SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOEL M. COHEN** **PART** 03M

Justice

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INDEX NO. 653536/2012

ANDREW KOLCHINS,

Plaintiff,

- v -

EVOLUTION MARKETS INC., ANDREW ERTEL

DECISION AFTER NON-JURY TRIAL

Defendants.

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This long-running breach of contract case centers on a battle of wills between a renewable energy credit broker (Plaintiff Andrew Kolchins) and his then-employer (Defendant Evolution Markets or "EvoMarkets") led by Andrew Ertel over the terms of a new employment agreement. Despite clear signals that both parties wished to continue working together, they could not get a deal done and Kolchins' employment was terminated upon expiration of his then existing employment agreement. Ten years of litigation has followed, including two stops at the Appellate Division and one at the Court of Appeals. With most of the legal issues having been thoroughly vetted, the case came down to certain key factual disputes to be resolved based on the evidence adduced by skilled counsel at trial.

Although the evidence showed that there was a fleeting moment (an email exchange between Kolchins and Ertel) suggesting an agreement had been made, the Court finds that Kolchins did not ever actually commit to the purported "Extension Agreement" that he now claims was binding and under which he seeks damages. In the end, Kolchins' aggressive and shifting negotiation strategy backfired, prompting EvoMarkets eventually to walk away without

extending his employment agreement. Not content with that outcome, however, EvoMarkets then decided not to pay Kolchins the contractually agreed-upon Production Bonus that he had earned *prior to* expiration of the 2009 Employment Agreement, on the ground that he was not employed by EvoMarkets at the time the bonus was to be paid.

In summary, after a non-jury trial, the Court finds as follows:

1. **Breach of Contract (First Cause of Action)**: Kolchins (i) failed to prove that EvoMarkets breached the purported "Extension Agreement," which never became a binding contract; but (ii) did prove that EvoMarkets breached the 2009 Employment Agreement by failing to pay the non-discretionary Production Bonus to which Kolchins was entitled for the second trimester of 2012, resulting in damages of $1,206,764.35 plus statutory prejudgment interest running from October 31, 2012, through the date of judgment. The provision in the Agreement requiring that Kolchins be employed by EvoMarkets at the time the non-discretionary Production Bonus was due is unenforceable as a matter of law.

2. **Violation of New York Labor Law § 193 (Second Cause of Action)**: Kolchins (i) proved that EvoMarkets violated New York Labor Law § 193 by failing to pay his non-discretionary Production Bonus for the second trimester of 2012, triggering *additional* liability in the amount of $1,206,764.35 in statutory liquidated damages (statutory interest does not apply to this amount), plus recovery of his reasonable attorneys' fees and costs incurred specifically with respect to his Labor Law claim against EvoMarkets; but (ii) failed to prove that Mr. Ertel is jointly liable as an "employer" for EvoMarkets' violation of Labor Law § 193.

I. FINDINGS OF FACT

The Court makes the following findings of fact based on its review of the evidence admitted at trial (April 5-8, 2022), including its evaluation of the credibility of the witnesses who testified during the proceedings, and closing arguments presented by counsel on May 26, 2022.

A. The Production Bonus

1. Plaintiff Andrew Kolchins worked as a broker of renewable energy credits at Evolution Markets Inc. ("EvoMarkets") (Kolchins Tr. 26:10-27:2).

2. His first contract was dated August 26, 2005 (the "2005 Agreement") (JX1).

3. His employment for the period from September 1, 2006 through August 31, 2009 was governed by the "2006 Agreement" (JX2).

4. With the 2006 Agreement, he was promoted to manage the Eastern U.S. Renewable Energy Brokerage Desk (the "Desk") (JX2). As such, he continued to broker transactions, but now also managed other brokers on the Desk (Ertel Tr. 404:10-405:5; Kolchins Tr. 46:14-47:13).

5. Kolchins negotiated to replace the "Discretionary Bonus" in the 2005 Agreement with a "Production Bonus" in the 2006 Agreement (*compare* JX2 at 11 *with* JX1 at 9; Kolchins Tr. 36:21-38:13).

6. His employment for the period from September 1, 2009 through August 31, 2012 was governed by the "2009 Agreement" (JX3).

7. The 2009 Agreement provided for a $200,000 salary, a $750,000 sign-on bonus, and minimum annual compensation of $750,000 (*id.*). As part of Kolchins' compensation, the 2009 Agreement also included, among other things, a "Discretionary Management Bonus Pool," a "Discretionary Management Override," and a Production Bonus (JX3 at 10-11).

8. The terms of the Production Bonus, as set out in the 2009 Agreement, were as follows:

> [Y]ou are eligible to be paid a bonus on a trimester basis ***based on your performance***. Any such bonus will be paid in accordance with firm wide bonus practices, which currently provide that ***bonuses are paid within two months of the close of a given trimester*** (for example, the bonus for the first trimester of a given year will be paid no later than June 30th of that year). ***The total bonus pool available to the Eastern U.S. renewable energy brokerage desk (the 'Desk') will be no less than 55% of the Net Earnings of the Desk.*** Net Earnings is defined as the revenue directly attributed to the Desk (as determined by EvoMarkets) and received by EvoMarkets during the relevant trimester less any direct costs incurred by the Desk . . . and indirect costs allocated to the Desk by EvoMarkets

(*id.* at 11 [emphases added]).

9. "[P]erformance," as that term is used in the Production Bonus, was undefined (*id.*).

10. The employment agreements of Kolchins' direct reports on the trading desk provided they were eligible for bonuses "at the sole discretion of EvoMarkets" (PX10/PX11; KolchinsTr.258:11-259:8, 260:16-23). By contrast, the word "discretion" does not appear in the relevant portion of Kolchins' 2009 contract with EvoMarkets.

