UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**CV 13-7973 DMG (PJWx)**	Date	May 12, 2016
Title	***Neurosigma, Inc. v. Antonio A.F. De Salles, et al.***	Page	1 of 9

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s) None Present	Attorneys Present for Defendant(s) None Present

Proceedings: IN CHAMBERS - ORDER RE DEFENDANT'S MOTION TO REOPEN CASE AND DISSOLVE STAY, DEFENDANTS' PETITION TO APPROVE CONSENT JUDGMENT, AND PLAINTIFF'S MOTION TO VACATE OR MODIFY ARBITRATION AWARD [49, 54, 61]

I.
BACKGROUND

On October 29, 2013, Plaintiff NeuroSigma, Inc. filed a complaint in this Court against Defendants Antonio A.F. De Salles and Alessandra Gorgulho alleging: (1) misappropriation of trade secrets; (2) conversion; (3) breach of implied contract; (4) quantum meruit; and (5) an accounting. [Doc. # 1.] The Court has laid out the factual background of this case in detail in its prior orders, and will not do so again here. *See* Doc. ## 26, 48.

On January 31, 2014, this Court granted De Salles's motion to compel arbitration and stay proceedings as to De Salles only. [Doc. # 26.] On January 16, 2015, this Court granted Gorghulos's motion to compel arbitration as to Gorghulos and to stay the action. [Doc. # 48.] The case was administratively closed. (*Id.*) The order stated that the parties could file a motion to reopen, if necessary, within 30 days after a final disposition of the arbitration. (*Id.* at 4.)

Pursuant to the Court's order, Neurosigma and De Salles submitted their disputes to the American Arbitration Association ("AAA"). (Declaration of Glenn E. Turner, III in support of Motion to Reopen Action and to Dissolve Stay ("Turner Reopen Decl.") ¶ 2 [Doc. # 50].) Evidentiary hearings were held on June 18-19, 2015, June 22, 2015, August 31, 2015, September 1-2, 2015, and September 8-10, 2015. (*Id.*) On December 30, 2015, a Partial Final Award was issued by the arbitration panel in favor of Defendants and denying all of Plaintiff's claims. (*Id.* ¶ 3, Ex. 1 ("Award").)

On February 29, 2016, De Salles filed a motion to reopen the case and dissolve the stay ("MTR"). [Doc. # 49.] On Marcy 3, 2016, De Salles filed a petition to approve the consent

judgment final arbitration award ("MTAA"). [Doc. # 54.] On March 29, 2016, NeuroSigma filed a motion to vacate or modify arbitration award ("MTV"). [Doc. # 61.]

II.
DISCUSSION

A. Motion to Reopen the Case

Both sides have filed substantive motions requesting that the Court rule on the enforceability of the Arbitration Award. NeuroSigma has not filed an opposition to De Salles's motion to reopen the case and dissolve the stay, *see* C.D. Cal. L.R. 7-9, and therefore is deemed to consent to the granting of the motion. *See* C.D. Cal. L.R. 7-12 ("The failure to file any required paper, or the failure to file it within the deadline, may be deemed consent to the granting or denial of the motion."). Defendant's motion to reopen the case is therefore **GRANTED**.

B. Motions to Vacate, Modify, or Approve Arbitration Award

"The Federal Arbitration Act gives federal courts only limited authority to review arbitration decisions, because broad judicial review would diminish the benefits of arbitration." *In re Sussex*, 781 F.3d 1065, 1072 (9th Cir. 2015) (internal citation and quotation marks omitted). "The [Supreme] Court has . . . made clear that motions to vacate will be granted 'only in very unusual circumstances' to prevent arbitration from become 'merely a prelude to a more cumbersome and time-consuming judicial review process.'" *Id*. (internal citation omitted).

A court *must* grant a request to affirm an arbitration award unless the award is vacated, modified, or corrected. 9 U.S.C. § 9 (emphasis added). A court may vacate an arbitration award where: (1) the award was procured by corruption, fraud, or undue means, (2) there was evident partiality or corruption in the arbitrators, (3) the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent to and material to the controversy, or of any other misbehavior through which a party's rights have been prejudiced, or (4) the arbitrators exceeded their powers or imperfectly executed them. 9 U.S.C. § 10(a). A court may modify an arbitration award where (1) there was a material miscalculation, (2) the arbitrators have awarded upon a matter not submitted to them, or (3) the award is imperfect in a matter of form not affecting the merits of the controversy. 9 U.S.C. § 11.

The FAA "does not sanction judicial review on the merits of arbitration awards[.]" *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007). The Ninth Circuit has adopted a narrow "manifest disregard of the law" exception under which an otherwise proper award may

be vacated. *Id.* "The manifest disregard exception requires something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand and apply the law." *Id.* (internal citation and quotation marks omitted). A court may not reverse an arbitration award "*even in the face of an erroneous interpretation of the law*" but, rather, "[i]t must be clear from the record that the arbitrators recognized the applicable law and then ignored it." *Id.* (emphasis added, internal citations omitted). Moreover, "to rise to the level of manifest disregard, the governing law alleged to have been ignored by the arbitrators must be *well defined, explicit, and clearly applicable*." *Id.* (emphasis in original, internal citation omitted).

1. Legality of the Stock Purchase Agreement

As discussed in previous orders, NeuroSigma and De Salles entered into a Restricted Common Stock Purchase Agreement ("SPA") which contained an arbitration clause stating that any controversy between the parties arising out of or relating to the agreement would be settled by arbitration. (Declaration of Allan E. Anderson in Support of the Motion to Vacate Arbitration ("Anderson Decl."), Ex. 5 ("SPA") ¶ 10.8 [Doc. # 61-2]). The Court has already upheld this clause as lawful and applicable to the parties' dispute. *See* Doc. ## 26, 48.

NeuroSigma contends that, as a neurosurgeon and researcher for the U.S. Department of Veterans Affairs ("VA"), De Salles was prohibited by federal regulation from being compensated by NeuroSigma. (MTV at 4.) According to NeuroSigma, the SPA was therefore void *ab initio*, and should be disregarded. (*Id.* at 1.) NeuroSigma also asserts, on the same grounds, that it would be a violation of federal statute for it to comply with the Award. (*Id.* at 10.)

Specifically, NeuroSigma argues that if it were to comply with the Award, it would violate the federal statutes prohibiting a federal employee from profiting from a conflict of interest, and extending liability to the business that makes the payment. *See* MTV at 10 (citing 19 U.S.C. §§ 208(a), 209(a)). Section 208(a) prohibits a federal employee from "participat[ing] personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter which, to his knowledge, he . . . has a has a financial interest[.]" 19 U.SC. § 208(a). Section 209(a) extends this liability to any organization that pays the salary of the federal employee under these circumstances. 19 U.S.C. § 209(a). Section 208 provides an exception for cases in which the federal employee makes full disclosure of the financial interest and receives in advance a written determination that the

interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee. 19 U.S.C § 208(b)(1)

NeuroSigma contends that, as a neurosurgeon, researcher, and Co-Director of the Epilepsy Surgery Program at the VA from 1990 to approximately 2012, De Salles "helped develop technologies that he then brought to NeuroSigma, which then licensed that technology from the VA." (MTV at 11.) De Salles met with the VA's clinical director to support NeuroSigma's efforts to do clinical trials at the VA, continued to work on the same technology at the VA, served as the "co-investigator" on that research, and helped obtain a grant to fund the studies at the VA. (*Id.*)

The arbitration panel considered NeuroSigma's position on this issue multiple times, ultimately finding it to be "spurious," "entirely without merit," and not "asserted in good faith." (Award at 6-7.) The panel found that NeuroSigma was fully aware of De Salles's outside commitments and the extent of his involvement with the VA, and that De Salles was not expected to (and did not) leverage VA resources for NeuroSigma's benefit. (*Id.* at 11-12.) The panel noted that the VA investigation into this issue, initiated by NeuroSigma as a hotline complaint, had been concluded without any charge or claim against De Salles. (*Id.* at 7.)

The Court reviews this finding only for "manifest disregard of the law." The record does not establish that De Salles's work at the VA while simultaneously working with NeuroSigma constituted an illegal conflict of interest. While De Salles may have worked on similar technology at the VA, there is no indication that he participated "personally and substantially" in making decisions regarding contracts with the VA, or that his relationship with the VA compromised the integrity of his work for the Government. As the arbitration panel noted in its decision, the VA conducted an investigation into this issue and found that there was no conflict of interest. Sections 208 and 209 are not so "clearly applicable" to this situation as to establish a manifest disregard for the law by the arbitration panel. The Court will not disturb the panel's finding that there was no conflict of interest and that the SPA was therefore legal.

2. Legality of the Award

For the reasons discussed above, compliance with the Award will not require NeuroSigma to violate 19 U.S.C. § 209. NeuroSigma contends that the Award strips NeuroSigma's restrictions on the transferability of its shares, which "may exponentially increase the number of shareholders," and that complying with the Award would therefore require NeuroSigma to violate federal securities laws. (MTV at 1.)

Specifically, NeuroSigma contends that, because the panel ordered NeuroSigma to remove transfer restrictions on its stock certificates and issue 900,000 shares of unrestricted stock, it will "result[] in burdensome corporate and securities law compliance issues for NeuroSigma." (MTV at 13-14.) NeuroSigma asserts that this was "not part of the bargain" contemplated by the SPA, as it will "destroy NeuroSigma's ability to govern its own future." (*Id.* at 14.) Neurosigma argues that the panel therefore "far exceeded" the authority granted by SPA's arbitration clause and afforded relief that De Salles neither requested nor could ever obtain. (*Id.*)

The SPA's arbitration clause states that *any controversy arising out of or relating to the agreement* shall be settled by arbitration. While NeuroSigma may be unhappy with the results of the arbitration, the fact that enforcement of the agreement will result in burdensome regulatory obligations does not render the Award illegal, or outside the scope of the panel's authority.

NeuroSigma also contends that the award of attorneys' fees was not permitted by contract or law. (*Id.* at 2.) The panel found considerable evidence of bad faith by NeuroSigma throughout these proceedings. *See* Award at 3-6 (enumerating instances of bad faith delays and other misconduct). This is sufficient to justify an award of attorneys' fees. *See, e.g., Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1064 (9th Cir. 1991) ("In light of the broad power of arbitrators to fashion appropriate remedies and the accepted 'bad faith conduct' exception to the American Rule, we hold that it was within the power of the arbitration panel in this case to award attorneys' fees."). The Court will not disturb the arbitration panel's decision to issue an award of attorneys' fees, which was supported by a finding of bad faith.

3. Allegations of Arbitrator Misconduct and Bias

"The burden of proving facts which would establish a reasonable impression of partiality rests squarely on the party challenging the award." *Sheet Metal Workers Int'l Ass'n, Local No. 162 v. Jason Mfg., Inc.*, 900 F.2d 1392, 1398 (9th Cir. 1990) (internal citations and quotation marks omitted). "The party alleging evident partiality must establish specific facts which indicate improper motives on the part of the Board. The appearance of impropriety, standing alone, is insufficient." *Id.* (internal citation and quotation marks omitted).[1]

[1] In its opposition to the motion to approve award NeuroSigma raises the allegation that Judge Chernow failed to adequately disclose to the parties the fact that he is a member of the same professional organization, the California Academy of Distinguished Neutrals, as Kenneth Gibbs, the founding partner of the law firm that represented De Salles in the arbitration. [Doc. # 76 at 24.] NeuroSigma states that Judge Chernow *did* disclose the fact that he had some contact with Gibbs but "failed to disclose the full extent of the relationship." (*Id.* n. 10.) NeuroSigma does not elaborate on the extent of the relationship beyond shared membership in a professional

a. Denial of Continuance

Neurosigma contends that the arbitrators committed misconduct by refusing to grant a continuance when NeuroSigma was forced to retain new attorneys a few days before the initial arbitration hearing. (MTV at 2.)

While "[t]he arbitrary denial of a reasonable request for a postponement . . . may serve as a ground for vacating the award . . . the granting or denial of a continuance is within the broad discretion of the arbitrator, and if there is a reasonable basis for the arbitrator's decision not to grant a postponement, the court should be reluctant to interfere with the arbitration award on those grounds." *Cypress Equip. Fund, Ltd. v. Royal Equip., Inc.*, No. C-96-3783 MMC, 1997 WL 106137, at *12 (N.D. Cal. Jan. 13, 1997) (internal citation omitted); *see also Healthcare Workers' Union Local 250, SEIU, AFL-CIO, CLC v. Am. Med. Response*, No. CVF05-1333AWIDLB, 2006 WL 1652247, at *1 (E.D. Cal. June 12, 2006) (internal citations omitted) ("An arbitrator's refusal to grant a postponement is not grounds to vacate an arbitration award if there is any reasonable basis for the arbitrator's considered decision not to grant a postponement.").

NeuroSigma submitted numerous requests to continue the arbitration proceedings in light of its need to change counsel due to insurance coverage issues, and was granted two lengthy postponements before its third request was denied. (Declaration of Glenn E. Turner, III in Opposition to Motion to Vacate ("Turner Opp. Decl.") [Doc. # 67] ¶¶ 2-8, Exs. 1-7 [Doc. ## 68-74].)

In in its June 10, 2015 ruling on one of these requests for continuance, the panel stated:

> Normally an unanticipated change of counsel two weeks before a substantial trial or hearing would constitute good cause for a continuance, subject to requiring the moving party to do equity for the adverse party. However, the circumstances of this case are not normal, and the events leading up to Claimant's counsel's recent withdrawal do not support an unexpected or unanticipated event sufficient to meet Claimaint[']s burden of good cause. O'Melveny & Meyers ("OMM") was the second counsel who withdrew from representation after Claimant's insurance carrier, Scottsdale, refused to pay their fees for a variety of reasons. . . . The fact

organization. NeuroSigma also states that panel member Mary Jones should have recused herself. (*Id.* at 3 n. 1.) NeuroSigma states that it "reserves the right to separately move for vacation of the Award and disqualification of the Panel as a result of these conflicts." (*Id.*) NeuroSigma has not moved as to these issues (*see* Notice of Motion to Vacate Arbitration Award [Doc. # 61]), and the Court therefore declines to address them.

> that Scottsdale did not want to pay OMM's fees, and OMM did not want to undertake the trial without payment, were well anticipated, likely as early as the time OMM was brought into the case, but clearly by the time the hearing dates in this matter were originally set.

(Turner Opp. Decl, Ex. 2 at 1.)

The panel found that NeuroSigma had long known of the potential need to change counsel, but did not request a continuance until two weeks before the hearing date, when it voluntarily changed counsel.[2] (*Id*. at 2.) The panel found that continuing the proceedings yet again would cause substantial prejudice to De Salles which was not outweighed by the inconvenience to NeuroSigma. (*Id.*) The panel's decision to deny NeuroSigma's *third* request for a continuance was not arbitrary, and had a reasonable basis.

Nor did the panel's decision to reject a third continuance constitute a violation of due process, under the circumstances. NeuroSigma was granted two prior continuances, had notice of the hearing, did not request a continuance until just two weeks before the hearing, and was seemingly vigorously represented by counsel at the arbitration hearings that ensued. *See, e.g., Hawkins v. National Transp. Safety Bd.*, 669 F.2d 576, 577 (9th Cir. 1982) (*per curiam*) (no due process violation or abuse of discretion where party had twice requested and received continuances, received notice of the date set for the hearing, was aware of the potential need for a continuance but failed to request additional continuance until two days before the hearing, and was vigorously represented by counsel at the hearing).

b. Videoconference Testimony

NeuroSigma contends that the arbitrators were guilty of misconduct in denying it the right to cross-examine two critical witnesses, De Salles and his wife. (MTV at 2.) NeuroSigma also asserts that, in allowing De Salles and his wife to testify via videoconference, the arbitrators exhibited "overt bias" in favor of De Salles. (MTV at 2.) NeuroSigma further maintains that an appearance by videoconference is against Brazilian law, and this decision therefore also manifests a disregard for the law. (*Id.*)

The arbitration panel's August 18, 2015 Scheduling Order indicates that both sides initially agreed to the use of videoconference testimony. (Turner Opp. Decl., Ex. 7 at 1.)

[2] The arbitration panel's order noted that, because OMM could not have unilaterally withdrawn as counsel without NeuroSigma's permission, NeuroSigma likely "create[d] the very predicament it finds itself in" by voluntarily changing counsel at such a late date. (Turner Opp. Decl., Ex. 2 at 2.)

NeuroSigma later objected to the videoconference testimony, but the panel upheld the parties' prior agreement to proceed via videoconference. (*Id.*)

When the time came for cross-examination of De Salles and his wife, NeuroSigma's counsel refused to proceed with the cross-examination, asserting that it was prohibited by Brazilian law, and that NeuroSigma feared future sanctions should it ever decide to conduct business in Brazil (which it currently does not). (Declaration of Allan E. Anderson ("Anderson Decl."), Ex. 6 [Doc. # 61-9] at 670:2-674:25.) The arbitration panel granted NeuroSigma additional time to provide supplemental legal authority in support of this position, but NeuroSigma was not able to offer any authority indicating either that Brazilian law prohibits testimony by video, or that a party engaging in arbitration might be sanctioned for agreeing to an arbitration panel's instructions to conduct cross-examination via videoconference. (*Id.*) Judge Sullivan of the arbitration panel noted that international arbitration is often conducted via Skype, and that Brazil is a signatory to the treaties which provide for international arbitration as a way to resolve disputes, and he would therefore be surprised if Brazil prohibited the practice. (*Id.* at 671:15-672:8.) NeuroSigma continued to insist that it would not ask any questions for risk of future sanctions, without citing any authority indicating the faintest risk of such sanctions. (*Id.* at 672:9-675:19.)

Notwithstanding the dubious (and still unsupported) proposition that Brazilian law prohibits the use of videoconference testimony in an arbitration taking place in the United States, there is no indication that the arbitration panel's decision to allow such testimony was motivated by bias, rather than a good faith belief that this was a permissible procedure and would facilitate resolution of the matter. The panel did not exhibit bias in allowing the videoconference testimony.

c. Penalties for Failure to Comply with Interim Decision

NeuroSigma asserts that the arbitrators committed misconduct by imposing penalties for failure to comply with the panel's interim decision. (MTV at 2, 19-20.) The panel once again found that NeuroSigma actedin bad faith in refusing to comply with its order of specific performance of the SPA. (Award at 3, 6-7.)

Pursuant to the Arbitration Rules and Mediation Procedures of the American Arbitration Association, an arbitrator "may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract." AAA R-47(a). "In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards.

In any [such ruling], the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate." AAA R-47(b). The arbitration panel has the power to grant sanctions "where a party fails to comply . . . with an order of the arbitrator." AAA R-58(a); *see also Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 264 F. Supp. 2d 926, 943 (N.D. Cal. 2003) ("A number of courts have held that arbitrators have authority to sanction . . . non-compliance with its interim orders.") (collecting cases). The arbitration panel did not act in manifest disregard of the law or outside the scope of its authority in imposing sanctions upon NeuroSigma for failure to comply with its interim order.

NeuroSigma has failed to meet its burden of establishing the "very unusual circumstances" which warrant vacating or modifying an arbitration award. The Court therefore affirms the Award pursuant to 9 U.S.C. § 9.

III.
CONCLUSION

In light of the foregoing, De Salles's motion to reopen case is **GRANTED**, NeuroSigma's motion to vacate or modify arbitration award is **DENIED** and De Salles's motion to confirm arbitration award is **GRANTED**.

IT IS SO ORDERED.