Credit Suisse Sec., (USA) LLC v Dellarusso
2020 NY Slip Op 33224(U)
September 30, 2020
Supreme Court, New York County
Docket Number: 657268/2019
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD, ***Justice*** — **PART** **IAS MOTION 35EFM**

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CREDIT SUISSE SECURITIES (USA) LLC,

Plaintiff,

- v -

RICHARD DELLARUSSO, MARK SULLIVAN

Defendant.

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INDEX NO. 657268/2019

MOTION DATE 9/24/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 183

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, it is

ADJUDGED and ORDERED that the petition is denied, and the arbitration award in *Richard J. DellaRusso and Mark L. Sullivan v. Credit Suisse Securities (USA) LLC*, FINRA No. 17-01406 is confirmed; and it is further

ADJUDGED and ORDERED that the cross motion to vacate the arbitration award referenced above is denied; and it is further

ORDERED that the Clerk of the Court is to enter judgment accordingly; and it is further

ORDERED that counsel for petitioner shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

MEMORANDUM DECISION

In this Article 75 proceeding, petitioner Credit Suisse Securities (USA) LLC (Credit Suisse) seeks an order, pursuant to CPLR 7511, to vacate an arbitration award dated November 11, 2019 (the Award) rendered in an arbitration before the Financial Industry Regulatory Authority ("FINRA") Dispute Resolution, entitled *Richard J. DellaRusso and Mark L. Sullivan v. Credit Suisse Securities (USA) LLC*, FINRA No. 17-01406 (the Arbitration). Respondents Richard J. DellaRusso (DellaRusso) and Mark L. Sullivan (Sullivan) (together, Respondents) cross-move for an order, pursuant to CPLR 7511, vacating and modifying the Award entered in their favor only to the extent of the interest awarded. For the reasons that follow, the petition and the cross motion are denied, and the Award is confirmed.

BACKGROUND FACTS

Respondents were employed as relationship managers (RMs) in Credit Suisse's private wealth management business in New York since 2008 (NYSCEF Doc. No. 1, petition, paras. 3, 4). Their clients were sophisticated, ultra-high-net worth investors, and they had built a book of business with $450 million under management (NYSCEF Doc. No. 152, FINRA amended statement of claim, para. 22). The terms of their employment and compensation were set forth in offer letters they executed with Credit Suisse (NYSCEF Doc. No. 5, exhibits 7 and 8; *see also* NYSCEF Doc. No. 12, DellaRusso offer letter). As part of their compensation, Respondents were participants in Credit Suisse's master share plan under which they received contingent deferred compensation in the form of award certificates that vested according to a schedule (NYSCEF Doc. No. 5, exhibits 7 and 8). These deferred awards were under several different programs and were based on high performance and loyalty (NYCEF Doc. No. 152, paras. 49-50). The offer letters indicated that if Respondents resigned, other than by retirement, any unvested awards would be cancelled (NYSCEF Doc. No. 5, exhibits 7 and 8; *see also* NYSCEF Doc. No. 5, exhibit 1, award certificate at CS0000170).

On October 20, 2015, Credit Suisse announced that it was closing its private wealth management business (NYSCEF Doc. No. 34). It announced to its RMs that it had entered into an "exclusive recruiting agreement to transition [its] US relationship managers to Wells Fargo," but that it would not be moving its "entire platform" to Wells Fargo (*id.* at 3-4). The agreement between Credit Suisse and Wells Fargo was a broker referral agreement in which Wells Fargo sought to hire some of Credit Suisse's RMs and various other employees of the private wealth management business, and Credit Suisse agreed to facilitate such hiring in exchange for certain referral fees (NYSCEF Doc. No. 125). On October 21, 2015, Credit Suisse and Wells Fargo conducted a town hall meeting to introduce Wells Fargo and its "transition package," which contained a cash offer and a "deferred [compensation] opportunity" for the specified employees (NYSCEF Doc. No. 37, at 51-52, 55). Credit Suisse explained that if the RMs entered into the "exclusive hiring arrangement" with Wells Fargo, they would resign from Credit Suisse and be hired by Wells Fargo, "moving 50 percent of your assets [i.e. clients] to Wells Fargo," and then get an "onboarding award" (*id.* at 56).

