Filed 6/19/12 Prime Associates Group v. NAMA Holdings CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

PRIME ASSOCIATES GROUP, LLC, et al., Plaintiffs and Appellants, v. NAMA HOLDINGS, LLC, Defendant and Respondent.	B226167 (Los Angeles County Super. Ct. Nos. BS123207, BS123445 & BS123457)

APPEALS from a judgment and order of the Superior Court of Los Angeles County, Kevin C. Brazile, Judge. Affirmed.

Greenberg Traurig, Jordan D. Grotzinger, and Leslie D. Corwin (Pro Hac Vice) for Plaintiffs and Appellants Alliance Network, LLC, Alliance Network Holdings, LLC, and Network World Market Center, LLC.

Dorsey & Whitney, Kent J. Schmidt, Jill A. Hammerbeck, and Roger J. Magnuson (Pro Hac Vice) for Plaintiff and Appellant Prime Associates Group, LLC.

Mitchell Silberberg & Knupp, Christopher B. Leonard, Valentine A. Shalamitski; Herrick Feinstein, Scott E. Mollen (Pro Hac Vice), and M. Darren Traub (Pro Hac Vice)

for Plaintiffs and Appellants Crescent Nevada Associates, LLC, and Fordgate World Market Center, LLC.

Sidley Austin, Howard J. Rubinroit, Ronald C. Cohen, and Frank J. Broccolo for Defendant and Respondent.

INTRODUCTION

This is an appeal by appellants Alliance Network, LLC (Alliance Network), Alliance Network Holdings, LLC, Network World Market Center, LLC, Prime Associates Group, LLC, Crescent Nevada Associates, LLC, and Fordgate World Market Center, LLC, from a judgment and order confirming an arbitration award in favor of NAMA Holdings, LLC (NAMA) and denying appellants' petitions to vacate or correct the award. Appellants also appeal from the trial court's postjudgment award of attorney fees to NAMA.

Appellants contend that the arbitration panel exceeded its powers by making a monetary award against Alliance Network although NAMA had not named it as a counterrespondent in its counterdemand for arbitration, and that this constituted a violation of due process. Appellants further contend that the monetary award granted by the arbitration panel violated the procedural rules governing the arbitration. We conclude that appellants forfeited these contentions by failing to present them to the arbitration panel and that the damages awarded to NAMA were appropriate.

Finally, we conclude that the arbitration panel's award of monetary sanctions to NAMA for discovery misconduct is not subject to our review, and that the trial court's award of attorney fees to NAMA for its costs and fees associated with bringing the motion to confirm the arbitration award was proper. Accordingly, we confirm the judgment in favor of NAMA, as well as the postjudgment order of attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

I. Inception of the Project

The World Market Center (the project) is a campus of home furnishings showroom buildings in Las Vegas, conceived by Shawn Samson and Jack Kashani. As originally planned, the project was to consist of eight buildings with 12 million square feet of exhibit space, which would house several thousand businesses and tenants. It was to be constructed in eight phases, one phase for each of the eight buildings. Phases 1 and 2 were completed in July 2005 and January 2007, respectively, and each housed over 200 businesses.

At the outset, Samson and Kashani proposed the idea for the project to brothers Nigel and Mousa Alliance. Evan Realty Group, LLC, an entity owned by the Alliances, became an investor in the project. Evan Realty Group, LLC, later became NAMA, the investment entity of Nigel and Mousa Alliance. An operating agreement was executed on August 9, 2001, effective July 20, 2000. The operating agreement created Alliance Network, which was comprised of three members: NAMA, Prime Associates Group, LLC (Prime) (an entity owned by Samson and Kashani), and Crescent Nevada Associates, LLC (Crescent). Seventy percent of the capital contributions were to come from NAMA, 20 percent from Crescent, and 10 percent from Prime. Samson and Kashani were to provide "sweat equity" and serve together as Alliance Network's "Managers." The powers and responsibilities of the Managers were detailed in the operating agreement.

II. The Settlement Agreement and the Creation of World Market Center Venture

As the project progressed, disputes arose among the members of Alliance Network, which were temporarily resolved pursuant to a settlement agreement executed in April 2004 by the members of Alliance Network (NAMA, Crescent, and Prime) and the Managers. The settlement agreement provided a mutual release of any prior claims

among members of Alliance Network and the Managers. It also created Alliance Network Holdings, LLC (Alliance Holdings), a wholly-owned subsidiary of Alliance Network, and Network World Market Center, LLC (Network), a wholly-owned subsidiary of Alliance Holdings (collectively, the Alliance Companies). The settlement agreement established a new approach to raising capital, and modified the method used to make distributions. The settlement agreement also reorganized and recapitalized the project by admitting Related World Market Center, LLC (Related), an affiliate of the Related Companies, L.P., into the project. Related agreed to become a 50 percent equity participant in the project and make capital contributions, help arrange construction financing, and provide completion guarantees required for construction financing. Related's participation in the project was memorialized in the WMCV operating agreement, which formed and governed World Market Center Venture, LLC (WMCV). The members of the WMCV operating agreement were an affiliate of Related and Network.

III. Phase 3 of the Project

In October 2006, WMCV tendered to Alliance Network's Managers a proposed funding notice for phase 3 of the project. The Managers forwarded the notice to the members of Alliance Network (Prime, Crescent, and NAMA), and each member was required to approve or disapprove of the notice. Alliance Network's affiliate, Network, was required to inform WMCV whether it would contribute its proportionate share of the phase 3 funding.

NAMA and the other members of Alliance Network unconditionally elected to invest in phase 3. However, when the time came for funding to be made, NAMA placed numerous conditions on its tender. Accordingly, the Managers refused the tender from NAMA.

Fordgate World Market Center, LLC (Fordgate), purchased NAMA's interest in phase 3. In December 2006, Crescent assigned its interest in phase 3 and subsequent phases to Fordgate. NAMA disputed the assignment of its interest to Fordgate, as well as

Crescent's assignment of its interest to Fordgate without allowing NAMA to exercise a right of first refusal.

IV. The Demand to Arbitrate

The Alliance Companies (Alliance Network, Alliance Holdings, and Network) and the Managers, Samson and Kashani (sometimes collectively referred to hereafter as the claimants), filed a demand to arbitrate, stating that the parties' "arbitration agreement . . . provides for arbitration under the Commercial Arbitration Rules of the American Arbitration Association."[1] The claimants indicated that they sought administration by the American Arbitration Association (AAA) case management center in Fresno.

The claimants stated that because of NAMA's failure to contribute its share of capital as promised in connection with phase 3, they suffered millions of dollars in damages. Also as a result of NAMA's failure, the claimants alleged that NAMA had no further right, title, or interest in Alliance Network or its affiliates or in any phase of the project, "other than having only a Distribution Interest and Percentage Interest in Phase 1 and Early Stage Ancillary Businesses." They sought a declaration that "NAMA has no right, title or interest of any kind in the Company, its subsidiaries or affiliates, or in any

---

[1] Article XI of the original Alliance Network operating agreement provided as follows: "Should any disagreement, dispute, conflict, claim or controversy arise between any of the members hereto, or between any member or the company and the legal representative of another member hereto, or between the company and the Manager, or between Evan Realty and the Manager with respect to this agreement or any of the provisions thereof, or as to the interpretation or effect thereof, or as to a breach thereof claimed to have been committed by any member or members or Manager, or as to any other matter, cause or thing whatsoever relating to this agreement, and should said dispute or disagreement fail to be amicably adjusted or resolved by mutual agreement of the member or members or Manager concerned therewith, shall initially be referred to . . . non-binding mediation . . . . If . . . non-binding mediation does not break the deadlock, then the members agree that the same shall be submitted to and determined by arbitration in the County of Los Angeles, State of California before and by the American Arbitration Association, in accordance with the procedures, rules and regulations of the American Arbitration Association then obtained and in force. . . ." The April 2004 settlement agreement provided for "binding arbitration in accordance with article XI of the Alliance operating agreement."

Phase or Ancillary Business of the Project other than NAMA's Phase 1 Economic Interest, and that Claimants did not breach any duties or contractual obligations and acted appropriately under the Company Agreements in delivering the Capital Call Notice and the Section 3.08 Notice . . . and exercising their rights and remedies thereunder."

Thereafter, the AAA, of its own accord, transferred the case to the International Centre for Dispute Resolution (ICDR) in New York.[2] NAMA opposed the transfer, any administration by the ICDR, and any application of the ICDR rules to supplant the AAA rules specified in the parties' arbitration agreement. The claimants, however, argued the case should remain in the ICDR. The ICDR declined to surrender administrative responsibility for the case and determined that the ICDR would leave it to the arbitration panel to decide which rules it would apply.

In November 2007, NAMA filed a "Statement of Defense and Counter-demand and Demand for Arbitration" with the AAA. It denied the allegations asserted by the claimants and asserted claims for itself and derivatively on behalf of Alliance Network. It named Samson, Kashani, Prime, Crescent, and Fordgate as counterrespondents. Generally stated, NAMA alleged that: "The Managers and/or the other Counter-Respondents have misappropriated . . . assets, monies, opportunities and other benefits, and income or other monies derived therefrom properly belong[ing] to Alliance Network, [Alliance] Holdings, and Network, and have wrongfully purported to assign, dilute, transfer or otherwise co-opt NAMA's interests in Alliance Network and/or the Project and withheld and diverted payments and distributions due to NAMA, as a direct and proximate result of which, Alliance Network, [Alliance] Holdings, Network, and NAMA have been and continue to be deprived of their rightful interests therein." NAMA specifically alleged that it believed, and had advised the Managers, "that the $19 million of funds generated by the re-financing and operation of Phase 1 held by Alliance Network (which the Managers improperly refused to distribute) should be distributed to the Members and/or be applied to satisfy, at least in part, any equity contribution Alliance

---

[2] The ICDR is the international division of the AAA and provides international dispute resolution services in matters involving foreign nationals and foreign entities.

Network might properly be required to provide respecting Phase 3." Instead, the funds were used by the Managers to fund litigation against NAMA.

The arbitrators dismissed Samson and Kashani, as individuals, from the matter in November 2008.[3] Subsequently, in January 2009, NAMA filed an amended statement of defense and counterdemand for arbitration which contained causes of action for declaratory relief and for an accounting. NAMA sought a declaration that: (1) it had the right to elect whether to coinvest or take a carried interest in future phases of the project on a phase-by-phase basis; (2) prior to NAMA being required to elect to invest in phase 3, it was entitled to receive the information specified in the Alliance Network and WMCV operating agreements; (3) its tender of funds for phase 3 was timely and effective; and (4) pursuant to the parties' agreements, the net proceeds of capital transactions were to be considered part of cash available for distribution, and all such proceeds had to be distributed quarterly to the members of Alliance Network. In its claim for an accounting, NAMA alleged that "[t]he management, operations, and financial affairs of Alliance Network and its subsidiaries and affiliates (including WMCV), including any monies due or owing to those companies or NAMA pursuant to the Alliance Company Agreements, the WMCV Operating Agreement, or otherwise, are required to be fully and properly accounted for to Alliance Network and its Members." NAMA alleged that material information about such matters had been withheld from it, even though such information was required to be provided to it pursuant to the operating agreements. It further alleged that "NAMA and Alliance Network have been deprived of their proper right, title, and interest to assets, monies, and other opportunities belonging to Alliance Network and to NAMA, the nature, amount, and/or value of which can only be ascertained by an accounting. Once such an accounting is completed, NAMA is

---

3 Specifically, the arbitrators dismissed the arbitration claims brought against Samson and Kashani as individuals, finding that a court had to decide whether Samson and Kashani were subject to arbitration in their individual capacities. The panel was careful to note that it was not deciding whether the two individuals were in fact subject to arbitration or making a determination on the merits of the underlying claims against them.

entitled to receive its proportionate share of such funds, including fees and income uncovered and/or identified by such accounting."

Under the heading of "Relief Requested," NAMA asked that after a full accounting was performed, after other issues were determined in the related proceedings regarding Samson's and Kashani's conduct, and after it had been provided all of the information to which it was entitled, that "[t]he parties' respective accounts and interests in Alliance Network, it[s] subsidiaries and affiliates, the Project, and its Phases be appropriately adjusted, and, if necessary, contributions and distributions appropriately unwound, depending on the election that NAMA makes [whether to invest in phase 3]." It also asked "[t]hat Prime, Crescent and/or Fordgate pay damages to Alliance Network and/or NAMA in an amount to be established in a separate phase of this proceeding."

V. The Arbitration Hearing

NAMA requested a bifurcated hearing, to allow for an accounting to first be conducted to aid in assessing its damages. However, the panel declined to order an accounting. The arbitration hearing began on January 5, 2009, and was conducted for 26 days before concluding on March 19, 2009.

The $18 million in reserves held by Alliance Network was a frequent subject of argument and testimony. In a posthearing brief, NAMA argued that its damages included, among other items, "cash distributions (including Preferred Returns) due to NAMA and attributable to Phases 1 and 2 (the determination of which requires an accounting, but which NAMA estimates to be approximately $14 million)."

VI. The Arbitration Panel's Final Award

The arbitration panel concluded that when Related delivered the proposed funding notice to Alliance Network and NAMA for construction of phase 3 in October 2006, the Managers "failed to conduct any sort of meaningful or adequate review of Related's Funding Notice to determine whether it was in the best interests, or 'inimical' to the best interests, of Alliance Network or its affiliates. . . . In general, the evidence established

that, subsequent to the formation of WMCV, Samson and Kashani largely abdicated their contractual duties to act on behalf of Alliance Network, and instead shifted their allegiance to protecting Prime's interests and deferring to the wishes of Related. [¶] In addition, as of the time NAMA was called upon to determine its response to the Funding Notice, Samson and Kashani had failed to provide NAMA with information respecting the Project required under the relevant agreements and necessary to NAMA's ability to rationally evaluate its options for responding to the Funding Notice. Specifically, financial statements and tax returns for the Alliance companies, current monthly calculations of income, losses and cash available for distribution for the business for 2005 and 2006, and monthly reports for June, July, August or September 2006 compliant with the requirements of the Settlement Agreement, had not been timely provided to NAMA at the time it was called upon to elect its response to the Funding Notice." The panel found that the Managers breached their contractual obligations by failing to review the funding notice and instead approving it, even though it contained terms that were inimical to the interests of Alliance Network and NAMA. The inimical terms included a provision that retained as reserves $18 million that would otherwise have been available for distribution, and a provision to include within the required capital contribution a material increment (over $14 million collectively) whose sole purpose was to enable the bank to lend enough to net the Managers approximately $7 million in fees to which they were not contractually entitled. As to the latter provision, the panel said: "It understates matters to say that the Managers wronged NAMA in this instance by approving a Funding Notice containing this investor-funded salary distribution. That approval was just the final act needed to bring to fruition their own wrongful plan, begun much earlier, to take from the investors a salary distribution for themselves to which they were not then contractually entitled. The evidence established that this plan was the work of the Managers."

The panel noted that the parties' dispute included "an $18,214,865.95 distribution paid to Alliance Network in June 2005 arising out of the refinancing of the Phase 1 construction loan. . . . NAMA demanded that these funds be distributed pursuant to section 3.09 of the Operating Agreement. Samson and Kashani refused to make the

distribution, ostensibly, at first, because the funds were being held as reserves for the Phase 1 share of the parking structure to be built as part of the Phase 3 construction activities, and later, on the theory that these funds could be used to fund Claimants' litigation activities against NAMA." The panel noted that NAMA had "complained often and vociferously about" the distribution issue. The panel concluded that every explanation offered by Samson and Kashani of their decision to reserve the distribution violated NAMA's rights.

The panel concluded that NAMA's objections to the lack of information and to the financial arrangements reflected in the funding notice for phase 3 had merit, and NAMA would have been within its rights to reject the notice or accept it conditionally on the ground that performance on its part was excused by the Managers' antecedent breaches. Instead, however, NAMA unconditionally accepted the funding notice. It was only when NAMA was called upon to tender its contribution for phase 3 that NAMA imposed substantial conditions, with the result that the tender was rendered ineffective and constituted a default. As a result of that default, NAMA lost any rights associated with phase 3. However, the panel concluded that NAMA continued to own its former interests in phases 1 and 2, and in the "excess land," and that contrary to the claimants' arguments, NAMA remained a member of Alliance Network with full rights to participate in future phases after phase 3.

The panel found that Fordgate and Crescent did not engage in any misconduct as alleged by NAMA. However, while Fordgate succeeded to NAMA's and Crescent's former interests in phase 3 and to Crescent's former interest in future phases, the panel ordered Fordgate to return to NAMA distributions it received as a result of its purported assumption of NAMA's interests other than those associated with phase 3 (although the evidence presented at the hearing was insufficient to permit the panel to make a precise quantification of the sum owed). The panel concluded that NAMA did not otherwise suffer compensable money damages by reason of the loss of its ability to participate in phase 3.

The panel awarded declaratory relief regarding NAMA's continued membership in Alliance Network and its ownership interests acquired before phase 3, and Fordgate's and Crescent's membership statuses. It denied NAMA's claims for an accounting and subsequent right to elect remedies, and for appointment of a receiver or referee.

As "other relief," the panel ordered as follows: "Claimant Alliance Network shall pay to NAMA, within thirty days of the date of this Final Award, $12,750,405.00 (representing NAMA's 70% share of the $18,214,865.95 of proceeds distributed to Alliance Network in June, 2006) together with interest at the rate of 5% from the date Alliance Network received these monies until the date of payment." The panel specified that Alliance Network was not to fund the proceeds necessary to satisfy this monetary obligation by means of any provision requiring NAMA to pay, directly or indirectly, any portion of the obligation.

The panel found that Crescent was a prevailing party and entitled to recover from NAMA its fees, costs, and expenses of arbitration in the total amount of $350,000; the panel found that none of the other parties were prevailing parties.

NAMA was granted monetary relief against claimants Alliance Network, Alliance Holdings, and Network as sanctions for discovery misconduct. Those claimants were ordered to reimburse NAMA for the administrative fees and expenses paid to AAA and the arbitrators in the amount of $414,211.68.

VII. The Request to the Arbitration Panel to Correct the Award

After the panel issued the final award, the claimants did not object to the fact that Alliance Network had been ordered to pay monetary damages to NAMA. They did not argue that the award exceeded the panel's powers pursuant to the terms of the parties' arbitration agreement. Rather, in a request to the arbitration panel to correct the award, the claimants disputed only the calculation of the amount of the award, saying that NAMA's share of distributions was subject to a "waterfall" provision set forth in the parties' written agreements.

VIII. The Panel's Interpretation of the Award

The arbitration panel issued a written "Interpretation of Award" which stated as follows. "Claimants' request is denied because it misapprehends the monetary relief ordered in Paragraph IV.B.1 of the Final Award. In reviewing the submissions supporting and opposing Claimants' request, however, the Tribunal recognizes that the language of Paragraph IV.B.1 of the Final Award apparently caused some uncertain[t]y as to the basis for the relief granted. Moreover, Article 30 empowers the Tribunal to provide a post-award interpretation of the Award. Accordingly, to eliminate any uncertainty, the Tribunal hereby provides the following interpretation of that language."

We set forth the pertinent language of the panel's interpretation when we discuss below whether its award of damages was proper.

IX. The Claimants' Petitions to Correct/Vacate the Award and NAMA's Petition to Confirm the Award

Claimants filed petitions to correct or vacate the arbitration award. The claimants did not contend that the arbitration panel had exceeded its authority by requiring *Alliance Network* to distribute money from the reserve. They argued that partial vacation or correction was all that was required. None of the parties argued at that time that a monetary award against Alliance Network was improper.

In its memorandum supporting its petition, Alliance Network stated that "*NAMA asserted only two claims against Alliance Network*," for an accounting and declaratory relief. (Italics added.) Alliance Network argued that NAMA's claims were limited to a distribution of funds and that NAMA had asserted no claim that gave rise to a damage award. It sought correction of the amount of the award on the ground that only a monetary distribution, not monetary damages, was encompassed within NAMA's arbitration claims.

In its memorandum in support of correction of the award, Prime argued that the award of damages was an equitable remedy that exceeded the panel's power under the ICDR rules. It later conceded it was not an equitable remedy but was "money damages at

law," and observed that "legal and equitable remedies were perfectly appropriate for the Panel to order." Prime argued, however, that because the amount of the award did not adhere to the parties' contractual waterfall provision, the award was *ex aequo et bono* or *amiable compositeur* and therefore forbidden by the ICDR rules.

NAMA filed opposition to the petitions to correct or vacate the arbitration award. NAMA also filed a petition to confirm the arbitration award.

After the trial court issued a tentative ruling denying the petition to correct or vacate the award, Prime's counsel, Roger Magnuson, argued for the first time at a hearing on May 7, 2010, that no claims had been asserted against Alliance Network in the arbitration. However, Alliance Network's counsel, Leslie Corwin, said that in fact NAMA had stated claims against his client: "[W]hat they asserted in their initial statement of claim and in their amended claim which this panel gave them the opportunity to put all their claims in on the eve of these hearings starting, all they asked for was the declaratory relief and a general claim for an accounting against my client Alliance." He explained that Alliance Network had sought declaratory relief stating that NAMA had not met its capital call regarding phase 3. Corwin continued: "[NAMA] sued Alliance for a declaration that they had met the capital call; that they were entitled to be a part of the project. That was their principal claim against Alliance. They also brought a claim claiming . . . they were entitled to an accounting and that they would have documents." He asserted that no claim *for damages* was made against Alliance Network.

Prime's counsel took exception, saying that in their statement of defense and counterclaim, NAMA sought declaratory relief *on behalf of* Alliance Network. "They never ever sued Alliance. They didn't sue Alliance." He said maybe Corwin had misspoken. But Corwin later reiterated: "What is before this court and what is before . . . that panel were the claims against Alliance."

The court inquired: "[I]f this error is so apparent as you allege, why didn't you go . . . back [to the] arbitrators and say, guess what panel, you made a blatant glaring error here correct it"? Counsel for Fordgate and Crescent responded that "[his] experience is

in life that people aren't terrific when it comes to acknowledging an error." The court asked, "But could you have gone back . . . ," and counsel replied, "We did. We asked for a clarification." Counsel said the arbitration panel responded by explaining that it was awarding "damages." Counsel asserted that "[t]he purpose of a pleading is to put somebody on notice," "to make sure that people aren't sandbagged; that they're not ambushed; that they know when they present their case what is the claim." The court responded that it was "difficult for this court to find that [the claimants] didn't know what was going on. You didn't know what they were after."

The court denied the claimants' petitions to correct or vacate the arbitration award, granted NAMA's petition to confirm the arbitration award, and entered judgment in its favor, concluding that the arbitration panel did not exceed its powers.

NAMA then filed a motion for attorney fees and costs. Over claimants' opposition, the court awarded NAMA its attorney fees for bringing the petition to confirm and opposing the claimants' petitions to correct or vacate, in the amount of $591,818.18.

The claimants filed notices of appeal from the judgment and order confirming the award and denying the petition to vacate or correct the award, and the postjudgment order awarding attorney fees and costs.

DISCUSSION

I. The Standard of Review

The parties' operating agreements provided that "[a]ll of the parties . . . agree[d] to be bound by any decision rendered by the [AAA] and agree[d] to accept such decision as the final determination on any subject matter submitted to them for consideration." The agreements stated that "[a] judgment upon the award or decision rendered by the [AAA] shall be binding upon the parties thereto and may be entered in any court having jurisdiction thereof and shall have the same force and effect for all purposes as a judgment of said court with respect to the parties or their legal representatives regarding

the subject matter therein concerned." Finally, the agreements stated that "[t]he result of arbitration by the [AAA] may not be appealed by any of the member or members or manager."

The parties agree on appeal that it matters not whether California or federal statutory law governing arbitration is applied; the result is the same under either statutory scheme.[4] "In providing for judicial vacation or correction of an award, our statutes ([Code Civ. Proc.] §§ 1286.2, subd. (d), 1286.6, subd. (b)) do not distinguish between the arbitrators' power to decide an issue and their authority to choose an appropriate remedy; in either instance the test is whether the arbitrators have 'exceeded their powers.'" (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 373 (*Advanced Micro Devices*). See 9 U.S.C.A. § 10(a)(4) [court may vacate award where arbitrators exceeded their powers].) "California has a well-established policy favoring arbitration as a speedy and relatively inexpensive means of settling disputes. [Citation.] To support this policy and encourage parties to settle their disputes through arbitration, it is essential arbitration judgments be both binding and final. Thus, as a general rule courts will indulge every reasonable intendment to give effect to arbitration proceedings. [Citations.]" (*Marsch v. Williams* (1994) 23 Cal.App.4th 238, 243.) "'This expectation of finality strongly informs the parties' choice of an arbitral forum over a judicial one. The arbitrator's decision should be the end, not the beginning, of the dispute.' (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 10 [(*Moncharsh*)].) [¶] To ensure that an arbitrator's decision is, indeed, the end of a dispute, arbitration judgments are subject to extremely narrow judicial review. [Citation.]" (*Marsch, supra,* at p. 243.) The scope of judicial review is that which is exclusively defined by the applicable statutes. (Code Civ. Proc., §§ 1286.2 & 1286.6; *Marsch, supra*, at p. 243.) We review de novo the trial court's order confirming the arbitration award, and denying the claimants' petitions to correct or vacate the award. (*Advanced Micro Devices, supra*, 9 Cal.4th at p. 376, fn. 9; see also

---

4 We note that the arbitrators concluded the Federal Arbitration Act was the applicable law governing the proceedings.

Anderman/Smith Co. v. Tennessee Gas Pipeline Co. (5th Cir. 1990) 918 F.2d 1215, 1218, fn. 2.)

II. Did the Arbitration Panel Have the Authority to Order Alliance Network to Pay Damages to NAMA Where It was Not Named as a Counterrespondent?

Appellants contend that the arbitrators engaged in a flagrant contravention of the due process rights of Alliance Network when they ordered it to pay NAMA roughly $12 million out of a reserve fund held by Alliance Network, because although Alliance Network was a claimant, NAMA never named it as a counterrespondent. Instead, appellants assert, NAMA filed its counterclaim *on behalf of* Alliance Network, in the form of a derivative suit. We conclude that appellants forfeited this claim by failing to raise it with the arbitration panel.

The panel determined that the parties' dispute included "an $18, 214,865.95 distribution paid to Alliance Network in June 2005 arising out of the refinancing of the Phase 1 construction loan," and that "NAMA demanded that these funds be distributed pursuant to section 3.09 of the Operating Agreement." Despite NAMA's clear litigation goal, seeking the disbursement of funds from Alliance Network, appellants lodged no due process objection. At the conclusion of evidence, the panel's final award plainly stated: "Claimant Alliance Network shall pay to NAMA, within thirty days of the date of this Final Award, $12,750,405.00 (representing NAMA's 70% share of the $18,214,865.95 of proceeds distributed to Alliance Network in June, 2006) together with interest at the rate of 5% from the date Alliance Network received these monies until the date of payment."

After the panel issued its decision, appellants sought only correction or partial vacation of the award, claiming that the arbitration panel appeared to have overlooked the waterfall provision contained in the parties' agreement. They did *not* argue that Alliance Network should pay nothing because it was not a named counterrespondent. Nor did they assert Alliance Network did not have notice that it could be required to pay NAMA out of the reserve fund held by it. By the limited nature of their objection, appellants acquiesced in the panel's conclusion that Alliance Network could be ordered to pay

NAMA from the fund; their dispute was with the amount (either $3 million or $9 million, rather than the approximate $12.75 million that was ordered).

Even after the arbitration panel denied appellants' request for correction of the award, and explained that the monetary relief provision of the final award was not based only on Alliance Network's failure to distribute the $18 million reserve and did not represent an attempt to strictly apply the distribution-related provisions in the parties' agreements such as the waterfall, appellants still did not attempt to argue to the arbitrators that NAMA had never requested monetary relief against Alliance Network. On appeal, they fail to offer an adequate explanation that would prevent our finding of forfeiture. They state in their reply brief: "Although the arbitrators referred to the $12 million, in their Interpretation of Award, as 'damages,' it *remained inconceivable* to Appellants that the arbitrators would issue a 'damages' award against a party not sued. Even after the Interpretation of Award was issued, Appellants *gave the arbitrators the benefit of the doubt*, and moved to correct the Award as a botched attempt to order a distribution in the wrong amount." (Italics added.) The panel was entirely clear in its interpretation of the award that it was awarding monetary damages against Alliance Network. If appellants had found this "inconceivable," they would have and should have called it to the arbitrators' attention. With more than $12 million at stake, it is inconceivable that appellants would "g[i]ve the arbitrators the benefit of the doubt," and simply let slide an allegedly egregious due process violation.[5]

---

[5] At oral argument, counsel for appellants claimed that appellants were prohibited by the ICDR rules from seeking any reconsideration from the arbitration panel other than for correction of computational or clerical errors. Not so. Article 30 of the ICDR rules stated in broad terms: "1. Within 30 days after the receipt of an award, any party, with notice to the other parties, may request the tribunal to interpret the award or correct any clerical, typographical or computation errors or make an additional award as to claims presented but omitted from the award." Certainly the ability to ask the arbitration panel to interpret its award would allow a party to question the panel's jurisdiction to enter the award. We conclude that the ICDR rules did not preclude appellants from raising their due process claim.

Under the circumstances present here, appellants cannot now expect this court to vacate the award on a ground raised for the first time on appeal. "Any other conclusion is inconsistent with the basic purpose of private arbitration, which is to finally decide a dispute between the parties. Moreover, we cannot permit a party to sit on his rights, content in the knowledge that should he suffer an adverse decision, he could then raise the . . . issue in a motion to vacate the arbitrator's award. A contrary rule would condone a level of 'procedural gamesmanship' that we have condemned as 'undermining the advantages of arbitration.' [Citations.]" (*Moncharsh*, *supra*, 3 Cal.4th at p. 30.)

III. Did the $12 Million Monetary Award Exceed the Scope of the Panel's Authority Pursuant to ICDR Rules?

Appellants contend that the $12 million award in favor of NAMA exceeded the authority of the arbitration panel because it ignored the waterfall provision of the contract, and instead constituted an equitable award that was reached according to the arbitration panel's concept of what was just and fair. While arbitrators generally are free to make such awards, appellants claim that the panel here was constrained by ICDR rules which forbade such an award. We again conclude that appellants forfeited this issue by failing to call it to the arbitrators' attention, as they raised it for the first time in the trial court. Furthermore, we conclude that the award did not in fact exceed the arbitrators' authority, but instead was the result of a permissible approach to awarding damages that were difficult to fix with precision.

As explained by the California Supreme Court: "The traditional rule is that '"[a]rbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim *that a party might successfully have asserted in a judicial action*." [Citations.] As early as 1852, this court recognized that, "The arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex aequo et bono* [according to what is just and good]." [Citation.] "As a consequence, . . . '[p]arties who stipulate in an

agreement that controversies . . . shall be settled by arbitration, may expect not only to reap the advantages that flow from the use of that nontechnical, summary procedure, but also to find themselves bound by an award reached by paths neither marked nor traceable and not subject to judicial review.' [Citation.]"' [Citations.]" (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 831-832.) In traditional arbitrations, arbitrators are given leeway in reading contracts and fashioning contractual remedies. "Arbitrators are not obliged to read contracts literally, and an award may not be vacated merely because the court is unable to find the relief granted was authorized by a specific term of the contract. [Citation.] The remedy awarded, however, must bear some rational relationship to the contract and the breach. The required link may be to the contractual terms as actually interpreted by the arbitrator (if the arbitrator has made that interpretation known), to an interpretation implied in the award itself, or to a plausible theory of the contract's general subject matter, framework or intent. [Citation.] The award must be related in a rational manner to the breach (as expressly or impliedly found by the arbitrator). [Fn. omitted.] Where the damage is difficult to determine or measure, the arbitrator enjoys correspondingly broader discretion to fashion a remedy. [Citation.]" (*Advanced Micro Devices, supra,* 9 Cal.4th at p. 381.)

In this arbitration, however, the panel determined that the matter would be subject to the ICDR rules.[6] Article 28 of the ICDR procedural rules specifies, under the heading of "Applicable Laws and Remedies," the following: "2. In arbitrations involving the application of contracts, the tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract. [¶] 3. The tribunal shall not decide as *amiable compositeur* or *ex aequo et bono* unless the parties have expressly authorized it to do so." Thus, appellants contend that under article 28 the arbitrators were required to decide the matter in strict accordance with the

---

6 NAMA asserted the ICDR lacked jurisdiction and authority to administrate the proceedings because the initial demand and the parties' agreement specified application of the AAA Commercial Arbitration Rules where, as here, there were no foreign parties to the proceedings. As no party challenged this order on appeal, we will assume the ICDR rules were appropriately applied in this matter.

terms of the contract. According to appellants, the panel's damage award violated that rule, rewrote the contract, and represented the panel's vague and imprecise determination of what was just and fair. Having failed to direct their argument to the arbitration panel, appellants cannot raise it here.

We find the case of *Blatt v. Farley* (1990) 226 Cal.App.3d 621 (*Blatt*) instructive. There, Blatt argued on appeal that since Farley's demand to arbitrate requested only $80,000, without making any provision for tax liabilities, the arbitrators had exceeded their powers by making an award of $137,000, which included tax liabilities. The appellate court found, however, that "We have no occasion in this case to determine whether an arbitrator's award in excess of a demand may be subject to judicial review, because even assuming for the sake of argument the issue might be reviewable, Blatt made no such objection before the arbitrators and has therefore waived the issue.

"At the arbitration hearing, Farley presented evidence and Blatt argued the merits of $230,000 damages. Blatt devoted several pages of his post-hearing brief to arguing the merits of these damages, commenting that '[Farley] would have the Board believe that he needs $231,035.00 to "be made whole."' There is no evidence that Blatt complained to the arbitrators that consideration of damages exceeding $80,000 required amendment of the Demand or was otherwise improper.

"The rules provide that, 'Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection thereto in writing, shall be deemed to have waived the right to object.' ([AAA Commercial Arbitration Rules,] Rule 38.) 'Usually if a party with knowledge of an irregularity in the proceedings continues, without objection, to take part in the proceedings, he waives any objection on account of such irregularity for he cannot thus take the chance of a favorable issue.' [Citations.]"[7] (*Blatt, supra*, 226 Cal.App.3d at pp. 628-629.)

---

[7] Article 25 of the ICDR procedural rules provides that "A party who knows that any provision of the Rules or requirement under the Rules has not been complied with,

Similarly here, appellants sat silent in the face of the alleged violation of the arbitration rules. After the panel issued its interpretation of the award, making clear that the $12 million award used the distribution percentages as a benchmark and starting point for the damage award and was not an erroneous result of the panel's attempt to apply the waterfall provision, appellants did not call to the panel's attention the prohibition of ICDR article 28. Nor did they contend that the arbitrators were required to strictly enforce the contractual provisions governing distribution *in order to comply with article 28*. Because they did not invoke that rule, they cannot rely on it now to reverse the final award. (*Moncharsh*, *supra*, 3 Cal.4th at p. 30.)

In any event, we conclude that the arbitration panel's method of arriving at the damages award was permissible under the stricter standards governing courts of law, as would be required of an arbitration governed by article 28 of the ICDR procedural rules.

In its interpretation of the award, the arbitration panel stated the following regarding the monetary relief it awarded. The provision in the final award of "damages to be paid to NAMA in the amount of $12,750,405 was intended by the Tribunal as an appropriate award of monetary relief to NAMA based on all of the evidence and arguments presented by the parties, and to constitute one component of the total package of relief awarded in the Final Award in resolution of all of the parties' various claims and defenses. Of these, the Panel regarded the 'failure to distribute' the $18,214,865.95 of proceeds paid to Alliance Network in June, 2006 and the inappropriate use of such funds for other purposes such as Phase 3 as the most significant, *although not the only*, basis for awarding monetary compensation to NAMA. The Tribunal *did not, and did not purport to*, undertake the task of calculating what amount of distributive share NAMA would have received had Alliance timely distributed those reserves in accordance with the contractually-specified 'waterfall' at the time those funds were received instead of using them for other, inappropriate, purposes. Nor would such a calculation have taken into account the significant injustice the Tribunal sought to remedy: the undeserved benefit

---

but proceeds with the arbitration without promptly stating an objection in writing thereto, shall be deemed to have waived the right to object."

Alliance experienced by means of its use, in connection with Phase 3 of the Project, of the full reserves—reserves in which NAMA had a 70% ownership interest, but from which it enjoyed none of the benefits. [¶] The value of that undeserved benefit to Alliance is, by its nature, *not susceptible to precise determination*. Nonetheless, the Tribunal regarded application of NAMA's ownership interest against the reserve amount as an appropriate *benchmark* for selecting the specific amount of monetary relief to be awarded to NAMA . . . . [T]he Final Award was not intended to limit the basis for the monetary award only to Alliance Network's failure to distribute the $18,214,865.95, nor to limit the Final Award's determination of the appropriate monetary award to NAMA to a lesser net amount derived by post-award application of the various distribution-related provisions contained in the parties' agreements, such as the 'waterfall.' *Rather, the Final Award selected the monetary amount awarded as an appropriate figure, together with all of the other relief awarded, taking into account all of the issues presented, including the other matters on which findings were made and non-monetary relief was granted to NAMA in the Final Award, and also taking into account the denial of NAMA's request directing a post-award accounting between the parties.* [¶] For these reasons, the amount set forth in Paragraph IV.B.1 of the Final Award was the monetary award deemed appropriate by the Tribunal based on all of the claims and evidence presented." (Italics added.)

It is not unusual that in cases involving a breach of contract, the calculation of damages is not capable of precise quantification. Section 3300 of the Civil Code provides that, "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." The arbitration panel made clear that its award of monetary relief was designed to compensate NAMA for *all* the detriment proximately caused by the Managers' misconduct (while acting on behalf of Alliance Network and as principals of Prime). The panel sought to remedy a "significant injustice": "the undeserved benefit Alliance experienced by means

of its use, in connection with Phase 3 of the Project, of the full reserves . . . in which NAMA had a 70% ownership interest, but from which it enjoyed none of the benefits." The arbitration panel used the amount available for distribution and the parties' percentage interests as a "benchmark," or starting point, on which to base its calculation of damages, which it explicitly stated was "'not susceptible to precise determination.'"

"In *Long Beach Drug Co. v. United Drug Co.* [(1939)] 13 Cal.2d 158, 174, the court declared: 'The fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent, or difficult of ascertainment does not bar the recovery.' In *Noble v. Tweedy* [(1949)] 90 Cal.App.2d 738, [745], these rules were again applied. There the court stated that once the fact of damage is shown with reasonable certainty 'the fact that the amount thereof may be difficult of exact admeasurement, or subject to various possible contingencies, does not bar a recovery.' . . . At page 746 the court declared: 'As long as there is available a satisfactory method for obtaining a reasonably proximate estimation of the damages, the defendant whose wrongful act gave rise to the injury will not be heard to complain that the amount thereof cannot be determined with mathematical precision. [Citing cases.] The method in the present case was practicable and fair, and the amount of damages assessed was as reasonably accurate as the circumstances would permit.'" (*Allen v. Gardner* (1954) 126 Cal.App.2d 335, 341.)

Here, appellants are not complaining that the amount of damages could not be determined with mathematical precision, but rather that the arbitration panel was required to employ only the precise calculation embodied in the waterfall provision set forth in the parties' agreement. Doing otherwise, according to appellants, constituted making an equitable award, *ex aequo et bono*. But that is not the case. The arbitration panel awarded those damages caused by the numerous wrongs done to NAMA, in a manner that "was as reasonably accurate as the circumstances would permit." The monetary relief was not an equitable remedy "previously unknown to equity jurisprudence," and it was certainly not a "nuclear weapon of the law" crafted out of thin air by the arbitration panel. (See *Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.* (1999) 527 U.S.

308, 332.) Tested by the appropriate standards, the method used by the arbitration panel was a proper one.

IV. The Award of Sanctions for Discovery Misconduct Is Not Subject to Judicial Review

The arbitration panel granted NAMA monetary relief against claimants Alliance Network, Alliance Holdings, and Network as sanctions for discovery misconduct. Those claimants were ordered to reimburse NAMA for the administrative fees and expenses NAMA paid to AAA and the arbitrators in the amount of $414,211.68. On appeal, the claimants contend that the arbitration panel's award of discovery sanctions in favor of NAMA exceeded the arbitrators' powers, and is subject to judicial review because the award violated public policy establishing that discovery sanctions may not be used to punish the offending party; in compensating the aggrieved party, the court may only award the reasonable expenses incurred by that party in attempting to compel proper discovery. (See *McGinty v. Superior Court* (1994) 26 Cal.App.4th 204, 210-212; *Ghanooni v. Super Shuttle* (1993) 20 Cal.App.4th 256, 262; Code Civ. Proc. § 1286.2, subd. (a)(4); *Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 443.)

We disagree. "Without an explicit legislative expression of public policy, however, courts should be reluctant to invalidate an arbitrator's award on this ground. The reason is clear: the Legislature has already expressed its strong support for private arbitration and the finality of arbitral awards in title 9 of the Code of Civil Procedure. ([Code Civ. Proc.,] § 1280 et seq.) Absent a clear expression of illegality or public policy undermining this strong presumption in favor of private arbitration, an arbitral award should ordinarily stand immune from judicial scrutiny." (*Moncharsh, supra,* 3 Cal.4th at p. 32.) Appellants have not pointed to an explicit legislative expression of public policy to the effect that judicial review is permitted when a party to arbitration is sanctioned for discovery misconduct and claims on appeal that the sanctions did not represent reasonable expenses incurred by the other party in attempting to compel proper

discovery. Since we cannot review the arbitration panel's reasoning or the evidence (*id.* at p. 11), we must conclude that the award did not exceed the arbitrators' powers.

V. The Trial Court Properly Awarded Attorney Fees to NAMA

Finally, appellants contend that the trial court erred by awarding to NAMA its attorney fees for bringing the petition to confirm and opposing the claimants' petitions to correct or vacate, in the total amount of $591,818.18. Appellants assert that because the arbitration panel found that NAMA was not a prevailing party, the trial court had to adhere to that determination. We disagree.

Section 12.14 of the Alliance Network operating agreement provided: "In the event any action be instituted by a party to enforce this Agreement, *the prevailing party in such action* (*as determined by the court*, agency or other authority *before which such suit or proceeding is commenced*), shall be entitled to such reasonable attorneys' fees, costs and expenses as may be fixed by the decision maker." (Italics added.)

The petition to confirm the arbitration award was an action to enforce the parties' agreement—specifically the portion of the agreement in which the parties contracted to submit disputes to final, binding arbitration that would not be subject to judicial review—and the trial court was authorized by section 12.14 to determine the prevailing party status in the proceeding before it. The language of section 12.14 does not support appellants' assertion that, once the arbitration panel determined the prevailing party status of each participant, all further proceedings were governed by that determination. The determination of the prevailing party in a postarbitration proceeding is a judicial function distinct from the arbitrator's decision to award fees in the arbitration proceeding itself. (Code Civ. Proc., § 1293.2; *Carole Ring & Associates v. Nicastro* (2001) 87 Cal.App.4th 253, 260; *Corona v. Amherst Partners* (2003) 107 Cal.App.4th 701, 707.)

DISPOSITION

The judgment is affirmed, as is the postjudgment order awarding attorney fees to NAMA. NAMA shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.