

<b>Sivanesan v YBF LLC</b>
2019 NY Slip Op 33829(U)
December 23, 2019
Supreme Court, Westchester County
Docket Number: 67996/2018
Judge: Gretchen Walsh
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To commence the statutory time period of appeals as of right pursuant to (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER: COMMERCIAL DIVISION

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Application of JANU SIVANESAN,

Petitioner,

Index No. 67996/2018  
Motion Seq. Nos. 1, 2  
Motion Date: 9/19/19

For an Order Pursuant to Article 75  
of the CPLR Confirming an  
Arbitration Award

**DECISION AND ORDER**

- against -

YBF LLC; DAVID SCHIEFFELIN;  
STACEY SCHIEFFELIN; VISUAL  
BEAUTY LLC; AND TPR HOLDINGS  
LLC,

Respondents.  
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WALSH, J.

Petitioner Janu Sivanesan (“Petitioner” or “Sivanesan”) petitions the Court pursuant to section 9 of the Federal Arbitration Act, 9 U.S.C. § 9 (“FAA”), for an Order confirming the Final Award transmitted on July 16, 2018 (the “Final Award”) by JAMS and ordered by the Honorable Helen E. Freedman (“hereinafter Arbitrator”) presiding as the sole arbitrator in Sivanesan’s arbitration action against Respondents YBF LLC (“YBF”), David Schieffelin and Stacey Schieffelin (collectively, the “YBF Respondents”), and Respondents Visual Beauty LLC (“Visual Beauty” or “VB”) and TPR Holdings LLC (“TPR”) (collectively, Visual Beauty and TPR being referred to as the “VB/TPR Respondents” and the YBF Respondents and the VB/TPR Respondents collectively being referred to as the “Respondents”), as supplemented by Arbitrator Freedman’s August 30, 2018 Award (the “August 2018 Award”) denying the formal objection of the VB/TPR Respondents seeking to modify or otherwise vacate the Final Award (collectively,

*Janu Sivanesan v YBF LLC et. al, Index No. 67996/2018*

Page 2

the Final Award and the Award being referred to as the “Awards”) and entering a final judgment on the Final Arbitration Award (Mot. Seq. No. 001). The VB/TPR Respondents oppose Petitioner’s Petition and Cross-Petition, pursuant to New York law and CPLR 7511, to vacate the Final Award (Mot. Seq. No. 002). No opposition was received by the YBF Respondents.

### **RELEVANT BACKGROUND AND FACTS**

#### **A. *The Parties***

Petitioner is an individual currently residing in the state of Florida that provided consulting services to YBF and its affiliates, as well as to Stacey and David Schieffelin, pursuant to a written contract dated July 20, 2009 signed by each of the YBF Respondents (the “Consulting Agreement”) (Pet. at 2). Respondent YBF is a limited liability company owned by Respondents Stacey Schieffelin and David Schieffelin with its principal place of business in Waterbury Connecticut, and office addresses at 711 Third Avenue, 11<sup>th</sup> Floor, New York, New York 10017, and other business locations within New York. YBF has been a company in the business of marketing and selling retail cosmetic products in the United States, Canada, and in numerous countries throughout the world, using “YBF” and related trademarks (the “YBF Marks”) that have been owned by it. During the pendency of the arbitration, YBF sold the YBF Marks and the right to exploit the license of the YBF Marks (the “YBF Business”) to TPR and Visual Beauty in or around May of 2016 (*id.*).

According to Petitioner, Respondent Stacey Schieffelin is, upon information and belief, a resident of Florida, has been an owner and founder of YBF and other beauty/cosmetic companies, and touts herself as a successful entrepreneur having been voted Woman Entrepreneur of the Year and one of the Ladies’ Home Journal Power Women. Petitioner states that, upon information and belief, Stacey Schieffelin maintains business offices at the following locations: (A) 711 Third Avenue, 11th Floor, New York, New York 10017; (B) 875 3<sup>rd</sup> Avenue, New York, New York 10022; (C) 48 West 20th Street, Penthouse Suite, New York, New York 10011; and (D) 950 3rd Avenue, Third Floor, New York, New York 10022 (*id.* at 3). Petitioner further states that Respondent David Schieffelin is, upon information and belief, a resident of Florida, a Harvard graduate, and entrepreneur who has been an owner and co-founder of YBF. He is married to Respondent Stacey Schieffelin. Upon information and belief, David Schieffelin

*Janu Sivanesan v YBF LLC et. al, Index No. 67996/2018*

Page 3

maintains business offices at the following locations: (A) 711 Third Avenue, 11<sup>th</sup> Floor, New York, New York 10017; (B) 48 West 20th Street, Penthouse Suite, New York, New York 10011; (C) 875 3rd Avenue, New York, New York 10022; and (D) 950 3rd Avenue, Third Floor, New York, New York 10022 (*id.*).

Petitioner contends that, upon information and belief, Visual Beauty is a shell limited liability company created by TPR for the purpose of purchasing the rights to the YBF Marks and the YBF Business in or about May of 2016. The President of Visual Beauty explained that “ybf beauty has proven sell-through and tremendous growth potential” in a 2016 press release concerning the acquisition. Visual Beauty is a Delaware limited liability company with offices located at 950 3rd Avenue, 3rd Floor, New York, New York 10022, and 875 3rd Avenue, 7th Floor, New York, New York, 10022. Petitioner argues that Visual Beauty is a successor in interest to YBF (*id.*).

TPR is a Delaware limited liability company based in New York and is an investor and operator in the consumer products industry that targets investments in the health, beauty and wellness categories. According to Petitioners, TPR is a successor entity to YBF. TPR’s principal place of business is located at 875 3rd Avenue, 7th Floor, New York, New York 10022. Visual Beauty is an affiliate of TPR also located at 875 3rd Avenue, 7th Floor, New York, New York 10022 (*id.*).

Petitioner argues that together TPR and Visual Beauty “exploit the YBF Marks for great profit through, for example, television shopping channels such as HSN (USA), HSE (EU), TNSN (Australia and New Zealand) and Citruss TV(Middle East), as well as by launching the sale of TBF [sic] cosmetics in Kohl’s Department Stores in April of 2018.” The YBF Marks are advertised as being TPR Brands on TPR’s website (*id.* at 4).