11. Until the last trimester of the 2009 Agreement's term – the second trimester of 2012 – Kolchins always controlled the allocation of bonuses from the Desk pool, and the Production Bonus paid to Kolchins under the 2009 Agreement for each trimester was always (A) calculated by Kolchins based on revenue and cost data for the Desk provided to him by the CFO, (B) paid in the amount that Kolchins instructed the CFO to pay, and (C) at least 55% of Kolchins' net earnings.

12. The 2009 Agreement purports to condition bonus eligibility on being "actively employed . . . at the time of firm-wide bonus payment dates" (JX2/JX3). And the firm-wide

bonus payment date for 2012's second trimester – the trimester at issue – was two months after Kolchins left EvoMarkets (JX3; Zeliger Tr. 651:5-7; Ertel Tr. 762:10-13).

B. THE PARTIES ATTEMPT TO NEGOTIATE A NEW EMPLOYMENT AGREEMENT

13. In September 2011, EvoMarkets and Kolchins began negotiating a new agreement to succeed the 2009 Employment Agreement (Kolchins Tr. 99:18-100:8, 101:15-102:4; JX66).

14. On June 8, 2012, Kolchins outlined specific demands, including the "ability to earn a bonus off of departed employees," and concluded: "Hope that this is acceptable and we can agree in principal [sic] to ***start working on the doc***" (JX81 [emphasis added]).

15. On June 15, Ertel responded:

> After several conversations with the Board members this week, the best offer we are willing to make you is as previously communicated with you. Again, it is at the same terms of your existing contract with the clarification around the issue of departed members of the team… We… hope that we can reach an agreement.

(JX87).

16. That same day, Kolchins asked Ertel "to put it in writing" (JX88).

17. Ertel responded that same day: "[T]he terms of our offer are the same terms as your existing contract (other than a clarification around the issue of departed members of the team) and include" four specific compensation terms. Ertel continued, "Any further questions let me know but you do have your existing contract" (Ertel Tr. 741:1-7; JX89).

18. On June 22, Kolchins sent EvoMarkets notice of non-renewal of his 2009 Agreement (JX93). If Kolchins had not sent this notice, the terms of the 2009 Agreement automatically would have been extended for one year. Although EvoMarkets argues that this notice indicated Kolchins' rejection of a proposal for a new three-year agreement, the Court disagrees. The non-renewal notice simply indicated Kolchins' decision to pursue a three-year extension agreement, rather than a one-year renewal on the same terms as the 2009 Agreement.

19. On June 27, Ertel wrote to Kolchins in an email that "[a]fter reflecting on our conversation of Friday [June 22], we feel that we have put a strong offer on the table and will not be improving it" (JX97).

20. On July 10, Kolchins replied to Ertel's email with a counter-proposal (JX97; Kolchins Tr. 318:19-23). Specifically, Kolchins wrote:

> . . . I am prepared to compromise on the minimum guarantee if you are willing to compromise on the signing bonus and base salary. Ultimately, it is an attempt to split the difference with Evo, which given the dollars we are talking can be considered significant from both sides.
>
> To summarize . . . [ellipses in original]
>
> If you can accept the sign on of 900k/split over the 3yrs and a base salary of 300k, [I] can agree to lower the minimum comp annually to 850k.

(JX97).

21. Kolchins testified that on July 13, he and Ertel had a meeting in which Ertel reconfirmed EvoMarkets' offer (Kolchins Tr. 320). According to Kolchins, Ertel "made it very clear" that "[t]he offer was still very well open to me" (*id.*). There are no emails or other contemporaneous evidence reflecting that Ertel reconfirmed the offer at this meeting.

22. In any event, on July 16, Kolchins emailed Ertel: "I accept, pls send contract." Ertel replied, "Mazel. Looking forward to another great run…" (JX102).

23. Kolchins testified that "pls send contract" meant "we had previously formalized the document. So I certainly intended or thought we would again this time" and admitted "we certainly considered ultimately signing a formal document" (Kolchins Tr. 107:11-13, 321:4-5). As will be seen, however, Kolchins' subsequent actions were not consistent with his testimony that he had agreed to the terms emailed to him by Ertel in June.

24. Ertel, for his part, viewed Kolchins' July 16 email as "basic terms" and testified it was "absolutely not" a binding contract: "It was clear, we had a practice, a long-running practice

that Mr. Kolchins was a part of, where every employee needed to execute a contract. And given the path of how difficult the negotiations were around the '09 contract . . . I expected very difficult negotiations and that's what we got" (Ertel Tr. 745:20-746:11).

25. Minutes after receiving Kolchins' July 16 email, Ertel emailed fellow Board members: "I will let u all know when I get a signature" and "When the offer sheet is signed I will believe it. Never know about him pulling a Jeremy Lin." Ertel believed "Kolchins was going to shop for a better offer until the day he signed the contract" (JX105; Ertel Tr. 747:12-748:6).

26. On July 20, Zeliger emailed Kolchins a draft proposed agreement and noted changes from Kolchins' 2009 Agreement, including a clawback of the signing bonus if Kolchins left without "Good Reason" or was terminated "for Cause" (JX106).

27. Kolchins did not object to such changes; he only asked for "reciprocal language pertaining to clawback"; Zeliger responded that he already had such protection and Kolchins agreed (*id.*; Kolchins Tr. 112:3-5).

28. Kolchins objected to what he claimed was a change to the 2009 Agreement, namely, deletion of language stating his last bonus would count towards his minimum guarantee. EvoMarkets agreed to Kolchins' request (Kolchins Tr. 111:2-112:5, 122:12-15, 326:4-23, 328:3-13, 329:13-17, 330:1-3; Zeliger Tr. 638:5-652:22).

29. On July 24, Zeliger sent Kolchins a revised draft, noting that EvoMarkets had "agreed to make several changes that [Kolchins] requested," while rejecting others (JX108).

30. Kolchins requested expanding the scope of when the "Special Noncompete Payment" would be paid, which was a material change to his 2009 Agreement (Zeliger Tr. 660:12-661:7).

31. On August 3, Zeliger wrote to Kolchins:

> We have discussed your request regarding the calculation of your guarantee and, in an effort to finalize your contract, we've agreed to make that change... we're agreeing to this change subject to you not having any additional substantive changes to your contract, as we hope the agreement is now substantially final.

(JX113).

32. Kolchins did not sign the August 3 draft contract. Instead, he continued to propose "additional substantive changes to the contract" (Zeliger Tr. 665-667). In short, both sides "continue[d] to try to negotiate towards a deal" (*id.* at 666:7).

33. Kolchins' objections to drafts after August 3 were *not* that those drafts diverged from his 2009 Agreement (Zeliger Tr. 667:21, 723:19-724:1). Rather, Kolchins' objections were to EvoMarkets' refusal to incorporate *his* ongoing proposed changes to the 2009 Agreement (JX118/120).

34. On August 13, Kolchins requested nine new material changes to the 2009 Agreement, including: (i) shortened restrictive covenants; (ii) increased compensation; (iii) expansion of the Eastern RECs bonus pool if that desk combined with others; (iv) the right to allocate the pool; (v) entitlement to the Special Non-Compete Payment if the agreement expired; and (vi) EvoMarkets' commitment to non-disparagement (JX116; Kolchins Tr. 126:14-127:13, 335:9-339:15; Zeliger Tr. 665:20-666:1, 668:7-678:18).

35. Kolchins acknowledged that changes concerning whether or not, and if so how much, he was paid if he was terminated for or without cause and/or for good reason were "commercial" terms (Kolchins Tr. 250:20-251:12).

36. On August 15, Zeliger sent Kolchins a revised draft, noting EvoMarkets accepted some of Kolchins' changes and concluded, "We hope to be able to sign this soon" (JX117; Zeliger Tr. 679:12-683:15).

37. By August 15, there were no changes to the 2009 Agreement in EvoMarkets' proposed draft to which Kolchins objected (Zeliger Tr. 683:16-19).

38. Rather, Kolchins objected to, among other things, the pre-existing client Non-Dealing and Special Non-Compete provisions in his 2009 Agreement (JX118; Zeliger Tr. 684:14-685:13).

39. At this point, Ertel lost patience with Kolchins' continued attempts to push for "massive" material changes to the 2009 Agreement (Ertel Tr. 432-434). In Ertel's view, Kolchins was "lifting the genie out of the bottle" by proposing changes that went beyond the terms of the 2009 Agreement (*id.* 433; JX 119). Growing "frustrated," Ertel instructed Zeliger to propose "changes that favor" EvoMarkets (JX 119), even though Ertel "did not think they would be acceptable to Kolchins" (Ertel Tr. 435:22).

40. Following Ertel's instructions, Zeliger wrote the following email to Kolchins on August 17:

> [W]e are not willing to make the additional requested changes to your agreement other than the changes that we accepted in the last draft. Also, we have two changes that we want to make: (1) extending the employee non-solicit from 9 months to 18 months following the non-compete period; and (2) revising the production bonus language to clarify that while your payout from the bonus pool is 55% of your net income, the payout for others on the desk is less depending on seniority.

(JX120).

41. Ertel testified that EvoMarkets made these changes to get the deal done and based on his "understanding around how [Kolchins]… was going to push and he was going to push and he was going to push till he went too far," something Kolchins admitted to in the past (Kolchins Tr. 318:24-319:7; Ertel Tr. 751:14-752:3).

42. Zeliger proposed a call among him, Kolchins, and Ertel (JX120).

43. Kolchins responded: "I cannot accept non-compete language that prevents me from doing my or a job without getting paid," but agreed to a call (JX120).

44. Kolchins then called Zeliger, cursed at him, and refused to speak with Ertel (Kolchins Tr.131:16-132:2, 347:21-348:4; Zeliger Tr. 688:14-690:10; Ertel Tr. 753:12-22; JX134).

45. On August 23, Kolchins wrote Zeliger: "I am not willing to consider your proposed two changes…" (JX121).

46. Later, Zeliger emailed Kolchins, asking: "Without commenting on the two proposed changes, and just so I understand, do you otherwise accept the last draft of your agreement that we sent you?" (JX122), which draft was substantively identical to the 2009 Agreement (updated to reflect changes in the intervening three years to which Kolchins had already agreed) (JX3/JX117; Zeliger Tr. 679:12-683:15). Zeliger described this email as conveying: "Can we now go back to effectively use our 2009 agreement, with some changes that have already been agreed to by us, and say, 'Let's just get this deal done with that agreement?'" (Zeliger Tr. 691:17-20).

47. Kolchins refused because the proposed agreement did not include changes he demanded that were not in his 2009 Agreement (Zeliger Tr. 691:17-20; JX116/JX118/JX120).

48. On September 1, 2012, Ertel and Zaborowsky called Kolchins while he was on vacation to inform him that his "employment with Evolution is ended today" (JX 134). On the call, Ertel explained "that we've tried to reach an agreement on a new contract," but "haven't been able to do so" (*id.*). Kolchins tried to backtrack "about the Evolution employee thing" where he sought to reduce such restrictive covenant by nine months, and admitted that "one of the sticking points" was "language that I put in" that the Production Bonus pool would include

groups in addition to the Eastern RECs desk (a material departure from his 2009 Agreement), and tried to reverse course on his other demands by claiming that "stuff was nothing" (JX134; Zeliger Tr. 725:12-726:13; Ertel Tr. 756:1-25). Ertel disagreed, stating "[t]hose commercial terms were significant in . . . value to us" (JX 134).

