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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| BASSAM Y. ALGHANIM, | : | |
| Plaintiff, | : | |
| - against - | : | 09 Civ. 8098 (NRB) |
| KUTAYBA Y. ALGHANIM, OMAR K. ALGHANIM, ALGHANIM INDUSTRIES COMPANY W.L.L., YUSUF AHMED ALGHANIM AND SONS W.L.L., and WALEED MOUBARAK, | : | |
| Defendants | : | |

**MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND/OR STAY THIS ACTION PENDING ARBITRATION**

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Plaintiff respectfully submits this memorandum of law in opposition to Defendants' various motions to dismiss the First Amended Complaint and/or stay this action pending arbitration pursuant to 9 U.S.C. §§ 3, 4 and 206.

## PRELIMINARY STATEMENT

This action arises out of the repeated criminal and tortious acts committed by Defendants Kutayba Y. Alghanim ("Kutayba"), Omar K. Alghanim ("Omar") and Waleed Moubarak ("Moubarak") (collectively "Individual Defendants") in the course of their extraordinary scheme to hack into Plaintiff Bassam Alghanim's ("Bassam") emails and thereby access his personal and proprietary information. Already, this Court has received a wealth of evidentiary detail revealing the depths to which Defendants were willing to stoop in pursuit of this scheme, including using an organization called the "Invisible Hacking Group" to steal Bassam's passwords and later creating a special covert website to allow the Individual Defendants to view the emails stolen from Bassam online. This Court and courts in England have granted preliminary injunctive relief in an effort to prevent the Individual Defendants from destroying evidence of their wrongdoing. And, some of the key players in that scheme, such as Timothy Zimmer, have now admitted their wrongdoing and apologized to Bassam. Further details of these undeniable facts are set forth in the accompanying Declaration of John L. Gardiner ("Gardiner Decl.").[1]

Now, in a desperate attempt to avoid having his actions further scrutinized by this Court – and to prevent a jury from considering the appropriate monetary remedy – Kutayba claims this action should be sent to Kuwait to be adjudicated by the Kuwaiti Prime Minister, pursuant to dispute clauses contained in two instruments signed by Bassam and Kutayba in March 2008: a

[1] Also accompanying this Memorandum are the declarations of (1) Meshari Al Osaimi ("Al Osaimi Decl."), (2) Reema Ali ("Ali Decl."), (3) Ahmed El-Kosheri ("El-Kosheri Decl."); and (4) Bassam Y. Alghanim ("Bassam Decl."). Reference is also made to (a) the declarations submitted by Defendants of Omar Al-Essa ("Al-Essa Decl."), Dr. Nasser Ghunaim Al Zaid ("Nasser Decl."), Dr. Ahmad Al-Samdan ("Al-Samdan Decl.") and Tai H. Park ("Park Decl.") and (b) Kutayba and Omar's November 23, 2009 Memorandum of Law ("Def. Mem.").

March 12, 2008 agreement, and a March 27, 2008 Memorandum of Understanding or "MOU."[2] The March Instruments address only the division of Bassam's and his brother Kutayba's commonly-owned property, and the dispute resolution provisions contained therein are of correspondingly limited scope. They do not, as Kutayba astonishingly claims, create an open-ended agreement to arbitrate literally any future dispute that might arise between the brothers, even subsequent criminal conduct.

Even more audaciously, Omar and Moubarak – who are not party to the March Instruments nor any other agreement contemplating arbitration with Bassam – now also seek refuge in the clauses. As shown below, neither Kuwaiti nor U.S. law supports their position.

**The Requirements of the New York Convention**

Because this motion seeks to compel arbitration in a country that has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the "New York Convention"), 21 U.S.T. 2517, it is governed by Chapter 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 201 *et seq.*, which applies the Convention.[3] As a result, to prevail here, the Individual Defendants must prove: (i) that this dispute is "capable of arbitration" in the place where arbitration is sought, *id.*, arts. II(1), II(3); (ii) that there exists between them a binding "agreement in writing" to submit their disputes to arbitration, *id.*, art. II(1); and (iii) that this dispute is a "a matter in respect of which" the parties agreed to arbitrate, *id.*, art. II(3). Each of these requirements poses insurmountable burdens for the Individual Defendants in this case.

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[2] *See* Al-Essa Decl. Ex. B ("March 12 Agreement") & Ex. C ("MOU"); collectively the "March Instruments." A further March 12, 2008 instrument, the "General Points of Settlement," was signed by the brothers that day. It does not contain any dispute clause. Bassam's opposition to the present motions, including this Memorandum, assumes *arguendo*, for purposes of this motion only, that the March Instruments are binding contracts and that the dispute resolution clauses contained therein are binding arbitration agreements. Bassam reserves all of his rights to argue that these agreements are not enforceable in any respect, something this Court is not – and will not – be called upon to review or determine.

[3] *See* 9 U.S.C. § 201 ("the Convention . . . shall be enforced in United States courts in accordance with this chapter"); *see also* 9 U.S.C. § 208 (provisions of FAA governing domestic arbitration are applicable "to the extent [they] are not in conflict with [Chapter Two of the FAA] or the Convention.").

**Bassam's Claims Are Not Arbitrable as a Matter of Kuwait Law**

As a matter of Kuwait law, which controls the interpretation of the March Instruments, the claims brought by Bassam in the Amended Complaint are not capable of arbitration. Six of Bassam's claims seek relief for violation of U.S. federal and state criminal laws, and all of his claims relate to conduct that was both illegal and intentionally tortious under U.S. statutes and common law. As such, none of these claims can be arbitrated in Kuwait. (Ali Decl. ¶¶ 6(c), 23, 36-38; El-Kosheri Decl. ¶¶ 11(i)-(ii); 15-32, 39-41.) Indeed, Article 173 of the Kuwait Civil & Commercial Procedures Law provides that arbitration cannot be sought in respect of matters where the Arabic law concept of "*solh*" (roughly translated as "amicable settlement") is unavailable – and, as matter of Kuwait law, *solh* is prohibited in cases involving criminal conduct or other matters affecting "public order," such as future intentional tortious conduct. (Ali Decl. ¶¶ 11-19; El-Kosheri Decl. ¶¶ 20-27.) As a result, Bassam's claims are not "a subject matter capable of settlement by arbitration" for purposes of Article II(1) of the New York Convention, and the dispute clause as applied to these claims is "inoperative" and/or "incapable of being performed" for purposes of Article II(3) of the Convention. (*See infra* § I.B.)

**Bassam's Claims Are also Beyond the Scope of the**
**Arbitration Agreements as a Matter of Kuwait Law**

Under Kuwait law, the claims in this case would not be regarded as matters in respect of which the parties have agreed to arbitrate, *i.e.*, they are not within the scope of the arbitration clauses. Kuwait law construes arbitration agreements narrowly. Although Kuwait law permits arbitration regarding the "performance" of "specific contracts," the disputes presented by the Amended Complaint do not concern performance of the March Instruments. On the contrary, they arise out of and relate solely to the Defendants' participation in the email hacking scheme, which was a violation of Bassam's *personal* privacy and his *personal* property in his confidential emails.

As even a cursory examination reveals, the dispute resolution clauses only encompass disputes relating to the division of Kutayba's and Bassam's commonly-owned property. The March 12 Agreement first notes that "The two Parties are partners in the ownership of assets and desire to terminate their partnership in an amicable way in accordance with the following," (Al-Essa Decl. Ex. B), and only then proceeds, in six paragraphs, to describe certain parameters for dividing those assets. (*Id.* ¶¶ 1-6.) The seventh paragraph then states:

> 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 Al Mohamed Al Ahmed Al Jaber Al Sabah.

(*Id.* ¶ 7.) Read in context with the preceding paragraphs, it is readily apparent that paragraph 7 only covers disputes concerning the division of the brothers' commonly-owned assets. To construe this as an open-ended, indefinite agreement encompassing future crimes and intentional torts would be a manifestly unreasonable construction, completely contrary to the intentions of the parties at the time of contracting. (*See* Bassam Decl. ¶ 2 (testifying that it was never contemplated that the March 12 Agreement would represent an open-ended clause covering future criminal activity).) It not only would render the preceding introductory paragraph meaningless and divorce the dispute resolution clause from the subject-matter of the agreement (Ali Decl. ¶¶ 6(a), 23, 28; El-Kosheri Decl. ¶¶ 32-34), it would also invalidate the clause entirely as a matter of Kuwaiti law because amicable settlement (*solh*) is not permissible for such disputes (Ali Decl. ¶ 26) and because it would be too indefinite to be valid (Ali Decl. ¶ 28(a)).

The MOU, which states that it "integrates, explains and provides further detail to" the March 12 Agreement (Al-Essa Decl. Ex. C at 1), further focuses upon the division of commonly-owned properties between the brothers and then states:

> [Kutayba] and [Bassam] 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.

(*Id.* at 10 ¶ 15 (emphasis added).) Like the March 12 Agreement, the scope of this clause is confined to disputes "related to the subject matter of" the MOU, *i.e.*, implementation of the division of commonly-owned property under the MOU. (Ali Decl. ¶¶ 23, 28; El-Kosheri Decl. ¶¶ 32-34.) Any contrary interpretation not only would unreasonably conflict with the parties' stated intentions (Bassam Decl. ¶ 2; *see also* Ali Decl. ¶ 28; El-Kosheri Decl. ¶¶ 11(iii); 34), it would result in an interpretation that violates Article 173 of the Kuwaiti Civil & Commercial Procedures Code. (Ali Decl. ¶¶ 23-26.) Thus, because the email hacking scheme allegations do not concern the division of the brothers' partnership property under the March Instruments, they do not fall within the scope of either the MOU or the March 12 Agreement. (*See infra* § I.B.)

**<u>If Federal Law Were Applicable, Bassam's Claims Still Would Not Be Arbitrable</u>**

The result would be no different under federal arbitration law, if it were applicable to these claims, for two reasons. First, the New York Convention still requires that the dispute in fact be "capable of settlement by arbitration," and, as explained above, the arbitration of these claims would be prohibited in Kuwait. Second, to allow arbitration of Bassam's claims would violate Second Circuit authority, which requires that arbitration clauses be interpreted so as to reflect the "'reasonable expectations'" of the parties. *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 28 (2d Cir. 1995) (citation omitted).

