No.

In the Supreme Court of the United States

ROBERT L. MYER AND
STRIDER MARKETING GROUP, INC., PETITIONERS

v.

AMERICO LIFE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the prevailing framework for commercial arbitration, the parties agree that a particular arbitral body—here, for example, the American Arbitration Association—will administer aspects of the arbitration such as selection and qualification of arbitrators. Courts reviewing the resulting arbitral awards under the Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, have divided over whether deference is due to an arbitral body on questions of the selection and qualification of an arbitration panel. The question presented is as follows:

Whether a court reviewing an arbitral award under the FAA should deferentially review the arbitral body's interpretation and application of the parties' agreement regarding the selection and qualification of an arbitration panel, or should instead decide such matters *de novo*.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Robert L. Myer and Strider Marketing Group, Inc. Robert L. Myer is an individual. Strider Marketing Group, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondents are Americo Life, Inc., Americo Financial Life and Annuity Insurance Company, Great Southern Life Insurance Company, The Ohio State Life Insurance Company, and National Farmers Union Life Insurance Company.

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Robert L. Myer and Strider Marketing Group, Inc., respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Texas in this case.

OPINIONS AND ORDERS BELOW

The opinions of the Supreme Court of Texas (App., *infra*, 1a-20a) are reported at 440 S.W.3d 18. The opinion of the Fifth Court of Appeals of Texas (App., *infra*, 21a-35a) is reported at 371 S.W.3d 537. A prior opinion of the Supreme Court of Texas (App., *infra*, 36a-42a) is reported at 356 S.W.3d 496. A prior opinion of the Fifth Court of Appeals of Texas (App., *infra*, 43a-51a) is reported at 315 S.W.3d 72. The Findings of Fact and Conclusions of Law of the District Court of Dallas County, Texas (App., *infra*, 52a-62a) is unreported. The Order of the District Court (App., *infra*, 63a-64a) is unreported. The Final Award of the Arbi-

trators is reprinted at App., *infra*, 65a-83a. The decision of the American Arbitration Association disqualifying an arbitrator named by respondents is reprinted at App., *infra*, 84a-86a.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on June 20, 2014. A petition for rehearing was denied on October 3, 2014 (App., *infra*, 87a). This Court has jurisdiction under 28 U.S.C. 1257(a).

STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, provides in pertinent part:

> FAA § 2, 9 U.S.C. 2: A written provision in any * * * contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
>
> FAA § 5, 9 U.S.C. 5: If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, * * * then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

> FAA § 10(a), 9 U.S.C. 10(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—
>
> * * *
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

STATEMENT

"Recourse to arbitration administered by agencies (institutional arbitration) has become the prevailing method of commercial arbitration * * * ." 2 Larry E. Edmonson, *Domke on Commercial Arbitration* § 24:2, at 24-5 (3d ed. 2014). Institutional arbitration under the auspices of an arbitral body—here, for example, the American Arbitration Association (AAA)—aids the dispute-resolution process in many ways. Of particular relevance here, "[i]nstead of naming a particular person" as arbitrator in advance, "parties often provide for the arbitration to be conducted pursuant to the rules of a named arbitration agency. Normally, when such a provision appears in the contract, the agency will select the arbitrator or help in the selection." *Id.* at 24-5 to 24-6. Disputes that arise about the process of selecting an arbitration panel and the qualifications of panelists to serve are typically resolved within this arbitral framework, but the disappointed party may attempt to renew its objections in a judicial proceeding under the Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, to confirm or vacate the arbitral award. The question presented in this case, which has divided lower courts,

is whether a court hearing those objections about the selection and qualification of a panel should review the arbitral body's decision deferentially, or should instead decide the matter *de novo*.

1. a. "[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995) (citing *AT&T Techs., Inc.* v. *Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-58 & 63 n.9 (1995); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 271 (1995); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-626 (1985)). The FAA reflects both a "liberal federal policy favoring arbitration," *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), and the "fundamental principle that arbitration is a matter of contract." *Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 67 (2010).

Accordingly, this Court has recognized that, along with the substantive merits of the parties' dispute, "'"procedural" questions which grow out of the dispute and bear on its final disposition' are presumptively *not* for the judge, but for an arbitrator, to decide." *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (quoting *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 557 (1964)). More generally, the Court has announced a rule of arbitral primacy in "circumstance[s] where parties would likely expect that an arbitrator would decide the * * * matter." *Ibid.* "And if there is doubt about that matter—about the 'scope of arbitrable issues'—[a court] should resolve that doubt 'in favor of arbitration.'" *Green Tree Fin.*

Corp. v. *Bazzle,* 539 U.S. 444, 452 (2003) (plurality) (quoting *Mitsubishi Motors*, 473 U.S. at 626); see *Rent-A-Center*, 561 U.S. at 77 (Stevens, J., dissenting) (explaining that "[t]he FAA * * * envisions a limited role for courts").

The enforcement of those agreements to arbitrate bottoms on Section 2 of the FAA, 9 U.S.C. 2, which provides that "[a] written provision in any * * * contract * * * to settle by arbitration a controversy * * * shall be valid, irrevocable, and enforceable." See, *e.g.*, *Rent-A-Center*, 561 U.S. at 70-72 (concluding that Section 2 required enforcement of parties' agreement to arbitrate questions of arbitration clause's enforceability); *Bazzle*, 539 U.S. at 454 (plurality) ("remand[ing] the case so that the arbitrator may decide the question of contract interpretation—thereby enforcing the parties' arbitration agreements according to their terms") (citing 9 U.S.C. 2). Section 5 of the FAA, 9 U.S.C. 5, echoes that general rule of enforceability in providing specifically that "[i]f in the [arbitration] agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed."

b. "The [FAA] also supplies mechanisms for enforcing arbitration awards: a judicial decree confirming an award, an order vacating it, or an order modifying or correcting it." *Hall Street Assocs., L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 582 (2008) (citing 9 U.S.C. 9-11). "Under the FAA, courts may vacate an arbitrator's decision 'only in very unusual circumstances.' " *Oxford Health Plans LLC* v. *Sutter*, 133 S. Ct. 2064, 2068 (2013) (quoting *First Options*, 514 U.S. at 942). "Under the terms of § 9, a court 'must' confirm an arbitration award 'unless' it is vacated, modified, or corrected 'as

prescribed' in §§ 10 and 11." *Hall Street*, 552 U.S. at 582. The grounds listed in Section 10 for vacating an arbitral award are exclusive; "the statutory text gives [courts] no business to expand the statutory grounds." *Id.* at 589.

Of relevance here, Section 10(a)(4) provides that a court may vacate an arbitral award "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." That ground allows only "limited judicial review," under which "the sole question" for the court "is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." *Oxford Health*, 133 S. Ct. at 2066, 2068.

2. This case arises from an arbitral award in connection with petitioners' sale of a group of insurance companies to respondents.

a. As part of the sale, "[t]he parties agreed to an upfront payment to [petitioner] Myer for the businesses and executed a 'trailer agreement' to provide for additional payments based on the businesses' future performance." App., *infra*, 2a. Controversies arose in 2005 about respondents' performance under the trailer agreement. *Id.* at 23a. In February 2005, respondents filed a demand for arbitration with the AAA, invoking a section of the trailer agreement providing that the parties would arbitrate their disputes under the auspices of the AAA. *Id.* at 3a, 23a.[1]

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[1] The arbitration provision is reproduced in full as part of the trial court's findings of fact at App., *infra*, 53a-55a. It provides in relevant part:

> In the event of any dispute arising after the date of this Agreement among the parties hereto with reference to any

b. The AAA convened an arbitration as requested. The AAA's first order of business was to constitute a panel of three arbitrators, as provided in the parties' agreement. The agreement specified that petitioners would appoint one panel member, respondents would appoint one panel member, and those two panelists would appoint a third. App., *infra*, 53a. It further provided that "[e]ach Arbitrator shall be a knowledgeable, independent businessperson or professional."

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transaction contemplated by this Agreement the same shall be referred to three arbitrators. [Respondents] shall appoint one arbitrator and [petitioners] shall appoint one arbitrator and such two arbitrators to select the third * * * . Each Arbitrator shall be a knowledgeable, independent businessperson or professional.

* * *

The arbitration proceedings shall be conducted in accordance with the commercial arbitration rules of the American Arbitration Association, except that [respondents] and [petitioners] each shall be entitled to take discovery * * * and the arbitrators shall have the power to issue subpoenas, compel discovery, award sanctions and grant injunctive relief. * * * The arbitrators shall decide by majority vote of the arbitrators. The arbitrators shall deliver their decision to [respondents] and [petitioners] in writing * * * . There shall be no appeal from their written decision, except as permitted by applicable law.

Any arbitration instituted pursuant to this Section shall be held in Dallas, Texas or such other city that is mutually agreeable to [respondents] and [petitioners], with the precise location within such city being as agreed upon by [respondents] and [petitioners] or, absent such agreement, at a location within such city designated by the American Arbitration Association's resident manager in Kansas City, Missouri.

* * *

Ibid. The parties also incorporated the AAA's Commercial Arbitration Rules (AAA Rules) (see *id.* at 53a-54a), which are excerpted at App., *infra*, 127a-132a.[2] Of relevance here, the AAA Rules provide that "[w]here the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-17 with respect to impartiality and independence unless the parties have specifically agreed [otherwise]." *Id.* at 130a (AAA Rule R-12(a)). Rule R-17 in turn provides:

> (a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for
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> (i) partiality or lack of independence,
>
> (ii) inability or refusal to perform his or her duties with diligence and in good faith, and
>
> (iii) any grounds for disqualification provided by applicable law. The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-12 shall be nonneutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.
>
> (b) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should

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[2] The parties agree that the 2003 version of the AAA Rules is applicable here. App., *infra*, 29a n.2; see *id.* at 3a; *id.* at 16a-17a (Johnson, J., dissenting). Except where noted, references in this petition to the AAA Rules are to the 2003 version.

> be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

Id. at 132a.

Respondents named Ernest E. Figari, Jr., as a panel member. Petitioners objected that Figari was partial toward respondents. App., *infra*, 3a. The AAA considdered the objection under AAA Rule R-17(b) and reported back to the parties in March 2005: "After careful consideration of the parties' contentions, the [AAA] has determined Ernest Figari will be removed as arbitrator in this matter." *Id.* at 85a. It asked respondents to designate a new panel member. *Ibid.* After naming another panel member who was disqualified, respondents ultimately named a panel member to whom petitioners had no objection. The panel member chosen by respondents was seated, and the full panel was convened. *Id.* at 3a.

c. The panel unanimously ruled in petitioners' favor on their principal claims, awarding petitioners approximately $26 million in payments due, breach-of-contract damages, and attorneys' fees. App., *infra*, 65a-83a. The panel concluded that "[t]he arbitrators were chosen and have served pursuant to the terms of the agreements of the parties." *Id.* at 67a.

3. a. Petitioners asked the District Court of Dallas County, Texas, to confirm the arbitral award. In response, invoking the FAA, respondents asked the trial court to vacate or modify the award on various grounds. App., *infra*, 88a-89a. As relevant here, they argued that "[t]he Award must be vacated under FAA § 5 and applicable law, because the Award was not made by arbitrators who were appointed under the method provided in the [parties' agreement]," *id.* at

89a, because, in respondents' view, the parties' agreement allowed the appointment of panel members who were partial to the appointing party.

Petitioners opposed the motion, arguing that nothing in the FAA permitted the court to overturn the award. See, *e.g.*, App., *infra*, 92a, 98a-99a (citing *Hall Street*, *supra*). With respect to respondents' argument that they were entitled to appoint a panel member who was not impartial, petitioners emphasized that the parties had "clearly submit[ted] to AAA jurisdiction to administer the arbitration and [to] the AAA rules," and therefore the "AAA was the proper forum to determine whether an arbitrator met AAA's own standards." *Id.* at 96a-97a. Petitioners further pointed out that Texas courts had expressed skepticism that the FAA allowed vacatur of an arbitral body's decisions about panelist qualifications. See *id.* at 99a-100a (" 'The FAA authorizes vacatur for "evident partiality" of arbitrators . . . but not for an arbitral body's disqualification of an arbitrator under its own rules and standards.' ") (quoting *Roehrs* v. *FSI Holdings, Inc.*, 246 S.W.3d 796, 809 (Tex. App. 2008)); see *id.* at 101a (Motion for Reconsideration) ("[Petitioners] contend[] the AAA had authority to make decisions regarding the disqualification of party-appointed arbitrators and [respondents] contend it did not.").

b. The state court summarily vacated the award (App., *infra*, 63a-64a), and on petitioners' motion for reconsideration, entered findings of fact and conclusions of law to the same effect (*id.* at 52a-62a). The court noted that respondents contended that the arbitration agreement established qualifications for the panel members (impartiality not among them) while petitioners emphasized that the agreement incorpo-

rated the AAA Rules (which require impartiality). *Id.* at 55a-56a. The court concluded that "the [agreement] is ambiguous as to which of the interpretations * * * constitutes the agreement of the parties," and proceeded to "find[ ], as the trier of fact, that [respondents'] interpretation is the proper one." *Id.* at 56a-57a. The court further found that "Figari was qualified to serve as an arbitrator." *Id.* at 60a. As a legal matter, the court concluded that "[t]he FAA governs the arbitration provision" and "[u]nder Section 5 of the FAA, 9 U.S.C. § 5, the AAA was required to follow the arbitration selection method" found by the court. *Id.* at 60a-61a. Because the AAA had not followed the court's interpretation of the parties' agreement in disqualifying Figari, the court concluded that the arbitral award should be vacated. *Id.* at 61a.

4. Petitioners appealed. The Texas Court of Appeals initially concluded that respondents had failed to preserve before the AAA their claim that the parties' agreement allowed the appointment of a panel member who was not impartial. App., *infra*, 43a-51a. But on review, the Supreme Court of Texas concluded otherwise and remanded for the court of appeals to address the merits of respondents' claim. *Id.* at 36a-42a.

On remand, the court of appeals held in petitioners' favor. App., *infra*, 21a-35a. Petitioners argued, as they had in the trial court, that the FAA "does not authorize vacatur of an arbitration award * * * 'for an arbitral body's disqualification of an arbitrator under its own rules and standards.' " *Id.* at 108a (quoting *Roehrs*, 246 S.W.3d at 809). The court of appeals agreed. It first stepped through the parties' competing interpretations of their arbitration agreement. *Id.* at 26a-28a. It noted that the arbitrator qualifications

established in the parties' agreement and in the AAA rules "can be read together and harmonized." *Id.* at 29a. It further concluded that under the parties' agreement, "selection of arbitrators" would be governed by the AAA. *Id.* at 32a.

The court of appeals explained that "[t]he AAA rules provide that the AAA will decide whether an arbitrator is disqualified under its rules and the disqualification decision 'shall be conclusive.' " App., *infra*, 33a (quoting AAA Rule 19 (1996)). Thus, "the sufficiency of [petitioners'] objection to Figari was a procedural matter for the AAA to decide." *Ibid.* Under its FAA precedents, the court explained, "[a]n arbitral body's interpretation of its own rules must be given substantial deference," and vacatur of an award " 'requires, at the very least, a showing that the AAA manifestly disregarded its own rules.' " *Ibid.* (quoting *Roehrs*, 246 S.W.3d at 809). Finding that respondents could not meet that high standard (*id.* at 33a-34a), the court of appeals vacated the trial court's judgment and remanded for the trial court to consider any other defenses respondents might have to enforcement of the arbitral award. *Id.* at 35a.

5. a. Respondents sought discretionary review in the Supreme Court of Texas. In opposing review, petitioners again relied on *Roehrs*, 246 S.W.3d at 809, for the proposition that "[t]he FAA does not authorize vacatur 'for an arbitral body's disqualification of an arbitrator under its own rules and standards.' " App., *infra*, 111a n.58.

b. The Supreme Court of Texas granted review and reversed in a 5-4 decision, directing that the arbitral award be vacated. App., *infra*, 1a-11a. The parties briefed the threshold question whether a court could

properly "second-guess the AAA's decision" about panelist qualifications. See, *e.g.*, *id.* at 112a ("Because the parties' agreement incorporated the AAA Rules, which provide that the AAA has authority over arbitrator disqualification and that its decision is 'conclusive,' this Court should not permit a Texas court to second-guess the AAA's decision.").

The Supreme Court of Texas reasoned that because "[a]n arbitration panel selected contrary to the contract-specified method lacks jurisdiction over the dispute," a court may properly vacate an award entered by such a panel. App., *infra*, 4a; see *id.* at 10a (explaining that Section 5 of the FAA, 9 U.S.C. 5, requires that the parties' agreement as to method of selection be followed). The court held that to decide whether the panel was properly selected, it would itself "look to the arbitration agreement to determine what the parties specified." App., *infra*, 5a. Reviewing the arbitration agreement, the court determined that "the parties did not intend to require impartiality of party-appointed arbitrators," *id.* at 9a, and that the parties did not intend this to be overcome by the AAA's rules requiring impartiality, *id.* at 9a-11a. Citing the Eleventh Circuit's decision in *Szuts* v. *Dean Witter Reynolds, Inc.*, 931 F.2d 830, 832 (1991), the state supreme court explained that "[w]hen * * * a conflict arises [between the parties' agreement and incorporated arbitral rules], the agreement controls." App., *infra*, 11a. Accordingly, the court concluded that "the arbitration award must be vacated": "Because the AAA disqualified [respondents'] first-choice arbitrator for partiality, the arbitration panel was formed contrary to the express terms of the arbitration agreement" and "exceeded its authority." *Ibid.* (citing 9 U.S.C. 10(a)).

c. The four dissenting Justices would have rejected respondents' effort to vacate the award, reasoning that the provisions of the parties' agreement were unambiguous and could be harmonized with the AAA rules to require that panel members be impartial. App., *infra*, 12a-20a.

d. Petitioners sought rehearing, arguing that the court had failed to offer sound reasoning for its conclusion that a court, rather than the AAA, had authority to interpret and apply the parties' agreement as to panelist qualifications. App., *infra*, 120a-126a. Petitioners explained that because the parties had "agreed to abide by AAA Rules," the AAA's disqualification was effectively conclusive, and the FAA supplied no ground for vacating it. *Id.* at 122a-124a (citing, *inter alia*, *Hall Street*, *supra*). The Supreme Court of Texas denied rehearing without comment. *Id.* at 87a.

REASONS FOR GRANTING THE PETITION

The AAA did here what it does in countless other matters, and what the parties agreed it would do: oversee the selection and qualification of a panel to arbitrate a commercial dispute. The majority of courts would have deferred to the AAA's execution of the responsibilities assigned to it. But here, the Supreme Court of Texas refused to defer, siding with a scattered minority of other courts, and creating a particularly intolerable conflict with the Fifth Circuit. The decision below saps the efficiency of arbitration by remitting the parties to cumbersome post-award judicial review of arbitrator qualifications and by nullifying the very services that arbitral bodies like the AAA exist to provide. That decision also fails to respect this Court's repeated holdings that an agreement to arbitrate presumptively contemplates arbitration of threshold pro-

cedural matters. "Because the parties bargained for the [AAA's] construction of their agreement" about the selection and qualification of the panel, a decision by the AAA "even arguably construing or applying the contract must stand." *Oxford Health*, 133 S. Ct. at 2068 (internal quotation marks and citations omitted). The petition for a writ of certiorari should be granted.

A. The Decision Below Conflicts With This Court's Federal Arbitration Act Precedents

The decision below holds that a court hearing a post-award dispute about arbitration panel qualifications should resolve the matter *de novo*, rather than defer to the arbitral body that the parties designated to decide precisely that issue. That holding fundamentally misconceives the role of a court under this Court's FAA precedents.

1. a. This Court's cases establish a rule that most questions arising in arbitration are presumptively matters for the arbitrator to resolve, subject only to extremely deferential judicial review. See, *e.g.*, *Howsam*, 537 U.S. at 84-85. This includes "'"procedural" questions which grow out of the dispute and bear on its final disposition,'" which "are presumptively *not* for the judge, but for an arbitrator, to decide." *Id.* at 84 (quoting *John Wiley*, 376 U.S. at 557). The Court has explained that "parties would likely expect that an arbitrator would decide [threshold] matter[s]," in addition to deciding the substance of their dispute. *Howsam*, 537 U.S. at 84. That is because, with limited exceptions, "when the parties have a contract that provides for arbitration of some issues * * * , the parties likely gave at least some thought to the scope of arbitration," *First Options*, 514 U.S. at 945. Ultimately, "if there is doubt * * * about the 'scope of arbitra-

ble issues' [a court] should resolve that doubt 'in favor of arbitration.' " *Bazzle*, 539 U.S. at 452 (plurality) (quoting *Mitsubishi Motors*, 473 U.S. at 626).[3]

b. Under this framework, the Supreme Court of Texas should have deferred to the AAA—the relevant "arbitrator" here—because the panelist-qualification question is a procedural matter parties would expect the arbitral body to resolve. Indeed, one of *the very reasons parties engage an arbitral body* is for it to preside over the selection process and ensure the selection of a qualified panel. As a leading treatise explains, "[t]he use of institutional arbitration by the business community * * * is obviously based on the recognition of the value of established rules and control of the procedure through administrative measures of the agency," which can address "problems * * * such as the failure of a party to appoint an arbitrator, the challenge of an arbitrator, and arbitrator misconduct during the proceedings." 1 *Domke on Commercial Arbitration* § 4:1, at 4-2; see 2 *id.* § 24.2 (describing in detail

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[3] Only "[i]n certain limited circumstances [will] courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter." *Bazzle*, 539 U.S. at 452 (plurality) (citing *AT&T Techs.*, 475 U.S. at 649). "These limited instances typically involve matters of a kind that 'contracting parties would likely have expected a court' to decide * * *, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy." *Ibid.* (quoting *Howsam*, 537 U.S. at 83). But that is a "narrow exception," *ibid.*, and it is merely "an 'interpretive rule,' based on an assumption about the parties' expectations." *Rent-A-Center*, 561 U.S. at 69 n.1 (quoting *Howsam*, 537 U.S. at 83). Thus, an arbitrator may definitively decide even "threshold issues concerning the arbitration agreement," *id.* at 68, if "parties clearly and unmistakably provide" for it, *AT&T Techs.*, 475 U.S. at 649.

the process of arbitrator selection under the auspices of an arbitral body); see also *First Options*, 514 U.S. at 944, 945 (relying repeatedly on *Domke on Commercial Arbitration*).

As a formal matter, the parties here assigned the merits of the arbitration to the three-member panel, and designated the AAA to arbitrate questions about the selection and composition of the panel itself. That agreement to arbitrate panel selection before the AAA is itself an enforceable agreement under FAA § 2, 9 U.S.C. 2, in exactly the way this Court has found other agreements to arbitrate discrete issues enforceable. See *Rent-A-Center*, 562 U.S. at 70 ("An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement * * * and the FAA operates on this additional arbitration agreement just as it does on any other. The additional agreement is valid under [FAA] § 2 * * * ."); *First Options*, 514 U.S. at 943 ("We agree * * * that a court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration."). The Supreme Court of Texas failed to follow that basic precept from this Court's cases when it refused to defer to the AAA's decision here.

If there were any doubt about the parties' expectations, the AAA Rules—which the parties here incorporated, see note 1, *supra*—made clear that the AAA would superintend the selection and qualification of the panel. As a basic matter, "[w]hen parties agree to arbitrate under [the AAA] rules, * * * they thereby authorize the AAA to administer the arbitration." App., *infra*, 129a (AAA Rule R-2). AAA Rule R-12 describes the AAA's role in overseeing appointment of panelists by a party and authorizes the AAA itself, as a

last resort, to make an appointment. *Id.* at 130a-131a. Unless the parties agree otherwise, the AAA has discretion whether to seat a single arbitrator or a panel of three. *Id.* at 131a (AAA Rule R-15). The AAA Rules set qualifications of impartiality and independence for panel members. *Id.* at 132a (AAA Rule R-17(a)). The rules further establish a process for potential panelists to disclose to the AAA any reasons they might be disqualified, and for the AAA to share that information with the parties. *Id.* at 131a (AAA Rule R-16). Ultimately, and of central relevance here, AAA Rule R-17(b) provides that "the AAA shall determine whether the arbitrator should be disqualified under the grounds [provided in the Rules]," and its "decision shall be conclusive." *Id.* at 132a.

