Penthouse 4C, LLC,	:	IN THE
Plaintiff	:	CIRCUIT COURT
vs.	:	FOR BALTIMORE CITY
100 Harborview Drive Council of Unit Owners	:	
	:	Case No. 24-C-10-2003
Defendant		
: : : : : : : : :		

MEMORANDUM OPINION

Defendant 100 Harborview Drive Council of Unit Owners (Defendant or "Council") has filed a Petition to Vacate $433,722 of the monetary damages awarded to Plaintiff Penthouse 4C LLC (Plaintiff or "the LLC") by a Majority Arbitration Award ("the Award"); and to Modify the Award's order of specific performance that requires it to replace the roof system and repair the exterior facade of 100 Harborview Drive Condominium ("the Condominium") in accordance with an Inspection Report issued by Construction System Group, Inc. dated August 18, 2009 ("the Inspection Report"). Plaintiff has filed a Petition to Confirm the Award.

With respect to the Petition to Vacate, the first question is whether it was timely filed. If it was timely filed, the issues are: (1) did Defendant waive its right to challenge the $433,722 award for consequential damages; and (2) does the $433,722 award exceed the Panel's authority under the Maryland Uniform Arbitration Act ("MUAA"), Md. Cts. and Jud. Proc. §§ 3-201 et seq.[1] and/or does it constitute a manifest disregard of the law. With respect to the request to Modify the specific performance portion of the Award, the issues are (1) was the issue of how to replace the roof and repair the exterior facade submitted to the Panel;

[1]All statutory references will be to the MUAA unless otherwise indicated.

and if it was, (2) did Defendant waive its right to seek modification by failing to object to evidence on how the repairs should be made, and, if the issue was not waived, (3) is the Court able to determine, based on evidence that was not submitted to the Panel, that the requested modification would not affect the merits of the Award.

PROCEDURAL BACKGROUND

On March 9, 2010, the LLC filed a Complaint in the Circuit Court for Baltimore City against the Council and the members of the Board of Directors of the Condominium seeking specific performance and damages. The Complaint alleged that the LLC owns 4C, a penthouse in the Condominium ("the Unit"), and that James W. Ancel, Sr. was the sole member of the LLC and the primary resident of the Unit. Ancel was not named as a Plaintiff. The Complaint alleged that Defendant failed to perform required maintenance of the Condominium and that the failure resulted in property damage to the LLC from water exposure. This caused mold to grow inside the Unit and other areas of the Condominium and as a result placed the health of Ancel and his children at risk.

After the court granted Defendant's Motion to Stay the Case for Arbitration, Plaintiff voluntarily dismissed the individual Board members, and the Council and the LLC selected retired Judges Paul E. Alpert, Dale E. Cathell, and Dana M. Levitz for the arbitration. After five days of hearing, a Majority of the Panel awarded Plaintiff $1,252,487 in damages and ordered the Council to replace the roof and repair the exterior facade in accordance with the Inspection Report.[2] On November 28, 2011 the Award was delivered to the parties.

[2]The Majority Award, which was signed by Judges Alpert and Levitz, also ordered the Council to perform other work within 60 days. Judge Cathell filed a dissent and partial concurrence. Judge Cathell disagreed on the extent of the repairs needed and also found that many of Plaintiff's damages were speculative.

On December 14, 2011 Plaintiff filed a Petition to Confirm Arbitration Award and Enter Judgment. On December 15, 2011 Defendant filed a Motion for Modification and Correction of Majority Award with the Arbitrators seeking to correct what everyone agrees was an inadvertent mistake, and to modify that portion of the Award that orders the Council to replace the roof system and repair the exterior facade in accordance with the Inspection Report. Plaintiff agreed with the request to correct the inadvertent mistake but otherwise opposed the requested modification. On December 28, 2011 the Majority Panel modified/corrected the inadvertent mistake in the Award but otherwise denied Defendant's Motion.[3] That order was received by the parties on December 30, 2011.

Before that order was received by the parties, Defendant filed a Motion to Dismiss Plaintiff's Petition to Confirm, or Alternatively to Stay Action arguing that the Court did not have jurisdiction to confirm the Award because the Motion for Modification and Correction was pending before the Arbitration Panel.[4] Alternatively Defendant requested that the Petition to Confirm be stayed pending the Arbitrators' decision on the Motion. On January 6, 2012 Plaintiff filed an Opposition to Defendant's Motion to Dismiss/Stay arguing that it was moot because of the Majority Panel's December 28, 2011 order. On January 9, 2012 Defendant filed a Reply arguing that the Petition to Confirm should be stayed until the court ruled upon a Petition to Vacate that Defendant planned to file within 30 days of its receipt of the December 28, 2011 order. Unaware of the Arbitration Panel's December 28, 2011 Order, on January 10, 2012 Judge Alfred Nance granted a stay of the Petition to Confirm

[3]Judge Cathell filed a dissenting order granting the Motion in full, with no explanation.

[4]Although both parties state in their Memoranda that it was filed on December 22, 2011, the Motion is date stamped December 28, 2011 and that is the filing date in the case history.

"pending the action and decision of the Arbitration Panel."[5] On January 17, 2012 Defendant filed a Second Motion to Stay the Petition to Confirm arguing that ruling on it should await Defendant's filing of a Petition to Vacate. On January 23, 2012 Plaintiff filed a Supplemental Petition to Confirm and an Opposition to the Second Motion to Stay. Also on January 23, 2012 Defendant filed its Petition to Vacate/Modify, and on February 7, 2012 Defendant filed a Response to Plaintiff's Supplemental Petition to Confirm Award.

On January 27, 2012 the parties filed a Joint Petition to Lift the Stay and on March 12, 2012 the stay was lifted. On March 14, 2012, the case was assigned to the Business and Technology Case Management Program. Argument was heard on March 16, 2012. For the reasons that follow, the Court will issue an order denying the Petition to Vacate/Modify the Award and granting the Petition to Confirm the Award.

