Matter of Williamson v Lipper
2010 NY Slip Op 33110(U)
October 28, 2010
Supreme Court, New York County
Docket Number: 604123/07
Judge: Shirley Werner Kornreich
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SCANNED ON 11/1/2010

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Justice

Index Number : 604123/2007

WILLIAMSON, RICHARD A.

vs.

KENNETH & LIPPER

SEQUENCE NUMBER : 002

CONFIRM AWARD

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 5
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	6, 7

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision/order

FILED
NOV 01 2010
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/28/10

JUSTICE SHIRLEY WERNER KORNREICH

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

Application of Richard A. Williamson, as Successor Liquidating Trustee of LIPPER CONVERTIBLES, L.P.,

Petitioner,

For an Order Pursuant to Article 75 of the CPLR Staying Arbitration of a Certain Controversy

-against-

KENNETH LIPPER, LIPPER & COMPANY, L.P., LIPPER & COMPANY, INC., AND LIPPER PARTNERS, L.P.,

Respondents.

----------X

Decision & Order

Index No. 604123/07

FILED
NOV 01 2010
NEW YORK
COUNTY CLERK'S OFFICE

RICHARD A. WILLIAMSON, ESQ, as Successor Liquidating Trustee on behalf of Lipper Convertibles, L.P., and Lipper Fixed Income Fund,

Plaintiff,

-against-

KENNETH LIPPER,

Defendant.

----------X

Index No. 602312/05

KORNREICH, J.:

In the above actions, which are consolidated herein for disposition of these motions only, Kenneth Lipper, Lipper & Company, L.P. (Lipper L.P.), Lipper & Company, Inc. (Lipper Inc.) and Lipper Partners, L.P. (Lipper Partners) (collectively, the Lipper Parties) move to confirm, in part, a final arbitration award. The the Successor Liquidating Trustee of Lipper Convertibles, L.P. and Lipper Fixed Income Fund, L.P., Richard A. Williamson, (the Trustee) cross-moves to vacate a portion of that award.

On March 2, 2010, a three-person arbitration panel, under the auspices of the Financial

Industry Regulatory Association (FINRA), issued a final award resolving two separate arbitrations. One was brought by petitioner Trustee and asserted claims against Mr. Lipper. The other was brought by the Lipper Parties against the Trustee and asserted claims for indemnification and sought to compel the Trustee to make a court-ordered distribution to Lipper Partners. The panel's award (the Award) (1) holds the Trustee liable to Mr. Lipper, Lipper L.P. and Lipper Inc. in the aggregate amount of $15,558,194, plus prejudgment interest on the Lipper Parties' claim for indemnification; (2) holds Mr. Lipper liable to the Trustee in the amount of $3,094,410, plus prejudgment interest on the Trustee's claim for unjust enrichment against Mr. Lipper; and (3) denies any and all other relief sought by the parties.

The Lipper Parties now move to confirm the portions of the Award that: (1) orders the Trustee to pay them $15,558,194 in indemnification, and (2) denies any and all other relief sought by the Trustee in his Statement of Claim. Although the Lipper Parties do not concede the propriety of the Award insofar as it holds Mr. Lipper liable in the amount of $3,094,410, they do not object to that portion of the Award to the extent it is applied as a set-off, reducing the amount the Trustee owes to the Lipper Parties to $12,463,784. The Trustee cross-moves to vacate the indemnification portion of the Award and to confirm the portion of the Award holding Mr. Lipper liable in the amount of $3,094,410.

For the reasons set forth below, the branches of the motion and the cross-motion to confirm the Award are granted. The branches of the motion and the cross-motion to vacate the Award are denied, and the Award is confirmed.

I. Background

Lipper Convertibles, L.P. (Convertibles) was a New York limited partnership that invested in a leveraged portfolio of convertible securities (Aff. of Elkan Abramowitz, ¶ 5). Convertibles, which was formerly known as Lipco Partners, L.P., was governed by an Amended and Restated Limited Partnership Agreement (the Convertibles Partnership Agreement) (*id.*; *see* Exh 3). From October 1, 1997 onward, Lipper Holdings LLC (Holdings) was the general partner of Convertibles; Lipper L.P. was the Placement Agent for Convertibles; Lipper Inc. was the managing member of Holdings; and Mr. Lipper was the President and Chief Executive Officer of Holdings and a General Securities Principal of Convertibles (*id.*, ¶ 6). Prior to January 2002, Edward Strafaci was one of two Executive Vice Presidents of Holdings and a co-manager of Convertibles (*id.*). He also served as Convertibles' portfolio manager (*id.*).

On January 14, 2002, both Strafaci and Michael Visovsky, Convertibles' Director of Research, suddenly resigned without notice (*id.*, ¶ 7). Following their resignations, Holdings commenced an internal review of Convertibles' valuations for the year-end 2001 (*id.*). This internal review and a subsequent review conducted by the law firm of Fried Frank Harris Shriver & Jacobsen LLP, determined that Strafaci had overvalued the portfolio by more than $300 million (*id.*). Strafaci ultimately pled guilty to four counts of securities fraud, and he was sentenced to six years in prison (Williamson Aff., ¶ 11; *see also* Abramowitz Aff., ¶¶ 7-8).

On March 26, 2002, Holdings, as the general partner, advised its limited partners that it would dissolve the partnership, liquidate the underlying securities, and return the net cash assets to limited partners (Williamson Aff., ¶ 12). Pursuant to the Convertibles Partnership Agreement, Holdings became the liquidating trustee in charge of the liquidation of such funds (*id.*).

Section 10.3 of the Convertibles Partnership Agreement governs the distribution of funds

to limited partners in the event of liquidation. Section 10.3 provides:

> Distribution to Partners following Termination. The Liquidating Trustee will distribute the proceeds of liquidation to the Partners in the following manner:
>
> (a) Net Profits and Net Losses for the Accounting Period ending as of the Termination Date shall be allocated, and the Partners' Capital Accounts shall be credited or charged, as set forth in Article 7;
>
> (b) Payment, or provision for payment, shall be first made of the expenses of liquidation and the debts and liabilities of the Partnership;
>
> (c) The Liquidating Trustee shall distribute the proceeds from sale and all other assets of the Partnership to the Partners in proportion to their respective Capital Accounts.

Thus, according to Section 10.3, payments would first be made to all creditors, reserves would be established for contingent and unliquidated claims and liabilities, and the remaining assets, if any, would be distributed to limited partners.

On October 3, 2002, Holdings filed a dissolution proceeding in this court seeking approval of a plan of distribution of Convertibles' assets (Abramowitz Aff., ¶ 9). Convertibles' limited partners objected to the distribution plan on a number of grounds, including its treatment of incentive compensation paid to Holdings, the general partner (Williamson Aff., ¶ 15). The limited partners argued that the distribution plan did not take into account the fact that, from 1995 to 2001, the general partner had paid itself over $40,000,000 in the form of an "Incentive Compensation Fee," which was based on the false "gains" reported by Strafaci (*id.*, ¶ 16).

In an order dated April 9, 2003, Justice Moskowitz approved the basic valuation method proposed by Holdings, but ordered the appointment of a new Liquidating Trustee (Abramowitz Aff., ¶ 10; *see* Exh 6). On June 27, 2003, Justice Moskowitz appointed Mr. Williamson as

Successor Liquidating Trustee (Williamson Aff., ¶ 20). As Successor Trustee, his primary duties initially involved proposing a revised plan for distribution in winding up the limited partnerships (*id.*). On December 15, 2003, the Trustee submitted a revised plan of distribution, which was supported by a report prepared by BDO Seidman (the Supplemental BDO Report) (*id.*; *see* Exh 18). That report recalculated the capital accounts of Convertibles' limited partners, and analyzed the unearned incentive compensation fees received by the general partner (*id.*).

By order dated February 13, 2004 (the February 13, 2004 Order), Justice Moskowitz approved the Trustee's revised plan of distribution (*id.*, ¶ 24; *see* Exh 24). At the Trustee's request, Justice Moskowitz also: (1) held Holdings, as general partner of Convertibles, liable for approximately $45.7 million in limited partner overwithdrawals and $41.8 million in excess performance fees; and (2) authorized the Trustee to investigate, and if he believed warranted, to assert claims against PricewaterhousCoopers LLC (PwC), Mr. Lipper, Mr. Strafaci, Holdings, and its officers, directors, manager or members, and overwithdrawn limited partners (February 13, 2004 Order, ¶¶ 9-12). In addition, Justice Moskowitz found that "Lipper Convertibles and Lipper Fixed Income are and shall be answerable to their respective partners only as partners and not as creditors" (*id.*, ¶ 15).

Starting in 2002, a total of 21 investigations, litigations and arbitrations occurred as a result of the dissolution of Convertibles (Abramowitz Aff., ¶ 13). Beginning on August 11, 2005, counsel for Mr. Lipper, Lipper L.P. and Lipper Inc. wrote a series of letters to the Trustee demanding indemnification of their legal fees and expenses in defending these matters (*id.*, ¶ 14; *see* Exh 9). The Trustee did not respond to these indemnification requests (*id.*, ¶ 15). Consequently, on November 6, 2007, Mr. Lipper, Lipper L.P. and Lipper Inc. filed a Statement of Claim with FINRA, seeking to arbitrate their right to indemnification pursuant to the terms of

the Convertibles Partnership Agreement (the Lipper Parties Arbitration) (*id.*, ¶ 15). In their Statement of Claim (*id.*, Exh 10), Mr. Lipper, Lipper L.P. and Lipper Inc. demanded that the Trustee indemnify them under Section 4.3 (b) of the Convertibles Partnership Agreement in each of the investigations and claims asserted against them (Statement of Claim, ¶¶ 64-68). The Lipper Parties represented that they sought such indemnification as "employees, agents or affiliates" of the general partner, rather than as partners (*id.*).

Section 4.3 (b) of the Convertibles Partnership Agreement provides:

> *Indemnification.* The General Partner and its partners, employees, agents and Affiliates shall be protected and indemnified by the Partnership to the fullest extent legally permissible under and by virtue of the Partnership Law against all liabilities and losses suffered by any of them by virtue of the status of each such Person as a general partner of the Partnership or a partner, employee, agent or Affiliate of the General Partner (including amounts paid in respect of judgments or fines or in settlement of litigation and expenses, including attorneys' fees, reasonably incurred by any of them in connection with any pending or threatened litigation or proceeding) with respect to any action or omission taken or suffered in good faith, other than liabilities and losses resulting from the negligence, malfeasance or violation of applicable law by the indemnified Person

(Convertibles Partnership Agreement, ¶ 4.3 [b]). None of the investigation and claims asserted against the Lipper Parties had resulted in a finding that any of them had engaged in "negligence, malfeasance or [a] violation of applicable law" (Abramowitz Aff., ¶ 15).

The Lipper Parties also sought a declaratory judgment that they would be entitled to recover such fees and expenses for those actions that remained pending (Statement of Claim, ¶¶ 69-72). In addition to seeking indemnification, the Statement of Claim also asserted claims on behalf of Lipper Partners arising out of the Trustee's refusal to pay a $2,886,075 distribution to which it alleged it was entitled under the February 13, 2004 Order, and a declaration regarding its

right to participate in future distributions by the Trustee (*id.*, ¶¶ 73-103).

On December 16, 2007, the Trustee filed an action under Index No. 604123/07, in which he sought to stay the Lipper Parties' Arbitration (Abramowitz Aff., ¶ 16). In his moving papers, the Trustee argued that, by not asserting their indemnification claims before the court entered the February 13, 2004 Order, either the Lipper Parties had waived their claims or, in the alternative, the Lipper Parties' claims were substantively barred by the doctrines of estoppel, res judicata and laches (*id.*; *see* Exh 16, at 3, 9-11, 13-17). The Trustee further argued that the February 13, 2004 Order barred the Lipper Parties from asserting claims in their capacities as creditors of Convertibles (*id.* at 14). In reply, the Trustee took the position, for the first time, that the Lipper Parties had also waived their procedural right to arbitrate and that, in any event, these were threshold issues for the court to decide (*id.*, ¶ 17; *see* Exh 13, at 9-14).

By order dated August 4, 2008, Justice Cahn rejected the Trustee's petition and held that the Lipper Parties Arbitration should proceed (*id.*, ¶ 18; *see* Exh 15). On August 26, 2008, the Trustee filed a notice of appeal and on September 2, 2008, moved for a stay pending appeal (*id.*). On October 2, 2008, the Appellate Division denied the Trustee's motion for an interim stay (*id*; *see* Exh 16). Thereafter, the Trustee allowed the time to perfect his appeal to lapse without either withdrawing the appeal or perfecting it (*id.*).

On June 27, 2005, the Trustee filed an action in this court against Mr. Lipper, under Index No. 602312/05, in which he asserted numerous claims, including a claim for unjust enrichment (Williamson Aff., ¶ 25; *see* Exh 25). On April 21, 2006, Justice Moskowitz issued an order compelling the Trustee to arbitrate his claims (*id.*; *see* Exh 28). On February 5, 2008, the First Department affirmed Justice Moskowitz's decision compelling arbitration (Abramowitz Aff., ¶ 19; *see* Exh 19).

On October 9, 2008, the Trustee filed a Statement of Claim against Mr. Lipper before FINRA (the Williamson Arbitration) (Williamson Aff., ¶ 25; *see* Exh 29). In his Statement of Claim, the Trustee asserted claims of negligence, breach of fiduciary duty, unjust enrichment, money had and received, and constructive fraudulent conveyance. Both the Lipper Parties Arbitration and the Williamson Arbitration were consolidated into one hearing before a FINRA panel on November 13, 2008, (*id.*, ¶ 28). Each side moved to dismiss the other's claims (Abramowitz Aff., ¶ 23). In his motion to dismiss, the Trustee represented to the Panel that he was withdrawing his appeal of Justice Cahn's order compelling arbitration and affirmatively submitted his arbitrability objections to FINRA (*id.*). He then repeated the arguments that he had previously presented to Justice Cahn, including the arguments: that the February 13, 2004 Order extinguished the Lipper Parties' right to seek indemnification as creditors; that the indemnification claim was barred by Section 121-1004 (b) of the New York Revised Limited Partnership Act (Williamson Aff., ¶ 28); that the Lipper Parties' claims were barred by the doctrines of estoppel, res judicata and laches; and that the Lipper Parties had waived their right to arbitrate (Abramowitz Aff., ¶ 23).

On July 21, 2009, the Panel denied the motions to dismiss (*id.*, ¶ 25). Between July 23, 2009 and October 28, 2009, the Panel held 15 days of hearings, during which it heard testimony from seven witnesses on issues regarding liability (*id.*, ¶ 27). The central issue in both the Lipper Parties' claim for indemnification and the Trustee's negligence and breach of fiduciary duty claims was whether Mr. Lipper had been negligent in connection with his supervision of Convertibles (*id.*). In addition to testimony by Mr. Lipper, both sides called expert witnesses regarding the appropriate standard of care for convertible arbitrage hedge funds during the relevant period (*id.*).

Each side also called an expert to testify regarding the extent to which Mr. Lipper – as a part owner of Convertibles' general partners – received and retained excess performance fees that Convertibles had paid to its general partners. Mr. Lipper's expert argued that the Trustee's unjust enrichment claim was barred by the applicable statute of repose and that even if the statute of repose was inapplicable, the maximum amount the Trustee could recover was $3,094,410 (*id.*, ¶ 32). In reaching this figure, the expert took into account that a substantial portion of the excess performance fees had been used to pay taxes and Convertibles' operating expenses (including salary and bonuses to its employees (*id.*). In contrast, the Trustee argued that Mr. Lipper had been unjustly enriched in the amount of $24,627,883, which reflected Mr. Lipper's percentage interest in the excess performance fees received by the general partners without accounting for expenses incurred in operating Convertibles (*id.*).

On November 17, 2009, the Panel notified the parties that the final arbitration award would include a finding that the Trustee was liable on the Lipper Parties' indemnification claim (*id.*, ¶ 38; *see* Exh 26). The parties then proceeded to the damages phase of the hearing, presenting evidence regarding the fees and expenses for which the Lipper Parties were seeking indemnification (*id.*). On January 20 and 21, 2010, the parties called a total of four witnesses and submitted approximately 70 exhibits (*id.*). The Lipper Parties presented evidence that, excluding amounts that had been reimbursed by insurance, Lipper L.P. had incurred fees and expenses in the amount of $7,872,083 in connection with the investigation by the United States Attorneys Office and the Securities & Exchange Commission, 12 separate actions brought in state and federal courts in New York, South Carolina and Illinois, and 7 arbitrations; and that Lipper, Inc. and Mr. Lipper had unreimbursed fees and expenses in the amount of $138,455 and $7,547,656, respectively, in connection with those matters (*id.*). Moreover, the Lipper parties presented

evidence that their counsel claims incorporated a discount of almost $3 million from the standard rates charged by Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C., their attorney, over the almost eight years it had represented Mr. Lipper (*id.*).

On March 20, 2010, the Panel issued an award (1) in favor of Mr. Lipper, Lipper L.P. and Lipper Inc. in the aggregate amount of $15,558,194, plus pre-judgment interest on their claim for indemnification;[1] (2) in favor of the Trustee in the amount of $3,094,410, plus prejudgment interest on his claims against Mr. Lipper; and (3) denying any and all other relief sought by the parties.

II. Discussion

The Federal Arbitration Act (the FAA) governs arbitrations that "affect" commerce (*Matter of Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247 [2005]). Because securities trading "affects" commerce, the FAA is applicable to arbitrations involving partnerships engaged in the business of trading securities (*see 212 Inv. Corp. v Kaplan*, 6 Misc 3d 1031[A], 2005 NY Slip Op 50265 [U], *5 [Sup Ct, NY County 2005] [Cahn, J.] [concluding that FAA applies to lawsuit by limited partners of hedge fund whose purpose was to invest in securities]).

Under the FAA, arbitration awards are entitled to "substantial deference" and are subject to extremely limited judicial review (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 475, *cert dismissed* 548 US 940 [2006]; *Matter of Uram v Garfinkel*, 16 AD3d 347 [1st Dept], *lv denied* 5 NY3d 717 [2005]; *see Wallace v Buttar*, 378 F3d 182, 189 [2d Cir 2004] [arbitration

[1] Specifically, the Panel awarded Lipper L.P. $7,872,083, Lipper Inc. $138, 455 and Mr. Lipper $7,547,656, with prejudgment interest running at a rate of 3% per annum from November 6, 2007.

award entitled to great deference and party petitioning for vacatur bears heavy burden]). Therefore, an award will be upheld so long as there is even a "'barely colorable justification for the outcome reached'" (*Wien*, 6 NY3d at 479, quoting *Matter of Andros Compania Maritima, S.A. [Marc Rich & Co., A.G.]*, 579 F2d 691, 704 [2d Cir 1978]).

Pursuant to Section 9 of the FAA, a court "must" confirm an award, unless it falls within one of several narrow exceptions:

> (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; or
>
> (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 USC § 10 [a]).