These features of the AAA Rules are a mainstay of institutional arbitration, and they reflect commercial parties' core expectation that arbitral bodies will decide matters affecting the selection and qualification of a panel. Other major arbitral bodies have comparable rules establishing a panel selection process, setting forth qualifications for panelists, and making clear that those bodies are responsible for conclusively resolving matters of panelist selection.[4]

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[4] CPR Inst. for Dispute Resolution, Administered Arbitration Rules, Rules 5-7 (July 1, 2013) (http://www.cpradr.org/Rules CaseSerices / CPRRules / AdministeredArbitrationRules . aspx); CPR Challenge Protocol, Decision Procedure, Rule 2 (http://www.cpradr.org/RulesCaseServices/CPRRules/Challenge Protocol.aspx); Financial Industry Regulatory Authority, Code of Arbitration Procedure for Customer Disputes, Rules 12400-12407, 12100(p), 12100(u) & 12400(c) (2014) (http://finra. complinet.com / en / display / display_viewall.html?rbid=2403& element_id = 4096 & record_id = 5174 & filtered_tag =); JAMS Comprehensive Arbitration Rules & Procedures, Rules 7 & 15

That is the dominant approach because it is the efficient approach. Part of "arbitration's essential virtue [lies in] resolving disputes straightaway." *Hall Street*, 552 U.S. at 588. Resort to an arbitral body ensures that once a panel is selected, the parties can rely on it to render a definitive award. Yet under the Texas Supreme Court's approach, parties must arbitrate their dispute first, only to find out later from a court whether they were proceeding before a satisfactory panel. As this Court has observed in a related context, such after-the-fact judicial review can "bring arbitration theory to grief in postarbitration process." *Ibid.*[5]

c. Because the parties agreed that the AAA would decide matters relating to the selection and qualifica-

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(July 1, 2014) (http://www.jamsadr.com/rules-comprehensive-arbitration/); Nat'l Arbitration Forum, Code of Procedure, Rules 21 & 23(d) (August 1, 2008) (http://www.adrforum.com/main.aspx?itemID=609&hideBar=False&navID=162&news=3).

The AAA's current rules, like the 2003 version of its rules relevant to this case, are to the same effect. AAA, Commercial Arbitration Rules and Mediation Procedures, Rules R-12, R-13, & R-18 (Oct. 1, 2013) (https://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_004130&_).

[5] Some Members of this Court have suggested in dissent that the question of "how the arbitrator should be selected" is "akin to the [question of] what shall be arbitrated," and therefore should be subject to the presumption of judicial resolution that attaches to questions of arbitrability. See *Bazzle*, 539 U.S. 456-457 (Rehnquist, C.J., dissenting). But the result here (and in other institutional arbitrations) would be the same under that approach. The AAA Rules incorporated in the parties' agreement "clearly and unmistakably" delegate responsibility to the AAA. *AT&T Techs.*, 475 U.S. at 649. For example, as discussed in the text, see pp. 17-18, *supra*, the AAA Rules provide that the AAA will administer the arbitration and issue a "conclusive" decision on whether to disqualify a panelist.

tions of the panel, the available grounds for vacating the AAA's decision are those enumerated in FAA § 10(a), 9 U.S.C. 10(a). See *Hall Street*, *supra*. The relevant ground would be Section 10(a)(4), which allows vacatur if "the arbitrators [*i.e.*, the AAA] exceeded their powers" in disqualifying Figari.

"[T]he sole question" for a court asked to vacate an award under Section 10(a)(4) "is whether the [AAA] (even arguably) interpreted the parties' [agreement about panelist qualifications], not whether [it] got its meaning right or wrong." *Oxford Health*, 133 S. Ct. at 2068; cf. App., *infra*, 33a (Texas Court of Appeals explaining that judicial vacatur under the FAA of the AAA's decision "requires, at the very least, a showing that the AAA manifestly disregarded its own rules") (quoting *Roehrs*, 246 S.W.3d at 809).

Respondents cannot make that showing. The AAA stated that it determined to disqualify Figari "[a]fter careful consideration of the parties' contentions" on the matter. App., *infra*, 85a. That is exactly the job the parties engaged the AAA to perform when they designated the AAA to administer their arbitration. At a minimum, the AAA rendered a decision " 'arguably * * * applying the [parties' agreement],' " which is enough to defeat vacatur under Section 10(a)(4). *Oxford Health*, 133 S. Ct. at 2068 (quoting *E. Associated Coal Corp.* v. *United Mine Workers*, 531 U.S. 57, 62 (2000)). Indeed, the divergence between the majority and dissenting Justices of the Supreme Court of Texas shows that the AAA's decision was not just arguably *grounded* in the parties' agreement, but arguably *correct* as a matter of law.

2. The Supreme Court of Texas gave few reasons for holding that it, rather than the AAA, had ultimate

responsibility for deciding whether Figari should have been disqualified. The court evidently took FAA § 5, 9 U.S.C. 5, as a sufficient warrant for judicial vacatur of the AAA's decision. See App., *infra*, 10a. That section provides that "[i]f in the [arbitration] agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed."

But Section 5 is merely a rule of decision that ensures that parties are free to contract for panelist qualifications and a selection method of the parties' choosing. It neither requires that a court decide questions of selection and qualifications, nor forbids the parties from assigning those matters to an arbitral body, as they did here. Section 5 therefore cannot justify the decision below.

B. The Decision Below Conflicts With Decisions Of Other Appellate Courts

Lower appellate courts are divided on the role of a court under the FAA in reviewing questions about the selection and qualifications of a panel. A substantial majority of courts, typically relying on this Court's decision in *Howsam*, *supra*, has recognized that the arbitral body is responsible for interpreting and applying the parties' agreement regarding the selection and qualifications of a panel, subject only to extremely deferential review by a court. A minority of appellate courts has reviewed such questions *de novo*, in the way the Supreme Court of Texas did here.

1. A well-reasoned line of cases holds that, because constitution of an arbitral panel is a procedural matter, courts must defer to the arbitral body's decisions. See, *e.g.*, *Adam Techs. Int'l S.A. de C.V.* v. *Sutherland Global Servs., Inc.*, 729 F.3d 443, 452 (5th Cir. 2013)

("The law presumes that 'procedural questions' "—including challenges to "the process used to select the arbitrators"—are for the "arbitrator to decide.") (citing, *inter alia*, *Howsam*, 537 U.S. at 84); *Crawford Grp., Inc.* v. *Holekamp*, 543 F.3d 971, 976-977 (8th Cir. 2008) (deferring to "the AAA's decision that [a panel member] was qualified to serve" because it was based on "an arguable interpretation of the provision [in the parties' agreement respecting arbitrator qualifications]"); *Prostyakov* v. *Masco Corp.*, 513 F.3d 716, 723-724 (7th Cir. 2008) (holding that a party's challenge to the selection of a AAA arbitrator was meritless because the parties had "authorize[d] the AAA to administer the arbitration * * * . Nothing more needs to be said"); *Bulko* v. *MorganStanley DW Inc.*, 450 F.3d 622, 626 (5th Cir. 2006); *Dockser* v. *Schwartzberg*, 433 F.3d 421, 425-427 (4th Cir. 2006) (Wilkinson, J.); cf. *Winfrey* v. *Simmons Foods, Inc.*, 495 F.3d 549, 551-552 (8th Cir. 2007) (explaining that because "contract interpretation is left to the arbitrator," the court would "defer[] to the arbitration panel's interpretation of " contract provisions on arbitrator qualifications).

Judge Wilkinson's careful opinion for the court in *Dockser* is representative. There, the Fourth Circuit affirmed the district court's dismissal of a party's complaint seeking a judicial determination of whether the parties' arbitration agreement required the selection of a single arbitrator or a panel of three. The court reasoned that "[t]he parties have agreed that arbitrator selection should follow the rules and procedures of the [AAA], and the number of arbitrators is a procedural question to be answered exclusively in that forum." 433 F.3d at 423. The court explained that a question about selecting "the proper number of arbitrators" is a

preliminary procedural matter, which the parties would "not * * * have expected a court * * * to decide." *Id.* at 426-427 (citing *Howsam*, 537 U.S. at 83). The *Dockser* court added that arbitrators and arbitral bodies have comparative expertise in deciding questions about panel composition because they involve " 'contract interpretation and arbitration procedures.' " *Id.* at 426 (quoting *Bazzle*, 539 U.S. at 453 (plurality)). Finally, the court emphasized that leaving the question of panel composition to arbitrators and arbitral bodies fosters the FAA's goal of "efficient resolution of disputes through arbitration," a goal that "would be undermined" by "allow[ing] arbitration proceedings to be stalled or nullified by ancillary litigation on minor issues." *Id.* at 423.

2. A competing minority line of appellate authority has refused to defer to an arbitral body or arbitration panel in similar situations. The hallmark of this line of cases is treating questions about selection and qualifications of the panel as matters for *de novo* judicial resolution, usually after an arbitral award. The Supreme Court of Texas aligned itself with this line in the decision below. See, *e.g.*, *Zeiler* v. *Deitsch*, 500 F.3d 157, 166 (2d Cir. 2007) (engaging in *de novo* analysis of contract provisions addressing the number of arbitrators required to render a decision, though ultimately upholding award); *Szuts*, 931 F.2d at 831 (11th Cir.) (vacating award after reviewing arbitration agreement *de novo* and concluding panel was improperly constituted); *Oakland-Macomb Interceptor Drain Drainage Dist.* v. *Ric-Man Constr., Inc.*, 850 N.W.2d 498, 504-505

(Mich. Ct. App. 2014) (reviewing parties' agreement *de novo* to overturn the AAA's arbitrator appointment).[6]

These cases offer scant reasoning for their aggressive view that arbitral bodies and arbitration panels deserves no deference in the performance of the very functions they are engaged to serve. For example, in *Szuts*—the decision on which the Supreme Court of Texas relied here—the Eleventh Circuit concluded that a two-member arbitration panel resulting from the belated disqualification of the third member was improperly constituted. 931 F.2d at 831. The court reached that conclusion after acknowledging—but finding itself "not persuaded" by—an alternative interpretation of the contract and the arbitral body's rules that would have saved the award rendered by the remaining two arbitrators. *Ibid.* Much like the Supreme Court of Texas in this case, the Eleventh Circuit in *Szuts* believed its approach was justified by the principle that "[t]he power and authority of the arbitrators * * * is dependent on the provisions of the arbitration agreement," 931 F.2d at 831. That principle is sound. But it does not answer the question of *who* interprets and applies "the provisions of the arbi-

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[6] *Zeiler* was decided under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, 21 U.S.T. 2517, which is implemented by the FAA (see 500 F.3d at 164; 9 U.S.C. 201), and which may have influenced the court's level of deference to the arbitral process. The Second Circuit had previously suggested that "weight must be given" to an arbitral body's application of its rules to questions about the selection and qualification of a panel. *York Research Corp.* v. *Landgarten*, 927 F.2d 119, 123 (1991). But even the *York Research* approach falls short of the deference other circuits apply and this Court's precedents prescribe.

tration agreement": a court *de novo*, or an arbitral body subject to deferential review?

3. The conflict described above is particularly intolerable because state and federal courts in Texas are now bound to apply diametrically opposed rules. In federal court, the Fifth Circuit's decisions control, and they hold that courts must defer to arbitral bodies' decisions about the selection and qualifications of a panel. See *Adam Techs.*, 729 F.3d at 452 (holding that a challenge to disqualification went to "the procedure of arbitration" and was thus reserved to the arbitrator to decide in the first instance); *Bulko*, 450 F.3d at 626.

By contrast, if left uncorrected, the contrary decision below will control proceedings in Texas state courts. Although the decision below cites *Bulko* in passing, it fails to respect *Bulko*'s deferential approach. The Texas Supreme Court's reversal of the Texas Court of Appeals make the conflict with *Bulko* particularly clear: The intermediate appellate court had refused to second-guess the AAA's disqualification decision, relying principally on *Roehrs* (see App., *infra*, 33a), which in turn relied on *Bulko* for the proposition that " 'determining [a panelist's] qualifications and eligibility is a matter left to the [arbitral body].' " *Roehrs*, 246 S.W.3d at 808-809 (quoting *Bulko*, 450 F.3d at 626) (first set of brackets in original).

As a result, in a Texas arbitration, an arbitral body's decisions about the selection and qualifications of a panel will be all but conclusive if the award is reviewed in federal court, while those same decisions will receive no deference at all if the award is reviewed in state court. Conflicts of that sort always present a strong case for this Court's review because they stand as an invitation to forum-shopping and create unjusti-

fied disuniformity. But that goes double in the arbitration context because the availability of federal jurisdiction in FAA proceedings turns on the sheer happenstance of whether the parties' particular dispute hypothetically could have been brought to federal court (save for the arbitration agreement). See *Hall Street*, 552 U.S. at 581-582 (citing FAA § 4, 9 U.S.C. 4). That conflict warrants immediate resolution.

C. The Question Presented Is Recurring And Fundamental To Modern Arbitration Practice

As the cases cited above suggest, courts regularly confront the question of the correct framework for analyzing complaints about the process by which an arbitrator or arbitration panel was selected. A party against which an arbitral award is entered will find such a claim attractive because prevailing on it will often, as here, result in complete vacatur of the adverse award. The decision below, and others like it, make such claims still more attractive by freeing them from the ordinary requirement of deference to the arbitral process under the FAA and this Court's decisions.

The question presented is, moreover, fundamental to modern commercial arbitration practice. Arbitration administered by an arbitral body, such as the AAA, "has become the prevailing method of commercial arbitration," precisely because the arbitral body can oversee the selection and qualification of arbitrators. 2 *Domke on Commercial Arbitration* § 24:2, at 24-5; see Revised Uniform Arbitration Act, Definitions cmt. 1 ("Arbitration organizations under their specific administrative rules oversee and administer all aspects of the arbitration process."). The decision below undermines the benefits those arbitral bodies offer to parties in a dispute because it effectively deprives those bodies of

the ability to seat an arbitrator or panel with unassailable authority to resolve the parties' dispute. And conversely, the decision requires "a more cumbersome and time-consuming judicial review process." *Hall Street*, 552 U.S. at 588 (internal quotation marks and citation omitted). Together, those deprive arbitration under the auspices of an arbitral body of a fair measure of its recognized efficiency.

The question presented is also important because, while divergent approaches persist in lower courts, parties in an arbitration will not know whether an early dispute about arbitrator selection is a time bomb, ticking away until post-award proceedings in court. That is because, unlike questions of arbitrability, which can often be addressed by a court (if appropriate) in preliminary proceedings to compel arbitration (as in *Rent-A-Center*, *supra*, for example), disputes about panel selection will typically arise when the parties agree their dispute is arbitrable and only after a demand for arbitration is made. Although courts have sometimes entertained early challenges to panel selection,[7] such proceedings are at best disruptive and cumbersome. A decision by this Court in respondents' favor would encourage parties to seek that sort of early (if inefficient) certainty, while a decision in petitioners' favor would alleviate the need for such proceedings by making post-award vacatur much less likely. Either way, this Court's resolution would foster efficient dispute resolution.

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[7] Compare *Oakland-Macomb*, 850 N.W.2d at 505-506 (permitting pre-award relief in court under the FAA on arbitrator-selection claim), with *Gulf Guar. Life Ins. Co.* v. *Conn. Gen. Life Ins. Co.*, 304 F.3d 476, 489-490 (5th Cir. 2002) (concluding no such relief is available).

D. This Case Is An Excellent Vehicle For Resolving The Question Presented

This case has several features that make it an especially attractive vehicle for resolving the question presented. *First*, the parties and every court below have agreed that the FAA supplies the framework for reviewing the arbitral award here, so the case has been litigated against the backdrop of this Court's FAA precedents, such as *Hall Street*. See, *e.g.*, App., *infra*, 10a, 26a, 44a, 60a. *Second*, unlike some FAA cases in which this Court's decision was complicated by uncertainty about whether the arbitrator had passed on the relevant issue (see, *e.g.*, *Bazzle*, 539 U.S. at 453-454), a clear record of the AAA's decision to disqualify Figari exists in the record of this case (see App., *infra*, 84a-86a). *Third*, the case arises from a proceeding administered by the AAA, "the leading agency for the administration of every type of arbitration, including both commercial and labor arbitration." 1 *Domke on Commercial Arbitration* § 4:2, at 4-3. That backdrop ensures that this Court's decision would be directly relevant to a large volume of mainstream commercial arbitrations. *Fourth*, a substantial arbitral award is at stake, ensuring that the question presented would be fully briefed by experienced counsel.

Fifth, this Court's decision on the general question of deference to arbitral bodies would be outcome-determinative for respondents' specific claim that the panel here was improperly constituted. On the one hand, if the Court agrees with the decision below that selection and qualification questions are matters for *de novo* judicial resolution, then respondents will prevail. In that event, the issue for judicial resolution would be a question of contract interpretation under Texas law

(see, *e.g.*, *First Options*, 514 U.S. at 944; *Mastrobuono*, 514 U.S. 63 n.9), and the decision below reflects the judgment of the Supreme Court of Texas, which is the highest authority on Texas contract law.

On the other hand, if this Court concludes that arbitral bodies' decisions about the selection and qualifications of a panel are subject only to extremely deferential review under the FAA, then petitioners will prevail. In that event, the issue for judicial resolution would be whether the AAA was " 'arguably * * * applying the [parties' agreement]' " in disqualifying Figari. *Oxford Health*, 133 S. Ct. at 2068 (quoting *E. Associated Coal*, 531 U.S. at 62). As explained above, p. 20, *supra*, that is precisely what the AAA did. At bottom, "[i]t is the [AAA's] construction [of the parties' arbitrator-selection agreement] which was bargained for; and so far as the [AAA's] decision concerns construction of the contract, the courts have no business overruling [it] because their interpretation of the contract is different from [the AAA's]." *Id.* at 2070 (internal quotation marks and citation omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

SUPREME COURT OF TEXAS

NO. 12-0739

AMERICO LIFE, INC., AMERICO FINANCIAL LIFE AND ANNUITY INSURANCE COMPANY, GREAT SOUTHERN LIFE INSURANCE COMPANY, THE OHIO STATE LIFE INSURANCE COMPANY, AND NATIONAL FARMERS UNION LIFE INSURANCE COMPANY, PETITIONERS

v.

ROBERT L. MYER AND STRIDER MARKETING GROUP, INC., RESPONDENTS

June 20, 2014

OPINION

On Petition For Review From
The Court Of Appeals For The Fifth District Of Texas

JUSTICE BROWN delivered the opinion of the Court, in which CHIEF JUSTICE HECHT, JUSTICE GREEN, JUSTICE GUZMAN and JUSTICE DEVINE joined.

JUSTICE JOHNSON filed a dissenting opinion, in which JUSTICE WILLETT, JUSTICE LEHRMANN and JUSTICE BOYD joined.

BROWN, *Associate Justice*.

This is an arbitration case. The petitioners contend the court of appeals erroneously imposed a requirement for the selection of arbitrators beyond those the parties agreed upon in their arbitration agreement. For the reasons explained below, we reverse.

I

In 1998, Robert Myer and Strider Marketing Group, Inc. (collectively Myer) sold a collection of insurance companies to the petitioners (collectively Americo). The parties agreed on an up-front payment to Myer for the businesses and executed a "trailer agreement" to provide for additional payments based on the businesses' future performance. The trailer agreement included an arbitration clause with six paragraphs of terms agreed upon by the parties, including:

> 3.3 Arbitration. In the event of any dispute arising after the date of this Agreement among the parties hereto with reference to any transaction contemplated by this Agreement the same shall be referred to three arbitrators. Americo shall appoint one arbitrator and Myer shall appoint one arbitrator and such two arbitrators to select the third . . . . Each arbitrator shall be a knowledgeable, independent businessperson or professional.
>
> . . .
>
> The arbitration proceedings shall be conducted in accordance with the commercial arbitration rules of the American Arbitration Association, except that Americo and Myer each shall be entitled to take discovery as provided under Federal Rules of Civil Pro-

> cedure Nos. 28 through 36 during a period of 90 days after the final arbitrator is appointed and the arbitrators shall have the power to issue subpoenas, compel discovery, award sanctions and grant injunctive relief. The arbitrators shall be entitled to retain a lawyer to advise them as to legal matters, but such lawyer shall have none of the relationships to Americo or Myer (or any of their Affiliates) that are proscribed above for arbitrators.

The agreement combines terms expressly chosen by the parties with the incorporation by reference of American Arbitration Association rules to govern the arbitration proceeding. When the parties executed their agreement, AAA rules did not require arbitrator-impartiality, but by the time Americo invoked arbitration in 2005 after disputes arose concerning the additional payments to Myer, the AAA rules by default required that "[a]ny arbitrator shall be impartial and independent . . . and shall be subject to disqualification for . . . partiality or lack of independence . . . ." AAA Commercial Arbitration Rules R-17(a)(I) (2003).

Myer alleged that Americo's first-choice arbitrator, Ernest Figari, Jr., was partial toward Americo, and successfully moved the AAA to disqualify him. Americo objected to Figari's disqualification but named another arbitrator, about whom Myer likewise complained, and whom the AAA likewise struck. Myer did not object to Americo's third appointee, who ultimately served on the panel. The arbitration proceeding resulted in a unanimous award in Myer's favor amounting to just over $26 million in payments due, breach-of-contract damages, and attorneys' fees.

When Myer moved to confirm the award in the trial court, Americo renewed its objection to Figari's dis-

qualification. Americo argued that in disqualifying Figari for partiality, the AAA failed to follow the arbitrator-selection process specified in the parties' agreement, which provided only that "each arbitrator shall be a knowledgeable, independent businessperson or professional." The trial court determined the arbitration agreement was ambiguous but ultimately agreed with Americo's reading and vacated the award. Myer appealed, and the court of appeals reversed on the ground that Americo had waived its objection to Figari's removal. We reversed that decision. *Americo Life, Inc. v. Myer*, 356 S.W.3d 496 (Tex. 2011) (per curiam). On remand, the court of appeals again reversed, this time on the merits, holding the arbitration agreement was unambiguous and the arbitration panel was properly appointed under both the terms of the agreement and the AAA rules. Nearly ten years after arbitration proceedings commenced between the parties, their case again comes before this Court.

II

Arbitrators derive their power from the parties' agreement to submit to arbitration. *City of Pasadena v. Smith*, 292 S.W.3d 14, 20 (Tex. 2009). They have no independent source of jurisdiction apart from the parties' consent. *I.S. Joseph Co. v. Mich. Sugar Co.*, 803 F.2d 396, 399 (8th Cir. 1986). Accordingly, arbitrators must be selected pursuant to the method specified in the parties' agreement. *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 672–73 (5th Cir. 2002). An arbitration panel selected contrary to the contract-specified method lacks jurisdiction over the dispute. Accordingly, courts "do not hesitate to vacate an award when an arbitrator is not selected according to the contract-specified method." *Bulko v. Morgan Stanley DW, Inc.*, 450 F.3d 622,

625 (5th Cir. 2006). So we look to the arbitration agreement to determine what the parties specified concerning the arbitrator-selection process.

A written contract must be construed to give effect to the parties' intent expressed in the text as understood in light of the facts and circumstances surrounding the contract's execution, subject to the limitations of the parol-evidence rule. *Houston Exploration Co. v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462, 469 (Tex. 2011). Facts and circumstances that may be considered include the commercial or other setting in which the contract was negotiated and other objectively determinable factors that give context to the parties' transaction. See id. (citing 11 Richard A. Lord, Williston On Contracts § 32.7 (4th ed. 1999)). When interpreting an integrated writing, the parol-evidence rule precludes considering evidence that would render a contract ambiguous when the document, on its face, is capable of a definite legal meaning. *Sun Oil Co. (Del.) v. Madeley*, 626 S.W.2d 726, 731–32 (Tex. 1981). The rule does not, however, prohibit considering surrounding facts and circumstances that inform the contract text and render it capable of only one meaning. *See id.; Wellington*, 352 S.W.3d at 469.

III

A

To determine the parties' intent, we examine the express language of their agreement. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011). In their agreement, the parties directly addressed the issue of arbitrator qualifications and agreed on a short list of requirements, namely that each arbitrator must be a "knowledgeable,

independent businessperson or professional." Americo argues the court of appeals improperly added "impartial" to the parties' list of qualifications. Myer counters that because "independent" and "impartial" are essentially synonymous, Americo was always obligated to name an impartial arbitrator.

We disagree that "independent" may be read interchangeably with "impartial." Various dictionary definitions might support some overlap between the two words, but when applied in the arbitration context, they carry distinct meanings. The parties in this case agreed to "tripartite arbitration," through which each party would directly appoint an arbitrator, and the two party- appointed arbitrators would agree on a third panelist. This method was commonplace when the parties executed their agreement in 1998. *See Burlington N. R.R. Co. v. TUCO Inc.*, 960 S.W.2d 629, 630 & n.2 (Tex. 1997) (describing the method as "often-used"). In a tripartite arbitration, each party- appointed arbitrator ordinarily advocates for the appointing party, and only the third arbitrator is considered neutral. *See, e.g., Winfrey v. Simmons Food, Inc.*, 495 F.3d 549, 552 (8th Cir. 2007) (noting the "industry custom that party arbitrators are frequently not required or expected to be neutral for ruling on disputes"); *Lozano v. Md. Cas. Co.*, 850 F.2d 1470, 1472 (11th Cir. 1988) (per curiam) ("An arbitrator appointed by a party is a partisan only one step removed from the controversy and need not be impartial."); *Metro. Prop. and Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co.*, 780 F. Supp. 885, 892 (D. Conn. 1991) (In tripartite arbitration, "each party's arbitrator 'is not individually expected to be neutral.'") (quoting *Soc'y for Good Will to Retarded Children v. Carey*, 466 F.Supp. 702, 708 (S.D.N.Y. 1979)); *Matter of Astoria*

Med. Grp. (Health Ins. Plan of Greater N.Y.), 182 N.E.2d 85, 87 (N.Y. 1962) ("[T]here has grown a common acceptance of the fact that the party-designated arbitrators are not and cannot be 'neutral,' at least in the sense that the third arbitrator or a judge is.").

In fact, the arbitration agreement in Burlington, like the agreement in this case, "did not specify whether the two arbitrators that the parties unilaterally selected . . . would be neutral or would represent the interests of the party appointing them." *Burlington*, 960 S.W.2d at 630. But in Burlington, unlike this case, there was "no dispute . . . that the parties intended and understood that the party arbitrators would be aligned with, act as advocates for, and ultimately side with the appointing party." *Id.*

The AAA rules in place when the agreement was executed likewise reflect the prevalence of this practice. At that time, the rules provided that "[u]nless the parties agree otherwise, an arbitrator selected unilaterally by one party is a party-appointed arbitrator and not subject to disqualification pursuant to Section 19." AAA Commercial Arbitration § 12 (1996). Section 19 contained procedures to challenge arbitrators for partiality. *See id.*, § 19. Accordingly, the AAA rules presumed party-appointed arbitrators were non-neutral, and the parties would have to "agree otherwise" to rebut this presumption.

The only indication the parties sought to "agree otherwise" is their requirement that party- appointed arbitrators be "independent." Americo argues that the parties chose the word "independent" not to require impartiality, but to proscribe arbitrators employed by or otherwise under the control of one of the parties. Americo's argument is certainly plausible; the practice

of appointing arbitrators who are somehow formally associated with the party appointing them is not unheard of. *See, e.g., Astoria*, 182 N.E.2d at 86 (party appointed "one of the incorporators of [the company] and its president from 1950 to 1957" who was at the time "a member of its board of directors and one of its paid consultants"); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 939 (4th Cir. 1999) ("Under the [terms of the arbitration agreement], Hooters is free to devise lists of partial arbitrators who have existing relationships, financial or familial, with Hooters and its management."). Indeed, to prevent this practice, some arbitration agreements expressly prohibit it. *See, e.g., Burlington*, 960 S.W.2d at 630 ("While [the arbitration agreements] prohibit the parties from selecting their own employees as arbitrators, [they] do not specify whether the two arbitrators that the parties unilaterally selected . . . would be neutral or would represent the interests of the party appointing them.").

Additional agreement terms lend support to Americo's interpretation. The agreement provides that arbitrators "shall be entitled to retain a lawyer to advise them as to legal matters, but such lawyer shall have none of the relationships to Americo or Myer (or any of their Affiliates) that are proscribed above for arbitrators." The only term that can be fairly read as a proscription of a "relationship" between a party and its chosen arbitrator is the requirement that all arbitrators be "independent" of the party appointing them. But it does not follow that an "independent" arbitrator must also be impartial; indeed, an independent arbitrator could be partial or impartial. However, if we follow Myer's suggestion that "independent" is synonymous with "impartial," it becomes unclear what "rela-

tionship" the agreement is attempting to proscribe. Impartiality is a state of mind, but "independent" necessarily refers to a relationship—the subject is free from someone or something.

The industry norm for tripartite arbitrators when the parties executed their agreement was that party-appointed arbitrators were advocates, and the AAA rules in place at that time presumed such arbitrators would not be impartial unless the parties specifically agreed otherwise. Given the pervasiveness of the practice, and the clear AAA presumption the parties had to rebut, we believe the parties would have done more than require its arbitrators to be "independent" if they wished them to be impartial. "Independent" and "impartial" are not interchangeable in this context, and therefore we conclude the parties did not intend to require impartiality of party-appointed arbitrators.

B

Having concluded the terms of the agreement do not require impartial party-appointed arbitrators, we turn to the effect of the incorporated-by-reference AAA rules on arbitrator qualifications. There is no dispute the AAA rules would govern matters on which the agreement is silent. The question is whether AAA rules on arbitrator qualifications can, as the court of appeals concluded, supplement terms agreed on by the parties that specifically speak to the same point.

The court of appeals reasoned that the rules and the agreement "can be read together and harmonized to avoid any irreconcilable conflict." *Myer v. Americo Life, Inc.*, 371 S.W.3d 537, 543 (Tex. App.—Dallas 2012). In other words, because "impartial" could be added without negating any expressly chosen qualifications, it was proper to do so to effectuate all the agreement's

provisions. But this cannot be the end of our inquiry, or the specifically chosen terms of any agreement would be hopelessly open-ended whenever outside rules are incorporated by reference.

When an arbitration agreement incorporates by reference outside rules, "the specific provisions in the arbitration agreement take precedence and the arbitration rules are incorporated only to the extent that they do not conflict with the express provisions of the arbitration agreement." *Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 832 (11th Cir. 1991). The Federal Arbitration Act, which the parties agree governs their agreement, requires that if an agreement provides "a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed." 9 U.S.C. § 5. Similarly, the AAA rules in effect when the parties executed their agreement, as well as when arbitration was invoked, both provide that "[i]f the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed." AAA Commercial Arbitration Rules § 14 (1996), R-12 (2003).

Any attempt to harmonize the AAA impartiality rule with the parties' expressly chosen arbitrator qualifications misses the point. We do not construe "conflict" between an agreement and incorporated rules so narrowly as to find it exists only if the rule contradicts the agreement. A conflict can exist when an agreement and incorporated rules speak to the same point. Even if both can be followed without contradiction, they conflict because the parties have already addressed the matter and are not in need of gap-filling from the AAA rules. When the agreement and incorporated rules

speak to the same point, the agreement's voice is the only to be heard.

Here, the parties chose a short list of arbitrator qualifications, and in doing so we must assume they spoke comprehensively. The parties chose "knowledgeable" and "independent" but not "impartial," and we think they meant not only what they said but also what they did not say. *See CKB & Assocs. v. Moore McCormack Petroleum, Inc.*, 734 S.W.2d 653, 655 (Tex. 1987) (*expressio unius est exclusio alterius*—the naming of one thing excludes another). And though we can concede the parties embraced some uncertainty by adopting AAA rules that were subject to change, we cannot conceive that they agreed to be bound by rules that would alter the express terms of their agreement. Nor can we imagine they took the trouble to expressly agree on some terms if their decision to incorporate AAA rules would leave those terms open to alteration. The AAA impartiality rule conflicts with the parties' agreement because the parties spoke on the matter and did not choose impartiality. When such a conflict arises, the agreement controls. *Szuts*, 931 F.2d at 832.

* * *

Because the AAA disqualified Americo's first-choice arbitrator for partiality, the arbitration panel was formed contrary to the express terms of the arbitration agreement. The panel, therefore, exceeded its authority when it resolved the parties' dispute. *See City of Pasadena*, 292 S.W.3d at 20; *I.S. Joseph Co.*, 803 F.2d at 399. Because the arbitrators exceeded their authority, the arbitration award must be vacated. *See* 9 U.S.C. § 10(a); *Bulko*, 450 F.3d at 625. Accordingly, we reverse the court of appeals' judgment and reinstate the trial court's order vacating the arbitration award.

JUSTICE JOHNSON, joined by JUSTICE WILLETT, JUSTICE LEHRMANN, and JUSTICE BOYD, dissenting.

The parties in this case agreed to arbitrate disputes regarding Robert Myer's sale of life insurance companies to Americo for tens of millions of dollars, and agreed that the arbitration proceedings would be conducted in accordance with the commercial arbitration rules of the American Arbitration Association (AAA). When this dispute arose and Myer challenged the first two arbitrators appointed by Americo, the AAA disqualified them. Americo protested the disqualification of the first arbitrator it appointed, reserved the right to challenge his disqualification, eventually named an arbitrator who was not disqualified, and arbitrated. After completion of the arbitration, Americo sought to have the trial court vacate the award. The court did so on the basis that the AAA improperly disqualified Americo's first appointed arbitrator, the panel was improperly constituted, and the award was void. The court of appeals reversed and remanded.

The Court holds that the trial court did not err by voiding the arbitration award because in their agreement (the trailer agreement) the parties established the exclusive qualifications and selection method for arbitrators. I agree with the court of appeals that the trailer agreement and provisions of the AAA rules which the parties specifically agreed would govern any arbitration proceedings are unambiguous, can be harmonized, and both can be given effect. Accordingly, the parties should be bound by the arbitrator selection provisions of both, as they agreed.

Myer sold multiple insurance companies to Americo. In 1998 they entered into a trailer agreement containing the following provisions regarding disputes:

> 3.3 Arbitration. In the event of any dispute arising after the date of this Agreement among the parties herein with reference to any transaction contemplated by this Agreement, the same shall be referred to three arbitrators. Americo shall appoint one arbitrator and Myer shall appoint one arbitrator and such two arbitrators to select the third. . . . Each arbitrator shall be a knowledgeable, independent businessperson or professional.
>
> . . .
>
> The arbitration proceedings shall be conducted in accordance with the commercial arbitration rules of the American Arbitration Association, except that Americo and Myer each shall be entitled to take discovery as provided under Federal Rules of Civil Procedure Nos. 28 through 36 during a period of 90 days after the final arbitrator is appointed and the arbitrators shall have the power to issue subpoenas, compel discovery, award sanctions and grant injunctive relief. The arbitrators shall be entitled to retain a lawyer to advise them as to legal matters, but such lawyer shall have none of the relationships to Americo or Myer (or any of their Affiliates) that are proscribed above for arbitrators.

Disputes arose, Americo demanded arbitration in 2005, and each party appointed an arbitrator. Myer objected to Ernest Figari, the arbitrator appointed by Americo. In its letter to the AAA about Figari, Myer protested that the parties "have not agreed to the appointment of a non- neutral arbitrator in this proceeding, and [Myer] requires that any arbitrator must qualify as an impartial and independent arbitrator." The AAA disqualified Figari as well as a second Americo appointee.

Finally, Americo appointed the arbitrator who served on the panel. That panel eventually rendered a unanimous award for Myer.

The trial court granted Americo's motion to set aside the award because the panel was improperly constituted and the award was void. The court entered findings of fact and conclusions of law, some of which were: (1) the arbitrator selection method in the AAA rules did not apply because the parties agreed on specific procedures and standards for appointing arbitrators; (2) the AAA was required to follow the procedures in the first paragraph of section 3.3 of the trailer agreement and it did not; and (3) the arbitrators were not required to be neutral or meet the "impartial and independent" standard of the AAA rules.

The court of appeals reversed. *Myer v. Americo Life, Inc.*, 371 S.W.3d 537, 542-46 (Tex. App.—Dallas 2012, pet. granted). It held that the trailer agreement was not ambiguous, the AAA rules applied to "proceedings" which included the arbitrator selection process, the arbitrator selection process complied with the trailer agreement and AAA rules that it specified, the applicable AAA rules required impartial arbitrators absent the parties' specific agreement otherwise, the parties did not specifically agree otherwise, and the AAA did not disregard its own rules in disqualifying Figari. *Id.*. I agree with the court of appeals' analyses and conclusions.

I also agree with a great deal of what the Court says, and certainly with the authorities it cites for fairly standard, unremarkable principles of contract interpretation. For example, I agree that the language in the trailer agreement that requires arbitrators to be "independent" cannot be read interchangeably with

"impartial." ____ S.W.3d ____ , ____ . I agree that in determining the intent of parties to an agreement we first and foremost, examine the express language of their agreement. Id. at _____ (citing *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011)). I agree that written contracts must be construed to give effect to the parties' intent as they expressed it in the text of the contract, and as the text is understood in light of the facts and circumstances surrounding the contract's execution, subject to the limitations of the parol evidence rule. Id. at ___ (citing *Houston Exploration Co. v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462, 469 (Tex. 2011)). I agree that "[w]hen an arbitration agreement incorporates by reference outside rules, 'the specific provisions in the arbitration agreement take precedence and the arbitration rules are incorporated only to the extent that they do not conflict with the express provisions of the arbitration agreement.'" *Id.* at (quoting *Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 832 (11th Cir. 1991)). But I view the Court, in the end, as giving only lip service to those principles and authorities.

The Court says that the parties agreed to an arbitrator selection process and decided what qualifications their arbitrators must possess by specifying that each arbitrator must be a "knowledgeable, independent businessperson or professional." _S.W.3d at ___. So far, so good. But it then determines that the parties "spoke comprehensively," by listing the requirements they desired as to arbitrators. While acknowledging the parties also agreed that the AAA rules would govern the proceedings, the Court draws two conclusions with which I disagree. The first is its response to the court

of appeals' conclusion that the AAA rules and the trailer agreement can be read together and harmonized to avoid any irreconcilable conflict. The Court's response is

> In other words, because [as the court of appeals held] impartiality could be added without negating any expressly chosen qualifications, it was proper to do so to effectuate all the agreement's provisions. *But this cannot be the end of our inquiry, or the specifically chosen terms of any agreement would be hopelessly open-ended whenever outside rules are incorporated by reference.*

Id. at _____ (emphasis added). The second conclusion with which I disagree is the Court's conclusion that the AAA provisions as to arbitrator impartiality conflict with the parties' specific agreement because of the added impartiality requirement. *Id.* at ___.

As to the Court's concern of "hopelessly open-ended" terms in the agreement, the trailer agreement executed by these sophisticated parties specifies that each appointed arbitrator "shall be a knowledgeable, independent businessperson or professional." But it also provides that the AAA rules apply to the proceedings. At the time the parties entered into the trailer agreement, the 1996 AAA rules were in effect. Those rules specified that

> The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) or under its commercial Arbitration Rules. *These rules and any amendment of them shall apply in the form obtaining at the time the demand for arbitration or*

> *submission agreement is received by the AAA.* The parties, by written agreement, may vary the procedures set forth in these rules.

AAA Commercial Arbitration §1 (1996) (emphasis added). That provision is not in the least ambiguous or unclear. The parties could have, but did not, incorporate the 1996 rules into their agreement while excluding any amendments to the rules. Then their agreement would not have been "open-ended" as the Court describes it. Rather, the parties incorporated language specifying that their disputes would be resolved according to whatever AAA rules were in effect when the demand for arbitration was made. The Court's conclusion that the parties could not have meant exactly what they said because the terms of their agreement would "leave those terms open to alteration" is a judicial re-making of the parties' agreement. If the parties to a contract want its terms to be open to alteration, they are entitled to make it so. If they do not, they can make it so. But whichever way they choose should be honored by the courts.

As to the Court's conclusion that there is a conflict between the arbitrator requirements in the trailer agreement and those in the AAA rules, there is no dispute that the 2003 AAA Rules apply. And as the court of appeals explained, the 2003 rules provide that when parties have agreed to each name an arbitrator, the standards of rule R-17 with respect to impartiality and independence will apply unless the parties have "specifically agreed" that the arbitrators are to be non-neutral and do not have to meet such standards. Myer, 371 S.W.3d at 543 (citing AAA Commercial Arbitration Rule R-12(b) (2003)). Rule R-17 provides that

> Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for . . . partiality or lack of independence.

AAA Commercial Arbitration Rule R-17(a) (2003). The trailer agreement provides that arbitrators will be knowledgeable, independent businesspeople or professionals. But Americo and Myer did not "specifically agree" that the arbitrators would be non-neutral and need not meet the Rule R-17 standards. Therefore, in addition to the qualifications the parties set out in the first paragraph of section 3.3 of the trailer agreement, the parties also agreed that (1) the AAA arbitration rules in effect at the time arbitration was demanded would apply, and (2) pursuant to the 2003 rules that were in effect when arbitration was demanded, the arbitrators would be impartial and perform their duties with diligence and good faith.

The Court concludes that the provisions in the trailer agreement and those in Rule R-17 conflict. It reaches that conclusion by assuming that the parties listed in their separate agreement all the requirements they desired of their arbitrators. But the trailer agreement language does not support such an assumption. To the contrary, the language of section 3.3 of the trailer agreement demonstrates just the opposite–that when the parties intended to supplant, vary, or circumscribe the provisions of the AAA rules, they knew exactly how to specifically do so:

> The arbitration proceedings shall be conducted in accordance with the commercial arbitration rules of the American Arbitration Association, *except that Americo and Myer each shall be entitled to take discovery as provided under Federal Rules of Civil Pro-*

> *cedure Nos. 28 through 36 during a period of 90 days after the final arbitrator is appointed and the arbitrators shall have the power to issue subpoenas, compel discovery, award sanctions and grant injunctive relief....* (emphasis added)

Neither section 3.3 of the trailer agreement listing the arbitrator requirements nor any other part of the trailer agreement includes language addressing, much less specifically providing for, non-neutral arbitrators. And courts should not "rewrite agreements to insert provisions parties could have included." *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 646 (Tex. 1996).

Further, contracts must be considered in their entirety, with all provisions harmonized, if possible, and all provisions given effect to the extent possible. *FPL Energy, LLC v. TXU Portfolio Mgmt. Co., L.P.*, 426 S.W.3d 59, 63 (Tex. 2014). "No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument." *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). By assuming the parties included all the arbitrator qualifications they desired in the trailer agreement, the Court confounds the intent of the parties as unambiguously expressed by the words they used in their agreement and the provisions of the AAA rules they incorporated into their agreement. That assumption leads the Court to determine that the trailer agreement and the AAA rules conflict when in reality they can be harmonized as our extensive contract interpretation precedent requires.

In the end the Court misses the mark: the parties' unambiguous agreement and AAA Rule R-17 requiring arbitrator impartiality can be harmonized, and the parties did not expressly agree that the arbitrators

could be non-neutral as they were required to do if they intended to negate the applicable AAA rules requiring impartiality. The parties were entitled to make whatever agreement they chose, open to alteration or not. Because the provisions of the trailer agreement and Rule R-17 can be harmonized, the provisions of both can be given effect. The provisions require the arbitrators to be impartial.

I would affirm the judgment of the court of appeals. Because the Court does not, I respectfully dissent.

APPENDIX B

FIFTH COURT OF APPEALS OF TEXAS

NO. 05–08–01053–CV

ROBERT L. MYER AND STRIDER MARKETING GROUP, INC., APPELLANTS

v.

AMERICO LIFE, INC., AMERICO FINANCIAL LIFE AND INSURANCE ANNUITY COMPANY, GREAT SOUTHERN LIFE INSURANCE COMPANY, THE OHIO STATE LIFE INSURANCE COMPANY, AND NATIONAL FARMER'S UNION LIFE INSURANCE COMPANY, APPELLEES

June 6, 2012
Rehearing Overruled August 7, 2012

OPINION ON REMAND

Before JUSTICES MOSELEY, O'NEILL, and MURPHY.

Opinion by JUSTICE O'NEILL.

Appellants Robert L. Myer and Strider Marketing Group, Inc. (collectively referred to as appellants) and Americo Life, Inc., Americo Financial Life and Insurance Annuity Company, Great Southern Life Insurance Company, The Ohio State Life Insurance Compa-

ny, and National Farmer's Union Life Insurance Company (collectively referred to as appellees) participated in arbitration. Appellants filed a petition with the district court to confirm the award, and appellees filed a motion to vacate and/or modify the award. The trial court denied appellants' motion to confirm the award and granted appellees' motion to vacate.

In our original opinion, we concluded appellees failed to preserve their issue for review regarding whether the arbitration panel was appointed under the method provided for in the arbitration agreement. We reversed and remanded for further proceedings.

The Texas Supreme Court reversed our decision because it concluded the record demonstrated appellees had properly presented their argument to the American Arbitration Association (AAA) and remanded the case back to this Court for further proceedings.[1]

Accordingly, we shall address the following arguments raised by appellants: (1) whether the trial court ignored rules of contract construction regarding whether the parties' arbitration agreement was ambiguous (2) whether an arbitrator can be disqualified by the AAA and (3) whether each of appellees' remaining challenges fail as a matter of law. We reverse and remand for further proceedings consistent with this opinion.

Background

The parties acknowledge the facts are generally undisputed; therefore, we will discuss only those facts relevant to the arguments on appeal, rather than detailing the business dealings leading up to the arbitration.

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[1] *Americo Life, Inc. v. Myer*, 356 S.W.3d 496 (Tex.2011).

Appellant Myer built a business platform for the sale and servicing of tax-sheltered insurance products. Myer sold the insurance companies to appellees in 1998. Appellees were unwilling to pay the full value up front, so the parties agreed to use "trailer agreements" as a financing mechanism. The parties entered into a new trailer agreement in October 1998, which contained the following arbitration clause:

> 3.3 Arbitration. In the event of any dispute arising after the date of this Agreement among the parties hereto with reference to any transaction contemplated by this Agreement the same shall be referred to three arbitrators. Americo shall appoint one arbitrator and Myer shall appoint one arbitrator and such two arbitrators shall select a third .... Each arbitrator shall be a knowledgeable, independent businessperson or professional.
>
> The arbitration proceedings shall be conducted in accordance with the commercial arbitration rules of the American Arbitration Association, except that Americo and Meyer each shall be entitled to take discovery as provided under Federal Rules of Civil Procedure Nos. 28 through 36 during a period of 90 days after the final arbitrator is appointed....

Several controversies arose between the parties and in February of 2005, appellees filed a Demand for Arbitration and Complaint in Arbitration with the AAA. Appellees appointed Ernest E. Figari, Jr. as an arbitrator, and appellants appointed Rodney D. Moore. Appellants filed an objection to Figari under AAA Rule R-17, which required that "any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and good faith." In March of

2005, a AAA case manager issued a decision disqualifying and removing Figari as arbitrator. Appellees then appointed, without objection, Richard A. Sayles as an arbitrator. The two arbitrators then selected a third arbitrator.