***B. Nature of the Arbitration***

The arbitration in question concerned Sivanesan’s right to receive compensation in the form of consulting fees of \$570 per hour (the “Consulting Fees”) and transaction fees equal to three percent of the outstanding equity which operates the YBF business and has the right to exploit the license of the YBF Marks (the “Transaction Fee”). Petitioner argued that the fees were due to her because she successfully negotiated a proposed transaction that was

*Janu Sivanesan v YBF LLC et. al, Index No. 67996/2018*

Page 4

consummated prior to the Consulting Agreement terminating, whereby the exclusive licensing rights to the YBF Marks, which had previously been transferred to Cosmetics Specialities East, LLC (“CSE”) pursuant to a licensing agreement that required royalties to be paid to YBF, was terminated (Pet. at 4-5).

In the Arbitration, Petitioner argued that those payments were owed pursuant to the July 20, 2009 Consulting Agreement (Pet. Ex. 1 [Consulting Agreement]). As a result of Petitioner’s services provided under the Consulting Agreement, YBF, rather than CSE, was to benefit from the future profits of products utilizing the YBF Marks. As noted previously, during the pendency of the arbitration, YBF sold the YBF Business to TPR and its affiliate Visual Beauty in or around May 2016 (Pet. at 4-5).

**C. *The Arbitration Hearing and Final Award***

The Consulting Agreement provides that “any dispute, controversy or claim directly or indirectly relating to or arising out of this agreement shall be submitted to binding arbitration with JAMS/ENDISPUTE in New York, New York” (Consulting Agreement at 3). The Consulting Agreement further provides that it “shall be governed by and construed in accordance with the laws of the State of New York without giving effect to any principles of conflicts of laws” (*id.*).

On August 27, 2015, Sivanesan filed a Demand for Arbitration with JAMS seeking to recover the Consulting and Transaction Fees, as well as the current and future equity distributions that she argued were due to her. On May 10, 2017, she filed an Amended Demand asserting the same claims but adding Stacey Schieffelin and David Schieffelin as parties following a May 8, 2017 Decision on Applications to Add Parties signed by the Arbitrator, requiring Sivanesan to serve that “Order and the Amended Demand for Arbitration and Complaint and Exhibits upon all defendants at their known Connecticut, New York, and Florida Addresses” (Pet ¶ 21). In addition, Sivanesan instituted the Arbitration against “John Doe” and “Jane Doe” being “fictitious and unknown to Claimant, the persons and/or entities intended and being those that at all relevant times held and continue to hold the YBF Marks” (*id.* ¶ 27). Respondents failed to respond to the Demand. On March 27, 2018, Arbitrator Freedman issued: (A) an Arbitration Summons to Appear and Present Documentary Evidence at an Arbitration

*Janu Sivanesan v YBF LLC et. al, Index No. 67996/2018*

Page 5

Hearing to Visual Beauty; and (B) an Arbitration Summons to Appear and Present Documentary Evidence at an Arbitration Hearing to TPR (Pet. ¶ 22). The body of each Arbitration Summons directed each party (*i.e.*, Visual Beauty and TPR) that it was being summoned to attend an April 25, 2018 arbitration hearing and to bring documents specified in the attachments to the Summonses (*id.*). Each Arbitration Summons also made it clear that Visual Beauty and TPR each were being considered as a successor to YBF (*id.*). Sivanesan duly served those Arbitration Summonses on Visual Beauty, TPR and the YBF Respondents.<sup>1</sup>

A one-day hearing was conducted in New York City on April 25, 2018 (the “Hearing”). As the Arbitrator noted in her Final Award dated July 18, 2018 (the “Final Award”), the “Respondents did not appear at the Hearing despite the extensive record in the Arbitration of Claimant and JAMS’ provision of notice of the Arbitration and the proceedings therein to Respondents via telephone, email, mail and overnight delivery to multiple phone numbers, addresses and/or emails to Respondents” (Final Award at 2). Sivanesan provided telephonic testimony and provided “numerous supporting documents” (*id.*).

In the Final Award the Arbitrator concluded that: (1) David Schieffelin and Stacy Schieffelin were properly added as Respondents pursuant to a decision on a motion dated May 8, 2017; (2) Respondents Visual Beauty and TPR were properly added as Respondents based on evidence adduced at the arbitration hearing that they were successors in interest to YBF LLC; and (3) all parties were properly noticed of all claims and proceedings.

In the Arbitration Sivanesan sought: (i) to recover consulting fees in the amount of \$59,455.00 plus \$45,651.66 in interest at the statutory rate of 9% for the period of December 23, 2009 to July 2, 2018 for a total of \$105,106.66 (the “Consulting Fee”) and transaction fees including interest thereon (the “Transaction Fee”) owed to Claimant pursuant to the Consulting Agreement with the YBF Respondents, and their affiliates and successors in interest; (ii) to recover all equity distributions to which Claimant would have been entitled by virtue of the Transaction Fee set forth in the Consulting Agreement (the “Equity Distributions”); (iii) to require the YBF Respondents, Visual Beauty and TPR Holdings (“Respondents”) to pay any

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<sup>1</sup> As discussed below, when Respondents challenged the validity of the service of the Arbitration Summons, the Arbitrator concluded that they were properly served.

*Janu Sivanesan v YBF LLC et. al, Index No. 67996/2018*

Page 6

future distributions owed to Claimant as a result of the equity interest that Respondents were required to convey to Claimant under the Consulting Agreement as of September 30, 2009 (“Equity Interest”); (iv) to require Respondents to provide monthly reporting of financial statements of YBF or any entity that operates the YBF Beauty business and/or utilizes the YBF Marks (the “YBF Beauty Business”) including profit and loss statements, balance sheets, statement of cash flow, and bank statements; (v) to require Respondents to provide yearly audited financials and the filed copies of all federal and state tax returns from 2009 to the present and each year thereafter upon filing; (vi) to provide an accounting of all amounts owed pursuant to the Demand; (vii) to recover costs and expenses (including attorneys' fees) incurred by Claimant in obtaining the relief sought herein, and (viii) to obtain such other and further relief as the Arbitrator deems just and proper (Final Award at 2).

In the Final Award, the Arbitrator found that, under the Consulting Agreement, Sivanesan was to be paid an hourly rate of \$570 known as the Consulting Fee as well as the Transaction Fee in the event that YBF either entered into an agreement for, or consummated, a transaction to recover the license to the YBF Marks from CSE prior to the expiration of the Consulting Agreement (*id.* at 3). The Arbitrator found that “[i]n or about July 2009 to October 2009, [Sivanesan] provided the Consulting Services to Respondents pursuant to the Consulting Agreement.” She found that the “Transaction was consummated as of September 30, 2009 - months before the Consulting Agreement expired on January 20, 2019 - and thus the Transaction Fee is due and owing” (*id.* at 4). The Transaction Fee was to be paid at the closing of the Transaction on September 30, 2009 and all Consulting Fees were due by the conclusion of the Consulting Services. The Master Agreement by and between YBF and CSE effective as of September 30, 2009, pursuant to which YBF obtained the YBF Marks from CSE and Consulting Agreement were entered into evidence at the Hearing. The Consulting Agreement also provides for the payment of the costs and expenses (including reasonable attorneys' fees) of the prevailing party of any arbitration of any dispute, controversy or claim directly or indirectly relating to or arising out of the Consulting Agreement (*id.*).

