NOTE

Vacating an Arbitration Award in Federal Court: The Jurisdictional Issues of the “Look Through” Approach and Arbitrators Violating Securities SRO Regulations

INTRODUCTION ........................................................................................................................................... 459
I. BACKGROUND ...................................................................................................................................... 463
II. THE “LOOK THROUGH” APPROACH ................................................................................................. 465
III. THE “LOOK THROUGH” APPROACH APPLIED TO SECTION 10 ......... 466
IV. FEDERAL JURISDICTION AND FINRA ................................................................. 473
   A. Jurisdiction under the Securities Exchange Act .................. 473
   B. FINRA as a Securities Self-Regulatory Organization .......... 475
   C. Whether a FINRA Violation Satisfies the Well-Pleaded Complaint Rule by invoking 15 U.S.C. § 78aa Jurisdiction.... 476
V. CONCLUSION ...................................................................................................................................... 480

INTRODUCTION

Imagine you are an investor, and you have lost a great deal of money because an investment firm violated a federal securities law. You decide to hire a lawyer and file a lawsuit, only to realize that your dispute is subject to mandatory arbitration by the Financial Industry Regulatory Authority ("FINRA")1 as is common in most securities contracts.2 Begrudgingly, you arbitrate your claim. However, during arbitration, the FINRA panel makes a decision that violates a FINRA regulation and, consequently, you are not awarded money. Naturally, you decide to appeal the decision made by this federally empowered FINRA agency, for a violation of a FINRA regulation, regarding an exclusively federal securities claim, in federal court. However, in response to your petition, you are told by the federal court that there are no federal issues at stake and the court lacks jurisdiction over your petition.3 Can this be right? How can a federal court lack jurisdiction in a situation that seems to involve both federal issues and a federal

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entity? This article will aim to answer these questions and explain why challenges to the results of FINRA arbitrations, which seem to implicate federal interests at first glance, are actually more akin to a contractual dispute and should accordingly not be a basis for federal question jurisdiction. Rather, any challenges to the arbitration results should be filed in state courts.

Arbitration law is quite unique on account of the fact that, historically, arbitration has been treated with judicial hostility and mistrust by the legal establishment.\(^4\) In response to this judicial hostility, Congress enacted the Federal Arbitration Act ("FAA") in 1925.\(^5\) Although the FAA quelled much hostility towards arbitration,\(^6\) it has also triggered numerous conflicts since its enactment.\(^7\) Many of these conflicts have arisen because the FAA is considered to be a jurisdictional “anomaly,” since the FAA itself does not provide for independent federal question jurisdiction.\(^8\) Thus, when seeking federal court review of an arbitration award, an FAA petition must allege a basis for jurisdiction – diversity of citizenship or some federal question that is independent of the FAA. Otherwise, the FAA claim must be litigated in state court.\(^9\)

While there are related issues regarding diversity jurisdiction’s application to the FAA,\(^10\) this article will address disputes that have surfaced among the circuit courts regarding the relationship between federal question jurisdiction and the FAA.\(^11\) Typically, a court must apply the well-pleaded complaint rule when determining whether a case or controversy invokes the jurisdiction of federal courts.\(^12\) This means that a court will

5. Szalai, supra note 4, at 325.
6. NOUSSIA, supra note 4, at 13.
7. Szalai, supra note 4, at 321.
8. Id. at 323 (citing Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983)).
10. See, e.g., Northport Health Servs. of Arkansas, LLC v. Rutherford, 605 F.3d 483, 486 (8th Cir. 2010).
11. Szalai, supra note 4, at 328; Magruder v. Fidelity Brokerage Servs. LLC, 818 F.3d 285 (7th Cir. 2016); Goldman v. Citigroup Global Mkts. Inc., 834 F.3d 242 (3rd Cir. 2016); Doscher v. Sea Port Grp. Sec., LLC, 832 F.3d 372 (2nd Cir. 2016); Ortiz-Espinosa v. BBVA Sec. of Puerto Rico, Inc., 852 F.3d 36, 47 (1st Cir. 2017).
look at the complaint and determine whether a federal issue has been properly alleged. However, some circuit courts have taken the approach that a federal court may “look through” a FAA petition in order to establish federal jurisdiction. The “look through” approach provides an exception to the well-pled complaint rule and allows a federal court to “look through” a FAA petition to the underlying dispute between the parties. This “look through” will determine whether the underlying dispute is predicated on a cause of action that “arises under” federal law and, therefore, warrants federal jurisdiction. The Supreme Court of the United States has partially tackled the issue of the “look through” approach. In a 2009 decision, the Supreme Court held that a federal court may “look through” a petition filed pursuant to Section 4 of the FAA, 9 U.S.C. § 4. In its decision, the Court did not mention whether this approach should be applied to all sections of the FAA, and much of the Court’s textual analysis regarding § 4 is not applicable to the other sections of the FAA. Consequently, the issue of whether the “look through” approach should be applied to other sections of the FAA has divided the circuits once again.

The knee-jerk reaction is to apply the “look through” approach to the entire FAA for purposes of simplicity and uniformity – because differing jurisdictional approaches among sections of the FAA would seem to be unnecessarily overcomplicated. However, the practical ramifications of applying the “look through” approach to all sections of the FAA are difficult to consolidate with the principles, and the general purpose, of federal court jurisdiction.


13. Doscher, 832 F.3d at 388-389; Ortiz-Espinosa, 852 F.3d at 47.
15. Id.
16. Id.
17. Id.
19. Compare Magruder v. Fidelity Brokerage Servs. LLC, 818 F.3d 285, 288 (7th Cir. 2016) (concluding that the “look through” approach did not apply to §10 of the FAA primarily because of the textual difference between § 4 and § 10), and Goldman v. Citigroup Global Mkts. Inc., 834 F.3d 242, 254-255 (3rd Cir. 2016) (agreeing with the Seventh Circuit in its conclusion that the textual difference between the two sections makes the “look through” approach inappropriate), with Doscher v. Sea Port Grp. Sec., LLC, 832 F.3d 372, 386-387 (2nd Cir. 2016) (holding that the “look through” approach should be applied to § 10 of the FAA because illogical inconsistencies arise when the “look through” approach is not applied consistently throughout the entire FAA), and Ortiz-Espinosa v. BBVA Sec. of Puerto Rico, Inc., 852 F.3d 36, 47 (1st Cir. 2017) (agreeing with the Second Circuit in its conclusion that the “look through” approach should be consistently applied throughout the entire FAA).
20. See Doscher, 832 F.3d at 387; Ortiz-Espinosa, 852 F.3d at 47.
To illustrate this point, I return to the example above. If you were a securities investor seeking to overturn the decision of an arbitration panel, you would have to file a FAA petition to the federal court under 9 U.S.C. § 10, which permits a federal court to vacate an arbitration award in certain situations where there has been misconduct regarding the panel’s decision. If the federal court were to apply the “look through” approach to the § 10 petition, jurisdiction could be predicated on the securities violation underlying the dispute. In other words, the substantive controversy of the federal securities violation – the securities claims arbitrated before FINRA – could serve as grounds for federal court jurisdiction. Now, suppose the arbitration award was procured by fraud, which is typically a state law issue. If the “look through” approach were to be applied, the federal court could hear the challenge because the original dispute was based on a violation of the federal securities law. However, in this scenario, the federal court would actually be addressing a state issue – whether fraud was committed – because at no point during judicial review would the underlying federal securities violation be pertinent to the § 10 petition to vacate the arbitration award. Thus, if the “look through” approach is extended to § 10, federal courts would entertain disputes that do not implicate any federal interests. Under current jurisprudence and well-settled jurisdictional principles, a federal court cannot assert jurisdiction over disputes that do not “arise under” federal law and implicate a federal issue on some level. Therefore, the “look through” approach is inappropriate when applied to § 10 of the FAA.

