UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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FIDELITY BROKERAGE SERVICES LLC and
NATIONAL FINANCIAL SERVICES LLC,

Petitioners,

- against -

PETER E. DEUTSCH, WILLIAM J. DEUTSCH, and THE FINANCIAL INDUSTRY REGULATORY AUTHORITY ("FINRA"),

Respondents,
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MEMORANDUM AND ORDER

17 Civ. 5778 (NRB)

17 Civ. 8866 (NRB)

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

This case arises out of a Financial Industry Regulatory Authority ("FINRA") arbitration filed by Peter and William Deutsch (the "Deutsches") against Fidelity Brokerage Services LLC ("FBS") and National Financial Services LLC ("NFS," and together with FBS, "Fidelity") alleging tort claims, breach of contract claims, and violations of FINRA rules. After holding 50 days of hearings, the FINRA arbitration panel (the "Panel") issued a well-reasoned award denying the Deutsches' claims in their entirety (the "Award"). Fidelity petitioned the Court to confirm the Award, and the Deutsches cross-petitioned to vacate. Because the Deutsches have not identified any arbitrator misconduct or manifest disregard of

the law that would merit vacatur, the petition to confirm is granted, and the cross-petition to vacate is denied.

II. BACKGROUND

A. Factual Background

1. The CMED Investment Scheme

William and Peter Deutsch are respectively the Chairman and CEO of Deutsch Family Wine & Spirits, an importer and marketer of wine and spirits, and they represented in the arbitration that they were "experienced investors with significant financial means." Third Am. Statement of Claim ("TASC"), July 30, 2013, ECF No. 32-6 ¶ 5. The Deutsches had non-discretionary brokerage accounts with Fidelity, as well as discretionary brokerage accounts on Fidelity's platform managed by David O'Leary of AER Advisors Inc. ("AER"), who served as their investment manager and advisor. Resp'ts' Cross Pet. to Vacate ("Pet. to Vacate"), Sept. 15, 2017, ECF No. 23 at 7-8; TASC ¶¶ 6-7, 10-14.

In 2011, AER devised a strategy, referred to as "China Gold" or "Fallen Angel," to invest in companies based in China whose share prices did not reflect their underlying value. Award, July 28, 2017, ECF No. 23-2 at 4; TASC ¶ 15. AER's theory was that after the Deutsches invested in one of these companies either management would buy out the company or a private equity firm or other strategic buyer would purchase the company's equity at a

significant premium to its share price. Award at 4. Beginning in November 2011, the Deutsches began to build positions through their Fidelity accounts in "China Gold" companies identified by AER, including, as relevant here, China Medical Technologies, Inc. ("CMED"). Award at 4-5; TASC ¶ 16. CMED, which was then listed on NASDAQ, was a holding company incorporated in the Cayman Islands with an ownership interest in medical device companies based in China. Award at 5; TASC ¶¶ 16-17.

The Deutsches represented that they were attracted to CMED because its "financial statements were stellar." TASC ¶ 19. However, they also acknowledged that there was a "constant drumbeat" of negative news surrounding the company, including that CMED: (1) announced that it intended to implement a debt restructuring, (2) stopped making its required filings with the Securities and Exchange Commission, (3) stopped providing requested information to CMED's external auditors and outside directors, and (4) defaulted on its debt obligations. Award at 5; TASC ¶¶ 29-31. NASDAQ halted trading in CMED on February 7, 2012, and delisted CMED on February 28, 2012. TASC ¶¶ 32-33. While these might have been red flags to the ordinary investor, "[t]hese events were viewed as positives by Deutsch and O'Leary, who believed they were signs CMED was deliberately going dark prior to announcing a deal that would take the company private at a premium to the current market price." Award at 5.

On June 15, 2012, unpaid bondholders of CMED filed a petition in the Cayman Islands to liquidate the company. Id. Undeterred, Peter Deutsch purchased nearly 800,000 additional shares of CMED, amassing a total position of more than 40% of all CMED shares. TASC ¶¶ 43-45. The SEC again halted trading in the stock on June 29, 2012. Id. ¶ 71. On July 16, 2012, the day trading in CMED resumed, Fidelity refused to entertain Deutsch's purchase orders for CMED on the basis that he was attempting a short squeeze. Award at 5; TASC ¶ 72.

2. The Arbitration

The Deutsches filed a statement of claim with FINRA two weeks later. Statement of Claim, July 30, 2012, ECF No. 32-1. Paul Biederman, Robert Anderson, and Fred Shinagel were appointed to serve on the Panel. Award at 13. Mr. Biederman was the only member of the Panel who was an attorney. See Pet. to Vacate at 5. The Deutsches' operative third amended statement of claim, filed July 30, 2013, alleged fifteen causes of action against Fidelity: (1) violation of FINRA Rule 2111 for lack of fair dealing; (2) violation of FINRA Rule 5310 for failure to make every effort to execute the trades; (3) violation of FINRA Rule 2010 for failure to "observe high standards of commercial honor and just and equitable principles of trade"; (4) violation of the duty of fair dealing; (5) fraud; (6) NFS's aiding and abetting fraud committed by FBS; (7) breach of contract; (8) gross negligence and/or

negligence; (9) third-party beneficiary of contracts between AER and Fidelity breached by Fidelity; (10) intentional interference with contract; (11) promissory estoppel; (12) negligent misrepresentation; (13) negligent supervision; (14) tortious interference with the Deutsches' prospective business relationship with TD Ameritrade; and (15) conversion. TASC ¶¶ 128-222. In their initial statements of claim, the Deutsches sought $125 million in damages. Statement of Claim at 12-13; Amended Statement of Claim, Nov. 1, 2012, ECF No. 32-3 at 35. In their third amended statement of claim, the Deutsches sought "[c]ompensatory damages equal pay for the fair market value of 66% of CMED realizable through a sale to a private equity buyer," as well as punitive damages, interest, and all costs and attorneys' fees. TASC ¶ 223.

The Panel held hearings over 50 non-consecutive days between July 1, 2014 and June 1, 2017. See Arbitration Tr., June 1, 2017, ECF No. 23-7 at 3. The Deutsches called sixteen witnesses on their direct case over the first 26 days of hearings. Decl. of Mark D. Knoll ("Knoll Decl.") ¶ 13, Oct. 16, 2017, ECF No. 32. Six of the Deutsches' witnesses provided expert testimony: (1) Brian Lenart on securities compliance and lending customer securities, Arbitration Tr., July 1, 2014, ECF No. 32-12 at 111:2-13; (2) Philip Grove on Chinese markets, the valuation of Chinese companies generally, and the valuation of CMED, Arbitration Tr., Feb. 10, 2015, ECF No. 32-13 at 28:24-29:13; (3) James O'Neill on Chinese

markets, Arbitration Tr., Feb. 23, 2015, ECF No. 32-14 at 22:22-23:9; (4) Andrew Bolton on the law of the Cayman Islands, Arbitration Tr., Apr. 14, 2015, ECF No. 32-15 at 7:8-11; (5) Vikram Kapoor on securities trading, quantitative finance, and related mathematics, Arbitration Tr., Apr. 14, 2015, ECF No. 32-16 at 147:4-8; and (6) Harvey Pitt, the former Chairman and General Counsel of the Securities and Exchange Commission, on securities regulation, Arbitration Tr., June 30, 2015, ECF No. 32-17 at 3:15-5:23, 10:15-11:1. Collectively, the Deutsches' expert witnesses testified for nine days. Memorandum of Law in Opposition to Respondents' Motion/Cross-Petition to Vacate Arbitration Award ("Opp'n"), Oct. 16, 2017, ECF No. 30, at 21.[1] Fidelity then called two fact witnesses and four expert witnesses, who testified for a total of 18 days. Knoll Decl. ¶ 21.

The Deutsches sought to present a rebuttal case at the close of Fidelity's case, offering the testimony of six witnesses. Letter from David Graff to the Panel, Nov. 15, 2016, ECF No. 32-20. The Panel permitted Peter Deutsch and David O'Leary to testify again, but limited the time available for the Deutsches' rebuttal case and excluded four additional rebuttal witnesses: (1) Sol Wachtler, the former Chief Judge of the New York Court of Appeals; (2) Harvey Pitt; (3) Gerald Brodsky; and (4) James O'Neill.

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[1] The Deutsches do not contest this representation, and the Court can identify no reason to doubt its accuracy.

Arbitration Tr., Nov. 16, 2016, ECF No. 32-19 at 43:24-44:9. However, the Deutsches submitted lengthy written proffers from each of the excluded witnesses. Pet. to Vacate ¶ 107 ("Proffers were submitted for each excluded witness."); see, e.g., Proffer of Sol Wachtler, ECF No. 23-3 (102-page submission).

During the arbitration, the parties contested the circumstances, significance, and legality of Fidelity's lending CMED shares to short sellers in the same period when the Deutsches were acquiring CMED stock. The Deutsches alleged that Fidelity lent out their CMED shares to market participants seeking to short CMED's stock without informing the Deutsches that it was doing so. TASC ¶¶ 27-29; Claimants' Pre-Closing Brief, May 12, 2017, ECF No. 32-11 at 7-15. Specifically, the Deutsches asserted that Fidelity "impermissibly loaned almost 1.8 million of the Deutsches' CMED shares from May 7 through June 7, 2012, against Peter Deutsch's express instruction, and while knowing that such lending was inimicable to the Deutsches' acquisition strategy." Claimants' Pre-Closing Br. at 13. Fidelity responded that the Deutsches had conceded that Fidelity was permitted to loan CMED shares held in their margin accounts, none of the Deutsches' pleadings contained a request for relief related to alleged "illegal lending," and there was no connection between allegations of "illegal lending" and alleged damages. Resp'ts' Closing Mem. of Law, May 12, 2017, ECF No. 32-22 at 21-26.

After the conclusion of testimony but before closing arguments, Xiaodong Wu, the founder and former CEO and Chairman of CMED, and Tak Yung Samson Tsang, the former CFO of CMED, were indicted in the Eastern District of New York on charges of conspiracy to commit securities fraud, conspiracy to commit wire fraud, and securities fraud for their roles in a scheme to defraud CMED's noteholders and investors. See United States v. Xiaodong Wu, 17 Cr. 144 (KAM), Indictment, ECF No. 1 (E.D.N.Y. Mar. 20, 2017). Fidelity filed notice of the indictment with the Panel, and the parties argued as to its admissibility. Order on Admission of New Document, Apr. 20, 2017, ECF No. 23-48. The Panel unanimously agreed to admit the indictment into the case record and further concluded that it would permit no further witness testimony on the subject. Id. The parties subsequently filed their pre-closing briefs, and the Panel held closing arguments on May 31 and June 1, 2017. Id.; Arbitration Tr., June 1, 2017, ECF No. 23-7.

