No. 25-

IN THE

Supreme Court of the United States

PETER L. MALKIN, ANTHONY E. MALKIN, THOMAS N. KELTNER, JR. AND ESRT MH HOLDINGS L.L.C.,

Petitioners,

v.

VIRGINIA SHASHA AND VIVIENNE PERO, CO-TRUSTEES OF THE VIOLET SHUKER SHASHA TRUST, DANIELLE P. BARGER, TRUSTEE OF THE EDELMAN FAMILY DECEDENT'S TRUST, DEBRA B. ADLER, SUCCESSOR TRUSTEE TO THE ADLER FAMILY TRUST; MYRNA JOY EDELMAN, TRUSTEE OF THE 2006 GILBERT M. EDELMAN INTER VIVOS TRUST, EMPIRE STATE LIQUIDITY FUND, LLC, MARY JANE FALES, MELVYN H. HALPER, PHYLLIS J. HALPER AND WENDY S. TAMIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The first question presented involves the proper scope of review of an arbitration award under the Federal Arbitration Act.

The Courts of Appeals are split on whether the doctrine of manifest disregard of the law survived this Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). *Hall Street* held that the enumerated grounds for vacatur of an arbitration award in the FAA are "exclusive." Four Circuits have since held that manifest disregard no longer exists; four Circuits have held that it does; and the remaining three have yet to address the issue. State courts applying the FAA typically follow the federal circuits where they are located, confirming and amplifying this split. *See Hoskins v. Hoskins*, 497 S.W.3d 490, 498-500 (Tex. 2016) (Willet, J., concurring) ("The upshot of today's decision is that we avoid the sort of quagmire that surrounds the TAA's federal counterpart, the Federal Arbitration Act (FAA). . . . And so courts and commentators await a definitive answer from the Supreme Court.") (footnotes omitted). Furthermore, courts that *do* recognize manifest disregard have developed varying formulations of the doctrine. This Court's resolution of these issues is essential, given the very substantial stakes in many arbitrations.

Thus, the first question presented is: is manifest disregard of the law a ground to vacate an arbitration award and if so, what does it mean?

2. The second question presented involves consent to service of petitions to confirm or vacate an arbitration

award by email. This question, too, has divided lower courts. *Compare Day & Zimmerman, Inc. v. SOC-SMG, Inc.*, No. 11-6008, 2012 WL 5232180, at *4 (E.D. Pa. Oct. 22, 2012) (permitting service of petition by email where it was the practice of parties during arbitration to exchange documents by email) *with Terwilliger v. Resource Am., Inc.*, No. 22 CIV. 9610, 2023 WL 3582342, at *3 (S.D.N.Y. May 22, 2023) (email service of petition to vacate award under FAA was not effective service). This is an important question given the universal use of email, and the text of the FAA supports permitting such service.

Thus, the second question presented is: is email service of a petition to vacate an arbitration award proper service under the FAA?

LIST OF PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 14.1(b)(i), the Petitioners in this action are Peter L. Malkin, Anthony E. Malkin, Thomas N. Keltner, Jr. and ESRT MH Holdings, LLC. Respondents in this action are Virginia Shasha and Vivienne Pero, Co-Trustees of the Violet Shuker Shasha Trust, Debra B. Adler, Successor Trustee of the Adler Family Trust, Myrna Joy Edelman, Trustee of the 2006 Gilbert M. Edelman Inter vivos Trust, The Empire State Liquidity Fund LLC, Mary Jane Fales, Melvyn H. Halper, Phyllis J. Halper, Wendy Tamis and Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust.

Pursuant to Supreme Court Rules 14.1(b)(ii) and 29.6, the undersigned counsel for Appellants Peter L. Malkin, Anthony E. Malkin, Thomas N. Keltner, Jr. and ESRT MH Holdings L.L.C. discloses as follows:

ESRT MH Holdings L.L.C. is a wholly owned subsidiary of ESRT Management, LLC. ESRT Management LLC, is a wholly owned subsidiary of Empire State Realty OP, L.P., a limited partnership (NYSE Arca Inc.: ESBA, OGCP, FISK), which is controlled by its sole general partner, Empire State Realty Trust, Inc., a publicly held corporation (NYSE: ESRT).

STATEMENT OF RELATED CASES

- *In the Matter of Shasha v. Malkin*, No. 2025-489, State of New York Court of Appeals. Order entered June 13, 2026.
- *Shasha v. Malkin*, No. 2023-04341, Supreme Court of the State of New York, Appellate Division, First Judicial Department. Order entered March 13, 2025.
- *Malkin v. Shasha*, No. 2023-04352, First Judicial Department. Order entered March 13, 2025.
- *Shasha v. Malkin*, No. 2024-01438, Supreme Court of the State of New York, Appellate Division, First Judicial Department. Order entered March 13, 2025.
- *Shasha v. Malkin*, No. 652074/2023, Supreme Court of the State of New York, New York County. Judgment entered November 2, 2023.
- *Malkin v. Shasha*, No. 651974/2023, Supreme Court of the State of New York, New York County. Judgment entered July 31, 2023.
- *Shasha v. Malkin*, No. 1:21-cv-06887, United States District Court for the Southern District of New York. Judgment entered September 27, 2021.
- *Malkin v. Shasha*, No. 20-cv-09874, United States District Court for the Southern District of New York. Judgment entered April 21, 2023.
- *Malkin v. Shasha*, No. 21-2675, United States Court of Appeals for the Second Circuit. Order entered April 20, 2023.

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INTRODUCTION

This case presents multiple acknowledged circuit splits on issues that frequently arise and that are of great practical significance.

1. In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), this Court held that the statutory grounds for vacating an arbitration award in Section 10 of the FAA, 9 U.S.C. § 10, are the "exclusive" grounds for vacating an arbitration award.

After *Hall Street*, the Circuits split on whether manifest disregard still exists. *Compare Citigroup Glob. Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009) ("manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected.") *with Weiss v. Sallie Mae, Inc.*, 939 F.3d 105, 109 (2d Cir. 2019) ("[M]anifest disregard remains a valid ground for vacating arbitration awards") (internal quotation marks omitted). Thus, whether manifest disregard is available depends entirely on the fortuity of where a petition to vacate is filed.

State courts are equally divided. *Compare ACN Dig. Phone Serv., LLC v. Universal Microelectronics Co., Ltd.*, 115 A.D. 3d 602, 603 (N.Y. App. Div. 1st Dep't 2014) (New York applies manifest disregard standard under the FAA that "holds that an award may be vacated if the arbitrators ignored well-settled law," which "requires 'egregious conduct' on the part of the arbitrators to support vacatur of an award.") (citing *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 478-79 (N.Y. 2006)) *with Hoskins v. Hoskins*, 497 S.W.3d 490, 495-96, 499 (Tex. 2016) (manifest disregard not an enumerated vacatur ground under the Texas Arbitration Act and concurrence noting that Fifth Circuit has abandoned the doctrine under the FAA); *and Pearson Dental Supplies, Inc. v. Superior Ct.*, 48 Cal. 4th 665, 677, n.3 (Cal. 2010) (vacatur of arbitration awards for legal error does not include manifest disregard under California Arbitration Act, noting that Ninth Circuit has previously held that manifest disregard served as ground for vacatur under the FAA). Like their federal counterparts, they have expressed frustration with the state of the law. *Hoskins*, 497 S.W. 3d at 498-500 (Willet, J., concurring) ("The upshot of today's decision is that we avoid the sort of quagmire that surrounds the TAA's federal counterpart, the Federal Arbitration Act (FAA). In recent years, the United States Supreme Court has 'cast severe doubt on, and nearly eliminated,' manifest disregard as a viable common-law vacatur doctrine vis-à-vis the FAA. That doubt has produced disarray in the literature and lower courts. . . . The courts' reactions are equally varied. . . . And so courts and commentators await a definitive answer from the Supreme Court.") (footnotes omitted); *Roffler v. Spear, Leeds & Kellogg*, 13 A.D.3d 308, 313 (N.Y. App. Div. 1st Dep't 2004) ("the bounds of [manifest disregard] have never been defined.") (Tom, J.P., dissenting from confirmation of award).

Commentators have urged the Court to resolve this issue. As one author put it, "the Court should . . . determine that manifest disregard is simply shorthand for FAA section 10(a), and thus remains an available ground for vacatur post-*Hall Street*." Karly A. Kauf, *"Manifest" Destiny: The Fate of the "Manifest Disregard of the Law" Doctrine After Hall Street v. Mattel*, 3 J. Bus. Entrepreneurship & L. 309, 317 (2010). Others have decried the uncertainty wrought by *Hall Street*. "[T]he Court's lack of guidance in these arbitration disputes has intensified the debate over the benefits and disadvantages of arbitration in general." Chad R. Yates, *Manifest Disregard in International Commercial Arbitration: Whether Manifest Disregard Holds, However Good, Bad, or Ugly*, 13 U. Mass. L. Rev. 336, 349 (2018).

Nor is there any reason for the Court to wait. The Circuit split is nearly as old as *Hall Street* itself, and eight of the twelve Circuits have weighed in. No additional percolation in the lower federal courts will assist the Court in deciding the issue.

Second, to say that manifest disregard, in jurisdictions where it still exists, is applied unevenly, is an understatement. Both before and after *Hall Street*, circuit courts have used varying tests for its application. Some courts applied a test that required assessing the intent of the arbitrator, asking whether the arbitrator consciously refused to apply clearly applicable law. *See Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 121 n.1 (2d Cir. 2011) (applying two-part test, "first, 'whether the governing law alleged to have been ignored by the arbitrators was well defined, explicit, and clearly applicable,' and, second, whether the arbitrator knew about 'the existence of a clearly governing legal principle but decided to ignore it or pay no attention to it.'") (citations omitted). Other circuits applied a more objective test, which turned on whether the arbitrator in fact failed to apply the law. *R.M. Perez & Assocs., Inc. v. Welch*, 960 F.2d 534, 539 n.1 (5th Cir. 1992) ("A legal error would present grounds for vacating an arbitrator's award only when the arbitrator's failure to decide in accordance with the law was clearly apparent, constituting 'manifest disregard' as opposed to mere misinterpretation.") (citing *Wilko*, 346 U.S. at 436). Meanwhile, the Seventh Circuit, before it jettisoned the doctrine entirely, alone among the circuits held that the doctrine meant "an arbitrator may not direct the parties to violate the law." *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2001).

Predictably enough, this has led to wildly inconsistent outcomes. *Compare Hardy v. Walsh Manning Sec., L.L.C.*, 341 F.3d 126, 132-33 (2d Cir. 2003) (party argued that arbitration panel had acted in manifest disregard of the law by misapplying the doctrine of *respondeat superior*; court held "award indeed contains a fundamental mistake of law," that "substantial financial liability should not be imposed upon an individual without a clear basis in law," and over dissent remanded the matter to arbitrators for clarification) *with Ebbe v. Concorde Inv. Servs., LLC*, 953 F.3d 172, 177-78 (1st Cir. 2020) (declining to vacate arbitration award based on alleged misapplication of *respondeat superior* by arbitrator).

It is no wonder, then, that, as with the continued vitality of manifest disregard itself, commentators have decried the inconsistent application of the doctrine and called on this Court to step in. "Cases centered on manifest disregard have wreaked havoc on lower court systems across many jurisdictions, thus warranting attention from the Supreme Court for clarification." Brian Forgue, *Re-Thinking the Federal Arbitration Act § 10: Vacating "Manifest Disregard"*, 7 Yearbook on Arb. & Mediation 255, 255 (2015) (citation omitted); *see also id.* at 268 ("Manifest disregard has been warped beyond recognition through common law interpretation, assuming it had a recognizable definition at the outset.");

Nicholas A. Rossini, *Lost in Dicta: The Curious Case of Nonstatutory Grounds of Vacatur in an Era of Ubiquitous Consumer Arbitration*, 52 Suffolk U. L. Rev. 343, 357 (2019) ("Without the Court's direction by way of clear opinions, lower courts lack the guidance to reach consistent conclusions.") (citations omitted).

Indeed, this confusion in the application of the doctrine has been the source of complaints going back decades. Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 Ga. L. Rev. 731, 774 (1996) (to say that lack of guidance from the Court "has left the federal circuit courts of appeals in a state of confusion regarding the grounds upon which a commercial arbitration award properly may be vacated is an understatement.") (footnote omitted).

Further, if manifest disregard is to mean anything, the relevant portion of the arbitration award in this case cannot stand: it involves undisputed facts, basic contract law and an indefensible result. In an arbitration stemming from the 2013 initial public offering of Empire State Realty Trust, the arbitration panel retroactively invalidated certain contractual overrides, a type of profit participation interest, that Empire State Building ("ESB") investors had granted the ESB supervisor. It did so because there was allegedly no consideration for the overrides, *even though both the Panel and the investors themselves repeatedly recognized that the supervisor had given investors who agreed to the overrides reduced fees for decades*. The Panel's reliance on a later statement in the S-4 solicitation documents that the Supervisor did not "pay" any consideration for the overrides, an accurate statement since the consideration was not a contemporaneous cash payment but a prospective fee reduction, made no sense, as a first-year law student would have recognized. Put simply, a federal securities filing is not a reality distortion field.

2. This case also presents an opportunity for the Court to determine whether email service of a petition to vacate an arbitration award is effective service under the FAA. This, too, is an important question, given the ubiquity of email communication between counsel, and one that has divided the lower federal courts. *Compare Day & Zimmerman, Inc. v. SOC-SMG, Inc.*, No. 11-6008, 2012 WL 5232180, at *4 (E.D. Pa. Oct. 22, 2012) (permitting service of petition by email where it was the practice of parties during arbitration to exchange documents by email) *with Dalla-Longa v. Magnetar Cap. LLC*, 33 F.4th 693, 696 (2d Cir. 2022) (email service insufficient); *see also Aperion Care, Inc. v. Senwell Senior Invest. Advisors*, No. 22 C 3120, 2022 WL 10505696, *2 (N.D. Ill. Oct. 17, 2022) (noting conflict between *Day & Zimmerman* and *Dalla-Longa* and other cases).

OPINIONS AND ORDERS BELOW

The arbitration panel's Award (Pet. App. G, 44a) is unpublished. The decisions of the New York Supreme Court denying Petitioners' motion to vacate in part and granting Respondents' motion to confirm the award (Pet. App. C, 6a; Pet. App. D, 11a) are unpublished. The decision of the Supreme Court, Appellate Division, First Department in the consolidated appeal from those decisions (Pet. App. B, 2a) is published at 236 A.D.3d

502, 231 N.Y.S.3d 3. The decision of the Court of Appeals denying leave to appeal (Pet. App. A, 1a) is published at 2026 N.Y. Slip Op. 60502, 2026 WL 89166.

JURISDICTION

The Court of Appeals entered its judgment on January 13, 2026. Petitioners' time to file a petition for a writ of certiorari runs until April 13, 2026. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 10(a) of the Federal Arbitration Act of 1947, 9 U.S.C. § 10(a), provides in pertinent part:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior

> by which the rights of any party have been prejudiced; 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.

Section 12 of the FAA, 9 U.S.C. § 12, provides in pertinent part: "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered."

STATEMENT

1. This Petition arises from Petitioners' application to vacate in part an arbitration award concerning the initial public offering of Empire State Realty Trust, Inc. ("ESRT"). ESRT is a real estate investment trust that combined ownership interests in various commercial properties in the New York metropolitan region, including the Empire State Building (the "Transaction").

2. The properties involved in the Transaction were owned and operated by partnerships created in the 1950s and 1960s. These partnerships used then-innovative structures that gave tax advantages and liability protection to the investors. One of the partnerships, Empire State Building Associates ("ESBA"), was formed in 1961 to acquire and hold the long-term lease to the Empire State Building. ESBA's ownership was divided into "participation interests," with the interest holders

referred to as "Participants."[1] ESBA and the other partnerships were converted to LLCs in the 1990s.

3. In November 2011, Petitioner Malkin Holdings LLC ("Malkin Holdings"), the supervisor of the partnerships, announced the planned Transaction. R.265. As with virtually all major transactions, after the potential Transaction was announced, a series of class actions were filed in Supreme Court, New York County. These cases were settled in September 2012, allowing the Transaction to proceed. Of more than 4,500 Participants, 12 opted out of the class action settlement and thus were not subject to its release. R.324.

4. In 2013, an overwhelming majority of ESBA Participants approved the Transaction. Similar supermajority consents were received by the investors in the other properties. ESRT's IPO took place on October 2, 2013. R.334-35; R.268.

5. In October 2014, the 12 Participants who had opted out of the class actions filed a AAA arbitration (the relevant ESBA agreements contained an arbitration clause) (the "Arbitration"). They asserted dozens of different alleged contractual and fiduciary breaches, as well as federal securities law violations. Petitioners here were the Respondents in the Arbitration, while the Participants were Claimants in the Arbitration. Pet. App. G, 45a-46a.

1. The actual ownership structure was somewhat more complicated, with three "Agents" who were partners in ESBA, each of whom entered into joint venture agreements with the Participants as joint venturers who owned 1,000 participation interests in the Agent's partnership interest. We have streamlined the description of that structure here for simplicity's sake.

6. After lengthy arbitration proceedings, the Arbitration Panel (the "Panel") issued its Final Award on August 26, 2020 (the "Award"). All of Claimants' many complaints about the Transaction, including all the securities law claims, were rejected, save one: that the "overrides" (a form of profit sharing on a "capital transaction" such as the Transaction), to which Participants had consented years before the IPO, were unenforceable against Claimants for lack of consideration. That one aspect of the Award is at issue here.

7. As the solicitation documents for the overrides themselves stated, Participants who agreed to the overrides received "in exchange" a prospective reduction in Malkin Holdings' fees. The overrides were memorialized in written agreements that the Claimants (or their predecessors in interest) voluntarily signed. Those agreements expressly stated that the signatory was agreeing to the overrides and would receive the resulting fee reduction as consideration.[2] There was, of course, no

2. *E.g.*, R.248 ("[Malkin Holdings] will assign, effective January 1, 1992 through January 5, 2076, to the Participant a pro rata portion of [Malkin Holdings'] additional compensation from the scheduled reductions in Master Lease rent to become effective in 1992 and 2013."); R.252 ("If all Participants execute Authorizations, [Malkin Holdings] will forego the right to receive $45,017 a year from 1992 to 2013, and $52,405 a year thereafter through January 5, 2076, and Participants will receive such amounts. [Malkin Holdings] will be obligated to assign such sums to each authorizing Participant. . . ."); R.350 ("Any Participant whose interest in [ESBA] is not already subject to this voluntary program may now approve the same voluntary program which is in effect for more than 81% of the Participants. An approving Participant will receive now the pro rata payment from [Malkin Holdings] retroactive to the January 1, 1992 start of this program of approximately $140 for each original $10,000 participating interest.").

guaranty that there would *ever* be a "capital transaction" triggering the overrides (these agreements were entered into years or even decades before the ESRT IPO was contemplated), so there was no assurance that Malkin Holdings would ever receive *anything* for the overrides.[3]

8. Notably, the Panel itself expressly found that consenting Participants had, in fact, received the fee reductions.[4] Claimants themselves conceded as much throughout these proceedings.[5] As recently in their brief to the First Department, for example, the Claimants acknowledged that "[f]ee payments began in 2009 and were in effect for five years" as "part of the voluntary compensation program."[6]

9. The Panel nonetheless held that consideration was lacking because Malkin Holdings had stated, years

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3. R.125 ("it was just $50,000 a year surrender by Malkin Holdings without any assurance that there would ever be[] a return on that you might say.").

4. Pet. App. G, 81a (Award stating "In return for signing the Consent Agreement, the Supervisor assigned a *pro rata* portion of its potential incentive compensation due to reductions in rent for the Master Lease, from 1992 to 2076—an 'assignment' worth approximately $50,000 per year if all Participants had executed Authorizations."); *see also id.* ("the incentive-compensation reductions from 1991 to 2001 totaled $140 for each original $10,000 unit").

5. R. 138 (testimony from one Claimant agreeing that "So that in exchange for the overrides, WM&B, your firm at the time, is giving up a right to receive compensation, correct").

6. Respondents' Brief In Opposition to First Department Appeal, dated January 2, 2025, at 21.

later in the Consent Solicitation, that it had not "paid" any consideration for the overrides. That was an accurate statement because there was no contemporaneous cash payment to Participants, but rather a contractually set reduction in fees otherwise payable to Malkin Holdings. Pet. App. G, 88a.

10. The Panel also rejected another equally valid form of consideration that (again) was undisputed. The evidence established, and the Panel agreed, that Malkin Holdings had significantly increased its services to Participants following implementation of the overrides while not increasing its fees—another, independently valid form of consideration. Here, again, despite expressly conceding that Respondents incurred "a detriment" by providing the additional services, the Panel nonetheless (again) found consideration lacking. Pet. App. G, 87a.

11. On November 23, 2020, Petitioners filed a petition in the United States District Court for the Southern District of New York to vacate the Award. Petitioners argued that the Panel's ruling that the overrides were not enforceable was in manifest disregard of the law. Petitioners sought otherwise to confirm the Award.

12. They emailed the petition to counsel for Respondents that same day. The parties had consistently used email service in both the Arbitration and a related action Respondents had filed in the Southern District of New York to toll the statute of limitations. In fact, counsel for Respondents had insisted that the parties *only* communicate by email in the Arbitration.

13. Nevertheless, almost a month later, Respondents asserted that they had not been served with the Petition within the statutory time period for vacatur.[7] Pet. App. F, 37a-38a.

14. The district court granted Respondents' motion to dismiss the petition as untimely, rejecting Petitioners' argument that electronic service of the petition was valid because of the prior conduct between the parties in the arbitration and declining to excuse defective service. Pet. App. F, 40a-42a. In a decision one month later, the district court denied the motion to vacate and confirmed the Award, finding that Petitioners had not demonstrated the award "evinced manifest disregard of the law." Pet. App. E, 24a.

15. Petitioners appealed. While that appeal was pending, this Court held in *Badgerow v. Walters*, 596 U.S. 1 (2022), that federal courts did not have subject matter jurisdiction by "looking through" to the underlying arbitration claims to determine whether a federal claim was raised. Such "look through" jurisdiction was the sole basis for federal court subject matter jurisdiction. Accordingly, the Second Circuit vacated the district court's order on April 20, 2023 for lack of subject matter jurisdiction, *Malkin v. Shasha*, No. 21-2675, 2023 WL 3012381, and the district court dismissed the action without prejudice on April 21, 2023. R.7.22.

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7. All Respondents, save for one, were represented by the same counsel, while the one remaining Respondent, Danielle P. Barger, was represented by separate counsel. Counsel for all Respondents except for Danielle P. Barger moved to dismiss the petition due to ineffective service (the "MTD Claimants").

16. Petitioners then re-filed their petition in New York Supreme Court, New York County, the same day as the federal court dismissal. They raised the same arguments for partial vacatur they had made in federal court. Respondents filed their own petition to confirm. The two petitions were assigned to the same state court justice, who denied the petition to vacate and granted the motion to confirm for the same reasons the federal court had in its September 2021 order finding that no manifest disregard had been established.[8] Petitioners once again appealed, this time to the First Department of the Supreme Court, Appellate Division. Pet. App. B, 2a; Pet. App. C, 6a and Pet. App. D, 11a.

17. By Decision and Order entered March 13, 2025, the First Department affirmed. Pet. App. B, 2a. It held "Supreme Court properly dismissed the Malkin parties' petition to vacate the arbitration award, as that petition was untimely" since it was filed "more than 90 days after delivery of the arbitration award," citing to CPLR 7511(a). *Id.* at 3a. It further held that Respondents "cannot avail themselves of the six-month grace period (CPLR 205-a)" because their federal petition was untimely under federal law. *Id.*

18. The First Department further ruled that email service on the MTD Claimants' counsel was ineffective because counsel had not "expressly consented" to such service and his acceptance of email service in related proceedings did not change matters. *Id.* at 3a-4a. In

8. One Claimant in the Arbitration, Danielle Barger, who by this time was separately represented, filed her own petition to confirm, which was granted on July 22, 2024.

so doing, the First Department cited Second Circuit authority on that point, *Dalla-Longa v. Magnetar Cap. LLC*, 33 F.4th 693 (2d Cir. 2022), without any substantial analysis of the issue, and without addressing the contrary authority Respondents had cited. Pet. App. L, 248a, 262a-267a; Pet. App. M., 280a-288a.

19. "As to the merits," the First Department relied exclusively on the Panel's citation to the statement in the S-4 that "the supervisor" "did not pay any consideration for the overrides," holding "[t]his statement 'more than meets the requirement that there be at least a barely colorable justification for the outcome reached' by the arbitrators." Pet. App. B, 4a (quoting *Matter of Daesang Corp. v. NutraSweet Co.*, 167 A.D.3d 1, 19 (1st Dept 2018)). The First Department did not mention or address the conceded fact that Respondents had given up fees in exchange for the overrides, as well as suffered a "detriment" by providing additional supervisory services.

20. Petitioners' motion for reargument or leave to appeal to the New York Court of Appeals was denied on June 17, 2025. Their motion for leave to appeal to the New York Court of Appeals was denied on January 13, 2026.

REASONS FOR GRANTING THE WRIT

The Circuits are deeply, irrevocably (and evenly) split on whether manifest disregard continues to be a ground to vacate an arbitration award under the FAA, with four Circuits holding each way in a split dating back to 2009. The Court should grant the petition to resolve this abiding Circuit split, which has only become more significant over the years as arbitration has continued to be a popular form of dispute resolution. The Court should hold that manifest regard retains its vitality, so there is some remaining check on what is otherwise unbridled arbitral power to flout the law, and should provide a clear test for lower courts to apply.

The petition should also be granted so that the Court can address whether email service of petitions to vacate arbitration awards is effective under the FAA. The lower court rulings in this case rejecting authority authorizing such service are erroneous and inconsistent with the FAA, which contains relaxed service provisions consistent with the goal of arbitration to resolve disputes practically and efficiently.

I. THE LOWER COURTS ARE HOPELESSLY SPLIT ON THE EXISTENCE AND MEANING OF "MANIFEST DISREGARD"

A. The Court Should Resolve the Circuit Split on Manifest Disregard After *Hall Street*

This Court first introduced "manifest disregard" of the law in *Wilko v. Swan.* There the Court explained that "the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation." 346 U.S. 427, 436-37 (1953) (footnote omitted), *overruled on other grounds, Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

Wilko's oblique reference made its way into the law even as it generated debate concerning its correctness, and this Court appeared to reaffirm manifest disregard. *See*, *e.g.*, *First Options of Chicago v. Kaplan*, 514 U.S. 938, 942 (1995) ("parties bound by arbitrator's decision not in 'manifest disregard' of the law") (citing *Wilko*, 346 U.S. at 436-37); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656 (1985) ("[a]rbitration awards are only reviewable for manifest disregard of the law") (Stevens, J., dissenting) (citing 9 U.S.C. §§ 10, 207).

Then came *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). There, the Court held that the enumerated grounds for vacatur in Section 10 of the FAA, 9 U.S.C. § 10, are the "exclusive" grounds for vacating an arbitration award. 552 U.S. at 583. However, the precise question of whether manifest disregard is a viable ground for challenging an arbitration award was not at issue in *Hall Street.* Instead, the question in that case was whether parties could modify the statutory grounds contractually. *Id.* at 585.

After *Hall Street*, the Circuits split sharply on manifest regard. Four Circuits—the Fifth, Seventh, Eighth, and Eleventh—have held that manifest disregard no longer exists. *See Citigroup Glob. Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009) ("In the light of the Supreme Court's clear language that, under the FAA, the statutory provisions are the exclusive grounds for vacatur, manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected."); *Affymax, Inc. v. Ortho-McNeil-Janssen Pharms., Inc.*, 660 F.3d 281, 285 (7th Cir. 2011); *Med. Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489

(8th Cir. 2010);[9] *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1324 (11th Cir. 2010).

Meanwhile, four other Circuits—the Second, Fourth, Sixth, and Ninth—have held that manifest disregard is still a viable doctrine, whether as a "judicial gloss" on Section 10 of the FAA or an independent ground. *Weiss v. Sallie Mae, Inc.*, 939 F.3d 105, 109 (2d Cir. 2019) ("[M]anifest disregard remains a valid ground for vacating arbitration awards whether applied as judicial gloss or as an independent basis.") (internal quotation marks omitted); *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415, 418–19 (6th Cir. 2008). The question remains open in the First, Third, Tenth, and District of Columbia Circuits. *Selden v. Airbnb, Inc.*, 4 F.4th 148, 160 n.6 (D.C. Cir. 2021); *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 220 n.2 (3d Cir. 2012); *Abbott v. Law Off. of Patrick J. Mulligan*, 440 F. App'x 612, 620

9. Which side the Eighth Circuit takes on this decisional split comes with an asterisk, however. While *Med. Shoppe* could not have been clearer in ruling that manifest disregard no longer exists, 614 F.3d at 489 ("We have previously recognized the holding in *Hall Street* and similarly hold now that an arbitral award may be vacated only for the reasons enumerated in the FAA") (citation omitted), it appears to have considered, if not applied, that doctrine when it vacated an arbitration award last year. *See Zeidman v. Lindell Mgmt. LLC*, 145 F.4th 820 (8th Cir. 2025), *cert. denied* No. 25-504, 2026 WL 79757 (Jan. 12, 2026). It was, however, unclear whether the Eighth Circuit actually applied manifest disregard in *Zeidman*, or whether it ruled that the panel had exceeded its authority. 145 F.4th 827-28. That ambiguity, as well as the Eighth Circuit's clear prior decisions rejecting manifest disregard, were ample grounds for this Court to deny certiorari in that case.

(10th Cir. 2011); *Ramos-Santiago v. UPS*, 524 F.3d 120, 124 n.3 (1st Cir. 2008).

Pertinent here, New York Courts have continued to apply manifest disregard, *see*, *e.g.*, *Lerner v. Credit Suisse Sec. (USA), LLC*, 193 A.D.3d 649, 650 (N.Y. App. Div. 1st Dep't 2021) (vacating award); *Daesang Corp. v. NutraSweet Co.*, 167 A.D.3d 1, 16 n.11 (N.Y. App. Div. 1st Dep't 2018) (relying on Second Circuit authority to apply manifest disregard post-*Hall Street*), though the New York Court of Appeals itself has not addressed the issue.

The Court previously has declined to decide whether manifest disregard is grounds for vacating an arbitration award. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 n.3 (2010) ("We do not decide whether manifest disregard survives our decision in *Hall Street* . . . ") (internal quotation marks omitted).

Commentators have noted the pernicious effects of this Circuit split, both on the uniform application of justice and, more broadly, on arbitration itself. One commentator noted that there is "[t]he split among federal circuit courts is creating inconsistency in the law of arbitration." Michael H. LeRoy, *Are Arbitrators Above the Law? The "Manifest Disregard of the Law" Standard*, 52 B.C. L. Rev. 137, 186 (2011). Another noted the current uncertainty surrounding manifest disregard "leaves the future of existing arbitration agreements in limbo. Moreover, after *Hall Street*, parties cannot resolve the confusion on their own. Thus, parties contemplating entering into arbitration agreements cannot confidently predict whether any resulting arbitration awards would be reviewable for substantive errors." Karen A. Lorang, *Mitigating Arbitration Externalities: A Call for Tailored Judicial Review*, 59 UCLA L. Rev. 218, 232 (2011). Yet a third noted the inconsistency that arises from having different rules in different jurisdictions:

> This lack of definition means that we will continue to have no uniform standard across jurisdictions for applying the doctrine. As a result, parties will be subject to different standards based on the jurisdiction in which their arbitration takes place. This may lead to forum shopping by parties sophisticated enough to include the more favorable jurisdictions in their forum-selection clauses. Moreover, it diminishes perceptions of procedural justice in arbitration because parties prefer defined procedures.

Thomas V. Burch, *Manifest Disregard and the Imperfect Procedural Justice of Arbitration*, 59 U. Kan. L. Rev. 47, 70 (2010) (footnotes omitted). Indeed, one commentator notes that a "lack of guidance" on the existence of manifest disregard "has intensified the debate over the benefits and disadvantages of arbitration in general." Chad R. Yates, *Manifest Disregard in International Commercial Arbitration: Whether Manifest Disregard Holds, However Good, Bad, or Ugly*, 13 U. Mass. L. Rev. 336, 349 (2018) (footnotes omitted).

These concerns have led to calls from both courts and commentators for this Court to resolve the split. *E.g. GS Equities, Ltd. v. Blair Ryan Co.*, No. 08 CIV. 1581, 2011 WL 3278909, at *3 n.1 (S.D.N.Y. July 26, 2011) ("Lower courts are split over whether 'manifest disregard of the law' is one [way] that an arbitrator can exceed his powers, . . . or is a wholly separate 'nonstatutory ground' for vacatur. . . . If it be the latter, then *Hall Street Associates* effectively eliminated 'manifest disregard' as a basis for overturning an arbitration award. Needless to say, the lower courts would appreciate guidance from the Supreme Court on this question.") (internal citations omitted); LeRoy, 21 B.C. L. Rev. at 186 ("The U.S. Supreme Court should address this problem."); Nicholas A. Rossini, *Lost in Dicta: The Curious Case of Nonstatutory Grounds of Vacatur in an Era of Ubiquitous Consumer Arbitration*, 52 Suffolk U. L. Rev. 343, 368 (2019) (the "status" of manifest disregard "will continue to vary by jurisdiction until the Supreme Court sees fit to resolve the matter directly."); Brian Forgue, *Re-Thinking the Federal Arbitration Act § 10: Vacating "Manifest Disregard"*, 7 Yearbook on Arb. & Mediation 255, 255 (2015) ("Cases centered on manifest disregard have wreaked havoc on lower court systems across many jurisdictions, thus warranting attention from the Supreme Court for clarification.").[10]

The Court should settle this question that has so long and sharply divided the lower federal courts.

B. Having Affirmed the Continued Existence of Manifest Disregard, the Court Should Define Its Parameters

In the over 70 years—nearly a third of this nation's existence—since the Court created the manifest disregard

10. This commentator further asserted "[m]anifest disregard has been warped beyond recognition through common law interpretation, assuming it had a recognizable definition at the outset." *Id*. at 268.

doctrine in *Wilko v. Swan*, the Court has never provided any standards for its application. Unsurprisingly, this lack of guidance has led lower courts to apply a patchwork of different standards and a wide variety of different analytical approaches when reviewing arbitration awards, a matter that continues to trouble courts in those Circuits that continue to apply manifest disregard post-*Hall Street*.

The resulting confusion has been the subject of concern for decades. "To assert that the dictum from the Supreme Court's opinion in *Wilko v. Swan* has . . . left the federal circuit courts of appeals in a state of confusion regarding the grounds upon which a commercial arbitration award properly may be vacated is an understatement." Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 Ga. L. Rev. 731, 774 (1996) (footnotes omitted). Decisional strands "continue to evolve in opposite directions." Noah Rubins, "*Manifest Disregard of the Law" and Vacatur of Arbitral Awards in the United States*, 12 Am. Rev. Int'l Arb. 363, 367 (2001); *see also George Watts & Son v. Tiffany & Co.*, 248 F.3d 577, 579-80 (7th Cir. 2001) ("[t]he law in other circuits is similarly confused, doubtless because the Supreme Court has been opaque"); *Roffler v. Spear, Leeds & Kellogg*, 13 A.D.3d 308, 313 (N.Y. App. Div. 1st Dep't 2004) ("the bounds of this ground have never been defined.") (Tom, J.P., dissenting from confirmation of award).

As result, even before *Hall Street*, the law in some circuits was so unsettled that it was impossible to predict the standard to be applied from one case to the next. *See* James M. Gaitis, *International and Domestic Arbitration Procedure: The Need For A Rule Providing A Limited Opportunity for Arbitral Reconsideration of Reasoned*

Awards, 15 Am. Rev. Int'l Arb. 9, 46 (2004) ("[T]he evolving application of the standard remains in such a state of flux that the impact of the doctrine on arbitrations will remain unpredictable until the doctrine is ultimately rejected or is permanently defined.") (footnote omitted);[11] *see also* Burch, 59 U. Kan. L. Rev. at 49, 60, 69 (referring to manifest disregard as "incoherent and inequitable"; further stating "the doctrine remains largely undefined" and "the definition we have is too limited"); Marcus Mungioli, *The Manifest Disregard of the Law Standard: A Vehicle for Modernization of the Federal Arbitration Act*, 31 St. Mary's L.J. 1079, 1115-16 (2000) ("Courts have been confronted with an unnecessarily burdensome task of searching for a useful definition of manifest disregard, which must end.") (footnote omitted).

Some examples illustrate the confusion. In *Hardy v. Walsh Manning Sec., L.L.C.*, 341 F.3d 126 (2d Cir. 2003),

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11. *See, also, e.g.*, Rubins, 12 Am. Rev. Int'l Arb. at 374 (noting "the wide variety of definitions different circuits have used to give concrete meaning to the *Wilko* and *First Options* concepts"); Howard A. Ellins & Christopher H. Withers, *Judicial Deference to the Authority of Arbitrators To Interpret and Apply Federal Antitrust Laws*, 12 Am. Rev. Int'l Arb. 387, 400 n. 76 (2001) (observing that *Wilko* dictum "has spawned a significant volume of case law, none of which has articulated a clear standard for the application of the [manifest disregard] doctrine in the context of a domestic commercial arbitration award") (citations omitted); Brent S. Gilfedder, *"A Manifest Disregard of Arbitration ?" An Analysis of Recent Georgia Legislation Adding "Manifest Disregard of the Law" to the Georgia Arbitration Code as a Statutory Ground for Vacatur*, 39 Ga. L. Rev. 259, 277 (2004) ("In the forty years since its creation, federal courts have been unable to formulate any clear analytical framework to apply this vacatur ground consistently") (footnote omitted).

a party to an arbitration argued that the arbitration panel had acted in manifest disregard of the law by misapplying the doctrine of *respondeat superior*. After a careful review of the arbitral record, the Second Circuit held that the "award indeed contains a fundamental mistake of law," *id*. at 133, that "substantial financial liability should not be imposed upon an individual without a clear basis in law," *id.* at 134, and (over a dissent) remanded the matter to the arbitrators for clarification. *Id*. *See also id.* at 132 ("we can discern no reading of the Award that resolves its apparent contradiction with the law of respondeat superior"). *Compare Ebbe v. Concorde Inv. Servs., LLC*, 953 F.3d 172, 177-78 (1st Cir. 2020) (declining to vacate arbitration award based on alleged misapplication of *respondeat superior* by arbitrator).

Yet, the same Circuit subsequently emphasized that "[a] federal court may not conduct a reassessment of the evidentiary record. . . ." *Wallace v. Buttar*, 378 F.3d 182, 193 (2d Cir. 2004). In fact, the Second Circuit has at times articulated directly conflicting principles *within the same opinion*. *Compare Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 214 (2d Cir. 2002) ("The arbitrator's factual findings and contractual interpretation are not subject to judicial challenge") *with id*. at 222 ("vacatur for manifest disregard of a commercial contract is appropriate only if the arbitral award contradicts an express and unambiguous term of the contract.").

New York State courts have confronted these same issues. For example, a New York appellate court vacated an arbitration award on manifest disregard grounds when a FINRA arbitration panel ruled that deferred equity-based compensation did not constitute "wages" under a New York statute. *Lerner*, 193 A.D.3d at 650. In so doing, it acknowledged that manifest disregard required that the legal principle at issue be "well defined, explicit, and clearly applicable." (citation omitted). Yet the court's holding relied primarily on lower court opinions that New York's highest court has not previously addressed, *id.*, which therefore could hardly meet the "well defined, explicit, and clearly applicable" standard.[12]

C. There Is No Reason to Delay the Court's Review

There is every reason for the Court to determine these issues now and none to wait. *First*, eight of the twelve Circuit courts have taken a side on whether manifest disregard exists in the seventeen years since *Hall Street*. No further development of the law can reasonably be expected. In the meantime, the unequal application of the law continues while this split persists. *Second*, commentators continue to debate the theoretical underpinnings of the doctrine, with some asserting that it violates the principle of finality of arbitration awards, while others assert it is necessary to maintain some control over rogue arbitrators. *Compare* Karly A. Kauf, *"Manifest" Destiny: The Fate of the "Manifest Disregard of the Law" Doctrine After Hall Street v. Mattel*, 3 J. Bus. Entrepreneurship & L. 309, 317 (2010) ("if the Supreme

12. Before it abrogated manifest disregard entirely, the Seventh Circuit had its own unique standard for manifest disregard, holding that "an arbitrator may not direct the parties to violate the law." *George Watts & Son*, 248 F.3d at 580. *Compare ARW Expl. Corp. v. Aguirre*, 45 F.3d 1455, 1463 (10th Cir. 1995) ("This Court has characterized the 'manifest disregard' standard as 'willful inattentiveness to the governing law.") (citation omitted).

Court were to hold that manifest disregard does not qualify under those sections, then little could be done if an arbitrator openly disregarded the law in lieu of his or her own belief system") (footnote omitted) *with* Forgue, 7 Yearbook on Arb. & Mediation at 269 ("Preservation of [the manifest disregard] standard . . . will likely only lead to more confusion."); *see also* Burch, 59 U. Kan. L. Rev. at 47 ("Critics claim this doctrine implicitly encourages parties to appeal arbitration awards, citing empirical evidence to show that parties rely on it more than any other ground for vacatur. Supporters claim manifest disregard is necessary—even in the limited form that courts usually apply it—to protect parties from arbitrators who fail to follow the law."). The Court should address this issue to put an end to that debate.

Third, confusion concerning the scope of the doctrine has persisted during the proverbial three score and ten years since *Wilko v. Swan.* There is no prospect that the lower courts will coalesce around a single standard, particularly since four Circuits do not recognize the doctrine at all.

Fourth, this issue will potentially apply to virtually every arbitration, since the Court in *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) ruled that for the FAA to apply, it is not necessary for the transaction at issue in the arbitration to have a substantial effect on interstate commerce, but only that the *type* of activity at issue has such effect. *See Cusimano v. Schnurr*, 26 N.Y.3d 391, 399–400 (2015) ("Although this interpretation is undeniably broad, the Supreme Court has made it abundantly clear that the FAA's reach is expansive"). Thus, it is hard to imagine an arbitration to which the

FAA, and its standards for review of arbitration awards, will not apply, at least not in the commercial context.

II. THE LOWER COURTS ARE SPLIT ON CONSENT TO EMAIL SERVICE

It is a fact of life for lawyers, parties to court proceedings and arbitrations, as well as for the world at large, that it is standard practice to communicate by email. Post-hearing court proceedings concerning arbitrations present a different procedural posture than the ordinary commencement of a litigation, coming as they do after the parties have already been engaged in an adjudicatory process concerning their dispute. Accordingly, the parties to such proceedings have generally been in communication with each other—often (as in this case) frequently and for years. They have often come to agreement, formally or informally, on how they will communicate and exchange documents and other information concerning their dispute. Thus when such parties come to court, they do not come with a blank slate concerning their methods of communication. They did not do so here.

Here, the Appellate Division, First Department relied on the Second Circuit's decision in *Dalla-Longa v. Magnetar Cap. LLC*, 33 F.4th 693 (2d Cir. 2022) to hold that email service was insufficient. Pet. App. B, 3a-4a. In coming to this conclusion, the First Department addressed whether the original petition that Petitioners filed in federal court (which was ultimately dismissed for lack of subject matter jurisdiction) was timely, which would have permitted Petitioners to avail themselves of the savings provision of N.Y. CPLR 205-a after dismissal of that case. That timeliness issue in turn depended on whether Petitioners' email service of the federal petition was effective service. Relying on *Dalla-Longa*, the First Department held that it was not.

Dalla-Longa itself addressed Fed. R. Civ. P. 5(b)(2)(E), which permits service "by other electronic means that the person consented to in writing." It held in something of an *ipse dixit* that respondent's agreement to email service in the arbitration "did not constitute" its "written consent to service of papers by email in a subsequent lawsuit brought in federal court to vacate the arbitration award," 33 F.4th at 696. It further held that neither section 12 of the FAA nor the AAA rules under which the arbitration had been administered authorized service by email in a subsequent litigation. *Id.* at 696-97. It found support for this position in both a prior unreported Second Circuit decision as well as in the Eleventh Circuit's decision in *O'Neal Constructors, LLC v. DRT Am., LLC*, 991 F.3d 1376, 1380-81 (11th Cir. 2021). 33 F.4th at 697.

However, the First Department did not address other, contrary authority that Petitioners cited in support of their position. For example, in a case with very similar facts, petitioners emailed the petition/motion to vacate an arbitration award to respondent's counsel one day before the three-month statutory deadline set by Section 12 of the FAA but did not personally serve respondent until some weeks later (beyond the statutory deadline). *Day & Zimmerman, Inc. v. SOC-SMG, Inc.*, No. 11-6008, 2012 WL 5232180, at *4 (E.D. Pa. Oct. 22, 2012). The court rejected respondent's contention that service was ineffective, noting

> Generally, email service of process is insufficient to provide adequate notice to the party served unless the other party has agreed in writing to accept electronic service . . . Here, the underlying arbitration spanned over two years, during which time email was used as the parties' primary mode of communication without fault. The Court can find no reason why this same agreement should not apply to the present litigation since the action directly involves the Arbitration.

Id. (internal citation omitted). Importantly, the court also noted the gamesmanship in which respondent engaged by not objecting to email service until after the deadline for service expired—exactly what Respondents' counsel did here. *Id*.

Other cases support this result, *Corinthian Colls., Inc. v. McCague*, No. 09 C 4899, 2010 WL 918074, at *2 (N.D. Ill. Mar. 4, 2010) (email sufficient in absence of express consent where movant emailed the petition, a cover letter providing notice of the filing, and a "notice of electronic filing confirming the filing of the petition" to opposing counsel, and opposing counsel had consented to electronic service in the arbitration); *U.S. v. Machat*, No. 08 Civ. 7936, 2009 WL 3029303, at *4 (S.D.N.Y. Sep. 21, 2009) (approving service by email and service on the defendant's attorney); *Scott v. Carpanzano*, 556 F. App'x 288, 293 (5th Cir. 2014) (permitting email service on attorney and "concluding that Mr. Carpanzano received notice reasonably calculated to apprise him of the pendency of the action and afford him an opportunity to present his objections") (citation omitted). *Cf. Hamilton v.*

Navient Sols., LLC, No. 18 Civ. 5432, 2019 WL 633066, at *4 (S.D.N.Y. Feb. 14, 2019) (emphasis added) (dismissing petition for vacatur where service was one day after a deadline but noting that "Hamilton could have emailed her application for vacatur to Navient or otherwise provided notice on time").

Indeed, the text of the FAA itself takes a more practical approach to service. It permits not only formal service of process on the parties to the arbitration itself, but also to the parties' attorneys, 9 U.S.C. § 12, strongly supporting the notion that arrangements concerning service in the underlying arbitration (as upon a party's attorney rather than the party itself) carry over to litigation concerning the arbitration.

The Court should address this issue: whether the formalistic requirements for service in *Della-Longa*, or the more practical approach of *Day & Zimmerman*, which permits implied consent consistent with the parties' past practice, should control. As noted, this issue takes on additional importance given the virtually uniform practice of counsel to communicate by email.

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO ADDRESS THESE IMPORTANT ISSUES

This case is an ideal vehicle to address these important issues.

First, the First Department applied the manifest disregard doctrine as formulated by the Second Circuit, thus squarely presenting the issue of the continued vitality of that doctrine, as well as its appropriate scope, for this Court's review.

Second, the specific issue presented in this case—whether the Panel manifestly disregarded the contractual principle of consideration—is an ideal one for the Court to address the manifest disregard doctrine. The principle, a staple in any first-year contracts class, is a settled one, first addressed in New York courts in the nineteenth century in *Hamer v. Sidway*, 124 N.Y. 538 (1891). The Panel set forth this principle in the Award and no party disputed it. Accordingly, this case presents precisely the type of "well defined, explicit, and clearly applicable" law to which courts have generally held that manifest disregard applies. *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 121 n.1 (2d Cir. 2011) (internal quotation marks omitted); *see also*, *e.g.*, *Wachovia*, 671 F.3d at 483 ("clearly defined and not subject to reasonable debate"); *Sherrock Bros. v. DaimlerChrysler Motors Co., LLC*, 260 F. App'x 497, 499 (3d Cir. 2008) ("clearly governing legal principle") (internal quotation marks omitted); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995) ("clearly established legal precedent").

Third, there is no dispute concerning the underlying facts. The Panel expressly found, on the face of its Award, that the Participants had received the fee reduction "in exchange" for agreeing to the overrides. Pet. App. G, 81a. This was supported by hearing testimony[13] and documents

13. R.138 (one of the Claimants conceding "WM&B, your firm at the time, is giving up a right to receive compensation" "in exchange for the overrides"); (R.129 (consideration consisted of "an assignment by the supervisor of a portion of its override. It was the portion attributable to the increased profit from reducing debt service"); R.125 ("it was just $50,000 a year surrender by Malkin Holdings without any assurance that there would ever be[] a return on that you might say."); R.141 (assignment of pro rata

submitted during the hearing.[14] And it was admitted (again) by the Participants in their First Department brief.[15] The only question is whether the later statement in the solicitation materials for the Transaction that Malkin Holdings did not "pay" any consideration for the overrides (Pet. App. G, 87a-88a) can trump that undisputed fact. Thus, this case presents a classic case concerning whether the Panel "manifestly disregarded" governing law.

Likewise, the Panel expressly found that the alternate grounds that Petitioners advanced for consideration—the increased supervisory services—also occurred after the implementation of the overrides and Malkin Holdings rendering of those services constituted a "detriment," but nevertheless held that consideration was lacking. (R.132

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portion of additional compensation "was part of the consideration for the voluntary consents").

14. *E.g.*, R.248 ("[Malkin Holdings] will assign, effective January 1, 1992 through January 5, 2076, to the Participant a *pro rata* portion of [Malkin Holdings'] additional compensation from the scheduled reductions in Master Lease rent to become effective in 1992 and 2013."); R.252 ("If all Participants execute Authorizations, [Malkin Holdings] will forego the right to receive $45,017 a year from 1992 to 2013, and $52,405 a year thereafter through January 5, 2076, and Participants will receive such amounts. [Malkin Holdings] will be obligated to assign such sums to each authorizing Participant. . . ."); R.350 ("Any Participant whose interest in [ESBA] is not already subject to this voluntary program may now approve the same voluntary program which is in effect for more than 81% of the Participants. An approving Participant will receive now the pro rata payment from [Malkin Holdings] retroactive to the January 1, 1992 start of this program of approximately $140 for each original $10,000 participating interest.").

15. Respondents' Brief In Opposition to First Department Appeal, dated January 2, 2025, at 21.

(consideration received from "[t]he benefit to the investors of continuing an expanded supervisory services."); R.129 ("The other part of the consideration which was, you know, presented in this context was, the supervisors'[] continuing service in an expanded array of services as, you know, property management became more demanding and various reasons."); Pet. App. G, 87a-88a).

Third, this case presents an appropriate vehicle because the First Department relied on the oft stated but undefined notion that an arbitration award should be confirmed where there is "a barely colorable justification" for the award. (Pet. App. B, 4a (quoting *Daesang Corp.*, 167 A.D.3d at 19)). This is a principle that courts have struggled to apply consistently. *See Waldo v. Cousins*, No. 2018-001590, 2021 WL 4979956, at *1 (S.C. Ct. App. Oct. 27, 2021) ("Because these cases [on oral real estate agency agreements] have not been clearly and explicitly overruled, they provide at least 'barely colorable justification' for the Arbitration Panel's award.") (citations omitted), *rev'd*, 442 S.C. 662, 668-69 (2024) (parties to arbitration agreement "do not bargain to have their dispute resolved by whim"; passage of statute concerning oral real estate agency agreements "removed any 'arguably colorable' basis for the award"); *Sotheby's Int'l Realty., Inc. v. The Relocation Grp., LLC*, 987 F. Supp. 2d 157, 168-69 (D. Conn. 2013) (noting "barely colorable justification" standard and vacating award based on statute concerning requirements for real estate commissions where claimant "neither strictly not substantially complied with" statute); *rev'd*, 588 F. App'x 64, 66 (2d Cir. 2015) (noting "barely colorable justification" standard and reversal vacatur of award where "[t]he district court also failed to address alternate readings" of statute "that might have supported the arbitrators' decision.").

Fourth, this case is a proper one for the Court to review the issue of email service in court proceedings after an arbitration award. There is no question that Respondents' counsel timely received the emailed petition to vacate, and thus he had *actual* notice. Thus, the case squarely presents the issue of whether such service is proper.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
February 2, 2026

Respectfully submitted,

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APPENDIX

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APPENDIX A — ORDER OF THE STATE OF NEW YORK COURT OF APPEALS, DECIDED AND ENTERED JANUARY 13, 2026

STATE OF NEW YORK
COURT OF APPEALS

Mo. No. 2025-489

IN THE MATTER OF VIRGINIA SHASHA, *et al.*,

Respondents,

v.

PETER L. MALKIN, *et al.*,

Appellants.

(And Another Proceeding.)

Present, Hon. Rowan D. Wilson, *Chief Judge, presiding*.

Appellants having moved for leave to appeal to the Court of Appeals in the above causes;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion is denied with one hundred dollars costs and necessary reproduction disbursements.

s/ Heather Davis
Heather Davis
Clerk of the Court

APPENDIX B — OPINION OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, FILED MARCH 13, 2025

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

3896-3896A-3896B

Index Nos. 651974/23, 652074/23
Case Nos. 2023-04341, 2023-04352, 2024-01438

IN THE MATTER OF VIRGINIA SHASHA *et al.*,

Petitioners-Respondents,

-against-

PETER L. MALKIN *et al.*,

Respondents-Appellants.

PETER L. MALKIN *et al.*,

Petitioners-Appellants,

-against-

VIRGINIA SHASHA *et al.*,

Respondents-Respondents.

Judgment (denominated an order), Supreme Court, New York County (Melissa A. Crane, J.), entered August 21, 2023, which dismissed a petition by Peter L. Malkin, Anthony E. Malkin, Thomas N. Keltner, Jr., and ESRT

MH Holdings, LLC (collectively, the Malkin parties) to vacate, in part, an arbitration award issued August 24, 2020, unanimously affirmed, with costs. Judgment, same court and justice, entered January 22, 2024, confirming the arbitration award and entering individual judgments for Virginia Shasha, Vivienne Pero, Debra B. Adler, Myrna Joy Edelman, Empire State Liquidity Fund, LLC, Mary Jane Fales, Melvyn H. Halper, Phyllis J. Halper, and Wendy S. Tamis (collectively, the Shasha parties), unanimously affirmed, with costs. Appeal from judgment (denominated an order), same court and justice, entered on or about August 1, 2023, which granted the Shasha parties' petition to confirm the arbitration award, unanimously dismissed, without costs, as subsumed in the appeal from the January 22, 2024 judgment.

Supreme Court properly dismissed the Malkin parties' petition to vacate the arbitration award, as that petition was untimely. The petition was filed on April 21, 2023, more than 90 days after delivery of the arbitration award (*see* CPLR 7511 [a]). Furthermore, the Malkin parties cannot avail themselves of the six-month grace period (CPLR 205-a) following the termination of a prior action based on the same transaction or occurrence, as their earlier action in the Southern District of New York was not "timely commenced" according to the rules applicable in that jurisdiction (*see Anandaraja v Icahn Sch. of Medicine at Mount Sinai*, 227 AD3d 533, 534-535, 212 N.Y.S.3d 60 [1st Dept 2024]). Specifically, the Malkin parties failed to serve their federal petition on the Shasha parties within the strict three-month statute of limitations under the Federal Arbitration Act (9 USC § 12). Their purported email service on the Shasha parties' counsel on the final day of the three-month period was insufficient. There is no evidence that counsel expressly consented to service of the petition by email (*see* Fed Rules Civ Pro rule 5 [b] [2] [F]; Advisory Comm Notes, 2000 amend, Fed Rules Civ Pro 5) and counsel's acceptance of email service of filings in the arbitration and other proceedings did not establish consent to email service of the federal petition (*see Dalla-Longa v Magnetar Capital LLC*, 33 F4th 693, 695 [2d Cir 2022]).

As to the merits, the Malkin parties failed to establish that the arbitration panel acted in "manifest disregard of the law" (*Matter of Nexia Health Tech., Inc. v Miratech, Inc.*, 176 AD3d 589, 590-91, 110 N.Y.S.3d 420 [1st Dept 2019]). The panel concluded that the override consent agreements under which the Malkin parties retained 10 percent of Empire State Realty Trust (ESRT) stock were not supported by consideration. This conclusion, in turn, relied on a statement in a Form S-4 Prospectus/Consent Solicitation Statement filed with the Securities and Exchange Commission in connection with the ESRT initial public offering that "the supervisor," the Malkin parties' predecessor in interest, "did not pay any consideration for the overrides." This statement "more than meets the requirement that there be at least a barely colorable justification for the outcome reached" by the arbitrators (*Matter of Daesang Corp. v NutraSweet Co.*, 167 AD3d 1, 19, 85 N.Y.S.3d 6 [1st Dept 2018] [internal quotation marks omitted], *lv denied* 32 NY3d 915, 98 N.Y.S.3d 768, 122 N.E.3d 566 [2019], quoting *Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 481, 846 N.E.2d 1201, 813 N.Y.S.2d 691 [2006], *cert dismissed* 548 U.S. 940, 127 S. Ct. 34, 165 L. Ed. 2d 1012, [2006], *lv denied* 32 NY3d 915 [2019]).

Furthermore, the arbitration panel properly rejected petitioners' contention that the Edelman Family Decedent's Trust, the trust of which respondent Danielle P. Barger was a trustee, was liable for defamatory statements allegedly made by Richard Edelman. The panel correctly applied the rule of agency law that an "agent cannot by his own acts imbue himself with apparent authority," since, although Richard Edelman arguably held himself out as the Trust's principal, the record lacked evidence "of some misleading conduct on the part of the principal," who was then Howard Edelman (*Hallock v State*, 64 NY2d 224, 231, 474 N.E.2d 1178, 485 N.Y.S.2d 510 [1984]). The Malkin parties' arguments to the effect that the panel did not give sufficient weight to a part of the evidentiary record (*see Matter of Daesang Corp.*, 167 AD3d at 20) are unpersuasive, as "[m]anifest disregard of the facts is not a permissible ground for vacatur of an award" (*Wien*, 6 NY3d at 483).

We have considered the Malkin parties' additional arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: March 13, 2025

/s/ Susanna Molina Rojas
Susanna Molina Rojas
Clerk of the Court

APPENDIX C — DECISION AND ORDER ON MOTION OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY, FILED AUGUST 1, 2023

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

INDEX NO. 652074/2023

MOTION DATE N/A

MOTION SEQ. NO. 001

PRESENT: **HON. MELISSA A. CRANE** **PART 60M**
Justice

VIRGINIA SHASHA, VIVIENNE PERO, SHIRLEY ADLER, MYRNA JOY EDELMAN, THE EMPIRE STATE LIQUIDITY FUND LLC,MARY JANE FALES, MELVYN H. HALPER, PHYLLIS J. HALPER, WENDY TAMIS,

Plaintiff,

- v -

PETER L. MALKIN, ANTHONY E. MALKIN, THOMAS N. KELTNER, ERST MH HOLDINGS, LLC,

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42 were read on this motion to/for CONFIRMDISAPPROVE AWARD/REPORT .

Petitioners move for an order confirming and directing judgment upon the Final Award entered August 26, 2020 in a AAA arbitration, *Virginia Shasha and Vivienne Pero, Co-Trustees, et al., v. Peter L. Malkin, et al.*, AAA No. 01-14-0001-6986. Respondents oppose the application.

Under CPLR 7510, "The court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511." "The scope of judicial review of an arbitration proceeding is extremely limited" (*Elul Diamonds Co. v Z Kor Diamonds, Inc.*, 50 AD3d 293[1st Dept 2008]). "An arbitration award must be upheld when the arbitrator offer[s] even a barely colorable justification for the outcome reached" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006]).

The court has reviewed the parties' submissions, including the Final Award. Petitioner has established that there is at least a colorable justification for the Committee's arbitration award, and respondent does not assert any basis to reject the award under CPLR 7511 (*see* the court's 7/28/23 decision and order in the related proceeding, *Malkin v Shasha,* Index No. 651974/2023).

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ADJUDGED that the petition is granted, and the award rendered in favor of petitioners and against respondents is confirmed; and it is further

ADJUDGED that petitioners VIRGINIA SHASHA AND VIVIENNE PERO, COTRUSTEES OF THE VIOLET SHUKER SHASHA TRUST; SHIRLEY ADLER, TRUSTEE OF THE ADLER FAMILY TRUST; MYRNA JOY EDELMAN, TRUSTEE OF THE 2006 GILBERT M. EDELMAN INTER VIVOS TRUST; EMPIRE STATE LIQUIDITY FUND, LLC; MARY JANE FALES; MELVYN H. HALPER; PHYLLIS J. HALPER; AND WENDY S. TAMIS, do recover from respondents PETER L. MALKIN; ANTHONY E. MALKIN; THOMAS N. KELTNER, JR.; AND ESRT MH HOLDINGS L.L.C., jointly and severally, the amounts set forth below, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs, and Petitioners have execution therefor:

A. VIRGINIA SHASHA AND VIVIENNE PERO, COTRUSTEES OF THE VIOLET SHUKER SHASHA TRUST: $77,385.88, together with interest at the statutory rate from October 2, 2020 until entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate;

B. SHIRLEY ADLER, TRUSTEE OF THE ADLER FAMILY TRUST: $38,692.94, together with interest at the statutory rate from October

2, 2020 until entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate;

C. MYRNA JOY EDELMAN, TRUSTEE OF THE 2006 GILBERT M. EDELMAN INTER VIVOS TRUST: $193,464.70, together with interest at the statutory rate from October 2, 2020 until entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate;

D. EMPIRE STATE LIQUIDITY FUND, LLC: $301,804.93, together with interest at the statutory rate from October 2, 2020 until entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate;

E. MARY JANE FALES: $270,850.58, together with interest at the statutory rate from October 2, 2020 until entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate;

F. MELVYN H. HALPER: $9,673.24, together with interest at the statutory rate from October 2, 2020 until entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate;

G. PHYLLIS J. HALPER: $60,477.06, together with interest at the statutory rate from October 2, 2020 until entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate; and

H. WENDY S. TAMIS: $19,346.47 (principal amount $11,869.00 plus interest of $7,477.47);

And it is further

ORDERED that the Clerk is directed to mark this proceeding disposed.

7/31/2023	/s/ Melissa Crane
DATE	MELISSA A. CRANE, J.S.C.

CHECK ONE: ☒ CASE DISPOSED
☒ GRANTED ☐ DENIED
APPLICATION: ☐ SETTLE ORDER
CHECK IF APPROPRIATE: ☐ INCLUDES TRANSFER/REASSIGN

☐ NON-FINAL DISPOSITION
☒ GRANTED IN PART ☐ OTHER
☐ SUBMIT ORDER
☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

APPENDIX D — DECISION AND ORDER ON MOTION OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY, FILED AUGUST 1, 2023

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

INDEX NO. 651974/2023

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 002

PRESENT: **HON. MELISSA A. CRANE** **PART 60M**
Justice

PETER L. MALKIN, ANTHONY E. MALKIN, THOMAS N. KELTNER, ERST MH HOLDINGS, L.L.C.,

Plaintiff,

\- v -

VIRGINA SHASHA, VIVIENNE PERO, DANIELLE P. BARGER, SHIRLEY ADLER, MYRNA JOY EDELMAN, EMPIRE STATE LIQUIDITY FUND, LLC,MARY JANE FALES, MELVYN H. HALPER, PHYLLIS J. HALPER, WENDY S. TAMIS,

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 59, 64 were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54 were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT.

To the extent the Petition seeks to vacate any portion of the arbitral award an AAA panel issued on August 24, 2020 (the "award"), the petition is denied.

Petitioners first tried to unwind this award in federal district court for the Southern District of New York, but were rebuffed because, *inter alia*, the Petition was untimely. Subsequent to the SDNY court rejecting the Petition, the Supreme Court of the United States rendered a decision (*Badgerow v Walters*, 132 S. Ct. 1310 [2022]) the holding of which meant that SDNY never had jurisdiction to entertain the Petition in the first place. Consequently, the SDNY court vacated its prior decisions and dismissed the case. Petitioners refiled here.

This Petition was untimely when filed in SDNY, because it was served outside of the three months section 12 of the FAA requires. The email to Barger's counsel on November 23, 2020 was not proper service. Refiling the same Petition here does not make it timely. This Petition is therefore dismissed as time barred.

In addition, for the same reasons Judge Annalisa Torres so eloquently described in her September 27, 2021 decision (now vacated for lack of subject matter jurisdiction), there has been no manifest disregard of the law.

In Mot. Seq. No. 02, all Respondents except Danielle P. Barger (collectively, without Barger, the MTD Respondents) move to dismiss the petition pursuant to CPLR 404, 406, and 3211. They also move for an order confirming the Final Award entered August 26, 2020 in the underlying arbitration, *Virginia Shasha and Vivienne Pero, Co-Trustees, et al., v. Peter L. Malkin, et al.*, AAA No. 01-14-0001-6986. The MTD Respondents commenced a separate action to confirm the same Final Award (*Shasha v Malkin*, Index No. 652074/2023). The MTD Respondents' motion to confirm the Final Award is granted as set forth in the accompanying decision and order granting the petition in *Shasha v Malkin*.

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED AND ADJUDGED that the court denies and dismisses the Petition seeking to vacate any portion of the Final Award; and it is further

ORDERED that Motion Seq. No. 02 (to confirm the Final Award) is granted as set forth in the accompanying decision and order resolving MS 01 in *Shasha v Malkin,* Index No. 652074/2023; and it is further

ORDERED that the clerk is directed to mark this proceeding disposed.

7/31/2023	/s/ Melissa Crane
DATE	MELISSA A. CRANE, J.S.C.

CHECK ONE:	☒ CASE DISPOSED
	☐ GRANTED ☐ DENIED
APPLICATION:	☐ SETTLE ORDER
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/ REASSIGN

☐ NON-FINAL DISPOSITION	
☒ GRANTED IN PART	☐ OTHER
☐ SUBMIT ORDER	
☐ FIDUCIARY APPOINTMENT	☐ REFERENCE

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED SEPTEMBER 27, 2021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20 Civ. 9874 (AT)

PETER L. MALKIN; ANTHONY E. MALKIN; THOMAS N. KELTNER, JR; AND ESRT MH HOLDINGS L.L.C.,

Petitioners,

-against-

VIRGINIA SHASHA AND VIVIENNE PERO, CO-TRUSTEES OF THE VIOLET SHUKER SHASHA TRUST; DANIELLE P. BARGER, TRUSTEE OF THE EDELMAN FAMILY DECEDENT'S TRUST; LAURENCE ADLER AND SHIRLEY ADLER, TRUSTEES OF THE ADLER FAMILY TRUST; MYRNA JOY EDELMAN, TRUSTEE OF THE 2006 GILBERT M. EDELMAN INTER VIVOS TRUST; EMPIRE STATE LIQUIDITY FUND, LLC; MARY JANE FALES; MELVYN H. HALPER; PHYLLIS J. HALPER; AND WENDY S. TAMIS,

Respondents.

ORDER

ANALISA TORRES, District Judge:

Petitioners, Peter L. Malkin, Anthony E. Malkin, Thomas N. Keltner, Jr., and ESRT MH Holdings L.L.C. ("ESRT"), bring this proceeding under the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 9-10, to vacate in part and otherwise confirm an arbitration award (the "Award") issued by the American Arbitration Association ("AAA"), resolving a dispute between them and Respondents, Virginia Shasha and Vivienne Pero, Co-Trustees of the Violet Shuker Shasha Trust; Laurence Adler and Shirley Adler, Trustees of the Adler Family Trust; Myrna Joy Edelman, Trustee of the 2006 Gilbert M. Edelman Inter Vivos Trust; Empire State Liquidity Fund, LLC; Mary Jane Fales; Melvyn H. Halper; Phyllis J. Halper; Wendy S. Tamis (collectively, the "MTD Respondents"); and Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust. Pet. at 1-2, ECF No. 1; Pet. Mot., ECF No. 37. Pursuant to the Court's August 4, 2021 order, the petition was dismissed as to the MTD Respondents due to insufficient service of process, and Barger is the only remaining Respondent. ECF No. 58. For the reasons stated below, that portion of the petition seeking to partially vacate the Award is DENIED and that portion of the petition requesting confirmation of the Award is GRANTED.

Appendix E

BACKGROUND[1]

Petitioners Peter L. Malkin, Anthony E. Malkin, and Thomas Keltner were members of Empire State Building Associates, LLC ("ESBA") and held positions in Malkin Holdings LLC ("Malkin Holdings"). S-4 Filing at 65, ECF No. 40-8; ECF No. 40-2 at 341; *see also* Pet. ¶¶ 13-15, at 1 n.1. According to Petitioners, Petitioner ESRT is a successor entity to Malkin Holdings, Pet. Mem. at 1 n.1, ECF No. 39, but Barger contends Petitioners have not provided documentation supporting this assertion. Resp. Opp'n at 4 n.1, ECF No. 48.

ESBA was formed as a general partnership to acquire and hold a long-term lease to the Empire State Building, expiring in 2076. Barger Aff. ¶ 4, ECF No. 49; ECF No. 40-6 at 4. Petitioners or their predecessors-in-interest owned ESBA and syndicated their interests in ESBA to investors through three identical participation agreements. Barger Aff. ¶ 5. Owners of such interests—which includes all Respondents—are referred to as "Participants." *Id.* ¶¶ 4-5; *see also* ECF No. 40-2 at 425:4-6. Malkin Holdings served as the "Supervisor" of ESBA, and managed the asset on behalf of the Participants. *Id.* ¶ 5. Petitioners received supervisory fees for those services. *See id.* ¶¶ 7-8.

In 1991, Malkin Holdings, as the Supervisor, solicited the consent of the Participants to share ten percent of

1. The following facts are taken from the parties' Rule 56.1 Statements and submissions. Citations to a paragraph in the Rule 56.1 statement also includes the other party's response.

the net proceeds of any "capital transaction" with Malkin Holdings. 56.1 ¶ 6, ECF No. 38; Barger Aff. ¶ 6. These were referred to as "Overrides." Barger Aff. ¶ 6; S-4 Filing at 61. The applicable consent solicitation agreement stated that "in exchange" for the Overrides, the Supervisor "shall pay to the [Participant] a portion of certain supervisory fees otherwise payable to [the Supervisor]," and that if all Participants executed such authorizations, the Supervisor would "forego the right to receive $45,017 a year from 1992 to 2013, and $52,405 a year thereafter . . . and Participants will receive such amounts." ECF No. 40-7 at 7, 34. Malkin Holdings issued two additional consent solicitations in 2001 and 2008. Barger Aff. ¶ 6.

In 2011, Malkin Holdings began soliciting consent from Participants for a planned transaction in which ESBA, along with other real estate investments Malkin Holdings supervised, would be consolidated and contributed to a publicly traded real estate investment trust in an initial public offering (the "REIT IPO"). *See* S-4 Filing at 1, 166. Malkin Holdings considered the REIT IPO a "capital transaction" that triggered the Overrides, and thus were entitled to receive distributions of the Overrides from the REIT IPO. *Id.* at 65. By the date of the REIT IPO, Participants holding approximately 94 percent of the interest in ESBA, including all of the Respondents, had agreed to the Overrides. *Id.*; Barger Aff. ¶ 6.

In October 2014, Respondents filed an AAA arbitration proceeding against Petitioners, asserting claims for breach of contract, breach of fiduciary duty, securities fraud, and common-law fraud.[2] 56.1 ¶¶ 25-26. Respondents specifically challenged Petitioners' entitlement to receive the Overrides, arguing that the consent agreements Petitioners utilized were invalid and unenforceable for lack of consideration. Award at 20, ECF No. 40-1. Petitioners subsequently asserted a counterclaim for defamation against the Edelman Family Decedent's Trust (the "Edelman Trust") based on alleged defamatory statements made by Richard Edelman, a beneficiary of the trust. 56.1 ¶ 27. Following a two-year evidentiary hearing and based on a voluminous record, on August 26, 2020, the panel of arbitrators (the "Panel"), issued a nearly 100-page Award. Award at 2.

The Panel determined that "the Supervisor did not provide consideration in exchange for the Overrides." *Id.* at 24. The Panel looked to Petitioners' Form S-4 Prospectus/ Consent Solicitation Statement (the "S-4 Filing") filed with the SEC in conjunction with the REIT IPO. *Id.* at 20, 23. The Panel concluded that had the Supervisor actually provided consideration, the S-4 Filing "presumably would have stated expressly that the Supervisor had provided a benefit in exchange for the Overrides. Otherwise the S-4 [Filing] is substantially misleading," and that Petitioners had repeatedly "stood by the accuracy of all statements in the S-4 [Filing]." *Id.* at 24, 24 n.12.

2. Other Participants brought a series of class-action lawsuits challenging whether the REIT IPO had triggered the Overrides—these lawsuits were settled. *See In re Empire State Realty Tr., Inc. Inv'r Litig.*, No. 650607/2012 (N.Y. Sup. Ct. June 26, 2012), ECF No. 14; ECF No. 40-11. Petitioners state that Respondents opted out of this settlement. Pet. 56.1 ¶ 16, ECF No. 38.

The Panel also rejected Petitioners' argument that the Supervisor's provision of expanded supervisory services constituted valid consideration for the Overrides. *Id.* at 22. The Panel found a "fundamental flaw" in this reasoning—namely, that "all *non-consenting* Participants continued to receive the same [expanded] supervisory services that the *consenting Participants* received." *Id* at 23 (emphasis in original). The Panel found, therefore, that no consideration was provided for the Overrides, and deemed them unenforceable against Respondents. *Id.* at 24, 26. It further awarded damages on the Overrides to Respondents. *Id.* at 96-97.

As for the defamation claim, the Panel concluded that the Edelman Trust was not liable for Richard Edelman's claimed defamatory statements, because Edelman did not have actual or apparent authority to make the alleged statements on its behalf. *Id.* at 93. The Panel determined that a document identifying Edelman as an Edelman Trust "designee" was an insufficient basis to determine actual authority because the origins of the document were unclear and the word "designee" was not defined, and that were "other gaps" in determining actual authority. *Id.* at 85-87. It further found Edelman did not have apparent authority because Petitioners had failed to establish that the principal of the Edelman Trust had, through his words or actions, held Edelman out as having authority to act or speak on behalf of the Edelman Trust, or permitted Edelman to represent that he "possessed any authority" on behalf of the trust. *Id.* at 88. It also concluded that evidence of Edelman's own actions was unavailing, because "[o]ne cannot create apparent authority as an agent by his or her own actions . . . ." *Id.* Accordingly, it determined that because Edelman's allegedly defamatory statements "cannot be imputed to the Edelman Trust under principles of actual agency or apparent agency . . . the Edelman Trust is not liable" for those statements. *Id.* at 93.

On November 23, 2020, Petitioners brought this proceeding to vacate in part, and otherwise confirm, the Award, on the ground that the Panel's holdings on the Overrides and the defamation counter-claim were in "manifest disregard of the law." Pet. ¶¶ 58-59.

DISCUSSION

I. Legal Standards

A. Summary Judgment

Summary judgment is appropriate when the record shows that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-26, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A genuine dispute exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. The moving party initially bears the burden of informing the Court of the absence of a genuine dispute of material fact by citing particular evidence in the record. Fed. R. Civ. P. 56(c)(1);

Celotex, 477 U.S. at 323-24. The burden then shifts to the opposing party to establish a genuine dispute of material fact. *Beard v. Banks*, 548 U.S. 521, 529, 126 S. Ct. 2572, 165 L. Ed. 2d 697 (2006). "Although a party opposing summary judgment need not prove its evidence in a form admissible at trial or under the evidentiary standard which will be required, it must show facts sufficient to enable a reasonable mind to conclude that a material dispute of fact exists." *Healey v. Chelsea Res. Ltd.*, 736 F. Supp. 488, 491-92 (S.D.N.Y. 1990) (citation omitted). In deciding the motion, the Court views the record in the light most favorable to the nonmoving party. *Koch v. Town of Brattleboro*, 287 F.3d 162, 165 (2d Cir. 2002).

B. Confirmation of an Arbitration Award

"[T]he confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the [C]ourt." *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984). Accordingly, even though petitions to confirm or vacate an arbitration award are "treated as akin to a motion for summary judgment," *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 109 (2d Cir. 2006), a court's review of such awards are limited. Under the FAA, a court must confirm an arbitration award "unless it is vacated, modified, or corrected as prescribed in §§ 10 and 11 [of the FAA]." *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008) (quotation marks omitted). "A party moving to vacate an arbitration award has the burden of proof, and the showing required to avoid confirmation is very high." *D.H. Blair*, 462 F.3d at

110. Provided there is a "barely colorable justification for the outcome reached," the reviewing court must confirm the award. *Bear, Stearns & Co., Inc. v. 1109580 Ont., Inc.*, 409 F.3d 87, 91 (2d Cir. 2005) (citation omitted).

C. Vacatur of an Arbitration Award

Petitioners do not claim entitlement to vacatur under any of the statutory grounds of the FAA. *See* 9 U.S.C. § 10(a). Rather, they argue that the Award should be vacated because it "exhibits a manifest disregard of law." *Duferco Int'l Steel Trading v. T. Klaveness Shipping, A/S*, 333 F.3d 383, 388 (2d Cir. 2003) (quotation marks omitted). The "standard of review under this judicially created doctrine is severely limited." *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 208 (2d. Cir. 2002) (citation and quotation marks omitted). Vacatur on this basis requires finding "something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand and apply the law." *Id.* (citation and quotation marks omitted). Accordingly, a court's review is highly deferential to the arbitrators, and relief on such a claim is rare. *STMicroelectronics, N.V. v. Credit Suisse Secs. (USA) LLC*, 648 F.3d 68, 78 (2d Cir. 2011); *see also Wallace v. Buttar*, 378 F.3d 182, 190 (2d Cir. 2004) (finding vacatur for manifest disregard is available "only in the most egregious instances of misapplication of legal principles").

Under the "manifest disregard" standard, the Court must find that "[t]he governing law alleged to have been ignored by the arbitrators [was] well defined, explicit, and clearly applicable." *Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Bobker*, 808 F.2d 930, 934 (2d Cir. 1986). Second, the Court must find that the arbitrators "appreciate[d] the existence of [this] clearly governing legal principle but decide[d] to ignore or pay no attention to it." *Westerbeke*, 304 F.3d at 209 (citations omitted). The party urging vacatur bears the burden of establishing manifest disregard, and the Court must find both prongs of the test are met. *InterDigital Commc'ns Corp. v. Nokia Corp.*, 407 F. Supp. 2d 522, 529 (S.D.N.Y. 2005).

II. Analysis

Petitioners state the Panel acted in "manifest disregard of the law" in two areas: first, in finding that, as a matter of law, there was no consideration for the Overrides Petitioners received; and second, in finding that the Edelman Trust was not liable for allegedly defamatory statements made by Edelman, a trust beneficiary. Pet. Mem. at 3-4. Because Petitioners have not met their burden of proving these conclusions evinced manifest disregard of the law, their motion for partial vacatur is DENIED.

A. Consideration for Overrides

Petitioners contend there is "clearly established" law that "courts are not to inquire into the adequacy of consideration, and any detriment, however slight, is sufficient." Pet. Mem. at 13. Petitioners argue, therefore, that in finding there was no consideration for the Overrides Malkin Holdings had received, the Panel acted in "manifest disregard of the law" because this amounts to an "inquir[y] into the adequacy of consideration," and the Panel itself had "repeatedly acknowledged that Malkin Holdings . . . gave up fees" in exchange for the Overrides. *Id.* Petitioners also contend the Panel ignored established law in concluding that Petitioners' provision of expanded supervisory services did not constitute consideration based on their finding that Participants who did not consent to the Overrides received the same services. *Id.* at 16-17. Petitioners state that because the Panel recognized that such services had been provided, any further inquiry into the adequacy of such consideration should not have been made. *Id.*

At the outset, Petitioners misstate the nature of the Panel's inquiry and reasoning. Although it is true that "the adequacy of consideration is not a proper subject for judicial scrutiny," in determining the validity of contract formation, courts must nevertheless establish that "something of real value in the eye of the law" was exchanged—that is, to inquire if there was *any* consideration exchanged, even if "grossly unequal or of dubious value." *Apfel v. Prudential-Bache Sec.*, 81 N.Y.2d 470, 616 N.E.2d 1095, 1097, 600 N.Y.S.2d 433 (N.Y. 1993) (citation and quotation marks omitted). The Panel here specifically concluded that Malkin Holdings, as the Supervisor, "*did not* provide consideration in exchange for the Overrides." Award at 24 (emphasis added). Its inquiry and conclusions, therefore, went to the *existence* rather than the *adequacy* of consideration for the Overrides. Petitioners provide no authority for the proposition that courts may not inquire as to whether *any* consideration was given in the formation of a contract, nor do they point to any other established legal principles that the Panel was aware of, but ignored, in so holding. *See Interdigital Comms. Corp.*, 407 F. Supp. 2d at 531 (where party seeking vacatur cannot "draw[] this Court's attention to [a] principle of law—let alone willful circumnavigation of that principle by the [p]anel," vacatur is not warranted). Because the Panel "cannot be said to disregard a law that is . . . not clearly applicable," there is no basis to conclude it acted in "manifest disregard" in its ruling on consideration. *Duferco Int'l Steel Trading*, 222 F.3d at 390.

Petitioners nevertheless contend that the Panel's conclusion was "obviously wrong" because the Panel "expressly recognized that Petitioners did, in fact, give up compensation in exchange for the Overrides" yet still "held that consideration was lacking." Pet. Mem. at 13, 15 (quotation marks omitted). At the outset, "internal inconsistencies within an arbitral judgment are not grounds for vacatur." *Westerbeke*, 304 F.3d at 211. And the Panel's citation to the underlying consent solicitations, Award at 17-19, and its restatement of Petitioners' arguments, *id.* at 22-23, are not tantamount to a "holding" or factual finding that Petitioners had, in fact, "*give[n] up* compensation" in exchange for the Overrides, as Petitioners urge. Pl. Mem. at 15 (emphasis added); *see also* Award at 21 ("Respondents *claim* the Supervisor represented that the Participants would receive (in effect) a deduction in the Supervisor's fees . . . [Respondents] *contend* the Supervisor agreed, in exchange for consenting to the Overrides, to allow each Participant to receive certain compensation the Supervisor was otherwise entitled to receive." (emphasis added) (quotation marks omitted)). Indeed, the Panel's only "conclusion" was to find that the Supervisor did not provide consideration for the Overrides. *Id.* at 24.

Petitioners' argument, at its essence, is that the Panel "manifestly disregarded" the alleged evidence that "Malkin Holdings for decades gave up fees to which it would have been entitled." Pet. Mem. at 13-14. But "the manifest disregard of evidence is not a proper ground for vacating an arbitral award." *Moorning-Brown v. Bear, Sterns & Co., Inc.*, No. 99 Civ. 4130, 2004 U.S. Dist. LEXIS 26279, 2005 WL 22851, at *4 (S.D.N.Y. Jan. 5, 2005); *see also Shanghai Foodstuffs Imp. & Exp. Corp. v. Int'l Chem.*, No. 99 Civ. 3320, 2004 U.S. Dist. LEXIS 1423, 2004 WL 213019, at *3 (S.D.N.Y. 2004) (concluding that a panel's factual findings are not reviewable). A federal court "may not conduct a reassessment of the evidentiary record[.]" *Wallace*, 378 F.3d at 193. Instead, "whatever the weight of the evidence considered as a whole, if a ground for the arbitrator's decision can be inferred from the facts of the case, the award should be confirmed." *Id.* (citation, quotation marks, and alteration omitted).

Plainly, there is ample support for the Panel's ultimate determination here. Petitioners had expressly stated in their public S-4 Filing that the Supervisor "did not pay any consideration for the overrides." S-4 Filing at 61, *see also* Award at 24. Petitioners also repeatedly reaffirmed the accuracy of the S-4 Filing. Award at 24 n.12. On that basis, the Panel concluded that the Supervisor "did not provide consideration" because it would be "substantially misleading" if Petitioners had, in reality, "provided a benefit in exchange for the Overrides," while maintaining the opposite in an allegedly accurate regulatory filing. *Id.* at 23-24.

Petitioners next contend the Panel's rejection of their secondary argument—that the real consideration paid for the Overrides was the "expanded supervisory services" the Participants received—was "equally flawed." Pet. Mem. at 16-17. But the Panel concluded the expanded services did not constitute consideration, because all Participants, whether they had consented to the Overrides or not, had received these expanded services. Award at 23. Again, this amounts to an inquiry as to the existence, not the adequacy of consideration. And again, Petitioners fail to establish "clear law" that the Panel supposedly ignored—or even misapplied—in reaching its conclusions. Petitioners' reliance on the Second Restatement of Contracts is unavailing. Pet. Mem. at 17 (citing Restatement (Second) of Contracts § 71(4) & cmt. e (1981)). The Restatement stands only for the proposition that consideration given by the promisee can benefit a third-party rather than a promisor, so long as it was "bargained for and given in exchange for the promise." *Dan-Bunkering (Am.), Inc., v. Tecnologias Relacionadas Con Energia y Servicios Especializados, S.A. DE C.V.*, No. 17 Civ. 9873, 2020 U.S. Dist. LEXIS 121749, 2020 WL 3893281, at *7 (S.D.N.Y. July 10, 2020). But Petitioners do not claim that the consenting Participants "bargained for" the expanded supervisory services in exchange for consenting to the Overrides, let alone that the Respondents agreed this benefit could flow to Participants who had not consented to the Overrides in the first place. Thus, once again, it is not clear that the law Petitioners cite as "clearly established" is even applicable here, so the Panel could not have acted in "manifest disregard" of it.

The Panel explicitly considered and rejected the same legal arguments that Petitioners raise now. Award at 21-24. Petitioners have failed to show that the Panel knew of, yet ignored law that was "clear" and "explicitly applicable" to the issues before them. At best, Petitioners' arguments amount to disagreements with the Panel's legal and factual conclusions. But "[a] federal court cannot vacate an arbitral award merely because . . . the arbitration panel made the wrong call on the law" as long as there is a "barely colorable justification for the outcome reached," which—as discussed—is evidently the case here. *Wallace*, 378 F.3d at 189 (citation omitted). Accordingly, Petitioners have failed to meet the high threshold required to show the Panel acted in "manifest disregard" of the law.

B. Defamation Claim

Petitioners next contest the Panel's determination that the Edelman Trust was not liable for defamatory statements made by Edelman, one of its beneficiaries, arguing that the Panel "manifestly disregarded the law of agency." Pet. Mem. at 18-20. Petitioners contend that in so holding, the Panel disregarded the "clear" and "well-established" principle that "an agent who acts with apparent authority in making a defamatory statement may subject the principal to liability," because the Panel had "effectively *already found* that Edelman had apparent authority." *Id.* at 18-19 (emphasis in original).

The Court finds Petitioners' arguments unpersuasive. There is no evidence the Panel disregarded the law of agency. Based on the evidence adduced by Petitioners, the Panel made the factual finding that Edelman did not act with apparent authority on behalf of the Edelman Trust. Award at 87, 93; *Minskoff v. Am. Exp. Travel Related Servs. Co., Inc.*, 98 F.3d 703, 708 (2d Cir. 1996) (holding that the existence of apparent authority is a question of fact). Again, under the manifest disregard standard, "[f]actual findings . . . are not reviewable." *Shanghai Foodstuffs*, 2004 U.S. Dist. LEXIS 1423, 2004 WL 213019, at *3. "It is not for the Court to conduct an independent review of the factual record presented to the arbitrators," or to make its own factual findings. *Moorning-Brown*, 2004 U.S. Dist. LEXIS 26279, 2005 WL 22851, at *3 .

Indeed, a review of the Panel's decision shows that the Panel fully considered and rejected the same evidence the Petitioners now point to, finding that "none of th[e] evidence" proffered "gets [Petitioners] closer to the goal line on their apparent agency assertion." Award at 88. And, the Panel concluded that there was no evidence the trustee of the Edelman Trust held out Edelman as having authority to speak for the trust, or permitted Edelman to represent himself as the trust's agent, as the caselaw requires. *Id.* at 85-90. Moreover, the Panel considered and distinguished Petitioners' cited cases on the facts, which further demonstrates that it did not unjustifiably disregard the legal principle at issue. *Id.* at 90-92. As such, there is a colorable justification for the outcome the Panel reached, and no basis to conclude it acted in manifest disregard of the law.

Accordingly, Petitioners' motion for partial vacatur on the basis of the Panel's resolution of their defamation claims is DENIED.

C. Confirmation

Under the FAA, the Court "must confirm an arbitration award unless it is vacated, modified, or corrected as prescribed in §§ 10 and 11." *Hall St. Assocs.*, 552 U.S. at 582 (quotation marks omitted). "[C]ourts must grant an arbitration panel's decision great deference." *Duferco Int'l Steel Trading*, 333 F.3d at 388. "[A] barely colorable justification for the outcome reached" is all that is necessary. *D.H. Blair*, 462 F.3d at 110. Here, having reviewed the record of the arbitration proceeding and having denied each of Petitioners' grounds for vacatur, the Court finds there is no genuine issue of material fact precluding summary judgment as to all portions of the Award, as there is more than "a barely colorable justification for the outcome reached." *Id.* Accordingly, the Award is CONFIRMED.

In addition, the Court shall also award post-award, pre-judgment interest at a rate of 9% annually, given the presumption in favor of awarding such interest. *Glob. Gold Mining LLC v. Caldera Res., Inc.*, No. 18 Civ. 4419, 2019 U.S. Dist. LEXIS 14751, 2019 WL 367824, at *6 (S.D.N.Y. Jan. 30, 2019); *SEIU, Local 32BJ v. Dayton Beach Park No. 1 Corp.*, No. 18 Civ. 3887, 2019 U.S. Dist. LEXIS 2561, 2019 WL 120998, at *4 (S.D.N.Y. Jan. 4, 2019) ("[T]he common practice among courts within the Second Circuit is to grant interest at a rate of nine percent per annum—

which is the rate of prejudgment interest under New York State law, N.Y. C.P.L.R. §§ 5001-5004—from the time of the award to the date of the judgment confirming the award." (citation omitted)). Further, because the Court's confirmation of the Award is a money judgment in a civil case, the Court will also award post-judgment interest to be calculated from the date of entry of this Order, pursuant to 28 U.S.C. § 1961(a).[3]

CONCLUSION

For the foregoing reasons, that portion of the petition seeking to partially vacate the Award is DENIED, and that portion of the petition requesting confirmation of the Award is GRANTED. The Clerk of Court is directed to enter a judgment against Petitioners, jointly and severally, in the amount of $1,165,160.50 as allocated by the Award,[4] plus 9.0% post-award, pre-judgment interest running from the Award date of October 2, 2020, to the date of judgment, and post-judgment interest as calculated from the date

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3. Barger requests "attorneys' fees and costs associated with this action." Resp. Opp'n at 18. However, the FAA does not provide for recovery of attorneys' fees, and the Court does not find that such an award is warranted under its inherent equitable powers. *Abondolo v. Sasson & Farah Glatt Kosher Meats, Inc.*, No. 06 Civ. 4835, 2007 U.S. Dist. LEXIS 54271, 2007 WL 2154188, at *2 (S.D.N.Y. Jul. 18, 2007) (finding attorneys' fees may be awarded when a party opposing confirmation refuses to abide by an arbitrator's decision without justification).

4. This is consistent with the monetary damages imposed by the Award. *See* Award at 96-97. 14

of this order. The Clerk of Court is further directed to terminate the motion at ECF No. 37, and to close the case.

SO ORDERED.

Dated: September 27, 2021
New York, New York

/s/ ANALISA TORRES
ANALISA TORRES
United States District Judge

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED AUGUST 4, 2021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20 Civ. 9874 (AT)

PETER L. MALKIN; ANTHONY E. MALKIN; THOMAS N. KELTNER, JR; AND ESRT MH HOLDINGS L.L.C.,

Petitioners,

-against-

VIRGINIA SHASHA AND VIVIENNE PERO, CO-TRUSTEES OF THE VIOLET SHUKER SHASHA TRUST; DANIELLE P. BARGER, TRUSTEE OF THE EDELMAN FAMILY DECEDENT'S TRUST; LAURENCE ADLER AND SHIRLEY ADLER, TRUSTEES OF THE ADLER FAMILY TRUST; MYRNA JOY EDELMAN, TRUSTEE OF THE 2006 GILBERT M. EDELMAN INTER VIVOS TRUST; EMPIRE STATE LIQUIDITY FUND, LLC; MARY JANE FALES; MELVYN H. HALPER; PHYLLIS J. HALPER; AND WENDY S. TAMIS,

Respondents.

Appendix F

ORDER

ANALISA TORRES, District Judge:

Petitioners, Peter L. Malkin, Anthony E. Malkin, Thomas N. Keltner, Jr., and ESRT MH Holdings L.L.C., bring this proceeding to vacate in part and otherwise confirm an arbitration award issued by the American Arbitration Association ("AAA"), resolving a dispute between them and Respondents, Virginia Shasha and Vivienne Pero, Co-Trustees of the Violet Shuker Shasha Trust; Laurence Adler and Shirley Adler, Trustees of the Adler Family Trust; Myrna Joy Edelman, Trustee of the 2006 Gilbert M. Edelman Inter Vivos Trust; Empire State Liquidity Fund, LLC; Mary Jane Fales; Melvyn H. Halper; Phyllis J. Halper; Wendy S. Tamis (collectively, the "MTD Respondents"); and Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust (together with the MTD Respondents, "Respondents"). Pet. at 1-2, ECF No. 1. Before the Court is the MTD Respondents' motion to dismiss the petition (1) pursuant to Federal Rule of Civil Procedure 12(b)(6), on the ground that the petition is time barred pursuant to § 12 of the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 12; (2) under Rule 12(b)(4) because of "insufficient process"; and (3) under Rule 12 (b)(5) due to "insufficient service of process." MTD Resp. Mot., ECF No. 46. For the reasons stated below, the MTD Respondents' motion is GRANTED.

BACKGROUND

The following facts are taken from the petition and are presumed to be true for the purposes of deciding a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC*, 783 F.3d 395, 398 (2d Cir. 2015).

Petitioners Peter L. Malkin, Anthony E. Malkin, and Keltner were members of Empire State Building Associates, LLC ("ESBA") and principals of Malkin Holdings, and hold various positions at Petitioner ESRT MH Holdings L.L.C. ("ESRT"). Pet. ¶¶ 13-15. ESRT is a successor entity to Malkin Holdings. *Id.* ¶ 16.

ESBA was formed as a partnership to acquire and hold a long-term lease to the Empire State Building, expiring in 2076. *Id.* ¶ 29. The ownership of ESBA was divided into three groups, each with 1,000 "participation interests," the owners of which are referred to as "Participants." *Id.* All Respondents held participation interests in ESBA and are thus Participants. *Id.* ¶¶ 17-25. Malkin Holdings served as a supervisor of ESBA, performing the functions of an asset manager on behalf of the Participants, and received a fixed annual fee for those services. *Id.* ¶ 30. In 1991, and on two subsequent occasions, Malkin Holdings solicited the consent of Participants to share 10 percent of the net proceeds of any capital transaction with Malkin Holdings. *Id.* ¶¶ 31-32. These requests became known as the "Overrides," and resemble modern day carried interest. *Id.* For those Participants opting into the Overrides, Malkin Holdings agreed to reduce its fees. *Id.*

In 2011, Malkin Holdings announced that it planned a transaction in which ESBA, along with other real estate investments Malkin Holdings supervised, would be consolidated and contributed to a publicly traded real estate investment trust in an initial public offering (the "Transaction"). *Id.* ¶ 35. Because the Transaction constituted a capital transaction, Malkin Holdings advised investors that the Overrides would be triggered as part of the Transaction. *Id.* ¶ 36. At the time of the Transaction, Participants holding approximately 94 percent of the interest in ESBA had agreed to the Overrides. *Id.* ¶ 32. When the Transaction was announced, a series of class actions were filed contesting whether the Transaction triggered the Overrides. *Id.* ¶¶ 38-39. Respondents opted out of these class actions. *Id.* ¶ 39.

In October 2014, Respondents filed an AAA arbitration proceeding against Petitioners, asserting contractual and fiduciary breaches, and federal securities law violations. *Id.* ¶ 46. On August 26, 2020, the panel of arbiters (the "Panel"), issued a 100-page award (the "Award"), which, among other things, found that the Overrides were unenforceable against Respondents because there was no consideration for them, and rejected Petitioners' counterclaim for defamation against the Edelman Trust. *Id.* ¶¶ 53, 55, 57; ECF No. 4-1.

On November 23, 2020, Petitioners filed the instant petition to vacate in part, and otherwise confirm, the Award. Pet. at 1. On that same day, Petitioners' counsel emailed, John Wyeth Griggs, counsel for the MTD Respondents, asking whether Griggs would accept service by email on behalf of the MTD Respondents. ECF No. 35 at 2. Griggs did not respond. *Id.* On December 2, 2020, Petitioners' counsel filed an affidavit of service, attesting that Jose Anibal Baez, counsel for Respondent Danielle P. Barger, consented to the acceptance of service on behalf of Barger via email. ECF No. 12. Petitioners filed affidavits of service for the MTD Respondents between December 10 and 14, 2020, indicating that two Respondents were served on December 3, three were served on December 4, and one was served on December 10, by personal service. ECF Nos. 14-17, 19-20; ECF No. 25 at 1. The two remaining Respondents were not served until December 23, 2020. ECF Nos. 28, 32. On December 22, 2020, Griggs filed a letter indicating that Petitioners failed to serve the MTD Respondents within the three-month statutory deadline. ECF No. 25. The MTD Respondents now move to dismiss the petition.

DISCUSSION

I. Rule 12(b)(6)

A. Legal Standard

"Dismissal under Fed. R. Civ. P. 12(b)(6) is appropriate when a defendant raises a statutory bar, such as lack of timeliness, as an affirmative defense and it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law." *Lucesco Inc. v. Republic of Argentina*, 788 F. App'x 764, 767 (2d Cir. 2019) (internal quotation marks and citation omitted). On a Rule 12(b)(6) motion to dismiss, a court may consider not only the complaint's factual allegations and documents attached to, or incorporated by reference in, the complaint but also "matters of which judicial notice may be taken," and "documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing the suit." *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993). Courts may take judicial notice of any facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Cox v. Perfect Bldg. Maint. Corp.*, No. 16 Civ. 7474, 2017 U.S. Dist. LEXIS 111202, 2017 WL 3049547, at *3 (S.D.N.Y. July 18, 2017) (quoting Fed. R. Evid. 201(b)). Materials appropriate for judicial notice include arbitration filings. *See, e.g., Plumbing Supply, LLC v. ExxonMobil Oil Corp.*, No. 14 Civ. 3674, 2017 U.S. Dist. LEXIS 142747, 2017 WL 3913020, at *6 n.3 (S.D.N.Y. Sept. 5, 2017).

B. Analysis

The MTD Respondents move to dismiss the petition on the ground that Petitioners failed to serve them within the three-month statutory period required by the FAA. MTD Resp. Mem. at 1, ECF No. 47. "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C. § 12. This three-month limitation is "absolute" and "strictly construed." *Anglim v. Vertical Grp.*, No. 16 Civ. 3269, 2017 U.S. Dist. LEXIS 19155, 2017 WL 543245, at *7 (S.D.N.Y. Feb. 10, 2017) (internal quotation marks and citation omitted); *see also Barclays Cap. Inc. v. Hache*, No. 16 Civ. 315, 2016 U.S.

Dist. LEXIS 90750, 2016 WL 3884706, at *2 (S.D.N.Y. July 12, 2016) ("[T]he three-month deadline contained in 9 U.S.C. § 12 is not subject to extension."). Thus, a "party may not raise a motion to vacate . . . an arbitration award after the three month period has run." *Barclays Cap. Inc.*, 2016 U.S. Dist. LEXIS 90750, 2016 WL 3884706, at *2 (internal quotation marks and citation omitted).

Here, the Panel issued the Award on August 24, 2020. ECF No. 4-1. Under § 12 of the FAA, the "clock starts ticking the same day that an award is delivered or filed, not the day after." *Anglim*, 2017 U.S. Dist. LEXIS 19155, 2017 WL 543245, at *7 (internal quotation marks, citation, and alterations omitted). As such, Petitioners' time to serve Respondents with notice of their motion to partially vacate the Award expired on November 24, 2020. Petitioners failed to do so. ECF Nos. 14-17, 19-20, 28, 32.

The Court rejects Petitioners' argument that electronic service of the petition on Griggs was valid because of the prior conduct between the parties in related proceedings. Pet. Opp'n at 1-2, ECF No. 51. Section 12 of the FAA is clear that:

> If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the

> adverse party may be found in like manner as other process of the court.

9 U.S.C. § 12.

The Second Circuit has held that, absent express written consent to electronic service, service by email is insufficient. *Martin v. Deutsche Bank Sec., Inc.*, 676 F. App'x 27, 29 (2d Cir. 2017); *see also* Fed. R. Civ. P. 5 advisory committee's note to 2001 amendment ("The consent must be express, and cannot be implied from conduct."); *Dalla-Longa v. Magnetar Cap. LLC*, No. 19 Civ. 11246, 2020 U.S. Dist. LEXIS 138712, 2020 WL 4504901, at *1 (S.D.N.Y. Aug. 4, 2020) ("Respondent did not consent in writing to service by email, and therefore Petitioner's service of notice of the Petition was improper under Rule 5"). And Petitioners concede that they had not received written consent from Griggs to electronic service of the petition on November 23, 2020. Pet. Opp'n at 17-19.

Similarly, the Court declines to excuse petitioners' defective service. *Id.* at 3. Here, Petitioners' reliance on *In re InterCarbon Bermuda, Ltd. & Caltex Trading & Transport Corp.*, is unavailing. 146 F.R.D. 64, 68 (S.D.N.Y. 1993). As the court in *Dalla-Longa v. Magnetar Cap. LLC* reasoned, *InterCarbon* involved service upon a foreign party, for which § 12 "provides no method of service." *Dalla-Longa*, 2020 U.S. Dist. LEXIS 138712, 2020 WL 4504901, at *4 (quoting *In re InterCarbon Bermuda, Ltd. & Caltex Trading & Transport Corp.*, 146 F.R.D. at 67); *see also Vidaplan, S.A., Inc. v. Cipriani Int'l, S.A.*, No. 06 Civ. 4930, 2006 U.S. Dist. LEXIS 117533, 2006 WL

8461283, at *6 (S.D.N.Y. Aug. 7, 2006) (excusing defective service on a foreign corporation). In this case, however, "[§ 12] is applicable and the methodology of proper service is clear." *Dalla-Longa*, 2020 U.S. Dist. LEXIS 138712, 2020 WL 4504901, at *4.

Finally, the Court declines to excuse improper service on the ground that the MTD Respondents have not shown prejudice or delay. *Id.* at 20-23. As this Court has already explained, "because the action to enforce or vacate an arbitration award is a 'creature of statute' and unknown in the common law, 'there is no common law exception to the three month limitations period on the motion to vacate.'" *Milberg LLP v. HWB Alexandra Strategies Portfolio*, No. 19 Civ. 4058, 2020 U.S. Dist. LEXIS 119762, 2020 WL 3833829, at *4 (S.D.N.Y. July 8, 2020) (quoting *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 175 (2d Cir. 1984)). Thus, equitable relief is unavailable.

Accordingly, the petition as to the MTD Respondents must be dismissed under Rule 12(b)(6).

II. Rules 12(b)(4) and (5)

Because the Court has granted the MTD Respondents' motion to dismiss under Rule 12(b)(6), it need not address the MTD Respondents arguments under Rules 12(b)(4) and (5).

CONCLUSION

For the foregoing reasons, the MTD Respondents' motion to dismiss is GRANTED, and dismissed as to the MTD Respondents. The Clerk of Court is directed to terminate the motion at ECF No. 46.

SO ORDERED.

Dated: August 4, 2021
New York, New York

/s/ ANALISA TORRES
ANALISA TORRES
United States District Judge

APPENDIX G — FINAL AWARD OF THE AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION TRIBUNAL, ENTERED AUGUST 26, 2020

AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL

Re: 01-14-0001-6896
Case No. 01-14-0001-6896

In the Matter of the Arbitration between:

VIRGINIA SHASHA AND VIVIENNE PERO, CO-TRUSTEES OF THE VIOLET SHUKER SHASHA TRUST, DANIELLE P. BARGER, TRUSTEE OF THE EDELMAN FAMILY DECEDENT'S TRUST, LAURENCE ADLER AND SHIRLEY ADLER, TRUSTEES OF THE ADLER FAMILY TRUST, MYRNA JOY EDELMAN, TRUSTEE OF THE 2006 GILBERT M. EDELMAN *INTER VIVOS* TRUST, EMPIRE STATE LIQUIDITY FUND, LLC, MARY JANE FALES, JUDITH JACOBSON, MELVYN H. HALPER, PHYLLIS J. HALPER, AND WENDY S. TAMIS,

("Claimants"),

v.

PETER L. MALKIN, ANTHOHY E. MALKIN, THOMAS N. KELTNER, JR., and MALKIN HOLDINGS, LLC

("Respondents and Counterclaim Claimants")

v.

DANIELLE P. BARGER, TRUSTEE OF THE EDELMAN FAMILY DECEDENT'S TRUST

("Counterclaim Respondent").

FINAL AWARD

We, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the three Agreements, each dated January 1, 1962, entered into between Lawrence A. Wien, Henry W. Klein, and Peter L. Malkin, respectively – on the one hand – and numerous "Participants," including Claimants or their predecessors in interest, respectively – on the other hand; and having been duly sworn; and having duly heard the proofs and allegations of Claim-ants other than Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust, represented by John W. Griggs, Esquire, Griggs & Adler, P.C., Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust, represented by José Anibal Bàez, Esquire, The Baez Law Firm, PLLC, and Respondents, represented by Thomas E.I. Dewey, Esquire, David S. Pegno, Esquire, and Jenifer L. Salzberg, Esquire, Dewey Pegno & Kramarsky LLP; **FIND** and **AWARD**, as follows.

I. INTRODUCTION.

A. Procedural History.

As set forth in their Conformed Statement of Claim and Demand for Arbitration, filed on October 14, 2014, Claimants seek damages arising out of the alleged "fraudulent and coerced conversion of ownership interests in the Empire State Building into a substantively different investment. The conversion was the final phase of a complex scheme designed to usurp power, revenue, and ultimately the Building itself from the investors in violation of contractual and fiduciary duties backing back over fifty years." Conformed Statement of Claim and Demand for Arbitration ¶ 2.

The evidentiary hearing started on May 24, 2016, after almost two years of pre-hearing discovery and motion practice. The hearing ended more than two years later, on August 7, 2018. There were thirty-nine hearing days. The transcript is more than 8,400 pages and there are hundreds of exhibits, totaling thousands of pages.

The following cursory review of just some of our orders reveals the complexity and contentiousness of this almost six-year-long proceeding:

Date of Order	Movant	Description of Order
September 2, 2015	Counterclaim Respondent Richard Edelman.	Staying counterclaim against Counterclaim Respondent Richard Edelman.
November 30, 2015	Claimants.	Granting Claimants' motion to redact portions of an exhibit to Respondents' motion to compel.

December 7, 2015	Claimants.	Granting in part and denying in part Claimants' motion to compel Respondents to produce certain documents.
December 15, 2015	Claimants	Denying Claimants' motion to redact certain names from their production of documents responsive to Respondents' document Request No. 17
December 17, 2015	Claimants	Denying Claimants' motion for reconsideration of December 7, 2015 order.
December 29, 2015	Counterclaim Respondent Robert A. Machleder.	Granting Counterclaim Respondent Robert A. Machleder's motion to dismiss Respondents' counterclaim. A three-page memorandum was part of the order.
January 12, 2016	Claimants.	Denying Claimants' motion for reconsideration of December 15, 2015 order regarding Respondents' document Request No. 17.

January 15, 2016	Counterclaim Respondent Richard Edelman.	Lifting stay of counterclaim against Counterclaim Respondent Richard Edelman and giving the parties an opportunity to supplement their previously submitted papers regarding Richard Edelman's objections to the American Arbitration Association's jurisdiction in this arbitration proceeding.

February 11, 2016	All parties.	Granting Respondents' motion to compel certain documents in the possession, custody or control of Counter-claim Respondent Richard Edelman and/or Steven Edelman; granting Claimants' motion to compel the deposition of Peter L. Malkin to take place on or before March 7, 2016; directing Respondents to serve a notice of deposition that identifies either Richard Edelman or a claimant as the deponent; and quashing Claimants' subpoenas directed to MacKenzie Partners, Inc. and Duff & Phelps LLC.
February 25, 2016	*Sua sponte*.	Scheduling Order No. 10 that, among other things, directed Richard Edelman to comply with the arbitrators' designated motion-submission procedure.

March 3, 2016	Richard Edelman.	Dismissing as moot Richard Edelman's objections to Respondents' notice of deposition.
March 6, 2016	Claimants.	Denying Claimants' motion objecting to February 11, 2016 discovery order that, as set forth in the twenty-page memorandum accompanying the order, was "Claimants' attempt to seek a fourth bite at the apple on the so called whistleblower-complaint issue." MARCH 6, 2016 MEMORANDUM at 6.
April 20, 2016	Respondents.	Granting Respondents' motion to dismiss as time barred the breach of fiduciary duty claims in paragraphs 27 and 34; and denying Respondents' motion to dismiss in all other respects. A thirty-one-page memorandum accompanied the order.

April 22, 2016	Claimant Trustee Howard Edelman.	Denying Claimant and Counterclaim Respondent trustee Howard Edelman's motion to dismiss counterclaim.
May 9, 2016	Respondents.	Allowing Richard Edelman to testify at the hearing in connection with the counterclaim, subject to certain conditions.
October 6, 2016	Joint request of counsel and Claimant Howard Gordon.	Directing identification of Claimants' witnesses during the October 2016 hearing days; and providing Claimant Howard Gordon the opportunity to proffer evidence.

January 23, 2017	Claimants.	Denying without prejudice Claimants' requested issuance of a *subpoena duces tecum* to Lawrence E. Dennedy; and granting Claimants' requested issuance of *subpoenas duces tecum* to Christopher Gregory and Brian Ginsberg, subject to certain conditions
January 23, 2017	Claimants.	Granting Claimants' motion to issue *subpoena duces tecum* to Martin B. Cowan, subject to certain modifications in the accompanying document request.
February 10, 2017	Claimants.	Granting Claimants' motion to issue *subpoena duces tecum* to Lawrence E. Dennedy.

February 13, 2017	Claimant Alan Gordon.	Denying Claimant Alan Gordon's motion to withdraw without prejudice; and directing that Gordon's claims be withdrawn, with prejudice, unless Gordon by February 17, 2017 satisfied certain conditions.
March 17, 2017	Claimant Alan Gordon.	Denying Claimant Alan Gordon's motion to withdraw without prejudice; directing that Gordon's claims be withdrawn, with prejudice, unless Gordon by March 31, 2017 satisfied certain conditions; and denying Gordon's motion to file a dispositive motion.
March 20, 2017	Claimant Alan Gordon.	Denying Claimant Alan Gordon's motion for reconsideration of March 17, 2017 order.

March 21, 2017	Claimant Alan Gordon.	Denying Claimant Alan Gordon's motion for reconsideration of March 17, 2017 order unless Gordon satisfied certain specified conditions; and denying Gordon's request to file a dispositive motion.
March 24, 2017	Claimants.	Denying Claimants' motion to issue a *subpoena duces tecum* to Lawrence E. Dennedy, upon condition that Respondents make a certain unconditional express representation.
March 31, 2017	Claimants.	Denying Claimants' motion to strike Respondents' Timeline.
May 3, 2017	Claimant Alan Gordon.	Dismissing Claimant Alan Gordon's claims with prejudice.

May 4, 2017	Claimants.	Denying Claimants' request to supplement the list of the ballots (or the ballots themselves) that Claimants use or otherwise refer to in questioning witnesses.
May 25, 2017	Claimants.	Granting in part and denying in part Claimants' motion regarding certain hearing procedures, including confirming witness list for the June 5, 2017 to June 9, 2017 hearing days; directing Respondents to identify the names and schedule of the witnesses who will testify on June 12, 14, 15 and 16, 2017; denying Claimants' request for additional document production; denying Claimants' request that nonparties Steven Edelman and Richard Edelman be allowed to hear the evidence against them; allowing Steven

		Edelman and Richard Edelman to testify in defense of the counterclaim; and directing procedures for the testimony of Howard Edelman, Lawrence E. Dennedy, and Hal Young.
November 17, 2017	Claimants.	Denying Claimants' motion to dismiss defamation counterclaim and to amend their statement of claim by adding a claim for abuse of process; and confirming that Claimants' claims do not include any claim for damages arising from certain allocations of the value of the subject properties.
May 29, 2018	Claimants.	Granting Claimants' motion to substitute successor trustees.

July 12, 2018	Claimants.	Granting Claimants' motion to substitute Danielle P. Barger as the Trustee of the Edelman Family Trust.
November 15, 2018	Claimants other than Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust.	Granting motion of Griggs & Adler, P.C. to withdraw as counsel for Edelman Family Decedent's Trust; directing a response to the request for a caption change; denying motion of Griggs & Adler, P.C. for certain changes in the post-hearing briefs and briefing schedule; and modifying the post-hearing briefing schedule.

December 13, 2018	Claimants other than Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust.	Granting motion of Claimants other than Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust, to amend the caption and modify the post-hearing briefing schedule; and denying motion of Claimants other than Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust, seeking recusal of one arbitrator, updating of disclosures of two arbitrators, reaffirmation of oaths of two arbitrators, administration of the post-hearing phase by the American Arbitration Association Commercial Division, an accounting of all arbitrator fees and costs associated with certain counterclaims and the withdrawal of

		Griggs & Adler, P.C., and relief regarding a certain meeting that had been scheduled for August 7, 2018.
December 20, 2018	Claimant Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust.	Directing payment of AAA fees and arbitrator fees in a designated proportion and denying motion of Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust, for post-hearing brief-content guidance.
January 7, 2019	Claimants other than Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust.	Granting motion of Claimants other than Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust, to amend the case caption; and denying all objections of Claimants other than Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust, to December 13, 2018 order.

January 11, 2019	Claimants other than Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust.	Granting motion of Claimants other than Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust, to modify the post-hearing briefing schedule; and denying all other requests in the January 8, 2019 Objections of Claimants other than Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust.

February 11, 2019	Claimants other than Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust.	Setting forth the allocation of fees of the arbitrators and American Arbitration Association; instructing José Anibal Bàez, Esquire to provide John W. Griggs, Esquire, Griggs & Adler, P.C. with a specification of the "case documents" that Bàez sought from Griggs and has not yet received; and denying all other aspects of the January 15, 2019 response of Claimants other than Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust, to the January 7 and January 11, 2019 orders.
March 14, 2019	Claimant Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust.	Denying motion of Claimant Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust, for reconsideration of allocation of fees in February 11, 2019 Order.

March 28, 2019	Claimant Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust.	Granting motion of Claimant Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust, to direct Griggs & Adler, P.C. to provide José Anibal Bàez, Esquire with copies of deposition transcripts, hearing transcripts, and hearing exhibits that Bàez did not yet receive.
March 28, 2019	Claimants other than Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust.	Granting motion of Claimants other than Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust, to modify the post-hearing briefing schedule.
March 28, 2019	Claimant Judith Jacobson.	Dismissing Claimant Judith Jacobson's claims, with prejudice, unless Jacobson by April 22, 2019 unconditionally retracted her March 12, 2019 notice to withdraw.

April 2, 2019	*Sua sponte.*	Clarifying whether there will be closing arguments or an additional set of post-hearing briefs.
April 9, 2019	Claimants other than Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust.	Denying motion of Claimants other than Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust, as set forth in the requests and demands in the April 8, 2019 letter from Griggs & Adler, P.C. that objected to certain aspects of the April 8, 2019 scheduling order.
June 13, 2019	Claimants other than Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust.	Granting motion of Claimants other than Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust, to modify the post-hearing briefing schedule; and denying all other merits-based requests and demands in the May 21, 2019 and June 10, 2019 letters from Griggs & Adler, P.C.

June 25, 2019	Claimants other than Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust.	Granting motion of Claimants other than Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust, to modify the post-hearing briefing schedule; and denying all other merits-based requests and demands in the May 21, 2019 and June 10, 2019 letters from Griggs & Adler, P.C.
July 18, 2019	Claimants other than Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust.	Granting motion of Claimants other than Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust, for a six-month delay in the briefing schedule.
December 10, 2019	*Sua sponte.*	Directing full payment of outstanding invoices.
January 13, 2020	*Sua sponte.*	Modifying the post-hearing briefing schedule.

B. The Remaining Claimants.

As confirmed in the June 2, 2020 e-mail from Jenifer L. Salzberg, Esquire, of Dewey Pegno & Kramarsky LLP, counsel for Respondents, the parties have agreed that the following are the remaining Claimants:

- 2006 Gilbert M. Edelman *Inter Vivos* Trust (Myrna Joy Edelman, Trustee).

- Adler Family Trust (Laurence and Shirley Adler, Trustees).

- Edelman Family Decedent's Trust.[1]

- Violet Shuker Shasha Living Trust (Violet Shasha and Vivienne Pero, Co-Trustees.[2]

- Empire State Liquidity Fund LLC.

1. By order dated May 11, 2018, Robert Paul Edelman, as the Trustee of the Edelman Family Trust, was substituted, without opposition, for Howard Edelman as the Trustee of the Edelman Family Trust. *Shasha v. Malkin*, No. 1:14-cv-09989-AT-RWL (S.D.N.Y. May 11, 2018). By order dated July 12, 2018, we directed that "Danielle P. Barger as the Trustee of the Edelman Family Trust is substituted for Robert Paul Edelman as Trustee of the Edelman Family Trust."

2. By order dated May 11, 2018, Virginia Shasha and Vivienne Pero, as Co-Trustees of the Violet Shuker Shasha Trust, were substituted for Emil Shasha as the Trustee of the Violet Shuker Shasha Trust. *Shasha v. Malkin*, No. 1:14-cv-09989-AT-RWL (S.D.N.Y. May 11, 2018).

- Mary Jane Fales.

- Melvyn H. Halper.

- Phyllis J. Halper.

- Wendy S. Tamis.

The same June 2, 2020 e-mail confirmed that the parties agree that the following are no longer parties to this arbitration proceeding:

- Alan D. Gordon.[3]

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3. By "corrected order" dated March 21, 2017, Gordon's claims were voluntarily dismissed with prejudice:

> Gordon's claims are hereby **DISMISSED WITH PREJUDICE**, unless by March 31, 2017:
>
> (a) Gordon in writing informs the American Arbitration Association ("AAA"), counsel for all other parties, and all arbitrators, that Gordon unconditionally retracts his January 13, 2017 request to withdraw with-out prejudice from these proceedings;
>
> (b) Gordon pays to Claimants' counsel all of Gordon's allocated costs through September 12, 2016, as previously invoiced by Claimants' counsel to Gordon in accordance with the cost-allocation arrangements then in effect among all Claimants;
>
> (c) Gordon pays to the AAA (or reimburses Claimants, as the case may be) 0.757805% of

- Judith Jacobson.[4]
- Robert A. Machleder.[5]

50% (i.e. 0.378903%) of all post-September 12, 2016 costs and expenses of the AAA and the arbitrators that the AAA has invoiced to date; and

(d) Gordon unconditionally states, in writing, that he hereafter shall expeditiously pay 0.378903% of any and all costs and expenses of the AAA and the arbitrators.

Our May 3, 2017 order stated:

AND NOW, this 3rd day of May 2017, upon consideration of the January 13, 2017 letter of claimant Alan Gordon ("Gordon") seeking to "withdraw without prejudice from the instant proceedings," Respondents' February 1, 2017 letter in response to Gordon's January 13, 2017 request, Gordon's February 10, 2017 letter reply, Respondents' March 3, 2017 e-mail, Gordon's March 3, 2017 submission, Claimants' March 3, 2017 e-mail, Claimants' March 14, 2017 e-mail, and Gordon's failure to respond to the Panel's March 21, 2017 Corrected Order, it is hereby **ORDERED** that Gordon's claims hereby are **DISMISSED WITH PREJUDICE**.

4. By order dated March 28, 2019, Jacobson's claims were dismissed with prejudice, "unless by April 22, 2019, Jacobson in writing informs the American Arbitration Association, counsel for all other parties, and all arbitrators, that Jacobson unconditionally retracts the Notice to withdraw from these proceedings." Jacobson did not thereafter "unconditionally retract[] the Notice to withdraw from these proceedings."

5. On February 23, 2016, Machleder filed a putative "Notice of Forced Dismissal as a Claimant." By memorandum dated

C. Claimants' Claims.

Claimants' "Conformed Statement of Claim and Demand for Arbitration" set forth the following claims:

- ***First Claim.*** Claimants allege that Respondents, in connection with the conversion of ownership interests in the Empire State Building ("ESB"), breached the fiduciary duties they owed to Claimants "through numerous and repeated conflicts of interest, and through actions characterized by self-dealing, disloyalty, unfair dealing, lack of disclosure, lack of due care, misrepresentations, coercion, disregard for Claimants' best interests in favor of their own, and ultimately bad faith." Conformed Statement of Claim and Demand for Arbitration ¶ 87; *see also id.* at ¶¶ 88-89.

- ***Second Claim.*** Claimants allege that Respondents, in connection with the conversion of ownership interests in the ESB, repeatedly breached their contractual obligations to Claimants.

- ***Third Claim.*** Claimants allege that Respondents, in connection with the conversion of ownership interests in the ESB, engaged in securities fraud by their "numerous and repeated false or misleading

March 6, 2016, we concluded, after an exhaustive recitation of the facts and procedural history, that "Mr. Machleder's February 23, 2016 voluntary dismissal of his claims is not 'a forced, default dismissal of a Claimant.'" March 6, 2016 Memorandum at 6-7.

statement of material fact about the transaction . . . upon which they intended [Claimants] to rely. ¶Respondents also failed to disclose to [Claimants] material facts that the [Claimants] would have reasonably considered in evaluating the proposed . . . transaction." *Id.* at ¶ 102.

- ***Fourth Claim.*** Claimants allege that Respondents, in connection with the conversion of ownership interests in the ESB, engaged in common law fraud through their false and misleading statements of material fact about the transaction and their failures to disclose material facts about the transaction "upon which [Claimants] would have reasonably relied in evaluating the proposed . . . transaction." *Id.* at ¶ 111.

D. The Objections of Counsel for Claimants Other than Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust, to the Post-Hearing Briefing Procedure and Schedule.

As set forth above, counsel for Claimants other than Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust – Griggs & Adler, P.C. – lodged repeated objections to and requests regarding the post-hearing briefing procedure and schedule. *See, e.g.*, March 28, 2019 6:38 PM e-mail from John W. Griggs, Esquire.

In response to these requests, we entered more than ten orders that favorably ad-dressed Griggs & Adler, P.C.'s requests to delay the post-hearing briefing schedule.

See, e.g., orders dated August 8, 2018, November 15, 2018, January 11, 2019, March 28, 2019, June 13, 2019, June 25, 2019, July 18, 2019, and January 13, 2020. As a result, the first set of post-hearing briefs was not filed until February 24, 2020, approximately eighteen months after August 7, 2018, the last hearing day.

We also accommodated Griggs & Adler, P.C.'s concern to have the "last word." To protect a claimed "right of reply," our last order on post-hearing briefing issues, dated January 13, 2020, specifically stated as follows: "Depending on the contents of the post-hearing briefs, the arbitrators in their discretion may schedule (a) closing oral arguments; ***or*** (b) one additional set of briefs to allow some or all parties to respond in writing to the briefs that are due on April 29, 2020."

We provided for simultaneous post-hearing briefs not only after consulting with the parties, but after expressly and unambiguously confirming that all parties agreed to simultaneous briefing. *See, e.g.*, T. 8417 (Respondents' counsel stating "yes" to an arbitrator's question, "You both agreed to simultaneous openings?"), 8421 (arbitrator chairperson: "So the issues are, we agree, or rather you agree that there should be simultaneous openings."), 8426 (arbitrator chairperson: "So we agree that the opening, simultaneous openings will be 100 [page limit].") & 8431 (arbitrator chairperson: "So opening simultaneous will be due December 3, 100 pages Times New Roman, 12.0 font, footnotes are 12 points.").

Claimants' claims that simultaneous briefing would cause prejudice or injure Claimants are without merit.

Respondents' initial post-hearing brief spent less than three pages, at the very end, on the defamation counterclaim. Post-Hearing Brief for Respondents-Counterclaimants at 97-100. By contrast, Counterclaim Respondent's post-hearing brief devoted all allotted twenty pages to argue the factual and legal issues relating to the defamation counterclaim. Edelman Family Decedent's Trust's Post-Hearing Brief in Opposition to Respondents' Defamation Counterclaim. and Counterclaim Respondent, in the second round of post-hearing briefing, took advantage of yet another opportunity to respond to the defamation counterclaim. Edelman Family Decedent's Trust's Post-Hearing Reply Brief in Opposition to Respondents' Defamation Counterclaim. Counterclaim Respondent's post-hearing briefs far exceeded the length of Respondents' briefs devoted to the counterclaim, and Counterclaim Respondent got in numerous "last words" on the counterclaim.

Griggs & Adler, P.C. chose not to submit any post-hearing briefs, even though Griggs & Adler, P.C. did not seek leave to withdraw as counsel for its clients.[6] In the face of this decision not to submit post-hearing briefs, we meticulously and scrupulously have reviewed the record, as set forth below in our detailed discussion and analysis of Claimants' claims and Respondents' counterclaim.

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6. Griggs & Adler, P.C.'s last submission to the panel was a July 9, 2019 e-mail that sought a six-month postponement of the post-hearing briefing process. We granted this request.

II. DISCUSSION.

A. The Duff & Phelps Claim.

The "Supervisor," Malkin Holdings LLC, R-231 at 10, hired Duff & Phelps, as "independent valuer," to allocate relative economic values of all entities that would be consolidated into Empire State Realty Trust, Inc. ("ESRT"). R-231 at 164; *see also* T. 4495, 4498, 4568, 4880, 5627-28, 6143-44, 6221, 6768 & 6951-53. Duff & Phelps's initial valuation set forth the total exchange value of the entities that would be consolidated into ESRT. R-231 at 245-46 & C-2-2 to C-2-7; T. 4495; *see also* Conformed Statement if Claim and Demand for Arbitration ¶ 49 ("Respondents hired Duff & Phelps to perform the appraisal. Duff & Phelps derived an exchange value for each property based primarily on a discounted cash flow analysis. The appraiser added up the total value of all properties and assigned to each an allocation percentage based on its percentage of total value. The exchange value was then used as the basis to allocate securities issued by the new entity, ESRT, for the properties that were consolidated into the REIT.").

Duff & Phelps's initial valuation allocated 60.3% of the exchange value to the ESB, which represented 34.2% of the total square footage of the consolidated properties. R-231 at 245-46 & C-2-2 to 2-7; T. 3299 ("The whole building represented about 30 something percent of the area and it was given over 50 percent of the share of the consolidation proceeds.").

Using a discounted cash flow analysis, Duff & Phelps's valuation had an unequal allocation of the exchange values of the three two-tier consolidated properties in the transaction, including the ESB. The ESB fee owner and lessor (Empire State Building Associates ("ESBA")) was allocated 54.5% and the ESB operating lessee (Empire State Building Company ("ESBC")) was allocated 45.5%. *Id.*[7]

The Supervisor disagreed with the 54.5%-45.5% for the ESB split because it was not consistent with the Supervisor's past practice and experience. T. 2047 ("Things have always been characterized since time began on these different deals as effectively as joint ventures."), 2769-70, 3531 ("[W]hen we received what was referred to as a DCF, the discounted cash flow method, the first cut, we were very surprised at the result because it was different than our kind of real estate business experience instincts told us would be the case. It was different than the appraisals we had received previously for ESB and for other properties that had a parallel kind of, you know, two-tier synthetic JV structure. Virtually all of those were very close to 50/50."), 4005-07, 4014-15 & 6768-70; R-231 at 242 ("It would have yielded a sharing ratio substantially dissimilar to that which was provided by other independent valuers in sales over the past decades of other two-tier properties supervised by the [S]upervisor and was approved by investors in both the entities parallel

7. The sharing ratios under the discounted cash flow analysis were 54.5% for ESBA and 45.5% for ESBC; 48.3% for 60 East 42nd St. Associates L.L.C. and 51.7% for Lincoln Building Associates L.L.C.; and 48.6% for 250 West 57th St. Associates L.L.C. and 51.4% for Fisk Building Associates L.L.C. R-231 at 242.

to the subject LLCs and their operating lessee. . . . In each case, the sale included both the lessor and lessee, and the allocation of the purchase price was based on a sharing ratio that was determined based on a report by an independent third party experienced in valuing real property and was approved by the investors as part of their consent to the sale. The [S]upervisor believes that the preliminary draft value initially provided by the independent third party (which determined the value of the residual interest in the property after expiration of the lease on a discounted cash flow basis) was inconsistent with the allocations in these prior sales of two-tier properties."); *see also* R-15 at 4 (June 15, 2007) & R-17 at 12 (February 8, 2008).

According to the Supervisor, it always was intended that ESBA, the owner of the ESB fee interest,[8] and ESBC, the operating lessee of the ESB, would be valued as an economic joint venture because these two entities always had functioned as an economic joint venture. For example:

- The two entities shared net operating profit above a base rent of $1 million ("Overage Rent") and a priority return to ESBA.

- The cost of capital improvements was deducted before Overage Rent was determined.

- Financing costs were deducted from the overage rent calculation so there was a 50/50 sharing of debt service.

8. ESBA acquired the fee interest in 2002 for $57.5 million. T. 4045-46.

- The consent of both entities was required before the ESB could be mort-gaged or sold.

R-2 at R_000017774; R-185 at R_00000027-32; R-231 at 238 ("When Lawrence A. Wien, and subsequently Lawrence A. Wien and Peter L. Malkin, structured the transactions involving the subject LLCs and the operating lessees, prepared the agreements establishing the structure, and marketed these investments, the intent of those who created the structure and drafted the agreements related thereto from the beginning was to achieve the economic attributes of a 50/50 joint venture."); R-231 at 238-42 ("Lawrence A. Wien and Peter L. Malkin organized [the ESB] in a two-tier structure for a variety of reasons. While legally distinct from a joint venture, the structure has the economic attributes of a 50/50 joint venture ("JV"). The entities always functioned economically like a 50/50 JV. . . ."); T. 2073-77, 4032-33, 4039-40, 4049-50, 4887-93, 5973-81, 6157-61, 6974-75 & 6981-82. The Helmsley Estate's representatives had the same negative reaction to the proposed 54.5%-45.5% split. T. 2769-70 & 4006.

Seeking to correct this apparent methodological error, the Supervisor provided additional documents and information to and met with Duff & Phelps. C-250 at DP_MALKIN_0000021; T. 2770-71, 3532, 4029, 4050, 6157, 6549-50 & 6770. After thoroughly reviewing the additional information, Duff & Phelps concluded that its initial allocation was not correct and that it instead should use a joint venture "split." T. 6150, 6157-59, 6162, 6283-85, 6550-53, 6632, 6770, 8257, 8269-70 & 8275; *see also* R-171 at 13. Duff & Phelps then modified the allocation to 50.4% for ESBA and 49.6% for ESBC.[9] R-231 at 265; T. 6966.

In the face of this evidence, Claimants contend the Supervisor breached its fiduciary duties to them by insisting and directing that Duff & Phelps modify the allocation between ESBA and ESBC to an (almost) 50/50 split:

> The Malkins instructed Duff & Phelps to split the value of the ESB on a 50/50 basis between ESBA, the fee and Master Lease owner, and ESBC, the sublessee, even though the appraiser had recommended that ESBA should be allocated a higher percentage. As the fee owner with perpetual life and a valuable reversionary interest upon expiration of the Sublease, ESBA had greater recognized value than ESBC, which was a limited-life entity that had been improperly extended pursuant to the Sublease modifications. By insisting on a 50/50 valuation that favored ESBC, thus insuring that ESBC, and most critically, the Helmsley Estate, would be substantially rewarded for approving the Malkins' self-serving project, the Malkins breached their fiduciary duty to the Participants. The S-4 states that "[t]he independent valuer relied on information the supervisor provided. . . . The supervisor has

9. Duff & Phelps allocated 29.9% of the overall exchange value to ESBC and 30.4% of the exchange value to ESBA. R-231 at C-2-2 to C-2-3.

> a conflict of interest in connection with the in-formation it provided because it affects the number of shares of common stock and operating partnership units issued to it and the Malkin Holdings group." This insistence on the 50/50 valuation is further evidence of the Malkins' professed self-dealing at the expense of the Participants.

Conformed Statement of Claim and Demand for Arbitration ¶ 50.

According to Chris Gregory, a managing director in the transaction opinions practice of Duff & Phelps since 2013, T. 8211, Respondents did not instruct or otherwise pressure Duff & Phelps to change its methodology:

> Q. You were told to change to the JV approach by Tom Keltner and Tony Malkin, weren't you?
>
> . . . .
>
> A. No, we were not told by them to change our methodology.

T. 8251-52.

We conclude that Claimants have not established that Duff & Phelps, upon being presented with additional information and facts, improperly changed its valuation methodology to the joint venture approach, which accorded fully with the Supervisor's decades-long practice and experience.[10] Accordingly, Respondents did not breach contractual or fiduciary duties and obligations or commit securities or common law fraud with respect to the Duff & Phelps allocation of value between ESBA and ESBC.

B. The Override Payment Claims.

The Supervisor solicited "capital transaction overrides" (the "Overrides") in consent solicitation statements sent to Participants, dated September 13, 1991, R-4, September 14, 2001, R-10, and June 9, 2008. In the event of a "capital transaction," the proposed Consent and Authorization form stated that Supervisor would receive ten percent of the distribution of capital proceeds otherwise payable to the consenting Participants, after they received a return of their original investment. R-4 at R_000008642-43; R-231 at 65 ("Represents a voluntary capital over-ride agreed to by approximately 94% of the participants and documented individually with each participant who granted the override, which provides the [S]upervisor with 10% of the distribution of capital proceeds otherwise payable to [P]articipants that have agreed to the voluntary capital override program after they have received a return of their original investment.").

The September 13, 1991 consent solicitation statement broadly defined a "capital transaction" as follows:

10. The change from a 54.5%-45.55% split to an (almost) 50%-50% split did not financially benefit, and in fact adversely affected, the Supervisor, which had a 15% interest in ESBA and only a 6% interest in ESBC. T. 2130, 2771-72, 2914-15 & 4061-63.

> "Capital Transaction" shall mean any one or more of the following trans-actions: (i) the original incurrence or refinancing of any indebtedness of [ESBA] or any joint venture in which [ESBA] has an interest, (ii) the sale, exchange, condemnation (or similar eminent domain taking), casualty or other disposition of all or any substantial part of the Property, the Master Lease or [ESBA's] interest in the Property or the Master Lease held through any joint venture in which [ESBA] has an interest, (iii) the liquidation and dissolution of [ESBA] or (iv) any similar transaction or event, the proceeds of which are deemed attributable to capital in accordance with generally accepted tax or accounting principles.

R-4 at R_000008672; *see also* T. 4154 ("it's intended to be a broad definition").

The Supervisor requested the voluntary consent of the Participants by asking them to sign a Consent and Authorization form (the "Consent Agreement"), which the Supervisor mailed to the Participants. R-4 & R-10; *see also* T. 4152-54. In seeking authorization, the September 13, 1991 "AUTHORIZATION OF MODIFICATION OF COMPENSATION TO WIEN, MALKIN & BETTEX" ("WM&B")[11] stated, in part, as follows:

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11. Wien, Malkin & Bettex "supervised the operations of [ESBA] since inception. The late Lawrence A. Wien and [Peter L. Malkin] organized [ESBA]." R-4 at R_000008641.

1. The undersigned shall pay to WM&B the additional compensation de-scribed in Peter L. Malkin's letter of September 13, 1991 and the accompanying Statement. [ESBA] shall be authorized to effect such payment and compensation arrangements on behalf of WM&B and the undersigned; and

2. Commencing January 1, 1992 through January 5, 2076, WM&B shall pay to the undersigned a portion of certain supervisory fees otherwise payable to WM&B by [ESBA] as set forth in Peter L. Malkin's letter of September 13, 1991 and the accompanying Statement. Such amount shall be paid to the undersigned no less frequently than annually so long as [ESBA] shall own any interest in the Property and WM&B shall receive such supervisory fees from [ESBA].

R-4 at R_000008646; *see also* T. 4152.

According to Respondents, 81% of Participants consented to the Overrides in 1991, T. 4152; R-10 at 8532 ("In 1991, more than 81% in interest of the Participants approved a voluntary individual program to share with Wien & Malkin LLP, which has served as [ESBA's] Supervisor from inception, a portion of excess distributions from any capital transaction, without changing the existing compensation to Wien & Malkin. Approving Participants receive each year a pro rata portion of additional compensation to which Wien & Malkin is otherwise entitled from reductions in master lease rent."); and approximately 94% of Participants consented in total over the course of the three solicitations, R-231 at 65; T. 4152.

In return for signing the Consent Agreement, the Supervisor assigned a *pro rata* portion of the Supervisor's potential incentive compensation due to reductions in rent for the Master Lease, from 1992 to 2076 – an "assignment" worth approximately $50,000 per year if all Participants had executed Authorizations. R-4 at 8669 ("WM&B will assign, effective January 1, 1992 through January 5, 2076, to the Participant a pro rata portion of WM&B's additional compensation from the scheduled reductions in Master Lease rent to become effective in 1992 and 2013. Payments will be made by WM&B at least annually. This assignment will terminate if either [ESBA] no longer has any interest in the Property or WM&B is no longer receiving additional compensation from [ESBA]."); *id.* at 8673 ("If all Participants execute Authorizations, WM&B will forego the right to receive $45,017 a year from 1992 to 2013, and $52,405 a year thereafter through January 5, 2076, and Participants will receive such amounts. WM&B will be obligated to assign such sums to each authorizing Participant, even if [ESBA] does not purchase the Property from Prudential."); R-10 at 8548.

According to the Supervisor, the incentive-compensation reductions from 1991 to 2001 totaled $140 for each original $10,000 unit. R-10 at 8532 ("Any Participant whose interest in [ESBA] is not already subject to this voluntary program may now approve the same voluntary program which is in effect for more than 81% of the Participants. An approving Participant will receive now the pro rata payment from Wien & Malkin retroactive to the January 1, 1992 start of this program of approximately $140 for each original $10,000 participating interest.").

All Claimants consented to the Overrides during the 1991 solicitation. *See, e.g.*, R-190 at 14973-76 (Elinor B. Roberts, predecessor to Mary Jane Fales), 14992-94 (Howard S. Edelman and Bernice Edelman), 14995-96 (Gilbert M. Edelman and Myrna Joy Edelman, 15012-16 (Melvyn H. Halper), 15030-32 (Phyllis J. Halper, Trustee, f/b/o Wendy Sue Halper), 15048-49 (Shirley Adler and Laurence Adler, Trustees of the Adler Family Trust, as amended 9/22/93) & 15056-58 (Violet S. Shasha); T. 549-50 & 2165.

The Supervisor considered the REIT IPO a "capital transaction" that triggered the Overrides. Accordingly, the Supervisor received distributions of the Overrides from the REIT IPO proceeds. R-231 at 65 ("The [S]upervisor will receive distributions on the voluntary capital overrides with respect to the consideration from the consolidation, because such consideration constitutes capital proceeds. If the enterprise value determined in connection with the IPO were the same as the aggregate exchange value, such overrides would comprise approximately 9.14% of the economic value of [ESBA]. These voluntary capital overrides were solicited pursuant to consent solicitation statements dated September 13, 1991, September 14, 2001 and June 9, 2008.").

The publicly filed ESRT Prospectus/Consent Solicitation Statement, dated January 21, 2013 (the "S-4"), disclosed that the exchange value of the relevant REIT IPO override amount applicable to the ESB was $304,352,372. R-231 at 88; *see also* Conformed Statement of Claim and Demand for Arbitration ¶ 52 ("The overrides alone were projected to be worth $304,000,000 to the Malkins, which reduced by that amount the proceeds that the Participants and other investors would have received, and the additional voting rights inflated the Malkins' voting power to more than 30% in ESRT, the newly created entity."). There is no dispute that the Supervisor in the REIT IPO received payment of the Overrides.

Claimants challenge Respondents' entitlement to receive the Overrides. Claim-ants assert (a) the Consent Agreements are invalid and unenforceable for lack of consideration; and (b) the REIT IPO was not a "capital transaction" and, therefore, the Overrides did not apply:

> The Malkins also sought consents to allow gratuitous payments to them-selves of 10% of the proceeds from any future "sale or financing" of the ESB, or other similar event, and included these requests in the solicitations of approval for the fee acquisition. The Malkins referred to these payments as "voluntary overrides." The voluntary overrides had no connection to the fee acquisition, and the solicitations were complicated and dense. Even the language of the 1991 and 2001 override solicitations varied, obscuring the scope and voluntary nature of the

> consents. Respondents also further confused the Participants by changing the wording and format of the override consent forms in the successive solicitations. How-ever, the Malkins were persistent in soliciting consents at the expense of the Participants, even despite at least one Claimant's lack of capacity to comprehend what the Malkins were seeking. Consequently, the solicitations were misleading, and failed to result in a meeting of the minds regarding the parties' respective obligations arising from the application of those obligations to the REIT transaction.

Conformed Statement of Claim and Demand for Arbitration ¶ 33; *see also id.* at ¶ 52 ("Forsaking all loyalty to the Participants, the Malkins chose to define the language of the override solicitations in the most expansive possible terms to encompass the REIT transaction, and thus authorize them to collect the override payments, despite the fact that the override solicitation language justified a narrower, more limited, interpretation that would have excluded the REIT transaction. However, such an interpretation would have deprived the Malkins of a primary financial benefit of the consolidation, and they chose to violate their duties to the Participants in order to derive that benefit.").

(1) Consideration.

Respondents argue that each Participant who entered into a Consent Agreement received valid consideration in exchange for the consent.

First, Respondents claim the Supervisor represented that the Participants "would receive (in effect) a deduction in the Supervisor's fees. . . ." Respondents' Post-Hearing Brief at 11. They contend the Supervisor agreed, in exchange for consenting to the Overrides, to allow each Participant to receive certain compensation the Supervisor was otherwise entitled to receive. R-4 at R_000008643 & R_000008669. And they claim that, if every Participant had consented to the Overrides, the Supervisor would have given up fees totaling approximately $45,000 each year from 1992 through 2013, and approximately $50,000 each year thereafter through January 5, 2076, which corresponds to $12 to $15 per $10,000 unit on an annual basis until the REIT IPO. R-4 at R_000008673; T. 3689 ("It was the portion attributable to the in-creased profit from reducing debt service, and it was a very small amount. I think it might have been, you know, $12 a year on a $10,000 investment.") & 4585 ("I think I called them almost nominal. They're like $15 a year on a $10,000 investment.").

Respondents point out that every Participant who consented to the Overrides received the benefit of the incentive compensation fee reduction. Respondents' Post-Hearing Brief at 55. They note that the Supervisor gave up the fee reduction with no assurance as to when, if ever, the Overrides might be triggered. T. 4585 ("That was in 1991 when there was no visible prospect of selling or, you know, of activating this voluntary compensation. So, you know, it was just $50,000 a year surrender by Malkin Holdings without any assurance that there would ever been a return on that you might say."). According to Respondents, this constituted adequate and hence valid consideration because, they assert, "courts are not to inquire into the adequacy of consideration." *Caisse Nationale de Credit Agricole-CNCA v. Valcorp, Inc.*, 28 F.3d 259, 265 (2d Cir. 1994).

Second, Respondents argue that the Supervisor's continued provision of supervisory services constituted valid consideration for the Overrides because the services that the Supervisor specifically was required to provide had expanded dramatically due to the decline of services that Helmsley-Spear had provided. T. 3689 ("The other part of the consideration which was, you know, presented in this context was, the supervisors'[] continuing service in an expanded array of services as, you know, property management became more demanding and various reasons.").

Keltner testified that the alleged fee reduction was the "technical" consideration and that the "real consideration" was providing expanded supervisory services:

> ARBITRATOR SINGER: I just have one follow-up question in part because you're a lawyer. But what is your understanding of the consideration that was given in exchange for the 10 percent override?
>
> THE WITNESS: There was kind of a technical consideration which was the assignment from the supervisor to the participant of a slight increment in the supervisory fee. It turned out

> to be like $12, $15 a year on a $10,000 unit. I think the real consideration and real operative factors are the ones I mentioned earlier.

T. 7150-51; *see also* T. 4159 ("THE CHAIRMAN: [M]y question is, what is your understanding of the consideration supporting the override? [Keltner]: The benefit to the investors of continuing and expanded supervisory services.").

Even if Respondents incurred a legal detriment in return for the Participants' promises to provide the Overrides, there is a fundamental flaw in Respondents' position – all *non-consenting* Participants continued to receive the same supervisory services that the *consenting Participants* received:

> ARBITRATOR SINGER: One other question which is that after you started getting these voluntary compensation agreements up to 94 percent, were the services that were provided to the 6 percent different than what was provided to the 94 percent?
>
> THE WITNESS: No difference.

T. 4167-68.

Respondents argue the S-4 states only that the Supervisor did not *pay* any consideration for the Overrides, but does not specifically state that no consideration of any kind was *provided* by the Supervisor. Respondents'

Post-Hearing Brief at 55-56 n.357; *see* R-231 at 61 ("The overrides were granted by the participants in either the subject LLCs' organizational documents or in the subsequent, separate voluntary agreements entered into individually, to permit the supervisor to share in benefits resulting from improvements in the property's operating results and value, and the supervisor did not pay any consideration for the overrides.").

This argument is unpersuasive. The S-4, which Respondents duly filed with the SEC and then distributed to all Participants and countless other prospective investors, should and presumably would have stated expressly that the Supervisor had provided a benefit in exchange for the Overrides. Otherwise, the S-4 is substantially misleading.[12]

Accordingly, we conclude that the Supervisor did not provide consideration in exchange for the Overrides that were voluntarily agreed to in the Consent Agreements.

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12. Anthony Malkin repeatedly stood by the accuracy of all statements in the S-4. T. 2383 ("Whatever it says is what it says."), 2386-87 ("To be honest with you, sir, whatever is in the document is in the document."), 2406 ("Whatever the document says is what the document says."), 2420 ("[W]hatever the document says is what it says. I don't recall every single thing in this document. I signed it. What-ever is in there is in there."), 2544 ("I'm willing to say that whatever this says is what it says."), 2561 ("No, I don't recall, but whatever is there is there."), 2563 ("Whatever it says it says."), 2915 ("Whatever is in there is what it is."), 2916 ("Whatever is cited in the document. I don't recall these numbers and so whatever is in the documents is what is in the document[s].") & 2923-24 ("[B]ut certainly the contents of the S-4 were provided to the SEC and that includes what it includes.").

Respondents make two additional arguments, each based on the New York General Obligations Law. First, they claim past consideration constitutes valid consideration if expressed in writing, citing Section 5-1105 of the New York General Obligations Law, which states:

> A promise in writing and signed by the promisor or by his agent shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or per-formed.

N.Y. General Obligations Law § 5-1105 (McKinney 2016).

Respondents claim they satisfied Section 5-1105 because the solicitations for the Overrides noted the Supervisor's numerous past actions that further justified the Overrides, and that each of the Claimants or their predecessors in interest agreed to the Overrides in a signed writing. In support of their proposition, Respondents rely on *Hoke v. Shanker*, 108 App. Div. 2d 1065 (3d Dep't 1985). Respondents' Post-Hearing Brief at 56. That case involved a dispute over an affiliation agreement under which plaintiff New York State Public Employees' Federation, AFL-CIO, a union representing some 50,000 state employees, was associated with defendants American Federation of Teachers, AFL-CIO and Service Employees' International Union, AFL-CIO, and national and international labor organizations. The Appellate Division rejected, without explanation or analysis, defendants' claim "that certain promises made therein were merely restatements of promises previously made and, as 'past consideration,' cannot constitute present consideration to support the agreement." *Id.* at 1066.

Section 5-1105 is not applicable here; Respondents did not assert, present any evidence, or otherwise establish that "past performance" or "executed performance" constituted the consideration for the Overrides.

Second, Respondents argue there was no need for consideration in exchange for the Overrides, citing Section 5-1103 of the New York General Obligations Law, which states:

> An agreement, promise or undertaking to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence of consideration, provided that the agreement, promise or undertaking changing, modifying, or discharging such contract, obligation, lease, mortgage or security interest, shall be in writing and signed by the party against whom it is sought to enforce the change, modification or discharge, or by his agent.

N.Y. General Obligations Law § 5-1103 (McKinney 2016).

Respondents argue that Section 5-1103 is satisfied because the Overrides were memorialized in the Consent Agreements that Claimants and the Supervisor all signed. *See, e.g.*, R-190 at R_000014952, R_000014984 & R_0000149593.

In their post-hearing briefs, Respondents rely only on *Granite Partners, L.P. v. Bear Stearns & Co.*, 58 F. Supp. 2d 228 (S.D.N.Y. 1999), in support of their contention that Section 5-1103 saves the day. Respondents' Post-Hearing Brief at 57. There, the court ruled on a Rule 12(b)(6) motion to dismiss a complaint for legal insufficiency. The court concluded that "dismissal of this claim would not be appropriate at this time based upon inadequacy of consideration." *Granite Partners, L.P. v. Bear Stearns & Co.*, 58 F. Supp. 2d at 257. The court stated that, "[u]nder New York law, a contract unsupported by consideration is generally invalid. . . . Neither a promise to do that which the promisor is already bound to do, nor the performance of any existing obligation constitutes valid consideration." *Id.* at 252 (*citing Tierney v. Capricorn Invertors, L.P.*, 189 App. Div. 2d 629, 631 (1st Dep't 1993)).

The court in *Granite Partners, L.P. v. Bear Stearns & Co.* concluded it was "unable to say that any contracts formed . . . were necessarily invalid for lack of consideration." *Id.* at 253. In *dicta*, the court suggested that a written agreement that provided for defendant securities brokers to provide month-end "marks" as part of their ongoing relationship with plaintiff funds "merely effected a modification of preexisting contracts between the Funds and the Brokers" and, therefore, was enforceable because it was in writing. *Id.* ("Under New York law, a written, signed agreement to discharge or modify an existing obligation is not rendered invalid because of the absence of consideration.") (*citing* N.Y. GEN. OBLIG. LAW § 5-1103). However, the court did not hold that consideration was not required for the contracts at issue to be valid.

Here, by contrast, the agreements establishing the Overrides did not constitute a "modification" of an ongoing working relationship. Instead, they were independent agreements that potentially provided brand new benefits to the Supervisor.

For all these reasons, the Overrides are not enforceable against Claimants.[13]

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13. Claimants allege Respondents were not entitled to Overrides because the REIT IPO was not a "Capital Transaction" – ESBA sold its ownership interest in the ESB to an affiliated and controlled entity in a transaction that was anything but arm's length. CONFORMED STATEMENT OF CLAIM AND DEMAND FOR ARBITRATION ¶¶ 52-53.

We conclude that the REIT IPO was a "Capital Transaction," although we acknowledge that this determination does not change our conclusion that the Overrides were not enforceable for the reasons stated above.

The REIT IPO constituted a *sale* of ESBA's ownership interest in the ESB. The Contribution Agreement stated, "the Operating Partnership intend[ed] to acquire, directly or indirectly, the right, title and interests (including fee interest, ground leasehold interests and operating leasehold interests, as applicable) of the Contributing Entities in the Contributed Properties." R-226 at Recitals ¶ A. Title to the ESB and ownership of the ESB Master Lease changed, and the parties paid New York City transfer taxes. T. 4156.

Claimants nevertheless assert that, even if the REIT IPO constituted a "sale," it was from the Malkins to the Malkins and, therefore, the Overrides were not triggered. Respondents disagree. *See* T. 3184 & 4156-57. So do we. The interests of the ESBA Participants were exchanged for interests in ESRT, a newly established public company subject to SEC and NYSE regulatory oversight – and not under the control of the Malkins or their affiliates. R-231. ESBA ceased to exist after the REIT IPO. *See id.* at 59 ("the business of each of the subject LLCs [including ESBA] will be liquidated and wound up promptly following the closing"); T. 4156-57 ("It's a third party and it's a new entity. It's transferring the property into a consolidated entity which is publicly held, overseen by an independent board, a whole new structure of governance. There's certainly continuing ownership by all the electing prior investors and that includes the Malkins. So they have a large economic interest in the new entity. It's less than 25 per-cent. It's not a sale to the Malkins.").

The REIT IPO was a "Capital Transaction" for two additional reasons. As set forth in the Contribution Agreement, the REIT IPO constituted an "exchange":

> [ESBA] desires to, and the Operating Partnership desires [ESBA] to, contribute to the Operating Partnership, all of [ESBA's] Property Interest, free and clear of all Liens . . . *in exchange for* . . . limited partnership interests (the "OP Units") in the Operating Partnership, shares of Class A Common Stock and/or shares of Class B Common Stock . . . .

R-226 at Recitals ¶ D (emphasis added); *see also* T. 4156.

Plus, the REIT IPO was a "disposition." *See, e.g., Lubin v. Belco Petroleum Corp.*, 1978 U.S. Dist. LEXIS 15868 (S.D.N.Y. Aug. 24, 1978) (arm's length transaction between unrelated parties

(2) Claimants' Fraud Claims Relating to the Overrides.

Claimants assert claims relating to the Overrides based on common law fraud and misrepresentation, and on SEC Rules 10b-5, 17 C.F.R. § 240.10b-5, and 14a-9, 17 C.F.R. § 240.14a-9. Conformed Statement of Claim and Demand for Arbitration ¶¶ 99-114; *see also* Claimants' Specification of Material Misstatements and Material Omissions 78-92.

However, neither the S-4 nor Respondents' other statements regarding the Over-rides in connection with the REIT IPO transaction (a) contained or involved any fraudulent or deceitful representations; (b) were untrue, false, or misleading with respect to any material fact; or (c) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. Nor did Respondents, in connection with the Overrides, employ any device, scheme, or artifice to defraud; or engage in any act, practice, or course of business which operated or would operate as a fraud or deceit upon Claimants or any other person. Respondents accurately disclosed that (a) they did not pay any consideration to the Participants in

involving sale of put-option); *Doniger v. Rye Psychiatric Hospital Center, Inc.*, 122 App. Div. 2d 873 (2d Dep't 1986) (agreement required shareholders attempting a disposition to offer their shares to the other shareholders; a petition for judicial dissolution of the corporation was a proposed "disposition"); *see also* T. 4156 ("[The REIT transaction] can fall under the term 'sale,' the term 'exchange,' the term 'disposition' or any similar transaction.").

exchange for the Consent Agreements; and (b) the REIT IPO was a "capital transaction." Accordingly, Respondents did not commit securities or common law fraud with respect to the Overrides.

(3) Respondents' Statute of Limitations Defense to the Fraud and Misrepresentation Override Claims.

Respondents assert the Override claims are time barred. However, the applicable six-year statute of limitations does not bar these breach-of-contract claims because the REIT IPO closed on October 2, 2013 and Claimants timely commenced this arbitration proceeding on October 14, 2014.

(C) The Lease Extension Claims.

(1) The Master Lease.

In 1961, ESBA, "a general partnership consisting of Lawrence A. Wien, Henry W. Klein, and Peter L. Malkin," acquired the "Master Lease" to the ESB. R-2 at ¶ I(A)(1) (ESBA Prospectus) ("Upon completion of the transactions described below [ESBA] will own a net lease . . . of the [ESB], 350 Fifth Avenue, New York City and the land thereunder.").

As set forth in the ESBA Prospectus, "[t]he initial term [of the Master Lease] will be 30 years and nine days to January 5, 1992. [ESBA] will have renewal options for four additional 21-year terms. Renewals are automatic upon the giving of appropriate notice by [ESBA], and do not require the payment of any additional consideration." *Id.* at ¶ V(1). The Master Lease, including renewal privileges, was due to expire on January 5, 2076. R-4 at R_000008652. The "annual net rent" during the term of the Master Lease was (a) $3,470,560 during the initial 30-year term, (b) $1,970,000 during the first 21-year renewal term and (c) $1,723,750 during each of the three successive 21-year renewal periods. *Id.*

(2) The Sublease.

"[ESBC was] a joint venture composed of [Lawrence A.] Wien, Mr. Harry Hclmsley, and two corporations owned by others." R-2 at ¶ I(A)(5); *see also* T. 1472.

Under the ESBA-ESBC net sublease – the "Operating Lease" – ESBA as sublessor subleased the ESB premises to ESBC as operating sublessee; the term and renewal privileges of the Master Lease and the Sublease were virtually identical. R-2 at ¶¶ I(A)(2) & (5) ("[ESBA] has contracted to purchase the [ESB], and the ground lease of the land underlying the building. . . . Simultaneously with the purchase, it will execute a net Sublease of the entire premises to [ESBC] (the 'Sublessee'), with the same term and renewal privileges as in the Master Lease."); *id.* at ¶ VI(1)(a) ("The Sublease will be for the same initial term as the Master Lease, less one day. It will have coextensive renewal privileges."); T. 2620-22.

To protect the ESBA Participants from liability and unfavorable tax treatment, ESBA's only purpose was to own the Master Lease. C-19 at ¶ 2 ("The only purpose of the [ESBA] partnership shall be the ownership of the Master Lease."); R-2 at ¶ I(A)(5) ("[ESBA] will not operate the property."); R-3 at ¶ 14 (ESBA Partnership Agreement); R-4 at R_000008652 ("The Master Lease obligates [ESBA], among other things, to pay all real estate taxes and other impositions, to keep the Property insured against casualty loss, general liability and certain other risks and to keep the Property, including all structural components, in good re-pair. The Sublease obligates [ESBC] to satisfy such obligations. This arrangement insulates the Participants from liabilities associated with operating [the ESB]."); T. 1636, 2603, 2605 ("Therefore, by putting these thousands of investors in as participants, again, not actual partners, in joint ventures, in a joint venture with agents who were then effectively general partners and then having [ESBC] operate the company, another general partner, you gave them the flow-through of income without tax on a corporate level, plus you shielded them from liability. If they had any involvement at all in the operation of the building, they ran the prospect of risk of joint and several personal liability for anything that would happen at the building."), 2634, 4033, 4036-37, 4173 & 4596.

As set forth in the ESBA Prospectus, ESBC controlled all operations of the ESB:

> [ESBC] is a joint venture among Lawrence A. Wien (25% interest), Harry B. Helmsley (25%), Cargo Despatch, Inc. (37½%) . . . and Martin Weiner Realty Corporation (12.5%). . . .

> The joint venturers have agreed that Messrs. Wien and Helmsley will control all matters relating to the operation of the building. Mr. Helmsley's firm, Helmsley-Spear, Inc., will act as managing agents for the building.

R-2 at ¶ VI(2); *see also* R-4 at R_000008652; R-189 at R_000008923-24 (Consent and Operating Agreement for ESBC) ("Lawrence A. Wien and Harry B. Helmsley, or survivor, and whether or not they or he are then parties hereunder, shall have full administrative and operational control of all matters connected with the business of the partnership other than those matters mentioned in paragraph 9 below, but including, without limitation, all matters: connected with the operation, management, leasing, maintenance, repair and improvement of the Building. . . .")[14]; T. 1426 ("All the power, authority and

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14. The referenced paragraph 9 carve out states as follows:

> Notwithstanding anything contained in this agreement, the following, and only the following, which are deemed to be major decisions of policy and matters affecting the partnership beyond administrative and operational matters shall be had and done only with the written approval of parties owning partnership interests aggregating at least Eighty (80%) Per Cent: (a) the modification, sale, assignment or mortgaging of the Operating Sublease; (b) the modification of any mortgage of the Operating Sublease; (c) the making or modification of any sub-sublease of the entire premises; (d) the termination, except for just cause, of the employment of either of the aforesaid firms; and (e) the changing of the compensation of either of such firms.

R-189 at R_000008924.

liability for the operation of the [ESB] in every single event, other than what was noted, from the colors of the lights to the types of the uniforms, to you name it, was vested in [ESBC]."), 2077 & 2633-35.

> Under the Sublease, ESBC paid the following to ESBA:
>
> [ESBC] is required to pay annual minimum rent of $6,780,560 through January 4, 1992; $6,018,750 from January 5, 1992 through January 4, 2013; and $5,895,625 from January 5, 2013 through January 4, 2076. [ESBC] has exercised its first renewal option for a lease term expiring on January 4, 2013.
>
> [ESBC] is also obligated to pay to [ESBA] additional rent ("Overage Rent") in an amount equal to 50% of [ESBC's] annual net income, as such term is defined in the Sublease, in excess of $1,000,000. . . .

R-4 at R_000008652-53; *see also* R-2 at ¶ I(A)(6) ("The Sublessee will agree to pay all expenses of operating and maintaining the property and also to pay·[ESBA] an annual net rent (the 'basic Sublease rent') which, if paid, will enable [ESBA] (a) to pay the Master Lease rent and to make any Leasehold Mortgage payments; (b) to defray administrative costs; and (c) to make monthly cash distributions to each participant equal to $900 per year on each $10,000 Participation."); R-17 at R_000029578 ("The effect of these relationships is that [ESBA] receives basic rent of $6,018,750 (from which it must pay master lease rent) annually while [ESBC] receives the first $1,000,000 in net income after payment of basic rent. The net priority to [ESBA] over [ESBC] is therefore $4,048,750."); R-231 (S-4) at 240; *see also* T. 2073 & 6985.

(3) The Terms of the Master Lease and the Sublease.

The Master Lease and the Operating Lease were each broken into automatic renewal periods of twenty-one years. R-2 at ¶¶ V(1) & VI(1)(a); C-11 at G&A-007253; *see also* T. 2618 & 6684-88. These automatic renewal periods ensured tax benefits through a shorter depreciation period for the leasehold acquisition cost and improvements:

> The lease was set up with – it was always considered it was one deal, but as with prior deals, the lease was segmented into sections because each section determined the period of time over which you can take depreciation. So by having an initial term and a series of terms shorter than the total duration of the master lease, you could depreciate everything from the acquisition over the initial term of the lease and then you have a renewal which would set another period over which you could take depreciation. So my grandfather, the same way he sought to create flow-through treatment for income without taxation at a corporate level and then synthesize the joint venture and then protect people from liability, he further utilized what

> was available under the tax code to accelerate depreciation. That was fundamentally, you know, his approach to things was tax efficient in-come from real estate.

T. 2628-29; *see also* T. 3452 ("Those windows were established at inception to allow accelerated depreciation on leasehold acquisition cost and improvements. They had no other purpose, no other expectation of how it was – you know these were economically compelled, always under-stood to be a foregone conclusion that they will be exercised."), 3453-54, 4033, 4596-98 & 6685 ("The initial term of 30 years was for the purpose of permitting the [ESBA] participants to write off their investment at 3-and-a-third percent a year for 30 years, which created a tax shelter for a little more than one-third of the initial nine percent return. And that was the purpose of it and it was always contemplated that the investment would continue for at least the 114 year total term.").

Because each party needed the other, ESBC had the right to step in and renew both the Master Lease and the Sublease, even if ESBA failed to do so. C-11 at G&A-6986-007285 ("Sublessor hereby irrevocably appoints Sublessee its attorney-in-fact, coupled with an interest, to execute and deliver any papers and to take any other action in the name of Sublessor necessary to give such notice of renewal to Lessor or to make such assignment upon the conditions stated herein."); T. 1113, 1551, 1594-95, 2754-55, 3443-44, 3459, 3464, 3476, 3896, 4033 ("[T]he renewal options were unilateral and unconditional rights of the lessee. Again, as a synthetic JV, there was no logic to breaking it up.

The logic was that these two parties were going to work together as long as they had an interest in the property. There are so many ways in which that was reflected. The lessor specifically in its organizational documents said it could not operate the property. It had to have the lessee in place."), 4040, 4172, 4180, 4182, 4293, 4597-98, 5426 & 6688 ("Under the terms of the lease between ESBA and ESBC, it specifically provides that if for any reason ESBA did not renew the lease, ESBC could force the renewal.").

The 1986 Tax Reform Act eliminated the tax benefit of having twenty-one-year renewal terms in the Sublease. T. 4596. Absent an economic rationale – there no longer was a benefit in having twenty-one-year windows – ESBA in 2010, as part of a "cleanup" measure, extended the Master Lease for its remaining renewal terms. ESBC, in turn, exercised the remaining options to extend the Sublease:

> And it was in that framework that we saw the so-called early renewals in 2010. They were not early as to the next renewal term, but they were early as to the renewal terms that would have followed, you know, maybe the last 40, 30 or 40 years up to 2076. We saw those as just a cleanup. It didn't seem responsible for fiduciary just to leave that all up in the air up in a calendar and send a letter every 15 years. It was economically compelled for the lessee to do that. There's no question that the lessee is going to renew the lease otherwise its asset is abandoned and extinguished. It had an unconditional right to do so. There is no reset of the rent. There's nothing.

> So it was in that context that we just cleaned this up by doing an early renewal of all the lease terms remaining. We did this at ESB. We did it at other properties, some of which were going into the consolidation and others that weren't. It was just a general approach that we took to all these supervised assets. So in that sense, we really treated this whole, quote, early renewal as a nonevent, honestly a nonevent.

T. 4196-97 & 4596-97; *see also* T. 3454 ("When that purpose had fallen away, there's – the depreciation is not governed in that way under current tax laws. It hasn't been for a few decades. There was no reason to, for either party, to insist upon this artificial windows [sic] for renewal.") & 6744 ("the tax reason for having a 30-year term no longer existed and we did a number of things to sort of clean up and simplify the investment").

(4) Claimants' Lease-Extension Allegations.

Claimants challenge Respondents' purported premature exercise of the renewal options of the Master Lease and the Sublease. According to Claimants, the Malkins in 2010 unilaterally sought "to shift a substantial proportion of the ESB's value from ESBA to ESBC by adding 63 years to the term of the Sublease, which constituted most, if not all, of the value of ESBC, thereby securing the Helmsley Estate's support for the REIT, instead of pursuing a transaction more favorable to the Participants. The Master Lease and Sublease both contained four 21-year renewal options, but the renewals could be exercised only at times specified in the respective leases. In addition, renewal and modification of the Master Lease, as well as modification of the Sublease, required approval of the Participants." Conformed Statement of Claim and Demand for Arbitration ¶ 41; *see also* T. 1557 ("Well, we are saying it should not have been renewed in 2010 when not only the second renewal option was exercised, but also the third and fourth, and then the restrictions in the lease were, I don't know, waived or something and – ") & 1618; Conformed Statement of Claim and Demand for Arbitration ¶¶ 42-44.

According to Claimants, "[t]he intended effect was to increase the value of ESBC, while simultaneously shifting value away from ESBA. . . ." *Id.* at ¶ 42; *see also* T. 1622 ("It artificially inflates ESBC's value.").

In support of these contentions, Claimants rely, in part, on paragraph 4 of the Participation Agreement, which states as follows:

> The Agent shall not agree to sell, mortgage or transfer the Property or the Master Lease, *nor to renew or modify the Master Lease*, nor to make or modify any mortgage thereon, *nor to make or modify any sublease affecting the premises*, nor to convert the partnership to a real estate investment trust, a corporation or any other form of ownership, nor to dispose of any partnership asset in any manner, without the consent of all of the Participants.

C-8 at ¶ 4 (emphasis added); *see also* T. 199-201, 266, 296-97 & 1545.

(5) Claimants did not Prove their Lease Extension Allegations.

Contrary to Claimants' contention, the Participants did not need to approve the automatic renewal extensions of the Master Lease. Doing something automatic and exercising a "foregone conclusion," which the parties contemplated at the time of the drafting of the Master Lease, was not a "renewal" or "modification" of the Master Lease. It was always understood and expected, as a matter of economic necessity, that the Master Lease would be renewed through its 2076 termination date and so there was no need to get the consent of the Participants for the "occasional episodic renewals in order to maintain the master lease in place." T. 1549, 2621-22, 2754 ("Well, it was as of right. The agents needed no authorization."), 3452, 3458 ("If you're saying that each time there was a renewal they had to go to the participants and ask permission to make the renewal, that would have rendered the entire structure, you know, inoperative. It would have defeated everyone's expectations, which is that this is a 115-year lease, at least 115 years."), 4172 ("People considered that this lease ran to 2076, period. There was so many ways in which that was not only an expectation but it was a feature of the structure."), 4197 ("It's a foregone – it's an economically compelled result that these renewals will occur."), 4596, 4900, 5498, 6686-88 & 6745-46.

Past practice confirms this conclusion. The Master Lease was not only renewed for another twenty-one-year term in 1989 without seeking participant vote, authorization or approval; there also was a pointblank statement, in the 1991 ESBA Consent and Authorization form, that Participant action was *not* required for the renewal. There is no evidence that any participant objected to this renewal procedure. In fact, there never was a participant vote on an interim extension of a master lease in *any* two-tiered investment that the Malkin parties ever had supervised. R-4 at R_000008652 ("[ESBA] has the right to renew the [Master L]ease for four additional 21-year terms with appropriate notice and without any additional consideration or action by the Participants. In January, 1989, [ESBA] exercised its first 21-year renewal option, for a term expiring on January 5, 2013."); T. 1554 ("There has never been, in any of these transactions, a consent to the investors to extend a lease and there are many which have such extensions, provisions in them prior to the IPO."), 3464-69, 4178, 4834-35 & 6715.

Contrary to Claimants' speculative claim that the renewal of the Sublease "shift[ed] value away from ESBA," Conformed Statement of Claim and Demand for Arbitration ¶ 42, this "economically-compelled" automatic and "obvious" renewal did not affect the valuations of ESBA or ESBC, T. 2759 ("Duff assumed the leases were, for both, were renewed but for the full term of the original deal."), 4598 ("And when Duff – as I think I've testified before, when Duff did its valuation, it didn't even ask us if the renewals had been exercised. It wasn't – it said we know they're going to be exercised if they're economically compelled and they're unilateral rights of the lessee."), 5425-26, 5431, 6163-64 & 6745-46. The renewal of the Sublease to its 2076 terminal position did not have any impact on the relative economic positions of ESBA and ESBC. T. 1716, 1722-23, 1726 & 4196.

Nor did Claimants support their charge that exercising the renewal options of the Master Lease was part of a covert plan to seek the Helmsley Estate's support for the REIT IPO transaction. *See* Conformed Statement of Claim and Demand for Arbitration ¶ 41. This contention relies, in part, on the premise that Respondents improperly failed to seek or secure the approval of the Participants for the renewals; but disregards the undisputed facts that Respondents in 1989 did not seek approval for an earlier renewal and that there was no objection to such purported "unilateral" action.

Claimants never explained what would have happened if ESBA had failed to extend the Sublease. However, ESBC had the right to renew the Sublease and would have renewed the Sublease if ESBA failed to do so. C-11 at G&A-6986-007283; T. 1551, 1715, 3896, 4033, 4597-98 & 6688.[15]

In fact, the conclusion is inescapable that ESBC – in which the Helmsley Estate had a majority interest, R-2 at ¶ 5 & R-231 at 40-41[16] – would have fought tooth and nail

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15. If ESBA did not renew the Sublease, ESBA would not have had a sublessee to manage and operate the ESB; ESBA was not authorized to manage or operate the ESB. C-19 at ¶ 2; R-2 at ¶ I(A)(5); R-3 at ¶ 14; R-4 at R_000008652; T. 2603, 2605, 2634, 4033, 4036-37 & 4596. So ESBA would have sought to enter into a sublease with another sublessee-operator, T. 4175, which would have lacked ESBC's experience and expertise in operating and managing the ESB.

16. The S-4 described the Helmsley Estate's control over ESBC:

to protect its lucrative and longstanding interest in the Sublease, *which was worth close to one billion dollars*. T. 1607, 2761 ("So if we had economically damaged them by failing to renew the operating lease, they would have sued."), 3475-76, 5227-28 (Claimants' expert), 5233 ("I can't think of a reason why [ESBC] wouldn't want to renew those leases economically if it was legally permissible and it was 100 percent up to them without further input."), 5428 ("So the question is what would the ESBC be leaving on the table if they were cut out of its exchange value in the IPO. And the answer is, $801.7 million of value. And that would have been cause for concern, to say the least."), 5430 & 6552.

Claimant did not establish how this sudden rupture and resulting conflict would have furthered the economic interests of the Participants. *See* T. 5431 ("So from an economic standpoint, because ESBC was a profitable enterprise, it is reasonable to assume that it would have

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> The Malkin Family and the Helmsley estate each effectively has an ability to veto actions by [ESBC], because under the operating agreement of [ESBC], full administrative and operational control of all matters connected with the business of [ESBC], including all matters connected with the operation, management, leasing, maintenance, repair and improvement of the [ESB], require the consent of 80% in interest of the participants in [ESBC]. The Helmsley estate (or its successor) owns 63.75% of the participation interests while principals of the supervisor have the right to vote as to 23.75% of the participation interests.

Id.; *see also* T. 2293.

continued to exercise its renewal rights at least through 2076, as it was contractually entitled to do so. And so therefore there's no reason to believe that they would have done anything other than that. And so therefore I don't visit [sic] as a value transfer. I view it as something that would have happened anyway. And, frankly, from the perspective of the IPO, this gives confidence to the market that ESBA and ESBC are economic partners in the deal for the long term, and that gives comfort to the marketplace and helps facilitate and gives shareholder value in the IPO.").

Just as importantly, Claimants failed to prove that ESBA would have successfully defended its right to remove ESBC, and hence the Helmsley Estate, as the ESB operating sublessee.[17]

For these reasons, we conclude that Respondents, in extending the terms of both the Master Lease and the

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17. Claimants do not advance the ball by insisting that the Participants had an economic interest in *not* renewing any twenty-one-year terms in the Sublease. *See, e.g.*, T. 298 ("Well, we wouldn't be sharing 50 percent of the net profits. We would have had 100 percent of the net profits. We'd own the property without being encumbered by the lease.") & 864.

This assertion disregards (a) ESBC's unilateral right to renew the Sublease; (b) the Helmsley Estate's interest in ESBC and the Sublease; (c) the fact that the Helmsley Estate would fight to prevent ESBC from being ousted from its lucrative perch as the operating sublessee; and (d) ESBA's need to have an experienced and expert sublessee to manage and operate the ESB – something ESBA indisputably could not do.

Sublease through 2076, did not breach contractual or fiduciary duties and obligations or commit securities or common law fraud.

(D) Claims Relating to the Increase in the Supervisory Fee.

Claimants allege Respondents breached their fiduciary duties by improperly and unfairly increasing the supervisory fee that Malkin Holdings charged to ESBA and that Respondents then used this fee increase to increase the capitalized amount Respondents received in the REIT IPO:

> Also in 2010, the Malkins unilaterally increased the supervisory fee charged to ESBA by Malkin Holdings for performing its supervisory functions. Without approval of the Participants, the Malkins increased the fee from $100,000 per year to $725,000, with additional adjustments for inflation in subsequent years. Simultaneously, the Malkins converted payment of the supervisory fee into a priority obligation which took precedence over distributions to the Participants, as well as eliminated any requirement for the Malkins to render services in exchange for collection of the fee. This sevenfold increase in the supervisory fee, along with increases in fees charged by other Malkin-owned entities, was later used in the REIT consolidation to justify payment to the Malkins of $16.3 million to cover "equitized"

> future value for services that the Malkins never performed.

Conformed Statement of Claim and Demand for Arbitration ¶ 45; *see also id.* at ¶ 84 ("Respondents' actions also cost Claimants millions of dollars in lost opportunities to receive greater value from the sale of their units, as well as losses stemming from . . . the skimming of ESBA revenue by Respondents through the unilateral increase of supervisory fees and the capitalization of those fees for services that had not been performed. . . ."); *Id.* at ¶ 88 ("Respondents have breached their fiduciary duties to Claimants by, among other actions, . . . unilaterally increasing, prioritizing and equitizing the supervisory fees. . . ."); T. 876 ("Q. So is it your understanding that these substantially increased fees that were actually charged in 2011, were then used in the Duff & Phelps analysis for projecting the discounted – used in the Duff & Phelps analysis for the discounted cash flow valuation of the Malkin company? A. Yes."), 878 ("It meant that they had chosen to use the higher number to figure out the, what's called the pre-sent value of that future income stream that was going to the management company.") & 1811-15; C-29 (July 1, 2010 agreement among members of ESBA) ("Malkin Holdings LLC shall be paid the sum of $725,000 per annum. Such amount shall be increased annually at the rate of in-crease in the consumer price index during the prior year. . . .").

The Participation Agreement stated that the Agents needed Participant consent only in certain instances – and determining the Supervisor's compensation was *not* one of those instances. R-3 at ¶ 4 ("The Agent shall not agree to sell, mortgage or transfer The Property or the Master Lease, nor to renew or modify the Master Lease, nor to make or modify any mortgage thereon, nor to make or modify any sublease affecting the premises, nor to convert the partnership to a real estate investment trust, a corporation or any other form of ownership, nor to dispose of any partnership asset in any manner, without the consent of all of the Participants."); *see also* T. 3958 ("There was no requirement for participant consent in these matters. That discretion was given to us. In fact it was specifically stated that we were to oversee the compensation, it's stated in the participating agreement or the Partnership Agreement that we were to oversee the compensation paid to the [S]upervisor.").

Contrary to Claimants' complaint that the supervisory fee increase was "unilateral" and improper, the ESBA Partnership Agreement specifically authorized the Agents to determine the amount of the Supervisor's compensation. C-19 at ¶ 5 (ESBA July 11, 1961 partnership agreement among Lawrence A. Wien, Henry W. Klein, and Peter L. Malkin) ("The firm of Wien, Lane & Klein of 60 East 42nd Street, New York, New York, shall maintain the books and records of the partnership, shall supervise the operation of this agreement and shall be compensated therefor in an amount to be determined by the partners."); T. 1116-18.

Further, there were valid reasons to increase the Supervisor's compensation:

> The fixed annual supervisory fee, which had been set in 1961, had not been changed during the roughly 50-year period and as we absorbed more responsibility as supervisor through the capital improvement program, the transition from Helmsley-Spear as manager and other requirements, we saw that the fixed annual supervisory fee, which I think for, in ESB was 100 and something thousand, really didn't even cover our cost and we decided that's not what was intended.
>
> . . . . So we decided to simply adjust the original number by the cumulative CPI increases over that time period from 1961 to date in 2010, which yielded a new supervisory fee of 725,000 something. Something in the $700,000 range.
>
> We did not try to look back and say, you know, we really should have been paid more in the prior years. We just said in constant dollars, we are keeping the fee as it was originally set and we'll go forward on that basis.

T. 3957-59; *see also* T. 227, 1115-16, 2752-53, 4273-74, 5409-10, 6627-28 & 6746-47 ("The basic fee of $100,000 had been set in 1961. Not only had there been more than 30 years of inflation, but because of the dysfunction of Helmsley-Spear, we had had to add a whole staff of people on our payroll so that we were actually losing a considerable amount of money every year acting as owner's representative. So we decided this really wasn't right and that maybe the simplest format would be to adjust the number prospectively only to reflect the impact of the Consumer Price Index on the $100,000.").

The supervisory fee increase did not materially increase the proceeds that Malkin Holdings received in the REIT IPO:

> Q. Can you tell us what impact, if any, the supervisory fee increase had on the allocation of exchange value to Malkin Holdings?
>
> A. Duff & Phelps did value Malkin Holdings as an entity and computed its profitability including this increased fee. Its computation indicated an exchange value of about $5 million total.
>
> The IPO proceeds after the, what I call the IPO discount, were about $3-and-a-half million. Well, that's, you know, less than a tenth of a percent of the enterprise value, so this affected the value of Malkin Holdings as Duff & Phelps computed it, but it was moving the needle in a very tiny way and it was not the reason we did this.
>
> We did it because we recognized we were in effect losing money annually in rendering these services and we thought that should be remedied whatever may happen in the

future, whether, you know, it's going to be a freestanding entity or be consolidated, whatever, you know.

. . . .

Q. And the $5.8 million exchange value allocation there, it may be obvious but I want to be clear, that included all the supervisory fees and all the other sources of income that Malkin Holdings received, one of which was the supervisory fees from ESBA, correct?

A. Exactly right, yes.

T. 3962-66; *see also* T. 3194; R-231 at 157 ("The fees for basic and special supervisory services expected to be received over the ten years ended 2020 were taken into account in determining the exchange value of the management companies.") & 265.

Claimants did not seriously challenge the factual underpinnings for the supervisory fee increase, including that (a) the supervisory fee had not changed since 1961; (b) the Consumer Price Index calculations underlying the increase in the supervisory fee, from $100,000 to $725,000, were accurate; (c) the Supervisor's duties, responsibilities and expenses had substantially increased in the preceding almost-fifty years; or (d) the going-forward increase, from $100,000 to $725,000, was proper, fair and appropriate.

For these reasons, we conclude that Respondents, in increasing the supervisory fee, did not breach contractual or fiduciary duties and obligations or commit securities or common law fraud.

E. The "Poison Pill" Claims.

Claimants allege Respondents adopted a "poison pill," thereby breaching their contractual and fiduciary duties and obligations, and committing securities and common law fraud:

> In 2008, Respondents began instituting several prerequisites to implement the consolidation that they were planning. These preliminary actions included . . . the adoption of a "poison pill" measure to prevent direct third-party proxy solicitations of Participants' interests.
>
> . . . .
>
> On November 30, 2011, Peter Malkin, Anthony Malkin, and Thomas Keltner, acting in their capacity as the members of ESBA LLC, without informing the Participants and without obtaining Participant consent, unilaterally executed Amendment Number One to the ESBA LLC Agreement ("the Poison Pill Amendment"), which purported to vest in Respondents unfettered authority to approve all actions that previously required the Participants' consent. The Poison Pill Amendment also purported to impose certain limitations on the transfer of ownership interests, thus restricting the

> Participants' ability to sell their units. The Poison Pill Amendment provided that any individual or entity, other than Respondents, acquiring an interest in ESBA greater than 6% would lose the rights both to vote and to receive distributions. The intended effect was to deter direct proxy solicitations to the Participants, and thus leave Respondents with sole discretion to evaluate and disregard all offers for the ESB or ESBA submitted for their approval. The Poison Pill Amendment was never communicated directly to the Participants, submitted for Participant approval, or adequately or meaningfully disclosed in the S-4. Again, Respondents violated their duties to the Participants by breaching the Participation Agreements, failing to disclose material information, consolidating Respondents' power at the Participants' expense, and ultimately usurping the Participants' opportunities to receive and evaluate solicitations for their units.

Conformed Statement of Claim and Demand for Arbitration ¶¶ 38 & 46.

In 2011, the Agents adopted a poison pill in Amendment No. 1 to the Limited Liability Company Agreement of ESBA. R-30; C-121; T. 2762, 3503 & 3507. As the Form 8-K, filed on December 5, 2011, explained:

> On November 30, 2011, the members of [ESBA] (the "Company"), a New York limited liability

> company, executed an amendment to the Company's limited liability company agreement (the "Amendment") to create three new series (series A-1, A-2 and A-3) of a new class of equity membership interests (the "new series") which provide protections similar to those under a shareholder rights plan for a corporation. Each new series corresponds to a participating group for which a member acts as agent. In general terms, the Amendment works by imposing a significant penalty upon any person or group that acquires 6% or more of the outstanding participation interests in a participating group. The Amendment should not interfere with any merger or other business combination approved by the members (other than such person or group).

R-30 at 2.

Respondent Anthony Malkin explained the background and purpose of the poison pill:

> We were told that this – well, first of all, we did it to prevent anyone from being able to block the investors on whose behalf we were working from being able to exercise their vote on the proposals put in front of them, number one. Number two, we did it because we were told that this was the logical and typical thing that you did in this sort of a situation when you were exposed in the middle of going through

> consents and a process with the SEC that you protected the opportunity for people to act on the transaction by putting in a poison pill.

T. 2762; *see also* T. 3508 ("There are no – there's no record of, there's no history of ESBA participants holding anything like a six percent interest. The amount of the transactions that occurred annually were way below six percent. The six percent was chosen not to try to restrict the normal course of transfers by the existing participants. It was chosen based on the kind of corporate metrics that you take about one-third of what would be a blocking position and that's the trigger for a pill."), 6748 ("[W]e were told that it was a standard provision in connection with an IPO. But secondly, the reason was that there were some tender offers that were out and the risk was that since we required not less than 80 percent of approval in each of three groups, someone who acquired 10 percent of one group or only approximately 3-and-a-third percent of the in-vestment could hold up a transaction and could blackmail the investment group in order to get a payment to go along with the transaction.") & 7138-39 ("I think it protected the rights of the participants against somebody, as I've said before, obtaining three-and-a-third percent of the total and being able to block material transactions.").

Thomas Keltner also explained the background and purpose of the poison pill:

> This is what, you know, might be called a pill agreement, which is I think as people know, has been recognized as a proper action in some

> cases for fiduciaries to protect long-term value or some strategic initiative from being upset by a self-interested spoiler who is not really, you know, very rooted in the entity.
>
> So the – in late 2011, as we contemplated what turned out to be a three-year process or actually a two-year process from 2011, it had been going for a year or so then we knew we were going to be spending a lot of money, a lot of time and attention on a program we thought was very beneficial for the investors and we wanted to have the ability to protect that from a kind of greenmail or other type of spoiler who came in.
>
> And we recognized that given the extraordinarily high super majority requirements in these entities, 80 percent, not across ESB as a whole, but 80 percent in each of three groups. So if you think about it, you know, someone could acquire a 20 percent interest in one of the participating groups that represent only about 7 percent of the entirety of ESBA and they could block this entire transaction.

T. 3505-06; *see also* T. 2763-64 & 4000 ("It was to protect a potential transaction into which tens of millions of dollars had been invested and for which we had reason to believe a very high proportion of our investors were supportive from a kind of greenmail or last minute raider who could obtain a veto on the entire transaction by acquiring a very small percentage amount of the whole entity.").

The S-4 explained the background of the poison pill:

> During the period from November 2010 through November 2011, the [S]upervisor discussed the risk of third parties making offers to acquire interests of the subject LLCs, such as through partial tender offers, that could have the purpose and effect of blocking a subject LLC's participation in the consolidation. The [S]upervisor determined at a meeting held in November 2011 to amend the limited liability company agreement of each of the subject LLCs to provide protections in the event of a third party acquisition of participation interests in the subject LLCs similar to that provided by shareholders' rights plans.

R-231 at 165; *see also* T. 3999.

Contrary to Claimants' assertions, *see, e.g.*, T. 867-69, 4792 & 4797, the Agents had the authority to adopt the poison pill, *see* R-3 at ¶ 4; T. 3509 ("There was no requirement for participant consent to amend the Partnership Agreement so we were within the technical requirements of our agreements, but what we were doing was informed by a fiduciary judgment in the way that I described that that was our judgment.") & 7136-37.

Claimants did not challenge the need to adopt the poison pill or the purposes of the pill. Plus, the poison pill, which did not change the voting rights of any participants, including Claimants, never was "invoked" and the ESBA investors voted on the proposed REIT IPO transaction. T. 2764, 4000-02, 6748 & 7139.[18]

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18. One investor chose not to buy additional ESBA units due to the poison pill:

> So after the original drafts of the consent solicitations went out, we looked at the idea, we meaning I and the folks who work with me, looked at the idea of going back out and seeing if we could acquire additional units. And we spoke to SL Green, which is a major REIT in New York City, and we talked about partnering with them in acquiring as many interests as we could in the hopes of acquiring a significant amount of interests. And that's when we studied the matter further, we discovered this document which we've referred to as a poison pill, additional acquisitions of units would – acquiring additional units would cause us to lose any voting rights attached to those additional units, and so therefore we decided that as a business matter we couldn't take the risk of acquiring things and not having voting rights attached to them.

T. 313-14; *see also* T. 8013-14 ("And the other purpose of the Poison Pill was to protect the Malkin general partners, the three agents, from ever losing control over the partnership because once an investor would have accumulated 6 percent, I think it was, of the unit shares, they would lose all their voting rights. And so the effect of that would be to discourage anybody from making an investment. In fact, when I had conversations with SL Green about making a tender offer here for the unit shares, that was a deal killer for them. And that would have provided a nice alternative, again, to the limited partners and was obviously something that the Malkins were very much opposed to because it would have threatened their control over the whole partnership.").

Claimants failed to establish how this claimed failure to buy additional units (assuming Claimants had proffered evidence that

Claimants failed to establish that the poison pill amendment was an improper exercise of the Agents' business judgment. Therefore, we conclude that Respondents, in enacting and then publicly and duly disclosing the poison pill in a securities filing, did not breach contractual or fiduciary duties and obligations or commit securities or common law fraud. Further, Claimants failed to proffer, let alone prove, that they suffered cognizable damages due to the poison pill. *See* C-193.

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the investor could have done so) caused any cognizable damages to Claimants. In fact, Claimants did not establish how the poison pill dissuaded even this investor from acquiring interests in ESBA:

> Q. You testified under examination by Mr. Griggs that you believed that an effect of the Poison Pill would be to deter folks from trying to acquire the ESBA interests. Do you recall that?
>
> A. Yes.
>
> Q. Okay. Isn't it a fact, sir, that the MacKenzie Capital conducted a mini tender for 18 participation interests at ESBA after the pill was adopted?
>
> A. Yes, that's true.
>
> Q. And that if [sic] fact was happening while the solicitation was occurring, correct?
>
> A. Correct.

T. 8084.

Our conclusion is on all fours with Justice Sherwood's rejection of an identical poison-pill assertion in the class action arising out of this very REIT IPO transaction:

> Objectors' assertion that the settlement fails to compensate the ESBA Participants for implementation of a "poison pill" provision in the 2011 amendment of the LLC Agreement is meritless. Contrary to the objection, the amendment does not change the Participation Agreement (although it impacts Participants' voting rights) and the Participants' consent is not required. Moreover, the ESBA members had authority to approve the amendment in the valid exercise of their business judgment. . . .
>
> According to Defendants, "[t]he 2011 amendment was adopted for several permissible purposes: (1) to protect ESBA against a hostile takeover, (2) to provide ESBA with sufficient time, leverage and negotiating room to evaluate competing offers, and (3) to prevent investors from acquiring a minority interest for the sole purpose of blocking otherwise beneficial transactions." The [] Objectors have not shown that the decision to adopt the amendment was not a proper exercise of the managers' business judgment.

R-116 at 5 (*In re Empire State Realty Trust, Inc. Investor Lit.*, No. 650607/2012, slip op. at 5 (Sup. Ct. May 17, 2013)); *see also* T. 4792-94, 4805-06 & 8083-84.

F. The Empire State Building Patent and Trademark Claims.

Claimants assert Respondents improperly stripped ESBA of its rights to the "Empire State Building" trademark:

> As further evidence of the gross advantage taken by the Malkins in their capacity as agents of the Participants, the S-4 disclosed for the first time that the Malkins and ESBC had appropriated for themselves all patent and trademark rights to the name "Empire State Building." The SEC filings disclosed that, in an application for trademark registration, dated May 13, 1999, and registered December 12, 2000, ESBC and the Malkins had listed themselves as the applicants and owners of record, despite ESBA's rightful ownership of the Building as confirmed in a 1999 court ruling. The registration was made without the knowledge or approval of the ESBA Participants, who had a superior claim to the intellectual property, and to whom the Malkins owed a duty of honesty, integrity, good faith and fair dealing. In addition, ESBC's appropriation of the intellectual property rights violated the Participation Agreements by disposing of a partnership asset without the Participants' unanimous consent.

Conformed Statement of Claim and Demand for Arbitration ¶ 56.

By Quitclaim, dated as of February 1, 1999, ESBA assigned the word mark "EMPIRE STATE BUILDING" and the design mark "DESIGN OF EMPIRE STATE BUILDING" to ESBC, subject to a reversion. R-234 ("The Marks will be owned by Assignee, its successors and assigns, for as long as such Net Operating Subleasehold is in effect; upon termination of such Net Operating Subleasehold the Marks and the Goodwill shall revert to Assignor, its successors and assigns; and upon termination of such Master Leasehold, the Marks and the Good-will shall revert to the holder of the interest in the Building superior to Assignor, i.e., the fee holder of the land on which the Building stands."); *see also* T. 1304.

ESBA was not an operating company. T. 4199. Consequently, as Claimants' own witness acknowledged, ESBA could not take advantage of the marks – ESBC was the proper party to exploit and use the marks. T. 1302; *see also* T. 4201-02 ("And the party who is operating the building and dealing with tenants and third parties is the lessee. It's the only party. It's the right party
The sublessee, that is ESBC, pre-IPO, was the only appropriate party to exploit and use the trademark at that time. I'll just abbreviate that the documents provide that at the expiration of the sublease, if there is one, ESBC's right to the trademark also expires and the trademark reverts to ESBA. So the trademark is just another, you know, property right that goes with the property in the same way that all the other property rights do here. It's with ESBC for operation, but its ultimate residual ownership if the lease expires is with ESBA.").

The Participating Agreements stated that the Agents needed Participant consent only in certain instances. Assigning trademarks was one of those instances because it was a way of disposing of a partnership asset. *See* R-3 at ¶ 4 ("The Agent shall not agree to sell, mortgage or transfer The Property or the Master Lease, nor to renew or modify the Master Lease, nor to make or modify any mortgage thereon, nor to make or modify any sublease affecting the premises, nor to convert the partnership to a real estate investment trust, a corporation or any other form of owner ship, *nor to dispose of any partnership asset in any manner, without the consent of all of the Participants*.") (emphasis added).

Consequently, this assignment of marks may have violated the ESBA Participating Agreements. *See* Conformed Statement of Claim and Demand for Arbitration ¶ 56. However, Claimants did not challenge that (a) ESBA was not an operating company; (b) ESBA could not exploit the marks; and (c) ESBC was the "only" party and the "right party" to exploit the marks.[19] Nor did Claimants quantify their alleged damages or prove that they suffered dam-ages as a result of this assignment – and it is unlikely there were any damages because ESBA could not exploit and use the marks. *See* C-193 at G&A-6986-010060 ("The damages calculations outlined above attempt to compensate Claimants for losses associated

19. The projected exchange value of the trademark licensing fees was approximately $85,000.00 per year for each of the twelve years starting June 1, 2013. R-231 at C-1-21; *see also* T. 4203-04. ESBA and ESBC shared equally in the profits realized from the use of the marks. T. 1303-04.

with the value of their investment, but do not compensate for damages that are not mathematically calculable by Participants, due to either the nature of the damages or Respondents' total control of all necessary information. . . . And, such damages include Claimants' losses associated with misappropriation by Respondents of the [ESB] trademark, which misappropriation was concealed from Participants for a period of twelve years.").

For these reasons, Respondents did not breach contractual or fiduciary duties or obligations, or commit securities or common law fraud, in connection with ESBA's assignment, subject to a reversion, of the ESB marks to ESBC.

G. The Indications-of-Interest Claims.

On or about June 18, 2013, the Supervisor received an "indication of interest" from Stephen B. Meister, on behalf of Cammeby's International, to purchase the ESB for $2 billion. C-41 at G&A-6986-008251-252. On or about June 21, 2013, the Supervisor received an indication of interest from Philip Pilevsky, on behalf of Philips International Holding Corp. and Princeton Holdings LLC, to purchase the ESB for $2.1 billion. *Id.* at 008253-54.

The Supervisor thereafter received an indication of interest, dated July 2, 2013, from Reuven Kahane, on behalf of RKRE INCRPORATED [sic], to purchase the ESB for $2.25 billion. *Id.* at 008255-56.

The Helmsley Estate's consent was required for any sale of the ESB. *Id.* at 008227 ("The Helmsley estate and Malkin Holdings group, as participants, each has effective veto power on major decisions (including a sale) related to ESB as each group has greater than 20% ownership interest in ESBC (i.e., operating lessee). The Helmsley estate owns 63.75% of the participation interests, while principals of the Supervisor have a 23.75% voting interest.") & 008223 ("The estate owns 63.75% of the participation interests in ESBC, which represents a potential blocking position to any consent process related to major decisions for the property.").

On July 22, 2013, the Helmsley Estate informed the Supervisor that the Estate declined to accept or pursue any of the indications of interest. *Id.* at 008317 ("The estate declines to accept or pursue any of the indications of interest that have been received for the purchase of the [ESB]. In its own interest and independent of your analysis, the Estate intends to continue on the IPO path, and to adhere to the agreement that we entered into with you concerning the IPO."); T. 5379.

In early July 2013, the Supervisor retained Lazard Frères & Co., which until then was not involved in the REIT IPO, as an independent financial advisor to review and issue a report regarding the indications of interest. R-124 & R-126 ("The meeting participants agreed that, while all of the firms that had been interviewed were highly qualified, Lazard Frères & Co. ("Lazard") was the preferred choice. . . . At the conclusion of the discussion, Messrs. Peter L. and Anthony E. Malkin, on behalf of the Supervisor and as members of ESBA, agreed that the Supervisor should seek to retain Lazard as an independent financial advisor. . . ."); *see also* T. 2523.

Matthew J. Lustig, Lazard's Managing Partner of North America Investment Banking and Head of Real Estate, led the Lazard team. *See* R-125 at R_000033818. The Supervisor provided Lazard with the indications of interest and other documentation regarding the REIT IPO. T. 2531; C-41 at G&A-6986-008222.

At an August 8, 2013 meeting with its legal advisors, the Supervisor agreed to await the Lazard report before responding to the indications of interest. R-130 at R_000033102 ("A discussion of the terms of the indications of interest followed, including a discussion of the time period set forth for closing the proposed transactions contemplated by the indications of interest, the provisions contained in certain of the letters received concerning participants having an option to receive an interest in the acquiring entity, the purchase prices and the lack of specificity as to the terms of the transaction included in the letters received. Among other things, the participants in the meeting discussed whether there should be follow up with parties who had contacted them and determined to defer a decision until after they had received a report from Lazard.").

On September 4, 2013, Lazard issued its report that summarized, among other things, the benefits of the REIT IPO as well as the difficulties associated with a potential standalone sale of the ESB. C-41 at G&A-6986-008235-36.

Later that day, at a meeting Anthony Malkin and Peter Malkin attended on behalf of both Malkin Holdings LLC and ESBA, Lustig stated that the indications of interest did not contain terms he would expect from a party submitting a serious bid:

> The meeting participants then discussed the indications that had been received to date, and Mr. Lustig compared them to what he might expect to advise a client to provide in the event his client was interested in purchasing one of the properties in question. He stated that the letters did not contain terms that he would expect from a party submitting a serious bid for the properties. He would have expected much more extensive terms that address all of the issues, and would have expected that a proposed form of purchase contract would have been included. There was a discussion of the potential reasons that the indications came in the form they did.
>
> . . . .
>
> In response to a question, Mr. Lustig stated that under the circumstances, including the impact on the IPO of pursuing any proposal and the deficiencies in the proposals received, it was reasonable not to pursue further discussion with bidders before making a decision on the offers. In response to another question, Mr. Lustig stated that as a personal matter (and not speaking on behalf of Lazard) he would advise an investor who asked for his advice what to do that nothing that is included in the indications

> would cause him to want to halt the Transaction to pursue the indications.

R-135 at 2-3.

On September 6, 2013, the Supervisor and ESBA members met to discuss further the indications of interest. They discussed the Lazard Report and presentation, including Lazard's view that the indications of interest were not credible alternatives to pursuing the REIT IPO. They decided the REIT IPO should proceed for several reasons, including that (a) the Helmsley Estate refused even to entertain any of the indications of interest and instead wanted to proceed with the REIT IPO; and (b) the investors had given overwhelming support to the REIT IPO. R-136 ("Anthony E. Malkin opened the meeting by stating that the Report and Lazard's presentation supported a view that the indications were not credible alternatives to the IPO. As Lazard had noted at the meeting, serious proposals would have looked very different from what had been received. Peter L. Makin and Mr. Keltner agreed. ¶Anthony E. Malkin noted that, with the substantial expenditures on the proposed REIT IPO to date, with the overwhelming sup-port of the investors that had been received, with the Helmsley Estate having stated that it does not intend to entertain a sale but wishes to go forward with the IPO, among other reasons, the Supervisor and the members of ESBA . . . should move forward with the IPO, and inform the investors of this decision as soon as possible. Peter L. Malkin and Mr. Keltner agreed.").

On September 6, 2013, the Supervisor informed the Participants that the REIT IPO should proceed. R-224 at R_000000178 ("As we have previously advised you, Malkin Holdings received indications of interest to purchase the fee and/or operating lease positions of the [ESB]. . . . ¶As fiduciaries, we review all matters concerning investment groups we serve. In our review of these indications of interest, we engaged Lazard Frères & Co. LLC as an independent financial advisor. After our review, we have concluded that it is in your best interest to proceed with the consolidation and IPO as approved by a supermajority of the Participants."); T. 4238.

On September 9, 2013, Stephen B. Meister sent the Supervisor an indication of interest, on behalf of Thor Equities, to purchase the ESB, including the Master Lease, for $1.4 billion. R-137 ("Enclosed please find a revised offer from an affiliate of Thor Equities ("Thor") offering to purchase fee title to the [ESB] (and the Master Lease) from [ESBA] for $1.4 billion. This offer is materially greater than the allocated portion of the [ESB] appraised value.").

The Supervisor at this time decided not to entertain any additional indications of interest, and so informed the Participants on September 19, 2013:

> As reported in our filings, we received unsolicited proposals to purchase the fee, master lease, and/or operating lease positions of the [ESB]. Most recently, a $1.4 billion offer for free and clear title to [ESBA's] fee and master lease interests was received. . . .

> As fiduciaries, we review all matters concerning investment groups we serve, including every unsolicited proposal. We engaged Lazard Frères & Co. LLC as an independent financial advisor. Among other things, we considered: (i) the potential to close any indication of interest submitted; (ii) the thousands of conversations with participants before, during, and after the prior consent; (iii) the costly, complicated, and time-consuming SEC filing and consent process required to allow any potential transaction to go forward (which no proposal accommodated); and (iv) the costs of the consolidation and IPO to date. We determined none of the proposals is a credible alternative to the approved consolidation and IPO.
>
> While it is possible that additional proposals will be made, from this point we are fully committed to effecting the consolidation and the IPO transaction and will not entertain any additional alternative. . . .

R-143.

Claimants allege Respondents breached their fiduciary duties by refusing to seriously entertain any indications of interest. Conformed Statement of Claim and Demand for Arbitration¶ 70 ("Respondents refused to engage in discussions or otherwise seriously entertain any of these offers, dismissing both the credibility and good faith of the offering entities, notwithstanding the premium above the

$1.18 billion exchange value assigned to ESBA as part of the REIT. Still, despite Respondents['] refusal to engage, the bidding war for the ESB continued."); *see also id.* at ¶¶ 68-76. We disagree.

First, the Helmsley Estate on July 22, 2013 unequivocally told the Supervisor that it refused to pursue the indications of interest. C-41 at G&A-6986-008317; *see also id.* at 008229. On August 20, 2013, after receiving additional indications of interest, the Helmsley Estate reaffirmed its position:

> The estate declines to accept or pursue any of the indications of interest that have been received for the purchase of the [ESB].
>
> . . . .
>
> Furthermore, for various reasons, until the IPO will have been withdrawn, the Estate would not consent to the marketing of the [ESB] for a private sale. For example, the time required to complete a private sale, requiring a marketing of the building, SEC review and effectiveness of the consent solicitation documents, and the completion of the consent solicitation process, could easily take ten to twelve months. As long as the IPO process is continuing, the Estate is unwilling to take the risks of an uncertain market, the possible failure to obtain the necessary consents and the possibility that no private transaction will be consummated.

Id. at 008318; *see also id.* at 008229 ("In a letter dated August 20, 2013 . . . counsel for the Helmsley estate reaffirmed its intention to pursue the IPO and further stated that it would not accept any of the indications of interest received to date and would not consent to the private sale of ESB as long as the Consolidation process is continuing."); T. 5379.

Given the Helmsley Estate's effective veto power over any ESB sale, the Estate's position made impossible any sale pursuant to any indications of interest:

> Q. All right. How, if at all, did these letters factor into your assessment of the indications of interest?
>
> A. Well, it rendered it very difficult to pursue, given that the operating partner to the [ESB] was against entertaining an indication of interest to sell the property and that it provided more basis to continue on the road to the IPO.

T. 5382; *see also* C-41 at G&A-6986-008229.

Second, the Supervisor, as part of its due diligence, promptly undertook a thorough review of the indications of interest. It retained Lazard as its financial advisor and provided Lazard with information concerning the indications of interest and the REIT IPO. R-125 & R-135; C-41. In early September 2013, Lazard delivered its report to the Supervisor. *Id.* The report stated clearly that the

REIT IPO was a preferable course; the report extensively listed the advantages of the REIT IPO, in contrast to the indications of interest that were subject to multiple uncertainties and risked eliminating the IPO window. *Id.* at 14-15, 20-23 & 29-30; *see also* R-135 at 1; R-143.

Third, there was serious concern that considering any indications of interest, even if none ultimately was pursued, would "seriously chill the market, [the] target market for the IPO," which took place only a few months later. Based on timing and other circumstances, it would have been highly risky for the REIT IPO to pursue any indications of interest. T. 4225 ("As I mentioned, we had received the necessary investor consents in June. So we were in a mode of executing on the IPO. The investment bankers at Goldman Sachs and Bank of America Merrill Lynch and others were conducting road shows. They were consolidating commitments. They were traveling around the world. And they advised us that if we even pursued alternatives, the investors would say I'm not sure this is happening; I'm not committing you know my allocation to this. It would very seriously chill the market, our target market for the IPO, which ended up, as you know, happening in early October, just a few months away from these events.").

Fourth, there were multiple reasons to question the merits and good faith of the indications of interest. For example, Stephen Meister, who was litigation counsel for the intervenors who had tried to stop the REIT IPO, Stephen Meister's son, and Mr. Penson, another adversary who also was in litigation with Respondents, all sent multiple indications of interest to the Supervisor. C-41 at

G&A-6986-008251-52, 008258-259 & 008260-264; *see also* T. 4210 & 4929 ("And I viewed these as last minute offers that were not – they were designed to derail a beneficial transaction for the investors and not help the investors get more."); R-135 at R_000033111.

The indications of interest appeared to be thrown together at the last minute and did not contain the customary terms and conditions that would signal good faith offers. T. 5377 ("Also I considered the offers or the indications of interests to be very flimsy in nature. That is, they did not generally have the types of terms and conditions that one who is entertaining such an offer would normally be expected to see, especially in many cases these came really what I consider on the eve of the IPO, so they would really have to effectively move the needle to be compelling in any form or fashion and they weren't. They also had a lot of provisions that I believe to be nonstarters, things like timelines that would not have matched up with what the necessary timeline would be to obtain things like SEC consent and clearance.").

The provisions that reflected a lack of good faith included the following:

- Break-up fees payable to the buyer. C-41 at G&A-6986-008272; *see also* T. 4210 ("I think one of them or two of them had a breakup fee that sort of went in reverse. We would have to pay them, we would have to pay the purported offerer if the transaction did not go through. That was a big part of the reaction we had.").

- Fully refundable and/or small buyer deposits. C-41 at G&A-6986-008261 & 008267; *see also* T. 4209 ("They had a light deposit.").

- Immediately effective standstills and restraints on new lease transactions and expenditures by the ESB. C-41 at G&A-6986-008260 & 008266; *see also* T. 2518-19, 2521 & 4210 ("Some of them typically wanted us to, in effect, cede control of our operations or of our leasing program by suspending those activities or conducting those activities only with their consent, which would be remarkable, you know, in the face of these, you know, this very light commitment, this very light indication of interest.").

- A mere ninety-day period to close. C-41 at G&A-6986-008230; *see also* T. 2518-19 & 4209 ("They had a closing period that took no account of the fact that we would need at least one year to get permission to close the [ESB].").

Further, some indications of interest appeared to be from dubious sources, including one for $2.25 billion on behalf of unidentified investors "who live in the Ukraine and Russia." C-41 at G&A-6986-008255. Another indication stated: "I want you make a serious offer. . . . It is big failure and a mirakel [sic] not contact me and listening what I have to say!" *Id.* at 008283.

The more sophisticated investors who submitted indications of interest presumably understood that the timing of the proposals, the unusual terms and conditions, and the requirement of a resubmission to the SEC for a new vote of ESBA Participants rendered their proposals unrealistic. C-41 at 008260; T. 2518-19. None of those offerors had made any overtures before or during the REIT IPO solicitation, despite the public nature of that process. T. 4209. To the contrary, despite widespread publicity for years, no indications of interest were submitted to the Supervisor until shortly before the scheduled REIT IPO and only after the Supervisor had secured Participant consent. T. 4298 ("It had been, you know, very public that we had been soliciting consents for action regarding the [ESB] and others through an SEC, a lengthy SEC process."), 5377 & 6564.

Fifth, Claimants failed to establish causation to support their claim that they suffered harm due to Respondents' alleged refusal to consider seriously the indications of interest. Claimants presented no testimony or other evidence to suggest that a transaction in fact would have resulted from any indications of interest, much less that any transaction would have yielded a more favorable result for the Participants than the REIT IPO. Nor did Claimants establish that there would have been a vote in favor of any indications of interest if presented to the Participants, let alone that any indications of interest would have ripened into a consummated transaction.[20]

20. As set forth in the S-4, the Participants had the opportunity to authorize a "Third-Party Transaction" as a potential alternative to the proposed publicly traded real estate investment trust. The S-4 summarized the Third-Party Transaction as follows:

Sixth, Claimants did not present evidence of the damages they allegedly suffered because of the

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> The third-party portfolio transaction would be undertaken only if the aggregate consideration is at least 115% of the aggregate exchange value for the subject LLCs, the private entities and the management companies included in the third-party portfolio transaction and certain other conditions are met. The proposal must provide for all cash, payable in full at closing, but such proposal may provide for an option for all participants to elect to receive securities as an alternative to cash. If the proposal provides for a securities option, the Malkin Family will have the right to elect to receive securities only on the same proportional basis as other participants. No member of the Malkin Family will be an affiliate, consultant, employee, officer or director of the acquiror after the closing or receive any compensation from the acquiror (other than their pro rata share of the consideration that they will receive in the third-party portfolio transaction).

R-231 at 1.

The Participants rejected the Third-Party Proposal. C-79 at G&A-6986-008560; *see also* T. 4209 ("It was public information that our proposal, the so-called third-party sale, did not pass.").

This suggests – but does not establish – that the Participants would not have voted in favor of any indications of interest. *Cf.* RESPONDENTS' POST-HEARING BRIEF at 71 ("[T]he indications were subject to multiple uncertainties . . . and risked completely eliminating the IPO window, given the stigma of a 'pulled' IPO. Further the ESBA Participants had *rejected* the Third Party Proposal, which would have authorized a portfolio sale.") (emphasis in original).

Supervisor's failure to enter into a transaction based on an indication of interest. *See* C-193. Absent this proof, it would be impossible to assess damages.

The issues discussed and conclusions set forth above were persuasively presented by Respondents' expert Paul Habibi at the evidentiary hearing and memorialized in his expert report, dated May 9, 2016. *See* R-171 at 9 ("Each of these indications of interest proved to be an inferior alternative to the ESRT IPO. In addition to the unique challenges specific to each of the offers . . . several obstacles prohibited the pursuit of the ESB, including: i. During the solicitation process for the REIT IPO, Participants did not consent to the option of a portfolio sale at 115% of exchange value; ii. The Helmsley Estate rejected the indications of interest in favor of an IPO, and the estate's consent would have been required of any sale that would have involved ESBC; iii. The time frame required to obtain consents for any of the third-party indications of interest would have jeopardized the IPO that Participants had overwhelmingly approved.") & 18; T 5376 ("For numerous reasons I determined that it was not in the best interests of ESBA to pursue those [indications of interest].") & 5375-5408.

These conclusions are further supported by the testimony of Respondents' expert Gerald D. Pietroforte at the evidentiary hearing and memorialized in his expert report, dated May 9, 2016. R-173 at 33 ("Based on the Helmsley Estate's rejection of the Indications and the issues associated with a third-party sale (such as the time that would have been required to solicit Participant consent for a sale), the Supervisor determined that there was no practical way to accept any of the Indications of Interest. The Supervisor also appropriately noted the many defects and challenges with the Indications themselves. As a result of this course of conduct, the Supervisor fulfilled its duties related to the Indications of Interest."); T. 6554-6568.

For these reasons, we conclude that Respondents did not breach contractual or fiduciary duties or obligations, or commit securities or common law fraud, when they did not pursue any of the indications of interest to purchase the ESB.

H. The Claims Relating to the Suburban Office Properties.

Claimants allege Respondents improperly included certain "underperforming" suburban office buildings in the REIT IPO transaction:

> For the Malkins, a primary advantage of the consolidation was the opportunity to cash out their investments in underperforming suburban properties, and procure reimbursement for their tax liability through the tax protection provisions built into the REIT transaction. The capital improvement program facilitated this opportunity in two important ways. First, the Malkins used the ESB's diminished annual revenues during the capital improvement program to suppress the ESB's relative

> appraisal value in the run-up to and promotion of the REIT. Then, they relied on soaring future revenues projected from the refurbished ESB to offset the diminishing or stagnant returns projected from the consolidated suburban properties. The Malkins thereby planned to shift the risk from their undesirable investments to the ESB, dispose of those properties, and secure for themselves $97.7 million in potential tax relief.

Conformed Statement of Claim and Demand for Arbitration ¶ 40; *see also id.* at ¶ 78 ("In addition, the Malkins received . . . subsidization of their less valuable suburban investments.").

According to Claimants, including the suburban properties adversely affected the ESRT share price. T. 6931 ("There's no monetary damage that you can trace directly to the allocation method, but you saw that there was a percent discount in the way the market reacted to the REIT and we believe part of that was due to the inexperience of the Malkins in doing REITs, and part of that was due to the perception that the suburban properties created because they're in the REIT."); *see also* T. 6936. However, Claimants did not proffer any evidence or expert testimony to support this assertion. *See* T. 6932-34.

Moreover, Claimants did not show how the suburban properties dragged down the REIT IPO transaction. In fact, Claimants did not contest that these properties "performed very well. They ha[d] top tier tenants, name brand tenants. . . . They're very good." T. 2833; *see also* T. 4912 ("I thought that these were good investments.").

Also, Claimants did not dispute that including the suburban properties in the transaction diversified the REIT. T. 3295 ("I mean one of the other benefits is diversity. These are projections. You can't guarantee results and it's, you know, a fundamental of investing to, you know, spread your bets around a little bit. For someone who's only in Empire, this was a chance to diversify a little bit and still keep half of Empire if you wanted it or sell part of it, because now you had a good liquidity feature in your investment which you had not had for 60 years.") & 3300.

Nor did Claimants contest that the REIT IPO may well have foundered – or would not have been able to "compete" from a valuation perspective with other REITs – if the transaction did not include the suburban properties; Respondents' investment advisors advised that investors "do not want to see split allegiances of management in REITs and [if there were] properties in the greater New York metropolitan area which were not included in a REIT based in New York, they would see that as incorrect." T. 2832-33; *see also* T. 2923 & 6750-51 ("I felt that the [ESB] was at an unusual risk as a single operation and since the rest of our buildings were operating very profitably; that is, that our office and retail buildings in Manhattan, it would be much safer for the investors and it would also create a much stronger, higher credit entity if we put together all of these office buildings and retail. And then we were told by the investment bankers that we had to include any property that might be competitive, so that it had to include the suburban office buildings which directly competed with the Manhattan office buildings.").

And the suburban properties did not receive inappropriate outsized valuations. As Claimants' own witness conceded, their relative values were reflected in lower calculated exchange values; Duff & Phelps in determining exchange value capitalized the lower cash flows of the suburban properties at a lower multiple compared to the ESB. T. 411; *see also* T. 3296, 3622-23 ("And if any property was lagging in some respect, it had less substantial growth than you think it should have, that would be reflected in its share of the consolidation proceeds. So all of these things were really self-correcting."), 3625 & 3903-04.[21]

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21. One suburban property, for instance, had a mere fractional exchange value:

> Q. And we were talking about the relative valuations of the suburban properties and I think Mr. Griggs was asking you about for Stamford Place last time around. Can you tell us what the percentage of the total exchange value for all the properties was that was allocated to First Stamford Place?
>
> A. 0.2 percent.
>
> Q. And how much was allocated to the [ESB] and the constituent entities, ESBA and ESBC?
>
> A. Approximately 56 percent.

T. 3909-10.

For these reasons, we conclude that Respondents did not improperly or wrongly include the suburban office properties in the REIT IPO transaction. We also conclude that Respondents did not thereby breach contractual or fiduciary duties and obligations or commit securities or common law fraud.

Even if the "suburban-properties" claims had merit (and they do not), our November 17, 2017 order confirmed that Claimants abandoned these claims:

> We hereby confirm that Claimants' claims do ***not*** include any claim for damages arising from (a) the allocation of the value of the "suburban properties" compared to the value of the Manhattan properties generally or to ESBA/ESBC specifically; or (b) any improper, unfair, erroneous or inappropriate allocation or any breach of fiduciary duty arising from the allocation of the value of the "suburban properties" compared to the value of the Manhattan properties generally or to ESBA/ESBC specifically.

(Emphasis in original.) *see also* T. 4697 ("Let me just make clear that we've never taken the position that the allocation done by Duff & Phelps among any of the entities was improper or inappropriate nor are we challenging it."), 6944 & 7192 ("Q: I don't recall that you have claimed in the past that the suburban properties, the inferior properties were overvalued. MR. GRIGGS: That is not a claim on which we submitted expert valuation testimony.").

I. The Tax Indemnity Claims.

Claimants claim Respondents improperly obtained outsized tax relief in connection with the REIT IPO transaction. Conformed Statement of Claim and Demand for Arbitration ¶ 40 ("The Malkins thereby planned to shift the risk from their undesirable investments to the ESB, dispose of those properties, and secure for themselves $97.7 million in potential tax relief.") & ¶ 78; T. 124 ("a tax protection agreement for a person who stands to earn I believe 73 million units struck me as overly generous."); C-89.

Keltner explained the tax protection agreement as follows:

> It's an undertaking by the, you could say the REIT and by the operating partnership, it's an undertaking by the enterprise to reimburse certain sponsoring parties for phantom income that they would recognize on the disposition of certain identified assets.
>
> In this case the tax protected parties were essentially Malkin family members and another family whose name I can't remember now, and they applied to I think four assets, which is somewhat marginal in the portfolio, they were the tax protected assets because they were the ones that had very large embedded phantom income for those tax protected parties.

> We were advised that – and we've seen that this type of tax protection is a relatively customary feature in consolidations like this and the obligation for reimbursement arises if the enterprise chooses to sell one of those properties. It's another part of the equation in determining whether or not to sell.
>
> The obligation expires after a fairly substantial period of time. I think it varied with different assets, but it was more or less the lifetime of Peter Malkin and his wife Isabel or 12 years, whichever is sooner. So that's how the tax protection agreements arose and that's how they worked.

T. 3924-25; *see also* T. 3928, 6887 ("These are agreements that are effective only if the properties to which they relate are sold by [ESRT] and it's a standard agreement a rollup [sic] where control over sale is surrendered to an independent Board of a new entity."), 6888 ("What they're referring to is properties, I believe, that have a negative basis. So that in the event of a sale there would be a tax that would come up for which there wouldn't be any cash to pay the tax. And so is it's typical that when sponsors who have controlled properties give up their control, that they are protected for a reasonable period of time against the decision that would sell the property without their having the opportunity to prevent it. So it's to prevent a tax that would arise on a sale that the sponsors of the rollup would never have authorized because of the negative impact upon them.") & 6890.

The S-4 fully disclosed the structure and consequences of, and the reasons for, the tax protection agreement:

> As part of the consolidation, the operating partnership intends to enter into a tax protection agreement with Peter L. Malkin and Anthony E. Malkin pursuant to which the operating partnership will agree to indemnify the Wien group and an additional third party investor in Metro Center (who was one of the original landowners and was involved in the development of the property) against certain tax liabilities. . . . The company believes that it is consistent with market practice for significant contributing unitholders, such as the Malkin Group and the one additional third party investor in MetroCenter, to be indemnified against certain tax liabilities as set forth in the tax protection agreement. Accordingly, the company believes it is appropriate to enter into a tax protection agreement. The operating partnership estimates that if all of its assets subject to the tax protection agreement were sold in a taxable transaction immediately after the IPO, the amount of the operating partnership's indemnification obligations (based on tax rates applicable for the taxable year ending December 31, 2012, and exchange values, and including additional payments to compensate the indemnified partners for additional tax liabilities resulting from the indemnification payments) would

> be approximately \$97.7 million (which will be \$119.6 million beginning after December 31, 2012 if certain sunset provisions under the Internal Revenue Code are not altered or reversed).

R-231 at 56; *see also* T. 3928.

Claimants did not challenge that the tax protection agreement was (a) a relatively customary feature in consolidation" such as the REIT IPO transaction; and (b) consistent with market practice. *See* T. 151. Nor did Claimants proffer evidence that it was inappropriate or improper to provide this tax protection. Further, Claimants did not establish that they suffered any loss or damage by reason of the tax protection agreement. *See* C-193. In fact, the agreement never has been implemented. It is triggered only upon a sale of any of the referenced tax protected entities or by another referenced triggering event.[22] However, Respondents have no intention of

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22. Keltner identified another event that could trigger the tax protection:

> There's one technical addition to that, which is if one of the tax protected properties were to have a disposition that reduced the non-recourse tax basis for investors and it created phantom income, that's another way in which it could happen.
>
> That would happen if mortgage debt existing on the tax protected assets were reduced by a substantial amount, that would reduce the tax basis for those tax protected investors in a way that would cause them to recognize phantom income.

disposing of any of the referenced properties, none has been sold, and none of the other triggering events has occurred. T. 3926 & 6887 (“none of these properties have had a sale and there is no present intention of any of them being sold, but that will be decided by the independent board of [ESRT]”).

For these reasons, we conclude that Respondents did not breach contractual or fiduciary duties and obligations or commit securities or common law fraud in connection with the tax protection agreement.

J. The Claims Relating to the Release of the Malkins’ Personal Tax Guaranties.

Claimants claim the Malkins in connection with the REIT IPO transaction received personal tax indemnities worth more than $1 billion:

> Respondents received enormous financial compensation and other ad-vantages, which resolved numerous conflicts of interest in Respondents’ favor. . . . [T]he Malkins received . . . personal tax indemnities worth over $1 billion. . . .

T. 3935. However, this “technical addition” never has been triggered. T. 3927 (confirming that “to date Mr. Malkin and his wife and anyone else has not received a penny by reason of this tax protection agreement”). *Cf.* R-231 at 56 (identifying other events that could trigger the tax protection).

Conformed Statement of Claim and Demand for Arbitration ¶ 78; *see also* T. 124 & 1513; *cf.* T. 125 ("That was not as much of a concern.").

Keltner explained the backup indemnities that the Malkins, for no compensation, previously had provided as an accommodation to ESBA:

> As is customary in non-recourse mortgage loans, there's a so-called exculpatory carve-out whereas a party is personally liable for certain kind of bad acts. The core one would be declaring bankruptcy, but it could also be, you know, fraudulent misapplication of proceeds from the property.
>
> So that carve-out indemnity, sometimes called a bad-boy guarantee or a good guy guarantee or something like that, is a supplement to a customary mortgage financing. The lender otherwise has no recourse to anyone except the property, but it has a recourse to those guarantors in the event of some bad act like bankruptcy, fraud, et cetera.
>
> So someone needed to step up and give those guarantees in order for the mortgage financing to go forward. There was nothing, you know, built in-to our organizational structure that designated anyone for that purpose. And Peter [Malkin] and Tony [Malkin], you know, stepped up and did that, so that's how they became

> those, you know, carve-out guarantors with respect to mortgage financings.

T. 3928-29; *see also* T. 1514-15 ("We have provided the backstop for certain exculpatory carve-outs. By any common nomenclature, these are absolutely, positively not personally guaranteed loans. And any witness or expert, excuse me, brought in as a witness would say that these loans were positively nonrecourse loans. Within the context of mortgage lending, lending of any kind post the savings and loan crisis of the late '80s, early '90s, nonrecourse loans included things call [sic] exculpatory carve-outs, and if you look through the rest of the section, it speaks specifically to the issues; fraud, misappropriation of funds, intentional breach, bankruptcy, and certain environmental matters. And then if you read further, it states that we were already indemnified, we were doing this in a representative capacity because there was nobody else to do it. The alternative was not getting loans, the alternative was collapsing the organizational structures of the partnerships."), 2174 ("So in a representative capacity, as we had with all loans since this was put in place, we signed personal guarantees and that loans in other buildings, other properties, absolutely standard practice in non-recourse loans that you need a live person to stand behind the exculpatory carveouts. That's what we did in a representative capacity for which we're indemnified by the general partnerships on whose behalf we signed them."), 4166-67 ("I think it was an ongoing practice of theirs to step into that responsibility."), 6545, 6548 & 6638 ("My understanding of the bad boy guarantees that were signed by the supervisor, there was no obligation for them to do so and they signed them and they got relief from those guarantees upon the IPO issuance.").

Keltner explained the reasons for releasing the Malkins from these guaranties:

> Q. And in connection with the REIT transaction, what was done with respect to these so-called bad-boy guarantees that the Malkins had previously provided?
>
> A. There was a substitution of the guarantor. The Malkins were released from those guarantees and the substituted guarantor was the new enterprise, now consolidated with a substantial balance sheet now qualifying as a guarantor in the eyes of the lenders for this purpose.

T. 3930; *see also* T. 1515.[23]

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23. The S-4 provided a thorough explanation of these releases that was consistent with Keltner's testimony:

> Peter L. Malkin and Anthony E. Malkin will be released from or otherwise indemnified for liabilities arising under certain guarantees and indemnities with respect to approximately $1.11 billion of mortgage loans (including currently undrawn amounts) on the company's properties, which will be assumed by the company upon closing of the IPO and the consolidation in respect of obligations arising after the closing. The guarantees and indemnities with respect to mortgage loans of many of the existing entities, including the

> subject LLCs, were undertaken by Messrs. Malkin and Malkin to meet a conventional lender requirement which became standard only long after such entities were formed. In each case, Messrs. Malkin and Malkin provided such guarantee while serving in a representative capacity as an agent or member of a subject LLC or private entity which was then seeking a mortgage loan. . . . The company believes that since the mortgage loans relating to the guarantees and indemnities will be assumed by the company upon closing of the consolidation, and it will have greater financial resources than the individual property owning entities which are subject to the mortgage loans, it is appropriate, and consistent with market practice, for Messrs. Malkin and Malkin to be indemnified by the company's operating partnership if the lenders do not consent to the release of these guarantors and/or indemnitors. Under the organizational documents of the subject LLCs and private entities and applicable law, Messrs. Malkin and Malkin are already generally entitled to indemnification from the participants in the subject LLCs and the private entities for liabilities incurred by them in good faith and not arising out of their own willful misconduct or gross negligence, including any such liabilities under these guarantees and indemnities. In addition, in connection with future mort-gage loans that the company would enter into in connection with future property acquisitions or refinancing of the company's properties, the company intends to enter into any necessary guarantees directly, and neither Messrs. Malkin and Malkin nor any of the company's other directors, executive officers or stockholders would be expected to enter into such guarantees[.]

R-231 at 57; *see also id.* at 280 ("Peter L. Malkin and Anthony E. Malkin will be released from or otherwise indemnified for

Claimants did not submit any evidence that it was atypical, improper, or inappropriate to release the Malkins from their respective personal tax indemnities and guaranties. *Cf.* T. 151 ("Q. Do you have any knowledge as to whether those, those types of provisions are typical in rollup transactions or transactions of this kind? A. I'm not aware if they're typical. Q. Or not, right? A. Correct."). *See* T. 1518 ("This is all common practice in the real estate business and anyone who is a real estate practitioner would say the exact same.").

Plus, Claimants did not suffer any harm, injury, or damage as a result of these releases. But for these releases and the substitution of ESRT as guarantor, the Participants would have remained liable to indemnify the Malkins for liabilities under their respective guarantees. *See* R-3 at ¶ 8 ("Except as provided in paragraph 6 hereof, the Agent shall not be personally liable for any act performed in good faith on or after January 1, 1962, nor for any obligation arising on or after January 1, 1962, unless due to the Agent's wilful misconduct, gross negligence or unless arising out of any liabilities under the Securities Act of 1933. The Participants shall indemnify

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liabilities arising under certain guarantees and indemnities with respect to approximately $1.11 billion of mortgage loans (including currently undrawn amounts) on the company's proper-ties, which will be assumed by the company upon closing of the IPO and the consolidation in respect of obligations arising after the closing. The guarantees and indemnities with respect to mortgage loans of many of the existing entities, including the subject LLCs, were undertaken by Messrs. Malkin and Malkin to meet a conventional lender requirement which became standard only long after such entities were formed."); T. 1517-18, 6639, 6641 & 6886.

the Agent in proportion to their interests in The Property against any loss or liability to which the Agent may be subjected by reason of acting as Agent hereunder. Such indemnity shall not apply, however, to any loss or liability resulting from obligations incurred prior to January 1, 1962, or resulting from obligations incurred at any time in bad faith or in contravention of the terms of this agreement."); R-231 at 57; T. 1516 ("We were indemnified by the assets of the entities on whose behalf we made these guarantees."), 2714, 3930, 6735 & 6872 ("As I said before, we didn't have that ultimate liability. We were completely indemnified by the individual partnerships. We undertook it without compensation as agents in order to get the mortgages for the partnerships."); *cf.* T. 153 ("Q. Now the indemnification provisions that you talked about that Mr. Malkin, Peter Malkin and Anthony Malkin got, are you aware of their prior rights to indemnification prior to the REIT transaction? A. No, I'm not. Q. Are you aware that entity by entity they had indemnification rights from the investors? A. I was only aware of ESBA.").

Moreover, the guaranty agreements never have been triggered. So, contrary to Claimants' assertion, Conformed Statement of Claim and Demand for Arbitration ¶ 78 ("[T]he Malkins received . . . personal tax indemnities worth over $1 billion. . . ."), there is no way, based on the evidence presented, to determine the "worth" of the now-released personal tax indemnities. *See* C-193.

For these reasons, we conclude that Respondents did not breach contractual or fiduciary duties and obligations or commit securities or common law fraud in connection with the releases of the Malkins' guaranties.

K. The Buyout Claims.

Claimants contend the "buy-out" provisions in the Participation Agreements were coercive and confiscatory:

- "Respondents then forced those Participants who had opposed the transaction, including Claimants, to consent under threat that their investments otherwise would be confiscated." Conformed Statement of Claim and Demand for Arbitration ¶ 5.

- "Respondents blatantly exploited this provision to intimidate Participants into approving the proposed consolidation, and ultimately to coerce Claimants into changing their votes and consenting against their will to a proposed transaction that was clearly adverse to their interests." *Id.* at ¶ 29.

See also id. at ¶¶ 57, 65, 67, 105 & 113.

The S-4 explained how an investor triggered a buyout and the consequence of a buyout:

> The buyout provision[] for [ESBA] . . . [is] triggered only if a super-majority consent is received with respect to either the consolidation or the third-party portfolio transaction by the applicable participating group. Unanimity on the consent is required pursuant to the organizational documents of [ESBA] . . . with respect to both the consolidation and the

> third-party portfolio proposal for the consent of a participating group; therefore, a participant in [the] subject LLC[] who does not vote in favor of such proposal (**and does not change his or her vote after notice that the request supermajority consent has been obtained**) will be subject to this buyout regardless of whether either or neither transaction is consummated or the required consent of other participating groups is received.

R-231 at 14 (emphasis in original); *see also id.* at 16 ("The buyout amount, which is equal to the original cost less capital repaid, but not less than $100, is currently $100 for the interest held by a participant in [ESBA] . . . per $10,000 original investment for [ESBA]. . . .") & 317-21.

The S-4 further explained that each ESBA investor had the opportunity to avoid the buyout by changing his or her vote to "yes" after initially voting "no" or abstaining:

> Prior to an agent purchasing the participation interests of non-consenting participants for the benefit of the applicable subject LLC, the agent will give such participants not less than ten days' notice after the required supermajority consent is received by the applicable participating group in such subject LLC to permit them to consent to the consolidation or the third-party portfolio proposal, as applicable, in which case their participation interests will not be purchased.

Id. at 10; *see also id.* at 16-20 & 317-21; T. 2647 ("If you don't agree and the super majority is reached, you have to change your vote or be bought out so that the vote can be changed on behalf of [ESBA]."), 5618 & 5716-17; *In re Empire State Realty Trust, Inc. Investor Lit.*, 2013 N.Y. Misc. LEXIS 5990, at *4 (Sup. Ct. Apr. 30, 2013) ("The current transaction documents contain a provision designed to allow dissenters to avoid selling at the current Buy Out Provision price of $100. If 80% or more of the Participants consent to the transaction, it will proceed and dissenters and abstainers will have ten days after getting written notice thereof to change their votes to 'yes' and thereby gain the same benefits as the members of the supermajority."); *id.* at *15 n.1 ("Under the terms of the REIT transaction, each dissenting Participant will have the opportunity to change an initial 'no' vote or abstention to a 'yes' vote and thereby to obtain the same benefits as the Participants who voted in favor of the transaction.").

The S-4 explained the purpose of the buyout, which was included in every ESBA consent solicitation:

> These buyouts are contractual provisions expressly stated for . . . [ESBA] at the inception of the[] subject LLC[] in [its] original participating agreement[] dated . . . July 11, 1961 . . . under which the participation interests were issued. The buyout provisions were included as a practical way to permit the entity to act, while still following the then current tax advice provided to the supervisor of the subject LLCs that participants needed

> to act unanimously to permit these subject LLCs to obtain partnership status and to avoid entity level tax as a corporation for U.S. federal income tax purposes. . . . [T]he buyout provisions preserved the unanimity which was considered necessary for these tax reasons, but prevented a small minority, which might be acting for its own purposes and not in the interests of other participants, from preventing action by the large supermajority. The agents are authorized under the participating agreement[] to buy out participation interests of participants that do not consent to the action if the required supermajority consent is received, as described below. Since such buyout is necessary to provide for the required unanimous consent and is not conditioned on the transaction closing, the agent has the right to buy out participation interests from participants who do not vote "FOR" either proposal, if the required supermajority consent is received by the applicable participating group with respect to such proposal, within ten days after written notice, as described below, whether or not either or neither proposal is consummated.

R-231 at 317-18; T. 2646 & 3734; *see also* R-43 at 2 ("The buyout provisions were provided for in the organizational documents based on tax advice received over 60 years ago by the predecessor to Malkin Holdings LLC . . . at the time the entities were originally formed as required to avoid 'double taxation' as a corporation under U.S. federal income tax law that no longer applies."); T. 2637 ("[T]his does talk specifically to the method of operation dealing with the issue that unanimity was required for the acts on which ESBA could vote and to avoid the tyranny of the minority thwarting the overwhelming desires of the investors. It was designed, as it was in all of these two-tier transactions, to have a super majority which on[c]e[] reached would allow the agents to [e]ffect the will of the vast majority by buying out anybody who did not change her or his vote to be in favor of what for which the super majority had voted."), 2648-49 ("And the fact is that in order to operate under the partner[ship] laws at the time, you needed unanimity.") & 7433.

The Supervisor did not instruct vote solicitors to use the buyout provision to encourage investors to vote yes. T. 2426, 5617, 5624, 5712 & 7841; *see also* T. 160 ("There wasn't pressure either way other than the messages that there was going to be a squeeze-out once a super majority was hit.").

Plus, the Supervisor did not want to exercise the buyout provision. T. 4111 ("In all of our dealings we sought to avoid buying out investors") & 5717 ("I was always sure to emphasize that we do not want to buy you out. The objective isn't for [ESBA] to buy these interests. The objective is just to follow the guidelines of the organizing documents, including the buyout provision.").

There is no evidence the Supervisor exercised the buyout provision in this REIT IPO transaction. *See* R-43 at 2 ("No participant was bought out in connection with the solicitation of consents from the private entities and over the course of the decades long history of all of these investments, no more than a handful out of thousands of investors has ever been bought out."); T. 3743, 4111-12 & 6771-72. The Supervisor even accommodated Participants who were concerned they would not be able to change their initial "no" vote to a "yes" vote and thereby avoid the buyout. T. 5626 & 7473-74.

We conclude Claimants did not establish that the buyout provisions were improper or coercive. We also conclude Claimants did not prove they were coerced with repeated threats that the sponsor would take their investment for a mere $100 if they refused to consent to the REIT IPO transaction.[24]

To the contrary, we conclude the Supervisor was exercising "a fully disclosed and formerly agreed to contract provision" that was "included as a practical way to permit the entity to act, while still following the

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24. For some Claimants, the buyout provision and its threat of confiscation caused great distress, nervousness, and apprehension; they feared they might lose the opportunity to change their vote and "accidentally default." T. 211, 333-34, 482, 534, 551, 657, 958, 977, 1192-93, 2244, 3034-35, 4694-95, 4700-02, 4705, 5627, 5725-27, 5729, 7755, 7768, 7782-83 & 8170-71.

We do not discount this anxiety, which may well have caused real terror. However, this distress alone does not mean that Respondents thereby breached fiduciary duties or did anything improper or fraudulent in connection with the buyout provision, which served the salutary purposes set forth in the S-4. *See* R-231 at 317-18.

then current tax advice provided to the supervisor of the subject LLCs that participants needed to act unanimously to permit these subject LLCs to obtain partnership status and to avoid entity level tax as a corporation for U.S. federal income tax purposes." R-231 at 317-18; *cf. Koppel v. 4987 Corp.*, 1997 U.S. Dist. LEXIS 19487, at *10-11 (S.D.N.Y. Dec. 8, 1997) ("Plaintiffs also allege that defendant coerced Participants into acquiescing to the Solicitation by threatening that, if 90% of the Participants in each trustee's partnership share voted in favor of the Solicitation's suggestions, that trustee would purchase the interests of the non-consenting Participants for $100 for each original $10,000 participation. . . . Koppel and Greenberg each signed a contract expressly providing for the buy-out option to which they now object. Paragraph 4 of the original participation contract authorized plaintiffs' agent, in the event of a sale of the Building approved by 90% of the Participants in each group, to buy back the interest of any non-consenting Participant in his respective group for book value, but not less than b$100. In this instance, exercising a fully disclosed and formerly agreed to contract provision does not constitute a securities violation."), *aff'd in part, rev'd in part*, 167 F.3d 125, 133 (2d Cir. 1999) ("The District Court did properly dismiss Koppel and Greenberg's claims under Rule 14a-9 as they relate to many of the other alleged misstatements and omissions described in the complaints. These claims include allegations that . . . the Participation Agreement's buyback provision was unreasonably coercive. Concluding that these allegations constitute no more than state law breach of fiduciary duty claims under a thin coat of federal paint, we affirm the District Court's dismissal of the claims relating to them.").

In reaching our conclusions, we agree with the court that considered the class action challenge to this REIT IPO transaction. The court dismissed the claim that the buyout provision in this very solicitation was improper or coercive:

> [T]he absence of a right of appraisal does not mean that Participants are being subject to oppressive buy out terms. Under the terms of the REIT transaction, each dissenting Participant will have the opportunity to change an initial "no" vote or abstention to a "yes" vote and thereby to obtain the same benefits as the Participants who voted in favor of the transaction.

R-107 at 7 n.1 (*In re Empire State Realty Trust, Inc. Investor Lit.*, No. 650607/2012, slip op. at 7 n.1 (Sup. Ct. Apr. 30, 2013)).

We also agree with the court in *Schneider v. Malkin*, Index No. 605716/1 (Sup. Ct. Feb. 14, 2002), which rejected a similar claim regarding the Supervisor's buyout provision in connection with a September 2001 consent solicitation to purchase the fee title of the ESB:

> As to the claim that the vote was coercive, the "buy-out" provision was only applicable after 80% approval by the Participants. In fact, plaintiff voted in favor of the Solicitation prior to the 10 day notice of the right to purchase unless consent was given. The purpose of the

> "buy-out" is to aid in the implementation of the decisions of the overwhelming majority of the Participants and has been found not [to] be actionable.

Id. at slip op. at 4 (*citing Koppel v. 4987 Corp.*, 1997 U.S. Dist. LEXIS 19487 (S.D.N.Y. Dec. 8, 1997) *aff'd in part, rev'd in part*, 167 F.3d 125, 133 (2d Cir. 1999)).[25]

For these reasons, we conclude that Respondents did not breach contractual or fiduciary duties and obligations or commit securities or common law fraud in connection with the "buy-out" provisions in the Participation Agreements.

L. The Claims Relating to Respondents' Alleged Failure to Reimburse All Transaction Costs.

The S-4 stated, "if the REIT were approved the Participants and Legacy Investors would be reimbursed for the consolidation expenses previously paid by it out of

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25. Our May 19, 2016 order denied Respondents' motion to dismiss Claimants' claims relating to the buyout because we concluded the claims were legally sufficient, but only after (a) giving a liberal construction to Claimant's claims; (b) providing Claimants with the benefit of every possible inference; and (c) not considering any transaction documents, including the S-4.

Having given Claimants a full opportunity to present evidence in support of their buyout claims and having considered the testimony and documentary evidence presented in the 39-day hearing, we conclude Claimants did not carry their burden of proving their claims relating to the buy-out provisions.

the proceeds from the IPO and the amount reimbursed will be distributed to participants." R-231 at 9.[26]

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26. The "question and answer" in the S-4:

> Q: Who will pay transaction expenses relating to the consolidation and the IPO if the consolidation closes and the IPO is consummated, and who will pay the transaction costs relating to the consolidation and the IPO if the consolidation does not close?
>
> A: If the company acquires the property of your subject LLC in the consolidation and the IPO is consummated, the company will bear all consolidation and IPO expenses. Your subject LLC will be reimbursed for the consolidation expenses previously paid by it out of the proceeds from the IPO and the amount reimbursed will be distributed to participants in your subject LLC. Each of [ESBA], 60 East 42nd St. Associates L.L.C. and 250 West 57th St. Associates L.L.C.'s allocable share of the costs of the consolidation and IPO as of September 30, 2012 are $16,024,725, $4,286,205, and $2,232,502, respectively. The supervisor estimates that the aggregate costs of the consolidation and IPO will be approximately $75,000,000 and that each of [ESBA], 60 East 42nd St. Associates L.L.C. and 250 West 57th St. Associates L.L.C.'s allocable share of such aggregate costs will be approximately $18,600,000, $4,900,000 and $2,600,000, respectively. If the consolidation does not close or your subject LLC does not approve the consolidation, your subject LLC will bear its proportionate share of the consolidation and IPO expenses based on exchange values and will not be reimbursed for the consolidation and IPO expenses previously paid by it.

R-231 at 9-10; *see also* T. 3993-94

Claimants claim this statement was materially false:

> After completion of the IPO, Respondents made reimbursements to the consolidated properties in the REIT, which in turn distributed the reimbursed funds to the Participants and Legacy Investors. The amounts reimbursed, however, were substantially less than the actual consolidation and IPO expenses. More significantly, the Respondents immediately, upon completion of the IPO, re-imposed the full complement of transaction expenses on the Participants and Legacy Investors without disclosure to the Participants and Legacy Investors, and in direct violation of Respondents' prior statements to the contrary.

Conformed Statement of Claim and Demand for Arbitration ¶ 80.

This claimed fraud allegedly caused substantial damages:

> In the Malkins' notification to the Participants and Legacy Investors of their computation of share allocation in the REIT, the Malkins fraudulently omitted two material facts, that the market value of the REIT was $3.126 billion, and that they had reduced that amount by $234 million in consolidation and IPO expenses. The Participants and Legacy Investors thus paid the

> transaction costs twice: first, by the reduction of their distributions from earnings; and second, by the direct and immediate reduction of their equity in the new entity. As a direct result of Respondents' fraudulent transfer of the REIT expenses, ESBA's exchange value percentage of 28.23% was applied to the reduced capitalization of $2.892 billion, thereby allocating to the Participants 28.23% of the planning costs, taxes, and underwriting fees, or $66 million in transaction costs. The Legacy Investors suffered a proportionate diminution in the value of their ESRT shares for consolidation and IPO costs which were allocated to them by Respondents both fraudulently and in gross violation of their fiduciary duties

Id. at ¶ 82.

Contrary to Claimants' allegations, the investors were reimbursed for all transaction costs that ESBA incurred in the transaction. T. 5471. Each investor received a *pro rata* check to reimburse his or her share of the transaction costs – the monies came out of the REIT IPO proceeds. C-77 at G&A-6986-009820 ("This letter and enclosed check explain to you [ESBA's] final cash distribution. . . . The total distribution to be made is $40,270,992, which is comprised of: . . . $24,923,377 of reimbursement for consolidation and IPO costs previously paid by ESBA]."); T. 936-37, 3993-95 & 5472-75 (the original ESBA investors received slightly less from their ESRT stock ownership because ESRT funds were used to fund the expense reimbursements).

Relying on the "reimbursed for the consolidation expenses" reference in the S-4, R-231 at 9, however, Claimants contend they did not receive reimbursement for *all* transaction expenses. CONFORMED STATEMENT OF CLAIM AND DEMAND FOR ARBITRATION ¶ 80 ("The amounts reimbursed, however, were substantially less than the actual consolidation and IPO expenses."). Claimants assert they were not reimbursed for the following transaction expenses:

Description of alleged unreimbursed expense	**Amount**
Project planning costs	$110,000,000
Transfer taxes	$89,513,000
Underwriting fees	$20,803,888
Other REIT expenses	$13,942,500

C-193 at G&A-6986-010059; REVISED C-168 at G&A-6986-021725.

Claimants' claim is without merit. They were reimbursed for the project planning costs. T. 5273-76 & 5471-72. And they are not entitled to recover the other expenses. This portion of their reimbursement claim rests on a misreading of the S-4. *See* REVISED C-168 at 5; T. 5268-69. The S-4 did not promise that the investors would be reimbursed for *all* transaction expenses. Rather, it stated, "Your subject LLC will be reimbursed for the consolidation expenses previously paid *by it* out of the proceeds from the IPO." R-231 at 9 (emphasis added).[27]

27. Relying on this provision from the S-4 and opining that Respondents failed to reimburse all consolidation expenses,

The "subject LLC" – ESBA – did not pay transfer taxes, underwriting fees or "other REIT expenses" before the closing of the REIT IPO; the newly formed entity – ESRT – paid these expenses. C-84 (value of "restricted shares" issued in the transaction: $13,942,500); T. 2548 ("[T]he reimbursement pledge was to deal with costs that had come out of pocket up to the point of the transaction actually being – the transactions being consummated, so those would be the amounts that were paid by the entities prior to the conclusion of the deal. That's at least my recollection."), 2549 ("the intention was and the listing was for those things which came out of pocket prior to the IPO itself"), *Id.* (the reimbursement provision did not include underwriting fees), 2549-50 (the reimbursement provision did not include transfer taxes), 3994 ("Q. And what does the phrase 'previously paid out' there mean to you? A. Everything up to the closing of the IPO I would say."), 5266 ("other REIT expenses" referenced in Claimants' damage claim is the same as the "restricted" REIT shares issued in connection with the transaction) & 5272-73 (ESBA did not "previously" pay out ESRT restricted shares). *Cf.* T.

Claimants' expert inexplicably had the following incomplete quotation in his report – omitting the above two italicized words and thereby materially modifying the reimbursement provision: "'Your subject LLC will be reimbursed for the consolidation expenses previously paid . . . out of the proceeds from the IPO and the amount reimbursed will be distributed to participants in your subject LLC.'" REVISED C-168 at 5 (*quoting* R-231 at 9) (ellipsis in expert report, *but not in original*); T. 5266-69. Claimants' expert was not able satisfactorily to explain the omission of these two words. T. 5269 ("At this point I have no recollection as to why it was left out.").

5271 (Claimants' expert did not know if ESBA paid the transfer taxes or the underwriting fees). Even Claimants' witness Martin Flaxman agreed the investors got what they were promised when it came to reimbursement of transaction expenses. T. 932.

Claimants further contend Respondents improperly applied and retained a six percent override on the expense-reimbursement distributions to the Participants. C-193 at G&A-6986-010059 ("Wrongful Deduction of 6% override – $1,495,402"); *see also* T. 3995. *Cf.* T. 5293 (Claimants' expert's report does not consider alleged "wrongful deduction of the six percent override"). But the agreed-upon six percent override applied to the expense-reimbursement distributions because they were "cash distributions" to the Participants:

> The only way [ESBA] gets the money to pay the bills or to make distributions aside from the basic rent is overage rent.
>
> And the recipient of the override is not ESBC, it's the Malkin Holdings or Malkin group whoever actually owns the override.
>
> So the overrides are, as we've gone into before, there are overrides which were applicable to interest in ESBC, there are overrides which were applicable to ESBA.
>
> The 6 percent override on ESBA is on overage rent. The overage rent goes to ESBA and

> that override is then paid to the owner of that override.
>
> . . . .
>
> Malkin Holdings had a 6 percent override on overage rent on the reimbursement to [ESBA] of amounts that had been paid out by [ESBA], that not only – those amounts which had been paid out had not only reduced the distributions to the participants, but it had also reduced the override to Malkin Holdings. When the money was reimbursed, Malkin Holdings was entitled to an override on that overage rent before it was distributed to the participants.
>
> . . . .
>
> THE CHAIRMAN: This was money to which an override had never before been applied.
>
> THE WITNESS: Correct.
>
> THE CHAIRMAN: And so therefore your position is unless an override is supplied, this would be kind of override free money that doesn't deserved to be override free money.
>
> THE WITNESS: Correct.

T. 2567-69; *see also* T. 3996 ("[T]his was effectively an additional distribution. These were the foregone distributions and under the organizational documents, there is a distribution payable to the supervisor equal to six percent of additional distributions. . . . If they weren't paid as expenses for the IPO consolidation, they would have been distributed at that time.").

For these reasons, we conclude that Respondents did not breach contractual or fiduciary duties and obligations or commit securities or common law fraud in connection with the purported failure to reimburse all transaction expenses.

M. Respondents' Remaining Defamation Counterclaim.

(1) The Alleged Defamatory Statements.

Respondents allege Claimant Edelman Family Decedent's Trust (the "Edelman Trust") is liable for the alleged defamatory statements that Richard Edelman purportedly made on an October 17, 2013 telephone conference call, including the following:

- Malkin Holdings "put false information in SEC filings" and "admitted in SEC filings that they provided false SEC filings. The SEC filings said if there was no REIT, ESBA would not be able to pay the mortgage. They admitted that was false when they had 99% of the vote." Respondents' Pre-Hearing Submission at 5; Answering Statement and Counterclaims of Respondents ¶ 80.

- Richard Edelman personally had a "tremendous discussion" with the SEC "about the jeopardy the Malkins are putting the REIT in." *Id.*

- The Malkins are "thugs" and "they think that they can say things that aren't true but the rewards are so great that they will say it anyway." *Id.*

- Malkin Holdings "had a plan, to deny [Participants] information." *Id.*

Respondents further allege the Edelman Trust is liable for the alleged defamatory statements that Richard Edelman purportedly made in a November 7, 2013 telephone conference call with ESBA investors, including the following:

> "There is new information from the SEC about communications between Malkin Holdings and the SEC during the process. It's clear from what I've read that Malkin Holdings did violate securities laws. They admitted it." R-148 at 1; Answering Statement and Counterclaims of Respondents ¶ 81; Respondents' Pre-Hearing Submission at 5.
>
> "They did lie to their investors in an SEC filing that was mailed to investors where they said we used our overage or additional rent to pay the mortgage on the purchase of the fee title. They then said later in that letter that if we did not approve the REIT we maybe would

receive our additional rent or overage rent in the future. And they were forced by the SEC to correct that and admit, in fact, that we did not use that money to pay the mortgage on the fee titles. And we used our basic rent, which is guaranteed money. And this was the subject of my meeting with the FBI. It was mailed across state lines and it's therefore a federal offense, and that's why I got them involved." R-148 at 3; Answering Statement and Counterclaims of Respondents ¶ 81; Respondents' Pre-Hearing Submission at 6.

"Malkin Holdings has admitted that they violated SEC regulations. SEC repeatedly warned them that they could never defend themselves by saying the SEC approved the S-4 and S-11. Every time Malkin Holdings said they made an error, they mailed letters from investors who were supportive of the transaction and the investors in some cases made fairly outrageous or simplistic claims. Those claims are considered as having been issued by Malkin Holdings because they mailed them. And those claims violate SEC regulations. And Malkins' attorneys were forced to admit that they did violate SEC regulations and that in fact they knew that they would be considered as being issued by Malkin Holdings. Everyone should know the issues that the SEC asked Malkin Holdings about, we have not seen the answers to the questions, but these guys went 'rogue' some time ago. More to come on how Malkin Holdings answered the SEC." R-148 at 4; Answering Statement and Counterclaims of Respondents ¶ 81; Respondents' Pre-Hearing Submission at 6.

"Anyone who read documents would know [the REIT IPO transaction] was a bad transaction. SEC asked Malkin Holdings to prepare abridged documents, and it is in that material where they lied. And I don't use that term casually. And of course we all know that Peter Malkin lied when he called investors. You've heard people on the calls talking about those calls, and the SEC had a team of three lawyers who interviewed them. I don't know if they interviewed 30 or 50 of them. I know that a large number called up the SEC and related their conversation in particular with Mr. Malkin when he was making very 'tall stories,' some of which were almost humorous where he related conversations that he had with me. I've never spoken to the man. He told people that I changed my mind and I voted for the REIT. It's a bizarre story, they were like a totalitarian regime. Malkin Holdings did anything they want and they paid tens of millions to lawyers. They will find that when we tell our story people will be so offended that their victory will be Pyrrhic. They started to violate rules and laws that govern these things." R-148 at 5; Answering Statement and Counterclaims of

Respondents ¶ 81; Respondents' Pre-Hearing Submission at 6.

"We did get the details [of the other purchase offers on ESB]. That's the part that Malkin lied to you about. Malkin Holdings hid from buyers, literally. They didn't conduct any auction. They hid. They had no communication with any of the buyers." R-148 at 6; Answering Statement and Counterclaims of Respondents ¶ 81; Respondents' Pre-Hearing Submission at 6.

"When management, when Peter Malkin, calls investors and lies to them, that's a bizarre situation. The SEC has interviewed scores of investors who have related these stories." R-148 at 6; Answering Statement and Counterclaims of Respondents¶ 81; Respondents' Pre-Hearing Submission at 7.

"The Malkins will face some sort of justice about crossed lines that meant that they violated laws. We'll feel that we had a fair hearing." R-148 at 11-12; Answering Statement and Counterclaims of Respondents¶81; Respondents' Pre-Hearing Submission at 7.

"Section 4 of the Participating Agreement requires consent of all participants to renew or modify the master lease. No vote was taken. Your manager went rogue a long time ago. The SEC knows." R-148 at 12; Answering Statement

> Answering Statement and Counterclaims of Respondents ¶ 81; Respondents' Pre-Hearing Submission at 7.
>
> "They did not have your best interest at heart." R-148 at 12; Answering Statement and Counterclaims of Respondents¶ 81; Respondents' Pre-Hearing Submission at 7.
>
> "[The Malkins] are people who should not have been trusted, this all shows. This is a tainted management team." R-148 at 13; Answering Statement and Counterclaims of Respondents ¶ 81; Respondents' Pre-Hearing Submission at 7.
>
> "I hope the Malkins will explain to those who are writing the books on them. They can explain why they thought it was ok to revise the master lease without vote. In the end they 'took advantage by lying and filing false SEC filings.'" R-148 at 15; Answering Statement and Counterclaims of Respondents ¶ 81; Respondents' Pre-Hearing Submission at 7.

Respondents further claim that, on a June 5, 2014 telephone conference call with former ESBA Participants, Richard Edelman made additional defamatory statements:

- The Malkins had misinformed them by stating that they "purchased the land under the [ESB]. . . . This gets into the thicket of what transpired during those years. They owned it just like you did. It was a typical 'Malkiness' fudge. It was a deception; that seems to be the common theme when we look at these things. I'm not surprised that they say that, though I'm disappointed." Answering Statement and Counterclaims of Respondents ¶ 82; Respondents' Pre-Hearing Submission at 7.

- The REIT IPO transaction had "diluted" the value of the ESBA participants' units. Answering Statement and Counterclaims of Respondents ¶ 84; Respondents' Pre-Hearing Submission at 7.

- "The other investors are riding our coat tails." *Id.*

Contending that Richard Edelman made these alleged defamatory statements in his capacity as beneficiary of the Edelman Trust, Respondents assert the Edelman Trust is liable under the doctrine of *respondeat superior* because Richard Edelman's defamatory statements can be imputed to the Edelman Trust under principles of actual agency or apparent agency. Respondents' Post-Hearing Brief at 97-98; T. 8382 ("we contend that Richard Edelman was acting on behalf of the trust, either with authority or apparent authority, in connection with his activities").

We do not have to consider the Edelman Trust's contentions that (a) Richard Edelman did not make the purported statements; (b) Richard Edelman's purported statements were not defamatory; (c) the statute of limitations bars the defamation counterclaim; and (d) a qualified privilege "protects" Richard Edelman's purported statements. *See* Edelman Family Decedent's Trust's Post-Hearing Brief. Even if we were to find in favor of Respondents on all these issues, we conclude that the Edelman Trust is not liable for Richard Edelman's claimed defamatory statements.

(1) Richard Edelman Did Not Have Actual Authority to Make the Alleged Defamatory Statements.

In support of their assertion that Richard Edelman had actual authority to make the alleged defamatory statements, Respondents point to Anthony Malkin's testimony that trustee Howard Edelman "authorized his son [Richard Edelman] to represent his interest and – ." T. 2472. However, Respondents did not establish the origin, nature, or scope of this alleged actual agency.

The evidence reveals only that Richard Edelman was listed in a "Designee Master File Maintena[n]ce" document as a "designee." R-303; T. 8389. We do not know the nature of the "designation." Did the designation allow Richard Edelman to communicate with Malkin Holdings regarding the Edelman Trust? Did the designation allow Richard Edelman to communicate with third parties regarding the Edelman Trust? If so, under what circumstances? When Howard Edelman was not available? At other times? Was the designation in place so Respondents had someone to contact when they could not reach Howard Edelman?

Further, we do not know the origin or creator of this document, which was "a Malkin Holdings' document," *Id.*, and hence not something that Howard Edelman prepared or in any way helped to prepare. Plus, we do not know the name(s) of the person(s) who provided the information in the document. This single document, without more, is too slender a reed on which to conclude that the Edelman Trust "designated" Richard Edelman to act and speak for the Edelman Trust in all respects.

Aside from these unanswered questions, there are other gaps in determining whether Richard Edelman had "actual authority." We do not know if and how Howard Edelman authorized Richard Edelman to represent his interests in the Edelman Trust, including by communicating with others about the investment. *See* T. 2472. We do not know what, if anything, Howard Edelman communicated to Richard Edelman, whether Howard Edelman consented to Richard Edelman's performance of these acts, and whether Howard Edelman conducted himself in a manner that permitted him to exercise control over Richard Edelman. *See In re Parmalat Securities Litig.*, 594 F. Supp. 444, 451-52 (S.D.N.Y. 2009) ("[Actual authority] may be express or implied, but in either case it exists only where the agent may reasonably infer from the words or conduct of the principal that the principal has consented to the agent's performance of a particular act.") (citations and quotation marks omitted).

For these reasons, we conclude Richard Edelman did not have actual authority to speak for the Edelman Trust when he purportedly made the alleged defamatory statements. Underscoring our conclusion, Danielle Barger, the current trustee of the Edelman Trust, stated that the trustee of the Edelman Trust did not have any authority to appoint an agent. T. 8371 ("In order for a trust to have authority to appoint an agent like a Power of Attorney under the trust, it has to have a specifically enumerated clause that has that. And this trust does not have such a clause. ¶It would also have to be reflected in an accompanying Power of Attorney document reflecting the trust, but it had no authority to do that because it wasn't in the original trust.") & 8389 ("As I testified earlier, the trust did not allow him to delegate such authority.").

(2) Richard Edelman Did Not Have Apparent Authority to Make the Alleged Defamatory Statements.

To prove Richard Edelman had apparent authority in purportedly making the alleged defamatory statements, Respondents must establish that Howard Edelman – the principal – by words or conduct led people with whom Richard Edelman dealt to believe the principal granted the agent authority he purported to exercise. *See, e.g., In re Nigeria Charter Flights Contract Litig.*, 520 F. Supp. 2d 447, 464 (E.D.N.Y. 2007) ("Apparent authority is that authority which the principal holds the agent out as possessing, or which he permits the agent to represent that he possesses. . . .") (citations and quotation marks omitted).

In support of their apparent agency argument, Respondents assert Richard Edelman acted as if he were a Participant, and not merely a trust beneficiary, because (a) he operated a web site for ESBA investors that stated that it "is a website for fifty year participant investors in" ESBA, T. 1246 & 2796; R-300; (b) his August 28, 2012 e-mail referred to "we, the owners of the [ESB]," R-55 at R_000033576; (c) he referred to himself "as fellow participant investors in [ESBA]," a "fellow investor," and a "fellow participant," *Id.* at R_000033578; T. 1956, 7619 & 7586; (d) other ESBA investors referred to him as an "investor" in ESBA, R-199; T. 582; and (e) he acted as if he were a principal with respect to the Edelman Trust's underlying investment in ESBA, *see* Respondents' March 6, 2016 Memorandum at 10 ("Richard Edelman and Steven Edelman acted as if they were the principals with respect to the trust's underlying ESBA investment.").

None of this evidence gets Respondents closer to the goal line on their apparent agency assertion. There is no evidence that *Howard Edelman* "held out" to others that Richard Edelman possessed any authority to act or speak for or on behalf of the Edelman Trust. Nor is there evidence that *Howard Edelman* in any way permitted Richard Edelman to represent that he possessed any authority on behalf of the Edelman Trust. One cannot create apparent authority as an agent by his or her own actions or representations.

Plus, nothing in the record shows that Howard Edelman, an elderly man, (a) received, saw or knew about Richard Edelman's August 28, 2012 e-mail, *see* R-55; (b) participated in or knew about any of Richard Edelman's telephone conference calls with ESBA investors, *cf.* T. 660 ("I don't even know who Howard Edelman is."); or (c) knew what Richard Edelman was doing, communicating or saying "on behalf of" the Edelman Trust. And there is no evidence that Howard Edelman, by *his* words or by *his* conduct, did anything whatsoever to lead third parties reasonably to believe that *he* had granted any authority of any kind to Richard Edelman. The bottom line: Respondents do not point to any words or conduct of *Howard Edelman* that would give rise to the appearance and reasonable belief that Richard Edelman possessed any authority to act on behalf of the trust. *See In re Nigeria Charter Flights Contract Litig.*, 520 F. Supp. 2d at 463 ("the third party's reliance on the appearance of authority must have been reasonable").

Respondents contend, however, that Howard Edelman's silence alone is sufficient to create apparent authority because it established his "acquiescence" to Richard Edelman's actions and words. *See In re WorldCom, Inc.*, No. 02–13533 (AJG), 2007 WL 735021, at *5 (Bankr. S.D.N.Y. Mar. 9, 2007) ("[A] principal's silence is sufficient to create apparent authority."); *Hatton v. Quad Realty Corp.*, 100 App. Div. 609, 610 (2d Dep't 1984).

Respondents assert, for instance, that Howard Edelman "took no steps to correct Richard Edelman's representation that he was a principal, thereby implicitly consenting to it." Respondents' Post-Hearing Brief at 99; *see also* T. 2478 ("but the reality is that he never came forward and disavowed the actions of his son.") & T. 7158 ("when the information became public and was published in the print, the media, [Howard Edelman] did nothing to contradict it").

Respondents' claim is speculative and conclusory, as they impliedly concede. *See* RESPONDENTS' POST-HEARING BRIEF at 99-100 ("the only possible conclusion is that Howard Edelman, as trustee, was (or should have been) aware of his son's activities"); T. 7157 ("Howard had to know what he was doing if he authorized it"); T. 7305 ("I say that Howard Edelman negligently, recklessly and/or knowingly permitted the beneficiary of the trust, Richard Edelman, to act on behalf of and in the interest of the Edelman family trust of which Howard was the trustee.").

We do not know the state of Howard Edelman's knowledge or information regarding Richard Edelman's words and conduct. We do not know whether Howard Edelman was capable of paying attention to and follow the communications that preceded the REIT IPO transaction or any of Richard Edelman's communications. *See, e.g.*, C-58. We do not know the state of Howard Edelman's relationship with his son, Richard Edelman. And nothing in the record suggests Respondents or anyone else ever demanded that Howard Edelman stop Richard Edelman from communicating claimed falsehoods regarding Respondents – or even informed Howard Edelman that Richard Edelman purportedly was communicating falsehoods regarding Respondents. *See* T. 7295-96 (Peter Malkin never communicated with Howard Edelman).

Under these circumstances, we are unable to conclude that Howard Edelman could have taken steps, let alone effective steps, to come forward and prevent Richard Edelman from repeatedly misrepresenting that he was a Participant, an ESBA investor and/or a spokesperson for the Edelman Trust. *Cf.* T. 2478 (Anthony Malkin) ("he never came forward and disavowed the actions of his son") & 7151 (Peter Malkin) ("the counterclaims are based on statements and actions by the beneficiaries of the trust of which Howard was the trustee and who claim to be acting on his behalf saying that they were the investors, and he didn't contradict that.").

As the following summaries show, Respondents' cited cases in support of their apparent agency contention are easily distinguishable; they reveal how Respondents' apparent agency argument misses the mark:

- *Johnson v. Nationwide General Ins. Co.*, 162 F.3d 1148 (2d Cir. 1998) (*mem.*) – The principal not only "widely advertis[ed]" the apparent agent's agency and "provided [the apparent agent] with various indicia of authority"; the principal, after "cloak[ing the apparent agent] with an aura of authority on which [plaintiff] reasonably relied, failed to "terminate [the apparent agent's] apparent authority. [The principal] did not publicize its termination of [the apparent agent] to his previous customers, much less to those members of the public who, like [plaintiff], would be justified in believing that such agency continue[d] to exist."

- *In re Nigeria Charter Flights Contract Litig.* – There was a triable issue of fact to support plaintiff's apparent agency claim;

the principal knew the putative agents "actively misrepresented themselves as [plaintiff]" by – among other things – using plaintiff's name, logo and other trademarks in a manner inconsistent with the terms of a trademark license agreement. *In re Nigeria Charter Flights Contract Litig.*, 520 F. Supp 2d at 464.

- *In re WorldCom, Inc.* – The principal authorized the agent to accept service of process on behalf of the principal and then withdrew the authorization, but continued to treat the agent as its agent for service of process and failed to inform third parties it had switched registered agents:

  > It is a familiar principle of law that when one has constituted and accredited another his agent to carry on a business, the authority of the agent to bind his principal continues, even after an actual revocation, until notice of the revocation is given. In the absence of any notice of the revocation of an agency, the principal may be held liable to third persons who never dealt with the agent previous to the revocation, if they, in common with the public at large, are justified in believing that such agency continues to exist.

> . . . .
>
> [The principal] authorized [the apparent agent] as its registered agent, and, as a result, [plaintiff] was aware that [the apparent agent] was the registered agent. After the Withdrawal [in bankruptcy], the Debtors have not established that they provided adequate notice that [the apparent agent] was no longer their agent.

In re WorldCom, Inc., 2007 WL 735021, at *4-5 (citation and quotation mark omitted).

- *Hatton v. Quad Realty Corp.* – The principals knew Kaufman, the apparent agent, for years had accepted payments on their behalf; the principals designated Kaufman for this very purpose. *Hatton v. Quad Realty Corp.*, 100 App. Div. at 610 ("By acquiescing in the designation of Kaufman as the person to whom the plaintiff was to make the mortgage payments and the tax, etc., payments and by accepting payment from him over a period of years, [the principals] impliedly consented to his agency for this purpose.").

- *Murray v. Holnam, Inc.*, 344 S.C. 129, 139, 542 S.E.2d 743, 748 (2001) – "A principal may be held liable for defamatory statements made by an agent acting within the scope of his employment or within the scope of his apparent authority."

In stark contrast to these cases, there is no evidence that putative principal Howard Edelman (a) actively held out or "widely advertised" Richard Edelman as an agent; (b) provided Richard Edelman with an aura of authority or with "various indicia of authority"; (c) had actual knowledge of Richard Edelman's alleged misrepresentations; (d) authorized Richard Edelman to act as an agent of the Edelman Trust; or (e) accepted benefits as a result of Richard Edelman's actions "on behalf of" the trust.

In *Graham v. Los Angeles First Nat'l Trust & Savings Bank*, 3 Cal. 2d 37 (1935), which Respondents also cite, the court did not consider apparent agency issues:

> Since the bank held legal title to the real property which the plaintiffs agreed to purchase, it follows that in the negotiations of purchase and sale relating to the real property, the bank stood in the position of principal and the beneficiary-sellers stood in the position of agents. It is now settled . . . that a purchaser who has been induced to enter into a contract by the fraudulent misrepresentations of an agent, by rescinding the contract may recover the consideration paid from [sic] the principal, although the principal was in fact ignorant of the representations made, and although such principal had attempted to limit its liability by a clause in the contract to the effect that it would only be bound by the representations contained in the written contract.

Id. at 42-43 (citations omitted).

And in *King World Productions, Inc. v. Financial News Network, Inc.*, 660 F. Supp. 1381 (S.D.N.Y. 1987), which Respondents cite, the court found there was "apparent agency" because the putative principal led people with whom the agent dealt to believe the principal had granted the agent the authority he purported to exercise. *Id.* at 1385 ("Given [the agent's] position at [the principal] nationally, his position within the local office, and his key role during the negotiations, there was nothing to put [plaintiff] on notice that [the agent] might not have authority to execute the sublease. . . . [The principal's general counsel] directed that [plaintiff] bring the sublease to [the agent] for execution. He specifically instructed [plaintiff's] representative to take the sublease to [the agent's] office, where [the agent] would execute it."). Here, by contrast, there is no evidence that Howard Edelman led anyone with whom Richard Edelman dealt to believe Howard Edelman had granted Richard Edelman the authority to act on behalf of the Edelman Trust.

For these reasons, we conclude that Richard Edelman did not have apparent authority.

(3) Conclusion Regarding the Defamation Counterclaim.

Richard Edelman's defamatory statements cannot be imputed to the Edelman Trust under principles of actual agency or apparent agency. Accordingly, the Edelman Trust is not liable for any alleged defamatory statements that Richard Edelman purportedly made.

Two last comments warrant mention in connection with the defamation counter-claim.

First, Claimants attack the defamation counterclaim as "the legally unsupported fantasy that a trustee is responsible [for] the alleged defamation statement of one of its contingent beneficiaries, as Richard was, at the time of the alleged statements." Edelman Family Decedent's Trust's Post-Hearing Brief at 1. However, our finding in favor of the Edelman Trust on the defamation counterclaim is based, not on the legal insufficiency of the counterclaim, but because there was not enough evidence to establish Richard Edelman was acting as an "agent" of the Edelman Trust. We could not have resolved this triable issue of fact before the hearing. *In re Nigeria Charter Flights Contract Litig.*, 520 F. Supp. 2d at 464 ("the existence of apparent authority is normally a question of fact") (citation omitted).

Second, Claimants contend the panel already dismissed the defamation counter-claim against the Edelman Trust. Edelman Family Decedent's Trust's Post-Hearing Brief at 2; Edelman Family Decedent's Trust's Post-Hearing Reply Brief at 1 n.1. Not so. Our March 6, 2016 order expressly dismissed the defamation counterclaim against Richard Edelman individually; the order did not dismiss the defamation counterclaim against the Edelman Trust.

III. CLAIMANTS' DAMAGES.

We calculate Claimants' damages relating to the Overrides based on the reports of (a) Claimants' expert Jeffrey M. Risius, dated May 9, 2016, as revised on June 1, 2017, C-167 & C-245; and (b) Respondents' expert Paul

Habibi, dated May 9, 2016, R-171.

Both Risius and Habibi value the ESRT shares at $13.00 per share as of the October 2, 2013 closing date of the REIT IPO, R-171 at 5 ¶ 23 (“Price on 10/2/13[:] $13”); C-167 at 9 ¶ 23. Based on these calculations, the value of the Overrides corresponds to $23,738.00 for each ESBA Unit as of the October 2, 2013 closing date (1,826 ESRT shares times $13.00 per ESRT share). *See* R-171 at 5 (“Override Payments Owed to Supervisor[:] $23,738”).

We calculate damages on the Override claims by multiplying $23,738.00 by the number of ESBA Units that each remaining Claimant owned at the REIT IPO closing:

Name	**ESBA Units at IPO**	**Damages**
2006 Gilbert M. Edelman Inter Vivos Trust (Myrna Joy Edelman, Trustee)	5	$118,690.00
Adler Family Trust (Laurence and Shirley Adler, Trustees)	1	$23,738.00
Edelman Family Decedent’s Trust (Danielle P. Barger, Trustee	5	$118,690.00
Violet Shuker Shasha Living Trust (Violet Shasha and Vivienne Pero, Co-Trustees)	2	$47,476.00
Empire State Liquidity Fund LLC	7.8	$185,156.40
Mary Jane Fales	7	$166,166.00
Melvyn H. Halper	0.25	$5,934.50

Phyllis J. Halper	1.563	$37,102.49
Wendy S. Tamis	0.5	$11,869.00

We add pre-award simple interest to these damage awards, at the rate of nine percent *per annum*, in accordance with New York law and as Claimants' expert specified. CPLR § 5001(a); AAA Commercial Rule R-47(d)(i) ("The award of the arbitrator(s) may include: i. interest at such rate and from such date as the arbitrator(s) may deem appropriate[.])"); T. 5152 ("and then you calculate prejudgment interest from there"), 5178 ("this is prior to prejudgment interest"), 5180 ("And those are all before prejudgment interest."), 5181 ("I'm just calculating prejudgment interest at a 9 percent simple interest rate"), 5190, 5191, 5201, 5203, 5204, 5208 ("[f]actoring in prejudgment interest"), 5250; C-245 at G&A-6986-022205 ("Pre-judgment simple interest applied to the concluded damage amount is calculated as follows: . . . 9% interest is based on New York Civil Practice Law & Rules Article 5004 which indicates that interest shall be applied at the rate of nine per centum per annum (9%), except where otherwise agreed upon in a contract or provided by statute."). We award pre-award simple interest from October 2, 2013 to October 2, 2020, which is the due date for Respondents to satisfy this award.

IV. CLAIMS FOR RECOVERY OF ATTORNEY'S FEES.

The Participating Agreements do not provide for the award of attorney's fees to a prevailing party or otherwise. R-3 at ¶ 2 ("Any dispute arising out of or regarding this agreement or The Property shall be determined by arbitration in the City of New York, in accordance with the rules of the American Arbitration Association then in effect, and such decision shall be binding upon all of the parties."). In their pleadings and submissions, however, the parties sought an award of attorney's fees and related expenses incurred in this arbitration proceeding. Accordingly, we have the discretion to award attorney's fees. AAA Commercial Rule 47(d)(ii) ("The award of the arbitrator(s) may include . . . an award of attorneys' fees if all parties have re-quested such an award or it is authorized by law or their arbitration agreement.").

We granted Claimants' Overrides claims, but we denied Claimants' other extensive claims and we awarded Claimants a small fraction of the damages they sought. We also denied Respondents' remaining counterclaim after we had dismissed, or Respondents had withdrawn, their other counterclaims. Under these circumstances, in our discretion, we decline to award attorney's fees to any party.

V. AAA ADMINISTRATIVE FEES AND ARBITRATOR COMPENSATION AND EXPENSES.

The Participating Agreements, dated as of January 1, 1962, do not provide for the allocation of AAA administrative fees or arbitrator compensation and expenses. *See* R-3 at ¶ 2.

However, the parties have requested an award of costs and expenses, specifically AAA administrative fees and Arbitrator compensation and expenses.

Because substantial portions of Claimants' claims and Respondents' counterclaims have been withdrawn or denied, the reallocation of costs and expenses is not appropriate. Accordingly, the administrative fees and expenses of the AAA totaling $111,305.70 are to be borne as incurred. The compensation and related expenses of the Arbitrators totaling $909,144.51 also are to be borne as incurred.

VI. FINAL AWARD.

For the reasons set forth above, we **DENY** all of Claimants' claims, except for their Override claims. We **AWARD** damages on the Override claims to Claimants, respectively, as follows, and we direct that Respondents jointly and severally pay the following amounts to the following Claimants on or before October 2, 2020:

Name of Claimant	**Principal Amount**	**Simple Interest at the rate of 9% *per annum*, from October 2, 2013 to October 2, 2020**	**Total Award Amount to be Paid on or Before October 2, 2020**
2006 Gilbert M. Edelman Inter Vivos Trust (Myrna Joy Edelman, Trustee)	$118,690.00	$74,774.70	$193,464.70

Adler Family Trust (Laurence and Shirley Adler, Trustees)	$23,738.00	$14,954.94	$38,692.94
Edelman Family Decedent's Trust (Danielle P. Barger, Trustee)	$118,690.00	$74,774.70	$193,464.70
Violet Shuker Shasha Living Trust (Violet Shasha and Vivienne Pero, Co-Trustees)	$47,476.00	$29,909.88	$77,385.88
Empire State Liquidity Fund LLC	$185,156.40	$116,648.53	$301,804.93
Mary Jane Fales	$166,166.00	$104,684.58	$270,850.58
Melvyn H. Halper	$5,934.50	$3,738.74	$9,673.24
Phyllis J. Halper	$37,102.49	$23,374.57	$60,477.06
Wendy S. Tamis	$11,869.00	$7,477.47	$19,346.47

We **DENY** Respondents' remaining Counterclaim.

We did not address all the parties' contentions in this Final Award, including numerous allegations in Claimants' Specification of Material Misstatements and Material Omissions,[28] because we did not consider the

28. Claimants' Specification of Material Misstatements and Material Omissions identify Respondents' alleged material misstatements, misrepresentations, and omissions relating to the following:

unaddressed contentions sufficiently material to this award to warrant discussion.

This Final Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims and counterclaims not expressly granted herein are hereby denied.

This Final Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument.

Dated: August 24, 2020	/s/ Charles F. Forer CHARLES F. FORER, Arbitrator Chairperson
Dated: August , 2020	/s/ BENNETT PICKER, Arbitrator
Dated: August 24, 2020	/s/ David C. Singer DAVID C. SINGER, Arbitrator

---

- The planning and preliminary steps leading up to the REIT IPO.
- The solicitation documents.
- Communications with Participants relating to the REIT IPO.
- Voluntary overrides.

I, CHARLES F. FORER, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Award.

Dated: August 24, 2020 /s/ Charles F. Forer
CHARLES F. FORER,
Arbitrator Chairperson

I, BENNETT PICKER, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Award.

Dated: August 24, 2020 /s/
BENNETT PICKER,
Arbitrator

I, DAVID C. SINGER, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Award.

Dated: August 24, 2020 /s/ David C. Singer
DAVID C. SINGER,
Arbitrator Chairperson

We specifically addressed some of these alleged material misstatements and omissions above. *See, e.g.*, Claimants' Specification of Material Misstatements and Material Omissions ¶¶ 26 (reference in S-4 to allocation of the value of ESB between ESBA and ESBC), 41 (reference in S-4 to instructions to Duff & Phelps regarding a joint venture valuation to allocate value of ESB between ESBA and ESBC) 63 (Respondents' alleged misappropriation of the ESB trademark) & 75 (indications of interest to purchase ESBA). We conclude that the remaining alleged material misstatements and omissions are not actionable.

This Final Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims and counterclaims not expressly granted herein are hereby denied.

This Final Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument.

Dated: August , 2020	/s/ CHARLES F. FORER, Arbitrator Chairperson
Dated: August 24, 2020	/s/ Bennett Picker BENNETT PICKER, Arbitrator
Dated: August 24, 2020	/s/ David C. Singer DAVID C. SINGER, Arbitrator

I, CHARLES F. FORER, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Award.

Dated: August 24, 2020 /s/
CHARLES F. FORER,
Arbitrator Chairperson

I, BENNETT PICKER, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Award.

Dated: August 24, 2020 /s/ Bennett Picker
BENNETT PICKER,
Arbitrator

I, DAVID C. SINGER, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Award.

Dated: August 24, 2020 /s/ David C. Singer
DAVID C. SINGER,
Arbitrator Chairperson

We specifically addressed some of these alleged material misstatements and omissions above. *See, e.g.*, Claimants' Specification of Material Misstatements and Material Omissions ¶¶ 26 (reference in S-4 to allocation of the value of ESB between ESBA and ESBC), 41 (reference in S-4 to instructions to Duff & Phelps regarding a joint venture valuation to allocate value of ESB between ESBA and ESBC) 63 (Respondents' alleged misappropriation of the ESB trademark) & 75 (indications of interest to purchase ESBA). We conclude that the remaining alleged material misstatements and omissions are not actionable.

APPENDIX H — DENIAL OF REARGUMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, FILED JUNE 17, 2025

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST JUDICIAL
DEPARTMENT

Present – Hon. Sallie Manzanet-Daniels,
Justice Presiding,

Barbara R. Kapnick
Bahaati E. Pitt-Burke
Llinét M. Rosado
Kelly O'Neill Levy,
Justices.

Motion Nos.	2025-01767 2025-02122
Index Nos.	652074/23 651974/23
Case Nos.	2023-04341 2023-04352 2024-01438

IN THE MATTER OF VIRGINIA SHASHA, *et al.*,

Petitioners-Respondents,

-against-

PETER L. MALKIN, *et al.*,

Respondents-Appellants.

Appendix H

PETER L. MALKIN, *et al.*,

Petitioners-Appellants,

-against-

VIRGINIA SHASHA, *et al.*,

Respondents-Respondents.

Respondents/petitioners-appellants having moved for reargument of, or in the alternative, for leave to appeal to the Court of Appeals (Motion No. 2025-01767) and petitioners/respondents-respondents having cross-moved for sanctions (Motion No. 2025-02122), from the decision and order of this Court, entered on March 13, 2025 (Appeal Nos. 3896-3896A-3896B),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion and cross-motion are denied.

ENTERED: June 17, 2025

/s/ Susanna Molina Rojas
Susanna Molina Rojas
Clerk of the Court

APPENDIX I — STATUTORY PROVISIONS INVOLVED

9 U.S.C. § 10

§ 10. Same; vacation; grounds; rehearing

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

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; 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.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 [5 USCS § 580] may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5 [5 USCS § 572].

9 U.S.C. § 12

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

APPENDIX J — EXCERPTS OF MOTION IN THE COURT OF APPEALS OF THE STATE OF NEW YORK, DATED JUNE 23, 2025

COURT OF APPEALS OF THE STATE OF NEW YORK

Index No. 652074/23

VIRGINIA SHASHA AND VIVIENNE PERO, CO-TRUSTEES OF THE VIOLET SHUKER SHASHA TRUST, DANIELLE P. BARGER, TRUSTEE OF THE EDELMAN FAMILY DECEDENT'S TRUST, LAURENCE ADLER AND SHIRLEY ADLER, TRUSTEES OF THE ADLER FAMILY TRUST; MYRNA JOY EDELMAN, TRUSTEE OF THE 2006 GILBERT M. EDELMAN INTER VIVOS TRUST, EMPIRE STATE LIQUIDITY FUND, LLC, MARY JANE FALES, MELVYN H. HALPER, PHYLLIS J. HALPER AND WENDY S. TAMIS,

Petitioners-Respondents,

– against –

PETER L. MALKIN, ANTHONY E. MALKIN, THOMAS N. KELTNER, JR., AND ESRT MH HOLDINGS L.L.C.,

Respondents-Appellants.

Appendix J

Index No. 651974/23

PETER L. MALKIN, ANTHONY E. MALKIN,
THOMAS N. KELTNER, JR. and ESRT MH
HOLDINGS L.L.C.,

Petitioners-Appellants,

– against –

VIRGINIA SHASHA AND VIVIENNE PERO, CO-TRUSTEES OF THE VIOLET SHUKER SHASHA TRUST, DANIELLE P. BARGER, TRUSTEE OF THE EDELMAN FAMILY DECEDENT'S TRUST, LAURENCE ADLER AND SHIRLEY ADLER, TRUSTEES OF THE ADLER FAMILY TRUST; MYRNA JOY EDELMAN, TRUSTEE OF THE 2006 GILBERT M. EDELMAN INTER VIVOS TRUST, EMPIRE STATE LIQUIDITY FUND, LLC, MARY JANE FALES, MELVYN H. HALPER, PHYLLIS J. HALPER AND WENDY S. TAMIS,

Respondents-Respondents.

New York County Clerk's Index Nos. 651974/23
and 652074/23
Appellate Division–First Department Case
Nos. 2023-04341,
2023-04352 and 2024-01438

Appendix J

MOTION FOR LEAVE TO APPEAL

DEWEY PEGNO &
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ARGUMENT

An issue merits review by this Court when it is "novel or of public importance." 22 N.Y.C.R.R. § 500.22(c)(4). As explained below, the questions presented in this case are both novel and of substantial importance, and leave should be granted so that this Court can address the availability of manifest disregard of the law as a ground to challenge arbitration awards, and if available, what the doctrine actually means, an issue that has engendered confusion in New York (and elsewhere) The Court should also address the appropriate guardrails to the deference given to arbitration awards, as well as the appropriate limitations periods for petitions to vacate arbitration awards and the appropriate manner of service of such petitions.

I. LEAVE SHOULD BE GRANTED TO ADDRESS WHETHER MANIFEST DISREGARD STILL APPLIES AND, IF IT DOES, THE PANEL'S MANIFEST DISREGARD OF THE FUNDAMENTAL CONTRACT PRINCIPLE OF CONSIDERATION

This case represents an important opportunity for this Court to decide whether manifest disregard of the law still exists as a ground to vacate an arbitration award, and if it does, to define the parameters of that doctrine.

A. The Court Should Grant Leave to Determine Whether Manifest Disregard Remains a Ground for Vacating an Arbitration Award

This Court adopted "manifest disregard" standard, which is a judicially created doctrine not expressly set forth in the FAA, in *Wien v. Malkin LLP v. Helmsley-Spear, Inc., 6 N.Y.3d 471, 481 (2006).* "To modify or vacate an award on the ground of manifest disregard of the law, a court must find 'both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.'" Wien, 6 N.Y.3d at 481 (quoting *Wallace v. Buttar*, 378 F.3d 182, 189 (2nd Cir. 2004)).

However, four years later, the United States Supreme Court decided *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), which also concerned the permissible grounds for vacating an arbitration award. Many Federal Circuit courts have interpreted *Hall Street* as holding that the statutory grounds in the FAA, which do not include manifest disregard, represent the exclusive grounds for challenging an arbitration award. *Citigroup Glob. Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009) ("In the light of the Supreme Court's clear language that, under the FAA, the statutory provisions are the exclusive grounds for vacatur, manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected.").[1] Other Circuit

1. *Accord Affymax, Inc. v. Ortho-McNeil-Janssen Pharm., Inc.*, 660 F.3d 281, 285 (7th Cir. 2011); *Med. Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F. 3d 485, 489 (8th Cir. 2010); *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1324 (11th Cir. 2010).

courts, however, including the Second Circuit, have held that manifest disregard remains a viable doctrine. *Weiss v. Sallie Mae, Inc.*, 939 F.3d 105, 109 (2d Cir. 2019) ("'[M]anifest disregard remains a valid ground for vacating arbitration awards' whether applied as judicial gloss or as an independent basis." (quoting *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 451-52 (2d Cir. 2011)).[2]

Respondents believe that this Court should hold that manifest disregard is still viable. However, the Court should grant leave to decide this important and open question concerning the permissible review of arbitration awards.

B. This Appeal Presents Important Questions Concerning the Application of Manifest Disregard, If It Applies

More than 20 years ago, Justice Peter Tom noted, addressing the manifest disregard doctrine, that "the bounds of this ground have never been defined." *See Roffler v. Spear, Leeds & Kellogg*, 13 A.D.3d 308, 313 (1st Dep't 2004) (Tom, J.P., dissenting from confirmation of award). Unfortunately, despite the best efforts of this (and other) courts, this doctrinal confusion not only persists, but if anything has worsened, such that an unsuccessful party in an arbitration cannot reliably predict whether even egregious failures to follow the law will result in vacatur.

2. *Accord Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415, 418–19 (6th Cir. 2008).

In 2006, as noted above, this Court addressed the manifest disregard doctrine in *Wien & Malkin*. The Court noted the familiar principle that a mere error of law will not satisfy the doctrine, 6 N.Y.3d at 481, and adopted a test articulated in several Second Circuit cases, requiring a party seeking vacatur on this ground to show "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." *Id*. (internal quotation marks omitted). Further, again tracking the *Wallace* Court, this Court held that an award should be upheld if it was "barely colorable," *id.* at 479, as the First Department held in this case.

The problem, however, is that courts (and parties to commercial disputes) have been utterly unable to make that standard workable or intelligible. Initially, as we have noted, following the United States Supreme Court decision in *Hall Street*, several federal courts of appeals have solved the problem by holding that manifest disregard does not exist *at all*.

However, even those that (correctly) continue to apply the doctrine have reached divergent outcomes. In *Hardy v. Walsh Manning Secs., L.L.C.*, 341 F.3d 126 (2d Cir. 2003), a party to an arbitration argued that the arbitration panel had acted in manifest disregard of the law by misapplying the doctrine of *respondeat superior*. The Second Circuit held that the "award indeed contains a fundamental mistake of law," *id*. at 133, that "substantial financial liability should not be imposed upon an individual without a clear basis in law," *id.* at 134, and (over a dissent) remanded the matter to the arbitrators for clarification. *Id*. *See also id.* at 132 ("we can discern no reading of the Award that resolves its apparent contradiction with the law of respondeat superior"). *Compare Ebbe v. Concorde Inv. Servs., LLC*, 953 F.3d 172, 177-78 (1st Cir. 2020) (declining to vacate arbitration award based on alleged misapplication of *respondeat superior* by arbitrator).

Similarly, in *Weiss v. Sallie Mae,* the Second Circuit was confronted by an arbitration award that awarded damages to a plaintiff while simultaneously concluding that the plaintiff was a member of a settlement class which had granted the defendant a general release. 939 F.3d at 107-08. The Second Circuit agreed with the district court that "the arbitrator ignored the unambiguous general release provision of the settlement agreement," again remanding to the arbitrator for clarification. *Id.* at 107, 111.

New York courts have confronted these same issues. For example, the First Department vacated an arbitration award on manifest disregard grounds when a FINRA arbitration panel ruled that the New York Labor Law applied to a deferred equity-based compensation scheme, holding that the scheme did not constitute "wages" under the statute, and hence there was no basis to award attorneys' fees. *Lerner v. Credit Suisse Secs. (USA), LLC*, 193 A.D.3d 649, 650 (1st Dep't 2021). And that Court has also held that a panel acted in manifest disregard of the law when an arbitration panel refused to enforce the terms of a settlement agreement, *Citigroup v. Fiorilli* 151 A.D.3d 665, 666 (1st Dep't 2017).

These First Department cases, if anything, underscore the random quality of results generated by the doctrine as currently formulated, since the case for *vacatur* here is at least as strong—and arguably stronger—than in those cases. Here, the legal principles surrounding consideration—that any consideration is sufficient, *Caisse Nationale de Credit Agricole-CNCA v. Valcorp*, Inc., 28 F.3d 259, 265 (2d Cir. 1994)—are simple and well-known to a first-year law student. Nor could there be any dispute about whether the Panel knew of these principles, or their applicability to this case. Further, the Panel made express findings—not surprisingly, given the record evidence—that Malkin Holdings had both given up fees and suffered a "detriment" in connection with securing the overrides. (R.32-33). In short, here, as in *Hardy*, "no reading of the facts," even as found by the Panel, can support the conclusion that consideration is lacking.

But here, the arbitrators decided that consideration was lacking for reasons that cannot withstand the slightest scrutiny. As explained above, the S-4 stated that "the supervisor did not pay any consideration for the overrides." This was and is an accurate statement, since consenting Participants did not receive a payment, as such, in exchange for the overrides; rather they received prospective fee reductions, which as the Panel itself recognized, were implemented *for years*.[3]

3. *See also* R.143 ("that charge would not apply to those [Participants] who entered into the voluntary override").

The Panel's ground for rejecting this point was wholly irrational. Its sole response was to say that if this were true, the S-4 "should and presumably would have stated expressly that the Supervisor had provided a benefit in exchange for the Overrides. Otherwise, the S-4 is substantially misleading."[4] Thus, the Panel's core holding was that even though by the Panel's own finding there was consideration, the failure adequately to describe that consideration in a later securities filing nullified that consideration as a matter of law, retroactively invalidating the agreement. That could no more be the case than if Malkin Holdings claimed consideration existed merely because it asserted in the S-4 that there *was* such consideration.

The First Department accepted this rationale as sufficient to support the Award, holding that it "more than meets the requirement that there be at least a barely colorable justification for the outcome reached." (Pegno Aff. Ex. F at 3).[5] In other words, reading an English sentence stating that "the Supervisor did not pay any consideration for the overrides" to mean "there was no consideration for the overrides" is "colorable," *even if the Panel knew and conceded that consideration existed. But see Nappa Constr. Mgmt., LLC v. Flynn*, 152 A.3d 1128, 1134-35 (R.I. 2017) (vacating arbitration award since it "reache[d] an irrational result in that

4. R.37-38 (footnote omitted).

5. The First Department did not address at all the second, independent source of consideration for the overrides, Malkin Holdings' increase in its supervisory services.

it contradicts the arbitrator's factual findings"). This case thus squarely raises the question of what, exactly, does that "requirement" mean and can it, as in this case, be satisfied by *any* purported rationale that the arbitrators express, no matter how obviously flawed or logically inconsistent. As noted, the difficult line drawing involved in deciding this issue has made for sometimes tortured and often inconsistent rulings by courts in this and other jurisdictions. *Compare Steyn v. CRTV, LLC,* 175 A.D.3d 1, 8-9 (1st Dep't 2019) (reversing trial court vacatur of attorneys' fee award where arbitrator could have determined that AAA rules and not New York law controlled, which conclusion "was not unreasonable.") *and Interactive Brokers LLC v. Saroop,* 969 F.3d 438, 442, 444 (4th Cir. 2020) (district court remanded matter to arbitrators for clarification, then vacated ensuing award for manifest disregard "because the law is clear that there is no private right of action to enforce FINRA rules"; circuit court reversed where parties arguably incorporated those rules in their contract; "[e]ven if this is not the only interpretation of the contracts, it suffices given our deferential review.") *with StoneMor, Inc. v. Int'l Bhd. of Teamsters, Local 469*, 107 F.4th 160, 163 (3d Cir. 2024) ("It's a steep climb to vacate an arbitration award. Nevertheless, our review is 'not toothless,' and we will reverse if the arbitrator 'rewrites the contract.' Here, the arbitrator did just that.") (internal quotation marks omitted); *Nappa Constr. Mgmt.,*152 A.3d at 1133-34 (vacating award that was contrary to clear terms of contract, holding that "[w]here an arbitrator's decision conflicts with the express terms of the agreement, it fails to draw from the essence of the agreement" and thus "manifestly disregard[ed]" parties' agreement).

The appeal raises other, related issues. For example, both Supreme Court and the First Department stressed the fact that the statement regarding the supervisor not paying consideration for the overrides was in an SEC filing, as did the Panel. It is hard to view matters otherwise given that both courts ignored objective reality in ruling that that statement in the S-4 controlled over historical fact. This case thus presents the issue of how much reliance can be put on an SEC filing to support an arbitration award, which is likewise a matter worthy of this Court's review—especially if it is now actually the law here in New York that any securities filing must describe the consideration given for a referenced contract, at pains of retroactive contract nullification.

II. LEAVE SHOULD BE GRANTED FOR THIS COURT TO ADDRESS THE TIMELINESS ISSUES RAISED BELOW

A. The Petition Below Was Timely Under the CPLR, and Leave Should be Granted to Address That Issue

Respondents' original federal petition was timely under New York's rules for confirmation, modification or vacating an arbitration award. Under CPLR § 7511(a), the original Petition was timely filed on November 23, 2020 because it was filed within ninety days of delivery of the Award to Respondents.

CPLR § 7511(a) provides "[a]n application to vacate or modify an award may be made by a party within ninety days after its delivery to him." Courts have held that CPLR § 7511 "does not apply a service requirement to the institution of a vacatur action." *Orange & Rockland Utils., Inc. v. Local 503, Int'l Bhd. Of Elec. Workers*, No. 05 CIV. 6320, 2006 WL 1073049, at *3 (S.D.N.Y. Apr. 21, 2006) (denying dismissal of motion for vacatur based on service after 90 day limitations period); *see also Safari Motor Coaches, Inc. v. Corwin*, 617 N.Y.S.2d 289, 290 (Sup. Ct. Saratoga Cty. 1994) (petition to vacate filed within 90-day limitation period was timely and service on respondent 92 days after receipt of award was "irrelevant"). That is, the petition must be *filed*—not served—within 90 days.

Here, Respondents filed their original action on November 23, 2020, and thus it was timely under CPLR § 7511(a). When the federal court dismissed the federal petition without prejudice, and Respondents filed their application in State court the very day of the federal court's dismissal order. That too, was timely under CPLR § 205(a), which provides that a timely commenced action that is dismissed on grounds including lack of subject matter jurisdiction remains timely if filed and served within six months.

Thus, Respondents' original petition was timely under CPLR § 7511 and their subsequent state court petition was timely under CPLR § 205. For purposes of the CPLR, the MTD Claimants' assertion that they were served more than 90 days after issuance of the arbitration award is simply irrelevant.

Furthermore, the law is clear that the CPLR's time period, and not the FAA's, applies in this Court. That is so because, while the FAA's substantive standards apply, the FAA does not displace state arbitration statutes in their entirety, and state rules governing the commencement of a petition to confirm and vacate still apply. *See Keilly v. Sands Bros. & Co., Ltd.*, 803 N.Y.S. 2d 385, 386 (Sup. Ct. N.Y. Cty. 2005) ("absent a clear federal mandate to the contrary, the state's procedural rules which govern the commencement of a civil proceeding, control.") (internal citation omitted). Notably, those rules include those relating to the deadlines for bringing such a proceeding. *See A Better Way Wholesale Autos, Inc. v. James Saint Paul*, No. CV1660311881, 2016 WL 8135391, at *4 (Conn. Super. Ct. Dec. 30, 2016) (state procedural deadline applies and not FAA's; "Requiring the movant to file within thirty days does not conflict with the primary purpose of the FAA, which is to encourage arbitration to the fullest scope of the parties' agreement to arbitrate.") (internal quotation marks omitted); *Atl. Painting & Contracting Inc. v. Nashville Bridge Co.*, 670 S.W.2d 841, 846 (Ky. 1984) ("The Federal Arbitration Act covers both substantive law and a procedure for federal courts to follow where a party to arbitration seeks to enforce or vacate an arbitration award in federal court. The procedural aspects are confined to federal cases.") (emphasis omitted).

The interplay between the FAA's time period and that of the CLPR where there was a non-merits-based dismissal of an earlier federal petition has not, to Respondents' knowledge, been addressed by any other court. The Decision did not expressly deal with that interplay, but conclusorily rejected Respondents' arguments. Given the Supreme Court's ruling in *Badgerow* limiting federal subject matter jurisdiction over petitions to review arbitration awards, it will likely be more common that such federal court dismissal will take place. Thus, this is likewise a matter that deserves this Court's review.

B. Leave Should Be Granted to Address the Circumstances Under Which Attorneys Can Consent to Service

1. The Petition was Served on the MTD Claimants' Attorney, Who Consented to Service

Section 12 of the FAA provides: "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C. § 12. It is undisputed that Mr. Griggs was the MTD Claimants' attorney and was thus authorized to receive service.

Moreover, contrary to the Decision, the MTD Claimants' attorney was properly served by email. Most (if not all) of the pleadings and correspondence during the six-year Arbitration and Tolling Action were exchanged electronically and Mr. Griggs never declined to accept service—in fact, he *insisted* that Respondents' counsel communicate with him via email.

Courts have exercised their discretion in permitting email service to counsel in the context of petitions to vacate arbitration awards even in the absence of express written consent. For example, in a case with very similar facts, petitioners emailed the petition/motion to vacate an arbitration award to respondent's counsel one day before the three-month statutory deadline set by Section 12 of the FAA but did not personally serve respondent until some weeks later (beyond the statutory deadline). *Day & Zimmerman, Inc. v. SOC-SMG, Inc.*, No. CIV.A. 11-6008, 2012 WL 5232180, at *4 (E.D. Pa. Oct. 22, 2012). The court rejected respondent's contention that service was ineffective, noting

> Generally, email service of process is insufficient to provide adequate notice to the party served unless the other party has agreed in writing to accept electronic service . . . Here, the underlying arbitration spanned over two years, during which time email was used as the parties' primary mode of communication without fault. The Court can find no reason why this same agreement should not apply to the present litigation since the action directly involves the Arbitration.

Id. (internal citation omitted). Importantly, the court also noted the gamesmanship in which respondent engaged by not objecting to email service until after the deadline for service expired—exactly with MTD Claimants' counsel did here. *Id. See also Corinthian Colls., Inc. v. McCague*, No. 09 C 4899, 2010 WL 918074, at *2 (N.D. Ill. Mar. 4, 2010) (finding email sufficient in absence of express consent where movant emailed the petition, a cover letter providing notice of the filing, and a "notice of electronic filing confirming the filing of the petition" to opposing counsel, and opposing counsel had consented to electronic service in the arbitration proceeding); *U.S. v. Machat*, No. 08 Civ. 7936 (JGK), 2009 WL 3029303, at *4 (S.D.N.Y. Sep. 21, 2009) (approving service by email and service on the defendant's attorney); *Scott v. Carpanzano*, 556 F. App'x 288, 293 (5th Cir. 2014) (permitting email service on attorney and "concluding that Mr. Carpanzano received notice reasonably calculated to apprise him of the pendency of the action and afford him an opportunity to present his objections") (citation omitted). *Cf. Hamilton v. Navient Sols., LLC*, No. 18 Civ. 5432 (PAC), 2019 WL 633066, at *4 (S.D.N.Y. Feb. 14, 2019) (emphasis added) (dismissing petition for vacatur where service was one day after a deadline but noting that "Hamilton could have emailed her application for vacatur to Navient or otherwise provided notice on time").

Neither Supreme Court nor the First Department addressed *Day & Zimmerman*, Respondents' argument that Mr. Griggs' conduct amounted to gamesmanship, or the fact that Mr. Griggs represented the MTD Claimants in a related, pending action at the time he was served with the Petition. The Decision merely relied on contrary authority, *Dalla-Longa v. Magnetar Cap. LLC*, 33 F.4th 693, 695 (2d Cir 2022), and did not address the conflict with those other cases. *See Aperion Care, Inc. v. Senwell Senior Invest. Advisors*, No. 22 C 3120, 2022 WL 10505696, *2 (N.D. Ill. Oct. 17, 2022) (noting conflict between *Day & Zimmerman* and other cases and *Dalla-Longa* and other cases). To our knowledge, there is no New York authority, let alone Court of Appeals authority, addressing this conflict. Both the bench and bar would benefit from this Court's guidance on this issue, particularly given the everyday use of email communications between counsel.

2. Courts Excuse Service in the Context of Arbitrations Where There Is Actual Notice and No Prejudice

It is not disputed that the MTD Claimants had actual notice of the motion to vacate and were not prejudiced by any delay in service. New York State courts have found these considerations relevant to service issues in other contexts. *See, e.g., Goldstein v. Columbia Presbyterian Med. Ctr.*, 1 A.D.3d 188, 188 (1st Dep't 2003) (granting extension to effect service where "Appellant failed to show any prejudice, particularly in light of evidence in the record that she had actual notice of the action."). Leave should be granted to permit this Court to provide guidance on the lack of prejudice from a technical defect in service in the context of post-arbitration proceedings, which federal courts have addressed, but as to which Respondents are aware of no New York State authority. *See In re InterCarbon Bermuda, Ltd. & Caltex Trading & Transp. Corp.*, 146 F.R.D. 64, 71 (S.D.N.Y. 1993) ("[T]he Second Circuit's decisions . . . establish that imperfect service of process in an arbitration case may not be fatal where jurisdiction over the arbitration is clear and where notice is sufficient to apprise the opposing party of the action being taken.") (citing *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Lecopulos*, 553 F.2d 842, 845 (2d Cir. 1977) and *Victory Transp., Inc. v. Comisaria*

General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964)); *see also Marine Trading Ltd. v. Naviera Commercial Naylamp S.A.*, 879 F. Supp. 389, 392 (S.D.N.Y. 1995) ("The Second Circuit has held that standards for service are to be liberally construed in the context of arbitration.") (citing *Grammenos v. Lemos*, 457 F.2d 1067, 1070 (2d Cir. 1972) and *InterCarbon Bermuda*).

CONCLUSION

For all the foregoing reasons, this Court should grant leave to appeal.

Dated: New York, New York
June 23, 2025

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KRAMARSKY LLP
/s/
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APPENDIX K — EXCERPTS OF APPELLANTS' MEMORANDUM OF LAW, DATED MARCH 24, 2025

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVSION—FIRST DEPARTMENT

Appellate Case Nos.:
2023-04341
2023-04352
2024-01438

New York County Clerk's
Index No. 651974/2023

PETER L. MALKIN; ANTHONY E. MALKIN;
THOMAS N. KELTNER, JR.;
AND ESRT MH HOLDINGS L.L.C.,

Petitioners-Appellants,

-against-

VIRGINIA SHASHA AND VIVIENNE PERO,
CO-TRUSTEES OF THE VIOLET SHUKER
SHASHA TRUST; DANIELLE P. BARGER,
TRUSTEE OF THE EDELMAN FAMILY
DECEDENT'S TRUST; DEBRA B. ADLER,
TRUSTEE OF THE ADLER FAMILY TRUST;
MYRNA JOY EDELMAN, TRUSTEE OF THE 2006
GILBERT M. EDELMAN INTER VIVOS TRUST;
EMPIRE STATE LIQUIDITY FUND, LLC; MARY
JANE FALES; MELVYN H. HALPER; PHYLLIS J.
HALPER; AND WENDY S. TAMIS,

Respondents-Respondents.

New York County Clerk's
Index No. 652074/2023

VIRGINIA SHASHA AND VIVIENNE PERO, CO-TRUSTEES OF THE VIOLET SHUKER SHASHA TRUST; DEBRA B. ADLER, SUCCESSOR TRUSTEE OF THE ADLER FAMILY TRUST; MYRNA JOY EDELMAN, TRUSTEE OF THE 2006 GILBERT M. EDELMAN INTER VIVOS TRUST; EMPIRE STATE LIQUIDITY FUND, LLC; MARY JANE FALES; MELVYN H. HALPER; PHYLLIS J. HALPER; AND WENDY S. TAMIS,

Petitioners-Respondents,

-against-

PETER L. MALKIN; ANTHONY E. MALKIN; THOMAS N. KELTNER, JR.; AND ESRT MH HOLDINGS L.L.C.,

Respondents-Appellants.

APPELLANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR REARGUMENT OR, IN THE ALTERNATIVE, LEAVE TO APPEAL TO THE COURT OF APPEALS

***

Senior Invest. Advisors, No. 22 C 3120, 2022 WL 10505696, *2 (N.D. Ill. Oct. 17, 2022) (noting conflict between courts on whether consent to service by email during an arbitration permits email service of petitions to confirm or vacate). Finally, New York Courts have not addressed whether prejudice is a consideration in determining whether to dismiss a petition as untimely, which has been a consideration New York courts have used in determining other issues of the timeliness of service.

ARGUMENT

I. THE COURT SHOULD GRANT REARGUMENT OF ITS CONFIRMATION OF THE PANEL'S RULING THAT THERE WAS NO CONSIDERATION FOR THE OVERRIDES

"Motions for reargument are addressed to the sound discretion of the [court that] decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision." *Rodney v. N.Y. Pyrotechnic Prods. Co.*, 112 A.D.2d 410, 411 (2d Dep't 1985) (citation omitted); *see Belrose Fire Suppression, Inc., v. Stack McWilliams, LLC*, 51 A.D.3d 485, 485 (1st Dep't 2008) (affirming grant of motion for reargument where court "determin[ed] that it had overlooked or misapprehended the relevant facts, and mistakenly arrived at its prior decision granting . . . summary judgment") (citations omitted); *Foley v. Roche*, 68 A.D.2d 558, 567 (1st Dep't 1979) ("A motion for reargument . . . is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law."); CPLR 2221(d).

We respectfully submit that this Court erred in ruling that the Panel did not act in manifest disregard in ruling that there was no consideration for the overrides.

As Appellants pointed out in the appellate briefing, an arbitral panel may not act in "manifest disregard of the law." *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 452 (2d Cir. 2011). "A court may infer that the arbitrators manifestly disregarded the law if it finds that the error made by them is so obvious that it would be instantly perceived by the average person qualified to serve as an arbitrator." *Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103, 108 (1st Dep't 2003) (alterations and quotation marks omitted).

"To modify or vacate an award on the ground of manifest disregard of the law, a court must find 'both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.'" *Wien v. Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 481 (2006) (quoting *Wallace v. Buttar*, 378 F.3d 182, 189 (2nd Cir. 2004)). Contrary to the Decision, this standard is met here.

First, all parties and the Panel itself repeatedly acknowledged that Malkin Holdings gave up fees to which it would have been entitled "in exchange" for overrides from consenting Participants. Period. The documents show it,[5] the testimony shows it,[6] and the issue was never contested.

In fact, *the Panel itself repeatedly recognized that these fee reductions had occurred*[7] and Respondents

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5. *E.g.*, R.248 ("[Malkin Holdings] will assign, effective January 1, 1992 through January 5, 2076, to the Participant a *pro rata* portion of [Malkin Holdings'] additional compensation from the scheduled reductions in Master Lease rent to become effective in 1992 and 2013."); R.252 ("If all Participants execute Authorizations, [Malkin Holdings] will forego the right to receive $45,017 a year from 1992 to 2013, and $52,405 a year thereafter through January 5, 2076, and Participants will receive such amounts. [Malkin Holdings] will be obligated to assign such sums to each authorizing Participant…."); R.350 ("Any Participant whose interest in [ESBA] is not already subject to this voluntary program may now approve the same voluntary program which is in effect for more than 81% of the Participants. An approving Participant will receive now the pro rata payment from [Malkin Holdings] retroactive to the January 1, 1992 start of this program of approximately $140 for each original $10,000 participating interest.").

6. R.129 (consideration consisted of "an assignment by the supervisor of a portion of its override. It was the portion attributable to the increased profit from reducing debt service"); R.125 ("it was just $50,000 a year surrender by Malkin Holdings without any assurance that there would ever be[] a return on that you might say."); R.141 (assignment of pro rata portion of additional compensation "was part of the consideration for the voluntary consents")).

7. R.32. *See also* R.33 ("the incentive-compensation reductions from 1991 to 2001 totaled $140 for each original $10,000 unit").

conceded the same.[8] Yet, incredibly, the Panel nonetheless held that consideration was lacking. The Panel's purported rationale for this holding—which was this Court's sole basis for affirmation confirmation of the Award on the merits—cannot save the Award. As noted in the Decision, the S-4 stated that "the supervisor did not pay any consideration for the overrides." This was and is an accurate statement, since consenting Participants did not receive a payment, as such, in exchange for the overrides; rather they received prospective fee reductions, which as the Panel itself recognized, were implemented.[9] The Panel nonetheless found this "argument" "unpersuasive" on the sole ground that the S-4, "which Respondents duly filed with the SEC" and sent to Participants, "should and presumably would have stated expressly that the Supervisor had provided a benefit in exchange for the Overrides. Otherwise, the S-4 is substantially misleading."[10] The Panel cited no authority of any kind for this holding, which is tantamount to holding that statements in securities filings control over undisputed facts, and a securities filing must describe the consideration underlying a contract referenced in that securities filing for the contract to remain valid. These matters were not addressed in the Decision, which simply accepted the Panel's holding at face value, and did not address *at all* the fact, acknowledged in the Award

8. Brief for Respondents, dated January 2, 2025 at 21 (conceding fee payments started in 2009 and were in effect for five years).

9. *See also* R.143 ("that charge would not apply to those [Participants] who entered into the voluntary override").

10. R.37-38 (footnote omitted).

and not disputed, that Appellants had in fact given up substantial fees in exchange for the overrides.

Equally flawed was the Panel's rejection of another form of consideration for the overrides which this Court also did not address in the Decision, namely that the Supervisor substantially increased the supervisory services it provided to Participants. Here, too, it was undisputed that this had occurred.[11] And, here, also, the Panel recognized as much, but nonetheless found consideration lacking because non-consenting Participants also received those benefits.[12] This (again) makes no sense at all: that the few Participants who did not consent to the overrides received, in effect, a free benefit does not somehow nullify consideration. *See* Restatement (Second) of Contracts § 71(4) & cmt. e (1981) ("It matters not from whom the consideration moves or to whom it goes. If it is bargained for and given in exchange for the promise, the promise is not gratuitous."). Once again, the Decision did not address this point.

Accordingly, the Panel's ruling on consideration was in manifest disregard of the law; this Court overlooked or misapprehended the foregoing undisputed authorities in confirming that ruling.

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11. R.132 (consideration received from "[t]he benefit to the investors of continuing an expanded supervisory services."); R.129 ("The other part of the consideration which was, you know, presented in this context was, the supervisors'[] continuing service in an expanded array of services as, you know, property management became more demanding and various reasons.")).

12. R.37.

II. THE COURT SHOULD GRANT REARGUMENT BECAUSE THE PETITION WAS TIMELY FILED

Respectfully, this Court overlooked controlling legal principles and the operative facts in determining that Appellants' petition was untimely.

Appellants' original federal petition was timely under CPLR § 7511(a) because it was timely filed within ninety days of delivery of the Award to Appellants. Courts have held that CPLR § 7511 "does not apply a service requirement to the institution of a vacatur action." *Orange & Rockland Utils., Inc. v. Loc. 503, Int'l Bhd. Of Elec. Workers*, No. 05 CIV. 6320, 2006 WL 1073049, at *3 (S.D.N.Y. Apr. 21, 2006). That is, the petition must be *filed*—not served—within 90 days. This Court's Decision does not acknowledge that Appellants' original petition would have been timely under CPLR § 7511(a). Similarly, Appellants' failure to personally serve their petition by November 23, 2020 is irrelevant for purposes of the CPLR.

When the federal court dismissed the federal petition without prejudice for lack of subject matter jurisdiction because of a recent Supreme Court ruling, Appellants filed their state court application the very same day. Thus, Appellants' state court petition was timely under CPLR § 205(a). *See Hakala v. Deutsche Bank AG*, 343 F.3d 111, 116 (2d Cir. 2003) (remedial provisions of CPLR § 205(a) apply to an action to vacate an arbitration award under CPLR § 7511).

This Court also misapprehended the clear law that the CPLR's time period, and not the FAA's, applies in this Court. That is so because, while the FAA's substantive standards apply, the FAA does not displace state arbitration statutes in their entirety, and state rules governing the commencement of a petition to confirm and vacate still apply. *See Keilly v. Sands Bros. & Co., Ltd.*, 803 N.Y.S. 2d 385, 386 (Sup. Ct. N.Y. Cty. 2005) ("absent a clear federal mandate to the contrary, the state's procedural rules which govern the commencement of a civil proceeding, control.") (internal citation omitted). Notably, this principle applies to rules relating to the deadlines for filing such a proceeding. *See A Better Way Wholesale Autos, Inc. v. James Saint Paul*, No. CV1660311881, 2016 WL 8135391, at *4 (Conn. Super. Ct. Dec. 30, 2016) (state procedural deadline applies and not FAA's); *Atl. Painting & Contracting Inc. v. Nashville Bridge Co.*, 670 S.W.2d 841, 846 (Ky. 1984) ("The procedural aspects [of the FAA] are confined to federal cases.") (emphasis omitted). This Court did not address, and appears to have overlooked or misapprehended, this dispositive point.

Finally, in ruling that Appellants' Petition was untimely, this Court did not differentiate between Danielle Barger, trustee of the Edelman Trust, who is represented by different counsel than the other Claimants, and those other Respondents (the "MTD Claimants", referred to in the Decision as the "Shasha parties"). However, it is not disputed that Barger's counsel accepted service of the federal court petition before the expiration of the FAA limitations period, so there is no dispute that she was timely served.[13]

13. R.503-504.

III. THIS COURT OVERLOOKED OR MISAPPREHENDED THE LAW IN RULING THAT THE MTD CLAIMANTS WERE NOT TIMELY SERVED

A. The Petition Was Served on the MTD Claimants' Attorney

Appellants timely provided email service to the MTD Claimants' attorney, who was authorized to receive service, within the three-month deadline of Section 12 of the FAA. *See* 9 U.S.C. § 12. Case law recognizes that an attorney can impliedly agree to accept email service in various contexts. *United States v. Bosurgi,* 343 F. Supp. 815, 818-19 (S.D.N.Y. 1972) (state court attorney "impliedly authorized" to receive service in related federal case for "the very object" for which attorney was originally retained); *In re Focus Media Inc.* 387 F.3d 1077, 1083 (9th Cir. 2004) ("When a defendant takes an active role in a [bankruptcy] case and appears through counsel in a proceeding integrally related to the case, such counsel is implicitly authorized to receive process" (citation omitted)); *Luedke v. Delta Air Lines, Inc.*, 159 B.R. 385, 395 (S.D.N.Y. 1993) (in Chapter 11 case, "attorney's activities on behalf of a client in proceedings in one court may indicate implied authority to receive service of process in integrally related litigation in another court"). The Decision did not deal with this case law.

B. Email Service was Appropriate

Contrary to the Decision, the MTD Claimants' attorney was properly served by email. Federal Rule of

Civil Procedure 5(b)(2)(E) allows for service by any other means, including electronic means, where the person served consents to the service in writing. Most (if not all) of the pleadings and correspondence during the six-year Arbitration (and the related federal action) were exchanged electronically and Mr. Griggs never declined to accept service.

Indeed, courts have permitted email service to counsel in the context of petitions to vacate arbitration awards even in the absence of express written consent. *See Day & Zimmerman, Inc. v. SOC-SMG, Inc*, No. CIV.A. 11-6008, 2012 WL 5232180, at *4 (E.D. Pa. Oct. 22, 2012) (allowing email service of a petition/motion to vacate award; "the underlying arbitration spanned over two years, during which time email was used as the parties' primary mode of communication without fault"; court observed respondents appeared to engage in gamesmanship by waiting twelve days to reject email service). *See also Corinthian Colleges, Inc. v. McCague*, No. 09 C 4899, 2010 WL 918074, at *2 (N.D. Ill. Mar. 4, 2010) (email sufficient without express consent where movant emailed petition, cover letter providing notice of filing, and "notice of electronic filing confirming the filing of the petition" and counsel had consented to electronic service in underlying arbitration); *U.S. v. Machat*, No. 08 Civ. 7936 (JGK), 2009 WL 3029303, at *4 (S.D.N.Y. Sep. 21, 2009) (approving service by email and service on the defendant's attorney); *Scott v. Carpanzano*, 556 F. App'x 288, 293 (5th Cir. 2014) (permitting email service on attorney and "concluding that Mr. Carpanzano received notice reasonably calculated to apprise him of the pendency of the action and afford him an opportunity to present his objections").

Mr. Griggs never responded to Respondents' November 23, 2020, email asking if he would consent to service and then waited 23 days after the service deadline to inform Respondents that service was allegedly untimely. Respectfully, this Court overlooked the foregoing principles (which it did not directly address in the Decision) and should have held that email service here was proper.

C. Reargument Should Be Granted Because this Court Overlooked That Courts Excuse Service in the Context of Arbitrations Where There Is Actual Notice and No Prejudice

Reargument should be granted because the MTD Claimants had actual notice of the motion to vacate and were not prejudiced by any delay in service. *See In re InterCarbon Bermuda, Ltd. & Caltex Trading & Transp. Corp.*, 146 F.R.D. 64, 71 (S.D.N.Y. 1993) ("imperfect service of process in an arbitration case may not be fatal where jurisdiction over the arbitration is clear and where notice is sufficient to apprise the opposing party of the action being taken.") (citing *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Lecopulos*, 553 F.2d 842, 845 (2d Cir. 1977); *Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964)); *see also Marine Trading Ltd. v. Naviera Commercial Naylamp S.A.*, 879 F. Supp. 389, 392 (S.D.N.Y. 1995) ("The Second Circuit has held that standards for service are to be liberally construed in the context of arbitration.") (citing *Grammenos v. Lemos*, 457 F.2d 1067, 1070 (2d Cir. 1972)). The Decision did not address this point, and reargument should be granted on it.

IV. ALTERNATIVELY, LEAVE SHOULD BE GRANTED TO APPEAL TO THE COURT OF APPEALS

In the alternative, the Court should grant Appellants leave to appeal to the Court of Appeals. The Rules of the Court of Appeals recognize that leave is appropriate in cases where "the issues are novel or of public importance", 22 NYCRR § 500.22(b)(4), which is the case here for several reasons.

First, the Panel's ruling on consideration, which was the sole basis of this Court's affirmance of the confirmation of the Award on the merits, raises important questions as to what "a barely colorable justification" for an award means, and the parameters of the manifest disregard doctrine. In this case, the Panel ignored basic legal principles based on fundamentally flawed logic that presents an inherent contradiction to the panel's own other rulings. To be sure, judicial review of arbitration awards is deferential and the grounds to challenge those awards are limited. However, this case, at a minimum, tests the limits of that judicial deference, and presents an opportunity for the Court of Appeals to determine the extent to which courts may examine the logic behind a panel's proffered grounds for a ruling. As this Court has ruled, a court's function on a motion to confirm an arbitration award is not to "simply to rubber-stamp the

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APPENDIX L — EXCERPT OF REPLY BRIEF OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION — FIRST DEPARTMENT , FILED JANUARY 17, 2025

To be Argued by:
THOMAS E.L. DEWEY
(Time Requested: 15 Minutes)

NEW YORK SUPREME COURT
APPELLATE DIVISION—FIRST DEPARTMENT

Appellate
Case Nos.:
2023-04341
2023-04352
2024-01438

Index No.
652074/23

Index No.
651974/23

VIRGINIA SHASHA and VIVIENNE PERO, Co-Trustees of the Violet Shuker Shasha Trust, DEBRA B. ADLER, Successor Trustee of the Adler Family Trust, MYRNA JOY EDELMAN, Trustee of the 2006 Gilbert M. Edelman Inter Vivos Trust, EMPIRE STATE LIQUIDITY FUND, LLC, MARY JANE FALES, MELVYN H. HALPER, PHYLLIS J. HALPER and WENDY S. TAMIS,

Petitioners-Respondents,

– against –

PETER L. MALKIN, ANTHONY E. MALKIN,
THOMAS N. KELTNER, JR. and
ESRT MH HOLDINGS L.L.C.,

Respondents-Appellants.

(For Continuation of Caption See Inside Cover)

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New York County Clerk's Index Nos. 651974/23 and 652074/23

PETER L. MALKIN, ANTHONY E. MALKIN,
THOMAS N. KELTNER, JR. and
ESRT MH HOLDINGS L.L.C.,

Petitioners-Appellants,

– against –

VIRGINIA SHASHA and VIVIENNE PERO, Co-Trustees of the Violet Shuker Shasha Trust, DANIELLE P. BARGER, Trustee of the Edelman Family Decedent's Trust, DEBRA B. ADLER, Successor Trustee of the Adler Family Trust, MYRNA JOY EDELMAN, Trustee of the 2006 Gilbert M. Edelman Inter Vivos Trust, EMPIRE STATE LIQUIDITY FUND, LLC, MARY JANE FALES, MELVYN H. HALPER, PHYLLIS J. HALPER and WENDY S. TAMIS,

Respondents-Respondents.

(TABLES INTENTIONALLY OMITTED)

PRELIMINARY STATEMENT

Nothing in Claimants'[5] Opposition Brief can conceal the fact that the Panel made flagrant errors in the Arbitration Award and that those portions of the Award should therefore be vacated (indeed, as we explain below, that Brief if anything confirms that the Panel's holdings cannot be squared with basic law). Further, the petition to partially vacate the Award was timely under the CPLR. Even if the FAA's procedural rules apply, the federal petition for partial vacatur was nevertheless timely (and, because the petition was indisputably timely served on

5. This reply memorandum refers to the parties by the same terms referenced in the Opening Appellate Brief ("Opening Br.") and therefore refers to the collective Respondents in the appeals as Claimants and Appellants as Respondents, the terms used to refer to the parties in the underlying arbitration.

the Edelman Trust Claimants, this Court must reach the merits in any event).

First, the Panel held as a matter of law that there was no consideration for the overrides that Malkin Holdings received.[6] As stated in the solicitation documents for the overrides, Participants who consented to the overrides received "in exchange" a reduction in Malkin Holdings' fees.[7] Even though the Panel itself found that Participants who consented had received the fee reductions, the Panel nonetheless held that consideration was lacking, seemingly because Malkin Holdings *later* stated in the Transaction solicitation that it had not "paid" any consideration for the overrides, which was an accurate statement because the consideration was a contractually-set fee reduction.[8]

The Panel's holding is contrary to basic contract and securities law and cannot be defended, even under the deferential standard applicable to review of an arbitration award. *See, e.g., Lerner v. Credit Suisse Sec. (USA) LLC*, 193 A.D.3d 649, 650 (1st Dep't 2021) (vacating portion of arbitration award where "[t]he arbitration panels manifestly disregarded the law in determining that the Labor Law applied and awarding liquidated damages and/or attorneys' fees thereunder"); *see also Matter of Carty (Nationwide Ins. Co.)*, 149 A.D.2d 328, 329 (1st Dep't 1989) (the court's function on a motion to confirm an arbitration award is not to "simply to rubber-stamp the award.").

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6. R.38.

7. R.35.

8. R.32-33, R.37-38.

Claimants' various efforts to defend the holding (if anything) prove the point. Thus, Claimants dispute the statement in Respondents' Brief that Claimants had received the fee reduction "for decades", stating as follows: "[f]ee payments began in 2009 and were in effect for five years."[9] Regardless of the dispute about *how long* Claimants received the fee reductions, *this is yet another admission that Claimants who consented to the overrides received reduced fees*, which is obviously adequate consideration. Not surprisingly, therefore, Claimants do not spend much time even trying to defend Judge Torres' rationale for upholding the Award—that the many statements in the Panel's own Award recognizing that the Claimants had received fee reductions were merely statements of Respondents' position[10]—since that is both plainly wrong (*see, e.g.*, R.32 (the Panel stating: "In return for signing the Consent Agreement, the Supervisor assigned a *pro rata* portion of the Supervisor's potential incentive compensation")), as Claimants themselves just confirmed, placing this case in the rare category of cases where the Panel's holding is irreconcilable with the facts *as found by the Panel itself*. *See Hardy v. Walsh Manning Secs, L.L.C.*, 341 F.3d 126, 130 (2d Cir. 2003) (remanding award to arbitrator when "it appears that no reading of the facts can support the legal conclusion" reached by the arbitrator).

Not surprisingly, therefore, Claimants are reduced to trotting out entirely new arguments and offering

9. Claimants' Br. at 21.

10. R.522-23.

distractions. They claim that there was no "meeting of the minds,"[11] an argument even the Panel rejected, understandably given the signed contracts Claimants (or their predecessors in interest) had signed.[12] They cite testimony that the fee reduction was "technical consideration,[13] though the law is clear that *any* consideration is sufficient (*see, e.g,, Mencher v. Weiss*, 306 N.Y. 1, 8 (1953) ("The slightest consideration is sufficient to support the most onerous obligation"), and the evidence in fact showed that Respondents gave up tens of thousands of dollars a year in fees.[14] And they play semantic games, noting that Respondents called the fee reductions "overrides" when the authorizing documents described them as modifications to compensation—without explaining why the terms used to describe the fee reductions matter, if, as they concede, Claimants received the benefit of those reductions. Similarly, they engage in verbal gymnastics concerning the actual mechanics of the fee reductions[15] without ever disputing the fundamental point that Respondents' statement in the S-4 that they did not "pay" for consideration—if relevant at all—was completely consistent with the (conceded) fact that Claimants received fee reductions. In short, this circle simply cannot be squared.

11. Claimants' Br. at 20.

12. R.31-34.

13. Claimants' Br. at 20.

14. R.129, R.252.

15. Claimants' Br. at 21.

The Panel compounded its error by then rejecting another equally valid and undisputed form of consideration. Although here, again, the Panel agreed that the evidence showed Malkin Holdings had significantly increased its services to Participants following implementation of the overrides—an independently valid form of consideration—and despite expressly conceding that Malkin Holdings incurred "a detriment" by providing the additional services, the Panel found consideration lacking because non-consenting Participants had also received that same benefit.[16] This, too, is contrary to basic contract law. *See* Restatement (Second) of Contracts § 71(4) & cmt. e (1981) ("It matters not from whom the consideration moves or to whom it goes. If it is bargained for and given in exchange for the promise, the promise is not gratuitous."). And Claimants' efforts to defend this holding amount to nothing more than *ipse dixit* ("[t]he arbitrators rejected the increased services as consideration because all Participants benefited from the services whether or not they were part of the voluntary compensation program and also because the supervisor had a pre-existing duty to provide them"),[17] because it is plainly wrong.

Second, the Panel manifestly disregarded the law when it found that the Edelman Family Decedent's Trust ("Edelman Trust"), an ESBA investor, was not liable for defamatory statements made by Richard Edelman

16. R.36-37.

17. Claimants' Br. at 22.

("Edelman"), a trust beneficiary.[18] Edelman repeatedly held himself out to Participants as a "fellow investor" while making a stream of defamatory statements about Respondents.[19] The Panel, however, held that Edelman lacked "apparent authority" to act for the Edelman Trust even though the Panel previously ruled that "according to facts of record" that were not substantively disputed and that Claimants do not dispute on this appeal that Mr. Edelman "acted as if [he] were the principal[] with respect to the trust's underlying ESBA investment" and "according to facts of record" was a "spokesperson[]" for the Edelman Trust.[20] *See Weiss*, 939 F.3d at 111 (vacating award and remanding to arbitrator in light of "incoherence" of decision).

Claimants offer no substantive response, instead pointing only to extraneous procedural points having zero to do with the legal issue of agency.[21] Further, Claimants assert that Respondents "repeatedly refer to supposed 'facts of record,'"[22] however it is not *Respondents* that refer to "so-called 'facts of record,'"[23] but rather that is the language of the Panel itself, which the Panel then disregarded when it made the *legal* determination that

18. R.99, R.107.

19. R.101, R.102.

20. R.176, R.178.

21. Claimants' Br. at 23-24.

22. Claimants' Br. at 24.

23. Claimants' Br. at 24.

Richard Edelman's statements could not be imputed to the Edelman Trust under the law of agency.

Third, Claimants' various convoluted procedural arguments about service fail. The procedural rules in the CPLR apply because they are not in conflict with the FAA (*Keilly v. Sands Bros. & Co., Ltd.*, 803 N.Y.S.2d 385, 386 (Sup. Ct. N.Y. Cty. 2005) ("absent a clear federal mandate to the contrary, the state's procedural rules which govern the commencement of a civil proceeding, control")) and CPLR § 7511 does not require service within ninety days of delivery of the award, but merely that the "application to vacate or modify an award may be made by a party within ninety days after its delivery to him." CPLR § 7511(a). The petition was timely filed—within 90 days of delivery.

CPLR § 205 also affords a party six months to commence a new action if a previous action was timely filed but dismissed without prejudice, which is exactly what happened here: the prior action was dismissed for lack of subject matter jurisdiction. Even if that were not the case, the prior application created equitable tolling, and the petition was in any event timely even under the procedural provisions of the FAA. Nevertheless, the Court must consider the merits of the hearing in any event because one of the Claimants—the Edelman Trust—did not contest service of the vacatur petition in either state or federal court.

ARGUMENT

I. CLAIMANTS FAIL TO REFUTE THAT THE PANEL DISREGARDED THE LAW ON CONSIDERATION

Claimants articulate no coherent argument disputing that the Panel's award was issued in manifest disregard of the law.

A. Claimants Do Not and Cannot Refute That the Fee Reductions Were Consideration

The Panel acted in manifest disregard of the law by holding that the Claimants received no consideration for the overrides, notwithstanding the undisputed fact that, in exchange for the overrides from Claimants, Malkin Holdings gave up fees to which it was entitled.[24]

1. It Is Not Disputed That Malkin Holdings Gave Up the Fees at Issue

It was undisputed during the arbitration that, beginning in 1991, Malkin Holdings gave up fees to which it was entitled and assigned those fees to Claimants "in exchange for" the overrides.[25] *First,* Respondents

24. Opening Br. at 4, 9-12, 21-27.

25. Opening Br. at 3, 23-25. Claimants support the Panel's manifest disregard of consideration law when they accuse Respondents of a "word game." (Claimants' Br. at 21.) Claimants (like the Panel) seem to not understand that giving up fees to which

presented extensive, undisputed testimony that this had, in fact, occurred. For example, the General Counsel of Malkin Holdings unequivocally testified that one aspect of consideration given to Participants in exchange for the overrides was "an assignment by the supervisor of a portion of its override. It was the portion attributable to the increased profit from reducing debt service . . ."[26]

The documentary record confirmed this. For example, a 2001 consent solicitation seeking (among other things) consent to the overrides from the handful of Participants who had not yet consented stated as follows:

> In 1991, more than 81% in interest of the Participants approved a voluntary individual program to share with Wien & Malkin LLP, which has served as Associates' Supervisor from inception, a portion of excess distributions from any capital transaction, without changing the existing compensation to Wien & Malkin. *Approving Participants receive each year a pro rata portion of additional compensation to which Wien & Malkin is otherwise entitled from reductions in master lease rent.*[27]

Second, nowhere in the Panel's Award, any court opinion, or the Claimants' Brief is there any citation to any

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Malkin Holdings was entitled *is* consideration. *See* Opening Br. at 23-25.

26. R.468.

27. R.645 (emphasis added).

evidence that the fee reductions did not occur,[28] nor was any such "non-payment" the basis for the Panel's ruling on this issue. And, as noted above, Claimants' own Brief concedes as much.

Third, the Panel itself recognized that Malkin Holdings gave up the fees to which it was otherwise entitled: "In return for signing the Consent Agreement, the Supervisor assigned a *pro rata* portion of the Supervisor's potential incentive compensation due to reductions in rent for the Master Lease, from 1992 to 2076—an 'assignment' worth approximately $50,000 per year if all Participants had executed Authorizations."[29]

Thus, the Panel itself (correctly) recognized the undisputed fact that Malkin Holdings gave up fees in

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28. Claimants assert that "for the first 18 years of the program . . . no fees were paid to any Participants." (Claimants' Br. at 21.) Claimants (like the Panel) miss the point: Malkin Holdings gave up fees to which it was entitled, which is valid consideration.

29. R.32. When the Panel restated the parties' respective positions in the Award, it took care to preface such statements with phrases such as "[a]ccording to the Supervisor" and "[a]ccording to Respondents." R.28, R.32. But no such qualifying language was used when the Panel wrote: "In return for signing the Consent Agreement, the Supervisor assigned a *pro rata* portion of the Supervisor's potential incentive compensation." R.32. Indeed, in the paragraph immediately preceding the quoted language, the Panel used a qualifying phrase ("According to Respondents, 81% of Participants consented to the Overrides in 1991 . . . and approximately 94% of Participants consented in total[.]"), but did not do so when it recognized that the Supervisor had assigned its potential incentive compensation. *Id.*

exchange for the overrides. That should have been the end of the matter.

2. The S-4 Did Not Contradict That There Was Consideration

Notwithstanding this undisputed evidence, the Panel inexplicably seized on the statement in the S-4 filed by Malkin Holdings that "the supervisor did not pay any consideration for the overrides."[30]

This statement—drafted by leading securities lawyers and reviewed by the SEC[31]—was both true and completely consistent with the proposition that there was valid consideration for the overrides. Malkin Holdings did not "pay" anything for the overrides; rather, it gave up its right to certain fees so Participants would receive those fees instead.[32] As Respondents noted in their Opening Brief, "[t]hat was an accurate statement because there was no contemporaneous cash payment to Participants, but rather a contractually set reduction in fees otherwise payable to Malkin Holdings."[33]

Claimants seek to refute this point by referring to the form that Participants signed when they agreed to the overrides, which states the supervisor "shall *pay* to

30. R.265.

31. Opening Br. at 25-26.

32. Opening Br. at 10, 23.

33. Opening Br. at 4.

the undersigned a portion of certain supervisory fees otherwise *payable* to" the supervisor.[34] But this statement only confirms that the consideration was in fact paid; and it does not change the undisputed fact that Malkin Holdings gave up "fees otherwise payable to it," which is consistent with the S-4's statement that Malkin Holdings did not "'pay' consideration for the overrides." And in any event the Panel did not rely on this statement in coming to its manifestly erroneous consideration ruling. Claimants' only other attempted response is to assert this is a "word game,"[35] without logic or evidence. These verbal gymnastics do not contradict the central premise Respondents established in their Opening Brief: the record is clear that the supervisor was entitled to certain payments but in consideration for Participants' consents, the supervisor assigned a portion of the payments to which it was entitled to the consenting Participants.[36]

Thus, the Panel expressly held that the failure to describe consideration in an S-4 retroactively nullifies the consideration and renders the underlying transaction inoperative. That is the rationale for the ruling. Of course, the Panel cited no authority to support the holding—because there is no authority to support it.

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34. Claimants' Br. at 21 (emphasis in original).

35. Claimants' Br. at 21.

36. *See* Opening Br. at 15-16, 23-25.

3. The Panel's Consideration Ruling Contradicted Basic Contract Law

The Panel's holding is in manifest disregard of the law of consideration in two separate respects.

First, the Panel necessarily evaluated the adequacy of consideration when it decided that consideration was lacking. However, "courts are not to inquire into the adequacy of consideration," *Caisse Nationale de Credit Agricole-CNCA New York Branch v. Valcorp, Inc.*, 28 F.3d 259, 265 (2d Cir. 1994) (citation omitted), and "the adequacy of consideration is not a proper subject for judicial scrutiny." *Apfel v. Prudential-Bache Sec. Inc.*, 81 N.Y.2d 470, 476 (1993) (citation omitted). *See also Mencher v. Weiss*, 306 N.Y. 1, 8 (1953) ("The slightest consideration is sufficient to support the most onerous obligation; the inadequacy, as has been well said, is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced.").[37]

This legal principle was made abundantly clear to the Panel: the correct law was repeatedly cited to the Panel from the start of the case through the post-hearing brief. *See Sotheby's Int'l Realty v. Relocation Grp. LLC*, 588 F. App'x 64, 66 (2d Cir. 2015) (manifest disregard requires

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37. Claimants make the same fundamental mistake that the Panel appears to have made, asserting that these payments were "technical consideration" and not the real consideration for the overrides. (Claimants' Br. at 20). But basic contract law establishes that there is no such thing as "technical consideration"—*any* consideration suffices to make a binding contract.

that "the arbitrators knew of the law's existence and its applicability to the problem before them"); *In the Matter of Citigroup Glob. Mrkts., Inc. v. Fiorillia*, 127 A.D.3d 491, 492 (1st Dep't 2015) (vacating arbitration award based on manifest disregard because arbitrators ignored the law). Yet, the Panel ignored the fees Respondents had surrendered in favor of Participants and inexplicably concluded that consideration was lacking.

Second, consideration either exists or it does not. There is no basis for ruling that one accurate sentence in a regulatory submission could somehow undo decades of historical transactions that occurred and on which all parties relied. *See Weiss v. Sallie Mae, Inc.*, 939 F.3d 105, 107, 111 (2d Cir. 2019) (remanding to arbitrator where award seemed to support "mutually exclusive determinations").

Accordingly, the Panel's conclusion was in manifest disregard of the law and that portion of the Award should have been vacated. *See Hardy v. Walsh Manning Secs, L.L.C.*, 341 F.3d 126, 130 (2d Cir. 2003) (vacating and remanding confirmation of arbitral award when award's rationale was inconsistent with uncontested fact).

4. Claimants' "Meeting of the Minds" Contention Was Not Before the Arbitrators and in Any Event Fails

Rather than offering a substantive response to these irrefutable points, Claimants instead spin a yarn that there was "no meeting of the minds on overrides" and that "there were no contracts between the Malkins and their investors for overrides"[38] because the terms "voluntary compensation" and "override" were used interchangeably.[39] Not surprisingly, the Panel made no such finding in the Arbitration Award nor should a court confirm a basis for an award that does not exist. The investors signed contracts providing for the overrides,[40] and the fact that Malkin Holdings began to call the voluntary compensation something else—overrides, which is simply more modern terminology for the same concept—does not remotely mean that the Participants did not agree to these payments, which they indisputably did.

B. The Panel Ignored Other Consideration in Manifest Disregard of the Law

Other than the assignment of fees to which it was otherwise entitled, Malkin Holdings also provided consideration in the form of expanded supervisory services. During the arbitration, the General Counsel of Malkin Holdings testified that Respondents did, in fact, provide expanded supervisory services as "property management became more demanding."[41] And the Panel itself directly quoted from the testimony from Malkin

38. Claimants' Br. at 20-21.

39. R.467.

40. R.31-34, R.269-295, R.334.

41. R.469.

Holdings' General Counsel on this issue.[42] And here, again, the Award did not cite any evidence that such expanded supervisory services were not provided (because no such evidence exists).

Thus, it was (again) undisputed on the record that Malkin Holdings had in fact provided expanded supervisory services, and (again) the Panel recognized as much by observing that this was a "detriment."[43] *See* Consideration, Black's Law Dictionary (11th ed. 2019) ("A 'consideration' has been explained to be 'any act of the plaintiff from which the defendant, or a stranger, derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, however small the detriment or inconvenience may be, if such act is performed, or inconvenience suffered by the plaintiff with the assent, express or implied, of the defendant[.]") (citation omitted).

The only rationale that the Panel and Claimants offer to justify this holding—that "all Participants benefitted from the services whether or not they were part of the voluntary compensation program and also because the supervisor had a pre-existing duty to provide them"[44]—is totally wrong. *See Asturiana De Zinc Mktg., Inc. v. LaSalle Rolling Mills, Inc.*, 20 F. Supp. 2d 670, 675 (S.D.N.Y. 1998) (award vacated in part when made "in

42. R.36-37.

43. R.37.

44. Claimants' Br. at 22; R.40.

'manifest disregard' of New York substantive law"). The fact that some non-consenting Participants were incidental beneficiaries of the expanded supervisory services provided does not mean that such services were not a legal detriment to Malkin Holdings, nor does it mean that it could not constitute valid consideration. *See* Restatement (Second) of Contracts § 71(4) & cmt. e (1981).

Implicitly conceding that the Panel's rationale is wrong, Claimants now argue that "[b]ecause the supervisor was paid substantially increased fees, the increased services cannot also serve as consideration for the overrides"[45] (these "substantially increased fees" apparently refer to the increase in the supervisory fees that Malkin Holdings received from the original $100,000 per year in 1961 to $725,000 per year commencing 2010). As with Claimants' argument that there was no "meeting of the minds" concerning the overrides, Claimants concoct a holding that is nowhere in the arbitration award. The award did not reference any "substantially increased fees" as undercutting consideration for the overrides, and indeed, the arbitrators found this was not an increase in any meaningful way since the 2010 increase accounted for inflation during that 49-year period (without there being any "make up" payment for the prior years).[46] Thus, it does not contradict the undisputed evidence that investors had received increased supervisory services *for decades* before 2010. Moreover, consideration encompasses, not only "benefit to the promisor" but also "detriment to

45. Claimants' Br. at 22.

46. R.55-56.

the promisee," *Holt v. Feigenbaum*, 52 N.Y.2d 291, 299 (N.Y. 1981), and the expanded supervisory services were indisputably a detriment to Respondents—as the Panel itself recognized.

II. CLAIMANTS FAIL TO REFUTE THAT THE PANEL MANIFESTLY DISREGARDED THE LAW OF AGENCY

Claimants do nothing to refute that the Panel manifestly disregarded well-settled law on defamation and agency.

Claimants fail to explain how the Panel could have concluded that Richard Edelman did not speak with apparent authority when it itself recognized that "according to facts of record" he was a "spokesperson" for the Trust when he made the defamatory statements at issue and "acted as if [he] were the principal[] with respect to the trust's underlying ESBA investment[.]"[4743] As explained in Respondents' Opening Brief, these factual findings compel the conclusion that Richard Edelman made such statements when he possessed apparent authority to speak on behalf of the Edelman Trust, and the Panel manifestly disregarded the law in concluding otherwise.[48]

This is especially true because "a principal's silence is sufficient to create apparent authority," *In re WorldCom,*

47. R.176, 178.

48. Opening Br. at 27-30.

Inc., No. 02-13533 AJG, 2007 WL 735021, at *5 (Bankr. S.D.N.Y. Mar. 9, 2007), and apparent authority may also exist by virtue of a principal's acquiescence to the acts of its agent. *See Hatton v. Quad Realty Corp.*, 100 A.D.2d 609, 610 (2d Dep't 1984). Howard Edelman designated Richard Edelman as a "designee"[49] and received numerous letters detailing the false and misleading statements made for years by Richard Edelman, all without any action by Howard Edelman to limit Richard Edelman's authority or to separate the Trust from Richard Edelman's statements. *See In re Nigeria Charter Flights Contract Litig.*, 520 F. Supp. 2d 447, 463 (E.D.N.Y. 2007) ("Apparent authority is that authority which the principal holds the agent out as possessing, or which he permits the agent to represent that he possesses . . .") (internal quotation marks omitted).

Claimants cannot reconcile the prior findings of the Panel with its determination that Richard Edelman did not possess apparent authority when he made the defamatory statements at issue. Claimants' only attempted argument is to assert that the Panel's statements—that "according to the facts of record" Edelman was a "spokesperson" for the Trust when he made the defamatory statements at issue and "acted as if [he] were the principal[] with respect to the trust's underlying ESBA investment"[50]—were somehow less valid because they were in the context of a discovery ruling, a point for which they cite no authority.[51]

49. R.474.

50. R.176, 178.

51. Claimants' Br. at 24.

Claimants do not even attempt to dispute that Edelman's public statements accusing Malkin Holdings of violating the securities laws were *per se* defamatory. *See, e.g., Liberman v. Gelstein*, 80 N.Y.2d 429, 435 (N.Y. 1992) (slander per se includes, among others, statements that charge plaintiff with a serious crime or statements that tend to injure another in his or her trade); *Pontarelli v. Shapero*, 231 A.D.2d 407, 411 (1st Dep't 1996) (accusations of "failure to uphold . . . fiduciary obligations" are per se defamatory). Nor do Claimants' references to the age of Howard Edelman, the damages sought in the arbitration, or that the current proceedings include a successor trustee of the Edelman[52] make even the faintest attempt at addressing the merits of Respondents' arguments.

Accordingly, the Panel manifestly disregarded the law of agency—and its own ruling—when it found that the Edelman Trust was not liable for Edelman's conduct. *See Weiss*, 939 F.3d at 111 ("mutually exclusive determinations" show potential manifest disregard).

III. THE PETITION WAS TIMELY FILED IN ACCORDANCE WITH THE CPLR

Respondents' original federal petition was timely filed under CPLR § 7511(a) ("[a]n application to vacate or modify an award may be made by a party within ninety days after its delivery to him") because it was filed within ninety days of delivery of the Award. That is beyond dispute.

52. Claimants' Br. at 23.

Claimants appear to concede this point, even favorably citing *Hakala v. Deutsche Bank AG,* 343 F.3d 111, 116 (2d Cir. 2003), a case on which Respondents rely,[53] and noting that in *Hakala*, "the initial petition for vacatur, which was re-filed under CPLR § 205(a), had been filed within 90 days and was therefore timely."[54] Such is the case here. Indeed, here, as in *Hakala*, "[t]he petition to vacate the arbitration award was timely filed in the federal court." 343 F.3d at 115.

Claimants' only attempt at distinguishing the other cases cited by Respondents is to argue that those cases were not subject to the FAA.[55] But Claimants miss the point. The CPLR's time period—requiring filing (not service) within 90 days, not the FAA's, applies here. *See Keilly v. Sands Bros. & Co., Ltd.*, 803 N.Y.S. 2d 385, 386 (Sup. Ct. N.Y. Cty. 2005) ("Substantive federal law governs issues concerning the construction and enforceability of the parties' arbitration agreement, preempting state law on those matters. However, absent a clear federal mandate to the contrary, the state's procedural rules which govern the commencement of a civil proceeding, control.") (internal citation omitted). And Claimants cite no law to the contrary.[56]

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53. Opening Br. at 31.

54. Claimants' Br. at 12.

55. Claimants' Br. at 11-12.

56. Claimants' attempt to distinguish *Keilly* because it does not "state[] a party can initiate an action in federal court under federal rules, miss the deadline for service under the federal rules,

Further, Claimants are just wrong when they claim Respondents assert "that a court can simply apply whichever statute is more liberal."[57] That is not what Respondents argue; rather, it is Respondents' position (and the law) that state rules governing the commencement of a petition to confirm or vacate apply absent a federal mandate to the contrary. *See Atl. Painting & Contracting Inc. v. Nashville Bridge Co.*, 670 S.W.2d 841, 846 (Ky. 1984) ("The federal Arbitration Act covers both substantive law and a procedure for federal courts to follow where a party to arbitration seeks to enforce or vacate an arbitration award in federal court. The procedural aspects are confined to federal cases."). Indeed, although Claimants contend that Respondents' authorities improperly rely on statutes exempted from the FAA,[58] they ignore that the federal courts never had subject matter jurisdiction over Respondents' original petition under the Supreme Court's decision in *Badgerow v. Walters*, 596 U.S. 1 (2022). Therefore, the CPLR is the only applicable statute of limitations.

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and then argue afterwards that the service was timely because it would have complied with state procedural rules" (Claimants' Br. at 12) misses the mark. This argument does not address Respondents' proposition that absent a clear federal mandate to obviate state law, state procedural rules govern, and does not address that the federal courts determined that they did not have subject matter jurisdiction over Respondents' initial federal petition. Thus, the petition was never properly before those courts.

57. Claimants' Br. at 13.

58. Claimants' Br. at 11-12.

For purposes of the CPLR, Claimants' assertion that they were served more than 90 days after issuance of the arbitration award is simply irrelevant. The original petition was timely filed and after that petition was "terminated" due to a change in the law by the United States Supreme Court, Respondents had six months to initiate a new petition under CPLR § 205(a). Respondents promptly filed the state court petition on the same date the federal court dismissed the petition without prejudice and promptly served the Claimants well within the six-month period provided by CPLR § 205(a). Claimants do not dispute that service of process after the ninety-day statute of limitations is irrelevant under the CPLR.

IV. SUPREME COURT ERRED IN HOLDING THAT MTD CLAIMANTS WERE NOT TIMELY SERVED UNDER THE FAA

Even if the FAA's time limits were to apply here, the petition was timely served.

A. Email to Claimants' Counsel Was Appropriate Service

As explained in our Opening Brief,[59] the record is clear that Claimants' counsel was impliedly authorized to receive service by email. However, Claimants unabashedly misconstrue the cases to avoid that result. Thus, Claimants cite *United States v. Bosurgi,* for the proposition that mere representation of a client does not automatically

59. Opening Br. at 17-19.

authorize receipt of service,[60] but conveniently omits the language immediately following: "What is necessary is that it appear that the attorney was authorized, either expressly or impliedly, to receive service of process for his client. And if such agency is to be implied, it must be implied from all the circumstances accompanying the attorney's appointment which indicate the extent of authority the client intended to confer." 343 F. Supp. 815, 817–18 (S.D.N.Y. 1972). Claimants simply ignore the parties' lengthy litigation history in their reply, including the fact that virtually all pleadings and correspondence during the six-year arbitration and tolling action in the District Court for the Southern District of New York were exchanged electronically and Claimants' counsel never declined to accept service.[61]

Similarly, Claimants miss the point of *Day & Zimmerman, Inc. v. SOC-SMG, Inc.*, No. 11-6008, 2012 WL 5232180, at *4 (E.D. Pa. Oct. 22, 2012), in which the court found defendant implicitly agreed to email service when, during the underlying arbitration, "email was used as the parties' primary mode of communication without fault. The Court can find no reason why this same agreement should not apply to the present litigation since the action directly involves the Arbitration." Claimants' only response to *Corinthian Colleges, Inc. v. McCague*, No. 09 C 4899, 2010 WL 918074, at *2 (N.D. Ill. Mar. 4, 2010) ("Because [respondent's] counsel had consented to electronic service in the AAA arbitration proceeding,

60. Claimants' Br. at 15.

61. Opening Br. at 34-35.

[petitioner's] notice was timely"), is to call it "an outlier."[62] But that case is entirely consistent with *Borsurgi* and the other cases Respondents cite to the effect that a course of conduct can establish consent to service by email, which is precisely what happened in this case.

B. Courts Excuse Service in the Context of Arbitrations Where There Is Actual Notice and No Prejudice

Even if this Court were to find Respondents' service by email improper, courts routinely excuse procedurally improper service in cases where there is actual notice and no prejudice resulting from such service. Claimants do not show why such discretion should not have been exercised in this case. *See In re Intercarbon Bermuda, Ltd. & Caltex Trad. & Transp. Corp.*, 146 F.R.D. 64, 68, 71 (S.D.N.Y. 1993) ("[I]mperfect service of process in an arbitration case may not be fatal where jurisdiction over the arbitration is clear and where notice is sufficient to apprise the opposing party of the action being taken.").

Claimants rely on the reasoning of the District Court, which distinguished *InterCarbon* on the basis that it dealt with service to a foreign party.[63] But the court in *InterCarbon* expressly noted that its holding was based on "considerations of basic fairness" and that imperfect service was excused because there was "no significant prejudice by [the] failure to adhere to proper methods

62. Claimants' Br. at 15-16.

63. Claimants' Br. at 17.

of service." 146 F.R.D. at 71. It is telling that Claimants cannot provide *any* example of prejudice they suffered from Respondents' email service. Indeed, it is clear they suffered none.

APPENDIX M — EXCERPTS OF PETITIONERS-APPELLANTS' BRIEF IN THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, DATED NOVEMBER 4, 2024

NEW YORK SUPREME COURT
APPELLATE DIVISION—FIRST DEPARTMENT

Index No.
652074/23

VIRGINIA SHASHA AND VIVIENNE PERO, CO-TRUSTEES OF THE VIOLET SHUKER SHASHA TRUST, DANIELLE P. BARGER, TRUSTEE OF THE EDELMAN FAMILY DECEDENT'S TRUST, LAURENCE ADLER AND SHIRLEY ADLER, TRUSTEES OF THE ADLER FAMILY TRUST; MYRNA JOY EDELMAN, TRUSTEE OF THE 2006 GILBERT M. EDELMAN INTER VIVOS TRUST, EMPIRE STATE LIQUIDITY FUND, LLC, MARY JANE FALES, MELVYN H. HALPER, PHYLLIS J. HALPER AND WENDY S. TAMIS,

Petitioners-Respondents,

– against –

PETER L. MALKIN, ANTHONY E. MALKIN, THOMAS N. KELTNER, JR., AND ESRT MH HOLDINGS L.L.C.,

Respondents-Appellants.

Appendix M

Index No.
651974/23

PETER L. MALKIN, ANTHONY E. MALKIN, THOMAS N. KELTNER, JR. AND ESRT MH HOLDINGS L.L.C.,

Petitioners-Appellants,

– against –

VIRGINIA SHASHA AND VIVIENNE PERO, CO-TRUSTEES OF THE VIOLET SHUKER SHASHA TRUST, DANIELLE P. BARGER, TRUSTEE OF THE EDELMAN FAMILY DECEDENT'S TRUST, LAURENCE ADLER AND SHIRLEY ADLER, TRUSTEES OF THE ADLER FAMILY TRUST; MYRNA JOY EDELMAN, TRUSTEE OF THE 2006 GILBERT M. EDELMAN INTER VIVOS TRUST, EMPIRE STATE LIQUIDITY FUND, LLC, MARY JANE FALES, MELVYN H. HALPER, PHYLLIS J. HALPER AND WENDY S. TAMIS,

Respondents-Respondents.

New York County Clerk's
Index Nos. 651974/23 and 652074/23
Appellate Division—First Department Case
Nos. 2023-04341, 2023-04352 and 2024-01438

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and granted the MTD Claimants' petition to confirm the award,[56] for the same reasons provided in the federal court's September 2021 decision.[57] Respondents filed notices of appeal of each order on August 21, 2023, and after the Court entered judgment in the Shasha Petition on January 22, 2024, Respondents filed notice of appeal of the judgment on January 24, 2024. This Court granted Respondent's motion to consolidate the three pending appeals on August 29, 2024.

ARGUMENT

I. The Panel's Holding That Consideration Was Lacking Is in Manifest Disregard of the Law

An arbitral panel may not act in "manifest disregard of the law." *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 452 (2d Cir. 2011); *see also Cantor Fitzgerald Sec. v. Refco Sec., LLC*, 83 A.D.3d 592, 593 (1st Dep't 2011) ("[T]he judicially-created "manifest disregard of the law" ground for vacating an arbitration award is still viable . . . .") (citations omitted). "A court may infer that the arbitrators manifestly disregarded the law if it finds that the error made by them is so obvious that it would be instantly perceived by the average person qualified to

56. R.5.

57. Danielle P. Barger filed her own petition for confirmation in Supreme Court, New York County. *See* No. 653772/2023. This petition was assigned to Justice Crane and the Court confirmed the award on July 22, 2024. No. 653772/2023 at NYSCEF Doc. No. 59. Respondents' unperfected appeal of Supreme Court's Decision and Order is pending before this Court.

serve as an arbitrator" *Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103, 108, 754 N.Y.S.2d 264, 270 (1st Dep't 2003) (alteration and quotation marks omitted).

"To modify or vacate an award on the ground of manifest disregard of the law, a court must find 'both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.'" *Wien v. Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 481 (2006) (quoting *Wallace v. Buttar*, 378 F.3d 182, 189 (2nd Cir. 2004)); *Transparent Value, L.L.C. v. Johnson*, 93 A.D.3d 599, 601, 941 N.Y.S.2d 96, 98 (1st Dep't 2012) (same). Each of these requirements is established here.

First, there is not and never has been any dispute about the applicable law: courts are not to inquire into the adequacy of consideration and any detriment, however slight, is sufficient. *See Apfel v. Prudential-Bache Sec. Inc.*, 81 N.Y.2d 470, 476 (1993) ("Absent fraud or unconscionability, the adequacy of consideration is not a proper subject for judicial scrutiny.") (citation omitted); *Caisse Nationale de Credit Agricole-CNCA New York Branch v. Valcorp, Inc.*, 28 F.3d 259, 265 (2d Cir. 1994) ("the courts are not to inquire into the adequacy of consideration") (citation omitted); *Mencher v. Weiss*, 306 N.Y. 1, 8 (1953) ("The slightest consideration is sufficient to support the most onerous obligation; the inadequacy, as has been well said, is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced.").

Second, the Panel's holding is obviously wrong. All parties and the Panel itself repeatedly acknowledged that Malkin Holdings *for decades* gave up fees to which it would have been entitled "in exchange" for overrides from consenting Participants. Period. The documents show it,[58] the testimony shows it,[59] and the issue was never contested. Indeed, one of the Claimants confirmed as much:

> Q. It states "If all participants execute authorizations, WM&B will forego the right to

58. *E.g.*, R.248 ("[Malkin Holdings] will assign, effective January 1, 1992 through January 5, 2076, to the Participant a *pro rata* portion of [Malkin Holdings'] additional compensation from the scheduled reductions in Master Lease rent to become effective in 1992 and 2013."); R.252 ("If all Participants execute Authorizations, [Malkin Holdings] will forego the right to receive $45,017 a year from 1992 to 2013, and $52,405 a year thereafter through January 5, 2076, and Participants will receive such amounts. [Malkin Holdings] will be obligated to assign such sums to each authorizing Participant…."); R.350 ("Any Participant whose interest in [ESBA] is not already subject to this voluntary program may now approve the same voluntary program which is in effect for more than 81% of the Participants. An approving Participant will receive now the pro rata payment from [Malkin Holdings] retroactive to the January 1, 1992 start of this program of approximately $140 for each original $10,000 participating interest.").

59. R.129 (consideration consisted of "an assignment by the supervisor of a portion of its override. It was the portion attributable to the increased profit from reducing debt service"); R.125 ("it was just $50,000 a year surrender by Malkin Holdings without any assurance that there would ever be[] a return on that you might say."); R.141 (assignment of pro rata portion of additional compensation "was part of the consideration for the voluntary consents")).

> receive $45,000.17 a year from 1992 to 2013 and $52,400.05 a year thereafter through January 5th, 2076, and participants will receive such amounts. WM&B will be obligated to assign such sums to each authorized participant even if Associates does not purchase the property from Prudential." Do you see that, sir?
>
> A. Yes.
>
> Q. Okay. So that in exchange for the overrides, WM&B, your firm at the time, is giving up a right to receive compensation, correct?
>
> A. That's what this says.[60]

In fact, *the Panel itself repeatedly recognized that these fee reductions had occurred*: as the Panel held, "In return for signing the Consent Agreement, the Supervisor assigned a *pro rata* portion of the Supervisor's potential incentive compensation due to reductions in rent for the Master Lease, from 1992 to 2076—an 'assignment' worth approximately $50,000 per year if all Participants had executed Authorizations."[61] Thus, the Panel itself expressly recognized that Respondents did, in fact, give up compensation "in exchange for the Overrides"—yet, incredibly, nonetheless held that

60. R.138.

61. R.32. *See also* R.33 ("the incentive-compensation reductions from 1991 to 2001 totaled $140 for each original $10,000 unit").

consideration was lacking. *See Anheuser-Busch, Inc. v. Beer, et al.*, 280 F.3d 1133, 1140 (7th Cir. 2002) (vacating arbitration award when "the arbitrator issued an award based not on any reading of or language in the contract, but rather on his personal view of how the contract would read"); *Asturiana De Zinc Mktg., Inc. v. LaSalle Rolling Mills, Inc.*, 20 F. Supp. 2d 670, 675 (S.D.N.Y. 1998) (award vacated in part when made "in 'manifest disregard' of New York substantive law").

If anything, however, the Panel's purported rationale for this nonsensical holding is even more bizarre. As explained above, the S-4 stated that "the supervisor did not pay any consideration for the overrides." This was and is an accurate statement, since consenting Participants did not receive a payment, as such, in exchange for the overrides; rather they received prospective fee reductions, which as the Panel itself recognized, were implemented.[62]

Though all this was quite clear, the Panel nonetheless found this "argument" "unpersuasive".[63] The sole ground for this conclusion was as follows:

> The S-4, which Respondents duly filed with the SEC and then distributed to all Participants and countless other prospective investors, should and presumably would have stated expressly that the Supervisor had provided a benefit in

62. *See also* R.143 ("that charge would not apply to those [Participants] who entered into the voluntary override").

63. R.37.

> exchange for the Overrides. Otherwise, the S-4 is substantially misleading.
>
> Accordingly, we conclude that the Supervisor did not provide consideration in exchange for the Overrides that were voluntarily agreed to in the Consent Agreements.[64]

Thus, the Panel's core holding is as follows: even though by the Panel's own admission there plainly was consideration, the failure adequately to describe that consideration in a later securities filing nullified that consideration as a matter of law, and retroactively invalidated the agreement. The Panel cites no authority of any kind for this holding—not surprisingly, because to state the proposition is to refute it. The S-4 itself, and the section addressing the overrides specifically, were drafted by leading securities lawyers and then reviewed in exhaustive detail by the SEC staff, which declared the S-4 effective after that review.[65] And, of course, the Participants themselves well knew all these facts, since they themselves had consented (or not) to the overrides.

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64. R.37-38 (footnote omitted).

65. *See* R.460 (SEC staff advising Participant that the S-4 "was declared effective by the SEC, which entails a determination by the staff that the document is materially compliant with the disclosure rules."); R.459 (in response to Participant who called SEC to ensure "as far as the SEC is concerned everything is proper and legit," SEC staff "responded that the SEC declared the registration statement effective and has no objection to the Malkins proceeding with the solicitation and closing the deal if requisite consents are received.").

Equally flawed was the Panel's rejection of one of the other elements of consideration for the overrides, namely that the Supervisor substantially increased the supervisory services it provided to Participants. Here, too, it was undisputed that this had, in fact, occurred.[66] And, here, also, the Panel recognized as much, but nonetheless found consideration lacking because non-consenting Participants also received those benefits.[67] This (again) makes no sense at all: that the few Participants who did not consent to the overrides received, in effect, a free benefit does not somehow nullify the adequacy of consideration. And the law (which the Panel ignored) is of course to the same effect. *See* Restatement (Second) of Contracts § 71(4) & cmt. e (1981) ("It matters not from whom the consideration moves or to whom it goes. If it is bargained for and given in exchange for the promise, the promise is not gratuitous.").

Third, the Panel obviously knew of the law's existence and its applicability. *Wien*, 6 N.Y.3d at 481. The correct law was repeatedly cited to the Panel, from the beginning of the case through Respondents' Post-Hearing Brief.[68]

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66. R.132 (consideration received from "[t]he benefit to the investors of continuing an expanded supervisory services."); R.129 ("The other part of the consideration which was, you know, presented in this context was, the supervisors'[] continuing service in an expanded array of services as, you know, property management became more demanding and various reasons.")).

67. R.37.

68. R.462-64 (Respondents' Pre-Hearing Memorandum dated May 18, 2016); R.467-70 Respondents' Post-Hearing Brief dated Feb. 24, 2020); *see also* R.36.

Further, Claimants cited no authority in opposition—there is none, and in any event they failed to submit a Post-Hearing Brief. The inescapable conclusion is that the Panel deliberately chose to disregard the applicable law, mandating vacatur of this aspect of the Award. *See In the Matter of Citigroup Glob. Mrkts., Inc. v. Fiorilla*, 127 A.D.3d 491, 492 (1st Dep't 2015) (vacating arbitration award when arbitrators "ignored the law").

II. The Panel's Holding Regarding Agency Is in Manifest Disregard of the Law

The Panel concluded in the Award that the Edelman Trust "is not liable for Richard Edelman's claimed defamatory statements."[69] In so concluding, the Panel not only disregarded its own prior ruling that Edelman was "according to facts of record" a "spokesperson["] and "according to facts of record" "acted as if" he "were the principal[] with respect to the trust's underlying ESBA investment,"[70] but also manifestly disregarded the law of agency.

The applicable legal principles are (again) clear and well-established. "An agent who acts with apparent authority in making a defamatory statement may subject the principal to liability." Restatement (Third) of Agency § 7.08 cmt. d (2006); *see also In re WorldCom, Inc.*, No.

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69. R.462-64 (Respondents' Pre-Hearing Memorandum dated May 18, 2016); R.467-70 Respondents' Post-Hearing Brief dated Feb. 24, 2020); *see also* R.36.

70. R.176, 178.

02-13533 AJG, 2007 WL 735021, at *5 (Bankr. S.D.N.Y. Mar. 9, 2007) ("[A] principal's silence is sufficient to create apparent authority."); *Hatton v. Quad Realty Corp.*, 100 A.D.2d 609, 610 (2d Dep't 1984) (implied agency by acquiescence of principal to acts of agents).

Here, Edelman repeatedly held himself out as a "Participant," not merely the beneficiary of a trust that held ESBA interests. Among many other things, he operated a website that stated that it "is a website by fifty year participant investors in" ESBA.[71] In an August 28, 2012 email, Edelman referred to "we, the owners of the Empire State Building" and stated "as fellow participant investors in [ESBA], we are all in this together".[72] A caller acting on behalf of the Edelmans represented that Edelman was an ESBA Participant in a voicemail left for Peter Malkin's daughter and Tony Malkin's sister, stating, "I'm a family friend of the Edelmans… who are investors, just like yourself."[73] Thus, it is not surprising that Claimants' own witness testified that she "trusted Richard Edelman" because "[h]e was a fellow investor like myself."[74]

71. R.121, R.126, R.472.

72. R.149, R.151; R.124 (on conference calls Edelman "identified himself as a fellow investor."); R.146 (same); R.147 (Edelman identified himself on conference calls as "a fellow participant").

73. R.473.

74. R.119.

Indeed, the Panel's ruling is all the more inexplicable since the Panel had effectively *already found* that Edelman had apparent authority: in a prior ruling, the Panel had expressly and repeatedly held that Edelman "according to facts of record" "acted as if [he] were the principal[] with respect to the trust's underlying ESBA investment" and "according to facts of record" was a "spokesperson[]" for the Edelman Trust.[75] These are essentially dictionary definitions of "apparent authority."

Moreover, the *only* ground the Panel offered for its holding—that the trustee, Howard Edelman, had not "held out" to others that Richard had authority to act for the Edelman Trust[76]—makes no sense. Howard Edelman had designated Edelman as a "designee,"[77] and received numerous letters specifically detailing the false and misleading statements made *for years* by Edelman.[78] Yet he did nothing. It is therefore clear, as the Panel itself had previously ruled, that he "permit[ted]" Edelman to hold himself out as representing the Edelman Trust. *See In re Nigeria Charter Flights Contract Litig., 520 F. Supp. 2d 447, 464 (E.D.N.Y. 2007)* ("Apparent authority is that authority which the principal holds the agent out as possessing, *or which he permits the agent to represent that he possesses* . . . .") (citations and quotation marks omitted) (emphasis added).

75. R.176, R.178.

76. R.102.

77. R.474.

78. *E.g.*, R.475.

Accordingly, the Panel manifestly disregarded the law of agency (and its own prior ruling) when it concluded that the Edelman Trust was not responsible for the defamatory statements by its agent, Richard Edelman.

III. The Petition Was Timely Filed in Accordance with the CPLR

Respondents' original federal petition was timely under New York's rules for confirmation, modification or vacating an arbitration award. Under CPLR § 7511(a), the original Petition was timely filed on November 23, 2020 because it was filed within ninety days of delivery of the Award to Respondents.

CPLR § 7511(a) provides "[a]n application to vacate or modify an award may be made by a party within ninety days after its delivery to him." Courts have held that CPLR § 7511 "does not apply a service requirement to the institution of a vacatur action." *Orange & Rockland Utils., Inc. v. Loc. 503, Int'l Bhd. Of Elec. Workers*, No. 05 CIV. 6320, 2006 WL 1073049, at *3 (S.D.N.Y. Apr. 21, 2006) (denying dismissal of motion for vacatur based on service after 90 day limitations period); *see also Safari Motor Coaches, Inc. v. Corwin*, 617 N.Y.S.2d 289, 290 (Sup. Ct. Saratoga Cty. 1994) (petition to vacate filed within 90-day limitation period was timely and service on respondent 92 days after receipt of award was "irrelevant"). That is, the petition must be *filed*—not served—within 90 days.

Here, it was. Respondents filed their original action on November 23, 2020, and thus it was timely under CPLR

§ 7511(a). Due to the United States Supreme Court's change of law and the Second Circuit's enforcement of *Badgerow v. Walters*, 142 S. Ct. 1310 (2022), the federal court dismissed the federal petition without prejudice, and Respondents filed their application the very day of the federal court's dismissal order.

That too, was timely. CPLR § 205(a) provides

> [i]f an action is timely commenced and is terminated in any other manner than by voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

New York courts have applied the remedial provisions of CPLR § 205(a) to petitions for vacatur under CPLR § 7511(a). *See Hakala v. Deutsche Bank AG*, 343 F.3d 111, 116 (2d Cir. 2003).

Thus, Respondents' original petition was timely under CPLR § 7511 and their subsequent state court petition was timely under CPLR § 205. For purposes of the CPLR, the

MTD Claimants' assertion that they were served more than 90 days after issuance of the arbitration award is simply irrelevant. The original petition was timely filed and after that petition was "terminated" due to a change in the law by the United States Supreme Court, Respondents had six months to initiate a new petition under CPLR § 205(a). Respondents promptly filed the state court petition on the same date the federal court dismissed the petition without prejudice and promptly served the MTD Claimants well within the six-month period provided by CPLR § 205(a).

Furthermore, the law is clear that the CPLR's time period, and not the FAA's, applies in this Court. That is so because, while the FAA's substantive standards apply, the FAA does not displace state arbitration statutes in their entirety, and state rules governing the commencement of a petition to confirm and vacate still apply. *See Keilly v. Sands Bros. & Co., Ltd.*, 803 N.Y.S. 2d 385, 386 (Sup. Ct. N.Y. Cty. 2005) ("Substantive federal law governs issues concerning the construction and enforceability of the parties' arbitration agreement, preempting state law on those matters. However, absent a clear federal mandate to the contrary, the state's procedural rules which govern the commencement of a civil proceeding, control.") (internal citation omitted). Notably, those rules include those relating to the deadlines for breaching such a proceeding. *See A Better Way Wholesale Autos, Inc. v. James Saint Paul*, No. CV1660311881, 2016 WL 8135391, at *4 (Conn. Super. Ct. Dec. 30, 2016) (state procedural deadline applies and not FAA's; "Requiring the movant to file within thirty days does not conflict with the primary purpose of the FAA, which is to encourage arbitration to the fullest scope of the parties' agreement to arbitrate.") (internal quotation marks omitted); *Atl. Painting & Contracting Inc. v. Nashville Bridge Co.*, 670 S.W.2d 841, 846 (Ky. 1984) ("The Federal Arbitration Act covers both substantive law and a procedure for federal courts to follow where a party to arbitration seeks to enforce or vacate an arbitration award in federal court. The procedural aspects are confined to federal cases.") (emphasis omitted).

IV. Supreme Court Erred in Holding that the MTD Claimants were Not Timely Served with the Petition to Vacate

A. The Petition was Served on the MTD Claimants' Attorney

Even if, contrary to the foregoing settled law, the FAA's time period and not the CPLR's applies here, the Petition to vacate was still timely.

Section 12 of the FAA provides: "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C. § 12. Mr. Griggs was the MTD Claimants' attorney and was thus authorized to receive service.

For example, in *United States v. Bosurgi*, the court held that the defendant's attorney in a state court case regarding funds in escrow subject to federal tax liens was "impliedly authorized" to receive service of process in a related federal case, as it addressed defendant's right to the money, "the very object" for which the attorney was originally retained. 343 F. Supp. 815, 818-19 (S.D.N.Y. 1972); *see also In re Focus Media Inc.* 387 F.3d 1077, 1083 (9th Cir. 2004) ("When a defendant takes an active role in a [bankruptcy] case and appears through counsel in a proceeding integrally related to the case, such counsel is implicitly authorized to receive process for the defendants." (citation omitted)); *Luedke v. Delta Air Lines, Inc.*, 159 B.R. 385, 395 (S.D.N.Y. 1993) (holding, in Chapter 11 case, "attorney's activities on behalf of a client in proceedings in one court may indicate implied authority to receive service of process in integrally related litigation in another court").

Indeed, neither the MTD Claimants nor the federal court disputed that Mr. Griggs was so authorized, given that Mr. Griggs unquestionably has represented the MTD Claimants since 2014—in the underlying Arbitration and the related Tolling Action and Barger Petition. *See supra* Fact Sections G, H.

B. Email Service was Appropriate

Contrary to Supreme Court's holding,[79] the MTD Claimants' attorney was properly served by email. Federal Rule of Civil Procedure 5(b)(2)(E) allows for service by any other means, including electronic means, where the person served consents to the service in writing. Fed. R. Civ. P. 5(b)(2)(E). The MTD Claimants contend

79. R.5-6.

that no such written consent was given, despite the fact that most (if not all) of the pleadings and correspondence during the six-year Arbitration and Tolling Action were exchanged electronically and Mr. Griggs never declined to accept service.

Indeed, courts have exercised their discretion in permitting email service to counsel in the context of petitions to vacate arbitration awards even in the absence of written consent. For example, in a case with very similar facts, petitioners emailed the petition/motion to vacate the arbitration award to respondent's counsel one day before the three-month statutory deadline set by Section 12 of the FAA but did not personally serve respondent until some weeks later (beyond the statutory deadline). *Day & Zimmerman, Inc. v. SOC-SMG, Inc.*, No. CIV.A. 11-6008, 2012 WL 5232180, at *4 (E.D. Pa. Oct. 22, 2012). The court rejected respondent's contention that service was ineffective, noting that while "[g]enerally, email service of process is insufficient to provide adequate notice to the party served unless the other party has agreed in writing to accept electronic service . . . Here, the underlying arbitration spanned over two years, during which time email was used as the parties' primary mode of communication without fault. The Court can find no reason why this same agreement should not apply to the present litigation since the action directly involves the Arbitration." *Id*.

Importantly, the court also noted the gamesmanship at play:

> Thereafter, [respondent] waited twelve days, well after the service deadline expired, before notifying [petitioners] that email was not an acceptable form of service. If nothing else, such actions suggest that [respondent] wanted [petitioners] to believe that service via email was proper so that [petitioners] would miss the filing deadline. In any event, it[']s clear that [respondent] was aware of [petitioners'] challenge to the arbitration award. Accordingly, the Court finds that service of the Complaint/motion via email was both proper and timely.

Id. See also Corinthian Colleges, Inc. v. McCague, No. 09 C 4899, 2010 WL 918074, at *2 (N.D. Ill. Mar. 4, 2010) (finding email sufficient in absence of express consent where movant emailed the petition, a cover letter providing notice of the filing, and a "notice of electronic filing confirming the filing of the petition" to opposing counsel, and opposing counsel had consented to electronic service in the arbitration proceeding); *U.S. v. Machat*, No. 08 Civ. 7936 (JGK), 2009 WL 3029303, at *4 (S.D.N.Y. Sep. 21, 2009) (approving service by email and service on the defendant's attorney); *Scott v. Carpanzano*, 556 F. App'x 288, 293 (5th Cir. 2014) (permitting email service on attorney and "concluding that Mr. Carpanzano received notice reasonably calculated to apprise him of the pendency of the action and afford him an opportunity to present his objections"). *Cf. Hamilton v. Navient Sols., LLC*, No. 18 Civ. 5432 (PAC), 2019 WL 633066, at *4 (S.D.N.Y. Feb. 14, 2019) (emphasis added) (dismissing petition for vacatur where service was one day after a deadline but noting that "Hamilton could have emailed her application for vacatur to Navient or otherwise provided notice on time"). Just as in *Day & Zimmerman*, where respondent waited 12 days after the service deadline had passed before notifying petitioners that email was unacceptable, there is similar gamesmanship at play here. *See* 2012 WL 5232180, at *4. Indeed, Mr. Griggs never responded to Respondents' November 23, 2020 email asking if he would consent to service on behalf of the MTD Claimants (despite later responding to a different email on that same email thread) and then proceeded to wait 23 days after the service deadline to inform Respondents that service was allegedly untimely. Mr. Griggs' failure to respond in any way—when the Federal Rules impose a duty to avoid unnecessary expense of service and in the midst of a pandemic—further demonstrates the gamesmanship at play here. Therefore, this Court should similarly hold that email service here was proper given that during the course of the six-year underlying Arbitration, the majority of correspondence between counsel for Respondents and Mr. Griggs was via email. *See Day & Zimmerman*, 2012 WL 5232180, at *4.

Supreme Court's decision does not address *Day & Zimmerman*, Respondents' argument that Mr. Griggs' conduct amounted to gamesmanship, or the fact that Mr. Griggs represented the MTD Claimants in a related, pending action at the time he was served with the Petition. For the reasons stated above, these arguments compel a different conclusion than that reached below.

C. Courts Excuse Service in the Context of Arbitrations Where There Is Actual Notice and No Prejudice

In any event, the MTD Claimants had actual notice of the motion to vacate and were not prejudiced by any delay in service. *See In re InterCarbon Bermuda, Ltd. & Caltex Trading & Transp. Corp.*, 146 F.R.D. 64, 71 (S.D.N.Y. 1993) ("[T]he Second Circuit's decisions . . . establish that imperfect service of process in an arbitration case may not be fatal where jurisdiction over the arbitration is clear and where notice is sufficient to apprise the opposing party of the action being taken.") (citing *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Lecopulos*, 553 F.2d 842, 845 (2d Cir. 1977); *Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964)); *see also Marine Trading Ltd. v. Naviera Commercial Naylamp S.A.*, 879 F. Supp. 389, 392 (S.D.N.Y. 1995) ("The Second Circuit has held that standards for service are to be liberally construed in the context of arbitration.") (citing *Grammenos v. Lemos*, 457 F.2d 1067, 1070 (2d Cir. 1972)). The MTD Claimants' motion practice and correspondence with the Court demonstrates they received actual notice of the Petition through their long-time counsel, Mr. Griggs. There is thus no reason not to hold that service was effective here.

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APPENDIX N — EXCERPT OF REPLY MEMORANDUM OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, FILED MAY 30, 2023

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

Index No. 651974/2023

PETER L. MALKIN; ANTHONY E. MALKIN; THOMAS N. KELTNER, JR.; AND ESRT MH HOLDINGS L.L.C.,

Petitioners,

-against-

VIRGINIA SHASHA AND VIVIENNE PERO, CO-TRUSTEES OF THE VIOLET SHUKER SHASHA TRUST; DANIELLE P. BARGER, TRUSTEE OF THE EDELMAN FAMILY DECEDENT'S TRUST; SHIRLEY ADLER, TRUSTEE OF THE ADLER FAMILY TRUST; MYRNA JOY EDELMAN, TRUSTEE OF THE 2006 GILBERT M. EDELMAN INTER VIVOS TRUST; EMPIRE STATE LIQUIDITY FUND, LLC; MARY JANE FALES; MELVYN H. HALPER; PHYLLIS J. HALPER; AND WENDY S. TAMIS,

Respondents.

Filed May 30, 2023

Appendix N

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE IN PART AND OTHERWISE CONFIRM ARBITRATION AWARD

DEWEY PEGNO & KRAMARSKY LLP
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Attorneys for Petitioners

ARGUMENT

I. Respondent Barger Defaulted

Respondent Danielle P. Barger, Trustee of the Edelman Family Decedent's Trust, has neither appeared in this action nor otherwise responded to Petitioners' Petition. Petitioners are therefore entitled to default judgment granting the petition as against Barger. *See, e.g., Castle Hill Medical PC v. MVAIC*, 992 N.Y.S.2d 157 (Civ. Ct. Kings Cty. May 16, 2014) (granting petition to vacate award after respondent failed to oppose it); *Chubb Ins. Co. v. GEICO Ins. Co.*, 873 N.Y.S.2d 232 (Sup. Ct. N.Y. Cty. Sep. 29, 2008) (same).[5]

II. The MTD Claimants Cannot Dispute the Panel's Consideration Holding Was In Manifest Disregard of the Law

Completely ignoring that the Panel itself found that consenting Participants had received the fee reductions

5. Petitioners refer to the Memorandum of Law (Dkt. # 3, at 17-19) for substantive arguments specific to Barger.

and that Malkin Holdings had significantly increased its services to Participants following implementation of the overrides[6]—both adequate forms of consideration—the MTD Claimants make no rational argument to counter the obvious conclusion that the Panel manifestly disregarded the law. Rather, they attempt to string together a series of non-sequiturs and misstatements of the record, claiming that the "promise to pay" was "illusory," "not paid for 18 years" and "a pittance." Dkt. #54 at 9. They are wrong.

First, the Panel itself repeatedly and clearly found that Malkin Holdings had given up fees to which it would have been entitled "in exchange for" the overrides:

- "In return for signing the Consent Agreement, the Supervisor assigned a pro rata portion of the Supervisor's potential incentive compensation due to reductions in rent for the Master Lease, from 1992 to 2076—an 'assignment' worth approximately $50,000 per year if all Participants had executed Authorizations."[7]

- "the incentive-compensation reductions from 1991 to 2001 totaled $140 for each original $10,000 unit."[8]

Rather than recognize the only legal conclusion that flows from those findings, the Panel stated that because

6. Dkt. # 5 (Award at 18).

7. Dkt. # 5 (Award at 18).

8. Dkt. # 5 (Award at 19).

the S-4 accurately stated that "the supervisor did not pay any consideration for the [o]verrides"[9] but did not detail the consideration that had been exchanged for overrides under written agreements effectuated for decade, those overrides—whose operation and effect were detailed in the S-4 itself—were somehow retroactively nullified. The Panel cited no authority for this holding and we are aware of none.[10]

Implicitly conceding that the Panel's rationale is indefensible, the MTD Claimants trot out an entirely new rationale, not even argued to the Panel and certainly not adopted by it, that they did not receive the consideration timely. This argument is nonsense because there is an avalanche of evidence that they did.[11]

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9. MTD Claimants dispute that the amounts that Participants received for the overrides were not "paid" by Malkin Holdings, citing to one of the solicitations. (Dkt. #54 at 9). That document shows that the payments worked exactly as Petitioners stated. The document states that Wien & Malkin "shall pay to the undersigned a portion of certain supervisory fees otherwise payable to" Wien & Malkin. Dkt. # 13 (R_000014975). Thus, while Wien & Malkin facilitated the payment to Participants, it did not come from its own funds, but, as Petitioners stated in the Petition, from fees otherwise payable to it. But all of this is mere irrelevant semantics—the fact remains that the Participants received this benefit, and that is consideration for the overrides.

10. Dkt. # 5 (Award at 23-24).

11. *See, e.g.*, Dkt. # 19 (R_000008532) ("In 1991, more than 81% in interest of the Participants approved a voluntary individual program to share with Wien & Malkin LLP . . . a portion of excess distributions from any capital transaction, without changing the

Second, concerning supervisory services, the Panel (again) effectively found that they had been provided (which was correct).[12] The Panel nonetheless held that consideration lacking because non-consenting Participants also received those benefits.[13] This (again) makes no sense at all: that the few Participants who did not consent to the overrides received, in effect, a free benefit does not somehow nullify the adequacy of consideration. And the law (ignored by the Panel) is to the same effect. *See* Restatement (Second) of Contracts § 71(4) & cmt. e (1981) ("It matters not from whom the consideration moves or to whom it goes. If it is bargained for and given in exchange for the promise, the promise is not gratuitous.").

Ignoring all this, MTD Claimants come up with yet another new argument, articulated for the first time, that "[t]he promise . . .was illusory as to when and as to amount". (Dkt. #54 at 9). MTD Claimants' assertion that the consideration they admit they received was "a pittance" (Dkt. #54 at 9-10) is contrary to established law. Courts are not to inquire into the adequacy of consideration and any detriment, however slight, is sufficient. *See, e.g., Caisse Nationale de Credit Agricole-CNCA N.Y. Branch v. Valcorp, Inc.*, 28 F.3d 259, 265 (2d Cir. 1994) ("the courts are not to inquire into the adequacy

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existing compensation to Wien & Malkin. Approving Participants *receive each year* a pro rata portion of additional compensation to which Wien & Malkin is otherwise entitled from reductions in master lease rent.") (emphasis added).

12. Dkt. # 5 (Award at 23).

13. Dkt. # 5 (Award at 23).

of consideration") (citations omitted). Far from refuting Petitioners' arguments, this contention only confirms that the Panel manifestly disregarded a bedrock principle of contract law. *See, e.g.*, *Weiss v. Sallie Mae, Inc.*, 939 F.3d 105, 111 (2d Cir. 2019) (vacating arbitration award "[i]n light of the incoherence of the arbitrator's decision"); *Lerner v. Credit Suisse Sec. (USA) LLC*, 193 A.D.3d 649, 650 (1st Dep't 2021) (vacating portion of award where "[t]he arbitration panels manifestly disregarded the law in determining that the Labor Law applied and awarding liquidated damages and/or attorneys' fees thereunder"); *In the Matter of Citigroup Glob. Mrkts., Inc. v. Fiorilla*, 127 A.D.3d 491, 492 (1st Dep't 2015) (vacating arbitration award when arbitrators "ignored the law").

III. Petitioners Timely Filed Their Petition

A. This Petition was Timely Filed in Accordance with the CPLR

Under CPLR § 7511(a), which applies to this proceeding, the Petition was timely because it was filed within ninety days of delivery of the Award to Petitioners.

CPLR § 7511(a) provides "[a]n application to vacate or modify an award may be made by a party within ninety days after its delivery to him." Courts have held that CPLR § 7511 "does not apply a service requirement to the institution of a vacatur action." *Orange & Rockland Utils., Inc. v. Loc. 503, Int'l Bhd. of Elec. Workers*, No. 05 CIV. 6320, 2006 WL 1073049, at *3 (S.D.N.Y. Apr. 21, 2006) (denying dismissal of motion for vacatur based on service after 90 day limitations period); *see also Safari Motor Coaches, Inc. v. Corwin*, 617 N.Y.S.2d 289, 290 (Sup. Ct. Saratoga Cty. 1994) (petition to vacate filed within 90-day limitation period was timely and service on respondent 92 days after receipt of award was "irrelevant"). That is, the petition must be *filed*—not served—within 90 days.

Here, it was. Petitioners filed their original action in the Southern District on November 24, 2020, and thus it was timely under CPLR § 7511(a). Due to the Supreme Court's change of law in the Second Circuit, and the Second Circuit's enforcement of *Badgerow v. Walters*, 142 S. Ct. 1310 (2022), the district court dismissed the federal petition without prejudice, and Petitioners filed this action the very day of the district court's dismissal order.

That too, was timely. As the MTD Claimants[14] acknowledge, CPLR § 205(a) provides

> [i]f an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within

14. There is no dispute that Barger's counsel accepted service of the federal petition to vacate and otherwise confirm the Arbitration Award. Only MTD Claimants raise an issue of timeliness of service of the federal petition.

> six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

New York courts have applied the remedial provisions of CPLR § 205(a) to petitions for vacatur under CPLR § 7511(a).[15] *See Hakala v. Deutsche Bank AG*, 343 F.3d 111, 116 (2d Cir. 2003).

For purposes of the CPLR, the MTD Claimants' assertion that they were served more than 90 days after issuance of the arbitration award is simply inapplicable. The original petition was timely filed under CPLR § 205(a), which provided Petitioners six months to initiate a new petition for vacatur because the original petition was "timely commenced" in the Southern District (a fact MTD Claimants do not dispute), was "terminated" because of a change in the law by the United States Supreme Court, Petitioners promptly filed the petition the day after the Second Circuit's ruling and on the same date the District Court dismissed the petition without prejudice and promptly served the MTD Claimants well within the six-month period provided by CPLR § 205(a).

15. The MTD Claimants' authorities disputing the applicability of CPLR § 205 are inapposite. *Guzy v. New York City*, 129 A.D.3d 614 (1st Dep't 2015) did not involve an arbitration or CPLR § 7511, but the Public Authorities Law, and the untimely filing was purportedly due to waiting for results of an investigation before filing a claim, as opposed to a change of law here. Similarly, *Bradley v. St. Clare's Hosp.*, 232 A.D.2d 814 (3d Dep't 1996) did not involve an arbitration but was a medical malpractice action.

The petition explicitly relies on the CPLR as the basis for both its relief and jurisdiction. *See* Dkt. #1 at 1, ¶ 60. Other than simply stating that the FAA continues to apply "and its strictures must be met along with those of CPLR § 7511(a)," (Dkt. #54 at 7-8), the MTD Claimants do not contest that the petition was timely filed under the CPLR, nor do they even address CPLR § 7511 despite the Petition's reliance on it as a basis of jurisdiction.

Furthermore, the law is clear that the CPLR's time period, and not the FAA's, applies in this Court. That is so because, while the FAA's *substantive* standards apply, the FAA does not displace state arbitration statutes in their entirely, and state rules governing the bringing of a proceeding to confirm and vacate still apply. *Keilly*, 803 N.Y.S.2d at 386 ("Substantive federal law governs issues concerning the construction and enforceability of the parties' arbitration agreement, preempting state law on those matters. However, absent a clear federal mandate to the contrary, the state's procedural rules which govern the commencement of a civil proceeding, control") (internal citation omitted). Notably, those rules include those relating to the deadlines for bringing such a proceeding. *A Better Way Wholesale Autos, Inc. v. James Saint Paul*, No. CV166031881, 2016 WL 8135391 at *4 (Conn. Super. Ct. Dec. 30, 2016) (state procedural deadline applies and not FAA's; "Requiring the movant to file within thirty days does not conflict with the primary purpose of the FAA, which is to encourage arbitration to the fullest scope of the parties' agreement to arbitrate") (internal quotation marks omitted); *Atl. Painting & Contracting Inc. v. Nashville Bridge Co.*, 670 S.W.2d 841, 846 (Ky. 1984) ("The federal Arbitration Act covers both substantive law and a procedure for federal courts to follow where a party to arbitration seeks to enforce or vacate an arbitration award in federal court. The procedural aspects are confined to federal cases.") (emphasis omitted).

B. Equitable Tolling Applies Due to the Change in Law Concerning Subject Matter Jurisdiction

Petitioners' application would also be timely based on equitable tolling. The petition for vacatur was filed in good faith based on existing case law applying the FAA and *Badgerow* changed the relevant law (through no fault of Petitioners.) As Petitioners filed the initial application in a venue that would ultimately become unavailable to them, Petitioners diligently pursued their rights but were frustrated by an intervening change in law.

"As a general matter, a litigant seeking equitable tolling must establish two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Est. of Mandarino v. Mandarino*, 699 F. Supp. 2d 646, 652 (S.D.N.Y. 2010) (internal quotation marks omitted). New York courts have held that an intervening change of law retroactively depriving a litigant of a cause of action may constitute such extraordinary circumstances. *See, e.g, Hargroves v. City of New York*, 694 F. Supp. 2d 198, 211 (E.D.N.Y. 2010), *rev'd on other grounds*, 411 F. App'x 378 (2d Cir. 2011) (intervening change of law constituted "rare and extraordinary circumstances" justifying equitable tolling of statute of limitations in § 1983 context);

Wharton v. County of Nassau, No. 07–CV–2137, 2010 WL 3749077, at *4 (E.D.N.Y. Sep. 20, 2010) (tolling § 1983 action where "Plaintiffs, through no fault of their own, relied on then-authoritative Second Circuit precedent to their detriment, and strict application of [precedent] would effectively deprive Plaintiffs of their cause of action.") (citation omitted).

Petitioners timely filed their federal action under the then-existing law of "look-through" jurisdiction, and after the federal court was stripped of subject matter jurisdiction to decide such actions, Petitioners promptly moved to dismiss its federal petition and refile in New York Supreme Court.

C. Petitioners' Service of the Original Southern District Action on the MTD Claimants' Counsel Was Proper

Even if the procedural provisions of the FAA apply, the Petition would still have been timely.

Section 12 of the FAA provides: "[n]otice of a motion to vacate, modify, or correct an award must be served upon the adverse party *or his attorney* within three months after the award is filed or delivered."[16] Petitioners sent an email on November 23, 2020, to the MTD Claimants' long-time counsel—Mr. Griggs—by attaching the filed Petition and related documents; therefore, service was proper and timely.

16. 9 U.S.C. § 12 (emphasis added).

1. The MTD Claimants' Counsel Was Authorized to Accept Service

It is well-established that an attorney's authority to act as an agent for service of process need not be express and may be implied from surrounding circumstances showing the intent of the client.[17] And, not surprisingly, courts have held that service on an attorney who has represented the same clients in a related case is proper service. As the Court in *United States v. Bosurgi* explained:

> What is necessary is that it appear that the attorney was authorized either expressly or impliedly, to receive service of process for his client. And if such agency is to be implied, it must be implied from all the circumstances accompanying the attorney's appointment which indicate the extent of authority the client intended to confer.

343 F. Supp. 815, 818-19 (S.D.N.Y.1972) (citations omitted). In *Bosurgi*, the defendant had hired a law firm to assert the defendant's alleged right to possession of a certain fund that was already being held in escrow subject to federal tax liens. *Id.* at 818. The attorney filed a state court action to claim the fund. *Id.* The United States then commenced a related action in federal district court and served process on the defendant's attorneys. *Id.* The

17. 4 C. Wright and A. Miller, Federal Practice and Procedure, § 1097 (4th ed.); 2 J. Moore and J. Lucas, Moore's Federal Practice, ¶¶ 4.12, 4.13 (1985).

Court upheld the service, reasoning that the attorney was "impliedly authorized" to receive service of process in the federal suit, as it addressed defendant's right to the money.

The cases cited in the MTD Claimants' Motion to Dismiss are inapplicable: none involve notice to counsel who had already appeared (and was continuing to appear) in a related case in the same court, between the same parties, involving the same subject matter and involving the same counsel.

Here, Mr. Griggs has appeared on behalf of the MTD Claimants and has been actively involved in a parallel Southern District of New York case brought to toll the statute of limitations for non-arbitrable claims (the "Tolling Action") for *six years*, a case to which the federal petition was marked related.[18] Service on Mr. Griggs was therefore appropriate given his representation of MTD Claimants in the Tolling Action.

Courts have authorized service of process on attorneys where an attorney serves as the client's representative even in the absence of a notice of appearance. *See Jian Zhang v. Baidu.com Inc.*, 293 F.R.D. 508, 515 (S.D.N.Y. 2013) (authorizing service on the plaintiff's New York counsel that made a special appearance in the case contesting service). Courts look to the factual circumstances to determine whether an attorney is "unquestionably"

18. No. 14 Civ. 09989, ECF #1, Compl. ¶ 3; ECF #14, Am. Compl. ¶ 3

a party's representative. *See Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 982 (2d Cir. 1996) (notice to counsel was proper where counsel was "unquestionably" party's representative); *U.S. v. Machat*, No. 08-CV-7936, 2009 WL 3029303, at *4 (S.D.N.Y. Sept. 21, 2009) (approving service by email and on defendant's attorney where the attorney had appeared for the defendant "and therefore must [have] know[n] how to contact [the defendant] to notify her of service") (citation omitted).

Since Mr. Griggs has been representing the MTD Claimants since 2014—in the underlying Arbitration, the related Tolling Action and original federal petition—Mr. Griggs is "unquestionably" the MTD Claimants' representative.

2. The MTD Claimants Consented to Email Service

Federal Rule of Civil Procedure 5(b)(2)(E) allows for service by any other means, including electronic means, where the person served consents to the service in writing.[19] MTD Claimants argue that email service to Mr. Griggs on November 23, 2020, was improper service because Mr. Griggs did not consent to email service in writing.[20] Most (if not all) of the pleadings and correspondence during the six-year Arbitration and Tolling Action were exchanged electronically and Mr. Griggs never declined to accept service. Notably, courts have

19. Fed. R. Civ. Proc. 5(b)(2)(E).

20. Dkt. #54 at 2.

exercised their discretion in permitting email service to counsel in the context of petitions to vacate arbitration awards even in the absence of written consent. *See, e.g.*, *Day & Zimmerman, Inc. v. SOC-SMG, Inc.*, No. CIV.A. 11-6008, 2012 WL 5232180, at *4 (E.D. Pa. Oct. 22, 2012) (upholding service by email on respondent's counsel even in the absence of express consent in writing, noting "the underlying arbitration spanned over two years, during which time email was used as the parties' primary mode of communication without fault. The Court can find no reason why this same agreement should not apply to the present litigation since the action directly involves the Arbitration, regardless of the parties['] chosen venue").

Mr. Griggs *never* responded to Petitioners' November 23, 2020 email asking if he would consent to service (despite later responding to a different email on that same email thread) and then proceeded to wait 23 days after the purported service deadline to inform Petitioners that service was allegedly untimely. Mr. Griggs' failure to respond—when the Federal Rules impose a duty to avoid unnecessary expense of service and in the midst of a pandemic—warrants relief here. This Court should similarly hold that email service here was proper given that during the course of the *six-year* underlying Arbitration, the majority of correspondence between counsel for Petitioners and Mr. Griggs was via email. *See Day & Zimmerman*, 2012 WL 5232180, at *4.

3. Courts Excuse Service in the Context of Arbitrations Where There Is Actual Notice and No Prejudice

In all events, even if the FAA applied to service issues, this Court may exercise its discretion to excuse such service, particularly when, as here, it is undisputed that the MTD Claimants had actual notice of this Petition and have not been prejudiced by any delay. "The Second Circuit has held that standards for service are to be liberally construed in the context of arbitration." *Marine Trading Ltd. v. Naviera Commercial Naylamp S.A.*, 879 F. Supp. 389, 392 (S.D.N.Y. 1995) (citing *Grammenos v. Lemos*, 457 F.2d 1067, 1070 (2d Cir. 1972)).

While MTD Claimants argue that equitable relief is unavailable here, relying on cherry-picked cases that have refused to permit delays in service—they are wrong.[21] *See Matter of Arbitration between InterCarbon Bermuda, Ltd. & Caltex Trading & Transp. Corp.*, 146 F.R.D. 64, 71 (S.D.N.Y. 1993) (where petition was sent to attorney within the three-month statutory deadline, finding respondent "has suffered no significant prejudice by [petitioner's] failure to adhere to proper methods of service.").

The MTD Claimants do not contend that they suffered any prejudice or other injustice because of the email service. Further, they do not dispute that they received actual notice of the Petition. All MTD Claimants were served in the federal action just as they have been served the instant petition.

21. *See* Dkt. # 54 at 6.

APPENDIX O — EXCERPTS OF RESPONDENTS' OPPOSITION IN THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, DATED MAY 23, 2023

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

Index No. 652074/2023

VIRGINIA SHASHA AND VIVIENNE PERO, COTRUSTEES OF THE VIOLET SHUKER SHASHA TRUST; SHIRLEY ADLER, TRUSTEE OF THE ADLER FAMILY TRUST; MYRNA JOY EDELMAN, TRUSTEE OF THE 2006 GILBERT M. EDELMAN INTER VIVOS TRUST; EMPIRE STATE LIQUIDITY FUND, LLC; MARY JANE FALES; MELVYN H. HALPER; PHYLLIS J. HALPER; AND WENDY S. TAMIS,

Petitioners,

-against-

PETER L. MALKIN; ANTHONY E. MALKIN; THOMAS N. KELTNER, JR.; AND ESRT MH HOLDINGS L.L.C.,

Respondents.

RESPONDENTS' OPPOSITION TO PETITION FOR CONFIRMATION OF ARBITRATION AWARD

***

ARGUMENT

The Panel's rulings on the consideration issue and the counterclaim are obviously irreconcilable with basic legal principles and must be vacated.

I. The Panel's Holding that Consideration Was Lacking is in Manifest Disregard of the Law

An arbitral panel may not act in "manifest disregard of the law." *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 452 (2d Cir. 2011); *see also Cantor Fitzgerald Sec. v. Refco Sec., LLC*, 83 A.D.3d 592, 593 (1st Dep't 2011) ("[T]he judicially-created "manifest disregard of the law" ground for vacating an arbitration award is still viable . . . .") (citations omitted).

"A court may find an award to be in manifest disregard of the law if the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and that legal principle was well defined, explicit and clearly applicable to the case." *Cheng v. Oxford Health Plans, Inc.*, 45 A.D.3d 356, 357 (1st Dep't 2007) (citations omitted). The Second Circuit has established a three-part test for determining whether an arbitration award was issued in manifest disregard of the law. *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003). *First*, the court considers whether the governing law that was allegedly ignored was "clear" and "in fact explicitly applicable to the matter before the arbitrators." *T.Co Metals LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010); *Merrill Lynch,* *Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 934 (2d Cir. 1986). *Second*, the court reviews whether "the arbitrators did in fact err in their application of the law, and that the outcome reached was erroneous." *Sotheby's Int'l Realty v. Relocation Grp. LLC*, 588 F. App'x. 64, 65-66 (2d Cir. 2015); *T.Co. Metals*, 592 F.3d at 339. *Third,* the court considers whether "the arbitrators knew of the law's existence and its applicability to the problem before them." *Sotheby's*, 588 F. App'x. at 66; *T.Co. Metals*, 592 F.3d at 339. Each of these requirements is easily established here.

First, there is not and never has been any dispute about the applicable law: courts are not to inquire into the adequacy of consideration and any detriment, however slight, is sufficient. *See Caisse Nationale de Credit Agricole-CNCA New York Branch v. Valcorp, Inc.*, 28 F.3d 259, 265 (2d Cir. 1994) ("the courts are not to inquire into the adequacy of consideration") (citation omitted); *Apfel v. Prudential-Bache Sec. Inc.*, 81 N.Y.2d 470, 476 (1993) ("Absent fraud or unconscionability, the adequacy of consideration is not a proper subject for judicial scrutiny.") (citation omitted); *Mencher v. Weiss*, 306 N.Y. 1, 8 (1953) ("The slightest consideration is sufficient to support the most onerous obligation; the inadequacy, as has been well said, is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced.").

Second, the Panel's holding is obviously wrong. All parties and the Panel itself repeatedly acknowledged that Malkin Holdings *for decades* gave up fees to which it would have been entitled "in exchange" for overrides from consenting Participants. Period. The documents show it,[38] the testimony shows it,[39] and the issue was never contested. Indeed, one of the Claimants himself confirmed as much:

> Q. It states "If all participants execute authorizations, WM&B will forego the right to receive $45,000.17 a year from 1992 to 2013 and

38. *E.g.*, Pegno Aff. Ex. 7 (R-4 at R_000008669) ("[Malkin Holdings] will assign, effective January 1, 1992 through January 5, 2076, to the Participant a *pro rata* portion of [Malkin Holdings'] additional compensation from the scheduled reductions in Master Lease rent to become effective in 1992 and 2013."); (R-4 at R_000008673) ("If all Participants execute Authorizations, [Malkin Holdings] will forego the right to receive $45,017 a year from 1992 to 2013, and $52,405 a year thereafter through January 5, 2076, and Participants will receive such amounts. [Malkin Holdings] will be obligated to assign such sums to each authorizing Participant…."); Ex. 15 (R-10 at 8532) ("Any Participant whose interest in [ESBA] is not already subject to this voluntary program may now approve the same voluntary program which is in effect for more than 81% of the Participants. An approving Participant will receive now the pro rata payment from [Malkin Holdings] retroactive to the January 1, 1992 start of this program of approximately $140 for each original $10,000 participating interest.").

39. Pegno Aff. Ex. 2 (Tr. 3689 (consideration consisted of "an assignment by the supervisor of a portion of its override. It was the portion attributable to the increased profit from reducing debtservice"); (Tr. 4585) ("it was just $50,000 a year surrender by Malkin Holdings without any assurance that there would ever be[] a return on that you might say."); Tr. 6712 (assignment of pro rata portion of additional compensation "was part of the consideration for the voluntary consents")).

> $52,400.05 a year thereafter through January 5th, 2076, and participants will receive such amounts. WM&B will be obligated to assign such sums to each authorized participant even if Associates does not purchase the property from Prudential." Do you see that, sir?
>
> A. Yes.
>
> Q. Okay. So that in exchange for the overrides, WM&B, your firm at the time, is giving up a right to receive compensation, correct?
>
> A. That's what this says.[40]

In fact, *the Panel itself repeatedly recognized that these fee reductions had occurred*: as the Panel held, "In return for signing the Consent Agreement, the Supervisor assigned a *pro rata* portion of the Supervisor's potential incentive compensation due to reductions in rent for the Master Lease, from 1992 to 2076—an 'assignment' worth approximately $50,000 per year if all Participants had executed Authorizations."[41] Thus, the Panel itself expressly recognized that Respondents did, in fact, give up compensation "in exchange for the Overrides"—yet, incredibly, nonetheless held that consideration was lacking. *See Anheuser-Busch, Inc. v.*

40. Pegno Aff. Ex. 2 (Tr. 4856).

41. Pegno Aff. Ex. 1 (Award at 18). *See also* Pegno Aff. Ex. 1 (Award at 19) ("the incentivecompensation reductions from 1991 to 2001 totaled $140 for each original $10,000 unit").

Beer, et al., 280 F.3d 1133, 1140 (7th Cir. 2002) (vacating arbitration award when "the arbitrator issued an award based not on any reading of or language in the contract, but rather on his personal view of how the contract would read"); *Asturiana De Zinc Mktg., Inc. v. LaSalle Rolling Mills, Inc.*, 20 F. Supp. 2d 670, 675 (S.D.N.Y. 1998) (award vacated in part when made "in 'manifest disregard' of New York substantive law").

If anything, however, the Panel's purported rationale for this nonsensical holding is even more bizarre. As explained above, the S-4 stated that "the supervisor did not pay any consideration for the overrides." This was and is an accurate statement, since consenting Participants received prospective fee reductions, which as the Panel itself recognized, were implemented.[42]

Though all this was quite clear, the Panel nonetheless found this "argument" "unpersuasive".[43] The sole ground for this conclusion was as follows:

> The S-4, which Respondents duly filed with the SEC and then distributed to all Participants and countless other prospective investors, should and presumably would have stated expressly that the Supervisor had provided a benefit in exchange for the Overrides. Otherwise, the S-4 is substantially misleading.

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42. *See also* Pegno Aff. Ex. 2 (Tr. 7062 ("that charge would not apply to those [Participants] who entered into the voluntary override")).

43. Pegno Aff. Ex. 1 (Award at 23).

> Accordingly, we conclude that the Supervisor did not provide consideration in exchange for the Overrides that were voluntarily agreed to in the Consent Agreements.[44]

Thus, the Panel's core holding is as follows: even though by the Panel's own admission there plainly was consideration, the failure adequately to describe that consideration in a later securities filing, nullified that consideration as a matter of law, and retroactively invalidated the agreement. The Panel cites no authority of any kind for this holding—not surprisingly, because to state the proposition is to refute it. The S-4 itself, and the section addressing the overrides specifically, were drafted by leading securities lawyers; and reviewed in exhaustive detail by the SEC staff, which declared the S-4 effective after that review.[45] And, of course, the Participants themselves well knew all these facts, since they themselves has consented (or not) to the overrides.

It is well understood that overrides once granted belong to their owners and cannot be reclaimed by the

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44. Pegno Aff. Ex. 1 (Award at 23-24) (footnote omitted).

45. *See* Pegno Aff. Ex. 16 (C-40 at 8147 (SEC staff advising Participant that the S-4 "was declared effective by the SEC, which entails a determination by the staff that the document is materially compliant with the disclosure rules."); C-40 at 8145 (in response to Participant who called SEC to ensure "as far as the SEC is concerned everything is proper and legit," SEC staff "responded that the SEC declared the registration statement effective and has no objection to the Malkins proceeding with the solicitation and closing the deal if requisite consents are received.")).

grantors unless so provided by their terms. There are many sales of overrides that show they have value on their own. One cannot reverse these overrides any more than one can unscramble and uncrack an egg. In short, the holding is nonsensical and made up out of freshly spun thread and woven cloth that has no part of the fabric of this Transaction.

Equally flawed was the Panel's rejection of one of the other elements of consideration for the overrides, namely that the Supervisor substantially increased the supervisory services it provided to Participants. Here, too, it was undisputed that this had, in fact, occurred.[46] And, here, also, the Panel recognized as much, but nonetheless found consideration lacking because non-consenting Participants also received those benefits.[47] This (again) makes no sense at all: that the few Participants who did not consent to the overrides received, in effect, a free benefit does not somehow nullify the adequacy of consideration. And the law (ignored) is of course to the same effect. *See* Restatement (Second) of Contracts § 71(4) & cmt. e (1981) ("It matters not from whom the consideration moves or to whom it goes. If it is bargained for and given in exchange for the promise, the promise is not gratuitous.").

46. Pegno Aff. Ex. 2 (Tr. 4159 (consideration received from "[t]he benefit to the investors of continuing an expanded supervisory services."); Tr. 3689 ("The other part of the consideration which was, you know, presented in this context was, the supervisors'[] continuing service in an expanded array of services as, you know, property management became more demanding and various reasons.")).

47. Pegno Aff. 1 (Award at 23).

Third, the Panel obviously knew of the law's existence and its applicability. *T.Co Metals*, 592 F.3d at 339. The correct law was repeatedly cited to the Panel, from the beginning of the case through Respondents' Post-Hearing Brief.[48] Further, Claimants/Petitioners cited no authority in opposition—there is none, and in any event they failed to submit a Post-Hearing Brief. The unfortunate yet inescapable conclusion is that the Panel deliberately chose to disregard the applicable law, mandating vacatur of this aspect of the Award. *See In the Matter of Citigroup Glob. Mrkts., Inc. v. Fiorilla*, 127 A.D.3d 491, 492 (1st Dep't 2015) (vacating arbitration award when arbitrators "ignored the law").

II. The Panel's Holding Regarding Agency is in Manifest Disregard of the Law

The Panel concluded in the Award that the Edelman Trust "is not liable for Richard Edelman's claimed defamatory statements."[49] In so concluding, the Panel not only disregarded its own prior ruling that Edelman was "according to facts of record" a "spokesperson["] and "according to facts of record" "acted as if" he "were the principal[] with respect to the trust's underlying ESBA investment",[50] but also manifestly disregarded the law of agency.

48. Pegno Aff. Exs. 17, 18 (Respondents' Pre-Hearing Memorandum dated May 18, 2016, at 14-16; Respondents' Post-Hearing Brief dated Feb. 24, 2020, at 54-57).

49. Pegno Aff. Ex. 1 (Award at 85).

50. Pegno Aff. Ex. 5 (Mar. 6, 2016 Panel Memorandum at 10, 12).

The applicable legal principles are (again) clear and well-established. "An agent who acts with apparent authority in making a defamatory statement may subject the principal to liability." Restatement (Third) of Agency § 7.08 cmt. d (2006); *see also In re WorldCom, Inc.*, No. 02-13533 AJG, 2007 WL 735021, at *5 (Bankr. S.D.N.Y. Mar. 9, 2007) ("[A] principal's silence is sufficient to create apparent authority."); *Hatton v. Quad Realty Corp.*, 100 A.D.2d 609, 610 (2d Dep't 1984) (implied agency by acquiescence of principal to acts of agents).

Here, Edelman repeatedly held himself out as a "Participant", not merely the beneficiary of a trust that held ESBA interests. Among many other things, he operated a website that stated that it "is a website by fifty year participant investors in" ESBA.[51] In an August 28, 2012 email, Edelman referred to "we, the owners of the Empire State Building" and stated "as fellow participant investors in [ESBA], we are all in this together".[52] A caller acting on behalf of the Edelmans represented that Edelman was an ESBA Participant in a voicemail left for Peter Malkin's daughter and Tony Malkin's sister, stating, "I'm a family friend of the Edelmans… who are investors, just like yourself."[53] Thus, it is not surprising that Claimants' own witness Ms. Manheimer testified

51. Pegno Aff. Ex. 2 (Tr. 1246; Tr. 2796); Ex. 19 (R-300).

52. Pegno Aff. Ex. 3 (R-55 at 1, 3); Ex. 2 (Tr. 1956 (on conference calls Edelman "identified himself as a fellow investor."); Tr. 7586 (same); Tr. 7619 (Edelman identified himself on conference calls as "a fellow participant")).

53. Pegno Aff. Ex. 20 (R-199).

that she "trusted Richard Edelman" because "[h]e was a fellow investor like myself."[54]

Indeed, the Panel's ruling is all the more inexplicable since the Panel had effectively *already found* that Edelman had apparent authority: in a prior ruling, the Panel had expressly and repeatedly held that Edelman "according to facts of record" "acted as if [he] were the principal[] with respect to the trust's underlying ESBA investment" and "according to facts of record" was a "spokesperson[]" for the Edelman Trust.[55] These are essentially dictionary definitions of "apparent authority".

Moreover, the *only* ground the Panel offered for its holding—that the trustee, Howard Edelman, had not "held out" to others that Richard had authority to act for the Edelman Trust[56]—makes no sense. Howard Edelman had designated Edelman as a "designee",[57] and received numerous letters specifically detailing the false and misleading statements made *for years* by Edelman.[58] Yet he did nothing. It is therefore clear, as the Panel itself had previously ruled, that he "permit[ted]" Edelman to hold himself out as representing the Edelman Trust. *See In re Nigeria Charter Flights Contract Litig.*, 520 F.

54. Pegno Aff. Ex. 2 (Tr. 582).

55. Pegno Aff. Ex. 5 (Mar. 6, 2016 Panel Memorandum at 10, 12).

56. Pegno Aff. Ex. 1 (Award at 88).

57. Pegno Aff. Ex. 21 (R-303).

58. *E.g.*, Pegno Aff. Ex. 22 (R-61).

Supp. 2d 447, 464 (E.D.N.Y. 2007) ("Apparent authority is that authority which the principal holds the agent out as possessing, *or which he permits the agent to represent that he possesses* . . . .") (citations and quotation marks omitted) (emphasis added).

Accordingly, the Panel manifestly disregarded the law of agency (and its own prior ruling) when it concluded that the Edelman Trust was not responsible for the defamatory statements by its agent, Richard Edelman.

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APPENDIX P — EXCERPT OF MEMORANDUM OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, DATED APRIL 21, 2023

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

Index No. ____________________

PETER L. MALKIN; ANTHONY E. MALKIN; THOMAS N. KELTNER, JR.; AND ESRT MH HOLDINGS L.L.C.,

Petitioners,

-against-

VIRGINIA SHASHA AND VIVIENNE PERO, CO-TRUSTEES OF THE VIOLET SHUKER SHASHA TRUST; DANIELLE P. BARGER, TRUSTEE OF THE EDELMAN FAMILY DECEDENT'S TRUST; SHIRLEY ADLER, TRUSTEE OF THE ADLER FAMILY TRUST; MYRNA JOY EDELMAN, TRUSTEE OF THE 2006 GILBERT M. EDELMAN INTER VIVOS TRUST; EMPIRE STATE LIQUIDITY FUND, LLC; MARY JANE FALES; MELVYN H. HALPER; PHYLLIS J. HALPER; AND WENDY S. TAMIS,

Respondents.

Dated April 21, 2023

Appendix P

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE IN PART AND OTHERWISE CONFIRM ARBITRATION AWARD

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Attorneys for Petitioners

Panel's decision was merely internally inconsistent as opposed to manifestly ignoring established New York law regarding consideration, 2) failing to address the Panel's prior finding that Edelman had apparent authority from the Edelman Trust and 3) ignoring case law upholding email service of petitions in the absence of written consent. While Petitioners' appeal was pending, the Supreme Court issued a new ruling prohibiting subject matter jurisdiction by "looking through" to the underlying arbitration claims to determine whether a federal claim was raised. *See Badgerow v. Walters*, 142 S. Ct. 1310 (2022). The Second Circuit vacated the district court's order in light of *Badgerow* on April 20, 2023 and the District Court dismissed the federal action without prejudice on April 21.

ARGUMENT

The Panel's rulings on the consideration issue and the counterclaim are obviously irreconcilable with basic legal principles and must be vacated.

I. The Panel's Holding that Consideration Was Lacking is in Manifest Disregard of the Law

An arbitral panel may not act in "manifest disregard of the law." *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 452 (2d Cir. 2011); *see also Cantor Fitzgerald Sec. v. Refco Sec., LLC*, 83 A.D.3d 592, 593 (1st Dep't 2011) ("[T]he judicially-created "manifest disregard of the law" ground for vacating an arbitration award is still viable . . . .") (citations omitted).

The Second Circuit has established a three-part test for determining whether an arbitration award was issued in manifest disregard of the law. *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003). *First*, the court considers whether the governing law that was allegedly ignored was "clear" and "in fact explicitly applicable to the matter before the arbitrators." *T.Co Metals LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 934 (2d Cir. 1986). *Second*, the court reviews whether "the arbitrators did in fact err in their application of the law, and that the outcome reached was erroneous." *Sotheby's Int'l Realty v. Relocation Grp. LLC*, 588 F. App'x. 64, 65-66 (2d Cir. 2015); *T.Co. Metals*, 592 F.3d at 339. *Third,* the court considers whether "the arbitrators knew of the law's existence and its applicability to the problem before them." *Sotheby's*, 588 F. App'x. at 66; *T.Co. Metals*, 592 F.3d at 339. Each of these requirements is easily established here.

First, there is not and never has been any dispute about the applicable law: courts are not to inquire into the adequacy of consideration and any detriment, however slight, is sufficient. *See Caisse Nationale de Credit Agricole-CNCA New York Branch v. Valcorp, Inc.*, 28 F.3d 259, 265 (2d Cir. 1994) ("the courts are not to inquire into the adequacy of consideration") (citation omitted); *Apfel v. Prudential-Bache Sec. Inc.*, 81 N.Y.2d 470, 476 (1993) ("Absent fraud or unconscionability, the adequacy of consideration is not a proper subject for judicial scrutiny.") (citation omitted); *Mencher v. Weiss*, 306 N.Y. 1, 8 (1953) ("The slightest consideration is sufficient to support the most onerous obligation; the inadequacy, as has been well said, is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced.").

Second, the Panel's holding is obviously wrong. All parties and the Panel itself repeatedly acknowledged that Malkin Holdings *for decades* gave up fees to which it would have been entitled "in exchange" for overrides from consenting Participants. Period. The documents show it,[37] the testimony shows it,[38] and the issue was never contested. Indeed, one of the Claimants/Plaintiffs himself confirmed as much:

> Q. It states "If all participants execute authorizations, WM&B will forego the right to receive $45,000.17 a year from 1992 to 2013 and $52,400.05 a year thereafter through January

37. *E.g.*, Pegno Aff. Ex. 7 (R-4 at R_000008669) ("[Malkin Holdings] will assign, effective January 1, 1992 through January 5, 2076, to the Participant a *pro rata* portion of [Malkin Holdings'] additional compensation from the scheduled reductions in Master Lease rent to become effective in 1992 and 2013."); (R-4 at R_000008673) ("If all Participants execute Authorizations, [Malkin Holdings] will forego the right to receive $45,017 a year from 1992 to 2013, and $52,405 a year thereafter through January 5, 2076, and Participants will receive such amounts. [Malkin Holdings] will be obligated to assign such sums to each authorizing Participant. . . ."); Ex. 15 (R-10 at 8532) ("Any Participant whose interest in [ESBA] is not already subject to this voluntary program may now approve the same voluntary program which is in effect for more than 81% of the Participants. An approving Participant will receive now the pro rata payment from [Malkin Holdings] retroactive to the January 1, 1992 start of this program of approximately $140 for each original $10,000 participating interest.").

38. Pegno Aff. Ex. 2 (Tr. 3689 (consideration consisted of "an assignment by the supervisor of a portion of its override. It was the portion attributable to the increased profit from reducing debt service"); (Tr. 4585) ("it was just $50,000 a year surrender by Malkin Holdings without any assurance that there would ever be[] a return on that you might say."); Tr. 6712 (assignment of pro rata portion of additional compensation "was part of the consideration for the voluntary consents")).

> 5th, 2076, and participants will receive such amounts. WM&B will be obligated to assign such sums to each authorized participant even if Associates does not purchase the property from Prudential."
>
> Do you see that, sir?
>
> A. Yes.
>
> Q. Okay. So that in exchange for the overrides, WM&B, your firm at the time, is giving up a right to receive compensation, correct?
>
> A. That's what this says.[39]

In fact, *the Panel itself repeatedly recognized that these fee reductions had occurred*: as the Panel held, "In return for signing the Consent Agreement, the Supervisor assigned a *pro rata* portion of the Supervisor's potential incentive compensation due to reductions in rent for the Master Lease, from 1992 to 2076—an 'assignment' worth approximately $50,000 per year if all Participants had executed Authorizations."[40] Thus, the Panel itself expressly recognized that Respondents did, in fact, give up compensation "in exchange for the Overrides"—yet, incredibly, nonetheless held that consideration was

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39. Pegno Aff. Ex. 2 (Tr. 4856).

40. Pegno Aff. Ex. 1 (Award at 18). *See also* Pegno Aff. Ex. 1 (Award at 19) ("the incentive-compensation reductions from 1991 to 2001 totaled $140 for each original $10,000 unit").

lacking. *See Anheuser-Busch, Inc. v. Beer, et al.*, 280 F.3d 1133, 1140 (7th Cir. 2002) (vacating arbitration award when "the arbitrator issued an award based not on any reading of or language in the contract, but rather on his personal view of how the contract would read"); *Asturiana De Zinc Mktg., Inc. v. LaSalle Rolling Mills, Inc.*, 20 F. Supp. 2d 670, 675 (S.D.N.Y. 1998) (award vacated in part when made "in 'manifest disregard' of New York substantive law").

If anything, however, the Panel's purported rationale for this nonsensical holding is even more bizarre. As explained above, the S-4 stated that "the supervisor did not pay any consideration for the overrides." This was and is an accurate statement, since consenting Participants received prospective fee reductions, which as the Panel itself recognized, were implemented.[41]

Though all this was quite clear, the Panel nonetheless found this "argument" "unpersuasive".[42] The sole ground for this conclusion was as follows:

> The S-4, which Respondents duly filed with the SEC and then distributed to all Participants and countless other prospective investors, should and presumably would have stated expressly that the Supervisor had provided a benefit in exchange for the Overrides. Otherwise, the S-4 is substantially misleading.

41. *See also* Pegno Aff. Ex. 2 (Tr. 7062 ("that charge would not apply to those [Participants] who entered into the voluntary override")).

42. Pegno Aff. Ex. 1 (Award at 23).

> Accordingly, we conclude that the Supervisor did not provide consideration in exchange for the Overrides that were voluntarily agreed to in the Consent Agreements.[43]

Thus, the Panel's core holding is as follows: even though by the Panel's own admission there plainly was consideration, the failure adequately to describe that consideration in a later securities filing, nullified that consideration as a matter of law, and retroactively invalidated the agreement. The Panel cites no authority of any kind for this holding—not surprisingly, because to state the proposition is to refute it. The S-4 itself, and the section addressing the overrides specifically, were drafted by leading securities lawyers; and reviewed in exhaustive detail by the SEC staff, which declared the S-4 effective after that review.[44] And, of course, the Participants themselves well knew all these facts, since they themselves has consented (or not) to the overrides.

It is well understood that overrides once granted belong to their owners and cannot be reclaimed by the

43. Pegno Aff. Ex. 1 (Award at 23-24) (footnote omitted).

44. *See* Pegno Aff. Ex. 16 (C-40 at 8147 (SEC staff advising Participant that the S-4 "was declared effective by the SEC, which entails a determination by the staff that the document is materially compliant with the disclosure rules."); C-40 at 8145 (in response to Participant who called SEC to ensure "as far as the SEC is concerned everything is proper and legit," SEC staff "responded that the SEC declared the registration statement effective and has no objection to the Malkins proceeding with the solicitation and closing the deal if requisite consents are received.")).

grantors unless so provided by their terms. There are many sales of overrides that show they have value on their own. One cannot reverse these overrides any more than one can unscramble and uncrack an egg. In short, the holding is nonsensical and made up out freshly spun thread and woven cloth that has no part of the fabric of this Transaction.

Equally flawed was the Panel's rejection of one of the other elements of consideration for the overrides, namely that the Supervisor substantially increased the supervisory services it provided to Participants. Here, too, it was undisputed that this had, in fact, occurred.[45] And, here, also, the Panel recognized as much, but nonetheless found consideration lacking because non-consenting Participants also received those benefits.[46] This (again) makes no sense at all: that the few Participants who did not consent to the overrides received, in effect, a free benefit does not somehow nullify the adequacy of consideration. And the law (ignored) is of course to the same effect. *See* Restatement (Second) of Contracts § 71(4) & cmt. e (1981) ("It matters not from whom the consideration moves or to whom it goes. If it is bargained for and given in exchange for the promise, the promise is not gratuitous.").

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45. Pegno Aff. Ex. 2 (Tr. 4159 (consideration received from "[t]he benefit to the investors of continuing an expanded supervisory services."); Tr. 3689 ("The other part of the consideration which was, you know, presented in this context was, the supervisors'[] continuing service in an expanded array of services as, you know, property management became more demanding and various reasons.")).

46. Pegno Aff. 1 (Award at 23).

Third, the Panel obviously knew of the law's existence and its applicability. *T.Co Metals*, 592 F.3d at 339. The correct law was repeatedly cited to the Panel, from the beginning of the case through Respondents' Post-Hearing Brief.[47] Further, Claimants/Plaintiffs cited no authority in opposition—there is none, and in any event they failed to submit a Post-Hearing Brief. The unfortunate yet inescapable conclusion is that the Panel deliberately chose to disregard the applicable law, mandating vacatur of this aspect of the Award. *See In the Matter of Citigroup Glob. Mrkts., Inc. v. Fiorilla*, 127 A.D.3d 491, 492 (1st Dep't 2015) (vacating arbitration award when arbitrators "ignored the law").

II. The Panel's Holding Regarding Agency is in Manifest Disregard of the Law

The Panel concluded in the Award that the Edelman Trust "is not liable for Richard Edelman's claimed defamatory statements."[48] In so concluding, the Panel not only disregarded its own prior ruling that Edelman was "according to facts of record" a "spokesperson["] and "according to facts of record" "acted as if" he "were the principal[] with respect to the trust's underlying ESBA

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47. Pegno Aff. Exs. 17, 18 (Respondents' Pre-Hearing Memorandum dated May 18, 2016, at 14-16; Respondents' Post-Hearing Brief dated Feb. 24, 2020, at 54-57).

48. Pegno Aff. Ex. 1 (Award at 85).

investment",[49] but also manifestly disregarded the law of agency.

The applicable legal principles are (again) clear and well-established. "An agent who acts with apparent authority in making a defamatory statement may subject the principal to liability." Restatement (Third) of Agency § 7.08 cmt. d (2006); *see also In re WorldCom, Inc.*, No. 02-13533 AJG, 2007 WL 735021, at *5 (Bankr. S.D.N.Y. Mar. 9, 2007) ("[A] principal's silence is sufficient to create apparent authority."); *Hatton v. Quad Realty Corp.*, 100 A.D.2d 609, 610 (2d Dep't 1984) (implied agency by acquiescence of principal to acts of agents).

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represented that Edelman was an ESBA Participant in a voicemail left for Peter Malkin's daughter and Tony Malkin's sister, stating, "I'm a family friend of the Edelmans . . . who are investors, just like yourself."[52] Thus, it is not surprising that Claimants' own witness Ms. Manheimer testified that she "trusted Richard Edelman" because "[h]e was a fellow investor like myself."[53]

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Moreover, the *only* ground the Panel offered for its holding—that the trustee, Howard Edelman, had not "held out" to others that Richard had authority to

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act for the Edelman Trust[55]—makes no sense. Howard Edelman had designated Edelman as a "designee",[56] and received numerous letters specifically detailing the false and misleading statements made *for years* by Edelman.[57] Yet he did nothing. It is therefore clear, as the Panel itself had previously ruled, that he "permit[ted]" Edelman to hold himself out as representing the Edelman Trust. *See In re Nigeria Charter Flights Contract Litig.*, 520 F. Supp. 2d 447, 464 (E.D.N.Y. 2007) ("Apparent authority is that authority which the principal holds the agent out as possessing, *or which he permits the agent to represent that he possesses* . . . .") (citations and quotation marks omitted) (emphasis added).

Accordingly, the Panel manifestly disregarded the law of agency (and its own prior ruling) when it concluded that the Edelman Trust was not responsible for the defamatory statements by its agent, Richard Edelman.

CONCLUSION

For all the above reasons, Petitioners respectfully request that the Court vacate the Panel's Award with respect to the Overrides and the Counterclaim and otherwise confirm the Award.

55. Pegno Aff. Ex. 1 (Award at 88).

56. Pegno Aff. Ex. 21 (R-303).

57. *E.g.*, Pegno Aff. Ex. 22 (R-61).

Dated: New York, New York
April 21, 2023

Respectfully submitted,

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