UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA S. ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendants. This Document Relates To: *Ricardo Rodriguez Caso* v. *Standard Chartered Bank International (Americas) Ltd., et al.*, No. 10-CV-9196	Master File No. 09-CV-118 (VM) (FM)

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR REARGUMENT AND RECONSIDERATION

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July 10, 2013

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INTRODUCTION

Standard Chartered Bank International (Americas) Limited ("SCBI") and Standard Chartered PLC (together, "Standard Chartered") respectfully submit this memorandum in opposition to plaintiff Ricardo Rodriguez Caso's ("Caso") Motion for Reargument and Reconsideration of this Court's June 12, 2013 Decision and Order (the "June 2013 Order") enforcing the Court's May 18, 2012 Order compelling arbitration of Caso's claims on an individual basis (the "May 2012 Order"). None of Caso's three purported bases for reconsideration has merit.

First, Caso asserts that the Court should not have compelled arbitration of his claims "without any substantive briefing," because he believes that certain contract interpretation principles required the parties' account agreements to be "read together and applied simultaneously" to prohibit Standard Chartered from enforcing the parties' arbitration agreement against a member of a putative class. (Plaintiff's Memorandum of Law in Support of Plaintiff's Motion For Reargument and Reconsideration at 5-10, June 26, 2013 (No. 10-CV-9196, Dkt. No. 88) ("Pl.'s Mot.").) Yet, Caso made the very same contractual interpretation arguments in 2012 (Apr. 20, 2012 Letter from Gaytri Kachroo at 2-4 (Dkt. No. 880)), and the Court expressly considered and rejected them in its May 2012 Order. Contrary to Caso's assertions, the Court's May 2012 Order was fully consistent with universal contract interpretation principles. Caso's attempt to reargue an issue decided more than one year ago is thus both untimely and wrong on the merits.

Second, Caso asserts that an arbitrator, not this Court, should have decided whether he could pursue class arbitration. Caso made this exact same argument in its opposition to SCBI's motion to enforce the May 2012 Order (May 30, 2013 Letter from Gaytri Kachroo at 2-3 (Dkt. No. 1144); June 7, 2013 Letter from David Stone at 1 (Dkt. No. 1148)), and now

adds that this is a "procedural issue[]" that is "generally left to arbitrators." (Pl.'s Mot. at 11 (citation omitted).) The Court correctly rejected this argument in its June 2013 Order, ruling that arbitrability here was a matter for the Court. Caso provides no controlling authority mandating a different result. *See Terra Sec. ASA Konkursbo* v. *Citigroup, Inc.*, 820 F. Supp. 2d 558, 560 (S.D.N.Y. 2011) (Marrero, J.) (noting that one of "[t]he major grounds justifying reconsideration" includes "an intervening change in controlling law") (citation and internal quotation marks omitted).

Third, Caso asserts that the Court's orders of May 2012 and June 2013 have somehow "operated a manifest injustice on Caso and the putative class" because they gave effect to Caso's waiver of a purported "right" to bring claims on behalf of a putative class. (Pl.'s Mot. at 2, 10.) This assertion is baseless. The Court correctly found that Caso's agreement to arbitrate *his* claims does not mean that he can pursue such claims on behalf of a putative class. This finding is fully consistent with federal law requiring courts to enforce agreements to arbitrate disputes in accordance with their terms. Caso's desire to represent a putative class under Federal Rule of Civil Procedure 23 in federal court does not trump the parties' arbitration agreement.

Caso's motion for reargument and reconsideration should be denied in its entirety.

