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AAA Panel Case Summaries
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I. JURISDICTIONAL ISSUES & CHALLENGES

"Browse Wrap" Arbitration Agreement for Internet Purchase Ruled Insufficient. The consumer in this case brought a class action alleging deceptive practices and false advertising. A hyper-link to the Terms of Use which included an arbitration provision was provided at the bottom of each page. The Ninth Circuit ruled that this arbitration agreement, known as a "browse wrap" agreement, was insufficient to constitute the affirmative action necessary to demonstrate an intent to enter into an agreement to arbitrate. The court noted that a "click wrap" agreement, which requires the consumer to click "I agree", stands in contrast to the approach adopted here. The court observed that "were there any evidence in the record that [the consumer] had actual notice of the Terms of Use or was required to affirmatively acknowledge the Terms of Use before completely his online purchase the outcome of this case might be different." The court found that a reasonably prudent user of the inquiry notice offered here would not have concluded that arbitration was a requirement of the purchase. "Given the breath of the range of technological savvy of online purchasers, consumers cannot be expected to ferret out hyperlinks to terms and conditions to which they have no reason to expect that they will be bound". *Nguyen v. Barnes and Nobels*, 763 F. 3d 1171, 1178-79 (9th Cir. 2014). Cf. *Nicosia v. Amazon.com, Inc.*, 2015 WL 500180 (E.D.N.Y.) (hybrid click wrap and browse wrap agreement ruled sufficient to require arbitration where the hyperlink to the Conditions of Use was conspicuous, express warning at checkout was given that purchases were subject to the Conditions of Use, and signing up for the account required acknowledgement of the terms of the Conditions of Use).

Dodd-Frank Whistleblower Claims Subject to Arbitration. A former investment oversight officer at TD Ameritrade alleged that he was fired for raising issues about a financial product sold by the company whose price he alleged had been improperly inflated. His claim under the Dodd-Frank whistleblower provision was subject to arbitration, the Third Circuit ruled. The court noted that unlike amendments that Dodd-Frank made to whistleblower protections under other federal statutes, including the Sarbanes-Oxley Act, the anti-retaliation provisions contained in Dodd-Frank did not invalidate arbitration agreements under that statute. The court reasoned that by adding anti-arbitration provisions to certain statutes and not to others, Congress expressed its intent to allow arbitration of Dodd-Frank whistleblower claims. The court concluded that this "legislative choice must be respected". *Khazin v. TD Ameritrade*, 773 F. 3d 488 (3rd Cir. 2014). See also *Murray v. UBS Securities*, 2014 WL 285093 (S.D.N.Y.).

Preclusive Effect of Confirmation of Arbitration Award for Arbitrator to Decide. An arbitration award was issued in a dispute between the Abu Dhabi Investment Authority and CitiGroup and that award was confirmed in court. The losing party, the Investment Authority, filed a second arbitration relating the same dispute and CitiGroup moved under the All Writs Act to enjoin arbitration on claim preclusion grounds. The Second Circuit ruled that it was for the arbitrator and not the court to rule on the claim preclusive effect of the earlier award. The court noted that confirmation of an award was not a review of the merits of the underlying dispute. "Under these circumstances, a district court unfamiliar with the underlying circumstances, transactions, and claims, is not the best interpreter of what was decided in the arbitration proceedings, the result of which it merely confirmed. *CitiGroup v. Abu Dhabi Investment Authority*, 776 F.3d 126 (2d Cir. 2015).

Question of Arbitrability for Court to Decide. NASDAQ brought a declaratory judgment action in court, which was granted, that sought to enjoin an arbitration. In ruling so, the trial court determined that the question of arbitrability was for the court and not for the arbitrator to decide. The Second Circuit affirmed. The court recognized that submission of the question of arbitrability to an arbitrator must be based on clear and unmistakable provisions in the agreement. Here, the broad referral to arbitration was limited by a provision that stated that certain claims, including claims seeking compensation for losses attributable to the exchanges of handling of securities transaction, were not arbitrable. One of the provisions in the agreement arguably immunized NASDAQ from liability for the type of claim asserted in this matter. On this basis, the court concluded that despite a broad arbitration provision the parties had not unmistakably committed the question of arbitrability to the arbitrator. The court also rejected the argument that the incorporation by reference of the AAA rules constituted a clear and unmistakable referral of the question to the arbitrator. The court noted that in this case the AAA rules would not apply until the question of arbitrability was decided and therefore it did not constitute a clear referral of the arbitrability question to the arbitrator. *NASDAQ OMX Group v. UBS Securities*, 770 F. 3rd 1010 (2d. Cir. 2014). See also *Huffman v. Hilltop Companies*, 747 F.3d 391 (6th Cir. 2014) (determination of whether arbitration clause permitted class-wide arbitration was for court to decide).

Forum Selection Clause Requires Enjoining of FINRA Arbitration. The agreement between the parties identified Swiss law as governing and Geneva as the "exclusive place of jurisdiction" except that disputes "related solely to fees payable" may be settled by means of a FINRA arbitration. A FINRA arbitration was filed, and respondent moved to enjoin the arbitration. The court determined that the question of arbitrability was for the court and not an arbitrator and concluded that the dispute raised questions beyond the fees payable and must be heard in Geneva. Moreover, at least one of the respondents was not a FINRA member and the respondent that was a FINRA member was not involved in the

dispute at hand. For these reasons, a preliminary injunction issued enjoining the FINRA arbitration. *Pictet Funds (Europe) v. Emerging Managers Group,* 2014 WL 6766011 (S.D.N.Y.).

Non-Signatory Spouse Not Bound in Negligence Case. The husband of the plaintiff, Joy Zinante, purchased an electric golf cart that caught fire and caused damage to the couple's home. Mrs. Zinante sued for negligence and the distributor of the golf cart sought to enforce the arbitration agreement in the sales contract signed by the husband. The Fifth Circuit refused to compel arbitration, finding that the wife's negligence claim was not founded on the underlying contract. The court rejected the application of the intertwined claims doctrine "because Zinante is a non-signatory plaintiff who is suing a party that alleges an arbitration agreement exists with her, a third-party." The court emphasized Zinante's "claims are neither derived from, nor intertwined with, the terms of the contract" between the distributor and her husband and therefore the doctrine of equitable estoppel did not bind her to that agreement. *Zinante v. Drive Electric,* 582 Fed. Appx. 368, 371 (5th Cir. 2014).

Non-Signatory Required To Arbitrate. Eidos took out an insurance loan from Stairway Capital Management to fund patent enforcement litigation, in which Eidos was represented by the McKenna Long law firm. Fulfilling a requirement of the loan, Eidos CEO Sedmak obtained a "contingent loss reimbursement policy" from Ironshore Specialty Insurance Company, and the insurance policy was issued to Eidos. Funds were used to pay McKenna Long's legal fees of over $11 million, but were also misused when paid to CEO Sedmak for his salary and paid to a corporation that Sedwak owned. Ironshore refused to pay out the policy, and filed for arbitration. Although neither the law firm partners nor Sedmark signed arbitration agreements, the court granted summary judgment requiring the parties to arbitrate, finding that the law firm and CEO obtained a "direct benefit" from the contract and were third-party beneficiaries of the agreement. *McKenna v. Ironshore,* 2015 WL 144190 (S.D.N.Y.)

Participation in Mediation by Non-Signatory Not Consent to Arbitrate. Flintkote Company entered into arbitration agreements with a number of its asbestos liability insurers, but not Aviva. A lengthy mediation in the context of a bankruptcy proceeding was held in which Aviva participated. The district court compelled arbitration on equitable estoppel grounds based on Aviva's participation in the mediation. Aviva appealed and the Third Circuit reversed. The appellate court found that Flintkote had no reasonable basis to believe that Aviva's mere participation in the mediation would lead to its willingness to arbitrate the dispute, particularly since the mediation was based on an agreement between the parties that did not refer to arbitration. The court also concluded that the record lacked clear and convincing evidence that Aviva "embraced" arbitration or any agreement to

arbitrate or directly benefited from any agreement that provided for arbitration. *Flintkote Co. v. Aviva PLC,* 769 F.3d 215 (3d Cir. 2014).

Successor Employer May Enforce Arbitration Agreement. DirecTV acquired 180 Connect. Marenco, a 180 Connect employee, sued DirecTV alleging wage and hour violations. DirecTV moved to compel arbitration and the California appellate granted the motion. The court reasoned that a non-signatory defendant may enforce an employment agreement under the doctrine of equitable estoppel where the plaintiff sues under an agreement containing an arbitration clause. The court found that the arbitration agreement and the employee's acceptance of it can be implied here by Marenco's continued employment. *Marenco v. DirecTV,* 233 Cal. App. 4th 1409 (2d Dist. 2015).

Arbitration Agreement in Unrelated Contract Not Binding. Douglas opened a checking account in 2002 which included an arbitration agreement. The checking account was closed a year later and the bank was acquired by a new bank. Douglas later sued the new bank on an unrelated matter alleging negligence and conversion and the bank sought to compel arbitration based on the delegation provision, providing that the question of arbitrability was for the arbitrator to decide, in the initial contract. The district court denied the motion to compel and the Fifth Circuit affirmed. While acknowledging that the delegation provision was enforceable, the court rejected the notion that the initial contract bound Douglas to arbitration of all future disputes. As put by the court, "Douglas did not intend to bind herself for life to gateway arbitration for any and all claims that ever might exist between her and [the bank]. She meant only to bind herself to arbitrate gateway questions of arbitrability" if within the scope of that agreement. *Douglas v. Regents Bank,* 757 F. 3d 460, 464 (5th Cir. 2014).

Fees Award Authorized Where Requested by Both Parties. The arbitrator in this case awarded fees to the defendant general contractor and its surety. A motion to vacate was filed on the basis that the agreement did not provide for the award of attorneys' fees. The Tennessee Court of Appeals overturned the trial court's vacatur of the award, finding that both parties had requested fees and therefore conferred authority upon the arbitrator to award such fees. The court relied on the fact that the AAA's Construction Industry Arbitration Rules were adopted by the parties and those rules provide that fees may be awarded where requested by all parties. *Lasco v. Inman Construction,* 2015 WL 129024 (Tenn. App.).

Agreement to Arbitrate In Employment Application Sufficient. Cruise filled out an employment application in 2007 and was hired seven weeks later. The application provided for mandatory and binding arbitration and Cruise placed her initials next to this provision. She was terminated in 2012 and sued for discrimination. The trial court denied a motion to compel but the California appellate court reversed, mandating that the matter

be heard in arbitration. The court rejected Cruise's claim that the contents of the arbitration policy were not provided to her and therefore the precise terms of the policy were not established. The court found that the employer's inability to establish the precise terms of the policy did not relieve Cruise of her obligation to arbitrate and that the employment application provided a sufficient writing to confirm her obligation to arbitrate employment related dispute. *Cruise v. Kroger Company,* 233 Cal.App.4th 390 (2d Dist. 2015).

Arbitration Agreement Found To Be Procedurally and Substantively Unconscionable. Plaintiffs filed a class action under the FLSA and the employer moved to compel arbitration. The Ninth Circuit denied the motion, finding that the arbitration agreement was both procedurally and substantively unconscionable. The court noted that the employer had a superior bargaining position and that arbitration was a condition of employment. The court ruled the arbitrator selection clause to be procedurally unconscionable because it gave the employer near unfettered discretion to select the arbitrators. The court found the shortened limitations period of six months to be substantively unconscionable, particularly given the nature of wage claims which may take time to recognize and investigate. The court also ruled substantively unconscionable the cost-shifting provision which awarded fees and costs to the prevailing party which is contrary to both California and federal law. In addition, the court found substantively unconscionable the $2600 filing fee necessary for commercial arbitration and the waiver of punitive damages. The court upheld the district court's refusal to sever the unconscionable portions of the arbitration agreement in its denial of the motion to compel. *Zaborowski v. MHN Government Services, Inc.*, 2014 WL 7174222 (9th Cir.).

Arbitration Agreement Incorporating AAA Rules Not Unconscionable. A California appeals court overturned a trial court and ruled that an arbitration agreement that incorporated AAA rules was not unconscionable. In doing so, the court rejected claims of procedural unconscionability based on the employer's failure to attach AAA rules to the agreement. The court noted that the rules were obtainable on the internet and failure to attach the rules, by itself, was not sufficient to sustain a claim of procedural unconscionability. The court also rejected the argument that the contract was substantively unconscionable based on the limited discovery permitted by the AAA rules. The court noted that the arbitrator was authorized under the rules to order such additional discovery as may be necessary for a full exposition of the issues. *Lane v. Francis Capital Management,* 224 Cal. App.4th 676 (2d Dist. 2014).

Forum Selection Clause Trumps FINRA Presumption of Arbitration. The City of Reno initiated a FINRA arbitration against Goldman Sachs relating to the issuance of $211,000,000 in securities. Goldman Sachs' motion to enjoin the FINRA arbitration was granted. The Ninth Circuit found that the agreements between the parties had a forum

selection clause which superseded any right to a FINRA arbitration. In doing so, the court rejected the notion that the presumption of arbitrability applied in this case and instead applied normal state law contract principles in finding that the parties intended to litigate rather than arbitrate any dispute. *Goldman Sachs v. City of Reno*, 747 F.3d 733 (9th Cir. 2014). See also *Brean v. Newoak,* 46 Misc. 3d 1203 (A), 2014 WL 7269750 (Sup. Ct. N.Y. Cty), cert. denied, 135 S.Ct. 477 (2014) (FINRA arbitration brought by non-member enjoined).

Employer's Participation in Arbitration Insufficient to Constitute Waiver. Sutherland filed a wage and hour class action in April 2010 and her employer, Ernst & Young, filed a motion to dismiss or to compel arbitration four months later. No substantial motion practice or discovery was undertaken by either party during that time. In 2013 the Second Circuit ordered that her claim be individually arbitrated. On remand Sutherland argued that Ernst & Young had waived arbitration by participating in the litigation. In determining whether waiver occurred, the Second Circuit looked at the time lapsed, the amount of litigation to date, and proof of prejudice. The court found that Sutherland's arguments were insufficient and that she had suffered no substantial prejudice. On these grounds, the court affirmed the district court's denial of Sutherland's waiver claims. *Sutherland v. Ernst and Young,* 2015 WL 234140 (2d Cir.). Accord *Richmont Holdings v. Superior Recharge Systems,* 58 Tex.Sup.Ct.J. 179 (Tex. 2014) (motion to compel eighteen months after complaint was filed and after a motion to transfer venue was submitted ruled insufficient to constitute waiver as delay in invoking arbitration by itself in this case fails to overcome presumption in favor of arbitration). But see *Bower v. Intercon Security Systems,* 232 Cal. App. 4th 1035 (1st Dist. 2014) (waiver of arbitration found where employer's actions were inconsistent with the right to arbitrate such as here where discovery was sought and responded too and settlement discussions on a class basis occurred).

II. CHALLENGES TO ARBITRATOR OR FORUM

FAA Does Not Provide for Pre-Arbitration Challenges to Panel. The commercial contract in this case permitted each disputing party to appoint an arbitrator and for those arbitrators to select one (1) or two (2) additional non-party arbitrators. As a result, a panel of nine (9) arbitrators was constituted. One party sued, arguing that the panel was improperly constituted and was weighted against it. Respondents moved to dismiss on jurisdictional grounds. The court granted the motion, finding that the FAA did not permit parties to challenge the fairness of the selection process or to remove an arbitrator prior to the arbitration occurring. "Under the FAA, courts have no authority to remove an arbitrator prior to an arbitration award being made." *AVIC International v. Tang Energy Group,* 2015 WL 477316 (N.D. Tex.).

Failure to Disclose Results in Vacatur. The arbitrator in this case was a former judge who at the commencement of the case made various disclosures. As the arbitration proceeded the arbitrator became engaged in various matters with one of the parties' law firms. As noted by the Hawaii Appellate Court, these business engagements were not trivial. They included additional arbitrations with the same firm and a retention of that law firm to represent a trust in which the arbitrator was a trustee. While the arbitrator did make supplemental disclosures in which he stated "I have served" as a neutral with members of the parties' law firms, he did not note that those arbitrations were pending. The court stated that "we do not expect parties to engage in a linguistics analysis to discern a latent possibility. If only a strained reading may be said to have encompassed facts worthy of disclosure, then for purposes of waiver, a party has not been placed on notice of such facts." The court emphasized that the burden of disclosure is on the arbitrator. The court concluded that prevailing law reflects "the principle that arbitrators must take special care to disclose business or similar dealings with parties, or their counsel, that occur during the pendency of arbitration proceedings. *Nordic PCL Construction v. LPIHGC, LLC*, 133 Hawai'i 451 (Haw. App. 2014).

Denial of Appointment of Mediator to Serve As Arbitrator Proper. Petitioner entered into a Master Service Agreement to provide services for Respondent's phone call center, and after Respondent did not pay, Petitioner filed for arbitration. In accordance with the Agreement, Petitioner filed for arbitration. While pending, the parties unsuccessfully attempted mediation with mediator-attorney Spellane. Afterwards, when selecting the tripartite panel, Respondent attempted to appoint mediator Spellane. Respondent objected and the AAA upheld the objection. Respondent moved in court to stay the arbitration but the court denied the motion and any challenge to arbitrability. Respondent's appeal of that determination was denied. When Petitioner refused to appoint a new arbitrator, the AAA appointed one for it. The panel ruled in favor of the Petitioner, which sought to confirm the award. The court confirmed the award, and barred Respondent's argument that the panel was improperly constituted on *res judicata* grounds. However, the court did not award the Petitioner sanctions because although it "appear[ed] that [Respondent] attempted to draw out the proceedings by filing numerous actions and appeals, it cannot be said that the actions are entirely devoid of any merit." *Sutherland Global Services, Inc. v. Adam Technologies,* 2014 WL 5482708 (W.D.N.Y.).

Evident Partiality Claim Denied. Following issuance of an award against it, the losing party, Oxbox, sought to vacate the award on evident partiality grounds. In particular, Oxbow pointed out that a lawyer from one of the arbitrator's former law firm, which he left nine years before his appointment in this case, was adverse to Oxbow's counsel in an unrelated fee dispute litigation. Among the matters at issue in the fees litigation were services rendered in 2000 and 2001 before the arbitrator's law firm disbanded. The

arbitrator testified in a jury trial on the matter in 2007 and his old firm signed a release making clear that it had no claims for fees in this dispute. The jury found for the arbitrator's prior colleague and the losing party retained the law firm to prosecute the appeal that also represented Oxbow in this arbitration. Ultimately the Texas Supreme Court ruled against the arbitrator's former colleague. The AAA denied Oxbow's application to remove the arbitrator and the panel issued a mixed ruling, finding on some claims for both parties. The trial court vacated the award and the appellate court reversed. The appellate court's analysis began with an assessment of the level of diligence required to discover the relationship at issue. The court noted that Oxbow's law firm's involvement in the fees litigation began three years after the arbitrator's law firm confirmed that it had no claim for fees, and two years after the arbitrator testified in the trial. Even had the arbitrator checked his old firm's records, which he did not have access to in any event, it would not have uncovered the relationship at issue. The court also emphasized that the arbitrator and his old firm had no stake in the fees litigation and were not served with the court papers. The court reasoned that the law firm's two clients "mutual, but unrelated decision to select the same counsel does not create a conflict with [the arbitrator], who has never been represented by that counsel or adverse to that counsel in any suit." The court added that the threshold for finding evident partiality "should remain high" where the ADR provider, here the AAA, "has heard and rejected the challenge" and, in the absence of actual knowledge of the relationship, deferred to the AAA's resolution of the dispute. *Port Arthur Steam Energy v. Oxbow Calining LLC,* 416 S.W.3d 708, 715 (Tex. App. 2014).

Receipt of Emails Regarding Arbitration Program Assumed. Couch filed suit against AT&T for age discrimination. AT&T moved to compel alleging that it had sent numerous e-mails to Couch via his company email to either agree to their arbitration program or opt out, to which he did not respond. Couch, whose job required regular use of his email, argued that he did not receive the emails and that he was unaware of the program, thus no enforceable agreement existed. The court compelled arbitration because the employee failed to rebut the presumption created by AT&T's production of evidence of sending the email. The court reasoned that New York law does not require a guarantee of receipt of an offer, but rather employs a rebuttable presumption of receipt under circumstances as present in this case, a presumption which Couch did not overcome. *Couch v. AT&T*, 2014 WL 7424093 (E.D.N.Y.).

III. CLASS & COLLECTIVE ACTIONS

Class Action Arbitration Question for Court. Who decides whether class arbitration is authorized where the arbitration agreement is silent on the issue – a court or arbitrator? The Third Circuit ruled that this gateway issue if for the court to decide. The court reasoned that the availability of class arbitration is a "substantive gateway" and

arbitrability issue under existing Supreme Court precedent properly submitted to a court for resolution in the absence of the parties' intent to the contrary. The Third Circuit found nothing in the relevant agreement that could overcome the strong presumption that questions of arbitrability are for the court to decide. *Opalinski v. Robert Half International*, 761 F.3d 326 (3d Cir. 2014), cert. denied, 2015 WL 998611 (S. Ct. March 9, 2015).

Class Action Bar Enforced. Adult entertainers brought a suit for wage and hour violations as a FLSA collective action. A dancer signed an agreement barring class actions after the filing of the complaint but before conditional certification of the class. She subsequently sought to opt in to the class and was denied the opportunity. The court rejected the claim that the bargaining disparity between a dancer and the club was sufficient to render the arbitration agreement unconscionable. The court also rejected the argument that the arbitration provision was substantively unconscionable because it denied the dancer the opportunity to proceed as part of the collective action. The court reasoned that the fact that certain litigation devices were not available in arbitration is part and parcel with arbitration's offer of informality and expedition. *Stephenson v. Great American Dream*, 2014 WL 186101 (N.D. Ga.).

IV. HEARING-RELATED ISSUES

Belated Counterclaims Appropriately Denied. In this employment contract dispute, a terminated COO filed a demand and sought damages. The employer answered the demand with a document entitled "Answer, Defenses, and Counterclaims" but wrote in the document "we are not asserting the counterclaims we could." It later filed counterclaims, but withdrew them eleven days later. During the first management conference the employer once again expressed an interest in asserting counterclaims, a deadline was set, but no counterclaims followed. During a second management conference, the employer once again confirmed that it decided not to file counterclaims and then five days before the hearing the employer requested and was granted an adjournment and then again expressed an interest in filing counterclaims, which was denied. The arbitrator found for the COO and the employer sought to vacate the award, alleging that the arbitrator exceeded her authority under New York's CPLR. The court denied the motion and confirmed the award. With respect to the arbitrator's failure to allow the filing of counterclaims, the court found the arbitrator's refusal to allow counterclaims four months after the deadline set and just prior to the hearing to be reasonable. The court reasoned that the arbitrator's decision was consistent with the AAA's Commercial Rules "and interests of fairness and timely adjudication." *Fulbrook Capital Management v. Batson*, 2015 WL 321889 (S.D.N.Y.).

V. CHALLENGES TO AWARD

Punitive Sanctions of Over $500 Million Dollars Upheld. The Minnesota Supreme Court upheld an arbitration award sanctioning Western Digital Corporation over $500,000,000 based on a finding that evidence had been fabricated in an action alleging misappropriation of trade secrets. The trial court vacated the award but the appellate court reversed and reinstated the award, and the Minnesota Supreme Court affirmed. The Court focused on the arbitrator's authority under the relevant arbitration agreement. The Court noted that the arbitration provision was broad and authorized the arbitrator to "grant injunctions or other relief" in any matter before the arbitrator. The Court also noted that the applicable AAA Employment Rules provided that the arbitrator could grant any remedy or relief available in court. The Court rejected Western Digital's argument that punitive sanctions are neither a remedy nor a form of relief. The Court reasoned that the punitive sanctions were requested as a redress for the wrong committed by Western Digital and its executive who fabricated the evidence and constituted a remedy provided to Seagate, the claimant in the arbitration. The Court emphasized that under Minnesota law arbitrators have broad authority to fashion remedies within the scope of the arbitration agreement. The Court concluded that "because punitive sanctions were a permissible form of relief and because the arbitrator had discretion in fashioning a remedy, we hold that the arbitrator did not exceed his authority." The Court acknowledged that entrusting an arbitrator with such broad discretion "could theoretically lead to unfair results in arbitration." But balancing against this cost comes the hope of a faster and less expensive resolution for the dispute, as well as a high degree of confidentiality. *Seagate Technology v. Western Digital Corporation,* 854 N.W.2d 750 (Minn. 2014).

Finding of Manifest Disregard Overturned. The trial court vacated an arbitration award in a real estate broker commission dispute based on the court's finding that the arbitration panel acted in manifest disregard of applicable Connecticut law. The Second Circuit noted that the district court, in reviewing the applicable statute, found that to construe the statute by its own terms would be "definitively absurd". The Second Circuit concluded that since the manifest disregard doctrine requires that the arbitrator ignore applicable law that was clear, the arbitrator in this case could not have manifestly disregarded the law as, by the court's own admission, the law was not clear. In doing so, the court took into account that the arbitration panel may have consisted of non-lawyers and "a court reviewing a arbitral award cannot presume that the arbitrator is capable of understanding and applying legal principles with the sophistication of a highly skilled attorney." *Sotheby's International Realty v. Relocation Group,* 588 Fed. Appx. 64, 65 (2d Cir. 2015).

Vacatur of Arbitration Panel's Award Overturned. An arbitration panel found various breaches of the parties' underlying agreement and the district court vacated the award on a

finding that the panel exceeded its authority. The Fifth Circuit reversed, and in doing so noted that "when an arbitration goes an opponent's way on the basis of questionable contract interpretation, parties often seek refuge" in the FAA's grounds for vacatur. The appellate reminded the district courts that the review of an arbitrator's award is limited to determining whether the arbitrator was even arguably interpreting the parties' contract. The Firth Circuit pointed out that in determining whether the arbitrator was arguably interpreting the agreement "district courts should consult the arbitrator's award itself" where the "award will often suggest on its face that the arbitrator was arguably interpreting the contract." In this case, the Fifth Circuit ruled the panel in fact was arguably interpreting the agreement and whether it did so appropriately does not constitute grounds for overturning the award. *BNSF Railway v. Alstom Transportation,* 777 F.3d 785 (5th Cir. 2015).

Manifest Disregard Rejected Despite Legal Error. The arbitrator here clearly misinterpreted Sixth Circuit law in finding that an indemnification agreement violated ERISA. The district court vacated the award on manifest disregard of the law grounds. The Sixth Circuit noted that the continued viability of the manifest disregard standard was "unsettled" after the Supreme Court's decision in *Hall Street Associates v. Mattel, Inc.,* 552 U.S. 576 (2008). Nonetheless, the court ruled that an arbitrator's error of law did not constitute manifest disregard of the law where the arbitrator was applying, or misapplying, existing law rather than intentionally disagreeing and disregarding it. The court reasoned that the arbitrator's misreading of precedent "is not enough to show a manifest (as opposed to possible, or even likely) disregard (as opposed to questionable reading" of the law. The court concluded "If an arbitrator relies on a colorable meaning of the words of the statute – as the arbitrator did here – the fact that there is Sixth Circuit precedent to the contrary is not necessarily determinative. . . . An arbitrator cannot reject the law, but can disagree with nonbinding precedent without disregarding the law." *Schafer v. Multiband Corp.,* 551 Fed.Appx. 814 (6th Cir. 2014), cert. denied, 134 S.Ct. 2845 (2014). See also *Central Pacific Bank v. Kirkeby,* 2013 WL 6487468 (D. Haw.) (manifest disregard claim rejected where arbitrator not fully apprised of applicable law until after award rendered); *Max Great Technology Co. v. MaxRay Optical Technology Co.,* 2014 WL 201466 (S.D.N.Y.)(award, including sanctions ruling, confirmed on default where manifest disregard not shown).

Arbitrator Under Religious Tribunal Exceeded Authority. Kleinbart agreed to sell BGS's equipment and believed he was entitled to a commission of $1,852.50. Instead he was paid half that amount. The parties submitted the dispute to a Rabbinical Court, a Beth Din, and signed an arbitration agreement. BGS's CEO was summoned to appear before the Beth Din and was directed to sign another arbitration agreement in English, even though he was fluent in the language, and denied the opportunity to confer with counsel. The arbitration agreement provided, among other things, that the parties waive all rights under New York State arbitration law. The CEO met with the Beth Din for approximately twenty minutes

and discussed the relevant issues. The Beth Din directed that BGS, and the CEO personally, pay $150,000 to Kleinbart which was 160 times the amount sought. BGS moved to vacate on a variety of grounds including that the panel exceeded its authority and on misconduct grounds as one of the Rabbis failed to disclose that he had a childhood friendship with Kleinbart and engaged in ex-parte communications with him. The court vacated the award finding "no apparent rational basis exists to justify an award to petitioner of $150,000 dollars." The court also found no rational basis to hold the CEO personally liable for the sales commission, and remanded the arbitration back to the Rabbinical Court. *Kleinbart v. Build Green Solutions,* 45 Misc. 3d 1215 (A), 2014 WL 5859378 (N.Y. Sup. Ct. Kings Cty.)

Rabbi's $20 Million Dollar Award Upheld. The parties agreed to arbitrate a dispute between AISH, a New York not for profit corporation, and Fetman who AISH's CFO. The parties agreed to expand the Rabbi's jurisdiction after a damaging admission made by Fetman in his testimony. In particular, the Rabbi concluded that Fetman had admitted to the theft of $2.4 million dollars and other evidence supported the possible theft of approximately $20 million overall and the Rabbi awarded the latter amount to AISH. The court rejected various challenges to the Rabbi's award. In rejecting Fetman's claim of duress, the court noted that he continued to participate in the proceeding after the alleged threats by the arbitrator. The court rejected a conflict of interest claim based on an alleged material financial relationship between AISH and one of the Rabbi's in this synagogue. In particular, AISH rented a catering hall located at the synagogue on six occasions for rentals of less than $1,000 each. The court concluded that the contacts were sufficiently occasional and remote as not to warrant a finding of an appearance of bias. The court also noted that Fetman signed at least two of the relevant checks for these events. The court also rejected a challenge based on the lack of specificity in the amount of damages. The court concluded that the arbitrator did not exceed his authority in constructing a remedy based on extrapolation and negative inferences. The court, in sum, granted the motion to confirm and proceeded to enforce the arbitrators order that certain properties be confiscated by AISH as part of the damages award. *AISH v. Fetman,* 45 Misc. 3d 1203 (A), 998 N.Y.S. 2d 305 (N.Y. Sup. Ct. Kings Cty. 2014).

Manifest Disregard Claim Rejected Where Panel's Award Was Based on Unasserted Claim. At issue in this case was a claim for royalties under a licensing agreement. In particular, a patent holder licensed its rights in exchange for stocks, royalties, and other benefits. The licensee, TiVo, sued a third party, EchoStar, for patent infringement and was awarded over $500 million in settlement of that claim. TiVo refused to compensate the patent holder with funds from this settlement, and the patent holder sued under the licensing agreement. The arbitration panel ruled that the patent holder's rights would be denied in contravention of the parties' expressed intentions and awarded royalties arising out of the EchoStar settlement based on the implied covenant of good faith and fair dealing.

The district court rejected a claim for vacatur and upheld the award. The Second Circuit affirmed. The court emphasized that the panel decided the precise issue they were tasked with deciding. The fact that the panel did not "wholly track the parties' arguments" did not constitute the panel exceeding its authority. The court noted that no authority was cited where arbitration awards were overturned because the arbitrators decided the case based on "alternative reasoning". Rather, the authority cited in support of overturning an award involved "instances where arbitrators went beyond alternative reasoning and instead awarded relief not requested by the parties." *TiVo v. Goldwasser*, 560 Fed.Appx. 15 (2d Cir. 2014).

Award Final Even Though Precise Amount of Damages Not Determined. The arbitration panel in this reinsurance dispute was asked to determine coverage for various forms of claimed losses, and ruled in favor of claimant on its indemnity claim and denied the relief requested with respect to the other claimed losses. The panel was not asked to decide the amount of the loss, and was not provided with any evidence on that question. Defendant sought to confirm the award which plaintiff opposed on the ground that the award was not final. The court rejected plaintiff's argument and confirmed the award. The court commented "for better or worse, the parties to this arbitration tasked the arbitral panel with resolving their dispute at a conceptual, rather than a mathematical, level." The court concluded that the panel "resolved the disputes the parties had queued up for it. There was nothing else for the panel to resolve on the evidence before it." *R&Q Reinsurance Co. v. Utica Mutual Insurance Co.*, 18 F.Supp.3d 389 (S.D.N.Y. 2014).

VI. ADR – GENERAL

Filing of Lawsuit Alone Does Not Constitute Failure to Mediate. The Purchase and Sale Agreement for an ocean front property contained a requirement that any dispute be submitted first to mediation. A party that "did not agree first to go to mediation" was liable under the Agreement for the other side's legal fees in litigation. A litigation was filed and conducted with no request for mediation being made. The court rejected a claim for an award of fees, finding that the mediation provision was not triggered by the mere filing of a court action. A clear refusal to mediate was required under Maine law, the First Circuit reasoned, in order for the heavy penalty of reverse fees to apply. *Thompson v. Cloud,* 764 F. 3d 82 (1st Cir. 2014).

Limited Discovery Not Bar to Wrongful Discharge Suit. The arbitration agreement here allowed for document discovery up to 20 interrogatories and three depositions. Further, the arbitrator could allow additional discovery based on a showing of "substantial need." The employee's claim that these limitations on full discovery rendered the arbitration provision substantively unconscionable was rejected. The California appellate court noted

that "unfettered" discovery is not required in arbitration and, in any event, claimant failed to show how limited discovery prevented him from vindicating his rights. The court also rejected the claim that the confidentiality provision in the arbitration agreement was unconscionable, finding nothing unreasonable or prejudicial in such a provision. *Sanchez v. CarMax Auto Superstores*, 224 Cal. App.4th 398 (2d Dist. 2014).

Failure to Admit Evidence Not Sufficient For Vacatur. The motion to vacate here was premised on the claim that the FINRA panel failed to admit highly pertinent evidence in a broker-dealer case involving the payment of commissions. The panel declined to admit evidence from offices outside of the New York Office at issue in the arbitration or to allow the testimony of witnesses outside of New York. The panel also declined to accept into evidence documents and testimony about other arbitrations awards involving the same employer. In rejecting the vacatur claim, the court found that the "Panel reasonably concluded that evidence involving the claims of brokers outside the New York Office – individuals who were not involved in recruiting Petitioners, who played no role in negotiating their employment agreements, and who were not privy to information about the compensation Petitioners had received – was not pertinent in determining [defendant's] liability to Petitioners." In any event, the court noted that the losing party had ample opportunity to introduce evidence to support its claims and concluded that it was not unfairly prejudiced by the Panel's refusal to hear additional evidence on the same points. *Rubenstein v. Advanced Equities*, 2014 WL 1325738 (S.D.N.Y.)

Limited Redactions to Court File Permitted. The underlying dispute here involved a technology startup and software provider. The arbitrator issued an award and a motion to vacate was denied. Both parties sought to redact or place under seal certain aspects of the file. The court granted the technology company's request to redact certain limited technical information, the disclosure of which could serve to shorten the time necessary for competitors to replace the system that it had developed. In contrast, the court rejected the software company's request that entire transcripts, briefs, and appendices be placed under seal. It did, however, grant the request for redaction of certain confidential technical information. *T-JAT Systems v. Amdocs Software Systems, 2015 WL 394075 (S.D.N.Y.).* But see *Clearwater Insurance v. Granite State Insurance*, 2015 WL 500184 (S.D.N.Y.) (request to seal file with application to confirm arbitration award denied as strong presumption of public access to judicial documents not overcome where parties offered no facts or arguments that justified sealing of the record).

VII. COLLECTIVE BARGAINING SETTING

CBA Requires Arbitration of Rehabilitation Act, But Not FMLA Claim. The Supreme Court ruled in *14 Penn Plaza LLC v. Pyett,* 556 U.S. 247 (2009), that a collective bargaining

agreement must "clearly and unmistakenly" require that statutory claims be made subject to arbitration. The Ninth Circuit ruled that the grievant's Rehabilitation Act claim in this case was required to be arbitrated because the CBA specifically incorporated it into its terms. In contrast, the FMLA policy, which was contained in the employer's handbook, was not subject to arbitration as the court could not state that the CBA clearly intended to have FMLA claims be subject to its grievance and arbitration procedures. *Gilbert v. Donahoe*, 751 F.3d 303 (5th Cir. 2014), cert. denied, 135 S.Ct. 251 (2014).

NLRB Revisits Arbitration Deferral Standard. The NLRB has revisited its long-standing arbitration deferral standard and found that it risked that the Board would defer to an arbitrator who had not necessarily considered the unfair labor practice issue present in the case. The Board, under its new ruling, places the burden of proving that the deferral standard has been met on the party urging deferral. This burden can be met where: "(1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the award." *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (December 15, 2014).

Arbitration Obligation Survives Expiration of Agreement. The personal services agreement here broadly provided that any claim relating to that agreement was subject to arbitration. The agreement also had a "survival" clause which designated certain paragraphs of the agreement that "survived the expiration" of that agreement. The paragraph relating to arbitration was not listed. The Sixth Circuit nonetheless ruled that the employees' FLSA and related claims were subject to arbitration. The court noted that the survival clause was not exhaustive as it did not include the restrictive covenants that clearly survived the expiration of the agreement. The court concluded that the employees had not demonstrated a clear indication that the parties did not intend the broadly worded arbitration provision to survive the expiration of the agreement. *Huffman v. Hilltop Companies*, 2014 WL 1243795 (6th Cir.).

Arbitration Award Properly Excluded In Jury Trial. The employee sued for sexual harassment and retaliation and the jury found for the employee and awarded back pay and other damages. The court also reinstated the employee. The employer appealed, arguing that the just cause determination should have been admitted into evidence. The Eleventh Circuit concluded that the district court acted within its discretion in excluding the award on the grounds that the arbitrator applied a different legal standard and the probative value of the award was outweighed by its prejudicial effect. *Smith v. City of New Smyrna Beach*, 588 Fed.Appx. 965 (11th Cir. 2014).

Termination for Teacher's Misconduct Ruled "Shockingly Disproportionate". A hearing officer found that a teacher engaged in misconduct by participating in sexual conduct with

an adult colleague in a darkened, empty school classroom during the performance of a school show. The negative publicity from this event caused widespread ridicule of and notoriety for the school and the Department of Education. Upon review, the court found that the teacher's behavior constituted misconduct but the penalty of discharge of her employment was disproportionate to the offense. The court noted that the teacher was at school not in her official capacity but as an audience member for a school show and that the incident involved consenting adults who were not observed by any student. The court also noted that the teacher had an unblemished disciplinary record and satisfactory teacher ratings. The court concluded that "while petitioner's behavior demonstrated a lapse in judgment, there is no evidence that the incident was anything but a one-time mistake." *Mauro v. Walcott*, 982 N.Y.S.2d 109 (1st Dep't 2014). See also *Brito v. Wolcott*, 982 N.Y.S.2d 105 (1st Dep't 2014) (same incident and result).

Termination for Theft Not Arbitrable Under CBA. The collective bargaining agreement in this case excluded from arbitration work rule violations involving theft. The *grievant* was caught on a security camera taking a key and key ring of value and he later lied about his actions. The grievant was terminated and when management refused to arbitrate his claim the union moved to compel. The court denied the union's motion. While acknowledging that an employer should not be permitted to circumvent a CBA's arbitration provision simply by invoking the word "theft", the court concluded that in this case the employer's characterization of the grievant's "conduct as theft in no way strained the customary definition of that term." The court concluded that while the grievant "has now come forth with testimony that he lacked the requisite *mens rea* for theft, that evidence is irrelevant as it was not before [the employer] at the time of his termination and could not have informed the Company decision to terminate his employment." *Bakery Confectionery Tobacco Workers v. Wegmans Food Markets,* 2014 WL 6883652 (W. D. N.Y.).

VIII. STATE LAW ISSUES

Waiver of PAGA Claim Unenforceable. The trial court denied a motion to compel a claim under California's Private Attorney General Act ("PAGA"). The appellate court affirmed, reasoning that PAGA claims differ from standard claims in that the disputes are between an employer and the State and is not merely a private dispute. Under these circumstances, private parties cannot waive the right to bring a PAGA claim in court. Relying on the non-severability provision, the court declared the entire arbitration agreement void and unenforceable. *Montano v. Wetseal Retail,* 232 Cal. App. 4th 1214 (2d Dist. 2015).