UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-80355-CIV-MARRA/BRANNON

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Petitioner,

vs.

TAMARA SMOLCHEK and MERI RAMAZIO,

Respondents.
_____/

ORDER DENYING PETITION TO VACATE ARBITRATION AWARD

THIS CAUSE is before the Court upon Merrill Lynch, Pierce, Fenner & Smith, Inc.'s ("Merrill Lynch's") Petition to Vacate Arbitration Award (DE 1),[1] filed pursuant to section ten of the Federal Arbitration Act ("FAA"). The petition has been extensively briefed and is ripe for adjudication. Upon a careful review of the record and the evidence presented by the parties, the Court finds no basis to overturn the arbitration panel's ruling and will therefore the deny Merrill Lynch's petition and will grant Respondent's cross-petition.

BACKGROUND

Respondents Tamara Smolchek and Meri Ramazio are former financial advisors with Merrill

[1]Respondents independently filed a corresponding petition to *confirm* the arbitration award. Because the petitions addressed the same arbitration agreement and seek opposite relief, the Court consolidated the petitions, *see* Order Consolidating Cases (DE 8), and will resolve both petitions with the instant ruling.

Lynch. Respondents brought arbitration claims against Merrill Lynch seeking certain long-term compensation under their employment agreements and damages under various tort theories. After a seventeen-day arbitration hearing, the three-member panel awarded Respondents—who were claimants in the arbitration proceeding—$10,250,000 in damages. The parties then filed competing petitions seeking either to confirm or vacate the award.

Merrill Lynch asserts three bases for vacating the award. First, it alleges evident partiality on the part of the chairwoman of the arbitration panel under section 10(a)(2) of the FAA relating to her failure to disclose certain facts suggesting a possibility of bias. Second, Merrill Lynch alleges misconduct under section 10(a)(3) relating to the panel's decisions to limit Merrill Lynch's presentation of its case and to impose sanctions against it. Last, Merrill Lynch argues that, in imposing the aforementioned sanctions without allowing Merrill Lynch sufficient notice or opportunity to be heard, the panel exceeded its powers under section 10(a)(4).

Respondents oppose the petition, arguing that Merrill Lynch failed to establish evident partiality because it did not demonstrate that the chairwoman knew the undisclosed facts. Additionally, Respondents assert Merrill Lynch knew the alleged facts prior to the final hearing and therefore waived any objections. Finally, Respondents argue that in light of the wide latitude afforded arbitrators under the FAA, Merrill Lynch has not shown that the panel engaged in misconduct or that it exceeded its powers.

JURISDICTION AND VENUE

The Court has diversity jurisdiction over this action under 28 U.S.C. § 1332(a)(1) because the parties are diverse and the amount in controversy exceeds $75,000. Venue is proper under 28

U.S.C. § 1391(b)(2) because the arbitration proceeding underlying this action took place in this judicial district.

DISCUSSION

At the outset, the Court notes that federal policy favors arbitration. *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1310-11; *Booth v. Hume Publ'g, Inc.*, 902 F.2d 925, 932 (11th Cir. 1990). For that reason, "[i]t is well settled that judicial review of an arbitration award is narrowly limited." *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1188 (11th Cir. 1995). Generally speaking, "federal courts should defer to the arbitrator's resolution of [a] dispute whenever possible." *Robbins v. Day*, 954 F.2d 679, 682 (11th Cir. 1992). However, the FAA enumerates "four narrow bases for vacating [an] arbitration award," three of which Merrill Lynch raises in the instant case. *Lifecare Int'l Inc. v. CD Med., Inc.*, 68 F.3d 429 (11th Cir. 1995). The Court will address each of Merrill Lynch's bases for vacation in turn.

A. Evident Partiality

The FAA states that a district court may vacate an arbitration award "[w]here there was evident partiality . . . in the arbitrators." 9 U.S.C. § 10(a)(2). The Eleventh Circuit has interpreted this statute to mean that an award may be vacated due to an arbitrator's evident partiality "only when either (1) an actual conflict exists, or (2) [an] arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists." *Gianelli*, 146 F.3d at 1312. "The burden of proving facts which would establish a reasonable impression of partiality rests squarely on the party challenging the award." *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1201 (11th Cir. 1982).

In the instant case, Merrill Lynch contends that the chairwoman of the arbitration panel, Bonnie Pearce ("Mrs. Pearce"), did not disclose: (a) the nature of her husband's law practice, (b) the sizeable award he earned against Merrill Lynch in 2005,[2] or (c) comments her husband ("Mr. Pearce") made to a newspaper after the award to the effect that he was particularly satisfied at having obtained an award against Merrill Lynch.[3] From the record, it appears clear that Mrs. Pearce did not disclose these facts. The Court will address the questions whether the undisclosed information "would lead a reasonable person to believe that a potential conflict exists," *id.*, and whether Mrs. Pearce knew the information of which Merrill Lynch complains after discussing Respondents' waiver argument.

After the Court granted the parties leave to conduct limited discovery, Merrill Lynch filed a Notice to Supplement and Clarify Petitioner's Petition to Vacate (DE 30). In the supplemental filing, Merrill Lynch revealed for the first time evidence indicating that it knew at least some of the information Mrs. Pearce is alleged to have withheld. Specifically, Merrill Lynch disclosed that its counsel had in its files eight pages printed from Mr. Pearce's website, each dated before the arbitration hearing, which commenced on January 23, 2012. Included with the printouts was an undated copy of the arbitration award in *Friedman*. Merrill Lynch also submitted an affidavit of attorney Douglas Spaulding, in whose files these documents were found, stating that he had no

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[2]*Friedman v. Merrill Lynch, Pierce, Fenner & Smith*, NASD Dispute Resolution No. 03-06176 ("*Friedman*").

[3]Specifically, Mr. Pearce stated that "winning" the case against Merrill Lynch was a "highlight in [his] career" and a "sweet victory" in light of the "attitude on the other side of the table." Homer Decl. Ex. 6.

recollection of accessing or reviewing them. Response Opp'n to Respondents' Not., Ex. A (DE 33-2). The affidavit is dated May 31, 2012.

Notwithstanding Spaulding's declaration, the Court finds that Merrill Lynch knew of Mr. Pearce's practice and his participation in the *Friedman* arbitration prior to the hearing. The fact that Mr. Spaulding has no present recollection of accessing or reviewing the information is not relevant. A Merrill Lynch attorney had the information in his files, which included a copy of an arbitration award referenced on the website.[4] The only logical conclusion that can be drawn from these facts is that a Merrill Lynch agent reviewed Mr. Pearce's website, noticed the *Friedman* reference, and gathered the arbitration award and other related documents. These facts undermine any suggestion or assertion that Merrill Lynch did not have knowledge, since knowledge of an agent is imputed to its principal. *Computel, Inc. v. Emery Air Freight Corp.,* 919 F.2d 678, 685 (11th Cir. 1990). In actuality, these facts make out a more compelling case for Merrill Lynch's actual knowledge of the relevant information than that of Mrs. Pearce, whose knowledge is merely presumed by virtue of her marital relationship.

Concluding that Merrill Lynch had knowledge of Mr. Pearce's practice and involvement in *Friedman*, the Court must now consider whether the doctrine of waiver applies. Merrill Lynch knew the relevant information and failed to raise the issue of Mrs. Pearce's partiality before the commencement of the hearing. The hearing then proceeded for at least five days, with Merrill Lynch

[4] The Court concludes that all of the relevant information in Spaulding's files were gathered before the arbitration hearing commenced. Although the printout of *Friedman* is undated, if a Merrill Lynch agent would have learned of it after the commencement of the hearing, Spaulding most definitely would have recalled that fact.

objecting only after Mrs. Pearce announced several decisions adverse to it. *See* Pet. to Vacate Arbitration Award ¶¶ 32-34, 56 (DE 1). The purpose of the waiver doctrine is to prevent a party that knows of possible bias from making a tactical decision to try its luck with a proceeding and keep a proverbial ace up its sleeve in case things go badly. *See, e.g.*, *Bianchi v. Roadway Express., Inc.*, 441 F.3d 1278, 1285 (11th Cir. 2006). While it is true that in the instant case Merrill Lynch did not wait until it received a final adverse ruling to state its concerns about Mrs. Pearce's bias, it did wait until the panel announced several adverse rulings with which it disagreed. Pet. to Vacate Arbitration Award ¶¶ 32-34, 56 (DE 1). Thus, the very same principles are at play. A party that discovers the possibility of bias cannot ignore it, proceed as if it has no concerns regarding bias, and then after receiving a detrimental ruling, announce what it had known before the proceeding began. Even though Merrill Lynch did not wait until it had finally lost, it still made a "calculated decision not to object to the alleged bias" and to attempt "to keep two strings in [its] bow." *Bianchi*, 441 F.3d at 1286.