Bassam's claims do not require this Court, in the course of adjudicating them, to decide any issue that is covered by the March Instruments. On the contrary, the email hacking claims in this action are independent and separate from the contract dispute, and Bassam's alleged injuries would have arisen even if the March Instruments never existed. Consequently, under established Second Circuit authority, Bassam's claims cannot be shoehorned into the dispute resolution provisions. *See Leadertex*, 67 F.3d at 28 (holding that defamation claims, while factually related to the contract claims, were not covered by the contract's broad arbitration clause); *Fuller v.*

*Guthrie*, 565 F.2d 259, 261 (2d Cir. 1977) (holding that, in drafting their arbitration clause, "it is highly unlikely that the parties could have foreseen, no less intended, to provide a forum for wholly unexpected tortious behavior"); *Kuklachev v. Gelfman*, 600 F. Supp. 2d 437, 462-64 (E.D.N.Y. 2009) (intellectual property claims related to a theatrical promotion contract were not covered by the contract's arbitration clause because, *inter alia*, the contract did not regulate use or ownership of any of this intellectual property).[4]

Relying on selective quotations from the Amended Complaint, the Individual Defendants argue that Bassam's damages claims implicate the March Instruments because Bassam's injuries are referable to the value of the property to be divided by those instruments. (Def. Mem. at 2, 17.) In fact, Bassam seeks damages for injuries that are wholly independent of the March Instruments – including the invasion of his personal privacy resulting from the theft of his personal and confidential emails – and is prepared to enter a stipulation to that effect. (Bassam Decl. ¶¶ 5-7.)

**On Any View, Non-Signatories Such as Omar and Moubarak Have No Right to Arbitrate**

Omar's and Moubarak's motions deserve short shrift. Neither of them is a party to any arbitration clause with Bassam. Under Kuwait law, a person cannot invoke arbitration unless he can show a written agreement with the adverse party expressly agreeing to arbitration of specified matters. Because neither Omar nor Moubarak has shown such an agreement, arbitration is unavailable to them as a matter of Kuwaiti law. (Ali Decl. ¶¶ 6(b), 33; El-Kosheri Decl. ¶¶ 11(v), 35-38; *see infra* § IV.A.) The same would be true if federal law applies, despite their strained effort to compel arbitration under an "estoppel" theory. The facts of this case fall

[4] Evidently willing to discuss anything except their participation in the email hacking scheme, the Individual Defendants extensively discuss a series of *other* disputes, submitting reams of pages of pleadings from the Kuwait courts from cases dealing with issues not raised in this case. But, the Kuwait litigation is irrelevant to this dispute, because at no point has Bassam sought to raise any issue in the Kuwait courts relating to the email hacking scheme.

far short of satisfying the Second Circuit's two-prong test for estoppel in such situations, which would require them to demonstrate: (1) that the claims against them are so "intertwined" with those against Kutayba that estoppel is appropriate; *and* (2) a "further necessary circumstance of some relation between [Bassam] and [Omar and Moubarak] sufficient to demonstrate that [Bassam] intended to arbitrate th[e] dispute" with them so that it would be *"inequitable"* for Bassam to refuse arbitration against them. *Ross v. Am. Express Co.*, 547 F.3d 137, 146 (2d Cir. 2008) (emphasis added). Here, the wrongfulness of the email hacking scheme is not dependent upon the March Instruments, and the injury suffered by Bassam would have arisen even if the March Instruments had never existed. Thus, Bassam's claims are not "intertwined" with claims under those instruments. Separately, the evidence already adduced demonstrates that Omar and Moubarak played key roles in the covert scheme and directed the computer hackers in their efforts. (*See* Gardiner Decl. *passim.*) It would therefore be manifestly *inequitable* for them to be able to seek arbitration under the March Instruments. As a matter of law, Bassam cannot be "estopped" from refusing to arbitrate his hacking claims with Omar and Moubarak.

For these reasons and as further set forth below, the Individual Defendants' cynical invocation of arbitration in an effort to derail this action should be denied.

## FACTUAL BACKGROUND

### A. The Parties

Bassam is a Kuwaiti citizen residing in Los Angeles, California. (Am. Compl. ¶ 22.) His brother, Defendant Kutayba, is a Kuwaiti citizen who maintains a residence in New York. (*Id.* ¶ 23.) Kutayba is also the Chairman of Defendants Alghanim Industries Company W.L.L. ("Alghanim Industries") and Yusuf Ahmed Alghanim and Sons W.L.L. ("YAAS"),[5] two of the

[5] Defendants Alghanim Industries and YAAS are companies headquartered and incorporated in Kuwait. *(cont'd)*

companies jointly owned by Bassam and Kutayba but presently under the control of Kutayba and Omar. (*Id.*)

Defendant Omar is a Kuwaiti citizen who maintains a residence in New York. Omar is the Chief Executive Officer of Alghanim Industries and YAAS, and he is Kutayba's son. (*Id.* ¶¶ 23-24.) Defendant Moubarak is a member of the New York bar, and serves as counsel to Kutayba and Omar and entities that they control, including Alghanim Industries and YAAS. (*Id.* ¶ 28.)

## B. Disputes Over the Brothers' Commonly-Owned Property

### 1. The Brothers Acquire Certain Assets as 50/50 Partners

In the 1970s, Bassam and Kutayba jointly succeeded to the substantial business empire founded by their father, Yusuf Ahmed Alghanim, as 50/50 partners. (*Id.* ¶ 33.) The numerous assets and businesses commonly owned by the brothers include Alghanim Industries, YAAS and other businesses located in Kuwait (*id.* ¶ 34), as well as a substantial stake in Gulf Bank, one of Kuwait's most significant banks (*id.* ¶ 35).

### 2. The Brothers Decide to Separate Their Commonly-Held Property

Beginning in and around 2007, after Kutayba's eldest son, Omar, had become active in the businesses in Kuwait, disputes began to develop between Kutayba and Bassam concerning the future of their business empire. (*Id.* ¶ 36.) Bassam and Kutayba later reached an impasse in their business and personal relations, and they decided to divide their commonly-owned property and go their separate ways. (*Id.*)

In early 2008, Kutayba orchestrated the involvement of high-ranking Kuwaiti officials to pressure Bassam to reach an agreement with him. (*Id.* ¶ 38.) Two agreements were entered into

*(cont'd from previous page)*
(Am. Compl. ¶¶ 26-27.) Neither of them are parties to the instant motion.

on March 12, 2008 providing for the division of their commonly-owned property. (*Id.*; Al-Essa Decl. Ex. B) Subsequently, the MOU was prepared with respect to the implementation of the March 12 Agreements. (Am. Compl. ¶ 38; Al-Essa Decl. Ex. C.)

### 3. The Scope of the March Instruments, Including Their Dispute Resolution Provisions, Is Limited to the Division of Commonly-Held Property

As noted above, the dispute resolution provisions in the March 12 instruments are focused upon the division of the brothers' partnership assets. Only after noting that *"[t]he two Parties are partners in the ownership of assets and desire to terminate their partnership in an amicable way in accordance with the following,"* does the March 12 Agreement proceed, in six paragraphs, to set certain parameters for dividing those assets. (Al-Essa Decl. Ex. B ¶¶ 1-6 (emphasis added).) The seventh paragraph then provides that future disagreements will be the subject of "advice, opinion and decision" by Sheikh Nasser Al Mohamed Al Ahmed Al Jaber Al Sabar, the Kuwait Prime Minister. (*Id.* ¶ 7.) This is not, as Defendants suggest (Def. Mem. at 14), an open-ended clause governing literally any dispute with Kutayba that might arise at any time in the future. On the contrary, read in context with the preceding paragraphs as the parties plainly intended, this dispute resolution clause only encompasses disputes concerning the implementation of the division of commonly-owned assets.

The MOU, which states that it "integrates, explains and provides further detail to the two agreements we signed on March 12, 2008" (Al-Essa Decl. Ex. C at 1), further addresses the division of commonly-owned properties between the brothers and then states that "any dispute arising in the future between us *related to the subject matter of this agreement* shall be finally decided by" the Kuwait Prime Minister. (*Id.* at 10 ¶ 15 (emphasis added).) Again, the limited scope of this clause is readily apparent, and this express limitation directly corresponds with the requirements of Article 173 of the Kuwait Arbitration Code, which limits contractual arbitration to "disputes that arise from the performance of a specific contract." (Ali Decl. Ex. C.) The theft

of intellectual property that was created after the agreements were executed (Bassam's confidential emails) plainly falls outside that scope. (*See infra* § I.B.)

#### 4. Subsequent Disputes in Kuwait Concerning Commonly-Owned Property

Despite the March Instruments, the dispute between Bassam and Kutayba over the division of their commonly-owned property has continued and intensified. Although Bassam has sought (and may continue to seek) certain relief in the courts of Kuwait concerning commonly-owned properties, he does not seek to litigate any aspect of these disputes in the current proceeding.[6] The Individual Defendants' voluminous references to such proceedings are therefore irrelevant.

### C. The Email Hacking Scheme

As alleged in the Amended Complaint, during the summer of 2008, Defendants embarked upon a covert program of industrial espionage designed to invade Bassam's privacy and gain access to his emails. The email hacking scheme is described in detail in the Amended Complaint, and substantial evidence of the scheme that has already been uncovered is set forth in the Gardiner Declaration. Among other things, the Individual Defendants hired private investigators to illegally "hack" into Plaintiff's password-protected AOL email accounts and steal *all* of Bassam's email, including privileged communications between Plaintiff and his attorneys in the United States and Kuwait. (Am. Compl. ¶¶ 47, 54, 67-76; *see also* Gardiner Decl. ¶¶ 5-9.) They also caused Alghanim Industries and YAAS to pay for the hacking they arranged. (Am. Compl. ¶ 91; *see also* Gardiner Decl. ¶ 42.)

Timothy Zimmer, one of the private investigators hired by Defendants, has admitted that

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[6] As the Al-Osaimi Declaration points out, the only case in Kuwait that even mentioned the dispute resolution provisions had nothing to do with the kind of misconduct alleged here. On the contrary, that dispute specifically involved the issue of the division of the profits of YAAS, something Kutayba claimed was expressly governed by the MOU. (Al-Osaimi Decl. ¶ 7.)

after he obtained Bassam's email passwords with the assistance of the Invisible Hacking Group in July 2008, he delivered batches of Bassam's emails to Mr. McIntyre two or three times a week until August 12, 2009 (when Bassam changed his passwords). (Gardiner Decl. ¶¶ 26-29.) Mr. McIntyre, in turn, coordinated the delivery of the emails to Omar and Moubarak, albeit that Mr. McIntyre now contends that he never read the emails before delivering them to Omar and Moubarak. (*Id.* ¶¶ 6-7.)

