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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

BRG SPORTS, INC. et al., Plaintiffs and Appellants, v. CHRIS ZIMMERMAN, Defendant and Appellant.	B282161 (Los Angeles County Super. Ct. No. BS160840)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ruth Kwan, Judge. Affirmed in part, reversed in part, and remanded with directions.

Seyfarth Shaw, Erik B. von Zeipel, P. Shawn Wood, and William I. Goldberg for Plaintiffs and Appellants.

Kennedy Berg, Gabriel Berg; The Matays Law Group, Charles J. Matays; Beaudoin & Krause-Leemon, and Wayne E. Beaudoin for Defendant and Appellant.

INTRODUCTION

BRG Sports, Inc. and BRG Sports, LLC (collectively, BRG) appeal from the judgment entered on their petition to confirm a final arbitration award. BRG contends the trial court erred in denying in part its motion for entry of judgment on the petition by purporting to enter separate judgments—one in favor of Chris Zimmerman against BRG for $500,000 plus interest, and one in favor of BRG against Zimmerman for $1.26 million plus interest—rather than entering one "net" judgment in favor of BRG. Zimmerman also appeals from the judgment, urging "reversal" because of post-arbitration misconduct by BRG. Zimmerman also contends the trial court erred in denying his motion to vacate, modify, or correct the final arbitration award because the arbitrator wrongly refused to hear evidence and incorrectly determined BRG was the prevailing party for purposes of awarding attorneys' fees.

BRG is right, and Zimmerman is wrong. The trial court correctly confirmed the arbitration award, but erred in purporting to do so in separate judgments. Therefore, we reverse the judgment and remand with directions to enter a single, net judgment in favor of BRG. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Arbitration

In April 2014 Zimmerman submitted an arbitration demand against his former employer, BRG, alleging BRG owed him at least $1.95 million in equity-participation compensation. Under his employment agreement, Zimmerman's equity-

participation compensation had two parts: a "short-term guaranteed cash incentive," or "Cash Incentive Plan," and a "longer-term equity appreciation pool," referred to as "Class B Units." Zimmerman stated in his arbitration demand: "Primarily, this dispute is focused on the 'fair market value' of [my] 6.88 million [BRG] Class B Units." Zimmerman alleged that BRG proposed, as part of his severance agreement, "all of his Class B Units were being called and were worth $0.00" and that he rejected that proposal. Alleging BRG had improperly attempted to call and undervalue his Class B Units, Zimmerman asserted claims for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, and, in the alternative, a declaratory judgment that he still owned his Class B Units.

In September 2015 the parties participated in a three-day arbitration hearing in Los Angeles. Zimmerman testified and called three other current or former BRG employees as witnesses. At the end of the second day of the arbitration, Zimmerman rested. At that time BRG stated that everyone on its witness list had already testified as part of Zimmerman's case except for James Shillito, an employee of a BRG-related company, and that BRG intended to call Shillito the following day before resting.

The following day, however, BRG rested without calling Shillito or any other witnesses. Zimmerman protested, explained he had intended to establish certain points through Shillito's testimony, and argued he had a right to call Shillito as a "rebuttal witness." In particular, Zimmerman sought to question Shillito about what Zimmerman claimed was a "key email" Shillito authored relating to the dispute. BRG stipulated to admitting the email into evidence, but informed the arbitrator

Shillito was no longer in Los Angeles. Zimmerman asked the arbitrator to "draw a negative inference from [Shillito's] not being here and find that those facts [Zimmerman had intended to establish] are established."

After hearing further argument on the issue and noting that, as a practical matter, Shillito was not there,[1] the arbitrator asked counsel for Zimmerman, "Okay, so other than this negative inference concept that you mentioned [and admitting the email into evidence], what else do you think ought to be done about it?" Counsel for Zimmerman responded, "If I can designate a paragraph in my post-trial brief to the negative inference in particular that I want drawn, and either you do or you don't, that's fine, that satisfies me. That takes care of the issue as far as I'm concerned." The arbitrator concluded discussion of the issue by admitting the email into evidence and directing that "[b]oth sides may, in their respective post-hearing briefs, address the issue as to whether or not it's appropriate to draw a negative inference from the fact that Mr. Shillito did not testify and if so, what that negative inference ought to be, and that concludes that."

