

Pharma Co.'s Arbitration Bid Denied In \$6M Contract Row

By **Vidya Kauri**

Law360, New York (January 22, 2016, 2:52 PM ET) -- A Chinese herbal pharmaceuticals manufacturer that has been accused by investors in a \$6 million lawsuit of breaching contracts in a \$12 million financing offering lost its bid to arbitrate the investors' claims after a federal judge ruled Thursday that the parties had explicitly agreed to resolve all their disputes in New York courts.

U.S. District Judge Victor Marrero sided with Connecticut-based investment firm and investor-representative Euro Pacific Capital Inc. that all transaction documents signed by the parties in 2010, such as a securities purchase agreement governing the purchase of promissory notes, the notes themselves and a registration rights agreement governing the Chinese company's obligation to register common stock, all contained the same language to commence any legal proceedings arising out of the documents in New York City only.

Bohai Pharmaceuticals Group Inc., which allegedly defaulted on the notes, had tried to argue that the case should be arbitrated on the grounds that a 2012 fund escrow agreement to pay for the notes between its subsidiary, Euro Pacific and a Chinese bank contained a clause to arbitrate before the China International Economic and Trade Arbitration Commission in Shanghai.

But Judge Marrero gave weight to Euro Pacific's arguments that the arbitration clause was designed specifically to protect the Chinese bank, which has no presence in the United States, and that Bohai and the investors could have agreed to arbitrate in the transaction documents if they had wanted to.

"The fact that the notes were amended on several separate occasions after the FEA was executed, and each such extension contains the same jurisdictional and forum selection clause requiring that all disputes be brought in the courts in New York City and governed by New York law, further supports Euro Pacific's argument that the reason the arbitration clause was entered in the FEA was that [the subsidiary] and the escrow bank preferred arbitration," Judge Marrero said.

Euro Pacific **sued Bohai last June** seeking \$5 million in damages with interest from the breach of contract claim in regards to the purchase agreement, and another \$1 million for damages allegedly suffered by Euro Pacific including business losses and reputational harm.

The firm, which handled the placement of slightly more than \$11 million out of the \$12 million offered in promissory notes, claims that Bohai left investors on the hook by failing to publicly report to the U.S. Securities and Exchange Commission since November 2014 in violation of the transaction documents and impeding investors' ability to calculate the market value of the securities at issue.

Judge Marrero refused to grant Bohai's motion to dismiss the case altogether, saying that the breach of contract claim arises out of its alleged failure to file timely reports with the SEC — a requirement under the transaction documents and not the FEA — and that Euro Pacific had pleaded enough facts to state a claim for relief for alleged breaches of covenant of good faith and fair dealing.

Euro Pacific's attorney David Graff told Law360 on Friday that Judge Marrero recognized the complexity and nuance of "going dark" schemes, where companies withhold information to investors.

"We believe that Judge Marrero's decision recognizes implicitly that, where a company engages in a scheme to withhold financial operational information from its investors to depress the price of its securities, the scheme is nuanced and complex and involves a far more detailed analysis of the company's misconduct than simply whether they filed with the Securities and Exchange Commission," Graff said.

A representative for Bohai could not be reached for comment.

Euro Pacific is represented by David Graff, Christopher Ayers and Rachael Kierych of Anderson Kill PC.

Bohai is represented by Leodis C. Matthews and Eugene Meyers of Dacheng Law Offices LLP.

The case is Euro Pacific Capital Inc. et al. v. Bohai Pharmaceuticals Group Inc., case number 1:15-cv-04410, in the U.S. District Court for the Southern District of New York.

--Editing by Patricia K. Cole.

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