*Lander Co., Inc. v. MMP Investments, Inc.**

I. INTRODUCTION

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[1] popularly called the New York Convention, entered into force in the United States on December 29, 1970.[2] The purpose of the Convention is to facilitate and unify the standards by which international agreements and awards are observed and enforced in the national courts of signatory states.[3] The New York Convention facilitates the use of international arbitration. International arbitration offers simplicity, manageable costs, expediency and neutrality as an alternative to traditional litigation in a remote national court.[4]

In the event that a losing party refuses to pay an arbitral award issued in a foreign state, the New York Convention serves as an enforcement mechanism. A prevailing party may use the Convention to seek enforcement of an arbitration award in a signatory State where the losing party has assets.[5] Pursuant to jurisdiction under the New York Convention, the successful party need only present a certified copy of the arbitral award or agreement to a court in the State where enforcement is sought.[6] The party objecting to enforcement then has the burden of proving that the award should not be enforced.[7]

In the United States, an additional advantage of enforcement under the New York Convention is that national courts offer greater deference to

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* 107 F.3d 476 (7th Cir. 1997).

[1] *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. I(1), 21 U.S.T. 2518, 2519, 330 U.N.T.S. 38, 38 [hereinafter New York Convention]. The New York Convention is codified at 9 U.S.C. §§ 201–208 (1994). The implementing legislation of the Convention makes up Chapter 2 of the Federal Arbitration Act. *See* 9 U.S.C. § 10 (1994).

[2] The Convention was drafted on June 10, 1958. The United States did not enact implementing legislation for this treaty until 1970. Currently, there are 106 signatory States or governments. *See* 9 U.S.C. § 201 (Supp. 1997).

[3] *See* Susan Choi, *Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions*, 28 N.Y.U. J. INT'L L. & POL. 175, 175 (1996).

[4] *See id.*

[5] *See id.*

[6] *See id.* at 188–189.

[7] *See id.* at 189.

international arbitration awards than to domestic arbitral awards.[8] It is very rare that a foreign arbitral award will be vacated under the New York Convention because to do so the award must fit into one of seven narrow exceptions for vacating an award listed in the Convention.[9] Thus, most foreign awards will be enforced under the New York Convention.

However, one of the weaknesses of the New York Convention is its failure to define several key terms,[10] such as "arbitral award" or "arbitral awards not considered as domestic . . . in the State where recognition and enforcement are sought."[11] This lack of clarity has led to nonconformity between the signatory States in their application of the Convention.[12]

In *Lander Co., Inc. v. MMP Investments, Inc.*,[13] the United States Court of Appeals for the Seventh Circuit examined the applicability of the New York Convention to a *domestically* issued arbitration award. The Seventh Circuit held, in a unanimous decision written by Chief Judge Posner, that the New York Convention was applicable to a domestically promulgated arbitration award between two United States citizens if the dispute arose out of an agreement or contract involving performance in a foreign State.[14] The holding was a result of the court's use of the language in 9 U.S.C. § 202[15] as a definition for the previously vague provision in Article I(1) dealing with "arbitral awards not considered as domestic awards in the State in which their recognition and enforcement are sought."[16] The court's opinion further clarified the United States' interpretation of the New York Convention and effectively broadened the jurisdictional scope of the Convention.

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[8] *See* Eloise Henderson Bouzari, *The Public Policy Exception to Enforcement of International Arbitral Awards: Implications for Post-NAFTA Jurisprudence*, 30 TEX. INT'L L.J. 205, 211–218 (1995). *See* discussion *infra* Part IV.

[9] *See id.* at 207–208; *see also* Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier, 508 F.2d 969 (2d Cir. 1974).

[10] *See* Choi, *supra* note 3, at 215.

[11] New York Convention, *supra* note 1, 21 U.S.T. at 2519, 330 U.N.T.S. at 38.

[12] *See* Choi, *supra* note 3, at 196.

[13] 107 F.3d 476 (7th Cir. 1997).

[14] *See id.* at 482.

[15] 9 U.S.C. § 202.

[16] *Lander*, 107 F.3d at 481–482 (quoting New York Convention, *supra* note 1, 21 U.S.T. at 2519, 330 U.N.T.S. at 38).

II. FACTS

The dispute in *Lander* concerned the termination of a contract between Lander Company and MMP Investments regarding the distribution of Lander's product in Poland.[17] The first contract between MMP and Lander, a two-year distributorship agreement, was entered into in March 1991.[18] Upon its expiration, the parties entered into a technical service agreement in February 1993 whereby MMP became the exclusive manufacturer and distributor of Lander's product in Poland for a five-year period.[19]

Problems arose in May 1993 when Lander claimed that MMP was producing a defective product. In an attempt to correct this problem, Lander's Chairman of the Board made a trip to visit MMP in Poland. The visit was to no avail, however, and Lander sent MMP a termination notice in February 1994.[20]

The contracts between Lander and MMP contained an arbitration clause requiring that any controversy arising under the agreements be settled by binding arbitration in New York City in accordance with the arbitration rules of the International Chamber of Commerce.[21] Pursuant to this clause, MMP filed a request for arbitration with the International Court of Arbitration of the International Chamber of Commerce (ICC).[22] The ICC appointed a sole arbitrator from New York to settle the dispute, and the parties executed a terms of reference in January 1995. Each party acknowledged that the arbitral tribunal was properly constituted and that the arbitrator had jurisdiction.[23] On October 31, 1995, the arbitrator issued an award in favor of Lander in the amount of $536,444.[24]

The arbitration rules of the ICC make arbitration awards final. When the parties submit to the arbitral tribunal, they are deemed "'to have waived

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[17] Lander produces shampoo and other products.

[18] *See* Lander Co., Inc. v. MMP Investments, Inc., 927 F. Supp. 1078, 1079 (N.D. Ill. 1996).

[19] MMP was to "'use its best efforts to promote the sale of a maximum quantity' of [Lander's] product 'including the establishment and development of a competent sales force of adequate size and appointment of capable sub-distributors and an experienced advertising consultant.'" *Id.*

[20] *See id.*

[21] *See Lander*, 107 F.3d at 478.

[22] *See Lander*, 927 F. Supp. at 1079.

[23] *See id.*

[24] *See id.*

their right to any form of appeal insofar as such waiver can be validly made.'"[25] Therefore, when MMP failed to pay the arbitral award due, Lander filed a petition to enforce the arbitral award in district court in the Northern District of Illinois under the New York Convention.[26]

In its complaint, Lander alleged that the parties were of diverse citizenship, that the amount in controversy exceeded $75,000[27] and that jurisdiction existed under 9 U.S.C. §§ 1, 9, 201, 202, 203, 207 and under 28 U.S.C. § 1332.[28]

MMP filed a motion to dismiss on the basis that the New York Convention failed to provide jurisdiction over domestically issued arbitral awards.[29] MMP argued that the New York Convention could only be applied to the enforcement of awards issued in foreign States under Article I(1) and according to the United States' reciprocity declaration.[30] MMP also moved to vacate the arbitral award under the Federal Arbitration Act (FAA).[31] MMP requested that the district court first make a ruling upon whether the New York Convention was applicable before it addressed its motion to vacate under the FAA.[32]

Lander opposed MMP's motion to dismiss and argued that the New York Convention was applicable. However, Lander did not argue that the arbitration award was enforceable under the FAA.[33]

III. ANALYSIS

A. *The New York Convention*

The New York Convention generally regulates the enforcement of arbitral awards between private parties.[34] The nationality of the parties is

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[25] *Lander*, 107 F.3d at 478 (quoting ICC Rules of Arbitration art. 24(2)).

[26] *See id.* This venue was selected because it is the venue where MMP resides. *See id.*

[27] The subject matter jurisdiction minimum controversy amount was amended in October, 1996. *See* 28 U.S.C. § 1332 (1994 & Supp. 1997).

[28] *See Lander*, 107 F.3d at 478.

[29] *See id.* at 481.

[30] *See id.*

[31] *See id.* at 478. Under the FAA, failure to move to vacate an award will result in an inability to oppose confirmation. *See id.*

[32] *See id.*

[33] *See id.*

[34] *See* Choi, *supra* note 3, at 175.

irrelevant.[35] The Convention serves dual purposes; it both recognizes and enforces foreign arbitral awards. The recognition provisions refer to *res judicata*; the Convention prohibits the parties from relitigating the merits of a previously adjudicated case. The enforcement aspect of the convention is self-explanatory.[36]

Four provisions of the New York Convention are central to an analysis of whether jurisdiction is proper. These four provisions include Article I(1), Article I(3), the U.S. reciprocity declaration and 9 U.S.C. § 202.

Article I(1) offers two separate bases of jurisdiction.[37] The first provision of Article I(1) creates jurisdiction under the New York Convention if the arbitral award is issued in a "State *other than* the State where the recognition and enforcement of such awards" is sought.[38] The second provision in Article I(1) states that the Convention shall also apply to "arbitral awards *not considered as domestic awards* in the State where their recognition and enforcement are sought."[39] This provision is called the nondomestic award provision of Article I(1) and is not defined in the Convention.

