IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DEBORAH L. MAIOCCO and P. DONALD MAIOCCO	:	CIVIL ACTION
v.	:	
GREENWAY CAPITAL CORP. (d/b/a Cortlandt Capital), et al.	:	NO. 97-MC-0053

Newcomer, J. January , 1998

M E M O R A N D U M

Presently before this Court is respondent Greenway Capital Corporation's ("Greenway") Amended Petition to Vacate Arbitration Award,[1] and petitioner Deborah L. Maiocco's and P. Donald Maiocco's (the "Maioccos") response thereto, and Greenway's reply thereto. For the following reasons, this Court will deny said Motion.

Also before this Court is petitioner's Motion to Confirm Arbitration Award Against Greenway. For the following reasons, the Court will grant said Motion.

I. Introduction

On or about October 21, 1994, Deborah L. Maiocco and P. Donald Maiocco (the "Maioccos") filed a Statement of Claim with the National Association of Securities Dealers ("NASD") against Greenway, Michael George ("George"), and Daniel Martin Michael McKeown ("McKeown"), stating that the Maioccos both held accounts at Valley Forge Investment Co., that such accounts were transferred to Greenway Capital Corp., Atlanta (the "Atlanta

1. The Court treats said Amended Petition to Vacate Arbitration Award as a Motion to Vacate Arbitration Award.

Accounts"), that at the time of the transfer, Ms. Maiocco's accounts totaled $350,000 and Mr. Maiocco's accounts totaled $100,000, and that George, who serviced the Atlanta accounts, had engaged in egregiously excessive and speculative trading in their accounts which allegedly lead to excessive commissions for George. Pursuant to the terms of the "Brokers Agreement" with Greenway, the Maioccos agreed that all disputes relating to securities transactions would be submitted by them to adjudication before the NASD.[2]

A three person NASD Arbitration panel heard testimony on September 16, 1996 (2 sessions), September 17, 1996 (2 sessions), September 18, 1996 (2 sessions) and October 8, 1996 (3 sessions) at a location in Philadelphia, Pennsylvania. During those hearings, Greenway maintained, inter alia, that it had nothing to do with the transactions engaged in by George, that it did not have oversight authority over Greenway Capital Corp., Atlanta or the Atlanta accounts, and that, in any event, it was insulated from suit by reason of a power of attorney executed by both Mr. and Ms. Maiocco in favor of George. Greenway also maintained that the Maioccos never contacted it directly with regard to the transactions on the Atlanta accounts and that the

2. The NASD provides a forum for the resolution of disputes involving public investors and broker-dealers. Arbitration offices of the NASD administer that forum according to procedures set forth in the NASD Code of Arbitration. Greenway is a member of NASD and is thus subject to the rules of the NASD.

Maioccos ratified any wrongful trades by failing to object within a reasonable time.

On January 10, 1997, the NASD issued a decision in favor of the Maioccos and against George, McKeown and Greenway. The arbitrators awarded Ms. Maiocco $162,501.12 in compensatory and consequential damages to be assessed jointly and severally against Greenway, George and McKeown; and $75,000 in punitive damages against Greenway. They awarded Mr. Maiocco $64,486.90 in compensatory and consequential damages to be assessed jointly and severally against Greenway, George and McKeown; and $25,000 in punitive damages against Greenway. In addition, they assessed forum fees to be paid to the NASD by Greenway in the amount of $8,300. This award was served by certified mail on Greenway's counsel pursuant to Section 10330(c) of the NASD Code of Arbitration.

On February 18, 1997, Greenway's counsel wrote to the NASD, claiming that as of the conclusion of the hearing on October 8, 1996 its representation of Greenway ceased. On that same day, the Maiocco's counsel responded, pointing out that Greenway's counsel submitted a post-hearing brief on November 5, 1996, four weeks after the conclusion of the hearing. On February 19, 1997, the NASD indicated by way of letter that service was proper.

On that same day, February 19, 1997, Greenway through its alleged "former" counsel, the law offices of Ruthann Niosi, filed an application for an order to show cause in the Supreme

Court of New York seeking to have the arbitration award vacated. On March 6, 1997, the Maioccos removed Greenway's application to the United States District Court for the Southern District of New York, and thereafter, on March 20, 1997, filed a motion to confirm the arbitration award with this Court because this district is the district in which the award was rendered.

Subsequently, on April 3, 1997, Greenway filed a petition to vacate the arbitration award in the Philadelphia Court of Common Pleas, which was removed to this Court on or about April 7, 1997.[3] This action was docketed as Greenway Capital Corp. v. Deborah L. Maiocco and P. Donald Maiocco, Civil Action No. 97-2397. On April 23, 1997, Greenway filed an amended petition to vacate the arbitration award in Civil Action No. 97-2397.

By Order dated July 30, 1997, this Court consolidated for all purposes Civil Action No. 97-2397 with the instant action, Deborah L. Maiocco and P. Donald Maiocco v. Greenway Capital Corp. (d/b/a Cortlandt Capital), et al., Miscellaneous Action No. 97-0053. Also by Order dated July 30, 1997, this Court granted the Maioccos' motion to confirm the arbitration award as against George and McKeown. Thus, two motions remain pending before this Court - the Maioccos' motion to confirm the

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3. The basis for this Court's jurisdiction is diversity of citizenship. 28 U.S.C. § 1332. Section 1 of the Federal Arbitration Act ("FAA") is not an independent source of federal subject matter jurisdiction. See Huffco Petroleum Corp. v. Transcontinental Gas Pipe Line Corp., 681 F. Supp. 400, 401 (S.D. Tex. 1988).

arbitration award as against Greenway and Greenway's motion to vacate the arbitration award.

In its motion to vacate the arbitration award, Greenway generally argues that the arbitrators engaged in misconduct and misbehavior during the course of the underlying NASD arbitration proceeding which resulted in numerous irregularities in the proceedings, causing the rendition of an unjust, inequitable and/or unconscionable award in violation of 9 U.S.C. § 10 and 42 Pa. Cons. Stat. Ann. § 7314. Greenway thus submits that the arbitration award against it must be vacated.

Specifically, Greenway argues that the arbitrators' conduct violated Section 10(a)(3) of the FAA. 9 U.S.C. § 10(a)(3). Greenway contends that the arbitrators improperly refused to postpone the hearing by failing to schedule another session to call a key rebuttal witness and by failing to stop the hearing when Greenway's arbitration counsel needed a bathroom break on one occasion and when its representative walked out of the hearing on another occasion.

Greenway also argues that the arbitration panel improperly refused to hear certain evidence. Greenway contends that the arbitrators failed to rule on its evidentiary objections in accordance with the NASD Code of Arbitration. Greenway further claims that the arbitration panel also improperly refused to hear evidence when it did not schedule another session so that Greenway could call a key rebuttal witness. Greenway also contends that its right to confront and cross-examine a witness

was violated when the arbitration panel received the testimony of a witness telephonically.

Finally, Greenway asserts that the arbitrators engaged in such "other misbehavior" which warrants vacatur of the arbitration award. Specifically, Greenway argues that the arbitration panel arbitrarily limited its case; that the panel interrupted her closing argument on too many occasions; that one arbitrator told Greenway's counsel that it would not read its brief; and that the panel impermissibly allowed the Maioccos to use demonstrative exhibits and impermissibly accepted into evidence certain expert testimony.

In response, the Maioccos argue that Greenway's motion should be denied for two reasons. First, the Maioccos argue that Greenway's motion was filed without the statute of limitations. Second, the Maioccos argue that Greenway has failed to establish that it is entitled to vacatur of the arbitration award under Section 10(a)(3).

The Court will address these issues seriatim.

II. Discussion

The Court will first address the Maioccos' statute of limitations argument and then will address Greenway's Section 10(a)(3) arguments.

A. Statute of Limitations

Relying on the recent case of Ekstrom v. Value Health, Inc., 68 F.3d 1391 (D.C. Cir. 1995), the Maioccos ask this Court to apply either Pennsylvania's or Massachusetts' statute of

limitations that apply to the filing of motions to vacate or modify arbitration awards and to find that Greenway's instant motion is untimely.

In Ekstrom, forty-eight days after notice of an arbitration award, petitioners filed a motion to vacate in federal district court pursuant to the FAA.[4] The district court dismissed the petition for lack of subject matter jurisdiction on the ground that petitioners had failed to seek review within 30 days of the arbitration award as required by Connecticut law. Petitioners appealed, arguing that although Connecticut law governs the substantive terms of the merger agreement, the three-month limitation period prescribed by the FAA in Section 12 applied because the statute of limitations was procedural.

Writing for a three-judge panel, Chief Judge Harry Edwards first determined that under the District of Columbia's choice of law provisions, the substantive law of Connecticut should apply based on the choice of law provision in the merger agreement. Id. at 1394. Chief Judge Edwards next found that Connecticut's statute of limitations was substantive, and thus included in the merger agreement's choice of law provision. Id. at 1394-95. Applying Connecticut's thirty-day statute of limitations, the Court determined that petitioners failed to timely file its motion to vacate. Finally, Chief Judge Edwards

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4. Section 12 of the FAA states that "[n]otice of a motion to vacate . . . an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered."

noted that the FAA did not preempt the state's statute of limitations because the state's statute of limitations did not conflict with the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Id. at 1396.

Although the reasoning in Ekstrom is extremely persuasive and cogent, the facts of this case simply do not dictate the same result that was reached in Ekstrom. While it is quite true that a state statute of limitations can be applied to determine the timeliness of a motion to vacate an arbitration award, the facts and law implicated in this case simply do not require the application of Massachusetts' or Pennsylvania's statute of limitations. As the analysis below will demonstrate, the statute of limitations that should be applied here is the one provided for in § 12 of the FAA.

A federal district court exercising diversity jurisdiction – as it does here – must apply the choice of law rules of the forum state. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 497, 61 S. Ct. 1020, 1022, 85 L. Ed. 1477 (1941); American Air Filter Co. v. McNichol, 527 F.2d 1297, 1299 n. 4 (3d Cir. 1975). Accordingly, I must apply Pennsylvania choice of law rules in this case.

Pennsylvania courts generally honor the intent of the contracting parties and enforce a choice of law provision in a contract. Smith v. Commonwealth Nat'l Bank, 384 Pa. Super. 65, 557 A.2d 775, 777 (1989). The Pennsylvania courts have adopted

section 187 of the Restatement (Second) Conflict of Laws which provides that:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

See, e.g., Schifano v. Schifano, 324 Pa. Super. 281, 471 A.2d 839, 843 n.5 (1984). The Brokers Agreement contains a choice of law provision which provides that the agreement shall be governed by the laws of the Commonwealth of Massachusetts. Therefore, this Court should apply Massachusetts substantive law to determine the character of the agreement.

As noted by the Ekstrom court, "'[c]hoice of law provisions in contracts are generally understood to incorporate only substantive law, not procedural law such as statutes of limitations. . . . Absent an express statement of intent, a standard choice of law provision such as this one will not be interpreted as covering a statute of limitation." Federal Deposit Ins. Corp. v. Petersen, 770 F.2d 141, 142-43 (10th Cir. 1985). In Ekstrom, the court found that under Connecticut law, the statute of limitations at issue there was "substantive," and as such, was covered by the choice of law provision in the merger agreement. On this point, the circumstances of the Ekstrom case diverge from the circumstances of this case.

As stated above, the choice of law provision in the Brokers Agreement does mandate that the substantive law of Massachusetts be applied to determine the character of and

disputes arising out of the Brokers Agreement. Thus, the next question is whether the statute of limitations concerning motions to vacate arbitration awards under Massachusetts law is substantive or procedural in nature.[5]

Under Massachusetts law, time limitations are now considered to be substantive. See Fedder v. McClennen, 959 F. Supp. 28, 33 (D. Mass. 1996) (citing New England Telephone & Telegraph Co. v. Gourdeau Const. Co., 419 Mass. 658, 647 N.E.2d 42 (1995)). However, before 1995, Massachusetts considered statute of limitations to be procedural in nature, and thus always applied its statute of limitations to actions filed within the state. See id. This temporal distinction is critically important as it relates to this case because the Brokers Agreement here was entered into before 1995. Because the Brokers Agreement was entered into before 1995, the Maioccos cannot now argue that the standard choice of law provision contained within the Brokers Agreement can be understood to incorporate the statute of limitations contained in § 12(b), ch. 251, unless they can produce some evidence that the choice of law provision meant to specifically include § 12(b). Admittedly, the Maioccos cannot produce any evidence, beyond the general language of the choice of law provision, that the parties intended to incorporate §

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5. Under Section 12(b) of the Massachusetts Uniform Arbitration Act, "[a]n application under this section shall be made within thirty days after delivery of a copy of the award to the applicant . . . ." Mass. Gen. L. ch. 251, § 12 (as amended by St. 1972, c. 200).

12(b) of the Massachusetts Uniform Arbitration Act. Therefore, the Court will not apply § 12(b).

Because the choice of law provision in the Brokers Agreement does not incorporate § 12(b) of the Massachusetts Uniform Arbitration Act, this Court must look to the time limits provided for in § 12 of the FAA. Section 12 of the FAA provides that a "[n]otice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C. § 12. In this case, the arbitration award was delivered to Greenway's counsel on January 15, 1997.[6] Greenway thus had until April 15, 1997 to move to vacate or modify the award. Greenway filed its petition to vacate the arbitration award on April 3, 1997. Thus, the petition was timely filed under Section 12 of the FAA. Disposing of this issue, the Court turns to the merits of Greenway's motion to vacate.

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6. Greenway argues that the statute of limitations should run from March 4, 1997, the day the "modified award" was served on Greenway's counsel. The Court disagrees. The modified award merely corrected a mistake in the spelling of the name of one of the defendants listed in the initial award. Thus, the statute of limitations should run from the date of delivery of the initial award. The initial award was served on counsel for Greenway by certified mail on January 15, 1997. Although Greenway's current counsel claims that Greenway was not properly served because the NASD served Greenway's arbitration counsel who was no longer allegedly representing Greenway, the Court finds that service was proper because Greenway never informed the NASD that its arbitration counsel no longer represented it. Thus, service was proper under § 10330(c)(1) of the NASD Code of Arbitration Procedure.

B. Section 10(a)(3) Violations

Section 10 of the FAA sets forth the following grounds, inter alia, under which a district court may vacate an arbitration award upon the application of any party to the arbitration:

> (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 any other misbehavior by which the rights of any party have been prejudiced.

9 U.S.C. § 10(a)(3). Accordingly, subsection 10(a)(3) allows a court to set aside an award in three possible circumstances: (1) where the arbitrators were guilty of misconduct in refusing to postpone the hearing; (2) where the arbitrators were guilty of misconduct by refusing to hear evidence pertinent and material to the controversy; and (3) where the arbitrators were guilty of any other misbehavior by which the rights of any party were prejudiced.[7] Greenway seeks vacatur of the arbitration award issued by the NASD panel based on all three grounds provided in § 10(a)(3). As will be discussed infra, the Court finds that Greenway has failed to establish that it is entitled to relief under § 10(a)(3).

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7. The type of "misconduct" covered by this subsection has been construed to mean "not bad faith, but 'misbehavior though without taint of corruption or fraud, if born of indiscretion.'" Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 599 (3d Cir. 1968) (quoting Stefano Berizzi Co. v. Krausz, 239 N.Y. 315, 317, 146 N.E. 436, 437 (1925) (Cardozo, J.)).

1. Refusal to postpone

Greenway contends that on more than one occasion the arbitrators improperly refused to postpone the hearing. Greenway claims that the arbitrators improperly refused to postpone the hearing so that it could call a key rebuttal witness. In addition, Greenway argues that the arbitrators impermissibly failed to postpone the hearing when Greenway's arbitration counsel needed a bathroom break on one occasion and when its representative walked out of the hearing on another occasion.

As its most "egregious example" of the arbitrators' failure to postpone the hearing, Greenway submits that the arbitrators improperly failed to postpone the hearing on the last day when Greenway requested a postponement so it could call an important rebuttal witness – Fred Luthy, an executive at Greenway. Despite Greenway's protestations to the contrary, this Court cannot find that the arbitrators engaged in misconduct by failing to postpone the hearing to allow Greenway to call Mr. Luthy.

Arbitrators are to be accorded a degree of discretion in exercising their judgment with respect to a requested postponement. Fairchild & Co., Inc. v. Richmond, Fredericksburg & Potomac RR Co., 516 F. Supp. 1305, 1313 (D.C. 1981). Assuming that there exists a reasonable basis for the arbitrators' decision not to grant a postponement, courts should be reluctant to interfere with the award on this ground. Id.

In this case, the arbitrators had a reasonable basis for their decision to deny the requested postponement. Admittedly, Greenway did not inform the arbitration panel or opposing counsel of its desire to call Mr. Luthy as a rebuttal witness until the last day of the hearing. Although the applicable rules of arbitration procedure did not require Greenway to identify Mr. Luthy as a witness because he was being called in rebuttal, Ms. Niosi, Greenway's counsel, should have informed the arbitration panel before the last day of the hearing that she was planning to call Mr. Luthy because she knew that Mr. Luthy would not be available. The arbitrators had set the schedule in this case based on the availability of themselves and the parties. It simply was poor judgment on the part of Greenway's counsel to wait until the last day of the hearing to inform the arbitrators that it planned to call a witness who simply was not available that day. Knowing that it needed the testimony of Mr. Luthy, Greenway had the responsibility to ensure that its employee would be there or to inform the arbitrators in advance that it was going to call a witness who may not be available. Greenway simply failed to take either course of action. The Court cannot now vacate the arbitration award based on Greenway's own poor judgment. Such a ruling would allow a party to unilaterally dictate the schedule of an arbitration hearing by failing in advance to notify the arbitrators that it may have difficulty obtaining the availability of a witness.

The Court also finds that the arbitrators did not engage in misconduct by refusing to grant Ms. Niosi a bathroom break and by refusing to stop the hearing when Greenway's representative left the room. First, arbitrators are not required to stop a hearing when a party to the hearing decides to leave the room when the arbitration is being conducted. This point needs no further elaboration. Second, although the arbitrators could have stopped the hearing to allow Ms. Niosi a bathroom break, the arbitrators were also justified in refusing to break it is within their discretion to request the attorneys and parties to wait until the next scheduled break. Moreover, no questions were asked of the witnesses when Ms. Niosi took her bathroom break; thus, Greenway cannot demonstrate any prejudice. Consequently, the Court concludes that Greenway is not entitled to have the arbitration award vacated based on the arbitrators' failure to postpone the hearing.

2. Refusal to hear evidence

Greenway also challenges the validity of the award by alleging that the arbitrators were guilty of misconduct in several respects for refusing to hear evidence pertinent and material to the controversy. In analyzing these allegations it should be noted that the arbitrators are charged with the duty of determining what evidence is relevant and what is irrelevant. Petroleum Transport, Ltd. v. Yacimientos Petroliferos Fiscales, 419 F. Supp. 1233, 1235 (S.D.N.Y. 1976). While the arbitrators may err in their determination, every failure to receive relevant

evidence does not constitute misconduct under the FAA so as to require the vacation of the award. The error which would constitute misconduct so as to justify vacating an award must not simply be an error of law, but one which so affects the rights of a party that it may be said to deprive him of a fair hearing. See Newark Stereotypers Union No. 18, 397 F.2d at 599.

Greenway's first allegation of misconduct in this regard rests on its contention that the arbitrators violated the NASD Code of Arbitration by failing to rule by majority as to whether evidentiary objections should be sustained or overruled. Greenway claims that "the lead arbitrator made up his mind and, without seeking the advice of his colleagues as required by the rules under which he operated, announced his decision." Greenway bases its entire argument in this regard on a reading of Sections 10323 and 10325 of the NASD Code of Arbitration. Section 10323 states that "[t]he arbitrators shall determine the materiality and relevance of any evidence proffered and shall not be bound by rules governing the admissibility of evidence." Section 10325 states that "[a]ll rulings and determinations of the panel shall be by a majority of the arbitrators." Reading these sections together, Greenway argues that all rulings as to the admissibility and relevance of evidence should be made by a majority of the arbitrators.

While this Court doubts whether Sections 10323 and 10325 should be read together, the Court will assume for the purposes of this motion that the arbitrators must make

admissibility and relevance determinations by majority vote. Although the arbitration record does not indicate actual votes by the arbitrators with respect to admissibility and relevance, the record does establish that the two non-lead arbitrators did not object to the rulings made by the lead arbitrator. Thus, a reasonable interpretation of the record would support the finding that the arbitrators agreed on all evidentiary rulings based on their silent assent. In addition, even if the Court were to find that the arbitrators improperly failed to rule on evidentiary issues by majority vote, Greenway has failed to demonstrate how its rights were adversely effected by this practice, and more importantly, how it did not receive a fair hearing. Thus, the Court will not grant Greenway's motion based on this ground.

Greenway's second allegation of misconduct with respect to the refusal to hear material evidence is based on the claim that its right to confront and cross-examine was taken from it when the panel took the testimony of Patricia Brooks, an employee of Greenway, Atlanta, telephonically. Greenway objected on the grounds that proper identification of the witness was impossible without confronting the witness in person, that the arbitrators would be unable to assess Ms. Brooks' credibility without witnessing her in person, and that Greenway's counsel was unable to effectively cross examine the witness by telephone particularly given that the witness had no documents pertaining to the case on hand.

The Court finds all of these objections to be without merit. First, Ms. Brooks' identity was confirmed by a facsimile transmission of her driver's license to the arbitration panel. Second, Greenway was not prevented from faxing documents to Ms. Brooks for use on cross-examination. Although the arbitrators properly refused to fax a document which was over one-hundred pages in length, the arbitrators did permit Greenway to fax any portion of the document that would be used by Greenway on cross-examination. Greenway refused, thus the arbitrators cannot be now blamed for Greenway's poor judgment. Finally, the Court finds that the arbitrators could properly assess the credibility of Ms. Brooks even though her testimony was taken telephonically. Although it is always more desirable to have a witness testify in person for the purpose of assessing credibility, the Court finds that the arbitrators could also adequately assess the credibility of Ms. Brooks during her telephone testimony. Indeed, Greenway does not offer any actual evidence that the arbitrators were prevented from properly assessing the credibility of Ms. Brooks. In light of the fact that there is no evidence that the arbitrators could not assess the credibility of Ms. Brooks, and in light of the fact that many arbitration hearings take telephonic testimony, the Court concludes that Greenway is not entitled to relief based on its purported inability to confront and cross-examine Ms. Brooks.

Finally, the Court finds that Greenway was not deprived of the opportunity to present evidence through Mr. Luthy. As

stated above, the arbitrators were not at fault for failing to postpone the hearing to take the testimony of Mr. Luthy. Instead, the Court found that Greenway was to blame for the scheduling problems surrounding Mr. Luthy. Thus, Greenway cannot base its refusal to hear evidence claim on Mr. Luthy's unavailability.

3. Any other misbehavior

Greenway further challenges the validity of the award pursuant to § 10(a)(3) by alleging that the arbitrators were guilty of other misconduct in several respects by engaging in certain "other misbehavior." In support of this allegation, Greenway argues that the arbitration panel arbitrarily limited its case; that the panel interrupted her closing argument on too many occasions; that one arbitrator told Greenway's counsel that it would not read its brief; and that the panel impermissibly allowed the Maioccos to use demonstrative exhibits and impermissibly accepted into evidence certain expert testimony. The Court finds that these grounds do not warrant the vacatur of the arbitration award under § 10(a)(3).

First, the Court finds that the arbitrators did not improperly limit the time in which Greenway could present its case. Indeed, the record demonstrates that the parties all had a full and fair opportunity to present their respective positions. The Court also finds that the arbitrators did not improperly interrupt the closing statement of Greenway's counsel. Although the arbitrators asked more questions of Greenway's counsel then

they did of the Maioccos' counsel, arbitrators have a right to ask questions during closing arguments. Thus, the Court finds that the arbitrators did not engage in misconduct by extensively questioning Greenway's counsel during her closing argument.

The Court also concludes that the arbitrators did not impermissibly admit evidence, in the form of an expert's report that had not been exchanged in advance of the hearing, through the admission of demonstrative exhibits that summarized this expert's testimony. During the course of the arbitration, the arbitrators refused to admit certain expert-created documents as evidence because the Maioccos had failed to exchange these documents in advance of trial. However, the arbitrators admitted these documents as demonstrative exhibits. Although there is some question as to whether the arbitrators should have admitted these documents as demonstrative exhibits, the Court finds that Greenway was not prejudiced by the admission of these exhibits. The arbitrators specifically ruled that these documents would not be considered evidence. Instead, the arbitrators merely used these exhibits as an aid to better follow the oral testimony of the Maioccos' expert. There simply is nothing wrong with this procedure. Indeed, a demonstrative exhibit is merely used to illustrate oral testimony and has no probative value in itself. Thus, Greenway could not have been prejudiced by the admission of these documents.

Greenway also fails to prove that the arbitrators engaged in misconduct by allowing a certain witness of the

Maioccos to testify as an expert witness. At the hearing, the arbitrators allowed a certain witness of the Maioccos to testify as an expert over Greenway's objections that this witness only had general familiarity with the NASD procedural manual provisions on supervision and thus was not competent to testify as an expert on supervisory oversight. The Maioccos, however, offered evidence that this witness was the supervisor of and principal of his own investment banking firm and thus was qualified to testify as an expert. Under these circumstances, this Court cannot find that the arbitrators engaged in misconduct justifying vacatur of the arbitration award by allowing this witness to testify as an expert witness. At most, this Court can only find that the arbitrators may have made a decision that this Court may have not reached; this conduct simply does not rise to the level of misconduct required to support a vacatur of an arbitration award.

The Court turns to Greenway's final argument that one of the arbitrators engaged in misconduct by stating that he would throw cases in the "trash" that Greenway had provided to the arbitrators in support of its position. During the course of the arbitration proceedings, Greenway submitted a cover letter with copies of cases attached in support of its position. In its closing, Greenway's counsel referenced the cases it had previously submitted. When the arbitrators and Greenway's counsel were quarrelling over what jurisdiction the cases provided by Greenway were from, one of the arbitrators made a

glib remark that he would throw the cases in the trash can. It is this comment that Greenway now claims warrants vacatur.

Although this Court is troubled by this statement and certainly does not condone such discourteous behavior on the part of arbitrators, the Court cannot find that this isolated statement warrants vacatur under § 10(a)(3). To begin, although the Court is in no fashion attempting to justify this comment, the Court notes that the comment was made in the middle of what can be characterized as a tense and uncivilized exchange between Greenway's counsel and the arbitrators. Second, immediately after this statement was made the arbitrator stated that he would read the cases submitted by Greenway. Third, Greenway was permitted to file a post-hearing brief in support of its position. Based on these facts, the Court simply cannot conclude that Greenway was prejudiced by this comment to such an extent, and if at all, to warrant vacatur of the arbitration award.[8]

Because Greenway has not established that it is entitled to relief under § 10(a)(3) of the FAA, the Court will deny its motion to vacate the arbitration award.

C. Motion to Confirm Arbitration Award

Pursuant to § 9 of the FAA, the Maioccos move to confirm the arbitration award entered against Greenway. Because the Court finds that the Maioccos' motion satisfies the

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8. The Court also notes that arbitrators are not required to read briefs, or any other written submissions made during a proceeding. See, e.g., Advest, Inc. v. McCarthy, 914 F.2d 6, 11 n.8 (1st Cir. 1990).

requirements of § 9 in that the arbitration award was made in this district and the award has not been vacated, modified or corrected as prescribed in §§ 10 or 11 of the FAA, the Court will grant the Maioccos' motion to confirm the arbitration award.

