(X08) FST CV-12-5013927-S 310 : SUPERIOR COURT
(X08) FST CV-12-6014987-S 219

CHARLES HENRY III, AHMED AMMAR, JOHN P. VAILE AS TRUSTEE OF JOHN P. VAILE LIVING TRUST, JOHN PAUL OTIENO, SOSVENTURES LLC, BRADFORD HIGGINS, WILLIAM MAHONEY, ROBERT J. CONRADS, EDWARD M. CONRADS, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF GIDDINGS OIL & GAS LP, HUNTON OIL PARTNERS LP AND ASYM ENERGY FUND III LP : JUDICIAL DISTRICT OF : STAMFORD/NORWALK

V. : AT STAMFORD

GREGORY IMBRUCE, GIDDINGS INVESTMENTS LLC, GIDDINGS GENPAR LLC, HUNTON OIL GENPAR LLC, ASYM CAPITAL III LLC, STARBOARD RESOURCES LLC, GLENROSE HOLDINGS LLC, AND ASYM ENERGY INVESTMENTS LLC : APRIL 11, 2016

(X08) FST CV-12-6015112-S 189 : SUPERIOR COURT

STARBOARD RESOURCES, INC. : JUDICIAL DISTRICT OF : STAMFORD/NORWALK

V. : AT STAMFORD

CHARLES HENRY III, AHMED AMMAR, JOHN P. VAILE AS TRUSTEE OF JOHN P. VAILE LIVING TRUST, JOHN PAUL OTIENO SOSVENTURES LLC, BRADFORD HIGGINS, WILLIAM MAHONEY, ROBERT J. CONRADS, EDWARD M. CONRADS, WILLIAM F. PETTINATI, JR., INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF GIDDINGS OIL & GAS LP, HUNTON OIL PARTNERS LP, ASYM ENERGY FUND III LP, GREGORY IMBRUCE, GIDDINGS INVESTMENTS LLC, GIDDINGS GENPAR LLC, HUNTON OIL GENPAR LLC, ASYM CAPITAL III LLC, GLENROSE HOLDINGS LLC, AND ASYM ENERGY INVESTMENTS LLC : APRIL 11, 2016

MEMORANDUM OF DECISION
RE: THE PLAINTIFFS' APPLICATION TO CONFIRM AN ARBITRATION AWARD, THE DEFENDANTS' OBJECTION THERETO AND THE DEFENDANTS' APPLICATION TO VACATE AN ARBITRATION AWARD AND THE PLAINTIFFS' OBJECTION THERETO.

I. Background

These consolidated cases arise out of the plaintiffs'[1] investment in three limited partnerships: Giddings Oil & Gas, LP (Giddings LP), Hunton Oil Partners, LP (Hunton LP) and ASYM Energy Fund III, LP (ASYM LP). The plaintiffs are investors and limited partners in each of these limited partnerships. Each of the limited partnerships had a general partner which is a limited liability company Giddings Genpar LLC, (Giddings Genpar), Hunton Oil Genpar LLC (Hunton Genpar) and ASYM III LLC (ASYM Genpar) respectively. Each of the limited liability companies that served as a general partner of a limited partnership had a manager; the manager of Giddings Genpar was Giddings Investment LLC, the manager of Hunton Genpar was Glenrose Holdings LLC and the manager of ASYM Genpar was ASYM Energy Investment LLC. The plaintiffs in their complaint alleged that the individual defendant Gregory Imbruce (Imbruce) exercised complete control over the managers and therefore over the general partners and over the limited partnerships. The various companies which acted as general partners and/or managers as well as Imbruce individually will be collectively referred to as the Imbruce defendants. The plaintiffs brought this action individually and derivatively on behalf of the three limited partnerships.

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[1]Unless otherwise indicated in this memorandum "plaintiffs" refers to all plaintiffs except Starboard Resources, Inc., which is the plaintiff in the interpleader action.

In their second amended complaint (in docket number CV 12-6014987) the plaintiffs alleged various fact patterns pursuant to which they asserted that the Imbruce defendants have made misrepresentations in the marketing of the investments, that the Imbruce defendants have violated the provisions of the Connecticut Uniform Securities Act (CUSA) and that the Imbruce defendants have wrongfully diverted assets of the various limited partnerships to their own purposes or accounts. The second amended complaint sounds in thirteen counts which seek both injunctive relief and monetary damages alleging counts that sound in fraud, breach of fiduciary duty, conversion, civil theft, and violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110b et seq. (CUTPA) among other theories of relief. The prayer for relief in the second amended complaint seeks both equitable relief and monetary damages.

The case of *Starboard Resources, Inc.* v. *Henry et al.* (the Starboard case) is an interpleader action in which Starboard Resources, Inc. (Starboard) seeks, inter alia, an order of the court authorizing it to deposit the disputed shares in court and a judicial determination regarding the relative rights of the parties to those shares.

On July 11, 2014 the court granted the motion of the Imbruce defendants to stay these actions pending completion of arbitration proceedings some of which had already begun. See Memorandum of Decision dated July 11, 2014(Docket #151.86). Consistent with the court order staying this action the parties proceeded to arbitration and by subsequent agreement broadened the arbitration beyond that which they had previously agreed to in their limited partnership agreements.[2]

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[2]The Gidding LP agreement and the ASYM LP agreement contained broad arbitration clauses, but the Hunton LP agreement did not. Subsequent to the court's decision staying the action the parties agreed to submit the disputes arising out of the Hunton LP to arbitration as well.

The parties proceeded with the arbitration[3] before a single arbitrator.

On September 10, 2015 the arbitrator rendered an award in favor of the plaintiffs herein, who as respondents in the arbitration proceeding had filed a counterclaim including allegations similar in nature to the allegations of the second amended complaint previously described. The award consisted of, declaratory awards, monetary damages, awards of attorney's fees, interest, injunctive relief requiring an accounting, post judgment interest as well as awards of arbitration fees and costs.

The Imbruce defendants now seek to vacate the arbitration award on six separate grounds: (1) the arbitration was tainted by the arbitrator's evident partiality; (2) the arbitrator lacked authority to enter a monetary award; (3) the arbitrator trampled on the Imbruce defendants' rights by failing to order production of highly relevant probative evidence; (4) the arbitrator was guilty of misconduct by denying the Imbruce defendants' reasonable postponement request; (5) the arbitrator exceeded her powers under the arbitration agreements and (6) the arbitrator's award evidences manifest disregard of the law. The court will review and discuss each of these claims in order.

II. Standards of Review

The parties seem to agree, and the court concludes, that because the nature of the limited partnership agreements and the events that give rise to the claims and counterclaims involve interstate commerce that the court must review these awards utilizing the standards set forth in the Federal Arbitration Act, 9 U.S.C. Section1et. seq., (the FAA) . The FAA (9 U.S.C. Section 10) provides that a court may vacate an arbitration award on the following grounds:

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[3]Certain additional parties/investors were cited into the arbitration proceeding and subsequent to the arbitration award were cited into this case. Those additional parties/investors initially filed an application to vacate the arbitration award but have subsequently withdrawn that application.

1. Where the award was procured by corruption, fraud or undue means;

2. Where there was evident partiality or corruption in the arbitrator;

3. Where the arbitrator was guilty of misconduct by 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 has been prejudiced; or

4. Where the arbitrator exceeded her powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matters submitted was not made.

Additionally there is case law which authorizes a court to vacate an arbitration award when the arbitrator's decision demonstrates "manifest disregard of the law."

> "The role of a [trial] court in reviewing an arbitration award is narrowly limited and arbitration panel determinations are generally accorded great deference under the Federal Arbitration Act. This deference promotes the twin goals of arbitration, namely settling disputes efficiently and avoiding long and expensive litigation. Consequently the burden of proof necessary to avoid confirmation of an arbitration award is very high, and a [trial] court will enforce the award as long as there is a barely colorable justification for the outcome reached."

Kolel Beth Yechiel Mechil of Tartikov, Inc. v. *YLL Irrevocable Trust*, 729 F.3d 99, 103-104 (2013) (internal citations and quotations omitted). The Connecticut Supreme Court has expressed similar deference to arbitration awards. "Since the parties consent to arbitration and have full control over the issues to be arbitrated, a court will make every reasonable presumption in favor of the arbitration award and the arbitrator's acts and proceedings." *O & G/O'Connell Joint Venture* v. *Chase Family Limited Partnership #3*, 203 Conn. 133, 145 (1987). This is particularly true when the parties have agreed to an unrestricted submission of the issues to arbitration.

> "Where the language of the arbitration clause indicates an intention on the part of the parties to include all controversies which may arise under their agreement and where the record reveals no specific questions which the parties submitted to the arbitrator,

> this submission would be construed as unrestricted. . . . A submission is deemed restricted only if the agreement contains express language restricting the breath of the issues, reserving explicit rights, or conditioning the award on court review."

