Decides that the Court may apply either FAA (9 U.S.C. 1 et seq) or NY Convention in determining grounds for vacation of an arbitral award!

(8)

[Enforcement]
- motions to confirm + vacate
- arb in US
- one party foreign
- court can confirm award
- no exceeding jd where failed to obj to arbitrability of claim
- no manifest disregard or miscalculation

27TH CASE of Focus printed in FULL format.

NATIONAL EDUCATION CORP., NETG HOLDINGS, INC., and NATIONAL EDUCATION TRAINING GROUP, INC., Plaintiffs, v. DR. JAMES MARTIN, Defendant.

No. 93 C 6247

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1995 U.S. Dist. LEXIS 15707

October 19, 1995, Decided

October 20, 1995, DOCKETED

COUNSEL: [*1] For NATIONAL EDUCATION CORPORATION, a Delaware corporation, NETG HOLDING INC., a Delaware corporation, plaintiffs: Francis J. McConnell, James Arthur McGurk, Michael Sweig Mendelson, Mitchell Bryan, McConnell & Mendelson, Chicago, IL. For NATIONAL EDUCTION TRAINING GROUP, INC., a Nevada corporation fka Applied Learning International, Inc., plaintiff: Elizabeth Jean Caprini, Francis J. McConnell, James Arthur McGurk, Michael Sweig Mendelson, Mitchell Bryan, McConnell & Mendelson, Chicago, IL.

For JAMES MARTIN, Dr., defendant: Marvin N. Benn, George W. Hamman, Aimee M. Devereux, Hamman & Benn, Chicago, IL. Terrence Patrick Canade, Nick J. DiGiovanni, Lord, Bissell & Brook, Chicago, IL. For COMPUTER CHANNEL INC, a New York corporation, defendant: Margaret S. Hickey, Lord, Bissell & Brook, Chicago, IL. Leon E Roday, Leboeuf, Lamb, Greene & Macrae, New York, NY.

For JAMES MARTIN, counter-claimant: Marvin N. Benn, George W. Hamman, Aimee M. Devereux, Hamman & Benn, Chicago, IL. Terrence Patrick Canade, Lord, Bissell & Brook, Chicago, IL.

For NETG HOLDING INC, counter-defendant: Francis J. McConnell, Michael Sweig Mendelson, Mitchell Bryan, McConnell & Mendelson, Chicago, IL.

JUDGES: [*2] GEORGE M. MAROVICH, UNITED STATES DISTRICT JUDGE

OPINIONBY: GEORGE M. MAROVICH

OPINION: MEMORANDUM OPINION AND ORDER

Now before the Court are Plaintiffs National Education Corp.'s, NETG Holdings, Inc.'s and National Education Training Group, Inc.'s (collectively "NETG") motion to confirm arbitration award and Defendant Dr. James Martin's ("Martin") motion to vacate or modify arbitration award. Specifically, Martin challenges the arbitrator's August 16, 1995 award of monetary and injunctive relief to NETG on three grounds: (1) the arbitrator exceeded his authority, (2) the arbitrator manifestly disregarded the law of contracts in deciding the issues presented, and (3) the arbitrator miscalculated the time period for purposes of calculating damages and/or enjoining Defendant's competitive activities. For the reasons set forth below, this Court grants Plaintiffs' motion and denies Defendant's motion.

To affirm

BACKGROUND

The present dispute arises out of a failed joint venture between NETG and Martin to produce computer education videos. Martin is purportedly an expert in new technologies in data processing. Under the parties' joint venture agreement, NETG was to produce and distribute videos based [*3] upon, and incorporating, Martin's ideas.

There are three categories of agreements between NETG and Martin which are relevant to the present action. First, in April 1991, the parties entered into at least four signed agreements ("the 1991 agreements") which established the basic terms of their relationship. These agreements contain arbitration clauses. The arbitration clause of greatest importance to the parties' current dispute is contained in the April 5, 1991 agreement:

Any dispute arising out of this Agreement which cannot

be resolved to the mutual satisfaction of the parties shall be submitted for arbitration of the American Arbitration Association in Chicago, Illinois according to the rules and procedures of the American Arbitration Association for commercial arbitration.

In 1993, the parties entered into the second category of agreements--the Heads of Agreement ("HOA"). The HOA amended the April 1991 agreements, but did not, itself, contain an arbitration clause. The parties contemplated preparing and executing additional documents to further refine and focus the HOA's general terms.

