Jan. 29, 2025).

may be entered in any federal or state court having jurisdiction thereof." R-52(c), *Commercial Arbitration Rules*, American Arbitration Association.

In sum, the parties' arbitration clause clearly demonstrates an intent to submit disputes to binding arbitration pursuant to the AAA's commercial rules. Visionary invoked this provision when it filed a demand for arbitration with the AAA. Moreover, the generic choice-of-law provision in the parties' contract, which refers to both federal and Georgia law, does not indicate that the parties agreed to apply the GAC instead of the FAA's default regime. The Court will therefore review the arbitral award under the FAA. [4]

---

4. Visionary also argues that Bank OZK, in a letter, represented to the AAA that "arbitration was not required." (Doc. 25 at 2.) The Court does not read Bank OZK's letter as suggesting that arbitration was optional under the circumstances. Instead, it appears that Bank OZK was pointing out that Visionary, not Bank OZK, triggered the parties' arbitration clause by filing an arbitration demand with the AAA. (*See* Doc. 25-1 at 3 ("Bank OZK did not pick AAA as the forum for the resolution of Visionary's claims . . . Visionary chose to seek resolution of its claims through AAA arbitration[.]").) In any event, the Court must consider "the language of the *contract or agreement itself*, and not other extraneous language . . . characterizing or making demands pursuant to it[.]" *Milliken & Co. v. Georgia Power Co.*, 829 S.E.2d 111, 115-16 (2019); *see also Internaves de Mexico s.a. de C.V. v. Andromeda Steamship Corp.*, 898 F.3d 1087, 1093 (11th Cir. 2018) ("[T]he actual language used in the contract is the best evidence of the intent of the parties and, thus, the plain meaning of that language controls." (quoting *Rose v. M/V "GULF STREAM FALCON"*, 186 F.3d 1345, 1350 (11th Cir. 1999))). Even if Bank OZK represented that the arbitration was nonbinding, its post-

IV. Review of the Arbitration Award

Visionary advances several arguments in support of vacating the arbitration award. For instance, Visionary contends that the arbitrators "intentionally ignored Article 4A of the Georgia Uniform Commercial Code, deferring to certain provisions of [National Automated Clearing House Association ("NACHA")] and ignoring other provisions of NACHA." (Doc. 7 at 6.) In addition, Visionary cites several court decisions for the principle that "acceptance [of funds] precludes return," suggesting "that Bank OZK must pay back Visionary's fund[s] received from the SBA." (*Id.* at 12.) According to Visionary, the arbitration "[p]anel manifestly disregarded this caselaw although it was made aware of it on numerous occasions in Visionary's dispositive briefs and post hearing briefs[.]" (*Id.* at 14.)

These arguments, however, address the merits of the arbitration decision and fail to satisfy the narrow statutory grounds for vacatur under the FAA. In its briefing, Visionary appears to reference 9 U.S.C. § 10(a)(4), asserting that the arbitrators "clearly exceeded its powers by administering its own brand of justice. . . ." (Doc. 11 at 7); *see* 9 U.S.C. § 10(a)(4) (permitting vacatur "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."). But "[a] party seeking relief under [Section

---

contract representation would not modify the terms of the written arbitration clause, which indicate that arbitration is binding.

10(a)(4)] bears a heavy burden." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013). "It is not enough . . . to show that the [arbitrator] committed an error—or even a serious error." *Id.* (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010)). Indeed, "an arbitral decision 'even arguably construing or applying the contract' must stand, regardless of a court's view of its (de)merits." *Id.* (quoting *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 62 (2000)). As such, " 'the sole question' a court should ask under the exacting standards of § 10(a)(4) 'is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.'" *S. Commc'ns Servs., Inc. v. Thomas*, 720 F.3d 1352, 1359 (11th Cir. 2013) (quoting *Sutter*, 569 U.S. at 569).

A review of the arbitration award, (Doc. 12-1), reveals that the three-arbitrator panel squarely "interpreted the parties' contract" and applicable law. *Sutter*, 569 U.S. at 569. The 31-page arbitration award first addressed the terms of the parties' agreement, finding that the parties' dealings were subject to Article 4A of the Georgia Uniform Commercial Code and that "Visionary also agreed to be bound by the NACHA Rules[.]" (Doc. 12-1 at 14.) "Moreover, based on a provision of Article 4A, the panel reasoned that 'to the extent there is a conflict between Article 4A of the Georgia UCC and the NACHA Rules, the NACHA Rules governed Bank OZK's handling of the V-ACH' transaction." (*Id.* at 15-16 (analyzing the effect of O.C.G.A. § 11-4A-501(b)).) Based on its analysis of the parties' agreement, Article 4A, NACHA Rules, and other relevant laws and regulations,

the arbitrators found that "Bank OZK acted in good faith, in a commercially reasonable manner, and in conformance with the applicable laws and regulations in connection with the V-ACH." (*Id.* at 17.)

Of course, Visionary strenuously disagrees with the panel's determination of the merits of its claims. Such disagreement, however, is insufficient to "overcome[e] the presumption under the Federal Arbitration Act that arbitration awards will be confirmed." *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998). Visionary has failed to satisfy any of the statutory grounds for vacatur under the FAA's highly deferential standard.[5]Accordingly, the arbitration award must be confirmed.

V. Conclusion

For the foregoing reasons, Plaintiff/Counter-Defendant Visionary's motion to vacate the arbitration award (Doc. 7) is **DENIED** and Defendant/Counter-

5. The Court would also confirm the arbitration award under the Georgia Arbitration Code's slightly less deferential standard, which permits vacatur for "manifest disregard of the law[.]" O.C.G.A. § 9-9-13. "[T]o prove that a manifest disregard of the law has occurred, a party . . . must provide evidence of record that, not only was the correct law communicated to an arbitrator, but that the arbitrator intentionally and knowingly chose to ignore that law. . . ." *ABCO Builders, Inc. v. Progressive Plumbing, Inc.*, 647 S.E.2d 574, 575 (2007). Such a showing is "extremely difficult" to make. *Id.* As explained above, the arbitration panel sufficiently addressed the parties' contract and applicable law and regulations. It therefore did not manifestly ignore the law.

[redacted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 25-10674

THE VISIONARY, BOOKS + CAFE, LLC,

Plaintiff-Counter Defendant-Appellant,

versus

BANK OZK,

Defendant-Counter Claimant-Appellee.

Filed October 16, 2025

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:24-cv-00014-SEG

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before JORDAN, BRANCH, and ANDERSON, Circuit Judges.

PER CURIAM:

Appendix C

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 Panel Rehearing also is DENIED. FRAP 40.

APPENDIX D — AWARD OF ARBITRATORS, AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION TRIBUNAL, DATED SEPTEMBER 18, 2023

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

CASE NO.: 01-22-0001-1503

THE VISIONARY, BOOKS + CAFÉ, LLC,

Claimant,

v.

BANK OZK,

Respondent.

September 18, 2023

AWARD OF ARBITRATORS

The undersigned Arbitrators, Bruce Bennett, Brian Burgoon, and Henry Chalmers (collectively, the "Panel" or "Arbitrators"), in the arbitration between The Visionary, Books + Café, LLC ("Visionary") and Bank OZK, having been designated in accordance with the arbitration agreement entered into by and between Visionary and Bank OZK dated September 15, 2020, having been duly sworn, and having duly heard the proofs and allegations of the parties, do hereby award as follows:

Appendix D

PROCEDURAL BACKGROUND[1]

1. Applicable Rules

The arbitration proceeded under the Commercial Arbitration Rules of the American Arbitration Association ("AAA") effective October 1, 2013 ("AAA Rules").

2. The Demands, Answers, and Requested Damages

Visionary initiated this arbitration by filing its arbitration demand on March 16, 2022, seeking an award of $2,860,000.00, plus attorney's fees, interest, arbitration costs, and "[t]reble [damages, and all] other available relief. . . ." Bank OZK filed its answer to the arbitration demand on April 14, 2022. In its answer, Bank OZK sought an award of its attorney's fees and arbitration costs against Visionary.

Visionary amended its arbitration demand on May 4, 2022. In the first amended demand, Visionary added claims for fraud and theft, and for punitive/exemplary damages. On May 6, 2022, Bank OZK submitted a letter to the AAA which responded to the first amended demand as well as to Visionary's May 4, 2022 request for interim measures and emergency measures of protection (discussed below).

---

1. The parties submitted many motions and other procedural requests throughout this arbitration. This section is only intended to be a summary of certain key procedural events and is not an exhaustive list of all procedural events, motions/requests, or orders entered in this arbitration.

Appendix D

On July 8, 2022, Visionary submitted its second amended demand, which amended its claims, increased its claim amount to $7,443,333.33, and sought an award of attorney's fees, interest, arbitration costs, punitive/exemplary damages, and the following additional relief: "special, consequential, treble, emotional distress, and such other relief as the Arbitrators deem just and equitable." On July 22, 2022, Bank OZK submitted its answer and response to the second amended demand, which Bank OZK stated was in addition to, and not a substitution for, its previous submissions.

On September 1, 2022, Bank OZK submitted its Amendment to Answers, and again stated that it sought its attorney's fees and arbitration costs.

On September 2, 2022, Visionary submitted its third amended demand, which, *inter alia*, clarified that its discrimination claim was also being asserted pursuant to an additional statute. As of the third amended demand, Visionary's claims were as follows:

> computer invasion of privacy (O.C.G.A. § 16-9-93(c)), computer theft (O.C.G.A. § 16-9-93(a)), computer forgery (O.C.G.A. § 16-9- 93(d)) under the Georgia Computer Systems Protection Act (OCGA § 16–9–90 et seq.); account takeover, breach of privacy & security; violation of Reg. CC (Expedited Funds Availability Act); violation of Georgia's Uniform Commercial Code – Funds Transfers (O.C.G.A. § 11-4A-101 et seq.); Georgia's Fair Business Practices

> Act (O.C.G.A. § 10-1-390 et seq.); tortious interference, theft, conversion, check fraud/ fraudulent negotiable instrument paid; ACH fund transfer fraud, breach of contract, breach of implied duty of good faith and fair dealing; breach of fiduciary duty, defamation, identity theft, negligence, negligent misrepresentation, fraudulent misrepresentation; violation of 14th Amendment; and discrimination (42 U.S.C. § 1981, Title VI, 42 U.S.C. § 2000d et seq.).

Third Am. Demand.

In the third amended demand, Claimant sought damages in the amount of $7,443,333.33, plus attorney's fees, interest, arbitration costs, punitive/exemplary damages, and the following additional relief: "special, consequential, treble, emotional distress, and such other relief as the Arbitrators deem just and equitable." The third amended demand served as the operative arbitration demand as of the final evidentiary hearing.[2] Bank OZK

2. Visionary sought permission to file a fourth amended demand on April 24, 2023, which Bank OZK opposed. The Panel determined that because the proposed fourth amended demand sought only to add factual allegations in support of Visionary's existing claims and did not assert new claims, Visionary was not required to amend its demand in order to assert these new factual bases for its claims. The Panel, therefore, denied Visionary's request for permission to file a fourth amended demand. 4/24/23 email Order. The Panel made clear that the Order did not prohibit Visionary from presenting evidence in support of the allegations it asserted in its proposed fourth amended demand or from arguing that the evidence supported its claims, and similarly, did not

submitted its answer and response to Visionary's third amended demand on September 15, 2022, and sought an award of its attorney's fees, and arbitration costs, fees, and arbitrators' compensation.

On April 10, 2023, Visionary and Bank OZK each submitted an itemization of damages. Visionary filed a supplemental itemization of damages on April 18, 2023. Visionary sought damages in the following amounts for its claims:

(a) Compensatory/Actual Damages: $2,860,000.00;

(b) Interest: $2,903,987.74;

(c) "[L]oss opportunity (Visionary)": $4,461,568.00;

(d) Punitive damages for certain of its claims: $11,440,000.00;

(e) Punitive damages for its discrimination (42 U.S.C. § 1981) claim: $34,320,000.00; and

(f) Attorney's fees and arbitration costs.

---

prevent Bank OZK from challenging such evidence or arguing that such evidence did not support Visionary's claims. *Id.* The Panel also issued its Order Denying Claimant's Purported Request to Amend Claim to Include Damages for Discomfort and Annoyance on April 28, 2023.

See Visionary's Supplemental Itemization of Damages.[3] In Bank OZK's Itemization of Damages, Bank OZK stated that it reserved the right to seek recovery of its attorney's fees, costs, and expenses.

On May 1, 2023, Visionary filed its Request for Attorney's Fees and Expenses of Litigation to "address the authority, basis and framework for issuing attorney fees" pursuant to Paragraph 27 of Scheduling Order #6 dated February 17, 2023.

3. The R-38 Order

Prior to the Panel's appointment as Arbitrators in this arbitration, on May 4, 2022, Visionary submitted a letter request for interim measures and emergency measures of protection pursuant to AAA Rules R-37 and R-38. The

3. Visionary presumably asserted its claims in the alternative, and Visionary did not seek all categories of damages for every claim. In its Supplemental Itemization of Damages, Visionary also sought damages for "emotional distress/discomfort and annoyance" in the amount of $2,860,000.00, however, as discussed below, the Arbitrators granted Bank OZK's dispositive motion with respect to those damages. *See* 4/28/23 Order on Subsequent Dispositive Motions pp. 2-3; *see also* 4/28/23 Order Denying Claimant's Purported Request to Amend Claim to Include Damages for Discomfort and Annoyance. Visionary also sought punitive damages in the amount of $11,440,000.00 plus treble damages in the amount of $35,828,435.34 for its claim under the Georgia Fair Business Practices Act ("FBPA") and punitive damages in the amount of $34,320,000 for its claim under the 14th Amendment; however, the Arbitrators also granted Bank OZK's dispositive motions with respect to the FBPA and 14th Amendment claims. *See* 4/28/23 Order on Subsequent Dispositive Motions pp. 3-5.

AAA appointed Judge James R. Eyler (Ret.) to serve as Emergency Arbitrator pursuant to Rule R-38. On June 22, 2022, the Emergency Arbitrator entered the Order Granting in Part and Denying in Part Emergency Relief ("R-38 Order"). The Panel was subsequently appointed to serve as the merits Arbitrators in this arbitration. After considering various requests and responses relating to the R-38 Order, on August 1, 2022, the Panel entered its Order on Claimant's Request Regarding Security Ordered by Emergency Arbitrator and Respondent's Proposal, which amended the R-38 Order. The parties submitted additional arguments regarding the R-38 Order and the Panel's August 1, 2022 Order, and the Panel issued its Supplemental Order on August 12, 2022, and its Second Supplemental Order on August 17, 2022, which further amended the R-38 Order.

4. The Dispositive Motions

(a) Initial Dispositive Motions

On September 9, 2022, Visionary and Bank OZK each filed an initial dispositive motion. Each party filed an opposition brief to the other's motion on October 24, 2022 and a reply brief on October 31, 2022. On November 9, 2022, the Panel entered its Order on Dispositive Motions, denying the initial dispositive motions filed by Visionary and Bank OZK.

