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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Pocket 4/1/01

WILLIAM A. GIBBS,

Petitioner

vs.

CIVIL ACTION

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.,

Respondent

1:99-CV-647-HTW

ORDER OF COURT

This matter is pending on motions requesting the court to vacate three awards of an arbitration panel and seeking a remand of all claims to a new arbitration panel for a new hearing. William A. Gibbs (hereinafter "petitioner") filed the motions against Merrill Lynch, Pierce, Fenner & Smith, Inc. (hereinafter "respondent"). Petitioner requests sanctions be imposed relating to the libel claim and the second ruling of the panel on that claim. This is the second appearance of this matter before this court. The petitioner also requested an immediate stay of the underlying arbitration pending this court's ruling on the instant motions, which is now moot since the panel has rendered a decision on all pending claims and filed a final award.

I. Procedural Background

This case originated when petitioner initiated arbitration proceedings against Merrill Lynch, his employer, and several employees of Merrill Lynch. The petition was filed pursuant to the rules of the National Association of Securities Dealers, Inc. (hereinafter "NASD"). All named respondents, except Merrill Lynch, have been dismissed from this action. In the

arbitration, petitioner alleged five claims against respondent Merrill Lynch: (1) violation of the Employee Retirement Income Security Act ("ERISA"); (2) constructive discharge; (3) libel based on written statements contained in regulatory forms, specifically that William Gibbs "resigned during the course of an internal review . . ."; (4) slander based on the same statements, but made orally; and (5) tortious interference with business relations.

Respondent moved to dismiss each of the asserted claims before the panel on the grounds that petitioner either was barred from bringing the claims due to an enforceable release between the parties signed after petitioner resigned, or was barred from maintaining the claims on the alleged facts as a matter of law. After oral argument and with the benefit of the parties written submissions, the arbitration panel dismissed all claims arising before the date of the release. At the same time, the arbitration panel dismissed petitioner's libel claim, but allowed petitioner's slander and tortious interference with business relations claims to proceed. The rulings of the panel were appealed to the district court and after consideration that Court confirmed the awards of the panel on all claims, except the dismissal of the libel claim. The district court overruled the award on the libel claim and remanded the matter to the panel for further proceedings. While the matter was pending in the district court, the panel held several hearings and subsequently dismissed petitioner's claims of slander and tortious interference in separate awards. The panel also dismissed the libel claim that had been remanded to the panel. In dealing with the issues now pending, the court will handle them in the following order: the slander claim, the libel claim revisited, tortious interference, and the motion for sanctions.

II. Standard of Judicial Review

As recognized in the prior Order of this court, judicial review of an arbitration award is "extremely limited" and whenever possible, courts should defer to the arbitration decision. (See, Order dated January 27, 2000, at p.4.)

The standard of review in the Eleventh Circuit is set forth in Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775 (11th Cir. 1993) as follows:

Our review of commercial arbitration awards is controlled by the Federal Arbitration Act ("FAA"). See 9 U.S.C.A. §§ 1-16. Judicial review of arbitration awards under the FAA is very limited. *Booth v. Hume Publishing, Inc.*, 902 F.2d 925, 932 (11th Cir. 1990). The FAA presumes that arbitration awards will be confirmed, 9 U.S.C.A. § 9, and enumerates only four narrow bases for vacatur, In addition to these four statutory grounds for vacatur, we have recognized two additional non-statutory bases upon which an arbitration award may be vacated. First, an arbitration award may be vacated if it is arbitrary and capricious. *Ainsworth v. Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992), cert. denied, 507 U.S. 915, 113 S.Ct. 1269, 122 L.Ed.2d 665 (1993); *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1413 (11th Cir. 1990); *United States Postal Serv. v. National Ass'n of Letter Carriers*, 847 F.2d 775, 778 (11th Cir. 1988). Second, an arbitration award may be vacated if enforcement of the award is contrary to public policy. *Delta Air Lines, Inc. v. Air Line Pilots Ass'n*, 861 F.2d 665, 671 (11th Cir. 1988), *1459 cert. denied, 493 U.S. 871, 110 S.Ct. 201, 107 L.Ed.2d 154 (1989); *U.S. Postal Service*, 847 F.2d at 777.

Pages 778-79.

It should be noted that at the time the Brown case was decided, the Eleventh Circuit recognized two non-statutory bases for vacation of an arbitration award; the award is arbitrary and capricious and the award is against public policy. In a later case, Montes v. Shearson Lehman Brothers, Inc., 128 F.3d 1456 (11th Cir. 1997), the Court recognized a third basis, the award is in manifest disregard for the law.

The statutory basis for vacating a panel's award is set out in the Federal Arbitration Act as follows:

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

- (1) Where the award was procured by corruption, fraud, or undue means.
- (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. . . .

9 U.S.C. § 10(a)(1)-(4).

As stated in Robbins v. Day, 954 F.2d 679, 683 (11th Cir. 1992), the narrow nature of these grounds prevents the courts from "roam[ing] unbridled" in their oversight of arbitration

awards. Judicial intervention is carefully restricted "to instances where the arbitration has been tainted in specified ways." Id. For example, courts are prohibited from vacating awards solely on the basis of error of law or interpretation. Instead, "misconduct pertaining to the proceedings on the part of the arbitrators or the parties" must be present for vacatur. Id. The arbitrators are authorized to determine when evidence is material or cumulative and is not bound to hear all the evidence tendered by the parties. Id.

While both sides cited Georgia statute and case law on the issues of defamation and tortious interference, there appears to be some disagreement on the question of applicable choice of law. Respondent's counsel argued to the panel that Georgia law applied, and counsel for petitioner states that he did not agree. The court agrees with the position taken by counsel for respondent that Georgia law applies. See, *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132 (6th Cir. Civ. 1996). In the Glennon case, the Court held "in federal question cases, a District Court entertaining pendent state claims should use the choice of law rules of the forum state." Id. at 136.