The Arbitrator further concluded that Claimant demonstrated that despite her repeated efforts to obtain payment over the years and Respondents' consistent acknowledgment of the

*Janu Sivanesan v YBF LLC et. al, Index No. 67996/2018*

Page 7

debt, Respondents failed to pay the Consulting Fee, Transaction Fee, Equity Distributions, and Equity Interest. This was despite repeated assurances by YBF and the Schieffelins that payments would be forthcoming.<sup>2</sup> The Arbitrator further determined that no testimony or other evidence had been offered by Respondents to refute the claims set forth in the Amended Demand and at the Hearing (*id.*)

The Arbitrator also found that, subsequent to the commencement of the Arbitration and with full knowledge of the Arbitration proceeding, YBF Respondents transferred the YBF Beauty Business to Visual Beauty and TPR (*id.*).

The Arbitrator concluded that Respondents YBF and the Schieffelins breached the Consulting Agreement and are jointly and severally liable for all fees due and owing under the Consulting Agreement. The Arbitrator found that Respondents Visual Beauty and TPR, as successors in interest to YBF, are also liable for the fees due and owing under the Consulting Agreement. The Arbitrator also found that all Respondents owe Sivanesan an Equity Distribution and Equity Interest in YBF and its successors as part of the compensation for the Consulting Services provided by Sivanesan including the consummation of the Transaction as set forth above. She determined that, based on such reliance, Sivanesan provided the Consulting Services in good faith, and pursuant to the Consulting Agreement, services by which Respondents were enriched.

In contrast, the Arbitrator determined that Respondents failed to compensate Sivanesan the fair value for the services Claimant provided, specifically by failing to pay the Consulting Fee, Transaction Fee, Equity Distribution, and Equity Interest thereby entitling Claimant to a recovery including Consulting Fees and equitable distributions provided for in the agreement.

Based on the evidence presented in connection with the Hearing, the Arbitrator determined that Sivanesan was entitled to the relief sought in her Amended Demand and as further determined at the Hearing. The Arbitrator found each of the Respondents, YBF LLC, David Schieffelin, Stacey Schieffelin, Visual Beauty LLC and TPR LLC to be jointly and severally liable. She awarded Sivanesan the Consulting Fee in the amount of \$59,455.00 for

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<sup>2</sup> The Arbitrator also noted that Sivanesan submitted copies of the communications with the YBF Respondents demonstrating her attempt to collect moneys due to her.

*Janu Sivanesan v YBF LLC et. al, Index No. 67996/2018*

Page 8

professional services rendered through October 31, 2009, together with interest owed at the statutory rate of 9% for the period of December 23, 2009 to the present, equaling \$45,651.66. She further awarded Sivanesan \$47,802.98 for attorneys' fees and costs for a grand total of \$152,909.64 and ordered Respondents to provide documents including profit and loss statements, balance sheets, statements of cash flow and tax returns for YBF, as well as a statement of amounts paid for the purchase of YBF's Beauty Business within thirty days of the Award in order to determine Claimant's equitable interest in Respondents' business.

Following the Hearing, Sivanesan's counsel prepared a supplemental Affirmation and served documents on all Respondents documents demonstrating that the Visual Beauty/TPR Respondents had been added as parties and that Sivanesan sought money damages from them.

***D. VB/TPR's Objection to the Final Award and August 2018 Teleconference***

In correspondence dated August 1, 2018, counsel for the VB/YPR Respondents contacted JAMS purporting to "lodge a formal objection" to the arbitration award (Pet. ¶ 31, Ex. 9). The VB/TPR Respondents claimed that they were "never parties to the arbitration . . . never received any notice of claims asserted against them in the arbitration" and were not served with process in the arbitration (*id.*). They requested that the award be immediately modified to remove VB/TPR or vacated (*id.*).

On August 20, 2018, the Arbitrator presided over a conference call in which counsel for the VB/TPR Respondents appeared and participated. Following this call, on August 30, 2018 the Arbitrator issued the August 2018 Award in which she summarized the VB/TPR Respondents' objections. In the call, the VB/TPR Respondents claimed that they were not properly served with notice of the arbitral proceedings, and jurisdiction over them had not been obtained (August 2018 Award at 1). The Arbitrator noted that the arbitration had been pending for over two years, and that "Counsel for Claimant has gone out of her way to serve the Schieffelines and YBF LLC at every conceivable address including the one occupied by Visual Beauty and TPR" (*id.*). She also noted that some of the of the summons were served on Stacey Schieffelin and David Schieffelin in care of Visual Beauty at their residence. The Arbitrator explained that, when counsel became aware that YBF had been sold to Visual Beauty and TPR during the pendency of the arbitration, she issued a subpoena directed to those entities to appear at the hearing. In the August 2018

*Janu Sivanesan v YBF LLC et. al, Index No. 67996/2018*

Page 9

Award the Arbitrator found that the “subpoenas were properly served and respondents’ counsel has admitted receiving them” but that “Respondents neither sought to quash the subpoenas nor did they respond to them in any way.” As the Arbitrator stated, no one appeared at the hearing.

Importantly, the Arbitrator pointed out that, during the hearing, Counsel for Claimant submitted documents indicating that TPR and Visual Beauty had purchased all of YBF’s assets and that, based on those documents, she found that “TPR was a successor entity to YBF and thus responsible for debts incurred by YBF” (August 2018 Award at 2). She also noted that Respondents had “ample opportunity to do so either prior to or at the hearing” and that the subpoenas served on the VB/TPR Respondents made clear that TPR was being considered a successor LLC to YBF (*id.*). In the August 2018 Award the Arbitrator found that vacating or reconsidering her award was not warranted and declined to do so. The Arbitrator also noted that she asked if Respondents would pay for a renewed hearing, acknowledge jurisdiction, and submit to questioning, but counsel for Respondents would not accede to her request (*id.*).

**PETITION TO CONFIRM THE ARBITRATION AWARD (MOT. SEQ. 001)**

***A. Petitioner’s Petition to Confirm the Arbitration Award***

On October 12, 2018, Sivanesan filed a Petition “pursuant to section 9 of the Federal Arbitration Act (*i.e.* 9 U.S.C. § 9) and other applicable law” for an order confirming the Final Award and entering a final judgment on the Final Award (Pet. at 1). In short, Petitioner argues that “[b]ecause Respondents pursued a deliberate strategy whereby they determined not to participate in any aspect of the arbitration proceeding, and disregarded Summonses issued by Arbitrator Freedman, the Final Award made specific findings and conclusions addressing fairness issues” (Pet. at 12). Petitioner also summarizes the Arbitrator’s conclusions in the Final Award regarding liability and damages, as well as the August 2018 conference call and the subsequent August 2018 Award in which she denied Respondents’ Formal Objection to the Final Award and determined that “vacating or reconsidering [her] award was not warranted” (Pet. at 19-20).

In her Petition, Petitioner requests that the Court issue an Order confirming the Final Arbitration Award, entering a judgement upon such an Award, and issuing an Order “requiring Respondents to provide documents including profit and loss statements, balance sheets, statements of cashflow, and tax returns for YBF, as well as a statement of amounts paid for the

*Janu Sivanesan v YBF LLC et. al, Index No. 67996/2018*

Page 10

purchase of YBF's Beauty Business within 30 days in order to determine Sivanesan's equitable interest in Respondents' business" (Pet. at 21).

***B. VB/TPR Respondents' Opposition to Petitioner's Petition to Confirm Arbitration Award***

In Opposition, the VB/TPR Respondents/ Cross Petitioners argue that, "[a]s set forth in the Cross Petition of Respondents, the Defective Award cannot be confirmed and must be vacated on several independent grounds, most conspicuously, because it completely violates the most basic due-process rights of Respondents" (Pet. Opp. at 1). The VB/TPR Respondents contend that Petitioner seeks confirmation of an arbitration award that was "spontaneously entered against Respondents as non-parties" at the Hearing (*id.*).<sup>3</sup>

They claim that the Arbitrator's grant of Petitioner's oral motion to add the VB/TPR Respondents as parties on the day of the Hearing pursuant to "an oral *ex-parte* motion made by Claimant at the hearing"<sup>4</sup> was improper because "prior to the Arbitration Hearing, Respondents were: (i) never parties to the arbitration; (ii) never named as parties in the arbitration; (iii) never served with any process as parties in the arbitration; (iv) never had any claims asserted against them in the arbitration; and (v) never had any relationship whatsoever with Claimant (much less any agreement to arbitrate with Claimant)" (*id.* at 1-2). The VB/TPR Respondents contend that they are "complete strangers" to the action, have never had any business or contractual relationship with Claimant, nor have "ever had any conceivable obligation to arbitrate with Claimant" (*id.* at 2).

The VB/TPR Respondents argue that Claimant's claims relate to the breach of a 2009 contract between Claimant and YBF LLC, as the named Respondent against which Claimant commenced the Arbitration (*id.*) They further contend that the "only relationship which Respondents have ever had with YBF LLC or the other named respondents in the Arbitration

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<sup>3</sup> The VB/TPR Respondents contend that New York law and CPLR article 75, rather than the FAA govern this arbitration. As discussed herein, regardless of which standard governs, the Arbitrator's Award shall be confirmed.

<sup>4</sup> Notably, the other Respondents failed to respond to the Arbitrator's subpoena or attend the Hearing.

*Janu Sivanesan v YBF LLC et. al, Index No. 67996/2018*

Page 11

related to an arms-length purchase of assets from YBF LLC that occurred in 2016” and that “during all relevant periods, Claimant was aware of this asset purchase and its arms-length nature” (*id.*).

They further argue that “at no time prior to the award against Respondents were Respondents ever identified as parties to the arbitration or were served with process in the proceedings” and that “the first and only documents directed to the VB/TPR Respondents specifically<sup>5</sup> in the Arbitration prior to the award were two third-party summons dated March 27, 2018” (*id.*). The VB/TPR Respondents admit that the Summons directed them to provide requested information at the Hearing regarding the asset purchase and the status of the proceeds of the sale transaction, but claim that it “explicitly indicated to Respondents that the Arbitrator did not have jurisdiction over Respondents and that jurisdiction rested with the federal and state courts of New York” and that it also “explicitly indicated to Respondents that [sic] only potential result of their refusal or neglect to obey the Third-Party Summons was for Claimant to Petition ‘a competent court of the State of New York’ to ‘compel [Respondents’] attendance, or punish [Respondents’] for contempt’” (*id.*).

**C. *Petitioner’s Memorandum in Further Support of Petition to Confirm Award***

In her Memorandum of Law in Further Support (“Pet. Reply”) Petitioner argues that this matter is governed by the FAA because the underlying transaction clearly involved interstate commerce and therefore Article 75 of the CPLR is irrelevant and inapplicable unless it is consistent with the FAA (Pet. Reply at 1). Petitioner notes that the Arbitrator is eminently qualified, having been elected to the New York State Supreme Court in 1988, having served as an acting Supreme Court Justice, and having been designated as Presiding Judge of the Litigation Coordinating Panel for multi-district litigation in New York State (*id.* at 2). Petitioner argues that the Arbitrator took care to make findings of fact concluding that Visual Beauty and TPR were properly added as Respondents based on evidence presented at the Hearing, that they were successors in interest to YBF, and that they were properly noticed of all claims and proceedings. According to Petitioner, Respondents failed to provide any admissible evidence refuting the

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<sup>5</sup> The VB/TPR Respondents therefore concede that they received notice of the Arbitration weeks prior to the Hearing, yet failed to respond or appear.

*Janu Sivanesan v YBF LLC et. al, Index No. 67996/2018*

Page 12

Arbitrator's conclusions regarding proper notice (*id.* at 3). Petitioner also notes that the VB/YBR Respondents involved themselves in the arbitration proceeding through filing documents and participating in a telephonic conference to argue that the Final Award should be vacated.