BACKGROUND

More than 18 months ago, Standard Chartered asked the Court to compel Caso to "arbitration on an individual basis of all disputes arising from [Caso's] investment account." (Dec. 23, 2011 Letter from Sharon L. Nelles at 1 (Dkt. No. 766).) Caso made three separate submissions to the Court in opposition to Standard Chartered's request. In two of these submissions, Caso asserted that Standard Chartered had waived its right to compel arbitration. (Dec. 27, 2011 Letter from Gaytri Kachroo (Dkt. No. 771); Dec. 30, 2011 Letter from Gaytri

Kachroo (Dkt. No. 772).) Then, in April 2012, Caso argued that "a detailed examination" of the parties' account agreements would reveal that they "explicitly bar" the arbitration of Caso's claims because Caso sought to represent a putative class. (Apr. 20, 2012 Letter from Gaytri Kachroo at 1.) To support this argument, Caso provided the Court with copies of the account agreements, which included the Nondiscretionary Investment Services Agreement (the "NISA") and the Application for Brokerage Account (the "Brokerage Agreement") (together, the "Account Agreements"), each of which contains an arbitration clause. (Apr. 20, 2012 Letter from Gaytri Kachroo & Exhibits thereto.) Caso asked the Court to "review the attached agreements" and then rule on Standard Chartered's request to compel arbitration. (Apr. 20, 2012 Letter from Gaytri Kachroo at 4.)

The NISA has an arbitration clause that provides: "*Customer and AEBI* agree that all controversies between *Customer and AEBI and/or any Agents* . . . shall be determined by arbitration in accordance with the rules of the American Arbitration Association." (May 24, 2013 Letter from Sharon L. Nelles at 3 (No. 10-CV-9196, Dkt. No. 70)) (quoting NISA ¶ 9(a)) (emphasis added); Ex. B. to Pl.'s Mot. ¶ 9(a).) The Brokerage Agreement contains a similar arbitration clause, but also prohibits enforcement of the arbitration clause against "any person who has initiated in court a putative class action . . . until: (i) the class certification is denied; or (ii) the class is decertified; or (iii) the customer is excluded from the class." (Apr. 20, 2012 Letter from Gaytri Kachroo at 2 (quoting Brokerage Agreement ¶ 6); Ex. A to Pl.'s Mot. ¶ 6.)

On May 18, 2012, this Court deemed Standard Chartered's December 23, 2011 request to be a motion to compel arbitration and granted the motion. (May 2012 Order at 1-2 (Dkt. No. 882).) The Court considered both the NISA and the Brokerage Agreement and found that "the contracts at issue . . . d[id] not bar arbitration" and "that Standard Chartered ha[d] not

waived its right to compel arbitration." (*Id.* at 2-3.) Moreover, after considering the terms of both agreements, the Court ruled that (1) "[t]he plain language of the NISA" compelled Caso to arbitrate "'all controversies'"; (2) "*the NISA alone governs* with regard to arbitration of claims arising from the investment" made by Caso; and (3) the NISA did not prohibit "enforcement of arbitration against a putative class plaintiff." (*Id.* at 2-6 (emphasis added).) Caso did not seek reconsideration of any aspect of the May 2012 Order.

Nearly one year later, on May 3, 2013, Caso initiated a putative class arbitration before the American Arbitration Association. On May 24, 2013, SCBI asked the Court to enforce its May 2012 Order granting Standard Chartered's motion for individual arbitration. (May 24, 2013 Letter from Sharon L. Nelles at 1.) Caso opposed SCBI's motion, arguing that the Court's May 2012 Order did not preclude class arbitration and that the issue of whether Caso could pursue class arbitration should be decided by the arbitrator. (May 30, 2013 Letter from Gaytri Kachroo at 2-3; June 7, 2013 Letter from David Stone at 1.) Caso pointed out that in issuing the May 2012 Order the Court had "consider[ed] multiple submissions from the parties about whether the two agreements at issue"—the NISA and the Brokerage Agreement—"compelled or prohibited arbitration of Caso's putative class action." (May 30, 2013 Letter from Gaytri Kachroo at 1-2.) Caso acknowledged that "the NISA again controls" but asserted that because the NISA does not contain a clause expressly "prohibiting class arbitration," Caso should be able pursue his claims in arbitration on behalf of a putative class. (*Id*. at 2.)

On June 12, 2013, the Court granted SCBI's motion, "reaffirm[ing] its May 18 Order compelling arbitration of Caso's individual claims and . . . preclud[ing] Caso from arbitrating his claims against SCBI arising out of the NISA on a class basis." (June 2013 Order at 4-5 (Dkt. No. 1151).) There is no reason for the Court to reconsider its June 2013 Order.

ARGUMENT

"Reconsideration of a previous order by the court is an extraordinary remedy to be employed sparingly . . . ." *Terra Sec.*, 820 F. Supp. 2d at 560 (citation and internal quotation marks omitted). In considering a motion for reconsideration, which is governed by Local Civil Rule 6.3, "[a] court must narrowly construe and strictly apply Rule 6.3 so as to avoid duplicative rulings on previously considered issues, and to prevent Rule 6.3 from being used to advance different theories not previously argued . . . ." *Id.* (citations omitted).

To succeed on a motion for reconsideration, Caso must demonstrate that the Court "overlooked controlling decisions or factual matters that were put before it on the underlying motion." *Abrahamson* v. *Bd. of Educ. of the Wappingers Cent. Sch. Dist.*, 237 F. Supp. 2d 507, 510 (S.D.N.Y. 2002) (citations omitted). Caso may not "present[] . . . new arguments that could have been, but were not, presented" in the original motion. *Drapkin* v. *Mafco Consol. Grp., Inc.*, 818 F. Supp. 2d 678, 696 (S.D.N.Y. 2011); *accord Abrahamson*, 237 F. Supp. 2d at 510. Nor may he reassert "those issues already considered" by the Court simply because he "does not like the way the original motion was resolved." *Liberty Media Corp.* v. *Vivendi Universal, S.A.*, 861 F. Supp. 2d 262, 265 (S.D.N.Y. 2012) (citation omitted). Rather, motions for reconsideration may be granted on three limited grounds: (1) "an intervening change of controlling law," (2) "the availability of new evidence," or (3) "the need to correct a clear error or prevent a manifest injustice." *Anwar* v. *Fairfield Greenwich Ltd.*, 283 F.R.D. 193, 195 (S.D.N.Y. 2012) (quoting *Virgin Atlantic Airways, Ltd.* v. *Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992)) (internal quotation marks omitted). None of these grounds is present to support reconsideration here.

I. Caso Improperly Reargues the Contractual Interpretation Questions That Were Addressed in the Court's May 2012 Order.

Although Caso styles his motion as seeking reconsideration of the Court's June 2013 Order, really at its core, his argument is that the Court erred in May 2012 when it compelled arbitration in the first instance. Specifically, Caso argues that (1) the Court overlooked the terms of the Brokerage Agreement, which Caso asserts preserves his right to bring a class action (Pl.'s Mot. at 5-6, 8, 10); and (2) the Court did not properly apply "[u]niversal principles of contract interpretation" and/or Florida contract law, which according to Caso, somehow mandate a different interpretation of the Account Agreements so as to allow Caso to bring class claims (Pl.'s Mot. at 6-10). Both of these arguments were raised by Caso and rejected by the Court in 2012. (*See generally* Apr. 20, 2012 Letter from Gaytri Kachroo.)

The time for Caso to challenge the Court's May 2012 Order expired over 13 months ago, on June 1, 2012. Local Civ. R. 6.3 ("[A] notice of motion for reconsideration or reargument of a court order . . . shall be served within fourteen (14) days after the entry of the Court's determination of the original motion . . . ."). Even if timely, however, Caso's motion presents no proper ground for reconsideration: Each of Caso's arguments is either an attempt to "rehash[] arguments previously rejected" by the Court or to "present[] [a] new argument[] that could have been, but [was] not, presented" in the original motion. *Drapkin*, 818 F. Supp. 2d at 696-97.

By arguing that the Court "ignored entire provisions of the Brokerage Agreement" in concluding that the NISA requires him to arbitrate his claims on an individual basis, Caso fails to take account of the holdings in the Court's May 2012 Order. (Pl.'s Mot. at 5-6, 8, 10.) Specifically, in its May 2012 Order, the Court acknowledged that unlike the NISA, which "compels arbitration for 'all controversies,'" the Brokerage Agreement "contain[s] a

clause prohibiting enforcement of arbitration against a putative class plaintiff." (May 2012 Order at 3.) The Court recognized, however, that the parties expressly agreed in the NISA that its terms control whenever an inconsistency or conflict arises between its provisions and any other agreement between the parties.[1] (*Id.* at 2-3.)

Contrary to Caso's assertion, there is no need for the Court to entertain further "substantive briefing" on the interplay between the NISA and the Brokerage Agreement. (Pl.'s Mot. at 5-6.) Nor was there any need for the Court to rehash its discussion of that issue in the June 2013 Order. (June 2013 Order at 2, 4.) As Caso has conceded, the Court already has "consider[ed] multiple submissions from the parties" regarding the Account Agreements. (May 30, 2013 Letter from Gaytri Kachroo at 2.) The Court concluded in the May 2012 Order that "the NISA alone governs" and that, because "the NISA does not contain a clause prohibiting enforcement of arbitration against a putative class plaintiff," there was "no impediment to arbitrability" of Caso's claims. (May 2012 Order at 3.) Having failed to challenge the Court's conclusion in May 2012 and having conceded that "the NISA again controls" (May 30, 2013 Letter from Gaytri Kachroo at 2), Caso cannot now assert that the Brokerage Agreement permits him to pursue class claims.

Substantively, Caso asserts that the Court would have "reach[ed] a different conclusion" if it had applied certain "rules of contractual construction." (Pl.'s Mot. at 7.) Caso suggests that the Court followed neither (1) "[u]niversal contract interpretation principles" requiring the court to "look at the four corners of the agreements in question to determine the plain meaning of their provisions and the intent of the parties" (*id.* at 6); nor (2) Florida law

[1] The Court pointed in particular to the NISA's provision that if "there is any conflict or inconsistency between the provisions of" the NISA "and any other agreement between the parties," including the Brokerage Agreement, then the provisions of the NISA "shall control." (May 2012 Order at 3 (quoting NISA ¶ 9(e)); *see also* Ex. B to Pl.'s Mot. ¶ 9(e).)

requiring that "when two or more documents are executed by the same parties in the course of the same transaction they will be read and construed together," and a contract should not be read "to render provisions meaningless when there is a reasonable interpretation that does not do so" (*id.* at 9-10). Neither of these arguments provides a basis for reconsideration.

The Court clearly looked to the four corners of the Account Agreements in its May 2012 Order to reach its conclusion that "[t]he plain language of the NISA"—the best evidence of the parties' intentions—required Caso to arbitrate his claims. (May 2012 Order at 2-3.) Indeed, Caso cites many of the same contract interpretation cases now in support of his request for reconsideration that he cited back in April 2012.[2] In his April 2012 submission, Caso argued that the Account Agreements must "be read in concert" to prevent enforcement of the arbitration clause against a putative class plaintiff and that "[p]ursuant to long-standing contract construction principles, the Court should not interpret the agreements in a manner that would render [the Brokerage Agreement] meaningless." (Apr. 20, 2012 Letter from Gaytri Kachroo at 1-3.) The Court was not persuaded then, and Caso has raised no basis for the Court to revisit its ruling now.

Moreover, the Court did appropriately apply contract interpretation principles in concluding that the NISA's clause requiring arbitration governed. The Court construed the terms of both Account Agreements, and, finding an inconsistency between the arbitration clauses in the NISA and the Brokerage Agreement, looked at the Account Agreements as a whole in ruling that the NISA governed by its plain terms. (May 2012 Order at 2-3.) The Court's approach was fully