(b) Subsequent Dispositive Motions

On March 29, 2023, Visionary filed a subsequent dispositive motion and Bank OZK filed two subsequent

dispositive motions and a renewed dispositive motion. The parties each filed opposition briefs on April 17, 2023 and reply briefs on April 21, 2023.

On April 28, 2023, the Panel entered its Order on Subsequent Dispositive Motions. In the Order, the Panel denied Visionary's dispositive motion, but granted Bank OZK's two dispositive motions and renewed dispositive motion, thereby granting summary disposition in Bank OZK's favor with respect to (1) Visionary's claim for intentional infliction of emotional distress and damages for emotional distress, (2) Visionary's claim for recovery under the 14th Amendment, and (3) Visionary's claim pursuant to the FBPA.

5. Bank OZK's Pre-Hearing Brief

On April 24, 2023, Bank OZK submitted its prehearing brief. Visionary did not submit an optional prehearing brief.

THE HEARING AND EVIDENCE

1. The Hearing

The final evidentiary hearing in this matter was conducted before the Panel on May 1, 2023, May 2, 2023, May 3, 2023, May 4, 2023, and May 5, 2023. The final evidentiary hearing continued, virtually, via Zoom videoconference, before the Panel on July 6, 2023.

Charlena L. Thorpe, Esq., represented Visionary, and John A. Thomson, Jr. Esq. and Ron C. Bingham II, Esq.,

represented Bank OZK at the final evidentiary hearing. Kandaria Rolle, Visionary's principal, Gene Osment, Esq., Bank OZK General Counsel-Litigation, and Kim Burnette, Esq., Bank OZK Associate General Counsel, attended the hearing on all days.[4]

2. Witnesses

During the evidentiary hearing, the Panel heard sworn testimony, subject to cross-examination, from the following individuals:

(a) Kandaria Rolle;

(b) Scott T. Suggs (Visionary's expert witness);

(c) Shawn Robertson;

(d) Tracie Walden;

(e) Ashley Wisdom;

(f) Christine Razor;

(g) Amy Davis;

(h) Jon Stockton (Bank OZK's expert witness);

4. Mr. Osment and Ms. Burnette attended the first portion of the May 5, 2023 hearing and another member of Bank OZK's legal department attended the remainder of the hearing that day.

(i) Ethan W. Smith (Bank OZK's expert witness);

(j) Elliott C. McEntee (Bank OZK's expert witness); and

(k) Clay Busker (Bank OZK's expert witness).

In addition, the Panel considered excerpts from the sworn deposition testimony of Ashley Wisdom and Amy Davis that were designated by Visionary and Bank OZK. *See* Visionary's Designations of Deposition Transcripts dated June 1, 2023; Bank OZK's Designations of Deposition Transcripts dated June 16, 2023.

3. Exhibits

The following exhibits were admitted into evidence and considered by the Panel:

(a) Claimant's Exhibits: C-1, C-4, C-5, C-6, C-7, C-20, C-21, C-22, C-23, C24, C-25, C-26, C-27, C-28, C-29, C-30, C-31, C-32, C-33, C-34, C-35, C-36, C-37, C-39, C-40, C-41, C-42, C-43, C-44, C-45, C-46, C-47, C-48, C-51, C-52, C-54, C-56, C-57, C-58, C-59, C60, C-61, C-62, C-63, C-64, C-65, C-66, C-67, C-69, C-70A, C-70B, C-71, C72, C-73, C-74, C75, C-76, C-79, C-81, C-82, C-83, C-84, C-86, C-90, C-90A, C-91, C-92, C-93, C-94, C-95, C96, C-97, C-98, C-99, C-100, C-101, C-102, C-103, C-104, C-105, C-106, C-107, C-108, C-110, C-112, C-114, C-115, C-116, C-118, C-119, C-120, C-125, C-126, C-127, C-131, C-133, C-134, C-136, C-141, C-146, C-147, C-148, C-149, C-150, C-151, C-153, and C-154.

(b) Respondent's Exhibits: R-1, R-4, R-16, R-17, R-18, R-19, R-20, R-21, R-22, R-23 (first page only),[5] R-24, R-80, R-86, R-88, R-89, R-90, R-91, R-92, R-93, R-94, R-95, R-96, R-97, R-98, R-99, R-102, R-104, and R-106.

4. Hearing Transcripts and Post-Hearing Briefs

The parties arranged for a stenographic record of the evidentiary hearing. The parties provided the transcripts of the evidentiary hearing to the Panel (cited in this Award as "Tr.") on May 23, 2023 (hearing days 3 and 4), July 5, 2023 (day 5), July 13, 2023 (days 1 and 2), and July 20, 2023 (day 6). The parties submitted closing arguments to the Panel by post-hearing briefs on August 11, 2023, and post-hearing response briefs on August 28, 2023, pursuant to paragraphs 6 and 7 of Post-Hearing Scheduling Order #2 dated July 24, 2023, as amended by email Orders dated August 8, 2023 and August 25, 2023. The Panel declared the evidentiary hearing closed as of August 28, 2023.

FACTUAL BACKGROUND[6]

On September 15, 2020, Visionary opened a small business checking account with Bank OZK ("Visionary account" or "Visionary's account") and entered into an agreement that governed Visionary's relationship with Bank OZK with respect to the Visionary account (the

5. Tr. 1042.

6. This section contains a high-level summary of the facts. It is not intended to be a recitation of all relevant facts considered by the Panel in issuing this Award.

"Agreement"). Exs. R-23, C-62; *see also* Exs. C-63, C-64, C-65, C-66. Prior to opening the Visionary account, Visionary's principal, Kandaria Rolle, had opened a small business account for another company, Ooleigh, Inc., with Bank OZK.

On May 3, 2021, Visionary applied for a grant under the federal Restaurant Revitalization Fund ("RRF") administered by the U.S. Small Business Administration ("SBA"). Ex. C-54. The RRF was a COVID-19 relief program designed to help restaurants and similar businesses impacted by the pandemic that were either already operating or that were not yet opened but had incurred expenses as of March 11, 2021.[7] *Id.;* Ex. C-51. In connection with its RRF application, Visionary provided the SBA with the Visionary account information for transmittal of any grant monies awarded under the RRF. Ex. C-54. The SBA approved Visionary's RRF application and awarded Visionary a RRF grant in the amount of $2,860,000.00. *Id.*; Ex. C-55.

The U.S. Treasury, on behalf of the SBA, transmitted the $2.86 million awarded to Visionary via a government automated clearing house ("ACH") credit entry to Bank OZK (the "V-ACH"). Bank OZK received the $2.86 million V-ACH on the morning of May 24, 2021. Due to its size being atypical for a small business account, Bank OZK began investigating the circumstances surrounding the

7. "The purpose of the Restaurant Revitalization Fund (RRF) is to support the restaurant industry by providing funding to those that have suffered significant pandemic-related revenue loss." Ex. C-54.

V-ACH. Bank OZK did this as part of its obligations under various federal laws and regulations designed to protect the U.S. financial and banking systems from potential fraud and abuse, including the Bank Secrecy Act and various other laws, regulations, directives, and advisories of federal banking and law enforcement agencies, discussed below.