The arbitration commenced on March 27, 2007 and a final award was rendered on June 29, 2007. The arbitrators reached a 3-0 decision in appellants' favor and awarded declaratory relief, $9.29 million in breach of contract damages, $15.8 million in damages for amounts wrongfully withheld under the new trailer agreement, and $1.29 million in attorneys' fees and costs.

On July 9, 2008, appellants filed a petition to confirm the arbitration award in the district court. Appellees later filed a motion to vacate and/or modify the arbitration award. They argued the award was not by arbitrators appointed under the method required in the agreement, and the panel exceeded its authority. On July 15, 2008, the trial court denied the motion to confirm and granted appellees' motion to vacate the arbitration award. In its conclusions of law, it stated the AAA failed to follow the arbitration selection method contained in the first paragraph of section 3.3 of the new trailer agreement by not allowing appellees to appoint Figari, and because the award was not issued by a properly appointed and authorized panel, it was void and had no binding effect. The trial court did not consider appellees remaining grounds for vacating the award because it concluded any remaining arguments were moot.

Appellants filed a motion to reconsider. The trial court denied the motion on September 8, 2008. This appeal followed.

Standard of Review

A review of a trial court's decision to confirm or vacate an arbitration award is de novo; therefore, we review the entire record. *Statewide Remodeling, Inc. v. Williams,* 244 S.W.3d 564, 566 (Tex.App.–Dallas 2008, no pet.). However, all reasonable presumptions are indulged in favor of the award and none against it. *Id.* (citing *CVN Group, Inc. v. Delgado,* 95 S.W.3d 234, 238 (Tex.2002)). An arbitration award has the same effect as a judgment of a court of last resort, and a court reviewing the award may not substitute its judgment for that of the arbitrators merely because it would have reached a different decision. *Williams,* 244 S.W.3d at 566. Arbitration awards are entitled to great deference by the courts "lest disappointed litigants seek to overturn every unfavorable arbitration award in court." *Id.* (citing *Daniewicz v. Thermo Instrument Sys., Inc.,* 992 S.W.2d 713, 716 (Tex.App.–Austin 1999, pet denied)).

Judicial review of arbitration awards adds expense and delay, thereby diminishing the benefits of arbitration as an efficient, economical system for resolving disputes. *Id.* Therefore, review of an arbitration award is quite narrow. *Id.* Review is so limited that an arbitration award may not be vacated even if there is a mistake of fact or law. *Crossmark, Inc. v. Hazar,* 124 S.W.3d 422, 429 (Tex.App.–Dallas 2004, pet. denied). Because of the deference given to arbitration awards, judicial scrutiny focuses on the integrity of the process, not the propriety of the result. *Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.,* 294 S.W.3d 818, 826 (Tex.App.–Dallas 2009, no pet.). When as here, a non-prevailing party seeks to vacate an arbitration award, it bears the burden in the trial court of bringing

forth a complete record that establishes its basis for vacating the award. *Williams,* 244 S.W.3d at 566.

It is undisputed the Federal Arbitration Act ("FAA") applies to this case. Under the FAA, an arbitration award must be confirmed unless it is vacated, modified, or corrected under one of the limited grounds set forth in sections 10 and 11 of the Act. *See* 9 U.S.C. §§ 9-11. Section 10(a) permits a court to vacate an arbitration award (1) where the award was procured by fraud, corruption, 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 material and pertinent 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 power, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. *Id.* § 10(a).

Although courts have recognized certain common law exceptions for vacating an arbitration award, the United States Supreme Court has held the grounds listed in the statute are the exclusive grounds for vacating an arbitration award under the FAA. *Hall St. Assocs., LLC v. Mattel, Inc.,* 552 U.S. 576, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008).

Discussion

Appellants argue the trial court erred by concluding the arbitration agreement is ambiguous and determining the parties agreed to its own procedures for appointing arbitrators thereby eliminating the procedures under the AAA for selecting arbitrators. The

paragraphs at issue in the arbitration agreement are as follows:

> 3.3 Arbitration. In the event of any dispute arising after the date of this Agreement among the parties hereto with reference to any transaction contemplated by this Agreement the same shall be referred to three arbitrators. Americo shall appoint one arbitrator and Myer shall appoint one arbitrator and such two arbitrators shall select a third .... Each arbitrator shall be a knowledgeable, independent businessperson or professional.
>
> The arbitration proceedings shall be conducted in accordance with the commercial arbitration rules of the American Arbitration Association, except that Americo and Meyer each shall be entitle to take discovery as provided under Federal Rules of Civil Procedure Nos. 28 through 36 during a period of 90 days after the final arbitrator is appointed....

Appellants argue these two provisions are not ambiguous because they are not susceptible to more than one reasonable interpretation. Reading the two provisions together, appellants assert the parties were required to select an arbitrator that met the requirements of both paragraph one and the AAA rules. Appellees contend the parties agreed in the first paragraph to a specific selection process not governed by the AAA, and reference to the AAA in the following paragraph refers only to the procedures the parties would use *during* arbitration and not to the *selection* of the arbitrators themselves. Thus, when faced with two reasonable interpretations of the agreement, appellees claim the trial court correctly concluded an ambiguity existed and correctly determined the parties estab-

lished their own procedures for choosing arbitrators that did not require following the AAA.

We first acknowledge that neither party argued ambiguity to the trial court. In fact, appellees specifically argued in their first amended answer and motion to vacate or modify arbitration award that "The Agreement provides that each party shall select its own arbitrator. Disregarding this *plain and unambiguous language,* the AAA refused to allow Americo's selected arbitrator to serve despite Americo's timely objection." [Emphasis added.] However, the issue of ambiguity can be raised sua sponte by the trial court. *See Hackberry Creek Country Club, Inc. v. Hackberry Creek Home Owners Ass'n,* 205 S.W.3d 46, 56 (Tex.App.–Dallas 2006, pet. denied) (a court may conclude a contract is ambiguous even in the absence of such pleading by either party); *see also Sage St. Assocs. v. Northdale Const. Co.,* 863 S.W.2d 438, 445 (Tex.1993). Thus, we shall begin our analysis with whether the trial court properly concluded an ambiguity exists in the arbitration agreement.

Whether a contractual ambiguity exists is a question of law. *In re D. Wilson Const. Co.,* 196 S.W.3d 774, 781 (Tex.2006). If a contract is ambiguous, a fact issue exists as to the parties' intent. *Affiliated Pathologists, P.A. v. McKee,* 261 S.W.3d 874, 879 (Tex.App.–Dallas 2008, no pet.). In determining whether a contract is ambiguous, we look to the contract as a whole, in light of the circumstances present when the contract was executed. *Id.* A contract is ambiguous only if it is subject to "two or more reasonable interpretations after applying the pertinent rules of construction." *In re D. Wilson Constr. Co.,* 196 S.W.3d at 781. If a contract is not ambiguous, it will be enforced as written, and parol

evidence will not be admitted for the purpose of creating an ambiguity or to give the contract a different meaning from that which its language imports. *McKee,* 261 S.W.3d at 879. Inartful drafting does not alone render a contractual provision ambiguous. *Id.* Moreover, ambiguity does not exist merely because the parties assert forceful and diametrically opposing interpretations. *Id.*

Courts must be particularly wary of isolating from its surroundings or considering apart from other provisions a single phrase, sentence, or section of a contract. *See State Farm Life Ins. Co. v. Beaston,* 907 S.W.2d 430, 433 (Tex.1995). Further, the parties to a contract generally intend every clause to have some effect, and the court will not strike down any portion of the contract unless there is an irreconcilable conflict. *Ogden v. Dickinson State Bank,* 662 S.W.2d 330, 332 (Tex.1983) (op. on reh'g).

We agree with appellants that the two provisions involving selection of the arbitrators can be read together and harmonized to avoid any irreconcilable conflict. Under the first sentence of section 3.3 of the agreement, an arbitrator must be "a knowledgeable, independent businessperson or professional." At the time the parties demanded arbitration in 2005, AAA Rules R-12(b) and R-17(a) applied.[2] Rule R-12(b) states that when parties have agreed that each party is to name an arbitrator, the arbitrator must meet the standards of R-17 with respect to impartiality and independence unless the parties have specifically agreed that the party-appointed arbitrators are to be

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[2] There is no dispute that the AAA rules, as amended and effective July 1, 2003, are applicable.

non-neutral and need not meet the standards. AAA Rule R-12(b). Rule R-17(a) states the following:

> (a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for
>
> (i) partiality or lack of independence,
>
> (ii) inability or refusal to perform his or her duties with diligence and in good faith, and any other groups for disqualification provided by applicable law.

AAA Rule R-17(a). Thus, reading these provisions together, the parties were required to select a knowledgeable, independent businessperson or professional who is impartial, independent, and shall perform his duties with diligence and in good faith. While Rule R-17(a) adds the additional requirement of impartiality for arbitrators, this does not create a conflict between the paragraphs.

Appellees argue the parties intentionally chose the "distinct concept" of independence over impartial and that the sentence explaining that the "arbitration proceedings shall be conducted in accordance with the commercial arbitration rules of the American Arbitration Association" means the AAA would apply after the arbitration panel was in place. Appellants respond that appellees' strained rationalization, that "independent" does not mean independent and "proceedings" does not mean proceedings, is unreasonable. We agree with appellants.

Appellees have cited a partial definition of "independent" to support their conclusion that independent

and impartial are not synonymous.[3] Websters Third New International Dictionary provides the following relevant definitions of "independent": "(1)(a)(1) not subject to control by others; ... (b)(2) being or acting free of the influence of something; (b)(3) not biased by others; acting or thinking freely." WEBSTER'S THIRD NEW INT'L DICTIONARY 1148 (1981). It defines "impartial" as "not partial; not favoring one more than other; treating all alike; unbiased." *Id.* at 1131. Both definitions include the concept of being unbiased. As such, this supports appellants argument that the two words are synonymous and do not create an irreconcilable conflict within the agreement.

We likewise agree that appellees' argument that the AAA only applied to proceedings after the arbitrators were empaneled is an unreasonable interpretation. Black's Law Dictionary defines "proceeding" as follows:

> 1. The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment. 2. Any procedural means for seeking redress from a tribunal or agency. 3. An act or step that is part of a larger action 4. The business conducted by a court or other official body.

BLACK'S LAW DICTIONARY 1221 (7th ed. 1999). We agree with appellants that had the parties intended for the AAA rules to govern only the "proceedings" after they selected arbitrators, they could have included such language in the arbitration agreement. In fact,

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[3] Appellees cite the following definition of independent: "not subject to control by others: not subordinate ... not affiliated with or integrated into a larger controlling unit (as a business unit)." WEBSTER'S THIRD NEW INT'L DICTIONARY 1253 (1986).

they excepted discovery proceedings from the control of the AAA rules indicating their willingness to depart from the AAA rules. However, based on the definition of "proceeding," we conclude the selection of arbitrators falls within the meaning of "any procedural means for seeking redress from a tribunal," "an act or step" part of the larger arbitration process, and "business conducted by ... an official body."[4] Thus, the trial court erred in its conclusion that the language in the arbitration agreement is ambiguous and subject to more than one reasonable interpretation.

In reaching this conclusion, we reject appellees' invitation to consider the "industry norms" at the time the parties entered into the agreement. "If the contract language is not fairly susceptible of more than one legal meaning or construction, however, extrinsic evidence is inadmissible to contradict or vary the meaning of the explicit language of the parties' written agreement." *See Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.,* 907 S.W.2d 517, 521 (Tex.1995). Thus, while the contractual provisions may have been inartfully written and the parties have diametrically opposing interpretations, this does not create an ambiguity. The parties agreed any arbitrator that failed to meet the standards of impartiality and independence was subject to disqualification under the AAA rules.

With this contract interpretation in mind, we now turn to whether the trial court erred by vacating the

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[4] The trial court found the language was intended to cover the arbitration proceedings themselves (such as the procurement of discovery, taking of evidence, procedures at hearings, etc.) but not the selection of the arbitration panel, "which is something that necessarily takes place before the arbitration proceedings."

arbitration award because it was not issued by a properly appointed and authorized arbitration panel. The AAA rules provide that the AAA will decide whether an arbitrator is disqualified under its rules and the disqualification decision "shall be conclusive." AAA Rule R-19; *see also Roehrs v. FSI Holdings, Inc.,* 246 S.W.3d 796, 808 (Tex.App.–Dallas 2008, pet. denied). An arbitral body's interpretation of its own rules must be given substantial deference. *Roehrs,* 246 S.W.3d at 808. This court has stated that "vacatur based on a procedural error requires, at the very least, a showing that the AAA manifestly disregarded its own rules." *Id.* at 809.

We cannot conclude that the evidence establishes that the AAA manifestly disregarded its own rules as to permit vacatur of the award. As discussed below, the sufficiency of appellants' objection to Figari was a procedural matter for the AAA to decide. AAA Rule R-19; *see also Roehrs,* 246 S.W.3d at 809. Moreover, the AAA's decision on the merits of appellants' objection to Figari was not so irrational that we may substitute our judgment for the AAA's.

On March 15, 2005, appellants filed a written objection with the AAA arguing that Figari's designation violated AAA Rule R-17 because the parties had not agreed to the appointment of a non-neutral arbitrator. They argued that Figari "is currently acting, as a non-neutral arbitrator on behalf of Americo Life, Inc. in two arbitrations between Americo Life, Inc. and Robert L. Myer involving the same purchase transaction at issue in the above-referenced arbitration." They further stated that the first of those two arbitrations resulted in an award in which Figari dissented in favor of appellees.

In response, appellees filed a letter on March 22, 2005 stating Figari had served as a neutral arbitrator in the previous proceedings and that "Under AAA rules, Mr. Figari is qualified to serve on the panel in this proceeding." The letter also provided that "there is no evidence that Mr. Figari does not meet all the requirements of Rule-17(a)." Not until the end of the response letter did appellees state "an argument can be made that the AAA rules do not govern the selection of and qualifications of the arbitrators in this proceeding." Thus, the main focus of their response letter was that Figari was in fact neutral and qualified under AAA Rule R-17(a).

The AAA determined otherwise and disqualified Figari. Not until after he was disqualified did appellees strongly urge their argument that the parties did not agree for the AAA to govern the selection of arbitrators. Appellees, however, proceeded over objection, to replace Figari with Sayles and continued with the arbitration.

While appellees did not get their first choice in arbitrators, nothing in the record indicates the selection process violated the parties' agreement. Appellants complained Figari was serving as a non-neutral arbitrator in other proceedings. In one of those proceedings, Figari dissented in favor of appellees. Thus, we cannot say the AAA's decision to disqualify Figari under its "partiality or lack of independence" standard constitutes a manifest disregard for its own rules.

Because we have concluded the AAA did not disregard its own rules during the selection of the arbitration panel, the trial court erred by vacating the arbi-

tration award on this basis.[5] We sustain appellants' first issue. Because the trial court expressly stated in its findings of fact and conclusions of law that "because the Court has found that the Award is void and has no binding effect, the remaining grounds raised by Defendants for vacating the Award are moot and, therefore, the Court has not reached them," we likewise reject the parties' invitation to consider them.

Conclusion

We reverse and remand to the trial court for further proceedings.

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[5] The trial court concluded vacatur was appropriate because the award "was not issued by a properly appointed and authorized arbitration panel."

APPENDIX C

SUPREME COURT OF TEXAS

NO. 10-0734

AMERICO LIFE, INC., AMERICO FINANCIAL LIFE AND ANNUITY INSURANCE COMPANY, GREAT SOUTHERN LIFE INSURANCE COMPANY, THE OHIO STATE LIFE INSURANCE COMPANY, AND NATIONAL FARMERS' UNION LIFE INSURANCE COMPANY, PETITIONERS

v.

ROBERT L. MYER AND STRIDER MARKETING GROUP, INC., RESPONDENTS

December 16, 2011

OPINION

On Petition For Review From
The Court Of Appeals For The Fifth District Of Texas

PER CURIAM

This case concerns an arbitration provision that allows each party to appoint one arbitrator to a panel, subject to certain requirements. At issue is whether Americo Life, Inc. waived its objection to the removal of the arbitrator it selected. The underlying dispute

concerned the financing mechanism for Americo's purchase of several insurance companies from Robert Myer.[1] Pursuant to the financing agreement, Americo and Myer submitted their dispute to arbitration under American Arbitration Association (AAA) rules. The arbitrators found in favor of Myer, and Americo filed a motion to vacate the award. The trial court granted the motion. It held that Americo was entitled to any arbitrator that met the requirements set forth in the financing agreement and that the arbitrator removed by the AAA met those requirements. The court of appeals reversed, holding that Americo had waived these arguments by not presenting them to the AAA. Because the record demonstrates otherwise, we reverse the court of appeals' judgment and remand the case to the court of appeals for further proceedings.

The parties entered into a financing agreement for Americo's purchase of several insurance companies from Myer. This agreement provides that any disputes "shall be referred to three arbitrators." It further provides that "Americo shall appoint one arbitrator and Myer shall appoint one arbitrator and such two arbitrators to select the third." The financing agreement provides that each arbitrator "shall be a knowledgeable, independent businessperson or professional."

However, the contract also provides that, subject to exceptions not at issue here, the proceedings "shall be conducted in accordance with the commercial arbitra-

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[1] Petitioners Americo Life, Inc., Americo Financial Life and Annuity Insurance Company, Great Southern Life Insurance Company, the Ohio State Life Insurance Company, and National Farmers' Union Life Insurance Company are referred to as Americo. Respondents Robert L. Myer and Strider Marketing Group, Inc. are referred to as Myer.

tion rules of the American Arbitration Association." At the time the parties entered into the financing agreement, the AAA rules provided that its "rules and any amendment of them shall apply in the form in effect at the time the administrative filing requirements are met for a demand for arbitration or submission agreement received by the AAA." At the time of the demand for arbitration between the parties, the AAA rules provided that "[a]ny arbitrator shall be impartial and independent . . . and shall be subject to disqualification for (i) partiality or lack of independence . . . ."

Here, Myer argued to the AAA that Americo's selected arbitrator, Ernest Figari, Jr., was not impartial and therefore should be removed. Americo responded that Figari was, in fact, impartial. The parties dispute whether Americo additionally responded that its selected arbitrator need only meet the "independent" and "knowledgeable" requirements from the financing agreement.

The AAA agreed with Myer and removed Figari from the arbitration panel. Americo asserted a standing objection to the continuation of the arbitration without Figari. Americo also stated that it would proceed to arbitrate without waiving its objection and without waiver of the right to appeal any decision based on the removal of Figari. Americo subsequently selected another arbitrator.

The arbitration panel rendered a unanimous decision awarding Myer declaratory relief, breach of contract damages of $9.29 million, $15.8 million in damages for wrongfully withheld payments under the financing agreement, and $1.29 million in attorney's fees and costs. Myer filed a petition to confirm the award in the district court and Americo filed a motion

to vacate or modify the award. Americo argued that, *inter alia*, the award was not made by arbitrators selected under the financing agreement's requirements and was therefore void.[2] The court granted Americo's motion to vacate and found that the AAA failed to follow the arbitration selection method contained in the financing agreement, that the AAA had no authority to strike Figari, and that the award was void because it was issued by an improperly appointed panel.

The court of appeals reversed. It held that:

> After arbitration, appellees argued to the trial court the award should be vacated under section five of the Federal Arbitration Act because the award was not made by arbitrators who were appointed under the method provided in the [financing] agreement. In their brief in support of their motion to vacate the arbitration award, appellees further explained their argument to mean the [financing] agreement did not require the party-appointed arbitrators to be "independent and *impartial*. Nor does the Agreement allow the AAA to disqualify a party's appointed arbitrator for partiality, bias, or any other basis." They continued to argue that because their right to select an arbitrator was governed by the standards in the [financing] agreement, the impartiality standard set out in the AAA rules was inapplicable. Essentially, appellees argued to the trial court they had a right to a non-neutral arbitrator. This, however, is not the argument they raised to

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[2] Americo's motion to vacate or modify the award was pursuant to section five of the Federal Arbitration Act (FAA), which provides: "If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed . . . ." 9 U.S.C. § 5.

> the AAA in response to appellants' objection to Figari.

315 S.W.3d 72, 75 (Tex. App.—Dallas 2009, pet. filed) (emphasis in original) (footnote omitted).

We have held that "appellate courts should reach the merits of an appeal whenever reasonably possible." *Perry v. Cohen*, 272 S.W.3d 585, 587 (Tex. 2008) (citing *Verburgt v. Dorner*, 959 S.W.2d 615, 616 (Tex. 1997)). Here, the record demonstrates that Americo argued to both the AAA and the district court that it was entitled to any arbitrator who met the requirements set forth in the financing agreement, regardless of the AAA's requirements.

In response to Myer's objection to Figari, Americo argued to the AAA that Figari was neutral. However, Americo also asserted:

> Finally, an argument can be made that the AAA rules do not govern the selection of and qualifications for arbitrators in this proceeding. . . . The Agreement states that "[e]ach arbitrator shall be a knowledgeable, independent businessperson or professional." . . .
>
> As long as Mr. Figari is "a knowledgeable, independent businessperson or professional," he is an acceptable designee for the arbitration panel hearing this matter, irrespective of the AAA rules. . . . Here, the parties' arbitration agreement plainly provides the method for selecting arbitrators for the three-person panel and establishes the qualifications for serving on the panel. . . . Mr. Figari possesses the requisite qualifications and the fact that he has served previously and is now serving as a member of a panel considering a dispute between

> some of these same parties does not change that fact. There has been—and can be—no allegation that Mr. Figari has been anything but knowledgeable and independent in his performance on the panels in Myer I and Myer II.

Furthermore, Americo wrote the AAA again after the AAA removed Figari but before the arbitration, stating:

> [T]he AAA Commercial Arbitration Rules do not govern the selection of and qualifications for arbitrators to hear disputes between Americo and Myer. . . . The Agreement states that "[e]ach arbitrator shall be a knowledgeable, independent businessperson or professional." . . .
>
> Mr. Figari is "a knowledgeable, independent businessperson or professional". Therefore, he is a proper designee for the Panel to hear this matter.

In addition, Americo's letter to the AAA cited *Brook v. Peak International, Ltd.*, which discusses the vacation of arbitration awards by arbitrators not appointed under the method provided by a contract and the preservation of such a complaint by presenting it during arbitration. 294 F.3d 668, 673 (5th Cir. 2002). Americo reiterated this argument in the district court, stating that "the Award must be vacated under FAA § 5 and applicable law, because the Award was not made by arbitrators who were appointed under the method provided in the Agreement."

The court of appeals is correct that Americo did not expressly state that arbitrators were not required to be neutral. 315 S.W.3d at 75–76. However, Americo argued that the AAA requirements did not apply, that the only applicable requirements were that they be

knowledgeable and independent businesspersons or professionals, and that Figari met these qualifications. Americo properly preserved this argument. Therefore, without hearing oral argument, TEX. R. APP. P. 59.1, we reverse the court of appeals' judgment and remand the case to the court of appeals for further proceedings consistent with this opinion.

APPENDIX D

FIFTH COURT OF APPEALS OF TEXAS

NO. 05–08–01053–CV

ROBERT L. MYER AND STRIDER MARKETING GROUP, INC., APPELLANTS

v.

AMERICO LIFE, INC., AMERICO FINANCIAL LIFE AND INSURANCE ANNUITY COMPANY, GREAT SOUTHERN LIFE INSURANCE COMPANY, THE OHIO STATE LIFE INSURANCE COMPANY, AND NATIONAL FARMER'S UNION LIFE INSURANCE COMPANY, APPELLEES

October 22, 2009
Rehearing Overruled July 30, 2010

OPINION

Before JUSTICES MOSELEY, O'NEILL, and MURPHY.