The Court also finds that the Maioccos are entitled to interest on the award that was entered on January 10, 1997. See Sun Ship, Inc. v. Matson Navigation Co., 785 F.2d 59, 63 (3d Cir. 1986) (an award confirmed under the FAA bears interest from the date of the award). Because the parties have not briefed what legal rate of interest should apply, the Court will not set the rate until the parties have submitted briefs on this issue.

D. Attorneys' Fees and Costs

The Maioccos, in their response to Greenway's motion, argue that they are entitled to the award of attorneys' fees and costs because Greenway has filed an improvident appeal from the arbitration award. Although Greenway's motion raises arguments that are not persuasive or well-reasoned, the Court cannot find that Greenway has violated the prohibitions contained in Rule 11 of the Federal Rules of Civil Procedure. Thus, the Court will not impose attorneys' fees and costs as a sanction against Greenway.

III. Conclusion

Accordingly, for the foregoing reasons, the Court will deny Greenway's motion to vacate arbitration award. The Court will also grant the Maioccos' motion to confirm arbitration award as against Greenway.

An appropriate Order follows.

Clarence C. Newcomer, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DEBORAH L. MAIOCCO and P. DONALD MAIOCCO	:	CIVIL ACTION
v.	:	
GREENWAY CAPITAL CORP. (d/b/a Cortlandt Capital), et al.	:	NO. 97-MC-0053

O R D E R

AND NOW, this day of January, 1998, upon consideration of Greenway Capital Corporation's ("Greenway") Amended Petition to Vacate Arbitration Award,[9] and petitioner Deborah L. Maiocco's and P. Donald Maiocco's (the "Maioccos") response thereto, and Greenway's reply thereto, it is hereby ORDERED that said Motion is DENIED.

IT IS FURTHER ORDERED that the Maioccos' Motion to Confirm Arbitration Award as Against Greenway is GRANTED.

IT IS FURTHER ORDERED that JUDGMENT is ENTERED as follows:

1. Petitioner Deborah L. Maiocco shall be entitled to a total of $162,501.12, representing compensatory, and consequential damages, and prejudgment interest, in her favor and against Greenway Capital Corp., New York (d/b/a Cortlandt Capital);[1]

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9. The Court treats said Amended Petition to Vacate Arbitration Award as a Motion to Vacate Arbitration Award.

1. Greenway is jointly and severally liable for this amount with Michael George and Daniel James Joseph McKeown; judgment was entered in the amount of $162,501.12 against George and McKeown on July 30, 1997.

2. Petitioner P. Donald Maiocco shall be entitled to a total of $64,486.90, representing compensatory, and consequential damages, and prejudgment interest, in his favor and against Greenway Capital Corp., New York (d/b/a Cortlandt Capital);[2]

3. Petitioner Deborah L. Maiocco shall be entitled to punitive damages in her favor and against Greenway Capital Corp., New York (d/b/a Cortlandt Capital) in the amount of $75,000;

4. Petitioner P. Donald Maiocco shall be entitled to punitive damages in his favor and against Greenway Capital Corp., New York (d/b/a Cortlandt Capital) in the amount of $25,000;

5. Forum fees are assessed against Greenway Capital Corp., New York (d/b/a Cortlandt Capital). Greenway Capital Corp., New York (d/b/a Cortlandt Capital) is liable to and shall reimburse the Maioccos for their hearing session deposit previously submitted to the NASD Regulation. Therefore, Greenway Capital Corp., New York (d/b/a Cortlandt Capital) shall have a net assessment due to the NASD of $8,300.00.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.

2. Greenway is jointly and severally liable for this amount with Michael George and Daniel James Joseph McKeown; judgment was entered in the amount of $64,486.90 against George and McKeown on July 30, 1997.