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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

STEPHEN L. SWARBICK, CESAR LOPEZ, and ELIZABETH FESTEJO,

No. 2:08-cv-00532-MCE-KJM

Plaintiffs,

v.

MEMORANDUM AND ORDER

UMPQUA BANK, WESTERN SIERRA NATIONAL BANK, and DOES 1 through 20, inclusive.

Defendants.

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Presently before the Court is a Motion by Defendant Umpqua Bank ("Defendant") to Vacate the December 30, 2009 "Final Arbitration Opinion and Award" issued in favor of Plaintiffs Stephen L. Swarbick, Cesar Lopez, and Elizabeth Festejo ("Plaintiffs") pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, et seq. Concurrently before the Court is a Motion by Plaintiffs for Confirmation of Arbitration Award pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, et seq.

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1 Plaintiffs also move for attorney's fees and costs. For the
2 reasons set forth below, Defendant's Motion is denied and
3 Plaintiffs' Motions are granted.¹
4

5 **BACKGROUND**
6

7 In July 2003, Defendant² and Woodbury Financial Services
8 ("Woodbury") entered into a Third-Party Brokerage Agreement
9 whereby certain employees of Defendant would dually serve as
10 Registered Representatives of Woodbury, selling financial
11 products on their behalf. Woodbury is a registered securities
12 broker-dealer that provides administrative and clearing functions
13 for institutions and brokers who cannot handle securities sales
14 directly under federal law. Plaintiffs served as such "dual
15 agents" meaning that they were simultaneously employed by
16 Defendant while selling securities as representatives of
17 Woodbury. Accordingly, Plaintiffs had an Employment Agreement
18 contract with Defendant and a separate agreement with Woodbury.
19 Securities sales were made either to customers of Defendant or
20 through the dual agent's personal contacts.

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24 ¹ Because oral argument would not be of material assistance,
25 this matter was deemed suitable for decision without oral
26 argument. Local Rule 230(g).

27 ² Umpqua Bank acquired Western Sierra National Bank in 2006.
28 The transactions described herein were entered into by Western
Sierra prior to acquisition. Nonetheless, the Court will refer to
all actions as being taken by "Defendant," as Umpqua Bank and
Western Sierra National Bank are now a single legal entity.

1 As compensation for securities sold through Defendant and
2 the dual agents, Woodbury paid a commission to Defendant on a
3 semi-monthly basis. However, pursuant to the Third-Party
4 Brokerage Agreement, Defendant was not entitled to commissions
5 for sales generated through the dual agents' personal contacts.
6 Instead, it was the responsibility of Defendant to forward the
7 appropriate funds to Plaintiffs.

8 However, commissions were not forwarded to Plaintiffs, and
9 in 2008 Plaintiffs filed suit against Defendant alleging breach
10 of contract to third-party beneficiaries, breach of fiduciary
11 duties, unjust enrichment, breach of California Labor Code, and
12 breach of Lopez's employment contract. Pursuant to Plaintiffs'
13 Employment Agreements the matter was then submitted to
14 arbitration. On December 30, 2009, the Arbitrator issued a Final
15 Award granting damages to Plaintiffs on the grounds of breach of
16 employment contract as to Plaintiff Lopez and breach of fiduciary
17 duty as to Plaintiffs Swarbick and Festejo. Attorney's costs and
18 fees were awarded to Swarbick and Festejo.

19 Defendant now moves to vacate the award of damages and
20 attorney's fees to Swarbick and Festejo on the allegation that
21 the Arbitrator manifestly disregarded the law and issued an
22 irrational and internally contradictory decision that fails to
23 draw its essence from parties' contract. Plaintiffs move for
24 confirmation of the award due to Defendant's failure to remit
25 damages as mandated by the Arbitrator's award. Plaintiffs also
26 seek to recover the cost of enforcing the Award.

