

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Appeal No. ED 91683

Phillip J. Behnen,

Appellant,

vs.

A.G. Edwards & Sons, Inc.,

Respondent.

OPENING BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the Circuit Court for the City of St. Louis. The Circuit Court entered judgment April 3, 2008. [LF 1760-66]. Appellant timely filed his post-trial motion Monday, May 5, 2008. [LF 1767-1800]. The Circuit Court denied the motion July 30, 2008. [LF 1802-08]. Appellant timely filed his notice of appeal August 6, 2008. [LF 1804].

This appeal does not present any issue within the exclusive jurisdiction of the Missouri Supreme Court. This Court of Appeals has jurisdiction under Article 5, Section 27(5) of the Missouri Constitution and Section 512.180, RSMo.

POINT RELIED UPON

The Circuit Court erred in vacating the last line of paragraph 3 of the arbitration award because the arbitration panel did not exceed its authority in ordering that Behnen’s Form U5 show that the termination of his employment with Edwards was “voluntary” in that FINRA specifically authorizes arbitrators to change the reason for termination on a Form U5 from “terminated” (accompanied by a reason) to “voluntary” if the reason given for the termination is defamatory, notwithstanding the general requirement that Form U5 information be “complete and accurate.”

CPK/Kupper Parker Communications, Inc. v. HGL/L. Gail Hart,
51 S.W.3d 881 (Mo. App. 2001)

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Hayob v. Osborne, 992 S.W.2d 265 (Mo. App. 1999)

Masonic Temple Association v. Farrar, 422 S.W.2d 95 (Mo. App. 1967)

STATEMENT OF FACTS

Appellant Phillip J. Behnen sued respondent A.G. Edwards & Sons, Inc. (“Edwards”) in the Circuit Court for the City of St. Louis for damages and an injunction. The lawsuit alleged, among other claims, defamation and fraud. [LF 11-23]

Behnen’s claim was based on a Form U5 Edwards filed with the securities regulators at the National Association of Securities Dealers (“NASD”) in connection with Edwards’ termination of Behnen’s employment. Companies in the securities industry must file a Form U5 with the NASD with respect to each associated person (employees are generally referred to as “associated persons” in the securities industry) who leaves the firm’s employment. [LF 23, 1782].¹

¹ During the pendency of these proceedings, the NASD’s regulatory functions were merged into the securities industry’s current self-regulatory organization, the Financial Industry Regulatory Authority:

July 26, 2007 – The Securities and Exchange Commission today gave final regulatory approval related to the consolidation of the member firm regulatory functions of the National Association of Securities Dealers, Inc. and NYSE Regulation, Inc., a wholly-owned subsidiary of New York Stock Exchange LLC. The Commission approved rule changes that allow for the consolidation of member firm regulation into a single, consolidated self-regulatory organization. The consolidated organization will be known as the Financial Industry Regulatory Authority, or FINRA....

SEC Gives Regulatory Approval for NASD and NYSE Consolidation, copy avail-

The Form U5 filed by Edwards stated that Behnen had been terminated for “violation of firm policy and industry rules and regulations.” [LF 24]. Specifically, Edwards stated: “Mr. Behnen was terminated for violation of firm policy regarding the receipt of commissions by a corporate officer.” [LF 27]. Edwards also checked Box 7F.1 on the Form U5, thereby asserting that Behnen’s employment ended “after allegations were made that accused the individual of ... violating *investment-related* statutes, regulations, rules or industry standards of conduct...” [LF 26].

On Edwards’ motion [LF 29-33], in September 2004 the circuit court compelled Behnen to submit his claims to arbitration. [LF 3-4, 122].

The parties arbitrated. It was a lengthy arbitration process: Behnen filed his statement of claim in December 2005; the hearing was held April 10 through 12, 2007, and the arbitrators issued their award May 2, 2007. [LF 124, 126, 1762].

The arbitration between Behnen and Edwards was brought under the auspices of the NASD. The NASD — and, later, FINRA — provides guidelines to arbitrators with respect to preparing an award following an arbitration. [LF

able on the internet at: <http://www.sec.gov/news/press/2007/2007-151.htm>. Because this change took place during the pendency of these proceedings, some regulations and guidelines are referenced as belonging to the NASD, while others refer to FINRA. The two entities are interchangeable for purposes of this appeal.

1770-71, 1774-91]. These guidelines include directions on how arbitrators are to handle “expungement” requests made in arbitration proceedings. [LF 1776-82].

If the claim is between a FINRA member firm and a current or former associated person and the panel intends to order the expungement of information from the Central Registration Depository (“CRD”), state whether the expungement order is based on the defamatory nature of the information, and if so, clearly state in the award that the “expungement order is based on the defamatory nature of the information in the CRD system.”

[LF 1780].

The FINRA guidelines incorporate Rule 2130 of the NASD for “expungement procedures.” Rule 2130 provides direction for when FINRA will expunge information from a Form U5 as a result of a dispute that involves associated persons and firms. The requirements for expungement vary depending on whether the information in question results from a customer dispute:

Defamation Claims in Intra-Industry Disputes

Under existing CRD policy, FINRA will expunge information from the CRD system — without the need for judicial intervention — if the expungement directives contained in intra-industry awards that involve associated persons and firms are based on the defamatory nature of the information ordered expunged and do not involve any customer dispute information. Arbitrators must clearly state in the award that they are ordering expungement relief based on the defamatory nature of the information in the CRD system.