Opinion by JUSTICE O'NEILL.

Appellants Robert L. Myer and Strider Marketing Group, Inc. (collectively referred to as appellants) and Americo Life, Inc., Americo Financial Life and Insurance Annuity Company, Great Southern Life Insurance Company, The Ohio State Life Insurance Compa-

ny, and National Farmer's Union Life Insurance Company (collectively referred to as appellees) participated in arbitration. Appellants filed a petition with the district court to confirm the award, and appellees filed a motion to vacate or modify the award. The trial court denied appellants' motion to confirm the award and granted appellees' motion to vacate.

On appeal, appellants assert the trial court ignored rules of contract construction regarding whether the parties' arbitration agreement was ambiguous and whether an arbitrator can be disqualified by the American Arbitration Association (AAA). Further, they argue each of appellees' remaining challenges fails as a matter of law. The parties agree the Federal Arbitration Act applies to this dispute. We reverse and remand for further proceedings.

Background

The parties acknowledge the facts are generally undisputed; therefore, we will discuss only those facts relevant to the arguments on appeal, rather than detailing the business dealings leading up to the arbitration.

Appellant Myer built a business platform for the sale and servicing of tax-sheltered insurance products. Myer sold the insurance companies to appellees in 1998. Appellees were unwilling to pay the full value up front, so the parties agreed to use "trailer agreements" as a financing mechanism. The parties entered into a new trailer agreement in October 1998, which contained, in part, the following arbitration clause:

> In the event of any dispute arising after the date of this Agreement among the parties hereto with reference to any transaction contemplated by this

> Agreement the same shall be referred to three arbitrators. Americo shall appoint one arbitrator and Myer shall appoint one arbitrator and such two arbitrators to select the third .... Each arbitrator shall be a knowledgeable, independent businessperson or professional. If either Americo or Myer refuses or neglects to appoint an arbitrator within 30 days after receipt of the written request for arbitration, the initiating party may appoint a second arbitrator. ....

Several controversies arose between the parties and in February of 2005, appellees filed a Demand for Arbitration and Complaint in Arbitration with the AAA. Appellees appointed Ernest E. Figari, Jr. as an arbitrator, and appellants appointed Rodney D. Moore. Appellants filed an objection to Figari under AAA rule R-17, which required that "any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and good faith." In March of 2005, a AAA case manager issued a decision disqualifying and removing Figari as arbitrator.

After the AAA removed Figari, appellees sent a letter to the AAA and appellants stating the following:

> Americo will proceed to arbitrate this matter subject to and without waiving its objection to the AAA's decision and without waiver of the right to appeal any decision in this matter based on the erroneous removal of Mr. Figari as Americo's designated member of the Arbitration panel (citations omitted). Americo hereby places its standing objection to conducting this arbitration without Mr. Figari on the Panel.

Based on the running objection, appellees contend they were not required to do anything else to preserve their

complaint. Appellees then appointed Richard A. Sayles as an arbitrator. The parties later agreed to the appointment of the third arbitrator.

The arbitration commenced on March 27, 2007 and a final award was rendered on June 29, 2007. The arbitrators reached a 3-0 decision in appellants' favor and awarded declaratory relief, $9.29 million in breach of contract damages, $15.8 million in damages for amounts wrongfully withheld under the new trailer agreement, and $1.29 million in attorneys' fees and costs.

On July 9, 2008, appellants filed a petition to confirm the arbitration award in the district court. Appellees later filed a motion to vacate or modify the arbitration award and argued the award was not by arbitrators appointed under the method required in the agreement and the panel exceeded its authority. On July 15, 2008, the trial court denied the motion to confirm and granted appellees' motion to vacate the arbitration award. In its conclusions of law, the trial court stated the AAA failed to follow the arbitration selection method contained in the first paragraph of section 3.3 of the new trailer agreement by not allowing appellees to appoint Figari, and because the award was not issued by a properly appointed and authorized panel, it was void and had no binding effect. The trial court did not consider appellees' remaining grounds for vacating the award because it concluded any remaining arguments were moot.

Appellants filed a motion to reconsider. The trial court denied the motion on September 8, 2008. This appeal followed.

Discussion

We begin our analysis by considering appellants' contention that appellees waived the argument they made to the trial court—and now make on appeal—to sustain the trial court's order vacating the arbitration award because the argument was never presented to the arbitration panel or any other proper tribunal before appellees participated in the arbitration. Appellees respond they properly objected and notified the arbitration panel and appellants of their running objection to Figari's removal from the panel; therefore, the issue is properly preserved for our review. We agree with appellants.

After appellants objected to Figari, appellees responded by arguing appellants' objection was based on "the erroneous contention that Mr. Figari served as a non-neutral arbitrator" in two previous arbitrations involving the same parties; however, they alleged he served as a neutral arbitrator in both proceedings. They further argued the AAA rules allowed the parties to agree to use a non-neutral arbitrator, but they acknowledged the parties had not reached such an agreement.

Appellees cited to rule R-12(a), which provides that "[w]here the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of rule R-17 with respect to impartiality and independence...." AAA Rule R-12(a) (2003). Rule R-17(a) states an arbitrator must be impartial and independent and shall perform his duties with diligence and in good faith. *Id.* Rule R-17(a). An arbitrator is subject to disqualification for (i) partiality or lack of independence, (ii) inability or refusal to perform his or her duties with diligence and in good faith, and

(iii) any grounds for disqualification provided by applicable law. *Id.* Appellees then contended "there is no evidence that Mr. Figari does not meet all of the requirements of Rule R-17(a)." Thus, under rule R-17(b)[1], appellees urged the AAA to overrule appellants' objection to Figari serving on the arbitration panel.

After arbitration, appellees argued to the trial court the award should be vacated under section five of the Federal Arbitration Act because the award was not made by arbitrators who were appointed under the method provided in the trailer agreement.[2] In their brief in support of their motion to vacate the arbitration award, appellees further explained their argument

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[1] Rule R-17(b) states "[u]pon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive." AAA Rule R-17(b).

[2] Section five of the Federal Arbitration Act states the following:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C. § 5 (2009).

to mean the trailer agreement did not require the party-appointed arbitrators to be "independent and *impartial.* Nor does the Agreement allow the AAA to disqualify a party's appointed arbitrator for partiality, bias, or any other basis." They continued to argue that because their right to select an arbitrator was governed by the standards in the trailer agreement, the impartiality standard set out in the AAA rules was inapplicable. Essentially, appellees argued to the trial court they had a right to a non-neutral arbitrator. This, however, is not the argument they raised to the AAA in response to appellants' objection to Figari.

In fact, they repeatedly argued to the arbitration panel that Figari was neutral and met the rules of impartiality and independence as required under rule R-17(a). They specifically stated "there is no evidence that Mr. Figari does not meet all of the requirements of Rule R-17(a)." At no time did they object or argue to the arbitration panel that they had a right to a non-neutral arbitrator that did not meet the requirements of independence and impartiality, nor have they cited us to any such record reference. Not until after the arbitration panel ruled against them did appellees then assert this new argument to the trial court.

As noted above, appellees did not raise the argument they now make on appeal to the arbitrating entity (AAA) or the arbitration panel prior to the arbitration proceeding. *See, e.g., Kendall Builders, Inc. v. Chesson,* 149 S.W.3d 796, 806 (Tex.App.–Austin 2004, pet. denied) ("A party may not sit idly by during an arbitration procedure and then collaterally attack that procedure on grounds not raised before the arbitrator when the result turns out to be adverse."); *Bossley v. Mariner Fin. Group, Inc.,* 11 S.W.3d 349, 351-52 (Tex.

App.–Houston [1st Dist.] 2000), *aff'd,* 79 S.W.3d 30 (Tex.2002).

We acknowledge that rule R-17(a)(iii) allows the parties to agree in writing that arbitrators directly appointed by a party under rule R-12 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence. AAA Rule R-17(a)(iii). However, both parties conceded at oral argument there is no document in the record showing the parties agreed to use a non-neutral arbitrator. Had the appellees asserted their alleged right to a non-neutral arbitrator to the AAA or the arbitration panel, the objection they later raised to the trial court might not have been waived, and thus available to sustain the trial court's holding in appellees' favor. However, on the record before us, appellees waived their argument that they were entitled to appoint Figari as a non-neutral arbitrator. *Kendall,* 149 S.W.3d at 806; *Bossley,* 11 S.W.3d at 351-52.

Appellees contend the arbitration panel's authority to enter the award is a claim of fundamental error that cannot be waived and cite to a 1986 Second Circuit case. *See Avis Rent A Car Sys., Inc. v. Garage Employees Union, Local 2 72,* 791 F.2d 22 (2d Cir.1986). However, we are persuaded by the holding in *Brook v. Peak International, Ltd.,* 294 F.3d 668, 673 (5th Cir.2002), in which the court determined the "failure to file a clear written objection to a defect in the [arbitrator] selection process constitutes waiver." Because appellees failed to file a clear written objection to the arbitration panel regarding the defect they now complain about on appeal, their issue is waived.

Further, before proceeding to arbitration, appellees could have sought an order from a district court compelling arbitration before what they considered a properly selected arbitrator. *See* 9 U.S.C.A. § 4 (2009) ("A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction ... for an order directing that such arbitration proceed in a manner provided for in such agreement."); *Brook,* 294 F.3d at 673. This they failed to do.

Thus, we agree with appellants and conclude appellees waived the argument they made below regarding whether the panel was appointed in violation of the method provided for in the arbitration agreement. We sustain appellants' first issue. Because the trial court expressly stated in its findings of fact and conclusions of law that "because the Court has found that the Award is void and had no binding effect, the remaining grounds raised by Defendants for vacating the Award are moot and, therefore, the Court has not reached them," we likewise will not consider them.

We reverse and remand to the trial court for further proceedings.

APPENDIX E

DISTRICT COURT OF DALLAS COUNTY, TEXAS

NO. DC-07-06538

ROBERT L. MYER AND STRIDER MARKETING GROUP, INC., PLAINTIFFS

v.

AMERICO LIFE, INC., AMERICO FINANCIAL LIFE AND ANNUITY INSURANCE COMPANY, GREAT SOUTHERN LIFE INSURANCE COMPANY, THE OHIO STATE LIFE INSURANCE COMPANY, AND NATIONAL FARMER'S UNION LIFE INSURANCE COMPANY, DEFENDANTS

October 15, 2008

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Texas Rule of Civil Procedure 297, the Court makes the following findings of fact and conclusions of law:

Findings of Fact

1. Plaintiffs Robert L. Myer ("Myer") and Strider Marketing Group, Inc. ("Strider") and Defendants Americo Life, Inc. ("Americo"), Americo Financial Life and Annuity Insurance Company, Great Southern Life Insurance Company, and The Ohio State Life Insur-

ance Company (collectively, "Defendants") are parties to a New Trailer Agreement dated October 1, 1998.

2. Section 3.3 of the New Trailer Agreement provides as follows:

> *In the event of any dispute arising after the date of this Agreement among the parties hereto with reference to any transaction contemplated by this Agreement the same shall be referred to three arbitrators. Americo shall appoint one arbitrator and Myer shall appoint one arbitrator and such two arbitrators to select the third (For purposes of this Section, "Myer" shall mean Myer and Myer's Affiliates, including Strider, and "Americo" shall mean Americo and its Affiliates, including the Americo Companies). Each Arbitrator shall be a knowledgeable, independent businessperson or professional. If either Americo or Myer refuses or neglects to appoint an arbitrator within 30 days after receipt of the written request for arbitration, the initiating party may appoint a second arbitrator. If the two arbitrators fail to agree on the selection of a third arbitrator within 30 days of their appointment, each of them shall name three individuals, of whom the other shall decline two, and the decision shall be made by drawing lots.*
>
> *Americo and Myer shall bear the expense of their own arbitration, including their arbitrator and outside attorneys' fees and shall jointly and equally bear with the other parties the expense of the third arbitrator. Any remaining costs of the arbitration proceedings shall be appointed by the three arbitrators.*
>
> *The arbitration proceedings shall be conducted in accordance with the commercial arbitration rules of*

the American Arbitration Association, except that Americo and Myer each shall be entitled to take discovery as provided under Federal Rules of Civil Procedure Nos. 28 through 36 during a period of 90 days after the final arbitrator is appointed and the arbitrators shall have the power to issue subpoenas, compel discovery, award sanctions and grant injunctive relief. The arbitrators shall be entitled to retain a lawyer to advise them as to legal matters, but such lawyer shall have none of the relationships to Americo or Myer (or any of their Affiliates) that are proscribed above for arbitrators. The arbitration hearings shall commence no sooner than 120 days after the date the final arbitrator is appointed and not later than 180 days after such date. The arbitration hearing shall be conducted during normal working hours on Business Days without interruption or adjournment of more than two days at anyone time or six days in the aggregate. In rendering their decision, the arbitrators shall consider the parties' proportionate responsibility for the circumstances underlying the dispute being arbitrated. The arbitrators shall decide by majority vote of the arbitrators. The arbitrators shall deliver their decision to Americo and Myer in writing within 20 days after the conclusion of the arbitration hearing, which written decision shall include detailed findings of fact and conclusions of law. There shall be no appeal from their written decision, except as permitted by applicable law.

Any arbitration instituted pursuant to this Section shall be held in Dallas, Texas or such other city that is mutually agreeable to Americo and Myer, with the precise location within such city being as agreed up-

on by Americo and Myer or, absent such agreement, at a location within such city designated by the American Arbitration Association's resident manager in Kansas City, Missouri.

Notwithstanding any other provision of this Section, nothing contained in this Agreement shall require arbitration of any issue for which injunctive relief is properly sought by a party hereto; provided, however, that no party shall be entitled to seek or be awarded any Damages (as defined in the Purchase Agreement, which definition is incorporated herein by this reference) from another party except pursuant to arbitration in accordance with this Section 3.3. The arbitrators, if they find that any party has acted in a fraudulent manner with respect to any representation contained in, or any transaction contemplated by, this Agreement, may award punitive damages to the victim of such fraudulent conduct.

3. On February 11, 2005, Americo filed a demand for arbitration with the American Arbitration Association ("AAA") under Section 3.3 of the New Trailer Agreement naming Myer and Strider as respondents. The case was assigned AAA Case No. 71 195 Y 00072 05.

4. Also on February 11, 2005, Americo appointed Ernest J. Figari, Jr. as an arbitrator under Section 3.3 of the New Trailer Agreement.

5. Mr. Figari, who had served as an arbitrator in two previous arbitrations between Americo and Myer without objection by Myer, was a "knowledgeable and independent businessperson or professional" as required by Section 3.3 of the New Trailer Agreement.

6. Americo argues that the first paragraph of Section 3.3 of the New Trailer Agreement provides for the

exclusive method of selecting arbitrators and that AAA's rules concerning the impartiality of an arbitrator constitute an interference with that aforementioned method of selecting an arbitrator. Americo argues that the language of the arbitration agreement contemplates that it is allowed to select an arbitrator of its choice and, so long as its choice meets the criteria in the first paragraph of Section 3.3 of the New Trailer Agreement (any dispute of which is to be determined by a Court, not AAA), such choice cannot be disturbed by AAA. Furthermore, Americo contends that the language in the third paragraph of Section 3.3 of the New Trailer Agreement, *viz.,* "The arbitration proceedings shall be conducted in accordance with the commercial arbitration rules of the American Arbitration Association, ..." relates to the arbitration proceedings themselves, as opposed to the selection of the arbitration panel, which occurs before the arbitration proceedings commence.

7. On the other hand, Myer and Strider argue that wherein the third paragraph of Section 3.3 of the New Trailer Agreement provides, "The arbitration proceedings shall be conducted in accordance with the commercial arbitration rules of the American Arbitration Association . . .", such language incorporates AAA's rules concerning the impartiality of an arbitrator, and AAA can, pursuant to such rules, disqualify a choice of any party to be an arbitrator.

8. As stated below in the Conclusions of Law, Section 3.3 of the New Trailer Agreement is ambiguous as to which of the interpretations in paragraphs 6 & 7, *supra,* constitutes the agreement of the parties because the language of Section 3.3 of the New Trailer Agree-

ment is reasonably susceptible to each of the foregoing interpretations.

9. The Court finds, as the trier of fact, that Americo's interpretation is the proper one constituting the "meeting of the minds" of the parties based on objective standards of standard contract law. Therefore, the first paragraph of Section 3.3 of the New Trailer Agreement contains the exclusive method agreed upon by the parties for appointing arbitrators, including the exclusive qualifications such arbitrators must meet, and the parties never agreed to any other method or qualifications.

10. Likewise, although the third paragraph of Section 3.3 of the New Trailer Agreement states that the arbitration proceedings shall be conducted in accordance with the commercial arbitration rules of the AAA, the parties did not intend, and did not agree, to use the AAA's arbitrator selection and qualification rules. Rather, in the first paragraph of Section 3.3, the parties expressly provided for their own method and procedure for selecting arbitrators, including their own agreed upon qualifications. Furthermore, the aforementioned language was intended to cover the arbitration proceedings themselves (such as the procurement of discovery, taking of evidence, procedure at hearings, *etc.)* but not the selection of the arbitration panel, which is something that necessarily takes place before the arbitration proceedings.

11. In a letter to the AAA dated March 15, 2005, Myer and Strider objected to Americo's appointment of Mr. Figari as an arbitrator on the grounds that he was not "neutral," solely because he had served as an arbitrator in the prior two arbitrations. Myer demanded that the AAA require Americo to appoint an arbitrator

who satisfied the AAA's then current version of the AAA's Commercial Arbitration Rules.

12. In a letter to the parties dated March 28, 2005, the AAA sustained Myer and Strider's objection to Americo's appointment of Mr. Figari and removed Mr. Figari as an arbitrator.

13. In a letter to the AAA dated April 1, 2005, Americo asserted a standing objection to the AAA's removal of Mr. Figari. Americo's standing objection stated, among other things, the following:

> *The decision of the American Arbitration Association ("AAA") on this matter is in error and introduces serious error into this proceeding from the outset. See 9 U.S.C. § 5 (if a method of selecting the arbitrator is provided for in the agreement between the parties, "such method shall be followed"). The intervention of the AAA into the issue of arbitrator selection is improper under the circumstances presented here.*
>
> *Americo never agreed with Myer or the AAA to have objections to the qualifications of a designated arbitrator decided by the AAA. As set out in Americo's response to Myer's objection to Mr. Figari, the AAA Commercial Arbitration Rules do not govern the selection of and qualifications for arbitrators to hear disputes between Americo and Myer. The New Trailer Agreement (the "Agreement"), which contains the arbitration provision applicable here, states that each party shall appoint one arbitrator and the two party-appointed arbitrators shall then select a third panel member. (New Trailer Agreement, § 3.3.) The Agreement states that "[e]ach arbitrator shall be a knowledgeable, independent businessperson or professional. " (Id.) Once a Panel has been selected, the Agreement provides that the "arbitration proceed-*

ings" shall be conducted according to the AAA rules. (See id.)

Mr. Figari is "a knowledgeable, independent businessperson or professional". Therefore, he is a proper designee for the Panel to hear this matter.

* * *

Americo and Myer expressly agreed on a method for selecting arbitrators and on the qualifications for persons designated to serve on the panel. Nothing in the Agreement (or the AAA rules for that matter) authorizes the AAA to decide issues related to arbitrator selection or qualifications. Mr. Figari possesses the necessary qualifications, but if Myer thinks he does not, the AAA is not the tribunal to decide this issue.

If the AAA stands by its decision to remove Mr. Figari from the Panel, Americo will proceed to arbitrate this matter subject to and without waiving its objection to the AAA's decision and without waiver of the right to appeal any decision in this matter based on the erroneous removal of Mr. Figari as Americo's designated member of the Arbitration Panel. See Brook v. Peak Int'l, Ltd., 294 F. 3d 668, 673 (5th Cir. 2002). Americo hereby places its standing objection to conducting this arbitration without Mr. Figari on the Panel and hereby "insist[s] upon the enforcement of [its] contractual rights" regarding the selection of the arbitration panel as provided for in its agreement with Myer. See id.

In sum, Americo objects to the AAA's removal of Mr. Figari from the Panel and will carry this objection throughout this proceeding.

14. In a letter to the AAA dated April 8, 2005, Myer and Strider responded to Americo's standing objection with the AAA. The response stated, among other things, the following:

> *In response to Americo's "standing objection" to an alleged error, Respondent states that Americo is free to have its "standing objection" in this proceeding.*

15. Americo never waived its standing objection and never agreed that the AAA could decide whether a person appointed as an arbitrator was a "knowledgeable, independent businessperson or professional" under Section 3.3 of the New Trailer Agreement.

16. The AAA had no authority to strike Mr. Figari.

17. Mr. Figari was qualified to serve as an arbitrator under the terms of the New Trailer Agreement.

18. On June 29, 2007, an AAA panel consisting of Richard A. Sayles, Joseph H. Hart, and Rodney D. Moore issued a final award (the "Award") in AAA Case No. 71 195 Y 00072 05.

19. Americo timely filed a motion to vacate the Award under the Federal Arbitration Act ("FAA").

20. This case was called to trial on July 8, 2008, and all parties appeared and announced ready.

21. Any findings of fact contained in the Conclusions of Law section below are hereby incorporated in this Findings of Fact section.

Conclusions of Law

1. The FAA governs the arbitration provision of the New Trailer Agreement.

2. Under Section 5 of the FAA, 9 U.S.C. § 5, the AAA was required to follow the arbitration selection

method contained in the first paragraph of Section 3.3 of the New Trailer Agreement.

3. As stated in paragraphs 6 & 7 of the Findings of Fact Section, *supra,* the Court concludes that the arbitration agreement, taken as a whole, is ambiguous, because the arbitration agreement is reasonably susceptible to each of the foregoing interpretations. The AAA rules regarding the selection and qualifications of arbitrators do not apply because the parties agreed to specific procedures and standards for appointing arbitrators.

4. The New Trailer Agreement does not require party-appointed arbitrators to be "neutral" or to meet the "impartial and independent" standard of Rule R-17 of the AAA commercial arbitration rules.

5. The AAA failed to follow the arbitration selection method contained in the first paragraph of Section 3.3 of the New Trailer Agreement by not allowing Americo's appointee, Ernest Figari, Jr., to sit on the arbitration panel.

6. Because the Award in AAA Case No. 71 195 Y 00072 05 was not issued by a properly appointed and authorized arbitration panel, the Award is void and has no binding effect.

7. Because the Court has found that the Award is void and has no binding effect, the remaining grounds raised by Defendants for vacating the Award are moot and, therefore, the Court has not reached them.

8. Any conclusions of law included in the Findings of Fact section above are hereby incorporated into this Conclusions of Law section.

Signed this the 15th day of October, 2008.

/s/ *Carl Ginsberg*

THE HON. CARL GINSBERG
193rd Judicial District Court

APPENDIX F

DISTRICT COURT OF DALLAS COUNTY, TEXAS

NO. DC-07-06538

ROBERT L. MYER AND STRIDER MARKETING GROUP, INC., PLAINTIFFS

v.

AMERICO LIFE, INC., AMERICO FINANCIAL LIFE AND INSURANCE ANNUITY COMPANY, GREAT SOUTHERN LIFE INSURANCE COMPANY, THE OHIO STATE LIFE INSURANCE COMPANY, AND NATIONAL FARMER'S UNION LIFE INSURANCE COMPANY, DEFENDANTS

July 15, 2008

ORDER

Came on for consideration this day the motion filed by Defendant Americo Life, Inc. ("Americo")[1] to modify or vacate the arbitration award entered in American Arbitration Association Case No. 71 195 Y 00072 05 (the "Award"). Also came on for consideration this day the motion filed by Plaintiffs Robert L. Myer and Strider Marketing Group, Inc (collectively "Myer") to confirm the Award. Having considered the pleadings, the evidence before the Court, the arguments of coun-

[1] The reference the Defendant Americo includes all Defendants listed in the style of this case.

sel and all other materials properly before the Court, the Court finds that Americo's motion to vacate should be granted and Myer's motion to confirm should be denied.

It is, therefore, ORDERED that Americo's motion to vacate the Award in American Arbitration Case No. 71 195 Y 00072 05 be and is hereby GRANTED.

It is further ORDERED that Myer's motion to confirm the Award in American Arbitration Case No. 71 195 Y 00072 05 be and is hereby DENIED.

It is further ORDERED that the Award in American Arbitration Case No. 71 195 Y 00072 05 be and is hereby VACATED.

Signed this 15th day of July, 2008.

/s/ *Carl Ginsberg*

Dallas County District Judge

APPENDIX G

AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION RULES
DALLAS, TEXAS

NO. 71 195 Y 00072 05

AMERICO LIFE, INC., CLAIMANT

v.

ROBERT L. MYER AND STRIDER MARKETING GROUP, INC., RESPONDENTS

June 29, 2007

FINAL AWARD

KATHLEEN GOSSETT-CANTRELL, CASE MANAGER.

JOSEPH H. HART, ARBITRATOR/PANEL CHAIR, and RODNEY D. MOORE and RICHARD A. SAYLES, ARBITRATORS.

THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration agreement entered into by the above-named parties and dated October 1, 1998, and having been duly sworn, and having heard the proofs and allegations of the parties, issue their FINAL AWARD as follows:

A. Recitals

1. The parties to the dispute in arbitration are AMERICO LIFE, INC. ("Americo"), Claimant, and ROBERT L. MYER and STRIDER MARKETING GROUP, INC. ("Strider"), Respondents (sometimes collectively referred to as "Myer"). Each side seeks affirmative relief and declaratory relief.

2. Americo and Myer are parties to a New Trailer Agreement dated October 1, 1998. In paragraph 3.3 of the New Trailer Agreement the parties agreed to submit to arbitration any subsequent dispute with reference to any transaction contemplated by the New Trailer Agreement. The disputes submitted to the arbitrators arose after the date of the New Trailer Agreement and are in reference to transactions contemplated by the New Trailer Agreement. Therefore, the arbitrators have jurisdiction to rule on all disputes covered by this Final Award.

3. Paragraph 3.3 of the New Trailer Agreement states that the arbitration should be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("Rules"). The arbitration was conducted in accordance with the Rules; any deviation from the Rules has been agreed to by the parties, or objections to such deviations were waived.

4. The parties agreed to an Amended Scheduling Order which was signed on February 22, 2007, by arbitrator Joseph H. Hart for the panel. Any deviations from the timing and scheduling set out in the Amended Scheduling Order were agreed to by the parties, or objections to such deviations have been waived.

5. The parties agreed that the location of the arbitration would be Dallas, Texas.

6. Paragraph 3.3 of the New Trailer Agreement provided that there shall be no appeal from the Final Award, except as permitted by applicable law.

7. Paragraph 3.3 of the New Trailer Agreement provides for a panel of three independent arbitrators, two named by the parties and the third selected by the two party-named arbitrators. Richard A. Sayles of Dallas, Texas and Rodney D. Moore of South Padre Island, Texas served as the party appointed arbitrators. Pursuant to the agreement of the parties, Joseph H. Hart of Austin, Texas was appointed by the American Arbitration Association as the third arbitrator. The arbitrators were chosen and have served pursuant to the terms of the agreements of the parties.

8. Legal counsel for Americo are Edwin R. DeYoung, John K. Schwartz, Roger B. Cowie and Barbara Ellis of Locke Liddell and Sapp, LLP, of Dallas and Austin, Texas. Legal counsel for Myer are D. Douglas Brothers and Julie A. Ford of George & Brothers and Peter E. Ferraro, Ferraro, P.C., all of Austin, Texas.

9. Both parties submitted motions for partial summary judgment, and both motions were denied.

10. The arbitration hearing of all claims on the merits took place in Dallas, Texas between March 26, 2007 and April 3, 2007 and on May 15, 2007. Both parties appeared through their representatives and through counsel. On May 15, 2007, after counsel announced that each side had fully presented its evidence and arguments, the arbitrators declared that the arbitration was closed. On May 17, 2007 Americo moved to re-open the hearing for the limited purpose of admitting Exhibit C-282 into evidence. The arbitrators granted the motion over the objection of Myer, and,

after receipt of Exhibit C-282, the arbitration hearing on the merits was closed on June 1, 2007.

In a letter dated June 7, 2007, counsel for Myer moved to re-open the hearing for the limited purpose of admitting portions of the deposition testimony of Robert L. Myer which were attached to the letter. (The letter refers to a deposition taken on March 7, 2007; the certification to the deposition transcript attached to the letter states that the deposition was taken on March 19, 2007.) Americo did not oppose Myer's request. Therefore, the arbitrators granted the motion, re-opened the hearing for the limited purpose stated, and, after receipt of the deposition testimony attached to the June 7, 2007 letter, the arbitration hearing on the merits was closed on June 12, 2007.

On June 20, 2007, the arbitrators re-opened the hearing to allow the parties to state their position on whether Section 3.3 or Section 3.5 or the New Trailer Agreement governed the award of attorneys' fees, costs and the expense of the third arbitrator. The parties responded on June 21 and June 22, 2007, and on June 22, 2007, the arbitration hearing on the merits was closed.

B. Factual Background, Contentions of the Parties and Issues.

The factual background, contentions, and issues are grouped and discussed below according to the area of dispute. In general, the disputes between the parties relate to Americo's October, 1998, purchase of several insurance marketing and related businesses from Myer. The purchase involved several contracts, including a Purchase Agreement, an Old Trailer Agreement, and the New Trailer Agreement. Two arbitrations

relating to other disputes between the parties have been conducted prior to this arbitration.

1. Qualifying Production and Basis Points

a. Background

As part of the consideration for the purchase Americo, pursuant to the New Trailer Agreement, agreed to pay Myer, through Strider, his wholly owned affiliate, an annual bonus, or "trailer," on certain new business generated during a five-year Qualifying Period. The parties agreed to a trailer of 25 basis points (.25%) of the accumulation accounts for each policy subject to the New Trailer Agreement. However, if the Qualifying Production, as defined in the New Trailer Agreement, did not reach $515 million during the five year Qualifying Period, the amount of the trailer payment would be reduced based upon a sliding scale.

As part of the formula for determining Qualifying Production, different insurance products were to be given different credit or weight. The two products that are the focus of this arbitration (for determination of the Qualifying Production) are flexible premium deferred annuities ("FPDA") and single premium deferred annuities ("SPDA"). FPDA products were given a weight of 100%, and SPDA products were given a weight of 30%.

FPDA products allow a policyholder to make two basic types of premium payments: (1) a single premium payment, including a single payment from a preexisting account or product (referred to as rollover or dump-in payments) and (2) additional premium payments over time, often through monthly payroll deductions (referred to as flow or periodic premiums). The applications for FPDA products indicated the amount

and nature of the premium payments to be expected during the first year.

Although a policyholder could choose to pay only one premium into a FPDA product, the nature of the product itself was to permit multiple premiums over time. In contrast, SPDA products allowed only one premium.

Qualifying Production was measured by "premiums received" during the first policy year. For FPDA products "premiums received" were calculated "by multiplying the aggregate expected first year premiums (as reflected on the applications) from flexible premium deferred annuities issued during the Qualifying Period by 100%."

A core dispute is whether single rollover or dump-in premiums (as opposed to periodic premiums) are considered "premiums received" for FPDA products and should, therefore, be given 100% credit, rather than 30% credit in arriving at the amount of Qualifying Production. If all premiums for FPDA products had been credited at 100%, the Qualifying Production benchmark of $515 million would have been exceeded during the Qualifying Period, and Strider would be entitled to a compensation rate of 25 basis points. Conversely, if rollover or dump-in premiums had been given credit at 30%, the $515 million benchmark would not have been met, and compensation would be calculated at lower than 25 basis points.

b. Contentions

Americo contends that under the literal reading of the New Trailer Agreement single rollover or dump-in premiums paid for FPDA products are not entitled to any Qualifying Production credit. However, Americo

has given Myer 30% credit because it considers 30% to reflect the true intent of the parties.

Myer contends that the New Trailer Agreement unambiguously requires that all expected first year premiums, whether flow or periodic, rollover or dump-in, should be given 100% credit in the determination of Qualifying Production.

c. Issue

In determining Qualifying Production is Myer entitled to 30% credit or 100% credit for single, rollover or dump-in premiums paid for FPDA products?

2. Policies to which Bonus Applies

a. Background

Once the Qualifying Production was determined and the basis point rate ascertained, then under Section 2.1(a) and Schedule A of the New Trailer Agreement the bonuses were to be calculated and paid based on the year-end accumulation accounts for the policies subject to the New Trailer Agreement. Whether the basis point rate is applied to Qualifying Products only or to all Products described on Schedule A of the New Trailer Agreement is another core dispute between the parties. "Qualifying Production," "Qualifying Products" and "Products" are all defined terms in the Agreement. Qualifying Products are more limited in number and scope; the group of policies comprising Products is broader and includes a larger number of policies, as reflected by Schedule A. If the basis point rate is applied only to Qualifying Products, the bonus compensation to Myer is lower; if it is applied to all Products described on Schedule A, the bonus compensation is higher.

b. Contentions

Americo claims that the parties intended that compensation should be calculated by applying the basis points only to Qualifying Products. Myer contends that the unambiguous language of the New Trailer Agreement requires that compensation should be determined by applying the basis points to all Products described on Schedule A.

c. Issue

Should the bonuses be based on the accumulation accounts for all Products listed on Schedule A of the New Trailer Agreement or only for Qualifying Products?

3. Premiums in Suspense Accounts

a. Background

Some premiums which were received by Americo were placed in suspense accounts and not applied to the policy balances at the end of the year. Had the premiums in suspense been applied to the policy balances at the end of the year, the compensation to Myer would have been higher.

b. Contentions

Myer claims that the failure to apply the suspense account premiums to the policy balances at the end of the year resulted in reducing the compensation he should have received. Americo does not contest the fact that it received premiums before December 31 for which Myer was not given credit. Rather, it states that it was not unusual in the industry for there to be a small delay in posting premiums to accumulation accounts; since the accumulation accounts did not reflect these premiums until after December 31, the premi-

ums justifiably were not included in the annual New Trailer calculation.

c. Issue

Should premiums received before December 31 have been included in the accumulation account balances under the New Trailer Agreement?

4. Offsets

a. Background

Under certain circumstances under the Old Trailer Agreement, the Purchase Agreement and the New Trailer Agreement, Americo is entitled to offsets against payments otherwise owed to Myer. Americo did reduce amounts payable to Myer by exercising offsets based on the damages awarded to Americo in the two earlier arbitrations between the parties. The right to the offsets is a contested issue.

b. Contentions

Myer contends that no offsets were allowed under the Old Trailer Agreement unless the Qualifying Production in the Qualifying Period fell below $150,000,000. As the Qualifying Production exceeded the required amount, he urges that no right to offset existed. Myer further contends that under both the Old and New Trailer Agreements setoffs are allowed only for "liquidated" damages." Myer urges that neither award is final; therefore, damages awarded in the earlier arbitrations are not liquidated and cannot be set off against payments owed Myer. In this arbitration Myer seeks only interest on the amounts he claims were wrongfully offset.

Americo asserts the right to make offsets under the purchase documents as well as common law. Americo

does not contest that Qualifying Production exceeded $150,000,000. However, Americo urges that the awards in the first two arbitrations are final and that damages awarded are liquidated. Americo further contends that Myer agreed that damages awarded in the first arbitration could be used to offset payments owed and that Myer failed to timely object to the offsets, to Americo's prejudice. Americo asserts that Myer's complaints are barred by the affirmative defenses of waiver, laches and estoppel. In addition, Americo contends that Myer has failed to prove that he has been damaged as a result of the offsets.

c. Issue

Did Americo improperly exercise offsets against Old and New Trailers owed Myer, and, if so, how much has Myer been damaged?

5. Audit

a. Background

Under the New Trailer Agreement Myer has the right to audit and inspect the records of Americo to verify the propriety of the amounts paid. Whether Americo complied with the provision is disputed.

b. Contentions

Myer claims that he gave proper notice of his intent to audit and inspect the books. He claims that Americo demanded $100,000 in advance and then refused to provide Myer with the information requested. Americo claims that its demand for prepayment of costs was reasonable, that it provided the data during discovery in this arbitration, and that Myer's claims are barred by *res judicata* and/or collateral estoppel.

c. Issue

Did Americo wrongfully refuse Myer's audit request, and, if so, is Myer entitled to a declaration that he should have access to the books and records without advance payment and that he should be furnished an annual statement?

6. Acts Intended to Frustrate Efforts to Maximize Qualifying Production

a. Background

The New Trailer Agreement provides that Americo should refrain from acts or omissions that are purposefully intended to frustrate efforts to maximize the amount of Qualifying Production and the New Trailers.

b. Contentions

Myer contends that Americo, in breach of the New Trailer Agreement and its duty of good faith and fair dealing, engaged in numerous acts and omissions which indicated a purposeful intention to frustrate efforts to maximize the amount of Qualifying Production and the New Trailers; as a result, Myer claims he has been damaged. Americo denies that it engaged in any such acts or omissions. It urges that Myer's claims are barred by *res judicata* and/or collateral estoppel and that Myer has failed to prove damages resulting from the alleged acts or omissions.

c. Issue

Did Americo engage in acts or omissions that were purposefully intended to frustrate efforts to maximize the amount of Qualifying Production and the New Trailers? If so, has Myer adequately proven his damages resulting from the alleged acts or omissions?

7. Good Faith and Prepayment Amounts

a. Background

Section 11.9 of the Purchase Agreement provides that in the event the arbitrators determine that Americo has wrongfully failed to pay to Myer any portion of the Old Trailer or New Trailer when due, then Americo shall immediately pay to Myer an amount equal to the sum of the amount wrongfully withheld plus an amount equal to double the amount wrongfully withheld. Any double amount paid is deemed to be a prepayment of Americo's future obligations to pay trailers and, therefore, does not constitute a penalty in the sense of punitive or additional damages. If Americo shows that it acted in good faith, then the prepayment is not due.

b. Contentions

Americo urges that it has acted in good faith in calculating the trailers. Myer urges that Americo has failed to prove that it acted in good faith and that Myer is, therefore, entitled to prepayments.

c. Issue

Did Americo fail to prove that it acted in good faith as to any amounts wrongfully withheld?

8. Fraudulent Conduct

a. Background

Section 11.5 of the Purchase Agreement provides that if the arbitrators find that any party has acted in a fraudulent manner with respect to any representation contained in, or any transaction contemplated by the purchase documents, then the arbitrators may award punitive damages to the victim of the fraudulent conduct.

b. Contentions

Myer contends that Americo has acted in a fraudulent manner in numerous ways. Americo denies that any conduct on its part was fraudulent.

c. Issue

Did Americo act in a fraudulent manner with respect to any representation contained in, or any transaction contemplated by the purchase documents?

9. Declaratory Judgment

Each party seeks declaratory relief in support of its positions outlined above.

10. Attorneys' Fees and Costs

Each party seeks attorneys' fees and costs, including costs of arbitration, under Section 3.5 or the New Trailer Agreement. Each side has stipulated that the prevailing party may recover its attorneys' fees, costs and the expense of the arbitration, including the expense of the third arbitrator.

C. Findings of Fact and Conclusions of Law

The arbitrators make the following findings of fact and conclusions of law. To the extent that a finding could be characterized as a conclusion, or a conclusion as a finding, the arbitrators designate them as such.

1. Findings of Fact

a. Qualifying Production and Basis Points

1) The New Trailer Agreement requires that single, rollover or dump-in premiums paid for FPDA products should be given 100% and not 30% credit in determining Qualifying Production.

2) The Qualifying Production during the Qualifying Period exceeded $515 million.

3) In determining compensation under Section 2.1 of the New Trailer Agreement, Myer is entitled to a full 25 basis points (.25%).

4) By failing to apply the 25 basis points, Americo wrongfully failed to pay Myer $2,399,915.00 when due and payable.

b. Policies to which Bonus Applies

1) The New Trailer Agreement requires that the bonuses should be based on the accumulation accounts for all Products listed on Schedule A of the Agreement and not only for Qualifying Products.

2) Based on Americo's exclusion of the accumulation accounts for all Products on Schedule A of the New Trailer Agreement, Americo wrongfully failed to pay Myer $5,495,415.00 when due and payable.

c. Premiums in Suspense Accounts

Based on Americo's failure to include premiums in suspense in year end accumulation accounts, Americo wrongfully failed to pay Myer $17,824.00 under the New Trailer Agreement when due and payable.

d. Offsets

1) Myer has waived objection to, and is estopped from complaining about the offsets.

2) Myer has failed to prove that he has been damaged by the offsets.

e. Audit

Americo refused to provide Myer the right to audit and inspect the records of Americo in violation of the New Trailer Agreement.

f. Acts Intended to Frustrate Efforts to Maximize Qualifying Production

Americo did not engage in acts or omissions that were purposefully intended to frustrate efforts to maximize the amount of Qualifying Production and the New Trailers. In addition, Myer failed to prove his damages resulting from the alleged acts or omissions.

g. Good Faith and Prepayment Amounts

Americo failed meet its burden to prove by a preponderance of the credible evidence that it acted in good faith as to any amounts wrongfully withheld.

h. Fraudulent Conduct

Americo did not act in a fraudulent manner with respect to any representation contained in, or any transaction contemplated by the purchase documents.

i. Attorneys' Fees and Costs

Myer's reasonable and necessary attorneys' fees and costs are $1,299,708.95.

2. Conclusions of Law

a. Americo breached the New Trailer Agreement, as follows:

1) By improperly calculating Qualifying Production,
2) By omitting Products upon which bonuses were payable,
3) By improperly calculating year end accumulation balances due to omission of premiums in suspense, and
4) By not allowing access to Americo's books and records to allow audit and inspection.

b. Americo did not breach the New Trailer Agreement by offsetting damage awards against Old or New Trailer payments.

c. Americo did not breach the New Trailer Agreement or a duty of good faith and fair dealing by engaging in acts or omissions that were purposefully intended to frustrate efforts to maximize the amount of Qualifying Production and the New Trailers.

d. As Americo failed to prove that it acted in good faith in failing to make the required payments, Myer is entitled to the prepayment amounts required by Section 11.9 of the Purchase Agreement.

e. Declaratory Judgment

Myer is entitled to the declaratory relief requested.

D. Award

Based on the foregoing findings and conclusions, the arbitrators make the following FINAL AWARD:

1. Actual damages for breach of contract to be paid by Americo to Strider:

For underpayment due to failure to account for full 25 basis points: $2,399,915.00, plus interest through January 31, 2007 at 7%:	$2,849,172.00
For underpayment for failure to account for all Schedule A policies: $5,495,415, plus interest through January 31, 2007 at 7%:	$6,420,335.00
For underpayment for failure to include amounts in suspense at year end: $17,824.00, plus interest through January 31, 2007 at 7%:	$23,758.00

Total actual damages for breach of contract: $9,293,265.00

The arbitrators AWARD to Strider, and ORDER that Americo pay Strider $9,293,265.00 as actual damages, together with interest from February 1, 2007 at 7% to time of award and post-award interest at 7% until paid.

2. Prepayment amount (two times the amounts wrongfully withheld, i.e., $2,399,915.00 + $5,495,415 + $17,824.00 = $7,913,154): $15,826,308.00

The arbitrators AWARD to Strider, and ORDER that Americo pay Strider $15,826,308.00 as prepayment amount, together with post-award interest at 7% until paid.

Strider's right to future payments under the New and Old Trailer Agreements shall be reduced by the principal amount of the prepayment amount actually paid by Americo, provided, however, that Americo may not charge interest on such prepayments.

3. Attorneys' fees and costs: $1,299,708.95

The arbitrators AWARD to Myer and Strider, and ORDER that Americo pay Myer and Strider $1,299,708.95 as attorneys' fees and costs, together with post-award interest at 7% until paid.

4. Arbitration fees and expenses

The administrative fees and expenses of the American Arbitration Association, totaling $27,250.00 and the compensation and expenses of arbitrator Joseph H.

Hart, totaling $76,877.07, shall be borne by Americo. Therefore, the arbitrators ORDER that Americo shall reimburse Myer and Strider the sum of $57,188.53, representing that portion of said compensation and expenses previously incurred by Myer and Strider together with post-award interest at 7% until paid.

E. Declaratory Judgment

The arbitrators AWARD to Myer and Strider, and against Americo a declaratory judgment, as follows:

IT IS ORDERED AND DECLARED THAT:

1. The New Trailer Agreement requires Americo to provide to the New Trailer payee, without charge, access to the relevant books and records from which that party may verify the information relied upon for the payments and the methodology used to calculate same. Americo shall furnish the New Trailer payee (not less than annually and in hard copy and electronic form) statements in substantially the same form as Respondent's Exhibit 224.

2. The New Trailer Agreement requires that the rate of compensation on the accumulation accounts payable under the New Trailer Agreement is 25 basis points.

3. The New Trailer Agreement requires that bonuses be paid on the accumulation accounts of all products described in Schedule A, and as listed in Respondents' Exhibit 240A, together with all other Equity Indexed Annuity products sold by Americo during the Qualifying Period, with such bonuses to be consistent with the products on Schedule A that most closely resemble the new product.

F. Other Relief

1. This is a final award.

2. All relief sought by Americo is denied.

3. This Final Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

4. This Final Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

6/29/07 /s/ *Joseph H. Hart*
Date JOSEPH H. HART, ARBITRATOR/PANEL CHAIR

6/29/07 /s/ *Rodney D. Moore*
Date RODNEY D. MOORE, ARBITRATOR

6/29/07 /s/ *Richard A. Sayles*
Date RICHARD A. SAYLES, ARBITRATOR

APPENDIX H

AMERICAN ARBITRATION ASSOCIATION

NO. 71 195 Y 00072 05

AMERICO LIFE, INC., CLAIMANT

v.

ROBERT L. MYER AND STRIDER MARKETING GROUP, INC., RESPONDENTS

March 28, 2005

LETTER

[LOGO AND HEADER MATERIAL]

VIA TELECOPY ONLY

G. Alan Waldrop, Esq.
Locke Liddle & Sapp, LLP
100 Congress Avenue, Suite 300
Austin, TX 78701

Doug Brothers, Esq.
George & Brothers, LLP
114 W. Seventh Street, Suite 1100
Austin, TX 78701

Re: 71 195 Y 00072 05

Americo Life, Inc.

VS

Robert L. Myer, Strider Marketing Group, Inc.

- Dallas, Texas

Claim: $913,441.00

Counterclaim: $1,000,000.00

Gentlemen:

After careful consideration of the parties' contentions, the Association has determined Ernest Figari will be removed as arbitrator in this matter.

Accordingly, we ask Mr. Waldrop to designate a new party appointed arbitrator on or before April 7, 2005. Absent notification by that date, the Association will make the appointment as authorized in the Rules.

This will advise the parties the Association has appointed Rodney D. Moore to serve as arbitrator in the above-captioned matter. Mr. Moore has made the enclosed disclosure.

Please advise the Association of any objections to the appointment of Mr. Moore by April 4, 2005, copying the other side. The arbitrator shall not be copied on any comments related to the disclosure.

If any objections are raised, the other party may respond within five business days. The AAA will make a determination regarding the arbitrator's continued service, in accordance with the Rules.

As requested by the neutral, if either party or their counsel knows of any contact or conflict that may be relevant, they are to communicate this information to the Association within ten days.

Please do not hesitate to contact us with any questions and/or concerns.

Sincerely,

/s/ *Kathleen Cantrell*

Kathleen A. Gossett-Cantrell
Case Manager
888 774-6929
Cantrellk@sdr.org

Nicolle L. Wright
Supervisor
972 702 8222
WrightN@adr.org

KAGC/jdt

Encl.

cc: Rodney D. Moore, Esq. w/encl. VIA TELECOPY ONLY

APPENDIX I

SUPREME COURT OF TEXAS

NO. 12-0739

AMERICO LIFE, INC., AMERICO FINANCIAL LIFE AND ANNUITY INSURANCE COMPANY, GREAT SOUTHERN LIFE INSURANCE COMPANY, THE OHIO STATE LIFE INSURANCE COMPANY, AND NATIONAL FARMERS UNION LIFE INSURANCE COMPANY, PETITIONERS

v.

ROBERT L. MYER AND STRIDER MARKETING GROUP, INC., RESPONDENTS

October 3, 2014

ORDER

Today the Supreme Court of Texas denied the motion for rehearing in the above-referenced cause.

APPENDIX J

IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS

NO. DC-07-06538

ROBERT L. MYER AND STRIDER MARKETING GROUP, INC.,
PLAINTIFFS

v.

AMERICO LIFE, INC., AMERICO FINANCIAL LIFE AND INSURANCE ANNUITY COMPANY, GREAT SOUTHERN LIFE INSURANCE COMPANY, THE OHIO STATE LIFE INSURANCE COMPANY, AND NATIONAL FARMER'S UNION LIFE INSURANCE COMPANY, DEFENDANTS

September 28, 2007

DEFENDANTS' ORIGINAL ANSWER AND MOTION TO VACATE AND/OR MODIFY ARBITRATION AWARD

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* * *

MOTION TO VACATE AND/OR MODIFY ARBITRATION AWARD

* * *

7. Pursuant to § 12 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., Americo is filing this Motion to Vacate Arbitration Award within 90 days of the Panel issuing the Award and before entry of a

judgment confirming the Award. Americo fully reserves the right to supplement, modify, and amend this Motion after the Panel rules on Americo's Motion to Modify.

8. The Award must be vacated under FAA § 5 and applicable law, because the Award was not made by arbitrators who were appointed under the method provided in the Agreement. The Agreement provides that each party shall select its own arbitrator. Disregarding this plain and unambiguous language, the AAA refused to allow Americo's selected arbitrator to serve despite Americo's timely objection. Because arbitrators who are not selected in accordance with the arbitration agreement have no power to decide the case, the Award must be vacated in its entirety.

* * *

APPENDIX K

IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS

NO. DC-07-06538

ROBERT L. MYER AND STRIDER MARKETING GROUP, INC.,
PLAINTIFFS

v.

AMERICO LIFE, INC., AMERICO FINANCIAL LIFE AND INSURANCE ANNUITY COMPANY, GREAT SOUTHERN LIFE INSURANCE COMPANY, THE OHIO STATE LIFE INSURANCE COMPANY, AND NATIONAL FARMER'S UNION LIFE INSURANCE COMPANY, DEFENDANTS

July 2, 2008

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO VACATE AND/OR MODIFY ARBITRATION AWARD

TO THE HONORABLE DISTRICT COURT JUDGE:

Plaintiffs Robert L. Myer ("Myer") and Strider Marketing Group, Inc. ("Strider") (collectively "Plaintiffs") submit this brief in support of their petition for a judgment confirming the arbitration award issued in Case No. 71 195 Y 00072 05 by the American Arbitration Association, and in opposition to Defendants' Motion to Vacate and/or Modify Arbitration Award.

I. Summary of Argument

Under the Federal Arbitration Act ("FAA") a proceeding to confirm an arbitration award should be simple and routine. This is because the FAA mandates that, when a party applies to a court for an order confirming the award, the court "must grant such an order." 9 U.S.C. § 9. The *only* exceptions to this mandate are the extremely narrow and inflexible grounds to vacate or modify that are listed in sections 10 and 11 of the FAA.

Americo's Motion to Vacate ignores this clear law and attempts to re-litigate a number of substantive issue that have already been decided by the arbitration panel. In fact, the same arguments that Americo makes to this Court were also made to the arbitrators in a motion to modify, and were rejected.

None of the grounds pleaded by Americo to prevent confirmation of the award come even close to what is required to vacate or modify the award. However, because Americo has pleaded, shotgun-style, a laundry list of complaints, Plaintiffs' response to Americo's motion has required a brief whose length is disproportionate to the simple task before the Court.

Americo claims that the arbitrators "exceeded their authority" under FAA § 10(a)(4). On its face, this claim is wholly without merit. Americo argues only that the Panel got it wrong, which is simply no grounds for vacatur. While Plaintiffs briefly explain below that the arbitrators did *not* get it wrong, that is not a matter for this Court to decide.

* * *

Another complaint of Americo's is that the American Arbitration Association's decision to disqualify Americo's first two choices of arbitrators was improper.

Again, nothing in the FAA permits vacatur for a complaint of this nature. As explained in this brief, the AAA's action was fully authorized and completely proper.

* * *

IV. This Court's role in reviewing an arbitration award.

While Plaintiffs ask the Court to confirm the arbitration award, Americo seeks to vacate it pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C § 1 *et seq*. Under the FAA, this Court's duty is very clear. "Under the terms of § 9 [of the FAA], a court '***must*** ***confirm*** an arbitration award 'unless' it is vacated, modified, or corrected '***as prescribed***' in §§ 10 and 11." *Hall Street Associates, L.L.C v. Mattel, Inc.*, 128 S.Ct. 1396, 1402 (2008) (emphasis added).

The FAA sharply limits the grounds for challenging an arbitration award in court. A court has statutory authority under the FAA to vacate an award only in four narrowly defined situations:

> (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, fi-

nal, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

* * *

Similarly, the FAA does not allow a court to overrule an arbitrator who simply misinterprets a contract. *Int'l Chem. Workers Union v. Columbian Chem. Co.*, 331 F.3d 491, 494 (5th Cir. 2003). A court is "not free to vacate the Award on the ground that the Panel misread the contract." *Myer v. Americo Life, Inc.*, 232 S.W.3d 401, 409 (Tex.App.—Dallas 2007, no pet.) (citing *Garvey*, 532 U.S. at 509).

* * *

In short, the law is clear that an allegation that the arbitrators "got it wrong" is not the same thing as "exceeding their powers." Yet that is exactly the argument that Americo makes here. Americo simply disagrees with the arbitrators' interpretation and application of the Agreement. The FAA does not permit vacatur on that basis.

* * *

VI. None of the grounds for vacatur under § 10(a)(3) of the FAA exist in this case.

As discussed in Part V above, none of Americo's complaints about the Panel's findings fall within §10(a)(4) as occasions where the arbitrators "exceeded their powers." Americo also argues that the Panel committed procedural errors in conducting the arbitra-

tion that serve as grounds for vacatur under § 10(a)(3) of the FAA.[4] These arguments fail as well.

* * *

VIII. Americo's complaint about AAA's decision to disqualify two arbitrators is not a ground to vacate the award.

Americo argues that the award must be vacated under FAA § 5 and § 10(a)(3) because the American Arbitration Association disqualified Americo's first two choices for a party-appointed arbitrator. As explained below, this claim has no merit.

A. Factual Background.

The Agreement provides that any dispute between the parties regarding the purchase transaction "shall he referred to three arbitrators." *See* Agreement at § 3.3. It states in relevant part: "Americo shall appoint one arbitrator and Myer shall appoint one arbitrator and such two arbitrators to select [sic] the third..." "Each arbitrator shall be a knowledgeable, independent businessperson or professional." *Id*.

In the same section, the Agreement provides, "[t]he arbitration proceedings shall be conducted in accordance with the commercial arbitration rules of the American Arbitration Association" (adding certain exceptions that are not relevant here).

This was the third arbitration involving Americo and Bob Myer pursuant to the above described arbitration agreement. All three proceedings were instituted

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[4] Americo's complaint that the American Arbitration Association also committed procedural error before the Panel was appointed is addressed separately in Part VIII of this brief.

by Americo filing a claim against Myer before the American Arbitration Association.

For the first arbitration, Americo chose Ernest Figari as its party-appointed arbitrator. For the second arbitration, the parties ended up retaining the same panel to decide Americo's more recent complaints against Myer. Americo then instituted a third arbitration against Myer while the second arbitration was in progress.

Pursuant to AAA Rule R-12, Americo filed with the AAA its notice of appointment of Mr. Figari as its party-appointed arbitrator for the third arbitration. Plaintiffs immediately objected to Mr. Figari on the grounds that he was not neutral and had dissented in favor of Americo in the first arbitration. D.Ex.4.

Americo responded to Plaintiffs' objection stating that Mr. Figari had been a "neutral" arbitrator in both the first and second arbitrations. D.Ex.6. Americo emphatically argued that Americo and Myer had always agreed that their appointed arbitrators would be neutral pursuant to AAA R-17(a), stating:

> The AAA rules specifically provide that when each party has agreed to appoint one arbitrator, the arbitrators serve as neutral arbitrators unless specifically agreed otherwise. See AAA R-12(b), R-17(a). **Americo and Myer have never agreed that the appointed arbitrators will not be neutral.**

D.Ex.6 (emphasis added).

Americo went on to argue that Mr. Figari met the impartiality standards for neutral arbitrators set forth in AAA Rule 17(a). Although Americo's response added that "an argument can be made that the AAA rules do not govern the selection of and qualifications for arbitrators in this proceeding," no objection was made

on that basis. Instead, Americo affirmatively requested that AAA act in accordance with its rules, stating: "***Under AAA Rule R-17(b), Americo urges AAA to promptly overrule Myer's objection to Mr. Figari's service on the panel in this proceeding***." D.Ex.6.

Americo, therefore, instituted this arbitration with the AAA, clearly submitting to AAA jurisdiction to administer the arbitration and the AAA rules. *See* AAA R-2 (when parties agree to arbitrate under these rules or initiate a proceeding with AAA, they thereby authorize the AAA to administer the arbitration). Americo also specifically represented that the parties had always agreed that their appointed arbitrators were to be neutral under AAA Rule 17a. And it affirmatively asked AAA to overrule Myer's objections pursuant to AAA rules.

When Americo was notified that AAA had disqualified Mr. Figari, Americo objected, for the first time, that "AAA is not the tribunal to decide this issue." D.Ex.8. It was only *after* Americo lost on this disqualification issue that it flatly asserted that AAA did not have the authority to make the determination at all. Significantly, Americo made no attempt to take the dispute to a forum that Americo did believe had authority to decide the issue.

* * *

Plaintiffs objected to Americo's second choice, and fully briefed the AAA as to why Mr. Johnson could not meet the requirement of impartiality, independence and lack of bias. D.Ex.14.

Americo filed a lengthy response claiming that Mr. Johnson was qualified and that AAA lacked the authority to disqualify him. Again, Americo claimed AAA was not the proper forum to decide the issue of qualifi-

cation. However, it again failed to seek relief from a forum that it did believe had the power to decide the issue.

AAA, not surprisingly, determined that Mr. Johnson lacked the qualifications to serve as a neutral arbitrator.

At that point, Americo chose Mr. Richard Sayles as its neutral party-appointed arbitrator, and Plaintiffs made no objection. Plaintiffs appointed Mr. Rodney Moore, and the Honorable Joe Hart, a retired Travis County District Judge, was appointed as the third arbitrator.

* * *

C. AAA was the proper forum to determine whether an arbitrator met AAA's own standards.

Americo claims that AAA did not have the authority to disqualify Americo's choice of arbitrator. Under Americo's interpretation of the Agreement, the provision that the arbitration proceeding would be conducted in accordance with AAA rules was not supposed to kick in until *after* the appointment of the arbitrators. Americo's own actions were contrary to this interpretation. In all three arbitrations, Americo first filed a claim against Myer with the AAA, and the arbitrators were selected in accordance with AAA rules under AAA administration.

Further, even if the parties had managed to get through the appointment process on their own with no participation by the AAA, under Americo's own interpretation the *proceeding* was still to be governed by AAA rules. Under those rules, the AAA can disqualify an arbitrator *at any time*, AAA Rule 17(b) states,

> Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

Americo had been perfectly content to follow AAA rules as to they applied to the appointment of arbitrators. Americo filed its notice of its choice of arbitrator as required by those rules, disclosures were made pursuant to those rules, and Americo continued to follow AAA rules even after Plaintiffs had objected to Mr. Figari. It was only after AAA decided against Americo that Americo claimed the selection rules did not apply.

Americo's real argument is that, although the parties clearly agreed that arbitration would be according to AAA rules, Americo should be able to pick and choose which of those rules ought to apply. There is nothing in the Agreement that remotely supports this position. The rule is simple: when the parties agree to arbitrate under certain rules, they are bound by those rules. *See In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 574 (Tex. 1999, orig. proceeding); *In re Scott*, 100 S.W.3d 575, 579 (Tex.App.–Fort Worth 2003, orig. proceeding).

D. AAA's actions, even if in error, are not grounds for vacatur

As described earlier in this brief, the grounds for vacating an arbitration award, which are set out in Section 10 of the FAA, are very narrow. If the AAA's decision to disqualify Americo's first two choices of arbitrator had been in error, that decision did not con-

stitute the type of "egregious departure" from the parties agreement that would justify vacatur under Section 10. *See Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396 (2008).

In a case involving a similar complaint and similar arbitration clause, the Texas Supreme Court recognized that the FAA does not provide an after-the-fact remedy for an alleged improper disqualification. In *In re Louisiana Pacific Corp.*, 972 S.W.2d 63, 67 (Tex. 1998), Louisiana Pacific withdrew its party-appointed arbitrator, to satisfy the opposing party's objection, and named another arbitrator instead. The opposing party objected, saying that Louisiana Pacific had only one opportunity to designate its arbitrator, and having done so once, the trial court should designate the arbitrator. The trial court granted the request and chose an arbitrator for Louisiana Pacific.

On a writ of mandamus, the Texas Supreme Court held that Louisiana Pacific was entitled to choose another arbitrator under the terms of the contract. Of significance to the present case, the Supreme Court found that mandamus was the appropriate remedy because Louisiana Pacific had no remedy to appeal the trial court's action (which was akin to a wrongful disqualification) because Section 10 of the FAA did not provide for judicial review of such action. *Id.* at 65.

Similarly, the Dallas Court of Appeals recently stated, "It is not clear that the FAA authorizes vacatur of an arbitration award based on the AAA' s allegedly erroneous disqualification of an arbitrator for partiality under its own procedural rules. The FAA authorizes vacatur for 'evident partiality' of arbitrators ... but not for an arbitral body's disqualification of an arbitrator under its own rules and standards." *McGrath v. FSI*

Holdings, Inc., 246 S.W.3d 796, 809 (Tex.App.—Dallas 2008, no pet.).

A month after the opinion in *McGrath*, the U.S. Supreme Court issued its opinion in *Mattel*, showing that the Dallas court had been prescient on whether an erroneous disqualification could ever support vacatur under Section 10. *Mattel* makes clear that the facts in this case could never justify vacatur. Section 10's grounds for vacatur are exclusive, narrow and inflexible, and cannot be stretched to include an erroneous disqualification of an arbitrator. *See Mattel*, 128 S.Ct. at 1403-05.

Even if some challenge were possible in the wake of *Mattel*, Americo would be required to demonstrate, at a minimum, a showing of "manifest disregard" by AAA of its own rules. *See McGrath*, 246 S.W.3d at 809 (AAA decision to disqualify an arbitrator under its partiality or lack of independence standard did not constitute a manifest disregard for its own rules). No such showing is remotely possible in this case.

* * *

APPENDIX L

IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS

NO. DC-07-06538

ROBERT L. MYER AND STRIDER MARKETING GROUP, INC.,
PLAINTIFFS

v.

AMERICO LIFE, INC., AMERICO FINANCIAL LIFE AND ANNUITY INSURANCE COMPANY, GREAT SOUTHERN LIFE INSURANCE COMPANY, THE OHIO STATE LIFE INSURANCE COMPANY, AND NATIONAL FARMER'S UNION LIFE INSURANCE COMPANY, DEFENDANTS

August 13, 2008

MOTION FOR RECONSIDERATION

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* * *

Myer contends the AAA had authority to make decisions regarding disqualification of party-appointed arbitrators and Defendants contend it did not.

* * *

APPENDIX M

IN THE FIFTH COURT OF APPEALS OF TEXAS

NO. 05–08–01053–CV

ROBERT L. MYER AND STRIDER MARKETING GROUP, INC., APPELLANTS

v.

AMERICO LIFE, INC., AMERICO FINANCIAL LIFE AND ANNUITY INSURANCE COMPANY, GREAT SOUTHERN LIFE INSURANCE COMPANY, THE OHIO STATE LIFE INSURANCE COMPANY, AND NATIONAL FARMER'S UNION LIFE INSURANCE COMPANY, APPELLEES

November 12, 2008

BRIEF OF APPELLANTS

* * *

SUMMARY OF THE ARGUMENT

The law is clear that a litigant unhappy with an arbitration award only has grounds for a trial court order vacating the arbitration award in the circumstances outlined in the Federal Arbitration Act ("FAA"). This case is not one of them. Because the trial court's order vacating the arbitration award in favor of Myer was error, this Court should reverse the trial court's judg-

ment and render judgment confirming the arbitration award.

It is undisputed that the three arbitrators who issued the unanimous arbitration award to Myer were appointed as provided in the parties' Arbitration Agreement. The Arbitration Agreement states that "Americo shall appoint one arbitrator and Myer shall appoint one arbitrator and such two arbitrators to select the third." Americo appointed Richard Sayles; Myer appointed Rodney Moore; and the parties agreed on Joseph Hart as the third member of the arbitration panel. Americo's real complaint is that it was not allowed its first choice for an arbitrator. But nothing in the Arbitration Agreement or the law provides Americo that right.

* * *

Finally, even if the AAA erred in disqualifying Figari (which Myer disputes), an allegedly improper disqualification of an arbitrator is not a proper ground for vacating an arbitration award. In fact, none of Americo's grounds for vacating the arbitration award are proper under the Federal Arbitration Act ("FAA"). The FAA—which the parties agree governs their arbitration—lists the specific grounds on which a trial court may vacate an arbitration award. And an allegedly improperly disqualified arbitrator is not one of those grounds. Nor are any of other arguments raised by Americo proper grounds for vacating on arbitration award. Even when the arbitrators make wrong factual findings or misinterpret the contract, the arbitration

award is to be confirmed.[67] Because none of the grounds for judicial vacatur apply in this case, the trial court erred. This Court should, therefore, reverse the trial court's judgment vacating the arbitration award and render judgment confirming the arbitration award in Myer's favor.

ARGUMENT

STANDARD OF REVIEW

Under the Federal Arbitration Act, Section 9, a court must confirm an arbitration award unless it is vacated, modified, or corrected as prescribed in Sections 10 and 11.[68] A court has statutory authority under the FAA to vacate an arbitration award only when: (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrators, or either of them; (3) 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) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award on the subject matter submitted was not made.[69] None of these grounds were alleged by Americo.

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[67] *See Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 394 (5th Cir. 2003); *Myer v. Americo Life, Inc.*, 232 S.W.3d 401, 409 (Tex. App.—Dallas 2007, no pet.).

[68] *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396, 1402 (2008).

[69] *See* 9 U.S.C. § 10(a).

Americo's actual complaint is that the AAA improperly disqualified its first choice for an arbitrator. But notably, a complaint about an allegedly improper disqualification of an arbitrator is not one of the grounds for vacating an arbitration award authorized under the FAA. This makes sense, since the deference afforded to arbitration awards would be undermined if parties could appoint unqualified arbitrators, then rely on the AAA's administrative disqualification of the arbitrator, under the AAA's rules, as a basis to try to avoid an unfavorable arbitration award after the fact.

Finally, the court of appeals reviews the trial court's decision to vacate an arbitration award *de novo* under the FAA.[70] The review of an arbitration award, however, is usually "extraordinarily narrow" and "exceedingly deferential" to the arbitration panel.[71] Indeed, it is presumed under the FAA that arbitration awards will be confirmed.[72] The court may not review the arbitrators' decision on the merits even if it is alleged that the decision is based on factual error or it misinterprets the parties' agreement.[73] Courts have no business re-litigating the merits of an underlying claim

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[70] *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 996 (5th Cir. 1995).

[71] *Hughes Training Inc. v. Cook*, 254 F.3d 588, 593 (5th Cir. 2001), cert. denied, 534 U.S. 1172 122 S.Ct. 1196 (2002); *see Sarofim v. Trust Co.*, 440 F.3d 213, 216 (5th Cir. 2006); *see also First Options of Chicago v. Kaplan*, 514 U.S. 938, 942 (1995) (vacatur should only occur in "very unusual circumstances").

[72] *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000), cert. denied, 531 U.S. 878 (2000).

[73] *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001); *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36 (1987).

in reviewing an arbitration decision.[74] When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's improvident, even silly, fact-finding does not provide a basis for a reviewing court to refuse to enforce the award.[75] A court cannot vacate an award for errors in interpretation of law or findings of fact, or for insufficiency of the evidence.[76] Further, a court is not free to vacate the award on the ground that the arbitration panel misread the contract.[77] Even a serious of error of law or fact does not suffice to overturn the arbitrator's decisions under the FAA.[78] Therefore, "'[d]isputes that are committed by contract to the arbitral process almost always are won or lost before the arbitrator. Successful court challenges are few and far between.[79]

* * *

E. Under the Federal Arbitration Act, an allegedly improper disqualification of an arbitrator is not a proper ground for vacating an arbitration award.

Finally, an allegedly improper disqualification of an arbitrator is not a proper ground for vacating an arbi-

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[74] *See Major League*, 532 U.S. at 509.

[75] *Id.* (quoting *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 39 (1987)).

[76] *Lennox-Investment Corp., Bank of America N.A.*, 2002 WL 979563, *6 (Tex. App.–Dallas, May 14, 2002) (not designated for publication).

[77] *Myer*, 232 S.W.3d at 409.

[78] *See Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 394 (5th Cir. 2003).

[79] *Gupta v. Cisco Sys., Inc.*, 274 F.3d 1, 3 (1st Cir. 2001) (*quoting Keebler Co. v. Truck Drivers, Local 170*, 247 F.3d 8, 10 (1st Cir. 2001)).

tration award under the FAA.[125] The FAA mandates that when a party seeks a trial court order confirming an arbitration award, the court "*must grant* such order."[126] The only exceptions to this mandate are the grounds to vacate or modify listed in Sections 10 and 11 of the FAA. A trial court has statutory authority under the FAA to vacate an arbitration award only in the following four situations:

> (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.[127]

Notably, an allegedly improper disqualification of an arbitrator is not one of the defined exceptions in the FAA. And the United States Supreme Court recently made clear, in *Hall Street Associates v. Mattel, Inc.*, that "[u]nder the terms of §9 [of the FAA], a court ***'must' confirm*** an arbitration award 'unless' it is vacated, modified, or corrected 'as prescribed' in §§ 10

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[125] *See* 2 RR 20.

[126] 9 U.S.C. § 9 (emphasis added).

[127] 9 U.S.C. § 10(a).

and 11."[128] The Supreme Court emphasized that the FAA "carries no hint of flexibility" and "[t]here is nothing malleable about 'must grant,' which unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies."[129] Moreover, this Court has expressly held that the FAA does not authorize vacatur of an arbitration award due to an allegedly improperly disqualified arbitrator: "The FAA authorizes vacatur for 'evident partiality' of arbitrators . . . but not for an arbitral body's disqualification of an arbitrator under its own rules and standards."[130] This Court should, therefore, reverse the trial court's judgment vacating the arbitration award and render judgment confirming the arbitration award in Myer's favor.

* * *

A. None of the grounds for vacatur authorized under Section 10(a)(4) of the Federal Arbitration Act exist in this case.

Americo seeks vacatur specifically under Section 10(a)(4) of the FAA, arguing that the arbitration panel "exceeded its authority." But none of Americo's allegations are a basis for vacatur under the FAA. Americo is merely challenging the factual findings and the contract interpretation decided by the panel, and such challenges cannot form the [illegible] for vacatur.[133] Even if Americo's allegations were proper challenges

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[128] 128 S. Ct. at 1402 (emphasis added).

[129] *Id*. at 1405 (emphasis added).

[130] *McGrath v. FSI Holdings, Inc.*, 246 S.W.3d 796, 809 (Tex. App.—Dallas 2008, no pet.).

[133] *See Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001).

under Section 10(a)(4), the arbitration panel correctly decided the issues in the arbitration award, and did not "exceed its authority" in any way.[134]

* * *

[134] 9 U.S.C. § 10(a)(4).

APPENDIX N

IN THE SUPREME COURT OF TEXAS

NO. 12-0739

AMERICO LIFE, INC., AMERICO FINANCIAL LIFE AND ANNUITY INSURANCE COMPANY, GREAT SOUTHERN LIFE INSURANCE COMPANY, THE OHIO STATE LIFE INSURANCE COMPANY, AND NATIONAL FARMER'S UNION LIFE INSURANCE COMPANY, PETITIONERS

v.

ROBERT L. MYER AND STRIDER MARKETING GROUP, INC., RESPONDENTS

February 6, 2013

RESPONSE TO PETITION FOR REVIEW

* * *

C. This arbitration case—which has been mired in the state court system for over five years at a substantial cost—has been anything but inexpensive and efficient.

"[A]rbitration is intended to provide a lower-cost, expedited means to resolve disputes[.]"[53] This Court has repeatedly recognized that arbitration is "a rapid,

[53] *See In re Poly-Am., L.P.,* 262 S.W.3d 337, 347 (Tex. 2008).

inexpensive alternative to traditional litigation."[54] As this Court has noted, "the desire to avoid steep litigation expense—including the costs of longer proceedings, more complicated appeals on the merits, discovery, investigations, fees, and expert witnesses—is ***the purpose of arbitration in the first place***."[55]

Arbitration is also intended to be final. The FAA mandates that when a party seeks a trial court order confirming an arbitration award, the court "***must grant*** such an order."[56] The U.S. Supreme Court held in *Hall Street Associates, L.L.C. v. Mattel, Inc.* that the FAA "carries no hint of flexibility" and "[t]here is nothing malleable about 'must grant,' which unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies."[57] Accordingly, a trial court has statutory authority under the FAA to vacate an arbitration award only in the situations listed in that statute—and the AAA's allegedly improper disqualification of an arbitrator is not one of them.[58]

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[54] *Jack B. Anglin Co., Inc. v. Tipps,* 842 S.W.2d 266, 273 (Tex. 1992); *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 195 (Tex. 2007).

[55] *In re Olshan Found Repair Co., LLC*, 328 S.W.3d 883, 894 (Tex. 2010) (emphasis added).

[56] 9 U.S.C. § 9 (emphasis added).

[57] 552 U.S. 576, 587 (2008).

[58] *See Roehrs v. FSI Holdings, Inc.*, 246 S.W.3d 796, 809 (Tex. App.—Dallas 2008, pet. denied) (the FAA does not authorize vacatur "for an arbitral body's disqualification of an arbitrator under its own rules and standards").

APPENDIX O

IN THE SUPREME COURT OF TEXAS

NO. 12-0739

AMERICO LIFE, INC., AMERICO FINANCIAL LIFE AND ANNUITY INSURANCE COMPANY, GREAT SOUTHERN LIFE INSURANCE COMPANY, THE OHIO STATE LIFE INSURANCE COMPANY, AND NATIONAL FARMER'S UNION LIFE INSURANCE COMPANY, PETITIONERS

v.

ROBERT L. MYER AND STRIDER MARKETING GROUP, INC., RESPONDENTS

July 10, 2013

BRIEF ON THE MERITS OF ROBERT L. MYER AND STRIDER MARKETING GROUP, INC.

* * *

The determinative question is whether the parties agreed that the AAA would be the authority to determine whether the party-selected arbitrator was qualified to serve. Because the parties' agreement incorporated the AAA Rules, which provide that the AAA has authority over arbitrator disqualification and that its decision is "conclusive," this Court should not permit a Texas court to second-guess the AAA's decision.

* * *

ARGUMENT

RESPONSIVE ISSUE ONE: For arbitration, the parties agreed each would select an arbitrator and agreed on the qualifications for the arbitrators. The question before this Court is whether that Agreement prohibited the American Arbitration Association from deciding a challenge to the qualifications of one of the selected arbitrators. Because the parties' Agreement expressly incorporated the AAA Rules, including the Rule that grants the AAA the "conclusive" authority to determine arbitrator disqualification, the AAA had authority to disqualify Ernest Figari, Jr.—and its decision should be conclusive.

* * *

D. Americo attempts sleight of hand to create a "conflict" between the provisions of the Arbitration Agreement and the AAA Rules and, based on the manufactured conflict, urges the Court to answer the wrong question.

Americo argues that the parties made a "specific agreement to impose uniform standards on all arbitrators" that has "conflicted with the AAA rules from the beginning." And, it claims, because of this supposed conflict, the incorporated AAA Rules R-12 and R-17 must be ignored. But there are several flaws with this argument.

First, Americo fails to demonstrate the conflict. There is no conflict between the Arbitration Agreement provision that "Americo shall appoint one arbitrator and Myer shall appoint one arbitrator" and "each Arbi-

trator shall be a knowledgeable, independent businessperson or professional" and Agreement's incorporation of the AAA rules (R-17, in particular) that grants the AAA the conclusive authority to determine whether the arbitrators are, in fact, knowledgeable and independent. That the Agreement's selection provision establishes the qualifications for the arbitrators says nothing about who will ultimately decide whether those qualifications are, in fact, met.

Second, Americo relies on a case that is readily distinguishable. In *Szuts v. Dean Witter Reynolds, Inc.*, the arbitration agreement stated that the proceeding "shall be before at least three arbitrators." 931 F.2d 830, 830 (11th Cir. 1991). During the proceeding, one of the arbitrators was disqualified and removed. The applicable AAA Rule in place allowed the proceeding to go forward with only two arbitrators, "unless the parties agree otherwise." *Id.* at 831. The Eleventh Circuit vacated the arbitration award because the parties had not agreed to go forward with only two arbitrators on the panel. This was a clear conflict with the parties' agreement: a panel of two arbitrators does not meet the agreement's requirement for a panel of "at least three." To the contrary here, the parties agreed each arbitrator must be "a knowledgeable, independent businessperson or professional," and the parties agreed by incorporating the AAA Rules that the AAA would resolve, conclusively, any dispute over whether the arbitrator was qualified. Americo can point to nothing in the Agreement that prevents a party from objecting that an arbitrator does not meet the agreed qualifications or that excludes the AAA from determining

whether to disqualify the arbitrator based on the objection.[58]

Third, under the guise of "conflict," Americo actually asks this Court to second-guess the AAA's reasons for disqualifying Figari. Americo asks the Court to decide that the appointed arbitrators were required to be only "independent," and thus Figari was improperly disqualified for not also being "impartial." But the Court can only be led down that path if it first concludes that the parties' Agreement, which incorporated the AAA Rules, expressly precluded the AAA from making the disqualification decision. Because the Agreement does not, the AAA gets to make the decision—and, as well, that decision is conclusive.

* * *

For arbitrating parties that agree to conduct their arbitration under the AAA Rules, there is already a forum for resolving disputes about the appointment of arbitrators—the AAA has authority to quickly and conclusively resolve the dispute pre-arbitration, before the parties invest extensive time, money, and resources into arbitrating their dispute.[67] But Americo argues that anytime parties expressly incorporate the AAA Rules, and also include an express provision about arbitrator qualifications, then the AAA loses

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[58] A parallel example would be if the issue in *Szuts* was whether the parties, who had agreed to "at least three arbitrators" could vacate the award if the AAA Rules required them to go forward with four. Because the language of the agreement required "at least three" arbitrators (not exactly three), a four-arbitrator panel would be consistent with the agreement's language, but effectuated through the incorporated AAA Rules. There would, like here, be no conflict.

[67] *See* **Appendix** 2, § R-17.

authority over arbitrator disqualification.[68] If that argument prevails, Texas courts will have to take the place of the AAA in resolving these disputes. Parties that seek to challenge the qualifications of their opponent's selected arbitrator will have no redress pre-arbitration, but will instead be forced to arbitrate first, then spend more time and money litigating their challenge in court. And parties can keep a do-over card in their back pocket by making a creative objection to the arbitrators, ensuring that if they lose, they will, at least, be able to keep the award tied up for years with post-arbitration court litigation and appeals.

The result: the circular repetition of this case that has been anything but rapid or inexpensive—and, eight years after the demand for arbitration, is still not final. A dispute the parties agreed would be resolved in the arbitration forum has pinballed through all three levels of the court system: the trial court, court of appeals (twice), and now this Court (twice), and still faces a return to the trial court on remand. Better public policy dictates that when the parties agreed to qualifications for their arbitrators and incorporated the AAA Rules, without excepting the Rules governing disqualification of arbitrators, the AAA has authority to "determine whether the arbitrator should be disqualified" and its "decision shall be conclusive."

RESPONSIVE ISSUE TWO: The unanimous arbitration award was made by a panel of three arbitrators properly chosen under the

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[68] Although Americo tries to hide that this is the core of its argument, it necessarily is. If the AAA has the authority granted under AAA Rule R-17, its determination of whether to disqualify Figari is "conclusive" and could not be reviewed by this Court.

terms of the parties' Arbitration Agreement. Specifically, Americo appointed an arbitrator of its choice under the terms of the Agreement. That arbitrator participated in the arbitration. Because the court of appeals correctly held the parties to their contract, vacatur is not appropriate here. The Court should deny this petition for review.

In this case, vacatur may only occur under the strict requirements of the Federal Arbitration Act ("FAA"). The FAA mandates that when a party seeks a trial court order confirming an arbitration award, the court "must grant such order." 9 U.S.C. § 9. The only exceptions to this mandate are the grounds to vacate or modify listed in Sections 10 and 11 of the FAA. *Id.* §§ 10, 11. A trial court has statutory authority under the FAA to vacate an arbitration award only in the situations listed in that statute—and an allegedly improper disqualification of an arbitrator is not one of them. Moreover, the U.S. Supreme Court made clear in *Hall Street Associates v. Mattel, Inc.* that "[u]nder the terms of § 9 [of the FAA], a court 'must' confirm an arbitration award 'unless' it is vacated, modified, or corrected 'as prescribed' in §§ 10, 11." 552 U.S. 576, 582, 128 S. Ct. 1396, 1402 (2008). The FAA "carries no hint of flexibility" and "[t]here is nothing malleable about 'must grant,' which unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies." *Id.* at 587.

Because the arbitrators were selected precisely in the manner outlined in the Arbitration Agreement, the panel had authority to issue the arbitration award and the trial court was required to confirm the award. The Agreement provides: "Americo shall appoint one arbi-

trator and Myer shall appoint one arbitrator and such two arbitrators to select the third."[69] And the panel that issued the unanimous award adverse to Americo and in favor of Myer was selected according to that Agreement—Americo appointed one, Myer appointed one, and those two appointed the third arbitrator.

The AAA did not prevent Americo from appointing an arbitrator to the panel. Americo did appoint an arbitrator: Richard Sayles. What Americo argues is that this Court should vacate the unanimous award because it did not get its first pick for an arbitrator. But nothing in the Arbitration Agreement guarantees Americo its first pick or any particular arbitrator—it only guarantees that Americo has the right to "appoint one arbitrator" who was "knowledgeable" and "independent." Americo exercised that right. Sayles' appointment was not forced on Americo, but was a choice freely made by Americo. Sayles served on arbitration panel and participated in the panel's decision and award. Thus, there is no basis for vacatur of the arbitration award.

Americo has cited no case (and Myer is aware of none) in which any court has set aside the award of an arbitration panel just because one of the parties was not allowed its first choice of an arbitrator, particularly when the party continued to select an arbitrator as provided in the parties' agreement and its arbitrator participated on the panel. The facts in the cases that have held an arbitration award void because it was issued by improperly appointed arbitrators are different, significantly:

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[69] *See* **Appendix 1**, § 3.3.

- *In Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos*, the parties' arbitration agreement required that the arbitrators be "chosen by mutual agreement," but the AAA appointed them without that mutual consent. 25 F.3d 223, 225-26 (4th Cir. 1994).

- *In Hugs & Kisses, Inc. v. Aguirre*, the parties likewise agreed to arbitration "where both sides negotiated in good faith regarding the choice of arbitrator," but instead one party unilaterally chose the arbitrator. 220 F.3d 890, 893 (8th Cir. 2000).

These cases are obvious examples of the parties' agreement being ignored. This case does not involve any rejection of the provisions in the Arbitration Agreement. Because Americo freely appointed one of the arbitrators and that arbitrator participated in the arbitration, it cannot be said that the arbitrator was not selected according to the parties' Agreement.

* * *

APPENDIX P

IN THE SUPREME COURT OF TEXAS

NO. 12-0739

AMERICO LIFE, INC., AMERICO FINANCIAL LIFE AND ANNUITY INSURANCE COMPANY, GREAT SOUTHERN LIFE INSURANCE COMPANY, THE OHIO STATE LIFE INSURANCE COMPANY, AND NATIONAL FARMERS UNION LIFE INSURANCE COMPANY, PETITIONERS

v.

ROBERT L. MYER AND STRIDER MARKETING GROUP, INC., RESPONDENTS

August 7, 2014

MOTION FOR REHEARING

* * *

Is the Majority's new standard of review for arbitration agreements—whether a court can "conceive that [the parties] agreed to be bound by the rules"—workable? In the countless cases where the parties have expressly agreed to abide by AAA or other rules, are the organizations' procedural decisions, authorized under those rules, now subject to post-arbitration judicial review? Will not the Majority's new, unique contract interpretation principles produce the satellite

litigation that is rejected under the FAA, stripping arbitration of its purpose as a fair and quick alternative to litigation without a lengthy appellate process? And are these new contract interpretation principles not a direct challenge to the Court's own recognition in *Nafta Traders, Inc. v. Quinn* that the FAA's stated grounds for vacating an arbitration award "are exclusive"—and they do not include vacatur based on erroneous conclusions of law or findings of fact? *See* 339 S.W.3d 84, 87, 91-92 (Tex. 2011) (citing *Hall Street Assocs, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008)).

I.

By mischaracterizing Myer's objection to exclude his objection that the arbitrator was not independent, the Majority avoided addressing that the AAA had authority to conclusively decide that an arbitrator is disqualified for lack of independence and that any error of law or fact by the AAA in making that decision is not a ground for vacatur under the Federal Arbitration Act.

The Majority's judgment rests on one conclusion: "the parties did not intend to require impartiality of party-appointed arbitrators."[5] But even if that conclusion is correct, it only answers half—a non-dispositive half—of the question. The parties undisputedly did intend to require the arbitrators to be "independent." And the AAA's disqualification came after Myer objected that Ernest Figari was not impartial *or independ-*

[5] Opinion, p. 8.

ent.[6] To reach a judgment for Americo, this Court must answer whether this objection to lack of independence makes a difference.

The Majority writes this second objection out of existence, mischaracterizing that "Myer alleged that Americo's first-choice arbitrator … was partial toward Americo" and that "the AAA disqualified Americo's first-choice arbitrator for partiality."[7] Those characterizations are false. Further, they unjustly permit the Majority to write as if its analysis is complete, when it is not. On rehearing, the Court should address the remaining material issues: Does not the AAA have authority to determine whether an arbitrator should be disqualified for lack of independence? And how is the AAA's procedural decision to disqualify Figari for lack of independence subject to judicial review, when errors of law and fact are not grounds for overturning an arbitration award under the FAA?

* * *

Additionally, recognizing the AAA's authority to make disqualification decisions—when the parties' arbitration agreement does not provide otherwise and they have agreed to abide by AAA Rules—upholds the

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[6] *See* Appendix C & D. Indeed, in the AAA, the primary disagreement between Americo and Myer was not whether Figari was required to be impartial: Americo acknowledged "Americo and Myer never agreed that the appointed arbitrators will not be neutral." Americo's argument was that AAA lacked authority to decide any objection to Figari (even an objection to his independence): "Americo never agreed with Myer for the AAA to have objections to the qualifications of a designated arbitrator decided by the AAA." *See* Appendix E & F. The Court's opinion reads as if this dispute has never existed.

[7] Opinion, pp. 3, 10.

FAA's intent to remove arbitration from all but very limited judicial review and aids judicial efficiency. If the Majority were to conclude that the AAA does not have the authority to decide an objection to an arbitrator's independence, who would have that authority? Either the arbitration proceedings would need to halt for satellite litigation in the trial court to resolve the objection, or the parties would be forced to incur the time and expense of completing arbitration, with one side thereafter trying to undo it all because its objection could not be resolved in advance. Leaving this procedural decision in the hands of the AAA before arbitration is more expedient and less wasteful—and it cannot be objectionable here because it is what the parties agreed when they agreed to abide by the AAA Rules.

* * *

B. The AAA's disqualification decision is not reviewable in the courts for errors of law or fact.

The incorporated AAA Rule that grants disqualification authority to the AAA also expressly provides that the AAA's word is final: the AAA's "decision shall be conclusive."[15] Under Texas arbitration law, a "conclusive" decision "has the effect of a judgment of a court of last resort." *See, e.g.*, *Hisaw & Assocs. Gen. Contractors, Inc. v. Cornerstone Concrete Sys., Inc.*, 115 S.W.3d 16, 18 (Tex. App.—Fort Worth 2003, pet. denied); *Xtria L.L.C. v. Int'l Ins. Alliance Inc.*, 286 S.W.3d 583, 591 (Tex. App.—Texarkana 2009, pet. denied). Thus, it is irrelevant if the AAA made an error of law or fact when it determined Figari lacked independence; such

[15] Appendix B, at R-17 (emphasis added).

errors are not reviewable by the courts and are not a proper basis for judicial vacatur of an arbitration award.

The United States Supreme Court held in *Hall Street* that the FAA's stated grounds for vacating an arbitration award "are exclusive"—and they do not include vacatur based on an arbitrator's erroneous conclusions of law or findings of fact. *See Nafta Traders*, 339 S.W.3d at 87, 91-92 (citing *Hall Street*, 552 U.S. at 578).[16] These exclusive grounds for vacatur under the FAA also do not allow vacatur for errors of law or fact by the AAA. The "exceeding their powers" ground for vacatur cannot be stretched to encompass AAA procedural decisions like this without eviscerating the FAA's objective to limit judicial review.

This Court has recognized that it must follow the Supreme Court's decision in cases, like this one, governed by the FAA. *Id.* But only by flouting Myer's objection to Figari's lack of independence (and acting as if Myer's Responsive Issue Two was not presented) could the Majority side-step *Hall Street's* dispositive impact on this case. The result under *Hall Street* is clear: a AAA decision to disqualify Figari for lack of independence—even if incorrect—could not be a proper basis for vacating the arbitration award. As such, the procedural decision should not be reviewable in the courts at all. This Court may want more judicial oversight over FAA arbitrations than *Hall Street* allows,

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[16] *See also In re Poly-Am., L.P.*, 262 S.W.3d 337, 362 (Tex. 2008) ("Both federal and state law require courts to enforce an arbitrator's decision, no matter what it is, with very few exceptions. The allowable exceptions … do not include (as the Supreme Court just held) disregarding the law, even if a legal error is 'manifest.'").

but it is insincere for the Majority to accomplish that by framing this case as a only a contract interpretation dispute over whether "independent" means "impartial." On rehearing, the Court should acknowledge the Supreme Court's mandate that the FAA's grounds for vacatur are exclusive and explain why that does not require affirmance of the arbitration award here.

* * *

Relatedly, is the Court now authorizing parties, who have agreed to abide by AAA (or JAMS, FINRA/NASD, or other) rules, to second-guess the correctness of the organizations' procedural decisions in the courts after arbitration? Given the prevalence of these agreements, the number of legal challenges could be enormous, postponing the finality and increasing the costs of countless arbitrations. And far more than just arbitration disqualification decisions would be subject to judicial challenge—so too would, for example, AAA decisions determining the locale of an arbitration;[34] extending a deadline;[35] setting an arbitrator's compensation;[36] interpreting and applying AAA Rules;[37] or suspending an arbitration for nonpayment.[38]

Decisions made by JAMS and FINRA under similar rules would also be at risk of post-arbitration rehashing.

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[34] Appendix B, at R-10 (providing "[i]f a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale, and its decision shall be final and binding").

[35] *Id*. at R-38.

[36] *Id*. at R-51.

[37] *Id*. at R-53.

[38] *Id*. at R-54.

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On rehearing, the Court should consider whether it really intends to thwart what the Supreme Court has said should be minimal judicial review under the FAA by releasing this floodgate of post-arbitration satellite litigation on Texas courts.

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APPENDIX Q

AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION RULES (2003)

EXCERPTS

R-1. Agreement of Parties* †

(a) The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specify-

* The AAA applies the *Supplementary Procedures for Consumer-Related Disputes* to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are nonnegotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA will have the discretion to apply or not to apply the Supplementary Procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction, even in consumer arbitration cases filed by the business.

† A dispute arising out of an employer promulgated plan will be administered under the AAA's National Rules for the Resolution of Employment Disputes.

ing particular rules. These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a demand for arbitration or submission agreement received by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator.

(b) Unless the parties or the AAA determines otherwise, the Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds $75,000, exclusive of interest and arbitration fees and costs. Parties may also agree to use these procedures in larger cases. Unless the parties agree otherwise, these procedures will not apply in cases involving more than two parties. The Expedited Procedures shall be applied as described in Sections E-1 through E-10 of these rules, in addition to any other portion of these rules that is not in conflict with the Expedited Procedures.

(c) Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes shall apply to all cases in which the disclosed claim or counterclaim of any party is at least $500,000, exclusive of claimed interest, arbitration fees and costs. Parties may also agree to use the Procedures in cases involving claims or counterclaims under $500,000, or in nonmonetary cases. The Procedures for Large, Complex Commercial Disputes shall be applied as described in Sections L-1 through L-4 of these rules, in addition to any other portion of these rules that is not in conflict with the Procedures for Large, Complex Commercial Disputes.

(d) All other cases shall be administered in accordance with Sections R-1 through R-54 of these rules.

R-2. AAA and Delegation of Duties

When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices.

R-3. National Roster of Arbitrators

The AAA shall establish and maintain a National Roster of Commercial Arbitrators ("National Roster") and shall appoint arbitrators as provided in these rules. The term "arbitrator" in these rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

* * *

R-7. Jurisdiction

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

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator

that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

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

* * *

R-12. Direct Appointment by a Party

(a) If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with the name and address of the arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any appointing party, the AAA shall submit a list of members of the National Roster from which the party may, if it so desires, make the appointment.

(b) Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-17 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Section R-17(a) that the party-appointed arbitrators are to be non-neutral and need not meet those standards.

(c) If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make the appointment within that period, the AAA shall make the appointment.

(d) If no period of time is specified in the agreement, the AAA shall notify the party to make the appoint-

ment. If within 15 days after such notice has been sent, an arbitrator has not been appointed by a party, the AAA shall make the appointment.

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R-15. Number of Arbitrators

If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed. A party may request three arbitrators in the demand or answer, which request the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute.

R-16. Disclosure

(a) Any person appointed or to be appointed as an arbitrator shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.

(b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

(c) In order to encourage disclosure by arbitrators, disclosure of information pursuant to this Section R-16 is not to be construed as an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

R-17. Disqualification of Arbitrator

(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for

(i) partiality or lack of independence,

(ii) inability or refusal to perform his or her duties with diligence and in good faith, and

(iii) any grounds for disqualification provided by applicable law. The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-12 shall be nonneutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.

(b) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.