The arbitrator asked counsel for Zimmerman, "So other than this subject about Shillito that we just covered, has the claimant been afforded full opportunity to present whatever evidence you determined was appropriate to present?" Counsel

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[1] The arbitrator stated that, "from a practical point of view, the guy is not here. Nothing we can do about that. No one is suggesting that we're going to adjourn the hearing and somehow get him to appear and to testify. I don't know how you would go about doing it."

for Zimmerman answered, "Yes." After asking counsel for BRG the same question and receiving the same answer, the arbitrator announced the time for presentation of evidence was closed. Counsel for Zimmerman did not ask the arbitrator for a continuance of the arbitration to allow Shillito to return to Los Angeles to testify, for permission to question Shillito by telephone from his current location, or for any other remedy.

The parties submitted their post-hearing briefs, and in October 2015 the arbitrator issued an interim award. The arbitrator ruled against Zimmerman on his claims for breach of the implied covenant of good faith and fair dealing, fraud, and a declaration that he still owned his Class B Units.[2] The arbitrator also ruled against Zimmerman on his breach of contract claim to the extent it concerned his Class B Units. Finding Zimmerman's breach of contract claim included a claim for unpaid benefits under the Cash Incentive Plan,[3] however, the arbitrator awarded Zimmerman $250,000 on that portion of the claim and declared Zimmerman was entitled to receive any other payments that might become due to other participants in that Plan. The arbitrator requested briefing from the parties regarding which side was the prevailing party for purposes of awarding attorneys' fees and costs.

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[2] In addressing the claim for fraud, the arbitrator stated he declined to draw the negative inference for which Zimmerman had argued because Shillito was not on Zimmerman's witness list and BRG had no obligation to call him or make him available as a rebuttal witness.

[3] Zimmerman's contract claims did not include allegations concerning the Cash Incentive Plan, but his fraud claim did.

The parties briefed the attorneys' fees issue, and the arbitrator issued a second interim award finding BRG was the prevailing party under *Hsu v. Abbara* (1995) 9 Cal.4th 863. (See *id.* at p. 876 [in determining the prevailing party, "the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources," and the court must make the determination "only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions'"].) Among other observations in support of his ruling, the arbitrator noted: "It is undeniable that [Zimmerman's] main litigation objective was centered on the value of his Class B Units which he initially alleged to have a value of approximately $1,500,000 and that the monetary relief he obtained in the Interim Award represented approximately only 12.5% of the compensatory damages he alleged on his contract claims. Moreover, it cannot be overlooked that [Zimmerman] could have obtained all of the monetary and declaratory relief he obtained in the Interim Award under the proposed severance agreement he was offered by [BRG] but chose to reject, so as to pursue his claims relating to the Class B Units on which he was entirely unsuccessful." In his final award the arbitrator awarded Zimmerman $250,000 plus prejudgment interest, declared he was entitled to receive any other payments that became payable to participants in the Cash Incentive Plan, and awarded BRG $1,234,695 in attorneys' fees and costs.

B. The Petition To Confirm the Arbitration Award

In March 2016 BRG filed a petition to confirm the final arbitration award, which Zimmerman opposed by filing a motion to vacate, modify, or correct the award. Zimmerman argued, among other things, the trial court should vacate the award because the arbitrator improperly "refused to hear evidence" from Shillito, the arbitrator exceeded his authority in finding BRG the prevailing party, and, if confirmed, the award would "chill arbitration" in violation of public policy. The trial court denied Zimmerman's motion.

Several days later, Zimmerman filed a motion for reconsideration, arguing the court's decision in *Royal Alliance Associates, Inc. v. Liebhaber* (2016) 2 Cal.App.5th 1092 (*Royal Alliance*), issued the day after the trial court denied Zimmerman's motion to vacate, modify, or correct the arbitration award, required the trial court to vacate the award. The trial court denied the motion for reconsideration. The court concluded it lacked jurisdiction to reconsider its decision under Code of Civil Procedure section 1008 because the *Royal Alliance* decision did not alter applicable case authority and thus was not "new law." The court also ruled that, even assuming it did have jurisdiction, *Royal Alliance* was distinguishable and did not require vacatur of the arbitration award in this case.

The trial court granted in part and denied in part a motion by BRG for entry of judgment on its petition. Specifically, the court granted BRG's request to enter judgment confirming the final arbitration award, but denied its request for a "[s]ingle [n]et [j]udgment" in favor of BRG to reflect the amount the arbitrator awarded BRG in attorneys' fees and costs offset by the amount awarded Zimmerman on his contract claim. Instead, the trial

court issued a "judgment" in which it purported to enter a judgment in favor of BRG against Zimmerman for $1,262,574 plus interest, based on the award of attorneys' fees and costs, and a judgment in favor of Zimmerman against BRG for $500,000 plus interest, based on the award in favor of Zimmerman on his contract claim.[4] The trial court stated, "I just want you to know that I don't believe in the offset. I don't believe that that's my role here." The court wrote on the judgment: "The judgments . . . are not to be netted and should be treated as two separate judgments." Both BRG and Zimmerman timely appealed, and we consolidated the appeals.

DISCUSSION

Zimmerman's appeal goes to the merits of the trial court's decision to confirm the arbitration award, while BRG's appeal challenges only the form of the resulting judgment. Therefore, we address Zimmerman's appeal first.

A. *The Trial Court Did Not Err in Denying the Motion To Vacate, Modify, or Correct the Arbitration Award and Confirming the Award*

Zimmerman makes three arguments on appeal. First, he contends "post-arbitration wrongdoing" by BRG "compels reversal." Second, he contends the trial court erred in denying his motion to vacate, modify, or correct the arbitration award because the arbitrator's "refusal to hear evidence" from Shillito

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[4] BRG conceded Zimmerman was entitled to an additional $250,000 payment that had become due to participants in the Cash Incentive Plan.

deprived Zimmerman of a "fair trial." Third, he contends the trial court should have vacated, modified, or corrected the arbitrator's prevailing party determination because that determination violated California public policy, "manifestly disregarded the law," and was a mistake of law not affecting the merits of the underlying contract dispute.

1. *Applicable Law and Standards of Review*

"The California Arbitration Act (CAA; [Code Civ. Proc.] § 1280 et seq.) 'represents a comprehensive statutory scheme regulating private arbitration in this state.'"[5] (*Cooper v. Lavely & Singer Professional Corp.* (2014) 230 Cal.App.4th 1, 10 (*Cooper*); see *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 (*Moncharsh*).) Under the CAA, "[t]he scope of judicial review of arbitration awards is extremely narrow because of the strong public policy in favor of arbitration and according finality to arbitration awards. [Citations.] An arbitrator's decision generally is not reviewable for errors of fact or law." (*Ahdout v. Hekmatjah* (2013) 213 Cal.App.4th 21, 33; see *Moncharsh*, at p. 11.) Judicial review of an arbitration award is ordinarily limited to the statutory grounds for vacating an award under section 1286.2 and correcting an award under section 1286.6. (*Moncharsh*, at pp. 12-13; *Sunline Transit Agency v. Amalgamated Transit Union, Local 1277* (2010) 189 Cal.App.4th 292, 303 (*Sunline Transit*).)

Under section 1286.2 a court must vacate an arbitration award if, among other circumstances, it determines "[t]he rights of the party were substantially prejudiced by misconduct of a

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[5] Undesignated statutory references are to the Code of Civil Procedure.

neutral arbitrator," "[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted," or "[t]he rights of the party were substantially prejudiced . . . by the refusal of the arbitrators to hear evidence material to the controversy." (§ 1286.2, subds. (a)(3)-(5).) Section 1286.6 requires that, unless the court vacates an award pursuant to section 1286.2, the court must correct and confirm the award as corrected if the court determines that "[t]here was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award," that "[t]he arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted," or that "[t]he award is imperfect in a matter of form, not affecting the merits of the controversy." "In relatively rare instances the court may also vacate or correct an arbitration award, '[w]here "according finality to the arbitrator's decision would be incompatible with the protection of a statutory right" or where the award contravenes "an explicit legislative expression of public policy."'" (*Sunline Transit*, *supra*, 189 Cal.App.4th at p. 303; see *Singerlewak LLP v. Gantman* (2015) 241 Cal.App.4th 610, 615-617.)

"To the extent the trial court resolved questions of law on undisputed facts" in ruling on a request to vacate or correct an arbitration award, we review the trial court's ruling de novo. (*Cooper*, *supra*, 230 Cal.App.4th at p. 12; see *Safari Associates v. Superior Court* (2014) 231 Cal.App.4th 1400, 1408.) "We review for substantial evidence any determinations of disputed factual issues." (*Royal Alliance*, *supra*, 2 Cal.App.5th at p. 1106; accord, *Cooper*, at pp. 11-12.)

2. *BRG's Purported "Post-Arbitration Wrongdoing" Does Not Justify Reversal*

Zimmerman begins by citing a raft of supposed "post-arbitration wrongdoing" by BRG—including "conceal[ing] . . . the second [Cash Incentive Plan] triggering event" that entitled him to an additional $250,000, "distort[ing] the holding of cases to request an inapplicable offset" in the judgment on its petition to confirm the arbitration award, and "falsely portray[ing in its appeal] the lower court as having issued [an] ill-informed ruling"—that he contends "compels reversal," presumably of the judgment confirming the arbitration award.