In connection with its investigation, Bank OZK officials reviewed the history and circumstances surrounding Visionary's account and details about the RRF program. Bank OZK representatives testified that there were several things of immediate concern. First, Visionary had essentially no activity in the Visionary account from its inception (the only transaction Visionary had from the account since its opening was a $28.95 purchase of checks). Ex. R-99. Because of the lack of activity in the account, it did not appear to Bank OZK that Visionary had ongoing expenses or revenues – at least not through its Bank OZK account. Second, Visionary's account information with Bank OZK, that Bank OZK stated was provided upon account opening, listed it as a financial consulting business and not a business in the restaurant industry for whom the RRF grants were intended. Third, Visionary's address was a box in a UPS store, and not a physical location for conducting a restaurant business. The RRF application prohibited applicants from using a P.O. Box address and required a physical location.[8] Further, Bank OZK had

8. Visionary argued that a box in a UPS store is not the same as a United States Postal Service ("USPS") P.O. Box. However, it was reasonable for Bank OZK to consider them to be the functional equivalent, because, as with a P.O. Box, a restaurant cannot by

concerns that Ms. Rolle's other company, Ooleigh, Inc., had also received two deposits from COVID-19 relief programs, and the majority of those funds remained unspent, which Bank OZK concluded was inconsistent with the purpose of the COVID-19 relief programs. Based on at least these factors, Bank OZK determined that the V-ACH could potentially be fraudulent. As such, Bank OZK placed a "customer-facing" hold on the $2.86 million V-ACH in Visionary's account just before noon (Eastern time) on May 24, 2021. Tr. 729-30 (Wisdom). This hold prohibited Visionary from accessing the $2.86 million while the hold remained in place.

Bank OZK contacted the SBA by email to inquire about the V-ACH. Exs. C-79, R-22. Richard Duda, an SBA official, responded and verified that the V-ACH was disbursed under the SBA's RRF program to Visionary. *Id.* In Mr. Duda's subsequent email, he included cautionary language regarding the need to look out for fraud with respect to COVID-19 relief programs. *Id.*

---

operated out of, serve food or beverages from, make sales from, or allow patrons inside a box in a UPS store. *See also, e.g., Kingsley Rests, Inc. v. U.S. Small Bus. Admin.*, No. 1:21-CV-2314-SCJ, 2021 WL 8441778, at *2 n.3 (N.D. Ga. Aug. 24, 2021). Visionary also argued that a UPS store where the box is located provides a physical address, unlike, as Visionary contended, a USPS P.O. Box, but that is not necessarily the case, as some USPS P.O. Boxes provide a street address as well. *See* https://www.usps.com/manage/po-boxes.htm#streetaddress ("An additional service to consider adding to your PO Box is Street Addressing. With Street Addressing (if available), you have the option of using the street address of your Post Office location, combined with your PO Box number, as your mailing address . . . ").

On May 26, 2021, Bank OZK returned the V-ACH to the U.S. Treasury for the benefit of the SBA. Visionary objected to the return of the funds, which subsequently led to Visionary's filing its arbitration demand. There was no testimony from any witness from the SBA as to what happened to the V-ACH funds upon return, but there was no evidence presented that Visionary ever received any of the RRF funds after Bank OZK returned the V-ACH to the U.S. Treasury/SBA.

DISCUSSION OF THE CLAIMS

Visionary initiated this arbitration and asserted numerous claims against Bank OZK. The parties did not address all of the claims at the final hearing or in their post-hearing briefing.

1. General Discussion of Claims

Despite the numerous claims, the crux of this arbitration boils down to whether Bank OZK acted improperly with respect to its investigation of the circumstances surrounding the VACH, placing a hold on the V-ACH funds in Visionary's account, ultimately returning the VACH to the U.S. Treasury/SBA, and taking actions with respect to Visionary's account to accomplish the foregoing. The Panel finds that it did not.

The expert testimony of Jon Stockton, Ethan W. Smith, and Elliott C. McEntee, submitted by Bank OZK, and the testimony of the Bank OZK current and former employees was very persuasive on the issue of

Bank OZK's obligations and duties, and the interplay of the various statutes, regulations, rules, and contractual provisions applicable to the monitoring of Bank OZK's customer accounts, the placement of holds on Bank OZK's customer accounts, and the processing and returns of ACH transactions, including the V-ACH.

Bank OZK's Duty to Monitor Customer Transactions under the BSA and other Laws

Underpinning Bank OZK's actions with respect to the V-ACH are duties imposed on Bank OZK as a federally regulated banking institution. The testimony of the Bank OZK representatives and Bank OZK's expert witnesses sufficiently established that Bank OZK has a duty to monitor transactions in its customers' accounts, including Visionary's account, to prevent money laundering and other fraudulent activities, with negative repercussions for Bank OZK if it fails to fulfill the duty. This duty derives from a number of laws and regulations, including under the Bank Secrecy Act, 31 U.S.C. §§ 5311, 5312 and its implementing regulations (including 31 C.F.R. § 1020.210 and 31 C.F.R. §§ 210.1, 210.2 & 210.3) ("BSA"), the U.S. Patriot Act, and regulations, directives, and advisories from various federal agencies, including the U.S. Treasury Department, the Financial Crimes Enforcement Network ("FinCEN"), and the Federal Deposit Insurance Corporation ("FDIC"). Ashley Wisdom, Bank OZK's Managing Director of BSA Administration, testified that these laws, regulations, and directives require Bank OZK to maintain its program to detect and monitor potentially fraudulent activity, and that Bank OZK also works closely with federal law enforcement

agencies, including the FBI and U.S. Secret Service, in performing its duties. *See, e.g.,* Tr. 718, 720, 725-26, 803 (Wisdom). Bank OZK's expert, Jon Stockton, testified about the various obligations of financial institutions imposed by these laws and regulations. *See* Stockton Testimony & Ex. R-96. Bank OZK's compliance with the BSA requirements is not optional – it is mandatory. *See, e.g.*, 31 C.F.R. § 1020.210.

Bank OZK also offered convincing fact and expert witness testimony that fraudulent conduct was common with respect to COVID-19 relief programs, which resulted in a number of directives by federal banking and law enforcement agencies to engage in heightened monitoring of its customers' accounts and transactions for potential fraud in COVID-19 relief programs. *See, e.g.*, Tr. 724-26, 753, 783 (Wisdom); Tr. 832-33, 845-46 (Razor); Tr. 1021-22 (Stockton).

No Finding Regarding Fraud in Connection With the V-ACH and Visionary's RRF Application

It is important to emphasize that the Panel does not make any findings as to whether Visionary committed fraud in connection with its application for the RRF grant or otherwise with respect to Visionary's eligibility to receive funds under the RRF. Visionary's application for the RRF funds and eligibility or entitlement to receive the RRF funds transmitted via the V-ACH are not issues that must be decided in order to resolve the claims in this arbitration. As such, the Panel declines to decide those issues. Any reference in this Award to a fraud

investigation, fraud hold, or similar fraud references in relation to Bank OZK's investigation and handling of the VACH must not be construed to suggest that the Panel has determined that any fraud or fraudulent conduct occurred.

What is relevant, however, is whether Bank OZK had a reasonable and good faith belief that there was the *potential* for fraud in connection with the V-ACH such that Bank OZK acted reasonably and lawfully in connection with the exercise of its duties under the BSA and other laws, regulations, and government agency guidance discussed above.

Certain Applicable Agreement Provisions, Laws, and Regulations[9]

To address Visionary's claims, the Panel first makes the following findings regarding the applicable Agreement provisions, laws, regulations, and other legal authorities governing Visionary's and Bank OZK's relationship and Bank OZK's obligations, duties, and permitted actions with respect to the V-ACH.

