

United States District Court
For the Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FERIAL KAREN ARDALAN,)	Case No. 5:09-cv-04894 JW
)	
Plaintiff,)	ORDER DENYING PLAINTIFF’S
)	MOTION TO VACATE
v.)	ARBITRATION AWARD;
)	GRANTING DEFENDANTS’
MACY’S INC., et. al.,)	MOTION TO CONFIRM
)	ARBITRATION AWARD
Defendants.)	
)	

Presently before the Court is Plaintiff Ferial Karen Ardlan’s (“Plaintiff”) Petition seeking to vacate an Arbitration Award issued September 26, 2011 (the “Award”), and reinstate a complaint against Defendants Macy’s, Inc. and Marisela Zambrano (“Defendants”). See Petition (“Pet.”), Docket Item No. 54. The Petition includes numerous exhibits, including a copy of the 22-page Award. See id., at Ex. 1.

Defendants have filed an opposition to the Petition, and alternatively move for an order confirming the Award. See Opp’n, Docket Item No. 59. Plaintiff also filed a further Response to Defendants’ materials. See Resp. to Defs.’ Objection, Docket Item No. 60.

Pursuant to Local Civil Rule 7-1(b), the Court concludes that this matter is appropriate for determination without oral argument. Having reviewed the relevant portions of the record - including all of the abovementioned materials - the Court will deny the relief sought by Plaintiff in its entirety, and will grant Defendants’ motion to confirm the Award.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. FACTUAL AND PROCEDURAL BACKGROUND

In December, 2010, the Court granted Defendants’ motion to compel binding arbitration. See Opp’n, at p. 1.¹ The arbitration proceedings were conducted through the American Arbitration Association (“AAA”), and heard by arbitrator Linda Hendrix McPharlin (the “Arbitrator”). See id. The Arbitrator was selected through AAA’s usual procedures, and the arbitration hearing was held over nine days in June and July, 2011. See id. On September 26, 2011, the Arbitrator issued a lengthy 22-page Award in favor of Defendants on each of Plaintiff’s claims. See id.; see also Award, at p. 21.

Plaintiff now moves this Court to vacate the Award, alleging, amongst other things, that there was “unprecedented masterful collusion” in the arbitration proceedings between the Arbitrator and Defendants. See Pet., p. 2-4.

For their part, Defendants request the Court deny Plaintiff’s motion to vacate the Award, as well as grant Defendants’ petition to confirm the Award and enter judgment on the Award in Defendants’ favor.

II. DISCUSSION

This case presents the issue of whether a district court may vacate a binding award of an arbitrator pursuant to the Federal Arbitration Act (“FAA”). In reviewing an award, a court must afford great deference to the arbitrator’s decision as well as the interpretation of the arbitrability of the dispute. See Sheet Metal Workers’ Int’l Ass’n v. Madison Indus., Inc., 84 F.3d 1186, 1190 (9th Cir. 1996); see also Pack Concrete, Inc. v. Cunningham, 866 F.2d 283, 285 (9th Cir. 1989). Such deference is given even in light of the speed and informality in which arbitration can take place. See Collins v. D.R. Horton, Inc., 505 F.3d 874, 879 (9th Cir. 2007). Indeed, it is these twin advantages that are lauded by federal policy and make arbitration favorable for the many private parties in resolving their disputes. See Fairchild & Co., Inc. v. Richmond, Fredericksburg &

¹ It is noted that Plaintiff has not provided consecutive paragraphs throughout the Petition, thus page numbers are used throughout this order when referencing the documents of both Plaintiff and Defendant.

1 Potomac R.R. Co., 516 F. Supp. 1305, 1313 (D.D.C. 1981); see also Madison Indus., Inc., 84 F.3d
2 at 1190; see also Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) (acknowledging that the FAA
3 “reflects a legislative recognition of the ‘desirability of arbitration as an alternative to the
4 complications of litigation.’”) (quoting Wilko v. Swan, 346 U.S. 427, 431, (1953)).

5 In assessing cases such as the instant one, it is important to remember that “arbitration is a
6 consensual agreement of the parties to substitute a final and binding judgment of an impartial entity
7 for the judgment of the court.” See Coast Trading Co. v. Pac. Molasses Co., 681 F.2d 1195, 1197
8 (9th Cir. 1982). The FAA itself provides limited grounds on which a federal court may vacate an
9 arbitral award, and such awards are binding and enforceable unless the district court finds present
10 one of the specified grounds. See 9 U.S.C. § 10; see also Kyocera Corp. v. Prudential-Bache Trade
11 Servs., Inc., 341 F.3d 987, 994 (9th Cir.2003) (en banc). While the FAA generally presumes that
12 arbitration awards will be confirmed, the statute enumerates four narrow bases for vacatur.

13 Specifically, section 10 provides that a court “may make an order vacating the [arbitration]
14 award only: (1) where the award was procured by corruption, fraud, or undue means; (2) where
15 there was evident partiality or corruption in the arbitrators, or either of them; (3) where the
16 arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause
17 shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other
18 misbehaviour by which the rights of any party have been prejudiced; or (4) where the arbitrators
19 exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award
20 upon the subject matter submitted was not made.” 9 U.S.C. § 10(a).²

21 **A. Plaintiff’s argument**

22 The Court has reviewed Plaintiff’s Petition in its entirety. Careful consideration has been
23 made of the section titled, ‘Argument’ (i.e. Section VI) through to the end of the Petition. Within
24 this section, Plaintiff addressed each of the four statutory bases above. See Pet., at pp. 15-30.
25 While several of those bases are misdirected, the Court has afforded Plaintiff a liberal construction
26

27 ² Section 9 of the FAA provides that a “party to the arbitration may apply to the court . . . for an
28 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. § 9.

1 of the Petition given the fact that she is acting pro se. See Haines v. Kerner, 404 U.S. 519, 520-
2 21(1972).³ Within this context, the court turns to Plaintiff’s arguments.

3 **B. The Award was not procured by corruption, fraud, or undue means**

4 Pursuant to 9 U.S.C. § 10(a)(1), Plaintiff contends that the Award should be vacated
5 because it was procured by corruption, fraud, or undue means. To succeed, Plaintiff must show
6 something more than just unfair conduct; instead, the Ninth Circuit has held that vacatur for “undue
7 means” requires behavior that is immoral, if not illegal. A.G. Edwards & Sons, Inc. v.
8 McCullough, 967 F.2d 1401, 1403 (9th Cir.1992). Importantly, a nexus must exist between the
9 alleged fraud and the basis for the arbitrator’s award. Forsythe International, S.A. v. Gibbs Oil Co.
10 of Texas, 915 F.2d 1017, 1022 (5th Cir.1990); see also McCullough, 967 F.2d at 1404 (holding that
11 the same test for “fraud” applies to “undue means” under 9 U.S.C. § 10(a)(1)). Further, “in order
12 to justify vacating an award because of fraud or undue means, the party seeking to vacate the award
13 must show that the conduct was (1) not discoverable upon the exercise of due diligence prior to the
14 arbitration, (2) materially related to an issue in the arbitration, and (3) established by clear and
15 convincing evidence.” McCullough, 915 F.2d at 1404.

16 Here, Plaintiff contends that the Award ignored testimonies of “grieving women in the
17 Department” which purportedly violated 9 U.S.C. § 10(a)(1). See Pet., at p.17. Further, Plaintiff
18 asserts that there was “tampering with evidence and concealing of testimonies.” See id., at p. 21.
19 Specifically, she argues that the Award did not refer to “Plaintiff’s claims” on “manager
20 favoritism,” “absenteeism,” “chatting” and “online dating.” Id.

21 Plaintiff’s argument under section 10(a)(1) is misdirected. The Court holds that the
22 contention that the “Award” did not refer to all the testimony does *not* indicate that the Arbitrator’s
23 award was procured by corruption or fraud - nor by undue means. The reason is two-fold.

24 First, the Arbitrator’s decision not to rely on evidence (or find it credible) is not a ground
25 for holding that the Award contravened 9 U.S.C. § 10(a)(1). As McCullough states, this section

26
27 ³ The Court observes that the Petition also provides arguments that stretch the four statutory bases
28 to such an extent that it is implausible to find how those arguments could fall within the purview of
the statutory framework.

1 applies when the conduct is immoral, if not illegal. 967 F.2d at 1403. Here, the Arbitrator’s
2 deliberation in giving weight and credibility to *some* of the 17 witnesses *over and above other*
3 *witnesses* is not immoral, nor is such conduct illegal as Plaintiff would have the Court believe.

4 Second, the fact that the Arbitrator devoted more than 12 pages of the Award to factual
5 findings demonstrates the standard that the Arbitrator sought to ensure that the arbitration itself was
6 fair, and certainly not fraudulent or corrupt. See id.; see also Pet., at Ex.1, pp. 2-14. By asserting
7 an argument under § 10(a)(1), Plaintiff is trying to force a ‘square peg’ through the proverbial
8 ‘round hole’ because there is no evidence in the record to give rise to this claim. Accordingly, the
9 argument fails, which runs consistent with the “extremely narrow scope” that is permitted in the
10 review of arbitration awards. See Emp’rs Ins. of Wausau v. Nat’l Union Fire Ins., 933 F.2d 1481,
11 1485 (9th Cir. 1991).

12 **C. There was no evident partiality or corruption by the Arbitrator**

13 Plaintiff’s next argument asserts that the Arbitrator was biased or partial to Defendants. In
14 order for Plaintiff to succeed on this claim under 9 U.S.C. §10(a)(2), she must show that specific
15 facts create a reasonable impression of bias. Lagstein v. Certain Underwriters at Lloyd’s, 607 F.3d
16 634, 642 (9th Cir.2010); see also Woods v. Saturn Dist. Corp., 78 F.3d 424, 427 (9th Cir. 1996).

17 Typically, an attack of “evident partiality” is directed to a specific form of bias. For
18 example, bias has been shown when (1) an arbitrator’s financial interest in the outcome of the
19 arbitration was not disclosed to the parties (Sheet Metal Workers Int’l Ass’n Local 420 v. Kinney
20 Air Conditioning Co., 756 F.2d 742, 746 (9th Cir.1985)), (2) a familial relationship made the
21 arbitrator’s impartiality suspect when not disclosed (Morelite Constr. Corp. v. N.Y. City Dist.
22 Council Carpenters Benefit Funds, 748 F.2d 79, 85 (2nd Cir. 1984)), and (3) an arbitrator’s former
23 employment by one of the parties was not disclosed (Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d
24 673, 677 (7th Cir.1983)). While not exhaustive, it is these examples that provide clear impressions
25 of the level of partiality that is required by the statute; all of which do not exist in the present case
26 for the reasons that follow.

1 Under §10(a)(2), Plaintiff seems to assert two arguments. They are: (1) that the Award
2 “twisted facts” contrary to the “voluminous evidentiary documents in the record,” and (2) that
3 Defendants and the Arbitrator engaged in ex parte communications. See Pet., at pp. 20, 24-25.⁴

4 With respect to argument (1), the Court simply does not agree with Plaintiff’s assertion that
5 so-called “twisted facts” in the Award create an impression of ‘evident partiality’ for the purposes
6 of 9 U.S.C. §10(a)(2). To trigger application of this section, more is required than what Plaintiff
7 proffers in the Petition - particularly in circumstances such as this where the Arbitrator is permitted
8 to give different weight to different testimony in her deliberation of the Award. For reasons similar
9 to that discussed above under 9 U.S.C. §10(a)(1), the fact that the Arbitrator may have given
10 weight to some facts, in light of the totality of all the evidence, does not establish partiality.
11 Indeed, as stated above, the Arbitrator is entitled to make findings with respect to weight and
12 credibility, and should do so in order to arrive at a conclusion one way or the other. Such conduct
13 does not make the Award a partial or biased one; rather, the steps taken by the Arbitrator in this
14 case were steps that must be taken to give effect to the twin advantages of speed and efficiency that
15 are praised by federal policy.

16 With respect to Plaintiff’s second argument under 9 U.S.C. §10(a)(2) regarding ex parte
17 communications, the Court rejects this argument on the basis that the declaration of Kevin Sears,
18 the Vice President of Labor Relations, rebuts any assertion of ex parte contact between Defendants
19 and the Arbitrator. Relevantly, he states:

20
21 I had no ex parte contacts with Arbitrator McPharlin during the arbitration
22 proceedings in this matter, whether pre-hearing, during the time of the hearing, or
23 post-hearing. I also am not aware that any of Macy’s personnel or witnesses had any
24 ex parte contact with Arbitrator McPharlin.

25 ⁴ While the Court has taken steps to identify these arguments, the Court is mindful not serve as
26 Petitioner’s advocate. See Hall v. Bellman, 935 F.2d 1106, 1110 (10th Cir. 1991). The Court
27 further observes that the remainder of the arguments with respect to §10(a)(2), asserted by Plaintiff,
28 are incomprehensible. For example, there are a number allegations unrelated to a motion to vacate
under the FAA - such as alleged facts noting “hysterical laughter on the sales floor” and other
allegations regarding employees “complementing tie color.” The Court cannot discern under what
statutory provision these claims may be brought. See Pet., at p. 20. Put simply, Plaintiff has not
clearly delineated the statutory sections and the arguments relevant to each one.

1 See Decl. of Kevin Sears (“Sears Decl.”), Docket Item No. 59.

2 In fact, because Plaintiff was pro se, Defendants “went out of [their] way to limit contact
3 with Arbitrator McPharlin during the time period of the arbitration hearing, including not eating in
4 the same restaurant and not staying at the same hotel as [the Arbitrator].” Id. In this case, the
5 Sears Declaration silences any ex parte concerns and satisfies the court that such conduct did not
6 occur as alleged.

7 But even if Plaintiff’s assertions were true, Plaintiff does not show how any ex parte
8 contract resulted in bias against her. Instead, the Petition tends to point the other way.
9 Specifically, when Defendants allegedly requested that the Arbitrator remove a document ex parte,
10 the Arbitrator said that she “really can’t” do that because, as the Arbitrator said, it was already “in
11 the record.” See Pet., at p. 24. Ironically, these quotes exist in the Plaintiff’s own Petition. Not
12 only are they inconsistent with the argument that Plaintiff is attempting to assert, the alleged ex
13 parte contact (if true) would not rise to to the level of “evident partiality” justifying vacatur. See
14 Fairchild, 516 F. Supp. at 1313; see also Bell Aerospace Co. v. Local 516, UAW, 500 F.2d 921,
15 923 (2d Cir. 1974).

16 **D. There is no evidence of misconduct on the part of the Arbitrator**

17 To vacate an arbitration award on the grounds of refusal to hear evidence, the party must
18 show that “the exclusion of relevant evidence deprive[d] a party from a fair hearing.” Karaha
19 Bodas Co. v. Perusahaan Pertambangan Minyak, 364 F.3d 274, 301 (5th Cir. 2004)⁵; Hernandez v.
20 Smart & Final, Inc., 09-cv-2266 BEN (NLS), 2010 WL 2505683, *8-9, 2010 U.S. Dist. LEXIS
21 60755, *17-18 (S.D. Cal. June 16, 2010). Specifically, “every failure of an arbitrator to receive
22 relevant evidence does not constitute misconduct requiring vacatur of an arbitrator’s award. A
23 federal court may vacate an arbitrator’s award only if the arbitrator’s refusal to hear pertinent and
24

25 ⁵ See, also Hoteles Condado Beach, La Concha and Convention Ctr. v. Union De Tronquistas
26 Local 901, 763 F.2d 34, 39 (1st Cir. 1985)) (holding that “[a]n ‘arbitrator is not bound to hear all of
27 the evidence tendered by the parties.... [He] must give each of the parties to the dispute an adequate
28 opportunity to present its evidence and arguments.”); Slaney v. Int’l Amateur Athletic Fed’n, 244
F.3d 580, 592 (7th Cir. 2001) ((cautioning that “parties that have chosen to remedy their disputes
through arbitration rather than litigation should not expect the same procedures they would find in
the judicial arena.”); Generica, Ltd. v. Pharm. Basics, Inc., 125 F.3d 1123, 1130 (7th Cir. 1997).

1 material evidence prejudices the rights of the parties to the arbitration proceedings.” See Hoteles
2 Condado Beach v. Union De Tronquistas Local 901, 763 F.2d 34, 40 (1st Cir. 1985); see also
3 Hernandez, 2010 WL 2505683, *8-9.

4 Here, and as the Court has already noted, the arguments in Plaintiff’s Petition have been
5 difficult to discern. The arguments with respect to 9 U.S.C. § 10(a)(3) are no exception.
6 Nonetheless, and on liberal construction of the Petition, the Court identifies at least two arguments
7 under this statutory ground. The first is an argument of ex parte communications between the
8 Defendants and the Arbitrator. See Pet., at p. 24. Discussion of this argument has been largely
9 made above with respect to § 10(a)(2). The Court confirms that the reasoning there is equally
10 applicable here, and finds against Plaintiff.

11 The second argument also overlaps with assertions raised above - specifically, that the
12 Arbitrator was guilty of misconduct in refusing to hear pertinent evidence of the Plaintiff’s case.
13 Id., at pp. 24-25. Here, Plaintiff targets the refusal of one specific piece of evidence worthy of
14 further analysis. Specifically, she contends that the Arbitrator did not consider Exhibit 19.⁶ By not
15 reviewing the Exhibit 19, Plaintiff asserts that the “Arbitrator accommodated Defendants by denial
16 of Plaintiff’s evidentiary documents.” Id., at p. 25. As such, Plaintiff asserts that this was “another
17 example of the Arbitrator’s prejudicial misconduct.” Id.

18 The Court, however, disagrees with Plaintiff, primarily because Plaintiff provides no
19 substantial or credible evidence that Arbitrator engaged in ex parte contact with Defendants to deny
20 review of Exhibit 19. This brings into question whether the Arbitrator was ever even aware of
21 Exhibit 19 in the first place. As such, the lack of any awareness would rebut any argument that it
22 was deliberately excluded.

23 Second, even if the Exhibit 19 was deliberately excluded, Plaintiff must show that “the
24 exclusion of relevant evidence deprive[d]” her from a fair hearing. See Karaha Bodas Co., 364
25 F.3d at 301; see also Hernandez, 2010 WL 2505683, at *8-9. After reviewing Exhibit 19, the
26 Court finds it difficult to view how the alleged exclusion of that exhibit could give rise to the

27 _____
28 ⁶ That exhibit is titled, “Middle Management’s Email correspondence with [Ms.] Macon, HR Director.”

1 impression that Plaintiff received an unfair hearing. As has been stated earlier, the Arbitrator
2 considered the testimony of 17 other witnesses. This occurred over the course of nine days.
3 During the hearing, a further 92 exhibits were submitted to the Arbitrator. See Opp’n, at p. 12. In
4 light of this evidentiary review, the Court is not persuaded that the Arbitrator’s action could
5 constitute misconduct that falls within the scope of 9 U.S.C. § 10(a)(3). The purpose of that
6 section is directed to cases where the misconduct amounts to a denial of fundamental fairness in the
7 proceeding. Thus, in light of the length of the hearing, alongside the number of witness and
8 exhibits on the record, the Court is must determine that Plaintiff was provided a fair arbitration
9 hearing.

10 Finally, Employers Ins. of Wausau v. National Union Fire Ins., 933 F.2d 1481, 1490 (9th
11 Cir. 1991), informs the Court that it is not enough to merely allege or show *some* misconduct or
12 misbehaviour by the Arbitrator with respect to § 10(a)(3); rather, “a showing of prejudice is a
13 prerequisite to relief based on an [arbitrator’s] evidentiary rulings.” Plaintiff has failed to make
14 such a showing, which only furthers the notion that this argument is without merit.

15 **E. The arbitrator did not exceed her powers**

16 Under 9 U.S.C. § 10(a)(4), “arbitrators exceed their powers when they express a ‘manifest
17 disregard for the law,’ or when they issue an award that is ‘completely irrational.’” See Bosack,
18 586 F.3d at 1104; Comedy Club, Inc. v. Improv West Assocs., 553 F.3d 1277, 1290 (9th Cir.
19 2009). This is a high standard for vacatur: “[i]t is not enough . . . to show that the panel committed
20 an error-or even a serious error.” Lagstein v. Certain Underwriters at Lloyd’s, 607 F.3d 634, 642
21 (9th Cir. 2010) (quoting Stolt-Nielsen S.A. v. Animal Feeds Int’l Corp., 130 S. Ct. 1758, 1767
22 (2010)). Indeed, “[n]either erroneous legal conclusions nor unsubstantiated factual findings justify
23 federal court review of an arbitral award under the statute, which is unambiguous in this regard.”
24 Bosack, 586 F.3d 1102; see also Kyocera Corp. v. Prudential-Bache T Servs., 341 F.3d 987, 997
25 (9th Cir. 2003) (en banc) (holding that “arbitrators ‘exceed their powers’ . . . when the award is
26 ‘completely irrational,’ or exhibits a ‘manifest disregard of law.’”)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV. ORDER

For the reasons stated above, Defendants' motion to confirm the Arbitrator's Award is GRANTED. Plaintiff's motion to vacate the arbitration award is DENIED.

IT IS SO ORDERED.

Dated: June 28, 2012


EDWARD J. DAVILA
United States District Judge