When the confirmation of an award is opposed, the court's review is limited to determining whether any of the statutory bases for vacating the award exist and "'[t]he showing required to avoid summary confirmation of an arbitration award is high" (*Rocket Jewelry Box, Inc. v Noble Gift Packaging, Inc.*, 157 F3d 174, 175 [2d Cir 1998] [citation omitted]). Thus, "[u]nless the party opposing confirmation can show a statutory basis for vacating, modifying, or correcting the award, the award must be confirmed" (*id.*). The underlying merits of the award are irrelevant to whether it should be confirmed (*see Paulson Inv. Co. v Almodovar*, 2005 WL 323737, *supra*; *Florasynth. Inc. v Pickholz*, 750 F2d 171 [2d Cir 1984]).

An argument for vacatur based on "manifest disregard of the law" has its genesis in Section 10(a)(4) of the FAA – the argument that the arbitrators exceeded their power *(Stolt-Neilson S.A. v AnimalFeeds Int'l. Corp.*, 130 S Ct 1758, 1766 [2010]; *see T.Co Metals, LLC v Dempsey Pipe & Supply, Inc.*, 592 F3d 329, 346 n10 [2d Cir 2010] [manifest disregard construed as interpretive gloss on 9 USC 10[a][4]). An arbitration award may be vacated on such ground (*Bradley v Merrill Lynch & Co.*, 344 Fed Appx 689, 690 [2d Cir 2009]; *Eyewonder, Inc. v Abraham*, 2010 US Dist LEXIS 93562 *9 [SDNY] [arbitral award may be vacated when it manifests disregard of law]), but it is "severely limited" to those "instances where some egregious impropriety on the part of the arbitrators is apparent..." (*Wallace*, 378 F3d 189; *Wien*, 6 NY3d 480, 481; *see e.g. Duferco Intl. Steel Trading v T. Klaveness Shipping A/S*, 333 F3d 383 [2d Cir 2003] [rejecting manifest disregard of the law argument, and affirming district court's confirmation of arbitral award]; *DiRussa v Dean Witter Reynolds Inc.*, 121 F3d 818 [2d Cir 1997], *cert denied* 522 US 1049 [1998] [holding that failure of arbitrators to award attorneys' fees under the Age Discrimination in Employment Act was not manifest disregard of the law]). In fact, between 1960 and 2003, the Second Circuit Court of Appeals vacated some or all of an award on this basis in only four out of at least 48 cases (*Duferco*, 333 F3d 389 ["Our reluctance over the years to find manifest disregard is a reflection of the fact that it is a doctrine of last resort – its use is limited only to those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent"]). "An arbitral award may be vacated for manifest disregard of the law 'only if "a reviewing court...finds 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."'" [citations omitted] *(Wallace*, 378 F3d 189).

Here, the Trustee opposes confirmation of the indemnification portion of the Award pursuant to 9 USC § 10 (a) (4), arguing that "the Panel exceeded its powers by issuing an award in manifest disregard of the law that is also contrary to public policy "(Trustee Mem., at 15). Specifically, the Trustee argues that the indemnification portion of the Award "violates and eviscerates" the February 13, 2004 Order of Justice Moskowitz, and "violates a provision of the New York Revised Limited Partnership Act" (*id.* at 2).

The Trustee's arguments against confirmation of the indemnification portion of the Award do not qualify for the extraordinarily narrow grounds under which an arbitration award can be vacated for "manifest disregard of the law." Consequently, the Lipper Parties' motion to confirm the indemnification portion of the Award is granted, and the Trustee's cross motion to vacate that portion of the award is denied.

The standard of "egregious impropriety" can be satisfied only where the party seeking vacatur points to "explicit evidence in the record" of "deliberateness or willfulness ... that shows the arbitrators' intent to flout the law" (*Wien*, 6 NY3d 484; *see also Yusuf Ahmed Alghanim & Sons v Toys "R" Us, Inc.*, 126 F3d 15, 24-25 [2d Cir 1997], *cert denied* 522 US 1111 [1998] ["'mere error in the law or failure on the part of the arbitrator[] to understand or apply the law' is not sufficient to establish manifest disregard of the law," as "manifest disregard" means that "'[t]he error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator'" (citations omitted)]; *Matter of Simon v Austin Hatch & Smith, LLC*, 2008 WL 4753249, 2008 NY Slip Op 32908[U] [Sup Ct, NY County 2008]). As noted by the court in *Wallace*:

> the award "should be enforced, despite a court's disagreement with it on the merits, if there is a barely colorable justification for the outcome reached." In sum, a court reviewing an arbitral award cannot presume that the arbitrator

> is capable of understanding and applying legal principles with the sophistication of a highly skilled attorney. Indeed, this is so far from being the case that an arbitrator "under the test of manifest disregard is ordinarily assumed to be a blank slate unless educated in the law by the parties." [citations omitted]

378 F.3d 190.

The Trustee seeks to vacate the indemnification portion of the Award on the ground that paragraph 15 of the February 13, 2004 Order bars the Lipper Parties' indemnification claims. According to the Trustee, the indemnification portion of the Award directly conflicts with paragraph 15 of the February 13, 2004 Order, which expressly states that "Lipper Convertibles and Lipper Fixed Income Fund are and shall be answerable to their respective partners only as partners and not as creditors" (February 13, 2004 Order, ¶ 15). The Trustee argues that, because the Lipper Parties are seeking indemnity as creditors, not as partners, confirmation of the Award would be an express violation of the February 13, 2004 Order (Trustee Mem., at 16-17). Indeed, the Trustee argues, paragraph 15 was "directly aimed" at precluding claims by the Lipper Parties (*see id.* at 2).

However, the Trustee is barred from raising this argument under the doctrine of the law of the case. Not only was this argument presented to – and rejected by – Justice Cahn, who denied the Trustee's attempt to block the Lipper Parties' claim from proceeding to arbitration, but the Trustee repeatedly presented this argument to the Panel, which likewise rejected it (*see* Trustee Mem., at 17 ["In each of his submissions [to the Panel], the [] Trustee explained that indemnification of the Lipper Parties was barred by paragraph 15 of the Order"]).

On April 1, 2008, the Trustee argued before Justice Cahn that the Lipper Parties' arbitration should be stayed because paragraph 15 of the February 13, 2004 Order barred any claim for indemnification. In an August 4, 2008 order, Justice Cahn denied the Trustee's motion

for a stay of arbitration. Although the order does not directly address how he resolved the Trustee's arguments, Justice Cahn's comments at oral argument demonstrate his finding that, if he permitted the arbitration to proceed, the Trustee would be bound by the finding of the arbitration panel. Specifically, although the Trustee argued that any award in favor of the Lipper Parties would "fly in the face of" the February 13, 2004 Order (Transcript of April 1, 2008 Oral Argument, at 53 [Aff. of Catherine M. Foti, Exh 27]), Justice Cahn stated that, notwithstanding the February 13, 2004 Order, "[y]ou would be bound if I sent [this case] to the arbitrator and the arbitrator gave the [Lipper Parties] an Award. You should be bound by the award" (*id.* at 54). Thus, Justice Cahn made clear that the Trustee could not subsequently raise paragraph 15 before the court in an attempt to vacate the arbitration award in favor of the Lipper Parties.

Justice Cahn ended the parties' debate as to the meaning of paragraph 15 by denying the Trustee's motion to stay, and ordering that the arbitration proceed. In rejecting the Trustee's argument, Justice Cahn necessarily concluded either (1) that the February 13, 2004 Order did not bar the Lipper Parties' claim or (2) that determination of the effect of that order was an issue that should be resolved by the arbitrators. The Trustee ultimately decided not to perfect his appeal of Justice Cahn's decision. Because the Trustee never perfected his appeal, Justice Cahn's rejection of those arguments in his order became law of the case, and cannot be revisited.

The purpose of the law of the case doctrine is to prevent relitigation of legal issues that have already been determined at an earlier stage of the proceeding (*Matter of Dondi v Jones*, 40 NY2d 8 [1976]; *Martin v City of Cohoes*, 37 NY2d 162 [1975]; *Brownrigg v New York City Hous. Auth.*, 29 AD3d 721 [2d Dept 2006]). Thus, "once an issue is judicially determined, either directly or by implication, it is not to be reconsidered by Judges or courts of coordinate jurisdiction in the course of the same litigation" (*Holloway v Cha Cha Laundry*, 97 AD2d 385,

386 [1st Dept 1983]; *see also Thompson v Cooper*, 24 AD3d 203 [1st Dept 2005]; *Hass & Gottlieb v Sook Hi Lee*, 11 AD3d 230 [1st Dept 2004]). Indeed, the law of the case doctrine is given even further weight where, as here, a party asks one judge to revisit a decision made by another judge who previously presided over the case (*see Gee Tai Chong Realty Corp. v GA Ins. Co. of N.Y.*, 283 AD2d 295, 296 [1st Dept 2001] ["where an application on an issue is directed to different Justices, the finality to be ascribed to the prior ruling becomes a paramount consideration"]).

In any event, even if Justice Cahn's decision were not law of the case, the Trustee has failed to meet his heavy burden of demonstrating that the Panel acted in "manifest disregard" of the law. He failed to prove violation of a "well defined, explicit, and clearly applicable" legal principle or that paragraph 15 of the February 13, 2004 Order so clearly and unequivocally barred the Lipper Parties from asserting their non-partnership-based indemnification rights that any other interpretation of that phrase would be an error "so obvious that it would be instantly perceived by the average person qualified to serve as an arbitrator," is proved. (*see Willemijn Houdstermaatschappij, BV v Standard Microsystems Corp.*, 103 F3d 9, 13 [2d Cir 1997]). To the contrary, the record demonstrates that paragraph 15 does not clearly and unambiguously bar the Lipper Parties' indemnification claims, and that thus, the Panel was well within its authority to reach its determination. As such, the Panel's decision does not rise to the heightened level of "manifest disregard."