3. The Award

The Panel issued a unanimous award in July 2017 denying the Deutsches' claims in their entirety. Award, ECF No. 23-2. In ruling for Fidelity, the Panel found that nothing Fidelity did (or failed to do) could have redeemed the Deutsches' fundamentally flawed strategy of investing in CMED. Id. at 7-10. The Panel found that each of the following would needed to have occurred for

the Deutsches' strategy to have proven a financial success: (1) the Deutsches needed to purchase approximately 6 million shares of CMED over an eight-day period in order to obtain two-thirds of the company; (2) the Deutsches needed to persuade a court in the Cayman Islands not to liquidate CMED; (3) CMED's bondholders needed to agree to exchange their defaulted bonds for 25% of their face value; (4) the Deutsches needed to convince a Chinese court to reverse the purportedly fraudulent transfer of 60% of CMED's subsidiaries; and (5) most importantly, the Deutsches needed to find a buyer who was willing to pay a premium for a company in liquidation proceedings whose former CEO and CFO had been indicted for perpetuating a fraud that had "in all probability" siphoned $200 million in cash out of the company. Id. at 7-9. Given these contingencies, each of which the Panel found were unlikely to (or could not possibly) occur, "an award of any amount by way of the alternate damages calculations presented by Claimants would be entirely speculative, hypothetical, remote or all of the above." Id. at 10 (emphasis in original).

The Panel did, however, criticize Fidelity's handling of the Deutsches' account:

> There did not seem to be much communication or coordination between different departments of Fidelity as to how to approach the client or to formulate a uniform and informed solution to the problems presented by his acquisition strategy. In particular, no one at Fidelity reached out to the client to gain his essential perspective prior to terminating his trading in CMED.

> In essence, the firm appeared to be more focused on its own interests at the expense of accommodating those of its client or at minimum gaining a key understanding as to what the client's intentions and interests were. Instead, the conclusion was reached that Deutsch and O'Leary were engineering a short squeeze and should be cut off from further purchases of CMED. By reason of the foregoing, the Panel finds in favor of Claimants on this equitable issue.

Id. at 10 (emphasis in original).

However, this criticism of Fidelity's behavior did not change the Panel's fundamental conclusion that "whatever Fidelity did or did not do would not have altered the failure of Claimants' investment because the events that doomed the strategy were either external to Fidelity or internal to CMED." Id. The Panel therefore denied the Deutsches' claims in their entirety. Id.

B. Procedural Background

On July 31, 2017, Fidelity and NFS filed an action in this Court to confirm the Award.[2] Pet. to Confirm Arbitration, July 31, 2017, ECF No. 1. The Deutsches filed an opposition to the petition to confirm the award and a cross motion to vacate. Cross Mot. to Vacate Arbitration, Sept. 15, 2017, ECF No. 22. The Deutsches also filed a petition to vacate the Award in the Supreme

[2] FINRA is named as a "nominal respondent" in this action as required by FINRA Rule 2080(b) because the Petition includes a request to confirm the Award's grant of expungement relief to Fidelity employee Mark Driscoll. Pet. to Confirm Arbitration ¶ 3. FINRA does not oppose confirmation of the award, and neither FINRA nor the Deutsches oppose the recommended expungement. See FINRA's Response to Pet. to Confirm Arbitration Award, Aug. 7, 2017, ECF No. 14. Therefore, in confirming the Award, we also confirm the expungement relief granted therein to Mr. Driscoll.

Court of the State of New York, which they explained was a "precaution" in case the Court determined that Fidelity's petition for confirmation failed to plead subject matter jurisdiction. Deutsch v. FINRA, No. 17 Civ. 8866 (NRB), Notice of Removal, Nov. 14, 2017, ECF No. 1. Fidelity removed that case to federal court, and we accepted it as related. Id.

III. DISCUSSION

A. Subject Matter Jurisdiction

Before we reach the merits of this action, we must address the Deutsches' challenge to this Court's subject matter jurisdiction. See Letter from Howard Graff to the Court, Sept. 15, 2017, ECF No. 20; Letter from Howard Graff to the Court, Sept. 29, 2017, ECF No. 27. As described in the petition to confirm the Award (and admitted in the Deutsches' Answer, Sept. 15, 2017, ECF No. 21 ¶ 4), "[t]his Court has subject matter jurisdiction over this Petition pursuant to 28 U.S.C. § 1332 because (i) the amount in controversy exceeds $75,000; and (ii) the Parties are citizens of different states." Pet. to Confirm Arbitration ¶ 4. The Deutsches, who sought damages exceeding $100 million in the arbitration, never questioned the amount in controversy. See Statement of Claim at 12-13; Amended Statement of Claim at 35. However, as citizens of Connecticut, they represented that they were "unable to assess" the parties' diversity because FBS and NFS

"d[id] not provide sufficient information" about their citizenship in the petition to confirm the arbitration. ECF No. 20 at 1.

