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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Bransten, J. Justice

PART 56

Eloxo Cane Overseas, Ltd. et al

- v -

Newsday USA, LLC

INDEX NO. 600809/08

MOTION DATE 3/20/08

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

FILED
JUN 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 6/17/08

_____ J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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FLUXO-CANE OVERSEAS LTD. and MANOEL FERNANDO GARCIA

Petitioners,

Index No: 600809/08

-against-

DECISION AND ORDER

NEWEDGE USA, LLC (f/k/a FIMAT USA, LLC),

Respondent.

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RICHARD B. LOWE III, J:

This matter arises from a dispute in connection with losses from positions in futures and options contracts. Respondent filed a Notice of Arbitration and Petitioner now seeks to stay the arbitration proceeding pursuant to CPLR §§ 3001, 6311, and 7503.

BACKGROUND

Unless otherwise noted, the facts below are taken from the P[redacted]

Petitioner Fluxo-Cane Overseas Ltd. ("Fluxo-Cane") is a British Virgin Islands corporation. Petitioner Manoel Fernando Garcia is the sole shareholder and president of Fluxo-Cane.

Respondent Newedge USA, LLC (f/k/a Fimat USA, LLC ("Newedge")) is a Delaware Limited Liability Company. Newedge is a broker that offers clearing and settlement services to investors in a range of investment instruments, including exchange-traded listed derivatives and equities, as well as regular and exotic commodities listed on over-the-counter markets.

Newedge is a subsidiary of non-party Newedge Group S.A. (UK Branch) (f/k/a Fimat

International Banque S.A. (UK Branch) ("Newedge Bank")). Newedge Bank is a branch of a banking institution that provides financing services, including margin financing facilities.

On February 13, 2008, Newedge filed a Notice of Arbitration with ICE Futures US, Inc. (f/k/a Board of Trade of the City of New York ("ICE")).[1]

The facts below are taken from Respondent's Notice of Arbitration.[2]

Newedge is a clearing member of ICE. Fluxo-Cane is a member firm of ICE, and Garcia is a conferring member.

As a result of a merger, Fluxo-Cane signed a new Customer Agreement with Newedge on March 18, 2007 ("Customer Agreement"). Additionally, Newedge, Newedge Bank, and Fluxo-Cane entered into a Demand Loan Margin Financing Facility on April 24, 2007 ("Financing Agreement"). The Financing Agreement provided for Newedge Bank to loan funds for Fluxo-Cane to use as margin in its account with Newedge. Both the Customer Agreement and the Financing Agreement were supported by a personal guarantee executed by Garcia in favor of Newedge and Newedge Bank (the "Personal Guarantee").

Fluxo-Cane traded sugar related futures and options pursuant to the Customer Agreement and used the financing facility under the Financing Agreement to finance its trades.

On January 14, 2008, Newedge issued a margin notice in the amount of $5,000,000 for same day funds as a result of losses incurred by Fluxo-Cane on its futures and options transaction. On the same day, ICE directed Newedge to collect an additional amount of margin

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[1]ICE is a designated contract market under the Commodity Exchange Act. ICE operates a global futures and options exchange for trading in a range of agricultural commodities, including cocoa, coffee, cotton, frozen concentrated orange juice, and suger.

[2]Verified Petition Ex 1.

on certain positions held by Fluxo-Cane. Subsequently, Newedge issued a margin notice in the amount of $6,477,670.20.

The January 14, 2008 margin notice stated that Fluxo-Cane could only place trades for liquidation purposes and pursuant to the Financing Agreement the amount of outstanding loans could not be increased.

On January 16, 2008, the amount of the outstanding loan was reduced from $4,513,894.00 to $2,821,534.00 by applying cash in the account to the loan.

Newedge asserts in the Notice of Arbitration that because Fluxo-Cane failed to satisfy the January 14, 2008 margin requirement, Fluxo-Cane was in default under the Customer Agreement with Newedge, which, in turn, resulted in the termination of the Financing Agreement with Newedge Bank.

On January 16, 2008, ICE sent a letter to Garcia advising him that ICE Board of Directors determined that Fluxo-Cane had exceeded position accountability levels established by ICE and that each firm carrying positions for Fluxo-Cane was required to reduce positions.

On January 17, 2008, Newedge began closing out Fluxo-Cane's open positions. By end of day February 12, 2008, all open positions had been offset. Also on February 12, 2008, Fluxo-Cane had an outstanding margin call of $6,477,670.20 and a deficit balance in its account of $5,106,889.59. This deficit balance is composed of $2,821,534.00 outstanding on the loan and owed to Newedge Bank, with the remaining $2,285,355.59 owed to Newedge as a futures account margin deficit.

On February 13, 2008, Newedge filed the Notice of Arbitration with ICE. Asserting that it has an "Allowable Claim" under ICE Rule 20.02(b), Newedge sought arbitration of its claims

to recover $5,106,889.59, the deficit balance in Fluxo-Cane's account.

On March 19, 2008, Fluxo-Cane filed a Petition seeking, among other things, a stay of the ICE Arbitration under CPLR §§ 3001, 6311, and 7503.

DISCUSSION

The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]).

Irreparable Harm

Fluxo-Cane makes out a showing of irreparable harm, because if Newedge's claim is not arbitrable, Fluxo-Cane would be "forced to expend time and resources arbitrating an issue that is not arbitrable, and for which any award would not be enforceable" (*see Longstreet Assocs., L.P. v Bevona*, 16 F Supp 2d 290, 293 [SD NY 1998], citing *Maryland Casualty Co. v Realty Advisory Bd. on Labor Relations*, 107 F3d 979, 984-85 [2d Cir 1997]. The rationale is that "by agreeing to arbitrate a party waives in large part many of his normal rights under the procedural and substantive law of the State, and it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent" (*see Kahan Jewelry Corp. v Venus Casting, Inc.*, 17 Misc 3d 684, 689 [Sup Ct, New York County 2007]).

Likelihood of Success

Fluxo-Cane seeks a preliminary injunction staying arbitration on the grounds that the claims asserted in Newedge's Notice of Arbitration are not arbitrable. For the purposes of this motion, Fluxo-Cane must demonstrate the lack of arbitrability of claims brought under three agreements: the Customer Agreement, the Financing Agreement, and the Personal Guarantee.

The principles governing adjudication of arbitrability disputes essentially provide: (1) "that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit," (2) "that the question of arbitrability -- whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance -- is undeniably an issue for judicial determination," and (3) "that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims" (*Maryland Cas. Co. v Realty Advisory Bd. on Labor Rels.*, 107 F3d 979, 982 [2d Cir 1997], citing *AT&T Techs., Inc. v Communications Workers of Am.*, 475 US 643, 648-50 [1986] [internal quotations marks and citations omitted] [summarizing the holdings of the three cases comprising the trilogy]; *accord Board of Educ. v Watertown Educ. Ass'n*, 93 NY2d 132, 141 [2000]; *Smith Barney Shearson Inc. v Sacharow*, 91 NY2d 39, 41 [1997]).

Here, Fluxo-Cane and Newedge are members of ICE. Under ICE Rules, the parties agreed to arbitrate under certain circumstances. ICE Rules provide for mandatory arbitration for any "Allowable Claim." In turn, an "Allowable Claim" is defined as a

> Claim for losses arising directly from (i) any order or Transaction for the purchase, sale, exercise or expiration of an Exchange Future Contract or Exchange Option, (ii) any cash market transaction which is part of, or directly connected to, any Transaction, (iii) any documented loan made to a Member by his Clearing member Guarantor for the express purpose of acquiring a Membership, (iv) any dispute concerning the purchase, sale, transfer or ownership of a Membership and (v) the performance of the Clearing Member guarantor's obligations pursuant to the terms of its Guarantee Agreement. An Allowable Claim shall not include legal or other incidental expenses incurred in connection with any such losses or with events giving rise to any such losses.

(Verified Petition Ex 6 at 4.) Accordingly, Fluxo-Cane and Newedge, as Members of ICE,

agreed to arbitrate an "Allowable Claim" (*see Willard Alexander, Inc. v Glasser*, 31 NY2d 270, 273 [1972] [when a person becomes a member of an association, he agrees, as a matter of law, to abide by the duly enacted provisions of its constitution and by-laws]; *God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assocs., LLP*, 6 NY3d 371, 374 [2006]). While Fluxo-Cane and Newedge agreed to arbitrate certain claims pursuant to their ICE membership, Garcia is not a member of ICE and, therefore, did not similarly agree to submit to arbitration. Based on the principle that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit," Garcia may not be compelled to arbitrate a dispute in connection with Garcia's obligations under the Personal Guarantee (*AT&T*, 475 US at 648). Accordingly, Newedge's arbitration claim against Garcia for amounts owed under the Personal Guarantee is stayed.

If members of an association agreed to submit to arbitration, then this Court must address whether an agreement by the members may supersede the prior agreement to arbitrate.

Here, following Fluxo-Cane and Newedge's respective memberships into ICE, two relevant agreements were entered into. Fluxo-Cane and Newedge entered into a customer agreement (the "Customer Agreement") governing the rights and obligations of the parties as customer (Fluxo-Cane) and as clearing broker (Newedge) (Verified Petition at ¶ 22). To accommodate margin call requirements under the Customer Agreement, Newedge Bank and Fluxo-Cane entered into a demand loan margin financing agreement (the "Financing Agreement") (*id.* at ¶ 28). Neither of the two agreements contained an arbitration clause (*see id.* at ¶¶ 23, 29, 32). Accordingly, this Court must determine whether the forum selection clauses in the Customer and Financing Agreements modified or superseded ICE Rules mandating

arbitration of an "Allowable Claim."

Here, the Financing Agreement included a forum selection clause which provides: "All disputes under this agreement shall be resolved by federal or state courts located exclusively in New York, New York, and New York substantive law shall apply . . . ." In unequivocal terms, the broad forum selection clause in the Financing Agreement submits to the exclusive jurisdiction of New York courts, carving nothing out for other disputes to be arbitrated. Giving the words of the forum selection clause in the Financing Agreement their plain and ordinary meaning, this Court concludes that Fluxo-Cane and Newedge submitted to the jurisdiction of New York courts (*see Eastern Minerals Int'l, Inc. v Cane Tenn., Inc.*, 274 AD2d 262, 265 [1st Dept 2000]). Accordingly, Newedge's arbitration claim seeking an award of $2,282,534.00 under the Financing Agreement shall be stayed.

In contrast to the Financing Agreement, the Customer Agreement provides for a forum selection clause which reads:

> *Customer* [Fluxo-Cane] *irrevocably submits to the jurisdiction of the courts of New York* and of the Federal Courts of the Southern District of New York with respect to litigation relating to all such disputes, including, but not limited to, disputes arising directly or indirectly as a result of or the relationship established as a result of this Agreement and transactions subject to this Agreement, agrees to commence actions and proceedings and assert claims for relief involving them only in such courts (unless Customer [Fluxo-Cane] has otherwise agreed to arbitrate all disputes with FIMAT [Newedge], in which case such arbitration shall be held only in New York City) . . .

(Verified Petition Ex 1 Attachment B at 14 [emphasis added]).

Generally, "any two parties to a bilateral contract could agree to modify it" (*Credit Suisse First Boston Corp. v Pitofsky*, 4 NY3d 149, 156 [2005]). Accordingly, the forum selection clauses in the Customer Agreement and ICE Rules concurrently governed forum selection

between the parties (*Intercontinental Packaging Co. v China Nat'l Cereals, Oils & Foodstuffs Import & Export Co.*, 159 AD2d 190, 194-95 [1st Dept 1990]). Section III.A of the Customer Agreement confirms this conclusion. Section III.A states:

> The Account(s) and all transactions and agreements in respect of the Account(s) shall be subject to:
> 1. the terms of this Agreement and any other terms Agreed by Fimat [Newedge] and Customer.
> * * *
> 3. the regulations of all applicable Federal, state, and self-regulatory agencies or authorities, including, but not limited to: (i) the provisions of the Commodity Exchange Act, as amended, and any rules, regulations, orders and interpretations promulgated thereunder by the CFTC; and (ii) the constitution, by-laws, rules, regulations, order and interpretations of the Commodity Exchange (and its clearing house, if any) on which such transactions are executed and cleared, and any relevant registered futures association, including, without limitation, the National Futures Association ("NFA"), except to the extent Subsections III.A.1 or III.A.2 above provide more specific restrictions.
> * * *

(Verified Petition Ex 1 Attachment B at 9.) Section III.A shows that both the terms of the Customer Agreement and ICE Rules controlled the parties' relationship. Further, to the extent that the terms in the Customer Agreement provided specific restrictions, Section III.A.3 establishes that the Customer Agreement took priority over ICE Rules. Thus, the next issue is, under the forum selection provision in the relevant agreements, whether the parties agreed to arbitrate the dispute asserted in the Notice of Arbitration.

Fluxo-Cane argues that because it declined to sign the Arbitration Agreement form, it should not be compelled to arbitrate the claims in the Notice of Arbitration. With respect to the Customer Agreement, it includes an Arbitration Agreement form which reads:

> Any controversy or claim . . . arising out of or relating to Customer Account(s) with Fimat [Newedge], to transactions between Fimat [Newedge] and Customer, to the Customer Agreement with Fimat [Newedge] or any other agreement

> between Fimat [Newedge] and Customer, or to the breach of any such transaction or agreement shall . . . be resolved by arbitration . . . .

While Fluxo-Cane may have refused to sign the arbitration agreement, the ICE Rules mandating arbitration remain applicable if an "Allowable Claim" is brought.[3] However, the Customer Agreement also provides: "*Customer* [Fluxo-Cane] irrevocably submits to the jurisdiction of the courts of New York . . . ." Indeed, Fluxo-Cane offers no support for the claim that a submission by Fluxo-Cane may be construed as a submission by Newedge as well. Moreover, Fluxo-Cane's obligation to submit to the jurisdiction of New York courts under the Customer Agreement does not supersede its obligation to submit to arbitration under ICE Rules. Accordingly, giving the words in the forum selection clause their plain and ordinary meaning, this Court finds that Newedge did not submit to the jurisdiction of New York courts (*see Eastern Minerals Int'l, Inc. v Cane Tenn., Inc.*, 274 AD2d 262, 265 [1st Dept 2000]). Furthermore, because Newedge did not submit to the jurisdiction of New York courts, ICE Rules requiring Newedge to arbitrate an "Allowable Claim" controls the determination of arbitrability. Thus, the issue that remains is whether the claim under the Customer Agreement asserted in the Notice of Arbitration is an "Allowable Claim" under ICE Rules.

This Court now reaches the question of the effect of ICE Rules upon the rights of the parties. Under the ICE Rules, members agree to arbitrate any "Allowable Claim." An "Allowable Claim" includes a claim for "losses arising directly from any order or Transaction for

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[3]Although not raised, it may be argued that Subsection III.A.1 may be read to incorporate the terms of the Financing Agreement as well, including the terms of the forum selection clause. However, the Customer Agreement also provides that in the event of a conflict between provisions in the Customer Agreement and another Agreement between the parties, the Customer Agreement shall govern (Verified Petition Ex 1 Attachment B at 16).

the purchase, sale, exercise or expiration of an Exchange Futures Contract or Exchange Option . . ." (Verified Petition Ex 6 at 4).

Newedge argues that the dispute asserted in the Notice of Arbitration is a dispute that arises directly from losses Newedge suffered by covering Fluxo-Cane's trading losses (Mem in Opp at 10). Specifically, Newedge argues that because Newedge is obligated to cover the losses of its clients, Newedge suffered losses directly from the trades when Fluxo-Cane had insufficient margin in its account to cover its own trading losses.

Fluxo-Cane responds with the characterization that Newedge seeks to recover losses from losses, namely that the purported losses Newedge suffered were, in reality, directly from Fluxo-Cane's losses. The import of Fluxo-Cane's characterization of Newedge's claim for losses from losses is to take Newedge's claim beyond the ambit of an "Allowable Claim" under ICE Rules.

"[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). "A court will endeavor to give the [contract] construction most equitable to both parties instead of the construction which will give one of them an unfair and unreasonable advantage over the other" (*Metropolitan Life Ins. Co. v Noble Lowndes Int'l*, 84 NY2d 430, 437 [1994], quoting *Fleischman v Furgueson*, 223 NY 235, 241 [1918] [internal quotation marks omitted]). Where a provision of an agreement is susceptible to more than one reasonable interpretation, the provision is ambiguous and construction of the provision's meaning as a matter of law is inappropriate (*LoFrisco v Winston & Strawn LLP*, 42 AD3d 304, 307 [1st Dept 2007]).

Therefore, to prevail on this prong for a preliminary injunction, Fluxo-Cane must

demonstrate a likelihood that as a matter of law Newedge's purported losses do not "arise directly from any order or Transaction for the purchase, sale, exercise or expiration of an Exchange Futures Contract or Exchange Option" (*see* Verified Petition Ex 6 at 4). Here, the Description of Claim in the Notice of Arbitration alleges:

> Throughout the process of demanding payment and alerting ICE of its claim, Newedge continued to close out Fluxo-Cane's open positions. As of the close of business February 12, 2008, all open positions had been offset. Also, as of the close of business on February 12, 208, Fluxo-Cane had still not satisfied its outstanding margin call of $6,477,670.20, and the deficit balance in the account was $5,106,889.59. This deficit amount is composed of $2,821,534.00 outstanding on the loan and owed to Newedge Bank, with the remaining $2,285,355.59 owed to Newedge LLC as a futures account margin deficit.

(Verified Petition Ex 1 at 5.) Newedge alleges that Fluxo-Cane's insufficient margin balance caused Newedge to close out Fluxo-Cane's open positions on the Exchange (*see id.*). Further, Newedge alleges that as a result of closing out the open transactions on the Exchange, Newedge incurred losses because Newedge, as Fluxo-Cane's clearing broker, was obligated to pay the Exchange for losses on those closed out transactions (*see id.*; Cunin Aff ¶ 6). This Court finds that a reasonable interpretation of an "Allowable Claim" includes Newedge's asserted claim in its Notice of Arbitration. Accordingly, this Court finds that Fluxo-Cane fails to demonstrate a likelihood of success in showing that Newedge has not asserted an "Allowable Claim" under the Customer Agreement.

Balance of Equities

Lastly, this Court finds that the equities are equally balanced. Here, Fluxo-Cane has failed to establish that the hardship it may sustain in the absence of a preliminary injunction would be any more than Newedge might experience as a result of its imposition (*see Somers*

Assocs. v Corvino, 156 AD2d 218, 219-220 [1st Dept 1989], *citing Edgeworth Food Corp. v Stephenson*, 53 AD2d 588 [1st Dept 1976]; *Metropolitan Package Store Assn. v Koch*, 80 AD2d 940 [3d Dept 1981]). Moreover, while Fluxo-Cane asserts that it will suffer irreparable harm by arbitrating claims in connection with its margin deficit, Fluxo-Cane's failure to maintain adequate margin precipitated the Notice of Arbitration in the first instance.

CONCLUSION

ORDERED that the Petition is granted, insofar as the Petition seeks to stay arbitration of claims under the Financing Agreement and the Personal Guarantee; and it is further

ORDERED that the Petition is denied, insofar as the Petition seeks to stay arbitration of claims under the Customer Agreement; and it is further

ORDERED that Petitioner shall arbitrate any "Allowable Claim" under the Customer Agreement and as defined by ICE Rules.

Dated: 6/13/08

ENTER:

J.S.C.