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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

ALLEN B. ROBERTS,

Petitioner,

- against -

JOEL L. FINGER, JEAN L. SCHMIDT, BARRY ASEN, MICHAEL P. PAPPAS, GREGORY B. REILLY, BRIAN D. SULLIVAN, ERIC D. WITKIN, THE ESTATE OF THOMAS C. GREBLE and ROBERTS & FINGER, LLP,

Respondents,

and

JEFFERY J. JANUZZO,

Additional Respondent.

INDEX NO. 602657/2006

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

Dated: April 3, 2007

KARLA MOSKOWITZ J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 3

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ALLEN B. ROBERTS,

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Index No. 602657/2006

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DECISION and ORDER

Respondents,

and

JEFFERY J. JANUZZO,

Additional Respondent[1].

----------x

KARLA MOSKOWITZ, J:

The court consolidates for disposition motion sequence numbers 001, 002, 003 and 004.

Petitioner, Allen B. Roberts ("Roberts"), a former equity partner in the respondent law firm, Roberts & Finger ("R&F"), petitions the court pursuant to CPLR 7502(a), 7511(a), 7511(b)(i)-(iv), 7511(d) and 7513 to vacate the July 13, 2006 arbitration decision that denied Roberts' claim for relief and awarded respondent R&F costs and attorneys' fees against Roberts in the amount of $383,963.12.

Respondents Joel L. Finger ("Finger"), R&F, Jean L. Schmidt ("Schmidt"), Eric D. Witkin ("Witkin") and Diane Greble as executor of the estate of Thomas C. Greble ("Greble Estate"), Barry Asen ("Asen"), Michael Pappas ("Pappas"), Gregory B. Reilly ("Reilly") and Brian D. Sullivan ("Sullivan") cross-move to dismiss the petition (motion sequence numbers

[1] By order dated February 15, 2007, the court permitted Jeffrey A. Januzzo to intervene as of right.

002, 003 and 004).

FACTS

In 1981, Roberts and Finger formed R&F, a law partnership. Paragraph 6(d) of the R&F Partnership Agreement ("Agreement") provides:

> Any partner may voluntarily withdraw from the Partnership on written notice of thirty (30) days to each of the members of the Management Committee. At the expiration of the thirty (30) day period, or sooner as mutually agreed upon, the withdrawal shall become effective. At any time during the pendency of the withdrawal notice and before the effective date of withdrawal, a termination of the Partnership may be voted in accordance with the provisions of paragraph 8 of the agreement. If this is done, dissolution proceedings, liquidation of assets, and distribution of proceeds shall ensue, and the notice of withdrawal shall be of no effect. Absent a termination of the Partnership, the withdrawing Partner's right, title and interest shall be extinguished as of the effective date of withdrawal but the withdrawing Partner shall be entitled to share in the profits and losses and in the assets of the Partnership to date of withdrawal on the same basis as set forth in paragraph 6(b) above.

On March 8, 2001, Roberts gave 30 days written notice to the R&F management committee of his intention to withdraw from the firm. On March 27, 2001, Finger gave notice to all R&F partners, including Roberts, of an April 4, 2001 partnership meeting to consider the dissolution of R&F. Roberts elected not to attend the meeting. At the April 4 meeting, 60% of the R&F partners voted to dissolve the partnership and then created a dissolution committee, consisting of Finger, Schmidt and Greble, that would liquidate R&F and distribute R&F's assets. The parties do not dispute that the dissolution committee collected a majority of R&F's

outstanding receivables and hired an appraiser to value R&F's assets. The dissolution committee provided all former R&F partners, including Roberts, with ongoing reports regarding the progress of the dissolution.

Following R&F's dissolution, its former partners formed Greble & Finger, LLP ("G&F"). G&F occupied R&F's former office space and used many of R&F's former assets, but G&F paid the rent and paid R&F for the assets pursuant to an asset sale and purchase agreement.

In June, 2002, Roberts commenced a lawsuit in this court against the individual respondents and G&F that alleged, "conspiracy by a group of lawyers and their new law firm to misappropriate and convert cash and other assets of their former partner . . . in order to use those assets unlawfully for the financial support of their new law firm and their personal lifestyles." (Finger Aff, Ex. 42, p. 1) By order to show cause, Roberts sought, among other things, appointment of a temporary receiver. Defendants cross-moved to compel arbitration of the dispute. The court denied Roberts' application for a temporary receiver and, by order dated August 15, 2002, granted the cross-motion to compel arbitration. Pursuant to a July 27, 2004 so-ordered stipulation, Roberts discontinued that lawsuit without prejudice. (Finger Aff., Ex. 43 & 44)

Thereafter, on January 28, 2005, Roberts filed a demand for arbitration with the American Arbitration Association ("AAA"). The demand alleged: (1) breach of contract; (2) breach of fiduciary duty and waste; (3) misappropriation; (4) unjust enrichment; (5) money and property had and received; and (6) failure to provide ERISA plan information against R&F and its partners and demanded more than $2,500,000 in damages in addition to costs and attorneys' fees. (Pet., Ex. B).

The arbitration demand named eight former R&F partners, including the four non-equity partners Witkin, Pappas, Reilly and Sullivan. In Panel Order Number 2, dated November 18, 2005, the panel dismissed the non-equity partners on the ground that they had not taken any of the actions Roberts complained of in the arbitration demand.[2] (Finger Aff. Ex. 12). The demand also named former partner Thomas Greble, who died before responding to the arbitration demand. The Panel's clarification to Panel Order No. 2 confirmed that the Greble Estate was not a party to the arbitration. (Finger Aff., Ex. 14). The remaining respondents, R&F, Finger and Schmidt answered the demand, and R&F counterclaimed for monetary damages based on Roberts' alleged breach of his fiduciary duty and for costs and attorneys' fees. R&F subsequently withdrew its counterclaim for monetary damages, but it did not withdraw the claim for costs and attorneys' fees.

The Panel conducted the hearing over six days during which Roberts called four fact witnesses and introduced 200 exhibits into evidence. When Roberts rested his case, respondents moved to dismiss the arbitration demand on the ground that Roberts had not made out a *prima facie* case. On May 11, 2006 the Panel issued an Interim Award granting respondents' motion to dismiss. The decision directed respondents to submit a detailed statement of the costs R&F incurred and the fees R&F paid in the arbitration. (Finger Aff, Ex. 2).

By Final Award dated July 13, 2006, the Panel, *inter alia*, incorporated the Interim Award into the Final Award and awarded R&F attorneys' fees and costs in the amount of $383, 963.12. (Finger Aff, Ex. 1).

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[2] That same order dismissed Roberts' claims against Asen who, although he was a 2% equity partner in R&F, also established that he had not taken any of the actions Roberts complained about in the arbitration demand.

THE INTERIM AND FINAL ARBITRATION AWARDS

a. Sixth Cause of Action

The Arbitration Panel determined that Roberts had no standing to assert the ERISA claim because he was not a plan participant at the time he made demands for information on the plan trustees. (Finger Aff, Ex. 2, para. 6A). Moreover, the Panel disallowed Roberts' claim for a statutory penalty under ERISA because it found that Roberts failed to present any information showing that R&F had not given him 401(k) plan information in the regular reports he received during dissolution. (Finger Aff., Ex.2, para 6B).

b. First through Fifth Causes of Action

The Panel considered these causes of action together because, "while positing different legal theories of recovery, all depend on the same series of events, which largely occurred after April 4, 2001." The Panel held "as a matter of law and common sense" that the March 27, 2001 notice of the April 4, 2001 meeting was adequate to alert Roberts that, if the partners voted to dissolve R&F, they would also take steps to implement that decision. The Panel also found that Roberts did not present any evidence that R&F's creation of the dissolution committee caused him any compensable damage. (Finger Aff, Ex. 2, para. 7).

The Panel rejected Roberts' argument that the Partnership Agreement required him to be a member of the dissolution committee and found that, pursuant to the Agreement, Roberts' position on the management committee did not require R&F to give him a role in managing the firm's dissolution.

The Panel held that the evidence did not support Roberts' allegations of looting and usurpation of assets by G&F and the respondents and thus concluded that the allegations lacked

merit. Moreover, the Panel found that Roberts did not present any evidence that "going concern value" or the "goodwill" of R&F would be greater than the amount that R&F received in the dissolution. Indeed, the panel stated that the fate of G&F and the dimunition of R&F's business, even before Roberts left, "belies the notion there was such substantial goodwill or going concern value." (Finger Aff., Ex. 2, para 9).

The Panel concluded that, "regardless of the Causes of Action Pleaded, [Roberts] has failed to establish a *prima facie* case that he has suffered any damage as a result of the manner in which the dissolution of Rogers [*sic*] & Finger was carried out." (Finger Aff., Ex. 2, para. 10)

The Panel determined that Roberts "shall recover nothing" on his causes of action and that he was responsible for bearing all of his own costs of the arbitration and R&F's costs and reasonable attorneys' fees in whole or in part. (Finger Aff. Ex. 2, para. 11).

The arbitrators' Final Award incorporated the Interim Award and assessed attorneys' fees and costs against Roberts and in favor of R&F in the amount of $383,963.12. (Finger Aff., Ex. 1).

ARGUMENTS

A. Roberts' Arguments in favor of Vacatur

Roberts argues that the court should vacate the award because the Panel exceeded its powers by issuing an irrational award that disregards the law, the facts and the R&F partnership agreement. Specifically, Roberts complains that the award ignores the evidence that the R&F dissolution was a sham.

Roberts also complains that he was prejudiced because the Panel Chair concealed that he is not a New York practitioner and that, because the Chair was unfamiliar with New York law, he

issued erroneous and wasteful rulings.

In addition, because the Panel would not hear Roberts before it dismissed Asner and the non-equity partners, Roberts claims that the Panel should not have dismissed those partners. Thus, Roberts asks the court to vacate the award. Roberts also contends that vacatur is warranted because counsel's joint representation of R&F and the individual respondents created an impermissible conflict of interest.

Roberts further argues that the Panel did not follow proper procedure because it refused to admit crucial evidence and failed to address his claims that respondents destroyed and withheld documents. Roberts also complains that the Panel improperly excluded the Greble Estate from the arbitration and that no contractual provision permits the Panel to award R&F attorneys' fees.

Finally, Roberts explains that, because the Panel never addressed the issues Roberts raised about interpretation of the Interim Award, the award was not final and definite, and vacatur is consequently necessary.

B. Respondents' Arguments in Opposition to Vacatur

Respondents argue that vacatur is unwarranted because the Panel's decision was final and definite, consistent with the evidence and the partnership agreement and adhered to proper procedure. Respondents contend that the Panel did address the issues the arbitration demand raised. Specifically, the Panel found that (1) the partnership agreement did not mandate that Roberts had to be a member of the dissolution committee; (2) the partners properly formed the dissolution committee; and (3) R&F provided Roberts with proper notice and ongoing reports of the dissolution activity, including collection of accounts receivable, sale of R&F's assets,

payment of R&F's debts and distributions to its partners. Respondents also contend that the Panel specifically found that Roberts had produced no evidence that R&F or any of the partners defrauded him.

Respondents contend that the Panel Chair's admission to practice law in both Massachusetts and New York is irrelevant and does not require that the court vacate the award. They claim the Chair did not conceal that he practiced law primarily in Massachusetts and that Roberts cannot show prejudice to him, in any way, because of the Chair's dual admission.

As to the dismissal of the non-equity partners, the respondents argue that Roberts' objections are untimely because Roberts did not object to the dismissal within the statutory 90 day time frame. They also argue that the dismissal was proper because Roberts presented no facts to support liability against them and that, pursuant to the Agreement, none of the non-equity partners was a party to the acts Roberts complained of in the arbitration demand. Moreover, respondents argue that the Panel correctly found no jurisdiction over the Greble Estate.

The respondents contend that the Panel also correctly found that it did not have jurisdiction to consider disqualification of respondents' counsel and, in any event, the dual representation presented no conflict.

Respondents argue that the Panel properly excluded the expert evidence that Roberts attempted to introduce through a fact witness in contravention of the Panel's order. Respondents also argue that the Panel specifically found that, despite his claims of spoilation and lack of access before the hearing, Roberts had timely access to all the documents he needed.

As to costs and fees, respondents contend that the award of attorneys' fees was proper because Roberts requested attorneys' fees in his arbitration demand and R&F demanded

attorneys' fees in its counterclaim. Thus, the Panel's decision that the reciprocal requests constitute a pro tanto agreement to arbitrate the issue is correct, and the law of this state and the AAA Commercial Arbitration Rules support the Panel's decision.

CHOICE OF LAW

In this case, R&F maintained offices in New York and New Jersey and represented several out-of-state clients. As a threshold matter, the court must therefore determine whether the Federal Arbitration Act ("FAA") or New York's CPLR Article 75 governs this proceeding.

The FAA applies when there is a written arbitration provision in a "contract evidencing a transaction involving commerce. . ." (9 U.S.C. § 2). In *Citizens Bank v Alafabco, Inc.*, (539 U.S. 52 [2003]), the United States Supreme Court held that the FAA encompasses a wider range of transactions than those actually "in commerce." The Court explained that the "involving commerce" provision of the FAA was the "functional equivalent" of the term "affecting commerce" and thus signals "the broadest permissible exercise of the Congress' Commerce Clause power."

After the Supreme Court remanded *Wien & Malkin, LLP v Helmsley-Spear, Inc.* (6 N.Y.3d 471 [2006]) to the New York Court of Appeals for further consideration in light of *Alafabco*, the Court of Appeals found that "the Supreme Court's remand . . . meant that if the subject matter of an arbitration affected interstate commerce, the FAA would apply." (6 N.Y.3d at 478 n.8)

However, neither *Wein & Malkin* nor *Alafabco* addresses the situation where, as here, the contract contains an explicit choice of law provision. The R&F Partnership Agreement includes

an arbitration provision in paragraph 10,[3] and paragraph 11(a) of the Agreement provides that "[a]ll provisions of this Agreement shall be given effect, and shall be enforced according to the laws of the State of New York." In *Hackett v Milbank, Tweed, Hadley & McCloy* (86 N.Y.2d 146, 154 [1995]), the respondent argued that the arbitration clause in the partnership agreement came within the scope of the Commerce Clause and the FAA because it applied to partners in offices throughout the United States. The Court stated:

> The overriding policy of the [FAA], however, is the enforcement of arbitration agreements according to their terms, including the parties' choice of governing law. The Parties' agreement here not only provided for binding arbitration of their dispute, it explicitly provided that New York law would govern that arbitration and that the only grounds for vacating the arbitrator's award are those encompassed by CPLR 7509 and CPLR 7511. Such an explicit and unambiguous choice of law in an arbitration agreement must be given effect.

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[3] Paragraph 10 of the agreement states in pertinent part:

> (a) Any controversy arising out of or relating to this agreement, or to the subject matter hereof, including any claim for recission and/or damages . . ., shall be settled by arbitration in accordance with the provisions of this paragraph.
>
> * * *
>
> (e) If the parties are unable to agree upon the selection of an arbitration panel in accordance with the provisions of subparagraph (c), then petitioning partner may file his demand for Arbitration with the American Arbitration Association in New York City and the controversy shall be settled there in accordance with its rules and under its auspices, and judgment may be entered upon the award in court of competent jurisdiction.

In *Salvano v Merrill Lynch, Pierce, Fenner & Smith, Inc.* (85 N.Y.2d 173, 180 [1995]), the New York Court of Appeals held:

> If the parties' arbitration agreement contains a choice of law clause providing that the law of a particular state will govern their arbitration, the parties choice will be given effect if to do so will not conflict with the policies underlying the FAA; otherwise the FAA applies. (Internal citations omitted).

In the *Matter of Smith Barney, Harris & Upham Co. v Luckie* (85 N.Y.2d 193, 200 [1995]), the Court found that, because the contract specified that New York law would govern the agreement and its enforcement, New York law would apply unless that law would conflict with the policies of the FAA. Moreover, in *Matter of Diamond Waterproofing Systems, Inc. v 55 Liberty Owners Corp.* (4 N.Y. 3d 247 [2005]), the Court explained that, based on *Luckie,* the FAA applied to the parties' arbitration clause, but only because the choice of law provision did not specify that New York law governed both the agreement and its enforcement.