But Zimmerman cites no authority suggesting that such "wrongdoing," assuming it occurred, is grounds for vacating or refusing to confirm an arbitration award. The only even remotely relevant case he cites in support of this argument, *City of Palo Alto v. Service Employees Internat. Union* (1999) 77 Cal.App.4th 327, held the trial court erred in confirming an arbitration award that violated public policy because it required one of the parties to violate a court order.[6] (See *id.* at pp. 339-340 ["the arbitration award . . . was irreconcilable with the public policy requiring obedience to court orders"].) There was no such circumstance here. Zimmerman's first argument fails.

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[6] The word "arbitration" appears in only one of the other 15 cases Zimmerman cites in connection with this argument, and that case concerned an appeal from an order denying a special motion to strike under section 425.16, which the Supreme Court compared in some respects to the denial of a motion to compel arbitration. (See *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 193.)

3. *The Arbitrator Did Not Refuse To Hear Evidence*

Zimmerman argues the trial court erred in denying his motion to vacate, modify, or correct the arbitration award, and "compounded [that] error" when it denied his motion for reconsideration, because the arbitrator's "refusal to hear evidence" from Shillito was a ground for vacating the arbitration award under section 1286.2, subdivision (a)(5). This argument, too, lacks merit.

Section 1286.2, subdivision (a)(5), requires the court to vacate an arbitration award where, as relevant here, "[t]he rights of the party were substantially prejudiced . . . by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of" the CAA. (See *Royal Alliance*, *supra*, 2 Cal.App.5th at p. 1107.) "The statute thus presents a two-part inquiry: (1) Did the arbitrators refuse to hear evidence material to the controversy or engage in other conduct contrary to the provisions of the CAA? (2) If so, were the rights of the party seeking to vacate the award substantially prejudiced?" (*Ibid.*)

On "the threshold inquiry regarding the arbitrators' conduct" (*Royal Alliance*, *supra*, 2 Cal.App.5th at p. 1107), the arbitrator here did not refuse to hear evidence. In particular, the arbitrator did not refuse to allow Shillito to testify. Instead, the arbitrator observed that, as a practical matter, Shillito was not available when Zimmerman (belatedly) made it known he wanted to call him as a witness in the arbitration, asked counsel for Zimmerman what he wanted to do about it, then gave Zimmerman exactly what his attorney asked for: an opportunity to argue the arbitrator should draw a negative inference from

Shillito's absence. Other than declining to draw that negative inference, which Zimmerman rightly does not suggest constituted a refusal to hear evidence, the arbitrator did not refuse to allow Shillito to testify or make any other ruling adverse to Zimmerman regarding Shillito's testifying (or not testifying) at the hearing.

Zimmerman does not identify any other provision of the CAA the arbitrator may have violated in connection with Shillito's not testifying at the hearing. The only other potentially relevant provision is section 1282.2, subdivision (d), which provides in pertinent part that, unless they agree otherwise, "[t]he parties to the arbitration are entitled to be heard, to present evidence, and to cross-examine witnesses appearing at the hearing." (See *Royal Alliance*, *supra*, 2 Cal.App.5th at p. 1108 ["[s]ection 1282.2, subdivision (d) is incorporated into section 1286.2, subdivision (a)(5) by the phrase 'other conduct of the arbitrators contrary to the provisions of this title'"].) The right to cross-examination in that provision, however, "'entitles a party to cross-examine witnesses *if* they appear at a hearing.'" (*Royal Alliance*, at p. 1108; accord, *Schlessinger v. Rosenfeld, Meyer & Susman* (1995) 40 Cal.App.4th 1096, 1106.) Shillito did not appear at the hearing, so the arbitrator could not have violated this provision.

Because the arbitrator did not refuse to allow Shillito to testify, and Shillito did not appear or testify at the arbitration, this case is readily distinguishable from *Royal Alliance*, the case on which Zimmerman primarily relies. In *Royal Alliance* the court affirmed an order vacating the arbitration award under section 1286.2, subdivision (a)(5), because the arbitrators (1) denied a request by one of the parties to testify in support of her

claims and (2) denied a request by counsel for that party to cross-examine a witness who appeared and "submitt[ed] oral evidence for the arbitrators' consideration."[7] (*Royal Alliance*, *supra*, 2 Cal.App.5th at pp. 1107-1108.) Those grounds for vacating the award are not present here.

Zimmerman makes much of the *Royal Alliance* court's statement that "[t]he pertinent question for us is not what the [applicable arbitration] rules provided or whether the arbitrators adhered to them; it is whether the trial court correctly concluded that the arbitrators prevented a party from fairly presenting its case and prejudiced her rights as a result." (*Royal Alliance*, *supra*, 2 Cal.App.5th at p. 1107.) But, as explained, the arbitrator here did not "prevent" anything. And there was nothing unfair about the arbitrator's asking Zimmerman what he proposed to do about Shillito's absence and then doing exactly what Zimmerman proposed.

Zimmerman also suggests the trial court erred because the arbitrator's conduct and rulings regarding Shillito constituted grounds for vacating the award under the procedural provisions of the Federal Arbitration Act (FAA) (9 U.S.C. §§ 10, 11). Specifically, he cites title 9 United States Code section 10(a)(3), which provides in relevant part that "the United States court in and for the district wherein the award was made may make an order vacating the award" in a case "where the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy."

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[7] The court noted the witness "did not technically 'testify' for purposes of California law, as she was not under oath." (*Royal Alliance*, *supra*, 2 Cal.App.5th at p. 1108.)

There are two problems with this argument. First, "'the FAA's *procedural* provisions (9 U.S.C. §§ 3, 4, 10, 11) do not apply unless the contract contains a choice-of-law clause expressly incorporating them.'" (*Mave Enterprises, Inc. v. Travelers Indemnity Co.* (2013) 219 Cal.App.4th 1408, 1429 (*Mave*); see *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1350-1352 [FAA provisions governing judicial review do not apply in state court, in part because "the provisions for judicial review of arbitration awards in sections 10 and 11 of the FAA are directed to 'the United States court in and for the district wherein the award was made'"]; *Los Angeles Unified School Dist. v. Safety National Casualty Corp.* (2017) 13 Cal.App.5th 471, 482 ["where, as here, the parties do not '*expressly* designate that any arbitration proceeding should move forward under the FAA's procedural provisions rather than under state procedural law' [citation], California procedures necessarily apply"]; *Judge v. Nijjar Realty, Inc.* (2014) 232 Cal.App.4th 619, 632 ["[a]bsent an agreement by the parties to apply the procedural provisions of the FAA to their arbitration, federal procedural rules apply only where state procedural rules conflict with or defeat the rights Congress granted in the FAA"]; *Mave*, at p. 1429 ["a state court applies its own procedural law—here, the procedural provisions of the CAA—absent a choice-of-law provision expressly mandating the application of the procedural law of another jurisdiction"]; *Royal Alliance*, *supra*, 2 Cal.App.5th at p. 1104, fn. 4 [same]). Zimmerman does not establish, or even attempt to establish, that the arbitration agreement here incorporated the procedural provisions of the FAA.[8]

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[8] The only reference Zimmerman makes to any sort of choice-of-law provision in the parties' arbitration agreement appears in

Second, even assuming the procedural provisions of the FAA applied, the only two cases Zimmerman cites where the court vacated an arbitration award under those provisions are distinguishable. In *Matter of Watkins-Johnson Co. v. Public Utilities Auditors* (N.D.Cal., Feb. 20, 1996, No. C-95 20715) [1996 WL 83883] the district court vacated an award under title 9 United States Code section 10 because the arbitrator denied one party's request to subpoena and cross-examine or in the alternative cross-examine by telephone the author of a written statement that was the other party's only evidence. (*Matter of Watkins-Johnson*, *supra*, at p. 3.) The arbitrator here did not deny—indeed Zimmerman did not make—any such request.

Similarly, in *Harvey Aluminum v. United Steelworkers of America* (C.D.Cal. 1967) 263 F.Supp. 488 the district court granted a motion to vacate an award under the procedural provisions of the CAA and FAA because the arbitrator refused to allow a witness to complete his testimony on direct examination, refused to allow re-direct examination of the witness, and then

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a footnote in a different section of his opening brief. In that footnote Zimmerman quotes a portion of the agreement requiring the arbitration to be administered by the American Arbitration Association (AAA) in Los Angeles, California. The only mention of the FAA appears in the last sentence: "The arbitrator shall administer and conduct any arbitration in a manner consistent with the [FAA] and to the extent that the AAA's Employment Arbitration Rules and Mediation procedures conflict with the FAA, the FAA shall take precedence." This language addresses only the arbitrator's manner of administering the arbitration and does not "expressly incorporat[e]" the FAA's procedural provisions concerning judicial review of the arbitrator's award. (See *Mave*, *supra*, 219 Cal.App.4th at p. 1429.)

admittedly "disregarded in its entirety" the witness's testimony. (*Harvey Aluminum*, at pp. 489-490, 493.) Here, the arbitrator did not refuse to allow anything or indicate he disregarded any evidence presented.

Because the arbitrator did not refuse to hear evidence within the meaning of section 1286.2, subdivision (a)(5), the trial court did not err in denying Zimmerman's motion to vacate the arbitration award on that ground. In addition, even assuming the trial court erred in denying Zimmerman's motion to reconsider that ruling under section 1008, Zimmerman suffered no prejudice warranting reversal. (See *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1245 [because """[a]n order denying a motion for reconsideration is interpreted as a determination that the application does not meet the [jurisdictional] requirements of section 1008,""" the proper course for the trial court when those requirements are met, but """the court is not persuaded the earlier ruling was erroneous,""" is """to grant reconsideration and to reaffirm the earlier ruling"""].)

4. *The Trial Court Did Not Err in Denying Zimmerman's Request To Vacate the Arbitrator's Prevailing Party Ruling*

Zimmerman also contends the trial court erred in refusing to vacate, modify, or correct the arbitrator's determination that BRG was the prevailing party for purposes of awarding attorneys' fees and costs. He offers three reasons, none of which has merit.

First, Zimmerman argues the arbitrator's prevailing party determination "was against California public policy." But "[v]acating an arbitration award based on public policy or a

statutory right requires an explicit legislative expression of a public policy violated by the award or a conflict with a statutory scheme. Otherwise, courts are reluctant to invalidate an arbitrator's award because 'the Legislature has already expressed its strong support for private arbitration and the finality of arbitral awards in title 9 of the Code of Civil Procedure. [Citation.] Absent a clear expression of illegality or public policy undermining this strong presumption in favor of private arbitration, an arbitral award should ordinarily stand immune from judicial scrutiny.'" (*Sunline Transit*, *supra*, 189 Cal.App.4th at p. 303; see *Moncharsh*, *supra*, 3 Cal.4th at p. 32 ["[w]ithout an explicit legislative expression of public policy . . . courts should be reluctant to invalidate an arbitrator's award on this ground"]; *Singerlewak LLP v. Gantman*, *supra*, 241 Cal.App.4th at p. 620 ["courts have refused to apply the exception when no explicit legislative expression of public policy is involved, or where the sole issue is merely an alleged error in the interpretation or application of the law governing the claim properly subject to arbitration"].)

Zimmerman does not identify the "explicit legislative expression of public policy" (*Moncharsh*, *supra*, 3 Cal.4th at p. 32) the arbitrator's prevailing party determination supposedly violated. In fact, Zimmerman does not cite any statutory language or legislative expression. The closest he comes is citing cases that comment on legislative concerns underlying Civil Code section 1717. (See, e.g., *PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1091 ["the statute as amended reflects the legislative purpose 'to establish uniform treatment of fee recoveries in actions on contracts containing attorney fee provisions and to eliminate distinctions based on whether recovery was authorized

by statute or by contract"'], quoting *Santisas v. Goodin* (1998) 17 Cal.4th 599, 616.) But even then he does not explain how a prevailing party determination based, as this one was, on the standard set forth in *Hsu v. Abbara*, *supra*, 9 Cal.4th at p. 876 ["[t]he prevailing party determination is to be made . . . only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions"'] conflicts in any way with those concerns. (See *ibid.* [determining that its construction of Civil Code section 1717 "properly reflects and effectuates legislative intent"].) And that the arbitrator may have misapplied or even misunderstood that standard is not a ground for reversal. (See *Singerlewak LLP v. Gantman*, *supra*, 241 Cal.App.4th at p. 620; *Creative Plastering, Inc. v. Hedley Builders, Inc.* (1993) 19 Cal.App.4th 1662, 1666 [even if prevailing party determination "constituted or was generated by the arbitrator's error of law or fact, it nonetheless binds the parties and is immune from judicial interference"].)

Second, Zimmerman argues that, in determining BRG was the prevailing party, the arbitrator "manifestly disregarded the law,"[9] which some federal courts, including the Ninth Circuit, have held is a valid ground for vacating an arbitration award under the FAA. (See, e.g., *Comedy Club, Inc. v. Improv West Associates* (9th Cir. 2009) 553 F.3d 1277, 1281 ["in this circuit, an arbitrator's manifest disregard of the law remains a valid ground for vacatur of an arbitration award under [9 U.S.C.] § 10(a)(4) of the [FAA]"]; see also *Lagstein v. Certain Underwriters at Lloyd's,*

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[9] Although it is not entirely clear, Zimmerman appears to suggest the arbitrator ignored case law Zimmerman contends establishes BRG could not be the prevailing party because it did not assert and prevail on counterclaims.

London (9th Cir. 2010) 607 F.3d 634, 641 [“‘“[m]anifest disregard of the law” means something more than just an error in the law or a failure on the part of the arbitrators to understand or apply the law’”; “‘[i]t must be clear from the record that the arbitrators recognized the applicable law and then ignored it’”].) “Manifest disregard of the law,” however, is “a basis for challenging an arbitration award . . . under the FAA but not the CAA.” (*Mave*, *supra*, 219 Cal.App.4th at p. 1422); see *Comerica Bank v. Howsam* (2012) 208 Cal.App.4th 790, 830 [“an arbitrator’s manifest disregard of the law is not a ground for vacatur under California law”]; see also *Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 918, fn. 1 [“[w]e decline to rule on defendants’ suggestion that this court adopt the ‘manifest disregard’ standard of review recognized by some federal courts in reviewing arbitration awards”].) As noted, Zimmerman has not demonstrated the FAA applies.

Finally, Zimmerman argues the trial court could have and should have corrected the arbitrator’s prevailing party determination because it resulted from a mistake of law and did not go to the merits of the parties’ contract dispute. For support he cites section 1286.6, subdivision (c), which requires correction of an arbitration award if the court determines “[t]he award is imperfect in a matter of form, not affecting the merits of the controversy.” But Zimmerman cites nothing to support his suggestion that a prevailing party determination underlying an attorneys’ fees award is merely “a matter of form, not affecting the merits of the controversy,” thus forfeiting the argument. (See *Orange County Water Dist. v. Alcoa Global Fasteners, Inc.* (2017) 12 Cal.App.5th 252, 360.) And case law suggests the law is to the contrary. (See *Moshonov v. Walsh* (2000) 22 Cal.4th 771, 776

(*Moshonov*) [rejecting the argument that the arbitrator's decision not to award attorneys' fees to the prevailing party should be corrected because it lay "outside the merits submitted for arbitration"]; *Moore v. First Bank of San Luis Obispo* (2000) 22 Cal.4th 782, 787 (*Moore*) [rejecting the appellants' attempt "to distinguish between the substantive merits of the arbitrated controversy and the 'ancillary' question of costs, including attorney fees"];[10] *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 26 ["[w]ho is the prevailing party is a mixed question of law and fact, and we simply have no power to second-guess the arbitrator's decision on that issue"].)

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[10] *Moshonov* and its companion case, *Moore*, considered this argument in the context of section 1286.6, subdivision (b), which requires correction if the court determines "[t]he arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted." The Supreme Court in *Moshonov* stated: "'We do not think . . . that the term "the merits of the decision" . . . is subject to any fixed meaning, incorporating a distinction between substantive issues and procedural remedies. The meaning of the phrase must rather be found in the terms of the submission. As we have noted, the parties here effectively submitted the issue of attorney fees to the arbitrator by submitting to arbitration all matters pending in the scheduled trial, including the prayer for attorney fees in the complaint. Hence, the issue of attorney fees related here to the merits of the arbitrator's decision on the matters submitted to arbitration, though it may well lie outside the merits of the arbitrator's decision in another case.'" (*Moshonov*, *supra*, 22 Cal.4th at p. 776.)

B. *The Trial Court Erred in Failing To Enter a Single, Net Judgment*

BRG contends the trial court erred in purporting to enter two judgments—one in favor of BRG against Zimmerman and another in favor of Zimmerman against BRG—rather than entering a single judgment in favor of BRG for the net amount Zimmerman owed BRG under the final arbitration award, i.e., the amount the arbitrator awarded BRG in attorneys' fees offset by the amount the arbitrator awarded Zimmerman on his contract claim. Whether the standard of review is de novo (as BRG contends) or abuse of discretion (as Zimmerman contends), the trial court committed a legal error in failing to enter one judgment. (See *Turman v. Superior Court* (2017) 17 Cal.App.5th 969, 980 ["[a] trial court's decision that rests on an error of law is an abuse of discretion"].)

"[A]s a general rule there can be only one final judgment in a single action." (*Nicholson v. Henderson* (1944) 25 Cal.2d 375, 378 (*Nicholson*); accord, *Department of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154, 196; see § 577 ["[a] judgment is the final determination of the rights of the parties in an action or proceeding"]; *Pastor v. Younis* (1965) 238 Cal.App.2d 259, 264 ["[i]t is well established that there can be but one judgment in an action as between the same parties and that is a judgment which determines all matters in controversy between them in the action"]; *Israel v. Campbell* (1958) 163 Cal.App.2d 806, 820 ["[i]ssues between the same parties should not be decided piecemeal in the same litigation but should be settled in one set of findings and one judgment"].)

