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## DAVID A. WEINTRAUB

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### Securities Law Update – September 2007

#### If It Looks Like a Hedge Fund and Quacks Like a Hedge Fund, Is it a Hedge Fund?

In his August 26, 2007 column, finance reporter Ben Stein wrote, “**It’s About the Fees.**” Hedge funds are largely a fraud. A hedge fund is supposed to hedge against market movements by unhedged instruments. In a very simple example, they are supposed to go short when the market is falling and thereby make money to hedge against losses in long positions.

I am sure that some were doing that recently, but from what I’ve seen, many were just highly leveraged bets on long positions. When the market turned sharply against them, they not only lost, but also sometimes had to sell under the compulsion of margin calls and thus hastily and for a loss. These are not what I could call hedge funds. This is just gambling. Now we see that, at least for many funds, it’s not about investing prowess or sharp insights. It is, as my idol, Warren E. Buffett has said so many times, about “fees, fees, fees.” The model hedge fund is not a means to outperform the market. It is a means to outcharge the investor.”

#### Stockbroker in Pain Despite \$5 Million Severance

After negotiating a \$5 million severance payment, former Smith Barney stockbroker David Trautenberg sued his former attorneys for breach of fiduciary duty. Trautenberg claimed that but for his former attorneys having breached their fiduciary duty, he would have negotiated a severance payment between \$20 and \$25 million. Trautenberg had been represented in two arbitration matters by both Paul, Weiss, et al. and a second law firm. The Paul, Weiss firm represented Trautenberg at Smith Barney’s request. After Trautenberg was advised that Smith Barney wished to negotiate a severance package, he learned that Paul, Weiss had advised Smith Barney ‘not to pay a penny to Trautenberg.’ Having discovered his former attorneys’ conduct, Trautenberg brought suit. The court dismissed Trautenberg’s claims because he purportedly failed to allege “but for” causation on Paul, Weiss’s part. The court’s reasoning in this opinion appears highly suspect. Had Trautenberg failed to obtain any severance payment, as compared with his \$5 million

payment, perhaps the Motion to Dismiss would have been denied. A copy of Trautenberg v. Paul, Weiss, Rifkind et al., 2007 U.S. Dist. LEXIS 56222 (S.D.N.Y. Aug. 2, 2007) is provided below.

### **Oops – Can I Please Have That Document Back?**

In LaSalle Bank National Association v. Merrill Lynch Mortgage Lending, Inc., 2007 U.S. Dist. LEXIS 59301 (S.D.N.Y. Aug. 13, 2007), a copy of which is provided below, Merrill Lynch sought the return of documents inadvertently produced. Merrill Lynch's inadvertent production was discovered in the middle of a deposition of one of its employees. Merrill Lynch was found to have waived its privilege for a number of reasons, including having allowed its witness to answer questions about the purportedly privileged document. Although the document was identified in an earlier privilege log, the document itself was not marked as privileged. Additionally, Merrill Lynch waited one month from the deposition before attempting to retrieve its document.

### **Arbitration Award Vacated – Manifest Disregard of Law Related to Attorneys Fees**

In Porzig v. Dresdner, Kleinword et al., 2007 U.S. App. LEXIS 18674 (2<sup>nd</sup> Cir. Aug. 22, 2007), a copy of which is provided below, the Second Circuit vacated an arbitration award issued by three NASD arbitrators. Although the arbitrators found a violation in violation of federal law, the panel failed to follow the law and award statutory attorneys consistent with a lodestar formula. The arbitrators showed manifest disregard of the law by basing its attorney's fees award upon the contingency fee agreement between the plaintiff and his counsel. This case clearly illustrates the "arbitrary" nature of arbitrators and the unpredictability of the process.

**DAVID H. TRAUTENBERG, Plaintiff, - against - PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, BRAD S. KARP, and DANIEL J. TOAL, Defendants.**

**06 Civ. 14211 (GBD)**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK**

**2007 U.S. Dist. LEXIS 56222**

**August 2, 2007, Decided  
August 2, 2007, Filed**

**COUNSEL:** [\*1] For David Trautenberg, Plaintiff: Leo Kayser, III, LEAD ATTORNEY, Kayser & Redfern, LLP, New York, NY; John Michael Rediker, Haskell Slaughter Young & Rediker, LLC, Birmingham, AL.

For Paul, Weiss, Rifkind, Wharton & Garrison L.L.P., Brad S. Karp, Daniel J. Toal, Defendants: Robert A. Atkins, LEAD ATTORNEY, Paul, Weiss, Rifkind, Wharton & Garrison LLP (NY), New York, NY.

**JUDGES:** GEORGE B. DANIELS, United States District Judge.

**OPINION BY:** GEORGE B. DANIELS

**OPINION**

**MEMORANDUM DECISION AND ORDER**

GEORGE B. DANIELS, District Judge:

Plaintiff David H. Trautenberg sued defendants the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP, attorney Brad S. Karp, and attorney Daniel J. Toal (collectively "Paul Weiss"), for breach of fiduciary duty and violation of New York

Judiciary Law § 487. Paul Weiss moved to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim. The motion to dismiss is granted.

**COMPLAINT ALLEGATIONS**

1

1 Unless otherwise noted, the facts are taken from the Complaint and are presumed true for purposes of deciding Paul Weiss's motion to dismiss. See, e.g., Buckley v. Deloitte & Touche USA LLP, No. 06 Civ. 3291, 2007 U.S. Dist. LEXIS 37107, 2007 WL 1491403, \*4 (S.D.N.Y. May 22, 2007) ("In reviewing a motion to dismiss, [\*2] the court must treat all factual allegations in the complaint as true and must draw all reasonable inferences in favor of the non-moving party.") (citations omitted).

Plaintiff was a commissioned-based salesperson in, and co-head of, the Private Wealth Management Group of Solomon Smith Barney, <sup>2</sup> a wholly-owned subsidiary of Citigroup, Inc. In 2000, plaintiff had \$ 1,881,412,000 of assets under management and he earned \$ 17,537,698

in gross commissions for the Private Wealth Management Group. This ranked plaintiff second in gross commissions and ninth in assets under management within Solomon Smith Barney. That same year, plaintiff was promoted to Managing Director.

2 Solomon Smith Barney's name was later changed to Citigroup Global Markets, Inc. For ease of reference, however, this opinion will refer to this entity as Solomon Smith Barney.

In 2002, state and federal authorities began investigating certain practices at Solomon Smith Barney, including the alleged dissemination of fraudulent and misleading research reports, conflicts of interest between research analysts and investment banking business, and the allocation of shares in Initial Public Offerings to Citigroup's and Solomon Smith [\*3] Barney's investment banking clients, or "spinning." These investigations revealed that a then Managing Director of Solomon Smith Barney, who was also the preeminent analyst in the telecom industry, issued fraudulent research reports and manipulated the market to assist Citigroup in obtaining investment banking business from companies in the telecom industry.

As a result of these regulatory investigations, and the eventual bankruptcy of WorldCom, Inc., Citigroup and Solomon Smith Barney were named as defendants in many large civil litigations, including class action lawsuits and customer arbitrations, seeking billions of dollars in damages. Paul Weiss was Citigroup's lead counsel in these various investigations, litigations, and arbitrations.

Plaintiff was personally named as a defendant in two of the arbitrations initiated by individual clients of Solomon Smith Barney. He was represented in these

arbitrations by Kramer, Levin, Naftalis & Frankel LLP. Paul Weiss, however, requested that it also be permitted to jointly represent plaintiff while it was also representing Citigroup, which was a co-defendant in these arbitrations. Plaintiff's independent counsel from Kramer Levin raised concerns [\*4] with Brad Karp at Paul Weiss about Paul Weiss's ability to simultaneously represent Citigroup and plaintiff. Karp, on behalf of Paul Weiss, represented that Paul Weiss understood its obligation to act in the best interests of plaintiff. On that basis, plaintiff agreed to be represented by his own attorneys at Kramer Levin, and to Paul Weiss's joint representation of plaintiff and Citigroup. Plaintiff was also subpoenaed to be a witness in WorldCom's bankruptcy proceedings. According to plaintiff, defendant Toal, on behalf of Paul Weiss, "pleaded and virtually demanded that Paul Weiss be allowed to co-represent along with Kramer Levin Trautenberg, in his testimony in the WorldCom bankruptcy proceedings." Compl. P 30. Plaintiff again consented to the joint representation, and Toal was allowed to participate in privileged meetings with plaintiff to prepare for his testimony.

In June 2003, Citigroup informed plaintiff that it wished to negotiate the terms of a separation agreement and terminate plaintiff's employment. Plaintiff retained two new attorneys--one from the firm of Wechsler & Cohen LLP, and the other from Kronish, Lieb, Weiner & Hellman LLP--to represent him in the negotiations. [\*5] At this time, two in-house attorneys were leading the negotiations for Citigroup. At a January 14, 2004 meeting between Citigroup and plaintiff, one of Citigroup's in-house attorneys told plaintiff "that Paul Weiss had advised Citigroup/SSB 'not to pay Trautenberg a penny' on Trautenberg's employment

matter." Compl. P 42. This was the first time that plaintiff became aware of Paul Weiss's direct involvement in the employment negotiations on behalf of Citigroup.

According to plaintiff, Paul Weiss, without plaintiff's knowledge, began advising Citigroup in its negotiations with plaintiff in or about December 2003 or January 2004. Plaintiff claims that "Paul Weiss advised Citigroup/SSB not to pay or offer Trautenberg the amount Trautenberg was seeking in his separation negotiations." Compl. P 58. By late January or early February 2004, Karp and Paul Weiss began openly acting as lead negotiator for Citigroup. At the time, Paul Weiss was still jointly representing Citigroup and plaintiff in the arbitrations. Plaintiff alleges that "[a]t no time prior to undertaking to advise and represent Citigroup/SSB in connection with Trautenberg's employment matter did Karp or Paul Weiss ask to meet [\*6] with Trautenberg to explain and disclose the material facts and risks relating to Paul Weiss' conflict of interest in representing Citigroup/SSB against Trautenberg." Compl. P 46. Nor did "Karp or Paul Weiss obtain, or attempt to obtain Trautenberg's consent to Paul Weiss' direct conflict of interest." Id. at P 47.

