

**Shareholder Representative Servs. LLC v NASDAQ
OMX Group, Inc.**

2016 NY Slip Op 31266(U)

July 5, 2016

Supreme Court, New York County

Docket Number: 651145/2014

Judge: Marcy Friedman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

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SHAREHOLDER
REPRESENTATIVE SERVICES LLC
IN ITS CAPACITY AS THE REPRESENTATIVE OF THE
SELLING SHAREHOLDERS OF FTEN, INC.

Index No.: 651145/2014

Plaintiff,

DECISION, ORDER,
AND JUDGMENT

– against –

THE NASDAQ OMX GROUP, INC. AND FTEN,
INC.

Defendants.

_____ x

Plaintiff Shareholder Representative Services LLC (SRS) brings this action in its capacity as representative of the former shareholders (Selling Shareholders) of defendant FTEN, Inc. (FTEN), a real-time risk management technology provider. (Compl. ¶¶ 1, 10.) The Selling Shareholders sold their equity interests in FTEN to defendant The NASDAQ OMX Group, Inc. (NASDAQ) for \$110 million in a December 2010 merger (the Merger). (*Id.* ¶ 1.) Both sides now claim entitlement to the balance of an indemnification escrow account created during the Merger (the Escrow Account). SRS moves for summary judgment on its own claims for breach of contract and a declaratory judgment, and dismissing a counterclaim for a declaratory judgment asserted by defendants.

Background

NASDAQ and FTEN memorialized the terms of their Merger in an Agreement and Plan of Merger dated as of December 15, 2010. (Merger Agreement, annexed as Exh. A to Aff. of Christopher Letang [managing director of SRS] In Supp. [Letang Aff.].) Article IX of the

Agreement provides NASDAQ with a right of indemnification from the Escrow Account for certain tax liabilities of FTEN and its subsidiaries (the Target Companies). Specifically, Section 9.01 provides, in pertinent part:

“Subject to the limitations set forth in this Article IX and elsewhere in this Agreement . . . [NASDAQ] and its Affiliates (including the Surviving Corporation) [collectively NASDAQ] . . . shall be indemnified from, and solely to the extent of, the Escrow Account against any Damages that [NASDAQ] incurs arising out of or resulting from:

(a) any breach of any representation or warranty contained in Article IV . . . ;¹

(e) any Taxes of the Target Companies for taxable periods (or portions thereof) ending on or before the Closing Date”

The term Damages is defined in Section 1.01 of the Agreement, in pertinent part, as “all actual out-of-pocket losses, liabilities, claims, demands, judgments, fines, damages, costs and expenses (including the reasonable fees and expenses of counsel) incurred or suffered by [NASDAQ] and, to the extent indemnified against under Section 9.01 (a) (for breaches of representations contained in Section 4.13), [or] Section 9.01 (e) . . . any Taxes imposed on or incurred by [NASDAQ]”

Article IX further specifies the notices required to assert a claim for indemnification and the required contents of such notices. Section 9.06 (a) provides, in pertinent part:

“(a) If [NASDAQ, here the ‘Claimant’] . . . wishes to assert an indemnification claim in accordance with this Article IX, then the Claimant shall deliver to [SRS] a written notice . . . (with a copy to the Escrow Agent) in accordance with Section 9.06 (b) (a ‘Claim Notice’) setting forth: (i) the specific representation, warranty, or covenant alleged to have been breached . . . or other indemnifiable matter described in

¹ As discussed further below, the Article IV representations and warranties referenced in Section 9.01 (a) cover, among other subjects, representations and warranties regarding the Target Companies’ filing of pre-Merger Taxes and Tax Returns. (See Merger Agreement §§ 4.01 [a], [b].) Section 1.01 of the Agreement defines Tax as “all forms of taxation or duties imposed, or required to be collected or withheld” This Section defines Tax Return as “any return, filing, report, claim, refund request, questionnaire, information statement or other document required to be filed . . . for any taxable period with any Taxing Authority”

Section 9.01 . . . ; (ii) taking into account the information available to the Claimant at such time, a reasonably detailed description of the facts and circumstances giving rise to the alleged breach of such representation, warranty or covenant or other indemnifiable matter . . . ; and (iii) taking into account the information available to the Claimant at such time, a reasonably detailed description of, and a reasonable estimate of the total amount of, the Damages incurred or expected to be incurred by the Claimant as a direct result of such alleged breach or other indemnifiable matter”²

Section 9.03 imposes an eighteen-month deadline, defined as the “Claim Expiration Date,” by which NASDAQ must “initially assert[]” an indemnification claim. Section 9.03 (a) provides: “It is the express intent of the parties that, except as set forth in Section 9.03 (b), notwithstanding any applicable statute of limitations, upon the Claim Expiration Date no further claims for indemnification can be initially asserted by [NASDAQ] under this Agreement.” Section 9.03 (b), however, preserves good faith claims asserted before the deadline. It thus provides:

“(b) Notwithstanding anything in this Section 9.03 to the contrary, if, prior to the Claim Expiration Date, [NASDAQ] . . . shall have duly delivered in good faith a conforming Claim Notice . . . [or] a notice of a Tax Controversy to [SRS] (with, in the case of a claim by [NASDAQ] or a Tax Controversy, a copy to the Escrow Agent in conformity with all of the applicable procedures set forth in the Escrow Agreement and in Section 9.06), then the specific indemnification claim set forth in such Claim Notice (to the extent of the matter specified in the Claim Notice) or any indemnification claim resulting from the Tax Controversy shall survive the Claim Expiration Date and shall not be extinguished thereby until resolution of the matter specified in the Claim Notice or the Tax Controversy in accordance with this Agreement and the Escrow Agreement”

Under the terms of the Merger Agreement, NASDAQ’s right to indemnification under Article IX is limited to the funds available in the Escrow Account. (Merger Agreement §§ 9.01,

² Section 9.06 (b) provides that “[a] copy of any Claim Notice from [NASDAQ] as Claimant shall be delivered by [NASDAQ] to the Escrow Agent contemporaneously with the delivery of such Claim Notice to the Securityholder Representative.”

9.03 [b].) By Escrow Agreement dated as of December 23, 2010, SRS and NASDAQ appointed U.S. Bank National Association as Escrow Agent and provided for the deposit of \$11 million into the Account for the payment of indemnification claims. (Escrow Agreement §§ 1, 2, Recital B [Letang Aff., Exh. B].) The Escrow Agreement also contains provisions governing the administration and release of funds from the Account. (Id. §§ 4, 5.)

Section 4 (a) of the Escrow Agreement requires a party seeking indemnification from the Escrow Account under Article IX of the Merger Agreement to deliver a “Claim Notice to [SRS] pursuant to Section 9.06 of the Merger Agreement,” with “a copy of the Claim Notice to the Escrow Agent.” Section 4 (b) further provides that, within thirty days of delivery to SRS of any Claim Notice, SRS must submit a Response Notice stating its position with respect to “the full amount claimed in the Claim Notice,” i.e., the Claimed Amount. The Section defines the term Contested Amount as “[a]ny part of the Claimed Amount that is not agreed by [SRS] to be owing to [NASDAQ] pursuant to [SRS’s] Response Notice.” Section 4 (h) of the Escrow Agreement then provides for disbursement to SRS within five days of the 18 month anniversary date of the Agreement of all amounts exceeding the Claimed Amounts and Contested Amounts. It thus provides:

“(h) Distribution of Escrow Fund Balance. Within five Business Days of the 18 month anniversary of the date of this Agreement . . . (the ‘Indemnification Escrow Anniversary Date’), if the Indemnification Escrow Fund Balance exceeds the full amount of the Claimed Amounts and Contested Amounts associated with all claims for indemnification made on or prior to the Indemnification Escrow Anniversary Date under Article IX of the Merger Agreement that are being contested or that otherwise have not been finally resolved and paid in accordance with this Agreement (‘Unresolved Escrow Claims’) as of the Indemnification Escrow Anniversary Date, the Escrow Agent shall disburse to the Paying Agent for distribution to the Common Stockholders cash from the Indemnification Escrow Account having an aggregate value equal to the amount by which the Indemnification Escrow Fund Balance exceeds the full amount of the Claimed Amounts and Contested Amounts of such

Unresolved Escrow Claims. Within five Business Days following the final disbursement of funds from the Indemnification Escrow Account to [NASDAQ] in connection with the final resolution of the last Unresolved Escrow Claim, the Escrow Agent shall disburse the Indemnification Escrow Fund Balance, if any, to the Paying Agent for distribution to the Common Stockholders.”

The parties appear to agree that the eighteen month periods set out in the Merger Agreement (terminating with the Claim Expiration Date), and the Escrow Agreement (terminating with the Indemnification Escrow Anniversary Date), elapsed at or around the same time, and in any event no earlier than June 23, 2012.³ (Compl. ¶¶ 4, 18 [June 23, 2012]; Letang Aff. ¶ 25 [June 24, 2012].) As there is no substantive difference between the dates involved, the Court will use the term “Claim Expiration Date” to refer to both the Claim Expiration Date and the Indemnification Escrow Anniversary Date.

On June 21, 2012, NASDAQ sent SRS and the Escrow Agent a letter entitled “Sales Taxes – Claim Notice / Notice of Tax Controversy.” (The June 21, 2012 Notice or Claim Notice [Letang Aff. Ex. C].) In the Claim Notice, NASDAQ stated that it “has estimated that it has incurred Damages in respect of unpaid sales Taxes . . . in an amount equal to \$8,434,165.86, plus certain costs and expenses,” for an aggregate Damages amount of \$8,859,975.86. (*Id.* at 1-2.) The Claim Notice further stated that “[t]hese Damages are indemnified against pursuant to Section 9.01 (e) of the Merger Agreement because they were incurred as a result of the failure of [FTEN] to file sales Tax Returns and pay sales Taxes . . . in respect of certain services and products for taxable periods (or portions thereof) ending on or prior to the Closing Date.” (*Id.* at 2.) Alternatively, the Claim Notice asserted an indemnification claim for these Damages under

³ The Complaint specifies December 15, 2010 as the “Closing Date” (Compl. ¶ 16), which would make the Claim Expiration Date June 15, 2012. (See Merger Agreement § 9.03 [a].) The documentary evidence shows, however, that December 15, 2010 is the date of the Merger Agreement rather than the Closing Date of the Merger. (See Merger Agreement § 2.05.)

Merger Agreement § 9.01 (a). (Id. at 2-3.)⁴ The Claim Notice attached supporting analyses and calculations of FTEN's pre-Merger sales tax exposure in five jurisdictions, prepared by the accounting firm KPMG LLP (KPMG). (Id., Sales/Use Tax Diagnostic Review at 5, Sales Tax Estimated Exposure Calculation.)

On November 21, 2012, SRS sent NASDAQ and the Escrow Agent a letter in which it contested the amounts claimed in the Claim Notice "in full." (Response Notice [Letang Aff. Ex. D].) As a result of NASDAQ's claim, \$8,859,975.86 remains in the Escrow Account. (Compl. ¶ 6, 30; Answer ¶ 30.)

Discussion

SRS's first cause of action for breach of contract alleges, among other things, that NASDAQ breached the Merger and Escrow Agreements (the Agreements) by "improperly serving the [June 21, 2012] Notice at a time when it had not incurred Damages and by failing to direct the Escrow Agent to release the Escrow Funds to the Selling Shareholders once the [Claim Expiration Date] elapsed despite the fact that Defendants had not incurred any Damages on that date." (Compl. ¶ 49.) The second cause of action alleges that "NASDAQ was not permitted to freeze any escrowed funds" (id. ¶ 53), and seeks "a declaration that the Escrow Balance be released in full to Plaintiff forthwith." (Id. ¶ 56.) NASDAQ's counterclaim seeks a declaratory judgment that defendants "are entitled to be indemnified for their payment of previously-unpaid taxes in respect of certain FTEN services and products for taxable periods ending on or prior to the Closing Date specified in the Merger Agreement" (Answer ¶ 74.) The counterclaim

⁴ Specifically, the Claim Notice states that "[a]lthough these Damages were also incurred as a result of breaches of certain representations in respect of Taxes set forth in Section 4.13 of the Merger Agreement, which would be indemnified against under Section 9.01 (a) of the Merger Agreement, Section 9.01 (e) provides that to the extent an indemnification claim can be made under both Sections 9.01 (a) and 9.01 (e), the claim shall first be indemnified against under Section 9.01 (e)." (Id. at 2-3.)

also seeks indemnification for NASDAQ's payment of previously unpaid taxes of FTEN for "taxable periods ending after the Closing Date . . . based on the selling shareholders' misrepresentations regarding FTEN's tax compliance and/or liabilities, failure to cooperate in resolving tax controversies as required by the Merger Agreement and failure to mitigate damages" (Id. ¶ 75.) NASDAQ claims that "[t]he pre- and post-closing taxes, and associated costs, fees, expenses and interest, for which [it is] entitled to be indemnified amount to at least \$8,859,975.86." (Id. ¶ 76.)

As an alternative to its request for release of the entire escrow balance to plaintiff, SRS seeks partial summary judgment dismissing the portions of NASDAQ's counterclaim seeking indemnification for post-Merger tax liabilities, and the "immediate release to Plaintiff of \$3,355,899.79 of the Escrowed Funds," which it contends are being held solely on account of the post-Merger claims. (Pl.'s Memo. In Supp. at 1.)

Pre-Merger Claims

In support of its request for release of the entire escrow balance, SRS contends that NASDAQ had no right under the Agreements to submit a Claim Notice for indemnification or to retain funds in the Escrow Account until it "actually 'incurred or suffered'" Damages. (See Pl.'s Memo. In Supp. at 2, 6, 18.) SRS further contends that NASDAQ did not incur Damages until "NASDAQ received a tax bill from a taxing authority fixing an amount of tax liability that [NASDAQ] was obligated to pay." (Id. at 18.) It is undisputed that NASDAQ did not receive any tax bills until after the Claim Expiration Date. (Id. at 13-14; Feb. 10, 2014 Ltr. from Alex Kogan [VP/Deputy General Counsel of NASDAQ] [Letang Aff. Ex. E].) SRS argues that the Claim Expiration Date is a contractual limitations period for the assertion of indemnification claims. Thus, according to SRS, NASDAQ's indemnification claims are barred, as is its right to

funds in the Escrow Account.

NASDAQ disputes SRS's contention that only Damages incurred before the Claim Notice or Claim Expiration Date are indemnifiable. NASDAQ argues that the Claim Expiration Date "is solely the cutoff for NASDAQ to submit claims notices to SRS." (Defs.' Memo. In Opp. at 1 [emphasis omitted].) NASDAQ further argues that "these notices are not limited to damages that have already been incurred," and that the Merger Agreement preserves claims set forth in timely Claim Notices following the Claim Expiration Date. (See *id.* at 1-2.)

SRS's motion therefore presents a pure issue of contract interpretation. It is well settled that the determination of whether a contract is ambiguous is one of law to be resolved by the court. (Matter of Wallace v 600 Partners Co., 86 NY2d 543, 548 [1995]; W.W.W. Assocs., Inc. v Giancontieri, 77 NY2d 157, 162 [1990].) Written agreements are to be construed in accordance with the parties' intent, and "the best evidence of what parties to a written agreement intend is what they say in their writing." (Schron v Troutman Sanders LLP, 20 NY3d 430, 436 [2013] [internal quotation marks, brackets, and citation omitted].) The court should determine from contractual language, without regard to extrinsic evidence, whether there is any ambiguity. (Chimart Assocs. v Paul, 66 NY2d 570, 573 [1986].) "Ambiguity in a contract arises when the contract, read as a whole, fails to disclose its purpose and the parties' intent, or where its terms are subject to more than one reasonable interpretation." (Universal Am. Corp. v Natl. Union Fire Ins. Co. of Pittsburgh, Pa., 25 NY3d 675, 680 [2015] [internal quotation marks and citation omitted].)