After concluding that the “look through” approach should not be applied to § 10 of the FAA, this article turns to the issue of whether such an approach would permit a federal court to rely on a FINRA regulation violation as the requisite independent jurisdictional basis for federal court jurisdiction. This second issue is closely related to the “look through” issue because advocates have frequently attempted to side-step the “look through” issue by arguing that a violation of FINRA regulations during an arbitration proceeding triggers federal jurisdiction under the Securities Exchange Act (the “Exchange Act”). If this were true, a § 10 petition alleging a FINRA violation would satisfy the well-pleaded complaint rule, and there would be

23. See infra Sections IV.A-B.
25. See, e.g., Goldman v. Citigroup Global Mkts. Inc., 834 F.3d 242, 255-256 (3rd Cir. 2016); Magruder v. Fidelity Brokerage Servs. LLC, 818 F.3d 285, 287 (7th Cir. 2016); Sacks v. Dietrich, 663 F.3d 1065, 1069 (9th Cir. 2011); Doscher, 832 F.3d at 376.
no need for a federal court to “look through” the § 10 petition. However, after examining the conflicting views that have arisen among the circuits, this article concludes that where arbitrators violate a FINRA regulation, this should not constitute a basis to invoke federal jurisdiction under the Exchange Act. Therefore, a § 10 petition must assert an independent basis for federal court jurisdiction, other than a FINRA violation, before a federal court can entertain a § 10 petition. Furthermore, the asserted jurisdictional grounds should appear on the face of the petition to satisfy the well-pleaded complaint rule, as the “look through” approach should not apply.

I. BACKGROUND

Congress passed the FAA in 1925.26 The primary purpose of the FAA was “to ensure judicial enforcement of privately made agreements to arbitrate.”27 The FAA was enacted in response to the “hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice.”28 This judicial hostility took several forms, including refusing to acknowledge arbitration agreements, declining to enforce arbitration through specific performance, and denying stays of judicial proceedings in favor of arbitration.29 The FAA attempted to quell hostilities toward arbitration by stating that arbitration agreements “shall be valid, irrevocable, and enforceable.”30

The intent of Congress when enacting the FAA was to proclaim a national policy that recognized the validity and enforceability of arbitration and prohibited the states from requiring a judicial forum for dispute resolution.31 The FAA has been held to apply to both state and federal courts,32 and any conflicting state laws are invalid because the FAA has been recognized as pre-empting state laws.33 Although the FAA has been interpreted to be substantive federal law governing all contracts that fall within its scope, the FAA itself contains no grant of federal jurisdiction.34 This has been referred to as an “anomaly” because typically a body of federal substantive law will have a provision that grants federal question jurisdiction to the lower federal courts, which allows federal courts to hear a case that

32. Id. at 12.
33. See William G. Phelps, Annotation, Pre-emption by Federal Arbitration Act of state laws prohibiting or restricting formation of arbitration agreements, 9 U.S.C.A. § 1 et seq., 108 A.L.R. Fed. 179 (1992) (this law report compiles many state laws that have been pre-empted by the FAA).
34. Kaster, supra note 9, at 52.
involves a dispute of the federal statute at issue.\textsuperscript{35} By contrast, under the FAA if no independent basis for federal jurisdiction can be established, the FAA must be enforced in state courts, which have concurrent jurisdiction over arbitration disputes.\textsuperscript{36}

The FAA is divided into three chapters.\textsuperscript{37} Chapter 1 is applied to domestic arbitration, while Chapters 2 and 3 are applicable to international arbitration agreements.\textsuperscript{38} Within Chapter 1 of the FAA, the statutory provisions that govern the enforceability of domestic arbitration agreements are § 2, § 3, and § 4.\textsuperscript{39} Section 2 of the statute declares arbitration agreements to be “valid, irrevocable, and enforceable.”\textsuperscript{40} Section 3 allows a party to stay litigation in any case raising a dispute referable to arbitration.\textsuperscript{41} Section 4 states that a “party aggrieved by a failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration” may petition a court, which, “save for such an agreement,” would have subject matter jurisdiction under Title 28.\textsuperscript{42}

While § 2, § 3, and § 4 govern the enforcement of arbitration agreements, § 9, § 10 and § 11 govern the confirmation, vacatur, and modification of arbitration agreements.\textsuperscript{43} Under these sections, the FAA allows a party to petition a court to vacate an arbitration award in certain circumstances.\textsuperscript{44} These sections state that a court may determine the validity of an award in a “United States court in and for the district wherein the award was made.”\textsuperscript{45} This language is the only jurisdictional language found in § 9, § 10 and § 11, and is very different from the jurisdictional “save for” language found in § 4.\textsuperscript{46} This difference in language has nurtured a circuit split on the issue of whether the jurisdictional approach to § 4 is the proper approach when dealing with petitions to vacate an arbitration award under § 10.\textsuperscript{47}

