UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

DENISE A. BADGEROW, Plaintiff,	*	**Case No.: 2:19-cv-10353-JCZ-JCW**
	*	**JUDGE: JAY C. ZAINEY**
v.	*	
	*	**MAGISTRATE: JOSEPH C. WILKINSON, JR.**
WALTERS ET AL.	*	
**********	*	**********

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO REMAND AND FOR COSTS

I. INTRODUCTION

Plaintiff Denise Badgerow filed an action to vacate the FINRA arbitration award in state court under Louisiana's Arbitration Act. *See* La. R.S. 9:4201. Plaintiff's action to vacate concerns the resolution of a single question: Whether Defendants obtained an arbitration award dismissing her Louisiana Whistleblower claim ("the Whistleblower claim") through perjury and fraud committed during the arbitration, such that the arbitration award must be vacated pursuant to LA Rev Stat § 9:4210. Plaintiff does not seek relief under federal law. Defendants nevertheless removed Plaintiff's state court action, asserting that Plaintiff's motion to vacate invokes this Court's federal question jurisdiction. Defendants are wrong. This Court has no jurisdiction over the removed action.

Defendants had the burden of proving that federal question jurisdiction exists, and they failed to meet their burden. First, Plaintiff's state action seeks relief under Louisiana's Arbitration Act for a determination of whether the arbitration award was procured by fraud. There is no federal question present in the action to vacate. Second, even if this Court were to "look through" the action to vacate and determine whether the underlying claims in her FINRA arbitration raised a

federal question,[1] Plaintiff's reference to a FINRA rule and an SEC rule in her Whistleblower claim does not satisfy the tests for federal question jurisdiction required by the Supreme Court and the Fifth Circuit. Plaintiff respectfully requests that the Action to Vacate be remanded.

II. FACTUAL BACKGROUND

A. The FINRA Arbitration and Plaintiff's Whistleblower Claim.

In her FINRA arbitration, Plaintiff sought damages under the Louisiana Whistleblower Protection Act, La. Rev. Stat. § 23:967 ("the Whistleblower Act") and the Louisiana Unfair Trade Practices Act, La. Rev. Stat. § 15:1401, *et seq.* ("LUTPA"), and for tortious interference. Plaintiff did not bring any claims seeking relief under the Securities and Exchange Act ("SEA") or any other federal law. In her Whistleblower Claim, Plaintiff asserted that she was terminated after complaining about Defendants' violations of a FINRA rule and an SEC rule, both of which are incorporated by reference as part of Louisiana's laws governing investment advisors and salesmen. LAC 10:XIII.1203(25).

The SEC rule requires that Plaintiff, who worked as an Associate Financial Advisor ("AFA"), only be employed pursuant to a written compensation agreement that provides how the AFA is to be paid any commissions on sales of securities. *See* 17 CFR § 240.17a-3. The second rule, adopted by FINRA, prohibits licensed individuals, such as Defendants, from routing commission payments through affiliated, unlicensed entities. *See* FINRA Rule 2040. Defendants paid Plaintiff using REJ Properties, Inc. ("REJ"), an affiliated, unlicensed entity. *See generally* Ex. D at 4-9 (describing conduct as part of the factual background for allegation that fraud

[1] Defendants urge this Court to apply a "look-through" analysis to determining federal jurisdiction over a motion to vacate an arbitration award, an approach that has never been adopted by the Supreme Court or the Fifth Circuit. *See HealthSpring Life & Health Ins. Co., Inc., v. Texas Health Management LLC*, Civil Action No. 4:18-CV-242 (E.D.Tex. June 25, 2018) (observing that neither the Supreme Court nor the Fifth Circuit has extended *Vaden v. Discover Bank,* 556 U.S. 49 (2009) to motions to vacate).

occurred during arbitration).

