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No. 101835-5

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

CHARLES SCHWAB & CO., INC., and
INTERACTIVE BROKERS LLC,

Petitioners,

v.

IRENE and PETER LEON GUERRERO, et al.,

Respondents.

RESPONDENTS' ANSWER TO AMICUS MEMORANDUM OF SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION

McNAUL EBEL NAWROT &
HELGREN PLLC

One Union Square
600 University, 27th Fl.
Seattle, WA 98101-3143
(206) 467-1816

Gregory J. Hollon
WSBA No. 26311
Timothy B. Fitzgerald
WSBA No. 45103
Theresa M. DeMonte
WSBA No. 43994

Attorneys for Leon Guerrero
Respondents

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I. INTRODUCTION

The Securities Industry and Financial Markets Association ("SIFMA") – an organization whose members include Petitioners Schwab and IBKR[1] – fails to establish that this case merits review under RAP 13.4. The arbitrator's nondisclosure of personal litigation involving unrelated parties and different subject matter does not amount to "evident partiality" under the FAA, and SIFMA's arguments to the contrary fail.

"Evident partiality" means partiality that is evident. Not speculative, not hypothetical, not theoretically possible, but evident. It is easy to speculate that the arbitrator's prior litigation experience made her more sympathetic to the Customers because, after all, she was once a plaintiff too. But it is just as easy to speculate in the other direction. For

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[1] *See* https://my.sifma.org/Directory/Member-Directory (last visited June 9, 2023) (listing Charles Schwab & Co., Inc. and Interactive Brokers LLC as members).

example, the Brokers had argued that the Customers should have sued the financial advisors who placed the improper trades – exactly what the arbitrator had done in her own prior litigation against her own financial advisor. Did the arbitrator's prior litigation against her financial advisor make her more sympathetic to the Brokers' argument that the Customers sued the wrong parties here? That speculative inference is just as likely as the speculation advanced by SIFMA and its member Petitioners.

Therein lies the Brokers' problem: Speculation does not rise to the level of "evident partiality" under the FAA. The Court of Appeals applied well-established law in determining that the Brokers – who do nothing more than speculate about the impact of the arbitrator's prior litigation experience – failed to meet the high standard for vacation under the "evident partiality" prong of the FAA, set forth in 9 U.S.C. §10(a)(2).

SIFMA's arguments here lack merit. First, SIFMA posits that this case raises a "significant question of

constitutional law." But arbitration enforced by the FAA does not implicate constitutional due process. Arbitration is a contractual arrangement between private parties that, by design, is subject to limited judicial review. SIFMA does not dispute that the parties received the judicial review to which they are entitled, and fails to demonstrate that these circumstances implicate constitutional due process at all.

Second, SIFMA contends that this Court's intervention is needed to "clarify" the FAA's evident partiality standard, which is the better part of a century old and the subject of hundreds of reported judicial decisions across the nation. Because the circumstances presented here do not rise to the level of "evident" partiality under any formulation, this case presents a particularly poor vehicle for any "clarification," which SIFMA fails in any event to show is necessary.

II. ARGUMENT

A. This Case Does Not Present a Constitutional Question

Echoing the Brokers' same arguments, SIFMA claims

constitutional error on the basis that "Ms. Bridgen's non-disclosure of her contemporaneous prosecution of at least one investment-related lawsuit reflected evident partiality that deprived the Brokers of fundamental due process rights." Amicus Mem. at 5. This argument is wrong in at least three respects.

First, it is wrong on the facts. SIFMA's and the Brokers' suggestion that Ms. Bridgen had "pending" claims against a financial advisor is at best incomplete and at worst misleading. In fact, Ms. Bridgen secured a final judgment against her financial advisor in *2017* – years prior to the arbitration of this matter. CP 1798–99. The remaining claims pending at the time of the arbitration involved the former financial advisor's ex-girlfriend – which were eventually settled for the small sum of $5,000. CP 1803.

Second, SIFMA is wrong that the non-disclosure reflected evident partiality. To the contrary, and as explained in the answer to the petition for review, the non-disclosure easily

could have been inadvertent, as FINRA's disclosure rules regarding prior litigation are far from clear. *See, e.g.*, Answer at 9–11. The FAA does not allow vacation for "theoretical" or "speculative" partiality; instead, it allows vacation only for "*evident* partiality." 9 U.S.C. § 10(a)(2) (emphasis added). And "'[e]vident partiality' is strong language and requires proof of circumstances 'powerfully suggestive of bias.'" *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1523 n.30 (3d Cir. 1994) (citation omitted); *Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 64 (2d Cir. 2012) ("Evident partiality may be found only 'where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.'" (citation omitted)).

As the Ninth Circuit has recognized, the evident partiality "standard differ[s] from the strict standards applicable to judges." *In re Sussex*, 781 F.3d 1065, 1074 (9th Cir. 2015). The Ninth Circuit has accordingly found evident partiality "in cases that involved direct financial connections between a party

and an arbitrator or its law firm, or a concrete possibility of such connections." *Id.* But where the "undisclosed facts" relate to "attenuated, or insubstantial connections between a party and an arbitrator," evident partiality claims were properly rejected. *Id.* (citation omitted).

Here, it is undisputed there were *no* connections between the arbitrator and any party or counsel. Instead, it is *hypothesized* by the Brokers and SIFMA that Ms. Bridgen's nondisclosure of personal litigation, in and of itself, somehow demonstrates bias. But such speculation does not equate to a "reasonable" impression of bias or "evident" partiality favoring the Customers. Indeed, the assumption that the Customers would be the party favored by any purported partiality is equally speculative and far from "evident." On this score, it is noteworthy that the award denied the Customers nearly half the losses they sought, *see* CP 1122–23, 1424, such that any partiality could just as easily be hypothesized to have cut against the Customers.

Third, and most importantly, SIFMA is incorrect that the arbitrator's nondisclosure implicates constitutional due process. For this dubious proposition, SIFMA cites to this Court's statement that, "in the context of due process, arbitration must meet the same requirements as a traditional judicial action." *Int'l Ass'n of Fire Fighters, Loc. 46 v. City of Everett*, 146 Wn.2d 29, 38, 42 P.3d 1265 (2002).[2] But the Court made this statement in the context of considering whether arbitration could be considered an "action" under a fee-shifting statute. *See id.* That case – which involved public employment arbitration pursuant to chapter 41.56 RCW – did not consider

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[2] In so stating, the Court cited to *Grays Harbor County v. Williamson*, 96 Wn.2d 147, 153, 634 P.2d 296 (1981), which explained that the "due process" provided by arbitration is the ability "to be heard and to present evidence, after reasonable notice of the time and place of the hearing." *Grays Harbor* acknowledged, however, that arbitration in fact does *not* meet the same requirements of a judicial action, but rather that arbitration "has been deemed a substitute for judicial action." *Id.* ("[T]he very purpose of arbitration is to avoid courts and formalities, the delay, the expense and the vexation of ordinary litigation.").

whether arbitration involving non-governmental parties implicates constitutional due process rights. *See id.*

Courts that have actually considered the issue have roundly held such arbitrations do *not* implicate constitutional due process. *See Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 207 (2d Cir. 1999) ("no state action in the application or enforcement of [an] arbitration clause"); *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995) ("[T]he state action element of a due process claim is absent in private arbitration cases."); *FDIC v. Air Fla. Sys., Inc.*, 822 F.2d 833, 842 n.9 (9th Cir. 1987) ("[W]e do not find in private arbitration proceedings the state action requisite for a constitutional due process claim."); *Austern v. Chicago Bd. Options Exchange, Inc.*, 716 F. Supp. 121, 125 (S.D.N.Y. 1989) (arbitration panel's conduct "did not in any way constitute state action"). And "every court to examine the issue has held that FINRA is not a state actor." *Weber v. PNC Invs.*, 844 F. App'x 579, 586 (3d Cir. 2021) (unpublished).