\textsuperscript{36} Kaster, supra note 9, at 52; Mercury Constr. Corp., 460 U.S. at 15 (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 818–19 (1976)).
\textsuperscript{37} Szalai, supra note 4, at 325; 9 U.S.C.A. §§ 1–16.
\textsuperscript{39} Id. at 325-326.
\textsuperscript{40} 9 U.S.C.A. § 2.
\textsuperscript{41} Id. at § 3.
\textsuperscript{42} Id. at § 4.
\textsuperscript{43} Id. at §§ 2–4, 9–11.
\textsuperscript{44} Id. at § 10.
\textsuperscript{45} Id. at §§ 9–11.
\textsuperscript{46} Compare § 4, with §§ 9–11.
\textsuperscript{47} Magruder v. Fidelity Brokerage Servs. LLC, 818 F.3d 285, 288 (7th Cir. 2016); Goldman v. Citigroup Global Mkts. Inc., 834 F.3d 242, 254-255 (3rd Cir. 2016); Doscher v. Sea Port Grp. Sec., LLC, 832 F.3d 372, 386-387 (2nd Cir. 2016); Ortiz-Espinosa v. BBVA Sec. of Puerto Rico, Inc., 852 F.3d 36, 47 (1st Cir. 2017).
II. THE “LOOK THROUGH” APPROACH

Section 4 of the FAA permits a party to petition for an order to compel arbitration without first filing a lawsuit. 48 The language of § 4 provides that an aggrieved party “may petition any United States district court which, save for such agreement [to arbitrate], would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties....” 49 Thus, there must be diversity, federal questions, or admiralty jurisdiction over the underlying dispute for a federal court to resolve a FAA petition. 50

The Supreme Court of the United States explored the issue of federal question jurisdiction as it relates to the FAA in the case Vaden v. Discover Bank. 51 In Vaden, the Court unanimously held that the statutory language of § 4 permitted a district court to look through a complaint to the nature of the underlying dispute to establish federal question jurisdiction. 52 In its analysis, the Court gave significant weight to the “save for” language found in § 4. 53 However, the Vaden case arose from peculiar facts in which the Court could examine prior court filings when looking through the § 4 petition. 54 Furthermore, the Court determined that even though a federal court may “look through” a § 4 petition to determine whether the controversy arises under federal law, it must base jurisdiction on the “whole controversy” between the parties. 55 However, a federal court typically receives a § 4 petition with no prior pleadings to evaluate, which begs the question: what should a court examine when “looking through” a § 4 petition? 56 The dissent in Vaden sought to answer this question. 57 Chief Justice Roberts stated a court should look at the petition in isolation and ignore any pleadings that may have taken place in order to decide whether the underlying arbitration dispute would be governed by federal law. 58 The Chief Justice took issue with the majority position in this case because they looked to the “whole controversy,” which included the state court filings that are not typically available in most § 4 petitions. 59

The Court’s reasoning in its § 4 decision is significant because the factual situation in Vaden is more analogous to the factual situation that would
be typical of a § 10 petition. Unlike a § 4 petition, where prior filings will typically be unavailable for examination when a court is conducting a “look through” approach, a § 10 petition will have a prior arbitration proceeding to evaluate if the court were to “look through” to the substantive controversy between the parties. Thus, at first glance, Vaden’s “whole controversy” approach would seem more appropriate, and easier to apply, to a § 10 petition.

III. The “Look Through” Approach Applied to Section 10

Section 10 of the FAA provides that “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” if certain grounds for vacatur exist. Although the “look through” approach has been applied to § 4 of the FAA, it is unclear whether the approach is appropriate for § 10 petitions. Furthermore, even if the “look through” approach was applied to § 10, similar questions to the questions left unanswered from Vaden are present. What should a court examine when applying the “look through” approach? Should the court examine the petition in isolation, or evaluate the arbitration proceedings that subsequently took place? These unanswered questions have caused inconsistent results in the lower federal court’s application of Vaden to other sections of the FAA.

A circuit split has developed over whether a court may “look through” a § 10 petition in order to establish federal question jurisdiction. The split is fueled by the Supreme Court’s statement in Vaden that “FAA § 4’s text drives the conclusion that a federal court should determine its jurisdiction

60. Compare Vaden, 566 U.S. at 54 (which dealt with a § 4 petition that had prior arguments available to the Court for evaluation), and Westmoreland Capital Corp. v. Findlay, 100 F.3d 263 (2nd Cir. 1996) (which dealt with a § 4 petition that did not have prior arguments available for evaluation), with Magruder v. Fidelity Brokerage Servs. LLC, 818 F.3d 285 (7th Cir. 2016), Goldman v. Citigroup Global Mkts. Inc., 834 F.3d 242 (3rd Cir. 2016), and Doscher v. Sea Port Grp. Sec., LLC, 832 F.3d 372 (2nd Cir. 2016) (all of which were § 10 petitions that had prior arbitration proceedings available for evaluation).

61. See Magruder, 818 F.3d at 288; Goldman, 834 F.3d at 254-255; Doscher, 832 F.3d at 386-387; Ortiz-Espinosa v. BBVA Sec. of Puerto Rico, Inc., 852 F.3d 36, 47 (1st Cir. 2017).


63. See Magruder, 818 F.3d at 288; Goldman, 834 F.3d at 254-255; Doscher, 832 F.3d at 386-387; Ortiz-Espinosa, 852 F.3d at 47.

64. See Vaden, 566 U.S. at 72 (Roberts, C.J., dissenting).

65. See id.

66. See id.

67. Magruder, 818 F.3d at 288; Goldman, 834 F.3d at 254-255; Doscher, 832 F.3d at 386-387; Ortiz-Espinosa, 852 F.3d at 47.

68. Magruder, 818 F.3d at 285; Goldman, 834 F.3d at 242; Doscher, 832 F.3d at 372; Ortiz-Espinosa, 852 F.3d at 36.
by ‘looking through’ a § 4 petition to the parties’ underlying controversy.” 69 Evaluating the Vaden decision, the circuits have yielded differing results when applying the “look through” approach to the entirety of the FAA. 70 The Seventh and Third Circuit have held that the “look through” approach should not apply to § 10, whereas the First and Second Circuit have held that the Vaden “look through” approach should extend to § 10. 71

Following Vaden, the Seventh Circuit was the first of the circuits to determine whether the Supreme Court’s “look through” approach should also apply to a § 10 petition. 72 In the case Magruder v. Fidelity Brokerage Services LLC, the Seventh Circuit held that the “look through” approach should not be applied to a § 10 petition. 73 The court began its analysis by distinguishing between the nature of a § 4 petition and a § 10 petition. 74 The court found that “[n]either § 9 nor § 10 has any language comparable to that on which the Supreme Court relied in Vaden.” 75 Next, the court found that not applying the “look through” approach harmonizes the law of arbitration with the law of contracts. 76