At the very least, the Court finds that Merrill Lynch's acceptance of the panel with knowledge of what Mrs. Pearce allegedly failed to disclose eliminates the presumption of bias that generally arises in failure to disclose cases, as it signifies that Merrill Lynch did not view the withheld information as significant enough to suggest partiality even alongside Mrs. Pearce's failure to disclose it. *See Gianelli*, 146 F.3d at 1313 ("Gianelli accepted Houck as an arbitrator with full knowledge of Gray Harris' representation of Kelley in the Nielson case. Therefore, Houck's knowledge of that connection cannot be the basis for a finding of 'evident partiality.'"). Absent this presumption, the Court cannot say that Merrill Lynch has demonstrated that Mrs. Pearce labored

under an actual conflict.[5] The alleged bias must be "direct, definite, and capable of demonstration," not "remote, uncertain, and speculative." *Lifecare*, 68 F.3d at 434. In the instant case, Merrill Lynch relies almost exclusively on the fact of Mr. and Mrs. Pearce's marriage to show that Mrs. Pearce knew the details of Mr. Pearce's practice which she failed to disclose.[6] Moreover, it is unclear why Mr. Pearce's experience representing a customer against a Merrill Lynch analyst for breach of fiduciary duty would predispose Mrs. Pearce in favor of a former analyst of Merrill Lynch suing for employment benefits and compensation for injury to reputation, mental anguish, and the like.[7] Considering the record as a whole, the Court finds the alleged bias too remote and speculative to warrant vacatur.

Merrill Lynch points out that nothing in Spaulding's files indicated that he knew of Mr. Pearce's comments in the *Palm Beach Post*:

> Winning this case, especially in view of the odds [is my career highlight]. Merrill Lynch wasn't going to settle this case because they had been so successful. Putting them down the way I did was a highlight in my career. This was most gratifying, not so much in terms of numbers—I've had bigger settlements—just the attitude on the other side of the table made this a sweet victory."

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[5]The Court discusses the decisions Merrill Lynch finds controversial in greater detail in Part B of this section.

[6]Notably, Merrill Lynch elected not to depose Mr. or Mrs. Pearce despite requesting and receiving "leave from the court to conduct narrow and limited discovery 'to prove that the panel chair had actual knowledge of [a] conflict of interest that she failed to disclose.'" Order (DE 18) (quoting Am. Mot. for Order Implementing Schedule for Briefing and Procedures and for Leave to Conduct Limited Discovery (DE 13)).

[7]Mr. Pearce's website states that he represents both investors and brokers and lists sample awards earned in both types of cases. Not. Suppl. & Clarify Petitioner's Pet. to Vacate, Ex. A 7-9 (DE 30-1).

Homer Decl. Ex. 6. Merrill Lynch argues that it cannot be said to have waived its bias objection when it did not know of these particular comments. The Court disagrees. Merrill Lynch knew of the arbitration award obtained by Mr. Pearce, and the additional fact that he relished the victory adds nothing to the bias calculus. "If merely adding additional facts to a bias claim were enough to avoid waiver, then waiver would be easily avoidable." *Bianchi v. Roadway Express., Inc.*, 441 F.3d 1278, 1285 (11th Cir. 2006). "[W]here the bias is *apparent enough*, waiver will occur." *Id.* (emphasis added). Moreover, Merrill Lynch has not demonstrated that Mrs. Pearce knew of the comments, or even if she had known of them at one time, that it would be reasonable to expect her to recall and disclose comments published over six years prior to the events in question. Thus, the comments are insufficient to demonstrate evident partiality.

In light of the foregoing, the Court finds that Merrill Lynch has failed to establish evident partiality and will deny this ground of its petition to vacate the award.

B. Arbitrator Misconduct & Exceeding of Powers

As its second and third grounds for vacating the arbitration award, Merrill Lynch points to sections 10(a)(3) and (a)(4) of the FAA, which allow a district court to vacate an arbitration award in the following circumstances:

> **(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.

9 U.S.C. § 10(a)(3), (4). Merrill Lynch suggests the following incidents demonstrate the applicability of these two sections:

- The panel allowed Respondents to keep Merrill Lynch's documents in their possession for approximately twenty-four hours after Merrill Lynch alerted it that some of the documents were privileged. Pet. ¶¶ 32-33 (DE 1).
- After learning that Respondents had kept some of the privileged documents for nearly ten days after the panel ordered them returned, the panel did not admonish them. Pet. ¶ 34 (DE 1).
- The panel precluded Merrill Lynch's counsel from participating and sanctioned them $1,000 for every hour it took them after the panel's deadline to create a privilege log. Merrill Lynch felt that despite working "around the clock," it could not meet the panel's deadline. Pet. ¶¶ 35-36 (DE 1).
- The panel imposed a $10,000 sanction, interrupted Merrill Lynch's cross-examination, and allowed only two hours at a later date to complete the cross-examination when Merrill Lynch attempted to use redacted medical records to impeach one of the Respondents. Merrill Lynch felt that the panel's prior orders limiting the use of medical information did not prohibit their use of redacted records for impeachment on a critical issue, but the panel disagreed. Pet. ¶¶ 49-50 (DE 1).
- Merrill Lynch believes the panel ruled unfairly against it on several issues, including relieving Respondents from having to identify specific clients they had lost, allowing a Respondent to testify about purported injuries and mental anguish without allowing

Merrill Lynch to cross-examine or obtain an independent medical evaluation, allowing Respondents' leading questions but precluding Merrill Lynch from leading witnesses even on cross examination, allowing Respondents more time to present their case, and refusing to accept a written motion to dismiss at the conclusion of Respondents' case-in-chief. Pet. ¶ 51-55, 57-59, 61 (DE 1).

- The panel disqualified one of Merrill Lynch's designated corporate representatives shortly before the hearing because Respondents would be upset and intimidated by his presence and then excluded a second potential corporate representative because he was a fact witness, despite allowing Respondents, who were also fact witnesses, to attend the entire hearing. Pet. ¶ 56 (DE 1).

The Court has carefully reviewed the transcripts provided by the parties and each of Merrill Lynch's claims of misconduct. However, the Court's review of the panel's actions is necessarily a limited one, as "federal courts should defer to an arbitrator's decision whenever possible." *Robbins*, 954 F.2d at 682; *see also Rosensweig v. Morgan Stanley & Co., Inc.*, 494 F.3d 1328, 1333 (11th Cir. 2007) ("[J]udicial review of an arbitration award is narrowly limited."). "Arbitrators 'enjoy wide latitude in conducting an arbitration hearing,' and they 'are not constrained by formal rules of procedure or evidence.'" *Rosensweig*, 494 F.3d at 1333 (quoting *Robbins*, 954 F.2d at 685). Thus, mere disagreement with one of the panel's decisions is not a basis to vacate the award; rather, the Court is only concerned with decisions that deprived the parties of "a fundamentally fair hearing." *Id*.

For each challenged decision, the Court finds that the panel had at least some reasonable

basis for the actions it took, and while the panel's decisions were in some cases detrimental to Merrill Lynch's case, Merrill Lynch has not demonstrated that it was unfairly prejudiced to the point of being denied a fundamentally fair hearing. With respect to the $10,000 sanction the panel imposed for Merrill Lynch's purported violation of its orders regarding medical information, although the panel refused to hear Merrill Lynch's objections at the time it issued the order, it did consider Merrill Lynch's motion for reconsideration, denied it, and restated its position. Under these circumstances, the Court will defer to the panel's interpretation of its own evidentiary rulings and directions to the parties.

CONCLUSION

After extensive briefing and thorough review of the record, the Court concludes that Merrill Lynch has not sufficiently demonstrated evident partiality on the part of the panel or that the panel engaged in misconduct or exceeded its powers. The Court will therefore deny Merrill Lynch's petition and confirm the award.[8]

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

1. The Petition to Vacate Arbitration Award (DE 1) is **DENIED**.

[8]In their response to the Petition, Respondents make passing reference to sanctions under Rule 11. Resp. Opp'n Pet. to Vacate Arbitration Award ¶ 65 (DE 7). Their request does not comply with the procedural requirements of Fed. R. Civ. P. 11(c)(2) and is therefore denied.

2. The award entered in the underlying arbitration is **CONFIRMED**.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 17th day of September, 2012.

KENNETH A. MARRA
United States District Judge