UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 19-22977-Civ-COOKE/GOODMAN

JOSE A. TORRES, *et al.*,

Petitioners,

vs.

MORGAN STANLEY SMITH BARNEY LLC *d/b/a* MORGAN STANLEY,

Respondent.
_____/

ORDER

THIS MATTER is before the Court on Jose S. Torres and Isabel Litovitch-Quintana's ("Petitioners") Petition to Confirm Arbitration Award (ECF No. 1). In Response, Morgan Stanley Smith Barney LLC ("MSSB") filed a Motion to Vacate Arbitration Award (ECF No. 9). Petitioners filed a response in opposition to that motion and moved for sanctions against MSSB (ECF Nos. 18, 21). The Motions are fully briefed and ripe for adjudication. For the reasons stated below, the Motion to Vacate is DENIED, the arbitration award is CONFIRMED, and the Motion for Sanctions is DENIED.

BACKGROUND

Petitioners filed the underlying arbitration claim with the Financial Industry Regulatory Authority ("FINRA") Dispute Resolution on July 19, 2017, bringing various claims against MSSB relating to Petitioners' investments in Puerto Rico bonds and closed-end bond funds, as well as the use of a securities-backed loan. ECF No. 9-12 at 1-2. MSSB presented defenses based on the Puerto Rico statute of limitations, which allegedly barred all claims as untimely. ECF No. 9 at 6.

The Discovery Dispute

On October 12, 2017, Petitioners requested MSSB produce all email correspondence or agreements relating to the termination of MSSB's former employee, Angel Aquino ("Mr. Aquino"). ECF No. 18 at 3. After MSSB objected to producing these documents,

Petitioners filed a Motion to Compel. *Id.* On November 8, 2018, the arbitration panel ordered MSSB to produce the documents by December 10, 2018. *Id.*

On January 14, 2019, the first day of evidentiary hearings, Petitioners discovered that Mr. Aquino sent a demand letter to MSSB that led to a settlement agreement wherein MSSB paid Mr. Aquino $250,000. ECF No. 18-3 at 1. Petitioners asked MSSB to turn over the demand letter and any related "e-mail and letter traffic outlining the nature of his claim and what led to this newly revealed $250,000 payment." *Id.* Petitioners believed MSSB was required to turn over these documents under the discovery order issued November 8, 2018, and they made an *ore tenus* motion for sanctions based on MSSB's alleged violation. *Id.* at 2 ("I want sanctions, Madam Chair. I should not be walking into a hearing for my clients that lost $3 million and be sandbagged by those lawyers."). After hearing argument, the arbitration panel ("the Panel") ordered MSSB to produce the settlement agreement as well as any "document related to Mr. Aquino that has not been produced." ECF No. 18-3 at 3. Although MSSB believed the documents relating to the settlement were outside the scope of the parties' discovery agreement, MSSB produced the settlement agreement that evening. ECF No. 9 at 11. MSSB did not provide any emails.

The next morning, Petitioners renewed their request for all "e-mail traffic" related to the settlement. ECF No. 9-39 at 3. The Panel ordered MSSB to produce those documents by the end of the day. ECF No. 9 at 13. While MSSB located 37 pages of emails related to the settlement that day, it did not provide them to Petitioners because it believed they were privileged. *Id.* On January 16, 2020, the Panel overruled MSSB's privilege objections and ordered MSSB to produce the documents. *Id.* MSSB produced the email documents that day. *Id.* Petitioners again moved for sanctions. ECF No. 18 at 4. Finally, on January 20, 2019, MSSB produced 240 pages of documents encompassed by the Panel's order. Petitioners moved for sanctions in the amount of $50,000 per day since December 10, 2018, the date it believed the documents should have been produced under the original discovery order. *Id.* The Panel reserved judgment on the motions for sanctions. *Id.*

The Award

At the conclusion of the proceedings, the Panel ordered each party to submit a post-hearing brief, including a separate 10-page brief on the pending motions for sanctions. ECF No. 18 at 5. Petitioners requested $2,739,792 in compensatory damages, $515,624 in

attorneys' fees, $10,959,168 in punitive damages, and $2,050,000 in sanctions. ECF No. 9-12 at 2; ECF No. 9-45 at 3.

On July 16, 2019, the Panel ordered MSSB to pay the Petitioners $261,420.63 in compensatory damages along with .1% interest per annum accruing from March 31, 2013, through and including August 30, 2014, and $3,000,000 in sanctions (the "Award"). ECF No. 9-12 at 7. The Panel found that Petitioners suffered "extreme prejudice" from MSSB's failure to provide documents "which the Panel deemed were highly relevant to the dispute in question." ECF No. 9-12 at 3-4. The Award was unanimous. *Id.* at 7.

The Arbitrators' Disclosures

Three public arbitrators served on the Panel that issued the Award: Barr, Pilgrim, and Ruiz. *Id.* at 7. Each arbitrator signed an Oath of Arbitrator containing a Disclosure Checklist, which states the questions contained within are "intended to help [the arbitrator] comply with the disclosure requirements as stated in FINRA Rule 12405 of the Customer Code and Rule 13408 of the Industry Code." ECF No. 9-19 at 8. The Disclosure Checklist instructs arbitrators to "provide a full explanation" to any question to which they answered, "yes." ECF No. 9-19 at 3.

On Arbitrator Ruiz's Disclosure Checklist, she answered, "Already on Disclosure Report," when asked "Have you ever been a party to a non-investment related lawsuit?" ECF No. 18-10 at 15. In the Disclosure Report, she made the following disclosure:

> A malpractice action against the hospital where my child was born. Because my son was a minor I was the plaintiff in his name K DP 2002-0262 (801) IRLANDA RUIZ AGUIRRE VS. HATO REY COMMUNITY HOSPITAL. We reached a settlement in 2013 that the Court approved. The case is inactive. My lawyer Arturo Luciano is the one who has all the documentation.

ECF No. 18-9 at 6.

After the Award was issued, MSSB discovered a Spanish-language decision on appeal in the case Arbitrator Ruiz disclosed in her Disclosure Report. ECF No. 9 at 11. The Court's review of the decision, which is attached to MSSB's Motion to Vacate (ECF No. 9-31), reveals the following facts. In 1995, Arbitrator Ruiz gave birth to twin males; one of them passed away a few hours after birth and the other survived but suffered injuries. In 2002, Arbitrator Ruiz and her husband brought a medical malpractice suit against the hospital where she delivered her sons in their individual capacities and on behalf of their

minor sons. In 2011, the appellate court dismissed the individual claims and the claims on behalf of Arbitrator Ruiz's deceased son pursuant to the Puerto Rico statute of limitations. The remaining claims on behalf of Arbitrator Ruiz's living minor son proceeded until, according to the Disclosure Report, the court approved a settlement between the parties in 2013. ECF No. 18-9 at 6.

On Arbitrator Pilgrim's Arbitrator Disclosure Checklist, she answered, "Already on Disclosure Report," when asked, "Has any lender ever instituted foreclosure proceedings involving you or a property owned in whole or in part by you directly or indirectly?" ECF No. 18-13 at 5. In the Disclosure Report, she disclosed she had a mortgage from Wells Fargo Bank, with whom had been a defendant in two foreclosure proceedings. ECF No. 18-12 at 6. She also disclosed she had a mortgage with "CitiMortgage (Citigroup)" and a home equity line of credit with "Citibank." ECF No. 18-12 at 4. MSSB contends that CitiMortgage was an affiliate of Citigroup Global Markets, Inc. ("CGMI"), who it argues was a "key entity in the underlying arbitration and a party to the joint venture Morgan Stanley Smith Barney LLC ("MSSB")." ECF No. 9 at 6. CGMI sold its interest in the joint venture in June 2013. ECF No. 18 at 10.

After the Award was issued, MSSB discovered that in October 2013, CitiMortgage filed a foreclosure action against Arbitrator Pilgrim. ECF No. 9 at 9. Upon Arbitrator Pilgrim entering into a loan modification with CitiMortgage on January 16, 2014, CitiMortgage filed an Attorney's Affirmation with the court stipulating to discontinue the foreclosure action. ECF No. 9-23 at 2. The affirmation stated that Arbitrator Pilgrim was never served with the summons and complaint. ECF No. 9-23 at 1.

The Motion to Vacate

Petitioners filed a Petition to Confirm Arbitration Award with this Court. ECF No. 1. MSSB filed a Motion to Vacate Arbitration Award, arguing there was "evident partiality" in Arbitrators Pilgrim and Ruiz based on their failures to make required disclosures. MSSB further argues the Panel exceeded their powers by awarding punitive sanctions in an amount that was arbitrary and excessive. ECF No. 9.

LEGAL STANDARD

This Court must confirm an arbitration award unless it determines the award should be vacated, modified, or corrected. *See* 9 U.S.C. § 9. Review of an arbitration award for

this purpose is "highly deferential and extremely limited." *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union AFL-CIO-CLC v. Wise Alloys, LLC*, 807 F.3d 1258, 1271 (11th Cir. 2015). This Court may only vacate an arbitration award upon motion:

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) **where there was evident partiality** or corruption in the arbitrators, or either of them;
> (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
> (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) (emphasis added). "A party seeking to vacate an arbitrator's award has the burden of establishing the existence of a specific statutory ground for vacatur." *Original Appalachian Artworks, Inc. v. JAKKS Pac., Inc.*, 718 F. App'x 776, 780 (11th Cir. 2017) (citing *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1324 (11th Cir. 2010)).

DISCUSSION

First, MSSB argues that there was evident partiality in Arbitrators Ruiz and Pilgrim because they failed to make disclosures, requiring vacatur under 9 U.S.C. § 10(a)(2). Second, MSSB argues that the Panel exceeded their powers by awarding punitive sanctions in excess of Petitioners' request, requiring vacatur under 9 U.S.C. § 10(a)(4). The Court will address each argument in turn.

I. There Is No Evident Partiality In The Arbitrators

Evident partiality exists where there is 1) an actual conflict or 2) "the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists." *Gianelli Money Purchase Plan & Tr. v. ADM Inv'r Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998). The allegation of partiality "must be 'direct, definite and capable of demonstration rather than remote, uncertain and speculative.'" *Lifecare Int'l, Inc. v. CD Med., Inc.*, 68 F.3d 429, 433 (11th Cir. 1995) (quoting *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1202 (11th Cir. 1982)). This requires the Court to take "a fact intensive inquiry" that is "highly dependent on the unique factual settings of each particular case." *Id.* at 435.

Here, MSSB argues vacatur is warranted because Arbitrators Ruiz and Pilgrim knew of, but failed to disclose, information which would lead a reasonable person to believe that a potential conflict exists. First, MSSB alleges that Arbitrator Ruiz failed to disclose that some of her medical malpractice claims were dismissed based on the Puerto Rico statute of limitations, which was the "key legal defense MSSB asserted in arbitration." Second, MSSB alleges that Arbitrator Pilgrim failed to disclose that CitiMortgage initiated a foreclosure action against her.

MSSB claims that the Court should find evident partiality in both arbitrators because they failed to make disclosures that were required under the FINRA rules. ECF No. 9 at 6. MSSB reasons that the information required by the rules is "'presumptively relevant to, or illustrative of, the issue of actual or perceived bias.'" *Id.* (citing *Citigroup Global Markets, Inc. v. Berghorst*, 2012 WL 5989628, *3 (S.D. Fla. Jan. 20, 2012) (vacating arbitration award under 9 U.S.C. § 10(a) based on a failure to disclose)).

As explained below, the Court finds neither Arbitrator Ruiz nor Pilgrim violated the FINRA rules. Moreover, the information the arbitrators did not disclose would not lead a reasonable person to believe a potential conflict exists. MSSB's reliance on *Berghorst* is misplaced. In that case, the court found there was an appearance of partiality where the arbitrator failed to disclose that he was "currently embroiled" in a legal dispute with a large national bank at the same time he was serving as an arbitrator in a proceeding against another large national bank. *Berghorst*, 2012 WL 5989628, at *4. Here, both the dismissal of Ruiz's malpractice claims and the initiation of the foreclosure action against Pilgrim occurred years before the arbitration proceeding commenced.

A. Arbitrator Ruiz

MSSB argues Arbitrator Ruiz's disclosure that she was a representative plaintiff in a malpractice lawsuit arising from the birth of her son that concluded with a settlement in 2013 was incomplete because she did not disclose several claims that were dismissed based on the statute of limitations. Arbitrator Ruiz was required to provide a "full explanation" regarding the question "Have you ever been a party to a non-investment related lawsuit?" She provided her attorney's name, the case name and case number, the procedural posture of the case, and the nature of the suit, *i.e.* medical malpractice against the hospital where she gave birth.

The Court finds Ruiz's disclosure to this effect was enough. MSSB does not provide the Court with any guidance on what constitutes a "full explanation" and it does not cite to any authority that indicates Ruiz was required to disclose the affirmative defenses raised in the malpractice suit in which she was a plaintiff. Moreover, the information Ruiz failed to disclose would not lead a reasonable person to believe that a potential conflict existed.

MSSB argues it had the "right to know how Arbitrator Ruiz was directly impacted by the central legal defense in the arbitration." ECF No. 9 at 4. But Arbitrator Ruiz was *not* directly impacted by the Statute of Limitations defense in the arbitration. There is no evidence she was directly impacted by any part of the arbitration. Rather, Arbitrator Ruiz was impacted by a statute of limitations defense raised in a totally unrelated lawsuit. MSSB asks this Court to find that a reasonable person would believe that a potential conflict existed because MSSB raised the same defense in a securities-related proceeding as a hospital raised in Ruiz's medical malpractice suit seven years earlier. The Court cannot do so. Accordingly, MSSB has failed to meet its burden to establish there was evident partiality in Arbitrator Ruiz.

B. Arbitrator Pilgrim

MSSB bears the burden to establish the grounds for vacatur. As part of that burden, MSSB must prove that Arbitrator Pilgrim knew that CitiMortgage named Pilgrim as a defendant in a foreclosure action. *See Gianelli*, 146 F.3d at 1309–10 ("We hold that an arbitrator cannot be guilty of "evident partiality" absent actual knowledge of a real or potential conflict."). In its Motion to Vacate, MSSB acknowledges that Pilgrim was not served with the summons and complaint before CitiMortgage modified Pilgrim's loan and voluntarily discontinued the action. ECF No. 9 at 8; ECF No. 9-23. MSSB offered no evidence in support of its motion that would establish Arbitrator Pilgrim knew of the foreclosure action.

Then, in its reply brief, MSSB states that Arbitrator Pilgrim "upon receipt of the summons wrote an angry letter to CitiMortgage's counsel disputing the basis for the foreclosure lawsuit." ECF No. 22 at 4. In a footnote, MSSB states it has attached a "recently produced" document that will "end Petitioners' speculation that Arbitrator Pilgrim might not have known" of the foreclosure action. ECF No. 22 at 4, n. 4. The Court will not rely on new evidence presented in MSSB's reply brief to determine whether Arbitrator Pilgrim

knew of the foreclosure action. *See Atl. Specialty Ins. Co. v. Digit Dirt Worx, Inc.*, 793 F. App'x 896, 901–02 (11th Cir. 2019) (When faced with a reply brief that offers new evidence, […] the district court has two permissible courses of action. It can either (1) permit the nonmoving party to file a sur reply or (2) refrain from relying on any new material contained in the reply brief.").

The Court finds that MSSB failed to meet its burden to establish that Arbitrator Pilgrim knew of the CitiMortgage foreclosure proceeding. However, even if Arbitrator Pilgrim knew of the action, MSSB's argument that there was evident partiality in Arbitrator Pilgrim fails. A reasonable person would not be led to believe a potential conflict exists because CitiMortgage allowed Arbitrator Pilgrim to modify her loan and voluntarily discontinued the action against her before she even appeared.

While MSSB claims that Arbitrator Pilgrim's letter to CitiMortgage's counsel was "angry" there is no evidence in the record that would show Arbitrator Pilgrim harbored any animosity toward CitiMortgage. At most, the letter shows that Arbitrator Pilgrim was concerned with the behavior of Mr. Gallo, outside counsel for CitiMortage, and cautioned him that this issue "implicates [his] professional and ethical conduct." ECF No. 22-2. It is clear from the letter than Arbitrator Pilgrim did not understand why she was being served with foreclosure papers when CitiMortgage granted her a loan modification and her CitiMortgage Homeowner Support Specialist reassured her that there was no pending foreclosure action against her. *See* ECF 22-2. Contrary to MSSB's assertion, it can hardly be said that Pilgrim was "in litigation with CGMI's affiliate" when the foreclosure action was discontinued before service. ECF No. 22 at 4, n. 3.

II. The Arbitrators Did Not Exceed Their Powers

Rule 12212 of the Code of Arbitration Procedure (the "Code") provides that the Panel "may sanction a party for failure to comply with any provision in the Code, or any order of the panel or single arbitrator authorized to act on behalf of the panel." The rule provides the panel with broad discretion to issue sanctions to the extent they are not "prohibited by applicable law." Rule 12511 of the Code provides that "failure to cooperate in the exchange of documents and information as required under the Code may result in sanctions."

MSSB argues the arbitration panel exceeded their powers by awarding $3,000,000 in sanctions. MSSB reasons that the award was excessive and punitive, which they allege is prohibited under applicable law. MSSB argues the sanctions award should be limited (if not vacated entirely based on the failure to disclose issue) to $10,000. ECF NO. 9 at 21.

First, MSSB argues that the Panel exceed its powers by awarding punitive sanctions. Relying on *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178 (2017), MSSB reasons that the Panel did not have the power to award punitive sanctions before providing "the full protection of criminal procedures." ECF No. 9 at 3. In response, Petitioners argue that the award was not punitive, and even if it were, *Goodyear* does not apply to arbitration panels.

In support of its argument that this Court should find the sanctions awarded to be punitive, and therefore prohibited, MSSB cites to *Envtl. Mfg. Sols., LLC v. Peach State Labs, Inc.*, 274 F. Supp. 3d 1298 (M.D. Fla. 2017). In *Peach State*, the court found that Peach State was not seeking to be compensated with its motion for sanctions, as they were already "made whole" from the misconduct by the court's award of attorneys' fees and costs Peach State incurred because of the misconduct. *Envtl. Mfg. Sols., LLC v. Peach State Labs, Inc.*, 274 F. Supp. 3d 1298, 1331 (M.D. Fla. 2017). The holding in *Peach State* is inapplicable to the specific facts presented here. Unlike the injured party in *Peach State*, Petitioners were not "made whole" by a separate award of attorney's fees and costs. The Award consisted only of compensatory damages and sanctions.

The Court agrees with Petitioners that the sanctions award was compensatory rather than punitive. The Panel stated in the Award that they were ordering MSSB to pay Petitioners the monetary sanctions "upon consideration of the negative effect that [MSSB's] noncompliance with the Panel's Orders had on its efforts to achieve a fair arbitration hearing." ECF No. 9-12 at 4. The Panel noted "the extreme prejudice [MSSB's] failure of compliance caused [Petitioners'] counsel in preparing their case and asserting their claims without the documents which the Panel deemed were highly relevant to the dispute in question, the central figure of which was the terminated employee whose related documents were being withheld." ECF No. 9-12 at 3-4. Thus, even if the Court were to determine that *Goodyear* applies to arbitration panels, the Panel here did not exceed its powers because the Award was not punitive in nature.

MSSB attempts to persuade the Court that the Panel erred in finding that Petitioners suffered prejudice, arguing that "Petitioners had every opportunity to examine each and every witness with these documents." ECF No. 9 at 3. However, this Court is not in the position to review the Panel's findings of fact or conclusions of law. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008) (holding that 9 U.S.C. §§ 9-11 contain the exclusive grounds for vacating or modifying an arbitration award).

Next, MSSB argues that the Panel exceeded its powers by awarding sanctions in an amount they claim is arbitrary and excessive because it was more than the amount Petitioners requested. ECF No. 9 at 4. In support, MSSB cites to *Totem Marine Tug & Barge, Inc. v. N. Am. Towing, Inc.*, in which the Fifth Circuit found an arbitration panel exceeded its powers by awarding damages that had not been sought. 607 F.2d 649 (5th Cir. 1979). While *Totem* is not binding on this Court, the Court notes that MSSB's reliance on that case is misplaced. In *Totem*, the Panel awarded damages on an issue that was not raised in the arbitration proceedings. Making matters worse, after the proceedings had concluded, the panel made an *ex parte* communication with the prevailing party to assist them in reaching a figure for damages, which violated the parties' agreement that "(a)ll evidence shall be taken in the presence of all the parties." *Totem*, 607 F.2d at 652 (alteration in original). Here, Petitioners raised the issue of sanctions on the first day of the evidentiary hearings, and both parties briefed the issue. ECF No. 18 at 2, 4.

While MSSB would like this Court to vacate the sanctions award based on a finding that the panel should have calculated the damages to compensate the Petitioners based only on attorney hours expended in light of the discovery non-compliance, it cannot do so. MSSB has failed to establish the existence of any statutory basis for vacatur or modification of the sanctions award.

III. Petitioners' Motion for Sanctions

Petitioners request this Court impose an award of attorney's fees and costs against MSSB as a sanction for filing a "patently baseless and frivolous" motion to vacate. This request is made pursuant to *B.L. Harbert International, LLC. v. Hercules Steel Co.*, 441 F.3d 905 (11th Cir.2006) (abrogated on other grounds by *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313 (11th Cir. 2010)). In that decision, the Eleventh Circuit provided "notice and warning" that "if a party on the short end of an arbitration award attacks that award in court without any

real legal basis for doing so, that party should pay sanctions." *B.L. Harbert Int'l, LLC*, 441 F.3d at 913-14.

While the Court has concluded that MSSB failed to meet its burden to establish the existence of any one of the four statutory grounds for vacatur, it does not conclude that MSSB's challenge was wholly baseless. Accordingly, Petitioners' motion for sanctions is denied.

CONCLUSION

For the foregoing reasons, it is **ORDERED and ADJUDGED:**

- The Petition to Confirm Arbitration Award (ECF No. 1) is **GRANTED**.
- MSSB's Motion to Vacate Arbitration Award (ECF No. 9) is **DENIED**.
- Petitioners' Motion for Sanctions (ECF No. 21) is **DENIED**.
- The Clerk shall **CLOSE** this case. All pending motions, if any, are **DENIED** ***as moot.***

DONE and ORDERED in chambers, at Miami, Florida, this 8th day of April 2020.

Marcia G. Cooke

MARCIA G. COOKE
United States District Judge

Copies furnished to:
Jonathan Goodman, U.S. Magistrate Judge
Counsel of Record