In reaching this conclusion, the Seventh Circuit provided an insightful comparison to current contract precedent. 77 The Seventh Circuit’s comparison was based on the Supreme Court case Kokkonen v. Guardian Life Insurance Co. 78 In Kokkonen, the Court held that if parties settle litigation that arose under federal law, any dispute about that settlement needs an independent jurisdictional basis, and because most contracts are governed by state law, federal question jurisdiction is generally unavailable. 79 The Seventh Circuit reasoned that an arbitration agreement is a contract that is almost identical in nature to a settlement agreement, and that the same principles should apply. 80 Thus, the Magruder court held that it could not look through the petition to find a federal question; the petition must state an independent ground for jurisdiction on its face. 81 By not extending the “look through” approach to § 10 petitions, the Seventh Circuit’s decision parallels the distinction Kokkonen
draws between an original federal claim and a dispute about its contractual resolution.\textsuperscript{82}

Shortly after the Seventh Circuit decided \textit{Magruder}, the Third Circuit followed suit and also refused to apply the “look through” approach to § 10.\textsuperscript{83} In \textit{Goldman v. Citigroup Global Markets}, the court articulated much of the same reasoning found in the Seventh Circuit decision and found the contract analogy in \textit{Magruder} persuasive.\textsuperscript{84} The Third Circuit held that the distinction between the text of § 4 and § 10 could not be ignored and found “no reason to artificially import the language [of § 4] into § 10.”\textsuperscript{85}

Although \textit{Magruder} and \textit{Goldman} were the first appellate courts to decide the § 10 “look through” issue post-\textit{Vaden}, several other circuits had previously held that the “look through” approach was inapplicable to § 10 before the \textit{Vaden} decision.\textsuperscript{86} In \textit{Kasap v. Folger Nolan Fleming & Douglas, Inc.}, the District of Columbia Circuit stated, “we do not see how [petitioner] can transport the unique jurisdictional language of § 4 into § 10.”\textsuperscript{87} Additionally, in \textit{Carter v. Health Net of California, Inc.}, the Ninth Circuit held that the petition to vacate an arbitration award was based on a state law contention that “the arbitrator exceeded his contractually defined powers.”\textsuperscript{88} Similarly, in \textit{Collins v. Blue Cross Blue Shield of Michigan}, the Sixth Circuit stated, in a pre-\textit{Vaden} decision, that “the federal nature of the claims submitted to arbitration… are actually based on the contract to arbitrate rather than on the underlying substantive claims.”\textsuperscript{89}

However, soon after the Third Circuit’s post-\textit{Vaden} decision of \textit{Goldman}, the Second Circuit decided \textit{Doscher v. Sea Port Group Securities, LLC}.	extsuperscript{90} The Second Circuit held that the “look through” approach should apply to § 10 of the FAA.\textsuperscript{91} In reaching its decision, the court held \textit{Vaden} expressed “three critical pieces of guidance” to be applied to the FAA.\textsuperscript{92} The Second Circuit’s first “guidepost,” extracted from \textit{Vaden}, was that “it reiterated the longstanding rule that the [FAA’s] provisions do not bestow or enlarge subject matter jurisdiction.”\textsuperscript{93} The second “guidepost” was that

\textsuperscript{82} \textit{Id. See Kokkonen,} 511 U.S. at 381.
\textsuperscript{83} \textit{Goldman v. Citigroup Global Mkts. Inc.}, 834 F.3d 242, 254-255 (3rd Cir. 2016).
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} \textit{Id. (quoting Minor v. Prudential Sec., Inc.,} 94 F.3d 1103, 1107 (7th Cir. 1996).
\textsuperscript{86} \textit{Kasap v. Folger Nolan Fleming & Douglas, Inc.}, 166 F.3d 1243, 1247 (D.C. Cir. 1999); \textit{Carter v. Health Net of Cal., Inc.}, 374 F.3d 830, 835 (9th Cir. 2004); \textit{Collins v. Blue Cross Blue Shield of Mich.}, 103 F.3d 35, 37 (6th Cir. 1996). \textit{See also} \textit{Ford v. Hamilton Inv., Inc.} 29 F.3d 255, 259 (6th Cir. 1994); \textit{Minor,} 94 F.3d at 1107.
\textsuperscript{87} \textit{Kasap}, 166 F.3d at 1247.
\textsuperscript{88} \textit{Carter,} 374 F.3d at 837.
\textsuperscript{89} \textit{Collins,} 103 F.3d at 37.
\textsuperscript{90} \textit{Doscher v. Sea Port Grp. Sec., LLC,} 832 F.3d 372 (2nd Cir. 2016).
\textsuperscript{91} \textit{Id. at} 381.
\textsuperscript{92} \textit{Id.}
\textsuperscript{93} \textit{Id.}
the *Vaden* decision “relied heavily on the text of, and interaction between, the relevant provisions of the [FAA].”\(^\text{94}\) Lastly, *Vaden’s* third “guidepost” was that the Court’s decision “identified the practical consequences resulting from the interpretive choices.”\(^\text{95}\)

According to the Second Circuit, extending jurisdiction to § 10 was necessary because of *Vaden’s* first “guidepost,” which held that the FAA does not enlarge subject matter jurisdiction.\(^\text{96}\) The court reasoned that the necessary result of limiting the “look through” approach solely to § 4 petitions is to expand the jurisdiction of § 4 because the same dispute between parties would have federal question jurisdiction under one provision of the FAA and not the other.\(^\text{97}\)

The Second Circuit’s second “guidepost” from *Vaden* was the Supreme Court’s heavy reliance on the text of, and interaction between, the relevant provisions of the FAA.\(^\text{98}\) Although the Second Circuit acknowledged that § 10 lacks the textual “save for” clause contained in § 4, and that “this distinction should not be taken lightly,” the court nevertheless held “*Vaden’s* other two guiding principles counsel against a too-hasty reliance on the absence of the ‘save for’ clause.”\(^\text{99}\) After dissecting the language of the statute, the court determined that, when viewed holistically, language of § 10 performs functions more analogous to venue and personal jurisdiction than subject matter jurisdiction.\(^\text{100}\) Because § 10 signals nothing about subject matter jurisdiction, the court reasoned that applying the “look through” approach to § 10 was consistent with the *Vaden* decision and there was no reason to construe the “save for” clause as “governing the predicate question of whether a federal court possesses jurisdiction over the dispute at all.”\(^\text{101}\)

Lastly, the Second Circuit found that the “look through” approach is necessary to comport with *Vaden’s* third “guidepost” of practical consequences resulting from the interpretive choices.\(^\text{102}\) The Second Circuit found that applying the “look through” approach to the entire FAA “prevents absurd and illogical discrepancies.”\(^\text{103}\) The court focused on the discrepancies that would emerge between differing jurisdictional tests and circled back around to the language of the statute and its geographical requirements.\(^\text{104}\)

Under § 10, a party may seek to vacate an arbitration

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94. *Id.*
95. *Id.*
96. *Id.*
98. *Id.* at 381-382.
99. *Id.*
100. *Id.* at 385.
101. *Id.*
102. *Id.* at 386.
103. *Id.*
104. *Id.*
award in a district court “in and for the district wherein the award was made.”

