175 L&A 9779

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB Justice

PART 15

Charles V. Marais

- v -

Barclays De Zoete Wedd Inc.

INDEX NO. 121088/02

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 3/31/03

WALTER B. TOLUB J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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CHARLES V. MARAIS,

Petitioner,

-against- Index No. 121088/02

BARCLAYS DE ZOETE WEDD, INC. and BARCLAYS CAPITAL INC., a/k/a BZW SECURITIES INC. a/k/a BARCLAYS DE ZOETE WEDD SECURITIES,

Respondents.

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**WALTER B. TOLUB, J.:**

Petitioner Charles V. Marais moves, pursuant to CPLR 7510 and Section 9 of the Federal Arbitration Act, for an order and judgment confirming an arbitration award rendered by an Arbitration Panel of the National Association of Securities Dealers Dispute Resolution, Inc., in connection with the arbitration proceeding between Marais and his former employers, respondents Barclays de Zoete Wedd, Inc. and Barclays Capital, Inc. a/k/a BZW Securities Inc. a/k/a Barclays de Zoete Wedd Securities (collectively, Barclays). Marais also moves, pursuant to New York Labor Law § 198, for attorneys' fees and costs incurred in this special proceeding.

Barclays cross-moves, pursuant to CPLR 7511, for an order vacating the arbitration award.

**FACTS**

On June 13, 2000, Marais commenced an arbitration before the National Association of Securities Dealers (NASD) against Barclays. The arbitration proceeding arose out of the

termination of Marais' employment by Barclays on September 18, 1996, after a lengthy investigation into his involvement in providing unverified and incorrect securities price lists to a Barclays client, which the client, in turn, provided to a third party. During the arbitration, Marais alleged that, from the summer of 1995 through December 1998, Barclays used Marais to protect Barclays from taking responsibility for its own regulatory missteps, and to serve as a "friendly" witness for Barclays in a litigation with Morgan Stanley, which had resulted from providing incorrect price lists. Marais further alleged that Barclays insisted on supplying its own lawyer to represent him, while the lawyer was clearly conflicted, based on her role leading an "internal review"of Marais. Moreover, Barclays convinced Marais that the firm would pay him bonuses and keep him in its employ, but concealed from him plans, already in place, to deny him bonuses, and to end his employment. Finally, Marais alleged, Barclays took advantage of the fact that Marais worked in a highly regulated industry, and made him a scapegoat by tainting his regulatory license and record.

Marais' claims in the arbitration included wrongful termination, breach of employment agreement, quantum meruit, fraud, negligent misrepresentation, promissory estoppel, violations of the New York Labor Law, and tortious interference with prospective economic advantage.

During the arbitration, the following facts were revealed, through both testimony and documentation: In October 1990, Marais joined the London office of Barclays de Zoete Wedd Limited as head of the European Warrants Desk. Marais signed a U.K. employment contract, which provided that he "will become a member of [the Pension] Scheme" and the "[l]ength of notice periods will be three months written notice" absent gross misconduct (Cl. Exh. 1 at B55-56[1]).

During his employment, Marais consistently earned bonuses based on the firm's regular annual practice, according to which bonuses were announced in the first quarter of the subsequent year. Thus, for each year up to the bonus for 1995 (normally paid in early 1996), the firm paid Marais a bonus.

In mid-October 1993, Marais transferred to New York.. Barclays confirmed in writing that "[t]he terms of Marais' U.K. contract will still apply" (Cl. Exh. 2 at B59).

Beginning in July 1995, Barclays subjected Marais to an "internal review" concerning faxes of price lists sent by Bobby Jain, Marais' colleague, and Marais, to ICAM, a customer of the bank. Geoffrey de Sibert, the principal of ICAM, had utilized faxes sent by Jain and Marais as part of a fraud committed upon participants in an investment fund, inflating the net asset value

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[1] References to "Cl. Exh. __" refer to the claimant's exhibits from the underlying arbitration.

of the fund. This activity ultimately resulted in a lawsuit by Morgan Stanley Luxembourg against Barclays.