The fact that due process does not apply to private arbitration is consistent with its existence as a creature of contract and with the lack of procedural protections generally found in arbitral forums. As one circuit judge observed:

> In the arbitration setting we have almost none of the protections that fundamental fairness and due process require . . . . The rules of evidence are employed, if at all, in a very relaxed manner. The factfinders (here the panel) operate with almost none of the controls and safeguards assumed [in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991)].

Lee v. Chica, 983 F.2d 883, 889 (8th Cir. 1993) (Beam, J., concurring in part and dissenting in part), *cert denied*, 510 U.S. 906, 114 S. Ct. 287, 126 L. Ed. 2d 237 (1993).

Even if the FAA's judicial review provisions provide some due process, *see Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987, 997–98 (9th Cir. 2003), that does not mean the court's action on a motion to vacate or confirm an award implicates due process such that an erroneous decision raises a constitutional question.

Were that the case, court enforcement of private contracts with common provisions such as choice of venue, choice of law, statute of limitations, or damage limitations would necessarily implicate constitutional concerns (as opposed to statutory or common law restrictions on contracts). That is not the law. *See, e.g.*, *Larson v. Snohomish Cnty.*, 20 Wn. App. 2d 243, 281, 499 P.3d 957 (2021) ("State enforcement of a contract between two private parties is not state action."); *Cremin v. Merrill Lunch, Pierce, Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1469 (N.D. Ill. 1997) ("[W]e refuse to hold that every time a Court enforces a private arrangement it potentially violates one party's constitutional rights.").

For this reason, this Court should reject SIFMA's contention that "due process requires that courts evaluate the *application* of the contracted-for rules to ensure that the parties still received a proceeding that was fundamentally fair." Amicus Mem. at 9. The review that is required under the FAA

is the review the FAA provides: narrow grounds for vacatur under the strict statutory standards at 9 U.S.C. § 10.

Here, the Court of Appeals properly enforced the parties' contract, determining that the remedy, provided by FINRA Rule 12407(b), of removing "an" arbitrator for nondisclosure of required information once the hearing has begun, was "precisely one for which the Brokers negotiated by selecting arbitration under FINRA as part of the express terms of the contract." Slip op. at 8. The Court of Appeals further noted that by failing to contend that there was evident partiality in the reconstituted panel that issued the final award, the Brokers failed to meet the "high hurdle" to show evident partiality under the FAA. *Id.* This decision was well grounded in precedent and fails to raise a constitutional question.

This Court should therefore reject SIFMA's flawed attempt to manufacture a constitutional question to secure review under RAP 13.4(b)(3). Because this case does not present *any*

constitutional question – much less a "significant one" – review is not warranted.

B. The Well-Established "Evident Partiality" Standard Does Not Require Clarification

SIFMA next contends this Court should "clarify" when evident partiality is present, claiming the Court of Appeals had an "overly narrow interpretation of the circumstances that can give rise to evident partiality under the FAA." Amicus Mem. at 11. It claims the appellate court's "narrow view of potential bases for evident partiality conflicts" with federal and Washington decisions. *Id.* But the three cases SIFMA relies on only confirm the Court of Appeals' decision was correct.

In the first case SIFMA cites, *Schmitz v. Zilveti*, the arbitrator failed to disclose that his "law firm represented the parent company of [one of the parties], in at least nineteen cases during a period of 35 years." 20 F.3d 1043, 1044 (9th Cir. 1994). Unlike the situation here, the possibility of bias in *Schmitz* was direct, definite and capable of demonstration – a

direct, substantial, non-trivial economic connection between the arbitrator and one of the parties. *See Lucile Packard Children's Hosp., Stanford Hosp. Clinics v. U.S. Nursing Corp.*, No. C 02-0192 MMC, 2002 WL 1162390, at *6 (N.D. Cal. May 29, 2002) (distinguishing *Schmitz*) (unpublished).

Next, SIFMA cites to *Pitta v. Hotel Ass'n of New York City., Inc.* for the proposition that the "evident partiality" standard "may be met by inferences from objective facts inconsistent with impartiality." 806 F.2d 419, 423 n.2 (2d Cir. 1986). In *Pitta*, those "inferences from objective facts" were direct and substantial because the arbitrator himself was tasked with arbitrating "the questions [of] whether he had been validly dismissed by the Council and whether the Office of Impartial Chairman [the office the purportedly-dismissed arbitrator himself held] was vacant." *Id.* at 421. Unsurprisingly, the arbitrator found his dismissal was invalid and that his position was not vacant. *Id.* at 422.

The Second Circuit acknowledged that "the mere appearance of bias that might disqualify a judge will not disqualify an arbitrator," but where "the subject of the arbitrable grievance directly concerns the arbitrator's own employment for what may be an extended period of time, impermissible self-interest requires his disqualification." *Id.* at 423. The finding of evident partiality in *Pitta* – where the arbitrator's interest was direct, certain, and substantial – is vastly different from the circumstances here, where the purported bias was, at most, remote and speculative.

Finally, SIFMA cites to *Newell v. Providence Health & Servs.*, 9 Wn. App. 2d 1038, 2019 WL 2578679 (June 24, 2019) (unpublished). SIFMA contends that *Newell* stands for the proposition that undisclosed "actual or apparent conflicts of interest" can provide a basis for vacatur. But any such conflicts must be reasonably perceived and evident, not speculative and hypothetical. The *Newell* court (which did not find evident partiality) approved of prior case law declining to find evident

partiality where, among other things, the appellant did not allege the arbitrator had "an interest in the outcome of the arbitration proceeding or a known, existing, substantial relationship with a party." *Id.* at *8 (quoting *Jensen v. Misner*, 1 Wn. App. 2d 835, 846–48, 407 P.3d 1183 (2017)). Here, the Brokers have not shown that the arbitrator had any relationship with a party, nor have they shown that her nondisclosure could create a reasonable one-way inference that she was biased against them.

In sum, the decades-old statutory standard of "evident partiality" is one that has been long applied, by many courts, including courts in Washington. Contrary to SIFMA's argument, the Court of Appeals' holding in this case correctly applied established precedent to the facts. Simply put, vacatur was not warranted under the FAA because the Brokers failed to meet their heavy burden to show that the arbitrator was "evidently partial" towards the Customers. This case and its factually unique circumstances do not present an issue of

substantial public interest warranting review under RAP 13.4(b)(4).

III. CONCLUSION

For the reasons set forth above, the Customers respectfully request this Court deny the petition for review.

I certify that this answer contains 2,484 words, in compliance with RAP 18.17.

DATED this 16th day of June, 2023.

McNAUL EBEL NAWROT & HELGREN PLLC

By: *s/Theresa M. DeMonte*
Gregory J. Hollon, WSBA No. 26311
Timothy B. Fitzgerald, WSBA No. 45103
Theresa M. DeMonte, WSBA No. 43994

600 University Street, Suite 2700
Seattle, Washington 98101
Phone: (206) 467-1816
Email: ghollon@mcnaul.com
tfitzgerald@mcnaul.com
tdemonte@mcnaul.com

Attorneys for Leon Guerrero Respondents

AND

///

BENDER LAW PLLC

By: *s/John A. Bender, Jr.*
John A. Bender, Jr., WSBA No. 19540

4634 East Marginal Way, Suite C-150
Seattle, Washington 98134
Phone: 206-390-9676
Email: john@bender-law.com

Attorneys for Naramore Respondents

GR 14.1(d) APPENDIX

2002 WL 1162390
Only the Westlaw citation is currently available.
United States District Court, N.D. California.

LUCILE PACKARD CHILDREN'S HOSPITAL AND STANFORD HOSPITAL CLINICS, Petitioners,
v.
U.S. NURSING CORPORATION, Respondent
U.S. NURSING CORPORATION, Cross-Petitioner
v.
LUCILE PACKARD CHILDREN'S HOSPITAL AND STANFORD HOSPITAL CLINICS, Cross-Respondents

No. C 02-0192 MMC.
|
May 29, 2002.

ORDER GRANTING PETITIONERS' MOTION TO CONFIRM ARBITRATION AWARD; DENYING RESPONDENT'S MOTION TO VACATE ARBITRATION AWARD; VACATING HEARING

CHESNEY, J.

***1** Before the Court are petitioners' Motion for an Order Confirming Arbitration Award, filed pursuant to 9 U.S.C. § 9, and respondent's Motion to Vacate Arbitration Award, filed pursuant to 9 U.S.C. § 10(a). Having reviewed the papers submitted in support of and in opposition to the motions, the Court deems the motions appropriate for decision on the papers, VACATES the hearing scheduled for May 24, 2002, and rules as follows.

I. BACKGROUND

On or about May 3, 2000, petitioners and respondent entered into a written agreement titled "Job Action-Staffing Agreement" ("Agreement") under which respondent was to "[u]se its best efforts to provide [nursing] staff as needed to fill [petitioners'] weekly schedule." (*See* Freedman Decl. Ex. 1 at 1.)[1] For an eight-week period beginning in June 2000, respondent provided replacement nursing staff to petitioners during a strike by petitioners' nurses. (*See* Freedman Decl. Ex. 2 at 1.)

The Agreement included the following arbitration clause:

> If any dispute arises under the terms of this Staffing Agreement, the parties agree that upon written demand of either party, the matter may be submitted for final and binding resolution to an arbitrator who shall have the authority to decide disputes concerning the interpretation and provisions of this Staffing Agreement. All arbitrators appointed to hear disputes arising under this Staffing Agreement shall be selected by the rules of the American Arbitration Association or by any other rules, which may be agreed upon by the parties. The arbitrator shall have no authority to order either party to pay the costs of arbitration or attorney fees of the other party. Arbitration shall take place in City.

(*See id.* Decl. Ex. 1 at 6.)

On February 2, 2001, respondent filed with the American Arbitration Association ("AAA") a demand for arbitration, alleging therein that petitioners breached the Agreement by failing to "pay the invoice balance due and owing in the amount of $2,664,954," or alternatively, that petitioners were liable under a "common count" for the "reasonable value of the work, labor and services rendered" or under the theory of "promissory estoppel" for costs expended by respondent in reliance on petitioners' promise to pay "certain agreed upon rates of pay" for nurses provided under the Agreement. (*See id.* Ex. 6.) On February 22, 2001, petitioners filed with the AAA an answer and counterclaim, denying respondent's claims and raising three counterclaims: (1) that respondent breached the Agreement by failing to provided staffing "as confirmed by oral and written representations made by [respondent's] personnel to representatives of [petitioners];" (2) that respondent negligently misrepresented respondent's "ability to provide appropriate staffing as required by the Staffing Agreement;" and (3) that respondent breached the Agreement by filing a lawsuit and refusing to voluntarily dismiss that action until after petitioners had incurred attorneys fees and costs to prepare and file a demurrer. (*See id.* Ex. 7.)

***2** On February 24, 2001, respondent filed an "Answering Statement of U.S. Nursing Corporation to Counterclaim and Objection to Jurisdiction of Arbitrator and Arbitrability of Counterclaim," in which respondent requested that the

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arbitrator, pursuant to "R-8 of the Commercial Dispute Resolution Procedures,"[2] conduct a preliminary hearing to rule on whether the parties had agreed to arbitrate the negligent misrepresentation claim. (*See id.* Ex. 8.) After a hearing on that matter, the arbitrator ruled that petitioners' negligent misrepresentation claim was arbitrable. (*See id.* Ex. 12.)

On November 29, 2001, the arbitrator issued an Arbitration Award ("Award"), in which the arbitrator concluded as follows: (1) respondent breached the Agreement by failing to use its "best efforts" to provide the nursing staff needed by petitioners (*see id.* Ex. 2 at 2); (2) although petitioners could have terminated the Agreement in light of respondent's breach, petitioners did not terminate and thus were liable to respondent for the services of the nurses provided by respondent in the amount of $2,555,352.20 (*see id.* Ex. 2 at 2-3); (3) respondent "misrepresented to [petitioners] that sufficient nurses to fill their order would be available," and petitioners relied on such misrepresentation to their detriment and incurred damages in the amount of $2,868,941.60 (*see id.* Ex. 2 at 3-4); and (4) respondent breached the Agreement by filing a civil action and not dismissing it until after petitioners had incurred damages consisting of attorney's fees and costs in the amount of $5,064.60, "not duplicative of work necessary irrespective of the forum." (*See id.* Ex. 2 at 5.) The arbitrator awarded petitioners the net amount of $319,994.76. (*See id.*)[3]

II. DISCUSSION

Section 9 of the Federal Arbitration Act ("FAA") provides that "any party to the arbitration may apply to the court ... for an order confirming the award, and thereupon 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." *See* 9 U.S.C. § 9.

Section 10 of the FAA provides that a district court "may make an order vacating the award upon the application of any party to the arbitration," where, *inter alia,* "the arbitrators exceeded their powers," *see* 9 U.S.C. § 10(a)(4), or "there was evident partiality ... in the arbitrators...." *See* 9 U.S.C. § 10(a)(2).

Petitioners move to confirm the Award on the ground that there exists no basis to vacate, modify, or correct the Award. Respondent moves to vacate the Award on the ground that (1) the arbitrator exceeded her powers by finding that petitioners' negligent misrepresentation claim was arbitrable; (2) the arbitrator exceeded her powers by awarding petitioners attorneys' fees; and (3) the arbitrator failed to disclose information that would have shown that she was evidently partial in favor of petitioners.

A. Negligent Misrepresentation Claim

***3** Respondent argues that petitioners' negligent misrepresentation claim was not arbitrable because that claim does not involve a dispute that "arises under" the parties' Agreement. (*See* Freedman Decl. Ex. 1 at 6.) Respondent further argues that because the parties did not agree that the arbitrator should decide the question of arbitrability, the arbitrator's decision to exercise jurisdiction over the claim is subject to de novo review.