In Paragraph 10 of the Agreement's Terms and Conditions, Visionary agreed that Bank OZK had the

9. This section is not intended to be an exhaustive list of all Agreement provisions, laws, regulations, or other legal authorities applicable to the parties, the V-ACH, or this arbitration. The lack of discussion of an Agreement provision, law, regulation, or other legal authority in this section or otherwise in this Award must not be construed to mean that the Agreement provision, law, regulation, or other legal authority is not applicable to the parties, the V-ACH, or this arbitration.

authority to immediately freeze or close Visionary's account if Bank OZK suspected fraud. Paragraph 10 provides in relevant part:

> . . . We may also close this account at any time upon reasonable notice to you and tender of the account balance personally or by mail. . . . Reasonable notice depends on the circumstances, and in some cases such as when we cannot verify your identity or we suspect fraud, it might be reasonable for us to give you notice after the change or account closure becomes effective. **For instance, if we suspect fraudulent activity with respect to your account, we might immediately freeze or close your account and then give you notice.** . . .

Ex. C-62 (Agreement ¶ 10 (emphasis added)); Ex. R-23.

Paragraph 21 of the Agreement's Terms and Conditions provides, "This agreement is subject to Article 4A of the Uniform Commercial Code – Fund Transfers as adopted in the state in which you have your account with us" (i.e., Georgia). Under Paragraph 21, Visionary also agreed to be bound by the NACHA Rules, which are the "automated clearing house association rules." Ex. C-62 (Agreement ¶ 21 ("You agree to be bound by automated clearing house association rules.")); Ex. R-23. Paragraph 21 further provides as follows:

> These rules [the NACHA Rules] provide, among other things, that payments made to you, or

> originated by you, are provisional until final settlement is made through a Federal Reserve Bank or payment is otherwise made as provided in Article 4A-403(a) of the Uniform Commercial Code. If we do not receive such payment, we are entitled to a refund from you in the amount credited to your account and the party originating such payment will not be considered to have paid the amount so credited . . . "

Ex. C-62 (Agreement ¶ 21); Ex. R-23; *see also* Tr. 1255-1256 (McEntee).

The NACHA Rules are a funds-transfer system rule, as defined in O.C.G.A. § 11-4A501 (b). O.C.G.A. § 11-4A-501(a) provides, "Except as otherwise provided in this article, the rights and obligations of a party to a funds transfer may be varied by agreement of the affected party." O.C.G.A. § 11-4A-501(b) provides, in relevant part, that "Except as otherwise provided in this article, a funds-transfer system rule governing rights and obligations between participating banks using the system may be effective even if the rule conflicts with this Article and indirectly affects another party to the funds transfer who does not consent to the rule . . . " (As noted above, under Paragraph 21 of the Agreement, Visionary agreed to be bound by the NACHA Rules.)

The U.S. Treasury Department's Green Book, a Guide to Federal Government ACH Payments ("Green Book"), applies to the V-ACH because the V-ACH was a government ACH entry from the U.S. Treasury, on behalf of the SBA. Ex. C-118, Green Book, Introduction section (noting the

applicability of the Green Book to federal government ACH payments, and noting that "Title 31 CFR part 210 provides the basis for most of the information contained in the Green Book" and further noting additional regulations that impact federal government ACH payments). *See* 31 C.F.R. § 210.2(l) ("Green Book means the manual issued by the Service which provides financial institutions with procedures and guidelines for processing Government entries."); 31 C.F.R. § 210.2(k) ("Government entry means an ACH credit or debit entry or entry data originated or received by an agency."); *see also* Tr. 1186-88 (McEntee).[10]

Thus, the Panel finds that to the extent there is a conflict between Article 4A of the Georgia UCC and the NACHA Rules, the NACHA Rules governed Bank OZK's handling of the V-ACH, and not Article 4A of the Georgia UCC.

Bank OZK's Handling of the V-ACH

Under NACHA Rule 8.101, because the V-ACH was for more than $100,000, the settlement date of the V-ACH

10. *See* 31 C.F.R. § 210.3(a) ("The rights and obligations of the United States and the Federal Reserve Banks with respect to all Government entries, and the rights of any person or recipient against the United States and the Federal Reserve Banks in connection with any Government entry, are governed by this part, which has the force and effect of Federal law."); 31 C.F.R. § 210.3(b) (incorporating the NACHA Rules); 31 C.F.R. § 210.3(c) ("Any person or entity that originates or receives a Government entry agrees to be bound by this part and to comply with all instructions and procedures issued by the Service under this part, including the Treasury Financial Manual and the Green Book. . . .").

was May 25, 2021, and not the May 24, 2021 date of the transmittal of the V-ACH to Bank OZK. *See* Ex. C-110; Tr. 1198, 1218-20, 1254-56 (McEntee). Bank OZK received the $2.86 million for the V-ACH from the U.S. Treasury on May 25, 2021, the date the funds were settled. Because there was a hold in place prior to settlement of the funds, and because Visionary agreed in Paragraph 21 of the Agreement that under the NACHA Rules, payments made to Visionary are "provisional until final settlement is made through a Federal Reserve Bank," Bank OZK did not "accept" the V-ACH. *See* Ex. C-110 (NACHA Rules § 8.101 [p. OR73]), Ex. C-62 (Agreement ¶¶ 10, 21); Ex. R-23; Tr. 1244-56, 1278-81 (McEntee).

Under NACHA Rules § 3.8, Bank OZK had two banking days to return the V-ACH to the U.S. Treasury. Ex. C-110 (NACHA Rules § 3.8 [p. OR52]); *Id.* (NACHA Rules App. 4.2 (Reason Code R-17) [p. OR146]); *see also id.* (NACHA Rules § 3.1.1 [p. OR45] ("An RDFI must accept Entries that comply with these Rules and are received with respect to an account maintained with that RDFI, subject to its right to return Entries under these Rules."); Tr. 1220-24 (McEntee); *see generally* Testimony of Amy Davis.[11] After Bank OZK's concerns were not alleviated through its investigation, Bank OZK returned

11. As explained by Elliott McEntee, R-17 was the appropriate return code for a suspicious ACH, even if the transaction did not contain an invalid account number. *See* Tr. 1202-04, 1230-33 (McEntee). Moreover, the U.S. Treasury apparently took no issue with the more detailed explanation Bank OZK used in the description field for R-17 instead of the word "Questionable," since it accepted Bank OZK's return of the V-ACH.

the V-ACH to the U.S. Treasury for the SBA on May 26, 2021.[12] This was within two banking days of the May 25, 2021 settlement of the V-ACH funds in compliance with the NACHA Rules.[13]

The Panel finds that Bank OZK acted in good faith, in a commercially reasonable manner, and in conformance with the applicable laws and regulations in connection with the VACH. Based on the potential badges of fraud identified by Bank OZK witnesses that gave Bank OZK concerns about the suspicious nature of the V-ACH,

---

12. There is no evidence to support Visionary's claim that Bank OZK kept the $2.86 million funds for itself after Bank OZK removed the V-ACH funds from Visionary's account. The evidence establishes that Bank OZK returned these funds to the U.S. Treasury/SBA on May 26, 2021.

