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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5

Justice

Index Number : 105354/2010

CANTOR FITZGERALD SECURITIES

vs.

REFCO SECURITIES, LLC

SEQUENCE NUMBER : 001

CONFIRM AWARD

CAL #17

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

n this motion to/~~for~~ Confirm Arb. Award

	PAPERS NUMBERED
~~Notice of Motion~~/Order to Show Cause — Affidavits — Exhibits ... Petition + cross-petition	1, 2, 3
Answering Affidavits — Exhibits	4, 5
Replying Affidavits + opp to cross-petition	6, 7, 8

Petition

Cross-~~Motion:~~ ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 7/29/10

JUL 29 2010

BARBARA JAFFE J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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CANTOR FITZGERALD SECURITIES,

Petitioner,

-against-

REFCO SECURITIES, LLC,

Respondent.

----------x

REFCO SECURITIES, LLC,

Petitioner,

-against-

CANTOR FITZGERALD SECURITIES,

Respondent.

----------x

Index Nos. 105354/10

Motion Date: 6/8/10
Motion Seq. Nos.: 001,
Calendar Nos.: 17,

DECISION & JUDGMENT

BARBARA JAFFE, JSC:

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By notice of petition dated April 23, 2010, petitioner Cantor Fitzgerald Securities (Cantor) moves pursuant to CPLR 7510 for a judgment confirming the arbitration award entered in its favor in the *Matter of Cantor Fitzgerald Securities vs. Refco Securities, LLC*, FINRA Dispute Resolution Arbitration No. 06-02954, and against respondent Refco Securities, LLC (Refco) for $11,193,466. Refco opposes the petition and, by notice of cross-petition dated April

26, 2010, moves pursuant to CPLR Article 75 for an order and judgment vacating the award. On May 13, 2010, Refco answered Cantor's petition and cross-petitioned to vacate the award. The petitions are hereby consolidated for decision; as Refco's cross-petition is redundant of its petition, it need not be addressed. For the reasons that follow, Cantor's petition is granted; Refco's petition is denied.

I. UNDISPUTED FACTUAL BACKGROUND

In April 2004, the parties entered into a written contract (Refco Securities LLC U.S. Dollar Fixed Income Transaction Fee Agreement) (Fee Agreement) whereby Refco, a broker-dealer regulated by the SEC and the Financial Industry Regulatory Authority (FINRA), and its affiliates were given access to Cantor's electronic platform for trading United States treasury instruments and related products. (Refco Verified Petition, dated Apr. 23, 2010 [Refco Pet.], Exh. A). In paragraph 2(a) of the Fee Agreement, Cantor agreed to provide access to the platform; Cantor's affiliate, eSpeed, Inc., provided the technological expertise. (*Id.*).

In exchange for Cantor's services, Refco agreed, in paragraphs 2(b) and 14, to pay a fixed quarterly fee, per-trade transaction fees, and volume-based, per-trade, and price-based adjustments until Cantor's termination of the agreement or the termination date of December 31, 2007 ("In the event of any termination of this Agreement by Cantor, [Refco] shall not be liable for any Quarterly Payments, Net Adjustments, Other Adjustments or Proprietary, MAC and High Volume Adjustments from and after the effective date of termination.") (*Id.*). In paragraph 10, the parties agreed that the Fee Agreement is governed by the laws of the State of New York. (*Id.*).

As of July 2005, Refco stopped making payments under the Fee Agreement. (Reply

Memorandum of Law in Response to Respondent's Opposition to Verified Petition to Confirm and in Opposition to Respondent's Verified Cross-Petition to Vacate the Arbitration Award, [Cantor Reply Memo.] at 4). On October 13, 2005, Refco went out of business. (Refco Pet.; Petitioner's Memorandum of Law In Support of Petition to Vacate Arbitration Award [Refco Memo.], at 2, 4]). Refco's assets, including customer accounts, were sold to a third party. (Supplemental Affirmation of Ruth A. Rauls, Esq. in Response to Respondent Refco Securities, LLC's Cross-Petition to Vacate the Arbitration Award, dated May 17, 2010 [Rauls Supp. Aff.], Exh. E at 44). Cantor continued to pursue and execute fixed fee agreements with other customers including Refco's former customers. (Cantor Reply Memo. at 4; Refco Pet).

On or about June 19, 2006, Cantor filed a statement of claim with the National Association of Securities Dealers (NASD), now FINRA, alleging Refco's breach of the Fee Agreement. (Notice and Verified Petition to Confirm Arbitration Award, dated Apr. 23, 2010 [Cantor Pet.], ¶¶ 6, 11). The parties submitted to arbitration, and, on February 11, 2010, participated in a hearing before a panel of three arbitrators. (*Id.* ¶ 12). Both parties were represented by counsel and given an opportunity to present evidence. (*Id.* ¶ 13). Several Cantor representatives testified; Refco presented no evidence. (Refco Pet., Exh. B).

On March 3, 2010, both parties submitted post-hearing briefs to the panel, addressing, among other issues, whether Cantor's award should be reduced by virtue of its having mitigated its damages by contracting with other parties to provide services or whether Cantor was a lost-volume seller which could not mitigate its damages. (*Id.* ¶ 14; Refco's Verified Answer and Cross-Petition to Vacate Arbitration Award, dated May 12, 2010 [Refco Ans.], Exhs. H, J). Cantor sought an award of $11,520,246, representing $12,000,000 in fixed fees from July 2005

to the end of the contract period, minus $277,553, a net adjustment for April 2005 through the end of 2005, $326,780 for the estimated net adjustment for May 2005 through September 2005, with set-offs for released monies for $944,632, and $139,455 in other rebates. (*Id.*, Exh. J).

Refco opposed, and asked that the maximum award be capped at $333,466, a total which it alleges reflects the $193,466 owed at the time of Refco's sale, and $140,000 in pro-rated fees for October 2005. (Refco Ans., Exh. H).

In a decision dated March 24, 2010, the panel found Refco liable to Cantor for compensatory damages in the amount of $11,193,466 plus nine percent interest calculated from the date of the award. The decision contains no factual or legal findings. (Refco Ans., Exh. G).

II. DISCUSSION

A. Contentions

Refco argues that its petition is governed by the standard of review set forth in the Federal Arbitration Act (FAA), which governs the enforcement of agreements to arbitrate and the review of arbitration decisions, and that the FAA standard requires both a determination of whether the panel "manifestly disregarded the law" and the application of certain factors. It contends that the panel manifestly disregarded the law by treating Cantor as a lost-volume seller, thereby failing to take into account its mitigated damages. It maintains that the panel, despite having been made aware of the governing principles in three legal briefs and on the record, ignored and manifestly disregarded those principles in reaching its decision by not acknowledging Cantor's failure to prove that it would have entered into new agreements with the former Refco customers absent the breach. It relies mainly on *Krafsur v UOP*, 196 BR 58, 66 (Bankr. WD Tex 1996), and asserts that as almost all of Refco's customers remained with Cantor after Refco went out of

business, Cantor sustained no damages. (Refco Memo.; Reply Memorandum of Law in Support of Petition to Vacate Arbitration Award [Refco Reply Memo.]).

Refco also contends that the panel manifestly disregarded the law by ignoring the Fee Agreement and Cantor's evidence and holding that it had a duty to remain in business, arguing that the panel implied a term in the Fee Agreement omitted by the parties, namely, that Refco's obligations would continue notwithstanding the closing of its business. (*Id.*).

In response, and in support of its petition, Cantor argues that the applicable standard of review is set forth in CPLR Article 75, and not the FAA, as the parties agreed that the Fee Agreement is governed by New York law. It also maintains, however, that even if the FAA applies, the "manifest disregard" standard has been disavowed, and that there is no indication that the panel ignored governing, well-defined principles of New York law. (Cantor Reply Memo.).

B. Analysis

1. Interplay of federal and state arbitration standards

The Federal Arbitration Act, 9 USC §§ 1 *et seq.*, was adopted to ensure judicial enforcement of private agreements to arbitrate. (*Dean Witter Reynolds, Inc. v Byrd*, 470 US 213 [1985]). It applies to any "written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction." (9 USC § 2; *Citizens Bank v Alafabco Inc.*, 539 US 52, 56 [2003]). Congress intended that the FAA reach "the broadest permissible exercise of Congress's Commerce Clause power," covering "a wider range of transactions than those actually 'in commerce' - that is, 'within the flow of interstate commerce.'" (*Citizens Bank*, 539 US at 56 [applying FAA to

contract involving intrastate commercial loan transactions]; *see also Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 478 [2006] [per *Citizens Bank*, if subject matter of arbitration merely affects interstate commerce, FAA applies]).

Review under the FAA is extremely limited; an arbitration award may only be vacated in the event of arbitrator fraud, corruption or misconduct. (*Wien & Malkin*, 6 NY3d at 479, 480). Notwithstanding the doubt engendered by the United States Supreme Court as to the continued viability of the manifest disregard standard as an independent ground for review or as a judicial gloss on the federal statutory grounds for vacatur (*Hall Street Assocs., LLC v Mattel, Inc.*, 552 US 576, 585 [2008]; *T.Co Metals, LLC v Dempsey Pipe & Supply, Inc.*, 592 F3d 329, 349 [2d Cir 2010]; *Wien & Malkin*, 6 NY3d at 479, 480; *Chase Bank USA, N.A. v Hale*, 19 Misc 3d 975, 982 [Sup Ct, New York County 2008]), the Court has since indicated that the matter remains open (*Stolt-Nielson S.A. v AnimalFeeds Intl Corp.*, 559 US 1786, n3 [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"]).

In New York, given the "strong public policy" in favor of resolving disputes through arbitration, the state standard, like the federal standard, is limited and deferential, and courts are "reluctant to disturb the decisions of arbitrators lest the value of this method be undermined." (*Matter of Goldfinger v Lisker*, 68 NY2d 225, 230 [1986]; *Frankel v Sardis*, __ NYS2d ___, 2010 NY Slip Op 05280 [1st Dept 2010]); *Kern v Krackow, D.D.S.*, 309 AD2d 650, 651 [1st Dept 2003], *lv denied*, 1 NY3d 505 [2004]). "Even where the arbitrator makes a mistake of fact or law, or disregards the plain words of the parties' agreement, the award is not subject to vacatur unless the court concludes that it is totally irrational or violative of a strong public policy, and

thus in excess of the arbitrator's powers." (*Hackett v Milbank, Tweed, Hadley & McCoy*, 86 NY2d 146, 154-155 [1995]; *Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308 [1984]).

Consistent with New York's policy, Article 75 of the CPLR permits the vacatur of an arbitration award upon a finding of (I) corruption, fraud or misconduct in procuring the award; or (ii) the partiality of the arbitrator, except where the award was by confession; or (iii) that the arbitrator exceeded his or her power or so imperfectly executed it that a final and definite award was not made; or (iv) a failure to follow the pertinent procedures, unless the party seeking vacatur continued with the arbitration with notice of the defect and without objection. (CPLR 7511[b][1]).

Although the parties here agreed that New York law governs the Fee Agreement, they did not agree that New York law governs the enforcement of the agreement, thereby indicating that the choice of law provision is not intended to limit review to state standards. (*See Smith Barney, Harris Upham & Co., Inc. v Luckie [Luckie]*, 85 NY2d 193, 202 [1995] [contract contained additional qualification that state law governs not only agreement but "more critically, its enforcement"]; *GFI Securities, LLC v Levin*, 21 Misc 3d 1135[A], 2009 NY Slip Op 51104[U] [Sup Ct, New York County 2009] [same]). Moreover, as the federal and state standards are equally deferential to the arbitrator's findings (Siegel, NY Prac § 607 [3d ed] [grounds for vacatur are similar]; *Hall*, 552 US 576, 588, n7 [FAA modeled after New York's arbitration statute]; *Luckie*, 85 NY2d at 205-06 [same]; *In re Johnson*, 22 Misc 3d 631, 646-647 [Sup Ct, New York County 2008] [both are similar, and therefore both "afford guidance" to court]), consideration of Refco's claims under the federal standard is not only appropriate, but results in no prejudice to Cantor.

2. Manifest disregard

An award reflects a "manifest disregard of the law," where an arbitrator has demonstrated "egregious impropriety" even if none of the FAA grounds requires vacatur. (*Wien & Malkin*, 6 NY3d at 480). The burden of proving a manifest disregard of the law is "heavy." (*T.Co Metals*, 592 F3d at 339). To satisfy it, the party seeking to vacate an award must show that: 1) the law allegedly ignored was clear and explicitly applicable; 2) the law was erroneously applied, without any conceivably justifiable ground, leading to an erroneous outcome; and 3) the arbitrator knew of the law. (*Id.*). A finding that a panel manifestly disregarded the law is unwarranted where the reviewing court merely disagrees with the panel's application of the law. Rather, the panel's determination must be upheld so long as there exists a "barely colorable justification" for it. (*Telenor Mobile Communications AS v Storm LLC*, 584 F3d 396, 507 [2d Cir 2009]). The reviewing court thus looks only to whether the arbitrator has disregarded the law, not to whether there was a manifest disregard of evidence or facts. (*Id.*, at 410).

Here, Refco alleges only that the panel manifestly disregarded the law by ignoring clear and explicitly applicable law.

3. Did the panel manifestly disregard the law by treating Cantor as a lost volume seller?

A lost volume seller is one with the capacity to perform a contract that was breached "in addition to other potential contracts due to unlimited resources or production capacity." (*In re Worldcom, Inc.*, 361 BR 675, 685 [SD NY 2007]). Damages are thus not mitigated where a lost volume seller contracts with another willing buyer following a breach "because it would have had the benefit of both contracts even if the first were not breached." (*Id.*).

Notwithstanding Refco's denial that the panel erred in deeming Cantor a lost volume

seller and awarding it the full amount of the contract, there has been no demonstration of a commonly applied law governing the determination of whether a party is a lost volume seller, let alone clear and explicitly applicable. The 1996 decision of the Texas Bankruptcy Court relied on by Refco is not binding on this court and reasonable minds may differ as to whether it constitutes well-defined precedent. In any event, Refco's former customers were not Cantor's only post-breach customers.

That the panel did not set forth its reasoning does not demonstrate a failure to consider the evidence. (*Smith v Positive Prod.*, 419 F Supp 2d 437, 447 [SD NY 2005] [where arbitrator does not provide reasoning, "award must be confirmed if a ground for the arbitrator's decision can be inferred from the facts"]). The panel interpreted the law argued to it and applied it to the supporting facts in a manner that does not rise to the level of manifest disregard of the law. (*Green Tree Fin. Corp. v Alltel Info. Svcs.*, 2002 WL 31163072 [D Minn 2002] [arbitrator's decision regarding lost volume seller status does not rise to level of manifest disregard of law, where arbitrator spent considerable attention to case]). The panel did not ignore or refuse to apply a law, but merely interpreted the available law differently than Refco. (*See Smith*, 419 F Supp 2d at 447; *Green Tree Fin. Corp.*, 2002 WL 31163072, at *6). Additionally, there is no manifest disregard of the law where an arbitrator's assessment of damages is supported by the facts. (*T.Co Metals*, 592 F3d 329, [denying vacatur based on petitioner's objection to arbitrator's calculation of damages, where arbitrator reviewed evidence and applied contractual provisions]).

Accordingly, having failed to demonstrate that the panel knowing ignored a clear, applicable law pertaining to lost volume sellers, Refco has not sustained its heavy burden of demonstrating that the panel manifestly disregarded the law in reaching its decision.

4. Did the panel err by implying from the Fee Agreement that Refco had a duty to remain in business?

Again, as the manifest disregard standard entails a limited inquiry into whether an arbitration panel ignored the law, it does not permit a review of the panel's interpretation of the evidence or facts. (*Telenor Mobile Communications*, 584 F3d at 410). The panel has the sole authority to interpret a contract, and there is no manifest disregard of the law where the contract's clear language is enforced. (*See Gemstar-TV Guide Intl., Inc v Yuen*, 61 AD3d 478 [1st Dept 2009], *lv denied* 13 NY3d 701).

Here, it is undisputed that the fees requested by Cantor and awarded by the panel were consistent with those set forth in the Fee Agreement, and that Refco concededly failed to make the payments. The panel was entitled to determine that Refco was obligated to make the payments. Even if it implied that Refco had a duty to remain in business, the panel enforced the obligations explicitly agreed upon by the parties and thus disregarded nothing. (*See Gemstar-TV Guide Intern.*, 61 AD3d at 479 [panel's decision to award termination payments supported by agreement's plain language and uncontroverted testimony]). Nor did it disregard any law when it found that Refco's obligation to pay did not cease absent Cantor's termination of the contract. Consequently, there is, at the very least, a "barely colorable justification" for the award.

III. CONCLUSION

Accordingly, it is hereby

ADJUDGED, that Cantor Fitzgerald Securities' petition seeking to confirm the arbitration award is granted and the award rendered in favor of Cantor Fitzgerald Securities and against Refco Securities, LLC is confirmed; it is further

ADJUDGED, that Refco Securities, LLC's petition seeking an order vacating the

arbitration panel's award is denied; it is further

ADJUDGED, that Cantor Fitzgerald Securities, having an address at 499 Park Avenue, New York, New York 10022 recover from Refco Securities, LLC, under the administration of RJM, LLC, with the assistance of Capstone Advisory Group, LLC, with offices at Park 80 West, 250 Pehle Avenue, Suite 105, Saddle Brook, New Jersey 07663 the amount of $11,193,466 plus interest at the rate of 9% per annum from the date of this award until the date of payment of the award; and it is further

ADJUDGED, that petitioner Cantor Fitzgerald Securities, having an address at 499 Park Avenue, New York, New York 10022 recover from Refco Securities, LLC, under the administration of RJM, LLC, with the assistance of Capstone Advisory Group, LLC, with offices at Park 80 West, 250 Pehle Avenue, Suite 105, Saddle Brook, New Jersey 07663, costs and disbursements in the amount of $ _____ as taxed by the Clerk, and that the petitioner have execution therefor.

This constitutes the decision and judgment of the court.

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: July 29, 2010
New York, New York

JUL 29 2010

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).