**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION**

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| BAMBERGER ROSENHEIM, LTD., | * | |
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| Petitioner, | * | |
| | * | |
| v. | * | 1:15-CV-04460-ELR |
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| OA DEVELOPMENT, INC., | * | |
| | * | |
| Respondent. | * | |
| | * | |

# ORDER

This matter comes before the Court following arbitration. Presently pending are (1) Petitioner's Motion to Vacate the Arbitration Award in favor of Respondent (Doc. No. 9); (2) Petitioner's alternative Motion to Modify Arbitration Award in favor of Respondent (Doc. No. 10); (3) Petitioner's Motion to Modify and Confirm the Arbitration Award granted in its favor (Doc. No. 11); and Respondent's Petition to Confirm Arbitration Award (Doc. No. 28). Upon review of the briefs in this matter, and with the benefit of oral argument, the Court's rulings on these matters are as set forth below.

## I. Background

Petitioner Bamberger Rosenheim, Ltd., also referred to as Profimex,[1] (hereinafter "Profimex") is an Israeli company that operates as an aggregator of capital for real estate investments worldwide. Respondent OA Development, Inc. (hereinafter "OAD") is a Georgia corporation which invests in, develops, manages, and brokers real estate projects in the United States.

On or about March 31, 2008, OAD entered into a Solicitation Agreement with Profimex. With the Solicitation Agreement, OAD appointed Profimex as the exclusive placement agent to secure investors in Israel for OAD's real estate projects. Pursuant to the terms of the Solicitation Agreement, each party would be entitled to charge various fees for services rendered under the contract. Generally speaking, OAD would present a property it wished to purchase to Profimex with a business plan showing the potential for the investment. Profimex then would have the option of providing, through its investor network in Israel, a portion of the funds necessary to acquire and maintain the property.

The Solicitation Agreement was to be governed by New York law. Further, in the event of any dispute with respect to the agreement, the following arbitration provision applied:

> Any disputes with respect to this Agreement or the performance of the parties hereunder shall be submitted to binding arbitration proceedings

[1] Profimex Ltd. is Bamberger's wholly-owned subsidiary.

> conducted in accordance with the rules of the International Chamber of Commerce. Any such proceedings shall take place in Tel Aviv, Israel, in the event the dispute is submitted by OAD, and in Atlanta, Georgia, in the event the dispute is submitted by Profimex.

(Doc. No. 9-3 at ¶ 9(a).)

The Solicitation Agreement terminated on March 31, 2013. During the contract period, the parties participated in a number of real estate projects. However, in February 2014, OAD sold one of the projects, which Profimex claims entitled it to a Promote Fee and a Disposition Fee, which OAD did not pay. Based on this, Profimex filed a Request for Arbitration with the International Chamber of Commerce ("ICC"). In its answer to the Arbitration Request, OAD included a counterclaim for defamation based on statements made by Profimex.

The arbitration took place in Atlanta, Georgia before Mr. Nisbet S. Kendrick ("the Arbitrator"). Early in the arbitration, Profimex challenged the Arbitrator's jurisdiction to consider the defamation counterclaims, contending that those claims must be brought in Tel Aviv, Israel. (Doc. No. 1-6.) The Arbitrator rejected Profimex's challenge. (Doc. No. 28-6.)[2] From September 2014 through June 2015, the Arbitrator ruled on various motions to dismiss and exclude testimony and conducted hearings. The final arbitration hearing took place from July 6, 2015 through July 10, 2015. The Arbitrator additionally received post-hearing briefs.

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[2] In the Arbitrator's final award, he indicated that the International Court of Arbitration adopted the Arbitrator's finding that the Tribunal had jurisdiction over the counterclaims asserted by OAD. (Doc. No. 28-38 at ¶ 6.)

On November 30, 2015, the Arbitrator rendered his final decision and award. The Arbitrator's final award found in favor of Profimex on its breach of contract claims. As to the Promote Fee, the Arbitrator found OAD liable for $296,052.00 in principal, $34,674.58 as pre-award interest, and $70,949.49 in attorney's fees and expenses. As to the Disposition Fee, the Arbitrator awarded Profimex $94,500.00 in principal, but expressly declined to award attorney's fees or interest.[3] On the defamation counterclaims, the Arbitrator found in OAD's favor. On these claims, the Arbitrator awarded OAD $500,000.00 in general damages, $200,000.00 in punitive damages, and $250,000.00 in attorney's fees based on the claims of defamation. The total award to OAD equaled $950,000.00. The Arbitrator also denied Profimex's claim for attorney's fees and expenses related to defending against OAD's counterclaims.

On December 23, 2015, Profimex filed a petition in this Court to vacate or modify the arbitration award on the defamation claims and an application to confirm the award on the breach of contract claims. On February 2, 2016, OAD filed an action to confirm the arbitration award. On March 16, 2016, the Court granted the parties' joint motion to consolidate cases. With all pending motions fully briefed, the Court turns its attention to the merits of this case.

[3] As to the lack of fees and interest, in an addendum, the Arbitrator clarified that he declined to award such fees because "Profimex did not provide authority that would require an award of those claims under New York law." (Doc. No. 32, Ex. A at ¶ 15.)

## II. Legal Standard

Both parties agree that resolution of this dispute is governed by The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "the New York Convention"). See Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH, 141 F.3d 1434, 1439–40 (11th Cir. 1998) (holding that the New York Convention and Chapter 2 of the Federal Arbitration Act ("FAA") govern an arbitral award granted by an arbitral panel sitting in the United States and applying American law).

In 1970, the United States acceded to the New York Convention, which was drafted in 1958. Id. at 1440. The second chapter of the FAA, which codifies the New York Convention, was passed the same year. Id. The New York Convention, along with the passage of Chapter 2 of the FAA, serves two purposes: (1) "to encourage the recognition and enforcement of international arbitral awards," and (2) "to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that is speedier and less costly than litigation." Id. (internal quotations and alteration omitted). Generally speaking, Chapter 2 of the FAA "establishes a strong presumption in favor of arbitration of international commercial disputes . . . and creates original federal subject-matter jurisdiction over any action arising under the [New York] Convention." Id.

An arbitrator's award "must be confirmed unless appellants can successfully assert one of the seven defenses against enforcement of the award enumerated in Article V of the New York Convention." Id. at 1441. Critically, the party challenging the arbitration award bears the burden of proving that any of the seven defenses apply. Id. at 1442. "The burden is a heavy one, as the showing required to avoid summary confirmance is high." Telenor Mobile Commc'ns AS v. Storm LLC, 584 F.3d 396, 405 (2d Cir. 2009) (internal quotations omitted). The seven defenses are as follows:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
>> (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
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>> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
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>> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> *(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*
>
> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
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> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

The New York Convention, Art. V (emphasis added). "When reviewing an arbitration award, '[c]onfirmation under the Convention is a summary proceeding in nature, which is not intended to involve complex factual determinations, other than a determination of the limited statutory conditions for confirmations or grounds for refusal to confirm.'" Chelsea Football Club Ltd. v. Mutu, 849 F. Supp. 2d1341, 1344 (S.D. Fla. 2012) (quoting Zeiler v. Deitsch, 500 F.3d 157, 169 (2d Cir. 2007)).

As emphasized above, Article V.1.e allows a court in the country where the arbitration award was entered to set aside or suspend that award. As both the Second and Fifth Circuit Courts of Appeals have held,

> the [New York] Convention mandates very different regimes for the review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where recognition and enforcement are sought. The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief.

Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 23 (2d Cir. 1997) (citing the Art. V(1)(e) of the New York Convention); See First Inv. Corp. of Marshall Islands v. Fujian Mawei Shipbuilding, Ltd., 703 F.3d 742, 748 (5th Cir. 2012) (a court with "primary jurisdiction" may set aside or modify an arbitral award in accordance with that country's domestic arbitration law). Because the arbitral award in this case was entered in the United States, this Court has "primary jurisdiction," and therefore can apply its domestic arbitral law to the award at issue.

The United States' domestic arbitral law comes from the FAA. Like the New York Convention, the FAA provides for only limited review of an arbitration award. Specifically, the FAA contains four statutory bases for vacating an arbitral award, as well as bases to modify such an award. "[T]hese statutory bases constitute the exclusive grounds for vacating an award pursuant to the FAA." Carey Rodriguez Greenberg & Paul, LLP v. Arminak, 583 F. Supp. 2d 1288, 1290 (S.D. Fla. 2008). This Court may vacate an award

> (1) where the award was procured by corruption, fraud, or undue means;
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> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
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> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). Further, an award may be modified or corrected in the following circumstances:

> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
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> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

Id. § 11.

Just as with the New York Convention, this Court's ability to review an arbitrator's award is exceedingly narrow under the FAA. Indeed, "judicial review of arbitration decisions is among the narrowest known to the law." AIG Baker

Sterling Heights, LLC v. Am. Multi-Cinema, Inc., 508 F.3d 995, 1001 (11th Cir. 2007) (internal quotations omitted). "The statute does not allow courts to roam unbridled in their oversight of arbitration awards, but carefully limits judicial intervention to instances where the arbitration has been tainted in specified ways." Marshall & Co. v. Duke, 941 F. Supp. 1207, 1210 (N.D. Ga. 1995) (Carnes, J.) (internal quotations omitted).

## III. Analysis

As detailed above, this Court must confirm an award unless one of the applicable defenses to the arbitration award applies. Accordingly, the Court reviews Profimex's arguments in favor of vacating and/or modifying the award first. Profimex argues that the award entered against it on OAD's counterclaims for defamation should be vacated because (1) the Arbitrator exceeded his powers in allowing for the arbitration of OAD's defamation dispute in Atlanta; (2) the Arbitrator denied Profimex a fundamentally fair hearing by not allowing Profimex to cross-examine an adverse witness and disregarding New York substantive law.

In the alternative, and only if the Court is not inclined to vacate the entire defamation award, Profimex seeks modification of that award in the following respects: (1) to exclude any and all findings and damages relating to three defamation claims that were excluded from arbitration prior to the final hearing and (2) to exclude the Arbitrator's award of punitive damages.

Finally, with regard to the breach of contract claim on which Profimex prevailed, Profimex moves to modify that award (1) to correct a miscalculation of interest relating to the Promote Fee and (2) to correct the omission of prejudgment interest and attorney's fees for the Disposition Fee award.

In all other respects pertaining to the breach of contract claim, Profimex moves to confirm the award in its favor. OAD moves to confirm the entire arbitration award as it was entered by the Arbitrator.

**A. Venue of the Defamation Claims**

Profimex argues that the portion of the arbitration award relating to the defamation claims should be vacated because the Solicitation Agreement provided that any dispute submitted by OAD shall be arbitrated in Tel Aviv, Israel. In support, Profimex relies upon the fourth statutory basis for vacating an arbitration award under the FAA, Section 10(a)(4): "where the arbitrators exceeded their powers, or so imperfectly execute them that a mutual, final, and definite award upon the subject matter submitted was not made."

As the Supreme Court has held, "[i]n certain limited circumstances, courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter . . . ." Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 452 (2003). These "limited instances" typically "include certain gateway matters, such as whether the parties have a valid arbitration agreement at all or

whether a concededly binding arbitration clause applies to a certain type of controversy." Id. (citing Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002)). Where, for example, the dispute centers on "whether [the parties] agreed to arbitrate a matter," that matter can properly be heard by the courts. Id. (citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942–45 (1995)). Where, however, the question centers on "what kind of arbitration proceedings the parties agreed to," the outcome is different. Id. The latter question "does not concern a state statute or judicial procedures," but rather "concerns contract interpretation and arbitration procedures." Id. at 453. As the Supreme Court explained in Howsam, these "gateway" questions "determine whether the underlying controversy will proceed to arbitration on the merits." 537 U.S. at 83. To that end, "procedural questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide." Id. at 84 (internal quotations omitted) (emphasis in original).

Interpreting Howsam and Green Tree, a number of courts have come to the conclusion that arbitral venue is a procedural issue for the arbitrator to decide. LodgeWorks, LP v. CF Jordan Constr., LLC, 506 F. App'x 747, 750 (10th Cir. 2012) (finding that the matter of arbitral venue was for the arbitrator decide, in part because it involves a matter of contract interpretation that is best left to the arbitrator); UBS Fin. Servs. v. W. Va. Univ. Hosps., Inc., 660 F.3d 643, 655 (2d

Cir. 2011) (arbitral venue is a procedural issue); Cent. W. Va. Energy, Inc. v. Bayer Cropscience LP, 645 F.3d 267, 274 (4th Cir. 2011) (disputes that are "akin to a venue dispute" and not a question of arbitrability are "appropriate for arbitral resolution"). See also Ridge at Red Hawk, L.L.C. v. Schneider, 493 F.3d 1174, 1178 & n. 3 (10th Cir. 2007) ("the fact that an arbitration was held in an improper venue does not call into question the merits of the award" and "venue is a matter that goes to process rather than substantive rights—determining which among various competent tribunals will decide the case" (internal quotation marks and brackets omitted)); Richard C. Young & Co. v. Leventhal, 389 F.3d 1, 5 (1st Cir. 2004) (finding that the district court lacked authority to interpret the forum selection clause); cf. McCullagh v. Dean Witter Reynolds, Inc., 177 F.3d 1307, 1310 (11th Cir. 1999) ("The arbitrators would presumably enforce the venue-selection clause in precisely the same way that a court would.").[4] The Court agrees

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[4] Profimex relies almost exclusively upon the Eleventh Circuit's decision in Sterling Fin. Inv. Grp. v. Hammer, 393 F.3d 1223 (11th Cir. 2004). There, the Eleventh Circuit held "a federal district court . . . has jurisdiction to enforce a forum selection clause in a valid arbitration agreement that has been disregarded by the arbitrators." Id. at 1225. Sterling is distinguishable from the facts of this case. Indeed, in Sterling, the arbitrators flatly ignored an arbitration provision mandating venue in Florida and allowed the arbitration to proceed in Texas. Id. at 1224. As will be explained in greater detail below, the Arbitrator in this case did not disregard an arbitration provision; rather, he interpreted the provision and reached a legal conclusion based on that interpretation. Accordingly, the facts of this case are much more analogous to Green Tree because the venue dispute is, in essence, a dispute over contract interpretation, not whether the given issue is subject to arbitration in the first place. To further this point, Sterling addressed a motion to stay arbitration in Texas and compel arbitration in Florida, not the standard that should be applied when reviewing an arbitrator's decision. Id.

Moreover, the Eleventh Circuit in Sterling expressly relied upon Bear, Stearns & Co. v. Bennett, 938 F.2d 31 (2d Cir. 1991). Twenty years after Bear, Stearns was decided, however, the

with the well-reasoned opinions in these cases, and finds that the Arbitrator's interpretation of the venue provision is a procedural matter subject to the deferential standard detailed in the FAA.

"A party seeking relief under [Section 10(a)(4)] bears a heavy burden. It is not enough to show that the arbitrator committed an error—or even a serious error." Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2068 (2013) (internal quotations and alterations omitted). "Because the parties 'bargained for the arbitrator's construction of their agreement,' an arbitral decision 'even arguably construing or applying the contract' must stand, regardless of a court's view of its (de)merits." Id. (quoting E. Assoc. Coal Corp. v. Mine Workers, 531 U.S. 57, 62 (2000)). "Of course, an arbitrator's award must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice." E. Assoc. Coal Corp., 531 U.S. at 62 (internal quotations omitted). "But as long as the arbitrator is even arguably construing or applying the contract and acting within

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Second Circuit recognized that Green Tree and Howsam "cast doubt on the continued viability of Bear, Sterns." UBS, 660 F.3d at 654. Indeed, the Second Circuit went so far as to include the following in a footnote:

> Without citing either Howsam or Green Tree or using the framework established in those cases, the Eleventh Circuit followed our decision in Bear, Stearns to conclude that venue is a matter for judicial rather than arbitral determination. Sterling Fin. Inv. Grp., Inc. v. Hammer, 393 F.3d 1223, 1225 (11th Cir. 2004). To the extent that arbitrators, not courts, presumptively have jurisdiction to adjudicate disputes over the enforceability of forum selection clauses, our holding to the contrary in Bear, Stearns was abrogated by Howsam, as clarified by Green Tree.

Id. at 655 n.8.

the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 38 (1987); Waddell v. Holiday Isle, LLC, No. 09-0040-WS-M, 2009 WL 2413668, at *4 (S.D. Ala. Aug. 4, 2009) (Section 10(a)(4) focuses on whether arbitrators have the power to reach a certain issue, not whether that issue was decided correctly). With this background in mind, "the sole question for [this Court] is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." Oxford, 133 S. Ct. at 2068. It is against this exceedingly deferential standard that the Court reviews Profimex's argument.