Louisiana's Commissioner of Securities adopted a Dishonest and Unethical Practices Rule ("the Louisiana Rule") pursuant to the Louisiana Securities Law, R.S. 51:701, *et seq.* Section 1203(25) of the Louisiana Rule provides that the following conduct is an unethical and dishonest practice:

> failing to comply with an applicable provision of the Rules of Fair Practice of the Financial Industry Regulatory Authority or an applicable fair practice or ethical standard promulgated by the Securities and Exchange Commission or by a self-regulatory organization approved by the Securities and Exchange Commission;

LAC 10:XIII.1203(25). Thus, Louisiana law incorporates by reference the same SEC and FINRA rules that Plaintiff complained about and that resulted in her termination. A party who violates the Louisiana Rule could be subject to severe penalties, including suspension, revocation of registration, and criminal prosecution. LAC 10:XIII.1201; See also La. R.S. 51:723.

During the arbitration, Plaintiff did not assert a cause of action based on Defendants' violations of the Louisiana Rule or the FINRA and SEC rules incorporated by Louisiana law. Instead, Plaintiff alleged that when she complained about the unlawful conduct, Defendants retaliated and wrongfully terminated Plaintiff in violation of the Louisiana's Whistleblower Act. Plaintiff never sought any kind of relief for Defendants' violation of the Louisiana Rule or the FINRA and SEC rules. Defendants nevertheless raised a straw man argument during the arbitration, and claimed that Plaintiff *was* attempting to assert a private right of action. *See* Ex. A at 7 (Plaintiff "has no right of action to a self-appointed regulator in asserting this right of action herein. It is exclusively an administrative matter"); Ex. B at 6 ("Claimants reurge their position established in their Statement of Answer that Badgerow has no standing and, hence, no right of action to become a self-appointed regulator for the SEC."). On December 27, 2018, the arbitration

panel issued the Arbitration Award, dismissing Plaintiff's Whistleblower Claim, LUTPA claim, and tortious interference claim.[2]

B. Plaintiff's Motion to Vacate.

Plaintiff filed an action to vacate against Walters, Meyer, and Trosclair in Civil District Court for the Parish of Orleans pursuant to LA Rev Stat § 9:4210. *See* Ex. C. The Action to Vacate only refers to Louisiana's Arbitration Act, and no other law. *See Id.* at 1.

In her action to vacate, Plaintiff has alleged that Defendants engaged in a pattern of fraud during the arbitration. *See* Ex. C. The fraud concerns whether Defendants knew that the conduct at issue in her Whistleblower Claim violated FINRA and SEC regulations. Plaintiff's action to vacate is based on the April 3, 2019 production of documents by a third party, in which the third party twice informed Defendants that the same conduct at issue in Plaintiff's Whistleblower Claim violated FINRA and SEC regulations.

> In response to a subpoena issued in Petitioner's current federal employment discrimination lawsuit, a third party recently produced copies of two proposals that were sent to the franchise in 2014 and 2015. The proposals clearly state that SEC regulations prohibit the conduct at issue. Ex. 1 ("Ameriprise policies, in addition to FINRA/SEC regulations, prohibit the payment of securities based compensation to selling employees or AFAs via a non-registered legal entity."). Thus, contrary to witness and defense counsel statements, these documents conclusively prove not only that the conduct at issue was a violation of law, and that the individual defendants were aware that the conduct was a violation of law at least a year before Badgerow was terminated.

Ex. D at 3. Defendants and their counsel had argued repeatedly to the arbitration panel that they were only aware that the conduct at issue did not conform with Ameriprise's "best practices." *Id.* at 13; *see also id.* at 9-10 (detailing over a dozen occasions during the arbitration where the

[2] Plaintiff's separate claim against Ameriprise Financial, Inc. for joint employer liability was dismissed at the conclusion of the arbitration hearing. In her Action to Vacate, Plaintiff does not name Ameriprise nor does she seek to vacate the dismissal of her arbitration claim against Ameriprise.

witnesses and defense counsel falsely represented that the conduct was not a violation of law and was unknown by Defendants to be a violation of law).

C. Plaintiff's State Action Against REJ Properties, Inc.

REJ made a written offer of employment to Plaintiff, and paid Plaintiff's salary. REJ was Plaintiff's employer. REJ was not a party to the arbitration and is not subject to the arbitration award. On April 26, 2019, three weeks before filing her motion to vacate, Plaintiff filed an action in state court that includes the same Whistleblower claim and related claims against REJ (hereinafter "the REJ Action"). Ex. E. In the REJ Action, Plaintiff also sued Walters, Meyer, and Trosclair, the three individual defendants who are defendants in the Action to Vacate, on the basis of alter ego liability. The Whistleblower claim against REJ (and against the individual defendants who used REJ as their alter ego) is the same as the Whistleblower claim at issue in the arbitration. None of the defendants in the REJ Action removed the action to federal court.