Credit Suisse indicated that if the RM "[did] not go to Wells Fargo, [the Credit Suisse deferred compensation awards are] not available to you. It's exclusive in complete alignment with our RMs who stay with the program and go to Wells Fargo. Anything else is a voluntary resignation to a third-party" (*id.* at 57; *see also* NYSCEF Doc. No. 126 ["RMs that accept the recruitment package with Wells Fargo will be deemed to be resigning from Credit Suisse, . . . employees who resign are not eligible for outstanding deferred compensation"]). Credit Suisse contends that the offers made to the RMs were lucrative, allowing them to earn a compensation package of 300% of their previous year's gross client revenue at Credit Suisse, plus compensation via an "onboarding award" to make them whole for the unvested share awards, but that the discretionary onboarding award was not intended to match the RMs' forfeited deferred compensation (NYSCEF Doc. No. 3, Credit Suisse memo of law in support [Credit Suisse memo] at 7; NYSCEF Doc. No. 126). Respondents contend that Credit Suisse entered into this arrangement with Wells Fargo to avoid paying their RMs the deferred compensation awards that were vested when they were terminated without cause by Credit Suisse.

On November 30, 2015, Respondents submitted letters of resignation to Credit Suisse and then joined UBS (NYSCEF Doc. No. 1, petition, para 5). In their resignation letters, Respondents advised Credit Suisse that due to its decision to exit the private banking business in the U.S., they considered this a "constructive termination," and that they were accepting positions with UBS (NYSCEF Doc. Nos. 47, 48). Credit Suisse filed Form U-5s for Respondents representing that their terminations were voluntary (NYSCEF Doc. No. 152, para. 52).

Credit Suisse asserts that Respondents began their job search in August 2015, and were meeting with UBS in September (NYSCEF Doc. No. 3, Credit Suisse memo at 8-9). It maintains that UBS was going to make Respondents whole for any unvested share awards that would be cancelled upon their resignation from Credit Suisse, and that Respondents provided UBS with proof of such unvested share awards (*id.* at 9, and NYSCEF Doc. No. 5, exhibits 17-20).

On December 30, 2015, Credit Suisse informed Respondents that Credit Suisse had cancelled their unvested share awards upon their resignations on November 30, 2015 (NYSCEF Doc. Nos. 51, 52).

On May 30, 2017, Respondents filed a Statement of Claim with FINRA seeking to arbitrate their claim that they did not resign but were constructively terminated by Credit Suisse on or about October 20, 2015, and as a result were entitled to payment of their vested deferred compensation share awards (NYSCEF Doc. No. 1, petition, para. 6). They contended that Credit Suisse exited Respondents' line of business, but was treating all employees as having voluntarily resigned in order to avoid having to pay hundreds of millions of dollars in earned deferred compensation to them (NYSCEF Doc. No. 152, amended claim, paras. 3, 13). They also asserted that Wells Fargo could not service their clients because it had few connections to executives in Silicon Valley, its alternative products platforms were insufficient, it could not support the structured notes and private equity in which their clients were already invested, its primary products and services were mortgages, car loans, and credit cards, and it had no international presence (*id.*, amended claim, paras. 37-39).

Respondents alleged that Credit Suisse breached its contractual obligations to them, submitted false U-5 forms, and refused to pay them their earned compensation in violation of the New York Labor Law (NYLL). They asserted that they were commissioned salespeople under Article 6 of the NYLL, their vested deferred compensation and incentive compensation were wages thereunder, and Credit Suisse violated the NYLL in refusing to pay these wages upon their termination without cause (*id.*, amended claim, paras. 60-64). Respondents also claimed that Credit Suisse's actions were in material breach of the parties' employment agreement (*id.*, amended claim, paras. 65-67). They sought damages in the amount of unpaid earned deferred compensation of $2.5 million, prejudgment interest, and attorneys' fees, costs, and liquidated damages pursuant to NYLL sec. 198(1-a). They further asserted that Credit Suisse constructively terminated them and then filed a false and misleading Form U-5 with FINRA, indicating that

Respondents' "Reason for Termination" was "Voluntary" (*id.*, amended claim, paras. 88-91). Respondents sought amendment of the U-5 forms from "Voluntary" to "Other" with an explanation of "Business Closure" (*id.*, amended claim, para. 91)