- If the intra-industry case was filed on or after April 12, 2004, and requests expungement of information from the following form U5 sections: Reason for Termination, Termination Disclosure or Internal Review Disclosure, or the Form U4 Termination Disclosure section (i.e., collectively non-customer dispute information), Rule 2130 does not apply.
- If the intra-industry case was filed on or after April 12, 2004, and requests expungement of customer dispute information, Rule 2130 applies.

[LF 1782].

NASD published the “Neutral Corner,” a publication for arbitrators. The December 2001 issue of the “Neutral Corner” included an article stating the NASD’s practice in honoring arbitration awards that direct the expungement of information from the CRD system and from an associated person’s Form U5. [LF 1795-96]. This article described the official policy as follows:

Reason for Termination

If, after a hearing on the merits involving an intra-industry dispute between an NASD member firm and an associated person, arbitrators decide to order CRD to expunge or delete the reason for termination contained in the associated person’s Form U-5, CRD will carry out this directive provided the award meets two requirements. First, as mentioned earlier, the award must state that the information is ordered expunged because it is defamatory in nature. In addition, the award must follow Form U-5 by (1) identifying the new reason for termination (i.e., deceased, voluntary, permitted to resign, discharged, or other) and (2) providing

an accompanying explanation when Form U-5 requires one. The reasons for termination that require an explanation in Form U-5 are: “permitted to resign,” “discharged,” or “other.” If the reason for termination is “voluntary” or “deceased,” no explanation is required....

For example, assume that an associated person was terminated by a member firm and the original reason for termination stated in the Form U-5 was “discharged.” Assume also that the original explanation for the discharge stated in the Form U-5 was “kept client money in violation of firm policy.” If the arbitrators conclude that the reason for termination and the accompanying explanation are defamatory in nature and should be expunged or deleted, they must state this in the award. In addition, the arbitrators must provide the new reason for termination in the award....

If the arbitrators in the above example believe the new reason for termination should be “voluntary,” they must state this in the award. However, in this case, CRD is authorized to carry out the expungement directive without any explanation for this new reason for termination in the award because Form U-5 does not require one for “voluntary” terminations.

[LF 1795-96 (emphasis added)].

Behnen filed a motion to confirm the arbitration award May 15, 2007. [LF 123-24]. The motion attached a copy of the arbitrators’ award. [LF 126-30]. The arbitrators’ award included an award of compensatory damages to be paid by Edwards to Behnen in the sum of \$248,353.83. [LF 128]. The arbitrators’ award

also ordered expungement of the reason given by Edwards for Behnen's termination, and included an admonition directed at Edwards:

3.) The Panel orders the expungement of the termination comment, "Violation of firm policy and industry rules and regulations" contained in Section 3 of the Form U-5 of Phillip J. Behnen's registration records maintained by the NASD Central Registration Depository ("CRD") because the comment is defamatory. The Panel orders that the reason for termination be changed to "Voluntary";

4.) The Panel strongly recommends that Respondent, A.G. Edwards & Sons, Inc., evaluate the adequacy and appropriateness of its procedures for (1) reviewing trades, particularly trades by home office employees with FC numbers; (2) document retention; and (3) conducting internal investigations. The Panel recommends that this evaluation be undertaken by the officers and/or directors of A.G. Edwards & Sons, Inc. with supervisory authority over its employees who testified at the hearing of this matter;

[LF 128; *see also* LF 1762-63 (court order quoting award)].

Behnen filed a motion to confirm the award. [LF 123-24]. Edwards filed a cross-motion that the arbitrators' decree be vacated. [LF 6, 137-41]. Edwards' motion contended that:

The Award should be vacated because the Panel (i) exceeded its powers, (ii) so imperfectly executed its powers that a mutual, final and definite award upon the subject matter submitted was not made, and (iii) manifestly disregarded the facts and law presented at the arbitration hearing. The Award should be vacated

for the additional reasons that it (i) violates public policy and (ii) is irrational.

[LF 141].

While the cross-motions to confirm and to vacate the award were pending, Behnen filed a motion with the NASD requesting that the award be modified to expunge the other defamatory statements contained in Behnen's Form U5. The arbitrators responded to Behnen's motion on September 19, 2007, by indicating that they were inclined to grant the relief sought, but would hold the motion to modify in abeyance pending the court's final decision on the motion to vacate:

Claimant filed a request to amend the award in this case. The request was dated June 26, 2007. Respondent, A.G. Edwards & Sons, Inc. filed a response to this request which was dated July 3, 2007 and Respondent Steve Garrett filed a response which was dated July 11, 2007. This is the panel's long-delayed response to Claimant's request.

On the basis of testimony and documents presented at the hearing, the panel found that Respondent, A.G. Edwards & Sons, Inc. had defamed Claimant Behnen by reporting that he was terminated for "[v]iolation of firm policy and industry rules and regulations." For this reason, the panel ordered, in paragraph three of the award, the expungement of the termination comment, "[v]iolation of firm policy and industry rules and regulations" contained in Section 3 of the Form U-5 of Phillip J. Behnen's registration records maintained by the NASD Central Registration Depository ("CRD"). **To render this expungement effective, Paragraph 3 also ordered that the reason for termination be changed to "voluntary," which the panel deemed**

to be less misleading than the other alternatives: (i) “terminated” accompanied by a defamatory reason or (ii) “allowed to resign.” The panel was unaware that related defamatory statements appeared in other publicly available documents, so the panel did not order their expungement. Nevertheless, the panel deems it unwise to amend the award while a judicial proceeding to vacate the award is pending. Therefore, the panel will hold Claimant’s request in abeyance pending the court ruling.