Fidelity responded by submitting documentation showing that Fidelity Global Brokerage Group, Inc. is a Massachusetts corporation and that it is the sole member of both FBS and NFS. Letter from Mark D. Knoll to the Court, Sept. 29, 2017, ECF No. 26. The Deutsches replied in conclusory fashion that "Fidelity's explanation does not established (sic) a jurisdictional predicate." ECF No. 27 at 1 n.1 (emphasis in original). As the parties agree that a limited liability company is deemed to have the citizenship of its members, see Bayerische Landesbank, N.Y. Branch v. Aladdin Capital Mgmt. LLC, 692 F.3d 42, 49 (2d Cir. 2012), Fidelity's submission clearly resolved any ambiguity as to the parties' diversity, and the Deutsches' failure to concede this point is perplexing. To the extent that the record was previously unclear, we now "deem the pleadings amended so as to properly allege diversity jurisdiction," Canedy v. Liberty Mut. Ins. Co., 126 F.3d 100, 103 (2d Cir. 1997), and proceed to the merits of this case.[3]

[3] The Deutsches represented that they filed the State Court action "out of an abundance of caution and only in the event that the Federal Court does not exercise jurisdiction with respect to the Award," Id., and Fidelity agreed that the issues presented in the two actions "are identical." Id. ECF No. 4. Because we find that we have subject jurisdiction over Fidelity's petition, we dismiss the removed action, No. 17 Civ. 8866 (NRB), as moot. See Nat'l Indemnity Co. v. IRB Brasil Resseguros S.A., 164 F. Supp. 3d 457, 473 n.24, 488 (S.D.N.Y. 2016).

B. Review of Arbitral Awards

Under the Federal Arbitration Act ("FAA"), "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 . . . ." 9 U.S.C. § 9. A district court may vacate an arbitral award in four circumstances:

> (1) where the award was procured by corruption, fraud, or undue means;
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> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
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> (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
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> (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). The Supreme Court has observed that "[r]eview under § 10 focuses on misconduct rather than mistake." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011).

"It goes without saying that there should be great hesitation in upsetting an arbitration award." Odeon Capital Grp. LLC v. Ackerman, 864 F.3d 191, 195 (2d Cir. 2017) (quoting Karppinen v. Karl Kiefer Mach. Co., 187 F.2d 32, 34 (2d Cir. 1951)). Arbitration panel determinations are accorded great deference

under the FAA, Leeward Constr. Co., Ltd. v. Am. Univ. of Antigua-Coll. of Med., 826 F.3d 634, 638 (2d Cir. 2016), and the role of a district court in reviewing an arbitration award is therefore "severely limited," Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co., 668 F.3d 60, 71 (2d Cir. 2012). "The burden of proof necessary to avoid confirmation of an arbitration award is very high, and a district court will enforce the award as long as 'there is a barely colorable justification for the outcome reached.'" Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr., 729 F.3d 99, 103 (2d Cir. 2013). "It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable." Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 671 (2010) (quoting Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001) (per curiam)). "The confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the Court." Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 23 (2d Cir. 1997) (quoting Florasynth, Inc. v. Pickholz, 750 F.2d 171, 176 (2d Cir. 1984)). In short, our job is not to micromanage the Panel, but to confirm that it committed no misconduct that would merit vacating the Award.

Here, the Deutsches seek vacatur under 9 U.S.C. § 10(a)(3) based on four rulings by the Panel that allegedly amount to fundamental unfairness and misconduct: (1) excluding proffered rebuttal expert testimony; (2) admitting the indictment of CMED executives into the arbitral record; (3) refusing to appoint an independent damages expert; and (4) failing to rule on certain motions. The Deutsches also seek vacatur because the Panel allegedly rejected their breach of contract and fiduciary duty claims in manifest disregard of the law and allegedly exceeded their powers under 9 U.S.C. § 10(a)(4) by failing to consider the Deutsches' common law claims and instead resolving an "equitable issue." We address these arguments in turn.

C. Arbitrator Misconduct – 9 U.S.C. § 10(a)(3)

Vacatur of an arbitral award is warranted if "the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy . . . ." 9 U.S.C. § 10(a)(3). "[M]isconduct occurs under this provision only where there is a denial of 'fundamental fairness.'" Kolel, 729 F.3d at 104 (quoting Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997)).

Arbitrators generally have broad discretion to conduct hearings, see Tempo Shain, 120 F.3d at 20, and "have substantial discretion to admit or exclude evidence," LJL 33rd St. Assocs., LLC v. Pitcairn Props. Inc., 725 F.3d 184, 195 (2d Cir. 2013). An

arbitrator "must give each of the parties to the dispute an adequate opportunity to present its evidence and argument." Tempo Shain, 120 F.3d at 20 (quoting Hoteles Condado Beach v. Union De Tronquistas Local 901, 763 F.2d 34, 39 (1st Cir. 1985)). However, "[i]n making evidentiary determinations, an arbitrator 'need not follow all the niceties observed by the federal courts.'" Tempo Shain, 120 F.3d at 20 (quoting Bell Aerospace Co. Div. of Textron v. Local 516, 500 F.2d 921, 923 (2d Cir. 1974)); see LJL, 725 F.3d at 194 ("[I]t is indisputably correct that arbitrators are not bound by the rules of evidence."). Arbitral panels "possess broad latitude to determine the procedures governing their proceedings, to hear or not hear additional evidence, to decide what evidence is relevant, material or cumulative, and otherwise to restrict the scope of evidentiary submissions." Commercial Risk Reinsurance Co. v. Sec. Ins. Co. of Hartford, 526 F. Supp. 2d 424, 428 (S.D.N.Y. 2007). Moreover, courts have held that arbitrators have no inherent obligation to conduct oral hearings at all, ST Shipping & Transp. PTE, Ltd. v. Agathonissos Special Mar. Enter., No. 15 Civ. 4983 (AT), 2016 WL 5475987, at *4 (S.D.N.Y. June 6, 2016), nor must they hear all of the evidence proffered by a party, Oracle Corp. v. Wilson, 276 F. Supp. 3d 22, 29 (S.D.N.Y. 2017). "To demonstrate arbitral misconduct, the challenging party must show that his right to be heard has been grossly and totally blocked,

and that this exclusion of evidence prejudiced him." Id. (internal quotation marks and citations omitted).

1. Rejecting Rebuttal Expert Evidence

The Deustches argue that the Panel's refusal to admit proffered expert testimony during their rebuttal case "amount[s] to fundamental unfairness and misconduct sufficient to vacate the award . . . ." Resp'ts' Mem. of Law in Support of Cross-Pet. to Vacate ("Pet. to Vacate MOL"), Nov. 21, 2017, ECF No. 35 at 27. Fidelity responds that the Panel had no obligation to admit additional expert testimony during claimants' rebuttal case. We agree. The Panel's conduct here falls well within its broad discretion to conduct hearings and exclude evidence. See LGL, 725 F.3d at 195. The Panel permitted the Deutsches to call 16 witnesses during their initial case, which lasted for 26 hearing days. Knoll Decl. ¶ 13. The Deutsches' six expert witnesses testified for nine of those days. Opp'n at 21. After Fidelity's case lasted another 18 hearing days, the Panel allowed the Deutsches to call two more witnesses on rebuttal, but precluded them from calling four additional experts. Knoll Decl. ¶ 21.

Given this record, the Deutsches can hardly argue that they were unduly time-restrained or unable to present their case. Parties must have an adequate opportunity to present evidence and argument, but they do not have unlimited time to present whatever testimony they please. At some point, arbitrators and courts must

draw the line. See PremiereTrade Forex, LLC v. FXDirectDealer, LLC, No. 12 Civ. 7006 (PAC), 2013 WL 2111286, at *7 (S.D.N.Y. May 16, 2013) ("The arbitrators' decision not to re-open testimony to receive potentially cumulative evidence from a new damages expert was within their discretion."); Areca, Inc. v. Oppenheimer & Co., Inc., 960 F. Supp. 52, 55 (S.D.N.Y. 1997) (Chin, J.) (refusing to allow the testimony of a witness was within the arbitrators' discretion where "[t]he scope of inquiry afforded petitioners was certainly sufficient to enable the arbitrators to make an informed decision and to provide petitioners a fundamentally fair hearing").

Tempo Shain, the only case relied on by the Deutsches in support of this argument, is readily distinguishable. There, the Second Circuit held that the exclusion of a key fact witness amounted to fundamental unfairness sufficient to vacate the award under § 10(a)(3). Tempo Shain, 120 F.3d at 20-21. The underlying arbitration in Tempo Shain turned on the content of oral representations made exclusively to the excluded witness during contract negotiations. Id. at 20. This witness became temporarily unavailable during the arbitration when his wife was diagnosed with cancer, and the panel simply concluded the hearing without waiting for his testimony. Id. at 17-18. The opposing party's representations about the contract negotiations therefore went unrebutted. Id. at 20.

The same analysis does not apply here. First, the exclusion of additional expert witnesses from the Deutsches' rebuttal case cannot be analogized to the exclusion of a party's principal fact witness. The former in no way rises to the level of fundamental unfairness required for vacatur. Second, the excluded expert witnesses here were allowed to proffer written submissions of their proposed testimony, which the Deutsches acknowledge were on precisely the topics they had requested to address orally. Pet. to Vacate ¶¶ 6 & n.1, 100, 107-11. By contrast, in Tempo Shain, the documents related to the proffered fact witness that had been admitted to the record were "not at all representative of what [the witness's] testimony would likely have been . . . ." 120 F.3d at 20. Given the record here, the Deutsches cannot demonstrate any prejudice that resulted from the exclusion of these witnesses, even if such a showing would have legal significance. See Oracle, 276 F. Supp. 3d at 29-30, 32.

2. Other Alleged Misconduct

The Deutsches assert that three additional rulings by the Panel amount to fundamental unfairness and misconduct requiring vacatur under FAA § 10(a)(3).

First, they point to the Panel's admission to the record of the indictment of former CMED executives, see United States v. Xiadong Wu, 17 Cr. 144 (E.D.N.Y. March 20, 2017), and the Panel's rejection of their application to submit expert evidence in

response to the indictment, Pet. to Vacate ¶¶ 112-15. These evidentiary rulings do not constitute "misconduct" as contemplated under § 10(a)(3) of the FAA. Arbitrators have substantial discretion to admit or exclude evidence, both under the law of this Circuit, see LJL, 725 F.3d at 194, and under the FINRA Rules, see FINRA Rules § 12604 ("The panel will decide what evidence to admit. The panel is not required to follow state or federal rules of evidence."). We have no trouble finding that the indictment of the former Chairman and CEO and former CFO of CMED was relevant to the arbitration, nor that the Panel was capable of putting the indictment in context without further expert testimony. The Court cannot fathom how these rulings could have "impair[ed] the 'fundamental fairness' of the proceeding," LJL, 725 F.3d at 195 (quoting Tempo Shain, 120 F.3d at 20), and therefore conclude that it was within the Panel's discretion to admit the indictment into evidence and exclude the Deutsches' proffered rebuttal evidence.

Second, the Deutsches assert that the Panel should have appointed an independent expert to provide a calculation of damages. Pet. to Vacate ¶ 116; Pet. to Vacate MOL at 23. Again, the decision to appoint an expert is well within the Panel's discretion to conduct proceedings. See Inficon, Inc. v. Verionix, Inc., 182 F. Supp. 3d 32, 40 (S.D.N.Y. 2016); cf. Azkour v. Little Rest Twelve, Inc., 645 F. App'x 98, 102 (2d Cir. 2016) (appointment of an expert in federal court "is committed to the sound discretion

of the district court"). Given that the Deutsches were permitted to call six expert witnesses during their case-in-chief, they can hardly argue that they were prejudiced by the Panel's refusal to appoint yet another expert on damages. Moreover, given the Panel's holding that <u>any</u> damages would have been "entirely speculative, hypothetical, remote or all of the above," Award at 9, there would have been no role for an independent damages expert to "calculate the Claimants' compensatory damages," as contemplated by the Deutsches, Letter from Howard Graff to the Panel, Apr. 12, 2017, ECF No. 23-47 at 10.

Third, the Deutsches argue that the Panel did not rule on several of their applications, including their motions to conform the pleadings to the proof and for sanctions against Fidelity. Pet. to Vacate ¶ 117(c)-(d); Pet. to Vacate MOL at 24. This argument plainly fails. The Award provides that "[a]ny and all claims for relief not specifically addressed herein, including punitive damages and attorneys' fees, are denied." Award at 4. Thus, the Deutsches are incorrect – the Panel addressed and denied these applications. Moreover, nothing in the record remotely suggests that sanctions against Fidelity, the prevailing party in the arbitration, would have been appropriate.

In sum, the Deutsches have failed to identify any arbitrator misconduct that would merit vacatur under FAA § 10(a)(3).

D. Manifest Disregard

The Deutsches next argue that the Award should be vacated because the Panel manifestly disregarded the law governing their breach of contract and fiduciary duty claims.[4] "A litigant seeking to vacate an arbitration award based on alleged manifest disregard of the law bears a heavy burden, as awards are vacated on grounds of manifest disregard only in those exceedingly rare instances where some egregious impropriety on the part of the arbitrator is apparent." T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 339 (2d Cir. 2010) (internal citations and quotation marks omitted). Vacatur on the basis of manifest disregard requires much "more than error or misunderstanding of the law." Telenor Mobile Commc'ns AS v. Storm LLC, 584 F.3d 396, 407 (2d Cir. 2009). "The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986). "The award should be enforced . . . if there is a barely colorable

[4] While two Supreme Court decisions cast doubt on the ongoing vitality of the manifest disregard doctrine, which has no clear basis in the text of the FAA, see Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 584-91, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008) (holding that sections 10 and 11 of the FAA specify the exclusive grounds for vacating, modifying, or correcting an arbitration award); see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 672 n.3, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010) ("We do not decide whether 'manifest disregard' survives our decision in [Hall Street] as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10."), the Second Circuit has since concluded that the manifest disregard doctrine survived Hall Street, see T.Co Metals, 592 F.3d at 339-40.

justification for the outcome reached." Telenor, 584 F.3d at 407 (quoting Wallace v. Buttar, 378 F.3d 182, 190 (2d Cir. 2004) (emphasis in original)).

Applying these principles, we may only vacate an arbitral award for manifest disregard if we find "both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." Zurich Am. Ins. Co. v. Team Tankers A.S., 811 F.3d 584, 589 (2d Cir. 2016) (quoting Wallace, 378 F.3d at 189). The Second Circuit has identified a three-step inquiry as to whether an arbitration award should be vacated on the grounds of manifest disregard:

> First, we must consider whether the law that was allegedly ignored was clear, and in fact explicitly applicable to the matter before the arbitrators. An arbitrator obviously cannot be said to disregard a law that is unclear or not clearly applicable. Thus, misapplication of an ambiguous law does not constitute manifest disregard.
>
> Second, [] we must find that the law was in fact improperly applied, leading to an erroneous outcome. [] Even where explanation for an award is deficient or non-existent, we will confirm it if a justifiable ground for the decision can be inferred from the facts of the case.
>
> Third, [] we look to a subjective element, that is, the knowledge actually possessed by the arbitrators. In order to intentionally disregard the law, the arbitrator must have known of its existence, and its applicability to the problem before him.

T.Co, 592 F.3d at 339.

1. Breach of Contract and Fiduciary Duty Claims

The Deutsches argue that the Panel manifestly disregarded the law governing their breach of contract and fiduciary duty claims. In analyzing the governing law, we accept the facts as they have been determined by the arbitrators. Westerbeke Corp. v. Daihatsu Motor Co., Ltd., 304 F.3d 200, 213 (2d Cir. 2000); see Garvey, 532 U.S. at 509 ("[T]he arbitrator's improvident, even silly, factfinding does not provide a basis for a reviewing court to refuse to enforce the award."); ConnTech Dev. Co. v. Univ. of Conn. Educ. Props., Inc., 102 F.3d 677, 687 (2d Cir. 1996) (holding that an erroneous factual determination is not a ground for vacating an arbitration award).

The Panel here found that the success of the Deutsches' investment strategy was dependent on the occurrence of five independent events that ranged from unlikely to impossible: (1) acquiring two-thirds of CMED's stock; (2) obtaining an adjournment from the Cayman Islands liquidation; (3) convincing CMED's bondholders to accept a steep discount on the face value of their bonds; (4) prevailing in a Chinese legal proceeding to reverse the purportedly fraudulent transfers of 60% of CMED's operating companies; and (5) finding a strategic buyer who was willing to pay a premium to acquire CMED.[5] Award at 6-8. The Panel therefore

[5] Under the standard for manifest disregard of the law, we will not revisit the Panel's findings of fact that these events were unlikely to occur. See Westerbeke, 304 F.3d at 213 ("Under the manifest disregard

reached the eminently reasonable conclusion that no action or inaction of Fidelity's could have redeemed the Deutsches' failed "China Gold" investment strategy. Id. at 9. Given the Panel's findings of fact, which we do not disturb, it logically follows that any damages would have been "entirely speculative, hypothetical, remote or all of the above." Id.

Of course, the Deutsches cannot and do not contest the basic legal principle that damages are a necessary element to both breach of contract and breach of fiduciary duty claims under New York law. See Orchard Fill Master Fund Ltd. v. SBA Commc'ns Corp., 830 F.3d 152, 156 (2d Cir. 2016) ("Under New York state law, a breach of contract claim must allege: (i) the formation of a contract between the parties; (ii) performance by the plaintiff; (iii) failure of defendant to perform; and (iv) damages."); SCS Commc'ns, Inc. v. Herrick Co., 360 F.3d 329, 342 (2d Cir. 2004) ("The elements of a cause of action for participation in a breach of fiduciary duty are: breach by a fiduciary of a duty owed to plaintiff; defendant's knowing participation in the breach; and damages.").[6]

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standard, however, the governing law must clearly apply to the facts of the case, as those facts have been determined by the arbitrator.") (emphasis in original).

[6] Because the Deutsches relied on a theory of damages under Massachusetts law in the arbitration, we note that damages are also an element of these claims under Massachusetts law. See Young v. Wells Fargo Bank, N.A., 828 F.3d 26, 32 (1st Cir. 2016) ("Under Massachusetts law, . . . [t]o demonstrate a breach of contract, the plaintiff must prove that a valid, binding contract existed, the defendant breached the terms of the contract, and the plaintiff

The Deutsches assert in response that the Panel "was required to . . . award . . . an appropriate remedy for such egregious misconduct." Pet. to Vacate MOL at 24. In essence, they argue that these claims were wrongly decided. But the role of this Court is not to conduct a de novo review of the Panel's analysis. See, e.g., Kolel, 729 F.3d at 103. Rather, under a manifest disregard theory, the Deutsches have the burden to present the Court with law that was (1) clearly applicable to the matter at hand, (2) known to the arbitrators, and (3) improperly applied. T. Co., 592 F. 3d at 339. The Deutsches do not come close to meeting this burden. The "authority" that the Panel supposedly ignored – the testimony of former Chief Judge Wachtler, a letter from Fidelity to the Department of Labor, and the cross-examination of Fidelity's witnesses – plainly does not constitute controlling precedent.

To the extent that the Deutsches rely on the basic legal principle that a contract holds its parties "to an enforceable legal duty," there is no evidence in the record that the Panel came to the opposite conclusion, i.e. that it found that contracts do not create an enforceable legal duty.[7] More fundamentally,

sustained damages as a result of the breach.") (internal citations and quotation marks omitted); Cold Spring Harbor Lab. v. Ropes & Gray LLP, 840 F. Supp. 2d 473, 479 (D. Mass. 2012) ("A claim for breach of fiduciary duty has four elements: 1) existence of a fiduciary duty arising from a relationship between the parties, 2) breach of that duty, 3) damages and 4) a causal relationship between the breach and the damages.").

[7] Nor is our analysis affected by the stray remark during the hearing by one of the arbitrators that "We follow the law, but we don't follow precedent." ECF No. 23 ¶ 28. The Deutsches have focused on this remark as

courts in this Circuit have "generally refused to second guess an arbitrator's resolution of a contract dispute." Yusuf Ahmed Alghanim & Sons v. Toys 'R' Us, Inc., 126 F.3d 15, 25 (2d Cir. 1997) (quoting John T. Brady & Co. v. Form-Eze Sys., Inc., 623 F.2d 261, 264 (2d Cir. 1980)); see Westerbeke, 304 F.3d at 213 ("The arbitrator's . . . contractual interpretation [is] not subject to judicial challenge, particularly on our limited review of whether the arbitrator manifestly disregarded the law.").

As to the breach of fiduciary duty claim, the Panel similarly did not disregard the legal principles that "a relationship of trust and confidence does exist between a broker and a customer with respect to those matters that have been entrusted to the broker," and "that particular factual circumstances may serve to create a fiduciary duty between a broker and his customer even in the absence of a discretionary account." Pet. to Vacate ¶ 42 (citing United States v. Wolfson, 642 F.3d 293, 295 (2d Cir. 2011)). Rather, these principles relate to the existence of a fiduciary duty, whereas the Panel's decision rested on a different element of a breach of fiduciary duty claim: the absence of cognizable damages. See Award at 9.

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one of the centerpieces of their case, but failed to demonstrate that it had any relevance to the outcome of the arbitration. They did not identify any specific precedent that the Panel failed to follow, nor did they establish that the Panel had knowledge of precedent that it refused to follow. See T.Co, 592 F.3d at 339 (internal quotations omitted).

The Deutsches also repeatedly quote an arbitrator's comment from the 49th day of the hearing – "fiduciary duty, blah, blah, blah," Arbitration Tr., Feb. 28, 2017, ECF No. 23-5 at 226:20 – to suggest that the Panel ignored the law on their breach of fiduciary duty claim, see Pet. to Vacate ¶¶ 11, 12, 28, 101, 102 ("Of course, the Deutsches did not view their legal rights – based on established precedent – as 'blah, blah, blah.'"), 104, 109 ("[T]he well settled legal principles governing fiduciary and contractual relationships have more import than 'blah, blah, blah'"); Pet. to Vacate MOL at i, 4 ("Obviously, 'blah, blah, blah' is not the serious consideration required of any arbitrator appointed under a provision mandating that contracting parties arbitrate a dispute."), 18; ECF No. 33 at 1 ("The Award . . . overlooks Fidelity's fiduciary obligations (characterized by the Panel as 'blah, blah, blah.')"), 4.