III. LEGAL ARGUMENT

A. This Court Lacks Subject Matter Jurisdiction Over the Removed Action.

A cause of action is presumed to remain outside of limited federal jurisdiction until the party asserting jurisdiction establishes the contrary. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). Having invoked federal jurisdiction, Defendants have the burden of proving that jurisdiction exists. *Stockman v. Federal Election Comm'n*, 138 F.3d 144, 151 (5th Cir. 1998). Any doubt as to this court's jurisdiction must be resolved in favor of remand. *See, e.g., Bosky v. Kroger Tex., L.P.*, 288 F.3d 208, 211 (5th Cir. 2002). *See also Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002) ("[a]ny ambiguities are construed against removal because the removal statute should be strictly construed in favor of remand"). *"Only state court actions that originally could have been filed in federal*

court may be removed to federal court by the defendant." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).

Defendants incorrectly assert that this Court has federal question jurisdiction over the Action to Vacate. R. Doc. No. 1 at 6 ("*The underlying federal violations Plaintiff alleged in her FINRA Statement of Claim, which she alleges in her Motion to Vacate filed in the CDC Action, establish original federal subject matter jurisdiction under 28 U.S.C. § 1331.*"). In trying to justify their improper removal, Defendants make arguments that have been rejected by the Supreme Court,[3] omit any reference to the applicable tests for determining federal question jurisdiction, and ignore an important fact that completely precludes the exercise of federal question jurisdiction, even if one were to adopt Defendants' other specious arguments.[4]

1. Plaintiff's Action to Vacate Does Not Invoke This Court's Federal Question Jurisdiction.

Plaintiff filed her Action to Vacate Arbitration Award in the Civil District Court for the Parish of Orleans pursuant to LA Rev Stat § 9:4210. *See* Ex. C. Plaintiff's Action to Vacate cites only to Louisiana's Arbitration Act. *Id.* at 1. Plaintiff's Action to Vacate raises a single issue: Whether the arbitration should be vacated under the Louisiana Arbitration Act because Defendants engaged in fraud during the FINRA arbitration. The Action to Vacate does not seek to relitigate the claims in the arbitration, but instead asks the Louisiana state court to examine Defendants' testimony and conduct during the arbitration in light of documents that were recently produced to Plaintiff.

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[3] *See, e.g., Merrell Dow Pharmaceuticals, Inc., v. Thompson*, 478 U.S. 804, 813 (1986) ("the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction.").

[4] Defendants cite to 28 U.S.C. § 1367 without explanation. The supplemental jurisdiction statute cannot be used to confer jurisdiction for a removal. "Supplemental jurisdiction on its own does not give federal courts the power to remove a state case that does not arise from a federal question or offer complete diversity of citizenship." *Halmekangas v. State Farm Fire and Cas. Co.*, 603 F.3d 290, 295 (5th Cir. 2010) (footnote omitted).

Plaintiff is seeking an evidentiary hearing to demonstrate that Defendants engaged in fraud. *See, e.g., Low v. Minichino*, 126 Hawaii 99, 267 P.3d 683, 686 (App. 2011) (reversing trial court because it failed to hold evidentiary hearing where fraud was the basis to vacate the arbitration award). Plaintiff has invoked the equitable jurisdiction of the Orleans Parish Civil District Court to determine whether the doctrines of equitable tolling and *contra non valentem* should toll the three-month prescriptive period for moving to vacate under Louisiana's Arbitration Act. *See, e.g., Nathan v. Carter*, 372 So.2d 560 (La.1979) (overturning and remanding trial court's summary rejection of the doctrine of *contra non valentem* so that the trial court can review the merits of plaintiff's fraud allegations); *Move, Inc. v. Citigroup Global Markets, Inc.*, 840 F.3d 1152 (9th Cir. 2016) (applying the doctrine of equitable tolling to the Federal Arbitration Act's equivalent of the three-month prescription under Louisiana's Arbitration Act).

Defendants wrongly assert that Plaintiff filed her action to vacate under the Federal Arbitration Act ("FAA"), arguing for this Court to apply a "look-through" analysis to review whether the underlying claims in the arbitration would arise under federal law and would be subject to this Court's jurisdiction if they had been brought directly in federal court. *See* R. Doc. No 1 at 3 (quoting *Vaden v. Discover Bank*, 556 U.S. 49, 62 (2009)) ("'A federal court may 'look through' a [9 U.S.C.] § 4 petition to determine whether it is predicated on an action that 'arises under' federal law.'")

First, Plaintiff did not file her action under the FAA, but instead filed in state court under Louisiana's Arbitration Act ("the LAA"). *See* Ex. C at 1.[5] Second, even if one assumes *arguendo* that Plaintiff had filed her action to vacate under the FAA, "[i]t is well established that the FAA is

[5] By arguing for an application of the look-through approach that the Supreme Court adopted for § 4 issues under the FAA, *see Vaden v. Discover Bank*, 556 U.S. 49, 62 (2009), Defendants implicitly concede that if this Court were to determine jurisdiction based solely on Plaintiff's Action to Vacate, there would be no federal question jurisdiction. Defendants' Motion to Confirm, in response to the Action to Vacate, cannot confer jurisdiction.

not an independent grant of federal jurisdiction." *Smith v. Rush Retail Centers, Inc.*, 360 F.3d 504, 505 (5th Cir. 2004). In order for this Court to vacate an arbitration award under § 10 of the FAA, an independent basis for federal jurisdiction must exist. *See id.*

Third, Defendants argue that this Court should apply the holding in *Vaden* to Plaintiff's Action to Vacate and "look through" to the underlying action in the arbitration to determine whether there is subject matter jurisdiction. *See* R. Doc. No. 1, Notice of Removal at 4-6 (citing to cases from other circuits where the courts have extended the holding of *Vaden* to motions to vacate). The Supreme Court has not extended its look-through test to motions to vacate under § 10 of the FAA. In a 2018 decision, the Eastern District of Texas reviewed the cases cited by Defendants and observed that the Fifth Circuit has not ruled on whether *Vaden*'s look-through analysis should be extended to motions to vacate. *See HealthSpring Life & Health Ins. Co., Inc., v. Texas Health Management LLC.*, Civil Action No. 4:18-CV-242 (E.D.Tex. June 25, 2018). The court in *HealthSpring* declined to extend *Vaden* to motions to vacate. *Id.*

The well-pleaded complaint rule provides that "a suit `arises under' federal law `only when the plaintiff's statement of his own cause of action shows that it is based upon [federal law].'" *Vaden*, 556 U.S. at 60 (quoting *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908)). The well-pleaded complaint rule focuses on whether the plaintiff has established federal jurisdiction by affirmatively alleging a federal claim. Plaintiff 's Action to Vacate is made pursuant to Louisiana's Arbitration Act. Plaintiff seeks no relief under federal law.

In a case decided by the Northern District of California, where the plaintiff filed an action in California state court for confirmation of an arbitration award and where the defendants removed to federal court, the court demonstrated how the well-pleaded petition analysis applies to an action to vacate filed in state court. *See Portillo v. Beyer Financial Corp.,* Case No. 15-cv-04493-RS

(N.D.Cal. Dec. 1, 2015.). Unlike the present case, the plaintiff in *Portillo* had explicitly alleged violations of the Truth in Lending Act and the FTC's Used Car Rule in the arbitration, but the court held that passing references to those statutes in the state action to confirm the arbitration award did not confer jurisdiction.

> Portillo seeks confirmation of his award pursuant to the terms of the California Arbitration Act. . . . Defendants make much of the fact that Portillo's petition obliquely references the statutes involved in the arbitration. Their plea is unavailing. In *Carter*, for example, as explained above, the Ninth Circuit held that no federal question was raised by a petition to confirm an arbitration award brought in Superior Court given that it "primarily invoked provisions of the California Arbitration Act." 374 F.3d at 833. The court reached this conclusion in spite of the fact that the underlying arbitration proceeding turned on the proper application of the federal Employee Retirement Income Security Act ("ERISA"). Id. at 837-39.