1. Standard of Review

Parties to an arbitration agreement may agree to submit questions of arbitrability to the arbitrator. *See First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943 (1995). Where the parties have so agreed, a district court may set aside the arbitrator's decision "only in certain narrow circumstances." *See id.;* 9 U.S.C. § 10. Where the parties have not agreed to submit the question of arbitrability to an arbitrator, but the arbitrator has ruled on that question, a district court decides the question de novo, "namely, independently." *See First Options,* 514 U.S. at 943.

Relying on *First Options,* respondent argues that because it filed an objection to the arbitrator's jurisdiction to hear the negligent misrepresentation claim, respondent "did not clearly and unmistakably agree to be bound by her ruling, and thus waive its right to de novo review." *See* Resp.'s Mot. to Vacate at 11:2-9; *First Options,* 514 U.S. at 947 (holding arbitrability subject to de novo review where parties did not "clearly agree" to submit the question of arbitrability to arbitration). Respondent's argument is not persuasive.

First Options requires de novo review where "the parties did *not* agree to submit the arbitrability question itself to arbitration." *See id.* at 943 (emphasis in original). Here, although respondent did file an "Objection to Arbitrability of Counterclaim [ ] for Negligent Misrepresentation," respondent expressly agreed to submit the arbitrability question to the arbitrator. Indeed, in its memorandum of points and authorities in support of its objection, respondent titled one section "Arbitrator Has Authority to Rule on

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Issue of Arbitrability." (*See* Freedman Decl. Ex. 10 at 8.) Respondent explained therein that the AAA Commercial Dispute Resolution Procedures are incorporated into the parties' Agreement,[4] and that Rule R-8 provides that the arbitrator has the power to rule on her own jurisdiction, including ruling on objections concerning the scope of an arbitration agreement.

Respondent does not argue to this Court that the AAA Commercial Dispute Resolution Procedures are not incorporated into the parties' Agreement nor does respondent deny that it requested that the arbitrator rule on the question of arbitrability. Where the parties have agreed to have an arbitrator decide the question of arbitrability, the applicable standard of review is one of deference to the arbitrator's decision. *See First Options,* 514 U.S. at 943 ("Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about *that* matter should not differ from the standard courts apply when they review any other matter that the parties have agreed to arbitrate.") (emphasis in original).

***4** In sum, the Court finds respondent clearly agreed to submit, and did submit, the issue of arbitrability of the negligent misrepresentation claim to the arbitrator. Accordingly, the Court will review the arbitrator's determination as to arbitrability with deference. *See id.* at 943 ("[A] court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration.")

2. Arbitrability of Negligent Misrepresentation Claim

Respondent argues that the Court should not defer to the arbitrator's decision as to the arbitrability of petitioners' negligent misrepresentation claim because the arbitrator exceeded her authority by "ignoring the plain language" of the Agreement (*see* Resp.'s Mot. to Vacate at 12:2-3), and/or because the arbitrator acted in "manifest disregard of the law." (*See id* . at 18:5-6.)

A district court's review of arbitration decisions is very narrow:

We review the Panel's award mindful that confirmation is required even in the face of erroneous findings of fact or misinterpretations of the law. It is not enough that the Panel may have failed to understand or apply the law. An arbitrator's decision must be upheld unless it is completely irrational or it constitutes a manifest disregard of the law.

French v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 784 F.2d 902, 906 (9th Cir.1986) (internal quotations and citations omitted). Further, "any doubts concerning the scope of [an arbitration agreement] should be resolved in favor of arbitration." *See id.* at 908 (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 406 U.S. 1, 24-25 (1983)).

Here, the arbitrator concluded that the negligent misrepresentation claim was "directly related" to respondent's contractual promise to use its best efforts to provide staff as needed to fill petitioners' weekly schedule, and that the "evidence relevant to the [negligent misrepresentation claim] was intertwined with the evidence relevant to the breach of contract claim." (*See* Freedman Decl. Ex. 12 at 1-2.) In so concluding, the arbitrator cited to cases which the arbitrator determined were supportive of her interpretation of the scope of the Agreement. *See, e.g., Coast Plaza Doctors Hospital v. Blue Cross,* 83 Cal.App. 4th 677, 684-85 (2000) (holding claim for negligent interference with prospective economic advantage and other tort and statutory claims constituted disputes "arising under" the parties' agreement where those claims "center[ed] around and [were] clearly based upon" terms in the agreement and were "inextricably related to [the agreement's] terms and provisions").

Before this Court, but not before the arbitrator, respondent argues that there exist other cases that have interpreted the phrase "arising under," or similar language, very narrowly.[5] *See, e.g., Mediterranean Enterprises, Inc. v. Ssangyoung Corp.,* 708 F.2d 1458, 1464 (9th Cir.1983) (holding "arising under" covers "only those [disputes] relating to the interpretation and performance of the contract itself"). Assuming, *arguendo,* respondent can rely at this time on law or arguments never presented to the arbitrator, respondent nonetheless has failed to make the requisite showing for vacatur. The cases cited by respondent involve determinations specific to the facts presented therein, and do not necessarily indicate that tort claims cannot fall within the scope of arbitration clauses containing language similar to that at issue, where such claims "relate to" the performance of the contract. *See id.*

***5** Here, as noted, the arbitrator concluded that the negligent misrepresentation claim "directly related" to the "best efforts" clause of the parties' Agreement. In a motion in limine filed prior to the arbitration hearing, respondent essentially agreed with the arbitrator's characterization of petitioners' negligent

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misrepresentation claim. In that motion, respondent argued that "[t]he false promise or promises that [petitioners] claim were made relate to the matter covered by the Job Action Staffing Agreement...." (*See* Freedman Decl. Ex. 13 at 7.) The arbitrator's decision that the negligent misrepresentation claim was arbitrable can hardly be described as "completely irrational" or "in manifest disregard of the law." *See French,* 784 F.2d at 906.

Accordingly, the Award will not be vacated on the ground that the arbitrator erred in concluding the negligent misrepresentation claim was arbitrable.

B. Damages

On petitioners' claim that respondent breached the Agreement by filing suit in state court, the arbitrator awarded petitioners damages in the amount of $5,064.60, which represented the "fees and costs related to the action, not duplicative of work necessary irrespective of the forum." (*See* Freedman Decl. Ex. 2 at 5.)

Respondent contends that this amount was awarded in excess of the arbitrator's authority because the Agreement provided that "[t]he arbitrator shall have no authority to order either party to pay the costs of arbitration or attorney fees of the other party." (*See id.* Ex. 1 at 6.) Respondent argues that this provision prohibits any award of damages based on attorney's fees. Petitioners interpret the provision to preclude the arbitrator from awarding attorney's fees incurred in connection with a party's participation in the arbitration proceeding, but argue that the provision imposes no limitation on the type of damages that can be awarded on an arbitrable claim. The arbitrator implicitly interpreted the provision as proposed by petitioners. The arbitrator noted in her Award that neither party sought "fees or costs," and awarded the sum in question as "damages ... due to the breach of the Agreement...." (*See id.* Ex. 2 at 1, 5.)

"[A]n otherwise valid arbitration award will not be vacated unless it may be said with positive assurance that the agreement is not susceptible of an interpretation that covers the award." *French,* 784 F.2d at 908 (internal quotations, alterations, and citation omitted). If the Agreement were interpreted as proposed by respondent, the parties would have contracted to arbitrate claims for breach of contract based on the filing of a lawsuit, but at the same time would have precluded recovery of any damages incurred as a result of that breach. In other words, the parties would have contracted to engage in an idle act. By contrast, the arbitrator's interpretation gives meaning to the Agreement and is consistent with the language therein.

***6** Accordingly, the arbitrator did not act in excess of her authority under the Agreement by awarding attorney's fees as damages for respondent's breach of contract.

C. Evident Partiality

Respondent argues that the Award should be vacated on the grounds of "evident partiality." *See* 9 U.S.C. § 10(a)(2). "[E]vident partiality is present when undisclosed facts show a reasonable impression of partiality." *Schmitz v. Zilveti,* 20 F.3d 1043, 1046-47 (9th Cir.1994) (vacating award where arbitrator failed to disclose his law firm's prior representation of arbitrating party's parent corporation).

Respondent argues that the arbitrator failed to disclose her "involvement with several non-profit groups benefitting children." (*See* Resp.'s Mot. to Vacate at 20:7-8.) In particular, respondent states that although the arbitrator disclosed that she was the founding president of the San Francisco Women Lawyers Alliance, she did not disclose that organization's participation in the operation of childcare centers located at two San Francisco courthouses, drafting legislation pertaining to childcare centers in courts statewide, and assisting the City and County of San Francisco in recovering delinquent fees earmarked for construction of child care centers. Respondent also states that the arbitrator did not disclose that both she and her husband were contributors to the Impact Fund, an organization that, *inter alia,* "contributes to litigation involving children's issues." (*See* Freedman Decl. ¶ 24.)[6] Respondent argues that because petitioner Lucile Packard Children's Hospital provides health care services to children, the arbitrator was required to disclose the above-referenced information.

Vacatur of an arbitration award for "evident partiality" is appropriate where "the possibility of bias [is] direct, definite and capable of demonstration rather than remote, uncertain and speculative." *See Middlesex Mutual Ins. Co. v. Levine,* 675 F.2d 1197, 1202 (4th Cir.1982); *see also Schmitz,* 20 F.3d at 1046 (citing *Levine* with approval). Here, respondent has not shown that the arbitrator had any prior involvement with any party to the arbitration, or any person or entity associated with any party to the arbitration, the usual circumstances involved where a court has found evident partiality.[7] *Compare Commonwealth Coatings Corp. v. Continental Casualty Co.,* 393 U.S. 145, 146 (1968) (finding evident partiality where

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arbitrator failed to disclose arbitrator's prior consulting work for party to arbitration), *and* *Schmitz,* 20 F.3d at 1048, *with* *Apusento Garden (Guam) Inc. v. Superior Court,* 94 F.3d 1346, 1352-53 (9th Cir.1996) (holding arbitrator's failure to disclose arbitrator and expert witness for party were “passive investors in a limited partnership” insufficient to create a “reasonable impression of possible bias”). Rather, at best, respondent has shown that the arbitrator supported organizations that have indirectly engaged in or supported projects that could be perceived to benefit children generally. Any possibility of bias capable of being inferred from these activities is simply too “remote, uncertain and speculative” to warrant vacatur. *See* *Levine,* 675 F.2d at 1202.

***7** Accordingly, respondent has failed to show evident partiality on the part of the arbitrator.

CONCLUSION

For the reasons stated, respondent has failed to show that the Award should be vacated.

Accordingly, petitioners' Motion for an Order Confirming Arbitration Award is hereby GRANTED and respondent's Motion to Vacate Arbitration Award is hereby DENIED.

This order terminates Docket Nos. 12 and 20.

The Clerk shall close the file.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2002 WL 1162390

Footnotes

1 Although the Agreement is not dated, the parties are in accord that it was executed on or about May 3, 2000. (*See id.* at ¶ 2; Flanagan Decl. ¶ 3.)

2 Rule R-8 of the AAA Commercial Dispute Resolution Procedures, titled “Jurisdiction,” provides in relevant part as follows:

(a) The arbitrator shall have the power to rule on his or her own jurisdiction including any objections with respect to the existence, scope or validity of the arbitration agreement.

...

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

(*See id.* Ex. 9.)

3 The net figure included $1,340.76, representing respondent's “share of deposits previously advanced to [AAA].” (*See id.* Ex. 2.)

4 As noted above, the arbitration clause provides that “[a]ll arbitrators appointed to hear disputes arising under this Staffing Agreement shall be selected by the rules of the American Arbitration Association or by any other rules, which may be agreed upon by the parties.” (*See id.* Decl. Ex. 1 at 6.) Respondent does not contend that the parties agreed to abide by any rules other than those of the AAA.

5 In its memorandum on arbitrability submitted to the arbitrator, respondent did not cite to any cases that interpret the phrase “arising under” or similar language. (*See* Freedman Decl. Ex. 10.) Instead, respondent argued, without citation to any case authority, that “tort claim [s] are clearly not included in the arbitration agreement, or anywhere else in the contract....” (*See id.* Ex. 10 at 6.)

6 Respondent has identified 16 grants made by the Impact Fund over the past four years to “parties that were involved in litigating children's issues.” (*See id.*) Of the 16 grants, 2 appear to have been made to entities challenging lack of access

to obstetric and/or pediatric care by indigent women and/or female inmates. (*See id.*) None of the other grants appears to involve issues pertaining to medical care.

7 Respondent has not cited to any case in which evident partiality has been found based on a showing similar to that made here.

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This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 3rd Cir. App. I, IOP 5.1, 5.3, and 5.7.
United States Court of Appeals, Third Circuit.

Dominik WEBER Appellant
v.
PNC INVESTMENTS, a Delaware Limited Liability Company

No. 20-1873
|
Submitted Under Third Circuit LAR 34.1(a) On January 28, 2021
|
(Opinion Filed: February 3, 2021)

Synopsis

Background: Bank employee who was terminated for dishonesty while working with securities, and whose employer had reported his misconduct with Financial Industry Regulatory Authority (FINRA), filed suit against his employer for defamation and intentional interference with contractual relations. Following arbitration of claims, the United States District Court for the Western District of Pennsylvania, Mark R. Hornak, Chief Judge, 2020 WL 563330, confirmed arbitration award in favor of bank. Former employee appealed.

Holdings: The Court of Appeals held that:

[1] bank employee waived claim that two of three arbitrators on panel should have been classified as non-public under FINRA, since he failed to raise issue prior to arbitration, and

[2] bank was not a “state actor,” as required to support bank employee's constitutional claim concerning reputation.

Affirmed.

West Headnotes (2)

[1]
Alternative Dispute Resolution Arbitrators and proceedings

Bank employee waived claim that two of three arbitrators on a panel resolving his claims against employer for defamation and intentional interference with contractual relations based on alleged dishonesty while working with securities should have been classified as non-public, rather than public, members of the panel under Financial Industry Regulatory Authority (FINRA) rule, since he failed to take action on this contention until after he received a negative result in arbitration, despite having ample opportunity to object previously. 9 U.S.C.A. § 10(a).

3 Cases that cite this headnote

[2]
Civil Rights Persons Protected, Persons Liable, and Parties

Bank, a private company, did not become a state actor simply by submitting paperwork to Financial Industry Regulatory Authority (FINRA), as required to support bank employee's claim against bank for violation of due process under Pennsylvania law in connection with his constitutional right to reputation for failure to expunge records relating to his alleged securities violations; undertaking an action that loosely paralleled actions that the state could undertake, such as maintaining a database of employees in the finance field and noting reasons for termination, did not convert private action into state action. Pa. Const. art. 1, § 1.

***580** On Appeal from the United States District Court for the Western District of Pennsylvania (D.C. No. 2:19-cv-704), Judge: Hon. Mark R. Hornak, Chief Judge

Attorneys and Law Firms

Jason A. Archinaco, Esq., Michael A. O'Leary, Esq., The Archinaco Firm, Pittsburgh, PA, for Plaintiff - Appellant

Danielle M. Kays, Esq., Seyfarth Shaw, Chicago, IL, Frederic L. Lieberman, Esq., Robert S. Whitman, Esq., Seyfarth Shaw, New York, NY, for Defendant - Appellee

Before: JORDAN, MATEY, Circuit Judges, and BOLTON,[*] District Judge.

OPINION[**]

JORDAN, Circuit Judge.

After Dominik Weber was fired from his job at a bank subsidiary, the subsidiary filed a form with the Financial Industry Regulatory Authority ("FINRA") indicating that Weber was terminated for dishonesty while working with securities. He believed that to be an unfair description with the effect of blackballing him from further ***581** employment in the "securities/finance industry." (Opening Br. at 6.) He accordingly submitted for arbitration several tort claims against his former employer, but he lost. He now seeks a second bite at the apple, asking that we vacate the arbitrators' decision on two grounds that were not raised during arbitration. He argues first that two of his arbitrators were misrepresented to be people without significant ties to the finance industry when they actually were industry insiders, and second that his employer's actions violated his due process rights under the Pennsylvania Constitution. For essentially the reasons well explained by the District Court, Weber's bid fails, since his misclassification claim comes too late and his state constitutional claim lacks merit.

I. BACKGROUND

Weber was hired by PNC Bank, N.A. ("PNC Bank") as a teller and was later promoted to work as a financial sales consultant for a subsidiary of the bank, PNC Investments ("PNCI"). In a step toward further promotion, Weber received PNCI's endorsement to take the FINRA licensing exams necessary to become a Financial Specialist. PNCI also filed a Uniform Application for Securities Industry Registration, Form U4 with FINRA, on behalf of Weber. Pursuant to Form U4, Weber agreed to arbitrate disputes resulting from his employment.[1]

Unfortunately, the need for arbitration arose. Weber was fired after PNCI determined that he had "twice lied to his Branch Manager." (App. at 810.) It then notified FINRA of the firing using a Uniform Termination Notice for Securities Industry Registration, Form U5, which is stored in FINRA's Central Registration Depository for public accessibility. In that form, PNCI noted that Weber "was terminated for being dishonest with his manager regarding his attendance and completion of sales documentation," (App. at 698,) and it responded "Yes" to question 7F(1) on that form, which reads, "was the individual discharged ... after allegations were made that accused the individual of ... violating *investment-related* statutes, regulations, rules or industry standards of conduct?" (App. at 701, 703.)

Weber's attorney asked that the Form U5 be amended and PNCI agreed, changing its response to "No" to question 7F(1) and revising its termination explanation to say: "Dominik Weber's employment was terminated due to violation [of] firm policy – not securities related. Specifically, Mr. Weber was terminated for misrepresenting facts regarding his attendance and completion of sales documentation." (App. at 709, 711.) FINRA disagreed with that revision, so PNCI changed the answer to question 7F(1) back to "Yes." (App. at 717.)

Weber then commenced a FINRA arbitration against PNCI. He asserted that the "Yes" answer to question 7F(1) effectively prevented him from obtaining similar employment, and he framed his complaint in three claims: "defamation"; "intentional interference with prospective contractual relations"; and "equitable/injunctive relief[.]" (App. at 737-41.) As relief, he requested "expungement of the false and defamatory [Form] U5 language[,]" as well as over a million dollars in compensation, costs, attorneys' ***582** fees, and punitive damages. (App. at 742-43.)

FINRA notified the parties of their rights regarding arbitrator selection and provided disclosure reports with each of the thirty potential arbitrators' background information, including the two arbitrators to whom Weber now objects, William Ryan and chairperson Gregory Mathews. Arbitrators can be removed from handling a dispute, if there is a showing of bias or there has been a failure to disclose required background information,[2] and parties have the right to request additional information about the arbitrators.

Mathews's disclosure report, dated April 10, 2017, stated that he had worked as Wachovia Corporation's Senior Vice

President/House Counsel from 1994 through 2004 and, before that, he was an SEC Attorney/Special Counsel from 1978 through 1982.[3] Ryan's report was also dated in April 2017 and noted his employment as Director of Employee Relations at Cummins Engine Company from 1978 to 1983 and as Chairman and CEO of Point Spring & Driveshaft Company from 1983 to the then-present. Shortly thereafter, FINRA informed the parties of the arbitrator selections, based on the parties' ranking of submissions. The selections, per FINRA rules, included two arbitrators (Mathews and Ryan) classified as "public," i.e., as not being a finance industry insider, and one classified as non-public, i.e., as working within the finance industry.[4]

Then, on June 13, 2017, the parties were provided an additional disclosure from Ryan in which he revealed that he personally had bank accounts with PNC Bank, that the company he led as Chairman and CEO used PNC Bank for certain banking needs, and that his son worked at PNC Bank as a teller and, later, as an operations analyst Ryan stated, however, "that these facts [would] not preclude [him] from rendering an objective and impartial determination in this matter." (App. at 769-81, 1115.) A further updated disclosure report for Ryan was sent to Weber on June 21, 2017, with no changes related to PNC Bank, and Weber did not request Ryan's removal or any more information.

The arbitration hearing took place more than a year and a half later, from January 28 to 31, 2019. During that hearing, Ryan advised the parties that his disclosure report remained accurate. At the end of the hearing, Weber's attorney confirmed, in response to a panel inquiry, that there was no "reason why this Panel should not be confirmed[.]" (App. at 797.) One week after the hearing, FINRA informed the parties that Ryan's son continued to be employed with PNC Bank. Then, a few days later, the case administrator for the arbitration notified the parties that Ryan's classification for future arbitration panels had changed from public to non-public. The letter stated, "[i]f you have any questions, please do not hesitate to contact me at [phone number] or by email[.]" (App. at ***583** 1142.) Weber did not do so. On March 18, 2019, the arbitration panel denied Weber's claims. (App. at 209-11, 214.)

Weber filed a motion in the District Court invoking the Federal Arbitration Act (FAA) and seeking to vacate the arbitrators' decision. He made the same two arguments he puts before us now, neither of which was raised before or at the arbitration. First, he complained that Mathews and Ryan were misclassified as public arbitrators when they should have been designated as non-public. Second, he claimed that PNCI's Form U5 filing, responding "Yes" to question 7F(1), violated his right to due process under the Pennsylvania Constitution. The District Court denied the motion for vacatur and granted PNCI's cross-motion to confirm the arbitration decision. *Weber v. PNC Invs. LLC*, No. 2:19-cv-00704, 2020 WL 563330, at *14 (W.D. Pa. Feb. 5, 2020). It held that Weber had waived his right to object to the alleged misclassification and found meritless his state constitutional claim. *Id.* at *8-14. Weber moved for reconsideration, which was denied. He then appealed to us.[5]

II. DISCUSSION[6]

We are no more persuaded than was the District Court by Weber's arguments, which we address in turn.

A. Misclassification of Arbitrators

[1] Weber argues that because arbitrators Mathews and Ryan should have been classified as non-public but were presented as being public members of the panel, his award should be vacated under § 10(a) the FAA, which allows vacatur "where there was evident partiality or corruption in the arbitrators" or "where the arbitrators were guilty of ... any other misbehavior by which the rights of any party have been prejudiced." 9 U.S.C. § 10(a). Because he took no action until after he received a negative result, despite having ample opportunity to object previously, he has waived any claim under § 10(a). *See* *Goldman, Sachs & Co. v. Athena Venture Partners, L.P.*, 803 F.3d 144, 148 (3d Cir. 2015) ("[W]here a party is capable of 'thoroughly and systematically digging for dirt on each of the three arbitrators,' it should do so prior to being solely motivated by the chance of vacating the award.") (citation omitted); *see also* *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 683 (7th Cir. 1983) ("That it did so little [investigating] suggests that its fear of a prejudiced panel is a tactical response to having lost the arbitration.").

1. *Chairman Mathews*

Weber asserts that Mathews failed to disclose that he performed certain in-house ***584** legal work for a broker dealer.[7] The information supporting this claim was found on Mathews's website, which, if it differs at all from his FINRA background disclosure, does so only subtly.[8] While Mathews's FINRA background notes that he was general

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counsel for Wachovia Corporation, his website adds that in that role, "he managed an active docket of over 300 cases covering a broad range of claims, including ... SEC and [National Association of Securities Dealers ("NASD") – the predecessor of FINRA –] claims." (App. at 515.) FINRA Rules 13402(b) and 13403(b)(2) require the chair of the arbitration panel be a public member, not an industry insider. According to Weber, the work Mathews performed at Wachovia makes his disclosure false, and the District Court erred in concluding that Weber had waived a misclassification claim.

In *Goldman, Sachs & Company v. Athena Venture Partners, L.P.*, we concluded that constructive knowledge of an issue suffices for the issue to be waived if there is a failure to raise it during arbitration. *See* 803 F.3d at 150. "Constructive knowledge in the arbitration context reasonably requires parties to exercise as much diligence and tenacity in ferreting out potential conflicts in selecting the panel as they do once attacking the award [becomes] the sole reason to research the arbitrators." *Id.* at 148 (internal quotation marks and modifications omitted). Weber attempts to restrict the impact of *Athena Venture*, arguing that it should be cabined to its facts, where "there was 'alarming information' about ethical issues that put the 'sore loser' on inquiry notice to conduct further research."[9] (Opening Br. at 23 (quoting *Athena Venture*, 803 F.3d at 149, 150).) He argues that because there were no comparable red flags with regard to Mathews, he did not need to conduct any significant pre-award inquiry. But such a duty exists under *Athena Venture*, regardless of red flags.

Weber both could have and should have looked into Mathews's background before the hearing and arbitration decision, not after. He does not suggest that he discovered this supposedly new information through anything other than a simple background check, and though this is something he says he should not have been expected to do before the award, our precedent says otherwise.

2. *Arbitrator Ryan*

For some reason not apparent in the record, FINRA reclassified Ryan as a non-public arbitrator shortly after Weber's arbitration hearing but nearly a month prior to the award. Based on that reclassification, Weber contends that Ryan must have been misclassified at the time he participated in the arbitration. The District Court concluded that "despite FINRA's late-in-the-game reclassification, Weber still could and should have objected to Ryan's participation." (App. at 27.) We likewise hold that Weber's failure to object constitutes waiver. Moreover, his claim is based on pure speculation and would have no merit even had it been preserved. *See* ***585** *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008) (concluding that the avenues available for overturning an arbitration award "address egregious departures from the parties' agreed-upon arbitration" and "extreme arbitral conduct"); *Brentwood Med. Assocs. v. United Mine Workers of Am.*, 396 F.3d 237, 238-39 (3d Cir. 2005) ("[A] court must ... interfere only when an [arbitration] award is severely problematic." (citation omitted)).

Weber argues that, at the time of the reclassification, there was no "rule / mechanism that would have permitted him to seek reconsideration of the [FINRA] Director's decision to keep Ryan on the panel[.]" (Opening Br. at 29.) Specifically, Weber argues the District Court was mistaken that FINRA Rule 13410(b) provides such a mechanism because, he says, the reclassification decision was a final determination by FINRA.[10] For that reason, according to Weber, he could not have brought his claim any earlier.

His argument misses the mark. Weber was told that, as a matter of FINRA policy, Ryan would be reclassified for future arbitrations. At the same time, he was told to contact the case administrator with any questions. He ignored that offer. A reasonably diligent inquiry would have, at the very least, involved responding to the reclassification note to request information on Ryan's status change and then perhaps objecting to Ryan's continued service on his panel, if there was a valid basis to object. We do not know why Ryan was reclassified, and evidently neither does Weber, so even if the claim were not waived, we would not assume error by FINRA based on Weber's speculation. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) (delegating certain questions of arbitrability to the NASD because it possesses expertise).

Whether or not Weber's interpretation of Rule 13410(b) is sound, the fact remains that he was given a procedure to investigate and declined to do so. Consequently, he has waived his claim.

B. Violation of the Pennsylvania Constitution[11]

Weber broadly asserts that "FINRA's Form U5 statutory scheme, i.e., its database, ... violates the Pennsylvania Constitution[,]" and in particular the fundamental right to "reputation."[12] (Opening Br. at 36-37 (citation omitted).) If for no other reason than that both FINRA and PNCI are not state actors, this claim plainly lacks merit.

***586** **[2]** Under the Pennsylvania Constitution, a person's right to reputation is "a fundamental interest which cannot be abridged without compliance with constitutional standards of due process[.]" *R. v. Commonwealth, Dep't of Pub. Welfare*, 535 Pa. 440, 636 A.2d 142, 149 (1994) (citation omitted). To bring a viable claim for a Pennsylvania due process violation, Weber had to show that the party whose actions he is complaining about is a state actor. *See Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 311 A.2d 588, 591 (1973); *accord Harvey v. Plains Twp. Police Dep't*, 421 F.3d 185, 195 (3d Cir. 2005) ("Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of [§ 1983].") (quoting *United States v. Price*, 383 U.S. 787, 794, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966)). As the District Court noted, "every court to examine the issue has held that FINRA is not a state actor" and "even if FINRA was a state actor, [PNCI] – unquestionably a private company – would not become a state actor simply by submitting paperwork to FINRA[.]" (App. at 31 (citations omitted).) We agree and have said as much previously. *See First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 699 n.5 (3d Cir. 1979) ("NASD is not a state agency[.]").

Weber attempts to avoid these prior decisions by narrowly arguing that it is the database of U4 and U5 Forms maintained by FINRA that is effectively a state actor, and PNCI's filing of Weber's U5 Form constitutes state action. (*See* Reply Br. at 22 ("[W]hat is being challenged is the maintenance of the ... database itself, and the constitutionally impermissible blackening of a person's reputation without any process at all[.]").) The argument is still unavailing.

Undertaking an action that loosely parallels actions that the state can undertake, such as maintaining a database of employees in the finance field and noting reasons for termination, does not convert private action into state action. *See Leshko v. Servis*, 423 F.3d 337, 340 (3d Cir. 2005) (describing that there are two categories of state action, "an *activity* that is significantly encouraged by the state or in which the state acts as a joint participant" and "an *actor* that is controlled by the state, performs a function delegated by the state, or is entwined with government policies or management" (citations omitted)). That alone is sufficient to affirm the District Court's decision.

III. CONCLUSION

For the forgoing reasons, we will affirm the District Court's orders confirming the arbitration award and denying reconsideration.

All Citations

844 Fed.Appx. 579

Footnotes

* The Honorable Susan Bolton, Senior United States District Judge for the District of Arizona, sitting by designation.

** This disposition is not an opinion of the full court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

1 Specifically, he agreed "to arbitrate any dispute, claim or controversy that may arise between me and my *firm* ... that is required to be arbitrated under the rules, constitutions, or by-laws of the SROs [i.e., self-regulatory organizations] indicated in Section 4 (SRO REGISTRATION) as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent *jurisdiction*." (App. at 694, Part 15A, ¶ 5.)

2 In particular:

> Before the commencement of any hearing or pre-hearing conference, ... FINRA will grant a party's request to remove an arbitrator if it is reasonable to infer that the arbitrator is biased, lacks impartiality, or has a direct or indirect interest in the outcome of the arbitration. ... After the commencement of the hearing, FINRA will remove an arbitrator only if the arbitrator fails to disclose required information not previously known by the parties.

(App. at 747.)

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3 On January 8, 2019, FINRA provided an updated report for Mathews, which added that he was counsel in an unrelated securities matter from 2014 to 2016.

4 The classification and participation of the third arbitrator is not at issue.

5 PNCI attempts to frame Weber's appeal, given its timing, as one that only challenges his motion for reconsideration. It contends that any appeal of the District Court's initial February 5, 2020 order is untimely. For that reason, PNCI says we should only consider those issues argued in Weber's motion for reconsideration, and for abuse of discretion at that. We agree with Weber that, "[p]ursuant to Rule 4(a)(4)(A), a timely motion for reconsideration will toll the time for filing a notice of appeal." (Reply Br. at 1.) *See United States v. Fiorelli*, 337 F.3d 282, 288 (3d Cir. 2003) (holding that a timely motion for reconsideration will toll the appeal deadline under Rule 4(a)(4)(A)). And Weber did not file multiple Rule 4(a)(4) motions, as PNCI suggests, as a basis for finding untimeliness.

6 The District Court had subject matter jurisdiction under 28 U.S.C. § 1332(a) and we have jurisdiction under 28 U.S.C. § 1291. We review a district court's denial of a motion to vacate an arbitration award *de novo*, with regard to its legal conclusions, and for clear error, with regard to its factual findings. *See Whitehead v. Pullman Grp., LLC*, 811 F.3d 116, 119 n.23 (3d Cir. 2016).

7 In particular, Mathews answered "no" to the question: "Are you, or were you ever, associated with ... a broker or a dealer?" (App. at 506.)

8 PNCI disputes whether his website is materially different from his FINRA disclosure statement. We will assume for the sake of argument that they are different.

9 One of the arbitrators in *Athena Venture* had ethical charges brought against him, which were revealed prior to completion of the arbitration hearings, and a deeper inquiry would have revealed various felonies. *See* 803 F.3d at 146.

10 Rule 13410(b) provides that, "[a]fter the first hearing session begins, the Director may remove an arbitrator based only on information required to be disclosed ... that was not previously known by the parties. The Director may exercise this authority upon request of a party or on the Director's own initiative."

11 Weber's motion to vacate was brought under diversity jurisdiction, 28 U.S.C. § 1332, and the state constitutional claim was brought under supplemental jurisdiction, 28 U.S.C. § 1367, as part of "the same case or controversy." The parties do not appear to have contested the District Court's supplemental subject matter jurisdiction to hear the claim, and the Court did not decline to exercise its jurisdiction. It would, however, likely have been within its discretion to do so, because "the claim raise[d] a novel or complex issue of State law" and because the Court had "dismissed all claims over which it ha[d] original jurisdiction." 28 U.S.C. § 1367(c).

12 Specifically, Weber explains that FINRA's "refusal to expunge his [Form U5] violates his right to reputation as guaranteed by Article I, Section 1 of the Pennsylvania Constitution[.]" (Reply Br. at 20 (citing *Carlacci v. Mazaleski*, 568 Pa. 471, 798 A.2d 186, 188-89 (2002)).)

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DECLARATION OF SERVICE

On June 16, 2023, I caused to be served a true and correct copy of the foregoing document to be served on counsel of record stated below, via the Washington Courts E-Portal:

John A. Bender Jr.
Bender Law PLLC
4634 East Marginal Way, Suite C-150
Seattle, WA 98134
Phone: 206-390-9676
Email: john@bender-law.com
atharshna@bender-law.com (asst.)
Attorney for Naramore Respondents

Christopher A. Stecher and Igor Stadnik
Keesal, Young & Logan
1301 5th Ave #3100
Seattle, WA 98101
Phone: (206) 622-3790
Email: christopher.stecher@kyl.com
igor.stadnik@kyl.com
sarah.yong@kyl.com (asst.)
Attorneys for Petitioner Charles Schwab & Co., Inc.

Robert B. Mitchell, Philip M. Guess,
Monica M. Guess
K&L Gates LLP
925 4th Avenue, Suite 2900
Seattle, Washington 98104
Phone: (206) 370-7580
Email: rob.mitchell@klgates.com
philip.guess@klgates.com
monica.guess@klgates.com
Suzanne.Petersen@klgates.com (asst.)
Attorneys for Petitioner Interactive Brokers LLC

Paul F. Rugani, WSBA No. 38664
Orrick, Herrington & Sutcliffe LLP
401 Union Street, Suite 3300
Seattle, WA 98101
Phone: (206) 839-4300
Email: prugani@orrick.com
Attorneys for Amicus Curiae Securities Industry and Financial Markets Association

Richard A. Jacobsen
Gregory D. Beaman
Jennifer M. Keighley
Orrick, Herrington & Sutcliffe LLP
51 W. 52nd Street
New York, NY 10019
Phone: (212) 506-5000
Email: rjacobsen@orrick.com; gbeaman@orrick.com; jkeighley@orrick.com
Attorneys for Amicus Curiae Securities Industry and Financial Markets Association

I declare under penalty of perjury under the laws of the United States of America and the State of Washington that the foregoing is true and correct.

DATED this 16th day of June, 2023, at Tukwila, Washington.

s/Thao Do
Thao Do, *Legal Assistant*

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Comments:

Sender Name: Thao Do - Email: tdo@mcnaul.com
Filing on Behalf of: Theresa Demonte - Email: tdemonte@mcnaul.com (Alternate Email: tdo@mcnaul.com)

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