

Nobel potentially owes ISC USD 272m for AMF agreement; attorneys say former treasurer bound company to agreement

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by Jacqueline Kwong in New York

Nobel Biocare (SWF:NOBN) may have to honor the AMF agreement with ISC Holdings, on the basis that the former's previous corporate treasurer had the apparent authority to bind Nobel to the agreement, attorneys said. A source close to ISC noted that a Netherlands judge has ruled that Nobel owes ISC USD 272m. On 21 January 2008, Nobel and ISC entered into the asset management and facilitation (AMF) agreement, which was signed by Nobel's former corporate treasurer, Martin Gerber. The agreement appointed ISC to act as Nobel's asset and investment manager for certain assets and for future assets. Gerber later obtained a power of attorney, which was signed by several members of Board of Directors, to open an account at ING Singapore, so that ISC could act as an asset manager for Nobel.

Nobel has refused to honor the AMF agreement since 7 May 2008, claiming that Gerber lacked the authority to bind Nobel to the contract and that the corporation was unaware of the agreement at the time it was made. On 9 May 2009, ISC petitioned to compel Nobel to arbitrate the issue at hand. The case was remanded back to the district courts after the United States Court of Appeals for the Second Circuit reviewed the motion.

On 27 May 2009, a Netherlands judge approved of ISC's petition to freeze Nobel's assets in the Netherlands. The judge ruled that Nobel owed ISC USD 272m, but only managed to freeze EUR 6m as Nobel only possessed that amount of funds in the Netherlands.

The USD 272m figure comes from the total Nobel would owe for ISC's services if the contract were honored for the five year-term agreed upon plus interest, costs, and loss of reputation, explained the source. He specified that Nobel would owe a total of USD 209m for ISC's services after the 5-year term.

Nobel declined requests for comment.

A prior shareholder of Nobel noted that litigation commonly went unnoticed by investors, unless it was of a material amount. "A potential payment of USD 272m

is definitely material," said the former shareholder.

Nobel has an "uphill battle" to prove that Gerber did not have the authority to bind the company to the AMF agreement, said Richard Donovan, a partner and the co-chair of the litigation department at Kelley Drye & Warren. Nobel's Board of Directors had ratified Gerber's delegation through a power of attorney, so it supports the fact that Gerber had apparent authority, he added.

Apparent authority is defined as a reasonable belief that a certain individual had the authority to act on behalf of another, based on the circumstances, facts, and dealings of the parties, explained Everett Wilson, a shareholder at Akerman Senterfitt.

The source also said that because Gerber reported directly to the Board of Directors and made approximately CHF 250,000 (USD 239,534.58) while at Nobel, which is not "a small sum", there are facts that indicate that Gerber was a high-ranking officer, said the source.

James Blackstock, a Counsel on Call attorney and an independent consultant, agreed, noting that Gerber was quoted as saying that he could be appointed to the Board of Directors. If Gerber could be appointed as a Board member, he definitely had great authority, he said.

Facts also suggest that ISC reasonably relied on Gerber's apparent authority, as evidence suggests that Nobel was aware of the contract because it benefited from the agreement, said Stephen Goodman, a partner at Pryor Cashman. He explained that if Nobel actually benefited from the contract, but did not pay, an American court would hold Nobel liable for the agreement.

While under oath, Nobel admitted that it did benefit from the AMF agreement, said the source. There were two instruments purchased prior to Nobel's termination of the agreement and the company admitted that one was sold and made a small profit, and the other would also make a profit, he added. The source said he believed Nobel would have gained a substantial benefit from the two instruments, but was unable to confirm the value.

The source also noted that it was hard to believe that Nobel did not know about the AMF agreement. Any high ranking officer would have known about an agreement that asked for a USD 100m transaction, which indicates that the corporation would also have been aware, he noted.

Prior to the termination of the AMF agreement, ISC had purchased a USD 100m

bank bond from UBS on behalf of Nobel.

Blackstock added that Gerber's power of attorney was also evidence that Nobel knew of the agreement. Several Board of Directors signed the power of attorney, which indicates that the company was made aware of the contract, said Blackstock.

Furthemore, a welcome letter was addressed to Nobel's Chairman of the Board Rolf Soiron, welcoming him to ING after a bank account was opened at the latter company, said the source. He added that ISC employees had also provided affidavits that they spoke to Soiron during their visits to the Nobel headquarters. Even Nobel's high-ranking officers provided affidavits, saying that they were aware of the agreement, he added.

All of these pieces of evidence can be used to support the argument that Nobel was aware of the agreement, which supports the contention that Gerber had apparent authority, said the source. If this case proceeds to litigation, ISC will cross-examine Soiron, he noted.

Yet Wilson said that the power of attorney does not support ISC's position. Power of attorneys are very limited in scope, and here, the power of attorney only allowed Gerber to open a bank account on behalf of Nobel, said Wilson. It did not grant Gerber the authority to sign the AMF agreement, he added.

Wilson also noted that generally, treasurers do not have apparent authority to sign contracts on behalf of a corporation. The president and the Board of Directors are the ones with authority to sign contracts, so ISC will need factual evidence to prove that Gerber had apparent authority, he explained.

The arbitration documents do not provide enough evidence to help ISC overcome the hurdle of proving that it reasonably relied on Gerber's apparent authority, said Wilson. However, he warned that it was possible that certain facts may not have been released, which could support ISC's position.