[*1] SCANNED ON 6/8/2007

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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 102558/2007

STOLTHAVER PERTH AMBOY

VS

JLM MARKETING

Sequence Number : 001

CONFIRM AWARD

INDEX NO. 102558/07

MOTION DATE 5/22/07

MOTION SEQ. NO. 001

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

UNFILED JUDGMENT This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To enter judgment, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the petition to confirm the February 2007 Final Award issued by the International Centre for Dispute Resolution in the matter of *Stolthaven Perth Amboy, Inc. vs. JLM Marketing, Inc.* is granted and the award rendered in favor of petitioner and against respondent is confirmed; and it is further

ORDERED that respondent's cross-petition to vacate the Final Award is denied; and it is further

ORDERED and ADJUDGED that petitioner Stolthaven Perth Amboy, Inc. shall have judgment and recover against respondent JLM Marketing, Inc. in the amount of $825,000.00, plus interest at the rate of 4% per annum from the date of March 22, 2007, as computed by the Clerk in the amount of $ _____, together with costs and disbursements in the amount of $ _____ as taxed by the Clerk upon the submission of an appropriate bill of costs, for the total amount of $_____, and that the petitioner have execution therefor; and it is further

ORDERED that petitioner serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and Judgment of the Court.

Dated: 6/7/07

HON. CAROL EDMEAD J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

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

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

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In the Matter of the Arbitration of
Certain Controversies between:

STOLTHAVEN PERTH AMBOY, INC.,

Index No. 102558-2007

Petitioner,

-against-

DECISION/ORDER

JLM MARKETING, INC.,

Respondent.

----------x

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this Article 75 proceeding, petitioner Stolthaven Perth Amboy, Inc. ("petitioner"), moves to confirm a certain February 2007 Arbitration Award in the matter of *Stolthaven Perth Amboy, Inc. vs. JLM Marketing, Inc.* issued by the International Centre for Dispute Resolution ("ICDR") and for pre-judgment interests and costs. In opposition, respondent, JLM Marketing, Inc. ("respondent") cross moves pursuant to CPLR 7507 and 7511 to vacate the award and costs.

I. FACTUAL BACKGROUND[1]

This action arises out of a contract dispute between petitioner and respondent. The contract at issue was a "Terminal Agreement," originally entered into between petitioner and a French company, Sofecia, concerning the storage of non-drinkable alcohol at petitioner's "terminal property" (the "Agreement").[2] The Agreement indicates that all disputes arising thereunder were to be governed by New Jersey law and to be decided under the commercial arbitration rules of the American Arbitration Association ("AAA").

On November 3, 1999, respondent purchased all of Sofecia's assets and executed an assignment, entitled "Assumption and Assignment of Stolthaven Terminal Agreement," of

[1] The facts are taken in large part from the Final Judgment issued by the Superior Court of New Jersey, filed on November 15, 2002, and from respondent's cross-motion to vacate the Award.

[2] These parties amended the Agreement in 1993 and again in 1998.

Sofecia's interest in the Agreement. On November 19, 1999, respondent requested that "GATX" submit a bid on both alcohol and solvent packages. On February 28, 2000, respondent then gave notice to petitioner that it "will not be renewing its contract with Stolt for ethanol denaturing when the current arrangement ends June 30, 2000." In response, petitioner took the position that the Terminal Agreement "remains in full force and effect through its stated termination date of December 31, 2002 . . . ." Petitioner also filed an arbitration with the AAA alleging that respondent wrongfully terminated the contract.

A. The First Arbitration

On April 22, 2002, a one-day hearing took place on the bifurcated issue of liability. The post-hearing briefs were submitted on May 17, 2002, and thus, the award was due on June 16, 2002. When no award was rendered by June 24, 2002, respondent informed the arbitration panel by letter that the time period to render a decision lapsed. Such letter also advised the arbitration panel that respondent objected to any reopening and any ruling from that point on as the panel would then have imperfectly executed its powers if it issued a decision beyond the 30 day period. Respondent then wrote a second letter, objecting to any award.

Thereafter, the AAA forwarded an executed partial final award on July 11, 2002 on the issue of liability (the "2002 Partial Award"), finding that respondent breached the Agreement.

In response, respondent filed a verified complaint by order to show cause in the Superior Court of New Jersey seeking to set aside the 2002 Partial Award. Petitioner argued that the Partial Award was imperfectly executed by its delivery beyond the 30-day period, that it was not executed in a manner in which deeds are executed as required under New Jersey law, and that there was evidence of partiality and a conflict of interest of the arbitrator, as well as a manifest disregard of the law.

On November 15, 2002, the New Jersey Superior Court initially held that the alleged partiality and conflict of interest claim, including the manifest disregard claim, lacked merit.[3]

[3] Cross-motion, Exh. 58, Decision, page 7, lines 1-11; page 10, lines 16-24.

However, since the Partial Award was issued 25 days beyond the prescribed statutory time-period, the Superior Court held that the Partial Award was null and void pursuant to the rules of AAA, and vacated the Partial Award "on that basis alone," and "remand[ed] it back if the parties wish[ed] to go to arbitration." The Superior Court stated that "There is no reason why the arbitration can't - - -cannot be resubmitted." The Superior Court finally found that the

> "issue of not having the award signed - - -in the manner in which - - -attested to in the manner in which deeds are . . . .[was] a technical issue. And if that was the only issue I would not vacate it because it's something that can be corrected by the members going before a notary public or whoever attests and saying that, yes, that is my signature, that is the decision I made and we attest and give it . . . ."

B. The Second Arbitration

On August 31, 2004, petitioner recommenced another arbitration before the ICDR. Manfred Arnold (selected by petitioner), Davidson Williams (selected by respondent), and Leo Kailas, the Chairman served on the arbitration panel (the "Panel"). On August 12, 2005, the Panel issued an Award, finding that respondent breached the Agreement ("Partial Final Award"). Unlike Arnold (petitioner's party arbitrator) and Chairman Kailas, Williams (respondent's party arbitrator), also found that respondent had grounds to terminate the Agreement.

Hearings on damages were held in October 2006, and post trial briefs were submitted on January 19, 2007. Pursuant to AAA rules, the hearings were declared closed on January 22, 2007, thereby requiring that an award be issued no later than February 21, 2007.

On February 21, 2007, the Panel issued an Award, in which it was determined that (1) there is due from respondent the net sum of $825,000.00, (2) the administrative fees of the ICDR in the amount of $12,450.00 shall be borne equally by the parties, and (3) respondent shall pay to petitioner the sum of $5,275.00, representing that portion of those fees and expenses in excess of the apportioned costs previously incurred by petitioner (the "Final Award"). A copy of the Final Award was delivered to petitioner and respondent on February 20, 2007.

Although the signature of respondent's party arbitrator, Williams, is accompanied by the signature of a purported notary, the signatures of Arnold and Chairman Kailas were not

notarized.[4]

II. INSTANT PROCEEDING

By Petition dated February 21, 2007, and within one year of delivery of the Final Award, petitioner commenced this action to confirm the Final Award.

In response, respondent cross-moves pursuant to CPLR 7507 and 7511 for an order vacating said Award and assessing costs.[5] Respondent argues that the Final Award was not properly executed, "affirmed," or acknowledged (*i.e.*, sworn to) in accordance with CPLR 7507, 2106, GCL 11 or RPL 298. Respondent contends that the Final Award was not affirmed by the two arbitrators who held against JLM. JLM contends that the 20-day correction period under AAA Rule 46, expired on March 16, 2007, and JLM timely filed a Notice of Objection to any actions being taken after that date. Thus, the Award is a nullity and cannot be confirmed. JLM also contends that the Award was previously vacated under New Jersey law in 2002 and that this matter should be dismissed for "venue reasons" since New York law and New Jersey law are identical on the key principles that the Award was not issued in a timely manner and not executed in a manner prescribed by law.

Furthermore, the Award should be vacated because two of the three arbitrators manifestly disregarded the law in that the arbitrators disregarded the principle that the "agreement to agree" contained in the Assignment between respondent and Sofecia is unenforceable and thus could not support a finding that respondent breached the parties' Agreement. Respondent also contends that respondent could have given six months notice of cancellation at any time on the ground of "radical change in the business of Sofecia," in light of (1) the sale of Sofecia's business, (2) Sofecia's business was deteriorating, and (3) Sofecia lost Union Carbide Corp. as an ethanol

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[4] Petitioner contends that under, AAA Rule 46, the arbitrators have 20 days to correct this "error."

[5] Respondent also wrote a letter, dated March 17, 2007, to the ICDR and counsel for petitioner, objecting to any "making and/or issuance of any award in this matter as being untimely under Rule 41 . . . and under Rule 36 to any attempt to re-open the hearings to cure this defect." Respondent also objected to th Final Award on the ground that it was not executed "'in the manner required by law.' (Rule 42(a))." According to respondent's letter, "there are no commercial rules that give the Panel any ability to act past March 13, 2007."

supplier. Further, petitioner breached the Agreement by failing to renegotiate certain terms of the Agreement. Respondent also argues that the award is a matter of corruption and bias. The Chairman of the Panel refused to grant respondent's motion to dismiss even though JLM shredded important documents, refused to turn over other important documents, and used and suborned perjured testimony, thereby depriving respondent of a fundamentally fair hearing. Respondent was prevented from establishing petitioner's failure to mitigate damages, which would bar petitioner's underlying claim for damages. Further, the Panel improperly considered the testimony of petitioner's expert, who was unqualified and based his conclusions on improper methodology. Finally, respondent contends that the Court should not exercise its discretion and award post-award, pre-judgment interest given that respondent was "duped" into believing that it had the right to terminate the Agreement in June 2000 by its terms, and that respondent would not have taken the assignment of the Agreement. In the event the Court awards such interest, the Court should apply New Jersey law.

In further support of its Petition and in opposition to respondent's cross-petition, petitioner contends that respondent raised each of its arguments in the arbitration proceeding and now attempts to reargue each issue. In addition, petitioner's papers and pleadings are untimely, that respondent failed to serve its opposition by March 15, 2007 as required, after obtaining adjournments based on false and misleading statements to the Court, with the intent to cause further delay of this action and after the threat of filing bankruptcy in the event a "high six-figure" award was issued. Respondent was already in default at the time it made its latest request for an adjournment, and neglected to submit an affidavit of merit with its opposition.

Petitioner also argues that the Final Award was properly executed by the arbitrators. The legislature deleted the term "acknowledged" from the arbitration statute and inserted the word "affirmed." Although the statute does not state what form the affirmation has to take, the Second Department has indicated that the affirmation need simply indicate that the recitation of the award was correct at the time it was made. Furthermore, the transcript clearly indicates that the

Panel was sworn before commencement of the hearing. Additionally, both the Chairman and Arnold executed written oaths, which were duly signed, notarized and sent to the ICDR in January and February 2005. Petitioner points out that the caselaw on which respondent relies predates the current version of the CPLR. Further, CPLR 2106, which precludes non-lawyers from submitting affirmation is irrelevant, as it is limited to the service or filing of an affidavit or affirmation "in the action" and makes no mention of an arbitration award. Notably, respondent cites to a statute that no longer applied to the arbitration proceeding. Nor is there any caselaw that requires that arbitrators' signatures be notarized. Further, the Final Award is valid under New Jersey law, and any omission by the arbitrators is purely technical, and does not support vacatur of the Final Award.

Petitioner also contends that respondent is not entitled to have this Court review the merits of the Final Award. Further, insofar as respondent seeks to vacate the Partial Final Award, respondent's application is untimely under the 90-day statute of limitations of CPLR 7511 and 120-day statute of limitation under New Jersey's arbitration statute (NJSA 2A:23B-23(b)). Thus, the respondent's challenge to the Panel's findings of liability is meaningless. Moreover, respondent failed to establish any of the prescribed grounds for vacating an award under New Jersey or New York law. In any event, the Panel applied the proper standards.

Furthermore, the Chairman's refusal to sanction petitioner regarding the production of documents lacks merit, in that respondent's allegations of document shredding lack merit and there is no right to discovery in arbitrations.

Therefore, argues petitioner, since respondent's cross-motion to vacate the Final Award must be denied, the Court must confirm the Final Award. And, petitioner is entitled to pre-judgment interest from March 22, 2007 since the Final Award gave respondent 30 days to from February 20, 2007 to make payment, as well as attorneys' fees pursuant to paragraph 11 of the Agreement.

In further support of its cross-petition, defendant argues that the affidavits of Kailas and

Arnold submitted in opposition to defendant's cross-petition, were notarized by petitioner's counsel. Thus, such affidavits indicate that petitioner's counsel met with the arbitrators in violation of AAA Rule 18(a) and demonstrate the collusion between the arbitrators and petitioner. Further, the affidavits of Kailas and Arnold do not cure the deficiencies in the Final Award, in that affirmations not made "under the penalties of perjury" or that specifically reference CPLR 2106 are defective. Defendant contends that neither the affirmation of Kailas, nor the unsworn and unattested affirmation of Arnold, was done either "under the penalties of perjury" or reference the CPLR. They also do not affirm the truth of the affirmation. The "Arbitrators Oath," signed over two years ago, makes no reference to a future award being properly affirmed or being true or under the penalties of perjury. Instead, argues defendant, the Arbitrators Oath merely stated that they would abide by the Code of Ethics and the rules of the American Arbitration Association (which they did not since they had *ex parte* communications with counsel for petitioner). Furthermore, this Court is permitted to review the Final Award for "manifest disregard of the law."

III. ANALYSIS

Vacatur of an arbitration award is limited to the grounds set forth in CPLR § 7511 (*Austin v Board of Education of the City School District of the City of New York,* 280 A.D.2d 365, 720 N.Y.S.2d 344 (1st Dept 2001). CPLR § 7511 provides in relevant part:

> **(b) Grounds for vacating.**
> 1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:
> (i) corruption, fraud or misconduct in procuring the award; or
> (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
> (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
> (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

With respect to subsection (iv), failure to follow the procedure of this article, CPLR 7507

provides in relevant part:

> Except as provided in section 7508 [Award by Confession], the award shall be in writing, signed and *affirmed* by the arbitrator making it within the time fixed by the agreement, or, if the time is not fixed, within such time as the court orders [emphasis added].

The record before the Court indicates that Chairman Kailas and Williams are attorneys. Each of their names is followed by "Esq.," and there is no basis in the record to indicate that Chairman Kailas or Williams is not an attorney. Thus, arguably, CPLR 2106 entitled "Affirmation of truth of statement by attorney, physician, osteopath or dentist" appears to govern the propriety of their affirmations.

CPLR 2106 provides, in pertinent part:

> The statement of an attorney admitted to practice in the courts of the state . . . authorized by law to practice in the state, who is not a party to an action, when subscribed and affirmed by him to be true under the penalties of perjury, may be served or filed in the action in lieu of and with the same force and effect as an affidavit.

Commentary to CPLR 2106 indicates, however, that CPLR 2106 applies under circumstances under which an affidavit or notarized statement is required. "CPLR 2106 was an innovation that was intended to ease the burdens of attorneys who, as a prerequisite to the submission of their own sworn written statement in an action, *were required under prior law to find a notary public to administer an oath*. The drafters of the CPLR determined that the attorney's professional obligations and the possibility of prosecution for making a false statement provided sufficient safeguards to dispense with the need for an appearance by the attorney before a notary public. Thus, the attorney is authorized by CPLR 2106 to simply sign his or her own statement and to affirm its truth subject to the penalties of perjury. Such affirmation has the same effect as an affidavit sworn to before a notary public. Similar considerations of convenience led to an amendment of the statute in 1973 to extend the same right of affirmation to physicians, osteopaths and dentists, *whose affidavits are also frequently required in civil litigation*" (Commentary, McKinney's CPLR Rule 2106, Vincent C. Alexander) (emphasis added).

Yet, CPLR 7507 does not require an "affidavit," or any acknowledgment before a notary, but an affirmation. C.P.A. § 1460, from which CPLR 7507 derives, required an award to be "acknowledged or proved, and certified, in like manner as a deed to be recorded" (*Wagner v Russeks Fifth Ave.*, 30 Misc 2d 127, 85 NYS2d 779 [N.Y. Sup. 1949]). Upon a reading of CPLR 7507, it is clear that the requirement that the Award be acknowledged before a notary was eliminated. Further, CPLR 2106 does not refer to arbitrators or arbitrations. Thus, contrary to respondent's contention, any failure of Kailas and Williams to comply with the strictures of CPLR 2106, is not fatal to the Final Award.

In any event, even assuming the applicability of CPLR 2106 to the Final Award, the affirmations made herein comply with the more general provision defining "affirmation" found in CPLR § 2309. CPLR § 2309, entitled "Oaths and affirmations," provides as follows:

> (b) Form. An oath or affirmation shall be administered in a form calculated to awaken the conscience and impress the mind of the person taking it in accordance with his religious or *ethical beliefs*. [emphasis added]

Here, the signatures of Chairman Kailas, Williams, and Arnold of the Final Award are accompanied by statements that they are "affirm[ed] upon my oath as Arbitrator." The "Arbitrator's Oath" to which each affirmation refers, states that:

> "The Arbitrator being *duly sworn*, hereby accepts this appointment . . . and will faithfully and fairly *hear and decide* the matters in controversy between the parties. . . in accordance with their arbitration agreement, the *Code of Ethics*, and the rules of the American Arbitration Association and will make an Award according to the best of the arbitrator's understanding." [Emphasis added].

The "Arbitrator's Oath" signed by Chairman Kailas and Arnold were also notarized in 2005. Furthermore, Chairman Kailas' and Arnold's "Oath of Arbitrator," each duly swore to uphold the "Code of Ethics."

"To make a valid oath, for the falsity of which perjury will lie, there must be in some form, in the presence of an officer authorized to administer it, an unequivocal and present act, by which the affiant consciously takes upon himself the obligation of an oath, such form being

essential to distinguish between an oath and a bare assertion and more being required than a mere intention unaccompanied by an unambiguous act" (*see e.g., Lynch v Huestad*, 118 AD2d 674, 500 NYS2d 25 [2d Dept 1986] citing N.Y.Jur., Affidavit, Oath and Affirmation, s 4, pp. 170-171 and CPLR 2309 (b)]).

In this regard, a notary's job is to verify that the persons whose signatures appear on the petition did indeed sign the petition in the witness's presence *and that they subscribed to the truth of the statements they made therein* (*see e.g., Lynch v Huestad, supra* [emphasis added]). There is no indication or allegation in the record, that the notary in each of the Arbitrator's Oaths failed to administer the oath in such form. Thus, incorporation by reference of each of the "Arbitrator's Oath," which was duly notarized, is the procedural and functional equivalent of the more affirmation required by both CPLR 2106 and CPLR 2309 (*see e.g. Sparaco v Sparaco*, 309 AD2d 1029, 765 NYS2d 683 [3d Dept 2003]).

Such incorporation by reference has been considered an acceptable means of satisfying the CPLR. In *Jones v Schmitt*, 7 Misc3d 47 [NY Sup. App. Term 2005]), a treating physician submitted an affirmation in which he stated that "pursuant to CPLR sec. 2106 and as a physician duly licensed to practice in the State of New York, hereby affirm the truth of the foregoing." The Court held that since the physician referred to CPLR 2106, which contains the phrase under penalties of perjury and he also affirmed the truth of the affirmation" CPLR 2106 was satisfied. There is no indication in the record that their affirmations were not "administered in a form calculated to awaken the conscience and impress the mind of the person taking it in accordance with their *ethical beliefs*."

Notwithstanding the above, the absence of an affirmation is also correctable (*see e.g., Victoria Ins. Co. v Utica Mut. Ins. Co.*, 8 AD3d 87, 778 NYS2d 481 [1st Dept 2004] [where awards did not meet the requirements of CPLR 7507 that they be signed and affirmed by the arbitrator respondent is estopped from now raising the issue; "Had respondent raised this issue as

well settled that such an award may not be vacated for errors of law or fact committed by the arbitrators (*Merrill Lynch, Pierce, Fenner & Smith Inc. v Graef,* 34 AD3d 220, 823 NYS2d 387 [1st Dept 2006] *citing Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479, 813 NYS2d 691 [2006], *cert. dismissed,*--- U.S. ----, 127 SCt 34, 165 LE2d 1012; *Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336, 812 NYS2d 413 [2005]).

An arbitrator's award will not be vacated even where the arbitrator's interpretation of an agreement misconstrues or disregards its plain meaning or misapplies substantive rules of law, unless it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on his power under CPLR 7511[b][1] (*Matter of Board of Educ. v Arlington Teachers Assn.*, 78 NY2d 33, 37; *Matter of Silverman*, 61 NY2d 299, *supra*; *Roffler v Spear, Leeds & Kellogg*, 13 AD3d 308, 788 NYS2d 326 [1st Dept 2004]). Even where an arbitrator makes errors of law or fact, a court may not undertake to conform the award "to [its] sense of justice" (id .). More simply, an arbitrator's award will be confirmed "if any plausible basis exists for the award" (*Azrielant v Azrielant*, 301 AD2d 269, 752 NYS2d 19 [1st Dept 2002]; *Graniteville Co. v First Natl. Trading Co.*, 179 AD2d 467, 469, lv. denied 79 NY2d 759 [1st Dept 1992]). Once authorized to resolve a dispute, arbitrators may interpret contract provisions as they see fit, with the scope of their discretion expansive, and will be considered to have exceeded their authority only if they give a completely irrational construction to the provisions in dispute (*Matter of Saltzman (Wohl)*, 168 AD2d 210, 562 NYS2d 95 [1st Dept 1990], *citing Matter of Silverman*, 61 NY2d 299, 308, 473 NYS2d 774 [1984]). An arbitrator is not bound by principles of substantive law and may do justice as he or she sees fit, applying his or her own sense of law and equity to the facts of the subject dispute (*see, Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308, 473 NYS2d 774 [1984]). And, a court is bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies, and "cannot examine the merits of an arbitration award and substitute its judgment for that of the

arbitrator simply because it believes its interpretation would be the better one" (*Kaminsky v Segura*, 4 Misc 3d 1019, 798 NYS2d 345 [NY Sup 2004]; *Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York,* 94 NY2d 321, 326). Indeed, an arbitrator's interpretation of the parties' contract is impervious to judicial challenge even where "the apparent, or even the plain, meaning of the words" of the contract has been disregarded (*Maross Construction, Inc. v Central New York Regional Transportation Auth.*, 66 NY2d 341, 497 NYS2d 321 [1985] *citing Rochester City School Dist. v Rochester Teachers Assn.*, 41 NY2d 578, 582 [1977]).

The record reflects sufficient evidence to support the Panel's Final Award, and that the Panel considered, but rejected petitioner's arguments. There is no evidence that the arbitrators refused to apply or altogether ignored well-defined, explicit, clearly applicable law brought to their attention. That the arbitrators may have applied a formula erroneously does not mean that they manifestly disregarded it (*see Solow Bldg. Co., LLC v Morgan Guar. Trust Co. of New York*, 30 AD3d 273, 818 NYS2d 31 [1st Dept 2006] *citing see Wien & Malkin,* 6 NY3d at 480-481, 813 NYS2d 691]).

Nor is there any basis in the record to support a finding that the Final Award was rendered by a Panel as a result of bias or partiality or corruption. Conclusory allegations of corruption on the part of the arbitrator failed to establish that the arbitrator exceeded her authority (*Scollar v Cece*, 28 AD3d 317, 812 NYS2d 521 [1st Dept 2006]). And, the mere suggestion of partiality is not sufficient to warrant interference with arbitrator's award (*Provenzano v Motor Vehicle Acc. Indemnification Corp.*, 28 AD2d 528, 279 NYS2d 973 [1st Dept 1967]). Respondent's claim that the Panel's manifest disregard of the law and failure to dismiss the arbitration due to respondent's breach of its discovery obligations do not warrant vacatur of the Final Award. It has been held that the "failure of arbitrators to permit access to vital records, material to the trial of the issues before them, would be a ground for setting aside an award if such failure made it impossible for a party to present evidence necessary for a determination of

the issues" (*Korein v Rabin*, 29 AD2d 351, 287 NYS2d 975 [1st Dept 1968]). The fact that an arbitrator conducted arbitration proceedings in way which one or the other side did not like would not be a ground for a charge of bias against the arbitrator *(see Nadalen Full Fashion Knitting Mills v Barbizon Knitwear Corporation*, 206 Misc 757, 134 NYS2d 612 [1954]). Here, the record of the arbitration indicates that the Panel addressed respondent's claim regarding discovery purportedly outstanding at the time of the arbitration, and considered petitioner's explanation that discovery was either exchanged or not subject to disclosure. Respondent's contention that the Panel was biased because it failed to dismiss the action due to the petitioner's failure to meet its discovery obligations is thus insufficient.

Further, respondent's arguments that the Panel exceeded its power or so imperfectly executed its power when it improperly (1) allowed petitioner to withhold discovery, (2) permitted petitioner to use perjured testimony, (3) failed to grant respondent's application to dismiss the arbitration due to petitioner's discovery breaches, and (4) considered petitioner's expert testimony, all relate to the conduct of the arbitration, lack merit. Arbitrators have broad discretion to decide what evidence should be presented (*In re Engel (Refco, Inc.)*), 193 Misc 2d 91, 746 NYS2d 826 [2002]). Nonetheless, respondent failed to establish that any additional information it would have provided to the Panel or that the absence of the purported perjured testimony would have changed the result in this case. Notably, respondent did have an opportunity to cross-examine the witnesses, although perhaps not to the extent it wished (*see Landro v D'Amond*, 180 Misc 2d 420, 691 NYS2d 249 [1998]). Further, respondent's disagreement with the Panel's assessment of the evidence is not a proper ground on which to base a claim of partiality, as a court may not review the weight the arbitrator gave conflicting evidence nor question the credibility findings of the arbitrator (*see Velasco v Beth Israel Medical Ctr*, 279 F Supp2d 333 [2003]).

However, petitioner failed to establish a basis for this Court to apply the interest rate under New York law. The Agreement indicates that New Jersey law governs the "validity,

performance, interpretation and effect of this Agreement, and any controversy arising out of or in connection with the Agreement . . . ." The Final Award gave respondent 30 days from the date of transmittal to tender payment due thereunder. Since respondent failed to pay petitioner within 30 days of February 20, 2007, petitioner's request for prejudgment interest commencing March 22, 2007 is granted, however, at the rate of 4.0%.

Based on the foregoing, it is hereby

ORDERED that the petition to confirm the February 2007 Final Award issued by the International Centre for Dispute Resolution in the matter of *Stolthaven Perth Amboy, Inc. vs. JLM Marketing, Inc.* is granted and the award rendered in favor of petitioner and against respondent is confirmed; and it is further

ORDERED that respondent's cross-petition to vacate the Final Award is denied; and it is further

ORDERED and ADJUDGED that petitioner Stolthaven Perth Amboy, Inc. shall have judgment and recover against respondent JLM Marketing, Inc. in the amount of $825,000.00, plus interest at the rate of 4% per annum from the date of March 22, 2007, as computed by the Clerk, together with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs, and that the petitioner have execution therefor; and it is further

ORDERED that petitioner serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and Judgment of the Court.

Dated: June 7, 2006

Hon. Carol Robinson Edmead