III. The Slander Claim

The arbitration panel had before it two defamation claims, libel and slander. The panel, ruling in favor of the respondent, dismissed both claims in separate orders; the libel claim being dismissed for a second time. As set out hereinabove in this order, the court has determined that Georgia law is to be applied with respect to all issues relating to the defamation claims.

Subsequent to the dismissal of the libel claims on March 13, 2000, petitioner filed a motion in the district court requesting the court to vacate "two orders" of the panel (Orders relating to slander and libel) and requesting other relief. In the motion, petitioner contends that

the court should vacate the panel's dismissal of petitioner's slander claim on the ground that it is in manifest disregard of the law and arbitrary and capricious, because the panel ignored Georgia law on slander and disregarded respondent's admissions that slanderous statements were made about petitioner to his clients. In the memorandum in support of the motion, petitioner used several pages summarizing "facts" he contends show why the motion to vacate the panel's order should be granted.

In response, respondent contends that the court should confirm the panel's order dismissing the slander claim, because it is neither in manifest disregard of the law nor arbitrary and capricious. Respondent argued that the petitioner's motion does not contain a citation to a single Georgia slander case in support of his position, or any coherent argument that the panel disregarded any law or acted arbitrarily and capriciously as those standards are defined within the Eleventh Circuit. Respondent asserts that petitioner is trying to get this court to engage in *de novo* review, which it cannot do under applicable case law. Respondent further argues that the panel, based upon all of the evidence and on the argument of respondent's counsel, "evidently concluded" that the statements in official filings that petitioner was under "internal review" when he resigned were true and that other statements made were true or made in good faith. Also, respondent argues that this court may not substitute its view of the evidence for the panel's findings.

The record before the panel reveals that after petitioner rested his case, the panel, over the objections of petitioner, allowed respondent to make an oral motion to dismiss. Petitioner contended before the panel that the motion should be denied and that respondent should

be required, according to Georgia law, to come forward with evidence to rebut the petitioner's case.

In the motion, the respondent argued to the panel that the statements made in the required filings (U-5 and DRP-5) were true, and there was evidence in the record establishing the same. Respondent further argued to the panel that petitioner had not proved publication of any alleged slanderous statement in the manner required by law in that there was insufficient proof of particular words or statements by agents or employees of the respondent, or that such words were false. Finally, respondent states that at this point in the proceedings, there could not be any slander claims against individual respondents who were no longer parties in the case. However, the court notes that any actionable statement made by agents or employees of respondent might still bind respondent, if made at the direction or authorization of respondent. See, Lepard v. Robb, 201 Ga.App. 41 (1991).

Shortly after the hearing adjourned on the motion to dismiss, the panel entered an order on the slander claim, as follows:

The panel grants Respondents' oral motions to dismiss, dated January 26 and 27, 2000, with respect to any remaining claims of slander against any Respondent. . . .

The panel gave no reason or explanation for its ruling, and the law does not require that reason or explanation be given. The court has reviewed the record of the arbitration proceedings with respect to arguments made by counsel in an effort to more fully understand the contentions of the parties before the panel.

The following excerpts from the record of the arbitration proceedings show some of the legal key points presented to the panel by counsel for the parties.

In his opening argument to the panel, Mr. Russell, counsel for respondent, stated the following:

At this point in the proceedings and on behalf of Marion Moore and Ann Nermoe and Bob Thorne and Merrill Lynch, I move to dismiss all claims asserted against them and that remain pending in this case. The claimant has now rested and put on his best case. We have had the presentation of the claimant's case for over 14 days, 14 hearing days. . . .

So for the slander claim that remains in this case, the burden of proof is on the claimant to show the particular and specific words stated by these respondents to a particular person, and the burden of proof is on the claimant to show that those statements were false, not that they were negative,

Truth is a complete defense to any slander claim. The burden of proving falsity always remains with the plaintiff or with the claimant. So if what Mr. Moore said, allegedly, what he allegedly said, was negative, but true, then that is an absolute defense to a slander claim, an absolute defense. And the burden of proving that his statements were false is with the claimant, Mr. Gibbs.

Georgia allows for certain privileged communications with regard to libel and slander

But Georgia law basically says that certain statements made cannot form the basis of a libel or slander action, one of which, or perhaps two of which, dealing with the good faith performance of a public or private duty, kind of go to the U-5 issue. But there is also, under Georgia statutes, 51-5-7, subparagraph 3, statements made with a good faith intent on the part of the speaker to

protect his or her interest in a matter in which it is concerned.

So if Merrill Lynch has a good faith basis to protect its interest or if Ann Nermoe or Marion Moore have a good faith basis to protect their interest in dealing with Merrill Lynch customers, that is a privileged communication and cannot form the basis of any recovery. . . .

The transcript location of the quoted excerpts is as follows: pp. 2762, 2773, 2775, and 2775-2776, dated 1-26-2000.

In his responding argument to the panel, Mr. Liddle, counsel for the petitioner, stated the following:

The burden of proof. There hasn't been any reference to the burden of proof, but as I understand a motion for directed verdict, the claimant establishes a prima facie case on the basis of the preponderance of the evidence as to each element of the claim. And if that is done, that is sufficient to go to the next phase, which is the respondent putting on its case. . . .

So to that degree the balancing that would be required in any civil action where that much lower standard of proof is required is what you're looking at. Have you heard enough that at this point the scale tips ever so slightly in favor of what Mr. Gibbs has presented here. If it has, this motion must be denied.