In this case, it does not appear that the FAA and the CPLR standards applicable to the judicial review of an arbitration award conflict. Petitioner claims, under CPLR 7511, that (1) the Panel engaged in misconduct (CPLR 7511[b][i]); (2) the Panel exceeded its power (CPLR 7511[b][iii]) because of its manifest disregard for the law and the complete irrationality of the award; and (3) the Panel failed to follow Article 75 procedures (CPLR 7511[b][iv]). The FAA's analogous grounds for vacatur of an arbitration award are: (1) misconduct, that includes refusal to hear evidence material to the controversy or other misbehavior prejudicing a party's right; and (2) manifest disregard for the law and exceeding the power of an arbitrator.

Accordingly, I find that the choice of law provision in the Partnership Agreement

evidences the parties' intention that New York Law governs the Agreement and its enforcement, that the CPLR Article 75 provisions do not conflict with the FAA, and thus CPLR 7511 governs judicial review of the petition to vacate the arbitration award.

CPLR 7511

CPLR 7511(b)(1) articulates the exclusive grounds a court may consider when reviewing an application to vacate an arbitration award: (i) corruption, fraud or misconduct in procuring the award; (ii) partiality of an arbitrator; (iii) the arbitrators exceeded their power or executed their power so imperfectly that a final and definite award was not made; and (iv) failure to follow appropriate procedures.

If a party seeking to vacate the award cannot establish the existence of one of the enumerated grounds, the court must confirm the award. (*N.Y. State Nurses Ass'n v Nyack Hospital*, 258 A.D.2d 303 [1st Dept 1999], *appeal denied*, 93 N.Y.2d 810). Moreover, when parties agree to submit their dispute to an arbitrator, the courts play a limited role in reviewing the arbitration award. The arbitrator's factual findings, interpretation of the contract and judgment concerning remedies bind the courts. A court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because the court's interpretation would be a better one. A court respects an arbitration award even if the arbitrators make errors of law or fact. Thus, a court will not assume the role of overseer to mold the award to its sense of justice. (*In re New York State Correctional Officers and Police Benevolent Ass'n v State of New York*, 94 N.Y.2d 321, 326 [1999]; *Sprinzen v Nomberg*, 46 N.Y.2d 623 [1979]; *In re N.Y. State Nurses Ass'n v Nyack Hosp.*, *supra* at 303; *Campbell v New York City Transit Authority*, 32 A.D.3d 350 [1st Dept 2006]).

Thus, both the express language of CPLR Article 75 and the well-settled case law limit the court's review to whether the petitioner has established any of the grounds for vacatur of the arbitration award that CPLR 7511 (b)(1) articulates.

DISCUSSION

A. The Award is Consistent with the Agreement and the Evidence.

Roberts complains that the Panel failed to address his contention that the Agreement entitled him to be a member of the dissolution committee. However, in the Interim Award, the Panel specifically found that, pursuant to the Agreement, R&F had properly formed the dissolution committee. The Panel also specifically rejected Roberts' argument that his role on the management committee required R&F to give him a role on the dissolution committee. (Finger Aff, Ex. 2, para. 7).

As to Roberts' contention that the dissolution was a sham, the Panel found that the partners voted the dissolution in accordance with the Agreement and that R&F sold its assets, collected its accounts receivable, paid its debts and then made distributions to the equity partners in accordance with the dissolution plan. The Panel dismissed Roberts' allegations that Finger, Schmitt and R&F had defrauded him because the "claimant has produced no evidence from which it could be found that the actions of the Dissolution Committee caused the claimant any compensable damage." (Finger Aff. Ex. 2, paras. 7, 8 and 9).

B. The Panel Chair did not Conceal that He was Admitted to the New York and Massachusetts Bars and this Dual Admission is Irrelevant.

That the Panel Chair is admitted to the bar in both New York and Massachusetts and that he may spend the majority of his time in Massachusetts is irrelevant. The Panel Chair's resume

clearly stated his affiliations in Massachusetts, and, in addition, information about the Chair's office was available to the public in Martindale-Hubbell. Moreover, Roberts never explains how the Chair's Massachusetts bar admission prejudiced him. This claim of prejudice is particularly odd because Roberts does not object to another Panel member who is not admitted to practice law in New York. (Finger Aff, Ex. 8).

Roberts presents no evidence to support his claims that the Panel Chair "misrepresented" his credentials or that the Panel Chair engaged in any form of deception or misconduct.

C. Robert's Objection to Dismissal of the Non-Equity Partners in Panel Order 2 is Untimely.

Panel Order 2 of November 18, 2005 dismissed all of Roberts' claims against Witkin, Sullivan, Asen, Pappas and Reilly. Pursuant to CPLR 7511(a), Roberts had 90 days, or until February 16, 2006, to move to vacate Order 2. Accordingly, Robert's July 27, 2006 petition is more than 5 months late. (Finger Aff, Ex. 12).

In addition, the Panel correctly interpreted the R&F Partnership Agreement (Pet., Ex A) that stated that the non-equity partners had no role in governance of the law firm, had no right to vote and, because they had no equity in the firm, they had no interest in the firm's profits and losses. (Finger Aff., Ex. 21-25).

D. The Panel did not have Jurisdiction to Hear Robert's Application to Disqualify Counsel.

In *Merrill Lynch, Pierce, Fenner & Smith v Benjamin (*1 A.D.3d 39,44 [1st Dept 2003]), the court stated:

Another matter "intertwined with overriding public policy

> considerations" and therefore beyond the reach of arbitrators' discretion is the disqualification of an attorney from representing a client. Like matters of attorney discipline, which have been held beyond the jurisdiction of arbitrators, issues of attorney disqualification involve interpretation and application of the Code of Professional Responsibility and Disciplinary Rules and cannot be left to the determination of arbitrators selected by the parties themselves for expertise in the particular industries in which they are engaged.
> (Citations omitted).

When a party seeks disqualification of counsel in an arbitration, a court stays the arbitration upon application to the court. (*Biderman Industries Licensing Inc. v Avmar*, N.V., 173 A.D.2d 401 [1st Dept 1991] ["The Supreme Court properly stayed arbitration of the disqualification issue, as such matter is intertwined with overriding public policy considerations."]). Accordingly, the Panel correctly found that, according to New York Law, it did not have jurisdiction to hear the disqualification application.

E. The Panel's Exclusion of an Expert Valuation Document was Procedurally Proper and Rational.

Roberts' attempt to admit into evidence an expert evaluation of his interest in R&F through a fact witness was procedurally improper and appears to have been an attempt to evade the Panel's requirement, in Panel Order 3, that the parties disclose, prior to the hearing, whether they would introduce expert testimony. (Finger Aff, Ex. 16). The Panel was within its authority when it ruled that only an expert could evaluate Roberts' interest in R&F, and, because Roberts did not apprise the Panel that he would employ expert testimony, Roberts could not introduce the expert valuation through a fact witness. (*In the Matter of Leonard Bernstein v On-Line Software International, Inc.*, 232 A.D. 2d 336, 338 [1st Dept 1996]) *appeal denied* 89 N.Y.2d 810 [1997]

["It is well established, however, that arbitrators are not bound by the rules of evidence and may admit or deny exhibits on an equitable basis"]). Moreover, the Panel did not foreclose Roberts from presenting the damages information to the Panel in a post-hearing memorandum, for example. (Tr. 1331-1332).

F. The Panel Specifically Addressed Roberts' Claims that Respondents Destroyed and Withheld Documents.

The Panel specifically found that nothing impeded Roberts' ability to present his case because, before the hearing commenced, he had access to all the documents he needed to present his case and the evidence did not support Roberts' claims that R&F destroyed and withheld documents. In the Interim Award the Panel found:

> that there was ultimately no impediment to Claimant's ability to prove damages based upon spoilation or denial of access to records in violation of the N.Y. Partnership Law, as the records–save possibly only a single letter of questionable existence and materiality related to the ERISA claim (Cl. Ex. 112), which was purportedly dated March 22, 2001, . . – were ultimately available to claimant in a timely fashion for the evidentiary hearing. (Finger Aff., Ex. 2, p. 7 fn. 2).

Accordingly, that branch of Roberts' petition that claims the Panel ignored his complaints of spoilation and lack of access to documents is without merit.

G. The Panel's Award of Attorneys' Fees was Proper.

Rule 43(d)(ii) of the AAA Commercial Arbitration Rules and New York Law permit an arbitration Panel to consider attorneys' fees and to award them if both parties to an arbitration proceeding request attorneys' fees, even if the arbitration agreement does not provide for that award. (*See Matter of Warner Bros. Records, Inc. v PPX Enterprises, Inc.*, 7 A.D.2d 330 [1st

Dept 2004] [agreement between the parties did not specifically provide for attorneys' fees, but arbitrators had authority to award fees because both sides requested an award of fees]).

Roberts initially asked for an award of attorneys' fees in his arbitration demand. (Pet. Ex. B). R&F asked for an award of attorneys' fees in its second amended counterclaim that it filed on November 9, 2005 (Finger Aff., Ex. 4), and neither party withdrew its fee request. Moreover, on January 31, 2006, pursuant to the Panel's order, Roberts submitted his list of damages to the arbitrators and repeated his request for attorneys' fees. Thus, the Panel had authority to award attorneys' fees.

H. The Panel did not have Jurisdiction over the Greble Estate

The Panel was correct in its holding in Panel Order 2 that it did not have jurisdiction over the Greble Estate because Greble died prior to the parties' selection of the panel members, and, at the time the parties choose the Panel Members, the Surrogate's Court had not yet appointed Greble's widow as his representative. Any order made between the death of a party and appointment of his representative is void as to the deceased. (*See Halperin v Waldbaums Supermarket,* 236 A.D.2d 514 [2nd Dept 1997]). Accordingly, the order appointing the Panel was void as to Greble, and the arbitrators lacked jurisdiction over the estate's representative because she did not have an opportunity to appear and be heard regarding the composition of the Panel. In its clarification of Panel Order 2 (Finger Aff, Ex. 13), the Panel correctly asserted that it did not have jurisdiction over the Estate's personal representative and that "[a]s to the claims addressed to Mr. Greble personally, it is claimant's obligation to pursue the claim against the estate's personal representative. (*See* N.Y. Jurisprudence Death sect. 36, citing *Spenser v Cassavilla,* 839 F. Supp. 1014 [S.D.N.Y. 1994])."

I. The Panel's Award was Final and Definite

The arbitrator's award is final and definite when it determines the controversy and does not create a new controversy. (*Purpora v Bear Stearns Companies, Inc.,* 238 A.D.2d 216 [1st Dept 1997], *appeal denied* 90 N.Y.2d 806 [1997]). In this case, the Panel addressed all of Roberts' concerns, including the tax return issue that he raised in a June 6, 2006 letter, by providing in the Interim Award that Roberts shall pay the fees and costs awarded to the R&F dissolution committee, "for distribution in accordance with the Plan of Distribution." Thus, the Panel assured that Roberts would pay the costs and fees to the distribution committee and then he would receive his pro rata share of any money R&F might have to distribute.

Moreover, the Panel did not address the request Roberts made for an accounting after the Interim Award because, before the hearing, in opposition to a motion to establish a procedure for an accounting, Roberts told the Panel that he was not seeking an accounting. (Finger Aff, Ex. 28). Thus, the Panel was correct in its refusal to consider Roberts belated request for an accounting.

In the Final Award the Panel stated, " [u]pon consideration of the positions and requests of the Firm and Roberts in their respective submissions. . . this Panel awards as follows:. . . ." (Finger Aff. Ex. 1, p. 3). Then, after reciting the details of the award, the Panel concluded, "[e]xcept as expressly set forth above, this Final Award is in full settlement of all claims and requests for relief in this arbitration." (Finger Aff, Ex. 1, p. 4). Thus, the Panel considered all the parties requests and submissions and issued an award that was final and definite.

Accordingly, it is

ORDERED that Roberts' petition to vacate the arbitration award is denied and the cross-

motions (motion sequencc numbers 002, 003 and 004) to dismiss the petition are granted.

The clerk is directed to enter judgment accordingly.

Dated: April 3, 2007

J.S.C.