PRIVATE ARBITRATION

Whiskers-N-Wizards Enterprises, Inc. Brian Dalmer and Olga Dalmer	))
v.	)
Original Investments, LLC and David G. Ackerman	))

ARBITRATION DECISION AND AWARD

Brian Dalmer, Olga Dalmer, and Whiskers-N-Wizards Enterprises, Inc. (together, "Claimant") brought this arbitration proceeding against Original Investments, LLC, ("Respondent") and its member David Ackerman. Claimant asserted four claims:

1) interference with prospective business relations;

2) violation of covenant of good faith and fair dealing;

3) breach of covenant of quiet enjoyment; and,

4) violation of 9 V.S.A. §4503(a)(2), which protects against discrimination on several grounds, including discrimination based upon the receipt of public assistance.

The Parties stipulated that I would serve as sole arbitrator under Section 35 of the governing Lease Agreement that contains the following arbitration clause:

> Any controversy which shall arise between Landlord [Original Investments] and Tenant [Whiskers-N-Wizards] shall be settled by arbitration in accordance with the Vermont Arbitration Act, Title 12 Vermont Statues Annotated Chapter 192. Such arbitration shall be before one disinterested arbitrator if one can be agreed upon by the parties within twenty-one days following written notice by either party to the other of the controversy which it requests arbitration. . . . The expense of arbitration proceedings conducted hereunder shall be borne equally by the parties, and all arbitration proceedings conducted hereunder shall be conducted in Chittenden County, Vermont.

I entered a written procedural order on February 27, 2015, which I amended in a written order dated April 16, 2015. The order included a hearing date set by the agreement of the Parties. I also

held several conferences with counsel by telephone to clarify the requirements of the Procedural Order and resolve pre-hearing disputes between the Parties.

Prior to the hearing, I dismissed the claim against Mr. Ackerman on the ground that he had not individually agreed to the arbitration provision of the Parties' Lease Agreement. The only Parties to the arbitration agreement are the two business entities named in the caption. There has been no formal objection by the Respondent to the participation of Mr. and Mrs. Dalmer as named Claimants in this matter. Consequently, they remain Parties to this proceeding.

I held evidentiary hearings in this matter on June 1 and 2, 2015. I recessed the matter after the close of evidence on the liability questions raised in this case. At the request of the Claimant, I extended the deadline for post hearing submissions to June 12, 2015. I reserved the right to reopen the hearings if needed to address damages evidence.

Following the hearing, counsel for the Claimant notified the Arbitrator and Respondent that his lawyer client relationship with the Claimant had been terminated. I have not been presented with any request for a ruling related to the representation of the Claimant; I have made no ruling on any questions this may present.

On June 12, 2015, the Parties each made post-hearing submissions. In its submission, the Respondent made a request that I award the Respondent its costs of arbitration, including arbitration fees. On June 13, 2015, the Parties reaffirmed their stipulation that this Final Decision and Award may be served by email.

The matter is now ripe for decision.

Summary of Positions of the Parties

While the Claimant has asserted four distinct cause of action, each legal theory derives from the same core of facts. Claimant, as tenant operated a hostel business in commercial space leased from the Respondent. Claimant asserts that the Respondent made false statements to governmental officials about a proposed change in the Claimant's business, and that those false statements delayed

zoning clearance for the change which resulted in the loss of a business opportunity with the State. In his opening statement, my hearing notes show that Counsel for the Claimant summarized his claim as follows:

> The documents and evidence will prove that Mr. Dalmer and wife are owners of Whiskers-n-Wizards. The entered a Lease Agreement with the Respondent that allowed them to open a hostel. They operated the hostel, but there was little winter trade. It became difficult for them to recover their investment, and they were concerned about the future of their business. The State offered to house homeless people at the hostel. Mr. Ackerman expressed concern. His concern was motivated by bias against homeless people. Mr. Ackerman misrepresented the nature of the business to the State and municipal officials as a homeless shelter; in fact, the hostel was merely adding a category of customers. Mr. Ackerman misrepresented that the hostel was being converted to a homeless shelter. In fact, Mr. Dalmer wanted to continue to operate as a hostel. He never agreed to make all of the spaces available for homeless people. Based on Mr. Ackerman's misrepresentations, the City of Burlington made adverse zoning determinations that arrived at a crucial point in the negotiations between Mr. Dalmer and the State which prevented the finalization of a contract with the State. Mr. Dalmer appealed and was ultimately successful. By the time his appeal succeeded, however, the State had made other plans. The opportunity to contract with the State for November through April was lost, and resulted in a loss of gross revenue in the amount of $24,000 per month. Mr. Dalmer was able to accept overflow from the State after the reversal of the zoning determination. Without the anticipated contract from the State Mr. Dalmer was not able to recover his original investment, and sold the business at a loss.