Zelvin v. *JEM Builders, Inc.*, 106 Conn. App. 401, 408 (2008) (internal citations and quotations omitted). In reviewing the language contained in the limited partnership agreements as well as the submission to arbitration contained in the subsequent agreement to include the Hunton LP disputes to arbitration, the court must conclude that the submission was unrestricted as the agreements to arbitrate included submission of all issues to the arbitrator without limitation.

The court will consider these standards and principles as it reviews the specific claims of the defendants upon which they base their application to vacate the award. These claims are framed in a manner consistent with the provisions with the FAA which provides for a specific grounds for vacating arbitration awards even with regard to unrestricted submissions.

III. Discussion

A. Was the arbitration tainted by evident partiality and corruption?

In its first grounds supporting vacatur, the respondents argue that the award should be vacated as a result of the "evident partiality" of the arbitrator. They base this claim chiefly on the arbitrators failure to disclose her role as arbitrator in a certain divorce proceeding. That divorce proceeding did not involve any of the parties to the subject arbitration but involved a divorce arbitration between an attorney and his spouse. The attorney was acting as the attorney for some of the defendants herein in a legal malpractice action brought against a firm of attorneys who had previously represented some of the defendants herein. In further support of their claim of "evident partiality" the defendants point out that in the divorce arbitration, the arbitrator found that the attorney had engaged in an adulterous affair and that the arbitrator's decision had subsequently been

vacated by the Superior Court based in part upon the arbitrator's consideration of ex parte evidence which she had received during a preliminary but unsuccessful mediation process. The defendants argue that the arbitrator should have disclosed her participation in the divorce arbitration proceeding.

We begin first with the standard for determining whether "evident partiality" exists within the meaning of the FAA. In *Morelite Construction Corp.* v. *New York City District Counsel Carpenter's Benefit Funds*, 748 F.2d 79 (2d Cir. 1984), the Second Circuit held "that evident partiality within the meaning of 9 U.S.C. Section 10 will be found where a reasonable person would *have to conclude* that an arbitrator was partial to one party to the arbitration." Id. at 84 (emphasis added); see also *Applied Industrial Materials Corp.* v. *Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007). Accordingly while it is an objective standard, i.e. that of a reasonable person, the standard is such that the facts *must* lead to the conclusion of partiality; not that his impartiality *might* reasonably be questioned. Under *Morelite* a reasonable person would *have to conclude* that the arbitrator was partial to one side in order for the court to vacate the arbitration award. *Applied Industrial Materials Corp.* at 137.

The court concludes that the arbitrator's participation in the divorce arbitration is so attenuated that a reasonable person would not have to conclude that the arbitrator was partial to one side. The divorce arbitration did not involve any of the parties to the subject arbitration. The divorce arbitration did not involve any of the attorneys or witnesses to the subject arbitration. The divorce arbitration involved an attorney who did not participate in the subject arbitration and did not represent any of the defendants or any other parties in the subject arbitration. The divorce arbitration involved an attorney who represented some of the defendants in a completely unrelated

matter. To suggest that the arbitrator would harbor some bias or partiality against a party because of her participation in an arbitration involving an attorney who happened to represent certain of the parties in an unrelated matter strains credibility. It is simply too attenuated to cause a reasonable person to reach a conclusion that the arbitrator harbored partiality. Even employing an arguably lesser standard such as "where it reasonably looks as though a given arbitrator would tend to favor one of the parties." *Vincent Builders, Inc.* v. *American Application Systems, Inc.*, 16 Conn. App. 486, 495 (1988) (internal citations and quotations omitted), the court concludes that the defendants have failed to sustain this burden.

The defendants rely heavily on the case of *Applied Industrial Material Corps.* supra and the case of *New Regency Productions, Inc.*, v. *Nippon Herald Films, Inc.*, 501 F.3d 1101 (9th Cir. 2007). While the *Applied Industrial Materials Corp.* case applied the *Morelite* standard in vacating an arbitration award, the facts are significantly different than those in the case at bar, as are the facts in *New Regency Productions, Inc.* In both cases the respective arbitrators held positions with companies that had nontrivial business relationships with parties to the arbitration or affiliates of parties to the arbitration.

The defendants herein bear a high burden of demonstrating "objective facts inconsistent with impartiality" *Scandinavian Reinsurance Co.* v. *St. Paul Fire & Marine Insurance Co.*, 668 F.3d 60, 72 (2d Cir. 2012) (internal quotations and citations omitted). The defendants have not sustained this burden of proof.

B. Did the arbitrator lack authority to enter a monetary award?

The defendants claim that the arbitrator lacked authority to enter a monetary award in favor of the plaintiffs and against the defendants because the plaintiffs failed to pay the American

Arbitration Association (AAA) filing fee consistent with the AAA's schedule of fees for arbitrations that include monetary damages. Prior to the rendering of the arbitration award the plaintiffs had only paid the AAA filing fees for non-monetary awards. The defendants continue that because the defendants did not have notice that the plaintiffs had paid the filing fee consistent with the AAA for monetary awards that the defendants were not on notice that the plaintiffs were seeking a monetary award until after the award was issued.

The record reveals that the defendants had ample notice that the plaintiffs were seeking monetary damages at all pertinent times. First, prior to the court granting the defendants motion to stay the superior court litigation in favor of arbitration, the plaintiffs had filed an amended complaint clearly seeking monetary damages. During the arbitration proceedings the plaintiffs who within the arbitration were counterclaim respondents filed counterclaims seeking monetary damages. The theories of relief contained in those counterclaims such as civil theft and Connecticut Unfair Trade Practices Act are theories of relief that are normally associated with claims for monetary damages including punitive damages and attorney's fees. Moreover the parties exchanged their monetary damages analyses by agreement and filed the same with AAA as well as with the arbitrator which clearly put the defendants on notice that the plaintiffs were seeking monetary damages well in excess of what they were actually awarded. While the parties agree that the plaintiffs only paid the AAA fee for non-monetary claims prior to the arbitration award, the plaintiffs did pay the fee for monetary claims upon receipt of its invoice from AAA subsequent to the order.

Based upon the record the defendants cannot prevail on their claim that they did not have notice of the monetary damages claims of the plaintiffs. They maintain that the failure of the plaintiffs to pay the monetary claim filing fee deprives the arbitrator of the authority to issue a

monetary award. Notably the defendants cite no authority for this position. Their argument and analysis is that the parties, in submitting their disputes to arbitration, agree to follow the rules of the American Arbitration Association. The rules of the American Arbitration Association include the payment of filing fees consistent with a certain schedule and that accordingly the failure to pay the filing fee consistent with monetary awards deprives the arbitrator of authority to issue a monetary award. There are several problems with this argument. First there, is nothing in the AAA rules that indicates or implies that the failure of a party to pay a fee which has not been billed deprives the arbitrator of any authority. While the AAA rules appear to provide AAA with a right to ask the arbitrator to suspend arbitration in the absence of payment of fees that are billed, that is a right of AAA under the rules and not a right of the parties. There is nothing in the AAA rules that indicates or implies that in the absence of a decision by AAA to request suspension of the proceedings that an arbitrator's authority is in any way limited by the failure to pay a particular fee at a particular time.

More importantly, the defendants' position is inconsistent with the fundamental and well established principle that the authority of an arbitrator is defined by the submission of the parties to arbitration and not by the contractual obligation of the parties to AAA or some other private dispute resolution administrator. Simply put the parties "established the authority of the arbitrator through the terms of their submission" *Zelfan* at 406. In the case at bar the submission was clearly broad enough to encompass monetary damages and the multiple filings of the parties provided ample notice that monetary damages were among the remedies being sought by the plaintiffs.

C. Did the arbitrator violate the defendants' rights by failing to order the production of certain material?

The defendants' next assert that the arbitration award should be vacated as a result of certain pretrial decisions made by the arbitrator, including her decision not to require the plaintiffs to produce certain documents and allowing the plaintiffs to amend their complaint to include certain previously withdrawn claims shortly before the trial but without allowing additional discovery. The defendants particularly claim that the failure of the arbitrator to require the plaintiffs to produce certain material pertinent to the valuation of Starboard, violated their rights to a fundamentally fair hearing.

In so arguing the defendants implicate section 10(a)(3) of the FAA which allows an award to be vacated if the arbitrators are guilty of misconduct by refusing to postpone a hearing, by refusing to hear evidence pertinent and material to the controversy or by engaging in any other misbehavior by which the rights of the party have been prejudiced. Federal courts have interpreted this section of the FAA "to mean that except where fundamental fairness is violated, arbitration determinations will not be opened up to evidentiary review." *Tempo Shain Corporation* v. *Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997) "The misconduct must amount to a denial of fundamental fairness of the arbitration proceeding in order to warrant vacating the award." *Concourse Beauty School, Inc.* v. *Polakov*, 685 F. Supp. 1311, 1318 (S.D.N.Y. 1988) quoting *Transit Cas. Co.* v. *Trenwick Reinsurance Co., Ltd.*, 659 F. Supp. 1346, 1354 (S.D.N.Y. 1987) affirmed mem., 841 F.2d 1117 (2d Cir. 1988), see also, *Vincent Builders*, supra, at 493. In reviewing the record this court cannot say that the decisions of the arbitrator in this complicated and involved proceeding, if error at all, prevented the parties from having a fundamentally fair proceeding. The decision which the arbitrator made with regard to production of Starboard's valuation material did not foreclose the defendants' ability to acquire the material through other procedural vehicles. More importantly

however, the defendants had access to significant raw data both by virtue of Starboard's status as a public company and by virtue of other disclosure and production that it had received. The result is that the defendants were able to and did provide significant testimony and evidence concerning their view as to the value of Starboard and its shares. Moreover the issue of Starboard's valuation was pertinent to the Imbruce defendants' claim for damages which the arbitrator did not have to reach because it did not conclude that the plaintiffs' were liable for the breaches of duties that the defendants had alleged in their arbitration complaint.

Similarly, other decisions by the arbitrator with regard to regulatory communications between the plaintiffs' counsel and the Connecticut State Department of Banking, which was pursuing certain regulatory enforcement actions against certain defendants, and the failure to require production of certain disclosures between plaintiffs' counsel and another party, that were made at the time when that party was aligned with the plaintiffs, simply do not amount to a violation of fundamental fairness. Section 10(a)(3) does not warrant vacatur even if an arbitrator has made an erroneous discovery or evidentiary ruling unless "the arbitrator's handling of these matters was in bad faith or so gross as to amount to affirmative misconduct, effectively depriving the plaintiff of a fundamentally fair proceeding." *Pochat* v. *Lynch*, 2013 WL 4496548 at 10 (S.D. FLA. 2013).

Finally, the defendants suggest that the arbitrator's allowance of an amendment to the arbitration counterclaim less than three weeks before the initiation of the trial violates the standard indicated. Notably at the same time the arbitrator allowed the plaintiffs to amend their counterclaim she also allowed the defendants to amend its complaint. The decision of the arbitrator did bring back into the proceeding theories of relief that had been asserted in prior iterations of the complaint originally filed in Superior Court, but not included in some of the earlier arbitration counterclaims.

However, the plaintiffs correctly argue that both trial courts and arbitrators are vested with broad discretion to allow amendments to complaints shortly before and even during or after the trial of a case. The defendants do not point to anything in particular from which this court can determine that they were deprived of a fundamentally fair proceeding.

D. Did the arbitrator's failure to grant a postponement request of the defendants deprive the defendants of fundamental fairness.

The defendants assert that the arbitrators failure to grant a request for a two week continuance deprived them of fundamental fairness. The basis for the defendants' claim is that they had not received a certain document that was required to be filed with the United States Security and Exchange Commission (the SEC), generally referred to as a "10-k." The defendants assert that the 10-k would have provided them with valuable information relevant to the valuation of Starboard and therefore relevant to the defendants' claim for damages.

> The threshold for vacatur based on a failure to postpone is high. Courts will not intervene in an arbitrator's decision not to postpone a hearing if any reasonable basis for it exists. . . . When a postponement results in an exclusion of evidence the complaining party must show that the exclusion of this evidence so effects the rights of the party that it may be said that the party was deprived of a fair hearing. . . . A party seeking vacatur based on a failure to postpone the proceedings must explain why a postponement was necessary to ensure a fair proceeding.

ALS & Associates, Inc. v. *AGM Marine Constructors, Inc.*, 557 F. sup. 2d 180 (D. Mass. 2008 at 182).

It appears from the record that the 10-k was available to the defendants prior to the hearing, that it was publicly filed with the SEC and that the 10-k was offered as an exhibit at the hearing.[4]

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[4]It is not clear from the record whether the arbitrator actually denied the request or merely delayed decision until the beginning of the hearing, possibly to determine whether or not the 10k was available at that time.

