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Re: Norwest Corp. v. Vulcan Capital Management

Dear Counselors:

In pursuance of the Agreement among us dated as of June 6, 2007, by the terms of which I was retained to arbitrate the dispute among the above named parties and render a Decision with respect thereto, I met with both of you and heard sworn testimony from Donovan F. Symonds, R. Kevin Whipkey and Andrew Scrymgeour, all on behalf of the plaintiff, and from Kevin Davis and Ford F. Graham, both on behalf of the defendant, on September 6 and 7, 2007. The witnesses were all questioned, both generally and specifically, on direct and cross-examination.

I also heard at the session legal and factual arguments from each counsel recounting their respective positions, having been favored by the said attorneys, prior to the hearing, with documents most, if not all of them, pre-marked. I had not only read all of the material so provided me but in clarification of that which is specifically at issue, I have now re-read much of the material presented, as well as 23 pages of my own notes taken during the course of the hearing, which is now closed.

I wish to express my thanks to both counsel for their excellent presentations, not only in the preparation of the paper work for my reading, but also during the hearing itself, all of it conducted in a manner befitting attorneys of such caliber.

This case presents for resolution unusual factual and legal issues, as they were developed from the foregoing documentation and the sworn testimony. Hopefully, a preliminary statement by the Arbitrator may be of great assistance to the parties in their understanding of the resolution I have reached as to the dispute before me.

PRELIMINARY STATEMENT

Simply stated, I am convinced, from all that I have read and heard, that the defendant, Vulcan Capital Management, Inc. (hereinafter referred to as VCM) by the principals, most particularly, its president, Ford F. Graham, either intentionally or more probably, as a result of changing market and economic conditions relating to the country of Bangladesh, which is where the bulk of certain services were rendered by the plaintiff corporation (hereinafter referred to as "Norwest"), sought retrospectively, to take advantage of a past relationship between it and Norwest with the goal in mind of depriving the latter at least until its (VCM's) financial condition changed favorably, of the otherwise justifiably earned fruits of a contract (or contracts) which Norwest believed it had entered with VCM, leading to the instant lawsuit and to this arbitration.

Because the parties had agreed between themselves, before turning the matter over to me for my consideration and determination, that the scope of the arbitration is limited to only the four specific claims pleaded in the complaint, namely, (a) breach of contract, (b) quantum meruit, (c) unjust enrichment, and (d) account stated, and that Norwest is so bound and limited in this proceeding, I interpret my power as arbitrator is to rule only as to whether I believe Norwest has met its burden of proving, by a preponderance of the evidence, that VCM (and no other entity) is responsible to it for the damages it seeks (and claims to have proved) which amounts to $124,567.39 plus interest.

I want to make clear from the outset that my Decision, as I am writing it subsequent to my having reasoned out the intricacies presented by the documentary evidence, as admitted during the hearing, and through the mouths of all of the people the parties themselves considered important for me to hear, is not based on any moral or ethical concept I may have as to the activities or standards of Mr. Graham, or of his sidekick, Kevin Davis, an alumnus of Princeton University and Harvard Law School, and a member in evident good standing of the New York Bar, but is solely founded on the rationale described in the immediately proceeding paragraph.

I should also add that the thrust of this Decision is not in any way based on the distinction asserted on behalf of the defendant relating to the possible jurisdictional defect which could have occurred based on the size of the claim or its divisibility. That Norwest (a Utah corporation) chose to sue VCM (a Delaware corporation) in the Southern District of New York, but might have been unable to sustain a claim in a satisfactory amount for that purpose, may have been a factor in the negotiation and preparation of the stipulation between the attorneys which led up the their decision to arbitrate within such very strict bounds, but it was of no consideration in my thinking process. I am not only bound by their private agreement, as recorded, but had they wished to make that argument in the Southern District itself, they could have done so, in which event this case may never have come to arbitration. However, it now being before me, I do not believe I am restricted from expressing my distaste for the tactics (if

that be a correct word to describe the format by which this case got to me) to which I have alluded and will be discussing in the body of this Decision.