In its answer to the claim, Credit Suisse asserted that Respondents chose to turn down employment with Wells Fargo, resigned without notice, and immediately began to work for UBS. It contended that Respondents suffered no economic harm because UBS's offer was financially more beneficial to them, paying them for the unvested deferred compensation awards they left behind at Credit Suisse (*id*., answer at 2). It denied the material allegations, asserted 20 affirmative defenses, and asserted counterclaims for breach of contract, breach of fiduciary duty, unfair competition and misappropriation of trade secrets (*id.*, answer, paras. 20-51). It sought recovery from each respondent for full repayment of the outstanding amount due under the terms of their offer letters that had accompanying promissory notes (*id.*).

The parties submitted to arbitration and participated in 19 hearing days from the end of November 2018 through September 2019 before a panel of three arbitrators (Panel) (NYSCEF Doc. No. 1, petition, para. 11). Both parties were represented by counsel, presented hundreds of exhibits in evidence, numerous witnesses testified along with Respondents, and counsel submitted preclosing briefs and made closing arguments. In addition, at the close of the hearings, Respondents submitted an affirmation of attorneys' fees to the Panel which, although Respondents' counsel apparently agreed to represent them on a contingency fee basis, detailed the hourly rates, experience, hours expended by each attorney and various costs (NYSCEF Doc. No. 9, Respondents' opposition memo at 22)

In the Award, the Panel found Credit Suisse liable to Respondent DellaRusso for compensatory damages in the amount of $818,903.00 plus interest of four percent per annum running from October 21, 2015 through and including the date of the Award, and attorneys' fees pursuant to NYLL sec. 198(1-a) in the amount of $185,929.00 (NYSCEF Doc. No. 160, Award at 3-4). It found Credit Suisse liable to Respondent Sullivan for compensatory damages in the amount of $416,914.00 plus interest of four percent per annum from October 21, 2015 through and including the date of the Award, and attorneys' fees in the amount of $185,929.00 pursuant to NYLL sec. 198(1-a) (*id.* at 4). The Panel denied Credit Suisse's counterclaims in their entirety, and recommended expungement of the Reason for Termination in Section 3 of both Respondents' Form U-5s to change the Reason to "Other," and the Explanation to "Termination without cause" (*id.* at 4-5).

Credit Suisse petitions to vacate this Award on the ground that the Panel manifestly disregarded the law. It urges that the law is clear that an employee is not terminated or constructively discharged simply by being informed his position will be eliminated on a future date (*see Molinar v Western Elec. Co.,* 525 F2d 521, 529-530 & n3 [1st Cir 1975], *cert denied* 424 US 978 [1976]; *see also Morris v Schroder Capital Mgt. Intl.*, 481 F3d 86, 89 [2d Cir 2007]). Credit Suisse also argues that the Panel sustained Respondents' claims for breach of contract without any proof of damages, because Respondents' damages had been mitigated when UBS paid them for their lost deferred compensation.

In opposition, Respondents contend that Credit Suisse's caselaw is factually distinguishable; the cases did not involve the closing of a business or of an employee's division, where all colleagues were laid off and the employee was terminated. They cite a line of cases finding that inevitable termination is either constructive or actual termination (*see Silverman v City of New York,* 216 F Supp 2d 108 [ED NY 2002], *affd* 64 Fed Appx 799 [2d Cir 2003]; *Chertkova v Connecticut Gen. Life Is. Co.*, 92 F3d 81 [2d Cir 1996]; *Lopez v S.B. Thomas, Inc.*, 831 F2d 1184 [2d Cir 1987]; *Bader v Special Metals Corp.*, 985 F Supp 2d 291 [ND NY 2013]). With regard to damages, Respondents urge that there is no legal basis for Credit Suisse's argument that mitigation is a defense to vested compensation or any other vested contractual right. In support of its cross motion to vacate, Respondents argue that the Panel manifestly disregarded NYLL section 198(1-a) when it awarded only four percent prejudgment interest instead of nine percent as provided in the CPLR.

DISCUSSION

Judicial review of arbitration awards is "extremely limited;" awards should be upheld "when the arbitrator offers even a barely colorable justification for the outcome reached," and "should not be vacated for errors of law and fact committed by the arbitrator" (*Wien & Malkin LLP v Helmsley-Spear, Inc*., 6 NY3d 471, 479-480 [2006] [internal quotation marks and citation omitted]). "[A]n arbitrator's rulings, unlike a trial court's, are largely unreviewable" (*Matter of Falzone [New York Cent. Mut. Fire Ins. Co.]*, 15 NY3d 530, 534 [2010]).

Judicial review of a FINRA arbitration is governed by the Federal Arbitration Act (FAA) (9 USC sec. 1 et seq.). It is undisputed that none of the grounds for vacating an arbitration award explicitly set forth in the FAA apply here (see 9 USC section 10[a]). Instead, Credit Suisse argues that the arbitrators manifestly disregarded the law when they determined that Respondents were terminated without cause. Under the FAA, there is a very limited judicially-created ground of "manifest disregard of the law" for vacating an arbitration award (*T.Co Metals, LLC v Dempsey Pipe & Supply, Inc.*, 592 F3d 329, 339 [2d Cir 2010]; *see Cantor Fitzgerald Sec. v Refco Sec., LLC*, 83 AD3d 592,593 [1st Dept 2011]).

To establish manifest disregard, a petitioner "bears a heavy burden," as awards are vacated on this ground only in "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 F3d at 339 [internal quotation marks and citations omitted]; *see Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d at 480-481; *Matter of Daesang Corp. v NutraSweet Co.*, 167 AD3d 1, 15-16 [1st Dept 2018] [a "doctrine of last resort," reserved for "rare occurrences of apparent egregious impropriety"] [internal quotation marks and citations omitted]). It requires much "more than error or misunderstanding with respect to the law" (*Telenor Mobile Communications AS v Storm LLC*, 584 F3d 396, 407 [2d Cir 2009] [internal quotation marks and citation omitted]; *see Matter of Nexia Health Tech., Inc. v Miratech, Inc.*, 176 AD3d 589, 591 [1st Dept 2019] [that arbitrator committed even a serious error is not enough]; *Transparent Value, L.L.C. v Johnson*, 93 AD3d 599, 601 [1st Dept 2012]; *STMicroelectronics, N.V. v Credit Suisse Sec. [USA] LLC*, 648 F3d 68, 78 [2d Cir 2011] [an error in law or a failure to understand or apply it is not enough, must show "that the panel intentionally defied the law"] [internal quotation marks and citation omitted]; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v* Bobker, 808 F2d 930, 933 [2d Cir 1986] [error must be obvious, and readily and instantly perceived by average arbitrator]). A court can vacate on this ground only if it "finds 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 F3d 584, 589 [2d Cir 2016] [internal quotation marks and citation omitted]; *Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d at 481). Where, like in the instant case, the arbitrators do not explain the reasons for their award, the court will uphold it if it can discern any valid ground to support the award (*STMicroelectronics, N.V.,* 648 F3d at 78).

Here, Credit Suisse failed to show that the Panel manifestly disregarded the law. Specifically, there is no basis to conclude that the Panel refused to apply or ignored explicit law of which they knew, and that the law ignored was explicit, well-defined, and clearly applied to this case. The parties do not dispute that if Respondents were involuntarily terminated without cause, the deferred compensation awards would immediately vest, but that if they voluntarily resigned, they would forfeit their rights to this compensation. Contrary to Credit Suisse's arguments, and as the Appellate Division, First Department recently found in *Matter of Credit Suisse Sec. (USA) LLC v Finn* (182 AD3d 493 [1st Dept 2020]), an identical arbitration case involving another former Credit Suisse RM who was terminated upon the same closing of this business division:

> "the law is not clear that its announcement of the closing of the U.S. private banking division, i.e., respondent's inevitable termination, did not constitute a constructive discharge (*see Chertkova v Connecticut Gen. Life Ins. Co.*, 92 F3d 81, 89-90 [2d Cir 1996]; *Lopez v S.B. Thomas, Inc.*, 831 F2d 1184, 1188 [2d Cir 1987]; *Bader v Special Metals Corp.*, 985 F Supp 2d 291, 310 [ND NY 2013]; *see also generally Morris v Schroder Capital Mgt. Intl.*, 7 NY3d 616, 621 [2006]). Unlike the cases relied upon by [Credit Suisse], this case does not involve the employer company's purchase or acquisition by another company (*see Evans v Winston & Strawn*, 303 AD2d 331, 333 [1st Dept 2003]; *Criscuolo v Joseph E. Seagram & Sons, Inc.*, 2003 WL 22415753, * 8, 2003 US Dist LEXIS 18991, * 25-26 [SD NY Oct. 21, 2003, No. 02 Civ 1302 (GEL)]; *Boss v Avanstar Communications, Inc.*, 911 F Supp 109, 110, 112 [SD NY 1995])."
>
> (*Matter of Credit Suisse Sec. (USA) LLC v Finn*, 182 AD3d at 494).