Similar to the claims of the defendants involving alleged arbitrator misconduct in the immediately proceeding section, the defendants simply have failed to sustain their very substantial burden of proof that they were deprived of fundamental fairness as a result of the arbitrator's decision. It does not appear from the record that the arbitrator's decision to go forward with the trial was inconsistent with the scheduling proposed by the defendants themselves or in anyway deprived the defendants of the materials which they claimed to need in seeking a postponement to procure. The defendants have failed to sustain their burden on this claim for vacatur.

E. Did the arbitrator exceed her powers under the arbitration agreement?

The defendants argue that the award or certain portions of it should be vacated because the arbitrator exceeded her powers under the arbitration agreements. They specifically argue that Imbruce never agreed to arbitrate any claim against him personally. The problem with Imbruce asserting that he did not agree to submit his personal and individual claims against the plaintiffs and the plaintiffs personal and individual claims against him to arbitration at this late date is that his position is inconsistent with the various filings and claims asserted both in the Superior Court and the arbitration proceeding itself. It is also inconsistent with the conduct of Imbruce throughout the arbitration proceedings. For example in his original motion to stay this litigation in favor of arbitration the defendants including Imbruce asserted and represented to the court "defendants are ready and willing to proceed with the arbitration of the plaintiffs' claims." (Defendants Motion to Stay, docket #132). In the demand for arbitration Imbruce is named as a claimant and in his amended demand he also includes himself as a claimant. At the time he made the Motion to Stay and asserted that he was willing to proceed with the arbitration of plaintiffs' claims, he knew the plaintiffs were asserting claims against him individually based upon the filed complaint. At no time

did he expressly or impliedly suggest that the arbitration should exclude claims against him individually. In fact, the filings express the opposite position.

While he voluntarily submitted his claims to arbitration and by his representations expressed that he was willing to arbitrate the plaintiffs' claims, he did not assert in any way lack of jurisdiction of the arbitrator to hear the plaintiffs' counterclaims against him personally as he would have been required to do under the rules of the American Arbitration Association and particularly Rules 7c. When he personally submitted his claims to arbitration he became bound by those rules. Rather than assert prior to the hearing that claims against him personally were not subject to arbitration he proceeded to defend those claims on the merits. Now having received an adverse decision by the arbitrator he asserts that he never consented to have the claims against him personally submitted to arbitration. His position is inconsistent with his prior filings in this litigation, the record within the arbitration proceedings, and his conduct during the arbitration. A party that does not believe they are obligated to arbitrate a matter has ample opportunity to raise that issue early in the proceedings. See e.g. *Mag Portfolio Consultant, GMBH* v. *Merlin Biomed Group LLC*, 268 F.3d 58 (2d Cir. 2001); *Thomson-CSF, S. A.* v. *American Arbitration Association*, 64 F.3d 773 (2d Cir. 1995). A party simply cannot participate in arbitration, submit filings that indicate a willingness to arbitrate claims, await a decision and when unhappy with the decision challenged the arbitrators authority.

The defendants further argue that the arbitrator had no authority to issue an award of attorney's fees and costs because the arbitration agreements expressly include a provision requiring each party to pay its own costs and fees.

Once again this is inconsistent with the position taken by the defendants during the arbitration proceeding when they asserted claims for fees and costs that they incurred. When both

parties to an arbitration agreement submit the issue of attorney's fees and cost to the arbitrator they have in fact consented to the arbitration of that issue. See e.g. *Marshal & Co.* v. *Duke*, 114 F.3d 188 (11th Cir. 1997).

Additionally, the arbitrator specifically found that the defendants had violated the provisions of the Connecticut Unfair Trade Practices Act which provides a statutory basis for the awarding of attorney's fees. A party to an arbitration proceeding may recover attorney's fees if the same is authorized by a particular statute. See e.g. *Reliastar Life Insurance Company of New York* v. *EMC National Life Company*, 564 F.3d 81, 87 (Second Cir. 2009).

The defendants finally argue that since only some of the claims presented in arbitration would justify the awarding attorney's fees the arbitrator abused her discretion in awarding the total amount of attorney's fee incurred. Such an award is justified under *Total Recycling Services of Connecticut Inc.* v. *Connecticut Oil Recycling Services, LLC*, 308 Conn. 312 (2013). There is no basis for this court to conclude on the record before it that the arbitrator abused her authority in not apportioning the attorney's fees between claims.

