

SCANNED ON 12/7/2006
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HERMAN CAHN
Justice

PART 49

Investools, Inc

INDEX NO. 602876/2006

MOTION DATE 8/30/06

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

Scott Watz, individually, Ted B. Scheel
and Jamie Lynn Scheel, individually and
as Trustees of the Scheel Family Trust

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

FILED
DEC 07 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: Nov. 28 2006

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

subsidiary of INVESTools, was created for the purpose of acquiring SESI, a company that provided marketing and database services, from defendants.

The defendants Waltz and the Shuels initiated an action for, among other things, breach of contract and conversion, in California state court on July 18, 2006. In that action, the defendants alleged that INVESTools and SES Acquisition Corp. failed to make earn-out payments in 2005, as specified under the Merger Agreement. The Merger Agreement called for Waltz and the Shuels to receive payments, which were contingent on Acquisition Corp. achieving certain revenue levels. Also, INVESTools was to continue to purchase services from SES Acquisition Corp. as long as it continued to provide services "in a manner reasonably acceptable to [INVESTools]." (Waltz Aff, Exh B, § 3.3(I).)

Before answering the Complaint in the California action, INVESTools commenced this action seeking a declaration that: (1) the defendants are not entitled to an earn-out payment for 2005, and (2) the Merger Agreement contains a mandatory forum selection clause requiring any action be brought in New York county, and that therefore defendants should be stayed from continuing to prosecute the California action.

The Merger Agreement contained both a choice-of-law provision and a jurisdiction provision. The choice-of-law provision clearly provided that the Merger Agreement was to be governed by New York law. (Waltz Aff, Exh B, § 8.5.) The jurisdiction provision stated that:

Any process against a party in, or in connection with, any suit, action or proceeding arising out of or relating to this Agreement or any of the transactions contemplated by this Agreement may be served personally or by certified mail at the address set forth in Section 8.2 with the same effect as though served on it or them personally. Each party hereby irrevocably submits in any suit, action or proceeding arising out of or relating to this Agreement or any of the transactions contemplated by this Agreement to the

jurisdiction of the United States District Court for the Southern District of New York, and the jurisdiction of any court of the State of New York located in New York County, and hereby waives any and all objections to jurisdiction and review that it or they may have under the laws of New York or the United States.

(Waltz Aff, Exh B, § 8.6.) Based on this provision, INVESTools has moved for a preliminary injunction to enjoin the previously filed California action and, instead, to proceed with the New York action.

DISCUSSION

In order to obtain a preliminary injunction, INVESTools must establish: (1) a likelihood of success on the merits; (2) irreparable harm if the preliminary injunction is not granted; and (3) a balance of equities weighing in its favor. *Doe v Axelrod*, 73 NY2d 748, 750 (1988).

INVESTools relies on the jurisdiction provision in the Merger Agreement to contend that the parties consented to New York county as the exclusive forum for all actions relating to the Merger Agreement. It reads the jurisdiction provision as an “unequivocal forum selection clause” mandating that the dispute be resolved in New York. (Pl Br at 2.)

Defendants, on the other hand, contend that the jurisdiction provision merely signifies that New York is a permissive jurisdiction and that the parties would not object to service of process in a New York action; it does not mandate that any actions be brought only in New York, nor is the word “exclusive” to be found in the provision. Defendants read the jurisdiction provision as “nothing more than a service of suit clause,” (Def Br at 1), i.e. a clause providing that the parties consent to a particular jurisdiction to ensure the parties accept service of process in that jurisdiction, but “[i]t does not bind the parties to litigate in a particular forum.” *Brooke Group v JCH Syndicate* 488, 87 NY2d 530, 534 (1996).

A jurisdiction clause will be read as exclusive if it contains language that demonstrates the parties' intention to be bound to a particular forum. *Babcock & Wilcox Co. v Control Components*, 161 Misc 2d 636, 643 (Sup Ct NY County 1993). "An agreement [c]onferring jurisdiction in one forum will not be interpreted as [e]xcluding jurisdiction elsewhere unless it contains specific language of exclusion." *New York v Pullman, Inc.*, 477 F Supp 438, 442 (SDNY 1979).

Typically, a clear indication of intent regarding inclusion and exclusion are words such as "shall" or "exclusive jurisdiction." *Babcock & Wilcox Co.*, at 642. Without any definitive words, courts have held that the provisions in question indicated permissive, or inclusive, jurisdictions. *Reliance Ins. Co. v Six Star, Inc.*, 155 F Supp 2d 49, 58 (SDNY 2001) (clause that the parties "will submit to the jurisdiction of the State of New York and will comply with all the requirements necessary to give such court jurisdiction" conferred permissive jurisdiction); *Credit Alliance Corp. v Crook*, 567 F Supp 1462, 1465 (SDNY 1983) (provision stating that the parties "agree to the venue and jurisdiction of any court in the State and County of New York" held to be permissive). Where a provision provided that "the undersigned does hereby agree to the venue and jurisdiction of any court in the State and County of New York regarding any matter arising hereunder," it was held to be a consent to jurisdiction clause that did not deprive the parties of the right to sue in another jurisdiction. *Orix Credit Alliance v Mid-South Materials Corp.*, 816 F Supp 230, 231-32 (SDNY 1993). The provision in *Orix Credit Alliance* is comparable to the one at issue in this case. There, the parties consented to jurisdiction in a state or a federal court in New York City, and waived objections to jurisdiction in such courts; they

did not agree that New York County should be the exclusive jurisdiction for any action relating to the Merger Agreement.

INVESTools cites to a recent decision by the Court of Appeals in support of its argument that the provision confers exclusive jurisdiction. In *Boss v American Express Financial Advisors, Inc.*, 6 NY3d 242 (2006), the parties had unambiguously provided for disputes to be decided in Minnesota courts and, therefore, the action brought in New York was improper. *Id.*, at 246. In addition to the specific language in the provision, two additional points were influential. First, the parties not only agreed to the jurisdiction of Minnesota for determining any controversies regarding the agreement, but also “expressly waive[d] any privileges contrary to [the] provision.” *Id.* Thus, the parties waived their rights to have any related matter heard outside of Minnesota. Second, there was no reason why the parties would contemplate litigating in New York because all of the relevant events took place in Minnesota and it was evident that the parties expected litigation to occur in Minnesota. *Id.* at 247.

However, INVESTools’s reliance on that case is misplaced because the jurisdiction provisions are not comparable. There is no similar language to which INVESTools can point whereby the parties waived any contrary rights to jurisdiction in New York. The provision in this case allowed for service of process in New York, and the parties agreed to submit to any action brought in New York without objecting to jurisdiction.

A preliminary injunction is not warranted.

Notwithstanding the above, the action is pending here. It seems clear that in view of the provision in the parties’ agreement, this court has jurisdiction. The California court may also

have jurisdiction. Whether it is more appropriate that this action or the California action be the one to continue, is not decided in this decision.

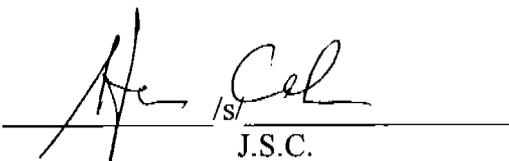
Accordingly, it is

ORDERED that INVESTools's motion for preliminary injunction is denied; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: November 28, 2006

ENTER:



J.S.C.

FILED
DEC 07 2006
NEW YORK
COUNTY CLERK'S OFFICE