An employee may be constructively discharged when he or she resigns in the face of inevitable termination (*see Silverman v City of New York*, 216 F Supp 2d 108, 115 [ED NY 2002] [Second Circuit courts have held threats of termination may be sufficient to establish constructive discharge], *affd* 64 Fed Appx 799 [2d Cir 2003]; *Leiman v New York*, 2000 WL 1364365, at * 9-10 [SD NY 2000], *affd* 9 Fed Appx 37 [2d Cir 2001]; *Chertkova v Connecticut Gen. Life Ins. Co.*, 92 F3d at 85-89; *Lopez v S.B. Thomas, Inc.*, 831 F2d at 1188). As in *Matter of Credit Suisse Secs. (USA) LLC v Finn*, the cases Credit Suisse relies upon do not involve employees whose businesses were closing (*see Amatuzio v Gandalf Sys. Corp.*, 994 F Supp 253, 263 [DNJ 1998] [ERISA benefits class action for severance and no claim by employees that they were constructively discharged]; *Molinar v Western Elec. Co.*, 525 F2d at 530 [no constructive discharge where duties and rank did not differ materially from those employee bargained for]). Credit Suisse's reliance on *Regis v Metropolitan Jewish Geriatric Ctr.* (2000 WL 264336, at * 12 [ED NY 2000]) is unavailing as that case is distinguishable. In *Regis*, the employee claimed constructive discharge in a Title VII discrimination action based on "intolerable working conditions" created by her supervisor's racial discrimination and harassment. The claims were dismissed because she failed to allege any acts of racial discrimination. Further, even if this court found some error by the Panel in its legal conclusion or that it failed to understand the law in some respect, which it does not, "such error does not equate to a manifest disregard for the law" (*Cantor Fitzgerald Sec. v Refco Sec., LLC*, 83 AD3d 592, 593).

Similarly, the Panel did not ignore or refuse to apply clear law applicable to the calculation of damages. Again, as the Court stated in *Matter of Credit Suisse Sec. (USA) LLC v Finn* (182 AD3d at 494):

> "Although damages for breach of an employment agreement may be offset by replacement compensation paid by a new employer (*see Cornell v T.V. Dev. Corp.*, 17 NY2d 69, 74 [1966]; *Donald Rubin, Inc. v Schwartz*, 191 AD2d 171, 172 [1st Dept 1993]), the arbitration panel could reasonably have concluded that the transition payments respondent received from his new employer did not in fact 'replace' the deferred compensation benefits withheld by petitioner, as they were subject to additional conditions and restrictions (*see In re Lehman Bros. Holdings Inc.*, 703 Fed Appx 18, 22 [2d Cir 2017]). Moreover, unlike the compensation at issue in the cases relied upon by petitioner, respondent's right to the benefits at issue vested upon his termination without cause. Petitioner offers no authority for the proposition that mitigation or offset is a defense to payment of *vested* compensation – at least where, as here, the new company was under no obligation to make a replacement payment (*see id.* at 21-22)"
>
> (182 AD3d at 494 [emphasis in original]).

Credit Suisse's identical mitigation defense, here, fails to provide a basis to vacate the Award. UBS was not under an obligation to make a replacement payment, and the deferred compensation it intended to pay Respondents was subject to additional conditions.

Contrary to Credit Suisse's arguments, the Panel appropriately awarded attorneys' fees to Respondents under NYLL section 198(1-a). Respondents demonstrated that they were commissioned salespersons (NYLL section 190[6]), and the deferred compensation awards were based on productivity and vested upon their termination without cause. As such, they constituted wages under NYLL section 190(1), and Credit Suisse's failure to pay them violated NYLL section 193, entitling Respondents to attorneys' fees under NYLL section 198(1-a) (*Ryan v Kellogg Partners Inst. Servs.*, 19 NY3d 1, 16 [2012]). Respondents submitted proof to the Panel of the amount of attorneys' fees based on their attorney's affirmation, which provided a sufficient basis for the Award.

To the extent that Credit Suisse argues that the Panel improperly refused to consider some text messages by Respondents, this fails to provide a basis to vacate. As Respondents point out, FINRA Rule 13604 provides that the panel "will decide what evidence to admit" and is "not required to follow state or federal rules of evidence" (NYSCEF Doc. No. 153), and the parties agreed to be bound by these rules (NYSCEF Doc. No, 156). Moreover, there was no arbitrator misconduct in excluding this evidence because it did not violate fundamental fairness (*see* 9 USC sec. 10[a][3]; *Matter of Credit Suisse Sec. (USA) LLC v Finn*, 182 AD3d at 493; *Tempo Shain Corp. v Bertek, Inc.*, 120 F3d 16, 20 [2d Cir 1997]). The text messages were reasonably excluded as cumulative evidence concerning Respondents' consideration of other potential employment opportunities.

On the cross motion, Respondents have failed to demonstrate a basis for disturbing the arbitrators' decision to award prejudgment interest at the rate of four percent instead of the statutory rate of nine percent (*see Matter of Kingdon Capital Mgt., LLC v Kaufman*, 110 AD3d 648, 648 [1st Dept 2013]; *Matter of Rothermel [Fidelity & Guar. Ins. Underwriters]*, 280 AD2d 862, 862 [3d Dept 2001]; *Matter of Gruberg [Cortell Group]*, 143 AD2d 39, 39 [1st Dept 1988]). While the arbitrators could have awarded "prejudgment interest as required under the civil practice law and rules" as provided in NYLL section 198(1-a), it was not an egregious error to award an amount that was lower. Respondents failed to show that they provided the Panel with "explicit and clearly applicable" law on that point. While they generally cited the NYLL section 198(1-a) to the Panel prior to the Award, they did not quote the text upon which they rely now and they did not cite any caselaw clearly holding that such rate was required for their damages in this arbitration. Thus, they failed to meet their burden of proof for vacatur (*see Duferco Intl. Steel Trading v T. Klaveness Shipping A/*S, 333 F3d 383, 389 [2d Cir 2003]).

The Panel could have awarded the prejudgment interest on the basis of Respondents' "compensatory damages" for breach of contract (NYSCEF Doc. No. 160, Award at 3-4), calculating the rate lower than the statutory rate (*see* CPLR 5004). After the Award was rendered, Respondents made their current argument in an application under FINRA Rule 13905, but that rule permits modification by the Panel on the very limited grounds "for typographical or computational errors." The Panel considered and denied that relief (NYSCEF Doc. Nos. 164, 165). This does not constitute an apparent and egregious error by the arbitrators. There is a colorable justification for awarding a lower interest rate, and, therefore, the award must be confirmed (*see Matter of Daesang Corp. v NutraSweet Co.*, 167 AD3d at 24 n18 ["internal inconsistencies within an arbitral judgment are not grounds for vacatur"] [internal quotation marks and citation omitted]; *Benihana Inc. v Benihana of Tokyo, LLC*, 2019 WL 251729, at *6 [SD NY 2019]; *see also Willemijn Houdstermaatschappij, BV v Standard Microsystems Corp.*, 103 F3d 9, 13 [2d Cir 1997]).

CONCLUSION

Accordingly, it is

ADJUDGED and ORDERED that the petition is denied, and the arbitration award in *Richard J. DellaRusso and Mark L. Sullivan v. Credit Suisse Securities (USA) LLC*, FINRA No. 17-01406 is confirmed; and it is further

ADJUDGED and ORDERED that the cross motion to vacate the arbitration award referenced above is denied; and it is further

ORDERED that the Clerk of the Court is to enter judgment accordingly; and it is further

ORDERED that counsel for petitioner shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

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9/30/2020		CAROL R. EDMEAD, J.S.C.
DATE		

CHECK ONE:	[x] CASE DISPOSED		[ ] NON-FINAL DISPOSITION	
	[ ] GRANTED	[x] DENIED	[ ] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE