SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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JOSEPH TODD LERNER and
ANNA SARAI WIINDERBAUM,

Petitioners,

Index No. 652771/2019

-against-

CREDIT SUISSE SECURITIES (USA) LLC,

Respondent.

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Masley, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6 7, 8, 9, 10, 11, 12, 13, 14, 15, 16,[1] 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139

were read on this petition to/for CONFIRM ARBITRATION AWARD

Petitioners, Joseph Todd Lerner and Anna Sarai Winderbaum, initiated this proceeding on May 8, 2019, pursuant to CPLR 7510 to confirm the arbitration award (Award) issued on May 7, 2019 by a FINRA arbitration panel (FINRA) (NYSCEF Doc. [NYSCEF] 1, Petition). Respondent, Credit Suisse Securities LLC (CSS), cross-petitioned pursuant to CPLR 7511 to vacate the Award (NYSCEF 15, Notice of Cross Petition).

In the Award, FINRA ordered CSS to pay $1,386, 628 to Lerner and $1,400,716 to Winderbaum in compensatory damages, the same amounts each in liquidated damages, $250,000 in attorneys' fees, and other fees and interest (NYSCEF 3, Award Petition ¶ 4). FINRA also recommended that CSS change the "Reason for Termination and Termination

[1] The court implores parties to follow the rules and file exhibits separately in NYSCEF with an appropriate description. For example, "CX 1A" is meaningless and useless. Further, CSS shall re-file NYSCEF 16, a 6-page affirmation with 37 unmarked exhibits totaling 794 pages. Each exhibit shall be filed in as a separate document in NYSCEF.

Explanation on the Form U-5 . . . to 'Other' and the Termination Explanation be changed to "Termination without cause" (*id.* ¶¶11, 12).

Petitioners seek an order (1) confirming the Award and (2) directing CSS to expunge petitioners' Forms U-5 by changing the termination explanation to "Terminated without cause" (NYSCEF 1, Petition, ¶¶i, ii, and p. 5).

CSS moves to dismiss the petition and vacate the Award. (NYSCEF 15, Cross Petition).

Undersection 10 of the Federal Arbitration Act (FAA), a court's review of a petition for vacatur is limited to four grounds, but only the fourth is at issue here: "where the arbitrators have exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made" (9 USC §10).

> [R]eview under § 10 focuses on misconduct rather than mistake. . . there should be great hesitation in upsetting an arbitration award. Arbitration panel determinations are accorded great deference under the FAA and the role of a district court in reviewing an arbitration award is therefore severely limited. The burden of proof necessary to avoid confirmation of an arbitration award is very high, and a district court will enforce the award as long as there is a barely colorable justification for the outcome reached. The confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the Court

(*Fidelity Brokerage Services LLC v Deutsch*, 2018 WL 2947972, *5 [SDNY 2018] [citations omitted], *affd* 763 Fed Appx 104 [2d Cir 2019]).

First, CSS argues that the award of liquidated damages defies clear and applicable law because (1) petitioners' deferred compensation are not considered wages under the Labor Law; (2) the labor law does not apply to the petitioners as investment advisors; and (3) CSS had a good faith basis for canceling petitioners' compensation.

To prevail on a petition to vacate an arbitration award due to manifest disregard of the law, CSS must show (1) "the arbitrators knew of the governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was

well defined, explicit, and clearly applicable to the case" (*Wein & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 481 [2006] [citation omitted]). "[A]wards are vacated on grounds of manifest disregard only in 'those exceedingly rare instances where some egregious impropriety on the part of the arbitrator is apparent'" (*T. Co Metals, LLC v Dempsey Pipe & Supply, Inc.*, 592 F3d 329, 339 [2d Cir 2010] [internal quotation marks and citation omitted]). However, this is not such a case.

FINRA awarded liquidated damages, an identical amount to FINRA's compensatory damage awards to petitioners (NYSCEF 3, Award ¶¶ 5, 6, p. 4).

Labor Law §198 (1-a) provides:

> [i]n any action instituted in the courts upon a *wage claim* by an employee . . . the court shall allow such employee to recover the full amount of any underpayment, all reasonable attorney's fees, prejudgment interest as required under the civil practice law and rules, and, unless the employer proves a *good faith basis to* believe that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages equal to one hundred percent of the total amount of the wages found to be due . . .

[emphasis added].

CSS challenges FINRA's finding that petitioners' deferred compensation qualified as wages under Labor Law §198 (1-a). CSS relies primarily on *Truelove v Northeast Capital & Advisory, Inc.*, where the court explained that "incentive compensation" that is "contingent and dependent, at least in part, on the financial success of the business enterprise" is not "wages" under the Labor Law (95 NY2d 220, 223-24 [2000]). CSS also relies on *Guiry v Goldman, Sachs & Co.* where the court held that plaintiff's unvested equity-based compensation was incentive pay because the value of the stock relied on the financial success of the business rather than the "employee's own performance," and thus, cannot be considered wages (31 AD3d 70, 72-73 [1st Dept 2006], *appeal withdrawn* 7 NY3d 809 [2006]).