Finally, the defendants assert that the award of attorney's fees and cost effectively result in an incorrect award of the arbitration cost. In this regard the defendants appear to be correct that the arbitrator awarded $32,600 of arbitration fees to be paid by the defendants to the plaintiffs at the same time she awarded attorney's fees based upon bills which clearly included the payment of the same arbitration fees to the American Arbitration Association. Accordingly it is appropriate to adjust the arbitration award to eliminate this duplicative charge. However such is not an appropriate basis for vacatur and the court will exercise its inherent equitable power to adjust the award to correct what is apparently a clerical error in the amount of $32,600.

F. Should the arbitrator's award be vacated because she exhibited a "manifest disregard of the law?"

In arguing that the award should be vacated by virtue of the arbitrator's "manifest disregard of the law" the defendants proceed along a path that requires them to overcome a significant hurdle.

> Our standard of review under this judicially created doctrine is severely limited. To vacate the award we must find something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law. The parties seeking vacatur bears the burden of proving manifest disregard.
>
> The two prong test for ascertaining whether an arbitrator has manifestly disregarded the law has both an objective and subjective component. We first consider whether the governing law alleged to have been ignored by the arbitrators [was] well defined explicit and clearly applicable. We then look to the knowledge actually possessed by the arbitrator. The arbitrator must appreciate the existence of a clearly governing legal principle but decide to ignore or pay no attention to it. Both of these prongs must be met before a court may find that there has been manifest disregard of law.

Westerbeke Corporation v. *Daihatsu Motor Co., LTD*, 304 F.3d 200, 208-209 (Second Cir. 2002) (internal citations and quotations omitted) see also *Jock* v. *Sterling Jewelers Inc.*, 646 F.3d 113 (Second Cir. 2011); *Wallace* v. *Buttar*, 378 F.3d 182 (Second Cir. 2004).

In attempting to meet this standard the defendants rely on the arbitrator's citation of C.G.S. § 36b-29(b) to bar the defendants' claim for fees and expenses because she found "multiple and repeated violations of the Connecticut Uniform Securities Act." While the correct citation would be C.G.S. § 36b-29(h) as opposed to § 36b-29(b) this hardly meets the standard of manifest disregard for the law and appears to be acknowledged by both the plaintiffs and the arbitrator herself as a typographical error as opposed to manifest disregard for the law.

Nor does their claim that the arbitrator misinterpreted CUTPA by applying it to a purely internal dispute rise to the standard required for vacatur. The issue is not whether another trier (be it arbitrator or judge) would have found that the wrongful conduct found by this arbitrator

constituted a CUTPA violation but whether the finding and conclusion of the arbitrator constituted a manifest disregard for the law. The court cannot conclude that the defendants have met the appropriate standard. Cases such as *Fink* v. *Golenbock*, 238 Conn. 183 (1996) hold that certain conduct that results in the usurpation of corporate assets for the benefit of another can under certain circumstances constitute CUTPA violations. The arbitrator's conclusions do not indicate a manifest disregard for the law.

Similarly in claiming that the arbitrators' conclusions that the defendants' conduct constituted civil theft represents a manifest disregard for the law of civil theft, the defendants ignore the fact that the plaintiffs were not only bringing an action in their own right as limited partners but were also bringing in an action derivatively on behalf of the limited partnerships. In that regard usurpation of funds owned by the limited partnership without any justification could well have been the basis for a civil theft claim. See e.g. *Tuckerbrook Alternative Investments LP* v. *Alkek & Williams, Ltd.*, superior court of the judicial district of Norwalk/Stamford at Stamford docket number CV 116010952 (March 16, 2015)

In short there is no indication whatsoever that the arbitrator failed to apply the law which she had a reasonable basis to conclude was applicable and certainly no basis for a determination that she intentionally disregarded the law as she knew it to be.

IV. Conclusion

For all the reasons stated herein the defendants' application to vacate the arbitration award is denied; the plaintiffs' application to confirm the arbitration award is granted. However the award is modified insofar as paragraph 12 of the award requires the defendants to pay the plaintiffs' administrative fees in the amount of $38,583.33. That component of the award is reduced by

$32,600 which represents the administrative fees and expenses that the defendants will pay as a part of the order that they pay the legal fees and expenses of the firm of Diserio Martin O'Connor & Castiglioni. The award is otherwise confirmed.

Judgment may enter in accordance herewith.

GENUARIO, J.

Decision entered in accordance with the foregoing 4/11/2016.
Supp-Court Atty
All Counsel notified