49. Afterwards, EvoMarkets refused to pay Kolchins' Production Bonus for the second trimester of 2012 (Ertel Tr. 762:14-16; Kolchins Tr. 144:24-145:7) on the ground that he was not employed by EvoMarkets on the day the bonus was to be paid.

C. ERTEL'S ROLE

50. Zaborowsky hired and supervised Kolchins (Kolchins Tr. 234:18-23; Zaborowsky Tr. 452:7-12, 499:2-11).

51. Zaborowsky negotiated and signed all of Kolchins' agreements (and his offer letter); Ertel's involvement was only "high level" (JX1/JX2/JX3/JX4; Ertel Tr. 426:15-24).

52. Kolchins reported to Zaborowsky, not to Ertel (Kolchins Tr. 234:10-23; Zaborowsky Tr. 452:11-13, 502:25-503:24).

53. Zeliger handled the negotiation of the proposed 2012 agreement and EvoMarkets' Board members (including Zaborowsky, Steve Nesis, Ned Sachs, and Dave Young) were all involved, as Ertel could not agree to that contract without Board approval (JX87; JX98; JX100; JX103; JX105; Zeliger Tr. 618:14-16; Ertel Tr. 739:23-740:18, 742:10-21, 744:11-745:15).

54. Ertel neither supervised nor controlled Kolchins' work schedules or conditions of employment (Kolchins Tr. 234:24-235:16).

55. Allowing Kolchins' agreement to expire was a "group decision" by EvoMarkets' Board and counsel, not a unilateral decision by Ertel (Ertel Tr. 446:23-447:2, 448:3-7, 754:24-755:6; Zaborowsky Tr. 562:19-23).

II. CONCLUSIONS OF LAW

A. THE PRODUCTION BONUS

i. BREACH OF CONTRACT

56. Kolchins established, by a preponderance of the evidence, his entitlement to the Production Bonus.

57. "As a general matter, 'an employee's entitlement to a bonus is governed by the terms of the employer's bonus plan'" (*Kolchins III*, 31 NY3d 100, 109 [2018], quoting *Truelove v. Northeast Capital & Advisory*, 95 NY2d 220, 225 [2000]). "However, [a]rticle 6 of the Labor Law sets forth a comprehensive set of statutory provisions . . . [that] strengthen and clarify the rights of employees to the payment of wages" (*id.*).

58. EvoMarkets argues that it is excused from the obligation to pay the Production Bonus based on language in the 2009 Agreement requiring Kolchins be actively employed on the payment date, which would be within two months after the close of the trimester. But "[w]here an employee has satisfied the criteria for a bonus before termination, that compensation cannot be withheld because, as here, the employee did not work until the date the bonus was to have been paid" (*Kolchins I*, No. 653536/2012, 2013 WL 4494380, at *4).

59. The issue for trial, as framed by the appellate court decisions in this case, was whether the Production Bonus constituted "earned wages" or a "discretionary" bonus. "[T]o the extent plaintiff's production bonus constituted 'earned wages' under the Labor Law, it was not subject to forfeiture" (*Kolchins III*, 31 NY3d 100, 109 [2018], *aff'g Kolchins II*, 128 AD3d 47, 64 [1st Dept 2015] ["[I]f plaintiff's contention is correct that the production bonus was actually earned through his own performance, plaintiff would be entitled to such bonus as wages, which are not subject to forfeiture"]). Stated differently, the Production Bonus "could constitute nonforfeitable 'wages'" to the extent it "was based only on plaintiff's performance as a manager

during his final trimester of employment" (*Kolchins III*, 31 NY3d at 110; *see Kolchins IV*, 182 AD3d 408, 409 [1st Dept 2020]; *Mirchel v RMJ Securities Corp.*, 205 AD2d 388, 389-90 [1st Dept 1994] [notwithstanding purported requirement that employee be employed at time bonuses were paid, "[e]mployees in this State may enforce an agreement to pay an annual bonus made at the onset of the employment relationship where such bonus constitutes an integral part of plaintiff's compensation" and bonus could not "be withheld because, as here, the employee did not work until the date the bonus was to have been paid."] [internal quotations omitted]; *Weiner v Diebold Grp.*, 173 AD2d 166, 167 [1st Dept 1991] [same]).

60. The evidence admitted at trial established that the Production Bonus was not "discretionary" or predicated on EvoMarkets' overall performance.

61. ***First***, the text of the 2009 Agreement supports Kolchins' position that the Production Bonus was nondiscretionary and based on his individual performance, not the performance of EvoMarkets as a whole. The provision expressly states that Kolchins would be "eligible to be paid a bonus on a trimester basis ***based on [his] performance***" (JX3 at 11 [emphasis added]). And nothing in the 2009 Agreement states or implies that the Production Bonus was discretionary or based on EvoMarkets' performance as a whole.

62. By contrast, other provisions within the 2009 Agreement are explicitly described as discretionary – the "Discretionary Management Bonus Pool" and the "Discretionary Management Override from Renewables and Structured Transaction Group Bonus Pool." The Court of Appeals noted this contrast as supporting a finding that the Production Bonus was nondiscretionary (*Kolchins III*, 31 N.Y.3d at 110; *Quadrant Structured Prod. Co. v Vertin*, 23 NY3d 549, 560 [2014] ["[I]f parties to a contract omit terms—particularly, terms that are readily

found in other, similar contracts—the inescapable conclusion is that the parties intended the omission."]).

63. ***Second***, the context of Kolchins' relationship with EvoMarkets supports the conclusion that the Production Bonus was non-discretionary. The performance bonus provision in the 2005 Agreement was called a "Discretionary Bonus." It provided that Kolchins would be "eligible ***for consideration*** of" a bonus, and provided that any payment would be "at the exclusive and sole discretion of" EvoMarkets (JX1 at 9 [emphasis added]). The 2006 Agreement replaced the Discretionary Bonus with the Production Bonus, removed any reference to discretion, and removed the words "for consideration" in the first sentence (*compare* JX1 at 9 *with* JX2 at 11). The 2009 Agreement's Production Bonus provision was substantially similar except that reference to any approval by EvoMarkets was removed (*compare* JX2 at 11-12 *with* JX3 at 11).

64. That all reference to "discretion" was removed when the parties replaced the "Discretionary Bonus" in the 2005 Agreement with the Production Bonus in subsequent agreements is further evidence that the Production Bonus was non-discretionary, as the Court of Appeals has already recognized (*Kolchins III*, 31 NY3d at 110). Kolchins explained that he negotiated for a nondiscretionary bonus because his success gave him leverage to do so (Kolchins Tr. 37:1-38:13, 29:2-7). EvoMarkets' position – that Kolchins obtained no greater rights to any bonus under the later contracts negotiated when he had become the most successful producer at the firm than under his entry level 2005 contract – is not credible, and ignores the differences in contract language.

65. ***Third***, a comparison of Kolchins' contract with the contracts of other members of the Desk he managed confirms that the Production Bonus was non-discretionary. Their contracts

provided that their performance bonuses from the Desk's bonus pool were "discretionary," not production bonuses, and determined at the discretion of their manager (Kolchins) (PX10; PX11; Kolchins Tr. 88:16-92:5). This contrast further demonstrates that Kolchins' bonus was nondiscretionary (*see Quadrant*, 23 NY3d at 560).

66. ***Fourth***, the course of performance under the 2009 Agreement confirms that the Production Bonus was based on Kolchins' individual performance as manager of his trading desk, and not based on EvoMarkets' overall performance. For each trimester during the contract term, EvoMarkets' CFO, Steven Semenza, would send Kolchins a spreadsheet showing the revenues generated by each member of the Desk, including Kolchins, and the direct and indirect expenses incurred by the Desk (JX42; JX48; JX51; JX59; JX70; JX90). Using the spreadsheet, Kolchins would determine the bonuses to be paid to the other members of the Desk, which would always be less than 55% of their net earnings, and his own Production Bonus, based on 55% of his own net earnings plus an override reflecting the delta between the bonuses paid to the other members of the Desk and 55% of their net earnings (Kolchins Tr. 64:5-65:8).

67. After making those calculations, Kolchins would instruct Semenza by email on the amounts to be paid to each member of the Desk, including himself (JX43; JX49; JX54; JX62; JX75).

68. Until the second trimester of 2012, the Production Bonus paid to Kolchins from the Desk pool was always in accordance with his instructions to Semenza (*compare id. with* JX143; Kolchins Tr. 92:6-97:25).

69. In some of those trimesters, EvoMarkets as a whole made money, and in others, EvoMarkets lost money – but, regardless, Kolchins always controlled the pool, he always received at least 55% of his net earnings plus an override from his colleagues' earnings, and his

Production Bonus was never impacted in any way by the performance of EvoMarkets as a whole or of any other desk (Kolchins Tr. 97:1-98:4).

70. Although Ertel "reviewed" Kolchins' allocation of the bonus pool, this fact does not preclude Kolchins' claim. For one thing, even if the payment were subject to review by the CEO, that does not itself suggest that the payment was discretionary. Moreover, there is no persuasive evidence that Ertel or anyone else at EvoMarkets impacted Kolchins' Production Bonus, other than to determine cost allocations from which the ultimate number would be drawn. Ertel's testimony on this point was inconclusive: he said, variously, that Kolchins' bonus was never reduced (Ertel Tr. 409:14-410:3), that it was reduced "at times," (Ertel Tr. 410:14-17), that he didn't recall if it was reduced (Ertel Tr. 413:22-414:22), and that maybe it was another member of the Desk whose bonus was reduced (Ertel Tr. 420:23-421:21). He also admitted that there is no email or other document reflecting any such reduction or discussion about it (Ertel Tr. 412:3-413:7).

71. Because the preponderance of the evidence proves that the Production Bonus in the 2009 Agreement was nondiscretionary and not dependent on EvoMarkets' overall performance, EvoMarkets breached the contract by failing to pay Kolchins his Production Bonus for the second trimester of 2012.

ii. NEW YORK LABOR LAW

72. And because the Production Bonus was non-discretionary, failure to pay it also violated section 193 of the Labor Law (*Kolchins III*, 31 NY3d at 110 [to the extent Production Bonus was non-discretionary, "any provision of the 2009 [A]greement that would operate to deny plaintiff those wages after they were 'earned' based on the timing of payment would be void as against public policy under article 6 of the Labor Law."]; *Ryan v Kellogg Partners Institutional Servs.*, 19 NY3d 1, 16 [2012] [employer's refusal to pay earned bonus constituted a

violation of § 193]; *Wachter v Kim*, 82 AD3d 658, 663 [1st Dept 2011] [executive stated a viable claim under § 193 based on employer's failure to pay earned bonus]).