THE PETITION TO VACATE WAS FILED TIMELY

Relying on dicta in *Letke Security Contractors, Inc. v. U.S. Surety Co.,* 191 Md. App. 462 (2010), Plaintiff argues that Defendant's Motion for Modification filed with the Arbitrators did not stay the time for filing a Petition to Vacate/Modify, and therefore Defendant's Petition was untimely. Defendant argues that Plaintiff's reliance on dicta in *Letke* is misplaced because *Mandl v. Bailey,* 159 Md. App. 64 (2004) held that the 30 day limitations period for filing a petition to vacate an award is tolled when a timely petition to modify the award has been filed with the arbitrator pursuant to § 3-222.[6] During oral

[5]Plaintiff's Opposition to the Stay was not docketed until January 19, 2012 (docket no. 27/1) and Judge Nance's order is dated January 10, 2012.

[6]§ 3-222 provides as follows:

> (a) A party may apply to the arbitrators to modify or correct an award within 20 days after delivery of the award to the applicant.

argument, Plaintiff argued that in *Mandl* the arbitration was conducted by the American Arbitration Association ("AAA") and therefore the holding only applies to cases where the arbitration took place under the AAA. As explained below, Plaintiff is incorrect.

Mandl argued, as does the Plaintiff that the "filing of the motion to modify did not toll the running of the 30 day limitations period." *Id.* at 103. After reviewing cases in other jurisdictions where courts had addressed the question of whether the filing of a timely motion to modify with an arbitrator tolls the running of the period for filing a petition to vacate an award under the Uniform Arbitration Act, the *Mandl* Court concluded that "[t]he better reasoned of those cases have held that a timely motion to modify indeed has such a tolling effect, because a contrary interpretation . . . would defeat the objective of arbitration: expeditious private dispute resolution." *Id.* at 105. *See Konicki v. Oak Brook Racquet Club, Inc.,* 110 Ill. App. 3d 217 (1982)(tolled)*; Swan v. American Family Mut. Ins. Co.,* 8 P.3d 546, 548 (Colo. App. 2000)(adopting the reasoning of the court in *Konicki)*; *Warner Chappell Music, Inc. v. Aberbach de Mexico, S.A.,* 638 N.Y.S.2d 35 (1996)(same). The Court explicitly rejected the reasoning in *Groves v. Groves,* 704 N.E.2d 1072 (Ind. App. 1999), the only case it found in which an appellate court had directly addressed the issue and reached a contrary conclusion.

The Court cited with approval the language from *Konicki* that "[a]ny other interpretation would lead to anomalous and unjust results." 159 Md. App. at 106 *citing* 110 Ill. App. 3d at 221.

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(c) The arbitrators may modify or correct an award:
(1) On the grounds stated in § 3-223(b)(1), (2), or (3) of this subtitle; or
(2) For the purpose of clarity.

> Thus, if the time for review is not tolled, a party would effectively lose his statutory right of judicial review if the arbitrators failed to resolve the application within the [30 day] period. In order to preserve his right of review a party would then be forced . . . to apply to the court during the pendency of the [motion to modify] before the arbitrator has made a final award. Since the grounds for [motion to modify before the arbitrator] are included within [the section governing a court action to vacate], the courts would be asked in many cases to simultaneously decide issues still pending before the arbitrator. We do not think such duplicative and inexpeditious use of the judicial and arbitration system was contemplated . . . .

Id. The *Mandl* Court explicitly agreed "with the reasoning employed by the courts in *Konicki, Swan*, and *Warner Chappell Music,* and [therefore held] that a timely filed motion to modify an arbitral award tolls the 30 day time period for filing a petition to vacate under CJ section 3-224(a)." *Id.* at 107. The Court concluded that the arbitration award was "final and complete when it was issued," but the timely filed motion to modify a calculation in the award "destroy[ed] the finality of that part of the award" and made "the entire award no longer complete." *Id.* at 95. There is nothing to suggest that the holding is limited to cases where the arbitration proceeded under the AAA rules.

In contrast to *Mandl*, in *Letke* the issue of timeliness was not raised on appeal. 191 Md. App. at 469 n.3 ("In this Court, appellee does not raise the timeliness of appellant's motion to vacate the award . . . ."). In what is therefore dicta, the Court stated that "Based on our *limited research*, we tend to agree with" the argument made below that a motion to modify does not toll the time for filing a Petition to vacate. (Emphasis added.) *Letke* did not cite any of the cases discussed in *Mandl*. The only case cited in *Letke* that addresses the issue is *Trustees of Boston and M. Corp. v. Massachusetts Bay Transportation Authority*, 294 N.E.2d 340, 346 (1973), where the court said in dicta that a motion to modify does not toll

the filing of a petition to vacate. 191 Md. App. at 478-80. *Letke* does not cite or discuss, let alone overrule or limit the holding in *Mandl*.

Based on the above, it is clear that the November 24, 2011 Majority Award was "final and complete" when it was delivered to all counsel on November 28, 2011, and remained so until Defendant filed its Motion for Modification and Correction of Majority Award. Necessarily, the filing of that Motion destroyed the finality of the parts of the Award that were the subject of the Motion because, depending on the ruling on the Motion, those parts of the Award could be changed. Thus, the Motion made the entire Award no longer complete because there were issues not yet decided: whether to grant the Motion for Modification and Correction. *See Mandl*, 159 Md. App. at 95. The Petition to Vacate was filed on January 23, 2012, well within 30 days of delivery date of December 30, 2012.

THE PANEL DID NOT EXCEED ITS JURISDICTION IN MAKING THE $433,722 AWARD FOR CONSEQUENTIAL COSTS

Defendant argues that the monetary damages of $433,722 for "Mr. Ancel's Consequential Costs" must be vacated because the Panel lacked jurisdiction to award damages incurred solely by Ancel." Defendant correctly states that when the authority of the arbitrator to decide an issue is challenged, courts conduct a *de novo* review and no deference is given to the decision of the arbitrator. Thus in its review of the award of attorney's fees the Court in *McR of Am. v. Greene*, 148 Md. App. 91, 98 (2002) conducted a *de novo* review because the arbitration agreement stated that "the fees and expenses of any such action shall be bourne solely by the party against whom the decision is rendered," and § 3-221(b) of the MUAA provides that "unless the arbitration agreement provides otherwise, [an] award may not include counsel fees." The award of attorney's fees clearly exceeded the arbitrator's

power because "there was no contractual or statutory basis for awarding attorney fees." *Id.* at 104-05. Similarly in *Stephen L. Messersmith, Inc. v. Barclay Townhouse Associates*, 313 Md. 652 (1988) the Court undertook a *de novo* review of the arbitrator's decision that there was an arbitration agreement because "when the arbitrator's very authority to adjudicate the dispute is challenged, . . . obedience to the arbitrators' assertion of jurisdiction is clearly inapt." *Id.* at 659-70.