The court rejects CSS's reliance on *Truelove* and *Guiry* which both relate to unvested incentive compensation (*Truelove*, 95 NY2d at 225; *Guiry*, 31 AD3d at 72). Here, petitioners' deferred equity-based compensation had vested and was commission-based, tied directly to their work performance (NYSCEF 29, Private Banking North America Relationship Manage Compensation Guide). Indeed, implicit in respondents' request for a "declaration that Claimants are not entitled to vesting, or delivery of their unvested contingent deferred awards" is that at least part of petitioners' deferred compensation had vested. (NYSCEF 3, Award p. 2, ¶2). Commissions are expressly included under the definition of "wages" in Labor Law (Labor Law § 190). A bonus or incentive pay is considered wages where it is linked to labor and vested (*Ryan v Kellogg Partners Institutional Services*, 19 NY3d 1, 16 [2012]). FINRA's application of the law contrary to CSS's interpretation does not render FINRA's interpretation a manifest disregard of the law.

CSS insists that as investment advisors, petitioners are not eligible for liquidated damages under the Labor Law because they are not "commission salespersons."

Article 6 of the Labor Law applies to enumerated categories of employees, including a "commission salesman." "The term 'commission salesman' does not include an employee whose principle activity is of a supervisory, managerial, executive or administrative nature" (Labor Law § 190 [6]). "Whether an employee acted in a 'supervisory, managerial, executive or administrative' capacity is a question of fact" (*Zentz v Int'l Foreign Exch. Concepts, L.P.*, 33 Misc 3d 1212(A), 2011 NY Slip Op 51908[U], *6 [Sup Ct, Kings County 2011], *affirmed*, 106 AD3d 904 (2013).)

Here, FINRA was presented with evidence from both parties. Indeed, the arbitrators heard 13 days of testimony (NYSCEF 3, Award p. 6). FINRA's "factual findings

and contractual interpretations are not subject to judicial challenge, particularly on our limited review of whether the arbitrator manifestly disregarded the law" (*Westerbeke Corp. v Daihatsu Motor Co.*, 304 F3d 200, 214 [2d Cir 2002].) Likewise, this court will not second-guess FINRA's factual determination that the petitioners are "commission salesman" covered by the Labor Law. CSS's reliance on *Guiry otherwise*, is misplaced since there the court specifically declined to determine the issue of employment status (31 AD3d at 78 n 1). Likewise *Cantor Fitzgerald Assocs., L.P. v Mines*, 1 Misc 3d 906(A), 2003 NY Slip Op 51528[U], *2 [Sup Ct, NY County 2003] is factually distinguished since there the defendant was not an investment advisor and he was "first vice president" and "a Cantor partner with an equity participation." Therefore, the court rejects CSS's employment status argument.

CSS insists that it proved "a good faith basis for believing underpayment of wages was in compliance with the law" and asserts FINRA's manifest disregard of Labor Law §198 (1-a). CSS believed petitioners' deferred compensation was properly cancelled pursuant to the terms of the controlling award certificate.

CSS has the burden to "prove a good faith basis" for the underpayment which depends on a factual determination "not subject to judicial challenge" (*Westerbeke Corp.*, 304 F3d at 213-14). This court accepts FINRA's findings as there is more than a "barely colorable justification for the outcome reached" (*See T. Co Metals, LLC,* 592 F3d at 339 (internal quotation and citations omitted)). Therefore, the court rejects CSS's manifest disregard arguments.

Second, CSS attacks FINRA's compensatory damages award as inconsistent with controlling contracts and the compensation methodology therein. CSS opines that the maximum amount FINRA could have awarded is $1 million each based on petitioner's own

valuation of the stock at issue. CSS speculates that FINRA could only impermissibly reach its $1.4 million award by including stock awards and bonuses that were explicitly "*ungranted*" in the contract making the Award's calculation "totally irrational." CSS relies on its Private Banking North America Relationship Manager Compensation Guide (Guide) which states that an employee has no right to their 2015 deferred stock awards and year-end bonuses if the employee "is not employed by [Credit Suisse] on the Grant Date *for any reason*" (NYSCEF 29, Guide at p. 8-10). CSS asks the Court to vacate the Award as irrational and exceeding the panel's authority. CSS relies on *Riverbay Corp. v Local 32-E*, for the proposition that an arbitrator exceeds his power "when he gives a totally irrational construction to the contractual provisions in dispute and, thus, makes a new contract for the parties" (91 AD2d 509, 510 [1st Dept 2003]).

Whether CSS's Guide governed petitioners' compensation terms was a disputed issue at the arbitration (See e.g. NYSCEF 127, Delorier Testimony, p 1203:5-12, 1270:5-13). Thus, even if FINRA clearly understood the Guide to make petitioners' ineligible to receive their 2015 deferred awards and bonuses, FINRA could have nevertheless determined the Guide was not controlling and properly disregarded it. "[T]he award should be enforced . . . if there is a barely colorable justification for the outcome reached" (*Wallace v Buttar*, 378 F3d 182, 190 [2d Cir 2004] (citation and quotation omitted). This standard applies even if a court disagrees with the decision on the merits (*See id.*). Further, "[a]rbitrators are not required to disclose the basis upon which their awards are made" (*Bear Stearns & Co., Inc. v Fulco*, 21 Misc 3d 823, 832 [Sup Ct, NY County 2008] [citation and quotation omitted]). "As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision" (*Oracle Corp. v*

Wilson, 276 F Supp 3d 22, 32 [SDNY 2017], *appeal withdrawn* 2017 WL 8289590 (2d Cir 2017). The parties selected arbitration and agreed to be bound by FINRA's findings. This court will not revisit FINRA's contract interpretation in the absence of misconduct, misconstruction, and misapplication.

Likewise, the court rejects CSS's miscalculation argument. Under the FAA, a court can order an award modification where there is an "evident material miscalculation of figures . . . ." (*See* 9 USC § 11 [a]). However, "[i]n those few instances where courts have modified arbitration awards under § 11(a), the errors have always been obvious, and the opposing parties generally have not challenged the miscalculations . . . . For the most part . . . § 11(a) is used to correct typographical, clerical, and other obvious errors" (*Companhia de Navegacao Maritima Netumar v Armada Parcel Serv., Ltd.*, 2000 WL 60200, *7 [SDNY, Jan. 25, 2000, No. 96 CIV. 6441 (PKL)]). There is no "obvious error" in FINRA's Award calculation.

Finally, CSS attacks petitioners' failure to mitigate damages. CSS argues, petitioners negotiated "replacement compensation" from their subsequent employer, Morgan Stanley which was "intended to replace stock [the Petitioner's] forfeited at [their] previous employer," i.e., the differed compensation at issue. CSS asserts that petitioners' failure to sign the Morgan Stanley "tendered replacement award offer" constitutes a clear failure to mitigate their damages, which was ignored by FINRA and grounds for vacatur of the Award.

The court rejects CSS's argument based on the Appellate Division decision in *Matter of Credit Suisse Securities (USA) LLC v Finn* which rejected this argument under nearly identical circumstances (182 AD3d 493 [1st Dept 2020]). In *Finn*, CSS argued that an arbitration award to an employee should be vacated because the arbitrators failed to

take into account that the employee mitigated the damages by accepting "replacement compensation" from his subsequent employer (*id.*). The court rejected this argument, stating, "the arbitration panel could reasonably have concluded that the transition payments respondent received from his new employer did not in fact 'replace' the deferred compensation benefits withheld by [CSS], as they were subject to additional conditions and restrictions" (*Id.* at 494). In this case, the "replacement compensation" offered to petitioners was conditioned on them working for Morgan Stanley for nine years before the awards vested (*See* NYSCEF 27, 28, Morgan Stanley Compensation Incentive Plan for Lerner and Winderbaum). Likewise, here FINRA could "reasonably have concluded that the transition payments [petitioners were offered by their] new employer did not in fact 'replace' the deferred compensation benefits withheld by [CSS]" (*Finn,* 182 AD3d 493, 494 citing *In re Lehman Bros. Holdings Inc.*, 703 F Appx 18, 21-22 [2d Cir 2017] for the proposition that mitigation or offset is a defense to payment of vested compensation is far from clear authority).

CSS insists that petitioners resigned on December 11, 2015, forfeiting the right to their deferred compensation awards and challenges FINRA's finding that the petitioners were terminated. This precise argument was rejected in *Finn* (182 AD3d 493, 494). Rather, the court found that "the law is not clear that [CSS's] announcement of the closing of the U.S. private banking division, i.e., respondent's inevitable termination, did not constitute constructive discharge" (*Id.*). Therefore, here FINRA properly concluded that petitioners were terminated, which in turn, caused their deferred compensation to vest (*Finn*, 122 NYS3d at 302-03).

The court has considered the parties' remaining arguments and finds them unavailing, without merit, or otherwise not requiring an alternate result.

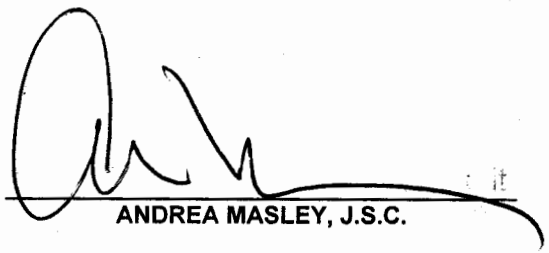
Accordingly, it is

ORDERED that the petition to confirm the Award is granted in its entirety (including, the monetary award, liquidated damages, the fees and the expungement directive); and it is further

ORDERED that CS's counter petition to vacate the Award is denied.

Motion Seq. No. 01:

7/16/2020
DATE



ANDREA MASLEY, J.S.C.

CHECK ONE:	[x]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[x]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE