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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

M. MICHELE SAWYER,

vs.
HORWITZ & ASSOCIATES, INC. and
CARLOS LEGASPY,

Plaintiff,

Defendant.

CASE NO. 11-CV-1604-LAB-JMA

**ORDER CONFIRMING
ARBITRATION AWARD**

Michele Sawyer challenges an arbitration award entered against her by a panel of the Financial Industry Regulatory Authority. Defendants are a brokerage firm and one of its representatives who, Sawyer alleges, lost almost all of the \$1,805,085 that she entrusted to their care through a series of ill-advised (and unauthorized) naked put options. Sawyer brought eight claims against the Defendants, alleging violations of the Securities Exchange Act as well as California law. The panel, in a 2-1 decision, denied all claims in their entirety.

I. Legal Standard

The Federal Arbitration Act provides that an arbitration award may be vacated

- (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

1 controversy; or of any other misbehavior by which the rights of
2 any party have been prejudiced; or

3 (4) where the arbitrators exceeded their powers, or so
4 imperfectly executed them that a mutual, final, and definite
award upon the subject matter submitted was not made.

5 9 U.S.C. § 10(a). With respect to (4), “arbitrators exceed their powers . . . not when they
6 merely interpret or apply the governing law incorrectly, but when the award is completely
7 irrational, or exhibits a manifest disregard of law.” *Schoenduve Corp. v Lucent*
8 *Technologies, Inc.*, 442 F.3d 727, 731 (9th Cir. 2006) (quoting *Kyocera Corp. v Prudential-*
9 *Bache Trade Services, Inc.*, 341 F.3d 987, 997 (9th Cir. 2003)).

10 A manifest disregard of the law is indicated when it’s clear that the arbitrators
11 recognized the applicable law and then ignored it. *Bosack v. Soward*, 586 F.3d 1096, 1104
12 (9th Cir. 2009). “[T]here must be some evidence in the record, other than the result, that the
13 arbitrators were aware of the law and intentionally disregarded it.” *Id.* (quoting *Lincoln Nat’l*
14 *Life Ins. Co. v. Payne*, 374 F.3d 672, 675 (8th Cir. 2004)). Moreover, the law has to be well
15 defined, explicit, and clearly applicable. *Carter v. Health Net of California, Inc.*, 374 F.3d
16 830, 838 (9th Cir. 2004). A legal conclusion that is merely erroneous, or rests on a
17 misinterpretation of law, must be left alone. *Kyocera Corp.*, 341 F.3d at 994; *French v.*
18 *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F.2d 902, 906 (9th Cir. 1986). Absent a
19 written opinion or some other indication of the arbitrators’ reasoning, “it is all but impossible
20 to determine whether they acted with manifest disregard for the law.” *Id.* (quoting *Dawahare*
21 *v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000)).

22 The Ninth Circuit has not elaborated at length on the meaning of “completely
23 irrational,” *Comedy Club, Inc. v. Improv West Associates*, 553 F.3d 1277, 1288 (9th Cir.
24 2009), but suffice it to say that neither unsubstantiated factual findings nor erroneous factual
25 findings justify vacating an arbitral award.¹ *Id.* at 994; *Merrill Lynch*, 784 F.2d at 906.

26 ¹ The Ninth Circuit *has* developed the meaning of “completely irrational” in the context
27 of arbitrations that arise out of contract disputes. In this context, an award is irrational where
28 it “fails to draw its essence from the agreement.” *Lagstein v. Certain Underwriters at Lloyd’s,*
London, 607 F.3d 634, 642 (9th Cir. 2010) (quoting *Comedy Club*, 553 F.3d at 1288). See
also *Bosack*, 586 F.3d at 1106. Because Sawyer’s dispute with Defendants doesn’t arise
out of a contract, this standard isn’t helpful in this case.

1 Indeed, “[w]hether or not the panel’s findings are supported by the evidence in the record
2 is beyond the scope of . . . review.” *Bosack*, 586 F.3d at 1105. In other words, this Court
3 has no authority to re-weigh the evidence presented to an arbitration panel and ask whether
4 it would have reached the same decision. *Id.* See also *Coutee v. Barington Capital Group,*
5 *L.P.*, 336 F.3d 1128, 1134 (9th Cir. 2003); *Local Joint Executive Bd. of Las Vegas v.*
6 *Riverboat Casino, Inc.*, 817 F.2d 524, 527 (9th Cir. 1987). “Broad judicial review of
7 arbitration decisions could well jeopardize the very benefits of arbitration, rendering informal
8 arbitration merely a prelude to a more cumbersome and time-consuming judicial review
9 process.” *Kyocera Corp.*, 341 F.3d at 997–98.²

10 II. Discussion

11 Arbitrators have no obligation to explain their decisions. *A.G. Edwards & Sons, Inc.*
12 *v. McCollough*, 967 F.2d 1401, 1403 (9th Cir. 1992). When they don’t offer any explanation,
13 however, the Court finds itself in a difficult position. Even though its review is a deferential
14 one, and the Court doesn’t even ask whether the panel’s findings are supported by the
15 record, it helps to have *something* to go on. This is especially true when, as here, a
16 petitioner doesn’t focus her objections to the panel’s decision and instead objects to it
17 wholesale.³ Indeed, Sawyer’s motion has all the substance of a brief for the panel

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19 ² Defendants take the bizarre position that the award is not reviewable *at all* because,
20 in their words (and with their emphasis), “FINRA Rule 12904 states: ‘Unless the applicable
21 law directs otherwise, *all awards rendered under the Code are final and are not subject to*
22 *review or appeal.*’” (Opp’n Br. at 7.) They dodge the words “Unless the applicable law directs
23 otherwise.” The applicable law, as stated by the Court (and recognized by the Defendants)
24 is that FINRA awards are reviewable under the standards set forth in 9 U.S.C. § 10(a) and
the Ninth Circuit’s interpretation of those standards. Even more surprising about
Defendants’ argument is that it follows a section of their brief under the heading “The FAA
Strongly Favors Confirmation of Arbitration Awards.” (Opp’n Br. at 5.) That’s true. But it’s
false to say, as Defendants do, that “pursuant to FINRA rules and the Submission
Agreements signed by all parties to the action, the Arbitration Award that FINRA issued . .
. is final and should not be subject to review or appeal.” (Opp’n Br. at 8.)

25 ³ The Court has read several decisions reviewing FINRA awards in which the court
26 was at least able to focus the petitioner’s objection on a particular holding, or particular
27 holdings, of the arbitral, and thereby focus its own analysis. See, e.g., *Cortina v. Citigroup*
28 *Global Markets*, 2011 WL 3654496 (S.D. Cal. Aug. 19, 2011) (considering several specific
arguments for vacating an arbitration award); *Arora v. TD Ameritrade, Inc.*, 2010 WL
2925178 (N.D. Cal. July 26, 2010) (considering four specific, procedural challenges to the
award); *Wells Fargo Advisors, LLC v. Shaffer*, 2011 WL 2669479 (N.D. Cal. July 7, 2011)
(considering whether arbitral’s findings that a promisory note was unconscionable, and that

1 adjudicating her claims for the first time. Over the course of ten pages under the heading
 2 “The Undisputed Evidence Proved Legaspy Breached His Fiduciary Duties To Claimant,”
 3 Sawyer essentially tries to make her case all over again, articulating four different points of
 4 law and making six different points about what, in her view, the undisputed evidence
 5 established.

6 **A. Denial of Motion for Expungement**

7 Sawyer’s first argument for vacatur is that the panel’s refusal to expunge Sawyer’s
 8 claims against Defendants necessarily means the claims were meritorious. That’s simply
 9 not true.

10 At the conclusion of the evidence, Defendants moved for expungement under FINRA
 11 Rule 2080(b)(1)(A) and 2080(b)(1)(C). (Lendrum Decl., Ex. 17.) The former allows for
 12 expungement when “the claim, allegation or information is factually impossible or clearly
 13 erroneous.” The latter allows for expungement when “the claim, allegation or information is
 14 false.”⁴ Without any kind of explanation, the panel denied the request: “Respondent

15
 16 a particular form could be the basis of a defamation claim, were made in manifest disregard
 17 of the law); and *Mid-Ohio Securities Corp. v. The Estate of Lawrence D. Burns*, 790
 18 F.Supp.2d 1263 (D. Nev. 2011) (affirming arbitral’s decision that plaintiff had standing and
 that her claims were eligible for arbitration).

19 ⁴ The Court trusts the parties that these are in fact the Rules, although the full text of
 20 Rule 2080 leaves the Court somewhat confused. A fuller reading of Rule 2080 suggests that
 subsections (b)(1)(A) and (b)(1)(C) aren’t exactly bases on which expungement may be
 sought and granted.

21 Rather, Rule 2080 requires that “parties petitioning a court for expungement relief or
 22 seeking judicial confirmation of an arbitration award containing expungement relief must
 name FINRA as an additional party and serve FINRA with all appropriate documents.” Rule
 23 2080(b). FINRA may waive this obligation, however, if it determines that the expungement
 relief is based on a judicial or arbitral finding that: (A) the claim, allegation or information is
 factually impossible or clearly erroneous; [or] (C) the claim, allegation or information is false.”

24 That is the context for subsections (b)(1)(A) and (b)(1)(C). They appear *not* to be
 25 freestanding bases on which expungement may be granted, but rather the bases for
 expungement that potentially relieve parties seeking expungement from the obligation to
 name FINRA as a party and serve it with papers.

26 That said, the Court is confident that subsections (b)(1)(A) and (b)(1)(C) are also
 27 regarded as expungement standards, plain and simple. Defendants have presented a list
 of frequent asked questions with respect to Rule 2080, and one of those is instructive here:
 28 “Do the standards above apply to court proceedings in addition to arbitrations? Yes
 FINRA will use the Rule 2080 standards in determining whether to oppose the expungement
 request and will recommend that the court use the standards *when considering the request
 for expungement.*” (Kelly Decl., Ex. 9, Q. 6.)

1 Legaspy's request for expungement is denied." (Lendrum Decl., Ex. 9.)

2 What does that mean, though? Sawyer interprets it as a finding that her claims were
3 not false, given that *that* is the basis for expungement under Rule 2080(b)(1)(C). But
4 Defendants *also* moved for expungement on the ground that Sawyer's claims were factually
5 impossible or clearly erroneous, the basis for expungement under Rule 2080(b)(1)(A). It is
6 entirely possible that the panel denied the motion to expunge because, even though it found
7 Sawyer's claims to be false, it did not find them to be factually impossible or clearly
8 erroneous.⁵ Moreover, Sawyer's argument forgets what the Court is looking for here: a
9 decision that is completely irrational or exhibits a manifest disregard of law. *Schoenduve*,
10 442 F.3d at 731. Sawyer cites no authority, and the Court does not believe any exists, for
11 the proposition that it is completely irrational, or manifestly unlawful, for an arbitral to refuse
12 to expunge claims that it nonetheless finds are not meritorious. Common intuition actually
13 serves up the opposite view: that it is completely logical to find that a party has not
14 technically violated the law but nonetheless conducted itself in such a manner that the public
15 would be well-served to know.

16 **B. Peripheral Arguments**

17 Sawyer's decision to lead with the argument that the panel's refusal to expunge her
18 claims means the panel found them "true" doesn't bode well for her petition. In fact, it makes
19 the Court that much more skeptical of her other arguments for vacatur. The Court pauses
20 here to consider other arguments Sawyer makes that, while peripheral in her petition,
21 nonetheless damage its credibility.

22 **1. Sanctioning of Legaspy**

23 Sawyer repeatedly references the fact that Horwitz & Associates sanctioned Legaspy
24 for the manner in which he handled her account, presumably to argue that the panel's

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26 ⁵ Sawyer is probably right to argue that FINRA's account of how it determined the
27 standards for expungement, see Kelly, Decl., Ex. 9, Q. 18), merely explains the rationale
28 behind Rule 2080 and does not expose some heightened standard for expungement. Still,
it is instructive that the animating purpose behind the expungement standards is the
preservation of information with "meaningful regulatory or investor protection value." This
lends additional plausibility to the determination of the arbitral that while Sawyer's claims
failed on their merits, they should not be expunged.