A court presented with a contractual interpretation issue should "construe the [contract] so as to give full meaning and effect to the material provisions. A reading of the contract should not render any portion meaningless. Further, a contract should be read as a whole, and every part

will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose.” (Beal Sav. Bank v Sommer, 8 NY3d 318, 324-25 [2007] [internal quotation marks and citations omitted]; W.W.W. Assocs., 77 NY2d at 162 [reading the contract “as a whole to determine its purpose and intent”]; National Conversion Corp. v Cedar Bldg. Corp., 23 NY2d 621, 625 [1969] [holding that “[a]ll parts of an agreement are to be reconciled, if possible, in order to avoid inconsistency”].) In addition, contemporaneous documents governing the same transaction should be read together. (See generally Brax Capital Group, LLC v WinWin Gaming, Inc., 83 AD3d 591, 592 [1st Dept 2011]; Gulf Ins. Co. v Transatlantic Reins. Co., 69 AD3d 71, 81 [1st Dept 2009] [same].)

As discussed above (supra at 2), Section 9.01 of the Merger Agreement authorizes indemnification of NASDAQ for Damages that NASDAQ “incurs arising out of or resulting from,” among other things, “Taxes . . . for taxable periods (or portions thereof) ending on or before the Closing Date” of the Merger Agreement. The term Damages is defined to include “Taxes imposed on or incurred by” NASDAQ, and the term Tax is defined as “taxation . . . imposed, or required to be collected or withheld . . .” (Merger Agreement § 1.01.) Under the express terms of the Merger Agreement, indemnification is therefore available only for Taxes actually imposed on or incurred by NASDAQ.

Contrary to SRS’s contention, however, nothing in the Merger Agreement imposes a time limitation on when Damages must have been incurred in order to be indemnifiable, provided that notice of the indemnification claim is given in a timely fashion. The provisions of the Merger Agreement governing the assertion of indemnification claims impose a deadline for such notice. Thus, as also discussed above (supra at 3), Section 9.03 (a) precludes an indemnification claim from being “initially asserted” after the Claim Expiration Date, which is defined in that provision

as the 18 month anniversary of the Closing Date of the Merger Agreement. Section 9.06 (a), however, expressly permits the assertion of a claim for indemnification of tax liabilities not incurred as of the time of the Claim Notice, as it permits the Claimant to set forth in the notice “a reasonable estimate of” Damages “expected to be incurred.” If “duly delivered in good faith,” and in conformance with the other substantive requirements of Section 9.06 (a), the Merger Agreement provides that the “specific indemnification claim set forth in such Claim Notice . . . shall survive the Claim Expiration Date and shall not be extinguished thereby until resolution of the matter specified in the Claim Notice” (*Id.* § 9.03 [b].) Read together, these provisions are not susceptible to the interpretation that NASDAQ must have incurred Damages before asserting an indemnification claim or is barred from claiming indemnification for Damages incurred after the Claim Expiration Date.⁵

The Escrow Agreement is consistent with the Merger Agreement. The plain language of the Escrow Agreement makes clear that the parties intended, in entering into that Agreement, not to establish new or different substantive indemnification rights, but to secure NASDAQ’s indemnification rights under the Merger Agreement. They secured those rights by agreeing to mechanisms and procedures for the holding and release of the escrow deposit required under the Merger Agreement. Thus, the Escrow Agreement specifically recites: “Section 2.06 (b) of the Merger Agreement requires [NASDAQ] to deposit \$11,000,000 . . . of the Merger Consideration

⁵ None of the cases cited by SRS involves similar contractual provisions. In the context of determining when an indemnification cause of action accrues and, therefore, whether a cause of action asserted in litigation is timely or premature, the cases discuss indemnification agreements which provide for indemnification for losses or liability incurred. (See *Madeira v Affordable Hous. Found., Inc.*, 323 Fed. Appx. 89, 91 [2d Cir 2009]; *Hutton Constr. Co., Inc. v County of Rockland*, 52 F3d 1191, 1193 [2d Cir 1995]; *515 Ave. I Corp. v 515 Ave. I Tenants Corp.*, 2010 WL 4904671, * 5 [Sup Ct, Kings County, Dec. 1, 2010, No. 65/05].) Here, in contrast, the parties dispute whether, under the particular contractual provisions at issue, a pre-litigation Claim Notice may validly be served before the liabilities estimated in such Notice have actually been “incurred,” and whether the indemnification claim for such liabilities survives a contractual claim expiration date. None of the cases cited by SRS addresses these distinguishable issues.

in escrow to provide a source of funds . . . to secure certain indemnification rights of [NASDAQ] under the Merger Agreement.” (Escrow Agreement, Recital B.) The parties further agreed in the Escrow Agreement to appoint an Escrow Agent and to establish a contractual framework for that agent “to hold, invest, administer and distribute the escrow funds . . .” (Id., Recital D.)

Section 9.08 of Merger Agreement, in contrast, expressly provides that indemnification claims shall be asserted in accordance with Section 9.06 of that Agreement. Although the Merger Agreement states that the administration of such claims shall be subject to the terms of the Escrow Agreement, it includes the caveat that application of the Escrow Agreement to such claims is “subject to the limitations set forth in this Article IX.” Thus, Section 9.08, entitled “Administration of Escrow Accounts,” provides:

“Upon the delivery of a Claim Notice from [NASDAQ] in accordance with Section 9.06, the administration of such claim shall, subject to the limitations set forth in this Article IX, be subject to the terms and conditions of the Escrow Agreement. In addition, releases of funds from the Escrow Accounts shall be governed by the Escrow Agreement.”

Contrary to SRS’s contention, the last sentence of § 9.08, stating that releases of escrowed funds shall be governed by the Escrow Agreement, does not provide for the Escrow Agreement to define the conditions that must be met in order for the right to indemnification to arise or for an indemnification claim to be asserted. Nor does the Escrow Agreement itself establish the substantive requirements for an indemnification claim.

In support of its contention that such requirements are imposed by the Escrow Agreement, SRS relies on Section 4 (a), which provides as follows:

“(a) Claim Notice. If [NASDAQ] has or claims to have incurred or suffered Damages for which it is or may be entitled to be indemnified, compensated or reimbursed from the [] Escrow Account under Article IX of the Merger Agreement, in addition to delivering a Claim Notice to [SRS] pursuant to Section 9.06 of the Merger Agreement, [NASDAQ] must deliver a copy of the Claim Notice to the Escrow Agent.”

SRS reads the opening clause of this Section as providing that “liability must be incurred to transmit a Claim Notice under the Escrow Agreement.” (Pl.’s Memo. In Supp. at 6.) SRS then argues that NASDAQ’s June 21, 2012 Notice was not a valid Claim Notice under Section 4 (a), and that there were “no ‘Claimed Amounts’ to hold in escrow beyond the 18-month deadline” imposed by the Claim Expiration Date.⁶ (*Id.*)

Although this Section on its face refers to Damages “incurred or suffered” by NASDAQ, it also expressly confirms that Article IX of the Merger Agreement governs NASDAQ’s entitlement to indemnification. As held above, Article IX does not require Damages to have been incurred prior to the Claim Expiration Date, provided that the Claim Notice is timely and contains “a reasonable estimate” of the Damages “expected to be incurred.”

This holding is reinforced by the absence in the Escrow Agreement of a definition of the term Claim Notice. Recital A of the Escrow Agreement provides that “[c]apitalized terms used but not defined in this Agreement shall have the meanings ascribed to such terms in the Merger Agreement” The term Claim Notice is defined in Section 9.06 (a) of the Merger Agreement, the very provision that permits a Claimant to provide a reasonable estimate of Damages.

Rather than setting forth substantive requirements for indemnification claims, Section 4 of the Escrow Agreement provides an administrative or procedural mechanism for the holding and release of funds from the Escrow Account. Read in context, Section 4 (a) requires delivery of Claim Notices to the Escrow Agent and SRS. Under Section 4 (b), delivery of a Claim Notice

⁶ SRS also argues that “Section 4 (a) of the Escrow Agreement . . . is the sole provision in either of the Agreements governing the release of funds from the Escrow Account.” (Pl.’s Reply Memo. at 9.) To the contrary, there are a number of provisions in the Escrow Agreement concerning the release of escrowed funds. (*See* Escrow Agreement §§ 4 [c]-[h] & 5 [entitled “Release of Escrow Funds”].)

triggers the requirement to serve a Response Notice. These Notices, in turn, instruct the Escrow Agent and the parties how escrowed funds are to be classified and whether they must be held beyond the Claim Expiration Date. (Escrow Agreement § 4 [c]-[h].) The Indemnification Escrow Anniversary Date, consistent with the Claim Expiration Date, authorizes the release of funds that are not the subject of Claim Notices filed in accordance with the requirements of and deadline set by the Merger Agreement.

On this motion, SRS does not purport to demonstrate as a matter of law that NASDAQ's June 21, 2012 Notice was submitted in bad faith, included an unreasonable estimate of the Damages NASDAQ expected to incur, or otherwise failed to comply with the terms of the parties' Agreements. SRS therefore is not entitled to summary judgment on its claims or dismissal of NASDAQ's counterclaim for a declaratory judgment in its entirety.

Post-Merger Claims

NASDAQ's counterclaim seeks a declaratory judgment that NASDAQ is entitled to indemnification not only for payments made in satisfaction of FTEN's pre-Merger tax liabilities, but for payments made with respect to "taxable periods ending after the Closing Date" (Answer ¶ 75.)

NASDAQ does not dispute that its indemnification right for taxes under Section 9.01 (e) of the Merger Agreement is limited to "taxable periods (or portions thereof) ending on or before the Closing Date." (See Defs.' Memo. In Opp. at 5-6.) NASDAQ argues, however, that its liability for post-Merger taxes is indemnifiable under the "broad[er]" provision of Section 9.01 (a). (*Id.* at 5.) Section 9.01 (a), as quoted above (*supra* at 2), provides for indemnification of NASDAQ against Damages arising out of or resulting from "any breach of any representation or warranty contained in Article IV."

The pertinent representations made by FTEN in Article IV concerned only FTEN's pre-Merger tax obligations. Specifically, FTEN represented in Section 4.13 that the Target Companies had "timely filed when due . . . all federal income Tax Returns, and all other material Tax Returns that they were required to file under applicable laws and regulations"; that "[a]ll Taxes due and owing by the Target Companies . . . have been timely paid"; and that "[t]o the knowledge of [FTEN], no Taxing Authority has any reasonable basis to assess any additional Taxes against any of the Target Companies for any period up to and including the Closing Date" (Merger Agreement § 4.13 [a]-[b].) NASDAQ has not identified any representation or warranty concerning FTEN's post-Merger tax liability. Rather, NASDAQ's contention appears to be that it relied on the representations in Section 4.13 (a) of the Merger Agreement to make projections about FTEN's post-Merger tax obligations, and paid a purchase price based on "the understanding that FTEN had correctly filed all required Tax Returns and paid all taxes owed." (Defs.' Memo. In Opp. at 17-18, 20.) According to NASDAQ, it has suffered post-Merger Damages as a result of the breaches of representations in Section 4.13. (See *id.* at 17-18; Merger Agreement § 9.01.)

Although creative, NASDAQ's argument ignores that FTEN limited its representations in the Merger Agreement to its pre-Merger Taxes and Tax Returns, and the parties expressly agreed in Section 9.01 (e) that indemnification for taxes would be limited to taxable periods ending on or before the Closing Date. Had these sophisticated commercial entities intended to provide a right to indemnification for post-Merger tax liabilities, they could have done so. The court will not rewrite these Agreements under the guise of contractual interpretation. (See Vermont Teddy Bear Co. v 538 Madison Realty Co., 1 NY3d 470, 475 [2004].)

In any event, a claim under Section 9.01 (a) for indemnification against post-Merger tax

liabilities is not maintainable because NASDAQ never transmitted a notice to SRS purporting to seek indemnification for such liabilities. Although the June 21, 2012 Notice cited Section 9.01 (a) as an alternative basis for indemnification, nothing in the letter or attached materials indicated that the Damages estimated by NASDAQ and KPMG included or encompassed post-Merger tax liabilities. To the contrary, the draft returns attached to the letter reflected KPMG's opinion that \$8,434,165,86 would be due and owing solely for taxable periods ending on or before the Closing Date. (Notice at 7, Schedule II, Sales Tax Estimated Exposure Calculation.)

Finally, NASDAQ argues that its failure to estimate post-Merger tax liabilities is immaterial because its June 21, 2012 Notice constitutes notice of a Tax Controversy under the Merger Agreement.⁷ (Defs.' Memo. In Opp. at 19-20.) NASDAQ then argues that Section 9.03 (b) of that Agreement provides that any claim resulting from a Tax Controversy shall survive the Claim Expiration Date. (See *id.*; Merger Agreement § 9.03 [b].)

Even accepting this argument, the June 21, 2012 Notice does not provide notice of any Tax Controversy involving post-Merger taxable periods. The only mention of a Tax Controversy appears in the reference line of the Notice: "Re: Sales Taxes – Claim Notice / Notice of Tax Controversy." The body of the Notice discusses only claims for "estimated . . . incurred Damages in respect of unpaid sales Taxes" "as a result of the failure of [FTEN] to file sales Tax Returns and pay sales Taxes . . . for taxable periods (or portions thereof) ending on or prior to the Claim Expiration Date." This Notice cannot be interpreted to allow indemnification of Damages resulting from entirely separate post-Merger controversies.

The \$3,355,899.79 sought by SRS purportedly "represents the difference between the

⁷ A Tax Controversy is defined in Section 6.13 (c) of the Merger Agreement as "the preparation of any Tax Return or any refund claim or any Tax audits, Tax disputes, Tax notices (including an assertion of a deficiency or a notice of a proposed adjustment), any assertion of a claim for Taxes or any administrative, judicial or other proceedings related to any Taxes."

\$8,434,165.86 frozen by NASDAQ as an estimate of sales taxes that it claimed it would incur . . . and the \$5,078,266 NASDAQ alleges it ultimately incurred for FTEN sales prior to the Merger.” (Pl.’s Memo. In Supp. at 16.) NASDAQ does not dispute these figures or assert any basis on which it is owed the \$3,355,899.79 other than as indemnification for FTEN’s post-Merger tax liabilities. On the other hand, Section 4 (h) of the Escrow Agreement only provides for the distribution of contested escrowed funds to SRS “following the final disbursement of funds from the [] Escrow Account to [NASDAQ] in connection with the final resolution of the last Unresolved Escrow Claim.”

SRS will accordingly be awarded partial summary judgment dismissing so much of NASDAQ’s counterclaim as seeks a declaration that it is entitled to indemnification for post-Merger tax liabilities. As NASDAQ’s claim has not been finally resolved, however, the court will not order the disbursement of any amounts from the Escrow Account at this time.

The Court has considered the parties’ remaining arguments and finds them unavailing. Although NASDAQ notes that SRS filed this motion before discovery in this action commenced, NASDAQ makes no showing that discovery may lead to evidence necessary to oppose this motion. (See CPLR 3212 [f].)

It is accordingly hereby ORDERED that the motion of plaintiff Shareholder Representative Services (SRS) for summary judgment is granted to the following extent:

It is hereby ORDERED that the branch of SRS’s motion for summary judgment dismissing the first counterclaim of defendants The NASDAQ OMX Group, Inc. (NASDAQ) and FTEN, Inc. (FTEN) for a declaratory judgment is granted to the extent that

It is hereby ADJUDGED and DECLARED that NASDAQ is not entitled to be indemnified for its payment of FTEN’s taxes for taxable periods ending after the Closing Date

specified in the Merger Agreement; and it is further

ORDERED that the branch of SRS's motion for summary judgment on its first cause of action for breach of contract and its second cause of action for a declaratory judgment regarding the Escrow Balance is denied; and it is further

ORDERED that the Clerk of Court shall enter judgment accordingly; and it is further

ORDERED that the remaining claims are severed and shall continue.

This constitutes the decision, order, and judgment of the court.

Dated: New York, New York
July 5, 2016



MARCY FRIEDMAN, J.S.C.