13. Bank OZK sufficiently explained why Bank OZK charged a $35 nonsufficient funds ("NSF") fee and sent an NSF notification to Visionary (*see* Ex. C-71) when Bank OZK removed the VACH funds from Visionary's account for return to U.S. Treasury/SBA while the fraud hold was in place. Bank OZK never took action to collect the $35 NSF fee (other than the automated sending of the NSF notification to Visionary), and refunded the $35 NSF fee to Visionary on June 4, 2021, *see* Ex. C-75, which returned Visionary's account balance to $471.15 as of June 4, 2021 (and which Visionary withdrew on June 4, 2021). *See* Exs. C-75, C-90. Thus, Visionary did not suffer any damages with respect to the erroneous $35 NSF fee that Bank OZK charged and later refunded to Visionary. Additionally, Visionary takes issue with the entry "CHK #00" on Visionary's account statement on the line for the $35 NSF fee. As Bank OZK officials testified, the "CHK #00" notation is an internal code that Bank OZK's system automatically uses, and does not represent an actual/physical check. Visionary has provided no evidence to contradict Bank OZK's testimony on this issue.

Bank OZK acted reasonably in deciding to begin a fraud investigation into the V-ACH. In exercising its required duties under the BSA and other applicable laws and regulations, Bank OZK acted properly in placing a hold on Visionary's account for the amount of the V-ACH funds. Not only did Visionary expressly give Bank OZK the ability to freeze its account under Paragraph 10 of the Agreement, but Bank OZK had the authority to place the hold on the account in order to comply with its duties under the BSA and other laws, regulations, and directives of various federal agencies discussed above. Without the ability to place fraud holds on suspicious transactions, Bank OZK would not be able to discharge its duties under the BSA and other applicable laws and regulations.

The evidence establishes that the V-ACH credit entry notification was received on May 24, 2021, the V-ACH was settled on May 25, 2021, and Bank OZK returned the V-ACH to the U.S. Treasury for the benefit of the SBA on May 26, 2021. *See, e.g.*, Ex. C-73; Ex. C-110 (NACHA Rule 8.101 [p. OR73]). This was all done in accordance with the parties' Agreement, the BSA and other laws, regulations, and agency guidance applicable to Bank OZK's duties to monitor its customers' accounts for potential fraud, and the NACHA Rules.

2. Computer Invasion of Privacy (O.C.G.A. § 16-9-93(c)), Computer Theft (O.C.G.A. § 16-9-93(a)), and Computer Forgery (O.C.G.A. § 16-9-93(d)), under the Georgia Computer Systems Protection Act (OCGA § 16-9-90 *et seq.*)

O.C.G.A. § 16-9-93 provides in relevant part:

> (a) Computer theft. Any person who uses a computer or computer network with knowledge that such use is without authority and with the intention of:
>
> 1. Taking or appropriating any property of another, whether or not with the intention of depriving the owner of possession;
>
> 2. Obtaining property by any deceitful means or artful practice; or
>
> 3. Converting property to such person's use in violation of an agreement or other known legal obligation to make a specified application or disposition of such property shall be guilty of the crime of computer theft.
>
> * * *
>
> (c) Computer Invasion of Privacy. Any person who uses a computer or computer network with the intention of examining any employment,

> medical, salary, credit, or any other financial or personal data relating to any other person with knowledge that such examination is without authority shall be guilty of the crime of computer invasion of privacy.
>
> (d) Computer Forgery. Any person who creates, alters, or deletes any data contained in any computer or computer network, who, if such person had created, altered, or deleted a tangible document or instrument would have committed forgery under Article 1 of this chapter, shall be guilty of the crime of computer forgery. The absence of a tangible writing directly created or altered by the offender shall not be a defense to the crime of computer forgery if a creation, alteration, or deletion of data was involved in lieu of a tangible document or instrument.
>
> * * *

O.C.G.A. § 16-9-93(g) provides for a private right of action for violation of this statute.

Under O.C.G.A. § 16-9-82(18), "'without authority' includes the use of a computer or computer network in a manner that exceeds any right or permission granted by the owner of the computer or computer network." Visionary presented no evidence that Bank OZK accessed a computer owned by Visionary. Instead, any computer system that Bank OZK used to receive the V-ACH,

review Visionary's account information, place a hold on the V-ACH, and return the VACH to the U.S. Treasury/ SBA was Bank OZK's own computer system. Bank OZK necessarily had authority to access its own computer system. Therefore, Visionary has failed to establish computer theft by Bank OZK in violation of O.C.G.A. § 16-9-93(a).

Visionary has also failed to establish a violation of O.C.G.A. § 16-9-93(c), computer invasion of privacy, by Bank OZK because Bank OZK did not review Visionary's account information on a computer system without authority. Bank OZK's review of Visionary's account information was on Bank OZK's own computer system. As discussed above, Bank OZK's actions were undertaken in compliance with applicable law and the parties' Agreement.

Finally, Visionary has failed to establish a violation of O.C.G.A. § 16-9-93(d), computer forgery. Visionary failed to present any evidence that Bank OZK created data relating to Visionary's account, altered data relating to Visionary's account, or deleted any data related to Visionary's account such that those actions would otherwise have constituted forgery. All the evidence that reflected the transactions Bank OZK made with respect to Visionary's account showed exactly what they purported to be, with no creation, alteration, or deletion of data or information to represent it to be something else.

Accordingly, Visionary has failed to meet its burden of proof on its claims for violation of the Georgia Computer

Systems Protection Act, including computer theft, computer invasion of privacy, and computer forgery.

3. Violation of Federal Regulation CC (Expedited Funds Availability Act)

Visionary claimed that Bank OZK violated federal Regulation CC ("Reg. CC") pursuant to the Expedited Funds Availability Act. The fraud hold that Bank OZK placed on Visionary's account was not a hold on the availability of funds under Reg. CC. Fraud holds, on the one hand, and holds on the availability of funds under Reg. CC, on the other hand, are separate and distinct. The evidence presented at the hearing established that Bank OZK complied with Reg. CC when it made the V-ACH funds available to Visionary on the morning of May 24, 2021, albeit for only a short period of time. Indeed, Ms. Rolle testified that she saw the $2.86 million in the Visionary account when she logged in online to the account on the morning of May 24, 2021. *See, e.g.*, Tr. 202 (Rolle); Ex. C-70A. It was not until later that morning (just before noon (Eastern time)) that Bank OZK placed a fraud hold on the $2.86 million, which Bank OZK was entitled to do under the Agreement and under the NACHA Rules. Reg. CC does not prohibit fraud holds on ACH's. *See* Tr. 669 (Walden). Therefore, Visionary has not met its burden of proof on its claim for violation of Reg. CC.

4. Violation of Georgia's Uniform Commercial Code – Funds Transfers (O.C.G.A. § 11-4A-101 *et seq.*)

As discussed above, the NACHA Rules control even if they conflict with the Georgia UCC pursuant to O.C.G.A.

§ 11-4A-501(b), and Visionary agreed to be bound by the NACHA Rules under Paragraph 10 of the Agreement. Because the V-ACH was in excess of $100,000, under the NACHA Rules, the V-ACH funds were "settled" on May 25, 2021. Under the NACHA Rules, Bank OZK had two banking days after settlement of the funds to return the VACH. After concluding its fraud investigation, Bank OZK returned the V-ACH on May 26, 2021, within the two-banking-day window. Because Bank OZK's handling of the V-ACH complied with the NACHA Rules, and because the NACHA Rules control over Article 4A of the Georgia UCC, Visionary has not met its burden of proof on its claim for violation of Article 4A of the UCC.

5. Breach of Contract and Breach of the Implied Duty of Good Faith and Fair Dealing

Visionary has not met its burden of proof on its claims for breach of contract or breach of the implied duty of good faith and fair dealing. Bank OZK's investigation of the circumstances surrounding the V-ACH and placement of a hold on the V-ACH were in compliance with both (a) Paragraph 10 of the Agreement and (b) Bank OZK's duties under the BSA and other applicable laws and regulations. Bank OZK's processing and return of the V-ACH were in compliance with the NACHA Rules, to which Visionary agreed to be bound under Paragraph 21 of the Agreement. Visionary has failed to meet its burden of proof to establish a breach of contract by Bank OZK. Further, because Visionary has not established a breach of contract, Visionary, therefore, cannot prevail on a standalone claim for breach of the implied duty of good faith and fair dealing.

6. Account Takeover, Identity Theft, and Breach of Privacy and Security

As discussed above, Bank OZK's actions with respect to Visionary's account and with respect to the V-ACH were in compliance with the parties' Agreement and applicable law and regulations. There was no evidence presented that Bank OZK "took over" Visionary's account, attempted to control Visionary's account, stole Visionary's identity, impersonated Visionary, or did anything improper with respect to (a) the Visionary account, (b) the V-ACH, (c) the hold Bank OZK placed on Visionary's account, and (d) the return of the V-ACH. Accordingly, Visionary has failed to carry its burden of proof with respect to "account takeover." Similarly, there was no evidence presented that Bank OZK stole or used Visionary's identity or impersonated Visionary. Therefore, Visionary has not met its burden of proof on its claim that Bank OZK committed identity theft. Visionary also has not met its burden of establishing its entitlement to an award for "breach of privacy & security," as Bank OZK did nothing improper in connection with its review of Visionary's account during its investigation of the circumstances surrounding the V-ACH, its placement of a hold on Visionary's account, and its return of the VACH to the U.S. Treasury/SBA. Bank OZK complied with the Agreement and applicable law in conducting its investigation, taking actions with respect to the Visionary account, and returning the V-ACH.

7. Tortious Interference

Because the Panel has found that Bank OZK acted properly and legally in investigating the V-ACH, placing

a hold on the amount of the V-ACH in Visionary's account, and returning the V-ACH to the U.S. Treasury/SBA, Visionary has not established that Bank OZK engaged in any wrongful conduct with the intent to interfere with any existing or prospective contractual or business relations. Therefore, Visionary's claim for tortious interference fails.

8. Theft, Conversion, Check Fraud/Fraudulent Negotiable Instrument Paid, ACH Fund Transfer Fraud, Fraudulent Misrepresentation, and Negligent Misrepresentation

Visionary asserted a number of fraud-based claims and other intentional tort claims. As discussed above, Bank OZK acted properly and in compliance with the Agreement and applicable law in connection with the V-ACH and the Visionary account. There was no evidence presented that Bank OZK engaged in theft, conversion, or any sort of fraudulent conduct. Further, Visionary did not establish that Bank OZK made any false statement of material fact to Visionary, intentionally or negligently, relating to the V-ACH or the Visionary account. Visionary relies on the statements Bank OZK's Pam Campbell purportedly made to Ms. Rolle relating to the status of the V-ACH to support its fraudulent misrepresentation claim. *See* Visionary's Post-Hearing Br. pp. 26-27. While Ms. Rolle testified that she spoke with Ms. Campbell on the morning of May 24, 2021 in which Ms. Campbell purportedly made vague statements about not knowing whether Bank OZK received the V-ACH, not knowing about the status of the funds, or needing to verify the

status of the funds, *see* Tr. 165-68, 171-72, 201-03 (Rolle),[14] these statements do not rise to the level of fraudulent

14. Ms. Rolle provided the following testimony regarding her May 24, 2021 telephone conversations with Ms. Campbell: "She said that she needed to verify – she didn't know if they received the money, which was odd. She said that she wasn't sure if they had received the money and she needed to check to make sure that they actually received the money. And she also said that she would talk to her – one of her internal partners about moving the money to also an interest-bearing account but she needed to find out, you know, what type of accounts the money could be moved to and that she would get back with me." Tr. 167-68 (Rolle). "I believe I ended up calling her again to follow up." Tr. 168 (Rolle). "Q. Did you speak to her when you called her back? A. Yes, I believe I did. And I really – I need to defer probably to my phone records because it was a – it was a short window in terms of when the money came in and then the next day, so I want to say we had a couple of calls during the day about moving the money." *Id.* "And – okay, my first call to Pam Campbell was May 21 st, according to the phone records and this particular exhibit. I called her at 10:10 to discuss moving the funds to an interest-bearing account and – [witness corrected to May 24th] . . . She did call me back at 10:18, so we had two phone calls – two phone calls on the 24th; . . . " Tr. 171-72 (Rolle). "I could see it from my online banking credentials when I logged in, but Pam Campbell was saying that she needed to verify whether or not the money were good; or funds had, in fact, been received. So we spent some part of May 24th, the first day of the deposit discussing whether or not Bank OZK received the money; and, you know, her – the information from her that she had to verify whether or not the money was in the account. So after we had discussed her verifying the money was in the account, whether or not they had received it or the money was in the account, what have you, she was also verifying whether or not she was in contact with what she told me was her internal contact to move the money to an interest-bearing account. That's what the information Pam Campbell provided to me in terms of the status of the account." Tr. 202 (Rolle).

statements. Further, Ms. Rolle testified that the next time she spoke with Ms. Campbell was on May 26, 2021, after the hold had been in place for two days. Tr. 204 (Rolle). Since Bank OZK placed the V-ACH funds on hold before noon (Eastern time) on May 24, 2021, Visionary cannot establish reliance on any statement by Ms. Campbell or any other Bank OZK employee after the hold was in place because, due to the hold, Visionary would not have been able to access the funds regardless of what she was told by Bank OZK. Further, even if Visionary could establish that Ms. Campbell's vague and evasive responses to Ms. Rolle constituted fraudulent or negligent misrepresentations, which the Panel holds they did not, Visionary has failed to establish how they caused her to change her position in reliance on such representations.

Accordingly, Visionary has failed to meet its burden of proof on its claims for theft, conversion, check fraud/fraudulent negotiable instrument paid, ACH fund transfer fraud, fraudulent misrepresentation, and negligent misrepresentation.

9. Breach of Fiduciary Duty

Bank OZK complied with the terms of the Agreement and all applicable laws regarding its handling of the V-ACH. Therefore, Visionary has not met its burden of establishing a breach of fiduciary duty claim.

10. Defamation

Visionary has not met its burden of proof with respect to its claim for defamation. Visionary did not identify

any defamatory statements that Bank OZK made about Visionary. Indeed, Visionary only testified as to potential, unspecified defamatory statements about Visionary's principal, Kandria Rolle, but did not show to the Panel how any such statements about Ms. Rolle may have damaged the Claimant, Visionary.

Moreover, with respect to its defamation claim, Visionary asserted only damages for "emotional distress/discomfort and annoyance," plus attorney's fees and arbitration costs. *See* Visionary's Supplemental Itemization of Damages dated 4/18/23 pp. 4-5; *see also* Visionary's Itemization of Damages dated 4/10/23 pp. 4-5 (asserting for defamation claim emotional distress damages, plus attorney's fees and arbitration costs). The Panel granted summary disposition on Visionary's attempt to seek emotional distress/discomfort and annoyance damages, thereby leaving no damages other than attorney's fees and costs that Visionary sought for this claim. *See* 4/28/23 Order on Subsequent Dispositive Motions pp. 2-3; *see also* 4/28/23 Order Denying Claimant's Purported Request to Amend Claim to Include Damages for Discomfort and Annoyance.

Visionary has not established that Bank OZK committed defamation.

11. Negligence

As discussed above, Bank OZK complied with the terms of the Agreement and all applicable laws regarding its handling of the V-ACH. Therefore, Visionary has not

met its burden of establishing a breach by Bank OZK of a duty of care that Bank OZK owed Visionary. Thus, Visionary has failed to establish negligence by Bank OZK.

12. Discrimination (42 U.S.C. § 1981, Title VI, 42 U.S.C. § 2000d *et seq.*)

Visionary argued that Bank OZK's actions in returning the V-ACH to the U.S. Treasury/SBA were done because of the race of Visionary's principal, Kandaria Rolle. The only facts that Visionary has put forward that arguably would support Visionary's discrimination claim is that before the pandemic (in 2020), Ms. Rolle met Pam Campbell, a Bank OZK branch manager, before Visionary opened its account, Tr. 161-64 (Rolle), and that Ms. Rolle believes that Ms. Campbell purportedly saw Ms. Rolle's driver's license in Visionary's account information, Tr. 216-17 (Rolle).

The Panel does not doubt the sincerity of Ms. Rolle's and Visionary's belief that race may have influenced Bank OZK's handling of the V-ACH. However, Visionary did not present sufficient evidence that would lead the Panel to conclude that Bank OZK knew Ms. Rolle's race at the time Bank OZK became aware of the V-ACH through the time Bank OZK returned the VACH to the U.S. Treasury/SBA, or that Ms. Rolle's race influenced in any way Bank OZK's actions in placing a hold on the Visionary account and returning the V-ACH to the U.S. Treasury/SBA.

As such, Visionary has failed to meet its burden of proof on its claim for discrimination pursuant to 42 U.S.C.

§ 1981, Title VI, or 42 U.S.C. § 2000d *et seq.*, and Bank OZK is entitled to an award on such claims.

13. Visionary's Attorney's Fees Claim

Because Visionary has not prevailed on any claims in this arbitration, it cannot prevail on its claim against Bank OZK for its attorney's fees, costs, and expenses. As such, Visionary has not met its burden of proof in establishing entitlement to attorney's fees, costs, and expenses in this arbitration.

14. Bank OZK's Attorney's Fees Claim

In Bank OZK's Itemization of Damages dated April 10, 2023, Bank OZK stated that it reserved the right to seek recovery of its attorney's fees, costs, and expenses. However, Bank OZK did not provide any argument with respect to, or evidence in support of, its request for attorney's fees, costs, and expenses. *See* Scheduling Order #6 dated February 17, 2023 ¶ 27 ("If either party requests an Award to include attorney fees, they shall address the authority, basis and framework for issuing attorney fees at or before the final hearing. The parties shall have the opportunity to file a post-hearing affidavit with the Panel to supplement their request for the amount of attorney fees."). Bank OZK also did not include a request for attorney's fees in its post-hearing brief or response brief. Therefore, Bank OZK has not met its burden of proof in establishing entitlement to attorney's fees, costs, and expenses in this case.

Appendix D

DISSOLUTION OF R-38 ORDER

Given the resolution of all claims in this arbitration, the R-38 Order, as amended by the Panel's subsequent orders (including the Panel's August 1, 2022, August 12, 2022, and August 17, 2022 Orders), is hereby dissolved. Bank OZK is relieved of all obligations under the R-38 Order, as amended, and Bank OZK has no further obligation to provide a security bond or any other form of security to Visionary in this arbitration. Bank OZK may unilaterally terminate all prior arrangements Bank OZK made regarding the provision of a security bond or any other security to Visionary in this arbitration.

CONCLUSION

Accordingly, the Panel awards as follows:

1. On Visionary's claim against Bank OZK for computer invasion of privacy (O.C.G.A. § 16-9-93(c)), computer theft (O.C.G.A. § 16-9-93(a)), computer forgery (O.C.G.A. § 16-9-93(d)) under the Georgia Computer Systems Protection Act (OCGA § 16–9–90 *et seq.*), an award is entered for Bank OZK, and against Visionary.

2. On Visionary's claim against Bank OZK for account takeover, an award is entered for Bank OZK, and against Visionary.

3. On Visionary's claim against Bank OZK for breach of privacy and security, an award is entered for Bank OZK, and against Visionary.

4. On Visionary's claim against Bank OZK for violation of Regulation CC (Expedited Funds Availability Act), an award is entered for Bank OZK, and against Visionary.

5. On Visionary's claim against Bank OZK for violation of Georgia's Uniform Commercial Code – Funds Transfers (O.C.G.A. § 11-4A-101 *et seq.*), an award is entered for Bank OZK, and against Visionary.

6. On Visionary's claim against Bank OZK for tortious interference, an award is entered for Bank OZK, and against Visionary.

7. On Visionary's claim against Bank OZK for theft, an award is entered for Bank OZK, and against Visionary.

8. On Visionary's claim against Bank OZK for conversion, an award is entered for Bank OZK, and against Visionary.

9. On Visionary's claim against Bank OZK for check fraud/fraudulent negotiable instrument paid, an award is entered for Bank OZK, and against Visionary.

10. On Visionary's claim against Bank OZK for ACH fund transfer fraud, an award is entered for Bank OZK, and against Visionary.

11. On Visionary's claim against Bank OZK for breach of contract, an award is entered for Bank OZK, and against Visionary.

12. On Visionary's claim against Bank OZK for breach of the implied duty of good faith and fair dealing, an award is entered for Bank OZK, and against Visionary.

13. On Visionary's claim against Bank OZK for breach of fiduciary duty, an award is entered for Bank OZK, and against Visionary.

14. On Visionary's claim against Bank OZK for defamation, an award is entered for Bank OZK, and against Visionary.

15. On Visionary's claim against Bank OZK for identity theft, an award is entered for Bank OZK, and against Visionary.

16. On Visionary's claim against Bank OZK for negligence, an award is entered for Bank OZK, and against Visionary.

17. On Visionary's claim against Bank OZK for negligent misrepresentation, an award is entered for Bank OZK, and against Visionary.

18. On Visionary's claim against Bank OZK for fraudulent misrepresentation, an award is entered for Bank OZK, and against Visionary.

19. On Visionary's claim against Bank OZK for discrimination (pursuant to 42 U.S.C. § 1981, Title VI, or 42 U.S.C. § 2000d *et seq.*), an award is entered for Bank OZK, and against Visionary.

20. On Visionary's claim against Bank OZK for an award for its attorney's fees, costs, and expenses, an award is entered for Bank OZK and against Visionary.

21. On Bank OZK's request for an award for its attorney's fees, costs, and expenses against Visionary contained in various filings submitted in this case, an award is entered for Visionary and against Bank OZK.

22. The R-38 Order, as amended, is hereby dissolved. Bank OZK is relieved of all obligations under the R-38 Order, as amended, and Bank OZK has no further obligation to provide a security bond or any other form of security to Visionary in this arbitration. Bank OZK may unilaterally terminate all prior arrangements Bank OZK made regarding the provision of a security bond or any other security to Visionary in this arbitration.

The administrative fees of the American Arbitration Association, the compensation of the R-38 Emergency Arbitrator totaling $4,050, and the compensation of the merits arbitrators totaling $215,034 shall be borne as incurred.

This Award is in full settlement of all claims submitted to this arbitration by Visionary against Bank OZK, and by Bank OZK against Visionary. All claims by Visionary against Bank OZK, and all claims by Bank OZK against Visionary, not expressly granted herein are hereby denied.

We do hereby affirm upon our oaths as Arbitrators that we are the individuals described herein and who executed this instrument which is our Award.

Appendix D

Dated: September 18, 2023

Arbitrator's signature: /s/_____
Bruce Bennett, Arbitrator

Arbitrator's signature: /s/_____
Brian Burgoon, Arbitrator

Arbitrator's signature: /s/_____
Henry Chalmers, Arbitrator