The third category of documents is the 1993 agreements which arguably contain the [*4] specific terms for implementing the HOA. These agreements were never signed by the parties.

Sometime during the negotiation of the 1993 agreements, video production stalled and Martin allegedly repudiated the HOA in an attempt to seek new distribution opportunities for his ideas.

In 1993, NETG sued Martin under all three categories of agreements--the 1991 agreements, the HOA and the 1993 agreements. In addition to seeking monetary relief, NETG sought to enjoin Martin from competing with NETG pursuant to the terms of a noncompete provision contained in the 1991 agreements. After various legal battles, NETG obtained from Magistrate Judge Lefkow on July 6, 1994 a temporary restraining order prohibiting Martin from producing and/or distributing video products which competed with NETG's video products.

Immediately thereafter, NETG sought to stay this litigation pending arbitration. In granting NETG's motion to stay, this Court stated:

Dr. Martin, for his part, does not contest the motion and agrees that this case should proceed to arbitration. Martin states that he would "consent to a stay or dismissal without prejudice." As for the scope of the arbitration, in its motion NETG argues [*5] that Counts I, II, and III of its Amended Complaint are squarely within the arbitration clauses of the relevant agreements. Martin offers no argument to the contrary and we likewise agree with NETG on this point. . . . NETG further notes that Dr. Martin has filed a counterclaim which they have moved to dismiss. According to its initial brief, "That fully briefed motion should be decided by arbitrator, since all of Martin's counterclaims . . . are within the scope of the operative language of the arbitration provision: 'Any dispute arising out of this Agreement.'" If this were all the material the Court received, it would seem an easy resolution given the substantial agreement of the parties.

Memorandum Opinion and Order of July 26, 1994, at pp. 1-2.

On July 28, 1994, Martin filed a Demand for Arbitration with the American Arbitration Association ("AAA"), asserting that NETG had breached its contracts with Martin by failing to produce videotaped courses. On August 31, 1994, NETG filed its Answer and Counterclaim, along with a motion to continue the amended temporary restraining order, with the AAA.

On November 2, 1994, the arbitrator entered an order enjoining Martin from [*6] marketing or distributing products in violation of the 1991 covenant not to compete until a ruling on the merits by the arbitrator.

Arbitration proceedings were conducted December 19-20, 1994, wherein Martin completed the presentation of his case-in-chief. NETG presented its case-in-chief on February 27-28 and March 1, 1995. On April 18, 1995, both sides submitted their lengthy post-trial briefs to the arbitrator. On May 2, 1995, both parties submitted to the arbitrator their responses to the others' post-trial brief. On May 26, 1995, the arbitrator heard closing arguments from counsel for Martin and counsel for NETG.

On August 16, 1995, the arbitrator issued his award. Under the award, Martin's claim was denied and NETG's counterclaim for compensatory damages was granted. Martin was ordered to pay NETG $ 6,647,000, and was enjoined from producing and/or distributing products in violation of the covenant not to compete until March 31, 1997. In addition, Martin was ordered to reimburse NETG for reasonable attorneys' fees and costs incurred in obtaining and continuing the TRO issued by the district court and the injunction order issued by the arbitrator. NETG's counterclaims for punitive [*7] damages and for attorneys' fees under the Illinois Franchise Act were denied. n1

n1 On March 3, 1995, Martin filed a second arbitration demand with the AAA claiming that NETG breached agreements with Martin, dated June 28, 1978, October 28, 1986, and April 6, 1991 respectively, by failing to pay royalties and provide accounts after late 1993. NETG moved to consolidate the March 3, 1995 Demand for Arbitration with the then pending arbitration concerning the present dispute. NETG's motion to consolidate was granted on May 9, 1995. On May 26, 1995, the arbitrator determined that the "consolidated matters" would not be addressed until after he issued an award with respect to the issues presented in the arbitration proceedings on Martin's first arbitration demand.

Given that the issues presented in Martin's second arbitration demand are separable from the issues presented in the arbitration demand upon which the arbitrator has ruled--a fact evidenced by the arbitrator's postponement of the second arbitration demand until the first arbitrable dispute had been resolved--, this Court may properly confirm the arbitrator's August 16, 1995 award. See *Eurolines Shipping Co. v. Metal Transport Corp., 491 F. Supp. 590 (S.D.N.Y. 1980).*

[*8]

On September 12, 1995, NETG filed its motion to confirm the arbitration award and this Court directed Martin to file his motion to vacate or modify so that the Court could consider the various issues pertaining to the arbitration simultaneously. Martin challenges the arbitrator's award on three basic grounds: (1) the arbitrator exceeded the scope of his authority by affording NETG relief under the HOA and the 1993 agreements--none of which contain arbitration provisions; (2) the arbitrator "manifestly disregarded" the law of contracts in finding that Martin breached the HOA, as the HOA fails for want of consideration; and (3) the arbitrator improperly awarded NETG damages through March 1996 and injunctive relief through March 1997, notwithstanding that the HOA expressly states that it terminated on December 31, 1994. The Court considers, and rejects, each of these grounds in turn. n2

n2 It should be noted that while the Court issued a preliminary order confirming the arbitration award on October 12, 1995, prior to Martin's submission of his Reply Memorandum in Support of Motion to Vacate or Modify Arbitration Award, the Court did review Martin's Reply Brief and consider the arguments contained therein in resolving the present dispute and in drafting this Memorandum Opinion and Order.

[*9]

DISCUSSION

This Court may apply either the Federal Arbitration Act ("FAA"), *9 U.S.C. § 1* et. seq., or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"), *9 U.S.C. § 201* et. seq., to the arbitration at issue. *Spector v. Torenberg, 852 F. Supp. 201 (S.D.N.Y. 1994).* The FAA can apply because the arbitration award arose in this district; the Convention can apply because Martin is not a United States citizen. *Id. at 205.*

A. The Arbitrator Did Not Exceed His Authority In Granting The Relief Requested By NETG

Both the FAA and the Convention provide that a court may vacate an arbitration award if the arbitrator exceeded his authority. *9 U.S.C. § 10; 9 U.S.C. § 201*, Art. V; see also *Zeigler Coal Co. v. District 12 United Mine Workers, 484 F. Supp. 445 (C.D. Ill. 1980);* National Cleaning v. Local 32B-32J, *833 F. Supp. 420 (S.D.N.Y. 1993).* The Court, not the arbitrator, must determine the scope of the arbitrable issues. *Mutual Service Corp. v. Spaulding, 871 F. Supp. 324, 327 (N.D. Ill. 1994).*

Martin argues that the arbitrator exceeded his authority with respect to the present dispute by granting NETG relief [*10] under the HOA--an agreement which contained no arbitration provision. Martin further maintains that the arbitrator exceeded his powers by considering the 1993 agreements--agreements which were not signed and, consequently, which were not legally binding upon Martin--both in determining whether Martin breached his contractual obligations to NETG and in calculating the amount of compensatory damages. Martin's arguments are unfounded for two fundamental reasons.

First, Martin waived any argument that NETG's claims under the HOA were non-arbitrable by failing to object to this Court's referral of those claims to arbitration. As correctly noted by Plaintiffs, the FAA invests courts with the authority to determine if claims are non-arbitrable; but this issue must be addressed before the matter proceeds to arbitration. Where a party fails to seek a court's determination under Section 4 that certain claims are non-arbitrable prior to the commencement of arbitration proceedings, that party waives its right later to challenge the arbitration award on the grounds that the arbitrator exceeded his authority in resolving those claims. *Comprehensive Accounting Corp. v. Rudell, 760 F.2d 138, [*11] 140 (7th Cir. 1985).*

In its motion to stay this action pending mandatory arbitration, NETG argued that Count I (a claim under the HOA), Count II (a claim under the 1991 agreement), and Count III (a claim under the covenant not to compete) of its Amended Complaint were squarely within the arbitration clauses of the relevant agreements, and that, as a result, this Court should refer those Counts to an arbitrator for resolution. As this Court specifically noted when granting NETG's motion to stay, Martin explicitly consented to the transfer of these Counts, as well as his counterclaim, to arbitration. After reviewing the allegations contained in NETG's Amended Complaint generally and in Count I of that Complaint specifically, there can be little doubt that Martin was aware when he consented to arbitration that NETG was alleging that Martin breached the HOA by, among other things, re-

fusing to sign the 1993 agreements. To permit Martin now to assert that the arbitrator exceeded his authority would unfairly reward Martin for sitting on his hands and would thwart the basic policies underlying both the FAA and the Convention: "It [is] too late for them to sit back and allow the arbitration [*12] to go forward, and only after it [is] all done, and enforcement [is] sought, say: oh by the way, we never agreed to the arbitration clause. That is a tactic that the law of arbitration, with its commitment to speed, will not tolerate." *Rudell, 760 F.2d at 140.* n3

n3 It is important to note that Martin was victorious on the only two issues over which he did, in fact, challenge the arbitrator's jurisdiction: NETG's claim under the IFDA and NETG's right to recover tort damages.

The second reason that Martin's contention that the arbitrator exceeded his authority is unfounded is that Martin affirmatively and consistently litigated in the arbitration proceedings the very issues which he now asserts were beyond the arbitrator's power to consider. Where a party voluntarily and unreservedly submits an issue to arbitration, it cannot later assert that the arbitrator was without authority to resolve that issue. *Jones Dairy Farm v. Local No. P-1236, 760 F.2d 173, 175* (7th Cir.), cert denied, *474 U.S. 845 [*13] (1985).*

In his Demand for Arbitration, Martin unquestionably put the HOA at issue and unequivocally recognized that the HOA was merely an amendment to the 1991 agreement which contained the arbitration provision:

The named claimant, a party to an arbitration agreement contained in written contracts, both dated April 5, 1991, as amended by the Heads of Agreement and providing for arbitration under the Commercial Arbitration Rules of the American Arbitration Association, hereby demands arbitration thereunder.

THE NATURE OF THE DISPUTE: Breach of the contracts by failure to produce videos.

THE CLAIM OR RELIEF SOUGHT (the Amount, if Any): Ruling that NETG breached its contracts, the contracts were terminated, that there are no restrictions on Martin, and money damages in an amount to be determined in the course of the proceedings.

(Emphasis designates portions typed by Martin on standard form.)

Further, at the arbitration, Martin steadfastly pursued his claim that NETG breached the HOA by failing to produce videos and by refusing to transfer a 4% stock interest in NETG Holdings to Martin (in exchange for Martin's 49% interest in JMI). Indeed, [*14] among the arguments presented by Martin in his post-trial briefs to the arbitrator are the following:

NETG did not, and never has, issued share certificates to Martin for 4% of NETG as required under paragraph (1) of the Heads of Agreement. (Martin's Post-Hearing Br. at p. 5)

Martin never stopped performing under the 1991 Agreement as modified by the Heads of Agreement. (Id. at 13)

No staff was left [at NETG to work on Martin's products] in direct breach of the Heads of Agreement. (Id. at 14)

NETG admits that the Heads of Agreement is binding, therefore its refusal to perform thereunder unless Martin agreed to substantial changes is an ordinary breach of contract. (Id. at 16)

The Heads of Agreement provides that NETG and Dr. Martin are to produce and market 70 to 100 course units per year. Heads of Agreement, Par. 4(a). Despite this obligation, NETG repeatedly refused to failed to [sic] produce or market any courseware under the Agreement. (Id. at 41)

By October 8 NETG had breached the Heads of Agreement and the 1991 Agreement by nonperformance. (Martin's Post-Hearing Reply Br. at 10)

In any event the Heads of Agreement was effective without [*15] further documentation. All NETG had to do was issue shares in NETG to Martin and perform the requirements set out in the Heads of Agreement, including producing (and by implication releasing) 70 to 100 units per year. (Id. at 11)

Martin's post-arbitration conduct further reveals his consent to the arbitrator's consideration of the HOA in resolving the parties' dispute. Martin filed a motion for reconsideration with the arbitrator in which he alleged not that the arbitrator had improperly considered claims arising out of the HOA, but rather that the arbitrator had inaccurately applied the relevant legal principles and should modify his award accordingly. Among the revealing statements contained in Martin's motion to reconsider are the following:

The parties agreed that the Heads of Agreement was a binding contract . . . Therefore, the issue was whether Martin had a legal obligation to agree to material changes in terms from the terms of the Heads of Agreement. (Martin's Motion for Reconsideration of Arbitration Demand at p. 1)

In order to reach the result contained in the Award, the arbitrator has to disregard established legal principles and accept the position urged [*16] by NETG: namely, that Martin breached the Heads of Agreement by refusing to sign the Johnson documents. (Id.)

Under the Heads of Agreement, NETG obtained Martin's interest in JMI and was to give Martin 4% of the stock in NETG. That was not done, and no provision therefor [sic] was made in the Award. Martin submits that the Award should be corrected in this respect. (Id. at 3)

Thus, by expressly acknowledging to the arbitrator the validity of the HOA and by affirmatively litigating in the arbitration proceeding his claim that NETG breached the HOA, Martin waived his present contention that the arbitrator exceeded the scope of his authority by resolving contractual issues arising out of the HOA. n4

n4 The cases cited by Martin in support of his position--National Cleaning v. Local 32B-32J, *833 F. Supp. 420 (S.D.N.Y. 1993)* and *Laborers Health and Welfare Trust v. Westlake, 53 F.3d 979 (9th Cir. 1995)*--are inapposite. In National Cleaning, the court vacated an arbitration award because the issue decided by the arbitrator was a "matter not submitted" to him. Here, Martin not only consented to the submission of NETG's Count I (which alleges breach of the HOA) to arbitration, but, indeed, actively pursued his own claims against NETG for breach of the HOA before the arbitrator. Thus, National Cleaning does not bolster Martin's claim that the arbitrator exceeded his authority.

Laborers Health is similarly unavailing. In Laborers Health, the court vacated an arbitration award on the ground the arbitrator exceeded his powers by granting relief under a contract which had been previously repudiated. Here, NETG does not now claim, nor did it claim before the arbitrator, that the 1993 agreements constitute valid and enforceable contracts which Martin breached. Rather, NETG claims that Martin's refusal to sign the 1993 agreements constituted acts which breached the admittedly valid HOA. Thus, while the arbitrator might have exceeded his authority had he treated the 1993 agreements as separate contracts, the fact is that the arbitrator did not so treat the 1993 agreements; he merely considered Martin's actions with respect to those agreements in determining whether Martin breached the HOA and the 1991 agreements--agreements which were clearly subject to the relevant contractual arbitration provisions.

[*17]

B. The Arbitrator Did Not "Manifestly Disregard" The Applicable Law

Martin asserts that, in addition to exceeding his authority, the arbitrator "manifestly disregarded" the law of contracts in granting NETG relief under the HOA. Specifically, Martin argues that because NETG failed to give Martin a 4% stock interest in NETG holdings as required by the HOA and/or because that stock interest would be effectively valueless, the HOA is void for lack of consideration and cannot serve as the basis for the arbitrator's award. Martin's argument fails for two basic reasons.

First, the legal error identified by Martin does not evidence such a "manifest disregard of the law" as to warrant vacating the arbitrator's award. According to the Seventh Circuit, to vacate an arbitration award for manifest disregard of the law, "there must be something beyond and different from mere error in law or failure on the part of the arbitrators to understand or apply the law; it must be demonstrated that the majority of arbitrators deliberately disregarded what they knew to be the law in order to reach the result they did." *Health Services Management Corp. v. Hughes, 975 F.2d 1253, 1267 (7th Cir. [*18] 1992).* In asserting that the arbitrator should have found that the HOA was not supported by valid consideration, Martin does not, and apparently cannot, maintain that the arbitrator "deliberately disregarded what [he] knew to be the law in order to reach the result he did." Rather, Martin's argument amounts to little more than an assertion that the arbitrator failed to understand and/or apply the law of contracts correctly. Such a failure on the part of the arbitrator would not, and does not, permit this Court to vacate the arbitration award.

Second, the Seventh Circuit's standards for "manifest disregard of the law" notwithstanding, it appears that the arbitrator's decision was entirely consistent with the applicable law. There is no dispute between the parties that, in consideration for accepting and complying with the terms of the HOA, Martin would receive "a 4.0% share holdings in National Education Training Group, Inc." Martin's contention that NETG's failure to give

Martin the required 4% stock interest voids the HOA is meritless, as (1) Martin did not receive the NETG shares because he admittedly refused to sign the tendered Share Exchange Agreement, and (2) NETG's failure [*19] to tender the shares to date, at worst, constitutes a breach of the HOA entitling Martin to damages or specific performance; it does not render the contract invalid. Moreover, Martin's assertion that the 4% stock interest represents merely illusory consideration because that stock interest is effectively valueless is similarly without legal merit, as the mere fact that, at the time the HOA was signed, the 4% stock interest could have had value is sufficient to support NETG's pledge: "the law will not inquire into the adequacy of the consideration to support a promise, only its existence." *Curtis 1000, Inc. v. Suess, 24 F.3d 941, 945 (7th Cir. 1994).*

Thus, the arbitrator's decision, at best, comports with the relevant legal principles, and, at worst, represents an innocent misunderstanding or misapplication of the law by the arbitrator--not the "manifest disregard for the law" which Martin asserts. In either case, this Court is not authorized to vacate the arbitrator's award.

C. The Arbitrator's Award Was Not Based Upon An "Evident Miscalculation Of Figures"

Martin further argues that, even if the arbitrator did not exceed the scope of his authority, the arbitrator's [*20] award was based upon an "evident miscalculation of figures" and that, consequently, this Court should modify the award pursuant to Section 11(a) of the FAA. According to Martin, the arbitrator's award of damages through March 1996 and of injunctive relief through March 1997 is patently insupportable in light of the fact that the HOA expressly states that it terminated on December 31, 1994. This argument is both legally and factually incorrect.

Section 11 of the FAA provides that a court may modify or correct an arbitration award "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." *9 U.S.C. § 11*(a). An "evident material miscalculation" occurs "where the record that was before the arbitrator demonstrates an unambiguous and undisputed mistake of fact and the record demonstrates strong reliance on that mistake by the arbitrator in making his award. . . ." *McIlroy v. Painewebber, Inc., 989 F.2d 817, 821 (5th Cir. 1993)* (quoting *Valentine Sugars, Inc. v. Donau Corp., 981 F.2d 210, 214 (5th Cir. 1993)*); see also *Babcock & Wilcox Co. v. PMAC, Ltd., 863 S.W.2d 225 [*21] (Tex. App. 1993)* (where arbitrator's award is "rationally inferable from the facts before him," arbitrator has not exceeded his powers or committed evident material miscalculation within the meaning of Section 11(a)).

Here, there is certainly a rational basis for both the arbitrator's calculation as to the proper amount of damages and his determination as to the appropriate length of the injunction. Initially, with respect to the arbitrator's award of injunctive relief, the one-year non-compete provision upon which the arbitrator relied is contained in the April 5, 1991 Agreement, which expressly terminates on March 31, 1996. As Martin himself consistently recognized in the arbitration proceedings:

[The April 5, 1991 Agreement] is a black and white contract. The termination date is quite clear. It's March 31, 1996. And there is nothing in [the] Heads of Agreement which changes that.

Arbitration Proceedings Tr. at 153-55. Thus, it was not "an unambiguous and undisputed mistake of fact" for the arbitrator to conclude that the injunction against Martin's competition with NETG should last until March 31, 1997--the termination date of the 1991 agreement plus one-year. [*22] n5

n5 As NETG points out, while the tendered amendment to the April 5, 1991 Agreement gave Martin the option of either shortening the term to December 31, 1994 or extending the term to December 31, 1998 (consistent with the HOA), Martin refused to sign the amendment, and, consequently, the term set forth in the 1991 agreement remained unchanged.

Furthermore, with respect to the arbitrator's damage award, the damage models submitted to the arbitrator by both Martin and NETG apparently assumed a production period of March 1993 through March 1996, coterminus with the 1991 Agreement. Martin's damage model calculated lost royalties on an assumed production of 70-100 units annually for this three-year period; while NETG's damage model calculated lost net revenues for the same period. Martin never argued until now that the production period should have been limited to December 31, 1994--the termination date of the HOA--for purposes of calculating damages. Indeed, such an argument would have undercut Martin's own [*23] damage figures and would have flatly contradicted Martin's position before the arbitrator that "there is nothing in [the] Heads of Agreement which changes [the termination date of the April 1991 agreement]." Hence, it appears that the arbitrator's damage award is firmly supported by the record and is not, as Martin contends, based upon an "evident material miscalculation of figures."

CONCLUSION

For the foregoing reasons, Martin's motion to vacate or modify the arbitrator's award is denied. Pursuant to Section 9 of the FAA, this Court enters judgment confirming the Award of the Arbitrator dated August 16, 1995 enjoining Martin from producing and distributing products in violation of the covenant not to compete until March 31, 1997, ordering Martin to pay NETG $ 6,647,000 in damages, and commanding Martin to reimburse NETG for reasonable attorneys fees and expenses incurred in obtaining and continuing the temporary restraining order issued by the federal district court and the injunction order issued by the arbitrator. Further, in accordance with Section 13 of the FAA, this Court awards NETG post-judgment interest from the date of the arbitrator's award, August 16, 1995. [*24]

ENTER:

GEORGE M. MAROVICH

UNITED STATES DISTRICT JUDGE

DATED: Oct. 19, 1995