

California District Court Denies Motion to Vacate FINRA Arbitration Award

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A California district court recently denied a motion to vacate an arbitration award which had denied a plaintiff's claims brought before the Financial Industry Regulatory Authority ("FINRA").

The background of this case can be found [here](#). In sum, in 2005, plaintiff Winnie Fang delivered certificates for shares of stock in Peet's Coffee & Tea, Inc. ("Peet's") to Merrill Lynch that her deceased husband had previously held. In 2010, Fang was notified that the California Controller had received the Peet's stock as unclaimed property. Fang then commenced an action against Peet's and others in California state court for allegedly mishandling her investment, which was resolved by a "partial settlement." Later, in 2015, Fang brought a FINRA arbitration against Merrill Lynch for breach of fiduciary duties and breach of contract. In February 2018, a FINRA arbitration panel issued an award, denying Fang's claims in their entirety, and ordered her to pay \$6,000 in expert witness fees incurred by Merrill Lynch. In the award, the panel detailed the prior proceedings. Among others, the panel noted that a hearing had been scheduled in October 2016, but that Fang failed to submit pre-hearing materials per an order of the panel. Instead, according to the panel, Fang filed an ex parte motion to continue the hearing on the grounds that Merrill Lynch had not provided certain discovery, and that Fang was planning to file a class action on the same claims, even though Fang had not filed any discovery motion by the deadline in the panel's scheduling order, and had not filed a class action case. The panel denied Fang's motion for a continuance. Fang then filed a motion to dismiss her claims without prejudice, and a motion for reconsideration of the denial of the continuance. The panel maintained the October 2016 hearing date, but said that it would take up Fang's motions at the arbitration hearing. However, just before the hearing, Fang filed an action in California federal court, with a motion for a temporary restraining order to stop the FINRA arbitration for alleged procedural violations. The California district court denied a TRO. Fang then appealed to the Ninth Circuit, which affirmed the district court's order. While the court proceedings were ongoing, the arbitration also proceeded. Fang and her counsel failed to appear at the October 2016 hearing. Merrill Lynch did appear, and an evidentiary hearing took place under FINRA rules. Merrill Lynch then sent the panel a copy of the Ninth Circuit decision affirming the denial of the TRO, and Fang submitted a "responsive" document that the panel interpreted to be another motion to dismiss without prejudice. The panel then suspended the arbitration until the California district court decided class certification in the case. The California district court, however, had already stayed that case, at the parties' joint request, to allow for completion of the arbitration. Merrill Lynch then made a motion for the issuance of an award in the arbitration. A hearing took place in January 2018 on that motion and Fang's new motion to

dismiss. At the hearing, Fang's lawyer said he could not attend the October 2016 hearing because "he had to appear in a matter for the United Nations," which the panel noted had not been raised in his continuance papers. The panel then denied Fang's motion to dismiss and issued the February 2018 award. Fang then moved in the California district court to vacate the award. Although she mentioned all four grounds in Section 10(a) of the Federal Arbitration Act ("FAA") as a basis for overturning the panel's award, the motion was based mainly on the claims that the award was the product of corruption, fraud and undue means, and exceeded the arbitrators' authority.

The California district court, in denying the motion to vacate the award, noted that "courts may vacate an arbitrator's decision 'only in very unusual circumstances'" and that the party seeking to vacate the award bears a high "burden of establishing that one of the grounds . . . justifies vacating the award." The court noted that Fang chose not to litigate the arbitration she had voluntarily commenced, and that there was no evidence indicating that the arbitrators were corrupt or partial to Merrill Lynch or that there was an actual bias against her, nor were there any facts that might create a reasonable impression of bias or otherwise indicate "evident corruption." The court also held that Fang's argument that the arbitrators exceeded their powers was also unavailing. In this regard, Fang argued that the panel misapplied FINRA rules to proceed with the arbitration. However, the court noted that interpretation of the FINRA rules is up to the arbitrators to decide. The court also found that Fang failed to show that the arbitrators somehow exceeded the bounds of the agreement that empowered them to hear Fang's arbitration demand, and that Fang did not identify a FINRA rule stating that the arbitration should have been terminated after she expressed a desire to file a class action lawsuit, or any case that supports that proposition. The court noted that Fang was perfectly free to withdraw her claims at any time under FINRA rules, but the consequence would have been a withdrawal with prejudice, "which apparently did not suit Fang's litigation plans." Finally, the court held that Fang had also not shown that the arbitrators were "completely irrational" or guilty of "a manifest disregard of law."

[Fang v. Merrill Lynch, Pierce, Fenner & Smith, Inc.](#), No. 16-cv-06071 (N.D. Ca. Nov. 23, 2018).

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