[LF 1800 (emphasis added)].

The circuit court granted Edwards’ motion to vacate the award in part by ordering that paragraph 1 and the last line of paragraph 3 of the arbitrators’ award be vacated as in excess of the arbitrators’ authority. [LF 8, 1764-65]. Behnen is not appealing the vacation of paragraph 1 of the award. With respect to its decision to vacate the last line of paragraph 3 of the award, the court’s order of April 3, 2008 stated:

The Court also finds that the line in Paragraph 3 ordering “that the reason for termination be changed to ‘Voluntary’” is also invalid. Plaintiff argues that this remedy is necessary to counteract the effects of the defamation perpetrated by Defendant. However, it is undisputed that Plaintiff’s termination was not voluntary. The NASD requires member firms to file “complete and accurate” information on any Uniform Termination Notice for Securities Industry Registration (“Form U-5”) that is required to be filed with the NASD. The Court finds that the panel exceeded its authority in ordering an inaccurate statement be placed on Plaintiff’s U-5.

[LF 1764-65].

Behnen moved to amend the order to confirm the award in total. [LF 1767-68]. Behnen's motion to amend provided the circuit court with copies of both the NASD guidelines on expungements and the panel's response to Behnen's motion to modify the award. [LF 1774-91, 1800].

The circuit court denied Behnen's motion to amend July 30, 2008. [LF 9, 1802-03]. Behnen filed his notice of appeal August 6, 2008. [LF 10, 1804].

ARGUMENT

The Circuit Court erred in vacating the last line of paragraph 3 of the arbitration award because the arbitration panel did not exceed its authority in ordering that Behnen's Form U5 show that the termination of his employment with Edwards was "voluntary" in that FINRA specifically authorizes arbitrators to change the reason for termination on a Form U5 from "terminated" (accompanied by a reason) to "voluntary" if the reason given for the termination is defamatory, notwithstanding the general requirement that Form U5 information be "complete and accurate."

This appeal presents a single issue: When the arbitrators ordered that the reason for Behnen's termination shown on his Form U5 be changed from "Terminated" to "Voluntary," did the arbitrators exceed their authority?

A. Standard of Review.

In considering whether the arbitrators exceed their authority, the Court is required to give the decision of the arbitrators — and not the decision of the Circuit Court — the highest degree of deference. As the United States Court of

Appeals for the Third Circuit phrased it, “we owe no deference to the District Court’s analysis, and instead we exercise plenary review over the District Court’s decision to vacate the arbitration award.” *Metromedia Energy, Inc. v. Enserch Energy Services, Inc.*, 409 F.3d 574, 578-579 (3d Cir. 2005).

In making their “plenary review” of a trial court’s decision to vacate or affirm an arbitration award, Missouri appellate courts consistently recognize that “judicial oversight of arbitration is strictly limited.” *CPK/Kupper Parker Communications, Inc. v. HGL/L. Gail Hart*, 51 S.W.3d 881, 883 (Mo. App. 2001); *Sheffield Assembly of God Church, Inc. v. American Ins. Co.*, 870 S.W.2d 926, 929 (Mo. App. 1994). The scope of judicial review of an arbitration award “is among the narrowest known to the law.” *CPK/Kupper Parker*, 51 S.W.3d at 883-884, quoting *Litvak Packing Co. v. United Food & Commercial Workers, Local Union No. 7*, 886 F.2d 275, 276 (10th Cir. 1989).

Both the United States Congress and the Missouri General Assembly have decided as a matter of public policy to allow only very limited review of arbitration awards. *CPK/Kupper Parker, supra*, citing Title 9, Sections 1–16 of the United States Code, and Sections 435.350–435.470, RSMo. “Arbitration awards are subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expen-

sive litigation.” *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993).

Finally, as the party challenging the arbitration award, Edwards bears the burden of proving the invalidity of the award, notwithstanding the Circuit Court’s judgment below. *Decker v. Kamil*, 100 S.W.3d 115, 117 (Mo. App. 2003). “An arbitration award, regular on its face, not the result of fraud or collusion, finally concludes and binds the parties on the merits of all matters properly within the scope of the award, both as to law and facts, and the courts will have no inquiry as to whether the determination thereon was right or wrong, for the purpose of interfering with the award.” *Masonic Temple Association v. Farrar*, 422 S.W.2d 95, 109 (Mo. App. 1967) (citations omitted).

There are five reason why the Court should conclude that the arbitrators were acting within their authority in ordering that Behnen’s termination be listed as “Voluntary.”

First, revision of Behnen’s Form U5 was requested in his petition; Edwards acknowledged that all of the claims in the petition were subject to arbitration; and revision of the Form U5 was one of the issues submitted to the arbitrators for their decision.

Second, the NASD authorizes its arbitrators to order CRD records, including the Form U5, be expunged if the stated reason for termination of employ-

ment is defamatory to the associated person. This authorization includes the express authority to change the reason for termination from “Terminated” to “Voluntary.” Thus, the arbitrators here were doing exactly what the NASD authorized.