Plaintiff and plaintiff's attorneys, however, were aware of Paul Weiss's dual role and its potential for conflict. On many occasions during the negotiations, plaintiff's attorneys told Paul Weiss that its representation of Citigroup against plaintiff was improper. On one such occasion, Karp responded by telling plaintiff's attorneys to "stop lecturing" him. Compl. P 49. In addition, during the legal preparation for the WorldCom bankruptcy litigation, plaintiff "continually objected to Defendants' representation of

Citigroup/SSB in connection with his employment matter and Defendants' conduct in 'holding him hostage' with respect to his employment matter until the completion of his WorldCom civil suit testimony." Id. at P 61. Despite these objections, Paul Weiss did not withdraw as counsel for Citigroup in the negotiations, nor did plaintiff or his attorneys take any action [\*7] to force Paul Weiss to withdraw from the negotiations or discontinue their dual representation in the other proceedings.

Plaintiff and Citigroup ultimately entered into a negotiated Separation Agreement, dated August 16, 2004, pursuant to which plaintiff received a \$ 5 million separation payment. More than two years later, on December 6, 2006, plaintiff filed this lawsuit asserting claims for breach of fiduciary duty and violation of New York Judiciary Law § 487. He claims that as a result of Paul Weiss's breach of fiduciary duty, plaintiff's "bargaining position . . . was compromised to such a degree that he was compelled to accept a separation agreement . . . at millions of dollars in value below what he could have otherwise obtained but for Defendants' wrongdoing." Compl. § 8. Plaintiff claims damages in the amount of \$ 20 million, the difference, he alleges, between a \$ 25 million separation payment he "would have been able to have attained" had Paul Weiss not breached its fiduciary duty, and the \$ 5 million he was forced to settle for and actually received. Id. at 70. He also seeks disgorgement of all the fees Paul Weiss earned in representing, and paid by, Citigroup in plaintiff's [\*8] employment matter, and an injunction preventing Paul Weiss from ever representing Citigroup against plaintiff again. Finally, plaintiff seeks treble compensatory damages pursuant to New York Judiciary Law § 487.

When considering a motion to dismiss under Rule 12(b)(6), the Court must "accept[] as true the factual allegations in the complaint and draw[] all inferences in the plaintiff's favor." *Allaire Corp. v. Okumus*, 433 F.3d 248, 249-50 (2d Cir.2006) (citations omitted). The complaint "does not need detailed factual allegations," yet it "requires more than labels and conclusions, and a formalistic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, U.S. , 127 S.Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007) (citations omitted). Rather, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 1965 (citation omitted).

### **BREACH OF FIDUCIARY DUTY**

To state a claim for breach of fiduciary duty in New York, plaintiff must sufficiently allege "(1) the existence of a fiduciary relationship; (2) knowing breach of a duty that relationship imposes; and (3) damages suffered." [\*9] *Nay ex rel. Thiele v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 05 Civ. 10264, 2006 U.S. Dist. LEXIS 52074, 2006 WL 2109467, \*6 (S.D.N.Y. July 25, 2006) (citation omitted). And to recover damages, he "must do more than make allegations of unscrupulous acts." *Greenberg v. Joffe*, 34 A.D.3d 426, 824 N.Y.S.2d 355, 356 (N.Y.App.Div. 2d Dep't 2006) (citation omitted). Rather, plaintiff "must, at a minimum, establish that [Paul Weiss's] actions were 'a substantial factor' in causing an identifiable loss." *Id.* (citation omitted). This requires allegations that, if true, demonstrate "that 'but for' the attorney's conduct the client would have prevailed in the underlying matter or would not have sustained any ascertainable damages." *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 780 N.Y.S.2d 593, 596

(N.Y.App.Div. 1st Dep't 2004) (citations omitted).

Here, the crux of plaintiff's breach-of-fiduciary-duty claim is that Paul Weiss violated New York's ethical rules by representing Citigroup in an action adverse to him and without his consent: "The Defendants had an affirmative obligation under the New York Lawyers Code of Professional Responsibility (the "Code") DR-5-101(A) and DR 5-105, and a legal obligation pursuant to their fiduciary duty and duty of loyalty [\*10] owed to Trautenberg, to decline and to discontinue representing Citigroup/SSB in connection with Trautenberg's employment matter." Compl. P 57. But even if Paul Weiss's conduct were determined to be a violation of New York's ethical rules for attorneys, it is well-established that the violation of a disciplinary rule, without more, does not establish a claim for breach of fiduciary duty. See *Schwartz v. Olshan Grundman Frome & Rosenzweig*, 302 A.D.2d 193, 753 N.Y.S.2d 482, 487 (N.Y.App.Div. 1st Dep't 2003); *Agron v. Douglas W. Dunham, Esq. & Associates*, No. 02 Civ. 10071, 2004 U.S. Dist. LEXIS 5412, 2004 WL 691682, \*6 (S.D.N.Y. March 31, 2004).

Plaintiff argues, however, that "the complaint avers far more than a mere technical violation of a disciplinary rule." Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss ("Opp. Brief") at 11. For example, plaintiff alleges that during the course of Paul Weiss's representation of plaintiff in the arbitrations, Paul Weiss obtained confidential information about plaintiff's employment, and about "potential claims" that plaintiff might have against Citigroup, that it later used against plaintiff in the negotiations. Compl. PP 32, 59, 64. Plaintiff fails to articulate [\*11] what or how privileged information was misused by Paul

Weiss. He merely alleges that "using information regarding Trautenberg's employment which Paul Weiss had obtained from Trautenberg, Paul Weiss evaluated Trautenberg's various claims and advised Citigroup/SSB regarding these claims directly contrary to Trautenberg's best interest." Compl. P 59. He alleges no information that would not have already have been known by or accessible to Citigroup, plaintiff's employer. Nor does he allege that there was any legitimate expectation that any information provided to Paul Weiss during the joint representation would not have been disclosed to Citigroup, irrespective of who served as its attorneys during the employment negotiations.<sup>3</sup> Moreover, plaintiff does not even attempt to allege that he did not agree to Paul Weiss' dual representation, or that he refused to negotiate, after independently consulting with his own counsel.

3 Since Paul Weiss was jointly representing Citigroup and plaintiff in the arbitrations, plaintiff had no reasonable expectation that any information Paul Weiss learned from him would not be shared with Citigroup. See, e.g., *Rocchigiani v. World Boxing Counsel*, 82 F.Supp.2d 182, 187-88 (S.D.N.Y. 2000) [\*12] (stating that one "client could not reasonably expect confidences imparted to the attorney during the course of the joint representation to be withheld from the other client") (citation omitted); *Tekni-Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123, 674 N.E.2d 663, 670, 651 N.Y.S.2d 954 (1996) ("Generally, where the same lawyer jointly represents two clients with respect to the same matter, the clients have no expectation that their confidences concerning the joint

matter will remain secret from each other, and those confidential communications are not within the privilege in subsequent adverse proceedings between the co-clients.") (citation omitted).

Plaintiff also alleges that Paul Weiss advised Citigroup "to slow down and drag out the negotiation process" so that Paul Weiss "could maintain 'control' over Trautenberg as a witness," and that Paul Weiss was "holding him hostage" until the completion of his WorldCom testimony. *Id.* at PP 60-61. However, the Complaint contains no factual assertions regarding how Paul Weiss "drag[ged] out the negotiations" or held plaintiff "hostage." Nor is there any particular allegation to support an inference that such delay forced plaintiff to agree to accept a \$ 5 million separation [\*13] agreement which provided him \$ 20 million less than he believed he was entitled.<sup>4</sup> Plaintiff's conclusory allegations are simply insufficient to state a claim, even under Rule 12(b)(6)'s liberal pleading standards. See, e.g., *Dow Jones & Co., Inc. v. Int'l Sec. Exch., Inc.*, 451 F.3d 295, 307 (2d Cir. 2006) (stating that a complaint that "consists of conclusory allegations unsupported by factual assertions . . . fails even the liberal standard of Rule 12(b)(6)") (citations and internal quotation marks omitted).

4 Plaintiff bases his claim on the conclusory and speculative allegation that "As a result of Defendants' breach of fiduciary duty, Trautenberg's bargaining position with SSB was compromised to such a degree that he was compelled to accept a separation agreement with SSB, also Defendants' client, at millions of dollars in value below what he could have obtained but for

Defendants' wrongdoing." Compl. P 8.

Even if plaintiff's factual assertions were sufficient to support an allegation that Paul Weiss breached its fiduciary duty, he has not adequately alleged that this breach caused his damages--*i.e.*, "that 'but for' [Paul Weiss's] conduct [plaintiff] . . . would not have sustained [\*14] any ascertainable damages." Fashion Boutique of Short Hills, 780 N.Y.S.2d at 596. Nowhere in the complaint does plaintiff make the "but for" connection between Paul Weiss's conduct and his claim of a "loss" of \$ 20 million. Indeed, plaintiff does not even allege that Citigroup ever offered him, or even considered offering him, a \$ 25 million severance. Instead, plaintiff merely alleges that "the value of the book of business developed and generated by Trautenberg was in excess of \$ 25 million." Compl. ¶ 65. He contends that because he left his book of business with Citigroup upon his departure, he should have received--and believes he could have otherwise negotiated, absent Paul Weiss's participation--at least a \$ 25 million severance payment. That contention is purely speculative. He merely contends that Paul Weiss's dual representation "served to strengthen Citigroup/SSB's and weaken Trautenberg's respective relative negotiating stances . . . ." Compl. P 63. These allegations cannot support a conclusion that Paul Weiss's conduct prevented plaintiff from receiving what he could have reasonably anticipated would have been a \$ 25 million severance payment, if Citigroup had access to [\*15] the same information but was represented by different lawyers. <sup>5</sup> As plaintiff has not alleged a breach of fiduciary duty on the part of Paul Weiss that was the "but for" cause of damages plaintiff alleges to have suffered, this claim is dismissed.

5 It must be emphasized that plaintiff had independent counsel who negotiated on his behalf and presumably advised him to accept the terms of the settlement agreement and a five million dollar severance payment, instead of refusing to negotiate, or pursuing legal action prior to agreeing to accept what he now considers an inadequate amount.

