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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 111745/2005

SOMA PARTNERS, LLC.

VS

NORTHEST BIOTHERAPEUTICS,

Sequence Number : 001

VACATE OR MODIFY AWARD

INDEX NO. _____

MOTION DATE 11/3/05

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the attached Memorandum Decision, it is hereby

ORDERED that the motion by SOMA Partners, LLC's to vacate the Award rendered in the Arbitration of SOMA Partners, LLC v. Northwest Biotherapeutics, Inc., is denied, and the petition is dismissed; and it is further

ORDERED that respondent Northwest Biotherapeutics, Inc.'s request for attorney's fees and costs is denied; and it is further

ORDERED that the Award dated March , 2005, rendered in the Arbitration of SOMA Partners, LLC v. Northwest Biotherapeutics, Inc. is confirmed pursuant to CPLR 7511(e); and it is further

ORDERED that counsel for petitioner SOMA Partners, LLC shall serve a copy of this Order along with Notice of Entry upon respondent within 20 days from the date of entry.

The foregoing constitutes the Decision and Judgement of this Court.

Dated: 12/30/05

HON. CAROL EDMEAD J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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In the Matter of the Application of
SOMA PARTNERS, LLC,

Index No. 111745/2005

Petitioner,

For an Order Vacating an Arbitration
Award Under Article 75 of the CPLR,

-against-

NORTHWEST BIOTHERAPEUTICS, INC.,

Respondent.

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HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner, SOMA Partners, LLC ("SOMA"), moves for an order vacating the arbitration award, dated May 23, 2005 (the "Award"), pursuant to CPLR 7511(b)(1)(ii) and (iii), on the grounds that the arbitrator was not impartial and that he exceeded his power by rendering a decision that was completely irrational, arbitrary, and capricious. Northwest Biotherapeutics, Inc. ("NWBT") opposes SOMA's motion, contending that SOMA's impartiality claim is patently frivolous and unsupported by New York law, and that the challenge to the rationality of the Award is meritless since it was supported by both the plain meaning of the contract among the parties and by uncontroverted evidence.[1] In addition, NWBT seeks costs and attorney's fees incurred in defense of SOMA's motion to vacate.

[1] While NWBT does not cross-move to confirm the Award, in the event that the Court denies SOMA's motion, CPLR 7511(e) directs the Court to confirm the Award upon a denial of a motion to vacate. Thus, a cross-motion to confirm by NWBT is unnecessary.

Factual Background

The Parties, their Contractual Relationship, and their Business Activities

SOMA is a New Jersey-based investment banking firm. NWBT is a biomedical research company located in Seattle, Washington. Toucan Capital Corporation ("Toucan"), a non-party in this matter, is a Maryland-based venture capital firm. This action stems from a contractual relationship between SOMA and NWBT and non-party Toucan's investment in NWBT.

Prior to the beginning of SOMA's and NWBT's contractual relationship (discussed *infra*), NWBT had various forms of contact with Toucan. On January 6, 2003, Toucan wrote a letter to NWBT indicating that it is a fund "heavily focused" in biotechnology and that it was "interested in getting acquainted" with NWBT to discuss "future funding" or "some form of collaboration with one or more of [Toucan's] portfolio companies." According to NWBT, in June of 2003, Toucan hired NWBT's Clinical Director, Dr. Michael Salgaller. On August 26, 2003, Toucan contacted NWBT's patent counsel to obtain information of certain patents filed by NWBT. Then on September 3, 2003, Toucan prepared a report "of the advantages and challenges" of the NWBT "project," noting, *inter alia*, NWBT's "ever-worsening financial situation" and that it was "moving forward with due diligence on this project." On September 12, 2003, Toucan exchanged internal emails discussing the possibility of meeting with NWBT in Seattle, Washington.

Five days later, on September 17, 2003, NWBT executed a "Letter of Intent" indicating NWBT's intent to engage SOMA as its exclusive investment banker in connection with a possible private placement of securities (the "Initial Agreement") (Petition, Exh. A). NWBT agreed to pay SOMA 6% of any monies raised from a private placement and warrants to purchase

6% of any non-debt securities issued.[2]

The day after the Initial Agreement was executed, but before SOMA contacted Toucan,[3] Toucan instructed its employees to "put a hold on ALL new deal prospecting, pitch meetings, and the like" in order to focus on "handling of pending deals - ... potential licenses or asset acquisitions from ... NWBT" for the "next 6 weeks." (Respondent Affidavit, Exh. 5, September 18, 2003 email). Then, on September 19, 2003 , SOMA called Toucan to discuss whether Toucan had any interest in making an investment NWBT (See email dated September 22, 2003). Toucan then decided to hold a conference call with SOMA, without NWBT, to "learn more about them and their interest." However, Toucan wanted to "be clear about [Toucan's] independent interest and analysis, and be careful not to get into a position in which they might try to claim they brought this deal to [Toucan]." Toucan conducted the conference call with SOMA on October 8, 2003 (Award, p 2, 3, Reply Exh. X).

Thereafter, on October 15, 2003, SOMA and NWBT executed a letter agreement (the "Agreement") to "confirm the engagement of SOMA . . . to act as [NWBT's] exclusive agent to arrange and negotiate a private placement" of securities of NWBT in order to raise capital. NWBT agreed, among other things, to pay SOMA as follows:

> "a non-refundable Retainer and Due Diligence Fee of $25,000 [§ 4(a)], ... 6% of all monies raised ... from the sale of such Securities ... to investors identified by SOMA [§ 4(b)]), ... warrants ... to purchase 6% of the aggregate Securities ... issued in the Private Placement [§ 4(c)], ... [and] reimburse[ment] [of] SOMA ... for all of its reasonable out-of-pocket expenses [§ 6]...."

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[2] "Private Placement" refers to the sale of securities under an exemption from registration with the Securities and Exchange Commission.

[3] According to an email dated Monday, September 22, 2003, SOMA first contacted Toucan on Friday, September 19, 2003 to discuss Toucan's interest in NWBT.

Significantly, in paragraph 7 of the Agreement, NWBT also agreed to compensate SOMA for

> "any securities sold to any party . . . at any time prior the expiration of 12 months after the Termination Date if such party was initially introduced to [NWBT] by SOMA ... during the Authorization Period in connection with the Private Placement ... and identified in writing to [NWBT] by SOMA ... prior to the expiration of the Authorization Period."[4]

NWBT also agreed to pay SOMA a $25,000 termination fee in the event NWBT terminated the Agreement. The Agreement replaced and superceded the Initial Agreement, and thus became the contract at issue in the eventual dispute (Agreement, § 17(a)).

In the following months, SOMA engaged in a strategy to shop NWBT to potential investors, who were willing to put forth anywhere between five to ten times more capital than SOMA originally envisioned.[5]

On December 26, 2003, NWBT emailed SOMA seeking information on a conference in January, 2004 in San Francisco, California to "meet and talk with other[]" investors. In response the following day, SOMA advised NWBT that it would be "a good idea to spend a day or two in [San Francisco] and try to meet as many investor contacts as possible." In reply, NWBT stated that the NWBT Board "would be in favor" of a large investment strategy of recapitalization "if

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[4] The Authorization Period is defined in § 2 of the Agreement as the period from October 15, 2003 until the Termination Date.

[5] On November 19, 2003, SOMA exchanged internal email indicating that a potential investor, Carl Gordon of Orbimed Advisors, LLC, would prefer a larger $15-30 million recapitalization investment in NWBT. In addition, on November 21, 2003, NWBT informed Mr. Gordon that it was "clear that a larger financing is a feasible and realistic option to follow (perhaps a commitment [of] $25-30 million ...) [and that] SOMA will discuss these possibilities with you." Further, on November 26, 2003, NWBT invited SOMA employees to join a NWBT Board Meeting by teleconference in order to "update the Board" and have "the Board get a sense of how things are going from SOMA ...." In another internal email between SOMA employees, SOMA expressed how it believed the conference call with the NWBT Board would be a good opportunity, and that SOMA must convey to the Board that a deal can be closed if SOMA markets a larger investment for buyers in NWBT. As reflected in the minutes of the eventual NWBT Board meeting conducted on December 2, 2003, which SOMA employees attended by teleconference, NWBT resolved to "continue to work with SOMA Partners to secure the capital necessary to continue the operations of the company and ... continue to consider and bring to the attention of the Board all potential avenues for obtaining such funding."

nothing else comes along."

NWBT met with Toucan at the San Francisco conference on January 14, 2004 and discussed an investment syndicate (see email dated January 19, 2004, Reply aff. Exh. V; Award page 3).[6]

On Friday, January 16, 2004, SOMA emailed NWBT a list of potential leads and investors interested in NWBT.[7] On the following Monday, January 19, 2004, NWBT emailed Toucan as a follow up to their meeting in San Francisco, to advise Toucan that the "syndicate [we] talked about has been updated." This update comprised a nearly identical list of potential leads and investors interested in NWBT that SOMA emailed NWBT on January 16, 2004.

According to SOMA, NWBT continued to use SOMA on the Toucan investment project until NWBT terminated its contract with SOMA (*see* Email, Reply aff. Exh. W). On January 23, 2004, NWBT emailed SOMA bridge loan documents under which NWBT's Board would entertain future funding from Toucan. In another email among SOMA employees, SOMA arranged two conference calls, one with SOMA, NWBT, and NWBT's legal counsel, and the other with Toucan, both to discuss the Toucan bridge loans. Several later emails sent during February and March of 2004 show SOMA's, NWBT's, and Toucan's involvement in the ongoing financing negotiations. Specifically, in emails sent on March 19, 2004 and March 23, 2004, SOMA, NWBT and Toucan circulated Toucan's "NWBT Restart Funding" memorandum, which briefly outlined Toucan's investment strategy. In pertinent part, the memorandum states that

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[6]On January 14, 2004, SOMA exchanged internal email of prospective leads, including Toucan, and indicated that NWBT met with Toucan at the conference, though "[SOMA] didn't set up [the] meeting."

[7] The Court notes that this list did not include Toucan (Reply, Exh. V).

Toucan's target total of investment into NWBT is $40 million, plus any bridge loan amounts converted into the investment.

Finally, through a letter dated April 23, 2004, NWBT terminated SOMA. Then, on April 26, 2004, NWBT and Toucan executed a $40 million recapitalization investment contract (the "Recap Agreement") providing an immediate investment of $500,000, as well as bridge loans. In pertinent part, § 4.9(h) of the Recap Agreement directs NWBT to notify SOMA that SOMA did not introduce Toucan to NWBT, and that SOMA is not entitled to any compensation by virtue of any investment by Toucan in NWBT other than an existing $3,000 obligation. During the course of the one year Tail Period following SOMA's termination, Toucan loaned NWBT approximately $5 million and made an equity investment of approximately $1.3 million in NWBT. SOMA then commenced a claim for arbitration with the American Arbitration Association ("AAA") to procure its fees under the Agreement. SOMA claimed that NWBT sold Toucan securities for $5,650,000 during the Authorization Period and Tail Period and failed to pay 6% thereof, as well as warrants to purchase 6% of the aggregate securities issued.(Petition, Exh. G, Amended Statement of Claim, page 7).

The Arbitrator

By notice dated November 10, 2004, Peter Gates (the "Arbitrator") was selected to be the sole arbitrator in the arbitration of SOMA and NWBT (the "Arbitration"). At this time, the Arbitrator was a partner in the law firm of Carter, Ledyard & Milburn, LLP ("CLM"). According to the Arbitrator's affidavit, on November 11, 2004 he performed a "conflicts check" within CLM to detect any potential conflicts of interest between himself and the arbitrating parties.

Later that day, John Cahill, Counsel[8] to CLM in its Washington, D.C. office, emailed the Arbitrator, indicating that he knew Ms. Powers of Toucan. Mr. Cahill also stated that he was currently a Board member of the Maryland Technology Development Corporation ("TEDCO"), which "has contractual and investment relationships with Toucan Capital." According to Ms. Powers's affidavit, TEDCO advised the Maryland Department of Business and Economic Development ("DBED") to invest $4 million in Toucan, and that DBED completed its full investment in Toucan by the Summer of 2003.

The following day, the Arbitrator responded to AAA that he "had nothing to disclose."

Preliminary hearings were held on December 2, 2004. Subsequently, the Arbitrator retired as a partner at CLM on December 31, 2004, and became counsel to the firm (Arbitrator aff., Exh. 21 to Beighle aff in opposition).

After hearings were held in March, 2005 and briefs submitted, an award was rendered on May 23, 2005. The Arbitrator attests that, until he reviewed his files on September 25, 2005, Mr. Cahill's email "had passed from [his] mind by the time of the Preliminary Hearing on December 2, 2004."

The Award

The issue before the Arbitrator was "the extent, if any, to which SOMA is entitled to be compensated by NWBT pursuant to the terms of the October Agreement by reason of investments made by Toucan in NWBT." After quoting various sections of the compensation provisions of the Agreement, the Arbitrator stated that:

the test of whether SOMA would receive a commission was a relatively easy one to meet

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[8] Without any evidentiary support, SOMA alleges that Mr. Cahill is a partner at CLM.

with respect to investments made while it was acting as the exclusive private placement agent, requiring merely that SOMA have 'identified' the investor, but the test after SOMA was terminated as agent was more stringent - SOMA had to have 'initially introduced' the investor to NWBT prior to termination. This distinction is meaningful and was clearly intended.

After considering all of the documents, testimony, and briefs, the Arbitrator concluded the following:

(1) Toucan was 'identified' by SOMA during the Authorization period. Notwithstanding that SOMA failed to identify Toucan in its written lists of investor contacts until March 23, 2004 long after its initial call to Toucan in September, 2003 and their subsequent conference call on October 8, 2003, I accept the assertions by SOMA's witnesses ... that they advised Dr. Boynton orally of these contacts shortly thereafter .... Accordingly, and because debt is specifically included in the definition of 'Securities' for which SOMA would be entitled to a fee, I conclude that SOMA is entitled to a fee of 6 percent of the amount of the two loans, each for $50,000, made by Toucan to NWBT on February 2 and March 1, 2004, respectively.

(2) Toucan was not 'initially introduced' by SOMA to NWBT. It is uncontroverted that: (a) [Toucan] wrote to [NWBT] on January 6, 2003 to introduce Toucan to NWBT as a possible investor;

(b) [Toucan] called [NWBT] in the late Spring of 2003 ... to discuss Dr. Michael Salgaller who Toucan was considering hiring ... to discuss NWBT's work and research and express Toucan's interest in NWBT;

(c) Toucan hired Dr. Salgaller in June 2003; ... [Dr. Salgaller] was intimately familiar with NWBT; [and]

(d) Toucan investigated NWBT's research and patents during August and September 2003, in preparation for making an overture to NWBT.... [Toucan] characterized its efforts internally as engaging in preliminary 'due diligence' on NWBT.

The foregoing activities occurred ... prior to SOMA's initial engagement by NWBT on September 17, 2003.

.... [U]nder the plain meaning of 'introduce' in the October Agreement SOMA had the burden of showing that it had brought Toucan 'to the table,' ... that it was instrumental in bringing Toucan and NWBT together, and ... that they would not have gotten together as and when they did and Toucan would not have made its investments in NWBT without SOMA's actions. SOMA has not met this burden.

(a) SOMA's telephone call to Toucan on September to Toucan and the conference call on October 8, 2003 did not constitute an 'introduction' of

Toucan to NWBT.

(b) When Ms. Powers, Dr. Salgaller, and Bruce Richardson of Toucan met with Dr. Boynton on January 14, 2004 during the biotechnology conference sponsored by J.P. Morgan it was the first time the two entities met ...; SOMA had no part in this meeting and ... did not include Toucan among the potential investors it recommended that Dr. Boynton meet at the conference; [and]

(c) SOMA provided no substantive information regarding NWBT to Toucan . . . .

* * * * *

Accordingly, I conclude that SOMA is not entitled to any compensation with respect to any investment made by Toucan in NWBT after the October Agreement was terminated on April 23, 2004.

NWBT was directed to pay to SOMA the sum of ... $6,000 plus interest.

Contentions of the Parties

SOMA's Petition

SOMA contends that the Arbitrator was not neutral and impartial due to an alleged conflict of interest, and that he exceeded his power by rendering a completely irrational, arbitrary, and capricious award.

SOMA argues that an arbitrator's impartiality can only be achieved if, prior to the commencement of the arbitration, the arbitrator discloses to the parties all facts which might reasonably cause one of them to ask for disqualification of the arbitrator or create a presumption of bias. SOMA contends that at the time of the Arbitration, the Arbitrator's partner, Mr. Cahill, was the director of an entity that was responsible for the investment of $4 million in Toucan, and an award in favor of SOMA would decrease the value of the Toucan investment in one of the parties to the Arbitration, NWBT. At no time did the Arbitrator or Toucan advise SOMA that Mr. Cahill was a member of the Board of Directors of TEDCO, as well as a member of TEDCO's Technology Transfer Advisor Committee, and that TEDCO and Toucan were jointly

engaged in TEDCO Ventures, "a collaborative activity of TEDCO and Toucan Capital in which TEDCO provides technology intelligence for companies and university research projects for Toucan and refers potential investment opportunities to Toucan." Further, SOMA asserts that Mr. Cahill met regularly with Toucan. Mr. Cahill was directly responsible for coordinating the relationship between Toucan and DBED, which had invested $4 million in Toucan Capital Fund II, LP, the same Toucan fund that invested in and controlled NWBT. SOMA contends that Mr. Cahill had a fiduciary relationship with regard to an investment in Toucan Fund II, and therefore had a direct interest in the outcome of the arbitration, since NWBT is now 95% owned and controlled by Toucan Capital Fund II. SOMA claims that it only learned of the relationship between the Arbitrator and Mr. Cahill after the Arbitrator rendered the Award. By failing to disclose his relationship with Mr. Cahill, the Arbitrator deprived SOMA of its right to challenge him as a neutral arbitrator.

Further, SOMA contends that an arbitrator exceeds his power, and that an arbitration award may be vacated as irrational, where the arbitrator gives a completely irrational construction to the provisions of the parties' agreement, thereby effectively rewriting it. Specifically, SOMA contends that while the Arbitrator correctly determined the commission rate issued on securities in the Private Placement prior to SOMA's termination, he neglected to grant SOMA fees on the warrants that were issued.

More significantly, SOMA argues that the Arbitrator misinterpreted § 7 of the Agreement by focusing only on the words "initially introduced" and ignoring the later qualifying language "in connection with the Private Placement" when rendering his decision. SOMA claims it completely irrational and arbitrary for the Arbitrator to pull out two words from a sentence and

apply them as if they stood alone as a separate requirement. Further, no rational, intellectually honest reader of this provision can come to the same conclusion as the Arbitrator. SOMA contends that its fees during the Tail Period were not contingent on "initially introducing" the investor to NWBT, but required an "initial introduction" of the investor "in connection with the Private Placement." SOMA asserts that when it negotiated the Agreement with NWBT, virtually every biotech investor in the market had been "introduced" to NWBT. However, SOMA claims that "Private Placement" was a defined term referring only to the offering that SOMA was making as NWBT's exclusive agent. SOMA argues that no investor could have been initially introduced to the Private Placement prior to SOMA's involvement with NWBT in September 2003 because there was no "Private Placement" before that time. Because "Private Placement" is defined in the Agreement, no one other than SOMA could have introduced Toucan to the Private Placement prior to SOMA's termination in April 2004. While SOMA was not involved in Toucan's introduction to NWBT in January 2003, that introduction involved an interest in NWBT's research and patents, not an introduction in connection with the Private Placement, which was only first created by the contracts between SOMA and NWBT in September and October 2003. Additionally, SOMA avers that § 7 of the Agreement cannot rationally mean that the investor had never heard of, spoken with, or even invested in NWBT before; instead, it means that SOMA, before the termination of its exclusive agency, had to have made the first introduction of the Private Placement to the investor. SOMA contends that the Arbitrator improperly took the words "initially introduced" out of context in order to deprive SOMA of its earned fees and warrants.

Finally, SOMA asserts that since it contacted Toucan, sent it documents, discussed the

proposed "Private Placement" in a conference call in October 2003, and encouraged Toucan to invest in the Private Placement, it is entitled to receive $360,000 in fees and warrants. SOMA claims that NWBT constantly expressed their gratitude and assured SOMA of their support for its fees. Thus, SOMA states that it relied on such assurances in its continued efforts during the NWBT/Toucan negotiations. As a result, SOMA characterizes its termination by NWBT as the most blatant and obvious act of bad faith, since NWBT used SOMA right up to the point of completing the final agreements with Toucan and then terminated them the day before the NWBT/Toucan contract was signed. SOMA also notes that although the Arbitrator found that "NWBT thought that SOMA should be paid its percent fee," the Arbitrator, ignoring the applicable law and facts, concluded that NWBT's termination of SOMA "was not of such 'bad faith' as to estop NWBT from contesting the fee."

NWBT's Opposition

In opposition, NWBT contends that SOMA's claims are patently frivolous, wholly unsupported by New York law,[9] and meritless.

NWBT submits that New York law has adopted a policy of non-interference with arbitration awards, and that New York courts are loathe to sustain belated claims of disqualification for an allegedly conflicted arbitrator. Also, SOMA's claim of impartiality is factually and legally meritless. NWBT points out that there is no claim that the Arbitrator or his firm had any relationship with any party or witness or was biased in any way. NWBT states that the Arbitrator was scrupulously fair-minded and independent. SOMA's claim that the Arbitrator

[9] Although NWBT relies mainly on New York law in opposing the petition, in a footnote, NWBT contends that that "[t]his contract to sell federally-registered securities clearly 'relates to commerce' and the Federal Arbitration Act controls." NWBT argues that SOMA's claim fails under either body of law.

was somehow prejudiced due to his indirect connections to Mr. Cahill, TEDCO, DBED, Toucan, and NWBT could not be more indirect, attenuated, or insubstantial. Nor is there any "ongoing relationship" between the Arbitrator and NWBT to justify vacatur of the Award. Moreover, the Senior Assistant Attorney General of the State of Maryland,[10] (the "Maryland AG") denies SOMA's allegation that TEDCO and Toucan were jointly engaged in TEDCO Ventures, and states that no legal relationship exists or has existed between TEDCO and Toucan. TEDCO merely helped DBED research Toucan before making an investment in Toucan. In addition, the Maryland AG states that Mr. Cahill did not meet regularly with Toucan, and "has played no role whatsoever in coordinating the relationship between Toucan and DBED with respect to Toucan's portfolio companies, including NWBT."

NWBT also notes that since there is no "substantial" business relationship between the arbitrator's firm and a party to the arbitration, there is no conflict of interest. Further, NWBT contends that DBED's investment in Toucan occurred in the Summer of 2003, long before Mr. Cahill became a director at TEDCO on July 1, 2004, and therefore Mr. Cahill had nothing to do with advising DBED to invest in Toucan.

In addition, NWBT argues that under New York caselaw, the Arbitrator's failure to disclose such an "indirect, insubstantial, and attenuated" connection does not require vacatur of the Award. Moreover, the Arbitrator's non-disclosure of such an "isolated" connection is not a basis to vacate the Award. Disclosure is not required where the "transactions" between the arbitrator and the party prior to the arbitration "were isolated and involved nothing of such a

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[10] Mr. Schwartz's letter to William Krause is attached to the affidavit of Mr. Krause, which was submitted with NWBT's opposition papers.

nature as would cause" the arbitrator to act other than with the requisite impartiality.

Furthermore, NWBT contends that the Award was proper. NWBT initially points out that CPLR 7501 prohibits this Court from considering anew the merits of an arbitrator's contract interpretation and application of the facts. Further, NWBT states that an award may only be vacated where the construction of a document is completely irrational. NWBT argues that to find an award "irrational" requires a showing that there is no proof whatever to justify the award, or that the award gave a completely irrational construction to the provisions in dispute, and, in effect, made a new contract for the parties. NWBT contends that with respect to an arbitrator's construction of a contract, courts may not set aside an award because they feel that the arbitrator's interpretation disregards apparent, or even the plain, meaning of the words that resulted from a misapplication of settled legal principles. In addition, NWBT argues that the Court's obligation to deny a motion to vacate is "heightened" where, as in the present case, the parties agreed not to have witnesses' testimony and proceedings transcribed.

NWBT contends that the Arbitrator properly applied uncontroverted facts to the plain meaning of the Agreement. NWBT states that under the Agreement, the only way SOMA would be entitled to any Tail Period compensation is if SOMA had "initially introduced" Toucan to NWBT during the Authorization Period. NWBT asserts that there is nothing ambiguous about the plain English phrase "initially introduced." NWBT contends that SOMA's claim that it "initially introduced" Toucan to NWBT is contrary to the evidence, which shows that SOMA's involvement in "introducing" Toucan to NWBT was "literally nil." NWBT asserts that the evidence demonstrates that Toucan had "initially introduced" itself to NWBT on January 6, 2003, more than nine months before NWBT retained SOMA. By the time NWBT retained

SOMA in September, 2003, Toucan was heavily involved in pursuing an investment in NWBT and had substantially completed its due diligence on NWBT. NWBT contends that SOMA's contact list sent to NWBT on October 16, 2003 omitted any mention of Toucan, and that not a single contemporaneous document exists indicating that SOMA conveyed the information it learned about Toucan to NWBT. Moreover, NWBT asserts that SOMA did not arrange, attend, know about, or take part in the meeting between Toucan and NWBT at the San Francisco conference in January 2004.

Furthermore, NWBT argues that SOMA's position on the Arbitrator's interpretation of "initially introduced" is meritless. NWBT states that SOMA does not explain why the phrase "initially introduced" should be replaced with a different standard. To earn "Tail Period" fees, SOMA was required to have "intially" (for the first time) "introduced" (established an acquaintance between) the investor and NWBT. Thus, to assert that SOMA need only have first "contacted" an investor during the Authorization Period concerning the Private Placement rather than have "initially introduced" is nothing less than rewriting the Agreement. Alternatively, any ambiguity in the Agreement must be construed against SOMA which drafted the Agreement. NWBT also contends that since SOMA's expert witness testified that the "Tail Period" provision offers a framework of protection to both parties to an investment banking contract, SOMA cannot now challenge the analytical framework advocated by its expert simply because the Arbitrator applied this framework, but ruled adverse to SOMA's position.

Additionally, NWBT asserts that SOMA's claim that it initially introduced Toucan to NWBT "in connection with the Private Placement" is factually wrong and legally unsupported. First, NWBT states that Toucan's investment in NWBT was not the "Private Placement" pitched

by SOMA. NWBT contends that while SOMA was pitching a $4 million raise of funds, Toucan had created and was pursuing a much different and larger $40 million investment program for NWBT that Toucan had devised itself with an altogether different business plan and strategy for the resulting company. Also, Toucan argues that Toucan conducted and substantially completed its own due diligence on NWBT, met with NWBT on its own in January 2004, and pursued a financing program and business strategy with NWBT that it devised with no substantive information from SOMA. Second, NWBT claims that analogously, New York courts only allow "finder's fee," when the finder both brought the parties in a business transaction together, and there is a causal relationship between that introduction and the ultimate conclusion of the transaction. Similarly, the phrase "in connection with the Private Placement" means that to be entitled to "Tail Period" fees, SOMA must not only have "initially introduced" the investor, but the introduction must have also caused the investor to make the investment. NWBT contends that neither of those conditions occurred in the present case.

In addition, NWBT contends that SOMA's claim to Tail Period compensation based on the Arbitrator's misinterpretation of Exhibit A to the Agreement is invalid since Exhibit A, which relates to potential compensation during the Authorization Period, does not relate to the entitlement to Tail Period compensation.

Finally, NWBT makes a general request for attorney's fees and costs incurred in preparing its opposition to SOMA's motion to vacate the Award. NWBT contends that SOMA's entire case is frivolous and meritless since the Award was based on "uncontroverted" evidence. NWBT claims that SOMA "cobbled together a post hoc, attenuated bias-by-fourth-hand association argument that ignores legal reason and precedent." Moreover, NWBT contends that

such fees and costs are appropriate since SOMA lacks a good faith basis in law or fact for filing its petition.

SOMA's Reply

In reply, SOMA contends that the Arbitrator cannot claim that he was ignorant of the relationship between Mr. Cahill and both Toucan and Ms. Powers. Further, the Arbitrator's own affidavit shows that he usurped the function of the parties by making his own determination as to what would be grounds for seeking his disqualification. And although the Arbitrator states that he was unbiased, SOMA asserts that proof of bias is not necessary where an arbitrator failed to disclose facts that could lead to his disqualification. Further, SOMA claims that contrary to NWBT's objection, SOMA still has the right to challenge the Arbitrator after the Award was rendered. Also, SOMA argues that the supportive case law used by NWBT regarding an arbitrator's alleged partiality is not directly applicable, and merely demonstrate the difficulty in drawing the line between those facts which do and do not support an inference of bias sufficient to vacate an award.

In response to NWBT's contention that federal law applies to the present case, SOMA argues that the Agreement provides that it shall be governed by New York State law applicable to agreements made and to be performed entirely within such state. Further, the Agreement provides for compulsory arbitration. Therefore, the parties have intentionally determined that for purpose of choice of law, this is not a matter involving interstate commerce, but rather a matter "to be performed entirely within" New York State. Thus, based on the language of the Agreement, New York law for agreements made and to be performed entirely in New York, i.e., a non-interstate agreement and non-interstate performance, is to be applied. In any event, SOMA

argues, federal law would also require vacatur of the Award.

SOMA also contends that the October 2003 conference call makes clear how Toucan, at the time of the call, was only interested in purchasing NWBT technology for its own purposes, and not interested in making a significant investment in NWBT. SOMA claims that none of the documents predating SOMA's involvement showed that Toucan had been introduced to NWBT in connection with the Private Placement. Instead, SOMA contends that Toucan was not introduced to the "Private Placement" until Toucan was approached by SOMA, and this is the initial introduction to the Private Placement that entitles SOMA to its fees for investments during the Tail Period.

SOMA also claims that its expert testified that SOMA was entitled to its full fees for Toucan's investments in the Tail Period, and that Exhibit A to the Agreement was typically left blank because no investment bank would be interested otherwise.

SOMA further argues that, contrary to NWBT's contentions, the evidence shows how SOMA presented the concept of a large raise of capital to the NWBT Board of Directors on December 2, 2003. Also, SOMA claims that it sent NWBT to the San Francisco conference in January 2004, and that together, SOMA and NWBT devised an approach to Toucan to persuade Toucan to invest in the Private Placement and make NWBT the necessary bridge loans. Also, SOMA refutes NWBT's claim that SOMA only pitched a $4 million raise of funds. SOMA claims that it presented Toucan with two alternatives: a small investment to tide NWBT over, and a large investment in NWBT's immunotherapy research. Furthermore, SOMA argues that it initiated the concept of a $30-40 million recapitalization of NWBT well before Toucan's meeting with NWBT at the San Francisco conference in January 2004. SOMA contends that "there is no

question" that it introduced concept of the large raise of $30-$40 million to NWBT

Analysis

Standard of Review

Contrary to NWBT's contention, this Court concludes that the matter herein is governed by New York law. An explicit and unambiguous choice of law in an arbitration agreement must be given effect (*see Hackett v. Milbank, Tweed, Hadley & McCloy*, 86 NY2d 146, 630 NYS2d 274 [1995]). A contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v. Insurance Co. of N. Am.*, 46 NY2d 351, 355, 413 NYS2d 352 [1978], *rearg denied* 46 NY2d 940, 415 NYS2d 1027 [1979]). Here, the Agreement provides, in pertinent part, that any dispute arising from the Agreement "shall be governed by the laws of the State of New York applicable to agreements made and to be performed entirely within such state" and "shall be finally decided by arbitration." Thus, the parties made an explicit and unambiguous choice for New York law to apply to the parties' disputes arising from the Agreement.

NWBT's contention that the Agreement involves interstate commerce, and that it is accordingly governed by the Federal Arbitration Act ("FAA") lacks merit. The Agreement in the present case is a contract whereby SOMA was obligated to attempt to sell NWBT's securities. Such a contract constitutes a transaction involving interstate commerce (*see Coenen v. R. W. Pressprich & Co.*, 453 F2d 1209 [2d Cir. 1972]), thereby implicating the application of the FAA. The FAA generally preempts state arbitration law with respect to the interpretation, construction, and review of arbitration agreements that fall within the scope of the FAA (*see Coenen v. R.W.*

Pressprich & Co., supra). However, even if a contract evidences a transaction involving interstate commerce, the overriding policy of the FAA is the enforcement of arbitration agreements according to their terms, including the parties' choice of governing law (*see Hackett v. Milbank, Tweed, Hadley & McCloy*, 86 NY2d 146, 630 NYS2d 274 [1995]). Just as parties may limit by contract the issues that they will arbitrate, so too may they specify by contract the rules under which that arbitration may be conducted (*see Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 US 468 [1989]; *see also Barbier v. Shearson Lehman Brothers, Inc. and Bendelac*, 948 F2d 117 [2nd Cir. 1991]). Thus, where the parties have unambiguously agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA (*Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 US 468 , *supra*).

NWBT, relying on *Masthead Mac Drilling Corp. v. Fleck* (549 FSupp 854 [SDNY 1982]), claims that New York courts, when dealing with arbitration disputes where the contract at issue involves a transaction involving commerce, apply federal, not state, arbitration law. Citing *Masthead*, the Southern District Court of New York in *Barbier v. Shearson Lehman Brothers, Inc. and Bendelac* (752 FSupp 151 [SDNY 1990]), again held that where a contract involves interstate commerce, federal arbitration law applies, notwithstanding the parties' New York State choice-of-law clause in the contract. However, on appeal, the Second Circuit Court of Appeals, citing *Volt*, found that the choice-of-law clause in *Barbier* clearly indicated that the parties elected to abide by the laws of the State of New York in the event of a dispute under the contract (*see Barbier*, 948 F2d 117, *supra*). Thus, the Second Circuit held in *Barbier* that New York State law applied, not the FAA. Similarly, the choice-of-law provision in the Agreement

herein clearly indicates an intent to for New York law to apply to arbitrations arising out of the Agreement, and as such, the laws of New York, not the FAA, apply to the review of the Award.

Grounds for Vacatur of the Award

CPLR 7511(b)(1) states, in pertinent part, that an "award shall be vacated on the application of a party who ... participated in the arbitration ... if the court finds that the rights of that party were prejudiced by ... (ii) partiality of an arbitrator appointed as a neutral, ...; or (iii) an arbitrator ... [who] exceeded his power ...."

Arbitrator's Partiality or Bias

In the interest of fairness, all arbitrators, before entering upon their duties, should make known any relationship, direct or indirect, that they have with any party to the arbitration, and disclose all facts known to them which might indicate any interest or create a presumption of bias (*Stevens*, 34 NY2d 123 [1974]). Thus, it has been held that the failure of an arbitrator to disclose facts which reasonably may support an inference of partiality or bias subject the arbitrator's award to vacatur under CPLR 7511(b)(1)(ii) (*see Stevens*, 34 NY2d 123 [1974] [where successful party to an arbitration conducted $2.5 million in business annually with the employers of two of the arbitrators, and one of those arbitrators was the sales manager at his company, such a substantial relationship between the party and the arbitrator was enough to require vacatur of the award]). However, an arbitrator is not required to reveal every facet of his past (*id.*). Even in the absence of full disclosure, vacatur of an award is not appropriate where the undisclosed relationship between the arbitrator and a party is not substantial (*see Stevens*, 34 NY2d 123, *supra*), or the relationship is peripheral, superficial, or insignificant (*see Weinrott*, 32 NY2d 190,

supra; *Tricots Liesse (1983), Inc. v. Intrex Industries, Inc.*, 284 AD2d 226, 726 NYS2d 268 [1st Dept. 2001]; *In the Matter of Wagner Stott Clearing Corp. and J.A. Celentano Securities Corp.*, 225 AD2d 367, 638 NYS2d 655 [1st Dept. 1996]; *Cross Properties*, 15 AD2d 913, *supra*).

In *Weinrott*, the arbitrator in question was counsel to FMC, a huge manufacturing and processing firm. A "Mr. Hait" was the chairman of the board of FMC. Shanks, a claimant in this case, was a director and member of the executive committee of Georgia-Pacific Corp. Mr. Hait became a director of Georgia-Pacific while the arbitration in question here was proceeding. Appellants claim that Mr. Hait must have been screened by Shanks before becoming a director of Georgia-Pacific. It was alleged that a decision by the arbitrator, Hait's subordinate at FMC, against Shanks would allegedly embarrass Hait, thus giving rise to the possibility of bias. The Court of Appeals described this relationship as a "weak line of indirect relationships purporting to tie an arbitrator to a claimant through a third party who is known only very casually by both parties." The relationship of the arbitrator and a party was "distant," "remote and speculative," and not "as substantial (32 NY2d 190, *supra*). The Court further noted that it would have been preferable if the arbitrator had disclosed the relationship, however distant, "but in the modern world of sprawling corporations and rapid travel, it would be most difficult to find a large number of potential well-qualified arbitrators who did not have some indirect relationship with one of the parties to the litigation." The asserted relationship too remote and speculative to provide a basis for reversal.

Similarly, in *Wagner Stott*, the potentially conflicting relationship of the arbitrator and a party was "too attenuated to raise even an inference or appearance of partiality" (225 AD2d 367, *supra*). In *Wagner Stott*, the arbitrator's brother was an independent securities broker, and had

transacted substantial business through a clearing house that was wholly owned by petitioner's parent company, Merrill Lynch Pierce Fenner & Smith. The First Department held that even assuming the arbitrator was aware of his brother's business relationship with another subsidiary of petitioner's parent company, "the relationship was too attenuated to raise even an inference or appearance of partiality." Therefore, the arbitrator's failure to disclose the relationship did not warrant vacatur of the award.(*see also*, *Cross Properties*, 15 AD2d 913, *supra* [where the potentially conflicting relationship between the arbitrator and a party "was not a disqualifying one" and was "of no consequence," vacatur not warranted]).

Contrary to SOMA's contention, the relationship between NWBT and the Arbitrator is far from substantial, and too attenuated to raise even an inference or appearance of partiality. There are several degrees of separation between the two. The Arbitrator was partner to CLM at the time of his selection, and at that time, his colleague, Mr. Cahill, was counsel to CLM in its Washington, D.C. office. Mr. Cahill served on the board of directors of TEDCO; TEDCO advised DBED to invest in Toucan, and the investment was completed in Summer of 2003; Toucan made a substantial investment in, and arguably controls one of the parties to the Arbitration, NWBT as of April 2004. Plainly, the purported "relationship" between the Arbitrator and NWBT is not substantial, and far too remote.

SOMA's reliance on *Stevens* is misplaced. After noting that the Appellate Division found the relationship between the arbitrator and the party was substantial enough to require vacating the arbitration award, the Court of Appeals held that "the failure of an arbitrator to disclose facts which reasonably may support an inference of bias is grounds to vacate the award under CPLR 7511." However, as stated above, the relationship between the Arbitrator and the Arbitrator's

colleague, who sat on the board of an entity that had a business relationship with another entity (Toucan) which invested in a party to the arbitration, NWBT, is not substantial so as to warrant vacatur of the Award.

SOMA's allegation that the Arbitrator "had an interest in the outcome because Mr. Cahill was a fiduciary with respect to an investment in Toucan" is simply not supported by the facts. Contrary to SOMA's claims, while *Stevens* requires an arbitrator to disclose potential conflicts, such disclosure is not required unless the relationship at issue is substantial. Regardless of whether the Arbitrator properly disclosed a potential conflict between himself and NWBT prior to the Arbitration, the initial burden established in *Stevens* has not been sustained: there has been no showing that there existed a substantial business relationship between the Arbitrator and NWBT.

Therefore, this Court concludes that the Arbitrator's failure to disclose Mr. Cahill's relationship to Toucan, does not warrant vacatur of the Award pursuant to CPLR 7511(b)(1)(ii).

Arbitrator Exceeding his Power by Rendering Completely Irrational Award

An arbitrator's award may be vacated, pursuant to CPLR 7511(b)(1)(iii), on the ground that the arbitrator exceeded his power. When an arbitrator is empowered to resolve disputes regarding the interpretation of a contract, an arbitrator has exceeded her power when her award is completely or totally irrational (*see Rochester City School District v. Rochester Teachers Assoc.*, 41 NY2d 578, 394 NYS2d 179 [1977]). An arbitration award is "totally irrational" if the arbitrator's interpretation of the contract essentially makes a new contract for the parties (*see In the Matter of the Arbitration between National Cash Register Company and Charles Wilson*, 8

NY2d 377, 208 NYS2d 951 [1960]; *see also Central Square Teachers Assoc. v. Board of Education of the Central Square Central School District*, 52 NY2d 918, 437 NYS2d 663 [1981]; *Riverbay*, 91 AD2d 509, *supra*). Also, an award with "no proof whatever to justify" it may render the award totally irrational, subjecting the award to judicial oversight (*see In the Matter of Peckerman v. D & D Assoc.*, 165 AD2d 289, 567 NYS2d 416 [1st Dept. 1991]). However, a court "may not vacate an award because [it] feels that the arbitrator's interpretation disregards the apparent, or even the plain, meaning of the words ..." (*see Rochester*, 41 NY2d 578, *supra*; *see also In the Matter of the Arbitration between Albany County Sheriff's Local 775 of Council 82, AFSCME, AFLCIO and County of Albany*, 63 NY2d 654, 479 NYS2d 513 [1984]; *National Cash Register*, 8 NY2d 377, *supra*). Moreover, an arbitrator is not totally irrational by rendering "justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement, ..." (*In the Matter of the Arbitration between Silverman and Benmor Coats, Inc.*, 61 NY2d 299, 473 NYS2d 774 [1984]).

In the present case, the Arbitrator, resolving the very dispute submitted to him, interpreted the Agreement in light of what he found to be the intent of the parties, and considered the evidence presented by the parties. In doing so, this Court cannot conclude that he reached a completely irrational result. Upon this Court's examination of the Award, it is clear that the Arbitrator identified the contractual language at issue, interpreted such language, and rendered the Award after applying certain findings of fact to the contractual language. The Arbitrator cited to the exact language of the Agreement, and determined that with respect to the fees for Toucan's investment after SOMA's termination, the Agreement required a showing that SOMA "initially

introduced" the investor to NWBT prior to the termination. The Arbitrator cited to various documentary and testimonial evidence of the contacts between NWBT and Toucan *before* SOMA's engagement, and determined that SOMA did not "initially introduce" Toucan to NWBT. "[A]n arbitrator's factual or legal determination is an evaluation of the competing ... claims offered by the parties, and as such, is not subject to judicial second-guessing" (*Hackett v. Milbank, Tweed, Hadley & McCloy*, 1995 NY Misc LEXIS 711 [Sup Ct, New York County, Dec. 22, 1995]).

SOMA primarily contends that the Arbitrator created a new contract by disregarding the clause "in connection with the Private Placement," which SOMA argues modifies the clause "initially introduced." However, as discussed above, the Arbitrator did not disregard the Private Placement clause. In his Award, the Arbitrator expressly cited to this phrase, and interpreted the Agreement as he saw fit. Therefore, the Court declines to vacate the Award pursuant to CPLR 7511(b)(1)(iii).

NWBT's Request for Attorney's Fees and Costs

NWBT's request for attorney's fees and costs incurred in defending SOMA's petition is denied. Section 130-1.1 of the Uniform Rules for the New York State Trial Courts provides that "[t]he court, in its discretion, may award . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part." Further, in addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as

provided in section 130-1.3 of this Subpart. This section provides that conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false. Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

SOMA's claims concern the partiality of the Arbitrator and the rationality of the Award. SOMA's arguments are not completely erroneous, and SOMA has included numerous cases in support of its position. Therefore, it cannot be said that SOMA's arguments were made in bad faith or frivolous so as to warrant the imposition of costs.

Confirmation of the Award

CPLR 7511(e) states, in pertinent part, that "upon the ... denial of a motion to vacate ..., [the Court] shall confirm the award." There is no need for NWBT to cross-move for confirmation of the Award since CPLR 7511(e) mandates an automatic confirmation upon denial of SOMA's motion to vacate (*see In the Matter of Bonnie J. White v. Department of Law of the State of New York*, 184 AD2d 229, 584 NYS2d 555 [1st Dept. 1992]). Therefore, in light of the

Court's denial of SOMA's motion to vacate, the Award is hereby confirmed.

Accordingly, it is hereby

ORDERED that the motion by SOMA Partners, LLC's to vacate the Award rendered in the Arbitration of SOMA Partners, LLC v. Northwest Biotherapeutics, Inc., is denied, and the petition is dismissed; and it is further

ORDERED that respondent Northwest Biotherapeutics, Inc.'s request for attorney's fees and costs is denied; and it is further

ORDERED that the Award dated March , 2005, rendered in the Arbitration of SOMA Partners, LLC v. Northwest Biotherapeutics, Inc. is confirmed pursuant to CPLR 7511(e); and it is further

ORDERED that counsel for petitioner SOMA Partners, LLC shall serve a copy of this Order along with Notice of Entry upon respondent within 20 days from the date of entry.

The foregoing constitutes the Decision and Judgement of this Court.

Dated: December 30, 2005

Hon. Carol R. Edmead, J.S.C.