

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

See More Light Investments,
Plaintiff,
vs.
Morgan Stanley DW Inc.,
Defendant.

No. CV 08-0580-PHX-MHM

ORDER

Pursuant to 9 U.S.C. § 10 of the Federal Arbitration Act, Plaintiff See More Light Investments moves to have this Court vacate the arbitration award of February 4, 2008, which denied the claims made by Plaintiff against Defendant Morgan Stanley DW in proceedings before the Financial Industry Regulatory Authority (“FINRA”). (Dkt. #49). Defendant, in response, moves for an order confirming the arbitration award. (Dkt. #48). Plaintiff has also filed a motion to have this Court decide the case. (Dkts. #54, 55).¹

¹The Parties’ motions are out of order, mislabeled, and confusing. Plaintiff’s motion to vacate the arbitration award is entitled “Amended Complaint,” in violation of Federal Rule of Civil Procedure 7(b), which requires a request for a court order to be made by motion. Defendant’s response was, for some reason, submitted to this Court the same day as Plaintiff’s “Amended Complaint.” To make matters more complicated, Plaintiff’s reply is also labeled “Motion to Overturn Arbitration Award,” thereby creating a second motion to vacate the arbitration award. To that second motion Defendant submitted a response and Plaintiff, in turn, submitted a reply. For purposes of this Order, this Court will proceed to

1 **I. BACKGROUND**

2 In April 1995, Plaintiff See More Light Investments, a general partnership, purchased
3 fifty-five Republic of Cuba 4.5% Bearer Bonds from Defendant Morgan Stanley DW Inc.,
4 located in California,² for the price of approximately \$23,250.³ (Dkt. #48, 49). As it turned
5 out, these bonds were distressed—the Republic of Cuba had defaulted on them after the
6 Communist Revolution of 1959—and they were taken off the market following Plaintiff’s
7 purchase.⁴ (Dkt. #48, Ex. 2).

8 In 2006, Plaintiff commenced arbitration before the Financial Industry Regulatory
9 Authority⁵ against Defendant and alleged the following: failure to deliver the bonds; breach
10 of fiduciary duty, violation of Title 31 Part 515 of U.S. Code of Federal Regulation;
11 intentional misrepresentation; and negligence. (Dkt. #48, Ex. 5). Plaintiff requested the
12 following relief: rescission of the sale of the bonds, compensatory damages, punitive
13 damages, and interest at an annual rate of 10%. (Id.). After a two-day evidentiary hearing
14 in February 2008, the arbitration panel denied all of Plaintiff’s claims. (Dkt. #48, Ex. 5).
15 Plaintiff filed a timely appeal to vacate the award; Defendant countered with a motion to
16 confirm the award.

17 _____
18 resolve the issues despite the tangled web of motions and treat them as properly filed.
19 However, the Parties are admonished that similar conduct in the future may result in
20 sanctions.

21 ²The transaction apparently took place at Defendant’s offices in California.

22 ³The exact amount Plaintiff paid is unclear. Defendant has asserted a purchase price
23 of \$22,930, (Dkt. #48, Ex. 2), whereas the arbitration panel’s award document states an
24 amount of \$23,250. (Dkt. #48, Ex. 5). Because this Court is charged with reviewing the
arbitration panel’s decision, which adopted the \$23,250 amount without indicating it was in
dispute, this Court will adopt that figure.

25 ⁴It is not clear why the bonds remained on the market for over thirty years after default
26 or whether Defendant knew about the default, and Parties have not provided an explanation
27 or an answer to these questions. However, as this Order illustrates, it is unnecessary to reach
a conclusion about the matter.

28 ⁵The hearing took place in Phoenix, Arizona. (Dkt. #48, Ex. 5).

1 Plaintiff alleges the following grounds for vacating the award: the chair of the
2 arbitration panel exhibited partiality, misconduct, undue means, and misbehavior because he
3 lacked experience as an arbitrator and because Plaintiff objected to his inexperience; the
4 same arbitrator exhibited partiality and misconduct in refusing to postpone a hearing; the
5 arbitration panel allowed two witnesses to testify telephonically, instead of in person, thereby
6 prejudicing Plaintiff; the chair of the arbitration panel acted with partiality against Plaintiff
7 and “introduced criteria of misconduct, undue means and misbehavior” and “exceeded his
8 powers” by denying Plaintiff’s requests for document production by Defendant; and the
9 arbitration panel exceeded their powers by manifestly disregarding the law by ignoring the
10 fact that Defendant violated the law in purchasing and retaining the Cuban bonds. (Dkt.
11 #49).

12 **II. STANDARD OF REVIEW**

13 The Federal Arbitration Act, 9 U.S.C. §§ 1–16, authorizes a district court to vacate
14 an arbitration award under any of the following circumstances: (1) the award was procured
15 by fraud, corruption, or undue means; (2) there was evidence of partiality or corruption on
16 the part of the arbitrators; (3) the arbitrators were guilty of misconduct in refusing to
17 postpone the hearing or in refusing to hear evidence pertinent and material to the controversy,
18 or of any other misbehavior prejudicing the rights of a party; or (4) the arbitrators exceeded
19 their powers. 9 U.S.C. § 10. Plaintiff urges this Court to vacate the arbitration award on all
20 of the available statutory grounds. (Dkt. #49). This Court will first take up Plaintiff’s claim
21 that the arbitrators exceeded their powers by manifestly disregarding the law.

22 **III. WHETHER ARBITRATORS EXCEEDED THEIR POWERS**

23 Plaintiff alleges that the “arbitrators by their award ratified a transaction that federal
24 law declares is null and void” and that, by doing so, the arbitrators acted in “manifest
25 disregard of that law.” (Dkt. #50). Plaintiff seeks a rescission of the transaction and requests
26 a return of the money it paid for the bonds. (Id.).

27 The Ninth Circuit has held that arbitrators exceed their powers, “not when they
28 merely interpret or apply the governing law incorrectly, but when the award is completely

1 irrational, or exhibits a manifest disregard of law.” Schoenduve Corp. v. Lucent Techs., Inc.
2 442 F.3d 727, 731 (9th Cir. 2006) (quoting Kyocera Corp. v. Prudential-Bache T Servs., 341
3 F.3d 987, 997 (9th Cir. 2003)). A manifest disregard of the law means “more than just an
4 error in the law or a failure on the part of the arbitrators to understand or apply the law. It
5 must be clear from the record that the arbitrators recognized the applicable law and then
6 ignored it.” Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co., 44 F.3d 826, 832 (9th Cir. 1995)
7 (internal citations omitted). Moreover, the law “alleged to have been ignored by the
8 arbitrators must be well defined, explicit, and clearly applicable.” Carter v. Health Net of
9 Cal., Inc., 374 F.3d 830, 838 (9th Cir. 2004) (internal citations and quotations omitted).

10 In sum, the Ninth Circuit spells out two requirements that must be met before a
11 finding is made that the arbitrators exceeded their powers: (1) the law alleged to have been
12 ignored is well defined, explicit, and clearly applicable; and (2) the arbitrators recognized the
13 applicable law and then ignored it.

14 The federal law Plaintiff alleges the arbitrators ignored is the Cuban Assets Control
15 Regulations (“Regulations”), 31 C.F.R. §§ 515.101 et seq. (2009). That law prohibits
16 transactions involving property in which Cuba “has at any time . . . had any interest of any
17 nature whatsoever, direct or indirect.” Id. § 515.201(a), (d). A transaction is defined under
18 the Regulations as “(a) [a]ny payment or transfer to such designated foreign country or
19 national thereof, (b) any export or withdrawal from the United States to such designated
20 foreign country, and (c) any transfer of credit, or payment of an obligation, expressed in
21 terms of the currency of such designated foreign country.” Id. § 515.309. The following
22 transactions are specifically prohibited under the terms of the Regulations: “[a]ll dealings in,
23 including, without limitation, transfers, withdrawals, or exportations of, any property or
24 evidences of indebtedness or evidences of ownership of property by any person⁶ subject to
25 the jurisdiction of the United States.” Id. § 515.201(b)(1). The Regulations further declare

26
27 ⁶“The term person means an individual, partnership, association, corporation, or other
28 organization.” 31 C.F.R. § 515.308 (2009).

1 that “[a]ny transfer . . . which is in violation of any provision of this part or of any regulation,
2 ruling, instruction, license, or other direction or authorization thereunder and involves any
3 property in which a designated national has or has had an interest . . . is null and void and
4 shall not be the basis for the assertion or recognition of any interest in or right, remedy,
5 power or privilege with respect to such property.” Id. § 515.203(a). As the sale of Cuban
6 bonds unquestionably constitutes a transaction as defined by the Regulations, there is no
7 doubt that the transaction between Plaintiff and Defendant is prohibited and null and void.
8 The Regulations are well defined, explicit, and clearly applicable, in accord with the Ninth
9 Circuit’s requirement in Carter, 374 F.3d at 838.

10 The next question is whether the arbitrators recognized this law and then ignored it.
11 This Court has before it an eight-page document entitled “Award: FINRA Dispute
12 Resolution.” (Dkt. #48, Ex. 5). That document includes the names of the Parties, an outline
13 of the procedural history, a case summary, which includes the claims alleged by Plaintiff, the
14 relief requested, other issues considered and decided, the award, and the fees associated with
15 arbitration. (Id.). On page two of the document, the arbitrators note that “Claimant alleged
16 . . . violation of Title 31 Part 515 of U.S. Code of Federal Regulation.” (Id.). That indicates
17 to this Court that the arbitrators recognized the relevant law, namely the Cuban Assets
18 Control Regulations.

19 In this eight-page document, the arbitrators make no other reference to the Cuban
20 Assets Control Regulations, and there is nothing showing what, if any, findings of fact or
21 conclusions of law the arbitrators made. The only indication that the arbitrators engaged in
22 an analysis of the facts and relevant law is one sentence under the section entitled “Award”:
23 “After considering the pleadings, testimony, and evidence presented at the hearing, the Panel
24 decided in full and final resolution of the issues submitted for determination.” (Id.).⁷ In light
25 of the arbitration panel’s summary decision, this Court can reach no other conclusion than

26
27 ⁷The parties do not argue, nor does this Court assume, that the arbitration panel is
28 required to document its factual and legal findings. Instead, this Court takes the arbitration
panel’s award document at face value.

1 that the arbitrators, after recognizing the relevant law, ignored it.⁸ As such, this Court finds
2 the arbitrators exhibited a manifest disregard of the law and exceeded their powers under the
3 Federal Arbitration Act. This finding renders Plaintiff's remaining claims moot.

4 **IV. DAMAGES**

5 As a consequence of the Cuban Assets Control Regulations, the sale of bonds is
6 unenforceable on grounds of public policy. RESTATEMENT (SECOND) OF CONTRACTS § 178
7 (1981) ("A promise or other term of an agreement is unenforceable on grounds of public
8 policy if legislation provides that it is unenforceable."); accord Newton v. Rumery, 480 U.S.
9 386, 392 (1987); see also Evans v. Jeff D., 475 U.S. 717, 759 (1986) (noting that "the
10 principle that an agreement which is contrary to public policy is void and unenforceable" is
11 well-established).

12 As indicated above, Plaintiff requested at the arbitration hearing a rescission of the
13 sale of the Cuban bonds and a return of the money it paid to Defendant in consideration for
14 the bonds plus interest. (Dkt. #48, Ex. 5). "[I]f a person transfers things to another in the
15 belief that he has a valid contract with him, he is entitled to restitution if there is no contract."
16 RESTATEMENT OF RESTITUTION § 47 cmt. b (1937); accord Oubre v. Entergy Operations, 522
17 U.S. 422, 433 (1998). See also RESTATEMENT OF RESTITUTION § 1 ("A person who has been
18 unjustly enriched at the expense of another is required to make restitution to the other.");
19 accord Mont. v. Crow Tribe of Indians, 523 U.S. 696, 721 (1998). Because the sale of the
20 bonds is a voided contract and has no legal effect, and because Plaintiff paid Defendant in
21 consideration for the bonds, Plaintiff is entitled to recover the money it paid Defendant. That
22 amount is \$23,250. (Dkt. #48, Ex.5).

23 Furthermore, because Defendant enjoyed the benefit of those funds since the time of
24 purchase in 1995, fourteen years ago, Plaintiff is also entitled to recover interest on the
25 principal. RESTATEMENT (SECOND) OF CONTRACTS § 354. ("[i]nterest may be allowed as
26

27 ⁸Evidence that the arbitration panel thoroughly analyzed the law would only
28 substantiate the conclusion that the arbitrators ignored the law.

1 justice requires on the amount that would have been just compensation had it been paid when
2 performance was due.”). The legal interest rate is fixed by statute and is payable without
3 compounding. Id. at cmt. a. As the transaction took place in California, the applicable legal
4 interest rate is ten percent per year. CAL. CIV. CODE § 3289(b) (2009).⁹ A simple ten percent
5 annual interest over the course of fourteen years on the principal amount of \$23,250 is
6 \$32,550.¹⁰

7 **Accordingly,**

8 **IT IS HEREBY ORDERED** granting Plaintiff’s motion to vacate arbitration award.
9 (Dkt. # 49, 51).

10 **IT IS FURTHER ORDERED** denying Defendant’s motion to confirm arbitration
11 award. (Dkt. # 48).

12 **IT IS FURTHER ORDERED** directing Defendant to pay Plaintiff restitution in the
13 amount of \$23,250 and interest in the amount of \$32,550.

14 **IT IS FURTHER ORDERED** denying as moot Plaintiff’s motion to decide the case.
15 (Dkt. #55).

16 **IT IS FURTHER ORDERED** denying as moot Defendant’s motion to strike
17 Plaintiff’s motion to decide the case. (Dkt.#56)

18 *///*

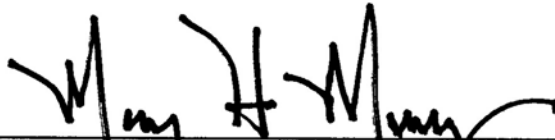
24 ⁹Although this Court finds that California law applies, even if Arizona law were to
25 apply, the same result would obtain, as the legal interest rate in Arizona is also ten percent.
26 A.R.S. § 44-1201 (2008).

27 ¹⁰Plaintiff requests attorney’s fees and costs. This Court will not entertain such
28 requests until properly submitted in accordance with Federal Rule of Civil Procedure
54(d)(2) and Local Rule 54.2.

1 **IT IS FURTHER ORDERED** directing the Clerk of the Court to enter judgment
2 accordingly.

3 DATED this 29th day of July, 2009.

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



Mary H. Murgula
United States District Judge