UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of May, two thousand twenty-five.

PRESENT:

REENA RAGGI,
SUSAN L. CARNEY,
ALISON J. NATHAN,
Circuit Judges.

Versel Green,

Plaintiff-Appellant,

v. **24-2550-cv**

Bank of America Merrill Lynch, Merrill Edge Advisory Center, Merrill Lynch, Pierce, Fenner & Smith Incorporated,

Defendants-Appellees.

FOR PLAINTIFF-APPELLANT: Versel Green, pro se, Cheektowaga, NY.

FOR DEFENDANTS-APPELLEES: Logan S. Fisher, Bressler, Amery & Ross, P.C., New York, NY.

Appeal from a judgment of the United States District Court for the Western District of New York (Vilardo, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the August 28, 2024 judgment of the district court is **AFFIRMED**.

Versel Green, pro se, appeals from the district court's dismissal of his complaint for lack of subject matter jurisdiction. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, to which we refer only as necessary to explain our decision to affirm the judgment below.

Green commenced this action under the Federal Arbitration Act (FAA) against Bank of America Merrill Lynch, Merrill Edge Advisory Center, and Merrill Lynch, Pierce, Fenner & Smith Incorporated, seeking to vacate an arbitration award issued by a Financial Industry Regulatory Authority (FINRA) arbitration panel. The defendants moved, under Federal Rules of Civil Procedure 12(b)(1)

and 12(b)(6), to dismiss Green's petition. The district court granted the defendants' 12(b)(1) motion, concluding that the court lacked subject matter jurisdiction because Green's petition did not allege a violation of federal law and his challenge to the arbitration award did not raise a federal question. *Green v. Bank of America Merrill Lynch*, No. 21-CV-371-LJV, 2024 WL 3950379 (W.D.N.Y. Aug. 27, 2024). On appeal, Green argues that he alleged a state law claim that implicated a federal issue and therefore the district court erred in dismissing his complaint for lack of subject matter jurisdiction.

"Where a district court grants a defendant's Rule 12(b)(1) motion to dismiss, an appellate court will review the district court's factual findings for clear error and its legal conclusions *de novo*." *Aurecchione v. Schoolman Transp. Sys. Inc.*, 426 F.3d 635, 638 (2d Cir. 2005). "The plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence." *Id*. We "liberally construe pleadings and briefs submitted by pro se litigants[.]" *McLeod v. Jewish Guild for the Blind*, 864 F.3d 154, 156 (2d Cir. 2017) (quotation marks omitted).

Green concedes that there was not diversity of citizenship, and the district court correctly concluded that the allegations of his petition did not establish federal question jurisdiction. Under 28 U.S.C. § 1331, "a case arises under federal

law when federal law creates the cause of action asserted." *Gunn v. Minton*, 568 U.S. 251, 257 (2013). In this case, Green invoked a federal statute, namely the FAA, in seeking to vacate an arbitral award. *See Badgerow v. Walters*, 596 U.S. 1, 4 (2022) ("[U]nder Sections 9 and 10 [of the FAA], a party may apply to the court to confirm, or alternatively to vacate, an arbitral award."). However, the FAA's "authorization of a petition does not itself create jurisdiction." *Id.* "Rather, the federal court must have what [the Supreme Court] ha[s] called an 'independent jurisdictional basis' to resolve the matter." *Id.* (quoting *Hall Street Associates, L. L. C. v. Mattel, Inc.*, 552 U.S. 576, 582 (2008)). In considering whether a Section 10 petition establishes subject matter jurisdiction, the "jurisdictional basis independent of the FAA must appear on 'the face of the application itself.'" *Trs. of New York State Nurses Ass'n Pension Plan v. White Oak Glob. Advisors, LLC*, 102 F.4th 572, 584 (2d Cir. 2024) (quoting *Badgerow*, 596 U.S. at 9).

The district court was correct that it lacked an independent jurisdictional basis. Here, Green's petition did not allege "that federal law (beyond Section 9 or 10 itself) entitle[d] [him] to relief." *See Badgerow*, 596 U.S. at 9. Green contested the enforceability of the arbitration award, but an arbitral award "is no more than a contractual resolution of the parties' dispute—a way of settling legal claims,"

and "quarrels about legal settlements—even settlements of federal claims—typically involve only state law, like disagreements about other contracts." *Id*. Where, as here, a Section 9 or 10 petition "raise[s] claims between non-diverse parties involving state law," the petition belongs in state, not federal court. *Id.* at 18.

On appeal, Green argues that his state law claims challenging the enforceability of the arbitral award—namely on the basis that the award violates public policy—conferred federal question jurisdiction because they implicated federal issues. For "a special and small category of cases brought under state law that implicate a federal issue[,] . . . federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Tantaros v. Fox News Network, LLC*, 12 F.4th 135, 140–41 (2d Cir. 2021) (alteration, quotation marks, and citations omitted). Here, Green's allegations that the award violated public policy because the panel improperly treated a pro se litigant suffering from various mental infirmities does not "necessarily raise[]" a federal issue. *See id.* at 141; *see also Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005).

We have considered Green's remaining arguments and conclude they are without merit. However, "dismissals for lack of subject matter jurisdiction must be without prejudice, rather than with prejudice." *Green v. Dep't of Educ. of City of New York*, 16 F.4th 1070, 1074 (2d Cir. 2021) (quotation marks omitted). Here, the district court did not specify whether its dismissal was with or without prejudice. We therefore modify the judgment to reflect a without-prejudice dismissal. *See United States v. Adams*, 955 F.3d 238, 250–51 (2d Cir. 2020) (recognizing our authority to modify and affirm judgments under 28 U.S.C. § 2106).

Accordingly, we **AFFIRM AS MODIFIED ABOVE** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court