As part of the "internal review," Barclays also placed Marais under enhanced supervision. On February 8, 1996, Marais was told that his 1995 bonus was being withheld, pending an investigation into ICAM by the Securities and Futures Authority (SFA), Marais' U.K. regulator. Barclays took this action even though Barclays' chief legal officer, Margaret Grieve, had assured U.K. regulators, as early as January 24, 1996, that Marais "had not violated any valuation procedures" (Cl. Exh. 10 at 3).

Ms. Grieve led the "internal review" of Marais. Despite an obvious conflict, Ms. Grieve also represented him as his legal counsel beginning in mid-1995. Ms. Grieve continue to represent Marais - while simultaneously investigating him - until May 9, 1996. Barclays utilized over 29 in-house and outside lawyers to assist the bank's "internal review" of Marais and the ICAM matter. Ms. Grieve and others guided Marais through interviews with regulators, and edited Marais' interview transcripts. During this time, Barclays and Ms. Grieve discouraged Marais from obtaining his own counsel and pursuing his claims against Barclays, and also discouraged him from resigning.

Although the decision to fire Marais was made by August 22, 1996, he was not terminated until September 11, 1996.

Apparently, Barclays timed the firing in light of the Morgan Stanley lawsuit, so as not to make Marais a hostile witness.

Upon Ms. Grieve's threat to Marais that if he didn't come in immediately, she would have no choice but to terminate his employment, Barclays subjected him to a humiliating 7 ½ hour interview by Samuel Seymour, head of Sullivan & Cromwell's criminal defense and investigations group. This interview occurred on August 30, 1996, eight days after it had already been determined that Barclays would terminate Marais. Although Ms. Grieve had led Marais to believe that Barclays would pay him a 1996 bonus, after Barclays terminated his employment, Barclays failed to pay him any bonus for his work in 1996.

Although H. Rodgin Cohen, Barclay's lead outside attorney, admitted that "none of [the] regulators ever made a finding that Marais had done anything wrong" (T2589[2]), and Barclays' internal documents plainly showed that "we do not have any evidence of any commission or any dishonest or fraudulent acts by an employee, including C.M. [Marais]" (Cl. Exh. 193), nonetheless, on September 26, 1996, Barclays filed a Form U-5, Uniform Notice of Termination, in which it contended that it had terminated Marais for regulatory misconduct . The Form U-5 is the standard form used in the securities industry to report the termination of a

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[2] References to "T__" refer to the transcript of the underlying arbitration, annexed as Exh. A to the October 8, 2002 Affirmation of Kathrine M. Mortenson.

registered representative's association with a broker dealer. The Form U-5 is often the first indication that the NASD receives regarding possible misconduct by members of the securities industry. Thus, when a terminated member of NASD seeks employment with another member, the potential employer consults the Form U-5 database. Marais' Form U-5 became available through the NASD's Central Registration Depository to regulators, Marais' customers, his potential future employers, and to the public on the Internet.

During the hearings, Barclays admitted that it wrongfully answered yes to three items on the Form U-5. Barclays answered "yes" to question 13A on the form, asking whether the individual was involved in any disciplinary action by a governmental body or self-regulatory organization [SRO], meaning "denial, revocation or suspension of a registration, or a censure, fine, cease and desist order, order of prohibition, temporary restraining order, injunction , bar or expulsion" by a governmental body or SRO. However, the disclosure reporting page explaining Barclays' answer "yes," refers only to an SFA notice of investigation and an SFA interview, neither of which constituted disciplinary action. During the hearings, Ms. Grieve admitted that reporting a disciplinary action under these circumstances was inappropriate (T2850-2851).

Barclays also wrongfully answered "yes" to question 14,

asking whether the individual involved is under investigation by a governmental body or SRO, referring to a supposed Federal Reserve investigation. However, as of September 26, 1996, the date the Form U-5 was signed, Barclays knew there was no Federal Reserve Investigation of Marais. Callum McCarthy, Chief Executive Officer of Barclays' North American Operations, advised in an internal memorandum dated September 10, 1996 that "a formal notice of investigation has not been issued" by the Federal Reserve" (Cl. Exh. 91 at BP11138). During the hearing, Ms. Grieve admitted this error, and stated that the answer should have been "no" (T822).