### **NEW YORK JUDICIARY LAW § 487**

Plaintiff also asserts a claim under § 487 of the New York Judiciary Law. That section permits an aggrieved party to recover treble damages in a civil action against an attorney that "[i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party." N.Y. Judiciary Law § 487 (2005). <sup>6</sup>

6 Paul Weiss contends that a "chronic and extreme pattern of legal delinquency" is a prerequisite to liability under this section. There is some support for this position. See, e.g., Schindler v. Issler & Schrange, P.C., 262 A.D.2d 226, 692 N.Y.S.2d 361, 362 (N.Y.App.Div. 1st Dep't 1999) [\*16] (stating that under § 487, "civil relief and the imposition of treble damages is warranted only where the defendant attorney has 'engaged in a chronic, extreme pattern of legal delinquency.'" (citations omitted). But other courts have held that such a pattern of behavior is not required, and that "[a] single act or decision, if sufficiently egregious and accompanied by an intent to deceive, is sufficient to support liability." Trepel v. Dippold, No. 04 Civ. 8310, 2005 U.S. Dist. LEXIS 8541, 2005 WL 1107010, \*4

(S.D.N.Y. May 9, 2005) (citations omitted); see also *Izko Sportswear Co., Inc. v. Flaum*, 25 A.D.3d 534, 809 N.Y.S.2d 119, 122 (N.Y.App.Div. 2d Dep't 2006) ("A violation of Judiciary Law § 487 may be established 'either by defendant's alleged deceit or by an alleged chronic, extreme pattern of legal delinquency by the defendant.'") (citations omitted) (emphasis in the original). This Court need not further address this split of authority, however, because, as is discussed in more detail below, plaintiff has insufficiently alleged a deceptive act on the part of Paul Weiss to support liability under § 487.

For § 487 to apply, however, the deceit must be of a party to a lawsuit in the course of a pending judicial proceeding. [\*17] See, e.g., *Gelmin v. Quicke*, 224 A.D.2d 481, 638 N.Y.S.2d 132, 134 (N.Y.App.Div. 2d Dep't 1996) (stating that the "party" referred to in § 487 is "clearly a party to an action pending in a court in reference to which the deceit is practiced, and not a person outside, not connected with the same at the time or with the court") (quoting *Looff v. Lawton*, 97 N.Y. 478, 482 (1884)); *O'Brien v. Alexander*, 898 F.Supp. 162, 168-69 (S.D.N.Y. 1995) (dismissing a § 487 claim "[s]ince no lawsuit was pending when the alleged representations in question were made," and because "section 487 by its terms applies only to statements made to the court or any party to a lawsuit").

Here, Paul Weiss allegedly deceived plaintiff in December, 2003, by initially failing to inform him of its representation of Citigroup in connection with negotiating the Separation Agreement. Clearly, negotiations between an employer and an employee over the terms of a separation

agreement is not a judicial proceeding, and this claim can be dismissed on that ground alone.<sup>7</sup>

7 In his opposition brief, plaintiff argues that this requirement is satisfied because the alleged deceit "occurred in the context of actual, then-pending arbitration and legal [\*18] proceedings." Opp. Brief at 19. Specifically, plaintiff maintains that Paul Weiss deceived plaintiff about its representation of Citigroup in the employment matter while the firm was representing plaintiff in the arbitrations. But even if Paul Weiss had intentionally concealed its role from plaintiff, this "deceit" would have nothing to do with the arbitration proceedings, and there are no allegations that Paul Weiss acted in any way other than in the best interest of plaintiff in those arbitrations. In fact, Paul Weiss helped plaintiff achieve victory in both of the arbitrations in which it jointly defended plaintiff. See *McWilliam v. Citigroup Global Markets, Inc.*, NASD Case No. 03-03452 (Order of the Panel 5/18/2005) (dismissing claims against Trautenberg) (Ex. C to the Affidavit of Robert A. Atkins ("Atkins Aff.")); *Shagen v. Solomon Smith Barney Holdings, Inc.*, AAA Case No. 13 169 00799 03 (final arbitration award denying in their entirety the claims against defendants, including Trautenberg) (Atkins Aff. Ex. D). Additionally, in the Shagen arbitration, the arbitration panel, at Paul Weiss's request, expunged the arbitration from plaintiff's records. *Shagen*, AAA Case No. 13 169 [\*19] 00799 03 at p.30.

Even if an alleged concealment had occurred in a pending lawsuit, however,

there are no allegations in the Complaint that would support a finding that Paul Weiss engaged in conduct intended to deceive plaintiff. See, e.g., Trepel, 2005 U.S. Dist. LEXIS 8541, 2005 WL 1107010 at \*4 (stating that an act must be "sufficiently egregious and accompanied by an intent to deceive" to be actionable under § 487) (emphasis added); Jaroslawicz v. Cohen, 12 A.D.3d 160, 783 N.Y.S.2d 467 (N.Y.App.Div. 1st Dep't 2004) (affirming dismissal of a § 487 claim because plaintiff failed to allege that defendant acted with intent to deceive). Indeed, by at least January 2004, plaintiff knew of Paul Weiss's involvement in the negotiations, and, by late January or early February 2004, that Karp was openly acting as Citigroup's lead negotiator. Compl. PP 44-46. During the subsequent months of open negotiations, plaintiff and his attorneys were fully aware of Paul Weiss's role prior to his agreement to settle and accept a \$ 5 million payment. Plaintiff is a well-educated, sophisticated businessman who was represented by two of his own, very competent attorneys during the year-long negotiations. Even before Paul Weiss took a lead settlement

[\*20] role, plaintiff knew that Paul Weiss was Citigroup's attorney, and that it would be under no obligation to withhold any information shared during their joint representation. Thus, plaintiff cannot now seriously claim that Paul Weiss engaged in deceptive conduct during the negotiations, or that he was in fact deceived into settling, to his twenty-million-dollar detriment.

Accordingly, plaintiff cannot state a claim under New York Judiciary Law § 487.

### CONCLUSION

Plaintiff has not stated a claim for breach of fiduciary duty, or for breach of New York Judiciary Law § 487. Therefore, the motion to dismiss the Complaint is GRANTED. This case is DISMISSED.

Dated: New York, New York

August 2, 2007

SO ORDERED:

GEORGE B. DANIELS

United States District Judge

**LASALLE BANK NATIONAL ASSOCIATION,  
TRUSTEE FOR CERTIFICATEHOLDERS OF  
COMMERCIAL MORTGAGE PASS-THROUGH  
CERTIFICATES, SERIES 2002-MWI, BY AND  
THROUGH GMAC COMMERCIAL MORTGAGE  
CORPORATION AS SPECIAL SERVICER, Plaintiff,  
v. MERRILL LYNCH MORTGAGE LENDING,  
INC., Defendant.**

**04 Civ. 5452 (PKL)**

**UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK**

**2007 U.S. Dist. LEXIS 59301**

**August 13, 2007, Decided**  
**August 13, 2007, Filed**

**CORE TERMS:** disclosure, inadvertent, attorney-client, discovery, questioning, disclosing, deposition, waived, inadvertently, weigh, confidential, privileged, precaution, mortgage, privileged documents, weighed, rectify, e-mail, inter alia, fundamental fairness, nondispositive, reasonableness, requesting, definite, severely, weighing, smoking, label, log, gun

**COUNSEL:** Attorneys for Plaintiff: Charles D. Riely, Esq., AKIN GUMP STRAUSS HAUER & FELD LLP, New York, New York; Talcott J. Franklin, Esq., Cole A. Wist, Esq., Nicola M. Shiels, Esq., PATTON BOGGS LLP, Dallas, Texas.

Attorneys for Defendant: Mark S. Landman, Esq., LANDMAN CORSI BALLAINE & FORD P.C., New York, New York; Daniel J. Flanigan, Esq., Paul D. Snyder, Esq., Amy E. Hatch, Esq., POLSINELLI SHALTON WELTE SUELTHAUS PC, Kansas City, Missouri.

**JUDGES:** Peter K. Leisure, U.S.D.J.

**OPINION BY:** Peter K. Leisure

## **OPINION**

### ***OPINION AND ORDER***

#### ***LEISURE, District Judge:***

Defendant Merrill Lynch Mortgage Lending, Inc. ("Merrill") previously moved the Court for a protective order seeking the return of a draft letter (the "Draft Letter") that was inadvertently disclosed to plaintiff LaSalle Bank National Association, Trustee for Certificateholders of Commercial Mortgage Pass-Through Certificates, Series 2002-MWI, by and through GMAC Commercial Mortgage Corporation as Special Servicer ("LaSalle") during discovery. Merrill claims the Draft Letter is either subject to an attorney-client or attorney work product privilege. United States Magistrate Judge Frank Maas denied defendant's motion in an oral ruling on September 20, 2005. Merrill now objects to Magistrate Judge Maas's ruling pursuant to Federal Rule of Civil Procedure 72(a). For the reasons that follow, Merrill's objection is DENIED.

## **BACKGROUND**

### *I. The Relevant Factual History*

*A. The Inadvertent Disclosure of the Draft Letter*

This breach-of-contract action concerns Merrill's sale of a certain commercial real estate mortgage loan into a pool of similar loans in connection with a commercial mortgage-backed securities offering. In short, plaintiff alleges Merrill breached a number of express warranties in a Mortgage Loan Purchase Agreement and a Pooling and Service Agreement that governed the sale of the loan. <sup>1</sup>

<sup>1</sup> The full factual history of this matter is set forth at length in an Opinion and Order disposing of the parties' cross-motions for summary judgment that is being issued concurrently with this Opinion and Order.

Plaintiff served its First Request for Production of Documents on Merrill on November 15, 2004, and Merrill in turn served its Responses to the First Document Requests on December 22, 2004. (Def.'s Mem. Supp. Objections 2.) Thereafter, between January and May 2005, Merrill produced over 15,000 pages of documents to plaintiff. Merrill withheld from that initial production approximately 2,500 pages of documents that it believed to be subject to an attorney-client privilege. It accordingly served plaintiff with a privilege log identifying the purportedly privileged documents. (Def.'s Mem. Supp. Objections 2.)

Included among the documents withheld by Merrill were the Draft Letter and an accompanying cover e-mail written by Merrill's in-house counsel to David Wolin, Esq., Merrill's outside counsel at the Baker & McKenzie law firm. (Def.'s Mem. Supp. Objections 2.) The Draft Letter, which Merrill alleges was prepared some time in 2003, was addressed to Wachovia Securities ("Wachovia") and concerned Wachovia's servicing of the loan at the center of this dispute. (Def.'s Mem. Supp. Objections 2-3.) The Draft Letter addressed one of the issues being contested in this action. The Draft Letter lacked a signature block. (Def.'s Mem. Supp. Objections 3.)

Plaintiff served its Second Request for Production of Documents on Merrill on June 24, 2005, and Merrill responded on or about July 31, 2005, with a production of 20,000 pages of documents. (Def.'s Mem. Supp. Objections 3; Pl.'s Mem. Opp'n Objections 2.) While Merrill excluded from this production approximately 2,500 pages of documents on the ground that they were subject to an attorney-client privilege, included was a copy of the Draft Letter without its accompanying cover e-mail. (Def.'s Mem. Supp. Objections 3.)