First, as set forth in both the Lipper Parties' submissions to Justice Cahn and the Panel, the Lipper Parties did not bring their claims as partners of Convertibles, but as "employee[s], agent[s] or Affiliate[s]" of the General Partners (*see* Convertibles Partnership Agreement, § 4.3 (b); Transcript of FINRA Arbitration, at 1390-1391; 3699-3700 [making clear in which capacity

Lipper Parties pursued their indemnification claims]). It is well established that courts must determine the validity of claims in the context of the capacity in which they were brought (*see Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255 [1970]; *Corcoran v National Union Fire Ins. Co. of Pittsburgh*, 143 AD2d 309 [1st Dept 1988]). Here, the Lipper Parties incurred legal expenses in their capacity as employees, agents or affiliates, rather than as limited partners, and they sought indemnification in those capacities.

Moreover, the February 13, 2004 Order was entered at the Trustee's request and was substantially unchanged from his proposed order (*see* Trustee's Mem., at 12; Notice of Settlement of Order [Williamson Aff., Exh 22]). The Trustee's December 2003 report to the court makes clear that the "bar" language was designed to extinguish creditor claims by limited partners against Convertibles brought for damages suffered in their capacity as limited partners (*see* Trustee's Report, at 24-25 [Williamson Aff., Exh 18] [stating that the bar language was necessary in order to "extinguish ... possible claims by limited partners against the partnerships which ... would convert the limited partner claimants into creditors"]). Hence, the bar language sought to prevent the limited partners from gaining priority over each other by converting their claims for the return of capital in the liquidation proceeding into priority judgments (*see id.* at 27 ["individual limited partners should not be permitted to obtain priority in distribution ahead of similarly situated partners"]). The Lipper Parties did not seek indemnification as limited partners suing Convertibles for the loss of their investment. Nor were their claims improperly "converted" from limited partner claims to creditor claims. Rather, the Lipper Parties' claims are creditor claims arising from their status as "employees[s], agent[s] or Affiliate[s]" of the General Partner, and not from their status as limited partners.

In addition, the Trustee himself stated in open court that the February 13, 2004 Order is

subject to "interpretation" (*see* Transcript of December 17, 2009 hearing, at 34:10-13 [Foti Aff., Exh 37]). Indeed, during the arbitration, the Trustee put at issue his own intent in obtaining the February 13, 2004 Order (*see* Trustee's Statement of Answer, Motion to Stay Arbitration and Motion to Dismiss Arbitration, at 21 [Williamson Aff., Exh 33 [discussing reasoning behind Trustee's Report]). The fact that the Trustee felt it important to explain to the Panel his intent behind paragraph 15 demonstrates that this provision does not clearly and unambiguously bar the Lipper Parties' claims. Moreover, the only evidence that the Trustee submits as to his intent is his December 2003 report, which nowhere states that the Trustee was seeking the bar language to preclude the Lipper Parties from pursuing their indemnification claims. Therefore, because the Trustee failed to put any evidence before the Panel suggesting that the Order was intended to preclude these claims, he cannot rely on this argument in support of his motion to vacate.

In sum, the Panel did not exceed the limits of its authority by ignoring "well defined, explicit and clearly applicable" law (*see Wien*, 6 NY2d 481), and, consequently, the Panel did not engage in manifest disregard by rejecting the Trustee's arguments (*see Merrill Lynch, Pierce, Fenner & Smith, Inc. v Bobker*, 808 F2d 930, 934 [2d Cir 1986] [manifest disregard does not apply to an "arguable difference regarding the meaning or applicability of laws urged upon" an arbitrator]).

Without citing any supporting case law, the Trustee further argues that the Award rendered in favor of Lipper L.P. should be vacated because New York Partnership Law § 121-1004 bars indemnification where "a judgment or other final adjudication adverse to the general partner establishes that ... he personally gained in fact a financial profit or other advantage to which he was not legally entitled" (Partnership Law § 121-1004 [b]). According to the Trustee,

the Award is precluded because the Supplemental BDO Report, which recalculated the limited partners' interests in Convertibles, noted that Lipper L.P. had received $19,786,829 in unearned incentive compensation fees. Consequently, the Trustee contends, the court's adoption of the Supplemental BDO Report constitutes an adjudication that Lipper L.P. received a financial benefit to which it was not entitled (Trustee's Mem., at 22-23).