The first delivery of the stolen emails took place on or about July 20, 2008 when Mr. McIntyre personally delivered over 300 pages of stolen emails to Omar on one of Omar's yachts, which at the time was moored in Capri. (*Id.* ¶ 30.) Shortly thereafter, a second hand delivery of stolen emails was made to Omar's yacht, this time when it was moored in Sardinia. (*Id.* ¶ 31.)

The conspirators then decided to facilitate access to the stolen emails via an electronic system. Thus, in or about July 2008, Mr. Zimmer created a website known as Jackshome.info, a secret, password-protected website (the "Covert Website") that they created specifically for the purpose of storing the stolen emails. (Am. Compl. ¶¶ 8, 51; Gardiner Decl. ¶¶ 32-34.) Mr. McIntyre has admitted that Omar and Moubarak were given the password to the Covert Website so that they could view its contents. (Gardiner Decl. ¶ 7; Am. Compl. ¶ 8.) Forensic evidence indicates that IP addresses associated with the Individual Defendants repeatedly accessed the website and downloaded Bassam's private information. (Gardiner Decl. ¶¶ 44-45; Am. Compl. ¶ 10)

Hoping to cover their tracks, once the stolen emails were reviewed, Defendants and their co-conspirators caused them to be deleted and destroyed. (Am. Comp. ¶¶ 8, 63.) Additionally, once the hackers learned that their illegal operations were compromised, they engaged in far more substantial measures to cover up their criminal scheme. (Gardiner Decl. ¶¶ 47-51.)

## D. The Present Lawsuit

Not surprisingly, Defendants' email hacking scheme contravened a slew of criminal and civil laws of the United States, New York and California. By the Amended Complaint filed on October 23, 2009, Bassam seeks relief against Defendants for:

- violations of the Stored Communications Act, 18 U.S.C. § 2701, *et seq.*, for intentionally accessing emails stored on AOL servers without authorization (Am. Compl. ¶¶ 115-22 (Count I));
- violations of the Computer Fraud & Abuse Act, 18 U.S.C. § 1030, for intentionally accessing computers and other facilities without authorization (Am. Compl. ¶¶ 123-32 (Count II));
- violation of the Wiretap Act, 18 U.S.C. § 2510, *et seq.*, for intentionally intercepting electronic communications without authorization, and disclosing and using such communications (Am. Compl. ¶¶ 133-46 (Count III));
- violation of the Racketeer Influenced & Corrupt Organizations Act ("RICO"), based on the criminal scheme to defraud Bassam and steal his emails and other proprietary information through numerous predicate criminal acts (Am. Compl. ¶¶ 147-56 (Count IV, based on 18 U.S.C. § 1962(c)); *id.* ¶¶ 157-63 (Count V, based on 18 U.S.C. § 1962(d));
- conversion and for aiding and abetting conversion (Am. Compl. ¶¶ 164-73 (Counts VI and VIII));
- invasion of privacy under California law and for aiding and abetting such invasion of privacy (Am. Compl. ¶¶ 174-84); and
- violation of the California Computer Data Access and Fraud Act, Cal. Penal Code § 502, for wrongfully accessing emails, computer systems and/or networks (Am. Compl. ¶¶ 185-96.)

None of Bassam's claims seeks any form of adjudication of his partnership disputes with Kutayba, nor does Bassam seek to have this Court interpret any part of the March Instruments.

# ARGUMENT

## I.
## AS A MATTER OF KUWAIT LAW, THE CLAIMS AGAINST KUTAYBA (AND, *A FORTIORI*, OMAR AND MOURABAK) ARE NOT ARBITRABLE

## A. Kuwait Law Governs Questions of Arbitrability

It is common ground – indeed, Defendants' experts strenuously aver – that Kuwait law governs the contract. (Nasser Decl. ¶ 28 ("Kuwaiti law is, with no doubt, the law governing the

Agreements"); Al-Samdan Decl. ¶ 26 (same).) In these circumstances, the parties' respective agreements that Kuwait law governs the construction of the March Instruments are the functional equivalent of a choice-of-law clause.[7] Thus, under controlling Second Circuit law, Kuwait law governs the issue of whether Bassam's claims are arbitrable. *See Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 51 (2d Cir. 2004) ("[A]pplying the parties' choice of law is the only way to ensure uniform application of arbitration clauses within the numerous countries that have signed the New York Convention.").[8]

That Kuwait law would *not* permit arbitration of claims relating to the email hacking scheme is proven by the declarations of Ms. Reema Ali, whose expert testimony on Kuwait law has been accepted on numerous occasions by United States courts (Ali Decl. ¶¶ 1-2),[9] and Dr. Ahmed El-Kosheri, a senior member of the Egyptian bar[10] and internationally-renowned jurist

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[7] *See Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 61 (2d Cir. 2004) (holding, with respect to a particular contract issue, that "the parties' briefs assume that New York law controls this issue, and such implied consent . . . is sufficient to establish choice of law.") (quotation marks omitted).

[8] *See also Yavuz v. 61 MM, Ltd*, 465 F.3d 418, 431 (10th Cir. 2006) ("Swiss law governs the Fiduciary Agreement. Accordingly, we hold that the choice-of-forum provision in that contract must be construed under Swiss law."); *Felman Prod. Inc. v. Bannai*, 476 F. Supp. 2d 585, 587-88 (S.D. W. Va. 2007) (holding that "[t]he courts must abide by the determinations of the parties as to location and application of law" and that "English law would read this arbitration clause narrowly"). Although Defendants cite *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 844 (2d Cir. 1987) in support of their argument that federal law governs the issue of arbitrability (Def. Mem. at 9-10), *Genesco* did not address a situation where, as here, both parties accepted that the subject contract was governed by the laws of a foreign country. Instead, *Genesco* dealt with a contract governed by New York law and thus addressed only the question of whether arbitrability was governed by U.S. federal law rather than state law. *See id.* at 845. Moreover, although the Second Circuit applied federal law in *Smith/Enron Cogeneration Ltd. Partnership v. Smith Cogeneration International, Inc.*, 198 F.3d 88, 96 (2d Cir. 1999), this too was a situation where the court was faced with the choice between federal and state law (Texas law), not between U.S. law and the law of a foreign country. Thus, *Motorola*, which is on all fours, supplies the controlling rule. Indeed, given that the parties have stipulated to the applicability of Kuwait law as the law governing the March Instruments, application of any other law to the issue of arbitrability would run afoul of the Second Circuit's admonition in *Smith/Enron* to avoid introducing "parochialism" into the application of the New York Convention. *See id.* at 96; *see also Republic of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334, 355 (S.D.N.Y. 2006) (explaining that the *Smith/Enron* "anti-parochialism principle" may, in certain circumstances, mandate *against* application of federal common law on arbitrability issues). In all events, the position would be no different under federal law, which also mandates the conclusion that the present dispute falls outside the dispute resolution clauses. (*See infra* § II.B.)

[9] *See, e.g., Robertson v. Am. Life Ins.*, C.A. No. 05C-07-108 SCD, 2006 Del. Super. LEXIS 413, at *7 (Del. Super. Oct. 4, 2006) ("In addition to extensive experience working in Kuwait and advising international companies on Kuwaiti law, Ms. Ali's opinion on Kuwaiti law has been admitted into evidence by at least two U.S. Courts.").

[10] The Individual Defendants' experts admit that Egyptian law has "great influence in the implementation of

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and arbitration expert who is not only an expert in Kuwait law but has also practiced as a senior legal advisor to and advocate for the Kuwait government. (El-Kosheri Decl. ¶¶ 1-6.)

### B. Under Kuwait Law, Bassam's Claims Regarding the Hacking Scheme Would Be Outside the Scope of the March 2008 Instruments

#### 1. Because Kuwait Law Prohibits Arbitration Agreements From Extending to Future Criminal or Intentional Tortious Acts, the Claims Here Cannot Be Arbitrated

Ms. Ali and Dr. El-Kosheri first explain that arbitration in Kuwait is governed by Chapter Twelve of the Kuwait Civil & Commercial Procedure Code, No. 38 of 1980. (Ali Decl. ¶¶ 7-8 & Ex. D; El-Kosheri Decl. ¶ 18.) This code sets forth a number of critical prerequisites to arbitrability. *First*, under Article 173, arbitration agreements may only validly be made concerning (1) a "specific [*i.e.*, existing] dispute" *or* (2) "the performance of a specific contract." (*Id.*) *Second*, the agreement must be "in writing." (Ali Decl. Ex. C; *see also* Ali Decl. ¶¶ 9-10.) *Third*, "[a]rbitration is not permissible in matters where solh [amicable settlements] are not permissible . . . ." (Ali Decl. Ex. C; Ali Decl. ¶ 11.)

This last-mentioned provision is critical, because it relates to a fundamental principle of Kuwait law (common to many Arab legal systems) that prohibits the arbitration of matters of "public order," including criminal matters. (Ali Decl. ¶¶ 12-13; El-Kosheri Decl. ¶¶ 19.) Indeed, contracts of "amicable settlement," or *solh*, are prohibited in cases relating to criminal matters or future intentional tortious conduct, because these are regarded as matters of public order. (Ali Decl. ¶¶ 15-16, 18-19; El-Kosheri Decl. ¶¶ 11(i); 20-27.) This principle is directly applicable here, because Bassam's claims relate to an email hacking scheme that violated criminal laws of the United States, New York and California, and would thus be regarded as incapable of

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Kuwaiti law." (Nasser Decl. ¶ 10.)

arbitration under Kuwait law. (Ali Decl. ¶¶ 36-37; El-Kosheri Decl. ¶¶ 11(i); 28-29.)[11] Nor would it be permissible to arbitrate tort claims relating to that same illegal conduct, because those claims also raise matters of public order and violation of foreign statutes. (Ali Decl. ¶¶ 36-37; El-Kosheri Decl. ¶¶ 11(ii); 28-32.)[12] For these reasons, a construction of the dispute resolution clauses in the March Instruments to permit arbitration of the claims in this case is impossible because it would violate Article 173 of the Kuwaiti Civil & Commercial Procedures Code. (Ali Decl. ¶ 23; El-Kosheri Decl. ¶¶ 20-27.)

The inability of a Kuwaiti arbitrator to actually adjudicate Bassam's claims thus requires denial of Defendants' motion on the grounds that: (1) the "differences" sought to be arbitrated are not "capable of being settled by arbitration" pursuant to Article II(1) of the New York Convention; and (2) the arbitration clause is "inoperative" and/or "incapable of being performed" in this case for purposes of Article II(3) of the Convention.[13]

### 2. Under Kuwaiti Law, the Dispute Clauses Are to Be Construed Narrowly, Thus Excluding the Present Non-Contractual Claims From Their Scope

Under Kuwait law, arbitration agreements are construed narrowly because arbitration is viewed as a departure from the normal rule that disputes should fall within the jurisdiction of the

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[11] Hacking emails is also regarded as criminal under a 2001 Kuwait statute relating to interference with telecommunications lines. (*See* Ali Decl. ¶ 28(e) & Ex. L; El-Kosheri Decl. ¶ 40.)

[12] In this respect, Dr. Samdan's assertion that "it is within the power of the arbitrator to award civil damages whether the claim is in tort or in contract" (Al-Samdan Decl. ¶ 43; Def. Mem. at 18) is inaccurate. The "authority" on which this assertion is based, namely, a 1976 decision of the Kuwaiti Court of Cassation (Al-Samdan Decl. Ex. I) does not actually support this proposition; it merely contains an anodyne statement that "evaluating damages is a matter of facts that can be fulfilled by the court independently without any supervision and the arbitral committee has the same authority attributed to court to decide on all disputes submitted to it." (*Id.*) As Ms. Ali explains, that particular Kuwaiti Court of Cassation decision does not actually address the ability of arbitrators to adjudicate tort claims. (Ali Decl. ¶ 17.)

[13] *See Corcoran v. Ardra Ins.*, 77 N.Y.2d 225, 233, 567 N.E.2d 969, 973, 566 N.Y.S.2d 575, 579 (1990) (as New York insurance law prohibited arbitration of the relevant disputes, arbitration clause was "incapable of being performed" for purposes of Article II(3) of the New York Convention; claims were "not 'capable of settlement by arbitration' . . . under the applicable domestic law [New York law]"); New York Convention, Art. II(3) (requiring courts to "refer" matters to arbitration *"unless* it finds that the said agreement is null and void, inoperative *or incapable of being performed*") (emphasis added); *see also R3 Aerospace, Inc. v. Marshall of Cambridge Aerospace Ltd.*, 927 F. Supp. 121, 123 (S.D.N.Y. 1996) ("[t]he subject matter of the dispute in this case, *i.e.*, possible attorney disqualification – is not capable of settlement by arbitration"); *Munich Reinsurance Am., Inc. v. ACE Prop. & Cas. Ins.*, 500 F. Supp. 2d 272, 275 (S.D.N.Y. 2007) (same).

courts. (Ali Decl. ¶ 25 & Ex. M (Court of Cassation Decision 106/90).) The Individual Defendants' experts are in accord. (*See*, *e.g.*, Nasser. Ex. 14 ("*arbitration is an exceptional means of recourse, limited to the will of the parties*").) Consistent with this principle and the terms of Article 173, an arbitration clause will not be interpreted in a manner exceeding the parties' original intentions as stated in their written agreement and elsewhere apparent from the record. (Ali Decl. ¶¶ 25-26; El-Kosheri Decl. ¶¶ 33-34.)

Applied here, these principles mandate the conclusion that the email hacking claims against Kutayba are non-arbitrable.[14] As demonstrated in detail above (*see supra* pp. 3-5), the dispute resolution clauses are, on their face, limited in scope to a particular subject matter: implementation of the agreed division of the brothers' commonly-owned property. (Ali Decl. ¶¶ 6(a), 23, 28; El-Kosheri Decl. ¶ 11(iii).) Indeed, Defendants' experts agree that the "scope" of the March Instruments is related only to "the division of family assets and the implementation of these agreements." (Al-Samdan Decl. ¶ 47; *accord* Nasser Decl. ¶ 42 ("the subject-matter of the Agreements is the division of the family business and assets between the Brothers and the implementation of such division").)

It follows that the dispute resolution provisions could not reach intentional torts not yet committed at the time of contracting and would extend only to disputes about implementation of the agreed division of commonly-owned property. The claims in the Amended Complaint fall outside this scope because they do not relate to the implementation of either the March 12 Agreement or MOU. Nothing in those instruments contemplates that the Defendants might hatch a scheme to hack into Bassam's personal email accounts and steal private communications, still less that the theft of such emails would be subject to arbitration – and, indeed, the evidence

[14] Because Omar and Moubarak are not parties to the March Instruments, the claims against them are plainly non-arbitrable as a matter of Kuwaiti law even if the clauses were to cover the claims against Kutayba, which they plainly do not. (*See infra* § IV.A.)

shows this was never contemplated. (Bassam Decl. ¶¶ 3-4.) Thus, Bassam's claims fall outside the scope of the dispute clauses. (Ali Decl. ¶ 24; El-Kosheri Decl. ¶¶ 11(iii), 32-34.)

A count-by-count analysis of Bassam's claims confirms that his claims do not come within the scope of the March Instruments:

- Four counts in the Amended Complaint are statutory actions under federal or state laws regarding computers and information protection, namely, the Stored Communications Act, the Computer Fraud & Abuse Act, the Wiretap Act and the California Computer Data Access & Fraud Act. Absolutely nothing in the March Instruments evinces an intention to address Kutayba's future compliance (or non-compliance) with U.S. laws related to computers and/or information protection.

- With respect to the two RICO causes of action, nothing in the March 12 Agreement or MOU suggests that they were intended to address Kutayba's future compliance (or non-compliance) with U.S. racketeering laws.

- The two conversion claims are predicated on the Defendants' theft of the emails and information contained therein, on the basis that the emails are Bassam's personal property. Nothing in the March 12 Agreement or MOU seeks to address the ownership of emails Bassam might send or receive in the future, much less to suggest that these future emails would somehow be commonly-owned partnership property (which they plainly are not).

- Finally, the two privacy claims are based on the violations of Bassam's *personal* privacy occurring after the agreements were executed. They plainly fall outside the scope of the MOU and March 12 Agreement.

Accordingly, applying Kuwait law, these matters are not subject to arbitration in Kuwait. (Ali Decl. ¶ 28; El-Kosheri Decl. ¶¶ 11(iii), 32-34.)

## II.
## FEDERAL LAW ALSO COMPELS THE CONCLUSION THAT THE CLAIMS AGAINST KUTAYBA (AND, *A FORTIORI*, OMAR AND MOURABAK) ARE NOT ARBITRABLE

### A. The Dispute Is Not "Capable of Arbitration" for Purposes of the New York Convention

Even if federal law governed all issues relating to arbitrability, including scope, the Individual Defendants would still need to prove that this dispute was "capable of arbitration" for purposes of the New York Convention. *Id.*, arts. II(1), II(3). As demonstrated above, however, disputes involving criminal activities or public order questions cannot be the subject of

arbitration in Kuwait. (*See supra* § I.B.) Thus, even if the claims were otherwise subject to arbitration as a matter of federal law, they nonetheless are not "capable of settlement by arbitration" for purposes of Article II(1) and II(3) of the New York Convention. *See Corcoran*, 77 N.Y.2d at 233, 567 N.E.2d at 973, 566 N.Y.S.2d at 579 (1990). (*See also supra* n.13.)

### B. Even If Bassam's Claims Were Capable of Settlement by Arbitration, Second Circuit Authority Mandates the Conclusion They Are Beyond the Arbitration Clauses' Scope

#### 1. An Arbitration Clause Cannot Be Construed in a Way That Deviates From the Parties' Reasonable Expectations

If the scope of the dispute resolution clauses in the March Instruments were governed by federal law and the claims in the Amended Complaint could be arbitrated under Kuwait law, the result as to scope would be no different than under Kuwaiti law. Under federal law, "[a]rbitration is strictly a matter of contract; if the parties have not agreed to arbitrate, the courts have no authority to mandate that they do so." *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir. 1995) (citation omitted). "[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Leadertex*, 67 F.3d at 27 (quotation marks omitted); *see also Opals on Ice Lingerie, Designs by Bernadette, Inc. v. Bodylines Inc.*, 320 F.3d 362, 369 (2d Cir. 2003) (the FAA "'make[s] arbitration agreements as enforceable as other contracts, but not more so'") (citation omitted).

Thus, notwithstanding the FAA's pro-arbitration policies,[15] "[arbitration] agreements must not be so broadly construed as to encompass claims and parties that were not intended by

[15] The Individual Defendants' heavy reliance on the FAA's pro-arbitration policies and the so-called "presumption of arbitrability" (Def. Mem. at 13-15) is misplaced. In the first place, Kuwait law does not create such a presumption. (*See supra* § I.B.) Second, even if federal arbitration policies were applicable, "'the FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties.'" *Opals on Ice*, 320 F.3d at 369 (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)). Thus, "nothing in the [FAA] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002). Therefore, the pro-arbitration policies of the FAA, even if applicable, could not operate to bring within the March Instruments disputes that are plainly outside the scope of those instruments.

the original contract." *Thomson-CSF*, 64 F.3d at 776. "'Claims that present no question involving construction of the contract, and no questions in respect of the parties' rights and obligations under it, are beyond the scope of the arbitration agreement.'" *Kuklachev*, 600 F. Supp. 2d at 460 (quoting *Collins & Aikman Prods. Co. v. Building Sys., Inc.*, 58 F.3d 16, 23 (2d Cir. 1995)).

The "main concern in deciding the scope of arbitration agreements is to faithfully reflect the reasonable expectations of those who commit themselves to be bound by them." *Leadertex*, 67 F.3d at 28 (quotation marks omitted). Thus,

> a court should determine whether the factual allegations that form the basis of a plaintiff's claims implicate construction of the contract or present questions respecting the parties' rights and obligations under the contract. If the factual allegations that form the basis for the claims do not pertain to the contract, the matter is not arbitrable. *The inquiry is fact-based and respects the parties' reasonable expectations in forming the contract.*

*Kuklachev*, 600 F. Supp. at 460-61 (emphasis added) (citing, *inter alia*, *Collins*, 58 F.3d at 19 and *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 844 (2d Cir. 1987)); *see also Fuller*, 565 F.2d at 261 (libel claims non-arbitrable because it was "highly unlikely that the parties could have foreseen, no less intended, to provide a forum for wholly unexpected tortious behavior"). Application of these principles here mandates denial of the Individual Defendants' motions.