An issue is not one of jurisdiction simply because a party chooses to label it as such. Here there is clearly an arbitration agreement between the LLC and the Council. The Council participated fully in the arbitration hearing without raising any objection to the Panel's jurisdiction. And as explained in detail below no issue on the appropriateness of a consequential damages award for Ancel's alternative living costs and relocation expenses was raised before the Panel.

More fundamentally, Defendant's jurisdictional challenge is premised on the Panel having made an Award to Ancel: "the Majority Panel misconstrued its own jurisdiction in presuming it had authority to award damages *to* Mr. Ancel even though he was not a party to the By-Laws or the arbitration." (Emphasis added.) Contrary to Defendant's argument, the Panel never purported to have "jurisdiction" over Ancel or any claim made by him and did not make an Award *to* Ancel. The Award states that "the majority of the arbitration panel *awards the Plaintiff* the sum of $1,252,487 . . . ." (Emphasis added.) In other words, although the Award included "Mr. Ancel's "Consequential" Costs for "Alternative living costs" and "Relocation expenses" for a total of $433,722, the Award was not made *to Ancel*. In sum, there is no issue of jurisdiction over any Award made to Ancel.

THE STANDARD FOR VACATING AN AWARD ON THE BASIS OF MANIFEST DISREGARD FOR THE LAW IS EXTREMELY HIGH

Defendant argues alternatively that the Award of Consequential Costs is "completely irrational" and "constitutes manifest disregard of the law." The standard for challenging an arbitration award is "is among the narrowest known at law." *Three S Del., Inc. v. DataQuick Info. Sys.*, 492 F.3d 520, 527 (4th Cir. 2007)(citations and internal quotation marks omitted).

> Judicial review of an arbitration award . . . is *substantially circumscribed.* In fact, the scope of judicial review for an arbitrator's decision is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all – the quick resolution of disputes and the avoidance of the expense and delay associated with litigation. Indeed, as we have emphasized, in reviewing such an award, a . . . *court is limited to determine whether the arbitrators did the job they were told to do — not whether they did it well, or correctly, or reasonably, but simply whether they did it*.

Id. (emphasis added).[7] The party seeking to vacate the award has the burden of proof "no matter how the mistake is characterized," and "this burden is a heavy one." *Sharp v. Downey*, 197 Md. App. 123, 149 *cert. granted*, 419 Md. 646 (2011)

Although neither the FAA nor the MUAA lists "manifest disregard of the law" as a basis to vacate an award, both federal and Maryland courts have construed the phrase "exceeding authority"[8] to mean a "manifest disregard of the law" and/or have concluded that

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[7]"The Maryland Act was meant to mirror the language of the . . . FAA [Federal Arbitration Act], and has been called the State analogue to the FAA. The FAA's statutory grounds to vacate an award . . . are largely the same as the Maryland Act's standards . . . . " *Sharp v. Downey*, 197 Md. App. 123, 146 n.12 *cert. granted*, 419 Md. 646 (2011)(citations and internal quotation marks omitted).

[8]The Federal Arbitration Act states that the district court may enter an "order vacating the award upon the application of any party to the arbitration . . . (4) where the arbitrators exceeded their

"manifest disregard of the law" is a separate, unenumerated, ground for vacating an award. *See Sharp*, 197 Md. App. at 151-59 and *Goldman Sachs Execution & Clearing, L.P. v. Official Unsecured Creditors' Comm. of Bayou Group, LLC*, 758 F. Supp. 2d 222, (S.D.N.Y. 2010). In *Sharp* the Maryland Court of Special Appeals acknowledged that the Court of Appeals has not expressly adopted the "manifest disregard of the law" standard, 197 Md. App. at 153, but noting that its cases applying the "manifest disregard" standard had not been overruled, applied that standard under the principles of *stare decisis*. *Id*. at 157. Because this Court is bound by decisions of the Court of Special Appeals, this Court will apply the "manifest disregard of the law" standard, and decline Plaintiff's invitation to disregard it because certiorari has been granted in *Sharp*.[9]

It is not easy to show a manifest disregard of the law because "'[m]anifest disregard' of the law is something beyond and different from *a mere error in the law* or failure on the part of the arbitrators to understand or apply the law." *Greene*, 148 Md. App. at 120 (emphasis added). It requires showing that the "arbitrators *understand* and *correctly stated the law,* but proceed to disregard the same." *Id*. (emphasis added).

> Although we may disagree with an arbitrator's interpretation of a contract, we must uphold it so long as it draws its essence

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powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." The Maryland statute states that "[t]he court shall vacate an award if: . . . (3) The arbitrators exceeded their powers." § 3-224.

[9]Plaintiff also argue that "in *Hall Street Associates, LLC v. Mattel, Inc.,* 552 U.S. 576, 586-88 (2008), the Supreme Court held that manifest disregard is not a viable standard for vacating an award under the [FAA] . . . ." However there is no basis in the cited pages or anywhere else in the opinion to support the statement. In *Goldman Sachs Execution & Clearing, L.P.*, the Court noted that despite the ambiguity remaining after the Supreme Court's decision in *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758, 1768 n.3, 176 L. Ed. 2d 605 (2010), the Second Circuit has "concluded that manifest disregard 'remains a valid ground for vacating arbitration awards.'" 758 F. Supp. 2d at 225 (citations omitted).

