CAUSE NO. 2010-21210

AMERICAN SENTERFITT, BILL BANKSTON, DONALD NEUMEYER, and RUBEN S. MARTIN, III,	§	**IN THE DISTRICT COURT OF**
Plaintiffs,	§	
VS.	§	**HARRIS COUNTY, T E X A S**
SCOTT D. MARTIN,	§	
Defendant.	§	**55th JUDICIAL DISTRICT**

P02
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ARBIX
(6)

FINAL JUDGMENT

Upon consideration of Scott D. Martin's Unopposed Motion to Confirm Arbitration Award, The Court renders the following Final Judgment:

(a) The Court hereby CONFIRMS the Final Award, dated July 5, 2012 attached hereto as Exhibit A and incorporated by reference herein;

(b) Plaintiffs American Senterfitt, Bill Bankston, Donald Neumeyer and Ruben S. Martin, jointly and severally, shall take nothing by this suit;

(c) Defendant Scott D. Martin shall take nothing on his counterclaim against Plaintiffs; and

(d) The parties shall be responsible for their own costs and attorneys' fees.

All other relief not expressly granted is denied. This is a Final Judgment.

SIGNED this 3 day of Aug, 2012.

Hon. Jeff Shadwick, Judge
55th Judicial District Court

Approved as to form and substance:

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EXHIBIT
A

AMERICAN SENTERFITT, BILL BANKSTON, DONALD NEUMEYER, and RUBEN S. MARTIN, III	§	
Claimants	§	**ARBITRATION BY AGREEMENT OF PARTIES IN CAUSE NO. 2010-21210 IN THE 55TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY, TEXAS**
vs.	§	
SCOTT D. MARTIN,	§	
Respondent.	§	

OPINION AND FINAL AWARD

The duly constituted and agreed panel of arbitrators in this matter, consisting of Billy Shepherd, Daryl Bristow, and Chairman Mark Glasser (the "Panel") heard and fully considered the exhibits and testimony introduced by the parties at the hearing on the merits of the matter conducted from December 5 through December 9, 2011, and further considered the parties' post-hearing submissions, which consisted of Claimants' Post-Hearing Brief, Claimants' Proposed Findings of Fact and Conclusions of Law, Scott Martin's Motion for Leave to Supplement Record, Scott Martin's Posthearing Brief, Scott Martin's Proposed Findings of Fact and Conclusions of Law, Claimants' Response to Respondent's Post-Hearing Brief, and Scott Martin's Posthearing Reply Brief.

Claimants allege that Respondent breached his fiduciary duties to the company known as MBI, of which each of the Claimants and Respondent are members, by acquiring for himself certain shares in Inspiration Biopharmaceutical ("Inspiration") in lieu of first presenting the opportunity for the purchase of those shares to MBI and/or its members. This is alleged by Claimants to have constituted the misappropriation of a corporate opportunity that, according to Claimants, would have been of interest to Claimants and/or MBI, if timely made known to them. As all of Claimants' causes of action and requests for relief flow from this central premise, the Panel first determines whether, under applicable law, Claimants and/or MBI had, at the time of formation of MBI, an interest or expectancy in the further purchase of shares through MBI in Inspiration.

At hearing of this matter, and in their post-hearing submissions, Claimants and Respondent made clear their general agreement on the test to be applied by the Panel in determining whether MBI (or the individual member Claimants through MBI) were denied a corporate opportunity by Respondent Scott Martin's personal acquisition of certain Inspiration shares. Respondent's expert on the law of corporate opportunity described the test in terms of the parties' "interest or expectancy."

> In Texas we use the interest or expectancy test. It is something that is an opportunity belonging to an entity, if the entity has an interest or expectancy in the opportunity. That means, the entity must have focused on the opportunity, must have shown some interest in at least thinking about pursuing it.

(Ragazzo, Tr. @ 1344).

Claimants' expert on the law of corporate opportunity described the test in terms of the "reasonable expectations" of the parties.

> Q. . . . Now, if it's not an ongoing deal, do you assume the opposite? Do you assume it was a one-shot deal? Then did Scott have any disclosure obligations at all?
>
> A. If it was a one-shot deal, then everything's different.

(Aldave, Tr. @ 1135-36).

> [I]t's not everything that might be in the authorized purposes of the entity. It's . . . the reasonable expectations of the parties.

(Aldave, Tr. @ 1140-41.)

We treat these articulations of the applicable standard as functionally equivalent. The first question before the Panel is therefore whether MBI was established only for the purpose of acquiring the shares of Inspiration that first came into the company or whether it was the expectation of all parties that that company would take advantage of on-going opportunities for investment in Inspiration.