Third, in exercising their authority to expunge defamatory CRD records, NASD arbitrators routinely order that the reason for a termination stated on a Form U5 be changed to “Voluntary”, even if the associated person did not really voluntarily quit his employment. Thus, the action the arbitrators took here is consistent with the usual and accepted practice for NASD arbitrators.

Fourth, an exhaustive search of all reported decisions in the United States found no court in the country, other than the Circuit Court below, to have ever vacated an NASD arbitration award as outside of the arbitrators’ authority because it directed that the reason stated for termination on an associated person’s Form U5 be changed to “Voluntary.” Neither Edwards in its motion, nor the Circuit Court in its judgment, cite even a single case holding that arbitrators cannot change the stated reason for termination of an associated person’s employment to “Voluntary” if the person did not actually voluntarily resign his or her employment. Thus, the decision below is unprecedented and made in the absence of any applicable legal authority.

Fifth, the arbitrators' award directing that Behnen's Form U5 reflect that termination of his employment was "Voluntary" is not inaccurate in a legally-meaningful way. As the arbitrators specifically explained, the term "Voluntary" is less misleading than the other, limited alternatives available to the arbitrators in effectuating their expungement of the false and defamatory reason for termination given by Edwards in the original Form U5.

Because the arbitrators did not exceed their authority, the judgment below should be reversed to the extent that it ordered that the last line of paragraph 3 of the award be vacated.

B. Both federal and state law permit an arbitration award to be vacated for only a few narrow reasons, none of which are applicable here.

The Circuit Court ordered the parties to arbitrate their dispute. [LF 122]. This order was made in response to Edwards' motion, which was filed pursuant to the authority of the Federal Arbitration Act, 9 U.S.C. §§ 1–16 (the "FAA"). [LF 29]. Sections 9 and 10 of the FAA state the grounds upon which an arbitration award will be confirmed or vacated. 9 U.S.C. §§ 9–10.

Section 9 of the FAA states in relevant part:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the

court so specified 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...

9 U.S.C. § 9. Section 10 of the FAA states in relevant part:

(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.

9 U.S.C. § 10.

Notwithstanding the narrow grounds for vacation provided under the FAA, Edwards moved to vacate the award on the following grounds:

The Award should be vacated because the Panel (i) exceeded its powers, (ii) so imperfectly executed its powers that a mutual, final and definite award upon

the subject matter submitted was not made, and (iii) manifestly disregarded the facts and law presented at the arbitration hearing. The Award should be vacated for the additional reasons that it (i) violates public policy and (ii) is irrational.

[LF 141]. Based on the FAA and the balance of Edwards motion to vacate, it is clear that the only statutorily-authorized ground for vacation raised by Edwards' motion is that stated in Section 9(a)(4) of the FAA, that is, that the award should be vacated because the arbitrators exceeded their powers.

The Circuit Court, however, did not analyze its power to vacate the award under the FAA. Instead, it analyzed the award under the parallel, but different, Missouri state statute, Section 435.405.1, RSMo. [LF 1763-65]. The Missouri statute states in relevant part:

Upon application of a party, the court shall vacate an award where:

- (1) The award was procured by corruption, fraud or other undue means;
- (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
- (3) The arbitrators exceeded their powers;
- (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of

section 435.370, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings pursuant to section 435.355 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

Section 435.405.1.

With respect to the portion of the award that was vacated, and is the subject of this appeal, the Circuit Court held that vacation was proper under the third paragraph of Section 435.405.1: “The Court finds that the panel exceeded its authority in ordering an inaccurate statement be placed on Plaintiff’s U-5.” [LF 1765]. This test — did the arbitrators exceed their powers? — is the same under both federal and state law, and therefore the analysis is the same regardless of which law applies to this issue.

Thus the only legal issue on appeal is whether the arbitrators exceeded their authority in requiring the CRD to change Behnen’s Form U5 to reflect that his termination was “Voluntary.” In deciding this issue, the court should give the arbitrators’ award the extreme deference required under the standard of review discussed above.

C. The powers and authority of the arbitrators are established by the terms of the agreement to arbitrate.

“The powers of the arbitrator are set and defined by the contract to arbitrate.” *Westridge Investment Group, L.P. v. McAtee*, 968 S.W.2d 243, 245 (Mo. App. 1998). “Federal and state laws concerning the powers of arbitrators, hold them as being set and defined by the contract to arbitrate...” *Estate of Sandefur v. Greenway*, 898 S.W.2d 667, 670 (Mo. App. 1995). “Arbitrators’ authority is limited to deciding matters that are in the scope of the arbitration agreement and have been submitted to them. If they decide matters beyond this scope, they have exceeded their authority.” *Welch v. Davis*, 114 S.W.3d 285, 291 (Mo. App. 2003). “Arbitrators exceed their power or jurisdiction *only* by deciding matters which were beyond the scope of the arbitration agreement or which clearly were not submitted to them.” *Edward D. Jones & Co. v. Schwartz*, 969 S.W.2d 788, 794 (Mo. App. 1998) (emphasis added).

Here, Edwards in its motion to compel arbitration expressly contended that Behnen’s claim that Edwards had defamed him by filing a false statement with the NASD concerning the grounds of Behnen’s termination was subject to the parties’ agreement to arbitrate:

12. On May 18, 2004, plaintiff filed the instant action in this Court, seeking injunctive relief and alleging defamation, fraud and negligent misrepresentation against A.G. Edwards, Schaeferle, an employee of A.G.

Edwards, and Garrett, also an A.G. Edwards employee. Specifically, plaintiff alleges in his Petition that A.G. Edwards and Garrett falsely stated to Behnen that he properly could receive commissions as Associate Vice President of the Private Client Group, and further alleges that A.G. Edwards and Schaeferle defamed Behnen by reporting to the NASD that plaintiff was terminated for receiving commissions in violation of firm policy.

13. The instant action “arises in connection with the business of [A.G. Edwards]” as set forth in the NYSE rules (at Rule 600) and the NASD rules (at § 10101). See Exhibits 2 & 3. Therefore, plaintiff’s claims are subject to arbitration under his agreement to arbitrate set forth in the Form U-4.

14. The instant action also “arises out of [plaintiff’s] employment or termination of employment” as set forth in the NASD rules (at § 10101). See Exhibit 3. For that independently sufficient reason, plaintiff’s claims are subject to arbitration under his agreement to arbitrate set forth in the Form U-4.

[LF 31-32].

Furthermore, prior to filing its motion to compel arbitration, Edwards, through its then-attorney, wrote to Behnen’s attorney stating that the claims in Behnen’s lawsuit were all subject to the parties’ arbitration agreement, and offering to modify Behnen’s Form U5 in settlement of the dispute:

Enclosed herewith is a copy of Philip J. Behnen’s Form U-4, executed by him on July 1, 1998. As you will note, ¶ 5 of the Form U-4 contains an agreement to arbitrate under the rules, constitutions or by-laws of the organizations indicated in Item 10 of the Form, which

includes the NASD and the NYSE. The NYSE constitution and the NASD rules, both provide for arbitration of the claim or controversy set forth in your client's petition filed May 18, 2004, in the Circuit Court for the City of St. Louis, State of Missouri.

Since an enforceable agreement to arbitrate your client's claims clearly exists, we hereby demand that your client dismiss his above-described petition and that he submit his claims to arbitration in accordance with the NASD/NYSE rules/constitution. Please promptly advise me of your client's position so that I can timely prepare an appropriate motion in response to the petition, if necessary.

In the meantime, my client remains willing to consider language that you may propose with respect to amendment of the Form U-5 to fully and finally settle all of your client's claims against it.

[LF 121]. This letter was attached as an exhibit to Edwards' motion to compel and was also cited in Edwards' motion. [LF 33, 121].

Thus, Edwards' own court filings to compel arbitration establish that the issues of (a) why Behnen was terminated and (b) whether Edwards' report to the NASD (on Behnen's Form U5) was defamatory, were matters within the scope of the parties' arbitration agreement. Significantly, the petition filed by Behnen — which Edwards contended successfully was wholly within the scope of the parties' arbitration agreement — specifically requested that an order be issued requiring Behnen's Form U5 be "replaced with a Form U5 which states that

plaintiff was terminated by A.G. Edwards & Sons, Inc. without cause” [LF 23], a form of relief similar to that granted by the arbitrators.

Because these matters were within the scope of the parties’ arbitration agreement, the arbitrators did not exceed their authority in deciding them. And because Edwards is the one who demanded that the arbitrators decide these issues, it should not be permitted after the fact to contend that the arbitrators exceeded their authority by deciding the issues it asked them to decide. *See Hayob v. Osborne*, 992 S.W.2d 265 (Mo. App. 1999).

Hayob was a lawsuit between the two shareholders of a corporation. One shareholder claimed that the other was using the corporation as his alter ego, and demanded, among other relief, that the controlling shareholder be ordered personally liable for the corporation’s debts to plaintiff. The defendant filed an answer. The parties subsequently agreed to arbitrate their dispute. The arbitration agreement provided: “The parties agree to dissolve the Corporation and to submit to arbitration the equitable distribution of its assets, taking into account the resolution of pending claims...” *Hayob*, 992 S.W.2d at 267. The arbitrator’s award ordered that the corporation pay the complaining shareholder almost \$52,000, and that, if the corporation could not make the full payment, ordered that the controlling shareholder pay it from his personal assets. *Id.* Defendant objected that the arbitrator had exceeded his authority, since there was no basis

under Missouri law to enter a personal judgment against a shareholder for the corporation's debts under the facts of the case. Defendant's motion to vacate was denied, and that denial was affirmed on appeal:

[T]he plaintiff (Respondent) filed an amended petition ... in which he demanded judgment against Osborne individually. Osborne filed an answer. The parties agreed by written contract to submit to arbitration all the claims contained in those pleadings. The scope of arbitration is defined by the contract between the parties. Therefore, the issue of adjudicating Respondent Osborne's personal liability was, indeed, within the jurisdiction of the arbitration panel. Accordingly, with respect to the issue of Respondent Osborne's personal liability, *no determination of the arbitrator would exceed his powers as contemplated by § 435.405.1(3), even if repugnant to the laws of the State of Missouri.*

Id. at 269 (citations omitted; emphasis added).

Similarly, even if altering the reason for termination on a Form U5 were repugnant to the rules of the NASD, the arbitrator could order it here because it was within the scope of issues submitted to the arbitrator. But such alterations are not repugnant to the NASD rules. Indeed, as shown below, the NASD authorizes and even encourages such alterations in the appropriate case.

