At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of September, 2012.

P R E S E N T:

HON. CAROLYN E. DEMAREST,

Justice.

- X

NEIL PISANE, INDIVIDUALLY AND AS A HOLDER OF 42.5% OF THE SHARES OF S&N CHEMICAL CO., INC.,

Plaintiff-Petitioner,

- against -

Index No. 12246/11

STEVEN FEIG, INDIVIDUALLY AND AS A SHAREHOLDER OF S&N CHEMICAL CO., INC. FOR THE DISSOLUTION OF S&N CHEMICAL CO., INC., A DOMESTIC CORPORATION,

Defendants-Respondents..

- X

The following papers numbered 1 to 10 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2 4-5
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	3 6
___ Affidavit (Affirmation)	
Other Papers Memoranda of Law	7-10

In this dissolution proceeding, plaintiff-petitioner Neil Pisane (Pisane) moves for an order, pursuant to CPLR 7511 (b), vacating the arbitration awards dated February 14, 2012 and May 7, 2012, entered following arbitration held pursuant to the Shareholders' Agreement during a stay of the instant proceeding. Defendant-respondent Steven Feig (Feig) cross-

moves for an order: (1) pursuant to CPLR 7510, confirming these arbitration awards and entering judgment thereon, and (2) awarding him the attorneys' fees and expenses incurred by him in opposing Pisane's motion and in bringing his cross motion, pursuant to the Shareholders' Agreement, and directing further proceedings to determine the amount of such attorneys' fees and expenses.

BACKGROUND

On January 1, 2004, Feig, Pisane, and non-party Robert Clark (Clark), as stockholders, S&N Chemical Co., Inc. (S&N), as the corporation, and Kenneth H. Godt & Associates, P.C. (Godt), as the trustee, executed a Shareholders' Agreement. Feig and Pisane each owned 42.5 shares of common stock (a 42.5% interest) in S&N and its related companies (collectively, the Companies), and Clark owned the other 15 shares (a 15% interest). Pisane, Feig, and Clark agreed that the Shareholders' Agreement was applicable to the Companies.

Article 15 (B) of the Shareholders' Agreement contained the terms for a stockholder-to-stockholder sale or transfer, specifying that the purchasing shareholder would pay 10% of the purchase price at the closing, and sign a series of 120 negotiable promissory notes which would provide for the payment of the balance in monthly installments over 10 years, with interest to be fixed at closing based upon the Federal Midterm Rate in accordance with the Internal Revenue Code or as agreed. Article 15 (D) contained a restrictive covenant, providing that the selling shareholder would not engage in a similar business as that carried on by the Companies for a period of three years.

Article 21 of the Shareholders' Agreement, entitled "Valuation for the Shares of Stock," provided, in subdivision (A), as follows:

> "A. The Stockholders agree that the purchase price for the shares in the [Companies] and all subsequent valuations as contemplated herein shall be the Certificate of Valuations as set forth in Exhibit 'A,' which is attached hereto and made a part of this Agreement. The Stockholders shall fix the total value of the common stock of the [Companies] by Certificate of Valuation signed by them and the [Companies] and affix such certificate to this Agreement. If the Certificate of Valuation is in existence and dated less than two years before the date as of which the value is to be determined, then the agreed value set forth in such certificate shall be conclusive. The Stockholders may, at any time, execute a new certificate of valuation that shall automatically supersede all prior certificates of valuation; however, in no event shall a certificate of valuation be effective unless signed by each of the Stockholders. If, at the time it is necessary to determine the value of the [Companies], and no certificates of valuation have been executed within two years, the total value shall be the higher of the values fixed in the last certificate executed by the Stockholders or the book value of the [Companies] as of the last day of the month immediately preceding the death of a Stockholder or the date of acceptance of an offer to sell . . ."

The Certificate of Valuation, annexed as Exhibit 'A' to the Shareholders' Agreement, signed by Feig, Pisane, and Clark, valued the Companies at $3,000,000 as of January 1, 2004. No later Certificate of Value was ever executed by the shareholders. The parties were unable to agree upon the value of the stock of the Companies.

Article 21 (B) of the Shareholders' Agreement provided:

> "*In the event the Parties are unable to reach a valuation of the shares of stock*, the generally retained accountants of [t]he

[Companies] are directed to use the following formula in conjunction with the then financial records of the business:
(1) Cash on hand [multiplied by] 1.25; plus
(2) Accounts Receivable [multiplied by] 2; plus
(3) Inventory [multiplied by] 2; plus
(4) Equipment as reflected on financial statements
(5) Less accounts and notes payable.
The total of the foregoing multiplied by two (2), *shall be the value for purposes of the Certificate of Valuation*" (emphasis added).

Article 21 (D) of the Shareholders' Agreement provides:

> "The [Companies'] regular accountants shall promptly make a determination, pursuant to paragraph (B) (1) hereof, of the value of the shares to be sold, and shall furnish a duly executed certificate to the [Companies] and to each Stockholder setting forth such determination. The determination of value as so made by such accountants *shall be final absent manifest error, conclusive and binding upon the parties hereto* . . ." (emphasis added).

Article 21 (E) addressed the calculation of book value of the Companies. It provided that "[the] book value of the [Companies] shall be established by the accountants for the [Companies]," who were required to take into account various factors in making such determination, including, inter alia, good will and physical assets.

Article 35 of the Shareholders' Agreement provided:

> In the event any dispute shall arise pursuant to any term or provision of this Agreement, the same shall be settled by arbitration before the American Arbitration Association within the County of Nassau, State of New York.... [T]he arbitrator shall direct that the successful party to such arbitration, as determined by the arbitrator, shall recover the costs and disbursements of the arbitration and its reasonable counsel fees. If a successful party to the arbitration shall be required to resort

> to court action to enforce any award in arbitration, the losing party agrees to pay for the other parties' counsel fees and the costs and disbursements of such action or proceeding.

By late 2010, disputes arose between the parties and, on February 7, 2011, Pisane had his 42.5% interest in the Companies appraised by valuation experts, Sigma Valuation Consulting Inc. (Sigma), who valued Pisane's interest at $675,000 as of December 31, 2010. On May 31, 2011, Pisane filed an order to show cause, commencing a proceeding for judicial dissolution of the Companies under Business Corporation Law § 1104-a in this court. By cross motion filed on July 11, 2011, Feig moved to compel arbitration and to stay or dismiss the dissolution proceeding. By a so-ordered stipulation dated July 12, 2011, the parties stipulated to stay the dissolution proceeding, pending arbitration of all claims asserted in Pisane's verified complaint and petition. In July 2011, Pisane filed a Statement of Claim with the American Arbitration Association (AAA), and the AAA appointed John F. Byrne as the arbitrator (Arbitrator Byrne).

Feig interposed an answer with counterclaims in the arbitration proceeding, dated September 7, 2011. Feig's second counterclaim asserted that, in seeking dissolution and thereby seeking to dispose of his shares in the Companies, Pisane became obligated to sell his shares in the Companies at the price and on the terms specified in Articles 15 and 21 of the Shareholders' Agreement. Feig's third counterclaim alleged that if the arbitrator determined that Feig was not entitled to relief under his second counterclaim, then the Companies alternatively elected to purchase Pisane's shares in the Companies for fair value

and upon such terms and conditions as may be approved by the arbitrator pursuant to Business Corporation Law § 1118.

Arbitration hearings were held over the course of three days, i.e., on November 22, 2011, December 12, 2011, and December 15, 2011, during which Arbitrator Byrne heard testimony from numerous witnesses, including the parties, their valuation experts, the Companies' comptroller, and the Companies' independent outside accountant. Arbitrator Byrne also allowed into evidence voluminous documentary evidence, including approximately 100 exhibits from Pisane.

Pisane's expert, Frank Lewis (Lewis), calculated the value of the Companies in accordance with the formula contained in Article 21 (B) of the Shareholders' Agreement based upon the Companies' October 31, 2011 financial data, and testified, at the arbitration, that the value of the Companies was $2,907,260. Pisane argued that the value of the Companies was either $2.9 million or $3.3 million (accounting for other factors and adding them to the $2.9 million calculation) or $3.675 million (relying upon an aggregate of the $3 million Certificate of Value and the $675,000 valuation by Sigma).

At the November 22, 2011 hearing, Arbitrator Byrne had directed the Companies' accountants, Bauman + Krasnoff LLP, to value the Companies in accordance with Article 21 (B) of the Shareholders' Agreement and to furnish a Certificate of Value pursuant to Article 21 (D) thereof for use in setting the price for Pisane's interest, and directed the Companies' accountants to testify at the next hearing on December 12, 2011. By an

Accountants' Report-Certificate of Value dated December 6, 2011 (Feig's Exhibit 7), the Companies' independent accountants furnished a Certificate of Value for the Companies as of October 31, 2011 for use of the parties. The Companies' independent accountants valued the Companies at a total of $1,503,073 ($1,418,233 for the five LLCs plus $84,840 for S&N), and Pisane's 42.5% interest in the Companies at $638,806. The Companies' independent accountants testified at the December 12, 2011 hearing that the $638,806 valuation (rounded to $639,000) for Pisane's shares was the correct valuation.

At the close of the arbitration hearings, Arbitrator Byrne directed the parties to set forth their legal and factual arguments in memoranda of law and subsequent reply memoranda of law, and the parties made such submissions.

On February 14, 2012, Arbitrator Byrne rendered a Partial Final Award. In his Partial Final Award, Arbitrator Byrne noted that Pisane, in his demand, had sought the dissolution of the Companies, and alternatively, sought to buy-out Feig's 42.5% interest in the Companies, and that Feig sought to enforce his alleged "right" to buy-out Pisane's 42.5% interest in the Companies pursuant to the Shareholders' Agreement. As a preliminary matter, Arbitrator Byrne addressed Pisane's arguments regarding an earlier November 30, 2011 order, in which Pisane's June 2010 demand to purchase Feig's shares was held null and void and superceded by Pisane's demand for dissolution of the Companies and Feig had been granted a priority right to purchase Pisane's interest in the Companies.[1] Arbitrator Byrne

[1] This argument appears to have related to the interpretation of a March 2006 agreement, not before this court, which the Arbitrator found conformed to the provisions of the

found that Pisane had "presented far from sufficient credible evidence or persuasive argument to dissuade [him]" from finding that Pisane's seeking of the dissolution of the Companies in court and in the arbitration proceeding must be deemed an offer to sell, which was accepted by Feig. Arbitrator Byrne thus found that Feig would purchase Pisane's 42.5% interest in the Companies.

In his Partial Final Award, Arbitrator Byrne found that the credible evidence established that the Companies' accountants had used the correct formula set forth in the Shareholders' Agreement in valuing Pisane's 42.5% interest in the Companies at $639,000 (rounded), and that Pisane's "suggestion that inventory and equipment be valued at 'cost' was neither contemplated in the relevant provisions of the Shareholders' Agreement nor logical in light of the benefit already derived by using depreciated value on the financial statements and tax returns." Arbitrator Byrne further found that "while both parties [had] insist[ed] that the value must be adjusted, upward or downward depending on which party believe[d] he ha[d] been 'aggrieved' the most, there [wa]s simply no basis in the provisions of the Shareholders' Agreement for such adjustments." Arbitrator Byrne determined that "the valuation of a 42.5% interest in [the Companies] at $639,000 was properly calculated in accordance with the Shareholders' Agreement, [and was] fair and reasonable."

The Arbitrator directed that the closing of the purchase of Pisane's shares by Feig would take place within 15 days from the date of the award, and directed Pisane to deliver

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Shareholder's Agreement.

his 42.5% interest in the Companies to Feig under the terms and conditions of the relevant provisions of the Shareholders' Agreement. Specifically, Feig was to deliver to Pisane the sum of $63,900 (10% of the purchase price) at the closing and 120 signed negotiable promissory notes providing for the payment of the balance of the purchase price, pursuant to Article 15 (B) (a) (4) of the Shareholders' Agreement, in monthly installments over the course of 10 years with interest at eight percent for the duration of the payment.

Arbitrator Byrne further found that the restrictive covenant on a selling shareholder contained in Article 15 (D) of the Shareholders' Agreement should "be modified to more accurately reflect the current, less punitive attitudes toward such provisions" and modified the restrictive covenant by directing that for a period of two years from the date of the award, Pisane could not directly or indirectly engage in a similar business as the Companies within a 100-mile radius.

Finally, in his Partial Final Award, Arbitrator Byrne found that pursuant to Article 35 of the Shareholders' Agreement, Feig, as the prevailing party in the arbitration, was entitled to recover "the costs and disbursements of the arbitration and [his] reasonable counsel fees." However, since Arbitrator Byrne had no evidence of the amount of such costs, disbursements, and counsel fees, he deemed his award to be a Partial Final Award with respect to all matters except costs, disbursements, and reasonable counsel fees. He directed Feig to submit an affirmation of services rendered setting forth the amount of costs, disbursements, and reasonable counsel fees sought by him pursuant to Article 35 of the

Shareholders' Agreement, and directed Pisane to submit his opposition to this application, upon which he would then render a determination in his Final Award.

Arbitrator Byrne noted that his February 14, 2012 Partial Final Award was in full and complete settlement and satisfaction of any and all claims, counterclaims, defenses, and offsets, except for a determination as to Feig's costs, disbursements, and counsel fees. Following receipt of Feig's affirmation in support of such costs and fees, and Pisane's opposition thereto, Arbitrator Byrne rendered a Final Award dated May 7, 2012. In his May 7, 2012 Final Award, Arbitrator Byrne directed that Pisane pay Feig the sum of $152,310.23 ($149,633.50 for attorneys' fees plus $2,676.73 for expenses) plus interest at the legal rate from the date of such Final Award.

On June 4, 2012, the parties closed on the sale to Feig of Pisane's interest in the Companies. By an Assignment and Acceptance of Membership Interest dated May 24, 2012 executed by Pisane and Feig, Pisane irrevocably sold, assigned, and transferred to Feig his 42.5% shares of common stock in the Companies. Feig paid Pisane the sum of $63,900 (10% of the purchase price) at the closing, and, on May 24, 2012, Feig executed a promissory note promising to pay Pisane the principal sum of $575,100 together with interest in 120 consecutive monthly installments of principal and interest, commencing on June 1, 2012 and continuing on the first day of each month thereafter up to and including May 1, 2022. Feig

has paid Pisane the first monthly payment (which together with the initial 10% payment totals over $70,000).[2]

DISCUSSION

Pisane, by his instant motion, now seeks to vacate the arbitration award. Pisane argues that Arbitrator Byrne exceeded his power by irrationally ignoring the plain language of the Shareholders' Agreement governing valuation. Specifically, Pisane contends that Arbitrator Byrne, in valuing his 42.5% interest in the Companies, was required to use the higher of the book value or $3 million, the value of the Companies set forth in the last executed Certificate of Value, pursuant to Article 21 (A) of the Shareholders' Agreement, in establishing the purchase price for Pisane's 42.5% share of the Companies.[3] Pisane

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[2]Feig argues that Pisane, by accepting the benefits of the arbitration award, by receiving payment for his shares and transferring his shares, should be estopped from contesting Arbitrator Byrne's authority to issue such award. Pisane, however, argues that his acceptance of payment under the arbitration award does not bar his motion to vacate this award because, in signing the closing documents, he wrote, "in so signing, I reserve all my rights and without prejudice to my pending motion concerning the above referenced case in Brooklyn Supreme Court,"and Feig sent payment without objecting to his reservation of his rights. It is unnecessary to determine this issue since the court finds (as discussed below) that Arbitrator Byrne did not exceed his powers in rendering the arbitration award.

[3]Feig asserts that Pisane's present argument was first raised in a post-hearing reply memorandum of law submitted to Arbitrator Byrne, and is inconsistent with the valuation arguments that Pisane had raised both before and during the hearings before him. Pisane disputes this, pointing to a November 16, 2011 letter by his attorney to Arbitrator Byrne, in which he stated that the valuation of the Companies for purposes of Article 21 of the Shareholders' Agreement was $3 million, and that he was entitled to have his interest in all Companies purchased for $1,950,000 (42.5% of this $3 million plus $675,000 based upon the February 7, 2011 valuation by Sigma). In that letter, however, Pisane also stated that notwithstanding this, he would entertain a serious all cash offer along the lines of the parties' prior discussions.

contends that Arbitrator Byrne irrationally failed to follow this contractual mandate, thus exceeding his authority and requiring the vacatur of his February 14, 2012 arbitration award. Feig, in his cross motion, seeks to confirm this arbitration award, arguing that it was correctly calculated pursuant to Article 21 (B) of the Shareholders' Agreement.

In addressing Pisane's motion and Feig's cross motion, the court notes that "New York law grant[s] arbitrators broad authority to resolve disputes through informal and expeditious means, and concomitantly limit[s] the authority of the courts to modify or vacate arbitration awards" (*Matter of Johnson [Summit Equities, Inc.]*, 22 Misc 3d 631, 650 [Sup Ct, NY County 2008]). Since "[t]hose engaged in commercial affairs have routinely resorted to arbitration for an expeditious resolution of their disputes by persons with a practical knowledge of the subject area . . . [c]ourts are reluctant to disturb the decisions of arbitrators lest the value of this method of resolving controversies be undermined" (*Matter of Goldfinger v Lisker*, 68 NY2d 225, 230 [1986]; *see also Matter of Siegel [Lewis]*, 40 NY2d 687, 689 [1976]).

Pursuant to CPLR article 75, courts play a limited role in reviewing the decisions of arbitrators (*see Matter of Goldfinger*, 68 NY2d at 230). CPLR 7510 provides that "[t]he court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511." Under CPLR 7511 (b) (1) (iii), an arbitration award shall be vacated if the arbitrator

"exceeded his or [her] power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made."

An arbitrator "exceed[s] his [or her] power" under CPLR 7511 (b) (1) (iii) only in the rare circumstances where his or her "'award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power'" *(Matter of Kowaleski [New York State Dept. of Correctional Servs.]*,16 NY3d 85, 90 [2010], quoting *Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]; *see also Matter of Falzone [New York Cent. Mut. Fire Ins. Co.]*, 15 NY3d 530 [2010]; *Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100*, 14 NY3d 119, 123 [2010]; *Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO, v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 79 [2003]; *Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308 [1984]; *Matter of Shimon v Silberman*, 92 AD3d 789, 790 [2d Dept 2012], *lv denied* 19 NY3d 802 [2012]). "Outside of these narrowly circumscribed exceptions, courts lack authority to review arbitral decisions, even where 'an arbitrator has made an error of law or fact'" (*Matter of Kowaleski [New York State Dept. of Correctional Servs.]*,16 NY3d at 91, quoting *Matter of Falzone*, 15 NY3d at 534).

Moreover, "an arbitrator's interpretation of the parties' contract is impervious to judicial challenge even where 'the apparent, or even the plain, meaning of the words" of the contract has been disregarded'" (*Maross Constr. v Central N.Y. Regional Transp. Auth.*, 66

NY2d 341, 346 [1985], quoting *Rochester City School Dist. v Rochester Teachers Assn.*, 41 NY2d 578, 582 [1977]; *see also Matter of Local Div. 1179, Amalgamated Tr. Union, AFL-CIO [Green Bus Lines]*, 50 NY2d 1007, 1009 [1980]; *Matter of Sims v Siegelson*, 246 AD2d 374, 376 [1st Dept 1998]). As mandated by CPLR 7501, the court, in determining whether to confirm or vacate an arbitration award, shall not "pass upon the merits of the dispute" (CPLR 7501; *see also Graniteville Co. v First Natl. Trading Co.*,179 AD2d 467, 469 [1st Dept 1992], *lv denied* 79 NY2d 759 [1992]).

"[I]t is '"not for the courts to interpret the substantive conditions of the contract or to determine the merits of the dispute"'" (*Matter of New York City Tr. Auth.*, 14 NY3d at 124, quoting *Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO*,1 NY3d at 83, quoting *Board of Educ., Lakeland Cent. School Dist. of Shrub Oak v Barni*, 51 NY2d 894, 895 [1980]). "'A court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one'" (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO*, 1 NY3d at 83, quoting *Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999]). "Indeed, even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice" (*id.*).

An arbitrator's award "will not be vacated even though the court concludes that his [or her] interpretation of the agreement misconstrues or disregards its plain meaning or

misapplies substantive rules of law, unless it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on his power (*Matter of Silverman [Benmor Coats]*, 61 NY2d at 308 [1984]; *see also Graniteville Co.*, 179 AD2d at 468-469). "An arbitration award will be confirmed if any plausible basis exists for the award and mere errors of law or fact will not suffice as a basis for vacatur" (*Graniteville Co.*,179 AD2d at 469).

Here, Pisane, relying upon the grounds set forth in CPLR 7511 (b) (1) (iii), argues that Arbitrator Byrne exceeded his powers. However, an arbitrator may be said to have exceeded his or her powers "'only if [he or she] gave a completely irrational construction to the provisions in dispute and, in effect, made a new contract for the parties'" (*Transparent Value, L.L.C. v Johnson*, 93 AD3d 599, 601 [1st Dept 2012], quoting *Matter of Natl. Cash Register Co. [Wilson]*, 8 NY2d 377, 383 [1960]). Arbitrator Byrne did not do so.

Pisane, in arguing that Arbitrator Byrne, did exceed his powers, relies upon the language of Article 21 (A) of the Shareholders' Agreement, which (as set forth above) provided that if, at the time that it is necessary to determine the value of the Companies, the Certificate of Value is more than two years old, the total value shall be the higher of the values fixed in the last certificate executed by the stockholders, or the book value of the Companies as of the last date of acceptance of an offer to sell. Pisane contends that, therefore, Article 21 (A) of the Shareholders' Agreement required Arbitrator Byrne to use the value of $3 million in valuing his shares of the Companies. Contrary to Pisane's

contention, however, this section specifically provided that a Certificate of Value was conclusive only if it were "dated less than two years before the date as of which the value is to be determined." Here, the Certificate of Value was dated well over two years before the date that value was determined. While Article 21 (A) of the Shareholders' Agreement sets forth that the stockholders may execute a new Certificate of Value to update and supersede all prior Certificates of Value, the Shareholders' Agreement specifically contemplated that the parties might not agree to reach a valuation of the shares of stock in the Companies and provided for a specific formula for such valuation in Article 21 (B).

Feig argues that Article 21 (B) of the Shareholders' Agreement addresses precisely the situation facing the parties where there is a buy-out of the Companies' shares by a shareholder since it provides the method by which the Companies' outside accountant must re-compute "the value for purposes of the Certificate of Value." Supporting Feig's argument, Article 21 (B) expressly stated that in the event the parties are unable to reach a valuation of the shares of stock, the generally retained accountants of the Companies are to use a specific formula and that the calculation based upon this formula "shall be the value for purposes of the Certificate of Value."

Arbitrator Byrne properly adopted the formula set forth in Article 21 (B) of the Shareholders' Agreement, and used by Feig's expert, who was the Companies' regular outside accountant who valued the Companies at $1,503,072.94 in accordance with the

appraisal formula set forth in Article 21 (B) of the Shareholders' Agreement. Pursuant to the Shareholders' Agreement, such valuation is "conclusive and binding upon the parties."

While Pisane contends that any deviation from the $3 million figure is irrational,[4] an arbitration award will not be deemed irrational "unless there is no proof whatever to justify the award" (*Matter of Peckerman v D & D Assoc.*,165 AD2d 289, 296 [2d Dept 1991]). Although the language in Article 21 (A) appears inconsistent with Article 21 (B) of the Shareholders' Agreement, Arbitrator Byrne, faced with these provisions, reasonably determined to use the methodology mandated by Article 21 (B) and (D), which required a formula-based valuation by the Companies' outside accountant, rather than ignoring this specific formula and the language of Article 21 (B) and (D) and using an eight-year-old Certificate of Value. Arbitrator Byrne, in his Partial Award, expressly found that "[t]he credible evidence established that [the Companies'] accountants used the correct formula set forth in the Shareholders' Agreement in valuing [Pisane's] 42.5% interest", thereby rejecting

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[4]Feig points out that Pisane, rather than consistently arguing, before Arbitrator Byrne, that he must apply only a $3 million value to the Companies pursuant to Article 21 (A) of the Shareholders' Agreement, based upon the $3 million figure contained in the eight-year-old Certificate of Value, instead, at various stages of this matter, variously claimed that the purchase price for his interest in the Companies should be based upon a $3.675 million valuation, a $2.9 million valuation, and a $3.3 million valuation. Feig also points to the fact that Pisane's 42.5% interest in the Companies was valued at $675,000 (within $40,000 of Arbitrator Byrne's Award) by Pisane's own appraiser, Sigma, as of December 31, 2010, before this litigation was commenced. Pisane argues that he only raised these other values as alternatives to the $3 million value, and that the $675,000 value should be added to the $3 million figure to encompass the value of all the Companies. There is no logical basis for such contention under the terms of the Shareholders' Agreement.

the use of the outdated Certificate of Value in favor of the formula agreed to by the shareholders in Article 21 (B). The court does not find this determination to be without rational basis or in excess of the arbitrator's powers.

Pisane insists, however, that Arbitrator Byrne did not merely interpret the Shareholders' Agreement, but ignored mandatory contractual language, thereby rewriting the Shareholders' Agreement and exceeding his authority. This contention is devoid of merit since Arbitrator Byrne stayed within the confines of the four corners of the Shareholders' Agreement, appropriately resolving a conflict among its provisions. Such resolution by Arbitrator Byrne constituted an interpretation of this contract which is impervious to challenge (*see Maross Constr.*, 66 NY2d at 346; *Transparent Value, L.L.C.*, 83 AD3d at 601).

While Pisane relies upon *Katz v Feinberg* (167 F Supp 2d 556 [SD NY 2001], *affd* 290 F3d 95 [2d Cir 2002]), such reliance is misplaced since, in that case, it was held that the arbitrators had exceeded their authority by reviewing and re-fashioning valuation contrary to the parties' intent to exclude disputes concerning valuation from the province of the arbitrators. Specifically, in *Katz* (167 F Supp 2d at 566-567), the parties' agreement expressly stated that the accountants' valuation "shall not be subject to any . . . arbitration . . . or review of any nature whatsoever." Here, in contrast, there was no such express limitation on Arbitrator Byrne's authority. To the contrary, the arbitration provision covered "any dispute."

Pisane's reliance upon *Matter of Arbitration Between Melun Industries, Inc. & Strange* (898 F Supp 990 [SD NY 1990]), is similarly misplaced. In *Matter of Arbitration Between Melun Industries, Inc. & Strange* (898 F Supp at 990), the arbitration clause in the contract of the parties was "quite narrow," and did "not empower the arbitrator to resolve any and all disputes between the parties, or to determine the 'fair' sale price for the company," but, rather, permitted arbitration solely about "the amount, if any, by which the book value of [the corporation] increased or decreased during the period from September 1, 1986 to the Closing Date." The federal district court, in *Melun Industries* (898 F Supp at 994-995), held, therefore, that "the arbitrator went outside the scope of the powers conferred by the Agreement" because he considered adjustments that predated the onset date, i.e., September 1, 1986 (rather than limiting his findings as to increases or decreases in the book value resulting solely from the events of the period from August 31 to closing) which were not covered by the arbitration agreement. Here, however, Arbitrator Byrne did not exceed his authority by addressing a dispute beyond the scope of arbitration as set forth in the Shareholders' Agreement, but limited his awards to the subject of the arbitration, acting well within the parameters of his authority under the Shareholders' Agreement in rendering his awards.

Finally, it is noted that, as contended by Feig, Business Corporation Law § 1118 afforded Arbitrator Byrne an independent rational basis for his award, not subject to the strictures of the Shareholders' Agreement. Business Corporation Law § 1118 (b) provides:

> "If one or more shareholders or the corporation elect to purchase the shares owned by the petitioner but are unable to agree with the petitioner upon the fair value of such shares, the court, upon the application of such prospective purchaser or purchasers or the petitioner, may stay the proceedings brought pursuant to section 1104-a of this chapter and determine the fair value of the petitioner's shares as of the day prior to the date on which such petition was filed, exclusive of any element of value arising from such filing but giving effect to any adjustment or surcharge found to be appropriate in the proceeding under section 1104-a of this chapter. . ."

Pursuant to this statutory authority, Arbitrator Byrne had the power to determine the "fair value" of Pisane's shares, as the trier of the facts raised by Pisane in the dissolution proceeding and raised by Feig in his third counterclaim in his answer in the arbitration proceeding, wherein Feig had sought to buy-out Pisane's shares for fair value, upon Arbitrator Byrne's determination, pursuant to Business Corporation Law § 1118, of the fair value of Pisane's shares as of the day prior to the date on which he filed his Statement of Claim in accordance with that section.

Pisane further argues that the attorneys' fee award, set forth in Arbitrator Byrne's May 7, 2012 arbitration award, should be vacated because he should deemed "the prevailing party" pursuant to Article 35 of the Shareholders' Agreement. As set forth above, however, Article 35 of the Shareholders' Agreement mandated that "the arbitrator shall direct that the successful party to such arbitration, *as determined by the arbitrator*, shall recover the costs and disbursements of the arbitration and its reasonable counsel fees [emphasis added]." Arbitrator Byrne determined that Feig was the prevailing party. This determination is further

borne out by the fact that Feig's interpretation of the Shareholders' Agreement was the one adopted by Arbitrator Byrne. Thus, Arbitrator Byrne's award of attorneys' fees and disbursements to Feig was rational and there is no basis to disturb this award (*see* CPLR 7511 [b] [1] [ii]; *Matter of Kowaleski [New York State Dept. Of Correctional Servs.]*, 16 NY3d at 90).

Pursuant to CPLR 7511(e), "[u]pon denying a motion to vacate or modify an arbitration award, the court must confirm the award" (*Larsen & Toubro Ltd. v Millenium Mgt., Inc.*, 45 AD3d 453, 453-454 [1st Dept 2007]; *see also Matter of American Fed. Group v AFG Partners*, 277 AD2d 119, 120 [1st Dept 2000], *lv denied* 96 NY2d 711 [2001]). Here, inasmuch as the court finds no basis to vacate Arbitrator Byrne's February 14, 2012 Partial Final Award or his May 7, 2012 Final Award, Pisane's motion to vacate these arbitration awards must be denied, and Feig's cross motion to confirm these awards is granted.

Feig, in his cross motion, also seeks to recover his attorneys' fees, costs, and disbursements incurred in connection with opposing Pisane's instant motion to vacate and in cross-moving to confirm the arbitration awards. As set forth above, Article 35 of the Shareholders' Agreement expressly provided that if the successful party to the arbitration were required to resort to court action to enforce an arbitration award, the unsuccessful party would pay the other party's counsel fees and his costs and disbursements. Pisane does not address this branch of Feig's cross motion. Thus, Feig is entitled to recover his attorneys' fees, costs, and disbursements relating to the instant litigation (*see Hooper Assoc. v AGS*

Computers, 74 NY2d 487, 491 [1989] [attorney's fees may be collected by a prevailing party where such an award is authorized by an agreement between the parties]; *D & W Cent. Station Fire Alarm Co., Inc. v United Properties Corp.*, 34 Misc 3d 85, 87 [App Term, 2d Dept, 2d, 11th, & 13th Jud Dists 2012]).

CONCLUSION

Accordingly, Pisane's motion to vacate the arbitration awards is denied, and Feig's cross motion to confirm the arbitration awards and award him attorneys' fees and expenses incurred in the instant motion and cross motion, is granted. Counsel for Feig shall submit, on notice to opposing counsel, an affirmation of reasonable fees and costs and substantiate such claim with appropriate documentation, within 20 days. Opposing counsel may submit such opposition as deemed appropriate within 20 days thereafter.

In light of the buy-out of petitioner's shares by respondent, which has closed, the petition for dissolution of S&N Chemical Co., Inc. is moot and the instant petition is dismissed.

This constitutes the decision, order, and judgment of the court.

E N T E R,

J. S. C.

HON. CAROLYN E. DEMAREST