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Securities Arbitration 2008: Evolving and Improving

*283 THINK THE RIGHT TO ARBITRATE HAS BEEN WAIVED? THINK AGAIN!

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*285 INTRODUCTION

When retained to handle a new lawsuit, the savvy lawyer always asks a number of threshold questions before delving into the merits of the dispute:

1. Which court has subject matter jurisdiction over the action?
2. Is the defendant properly subject to personal jurisdiction?
3. What is the correct venue?
4. And, of course, in the modern era (post 1987), counsel must always ask: Does an arbitration agreement exist?

If a case is filed in court notwithstanding the existence of an arbitration agreement, the first order of business often involves filing a motion to compel arbitration. Unless there is a valid defense to arbitration, the Federal Arbitration Act ("FAA") [FN1] directs that the case be stayed and the dispute compelled to arbitration before the appropriate body.

There are times, however, when -- either by accident or by design -- an arbitrable controversy lingers in court for some time without being compelled to arbitration. In such cases, the question naturally arises: At what point does a party waive its right to compel arbitration by participating in the litigation before a judicial forum? That is the focus of this chapter in the course book of PLI's *Securities Arbitration 2008.*

Many practitioners are of the belief that inserting so little as a toe through the courthouse door constitutes an election to proceed in a judicial forum, and thus a waiver of the right to arbitrate. However, this is not the case. Indeed, as this chapter demonstrates, it is not at all uncommon for a dispute to be compelled to arbitration even if litigation has proceeded *for several months or years*. This conclusion is confirmed by a recent, instructive decision from the United States District Court for the Southern District of New York, captioned *Brownstone Investment Group, LLC v. Levey*. [FN2]

BACKGROUND OF *BROWNSTONE V. LEVEY*

The *Brownstone* litigation arose out of a partnership dispute in the securities industry. The subject company, Brownstone Investment Group, LLC ("Brownstone"), was a registered securities broker-dealer. Thus, ***286** because the case involved a dispute between Brownstone and a person formerly associated with it, the dispute was subject to mandatory arbitration under the rules of the National Association of Securities Dealers, Inc. ("NASD"). Rather than file an arbitration claim, Brownstone chose to bring an action in the United States District Court for the Southern District of New York. The defendant, unaware of his right to compel arbitration of the dispute, responded to the complaint by filing an Answer and asserting a Counterclaim for, among other things, the value of his partnership interest.

The parties proceeded in federal court to litigate the dispute for more than 10 months. The course of the litigation was typical of complex commercial actions: several depositions were taken by both sides; thousands of pages of documents were exchanged; legal fees and costs mounted up on both sides; and, numerous discovery disputes were submitted to the presiding United States Magistrate Judge for decision.

Approximately 10 months after the case was first filed, the defendant learned for the first time that he had had a right to compel arbitration of the dispute under the rules of the NASD. He immediately retained new counsel and filed a motion to compel arbitration; Brownstone argued in response that the defendant had waived his right to arbitrate by participating in over 10 months of litigation, including but not limited to affirmatively asserting Counterclaims.

It is instructive for all practitioners of securities arbitration to understand why, on these facts, both a United States Magistrate Judge and a United States District Judge ruled that the right to compel arbitration had not been waived. [FN3]

THE PRESUMPTION IN FAVOR OF ARBITRATION

Most practitioners in the area of arbitration are familiar with the Supreme Court's oft-cited pronouncement on the issue: "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." [FN4] Not all are aware, however, of the full context of the quote:

[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability. [FN5]

***287** Following this principle, the lower federal courts have consistently declared that waiver "is not to be lightly inferred." [FN6]

Accordingly, the burden is properly on *the party opposing arbitration* to provide adequate justification for a finding of waiver. All doubts must be resolved in favor of arbitration.

THE "THREE-FACTOR TEST"

Courts generally employ similar frameworks in determining whether a waiver of arbitration has occurred, although there is no universally accepted formulation of the test. In *Brownstone*, the court followed a three-factor test set out by the Second Circuit:

[I]n determining whether [a party] has waived its right to arbitration, we will consider such factors as (1) the time elapsed from the commencement of litigation to the request for arbitration, (2) the amount of litigation (including any substantive motions and discovery), and (3) proof of prejudice. [FN7]

The factors are viewed cumulatively, rather than in isolation. *Id.*

While a court will certainly consider all three factors, and each case is judged according to its unique set of facts, one should not infer that the three factors have equal weight. Indeed, the element of prejudice is by far the most important. As such, a clear majority of federal circuits have held that *without a showing of prejudice, there can be no waiver, regardless of whether the other factors are applicable.* [FN8]

***288** Some courts adopt an even tougher test, requiring proof of all elements before a party will be found to have waived the right to arbitrate. [FN9]

Similarly, the test adopted by the Eleventh Circuit has only two elements rather than three, but as with the Third, Eighth, and Ninth Circuits, each of those elements must be demonstrated to the court's satisfaction. [FN10]

There is, however, a minority view which holds that proof of actual prejudice is not an indispensable requirement. [FN11] Indeed, the *St. Mary's* decision explicitly recognized the existence of a circuit split on this issue. [FN12]

Finally, there are those Circuits which insist on prejudice, but appear to apply a less stringent standard than the courts which follow the majority rule. [FN13] Similarly, while the Fifth Circuit requires a showing of prejudice, it apparently regards "substantially invoking the litigation machinery" as sufficient to constitute prejudice, regardless of whether the opposing party suffered concrete harm. [FN14]

***289** While the courts obviously apply varying standards to the question of whether a waiver has occurred, we will continue, for purposes of this chapter, to discuss the state of jurisprudence under the majority rule followed in the Second Circuit and elsewhere.

THE "TIME ELAPSED" FACTOR

The first factor directs a court to consider "the time elapsed from the commencement of litigation to the request for arbitration." [FN15] However, the question is not merely a mathematical inquiry into how many months or years have elapsed since the case was filed. Rather, the degree of progress is relevant as well; a request to compel arbitration on the eve of trial is obviously less likely to be granted than a request at an early stage of discovery, even if the exact same period of time has elapsed in both cases. [FN16]

While the question of how much time is "too much" is obviously subject to debate, it is noteworthy that a number of cases have declined to imply a waiver even where the case was litigated for quite a significant period. [FN17]

As noted above, the *Brownstone* case involved approximately 10 1/2 months of litigation by the parties prior to the decision to seek arbitration. In analyzing this factor, the court began by noting that "Levey's delay of more than ten months in seeking arbitration is insufficient by itself to support a finding of waiver." [FN18] Even though substantial discovery had taken place over the course of those 10 months, the court declined to find that this factor weighed in favor of waiver: "the Court has considered that, whatever the extent of pretrial proceedings that have taken place to date, discovery is far from complete and the case is still a long way from being ready for trial." [FN19] The court accurately noted that it might well take an additional two years to conclude a trial of ***290** a complex commercial case of this type, weighing against a finding of waiver. Although Brownstone argued that it intended to move the case towards summary judgment in relatively short order, and that compelling the case to arbitration would take away their right to do so, the court rejected this line of attack:

Defendants' argument would stand the notion of actual prejudice on its head. For it essentially ascribes prejudice to their being deprived of a full opportunity to bring about even more prejudice upon themselves than what they here claim they have already suffered. In effect, Defendants seek to finish litigation in this forum and thereby incur what probably would have been greater delay and expense than they would experience if the parties were to commence arbitration now . . . . [FN20]

THE "AMOUNT OF LITIGATION" FACTOR

The second factor looks at the extent to which the parties have utilized the court's processes in furtherance of litigation. While this, like the other factors, involves a fact-specific inquiry, the case law makes clear that there is no "bright-line rule" which implies a waiver as soon as the case reaches a certain stage. [FN21]

Preliminary discovery measures, such as document discovery, are unlikely to result in a finding of waiver even if they continue for several months. [FN22]

In *Brownstone,* however, a case where several depositions were taken prior to the decision to pursue arbitration, the Magistrate Judge ruled that the second factor counseled in favor of waiver. [FN23]

***291** Another respect in which the nature of the litigation to date may come into play is where a party who has asserted affirmative claims seeks to compel arbitration. While this certainly is a factor that a court may consider, it is not inherently dispositive. [FN24]

THE "ACTUAL PREJUDICE" FACTOR

The third and most important factor asks whether there has been *substantial prejudice* to the party opposing arbitration. As noted above, unless this factor is satisfied, the majority rule will not permit a finding of waiver.

One common argument arises where a party, prior to seeking arbitration, has taken advantage of discovery procedures that would not be available in arbitration. [FN25]

While a finding of prejudice may arise from the fact that a party has taken advantage of the availability of depositions and similar discovery procedures, the courts have declined to establish any sort of "one-deposition rule" providing that as soon as a party conducts any sort of discovery which would not be available in arbitration, the right to arbitrate is waived. For example, in *Rush v. Oppenheimer & Co.,* [FN26] the Second Circuit reversed a district court decision that had found a waiver of the right to compel arbitration based upon "extensive involvement over the course of eight months in the litigation, including taking rather extensive discovery, bringing a motion to dismiss, and posing thirteen affirmative defenses to the amended complaint, all without raising the right to arbitrate." [FN27]

In *Brownstone*, the plaintiff relied quite heavily on *Zwitserse* and cases of that type, arguing that the defendant had utilized discovery procedures unavailable in arbitration, such as depositions. As the ***292** *Brownstone* court noted, however, such a ruling would fly squarely in the face of the Second Circuit precedent which holds that there is no "bright-line rule" for when a waiver has occurred:

If the mere use of discovery procedures not available in arbitration were enough by itself to constitute reason for a finding of sufficient prejudice, in most cases it would result in a virtually automatic waiver of arbitration, regardless of the content, materiality, or demonstrable prejudice associated with the information so acquired. [FN28]

Rather than adopt such a bright-line rule, the court noted instead that a key issue is whether specific information obtained through discovery would have been unavailable in the arbitral forum. [FN29]

In this regard, it is useful to note the unique facts of *Zwitserse*, a case often cited in support of pro-waiver arguments. Specifically, "ZwitserLeven admitted that its main purpose in instigating the preliminary witness hearing was 'to preserve the testimony of witnesses whose attendance at arbitration hearings in New York could not be compelled [and to provide the] arbitration tribunal with information which ABN and ABN CMC might otherwise elect to withhold." [FN30] In other words, the party seeking arbitration openly admitted that it had instituted litigation for the very purpose of obtaining evidence not otherwise available to it. Obviously, this situation is far different from the typical case where a few depositions happen to be taken prior to the decision to pursue arbitration.

Another prejudice argument which is virtually always available is the significant investment in time and money which a party must incur in order to litigate a case in the court system. At least under the majority rule, however, the courts have made clear that this simply is not a factor in the analysis. [FN31] Accordingly, it will generally not be helpful to argue that time and money have been wasted because the motion to compel arbitration was not filed earlier, unless unique circumstances are present.

Another potential source of prejudice arises from favorable rulings obtained by the party opposing arbitration -- rulings that would become null and void should the matter be compelled to arbitration. In ***293** *Brownstone,* for example, two third-party defendants had prevailed on a pre-answer motion to dismiss Levey's claims against them, and the argument was made that substantial prejudice would accrue if that ruling were

negated. The District Court upheld the Magistrate Judge's report and recommendation in this regard:

Prejudice may be found where "damage to a party's legal position . . . occurs [because] the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue," *Doctor's Assocs., Inc. v. Distajo,* 107 F.3d 126, 134 (2d Cir. 1997), or where "a party loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration." *Kramer v. Hammond,* 943 F.2d 176, 179 (2d Cir. 1991). Here, however, it is difficult to understand how either Stephen Lowey or Naylor would be prejudiced by the arbitration of this dispute, since Judge Marrero dismissed Levey's claims against them without prejudice. . . . [FN32]

The question, then, remains fact-specific; there is no doctrine which holds that a party is necessarily foreclosed from pursuing arbitration if he or she has been the subject of an adverse ruling in the case.

WHAT IS NOT ACTUAL PREJUDICE?

Given the lack of any bright-line principles to guide us, arguments grounded in the case law tend to focus more on the sorts of allegations that courts have found to NOT constitute actual prejudice. An oft-cited example is provided by *Rush, supra,* which held that no waiver had occurred notwithstanding "rather extensive discovery, bringing a motion to dismiss, and posing thirteen affirmative defenses to the amended complaint, all without raising the right to arbitrate." [FN33]

Perhaps the most instructive example, however, is the Second Circuit's decision in *Leadertex*. In that litigation, the defendant first removed a case from state court to federal court, without asserting a right to compel arbitration. [FN34] The defendant then filed an Answer, an Amended Answer, and an Answer to the Amended Complaint -- all of which asserted numerous Counterclaims -- again without claiming a right to compel arbitration. [FN35] After seven months of federal court litigation proceeded, the defendant/counter-plaintiff "availed itself of the federal forum by its energetic pursuit of discovery," including "multiple prolix interrogatories and demands for document production." [FN36] Defendant took ***294** multiple depositions and actually completed the discovery process, without ever raising the issue of arbitration. Only after discovery had concluded and the plaintiff had filed a motion for partial summary judgment, did the defendant suddenly file a cross-motion seeking to compel arbitration -- a mere two months before the trial ready date.

In spite of these egregious facts, the Second Circuit held that none of this was sufficient to support a finding of waiver:

Only at the eleventh hour, with trial imminent, and apparently to counter plaintiff's attempt to replevy its goods in defendant's hands, did Morganton belatedly act. Its proffered excuse for the delay - that it was forced to wait until it obtained from Leadertex copies of contracts containing the arbitration clause -- is somewhat disingenuous, as Morganton always had its own copies of those contracts in its own possession.

Morganton's conduct strongly implies it forfeited its contractual right to compel arbitration. As a consequence, we are firmly persuaded that Morganton's actions were inconsistent with its fight to compel arbitration. *Yet however unjustifiable Morganton's conduct, there can be no waiver unless that conduct has resulted in prejudice to the other party.* [FN37]

The Second Circuit ultimately ruled that arbitration had been waived in *Leadertex* -- but not for any of the reasons discussed above. Instead, the court found that the only legitimate basis for a finding of waiver was that the defendant's actions had caused significant economic prejudice to the plaintiff, because the plaintiff's trade goods had remained in the defendant's possession throughout the protracted litigation -- preventing the plaintiff from fulfilling customer orders or generating cash flow. [FN38]

Obviously, *Leadertex* hardly presents the only scenario under which a court will find prejudice and thus a waiver of the right to arbitrate, but it provides an extraordinarily illustrative description of what can constitute prejudice, as well as what cannot. In

Circuits which follow the majority rule and require a demonstration of actual prejudice, it will likely be rare for a finding of waiver to be made based upon nothing more than the occurrence of ordinary litigation events.

Similarly instructive is the *Brownstone* court's description of the factors which led it to distinguish the case before it from cases, like *Leadertex* and *Zwitserse,* where the opposite ruling was made:

Applying the doctrine of these cases properly read to the circumstances of the action at hand, the Court finds several considerations compelling in support of a determination that no waiver of arbitration has occurred: (1) Defendants have not demonstrated what specific information Levey ***295** has obtained through litigation that he would not be able to acquire through an arbitration proceeding and how use of that information in arbitration would unfairly prejudice Defendants; (2) whatever information Levey has obtained in discovery he now possesses not because he invoked judicial resources to obtain such discovery and information to later gain an advantage in the arbitration he seeks; rather, it was Brownstone that commenced court litigation and insisted on pursuing the expedited discovery about which Defendants now raise objections; (3) the proceedings in this Court have not sufficiently advanced to a point at which Levey has improperly availed himself of judicial resources -- in delay, expenses, or change in the position of the Defendants -- to cross the threshold of inherent unfairness to Defendants. [FN39]

Based upon this ruling, it seems critical for a party seeking to establish waiver to point to specific facts, grounded in the individual circumstances of a given case, that go well beyond boilerplate allegations that “the case has been litigated extensively” or that “costs and expenses have been incurred because arbitration was not pursued earlier. The federal courts appear to take quite seriously the Supreme Court's admonition that “any doubts . . . should be resolved in favor of arbitration.” [FN40]

DOES KNOWLEDGE OF THE RIGHT TO ARBITRATE MATTER?

There is one final point that merits attention even though the *Brownstone* decision only touches on it in passing: the question of whether the party belatedly seeking arbitration knew of that right at an earlier time. In fact, some might see this as a crucial issue, given the standard definition of “waiver” as “the voluntary relinquishment of a known right.”

Be that as it may, the majority of waiver cases do not even reference the issue of knowledge. *Leadertex*, for example, went so far as to label the moving party's proffered excuse as “disingenuous.” Yet the court in *Leadertex* declined to base a finding of waiver on the evident fact that the defendant had seemingly known all along of its right to arbitrate.

As it happens, while the issue of foreknowledge was disputed in the *Brownstone* matter, the court ultimately deemed it irrelevant either way. As explained by Magistrate Judge Pitman to the parties during the briefing process, the argument can be made that if the party seeking arbitration must have known of his or her right to arbitrate for a waiver to occur, the issue of prejudice to the opposing party would become virtually irrelevant, because an unwitting defendant would always be entitled to a “free shot” to compel arbitration regardless of the stage the ***296** litigation has reached. Perhaps this is the reason why many courts, rather than delve into the issue of knowledge, prefer to analyze the matter in terms of prejudice and whether it would be manifestly unfair to the opposing party if the case were belatedly compelled to arbitration.

There are, however, a minority of courts which take the position that knowledge of the right to arbitrate is a necessary precondition to any finding of waiver. [FN41] While it does not appear that there are any cases where this element of the test has been applied to a truly extreme fact pattern (for example, where a party does not learn of his right to arbitrate until the midst of trial), it bears noting that some courts do, in fact, regard the moving party's knowledge as a relevant factor.

CONCLUSION

The issue of waiver is one where many practitioners harbor assumptions that are not in line with the governing case law. While it is commonly believed that even minimal efforts to participate in litigation will operate as a waiver of any right to arbitrate, the case law demonstrates that just the opposite is true. It is, in fact, uncommonly difficult to establish that the right to arbitrate has been waived, even where the litigation effort is well underway in a court of law.

Given the Supreme Court's holding that all doubts must be resolved in favor of arbitration and against a finding of waiver, it is important for the practitioner who seeks to establish a waiver to arm himself or herself with fact-specific arguments as to why actual and substantial prejudice would result if the case were compelled to arbitration. Likewise, it is important for the party seeking to compel arbitration to be familiar with the relevant decisions in this area, as the case law quite clearly disfavors the notion of waiver.

[FN1]. 9 U.S.C. §1 *et seq.*

[FN2]. 514 F. Supp. 2d 536 (S.D.N.Y. 2007).

[FN3]. The Report and Recommendation authored by United States Magistrate Judge Henry Pitman is reported at 514 F. Supp. 2d 536 (S.D.N.Y. 2007).

[FN4]. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

[FN5]. *Id.* (emphasis added).

[FN6]. *See, e.g.*, *Glazer v. Lehman Bros.*, 394 F.3d 444, 450 (6th Cir. 2005); *Thyssen, Inc. v. Calypso Shipping Corp., S.A.*, 310 F.3d 102, 104-105 (2d Cir. 2002); *Painewebber Inc. v. Faragalli*, 61 F.3d 1063, 1068 (3d Cir. 1995). *See also* *Coca-Cola Bottling Co. v. Soft Drink and Brewery Workers Union Local 812*, 242 F.3d 52, 57 (2d Cir. 2001) ("There is a strong presumption in favor of arbitration . . . .").

[FN7]. *PPG Indus., Inc. v. Webster Auto Parts, Inc.*, 128 F.3d 103, 107 (2d Cir. 1997).

[FN8]. *See* *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 122 (2d Cir. 1991) ("waiver through participation in previous litigation may be found only when the party seeking to avoid arbitration is able to demonstrate some resulting prejudice"); *Microstrategy, Inc. v. Lauricia*, 268 F.3d 244, 249 (4th Cir. 2001) ("even in cases where the party seeking arbitration has invoked the 'litigation machinery' to some degree, 'the dispositive question is whether the party objecting to arbitration has suffered *actual prejudice*"'); *General Star Nat'l Ins. Co. v. Administratia Asigurarilor de Stat*, 289 F.3d 434, 438 (6th Cir. 2002) ("Although a waiver of the right to arbitration is 'not to be lightly inferred,' a party may waive the right by delaying its assertion to such an extent that the opposing party incurs actual prejudice."); *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 701 (10th Cir. 1989) ("Parties seeking to prove waiver of arbitration obligations bear a heavy burden; they must show substantial prejudice. . . . Moreover, inconsistent behavior alone is not sufficient; the party opposing a motion to compel arbitration must have suffered prejudice.").

[FN9]. *See* *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 233 (3d Cir. 1997) ("[A] party waives the right to compel arbitration only in the following circumstances: when the parties have engaged in a lengthy course of litigation, when extensive discovery has occurred, and when prejudice to the party resisting arbitration can be shown."); *Kelly v. Golden*, 352 F.3d 344, 349 (8th Cir. 2003) ("The party seeking arbitration may be found to have waived his right to it, however, if he '(1) knew of an existing right to arbitration; (2) acted inconsistently with that right; and (3) prejudiced the other party by these inconsistent acts."'); *Sovak v. Chugai Pharmaceutical Co.*, 280

F.3d 1266, 1270 (9th Cir. 2002) ("In order to prevail, Sovak must show (1) Cook had knowledge of its existing right to compel arbitration; (2) Cook acted inconsistently with that existing right; and (3) he suffered prejudice from Cook's delay in moving to compel arbitration.").

[FN10]. *See* *Ivax Corp. v. B. Braun of America, Inc.*, 286 F.3d 1309, 1315-16 (11th Cir. 2002) ("In determining whether a party has waived its right to arbitrate, we have established a two-part test. First, we decide if, 'under the totality of the circumstances,' the party 'has acted inconsistently with the arbitration right,' and, second, we look to see whether, by doing so, that party 'has in some way prejudiced the other party.'").

[FN11]. *See* *St. Mary's Medical Center v. Disco Aluminum Products Co.*, 969 F.2d 585, 590 (7th Cir. 1992) ("[W]here it is clear that a party has forgone its right to arbitrate, a court may find waiver even if that decision did not prejudice the non-defaulting party."); *National Foundation for Cancer Research v. A. G. Edwards & Sons, Inc.*, 821 F.2d 772, 777 (D.C. Cir. 1987) ("This Circuit has never included prejudice as a separate and independent element of the showing necessary to demonstrate waiver of the right to arbitration.").

[FN12]. 969 F.2d at 590.

[FN13]. *See* *In re Tyco Int'l Ltd. Sec. Litig.*, 422 F.3d 41, 44 (1st Cir. 2005) (requiring only that a "modicum of prejudice" be demonstrated).

[FN14]. *Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 1156, 1158 (5th Cir. 1986).

[FN15]. *PPG Indus.*, 128 F.3d at 107.

[FN16]. *See, e.g.*, *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 25 (2d Cir. 1995) ("The proximity of a trial date when arbitration is sought is also relevant.").

[FN17]. *See* *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 122 (2d Cir. 1991) (delay of more than three years held insufficient, standing alone, to support a finding of waiver); *Sweater Bee by Banff, Ltd. v. Manhattan Industries, Inc.*, 754 F.2d 457, 461 (2d Cir. 1985) (no waiver of arbitration despite delay of over two years); *Acquaire v. Canada Dry Bottling*, 906 F. Supp. 819, 830 (E.D.N.Y. 1995) (no waiver notwithstanding three-year delay prior to seeking arbitration).

[FN18]. 514 F. Supp. 2d at 540

[FN19]. *Id.* at 541.

[FN20]. *Id.*

[FN21]. *See* *S & R Co. v. Latona Trucking, Inc.*, 159 F.3d 80, 83 (2d Cir. 1998).

[FN22]. *See, e.g.*, *Salerno v. Aetna Life Ins. Co.*, 1996 U.S. App. LEXIS 5587, at *3 (2d Cir. Mar. 26, 1997) ("Although both parties proceeded with document discovery for four months before Aetna first informed the court that this dispute was subject to arbitration, such discovery procedures would also have been available in arbitration."); *McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co.*, 858 F.2d 825, 833 (2d Cir. 1988) ("PP&L merely responded to the plaintiffs' complaints, participated in some discovery, and spoke of the possibility of seeking summary judgment. We have held that such conduct is insufficient to constitute a waiver.").

[FN23]. *See* 514 F. Supp. 2d at 551 ("Levey had, among other things, filed counterclaims and third-party claims, conducted seven depositions, served twenty requests to admit, twenty interrogatories and sixty-five document requests, and received over 44,000 pages of documents in discovery. These actions certainly pertained to substantial issues going to the merits of this dispute, and, therefore, weigh in favor of a finding of waiver.").

[FN24]. *See Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading*, 88 F. Supp. 2d 168, 178 (S.D.N.Y. 2000) ("even a party that initiates litigation does not waive its right to demand arbitration, absent a finding of prejudice"); *Freeman v. Complex Computing Co.*, 931 F. Supp. 1115, 1119 (S.D.N.Y. 1996) ("plaintiff did not waive his right to arbitrate by commencing this action").

[FN25]. *See*, *e.g.*, *Cotton v. Slone*, 4 F.3d 176, 180 (2d Cir. 1993) ("Slone has secured for himself the benefits of pretrial discovery that is often unavailable in an arbitral forum."); *Zwitserse Maatschappij Van Levensverzekering En Lijfrente v. ABN Int'l Capital Mkts. Corp.*, 996 F. 2d 1478, 1480 (2d Cir. 1993) ("The hearing permitted ZwitserLeven to unfairly profit from the benefits of discovery that it most likely would not otherwise have been entitled to in arbitration.").

[FN26]. 779 F.2d 885 (2d Cir. 1985),

[FN27]. *Id.* at 887.

[FN28]. 514 F. Supp. 2d at 546.

[FN29]. *Id.* at 545.

[FN30]. 996 F.2d at 1480.

[FN31]. *See Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 26 (2d Cir. 1995) ("pretrial expense and delay - unfortunately inherent in litigation -- without more, do not constitute prejudice sufficient to support a finding of waiver"); *Crysen/Montenay Energy Co. v. Shell Oil Co.*, 226 F.3d 160, 163 (2d Cir. 2000) ("Incurring legal expenses inherent in the litigation, without more, is insufficient evidence of prejudice to justify a finding of waiver.").

[FN32]. 514 F. Supp. 2d at 552.

[FN33]. 779 F.2d at 887.

[FN34]. 67 F.3d at 23.

[FN35]. *Id.* at 26.

[FN36]. *Id.* at 24.

[FN37]. 67 F.3d at 26 (emphasis added).

[FN38]. 67 F.3d at 27.

[FN39]. 514 F. Supp. 2d at 545.

[FN40]. *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24-25.

[FN41]. *See, e.g.*, *Kelly v. Golden*, 352 F.3d 344, 349 (8th Cir. 2003) ("The party seeking arbitration may be found to have waived his right to it, however, if he [among other

things] ‘knew of an existing right to arbitration’ . . .”); *Sovak v. Chugai Pharmaceutical Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002) (“In order to prevail, Sovak must show (1) Cook had knowledge of its existing right to compel arbitration . . . .”).

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