Petitioner argues that even if the Arbitrator imperfectly applied the law with respect to successor liability, it is not a basis for refusing to confirm her awards, as courts may only vacate arbitration awards for an overt disregard of the law and not merely for an erroneous interpretation (*id.* at 8-10). She also contends that "due process was satisfied because the VB/TPR Respondents possessed adequate notice and an opportunity to be heard - even if they chose not so avail themselves of it" (*id.* at 10). Petitioner argues that VB/TPR Respondents' memorandum in opposition inappropriately contains hearsay statements made by the Arbitrator and others during the August 20, 2018 telephonic conference and that these comments should be ignored or stricken (*id.* at 13-14). Petitioner contends that, pursuant to JAMS Rule 30 arbitrator testimony (and therefore certainly arbitrator hearsay testimony) is prohibited.<sup>6</sup>

**VB/TPR RESPONDENTS' CROSS PETITION TO VACATE THE AWARDS**  
**(MOT. SEQ. 002)**

***A. Cross Petition to Vacate the Awards***

In their Cross Petition ("Cross Pet"), Cross Petitioners seek an order "pursuant to article 7511 of the New York Civil Practice Law and Rules (the "CPLR"); and, to the extent held applicable, section 10 of the Federal Arbitration Act, vacating the two (2) awards issued by JAMS and arbitrator Helen Freedman (the "Arbitrator") against Cross Petitioners," the Final Award and the August 2018 Award (Cross Pet. at 1). Cross Petitioners contend that they were not parties to the arbitration nor received any notice of any claims asserted against them prior to

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<sup>6</sup> JAMS Com. Arb. R. and Pro. Rule 30 titled Disqualification of the Arbitrator as a Witness or Party and Exclusion of Liability provides:

(a) The Parties may not call the Arbitrator, the Case Manager or any other JAMS employee or agent as a witness...in any pending or subsequent litigation or other proceeding involving the Parties and relating to the dispute that is the subject of the Arbitration. The Arbitrator, Case Manager and other JAMS employees and agents are also incompetent to testify as witnesses...in any such proceeding.

*Janu Sivanesan v YBF LLC et. al, Index No. 67996/2018*

Page 13

entry of the these Awards and, therefore, in issuing the Awards the Arbitrator “manifestly disregarded the law and evidence, exceeded her powers as an arbitrator, violating public policy, and utterly failing to discharge her duties in accordance with the law and the guidelines governing the arbitration” (*id.* at 2).

The VB/TPR Respondents argue that the Arbitration was never commenced or amended to include them and that the “Named Respondents” (*i.e.*, TBF LLC, David Schieffelin and Stacey Shieffelin) were the only parties ever served with the pleadings or notices in the Arbitration. The VB/TPR Respondents argue that the only document actually directed to them throughout the Arbitration was “a third-party summons issued by the Arbitrator, on or about March 27, 2018 seeking documents and testimony from Cross Petitioners as non-parties to the Arbitration,” and that these subpoenas were served “literally weeks before the sole and final arbitration hearing conducted in the Arbitration was held on April 25, 2018” (*id.* at 5-6). The VB/TPR Respondents claim that neither of these documents “indicated to Cross Petitioners in any way either that Claimant had asserted any claims against them in the Arbitration - or that the Arbitrator had asserted jurisdiction over them as respondent parties in the Arbitration” (*id.* at 7). They argue that the subpoenas did not indicate that the appearance requested was an appearance at a hearing on claims asserted against them nor that “noncompliance with the non-party subpoenas was might result in their addition as parties to the Arbitration and award against them as parties” (*id.*).

The VB/TPR Respondents contend that their “spontaneous” addition at the Hearing was without notice and the opportunity to be heard. They argue that “[a]lthough every detail of the events surrounding issuance” of the Award “remains unknown to Cross Petitioners,” the Arbitrator appears to have granted an oral request by Claimant *made for the first time at the hearing* to add Cross Petitioners as respondent-parties in the Arbitration and enter an award holding them jointly and severally liable with the Named Respondents for the claims asserted in the Action as purported successors in interest” (*id.*). They claim to have “indirectly discovered that the award had been issued and immediately acted to have the award vacated,” pointing out “the complete lack of notice to Cross Petitioners of the proceedings against them” (*id.* at 8).

They claim that in the August conference call, the Arbitrator “explicitly represented that

*Janu Sivanesan v YBF LLC et. al, Index No. 67996/2018*

Page 14

JAMS acknowledged defects with the service of Cross Petitioners underlying the award” and that “the Arbitrator further explained that her award against Cross Petitioners was made largely based upon their failure to appear at the Arbitration Hearing in compliance with the Third-Party Subpoenas - emphasizing that the Arbitration had been pending for many years - and that proceedings to compel compliance with the subpoenas in state or federal court would have further delayed the Arbitration significantly” (*id.* at 9). The VB/TPR Respondents also claim that “the service documents in the Arbitration provide a complete record of lack of service performed in the Arbitration” and that the service lists and Affidavits of Service prepared by JAMS and Claimant confirm that they were never parties to the Arbitration nor were they served with any pleadings or notices other than the subpoenas prior to the Arbitration when they were added as parties (*id.* at 10).

The VB/TPR Respondents contend that the Final Award must be vacated based on due process violations “under any applicable standard” (*id.* at 12). They argue that the circumstances surrounding entry of the Final Award confirm a complete “disregard for basic due process rights of Cross Petitioners and fundamental unfairness to them in the Arbitration to their severe prejudice” (*id.* at 13). They argue that “far less egregious violations of due process than those present here have been vacated under CPLR 7511(b)(1)(iv)” and that the “Arbitrator’s conclusion that service of a single non-party subpoena upon Cross Petitioners established adequate notice of the claims and proceedings against them as parties so as to satisfy basic due process requirements – is simply shocking” (*id.* at 13-14.).

The VB/TPR Respondents also argue that their factual contentions provide independent grounds for vacating the Awards under CPLR 7511(b), including in that the Arbitrator “exceeded her authority in entering the award” and that the Awards should be vacated as a matter of public policy (*id.* at 15-16).

***B. Petitioner’s Opposition to Cross Petition to Vacate Awards***

In her Memorandum of Law in Opposition to the VB/TPR Respondents Cross-Petition to Vacate (“Cross-Pet. Opp.”), Petitioner Sivanesan argues that the VB/TPR Respondents already sought to vacate the Arbitrator’s Final Award on the same grounds identified in their recently filed Cross Petition (*id.* at 1). Sivaneson argues that the VB/TPR Respondents have actively

*Janu Sivanesan v YBF LLC et. al, Index No. 67996/2018*

Page 15

invoked the jurisdiction of Arbitrator Freedman and JAMS by filing with JAMS both a Formal Objection and Formal Request seeking to vacate the Final Award (*id.*). She contends that, after receiving briefing and oral argument on these issues, Arbitrator Freedman issued her August 2018 Award rejecting the VB/TPR Respondents' claims of due process violations premised on insufficient notice of the proceeding and the claims against them, and affirming her previous well supported conclusion that they are jointly and severally liable to Petitioner based on successor liability principles. According to Petitioner, the Cross-Petition provides no factual or legal basis for overturning the August 2018 Award and instead "seeks to vacate the Final Award—which has already been rejected in a fair proceeding held by Arbitrator Freedman" (*id.*). Sivanesan argues that, for the reasons provided below, and in previous submissions, this Court should deny the Cross Petition and grant Sivanesan's Verified Petition to Confirm.

She also argues that the Cross Petition must be denied because it was filed late—20-days after the deadline for filing the Cross Petition set in the January 18, 2019 stipulated Order issued by this Court, and that the Cross-Petition inappropriately relies on inadmissible hearsay statements and other irrelevant matters that should not be considered by the Court (*id.* at 2).

In short, Petitioner Sivanesan argues that, because the "Cross-Petition filed by the VB/TPR Respondents is overwhelmingly duplicative of their February 28, 2019 Memorandum of Law in Opposition to Petitioner's Petition to Confirm Arbitration Award, Sivanesan hereby incorporates by reference her March 20, 2019 Memorandum of Law in Further Support of Janu Sivanesan's Verified Petition to Confirm Arbitration Award, as well as her Verified Petition to Confirm Arbitration Award (with exhibits), and her Memorandum of Law in Support of Janu Sivanesan's Verified Petition to Confirm Arbitration Award that was filed on or about October 12, 2018" (*id.*). Specifically, and not by way of limitation, Petitioner adopts the following arguments from her Memorandum of Law in Further Support of Janu Sivanesan's Verified Petition to Confirm Arbitration Award:

- A. The FAA Governs this Action, Not Article 75 of the CPLR;
- B. The Arbitrator's Finding of Successor Liability Must Not be Set Aside;
- C. Arbitrator Freedman's Final Award and Award Are Consistent with Due Process;
  1. The VB/TPR Respondents Waived Their Due Process And Other Objections

*Janu Sivanesan v YBF LLC et. al, Index No. 67996/2018*

Page 16

by Participating in the Arbitration Process without any reservation of rights;

2. The VB/TPR Respondents Were Afforded Due Process Consisting of Adequate Notice and a Fair Opportunity to Participate in the Hearing; and

D. Hearsay Statements Attributed to the Arbitrator (Or Others) Should be Ignored or Stricken.

### LEGAL DISCUSSION

The Court agrees with Petitioner's argument that because the VB/TPR Respondents failed to timely serve and file their Cross Petition and Opposition in accordance with this Court's scheduling order and failed to provide any excuse (let alone good cause) for why their Cross Petition and Opposition were filed late, their arguments in support of their position that the Awards should be vacated should not be considered by this Court<sup>7</sup> (*see Yonir Tech., Inc. v Duration Sys. [1992] Ltd.*, 244 F Supp 2d 195, 206 [SDNY 2002] ["Both federal and state law require that motions to vacate arbitration awards be timely"]; *Matter of Lyden v Bell*, 232 AD2d 562, 564 [2d Dept 1996] [denying motion to vacate and/or modify the arbitration award as untimely]; *Matter of State Farm Mut. Auto. Ins. Co. v Elias*, 221 AD2d 547, 548 [2d Dept 1995] [denying application to vacate because it was untimely]; *Florasynth, Inc. v Pickholz*, 750 F2d 171, 175 [2d Cir 1984] ["defendant's failure to move to vacate the [arbitration] award within the...time provided precludes him from later seeking that relief when a motion is made to confirm the award"]). In any event, even if the Court considered Respondents' objections to the Awards, the Awards would be confirmed.

The Court does not agree with Cross Petitioners' argument that because they had no relationship with Petitioner – “much less a contractual relationship with [Petitioner] that entitles [her] to arbitrate claims against them” – there is no basis for Petitioner to have arbitrated any claims against them (Cross Pet. at ¶ 2). Based on the subpoenas issued, Visual Beauty and TPR knew that as part of the proceeding, the Arbitrator intended on taking evidence on the issue of Visual Beauty and TPR as successors in interest to YBF such that they should be held liable for

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<sup>7</sup> The Court's January 18, 2019 Order provided a February 8, 2019 deadline for filing a Verified Cross-Petition to Vacate the Arbitration Award and the VB/TPR Respondents' Cross Petition was filed on February 28, 2019.

*Janu Sivanesan v YBF LLC et. al, Index No. 67996/2018*

Page 17

YBF's alleged defaults. The Arbitration Summonses, served a month before the Hearing, expressly noted that Petitioner was seeking liability against a John and Jane Doe who "at all relevant times held and continue to hold the YBF Marks" (Pet. Ex. 3 ¶ 7 and Ex. E).

Visual Beauty and TPR did not seek to stay that arbitration and the Arbitrator proceeded to take evidence on this issue during the Hearing from which Visual Beauty and TPR absented themselves. At the conclusion of the Hearing, the Arbitrator found that Visual Beauty and TPR were the successors in interest to YBF, the signatory to the Consulting Agreement and arbitration clause, and, as such, they are bound to arbitrate (*see Matter of AT&S Transp., LLC v Odessa Logistics & Tech. Corp.*, 22 AD3d 750 [2d Dept 2005]; *Personal Communications Devices, LLC v HTC Am. Inc.*, 40 Misc 3d 790 [Sup Ct., Suffolk County 2013]; *Stotter Div. of Graduate Plastics Co. v District 65, United Auto Workers AFL-CIO*, 991 F2d 997 [2d Cir 1993]<sup>8</sup>) and they cannot use their "tactical choice to absent [themselves] from the arbitration" as a means to vacate the Awards (*Bridgepointe Master Fund Ltd. v Biometrx, Inc.*, 2009 WL 4756440 at \*3 [SDNY 2009]; *see also Miss Universe L.P. v Monnin*, 952 F Supp 2d 591 [SDNY 2013]; *Matter of Klein v Pereirar*, 2014 NY Slip Op 51055[U], 44 Misc 3d 1208[A] [Sup Ct, Kings County 2014], *affd* 140 AD3d 958 [2d Dept 2016]).

An arbitration award will be confirmed upon application of a party made within one year after its delivery, "unless the award is vacated or modified upon a ground specified in section 7511" (CPLR 7510). "The purpose of arbitration is to allow final, binding resolution of parties' claims without resorting to the courts. The scope of review of an arbitration decision is extremely limited. As a result, great deference is given to any arbitration award" (*In re Broadcast Music*

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<sup>8</sup>The Court finds the Second Circuit's decision in *Stotter* instructive. In that case, even though the successor entity had not been made a party to the arbitration, the Second Circuit affirmed the District Court's confirmation of the arbitration award as against the successor company holding

*Stotter*, GPC's predecessor, was properly served pursuant to the AAA rule, and the various communications to GPC regarding the arbitration satisfied the purpose of the rule, even assuming that GPC's full participation in the arbitration did not constitute a waiver of the requirement. Judgment upon such procedural aspects of the arbitration, furthermore, is a matter for the arbitrator, not his (or any other) court (*Stotter Div. of Graduate Plastics Co.*, 991 F2d at 1001).

*Janu Sivanesan v YBF LLC et. al, Index No. 67996/2018*

Page 18

*Inc.*, 2006 NY Slip Op 52043[U], 13 Misc 3d 1228 [A], 2006 WL 3026328 [Sup Ct, NY County 2005]).

Pursuant to CPLR 7511(b)(1), an arbitration award may be vacated if “an arbitrator ... exceeded his power ....”, which “occurs only where the arbitrator’s award (1) violates a strong public policy, (2) is irrational, or (3) clearly exceeds a specifically enumerated limitation on the arbitrator’s power” (*Matter of Local 342 v Town of Huntington*, 52 AD3d 720, 720 [2d Dept 2008]; *Matter of Board of Educ. of Arlington Cent. School Dist. v Arlington Teachers Assn.*, 78 NY2d 33, 37 [1991]). The party moving to vacate the award bears the burden of establishing by clear and convincing evidence the grounds for vacatur (*see Berg v Berg*, 85 AD3d 952 [2d Dept 2011]; *Muriel Siebert & Co. v Ponmany*, 190 AD2d 544 [1st Dept 1993]).

Similar to CPLR 7511, under the Federal Arbitration Act (“FAA”), arbitration awards are subject to “extremely limited review” and the standard to vacate the award is extremely high with the party moving to vacate the award having the burden of proof (*Sawtelle v Waddell & Reed, Inc.*, 304 AD2d 103, 108 [1st Dept 2003]). As noted by the *Sawtelle* court:

“[M]anifest disregard ‘clearly means more than error or misunderstanding with respect to the law ....’” and “to modify or vacate an award on this ground, a court must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case” ... “[A] court may infer that the arbitrators manifestly disregarded the law if it finds that the error made by [them] is so obvious that it would be instantly perceived by the average person qualified to serve as an arbitrator” ... [i]f there is ‘even a barely colorable justification for the outcome reached,’ the court must confirm the arbitration award” (*Sawtelle*, 304 AD2d at 108 [citations omitted]; *see also Cheng v Oxford Health Plans, Inc.*, 45 AD3d 356, 357 [1st Dept 2007]).

Thus, even if the FAA controls, while the standard may not be clear and convincing, it is nevertheless stringent (*U.S. Elec., Inc. v Sirius Satellite Radio, Inc.*, 17 NY3d 912 [2011]).

An award is rational if “any basis for [its] conclusion is apparent to the court” (*Caso v Coffey*, 41 NY2d 153, 158 [1979]) and is irrational only if there is no proof to justify it (*Matter of Jadhav v Ackerman*, 62 AD3d 797, 798 [2d Dept 2009]). Thus, “[a]n arbitration award is irrational if there is no proof to justify it or its construction of the provisions in dispute, in effect, creates a new contract for the parties ... ‘The mere fact that a different construction could have

*Janu Sivanesan v YBF LLC et. al, Index No. 67996/2018*

Page 19

been accorded the provisions concerned and a different conclusion reached does not mean that the arbitrators so misread those provisions as to empower a court to set aside the award” (*Matter of City of Peekskill v Local 456, Intl. Brotherhood of Teamsters*, 49 AD3d 730, 731 [2d Dept 2008], quoting *Matter of Natl. Cash Register Co. v Wilson*, 8 NY2d 377, 383 [1960]; see also *Matter of Rockland County Bd. of Cooperative Educ. Serv. v Boces Staff Assn.*, 308 AD2d 452 [2d Dept 2003]).

A legal error by an arbitrator is not, by itself, a proper basis for permitting a disappointed party to avoid the result decreed by the body that the party agreed would render a final and binding determination (see *Matter of Sprinzen v Nomberg*, 46 NY2d 623, 629-630 [1979]). Thus, “[e]ven if the arbitrators misapply substantive rules of law or make an error of fact, unless one of the three narrow grounds applies in the particular case, the award will not be vacated” (*Matter of Chin v State Farm Ins. Co.*, 73 AD3d 918, 919 [2d Dept 2010], quoting *Matter of Erin Constr. & Dev. Co. v Meltzer*, 58 AD3d 729, 730 [2d Dept 2009]).

The Appellate Division Second Department has outlined the relevant considerations as follows:

“Courts are bound by an arbitrator’s factual findings, interpretation of the contract and judgment concerning remedies” ... A court reviewing an arbitration award may not “re-weigh or re-examine the evidence” ... or otherwise “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” ... The Court of Appeals has “stated time and again that an arbitrator’s award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice” (*Matter of Miro Leisure Corp. v Prudence Orla, Inc.*, 83 AD3d 945, 945-946 [2d Dept 2011] [citations omitted]; see also *Matter of Kowaleski v New York State Dept. of Correctional Services*, 16 NY3d 85, 91 [2010] [courts lack authority to review arbitral decisions, even where an arbitrator has made an error of law or fact] ).

“An arbitrator is not bound by principles of substantive law or rules of evidence, and may do justice and apply his or her own sense of law and equity to the facts as he or she finds them to be” (*Matter of Chin, supra*, 73 AD3d at 740, quoting *Matter of Erin Constr. & Dev. Co., supra*, 58 AD3d at 730) even if that results in “an award reflecting the spirit rather than the letter of the agreement” (*Fitzgerald v Fahnestock & Co.*, 48 AD3d 246, 247 [1st Dept 2008],

*Janu Sivanesan v YBF LLC et. al, Index No. 67996/2018*

Page 20

quoting *Matter of Silverman v Benmor Coats, Inc.*, 61 NY2d 299, 308 [1984]).

It is well settled that “[i]n reviewing an award, a court is bound by the arbitrator’s factual findings and interpretations of the contract ... [and] a court ‘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’” (*Matter of Brown & Williamson Tobacco Corp. v Chesley*, 7 AD3d 368, 372 [1st Dept 2004], quoting *Matter of New York State Correctional Officers & Police Benevolent Assn.*, 94 NY2d 321, 326 [1999]).

Thus, as with the irrationality standard, “[e]ven if the panel erred in making its legal conclusion ... or failed to understand the law, such error does not equate to a manifest disregard for the law” and “the manifest disregard standard does not permit review of the panel’s interpretation of the parties’ agreement even if that interpretation was erroneous” (*Cantor Fitzgerald Sec. v Refco Sec., LLC*, 83 AD3d 592, 592 [1st Dept 2011]).

