SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SHLOMO HAGLER J.S.C. PART 17
Justice

Index Number : 650284/2013
DIMENSION TRADING PARTNERS,
vs.
LISSETTE, JAMIE F.
SEQUENCE NUMBER : 001
SUMMARY JUDGMNT/LIEU COMPLAINT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 10, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits cross-motion & | No(s). 2,3,4
Replying Affidavits & opposition to cross-motion | No(s). 5,6,7,8
Reply and cross-motion | No(s). 9,10

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Decision & Order.

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

Dated: 1/21/14

SHLOMO HAGLER, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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DIMENSION TRADING PARTNERS,

Plaintiff,

- against-

JAMIE F. LISSETTE and HAMMERSTONE NV, INC.,

Defendants.

----------X

Index No.: 650284/2013

DECISION & ORDER

Motion Sequence No.: 001

SHLOMO S. HAGLER, J.:

Plaintiff Dimension Trading Partners ("DTP" or "plaintiff") moves, pursuant to CPLR 3213, for an order granting summary judgment in lieu of a complaint against defendants Jamie F. Lissette ("Lissette") and Hammerstone NV, Inc. ("Hammerstone") (collectively, "defendants"), in the amount of $100,000, with interest from December 31, 2011, at 10% per annum. Defendants cross-move, pursuant to CPLR 7305 (a), for an order compelling plaintiff to arbitrate its claims against defendants, and seeking a stay of this action. Both the motion and cross-motion are consolidated herein for disposition.

BACKGROUND

It is alleged that plaintiff is a professional trading company which is not a member of Financial Industry Regulatory Authority ("FINRA"), or of any other exchange. DTP dissolved on August 21, 2012. Prior to its dissolution, it is conceded that DTP provided outside traders with the use of a trading platform, by "providing beneficial commission rates, and back office support ... ." (Affirmation of Ralph A. Daiuto, Jr. [Daiuto], dated March 17, 2013, in further support of plaintiff's motion for summary judgment and in opposition to defendants' cross-motion [Daiuto Aff.], Exhibit "B," letter of defendants' counsel, Eric S. Hutner, Esq. dated February 24, 2009).

Non-party Dimension Trading Group, LLC ("DTG"), was a broker dealer which ceased trading on December 31, 2011. According to Daiuto, the CEO and managing member of DTG, DTG was a member of the Chicago Board Stock Exchange (CBSE), but was never a FINRA member. Both Daiuto and Gary Sofen ("Sofen"), who is the managing member of plaintiff, submitted affidavits on behalf of plaintiff. Daiuto claims to never have been a member of plaintiff. During oral argument, plaintiff's mentioned that Daiuto, a lawyer, is also a member of another company named Dimension Capital Partners ("DCP"), and has a role of "back office person" for plaintiff. (Transcript of March 20, 2013, at 14-15).

Lissette is in the securities trading business. He does so through his wholly-owned company, Hammerstone. Hammerstone traded with plaintiff in 2008 and 2009 and was a class C member of plaintiff. As reflected by a K-1 tax form issued by plaintiff, Hammerstone traded with plaintiff at a loss of $154,033 for 2008, and a loss of $127,967.00 for 2009. (Affidavit of Sofen, sworn to on dated March 15, 2013, in further support of plaintiff's motion for summary judgment and in opposition to defendants' cross-motion [Sofen Aff.], Exhibit "A"). In 2009, Lissette, claiming to be an associated person with DTG, traded with DTG at a loss, as reflected in the K-1 form given to Lissette by DTG. (Daiuto Aff. at ¶10, Exhibit "C").

According to plaintiff, due to the trading losses in 2009, DTG did not allow defendants to trade with DTG anymore. DTG claims that at all times Lissette remained liable for those losses and received a K-1 tax form reflecting the 2009 losses. (*Id.*) The K-1 form issued to Lissette from DTG in 2009 indicated that Lissette, as a member of DTG, contributed $330,000 in capital, and had a $330,000 decrease, or loss. (*Id.*) In an e-mail dated November 2, 2009, Daiuto on behalf of DTG, writes the following to Lissette, in pertinent part:

> "Jamie,
> As per our recent conversations, here is what we propose:
> You sign a promissory note for the amount of monies that you are negative to the firm [DTG] ($288,000) plus some amount above that will serve as "equity" in your account-e.g., sign a promissory note for $300,000 and you will have $12k in your account; we give you $500k in BP; and you trade on an 80%-20% profit split.
> Of course, the numbers can be adjusted as needed, in order to give you the right opportunity to trade out of this situation."

(*Id.*, Exhibit "E") .

Lisette e-mailed back the next day, in pertinent part, "If I trade on a 80/20 split and make 100k, do I have any access to the 'profit' or does it pay off the debt immediately?" (*Id.)* Daiuto then states that Lissette offered to sign a promissory note in 2009 for $50,000 as a way to "pay back those losses [with DTG] with anticipated future trading profits." (*Id.* at ¶11, Exhibit "E"). DTG did not accept Lissette's offer at that time. (*Id.* at ¶ 12).

According to Daiuto, Lissette's next contact with Daiuto was in May 2010, when Lissette offered to make a $100,000 promissory note with plaintiff as a way to address the trading losses with both plaintiff and DTG, and to be able to trade again at DTG. (*Id.* at ¶13, Exhibit "E"). DTG agreed to Lissette's proposal and then plaintiff executed the promissory note with defendants. (*Id.* at ¶14). Daiuto explains that the note was also executed for "Hammerstone's past trading losses at DTP. Additionally, Lissette agreed to pay down his past trading losses at DTG through anticipated future trading profits." (Daiuto Aff. at ¶ 14).

On June 1, 2010, defendants executed a note ("Note") by which they agreed to pay plaintiff $100,000. (Affidavit of Sofen, sworn to on January 11, 2013, in support of the motion [Sofen Supporting Aff.], Exhibit "A"). Pursuant to the terms of the Note, the principal was to be paid, at plaintiff's discretion, at any time after December 31, 2011. (*Id.* at ¶1). In the event of a

default, defendants are liable for ten percent interest, per year. (*Id.*) The Note also states that any legal action with respect to the Note "may be brought in any court of the State of New York sitting in the County of New York or in the United State District Court for the Southern District of New York." (*Id.* at ¶18). The laws of the State of New York are to be used to enforce the note, notwithstanding any other conflicts of law analysis. (*Id.* at ¶12). The Note also states, with respect to venue, that defendants "expressly and irrevocably waive[-] any claim or defense in any such action or proceeding based on alleged lack of personal jurisdiction, improper venue or *forum non conveniens* or any similar basis." (*Id.* at ¶18).

Much confusion abounds and many conflicting statements have been asserted subsequent to the execution of the Note. Daiuto claims that DTG, and not plaintiff, issued Lissette a user name and password to access the DTG trading platform. (Daiuto Aff. at ¶16). After trading for about a month, DTG revoked Lissette's trading privileges, allegedly due to more trading losses. Daiuto contends, "[i]nstead of paying down any of his outstanding prior trading losses at DTG with trading profits, Lissette quickly amassed approximately $60,000 in additional trading losses." (Daiuto Aff. at ¶17). Yet, Sofen denies that it gave Lissette a user name and password to trade with plaintiff. (Sofen Aff. at ¶9).

Defendants dispute the factual allegations regarding the Note. To start, defendants interchange plaintiff and DTG. For instance, Lissette claims that he had a conversation with Daiuto, believing him to be plaintiff's CEO, not DTG's. (Lissette Aff. at ¶7). He then maintains that he did have an exchange with Daiuto in May 2010, but that was in regard to a trading position with plaintiff (not DTG) and that he was promised to not have to bear any risk of loss

from the trades with plaintiff. (*Id.* at ¶8). Thus, the parties dispute with whom Lissette was trading.

Lissette explains that, in some trading arrangements, the trader puts up his own money for the trades and receives approximately 95% of the profits. However, in other trading arrangements, like the one he proposed with plaintiff, he would receive money from a fund (such as plaintiff) and the fund would receive a larger share of the profits. (*Id.* at ¶10). He continues that, in his arrangement with plaintiff, plaintiff agreed to fund him $100,000, in exchange for 60% of the profits. (*Id.* at ¶11). Lissette further maintains that he was told that plaintiff would never seek to collect on the Note, but only use the Note for bookkeeping reasons. (*Id.* at ¶14). Lissette explains that, in his previous relationship with plaintiff, he did not bear any risk of loss in the trades. (*Id.* at ¶11). Defendants further claim that they dispute any claim of past losses in the "Dimension" accounts and that the Note had "nothing to do" with past trading losses at either plaintiff or DTG. (*Id.* at ¶13). Lissette concludes that the Note was "given in connection with an underlying proprietary trading arrangement pursuant to which I traded an account set up with [plaintiff] and using [plaintiff's] funds." (*Id.* at ¶3).

Lissette claims that plaintiff, not DTG, issued him a username and password in June 2010, and that he then began to trade in plaintiff's account. After about a month, his account stopped working, and he was told that his account was terminated. Lissette, however, asserts that it was plaintiff that provided him with a user name and password to trade on plaintiff's website which it then revoked. (Affidavit of Lissette, sworn to on March 8, 2013, in opposition to the motion and support of the cross-motion [Lissette Aff.], at ¶¶19-20). In support thereof, Lissette produced a K-1 for 2010 that plaintiff issued to him that indicated that he contributed $100,000

in capital and lost $100,000. (Affidavit of Lissette, sworn to on March 26, 2013 [Lissette Reply Aff.], at ¶2, Exhibit "A"). Apparently, according to Lissette, plaintiff, not DTG, told him that his account was being terminated for high losses. However, "[a]ccording to my calculation, the losses in the account never met or exceeded $100,000." (Lissette Aff., at ¶ 23). Lissette continues that the Note was not fully funded because he was not transferred the entire $100,000. He further believes that plaintiff "breached the underlying proprietary trading agreement by terminating [his] trading account." *(Id.)*

Defendants maintain that despite multiple requests, plaintiff has not provided them with records documenting the trades. Lissette specifically claims that he requested:

> "(a) An account statement or other records of the trades in the account showing profits and losses;
> (b) A copy of [the] trading agreement;
> (c) Documentation concerning the establishment of the account;
> (d) Records of commissions and fees charged to the account;
> (e) Any information confirming that no one but [he] had access to trade in the account"

(Id. at ¶ 21.)

ARGUMENTS

According to plaintiff, demands for payment on the Note were made on December 13, 2011 and January 6, 2012. Defendants have not made any payments on the Note. Plaintiff is seeking summary judgment on the Note. It maintains that defendants agreed to pay plaintiff the amount of the Note, and then defaulted. As the Note is, according to plaintiff, an instrument for the payment of money only, and the lack of payment is not disputed, plaintiff contends that it is entitled to summary judgment.

In opposition to plaintiff's motion, defendants argue that summary judgment should be denied due to lack of consideration, fraudulent inducement and that disputed facts remain which preclude summary judgment. Defendants seek to have the motion stayed and the matter arbitrated. Defendants argue that this dispute should be arbitrated before FINRA, since they surmise that plaintiff is a member of FINRA. They also claim that plaintiff lacks standing to bring this lawsuit as plaintiff has since dissolved.

Plaintiff maintains, in response, that the parties never agreed to arbitrate the Note. The express terms of the Note permit the plaintiff to bring the action in any court sitting in the County of New York, which it did. It also contends that it was never a member of FINRA. With respect to DTG, plaintiff and DTG are "completely separate corporate entities with their own operations." (Sofen Aff. at ¶ 3). DTG was also not a member of FINRA, but is a former member of the CBSE. The Note, according to plaintiff, is a free-standing obligation, not tied to or dependent upon defendants' trading.

In their reply, defendants allege that the dispute over the Note should be arbitrated since plaintiff's limited liability agreement provides that the instant dispute should be arbitrated. They also maintain that plaintiff can be further ordered to arbitrate since plaintiff is an alter ego of DTG. The CBSE, of which DTG was a member, allegedly contains a broad arbitration provision that defendants seek to enforce over this dispute.

DISCUSSION

As an initial point, plaintiff has standing to proceed with its motion. Although plaintiff dissolved after the note was executed, plaintiff still retains the ability to wind up its affairs and collect on outstanding notes. *(See* Limited Liability Company Law § 703).

I. Motion to Compel Arbitration:

Defendants argue that plaintiff should be compelled to arbitrate its claims on the Note. They provide several different avenues for arbitration, including through FINRA, and through the plaintiff's own LLC agreement.

FINRA

Defendants allege that plaintiff should be compelled to arbitrate through FINRA. However, defendants failed in its burden to produce documentation in admissible form evidencing that either plaintiff or DTG is a member of FINRA[1]. In fact, through counsel, defendants acknowledged that plaintiff is not a member of FINRA or of the New York Stock Exchange. Accordingly, plaintiff cannot be compelled to arbitrate through FINRA.

The Note May Be A Separate Transaction:

Defendants maintain that the Note was part of an underlying trading agreement between defendants and plaintiff. Plaintiff reiterates that the Note was issued to address losses at both plaintiff and DTG and, after signing such Note, defendants were allowed to trade again at DTG.

It is well settled that "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." *(W.W.W. Assoc. v Giancontieri,* 77 NY2d 157, 162

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[1] In support of their position, defendants provide a one page document that has a heading FINRA and below that a title "Form Filing History" for "Individual Name: LISSETTE, JAMES F" with a "Source" containing three (3) entries listing DTG. (Lissette Aff. , Exhibit "A"). Clearly, this document does not show that plaintiff was a member of FINRA. Moreover, to the extent that defendants claim that this document somehow demonstrates that DTG was a member of FINRA, there is no support for this argument as the origin and the details of this document is wholly unexplained and unverified.

[1990]). "The court's role is limited to interpretation and enforcement of the terms agreed to by the parties, and the court may not rewrite the contract or impose additional terms which the parties failed to insert." *(131 Heartland Blvd. Corp. v C.J. Jon Corp.*, 82 AD3d 1188, 1189 [2d Dept 2011]).

The Note itself needs to be interpreted according to its express language, as it is not ambiguous, and is a separate contract from any trading or other agreement between the parties. In the Note, the parties set forth that plaintiff would be able to pursue a claim with respect to the promissory note in a court in the County of New York, which it did. There is no arbitration clause in the Note. The Note does not reference any trading arrangement between the parties. As such, any dispute related to the Note does not have to be arbitrated, as there was no agreement between plaintiff and defendants to arbitrate the Note.

Furthermore, there are allegations that the Note was created as a way for defendants to pay back losses to both plaintiff and DTG. The 2009 K-1 form documents that Hammerstone traded at a loss with plaintiff. In the e-mail exchange between Lissette and Daiuto, Daiuto discusses defendants' losses with DTG. Despite alleging that the promissory note had nothing to do with past trading losses, Lissette appears to acknowledge his debt and offers to be a part of something structured, including signing a promissory note. Defendants do not dispute the e-mail exchange between the parties, but state that they were assured plaintiff would never seek to collect on the debt.

Plaintiff's LLC Agreement:

In support of defendants' cross-motion, Lissette unequivocally stated that he was "never a member or shareholder of DTP." (Lissette Aff. at ¶13). In reply, defendants change their earlier

position and offer a new argument that defendants were actually a member of DTP by virtue of plaintiff's **unsigned** LLC Agreement. (Lissette Reply Aff., Exhibit "B"). As such, they now argue, for the first time, that the arbitration clause in plaintiff's LLC agreement should compel the parties to arbitrate this dispute, since, at one point, Hammerstone was a class C member of plaintiff. The LLC agreement's arbitration clause states that "[a]ny and all disputes or controversies between parties hereto arising out of or relating to this Agreement, or the breach thereof, shall be settled by binding arbitration administered by the American Arbitration Association..." (Lissette Reply Aff., Exhibit "B" at ¶16.06).

Defendants are not permitted to change their former position and then offer new arguments in reply that they were actually a member of plaintiff as it deprived plaintiff an opportunity to address said new argument. (*Esdaille v Whitehall Rlty. Co.*, 50 AD3d 251 [1st Dept 2008]; *Lumbermens Mut. Cas. Co. V Morse Shoe Co.*, 218 AD2d 624 [1st Dept 1995]). As such, this Court can not consider this new argument.

Arbitration Through the Chicago Board Stock Exchange:

Defendants argue that plaintiff "can be compelled to arbitrate under the CBSE [Chicago Board Stock Exchange] Rules because DTP is the alter ego of DTG and the Note is inextricably intertwined with the parties association with DTG." (Defendants' reply memorandum of law at 2). Lissette claims to have been an associated person with DTG when the Note was executed. Lissette claims that the CBSE rules contain a similar arbitration agreement as the FINRA rules. (Lissette Reply Aff. at ¶3). However, defendants failed to attach a copy of the CBSE rules in admissible form, but purportedly provided a link to the CBSE website where the rules can be found. This is insufficient as it is raised for the first time on reply and such an unaided search of

the CBSE website would be outside this record as documents contained therein would require authentication to overcome the classic hearsay rules.

Even if the CBSE rules could be considered, it would not compel plaintiff to submit to arbitration under the circumstances stated below. In support of the contention that a non-signatory such as plaintiff can be bound to another arbitration agreement, defendants rely on *Merrill Lynch Intl. Fin., Inc. v Donaldson* (27 Misc 3d 391 [Sup Ct, NY County 2010]), which was discussed during oral argument. In *Merrill Lynch Intl. Fin., Inc. v Donaldson*, the defendant was a broker and a former employee of Merrill Lynch Pierce Fenner & Smith ("MLPFS"). Prior to MLPFS' merger with Bank of America, MLPFS made retention loans available to certain employees, like the defendant, to induce them to continue working with MLPFS after the merger. There, the plaintiff Merrill Lynch International Finance, Inc. ("MLIFI"), an affiliate of MLPFS and a subsidiary of Bank of America, was the financing arm of the loan. When the defendant resigned after the merger, MLIFI sought to recover, pursuant to CPLR 3213, the balance of the retention loan. Defendant moved to compel arbitration, arguing that the dispute related to his employment with MLPFS, which is bound to arbitrate any employment-related disputes through FINRA.

The court found that, in certain circumstances, the requirement to arbitrate must be imputed to a non-signatory. Although the actual loan did not have an arbitration provision, the loan was issued as part of defendant's employment compensation or employment benefit, as a way to induce him to continue with his employment. Since there was a close and connected relationship with MLIFI and MLPFS, MLPFS being the signatory to the arbitration agreement, FINRA's arbitration requirement of employment disputes could not be avoided simply by having

an affiliate fund the loan. The court described the five applicable theories as to how a non-signatory to an agreement may be bound, which included incorporation by reference, assumption, agency, veil piercing/"alter ego" and estoppel. The court found that the case presented issues of agency and estoppel.

Here, the disparities between *Merrill Lynch Intl. Fin., Inc. v Donaldson* and the present situation require different outcomes. In *Merrill Lynch Intl. Fin., Inc. v Donaldson*, MLPFS and the defendant had an employment contract, requiring arbitration of employment related disputes. There was no other reason for this "sweetheart loan" except as a way for defendant to agree to stay on as an employee. *(Id.* at 397). As the court stated, it was "an employment benefit made to induce continued employment." (*Id.*) The note was incorporated into the defendant's employment benefit, so the two could not be separated. As such, MLPFS could not avoid their requirement to arbitrate employment disputes through FINRA simply by having another affiliate fund and sign the loan.

Here, the loan created was not a retention loan available to certain favored employees as an incentive to stay with plaintiff. Lissette, through Hammerstone, runs his own business of trading securities. Defendants never were employees of plaintiff. Defendants' utilization of plaintiff's trading platform does not create an employment agreement when one never existed. Moreover, the Note was a separate and independent transaction between plaintiff and defendants.

Furthermore, unlike in *Merrill Lynch Intl. Fin., Inc. v Donaldson*, plaintiff is more than simply a financing arm. The past history shows that defendants traded with both plaintiff and DTG. On this record, defendants have failed to come forward with admissible evidence that plaintiff and DTG are not distinct corporate entities with separate ownership and management.

Defendants interchange plaintiff with an alleged sister company, DTG, as a way to enforce arbitration through DTG's association with the CBSE by applying the alter ego theory. However, the defendants actually insist that they were trading with plaintiff, and that it was plaintiff that terminated their access to the trading platform.

Regardless, in terms of allegations that plaintiff is DTG's alter ego, the CBSE requirement that DTG has to arbitrate claims through the CBSE cannot be imputed to plaintiff. In this situation, "it cannot be said that [plaintiff] has perverted the privilege of doing business in a corporate form and was the alter ego of [DTG] for the purpose of committing some wrongful act or avoiding its obligations. As a result, we cannot impute to [plaintiff] an agreement to arbitrate [internal quotation marks and citation omitted]." *(TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 340 [1998]).

Moreover, simply because the Note and a trading agreement either with plaintiff or DTG, are related, does not mean that arbitration must be compelled through DTG's arbitration forum. The mere existence of interrelated claims among plaintiff, defendants and DTG, is not enough to subject plaintiff, a non-signatory, to any arbitration agreement between defendants and DTG. *See TNS Holdings Inc. v MKI Securities Corp.*, 92 NY2d at 340 ("[i]nterrelatedness, standing alone, is not enough to subject a nonsignatory to arbitration"). There is no reason why the Note dispute should not be brought in this court, as set forth in the Note itself.

"The proponent of arbitration has the burden of demonstrating that the parties agreed to arbitrate the dispute at issue." *(Eiseman Levine Lehrhaupt & Kakoyiannis, PC v Torino Jewelers, Ltd.*, 44 AD3d at 583). Defendants have not met their burden to demonstrate how plaintiff should be compelled to arbitrate either through FINRA, the LLC agreement or through

DTG's membership with the CBSE. As such, the cross motion to arbitrate and stay the action is denied.

II. Summary Judgment

As provided for in CPLR 3213, "[w]hen an action is based upon an instrument for the payment of money only ... the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint [internal quotation marks and citation omitted.]" (*Bonds Fin., Inc. v Kestrel Tech., LLC*, 48 AD3d 230, 231 [1st Dept 2008]). The plaintiff has the burden to demonstrate that there was a "promissory note, executed by the defendant, containing an unequivocal and unconditional obligation to repay, and the failure by the defendant to pay in accordance with the note's terms [internal quotation marks and citation omitted]." *(American Realty Corp. of NY v Sukhu*, 90 AD3d 792, 793 [2d Dept 2011]). If the plaintiff is able to meet its burden, the defendant must come forward with "evidence establishing the existence of a triable issue with respect to a bona fide defense." *(Id.)*

Defenses to the Note:

Plaintiff maintains that the Note itself is not ambiguous, that defendants do not dispute executing the Note, and that they have not made any payments on the Note. Plaintiff claims that the terms of the Note preclude defendants from raising any defenses extrinsic to the Note. Through counsel, plaintiff avers that defendants "waived any defenses except actual payment ... [b]ecause of the waiver provision in the Note, Defendants are barred from raising defenses, including those based on any trading agreements and alleged oral representations." (Reply memorandum of law at 7).

However, the provision referred to by plaintiff does not contain a waiver of defenses, such as fraud or lack of consideration. The provision states that, if plaintiff commences a proceeding to collect on the Note, defendants may not raise a counterclaim. The language referred to by plaintiff also addresses defenses with respect to claims arising out of other agreements. As such, defendants are not precluded from raising defenses to the Note.

Defendants claim that they have established a defense of failure of consideration. "If proved, lack of consideration is a perfectly viable defense [to a motion for summary judgment in lieu of a complaint] [internal quotation marks and citation omitted]." *(Manufacturers Hanover Trust Co. v L.N. Props., Inc.,* 174 AD2d 383, 383 [1st Dept 1991]). They argue that they were never given access to the entire $100,000, and that plaintiff improperly terminated Lissette's account prior to $100,000 in losses.

Plaintiff argues that the Note itself is supported by adequate consideration. Since the Note states "for value received" and Lissette was allowed to trade after the Note was executed, the assertions with respect to lack of consideration are, according to plaintiff, speculative.

The promissory note for $100,000 was executed on June 1, 2010. Plaintiff states that the Note was executed as a way to address prior trading losses at both plaintiff and DTG. After executing the Note, Lissette was allowed to trade at DTG. According to plaintiff, after one month, Lissette "quickly amassed" approximately $60,000 in trading losses. His trading privileges were then revoked by DTG. According to plaintiff, plaintiff was never involved in this trading agreement. Plaintiff does not provide any evidence about who exactly terminated Lissette's ability to trade. Nor is any evidence submitted demonstrating that defendants were given the $100,000.

Regardless, both plaintiff and defendants do not dispute that Lissette had not yet amassed $100,000 in losses before his account was terminated. Plaintiff provides a K-1 form indicating that Lissette contributed $100,000 in capital to plaintiff and then had a $100,000 loss. Yet, this does not provide any formal documentation as to the trading history of Lissette's account with either plaintiff or DTG, or whether or not he had been given access to all of the funds. Likewise, despite objecting to the defense of lack of consideration, Daiuto's affidavit states that Lissette lost approximately $60,000 and then had his trading privileges revoked. As such, defendants raised an issue of fact with respect to lack of consideration, and summary judgment in lieu of a complaint is denied.

As a result of the above, defendants' other defenses do not need to be addressed at this time.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff Dimension Trading Partners, LLC's motion for summary judgment in lieu of complaint is denied; and it is further;

ORDERED that plaintiff shall serve a formal complaint upon defendants' attorney within 20 days of service on plaintiff's counsel of a copy of this order with notice of entry and defendants shall move against or serve an answer to the complaint within 20 days after service thereof; and it is further

ORDERED that defendants Jamie F. Lissette and Hammerstone NV, Inc.'s cross-motion to compel arbitration and stay of this action is denied.

Dated: January 21, 2014

ENTER: