UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BASSAM Y. ALGHANIM, Plaintiff, v. KUTAYBA Y. ALGHANIM et al., Defendants.	Case No. 09-CIV-8098 (NRB)

DEFENDANTS KUTAYBA Y. ALGHANIM AND OMAR K. ALGHANIM'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED COMPLAINT OR, IN THE ALTERNATIVE, STAY THIS ACTION PENDING ARBITRATION

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Defendants Kutayba Y. Alghanim and Omar K. Alghanim respectfully submit this memorandum of law in support of their motion to dismiss plaintiff Bassam Y. Alghanim's First Amended Complaint or, in the alternative, stay this action pending arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 3, 4, 206.[1]

PRELIMINARY STATEMENT

This lawsuit is the latest in a long series of attempts by plaintiff Bassam Y. Alghanim ("Bassam") to avoid his contractual obligation to arbitrate disputes with his brother, defendant Kutayba Y. Alghanim ("Kutayba"). In March 2008, Bassam and Kutayba agreed to divide their family business and other jointly owned assets. Two different agreements between the brothers contain broad arbitration clauses requiring arbitration before a Kuwaiti arbitrator. In the first agreement, the brothers committed to arbitrate "any disputes arising in the future" between them. In the second agreement, the brothers agreed to arbitrate any disputes arising in the future "related to the subject matter" of their agreement, including the division of the brothers' assets.

Since entering into the agreements, Bassam has done everything in his power to avoid his obligations, including his obligation to arbitrate. In the past year alone, he has filed nine different lawsuits in Kuwait seeking to adjudicate matters relating to the family's assets. Not one of those lawsuits has survived a motion to dismiss. Most recently, on November 2, 2009, a Kuwaiti court recognized the validity of the arbitration clauses in dismissing one of Bassam's newer lawsuits in favor of arbitration. Significantly, the court reached this conclusion in a case – like this one – where Bassam did not purport to be suing for breach of any of the agreements, did not mention the arbitration clause, and had attempted to avoid arbitration by

[1] 9 U.S.C. §§ 3 and 4 are applicable to foreign arbitration agreements by virtue of 9 U.S.C. § 208.

naming a non-signatory to the agreements. The Kuwaiti court saw through those tactics and dismissed the action as to all defendants.

The same result should be reached here. There can be no serious question that the claims Bassam asserts in this action relate to the subject matter of the brothers' agreements and fall squarely within the arbitration provisions. The crux of plaintiff's complaint is that Kutayba and his agents "hacked" into Bassam's email to access his "litigation and business strategy," and that they did so to give Kutayba an unfair advantage in ongoing negotiations and litigation regarding "the multi-billion dollar disputes between them." Although the complaint mentions the agreements only in passing, no amount of creative pleading can change the fact that the ongoing "multi-billion dollar dispute" about the division of the family assets is the precise subject matter of the brothers' agreements. Nor can Bassam hide from the fact that the "strategy" allegedly affected is Bassam's strategy with respect to the litigation and implementation of those agreements. These are the very subject matters the brothers agreed to arbitrate.

STATEMENT OF FACTS

A. The Ongoing Dispute Over the Family Business

This lawsuit arises out of a family and business dispute between two well known Kuwaiti citizens, Bassam and Kutayba Alghanim. For decades, Bassam and Kutayba jointly owned their family businesses and personal assets. However, in early 2008, the brothers decided to divide their assets and go their separate ways. (Am. Compl. ¶¶ 33-36.) On March 12, 2008, they entered into two agreements that provided for the dissolution of their partnership. (Id. ¶ 38; Declaration of Omar Al-Essa, dated November 18, 2009 ("Al-Essa Decl."), Ex. A. ("General Points of Settlement"); Ex. B ("March 12 Agreement").) Shortly thereafter, on March 27, 2008,

the parties agreed to a Memorandum of Understanding ("MOU"), which not only incorporated the March 12 Agreement, but also outlined additional terms of dissolution. (Am. Compl. ¶ 38; Al-Essa Decl. Ex. C ("MOU").) Both the March 12 Agreement and MOU (together, "the Agreements") were signed in Kuwait before Sheikh Nasser Mohammed al Ahmed al Jaber Al Sabah, the Prime Minister of Kuwait, who served as neutral witness. (Al-Essa Decl. ¶¶ 3-4, Exs. B and C.)

The Agreements address the rights and obligations of the brothers vis-à-vis all of their business and personal assets, including Yusuf Ahmed Alghanim and Sons W.L.L. ("YAAS") and Alghanim Industries Company W.L.L. ("Alghanim Industries"). (Al-Essa Decl. ¶ 4, MOU.) Under the terms of the Agreements, the parties agreed that "[t]he ownership proportion in all the common assets in Kuwait . . . will be 60% to Kutayba Y. Alghanim and 40% to Bassam Y. Alghanim" and that "[t]he ownership proportion in the common assets outside Kuwait will be 50% to each of them." (March 12 Agreement ¶ 2; see also MOU ¶¶ 1.2, 1.3.) The MOU also contains a detailed methodology for valuing and dividing the businesses and assets. (See MOU at 1, 10.)

B. Plaintiff Agrees to Arbitrate

The brothers agreed in writing to resolve disputes between them before a Kuwaiti arbitrator. The March 12 Agreement provides that "[s]hould any dispute arise in the future between the two Parties, the final advice, opinion and decision relating thereto will be issued by his highness Sheikh Nasser A[l] Mohamed Al Ahmed Al Jaber Al Sabah."[2] (March 12 Agreement ¶ 7 (emphasis added).) In the MOU, signed less than three weeks later, the parties reiterated their commitment to resolve any disputes by arbitration. Bassam and Kutayba

[2] The General Points of Settlement, also signed on March 12, does not contain an arbitration clause.

expressly "confirm[ed] their agreement that any dispute arising in the future between [them] related to the subject matter of this agreement shall be finally decided by H.H. Sheikh Nasser Mohammed al-Ahmed al-Jaber Al-Sabah." (MOU ¶ 15 (emphasis added).) The brothers' agreement to arbitrate "any dispute" related to the division of the family's assets is unqualified, as neither of the Agreements nor any other document limits its scope in any way.

C. Plaintiff Brings Litigation in Kuwait

Shortly after entering into the MOU, the parties began to disagree over the implementation of that agreement. Among other issues, the parties disagreed about the timing of different transactions contemplated by the MOU and the valuation of certain assets to be transferred. As the dispute escalated, it became clear that Bassam was trying to avoid the arbitration provisions. In March 2009, Bassam filed six lawsuits in Kuwait in which he sought to place into judicial receivership certain of the family's substantial businesses that are expressly allocated to Kutayba (in exchange for consideration based on their value as of March 31, 2008) pursuant to the MOU, including Alghanim Industries and YAAS. (See, e.g., Al-Essa Decl. ¶¶ 6-8, Exs. E and H.) The six different judges hearing these six separate cases all dismissed Bassam's claims. (Id. ¶¶ 6-8, Exs. F and I.) Bassam appealed five of these dismissals and lost them all. (See, e.g., Al-Essa Decl. Ex. G and J.)[3]

In March 2009, Bassam again targeted Kutayba's interests in Alghanim Industries and YAAS by filing two additional lawsuits in Kuwait. In the first case, Bassam sued Kutayba and YAAS, requesting that the Kuwaiti Court of First Instance appoint an expert to calculate YAAS's profits for 2007 and 2008 and order Kutayba and YAAS to pay Bassam his share. (Al-Essa Decl. Ex. K.) In the second action, Bassam asserted identical claims against Kutayba and

[3] These cases were filed in a Kuwaiti court with jurisdiction over "urgent" matters, to which the arbitration agreements do not apply.

Alghanim Industries. (Al-Essa Decl. Ex. M.) Kutayba and the corporate defendants challenged the court's jurisdiction to hear Bassam's claims on the basis of the arbitration agreements entered into by Bassam and Kutayba (which Bassam failed to acknowledge in the pleadings he filed in each case). (Al-Essa Decl. Exs. K and M.) Kutayba, YAAS, and Alghanim Industries all argued that these arbitration agreements were not only valid and enforceable, but that the disputes before the Kuwaiti courts fell squarely within their broad scope. (Id.)

On October 19, 2009 – only after defendants Kutayba and Omar notified this Court and Bassam's counsel of their intention to file this motion – Bassam attempted to voluntarily dismiss his case concerning YAAS. (Al-Essa Decl. ¶ 8.) Notwithstanding Bassam's attempt to avoid the issuance of a ruling that could have been (and turned out to be) damaging to his New York lawsuit, on November 2, 2009, the Court of First Instance ruled that Bassam's case against both Kutayba and YAAS was referable to arbitration. The Court held that:

> [w]hereas, both YAAS and KYA primarily pleaded the lack of jurisdiction of the Court to hear the case because of the Arbitration Clause and neither YAAS nor KYA submitted any defense on the merits, and whereas YAAS was the subject of the present case, and whereas the agreement entered into between KYA and BYA indicated that any dispute arising in relation to YAAS shall be settled by way of arbitration and by the arbitrator named in the said agreement, and therefore YAAS' and KYA's argument for lack of jurisdiction to hear the case is founded on valid facts and law; and the Court shall not have a competence jurisdiction to hear the case notwithstanding the decision of the Plaintiff to waive the case and have it written-off, because the court is entitled to rule on the case even though Plaintiff is absent if the case is ready to be decided.

(See Al-Essa Decl. Ex. K at 5.)[4] On that same day, apparently fearful that a second court would dismiss the identical claims asserted against Alghanim Industries, Bassam filed notice that he

[4] Bassam recently appealed the Kuwaiti court's November 2 dismissal of this case.

was abandoning that lawsuit.[5] (See Al-Essa Decl. Ex. N.)

D. Plaintiff Commences Litigation in the United States

Having faced repeated dismissal of his claims in Kuwaiti courts (though not having yet received the November 2, 2009 judgment mentioned above), Bassam filed this action on September 22, 2009. The subject matter of plaintiff's complaint directly relates to the subject matter of the Agreements: the family's businesses and assets, the manner in which they have been divided between the brothers, and the resolution of any disputes related to that division. Plaintiff acknowledges this fact from the outset. In paragraph 1 of the Amended Complaint he alleges:

> In the midst of a bitter family battle between Plaintiff and his brother (Defendant Kutayba) over the break-up of their multi-billion dollar business empire, Defendants embarked upon a covert program of industrial espionage designed to undermine Plaintiff's position and gain an unfair advantage in the ongoing negotiations and legal proceedings.

(Id. (emphasis added).) While plaintiff asserts a variety of causes of action, all are based on the same central allegations: by hacking into his email, "Defendants illegally accessed and recorded Plaintiff's litigation and business strategy with respect to the multi-billion dollar disputes between them."[6] (Id. ¶ 77; see also id. ¶¶ 60, 80, 121, 128, 141, 149, 167, 172, 183, 189.) At the

[5] On October 13, 2009, Bassam filed yet another action against Kutayba and YAAS, among others, this time asking the Kuwaiti court to declare that Bassam owns 50% of YAAS (even though under the MOU, he agreed to receive a payment in cash or Gulf Bank shares valued as per the MOU, at defendant Kutayba's option, equal only to 40% of the value of YAAS as of March 31, 2008). (See Al-Essa Decl. Ex. G.) It is, of course, possible that Bassam will abandon this new action concerning YAAS in light of the Court of First Instance's November 2, 2009 order that dismissed the similar action he brought against the same parties. If plaintiff does not voluntary dismiss this new action as he should, Kutayba will make a motion in the Kuwaiti court to dismiss the action in favor of arbitration so that that all claims asserted by plaintiff against Kutayba and YAAS can be heard by the arbitrator in the same proceeding.

[6] Plaintiff refers numerous times throughout his Amended Complaint to "disputes" or "litigation" without making any mention of the fact that such "disputes" and "litigation" are directly related to the division of his family's

heart of plaintiff's complaint is the claim that Kutayba and his agents engaged in computer "hacking" in order to gain an unfair advantage for Kutayba in the ongoing dispute concerning the implementation of the MOU. This theme reverberates throughout the Amended Complaint:

- "Through this covert program of illegal espionage, Kutayba, Omar, Moubarak and their co-conspirators secured real-time access to Plaintiff's strategic planning and the legal advice he was receiving from his attorneys in the United States and Kuwait. As a result, Defendants were able to derail the negotiations, assert and maintain their control over the brothers' joint assets and use them for their own benefit, and continue their strategy of trying to force Plaintiff to take less than his fair share of the brothers' joint assets by denying him access to his assets and income." (id. ¶¶ 13-14);

- "Kutayba and Omar stole Plaintiff's emails to gain advantage in a dispute that concerns, in part, Kutayba's breach of Plaintiff's rights by improperly assuming control of two New York-based service companies (Green Drake Corporation N.V. and A.I. International Corporation . . .) that are required to act as agents for the two brothers in managing an almost half billion dollar investment portfolio and servicing their properties and interests throughout the world."[7] (id. ¶ 21) (emphasis added);

- "Plaintiff and Defendant Kutayba have been embroiled in a contentious and acrimonious dispute over the division of their assets ever since the March 12 Agreements and subsequent MOU were entered into. . .. In the course of negotiations and in preparation for the possibility of litigation with respect to the brothers' underlying business disputes, Plaintiff repeatedly consulted his attorneys in the United States and Kuwait. As an integral part of those consultations, Plaintiff and his attorneys have exchanged numerous privileged communications regarding the strategy to be followed in the negotiations and litigation and the legal advice regarding various aspects of the dispute. Almost all of this legal advice was sent to and received by Plaintiff at his password-protected AOL email addresses that Defendants Kutayba and Omar caused to be hacked into . . .." (id. ¶¶ 42-44);

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businesses and assets, which is the "subject matter" of the Agreements. (See, e.g., Am. Compl. ¶¶ 1, 14, 42-44, 46, 48, 128.)

[7] Green Drake Corporation N.V. and A.I. International Corporation are companies allocated under the MOU, and Bassam's and Kutayba's "rights" with respect to the companies and the assets they managed are extensively detailed throughout that agreement. (See MOU ¶¶ 1.3, 1.3.1, 1.5, 1.6, 1.7, 1.11, Schedule F.)

- "The unlawful conduct of Defendants . . . has allowed Defendants Kutayba and Omar to assert and illegally maintain control over the brothers' joint assets, parry all of his efforts to obtain his assets and income and deprived him of the value of the legal advice for which he paid substantial sums. This has enabled Kutayba and Omar to prolong their campaign of wrongfully barring Plaintiff from the use and enjoyment of his assets and is allowing them to continue their wrongful use of Plaintiff's assets for their benefit." (id. ¶ 113); and

- "The object of the fraud [committed when defendants violated the Computer Fraud and Abuse Act] and the things obtained did not consist only of the use of the computer or computers; rather the goal was to surreptitiously obtain the confidential information contained in [plaintiff's] emails to further Defendants' goal of depriving Plaintiff of his rightful assets." (id. ¶ 128).

At a hearing held on October 5, 2009, defendants Kutayba and Omar informed the Court – since plaintiff had failed to do so in his complaint or otherwise – of the existence of arbitration clauses contained in the March 12 Agreement and the MOU. (10/05/2009 Hearing Tr. at 22.) Because the causes of action plaintiff asserts fall squarely within the scope of the arbitration agreements, defendants notified the Court that they intended to move to dismiss the complaint or, in the alternative, stay the action pending arbitration in Kuwait. The Court allowed defendants to make their motion and waived its rule requiring defendants to file a request for a pre-motion conference.[8] (Id. at 43.) It also stayed discovery pending the resolution of this motion. (Id. at 33-34.)

On October 23, 2009, plaintiff amended his complaint to add three new defendants – Alghanim Industries, YAAS, and Waleed Moubarak – and assert two new claims under the Racketeer Influenced and Corrupt Organizations Act. The additional allegations in the Amended Complaint only reaffirm the connection between plaintiff's claims and the

[8] In addition, the Court instructed defendants to limit their initial motion to the argument that plaintiff's claims should be decided by an arbitrator. (10/05/2009 Hearing Tr. at 43.) Defendants reserved all of their rights in this regard, including their right to file a motion to dismiss pursuant to Rule 12(b)(6) at a later date. (Id. at 44.)

Agreements. All of the newly added defendants are closely related to defendants Kutayba and Omar. Defendants Alghanim Industries and YAAS are two companies that were divided between the brothers pursuant to the Agreements and are presently managed by Kutayba (as Chairman) and Omar (as Chief Executive Officer). (Am. Compl. ¶¶ 23-24.) Defendant Moubarak is counsel to defendants Kutayba and Omar, as well as to Alghanim Industries and YAAS. (Id. ¶ 28.) In addition, the only allegations made against the newly added defendants are that they assisted defendants Kutayba and Omar to carry out a scheme, the sole purpose of which was "to steal Plaintiff's email and the information contained in them, which were used by Kutayba and Omar to assert and maintain control of the joint assets belonging to Plaintiff and Kutayba." (Id. ¶ 83.) None of the recently added defendants are relevant in their own right; rather, plaintiff's claims against these defendants are wholly dependent on the allegations plaintiff makes against Kutayba.

ARGUMENT

I. THE COURT SHOULD DISMISS OR, IN THE ALTERNATIVE, STAY THIS ACTION BECAUSE THE PARTIES INTENDED ANY DISPUTE BETWEEN THEM TO BE ARBITRATED

The Federal Arbitration Act ("FAA" or "the Act") "requires the federal courts to enforce arbitration agreements, reflecting Congress' recognition that arbitration is to be encouraged as a means of reducing the costs and delays associated with litigation." Vera v. Saks & Co., 335 F.3d 109, 116 (2d Cir. 2003) (quotations omitted). This "emphatic" federal policy in favor of arbitral dispute resolution applies with "special force" in international disputes. Genesco v. T. Kakuichi & Co., Ltd., 815 F.2d 840, 847 (2d Cir. 1987) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473, U.S. 614, 631 (1985) (quotations omitted)). Where, as here, the parties have entered into a foreign arbitration agreement, a court must "direct that arbitration be held in accordance with the agreement at any place therein provided for,

whether that place is within or without the United States." 9 U.S.C. § 206. The enforcement provisions of the FAA are "mandatory"; the Act "'leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.'" Genesco, 815 F.2d at 844 (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 218 (1985)) (emphasis added); see also Intergen N.V. v. Grina, 344 F.3d 134, 141 (1st Cir. 2002) ("[E]nforcing arbitration clauses under the New York Convention is an obligation, not a matter committed to district court discretion."). Where all of the plaintiff's claims must be submitted to arbitration, the complaint should be dismissed. See, e.g., Genesco, 815 F.2d at 844.

To determine whether it must refer a matter to arbitration under Section 206 of the Act, the court need only answer two questions: whether the parties agreed to arbitrate, and if so, whether the scope of that agreement encompasses the asserted claims. PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1198 (2d Cir. 1996). In the absence of an explicit choice-of-law provision, courts typically apply federal law to interpret the terms of an international arbitration agreement and thus answer these questions. See, e.g., Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, Inc., 198 F.3d 88, 96 (2d Cir. 1999); Motorola Credit Corp. v. Uzan, 388 F.3d 39, 51 (2d Cir. 2004); Certain Underwriters at Lloyd's London v. Argonaut Ins. Co., 500 F.3d 571, 577-78 (7th Cir. 2007).

If, however, the Court decided to employ a choice-of-law analysis, Kuwaiti law would undoubtedly apply. The Agreements were signed in Kuwait by two Kuwaiti citizens before the Prime Minister of Kuwait who served as witness (MOU at 10), and they primarily concern the parties' interests in Kuwaiti companies and assets (including defendants Alghanim Industries and YAAS) (see, e.g., id. ¶ 1.2). The Agreements require substantial performance in

Kuwait, including, among other things, the valuation of certain Kuwaiti interests by the Kuwait office of Ernst & Young (see, e.g., id. ¶ 2.4), the transfer of a group of Kuwaiti companies known as Alghanim Industries to Kutayba (id. ¶ 4.2), the transfer of a number of shares in Gulf Bank to Bassam (id. ¶ 3.1), and the sale of certain Kuwaiti marketable securities (see, e.g., id. ¶ 2.5). In addition, plaintiff and defendant Kutayba agreed to resolve any disputes between them before a Kuwaiti arbitrator. (Al-Essa Decl. Ex. B ¶ 7; MOU ¶ 15.)

In any event, the determination of this issue makes no substantive difference here. The result would be the same whether federal or Kuwaiti law applied: this Court should dismiss the Amended Complaint.

A. Kutayba and Bassam Entered into Valid Agreements to Arbitrate

Plaintiff twice agreed to arbitrate disputes between him and his brother. The March 12 Agreement states in no uncertain terms: "Should any dispute arise in the future between the two Parties, the final advice, opinion and decision relating thereto will be issued by his highness Sheikh Nasser A[l] Mohamed Al Ahmed Al Jaber Al Sabah." (March 12 Agreement ¶ 7 (emphasis added).) Paragraph 15 of the MOU reaffirms the parties' commitment to arbitrate their disputes: "KYA and BYA hereby confirm their agreement that any dispute arising in the future between us related to the subject matter of this agreement shall be finally decided by H.H. Sheikh Nasser Mohammed al-Ahmed al-Jaber Al-Sabah." (MOU ¶ 15 (emphasis added).) The arbitration clauses are unquestionably valid and binding under any applicable law.

1. U.S. Law

Under established federal law, "[i]f the parties have agreed to submit a dispute for a decision by a third party, they have agreed to arbitration." AMF Inc. v. Brunswick Corp., 621

F. Supp. 456, 460 (E.D.N.Y. 1985) (Weinstein, J.) "No magic words such as 'arbitrate' or 'binding arbitration' or 'final dispute resolution' are needed to obtain the benefits of the [Federal Arbitration] Act." Id. at 460; see also McDonnell Douglas Fin. Corp. v. Penn. Power & Light Co., 858 F.2d 825, 830 (2d Cir. 1988).

2. Kuwaiti Law

Like federal law, Kuwaiti law does not require any special phrasing for the formation of a valid and binding arbitration agreement. (Declaration of Dr. Ahmad Al-Samdan, dated November 19, 2009 ("Al-Samdan Decl.") ¶ 30 ("An agreement to arbitrate must be evidenced in writing, but it 'does not need to be expressed in any specific phrases . . ..'").) Rather, under the law of Kuwait, there are only three elements necessary to establish the validity of an agreement to arbitrate, all of which are readily satisfied here: (1) that the agreement is in writing; (2) that the subject matter to be arbitrated is a matter about which arbitration is permitted; and (3) that the agreement is made by a competent person. (See Al-Samdan Decl. ¶¶ 27-37; Declaration of Dr. Nasser Ghunaim Al Zaid, dated November 21, 2009 ("Nasser Decl.") ¶ 31-32.) The arbitration agreements between plaintiff and defendant Kutayba are in writing, they concern civil or commercial matters that are unquestionably arbitrable in Kuwait (Al-Samdan Decl. ¶¶ 33-35; Nasser Decl. ¶ 32), and they were entered into by prominent Kuwaiti businessmen. Therefore, under both federal law and Kuwaiti law, the result is the same – both arbitration agreements reveal a clear intent by Bassam and Kutayba to arbitrate any disputes between them. (Al-Samdan Decl. ¶¶ 31-32; Nasser Decl. ¶ 34.)

This conclusion is supported by the opinions of two experts in Kuwaiti arbitration law. Dr. Ahmad Al-Samdan is a senior partner with the law firm Ahmad Al-Samdan and Partners, as well as a professor of international commercial arbitration and conflict of laws at

Kuwait University. Dr. Nasser Ghunaim Al Zaid is currently the Secretary General of the Gulf Cooperation Council Commercial Arbitration Centre. Both experts unequivocally concluded that Paragraph 7 of the March 12 Agreement and Paragraph 15 of the MOU are valid and enforceable arbitration agreements. (Al-Samdan Decl. ¶ 31 ("Here, the parties have clearly expressed in writing their intent to submit their potential disputes related to the subject matter of the Agreements to arbitration in clause 7 of the March 12 Agreement and clause 15 of the MOU."); Nasser Decl. ¶ 34 ("Articles 7 and 15 are worded in a way that does not give rise to any doubt with respect to both parties' intent to refer any dispute that might arise between them to arbitration.").)

The Kuwaiti Court of First Instance reached the same conclusion in its November 2, 2009 opinion dismissing plaintiff's lawsuit against Kutayba and YAAS. In that lawsuit, Bassam sued KYA and YAAS seeking an order appointing an expert to determine YAAS's profits, and an order requiring Kutayba to pay Bassam his share of those profits. (Al-Essa Decl. Ex. K.) Kutayba and YAAS defended solely on the ground that the dispute was subject to arbitration pursuant to the March 12 Agreement and the MOU. (Id.) The court decided that these arbitration agreements were valid and enforceable and that plaintiff's claims against both Kutayba and YAAS were within the broad scope of those clauses. (Id.) Accordingly, it dismissed plaintiff's case for lack of jurisdiction and referred the matter to arbitration. (Id.) Regardless of whether federal law or Kuwaiti law applies, this Court should do the same.

B. Plaintiff's Claims Fall Within the Scope of the Arbitration Agreements

1. The Dispute Is Subject to Arbitration under Federal Law

The Federal Arbitration Act's policy favoring arbitration requires courts "to construe arbitration clauses as broadly as possible." Genesco, 815 F.2d at 847 (emphasis added). In accordance with this policy, the United States Supreme Court has instructed that "any doubts

concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) (emphasis added).

The expansive language of the arbitration clauses in this case is in some respects exactly like that which the Second Circuit has described as the "prototypical broad arbitration provision." Oldroyd v. Elmira Sav. Bank, FSB, 134 F.3d 72, 74, 76 (2d Cir. 1998) (addressing arbitration clause in that covered: "[a]ny dispute, controversy or claim arising under or in connection with this Agreement"); see also JLM Indus., Inc. v. Stolt-Nielsen SA, 387 F.3d 163, 167, 172 (2d Cir. 2004) (holding that the language "[a]ny and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration" was "at least as expansive as the language contained in a number of arbitration clauses that this Court has characterized as 'broad'"); Vera, 335 F.3d at 117 (finding that language requiring "[a]ny dispute, claim, grievance or difference arising out of or relating to this Agreement which the Union and the Employer have not been able to settle [shall be arbitrated]" constituted a broad arbitration clause). But, in other respects, the arbitration clause in the parties' Agreements is even broader than those that have been termed "prototypical." Unlike those agreements that cover only issues "arising out of" a contract, this clause covers any dispute "related to" the "subject matter" of the March Agreements. Int'l Talent Group, Inc. v. Copyright Mgmt., Inc., 629 F. Supp. 587, 592 (S.D.N.Y. 1986) ("An arbitration clause covering claims 'relating to' a contract is broader than a clause covering claims 'arising out of' a contract."). In other words, the arbitration clauses are not limited to matters "arising out of" the agreements or even matters "relating to" the agreements. Rather, the MOU covers any dispute that relates to the "subject matter" of the agreement, including disputes that are not related to the agreement itself. The March 12 Agreement's arbitration clause is even broader, as it covers "any dispute" between the brothers.

Broad arbitration provisions, such as the ones at issue here, require arbitration when the "allegations underlying the claims 'touch matters' covered by the parties' . . . agreements . . ., whatever the legal labels attached to them." Genesco, 815 F.2d at 846; see also JLM Indus., Inc., 387 F.3d at 172 (explaining that a broad arbitration clause is "presumptively applicable to disputes involving matters going beyond the interpret[ation] or enforce[ment of] particular provisions of the contract which contains the arbitration clause") (quotations omitted). Indeed, "the existence of a broad agreement to arbitrate creates a presumption of arbitrability which is only overcome if it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." WorldCrisa Corp. v. Armstrong, 129 F.3d 71, 74 (2d Cir. 1997) (quotations omitted) (emphasis added). In determining whether a particular claim falls within the scope of the parties' arbitration agreement, courts "focus on the factual allegations in the complaint rather than the legal causes of actions asserted." Genesco, 815 F.2d at 846. The purpose of such focus is to prevent plaintiffs from avoiding arbitration merely through creative pleading including, as is the case with the Amended Complaint, failing to even acknowledge the existence of the arbitration agreements at issue (as plaintiff has done in almost every case he has filed in Kuwait).

The Amended Complaint not only "touch[es] matters" concerning the Agreements, but directly "relate[s] to" the "subject matter" of those contracts: the family's businesses and assets, the manner in which they have been divided between the two brothers, and the resolution of any disputes related to that division. Indeed, plaintiff acknowledges the relationship between the lawsuit and the Agreements in the very first paragraph of the Amended Complaint:

> In the midst of a bitter family battle between Plaintiff and his brother (Defendant Kutayba) over the break-up of their multi-

> billion dollar business empire, Defendants embarked upon a covert program of industrial espionage designed to undermine Plaintiff's position and gain an unfair advantage in the ongoing negotiations and legal proceedings.

(Am. Compl. ¶ 1.) Put simply, plaintiff has alleged that defendants engaged in a scheme to provide Kutayba with an unfair advantage in ongoing "negotiations and legal proceedings" surrounding the "break-up of their multi-billion dollar business empire." That breakup is the precise subject matter of the MOU and the March 12 Agreement. Moreover, this theme appears throughout the Amended Complaint and with respect to every cause of action asserted therein, as the central allegations that give rise to each of plaintiff's ten claims are identical: by hacking into his email, "Defendants Kutayba and Omar have illegally accessed and recorded Plaintiff's litigation and business strategy with respect to the multi-billion dollar disputes between them." (Id. ¶ 77; ¶ 14 ("As a result, Defendants were able to derail the negotiations and assert and maintain their control over the brothers' joint assets . . . and continue their strategy of trying to force Plaintiff to take less than his fair share of the brothers' joint assets . . .."); ¶ 21 ("Kutayba and Omar stole Plaintiff's emails to gain advantage in a dispute that concerns, in part, Kutayba's breach of Plaintiff's rights by improperly assuming control of two New York-based service companies . . .."); ¶ 80 ("as a result of this illegal disclosure of [plaintiff's] privileged communications he will be unable to act effectively in his dispute with Kutayba, which affects every aspect of his life and nearly everything he owns."); see also id. ¶¶ 40-44, 60, 113, 121, 128, 141, 149, 167, 172, 183, 189.) Indeed, in many respects, the Amended Complaint reads like a motion alleging discovery abuses in connection with ongoing litigation concerning the implementation of the Agreements.

The Second Circuit has repeatedly found that causes of action are arbitrable where the plaintiff's claims, like those asserted here, implicate the parties' rights and obligations under

the contract containing the arbitration clause. See JLM Indus., Inc., 387 F.3d at 175 ("the damages which JLM asserts it suffered as a result of the conspiracy among the Owners result from the fact that it entered into the charters"); Genesco, 815 F.2d at 846 (finding that an alleged RICO conspiracy fell within the scope of the arbitration clauses contained in the parties' sales contracts because the alleged RICO violations "related to" the underlying sales transactions between the parties).

Even further, the Amended Complaint is pled in a manner intended to recover essentially the same damages plaintiff asserts he would be entitled to if he could successfully enforce his rights under the Agreements. According to the Amended Complaint, "Defendants [have] achieved an unfair and illegal advantage in [] litigation before it has even commenced. Plaintiff has no way to redress that injury except through this action." (Am. Compl. ¶ 48 (emphasis added).) Moreover, plaintiff does not allege "losses" typical of those found in most computer fraud cases, which generally amount to thousands or tens of thousands of dollars; rather, he boldly claims damages "in the many hundreds of millions of dollars." (Id. ¶ 113.) According to the Amended Complaint, "as a result of this illegal disclosure of his privileged communications he will be unable to act effectively in his dispute with Kutayba, which affects every aspect of his life and nearly everything he owns." (Id. ¶ 80 (emphasis added).) To the extent that it is even possible to assess the speculative damages plaintiff seeks, that value could never be determined except by litigating in the United States the very issue he promised to arbitrate in Kuwait: the division of the family's businesses and assets under the Agreements. (See MOU ¶ 15; Al-Essa Decl. Ex. B ¶ 7.)

This Court should refuse plaintiff's invitation to hear his claims and instead dismiss the Amended Complaint or, in the alternative, stay this action pending arbitration. See

Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc., 252 F.3d 218, 224 (2d Cir. 2001) ("arbitration of even a collateral matter will be ordered if the claim alleged 'implicates issues of construction or the parties' rights and obligations under it'"); JLM Indus., Inc., 387 F.3d at 175 (although plaintiff "will try to proffer evidence of a conspiracy that was formed independently of the specific contractual relations between the parties," plaintiff's claims fell squarely within the broad scope of the parties' arbitration clause because plaintiff "asserts that it suffered damages as a result of this conspiracy, and it could not have suffered these damages if it had not entered into the . . . contracts") (emphasis added); Travelclick, Inc. v. Open Hospitality Inc., No. 04 Civ. 1224, 2004 WL 1687204 (S.D.N.Y. July 27, 2004) (finding arbitration clause in former employee defendant's employment agreement sufficiently broad to require arbitration of claims that employee misappropriated confidential information in violation of the Computer Fraud and Abuse Act).

2. The Dispute Is Subject to Arbitration under Kuwaiti Law

The result would be the same if Kuwaiti law were applied. Under Article 173 of the Civil and Commercial Procedure Code No. 38 of 1980, parties may agree to arbitrate all disputes arising from the implementation of a contract. (See Al-Samdan Decl. ¶ 27; Nasser Decl. ¶ 39.) Arbitration is not, however, limited to matters of contract. Rather, under Kuwaiti law, it is within the power of the arbitrator to award civil damages whether the claim sounds in contract or tort. (See Al-Samdan Decl. ¶ 43 (citing Court of Cassation, Decision No. 19/1974, June 2, 1976).) In addition, like federal law, Kuwaiti law provides that "where an arbitration agreement is broadly drafted, a Kuwaiti court will favor arbitration as a method of resolving the dispute between the parties, so long as there is a relationship between the dispute and the subject matter of the arbitration agreement." (Al-Samdan Decl. ¶ 42 (citing Court of Cassation, Decision No.

441/98, February 1, 1999); see also Nasser Decl. ¶ 40 (explaining that where an arbitration clause uses broad terms, it "implies the parties' intent not to limit the arbitration agreements to very narrow and specific disputes so long as they relate to the subject matter of the Agreements").)

The arbitration provisions contained in the Agreements would be considered "broad" under Kuwaiti law. (See Al-Samdan Decl. ¶ 42 ("it is my opinion that an arbitration agreement that provides that 'any dispute' arising between the parties 'related to' a certain 'subject matter' is a type of arbitration agreement that the Kuwaiti courts will consider to be broadly drafted"); Nasser Decl. ¶ 40 ("it is worth noting that the Agreements contain arbitration agreements that provide for very broad terms").) Kuwaiti courts would therefore find that they do not have jurisdiction to hear any claims concerning disputes between plaintiff and Kutayba if there is a relationship between the dispute and the subject matter of the arbitration agreement. (See Al-Samdan Decl. ¶ 40; Nasser Decl. ¶39 ("agreements to arbitrate may be made regarding any disputes which arise out of the implementation of a contract in which case state courts cannot hear such disputes" (citing Court of Cassation, Decision No. 132/1996, Commercial, dated 4 November 1996)).) In this case, a court applying Kuwaiti law would find that plaintiff's claims fall within the broad scope of plaintiff's and Kutayba's agreements to arbitrate for substantially the same reasons that a court applying federal law would reach that conclusion.

Based on his analysis of Kuwaiti law and the allegations in the Amended Complaint, Dr. Al-Samdan concluded that "a Kuwaiti court would decide that the [Amended] Complaint directly relates to the subject matter of the Agreements, which is the division of family assets, and that it would refer this matter to arbitration in accordance with the Brothers' agreement to arbitrate." (Al-Samdan Decl. ¶ 47.) Dr. Al-Samdan's conclusion is based, in part,

on his finding that "the action before th[e] Court is directly related to the subject matter of the March 12 Agreement and the MOU" (id.), because, among other things, "[a]lthough Plaintiff alleges that defendant Kutayba engaged in 'corporate espionage', he also states that the alleged espionage related to the underlying dispute between Plaintiff and defendant Kutayba over the division of the family wealth" (id. ¶ 45). In his view, Kuwaiti courts would also consider the fact that "[t]he damages Plaintiff seeks to recover in the Complaint also relate directly to the subject matter and the implementation of the Agreements" (id. ¶ 48) to require dismissal of plaintiff's claims and referral of the matter to arbitration. According to Dr. Al-Samdan, "[t]hese 'many hundreds of millions of dollars' [plaintiff seeks to recover here] do not seem to relate to the alleged wrongdoing of hacking into Plaintiff's emails, stealing privileged information and violating his privacy rights, however. Instead, this amount seems to be what he believes is his share of the family assets." (Id.)

Dr. Nasser concurs. He concluded that "[i]f the dispute submitted before the US Courts was submitted before Kuwaiti courts, the latter would refer it to arbitration for resolution." (Nasser Decl. at 9.) The basis for his opinion is threefold. First, in Dr. Nasser's view, "[t]he connection between the present dispute and the subject matter of the arbitration agreements is highlighted by Plaintiff's repetitive statements that the violations committed by the defendants were aimed at undermining his position in relation to the division of the Brothers' assets, which is the subject matter of the Agreements." (Nasser Decl. ¶ 43 (citing Am. Compl. ¶¶ 1;13-14;113).) Second, Dr. Nasser concluded that because "the violations that are claimed by the Plaintiff are closely linked to the performance of the obligations that are contained in the Agreements and are within the subject matter thereof . . . it is not conceivable to decide on the dispute raised by the Complaint without referring to the Agreements." (Nasser Decl. ¶ 44.)

Finally, Dr. Nasser believes that Kuwaiti courts would refer the matter to arbitration because the damages plaintiff seeks to recover in this action approximate those he would seek to recover for breach of his rights under the Agreements. (Id. ¶¶ 46, 47.)

The recent decision by the Court of First Instance in Kuwait strongly supports this conclusion and demonstrates the breadth of the arbitration clauses. In that case, Bassam again filed a complaint that did not mention the MOU or the March 12 Agreement. Nor did the complaint mention the ongoing dispute arising from the MOU or the division of assets subject to the MOU. The court nonetheless dismissed the lawsuit in favor of arbitration because it related to the same subject matter as the MOU – i.e., it touched on the allocation of profits from one of the assets (YAAS) allocated under the MOU. The Amended Complaint in this case, of course, is much more directly related to the MOU in that it explicitly alleges wrongdoing in connection with the parties' dispute regarding the division of assets subject to the MOU and claims damages that are related to the MOU.

Therefore, regardless of whether federal or Kuwaiti law applies, this action should be dismissed or, in the alternative, stayed pending arbitration.

C. Plaintiff's Claims Against Defendant Omar Should Also Be Dismissed

Although defendant Omar did not sign the Agreements, he may nonetheless arbitrate the claims plaintiff asserts against him here. Non-signatories to an arbitration agreement may compel arbitration of claims asserted against them by a signatory to an arbitration agreement where the "relatedness of the parties, contracts, and controversies" is close. JLM Indus., Inc., 387 F.3d at 177 (quotations omitted); see also Choctaw Generation L.P. v. Am. Home Assurance Co., 271 F.3d 403, 406 (2d Cir. 2001); Astra Oil Co. v. Rover Navigation, Ltd., 344 F.3d 276, 279-80 (2d Cir. 2003). Under circumstances such as these, the bound party should

be "estop[ped] . . . from avoiding arbitration" and his claims dismissed. JLM Indus., Inc., 387 F.3d at 177.

Omar is named as a defendant in this action based solely on allegations that he assisted his father to create, supervise and fund a conspiracy to steal plaintiff's emails to benefit Kutayba in ongoing negotiations and litigation regarding the implementation of the Agreements. (See, e.g., Am. Compl. ¶ 21 ("Kutayba and Omar stole Plaintiff's emails to gain advantage in a dispute that concerns, in part, Kutayba's breach of Plaintiff's rights . . .."); ¶ 77 ("Defendants Kutayba and Omar have illegally accessed and recorded Plaintiff's litigation and business strategy with respect to the multi-billion dollar dispute between them."); ¶ 100 ("Defendants Kutayba, Omar and Moubarak used the information in the emails to gain an unlawful advantage in the ongoing dispute between Plaintiff and Kutayba.").) And Omar is involved in that underlying dispute between plaintiff and Kutayba only because he is Kutayba's son and the CEO of Alghanim Industries and YAAS. (See, e.g., id. ¶¶ 1, 23-24, 76, 83-86.) The alleged dispute between plaintiff and Omar is thus "intimately founded in and intertwined" with plaintiff's alleged dispute with Kutayba. Choctaw Generation L.P., 271 F.3d at 406 (quotations omitted). In fact, the disputes are indivisible. Plaintiff should therefore not be allowed to circumvent his obligation to arbitrate this dispute merely because Omar did not also sign the arbitration agreements dividing his family's businesses and assets. See Astra Oil Co., 344 F.3d at 281 (holding that a non-signatory defendant could compel arbitration where its affiliate, with whom it shared a "close corporate and operational relationship," had entered into an arbitration agreement with plaintiff); Choctaw Generation L.P., 271 F.3d at 406 (the "tight relatedness of the parties,

contracts and controversies" allowed non-signatory defendant to bind signatory plaintiff to arbitration agreement).[9]

Requiring plaintiff to honor his obligation to arbitrate with respect to his claims against Omar is also appropriate because plaintiff alleges that Omar and Kutayba committed the same wrongdoing in furtherance of a single conspiracy.[10] See, e.g., Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, Inc., 198 F.3d 88, 98 (2d Cir. 1999) (holding that plaintiff could not escape arbitration with respect to claims asserted against non-signatories when plaintiff treated signatories and non-signatories alike for the purpose of pleading his claims); JLM Indus., Inc., 387 F.3d at 178 n. 7 (explaining that "the principles of estoppel . . . are not limited to relations among corporate parents and their signatory subsidiaries" and applying doctrine to unaffiliated co-conspirators). That plaintiff treats Kutayba and Omar interchangeably and as a single unit in the Amended Complaint is not fortuitous; it is strategic. By casting both as the masterminds of the so-called conspiracy, plaintiff attempts to hold them jointly and severally liable for the acts of each other, and for the acts of their alleged co-conspirators. (See, e.g., Am. Compl. ¶ 86 ("This association-in-fact . . . has a discernible hierarchy, organization and structure. Defendants Kutayba and Omar stood to benefit the most from this scheme and they were ultimately responsible for its creation and supervision and caused it to be funded."); ¶ 29 ("[E]ach was the agent of the other and each is responsible for all the actions of the others in furtherance of their conspiracy.").) Plaintiff should not be permitted to rely on group pleading

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[9] It is of no consequence that defendant Omar has no explicit obligations under the Agreements. When a plaintiff's claims against a non-signatory "make reference to" or "presume the existence of" a written agreement containing an arbitration clause, they "arise out of and relate directly to the underlying agreement" and arbitration is appropriate. Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757-58 (11th Cir. 1993).

[10] See, e.g., Am. Compl. ¶ 2 ("Kutayba and Omar caused the defendant companies . . . to hire private investigators to illegally 'hack' into Plaintiffs password-protected email accounts"); ¶ 18 ("[t]he purpose of the hacking scheme . . . was to transport the stolen emails to Kutayba and Omar"); ¶ 50 ("the hacking of Plaintiff's emails was done by or at the direction of Defendant Kutayba and Omar"); see also id. ¶¶ 21, 44, 48, 83, 91, 113.

when it serves a litigation purpose, but distinguish between defendants when it furthers his interest of avoiding arbitration. Rather, the Court should require him to arbitrate his claims concerning the ongoing dispute with his family over the division of the family's businesses and assets, as plaintiff twice agreed to do when he entered into the Agreements with Kutayba. Sidell v. Structured Settlement Invs. LP, No. 3:08-cv-00710, 2009 WL 103518, at *2 (D. Conn. Jan. 14, 2009) ("The Court does note that [plaintiff] asserts in his complaint that all of the defendants in this case were agents of or were acting in concert with the signatory to the agreement, and so all of the defendants are entitled to rely on the arbitration agreement.").

Non-signatory defendants would also be permitted to arbitrate claims against plaintiff under Kuwaiti law. As described above, the Kuwaiti Court of First Instance has already dismissed a similar action brought by plaintiff against Kutayba and YAAS on the ground that it did not have jurisdiction to hear claims asserted against either defendant because such claims must be arbitrated pursuant to the same arbitration agreements defendants Kutayba and Omar invoke here. In its opinion, the court "did not concern itself with the fact that non-signatories to the arbitration agreement [YAAS] were named as defendants" in that action. (Al-Samdan Decl. ¶ 58; see also Al-Essa Decl. Ex. K at 5.) Rather, the court permitted YAAS to rely on the arbitration agreement entered into between plaintiff and Kutayba because "YAAS was the subject of the present case, and [] the agreement entered into between KYA and BYA indicated that any dispute arising in relation to YAAS shall be settled by way of arbitration and by the arbitrator named in the said agreement." (Al-Essa Decl. Ex. K at 5.) Drs. Al-Samdan and Nasser agree that based on the relationship between Omar and Kutayba, Omar's relationship with respect to the Agreements, and the nature of plaintiff's allegations against Omar and

Kutayba collectively, a Kuwaiti court should refer plaintiff's claims against Omar to arbitration. (See Al-Samdan Decl. ¶¶ 50-58; Nasser Decl. ¶¶ 50-53.)[11]

CONCLUSION

For the foregoing reasons, defendants Kutayba Y. Alghanim and Omar K. Alghanim's motion to dismiss the Amended Complaint or, in the alternative, stay this action pending arbitration in Kuwait, should be granted.

Dated: New York, New York
November 23, 2009

Respectfully submitted,

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[11] As discussed above, after defendants Kutayba and Omar informed the Court of their intention to file this motion, plaintiff amended the complaint to add Alghanim Industries, YAAS, and Moubarak as defendants. Defendants Alghanim Industries and YAAS have not been served and for that reason, do not join this motion. In any event, the addition of these three new defendants has no impact on defendants Kutayba and Omar's motion because, for the same reasons explained in I.C above, among others, plaintiff's claims against all of these parties can be referred to arbitration under either federal or Kuwaiti law and in no way preclude this Court from dismissing plaintiff's claims against Kutayba and Omar.