

**ETF Intl. Assoc., Inc. v American Stock Exch., LLC**

2010 NY Slip Op 30120(U)

January 13, 2010

Supreme Court, New York County

Docket Number: 112100/08

Judge: Joan A. Madden

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

PRESENT: Hon. Judge A. Madden

PART 11

Index Number : 112100/2008

ETF INTERNATIONAL ASSOCIATES, INC.,

VS.

AMERICAN STOCK EXCHANGE, LLC

SEQUENCE NUMBER : # 001

DISMISS

Justice

INDEX NO. 112100-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

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

*is decided in accordance with the annexed Memorandum and order,*

**FILED**

JAN 22 2010

NEW YORK COUNTY CLERKS OFFICE

Dated: January 13, 2011

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

-----X

ETF INTERNATIONAL ASSOCIATES, INC.,

Plaintiff,

-against-

AMERICAN STOCK EXCHANGE LLC,

Defendant.

-----X

**FILED**  
Index No. 112100/08  
JAN 22 2010  
COUNTY OF NEW YORK

JOAN A. MADDEN, J.:

Defendant, the American Stock Exchange LLC (Amex), moves, pursuant to CPLR 3212, for summary judgment dismissing all claims against it. Plaintiff ETF International Associates, Inc. (International) cross-moves, pursuant to CPLR 3212, for summary judgment holding that it is entitled to compensation on all Exchange Traded Funds (ETFs) developed by nonparty ProFunds Advisors LLC (ProFunds) and traded on Amex, and an order directing Amex to allow International to examine the books and records of Amex, pursuant to the parties' consulting agreement.

FACTS

Amex was registered with the United States Securities and Exchange Commission (the SEC) as a national securities exchange for the trading of equity securities and various derivative products, including ETFs.<sup>1</sup> International is in the business of

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<sup>1</sup> According to Amex, a series of transaction on or about October 1, 2008 resulted in Amex being acquired by NYSE Euronext,

developing new ETFs and identifying potential sponsors for listing such products on exchanges.

On March 1, 1999, International and Amex entered into a consulting agreement which provided that International would introduce Amex to new ETFs, and the sponsor of the new funds. The agreement provided that if Amex decided to pursue and have traded on Amex the sponsors' ETFs introduced to Amex by International, then Amex would pay International a consulting fee of 5% of the transaction charges billed by Amex for trades of the ETFs, including any fees for options, for two years from the start of trading of those ETFs. From March 1, 1999 through February 28, 2002, International did not earn any consulting fees, because no ETFs introduced to Amex by International were traded on Amex.

On February 28, 2002, the consulting agreement was amended by increasing the consulting fee period from two years from the start of trading to three years from the start of trading. In early 2002, ProFunds, an investment advisory firm, was pursuing an "exemptive relief" application with the SEC under the Investment Company Act of 1940, in order to launch a number of ETFs which were expected to be listed on Amex. A question arose as to whether International had played any meaningful role with respect to the new ETFs and/or with respect to introducing

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and an indirect subsidiary of NYSE Euronext, NYSE Alternext US LLC, became the successor-in-interest to Amex. NYSE Alternext US LLC was renamed NYSE Amex LLC.

ProFunds to Amex. To address that issue, and resolve the question of whether International was entitled to any compensation resulting from the ProFunds ETFs, the agreement was amended again, on May 20, 2002. The second amendment provides:

4. (a) If the AMEX notifies [International] that it wishes to further pursue a New Fund Product, the product and related sponsor will be designated by the AMEX as a product and sponsor introduced by [International], entitling [International] to certain annual compensation if the product becomes listed and traded on the AMEX. In such event, [International] will receive on an annual calendar year basis 5% of the transaction charges billed by the AMEX for transactions effected on the AMEX in the New Fund Product and in any options on such product as may be listed on the AMEX for a period of three (3) years from the start of trading of such New Fund Product on the AMEX (the "New Fund Product Payment Period").

(b) Notwithstanding the foregoing, it is understood by the parties that if an ETF sponsored by Profunds that is included in Schedule C attached hereto, including successor funds, ("Profunds ETFs") becomes listed and traded on the AMEX, [International] will receive on an annual calendar year basis 5% of the transaction charges billed by the AMEX for transactions effected on the AMEX in such Profunds ETF for a period of three (3) years from the start of trading of such Profunds ETF on the AMEX (the "Profunds Payment Period"). The New Fund Product Payment Period and the Profunds Payment Period together are referred to as the "Payment Period."

Notice of Cross Motion, Ex. A (emphasis supplied). Schedule C lists 30 names of funds.

The original agreement was still in effect after the execution of the amendment, with the exception of those paragraphs specifically addressed by the amendments. Paragraph seven of the March 1, 1999 agreement provides, in part, that the "AMEX shall keep accurate books of account and records as are

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necessary to document all amounts due to [International] hereunder and [International], or his [sic] authorized agent, shall have the right, at his [sic] own expense to examine such books of account and records to verify the payment due hereunder." Notice of Cross Motion, Ex. B.

A number of ETFs sponsored by ProFunds began to list and trade on Amex during 2006 and 2007. Some of those were listed on Schedule C, and others were not. Amex made a payment to International, in the spring of 2007, in the amount of \$24,382.98 based on the transactions billed by Amex for transactions on the Amex in 2006 with respect to ETFs included on Schedule C. In May 2008, Amex paid International \$59,243.60 based on the transactions billed by Amex for transactions in 2007 regarding ETFs that were included on Schedule C. Amex did not include any amounts for ETFs other than those listed on Schedule C, or for options on any of the ETFs. Amex provided International with information as to the transaction charges billed in each of the Schedule C ETFs, in order to show how the payments were calculated.

International contends that the intent of the agreement was to pay it compensation based upon the commissions charged by Amex to its customers for ETFs sponsored by ProFunds as they existed, and as they may be developed in the future. International asserts that the phrase "including successor funds" was intended

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to include all newly developed ETFs sponsored by ProFunds. International further maintains that it is entitled to compensation based upon not only transactions, but options. It commenced this action seeking such payment, as well as an order directing Amex to allow it to examine Amex's books and records to verify the consulting fee due.<sup>2</sup>

#### DISCUSSION

It is well settled that a contract is to be construed according to the plain meaning of the words, and without reference beyond the four corners of the document unless the document is ambiguous and requires parol evidence to determine the intent of the parties. *Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 61 AD3d 614 (1<sup>st</sup> Dept 2009); *Riverside South Planning Corp. v. CRP/Extell Riverside, L.P.*, 60 AD2d 61, 66 (1<sup>st</sup> Dept 2008), *aff'd*, 13 NY3d 398 (2009); *Unisys Corp. v Hercules Inc.*, 224 AD2d 365 (1<sup>st</sup> Dept 1996). Furthermore, "clear contractual language does not become ambiguous simply because the parties to the litigation argue different interpretations." *Riverside South Planning Corp. v. CRP/Extell Riverside, L.P.*, 60 AD2d at 67 (citations omitted).

It is further understood that a contract should be

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<sup>2</sup> International had originally also sought legal fees in this action, but has conceded that it has no legal basis to seek such fees, and does not object to dismissing the third cause of action, which sought such fees.

construed so as to give force and effect to each provision. *Spaulding v Benenati*, 57 NY2d 418 (1982); *RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 (1<sup>st</sup> Dept 2007). Moreover, "there is no basis to interpret an agreement as impliedly stating something which the parties neglected to include." *RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d at 274 (internal citation and quotations omitted).

Under these principles, the court finds that the unambiguous terms of the agreement warrant a finding of summary judgment in Amex's favor. International argues that the phrase "including successor funds" can be given meaning only by construing it to mean additional funds not included in Schedule C, which may be developed by ProFunds and traded on Amex in the future. However, such an interpretation would make the inclusion of the funds on Schedule C unnecessary. Rather, the agreement, had it meant to include all ETFs, could have said all ETFs sponsored by ProFunds. The fact that the agreement limited compensation to those funds listed on Schedule C, plus their successors, can only mean that not all ETFs sponsored by ProFunds would be included. See *RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d at 274.

While it is true, as International points out, that the agreement does not define "successor funds," that merely means that the court must construe the term in accordance with its plain meaning. *Riverside South Planning Corp. v. CRP/Extell Riverside, L.P.*, 60 AD2d at 67 The plain meaning of successor is

"one who takes over the obligations or rights of another." See Business Dictionary.com (2010). Moreover, a successor corporation is defined as "a corporation that through amalgamation, consolidation or other assumption of interests is vested with the same rights and duties as the original corporation." Black's Law Dictionary, (7<sup>th</sup> Ed 1999) at 1146.

Thus, in accordance with the plain meaning of the term successor, in order for International to be entitled to compensation with respect to ETFs that are not on Schedule C, International would have to show that the new EFTs succeeded to the rights and/or obligations of an EFT on Schedule C. However, International has not offered any evidence, or even an allegation, that any of the EFTs for which it now seeks compensation were in any way related to the ProFunds EFTs on Schedule C. Therefore, Amex has sustained its burden of demonstrating that it is not responsible for payment of fees with respect to any ETFs that are not on Schedule C, or were successor funds to those on Schedule C and International has failed to raise a question of fact in opposition.

International maintains that it is entitled to fees based upon options as well as transactions with respect to the ProFunds ETFs. However, section 4(b), which governs International's right to fees with respect to ProFunds EFTs, does not include options as a basis for such fees. Notably, that paragraph 4(a) specifies fees for options related to New Fund Products that are not ProFund EFTs, while section 4(b) does not, also indicates that

options were not intended to be included in International's compensation for ProFunds EFTs.

International contends that, in accordance with paragraph 7 of the agreement, it is entitled to examine the books and records of Amex to verify the commissions earned by International. Amex states that it has provided complete information to International with respect to the transaction charges in the Schedule C ETFs, and that International has not identified any information that has been withheld from it pertaining to transactions in those ETFs. Amex further maintains that International is not entitled to further information, because it is not entitled to compensation with respect to the other ETFs sponsored by ProFunds, or on the options on any ProFunds ETFs.

International is not entitled to any information with respect to funds for which it is not entitled to obtain compensation, nor is it entitled to information with respect to options on the ProFunds EFTs. Amex has presented evidence that it supplied whatever information it was required to supply. International has not specified any information that it is lacking regarding the transaction fees with respect to the ETFs contained on Schedule C. Accordingly, International has failed to demonstrate that there is any issue of fact regarding its demand for further information. Thus, its cause of action seeking an accounting is dismissed.

#### CONCLUSION

In view of the above, it is hereby

ORDERED that the motion of American Stock Exchange LLC for summary judgment dismissing all claims against it is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the cross motion of ETF International Associates, Inc. is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: January 13, 2010

  
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J.S.C.

**FILED**  
JAN 22 2010  
NEW YORK  
COUNTY CLERK'S OFFICE