Because this geographical nexus is required, the Doscher court reasoned that a district court should have jurisdiction if the parties could have initially filed a motion to compel, under § 4, in federal court.

The Second Circuit is not alone in its interpretation of the Vaden decision and § 10 of the FAA. In Ortiz-Espinosa v. BBVA Securities of Puerto Rico, Inc., the First Circuit agreed with the reasoning of Doscher and held that the “look through” approach should apply to the entirety of the FAA. After holding out Doscher as persuasive, the First Circuit added that in a post-arbitration proceeding, arbitrators may be called upon to answer questions that implicate federal law. The First Circuit used § 10(a)(3) as an example, which may require an arbitrator to consider questions of federal law in deciding whether the arbitrator disregarded or excluded evidence that was “material to the controversy.”

In addition to the First and Second Circuit’s reasons for applying the “look through” approach to the entire FAA, there is an additional practical consideration that has gone unaddressed. There is a correlation between the factual situation in Vaden and a typical § 10 petition. In Vaden, the Court took advantage of the ability to look through the § 4 petition and evaluate the state claims and counter-claims, in spite of the fact that court proceedings typically do not exist prior to a § 4 petition because the petition usually takes place at the initial pleadings stage of litigation. However, in a § 10 petition, an arbitration proceeding has already taken place, which means the court can evaluate the claims and counter-claims that were actually argued before the arbitration panel. Therefore, Vaden’s “look through” approach could be applied to a § 10 petition because the majority in Vaden looked to the claims that had previously taken place between the parties to determine whether there was a federal issue involved.

106. Doscher, 832 F.3d at 386.
108. Id. at 47.
109. Id.
110. Id. (quoting 9 U.S.C. § 10(a)(3)).
111. Compare Vaden, 566 U.S. at 54 (which dealt with a § 4 petition that had prior arguments available to the Court for evaluation), and Westmoreland Capital Corp. v. Findlay, 100 F.3d 263 (2nd Cir. 1996) (which dealt with a § 4 petition that did not have prior arguments available for evaluation), with Magruder v. Fidelity Brokerage Servs. LLC, 818 F.3d 285 (7th Cir. 2016), Goldman v. Citigroup Global Mkts. Inc., 834 F.3d 242 (3rd Cir. 2016), and Doscher v. Sea Port Grp. Sec., LLC, 832 F.3d 372 (2nd Cir. 2016) (all of which were § 10 petitions that had prior arbitration proceedings available for evaluation).
Nevertheless, this article finds the reasoning of the First and Second Circuits lacking the persuasive force to overcome the textual difference between § 4 and § 10 of the FAA. In *Vaden*, the Court relied heavily on the text of § 4, and there are concerning differences between § 4 and § 10 that caution against an application of the “look through” approach to §10. As an initial matter, the Court in *Vaden* held that the jurisdictional “save for” language of § 4 supports looking through a petition to determine jurisdiction over “the controversy between the parties.” In contrast, not only does § 10 not have the same jurisdictional language as § 4, it also does not have the same “controversy between the parties” language, which the *Vaden* Court used as guiding language to support looking through the petition to the “substantive conflict between the parties.” Additionally, the First and Second Circuits did not advance reasons that undermined the Seventh Circuit’s comparison to the Supreme Court case *Kokkonen*. Because the Seventh Circuit’s analogy between settlement and arbitration resolutions harmonizes the law of contracts with the law of arbitration and because the “save for” language found in § 4 that was the driving force behind the *Vaden* decision is not present in the text of § 10, the most straightforward reading of *Vaden* cautions against applying the “look through” approach to a § 10 petition.

Another reason against adopting the “look through” approach to a § 10 petition is illustrated by dissecting the petition itself and examining the controversies at issue before a federal court. When an FAA petition asserts federal question jurisdiction, a threshold determination is required. A court must first identify the controversies before the court in order to decide whether the controversies invoke federal question jurisdiction. Using the framework proposed by Arron Franklin of the University of Toledo Law Review, a § 10 petition can be severed into two separate disputes. The first dispute is the dispute that necessitated arbitration in the first place, the *underlying dispute*. The second dispute is the dispute about the arbitration award that was granted by the arbitrators, the *motion dispute*. By implementing this framework, it becomes easier to understand an argument determining the applicability of the “look through” approach to § 10.

115. Id. at 62.
122. Id. at 96 (emphasis added).
123. Id. (emphasis added).
fact, the Supreme Court in Vaden looked through the §4 petition to the substantive dispute between the parties and referred to the substantive dispute as the “underlying dispute.”\(^{124}\) This look through to the underlying dispute was prompted by the text of §4.\(^{125}\) However, unlike a §4 petition, a §10 petition has an additional dispute, the motion dispute.\(^{126}\) When a party petitions a court to vacate an arbitration award under §10, the party’s petition states a controversy, or dispute, that no longer relates to the underlying dispute that prompted arbitration in the first place.\(^{127}\) This is because §10 of the FAA provides for certain, specific instances in which a party can petition to vacate an arbitration award; none of which involve the underlying dispute.\(^{128}\) All the grounds enumerated by §10 that a party can rely upon to vacate an arbitration award involve some type of misconduct, wrongdoing, or fraud in relation to the actions taken by the arbitrators.\(^{129}\) Furthermore, these enumerated reasons for vacatur under §10 have been held as being the “exclusive grounds” for vacating an arbitration award.\(^{130}\) Therefore, for purposes of federal question jurisdiction, it is more sensible for a court to evaluate the motion dispute when dealing with a §10 petition because the necessary dispute before the court is whether there was some issue with the arbitration proceedings.\(^{131}\)

Once the distinction between a motion dispute and an underlying dispute is made, and considering that §10 jurisdiction should be predicated on the motion dispute, it is evident the “look through” approach should not be applied to a §10 petition. In a §10 petition, a party will claim that there was some violation by the arbitrators or some fraudulent conduct that took place during arbitration that caused an unjust arbitration award.\(^{132}\) There is no reason a court should look through the petition to the underlying dispute


125. Id.


128. 9 U.S.C.A. § 10 (“In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct . . . or other misbehavior by which the rights of any party have been prejudiced; or where the arbitrators exceeded their power or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.”).

129. Id.


131. See id.

Summer 2017] VACATING AN ARBITRATION AWARD 473

in determining jurisdiction.133 Instead, when evaluating a § 10 petition asserting jurisdiction under 28 U.S.C. § 1331 or § 15 U.S.C. 78aa, a court should apply the same well-pleaded complaint rule that would typically apply to a case or controversy.134 Thus, to be successful, a § 10 petition should allege that the misconduct or wrongdoing, the grounds of which would allow for vacatur of the arbitration award, violated some federal law, which would in turn allow the grant the federal court jurisdiction.

IV. FEDERAL JURISDICTION AND FINRA

A § 10 petition allows for vacatur of an arbitration award when the award involved some type of misconduct, wrongdoing, or fraud in relation to the actions taken by the arbitrators.135 Consequently, as one of the largest arbitration forums in the United States, many § 10 petitions are direct challenges to the actions of a FINRA arbitrator.136 This is significant because when advocates find themselves struggling to assert an independent ground for federal jurisdiction – because the FAA does not provide for federal jurisdiction – it has been argued that the arbitrator’s violation of FINRA regulations during the arbitration proceedings should fall under the grant of federal jurisdiction under the Exchange Act, 15 U.S.C. § 78aa. Thus, after deciding that the “look through” approach should not be applied to § 10, the critical question remains of whether a FINRA regulation violation made by an arbitrator would satisfy the well-pleaded complaint rule and serve as independent jurisdictional grounds under 15 U.S.C. § 78aa.

A. Jurisdiction under the Securities Exchange Act

The Supreme Court has recently provided some clarity when dealing with the Exchange Act’s grant of jurisdiction.137 In Merill Lynch, Pierce, Fenner & Smith Inc. v. Manning, the Court examined and defined the scope of exclusive federal jurisdiction under § 78aa.138 The Court adopted an identical inquiry to the familiar “arising under” test for federal question jurisdiction under 28 U.S.C. § 1331.139 In doing so, the Court expressly rejected some circuits that had interpreted the jurisdictional scope of § 78aa as broader than the jurisdictional grant of § 1331.140 Citing well-settled

135. Id.
136. See, e.g., Goldman, 834 F.3d at 251; Magruder, 818 F.3d at 288; Sacks v. Dietrich, 663 F.3d 1065, 1069 (9th Cir. 2011); Doscher v. Sea Port Grp. Sec., LLC, 832 F.3d 372, 374-375 (2nd Cir. 2016).
138. Id. at 1567–68 [“Manning”].
139. Id.
140. Id. at 1567 & n. 1.
precedent regarding the jurisdictional scope of § 1331. The Court held that “§ 78aa applies to two kinds of suits: (1) those in which ‘federal law creates the cause of action asserted’ and (2) ‘a special and small category of cases’ that ‘necessarily raise a stated federal issue, actually disputed and substantial’.” The Court held that the first category encompasses cases that assert a federal cause of action created by the Exchange Act, whereas the second category encompasses actions that fall outside the duties imposed by the Exchange Act, but “necessarily raise[] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state power.” Thus, the Court concluded that when dealing with a jurisdictional issue under § 78aa, the same “arising under” and well-pleaded complaint analysis applied to §1331 should be applied to §78aa.

One of the cases overturned by the Manning decision – significant to this article – was the Ninth Circuit case, Sparta Surgical Corp. v. National Ass’n of Securities Dealers, Inc. In Sparta, the plaintiffs had asserted state law claims that alleged that the National Association of Securities Dealers (“NASD”) had violated its internal rules. The Ninth Circuit in Sparta found that because § 78aa grants exclusive jurisdiction over actions brought to enforce securities exchange rules, federal jurisdiction was proper. However, the Manning decision held that this interpretation of the Exchange Act’s jurisdiction was overly broad, and the proper jurisdictional analysis of § 78aa should mirror an analysis under §1331. Although Manning defined the scope of § 78aa jurisdiction and overruled circuits that implemented broader interpretations, to what extent § 78aa jurisdiction encompasses FINRA regulations has yet be determined.

141. Id. at 1569–71 (citing Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg., 545 U.S. 308, 314 (2005); Gunn v. Minton, 133 S.Ct. 1059, 1064 (2013); Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 807 (1986)).
143. Id. (citing Gunn, 133 S.Ct. at 1064) (internal quotations omitted).
144. Id. at 1566.
145. Sacks v. Dietrich, 663 F.3d 1065, 1069 (9th Cir. 2011); Sparta Surgical Corp. v. Nat’l Ass’n of Sec. Dealers, Inc., 159 F.3d 1209 (9th Cir. 1998) (“Sparta”).
146. Doscher, 832 F.3d at 378; Sparta, 159 F.3d at 1212.
147. Sparta, 159 F.3d at 1212.
B. FINRA as a Securities Self-Regulatory Organization

The concept and issues regarding industry self-regulation are often “poorly understood and under-theorized.”\(^{151}\) Under the Exchange Act, the Securities Exchange Commission (“SEC”) can create a self-regulatory organization (“SRO”).\(^{152}\) An SRO promulgates internal regulatory rules that are subject to SEC approval, abrogation, or modification.\(^{153}\) Further, the Exchange Act requires an SRO to both abide by and enforce their own internal rules.\(^{154}\) As discussed above, a violation of the Exchange Act triggers exclusive federal jurisdiction.\(^{155}\) However, it is not entirely clear whether a violation of a securities SRO regulation falls within the scope of § 78aa’s exclusive grant of federal jurisdiction.\(^{156}\)

FINRA is a securities SRO, which promulgates rules and regulations subject to SEC approval, abrogation, or modification.\(^{157}\) However, FINRA is not part of the government.\(^{158}\) FINRA is a not-for-profit organization authorized by Congress to protect American investors by ensuring the securities industry operates fairly and honestly.\(^{159}\) It was created by the Exchange Act and has evolved significantly since its creation.\(^{160}\) In 2007, the NASD and the New York Stock Exchange, Inc. (“NYSE”), merged to form FINRA, for the purpose of a “single self-regulator for all securities firms doing business with the public.”\(^{161}\) Since its formation, FINRA has continued to regulate all U.S. securities firms that do business with the public and is responsible for the “surveillance, investigation and enforcement of more than eighty percent of U.S. equity trading.”\(^{162}\) The major securities exchanges have delegated to FINRA oversight and disciplinary responsibilities as well as the responsibility of regulating market functions.\(^{163}\)


\(^{153}\) Id. at § 78s(b)-(c).

\(^{154}\) Id. at § 78s(g).


\(^{156}\) See, e.g., Goldman v. Citigroup Global Mkts. Inc., 834 F.3d 242 (3rd Cir. 2016); Magruder v. Fidelity Brokerage Servs. LLC, 818 F.3d 285 (7th Cir. 2016); Sacks v. Dietrich, 663 F.3d 1065, 1069 (9th Cir. 2011); Doscher v. Sea Port Grp. Sec., LLC, 832 F.3d 372 (2nd Cir. 2016); NASDAQ QMX Grp., Inc. v. UBS Sec., LLC, 770 F.3d 1010 (2014); Ortiz-Espinosa v. BBVA Securities of Puerto Rico, Inc., 882 F.3d 36 (2017).


\(^{159}\) Id.

\(^{160}\) Id. at 964.

\(^{161}\) Id.


\(^{163}\) Id.
SEC has also delegated “significant duties” to FINRA, such as monitoring “the internal operations of its members, all of which are also regulated by the SEC.” 164 Today, FINRA’s revenue now “almost equals the operating budget of the SEC.” 165 Significantly, FINRA operates and manages the largest arbitration forum in the United States when it comes to securities disputes.

C. Whether a FINRA Violation Satisfies the Well-Pleaded Complaint Rule by invoking 15 U.S.C. § 78aa Jurisdiction

Being the largest securities arbitration forum in the United States, many courts are faced with FAA claims that stem from FINRA arbitration proceedings. 167 These FAA claims include § 10 petitions to vacate an arbitration award. 168 Interestingly, the same courts that are split on whether to apply the “look through” to a § 10 petition ultimately agree that an arbitrator violating an internal FINRA regulation should not trigger federal jurisdiction under § 78aa. 169 The only circuit that has held otherwise is the Ninth Circuit’s decision of Sacks v. Dietrich. 170 However, the foundations supporting the Ninth Circuit’s decision have been eroded away by Manning, and Sacks has become less defensible in light of the recent Supreme Court decision. 171

According to the Ninth Circuit, § 78aa jurisdiction extends to claims based on violations of internal SRO rules by arbitrators. 172 In Sacks, the Ninth Circuit concluded that federal jurisdiction was proper because the central question of the case was whether FINRA rules were violated and

164. Id.
168. Goldman, 834 F.3d at 247-248; Magruder, 818 F.3d at 288; Doscher, 832 F.3d at 374; Ortiz-Espinosa v. BBVA Securities of Puerto Rico, Inc., 852 F.3d 36, 43-44 (2017).
169. Goldman, 834 F.3d at 258-259; Magruder, 818 F.3d at 288-289; Doscher, 832 F.3d at 388-389; Ortiz, 852 F.3d at 49-50.
170. Sacks, 663 F.3d at 1069 [“Sacks”].
171. Doscher, 832 F.3d at 376–77.
172. Sacks, 663 F.3d at 1069.
thus “application of federal law [was necessary] to resolve each of the state law theories.” As a basis for the Ninth Circuit’s conclusion in Sacks, the court relied on their prior decision of Sparta – which, as discussed above, has since been overturned by Manning. Using Sparta as a basis for its decision, the Sacks court refused to distinguish “between a case in which an SRO violated its own rules and one in which an arbitrator was charged with the rule violation.” The Sacks court “chose to ground its decision on the characterization of internal SRO rules as federal law, regardless of the identity of the alleged violator.”

However, in a case that was decided after Manning, the Second Circuit expressly disagreed with the Ninth Circuit’s characterization in Doscher. The Second Circuit reasoned that when an SRO like FINRA violates internal rules, the conduct violates § 78s(g)(1). On the other hand, when someone other than the SRO violates internal rules, “neither the cause of action nor any necessary element of it involves adjudicating any breach of a federal obligation.” Additionally, the Second Circuit refused to follow the Ninth Circuit’s reasoning because “whatever force existed in the Ninth Circuit’s conclusion that any violation of SRO rules falls categorically within 15 U.S.C. § 78aa’s grant of ‘exclusive [federal] jurisdiction’… is no longer tenable following the Supreme Court’s recent decision in [Manning].” The Second Circuit recognized the full impact of the Manning decision and expressly rejected Sparta’s broader interpretation of § 78aa. Because the Exchange Act itself imposes no duty to comply with SRO rules on arbitrators or other non-SRO parties to arbitration, the Manning “arising under” test does not grant federal jurisdiction to a securities SRO violation by arbitrators.

But the issue of whether a FINRA violation by an arbitrator invokes federal jurisdiction is not an issue to be taken lightly. Applying the federal question jurisdiction inquiries of § 1331 to a FINRA violation by an arbitrator, as Manning requires, there are reasonable arguments that would support an application of federal question jurisdiction.

Federal question jurisdiction’s “arising under” test is governed by the well-pleaded complaint rule and, consequently, the Grable & Sons Metal Products, Inc. v. Darue Engineering and Manufacturing and Gunn v. Min-

173. Doscher, 832 F.3d at 376 (quoting Sacks, 663 F.3d at 1069).
174. Sparta Surgical Corp. v. Nat’l Ass’n of Sec. Dealers, Inc., 159 F.3d 1209, 1212 (9th Cir. 1998).
175. Doscher, 832 F.3d at 378; Sacks, 663 F.3d at 1069.
176. Doscher, 832 F.3d at 378; Sacks, 663 F.3d at 1069.
177. Doscher, 832 F.3d at 378.
178. Id.
179. Id.
180. Id.
ton exception ("Grable exception"). Under this exception to the well-pleaded complaint rule, a federal court has jurisdiction if a federal issue is necessarily raised, actually disputed, substantial, and a federal forum entering the claim would not disturb the balance between federal and state power. When reviewing the circuit courts that have applied the Grable exception to FINRA, there exists a small distinction upon which courts have hinged their jurisdictional decisions.

At the outset, the court must first determine whether a FINRA regulation violation by an arbitrator necessarily raises a federal issue. Often, the alleged misconduct will be that the arbitrator violated an internal FINRA rule and although an agent of FINRA cannot violate an internal regulation without raising an issue of federal law under § 78aa, courts have classified FINRA arbitrators as a third party, and determined that the same federal interests are not triggered. But should the arbitrator be categorized as a third party? Conceivably, arbitrators could be categorized as agents of FINRA because they are tasked with executing the same rules and regulations as an employee of FINRA. If a FINRA employee violated a FINRA rule when regulating the securities industry, a federal court could hold that a federal interest was necessarily raised. Thus, an arbitrator violating a FINRA regulation could arguably implicate a similar federal interest. However, further analysis of the Grable "substantiality" analysis to a FINRA violation by an arbitrator took place in the Third Circuit case of Goldman.