And the touchstone and the key to that is to establish a conditional privilege in Georgia, which is what respondents concede applies here, that the respondents must establish, it is their burden of proof that - and they must carry this burden of proof. At this point in the case I submit to you not only have they not, but it's unlikely that they could have sustained that burden of proof. They must sustain the burden of proof of establishing good faith. It's affirmative. The section of the statute that Mr. Russell

paraphrased talks about establishing good faith by the defendant or the respondent, not just that you can say, "Well, we did it in good faith." You have to prove it. . . .

Acting improperly. You heard Mr. Russell indicate that there is some sort of privilege to conduct yourself appropriately with regard to the U-5. You got me. I got to tell you that after what I've just reviewed with you, if anyone in this room thinks that the U-5 was prepared properly or in accordance with some sort of standard of good faith and an attempt at accuracy and truthfulness, I would be surprised. It clearly was not. It's not truthful in any respect.

With regard to defamation, there are specific statements both on the U-5 and those things that were repeated and the things that Mr. Gibbs was required to repeat and the statements made by Ann Nermoe to Maggie Dutton and the statements made by Mr. Moore to Mr. Meschke and the statements that they have indicated that they made after Mr. Thorne told them that they could so ahead and say that there was this pending investigation.

Those statements were all false and too numerous to identify each and every one specifically. . . .

The Georgia statute specifically talks about general damages. There are four types of defamation that are outlined in the Georgia statute, which is Georgia statute 51-5-4. The first three are ones that say that damage and that--the subsection B of that says that damage is to be inferred. And those three--the third one is making charges against another in reference to his trade, office or profession, calculated to injure him therein. So that's one of the ones that damages are to be inferred.

The transcript location of the quoted excerpts are as follows: pp. 2807-2809, 2816, 2814-2815, 2856-2857, and 2819, dated January 26, 2000.

When it ruled on the motion to dismiss the slander claim, the panel had spent fourteen days in evidentiary hearings relating to the issues of slander and tortious interference to

business relations. Further, it appears that the panel allowed sufficient time to counsel for the parties to argue the facts and the law. During the course of this case, petitioner testified as a witness and called several employees of respondent as witnesses, which included Peter Serenita, Vicki Holley, Bob Thorne, Marion Moore and Pam Middleton. Also, a considerable amount of documentary evidence was admitted.

The record of proceedings before the panel shows that the parties were in disagreement as to the meaning and coverage of Georgia law on slander (as contained in O.C.G.A. §5-5-1 et seq.), including burdens of proof and inferences to be drawn from the evidence. Both sides cited statutory and case law for the panel's consideration. While the court is not able to discern the legal basis for the award of the panel on slander, certain pertinent aspects of the law are clearly established. The petitioner has the burden of proof of the particular words stated by respondent's agent and employees to his customers and that the statements made were false. ITT Rayonier Inc. v. McLaney, 204 Ga. App. 762, 765 (1992); see also, Yandle v. Mitchell Motors, Inc., 199 Ga. App. 211, (1991); Davis v. Copelan, 215 Ga. App. 754, 764 (1994). See also, Straw v. Chase Revel, Inc., 813 F.2d 356, 361, n.6 (11th Cir. 1987), where it is stated that Georgia law places the burden of proving falsity on the petitioner and that only the element of malice may be inferred under O.C.G.A. §51-5-5. Another well-established rule is that truth may always be proved in justification of an alleged slander. O.C.G.A. §51-5-1.

During the argument before the panel, respondent contended that a showing that the alleged statements were privileged or made in good faith would defeat a claim of slander. It appears under Georgia law that the burden of proof on such matters would be on the

respondent since these are affirmative defenses. Sparks v. Parks, 172 Ga. App. 823, 825 (1984) and Van Gundy v. Wilson, 84 Ga.App. 429 (1951).

Based upon a careful review of the record before the panel and briefs submitted by the parties, the court concludes that there existed sufficient legal basis for the decision of the panel dismissing the slander claim at the end of petitioner's case. It appears from the record before the panel that it was possible for the panel to find that petitioner had failed to carry his burden of proving the specific words made to his customers and that such words were false. Also, if the specific words were proved, the panel might very well have found that they were true. If the findings of the panel were based solely on petitioner's case, a consequence thereof is that respondent would not be required to come forward to present evidence in rebuttal or seek to establish affirmative defenses in terms of privileged or good faith.

Based upon the foregoing, the court concludes that no sufficient factual or legal basis has been presented that would support a finding that in its dismissal of the slander claim, the panel was arbitrary and capricious or was in manifest disregard for the law. Accordingly, petitioner's motion to vacate the panel's award on the slander claim will be denied.

The court's rulings in this Order are made in accordance with prevailing case law holding that judicial review of an arbitration award is extremely limited. A court may not engage in a *de novo* review of a panel's decision. See, O.R. Securities v. Professional Planning Assoc., 857 F.2d 742, 748 (11th Cir. 1988) and "II. Standards of Judicial Review" of this Order. The court might very well have reached a different conclusion than the panel if the case was before

the court on a Rule 50-type motion (motion for judgment as a matter of law; formerly motion for directed verdict) presented after the petitioner rested.

IV. The Libel Claim Revisited

On March 9, 1999, petitioner filed his petition to vacate the panel's first Order dismissing the libel, ERISA, and constructive discharge claims. Petitioner contended that the panel was guilty of misconduct and had exceeded its authority. After hearing oral argument by teleconference on November 18, 1999, and considering the written submissions of the parties, on January 28, 2000, in an Order (hereinafter "the prior Order"), the panel's award was vacated as to the libel claim, but confirmed as to the ERISA and the constructive discharge claims. The court remanded the libel claim to the panel for an evidentiary hearing.

In so doing, this Court specifically stated:

Regarding the libel claim, the court agrees with the respondent that statements made in the U-5 and DRP-5 and filed with the NASD are qualified statements under Georgia law. See O.C.G.A. § 51-5-7. The statements in these forms were required by the NASD regulations. However, they are qualified privileges rather than absolute privileges under Georgia law. See O.C.G.A. § 51-5-8 (which deals with absolute privileges such as allegations in a pleading). Although privileged, there remains a question as to whether they were willfully false or made with actual malice. It is clear under Georgia law that truth may always be proved in justification of an alleged libelous statement as a complete defense. *This court concludes that there was insufficient proof in the record before the panel to show whether the statements were true or false.*

In making this ruling on the libel claim, the court is not concerned with what party will ultimately prevail; *only that an evidentiary hearing be held and*

a ruling be made on the merits of the libel claim as promptly as possible.

Order of Court, dated January 27, 2000, at 11 (emphasis added).

While said motion for vacatur was pending before this court, the arbitration panel and parties were not idle. In July of 1999, the hearings before the panel began. The record reveals that the panel had held fourteen days of hearings on the pending issues. During those hearings, the panel received evidence in the form of testimony and exhibits regarding the claims that remained in the case at that time; slander and tortious interference. This evidence was presented during the petitioner's phase of the case.

On February 9, 2000, a week or so after this court had remanded the libel claim and after the panel dismissed the slander claim, respondent again moved the panel to dismiss the libel claim. Respondent contended that the testimony of petitioner and witnesses he called showed that petitioner could not succeed on his libel claim, because the evidence already in the record proved that the statements made on the U-5 and DRP-5 forms were not false. Respondent also stated that the district court was not aware of this evidence when it remanded the libel claim for an evidentiary hearing.

Petitioner answered respondent's motion to dismiss on February 22, 2000, and respondent replied on February 25, 2000. On March 3, 2000, the panel issued an Order advising that the panel chairman, Mr. Moran, had read the court's Order and now asked three questions of the parties: (1) why the panel should not hold an evidentiary hearing and make a ruling on the merits of the libel claim as promptly as possible; (2) why the panel should even consider a motion to dismiss the libel claim before holding an evidentiary hearing in light of the specific wording

of the undersigned's order; and (3) why the parties believe the libel claim should, or should not, be argued in a different forum.

After hearing oral argument from the parties on March 13, 2000, the panel filed the following Order:

The panel, having held evidentiary hearings on the merits of the libel claim, grants Respondent Merrill Lynch's Motion to Dismiss Libel Claim Relating to Forms U-5 and DRP-5, as filed on February 9, 2000.

Petitioner now brings this motion in this court contending the panel failed to follow the specific instructions of this court that the panel hold an evidentiary hearing on the libel claim so that petitioner could receive a full and fair hearing, and that respondent's counsel, Mr. Russell, had encouraged the panel to disobey the Order of this court. Petitioner requests that this court vacate the panel's March 13, 2000 Order, dismissing the libel claim and remand the matter to a new panel for further consideration. Also, petitioner asks this court to sanction respondent and its counsel for their conduct in seeking to evade the January 28, 2000, Order. In support of his position, petitioner contends that the panel's award should be vacated (1) under section 10(a)(3) of the FAA because it refused to hear pertinent and material evidence and engaged in prejudicial misbehavior; (2) under section 10(a)(4) of the FAA because it exceeded its powers in dismissing the libel claim without a hearing; and (3) because it is in manifest disregard of the law and is arbitrary and capricious.

In order to remedy the panel's actions, petitioner contends, the court should vacate the panel's orders dismissing the libel and slander claims, remand all claims (including then

surviving tortious interference claim) to a new arbitration panel, sanction respondent and its counsel, and award attorney's fees and costs.

Petitioner argues that vacatur is appropriate because the panel has twice refused to hear pertinent and material evidence regarding the libel claim by dismissing the claim without an evidentiary hearing and the panel has engaged in misbehavior prejudicial to petitioner by denying the evidentiary hearing this court ordered. Petitioner further contends that the panel has exhibited bias. The main thrust of petitioner's argument is that the panel denied him "fundamental fairness" by dismissing the libel claim without hearing evidence on this claim. In support of his argument, petitioner cites Montes v. Shearson Lehman Brothers, Inc., 128 F.3d 1456, 1464 (11th Cir. 1997) and Ainsworth v. Skurnick, 960 F.2d 939, 941 (11th Cir. 1992), cert. denied, 507 U.S. 915 (1993). These cases contain factual situations in which awards of arbitration panels were vacated.

As an initial matter, respondent raises a jurisdictional question in footnote 2 of its brief opposing vacatur stating that the case is now closed and the court did not retain continuing jurisdiction to review the panel's ongoing conduct. Respondent states that it nevertheless believes that this court is the appropriate forum for resolution of the instant issues and is merely concerned about the procedural posture of the action.¹ This point is well taken, as the court notes that the federal courts have inherent power and authority to enforce a judgment and punish a party for

¹ The court further notes that the parties never challenged the January 28, 2000, Order by direct appeal or motion for post-judgment relief. They cannot now, several months later, object to the legality of the order. Combs v. Ryan's Coal Co., 785 F.2d 970, 979 (11th Cir.), cert. denied, --- U.S. ----, 107 S.Ct. 187, 93 L.Ed.2d 120 (1986).

disobeying the courts' orders. 18 U.S.C. § 401(3). In light of the clear language of the statute, this court determines that it retains jurisdiction of this matter.

As already discussed in part II of this Order, in addition to the narrow statutory grounds, the Eleventh Circuit Court of Appeals has recognized three non-statutory grounds for vacatur. The non-statutory grounds for vacatur include: (1) the award is "arbitrary and capricious," Robbins, 954 F.2d at 683; (2) the award is contrary to public policy, Brown, 994 F.2d at 780; and (3) the award is in "manifest disregard of the law," Montes, 128 F.3d 1456.

Based on a review of the record of the proceedings before the panel, while mindful of the limited judicial review of arbitrators, the court concludes that one or more legal basis for vacatur is indicated in this case. One is set forth in United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987) and W.R. Grace & Co. v. International Union of the United Rubber Workers of America, Local 759, 461 U.S. 757, 766, 103 S.Ct. 2177, 2183, 76 L.Ed.2d 298 (1983). In Misco, the United States Supreme Court announced that the judiciary may refuse to enforce an award which contradicts a "well defined and dominant" public policy and therein identified two such policies, one being "obedience to judicial orders." Misco, 484 U.S. at 43. In announcing the rule of Misco, the Supreme Court explicitly relied on its earlier decision in W.R. Grace, "It is beyond question that obedience to judicial orders is an important public policy. . . ." W.R. Grace, at 766, 2183, 298.

In the prior Order, this court ruled, "This case is REMANDED to the arbitration panel for further proceedings consistent with this Order as to the libel claim." A careful reading of that Order shows the mandate of the Order is further explained by reference in the case of

Prudential Sec. Corp. v. Dalton, 929 F. Supp. 1411 (N.D. Okla. 1996). Page 10 of the court's prior Order states as follows:

. . . . As to this issue, the basis of this court's ruling is summed up in the following statement from Dalton, where the court stated that the arbitration panel

exceeded their powers in granting a motion to dismiss without hearing such evidence. The claimant was thereby denied fundamental fairness.

Memorandum Opinion and Order, January 28, 2000, p. 10.; Dalton, 929 F.Supp. at 1417.

The Court in the Dalton case emphasized that "a fundamentally fair hearing requires . . . opportunity to be heard and to present relevant and material evidence and argument before the decision makers . . ." Id. at 1417 (citing Robbins, 954 F.2d at 685).

It is clear from the three questions asked of the parties by the panel's chairman, after reading the court's prior Order, the panel was unclear as to how best to proceed and sought guidance from the parties on the meaning of the language of the Order. It does not appear from the record that the parties provided the panel written responses to the questions raised, but did present their respective interpretations as part of their oral argument on the motion to dismiss. After hearing argument from the parties, the panel decided to follow the interpretation advised by counsel for respondent.

The record reveals that the arbitrators, after hearing argument, determined that sufficient evidence on the libel claim had been produced prior to this court's Order. The court finds this conclusion troubling. At the time the court issued the prior Order, the court was well

aware that the parties were not sitting on their hands since July, 1999. Respondent's counsel explained to this court during the November 18, 1999 teleconference that

. . . we've now proceeded over this past year with the remaining claims before the arbitration panel. We've had six days of evidentiary hearings, starting in July, then we had two in July, three in September, one recently. We got another one scheduled for the Monday after Thanksgiving.

Teleconference held on November 18, 1999, transcript, at pp. 22-23.

When the court issued its prior Order, the court was well aware that evidence on other issues was being presented to the panel. Also, and perhaps of even greater import, when the libel claim was dismissed by the panel in its December, 1998 Order, the libel claim was out of the case and no longer before the panel for consideration.

Once the petitioner filed his first motion for vacatur of the libel claim with this court, the panel had no jurisdiction over that claim. Thus, any evidence admitted on other pending claims was not presented to the panel with an eye toward the libel claim. In fact, the statements to the panel by both parties indicates that during the relevant period, none of the evidence relating to the libel claim was "fair game" for the arbitration panel because it was taken out of the case.

The record before the panel indicates that even as late as January 27, 2000, the day before this court entered the prior Order, counsel for respondent argued to the panel that libel was not before them. As the transcript of Mr. Russell's January 27, 2000 statements before the panel indicates: he clearly took the position that libel was out of bounds as his questions were not targeted to libel; his proffer of witnesses was not structured to address the libel claim; and that any evidence taken during the period was merely "collateral" and "background":

Once again, *the U-5 language is out of this case.* We have not been called upon to defend that language here. *We haven't structured our proffer of witnesses. I haven't asked questions with the view toward defending that claim. It, like the events predating June 14th, is collateral, background, but not a fact on which this panel can award damages.*

And if there is any change of mind by this panel, and I respectfully submit that there cannot be and should not be based on the facts, *then you can throw our proffer of witnesses out the window because our proffer was based upon the case as it stood when we proffered the witnesses.*

And we would have to add to our witness list Musselman, Meditz, Drew, Kassel, Mandel, people with the New York Stock Exchange and the Florida securities commissioner's office with regard to this delay in getting Gibbs' license transferred so we can find out the exact cause of that, whether it was Merrill Lynch or PaineWebber or Bill Gibbs or the regulators.

But I submit to you that *none of that is fair game for this proceeding. It was taken out of the case properly. And if there was any, using the Federal Arbitration Act standard, any arbitrary or capricious actions by this panel in dismissing that claim, that's for the federal court to decide.* That's the claim by the claimant in federal court, that this panel acted arbitrarily and capriciously in dismissing the claims that it did.

Transcript, p. 2877, line 18; p. 2878, line 24. (emphasis added).

As already stated, these statements reflects respondent's position before this court's prior Order issued. Only *after* the prior Order issued remanding the libel claim back to the panel (and after

the slander claim was dismissed), respondent reversed course and took the position that enough evidence on libel was already in the record for the panel to again dismiss it without holding further evidentiary hearings.

In support of the new motion to dismiss, respondent contended that the evidence heard by the panel during the period while the motion was pending in federal court was as good as having the evidentiary hearing required by the Order. Respondent specifically argued that it was proper not to hold a new evidentiary hearing, because enough evidence on the issue had already been heard during the time the first petition for vacatur was pending before the court. To support this position, respondent's counsel argued that the whole record -- which was not before the district court at the time it ruled in January, 2000 -- now encompassed the very evidence that the court required on the libel claim. Emphasizing judicial efficiency, respondent's counsel argued that the motion to dismiss was consistent with the requirement of this court's Order regarding efficient and expeditious adjudication; that additional hearing would now be cumulative.²

A close review of the record indicates that only after this court remanded the libel claim for an evidentiary hearing (and after the panel dismissed the slander claim) did respondent contend that the evidence admitted on the other claims was sufficient to address the libel claim too. The dismissal of the libel claim and the earlier position taken by respondent that evidence admitted on other claims was "out of the case," merely "background, collateral," and that

² From a reading of the submissions of the parties, the court finds that the prior Order has been subjected to profoundly different interpretations. Although they were not required to do so, the court is mindful that neither party requested of this court clarification as to what the court meant when ordering that a evidentiary hearing be held on the libel claim.

respondent's counsel "never asked questions with the view toward defending [the libel] claim," cannot easily be squared with the new contention that the evidence heard on the other issues now constitutes a sufficient evidentiary hearing on the libel claim.

Before reaching a final decision on the libel issue, the court determines that certain other matters should be discussed and evaluated, such as, the scope of evidence before the panel, the proffer of evidence by the petitioner and judicial estoppel.

When the panel heard argument on the motion to dismiss the libel claims, there had been several days of hearing in which evidence was presented on the slander and tortious interference claims. Petitioner had rested his case as to these claims and the panel had dismissed the slander claim. Among the witnesses testifying were petitioner, Peter Serenita, Vicki Holley, Bob Thorne, Marion Moore and Pam Middleton. Other than petitioner, all witnesses were employees of respondent. Respondent argued before the panel and to this court that petitioner's libel claim (same as the slander claim) is without merit because the evidence shows that the statements made in the U-5 were true, due to the fact that the evidence in the record shows that petitioner resigned while he was under "internal review." Respondent relied heavily on the testimony of petitioner before the panel, where it appears he testified that an "internal investigation" might have been going on when he resigned.

In response, petitioner argued that in his testimony petitioner never testified that he was under "internal review." Petitioner also argued that testimony of the other witnesses (employees of respondent) was insufficient on this point because they had no direct and controlling knowledge on this issue. Petitioner pointed to a NASD document which he contends shows that "internal review" is a term of art and is quite different from an "internal investigation."

The court determines that the panel was authorized to consider the evidence previously admitted on other claims as evidence on the libel issue. It certainly can be argued that a dismissal of the slander claim should require a dismissal of the libel claim. While similarities exist between the two, there are differences; as in this case, the slander claim was much broader than the libel claim. The slander claim was based on alleged oral statements made to several customers or prospective customers of petitioner. Also, the basis of dismissal of the slander claim might have been a lack of proof of publication of specific words, whereas there is no question of publication regarding the libel claim (the language in the required filings). It is the court's view that it would have been possible for the panel to dismiss the slander claim without deciding whether statements made were true or false.

Petitioner's counsel stated to the panel that as to the libel claim, he would call several witnesses which included Meditz, Kassel, Musselman, Drew, and Montaganino. It should be noted except for Montaganino, these are the same witnesses respondent's counsel stated he planned to call on the libel claim prior to the entering of said prior Order. Petitioner contends that no witness had been called to testify who signed, participated in the preparation of or approved the language in the U-5 form. Petitioner further contended to the panel that he needed to conduct discovery on the libel issue, particularly relating to information contained in Exhibit B, motion #51, which he says was only delivered to him near the end of the proceedings. As to this exhibit, petitioner asserts that it shows that, Helmuth Meditz, a compliance officer of respondent, approved a version of the U-5 form showing that respondent's departure was "voluntary." Petitioner's counsel states that on three occasions he informed the panel of his interest in calling Mr. Meditz (citing transcript, pp. 1614, 2759), but his request was denied, without explanation

on April 17, 2000 (transcript not available). The court concludes that petitioner, at the very least, should have been allowed to call Mr. Meditz.

In the motion to this court, petitioner contends that judicial estoppel should be applied against respondent because of the conduct of its counsel in employing unfair strategies to the petitioner's disadvantage. Respondent replied that judicial estoppel does not provide a legal basis for the court to vacate an arbitration award as it is not one of the statutory or judicially crafted grounds. Respondent further argues that respondent's representations to the panel on the libel issue, before and after the prior Order, were not inconsistent.

The court concludes that whether or not the doctrine of judicial estoppel applies is a federal law issue, notwithstanding the court's prior ruling that state applies to the issues of libel and slander. The doctrine of "judicial estoppel" is defined in Black's Law Dictionary, 7th Edition, as follows:

Estoppel that prevents a party from contradicting previous declarations made during the same or a later proceeding if the change in position would adversely affect the proceeding or constitute a fraud on the court.

A case by the Eleventh Circuit Court of Appeals, relying on Fifth Circuit case law, stated that the doctrine of judicial estoppel is directed against parties who attempt "to manipulate the court system through the calculated assertion of divergent sworn positions in judicial proceedings." Chrysler Credit Corp. v. Rebhan, 842 F.2d 1257, 1261 (11th Cir. 1988). In the Rebhan case, the doctrine was applied to a party, who he did not actually sign the verified

pleading involved, but was aware of it and together with his attorney relied on said pleading in one court and took a different position in another court.

In support of his position that judicial estoppel applies to an arbitration, petitioner cited Lydon v. Boston Sand & Gravel, Co., 175 F.3d 6 (1st Cir. 1999), a case involving an arbitration in a labor-management matter in which judicial estoppel was applied. In that case, the Court stated the following:

The judicial estoppel doctrine is intended to “maintain the integrity of the judicial system and to protect parties from opponents’ unfair strategies. Indeed, if parties feel free to select contradictory positions before different tribunals to suit their ends, the integrity and efficacy of the courts will suffer. The [judicial estoppel] doctrine should be employed when a litigant is playing fast and loose with the courts, and when intentional self-contradiction is being used as a means of obtaining unfair advantage.

Lydon v. Boston Sand & Gravel Co., 175 F.3d 6, 12.

A reading of the Lydon case shows that while the facts are quite different from the instant case, the law stated therein is legally sound. It is this court’s opinion that the doctrine of judicial estoppel can be applied to an arbitration proceeding brought before a district court, if a proper showing is made that a party is “playing fast and loose” with the courts. It is clear to the court, in the instant case, counsel for respondent took strikingly inconsistent positions before the panel relating to the libel issue. Upon consideration of the facts in this case, the court is not convinced that the doctrine of judicial estoppel applies. The inconsistent positions taken by

respondent, in its written motion and oral argument, were before the same tribunal, the arbitration panel.

The court has given due consideration to legal standards that it must follow in deciding a motion to vacate the award of an arbitration panel as set forth in part II of this order. However, upon careful consideration of the record in the case, the court determines that petitioner's motion to vacate the arbitration award on the libel issue will be granted. The court's prior Order was not appealed or modified. Both the panel and parties agreed that no evidentiary hearing had been heard on the libel issue prior to the first dismissal. Accordingly, there can be no dispute that the parties and the panel were required to fully follow the mandate of the order.

The panel, on its own motion or following the advice of respondent's counsel, did not follow the terms of that order. The statement in the panel's award of dismissal, entered March 13, 2000, "having held evidentiary hearings on the merits of the libel claim" is not accurate, as no evidentiary hearings were held directly on that claim.

In the court's view, if petitioner, in his testimony admitted or testified to the effect that the language in the U-5 form was not false, the panel would have been authorized to dismiss the libel claim without additional evidence. The evidence in the record reveals that petitioner never testified that he was under "internal review" at the time of his resignation. It appears that he simply stated that an "investigation" was pending when he resigned. The testimony of another witness, Mr. Serenita, an employee of respondent, states that as to an internal review, "We never got to that stage."

In his briefs to the court, petitioner made a compelling argument on this matter. Petitioner argues that in order to adequately present his case on the libel claim, there must be notice when the claim will be heard, be allowed time to prepare, collect necessary documents, and call needed witnesses. He states that only then would he be able to make a proper opening statement and focus his questions to the witnesses on the issues of the claim. Due to the change in strategy of the respondent's counsel, which was accepted by the panel, petitioner was denied the opportunity to do these things. Consequently, the court concludes that petitioner was denied "fundamental fairness," and this is a ground for vacatur under 9 U.S.C. 10(a)(3) "refusing to hear evidence pertinent and material to the controversy."

The court further concludes that the award of the panel on the libel issue is subject to vacatur because the panel refused to follow the order of this court dated January 28, 2000, and that is a violation of an important public policy-- obedience to judicial orders. Even a finding that the panel attempted to follow said order by applying evidence already in the record to the libel claim would not be legally sufficient, as that would be only partial compliance with the Order. Based on the foregoing, the petitioner's motion to vacate the arbitration panel's Order dismissing the libel claim will be granted. Further, the court will remand this claim to a new arbitration panel for a hearing on the libel claim consistent with this Order.

The court acknowledges that the scrutiny made in this Order of the arbitration panel's award on the libel issue might not ordinarily be legally justified given the limited scope of review allowed to a district court. However, the court's Order of January 28, 2000, requiring an evidentiary hearing on the libel claim, added a new dimension to the proceeding before the

panel. In the court's view, this justified the review made in this case as the court is required to determine whether the Order was followed.

Notwithstanding the decision to vacate the award on the libel claim, the court disagrees with the assertion by counsel for the petitioner that the rulings rendered by the panel indicate that the panel was biased against the petitioner. The record reveals that the panel made a serious effort to comply with the prior Order of this court, but failed to follow the mandate of that Order. The record also reveals that the court agreed with the awards of the panel on all other claims of the petitioner.

V. Tortious Interference Claim

Petitioner's claim of tortious interference with business relations was the last claim ruled on by the panel. This claim was dismissed in an award filed June 1, 2000, by a two to one vote (with one panel member dissenting). The record before the panel reveals that respondent decided not to put up evidence in defense after the petitioner rested, choosing to proceed to closing arguments, which was objected to by the petitioner. In the final award of the panel, which dismissed the tortious interference claim, the panel did not provide any reason or explanation of its decision.

Petitioner's brief attacks the panel's ruling arguing that the panel disregarded the evidence in support of the tortious interference claim as well as Georgia's law on tortious interference, and therefore, its award is in manifest disregard of both the law and the facts and is arbitrary and capricious. Petitioner makes much of the dissent by one of the arbitrators, asserting that the dissenter was a stockbroker for nearly eleven years and understood the practices of the

securities industry. Petitioner contends that the facts in the record shows that respondent engaged in wrongful conduct without privilege, acted with malice, induced a breach of contractual obligations or caused other parties to fail to do business with petitioner, and that such conduct proximately caused damage to petitioner. Petitioner contends that the panel's award dismissing the tortious interference claim should be vacated under 9 U.S.C. 10(a)(3), because the panel refused to "hear evidence pertinent and material to the controversy" and engaged in prejudicial "misbehavior."

In response, respondent contends that petitioner is improperly asking for *de novo* review of the panel's decision, pointing to this court's earlier Order which stated, that judicial review of an arbitration award is "extremely limited," and whenever possible, courts should defer to the arbitration decision. Respondent further contends that petitioner has failed to prove each and every element of a tortious interference claim.

As to the claim of tortious interference, the court concludes that petitioner has not met this burden of establishing grounds to vacate the award. The record reveals that respondent argued to the panel that the tortious interference claim failed as a matter of law because respondent was not a "stranger" or an intermeddler in the relationships or contracts with its own clients. That argument has been reasserted in briefs filed in this court.

The court concludes that the panel was not guilty of misconduct in that it refused to hear material evidence on the tortious interference claim. Also, the court finds that there is no evidence in the record (and petitioner does not point to any single instance) where respondent requested that the panel not follow Georgia law regarding tortious interference. The court finds

that the panel did not manifestly disregard Georgia law regarding the elements of a tortious interference claim.

The court now turns to the discussion of the stranger doctrine in Georgia. The elements of that doctrine are set out below:

Tortious interference claims, whether asserting interference with contractual relations, business relations, or potential business relations, share certain common essential elements: (1) improper action or wrongful conduct by the defendant without privilege; (2) the defendant acted purposely and with malice with the intent to injure; (3) the defendant induced a breach of contractual obligations or caused a party or third parties to discontinue or fail to enter into an anticipated business relationship with the plaintiff; and (4) the defendant's tortious conduct proximately caused damage to the plaintiff.

Disaster Servs., Inc. v. ERC Partnership, 228 Ga. App. 739, 492 S.E.2d 526, 528 (1997).

The facts in this case that give rise to the stranger doctrine are simply stated. Petitioner was a licensed stock broker engaged in the business of selling securities as an employee of respondent. Since petitioner was selling, as respondent's employee, the employer was an economic beneficiary of any business transactions between petitioner and the clients.

The leading authority on the stranger doctrine in Georgia is Atlanta Market Center Management Company v. McLane, 269 Ga. 604, 503 S.E.2d 278 (1998). With regard to the stranger doctrine in Georgia, the Supreme Court teaches:

Thus, in order for a defendant to be liable for tortious interference with contractual relations, the defendant must be a stranger to both the contract and the business relationship giving rise to and underpinning the contract. Renden v. Liberty Real Estate, 213 Ga.App. 333, 444 S.E.2d 814 (1994) (where the lessor

was "an essential entity" to the subletting of space by its tenant since the tenant's right to sublease was set forth in the lessor's lease). [FN2]

...

FN2. While the tort alleged in Renden v. Liberty Real Estate was tortious interference with a business relationship, the applicability of the "stranger doctrine" is the same for that tort as for tortious interference with a contractual relationship.

...

We endorse the Court of Appeals' line of cases which, in effect, reduce the number of entities against which a claim of tortious interference with contract may be maintained.

Atlanta Market, 269 Ga. at 609-610, 503 S.E.2d at 283.

Applicable case law shows that the stranger doctrine has been expanded to cover those who benefit from the contract of others, without regard to whether the beneficiary was intended by the contracting parties to be a third-party beneficiary. Lake Tightsqueeze, Inc. v. Chrysler First Fin. Serv. Corp., 210 Ga.App. 178, 435 S.E.2d 486 (1993) (one who would benefit from the contract with which one is alleged to have interfered is not a stranger to the contract and cannot have tortiously interfered); Disaster Services v. ERC Partnership, 228 Ga.App. 739, 492 S.E.2d 526 (1997) (one with a direct economic interest in the contract, even though not a third-party beneficiary, is not a stranger to the contract) and Jefferson-Pilot Comm. Co. v. Phoenix City Broadcasting, 205 Ga.App. 57, 60, 421 S.E.2d 295 (1992), (all parties to a comprehensive interwoven set of contracts which provided for the financing, construction, and transfer of ownership" were not strangers). Accordingly, as a matter of law, the court concludes

that respondent cannot be held liable on the tortious interference claim under the facts of this case.

VI. Motion for Sanctions

Petitioner requests that this court impose sanctions against respondent and its counsel under the court's inherent power and 28 U.S.C. § 1927. Petitioner argues that the conduct of respondent and its counsel in improperly requesting the panel to dismiss the libel claim caused multiple proceedings before the panel and this court and was unreasonable and vexatious. Petitioner argues that as to sanctions, the court should award to him the additional attorney's fees and expense which arose as a direct result of this misconduct.

Respondent argues in opposition that this court may not and should not impose sanctions based on the alleged misconduct in the underlying arbitration proceedings. Respondent argues that 28 U.S.C. §1927 applies only to "cases in court," and the decision of whether any attorney violated standard practice under NASD rules is for the panel to decide. Respondent contends that there has been no showing that respondent or its counsel acted in bad faith; that counsel's actions were consistent with the court's Order. Respondent states that its conduct is in stark contrast with the inflammatory and vexatious rhetoric in petitioner's motion to the court and before the panel.

The court disagrees with respondent that the court is without authority to impose sanctions against a party or counsel in an arbitration proceeding brought before a district court in a case where there is a claim that a court's order has not been followed. The court agrees with the respondent that petitioner has not proved bad faith or egregious conduct that would demand sanctions under §1927 or inherent powers. The court's finding hereinabove that the position

advanced by counsel for petitioner regarding the libel claim was not legally justified is not tantamount to a finding of bad faith. Accordingly, the imposition of sanctions is not appropriate, and the motion will be denied.

CONCLUSION

In accordance with the foregoing, petitioner's motions to vacate are hereby GRANTED IN PART and DENIED IN PART. In specific terms, the panel's arbitration award is VACATED as to the libel claim and the panel's awards are CONFIRMED as to the slander and tortious interference with business relations claims. Petitioner's motion for sanctions is DENIED. Moreover, the case is REMANDED to a new NASD panel for further proceedings to conduct an evidentiary hearing on the libel claim consistent with this order. It is ORDERED that the parties shall bear their own costs. The clerk is DIRECTED to enter a judgment pursuant to this order.³

SO ORDERED, this 29th day of March, 2001.


HORACE T. WARD, SENIOR JUDGE
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

APR 01 2001

CLERK

DEPUTY CLERK

³The clerk is notified that this Order terminates docket entries 35-1, 35-2, 35-3, 35-4, 36-1, 42-1, 44-1, and 45-1.