JAMS COMMERCIAL ARBITRATION TRIBUNAL

CYPRESS PARTNERS, LLC,

Claimant,

Reference Number 1425028705

against

PHILIP R. SHAWE and JOHN DOES Nos. 1-10,

Respondents.

FINAL ARBITRATION AWARD

WE, THE UNDERSIGNED ARBITRATORS, having duly heard the proofs and allegations of the parties, hereby issue the following FINAL ARBITRATION AWARD.

A. Background

Claimant Cypress Partners, LLC ("Claimant" or "Cypress") entered into an Engagement Agreement with Respondent Philip R. Shawe ("Respondent" or "Shawe").[1] The central question in this arbitration is whether Shawe breached the Engagement Agreement by failing to pay certain fees and expenses allegedly owed under the Engagement Agreement following Shawe's purchase of Elizabeth Elting's shares in TransPerfect Global, Inc. ("TransPerfect"). Specifically, Cypress seeks an award of $800,000 in financing fees, pre-judgment interest exceeding $100,000, and the reimbursement of its reasonable attorneys' fees incurred in pursuing its claims for relief.

The Engagement Agreement contains a provision requiring that "[a]ny dispute arising out of or relating to the interpretation or execution of this letter agreement shall be submitted to arbitration for resolution. . . " Following the failure to pay an invoice for services submitted by Cypress, Cypress made a Demand for Arbitration seeking to resolve the dispute by arbitration through the American Arbitration

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[1] John Does Nos 1-10 were also named as Respondents in this proceeding. They were alleged to be affiliates of Shawe that "are yet unknown and are jointly and severally liable to Cypress." While Cypress reserved the right to amend its Notice of Claim to identify those entities, it never did so. Thus, those entities never became named Respondents in this proceeding.

Association. Respondent rejected the Arbitration Demand, and on July 23, 2018, the American Arbitration Association dismissed the Arbitration Demand based on the refusal to consent. A month or so later, Claimant filed a Verified Complaint in the Supreme Court of the State of New York asserting claims for breach of contract, quantum meruit and unjust enrichment. At the same time, Cypress filed a motion to compel arbitration pursuant to Article 75 of the New York Civil Practice Law and Rules. On December 13, 2018, Justice Jennifer G. Schecter issued an order compelling arbitration of the breach of contract claim and simultaneously staying the claims for quantum meruit and unjust enrichment pending the outcome of the arbitration.

Following this decision, the parties were directed by Justice Schecter to confer, and they agreed that the arbitration would be administered by JAMS and governed by JAMS rules and procedures. The parties each selected an arbitrator. Cypress selected Dennis E. Glazer, Esq., and Shawe selected Hon. Stephen G. Crane. The two arbitrators named by the parties selected Mark E. Segall, Esq. to be the Chair of the Arbitration Tribunal.[2]

On March 14, 2019, the tribunal held a preliminary hearing by telephone. During that call, the parties agreed that the terms of the JAMS Comprehensive Arbitration Rules & Procedures (the "Arbitration Rules") would apply to this proceeding. Pursuant to Rule 7 of the Arbitration Rules the party-appointed arbitrators are neutral and independent of the party who appointed them. The parties were directed to serve formal pleadings, which they did. The parties conducted discovery through early October 2019 and made pre-hearing submissions that were sufficiently comprehensive that the Panel and counsel for both sides agreed that there was no need to hear opening statements at the arbitration hearing itself. The arbitration hearing took place on October 21 and 22, 2019. The hearing transcript is 570 pages, and both sides were represented ably and had a full and fair opportunity to be heard. During the course of the hearing, upon inquiry from the Chair counsel for both sides confirmed on the record that the sole issue for the panel to decide is whether there is a breach of contract and that any quantum meruit claims would be decided by the state court. Counsel for Respondent stated: "Yes, in fact, I think, you would be exceeding your authority were you to rule on the quantum meruit claims or the unjust enrichment claims." Counsel for Claimant was asked whether he agreed with that, and he responded "Yes." (Day 2 Tr. 46-47)

The parties agreed that oral post-hearing closing arguments were unnecessary, but that both sides would have the opportunity to submit simultaneous post-hearing initial briefs and reply briefs. The briefing was completed as scheduled by December 20, 2019. The Arbitration Panel has reviewed with care those briefs and the exhibits and legal authorities upon which they rely. The parties agreed that this Award would be issued no later than February 28, 2020. That deadline has been met.

[2] The Engagement Agreement provides that any dispute would be heard by a single arbitrator, but the parties agreed instead to proceed with a panel of three.

B. Facts

The following is a statement of those facts found by the Arbitrators to be true and necessary to the Award. To the extent that this recitation differs from any party's position, that is the result of determinations as to credibility, relevance, burden of proof, and the weight of the evidence, both oral and written.

This arbitration has its roots in the disagreements between Shawe and Elizabeth Elting, who at one time were co-CEOs and Co-Founders of TransPerfect, which is one of the world's leading providers of translation and litigation support services. The relationship between the two of them grew to be toxic and led to the successful filing by Elting of a petition in the Delaware Court of Chancery seeking the dissolution and forced sale of TransPerfect. The Delaware Chancery Court ultimately appointed Robert B. Pincus as the Custodian of TransPerfect with a mandate to sell the Company while maintaining the business as a going concern and maximizing value for the stockholders.[3] The expectation was that Pincus would conduct an auction sale of the Company.

During the course of the Delaware Chancery Court litigation, J.T. Atkins, the managing partner of Cypress, which is a financial services advisory firm, had testified as an expert witness. Cypress was paid in full for his services for work that was performed between late 2014 through early 2016. Atkins is an attorney by training who described himself as a "recovering lawyer."

By the fall of 2016, the parties, including Shawe's attorneys and Cypress, began negotiating with the Custodian concerning a stalking-horse bid to acquire the shares held by Eltling that would serve as the opening offer for control of TransPerfect. The terms of the bid were embodied in a term sheet sent to the Custodian on December 22, 2016.[4] As Atkins testified, the primary terms of what is described in the term sheet as a Co-Founder Offer were the offer price, the go-shop period and Shawe's matching rights. Shawe offered $300 million for Elting's interest in the Company. There was to be a 60-day "go-shop" period during which the Custodian could solicit third parties for their interest in the Company, including on the part of Elting herself. If during the 60-day period the custodian received what was determined to be a superior proposal, Shawe had the right to match the superior proposal within seven days if it was below a certain level or, if it was above that level, engage in a head to head auction with the highest bidder. It was contemplated that this transaction would close nearly a year ahead of an auction sale and that the transaction costs would be significantly lower than would be incurred if a full-fledged auction went forward.

The negotiation of the Engagement Agreement and a similar agreement with Cyndx Advisors LLC ("Cyndx") took place in December 2016. Before any drafts were circulated between Cypress and Shawe, Shawe wrote Atkins and the head of Cyndx as follows:

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[3] Many of the decisions in the Delaware Chancery Court, in Delaware federal court, and New York State Court are quite critical of Shawe, but whatever misdeeds may or may not have taken place while Shawe and Elting were co-owners of TransPerfect or during the course of those litigations has no bearing on the issues before this Panel.

[4] The first page of the document bears the notation "RHP Draft December 8, 2016", but the record established that this is the final version of the term sheet.

> "Jim and JT, Thank you for agreeing to work with me to secure financing for my efforts to purchase Liz Elting's 50% stake in TransPerfect in a 'stalking horse' process . . . The purpose of this email is to make sure we're on the same page on key terms and key process items . . . This arrangement is only for the deal currently on the table with the Custodian (there is no 'tail')." [emphasis supplied]

The negotiation of the language and term of the Engagement Agreement took place between Atkins and Jay Clayton, who was then a partner at Sullivan and Cromwell. The email exchange that took place is consistent with Shawe's email.[5] On December 24, 2016, Atkins provided Cypress' draft of a proposed engagement agreement to Shawe, and the draft was forwarded to Clayton. This draft defined the term "Transaction" as "a possible financing for the purchase of, or the sale of your interest in TransPerfect Global, Inc. (the 'Company'), regardless of the form or structure of such transaction (the 'Transaction')." [emphasis supplied].

Clayton rejected this formulation and instead revised the definition of "Transaction" as "a possible financing of the purchase of Liz Elting's interest in TransPerfect Global, Inc. (the 'Company'), in substantially the form contemplated by the term sheet presented by Mr. Shawe to the Custodian on December 22, 2016 (the 'Transaction')." [emphasis supplied]. The change in language itself makes clear that Clayton, acting on behalf of Shawe, had rejected Cypress' formulation.

An email exchange on December 27, 2016 makes clear that Atkins accepted Clayton's formulation. This exchange focused on the scope of the engagement. In response to some comments by Atkins relating to the time within which a Transaction needed to be consummated Clayton made clear to Atkins that "this engagement is for the financing of the 'stalking horse' transaction only. Eg, if it does not work and the Custodian does an auction, that is not part of this engagement." In response, Atkins acquiesced, responding as follows:

> "So what you're saying is that if Bob [the Custodian] terminates the stalking horse/go shop process and moves to an open auction, all bets are off and we start over. That's fine."

Clayton responded to this email by stating "Agree." Thus, it seems clear that the parties adopted Shawe's limitation on the definition of "Transction" to include only the Co-Founder Transaction.[6]

Pursuant to the Term Sheet, a non-refundable $200,000 retainer was to be paid Cypress, and it is undisputed that Shawe made this payment. In addition, there is a requirement to pay a "Financing Fee" in one of two circumstances. The first circumstance is if financing for the "Transaction" was obtained from one of a specified list of traditional lenders who were contacts of Cypress. It is

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[5] Although Clayton was listed as a witness in Shawe's pre-hearing submission, he did not appear at the hearing, and neither side pressed for his testimony. In any event, the email record of the exchange between him and Atkins is clear and speaks for itself.

[6] Atkins' explanation of this email exchange was unpersuasive. His description of it as encompassing "an all cash bid to buy Liz out" is not consistent with the language of the Engagement Agreement as revised by Clayton and accepted by Atkins.

undisputed that did not occur. The second circumstance involves the obtaining of financing for the "Transaction" that is not obtained by Cypress. In that case, a Financing Fee of $1,000,000 (less the $200,000 retainer) would be due if committed financing were received within three months from the date on which Cypress receives unaudited GAAP financials for the nine months ending September 30, 2016 or during the term of the engagement or within 12 months thereafter, a "Transaction" is consummated or an agreement is entered into that subsequently results in a "Transaction." Shawe does not contend that the time for payment had expired. Rather, his position is that a "Transaction" within the meaning of the Engagement Agreement did not occur and that, as a result, all obligations under the Engagement Agreement were terminated. There is no dispute that Shawe never sent a formal notice of termination, but there is no evidence that the sending of a formal notice was required.

The Cyndx Engagement Letter executed in December 2016 had the same definition of "Transaction" as in the Cypress Engagement Letter. Cyndx had relationships with non-traditional lenders and was able to identify a lender who was committed to fund the Co-Founder Transaction. That transaction was never consummated, however. The Custodian did not support it, and the Chancery Court would not approve it.

At that point, Shawe decided to pursue the Auction Sale. Shawe executed a new Engagement Agreement with Cyndx which defined "Transaction" differently from the prior Cyndx Agreement and differently from the Cypress Engagement Letter. Pursuant to the terms of this document Cyndx was retained as "sole strategic advisor and placement agent" in connection "with the potential acquisition of a majority interest in TransPerfect." This agreement incorporated certain of the terms of the prior Cyndx Engagement Agreement. No additional agreement was entered into between Cypress and Shawe, and there is no evidence that Atkins ever asked for one.

The Auction Sale process took place from April 2017 through November of 2017. During that time, Credit Suisse was named as financial advisor to the Custodian. It notified 97 potential participants, ultimately received indications of interest from 16 participants, and conducted four rounds of bidding. Shawe prevailed through the process and executed a securities purchase agreement on November 19, 2017, thus satisfying the condition of the Engagement Agreement that an agreement be executed within twelve months of the signing of the Engagement Agreement. The purchase price was $385 million. Shawe was not the beneficiary of having matching rights or being able to act as an insider stalking horse. The purchase was financed by an entity that Cyndx brought to the table. After lengthy court proceedings Shawe's purchase of Elting's shares was finally consummated on May 7, 2018.

There is considerable disagreement as to the role that Cypress played during this period. Cypress introduced evidence that it was identified by Shawe as one of his financial advisors, attended meetings, continued to seek financing for the transaction, continued to provide strategic advice, and worked to identify sources of post-acquisition financing. At the hearing Shawe presented testimony to show that Cypress' involvement was relatively small and was of little or no value.

At the closing Cyndx received its fees. A few days earlier, Atkins sent an invoice to Shawe. The amount of the invoice was for $1,000,000 plus approximately $2,000 in expenses. As Atkins testified, he

neglected to deduct the $200,000 retainer and sent a revised invoice a week or so later. Shawe never paid this invoice. Indeed, he never even extended the courtesy of returning Atkins' calls about it.

C. Legal Analysis

The parties are not in substantive disagreement as to the legal standards that determine whether Shawe breached the terms of the Engagement Agreement by not paying the Financing Fee. As Claimant puts it, under New York Law, the intention of the parties should control, and the best evidence of intent is the contract itself. Claimant argues that this Panel's "function in interpreting a contract [should be] to apply the meaning intended by the parties, as derived from the language of the contract in question. [T]he best evidence of what parties to a written agreement intend is what they say in their writing. Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." (Claimant's Initial Post-Hearing Brief, p. 13) Similarly, Respondent argues that "When the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the document" and that a "writing should be enforced according to its terms, without recourse to extrinsic evidence to create ambiguities not present on the face of the document." (Respondent's Initial Post-Hearing Brief, p. 16)

In this case, both sides argue that the contract is unambiguous and that the defined term "Transaction" in "substantially the form contemplated by the term sheet sent to the Custodian on December 22, 2016" is crystal clear, and each argues that its position is supported by the document. Taken in isolation the Panel concludes that the definition is in fact ambiguous. The test under New York law is "whether the agreement on its face is reasonably susceptible of more than one interpretation." *Chimart Associates v. Paul*, 66 N.Y.2d 570, 573 (1986). Just reading this phrase does not supply the answer as to whose interpretation is correct. Thus, the standard for consideration of the extrinsic evidence is satisfied. An examination of that evidence leads us to conclude that Shawe's interpretation is correct.

In this regard, the email exchange between Atkins and Clayton described earlier in this Award is decisive. Clayton eliminated language that would have permitted Cypress to be paid "regardless of the form and structure of such transaction." Had that language been retained in the final agreement, Cypress' right to be paid would be indisputable. Clayton clearly stated that "this engagement is for the financing of the 'stalking horse' transaction only. Eg, if it does not work and the Custodian does an auction that is not part of this engagement" and Atkins' acquiescence in the form of his email response ("So what you're saying is that if Bob [the Custodian] terminates the stalking horse/go shop process and moves to an open auction all bets are off and we start over. That's fine" provides definitive evidence that the parties agreed that no additional Financing Fee beyond the $200,000 retainer was required to be paid. Once the Court failed to approve the stalking horse bid and proceeded with the auction process Cypress' right to a fee was terminated.

If Shawe had intended to hire Cypress for work as broadly as its claims, the language proposed by Atkins would not have been stricken. Moreover, given that the issue of a greater scope was flagged specifically, rejected and then addressed specifically by a limiting reference to a specific form, this Panel

accepts the inference that all other forms not mentioned are excluded. *See, e.g., Prince v. Coca-Cola Bottling Co.*, 37 F. Supp. 2d 289, 293 (S.D.N.Y. 1999). These facts distinguish this case from the decision in *Stormharbour Securities LP v. IIG Trade Opportunities Fund, N.V.*, 2015 WL 5724605 (Sup. Ct. N.Y. County 2015), *affd,* 145 A.D.3d 497 (1st Dept. 2016). In that case, the use of the phrase "substantially similar" before the word "transaction" had the impact of enlarging the scope of transactions that would be covered. In contrast, in this case the terms inserted by Clayton and accepted by Atkins were used specifically to narrow the scope of the services to the specific form of the stalking-horse transaction described in the Term Sheet.

Professor Steven Davidoff Solomon testified on Cypress' behalf as part of Claimant's attempt to argue that its interpretation of "Transaction" was consistent with industry custom and practice. But there is no evidence the parties who negotiated the Engagement Agreement knew about such industry practice and relied upon it when drafting the contract. Under these circumstances, the courts have held that they should not rely upon such evidence. *See, e.g., CMMF, LLC v. J.P. Morgan Inv. Mgmt., Inc.*, 992 N.Y.S.2d 158, 2013 WL 8480424, at *11 (Sup. Ct. New York County 2013) (applying this principle to exclude industry custom relating to the definition of "asset-based securities").[7]

Cypress also argues that Shawe's conduct in not notifying it of his position that the Engagement Agreement was terminated constituted a breach of the duty of good faith and fair dealing, but the cases are clear that reliance cannot be placed on this implied duty where, as here, the contract does not contain any provision requiring notification by Shawe that the contract had terminated when the Chancery Court rejected the stalking-horse provision. That Cypress continued to provide certain services post-termination does not mean that there was any contract that mandated payment for those services.[8]

For these reasons, the Panel concludes that Cypress cannot prevail on its breach of contract claim.[9] Cypress has no entitlement to be paid an additional $800,000 in fees.

D. <u>Attorneys' Fees and Costs</u>

Cypress also asserts a claim for reimbursement of its attorneys' fees and costs. This assertion does not appear to be predicated on prevailing on its breach of contract claim. Indeed, there is no "prevailing party" clause in the paragraph requiring arbitration of "[a]ny dispute arising out of or relating to the interpretation or execution of this letter agreement." Instead, Cypress relies upon a provision of the Engagement Agreement requiring reimbursement of fees incurred during the course of the engagement (which is not the case here) and separate indemnification

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[7] Creighton Hoffman, a principal in a consulting firm, provided expert testimony on Respondent's behalf. His testimony had little, if any, impact on the conclusions reached in this Award.

[8] This Panel does not have the quantum meruit or unjust enrichment claims before it. The finder of fact on those claims will have to decide whether the considerable services provided by Cypress subsequent to January 2017 merit a finding in its favor on those claims and, if so, decide whether to award damages. That issue is not before this Panel.

[9] Since Cypress did not prevail on its claim for breach of contract, the Panel need not address Cypress' request for pre-judgment interest in an amount in excess of $120,000.

provisions that are referenced in the Engagement Agreement and described in greater detail in Annex A of the Agreement. Any fair reading of that Annex makes clear that it was designed to apply to fees incurred in connection with legal proceedings instituted by third parties and no application to disputes between parties to the contract. The New York Court of Appeals has held that indemnification clauses do not apply to attorneys' fees incurred in disputes between the parties to the contract unless the language of the contract is "unmistakably clear" that it applies to such claims. *Hooper Assoc., Ltd. V. AGS Comput., Inc.*, 74 N.Y.2d 487, 492 (1989). That standard has not been satisfied in this case. Therefore, Claimant's request for the reimbursement of its attorneys' fees and the costs of this proceeding is denied.

Respondent did not request that it be awarded the costs of these proceedings in its Response to the Notice of Claim or in any of its pre-hearing or post-hearing submissions.

Relief Granted

1. Claimant's claim of breach of contract is denied, and this claim is dismissed against the Respondents Philip R. Shawe and John Does Nos. 1-10.

2. Claimant's request for the reimbursement of its attorneys' fees is denied.

3. No costs are to be awarded to either side.

4. This Award resolves all issues submitted for decision in this proceeding. To the extent any claim is not mentioned specifically herein, it is denied.

Dated: New York, New York
February 13, 2020

Mark E. Segall, Arbitrator and Chair

Stephen G. Crane, Arbitrator

Dennis E. Glazer, Arbitrator

provisions that are referenced in the Engagement Agreement and described in greater detail in Annex A of the Agreement. Any fair reading of that Annex makes clear that it was designed to apply to fees incurred in connection with legal proceedings instituted by third parties and no application to disputes between parties to the contract. The New York Court of Appeals has held that indemnification clauses do not apply to attorneys' fees incurred in disputes between the parties to the contract unless the language of the contract is "unmistakably clear" that it applies to such claims. *Hooper Assoc., Ltd. V. AGS Comput., Inc.*, 74 N.Y.2d 487, 492 (1989). That standard has not been satisfied in this case. Therefore, Claimant's request for the reimbursement of its attorneys' fees and the costs of this proceeding is denied.

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Dated: New York, New York
February 13, 2020

Mark E. Segall, Arbitrator and Chair

Stephen G. Crane, Arbitrator

Dennis E. Glazer, Arbitrator

State of New York)
: ss:
County of New York)

I, Mark E. Segall, do hereby affirm upon my oath as Arbitrator that I am the individual described in and executed this instrument which is my FINAL AWARD.

Feb. 13, 2020
Date

Mark E. Segall

State of New York)
: ss:
County of New York)

I, Stephen G. Crane, do hereby affirm upon my oath as Arbitrator that I am the individual described in and executed this instrument which is my FINAL AWARD.

02/13/20
Date

Stephen G. Crane

State of New York)
: ss:
County of Westchester)

I, Dennis E. Glazer, do hereby affirm upon my oath as Arbitrator that I am the individual described in and executed this instrument which is my FINAL AWARD.

_____
Date

_____
Dennis E. Glazer

State of New York)
: ss:
County of New York)

I, Mark E. Segall, do hereby affirm upon my oath as Arbitrator that I am the individual described in and executed this instrument which is my FINAL AWARD.

Feb 13, 2020
Date

Mark E. Segall

State of New York)
: ss:
County of New York)

I, Stephen G. Crane, do hereby affirm upon my oath as Arbitrator that I am the individual described in and executed this instrument which is my FINAL AWARD.

Date

Stephen G. Crane

State of New York)
: ss:
County of Westchester)

I, Dennis E. Glazer, do hereby affirm upon my oath as Arbitrator that I am the individual described in and executed this instrument which is my FINAL AWARD.

Feb 14, 2020
Date

Dennis E. Glazer

SERVICE LIST

Case Name: Cypress Partners LLC vs. Shawe, Philip R. et al.
Reference #: 1425028705
Panelist: Crane, Stephen G.,
Segall, Mark E.,

Hear Type: Arbitration
Case Type: Business/Commercial

Gerard DiConza

Archer

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Philip Shawe

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Cypress Partners LLC vs. Shawe, Philip R. et al.
Reference No. 1425028705

I, John Graber, not a party to the within action, hereby declare that on February 25, 2020, I served the attached Final Award on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at New York, NEW YORK, addressed as follows:

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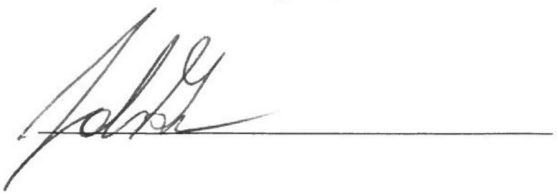
Parties Represented:
Jane Doe 1-10
John Doe 1-10
Philip R. Shawe
Philip Shawe

I declare under penalty of perjury the foregoing to be true and correct. Executed at New York, NEW YORK on February 25, 2020.



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