> from the agreement. As long as the arbitrator is even arguably construing or applying the contract a court may not vacate the arbitrator's judgment. Consequently, an award may be overturned only if the arbitrator must have based his award on his own personal notions of right and wrong, for only then does the award fail to draw its essence from the collective bargaining agreement.
>
> Not only is an arbitrator's fact finding and contract interpretation accorded great deference, but its interpretation of the law is accorded deference as well. A legal interpretation of an arbitrator may only be overturned where it is in manifest disregard of the law. An arbitration award is enforceable even if the award resulted from a misinterpretation of law, faulty legal reasoning or erroneous legal conclusion, and may only be reversed when arbitrators understand and correctly state the law, but proceed to disregard the same.

Upshur Coals Corp. v. United Mine Workers, Dist. 31, 933 F.2d 225, 229 (4th Cir. 1991)(citations and quotations omitted).

Further, because "arbitrators are not required to explain their decisions," when they choose to not explain "it is all but impossible to determine whether they acted with manifest disregard for the law." *Choice Hotels Int'l, Inc. v. Felizardo*, 278 F. Supp. 2d 590, 596 (D. Md. 2003)(citations omitted). "There must be some showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it." *Id*. at 597. In determining if the arbitrators acted in manifest disregard of the law, a court is "obliged to give the arbitral judgment the most liberal reading possible." *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 212 n.8 (2d Cir. N.Y. 2002) and in the absence of an explanation from the arbitrators should "confirm the award if," the court is "able to discern any colorable justification for the arbitrator's judgment, even if that reasoning would be based on an error of fact or law." *Id*. (Citations omitted). "Conversely, a court may infer that the arbitrators

manifestly disregarded the law if it finds that the error made by the arbitrators is so obvious that it would be instantly perceived by the average person qualified to serve as an arbitrator." *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp*., 103 F.3d 9, 13 (2d Cir. N.Y. 1997)(citation omitted). In other words, if the panel had given an explanation, the explanation would "have strained credulity." *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. N.Y. 1998).[10]

In the cases that this Court has found where an award was vacated because of manifest disregard for the law, it was clear that the arbitrator made a conscious decision to disregard the law. For example in *Raymond James Fin. Servs. v. Bishop*, 596 F.3d 183, 190 (4th Cir. 2010) the arbitration panel stated the reasons for its award and it was clear that the reasons "had no basis in law," but "merely reflected the panel's personal views of right and wrong." Likewise in *Sharp*, the arbitrator issued a lengthy decision that showed the "irrationality" of the award, and thus a manifest disregard for the law.

> [T]he arbitrator's statements that "Sharp has no access to Morgan Station Road" and that "Lot 2 is landlocked" are fundamentally irreconcilable with his statement that ". . . Sharp, does not have an implied easement by necessity, he does not need one."

Id. at 171.

In *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456 (11th Cir. 1997), there was overwhelming evidence that an attorney had urged the panel to disregard the law:

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[10]In *Halligan v. Piper Jaffray, Inc.*, the court concluded that the arbitrators had "disregarded the law or the evidence or both" because there was "strong evidence" that the Petitioner "was fired because of his age" and because the parties agreed that "the arbitrators were correctly advised of the applicable legal principles . . . ." 148 F.3d at 204.

Shearson's counsel, in his opening statement to the arbitration board, set the stage for the arguments to follow:

> I know, as I have served many times as an arbitrator, that you as an arbitrator are not guided strictly to follow case law precedent. That you can also do what's fair and just and equitable and that is what Shearson is asking you to do in this case.

Later, during his closing argument, Shearson's attorney again stated:

> You have to decide whether you're going to follow the statutes that have been presented to you, or whether you will do or want to do or should do what is right and just and equitable in this case. I know it's hard to have to say this and it's probably even harder to hear it but *in this case this law is not right.* Know that there is a difference between law and equity and I think, in my opinion, that difference is crystallized in this case. *The law says one thing. What equity demands and requires and is saying is another.* What is right and fair and proper in this? *You know as arbitrators you have the ability, you're not strictly bound by case law and precedent.* You have the ability to do what is right, what is fair and what is proper, and that's what Shearson is asking you to do.

The lawyer continued, and reiterated the argument he had been making throughout the case, "thus, as I said in my Answer, as I said before in my Opening, and I now ask you in my Closing, not to follow the FLSA if you determine she's not an exempt employee."

Id. at 1459 (footnotes omitted)(italics in original). The Court concluded:

> [I]n light of the express urging to deliberately disregard the law, the lack of support in the facts for the ruling and the absence in the decision, or otherwise in the record, indicating that the

> arbitrators rejected [the] plea to manifestly disregard the law, [the award was vacated].

Id. at 1464.[11]

A comparison of *O-S Corp. v. Samuel A. Kroll, Inc.*, 29 Md. App. 406 (1975) and *Birkey Design Group, Inc., et al. v. Egle Nursing Home, Inc.*, 113 Md. App. 261 (1997) shows how difficult it is to prove that an award was made in manifest disregard of the law when the arbitrator does not give an explanation for an award. In *O-S Corp.* although the arbitrators did not supply reasoning, it was clear from the award how the damages had been calculated and there was no dispute between the parties on what the arbitrators had done.

> The arbitrators awarded appellee the wages reflected in the schedule rather than limiting the award to wages appellee had actually paid. Further, the arbitrators added 15% of the appellee's billings to the award for reimbursement of insurances, such as unemployment compensation, social security, etc. . . . .

Id. at 412 (footnote omitted). Both parties "conceded that appellee was awarded more than appellee paid out for labor." *Id.*[12]

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[11]The concurring opinion underlined the narrowness of this holding:

> I . . . write separately only to emphasize how narrowly the decision in this case is limited to the unusual facts presented. Those facts are that: 1) the party who obtained the favorable award had conceded to the arbitration panel that its position was not supported by the law, which required a different result, and had urged the panel not to follow the law; 2) that blatant appeal to disregard the law was explicitly noted in the arbitration panel's award; 3) neither in the award itself nor anywhere else in the record is there any indication that the panel disapproved or rejected the suggestion that it rule contrary to law; and 4)the evidence to support the award is at best marginal.

Id. at 1464 (Carnes, Circuit Judge, concurring specially).

[12]Although it was decided under MUAA, the Court in *O-S Corp.* assumed that the standard for reviewing an arbitrator's decision is the same as the standard reviewing the decision of a lower

In *Birkey Design Group,* Egle sought damages of $287,560.11 and attorney's fees of $80,270.72. There was no provision in the contract for an award of attorney fees. Without elaboration, the arbitrator ordered Birkey to pay Egle $80,270.00. Birkey did not file a request for clarification but instead filed a petition to vacate arguing that the arbitrator exceeded his power. Birkey argued that "While the arbitrator did not expressly identify the award as attorney's fees, simple logic, and a hearty disregard for cosmic coincidence is all that is needed to reach this conclusion." *Id.* at 266. However both the trial and appellate courts refused to assume that the award was for attorney's fees because the issue would have been clarified if Birkey had sought clarification from the arbitrator. The appellate court stated:

> It is not this Court's function to speculate about the arbitrator's thought process when making an award. Appellate discipline mandates we give deference to the decision of the arbitrator. The possible combinations of actual damages that amount to $82,270.00 are infinite. Since it is possible that the award comprised damages rather than attorney's fees, we must assume the arbitrator acted properly.

Id. at 267. The Court noted that if it were "to make a judicial determination as to whether or not the award was attorney's fees, it would expand judicial review," beyond the narrow scope of review of arbitration awards. *Id.* at 269.

THE RECORD IN THIS CASE DOES NOT SUPPORT DEFENDANT'S ARGUMENT THAT THE AWARD WAS MADE IN "MANIFEST DISREGARD FOR THE LAW"

Defendant never presented the issue of an award for expenses related to Ancel's move to the Panel and the Panel did not chose to provide any explanation for the Award. Therefore

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court. "Procedurally our review is similar to a review under Md. Rule 1086 when we are called upon to review actions tried by a lower court without a jury." *Id.* at 411. It is clear that that is not the standard. As discussed above, unlike a lower court, an arbitrator need not state reasons and a "mere error of law" does not therefore subject the award to vacatur.

it is "impossible to determine whether they acted with manifest disregard for the law." *Choice Hotels Int'l, Inc.*, 278 F. Supp. 2d at 596. In addition Defendant made no effort to seek clarification after the Award was made. In *Birkey Design Group* the Court noted:

> It is well-established that parties to an arbitration waive their objections to arbitrator bias or other allegedly improper behavior by the arbitrator if, knowing of the alleged[] biased, or improper conduct, they do not object to it prior to the arbitration award when there is still an opportunity to rectify the alleged errors.

113 Md. App. at 270 *citing Graceman v. Goldstein*, 93 Md. App. 658, 671 (1992). The Court pointed out that although *Graceman* addressed the issue in the context of improper conduct of the arbitrator that was not objected to during the course of arbitration, "[t]he rationale of *Graceman,*" provides "equal justification in requiring parties to seek clarification of an award before raising [an] issue on appeal," and "ensure[s] that parties voice their objections at a time when they can be dealt with by the arbitrator." *Id.*

In reviewing the decisions of trial courts, where the standard of review is much broader, "parties cannot raise an issue on appeal without attempting to resolve it at trial." *Id.* at 270-71. That "rationale has a more compelling justification in the realm of arbitration because arbitration, more so than conventional litigation, is intended to resolve disputes expediently and with finality." *Id.* at 271. Thus the Court held "that parties waive their right to seek judicial clarification of arbitrators' awards if the parties fail first to petition arbitrators to clarify their awards . . . ." *Id.*

Agco Corporation, v. Max Anglin, 216 F.3d 589 (4th Cir. 2000), cited by Defendant, not only does not support Defendant's position, it confirms that Defendant waived the argument by failing to present it.

> If a party *willingly and without reservation allows an issue to be submitted to arbitration*, he cannot await the outcome and then later argue that the arbitrator lacked authority to decide the matter.

Id. at 593 (citations omitted and emphasis added). In *Argo* "the objecting party clearly made known to the arbitrator their position" *Id.* at 593.

> Although no transcript was made of the arbitration proceedings, it is undisputed that counsel for the Anglins objected to arbitration of the Retail Obligations.**** [C]ounsel for the Anglins "carefully and explicitly, in unambiguous language, made known to the arbitrators and [AGCO their] clear intention" to preserve their objection to the arbitrability of the Retail Obligations, even though they agreed to proceed with the arbitration hearing. The Anglins therefore did not waive their right to object to the scope of the arbitration.

Id.

In contrast, Defendant never raised the issue despite numerous opportunities to do so. One month before the Arbitration Hearing began Plaintiff filed an Amended Complaint that alleged "due to the conditions of [the Unit], Mr. Ancel must vacate [it] until after the repair and remediation of the water infiltration and concomitant mold growth is completed." The Amended Complaint went on to allege that the LLC had suffered "direct and consequential" damages "which has resulted in . . . loss of use of the property." The parties exchanged exhibits before the hearing began and Plaintiff submitted an Exhibit entitled "Compilation of Certain Expenses Related to PH4C" and another entitled "Damages Summary." The Damages Summary included damages claimed for alternative living costs of $505,738 and relocation expenses of $60,690 for Ancel. The Compilation provided detailed documentation in support of the claim for alternative living costs and

relocation expenses. Further, in its pre-hearing statement Plaintiff was more explicit, saying the Unit was unsafe for occupancy by Ancel and his family and requesting damages "to make Mr. Ancel whole," specifically seeking alternative living costs in the amount of $507,738 and $60,690.

At the hearing Ancel's testimony included the claim for alternative living costs and relocation expenses. Although Defendant objected to Ancel's testimony on present value cost increases for construction costs, it did not object to his testimony on alternative living costs and relocation expenses; nor did it ask the Arbitrators to exclude it. In its Post Hearing Brief Plaintiff asked to be compensated "for the consequential damages that its sole member has incurred."

Defendant's only reference to the appropriateness of the consequential damages award is hidden in its Post Hearing Brief. In order to understand why the reference is hidden, the structure of the brief is presented. The brief is 25 pages long and has the following topics in all caps, bold and underlined:

INTRODUCTION

ABANDONED ISSUES

NON-VIABLE CAUSES OF ACTION

THE NEGLIGENCE AND BREACH OF CONTRACT CLAIMS

DAMAGES

Within the Damages section, which begins on page 10, there are three major subtopics:

A. Plaintiff's Objection to the Admissibility of Daniel Baxter's Opinions is Meritless and the Motion to Strike Mr. Baxter's Opinions Should Be Denied

B. The Evidence Demonstrates that PH4C Does Not Have Atypical Mold Levels

C. Plaintiff's Claims for Negligence and Breach of Contract Are Barred by Contributory Negligence and Plaintiff's Failure to Mitigate Its Own Damages

The eighth paragraph of subsection B on page 18 begins as follows:

> Mr. Ancel also requested that he be reimbursed for property taxes and condominium fees as well as his insurance cost for this unit. First, there are two issues there. One is that PH4C will still own the unit, obtaining the benefit of the maintenance of the common elements for which the condominium fees are used and obtaining the benefits of the property tax deduction from income taxes. Further, the cost of insuring the unit should not be recoverable and clearly the cost of Mr. Ancel's umbrella policy, which would cover his automobiles and cover him for liability coverage would not be recoverable. Mr. Ancel has not broken down any of these costs to determine to what extent any such cost is not attributable to PH4C. *Finally, it should be noted that PH4C is the Plaintiff here, not Mr. Ancel, and Mr. Ancel's testimony was that he paid these costs, Mr. Ancel is not PH4C; he is simply the resident of PH4C and there is no evidence that the corporation has incurred any of these expenses.*"

(Emphasis added.) The very next paragraph states

> We also have monthly relocation costs, one time relocation cost and temporary housing at 408 Bosley Avenue. *Once again, these are all items paid for by Mr. Ancel and not by PH4C and Mr. Ancel is not the Plaintiff in this matter. These are not costs incurred by the corporation.* Additionally, these are costs which are contingent upon the unit being uninhabitable for forty-nine months. To reach that conclusion one must not only believe that the entire unit must be gutted and rebuilt, which even Mr. Duffy does not support, but that it will take forty-nine months to complete these repairs when Mr. Lowery himself testified that once you get below the level of Mr Ancel's unit, which is the top floor, when repairing the exterior of the building there is no reason why he cannot begin repairs at that time. Mr. Ewell of CSG testified that the approach that they are contemplating is to complete repairs of the roof in certain areas which are not being used to support swing stages at the same time that the façade project is being undertaken. Therefore, the duration of the

> repairs necessary is simply one of conjecture as there is no adequate testimony to support this timeline.

Id. at 19 (emphasis added). On page 24 of that same brief Defendant states: "in this case Mr. Ancel is the sole member of PH4C, and therefore, the actions of Mr. Ancel will be the actions of the corporation."

Closing arguments were not transcribed but no party has suggested that the issue was raised in closing arguments. The Majority Arbitration Award states that "James W. Ancel, Sr. is the LLC's sole member and in practical effect owns the unit." The Majority concluded that "the unit cannot be said to be safe for normal occupancy," and awarded the Plaintiff LLC "Consequential" Costs for Mr. Ancel's "Alternative living costs" and "Relocation Expenses" totaling $433,722.[13] Tellingly, in its post Award motion, Defendant makes no mention of the Award with respect to the "Consequential Costs."

Defendant's argument that the language in its Post Hearing Brief on pages 18-19 was sufficient to raise the issue before the Panel would require this Court to expand the scope of review beyond what is used by appellate courts to review the decisions of lower courts. *See Oak Crest Vill. v. Murphy*, 379 Md. 229, 241 (2004) ("We have long and consistently held to the view that if a point germane to the appeal is not adequately raised in a party's brief, the court may, and ordinarily should, decline to address it. The three-line conclusory footnote in Oak Crest's brief does not adequately present the issue; it gives no reasons or no basis for

[13]The fact that Defendant did not make the argument before the Arbitrators that it is now making is highlighted by Judge Cathell's dissenting opinion which does not distinguish Plaintiff from Mr. Ancel. Judge Cathell states that the majority held "that *Plaintiff* is entitled to a total of almost $900,000.00 to remove what might be there (including over $550,000.00 for *Plaintiff* to live elsewhere while what may be there is removed)." (Emphasis added.) If Defendant had in fact made the argument that it is now making, it is extremely unlikely that Judge Cathell would not have addressed it in his dissent.

challenging the Circuit Court's ruling that § 8.11 was substantively in conflict with HG § 19-345 (b)." (Citations and internal quotation marks omitted.)). *See also Klauenberg v. State*, 355 Md. 528, 552 (1999) ("Appellant proffers no argument as to why the trial court abused its discretion in denying the motion for mistrial. *** [A]rguments not presented in a brief or not presented with particularity will not be considered on appeal. Accordingly, th[e] issue is waived." (Citation omitted.)).

Plaintiff contrasts Defendant's handling of this issue with two other significant issues:

> Defendant's approach to the issue of consequential damages is in stark contract to how it treated the issue of the relevant time period that the Arbitrators could consider for liability purposes. There, Defendant presented an oral motion to the Arbitrators before the Hearings, seeking to limit the time-frame of the Amended Complaint from 2008 to the present (versus from the earlier dates of when the Council was formed or obtained control from the developers). The basis for Defendant's motion arose, in part, from Plaintiff's pre-hearing statement. * * * Defendant knew about Plaintiff's consequential damages claim in advance of the Hearings - just as it knew about the time-frame that Plaintiff believed to be relevant. Defendant objected to the latter issue (time-frame) before the Hearings but failed to object properly at any point to the former issue (damages).
>
> Defendant's approach is also in stark contrast to how objections to Mr. Baxter's expert testimony were handled by the parties. There, Plaintiff raised an oral motion immediately following Mr. Baxter's testimony, Seeking to exclude certain portions from the Arbitrator's consideration. Judge Alpert requested that the motion be put in writing, which Plaintiff did. This gave Defendant the opportunity to respond in writing and the Arbitrators the opportunity to consider the issue once fully briefed. Here, Defendant did not object to Mr. Ancel's consequential damages testimony, did not file any motion to exclude the testimony, [and] never once presented [the issue] . . . to the Arbitrators.

Citing *Mandl* in an effort to justify its failure to raise the issue in its post Award motion, Defendant states "such a request would have asked the Panel to review the merits of its decision." 159 Md. App. at 84. However, Defendant's failure to raise the issue in its motion is more aptly compared to the party's failure in *Birkey Design Group* where "Birkey, . . . stood mute, despite a statute providing for clarification. Birkey should not benefit from its conscious decision to forgo clarification of the award on the unreasonable expectation that it would obtain a favorable result from a clairvoyant appellate panel." 113 Md. App. at 269. In rejecting Birkey's effort to have the courts review the issue, the Court stated:

> Under [Birkey's] view, the losing party at arbitration could circumvent ascertaining the arbitrator's [rationale] by asking an appellate court to speculate as to the arbitrator's [rational]. A losing party would probably prefer that an appellate court examine the award rather than the arbitrator who ruled against him. We think this interpretation is inapposite of the legislative goals of arbitration.

Id.

The Award of Consequential Damages, especially in light of Defendant's silence, cannot be said to be "completely irrational." *See O-S Corp.*, 29 Md. App. at 409 ("An award that is 'completely irrational' is inferentially opprobrious, i.e., '[e]xpressing or carrying a sense of disgrace or contemptuous scorn,' causing it to be suspect in its conception." (Citations omitted.)). There is nothing irrational about the Majority Panel's decision to make an Award that was never challenged. Not only did Defendant fail to object to exhibits and testimony related to the issue, Defendant often treated Ancel as the practical owner of the Unit. Under the Majority's decision the LLC could not provide the Unit as a residence to Ancel; therefore the LLC's value was arguably diminished because the Unit could not be used as a residence. As Plaintiff points out in this Court, arguably the LLC was required to

provide alternative housing once the Unit became unhabitable. *See Fried, Krupp, G.M.B.H., Krupp Reederei Und Brennstoff-Handel-Seeschiffarht, v. Solidarity Carriers, Inc.*, 674 F. Supp. 1022, 1027-28 (U.S. Dist. S.D.N.Y. 1987) (court refused to conclude that the arbitrators exceeded the scope of their authority by awarding damages for a claim that belonged to a non-party to the arbitration because there was some possibility of indemnification).[14]

Therefore, Defendant's argument that the Award violates the "economic loss rule," need not be addressed because even if the Award was an error of law, it may not be vacated. *See e.g. Americas Ins. Co. v. Seagull Compania Naviera, S.A.*, 774 F.2d 64, 67 (2d Cir. N.Y. 1985) ("The intent of a panel of arbitrators should not be frustrated merely because its members may have misinterpreted the law."). Defendant has not, and cannot, show that the "arbitrators [understood] and correctly stated the law, but proceed[ed] to disregard the same." *Greene*, 148 Md. App. at 120 (emphasis added). Defendant cannot even show that the Arbitrators were aware of the applicable law because Defendant never referred them to any law on consequential damages. The Majority Award clearly "draws its essence from the [arbitration] agreement." *Upshur Coals Corp.*, 933 F.2d at 229 (citations and quotations omitted). Thus, there is no basis to vacate it.

[14]Defendant's reliance on *Eljer Manufacturing, Inc., v. Kowin Dev. Co.*, 14 F.3d 1250 (7th Cir. 1994) is misplaced. There the Arbitrator awarded money to Kowin that Eljer allegedly received unjustly from the Bank of China. The Bank of China was not a party to the arbitration and there was nothing to explain why Eljer should pay Kowin for losses suffered by the Bank of China.

DEFENDANT HAS NOT SHOWN THAT ITS REQUESTED MODIFICATION IS ON A MATTER NOT SUBMITTED TO THE PANEL OR THAT THE MODIFICATION WOULD HAVE NO AFFECT ON THE MERITS OF THE AWARD

Defendant also seeks modification of the specific performance part of the Majority Panel's Award that orders the Council to "replace the building's roof system and repair the exterior facade and other matters in accordance with Page 18 of CSG's Inspection Report of August 18, 2009." The Inspection Report was prepared by CGS after it was hired by the Council in January 2009 to serve as a consultant. Page 18 lists CGS' recommendations. The three modifications that Defendant seeks are (1) incorporation into the Award of two CSG Project Manuals, which were not introduced into evidence; (2) to allow the Council to perform a peer-review of the Project Manuals; and (3) to allow value-engineering of the Project Manuals.

Defendant argues that these modifications are permitted under § 3-223(b) because the question of "*how* to perform the repairs" was not an issue submitted to the Panel and thus the Panel had no authority to order that the repairs be done in accordance with the Inspection Report. Defendant also argue that the proposed modifications do not affect the merits of the decision upon the issues that were submitted to the Panel. Plaintiff argues in response that (1) the issue of *how* to perform the work was submitted to the Arbitrators; (2) Defendant waived the right to seek a modification because it did not object to evidence on *how* to make the repairs; and (3) the requested modification is based on evidence not offered during the hearing and would affect the merits of the Award.

Section 3-223(b)(2) provides: "The court shall modify or correct the award if: *** [t]he arbitrators have awarded upon a matter not submitted to them and the award may be

corrected without affecting the merits of the decision upon the issues submitted . . . ." A key issue before the Panel was: what does it take to repair the roof and facade around the Unit to prevent any further water infiltration. It is not possible to answer that question without addressing *how* to do the repairs. Furthermore, it would be impossible for this Court to determine that the proposed modifications will not affect the merits of the Award based on evidence that was not submitted to the Arbitrators.

Both the Amended Complaint and the testimony and exhibits make clear that the issue of how to do the repairs was submitted to the Panel. In Count I of its Amended Complaint, Plaintiff asked that the Council be ordered to "correct the Maintenance Issues . . . in a workmanlike manner within a reasonable period of time, using appropriate means and methods at a competitive costs." A request to have the issues done "in a workmanlike manner" put the issue of *how* before the Panel. Furthermore, Defendant's expert, Clay C. Ewell, the President of CSG, testified that the recommendations made in CSG's Inspection Report on how to correct the water infiltration had not changed.[15]

Page 18 of the Inspection Report lists 21 recommendations in two phases. Phases 1-3 have 19 specific recommendations and Phase 4 has 2. In answer to questions from Judge Levitz, Mr. Ewell testified that the phasing plan had been abandoned but that the recommendations listed remained the same. Judge Levitz directed Mr. Ewell's attention to Page 18 of the Inspection Report and then asked the following questions:

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[15]The problem with Defendant's argument that how to do the repairs was not before the Arbitrators is contradicted by language it uses in its Reply: "In its Opposition, Plaintiff concedes that all three building experts who testified during the hearing agreed with the recommendations of CSG on *how* to repair the roof and facade . . . ." (Emphasis added.)

HONORABLE JUDGE LEVITZ: – *you list recommendations* --

THE WITNESS: Yes, sir.

HONORABLE JUDGE LEVITZ: – *that need to be done to – to make this building watertight.* I'm gong to use that – that expression. And you do it – there's Phase I to III and then Phase IV. Phase IV is the replace – well, main roof replacement. Are those still – I mean, has that changed or are those your recommendations now to make this building stop leaking?

THE WITNESS: That phasing plan has pretty much been abandoned, and the – the notion now is – the plan now is to perform all of the work in one continuous project.

HONORABLE JUDGE LEVITZ: Okay. But the – the – so you would just – the change is instead of Phase I to III and then Phase IV, just all one phase?

THE WITNESS: A very long phase –

HONORABLE JUDGE LEVITZ: A very long phase.

THE WITNESS: – but yes.

HONORABLE JUDGE LEVITZ: *Are the recommendations of things to do, are they still the same*?

THE WITNESS: *Yes*.

(Emphasis added.)

Plaintiff's experts agreed with the recommendations in the Inspection Report. Therefore Defendant's argument that the issue was not before the Panel because it was not contested, is only half-correct. The "rest of the story" is that there was a consensus on how the work would be done – it would be done in accordance with Page 18 of the Inspection Report. As Defendant acknowledges, the Panel "endorse[d] the recommendations of CSG."

The Project Manuals were not offered into evidence despite the fact that the Council had distributed them, obtained bids, and selected contractors to perform the work. Not only were the Manuals not offered into evidence, their very existence was not disclosed to the Panel until Defendant filed its motion for modification. Defendant's expert never referred to the Project Manuals or suggested in any way that revisions had been considered to the recommendations in the Inspection Report. Neither of Plaintiff's experts ever saw the Project Manuals. In fact, it appears that Plaintiff did not know about the Manuals prior to Defendant's post Award motion. Defendant's failure to introduce the Manuals into evidence does not mean the issue of how to make the repairs was not submitted to the Arbitrators. It means that the Arbitrators, by Defendant's choice, reached a decision without potentially relevant evidence. Defendant cannot remedy that now that the hearing is over.[16]

Defendant's request for peer review and value engineering must also be rejected. Defendant states that other condominium owners have requested that other engineering companies perform a "peer review" of the Project Manuals to make sure that they encompass all the necessary work, and that some condominium owners have requested that the Council perform "value engineering" to determine if some of the project costs can be reduced without affecting the final result. However neither the peer review nor the value engineering were mentioned during the five day hearing and Defendant's silence is once again fatal.

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[16]Defendant harps on the fact that the Inspection Report recommends the "*Develop[ment of] a Project Manual* for phased roof and facade rehabilitation include [sic] technical specifications, drawings, general condition requirements and bidding documents for competitive bidding of the ... rehabilitation work." (Emphasis added.) According to Defendant the Project Manuals should be incorporated because they are required by the Inspection Report. That may or may not be true, but the failure to admit them into evidence, or make any reference to their existence, is fatal to Defendant's request that it be permitted to change the recommendations listed on Page 18 because of information in the Project Manuals.

It is impossible for this Court to conclude, based on evidence that was not presented to the Panel, that the proposed modifications will have no effect on the merits of the Award. Plaintiff argues that the modification would of necessity affect the merits because the Project Manuals do not have the same scope of work as that outlined in the Inspection Report.[17] As an example Plaintiff points to the plan in one of the Project Manuals to caulk the exterior handrails instead of replacing them as recommended by the Inspection Report.[18] Defendant's response is that the Amended Complaint does not refer to the exterior handrails and that during the hearing the condition of the exterior handrails was not identified as a possible source of the water infiltration. Defendant argues that this "minor discrepancy between the Inspection Report and the Project Manuals does not affect the merits,"and it is the only "discrepancy" between the Project Manuals and the Inspection Report.

Defendant's argument fails. There was no testimony on the repair of the exterior handrails because Page 18 of the Inspection Report recommends "Remov[al] and replace[ment of the] railings." The recommendation to "remove and replace railings" was one of the recommendations CSG's President said was "still the same," in answer to Judge Levitz' question on what "need[s] to be done to – to make this building watertight." Plaintiff and its experts were satisfied with a replacement of the handrails, thus nothing more needed to be said. Defendant's silence in the face of its expert's answer to Judge Levitz' question cannot be overcome at this stage of the proceedings. Perhaps caulking will work equally as

[17]Plaintiff argues that the Project Manuals are unsigned, incomplete, and full of blanks. That is not quite correct. It is the Bid Forms that are attached to the Project Manuals that are unsigned and are incomplete. That is to be expected because the Project Manuals presumes that the work will be competitively bided.

[18]Defendant claims this approach will result in a cost-savings of $1.5 million.

well as replacement. Perhaps not. For this Court to make that determination is both beyond the scope of review and would violate Plaintiff's right to be heard because it would be made on Defendant's unchallenged evidence. For the same reason, this Court cannot determine that peer review and value engineering should or should not be done. No evidence to support those components was presented to the Arbitrators, and thus, once again it would be beyond the scope of review.

For all the reasons stated above, the Court will enter an order denying the Petition to Vacate and to Modify the Award and granting the Petition to Confirm the Award.

Dated: June 5, 2012

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JUDGE EVELYN OMEGA CANNON