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[2] *Compare* Pl.'s Mot. at 6-7 (citing *Matrobuono* v. *Shearson Lehman Hutton*, 514 U.S. 52, 63 (1995), *Int'l Multifoods Corp.* v. *Commercial Union Ins. Co.*, 309 F.3d 76, 86 (2d Cir. 2002), and *Local 205 Comty. & Social Agency Emps.' Union* v. *Day Care Council of N. Y., Inc.*, 992 F. Supp. 388, 392 (S.D.N.Y. 1998)), *with* Apr. 20, 2012 Letter from Gaytri Kachroo at 3 (same).

consistent with Florida contract law, which provides that "[w]here the terms of a contract are clear and unambiguous, the parties' intent must be gleaned from the four corners of the document," and "the language itself is the best evidence of the parties' intent, and its plain meaning controls." *Crawford* v. *Barker*, 64 So. 3d 1246, 1255 (Fla. 2011) (citations and internal quotation marks omitted). The Court's decision does not, as Caso suggests, render the Brokerage Agreement's arbitration clause meaningless. (Pl.'s Mot. at 6-7, 9.)[3] Indeed, Caso's interpretation of the two Account Agreements would deprive of meaning the language in the NISA providing that it controls in the event of an inconsistency with any other agreement.

II. Caso Presents No Facts or Controlling Law Warranting Reconsideration of the Court's Conclusion That It Retains Jurisdiction To Enforce the May 2012 Order.

Caso advances only one supposed legal error that is directed at the Court's June 2013 Order (rather than the May 2012 Order)—namely, that arbitrators rather than the Court should have decided the issue of whether the parties agreed to class arbitration. (*See* Pl.'s Mot. at 11; May 30, 2013 Letter from Gaytri Kachroo at 2-3.)[4] The Court considered and expressly rejected this argument in its June 2013 Order, ruling that it "retain[ed] jurisdiction to enforce and determine the contours of the May 18 Order compelling arbitration," and quoting *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 947 (1995), which held that "where the parties did not clearly agree to submit the question of arbitrability to arbitration . . . the arbitrability of the []

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[3] Contrary to Caso's assertions, Florida law would not have permitted the Court to construe the agreements against the draftsman, SCBI. (Pl.'s Mot. at 7, 10 & n.3.) "The 'construction-against-the-draftsman' rule" does not apply" where, as the Court found here, the intent of the parties is clear "from the words of the contract itself" or "when . . . the parties' actual intent has been otherwise conclusively determined." *Child* v. *Child*, 474 So. 2d 299, 301 (Fla. Dist. Ct. App. 1985) (citations omitted).

[4] Caso did *not* raise this argument when Standard Chartered first sought to compel arbitration on an individual basis in 2011.

dispute was subject to independent review by the courts." (June 2013 Order at 3-4.) Caso presents no fact or controlling law overlooked by the Court on this issue.

Instead, Caso argues that the Court erred in deciding the issue of whether class arbitration is permitted under the parties' Agreements because "the issue of whether a case may proceed as a class action is procedural," and "procedural issues are generally left to arbitrators." (Pl.'s Mot. at 11 (citing *Ottley* v. *Sheepshead Nursing Home*, 688 F.2d 883, 890 (2d Cir. 1982)).) But, Caso already has conceded that "whether the applicable arbitration agreement permits class arbitration" is a "gateway question[] of arbitrability" (May 30, 2013 Letter from Gaytri Kachroo at 3), and such issues are normally left to the court to decide, *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002). Caso cannot now, on a motion for reconsideration, "advance new arguments to supplant those that failed in the prior briefing of the issue." *Drapkin*, 818 F. Supp. 2d at 697 (citation omitted).

