

BGC Capital Mkts. L.P. v Tullett Prebon America's Corp.

2013 NY Slip Op 32973(U)

November 21, 2013

Sup Ct, New York County

Docket Number: 651954/2010

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 49

BGC CAPITAL MARKETS, L.P.,

Plaintiff,

-against-

TULLETT PREBON AMERICA'S CORP.,

Defendant.

INDEX NO. 651954/2010

MOTION DATE July 30, 2013

MOTION SEQ. NO. 007

MOTION CAL. NO.

The following papers, numbered 1 to were read on this motion to dismiss the amended complaint

PAPERS NUMBERED

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

Answering Affidavits — Exhibits

Replying Affidavits

Table with 1 column 'PAPERS NUMBERED' and 3 empty rows.

Cross-Motion: Yes No

Upon the foregoing papers, defendant Tullett Prebon America's Corp.'s motion, pursuant to CPLR 3211 (a)(1), (5) and (7), to dismiss the amended complaint is decided in accordance with the accompanying decision and order.

Dated: November 21, 2013

O.P. Sherwood signature
O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 49**

-----X
BGC CAPITAL MARKETS, L.P.,

Plaintiff,

**DECISION AND ORDER
Index No. 651954/2010
Mot. Seq. No. 007**

-against-

TULLETT PREBON AMERICA'S CORP.,

Defendant.

-----X
O. PETER SHERWOOD, J:

Defendant Tullett Prebon America's Corp. ("Tullett Americas" or "defendant") moves, pursuant to CPLR 3211 (a) (1), (5) and (7), to dismiss the amended complaint. For the reasons that follow, defendant's motion is granted and the complaint is dismissed.

Plaintiff BGC Capital Markets ("BGC CM" or "plaintiff") describes itself as an "interdealer broker," meaning that it brokers deals for buying and selling certain financial instruments by institutional traders on behalf of their investor clients. Defendant Tullett Americas is also an interdealer broker and competes with BGC CM in the same market. BGC CM alleges that Tullett Americas misappropriated certain proprietary information regarding U.S. Treasury data, including benchmark bid/offer prices and yields (the "U.S. Treasury Data", or the "Data") from BGC CM's affiliate, BGCantor Market Data, L.P. ("Market Data") and allowed Tullett Americas' brokers to use that information. BGC CM alleges that the Data, which was on its computer network system, was compiled through a substantial investment of resources by its affiliates and gave BGC CM an advantage against its competitors in the interdealer broker industry. BGC CM brings this action to recover damages for the theft of the Data. In the amended complaint, plaintiff alleges causes of action for unfair competition and misappropriation (first cause of action), violation of the Computer

Fraud and Abuse Act (18 USC § 1030) (second cause of action) and unjust enrichment (third cause of action).

The Parties and Their Affiliates

BGC CM is a subsidiary of BGC Partners, Inc. (“BGC Partners”). BGC Partners is owned, in part, by Cantor Fitzgerald Limited Partnership (“CF Partners”), which is the ultimate parent of the Cantor Fitzgerald entities. Cantor Fitzgerald Securities (“CF Securities”), is an indirect subsidiary of CF Partners. Market Data is also a subsidiary of CF Partners. Cantor Fitzgerald & Co. is another related entity, as is Cantor Fitzgerald Financial. CF Partners and BGC Partners are run by the same CEO, Howard Lutnick. BGC CM alleges that the above Cantor Fitzgerald affiliated companies (hereinafter the “Cantor Fitzgerald Affiliates”) are one of the world’s premier sources of proprietary information concerning the real-time trading activities of certain financial markets, including benchmark bid/offer prices and yields for U.S. Treasury securities. BGC CM has unfettered access to this data through the companies’ eSpeed network system.

Tullett Prebon PLC (Tullett Prebon) is a large, public company that trades on the London Stock Exchange. According to BGC CM, Tullett Prebon describes itself as an intermediary in wholesale financial markets facilitating the activities of its clients, in particular commercial and investment banks. Tullett Americas is an affiliate of Tullett Prebon and is an intermediary in wholesale financial markets, facilitating the activities of its clients, in particular commercial and investment banks, hedge funds and buy-side institutions. BGC CM alleges that Tullett Americas operates as the American brokerage arm of Tullett Prebon.

Tullett Prebon Financial Services LLC (“Tullett Financial”) is an affiliate of Tullett Prebon and Tullett Americas and is a financial markets data provider. It uses real-time price information

from the interdealer brokered financial and commodity markets. It offers foreign exchange and money markets, interest rate derivatives and swaps, and fixed income price information. The company licenses data products, including SwapMarker, MortgageMarker, TreasuryMarker, and MoneyMarker to customers through information vendors, as well as through direct feeds or the internet. Tullett Financial is now known as Tullett Prebon Information (C.I.) Ltd. (“Tullett Information”).

The Redistribution Agreement

In January 2002, CF Securities entered into a “Redistribution Agreement” (the “RA”) with Tullett Financial. The RA provided that the parties would share the Cantor Fitzgerald Affiliates’ U.S. Treasury Data with Tullett Financial’s swaps data to create a new joint product, “SwapMarker 100” (also known as SMKR100), a financial data product offered to third-party subscribers. Pursuant to the RA, CF Securities agreed to provide the U.S. Treasury Data to Tullett Financial, which would be responsible for creating and redistributing SwapMarker100 to third parties.

In 2006, CF Securities assigned the RA to Cantor Fitzgerald & Co. In 2008, Market Data assumed responsibility for the RA in connection with a merger of a number of related Cantor Fitzgerald entities.

BGC CM contends that the RA provided specific safeguards against allowing Tullett Americas’ brokers access to the Data, so that they could not use the Data to compete with the Cantor Fitzgerald Affiliates’ brokers. Thus, under section 3.2 of the RA, CF Securities authorized Tullett Financial to display information derived from the CF Securities’ U.S. Treasury Data to “two price reporters in New York employed by an Affiliate of [Tullett Financial] and two price reporters in London employed by an Affiliate of [Tullett Financial] solely for the purposes of inputting” the

appropriate Tullett Financial swaps data to create SMKR100 (Rauls Aff, Exhibit “A” at 2). The RA also contained a restriction on CF Securities’ use of the Data and provided, in section 4.2, that the Data “shall not be used in any way competitive with the brokerage or data sales business of [Tullett Financial] or its Affiliates, including Tullett & Tokyo Liberty Plc. and its subsidiaries” (*id.* at 3).

The RA provided that any use of either parties’ data in violation of sections 3.2 or 4.2 would constitute “wrongful appropriation” of the data. The RA contained a financial penalty for wrongful use of either parties’ data. Section 3.2 provides, in part, as follows:

“Subject to the terms, conditions and limitations set forth herein, Cantor hereby grants to [Tullett Financial] a license for the Term of this Agreement for the non-exclusive, non-transferable, worldwide right (i) to use, copy, adapt, translate, input and store the Cantor Information for the purposes of integrating it with the [Tullett Financial] Information . . . so as to enable [Tullett Financial] to create the Swap Page . . . [Tullett Financial] shall have no rights to use, market or commercially exploit any historical Cantor Information without the express written consent of [CF Securities] Any use by [Tullett Financial] in violation of this Section 3.2 shall constitute wrongful appropriation of the Cantor Information and the Swap Page, therefore in addition to any other remedies to which [CF Securities] may be entitled for such wrongful appropriation, (x) [Tullett Financial] shall pay [CF Securities] \$4,500 per day for each fixed income broker or swaps broker (including managers of fixed income brokers and swaps brokers) within [Tullett Financial] or its Affiliates receiving the Cantor Information, the Swap Page or any information or data derived from the Cantor Information or the Swap Page, which amount shall not constitute liquidated damages”

(Rauls Aff, Exhibit “A” at 2).

Section 4.2 of the RA contained a reciprocal clause forbidding the Cantor Fitzgerald Affiliates from making use of Tullett Financial’s proprietary information, and contained an identical damages clause based upon a per broker, per day calculation. By written amendment, dated July 20, 2004 (the “Amendment”), the parties amended the RA to delete the references to \$4,500 in sections

3.2 and 4.2 and, instead, substitute the amount of \$500.00. All other terms of those sections remained the same.

Notably, the RA otherwise restricted the liability that could be imposed on any party to the agreement, or to their affiliates. Section 11.1 of the RA provides, in relevant part, as follows:

“Except as provided in sections 3.2 and 4.2, in no event shall any party or any of its affiliates, directors, officers, managers, agents or employees (“covered persons”) be liable to the other parties or any other person (including, without limitation, any subscriber or redistributor), under any theory of liability, for any indirect, special, incidental, consequential, punitive or exemplary damages or any loss of profit arising from or related to this agreement, or the use of the [Tullett Financial] information or the [CF Securities’] information . . .”

(Rauls Aff, Exhibit “A” at 15).

The term “Affiliate” is defined in section 2.1 of the RA as follows:

“‘Affiliate’ shall mean, with respect to any Person, any other Person that directly or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such Person. eSpeed, Inc. (‘eSpeed’) is an Affiliate of Cantor as of the date hereof.”

(Rauls Aff, Exhibit “A” at 1).

The RA was for an initial term of two years with successive one-year renewals until terminated by either party upon one-year’s notice.

The Litigation

Plaintiff alleges that, in 2010, Market Data discovered that Tullett Financial was re-distributing the U.S. Treasury Data to brokers for its affiliate brokerages, including Tullett Americas. During that same period of time, BGC CM alleges that it discovered that Tullett Americas and its affiliated brokers were stealing and then using or leveraging this proprietary data.

On November 10, 2010, the Cantor Fitzgerald Affiliates commenced three separate proceedings against the three Tullett entities. In one proceeding, Market Data, Cantor Fitzgerald & Co. and CF Securities (the “Cantor Parties”) brought an arbitration proceeding with the American Arbitration Association (“AAA”) against Tullett Information (the “AAA Arbitration”). In the AAA Arbitration, the Cantor Parties sought damages for breach of the RA, quasi-contract and fraudulent inducement – all arising out of allegations that Tullett Financial (now “Tullett Information”) allowed its brokers to access and use the restricted data.

In a second proceeding, CF Financial sought to arbitrate similar claims against Tullett Financial, Tullett Americas and Tullett Information with the Financial Industry Regulatory Authority (“FINRA”) (the “FINRA Arbitration”).

Finally, BGC CM commenced the instant state court action against Tullett Americas, seeking, as noted above, damages for unfair competition, violation of the Computer Fraud and Abuse Act and unjust enrichment.

In response to the state court complaint, Tullett Americas moved, pursuant to CPLR 7511, to compel BGC CM to arbitrate before the AAA and stay the action pending the outcome of the pending AAA Arbitration (the “Tullett Motion”). In a separate petition regarding the FINRA Arbitration, Tullett Financial, Tullett Americas and Tullett Information moved, pursuant to CPLR 7503 (a), to compel CF Financial, BGC CM, Market Data, Cantor Fitzgerald & Co. and CF Securities to arbitrate before the AAA, and pursuant to CPLR 7503 (b) to stay the FINRA Arbitration pending completion of the pending AAA Arbitration proceeding, as well as their proposed AAA arbitration proceeding involving the parties in the state court action (the “Tullett Petition”).

By decision and order dated April 15, 2011, this court denied that portion of the Tullett Petition to compel arbitration and adjourned that portion of the proceeding to stay the FINRA Arbitration pending a determination by the FINRA arbitrator as to whether that proceeding would be stayed pending a decision in the AAA Arbitration. I granted the Tullett Motion and stayed this action pending the outcome of the AAA proceeding.

The AAA Award

The Cantor Parties and Tullett Information proceeded to arbitration which concluded with an “Award of Arbitrator,” dated March 9, 2012 (the Award). Tullett Americas has annexed the Award to its counsel’s affirmation in support of its motion to dismiss (Davis Aff, Exhibit “1”).

In the Award, the arbitrator stated that, upon commencement of the arbitration, the parties stipulated that, during the period between September 1, 2007 through January 25, 2011 certain Tullett Americas swaps and fixed income brokers had “permissioned access” to the Cantor Parties’ Data. Accordingly, the principal issue in the arbitration was the nature and extent of damages as result of such access.

The arbitrator made several findings. First, he found that the \$500.00 per broker day provision was an unenforceable penalty under New York law. The arbitrator held that the Cantor Parties did not meet their burden of establishing that the per day amount was not a penalty. He noted that the RA specifically provided that “the \$4,500.00 per broker per day amount shall not constitute liquidated damages.” While the amendment changed the \$4,500.00 to \$500.00, it did not change the statement that the amount would not constitute liquidated damages. The arbitrator reasoned that, if the \$500 was not liquidated damages, then it could only be compensatory or punitive damages. Based on the testimony of one of Tullett Information’s witnesses, that the \$500 figure was arrived

at “out of thin air,” the amount bore no relationship to the Cantor Parties’ actual damages and was, therefore, not compensatory damages. The \$500 per broker per day provision was, therefore, an unenforceable penalty clause.

The arbitrator noted that the Cantor Parties had argued that their loss should include not just the loss of income to the Cantor Parties from licensing the U.S. Treasury Data, but also the competitive loss to the Cantor Parties’ brokers as a result of the Tullett Information’s brokers wrongfully having access to the Data. He found that (a) the Cantor Parties never established that such losses actually occurred by reference to any specific lost transactions, and (b) that the Cantor Parties never established that the U.S. Treasury Data was significantly different from the Treasury and other data which Tullett Information obtained from other vendors of such data after the 2007 termination of the RA, and (c) the Cantor Parties never adequately explained why it was willing to continue to license the Data to Tullett Information after the 2007 termination of the RA if Tullett Information’s use of such information was so harmful to the Cantor Parties’ own brokerage business.

The arbitrator also noted that the Cantor Parties argued that their damages should be paid on the basis of all Tullett Information’s brokers who had access to, or permission to use the Data, regardless of whether any such broker even knew that he or she had such access, or actually used the Data. He held that there was no reason to assess damages against the numerous Tullett Information’s brokers who submitted declarations asserting that while their information technology system may have given them permission and/or access to the Data, they, in fact, had no idea that such permission or access existed, and never looked at, or used, the Data. The arbitrator stated that the Cantor Parties presented no evidence to establish that any damage was actually caused by any broker who did not even know that he or she had access to the Data.

The arbitrator found that, based on the Cantor Parties' actual losses, it was entitled to damages in the amount of \$789,998.00 plus prejudgment interest at the statutory rate of 9% from January 1, 2010 to the date of the award. The Cantor Parties' application for attorneys' fees and costs was denied.

Thereafter, Tullett Information moved, pursuant to CPLR 7511, to confirm the arbitration award. The Cantor Parties cross-moved, to vacate or modify the Award. By decision, order and judgment dated November 20, 2012, this court confirmed that award and denied the cross motion to vacate or modify the Award.

The Motion to Dismiss

Citing the Award, Tullett Americas moves, pursuant to CPLR 3211 (a) (5), to dismiss the complaint based upon collateral estoppel and res judicata, and pursuant to CPLR 3211 (a) (1), to dismiss based upon section 11.1 of the RA, which limits BGC CM's damages to the award in the AAA arbitration.

“[R]es judicata, or claim preclusion, bars successive litigation based upon the ‘same transaction or series of connected transactions’ if: (i) there is a judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was”

(*Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 122 [2008] [internal citation omitted], *cert denied*, 555US1136 [2009]).

“The doctrine of collateral estoppel, a narrower species of *res judicata*, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same” (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). Under New York

law, collateral estoppel precludes a party from relitigating an issue in a subsequent proceeding when:

(1) an identical issue was necessarily decided in a prior proceeding against that party or those in privity with that party; and (2) the party against whom collateral estoppel is being imposed had a full and fair opportunity to contest the decision now said to be controlling (*Buechel v Bain*, 97 NY2d 295, 304-305 [2001]). The doctrine “is based upon the general notion that a party, or one in privity with a party, should not be permitted to relitigate an issue decided against it” (*D’Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]). The term privity includes those who have the same property interest involved in a prior litigation:

“It has been said that the term privity does not have a technical and well-defined meaning. It denominates a rule, however, to the effect that under the circumstances, and for the purposes of the case at hand, a person may be bound by a prior judgment to which he was not a party of record (Restatement, Judgments, § 83, Comment a). It includes those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and possibly coparties to a prior action (Restatement, Judgments, §§ 81-90)”

(*Watts v Swiss Bank Corp.*, 27 NY2d 270, 277 [1970]).

“[A] nonparty to a prior litigation may be collaterally estopped by a determination in that litigation by having a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation . . . ; [Privity] includes those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and possibly coparties to a prior action”

(*Matter of Juan C. v Cortines*, 89 NY2d 659, 667-668 [1997] [internal quotation marks and citations omitted]).

Here, the Award makes clear that the issue as to whether the Cantor Parties suffered any loss to their brokerage business was raised by the Cantor Parties and that it was litigated, with the result that the arbitrator found against them. According to the arbitrator, the Cantor Parties never established that such losses actually occurred through reference to any specific lost transactions.

Nonetheless, BGC CM argues that Tullett Americas' claims of collateral estoppel and res judicata cannot form the basis of a dismissal in this action, because BGC CM was not a party to, nor in privity with, any party to the AAA Arbitration. However, given the relationship between BGC CM and the Cantor Parties, there can be little doubt that BGC CM was in privity with these parties for res judicata and collateral estoppel purposes. BGC CM and the Cantor Parties are all related corporate entities. CF Partners (a party to the AAA Arbitration) and BGC Partners (BGC CM's parent corporation) are run by the same CEO, Howard Lutnick. BGC Partners has controlled the three proceedings brought by the related entities. BGC Partners' chief legal officer, Stephen Merkel, is also the chief legal officer of BGC CM, BGC Financial, and Market Data. Under these circumstances, BGC CM's interests were well represented by the parties to the AAA Arbitration (*see Juan C.*, 89 NY2d at 667-668).

Although Tullett Information argued in the AAA Arbitration that the arbitrator should not award any damages to the Cantor Parties' affiliated brokerage business because they were attempting to recover those damages in this action, it is clear that the arbitrator rejected that argument and ruled on the Cantor Parties' claim for damage to their brokerage business. To allow BGC CM to now relitigate that very issue in this proceeding would give BGC CM an impermissible second chance.

Moreover, BGC CM's claims of unfair competition and misappropriation of its proprietary data are grounded upon its proprietary interest in the Data, which interest, in turn, is a product of its

affiliation, or privity, with the Cantor Parties. “[T]he gravamen of a claim of unfair competition is the bad faith misappropriation of a commercial advantage *belonging to another* by infringement or dilution of a trademark or trade name or by exploitation of proprietary information or trade secrets” (*Eagle Comtronics v Pico Prods.*, 256 AD2d 1202, 1203 [4th Dept 1998] [emphasis added]; *see also Out of Box Promotions, LLC v Koschitzki*, 55 AD3d 575, 578 [2d Dept 2008]; *Beverage Mktg. USA, Inc. v South Beach Beverage Co., Inc.*, 20 AD3d 439, 439-440 [2d Dept 2005], *affd.* 58 AD3d 657 [2009]). “A plaintiff claiming misappropriation of a trade secret must prove: (1) it possessed a trade secret, and (2) defendant is using that trade secret in breach of an agreement, confidence, or duty, or as a result of discovery by improper means” (*Integrated Cash Mgt. Servs., Inc. v Digital Transactions Inc.*, 920 F2d 171, 173 [2d Cir 1990]).

Here, BGC CM alleges that the U.S. Treasury Data is derived from the electronic brokering eSpeed system, which is operated by [BGC CM’s] affiliates (Complaint, ¶ 15). It alleges that the Data “is both very valuable and almost impossible to source elsewhere” (Complaint, ¶ 16). It further alleges that “[p]laintiff and its affiliate interdealer brokers have direct access to this data by virtue of their relationship with their affiliate which owns and operates the eSpeed system, and use the [U.S. Treasury] Data in their business operations” (Complaint, ¶ 17). In other words, BGC CM alleges that it has possessory rights to the Data as a result of its relationship with the Cantor Fitzgerald Affiliates. Therefore, BGC CM may not claim possessory rights to the Data while at the same time denying privity with affiliates who own the rights to it. BGC CM’s first cause of action for damages arising out of Tullett America’s misappropriation of the Data is barred by the doctrine of collateral estoppel.

Similarly, BGC CM's third cause of action for unjust enrichment is also barred by collateral estoppel. "Unjust enrichment is a quasi contract theory of recovery, and 'is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned'" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd.* 19 NY3d 511 [2012], quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). In order to plead a claim for unjust enrichment, the plaintiff must allege "that the other party was enriched, *at plaintiff's expense . . .*" (*Georgia Malone & Co., Inc v Rieder*, 86 AD3d at 408) (emphasis added). Inasmuch as the issue of whether the Cantor Parties' brokers suffered any trading losses has been litigated and determined, BGC CM may not litigate it anew. Accordingly, BGC CM's third cause of action for unjust enrichment is also barred by the doctrine of collateral estoppel.

BGC CM's second cause of action is for violation of the Computer Fraud and Abuse Act (18 USC § 1030) (CFAA). The CFAA prohibits unauthorized access to protected computers with intent to defraud or cause damage.

The CFAA is primarily a criminal provision aimed at hacking offenses (*University Sports Pub. Co. v Playmakers Media Co.*, 725 F Supp 2d 378, 380 [SD NY 2010]). It does, however, provide for a private cause of action in certain circumstances. As far as BGC CM's claim is concerned, the statute provides, in relevant part, as follows:

"(a) Whoever . . .

(2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . .

(C) information from any protected computer . . . [or]

(4) knowingly and with intent to defraud, accesses a protected computer without authorization or exceeds authorized access, and by

means of such conduct furthers the intended fraud and obtains anything of value . . . [or]

(5) (C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage and loss

...

shall be punished as provided in subsection (c) of this section”

(18 USCA § 1030 [a] [2], [a] [4], and [a] [5] [C]).

Under the statute, “the term ‘exceeds authorized access’ means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter” (18 USCA § 1030 [e] [6]). Thus, in order to state a claim under the CFAA, a plaintiff must allege, at a minimum, that a defendant intentionally accessed a protected computer, without authorization, or that he exceeded his authorization and thereby obtained protected information.

BGC CM alleges that, Tullett Americas knowingly “accessed protected computers without authorization and/or exceeded authorized access . . . thereby obtaining valuable proprietary information from a protected computer . . . using such information improperly without authorization or payment, and in competition with Plaintiff” (Complaint, ¶ 71). However, it undisputed that it was Tullett Information, not Tullett Americas, which was given access to the Data for purposes of creating the swap page (complaint, ¶ 29). Further, during the AAA Arbitration, Tullett Financial conceded that it improperly gave the Tullett Americas’ brokers “permissioned access” to the Data (Rauls Aff, Exhibit “B”, Stipulation dated 8/3/2011, at 2). Under these circumstances, the CFAA is inapplicable. The Tullett Americas brokers did not access their computers without authorization, nor did they exceed their authorization to obtain the Data, since they had been given “permissioned access” by Tullett Information.

In addition, it is noteworthy that the federal courts in this Circuit have held that an employee who is authorized to access a database, does not violate the CFAA by using his access privileges to thereafter misappropriate information (see *University sports Publications Co. v Playmakers Media Co.*, 725 F Supp 2d at 383; *Orbit One Communications, Inc. v Numerex Corp.*, 692 F Supp 2d 373, 385 [SD NY 2010]; see also *LVRC Holdings LLC v Brekka*, 581 F 3d 1127, 1130-1131 [9th Cir 2009]). The CFAA does not apply to Tullett Information. Accordingly, the second cause of action is dismissed for failure to state a cause of action.

Finally, Tullett Americas asserts that all of plaintiff's claims are barred by a limitation of liability provision in the RA. The term "any party or any of its affiliates" as used in Section 11.1 (the relevant portion of which is reproduced above) clearly applies to Tullett Americas. Thus, that section provides that Tullett Americas shall not be liable "to the other parties or any other person," "under any theory of liability," for "any loss of profit arising from . . . the use of the [CF Securities'] information . . ." There is no doubt that Section 11.1 was intended to protect the affiliates of the contracting parties, and that this lawsuit was precisely what the contracting parties intended to avoid.

BGC CM argues that this court's denial of Tullett America's motion to compel arbitration constituted a ruling that BGC CM was not bound by, and its claims were not affected by the RA. Contrary to BGC CM's contention, this court simply denied the motion to compel arbitration and did not address whether BGC CM was subject to the limitation of liability provision contained in the RA.

BGC CM further argues that its rights cannot be affected by any limitations of liability, because the provision is enforceable only against the signatories or parties to the contract. However, third-party beneficiaries to a contract may be bound by the terms of the contract, including a

limitation of liability provision (*Schietinger v Taucher Cronacher Professional Engrs., P.C.*, 40 AD3d 954, 956 [2d Dept 2007]; *Rector v Calamus Group, Inc.*, 17 AD3d 960, 962 [3d Dept 2005]; *Buhler v French Woods Festival of Performing Arts*, 154 AD2d 303, 305 [1st Dept 1989]; *Blue Cross of Northeastern N. Y. v Aytte*, 35 AD2d 258, 260 [3d Dept 1970]). Having already determined that the amended complaint should be dismissed, it is unnecessary to the disposition of this case to determine whether BGC CM was a third-party beneficiary of the RA. Nonetheless, it was clearly the intent of the contracting parties that the within lawsuit be prohibited by the RA.

Accordingly, based upon the foregoing discussion, it is

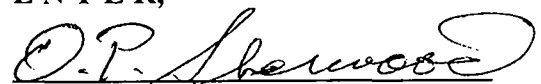
ORDERED that the motion by defendant Tullett Prebon Americas Corp. to dismiss the complaint is **GRANTED**; and it is further

ORDERED that the complaint is **DISMISSED**, with costs and disbursements to defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

DATED: November 21, 2013

ENTER,



O. PETER SHERWOOD

J.S.C.