### 2. Because the Email Hacking Claim Is Independent of the Agreements, the Claims In this Action Are Plainly Non-Arbitrable

Time and again, courts of this Circuit have refused to order arbitration of issues that, as here, fall outside what the parties reasonably contemplated when entering the arbitration agreement. *See Leadertex*, 67 F.3d at 28 (defamation claims, while factually related to contract claims, were not contemplated by the contract's broad arbitration clause); *Fuller*, 565 F.2d at 261 ("unexpected tortious conduct" not within scope); *Telenor E. Invest AS v. Altimo Holdings & Invs. Ltd.*, 567 F. Supp. 2d 432, 440 (S.D.N.Y. 2008) (a claim of securities law violations had "nothing to do with" the parties' shareholders agreement governing nomination of board

members and providing for arbitration); *Kuklachev*, 600 F. Supp. 2d at 462-64 (intellectual property claims related to a theatrical promotion contract were outside contract's arbitration clause because, *inter alia*, contract did not regulate use or ownership of such intellectual property).[16]

*Leadertex* is particularly instructive. That case involved a dispute between two companies, Leadertex, Inc. ("LI") and Morganton Dyeing & Finishing Corp ("Morganton"), whose standard contract terms provided for arbitration of disputes. *Id.* at 22-23.[17] Disputes arose between the parties concerning the quality of goods supplied by LI to Morganton, resulting in LI filing a lawsuit which included a series of defamation claims, based on Morganton's alleged statements that "[LI] [was] dishonest in their conduct of business, incompetent and incapable to supply manufacturers with goods conforming in color and quality with that requested by its customers," that LI had a "practice" of selling "defective" goods and that it had engaged in a scheme to "defraud" others by supplying "defective, non-conforming goods." *Id.* at 21, 23. The

[16] *See also Fleck v. E.F. Hutton Group, Inc.*, 891 F.2d 1047, 1054 (2d Cir. 1989) (although statements by plaintiff's former employer relating to his job performance fell within scope of the arbitration agreement, a claim based on a statement that plaintiff was a "disbarred lawyer" was outside its scope because the claim did not arise "'in connection with [his] business [or] in connection with his activities as an [employee]'") (citation omitted); *Mikes v. Straus*, 889 F. Supp. 746, 754 (S.D.N.Y. 1995) (*qui tam* action under the False Claims Act fell outside scope of employment agreement's arbitration clause because "even if plaintiff had never been employed by defendants . . . she still would be able to bring a suit against them for presenting false claims to the government."); *Kurschus v. PaineWebber, Inc.*, 95 Civ. 1652, 1996 U.S. Dist. LEXIS 962, at *11-12 (S.D.N.Y. Jan. 31, 1996) (claims of malicious prosecution, negligence, and conspiracy to violate 18 U.S.C. § 1983, arising out of an ex-employee's contention that his supervisor had manufactured charges of sexual misconduct against him, were not arbitrable because they related solely to his allegedly false arrest and attempted prosecution, and thus "present[ed] no questions involving construction of the [employment] contract or the parties' rights or obligations under it"); *McMahon v. RMS Elec., Inc.*, 618 F. Supp. 189, 192 (S.D.N.Y. 1985) (although claims based on statements made about reasons for plaintiff's termination for cause were arbitrable under an employment agreement, defamation claim based on company president's comment that employee was the "company drunk" and interfered with company operations was beyond the scope because "the resolution of [that] claim does not require reference to the underlying contract," and "[did] not require an interpretation of the contractual agreement between the two parties. Furthermore, the defamation claim is not arbitrable simply because the statements were made during the term of McMahon's employment."); *Combined Energies v. CCI, Inc.*, 484 F. Supp. 2d 186, 189 (D. Me. 2007) (although parties' contract "provided the backdrop" for plaintiff's allegations of, *inter alia*, tortious interference and defamation, they still fell outside contractual arbitration clause because these claims did not concern performance of the contract), *aff'd*, 514 F.3d 168 (1st Cir. 2008).

[17] The arbitration agreement in *Leadertex* was, if anything, broader than the dispute resolution clauses at issue here, and extended to "[a]ny controversy or claim arising under or in relation to this order or contract, or any modification thereof, shall be settled by arbitration." *Leadertex*, 67 F.3d at 27-28 (quotation marks omitted).

Second Circuit held that, although these defamation claims were "factually quite closely related to the contract claims," *id.* at 28, they still fell outside the scope of the contractual arbitration clause:

> There is nothing to indicate that, when Morganton and [LI] included an arbitration clause in their dyeing and warehousing agreement, they could reasonably have expected, or even contemplated, that that clause also would extend to a defamation claim based on statements about subjects other than Morganton's services for [LI]. Because *we must enforce the parties' reasonable expectations*, we conclude that [LI]'s defamation cause of action is not governed by the parties' arbitration agreement.

*Leadertex*, 67 F.3d at 28-29 (emphasis added). Precisely the same conclusion applies to the email hacking scheme here. It simply beggars belief that in signing the March Instruments Bassam contemplated arbitrating an email hacking scheme he was exposed to after the March Instruments were signed. Far from enforcing the parties' reasonable expectations, permitting Kutayba to invoke arbitration in this case would demolish those expectations.

Similarly, in *Kuklachev*, the parties entered into a contract under which the defendant would promote plaintiff's "Moscow Cat Theater" act in the U.S. and further provided that "[a]ll claims arising from this Agreement shall be settled by an arbitrator." 600 F. Supp. 2d at 457. Later, the promoter started performing its own shows, allegedly using Kuklachev's trademark and images, prompting Kuklachev to bring a series of claims against the promoter under a variety of legal theories, including copyright and trademark infringement claims under the Lanham Act, as well as claims of false advertising and infringement of trade dress. *Id.* at 450-54.

In words that resonate strongly here, Judge Sifton noted that:

> The allegations upon which the claims are based are broad in scope and do not pertain to the contract. The existence of the contract was not a factual predicate for the dispute. These points set this case apart from cases in which the courts have ordered arbitration based on the facts underlying the complaint.

*Kuklachev*, 600 F. Supp. 2d at 461. Thus, claims relating to alleged theft of "Moscow Cats Theater" copyright and trademarks were held to be beyond the scope of the arbitration clause:

> Had there been no contract between the parties, defendants could still have taken all of the actions with respect to intellectual property that they are alleged to have taken in this case. . . . [T]he facts underlying plaintiffs' intellectual property claims *are not reducible to breach of contract claims, do not require interpretation of the contract, and do not implicate the parties' rights and obligations under the contract.* Instead, the alleged copying and intentional infringement by the [defendants] was beyond the scope of anything discussed in or contemplated by the contract.

*Id.* at 463 (emphasis added).[18]

The same conclusions apply here. The email hacking scheme is "beyond the scope of anything discussed in or contemplated by the contract." *Id.* Bassam's claims neither "implicate construction of the [March Instruments] nor present questions respecting the parties rights and obligations under [them]." *Id.* at 460. Accordingly, they are non-arbitrable.

## III.
## DEFENDANTS' ATTEMPTS TO SHOEHORN THIS CASE INTO THE DISPUTE RESOLUTION PROVISIONS ARE UNAVAILING

### A. The Brothers Never Entered Into an Open-Ended Agreement to Submit Literally All Future Disputes to Arbitration

Relying on the part of paragraph 7 of the March 12 Agreement that states that "any disputes" between the brothers are to be referred to the Kuwaiti Prime Minister, Defendants' seek to portray the March 12 Agreement as being so "broad" as to encompass literally "any disputes" (Def. Mem. at 13-15; Park Decl. ¶ 4); in other words, a life-long pact to submit literally any future disputes of whatsoever nature to the Kuwaiti Prime Minister. This interpretation, besides being invalid under Kuwait law (*see supra* § I.B), completely ignores the other language in the

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[18] In *Kuklachev*, the cat theater owner also claimed that the promoter committed fraud in inducing him to leave his scenic materials in the United States at the end of the 2006 tour, while concealing his intention to improperly utilize those materials himself. 600 F. Supp. 2d at 466. These claims were arbitrable because the "scenic materials were brought to the United States pursuant to the contract, and were stored by [the promoter] in anticipation of the 2007 tour that would take place under the contract's requirements." *Id.* at 467. Thus, "[w]hether [the promoter] misrepresented the purpose of storing the materials and whether he kept them beyond the time he was entitled to do so are questions that relate directly to the contract." *Id.* The court also held that a claim for unfair competition was arbitrable to the extent it alleged the promoter misappropriated goodwill from the cat theater's 2005 and 2006 tours, because that would require an assessment of the performance of the contract in those years. *Id.* at 466. Here, in contrast: (1) the treatment of Bassam's future private emails was not at any stage addressed by the March Instruments; thus in no sense does the hacking scheme "relate directly" to them; and (2) it could not be – and is not – suggested that the theft of these emails constitutes the misappropriation of the commonly-held property that is the subject of the contract.

March Instruments that expressly sets the scope of paragraph 7, namely: (1) the prefatory paragraph of the March 12 Agreement making reference to the brothers' desire to divide their commonly-owned property; (2) paragraph 15 of the MOU, defining the scope of the dispute resolution by reference to the "subject matter of the MOU" (*i.e.*, the division of commonly-owned property); and (3) the introductory words of the MOU, which indicate that one of the MOU's functions is to "explain" the March 12 Agreement.

To claim, in the face of these critical modifying terms, that paragraph 7 represents a stand-alone, all-embracing and perpetual clause covering literally any future dispute, would thus not only violate the "reasonable expectations" of the parties, *see Leadertex*, 67 F.3d at 29, but also violate the basic canon of contract construction that requires that all provisions in a contract be read together in their proper context, and that an interpretation will be disfavored if it denudes a particular term of any meaning or if it would render the clause invalid.[19]

The evidence indicates that no such thing was intended. Bassam's own testimony confirms that at the time he signed the agreements the possibility that his brother would hack into his emails did not enter his mind and that he did not and never would have agreed to arbitrate that future theft of his own private emails if it had entered his mind. (Bassam Decl. ¶ 3.)

The Individual Defendants' absurdly overbroad interpretation of the March 12 Agreement bears remarkable resemblance to the defendants' strained attempts in *Fuller* to bring plaintiffs' slander claims within a contractual arbitration clause. Rejecting this argument, the Second Circuit observed that

> it would stretch the meaning of "musical services" beyond any reasonable definition to suggest that the slander claim falls within it. Although the agreement to arbitrate was

[19] *See Kinek v. Paramount Commc'ns, Inc.*, 22 F.3d 503, 509 (2d Cir. 1994) ("[P]rinciples of contract construction . . . require that all provisions of a contract be read together as a harmonious whole, if possible."); *Conzo v. City of New York*, 438 F. Supp. 2d 432, 435 (S.D.N.Y. 2006) ("[An] interpretation that gives effective and lawful meaning to all the terms of the contract is preferred over one which leaves a portion of the contract meaningless or unlawful.").

> undoubtedly intended to cover disputes arising from the character of Guthrie's performance and his payment for it, it is highly unlikely that the parties could have foreseen, no less intended, to provide a forum for *wholly unexpected tortious behavior.*

565 F.2d at 261 (emphasis added). Likewise, here, Defendants' claim that the March 12 Agreement covers "wholly unexpected tortious behavior" is a wild and unacceptable "stretch."

**B. The Fact That the Hacking Took Place Amidst the Brothers' Acrimony <u>Does Not Make this Case "Related to the Subject Matter" of the MOU</u>**

Defendants next argue that, because the Amended Complaint makes reference to the MOU and the brothers' acrimonious partnership dispute, this case is necessarily "related to the subject-matter" of the MOU for purposes of its dispute resolution provisions. (Def. Mem. at 15-16.) This argument seeks to expand the plain meaning of the words "related to" so that they extend to literally any claim that even makes mention of the brothers' partnership dispute, even if the claims do not actually seek relief involving commonly-owned property. But this kind of extrapolation once again does fundamental violence to the parties' "reasonable expectations" – which is precisely what the Second Circuit warned against in *Leadertex.* 67 F.3d at 29.

The Individual Defendants argue that paragraph 15 of the MOU captures any dispute "touching upon" the MOU. (Def. Mem. at 15.) But this certainly is not the case in Kuwait, and in all events, the Second Circuit in *Leadertex* specifically cautioned against this kind of loose phraseology, observing that an inquiry based on whether a complaint "'touch[es] matters'" covered by the parties' agreements did not *"yield[] a principled way of . . . deciding"* arbitrability. 67 F.3d at 28 (emphasis added) (citation omitted).

*JLM Industries v. Stolt-Nielsen SA*, 387 F.3d 163 (2d Cir. 2004), on which Defendants heavily rely, involved an alleged tortious conspiracy that had a direct effect on the contracts under which arbitration was sought, thus prompting a finding of "intertwined-ness." As elaborated below, Bassam does not seek redress for the impact, if any, that the tortious conduct may have had on his rights under the MOU. Moreover, "[t]he central factual allegations of the

[plaintiffs'] complaint . . . posit[ed] that a price-fixing conspiracy among the Owners undermined legitimate contractual relations between the parties," *id.* at 174, and that the damages allegedly suffered by plaintiffs as a result of such conspiracy would never have been sustained, "had [plaintiff] not entered into the 'nearly 80' contracts with the Owners which it alleges were formed during the proposed class period." *Id.* at 175. Thus, the claims in *JLM* went to the heart of the contractual relationship because they affected the contract price – a situation that has no parallels here because the injurious effect of the email hacking scheme arises independently of the March Instruments and the injury would have been suffered even had those instruments never existed.

Likewise, Plaintiff's claim in *Genesco* that defendants had conspired to destroy its business "through the systematic acceptance of overcharges and unmarketable goods" was certainly not "wholly independent of the contract" for the sale of textiles. *Id.* at 846 (quotation marks omitted). Once again, the alleged wrongdoing depended upon the parties performing the contract – by supplying shoddy goods under it. Here, in sharp contrast, the *entire* email hacking scheme was independent of performance under a contract to divide commonly-owned property between the brothers, and the significant part of the injury (principally the invasion of privacy by stealing Bassam's personal emails concerning family, health and medical matters) did not even have a relationship to business.[20] Thus, it would not "'faithfully reflect the reasonable

[20] The Individual Defendants rely on numerous other cases where, unlike here, the alleged tortious or other wrongful acts were committed within the parameters of the parties' contractual relationship. *See Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 229 (2d Cir. 2001) (claims under agreement to indemnify losses related to goods shipped under a charter agreement were arbitrable under the charter agreement because the indemnity agreement "clearly implicate[d] at least two clauses of the charter," one of which explicitly discussed indemnification); *Oldroyd v. Elmira Sav. Bank, FSB*, 134 F.3d 72, 77 (2d Cir. 1998) ("Inasmuch as more than half of [plaintiff's] employment contract relates to the subject of termination from employment, there can be no doubt that a retaliatory discharge claim touches matters covered by the employment contract."); *WorldCrisa Corp. v. Armstrong*, 129 F.3d 71, 74-75 (2d Cir. 1997) (all of plaintiff's claims were essentially for breach of contract and the dispute would necessarily involve interpretation of the language of the contract and defendant's performance thereunder); *TravelClick, Inc. v. Open Hospitality Inc.*, No. 04-CV-1224, 2004 WL 1687204, at *6 (S.D.N.Y. July 27, 2004) (claims of an ex-employee, who alleged that his former employer misused confidential information gained during his employment, were arbitrable under an employment agreement because defendants' wrongdoing implicated the confidentiality provisions of the employment agreements); *Int'l Talent Group, Inc. v. Copyright Mgmt., Inc.*, 629 F. Supp. 587, 592 (S.D.N.Y. 1986) (during a computer project, one contract covered hardware and

*(cont'd)*

expectations'" of the parties for these claims to be arbitrated. *Leadertex*, 67 F.3d at 28.[21]

**C. Defendants' Motivations in Seeking to Hack the Emails Are Irrelevant**

Equally untenable is Defendants' argument that, because the hacking was motivated by a desire to advantage Kutayba in the negotiations, it must necessarily present a dispute "related to" the MOU. If accepted, this would mean that an otherwise unrelated criminal or tortious activity could be deemed "related to" a contract dispute, merely based upon the subjective mental state formed by the wrongdoer *after* the contract had been signed. Not only would this work a fundamental inequity to the victim of the wrongdoing (who, here, had no idea the hacking was taking place), it would violate the rule that "[arbitration] agreements must not be so broadly construed as to encompass claims and parties that were not intended by the original contract." *Thomson-CSF*, 64 F.3d at 776.

At bottom, Defendants' "relatedness" argument boils down to a crude "but-for" argument: that the hacking would not have happened if the acrimony under the March Instruments had not arisen. Dismissing a similar argument in *Kurschus*, Judge Sweet stated:

> The fact that the employment relationship [in *McMahon*] was a "but for" cause of the motivation behind the defendant's statements [that plaintiff was the company drunk], in that the statements would never have been made if not for the employment relationship, was found to be insufficient to bring the latter statement within the scope of the agreement. *See Fleck*, 891 F.2d at 1052. Similarly, the employment relationship between Mr. Sager and Kurschus may be a "but for" cause of Kurschus' arrest (since otherwise Mr. Sager's wife would not have had any contact with Kurschus), but it is insufficient to bring the claims stemming from the arrest within the scope of the agreement.

*Kurschus*, 1996 U.S. Dist. LEXIS 962, at *13; *accord McMahon*, 618 F. Supp. at 192. Thus, the

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*(cont'd from previous page)*
another software; all breach of contract claims relating to the project were arbitrable under the software contract, as were related fraud claims, because the two contracts were interconnected). These cases are obviously inapplicable here, where the relevant criminal and tortious misconduct was not committed in the course of performing the March Instruments.

[21] *JLM* and *Genesco* also involved clauses that were broader than the instant clauses. The clause in *Genesco* extended to *"[a]ll claims and disputes of whatever nature arising under this contract."* 815 F.2d at 845. The arbitration clause in *JLM* embraced "[*a*]*ny and all differences and disputes of whatsoever nature arising out of this Charter*." 387 F.3d at 167.

Individual Defendants' "but for" argument is unavailing.

### D. Bassam Is Not Seeking Contract Damages or Any Other Form of Damages Related to the MOU

The Individual Defendants next assert that, in this action, Bassam seeks to measure his damages by reference to the improper advantages Defendants sought to gain over him in their negotiations through the email hacking scheme. As they would have it, this means that the allegations of email hacking in the Amended Complaint are subject to the dispute resolution clauses. (Def. Mem. at 17; Park Decl. ¶ 8.) In fact, in this action Bassam seeks compensation, not for any injury to his commonly-owned assets, but only to his *personal* privacy and proprietary information. Moreover, while it is readily conceivable that the alleged misappropriation of emails and information contained therein may have *advantaged* the defendants (and prejudiced Bassam) with respect to their disputes over the commonly-owned property, this does not (and cannot) mean that the alleged misconduct, or the claims for damage arising out of this misconduct, fall within the scope of the alleged arbitration agreements.[22]

To the contrary, the legally cognizable damages suffered by Bassam and sought by him in this action relate to the invasion of his privacy and confidential information. He seeks recovery for "damages for the invasion of his privacy, including mental anguish and emotional distress; statutory damages; damages for costs incurred in investigating and attempting to stop the crimes; punitive damages; and attorneys' fees." Bassam Decl. ¶ 5. A jury in this case can properly consider all of the compensatory damages without determining the value of rights under the agreements, and award a large multiple of damages as punitive damages for the malicious

[22] The Individual Defendants try to analogize their malfeasance to a case of mere discovery abuse that could be handled within the context of the arbitration proceeding itself. (Def. Mem. at 16.) This analogy is not only inaccurate (in that this case concerns independent criminal conduct arising outside the confines of arbitral discovery), it is also nonsensical, because it assumes that any criminal or tortious conduct arising within an arbitral proceeding is itself arbitrable. The Individual Defendants cite no case that states that crimes or torts occurring in the course of an arbitration (*e.g.*, assault or intimidation of a witness) are, by virtue of the context in which they were committed, solely arbitrable. We are aware of none, and Kuwait law is expressly to the contrary. (Ali Decl. ¶ 36).

and egregious conduct in which the Defendants engaged. Lest the Individual Defendants profit by misconstruing Bassam's claim for damages as requiring this Court to enforce (or for that matter determine the value of rights under the agreements), Bassam has expressly stated that he will not seek any damages in this action that depend upon the existence of the agreements and has agreed to so stipulate. (Bassam Decl. ¶¶ 6-7.)

* * *

Accordingly, as Bassam never agreed to arbitration of the instant disputes, Kutayba's motion to dismiss and/or stay[23] in favor of arbitration should be denied.

## IV.
## IN ALL EVENTS, THE NON-SIGNATORIES CANNOT COMPEL ARBITRATION

### A. Kuwait Law Bars Omar and Moubarak from Seeking to Arbitrate Disputes

Omar and Moubarak admit they have not signed any arbitration agreement with Bassam. (Def. Mem. at 21; Park Decl. ¶ 6.) Kuwait law,[24] which insists that "arbitration may not be provided except in writing" (Kuwait Arb'n. Code art. 173, Ali Decl. Ex. C), thus bars them from seeking arbitration against Bassam. (Ali Decl. ¶¶ 6(c), 33; El-Kosheri Decl. ¶ 11(v); 35-38.)

Defendants' experts offer no justification for these non-signatories being able to compel

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[23] Defendants' motion for a stay pending arbitration is based solely upon Section 3 of the FAA. (Def Mem. at 1.) Yet Section 3 applies only if the court is "satisfied that the issue involved in [the litigation] is referable to arbitration under [an arbitration] agreement," 9 U.S.C. § 3; *accord WorldCrisa*, 129 F.3d at 74-75; a finding that cannot be made here. Thus, the Individual Defendants have failed to establish any basis for a stay.

[24] *See Motorola*, 388 F.3d at 51 (non-signatories are bound to "accept the Swiss choice-of-law clauses that govern those agreements"); *Republic of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334, 355 (S.D.N.Y. 2005) (where a "nonsignatory to a particular arbitration agreement seeks to enforce that agreement against a signatory," arbitrability is governed by the foreign governing law); *see also Felman*, 476 F. Supp. 2d at 587-88 (applying English law to issue of whether a non-signatory could seek arbitration under English law contract). The rationale for this rule is that "the party seeking arbitration must implicitly accept that the contract under which arbitration is sought is valid and binding on it, and the party opposing arbitration has signed the contract, so both parties can reasonably be bound by the choice-of-law clause." *Republic of Ecuador*, 376 F. Supp. 2d at 355. To be sure, in *Sarhank Group v. Oracle Corp.*, 404 F.3d 657 (2d Cir. 2005), federal law was applied to the issue of whether a foreign signatory could compel a U.S. nonsignatory to arbitrate claims. *See id.* at 662. But *Sarhank* addressed the position of an *unwilling non-signatory*. In such a situation, "the nonsignatory party opposing arbitration is in essence contending that it is not subject to the contract at all; thus, applying the choice-of-law clause from that contract to determine the issue would beg the question in a manner potentially unfair to the nonsignatory." *Republic of Ecuador*, 376 F. Supp. 2d at 355. Here, in contrast, Omar and Moubarak are *willing* non-signatories seeking to capitalize on the contracts. Thus, they must accept that Kuwait law applies to their arbitrability claim. *See id.* In all events, federal law also bars Omar and Moubarak from invoking the dispute resolution clauses. (*See infra* § II.)

arbitration. Dr. Nasser merely states that there is a "*question* as to whether claims brought against them could . . . be settled through arbitration." (Nasser ¶ 50 (emphasis added).) His failure to offer any authority in support of this view is not surprising, because Kuwait law is to the contrary. (Ali Decl. ¶¶ 29-31; El-Kosheri Decl. ¶ 37 & Ex. 2.) Dr. Nasser also claims that arbitration against the non-signatories is appropriate because the Amended Complaint alleges that "they all acted together for the common purpose of thwarting the implementation of the Agreements." (Nasser Decl. ¶ 53 (quoting Am. Compl. ¶ 83).) But, being a member of a criminal conspiracy confers no standing in Kuwait arbitration. (Ali Decl. ¶ 32.)[25] Accordingly, Kuwait law compels denial of Omar's and Moubarak's motion to dismiss.

## B. Even Under Federal Law, the Showing Here Would Be Inadequate

### 1. Federal Law Presumes that Non-Signatories Have No Right to Arbitrate

Under federal arbitration law, arbitration "'is a matter of consent, not coercion.'" *Opals on Ice*, 320 F.3d at 369 (citation omitted). Moreover, although in *Thomson-CSF*, it was said that non-signatories may be subject to arbitration based on "(1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel," 64 F.3d at 776, more recently the Second Circuit has stated that "[w]here . . . a non-signatory moves to compel arbitration with a signatory, it remains an open question in this Circuit whether the non-signatory may proceed upon any theory other than estoppel." *Ross v. Am. Express Co.*, 547 F.3d 137, 143 n.3 (2d Cir. 2008) (citation omitted).[26] Here, there is no basis for allowing the non-signatories to compel arbitration under estoppel or any other theory.

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25 Mr. Al-Samdan argues that because the scheme had a "'discernable hierarchy,'" with Kutayba and Omar "ultimately responsible for its creation and supervision," this should allow each and every co-conspirator to arbitrate their disputes. (Al-Samdan Decl. ¶¶ 50-53 (quoting Am Compl. ¶ 86).) Once again, no legal basis, statutory or case-based, exists to support this conclusion which is squarely contrary to Kuwait law. (Ali Decl. ¶¶ 29-31; El-Kosheri Decl. ¶ 37.) Besides, if the supposed basis for allowing co-conspirators to arbitrate is that they were "just following orders," this could not possibly assist Omar, who was giving the orders.

26 We reserve the argument that the *Thomson-CSF* theories would violate the New York Convention's requirement of an "agreement in writing under which the parties undertake to submit to arbitration." *Id.*, art. II(1).

### 2. **<u>Omar and Moubarak Have Failed to Demonstrate that Estoppel Applies</u>**

#### a. The Heavy Burden on a Party Alleging Estoppel

Relying on *JLM*, Omar and Moubarak claim that the "relationship" between them and Kutayba allows them to arbitrate. (Def. Mem. at 21.) But the Second Circuit has explained that:

> *JLM Industries* did not say or mean that whenever a relationship of any kind may be found among the parties to a dispute and their dispute deals with the subject matter of an arbitration contract made by one of them, that party will be estopped from refusing to arbitrate. . . . *[I]n addition to the "intertwined" factual issues, there must be a relationship among the parties of a nature that justifies a conclusion that the party which agreed to arbitrate with another entity should be estopped from denying an obligation to arbitrate a similar dispute with the adversary which is not a party to the arbitration agreement.*

*Sokol Holdings, Inc. v. BMB Munai, Inc.*, 542 F.3d 354, 359 (2d Cir. 2008) (emphasis added); *see also id.* at 361 (reaffirming "basic principle" remains that "one does not give up one's right to court adjudication except by consent"); *accord Ross*, 547 F.3d at 143.

Thus, Omar and Moubarak must show both: (1) that the claims against them are factually intertwined with those against Kutayba; *and* (2) that a "further necessary circumstance of some relation between [Bassam] and [them] sufficient to demonstrate that [Bassam] intended to arbitrate th[e] dispute with [them.]" *Ross*, 547 F.3d at 143. They have shown neither.

#### b. The Claims Against the Defendants Are Not "Intertwined"

Under the estoppel doctrine, "[c]laims are intertwined 'where the merits of an issue between the parties [are] bound up with a contract binding one party and containing an arbitration clause.'" *Denney v. Jenkens & Gilchrist*, 412 F. Supp. 2d 293, 298 (S.D.N.Y. 2005) (quoting *JLM*, 387 F.3d at 178 n.7). If a plaintiff's claims are unconnected with the contract claims, there is no "intertwining." *See id.* at 300-01 (no estoppel where arbitrable contract dispute bore only an attenuated relationship with the alleged fraud perpetrated by the non-signatory); *see also Stechler v. Sidley, Austin Brown & Wood, L.L.P.*, 382 F. Supp. 2d 580, 591-92 (S.D.N.Y. 2005) (in action against several professional firms that allegedly devised improper

tax minimization scheme, law firm could not rely upon arbitration clause in the contract between its client and the plaintiff because, *inter alia*, claims against the law firm "'[could] hardly be characterized as arising out of or being integrally related to'" that contract) (citation omitted).[27]

Moreover, it is clear from *Kuklachev* that a claim is not "intertwined" with a contract claim if the subject injury could have occurred even had the contract never existed. *See Kuklachev*, 600 F. Supp. 2d at 461 (denying arbitration because "[h]ad there been no contract between the parties, defendants could still have taken all of the actions with respect to intellectual property that they are alleged to have taken in this case").

In *Denney*, plaintiffs were allegedly induced by accounting firms to join a scheme to reduce their taxable capital gains – a scheme the IRS ultimately held to be invalid. 412 F. Supp. 2d at 296. Plaintiffs then sued the accounting firms and the alleged co-participants in the scheme, including Deutsche Bank ("DB"), alleging various RICO and tort claims. *Id.* Although arbitration was ordered as to the accounting firms and other defendants *with whom plaintiffs had signed arbitration clauses*, the claims against [DB] were not sufficiently intertwined with the other claims to work an estoppel. *Id.* at 299. This was because: (1) "Plaintiffs [did] not allege that [DB] induced the [relevant] Agreements," *id.* at 299-300; (2) although [DB] paid fees to the accounting firms, this aspect of their conduct "[was] not a substantial component of plaintiffs' claim against [DB]," *id.* at 300; and (3) Plaintiffs failed to allege that the contracts with the accountants "were integral to the fraudulent scheme"; indeed the contracts were "only collaterally related to plaintiffs' claims against [DB]," *id.* at 300-01.

Here, as in *Denney*, a finding of liability against the non-signatories – Omar and

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[27] *See also Massen v. Cliff*, 02 Civ. 9282, 2003 U.S. Dist. LEXIS 7392, at *14 (S.D.N.Y. Apr. 25, 2003) (plaintiff, a real estate agent, worked for the Corcoran Group but also had a side deal with a particular Corcoran broker, Cliff, to receive an "additional stipend" in the form of extra commissions; Cliff not entitled to rely on arbitration clause in plaintiffs' contract with Corcoran Group because the issue of "whether plaintiff ha[d] any right to commissions under the alleged agreement with Cliff [was] independent of the [Corcoran contract]").

Moubarak – is not dependent upon a finding that Kutayba breached his contractual obligations to Bassam.[28] Indeed, the hacking could have occurred, would have been wrongful, and would have inflicted injury on Bassam – even if the March Instruments had never existed.[29]

Finally, although the scheme represents a conspiracy involving all Defendants, this does not mean that the claims against them are "intertwined." *See Stechler*, 382 F. Supp. 2d at 591 ("it is *not* the case that 'a claim against a co-conspirator of [the party entitled to compel arbitration] will always be intertwined to a degree sufficient to work an estoppel'"; the inquiry in every case is "'fact-specific'") (quoting *JLM Indus.*, 387 F.3d at 177) (emphasis added).[30] Here, each Defendant is independently liable for his own participation in the criminal and tortious hacking scheme. It is even possible that Kutayba has defenses that his co-conspirators do not possess, or *vice versa*. Thus, because Omar and Moubarak have failed to prove the "quantum of intertwined-ness sufficient to work an estoppel," *Denney*, 412 F. Supp. 2d at 299 (quotation

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[28] Thus, Omar's and Moubarak's reliance upon cases where the claims against the non-signatories pertained to guarantees of the performance of the relevant contract – and/or required a finding that the contract was breached – is misplaced. *See Choctaw Generation Ltd P'ship v. Am. Home Assurance Co.*, 271 F.3d 403, 408 (2d Cir. 2001) (court compelled arbitration of claims under a surety bond because the surety contract incorporated the related construction contract by reference, and the surety claims were "essentially an aspect of the same controversy now in arbitration between the two signatories to the Construction Contract"); *Astra Oil Co., Inc. v. Rover Navigation, Ltd.*, 344 F.3d 276, 281 (2d Cir. 2003) (non-signatory who issued a "warranty of seaworthiness" in connection with the chartered vessel was entitled to rely on arbitration clause in charter); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 758 (11th Cir. 1993) (allowing parent company to arbitrate under a license agreement signed by its subsidiary where the tort claims against the parent essentially amounted to a claim that the parent "caused [the subsidiary] to violate various terms and provisions of the license agreement").

[29] *See, e.g., Denney*, 412 F. Supp. 2d at 299 (claims are not intertwined if plaintiff could allege the same causes of action even if the contract were found to be invalid); *Kuklachev*, 600 F. Supp. 2d at 461-62 (distinguishing cases finding non-contract claims arbitrable because "the claims [in those cases] could not have arisen had there not been a prior contract between the parties"); *Miron v. BDO Seidman, LLP,* 342 F. Supp. 2d 324, 333-34 (E.D. Pa. 2004) (plaintiff's claims could still be brought even if the agreements were held to be invalid); *Massen,* 2003 WL 2012404, at *4 (invalidity of the contract with the arbitration clause would not affect plaintiff's right to recover).

[30] In *JLM*, the plaintiffs, liquid chemical dealers, entered into a series of charters with the *affiliates* of the tanker owners, but did not in every case contract with the owners themselves. 387 F.3d at 178. The claims against the owners were thus "intertwined with the charters, since . . . it [was] the fact of JLM's entry into the charters containing allegedly inflated price terms that gives rise to the claimed injury." *Id.* Moreover, while some conspirators were non-signatories with respect to some charters, each defendant or its subsidiary had entered into standard form contracts containing the arbitration clause with some members of the plaintiff class. *Id.* at 178 & n.7. Here, the "claimed injury" did not arise from entry into the March Instruments, but from the independently wrongful hacking scheme.

marks omitted), their estoppel theory must fail.

c. It Would Not Be "Inequitable" for Bassam to Refuse Arbitration

Omar and Moubarak also fail to satisfy the second prong of the estoppel doctrine, *i.e.*, that there exists a "'relationship among the parties'" that would make it "'inequitable'" for Bassam to refuse to arbitrate with Omar and Moubarak. *Ross,* 547 F.3d at 145 (quoting *Sokol*, 542 F.3d at 362). As *Ross* demonstrates, persons like Omar and Moubarak, who stand as strangers to the contract, are not generally permitted to claim arbitration under an estoppel theory. *Id.* at 146.[31]

Omar and Moubarak nevertheless claim that estoppel is appropriate because they were part of an alleged conspiracy with Kutayba to harm Bassam. (Def. Mem. at 23.) This claim is preposterous on its face. How can the fact that they secretly and criminally conspired with Kutayba to injure Bassam make it in any way "equitable" for them to seek arbitration pursuant to the March Instruments?[32] Bassam testifies that he never agreed to arbitrate any subject with Omar or Moubarak, much less the issues arising from their hacking into Bassam's private emails. (Bassam Decl. ¶ 8.)

Against this record, it would be positively *inequitable* for Omar and Moubarak, having

[31] Omar and Moubarak's relationship to Kutayba is akin to Mrs. Kurschus's relationship to her husband's firm in *Kurschus*. *See* 1996 U.S. Dist LEXIS 962, at *11-13 (plaintiff's claim against his supervisor's wife for malicious prosecution based on false claim that he sexually assaulted her was not arbitrable under his employment agreement). As with the spousal relationship in *Kurschus*, some form of "relationship" may exist between the Individual Defendants; but not one that bears any relevance to the contract under which arbitration is sought.

[32] Omar and Moubarak cite *JLM* for the extraordinary proposition that "unaffiliated co-conspirators" are generally entitled to the benefits of their co-conspirators' arbitration clause. (Def. Mem. at 23.) Not surprisingly, *JLM* does not actually support such a remarkable proposition. In *JLM*, it was first held that a group of non-signatory owners were entitled to invoke arbitration clauses in charters entered into by their *subsidiaries*. 387 F.3d at 178. Having thus held that every owner was entitled to arbitrate, the court held that they were also entitled to arbitrate claims that they were "jointly and severally liable" for antitrust violations committed by each other. *Id.* at 178 n.7. In making this highly fact-specific ruling, the Second Circuit stressed that it was *not* creating a rule applicable to all alleged unaffiliated co-conspirators. *See id.* ("*We do not, in so holding, mean to suggest that a claim against a co-conspirator of a party alleged to have engaged in antitrust violations will always be intertwined to a degree sufficient to work an estoppel.* ") (emphasis added). Omar and Moubarak conveniently ignore this critical disclaimer. Moreover, each of the *JLM* defendants (or their affiliates) had signed multiple standard-form contracts with an arbitration clause, and the plaintiffs sought to represent a class of all the shippers under those contracts. Here, by contrast, the non-signatories signed no contracts and the record contains no sign that Bassam contemplated arbitration against multiple parties.

knowingly broken the law in order to inflict harm on Bassam, to now seek to coerce Bassam to arbitrate with them in a procedural setting to which he never agreed. Thus, here, as in *Stechler*, "[t]here is no sign that the [signatory] could have imagined that, in entering into an [alleged] arbitration agreement with [other parties], [he was] also entering into an arbitration agreement with [non-signatories]." 382 F. Supp. 2d at 592.[33]

### 3. <u>Omar and Moubarak Cannot Invoke the "Agency" Exception</u>

Even assuming, despite the Second Circuit's statements in *Ross*, that a non-signatory could force arbitration against a signatory under an "agency" theory, that theory also is unavailable here. Although, to be sure, *disclosed* agents or employees have been allowed to rely on arbitration clauses signed by their principals, *see Ross,* 547 F.3d at 144, no such agency existed here with respect to the March Instruments. Lacking an agency relationship with respect to the agreements, Omar and Moubarak cannot rely on the fact that, after the agreements were signed, they covertly formed a conspiracy with Kutayba to engage in criminal conduct that was not within the bounds of activity contemplated by (or regulated by) the agreements.

Moreover, although Omar and Moubarak now conveniently claim that they were "agents" of Kutayba with respect to the implementation of the March Instruments, the email hacking scheme is completely beyond the bounds of activity contemplated by those agreements. *See I Sports v. IMG Worldwide, Inc.*, 813 N.E.2d 4, 11 (Ohio Ct. App. 2004) (two putative agents, a sports promoter and its in-house lawyer, wrote letters defaming the plaintiff; they could not invoke arbitration under the agreement signed between plaintiff and their principal because "the

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[33] Omar and Moubarak cite a number of garden variety estoppel cases permitting arbitration where it had been disclosed that the non-signatory was a corporate affiliate of the signatory involved in the conduct related to the dispute. *See Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 98 (2d Cir. 1999) (party resisting arbitration was estopped from refusing arbitration against non-signatory affiliates where the nonsignatory had an ongoing business relationship with the signatories regarding the construction and operation of the power plant which was the subject of the dispute); *Astra*, 344 F.3d at 281 (finding estoppel appropriate where the non-signatory was treated throughout the parties' relationship as if it were actually a party to the relevant agreement). Here, in sharp contrast, Omar and Moubarak's participation in the hacking scheme was totally covert.

claims brought against [the agents] do not arise from the agreement and do not relate to their actions as purported agents of APE under the agreement."). Thus, because "an agent or employee of a signatory cannot invoke an arbitration clause unless the parties intended to bring them into the arbitral tent," *id.* at 11, the agency exception has no possible application here.[34]

## CONCLUSION

For the foregoing reasons, Bassam respectfully requests that the Court deny the Individual Defendants' motion in its entirety.

Dated: New York, New York
December 18, 2009

SKADDEN, ARPS, SLATE
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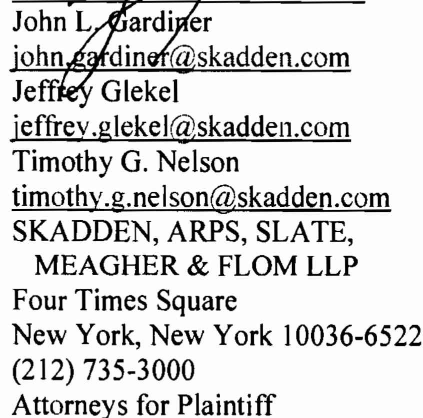

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[34] Omar and Moubarak selectively cite *Sidell v. Structured Settlement Investments LP*, No. 3:08-cv-00710, 2009 U.S. Dist. LEXIS 2244, at *7 (D. Conn. Jan. 14, 2009) for the proposition that they, as "agents" or persons "acting in concert" with Kutayba should be permitted to claim arbitration. (Def. Mem. at 24.) They ignore, however, that (1) the arbitration clause in *Sidell* was in an employment contract; and (2) the non-signatories in *Sidell* were former co-workers of the plaintiff and thus were disclosed agents; and (3) their alleged wrongdoing (improperly accessing his personal emails on a company computer) was done at the workplace in their capacity as employees. *See Sidell*, 2009 U.S. Dist. LEXIS 2244, at *7. Here, by contrast, the March Instruments are personal contracts between Bassam and Kutayba; the hacking scheme in question was independent of those agreements, and Omar and Moubarak's role in that scheme was entirely covert. *Sidell* is thus wholly distinguishable.