1 findings cut against those of Legaspy's own employer. (See Br. at 9.) For example, in her
2 reply brief she writes:

3 At the time of the events in question, Ms. Sawyer was a single
4 mother earning less than \$10,000 per year and she expressly
5 rejected "speculation" and "aggressive growth" as her account
6 investment objectives. Under these circumstances, when an
7 investment professional places the overwhelming majority of the
8 client's net worth into highly speculative and volatile naked put
9 options and loses over a million dollars in less than six weeks,
10 something is wrong. This is exactly what Legaspy's own
11 employer concluded when it "sanctioned" Legaspy \$200,000 for
12 unethical conduct in Ms. Sawyer's account.

13 (Reply Br. at 10.) This is a misrepresentation of the letter sanctioning Legaspy. He was not
14 sanctioned for his actual investment practices, which are the substance of Sawyer's claims
15 against him, but for violating FINRA rules. Here is what the letter said:

16 Finally, another instance of an unreported complaint and
17 reimbursement came to light in the Sawyer arbitration claim
18 where you reimbursed Sawyer for interest and personally
19 purchased a bond from her account to give her the means to
20 meet a margin call.

21 (Lendrum Decl., Ex. 5.) Sawyer's core grievance against Legaspy is that he breached his
22 fiduciary duties to her by investing her money as she specifically directed him *not* to. That
23 Legaspy reimbursed her for interest and gave her money to meet a margin call—violations
24 of *FINRA* rules—says little about whether that core grievance is meritorious.

25 **2. Judge Frosburg**

26 The panel's decision was not unanimous. Its award noted that "Arbitrator E. Milton
27 Frosburg agrees with the Panel's finding that Respondent Carlos Javier Legaspy would not
28 be entitled to expungement relief as per FINRA Rule 12805 and Rule 2080 and dissents as
to the Panel's decision regarding liability and damages." (Lendrum Decl., Ex. 9.) Sawyer
makes far too much of Judge Frosburg's dissent. Indeed, she comes rather close to
suggesting that Judge Frosburg's dissent, in and of itself, shows that the panel's decision
cannot possibly be justified:

[I]ndependent of the fact that Panel unanimously found that Ms.
Sawyer's claims were true, the Majority's decision to deny Ms.
Sawyer's claims in their entirety simply cannot be reconciled with
the undisputed evidence and, as Judge Frosburg concluded, the
evidence proves that Respondents are liable for the harm

1 caused to Petitioner.
2 (Br. at 13.) There are two problems, at least, with Sawyer's reliance on the mere fact that
3 the panel's award was not unanimous. The first is that the extent of Judge Frosburg's
4 dissent is completely unclear. Maybe he believed Sawyer should prevail on all of her claims
5 and receive from Defendants the \$2 million she seeks, but maybe he believed one of
6 Sawyer's claims had merit and she should receive only some nominal damage award. The
7 Court has no idea. All that is clear is that Judge Frosburg disagreed with the majority's
8 determination that Sawyer's claims should be denied in their entirety and that she should
9 receive no damages. Second, there is *nothing* about Judge Frosburg's dissent that entitles
10 it to more weight than the majority's opinion. It would be one thing if Judge Frosburg,
11 outraged at the majority's opinion, offered specific bases for his dissent, but all the Court
12 has to go on is the majority's conclusion that "Claimant's claims are denied in their entirety"
13 and the fact that Judge Frosburg "dissents as to the Panel's decision regarding liability and
14 damages." (Lendrum Decl., Ex. 9.) Those opinions are equally unilluminating.

15 **3. Presentation of the Record**

16 Defendants take Sawyer to task for not presenting a complete record of the arbitration
17 hearing, and the Court has to agree. As presented, Sawyer's petition appears to be
18 completely self-serving. The record she provides is plainly edited to provide the Court with
19 what she wants it to see, which confuses the Court's role in reviewing an arbitration award
20 with the arbitral's role in resolving her claims in the first instance. The arbitral denied that
21 her claims were righteous, and the point now isn't to put on the same case before this Court
22 to see what it thinks. At least one court has raised the possibility that the simple failure to
23 provide a complete record of an arbitration is grounds for rejecting a petition to vacate an
24 arbitration award. See *Lew Lieberbaum & Co., Inc. v. Randle*, 85 F.Supp.2d 123, 126
25 (E.D.N.Y. 2000) ("Other than the panel's award, the Petitioners have only supplied the Court
26 with Petitioner's counsel's self-serving summary of the testimony in his supporting affidavit.
27 The lack of a sufficiently complete record alone is enough to require rejection of the
28 Petitioner's position. It is the Petitioner's burden to demonstrate manifest disregard of the

1 law, and the failure to offer the entire record leaves the Court unable to exclude the
2 possibility that the award is supported by evidence that the Petitioner has not supplied.”).

3 **C. “The Undisputed Evidence”**

4 Sawyer’s second argument for vacatur, which the Court alluded to above, is that the
5 undisputed evidence shows Legaspy breached his fiduciary duties to her. The argument
6 could be more precise. Is Sawyer arguing that the arbitrators exhibited a manifest disregard
7 of the law, or that their decision was completely irrational on the facts presented? Both,
8 actually.

9 **1. Manifest Disregard for the Law**

10 In several places Sawyer attempts to rebut *legal* arguments made by the Defendants
11 during the arbitration, followed by the hypothetical proposition that *if* the arbitrators accepted
12 those arguments, they would have done so in manifest disregard of the law. It is easiest to
13 simply quote from Sawyer’s opening brief:

14 Accordingly, Respondents’ argument that Claimant is not entitled
15 to recover for the harm caused by Legaspy’s unsuitable trades
16 because the losses were caused by “historic market conditions”
is contrary to the law and if accepted would be in manifest
disregard for the law.” (Br. at 20.)

17 Finally, Respondents argued that Ms. Sawyer’s “losses” had to
18 be offset against gains from interest paid on her bonds in years
19 before the three options were sold. This too is an invalid
20 defense Given that Respondents acknowledged that
21 suitability is a transaction specific analysis, crediting
Respondents with income from other investments long before
the three options were sold would be in manifest disregard of the
law. (Br. at 21–22.)

22 Respondents argued that Legaspy’s strategy was suitable
23 because Sawyer was wealthy and had employed other
investment managers in the past, including one who purchased
24 a ‘hedge fund’ for Petitioner As in *Strobel*, here,
25 Respondents’ “defense” was that because Ms. Sawyer had prior
stock market experience and accumulated \$2.2 million in assets,
26 Respondents had a license to speculate with Ms. Sawyer’s hard
life savings. Just as in *Strobel*, this defense is invalid and if
accepted by the majority would be in manifest disregard for the
law. (Br. at 22–23.)

27 Finally, Resondents argued that bonds purchased on behalf of
28 Ms. Sawyer balanced out the risk of the “highly speculative”
options, such that on the whole the *account* was suitable
Thus, if this defense was accepted, it too would have been in

1 manifest disregard for the law. (Br. at 23.)

2 These arguments all miss the point. An arbitral's award isn't in manifest disregard of the law
3 unless it is clear from the record that the arbitral recognized the applicable law and then
4 ignored it. *Bosack*, 586 F.3d at 1104. It is also all but impossible to determine whether
5 arbitrators have acted with manifest disregard for the law where they don't explain their
6 decision (which they have no obligation to do). *Id.* The panel's decision isn't in manifest
7 disregard of the law just because the *Defendants*, according to Sawyer, advanced baseless
8 legal arguments.

9 The Court should also address Sawyer's claim that *Duffy v. Cavalier* is controlling
10 case law, that the panel knew it, and that the panel disregarded the case. (See Br. at 13–14;
11 Reply Br. at 5–6.) In both of her briefs, Sawyer includes the same excerpt from *Duffy* and
12 bolds the same language:

13 [W]here an apparently unsophisticated investor expresses a
14 desire to engage in speculative investments with the objective of
15 making large profits, the stockbroker cannot simply carry out the
16 customer's wishes. Rather, the **stockbroker has a fiduciary
17 duty (1) to ascertain that the investor understands the
18 investment risks in light of his or her actual financial
19 situation; (2) to inform the customer that no speculative
20 investments are suitable if the customer persists in wanting to
21 engage in such speculative transactions without the
22 stockbroker's being persuaded that the customer is able to bear
23 the financial risks involved; and (3) to refrain completely from
24 soliciting the customer's purchase of any speculative
25 securities** which the stockbrokers considers to be beyond the
26 customer's risk threshold.

27 215 Cal.App.3d 1517, 1532 (Cal. Ct. App. 1989). There are a number of problems here.
28 First, the actual duty that Sawyer mines from *Duffy*—the bolded language— isn't absolute or
free-floating. The excerpt itself shows this, because it prefaces the stated duties with two
conditionals: *If* an investor appears to be unsophisticated, and *if* she wants to invest
speculatively to reap large returns, *then* the stockbroker has the duties mentioned. But one
of these prerequisite conditions isn't present here, namely the express desire to invest
speculatively. Actually, the *absence* of that condition is critical to Sawyer's claims. She
writes:

In fact, Ms. Sawyer explicitly rejected "aggressive growth" and

1 “speculation” as investment objectives. Moreover, Horwitz’ own
2 Compliance Officer, Michael Gregory, admitted that neither
3 “speculation” nor “aggressive growth” were secondary
4 investment objectives for Ms. Sawyer’s accounts.

(Br. at 15.) Taking Sawyer at her word, then, and assuming she had no interest in risky,
5 high-reward investments, *Duffy* doesn’t do for her what she needs it to.

6 Sawyer also suggests that Defendants conceded in their post-arbitration brief that
7 *Duffy* was “controlling California case law,” the implication being that the panel obviously
8 knew of the case and the law it stands for. (Br. at 14.) Sawyer cites to page 3 of that brief,
9 however, on which the Court sees no mention of *Duffy*. (Lendrum Decl., Ex. 21.) In her
10 reply brief, Sawyer cites to page 17 of post-arbitration brief for the Defendants’ concession
11 as to the controlling law, but again the Court doesn’t see what Sawyer claims is there.⁶

12 (Lendrum Decl., Ex. 21.) Here is what Defendants *do* concede, as far as *Duffy* is concerned:
13 “Under California law, there is a fiduciary duty in the broker-customer relationship.” (Opp’n
14 Br. at 14.) That’s a completely uncontroversial proposition, obviously, and at its level of
15 generality it gets Sawyer nowhere. The question here isn’t whether Defendants had some
16 fiduciary duty to Sawyer, but what, on the facts of this case, the scope of their fiduciary
17 duties actually were, and whether those duties were breached. *Duffy* confirms this:

18 The question is not whether there is a fiduciary duty, which there
19 is in every broker-customer relationship; rather, it is the *scope or extent* of the fiduciary obligation, which depends on the facts of
20 the case.

21 215 Cal.App.3d 1517. Sawyer has to do far, far more than simply cite *Duffy* as she has to
22 show that the panel’s award was in manifest disregard of the law. And having reviewed the
23 record and Sawyer’s pleadings, the Court finds Sawyer has not made that showing.

24 **2. “Completely Irrational”**

25 Sawyer assembles at least five “facts” that she asserts were undisputed and
26 essentially require the conclusion that Legaspy breached his fiduciary duties to her: (1) her

27 ⁶ Perhaps the paginations in the documents presented by Sawyer to the Court are off.
28 She says in her reply brief that she presented controlling law to the panel during her closing
argument, citing pages 39 and 43 of Exhibit 19 (a PowerPoint presentation). (Reply Br. at
5.) Those pages don’t contain a single case, or even a single legal principle.

1 investment objective was simply “growth,” not “aggressive growth” or “speculation.”; (2)
2 Legaspy solicited and placed the objectionable transactions; (3) Legaspy admitted his
3 investment attack was speculative and unsuitable for Sawyer; (4) Legaspy failed to learn
4 about Sawyer’s actual financial circumstances, or else he chose to ignore what he did learn;
5 and (5) Legaspy admitted he falsified Sawyer’s options experience to obtain approval to
6 trade options in her account. (Br. at 15–19.)

7 Here, Sawyer is transparently re-arguing her claims before the Court in a manner that
8 is inappropriate under the prevailing standards for review of an arbitral’s decision. It is clear,
9 with even a cursory review of the record and Defendants’ pleadings before the Court, that
10 there is another side to this case. Defendants deny that Legaspy even had a fiduciary duty
11 to Sawyer when the transactions in question took place, assuming there was such a duty
12 they deny that it was breached, and they deny that any of Sawyer’s losses were caused by
13 Legaspy. The panel heard this matter for 14 days, over which Sawyer and Defendants put
14 on witnesses and presented testimony favorable to their arguments. Sawyer has failed to
15 show that it was completely irrational of the panel to reach the conclusion that it did.

16 **D. Refusal To Hear Evidence**

17 Sawyer’s third and final argument for vacatur is that the panel refused to hear
18 pertinent and material evidence that was favorable to her case. See 9 U.S.C. § 10(a)(3).
19 Not only must Sawyer show that the evidence at issue was pertinent and material, she must
20 also show prejudice. *U.S. Life Ins. Co. v. Superior Nat. Ins. Co.*, 591 F.3d 1167, 1174 (9th
21 Cir. 2010). The Supreme Court has suggested—and Sawyer concedes—that the refusal
22 must demonstrate bad faith or be “so gross as to amount to affirmative misconduct.” *United*
23 *Paperworkers Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 40 (1987).

24 The first piece of evidence Sawyer argues was wrongfully excluded was her own
25 telephone records, which had not been produced in discovery, and which she attempted to
26 introduce in her case in chief to rebut Legaspy’s account of when he spoke with Sawyer.
27 The Court has read the relevant portion of the hearing transcript. (Lendrum Decl., Ex. 28
28 at 93–97.) When counsel for Ms. Sawyer initially attempted to introduce the documents,

1 counsel for Defendants objected:

2 Mr. Kelly: Mr. Chairman, these were not produced in discovery.
3 This is not rebuttal testimony. This is plaintiff's case in chief.

4 Mr. Cohn: It is

5 Mr. Lendrum: May I respond, Mr. Chairman?

6 Mr. Cohn: Please.

7 Mr. Lendrum: This is certainly a document that is in rebuttal to
8 the testimony that this gentleman gave and testified repeatedly
9 under oath as to this broker log.

10 Mr. Cohn: You are presenting your case in chief, not rebuttal to
11 any witnesses you called in as an adverse witness, but these
12 documents existed and were requested in the discovery
13 process. They should have been turned over.

14 After a brief recess and some subsequent discussion, much of it heated, the panel went off
15 the record into an executive session. It decided to exclude the records. At that point,
16 counsel for Ms. Sawyer asked that the exclusion be without prejudice to introducing the
17 records in rebuttal. Mr. Cohn replied, "We'll address it at that point. Very well." The record
18 clearly shows that the panel heard argument on the issue (punctuated by intense bickering
19 between counsel), gave thought to it, and had a coherent reason for excluding the evidence.
20 Sawyer does not come close to showing that the decision was "so gross as to amount to
21 affirmative misconduct."

22 Sawyer also complains that during her counsel's cross-examination of Legaspy
23 following Defendants' direct, he was prevented from introducing Legaspy's earlier testimony
24 to impeach him. (See Lendrum Decl., Ex. 27 at 166-68.) This complaint borders on
25 frivolous. The panel did not prevent Sawyer from introducing pertinent, material testimony
26 of Legaspy. It simply denied Sawyer's counsel the opportunity to remind the panel of
27 testimony it had already heard because it was beyond the scope of a proper cross-
28 examination. Moreover, the panel invited Sawyer's counsel to make the argument in his
closing: "Mr. Cohn: Yeah, I think at this point, let's address the cross examination for this
witness's testimony today. And you can bring that up in argument." There was no prejudice
here, nor was there affirmative misconduct.

1 **III. Conclusion**

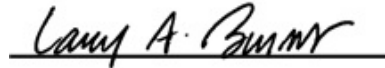
2 For the reasons given above, Sawyer's petition to vacate the arbitration award against
3 her is **DENIED**. Defendants' cross-motion to confirm the arbitration award is **GRANTED**.

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5 **IT IS SO ORDERED.**

6 DATED: January 30, 2012

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HONORABLE LARRY ALAN BURNS
United States District Judge

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