The Arbitrator found that “Counsel for Claimant has gone out of her way to serve the Schieffelins and YBF LLC at every conceivable address including the one occupied by Visual Beauty and TPR” (August 2018 Award at 1). Moreover, as the Arbitrator pointed out, some of the summons were served on Stacey Schieffelin and David Schieffelin in care of Visual Beauty at the very address where these respondents reside (*id.*). The VB/TPR Respondents possessed notice and a fair opportunity to participate in the arbitration hearing.<sup>9</sup>

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<sup>9</sup> As Petitioner notes, in light of the compelling policy reasons favoring arbitration, arguments that the VB/TPR Respondents did not receive formal service of process or other formal notice should be disregarded in light of the fact they received adequate actual or constructive notice (*Sanders v Gardner*, 7 F Supp 2d 151, 169 [EDNY 1998] [award confirmed when actual and timely notice received, although party did not participate in the arbitration hearing]; see also, e.g., *Gingiss Intern., Inc. v Bormet*, 58 F3d 328, 332 [7th Cir 1995] [“Inadequate notice is not one of [the statutory] grounds” for vacating an arbitration award]; *Bernstein Seawell & Kove v Bosarge*, 813 F2d 726, 729-30 [5th Cir 1987] [party did not receive the arbitration notice but received constructive notice of hearing, and the court affirmed the confirmation of the arbitration award finding “due process is not violated if the hearing proceeds in the absence of one of the parties when that party’s absence is the result of his decision not to attend”]; *Merrill Lynch, Pierce, Fenner & Smith v Lecopulos*, 553 F2d 842, 845 [2d Cir 1977] [“no unfairness results from giving effect to the notice they actually received”]; *Borop v Toluca Pacific Securities Corp.*, 1997 WL 790588, at \*2 n. 7 [ND Ill 1997] [“Absent fraudulent or improper conduct, defective notice cannot justify an order vacating an arbitration award under

*Janu Sivanesan v YBF LLC et. al, Index No. 67996/2018*

Page 21

“It is well settled that, when a dispute has moved to arbitration, a party seeking to vacate the ultimate award must meet a heavy burden, for once the issue is properly before the arbitrators, questions of law and fact are merged in the award and are not within the power of the judiciary to resolve” (*North Syracuse Central School Dist. v Northern Syracuse Educ. Assoc.*, 45 NY2d 195, 200 [1978]; see also *Matter of Fintz v Reid*, 2007 WL 7652172 (Sup Ct, Nassau County 2007)). The Arbitrator’s cogent and thorough Final Award and August 2018 Award, as set forth above, are more than sufficient to justify confirmation of her decision.

### CONCLUSION

The Court has read the following papers with regard to these motions:

- 1) Notice of Petition dated October 12, 2018; Affidavit of Janu Sivanesan, sworn to October 12, 2018, together with the exhibits annexed there; and Memorandum of Law dated October 12, 2018;
- 2) Notice of Cross-Petition dated February 27, 2019; Verified Cross-Petition dated February 27, 2019; Affirmation of Scott L. Swanson, dated February 27, 2019, together with the exhibits annexed there; and the Memorandum of Law dated February 28, 2019,
- 3) Memorandum of Law in Opposition to Cross-Petition to Vacate, dated March 20, 2019;
- 4) Memorandum of Law in Support of Petition to Confirm Arbitration Award dated March 20, 2019.

Based upon the foregoing and for the reasons set forth above it is hereby

ORDERED that the Final Award transmitted on July 16, 2018 (the “Final Award”) by JAMS and ordered by the Honorable Helen E. Freedman presiding as the sole arbitrator in Janu Sivanesan’s arbitration action against Respondents YBF LLC, David Schieffelin and Stacey Schieffelin (collectively, the “YBF Respondents”), and Respondents Visual Beauty LLC and

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Section 10 of the FAA. 9 U.S.C. § 10. Thus, any defects in notice here do not provide justification for an order vacating the arbitration award.”]; *Marsillo v Geniton*, 2004 WL 1207925, at \*5-6 [SDNY 2004] [although it was unclear whether petitioner received all arbitration-related correspondence, award was confirmed where he had actual notice of NASD arbitration proceedings and “his failure to make any inquiries” about other correspondence “suggest that [he] simply chose to ignore the arbitration proceedings”)].

*Janu Sivanesan v YBF LLC et. al, Index No. 67996/2018*

Page 22

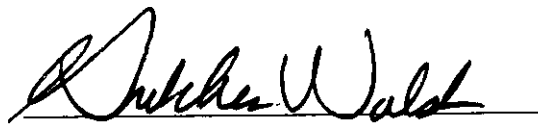
TPR Holdings LLC (collectively, the “VB/TPR Respondents,” and the YBF Respondents and the VB/TPR Respondents collectively being referred to as the “Respondents”), as supplemented by Arbitrator Freedman’s August 30, 2018 Award (the “Award”) denying the formal objection of the VB/TPR Respondents seeking to modify or otherwise vacate the Final Award (collectively, the Award and the Final Award being referred to as the “Final Arbitration Award”) is confirmed; and it is further

ORDERED that the Respondents are required to provide documents including profit and loss statements, balance sheets, statements of cashflow, and tax returns for YBF LLC, as well as a statement of amounts paid for the purchase of YBF LLC’s Beauty Business within 30 days in order to determine Janu Sivanesan’s equitable interest in Respondents’ business; and it is further

ORDERED that Petitioner shall, pursuant to the provisions of 22 N.Y.C.R.R. §202.48, submit a proposed judgment, in accordance with the provisions of this Decision and Order, together with any bill of costs, to this Court (and not the Clerk of the Court) noticed for settlement for January 10, 2020 (on submission, no appearances required).

Dated: White Plains, New York  
December 23, 2019

ENTER:



HON. GRETCHEN WALSH, J.S.C.

*Janu Sivanesan v YBF LLC et. al, Index No. 67996/2018*

Page 23

APPEARANCES:

BOWMAN AND BROOKE LLP

By: Christopher R. Carton

Erica S. Mekles

317 George Street, Suite 320

New Brunswick, NJ 08901

By: Charles (C.J.) Schoenwetter (*Pro Hac Vice Motion to be filed*)

150 South Fifth Street, Suite 3000

Minneapolis, MN 55402

*Attorneys for Petitioner Janu Sivanesan*

CERVINI SWANSON LLP

By: Scott L. Swanson

500 Fifth Avenue # 3020

New York, New York 10110

*Attorneys for Cross Petitioners TPR Holdings LLC  
and Visual Beauty LLC*