The Court is persuaded by a recent decision from the Eleventh Circuit Court of Appeals. In S. Commc'ns Servs., Inc. v. Thomas, the Court addressed a challenge that the arbitrator exceeded his authority by determining that the contract at issue allowed class arbitration. 720 F.3d 1352, 1357 (11th Cir. 2013). The Court concluded, however, that even "the briefest glance" at the arbitrator's decision "reveal[ed] that the arbitrator in this case arguably 'interpreted the parties' contract." Id. at 1359 (quoting Oxford, 133 S. Ct. at 2068). The arbitrator in Thomas (1) "began his award by recounting the text of the contract's arbitration clause"; (2) acknowledged that the contract was silent with respect to class actions; (3) "went on to examine the text of AAA Supplementary Rule 3, which was

incorporated by reference into the contract"; (4) "[a]fter parsing the language of that rule, the arbitrator went on to consider the meaning of the words 'any disputes'"; and (5) "interpreted the meaning of silence as to class arbitration within the clause and determined that it [was] fair to conclude the intent of the clause was not to bar class arbitration." Id. at 1359–60 (alteration and quotation omitted). Against this back drop and with "extraordinary deference," the Eleventh Circuit concluded that the arbitrator did not "stray from his delegated task of interpreting a contract." Id. at 1360 (alteration and quotation omitted).

Here, the Arbitrator engaged in the same methodical process when interpreting the parties' contract. (See Doc. No. 28-6.) The Arbitrator first addressed whether OAD's defamation counterclaim bore a reasonable relationship to Profimex's breach of contract claim, as is required by New York law. The Arbitrator, in so doing, interpreted the arbitration clause within the Solicitation Agreement not to limit arbitrable matters to only those concerning the Solicitation Agreement's terms, but rather to include matters relating to the performance of the parties under the agreement. Thereafter, the Arbitrator addressed Profimex's contention that venue in Atlanta was improper because the counterclaims were submitted by OAD, and therefore had to be arbitrated in Israel. (See Doc. No. 9-3 at ¶ 9(a) (requiring disputes submitted by OAD to be arbitrated in Tel Aviv, Israel).) The Arbitrator first recounted the arbitration provision within the

Solicitation Agreement and more specifically the forum selection clause, and then acknowledged the absence of any language pertaining to counterclaims. He then interpreted the International Chamber of Commerce rules, which the parties expressly incorporated into the arbitration clause. Specifically, the Arbitrator cited to Article 5, which permits and provides for adjudication of counterclaims submitted by a respondent.[5] On that basis, the Arbitrator concluded that the "dispute" was submitted by Profimex, and that the Arbitrator could exercise jurisdiction over the counterclaims asserted.

One fact is thus abundantly clear to this Court: the Arbitrator engaged with the contract's language and at least arguably construed the contract in reaching his conclusion. As in Thomas, "[i]t is not for [this court] to opine on whether or not that task was done badly, for it is the arbitrator's construction of the contract which was bargained for. The arbitrator's construction holds, however good, bad, or ugly." 720 F.3d at 1360 (internal quotations and alterations omitted).[6] See also Pochat v. Lynch, No. 12-22397-CIV, 2013 WL 4496548, at * (S.D. Fla. Aug. 22, 2013) ("As long as the arbitrator is even arguably construing or applying the

[5] Specifically, Article 5, Paragraph 5 provides that the respondent shall submit counterclaims with its answer.

[6] At oral argument, Profimex argued at length regarding the public policy behind enforcing forum selection clauses. In no way should this order be construed as disagreeing with that point. However, there is no evidence before the Court that the Arbitrator disregarded the forum selection clause. Rather, the Arbitrator interpreted that very clause to determine that he had jurisdiction to consider the defamation counterclaims. Profimex's dispute is therefore not that the Arbitrator completely ignored the forum selection clause, as alluded to at oral argument, but rather that Profimex disagrees with how that clause was interpreted.

contract and acting within the scope of his authority, that a court is convinced he committed a serious error does not suffice to overturn his position." (internal quotation and alteration omitted)) (Rosenbaum, J.).[7]

In sum, the Court finds no basis for vacating the Arbitrator's decision regarding the proper venue for OAD's defamation counterclaims.

### B. Whether Profimex Received a Fundamentally Fair Hearing

Profimex's next basis for vacatur is that the Arbitrator engaged in misconduct that prejudiced Profimex's rights in two respects. First, Profimex alleges that it was denied cross-examination of an adverse witness, which denied it of a fundamentally fair hearing. Second, Profimex alleges that the Arbitrator disregarded New York defamation law.

#### *i. Cross Examination of Itay Goren*

Section 10(a)(3) of the FAA allows a Court to vacate an arbitration award where the Arbitrator was "guilty . . . of any [] misbehavior by which the rights of

[7] Profimex argues in reply that it never agreed to delegate exclusive authority to the Arbitrator to decide the issue of venue. Accordingly, and given the significant importance of venue to a given dispute, Profimex urges the Court to conduct an independent de novo review of the venue provision. Profimex's argument fails for a number of reasons. The cases cited by Profimex, however, address arbitrations where the arbitrator, in Profimex's own words, "disregarded the parties' forum selection clause." (Doc. No. 20 at 4.) See Sterling, 393 F.3d at 1224 (affirming a motion to stay arbitration where the arbitration was occurring in Houston, Texas but the arbitration clause unambiguously required arbitration in Florida). In Sterling, however, the Court merely held that the district court has jurisdiction to enforce a forum selection clause that was patently disregarded. Id. at 1225. As noted above, the Arbitrator did not "disregard" the forum selection clause. Rather, he engaged with it and interpreted it. That Profimex disagrees with this interpretation does not provide grounds for vacating the decision. Second, as the Arbitrator noted, Section 5 of the ICC rules require a respondent to, with its answer, file its counterclaims.

any party have been prejudiced." Profimex alleges that by considering and relying upon the testimony of Itay Goren the Arbitrator deprived Profimex of a fundamentally fair hearing.

"In making evidentiary determinations, arbitrators are not required to 'follow all the niceties observed by the federal courts,' but they must give the parties a fundamentally fair hearing." Rosenweig v. Morgan Stanley & Co., 494 F.3d 1328, 1333 (11th Cir. 2007) (quoting Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997)). Indeed, "the arbitrator has great flexibility and the courts should not review the legal adequacy of his evidentiary rulings." Amalgamated Meat Cutters & Butcher Workmen of N. Am., Dist. Local No. 540 v. Neuhoff Bros. Packers, Inc., 481 F.2d 817, 820 (5th Cir. 1973).[8]

Section 10(a)(3) "does not warrant vacatur where an arbitrator merely made an erroneous discovery or evidentiary ruling; rather, a plaintiff must show that the arbitrator's handling of these matters was in bad faith or so gross as to amount to affirmative misconduct, effectively depriving the plaintiff of a fundamentally fair proceeding." Thames v. Woodmen of World Life Ins. Soc., No. 13-0063-WS-N, 2013 WL 4162257, at *3 (S.D. Ala. Aug. 13, 2013). This court need only determine that there was some "reasonable basis" for the actions taken by the

[8] Decisions by the former Fifth Circuit issued before October 1, 1981, are binding as precedent in the Eleventh Circuit. See Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1207 (11th Cir.1981) (en banc).

Arbitrator. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Smolchek, No. 12-80355-CIV, 2012 WL 4056092, at *5 (S.D. Fla. Sept. 17, 2012). This Court cannot "look over the shoulder of the Arbitrator in order to alter his credibility decisions, rather we only consider whether the Arbitrator provided a fair and full hearing consistent with the FAA . . . ." Int'l Chem. Workers Union v. Columbian Chem. Co., 331 F.3d 491, 496 (5th Cir. 2003); Fitigues, Inc. v. Varat, 2 F.3d 1153 (Table), 1993 WL 312888, at *5 (7th Cir. Aug. 18, 1993) (an arbitrator is not guilty of misconduct in making a credibility finding as to the weight to give evidence). Finally, "even a showing of misconduct (without more) does not suffice, because § 10(a)(3) also includes a prejudice element that the party petitioning for vacatur must satisfy." Thames, 2013 WL 4162257, at *4.

Profimex frames its argument as follows: "The Arbitrator's consideration and reliance on inherently unreliable testimony from OAD witness Itay Goren without Profimex being afforded an opportunity to cross-examine the testimony, deprived Profimex of a fundamentally fair hearing and constituted arbitrator misconduct pursuant to 9 U.S.C. § 10(a)(3)." (Doc. No. 9-1 at 15.) At no point in the arbitration did the Arbitrator preclude Profimex from cross-examining Mr. Goren. Profimex did, in fact, receive an opportunity to cross-examine the witness. The problem arose, however, when Mr. Goren was uncooperative by self-limiting the time of his deposition and refusing to answer a number of Profimex's

questions. Profimex thus moved the Arbitrator to exclude the testimony of Mr. Goren and Ms. Karen Fortune, whose expert report relied upon Mr. Goren's statements. The Arbitrator denied the motions, but noted that Mr. Goren's uncooperative testimony would be taken into consideration when making a credibility determination. Ultimately, the Arbitrator decided to rely upon both Mr. Goren's and Ms. Fortune's testimony in his final ruling.

The question is thus not whether the Arbitrator precluded Profimex from cross-examining an adverse witness, material or otherwise, or even whether Profimex was actually deprived, in some other way, of cross-examining this witness. Instead, the issue is more properly stated as Profimex believes the Arbitrator committed misconduct by deciding to consider an admittedly uncooperative witness's testimony. Under that line of reasoning, Profimex argues that it was denied a fundamentally fair hearing because the Arbitrator decided to give weight to the testimony of a witness who was uncooperative and refused to answer a number of questions.

The Court rejects Profimex's argument for a number of reasons. First and foremost, Profimex has, in no way, proven that the Arbitrator's alleged misconduct (even assuming there was any) was "in bad faith or so gross as to amount to affirmative misconduct." Thames, 2013 WL 4162257, at *3. Second, as thoroughly detailed above, courts across this country refuse to meddle in the evidentiary

rulings and credibility determinations of Arbitrators. This Court follows those well-reasoned opinions. The Arbitrator in this case allowed for numerous depositions, voluminous document production, and a full week-long hearing. Simply because the Arbitrator decided to give weight to testimony of a witness who refused to answer many of Profimex's questions does not somehow alter an otherwise fair hearing into one that must be corrected. Perhaps most telling, the Arbitrator expressly explained the basis for considering Mr. Goren's testimony in the Arbitration Award:

> The Arbitrator carefully reviewed Mr. Goren's testimony and found his refusal to answer questions that would specifically identify his current clients or details about his current business activities understandable in light of the fact that Mr. Goren has already successfully sued Profimex for defamation in Israel and has claim [sic] for severance and compensation still pending. The Arbitrator further finds that Mr. Goren's testimony regarding the market effect of the Profimex statements made to Israeli investors to be consistent with what would be a reasonably foreseeable consequence of statements of the type found to be defamatory and therefore credible.

(Doc. No. 9-2 at ¶ 126.) Finally, Profimex failed to prove how any alleged misconduct so prejudiced Profimex so as to render the arbitration fundamentally unfair. For all of these reasons, the Court finds that the consideration of Mr. Goren's testimony does not provide a basis for vacating the arbitration award.

*ii. Whether the Arbitrator Disregarded New York Defamation Law*

Profimex next argues that Arbitrator disregarded New York substantive law in recognizing and applying evidence to OAD's defamation dispute. Specifically,

Profimex alleges that the Arbitrator allowed OAD to present 70-plus defamatory statements as one defamation claim, when New York law requires each defamatory statement to be pled as a separate cause of action. For this reason, Profimex argues that the Arbitrator (1) engaged in misconduct and (2) exceeded the scope of his authority.

"When reviewing an arbitration award, [this Court] may revisit neither the legal merits of the award nor the factual determinations upon which it relies." Wiand v. Schneiderman, 778 F.3d 917, 926 (11th Cir. 2015). "In the Eleventh Circuit, even when an arbitrator manifestly disregards the law, a district court has no jurisdiction to vacate the award." S. Commc'ns Servs., Inc. v. Thomas, 829 F. Supp. 2d 1324, 1332 (N.D. Ga. 2011) (citing Frazier v. CitiFinancial Corp., 604 F.3d 1313, 1324 (11th Cir. 2010)); White Springs Agricultural Chem., Inc. v. Glawson Invests. Corp., 660 F.3d 1277, 1283 (11th Cir. 2011) ("We cannot, however, review the panel's award for underlying legal error. Even though White Springs presents its argument in terms of the FAA, it asks us to do what we may not—look to the legal merits of the underlying award."(citations omitted)); CareMinders Home Care, Inc. v. Sandifer, No. 1:14-cv-03573-WSD, 2015 WL 4040464, at *5 (N.D. Ga. June 29, 2015) ("Respondents simply argue that the Arbitrator would not have awarded attorneys' fees if he had applied Georgia law

correctly. That is not a reviewable claim under the FAA's highly deferential standard.")

Profimex's argument is simply that the Arbitrator failed to correctly apply New York law and that the Arbitrator arbitrarily applied evidence. This is precisely the sort of challenge that a court reviewing an arbitration award cannot entertain. See CareMinders, 2015 WL 4040464, at *5. Accordingly, the Court denies Profimex's motion to vacate the arbitration award based on a failure to apply New York substantive law.

**C. Profimex's Alternative Request to Modify the Arbitration Award**

Profimex moves in the alternative for a modification of the award rendered in favor of OAD in two respects: (1) to exclude findings and damages related to previously excluded statements and (2) to strike OAD's award of punitive damages.

*i. Calculation of Damages Based on Excluded Statements*

First, Profimex moves to modify the award by excluding findings and damages related to three defamation claims that were excluded by the Arbitrator prior to the final hearing. These claims are referred to as 1-5/68, 1-8/69, and 1-51/71. The arbitration award specifically awarded damages based on statements 1-5/68 and 1-8/69. Statement 1-51/71 was found not to be defamatory. Profimex requests a *pro rata* reduction of the award applicable to the two statements found

to be defamatory. OAD does not oppose Profimex's motion with respect to the two statements found to be defamatory. Accordingly, the Court modifies the Arbitrator's award to reflect the pro rata amounts attributed to the excluded statements.[9] See Section C.iii for the Court's amended damages calculation.

*ii. Punitive Damages*

Next, Profimex argues that OAD's award of punitive damages should be stricken. The FAA allows a court to modify an arbitration award where "the arbitrators have awarded upon a matter not submitted to them . . . ." 9 U.S.C. § 11(b). Profimex argues that OAD failed to properly request or submit the issue of punitive damages for arbitration. Profimex contends that the first time OAD requested punitive damages was after the final hearing in a post-hearing brief. Profimex relies on Davis v. Prudential Securities, Inc. to support its belief that the issue of punitive damages was not submitted. 59 F.3d 1186 (11th Cir. 1995). In Davis, however, the Eleventh Circuit found that the issue of attorney's fees was not submitted to arbitration because (1) the Statement of Claim made no request for fees; (2) neither party presented evidence or argument on the issue; and (3) any legal authority provided by Davis to the arbitrator related primarily to compensatory and punitive damages. Id. at 1195. That the arbitrators were aware

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[9] Because this modification involves a simple mathematical correction, the Court finds modification appropriate. Indeed, it is clear that the Arbitrator's intent, as expressed in his earlier ruling, was to exclude those statements from damages.

of statutory authority allowing attorney's fees did not, however, qualify as submitting the issue to arbitration. Id.

The Court finds the facts of the Davis case distinguishable from that at bar. Profimex is not correct that the issue of punitive damages was never asserted in OAD's answer. In OAD's answer and counterclaim, OAD states that it requests an award of damages in an amount to be proven at trial. (Doc. No. 1-3 at 22.) Although this request for damages is certainly broad, given that New York substantive law allows for punitive damages, and similarly does not require them to be pled as a separate cause of action, the Court cannot hold that OAD was not submitting the issue of punitive damages to the Arbitrator. See Valentine Sugars, Inc. v. Donau, 981 F.2d 210, 213 (5th Cir. 1993) (finding that a "broad" demand for arbitration "gave the arbitrators the power to do whatever was necessary to resolve any disputed matter arising out of the joint venture"); see also Zunno v. Kiernan, 170 A.D.2d 795, 797 (N.Y. Sup. Ct. 1991) (a punitive damage request need not be pled as a separate cause of action).

To that end, whether an arbitrator "plainly believed" an issue to be submitted to him is relevant to determine whether that matter was indeed submitted. White Springs, 660 F.3d at 1281; Executone Info. Sys., Inc. v. Davis, 26 F.3d 1314, 1321 (5th Cir. 1994). Here, it is clear that the Arbitrator believed a claim for punitive damages was submitted to him. Indeed, during the final hearing, he required a

witness to respond to a line of questioning because the questions were relevant to the punitive damage claim.[10] (Doc. No. 15, Ex. 7 at 1602.) Perhaps telling, Profimex made no objection at that time to the punitive damage issue.

Finally, evidence was certainly presented at the final hearing and in post-hearing briefing as to the issue of punitive damages. Critically, Profimex responded to OAD's briefing, arguing that OAD was not legally entitled to punitive damages, but at no point arguing that the issue was not properly before the Arbitrator. Based on these facts, the Court finds that Profimex has not met its burden of establishing that modification of the arbitration award to exclude punitive damages is necessary.

*iii. Summary*

Having determined that the punitive damages award remains, and based on the parties' agreement that two statements found to be defamatory should be excluded from the damages calculation, the Court finds as follows: The arbitration award provided $500,000.00 in general damages, $200,000.00 in punitive damages, and $250,000.00 in attorney's fees to OAD on the defamation claims. The Arbitrator expressly stated that the damages would be allocated *pro rata* among the thirty-three (33) statements found to be defamatory. Therefore, the

[10] Profimex argues that the Arbitrator's statement to the witness was just as likely a "simple misstatement." (Doc. No. 22 at 7.) However, the Arbitrator plainly referred to a punitive damages claim. When viewed in light of the highly deferential standard with which this Court reviews arbitration awards and the heavy burden Profimex carries to support modification, the Court will not construe the plain meaning of a statement to assume that the Arbitrator misspoke.

damages attributable to each individual defamatory statement is as follows: $15,151.52 for general damages,[11] $6,060.61 in punitive damages, and $7,575.76 in attorney's fees. Because the Court modifies the award by excluding two of the statements, $30,303.04 shall be subtracted from the general damages calculation; $12,121.22 shall be subtracted from the punitive damages calculation; and $15,151.52 shall be subtracted from the attorney's fees calculation. The modified award to OAD on the defamation claims is therefore $469,696.96 in general damages; $187,878.78 in punitive damages; and $234,848.48 in attorney's fees.

**D. Profimex's Motion to Modify the Award Rendered in its Favor**

Profimex's final motion seeks to confirm the award entered in its favor in most respects, with two modifications. First, Profimex seeks modification of the award relating to the Promote Fee to recalculate interest to run through the date of the arbitration award, as opposed to July 2, 2015, the date that the parties' created their stipulation of facts. Second, Profimex seeks correction of the Arbitrator's "evident mistake" of omitting prejudgment interest and attorney's fees for the Disposition Fee award.

*i. Promote Fee Interest*

The arbitration award on the Promote Fee, as it stands, awards interest through July 2, 2015, which was the date of the parties' Stipulation of Facts. The

[11] In brief, Profimex states that the general damages should be just $12,151.52 per claim. However, $500,000.00 divided by 33 statements equals $15,151.52.

very next stipulation indicated that interest on the Promote Fee claim shall continue to accrue. OAD does not specifically contest any of these facts. Rather, OAD states that Section 11 of the FAA does not allow for modification in this instance.

Section 11(a), the section upon which Profimex relies, allows a court to modify an award "where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award." This section "is limited to 'simple formal, descriptive, or mathematical mistake,' not disagreement over factual or legal decisions deliberately made." Waddell v. Holiday Isle, LLC, No. 09-0040-WS-M, 2009 WL 2413668, at *3 (S.D. Ala. Aug. 4, 2009) (quoting Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 749 (8th Cir. 1986)). Indeed, Section 11(a) does not reach mistakes of fact or law pertaining to the amount of damages awarded. Id. (listing cases). Stated differently, "only computational errors may be corrected—not factual or legal errors that led to the numbers being used . . . ." Id.

Profimex makes a number of arguments about how the Arbitrator clearly intended for interest to run through the judgment, and therefore the request is truly to correct a mathematical error. However, the Arbitrator resolved any ambiguity in his intent on April 14, 2016, when he ruled upon Profimex's Application for

Correction of Errors in Final Award. (Doc. No. 32-1.) As the Arbitrator clearly explained:

> The Arbitrator entered an award on the Promote Fee and interest on the Promote Fee in the specific sum included in the stipulation of the Parties. In making this award the Arbitrator resolved any ambiguity or lack of certainty in the stipulation of the Parties by making the award in the amount specifically stipulated. The Arbitrator adopts and accepts the arguments of Respondent as stated in the Application Response, § II.A. both that further award is not consistent with the precise stipulation of the Parties and that Claimant's request is not a request for correction of a typographical or computational error. The stipulation of the Parties refers to only one specific sum and that sum is the amount stated in the Award. See Stipulation of Facts, ¶ 22. Although the Stipulation also includes a statement that the stipulated amount would continue to accrue interest at a specified rate, the Parties did not stipulate a per diem calculation of that rate and the Arbitrator did not go beyond the sum specifically stipulated by the Parties in making the award.

(Id. ¶ 9.) The Arbitrator's statement quoted above makes clear that this is not a case of an "obvious numerical gaffe" but rather a factual and legal decision "deliberately made." Grain, 551 F.3d at 379; Waddell, 2009 WL 2413668, at *3.

Thus, Profimex does not allege a mathematical error. Rather, Profimex argues that the Court should reach a different conclusion as to the stipulations in this case. This the Court cannot do. See, e.g., Grain, 551 F.3d at 379 ("Instead of complaining that the arbitrators made an obvious numerical gaffe in computing the total award, Grain and Barnes argue that the arbitrators made a mistake on the merits when they refereed a dispute between the parties over the appropriate start

and stop dates for calculating the interest award. Whatever else such an alleged error may be, it is not 'an evident material miscalculation of figures.'").

Profimex additionally cites to Section 11(c), which allows the Court to correct an award "[w]here the award is imperfect in matter of form not affecting the merits of the controversy." "Scant case law exists in the Eleventh Circuit on the question of when modification of an arbitration award is appropriate pursuant to Section 11(c)." Pochat, 2013 WL 4496548, at *18. Based on this lack of case law, Judge Rosenbaum looked outside the Eleventh Circuit and allowed modification under Section 11(c) where it was clear that the result would not run contrary to the arbitration panel's intent. Id. at *20 ("Of course, without clarification from the Panel, it is impossible to know for certain if it would have approved offset. But nothing in the Award or the Arbitration proceedings even hints that the Panel intended not to allow for setoff, and it is hard for this Court to imagine that the Arbitrators would have specifically desired the circuitous result that would arise from precluding setoff, especially given that the basic policy of conducting arbitrations is to offer a means of deciding disputes expeditiously and with lower costs than in ordinary litigation." (internal quotations omitted)).

The opposite is true in this case. The Arbitrator has clearly spoken on this particular issue, indicating that it was his intent to limit the prejudgment interest

award. Thus, and for the same reasons as with Section 11(a), the Court will not disturb the Arbitrator's decision.

*ii. Disposition Fee Interest and Attorney's Fees*

Profimex's final request for modification pertains to the Disposition Fee. In the arbitration award, the Arbitrator concluded that Profimex was not entitled to the award because "Profimex did not provide authority to those claims under New York law." (Doc. No. 9-2 at ¶ 38.) The Arbitrator noted that OAD disputed the claim for attorney's fees and interest both as a matter of law and evidence. (Id.) In the April 16, 2016 Addendum, the Arbitrator did amend his original findings to say that "Profimex did not provide authority that would require an award of those claims under New York law." (Doc. No. 32-1 at ¶ 15.) The Arbitrator again declined to allow attorney's fees and interest on the Disposition Fee claim. (Id. ¶ 16.) At oral argument and before the Arbitrator, Profimex argued that the Solicitation Agreement expressly contemplated an award of attorney's fees.

Profimex argues that the Arbitrator committed an evident material mistake that should be modified under Section 11(a). Specifically, Profimex alleges that "[b]ut for the Arbitrator's evident and undisputed mistaken recollection that Profimex did not cite to any legal authority to support its contractual claim for attorneys' fees, the Arbitrator would have enforced the parties' agreement and awarded Profimex attorneys' fees and expenses pursuant to Section 6 of the

Solicitation Agreement." (Doc. No. 21 at 11–12; see also Doc. No. 11-1 at 15 ("This oversite [sic] is an evident material mistake that should be corrected by this Court").) However, the Arbitrator in his Addendum specifically clarified that the decision to deny attorney's fees and interest was not a miscalculation or undisputed mistaken recollection, but rather an intentional decision. For reasons already stated above, the relief requested by Profimex is not the sort contemplated by Section 11(a). In its reply brief, Profimex additionally alleges that the award is imperfect as to form pursuant to Section 11(c). Again, for the same reasons as above, Profimex has failed to meet its burden of showing that this section applies.

**E. Remainder of the Award**

Aside from the motions to vacate and modify, there are two additional motions and/or requests before the Court to confirm the award.

Profimex moves to confirm the arbitration award entered in its favor on the breach of contract claims, subject to the two requested modifications detailed above. (Doc. No. 11.) To the extent Profimex seeks confirmation of the breach of contract award, the Court grants that motion. Given the complex posture of this motion, the Court offers this brief clarification. Profimex's motion, which is docket number 11, seeks (1) two modifications of the breach of contract award and (2) confirmation of the remainder of the breach of contract award. Therefore, the

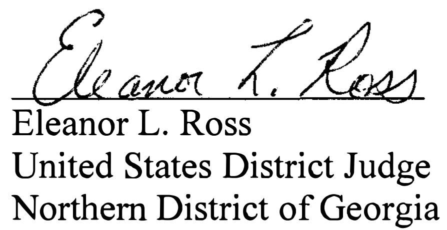
Court grants in part and denies in part Profimex's motion, and confirms the breach of contract award in its entirety.

OAD moves the Court to confirm the arbitration award in its entirety. (Doc. No. 28.) The Court grants in part and denies in part OAD's motion. The Court confirms the arbitration award with one limited exception: the Court modifies the defamation damages award to exclude the two improperly included defamation statements in that calculation.

## IV. Conclusion

For the reasons stated herein, the Court **DENIES** Petitioner's Motion to Vacate OAD Arbitration Award (Doc. No. 9); **GRANTS IN PART** and **DENIES IN PART** Petitioner's alternative Motion for Modification of OAD Award (Doc. No. 10); and **GRANTS IN PART** and **DENIES IN PART** Petitioner's Motion to Modify and Confirm Profimex Award. (Doc. No. 11.) The Court **GRANTS** Respondent's Motion for Leave to File Excess Pages. (Doc. No. 26.) Finally, the Court **GRANTS IN PART** and **DENIES IN PART** Respondent's Motion to Confirm Arbitration Award (Doc. No. 28). The Court hereby **CONFIRMS** the arbitration award entered in this case except with respect to the one modification detailed herein at Section III.C(i & iii). There being no further matters in this action, the Court **DIRECTS** the Clerk to **CLOSE** this case.

**SO ORDERED**, this 24th day of August, 2016.



Eleanor L. Ross
United States District Judge
Northern District of Georgia