

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

RED ZONE LLC,

Plaintiff,

-against-

CADWALADER, WICKERSHAM & TAFT LLP,

Defendant.

-----X

Index No. _____

IAS Part: ____

COMPLAINT

Jury Trial Demanded

Plaintiff RED ZONE LLC, by its attorney, Jeffrey A. Jannuzzo, Esq., as and for its
Complaint against defendant CADWALADER, WICKERSHAM & TAFT LLP, alleges as follows:

1. This is an action for legal malpractice involving representation in a commercial matter. Plaintiff's damages are in excess of \$13 million. Assignment to the Commercial Division is requested pursuant to Section 202.70(b)(8) of the Uniform Rules of the Trial Courts. Electronic filing is mandatory pursuant to Section 202.5-bb of such Rules. A Notice of Commencement of Action Subject to Mandatory Electronic Filing, dated today, is served herewith.

THE PARTIES AND VENUE

2. Plaintiff Red Zone LLC ("Red Zone") is a Delaware limited liability company, with its principal place of business at 1800 Tysons Blvd., Suite 550, McLean, VA 22102-4270.

3. Defendant Cadwalader, Wickersham & Taft LLP ("Cadwalader") is a domestic registered limited liability partnership, with its principal offices at One World Financial Center, New York, NY 10281.

4. The address for service of process of defendant Cadwalader set forth in the records of the N.Y. Department of State is: Cadwalader, Wickersham & Taft LLP, One World

Financial Center, New York, NY 10281.

5. Defendant Cadwalader was at the times complained of, through the present, engaged in the practice of law in the State of New York.

6. The Cadwalader partner responsible for the engagement with Red Zone which gives rise to this lawsuit was Dennis Block, Esq.

7. Mr. Block delegated to Cadwalader partner William Mills, Esq., the responsibility for preparation of the written agreement which gives rise to this malpractice action, and was responsible for supervising the performance of services by Mr. Mills with regard to such work.

8. Venue is proper in New York County pursuant to CPLR 503(a) and (c) by reason of the residence of defendant.

THE FACTS

9. At the beginning of 2005, Red Zone owned approximately 8.76% of the voting stock of Six Flags, Inc., (“Six Flags”) a corporation which owned the well-known amusement parks of the same name. Red Zone had purchased such stock in 2004 for \$34.5 million.

10. Red Zone believed that Six Flags was underperforming, and after efforts to negotiate changes in business plans with Six Flags were unsuccessful, Red Zone sought professional advice to obtain financing in order to acquire Six Flags.

11. Red Zone had retained defendant Cadwalader in mid-2004 to represent it in connection with its investment in and possible acquisition of Six Flags, Inc.

12. In April 2005, Red Zone met with an investment bank, UBS Securities LLC (“UBS”) to discuss its Six Flags investment.

13. Defendant Cadwalader negotiated an engagement agreement that concerned

the work UBS would do for Red Zone in connection with Six Flags, and the fees that UBS would be paid for such work. UBS and Red Zone executed that agreement on June 7, 2005. *Exhibit A.*

14. Under the June 7, 2005 UBS engagement agreement, if there was an “acquisition transaction” involving Red Zone and Six Flags, Red Zone would pay UBS a transaction fee of \$10 million, payable at the closing of the acquisition transaction, net of fees already paid, plus expenses. The transaction fee was payable if an acquisition transaction occurred within 18 months of the engagement agreement’s execution, *i.e.*, by December 7, 2006.

15. Under the terms of Six Flags’ agreements with its bondholders, Six Flags’ bondholders would have had the right to demand the immediate repayment of approximately \$2.6 billion in debt and preferred stock if Red Zone merged with Six Flags or otherwise acquired more than 34.9% of its shares.

16. Due to this “poison debt” and other factors, UBS was unable to raise sufficient capital to acquire Six Flags. Red Zone concluded that absent a negotiated transaction with Six Flags, it would be impossible or prohibitively expensive to acquire the company. Red Zone further ruled out a friendly negotiated transaction with Six Flags in light of its board’s past intransigence.

17. Instead, Red Zone determined to pursue a proxy contest (also known as a “consent solicitation”), seeking approval by the shareholders to replace three of Six Flags’ seven directors, and other business initiatives proposed by Red Zone.

18. Prior to launching the proxy contest on August 17, 2005, Red Zone informed Cadwalader, through Mr. Block, that Red Zone was completely unwilling to pay a \$10 million fee to UBS for anything that did not result in Red Zone owning a majority of the voting stock of Six Flags. Red Zone informed defendant Cadwalader, through the responsible partner Dennis Block,

Esq., that it was completely unwilling to go through with the proxy contest unless it could be assured that its liability to UBS would be capped at no more than \$2 million, for anything that did not result in Red Zone owning a majority of the voting stock of Six Flags.

19. Mr. Block acknowledged in deposition testimony having received such instructions from Red Zone, specifically including that if Red Zone's obligation to UBS for fees was not capped at \$2 million as described above, Red Zone would not go forward with the consent solicitation or any further actions involving Six Flags:

And his view was no, I'm leaving, we're not going to do this deal. It's either \$2 million, or nothing. *Exhibit B at 58 (Block depo. trans.) (Emphasis added); see also pp. 53-59.*

20. Red Zone instructed defendant Cadwalader, through Mr. Block, to negotiate an agreement with UBS that capped Red Zone's liability at \$2 million for any work regarding Six Flags that did not result in Red Zone owning a majority of the voting stock of Six Flags, and to reduce such agreement to a writing that would be signed by and binding on UBS.

21. Mr. Block acknowledged in deposition testimony that he had received such instructions from Red Zone, and that Mr. Block had then instructed Cadwalader partner William Mills, Esq. to prepare a written agreement that would limit Red Zone's payment to UBS according to Cadwalader's instructions from Red Zone,:

At that point I asked [Andrew] Sriubas and I asked Andy Schleimer, [who] was one of Mr. Sriubas's people, and Bill Mills, one of my people, to come into the room, we told them exactly what transpired during the meeting and we told them because we didn't want any confusion with respect to what you and I had been talking about on Page 1 of the engagement letter, to amend the engagement letter so to take out any concept or any context [sic] of proxy contest as a means of their [sic] being a payment in excess of 2 million. *Exhibit B at 59. (Emphasis added.)*

22. Mr. Block testified that the written amendment which was subsequently

prepared, and approved by Cadwalader, was expected and intended to accomplish the instructions of Red Zone:

Q. Mr. Block, I'm going to show you a document that's previously been marked as Plaintiff's Exhibit 3 [the August 17, 2005 agreement] and give you a moment to look at it. But is that the document that you were referring to just before we broke?

A. Yes, it was.

Q. And your understanding is that this was drafted in the initial – initially by UBS?

A. I think -- well, let me give you my best recollection. Andy Sriubas and I asked Andrew Schleimer and Bill Mills to come up with an agreement that was as he and I described we wanted, which was the elimination of the concept of control having anything to do with a proxy contest. We were taking the \$10 million totally off the table, that was the concept. *Exhibit B at 64-65*.

Q. When you say the \$10 million was off the table -- was off the table, that was in connection with the proxy contest itself, correct?

A. No, it was off the table period. Unless, unless they did an acquisition of more than 50 percent of the stock within the tail period, they would not get more than \$2 million.

Q. Can you show me in the agreement where it says that the only way that they could get more than \$2 million was to do an acquisition of more than 50 percent of the stock?

A. Paragraph 1 is supposed to accomplish that. *Id. at 66-67*.

Q. So it's just to clarify what the understanding of the original agreement was? [Objection omitted]

A. It was to make clear the parties' agreement that UBS would not get more than \$2 million unless 51 percent of the stock was acquired by Red Zone. *Id. at 69. (Emphasis added.)*

23. Mr. Block reviewed the August 17, 2005 written agreement before it was signed. *Exhibit B at 65*.

24. Both of the UBS representatives who signed the August 17, 2005 agreement

have submitted affidavits which in which they affirmed that they understood that UBS had orally agreed to cap Red Zone's fee liability at \$2 million as described above, and that each of them signed the August 17, 2005 agreement based on such understanding. *Exhibit C (Sriubas Aff.) and Exhibit D (Schleimer Aff.)*

25. These sworn statements by the UBS representatives rule out that UBS was not willing to enter into a written agreement that capped Red Zone's liability at \$2 million, as described above.

26. The August 17, 2005 agreement is *Exhibit E* hereto.

27. As further described below, Red Zone relied upon the representations and advice of Cadwalader and signed the August 17, 2005 agreement.

28. By Decision dated October 28, 2010, the N.Y. Supreme Court, Appellate Division, First Department, ruled as a matter of law that the August 17, 2005 agreement did not cap Red Zone's liability at \$2 million, holding as follows:

In addition, Red Zone's argument that the side agreement capped UBS's fee at \$2 million is belied by a reading of the document itself. *Exhibit F (decision) (Emphasis added.)*

29. The Appellate Division ruled that UBS was entitled to payment of the unpaid \$8 million balance of its \$10 million fee, plus interest and certain expenses and costs.

30. **Continuous Representation.** Contrary to the requirements of 22 NYCRR Rule 1215.1, which came into effect in December 2002, Cadwalader never provided its client Red Zone with either a retainer agreement or an engagement letter. Because Cadwalader failed to comply with Rule 1215.1, Cadwalader is estopped to deny that the scope of its engagement and the duration thereof are as described herein.

31. Cadwalader continuously represented Red Zone with regard to the Six Flags

matter from at least July 2004 through at least November 2010. It was mutually understood between Cadwalader and Red Zone that Cadwalader continued to be Red Zone’s counsel concerning the Six Flags matter throughout this time, and that there was a continuing need for legal advice by Cadwalader regarding the Six Flags matter during this time.

32. For example, when Cadwalader sent Red Zone a list of its invoice history on November 16, 2006 regarding the Six Flags matter, Cadwalader entitled the document “*Red Zone - Six Flags – Payment History (90229.001)*.” The invoice history listed invoices from November 2004 through April 2006 as follows:

<u>Invoice</u>	<u>Date</u>	<u>Total</u>
640558	11/15/04	\$128,543.63
640550	12/14/04	\$13,696.55
651445	1/31/05	\$51,082.97
657787	3/31/05	\$14,256.66
661285	4/30/05	\$2,340.36
668141	5/31/05	\$30,663.05
673775	7/22/05	\$68,237.05
678342	8/30/05	\$41,606.92
681456	9/19/05	\$43,861.72
683397	9/30/05	\$173,171.75
686694	10/25/05	\$156,748.62
689431	11/15/05	\$59,379.41
694983	12/20/05	\$254,232.27
701975	2/13/06	\$88,607.03
713187	4/30/06	\$7,284.15
711173	4/30/06	\$13,204.75
		\$1,146,916.89

33. Cadwalader considered itself to be continuing to represent Red Zone with regard to the Six Flags matter throughout this period as demonstrated by Cadwalader's own billing practices, shown above.

34. Thereafter, Cadwalader through the responsible partner Dennis Block continued to represent Red Zone regarding the Six Flags matter, and advised Red Zone in at least December 2006, January 2007, and February 2007 with regard to the Six Flags matter. Cadwalader billed Red Zone for professional time regarding the Six Flags matter during such months, and was paid for such time.

35. Following UBS's demand on May 22, 2007 for payment of the \$8 million balance of its fee plus expenses for UBS's work regarding Six Flags, Cadwalader continued to advise Red Zone with respect to such demand by UBS, including the interpretation and application of the UBS engagement letter of June 7, 2005, and the August 17, 2005 side letter agreement. Cadwalader billed Red Zone and was paid for professional time concerning the Six Flags matter during at least the months of May, June, and August 2007.

36. As part of its continuing representation, and in an attempt to cure or mitigate any malpractice with regard to the Six Flags matter, Cadwalader advised Red Zone, as its counsel, in connection with the demand by UBS, and the foregoing engagement agreement and side letter, during the time period from the receipt of the UBS demand dated May 22, 2007, through the commencement of the litigation by UBS on or about September 12, 2007. During this time, Dennis Block had attorney-client privileged communications with Red Zone's in-house counsel regarding the Six Flags matter.

37. After the litigation was commenced, as part of its continuing representation, and in an attempt to cure or mitigate any malpractice with regard to the Six Flags matter,

Cadwalader advised Red Zone, as its counsel, in connection with the litigation commenced by UBS to recover the \$8 million fee, entitled *UBS Securities LLC v. Red Zone LLC*, Supreme Court, N.Y. County, Index No. 603057/2007, including in connection with Red Zone's defenses based on the engagement agreement and side letter.

38. Because Cadwalader partners Dennis Block and William Mills were potential trial witnesses in the UBS action, Cadwalader could not represent Red Zone as trial counsel in that action. However, during the UBS litigation, defendant Cadwalader remained active as counsel for Red Zone, in an effort to cure or mitigate any malpractice with regard to the Six Flags matter, and to cure or mitigate the damages asserted by UBS against Red Zone as a result of Cadwalader's performance of legal services.

39. When UBS commenced the litigation, Mr. Block communicated with Red Zone, as Red Zone's counsel, concerning Red Zone's seeking or Cadwalader's providing legal advice in connection with the Six Flags matter, and engaged in communications that were subject to the attorney-client privilege, in his capacity as counsel for Red Zone. *Exhibit B at 7 and 9 (Block deposition)*.

40. Cadwalader, through Mr. Block, as Red Zone's counsel, communicated in 2007 with Red Zone's other counsel in connection with the Six Flags matter, in an attempt to cure or mitigate, and engaged in communications that were subject to the attorney-client privilege, in his capacity as counsel for Red Zone. *Exhibit B at 9-10 (Block deposition)*.

41. Cadwalader lawyers, including Cadwalader's in-house general counsel, had confidential attorney-client privileged communications with Red Zone's litigation counsel and Red Zone's in-house counsel, in their capacity as attorneys for their mutual client Red Zone, in connection with the UBS action, as part of Cadwalader's continuing attempt to cure or mitigate.

42. For example, Cadwalader advised Red Zone in connection with the UBS action, in Cadwalader's capacity as counsel for Red Zone, in an attempt to cure or mitigate, by advising Red Zone and its trial counsel in connection with depositions and discovery during Winter 2009. Among other things, Cadwalader's general counsel and another Cadwalader lawyer met in person with Red Zone's trial counsel and Red Zone's in-house counsel on February 26, 2009; and held a conference call on March 4, 2009. It was mutually understood between Cadwalader and Red Zone that they were engaged in attorney-client privileged communications on behalf of Red Zone regarding the Six Flags matter.

43. Red Zone's trial counsel shared with Cadwalader confidential work product in the UBS litigation, in its capacity as counsel for their mutual client Red Zone, including Red Zone's litigation counsel's confidential selections of "hotdocs," and their confidential chronology of events pertinent to the litigation. For example, on February 22, 2009, trial counsel for Red Zone shared with Cadwalader, in their mutual capacity as counsel for Red Zone, a detailed chronology that was labeled as "Attorney Work Product/Confidential and Privileged."

44. Cadwalader advised Red Zone in connection with the UBS action, in Cadwalader's capacity as counsel for Red Zone, in an effort to cure or mitigate, by reviewing motions for summary judgment during Spring/Summer 2009. It was mutually understood between Cadwalader and Red Zone that they were engaged in attorney-client privileged communications on behalf of Red Zone regarding the Six Flags matter.

45. Red Zone's trial counsel confirmed with Cadwalader from time to time in writing that confidential work product was being shared "*pursuant to the privilege our law firms share as counsel to Red Zone.*" For example, Red Zone's trial counsel shared with Cadwalader the draft summary judgment brief for Red Zone, and in an email dated June 3, 2009, stated: "*I am*

sending [this] pursuant to the privilege our firms share as counsel to Red Zone.”

46. On behalf of Cadwalader, in his capacity as counsel for Red Zone, Mr. Block reviewed confidential work product of Red Zone’s trial counsel in the UBS action, and provided advice in connection with such work product, through communications with other Cadwalader lawyers who interacted with Red Zone’s trial counsel, which were subject to the attorney-client privilege in their mutual capacity as counsel for Red Zone. For example, after attorney-client privileged input to the draft brief by Mr. Block and other Cadwalader lawyers, trial counsel for Red Zone shared with Cadwalader a revised draft of the Red Zone summary judgment brief, and in an email dated June 5, 2009, stated: *“Thank you again for offering to review this document pursuant to the privilege we share as counsel to Red Zone.”*

47. At no time did Cadwalader express any disagreement with these statements of Cadwalader’s role as counsel to Red Zone.

48. The representation by Cadwalader with regard to the Six Flags matter, and the efforts by Cadwalader to cure or mitigate, continued through at least November 2010. On November 19, 2010, the in-house general counsel for Cadwalader telephoned Red Zone’s in-house counsel, to discuss strategy for responding to the adverse decision of the Appellate Division, First Department entered October 28, 2010, noted above.

First Cause of Action
Breach of Contract

49. All prior allegations are incorporated herein.

50. As set forth above, defendant Cadwalader was given, and accepted, the responsibility to put in place a written agreement with UBS to limit Red Zone’s liability to UBS to no more than \$2 million, for anything other than the acquisition of a majority of the Six Flags’ voting stock.

51. As set forth above, defendant Cadwalader advised its client Red Zone that it had obtained such an agreement with UBS, and that it had obtained a written amendment of the UBS June 7, 2005 engagement agreement, which accurately recorded such agreement, namely, the August 17, 2005 agreement.

52. As set forth above, defendant Cadwalader advised its client Red Zone that by signing the August 17, 2005 letter, Red Zone's liability to UBS for fees would be no more than \$2 million for anything other than the acquisition of a majority of Six Flags' voting stock.

53. Defendant Cadwalader knew that its client Red Zone would not go any further with regard to Six Flags, and would not proceed with the consent solicitation, unless Red Zone's liability was capped at no more than \$2 million for anything other than the acquisition of a majority of Six Flags' voting stock.

54. Red Zone relied on the advice of its counsel defendant Cadwalader, and signed the August 17, 2005 agreement.

55. As noted, the Appellate Division, First Department, ruled on October 28, 2010 that the August 17, 2005 agreement did not affect Red Zone's liability to UBS, and that it did not cap Red Zone's liability at \$2 million, as a matter of law.

56. Red Zone has sought leave to appeal the October 28, 2010 Decision to the Court of Appeals. However, unless the October 28, 2010 decision is reversed or modified on appeal, it is res judicata or collateral estoppel that defendant Cadwalader did not fulfill its professional responsibility to Red Zone, and that although defendant Cadwalader told Red Zone it had obtained a written agreement that limited Red Zone's liability to \$2 million, defendant Cadwalader did not do so, as a matter of law.

57. But for the breach of contract of Cadwalader sounding in legal malpractice,

Red Zone would not have been held liable to UBS as described above, nor would Red Zone have incurred the legal fees and expenses it incurred in an attempt to cure or mitigate Cadwalader's breach of contract.

58. By reason of defendant Cadwalader's foregoing breach of contract sounding in legal malpractice, Red Zone has been damaged as follows:

- A. The amount by which Red Zone has been held liable to UBS, including the UBS fee of \$8 million, plus the UBS expenses of \$119,092.94; plus court costs of \$9,678.63, and prejudgment interest through January 25, 2011 of \$3,433,375.79; for a subtotal of \$11,562,147.36, plus additional prejudgment interest of \$2,001.97 per day from January 26, 2011 through date of entry of Judgment; together with statutory post judgment interest from the date of the entry of Judgment; all as set forth in the proposed Judgment filed by Red Zone with Notice of Settlement dated January 25, 2011 (or as such Judgment may be modified or amended).
- B. Red Zone's professional fees and expenses in connection with the UBS litigation to try to cure or mitigate, in an amount not yet finally determined, to be proven at trial, not less than \$1.5 million.
- C. Statutory interest pursuant to CPLR 5001, 5002, 5003, 5004, and all other applicable law.

Second Cause of Action
Professional Negligence

59. All prior allegations are incorporated herein.

60. The representation of Red Zone by Cadwalader was professionally negligent, and defendant Cadwalader and the lawyers it assigned to this engagement failed to exercise the ordinary and reasonable skill and knowledge commonly possessed by a member of the legal profession in carrying out their engagement.¹

61. Among other things, the contract language that would have effectuated the

¹ See *Darby & Darby, P.C. v. VSI Intern., Inc.*, 95 N.Y.2d 308, 313, 716 N.Y.S.2d 378, 380 (2000).

\$2 million cap on fees described herein was well within the level of skill of an ordinary practitioner, much less of a law firm where the profits per partner are said to average over \$2 million a year.

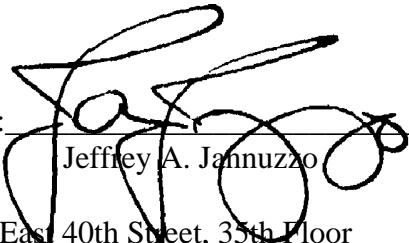
62. But for the professional negligence of Cadwalader, Red Zone would not have been held liable to UBS as described above, nor would Red Zone have incurred the legal fees and expenses it incurred in an attempt to cure or mitigate Cadwalader's professional negligence.

63. By reason of defendant Cadwalader's professional negligence, Red Zone has been damaged as set forth above, in the First Cause of Action.

WHEREFORE, plaintiff RED ZONE LLC hereby demands judgment against defendant CADWALADER, WICKERSHAM & TAFT LLP on the First and Second Causes of Action for its damages to be established at trial, described herein, not less than \$13 million (as set forth in more detail, above); plus statutory interest; and for such other and further relief as the Court deems proper, including costs and attorneys' fees.

Dated: January 14, 2011

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Attorney for plaintiff Red Zone LLC

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