Id. Plaintiff's Action to Vacate contains no reference to federal law. Ex. C.

2. <u>The Underlying Claims in Plaintiff's Arbitration Do Not Raise a Federal Question.</u>

Even if one assumes *arguendo* that this Court is required to look through Plaintiff's Action to Vacate to determine whether Plaintiff's underlying claims in the arbitration invoke federal question jurisdiction, there still is no basis for finding that this Court has subject matter jurisdiction.

Plaintiff's Statement of Claim in the FINRA arbitration contained only state law causes of action. *See* Ex. F. "[T]here is generally no federal jurisdiction if the plaintiff properly pleads only a state law cause of action." *MSOF Corp. v. Exxon Corp.*, 295 F.3d 485, 490 (5th Cir. 2002). The "the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow Pharmaceuticals, Inc., v. Thompson*, 478 U.S. 804, 813 (1986). The United States Supreme Court has "sh[ied] away from the expansive view that mere need to apply federal law in a state-law claim will suffice to open the `arising under' door." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313 (2005).

There are only two bases for finding that a reference to federal law in a state law cause of action confers federal question jurisdiction. First, Defendants must demonstrate that Plaintiff references a federal law that provides a private right of action. *See Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 817 (1986) ("We conclude that a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim 'arising under the Constitution, laws, or treaties of the United States.' 28 U. S. C. § 1331.") Second, if the federal law referenced by Plaintiff does not provide a private right of action, Defendants must show that Plaintiff's claims fit into the "special and small" category of cases in which a state law cause of action involves important federal issues giving rise to federal question jurisdiction. *Gunn v. Minton*, ___ U.S. ___, 133 S. Ct. 1059, 1064 (2013) (citing *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 (2006)). *See also Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313 (2005).

1. <u>The SEC Rule Referenced in Plaintiff's Whistleblower Claim Does Not Provide a Private Right of Action.</u>

Defendants cannot meet their burden of proving federal question jurisdiction because there is no private right of action under 17 CFR § 240.17a-3 or FINRA Rule 2040.

> [W]here a state law incorporates federal law as the applicable state standard —it has occasionally been suggested that this is enough to confer federal-question jurisdiction. The Supreme Court has now rejected this suggestion, at least for cases in which the state claim is based on a violation of a federal statute for which Congress has declined to provide a private, federal cause of action.

Oliver v. Trunkline Gas Co., 796 F.2d 86, 88 (5th Cir. 1986) (citations omitted). *See also Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 817 (1986).

It is well-established that there is no private right of action for a violation of § 17(a) of the Securities Exchange Act of 1934, which is the statute under which 17 CFR § 240.17a-3 was

promulgated. *See Touche Ross & Co. v. Redington,* 442 U.S. 560 (1979). In *Touche Ross*, the trustee for a company in bankruptcy alleged that the company's accounting firm, which conducted audits of the company's books and records that were prepared for filing with the SEC pursuant to § 17 (a) of the 1934 Act and 17 CFR § 240.17a-5, was liable for failing to uncover fraudulent representations made by officers of the company. The Supreme Court held that "there is no basis in the language of § 17 (a) for inferring that a civil cause of action for damages lay in favor of anyone." 442 U.S. at 571. During the arbitration, Defendants recognized this verity when they argued that Plaintiff had no basis for bringing a private right of action under the SEC and FINRA rules. *See* Ex. A at 7; Ex. B at 6.

The cases cited by Defendants are cases where the plaintiff had actually asserted – implicitly or explicitly – a federal cause of action. For example, in *Harrison*, the plaintiff's lawsuit alleged state law claims, but also referenced federal law as a component of those claims. *Harrison v. Christus St. Patrick Hosp.*, 432 F. Supp. 2d 648, 649 (W.D. La. 2006). In the motion to remand decision in *Harrison,* the Magistrate Judge recommended that the case be remanded for lack of subject matter jurisdiction because the plaintiff did not explicitly assert a cause of action or seek a remedy under the Emergency Medical Treatment and Active Labor Act ("EMTALA"). *Id.* The district court rejected the recommendation and found that the plaintiff's claim depended on the resolution of substantial questions of federal law because the plaintiff specifically alleged a right to recover for violations of the EMTALA, i.e., "improper emergency room screening and/or treatment based upon the plaintiff's ability to pay," even though the plaintiff failed to reference the statute. *Id.* at 650-51.

The *Harrison* court's denial of the motion to remand and its decision that there was federal question jurisdiction can best be understood in conjunction with a reading of the same court's

decision dismissing plaintiff's case in its entirety, decided the day before the decision denying the motion to remand. *See Harrison v. Christus St. Patrick Hosp.,* 430 F. Supp. 2d 591 (W.D. La. 2006). In dismissing the plaintiff's claims that the hospital defendants were required to give the same discounts to non-indigent uninsured emergency room patients as are given to Medicare, Medicaid and managed care patients, the court in *Harrison* explicitly found that the plaintiff had "artfully deleted all references to federal law" in an effort to defeat federal court jurisdiction. 430 F. Supp. 2d at 595. The court found that the Plaintiff was *sub silentio* attempting to assert a cause of action under the EMTALA:

> In the instant case, plaintiff's complaint attempted not to invoke the EMTALA to defeat federal jurisdiction, but allegations regarding emergency room admission and treatment create a federal question pursuant to the EMTALA and the plaintiff has failed to sufficiently allege the personal or economic harm necessary to support a private action under EMTALA.

430 F. Supp. 2d at 596. In addition, the *Harrison* court found that a determination of the merits of the plaintiff's argument "raises questions of federal health care policy" and "would mandate an interpretation of federal statutes governing Medicare, Medicaid and reimbursements under those programs." *Harrison v. Christus St. Patrick Hosp.,* 432 F. Supp. 2d at 650. *Harrison* is thus inapposite to the facts here, where: 1) Plaintiff is not seeking to assert a private right of action under federal law; 2) the federal law that Plaintiff has referenced does not permit a private right of action; and 3) Plaintiff's reference to federal law raises no question of federal policy on any issue.

In *McCormick v. Am. Online, Inc.*, the party seeking to vacate the arbitration award had sought relief in the arbitration for violations of the Stored Communications Act. *McCormick v. Am. Online, Inc.*, 909 F.3d 677, 684 (4th Cir. 2018). The Court held, after applying the look-through test, that Plaintiff's claims could have been litigated in federal court absent the arbitration agreement. *Id.* Similarly, in *Ortiz-Espinosa v. BBVA Sec. of Puerto Rico, Inc.*, 852 F.3d 36, 47

(1st Cir. 2017), the plaintiff's underlying claim in the arbitration was specifically a claim under the Securities Exchange Act of 1934.

In *Doscher v. Sea Port Grp. Sec.*, the plaintiff had filed a motion to vacate in federal court, asserting that there was federal question jurisdiction based on the arbitration panel's failure to "to enforce FINRA Rule 13505, which provides, in full, that '[t]he parties must cooperate to the fullest extent practicable in the exchange of documents and information to expedite the arbitration.'" *Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372, 375 (2d Cir. 2016). The *Doscher* court affirmed the trial court's ruling that the plaintiff's motion to vacate, alleging that the arbitrator violated a FINRA rule, did not raise a federal question because FINRA rules are not federal law.

The Second Circuit in *Doscher* decided to overturn its own precedent and hold for the first time that the Supreme Court's look-through approach in *Vaden* applied to motions to vacate under the FAA. The Second Circuit explicitly *did not find* that "federal subject matter jurisdiction existed based on alleged violations of the SEA," as Defendants have asserted. R. Doc. No. 1 at 4-5. Because the trial court had dismissed the motion to vacate without looking through to the underlying claims in the arbitration, the Second Circuit reversed and remanded the dismissal of plaintiff's action to vacate so that the district court could determine whether those claims created federal question jurisdiction. *Doscher*, 832 F.3d at 388.

In contrast to the cases cited by Defendants, Plaintiff has never alleged "a right or immunity" created by Federal law. Plaintiff never claimed that she had a private right of action under the SEA nor has she claimed damages for Defendants' violation of 17 CFR § 240.17a-3. Instead, Plaintiff has asserted that when she complained about Defendants' violations of SEC and FINRA rules, she was terminated in violation of Louisiana's Whistleblower Act.

2. Plaintiff's Whistleblower Claim Does Not Raise a Necessary, Substantial Federal Issue.

Absent reference to a federal statute the creates a private cause of action, the grounds for finding federal question jurisdiction over a state cause of action are extremely limited. "In cases lacking a federal cause of action, the Supreme Court has clearly upheld jurisdiction under § 1331 in only four instances." *PlainsCapital Bank v. Rogers*, 715 F. App'x 325, 328 (5th Cir. 2017) (quotation marks and citation omitted). Defendants have not even attempted to meet their burden of proving that Plaintiff's reference to 17 CFR § 240.17a-3 falls within the "special and small category of cases" that warrant exercise of this Court's federal question jurisdiction.

The test for determining whether Plaintiff's claim is within that narrow class of cases where the federal law referenced does not provide a private right of action is as follows: "[F]ederal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton,* ___ U.S. ___, 133 S. Ct. 1059, 1065 (2013) (citing *Grable*, 545 U.S. at 314). The only prong of the test that favors Defendants is that the federal law issue is actually disputed by Defendants. None of the other prongs of the *Grable* test are met here.

a. Federal Law is Not Necessarily Raised in Plaintiff's Claim.

Defendants cannot prove that Plaintiff's underlying Whistleblower claim meets the first prong of the *Grable* test, i.e., that Plaintiff's state-law claim "necessarily raise a stated federal issue." The Fifth Circuit has held that if there is another basis for relief in the state claim without reference to federal law, then there is no federal question jurisdiction. "As an alternate theory supporting a single claim, the federal question is not a necessary element of the state claim, and thus does not create federal question jurisdiction." *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 918

(5th Cir.), *cert. denied*, 534 U.S. 993 (2001). Even if one assumes *arguendo* that Plaintiff's Whistleblower Claim alleging retaliation for notifying Defendants of their violation of the SEC's Books and Records rule raised a federal question, this would not be enough to confer federal question jurisdiction.

In the FINRA arbitration, Plaintiff alleged that she was wrongfully terminated because she notified Defendants of their violations of two separate rules, both of which independently have been deemed unethical and dishonest conduct under Louisiana law. *See* LAC 10:XIII.1203(25). One of the rules that Defendants violated is a FINRA rule. *See* FINRA Rule 2040. Plaintiff's termination for notification of a violation of FINRA Rule 2040 would, alone, constitute grounds for liability under the Whistleblower Act. It is well-settled that a violation of a FINRA rule does not confer federal question jurisdiction upon this Court. *See, e.g., Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372, 375-77 (2d Cir. 2016) (FINRA rules are not federal law and allegations of violations of FINRA rules do not create federal question jurisdiction); *Ford v. Hamilton Invs., Inc.*, 29 F.3d 255, 259 (6th Cir. 1994) ("[a] breach of the [FINRA] rules does not present a question that arises under the laws of the United States within the meaning of 28 U.S.C. § 1331"); *Blood v. Efficient Advisors, LLC*, Case No. A-17-CA-406 (W.D. Texas June 9, 2017) (noting that a breach of FINRA rules does not present a federal law question); *Lange v. H. Hentz & Co.*, 418 F. Supp. 1376, 1380-81 (N.D.Tex.1976) (same, under NASD - predecessor to FINRA - rules). The allegation based on alternative conduct – the violation of FINRA Rule 2040 – as the reason that Defendants retaliated against Plaintiff, demonstrates that Plaintiff's claim does not necessarily raise an issue of federal law. *See Howery v. Allstate Ins. Co.*, 243 F.3d at 918.

b. Defendants' Violation of 17 CFR § 240.17a-3 Does Not Raise a Substantial Question of Federal Law.

Defendants fail even to cite the requirement that Plaintiff's reference to 17 CFR § 240.17a-3 raises a substantial question of federal law and they make no effort to demonstrate how Plaintiff's reference to the SEC rule meets the applicable standard. The significance of the question of federal law is not determined by the federal law's relevance to the dispute, but to federal jurisprudence. The federal right at issue must be "a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum." *Grable*, 545 U.S. at 313. There is no substantial federal right, and no federal interest in having Plaintiff's case decided in federal court.

In *Singh v. Duane Morris LLP*, 538 F.3d 334, 339 (5th Cir. 2008), the plaintiff brought a legal malpractice case in state court against his attorney for his attorney's handling of a federal trademark lawsuit that the plaintiff lost. To prove his malpractice case, Singh would have had to demonstrate that, but for the attorney's conduct, he would have won the prior lawsuit. The attorney removed the malpractice case to federal court, claiming that the argument that the attorney had failed to present evidence of secondary meaning under federal trademark law created a federal question that invoked the court's subject matter jurisdiction. *Id.* at 337. The trial court denied the plaintiff's motion to remand, and the Fifth Circuit reversed. "[T]this case involves no important issue of federal law. Instead, the federal issue is predominantly one of fact — whether Singh had sufficient evidence that his trademark had acquired secondary meaning. Though obviously significant to Singh's claim, that issue does not require 'resort to the experience, solicitude, and hope of uniformity that a federal forum offers.' [*Grable*, 545 U.S.] at 312, 125 S.Ct. 2363." *Id.* at 339.

The interpretation of 17 CFR § 240.17a-3 in Plaintiff's underlying Whistleblower claim in the arbitration does not require "resort to the experience, solicitude, and hope of uniformity that a

federal forum offers." The SEC rule is not a statute under which parties are seeking redress in federal court; it is a rule adopted pursuant to a federal statute that provides no private cause of action. The SEC rule is a regulation that is enforced by the SEC. Any uniformity needed to interpret 17 CFR § 240.17a-3 is provided by the SEC, largely, if not exclusively, outside of the federal judicial system. Cases that refer to the SEC's "books and records" regulations typically concern whether liability should attach or what liability should attach for violations of the rules, not the interpretation of the regulations themselves. *See, e.g., Geman v. SEC*, 334 F.2d 1183 (10th Cir. 2003) (upholding SEC sanctions for conduct, including aiding and abetting the violations of SEC recordkeeping regulation; sanctions including disbarment for three years and $200,000 fine). The interpretation of 17 CFR § 240.17a-3 in Plaintiff's arbitration does not constitute a substantial question of federal law. *Compare Grable*, 545 U.S. at 315 (ruling that "[t]he meaning of the federal tax provision is an important issue of federal law that sensibly belongs in a federal court").

c. <u>The Exercise of Jurisdiction Over Plaintiff's Whistleblower Case Would Disrupt the State-Federal Balance.</u>

The Fifth Circuit described the dangers of federal courts assuming jurisdiction over state law claims that merely reference federal law.

> An expansive interpretation of the federal question statute to allow federal courts to assert jurisdiction over cases with tangential and inessential federal components would step upon the authority of state courts to decide state law and ignore the capacity of state courts to decide questions of federal law. It would allow a federal tail to wag the state dog. *Franchise Tax Board* recognized as much with its insistence that the federal question be substantial before a federal court takes jurisdiction over a case stating only state law claims.

Howery v. Allstate Ins. Co., 243 F.3d at 918-19. *See also Grable*, 545 U.S. at 318-19 (discussing the prevalence of federal law violations that form the foundation of routine state tort causes of action).

Exercising federal jurisdiction here would provide precedent for the federalization of any Whistleblower claim that alleged, as the conduct that resulted in retaliation, the disclosure of federal law violations that are incorporated by reference in state law. Numerous cases within the Fifth Circuit and elsewhere have declined to find federal jurisdiction for state law claims where the plaintiff merely referenced federal law. *See Turbine Powered Technology LLC v. Crowe*, Civil Action No. 6:17-00801 (W.D. La. February 14, 2018) (discussing collected cases).

Even assuming arguendo that the "look-through" approach for motions to vacate would be adopted by the Fifth Circuit, there are no federal issues in Plaintiff's claims in the FINRA arbitration that invoke this Court's federal question jurisdiction.

For all of the above-stated reasons, Plaintiff respectfully requests that this Court grant her motion to remand.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2019, a copy of the above and foregoing has been served upon counsel for all parties by electronic means and filed electronically with the Clerk of Court using the CM/ECF system.

/s/ Amanda Butler
Amanda Butler, Esq.
Business Law Group
4827-3922-3191, v. 2