Nor does Caso point to any controlling authority that required the Court to defer to arbitrators on the question of whether Caso can pursue class claims in arbitration. The Court correctly ruled in its June 2013 Order that the class question is an issue committed to the court to decide on a motion to compel arbitration (June 2013 Order at 2-3), and under *First Options of Chicago, Inc.*, "[i]f . . . the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration," 514 U.S. at 943. *See also Howsam*, 537 U.S. at 83 ("[W]hether the parties [to a contract] have submitted a particular dispute to arbitration . . . is an issue for judicial determination . . . .") (internal quotations and citations omitted). Several courts in this Circuit have reached the same result. *See, e.g.*, *Ryan* v. *JPMorgan Chase & Co.*, No. 12-CV-4844, 2013 WL 646388, at *5-6 (S.D.N.Y. Feb. 21, 2013) (compelling putative class

plaintiff to individual arbitration); *Sanders* v. *Forex Capital Mkts., LLC*, No. 11-CV-864, 2011 WL 5980202, at *1, 10 (S.D.N.Y. Nov. 29, 2011) (compelling putative class plaintiff to individual arbitration); *see also Safra Nat'l Bank of N.Y.* v. *Penfold Inv. Trading, Ltd.*, No. 10-CV-8255, 2011 WL 1672467, at *3 (S.D.N.Y. Apr. 20, 2011) ("[T]he availability of class arbitration is a gateway issue to be decided by courts.").[5]

III. No Manifest Injustice Has Resulted.

Lastly, Caso argues that the Court's May 2012 and June 2013 rulings "operate[] a manifest injustice on Caso and the putative class" because they have "the undeniable, and perhaps unintended, consequence of precluding Caso, and all other similarly situated individuals, from bringing a class action in any forum, ever." (Pl.'s Mot. at 2, 5.) The Court's rulings are not unintended. In fact, Caso himself recognized back in April 2012 that if the Court compelled him to arbitrate his claims, he might be "deprived of [his ability to pursue] a class action" whether in federal court or in arbitration. (Apr. 20, 2012 Letter from Gaytri Kachroo at 2.) Then—as now—Caso asserted that such an outcome "would be improper and unjust." (*Id.* at 4.) The Court disagreed, and nothing has changed that would warrant reconsideration or a different outcome.

Caso entered into an agreement to arbitrate his claims with SCBI on an individual basis. He has no "right" to represent a putative class; nor does any putative class have a right to have Caso as its representative. To the contrary, the law is clear that in federal court the ability "to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims" and can be waived by agreeing to arbitrate. *Parisi* v. *Goldman, Sachs & Co.*, 710 F.3d 483, 488

[5] The case on which Caso relies, *Ottley* v. *Sheepshead Nursing Home*, 688 F.2d 883, 890 (2d Cir. 1982), in which the court held that the question of whether a notice of a grievance was timely provided to the employer in accordance with the terms of a collective bargaining agreement was left to the arbitrators, says nothing about class treatment.

(2d Cir. 2013) (citation omitted). Indeed, the Supreme Court has recently reinforced this limitation, holding that "arbitration is a matter of contract" and that "courts must rigorously enforce arbitration agreements according to their terms." *Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (citations omitted).

Further, with respect to the arbitration proceeding itself, parties may agree to "specify *with whom*" they wish to arbitrate their disputes and may not be forced to class arbitration absent agreement to such proceedings. *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1774 (2010). The Supreme Court also has rejected Caso's argument that a purported "right" to the class action framework must be expressly waived in the arbitration context. Rather, in *Stolt-Nielsen*, the Supreme Court held that parties who had agreed to arbitration—and thus, like Caso, did not have the ability to bring a class action under Rule 23—did not have the right or ability to proceed on a class basis in arbitration unless the parties so agreed. 130 S. Ct. at 1774-75. In so holding, the Court made clear that parties do not agree to class arbitration "by simply agreeing to submit their disputes to an arbitrator." *Id.* at 1775. If Caso were correct that he had an "entitlement to class proceedings for the vindication of" his rights, that would "invalidat[e] [the parties'] private arbitration agreements" and abridge the parties' substantive right to contract. *Italian Colors Rest.*, 133 S. Ct. at 2309-10.

CONCLUSION

Because the Court correctly decided to enforce its May 2012 Order in its June 2013 Order, and Caso has not shown any fact or controlling law the Court overlooked that would mandate a different result, Caso's motion for reconsideration should be denied.

Dated: July 10, 2013
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