THE PARTIES AND THEIR RELATIONSHIP

Norwest is located in Park City, Utah. It is and has been in the energy consulting business since about 1980 and Donovan Symonds, one of its original founders, has been associated with the company since it inception. He has a college degree as a professional engineer, and a Ph.D. from the University of Washington. He testified that his company had worked for "Vulcan" in the period of the late nineteen nineties, which was the time he got to know Ford Graham. He described consulting services performed in Wyoming for what he said was VCM, and testified that between 2002 and 2005 he had spoken on occasion to Ford Graham, exchanged e-mails with him, and indeed attended conferences at which they were both present. There was a familiarity between them. Thus, he stated that it came as no surprise in the year 2005 to be asked to perform some consulting services at Graham's request. He said that he did not request a retainer or any formal agreement because he had "worked for Graham before". He said he "knew Graham – they had paid their bills" (the quotes are taken from my notes of the testimony given before me by the witnesses under oath; there is no stenographic record, by stipulation, as all are aware). When asked by his counsel "did you have an understanding as to whom you would be working for?", his response was "my understanding is we were working for Vulcan Capital."

Exhibit 3 in evidence, on its face, would be some evidence in support of that statement as it was then presented; I do not intend to review in its entirety, every document in evidence [or even the bulk thereof] some of which deal with either an apparent effort to make Symonds believe he was dealing with VCM or are now the subject of argument as to their meaning vis-à-vis the very question which has been so seriously raised as to the entity with which defendant claims the plaintiff knew or should have known it was doing business.

Suffice it to say that there is no question that on the strength of his conversations and e-mails with Graham, Symonds directed his associate Scrymgeour to proceed to Bangladesh without delay or that Scrymgeour so performed. Both Symonds and Scrymgeour testified before me with relation to the latter's activities and reports. During one of the weeks when Scrymgeour was in Bangladesh, Graham joined him. There is no question that Graham was aware of Scrymgeour's work or of his own cooperation with it. The record is replete with their activities, both inter se and with the representatives of the government, not only at this first period of activity but during a later second period of time as well, then working with Graham's associate, one Shokat Razi, relating to the issuance of a license for VCM's benefit.

There is an actual plethora of material substantiating the breadth of the communication between any one of several of the principals of Norwest with Graham and/or his "organization". Over and beyond that documentary evidence and the

testimony of the witness Symonds and Scrymgeour with regard to the Bangladesh work, I heard from the witness Whipkey, a professional engineer licensed in 5 states with a B.S. in Mining Engineering from Virginia Tech University, who testified regarding four separate projects on which he worked or which he supervised, assertedly for "Vulcan", preliminarily a due diligence effort which blossomed into an assessment of operations and the performance of a financial analysis, leading to reports and combined effort with one Peter Veillon, his (Whipkey's prior and long term contact at VCM). Exhibits 16 and 18, both admitted into evidence, represent an e-mail exchange between the two men, Whipkey's e-mails as "Senior Project Manager" of Norwest, and Veillon's simple identification of himself as "Vulcan Capital Management". Even if Exhibit 18 didn't include the sentences

> "I know that your boss and mine have not settled up on an outstanding invoice. That being said, it will be settled up shortly....",

I find these e-mails compelling and additionally supportive of plaintiff's essential theme, that it had a contract with VCM, and that the latter's failure to pay constituted a breach.

I listened carefully, at first with some respect, but ultimately in shock, to the testimony of Kevin Davis, who described himself as "managing director and chairman" of VCM, as he attempted to relate what I would call the shifting nature of the several partly or fully Vulcan-identified-companies within his and his cohort, Mr. Graham's, control, as well as the interlocking positions each filled in such corporations. Businesses are of course free to operate in any fashion they please, so long as they stay within the law, and the scope of my involvement in this case does not include any effort to examine their various tax returns, federal, state or local. However, Mr. Davis lost me early in his testimony when he said:

> "Norwest has never been engaged by Vulcan Capital Management",

and that prior to his learning of the existence of the lawsuit, he had no idea that Norwest was looking to VCM for payment of these bills (ostensibly meaning the Bangladesh bill and those dealing with Whipkey's efforts, the so called Buckeye work). Even as to those bills, he admitted that it would be fair for Global Vulcan Energy International (GVEI), a separate entity not a party to this proceeding, to pay Questa Engineering, a separate entity which is a part of Norwest and also not a party to this proceeding, to pay what is due the latter (alleged by plaintiff as part of its claim) at this time but that GVEI doesn't have the resources to pay them (as does not VCM presumably).

Thus, again, it is not the amount of the billing which is (or has been) really in question. It was only where to get the money to pay it. And, seemingly, by use of the "three-card monte scheme" which the defendant has interposed, the plaintiff has been deprived of the fruits of its contract.

One is led to believe that as to Mr. Davis, at least, and perhaps as to Mr. Graham, as well, their heart may have been in the right place; they knew the bills should be paid because they knew Norwest did the work, but since nobody had any money to pay them, it became safer to use a good offense as the best defense. That would seem to be why the defendant took the position that it was Norwest's claims against VCM which were spurious, and meant only

"...as a strategy to get paid sooner",

which were Mr. Davis' final words in rebuttal.

I wonder if he will realize, in reading this Decision, how they fell on deaf ears coming from an attorney with his background and observable ability.

If ever there was an example brought before me on a witness stand to typify what I believe Wall Street and the general business community do not want to put forward as how business should be run, Ford F. Graham has played the role.

It is my understanding of his testimony that VCM, of which he is the president, owns no interest in any company for which it provides services and that its efforts are limited to "back office support, accounting support." Although he went into greater detail in describing VCM as a "portfolio company" with 34 or 35 operating companies in the areas of power, mining, and distribution of oil or gas, each with its own group of investors, he very shyly refused to compare its operations with other well-known institutions of capital support for American business, but stated quite clearly that this company makes no profit, that its only income is from fees, presumably from the 34-35 operating companies (as well as, he says, reimbursement from those companies for project expenses, a not generally known or accepted or acceptable method of earning income), and went to great pains to indicate that VCM had never paid any bills to Norwest.

It struck me at that point to wonder why, at the very first time Norwest ever sought payment from VCM for the Bangladesh work (putting aside the later failure to tell Symonds that "we, i.e., VCM, never paid you for any work and didn't agree to pay you for this work at the outset of the collection problem") Graham didn't tell him right then and there that he was dealing with some other entity then VCM when it came to talking money? And why did he tease Symonds along with e-mails about the US Army not paying their bills on time, or needing to write for money from Iraq, or the other kinds of responses which marked the early days of the Symonds push for his company's allegedly overdue payments? It has yet to be explained to me why it took the lawsuit which I am now deciding to bring out the excellently well-prepared kind of argument which VCM's attorney and her adversary drew which seeks to limit my right, not necessarily to pierce a corporate veil, so to speak, to use the lilting language of law, but to let me peek behind the curtain to learn what there really is for me to decide.

Like his sidekick, Mr. Davis, the witness Graham stood on high ground when he testified:

> "We have a moral obligation to pay our bills. They did the work. Not a case of not wanting to do the right thing".

It seems that although everybody tells everybody that they want to do the right thing, they literally had to be dragged kicking and screaming to the place where they are going to have to do it, which is now unfortunately the arbitrator's job.

THE ARBITRATORS' FINDINGS

Although it may be read in terms of working backwards, let me first state what is not part of the recovery granted to the plaintiffs herein.

The defendant correctly argues that there can be no account stated claim against any VCM entity, either because another entity (GVEI) was actually "involved" in 7 of the 18 alleged invoices, or because it has not been satisfactorily otherwise presented to my satisfaction, even if the other 11 had been properly addressed, that the elements of an account stated claim had been proved by the required preponderance of the evidence. This alternative pleading is dismissed.