In context, it is clear that the Deutsches misrepresented the arbitrator's statement. The complete quote from the hearing transcript is:

> In your post hearing brief, preclosing brief, whatever you want to call it, I expect you to argue every single legal theory from fiduciary duty to the margin rules, to whether this is a contract, to calculation of damages, everything. I want to hear everything, every single legal argument you have. Whether it is [Sol] Wachtler wrote an article about fiduciary duty, cite it, according to Judge Wachtler, who is an expert on fiduciary duty, blah, blah, blah. That applies here, blah, blah, blah. You have absolutely 110 percent of

> our attention when it comes to any legal argument you want to advance. Anything. On both sides.

Arbitration Tr., Feb. 28, 2017, ECF No. 23-5 at 5 (emphasis added). That is, in excluding the Deutsches' proffered legal experts from their rebuttal case after nearly 50 days of hearings, the Panel clarified that the Deutsches could include any legal argument in their pre-closing brief that Judge Wachtler would have presented in his testimony. There is no reading of the above passage that suggests that the Panel did not take the Deutsches' legal arguments seriously. Given that arbitrators may establish reasonable limits on witness testimony, PremiereTrade, 2013 WL 2111286, at *7; Areca, 960 F. Supp. at 55, and have no inherent obligation to conduct oral hearings at all, ST Shipping & Transport, 2016 WL 5475987, at *4, the Deutsches have no basis to argue that we should vacate the Award because they could only include Judge Wachtler's legal arguments in their papers.

2. Failure to Adjudicate Common Law Claims

The Deutsches next argue that the Panel failed to adjudicate the common law claims presented and litigated in the arbitration. Pet. to Vacate MOL at 18-21. This argument borders on the frivolous. The Award listed each of claimants' causes of action, Award at 2, and concluded:

> After considering the pleadings, the testimony and evidence presented at the hearing, and the post-haring submissions, the Panel has decided in full and final resolution of the issues submitted for determination as

> follows: 1. Claimants' claims are denied in their entirety . . . 4. Any and all claims for relief not specifically addressed herein, including punitive damages and attorneys' fees, are denied.

Id. at 3-4 (emphasis added).

The language of the Award is crystal clear: each of the Deutsches' claims was denied in full. See Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 481 F.3d 813, 820 (D.C. Cir. 2007) ("[Petitioner's] other contention – that vacation is required because the panel failed to adjudicate [certain claims] . . . is frivolous: the [award] stated that '[a]ny relief not specifically addressed herein, including punitive damages, is denied in its entirety.'").

It follows that the Panel did not "limit[] the issues it was adjudicating" by "shut[ting] out the Deutsches' common law claims based upon Fidelity's conflicted and concealed manipulation of the market from March through June of 2012." Pet. to Vacate MOL at 19. The Panel specifically made reference to "Fidelity's allegedly unlawful lending out of CMED," Award at 4, and denied all of the Deutsches' claims, including those related to this alleged manipulation. It was unavoidable that the written Award would not address every single issue that came up over the course of this lengthy arbitration, and the Deutsches' discontent with the level of detail devoted to certain claims simply does not merit vacatur of the Award.

E. Exceeding the Scope of Authority – 9 U.S.C. § 10(a)(4)

Finally, the Deutsches argue that the Panel exceeded its powers under § 10(a)(4) of the FAA because it resolved an "equitable issue" rather than the claims that the parties consented to arbitrate. Pet. to Vacate MOL at 18-21. The Second Circuit has "consistently accorded the narrowest of readings to the Arbitration Act's authorization to vacate awards where the arbitrators exceeded their powers." John T. Brady, 623 F.2d at 264 (internal quotation marks omitted).

The Panel described its criticism of Fidelity's decision to terminate the Deutsches' trading in CMED as an "equitable issue," but rejected the Deutsches' claims in their entirety because Fidelity's conduct did not result in any damages. Award at 9. The Deutsches mischaracterize this portion of the Award, which explains the Panel's misgivings about aspects of Fidelity's conduct, as the adjudication of a claim that was never asserted. Rather, the Panel found that its resolution of this "equitable issue" had no effect on the Deutsches' claims. Id. Such a ruling is completely consistent with the Panel's limiting its powers to the claims that the parties consented to arbitrate.

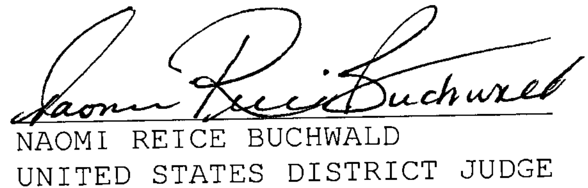
IV. CONFIRMATION OF THE AWARD

Because the Deutsches have failed to establish grounds for vacating or modifying the Award, we "must" grant the petition to confirm the arbitration Award. 9 U.S.C. § 9.

V. CONCLUSION

For the foregoing reasons, the petition to confirm the Award is granted, and the cross-petition to vacate the Award is denied. The Clerk of the Court is directed to close this case and the related action (No. 17 Civ. 8866), and to terminate the motions pending therein.

Dated: New York, New York
May 31, 2018



NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

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