

Jonas v Newedge USA, LLC

2008 NY Slip Op 32168(U)

July 30, 2008

Supreme Court, New York County

Docket Number: 0600585/2008

Judge: Richard B. Lowe

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

PRESENT: Loewe
Justice

PART 56M

Stanley Jonas and
Apicom Management Partners LLC

INDEX NO. 600585/08

Newedge USA, LLC,
Newedge Financial, Inc., and
Societe Generale, S.A.

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

AUG 04 2008

COUNTY CLERK
NEW YORK

Loewe
HON. RICHARD D. LOEWE, JR.

Dated: 7/30/08

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
STANLEY JONAS and AXIOM MANAGEMENT
PARTNERS, LLC,

Plaintiffs,

-against-

NEWEDGE USA, LLC, NEWEDGE FINANCIAL, INC.,
and SOCIÉTÉ GÉNÉRALE, S.A.,

Defendants.

-----X
RICHARD B. LOWE, III, J.:

Index No. 600585/08
FILED
AUG 04 2008
COUNTY CLERK'S OFFICE
NEW YORK

In this action, plaintiffs Stanley Jonas (Jonas) and Axiom Management Partners, LLC (Axiom) contend that defendant Newedge USA, LLC, f/k/a Fimat USA, LLC (Fimat) has dishonored a settlement agreement arising out of a prior arbitration by failing to pay plaintiffs commissions, profits, trading discounts and introductory fees.

Motion Sequence Nos. 001 and 002 are consolidated for disposition, and are disposed of in accordance with this decision. In Motion Sequence No. 001, Fimat moves, by order to show cause, for an order, pursuant to the Federal Arbitration Act and CPLR Article 75, compelling plaintiffs to arbitrate their claims against Fimat, and staying the prosecution of plaintiffs' claims against Fimat herein pending such arbitration. Fimat also requests an extension of time for Fimat to answer, move or otherwise respond to any claims not directed to arbitration up and through 20 days after the hearing on Fimat's motion.

In Motion Sequence No. 002, defendants Société Générale, S.A. (Société Générale) and Newedge Financial, Inc. f/k/a Calyon Financial, Inc. (CFI) move, by order to show cause, for an order, pursuant to CPLR 3013 and 3211 (a) (7), dismissing the complaint as against them, or staying this action pending the arbitration.

FACTS

Fimat is a registered broker dealer and futures commission merchant principally engaged in the intermediation of futures contracts, fixed income securities, equities, foreign exchange, and their related derivatives for customers, affiliates and counterparties around the country and internationally. Fimat maintains offices in Chicago, Houston, Kansas City, New York, Philadelphia and San Francisco (Aff. of C. Martin Goldenberg, ¶ 2).

Jonas was a Fimat employee from 1991 to 2005, co-heading Fimat's Derivative Products Group (the DPG Group) with Pierre Wolf, another Fimat employee (*id.*, ¶¶ 14-15). In the spring of 2005, Jonas, later joined by Wolf, commenced an arbitration against Fimat before the Hon Michael J. Dontzin (J.S.C., Ret.) at JAMS¹ to challenge alleged non-payments and underpayments by Fimat of commissions and profits that were owed to him under his employment agreement with Fimat (Amended Complaint,² ¶¶ 1, 17).

The 2005 arbitration was settled in principle, and the points of agreement read into the record, in August 2005 (*id.*, ¶ 18). As part of the settlement, the employment relationship between Fimat and Jonas ended, after which Jonas, individually and through Axiom, a limited liability company of which Jonas is the principal member, entered into an independent contractor relationship with Fimat (Amended Complaint, ¶ 3). Pursuant to that independent contractor relationship, Jonas was to receive a fixed proportion of commissions that were

¹ JAMS, formed in 1979 as "Judicial Arbitration and Mediation Services, Inc.," is a nationwide alternative dispute resolution service.

² Although both the moving and opposing papers refer to the complaint, plaintiffs served and filed an amended complaint, as of right, on April 15, 2008.

generated by trades executed on behalf of his customers (Amended Complaint, ¶ 3; Jonas Aff., ¶ 6). Jonas was also to receive a portion of the Aggregate Net Revenue of the DPG Group (*id.*). That independent contractor relationship continued until November 30, 2007, when Fimat exercised its contractual right to buy out Jonas and Axiom for \$12 million (*id.*, ¶¶ 2, 3; Goldenberg Aff., ¶¶ 6, 10).

In October of 2006, the parties entered into an “Introducing Broker and Settlement Agreement between Fimat USA, LLC and Stanley R. Jonas” (the IB/Settlement Agreement [Goldenberg Aff., Exh A]), which expressly settled all their past disputes, and set forth the terms of the prospective relationship between Fimat, Jonas and Axiom, “an entity principally owned and controlled by [Jonas]” (*id.*, ¶ 3; IB/Settlement Agreement, at 1; Amended Complaint, ¶ 3). Plaintiffs allege that Fimat “delayed” signing this final agreement with them as a tactic to minimize the sums that Fimat would ultimately pay Jonas (Amended Complaint, ¶¶ 2, 21).

The IB/Settlement Agreement contains several terms governing the relationship of the parties, including specifying the services plaintiffs were to perform for Fimat, and how plaintiffs were to be compensated by Fimat for their services, as well as in connection with certain trades of plaintiffs’ customers (see *e.g. id.*, ¶¶ 3, 23, 26-30, 35-37). Jonas also alleges that he had two additional agreements with Fimat. First, he alleges that he and Fimat agreed that he was to share in a portion of so-called “floor broker rebates” received by Fimat on certain trades (*id.*, ¶¶ 31-34). Second, he asserts that he was to receive a fee for Fimat’s hiring of certain employees that he introduced (*id.*, ¶¶ 59-62).

Jonas alleges that Fimat began almost immediately to dishonor its obligations

under the IB/Settlement Agreement by failing to pay commissions and other revenue when due, as well as under the other two independent arrangements Jonas had with Fimat (*id.*, ¶¶ 7, 38-40). Jonas asserts that, through his long-time counsel Leon Baer Borstein, Esq., he challenged Fimat concerning those material breaches of the IB/Settlement Agreement several times during 2007, culminating in a letter to Fimat dated September 30, 2007, which identified a series of unauthorized deductions by Fimat from the commissions payable to plaintiffs. Plaintiffs allege that, as a result of Fimat's alleged breaches, Jonas "indicated" to Fimat that he would be terminating the relationship between plaintiffs and Fimat. In that letter, Borstein also reserved the right to commence arbitration (Jonas Aff., ¶ 8; Borstein Aff., ¶ 4).

The IB/Settlement Agreement contains the following broad arbitration clause:

Any future dispute between Fimat and Jonas shall be resolved before the Hon. Michael J. Dontzin or his designee at JAMS; the arbitrator shall strictly construe the terms of this Agreement before giving full force and effect to all its terms and conditions. However, if JAMS is unable to offer a hearing date within 5 business days of the demand, either party may commence litigation in the State or Federal courts located in the City of New York. New York procedural and substantive law shall apply

(IB/Settlement Agreement, ¶ 19).

After Jonas failed to commence arbitration against Fimat, Fimat brought an arbitration against Jonas by letter dated October 25, 2007 to Judge Dontzin (Goldenberg Aff., Exh C [10/25/07 letter from Fimat to Dontzin]).

Plaintiffs concede that "[p]ursuant to ¶ 19 of the IB/Settlement Agreement, Jonas and Fimat agreed upon the manner in which disputes between them would be decided," i.e., through arbitration (Amended Complaint, ¶ 12). Plaintiffs claim to be excused from the arbitration requirement, however, because "despite a formal request to the JAMS case manager

by Jonas's counsel on December 5, 2007 to commence the arbitration, JAMS indicated that it could not do so because Fimat had failed to pay its mandatory filing fee to JAMS" and "therefore, a hearing date was not offered within the 5 day period of the demand" (*id.*, ¶ 13).

Defendants contend that plaintiffs have expressly waived the five-day requirement, and therefore, must continue to arbitrate their claims.

In the October 25, 2007 letter, Fimat requested joinder of the Jonas arbitration with a then-pending arbitration that Pierre Wolf had commenced against Fimat. Jonas, through Borstein, responded on October 28, 2007 to Judge Dontzin by objecting to consolidation of his arbitration with Wolf's arbitration, and expressly informed JAMS that in connection with any such arbitration, Jonas had waived the five-day requirement:

As Mr. Jonas' counsel, I certainly do not consent to the joinder of two distinct actions, pursuant to two separate contracts by two claimants not involved in each other's arbitrations. **BUT I do consent to arbitration pursuant to the Agreement by JAMS when properly recognized by JAMS and I waive any 5 day contractual requirement in which JAMS has to offer a hearing date**

(Goldenberg Aff., ¶ 7; Exh D, at 2 [10/28/07 letter from Borstein to Dontzin (emphasis added)]).

On November 26, 2007, Borstein again expressly confirmed to JAMS that Jonas had waived the five-day requirement. Borstein wrote to Judge Dontzin:

You have already held that Fimat's letter to you dated October 25, 2007 is to be deemed to be the arbitration demand of Fimat. As you also know, **I have waived the 5 day rule for Mr. Jonas by phone and reconfirm by this letter that waiver**

(Goldenberg Aff., ¶ 9; Exh F [11/26/07 letter from Borstein to Dontzin (emphasis added)]).

On November 30, 2007, Fimat elected to exercise its contractual right to "buy out" Jonas's and Wolf's contracts by making payments of \$12 million to each (*id.*, Exhs G and

H). The claim asserted by Wolf was narrower than the disputes with Jonas, and Fimat notified JAMS that as a result of the buyouts, a hearing scheduled for December 5, 2007 in the Wolf arbitration had been rendered moot (*id.*, ¶ 10; Exh I).

A few days later, Borstein responded to JAMS that he wanted to make it “perfectly clear” that the Fimat/Jonas arbitration continued unabated, even if the Fimat/Wolf hearing was not going forward. As stated by Mr. Borstein:

Pursuant to the Goldsmith letter, Mr. Goldsmith [Fimat’s counsel] indicated that the Wednesday Arbitration session in the **Wolf v. Fimat** matter is now moot. The letter did not reference the arbitration between Jonas and Fimat and by this letter I want to make perfectly clear that the **Fimat v. Jonas** arbitration, presently pending before JAMS, **continues unabated**

(*id.*, ¶ 11; Exh J [12/3/07 email from Borstein to JAMS (emphasis added)]). The December 3 email also indicated that Jonas had paid his arbitration fee in connection with the arbitration, but that Fimat had not (*id.*).

On December 5, 2007, Borstein again wrote to JAMS, stating that he was:

waiting for the assignment of the index number for this arbitration and a statement as to the date our answer and counterclaims have to be filed. Please advise us as soon as possible so that we can move this arbitration forward expeditiously. Thank you

(*id.*, ¶ 12; Exh K [12/5/07 e-mail from Borstein to JAMS]).

Fimat contends that, despite plaintiff’s contentions, nowhere in this communication to JAMS did Jonas make a formal request to commence the arbitration, or to request a hearing, much less one in five days.

Pursuant to Jonas’s contract, following the November 30, 2007 buyout of plaintiffs, Fimat is to render a final accounting on approximately May 30, 2008 (Goldenberg

[* 8]

Aff., ¶ 14; IB/Settlement Agreement, ¶ 17). In connection with the preparation of that final accounting (and the final accounting for Wolf), on February 25, 2008, Fimat requested that the JAMS arbitration continue, because Wolf and Jonas were taking potentially contradictory positions about accounting methodologies, and disagreed as to how certain money was to be allocated between them, potentially leading to inconsistent results (Goldenberg Aff., ¶ 15; Exh L).

Plaintiffs' response was to initiate this action, contending that because Fimat has frustrated the arbitration process by failing to pay the arbitration fee and by purporting to moot the arbitration by "buying" Jonas out, they have been forced to come into this court.

The first two causes of action, by both plaintiffs, and the third cause of action, by Jonas only, are against Fimat for alleged breaches of the IB/Settlement Agreement. Plaintiffs' first cause of action claims that Fimat breached the IB/Settlement Agreement by failing to pay them certain commissions, failing to pay or underpaying plaintiffs a percentage of certain revenues received by Fimat, failing to reimburse plaintiffs for certain "research" expenses, and failing to provide Jonas with "favorable charges" for his personal trading account. The second cause of action claims that, under the IB/Settlement Agreement, Fimat was required to pay plaintiffs \$15,000,000 (not \$12,000,000) to terminate the relationship. The third cause of action claims that Fimat breached the IB/Settlement Agreement by not permitting Jonas to continue trading his personal account at Fimat.

The fourth cause of action, by Jonas only, is against Fimat for breach of an alleged agreement whereby Fimat agreed to pay Jonas a fee for employees Jonas introduced to Fimat. The fifth cause of action, also by Jonas only, is against Fimat for breach of Fimat's

alleged agreement to pay Jonas a “floor broker introductory fee.”

The sixth cause of action, by Jonas only, is against defendants Société Générale and CFI for allegedly inducing Fimat to breach its agreements with plaintiffs.

The seventh cause of action by both plaintiffs claims that Fimat interfered with Jonas’s relationships with his customers, in violation of plaintiffs’ expectations pursuant to the IB/Settlement Agreement and the DPG Master Agreement.³ The eighth cause of action, by Jonas only, alleges that Fimat breached a non-compete obligation to Jonas under the DPG Master Agreement.

Fimat contends that each of the claims against it must proceed in the arbitration at JAMS. Société Générale and CFI contend that the sixth cause of action fails to state a claim, and must be dismissed.

DISCUSSION

Fimat’s Motion to Compel Arbitration (Motion Sequence No. 001)

Under New York law, motions to compel arbitration generally proceed under the Federal Arbitration Act (the FAA), 9 USC § 1, *et seq.*, or CPLR 7503 (a). Where, as here, an agreement to arbitrate affects interstate commerce (*see* Goldenberg Aff, ¶ 2 [Fimat is a business engaged in interstate commerce, and Jonas’s agreement with Fimat involves that commerce]), it is subject to the FAA (*see Allied-Bruce Terminix Cos., Inc. v Dobson*, 513 US 265 [1995] [the FAA applies to all contracts involving “interstate commerce”]; *State of New York v Oneida*

³ The “DPG Master Agreement among Fimat USA, LLC, Pierre Wolf and Corridor Capital Group LLC” dated as of October 1, 2005 and executed in December 2006 (Goldenberg Aff., Exh L), was referenced in the IB/Settlement Agreement (*see* IB/Settlement Agreement, ¶ 15). The DPG Master Agreement also requires arbitration before JAMS (*see* DPG Master Agreement, ¶ 4).

Indian Nation of New York, 90 F3d 58 [2d Cir 1996] [same]).

Congress adopted the FAA to ensure the enforcement of private agreements to arbitrate and thereby “establishe[d] an ‘emphatic’ national policy favoring arbitration which is binding on all courts, State and Federal” (Singer v Jefferies & Co., 78 NY2d 76, 81 [1991]). New York also has a strong policy favoring arbitration (see e.g. Board of Educ. of Bloomfield Cent. School Dist. v Christa Constr., Inc., 80 NY2d 1031, 1032 [1992] [“This Court has repeatedly held that arbitration is a favored method of dispute resolution in New York, and ‘New York courts “interfere as little as possible with the freedom of consenting parties” to submit disputes to arbitration” (citation omitted)]. As such, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration” (Moses H. Cone Mem. Hosp. v Mercury Constr. Corp., 460 US 1, 24-25 [1983]; see also League of American Theatres & Producers, Inc. v Cohen, 270 AD2d 43 [1st Dept 2000]).

The FAA provides that “[a] party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration may petition ... for an order directing that such arbitration proceed in the manner provided for in such agreement” (9 USC § 4). In such circumstance, a judicial order compelling arbitration is mandatory (see e.g. GAF Corp. v Werner, 66 NY2d 97 [1985], cert denied 475 US 1083 [1986] [FAA requires courts to issue orders of arbitration where section’s conditions are met]). Similarly, CPLR 7503 (a) mandates that “[w]here there is no substantial question whether a valid agreement was made or complied with ... the court shall direct the parties to arbitrate.”

In deciding a motion to compel arbitration, either under the FAA or CPLR Article 75, the limited role of the court includes determining “whether parties have agreed to submit

their disputes to arbitration and, if so, whether the disputes generally come within the scope of their arbitration agreement” (Sisters of St. John the Baptist, Providence Rest Convent v Geraghty Constructor, 67 NY2d 997, 998 [1996]; see also Fletcher v Kidder, Peabody & Co., Inc., 81 NY2d 623, cert denied 510 US 993 [1993]). “The court’s inquiry ends, however, where the requisite relationship is established between the subject matter of the dispute and the subject matter of the underlying agreement to arbitrate” (State of New York v Phillip Morris, Inc., 30 AD3d 26, 31 [1st Dept 2006], affd 8 NY3d 574 [2007] [citation omitted]; see also Eric Riebling Co., Inc. v Martin Woodworking Machs. Corp., 294 AD2d 465, 466 [2d Dept 2002] [holding that “once the court has performed this initial screening process, and determined that the parties agreed to arbitrate, its role ends”]).

Under this framework, “[if] the allegations underlying the claims ‘touch matters’ covered by the parties’ [arbitration agreement], then those claims must be arbitrated, whatever the legal labels attached to them” (Genesco, Inc. v T. Kakiuchi & Co., Ltd., 815 F2d 840, 846 [2d Cir 1987]). Thus, a broad arbitration clause creates a presumption of arbitrability which can be overcome only if it “may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute” (AT & T Techs., Inc. v Communications Workers of Am., 475 US 643, 650 [1986]).

Here, it is clear that, whether viewed under the FAA or CPLR Article 75, the parties have a valid arbitration clause, intended broadly to cover any disputes between Jonas and Fimat. Plaintiffs do not dispute that paragraph 19 of the IB/Settlement Agreement facially applies to the disputes between Jonas and Fimat, or that it is a valid and binding arbitration clause (see Amended Complaint, ¶ 12). Rather, plaintiffs characterize Borstein’s December 5,

2007 e-mail to JAMS as a “formal request to the JAMS case manager ... to commence the arbitration,” and claim that they should be excused from complying with paragraph 19 because Fimat did not pay a filing fee on December 5, 2007, and JAMS then failed to offer a hearing date within five business days of Borstein’s December 5, 2007 e-mail (*id.*, ¶ 13). Neither argument has any merit. As set forth below, the evidence establishes that Jonas did not attempt to commence a new arbitration, or request a hearing, in the December 5, 2007 e-mail, that he had expressly waived the five-day requirement on multiple occasions before then, and that he had acknowledged to JAMS that the existing arbitration continued unabated.

First, it is evident that Borstein’s December 5, 2007 e-mail cannot be characterized as “a formal request ... to commence the arbitration” because, as Borstein conceded in his December 3rd e-mail, an arbitration was already “pending” and “continues unabated” (12/3/07 e-mail from Borstein to Dontzin). The December 5, 2007 e-mail makes clear that, at that time, Jonas knew that the arbitration had been pending since October, but had not yet bothered to serve or file an answer or counterclaim. Indeed, the email simply states that Jonas was “waiting for the assignment of the index number for this arbitration and a statement as to the date our answer and counter claims have to be filed ... so that we can move this arbitration forward expeditiously” (12/5/07 e-mail from Borstein to JAMS). As such, it is clear that the December 5th e-mail does not contain a request to commence arbitration, and does not request a hearing, either explicitly or implicitly, much less one in five days.

Moreover, the five-day rule had already been expressly waived by Jonas. “Waiver is the intentional relinquishment of a known right, and therefore may be inferred from conduct or a failure to act that ‘evince[s] an intent not to claim the purported advantage [citation

omitted]” (Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P., 22 AD3d 204, 209 [1st Dept 2005] [citation omitted], affd as mod 7 NY3d 96 [2006]; 5 NY Jur 2d, Estoppel, Ratification and Waiver, § 74 [waiver is “the intentional relinquishment of a known right which, except for the waiver, the waiving party would have enjoyed”]). The waiver must be “clear, unequivocal and deliberate [citation omitted]” (Silverman v Silverman, 304 AD2d 41, 46 [1st Dept 2003]).

Jonas, through his long-time counsel Borstein, twice expressly waived the five-day requirement in writing, and in clear and unequivocal terms (see 10/28/07 letter from Borstein to Dontzin [“I waive any 5 day contractual requirement in which JAMS has to offer a hearing date”]; 11/26/07 letter from Borstein to Dontzin [“I have waived the 5 day rule for Mr. Jonas by phone and reconfirm by this letter that waiver”]). It is thus clear that Jonas knowingly, clearly, unequivocally and deliberately relinquished his right to assert the five-day requirement as a condition precedent to arbitration (see Welch v Hauck, 18 AD3d 1096, 1098 [3d Dept], lv denied 5 NY3d 708 [2005] [party’s actions effectuated a waiver by his “intentional relinquishment of a known right”] [citation omitted]; Mingo Pizza Corp. v Hirstan Assocs., 289 AD2d 21 [1st Dept 2001] [same]).

Nevertheless, plaintiffs contend that the waiver was only a temporary waiver granted by Borstein on behalf of Jonas “to avoid a prejudicial consolidation in November 2007” of Fimat’s disputes with Jonas and Wolf, and to “incentivize JAMS to schedule a prompt hearing” (Opp Mem., at 1-2). Thus, plaintiffs argue, Jonas did not intend to irrevocably waive the right to seek judicial resolution of Jonas’s grievances with Fimat in the future. In support of this argument, plaintiffs cite Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt.,

L.P. (7 NY3d 96 [2006]), where the Court found that although the plaintiffs had waived a non-competition covenant for a period of time, a subsequent attempt by the plaintiffs to enforce the covenant suggested a revocation of the waiver. Plaintiffs contend that similarly, although Borstein “undoubtedly had temporarily waived the five-day rule,” when “Borstein then attempted to proceed with the arbitration of the remaining issues at JAMS on December 3 and December 5, 2007, Fimat lost the ability to rely upon any prior waiver” (Opp Mem., at 14-15).

The court rejects this argument, as it is clear that, in the December 3rd and 5th e-mails, Borstein was not attempting to commence a new arbitration with a new five-day rule, and thus, did not revoke the waiver. For example, in the December 3rd e-mail, he conceded that the “**Fimat v. Jonas** arbitration, presently pending before JAMS, continues unabated” (12/3/07 e-mail from Borstein to Dontzin). According to Borstein, “[t]hat means that we need for JAMS to assign an index number, Fimat needs to pay its arbitration filing fee (Jonas has already paid his filing fee) and Jonas will assert all of his counterclaims timely as in any other arbitration” (*id.*). Again, in the December 5th e-mail, Borstein simply stated that he was “waiting for the assignment of the index number for this arbitration,” and then asked when Jonas’s answer and counterclaim, which had not yet been served or filed, would be due (12/7/07 e-mail from Borstein to JAMS). Nothing in either of these e-mails suggests that Borstein was attempting to commence, rather than to continue, arbitration, or was revoking the prior waiver.

Finally, plaintiffs’ reference to Fimat’s failure to pay the arbitration fee is a red herring, as issues relating to procedural matters, such as the payment of filing fees, are for the arbitrator to resolve (see e.g. J. Castronovo, Inc. v Hillside Dev. Corp., 140 AD2d 585, 585 [2d Dept 1988] [“Neither the filing with the AAA, nor the payment of the filing fee constituted

conditions precedent to arbitration. They are rather, procedural requirements for the conduct of the arbitration itself. Any questions as to compliance with these procedural matters shall be decided by the arbitration forum”]; accord Goldstein v Goldstein, 214 AD2d 567 [2d Dept 1995]). In any event, Fimat asserts that, promptly following receipt of Borstein’s December 3, 2007 e-mail, Fimat inquired of JAMS about making payment, and on December 7, 2007, JAMS e-mailed Fimat that it would be sending an invoice to Fimat. The invoice did not come because the prior case manager had apparently left JAMS without preparing the invoice. Fimat eventually resolved the issue, and asserts that on March 13, 2008, it remitted the JAMS case administration fee (Goldenberg Aff., ¶ 15, n 5).

Next, although plaintiffs contend that not all of their claims “are even within the scope of the IB/Settlement Agreement” (Opp Mem., at 2), a review of these claims reveals that, with the exception of the sixth cause of action, they all come within the broad arbitration clause, which requires arbitration of “[a]ny future disputes between Fimat and Jonas” (IB/Settlement Agreement, ¶ 19).

The first three causes of action expressly arise under the IB/Settlement Agreement, and are thus subject to arbitration. The fourth and fifth causes of action, in which Jonas requests a fee for certain employees he allegedly introduced to Fimat, and certain “floor broker introductory fees” to be paid to him, both fall within the broad rubric of the “any future disputes” scope of the arbitration clause. Likewise, the seventh cause of action against Fimat is premised on the “expectation” of Jonas and Axiom under the IB/Settlement Agreement and the DPG Master Agreement, and the eighth cause of action is based on Fimat’s alleged breach of the DPG Master Agreement, as to which Jonas claims third-party beneficiary status. Thus, both

causes of action fall within the broad arbitration clause requiring arbitration of any disputes between Fimat and Jonas. In addition, the DPG Master Agreement contains an arbitration clause as well.

Accordingly, Fimat's application to compel plaintiffs to arbitrate their claims against Fimat is granted. As such, Fimat's motion for an extension of time to answer, move or otherwise respond to any claims not directed to arbitration is denied as moot.

**Société Générale's and CFI's Motion to Dismiss
the Sixth Cause of Action (Motion Sequence No. 002)**

In the sixth cause of action, plaintiffs allege that Société Générale and CFI tortiously induced Fimat to breach the IB/Settlement Agreement, the floor broker's "rebate" agreement, and the fee arrangement regarding potential employees.

Société Générale is a French entity, alleged to be Fimat's "corporate parent" (Amended Complaint, ¶ 11; n1, at 1). CFI is a Delaware corporation alleged to have entered into a merger agreement with Société Générale, whereby Société Générale and CFI agreed to "combine their global broker dealer operations under the name of "Newedge Group" (*id.*, ¶¶ 10, 48; n 1, at 1).

With respect to plaintiff's tortious interference claim, the Amended Complaint alleges as follows:

6. [U]pon information and belief, Fimat's breach was part of a larger picture, through which Defendants [Société Générale] and [CFI] facilitated a merger between Fimat and [CFI] by manipulating and understating the liabilities owed to Jonas.

48. Between January and August, 2007, Fimat's parent company, Defendant [Société Générale], entered into merger negotiations with [CFI], pursuant to which the two companies would combine their global broker/dealer operations under the name of Newedge

Group. Upon information and belief, discussions regarding a merger began in or about the summer of 2006. In fact, a Fimat employee, Vincent Bonamy, mentioned to Jonas at the time the IB/Settlement Agreement was executed, in October 2006, that a buyout of the IB/Settlement Agreement might be triggered in any event due to a contemplated merger. Pursuant to the merger, Fimat would change its name to Newedge USA, LLC, and [CFI] would change its name to Newedge Financial Inc.

49. Upon information and belief, Defendants [Société Générale] and [CFI] were fully aware of Fimat's breach of the IB/Settlement Agreement and that Fimat could potentially owe Jonas upwards of \$50,000,000.

50. Upon information and belief, [Société Générale] and [CFI] induced Fimat to delay signing a definitive agreement and to renege on its existing contractual and other legal obligations to Jonas.

54. Prior to the consummation of the merger, several Fimat brokers informed Jonas that the DPG sales force had been brought to a meeting in California. During the event in California, a [CFI] representative revealed that, post-merger, the merged brokerage operation would go forward without the DPG (i.e., without Jonas). As a consequence, whatever amount the merged entity (now known as Newedge) did not have to share with the co-heads of the DPG, Jonas and Wolf, would correspondingly increase the amount that the other employees in the DPG could expect to earn, particularly if Newedge was able to continue to do business with Jonas's customers.

55. Subsequently, upon information and belief, a Fimat representative, Gary DeWall, confirmed this fact in an October 2007 meeting with Wolf in which Mr. DeWall explained that [CFI] had already decided how much it was prepared to pay to end the relationship with Mr. Wolf and Jonas. ...

The sixth cause of action itself (Amended Complaint, ¶¶ 97-101) adds nothing to the foregoing, as it is comprised of only five paragraphs of generic boilerplate, e.g., "Defendants [Société Générale] and [CFI] [were] aware of Fimat's obligations pursuant to the IB/Settlement Agreement as well as its other arrangements with Jonas" and that these defendants "intentionally

induced Fimat to breach them and or frustrated the performance of those contracts” (*id.*, ¶¶ 99-100).

To state a claim for tortious interference with contract, a plaintiff must allege (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant’s knowledge of that contract; (3) the defendant’s intentional procurement of a breach of that contract; and (4) resulting breach and damages (Lama Holding Co. v Smith Barney Inc., 88 NY2d 413 [1996]; accord Foster v Churchill, 87 NY2d 744 [1996]; Joan Hansen & Co. v Everlast World’s Boxing Headquarters Corp., 296 AD2d 103 [1st Dept 2002]; Vigoda v DCA Productions Plus Inc., 293 AD2d 265 [1st Dept 2002]). All of the elements of the theory must be pleaded in order to avoid dismissal (Bonanni v Straight Arrow Pubs., Inc., 133 AD2d 585 [1st Dept 1987]).

“Specifically, a plaintiff must allege that the contract would not have been breached ‘but for’ the defendant’s conduct” (Burrowes v Combs, 25 AD3d 370, 373 [1st Dept], *lv denied* 7 NY3d 704 [2006]; see also Washington Ave. Assocs., Inc. v Euclid Equip., Inc., 229 AD2d 486 [2d Dept 1996]). “Although on a motion to dismiss the allegations in a complaint should be construed liberally, to avoid dismissal of a tortious interference with contract claim a plaintiff must support his claim with more than mere speculation” (Burrowes v Combs, 25 AD3d at 373).

Although plaintiffs contend that “the complaint amply alleges facts from which a motive to interfere with Fimat’s agreement with Jonas may be inferred” (Opp Mem., at 2), in reality, the amended complaint merely speculates, in the most conclusory of terms, that Société Générale and CFI “induced Fimat to delay signing a definitive agreement and to renege on its

existing contractual and other legal obligations to Jonas” in order to “facilitate” a merger between CFI and Société Générale (Amended Complaint, ¶¶ 6, 50). These conclusory allegations are insufficient to sustain a claim for tortious interference with contract (see Granite Partners, L.P. v Bear, Stearns & Co. Inc., 17 F Supp 2d 275, 293 [SD NY 1998] [dismissing tortious interference claim under New York law on ground that “[t]he pleadings may not be conclusory; rather they must be supported by sufficient allegations of fact”]; Chestnut Hill Partners, LLC v Van Raalte, 45 AD3d 434, 435 [1st Dept 2007] [“the speculative allegations set forth by plaintiff are insufficient to sustain a claim for ... tortious interference with contract”]; Black Car and Livery Ins., Inc. v H&W Brokerage, Inc., 28 AD3d 595, 595 [2d Dept 2006] [“The cause of action alleging tortious interference with a contract was properly dismissed as to the respondent, as the allegations in support of this cause of action ‘are devoid of a factual basis and are vague and conclusory’”] [citation omitted]; Martian Entertainment, LLC v Harris, 12 Misc 3d 1190[A], 2006 NY Slip Op 51517[U], * 7 [Sup Ct, NY County 2006] [dismissing tortious interference claim on ground that “plaintiff must support its claim with more than mere speculation”]).

Moreover, most of the allegations made by plaintiffs in support of the tortious interference cause of action are made upon information and belief (see Amended Complaint, ¶¶ 6, 48-50, 55). Such allegations are insufficient as a matter of law (see Angel v Bank of Tokyo-Mitsubishi, Ltd., 39 AD3d 368 [1st Dept 2007] [allegations in complaint made upon information and belief are insufficient to withstand a motion to dismiss]; Mandarin Trading Ltd. v Wildenstein, 17 Misc 3d 1118[A], 2007 NY Slip Op 52059[U], * 5 [Sup Ct, NY County 2007] [allegation based upon information and belief “is simply a conclusory claim or statement

unsupported by factual evidence,” and, as such, “the bald allegation is not entitled to preferential consideration” on a motion to dismiss]).

In addition, plaintiffs fail to allege that “but for” any acts of Société Générale and CFI, Fimat would have done anything differently, i.e., signed the IB/Settlement Agreement before October 2006. This omission is fatal to their claim (see CDR Créances S.A. v Euro-American Lodging Corp., 40 AD3d 421, 422 [1st Dept 2007] [“The tortious interference cause of action was deficient for failure to allege the required ‘but for’ causation and intent to induce a breach in nonconclusory fashion”]; Constantin Assocs. v Kapetas, 17 Misc 3d 1137[A], 2007 NY Slip Op. 52320[U] [Sup Ct, NY County 2007] [same]).

Plaintiffs also hypothesize that Société Générale and CFI caused Fimat to breach its existing contractual obligations to plaintiffs. This claim is equally bereft of any factual allegations to support it. Not a single act is alleged, nor a single event described, to create an inference that either Société Générale or CFI did anything to cause Fimat to breach any obligations to plaintiffs. Moreover, not a single allegation is offered to suggest that Fimat would have done anything differently but for the supposed “inducement” of Société Générale or CFI.

Any such claim against Société Générale additionally fails because Société Générale, as Fimat’s alleged corporate parent, cannot be liable for tortious interference with Fimat’s contracts. Under New York law, “a person who has a financial interest, as a stockholder, in the business of another is privileged to interfere with a contract which that other person or business had with a third person if his purpose is to protect his own interest” in the absence of malice or illegality (Felsen v Sol Café Mfg. Corp., 24 NY2d 682, 687 [1969]; see Foster v Churchhill, 87 NY2d 744, 750 [1996] [“The imposition of liability in spite of a defense

of economic interest requires a showing of either malice on the one hand, or fraudulent or illegal means on the other”]; see e.g. Brierwood Shoe Corp. v Sears, Roebuck and Co., 479 F Supp 563, 565 [SD NY 1979] [under New York law, tortious interference claim against majority shareholder was “frivolous on its face” due to economic interest of shareholder in company that was party to contract with plaintiff]). Plaintiffs have failed to make any allegation of either malice or fraudulent conduct on the part of Société Générale or CFI.

Consequently, plaintiffs’ allegations are insufficient to state a cause of action for tortious interference with contractual relations, and this action must be dismissed as against Société Générale and CFI. Defendants’ alternative motion for an order staying this action pending the arbitration is denied as moot.

The court has considered the remaining claims, and finds them to be without merit.

Accordingly, it is


ORDERED that the motion of defendant Newedge USA, LLC, f/k/a Fimat USA, LLC, to compel arbitration of plaintiffs’ claim against it, and to stay this action, pending arbitration of plaintiffs’ claims (Motion Sequence No. 001), is granted, to the extent of staying further prosecution of any proceedings in this action; and it is further

ORDERED that plaintiffs and defendant Newedge USA, LLC, f/k/a Fimat USA, LLC, are directed to proceed to arbitration forthwith before the Hon Michael J. Dontzin (J.S.C., Ret.) at JAMS, with respect to the first, second, third, fourth, fifth, seventh and eighth causes of action of the amended complaint; and it is further

ORDERED that the motion of defendants Société Générale, S.A. and Newedge

Financial, Inc. f/k/a Calyon Financial, Inc. for an order dismissing the complaint against them (Motion Sequence No. 002), is granted, and the complaint is hereby severed and dismissed as against defendants Société Générale, S.A. and Newedge Financial, Inc. f/k/a Calyon Financial, Inc., and the Clerk is directed to enter judgment in favor of said defendants.

Dated: July 30, 2008

ENTER.


J.S.C.
HON. RICHARD B. LOWE, III

FILED
AUG 04 2008
COUNTY CLERK'S OFFICE
NEW YORK