# Civil No. [redacted]

IN THE

# United States District Court

SOUTHERN DISTRICT OF NEW YORK

KENT BUILDING SERVICES, LLC,

*Petitioner,*

*v.*

[redacted],

*Respondent.*

## MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO VACATE ARBITRATION AWARD AND IN SUPPORT OF CROSS-MOTION TO CONFIRM ARBITRATION AWARD AND FOR THE AWARD OF ATTORNEYS' FEES AND COSTS

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Respondent, [redacted] ("Respondent" or "[redacted]"), by his counsel Levin Epstein & Associates, P.C., respectfully submits this Memorandum of Law in Opposition to the Verified Amended Petition to Vacate Arbitration Award (the "Petition") filed by Petitioner, Kent Building Services, LLC ("Petitioner" or "KENT"), and in support of [redacted]'s Cross-Motion to Confirm the Arbitration Award and for an Award of Attorneys' Fees and Costs, pursuant to 28 U.S.C. § 1927.

## PRELIMINARY STATEMENT

In this proceeding, the Petitioner moves to vacate an Arbitration Award which determined that the Petitioner terminated its employment of Mr. [redacted] "without cause" and that the Petitioner breached the employment agreement between the parties by failing to pay Mr. [redacted] a $100,000.00 severance payment upon his termination "without cause" as required by the agreement.[1] In so holding, the Arbitrator found that the Petitioner acted arbitrarily and in violation of an implied covenant of good faith and fair dealing when it terminated Mr. [redacted], ostensibly under the "for cause" provision of the employment agreement.

The Petitioner seeks to vacate the Award by contending that the arbitrator acted in manifest disregard of the law. The Respondent opposes the Petitioner's application, cross-moves to confirm the Award and seeks the imposition of sanctions pursuant to 28 U.S.C. 1927.

The Petitioner's attempt to re-argue the merits of the claims that it arbitrated for one year and lost is classically improper, completely baseless and warrants the denial of the Petition with the imposition of sanctions.[2] Presumably aware that a motion to vacate an arbitration award

[1] At the time of his termination, Mr. [redacted] received an annual base salary of $200,000.00. Agreement, § 3(a). The agreement required the company to pay Mr. [redacted] a severance payment equal to six months of his annual base salary if the company terminated [redacted] "without cause". *Id*. §4(e).

[2] *See, Manning v. Smith Barney, Harris Upham Co.,* 822 F. Supp. 1081, 1083-84 S.D.N.Y.1993) (imposing sanctions and noting "that sanctions are peculiarly appropriate in the context of a challenge to an arbitration award which appears to be a largely dilatory effort"); *Quick & Reilly, Inc. v. Jacobson,* 126 F.R.D. 24, 28 (S.D.N.Y.1989) (finding the plaintiffs' opposition to the confirmation of the award was devoid of merit); *see*

cannot be based on a challenge to the arbitrator's factual determinations, the Petitioner attempts to shoehorn its challenge to the award on the basis that the arbitrator applied the incorrect legal standard to the interpretation of a discretion clause in an employment agreement that includes "for cause" and "not for cause" termination provisions.

Similar Trojan-horse strategies have been outright condemned by this Court and the Second Circuit. *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 211 (2d Cir. 2002) (reversing vacatur of arbitration award where the petitioner's arguments "ostensibly challenge[d] the arbitrator's manifest disregard of New York's law" of contract interpretation, but in fact the petitioner challenged the arbitrator's reading of the parties' agreement."); s*ee also, InterDigital Commc'ns v. Nokia*, 407 F. Supp. 2d at 531 ("Courts do not have the power to review the merits of arbitrators' contract interpretations.").

Here, the arbitrator rendered a forty-three (43) page, well-reasoned decision (the "Award") undergirded with no less than 169 citations to the record of the full two-day hearing, dozens of citations to the relevant case law, and included a clear and detailed explanation of the applicable legal standard and the parties' respective legal positions, now ostensibly challenged before this Court. (*See* Award, Pet. Appendix 1.) The arbitrator's award stated in plain English the correct legal standard governing a discretion clause in any contract, as follows:

> Under New York law, a covenant of good faith and fair dealing is implied in all contracts. Further, where a contract gives a party the power to act in his/her discretion, the New York courts have held that such a provision embraces the tenets that: (1) "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract"; and (2) the promise not to act **arbitrarily** or **irrationally** in exercising that discretion.

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*also Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 708 (2d Cir.1985) (upholding the imposition of sanctions where the district judge concluded that the plaintiff "had presented 'frivolous, unreasonable and groundless' opposition to [the defendant's] motion to confirm the arbitration award").

*Award* at 38 (citations omitted) (emphasis added). The paragraph cited above was supported by citations to long standing New York legal precedent. *Award* at 38 fn. 162, fn., 163, fn. 164. In defiance of the applicability of this well settled precept, the Petitioner contends that the arbitrator disregarded a legal standard which requires [redacted] to establish bad faith with evidence that Neuman had terminated [redacted]'s employment for a "constitutionally impermissible purpose or in violation of a statutory or decisional law" (hereinafter "Bad Faith Standard").

As the Second Circuit held, in *State Street Bank and Trust Co. v. Inversioned Errazuriz*, "[w]here [a] contract contemplated the exercise of discretion, this pledge includes a promise not to act **arbitrarily** or **irrationally** in exercising that discretion."[3] Having considered the parties' respective legal positions, the arbitrator, in her forty-three (43) page opinion, supplied a reasoned and detailed analysis of the facts as applied to the governing law, concluding as follows:

> For all of the foregoing reasons, I find, Neuman [the Chief Executive Officer of KENT] exercised the discretion provided in the Agreement in an **arbitrary** and **irrational** manner in violation of the implied covenant of good faith and fair dealing that exist between the parties to a contract.[4]

This is law in New York State, plain and simple.

Thus, the Petitioner's argument that the arbitrator manifestly disregarded the law is a straw argument that constitutes an indefensible lawyers' contrivance to frustrate [redacted]'s recovery.[5] Respectfully, enough is enough.[6]

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[3] 374 F.3d 158, 169 (2d Cir. 2004) (quoting *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995) (emphasis added)); *see also Award* at 24 (citing *State Street Bank and Trust Co.*).

[4] *Award* at 39 (emphasis added).

[5] *See, Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 208 (2d Cir. 2002) (explaining that "[t]o vacate the award, we must find "something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law.") (citations omitted).

[6] In fact, this is the second baseless proceeding that KENT foisted on [redacted]. Prior to the commencement of the arbitration proceeding at issue here, KENT wrongfully obstructed [redacted]'s entitlement to unemployment benefits on patently frivolous grounds of "Discharge for Misconduct: Discharge for Severe Misconduct," as KENT reported to the New Jersey Department of Labor. KENT' false report resulted in the [redacted]'s wrongful disqualification for unemployment benefits. In that certain appeal styled as *In the Matter of* [redacted] [redacted], Docket No.:

The law in the Second Circuit is crystal clear: under the highly deferential standard of review for the vacatur of an arbitration award based solely on the doctrine of manifest disregard of the law, courts in the Second Circuit cannot review claims that an arbitrator misconstrued a contract or misapplied the facts. *I/S Stavborg v. Nat"l Metal Converters, Inc.*, 500 F.2d 424, 432 (2d Cir. 1974); *see also InterDigital Commc"ns Corp. v. Nokia Corp.*, 407 F. Supp. 2d 522, 531 (S.D.N.Y. 2005). But this is exactly what Petitioner asks this Court to do — it nominally argues that there has been a manifest disregard of the law, yet the substance of its argument challenges the factual findings and contractual interpretations of the arbitrator.

The Petitioner's admitted "voluminous"[7] submission, of literally the entire record from the underlying arbitration proceeding, begs this Court to review the entire record, invade the province of the arbitrator, and evidences the true intent of this proceeding – a *de novo* review of the underlying proceeding.[8] Such conduct warrants the imposition of sanctions.

This is precisely the type of meritless re-litigation of an arbitration award against which the courts have strongly cautioned on pain of sanctions. *See e.g.*, *DigiTelCom, Ltd. v. Tele2 Sverige AB,* No. 12 Civ. 3082, 2012 WL 3065345 (July 25, 2012)(sanctioning petitioner); *Manning v. Smith Barney, Harris Upham & Co.,* 822 F.Supp. 1081, 1083–84 (S.D.N.Y.1993); *see also B.L. Harbert Int'l, LLC v. Hercules Steel Co.,* 441 F.3d 905, 913–14 (11th Cir.2006) (suggesting that "[w]hen a party who loses an arbitration award assumes a never-say-die attitude and drags the dispute through the court system without an objectively reasonable

[redacted], before the Appeal Tribunal of the New Jersey Department of Labor, [redacted]'s disqualification was overturned on the grounds KENT' alleged conduct failed to meet the threshold legal requirement for disqualification under N.J.S.A. 43:21-5(b) and N.J.S.A. 43:21-5.

[7] See Amended Petition at fn. 1.

[8] Indeed, the Amended Petition inclusion of dozens of citations to the transcript of the hearing – and not the actual Award – demonstrates that this proceeding is essentially an appeal, not a challenge based on the limited doctrine of manifest disregard of the law.

belief it will prevail, the promise of arbitration is broken" and that in such a case sanctions may be appropriate).[9]

Accordingly, it is respectfully requested that this Court deny/dismiss the Petitioner's motion to vacate the Award, and grant Mr. [redacted]'s cross-motion for an order/judgment confirming the Award, together with attorneys' fees and costs[10], as this Court and other courts have done when faced with baseless attacks on arbitration awards.

## SUMMARY OF FACTS

The Respondent respectfully incorporates herein, and refers this Court to, the facts considered and determined by the Arbitrator as fully set forth in the Arbitration award.[11] Rather than repeat the relevant facts at length, the Respondent will summarize them below.

The Petitioner and the respondent [redacted] entered into a certain employment agreement dated April 2, 2013 ("Agreement"), whereby the Petitioner employed Mr. [redacted] to start-up and operate a janitorial business known as Kent Building Services, LLC. In relevant part, the Agreement permitted KENT to terminate Mr. [redacted] "for cause" or "without cause." The Agreement further provides that should the company terminate Mr. [redacted] "without cause" then KENT will pay Mr. [redacted] a severance payment in an amount equal to six (6) months of his current base salary. Since Mr. [redacted]'s annual base salary was $200,000.00 at the time of

[9] *See also See Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 708 (2d Cir.1985) (affirming district court's imposition of sanctions where attorney raised "arguments which were not only inappropriate upon a motion to confirm but were also without merit"); *Matter of U.S. Offshore, Inc. (Seabulk Offshore, Ltd.),* 753 F.Supp. 86, 92 (S.D.N.Y.1990) (granting attorneys' fees under Rule 11 where party's arguments "appear[ed] to have been motivated by a desire to forestall complying with the award ... and ... in the main [were] not warranted by existing law or a good faith argument to extend, modify or reverse existing law"); *Enmon,* 675 F.3d at 145–46 (affirming district court's imposition of sanctions for frivolous opposition to a petition to confirm arbitration based on misrepresentations of the record and arbitral proceedings).

[10] *See* Fed.R.Civ.P. 54(d)(1) ("Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party."); see also *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Milnes*, No. MISC. 11-260, 2014 WL 1386321, at *5 (E.D. Pa. Apr. 8, 2014).

[11] [redacted] has sought to limit this section to the facts relevant to the denial of the Petition and does not address the many misstatements or inflammatory allegations in Petitioner's submission that are irrelevant to the instant application.

his termination, he was entitled to a severance payment of $100,000.00 if he was terminated "without cause".

On December 16, 2013, KENT, by its chief executive officer Gil Neuman, terminated Mr. [redacted]'s employment with the company, ostensibly "for cause." Mr. [redacted] filed a demand for arbitration seeking, *inter alia,* a declaration that he was terminated "without cause" and that KENT breached the employment contract by failing to pay the $100,000.00 in severance payment as required by the employment agreement.[12] The Arbitrator issued an Award in favor of [redacted] in the amount of $100,000.00, finding that Kent had breach the employment agreement.

**A. The "For Cause" Termination Provisions under the Employment Agreement**

The Agreement sets forth several terms and conditions for the termination of [redacted]'s employment "for cause." The Petitioner asserted many of the "for cause" terms and conditions as affirmative defenses. *Award* at 39. Notably, the arbitrator found "that based upon the entire credible record, that [sic] the evidence is insufficient to establish [the "for cause" defenses] or any of the numerous acts asserted by Respondent as part of its affirmative defenses." *Id*.

Ultimately, the arbitration award was determined on the sole issue of whether KENT's chief executive officer, Gil Neuman, acted arbitrarily and/or in violation of an implied covenant of good faith and fair dealing when he exercised his "discretion", as permitted under the "for cause" provision of the agreement, to terminate Mr. [redacted]. *Id*. That part of the "for cause" provision which provides for the CEO's use of "discretion" states:

[12] Several claims were dismissed by the arbitrator upon the Respondent's motion prior to and at the time of the award. *Award* at 38, 40 (Wrongful termination and unjust enrichment).

> **4. Termination.**
>
> . . .
>
> **d) Termination By Company for Cause**. The Company may terminate Mr. [redacted]'s employment "for cause" at any time. As used herein, "for cause" shall mean any one of the following:
>
> . . . .
>
> - Poor job performance as determined in the discretion of the CEO.

*Employment Agreement* § 4(d); *Award* at 6.

## B. The Arbitrator Discredits KENT'S Reasons for Terminating [redacted]

Of the grounds that KENT claims justified [redacted]'s termination, the Arbitrator found that virtually all of the bases were contrived for the purpose of the arbitration proceeding, in that those bases were not considered by KENT's Chief Executive Officer (Neuman) or were not even known to him at the time of his decision to terminate [redacted]. The Award recited the following testimony and findings:

- Neuman was not aware of any of the details related to OTG's complaints before the arbitration hearing in this case. *Award* at 34;
- "Based on Neuman's own testimony, as well as the documentary record, I find that the only matter considered by Neuman concerning his decision to terminate Claimant was the incident that occurred at 100 Challenger Rd., which involved the failure to pay to Ocasio for work that she performed after Li re-hired her without Claimant's authorization." *Award* at 34;
- "Neuman conceded that he did not read all the emails" which he learned after [redacted]'s termination contain information which exculpated [redacted] from any wrongdoing in the 100 Challenger Rd incident. *Award* at 38-39
- With regard to the 100 Challenger Rd incident, "Neuman candidly admitted that: 'I [Neuman] don't know what exactly took place . . . . '" *Award* at 39.

- "Nonetheless, since I am convinced that Claimant's alleged behavior was not considered by Neuman as part of his decision to terminate Claimant, this issue does not need to be resolved in this case." *Award* at 35;

- "Upon review, I believe it is unnecessary to resolve this issue since I am convinced that the alleged lackluster growth of Respondent's business was not considered by Neuman when he decided to terminate Claimant's employment." *Award* at 36.

- "[B]ased upon the entire credible record, [] the evidence is insufficient to establish that Claimant was engaged in gross mismanagement of Respondent's business, gross misconduct or any of the numerous acts asserted by Respondent as part of its Affirmative Defenses." *Award* at 39.

**C. The Arbitrator Identified the Proper Legal Standard**

After dismissing all of the Respondent's affirmative defenses, the Arbitrator narrowed the arbitration into a single issue of "whether Neuman, based on his sole discretion, acted within his contractual right to terminate Claimant due to the incident at 100 Challenger Rd. . . . ." (citations omitted) *Award* at 37.

In deciding this issue, the Arbitrator concluded that the following legal standard governed the analysis of the discretion clause in the employment agreement:

> Under New York law, a covenant of good faith and fair dealing is implied in all contracts. Further, where a contract gives a party the power to act in his/her discretion, the New York courts have held that such a provision embraces the tenets that: (1) "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract"; and (2) the promise not to act arbitrarily or irrationally in exercising that discretion.

*Award* at 38 (citations omitted). The above-referenced paragraph included references to the controlling case law, such as *Industry Associates, LLC. v. Trim Corp. of America*, 47 N.Y.S. 2d 29, 31, 297 A.D. 2d 630, 631 (2d Dep't 2002); *Kirk La Shelle Co. v. Armstrong Co.,* 263 N.Y. 79, 87, 188 N.E. 163; *Dalton v. Educational Testing Services,* Supra, *Tedschi v. Wagner College*, 49 N.Y. 2d 652, 659, 427 N.Y.S. 2d 760, 404 N.E. 2d 1302; and *Murphy v. American Home*

*Products Corp*., 58 N.Y. 2d 293, 304, 461 N.Y. 2d 232, 445 N.E. 2d 86. *Award* at 38 fns. 162, 163, 164 and 165.

As to the application of the above-referenced legal standard to [redacted]'s breach of contract claim, the Arbitrator stated the threshold question before the tribunal as follows:

> on what basis did Respondent [KENT] by Neuman, its CEO, terminate the employment of Claimant [redacted] on December 16 [2013]? Based on Neuman's own testimony, as well as the documentary record, I find that the only matter considered by Neuman concerning his decision to terminate Claimant was the incident that occurred at 100 Challenger Rd., which involved the failure to pay to Ocasio for work that she performed after Li re-hired her without Claimant's authorization.

*Award* at 34.

After reviewing the entire record and considering the parties testimony and legal arguments, the arbitrator found that "Neuman exercised the discretion provided in the Agreement in an arbitrary and irrational manner in violation of the implied covenant of good faith and fair dealing that existed between the parties to a contract." *Award* at *39*. And that by violating the implied covenant, the arbitrator found KENT had "breached the Employment Agreement" when "Neuman terminated Claimant's employment without cause and failed to pay him the severance payment as provided in Article 4(e) of the Agreement." *Award* at 34.

As of the date of this filing, KENT has not made any payment on account of the Award, nor has KENT's attorneys informed the undersigned of the escrow of any funds to satisfy the Award.

## POINT I

## STANDARD OF REVIEW

"[Arbitration] awards are vacated on grounds of manifest disregard only in those exceedingly rare instances where some egregious impropriety on the part of the arbitrator is apparent." *Westminster Sec. Corp. v. Petrocom Energy Ltd.*, No. 10 CIV 7893 DLC, 2011 WL 166924, at *5 (S.D.N.Y. Jan. 19, 2011), aff'd, 456 F. App'x 42 (2d Cir. 2012). Such impropriety requires "more than error or misunderstanding with respect to the law, or an arguable difference regarding the meaning or applicability of law urged upon an arbitrator." *Westminster Sec. Corp. v. Petrocom Energy Ltd.*, No. 10 CIV 7893 DLC, 2011 WL 166924, at *5 (S.D.N.Y. Jan. 19, 2011), aff'd, 456 F. App'x 42 (2d Cir. 2012). *Merrill Lynch*, 808 F.2d at 933 (holding that "to adopt a less strict standard of judicial review would be to undermine [the] well established deference to arbitration as a favored method of settling disputes when agreed to by the parties.").

Thus, an 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." *Westminster Sec. Corp. v. Petrocom Energy Ltd.*, No. 10 CIV 7893 DLC, 2011 WL 166924, at *5 (S.D.N.Y. Jan. 19, 2011), aff'd, 456 F. App'x 42 (2d Cir. 2012) (citation omitted); *Wallace v. Buttar*, 378 F.3d 182, 190 (2d Cir. 2004) (emphasis added; internal quotation omitted); *see also Schwartz*, 2011 WL 2011 WL 5966616, at *7 ("If the arbitrator has provided even a barely colorable justification for his or her interpretation of the contract, the award must stand." (internal quotation omitted); *STMicroelectronics*, 648 F.3d at 79 ("[W]e do not require that a potential distinction be correct, only that it be at least barely colorable" (quoting *T.Co Metals*, 592 F.3d at 339)).

As the Second Circuit recently concluded, "[a] litigant seeking to vacate an arbitration award based on alleged manifest disregard of the law bears a 'heavy burden,' ... as awards are

vacated on grounds of manifest disregard only in 'those exceedingly rare instances where some egregious impropriety on the part of the arbitrator is apparent.' " *Sutherland Glob. Servs., Inc. v. Adam Techs. Int'l SA de C.V.*, 639 F. App'x 697, 699 (2d Cir. 2016) *citing T.Co Metals,* 592 F.3d at 339 (quoting *Stolt–Nielsen SA v. AnimalFeeds Int'l Corp.,* 548 F.3d 85, 91–92 (2d Cir.2008)).

In determining whether a petitioner has carried the heavy burden for invoking the doctrine, the Second Circuit has required parties challenging awards on manifest disregard grounds to show that: (i) "the law that was allegedly ignored was clear, and in fact explicitly applicable to the matter before the arbitrators [as] an arbitrator obviously cannot be said to disregard a law that is unclear or not clearly applicable", *Duferco*, 333 F.3d at 390 (citation omitted), (ii) "the law was in fact improperly applied, leading to an erroneous outcome", *id*. and (iii) the arbitrator knew of a governing legal principle that was applicable to the facts of the dispute but refused to apply it or ignored it all together. *Id*.

Because one of the primary purposes of selecting arbitration as a dispute resolution mechanism is finality, court review of arbitration awards is extremely limited, with courts required to give great deference to the arbitrators' determination. *Westminster Secs. Corp. v. Petrocom Energy Ltd.*, No. 11-607-cv, 2012 WL 147917, at *1 (2d Cir. Jan. 19, 2012) ("Our review of arbitral awards is extremely deferential"); *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 388 (2d Cir. 2003) ("It is well established that courts must grant an arbitration panel's decision great deference"); *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997) ("The review of arbitration awards is 'very limited... in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation'") (citation omitted).

## POINT II

## THE ARBITRATOR DID NOT ACT IN MANIFEST DISREGARD OF THE LAW

Contrary to the Petitioner's contention, the arbitrator did not act in manifest disregard of the Bad Faith Standard. The Arbitrator applied the correct legal standard to determine the sole remaining issues of whether the petitioner acted arbitrarily and/or in violation of the covenant of good faith and fair dealing that was implied in the employment agreement between the parties. *Award*, at 38. Specifically, the arbitrator applied the precept that

> Under New York law, a covenant of good faith and fair dealing is implied in all contracts. Further, where a contract gives a party the power to act in his/her discretion, the New York courts have held that such a provision embraces the tenets that: (1) "neither party shall do **anything** which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract"; and (2) the promise not to **act arbitrarily or irrationally** in exercising that discretion.

*Award* at 38 (citations omitted) (emphasis added). As discussed below, the Bad Faith Standard proposed by the Petitioner, does not apply to employment contracts that provide express limitations on the employer's right to terminate employment, such as the Agreement made between the parties in this action.

### A. The Arbitrator Did Not Refuse to Apply or Ignore a Governing Legal Principal

The Petitioner has failed to meet its burden on the first prong of manifest disregard test which requires the petitioner to show that "the arbitrator knew of the governing legal principal yet refused to apply it or ignored it altogether." *Greenberg*, 220 F.3d at 28.

Here, KENT spuriously argues that the arbitrator ignored New York case law which has no application to the discretion provision in a non-at will employment agreement. The contract law applied by the Arbitrator is clearly on point.

For an award to be in "manifest disregard of the law,"

> [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. Moreover, *the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it*.

*Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 24 (2d Cir. 1997) (emphasis added), *citing*, *Merrill Lynch,* 808 F.2d at 933. Here, the arbitrator specifically addressed the cases which contain New York's law governing a discretion provision in a non-at will employment contract and upon which [redacted] relied in its arguments. *Award* at 38 fns. 162, 163, 164 and 165; *see also*, *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 24 (2d Cir. 1997) (finding no manifest disregard of the law under similar analysis as presented here).

Of the Arbitrator's forty-three (43) page Award, no less than two (2) full pages are dedicated exclusively to the discussion of the legal standard that KENT urged on the tribunal for the construal of a discretion clause in a non-at-will employment agreement. *Award* at 30-31. Moreover, the Award cites the very decisions that KENT wrongfully claimed controlled the legal standard for a discretion clause in a non-at-will employment agreement. *Award* at 31 fn. 146. Therefore, it is clear on the face of the Award that the arbitrator carefully considered the controlling law and the parties' respective legal positions. S*ee Commercial Refrigeration, Inc. v. Layton Constr. Co.*, 319 F. Supp. 2d 1267, 1270-71 (D. Utah 2004) (explaining that "That the arbitrator disagreed with a party's legal position is not evidence that the arbitrator ignored controlling law, but merely that the arbitrator disagreed with that party's position. This Court is not permitted to determine whether the arbitrator applied the law of contracts correctly, but only whether the arbitrator deliberately ignored the relevant law, and it is evident that he did not.").

**B. Petitioner's Bad Faith Standard is Not Clear and Plainly Applicable**

The Petitioner has not and cannot meet its burden of showing that the bad faith standard it proposes "was clear and explicitly applicable to the matter before the arbitrator." *Duferco*, 333 F.3d at 390 (citation omitted). The issues in the case at bar, as determined by the arbitrator, is "whether Neuman, based on his sole discretion, acted within the contractual right to terminate claimant [Mr. [redacted] ] . . . ." *Award* at 37

In relevant part, Article 4(d) of the Agreement permits the respondent to terminate Mr. [redacted]'s employment "for cause", which is defined as "poor performance as determined in the **discretion** of the CEO [Neuman]" (emphasis added). *Award* at 36. To determine the issue of whether Neuman exercised his discretion properly, the arbitrator found it appropriate "to imply an obligation of good faith and fair dealing when considering the breach of contract claim related to the employment agreement in this case." *Award* at 38. Citing well established legal precedent in New York State, the arbitrator stated the applicable standard as follows:

> "Under New York law, a covenant of good faith and fair dealing is implied in all contracts. *Further, where a contract gives a party the power to act in his/her discretion, the New York courts have held that such a provision embraces the tenets that: (1) 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" and (2) the promise not to act arbitrarily or irrationally in exercising that discretion*'"[13] (emphasis added) *Award* at 38.

Applying this standard to the testimony of the parties, the arbitrator found that "Neuman exercised the discretion provided in the Agreement in an arbitrary and irrational manner in violation of the implied covenant of good faith and fair dealing that existed between the parties to the contract." *Award* at 39.

[13] *Citing*, *Industry Association, LLC v. Trim Corp. of America*, 747 N.Y.S2d 29, 31, 287 A.D.2d 630, 631 (2d Dep't 2002)

It is undisputed that both parties understood that in exercising the discretion provided in the agreement, Mr. Neuman would do so in good faith. Petition ¶ 123. However, where the petitioner diverges is in its mistaken contention that [redacted] had the burden of "establishing bad faith, which can only be evidenced by termination 'for constitutionally impermissible purpose or in violation of statutory or decisional law'" and that Mr. [redacted] failed to do so. Petition ¶ 124; *citing*, *Card v. Sielaff*, 154 Misc.2d 238, 244 (N.Y. Sup. Ct. 1992). The Petitioner's contention is unavailing in several regards.

**i. Bad Faith Standard is Not Clear and Explicitly Applicable to the Arbitrary and Irrational Matter**

As an initial matter, the Petitioner's argument misses the mark in that it fails to consider that the "good faith" which is implied in the contract is coupled with a unilateral "discretion" clause that is provided in the same contract.[14] Under the implied covenant of good faith and fair dealing, the combination of the two results in a dual pledge by the Petitioner. *See*, *e.g. Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995)(Recognizing one pledge for implied good faith and a second pledge for the discretion provision provided in the contract).

As for the first pledge created by the implied good faith, "[e]ncompassed within the implied obligation of each promisor to exercise good faith are any promises which a reasonable person in the position of the promissee would be justified in understanding were included." *Dalton*, 87 N.Y.2d at 389 (internal quotation marks and citations omitted). "This embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Id*.

[14] This is a unilateral discretion provision in that only the CEO of Kent can exercise it.

As for the second pledge created by the discretion provision, "[w]here the contract contemplates the exercise of discretion, [the good faith pledge] includes a promise not to act arbitrarily or irrationally in exercising that discretion." *Id*.

The Bad Faith Standard simply cannot be reconciled with the pledge not to act arbitrarily and irrational. *Dalton*, 87 N.Y.2d at 389. The petitioner concedes as much in paragraph 130 of the Petition where it quotes "'A bad faith standard is not the same as an arbitrary and capricious standard, although sometimes it may appear to be.' *Duchinsky v. Scopetta*, 18 Misc. 3d 1141(A) (Sup. Ct. Kings Cty. March 4, 2008). 'Rationality is what is reviewed under the arbitrary and capricious standard.' *Pell v. Board of Educ.*, 34 N.Y.2d 222, 231 (1974)." *Petition* ¶ 130. A fortiori, because the arbitrator found that "Neuman exercised the discretion provided in the Agreement in an arbitrary and irrationally manner," (*Award* at 39) the bad faith standard was not "explicitly applicable to the matter before the arbitrator." *Duferco*, 333 F.3d at 390.

**ii. Bad Faith Standard is Not Clear and Explicitly Applicable to the Claim for Breach of Implied Covenant of Good Faith and Fair Dealing**

Further, the bad faith standard was not applicable to any matter determined by the arbitrator under the implied covenant of good faith and fair dealing. Contrary to the Petitioner's contention, the arbitrator was not required to find bad faith through evidence showing that Mr. Neuman exercised his discretion in terminating [redacted] for a constitutionally impermissible purpose or in violation of statutory or decisional law. Petition ¶¶ 124, 127. The Petitioner has failed to cite any legal precedent in New York State that requires such a showing in a claim involving a violation of an implied covenant of good faith and fair dealing based on a party's exercise of the discretion that is provided in a contract, as in the case at bar.

To the contrary, the standard established under New York legal precedent is that a covenant of good faith and fair dealing is implied in all contracts and "embraces a pledge that

neither party shall do *anything* [lawful or unlawful] which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (emphasis added) *Dalton*, 87 N.Y.2d at 389 (internal quotation marks and citations omitted); *Celauro v. 4C Foods Corp.*, 2016 NY Slip Op 31917(U)(N.Y. Sup. Ct. 2016); *see also*, Black's Law Dictionary (10th ed. 2014) defines "acting in good faith" as "[b]ehaving honestly and frankly, without any intent to defraud or to seek an unconscionable advantage."

As for the legal precedent cited by the petitioner in support of its contention (*Card v. Sielaff*, 154 Misc.2d 238 [N.Y. Sup. Ct. 1992]; *Matter of New York State Thruway Auth. v. New York State Div. of Human Rights*, 859 N.Y.S.2d 904 [N.Y. Sup. Ct. 2008]), those cases are inapposite to the factual and legal issues that were determined by the arbitrator. In *Car* and *New York State Thruway Auth*, the courts held that "bad faith" can only be evidenced by termination "for a constitutionally impermissible purpose or in violation of statutory or decisional law." *Card*, 154 Misc.2d at 244; *New York State Thruway Auth*, supra. The petitioner's reliance on these decisions is misplaced. These decisions are readily distinguishable from the case at bar.

Unlike the case at bar, *Card* and *New York State Thruway Auth.* involved the termination of a probationary, public employees. The discharged employees commenced an Article 78 proceeding against their former municipal employer for wrongful termination.

In *Card*, the court stated

> that a probationary employee may be discharged at will without a hearing, without charges being filed and without the provision of specific reasons. *The scope of review in an article 78 proceeding involving the termination of a probationary employee is limited to whether the termination was made in bad faith*. The burden is on the petitioner to demonstrate that the termination was made in bad faith; a bad faith determination is defined as one based on constitutionally impermissible purpose or in violation of statutory or decisional law [emphasis added]

*Card*, 154 Misc.2d at 244

Likewise, the court in *New York State Thruway Auth.* held that

> "[a] probationary employee may be discharged without a hearing and without a statement of reason in the absence of any demonstration that the dismissal was a constitutionally-impermissable purpose or in violation of statutory or decisional law[bad faith]. *Judicial review of the discharge of a probationary employee is limited to whether the determination was made in bad faith or for improper or impermissable reason*" (internal quotations and citations omitted)(emphasis added).
>
> *New York State Thruway Auth.*, 859 N.Y.S.2d at 904.

Notably, the probationary employees in *Card* and *New York State Thruway Auth.* who sued for wrongful termination were at-will employees whose employment can be terminated for any or no reason provided the reason is not unlawful. Moreover, there were no contracts and there were no claims for breach of an implied covenant of good faith and fair dealing.

In stark contrast, Mr. [redacted] is not a probationary, civil service employee whose termination is not subject to expressed limitations provided in a contract. Rather, Mr. [redacted] is a party to an employment contract made between private parties that expressly defines the terms and conditions under which KENT may terminate Mr. [redacted] "for cause." Mr. [redacted] claimed that KENT breached that contract when KENT arbitrarily exercised his discretion to terminate [redacted]'s employment "for cause".

Because the cases cited by the Petitioner in support of the bad faith standard "are factually distinguishable in a material respect from the case at bar," the bad faith standard proposed by the petitioner "is not 'well defined, explicit, and clearly applicable'" and, therefore, the arbitrator did not act in manifest disregard of the law. *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 2016 (2d Cir. 2002)

Further, Petitioner's contention that some unlawful act is required to establish bad faith in a claim for a breach of a covenant of good faith and fair dealing implied in a contract, is incongruent with the plethora of New York precedent which found that an implied covenant can be violated by actions of parties that were not unlawful. *See* e.g., ***Public Sector Pension Inv. Bd. v. Saba Capital Mgt., L.P.***, 2016, 2016 NY Slip Op 30215(U)(rejecting a valuation of securities); ***Levin v. HSBA Bank USA, N.A.***, 2012 NY Slip Op 33164(U)(order in which banks post customer's transactions); ***Atlas El. Corp. v. United El. Group, Inc.***, 77 A.D.3d 859 (2d Dept. 2010)(developing maintenance and service contracts in violation of confidentiality agreement); ***511 W. 232nd Owners Corp. v. Jennifer Realty Co.***, 98 N.Y.2d 144 (2002) (failure to sell sufficient number of shares in a timely manner).

Where "an arbitral award contains more than one plausible reading, manifest disregard cannot be found if at least one of the readings yields a legally correct justification for the outcome." *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 390 (2d Cir. 2003). The arbitrator plainly applied the relevant legal standard and concluded that the evidence did not meet it. *Award* at 38. Petitioner's argument therefore amounts to a claim that the arbitrator evaluated the *evidence* incorrectly. "[T]he Second Circuit does not recognize manifest disregard of the evidence as [a] proper ground for vacating an arbitrator's award." *Wallace v. Buttar,* 378 F.3d 182, 193 (2d Cir. 2004) (quoting *Success Sys., Inc. v. Maddy Petroleum Equip., Inc.*, 316 F. Supp. 2d 93, 94 (D. Conn. 2004).

## POINT III

## ATTORNEYS' FEES AND COSTS SHOULD BE IMPOSED PURSUANT TO 28 U.S.C. § 1927

The Respondent's cross-motion for an order assessing attorney fees and costs against the petitioner's attorney pursuant to 28 U.S.C. § 1927 should be granted. The sanction is warranted because the instant petition to vacate the arbitration award is completely meritless and was commenced in bad faith.

Section 1927 provides that

> "Any attorney . . . admitted to conduct cases in any court of the United Sates or any Territory thereof who so multiplies the proceeding in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927.

Sanctions under section 1927 are appropriate where, as here, "(1) the offending party's claims were entirely without color, and (2) the claims were brought in bad faith, i.e., 'motivated by improper purpose such as harassment or delay.'" *Eiseman v. Greene*, 204 F.3d 393, 396 (2d Cir. 2000) *quoting*, *Schlaifer Nance & Co. v. States of Warhol*, 194 F.3d 323, 336 (2d Cir. 1999); Bad faith can be inferred where "[the attorney's] actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay." *Salovaara v. Eckert*, 222 F.3D 19, 35 (2d Cir. 2000); *Emmon v. Prospect Capital Corp.*, 675 F.3d 138, 143 (2d Cir. 2012). Courts in the Second Circuit have relied on section 1927 to sanction meritless motions to vacate arbitration awards. *See, Prospect Capital Corp. v. Enmon*, No. 08 Civ. 3721, 2010 WL 907956 (S.D.N.Y. Mar. 9, 2010); *Manning v. Smith Barney, Harris Upham & Co.*, 822 F. Supp. 1081, 1083-84 (S.D.N.Y. 1993). "An award under § 1927 is proper when the attorney's actions are so completely without merit as to require the conclusion that they

must have been undertaken for some improper purpose." *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 79 (2d Cir. 2000)

**A. No Colorable Basis to Vacate the Award**

"[A] claim is entirely without color when it lacks any legal or factual basis" (internal quotation marks omitted). *Sierra Club v. United States Army Corps of Eng'rs*, 776 F.2d 383, 390 (2d Cir. 1985); *Safeco Ins. Co. of America v. M.E.S., Inc.*, 2016 U.S. Dist. Lexis 122290 (E.D.N.Y. 2016); *Dorchetser Fin. Holding Corp. v. Banco BRJ, S.A.*, 2016 U.S. Dist. LEXIS 66340 (S.D.N.Y. 2016). In the case at bar, there is no legal or factual basis whatsoever for counsel's claim that the arbitrator acted in manifest disregard of the bad faith standard proposed by the petitioner and applied in *Card v. Sielaff*, 154 Misc.2d 238 (N.Y. Sup. Ct. 1992) and *Matter of New York State Thruway Auth. v. New York State Div. of Human Rights*, 859 N.Y.S.2d 904 (N.Y. Sup. Ct. 2008).

As discussed in POINT II (B) above, counsel for the Petitioner conveniently ignores that the bad faith standard has no legal or factual application to the matter that was before the arbitrator.

Counsel also ignores the abundance of precedent which recognize that any action, whether lawful or unlawful, by a party to a contract can be the basis of a claim for breach of an implied covenant of bad faith and faith dealing. POINT II(B); *see e.g. Dalton v. Educ. Testing Serv.*, 87 N.Y.2D 384, 389 (1995).

**B. Misrepresentation of Facts**

Counsel has misrepresented the facts in the matter in an attempt to mislead this court to believe the Arbitrator erred in finding that Mr. [redacted] was terminated from his employment

without cause. These misrepresentations, coupled with the meritless claim discussed above "establish clear evidence of bad faith." *Salovaara v. Eckert*, 222 F.3d 19, 35 (2d Cir. 2000).

Specifically, in the Petition's statement of facts, counsel details certain allegations of Mr. [redacted]'s poor performance during his employment as president of Kent. Counsel contends that these allegations of poor performance were sufficient reason to terminate Mr. [redacted] "for cause" under the employment agreement. Petition ¶¶ 34-86.[15] However, assuming without conceding that these allegations are true, the Petition fails to mention that based upon the Petitioner's testimony and the documentary record, the Arbitrator found that none of these allegations, except one, were factors in the Petitioner's decision to discharge Mr. [redacted].