- D. The NASD authorizes its arbitrators to enter awards expunging from a Form U5 defamatory reasons for termination, and to direct the CRD to make the reason for an associated person's termination be listed as "Voluntary."**

FINRA, like the NASD before it, provides arbitrators with an Award Information Sheet, which is completed by the arbitrators for use by FINRA Dispute Resolution staff to prepare the formal arbitrators' award. [LF 1774-91]. The current Award Information Sheet form is available on FINRA's website at: <http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@neutrl/documents/arbmed/p009465.pdf>.²

The Award Information Sheet states that the arbitrators may order the expungement of defamatory materials from an associated person's CRD records, including his Form U5, upon an express finding based on evidence that the information in the records is defamatory. [LF 1780-82].

The NASD provided directions to its arbitrators on how to exercise their power to order expungement of such defamatory material. These instructions appeared in the December 2001 issue of "Neutral Corner," a monthly publication provided by the NASD to its arbitrators. The December 2001 article specifically recommends that arbitrators follow the very procedure followed by the arbitrators here to expunge defamatory material from a Form U5. The recommended procedure is to change the reason for the associated person's termination from

² The form can currently be accessed from FINRA's home page (www.finra.org) by using the following series of links: Arbitration & Mediation; Resources for Neutrals; Arbitration Process; Arbitration Case Guidance & Resources; and finally Award Information Sheet.

“Terminated” to “Voluntary” if necessary to expunge a defamatory reason for termination.

These instructions, provided by the applicable regulatory body, the NASD, demonstrate that the arbitrators were not exceeding their authority in making the award vacated by the Circuit Court. Instead, the arbitrators here were precisely following the procedures authorized and recommended by the NASD for handling this kind of situation.

The December 2001 “Neutral Corner” article is available on FINRA’s website³ and is reproduced in the legal file. [LF 1795-96].

In the December 2001 “Neutral Corner” article, the NASD presented a hypothetical case in which an associated person is terminated from his employment by a member firm for a stated reason which turns out to be defamatory — that is, false and harmful to the person’s reputation. The hypothetical presents a situation almost identical to what happened to Behnen:

For example, assume that an associated person was terminated by a member firm and the original reason for termination stated in the Form U-5 was “discharged.” Assume also that the original explanation for the discharge stated in the Form U-5 was “kept client money in violation of firm policy.” If the arbitrators conclude that the reason for termination and the accompanying explanation are defamatory in

³ Available at: <http://www.finra.org/ArbitrationMediation/Neutrals/Education/NeutralCorner/p009942>.

nature and should be expunged or deleted, they must state this in the award. In addition, the arbitrators must provide the new reason for termination in the award.

If the arbitrators believe the new reason for termination should be “permitted to resign,” they must say so explicitly in the award. They also must provide an explanation for this new reason in the award because Form U-5 requires one for this particular type of termination. Otherwise, CRD is not authorized to carry out the arbitrator order to delete the original reason for termination and the accompanying explanation in Form U-5.

Arbitrators who decide to expunge a reason for termination and an accompanying explanation contained in a Form U-5 because they are defamatory should avoid the use of award language that directs a respondent member firm or CRD to amend such reason or explanation because Form U-5 prohibits such amendments. Instead, arbitrators should use specific award language that: directs CRD to expunge the reason for termination and the explanation because they are defamatory; states a new reason for termination; and provides an explanation for the new termination reason when Form U-5 requires one.

If the arbitrators in the above example believe the new reason for termination should be “voluntary,” they must state this in the award. However, in this case, CRD is authorized to carry out the expungement directive without any explanation for this new reason for termination in the award because Form U-5 does not require one for “voluntary” terminations.

[LF 1795-96 (emphasis added; original emphasis omitted)].

Consequently, the Circuit Court erred when it concluded that the arbitrators in this case exceeded their authority by expunging the defamatory material placed by Edwards in Behnen's Form U5 and directed that the new reason for termination should be "Voluntary."

E. NASD Arbitrators routinely order that the reason for a termination be changed to "Voluntary" when an associated person has been wrongfully discharged.

Consistent with the authority granted by the NASD, NASD arbitrators routinely enter awards ordering that the "Reason for Termination" on a terminated associated person's Form U5 be listed as "Voluntary" if the person was wrongfully discharged by a member firm.

Below is a list of arbitration awards entered since 2006 in which NASD arbitrators entered orders consistent with the portion of the award the Circuit Court's judgment vacated. The list only goes back to 2006 for convenience's sake; there are many other, similar awards from before 2006.

In *Barron v. H&R Block Financial Advisors, Inc.*, NASD Case No. 07-00960, 2008 NASD Arb. Lexis 117 (Feb. 7, 2008), the claimant sued for defamation based on his Form U5, and requested an expungement order. The arbitrators found for the claimant and ordered "that the Reason for Termination be immediately changed to 'Voluntary.'"

In *Martin v. Columbia Funds Distributors, Inc.*, NASD Case No. 06-00871, 2007 NASD Arb. Lexis 969 (Sep. 28, 2007), the claimant sued for defamation based on his Form U5, and requested an expungement order. The arbitrators found for the claimant and ordered “the expungement by FINRA to amend the language of the Form U5 of [the claimant’s] registration records ... to remove all references to ‘discharge’ as reason for separation/termination, and replace the language to read ‘voluntary’ as reason for termination.”

In *Augustus Capital LLC v. Sankin*, NASD Case No. 05-02528, 2007 NASD Arb. Lexis 812 (July 26, 2007), the respondent counterclaimed for defamation based on his Form U5, and requested an expungement order. The arbitrators found for the counterclaimant and ordered that “the Reason for Termination Section should be expunged and that the Reason for Termination be changed to voluntary.”