Counsel for the Respondent summarized the question posed by this case as follows:

> Is a commercial landlord responsible for a tenant's claimed damages when the landlord asks the local zoning office if tenant change of use in the leased premises requires a new permit, and the City's determination that a new permit was required created a minimal delay for the tenant's new business?

FINDINGS OF FACT

1. The Whiskers-N-Wizards hostel received a zoning permit and opened in the summer of 2010. In part, the zoning permit provides: "The hostel shall operate in conformance with established Hostel International standards but does not need to be a member of the organization." *Comprehensive*

Exhibits Binder ("Exhibits") at page 12. Burlington's Comprehensive Development Ordinance defines a hostel as: "A place where travelers may stay for a limited duration as recognized by the International Hostel Association." *Id.* at page 13.

2. Mr. Dalmer's business was at best marginal, and faced particular challenges in the winter months when few wanted to stay at the hostel. In August and September of 2012, Mr. Dalmer entered into discussions with representatives of the State of Vermont over whether they could rent beds at the hostel to house homeless people in need of temporary shelter. He also initiated conversation with Nic Anderson of the Burlington Zoning and Planning Department concerning whether he would have to amend his zoning permit to accept homeless people under his zoning permit.

3. On September 6, 2012, Mr. Ackerman learned of the discussions with the State in a phone call he had with an acquaintance who was affiliated with the Burlington Housing Authority. Mr. Ackerman contacted Mr. Dalmer, who invited Mr. Ackerman to a meeting that day with two representatives of the State who were meeting with Mr. Dalmer at the hostel. There is conflicting testimony on what was said by Mr. Ackerman at the meeting. I find it credible that Mr. Ackerman asked many questions about the proposal in this meeting. While some of the listeners may have found those questions to be challenging, there is no credible evidence that Mr. Ackerman did anything in this meeting beyond asking hard but legitimate questions on a new concept for the use of the hostel.

4. At some point on either September 6 or 7, Mr. Ackerman spoke with someone at the City of Burlington Zoning and Planning office about the zoning implications of using the hostel to provide temporary housing for homeless people. Mr. Ackerman then prepared a detailed email to Mr. Dalmer (with copies to the two representatives of the State who had attended the September 6 meeting) in which Mr. Ackerman posed a series of questions about the concept. Mr. Ackerman also described the concept as a "shelter." He further stated that the change in use would require an amended zoning permit, a statement that was based on what Mr. Ackerman had been told by the City representatives. *Exhibits* at page 65.

5. The Claimant places much emphasis on Mr. Ackerman's use of the word "shelter" in this email (and subsequent communications), and claims that Mr. Ackerman's choice of this word was a fundamental misrepresentation of the Claimant's plans that improperly influenced the Burlington Zoning staff to require a permit amendment. The Claimant also asserts that the use of this term was disparaging and in bad faith. The facts do not support the Claimant. While Claimant asserts it was consistently planning to rent forty of its forty-eight beds to the State (and reserve the balance for travelers), I find credible Mr. Ackerman's testimony that Mr. Dalmer initially said his plan was to use all of his beds in the winter season for housing homeless people. Mr. Dalmer's subsequent submission to the Development Review Board during the appeal process can only be read as planning to devote all the hostel beds to housing homeless people. *See Exhibits* at p. 440. At best, Mr. Dalmer presented varying plans to both his Landlord and the City. This moving target could well have been reasonably described, at least in layperson terms, as encompassing a shelter. While shelter may be more or less descriptive, it is hardly pejorative. Finally, Mr. Lerner persuasively testified that Mr. Ackerman did not lobby him, and that the Burlington Zoning and Planning Department made its own decisions without influence from Mr. Ackerman. The use of the term "shelter" in describing the potential use of beds to house the homeless—regardless of whether it originated with Mr. Ackerman—was of no consequence to what followed.

6. On September 28, 2012, the Burlington Zoning and Planning Department issued a written determination that the use of the hostel for housing homeless families would require a new permit, as it changes the use of the facility from that approved: a short term rental for travelers. *Exhibits* at page 121. Whisker-N-Wizards appealed this determination to the Burlington Development Review Board.