On August 16, 2005, plaintiff deposed a Merrill employee named David Rodgers. During Mr. Rodgers's deposition, plaintiff introduced the Draft Letter as an exhibit and a source of questioning for Mr. Rodgers. After reviewing the Draft Letter and conferring with Rodgers, Merrill's counsel stated that it was "possibly an attorney/client communication," and then confirmed that it was a draft letter sent by Rodgers to outside counsel that, as such, "would, of course, be an attorney/client communication." (Rodgers Dep. 128:20-129:23.) Merrill's counsel then permitted the questioning of Rodgers with respect to the Draft Letter with the caveat that Merrill's "inadvertent production" of the letter "can't be deemed as some general waiver of the attorney/client privilege." (Rodgers Dep. 129:24-130:13.) He went on to state a number of additional times that Merrill did

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not intend to allow, nor did the inadvertent production of the letter serve as, a general waiver of the attorney-client privilege Merrill had with Baker & McKenzie. (Rodgers Dep. 130:14-132:22.) The parties' counsel agreed that plaintiff did not intend to question Rodgers as to the attorney-client communications associated with the document and questioning then resumed. (Rodgers Dep. 131:22-132:3.)

On September 16, 2005, Merrill received plaintiff's supplemental document production, which contained, *inter alia*, an e-mail written by plaintiff's expert to plaintiff's counsel in which the former characterized the Draft Letter as "about as close to a smoking gun as one ever finds." (Riely Decl. Ex. D.) That day, Merrill's counsel wrote to plaintiff's counsel, requesting that the Draft Letter be returned. (Def.'s Mem. Supp. Objections 6-7.) When plaintiff declined, defense counsel contacted the Court in writing to request the Court to order the plaintiff's return of the document; plaintiff objected in writing to the Court the following day. (Def.'s Mem. Supp. Objections 7.)

### *B. Magistrate Judge Maas's Ruling*

Given defendant's request for an expedited hearing on its request for a protective order relating to the Draft Letter, Magistrate Judge Maas held a telephonic hearing on September 20, 2005. During the hearing, plaintiff argued that defendant had failed to establish that the Draft Letter was in fact an attorney-client communication subject to a privilege, and that, even assuming defendant had made such a showing of privilege, the privilege was waived. (Hr'g Tr. 13:8-16:21, Sept. 20, 2005.) Defendant argued generally that the Draft Letter was subject to the attorney-client privilege, and that there had been no inadvertent waiver. (Hr'g Tr. 2:25-3:17, 4:4-14, 4:23-6:14, 7:1-8:17.)

Magistrate Judge Maas ruled orally that, notwithstanding the question whether the Draft Letter was in fact subject to an attorney-client privilege, "it seems to me the colloquy at the deposition of Mr. Ro[d]gers and the specific questioning that was allowed does amount to a waiver with respect to this document." (Hr'g Tr. 23:3-5.) Magistrate Judge Maas acknowledged that this action is a document-intensive one and that he understood how the Draft Letter could have been inadvertently produced, particularly because the letter uses the words "we" and "us," thus lulling one into the belief that it was drafted by someone at Merrill and not outside counsel. (Hr'g Tr. 23:6-13.)

However, when the disclosure of the document was made apparent on August 16, 2005, defendant had "a duty to act promptly to seek the return of the document if indeed the privilege wasn't waived by the questioning at the deposition." (Hr'g Tr. 23:15-18.) Most important, the Court found that because defendant waited one full month after learning of disclosure to retrieve the document (ostensibly because plaintiff's expert had just referred to the document as a "smoking gun" that same day), such inaction warranted a finding of waiver. (Hr'g Tr. 23:18-25.)

As for defendant's argument that fundamental fairness weighed in favor of finding no waiver, the Court balanced the prejudice to defendant with the prejudice inflicted upon plaintiff: plaintiff's counsel had relied on the document on the record to direct its lines of questioning in various depositions. (Hr'g Tr. 24:1-12.) Magistrate Judge Maas then denied defendant's application, making no finding as to any argument that a broader

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subject matter waiver had been made. (Hr'g Tr. 24:19-25.)

## DISCUSSION

### I. *Standard of Review*

Federal Rule of Civil Procedure 72(a) provides as follows:

Within 10 days after being served with a copy of the magistrate judge's order [on a nondispositive matter], a party may serve and file objections to the order . . . . The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.

Fed. R. Civ. P. 72(a); *see* 21 U.S.C. § 636(b)(1)(A) (2000) ("A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law."); *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 525 (2d Cir. 1990) (stating nondispositive matters are "reviewable by the district court under the 'clearly erroneous or contrary to law' standard"). Merrill timely served and filed its objections on September 28, 2005. Plaintiff does not dispute this fact. A district court is justified in finding a magistrate judge's finding "clearly erroneous" where, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Labarge v. Chase Manhattan Bank*, No. 95 Civ. 173, 1997 WL 583122, at \*1 (N.D.N.Y. Sept. 3, 1997) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)); *accord Am. Rock Salt Co., LLC v. Norfolk S. Corp.*, 371 F. Supp. 2d 358, 360 (W.D.N.Y. 2005) ("[R]eversal is warranted only if the reviewing court is 'left with the definite and firm conviction that a mistake has been committed.'" (quoting *Easley v. Cromartie*, 532 U.S. 234, 242 (2001))); *United Parcel Serv. of Am., Inc. v. The Net, Inc.*, 222 F.R.D. 69, 70-71 (E.D.N.Y. 2004) ("An order is 'clearly erroneous' only when 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" (quoting *Thompson v. Keane*, No. 95 Civ. 2442, 1996 WL 229887, at \*1 (S.D.N.Y. May 6, 1996))). Consequently, "parties seeking to overturn the Magistrate's discovery rulings 'bear a heavy burden.'" *Citicorp v. Interbank Card Ass'n*, 87 F.R.D. 43, 46 (S.D.N.Y. 1980); *accord Com-Tech Assocs. v. Computer Assocs. Int'l, Inc.*, 753 F. Supp. 1078, 1099 (E.D.N.Y. 1990) (same); 12 Charles Alan Wright et al., *Federal Practice and Procedure* § 3069, at 350-51 (2d ed. 1997) ("[I]t is extremely difficult to justify alteration of the magistrate judge's nondispositive actions by the district judge.").

Given such a highly deferential standard of review, magistrate judges are afforded broad discretion and "reversal is appropriate only if that discretion is abused." *Standard Forex*, 882 F. Supp. at 42; *accord Doe v. Marsh*, 899 F. Supp. 933, 934 (N.D.N.Y. 1995) (stating abuse-of-discretion standard applies). The Court now turns to the applicable

substantive standards.

## II. *Inadvertent Disclosure*

In this district, the inadvertent producer of a privileged document during discovery "may demonstrate, in appropriate circumstances, that such production does not constitute a waiver of the privilege or work-product immunity and that it is entitled to the return of the mistakenly produced documents." 2 *Lava Trading, Inc. v. Hartford Fire Ins. Co.*, No. 03 Civ. 7037, 2005 WL 66892, at \*2 (S.D.N.Y. Jan. 11, 2005); accord *United States v. Rigas*, 281 F. Supp. 2d 733, 738 (S.D.N.Y. 2003) (same). Courts balance the following four factors in assessing such a demonstration: (1) the reasonableness of the precautions taken by the disclosing party to prevent inadvertent disclosures; (2) the length of time taken by the disclosing party to redress or cure the error; (3) the size of the disclosure relative to the entire volume of discovery involved; and (4) the overarching issue of fundamental fairness and protection of the privilege. *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985); accord *MSF Holding, Ltd. v. Fiduciary Trust Co. Int'l*, No. 03 Civ. 1818, 2005 WL 3338510, at \*1 (S.D.N.Y. Dec. 7, 2005) (stating and applying the *Lois* factors); *Rigas*, 281 F. Supp. 2d at 738 (same).

2 This "middle-of-the-road" approach lies between, on the one hand, a lenient approach in which waiver is found only where the disclosing party intended to do so, and, on the other hand, a strict approach in which an inadvertently disclosed document is deemed waived regardless of intent. See, e.g., *In re Natural Gas Commodity Litig.*, 229 F.R.G. 82, 86 n.6 (S.D.N.Y. 2005); *United States v. Rigas*, 281 F. Supp. 2d 733, 737 (S.D.N.Y. 2003). See generally 3 Margaret A. Berger & Jack B. Weinstein, *Weinstein's Federal Evidence* § 503.42[4] (Joseph M. McLaughlin ed., 2d ed. 2005).

## III. *Application of the Lois Factors to Defendant's Arguments*

### A. *The Reasonableness of Precautions Taken*

The first *Lois* factor -- the reasonableness of the precautions taken to prevent inadvertent disclosure -- weighs in favor of finding waiver. Here, defendant claims it conducted a page-by-page review of its document disclosures by one of two attorneys, resulting in the retention of approximately 2,500 privileged documents in each of two document disclosures. (Def.'s Mem. Supp. Objections 2-3.) While such a measure normally weighs against a finding of waiver, see, e.g., *In re Natural Gas Commodity Litig.*, 229 F.R.D. 82, 86-87 (S.D.N.Y. 2005), it is severely undercut, as Magistrate Judge Maas noted, by the absence of another entirely fundamental precaution, to wit, the failure to notate the subject document with any sign of its attorney-client or attorney work product nature. Courts have frequently found that a disclosing party's failure to include a legend or other notation identifying the document as an attorney-client communication or one prepared in anticipation of litigation. weighs toward a finding of waiver, see, e.g., *MSF Holding, Ltd.*, 2005 WL 3338510, at \*2 (holding that failure to include an attorney-

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client privilege legend in inadvertently disclosed e-mail communications weighed in favor of a finding of waiver under the first *Lois* factor); *Atronic Int'l, GMBH v. SAI Semispecialists of Am., Inc.*, 232 F.R.D. 160, 164 (E.D.N.Y. 2005) (holding that first *Lois* factor weighed in favor of dismissal where "counsel failed to label the documents 'confidential' or 'privileged' so as to put others on notice of their privileged nature"); *Spanierman Gallery, Profit Sharing Plan v. Merritt*, No. 00 Civ. 5712, 2003 WL 22909160, at \*3 (S.D.N.Y. Dec. 9, 2003) (finding waiver of privilege where subject documents "were not labeled 'confidential' or 'privileged'"); *Local 851 of Int'l Brotherhood of Teamsters v. Kuehne & Nagel Air Freight, Inc.*, 36 F. Supp. 2d 127, 132 (E.D.N.Y. 1998) (weighing the first *Lois* factor in favor of a finding of waiver where, "[m]ost notably, defendants' counsel failed to label the Letter as confidential or to employ a procedure for separating confidential communications from non-privileged material"); *United States v. Gangi*, 1 F. Supp. 2d 256, 265 (S.D.N.Y. 1998) (finding precautions to be unreasonable where, *inter alia*, "[t]he Government did not label the Prosecution Memorandum 'confidential,' 'privileged,' or 'work product'").

Additionally, while the Court recognizes that where an inadvertently disclosed document appears in a privilege log given to the disclosing party's adversary, the disclosing party's adversary is essentially on notice that the production of a document in the log was likely inadvertent, *see Liz Claiborne, Inc.*, 1996 WL 668862, at \*4, the Court finds that the force of this proposition is severely weakened where, as here, the disclosing party allows deposition questioning as to the contents of the document and thereafter fails to request the document's return.

#### B. Time Taken to Rectify an Inadvertent Disclosure

Magistrate Judge Maas correctly placed great weight on Merrill's failures with respect to the second *Lois* factor -- viz., the promptness of efforts undertaken to rectify the error. *See generally* 3 Margaret A. Berger & Jack B. Weinstein, *Weinstein's Federal Evidence* § 503.42[4] (Joseph M. McLaughlin ed., 2d ed. 2005) ("In applying these factors, the courts give great significance to the promptness of measures taken to rectify the disclosure. If the attorneys themselves have done little to repair the damage caused by their own mistake, courts feel little obligation to intervene."). While an inadvertent disclosure may be remedied where the privilege is immediately asserted upon discovery of the disclosure, and a "prompt request" is made for the return of the document(s), *Liz Claiborne, Inc. v. Mademoiselle Knitwear, Inc.*, No. 96 Civ. 2064, 1996 WL 668862, at \*5 (S.D.N.Y. Nov. 19, 1996), courts faced with less-than-prompt return requests, as is the case here, weigh such delay in favor of a finding of waiver, *see, e.g., SEC v. Cassano*, 189 F.R.D. 83, 86 (S.D.N.Y. 1999) ("Although the SEC acted promptly once it determined that the document had been produced, a factor cutting in its favor, the time taken to rectify the error, in all the circumstances, was excessive. There was no excuse for waiting 12 days to find out what the document was."); *Liz Claiborne, Inc.*, 1996 WL 668862, at \*5 ("Plaintiffs' counsel waited a month before requesting that Mademoiselle return the Privileged Notes. Plaintiffs' delay in requesting the return of the privileged documents supports a finding of waiver.").

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This is not a case in which defense counsel acted in a prompt fashion -- i.e., within a day or two -- as to warrant a finding of no waiver. *See, e.g., United States v. Rigas*, 281 F. Supp. 2d 733, 741 (S.D.N.Y. 2003) (weighing timeliness factor in favor of disclosing party where, *inter alia*, it contacted its adversary the same day of disclosure to demand document's return); *Prescient Partners, L.P. v. Fieldcrest Cannon, Inc.*, No. 96 Civ. 7590, 1997 WL 736726, at \*6 (S.D.N.Y. Nov. 26, 1997) ("No inordinate delay occurred in this case because Prescient's counsel wrote defendants' counsel the day after learning of the error to demand return of the documents."); *Georgia-Pacific Corp. v. GAF Roofing Mfg. Co.*, No. 93 Civ. 5125, 1995 WL 117871, at \*2 (S.D.N.Y. Mar. 20, 1995) ("Nor did GAF's counsel's delay in asserting the privilege constitute a waiver of the privilege. Mr. Kneller acted within two business days after discovery of his inadvertence.").

### C. Scope of Discovery

The third *Lois* factor -- the size of the inadvertent disclosure relative to the entire volume of discovery involved -- does not weigh in favor of a finding of waiver, nor did Magistrate Judge Maas attribute such weight to this factor. The Draft Letter is four pages long, while Merrill produced approximately 40,000 pages of documents to plaintiff during discovery. Courts have found that inadvertent disclosures of similar proportion do not compel a finding that a privilege has been waived. *See, e.g., Prescient Partners, L.P.*, 1997 WL 736726, at \*6 ("Courts have routinely found that where a large number of documents are involved, there is more likely to be an inadvertent disclosure rather than a knowing waiver." (quoting *Baker's Aid v. Hussmann Foodservice Co.*, No. 87 Civ. 0937, 1988 WL 138254, at \*5 (E.D.N.Y. Dec. 19, 1988))); *Martin v. Valley Nat'l Bank of Ariz.*, No. 89 Civ. 8361, 1992 WL 196798, at \*4 (S.D.N.Y. Aug. 6, 1992) (finding that the third *Lois* factor did not weigh in favor of waiver where five documents were inadvertently disclosed out of a total of more than 50,000 pages of documents produced in discovery).

### D. Overarching Issues of Fundamental Fairness

Finally, while Magistrate Judge Maas weighed the inevitable prejudice to Merrill in finding that any privilege as to the Draft Letter had been waived, he also rightly recognized the converse prejudice to plaintiff if the inadvertent disclosure were found to not serve as a waiver. Plaintiff directed its discovery efforts and, more specifically, its lines of questioning in depositions, based on the existence of the Draft Letter in the record. <sup>3</sup> Moreover, the Court adds that defendant's rather significant delay in even addressing the inadvertent disclosure which, whether causally or not, followed plaintiff's expert's "smoking gun" statement, severely undermines its contention that it has been unfairly prejudiced. *See Lava Trading, Inc. v. Hartford Fire Ins. Co.*, No. 03 Civ. 7037, 2005 ML 66892, at \*3 (S.D.N.Y. Jan. 11, 1995) ("Furthermore, Hartford's delay undercuts any contention by defendant that fairness compels the return of the unredacted documents."). Magistrate Judge Maas did not abuse his discretion in weighing this factor and in holding that any asserted privilege had been waived. *See, e.g., Commodity Futures Trading Comm'n v. Standard Forex, Inc.*, 882 F. Supp. 40, 42 (E.D.N.Y. 1995).

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3 Magistrate Judge Maas stated that "because [plaintiff's counsel] was allowed to question about the [Draft Letter] and because those questions are part of the record[,] LaSalle has foregone asking questions at certain depositions." (Hr'g Tr. 24:9-12.)

### **CONCLUSION**

For the foregoing reasons, defendant's objection to Magistrate Judge Maas's ruling that any privilege asserted as to the Draft Letter had been waived by its inadvertent disclosure to plaintiff is DENIED. Magistrate Judge Maas's ruling was neither clearly erroneous nor contrary to law. The Court reaffirms Magistrate Judge Maas's finding that the waiver was specific to any privilege concerning the Draft Letter; there is no finding that a more general waiver was made.

### **SO ORDERED.**

**New York, New York**

August 13, 2007

Peter K. Leisure

U.S.D.J.

**BERNHARD B. PORZIG, Plaintiff-Appellant, -v.- DRESDNER,  
KLEINWORT, BENSON, NORTH AMERICA LLC and  
DRESDNER BANK AG, Defendants-Appellees,**

**Docket No. 06-1212-cv**

**UNITED STATES COURT OF APPEALS FOR THE SECOND  
CIRCUIT**

**2007 U.S. App. LEXIS 18674; 101 Fair Empl. Prac. Cas. (BNA)  
338**

**February 16, 2007, Argued  
August 7, 2007, Decided**

**SUBSEQUENT HISTORY:** As Amended, August 22, 2007.

**PRIOR HISTORY:**

Plaintiff-Appellant Bernhard Porzig appeals from an order of the United States District Court for the Southern District of New York (Jones, J.) denying his motion to vacate and modify an arbitration award. VACATED and REMANDED.

Porzig v. Dresdner Kleinwort Benson N. Am. LLC, 1999 U.S. Dist. LEXIS 11067 (S.D.N.Y., June 18, 1999)

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff sued for age discrimination under state and federal law. The case was subject to arbitration. An arbitration panel (panel) awarded damages to plaintiff, but did not award attorney's fees and costs. The U.S. District Court for the Southern District of New York remanded to the panel for a determination of reasonable attorney's fees and costs. The panel issued an award of fees and costs. The district court affirmed. Plaintiff appealed.

**OVERVIEW:** The Federal Arbitration Act provided four statutory grounds (9 U.S.C.S. § 10(a)) for vacatur in situations that involved, generally, impropriety on the part of the arbitrators. In addition, a court could vacate if the arbitration award exhibited a "manifest disregard for the law." Here, the appellate court determined that the panel's modified award was issued in manifest disregard of the law. The appellate court found the following factors clouded the presumption of validity of the panel's attorney fee award: (1) the district court concluded the original attorney's fee award was issued in manifest disregard of the law and vacated the award; (2) the same panel on remand acted without authority with respect to a portion of the award; (3) plaintiff accurately explained to the arbitrators the controlling law with regard to attorney's fees, while defendants advanced several misstatements of law to the panel--including one on the very point of

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law on which the district court had found manifest disregard; and (4) the panel did not explain how it came up with a fee award that was virtually identical to the contingent fee.

**OUTCOME:** The appellate court vacated the district court's decision and remanded to the district court for further proceedings consistent with the appellate court's opinion and to determine the appropriate amount of appellate attorney's fees.

**CORE TERMS:** attorney's fees, arbitrator, manifest, modified, arbitration, arbitral, vacate, contingency fee, vacated, fee award, original award, calculation, vacatur, arbitration panel, reasonable fees, quotation marks, contingent fee, litigating, lodestar, arbitration award, time spent, fee-shifting, methodology, arbitrate, billing, modify, hourly, spent, disbursements, award of attorney's fees

### **LexisNexis(R) Headnotes**

#### ***Labor & Employment Law > Discrimination > Age Discrimination > Remedies > Costs & Attorney Fees***

[HN1]Section 626(b) of the Age Discrimination in Employment Act, 29 U.S.C.S. § 626(b), incorporates by reference 29 U.S.C.S. § 216(b) of the Fair Labor Standards Act, which states that the court shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

#### ***Civil Procedure > Alternative Dispute Resolution > Judicial Review***

[HN2]When a party challenges the district court's review of an arbitral award under the manifest disregard standard, the appellate court reviews the district court's application of the standard de novo. Courts, however, play only a limited role when asked to review the decision of an arbitrator, and only a very narrow set of circumstances delineated by statute and case law permit vacatur.

#### ***Civil Procedure > Alternative Dispute Resolution > Judicial Review***

[HN3]The U.S. Court of Appeals for the Second Circuit has repeatedly recognized the strong deference appropriately due arbitral awards and the arbitral process, and has limited its review of arbitration awards in obeisance to that process. The value of arbitration lies in its efficiency and cost-effectiveness as a process for resolving disputes outside the courts, and its tendency to foster a less acrimonious process. To encourage and support the use of arbitration by consenting parties, the Second Circuit, therefore, uses an extremely deferential standard of review for arbitral awards.

#### ***Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act > General Overview***

#### ***Civil Procedure > Alternative Dispute Resolution > Judicial Review***

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[HN4]A decision of an arbitrator is not totally impervious to judicial review. The Federal Arbitration Act provides four statutory grounds for vacatur in situations that involve, generally, impropriety on the part of the arbitrators. In addition, a court may vacate an award if it exhibits a "manifest disregard of the law." The appellate court's review under the doctrine of manifest disregard of the law is highly deferential and such relief is appropriately rare. An arbitral award may be vacated for manifest disregard only where a petitioner can demonstrate both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well-defined, explicit, and clearly applicable to the case.

***Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act > General Overview***

[HN5]The Federal Arbitration Act allows for vacatur: (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 controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C.S. § 10(a).

***Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act > General Overview***

***Civil Procedure > Alternative Dispute Resolution > Judicial Review***

[HN6]The U.S. Court of Appeals for the Second Circuit will vacate an award only upon finding a violation of one of the four statutory bases, or, more rarely, if it finds a panel has acted in manifest disregard of the law.

***Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act > General Overview***

***Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act > Arbitration Agreements***

[HN7]The mere fact that an arbitral panel may have interactions with both a party and the party's lawyer based on the lawyer's representation of the client before the panel does not give the panel a long arm to exercise jurisdiction over the attorney-client relationship. A paramount question for reviewing courts is whether the arbitral panel has acted within the bounds of its authority. The authority of the arbitral panel is established only through the contract between the parties who have subjected themselves to arbitration, and a panel may not exceed the power granted to it by the parties in the contract. The arbitrator is constrained foremost by this principle that a party cannot be forced to arbitrate any dispute that it has not obligated itself, by contract, to submit to arbitration. Where the arbitrator goes beyond that self-limiting agreement between

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consenting parties, it acts inherently without power, and an award ordered under such circumstances must be vacated. 9 U.S.C.S. § 10(a)(4).

***Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act > General Overview***

***Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees***

[HN8]In ascertaining the amount of reasonable attorney's fees to which a successful claimant is entitled, arbitration panels use the same fee calculation methods as the courts--generally the "lodestar" analysis by which the decision maker considers all of the case-specific variables courts have identified as relevant to the reasonableness of the attorney's fees. The presumptively reasonable fee analysis involves determining the reasonable hourly rate for each attorney and the reasonable number of hours expended, and multiplying the two figures together to obtain the presumptively reasonable fee award.

***Civil Procedure > Alternative Dispute Resolution > Judicial Review***

***Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees***

[HN9]Generally when reviewing analyses of reasonable attorney's fees, the appellate court has the benefit of being able to examine the methodology used by a district court to ensure that court applied the law correctly. While arbitral panels may, but are not required to, explain their reasoning, when the circumstances that exist in this case are present--namely, where a court has already taken the rare and extreme step of vacating the original award for being issued in manifest disregard of law, where the panel on remand has acted plainly outside its authority with respect to one facet of the award, and where the appellate court does not have the benefit of being able to examine the panel's analytical methodology on the very issue that required the original vacatur and remand--the appellate court may consider that absence of explanation when deciding whether the panel has acted in manifest disregard of the laws.

***Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees***

[HN10]It is true that a reviewing authority may consider the contingency fee paid in determining a reasonable attorney's fee; it is also undisputed, however, that the contingency fee may not serve as a cap on an attorney fee award.

***Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees***

[HN11]If an attorney is required to expend time litigating his fee claim, yet may not be compensated for that time, the attorney's effective rate for all the hours expended on the case will be correspondingly decreased. Such a result would not comport with the purpose behind most statutory fee authorizations, viz., the encouragement of attorneys

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to represent indigent clients and to act as private attorneys general in vindicating congressional policies.

***Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees***

[HN12]While it is true that courts and arbitral panels deciding reasonable fees can and should take into consideration many aspects of an attorney's practice to ensure a reasonable hourly rate, it is long established that courts should not automatically reduce the reasonable hourly rate based solely on an attorney's status as a solo practitioner.

***Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act > General Overview***

[HN13]Arbitral panels are not required to explain their awards.

***Civil Procedure > Appeals > Costs & Attorney Fees  
Labor & Employment Law > Discrimination > Age Discrimination > Remedies > Costs & Attorney Fees***

[HN14]Appellate attorney's fees may also be awarded under the Age Discrimination in Employment Act when the appellate court determines in its discretion that they are appropriate.

***Civil Procedure > Appeals > Costs & Attorney Fees***

[HN15]Although appellate courts may determine appellate fees, district courts are generally best suited to task.

**COUNSEL:** Michael K. O'Donnell, Law Office of Michael K. O'Donnell, Greenwich, CT, for Plaintiff-Appellant.

Barry Cozier (Kenneth J. Kelly, David J. Clark, of counsel, on the brief) Epstein, Becker & Green, P.C., New York, NY, for Defendants-Appellees.

**JUDGES:** Before: HON. GUIDO CALABRESI, HON. BARRINGTON D. PARKER, HON. PETER W. HALL, Circuit Judges.

**OPINION BY:** HALL,

**OPINION**

HALL, *Circuit Judge:*

Bernhard Porzig seeks vacatur of a modified arbitration award. The award was the result of Porzig's success in an underlying arbitration proceeding in which Porzig had alleged intentional age discrimination in violation of State and Federal laws. On appeal, Porzig asserts that the award he received for attorney's fees was issued in manifest

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disregard of the law. We find that a portion of the award in this case was issued in violation of the Federal Arbitration Act and that additional significant portions were issued in manifest disregard of the law based on the convergence of multiple factors implicating the integrity of the award. Accordingly, we vacate the order of the District Court, and remand to that court for further proceedings.

## I. Factual and Procedural Background

Porzig was hired as Vice President of Central Bank Sales by Dresdner Securities, a subsidiary of Dresdner Bank, in December 1995. As a condition of his employment, Porzig was required by the NASD, the industry self-regulatory organization, to sign and execute a standard "U-4" form containing an agreement to arbitrate any future disputes. Porzig agreed he would "arbitrate any dispute, claim or controversy that may arise between [himself] and [his] firm . . . that is required to be arbitrated under the rules, constitutions, or by-laws of the [NASD]." The NASD regularly required such agreements as a condition of employment. See *id.* at 198 & n.1. According to this pre-dispute agreement, the arbitration was to be conducted in accordance with NASD's Code of Arbitration Procedure.

In January of 1998, Porzig was fired. Initially, he filed an action against the Defendants Dresdner, Kleinwort, Benson, North America LLC and Dresdner Bank ("Dresdner") in the Southern District of New York making a claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623, *et. seq.* Upon motion by Dresdner, the District Court stayed the action because the dispute was subject to the arbitration provisions of the agreement Porzig had signed upon entering employment. Thereafter, the parties submitted their dispute to a three member Arbitration Panel ("Panel") at the NASD.

The Panel concluded that "age was a factor" in Dresdners' decision to terminate Porzig's employment. The Panel awarded Porzig \$ 96,200 in compensatory damages, plus \$ 27,679 of interest, and \$ 96,200 in punitive damages. Contrary to statutory requirements,<sup>1</sup> the Panel did not award Porzig attorney's fees or costs and, in fact, assessed \$ 13,840.75 against Porzig in forum, filing, and arbitrators' fees (hereinafter the "Original Award").

1 [HN1]Section 626(b) of the ADEA, 29 U.S.C. § 626(b), incorporates by reference 29 U.S.C. § 216(b) of the Fair Labor Standards Act, which states, in relevant part, that "[t]he court . . . shall, in addition to any judgment awarded to the plaintiff, . . . allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." See *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 822 (2d Cir. 1997) (alteration in original).

Porzig appealed the Original Award to the Southern District of New York, seeking a modification to provide him an award of attorney's fees and costs and to vacate the Panel's assessment against him of the various fees. The District Court (Jones, J.) concluded the arbitrators had acted in manifest disregard of the law with respect to attorney's fees, finding there had been "ample evidence to support the conclusion that the arbitrators were made aware of the applicable law but either refused to apply it or ignored it altogether." The court remanded the case to the Panel to determine the

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reasonable attorney's fees to which Porzig was entitled and to fashion a new award. Although in its initial order the District Court denied Porzig's motion to vacate or modify the award as to costs, it subsequently granted his motion when it reconsidered its decision on that point. Concluding on the motion to reconsider that the arbitrators had in fact disregarded the law with respect to costs "just as they did with respect to attorney's fees," the court vacated the original award as to costs and instructed the Panel also to modify the award and assess the \$ 13,840.75 in costs against Defendants, not Porzig.

On remand, Porzig submitted to the Panel a fee application that consisted of an Attorney Affirmation and a Memorandum of Law. The application included detailed billing records outlining each fee request delineated on a spreadsheet that set out the date of the service, a description of the service, the time spent, and the rate charged, documenting a total of \$ 249,996.95 in attorney's fees and \$ 12,050.09 in costs. The billing records included entries for the representation Attorney Michael K. O'Donnell had provided before the District Court successfully arguing Porzig's right to receive attorney's fees and costs. Porzig explicitly informed the Panel that he was entitled to attorney's fees to compensate him for the time his attorney spent preparing the fee application and for litigating the fee claim. In support of this position, he cited *Gagne v. Maher*, 594 F.2d 336, 344 (2d Cir. 1979), *aff'd on other grounds*, 448 U.S. 122, 100 S. Ct. 2570, 65 L. Ed. 2d 653 (1980), which clearly states that attorneys are to be recompensed for time spent litigating attorney's fees.

For their part, Dresdner filed an affidavit in opposition to Porzig's fee application arguing contrary to law, see *Blanchard v. Bergeron*, 489 U.S. 87, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989), that Porzig's contingency fee arrangement with Mr. O'Donnell "should set the maximum limit (\$ 73,359.67) on the amount Porzig can recover under the fee-shifting statute." To that end, Dresdner requested the Panel require Porzig to disclose the details of his fee agreement with his counsel to help the Panel determine the new award. Dresdner suggested, also contrary to law, see 29 U.S.C. § 626(b); *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 86 (2d Cir. 1983), that in circumstances such as Porzig's, "an award of attorneys' fees may . . . be unnecessary to achieve the purposes of the statutory fee-shifting provision." They indicated to the Panel that "Porzig's attorney fee application should be substantially reduced, *if not denied in its entirety*." (Emphasis added). While Dresdner did not specifically deny Porzig's accurate recitation of settled law establishing Porzig's right to collect fees and costs for the time spent litigating his right to those fees, Dresdner's statement that Porzig's contingency fee "should set the maximum limit" on his recovery clearly precludes fees expended to recover attorney's fees. Dresdner also requested reimbursement of \$ 26,261.19 in fees accrued in connection with the removed federal action Porzig brought initially. Porzig filed papers opposing that position.

In response to the parties' motions, the Panel issued an order requesting that Mr. O'Donnell provide the Panel with copies of all fee agreements between him and Porzig. Porzig requested the Panel reconsider that request or, at minimum, require Dresdner's counsel's billing and expense records for comparison of fees. The Panel denied both of Porzig's requests. Porzig ultimately submitted the information regarding his fee contract with Mr. O'Donnell, which allowed O'Donnell "one-third (33-1/3[ ] percent) of any recovery by settlement or otherwise" and stated that Porzig would be responsible for "any out-of-pocket expenses and disbursements which may be incurred," as well as a \$

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2,500 retainer fee. The affidavit Mr. O'Donnell submitted with the fee agreement concluded the "attorney's fees, costs, and net disbursements" from his representation of Porzig amounted to \$ 79,937.81, plus the \$ 2,500 retainer fee, for a total of \$ 82,437.81.

The Panel issued its modified arbitration award (hereinafter "Modified Award") on May 19, 2004. The Modified Award granted Porzig's application in part, ostensibly awarding \$ 75,000 for attorney's fees and \$ 8,500 in costs. It stated:

[Defendants] are jointly and severally liable for and shall pay to Respondent's counsel, Mr. O'Donnell, the sum of \$ 75,000.00 for reasonable attorneys' fees (which sum includes interest from the date of the award of damages to Respondent) in the above matter, and an additional sum of \$ 8,500.00, the reasonable amount of costs and disbursements, for a total amount of \$ 83,500.00.

[Porzig's] counsel, Mr. O'Donnell, shall remit to Respondent Porzig the sum of \$ 82,437.81, which Mr. O'Donnell[] has represented as constituting all attorneys' fees, costs, disbursements, and expenses retained by him out of the Panel's award, or otherwise paid to him by [Porzig].

Porzig again appealed to the District Court from that Modified Award, requesting the court vacate that award with respect to attorney's fees and again remand the issue to the Panel with instructions that it use the lodestar method of calculation to determine the reasonable fees, direct Dresdner to submit evidence of their attorney billing and expense records, vacate the Modified Award with respect to its instruction to Attorney O'Donnell to reimburse Porzig's paid contingency fee, and modify that award to ensure all forum, filing, and arbitrators' fees and expenses are paid by Defendants. The District Court denied Porzig's motion, and Porzig appealed to this Court seeking essentially the same relief.<sup>2</sup>

<sup>2</sup> Porzig does not reiterate on appeal his request that the District Court order the Panel to provide that all forum, filing, and arbitrators' fees and expenses be paid by Defendants. While we assume this will not be an issue on remand, we remind the Panel that it would act, again, in manifest disregard of law were it to factor these fees into its calculation of what to award Porzig on remand. The Panel is, of course, free on remand to grant Porzig's request explicitly to assess these fees against Dresdner.

## II. Analysis

Porzig argues principally that the Modified Award reflected once again the Panel's manifest disregard of the law. The Dresdner Defendants in turn contend that under the limited standard of review, there is no basis to vacate or modify the Modified Award. [HN2]"When a party challenges the district court's review of an arbitral award under the manifest disregard standard, we review the district court's application of the standard *de novo*." *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004) (quotation marks and citation omitted). Courts, however, "play only a limited role when asked to review the decision of

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an arbitrator," *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987), and only a "very narrow set of circumstances delineated by statute and case law" permit vacatur, *Duferco Int'l. Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 388 (2d Cir. 2003).

[HN3]This Court has repeatedly recognized the strong deference appropriately due arbitral awards and the arbitral process, and has limited its review of arbitration awards in obeisance to that process, see, e.g., *Halligan v. Jaffray, Inc.*, 148 F.3d 197, 200 (2d Cir. 1998) (noting the strong judicial support of "the use of arbitration as a device to resolve disputes"). The value of arbitration lies in its efficiency and cost-effectiveness as a process for resolving disputes outside the courts, and its tendency to foster a less acrimonious process. See *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 821 (2d Cir. 1997); *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 190-91 (2d Cir. 1999). To encourage and support the use of arbitration by consenting parties, this Court, therefore, uses an extremely deferential standard of review for arbitral awards. See *Duferco*, 333 F.3d at 388.

[HN4]A decision of an arbitrator, however, is not totally impervious to judicial review. The FAA provides four statutory grounds for vacatur in situations that involve, generally, impropriety on the part of the arbitrators. <sup>3</sup> In addition, a court may vacate an award if it exhibits a "manifest disregard of the law." *Goldman v. Architectural Iron Co.*, 306 F.3d 1214, 1216 (2d Cir. 2002) (quoting *DiRussa*, 121 F.3d at 821). Our review under the doctrine of manifest disregard of the law is highly deferential and such relief is appropriately rare. *Duferco*, 333 F.3d at 389. An arbitral award may be vacated for manifest disregard only where a petitioner can demonstrate "both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well-defined, explicit, and clearly applicable to the case." *Wallace*, 378 F.3d at 189 (internal quotation marks omitted).

3 [HN5]The FAA allows for vacatur: "(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 controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a).

Other Circuits have recognized additional, nonstatutory bases upon which a reviewing court may vacate an arbitrator's award, including where the awards are "completely irrational," *Hoffman v. Cargill Inc.*, 236 F.3d 458, 461 (8th Cir. 2001) (internal quotation omitted); *French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F.2d 902, 906 (9th Cir. 1986), "arbitrary and capricious," *Peebles v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 431 F.3d 1320, 1326 (11th Cir. 2005), and contrary to an explicit public policy, *Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* 481 F.3d 813, 819 (D.C. Cir. 2007); *Twin Cities Galleries, LLC v. Media Arts Group, Inc.* 476 F.3d 598, 600 (8th Cir. 2007); *Prestige Ford v. Ford Dealer Computer Servs.*, 324 F.3d 391, 395-96 (5th Cir. 2003). To the extent our sister courts may have broadened somewhat the

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path to vacatur of an arbitration award, we decline to wander from the narrow one embodied in our own jurisprudence. Thus, [HN6]we will vacate an award only upon finding a violation of one of the four statutory bases, or, more rarely, if we find a panel has acted in manifest disregard of the law. See *Wallace*, 378 F.3d at 189.

That said, in our review of this case we find several issues that cause us great concern. We examine them in more depth below, but, generally, the following factors cloud the presumption of validity of the award: (1) the district court concluded the original attorney's fee award was issued in manifest disregard of the law and vacated the award; (2) the same Panel on remand acted without authority with respect to a portion of the award; (3) Porzig accurately explained to the arbitrators the controlling law with regard to attorney's fees, while the Defendants advanced several misstatements of law to the Panel -- including one on the very point of law on which the district court had found manifest disregard; (4) the Panel did not explain how it came up with a fee award virtually identical to the contingent fee. Taken individually, in all likelihood, such circumstances would not have overcome the deference owed to the Panel's award. Taken together, however, these circumstances create, if not the perfect storm, then a disturbance ample enough to give us pause. Upon careful reflection, and mindful of the importance that the arbitration process plays in dispute resolution today and the narrow lens through which we examine such awards, we conclude the award here was issued partially in violation of the enabling statute and partially in manifest disregard of law and must be vacated.

#### **A. Order to Return Fees to Client**

[HN7]The mere fact that an arbitral panel may have interactions with both a party and the party's lawyer based on the lawyer's representation of the client before the panel does not give the panel a long arm to exercise jurisdiction over the attorney-client relationship. See *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 651, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986) (arbitrators must not be allowed to "impose obligations outside the contract" (quotation marks and citation omitted)). A paramount question for reviewing courts is whether the arbitral panel has acted within the bounds of its authority. See *187 Concourse Assocs. v. Fishman*, 399 F.3d 524, 527 (2d Cir. 2005) (per curiam) (noting in collective bargaining context that the award must "draw[] its essence from the collective bargaining agreement, since the arbitrator is not free merely to dispense his own brand of industrial justice" (internal quotation marks omitted)); *Local 1199, Drug, Hospital, & Health Care Employees Union v. Brooks Drug Co.*, 956 F.2d 22, 25 (2d Cir. 1992) ("The scope of authority of arbitrators generally depends on the intention of the parties to an arbitration, and is determined by the agreement or submission." (quotation marks and citation omitted)). The authority of the arbitral panel is established only through the contract between the parties who have subjected themselves to arbitration, and a panel may not exceed the power granted to it by the parties in the contract. See 9 U.S.C. § 10(a)(4); *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 262 (2d Cir. 2003); see also *Brook v. Peak Int'l*, 294 F.3d 668, 672 (5th Cir. 2002) ("The power . . . of arbitrators . . . is dependent on the provisions under which the arbitrators were appointed." (internal quotation marks omitted)). The arbitrator is constrained foremost by this principle that "a party cannot be forced to arbitrate any dispute that it has not obligated itself, by contract, to submit to

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arbitration." See *USW v. Mead Corp., Fine Paper Div.*, 21 F.3d 128, 131 (6th Cir. 1994). Where the arbitrator goes beyond that self-limiting agreement between consenting parties, it acts inherently without power, and an award ordered under such circumstances must be vacated. 9 U.S.C. § 10(a)(4).

Porzig's attorney was not before the arbitration panel in any manner other than as Porzig's counsel; Porzig was not before the Panel with respect to his relationship with his attorney; and neither Porzig nor Attorney O'Donnell had agreed to arbitrate a dispute, if in fact there was one, over their fee contract. The Panel here was plainly without jurisdiction to order Porzig's lawyer to pay back to his client the specified contingency fee. That portion of the Modified Award must be vacated.<sup>4</sup> See 9 U.S.C. § 10(a)(4); *Brooks Drug Co.*, 956 F.2d at 25.

4 Although neither party has raised the issue, we note the concern that a conflict of interest may arise when a lawsuit such as this one is filed for attorney's fees in the client's name. However, because any attorney's fee award ultimately belongs to Porzig, the client, and not the attorney, see *Evans v. Jeff D.*, 475 U.S. 717, 730, 106 S. Ct. 1531, 89 L. Ed. 2d 747 (1986), we conclude the decision reached here does not create any conflict between Porzig and his counsel. We assume the attorney and client will settle the distribution of the attorney's fees, which are Porzig's property, according to their own contract terms, which are beyond the province of this Court. See, e.g., *Red Ball Interior Demolition Corp. v. Palmadessa*, 173 F.3d 481, 484 (2d Cir. 1999) (noting extrajudicial nature of private contracts not before a court).

## B. Reasonable Attorney's Fees

[HN8] In ascertaining the amount of reasonable attorney's fees to which a successful claimant is entitled, arbitration panels use the same fee calculation methods as the courts -- generally the "lodestar"<sup>5</sup> analysis by which the decision maker considers all of the case-specific variables courts have identified as relevant to the reasonableness of the attorney's fees. See *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 2007 U.S. App. LEXIS 16583, 2007 WL 2004106, \*7 & n.4 (2d Cir., July 12, 2007); see also *Hensley v. Eckerhart*, 461 U.S. 424, 440, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) (discussing fee calculation); *Blum v. Stenson*, 465 U.S. 886, 888, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984) (same). The presumptively reasonable fee analysis involves determining the reasonable hourly rate for each attorney and the reasonable number of hours expended, and multiplying the two figures together to obtain the presumptively reasonable fee award. See *Arbor Hill*, 2007 U.S. App. LEXIS 16583, 2007 WL 2004106 (analyzing reasonable fee methodology); *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 763-64 (2d Cir. 1998). Courts are regularly called upon to conduct a reasonable fee analysis even though a lawyer may have taken the case on a contingent fee. See, e.g., *Blanchard v. Bergeron*, 489 U.S. 87, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989); *Luciano v. Olsten Corp.*, 109 F.3d 111 (2d Cir. 1997); *Dominic v. Consol. Edison Co. of New York, Inc.*, 822 F.2d 1249 (2d Cir. 1987). [HN9] Generally when reviewing analyses of reasonable attorney's fees, we have the benefit of being able to examine the methodology used by a district court to ensure that court applied the law correctly. While arbitral panels may, but are not required to, explain their

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reasoning, when the circumstances that exist in this case are present -- namely, where a court has already taken the rare and extreme step of vacating the original award for being issued in manifest disregard of law, where the Panel on remand has acted plainly outside its authority with respect to one facet of the award, and where we do not have the benefit of being able to examine the Panel's analytical methodology on the very issue that required the original vacatur and remand -- we may consider that absence of explanation when deciding whether the Panel has acted in manifest disregard of the law. *Halligan*, 148 F.3d at 204 ("[W]e believe that when a reviewing court is inclined to hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be taken into account.").

5 We note that this Court recently opined that the "meaning of the term 'lodestar' has shifted over time, and its value as a metaphor has deteriorated to the point of unhelpfulness." *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 2007 U.S. App. LEXIS 16583, 2007 WL 2004106, \*7 & n.4 (2d. Cir., July 12, 2007). While not requiring subsequent Panels to abandon the entrenched term, *Arbor Hill* persuasively reasons that because the Supreme Court has not resolved the relationship between the "lodestar" method and the *Johnson* method, see *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87, 92-93, 96, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989), the term lodestar is indeed a misnomer. *Arbor Hill*, 2007 U.S. App. LEXIS 16583, 2007 WL 2004106, at \*6. We generally agree and employ the term here only as a point of orientation.

[HN10]It is true that a reviewing authority may consider the contingency fee paid in determining a reasonable attorney's fee, *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974), *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87, 92-93, 96, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989); it is also undisputed, however, that the contingency fee may not serve as a cap on an attorney fee award, *Blanchard*, 489 U.S. at 90 (1989). Porzig carefully and accurately explained to the arbitral panel the prevailing law as to the manner in which a contingency fee may be considered in a fee calculation. *Cf. DiRussa*, 121 F.3d at 823 (finding plaintiff had not explained to the arbitrators that attorney's fees were *mandated* under the statute).

In addition, both Porzig and the District Court made clear to the Panel that it was not only obliged to award Porzig attorney's fees under the ADEA, see *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 86 (2d Cir. 1983); accord *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 913 (2d Cir. 1997), it was also obliged to award fees for pursuing that statutory right to fees. As we stated in *Gagne*,

[HN11]If an attorney is required to expend time litigating his fee claim, yet may not be compensated for that time, the attorney's effective rate for all the hours expended on the case will be correspondingly decreased. . . . Such a result would not comport with the purpose behind most statutory fee authorizations, [v]iz, the encouragement of attorneys to represent indigent clients and to act as private attorneys general in vindicating congressional policies.

*Gagne*, 594 F.2d at 344 (quoting *Prandini v. Nat'l Tea Co.*, 585 F.2d 47, 53 (3d Cir. 1978)); see also, e.g., *Benson v. Brower's Moving & Storage, Inc.*, 907 F.2d 310, 316 (2d Cir. 1990) (allowing for attorney's fees and costs incurred in defending appeal).

These rules of law pertaining to contingent fees with respect to attorney's fee awards are explicit, well-defined, and clearly applicable to this case. The record is clear that the arbitrators were told they were required to compensate Porzig for his reasonable attorney's fees -- indeed their prior failure to do so required the award to be vacated -- and, from Porzig's submissions, that contingent fees may not serve as a cap on attorney's fee awards. *Wallace*, 378 F.3d at 189.

Despite the settled jurisprudence with respect to the mandatory requirement both that attorney's fees be awarded for successful claims brought under the ADEA and that attorney's fees be awarded for litigation enforcing the right to those fees, Dresdner nonetheless made two problematic arguments to the Panel: (1) "an award of attorneys' fees may . . . be unnecessary to achieve the purposes of the statutory fee-shifting provision," and (2) the contingency fee "should set the maximum limit . . . on the amount Porzig can recover under the fee-shifting statute." The first flies in the face of the district court's determination that the Panel had already manifestly disregarded the law when it first refused to award attorney's fees. The second is contrary to a position already established by the Supreme Court. See *Blanchard*, 489 U.S. 87, 109 S. Ct. 939, 103 L. Ed. 2d 67.

In this case, the Panel, stating it had considered "numerous factors" when fashioning the award, awarded Porzig \$ 83,500.00 in attorney's fees and costs. This award is remarkably similar to the \$ 82,437.81 contingent fee Attorney O'Donnell stated he had already received from Porzig. The Panel did not indicate whether it had considered the fact that Porzig was required to appeal the Original Award to the District Court or the time Attorney O'Donnell spent on the fee application. This similarity in amount between the original contingency fee and the Modified Award, viewed in light of the (now vacated) portion of the order requiring Attorney O'Donnell to reimburse that contingency fee, and seen against the backdrop of the litigation history of the Panel's inquiry into that fee, suggests that the Defendants' misstatement of the law with respect to contingent fees influenced the Panel in its final determination.<sup>6</sup> Moreover, it is apparent the Panel failed to award Porzig any attorney's fees whatsoever for the time his attorney spent in District Court successfully litigating his statutory right to the fees or for the attorney time spent relitigating the issue in front of the Panel after remand from the District Court -- fees which, as had been made clear to the Panel, were mandatory. *Gagne*, 594 F.2d at 344.

<sup>6</sup> We also find troubling Dresdner's repeated insinuations to the Panel, as well as this Court, that Attorney O'Donnell's hourly fee rate should be reduced because he is a solo practitioner. [HN12]While it is true that courts and arbitral panels deciding reasonable fees can and should take into consideration many aspects of an attorney's practice to ensure a reasonable hourly rate, see *Arbor Hill*, 2007 U.S. App. LEXIS 16583, 2007 WL 2004106, at \*6, it is long established that "courts should not automatically reduce the reasonable hourly rate based solely on an

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attorney's status as a solo practitioner." *McDonald ex rel Prendergast v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 450 F.3d 91, 98 n.6 (2d Cir. 2006).

In this case, because of the lack of any transparent fee calculation analysis by the Panel, which handicaps our ability to review the reasonableness of the Modified Award, <sup>7</sup> the numerous incorrect representations regarding the applicable law made by the Defendants to the Panel, the fact that the Panel issued the original award in manifest disregard of the law, and the fact that the Panel issued a portion of the present award without authority, we conclude that the Modified Award was issued in manifest disregard of the law.

<sup>7</sup> We do not hold here that any failure on the part of an arbitration panel to set forth a transparent fee analysis will subject the award to heightened judicial scrutiny. Indeed, we reiterate that [HN13]arbitral panels are not required to explain their awards. This award, however, was issued *after* a federal court had taken the rare step of concluding, correctly, that the Panel had acted in manifest disregard of law -- a slap, no doubt, that one would have supposed would make the Panel consider its subsequent actions with careful regard. Instead, the Panel, issued a portion of the award without any authority whatsoever, chose not to explain its methodology and then apparently ignored the law again. In these circumstances, the failure to provide an explanation is suspicious at best, and we will take that failure into account.

#### **E. Other Claims**

Porzig also seeks a decision from this Court that would mandate the Panel to order Dresdner to produce records of their attorneys' fees and costs. While the Panel is free to do so on remand, we affirm the District Court's denial of that request, substantially for the reasons stated in the District Court's opinion.

#### **F. Appellate Attorney's Fees**

[HN14]Appellate attorney's fees may also be awarded under the ADEA when the appellate court determines in its discretion that they are appropriate. See, e.g., *Goodman v. Heublein, Inc.*, 682 F.2d 44, 48 (2d Cir. 1982); *Verbraeken v. Westinghouse Elec. Corp.*, 881 F.2d 1041, 1052-53 (11th Cir. 1989); *Ramsey v. Chrysler First, Inc.*, 861 F.2d 1541, 1545 (11th Cir. 1988) (quoting *O'Donnell v. Georgia Osteopathic Hosp., Inc.*, 748 F.2d 1543, 1553 (11th Cir. 1984)); *Hedrick v. Hercules, Inc.*, 658 F.2d 1088, 1097-98 (5th Cir. Unit B Oct. 1981); *Cleverly v. Western Elec. Co.*, 594 F.2d 638, 643 (8th Cir. 1979); see also *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1557 (10th Cir. 1988); *Gilchrist v. Jim Slemmons Imports, Inc.*, 803 F.2d 1488, 1502 (9th Cir. 1986). We conclude such fees are appropriate in this instance. Accordingly, on remand, the District Court shall determine the reasonable amount of attorney's fees to be awarded for the time Porzig spent appealing the Modified Award to the District Court and to this Court, and enter judgment therefor. The District Court shall instruct the Panel to include those fees in its award, which shall be in addition to, but not duplicative of, the fees and costs to be calculated by the Panel on remand. See *Dague v. Burlington*, 976 F.2d 801, 804-05 (2d Cir. 1992) (noting that [HN15]although appellate courts may determine appellate fees, district courts are generally best suited to task).

### **III. Conclusion**

For the reasons stated, we vacate the District Court's decision. We remand to the District Court for further proceedings consistent with this opinion and to determine the appropriate amount of appellate attorney's fees.