Specifically, the arbitrator found that the alleged acts of poor performance were either (1) unknown to the Petitioner's CEO, Gil Neuman, at the time he decided to discharge [redacted]; (2) were known but not considered in his decision to terminate the employment; and/or (3) were not stated as the reason for his decision to terminate the employment. Award, pp. 34-36. In the *Award*, the arbitrator recounted the following testimony:

- Neuman was not aware of any of the details related to OTG's complaints before the arbitration hearing in this case. *Award* at 34.

- "Based on Neuman's own testimony, as well as the documentary record, I find that the only matter considered by Neuman concerning his decision to terminate Claimant was the incident that occurred at 100 Challenger Rd., which involved the failure to pay to Ocasio for work that she performed after Li re-hired her without Claimant's authorization." *Award* at 34.

- "Neuman conceded that he did not read all the emails" which he learned after [redacted]'s termination contain information which exculpated [redacted] from any wrongdoing in the 100 Challenger Rd incident. *Award* at 38-39.

[15] The arbitrator found that "the evidence is insufficient to establish that Claimant [redacted] was engaged in gross management of the Respondent's business, gross misconduct or any of the numerous acts asserted by respondent as part of its Affirmative Defenses. *Award* at 39

- With regard to the 100 Challenger Rd incident, "Neuman candidly admitted that: 'I [Neuman] don't know what exactly took place . . . . '" *Award* at 39.

- "Nonetheless, since I am convinced that Claimant's alleged behavior was not considered by Neuman as part of his decision to terminate Claimant, this issue does not need to be resolved in this case." *Award* at 35.

- "Upon review, I believe it is unnecessary to resolve this issue since I am convinced that the alleged lackluster growth of Respondent's business was not considered by Neuman when he decided to terminate Claimant's employment." *Award* at 36.

- "[B]ased upon the entire credible record, [] the evidence is insufficient to establish that Claimant was engaged in gross mismanagement of Respondent's business, gross misconduct or any of the numerous acts asserted by Respondent as part of its Affirmative Defenses." *Award* at 39.

As for the one allegation of mismanagement that was the stated reason for Mr. Neuman's decision to terminate [redacted]'s employment - i.e. the Challanger Road incident - the Arbitrator found that based on Neuman's testimony, his decision was arbitrary and violated the implied covenant of good faith and fair dealing. *Award* at 38-39.

It is clear, that by omitting the foregoing findings of the arbitrator, Counsel attempts to impress upon the Court that the Petitioner had not acted in bad faith when it discharged Mr. [redacted]. "A court does not review an arbitration award de novo." *See Livingston v. Nestle-leMur Co.*, 607 F. Supp. 1337, 1340 (S.D.N.Y. 1985). Rather a court should show deference to an arbitrator's findings, interpretations, and award, even if the results reached are not results which the court necessarily agrees. *See*, *e.g.*, *United Paperworks International Union v. Misco, Inc.*, 484 U.S. 29, 108 S.Ct. 364 (1987); *United States Steel and Carnegie Pension Fund v. Dickinson*, 753 F.2d 250 (2d Cir. 1985).

"Sanctions are peculiarly appropriate in the context of a challenge to an arbitration award which appears to be a largely dilatory effort." *Manning v. Smith Barny, Harris Upham & Co.*, 822 F.Supp. 1081, 1083-84 (S.D.N.Y. 1993); *see also B.L. Herbert Int'l, LLC v. Hercules Streel*

*Co.,* 441 F.3d 905, 913-14 (11th Cir. 2006)(suggesting "when a party who loses and arbitration award assumes a never-say-die attitude and drags the dispute through the court system without an objectively reasonable belief it will prevail, the promise of arbitration is broken" and that in such a case sanctions are appropriate).

The Second Circuit has held that sanctions pursuant to 28 U.S.C. § 1927 are appropriate where the claim asserted is lacking merit and made in bad faith. *See In re 60 E. 80th St. Equities, Inc.,* 218 F.3d 109, 115-117 (2d Cir. 2000). Here, as discussed above, there is no merit to Petitioner's claim to vacate the Award, in that no reasonable interpretation of Second Circuit law could justify its apparent beliefs, first, that a challenge to the arbitrator's determination of the facts or interpretation of the underlying contract is a basis to vacate the Award; second, that this Court has the authority to substitute Petitioner's interpretation of the parties' agreements for that of the arbitrator.

### C. Petitioner's Motion is Barred Under Well Defined Second Circuit Case Law That Prohibits Vacatur of Awards Based on Contract Interpretation

Petitioner's manifest disregard of the law argument "amount[s] to little more than a thinly veiled attempt to challenge the [arbitrator's] 'factual findings and contractual interpretation,'" and the Court should thus reject Plaintiffs' "attempt to supplant the Panel's findings with its own contrary interpretations of the contracts at issue." *In re Arbitration Between InterDigital Commc'ns Corp. and Samsung Elecs. Co.*, 528 F. Supp. 2d 340, 359 (S.D.N.Y. 2007). The Second Circuit has held that "[w]ith respect to contract interpretation, this standard essentially bars review of whether an arbitrator misconstrued a contract." *T.Co. Metals*, 592 F.3d at 339 (emphasis added); *Westerbeke*, 304 F.3d at 214; *Commercial Risk Reinsurance Co. v. Sec. Ins. Co. of Hartford*, 526 F. Supp. 2d 424, 432 (S.D.N.Y. 2007) (holding that "[t]he interpretation of

contractual terms by arbitrators is not subject to judicial challenge, even when the award may be grounded on an erroneous construction of the parties' agreement."). But this is exactly the sum and substance of the Petition.

Accordingly, the arbitrator's analysis of the contract at issue is final and was not subject to vacatur.

**D. The Petitioner's Application to Vacate the Arbitration Award is Frivolous**

Far from ignoring the controlling law, the Award aptly analyzes in detail the legal principles that governed the claims at issue and correctly applied them in reaching its ultimate conclusions regarding the facts at bar. *See Rame, LLC v. Popovich,* 878 F. Supp. 2d 439 (S.D.N.Y. 2012) (upholding arbitration award where arbitrator correctly applied governing law); *L'Objet, LLC v. Ltd.*, No. 11 Civ. 3856(LBS), 2011 WL 4528297 (S.D.N.Y. Sept. 29, 2011 (same). Petitioner's attempt to contend otherwise exemplifies the frivolousness of Petitioner's entire application before this Court.