73. The Labor Law provides for double damages unless the employer can prove that it acted in good faith (N.Y. Labor Law ("NYLL") § 198 [1-a]). Defendants arguably waived that defense by not including it in its answer. But in any event, Defendants did not carry their burden of proving the defense (*Inclan v New York Hosp. Group, Inc.*, 95 F Supp 3d 490, 504 [SD NY 2015] ["The employer bears the burden of proving good faith and reasonableness, [and] the burden is a difficult one, with double damages being the norm and single damages the exception."], quoting *Herman v RSR Sec. Services Ltd.*, 172 F 3d 132, 142 [2d Cir. 1999]). Although EvoMarkets asserts that it consulted with counsel in deciding not to pay the Production Bonus, there was no evidence adduced at trial about what, specifically, counsel advised (*see Inclan*, 95 F Supp 3d at 504 [rejecting advice-of-counsel defense to NYLL claim where, as here, "the record contains no evidence as to the advice of prior counsel nor of whether defendants followed that advice"]).[1]

74. Ertel, however, is not personally liable as an "employer" under the Labor Law (NYLL § 190 [3]). New York courts apply an "economic reality" test to determine NYLL "employer" status: "whether the alleged employer: (a) had the power to hire and fire the

[1] The good-faith defense here relies, in part, on the Court's initial dismissal of Kolchins' NYLL claim. The claim was initially dismissed because EvoMarkets withheld the Production Bonus in its entirety, rather than withholding a portion of it, which meant it was "not a 'deduction' within the meaning of Labor Law § 193" under binding First Department precedent (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 449 [1st Dept 2017]). But *Perella Weinberg* (and other similar cases) post-dated EvoMarkets' decision not to pay Kolchins the Production Bonus, so it could not have been part of EvoMarkets' calculus in 2012. It is true that *Perella Weinberg* itself cited a handful of cases that pre-dated EvoMarkets' decision about the Production Bonus. But there was no evidence adduced at trial that showed Defendants actually relied on such cases in coming to their decision.

employees, (b) supervised and controlled employee work schedules or conditions of employment, (c) determined the rate and method of payment, and (d) maintained employment records" (*Carter v Dutchess Community College*, 735 F2d 8 [2d Cir. 1984]; *see Bonito v Avalon*, 106 AD3d 625 [1st Dept 2013]).

75. These factors are not "a rigid rule" but rather "a nonexclusive and overlapping set of factors to ensure that the economic realities test… is sufficiently comprehensive and flexible…." (*Barfield v New York City Health and Hosps. Corp.*, 537 F3d 132, 143 [2d Cir 2008] [addressing the FLSA, internal quotations/citations omitted]; *Teri v Spinelli*, 980 F Supp.2d 366, 375 [ED NY 2013] [applying economic reality test to claims under FLSA and NYLL]).

76. Ertel was not Kolchins' employer for purposes of the Labor Law. Zaborowsky, not Ertel, hired and always supervised Kolchins (Kolchins Tr. 234:18-23; Zaborowsky Tr. 452:7-12, 499:2-11). Zaborowsky, not Ertel, negotiated and signed all of Kolchins' agreements (and his offer letter), while Ertel's involvement was only "high level" (JX1; JX2; JX3; JX4; Ertel Tr. 426:15-24). Kolchins reported directly to Zaborowsky, not to Ertel (Kolchins Tr. 234:10-23; Zaborowsky Tr. 452:11-13, 502:25-503:24). Ertel neither supervised nor controlled Kolchins' work schedules or conditions of employment (Kolchins Tr. 234:24-235:16). The decision to allow Kolchins' agreement to expire, and to not pay him a Production Bonus, was a "group decision" and not made solely by Ertel (Ertel Tr. 446:23-447:2, 448:3-7, 754:24-755:6; Zaborowsky Tr. 562:19-23).

B. THE EXTENSION AGREEMENT

77. Kolchins failed to establish, by a preponderance of the evidence, that he and EvoMarkets entered into a binding employment agreement to extend the 2009 Agreement through 2015.

78. To create a binding contract, there must be an objective manifestation of the parties' intent to be bound by the agreement (*Matter of Express Indus. & Term. Corp. v New York State Dep't of Transp.*, 93 NY2d 584, 589 [1999]).

79. The Court of Appeals' decision in *Brown Bros. Elec. Contractors, Inc. v Beam Const. Corp.*, 41 NY2d 397, 399 [1977], "presents the template for deciding a case, such as this one, where the issue is whether the course of conduct and communications between [the parties have] created a legally enforceable agreement" (*Kolchins III*, 31 NY3d at 106 [internal citations and quotation marks omitted]). Under *Brown Bros.*,

> it is necessary to look . . . to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds. In doing so, disproportionate emphasis is not to be put on any single act, phrase or other expression, but, instead, on the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain.

(*id.*).

80. Affirming the denial of Defendants' motion to dismiss in this case, the Court of Appeals found "it is possible to draw competing inferences based on the totality of the parties' communications as set forth in this record" (*id.* at 108). And at the motion to dismiss stage, EvoMarkets "ha[d] not met its burden to conclusively refute the allegations of the complaint that the parties entered into a new contract" (*id.*).

81. But at trial, the burden was on Kolchins to prove the existence of a contract (*Zheng v City of N.Y.*, 19 NY3d 556 [2012]). And, considering the totality of the evidence, Kolchins failed to meet this burden.

82. Kolchins failed to establish that the parties ever came to agreement on the terms of a new deal. Rather, the parties engaged in intense negotiations, over the course of months, about multiple, material components of the proposed agreement. The objective manifestation of

the parties' intent is made clear by Kolchins' own emails that demanded terms that materially deviated from his 2009 Agreement (*i.e.*, the agreement he claims was "extended" by virtue of his July 16 "I accept" email).[2]

83. Kolchins' claim that his changes were not "material," and just "tinkering," are not credible (Kolchins Tr. 139:24-140:2; 218:24-219:17). The parties had several substantive objections to each other's drafts long after Ertel's "Mazel" e-mail. For example, Kolchins requested expanding the scope of when the "Special Noncompete Payment" would be paid (Zeliger Tr. 660:12-661:7). And on August 13, Kolchins requested nine new material changes to the 2009 Agreement, including: (i) shortened restrictive covenants; (ii) increased compensation; (iii) expansion of the Eastern RECs bonus pool if that desk combined with others; (iv) the right to allocate the pool; (v) entitlement to the Special Non-Compete Payment if the agreement expired; and (vi) EvoMarkets' commitment to non-disparagement (JX116; Kolchins Tr. 126:14-127:13, 335:9-339:15; Zeliger Tr. 665:20-666:1, 668:7-678:18). As the court reasoned in *Winston v Mediafare Entertainment Corp.*, 777 F2d 78, 82-83 [2d Cir 1985], when parties "insist on continually redrafting the specific terms of a proposed agreement, the changes made must be

[2] The Court notes that on July 10, 2012, Kolchins made a counteroffer to Ertel, which "extinguishe[d] the offer and render[ed] any subsequent acceptance thereof inoperative" (*e.g.*, *Jericho Group, Ltd. v Midtown Dev., L.P.*, 32 AD3d 294, 299 [1st Dept 2006] ["Rejection by counteroffer extinguishes the offer and renders any subsequent acceptance thereof inoperative"]). Kolchins wrote that he was "prepared to compromise on the minimum guarantee if [EvoMarkets was] willing to compromise on the signing bonus and base salary," and proposed a "minimum comp" of $850,000 in exchange for a $900,000 sign-on bonus and a base salary of $300,000 (JX97). This counteroffer on July 10 rendered the subsequent "acceptance" on July 16 ineffective. Although Kolchins testified that Ertel renewed the offer orally, at a meeting on July 13 (Tr. 320:1–9), there are no documents or other contemporaneous evidence reflecting the specific terms of an offer on July 13. In the Court's view, Kolchins' recollection of a meeting with Ertel fails to establish that a new offer was made between his July 10 counteroffer and his July 16 "acceptance" email. The July 10 counteroffer does not dispose of Kolchins' claim, however, because his July 16 "acceptance" email could be construed as making a new offer to which Ertel accepted in his "Mazel" email.

deemed important enough to the parties to have delayed final execution and consummation of the agreement." And "[i]t is not for the court to determine retrospectively that at some point in the evolution of a formal document that the changes being discussed became so 'minor' or 'technical' that the contract was binding despite the parties' unwillingness to have it executed and delivered," because that would "deprive the parties of their right to enter into only the exact contract they desired" (*id.*). Kolchins' continued insistence upon material terms inconsistent with EvoMarket's offer supports the Court's conclusion that there was never a binding contract (*compare with, e.g.*, *Newmark & Co. Real Estate Inc. v 2615 E. 17 St. Realty LLC*, 80 AD3d 476, 477 [1st Dept 2011] [finding enforceable contract where there was "no evidence that defendant objected to, protested, or rejected any of the provisions in the last version of the agreement"]).

84. In late August, Zeliger emailed Kolchins, asking: "Without commenting on the two proposed changes, and just so I understand, do you otherwise accept the last draft of your agreement that we sent you?" (JX122), which draft was substantively identical to the 2009 Agreement (JX3; JX117; Zeliger Tr. 679:12-683:15). Zeliger described his email as conveying: "Can we now go back to effectively use our 2009 agreement, with some changes that have already been agreed to by us, and say, 'Let's just get this deal done with that agreement?'" (Zeliger Tr. 691:17-20). But Kolchins refused because the proposed agreement did not include changes ***he*** demanded that were ***not*** in his 2009 Agreement (Zeliger Tr. 691:17-20; JX116; JX118; JX120).

85. The lack of mutual assent is further evinced by contemporaneous emails Ertel sent to fellow board members immediately after the July 16 email exchange. In those emails, Ertel stated that Kolchins might lever negotiations to secure a better deal elsewhere and that Ertel

"will believe" there is a deal only when something is "signed" (JX103; JX105; Ertel Tr. 746:12-748:6).

86. For his part, Kolchins places disproportionate emphasis on his email on July 16, which said "I accept, pls send contract." Kolchins cannot credibly rebut the fact that he continued negotiating material terms both before and after that email. And his attempts to procure more favorable terms, and to refuse to sign an agreement consistent with the 2009 Employment Agreement, demonstrate that he did not intend to be bound by the email exchange. Based on the totality of the evidence, the Court finds that "pls send contract" was not a mere formality from Kolchins' perspective, but was instead a signal that that the real negotiations were about to begin.

87. To be sure, as the First Department held in affirming the denial of Defendants' motion to dismiss, "[a]n agreement is still binding if a party has a change of heart between the time of agreeing to the terms of the agreement and the time those terms are reduced to writing" (*Kolchins II*, 128 AD3d 47, 63 [1st Dept 2015]). That is, "[o]nce the renewal agreement is reached . . . it may not be repudiated by either party" (*id.*). But the communications following the July 16 email do not indicate "a change of heart" by either side.[3] Viewing the totality of the evidence before and after July 16, Kolchins' "acceptance" email was an inflection point, not a finish line. And that was Kolchins' own doing. He could have agreed to sign a contract with substantially the same terms offered as of July 16, and had he done so, EvoMarkets would be bound by those terms. Indeed, the evidence indicates EvoMarkets would have happily signed

[3] The First Department also noted that an "impasse on a drastic new change does not necessarily defeat the original agreement of the parties," "***if*** plaintiff's contention is the correct characterization of the parties' negotiations" (*id.* [emphasis added]). For the reasons stated above, however, Kolchins' characterization of the parties' negotiations is not correct.

such an agreement. But Kolchins chose to push for material new terms not included in the 2009 Agreement, with the risk that EvoMarkets would, at some point, stop playing along. And that is exactly what happened.

88. The irony here is that, from both sides' perspectives, it appears this was an agreement that should have happened. The evidence showed that EvoMarkets wanted to retain Kolchins (Ertel Tr. 749-751), and Kolchins did not want to leave EvoMarkets (JX 134). But the philosophy Kolchins espoused at the trading desk – "to push, push, push and then when you push someone over the edge, you beg for forgiveness" (Kolchins Tr. 318-319) – failed him in these negotiations.

III. DAMAGES

A. DAMAGES FOR PRODUCTION BONUS CLAIM

89. As a result of prevailing on his Production Bonus claim, Kolchins is entitled to breach of contract damages in the amount of $1,206,764.35, with pre-judgment interest accruing at the statutory rate from October 31, 2012 (*see* CPLR 5001, 5004; JX 3).[4]

90. In addition, Kolchins is entitled to liquidated damages under the NYLL equal to the amount withheld, *i.e.* $1,206,764.35. That amount is not subject to statutory prejudgment interest.

91. Because Kolchins did not prevail on his claim regarding the Extension Agreement, the Court need not decide whether any recovery under such agreement should be

[4] Kolchins proposed that the Production Bonus owed is $1,324,472.52 (Pl.'s post-trial br. ¶¶ 65-66) based on how he *would have* divided the desk pool among his co-workers, including his taking a share of a portion of the bonus attributable to the other employees' trades. The Court finds Kolchins' after-the-fact analysis to be overly speculative. Therefore, the Court finds that the evidence supports the figure of $1,206,764.35 as the principal owed on the Production Bonus claim.

reduced by the more than $9 million Kolchins earned from other sources (none of which he would have earned if he were employed by EvoMarkets).

B. ATTORNEYS' FEES

92. The NYLL also requires that "[i]n any action . . . in which the employee prevails, the court shall allow such employee reasonable attorney's fees . . ." (NYLL § 198 [1–a]; *Kahlil v Original Old Homestead Rest., Inc.*, 657 F Supp 2d 470, 474 [SD NY 2009] ["Plaintiffs are the prevailing party for the purposes of the FLSA and NYLL 'if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'"], quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 [1983]). Kolchins is therefore entitled to recovery of reasonable attorneys' fees and costs incurred specifically with respect to his Labor Law claim against EvoMarkets, as distinguished from his breach of contract claim against the company and his failed Labor Law claim as to Ertel.

93. Section 10 of the 2009 Agreement provides that the "prevailing party . . . shall be awarded its reasonable attorneys' fees and all expenses" (JX 3), but "[g]iven the mixed results of this case" neither side is entitled to attorneys' fees under that provision (*Blue Sage Capital, L.P. v Alfa Laval U.S. Holding, Inc.*, 168 AD3d 645, 646 [1st Dept 2019] ["conclud[ing] that neither party had substantially prevailed on the central claims advanced and that therefore neither was entitled to attorneys' fees" "[g]iven the mixed results"]). "[T]he correct standard for determining the 'prevailing party' under a contractual attorneys' fees clause" is "success on the central claims in the action" (*Zamir v Ben-Harosk*, 188 AD3d 513 [1st Dept 2020]). Here, as in *Blue Sage*, the verdict is a mixed bag. While Kolchins prevailed on his breach of contract claim and part of his Labor Law claim, he lost the argument that Ertel is personally liable for the Labor Law violation. EvoMarkets prevailed as to the Extension Agreement, meanwhile, but still must pay Kolchins

millions of dollars for withholding his Production Bonus. Neither side, therefore, succeeded on all "the central claims in the action" (*Zamir*, 188 AD3d at 513).

IV. CONCLUSION

It is therefore:

ORDERED and ADJUDGED that Plaintiff Andrew Kolchins: (i) failed to prove the branch of his First Cause of Action (Breach of Contract) alleging that EvoMarkets breached the purported Extension Agreement, which never became a binding agreement; (ii) proved the branch of his First Cause of Action alleging that EvoMarkets breached the parties 2009 Employment Agreement by failing to pay the Production Bonus due under that agreement for the second trimester of 2012, resulting in damages of $1,206,764.35 plus statutory prejudgment interest running from October 31, 2012, through the date of judgment; (iii) proved the branch of his Second Cause of Action (Labor Law) alleging that EvoMarkets violated New York Labor Law § 193 by failing to pay his non-discretionary Production Bonus for the second trimester of 2012, triggering an award of $1,206,764.35 in statutory liquidated damages (statutory interest does not apply to this amount), plus recovery of his reasonable attorneys' fees and costs incurred specifically with respect to that claim; and (iv) failed to prove the branch of his Second Cause of Action alleging that Mr. Ertel is jointly liable as an "employer" for EvoMarkets' violation of Labor Law § 193; and it is further

ORDERED that Kolchins submit a proposed judgment for the Court's review on or before June 28, 2022, including appropriate documentation reflecting the amount of his reasonable attorneys' fees and costs incurred specifically with respect to his successful Labor Law claim against EvoMarkets. Defendants may submit a proposed counter-judgment, with

accompanying explanation for any differences, on or before July 8, 2022. The parties are strongly encouraged to reach agreement, if possible, on the form of judgment.

This constitutes the decision and order of the Court.

Enter:

DATE: 6/7/2022 JOEL M. COHEN, JSC

Check One: [X] Case Disposed [ ] Non-Final Disposition

Check if Appropriate: [ ] Other (Specify _____)