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1 "Manifest disregard of the law" is established by a "clear"
2 showing from the record that "the arbitrator recognized the
3 applicable law and then ignored it." Comedy Club, Inc. v. Improv
4 West Assocs., 553 F.3d 1277, 1290 (9th Cir. 2009). The "manifest
5 disregard" exception requires something beyond and different from
6 a mere error in the law or failure on the part of the arbitrators
7 to understand and apply the law. Colling v. D.R. Horton, Inc.,
8 505 F.3d 874, 879 (9th Cir. 2007). Accordingly, the court may
9 not reverse an arbitration award for erroneous interpretation of
10 the law. Id. Rather, there must be some evidence in the record,
11 other than the result, that the arbitrators were aware of the law
12 and intentionally disregarded it. Bosack, 586 F.3d at 1104.

13 The "completely irrational" standard is extremely narrow and
14 is satisfied only where the arbitration decision fails to draw
15 its essence from the agreement. Comedy Club, 553 F.3d at 1288.
16 An award draws its essence from the agreement if the award is
17 derived from the agreement, viewed in light of the agreement's
18 language and context, as well as other indications of the
19 parties' intentions. Bosack, 586 F.3d at 1106. Under this
20 standard of the review, the court does not decide "the rightness
21 or wrongness of the arbitrators' contract interpretation, only
22 whether the panel's decision draws its essence from the
23 contract." Id.

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1 An arbitrator does not exceed his authority "if the decision
2 is a plausible interpretation of the arbitration contract." U.S.
3 Life Ins., 591 F.3d at 1177. Accordingly, "the court must defer
4 to the arbitrator's decision as long as the arbitrator even
5 arguably construed or applied the contract." Id. (citing United
6 Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987)).

8 ANALYSIS

9 I. MOTION TO VACATE/MOTION TO CONFIRM

10 Defendant bases its Motion to Vacate on belief that the
11 Arbitrator's award exhibited "manifest disregard of the law" or
12 was "completely irrational" in that it relied on the same
13 contractual provisions in denying damages in one instance yet
14 awarding damages in another. Defendant argues that because the
15 Arbitrator found that Plaintiffs did not have contractual rights
16 under the third-party agreement, it was therefore contradictory
17 for the Arbitrator to rely on that same agreement in finding a
18 breach of fiduciary duty.

19 However it is both plausible and rational that the
20 Arbitrator, in addressing two different legal claims, would
21 arrive at two different results. The legal standard applicable
22 to the determination of third-party beneficiary status is
23 separate from the question of fiduciary duty.

24 To qualify as an third-party beneficiary to a contract, a
25 Plaintiff must show that the contract reflects an express or
26 implied intention of the parties to the contract to benefit the
27 third party. County of Santa Clara v. Astra USA, Inc., 588 F.3d
28 1237, 1244 (9th Cir. 2009).

1 In denying Plaintiffs' third-party beneficiary claim, the
2 Arbitrator reasoned that "there is insufficient proof that the
3 claimants are more than incidental beneficiaries under the terms
4 of the Woodbury agreement." "A careful reading of [the brokerage
5 agreement] demonstrates that it does not spell out expressly a
6 duty to pay [Plaintiffs] non-referral commissions." Ultimately,
7 Plaintiffs' third-party beneficiary claim was denied for lack of
8 intentional conferral of a benefit.

9 Conversely, a breach of fiduciary duty claim does not
10 require a showing of intent. Rather, breach of fiduciary duty
11 requires (1) the existence of a duty (2) breach, and (3) damages
12 proximately caused by the breach. Goodworth Holdings, Inc. v.
13 Suh, 99 Fed. Appx. 806, 808 (9th Cir. 2009). The Arbitrator held
14 that "[s]ince Plaintiffs were employed by [Defendant] under a
15 dual relationship...[Defendant] voluntarily assumed disbursement
16 obligations for funds forward by Woodbury that [Defendant] was
17 not permitted to retain under the distinguishing terms of the
18 Woodbury brokerage agreement." In holding that a fiduciary duty
19 did exist, the Arbitrator took into account both Defendant's role
20 as Plaintiffs' employer and the portions of the agreement which
21 outlined how Defendant was to be compensated. This analysis is
22 separate from the inquiry of whether the agreement was *expressly*
23 *intended* to benefit Plaintiffs as third parties. Accordingly,
24 the Arbitrator could rationally find, in light of the applicable
25 law and upon consideration of terms of the contract, that a
26 fiduciary duty was established by the parties' agreement but
27 third-party beneficiary rights were not.

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1 Defendant has failed to show that the Arbitrator exceeded
2 his power. There is no evidence on the record that the
3 Arbitrator exhibited manifest disregard of the law. Nor is there
4 evidence that the award failed to draw its essence from the
5 contract therefore rendering it "completely irrational." The
6 court must defer to the arbitrator's decision as long as the
7 arbitrator even arguably construed or applied the contract. U.S.
8 Life Ins. Co.v. Superior Nat. Ins. Co., 591 F.3d 1167, 1177 (9th
9 Cir. 2010). He has done so here.

10 Defendant similarly seeks to vacate the Arbitrator's award
11 of attorney's fees and costs arguing that recovery on a tort
12 claim cannot form the basis of an award of attorneys fees.
13 Defendant relies on Exxess Electronixx, et al v. Heger Realty
14 Corp., for this proposition. However, as Exxess itself points
15 out, "as to tort claims the question of whether to award
16 attorney's fees turns on the language of the contractual
17 attorney's fee provision, i.e., whether the party seeking fees
18 has 'prevailed' within the meaning of the provision and whether
19 the type of claim is within the scope of the provision." Exxess
20 Electronixx, et al v. Heger Realty Corp., 64 Cal. App. 4th 698,
21 708 (1998).

22 Here, parties were compelled to arbitration based upon the
23 arbitration provision of their Employment Agreements. (Order
24 Granting Def.'s Mot. to Compel pg. 11; Pls.' Ex. "A" to Murphy
25 Decl. pg. 9) The Employment Agreements go on to state that:

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1 In the event of any arbitration or litigation
2 concerning any controversy, claim or dispute
3 between the parties hereto, arising out of or
4 relating to this Agreement or the breach thereof,
5 or the interpretation thereof, the **prevailing**
6 **party shall be entitled to recover from the losing**
7 **party reasonable expenses**, attorneys' fees
8 incurred in connection therewith or in the
9 enforcement or collection of any judgement of
10 award rendered therein.

11 (Pls.' Ex. "A" to Murphy Decl. pg. 10 (emphasis added)). Based
12 on these contractual terms, the Court finds that the Arbitrator
13 did not exceed his powers in awarding Plaintiffs, as the
14 prevailing parties of arbitration, attorney's fees and costs.

15 Defendant's Motion to Vacate is denied.

16 **II. MOTION FOR COSTS AND ATTORNEY'S FEES**

17 Plaintiffs seek to recover additional attorney's fees and
18 costs incurred in the enforcement of the arbitration award.
19 Pursuant to the aforementioned contractual provisions, the
20 Employment Agreement, which mandated parties' arbitration, allows
21 for such recovery. Accordingly, the Court grants Plaintiffs'
22 request for costs at the amount estimated by Plaintiffs minus
23 Plaintiffs' projection of the cost of hearing as the hearing on
24 this matter has been vacated under Local Rule 230(g).

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1 **CONCLUSION**

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3 For the foregoing reasons, Defendant's Motion to Vacate
4 Arbitration Award (Docket No. 26) is DENIED. Plaintiffs' Motion
5 for Confirmation of Arbitration Award (Docket No. 29) is GRANTED.
6 Plaintiffs are further awarded attorney's fees and costs incurred
7 in the enforcement of the arbitration award at the amount of
8 \$26,075. The Clerk is directed to enter judgement in favor of
9 Plaintiffs in accordance with the December 30, 2009 "Final
10 Arbitration Opinion and Award." The Clerk is further directed to
11 close the case.

12 IT IS SO ORDERED.

13 Dated: February 26, 2010

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16 MORRISON C. ENGLAND, JR.
17 UNITED STATES DISTRICT JUDGE
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