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6 IN THE UNITED STATES DISTRICT COURT  
7  
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA

9 FINANCIAL TECHNOLOGY PARTNERS  
10 L.P.,

11 Plaintiff,

12 v.

13 FNX LIMITED, FARID NAIB, and DOES 1-  
14 20

15 Defendants.  
16 \_\_\_\_\_/

No. C 07-01298 JSW

**ORDER GRANTING  
PLAINTIFF'S MOTION  
REGARDING JURY TRIAL**

17 Now before the Court is the motion regarding jury trial by plaintiff Financial  
18 Technology Partners, L.P. ("FT Partners"). The Court finds that this matter is appropriate for  
19 disposition without oral argument and it is hereby deemed submitted. *See* N.D. Civ. L.R. 7-  
20 1(b). Accordingly, the hearing set for February 27, 2009 is HEREBY VACATED.  
21 This action concerns a contract dispute between defendant FNX Limited ("FNX") and FT  
22 Partners. In the agreement at issue, there is a provision that waives the right to a jury trial. The  
23 parties dispute whether this provision is valid and enforceable. Plaintiff argues that the  
24 agreement contains a choice of law provision designating California law, and thus, contends  
25 that California law controls. Under California law, pre-litigation contractual waivers of the  
26 right to a jury trial are unenforceable because such waivers violate the California Constitution.  
27 *Grafton Partners L.P. v. Superior Court*, 36 Cal. 4th 944, 967 (2005). Under federal law,  
28 although the right to a jury trial is protected by the Seventh Amendment of the United States  
Constitution, the

1 right to a jury trial may be waived by a contract knowingly and voluntarily executed. *See*  
2 *Okura & Co. (America), Inc. v. Careau Group*, 783 F. Supp. 482, 488 (C.D. Cal. 1991); *see*  
3 *also Phoenix Leasing Inc. v. Sure Broadcasting, Inc.*, 843 F. Supp. 1379, 1384 (D. Nev. 1994).  
4 Nevertheless, courts “must indulge every reasonable presumption against the waiver of the jury  
5 trial.” *United States v. Nordbrock*, 941 F.2d 947, 950 (9th Cir.1991).

6 Generally, the right to a jury trial in federal court is governed by federal law. *Simler v.*  
7 *Conner*, 372 U.S. 221, 221-22 (1963). The rationale underlying this rule is to protect the  
8 federal policy favoring jury trials. *Id.* at 222. The Supreme Court stated its holding that federal  
9 law governs the right to a jury trial was necessary to ensure that the Seventh Amendment is  
10 enforced uniformly. *Id.* The Court noted that in diversity cases, although the substantive  
11 dimensions of the claims asserted are based on state law, the characterization of whether such  
12 claims are legal or equitable for purposes of determining whether there is a right to a jury trial  
13 must be determined according to federal law. *Id.*

14 FT Partners argues that because the contract at issue has a choice of law section which  
15 provides that California law governs, the Court should look to California law in determining  
16 whether the waiver of the right to a jury trial is enforceable. Defendants FNX and Farid Naib  
17 counter that even where there is a choice of law provision, courts still apply federal law on this  
18 issue. However, the only authority on point cited, and located by the Court, is an out of circuit  
19 unpublished district court case which lacks thorough analysis. *See TransFirst Holdings, Inc. v.*  
20 *Phillips*, 2007 WL 867264, \*2 (N.D. Tex. March 22, 2007). The court in *TransFirst* simply  
21 rejected the argument that the choice of law provision should be applied because the moving  
22 party failed to offer a convincing reason why it should be applied. *Id.* The Court finds that  
23 because of the lack of analysis, *TransFirst* is not persuasive.

24 Ironically, although the reason the Supreme Court held that federal law governs the right  
25 to a jury trial was to protect this right, applying federal law here would eliminate that right. The  
26 Court finds that applying California law here, which is more protective of the right to a jury  
27 trial, would promote the policy underlying the rule regarding jury waivers. Moreover, the  
28 California law at issue is premised on an interpretation of the California Constitution, not the

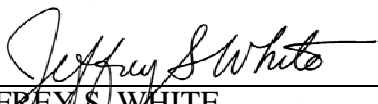
1 Seventh Amendment of the United States Constitution. Thus applying California law here  
2 would not undermine the uniformity of enforcing the Seventh Amendment. Finally,  
3 Defendants' conduct in this case, including submitting a case management statement in June  
4 2007 providing that this case would be tried by a jury, calls into question whether they could  
5 enforce the waiver. *See RDO Financial Servx. Co. v. Powell*, 191 F. Supp. 811, 814 (N.D. Tex.  
6 2002) (finding in light of the presumption against jury waiver that the defendants relinquished  
7 their right to enforce a jury waiver by delaying and acting inconsistently with enforcing the jury  
8 waiver). Given that courts "must indulge every reasonable presumption against the waiver of  
9 the jury trial," *Nordbrock*, 941 F.2d at 950, the Court honors the parties' choice of law  
10 provision in the contract at issue and holds that, pursuant to California law, the jury waiver  
11 provision is unenforceable.

### 12 CONCLUSION

13 For the foregoing reasons, the Court GRANTS FT Partners' motion regarding jury trial.  
14 The Court FURTHER ORDERS that the pretrial conference will be held at 2:00 p.m. on June 8,  
15 2009 and the trial will begin at 8:00 a.m. on July 6, 2009.

16 **IT IS SO ORDERED.**

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18 Dated: February 24, 2009

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21 JEFFREY S. WHITE  
22 UNITED STATES DISTRICT JUDGE  
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