Because of my findings as to the breach of contract and quantum meurit claims, it was not necessary for me to rule on the unjust enrichment claim, nor even to dispute defendant counsel's assertions that VCM was not the beneficiary of the Norwest services.

Simply stated, however, for all the reasons indicated previously, and because I find that all of the essential elements of a contract have been proved by the plaintiff, as pleaded in its complaint, I am ruling in its favor for the amount billed by it which, so that the parties may be aware of the extent of my findings, I have established is also in the agreed price and reasonable value of $124,567.39.

The defendant has relied in its defense on its absolute denial of Paragraph 9 of the complaint; the entire hearing revolved about what at best, from the defendant's point of view, was its shoddy treatment of the plaintiff's billing from the outset. Taking advantage of what must be recognized as the confidence of the plaintiff's chief executive officer, with whom it had done business previously, and resorting to the almost shill-game-like post-performance assertion that the plaintiff was not really doing business this time with the same entity with which it had dealt on a prior occasion or occasions, defendant sought to construct a sort of Chinese wall against payment. Although it seems in retrospect that plaintiff would have, and perhaps should have, taken earlier steps to protect its position, it is undeniable to the arbitrator that to find any other way than is clearly set forth in this Decision would be tantamount to approving an odious business practice amounting to giving defendant something for nothing.

Defendants' position throughout the tenure of the parties' relationship is little more than taking advantage of a technical error, or series of them, in effect waiting for the right time to refuse to pay, interestingly supported by his counsel's careful admonition to me in her letter of August 24, 2007, when she writes: "The absence from the Complaint of any separate claim for these amounts based on a different alleged "contract" covering these other projects precludes Norwest from asserting any such claim in this proceeding, regardless of the reason why no such claim is pleaded" (emphasis supplied), referring to the terms of the private Arbitration Agreement between counsel, pursuant to the terms of which I am bound to arbitrate only those claims pleaded in the Complaint, which may not be amended. It is my consequent understanding that if I had found that the plaintiff had failed to provide any of its causes of action as pleaded in this Complaint, it would have the added effect of terminating permanently its right to collect any monies for the services it provided, even if a mutual mistake of fact had existed as to the identity of the parties or as to either of them, let alone if that kind of mistake were of the plaintiff's own making, as seems to be what the defendant would have me believe.

The illusory nature of the defendant's position is underscored by an examination of a number of the exhibits which were admitted into evidence without objection. Long before the service of the complaint in the action itself (which I believe I am correct in stating was sometime at or around the month of August, 2006), the type of e-mail exchanges between Ford (Graham) and Donovan (Symonds) are more than merely revealing, both as to what is said in them and what is not said in them (without even stressing that Ford's e-mails to Donovan always and invariably indicate they came from VCM at its New York City address). Thus, Exhibit 20, A Symonds e-mail, sent at 5:32 p.m. on September 23, 2005, including therewith a copy of a letter sent by him by regular mail that same day, demanding payment for the services rendered states:

> "Ford, we have worked with Vulcan for many years but we cannot continue to perform services for Vulcan without receiving payment in full....",

to which Ford does not respond -- for example – "no, no, no, Donovan, you are not working for Vulcan, you are working for GVEI" (or any other acronym his and Davis' brilliance propels them to use) – what he does say, at 6:30 p.m., that day, is:

> "I am sorry. I told Andrew Scrymgeour last week and we got waylaid by incredible work load for ACOE/FEMA..., no excuse except, etc....I will get it [obviously, payment] done first item next week....

That same exhibit make clears that Graham wants his work to be continued.

On October 11 (according to Exhibit 23) Symonds writes:

> "Since we have neither received payment for our overdue invoices, nor had feedback from you regarding a date certain to receive payment, I have reluctantly solicited the help of a national collection agency...We have no alternative but to resort to this action....

Graham's response is clearly meant to "buy time". There is no issue raised as to the party which owes Norwest the money. There is no issue raised other than the same, lame excuse which had already marked the stall period referred to previously:

> "...I apologize for the impact on you....Once we have cleared this up [the collection of a $12 million prepayment from one of our customers next 10-12days. I hope, we will take care of all of your invoices, etc.

Again, I fail to find any indication that anyone at VCM believed then that the Norwest agreement was with any other entity than VCM.

Exhibits 21, 24, 26 and 28 represent repetitive examples of Don's (Symond's) efforts to get paid and Ford's (Graham's) maneuvering, through excuses and promises, to buy more time. On October 6th, Ford's e-mail refers to his having failed to plan on "capital draws from our investors to cover your billings, et al." In his testimony at the hearing, Graham testified, incidentally, that since there were different investors for different projects, he could not approach any one set of investors to try to secure payment for debts of another. Understandable, but inconsistent with what he was telling Symonds in this exhibit.

Exhibit 24 shows quite clearly that on November 17th, in response to a very strong letter from Don, now threatening actual legal action "within the next few days" and requesting a specific intermediate payment of $67,734.48, Graham e-mailed:

> "Let's talk in the morning. I believe we will have you done this next two weeks".

There was no indication from VCM that it didn't owe the money. There was no indication that the Bangladesh job was done for a different entity than the one involving the U.S. civil projects (the so-called Buckeye work, as to which it was sought at the hearing to shift the responsibility for payment to a separate corporation, evidently under the control of the same two people who testified before me).

Graham's prevarications and slippery tactics did not end there. On January 9, 2006, he e-mails Symond's (Exhibit 26)

> "We look to be closing financing next week for $40 million. We will catch up all payments then."

Seeking new effort on Norwest's behalf, for both Buckeye and Bangladesh, Graham e-mailed Symonds on January 23rd (Exhibit 28)

> "I will call this week. Looks like we close on financing ($20 million) and all get paid within next 7-12 days. Finally!"

When Symonds e-mailed him a response that same afternoon, he advised Ford to "forward the confirmed amount to Norwest and I will distribute to Questa." It was Symond's birthday and he was acknowledging what a good birthday present it was to know this matter of payment was being resolved. Obviously, it was merely more of the scam.

Even in all of Exhibit 29, a panoply of exchange of e-mails relating to the work which had been done and the additional work which Graham wanted done, covering a period from March 16th through 31, 2006, there is never a mention of Norwest having worked for any other organization than VCM.

It appears clear to the arbitrator, without any semblance of doubt, that Norwest entered into a contract with VCM, that it carried out its responsibilities under that contract, through performance not in any way challenged throughout the entire period of these particular aspects of their relationship, and that the defendant, VCM, breached the contract by failing to satisfy one of its essential terms, namely payment of an account it had earned (and has proved through the evidence introduced at this proceeding).

Although I am more than merely satisfied with the legal and logical basis of this Decision, I would be remiss if I did not state that during the course of making the foregoing findings I recognized the sloppiness of the plaintiff's business dealings and its accounting practices, some or all of which contributed to the fact that this litigation needed to be commenced and, more unfortunately, brought to this kind of conclusion. Had there been a document clarifying the relationship between the parties and identifying what it was that who set out to do for whom, it goes without saying that the kind of defense which was presented could not have arisen (nor, I dare say, would I have heard the preposterous agreement that the defendant presented relating to the alleged phoniness of its position directed against the plaintiff). Plaintiff's books and records, as, supplemented by the testimony, may have proved beyond a reasonable doubt that it performed the services it said it rendered for the defendants, but its actual billing was at best a source of confusion. Only what appeared to me as the chicanery of the defendant in dealing with that apparent confusion could and did overcome the point that defendant could have made at a more appropriate and earlier time in the relationship of the parties, all as I have spelled out, I hope with clarification, in the pages of this Decision. In short, plaintiff may be charged with poor bookkeeping habits, but it was defendant whose "hands" sullied the process. It is my belief that Messrs. Graham and Doris reaped the benefit of the contractual relationship, no matter which of the

entities they control, and certainly controlled at the time, and that because Symonds believed he was dealing with VCM and no one from the defendant's side properly told him what they have now told me, their entity must pay for it.

INTEREST ON THE AWARD

Having found in favor of the plaintiff, as indicated herein, the plaintiff has made clear that it seeks the inclusion of an award of interest commensurate with statutory law and in accordance with an exhibit it submitted, detailing its position as to almost any possible finding I might have made if in its favor.

Based on several factors which I present below, I do not believe I am able to make any interest award. I submit that such determination should be made, if at all, by the Court itself in which this action commenced, and that both by law and by the agreement of the parties, I have no alternative but to take this stand.

Plaintiff's Exhibit 32, admitted without objection, presents a detailed roadmap of interest alleged to have been earned on all of the invoices presented to the defendant (whether directly to VCM (11 invoices)), Vulcan Global Energy International, L.C. (2 invoices, on the stationery of Questa), and 5 more to the same entity on the stationery of Norwest (all such invoices part of plaintiff's Exhibit 1). As to each of the invoices plaintiff has presented to me the amount of interest it alleges is due, using simple 9% interest from the date of the invoice through September 7, 2007 (the hearing date). While this "spreadsheet" would appear to make of my task relating to the compilation of interest a relatively simply arithmetic calculation, I believe I must pass on this question of the additional $23,046.66 it would add to the judgment to be entered herein, for the reasons set forth below.

I took in no evidence nor heard any statement from the defendant regarding the entry of interest. The entire question was not in reality placed before me, probably because it would have not been a proper subject for any testimony or argument if my Decision were to adopt the defendant's legal position, such that the case were dismissed.

Much more importantly, however, and having nothing to do with the statement just made, I am bound, very clearly it seems to me, by the private Stipulation of the attorneys and parties, referred to by me previously but unknown to me at the time I was retained, by the language of the first sentence of Paragraph 7 thereof, to wit:

> "The Arbitrator shall render an award in writing, within thirty (30) days of the close of proof, specifying the prevailing party, and the amount of damages, if any....(emphasis supplied).

Nowhere in that sentence nor in that (or any other) Paragraph is there a direction as to the computation of interest, if any. At best, from plaintiff's point of view, is the sentence in that same Paragraph directing that any award rendered by the Arbitrator is to be deemed made in the State of New York, as well as the language of Paragraph 8 relating to any application to confirm, modify or set aside the award, directing that it be made by motion in the Action (i.e., this Action, which has not been closed).

The foregoing language again must be read in the context of paragraph 1 of the Stipulation (although labeled Arbitration Agreement, I want to be careful not to confuse the documents with the separate Arbitration Agreement the parties have with me), entered into without my knowledge of its existence, limiting my right "to arbitrate any claims other than those stated in the Complaint, and that the Complaint may not be amended." Although the Complaint does in fact demand interest and Exhibit 32 is obviously meant to raise the issue of interest, I am far from satisfied that it is I, the Arbitrator, who should be charged with the duty of deciding whether the plaintiff is entitled to interest which remains, by law and by the parties' own Stipulation, the prerogative of the District Court – by motion in this Action, which is a necessity in any event should either of the parties choose to confirm, modify or set aside my award.

Defendant's counsel's letter to me of August 24, 2007 (with copy to plaintiff's counsel) has so alerted me to her concept of what it was that I was chosen by the attorneys to rule on, very specifically, and I am interpreting the Stipulation to mean that I may only rule on the four claims Norwest pleaded in the Complaint.

I feel that I have carried out that obligation to the fullest. The parties will have to go to the District Court, in any event, unless they agree to dispose of the Action in some other fashion, and the interest question may be presented to that Court with the full benefit of the Arbitrator's Decision to guide it.

THE AWARD

Based upon all of the foregoing, I find that this plaintiff is entitled to an Award in the sum of $124,567.39 from this defendant. No decision has been reached by the Arbitrator on the question presented regarding the interest requested by the plaintiff, all as explained in the Decision.

The foregoing represents the entirety of the Arbitrator's Decision.

Thank you for this opportunity of permitting me to consider and rule in this matter.

Very truly yours,

Samuel G. Fredman

SGF/mr