A persuasive application of the Grable "substantiality" analysis to a FINRA violation by an arbitrator took place in the Third Circuit case of Goldman. In Goldman, the court was faced with the argument that a violation of a FINRA regulation by an arbitrator was similar to the violation seen in the case of NASDAQ OMX Group, Inc. v. UBS Securities, LLC,

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183. Grable, 545 U.S. at 314; Gunn, 133 S.Ct. at 1064.
185. See Goldman, 834 F.3d at 249; NASDAQ, 770 F.3d at 1024. See also Grable, 545 U.S. at 314; Gunn, 133 S.Ct. at 1064.
186. See Goldman, 834 F.3d at 247-248; Doscher v. Sea Port Grp. Sec., LLC, 832 F.3d 372, 374 (2015); Sacks v. Dietrich, 663 F.3d 1065, 1067 (9th Cir. 2011).
188. See NASDAQ, 770 F.3d at 1024; Sacks, 663 F.3d at 1068-69; Doscher, 832 F.3d at 375-376.
190. See NASDAQ, 770 F.3d at 1020, Doscher, 832 F.3d at 375.
191. Sacks, 663 F.3d at 1068-69. See also Doscher, 832 F.3d at 375-376.
which invoked federal jurisdiction.\footnote{193}{Id. at 257; \emph{NASDAQ}, 770 F.3d at 1010.} In \emph{NASDAQ}, the court found that the federal interest at issue was substantial because the issues were directed at the securities exchange, which implicated the “central role stock exchanges play in the national system of securities markets.”\footnote{194}{\emph{Id.} at 258 (quoting \emph{NASDAQ}, 770 F.3d at 1024).} However, similar to the \emph{Doscher} court, the \emph{Goldman} court distinguished the \emph{NASDAQ} case because it involved “more substantial questions of federal law.”\footnote{195}{\emph{Id.} (quoting \emph{Goldman}, 834 F.3d at 258 (quoting \emph{NASDAQ}, 770 F.3d at 1024).}} Consistent with its “look through” approach reasoning, the \emph{Goldman} court held that a § 10 petition to vacate an arbitration award is a commonplace state law contract dispute, and does not affect the “federal system as a whole.”\footnote{196}{\emph{Id.} (quoting \emph{Goldman}, 834 F.3d at 258–59).}

Additionally, the \emph{Garble} inquiry regarding the balance between state and federal power was addressed in the \emph{Goldman} case.\footnote{197}{\emph{Id.} at 257–59.} The Third Circuit held that federal question jurisdiction over a FINRA claim would cause a “flood of cases that would enter federal courts if the involvement of a self-regulatory organization were itself sufficient to support jurisdiction.”\footnote{198}{\emph{Id.} (citing \emph{Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.}, 545 U.S. 308, 314 (2005)).} However, there are some considerations to take into account before quickly dismissing a FINRA violation by an arbitrator as a state law matter. Initially, many cases that were overturned by \emph{Manning} for an overly broad interpretation of § 78aa jurisdiction, such as \emph{Sparta}, took place before the 2007 merger with FINRA, and dealt with violations of a NASD rule.\footnote{199}{\emph{Id.}} To distinguish a FINRA violation from the NASD violation that took place in \emph{Sparta}, FINRA consolidated SEC entities NASD and NYSE and now has over 641,000 brokers and nearly 4,000 securities firms.\footnote{200}{Statistics, FIN. INDUS. REGULATORY AUTH., www.finra.org/statistics (last visited Sept. 4, 2017).} Today, FINRA has a much larger integration into the securities industry than NASD had when \emph{Sparta} was decided.\footnote{201}{\emph{Id.}} It adopts rules and by-laws in conformance with the Exchange Act, and § 78aa “confers exclusive jurisdiction upon the federal courts for suits brought to enforce the Act or rules and regulations promulgated thereunder.”\footnote{202}{\emph{Id.} (citing \emph{Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.}, 545 U.S. 308, 314 (2005)).} As a branch of the SEC, FINRA is a major player in federal securities industry.\footnote{203}{See supra Part IV.} Thus, there exists a natural inclination from looking at the plain language of § 78aa, and the functions of FINRA, to assume a violation of its rules and regulations would warrant
federal jurisdiction. The same federal interests driving Congress’ decision to grant federal courts exclusive jurisdiction over the securities industry in the Exchange Act can be mirrored in a FINRA violation. Nevertheless, these considerations are not compelling enough in light of the Manning decision, which rejected similar arguments when deciding the scope of § 78aa jurisdiction.

V. CONCLUSION

When dealing with the FAA, a “look through” approach should not be applied to a § 10 petition. The language of § 10 does not have “any language comparable to that on which the Supreme Court relied in Vaden.” Not applying the “look through approach to § 10 harmonizes the law of arbitration with the law of contracts.” There are no practical justifications for a court to look through to the underlying dispute. Instead, a court should evaluate the motion dispute, and apply the well-pleaded complaint rule. Similarly, if the § 10 petition involves a securities dispute, the Manning decision mandates a similar analysis of the petition.

The Exchange Act imposes no duty to comply with FINRA rules either on the arbitrators or non-SRO parties to arbitration. Thus, an action to vacate an arbitration award on either ground does not fall into either Manning category. FINRA regulations do not create a federal cause of action, nor does a FINRA violation fit into the special and small Manning category that necessarily raises a federal issue, actually disputed and substantial. Therefore, a federal court does not have federal question jurisdiction over a § 10 petition to vacate an arbitration award based on an arbitrator’s violation of a FINRA regulation. Section 78aa jurisdiction should not extend to violations of FINRA rules by an arbitrator, even though FINRA is quite entrenched in regulating the securities industry.

205. Compare NASDAQ OMX Grp., Inc. v. UBS Sec., LLC, 770 F.3d 1010, 1020 (2nd Cir. 2016) (stating that the federal system has an interest in regulating the stock market and the securities industry), with Statistics, FIN. INDUS. REGULATORY AUTH., www.finra.org/statistics (last visited Sept. 4, 2017) (which shows how entrenched FINRA is regulating securities issues).
207. Magruder v. Fidelity Brokerage Servs. LLC, 818 F.3d 285, 288 (7th Cir. 2016).
208. Goldman, 834 F.3d at 255 (quoting Magruder, 818 F.3d at 288).
209. See Doscher v. Sea Port Grp. Sec., LLC, 832 F.3d 372, 377 (2nd Cir. 2016); Goldman, 834 F.3d at 258-259.
211. Id.
212. Id. at 388-389.
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