IN THE SUPREME COURT OF IOWA

NO. 23-0439

PRINCIPAL SECURITIES, INC.,

Petitioner-Appellee,

vs.

MARK A. GELBMAN,

Respondent-Appellant.

RESPONDENT-APPELLANT'S FINAL BRIEF

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE CELENE GOGERTY

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. **DID THE DISTRICT COURT ERR IN GRANTING PRINCIPAL SECURITIES, INC.'S MOTION TO VACATE THE ARBITRATION AWARD?**

ROUTING STATEMENT

This appeal should be routed to the Iowa Court of Appeals because it involves issues of well-settled law and no issues of first impression.

STATEMENT OF THE CASE

On June 14, 2021, Mark A. Gelbman ("Mr. Gelbman" or "Appellant") filed a statement of claim with the Financial Industry Regulatory Authority ("FINRA") for expungement of his Form U5 and U4.[1] A merits hearing was held before the FINRA arbitrator ("Arbitrator") during which both parties were provided a full and fair opportunity to present their evidence and arguments. On February 23, 2022, the Arbitrator issued an award granting Mr. Gelbman's request for expungement (the "Award").

[1] Principal, a securities broker/dealer, is a "member" of FINRA, while Mr. Gelbman, who was employed by Principal as a registered representative prior to his termination, was an "associated person." FINRA Rules 13100(b), (q), and (u). Given these identities or roles, Mr. Gelbman and Principal were required to submit their dispute to arbitration under FINRA's Code of Procedure. FINRA Rules 13200(a) and 9120(c).

On May 5, 2022, Principal Securities, Inc. ("Principal" or "Appellee") filed a motion to vacate the Award with the Iowa District Court for Polk County. On June 28, 2022, Mr. Gelbman filed an Answer to Principal's motion to vacate. On September 1, 2022, Mr. Gelbman filed a brief opposing Principal's request for vacatur of the Award. The Iowa District Court for Polk County (the "District Court") held a hearing on this matter on December 9, 2022, and issued its ruling on Principal's motion to vacate on February 7, 2023, granting Principal's motion.

The District Court erred as a matter of law because the Arbitrator's Award did not lack support by substantial evidence on the record as a whole. The Award specifically states that the Arbitrator reached his determination "[after considering the pleadings, the testimony **and evidence** presented at the hearing, and any post-hearing submissions…" (emphasis supplied) (App. at 203). The District Court erred by calling into question that finding by the Arbitrator and in opening its own independent inquiry of the evidence presented. These undertakings by the District Court are not permitted under Iowa statute or case law, as further discussed below. As such, the District Court's order should be reversed and the Award should be confirmed.

Here, Principal does not complain that the Award was the result of corruption, fraud, or undue means, nor does it assert the Arbitrator himself was corrupt or evidently partial to Mr. Gelbman. There is no suggestion the Arbitrator refused to

continue the arbitration hearing despite a proper request to do so. There is no suggestion that the Arbitrator declined or otherwise failed to hear pertinent, material evidence. Principal has not claimed that the Arbitrator engaged in behavior that prejudiced its rights. Principal has not argued that the Award is not mutual, final, or definite. And finally, Principal has not suggested that the parties were not required to arbitrate their dispute.[2]

STATEMENT OF FACTS

Beginning in October 2011, Mr. Gelbman was employed by Principal as its registered representative.[3] In early March 2022, Mr. Gelbman was informed that he was the subject of an investigation by Principal regarding whether he had complied with company policies governing the rebalancing of customer accounts. Mr. Gelbman offered to resign his position with Principal, but was advised by the

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[2] Principal has waived every basis on which the vacatur of an arbitration award can be permitted under the Federal Arbitration Act except one, i.e., that the arbitrator exceeded his authority in rendering the award, and all but two under the Iowa Arbitration Act, i.e., the arbitrator exceeded his authority and that the award is not supported by substantial evidence in the record. *See* 9 U.S.C. §10(A)(1) through (4) and Iowa Code 679A.12(1)(a) through (f).

[3] Because Mr. Gelbman and Principal were, for purposes of this litigation, an "associated person" and a "member", respectively, neither of them was a "customer" as that term is defined in FINRA Rule 13100(k). Consequently, this dispute is an *industry* dispute as opposed to a *customer* dispute. *Cf.* FINRA Rules 12200, 12201, and 13200(a) and FINRA Interpretative Material 13000. This distinction is significant because different standards of proof apply in the two categories of cases.

company not to do so. On March 30, 2021, Principal terminated Mr. Gelbman's employment. The basis for this termination was Principal's determination that Mr. Gelbman had, in fact, violated Principal's rules setting forth the procedure to be followed when rebalancing customer accounts.

Principal reported Mr. Gelbman's termination to FINRA on what is known as a Form U5.[4] The substance of the Form U5 information submitted by FINRA members is maintained in a database by FINRA known as the Central Registration Depository (the "CRD"). A FINRA program known as "BrokerCheck" makes the information contained in the CRD available to the public by featuring it on FINRA's website. That information is used by investors and prospective employers to perform what amount to background checks on financial professionals since it discloses, among other things, complaints and enforcement actions against brokers, as well as disclosing the ostensible reasons for the termination of a broker's employment with a broker/dealer.[5] Here, Principal's Form U5 filing caused the CRD and BrokerCheck to reflect only that Mr. Gelbman was discharged from his employment with Principal

[4] FINRA By-Laws, Article V, §3.

[5] *See* FINRA's Broker Check FAQ, accessible at https://www.finra.org/investors/learn-to-invest/choosing-investment-professional/about-brokercheck/faq.

because he failed to adhere to the company's policies regarding discretionary trading in customer accounts. (App. at 249-255).

Mr. Gelbman believed (and still believes) the BrokerCheck disclosures do not present a complete and accurate picture of the facts and circumstances regarding his departure from Principal. As result, on or about June 11, 2021, Mr. Gelbman filed a Statement of Claim with FINRA. (App. at 641). The Statement of Claim sets forth the reasons Mr. Gelbman believed the information regarding his termination published on BrokerCheck did not fairly and accurately describe his termination. Because Principal's U5 disclosure concerning Mr. Gelbman tended to mislead the public, cast him in a false light, and be defamatory in nature, Mr. Gelbman asked the Arbitrator to exercise his broad discretion and plenary authority to issue an arbitration award changing, amending, or modifying the statements concerning termination of his employment so that they would accurately reflect what transpired.

Principal participated fully in the merits hearing of Mr. Gelbman's claims, which were heard by a single Arbitrator mutually selected by the parties pursuant to FINRA's rules. (FINRA Rules 13400-13414). At the hearing, Principal submitted exhibits for the Arbitrator's consideration and examined and cross-examined witnesses. (App. at 197-205, 215-604). Principal never raised any objection to the manner in which the arbitration was conducted nor to the character of the Arbitrator, either before, during or after the arbitration.

The Arbitrator considered the evidence presented at the hearing and applied to the facts thus ascertained what he considered to be applicable law. (App. at 197-205). Based on his consideration of the evidence presented and the relevant law, the Arbitrator entered an Award directing that the BrokerCheck disclosures be changed to reflect what he determined was an accurate picture of the circumstances surrounding Principal's termination of Mr. Gelbman's employment.

Principal moved to vacate the Award (App. at 9-32) and the District Court hearing the matter granted Principal's motion. (App. at 152-165). Mr. Gelbman timely filed his notice of appeal (App. at 167-169) and respectfully submits the instant brief in support of his appeal.

ARGUMENT

1. THE DISTRICT COURT ERRED IN GRANTING PRINCIPAL SECURITIES, INC.'S MOTION TO VACATE THE ARBITRATION AWARD

I. PRESERVATION OF ERROR

The matters at issue in this appeal were raised below (App. at 89-103) and were timely appealed (App. at 167-169).

II. STANDARD AND SCOPE OF REVIEW

When reviewing the order of the District Court, this Court's standard and scope of review is focused and it is empowered to reverse the order without directing a rehearing. "An appeal may be taken from…an order vacating an award without

directing a rehearing." Iowa Code § 679A.17(1)(e). An Appellate Court reviews a district court's decision on a motion to vacate an arbitration award as provided by Iowa Code section 679A.17(2) (2005). *See Humphreys v. Joe Johnston Law Firm, P. C.*, 491 N.W.2d 513, 514 (Iowa 1992); *see also Ales v. Anderson, Gabelmann, Lower & Whitlow, P.C.*, 728 N.W.2d 832, 838-39 (Iowa 2007). An Appellate Court's scope of review of an appeal from a district court's decision in a civil lawsuit is for correction of errors at law. *See MBNA Am. Bank, N.A. v. Boyce*, No. 04-1733, 2006 Iowa App. LEXIS 948, at *2 (Ct. App. Aug. 9, 2006); *Des Moines Area Ass'n of Realtors, Inc. v. U.S. Recognition, Inc.*, No. 04-1701, 2006 Iowa App. LEXIS 29, at *3 (Ct. App. Jan. 19, 2006); *DLR Grp., Inc. v. Oskaloosa Cmty. Sch. Dist.*, 881 N.W.2d 470 (Iowa Ct. App. 2016); and *Ales*, 728 N.W.2d at 839.

A district court's review is also limited because applying "a broad scope of judicial review" that would "allow courts to 'second guess' an arbitrator . . . would nullify the very advantage of arbitration." *See also Ales*, 728 N.W.2d at 839 (quoting *$99 Down Payment, Inc. v. Garard*, 592 N.W.2d 691, 694 (Iowa 1999)). Unless the award "violate[s] one of the provisions of section 679A.12(1), [the Appellate Court] will not correct errors of fact or law." *Id.* "[The Appellate Court will] look at the District Court's decision to determine whether it followed the directives of Iowa Code section 679A.17(2) in vacating the award." *Des Moines Area Ass'n of Realtors, Inc.*, No. 04-1701, 2006 Iowa App. LEXIS 29, at *5.

Also central to this Court's analysis is the standard and scope of review under which the District Court was required to operate. "Following an arbitration award, a party may apply to the District Court to confirm, vacate, modify, or correct the award." Iowa Code §§ 679A.11-.13. Iowa Code section 679A.12(1)(c) provides, "[u]pon application of a party, the District Court shall vacate an award if the 'arbitrators exceeded their powers. The arbitrator's power and authority is defined by any arbitration agreement between the parties and Iowa Code [chapter] 679A." *Belmond-Klemme Cmty. Sch. Dist. v. Belmond-Klemme Educ. Ass'n*, 974 N.W.2d 813 (Iowa Ct. App. 2022) (quoting *DLR Grp., Inc.*, 881 N.W.2d 470 (the Court concluded that the district court properly found the arbitrator did not exceed his powers due to the arbitrator acting within the scope of the arbitration agreement); *accord Humphreys*, 491 N.W.2d at 516).

Judicial review of arbitration awards is limited in Iowa. *See Humphreys*, 491 N.W.2d at 515; *Reicks v. Farmers Commodities Corp.*, 474 N.W.2d 809, 810-11 (Iowa 1991); *Iowa City Cmty. Sch. Dist. v. Iowa City Educ. Asso.*, 343 N.W.2d 139, 142-43 (Iowa 1983); *Sergeant Bluff-Luton Educ. Asso. v. Sergeant Bluff-Luton Cmty. Sch. Dist.*, 282 N.W.2d 144, 147-48 (Iowa 1979). "The function of the courts is strictly limited to a determination of the arbitrator's authority and the existence of an arbitrable dispute." *Des Moines Area Ass'n of Realtors, Inc.*, No. 04-1701, 2006 Iowa App. LEXIS 29, at *4. "Ordinarily courts may not inquire into the merits of

the decision itself." *Teamsters Local Union v. Associated Grocers of Iowa Coop., Inc.*, 263 N.W.2d 755, 757 (Iowa 1978) (citing *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 80 S. Ct. 1358 (1960)).

"The Iowa Supreme Court has recognized the arbitrator's broad authority and correspondingly restricted judicial involvement in the arbitration process." *Id.*; *see also Humphreys*, 491 N.W.2d at 515. "Most important, limited judicial review gives the parties what they bargained for—binding arbitration, not merely arbitration binding if a court agrees with the arbitrator's conclusion." *Sergeant Bluff-Luton*, 282 N.W.2d at 147. Arbitration decisions "are not…closely scrutinized." *Reicks*, 474 N.W.2d at 811. "A refined quality of justice is not the goal in arbitration matters." *Id*. "Arbitration is looked on favorably as an alternative to civil litigation." *Humphreys*, 491 N.W.2d at 514. Accordingly, every reasonable presumption will be indulged in favor of the legality of an arbitration award. *Id.*; *First Nat'l Bank v. Clay*, 231 Iowa 703, 713, 2 N.W.2d 85, 91 (Iowa 1942).

"[T]he District Court is not authorized by chapter 679A to scrutinize the [arbitration] award." *Des Moines Area Ass'n of Realtors, Inc.,* No. 04-1701, 2006 Iowa App. LEXIS 29, at *6.

> "Two provisions of chapter 679A are particularly relevant to this case: section 679A.12 and section 679A.13. Section 679A.12 allows the District Court to vacate an arbitration award under certain circumstances. However, the fact that the award could not or would not

> be granted by a court of law or equity is not grounds for vacating the award. Iowa Code § 679A.12(2). Section 679A.13 allows the District Court to modify or correct an award under certain circumstances. Applications to the District Court to vacate, modify, or correct arbitration awards are by motion and are heard as provided by our rules of civil procedure relating to motions. Iowa Code § 679A.15. We review the District Court decision as provided by Iowa Code section 679A.17(2). Because this is an appeal from a court order in a civil law suit, our review is for correction of error. Iowa R. App. P. 4."

Humphreys , 491 N.W.2d at 514.

Arbitration is viewed favorably as an alternative to civil litigation because it "avoids the expense and delay generally associated with traditional civil litigation." *$99 Down Payment*, 592 N.W.2d at 694. Put another way, Iowa law indulges every reasonable presumption in favor of the legality of arbitration awards. *Humphreys*, 491 N.W.2d at 514. Judicial involvement in arbitration is thus "very limited" because allowing "courts to 'second guess' an arbitrator…would nullify the very advantages of arbitration." *$99 Down Payment*, 592 N.W.2d at 694. "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority even a court's conviction that the arbitrator committed error does not suffice to overturn the decision." *Ales*, 728 N.W.2d at 841.

III. THE DISTRICT COURT ERRED IN GRANTING PRINCIPAL SECURITIES, INC.'S MOTION TO VACATE THE ARBITRATION AWARD

A. The District Court Ignored the Arbitrator's Stated Findings and Substituted Its Own Views Concerning the Evidence Presented in the Underlying Arbitration

Iowa Code section 679A.12 describes the only grounds upon which an arbitration award can be vacated and is the governing statute here. The District Court erred as a matter of law because the Arbitrator's Award did not lack support by substantial evidence on the record as a whole. Iowa Code § 679A.12(1)(f). "[The court's] role is not to inquire into the propriety of the arbitrator's application of the law—[the court] merely determine[s] if he acted within the powers granted by the arbitration agreement." *DLR Grp., Inc.*, 881 N.W.2d 470 (concluding that the district court properly found the arbitrator did not exceed his powers due to the arbitrator acting within the scope of the arbitration agreement, confirming the arbitration award). "This court does not consider evidence to be insubstantial merely because different conclusions can be drawn from the evidence." *Raper v. State*, 688 N.W.2d 29, 51 (Iowa 2004) (concluding that even though they may draw different conclusions from the evidence, a reasonable mind would accept the evidence as adequate to confirm the original determination). "[T]he ultimate question is whether the evidence supports the finding actually made, not whether the evidence would support a different finding." *State v. Dohlman*, 725 N.W.2d 428, 430 (Iowa 2006) (internal citations omitted).

The Court in *Humphreys* explained that, "[e]ven if the arbitrator did not consider the exhibits, [the] claim [of the party seeking to vacate the award] still fails. An arbitrator's failure to consider certain evidence is not sufficient to modify,

correct, or vacate an award." *Humphreys*, 491 N.W.2d at 517 (citing Iowa Code §§ 679A.12, 679A.13). "Although certain exhibits may be missing, this fact is not sufficient evidence of prejudice to require the modification, correction, or vacation of the award." *Id*. This precedent applies with particular force here, as explained below.

The District Court grounded its decision on its view that the Arbitrator made no findings in the Award for the Court to review. In fact, the Award specifically states that the Arbitrator decided in full and final resolution of the issues submitted for determination "[after considering the pleadings, the testimony **and evidence** presented at the hearing, and any post-hearing submissions…" (emphasis added). Per FINRA Rule 13904, arbitrators are not required to provide in the final award details concerning their analysis of the evidence presented during the arbitration hearing.[6] In other words, arbitrators are not required to draft the final award as a court would draft a final order or judgment.

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[6] "…(e) The award *shall* contain the following: (1) The names of the parties; (2) The name of the parties' representatives, if any; (3) An acknowledgement by the arbitrators that they have each read the pleadings and other materials filed by the parties; (4) A summary of the issues, including the type(s) of any security or product, in controversy; (5) The damages and other relief requested; (6) The damages and other relief awarded; (7) A statement of any other issues resolved; (8) The allocation of forum fees and any other fees allocable by the panel; (9) The names of the arbitrators; (10) The dates the claim was filed and the award rendered; (11) The number and dates of hearing sessions; (12) The location of the hearings; and (13) The signatures of the arbitrators. (f) The award *may* contain a rationale underlying

As to the first two awards issued by the Arbitrator:

- "The expungement of the entire termination explanation on form U5; and
- The replacement of the termination explanation with the specific language listed in the Award." (App. at 197-205).

The District Court erred as a matter of law and exceeded its power by determining that the portion of the Award recommending replacement explanation language was not supported by substantial evidence. The District Court was required to accept the Arbitrator's assertion that he reached his decision after reviewing "the pleadings, the testimony and evidence presented at the hearing, and any post-hearing submissions…." (App. at 197-205).

It was beyond the District Court's purview to question the Arbitrator's statement and to second-guess his conclusions. That was simply not the role of the District Court, which was reviewing an arbitration award issued by a duly appointed Arbitrator the parties agreed to have their disputes heard by.

As to the second two awards issued by the Arbitrator:

- "The expungement of all references to Occurrence Numbers 2121897 and 2121898 from the registration records; and
- The change of any questions answered "yes" to be changed to "no" on the registration records." (App. at 197-205).

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the award." FINRA Rule 13904 (e)-(f) (emphasis on mandatory "shall" and permissive "may" supplied).

The District Court erred as a matter of law and exceeded its power by determining that the Award was not supported by substantial evidence in its finding that the Form U5 filings were neither defamatory nor misleading. The District Court observed that "the Award neglects to make any finding that the answers were defamatory in nature or misleading as outlined in Respondent's Statement of Claim." (App. at 152-165).

But that is wrong. The Award specifically states that the Arbitrator reached his determination of the issues "[after considering the pleadings, the testimony and evidence presented at the hearing, and any post-hearing submissions…" (App. at 197-205). Moreover, the District Court acknowledges that "***Respondent's own testimony***…supports the expungement and language change prescribed in the Award." (emphasis supplied) (App. at 152-165).

Therefore, evidence on the record *does* support the Arbitrator's Award, and the District Court erred as a matter of law by considering such evidence to be insubstantial merely because it reached a different conclusion from that evidence. *See Raper*, 688 N.W.2d at 51. Because Mr. Gelbman's testimony supports the finding made by the Arbitrator, the District Court's decision to vacate the Award, based on its own analysis of the evidence, which apparently caused it to reach a different conclusion, must be reversed. *Id*. (internal citations omitted).

CONCLUSION

For the foregoing reasons, Appellant Mark Gelbman respectfully requests that this Court reverse the District Court's order granting Appellee Principal's motion to vacate the arbitration award, and for such other and further relief deemed appropriate under the circumstances.

APPLICATION FOR APPELLATE ATTORNEY FEES

The Appellant Mark Gelbman applies for attorney fees in this appeal. A detailed application with an itemized statement for attorney fees of Appellant in this appeal will be filed when all of the briefs are completed.

ORAL ARGUMENT

Appellant Mark Gelbman respectfully requests that oral argument be held concerning this appeal.

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CERTIFICATE OF FILING AND SERVICE

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

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CERTIFICATE OF COST

The undersigned hereby certifies that the cost of printing the Appellant's Brief was $0, because it was filed electronically.

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