It is undisputed that Claimants first became aware of the opportunity to invest in Inspiration through an overture made to them by Respondent. That overture was one in which Respondent offered Claimants the opportunity to acquire, at a discount, a portion of the Inspiration shares that had already been purchased by Respondent. To their credit, Claimants unhesitatingly offered to contribute their personal funds to the worthy undertaking that is Inspiration. Claimants' financial incentive to contribute those funds included the opportunity to acquire their shares at a discount. The corresponding benefit to Respondent for offering his shares to Claimants at a discount was that Respondent would be permitted to maintain voting control of those shares.

The parties mutually agreed that Claimants' contributions to Inspiration would be implemented through the formation of a limited liability company known as MBI. The Panel heard testimony from both sides respecting this choice of vehicle for investment by the Claimants. Claimants contend that the choice of this vehicle supports their view that additional investments in Inspiration through MBI were contemplated. Respondent contends that the vehicle was formed only to implement a "one-shot deal." The Panel has therefore closely scrutinized the Company Agreement by which the LLC was formed, the testimony of the parties with respect to their intentions at the time of the LLC's formation, the expert testimony offered

by both sides on this issue, and the testimony of Mr. Chris Booth, the attorney who drafted the Company Agreement. Having considered all this proof, it is the view of a majority of the Panel that neither the selection of the LLC vehicle for implementation of Claimants' investments nor any aspect of the Company Agreement itself offers persuasive evidence of the parties' intentions in either direction. A fair reading of the testimony offered by the legal experts for both sides is that they, too, agree that the intentions of the parties with respect to future investments in Inspiration by MBI is not made clear simply by the choice of investment vehicle or by the terms of the Company Agreement.

At hearing, the parties offered testimony of their intentions in forming the LLC and in utilizing the Company Agreement to do so. Claimant Ruben Martin placed heavy emphasis on the original purpose of the MBI deal being to help Scott Martin obtain funding to satisfy his founder's commitment. (Ruben Martin, Tr. @ 115-116). Ruben Martin then testified that "you have to make the assumption that the purpose was to invest in Inspiration," (Ruben Martin, Tr. @119) but he also testified "that . . . the purpose of MBI was for *that* purchase." (Ruben Martin, Tr. @120, emphasis added). Although Ruben Martin referenced additional purchases, he did not testify to any direct, explicit agreement to form an entity as a perpetual, ongoing Inspiration investment vehicle. When asked whether, at the time of the formation of MBI, there was a potential for a follow-on Inspiration investment, his answer was: "I don't know." (Ruben Martin, Tr. @ 213). Ruben Martin further stated: "He [Scott] had a problem. When he asked me that he needed to raise this additional money, we did it." (Ruben Martin, Tr. @ 213).

Claimant Neumeyer testified as follows regarding the formation of MBI and the subject, at the time of formation, of any agreement or intent regarding the future investments using the MBI special entity vehicle:

> Q. Now, at the time that happened, were there any express discussions about follow-on investments in MBI?
>
> A. No.
>
> Q. Were there – but did you have an expectation one way or the other as to whether or not MBI might participate in future Inspiration stock acquisitions if the opportunity arose?
>
> A. I can't remember any speculation.

(Neumeyer, Tr. @ 951).

Claimant Bankston also testified, but provided no evidence of an agreement at inception to form an ongoing investment company to invest, in the future, in additional Inspiration opportunities:

> Q. .... [A]t the time you invested, you didn't really even know the difference between Inspiration and MBI; right?
>
> A. No, sir, I did not.

> Q. And so the fact of a MBI vehicle, it just really didn't make a difference to you, did it?
>
> A. I just knew I was in a partnership with Scott and Ruben – and Don. That's all I knew about.
>
> Q. All right. Well, I believe in your deposition you said it a little bit different. You said, "Look, I didn't know the difference between Inspiration and MBI." You didn't say anything about a partnership.
>
> A. Well, I didn't – I didn't know that there was a – I didn't know there was a difference. No, sir, I did not know.

(Bankston, Tr. @ 1051).

Scott Martin testified that once MBI bought to hold his discounted legacy shares, it (MBI's purpose) was (to use Ruben Martin's own words) "done:"

> [O]nce it was established and MBI was there, and it had its $4 million obligation that Scott had, once that $4 million was done, then, yes, we were there, we were done. And that's what we had put in. *And that's what the purpose of the entity was.*

(S. Martin, Tr. @ 254 (emphasis added)).

> A. I was clear that – that you wouldn't make any future investments through MBI, because you would be buying direct shares from Inspiration. You wouldn't be going through MBI and giving me the votes and the control when you could get the same thing and same price direct with MBI – with IB, so I – *we talked about all that. . . .*

(S. Martin, Tr. @392-93 (emphasis supplied)).

In a December 8, 2006 email to Bill Bankston (DX-2), Scott Martin makes a distinction between his existing Inspiration stock "position" (at a significant discount, the chance to buy "into my position," – which became MBI) and a separate and additional opportunity to invest individually in an upcoming $15 million offering. Scott Martin's disclosure of future individual investment opportunities, without the limitations that would be placed on buying his legacy shares at a discount, supports the conclusion that it was his view and his intention that others would be free, indeed invited, to invest individually after that and in lieu of a purchase by or through MBI into his "position."

Chris Booth, who drafted the MBI Company Agreement, testified that there was no discussion one way or the other about Scott Martin investing in Inspiration outside MBI (Booth, Tr. @ 759); that the language of the Agreement was intended to for a "special purpose entity" (Booth, Tr. @ 771); that the operations of a special purpose entity are limited to be what their

purpose is for (Booth, Tr. @ 771); that there is nothing in the documentation one way or the other about whether there was any expectancy that Scott Martin or anyone else would bring future opportunities to MBI. (Booth, Tr. @ 771-72).

He also acknowledged:

> Q. It's also typical, is it not, sir, for single purpose entities to be finished, to have a single transaction and very little or no activity afterwards, correct?
>
> A. That's – that's certainly – depending what they're set up for, that's certainly true, too. (Booth, Tr. @ 773).

A majority of the Panel finds in this testimony no clear statement of intention by the parties to create the LLC as other than a single-purpose vehicle. A majority of the Panel nevertheless turns its attention to what we believe, and what the law of Texas states, may be the most compelling evidence of the contracting parties' intentions here:

> No principle of interpretation of contracts is more firmly established than that great, if not controlling, weight should be given by the court to the interpretation placed upon a contract of uncertain meaning by the parties themselves. Courts rightfully assume that parties to a contract are in the best position to know what was intended by the language employed. The court should adopt the construction of the instrument as placed upon it by the parties unless there is clear language in the instrument indicating an intention to the contrary.
>
> *Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1979) (citations omitted); *see also Page v. Superior Stone Prods., Inc.*, 412 S.W.2d 660, 664 (Tex.Civ.App.—Austin 1967, writ ref'd n.r.e. ("the construction given the contract by the parties and their actions under the contract, before any controversy arose as to its meaning, with knowledge of its terms, will be adopted and enforced by the courts when reasonable").

The Panel heard substantial proof of gatherings arranged by Respondent for the purpose of interesting so-called "angel investors" in Inspiration. Respondent contends that, through their attendance at these meetings, and through at least one communication from Respondent to Claimants regarding these meetings, Claimants understood both that Respondent intended to make further investments in Inspiration and that Respondent intended to invite still others to invest in Inspiration, all of this outside of MBI. (DX-17; DX-23). Respondent places much emphasis upon Claimants' knowledge of and participation in these meetings and their failure to at that time express any interest in a further personal investment in Inspiration, or to lodge any protest that MBI was not expressly put in line for such investments, as proof that Claimants understood and intended that MBI was a "one-shot deal." Claimants respond to this through testimonial proof that they did not understand that these overtures to angel investors might have

permitted them the further opportunity to invest in Inspiration, either individually or through MBI, and that, among other things, Respondent's communications to Claimants regarding his own intentions with respect to future investments were, at best, vague, and, at worst, purposefully inadequate.

Having weighed the rival proof on this issue, and the credibility of the witnesses on both sides of the issue, a majority of the Panel concludes that Claimants, by their conduct, displayed their intention that MBI would serve only as a one-shot investment opportunity for Claimants and that none of them had the intention or desire that MBI would serve as an on-going investment vehicle for purposes of acquiring additional shares of Inspiration. It therefore follows, and a majority of the Panel concludes, that Respondent breached no fiduciary duty to Claimants by failing to do more to allow or encourage Claimants' further investments in Inspiration through MBI. A majority of the Panel also concludes that, by his later acquisition of additional shares of Inspiration, Respondent did not unlawfully deprive Claimants, either individually or as members of MBI, of a corporate opportunity.

In the view of a majority of the Panel, our finding is supported by several other aspects of the Claimants' proof at hearing. First, although Claimants contend that they first learned of Respondent's additional investments in Inspiration through a review of certain documents found in Respondent's desk as early as September of 2008, and that, according to Ruben Martin, he was "shocked" to find this (R. Martin, Tr. @ 356), Claimants brought forth no documents to indicate that it was only then that they first understood that Respondent intended to or had already made additional investments in Inspiration. But even if true that it was not until 2008 that Claimants knew of Respondent's additional purchases, the finding by a majority of the Panel is nevertheless supported by the Claimants' unexplained – and, in the view of a majority of the Panel, inexplicable – delay until April 2010 before instituting any proceeding to complain of Respondent's acquisition of those shares.

The Panel understands that Claimants contend that further and fuller disclosures respecting the affairs of Inspiration would have led them to undertake further investments in Inspiration. A majority of the Panel, however, finds this proof and this argument unconvincing, as it puts the cart before the horse. If, as a majority of the Panel has concluded, it was the intention of all parties that MBI would serve as a vehicle only for a one-time acquisition of shares for the benefit of Claimants, then Respondent had no obligation to make any further disclosures to Claimants regarding the performance or prospects of Inspiration, whether good or bad. Further, the record is devoid of proof that Claimants ever took any steps themselves to monitor the financial performance and prospects of Inspiration at any time after their original investment. It is the view of the majority of the Panel that this is not the conduct of individuals who had purchased Inspiration shares with a concern for the potential return on their investment, and least of all is it conduct consistent with the contention that Claimants invested in Inspiration through MBI with the expectation that further investments through MBI would follow. This conclusion by a majority of the Panel is further supported by the fact that MBI had no staff, no provision for future investment analysis, no independent accounting firm, no meetings for investment presentations or considerations, and nothing else to indicate that it was intended as a ongoing investment vehicle.

A majority of the Panel therefore concludes that Claimants in fact had ample knowledge of the opportunity to invest in Inspiration through MBI after their original investment, but failed to make these investments only because they had no interest in purchasing additional shares of Inspiration under such conditions as would have been imposed at that time. The proposition that the MBI investors other than Scott Martin would be willing to further invest within the MBI structure – at full stock prices – and at the same time give up significant value by turning total control over any newly-acquired shares to Scott Martin, is not credible. In the view of a majority of the Panel, it makes sense for Claimants to have taken Scott Martin's very favorable stock price position and in exchange give him total control at the time of MBI's formation. But it is the view of a majority of the Panel that it makes no sense to suggest that Claimants would have participated in the creation of a structure to facilitate Claimants' purchase of Inspiration investments in MBI *other than* as a buy-in to Scott Martin's favorably-priced legacy shares – and certainly not with the knowledge that all such further purchases of shares would have been on a non-voting basis.

Having concluded that the preponderance of the evidence demonstrates that MBI was established with the intention and understanding of all parties that it would serve as a one-time vehicle for the collective investment of each of the Claimants in Inspiration, that the later accumulation of additional shares by Respondent did not constitute the deprivation of a corporate opportunity available to MBI or its members, and that Claimants knew of the opportunity to invest further in MBI after their original investment but purposefully declined that opportunity, a majority of the Panel denies all relief requested by Claimants, including their claims for damages, for equitable relief, and for declaratory relief. There being inadequate proof that Claimants' action was filed for an improper purpose under § 101.461(b)(2) of the Tex. Bus. Org. Code, a majority of the Panel also denies all relief requested by Respondent.

Accordingly, it is the Panel's award that Claimants and Respondent take nothing upon their claims herein and that the parties shall be responsible for their own costs and attorneys fees.

DATED: July 5, 2012

Mark K. Glasser

Daryl Bristow

AMERICAN SENTERFITT,	§	
BILL BANKSTON,	§	
DONALD NEUMEYER,	§	
and RUBEN S. MARTIN, III,	§	
	§	**ARBITRATION BY AGREEMENT**
Claimants,	§	**OF PARTIES IN CAUSE NO. 2010–21210**
	§	**IN THE 55TH JUDICIAL DISTRICT**
vs.	§	**COURT OF HARRIS COUNTY, TEXAS**
	§	
SCOTT D. MARTIN,	§	
	§	
Respondent.	§	

DISSENT

I respectfully dissent.

Billy Shepherd
July 5, 2012

I, Chris Daniel, District Clerk of Harris County, Texas certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.
Witness my official hand and seal of office this April 25, 2017

Certified Document Number: 52971337 Total Pages: 11

Chris Daniel, DISTRICT CLERK
HARRIS COUNTY, TEXAS

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