7. On November 1, 2012, Mr. Ackerman submitted an email for consideration of the Board in which Mr. Ackerman stated that as owners, he and his wife accepted the determination that the

housing of homeless people was a change from the originally permitted use and would require a new permit. *Exhibits* at page 142.

8. On November 7, 2012, the Burlington Development Review Board held a hearing on the appeal. The Board initially voted to deny the appeal and uphold the determination that a new permit was required. On November 19, 2012, the Board voted to reopen the hearing in response to a letter from Vermont Legal Aid asserting that the Board's action may have violated fair housing practices laws. *Exhibits* at page 513.

9. On December 18, 2012, the Board held another public hearing. Counsel for the Respondent appeared and stated that the proposal by Whiskers—N—Wizards presented a change in use that would require a new zoning permit. *Exhibits* at page 175.

10. On January 15, 2013, the Board reversed its previous determination, and upheld the appeal by Whiskers—N—Wizards. The Board voted, by a margin of four to one, that "the referral of homeless families for temporary housing to and acceptance by the hostel does not constitute a change in use." *Exhibits* at page 514. The Board's decision states that it relies upon "the finding that the guests will be travelers who stay for a limited duration." *Exhibits* at page 517. It is unclear on the face of the decision why the Board found people in need of temporary shelter to be travelers, the limiting term in the original zoning permit.

11. Subsequently, Whiskers-N-Wizards began accepting referrals of homeless families and individuals. These referrals continued during the winter until Mr. Dalmer sold the business in March of 2014. *Exhibits* at page 657-58.

12. Mr. Dalmer asserts that he would have achieved an agreement to rent forty beds to the State at a fixed price of twenty dollars per night for the entire winter of 2012-13 (regardless of whether the State used the beds) in the absence of the zoning controversy. I find Mr. Dalmer's assertion to be speculation. There is no evidence from the State to support this claim. There was not even a draft contract with the State. The State did not agree to this arrangement in subsequent winters. Moreover,

the testimony of the only witness from the State—Christine Dalley—at least raises substantial doubt as to whether Mr. Dalmer's proposal to pay for beds regardless of their usage would have been accepted by the State, even in the absence of the approximately four months required to resolve the zoning questions once they were raised.

13. There is no credible evidence that any of the actions of Mr. Ackerman or the Respondent were motivated by animus toward recipients of public assistance. There is no credible evidence that Mr. Ackerman or the Respondents harassed anyone.

CONCLUSIONS OF LAW

While there are many flaws in the Claimant's case, I will focus on three that are fatal. First, all of the behavior of the Respondent is protected under the *Noerr-Pennington* doctrine, which protects the rights of citizens to petition their governmental officials. Second, there is no credible evidence that the four months spent resolving the zoning question is the proximate cause of any damage asserted in this case, because there is no credible evidence that in the absence of this delay the Claimant would have obtained the State contract that is the premise of its damage claim. Third, there is no credible evidence that anything done by the Respondent influenced or affected the actions of the Burlington Zoning and Planning Department or the Burlington Development Review Board.

Noerr-Pennington

All of the alleged actions of the Respondent (acting through Mr. Ackerman) are protected under the First Amendment to the United States Constitution. Citizens have the right to petition their government officials—including petitioning through participation in the litigation process—and enjoy constitutional immunity from liability:

> The *Noerr-Pennington* doctrine "establishes a party's right to petition all branches of the government by providing broad antitrust immunity to a petitioning defendant despite an anti-competitive purpose." *T.F.T.F. Capital Corp. v. Marcus Dairy, Inc.*, 33 F.Supp.2d 122, 125 (D.Conn.1998). Despite its antitrust origins, the doctrine has been held to protect the exercise of a defendant's First Amendment rights even when such action would normally constitute tortious interference. *See*

> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982); *Zeller v. Consolini*, 59 Conn.App. 545, 551, 758 A.2d 376 (2000). As this Court has held, petitioning the government cannot, "as a matter of law form the basis of a ... common law claim of tortious interference with business expectancy because imposing liability for the act of filing a non-sham lawsuit would present serious constitutional problems under the First Amendment." *T.F.T.F. Capital*, 33 F.Supp.2d at 125; *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) ("In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."). Further, courts have held that the doctrine applies to zoning proceedings before a local zoning board. *See, e.g., Empress LLC v. City & County of San Francisco*, 419 F.3d 1052 (9th Cir.2005); *WIXT Television, Inc. v. Meredith Corp.*, 506 F.Supp. 1003 (N.D.N.Y.1980).
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> The *Noerr-Pennington* doctrine further protects "allegedly false statements," *Tuosto v. Philip Morris USA Inc.*, 2007 WL 2398507, 2007 U.S. Dist. LEXIS 61669 (S.D.N.Y. Aug. 21, 2007), and statements that fall "far short of the ethical standards generally approved in this country." *Eastern R.R. Presidents Conference*, 365 U.S. at 140, 81 S.Ct. 523.

Jackson Hill Rd. Sharon CT v. Town of Sharon, 561 F. Supp. 2d 240, 245 (D. Conn. 2008).

Another federal judge has described the constitutional immunity afforded to citizens to petition governmental officials on zoning matter, even if they are motivated by invidious intent:

> The crux of the allegations against the Neighbors hinges on their participation in meetings in which they aired their concerns about Barnes. Such behavior is a classic example of activity that the Supreme Court aimed to protect in developing the Noerr–Pennington doctrine. "In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that people cannot freely inform the government of their wishes would ... be particularly unjustified". *Noerr*, 365 U.S. at 137, 81 S.Ct. at 529; see also *Omni*, 499 U.S. at 379–80, 383, 111 S.Ct. at 1353–54, 1355–56 (finding that the right to petition is both a constitutional right, and also a "political" right stemming from citizens' right to participate in government, and that Noerr–Pennington should be used to protect this right); see generally George W. Pring & Penelope Canan, *SLAPP's—Getting Sued for*

> *Speaking Out* 15–29 (1996) (the Noerr–Pennington doctrine is a shield that is properly wielded when litigation threatens to chill a petitioner's right to free speech).
>
> It is irrelevant that the Neighbors' petitioning may have been motivated by racism. Under the Noerr–Pennington doctrine, it does not matter what factors fuel the citizen's desire to petition government. As long as there is petitioning activity, the motivation behind the activity is unimportant. See e.g. *Noerr,* 365 U.S. at 139, 81 S.Ct. at 530 ("The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so"); *Pennington,* 381 U.S. at 670, 85 S.Ct. at 1593 ("*Noerr* shields ... a concerted effort to influence public officials regardless of intent of purpose"); *Omni,* 499 U.S. at 380, 111 S.Ct. at 1354 ("That a private party's political motives are selfish is irrelevant").

Barnes Foundation v. Township of Lower Merion, 927 F. Supp. 874, 876-77 (E.D. Pa. 1996)(footnote omitted).

Despite this clear law, the Claimant asserts that Mr. Ackerman lost his constitutional protection because his behavior falls within the "sham" exception to *Noerr-Pennington.* In *Octane Fitness*, the United States Supreme Court described the "sham" exception:

> Under the *Noerr–Pennington* doctrine—established by *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *United Mine Workers v. Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965)—defendants are immune from antitrust liability for engaging in conduct (including litigation) aimed at influencing decisionmaking by the government. *PRE,* 508 U.S., at 56, 113 S.Ct. 1920. But under a "sham exception" to this doctrine, "activity 'ostensibly directed toward influencing governmental action' does not qualify for *Noerr* immunity if it 'is a mere sham to cover ... an attempt to interfere directly with the business relationships of a competitor.' " *Id.,* at 51, 113 S.Ct. 1920. In *PRE*, we held that to qualify as a "sham," a "lawsuit must be objectively baseless" and must "concea[l] 'an attempt to interfere directly with the business relationships of a competitor....' " *Id.,* at 60–61, 113 S.Ct. 1920 (emphasis deleted). In other words, the plaintiff must have brought baseless claims in an attempt to thwart competition (*i.e.,* in bad faith).

Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S. Ct. 1749, 1757, 188 L. Ed. 2d 816 (2014).

The Jackson court explained the "sham" exception in the context of zoning disputes:

> The sham exception includes "unethical conduct in the setting of the adjudicatory process or the pursuit of a pattern of baseless, repetitive claims." *Landmarks Holding Corp. v. Bermant,* 664 F.2d 891, 896 (2d Cir.1981). Specifically, it involves examining whether defendants acted "with or without probable cause, and regardless of the merits of the cases." *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 512, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). The gravaman of the inquiry is whether defendants' conduct had "a purpose to deprive the competitors of meaningful access to the agencies and courts." *Id.* at 512, 92 S.Ct. 609. The Court of Appeals for the Fourth Circuit has recognized that "misrepresentations made with intent to abuse the administrative processes so as to deny [plaintiff] meaningful access .... would fall within the sham exception." *Hospital Bldg. Co. v. Trustees of Rex Hospital,* 691 F.2d 678, 687 (4th Cir.1982).

Jackson Hill Rd. Sharon CT v. Town of Sharon, supra, 561 F. Supp. 2d at 245.

Mr. Ackerman's conversations with Burlington Zoning officials and representatives of the State of Vermont, and his subsequent participation in the quasi-judicial proceeding to appeal the zoning determination, did not even approach the kind of misbehavior required to fit within the "sham" exception. Mr. Ackerman's assertions and claims on behalf of the Respondent in the zoning controversy were well founded; they were not either "objectively baseless" or an attempt to "interfere" with Whiskers-N-Wizards. Regardless of whether one agrees with Mr. Ackerman's use of the word shelter, that usage is not a misrepresentation that denied the Claimant meaningful access to the quasi-judicial process for reviewing zoning determinations.

Mr. Ackerman asked questions of zoning officials and advanced reasonable positions in the appeal. The Planning and Zoning Department independently determined that a permit amendment was necessary. The Development Review Board initially upheld the determination, and then reversed itself on a divided four to one vote. An objective review does not provide any support for the notion that Mr. Ackerman's assertions were baseless, or aimed to interfere with the interests of the Claimant.

The Respondent is immune from all of the claims in this matter under the First Amendment to the United States Constitution, as explicated by the *Noerr-Pennington* doctrine.

State Contract Decision and Proximate Causation

I bifurcated the presentation of evidence in this proceeding so that the Parties addressed liability issues but did not have to present evidence on the amount of damages. I made this decision because it was clear that hearings on the amount of damages would be expensive (involving an expert) and unnecessary if the Claimant could not establish a liability claim. *See Rule 32 (b) American Arbitration Association Commercial Arbitration Rules* (authorizing arbitrators to bifurcate proceedings).

An essential element for liability on each of the four claims at issue in this proceeding is at least some economic damages proximately caused by the Respondent. *E.g., J.A. Morrissey, Inc. v. Smejkal*, 2010 VT 66, ¶ 21, 188 Vt. 245, 255, 6 A.3d 701, 708-09 (2010)(damages an essential element of claim for intentional interference with economic relations). The Parties presented their evidence on this question in the hearing.

The Claimant's damage theory was that but for the four-month delay between the time the zoning issue arose and the Burlington Development Review Board ruled in the Claimant's favor, the Claimant would have obtained a lucrative contract from the State of Vermont. The contract hypothesized by Mr. Dalmer would have paid for the use of forty beds per night for the winter season, regardless of whether people actually used or needed the beds. The evidence, however, presented no support for the State agreeing to such a contract.

While Mr. Dalmer may have believed that he would have received a firm contract from the State of Vermont, the evidence did not support his belief. None of the contemporaneous documentary exhibits comes close to supporting this claim. There never was a draft contract, memorandum of understanding, or even a letter agreement. The email exchanges relief upon by Mr. Dalmer are at best ambiguous. The only witness from the State of Vermont, Christine Dalley (who is currently the Director for the State's General Assistance Program), persuasively rebutted Claimant. To her understanding, the State's rules did not allow the contract Mr. Dalmer assumed he would have

received in 2012. The following year (after the resolution of the zoning dispute) the State refused to enter into a firm contract for beds with Whiskers—N—Wizards.

The Claimant failed to provide any credible evidence to find that there were any damages caused by the Respondent under the theory of the case advanced by the Claimant in the hearings.

Proximate Causation of Delay

Even if I had concluded that Respondent's actions were somehow improper—and, to emphasize, there is no credible evidence that any of the Respondent's actions were improper—liability would only attach if those actions had an impact. Stated another way, the Claimant had to prove that the Respondents in some fashion caused the delay in obtaining zoning approval. *E.g.*, *J.A. Morrissey, Inc. v. Smejkal*, 2010 VT 66, ¶ 21, 188 Vt. 245, 255, 6 A.3d 701, 709 (2010)(essential element of claim is proof that the interference caused the harm sustained).

The Claimant presented no credible evidence to support the theory that the actions of the Respondents had any impact on the decisions of the Burlington zoning authorities. To the contrary, it was the Claimant who initiated conversations with the Planning and Zoning Department. Mr. Lerner (the Assistant Director of Planning and Zoning Administrator) persuasively testified that his office made its own decisions.

The record supports Mr. Lerner's testimony. Mr. Lerner's September 28, 2012 determination as Zoning Administrator bears no evidence of influence or persuasion from the Respondent. *Exhibits* at page 121. The staff memorandum from the Planning and Zoning Department, submitted to the Development Review Board on November 7, 2012, is a thoughtful and thorough explanation of why the proposal required a permit amendment. It bears no evidence of influence or persuasion from the Respondent. *Exhibits* at page 145. The initial Development Review Board decision upholding Mr. Lerner's determination bears no evidence of influence or persuasion from the Respondent. And, when the Development Review Board finally reversed Mr. Lerner's determination, it did so in a divided four to one vote.

There is no credible evidence that the Respondents in any way affected the actions of the Burlington Planning and Zoning Department or the Development Review Board. Those entities, and those entities alone, were responsible for their own decisions.

The Claimant failed to prove that the actions of the Respondent had any impact on the delay in obtaining zoning approval.

Claim for Attorney's Fees

The Arbitration Agreement broadly empowers me to decide any controversy arising between the Parties. The Parties' agreement does not expressly grant or deny to the arbitrator the power to award attorney's fees. It does provide that the Parties shall equally bear the costs of arbitration, which refers to arbitrator fees and expenses.

At first blush, the Vermont Arbitration Act prohibits the award of attorney's fees in this case.

> An arbitration award may direct the payment of attorney fees if the parties have explicitly authorized the arbitrator to make such an award or if the award is based in whole or in part upon state or federal law which permits recovery of attorney fees.

12 V.S.A. § 5665 (emphasis added). Here, there is no "explicit authorization" to award fees.

While there is disagreement among judges and scholars, the following summarizes the most generally accepted view of the law governing the power of an arbitrator to award attorney's fees in the absence of a provision in the arbitration agreement authorizing an award to the prevailing party:

> Even though arbitrators are generally authorized to award whatever relief they believe is fair, typically they are allowed to award attorney's fees only when authorized by statute or by agreement. [*See, e.g., Cronin v. CitiFinancial Services, Inc.*, 2009 WL 1033613 (E.D. Pa. 2009), judgment aff'd, 352 Fed. Appx. 630, 74 Fed. R. Serv. 3d 694 (3d Cir. 2009) (underlying contract provided for attorney's fees); *Marshall & Co., Inc. v. Duke*, 114 F.3d 188 (11th Cir. 1997); *Thompson v. Jespersen*, 222 Cal. App. 3d 964, 272 Cal. Rptr. 132 (2d Dist. 1990); *Tayco Const. Co., Inc. v. La Cuisine Restaurant, Inc.*, 593 So. 2d 954 (La. Ct. App. 4th Cir. 1992); *Prudential-Bache Securities, Inc. v. Tanner*, 72 F.3d 234, 11 I.E.R. Cas. (BNA) 453 (1st Cir. 1995).]

> However, courts have permitted arbitrators to award attorney's fees without specific authorization where they find some form of bad faith. [See *Sun Fire Protection & Engineering, Inc. v. D.F. Pray, Inc.*, 73 Mass. App. Ct. 906, 899 N.E.2d 114 (2009) (arbitrator was permitted to award prearbitration litigation attorney's fees); *Intercity Co. Establishment v. Ahto*, 13 F. Supp. 2d 253, 263–64 (D. Conn. 1998) (in proceeding under FAA, "[a]bsent a provision in the arbitration agreement foreclosing attorney's fees as a remedy, respondents were not precluded from seeking fees and there was nothing improper in their award"); *ReliaStar Life Ins. Co. of N.Y. v. EMC Nat. Life Co.*, 564 F.3d 81 (2d Cir. 2009) (arbitration award for attorney's fees was considered to be "compensatory" rather than "penal"); *Marshall & Co., Inc. v. Duke*, 114 F.3d 188, 190 (11th Cir. 1997) (noting that parties raised no jurisdictional challenge to attorney's fee award, but observing that, "[i]n any event, the arbitrators have the power to award attorney's fees pursuant to the 'bad faith' exception to the American Rule that each party bears its own attorney's fees"); *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1064, 1992 A.M.C. 328 (9th Cir. 1991) (Recognizing the "bad faith exception" to the "American Rule" that each party bears its own attorney's fees, the court stated, "Federal law takes an expansive view of arbitrator authority to decide disputes and fashion remedies ... . In light of the broad power of arbitrators to fashion appropriate remedies and the accepted 'bad faith conduct' exception to the American Rule, we hold that it was within the power of the arbitration panel in this case to award attorneys' fees.").]
>
> Other courts allow the award of attorney's fees without specific authorization because they considered them to be compensatory. [See *Mulligan v. Hornbuckle*, 227 Or. App. 520, 206 P.3d 1078 (2009) (arbitrator rendered an "enhanced" award rather than "attorney's fees" award); *ReliaStar Life Ins. Co. of N.Y. v. EMC Nat. Life Co.*, 564 F.3d 81 (2d Cir. 2009) (citing *Synergy Gas Co. v. Sasso*, 853 F.2d 59, 129 L.R.R.M. (BNA) 2041, 109 Lab. Cas. (CCH) P 10641 (2d Cir. 1988), (an award of attorney's fees did not contravene New York's public policy against punitive arbitration awards because the fees were compensatory, not penal)); *Martik Bros., Inc. v. Kiebler Slippery Rock*, LLC, 2009 WL 1065893 (W.D. Pa. 2009) (award for attorney's fees upheld along with other compensatory damages).]

1 Alternative Dispute Resolution Practice Guide § 5:3 (WL updated through September, 2014).

The leading case is *ReliaStar Life Ins. Co. of N.Y. v. EMC Nat. Life Co.* In *ReliaStar,* a divided panel of the Second Circuit held: "[w]e here clarify that a broad arbitration clause, such as the one in this case, *see* Coinsurance Agreements § 10.1, confers inherent authority on arbitrators to sanction a

party that participates in the arbitration in bad faith and that such a sanction may include an award of attorney's or arbitrator's fees."

ReliaStar Life Ins. Co. of N.Y. v. EMC Nat. Life Co., 564 F.3d 81, 86 (2d Cir. 2009)(footnote omitted).

Although *ReliaStar* was decided under the Federal Arbitration Act, precedent from the Vermont Supreme Court establishes that the decision is at least persuasive authority in Vermont:

> Decisions under statutes based on the Uniform Arbitration Act and under the Federal Arbitration Act are helpful to us in construing the Vermont act. The decisions are virtually uniform that the vacatur ground that the arbitrator exceeded his powers does not authorize the court to review the legal or factual conclusions of the arbitrator. The proper inquiry "focuses on whether the arbitrator[ ] had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrator [ ] correctly decided that issue." *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 824 (2d Cir. 1997).

Vermont Built, Inc. v. Krolick, 2008 VT 131, ¶ 17, 185 Vt. 139, 148, 969 A.2d 80, 87 (2008).

While not addressing the Vermont Arbitration Act provision on point, the Vermont Supreme Court has held that arbitrators can award attorney's fees, as long as the award falls within the ambit of the arbitration agreement, and that such awards do not have to meet the bad faith standard imposed on a court:

> What Lunde seeks is judicial review of the arbitrator's decision to award attorney's fees to the limited partners. He asks the Court to apply the standards that might have applied if the case were decided in court, but it was not. The parties chose a different forum with a different scope, procedure, and standards. The arbitrator had broad authority pursuant to the parties' agreement and its determination is not subject to the same level of review as a judge's determinations would have been. The arbitrator's award involved a "judgment about facts and law" that we are without power to review. *Krolick*, 2008 VT 131, ¶¶ 19, 20, 185 Vt. 139, 969 A.2d 80 (quotation omitted) (holding that it was error for superior court to modify arbitration award because arbitrator exceeded powers by denying plaintiff's request for attorney's fees, where issue was properly submitted to, and decided by, arbitrator). As we noted in *Krolick*, "[a]n arbitrator does not exceed his or her powers where the 'real objection appears to be that the arbitrators committed an obvious legal error in denying [plaintiff] attorney's fees.' " *Id.* ¶ 17 (quoting *DiRussa*, 121 F.3d at 824).

O'Rourke v. Lunde, 2014 VT 88, ¶ 43, 104 A.3d 92, 103-04 (Vt. 2014).

Despite the failure of *Lunde* to address 12 V.S.A. § 5665, I believe I have power to award attorney's fees. I do not, however, conclude that I should exercise that power. As arbitrator, some external standard needs to constrain my discretion. On important legal issues on which the Parties' contract provides little or no guidance, I look to the law as the standard I should apply. I do not want to fall into the trap of dispensing my own "brand of industrial justice." *ReliaStar Life Ins. Co. of N.Y. v. EMC Nat. Life Co.*, 564 F.3d 81, 85 (2d Cir. 2009). I want to be guided by the law. So I look to the Vermont decisions for the standards to apply in determining whether a party can recover its attorney's fees in the absence of a contractual agreement to do so.

The Vermont Supreme Court has described the governing law:

> We apply the "American Rule" with regard to attorneys' fees, which means that parties must bear their own attorneys' fees absent a statutory or contractual exception. *Myers v. Ambassador Ins. Co.*, 146 Vt. 552, 558, 508 A.2d 689, 692 (1986). This Court has, however, recognized the ability of courts to use their equity power to award fees "as the needs of justice dictate." *In re Gadhue*, 149 Vt. 322, 327, 544 A.2d 1151, 1154 (1987). This power may be invoked "only in exceptional cases and for dominating reasons of justice." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 167, 59 S.Ct. 777, 83 L.Ed. 1184 (1939). In *Gadhue*, we quoted the New Hampshire Supreme Court in explaining the type of conduct that would justify an award of attorneys' fees. "Bad faith conduct held to justify the award of counsel fees has been found where one party has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons' where the litigant's conduct can be characterized as unreasonably obdurate or obstinate, and where it should have been unnecessary for the successful party to have brought the action." *Gadhue*, 149 Vt. at 329, 544 A.2d at 1155 (quoting *Harkeem v. Adams*, 117 N.H. 687, 377 A.2d 617, 619 (1977)). Applying this standard, in both *Gadhue* and *Harkeem* attorneys' fees were awarded when a litigant was compelled to appear more than once in the state supreme court before obtaining relief.

DJ Painting, Inc. v. Baraw Enterprises, Inc., 172 Vt. 239, 246-47, 776 A.2d 413, 419-20 (2001).

In *Lunde*, the Vermont Supreme Court further explained the high standard.

> A court may use its equitable powers to award attorney's fees "in exceptional cases based on the bad-faith conduct of litigants." *Agency of Natural Res. v. Lyndonville Sav. Bank & Trust Co.*, 174 Vt. 498, 501, 811 A.2d 1232, 1236 (2002) (mem.). "This power must be exercised with cautious restraint, however—only in those exceptional cases where justice demands an award of attorney's fees, such as where a party is unjustly forced to endure a second round of litigation." *Id.* (citation omitted); see also *In re Gadhue*, 149 Vt. 322, 328–29, 544 A.2d 1151, 1154–55 (1987) (holding that litigant who "was compelled to appear twice before the state supreme court in order to obtain relief which should have been forthcoming after the first appearance" was entitled to fees under bad-faith exception to American Rule). The arbitrator in this case made a specific finding that although Lunde breached his contractual and fiduciary duties as general partner, "I do not have sufficient evidence from which I may conclude that Mr. Lunde's failures were in fact willful; they may have been due to physical and/or mental incapacities." A court which made similar findings would have no basis to award fees based on bad faith or contumacious conduct. See *Southwick v. City of Rutland*, 2011 VT 105, ¶ 9, 190 Vt. 324, 30 A.3d 1298 (holding that mere failure by one party to honor terms of agreement requiring another party to bring legal action to enforce agreement was insufficient basis for awarding attorney's fees to prevailing party).

O'Rourke v. Lunde, 2014 VT 88, ¶ 33, 104 A.3d 92, 101 (Vt. 2014). And even though *Lunde* upholds an arbitrator's award that fails to meet this high standard, for me to responsibly exercise my power, it is the standard itself that matters.

The Claimant's case was thin. The weakness in the case, however, do not rise to the level of bad faith or vexatious litigation required to award attorney's fees under these precedents. Moreover, I am mindful that the Parties could have written their arbitration agreement differently to provide for the award of attorney's fees, but chose not to do so. Consequently, I am denying the request for an award of attorney's fees and litigation costs.

FINAL AWARD

All Claims in this matter are DENIED with prejudice. Each side shall bear its own costs and attorney's fees for this proceeding.

DATED at Richmond, Vermont this 14th day of June, 2015.

Michael Marks, Arbitrator