In addition, Barclays wrongfully answered "yes" to question 15 of the Form U-5, which asks whether the individual was subject to an internal review for fraud or wrongful taking of property, or for violating investment-related statutes, regulations or industry standards of conduct. Ms. Grieve again admitted that the "yes" answer was an error, testifying that she misunderstood the form to include a review that relates to "conduct *** in connection with a matter that is sufficiently serious to raise questions about the appropriateness of an individual's behavior in light of firm policy, NASD regulations, [and] principles of common law" (T 699-700).

Barclays filed the Form U-5, and the equivalent form for Commodities Futures Trading Commission registration, a Form 8-T,

regarding Marais. Despite events reflecting that Marais acted property, Barclays never updated the Form U-5.

By filing the Form U-5, Barclays effectively banned Marais from continuing his career in the securities industry. Indeed, the negative Form U-5 created by Barclays rendered it impossible for Marais to find employment.

On June 13, 2000, Marais filed his Statement of Claim, in which he asserted that he was due bonuses and other compensation allegedly promised to him. In addition, Marais asserted a claim for tortious interference with prospective economic relations, based on his contention that the Federal Reserve and the SFA - whose investigations of Marais' conduct had been reported on the Form U-5 - had concluded their investigations and determined to take no action against him.

Arbitration hearings were held on 18 days from November 13, 2001 to July 22, 2002 at the offices of the NASD in New York, New York before a duly constituted three-person Arbitration Panel of the NASD. The Panel consisted of the Hon. Walter M. Schackman, a former Justice of this Court, Christina Kallas, Esq., an attorney with work experience in the securities industry, and Dr. Tama Taberman, who served as the industry arbitrator on the Panel. Justice Schackman served as Chair of the Panel.

During the arbitration, Barclays violated three of the Panel's orders. These included orders to provide documents that

were withheld based on Barclays' assertion of an attorney-client privilege, and certain documents withheld based on assertion of a "Federal Reserve privilege." Most significantly, the Panel ordered Barclays to produce an unredacted version of a September 10, 1996 interview memorandum prepared by Barclay's counsel (Cl. Exh. 226 [Mortenson Aff., Exh. J]) that had been redacted based on the Federal Reserve's directions. Barclays refused to produce an unredacted version of the document, on the ground that the Federal Reserve had directed Barclays not to produce the document in its entirety.

On September 26, 2002, the Arbitration Panel issued its award, directing Barclays to pay Marais approximately $4,000,000, including: (1) $1,250,000, plus interest, in compensatory damages based on the Form U-5 which Barclays filed with the NASD; (2) $842,467, plus interest, on Marais' breach of contract claim, including $66,746 in "notice" pay, and $236,031 in pension contributions; (3) $106,242, plus interest, as liquidated damages under Section 198 of the Labor Law; (4) $248,000 as attorneys' fees under Section 198 of the Labor Law; and (5) $1,000,000 in punitive damages, based on the Panel's finding that Barclays:

> willfully and wantonly disregarded the rights of Claimant in their filing of the Form U-5; in the manner in which Claimant was treated by Respondents from February to September 1996; in withholding records from Claimant's counsel; in consciously disregarding a specific order of the Panel to produce a document after being warned that a sanction

> would follow; in subjecting Claimant to humiliation in their various interrogations of him during 1996; in failing to advise Claimant to retain his own counsel at the appropriate time; and misleading Claimant as to the likelihood of his continued employment with Respondent.

Award at 4, ¶ 6 (Petition, Exh. A). The Panel also found that the "Form U-5 filed with NASD for Claimant *** contains defamatory information" and should be expunged (id., ¶ 1).

Marais now moves for confirmation of the award, and Barclays seeks to vacate the portions of the award granting $1.25 million in compensatory damages, $1 million in punitive damages, and the notice and pension pay.

