

At the Commercial Division of the
Supreme Court of the State of New York,
held in and for the County of Kings, at the
Courthouse, at Civic Center, Brooklyn, New
York, on the 1st day of December , 2006.

P R E S E N T:

HON. CAROLYN E. DEMAREST,
Justice.

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In the matter of the Arbitration between
ISAAC RAITPORT and SHIRLEY RAITPORT,

Petitioners,

DECISION AND ORDER

- against -

Index No.4153/06

SALOMON SMITH BARNEY, INC.and CIBC
WORLD MARKETS CORP. A/K/A/ CIBC
OPPENHEIMER & CO., INC.,

Respondents.

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The following papers numbered to read on this motion:

	<u>Papers Numbered</u>
Notice of Motion-Order to Show Cause and Affidavits (Affirmations) Annexed _____	<u>1</u>
Answering Affidavits (Affirmations) _____	_____
Reply Affidavits (Affirmations) _____	<u>8,9, 10, 11</u>
Other Papers _____	<u>4,5,6,7,12,13</u>
Memoranda of Law _____	<u>2,3</u>

On July 20, 2006, this Court rendered a Decision and Order denying
petitioners' motion, pursuant to CPLR 7511 (b) and Section 10 of the Federal

Arbiration Act, to vacate the Arbitration Award rendered by a panel of the National Association of Securities Dealers (NASD) on November 15, 2005, dismissing petitioners' claims, and granted the cross-motion of respondents to confirm the Award. In their motion, petitioners challenged, among other things, NASD's removal of Peter Cella as Chairman of the Panel shortly before hearings commenced, contending that such action evidenced misconduct in the procurement of the Award. In rejecting petitioners' contentions respecting the removal of Chairman Cella, this Court concluded, upon the representations of the parties, that "NASD removed Chairman Cella only after Mr. Cella's bias against SSB and failure to disclose his prior representation of a claimant against SSB in which he had described SSB as 'axe murderers', as well as other improprieties in prior arbitrations, was discovered." Thus, this Court concluded that George Friedman, Director of Arbitration for NASD, had properly exercised his discretion, in accordance with NASD rules, in order to ensure "the neutrality of the panel".

Subsequent to the publication of my Decision and Order, I received a 14-page communication from Peter Cella dated August 4, 2006, in which he contested the factual predicate both for his removal as Chairman by NASD and for this Court's rejection of petitioners' claims of impropriety in securing his removal. While unable to "recall" whether he had referred to Shearson as "axe-murderers" in a prior matter (*Franzone v. Shearson Lehman Bros.*, NASD No. 91-01919), Mr. Cella insisted that such reference "was not directed against SSB" which, as Shearson's successor, had only "minimal participation" in the 1991 arbitration, concluded in 1995, after Shearson had been acquired by SSB. Mr. Cella also

disputed the propriety of his 2002 removal as an arbitrator in a prior arbitration involving Smith Barney (*Matarezzo v. Smith Barney*, NASD No. 02-04069), the reason for which had not been disclosed to him. As Mr. Cella is not a party to this matter and has no standing to intervene or seek relief of any kind, this Court took no action with respect to the August 4 communication, which was served on counsel for the parties herein.

Not surprisingly, however, by Notice of Motion dated August 9, 2006, petitioners moved to reargue and renew, citing and annexing the Cella letter of August 4. In that motion, in addition to the limited issue addressed herein, plaintiffs sought to reargue the entire matter, even raising issues concerning other panel members not previously raised. In their motion, petitioners concede “claimants did have a full and fair opportunity to be heard” before the Panel, but insist “unfortunately no one was listening” (*Motion to Reargue and Renew*, p. 5). This Court declines to review the several issues previously addressed and denies the Motion to Reargue as to petitioners’ contentions that both the Court and the Panel incorrectly rejected their arguments regarding the law and its application to the facts of this case with respect to petitioners’ alleged contractual rights to special treatment by respondents. This Court also declines petitioners’ invitation to discuss matters not previously raised. See *Gellert & Radner v. Gem Community Mgmt., Inc.*, 20AD3d 388 (2d Dep’t, 2005).

Respondents vigorously opposed petitioners’ request to reargue and renew, arguing that the information contained in Mr. Cella’s letter was not “new evidence” not previously available to petitioners pursuant to CPLR 2221. As respondents correctly point out, Mr. Cella’s letter of August 4 (at p. 10) states that,

following several unsuccessful attempts on his own part to discover from NASD counsel for George Friedman the reason for his removal, over the objection of respondents, “[i]n or about early June 2005 claimant’s counsel undertook to provide me with a full set of the Raitport removal motion papers.”¹ This was well in advance of any application to this Court and was even substantially prior to issuance of the Arbitration Award of November 15, 2005. Moreover, as respondents noted at oral argument, petitioners’ counsel, Timothy Dennin, was claimants’ counsel in Matarazzo v. Smith Barney, and had been copied with the March 25, 2003, letter from William Hohausser, Associate General Counsel to Smith Barney, to Mr. Friedman appealing his denial of their motion to remove Mr. Cella from the panel in that case upon a similar failure to disclose his prior representation of claimants against a predecessor of Smith Barney and his characterization of Smith Barney as “axe murderers”. Petitioners’ representation that “[t]he newly discovered facts contained in the former Chairman Cella’s letter to this Court, were not known to Petitioners at the time of filing the Motion to Vacate nor during the brief oral argument on said motion” (Motion to Reargue at 2), is disingenuous at best. Clearly, since , as early as May 23, 2005, petitioners’ counsel was in communication with Mr. Cella regarding his removal and was in possession of the entire file before Mr. Friedman, he was in a position to “discover” and “obtain” the purportedly newly-discovered evidence now under submission. Respondents’ resistance to the instant motion is well-founded. See

¹See Cella letter of 7/25/05 to NASD Dispute Resolution Staff Attorney Rosenfeld, indicating that “under date of May 23rd the Claimant’s counsel in the Raitport arbitration wrote to me advising ‘ . . . It is claimants’ position that full disclosure should be made to you concerning the reasons why you were removed on the eve of the Arbitration Hearing.’”, and offering copies of the various letters to NASD from respondents’ counsel.

Yard v. New York City Transit Auth., 4 AD3d 352 (2d Dep't, 2004); Shapiro v. State, 259 AD2d 753 (2d Dep't, 1999); In re Estate of Gifford, 28 AD3d 953 (3d Dep't, 2006). However, because of Mr. Cella's direct intervention and challenge to the grounds described in this Court's prior decision, the Court has entertained the motion so as to complete the record and permit review of the propriety of Mr. Friedman's decision to remove Mr. Cella.

The gist of the respondents' defense of the decision to remove Mr. Cella is that his failure to disclose his prior representation of claimants against respondents or their predecessor entities and his inflammatory remarks characterizing such entities in the context of such representation violated his obligation under NASD rules to fully disclose possible bias. Respondents have also taken issue with Mr. Cella's breach of NASD rules by sharing information regarding settlement with members of the presiding panels in that case.

By letter dated September 6, 2006, Mr. Cella again communicated to this Court his umbrage at respondents' "continued misrepresentations" regarding his failure to disclose in compliance with NASD rules. Citing to prior arbitrations involving respondents or their constituent predecessors in which Mr. Cella had been designated a member of the arbitration panel (Boccaro v. SSB, NASD No. 03-06491; Bookman v. Morgan Stanley, NASD No. 02-01678; Matarazzo v. Smith Barney, NASD No. 02-04069), Mr. Cella complained that SSB consistently sought his removal only after the commencement of proceedings in Boccano and Bookman, as well as in Raitport, notwithstanding its knowledge of his prior removal in the earlier case (Matarazzo) based upon alleged improprieties as an advocate in Franzone v. Shearson Lehman (NASD No. 91-01919). Mr. Cella was particularly concerned that he had been refused access to the reasons for his

removal.

During oral argument of the instant motion on September 13, 2006, it became increasingly clear to this Court that, regardless of the procedural merit of petitioners' motion, the record would be incomplete without the documentation which informed Director Friedman's decision to remove Mr. Cella long after the prehearing conference on January 21, 2004 and only days before the arbitration hearings were to commence on February 8, 2005. Accordingly, all parties were invited to supplement their submissions and were directed to obtain an affidavit from Mr. Friedman, if possible.

In compliance with my request, petitioners' counsel, Mr. Dennin, wrote to Mr. Friedman asking that he "confirm" that the sole basis for Mr. Cella's removal was contained in the correspondence to him by the parties, copies of which were attached. When Mr. Friedman, though an associate, declined to respond², Mr. Dennin served a court-ordered subpoena for the NASD file relating to Mr. Cella's removal, which also was not answered.

On behalf of SSB, Counsel Jeh Johnson explained in a Supplemental Affirmation that Mr. Cella's reference to SSB's predecessor as "axe murderers" was contained in a letter dated July 9, 1995, SSB's copy of which had been destroyed in the attack of September 11, 2001. Mr. Johnson attached, however, a responsive letter dated July 13, 1995 to Jill Wile, Senior Staff Attorney at NASD, in which the remark is addressed. Mr. Johnson also explained that, although other

²In a letter dated September 26, 2006, Staff Attorney Avi Y. Rosenfeld explained that, apparently as a matter of policy, "NASD Dispute Resolution does not disclose the reasons for decisions made by the Director of Arbitration to grant or deny requests to remove an arbitrator. No provision of the Code of Arbitration Procedure obligates the Director to disclose the basis of his or her decisions, as arbitrators are not obligated to disclose the reasons for their decisions."

counsel to SSB had been aware of Mr. Cella's history of participation in other cases, none of the attorneys working on the Raitport case were aware of it and had only learned of the reasons for the requested removal "at the 11th hour".

Rule 10312 of the NASD Code of Arbitration Procedure governs the arbitrator's duty of disclosure. Rule 10312 (a) mandates: "Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination", including "(2) [a]ny existing or past financial, business, professional, family, social, or other relationships or circumstances that are likely to affect impartiality or might reasonably create an appearance of partiality or bias" (emphasis added).³ Rule 10312 (d) provides that "[t]he Director may remove an arbitrator based on information that is required to be disclosed pursuant to this Rule", but may do so, after the commencement of a pre-hearing conference or a hearing, "based only on information not known to the parties when the arbitrator was selected." As a general rule, "[t]he Director will grant a party's request to disqualify an arbitrator if it is reasonable to infer, based upon information known at the time of the request, that the arbitrator is biased, lacks impartiality, or has an interest in the outcome of the arbitration. . . ." (Rule 10312 (d) (3)).

It is not the function of this Court to interpret the NASD Rules or determine their correct application to this case. See National Planning v. Achatz, 2002 WL

³ See also, Canon II of the Revised Code of Ethics for Arbitrators in Commercial Disputes (eff. 3/1/04), which requires disclosure of "any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties." ((A) (2)) (emphasis added). Canon II (D) directs: Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure."

31906336 (WDNY 2002). That role is firmly vested in the Director of Arbitration.⁴ Nor will this Court speculate upon the thoughts of Director Friedman in reaching his decision. Suffice it to conclude that, upon the record now before the Court, there is compelling evidence to support a good faith finding that Chairman Cella was an inappropriate panel member whose history with the predecessors of respondents, and his failure to disclose same in compliance with NASD Rules, warranted his removal from the panel. There is no evidence of impropriety, procedural defect or misconduct, fraud, or corruption in procuring the Award which would justify vacating the Award of November 15, 2005, pursuant to CPLR 7511.

Upon review of the record now supplemented with the purported “newly-discovered evidence”, this Court adheres to its original decision of July 20, 2006. The Motion to Vacate is denied and the Award of November 15, 2005, is confirmed.

The foregoing constitutes the decision and order of the Court.

E N T E R :

J.S.C.

⁴See, e.g., NASD Rule 10308 (d) authorizing the Director to determine whether to disqualify or remove an appointed arbitrator for failure to disclose pursuant to Rule 10312.