The Award bears all of the indicia of a careful and thorough opinion in its citations to the record, controlling case law and analysis of the parties' legal positions. *See Commercial Refrigeration*, 319 F. Supp. 2d at 1270 ("That the arbitrator was not willfully inattentive to the legal consequences of his factual determination is evident from the Award's careful and thorough discussion…."); *Westminster Secs. Corp. v. Petrocom Energy Ltd.*, No. 10 CIV 7893 DLC, 2011 WL 166924, at *6 (S.D.N.Y. Jan. 19, 2011) (confirming arbitration award) (explaining that "[t]he arbitration panel's decision here was fully immersed in the language of the contract."). Thus, this Court should respectfully confirm the Award.

## E. First Prong - Petitioner Failed to Satisfy the First Prong of the Manifest Disregard Standard that Required a Showing of "Disregard" for the Controlling Law

Under the first prong of the manifest disregard standard, a party seeking vacatur must demonstrate that the arbitrator knew of the relevant principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it. *See Merrill Lynch,* 808 F.2d at 933 ("[T]he term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it."); *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 217 (2d Cir. 2002). A court may find intentional disregard if the reasoning supporting the arbitrator's judgment "strain[s] credulity," *id.,* or does not rise to the standard of "barely colorable," *see Willemijn,* 103 F.3d at 13; *Fahnestock,* 935 F.2d at 516 (confirming award so long as "any colorable justification" supports the decision); *Siegel v. Titan Indus. Corp.,* 779 F.2d 891, 894 (2d Cir.1985) (confirming an arbitration award of damages even though the tribunal did not explain the calculus used to arrive at the damages amount, because the moving party submitted an affidavit explaining how the tribunal may have arrived at its damages award without violating the governing law). Petitioner does not allege anything of this sort.

As discussed above, Petitioner failed to demonstrate that the arbitrator deliberately ignored a clearly settled principle of law — the first manifest disregard factor. Here, the applicable principles of law that governed the construal of a discretion clause in a non at-will employment agreement were clearly set forth in the Award. *Award* at 38 fns. 162, 163, 164 and 165. Petitioner cannot seriously contend that the arbitrator did not apply those principles.

## F. The Court Should Impose Attorneys' Fees for This Action Pursuant To 28 U.S.C. § 1927

The Respondent respectfully requests that this Court impose attorneys' fees pursuant to 28 U.S.C. § 1927.[16] Section 1927 has been relied on by several courts, including this one, to sanction meritless motions to vacate arbitration awards, such as the one here. *See Prospect Capital Corp. v. Enmon*, No. 08 Civ. 3721, 2010 WL 907956 (S.D.N.Y. Mar. 9, 2010); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Whitney*, 419 Fed. App'x 826 (10th Cir. 2011); *DMA Int'l, Inc. v. Qwest Commc'ns Int'l, Inc.*, 585 F.3d 1341 (10th Cir. 2009); *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269 (10th Cir. 2005); *United States ex rel. Superior Steel Connectors Corp. v. RK Specialties Inc.*, No. 11–cv–01488, 2011 WL 5176157 (D. Colo. Oct. 3, 2011); *Interface Sec. Sys., LLC v. Edwards*, No. 03-cv-4054, 2007 WL 178276 (C.D. Ill. Jan. 19, 2007). For example, in *DMA Int'l*, the court noted that the party's argument that the arbitrator had manifestly disregarded the law in construing the contract is:

> 'simply another way of saying that the arbitrator clearly erred, and even a showing of clear error on the party of the arbitrator is not enough.' No objectively reasonable interpretation of our case law could have justified DMA's apparent belief that it would prevail given that such an outcome would require us to substitute our interpretation of the contract for that of the arbitrator.

585 F.3d at 1346 (citations omitted). The court thus concluded that "only by imposing sanctions in cases like this can we give breath to the 'national policy favoring arbitration.'" *Id*. (citation omitted).

The Second Circuit has held that sanctions pursuant to 28 U.S.C. § 1927 are appropriate where the claim asserted is lacking merit and made in bad faith. *See In re 60 E. 80th St. Equities, Inc.*, 218 F.3d 109, 115-117 (2d Cir. 2000). Here, as discussed above, there is no merit to

[16] Pursuant to this statute, "Any attorney or other person admitted to conduct cases in any court of the United Sates or any Territory thereof who so multiplies the proceeding in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927.

Petitioner's claim to vacate the Award, in that no reasonable interpretation of Second Circuit law could justify its apparent beliefs, first, that a challenge to the arbitrator's determination of the facts or interpretation of the underlying contract is a basis to vacate the Award; second, that this Court has the authority to substitute Petitioner's interpretation of the parties' agreements for that of the arbitrator.

While [redacted] appreciates that a request for sanctions under section 1927 is a serious one, this is a case where such sanctions are clearly warranted. [redacted] respectfully requests that this Court impose sanctions under 28 U.S.C. § 1927, requiring payment of [redacted]'s attorneys' fees for having to defend against a meritless, bad faith motion to vacate a thorough, well-reasoned arbitration award.[17]

## POINT IV

## CONFIRMATION OF THE ARBITRATION AWARD

An arbitration award should be confirmed unless it is vacated, modified, or corrected. *D.H. Blair & Co.*, 462 F.3d at 110. Thus, "[d]ue to the parallel natures of a motion to vacate and a motion to confirm an arbitration award, denying the former implies granting the latter." *L'Objet, LLC v. Ltd.*, No. 11 Civ. 3856 (LBS), 2011 WL 4528297, at *3 (S.D.N.Y. Sept. 29, 2011). For the reasons stated above, Plaintiffs have failed to make a case for vacating the Award and, thus, have not established a valid defense to confirmation and enforcement of the Award.

[17] "[S]anctions are peculiarly appropriate in the context of a challenge to an arbitration award which appears to be a largely dilatory effort." *Manning v. Smith Barney, Harris Upham & Co.,* 822 F. Supp. 1081, 1083-84 (S.D.N.Y. 1993); *see also B.L. Harbert Int'l, LLC v. Hercules Steel Co.,* 441 F.3d 905, 913-14 (11th Cir. 2006) (suggesting that "[w]hen a party who loses an arbitration award assumes a never-say-die attitude and drags the dispute through the court system without an objectively reasonable belief it will prevail, the promise of arbitration is broken" and that in such a case sanctions may be appropriate).

## CONCLUSION

For the foregoing reasons, [redacted] respectfully requests that the Court: (i) deny KENT's petition in its entirety, (ii) confirm the Award, (iii) award [redacted] costs and fees in defending the frivolous motion and making his cross-motion, along with such other and further relief the Court deems just, proper, and equitable.

Respectfully Submitted,

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