There was only one action here, BRG's petition to confirm the arbitration award, and Zimmerman does not suggest any

exception to the general rule applies. (See *Nicholson*, *supra*, 25 Cal.2d at pp. 379-380 [discussing the exceptions].) The trial court therefore committed legal error in (purportedly) entering a judgment in favor of BRG against Zimmerman and a separate judgment in favor of Zimmerman against BRG. (See *id.* at p. 301 ["[t]o attempt to adjudicate the rights of one party by a single judgment and those of the other by a separate judgment when the controversy is between only two parties and concerns but one subject matter[,] a single piece of real property[,] is simply an attempt to dispose of the case piecemeal, a procedure which has been condemned by this court in numerous decisions"].)

The proper course, as suggested by the cases BRG cites as well as other cases, was to enter a net judgment in favor of the party owed the greater amount to avoid what the United States Supreme Court has called, in an analogous context, "'the absurdity of making A pay B when B owes A.'" (*Citizens Bank v. Strumpf* (1995) 516 U.S. 16, 18 (*Citizens Bank*);[11] see *Langford v. Langford* (1902) 136 Cal. 507, 508-509 [the plaintiff's failure to answer a cross-complaint did not deprive him of the right to recover on his complaint because "[e]ach of the parties was seeking a money judgment against the other, and if the defendant should establish her claim upon the cross-complaint the court would enter judgment in favor of the one who should

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11 The United States Supreme Court was discussing the "right of setoff (also called 'offset')," which "allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding 'the absurdity of making A pay B when B owes A.'" (*Citizens Bank*, *supra*, 516 U.S. at p. 18; see also *Jess v. Herrmann* (1979) 26 Cal.3d 131, 137 ["a setoff procedure simply eliminates a superfluous exchange of money between the parties"].)

establish the greater claim, but only for the difference between the two"]; *American Nat. Bank v. Stanfill* (1988) 205 Cal.App.3d 1089, 1095 ["'[w]here the plaintiff recovers on his complaint and the defendant recovers on his cross-complaint, a single net judgment should be rendered'"]; *Israel v. Campbell*, *supra*, 163 Cal.App.2d at p. 820 ["appellants' rights were limited to offsets and not to damages" in a separate judgment]; *Moss Const. Co. v. Wulffsohn* (1953) 116 Cal.App.2d 203, 205 ["there could have been only one judgment entered herein and that was and is the net judgment rendered in favor of plaintiff"].)

Zimmerman does not cite any case holding entry of a net judgment is improper. Instead, he attempts to distinguish the cases BRG cites on the ground they concerned netting amounts owed on claims and counterclaims, whereas this case involves netting amounts owed on different components of an arbitration award. But Zimmerman does not explain why that distinction should make any difference. "Making A pay B when B owes A" is equally absurd in both situations. Moreover, courts in other jurisdictions have approved netting in the context of confirming arbitration awards. (See, e.g., *STMicroelectronics, N.V. v. Credit Suisse Secs. (USA) LLC* (2d Cir. 2011) 648 F.3d 68, 82 ["allowing [appellant] to pay just its *net* obligation [under an arbitration award] avoids 'the absurdity of making A pay B when B owes A'"]; *National Risk Underwriters, Inc. v. Occidental Fire* (4th Cir. 1991) 931 F.2d 1015, 1016-1017 [district court confirming arbitration award did not err by offsetting amounts owed between the parties under the award and entering judgment in favor of one party for the net amount]; *Pochat v. Merrill Lynch* (S.D.Fla., Aug. 22, 2013) 2013 WL 4496548 at p. 20 [granting a petition to modify an arbitration award to offset

amounts owed between Merrill Lynch and Pochat because, "[i]f the Court did not permit offset, Merrill Lynch would be faced with the 'absurdity' of having to pay Pochat when Pochat owes Merrill Lynch a far greater amount"].)

Zimmerman also suggests some of the cases cited by BRG are inapplicable because they involved offsetting amounts admittedly owed, whereas Zimmerman disputes the prevailing party determination underlying the arbitrator's attorneys' fees award. But, again, Zimmerman does not explain why this distinction is material. Because the trial court erred in purporting to enter separate judgments, we reverse and remand for entry of one net judgment in favor of BRG.

DISPOSITION

The judgment is reversed and the matter remanded to the trial court with directions to vacate the judgment(s) and enter a new judgment in favor of BRG against Zimmerman in an amount reflecting BRG's award for attorneys' fees offset by Zimmerman's award on his contract claims. In all other respects, the judgment is affirmed. BRG's motion for sanctions is denied. BRG is to recover its costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution