UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NYKCOOL A.B.,	:	
Petitioner,	:	
-against-	:	10 Civ. 3867 (LAK)(AJP)
PACIFIC FRUIT INC. and KELSO ENTERPRISES LTD.,	:	**REPORT AND RECOMMENDATION**
Respondents.	:	

ANDREW J. PECK, United States Magistrate Judge:

To the Honorable Lewis A. Kaplan, United States District Judge:

Petitioner NYKCool A.B. brings this petition pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., to confirm an arbitration award in its favor against respondents Pacific Fruit, Inc. and Kelso Enterprises Ltd. (Dkt. No. 1: Petition ["Pet."].)[1/] NYKCool also seeks post-

[1/] The FAA does not independently confer subject matter jurisdiction on the federal courts. See, e.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32, 103 S. Ct. 927, 942 n.32 (1983) ("The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 . . . or otherwise. . . . [H]ence, there must be diversity of citizenship or some other independent basis for federal jurisdiction . . . ."); accord, e.g., Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 581-82, 128 S. Ct. 1396, 1402 (2008); Durant, Nichols, Houston, Hodgson, & Cortese-Costa, P.C. v. Dupont, 565 F.3d 56, 63 (2d Cir. 2009); Perpetual Sec., Inc. v. Tang, 290 F.3d 132, 136 (2d Cir. 2002). "Thus, '[t]here must be an independent basis of jurisdiction before a district court may entertain petitions under the Act.'" Durant, Nichols, Houston, Hodgson, & (continued...)

award interest on the principal of the award "at a prime lending rate published by the Federal Reserve Bank." (Pet. ¶¶ 13, 17.) Pacific and Kelso have cross-moved to vacate the award (Dkt. No. 12: Notice of Cross-Motion) on the ground that the arbitration panel's finding was "made in manifest disregard of the law." (Dkt. No. 13: Pacific/Kelso Br. at 1, 9-16.) Pacific and Kelso also assert that the award should be vacated, or at least should be remanded to the arbitrators, because "the award is not final and cannot be confirmed." (Pacific/Kelso Br. at 2, 16-25.)

For the reasons set forth below, NYKCool's petition to confirm the arbitration award and for post-award interest should be GRANTED, and Pacific/Kelso's cross-motion to vacate the award should be DENIED.

FACTS

NYKCool is a Swedish firm "engaged in the business of maritime transportation for hire." (Dkt. No. 1: Pet. ¶ 5; Dkt. No. 14: Weiss Aff. Ex. A: Final Award at 3.) NYKCool is "one of the world's largest operators of specialized reefer vessels with a fleet of more than 50 ships" and "offices in Chile, New Zealand, South Africa and the United States." (Final Award at 3.) Pacific exports bananas and other cargo from Equador to California; Kelso exports bananas and other cargo from Equador to Japan. (Dkt. No. 13: Pacific/Kelso Br. at 5; Final Award at 3.) "[A]lthough separate legal entities," Pacific and Kelso are "both part of the 'Noboa Group' of companies based in Equador and owned by Mr. Alvaro Noboa." (Final Award at 3.)

(...continued)

Cortese-Costa P.C. v. Dupont, 565 F.3d at 63; accord, e.g., Hall St. Assocs. v. Mattel, Inc., 552 U.S. at 582, 128 S. Ct. at 1402; Perpetual Sec., Inc. v. Tang, 290 F.3d at 136. Here, federal jurisdiction is conferred by 28 U.S.C. § 1333, admiralty and maritime jurisdiction.

The Underlying Dispute

On December 8, 2000, NYKCool entered into Contracts of Affreightment ("COAs") with Pacific and Kelso, under which NYKCool agreed to carry weekly shipments of bananas and other cargo from Equador to California and Japan, respectively. (Dkt. No. 13: Pacific/Kelso Br. at 5; Dkt. No. 14: Weiss Aff. Ex. A: Final Award at 5-11; Dkt. No. 22: Weiss Sup. Aff. Ex. I: Pacific COA & Ex. J: Kelso COA.) These agreements were part of a larger trading scheme wherein, after loading Pacific's and Kelso's cargo in Equador, NYKCool's vessels would sail to California, unload Pacific's fruit and load Sunkist oranges for shipment to Japan. (Final Award at 4.) After discharging Kelso's and Sunkist's cargo in Japan, the vessels would load automobiles for the return trip to South America. (Id.) Several of NYKCool's vessels, with sufficient capacity to carry "pre-agreed cargo volumes," were specifically selected to perform this "interrelated around-the-world weekly service." (Final Award at 3-4.)

The written COAs covered the period January 2001 to December 2002 and set forth the "Base Cargo Volumes" and freight rates for each contract year. (Pacific COA at App'x X; Kelso COA at App'x X; Pacific/Kelso Br. at 5-6; Final Award at 3-11.) The COAs required Pacific and Kelso to make weekly lump sum payments sufficient to cover their minimum cargo commitments, "regardless of the actual quantity of cargo loaded . . . on any particular voyage." (Pacific COA ¶ 11(a); Kelso COA ¶ 11(a); Pacific/Kelso Br. at 5-6; Final Award at 4.) At an end-of-year accounting, the weekly lump sum payments were credited against the total amount of "Actual

Freight" and "Deadfreight" owed.[2/] (Pacific COA ¶ 11(b); Kelso COA ¶ 11(b); Pacific/Kelso Br. at 6; Final Award at 4.) If the amount of "Actual Freight" and "Deadfreight" exceeded the amount previously paid, Pacific and Kelso owed NYKCool the balance. (Pacific COA ¶¶ 11(b)-(c); Kelso COA ¶ 11(b); Pacific/Kelso Br. at 6.) Conversely, if the amount of "Actual Freight" and "Deadfreight" were less than the amount paid, Pacific and Kelso were entitled to a refund from NYKCool. (Pacific COA ¶¶ 11(b)-(c); Kelso COA ¶ 11(b); Pacific/Kelso Br. at 6.)

For the years 2001-02, the value of the COAs exceeded $70,000,000. (Final Award at 11.) However, Kelso's market in Japan "proved to be less than anticipated," and in 2002, it used less below-deck cargo space than assigned. (Final Award at 11.) While the downturn in the Japanese market meant Kelso owed significant deadfreight, the availability of below-deck cargo space allowed Pacific to "containerize" less of its California-bound cargo. (Final Award at 11; see

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[2/] "Actual Freight" equals:

> the sum of (i) the number of palletized boxes actually loaded during the Contract Year multiplied by the Applicable Freight Rate per box (as set forth in Appendix X hereto), and (ii) the number of containers actually loaded during the Contract Year multiplied by the Applicable Freight Rate per container (as set forth in Appendix X hereto).

(Pacific COA ¶ 11(b).) "Deadfreight" equals:

> the shortfall (if any) in palletized boxes loaded (as compared to the Base Cargo Volume of palletized boxes set forth in Appendix X hereto) multiplied by the Deadfreight Rate per box (as set forth in Appendix X hereto), plus the shortfall (if any) in containers loaded (as compared to the Base Cargo Volume of containers set forth in Appendix X hereto) multiplied by the Deadfreight Rate per container (as set forth in Appendix X hereto).

(Pacific COA ¶ 11(b).)

Dkt. No. 17: Keane Aff. Ex. 1: Arbitration Exs. at LC00262-77.) In turn, NYKCool did not need to provide as many refrigerated containers for the 2002 contract year and, "[a]lthough not obliged to do so, [NYKCool] willingly chose to pass the resulting savings to Pacific Fruit in the form of an 'Equipment Savings Credit' of $2,300,000." (Final Award at 11; see Arbitration Exs. at LC00106-07, 00262-77.)

At a December 20, 2002 meeting, the parties agreed to extend the December 8, 2000 COAs through 2004. (Pacific/Kelso Br. at 6; Final Award at 11-12; Arbitration Exs. at LC00051-57.) The parties agreed on new base cargo volumes and freight rates for 2003 and 2004. (Final Award at 11; Arbitration Exs. at LC00053-57.) Addenda to the December 8, 2000 COAs were drafted but, due to disagreement over a volume shifting clause,[3/] never signed. (Final Award at 12; Arbitration Exs. at LC00051-57.) Nevertheless, the parties' Equador-California-Japan trade continued through 2004 without incident. (Pacific/Kelso Br. at 6; Final Award at 12.) As before,

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[3/] Alvaro Noboa proposed that "[i]f Kelso should ship less than its minimum volume in a given year, then Pacific Fruit has the option to ship a greater volume without additional cost except for the discharging costs in California. [NYKCool] will supply additional container equipment, if necessary." (Arbitration Exs. at LC00051, 53, 57.) NYKCool did not agree to this amendment and maintained that "clauses 3 . . . in both of the Kelso/Pacific fruit contracts . . . stipulated how and when [Pacific and Kelso could] fluctuate volumes between the two destinations." (Arbitration Exs. at LC00052.) Pursuant to clause three of the Pacific COA, Pacific could "load additional [cargo] below deck on any voyage on a space available basis," and could load additional containers on deck provided there were available slots and Pacific provided their own containers. (Pacific COA ¶ 3(a).) Moreover, Pacific could "elect to yield any number of their allocated containers . . . to Kelso . . . for use in [its] Equador to Japan trade, subject to . . . Sunkist space and/or equipment requirements for that voyage." (Pacific COA ¶ 3(b).) The Kelso COA also provides that additional cargo may be stored, "below or on deck on a space available basis." (Kelso COA ¶ 3(a).) However, the "[a]vailability of container equipment and slots for loading [is] dependent upon containers loaded on same voyage by charterers Pacific Fruit." (Kelso COA ¶ 3(d).)

Pacific and Kelso made weekly lump sum payments based upon the pre-arranged minimum cargo volumes, not the amount of cargo actually loaded. (Final Award at 12.)

On September 22, 2004, executives from NYKCool met with Alvaro Noboa and other Pacific/Kelso representatives to discuss extending the COAs through the end of 2008. (Pacific/Kelso Br. at 6; Final Award at 12 & n.8; Arbitration Exs. at LC00064, 66.) The parties agreed to "[d]irect continuation of the present COAs . . . for the next four years, beginning 2005 and continuing through end 2008" (Arbitration Exs. at LC00061), and reached agreement on base cargo volumes for 2005-08,[4/] freight rates for 2005 and a mutual termination clause, but they could not agree on a freight adjustment formula, a cargo volume shifting option, or an "[e]quipment [s]avings [c]redit" for years 2003-04. (Pacific/Kelso Br. at 6; Final Award at 12-13; Arbitration Exs. at LC00060-109, 00188-93.)

Despite these outstanding issues, "the parties continued to do business" and the trade scheme "went forward without protest or noticeable difficulty until March, 2005," when Kelso informed NYKCool that the Japanese market had "seriously deteriorated prompting it to seek some relief from its mounting deadfreight obligations." (Pacific/Kelso Br. at 6; Final Award at 13; see Arbitration Exs. at LC00110-21.) As an accommodation to Kelso, NYKCool "propose[d] that if practical and financially viable, [it] will use smaller vessels in the Pacific trade ad hoc, and at the

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[4/] After some back and forth, the parties agreed on base cargo volumes of 9.8 million boxes to Japan and 8.2 million boxes to Califiornia. (See Arbitration Exs. at LC00064-88.) However, on November 11, 2004, Kelso requested that the base cargo volume to Japan be increased to 11.2 million boxes. (See Arbitration Exs. at LC00089.) A larger vessel lineup, later referred to as the "final lineup," was configured to meet this demand. (See Arbitration Exs. at LC00090-91, 00186.)

end of the year [it] will sum up how much capacity [actually had been] assigned. The assigned number of boxes will then be the volume that [Pacific and Kelso] are commit[t]ed to pay freight for." (Arbitration Exs. at LC00110-12.) NYKCool stressed that its proposal to "allocate smaller tonnage" was based on its ability to "find alternative and acceptable employment for the bigger vessels" currently assigned to the Pacific/Kelso trade, and that it could not "commit" to lower base cargo volumes than already agreed. (Arbitration Exs. at LC00110-12; see Final Award at 13.) NYKCool successfully substituted smaller vessels twenty-three times in 2005, saving Kelso approximately $2.3 million in deadfreight costs. (Final Award at 13; Arbitration Exs. at LC00153-65, 00186-91.)

In August 2005, Kelso informed NYKCool that it anticipated shipping just 9.5 million boxes of cargo to Japan in 2006, approximately 1.7 million boxes less than the allocated volume (see page 6 n.4 above), and that it wanted to continue using the smaller vessels to avoid deadfreight costs (see Arbitration Exs. at LC00113-21). Because the substitution of smaller vessels in 2005 had resulted in such large savings, which would not be realized until after the end-of-year accounting, Pacific and Kelso further proposed that their weekly lump sum payments be adjusted to reflect the capacity of the smaller vessels used, rather than the pre-agreed base cargo volumes. (see Arbitration Exs. at LC00134-44, 00167-71.)

NYKCool responded that it would assign the same vessels as in the original 2005 lineup, "since this is what w[as] agreed [to] for the full contract period, 2005-2008" (Arbitration Exs. at LC00139-40), but that it would endeavor, as it had in 2005, to assign smaller vessels when possible (see Arbitration Exs. at LC00113-46). NYKCool warned, however, that it might not "be

as successful as during 2005 to replace the [large] vessels with smaller tonnage." (Arbitration Exs. at LC00197.) NYKCool further agreed to allow Pacific and Kelso to make lump sum payments based on the presumption that smaller vessels would be used, provided however, that the ratio between the Japan and California cargo volumes be maintained. (Arbitration Exs. at LC00117, 00123-30, 00186-201.)

In contrast to the manner in which payments had been made since December 8, 2000, in late 2005 or early 2006 Pacific and Kelso (over NYKCool's objections) began to make weekly lump-sum payments based upon the amount of cargo actually shipped rather than the "cargo capacity assigned." (Pacific/Kelso Br. at 6; Final Award at 13; see Arbitration Exs. at LC00167-211.) Because the parties had not agreed on 2006 freight rates, or an automatic freight "adjustment mechanism," Pacific and Kelso "continued to apply the agreed-upon rates applicable in 2005 for freight shipped in 2006." (Pacific/Kelso Br. at 6; see Arbitration Exs. at LC00137-39, 00182-88, 00210-11.)

In August 2006, citing the continued decline of the Japanese market, Kelso announced that it would terminate its COA effective December 31, 2006; in turn, NYKCool exercised its option to terminate the Pacific COA. (Final Award at 14.)

The Arbitration Proceedings and Final Award

NYKCool commenced arbitration against Pacific and Kelso "seeking to recover unpaid freight and 'de facto' deadfreight" from Pacific/Kelso during the 2005-06 calendar years.[5/]

[5/] Specifically, NYKCool alleged that a "binding contract covering the period between 2005 (continued...)

(Dkt. No. 1: Pet. ¶ 8; Weiss Aff. Ex. A: Final Award at 2; NYKCool Arbitration Br. at 2.) Pacific/Kelso denied the existence of an enforceable contract[6/] and argued, in the alternative, that they were owed an "Equipment Savings Credit" of over $3 million plus a refund for overpayment in 2005-06. (Dkt. No. 13: Pacific/Kelso Br. at 1-3; Pacific/Kelso Arbitration Br. at 47-55; Final Award at 15-16 & n.3.)

A three member arbitration panel, composed of A.J. Sicilian, Joseph H. Winer and David W. Martowski, was formed to arbitrate the dispute. (Pet. ¶ 9; Pacific/Kelso Br. at 3; Final Award at 1.) The parties agreed that the proceedings would be governed by the rules of the Society of Marine Arbitrators and decided by the "Federal Maritime Law of the United States." (Pet. ¶ 9; Final Award at 7-8; Dkt. No. 22: Weiss Sup. Aff. Ex. I: Pacific COA ¶ 27 & Ex. J: Kelso COA ¶ 27.) The arbitrators held evidentiary hearings in New York City on December 9-12, 2008 and March 25-27, 2009. (Pet. ¶ 10; Pacific/Kelso Br. at 3; Final Award at 2.) The proceedings officially closed on January 20, 2010; on April 28, 2010, the arbitration panel issued a Final Arbital Award, in NYKCool's favor. (Pet. ¶ 13; Pacific/Kelso Br. at 3-4; Final Award at 1-2, 16-30.)

5/ (...continued)
and 2008 was concluded in Equador on 22 September 2004," and that "items not fully agreed [to] were simply not significant enough to prevent formation of the contract." (Dkt. No. 14: Weiss Aff. Ex. B: NYKCool Arbitration Br. at 1, 11-13, 29; Weiss Aff. Ex. C: NYKCool Arbitration Reply Br. at 5-6.)

6/ Specifically, Pacific/Kelso argued: (1) "that the parties never reached a meeting of the minds on all essential terms of the contract," and so no "binding agreement" existed; and (2) "the parties reserved the right not to be bound absent a signed writing" and "no written agreement was ever signed." (Weiss Aff. Ex. F: Pacific/Kelso Arbitration Br. at 30-38.)

Specifically, the arbitration panel found that "the parties did reach a binding and enforceable new contract" for 2005-08, thereby rejecting Pacific/Kelso's principal argument "that the parties' negotiations never resulted in a meeting of the minds sufficient to form a binding contract." (Final Award at 16-18.) Although the panel recognized that at the conclusion of the September 22, 2004 meeting "there were open items on which no agreement had been reached" (Final Award at 17-27), "the absence of an agreement on th[ose] issue[s] did not prevent the parties from carrying-out their respective obligations under th[e] agreements." (Final Award at 18-27.) More importantly, the panel found that Pacific/Kelso had "performed and derived the benefits of th[e] agreements for two full years before advancing the argument that an enforceable contract had not been reached," and therefore were "equitably estopped from now arguing that a binding agreement did not come into force." (Final Award at 17-18.)[7/] Finally, because the panel found "that the parties reached agreement on a new contract for 2005-2008, [it] considered [Pacific/Kelso's] reliance upon Clause 34 of the 2001-2002 COA permitting the contract to be 'amended or supplemented . . . only by written instrument' to be misplaced." (Final Award at 17, emphasis added.) Consistent with these findings, the panel awarded NYKCool damages of $8,487,157 for unpaid freight in 2005 and 2006, inclusive of interest. (Final Award at 29.)

With respect to Pacific/Kelso's claim for equipment savings credits of over $3 million, the panel found that unlike in 2002, where Pacific/Kelso gave NYKCool "ample advance

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7/ The Panel found that Pacific/Kelso's loading of "nearly 30 million export boxes of fruit and freight payments exceeding $70 million. . . . was neither token nor merely incidental performance, but conscious compliance with the very substantial obligations [Pacific/Kelso] had taken upon themselves." (Final Award at 17.)

notice that it would not meet its cargo volumes" permitting NYKCool to lease fewer containers that year, they gave no such notice in 2003-04 and NYKCool could not be faulted for failing to "foresee Kelso's loss of market share." (Final Award at 24-26.) The panel further held that NYKCool's payment of the 2002 equipment savings credit did not "establish[] a course of conduct that [created] a new contractual entitlement," and in any event, Pacific/Kelso failed to prove that "any such savings were achieved" in 2003-06. (Final Award at 26.)

After considering "all of the facts and circumstances, the nature and value of the claims and counterclaims, the relative level of effort, the reasonableness of the expenditures and the extent of success of the prevailing party," the panel concluded that NYKCool was "entitled to an allowance of $300,000 towards its attorneys' fees and costs." (Final Award at 28-29.) Accordingly, the panel granted NYKCool a Final Award of $8,787,157. (Final Award at 28-29.)[8/]

Finally, the panel held that in the event the "Award [was] not satisfied within 30 days . . . interest at the prime lending rate published by the Federal Reserve Bank will resume accruing on the principal amounts [owed] until the Award shall be fully satisfied or reduced to judgment, which ever first occurs." (Final Award at 29.) The last sentence of the Final Award states that "[t]his Award is final and the parties have consented to its recognition and enforement by any court of competent jurisdiction." (Final Award at 30.)

[8/] The Award stated that "[t]he information supplied is insufficient for the panel to separate the amounts awarded to NYKCool between Pacific Fruit and Kelso and so that final allocation is left to the charterers [i.e., Pacific and Kelso] themselves." (Final Award at 29.)

ANALYSIS

I. LEGAL STANDARDS GOVERNING REVIEW OF ARBITRATION AWARDS

"Normally, confirmation of an arbitration award is 'a summary proceeding that merely makes what is already a final arbitration award a judgment of the court.'" D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 110 (2d Cir. 2006); accord, e.g., Idea Nuova, Inc. v. GM Licensing Grp., Inc., 617 F.3d 177, 180 (2d Cir. 2010); Encyclopedia Universalis S.A. v. Encyclopedia Britannica, Inc., 403 F.3d 85, 89 n.2 (2d Cir. 2005). To ensure that "the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation" are met, arbitration awards are subject to "very limited review." Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108, 111 (2d Cir.1993) (citation omitted); see, e.g., Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 588, 128 S. Ct. 1396, 1405 (2008) (FAA §§ 9-11"substantiat[e] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.'"); Idea Nuova, Inc. v. GM Licensing Grp., Inc., 617 F.3d at 180 (An "arbitral award is entitled to 'strong deference.'"); Bradley v. Merrill Lynch & Co., 344 F. App'x 689, 690 (2d Cir. 2009) ("Arbitration awards are subject to 'severely limited' review by the courts."); Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC, 497 F.3d 133, 138-39 (2d Cir. 2007) (The Second Circuit "has repeatedly recognized the strong deference appropriately due arbitral awards and the arbitral process, and has limited its review of arbitration awards in obeisance to that process."); Wallace v. Buttar, 378 F.3d 182, 189 (2d Cir. 2004) ("A motion to vacate filed in a

federal court is not an occasion for de novo review of an arbitral award."); Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383, 388 (2d Cir. 2003) ("It is well established that courts must grant an arbitration panel's decision great deference.").[9/]

Indeed, "an arbitration award should be enforced, despite a court's disagreement with it on the merits, if there is 'a barely colorable justification for the outcome reached.'" Landy Michaels Realty Corp. v. Local 32B-32J, Serv. Emp. Int'l Union, AFL-CIO, 954 F.2d 794, 797 (2d Cir. 1992); accord, e.g., Matthew v. Papua New Guinea, No. 10-0074-cv, 2010 WL 3784198 at *1 (2d Cir. Sept. 30, 2010) (The "'award should be enforced, despite a court's disagreement with it on the merits, if there is a barely colorable justification for the outcome reached.'"); Stolt-Nielson SA v. Animalfeeds Int'l Corp., 548 F.3d 85, 92 (2d Cir. 2008), rev'd on other grounds, 130 S. Ct. 1758 (2010); Rich v. Spartis, 516 F.3d at 81; D.H. Blair & Co. v. Gottdiener, 462 F.3d at 110.

"A party petitioning a federal court to vacate an arbitral award bears the heavy burden of showing that the award falls within a very narrow set of circumstances delineated by statute . . . ." Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d at 388; see, e.g., Matthew v. Papua New Guinea, 2010 WL 3784198 at *1 ("A party seeking to vacate an arbitration award . . . bears a decidedly heavy burden."); T. Co. Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329 (2d Cir. 2010); D.H. Blair & Co. v. Gottdiener, 462 F.3d at 110 ("A party moving to vacate an

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[9/] See also, e.g., Rich v. Spartis, 516 F.3d 75, 81 (2d Cir. 2008); Hardy v. Walsh Manning Sec., LLC, 341 F.3d 126, 129 (2d Cir. 2003); Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9, 12 (2d Cir. 1997).

arbitration award has the burden of proof, and the showing required to avoid confirmation is very high.").[10/]

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

9 U.S.C § 10(a).[11/]

[10/] See also, e.g., Bradley v. Merrill Lynch & Co., 344 F. App'x at 690; Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC, 497 F.3d at 138; Wallace v. Buttar, 378 F.3d at 189; Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co., --- F. Supp. 2d ---, 2010 WL 653481 at *6 (S.D.N.Y. Feb. 23, 2010) ("Under the FAA, the party challenging an arbitral award has the burden of proving the existence of grounds to vacate.").

[11/] Section 11 of the FAA specifies the circumstances where a district may "modify[] or correct[]" an arbitration award:

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

(continued...)

The Second Circuit has held that arbitrators have "exceeded their powers" or "imperfectly executed them" when they exhibit a "manifest disregard of the law." Stolt-Nielson SA v. Animalfeeds Int'l Corp., 548 F.3d at 94-95.[12/] The Circuit has cautioned, however, that manifest disregard "clearly means more than error or misunderstanding with respect to the law." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986); accord, e.g., Stolt-Nielson SA v. Animalfeeds Int'l Corp., 130 S. Ct. at 1767 ("It is not enough for petitioners to show that the panel committed an error – or even a serious error."); T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d at 339; Telenor Mobile Commc'ns AS v. Storm LLC, 584 F.3d at 407; Stolt-Nielson SA v. Animalfeeds Int'l Corp., 548 F.3d at 91-92. Instead, it requires that "'the

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[11/] (...continued)
promote justice between the parties.

9 U.S.C.A. § 11.

[12/] Until recently, the Second Circuit treated the "'manifest disregard' standard as a ground for vacatur entirely separate from those enumerated in the FAA." See Stolt-Nielson SA v. Animalfeeds Int'l Corp., 548 F.3d at 94 (citing cases). However, following the Supreme Court's decision in Hall St. Assocs. v. Mattell, Inc., 552 U.S. 576, 128 S. Ct. 1396 (2008), in which the Supreme Court held that the FAA sets forth the "exclusive" grounds for vacating an arbitration award, id. at 584, 128 S. Ct. at 1403, the Second Circuit "reconceptualized [manifest disregard] as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA." Stolt-Nielson SA v. Animalfeeds Int'l Corp., 548 F.3d at 94; accord, e.g., T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d at 340; Telenor Mobile Commc'ns AS v. Storm LLC, 584 F.3d 396, 407 n.6 (2d Cir. 2009); Rai v. Barclays Capital, Inc., --- F. Supp. 2d --- , 2010 WL 2465501 at *4 (S.D.N.Y. June 15, 2010); Idea Nuova, Inc. v. GM Licensing Grp., Inc., 08 Civ. 8598, 2009 WL 2568332 at *3 (S.D.N.Y. Aug. 19, 2009), aff'd, 617 F.3d 177 (2d Cir. 2010). Most recently, the Supreme Court declined to "decide whether "'manifest disregard'" survives [its] decision in Hall Street . . . as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10." Stolt-Nielson SA v. Animalfeeds Int'l Corp., 130 S. Ct. 1758, 1768 n.3 (2010).

arbitrator knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it.'" Stolt-Nielson SA v. Animalfeeds Int'l Corp., 548 F.3d at 95; see, e.g., Stolt-Nielson SA v. Animalfeeds Int'l Corp., 130 S. Ct. at 1767 ("'It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively "dispenses his own brand of industrial justice" that his decision may be unenforceable.'"); Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC, 497 F.3d at 139 ("An arbitral award may be vacated for manifest disregard only where a petitioner can demonstrate 'both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well-defined, explicit, and clearly applicable to the case.'"); Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d at 389 ("A party seeking vacatur bears the burden of proving that the arbitrators were fully aware of the existence of a clearly defined governing legal principle, but refused to apply it, in effect, ignoring it.").

Stated more fully, the three steps in a court's post-Hall Street application of the "manifest disregard" standard are:

> "First, we must consider whether the law that was allegedly ignored was clear, and in fact explicitly applicable to the matter before the arbitrators. An arbitrator obviously cannot be said to disregard a law that is unclear or not clearly applicable. Thus, misapplication of an ambiguous law does not constitute manifest disregard.
>
> "Second, once it is determined that the law is clear and plainly applicable, we must find that the law was in fact improperly applied, leading to an erroneous outcome. We will, of course, not vacate an arbitral award for an erroneous application of the law if a proper application of law would have yielded the same result. In the same vein, where an arbitral award contains more than one plausible reading, manifest disregard cannot be found if at least one of the readings yields a

> legally correct justification for the outcome. Even where explanation for an award is deficient or non-existent, we will confirm it if a justifiable ground for the decision can be inferred from the facts of the case.
>
> "Third, once the first two inquiries are satisfied, we look to a subjective element, that is, the knowledge actually possessed by the arbitrators. In order to intentionally disregard the law, the arbitrator must have known of its existence, and its applicability to the problem before him. In determining an arbitrator's awareness of the law, we impute only knowledge of governing law identified by the parties to the arbitration. Absent this, we will infer knowledge and intentionality on the part of the arbitrator only if we find an error that is so obvious that it would be instantly perceived as such by the average person qualified to serve as an arbitrator."

Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d at 93 (quoting Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d at 389-90); accord, e.g., Matthew v. Papua New Guinea, 2010 WL 3784198 at *2; T.Co Metals LLC v. Dempsey Pipe & Supply, Inc. 592 F.3d at 339; Telenor Mobile Commc'ns AS v. Storm LLC, 584 F.3d at 408.

"Although judicial review of an arbitration award is very narrowly limited, a court should not attempt to enforce an award that is ambiguous or indefinite." Americas Ins. Co. v. Seagull Compania Naviera, S.A., 774 F.2d 64, 67 (2d Cir. 1985) (citations omitted). Rather, "[a]n ambiguous award should be remanded to the arbitrators so that the court will know exactly what it is being asked to enforce." Americas Ins. Co. v. Seagull Compania Naviera, S.A., 774 F.2d at 67.[13/]

[13/] Accord, e.g., Rich v. Spartis, 516 F.3d at 83; Hardy v. Walsh Manning Sec., L.L.C., 341 F.3d at 134; Landy Michaels Realty Corp. v. Local 32B-32J, Serv. Emp. Int'l Union, AFL-CIO, 954 F.2d at 797; Ottley v. Schwartzberg, 819 F.2d 373, 376 (2d Cir.1987); Hartford Fin. Holdings, Inc. v. Singer, 08 Civ. 2459, 2010 WL 1838843 at *4 (S.D.N.Y. May 4, 2010); Hartford Fire Ins. Co. v. Evergreen Org., Inc., 07 Civ. 7977, 2008 WL 4185731 at *5 (S.D.N.Y. Sept. 2, 2008).

II. PACIFIC/KELSO'S MANIFEST DISREGARD CLAIM IS WITHOUT MERIT

Pacific/Kelso contend that they "unequivically communicated their intent to not be bound in the absence of executed written agreements,"[14/] and thus the arbitration panel's "finding that the parties had entered into binding and enforceable [oral] contracts was made in manifest disregard of the law." (Pacific/Kelso Br. at 9-16; Dkt. No. 21: Pacific/Kelso Traverse at 1-3). Specifically, Pacific/Kelso maintain that "[c]lear [a]nd [e]xplicitly [a]pplicable" Second Circuit precedent "established a four-factor test to determine whether parties to an alleged agreement intended to be bound in the absence of a written and executed document," as follows:

> (1) "whether there [was] an express reservation of the right not to be bound in the absence of a writing;"
>
> (2) "whether there [was] partial performance of the contract;"
>
> (3) "whether all . . . terms of the alleged contract [were] agreed upon; and"
>
> (4) "whether the agreement at issue is the type of contract that is usually committed to writing."

(Pacific/Kelso Br. at 10-11, quoting Winston v. Mediafare Entm't Corp., 777 F.2d 78, 80 (2d Cir. 1985).)[15/] According to Pacific/Kelso, they "identified Winston as controlling law on two occasions

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[14/] In particular, Pacific/Kelso allege that their intent not to be bound can be inferred from the written "recap" of the agreement reached between Noboa and NYKCool executives on September 22, 2004, wherein the parties agreed to "endeavor to have [a formal addendum to the December 8, 2000 COAs] fully executed no later than October 15, 2004." (Dkt. No. 13: Pacific/Kelso Br. at 13; see Dkt. No. 17: Keane Aff. Ex. 1: Arbitration Exs. at LC00061-62, 00064-65.)

[15/] In Winston, the district court was asked to enforce an unsigned settlement agreement. Winston v. Mediafare Entm't Corp., 777 F.2d at 80. Although the parties' attorneys had reached complete agreement on all settlement terms, they also had agreed that payment would remain in escrow until a written agreement was fully executed. Winston v. Mediafare (continued...)

and expressly set forth the controlling analysis in its post-hearing brief," but the panel "simply chose to ignore it." (Pacific/Kelso Br. at 13, 15.) "Had the Panel applied all four factors of the Winston test to the undisputed evidence before it," Pacific/Kelso argue, "it necessarily would have found that there were no binding agreements." (Pacific/Kelso Br. at 12.)

Pacific/Kelso have failed to prove that the arbitrators "willfully flouted the governing law by refusing to apply it." Stolt-Nielson SA v. Animalfeeds Int'l Corp., 548 F.3d 85, 95 (2d Cir. 2008), rev'd on other grounds, 130 S. Ct. 1758 (2010); see cases cited at pages 16-17 above.

As an initial matter, the fact that the arbitrators "failed to even mention Winston" (Pacific/Kelso Br. at 12), is insufficient to prove that they ignored it; "[e]ven where an arbitrator's explanation for an award is deficient, [the Court] must confirm it if a justifiable ground for the decision can be inferred from the record." Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d at 97; accord, e.g., D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 110 (2d Cir. 2006) ("The arbitrator's

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15/ (...continued)
Entm't Corp., 777 F.2d at 79, 81. Nonetheless, the district court "found that the parties had entered into a 'binding settlement agreement which plaintiff is entitled to enforce.'" Winston v. Mediafare Entm't Corp., 777 F.2d at 80. On appeal, the Second Circuit found that the district court "erred in concluding that the parties here intended that a binding agreement could be reached prior to execution of a final document satisfactory in every respect to both sides." Winston v. Mediafare Entm't Corp., 777 F.2d at 81. Although the "freedom to contract orally remains even if the parties contemplate a writing to evidence their agreement. . . . if either party communicates an intent not to be bound until he achieves a fully executed document, no amount of negotiation or oral agreement to specific terms will result in the formation of a binding contract." Winston v. Mediafare Entm't Corp., 777 F.2d at 80. The Circuit clarified that "it is the intent of the parties that will determine the time of contract formation[, and t]o discern that intent a court must look to 'the words and deeds [of the parties] which constitute objective signs in a given set of circumstances.'" Winston v. Mediafare Entm't Corp., 777 F.2d at 80. To help guide a district court's inquiry into whether the parties "intended to be bound in the absence of a document executed by both sides," the Second Circuit set forth the four part balancing test described above. Winston v. Mediafare Entm't Corp., 777 F.2d at 80-81.

rationale for an award need not be explained, and the award should be confirmed if a ground for the arbitrator's decision can be inferred from the facts of the case.") (quotations omitted); Wallace v. Buttar, 378 F.3d 182, 190 (2d Cir. 2004) ("'[A]rbitrators are not required to provide an explanation for their decision.'"); Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9, 12-13 (2d Cir. 1997) ("When arbitrators decline to provide an explanation for their decision, a reviewing court . . . must confirm the arbitrators' decision 'if a ground for the arbitrator[s'] decision can be inferred from the facts of the case.'").

Second, it is evident from the arbitrator's written decision that they directly addressed the second Winston factor, i.e., "whether there [was] partial performance of the contract":

> [Pacific/Kelso] performed and derived the benefits of th[e] agreements for two full years before advancing the argument that an enforceable contract had not been reached. That performance included weekly loadings of cargo totaling nearly 30 million export boxes of fruit and freight payment exceeding $70 million. Unlike the authorities cited by [Pacific/Kelso], this was neither token nor merely incidental performance, but conscious compliance with the very substantial obligations [Pacific/Kelso] had taken upon themselves. Nor was [Pacific/Kelso's] performance undertaken grudgingly or with a reservation of rights as to whether a binding agreement had been reached.
>
> Had [Pacific/Kelso] truly believed that no contract was in force, their remedy was to timely disavow any obligation to [NYKCool] and decline to load the ships [NYKCool] placed at their disposal. But [Pacific/Kelso] did neither. Instead, they wrongly remained silent while enjoying the benefits of [NYKCool's] performance for two years. Under these circumstances, we consider that [Pacific/Kelso] are equitably estopped from now arguing that a binding agreement did not come into force.

(Dkt. No. 14: Weiss Aff. Ex. A: Final Award at 17-18.)

Pacific/Kelso do not contest the panel's partial performance finding, but argue instead that partial performance "is not a sufficient basis to find an intent to be bound under the Winston

analysis." (Pacific/Kelso Br. at 14; Pacific/Kelso Traverse at 2-3.) But Winston is a balancing test, "[n]o single factor is decisive," and "partial performance is an unmistakable signal that one party believes there is a contract; and the party who accepts performance signals, by that act, that it also understands a contract to be in effect." R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69, 75, 76 (2d Cir. 1984); see also, e.g., Rubinstein v. Clark & Green, Inc., No. 08-CV-0337, 2010 WL 298239 at *4 (N.D.N.Y. Jan. 19, 2010) ("Because it is the objective evidence of intent that matters, partial performance may in some instances indicate whether the parties have formed a binding . . . agreement."), aff'd, No. 10-0415-CV, 2010 WL 3959634 (2d Cir. Oct. 12, 2010); Pearce v. Manhattan Ensemble Theater, Inc., 06 Civ. 1535, 2009 WL 3152127 at *7 (S.D.N.Y. Sept. 30, 2009) (denying summary judgment on breach of contract claim because "[i]t would be reasonable for a jury to find that the parties' partial performance indicates that they reached an oral agreement."); Haskell Co. v. Radiant Energy Corp., No. 05-CV-4403, 2007 WL 2746903 at *8 (E.D.N.Y. Sept. 19, 2007) ("Although plaintiffs may have been mistaken, it is highly unlikely that they would have started working absent a belief that an agreement was in place."). Indeed, it is especially noteworthy that Pacific/Kelso do not contest that a binding contract existed for the 2003-04 extension of the COAs despite the absence of a written agreement, but only challenge the subsequent extension, despite its partial performance. (See pages 5-6, 9 n.6 above.)

Even if a court might reach a different conclusion if it were to review the evidence de novo, the arbitration panel's finding of partial performance provides more than a "barely colorable justification" for the conclusion that the parties intended to enter into a "binding and enforceable new contract" despite the absence of a signed writing. See, e.g., Telenor Mobile

Commc'ns AS v. Storm LLC 584 F.3d 396, 407 (2d Cir. 2009) ("A mere demonstration that an arbitration panel made 'the wrong call on the law' does not show manifest disregard; 'the award should be enforced . . . if there is a barely colorable justification for the outcome reached.'"); Stolt-Nielsen SA v. AnimalFeeds Int'l Corp. 548 F.3d at 91 ("We have . . . recognized that the district court may vacate an arbitral award that exhibits a 'manifest disregard' of the law. We do not, however, 'recognize manifest disregard of the evidence as proper ground for vacating an arbitrator's award.'"); Wallace v. Buttar, 378 F.3d at 190 ("A federal court cannot vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law. On the contrary, the award 'should be enforced, despite a court's disagreement with it on the merits, if there is a barely colorable justification for the outcome reached.'").

Pacific/Kelso have failed to demonstrate that the arbitration panel acted with "manifest disregard" of the law under the FAA, and thus their motion to vacate the award on that basis should be DENIED.

III. THE ARBITRATION AWARD IS FINAL AND ENFORCEABLE

Pacific/Kelso also contend that the "[a]ward [c]annot [b]e [c]onfirmed" because the panel "awarded damages in a lump-sum" and left it up to Pacific and Kelso to "decide their respective liabilities between themselves." (Dkt. No. 13: Pacific/Kelso Br. at 17-19; see page 2 above.) Pacific/Kelso argue that because "the contractual liabilities at issue here arise under two separate contracts," they are not jointly and severally liable and the award therefore is "too indefinite, ambiguous, or incomplete to be enforced." (Pacific/Kelso Br. at 18-19.)

This is not the case where the award is so ambiguous or indefinite that the Court does not "know exactly what it is being asked to enforce." Americas Ins. Co. v. Seagull Compania Naviera, S.A., 774 F.2d 64, 67 (2d Cir. 1985). The award clearly indicates the total amount due NYKCool and permits Pacific and Kelso to decide, between themselves, how much each will pay. (Dkt. No. 14: Weiss Aff. Ex. A: Final Award at 27-29.) While Pacfic/Kelso never requested that the arbitration panel apportion damages between them, the award clearly indicates each component of the award, including the amount of freight incurred for cargo shipped to California and Japan respectively. (Final Award at 27-28.) Thus, if Pacific/Kelso want to apportion liability between themselves on the grounds that Pacific is only liable for the freight to California and Kelso is only liable for the freight to Japan, the only impediment to their doing so is an accurate calculation of payments previously made by each for the California and Japan trade. The requisite information for such a calculation is necessarily (and perhaps exclusively) in their possession. That they have made no effort to do so does not render the award too vague or otherwise indefinite to prevent enforcement. See, e.g., Kallen v. Dist. 1199, Nat. Union of Hosp. & Health Care Emp., RWDSU, AFL-CIO, 574 F.2d 723, 726 (2d Cir. 1978) (Confirming arbitration award that permitted respondent to "negotiate adjustments in one segment of the amount due if it produces records more accurate than those upon which the arbitrator was forced to rely" because "[f]ar from being incomplete, the award commendably responds to conditions of uncertainty by incorporating an element of limited flexibility designed to benefit the very party now complaining.); MCI Telecomm. Corp. v. Universal Spanish Commc'ns, Inc., No. 98-CV-6650, 1999 WL 390607 at *2 (E.D.N.Y. Apr. 12, 1999) (confirming arbitration award for breach of contract claim despite the fact

that the arbitrator did not "apportion liability" between various corporations. "[T]he fact that an arbitrator does not apportion liability among the parties to an arbitration proceeding is not a ground under [FAA] Section 10 or 11 for vacating an arbitration award.").

Moreover, although the panel created some confusion by intermittently using the the singular term "contract" (see page 10 above) but also the plural terms "agreements" or "COAs" to describe the new contract formed in September 2004 (see, e.g., Dkt. No. 21: Pacific/Kelso Traverse at 4-5 & examples cited therein),[16/] whether there were one or two contracts, and thus, whether Pacific and Kelso are jointly and severally liable under the law of contract, is totally irrelevant. Under the broad authority granted by the rules of the Society of Marine Arbitrators, the arbitrators had the power to fashion "any remedy or relief which [they] deem[] just and equitable." (Society of Marine Arbitrators, Maritime Arbitration Rules § 30.) Accordingly, the arbitrators were not limited by the remedies available in contract. See, e.g., ReliaStar Life Ins. Co. v. EMC Nat'l Life Co., 564 F.3d 81, 86 (2d Cir. 2009) ("Where an arbitration clause is broad, arbitrators have the discretion to order such remedies as they deem appropriate."); Banco de Seguros del Estado v. Mut. Marine Office, Inc., 344 F.3d 255, 262 (2d Cir. 2003) ("Where an arbitration clause is broad, as here, arbitrators have the discretion to order remedies they determine appropriate, so long as they do not exceed the power granted to them by the contract itself. . . . It is not the role of the courts to undermine the comprehensive grant of authority to arbitrators by prohibiting an arbitral security

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[16/] Pacific/Kelso also referred to a single agreement before the arbitrators. (See Weiss Aff. Ex. F: Pacific/Kelso Arbitration Br. at 43 ("the freight mechanism, volume-shifting option and $2.385 million equipment savings credit were major terms of the proposed agreement, and the evidence supports a conclusion that the 2005 and 2006 voyages 'were the subject of an interim agreement.'") (emphasis added).)

award that ensures a meaningful final award.") (citations omitted); Hartford Fire Ins. Co. v. Evergreen Org., Inc., 07 Civ. 7977, 2008 WL 4185731 at *4 (S.D.N.Y. Sept. 2, 2008) ("[A]rbitrators have 'power to fashion relief that a court might not properly grant.'") (quoting Sperry Int'l Trade, Inc. v. Gov't of Israel, 689 F.2d 301, 306 (2d Cir. 1982)); Blue Sympathy Shipping Co. v. Seriocean Int'l, 94 Civ. 2323, 1994 WL 597144 at *1 (S.D.N.Y. July 6, 1994) (same).[17/]

Upon a close reading of the Final Award (and the evidence upon which it is based), the Court is convinced that liability is based upon the breach of a single contract to which Pacific and Kelso were joint obligors. In such cases, the law permits NYKCool to recover the full amount of damages from either party. See, e.g., LoCurto v. LoCurto, 07 Civ. 8238, 2008 WL 4410091 at *7 (S.D.N.Y. Sept. 25, 2008) ("Ordinarily, a plaintiff has the option of suing a joint obligor for breach of contract individually because joint obligors are jointly and severally liable, and the plaintiff can recover the full amount of the damages to which he is entitled from any one of the joint obligors."); Battery Assocs. v. J & B Battery Supply, Inc., 944 F. Supp. 171, 178 (E.D.N.Y. 1996)

[17/] See also, e.g., Telenor Mobile Commc'ns AS v. Storm LLC, 524 F. Supp. 2d 332, 359 (S.D.N.Y. 2007) (Lynch, D.J.) ("'Arbitrators . . . enjoy broad discretion to create remedies unless the parties' agreement specifically limits this power.' 'While an arbitrator's award must 'draw its essence' from the parties' agreement . . . the effectiveness of arbitration in resolving complicated commercial disputes would be severely undermined if arbitrators were limited to the mechanical application of contested contractual provisions.' If the arbitration clause does not include any limit on the arbitrators' powers to craft a remedy, a respondent must 'overcome a powerful presumption that the arbitral body acted within its powers.' Accordingly, while an arbitrator may not award relief expressly forbidden by the agreement of the parties, an arbitrator may award relief not sought by either party, so long as the relief lies within the broad discretion conferred by the FAA.") (citations omitted), aff'd, 351 F. App'x 467 (2d Cir. 2009).

("Generally, 'joint and several liability arises when two or more persons co-sign a contract.'"); see also Restatement (Second) of Contracts § 289 ("Where two or more parties to a contract promise the same performance to the same promise, each is bound for the whole performance thereof, whether his duty is joint, several, or joint and several.").

Pacific/Kelso's contention that they cannot be deemed joint obligors because neither was "obligated to perform the obligations of the other" (Pacific/Kelso Traverse at 10), is unavailing.

> In the case of a contract with multiple obligors or multiple obligees, [whether contract rights or duties are joint, several, or joint and several] is ultimately a question of the parties' intent, as revealed by the language of their contract and the subject matter to which it relates, as well as the surrounding circumstances, including the practical construction placed on the contract by the parties themselves, the interests of the parties, and the purposes sought to be accomplished at the time the contract was made.

12 Williston on Contracts § 36:2 (4th ed. 2010); see also Restatement (Second) of Contracts § 288 ("Where two or more parties to a contract make a promise or promises to the same promisee, the manifested intention of the parties determines whether they promise that the same performance or separate performances shall be given."); 9 Corbin on Contracts § 52.4 (rev. ed. 2007) ("If the transaction takes the form of a single contract and the promisors so express themselves as to lead the promise reasonably to understand that each one promises the whole compensation, they are all bound accordingly.").

Here, Pacific and Kelso are both owned by Noboa (see page 2 above), negotiated with NYKCool as though a single entity (see Dkt. No. 17: Keane Aff. Ex. 1: Arbitration Exs. at LC00110-211), secured an "integrated . . . service, with obvious cost benefits to both parties" (Final Award at 20), were jointly represented at the arbitration (and in this Court) by one law firm (see

Weiss Aff. ¶ 1 & Ex. F: Pacific/Kelso Arbitration Br.), and presented a joint defense in which they: (1) relied on the same evidence, (2) consistently referred to themselves as "Kelso/Pacific," and (3) asserted a single, and seemingly indivisible, counterclaim against NYKCool (see Pacific/Kelso Arbitration Br.; Weiss Aff. Ex. G: Pacific/Kelso Reply Arbitration Br. at 45-48). Accordingly, there is ample evidence to support a finding that the parties intended the obligation to pay NYKCool be that of "Pacific/Kelso."

For the reasons stated above, the Final Award is not "too indefinite, ambiguous, or incomplete to be enforced" and NYKCools petition for confirmation of the award should be GRANTED.[18/]

CONCLUSION

For the reasons set forth above, NYKCool's motion to confirm the arbitration award (Dkt. No. 1) should be GRANTED, and Pacific/Kelso's cross-motion to vacate the award (Dkt. No. 12) should be DENIED. NYKCool's application for post-award interest, accrued from April 28, 2010, the date of the Final Award, to the date of judgment, "at the prime lending rate published by the Federal Reserve Bank," also should be GRANTED, as it is unopposed.

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections (and any responses to objections) shall be

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[18/] If a reviewing court were to disagree, it still should confirm the award in NYKCool's favor and remand to the arbitration panel to specify whether they found one contract or two, and if two, the amount owed to NYKCool by each of Pacific and Kelso. (See cases cited at page 17 above.)

filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Lewis A. Kaplan, 500 Pearl Street, Room 1310, and to my chambers, 500 Pearl Street, Room 1370. Any requests for an extension of time for filing objections must be directed to Judge Kaplan. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466 (1985); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993), cert. denied, 513 U.S. 822, 115 S. Ct. 86 (1994); Roldan v. Racette, 984 F.2d 85, 89 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir.), cert. denied, 506 U.S. 1038, 113 S. Ct. 825 (1992); Small v. Secretary of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989); Wesolek v. Canadair Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir. 1983).

DATED: New York, New York
November 24, 2010

Respectfully submitted,

Andrew J. Peck
United States Chief Magistrate Judge

Copies to: Edward A. Keane, Esq.
Joshua R. Weiss, Esq.
Judge Lewis A. Kaplan

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