In *IMS Securities, Inc. v. Abern*, NASD Case No. 05-04719, 2007 NASD Arb. Lexis 190 (Feb. 20, 2007), the claimant sued for defamation based on his Form U5, and requested an expungement order. The arbitrators found for the claimant and ordered “the expungement of the Form U-5 to correct the reason for termination from ‘discharge’ to ‘voluntary resignation’”

In *Hodges v. Partner Connections, LLC*, NASD Case No. 05-02771, 2007 NASD Arb. Lexis 149 (Feb. 8, 2007), the claimant sued for defamation based on

his Form U5, and requested an expungement order. The arbitrators found for the claimant and ordered “that the U-5 show only voluntary termination.”

In *Sulaiman v. Trustbank Securities Brokerage, Inc.*, NASD Case No. 05-06626, NASD Arb. Lexis 1943 (Dec. 21, 2006), the claimant sued for defamation based on his Form U5, and requested an expungement order. The arbitrators found for the claimant and ordered: “The new reason for termination should be immediately changed to ‘Voluntary,’ and the entirety of the corresponding termination comment made by [respondent] be deleted. Replacement language for the termination comment is not required as Form U5 does not require a termination comment when the reason for termination is ‘voluntary.’”

In *Golan v. Sentra Securities Corp.*, NASD Case No. 05-02039, 2006 NASD Arb. Lexis 1775 (Nov. 21, 2006), the claimant sued for defamation based on his Form U5, and requested an expungement order. The arbitrators found for the claimant and ordered “that the Reason for Termination in Item 3 of the Form U-5 of [claimant] be expunged and be replaced with ‘Voluntary’”

In *Kozlowski v. NY Life Securities, Inc.*, NASD Case No. 05-0685, 2006 NASD Arb. Lexis 1677 (Oct. 25, 2006), the claimant sued for defamation based on his Form U5, and requested an expungement order. The arbitrators found for the claimant and ordered “that the reason for termination of ‘other’ be expunged and replaced with ‘voluntary.’”

In *Spencer v. Heartland Securities, Corp.*, NASD Case No. 05-04037, 2006 NASD Arb. Lexis 1232 (July 26, 2006), the claimant sued for defamation based on his Form U5, and requested an expungement order. The arbitrators found for the claimant and ordered “the expungement of the Reason for Termination from ‘Discharge,’ and replaces it with ‘Voluntary.’”

In *Barlow v. SunAmerica Securities, Inc.*, NASD Case No. 04-07613, 2006 NASD Arb. Lexis 1035 (June 13, 2006), the claimant sued for defamation based on his Form U5, and requested an expungement order. The arbitrators found for the claimant and ordered: “The Reason for Termination should be expunged and replaced with ‘Voluntary.’”

In addition to the ten awards quoted above, *see also Burge v. IMS Securities, Inc.*, NASD Case No. 05-03998, 2006 NASD Arb. Lexis 772 (May 5, 2006); *Figarola v. Credit Suisse First Boston, Inc.*, NASD Case No. 03-09241, 2006 NASD Arb. Lexis 726 (Apr. 26, 2006); *Bevin v. Guardian Investor Services LLC*, NASD Case No. 05-00845, 2006 NASD Arb. Lexis 506 (Mar. 20, 2006); *Frank v. Whitehall Wellington Investments, Inc.*, NASD Case No. 03-01844, 2006 NASD Arb. Lexis 542 (Mar. 9, 2006); *LaBorde v. G&W Equity Sales, Inc.*, NASD Case No. 03-07324, 2006 NASD Arb. Lexis 407 (Feb. 28, 2006); *Cherry v. Neuberger Berman, LLC*, NASD Case No. 05-05343, 2006 NASD Arb. Lexis 355 (Feb. 22, 2006); *Oppenheimer & Co., Inc. v. Patrick*, NASD Case No. 05-01160, 2006

NASD Arb. Lexis 273 (Feb. 17, 2006); *Carillion Investments, Inc. v. Gidley*, NASD Case No. 04-2003, 2006 NASD Arb. Lexis 108 (Jan. 26, 2006); *Lee v. Signature Securities Group*, NASD Case No. 05-04862, 2006 NASD Arb. Lexis 6 (Jan. 10, 2006); *Pugliese v. Spear, Leeds & Kellogg L.P.*, NASD Case No. 05-00427, 2006 NASD Arb. Lexis 21 (Jan. 6, 2006).

The arbitrators' action here is not unprecedented. Rather, the action that the Circuit Court vacated was plainly in line with standard NASD practice and procedure and fully within the arbitrators' authority.

F. There is no legal authority to support the contention that the arbitrators exceeded their power in ordering expungement of the defamatory material from Behnen's Form U5 and ordering that the reason for termination of his employment be changed to "Voluntary."

Give the many NASD arbitrations in which arbitrators have ordered the reason for termination to be changed to "Voluntary," if such an award exceeds the arbitrators' authority, one would expect to find some reported decisions in which other courts have rejected such awards. Edwards did not cite a single such case in its motion to vacate the award — even though, as the party seeking to vacate the award, it was Edwards' burden to establish a legal basis to overcome the extreme deference given by Missouri courts to arbitrators' decisions.

The lack of cited authority is not the result of inadequate legal research by Edwards' experienced securities lawyers. Edwards could find no cases vacat-

ing such an order because there are no reported cases doing so anywhere in the United States.

In the Circuit Court, Edwards argued that it has a duty to accurately report to the regulators its view of the facts of Behnen's termination on his Form U5, and for that reason alone the arbitrators' award should be vacated.

The Circuit Court's judgment shows it found this argument compelling, even though the result was to leave an even more inaccurate (and defamatory) statement in place in the CRD records.

The Circuit Court erred.

The arbitrators found, after a full evidentiary hearing, that the information Edwards had provided to the regulators in its Form U5 submission was not accurate, but instead was false and inaccurate — in a word, defamatory. While Edwards obviously disagrees with the arbitrators' factual finding that the information Edwards submitted was false and inaccurate, Edwards is nonetheless bound by the factual findings made in an arbitration in which it participated — just as the Circuit Court, in considering the motion to vacate, was bound by the arbitrators' factual findings. *Masonic Temple Association*, 422 S.W.2d at 109.

Moreover, the arbitrators' award did not impact Edwards' obligation to accurately report facts to the CRD. *The arbitrators did not order Edwards to report anything*. Rather, the arbitrators directly instructed the CRD — not

Edwards — to make certain changes in its records. Edwards’ duty to report accurately was not impacted by the award, and its duty to accurately report information to its regulators provides no basis for vacating any portion of the arbitrators’ award.

G. The arbitrators’ determination that requiring Behnen’s Form U5 to state that the termination of his employment with Edwards as “voluntary” was less misleading than any of the other reasons available under Form U5 is entitled to great deference by the courts.

The Form U5 has limitations. In the area of grounds for termination of an associated person’s employment with a member firm, the Form U5 provides only a handful of reporting options: deceased, discharged, permitted to resign, voluntary, or other. [LF 1795].

The arbitrators here determined, as have the arbitrators in so many other cases, that the least misleading reason to give for the termination of employment of a wrongfully discharged associated person, like Behnen, was “Voluntary.” Indeed, the arbitrators here expressly so stated when they held in abeyance Behnen’s request to expand the scope of their expungement order to include other, defamatory public CRD records concerning the termination of Behnen’s employment:

To render this expungement effective, Paragraph 3 also ordered that the reason for termination be changed to “voluntary,” which the panel deemed to be less mislead-

ing than the other alternatives: (i) “terminated” accompanied by a defamatory reason or (ii) “allowed to resign.”

[LF 1800].

The arbitrators acted within their power in making this reasonable decision based on the facts as they found them.

CONCLUSION

The arbitrators did not exceed their authority in ordering in their award that Behnen’s Form U5 be changed to reflect that the termination of his employment by Edwards was “Voluntary.” This type of change is directly authorized by the NASD under circumstances similar to those here. This type of change has been ordered by countless NASD arbitration panels over the years. This type of change has never been successfully challenged in any court, except the Circuit Court below. This type of change is routine, ordinary, and well within the limits of the arbitrators’ authority.

For all these reasons, the judgment of the Circuit Court vacating the last line of the third paragraph of the arbitrators’ award should be reversed and that portion of the award reinstated and confirmed.

In addition, the public policy of both the United States and the State of Missouri is to encourage and enforce arbitration agreements. Arbitration awards are subject to very limited judicial review in large part to promote the goals of

arbitration, which include “avoiding long and expensive litigation.” *Folkways Music Publishers*, 989 F.2d at 111. Parties like Edwards, however, flout these rules and undermine the public policy of both the United States and this State by endlessly litigating every aspect of the process — including engaging in full-bore attacks to vacate awards, like the award here, that clearly should be confirmed. This type of systematic misconduct is evident both in Edwards’ motion to vacate, which asserted as “grounds” for vacation numerous reasons that are not included in the statutory grounds for vacation, and by insisting that the entire arbitration record be included in the legal file of this appeal so that it can burden Behnen and this Court with an improper attack on the factual bases for the arbitrators’ award. [See LF 238-1760].

This kind of misconduct is all too pervasive. Big companies like Edwards abuse the arbitration system, including the post-award motion-to-vacate process, to impose immense financial burdens on individuals like Behnen, in the hope that by sheer muscle and money they can win victories that the law and the facts would deny them. This kind of misconduct is like a knife in the gut of the arbitration system, and runs directly contrary to Congress’s and the General Assembly’s determination that we should avoid long and expensive litigation.

Behnen therefore respectfully requests that the Court award him as sanctions against Edwards the attorneys’ fees and expenses he has incurred both

in the Circuit Court and here in opposing Edwards' attempts to vacate this proper arbitration award.

Respectfully submitted,

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ATTORNEY'S CERTIFICATE AND CERTIFICATE OF SERVICE

Pursuant to Rule 84.06(c), the undersigned certifies:

1. The Opening Brief filed December 4, 2008, on behalf of appellant Phillip J. Behnen complies with the requirements of Rule 55.03.
2. The brief complies with the limitations in Rule 84.06(b).
3. The brief contains 9,046 words, *including* the cover, table of contents, table of authorities, and signature block, all of which are permitted to be excluded from the count.
4. Electronic copies of the brief, in both WordPerfect and Adobe PDF format, are on the enclosed floppy disk, and have been scanned for viruses and are virus-free.
5. Two copies of the brief and a duplicate of the floppy disk filed with the Court, have been served on counsel of record for respondent December 4, 2008, by mailing the same by U.S. Mail, first-class postage prepaid, to:

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