## DISCUSSION

### A. Legal Standard

Since, as the Court of Appeals has held, "the arbitration of disputes concerning employment in the securities industry *** [is] governed by the Federal Arbitration Act (FAA)" (Matter of Salvano v Merrill Lynch, Pierce, Fenner & Smith, Inc., 85 NY2d 173, 180 [1995]), judicial review of this award is governed by the FAA (see Sawtelle v Waddell & Reed, Inc., ___ AD2d ___, 754 NYS2d 264 [1st Dept 2003]). The FAA embodies a strong "liberal federal policy favoring arbitration agreements" (Green Tree Fin. Corp.-Ala. v Randolph, 531 US 79, 81 [2000]). As a consequence, arbitration awards are subject to very limited judicial review under the FAA (Willemijn Houdstermaatschappij, BV v Standard

Microsystems Corp., 103 F3d 9 [2d Cir 1997]).

Accordingly, all doubts must be construed in favor of confirmation (In re Arbitration between Griffin Indus., Inc. and Petrojam, Ltd., 58 F Supp2d 212 [SD NY 1999]), and an award must be confirmed if there is even a "barely colorable justification" for the award (Willemijn Houdstermaatschappij, BV v Standard Microsystems Corp., supra, 103 F3d at 13). Arbitration awards cannot be vacated under the FAA, even if the decision reached by the arbitrators is "clearly erroneous" (Chisolm v Kidder, Peabody Asset Mgmt., Inc., 966 F Supp 218, 223 [SD NY 1997], affd 164 F3d 617 [2d Cir 1998]). Barclays, as the party moving to vacate, therefore "bears a heavy burden of proof" to overcome the "presumption in favor of confirm[ation]" (Brotman v Sant Cassia Inv. Mgmt., 1997 WL 401671, * 2 [SD NY 1997]; DeGaetano v Smith Barney, Inc., 983 Supp 459 [SD NY 1997]).

The FAA provides for vacating an arbitral award "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 USC §10 [a] [4]). Under this standard, arbitral awards should be vacated in three circumstances. First, "if arbitrators rule on issues not presented to them by the parties, they have exceeded their authority and the award must be vacated" (Fahnestock & Co. v Waltman, 935 F2d 512, 515 [2d Cir] [citation omitted]; cert

denied 502 US 942 [1991]). Second, an award should be vacated "where the arbitrators manifestly disregarded the law" (Greenberg v Bear, Stearns & Co., 220 F3d 22, 27 [2d Cir 2000], cert denied 531 US 1075 [2001]). Finally, an arbitral award should be vacated where its "enforcement would violate a well defined and dominant pubic policy" (id.[citation omitted]).

Barclays contends that certain portions of the award are invalid on each of the above grounds.

**B. The Compensatory Damages Award**

The Panel awarded Marais $1.25 million for "damages [he] has sustained by reason of the defamatory Form U-5 filed for him," and "recommend[ed] the expungement" of certain information from the Form U-5, based on its determination "that the Form U-5 filed with NASD for Claimant on September 26, 1996 contains defamatory information" (Award at 4, ¶ 2 & 3, ¶ 1). Barclays contends that this portion of the award should be vacated on the ground that the arbitrators clearly "exceeded their powers" in awarding relief based on defamation, because Marais never asserted a defamation claim against Barclays.

Barclays' arguments must be rejected. Courts have "consistently accorded the narrowest reading to this subsection, especially where it has been invoked in the context of arbitrators' alleged failure to correctly decide a question on which all concede to have been properly submitted in the first

instance" (Synergy Gas Co. v Sasso, 853 F2d 59, 63 [2d Cir] [citation and quotations omitted], cert denied 488 US 994 [1988]).

Rather than being based on defamation, the Panel's compensatory damage award was based on Marais' tortious interference claim, which both parties litigated. Marais' claim for tortious interference with prospective economic advantage was partially based on Barclay's Form U-5 filing. This claim was submitted in Marais' Statement of Claim (Mortenson Aff., Exh. C at 2, 6-8 and 9), Barclays filed an answer to this claim (id., Exh D. at 11-12), and both parties submitted extensive evidence concerning Barclays' tortious interference, including over 200 pages of testimony by Ms. Grieve concerning Barclays' false statements on Marais' Form U-5, and its failure to update the U-5 (see T460-468; T648-733; T792-874; T939-40; T2805; and T2812-2864). In addition, both parties addressed the tortious interference claim in their post-hearing briefs (see Mortenson Aff., Exh. E at 9-17; Exh. L at 28-30), and both parties made arguments concerning Marais' tortious interference claim during summation (T2911-2929; T3005-3027). The award itself recognizes that "Claimant asserted the following causes of action: *** tortious interference with prospective economic advantage" (Award at 1). Indeed, the award relied on evidence of Barclay's conduct that Marais presented in support of his tortious interference

claim, referring in paragraphs 2 and 6 to "the defamatory Form U-5", Barclays' "willful and wanton disregard of Marais' rights in filing the Form U-5, "the manner in which Claimant was treated," "subjecting Claimant to humiliation in their various interrogatories of him," "failing to advise Claimant to retain his own counsel at the appropriate time," and "misleading Claimant as to the likelihood of his continued employment." (id.).

Accordingly, given this extensive record, it is clear that damages in the award were based on Marais' tortious interference claim, rather than a non-asserted defamation claim.

Moreover, although the award refers to the "defamatory nature of the information" contained in the Form U-5, and refers to that document as to the "defamatory Form U-5," these references do not mean that the Panel was awarding damages for defamation. To the contrary, the NASD's rules required the Panel to refer to the Form U-5 as "defamatory" in order to expunge it. As stated in the NASD's Notice to Members 99-54, the NASD will only carry out that relief if the Arbitrators "clearly state in the 'Award' section of the award that they are ordering expungement relief based on the defamatory nature of the information" (Aff. of Jeffrey L. Liddle, Exh. U at 352). The NASD Notice explicitly states, however, that references to the defamatory nature of a U-5 do not equate to a finding of

liability on a claim for defamation: "Arbitrators, however, are not required to state explicitly in the award that they have found that all of the elements required to satisfy a claim in defamation under governing law have been met" (id.). Thus, the Panel's reference to a "defamatory U-5" cannot be equated to a finding of liability upon a claim of defamation.

Accordingly, Barclays has failed to demonstrate that the Panel's award of compensatory damages exceeded its authority.

Barclays also contends that the award of compensatory damages related to the Form U-5 should be vacated because it was made in manifest disregard of the law. First, Barclays argues, statements in a Form U-5 are protected under New York law by an absolute privilege. Second, in the Form U-4 that Marais executed when he began employment with Barclays, Marais expressly waived any claim he might have had based on statements in a Form U-5. Third, because the award is based on a defamation claim, it is time-barred.

The burden is on Barclays to show manifest disregard, and this burden "is an extremely high one" (Wall Street Assocs., L.P. v Becker Paribas, Inc., 818 F Supp 679, 686 [SD NY 1993], affd 27 F3d 845 [2d Cir 1994]). The "manifest disregard" doctrine is "severely limited" (Halligan v Piper Jaffray, Inc., 148 F3d 197, 202 [2d Cir 1998], cert denied 526 US 1034 [1999], quoting Government of India v Cargill, Inc., 867 F2d 130, 133 [2d Cir

1989]). It requires "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" (Willemijn Houdstermaatschappij, BV v Standard Microsystems Corp., supra, 103 F3d at 12, quoting Siegel v Titan Indus. Corp., 779 F2d 891, 892 [2d Cir 1985]).

To modify or vacate an award on the ground that the arbitrators acted in manifest disregard of the law, a court must find "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" (Halligan v Piper Jaffray, Inc., supra, 148 F3d at 202, quoting DiRussa v Dean Witter Reynolds Inc., 121 F3d 818, 821 [2d Cir 1997], cert denied 522 US 1049 [1998]). Where, as here, the arbitrators have not articulated an explanation for their award, courts must nonetheless confirm their determination if a ground for the decision can be inferred from the facts, and, provided that there is "even a barely colorable justification for the outcome reached," it will be upheld (see Willemijn Houdstermaatschappij, BV v Standard Microsystems Corp., supra, 103 F3d at 13 [citation omitted]).

Barclays has failed to meet this very stringent burden. Barclays has not established that well-defined, clearly applicable law precludes the result that the Panel reached, or,

more importantly, that there was no "colorable justification" for the Panel's determination.

The Panel did not manifestly disregard the law upholding an absolute privilege for statements made on Form U-5, because New York does not clearly recognize such a privilege. Under New York law, some cases have held that statements on a Form U-5 are entitled to absolute immunity, and others have held that such statements are only entitled to qualified immunity (see e.g. Fahnestock & Co. v Waltman, 935 F2d 512 , supra [applying qualified immunity]; compare Herzfeld & Stern, Inc. v Beck, 175 AD2d 689 [1st Dept 1991], appeal dismissed 79 NY2d 914 [1992] [applying absolute immunity]).

This split of authority on what type of privilege attaches to a Form U-5 is fatal to Barclays' cross motion to vacate. For example, in Acciardo v Millennium Secs. Corp. (83 F Supp2d 413 [SD NY 2000]) a case directly on point, a brokerage firm sought to vacate an arbitration award granting damages for defamation on a Form U-5. The firm argued that the arbitrators manifestly disregarded the law, citing the same cases that Barclays cites here. The Court in Acciardo, however, noted that "in recent years, courts have overwhelmingly granted Form U-5 statements qualified, rather than absolute, immunity," and referred to the "conflicting legal precedents in New York" represented by Herzfeld and Fahnestock (id. at 419). Since the conflicting law

did not present a "well defined, explicit and clearly applicable" legal precedent, the Court denied the motion to vacate, stating that:

> The complex issues raised by the conflicting legal sources and controversial debate over U-5 defamation makes the Arbitrators' error, if any, far from obvious.

Id. at 421.

Given this conflict in the law, Barclays cannot demonstrate that there existed clearly applicable law applying an absolute privilege. Thus, there was ample basis for the Panel to conclude that applying qualified immunity to a Form U-5 was proper.

Nor can Barclays establish that the Panel manifestly disregarded the law concerning Barclays' affirmative defense that, by executing a Form U-4 when he commenced employment with Barclays, Marais waived his future U-5 claim. The Form U-4 that Marais executed contains the following provision:

> I release each employer, former employer and each other person from any and all liability, or whatever nature, by reason of furnishing any of the above information, including that information reported on the Uniform Termination Notice for Securities Industry Regulation (Form U-5).

(Mortenson Aff., Exh. M at BP 3024).

The decision by the Panel to reject this defense does not indicate manifest disregard of the law. In rejecting this defense, the Panel may well have found that the language on the Form U-4, which is signed at the outset of employment, clearly

refers to a new hire releasing prior employers for information already reported on any existing Form U-5. By its terms, the Form U-4 refers to "information reported on the *** Form U-5." Indeed, the Panel could have found that Barclays' waiver argument is illogical, given that every person who is the subject of a Form U-5 necessarily signed an earlier Form U-4. If Barclays' argument is to be believed, it would be impossible for any employee to prevail on a U-5 defamation or tortious interference claim, which is not the case (see Acciardo v Millennium Secs. Corp., 83 F Supp2d 413, supra; Fahnestock & Co. v Waltman, 935 F2d 512 , supra ).

Barclays cites Hessel v Goldman, Sachs & Co. (281 AD2d 247 [1st Dept], lv dismissed in part, denied in part 97 NY2d 625 [2001]) for the proposition that the law is "clear" that the language in the Form U-4 validly releases claims based on a future Form U-5. However, Hessel was not an arbitration case, and did not involve the extremely narrow review governing this case. Moreover, while the Court found that the plaintiff released claims arising from his Form U-5, the decision does not state that the release was based on the Form U-4. Accordingly, this decision does not constitute "well defined, explicit and clearly applicable law."

Barclays also argues that the compensatory damages award must be vacated because the statute of limitations for defamation

is one year, and Marais filed his claim almost four years after the Form U-5 was filed. The Court rejects this argument, as it has already been determined that the compensatory damage award was not based upon a defamation claim.

Accordingly, in awarding compensatory damages, the Panel did not ignore or refuse to apply well-defined and clearly applicable law in rejecting any of Barclays' claims in such a way that would amount to manifest disregard.

**C. The Punitive Damages Award**

The Panel awarded Marais $1 million "as punitive damages" (Award at 4, ¶ 6). The Panel stated that it based this award on (1) Barclays' "filing of the Form U-5"; (2) Barclays' withholding of certain documents from production; and (3) actions that Barclays took during the course of its investigation of Marais' conduct prior to his termination (see id.). Barclays argues that an award of punitive damages on these grounds manifestly disregards the law, and is contrary to public policy.

First, Barclays argues that the punitive damages award should be vacated because it is based in part on the Form U-5 and, because Form U-5s are absolutely privileged, any award grounded on statements contained in the Form U-5 is in manifest disregard of the law. The Court rejects this argument, given the conflict in the law, discussed above, with respect to whether Form U-5s are subject to an absolute or qualified privilege.

Second, with respect to the withholding of documents, the Panel specifically stated that the punitive damages award was based on Barclays "withholding records from Claimant's counsel" and "in consciously disregarding a specific order of the Panel to produce a document after being warned that a sanction would follow" (Award at 4, ¶ 6). Barclays contends that the only documents it withheld from production were documents it was required by federal law to withhold. Thus, according to Barclays, the Panel's insistence that it produce an unredacted version of one document (Cl. Exh. 226), and its subsequent imposition of punitive damages based on Barclays' inability to produce that document, manifestly disregarded federal law and is contrary to public policy.

Barclays argues that the Federal Reserve's regulations expressly prohibit Barclays from disclosing "confidential supervisory information" (see 12 CFR § 261.20 [g]), and that these regulations also expressly prohibit Barclays from disclosing such information even in the face of an explicit order to do so:

> Unless the Board has authorized the disclosure of the information requested, any person who has Board information that may not be disclosed, and who is required to respond to a subpoena or other legal process, shall attend at the time and place required and decline to disclose or to give any testimony with respect to the information, basing such refusal upon the provisions of this regulation. If the court or other body orders the disclosure of the information or the giving of testimony, the person having the

> information shall continue to decline to disclose the information and shall promptly report the facts to the Board for such action as the Board may deem appropriate.

12 CFR § 261.23 (b).

Barclays contends that, in light of these regulations, and in light of the Federal Reserve's directive not to produce the document in its entirety, the Panel flagrantly disregarded federal law in ordering Barclays to provide Marais with an unredacted of Cl. Exh. 226, and in awarding punitive damages based upon Barclays' refusal to do so. Accordingly, Barclays argues, the punitive damages award must be vacated.

Barclays' reliance on this regulation as a basis for vacating the Award completely lacks merit. The plain language of the regulation contemplates that a court or other body, such as the Panel, may order the disclosure of information. The regulation does not provide that such orders are impermissible or unlawful, and does not provide that a court or panel may not sanction a party for refusing to comply with an order.

Moreover, during the hearing, both parties cited In Re Bankers Trust Co. (61 F3d 465 [6th Cir 1995], cert dismissed 517 US 1205 [1996]), the only decision on point. The Court in Bankers Trust determined the very issue involved here: whether the regulation had the authority to overcome legitimate discovery orders. The Court found that the regulation lacked the power to override discovery procedures. Specifically, the Court found

that the regulation exceeded the Federal Reserve's authority, was inconsistent with the rules governing discovery and could not be enforced:

> The statutory authorities upon which the Federal Reserve relies, however, simply do not give it the power to promulgate regulations in direct contravention of the Federal Rules of Civil Procedure.
>
> * * *
>
> We likewise conclude that Congress did not empower the Federal Reserve to prescribe regulations that direct a party to deliberately disobey a court order, subpoena or other judicial mechanism requiring the production of information.

Id. at 470. Accordingly, the Court held, discovery orders take precedence over the Federal Reserve's regulations (id.).

Although the Federal Rules of Civil Procedure are not applicable here, the NASD Code is. In its Answer to the Petition to Confirm, Barclays admitted that "Barclays Capital, Inc. is a NASD member and was required to arbitrate Marais' claims against it" (Answer, ¶ 5). As such, Barclays was, at all times, bound by the NASD Code. That Code prohibits a member, such as Barclays, from failing "to produce any document in his possession or control as directed pursuant to provisions of the NASD Code" (NASD Code of Arb. Proced. IM-10100). Moreover, as that Code explicitly provides at Rule 103229b, "[t]he arbitrator(s) shall be empowered without resort to the subpoena process to direct *** the production of any records in the possession or control of

such person or members."

Consequently, as set forth in Bankers Trust, upon which the Panel clearly relied, the Federal Reserve regulation cited by Barclays does not prohibit the Panel from issuing sanctions following disobedience of an order. Accordingly, the Panel's ruling was not in manifest disregard of the law, as it correctly followed Banker's Trust, the only law on the subject. As Justice Schackman put it, "I think that the Bankers Trust Company covers this. We have a right to get what we need" (T365).

Barclays also contends that ordering Barclays to provide Marais with an unredacted copy of Claimant's Exhibit 226, and awarding punitive damages for Barclays failure to do so, violates public policy. Barclays vaguely argues that the Panel's "award of punitive damages based on Barclays' adherence to governing federal regulations fundamentally undermines the public policy goal of promoting the free exchange of information between financial institutions and the Federal Reserve" (Barclays' Mem at 23). However, the punitive damages award cannot be vacated upon this basis, because Barclays has failed to demonstrate that the award is "directly at odds with a well defined and dominant public policy resting on clear law and legal precedent" (St. Mary Home, Inc. v Service Employees Intern. Union, Dist. 1199, 116 F3d 41, 46 [2d Cir 1997]).

Finally, Barclays argues that the remainder of the punitive

Marais contends that he is entitled to reimbursement of costs and attorneys' fees incurred in connection with his petition to confirm the award "as ancillary relief" (Marais Mem. at 38-39). This claim is based on (1) New York Labor Law; and (2) "Barclays' meritless opposition" to the Award, based on 22 NYCRR § 130-1.1 (see id.). Marais is not entitled to attorneys' fees on either basis.

Barclays has not moved to vacate the portions of the Award - paragraphs 4 and 5 - that were based on New York Labor Law. To the contrary, on October 28, 2002, Barclays paid paragraphs 4 and 5 of the Award - plus part of paragraph 3 - via a wire transfer of funds to an account specified by Marais' counsel (see Supplemental Mortensen Aff. ¶ 3 and Exh A). Accordingly, Marais is not contesting that portion of the award based upon the Labor Law and, thus, attorneys' fees may not be awarded on this basis (see Gottlieb v Kenneth D. Laub & Co., 82 NY2d 457, 459 [1993] [holding that attorneys' fees are only available for "wage claims based upon violations of one or more of the substantive provisions of Labor Law article 6"]).

Moreover, where a bona fide dispute exists between the parties concerning the validity of an award, a party cannot recover costs or fees under the Labor Law (see Bigda v Fischbach Corp., 849 F Supp 895 [SD NY 1994] [no liability under New York Labor Law when bona fide dispute exists over employer breached

employment agreement]). Although its cross motion to vacate is being denied, the grounds for vacatur put forth by Barclays are clearly bona fide.

Likewise, Barclays' arguments are not so blatantly meritless as to justify the imposition of costs and fees under 22 NYCRR § 130-1.1 (see, Grossman v Pendant Realty Corp., 221 AD2d 240 [1st Dept 1995], lv dismissed 88 NY2d 919, rearg denied 88 NY2d 1018 [1996]).

Accordingly, Marais' request for costs and attorneys' fees is denied.

The Court has considered the remaining claims, and finds them to be without merit.

Accordingly, it is

ORDERED that petition is granted, and the arbitration award rendered in favor of petitioner Charles V. Marais and against respondents Barclays de Zoete Wedd, Inc. and Barclays Capital, Inc. a/k/a BZW Securities Inc. a/k/a Barclays de Zoete Wedd Securities is confirmed; and it is further

ORDERED that respondents' cross motion to vacate is denied; and it is further

ORDERED that petitioner's motion for attorneys' fees is denied; and it is further

Settle Judgment on notice.

This constitutes the decision and order of this court.

Dated: 3/31/05

HON. WALTER B. TOLUB, J.S.C.