NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL JAY DEMARTINI; RENATE DEMARTINI, Plaintiffs-Appellees, v. THOMAS CHRISTOPHER JOHNS; JOHNS & ALLYN, A.P.C., Defendants-Appellants.	No. 15-15205 16-15078 D.C. No. 3:12-cv-03929-JCS MEMORANDUM*

MICHAEL JAY DEMARTINI; RENATE DEMARTINI, Plaintiffs-Appellants, v. THOMAS CHRISTOPHER JOHNS; JOHNS & ALLYN, A.P.C., Defendants-Appellees.	No. 16-15134 D.C. No. 3:12-cv-03929-JCS

Appeal from the United States District Court
for the Northern District of California
Joseph C. Spero, Magistrate Judge, Presiding

Argued and Submitted April 20, 2017

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

San Francisco, California

Before: THOMAS, Chief Judge, MURGUIA, Circuit Judge, and BAYLSON,** District Judge.

Thomas Christopher Johns and the law firm Johns & Allyn, A.P.C. (collectively, "Defendants") appeal the district court's order denying their motion to vacate an arbitration award entered against them on Michael and Renate DeMartini's (collectively, "Plaintiffs") legal malpractice claims. Defendants also appeal the district court's denial of their request for a stay in response to Plaintiffs' motion to confirm the arbitration award. Plaintiffs cross-appeal the district court's grant of Defendants' motion to amend the judgment pursuant to Federal Rule of Civil Procedure 59(e). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm in part and reverse and remand in part.

I.

We review de novo the district court's decision to deny a motion to vacate an arbitration award. *Woods v. Saturn Distrib. Corp.*, 78 F.3d 424, 427 (9th Cir. 1996). Defendants argue that the district court erred in denying their motion to vacate under § 10 of the Federal Arbitration Act ("FAA"), which, in relevant part, authorizes vacatur "where the arbitrators exceeded their powers, or so imperfectly

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** The Honorable Michael M. Baylson, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). We have strictly interpreted this standard, emphasizing that review of an arbitration award itself is "both limited and highly deferential." *Sheet Metal Workers' Int'l Ass'n v. Madison Indus., Inc.*, 84 F.3d 1186, 1190 (9th Cir. 1996). Accordingly, "arbitrators exceed their powers in this regard not when they merely interpret or apply the governing law incorrectly, but when the award is completely irrational, or exhibits a manifest disregard of law." *Kyocera Corp. v. Prudential–Bache Trade Servs., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003) (en banc) (internal quotation marks and citations omitted). This means that "[i]t must be clear from the record that the arbitrators recognized the applicable law and then ignored it."' *Lagstein v. Certain Underwriters at Lloyd's, London*, 607 F.3d 634, 641 (9th Cir. 2010) (quoting *Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 832 (9th Cir. 1995)). "As such, mere allegations of error are insufficient." *Carter v. Health Net of Cal., Inc.*, 374 F.3d 830, 838 (9th Cir. 2004).

Defendants argue that the arbitrator showed a manifest disregard of law when she denied their requests to dismiss Plaintiffs' malpractice claims as time-barred. Defendants specifically argue that the arbitrator correctly recognized the one-year statute of limitations that applies to malpractice claims, but then intentionally ignored it in applying the law to the facts before her. *See* Cal. Code

Civ. P. § 340.6(a); *see also Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton, LLP*, 35 Cal. Rptr. 3d 31, 51 (Cal. Ct. App. 2005) (explaining that the one-year limitations period "is triggered by the client's discovery of 'the facts constituting the wrongful act or omission,' not by his discovery that such facts constitute professional negligence"). We cannot conclude from the record that the arbitrator's decision—while perhaps an erroneous application of the California statute of limitations for legal malpractice claims—constitutes a "manifest disregard" of law. *See Bosack v. Soward*, 586 F.3d 1096, 1104 (9th Cir. 2009) ("[T]here must be some evidence in the record, other than the result, that the arbitrators were aware of the law and intentionally disregarded it." (alteration in original) (quoting *Lincoln Nat'l Life Ins. Co. v. Payne*, 374 F.3d 672, 675 (8th Cir. 2004)); *cf. American Postal Workers Union AFL-CIO v. U.S. Postal Serv.*, 682 F.2d 1280, 1284 (9th Cir. 1982) (finding a manifest disregard of law when the record showed the arbitrator recognized the applicable law, but refused to apply it because of "the arbitrator's belief that the penalty was too severe" under the circumstances). Defendants have failed to carry their heavy burden of showing the arbitrator's award warrants vacatur based on a manifest disregard of law on the part of the arbitrator.

Defendants also argue the district court erred in denying its motion to vacate the arbitration award on public policy grounds. While a court may vacate an

arbitration award that is contrary to public policy, this is a very narrow exception. *Stead Motors v. Auto. Machinists Lodge No. 1173*, 886 F.2d 1200, 1209 (9th Cir. 1989) (en banc) ("[A] court need not, in fact cannot, enforce an award which violates public policy."). To vacate an arbitration award on public policy grounds, the panel must find (1) that an "explicit, well defined and dominant" public policy exists, and (2) "that the policy is one that specifically militates against the relief ordered by the arbitrator." *Id.* at 1210–13.

Defendants argue that the arbitration award should be vacated because it is based on perjury committed by Mr. DeMartini in the underlying partition action, and the "the public policy against perjury is explicit and well-defined." A review of the record reveals that Defendants made similar claims of perjury to the arbitrator, and the arbitrator directly questioned Mr. DeMartini during the arbitration proceeding about whether he had lied under oath during the partition action. The arbitrator's final decision indicates that the arbitrator rejected Defendants' claims that Mr. DeMartini intentionally gave false testimony during his deposition and at the underlying trial. *See* Cal. Penal Code § 118 (defining "perjury" as when an individual, under oath, "willfully states as true any material matter which he or she knows to be false"). The arbitrator found that Mr. DeMartini was "being asked to juggle competing complex concerns and follow difficult instructions under pressure," and ultimately entered an award in Plaintiffs'

favor, which strongly indicates that the arbitrator did not believe that Mr. DeMartini had intentionally misrepresented any material facts during his deposition. Although the arbitrator did not expressly address whether Mr. DeMartini intentionally gave false testimony at trial in her written decision, she was not required to do so. *Bosack*, 586 F.3d at 1104 (stating that and arbitrator's "award may be made without explanation of their reasons and without a complete record of their proceedings"). Because Defendants' public policy argument would require the Court to revisit the arbitrator's findings of fact and conclusions of law with respect to Defendants' perjury argument put forth to the arbitrator, the Court will not vacate the award on this ground. *Kyocera*, 341 F.3d at 994.

Accordingly, we affirm the district court's denial of Defendants' motion to vacate the arbitration award under § 10 of the FAA or on public policy grounds.

II.

We review a district court's denial of a motion to stay for abuse of discretion. *United States v. Peninsula Comm., Inc.*, 287 F.3d 832, 838 (9th Cir. 2002). A district court "has broad discretion to stay proceedings as an incident to its power to control its own docket" in an effort to promote judicial economy. *Clinton v. Jones*, 520 U.S. 681, 706–07 (1997); *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005). The party who moves for a stay has the burden to "make out a clear case of hardship or inequity in being required to go forward,"

and the court must weigh the competing interests that will be affected by the granting of or refusal to grant the stay. *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936).

We cannot conclude that the district court abused its discretion in denying Defendants' request to stay ruling on Plaintiffs' motion to confirm the arbitration award. The FAA mandates courts to confirm an arbitration award unless the award has been vacated, modified or corrected. *See* 9 U.S.C. § 9 ("[A]t 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." (emphasis added)). The Supreme Court has noted that § 9 of the FAA "carries no hint of flexibility." *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 587 (2008). Because the district court had already denied Defendants' motion to vacate the arbitration award, and the three-month limitation period for bringing any further motion to vacate or alter the arbitration award had passed by the time Plaintiffs moved to confirm the arbitration award, *see* 9 U.S.C. § 12, the district court was obligated to summarily confirm the award. The district court properly rejected Defendants' arguments that ruling on the motion to confirm the arbitration award would result in a considerable waste of resources for both the parties and the court. Further, Defendants have not persuasively argued that they were subjected to any

"hardship or inequity" in requiring to litigate Plaintiffs' motion to confirm the award. *See Landis*, 299 U.S. at 255.

Accordingly, we affirm the district court's denial of Defendants' request to stay ruling on Plaintiffs' motion to confirm the arbitration award.

III.

Plaintiffs cross-appeal the district court's grant of Defendants' motion to amend the judgment pursuant to Rule 59(e). We review a district court's grant of a Rule 59(e) motion to amend judgment for abuse of discretion. *Int'l Rehab. Sci. Inc. v. Sebelius*, 688 F.3d 994, 1000 (9th Cir. 2012).

The district court initially entered judgment in favor of Plaintiffs "in the amount of $177,100.00" and, consistent with the arbitration award, granted "prejudgment interest from June 30, 2011, at the California statutory rate." Defendants filed a Rule 59(e) motion to amend the judgment, arguing that the district court's judgment conflicted with California law, which only allows for prejudgment interest to start from the date the legal malpractice arbitration award was issued—July 30, 2014. *See* Cal. Civ. Code § 3287. The district court agreed and granted Defendants' motion to amend the award, concluding that "the date stated in its previous order and judgment is clearly erroneous," as it does not comport with § 3287 of the California Civil Code. The court then entered an

amended judgment in the amount of $177,100 "plus prejudgment interest from **July 30, 2014** at the California statutory rate."

The district court abused its discretion in granting Defendants' Rule 59(e) motion and amending the judgment so that it conflicted with the arbitrator's grant of prejudgment interest. Sections 10 and 11 of the FAA provide the "exclusive grounds" for vacating or modifying an arbitration award. *Hall Street*, 552 U.S. at 584. Under the FAA, motions to vacate, modify, or correct the arbitration award must be served on the opposing party within three months after the award is filed. 9 U.S.C. § 12. Here, the arbitrator issued her final decision on July 30, 2014 and, although Defendants knew that the award consisted of prejudgment interest beginning from June 30, 2011 through the date of the award, Defendants did not raise this issue in their motion to vacate the award, or otherwise move to modify the grant of prejudgment interest within three months of the award. Accordingly, at the time Defendants filed their Rule 59(e) motion, they were time-barred from amending the arbitration award pursuant to the FAA. *See* 9 U.S.C. § 12. Defendants' attempt to circumvent the FAA through a Rule 59(e) motion was improper. *See Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1133, 1133 n.3 (9th Cir. 2000). Further, we note that it is well-established that a Rule 59(e) motion "may *not* be used to raise arguments . . . for the first time when they could reasonably have been raised earlier in the litigation," *Kona Enter., Inc. v.*

Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000). The argument that the arbitrator's grant of prejudgment interest from June 30, 2011 violated state law most certainly "could reasonably have been raised earlier in the litigation." *Id.*

Accordingly, we reverse the district court's Rule 59(e) order and remand to the district court with instructions to enter judgment consistent with the arbitration award—"$158,000 plus interest thereon at the California statutory prejudgment interest rate from June 30, 2011 through the date of [the arbitration award]," and "$19,100.00 for arbitration fees and costs"[1]—including post-award prejudgment interest under California Civil Code § 3287(a).

AFFIRMED in part, REVERSED in part, and REMANDED. Costs are taxed against Defendants.

[1] The $19,100 for arbitration fees and costs is not subject to prejudgment interest.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
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* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk