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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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GOLDMAN, SACHS & Co.,

Plaintiff,

-against-

CVR ENERGY, INC.,

Defendant.

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DECISION AND ORDER
Motion Seq. Nos.: 001 -and- 002

Index No. 652149/2012

DEUTSCHE BANK SECURITIES, INC.,

Plaintiff,

-against-

CVR ENERGY, INC.,

Defendant.

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Motion Seq. Nos.: 001 -and- 002

Index No. 652800/2012

O. PETER SHERWOOD, J.:

By preliminary conference order dated September 5, 2012, this court declared that *Goldman, Sachs & Co. v CVR Energy, Inc.*, Index No. 652149/2012, and *Deutsche Bank Securities v CVR Energy, Inc.*, Index No. 652800/2012, are consolidated for pre-trial purposes. Motion sequence nos. 001 and 002 in each action are essentially identical, and are consolidated herein for purposes of disposition.

In motion sequence number 001 in each action, each plaintiff, Goldman, Sachs & Co. (Goldman Sachs) and Deutsche Bank Securities, Inc. (Deutsche Bank) (together, the Banks), moves, in its respective action, for an order pursuant to CPLR 3212 granting summary judgment in its favor and dismissing the complaint. In motion sequence number 002, each plaintiff moves for an order striking the jury demand filed by defendant CVR Energy, Inc. (CVR), a Delaware corporation.

In each action, the plaintiff seeks to recover sale transaction fees and reasonable expenses, including attorneys' fees and travel expenses, for services that it, undisputedly, provided to CVR, a refiner and marketer of petroleum fuels, pursuant to the terms of two sets of investment banking services engagement letters. CVR retained each plaintiff upon learning that Carl Icahn and his

affiliated companies (collectively, Icahn) had, in January 2012, acquired a substantial minority interest in CVR, and might be preparing to acquire or to influence control over CVR.

In January and February, 2012, CVR entered into an initial engagement letter with each plaintiff. The letters contain substantially similar terms.

The Deutsche Bank initial engagement letter, dated January 23, 2012, and the Goldman Sachs initial engagement letter, dated February 15, 2012, memorialize CVR's retention of each plaintiff to provide advisory and investment banking services to CVR and its board of directors ("the Board") in connection with, among other things, their evaluation of a range of financial and strategic alternatives, including any challenge to its business plan or capitalization, or any actual or threatened contested solicitation of proxies.

Each initial engagement letter provides for flat rate fees, applicable in a variety of transactions or situations in which CVR may become involved, and for reimbursement of each plaintiff's reasonable out-of-pocket expenses (*see* Goldman Sachs initial engagement letter §§ i, ii, iii; Deutsche Bank initial engagement letter § 2). In each letter, the contracting parties anticipated that, in the event of a sale or similar transaction, the parties would enter into a second agreement governing the specific transaction and setting forth new fee provisions (*see* Goldman Sachs initial engagement letter at 2; Deutsche Bank initial engagement letter § 1B).

On February 16, 2012, Icahn announced a tender offer for all outstanding CVR stock at $30 per share. Soon thereafter, the Banks advised CVR that each required a new fee arrangement. On March 23, 2012, CVR and Deutsche Bank entered into a second engagement letter, confirming CVR's retention of that company to provide advisory and investment banking services to CVR and its Board relating to Icahn's attempt to obtain control over CVR. The letter also sets forth a schedule of flat rate fees, including an independence fee, an announcement fee, a proxy contest fee, and a termination fee, and fees based upon a percentage of the value CVR stock, such as a sale transaction fee and a success fee, each payable upon different triggering events and dates (*see* Deutsche Bank second engagement letter § 2). Calculation of the fee due in connection with a sale of CVR stock was based upon the "Aggregate Consideration," or,

> "the total amount of cash and the fair market value on the date which is five days prior to the consummation of the Sale Transaction (the 'Valuation Date')"

(*id.*). Further, in relevant part, that letter provides that,

> "[f]or purposes of calculating Aggregate Consideration, (i) all shares will be deemed transferred where a Sale Transaction is effected by the transfer of shares (A) constituting 50% or more of the then outstanding equity securities of or equity interest in [CVR] or its subsidiaries or affiliates or (B) possessing 50% or more of the then outstanding voting power of the outstanding equity securities of or equity interest in [CVR] or its subsidiaries or affiliates"

(*id.*).

That letter also obligated CVR to reimburse Deutsche Bank for its reasonable out-of-pocket expenses, including attorneys' fees and travel expenses, incurred in connection with its performance of the services required by the terms of the letter (*see id.* § 3).

The Goldman Sachs second engagement letter, dated March 21, 2012, similarly confirmed CVR's retention of Goldman Sachs to assist CVR and its Board in their analysis and consideration of an Icahn tender offer, or any other attempt by Icahn, or another person or group, to gain control over CVR. That letter set forth a fee schedule substantially similar to that set forth in the Deutsche Bank second engagement letter.

All four engagement letters were addressed to John (Jack) Lipinski, CVR's chairman of the board, chief executive officer (CEO), and president. Lipinski admittedly delegated the responsibility of handling the engagement letters to Edmund Gross, CVR's senior vice president and general counsel, and Frank Pici, CVR's chief financial officer (CFO) (*see* Jack Lipinski Feb. 26, 2013 dep tr at 16, lines 8-15). Pici executed all four letters on behalf of CVR.

On April 18, 2012, CVR and Icahn entered into a transaction agreement that facilitated the Icahn tender offer by, among other things, removing a "poison pill" obstruction to the Icahn tender offer that had previously been approved by the Board.

On May 3, 2012, Deutsche Bank and Goldman Sachs each submitted to CVR its invoice seeking approximately $18 million in sale transaction fees, with reimbursement of reasonable expenses of approximately $90,000, for a combined total fee of more than $36 million, based on the

Banks' calculation of CVR's aggregate consideration, as that term is defined by the second engagement letters.

On May 4, 2012, the Board unanimously approved the minutes of a number of Board meetings, including a meeting held on February 28, 2012, at which the sale transaction fee amount was discussed with the Board by Benjamin M. Roth, a partner at Wachtell Lipton Rosen & Katz, CVR's attorneys (*see* Benjamin Michael Roth Mar. 8, 2013 dep tr at 139, lines 3-16), and an April 18, 2012 meeting, at which the Board approved a resolution authorizing payment of fees to the Banks. CVR contends that no approval of the success fee provisions occurred at the meetings.

Also on May 4, 2012, Icahn instructed Lipinski and Pici by email "not [to] make any significant payments, including to any investment banking firms or other advisor retained by CVR in connection with our tender offer" (Vincent Intrieri, Icahn sr. managing director, May 4, 2012, email to Lipinski and Pici). Consistent with that instruction, CVR made no payments against the Banks' invoices.

On May 7, 2012, the transaction closed and Icahn acquired more than 50% of CVR's outstanding stock. Upon CVR's failure and refusal to pay the Banks' invoices, each plaintiff commenced an action to enforce the second engagement letters and recover success fees allegedly due each of them. In its complaint, Goldman Sachs asserts a cause of action for breach of contract, and seeks to recover $18,415,007.06 in unpaid fees and $82,283.98 in expenses, together with interest and attorneys' fees in connection with this action. In its complaint, Deutsche Bank asserts a cause of action for breach of contract, and seeks to recover $18,505,870.06 in unpaid fees and $90,862.00 in expenses, together with interest and attorneys' fees. In each of its answers, CVR denies that it is contractually obligated to pay the demanded fee.

The Banks now seek summary judgment in their respective actions on the grounds that the undisputed record conclusively demonstrates that CVR executed the second engagement letters, that the Banks fully complied with their contractual obligations, and that CVR breached those letters' clear and unambiguous fee provisions by failing to pay the Banks' invoices.

In partial opposition, CVR admits that it engaged the Banks to provide certain services, but argues that triable issues sufficient to preclude summary judgment exist regarding the amount of compensation to which the Banks are contractually entitled (*see* oral argument tr at 17, lines 13-21,

at 31, lines 11-13). Specifically, CVR contends that triable issues of fact exist regarding whether Pici had the authority to bind CVR to the fee provisions of the second engagement letters; whether CVR subsequently authorized, or, ratified, those letters; and, if so, which fees were earned by the Banks, on the ground that the fee provisions' terms are ambiguous. CVR contends that it never agreed to pay the Banks a success fee, and that the fee is, at bottom, an unconscionable reward for failing to stave off the Icahn tender offer. However, CVR concedes that, assuming that CVR is contractually obligated to pay success fees, the Banks' mathematical calculations of the fees owed are correct (*see* Pici May 3, 2012 email to Lipinski; Pici dep tr at 134, line 20 to 135, line 14; Susan Ball, CVR CFO, Feb. 26, 2013 dep tr at 32, line 22 to 33, line 13).

On a motion for summary judgment, the movant must establish by evidentiary proof in the form of affidavits or other evidence that no issues of material fact exist, and that judgment, as a matter of law, should be granted in its favor (*see Cox v Kingsboro Med. Group*, 88 NY2d 904, 906 [1996]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212). Once the movant establishes a prima facie right to summary relief, the burden of proof shifts to the opposing party to establish, with admissible evidentiary support, the existence of a genuine issue of material fact sufficient to defeat the motion (*see Friends of Animals v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067-1068 [1979]).

To prevail on a breach of contract claim, the plaintiff must allege and demonstrate the terms of the agreement, the consideration, the plaintiff's performance, the defendant's breach, and resulting damages (*see Furia v Furia*, 116 AD2d 694, 965 [2d Dept 1986]). The law of New York "presumes that one who is capable of reading has read the document which he has executed and he is conclusively bound by the terms contained therein" (*Marine Midland Bank v Embassy E.*, 160 AD2d 420, 422 [1st Dept 1990] [citations omitted]).

The undisputed record conclusively demonstrates that CVR is bound by the terms of the second engagement letters. CVR does not dispute that Pici, then CVR's CFO, executed those letters, and that the Banks fully performed in accord with the letters' terms (*see* CVR response to the Banks' Rule 19-a Statement ¶¶ 23, 24). There is no dispute that CVR invited the Banks to attend virtually every Board meeting, announced publicly that it had engaged the Banks as financial advisors in connection with the Icahn tender offer, and accepted the Banks' services pursuant to the terms of the

initial and second engagement letters. CVR does not dispute the Banks' allegations that the Banks dedicated core teams of more than 25 people, intermittently assisted by additional personnel over a period of months, to research, analyze, provide financial advice to CVR and its Board, and render opinions on the Icahn tender offer. "Parties cannot accept benefits under a contract fairly made and at the same time question its validity" (*Svenska Taendsticks Fabrik Aktiebolaget v Bankers Trust Co.*, 268 NY 73, 81 [1935]; *see Spectra Audio Research v 60-86 Madison Ave. Dist. Mgt. Assn.*, 267 AD2d 23, 24 [1st Dept 1999]).

Moreover, the undisputed evidentiary record conclusively demonstrates that CVR and its Board subsequently ratified the second engagement letters. "Ratification is the express or implied adoption of the acts of another by one for whom the other assumes to be acting, but without authority[,] . . . [and it] relates back and supplies original authority to execute [an agreement]" (*Holm v C.M.P. Sheet Metal*, 89 AD2d 229, 232 [4th Dept 1982]). Ratification requires "full knowledge of the material facts relating to the transaction, and the assent must be clearly established and may not be inferred from doubtful or equivocal acts or language" (*id.* at 233).

"When an act is done without authority, under an assumed agency, it is the duty of the principal to disavow and repudiate it in a reasonable time after information of the transaction if he would avoid responsibility thereof" (*C.E. Towers v Trinidad & Tobago [BWIA Intl.] Airways Corp.*, 903 F Supp 515, 526 [SD NY 1995] [internal quotation marks and citation omitted]; *see Hannigan v Italo Petroleum Corp. of Am.*, 43 Del 333, 341 [Sup Ct, Del 1945] ["Where a contract is made by one assuming to act on behalf of a corporation . . . and the corporation, after knowledge of the facts attending the transaction is brought home to its proper officers, receives and retains the benefit of it without objection, it thereby ratifies the unauthorized act"]).

Contracting parties'

> "attempt to minimize the significance of a contract signed by their corporate president notwithstanding, an agreement entered into within the exercise of a corporate officer's apparent authority is binding on the corporation without regard to the officer's lack of actual authority. Even in the instance where a chief executive's actual authority to enter into a particular agreement without the approval of the board of directors is in doubt, no obligation is imposed on the other party to the transaction to show that [the president] did, in fact, consult the board"

(*Goldston v Bandwidth Tech. Corp.*, 52 AD3d 360, 363 [1st Dept 2008] [internal quotation marks and citation omitted]; *Savasta v 470 Newport Assoc.*, 180 AD2d 624, 626-627 [2d Dept 1992], *affd* 82 NY2d 763 [1993]).

On April 18, 2012, the Board passed a resolution authorizing CVR to pay all fees incurred by it "in connection with the Transaction Agreement and the other transactions contemplated thereby, including, without limitation, fees and expenses of [CVR's] financial advisors" (minutes of the meeting of the Board of Directors of CVR Energy, Apr. 18, 2012, and resolutions attached as Appendix C; *see* CVR response to the Banks' Rule 19-a Statement ¶ 33). The resolution was passed by the Board on the same day that Pici advised the Board members that the Banks' fees would total $36 million (*see* CVR response to the Banks' Rule 19-a Statement ¶ 33; George Matelich, former Board member, Mar. 22, 2013 dep tr at 40, line 7 to 41, line 22).

After learning the probable amount of the fees, the Board did not question, modify, or vacate the fee resolution or express any objection to the fee provisions of the second engagement letters. CVR concedes that immediately following the conclusion of the telephonic April, 2012, Board meeting, the Board members remained on the line with Gross and Pici (*see* CVR opposition brief at 9). CVR further concedes that, Pici then disclosed to the Board the existence of the second engagement letters and his opinion that the Banks would bill CVR for sale transaction fees of more than $18 million each (*see id.*).

On May 4, 2012, the Board's individual members signed consents to a resolution approving the minutes of prior Board meetings, including the April, 2012, meeting at which the fee resolution was passed and the February 28, 2012, meeting, which summarized a presentation by Benjamin M. Roth, a partner at Wachtell Lipton Rosen & Katz, CVR's attorneys, explaining the fee provisions of the second engagement letters. In addition, the minutes of the April, 2012, meeting were approved by Gross and Lipinski.

The ratification by CVR of the second engagement letters renders irrelevant CVR's arguments regarding whether Pici possessed authority, actual or apparent, to execute those letters, his understanding of the terms of those letters on the date that he executed them, and whether there existed a mistake, mutual or unilateral, with regard to the fee terms.

Contrary to CVR's contention, the fee provisions of the second engagement letters are not ambiguous, nor can they be interpreted as excluding a transaction with Icahn. The well-established law of contract interpretation provides that:

> "[i]n interpreting a contract, the intent of the parties governs. A contract should be construed so as to give full meaning and effect to all of its provisions. Words and phrases are given their plain meaning. Rather than rewrite an unambiguous agreement, a court should enforce the plain meaning of that agreement.
>
> Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment. On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact, and summary judgment should be denied"

(*American Express Bank v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990], *app denied* 77 NY2d 807 [1991] [internal citations omitted]; *see* CPLR 3212). Further, "[w]hether or not a writing is ambiguous is a question of law to be resolved by the courts" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

The Deutsche Bank second engagement letter clearly provides that CVR "shall pay Deutsche Bank for its services hereunder a cash fee . . . . Upon the earlier of (i) the final withdrawal, settlement, termination or completion of an Icahn Proposal" (Deutsche Bank second engagement letter § 2 [a]). The Goldman Sachs second engagement letter provides that a fee will be due from CVR upon "a sale of 50% or more of the outstanding common stock . . . accomplished . . . by means of a tender offer . . . or otherwise" (Goldman Sachs second engagement letter § iii).

CVR repeatedly argues that, because it retained the Banks to defeat the Icahn tender offer, it is unconscionable to require CVR to pay the Banks a success fee when the tender offer succeeded. However, neither engagement letter specifies defeating the tender offer as a goal, and it is not commercially unreasonable for the Banks to receive payment for their work performed in aiding CVR to obtain the best possible results in a range of eventualities, including the Icahn tender offer. "Equity will not relieve a party of its obligations under a contract merely because subsequently, with the benefit of hindsight, it appears to have been a bad bargain" (*Raphael v Booth Mem. Hosp.*, 67 AD2d 702, 703 [2d Dept 1979]).

The court has considered CVR's remaining arguments and finds them to be similarly without merit. For the foregoing reasons, the motion for summary judgment by each plaintiff is granted in its entirety. Additionally, the motion filed in each action to strike CVR's jury demand is denied as moot, inasmuch as summary judgment on liability and damages has been granted.

Accordingly, it is

ORDERED that motion sequence number 001 in the action bearing index No. 652149/2012 is granted, and the Clerk of the Court is directed to enter judgment in favor of plaintiff Goldman Sachs & Co. and against defendant CVR Energy, Inc. in the amount of $18,497,291.04, together with interest at the statutory rate from the date of the decision on this motion, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that motion sequence number 001 in the action bearing index No. 652800/2012 is granted, and the Clerk of the Court is directed to enter judgment in favor of plaintiff Deutsche Bank Securities Inc. and against defendant CVR Energy, Inc. in the amount of $18,596,732.06, together with interest at the statutory rate from the date of the decision on this motion, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that motion sequence number 002, to strike the jury demand, in each action is denied as moot.

This constitutes the decision and order of the court.

DATED: **September 8, 2014**

ENTER,

O. PETER SHERWOOD
J.S.C.