The second relevant provision of the New York Convention is Article I(3). Article I(3) authorizes a State, when "signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, *any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.*"[40] Pursuant to Article I(3), the United States

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[35] *See id.* at 188; *see also* Kenneth T. Unger, *The Enforcement of Arbitral Awards Under UNICTRAL's Model Law on International Commercial Arbitration,* 25 COLUM. J. TRANSNAT'L L. 717, 724 (1987).

[36] *See* Unger, *supra* note 35, at 723.

[37] *See* New York Convention, *supra* note 1, 21 U.S.T at 2519, 330 U.N.T.S. at 38. In its entirety, art. I(1) reads:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

Id.

[38] *Id.*(emphasis added).

[39] *Id.*(emphasis added).

[40] *Id.* at art. I(3).

added a reciprocity declaration to the implementing legislation of the Convention, declaring that it "will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State."[41] Thus, the U.S. reciprocity declaration limits the jurisdictional scope of the Convention.

Finally, the last relevant provision is the United States Arbitration Act.[42] 9 U.S.C. § 202 describes the following awards or agreements as subject to the jurisdiction of the New York Convention:

> An agreement or award arising out of . . . a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention *unless* that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.[43]

If the language in this section is used to define the provision in Article I(1) dealing with nondomestic awards, it would extend the application of the New York Convention to disputes between domestic corporations that enter contracts involving performance abroad. Lander made this argument in its petition to confirm under the New York Convention.

B. *The District Court Opinion*

The District Court for the Northern District of Illinois dismissed the case, holding that Lander lacked jurisdiction under the New York Convention.[44] Additionally, the district court held that the court lacked jurisdiction to enforce the award under the FAA due to Lander's failure to explicitly raise a claim under that statute.[45] Thus, the district court found Lander's allegations of diversity to be mere surplusage.

The district court held that the nondomestic provision of Article I(1) could not be used as a basis for creating jurisdiction over a domestically promulgated award under the New York Convention.[46] According to the court, rejecting jurisdiction was necessary to avoid an inconsistency between the Convention and the United States' reciprocity declaration to

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[41] New York Convention, *supra* note 1, 21 U.S.T at 2566, 330 U.N.T.S. at 81.

[42] 9 U.S.C. § 202.

[43] *Id.* (emphasis added).

[44] *See Lander*, 927 F. Supp. at 1082.

[45] *See id.* at 1078 n.1.

[46] *See id.* at 1080–1082.

the Convention.[47] The district court interpreted the U.S. reciprocity declaration to limit the jurisdictional scope of the Convention solely to the enforcement of awards promulgated in a *separate signatory State* from the one in which the award was granted.[48] Defining Article I(1) in terms of 9 U.S.C. § 202 would be inconsistent with this interpretation of the U.S. reciprocity declaration. Section 202 authorizes the use of the Convention to enforce an award in the same State in which the award was issued if the agreement envisages performance abroad.[49] Thus, the district court's interpretation of the U.S. reciprocity declaration prevented the use of 9 U.S.C. § 202 as a definition for the Article I(1) nondomestic provision.[50] As a result, the district court found that jurisdiction was lacking under the New York Convention to enforce the domestic award.[51]

C. *The Seventh Circuit Court of Appeals Opinion*

On appeal, the Seventh Circuit reversed the district court, holding that federal jurisdiction was proper under *both* the New York Convention and the FAA.[52] First, the Seventh Circuit held that jurisdiction was proper under the FAA. The court ruled that Lander's allegation of diverse citizenship under 28 U.S.C. § 1332 and its citation to 9 U.S.C. § 9,[53] could be read as nothing other than a pleading of jurisdiction under the FAA.[54] The court reasoned that MMP's only basis to argue that Lander had not asserted jurisdiction under the FAA was Lander's failure to explicitly allege jurisdiction thereunder.[55]

The Seventh Circuit dismissed MMP's waiver allegation, however, holding that jurisdiction either exists or it does not, and that it would hold harmless the "inadvertent failure to cite the statute."[56] To the contrary, the court held that MMP had waived its ability to challenge jurisdiction through

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[47] *See* 9 U.S.C. § 201. *See also* New York Convention, *supra* note 1, art. I(3), 21 U.S.T at 2519, 330 U.N.T.S. at 38.

[48] *See Lander*, 927 F. Supp. at 1080-1081.

[49] *See* 9 U.S.C. § 202.

[50] *See id.*

[51] *See id.*

[52] *See Lander*, 107 F.3d at 479.

[53] 9 U.S.C. § 9 describes which courts have jurisdiction over a dispute under the Federal Arbitration Act.

[54] *See Lander*, 107 F.3d at 479.

[55] *See id.*

[56] *Id.*

its agreement to be bound by arbitration. Subjecting the case to binding arbitration, the court held, creates jurisdiction in the courts, which provide judicial enforcement of arbitral awards.[57]

After finding that jurisdiction was proper under the FAA, the court stated that an independent review of jurisdiction under both the FAA and the New York Convention was necessary because of important distinctions between the two.[58] The Seventh Circuit explained that the FAA and the New York Convention create different substantive rights for the parties, including: differences in the length of the statute of limitations,[59] differences in the ease by which an arbitral award may be vacated[60] and differences in procedural provisions.[61]

The Seventh Circuit held that the New York Convention does not have exclusive jurisdiction within its "domain of jurisdiction."[62] Rather, the court cited to Article VII of the New York Convention which explicitly states that the Convention shall not "deprive [a] . . . party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law."[63] Thus, the New York Convention and the FAA share jurisdiction over disputes such as the one at issue in *Lander*.[64]

The last issue the Seventh Circuit addressed before turning to the issue of jurisdiction over a domestically promulgated award pertained to whether the venue was proper in the Northern District of Illinois. Under the FAA, the confirmation of an arbitral award shall occur in either (a) the court specified in the arbitration agreement between the parties or (b) in the district where the arbitration was conducted.[65] The arbitration agreement in

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[57] *See id.* at 480.

[58] *See id.*

[59] The FAA has a short, three-month statute of limitations. *See* 9 U.S.C. § 12 (1994). By contrast, the New York Convention has a three-year statute of limitations. *See* 9 U.S.C. § 207.

[60] *See id.*; *see also* discussion *infra* Part IV.

[61] *See Lander*, 107 F.3d at 480. Unlike the FAA, the New York Convention contains its own procedural provisions.

[62] *Id.* at 481.

[63] *Id. See also* New York Convention, *supra* note 1, 21 U.S.T at 2520–2521, 330 U.N.T.S. at 42, 44.

[64] It should be noted, however, that the United States Arbitration Act provides that the New York Convention's terms will govern in the event of a conflict between the two. *See* 9 U.S.C. § 208.

[65] *See* 9 U.S.C. § 9. The New York Convention has a similar provision. *See* 9 U.S.C. § 204.

Lander did not specify the court in which a petition of confirmation should be filed; thus, the first venue provision was not met. The petition of confirmation was filed in the Northern District of Illinois, but the arbitration was conducted in the Southern District of New York.[66] The second venue provision was therefore also not met. Arguably, venue was improper.

The Seventh Circuit held, however, that the provision in the FAA describing the two possible venues merely creates *alternatives* to the traditional venues offered to a party in federal court.[67] Lander filed in the venue in which MMP resides; the district where the defendant resides is a traditional venue. Therefore, the Seventh Circuit found the Northern District of Illinois to be a proper venue. The court stated that there was no reason to force Lander to file in a district less convenient for both parties.[68]

Finally, the Seventh Circuit turned its attention to the issue of whether the district court had jurisdiction to enforce a domestically issued award under the New York Convention. The Seventh Circuit found that the district court had proper jurisdiction under Article I(1) and Article I(3) of the New York Convention.[69] Interpreting the New York Convention as a whole, and providing a consistent reading to all provisions, the Seventh Circuit interpreted the meaning of the nondomestic provision in Article I(1) to be defined by 9 U.S.C. § 202. The Seventh Circuit found the language in § 202 to define the nondomestic provision in Article I (1), and thereby held it to be applicable to the facts in *Lander* in that the agreement called for performance in Poland.[70]

The Seventh Circuit's holding reflected its liberal interpretation of the United States' reciprocity declaration. The court interpreted the U.S. reciprocity declaration to limit jurisdiction under the New York Convention to agreements in which *both parties were signatory States of the Convention.*[71] The court did not find the reciprocity declaration to require that the State where enforcement is sought be a State separate from the one which issued the award. Interpreting the U.S. reciprocity declaration in this manner, the Seventh Circuit found no inconsistencies in defining the

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[66] *See Lander*, 107 F.3d at 480.
[67] *See id.* at 480–481.
[68] *See id.* at 481.
[69] *See id.*
[70] *See id.* at 481–482.
[71] *See id.*

nondomestic provision of Article I(1) by the language of 9 U.S.C. § 202.[72] Thus, the Seventh Circuit's interpretation of Article I(1), Article I(3) and the U.S. reciprocity declaration allowed for the enforcement of the domestically issued arbitral award in *Lander*.

IV. IMPACT OF *LANDER* ON ADR

Because the Seventh Circuit's decision in *Lander* was so recently delivered, neither the Supreme Court nor other districts have had the opportunity to accept, reject or comment upon the holding. However, if the holding in *Lander* is adopted universally it could significantly enlarge the number of domestic arbitral awards which will be enforced under the New York Convention. Greater enforcement of domestic awards under the Convention would result in fewer domestic awards being vacated. Therefore, parties whose arbitral awards fall under the domain of both the FAA and New York Convention are likely to prefer jurisdiction under the Convention.[73]

The U.S. policy of a "pro-enforcement bias"[74] of foreign arbitral awards was established by the case of *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier*.[75] The court mandated that the grounds for vacating an award under the New York Convention be limited to the seven grounds listed in Article V.[76] The court also dictated that the

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[72] *See id.* at 482.

[73] The Seventh Circuit held that the New York Convention does not have exclusive jurisdiction over its domain, but that it shares jurisdiction with the FAA. *See Lander*, 107 F.3d at 481.

[74] *See* Bouzari, *supra* note 8, at 211.

[75] 508 F.2d 969 (2d Cir. 1974).

[76] The seven grounds include:

> (a) invalidity of the arbitration agreement;
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> (b) violation of due process;
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> (c) excess by arbitrator of his authority;
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> (d) irregularity in the composition of the arbitral tribunal or in the arbitral procedure; and
>
> (e) award not binding, suspended or set aside in the country of origin.
>
> Additionally, the court can refuse to enforce an award under Article V(2) if its subject matter is incapable of settlement by arbitration under the enforcing country's laws or if recognition or enforcement of the award would violate the enforcing country's public policy.

public policy ground, the ground most often pled by parties opposing confirmation of an award, be construed narrowly. The court stated that the "'[e]nforcement of foreign arbitral awards may be denied on [the public policy] basis only where enforcement would violate the forum State's most basic notion of morality and justice.'"[77]

Ironically, it was feared at the time the U.S. became a signatory State to the New York Convention that the grounds could be used by national courts to create a loophole in the enforcement of the Convention.[78] Of the seven grounds, the greatest concern was the broadness of the undefined "public policy" ground.[79] U.S. courts, however, have rarely refused to enforce a foreign arbitral award because of public policy.[80] Similarly, U.S. courts have rarely vacated foreign arbitral awards because of a violation of due process. In fact, only in a few cases in which violations were particularly egregious have parties been successful in vacating an award under this ground.[81] Arguably, therefore, several of the grounds to vacate an award under the New York Convention exist in theory only.[82]

Domestic arbitration awards, by contrast, are often vacated under the FAA because they are subject to the expansive ground of "manifest disregard of the law."[83] Additionally, U.S. courts have used a "public policy" basis to vacate domestic arbitral awards under the FAA, though the statute contains no language to this effect.[84] Possible reasons for this greater deference to foreign arbitral awards under the New York Convention than to domestic awards under the FAA[85] include comity or respect for the "'capacities of foreign and transnational tribunals,'"[86] and

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Choi, *supra* note 3, at 189 (paraphrasing New York Convention, *supra* note 1, 21 U.S.T. at 2520, 330 U.N.T.S. at 40, 42) (footnotes omitted).

[77] Bouzari, *supra* note 8, at 211 (quoting *Parsons*, 508 F.2d at 974).

[78] *See id.* at 208.

[79] *See id.*

[80] *See* Choi, *supra* note 3, at 199, 206; *see also* Bouzari, *supra* note 8, at 208.

[81] *See* Choi, *supra* note 3, at 208.

[82] *See* Bouzari, *supra* note 8, at 212.

[83] *Id.* at 207.

[84] *See id.* at 208, 212–214.

[85] A comparison of the enforcement of foreign arbitral awards under the New York Convention versus domestic awards under the FAA demonstrates that a foreign award is much less likely to be vacated. For a complete comparative analysis, see Bouzari, *supra* note 8, at 213–218.

[86] Bouzari, *supra* note 8, at 215 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985)).

stare decisis.[87]

However, in light of the "pro-enforcement bias" of the New York Convention,[88] the *Lander* opinion could greatly increase the number of domestic arbitral awards which will be enforced under the New York Convention. Increased use of the New York Convention may lead to the greater enforcement of arbitral awards and agreements in the U.S. in terms of international commerce.

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[87] *See id.* at 216.

[88] The Seventh Circuit alluded to this bias in its opinion. However, the court did not give its opinion of whether or not the bias existed. *See Lander*, 107 F.3d at 480.