The court rejects this argument. In order to meet his burden of proving manifest disregard, the Trustee must show that the Panel "knew of the governing legal principle," and ignored it, and that "the law was well defined, explicit and clearly applicable." The Trustee never argued to the Panel that the Supplemental BDO Report had been transformed into a final adjudication by means of the February 13, 2004 Order. Rather, he only argued generally that Justice Moskowitz's April 11, 2003 and February 13, 2004 orders constituted a final adjudication that Lipper L.P. gained a financial profit to which it was not entitled. The Trustee's current argument that the Supplemental BDO Report became a "final adjudication" when it was incorporated into the court's orders, was not made to the Panel.

Additionally, by its terms, the exclusion set forth in section 121-1004 does not apply here, because no adverse judgment or final adjudication has been entered against Lipper L.P. The Supplemental BDO Report is a not a court order and does not address Lipper L.P.'s legal rights with respect to the money it received. Further, in the February 13, 2004 Order, the court only determined that Lipper Holdings was liable for the entire amount of the alleged overpaid performance fees (*see* Order, ¶¶ 4-5). It made no finding against Lipper L.P. Lipper L.P. has never been held liable in any court proceeding arising out of Convertibles' dissolution.

The Trustee also argues that the Award should be vacated as violative of public policy because it directly conflicts with the February 13, 2004 Order. To the contrary, public policy

strongly favors arbitrations (*see Green Tree Fin. Corp.-Alabama v Randolph*, 531 US 79, 81 [2000] [noting "liberal federal policy favoring arbitration agreements"]; *Matter of Curtis, Mallet-Prevost, Colt & Mosle v Garza-Morales*, 308 AD2d 261, 262 [1st Dept 2003] [noting New York's "strong and longstanding policy" favoring arbitration]). As previously discussed, the February 13, 2004 Order does not conflict with the Award. As a result, public policy does not mandate vacating the Award (*see Matter of Smithkline Beecham Biologicals S.A. v Biogen*, Inc., 1996 WL 209897, * 6 [SD NY 1996] [refusing to vacate award on public policy grounds, despite movant's argument that it conflicted with another award, because awards did not actually conflict]).

Finally, the Trustee asserts that awarding indemnification to Lipper L.P. violates the strong public policy set forth in Partnership Law § 121-2004. However, the Trustee fails to cite any cases to support this proposition, or identify the public policy underlying section 121-2004 that would be violated. Accordingly, because the Panel clearly considered the proper legal principles and properly applied them (*see* 9 USC § 9), the Lipper Parties' motion to confirm the indemnification portion of the Award is granted, and the Trustee's cross motion to vacate that portion of the Award is denied.

Furthermore, unless there exist grounds for vacating or modifying an arbitration award, it must be confirmed by the court (9 USC § 9; *see Local 670 v Blair Ventures LLC*, 2009 WL 3963875 [SD NY 2009] [confirming arbitration award where defendant did not oppose the award, and no grounds for vacatur existed]). No grounds exist for vacating that part of the Award which provides that Mr. Lipper was unjustly enriched in the amount of $3,094,410, plus interest. There is no evidence that this portion of the Award was procured by corruption, fraud or undue means; that the arbitrators were partial, corrupt, or guilty of misconduct; that they failed to follow

proper procedure; or that they exceeded the scope of their powers (*see* 9 USC § 10). Also, there is no evidence that this portion of the Award is irrational, was issued in manifest disregard of the law, or violates public policy.

Mr. Lipper cites no legal ground to support vacatur of this portion of the Award. Instead, he contends that the Panel failed to apply a statute of repose that he claims would have negated Mr. Lipper's liability (*id.* at 13, n 15). However, the statute of repose referred to by Mr. Lipper applies only to partnership distributions, whereas Mr. Lipper's liability for unjust enrichment was based on his receipt of incentive compensation payments to which he was not entitled, rather than partnership distributions. Moreover, although Mr. Lipper states that he "does not concede the propriety of the [unjust enrichment portion of] the Award," he also states that "he does not object to that portion of the Award to the extent it is applied as a set-off reducing the Amount the Trustee owes him" (Lipper Parties Mem., at 2, n 2). Ergo, the Lipper Parties' motion to vacate the portion of the Award finding Mr. Lipper liable in the amount of $3,094,410 on the Trustee's claim for unjust enrichment is denied, and the Trustee's cross-motion to confirm this portion of the Award is granted.

In light of the above determinations, the entirety of the Award is confirmed. The court has considered the remaining arguments, and finds them to be without merit. Accordingly, it is

ORDERED that the motion to confirm the indemnification portion of the arbitration award is granted; and it is further

ORDERED that the cross motion to vacate the indemnification portion of the arbitration award is denied; and it is further

ORDERED that the motion to vacate the unjust enrichment portion of the arbitration award is denied; and it is further

ORDERED that the cross motion to confirm the unjust enrichment portion of the arbitration award is granted; and it is further

ORDERED that the arbitration award is confirmed.

Dated: October 28, 2010

ENTER:

J.S.C.

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