IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

TIMOTHY MALONE and SHARON MALONE, his wife, and SARDIS CEMETERY PROPERTIES INC., Plaintiffs, v. RICHARD C. STOYECK, and ANDRE LABARBERA, Defendants.	Civil Action No. 4:21-cv-00130-VMC

ORDER

This is a Petition to Confirm Arbitration Award pursuant to 9 U.S.C. § 9. The Court has jurisdiction over this proceeding under 28 U.S.C. § 1332 because Petitioners are citizens of Georgia (Pet. ¶ 1, Doc. 1),[1] Respondents are citizens of states other than Georgia, (*id.* ¶¶ 2, 3), and the award Petitioners seek to confirm

[1] The Court takes judicial notice of the records of the Georgia Secretary of State to confirm that Petitioner Sardis Cemetery Properties Inc. is a Georgia corporation with its principal place of business in Cedartown, Polk County, Georgia. *See* SARDIS CEMETERY PROPERTIES, INC., GEORGIA SEC'Y OF STATE, https://ecorp.sos.ga.gov/BusinessSearch/BusinessInformation?businessId=1081829&businessType=Domestic%20Nonprofit%20Corporation&fromSearch=True; *See also Auto-Owners Ins. Co. v. G&D Constr. Grp., Inc.*, 588 F. Supp. 3d 1328, 1331 (N.D. Ga. 2022) (citing *NP 301, LLC v. Liberty Mut. Ins. Co.*, No. 1:20-CV-02298-LMM, 2020 WL 10622591, at *5 (N.D. Ga. Aug. 7, 2020); *Ladies Mem'l Ass'n, Inc. v. City of Pensacola, Fla.*, No. 3:20CV5681/MCR/EMT, 2020 WL 8449155, at *2 (N.D. Fla. Aug. 25, 2020)).

exceeds $75,000. *See Badgerow v. Walters*, 142 S. Ct. 1310, 1314 (2022) (holding that a petition to confirm or vacate an award under the Federal Arbitration Act must have its own basis for subject matter jurisdiction). Respondents have filed a Cross-Petition to Vacate pursuant to 9 U.S.C. § 10.

Background

On September 10, 2019, Petitioners filed an amended arbitration action before the Financial Industry Regulatory Authority ("FINRA") Office of Dispute Resolution, Arbitration No. 18-04008, against Respondents alleging the violation of the anti-fraud provisions of the federal securities laws, churning or excessive activity, unauthorized trading, the fraudulent extension of margin credit, breach of fiduciary duty, common law fraud, and the violation of the Georgia Uniform Securities Act of 2008. (Pet. ¶ 6)

Each of the Respondents were registered with FINRA, and according to the terms and conditions of their association with FINRA, they agreed to be bound by the FINRA Code of Arbitration Procedure, and:

> agree[d] to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the SROs indicated in Section 4 (SRO REGISTRATION) as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent jurisdiction.

(*Id.* ¶ 7). On May 10, 2021 through May 13, 2021, a final evidentiary hearing was held by FINRA, and on May 27, 2021, an award was entered unanimously by the Panel against Respondent LaBarbera for $1,156,228, which includes:

> a) $858,123 in compensatory damages;
>
> b) $145,165 in interest at the rate of 7.00% per annum from November 1, 2018 through and including April 30, 2021.
>
> c) $100,000 in punitive damages pursuant to O.C.G.A. § 13-6-11 and Georgia Uniform Securities Act, Official O.C.G.A § 10-5-58;
>
> d) $50,118 in attorneys' fees pursuant to O.C.G.A § 10-5-58(c) and O.C.G.A § 13-6-11; and
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> e) $1,821 in costs.

(*Id.* ¶ 8). On May 10, 2021 through May 13, 2021, a final evidentiary hearing was held by FINRA, and on May 27, 2021, an award was entered unanimously by the Panel against Respondent Stoyeck for $813,485, which includes:

> a) $572,082 in compensatory damages;
>
> b) $96,776 in interest at the rate of 7.00% per annum from November 1, 2018 through and including April 30, 2021.
>
> c) $100,000 in punitive damages pursuant to O.C.G.A § 13-6-11 and Georgia Uniform Securities Act, O.C.G.A § 10-5-58;
>
> d) $33,412 in attorneys' fees pursuant to O.C.G.A § 10-5-58(c) and O.C.G.A § 13-6-11; and
>
> e) $1,214 in costs.

(*Id.* ¶ 9). The Court refers to the May 27, 2021 Award against Respondent LaBarbera and the May 27, 2021 Award against Respondent Stoyeck as the "Awards." (Pet. Ex A, Doc. 1 at 8–15).

Petitioners filed this action to confirm the Awards on July 9, 2021. (Doc. 1). Respondents filed an Answer to the Petition on August 16, 2021 (Doc. 10) and a Cross-Petition seeking to vacate the Awards that same day. (Doc. 11).

Petitioners filed a Memorandum in Opposition to Respondent's Cross-Petition on August 25, 2021. (Doc. 12). Respondents filed a Response to the Memorandum on November 2, 2021. (Doc. 18). Petitioners filed a Reply on November 6, 2021. (Doc. 19).

Then, Respondents filed a Motion to Vacate Arbitration Award on December 15, 2021. (Doc. 21). Petitioners filed a response to the Motion to Vacate and embedded motion to strike the Motion to Vacate on December 31, 2021 (Doc. 22). Respondents filed a Reply on January 27, 2021. (Doc. 23).

Legal Standard

Section 9 of the Federal Arbitration Act provides in part:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the

> award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

9 U.S.C. § 10.

"A confirmation proceeding under 9 U.S.C. § 9 is intended to be summary: confirmation can only be denied if an award has been corrected, vacated, or modified in accordance with the [Federal] Arbitration Act." *Cullen v. Paine, Webber, Jackson & Curtis, Inc.*, 863 F.2d 851, 854 (11th Cir. 1989) (quoting *Taylor v. Nelson*, 788 F.2d 220, 225 (4th Cir. 1986)). Under the Act, an award may be vacated for the following reasons:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10. "Under the FAA, federal courts have limited authority to vacate or modify an arbitration award." *Gherardi v. Citigroup Glob. Markets Inc.*, 975 F.3d 1232, 1236 (11th Cir. 2020). "Vacatur is allowed 'only in very unusual

circumstances,' and only in the circumstances enumerated in the statute." *Id.* (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)). As the Eleventh Circuit noted in *Gherardi*:

> Judicial review of arbitration decisions is "among the narrowest known to the law." *Bamberger Rosenheim, Ltd. v. OA Dev., Inc.*, 862 F.3d 1284, 1286 (11th Cir. 2017) (quoting *AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 508 F.3d 995, 1001 (11th Cir. 2007)). Arbitrators do not exceed their powers when they make errors, even "a serious error." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010). That means, however difficult it may be, "we must defer entirely to the arbitrator's interpretation of the underlying contract no matter how wrong we think that interpretation is." *Wiregrass*, 837 F.3d at 1087; see also *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte Int'l GmbH*, 921 F.3d 1291, 1303 (11th Cir. 2019). In fact, under our current scheme, an arbitrator's actual reasoning is of such little importance to our review that it need not be explained—the decision itself is enough. *See O.R. Sec., Inc. v. Prof'l Planning Assocs.*, Inc., 857 F.2d 742, 747 (11th Cir. 1988).

975 F.3d at 1237.

The Act requires that "[n]otice of a motion to vacate, modify, or correct an award . . . be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C. § 12. "[T]he failure of a party to move to vacate an arbitral award within the three-month limitations period prescribed by section 12 of the [Federal] Arbitration Act bars him from raising the

alleged invalidity of the award as a defense in opposition to a motion brought under section 9 of the [FAA] to confirm the award." *Cullen*, 863 F.2d at 854.

Discussion

As an initial matter, Respondent's December 15, 2021 Motion to Vacate (Doc. 21-1) is untimely. The Awards were entered against Respondents on May 27, 2021, and the Motion to Vacate was filed over six months later. Accordingly, the Court will deny the December 15, 2021 Motion to Vacate and will not consider any arguments raised for the first time in that motion.

The Cross-Petition to Vacate (Doc. 11), on the other hand, was filed on August 16, 2021, which is 81 days after the date of the Awards. However, even if the Court were to construe the Cross-Petition as a timely motion to vacate, the Court would deny it.

First, Respondents claim that the FINRA Panel failed to follow its own rules about ranking and striking arbitrators and/or denied Respondents the opportunity to do so. (Cross-Pet. ¶¶ 6–11). But a failure of the arbitrator to properly interpret its own rules does not constitute a ground to vacate an arbitration award under the FAA, and a denial of the opportunity to rank or strike arbitrators does not in and of itself establish partiality of an arbitrator under FAA Section 10(a)(2).

Second, Respondents argue that Respondent Stoyeck is elderly and not fluent with computers, but the arbitration unfairly proceeded over Zoom over his objection. (Cross-Pet. ¶ 6–12). In response to this argument, the Court finds Judge Lefkow's opinion from the Northern District of Illinois persuasive on this point:

> FINRA Rule 12409 gives "the panel ... the authority to interpret and determine the applicability of all provisions under the Code. Such interpretations are final and binding upon the parties." The panel did precisely that, concluding that the "location" for its hearing under Rule 12213(a) will be remote. Even on the court's independent review, Rule 12213(a) appears to permit such an interpretation. That rule provides, "The Director will decide which of FINRA's hearing locations will be the hearing location for the arbitration." Rule 12213(a)(1). Here, the Director decided to make "virtual hearing services (via Zoom and teleconference)" available "to parties in all cases by joint agreement or by panel order." (Dkt. 1 Exh. A.) The panel then ordered the case to proceed remotely. (Dkt. 1 Exh. B.) Thus, even without the Federal Arbitration Act's significant deference to arbitral procedures and Rule 12409's further deference, the procedure in this case complied with the FINRA Rules.

Legaspy v. Fin. Indus. Regul. Auth., Inc., No. 20 C 4700, 2020 WL 4696818, at *3 (N.D. Ill. Aug. 13, 2020). As Respondents agreed to arbitration under FINRA Rules, they are bound by the FINRA Director's reasonable interpretation of such rules, including those pertaining to in-person or virtual hearings.

Third, Respondents take issue with how the Panel ruled on pre-hearing discovery motions. (Cross-Pet. ¶¶ 6–11). This is not a basis to vacate the Awards. Arbitrators do not exceed their powers when they make errors, even "a serious

error." *Stolt-Nielsen*, 559 U.S. at 671. The "sole question" is "whether the arbitrator (even arguably) interpreted the parties' contract [including the Rules the parties contracted to apply], not whether she got [their] meaning right or wrong." *Gherardi*, 975 F.3d 1232, 1238 (11th Cir. 2020) (quoting *Wiregrass Metal Trades Council AFL-CIO v. Shaw Env't & Infrastructure, Inc.*, 837 F.3d 1083, 1088 (11th Cir. 2016)).

Fourth, Respondents argue that "the Claimant's Award cannot be confirmed because it was it is the result of impermissible bias, corruption, and fraud" and that "[t]he Award was the result of the arbitrator's partiality to the arbitration Claimants and their counsel, and hostility and contempt for Respondents." (Cross-Pet. ¶¶ 14–15). But these conclusory arguments do not provide a factual basis to vacate an award. *Scott v. Prudential Sec., Inc.*, 141 F.3d 1007, 1015 (11th Cir. 1998), *abrogated on other grounds by Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585 (2008) ("[V]ague, remote, and speculative charges . . . cannot support an order to vacate an arbitration award.").

Fifth, Respondents argue that they were prevented from defending themselves, offering evidence, or presenting the testimony of witnesses, including being prohibited from examining at least one of the parties to the arbitration. (Cross-Pet. ¶ 16). Relatedly, Respondents argue that the Award should be vacated under Section 10(a)(3), because "[t]he Panel improperly denied the Respondents'

ability to obtain from Claimants documents and evidence during discovery and refused to hear pertinent evidence critical to Respondents' defenses." (*Id.* ¶¶ 27–30). While the FAA permits the Court to vacate an award "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," 9 U.S.C. § 10(a)(3), "[t]o establish misconduct, the party moving for vacatur must show that there was no reasonable basis for the arbitrator's [action]." *CM S. E. Texas Houston, LLC v. CareMinders Home Care, Inc.*, 662 F. App'x 701, 704 (11th Cir. 2016) (citing 9 U.S.C. § 10(a)(3); *Johnson v. Directory Assistants, Inc.*, 797 F.3d 1294, 1301 (11th Cir. 2015)). The Court "may vacate an award on these grounds only if the arbitrator's choice 'prejudice[d] the rights of the parties and denie[d] them a fair hearing.'" *Id.* (quoting *Robbins v. Day*, 954 F.2d 679, 685 (11th Cir. 1992), *disapproved on other grounds by First Options*, 514 U.S. at 938). Respondents can point to no specific prejudice they suffered based on their alleged failure to be permitted to present or examine witnesses. *See id.* ("Prejudice might occur when, for example, the arbitrator's choice not to postpone a hearing entirely prevents a party from presenting a key witness' material, noncumulative testimony.") (citing *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20–21 (2d Cir. 1997)). Respondents' complaints of prejudice are "vague, remote, and speculative"

which "cannot support an order to vacate an arbitration award." *Scott*, 141 F.3d at 1015.

Sixth, Respondents allege that the Awards were not based on credible evidence and that the Panel did not follow the FINRA Rules or Arbitrator's Guide in formulating the Awards. (Cross-Pet. ¶ 14–21).[2] This is not a basis to vacate the Awards. "Vacatur under § 10(a)(4) 'is permitted only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice.'" P*eebles v. Terminix Int'l Co., LP*, No. 20-14365, 2021 WL 5894857, at *2 (11th Cir. Dec. 14, 2021) (quoting *Gherardi*, 975 F.3d at 1237). Respondents have fallen far short of meeting this standard.

Seventh, Respondents allege that the Panel exhibited evident partiality or corruption in the arbitrators, but their only basis for purported partiality is that "[t]he Panel[] issu[ed] an award with no basis in logic, the law, or the evidence, which was contrary to and unsupported by law and the Petitioner's own evidence, that was hearsay and inherently unreliable," and that "[t]his partiality is further established by the erroneous and punitive orders on pre-hearing discovery, where the Panel denied the Respondents access to documents obviously necessary for their defense, imposed some sanctions and threatened others." (Cross-Pet ¶¶ 22–

[2] The Cross-Petition contains two sets of paragraph 14–16; the Court refers here to the second set.

23). This falls far short of the showing needed to establish partiality or corruption under FAA Section 10(a)(2). Under that provision, "[t]he alleged partiality must be 'direct, definite and capable of demonstration rather than remote, uncertain and speculative.'" *Perez v. Cigna Health & Life Ins. Co.*, No. 20-12730, 2021 WL 2935260, at *2 (11th Cir. July 13, 2021) (quoting *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1202 (11th Cir. 1982)). "[T]he mere appearance of bias or partiality is not enough to set aside an arbitration award." *Id.* (quoting *Lifecare Int'l, Inc. v. CD Med., Inc.*, 68 F.3d 429, 433 (11th Cir. 1995)). Respondents' contentions of partiality are speculative and not definite or capable of demonstration.

Eighth, Respondents contend that the Awards were "in manifest disregard of the law and the facts" because, among other reasons, they were "dramatically in excess of any possible compensatory damages, dramatically in excess of the damages requested by the Petitioner or her own expert, contrary to any version and interpretation of the evidence introduced at the hearing, or unsupported by any evidence introduced at the hearing." (Cross-Pet ¶¶24–26). But as the Eleventh Circuit has recognized in *Campbell's Foliage, Inc. v. Fed. Crop Ins. Corp.*, 562 F. App'x 828, 831 (11th Cir. 2014), "[i]n view of *Hall Street,* we have held the 'judicially-created bases for vacatur' we had formerly recognized, such as where an arbitrator behaved in manifest disregard of the law, 'are no longer valid.'" (citing 552 U.S. 576, 585 and quoting *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1324 (11th

Cir. 2010)). Moreover, for the reasons given above, this does not constitute a basis to vacate the Awards under Section 10(a)(4). *See Peebles*, 2021 WL 5894857, at *2.

Lastly, Respondents seek to modify the award on the grounds that the Awards were determined by "fiat" and not competent evidence. (Cross-Pet. ¶¶ 31–33). But this is not an argument that the Awards were miscalculated pursuant to 9 U.S.C. § 11(a), it is a challenge to the substance of the Awards. The Court has already rejected Respondents' challenges for the reasons given above.[3]

Conclusion

Because Respondents have not set forth a basis to vacate or modify the Awards, the Court will confirm the Awards. Accordingly, it is

[3] Petitioners request that the Court sanction respondents, citing *B.L. Harbert Intern., LLC v. Hercules Steel Co.*, 441 F.3d 905, 913-14 (11th Cir. 2006). (Doc. 12 at 14-15). While the Eleventh Circuit in that case indicated that sanctions for baseless motions to vacate arbitral awards are often justified, it did not create a new mechanism for the Court to impose sanctions. Absent a statutory fee-shifting provision, the Court is limited to sanctions against attorneys under 28 U.S.C. § 1927, the various sanctioning provisions in the Federal Rules of Civil Procedure including Federal Rule of Civil Procedure 11, and the Court's inherent power. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 42–43 (1991). Respondents do not appear to be attorneys, Petitioners did not comply with Rule 11's safe-harbor provision, and the Court cannot sanction a party based on its inherent power unless "bad faith exists . . . [and] neither the statute nor the Rules" provide an adequate sanction. *Id.* Because Respondents' alleged "bad-faith conduct in the course of litigation . . . could be adequately sanctioned under the Rules," and because Petitioners did not seek sanctions under the Federal Rules of Civil Procedure, the Court will decline to resort to sanctions under its inherent power at this time. *Id.*

ORDERED that the Motion to Vacate Arbitration Award (Doc. 21) is **DENIED.**

It is **FURTHER ORDERED** that the Petition to Confirm Arbitration Award (Doc. 1) is **GRANTED**. The Clerk is **DIRECTED** to enter a judgment in favor of Petitioners and against Respondents confirming the Arbitration Awards dated May 27, 2021, and more specifically entering judgment against Respondent LaBarbera for $1,156,228, which includes:

> a) $858,123 in compensatory damages;
>
> b) $145,165 in interest at the rate of 7.00% per annum from November 1, 2018 through and including April 30, 2021.
>
> c) $100,000 in punitive damages pursuant to O.C.G.A. § 13-6-11 and Georgia Uniform Securities Act, Official O.C.G.A § 10-5-58;
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> d) $50,118 in attorneys' fees pursuant to O.C.G.A § 10-5-58(c) and O.C.G.A § 13-6-11; and
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> e) $1,821 in costs;

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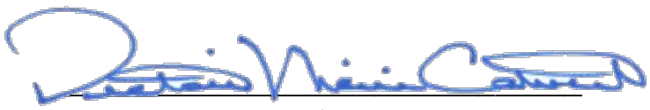
d) $33,412 in attorneys' fees pursuant to O.C.G.A § 10-5-58(c) and O.C.G.A § 13-6-11; and

e) $1,214 in costs.

The Clerk is further directed to close the case.

SO ORDERED this 14th day of February, 2023.



Victoria Marie Calvert
United States District Judge