UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

DEFENDANTS' JOINT REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED COMPLAINT OR, IN THE ALTERNATIVE, STAY THIS ACTION PENDING ARBITRATION

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PRELIMINARY STATEMENT

Plaintiff concedes that the two arbitration agreements he entered into with defendant Kutayba are valid and binding. Yet, in an effort to evade the broad scope of those agreements, plaintiff attempts to recast the allegations in the Amended Complaint and, indeed, largely ignores what his pleadings plainly allege. Moreover, he would have the Court disregard the strong federal presumption in favor of arbitration and clear Second Circuit law holding that disputes like this one are arbitrable as he argues that the issues presented are governed by Kuwaiti law.

Plaintiff's effort at distraction must fail. He is bound by the allegations in the Amended Complaint and cannot simply wish them away. Nor can he transform defendants' motion into one governed by Kuwaiti law. Binding Second Circuit law defeats his effort. Were his argument about controlling Kuwaiti law to be accepted, the powerful federal presumption in favor of arbitration would be at the mercy of myriad foreign laws. This Court need not delve into issues of foreign law in order to resolve defendants' motion.

Even if the Court were to consider Kuwaiti law, it would quickly find that plaintiff's efforts to evade arbitration would nevertheless also fail. Plaintiff's contention that this dispute is not "capable of arbitration" (or, in Arabic, solh) is based on the conclusions of two Kuwaiti law experts who mistakenly understood this to be a criminal case, when clearly it is not. And plaintiff's argument that Kuwaiti law prohibits the type of broad arbitration clause agreed to by plaintiff and defendant Kutayba – which provides for the arbitration of both contractual and non-contractual liabilities (such as potential torts) – is contrary to the conclusions of the authorities on which his own experts rely, and is also readily contradicted by the expert testimony of Dr. Al-Samdan, a professor of international commercial arbitration at Kuwait University, and Dr. Nasser, the Secretary General of the Gulf Cooperation Council Commercial Arbitration Centre.

In apparent recognition of the fact that the Amended Complaint raises claims that must be subject to arbitration, plaintiff struggles to distance his claims from the subject matter of his agreements with defendant Kutayba. Indeed, he asserts a revised theory of liability and damages, for the first time in his opposition brief. While plaintiff still appears to seek the recovery of hundreds of millions of dollars in damages, he now claims that this astronomical figure is based not on the harm he suffered as a result of defendants' alleged theft of emails disclosing his strategy for pursuing his rights under the agreements, but instead on the "emotional distress and mental anguish" he purportedly suffered when defendants also allegedly took emails containing his medical information. Not only is plaintiff's eleventh-hour disavowal of his pleadings improperly asserted and as such, utterly irrelevant, it is a concession that his claims as pled are subject to arbitration.[1]

ARGUMENT

I. U.S. LAW APPLIES IN ALL RESPECTS

A. U.S. Courts Must Apply U.S. Law to Interpret Article II of the Convention

Plaintiff's opening argument is premised on the notion that under Article II of the Convention, a U.S. court must decline to enforce an arbitration agreement if it violates a foreign state's public policy (here, Kuwait). (See Pl. Opp. at 2, 17-18.)[2] That reading of the Convention has no support in the law. To the contrary, it is widely accepted that Article II's exceptions were

[1] Plaintiff's brazen request that the Court consider the merits of his claims when deciding whether they are arbitrable is also improper. (See Declaration of John L. Gardiner, dated Dec. 18, 2009 ("Gardiner Decl.") ¶ 3.) The Supreme Court has warned in no uncertain terms that "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." See AT&T Tech., Inc. v. Comm'ns Works of Am., 475 U.S. 643, 649 (1986).

[2] Citations to "Pl. Opp." refer to plaintiff's Memorandum of Law in Opposition to Defendants' Motions to Dismiss and/or Stay this Action Pending Arbitration; citations to "Defs. Br." refer to Defendants Kutayba Y. Alghanim and Omar K. Alghanim's Memorandum of Law in Support of Their Motion to Dismiss the Amended Complaint or, in the Alternative, Stay this Action Pending Arbitration. Defendant Moubarak joined in the motion to dismiss and relied upon, and incorporated by reference, this brief in support of his motion. (See Declaration of Tai H. Park, dated Nov. 23, 2009 ("Park Decl.").)

included to protect a signatory state from being required to enforce an agreement that violates its own public policy. See A. Van den Berg, The New York Arbitration Convention of 1958 152-53 (1981) ("As a court derives its competence as a rule from its own law, it should inquire under its own law whether the competence has lawfully been excluded in favor of arbitration."). For this reason, U.S. courts have roundly rejected plaintiff's interpretation of the Convention and instead held that they must apply domestic, not foreign, law when giving effect to Article II. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 639 n.21 (1985) ("Art. II(1) of the Convention . . . contemplates exceptions to arbitrability grounded in domestic law."); U.S. Lines, Inc. v. Am. Steamship Mut. Prot. and Indem. Assoc., Inc., 197 F.3d 631, 639 (2d Cir. 1999) (applying Mitsubishi); Apple & Eve, LLC v. Yantai N. Andre Juice Co., 610 F. Supp. 2d 226, 228-29 (E.D.N.Y. 2009) (an agreement to arbitrate is "null and void" only when it "contravenes fundamental policies of the forum nation") (citation omitted) (collecting cases); Van den Berg at 152-53 ("It is significant to note that all courts decided the question of arbitrability exclusively under their own law and did not take account of the law of the country where the arbitration was to take place . . . .").[3]

Under U.S. law, a court may only refuse to enforce an arbitration agreement on public policy grounds if the plaintiff can demonstrate that Congress expressed a clear intention that courts should have exclusive jurisdiction over the claims at issue. Mitsubishi, 473 U.S. at 639

[3] The cases plaintiff cites are not to the contrary. Corcoran v. Ardra Insurance Co., Ltd. does not support – and indeed, contradicts – plaintiff's assertion that foreign law applies. In that case, the court recognized that Article II's exceptions are implemented by examining the law of the country asked to enforce the arbitration agreement and accordingly applied U.S. law to determine whether a dispute was "capable of settlement by arbitration." 567 N.E.2d 969, 972 (N.Y. 1990). Munich Reinsurance America, Inc. v. ACE Property & Casualty Insurance Co. did not even implicate the Convention because it concerned a dispute between U.S. citizens and an agreement to arbitrate in New York. 500 F. Supp. 2d 272 (S.D.N.Y. 2007). And in R3 Aerospace, Inc. v. Marshall of Cambridge Aerospace, Ltd., the question of whether foreign law applied under Article II never arose because the United States was both the country where enforcement was sought and where the arbitration was to take place. 927 F. Supp. 121 (S.D.N.Y. 1996).

n.21. Plaintiff does not even try to make this showing, and for good reason. It is generally accepted that plaintiff's claims are arbitrable under U.S. law. See, e.g., Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 240 (1987) (civil RICO); Travelclick, Inc. v. Open Hospitality Inc., 2004 U.S. Dist. LEXIS 14395, at *16 n.4 (S.D.N.Y. July 27, 2004) (CFAA).

B. In the Absence of a Choice-of-Law Clause, Federal Law Applies to Interpret the Arbitration Terms of the March Agreements

Plaintiff concedes that the March Agreements do not contain choice-of-law clauses and does not dispute that, in the absence of an explicit choice-of-law provision, federal law applies to matters of contract interpretation. (See Defs. Br. at 10 (collecting cases).) Instead, plaintiff claims that defendants "stipulated" that Kuwaiti law governs. (Pl. Opp. at 12, 13 n.8.) That is simply not true. Plaintiff never asked defendants (nor would they have agreed) to enter into such a stipulation. Moreover, nothing in defendants' opening brief could be construed to imply that Kuwaiti law, not federal law, governs on the question of arbitrability. To the contrary, defendants made clear that federal law applies precisely because the parties did not agree that the arbitration provisions of the March Agreements should be governed by Kuwaiti law. (See Defs. Br. at 10). While defendants also submit, in the alternative, that if the Court decided to employ a choice-of-law analysis Kuwaiti law would apply (see id.), plaintiff fails to provide any reason why the Court should depart from the rule requiring the application of federal law in favor of such an analysis. Federal law clearly applies in all respects.

C. The Applicability of Kuwaiti Law, if any, Is Limited to Questions of Contractual Interpretation

Even if the Court decides that Kuwaiti law governs the March Agreements, it may only apply it to answer the limited question of whether the parties obligated themselves to arbitrate certain issues. The Court may not, as plaintiff insinuates, impose foreign rules that conflict with the Federal Arbitration Act's ("FAA") mandate requiring the enforcement of agreements to

arbitrate. (Compare Pl. Opp. at 12-17 with Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 53 (1995) (choice-of-law provisions encompass only matters of contract interpretation, "but not . . . special rules limiting the authority of the arbitrators").) Nor may the Court replace the strong federal policy in favor of arbitration with alleged foreign law presumptions to the contrary. (Compare Pl. Opp. at 18 n.15 with Shaw Group, Inc. v. Triplefine Int'l Corp., 322 F.3d 115, 120 (2d Cir. 2003) ("the federal policy in favor of arbitration [which] requires that any doubts concerning the scope of arbitrable issues be resolved in favor of arbitration" applies regardless of the law the parties choose to govern their agreements) (quotations and citations omitted).) Plaintiff's insistence that Kuwaiti law pre-empts federal law must therefore be rejected.

II. PLAINTIFF'S CLAIMS ARE ARBITRABLE

A. U.S. Law

Plaintiff does not contest that the arbitration clauses contained in the March Agreements are broad in scope and cover any dispute "related to" the "subject matter" of the agreements, including disputes that are not related to the agreements themselves. (Defs. Br. at 13-14; Pl. Opp. at 9-10.) The Court must therefore stay this action in favor of arbitration unless "it may be said with positive assurance that the arbitration clause[s] [are] not susceptible of an interpretation that covers the asserted dispute." WorldCrisa Corp. v. Armstrong, 129 F.3d 71, 74 (2d Cir. 1997) (quotations and citations omitted) (emphasis added). Plaintiff carries the burden of overcoming this strong presumption and his failure to do so here is plainly evident. Oldroyd v. Elmira Sav. Bank, FSB, 134 F.3d 72, 77 (2d Cir. 1998).[4]

[4] Unable to dispute the broad scope of the arbitration agreements, plaintiff instead argues that the "subject matter" of the March Agreements is narrow. (Pl. Opp. at 9-10, 22-24.) Plaintiff's self-serving characterizations aside, the parties appear to agree that the "subject matter" of the March Agreements includes the family's businesses and assets, the manner in which they have been divided between the brothers, and the resolution of any disputes related

Plaintiff's claims are no doubt "related to" the "subject matter" of the March Agreements. According to the Amended Complaint, the March Agreements created the very rights that plaintiff claims defendants' alleged "hacking" scheme denied him:

> [t]he unlawful conduct of Defendants . . . has allowed Defendants Kutayba and Omar to assert and illegally maintain control over the brothers' joint assets, parry all of his efforts to obtain his assets and income and deprived him of the value of the legal advice for which he paid substantial sums. This has enabled Kutayba and Omar to prolong their campaign of wrongfully barring Plaintiff from the use and enjoyment of his assets and is allowing them to continue their wrongful use of Plaintiff's assets for their benefit. The losses Plaintiff is sustaining by reason of that campaign of obstruction and self-dealing are in the many hundreds of millions of dollars.

(Am. Compl. ¶ 113; see also id. ¶¶ 1, 13-14, 21, 77, 80, 83-84, 121, 127-28, 131, 145, 149, 155, 159, 167, 172, 177, 183, 195.) Indeed, plaintiff seeks compensation for "the consequences flowing from the disclosure of privileged and confidential strategic legal advice" for every cause of action asserted. (See id. ¶¶ 120, 131, 145, 155, 162, 167, 172, 177, 183, 195.) This case is a classic example of the type of dispute premised on conspiratorial conduct that the Second Circuit has routinely referred to arbitration. See, e.g., JLM Indus., Inc. v. Stolt-Nielsen SA, 387 F.3d 163, 175-76 (2d Cir. 2004) (ordering arbitration of claims premised on allegations that price-fixing conspiracy among defendants undermined legitimate contractual relations between parties); Genesco v. T. Kakuichi & Co., Ltd., 815 F.2d 840, 846 (2d Cir. 1987) (ordering arbitration of dispute involving claims that defendant overcharged plaintiff by conspiring with and bribing its vice-president); Collins & Aikman Prods. Co. v. Bldg. Sys., Inc., 58 F.3d 16, 23 (2d Cir. 1995) (finding that tort claims arising out of wrongful course of conduct aimed at depriving plaintiff of his contractual rights must be arbitrated); Kerr-McGee Refining Corp. v.

(footnote continued from previous page)

to that division. (See id.; Defs. Br. at 15.) Indeed, plaintiff himself alleges that his dispute with Kutayba over the division of their assets "affects every aspect of his life and nearly everything he owns." (Am. Compl. ¶ 80.)

M/T Triumph, 924 F.2d 467, 471 (2d Cir. 1991) (finding RICO claim arbitrable even where predicate acts fell outside scope of arbitration clause).[5]

Plaintiff nonetheless argues that this action does not relate to the March Agreements because the tortious acts alleged took place outside the parameters of the parties' contractual relationship and the claims asserted do not implicate construction of the contracts. (See Pl. Opp. at 18-19, 21, 23, 25 n.20.) But this precise argument has already been considered and rejected by the Second Circuit. In JLM Industries, the district court held that a RICO claim based on a "conspiracy . . . formed independently of the specific contractual relations between the parties" was not arbitrable because it "in no way depend[ed] upon interpretation, construction, or application of any provision of the [agreement between the parties]." 387 F.3d at 175-76. The Second Circuit reversed, explaining that:

> the district court's focus upon the absence of an issue of interpretation, construction, or application of any provision of [the agreement] implies that arbitration is only appropriate in cases which concern breach of contract claims. When we deal with a broad arbitration clause, however, it is clear that we have not limited arbitration claims to those that constitute a breach of the terms of the contract at issue. Thus, this Circuit has rejected the notion that the presence of such claims is a pre-requisite to sending a matter to arbitration.

Id. at 176 (quotations and citations omitted). Indeed, broad arbitration clauses, like those at issue here, are "presumptively applicable to disputes involving matters going beyond the

[5] Plaintiff claims that the arbitration clauses at issue in JLM Industries and Genesco are broader than those contained in the March Agreements. (Pl. Opp. at 26 n.21.) That is an untrue statement. Unlike the arbitration clauses in those cases, which respectively required arbitration of disputes "arising under" and "arising out of" the agreements in question, the provision in the MOU requires the arbitration of any dispute "related to" the subject matter of the agreement. (Compare Declaration of Omar Al-Essa, dated Nov. 18, 2009 ("Al-Essa Decl."), Ex. C ¶ 15 with JLM Indus., 387 F.3d at 167; Genesco, 815 F.2d at 845.) "An arbitration clause covering claims 'relating to' a contract is broader than a clause covering claims 'arising out of' a contract." Int'l Talent Group, Inc. v. Copyright Mgmt., Inc., 629 F. Supp. 587, 592 (S.D.N.Y. 1986) (citation omitted). The arbitration clause in the March 12 Agreement is even broader. (See Al-Essa Decl. Ex. B ¶ 7.)

interpret[ation] or enforce[ment of] particular provisions of the contract . . . ." Id. at 172 (quotations and citation omitted).[6]

Plaintiff attempts to find refuge in a series of cases that, unlike this one, concern claims for defamation. (See Pl. Opp. at 19-24.) None of these cases can help plaintiff avoid arbitration. In Leadertex, Inc. v. Morganton Dyeing & Finishing Corp., defendants unsuccessfully attempted to compel arbitration based on an arbitration clause contained in standard form contracts related to a narrow subject matter – services provided with respect to particular goods. 67 F.3d 20, 22 (2d Cir. 1995). There, the court held plaintiff's claims were not arbitrable because they were based on defamatory statements that in no way concerned the specific goods that were the subject of the contracts. Id. at 28.

It is hard to imagine how this case could be more different than Leadertex. Here, the parties entered into a broad arbitration agreement concerning a broad subject matter, which plaintiff himself claims "affects every aspect of his life and nearly everything he owns." (Am. Compl. ¶ 80.) Even further, in Leadertex the defamatory statements had nothing to do with the services provided. In this case, however, defendants allegedly conspired to steal emails that contained information about plaintiff's plans for enforcing his rights under the March

[6] Unable to point to a single word or phrase in the March Agreements that supports his argument as to what the parties did and did not "reasonably contemplate" at the time they agreed to arbitrate, plaintiff proffers "evidence" of his "actual" intent. (See Pl. Opp. at 16-17, 19, 21 (citing Declaration of Bassam Y. Alghanim, dated Dec. 17, 2009 ("Bassam Decl.") ¶ 3)).) Plaintiff's after-the-fact attempt to read into the arbitration clauses exclusionary language that benefits him but was not agreed upon by the parties should be rejected. It is black letter law that when interpreting the parties' intent, the Court must look at the plain language of the arbitration agreements – which are unambiguous in their breadth and contain no exclusionary language whatsoever – not plaintiff's ex post facto account of his true intentions. See Goldman v. Comm'r, 39 F.3d 402, 405-06 (2d Cir. 1994) ("general principles of contract law . . . dictate that where the language of a contract is unambiguous, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any nature") (quotations and citations omitted); 11 Williston on Contracts § 31:4 (4th ed.) ("If the language used by the parties is plain, complete, and unambiguous, the intention of the parties must be gathered from that language, and from that language alone, regardless of what the actual or secret intentions of the parties may have been.").

Agreements and harmed him when they allegedly used that stolen information to thwart his strategy to litigate breach of contract claims against Kutayba.[7]

Saddled by his own allegations, plaintiff attempts to minimize the significance of defendants' purported motivation in hacking his email. (See Pl. Opp. at 26.) But he cannot escape his own pleading. Plaintiff alleged this "common purpose" in the first place in order to plead critical elements of his RICO claim – that defendants formed an "association-in-fact enterprise" and engaged in a "pattern" of racketeering activities. See Boyle v. U.S., 129 S. Ct. 2237, 2244 (2009); Gross v. Waywell, 628 F. Supp. 2d 475, 485 (S.D.N.Y. 2009). Pleading the "purpose" of defendants' alleged wrongful conduct is also necessary to establish elements of all of plaintiff's other claims, including loss causation and damages. (See Am. Compl. ¶¶ 120, 131, 145, 155, 162, 167, 172, 177, 183, 195 (alleging damages for "the consequences flowing from the disclosure of privileged and confidential strategic legal advice" under every Count).)

As a last resort, plaintiff disclaims his intention to seek any damages for "impairment of [his] rights under the March 12 Agreement or the MOU," and instead claims that this action is really nothing more than an attempt to recover "damages for the invasion of [his] privacy, including mental anguish and emotional distress." (Bassam Decl. ¶ 5.) Plaintiff is foreclosed from pursuing this improperly asserted theory of damages in his legal memorandum. He had ample opportunity to plead this theory in his first two complaints and chose not to do so. World

[7] Plaintiff's reliance on Fuller v. Guthrie, 565 F.2d 259 (2d Cir. 1977), is also misplaced. (See Pl. Opp. at 23-24.) In that case, the court held defamation claims based on statements made by defendant about plaintiff were not related to the subject matter of their agreement because they concerned plaintiff's failure to perform under unrelated agreements with third-parties. Here, of course, the alleged conspiracy undermined plaintiff's contractual relationship with defendant Kutayba, not with unrelated third-parties. Kuklachev v. Gelfman, 600 F. Supp. 2d 437 (E.D.N.Y. 2009), is also inapposite. (See Pl. Opp. at 21-22.) There, the court held plaintiff's claims were not related to a contract because the acts giving rise to those claims were committed after the contract had been fully performed and concerned a show different than the one that was the subject of the agreement. Id. at 463-66. Here, the allegedly wrongful conduct occurred contemporaneous with the parties' performance of and ongoing dispute to enforce their respective rights under the contracts.

Book, Inc. v. IBM Corp., 354 F. Supp. 2d 451, 454 (S.D.N.Y. 2005) (refusing to consider new theory of liability asserted for first time in plaintiff's opposition brief).

The Amended Complaint makes passing reference to "medical or health matters" in only four of the nearly 200 paragraphs contained therein and nowhere in those four paragraphs does plaintiff allege that defendants used this information or that he suffered "mental anguish and emotional distress" as a result. (Compare Bassam Decl. ¶ 5 with Am. Compl. ¶¶ 46, 99, 175, 181.) Indeed, defendants' alleged access to medical information is mentioned as an incidental fact, an add-on, with no suggestion whatsoever that defendants sought to acquire such information. Allegedly obtaining this information was plainly outside the common purpose allegedly held by all the defendants. (See, e.g., Am. Compl. ¶¶ 83, 91, 100, 113, 149, 159.) If plaintiff genuinely would have this Court disregard the theory of damages pled in the Amended Complaint, he would also eviscerate the very causes of actions he asserts (such as they are) – plaintiff's original theory of liability is dependent on his allegations that defendants "hacked" plaintiff's emails in order to gain an unlawful advantage in their ongoing dispute with plaintiff over the implementation of the March Agreements. (See, e.g., Am. Compl. ¶ 83.) If, as plaintiff now claims, the alleged "hacking" activities were aimed at obtaining plaintiff's medical information, plaintiff would have further undermined his own RICO claim.

In any event, as noted above, it is beyond question that a party may not amend its complaint through statements made in motion papers. See Wright v. Ernst & Young LLP, 152 F.3d 169, 178 (2d Cir. 1998). Plaintiff is thus bound by his own allegations, which on their face make clear that this dispute relates to the "subject matter" of the March Agreements.

B. Kuwaiti Law

Plaintiff attempts to introduce doubt as to the arbitrability of his claims by insisting that Kuwaiti law prohibits arbitration of this dispute. Specifically, plaintiff argues that (1) his civil claims are really "criminal" and therefore not arbitrable under Kuwaiti law; and (2) parties to a contract may only agree to arbitrate matters related to contractual obligations but not potential torts, even if they are related to the subject matter of the agreement. (Pl. Opp. at 3-5, 14-17.) As explained by Drs. Al-Samdan and Nasser, the conclusions reached by plaintiff's experts are based on mischaracterization or misunderstanding of the nature of his claims, or are just plain wrong. (See generally Reply Declaration of Dr. Ahmad Al-Samdan, dated Jan. 7, 2010 ("2d Al-Samdan Decl."); Reply Declaration of Dr. Nasser Al Zaid, dated Jan. 7, 2010 ("2d Nasser Decl.").) But even if plaintiff's interpretation of Kuwaiti law were correct, this Court may not impose foreign law that conflicts with the FAA's mandate requiring the enforcement of arbitration agreements. Rather, the Court must enforce the parties' agreements to arbitrate this dispute "even if a rule of state law would otherwise exclude such claims from arbitration." Mastrobuono, 514 U.S. at 58.

1. The Present Dispute Is Capable of Arbitration (or Solh)

It is clear that Ms. Ali and Dr. El-Kosheri's conclusion that this dispute is not capable of arbitration (or solh) under Kuwaiti law is based almost exclusively on their mistaken belief that plaintiff's claims are criminal claims. (Pl. Opp. at 3, 14-15.) Both experts opine that Kuwaiti law prohibits the arbitration of plaintiff's claims because an arbitrator cannot determine criminal guilt or impose criminal penalties. (See Declaration of Reema I. Ali, dated Dec. 17, 2009 ("Ali Decl.") ¶¶ 19, 28, 28(e); Declaration of Ahmed Sadek El-Kosheri, dated Dec. 17, 2009 ("El-Kosheri Decl.") ¶¶ 14-28.) Despite what Ms. Ali and Dr. El-Kosheri may have been led to

believe, there is no question that civil actions brought under RICO and other federal statutes are not criminal matters.[8] The Court is neither being asked to decide whether defendants are guilty of a crime nor to impose criminal penalties. See, e.g., Sedima, S.P.R.L. v. IMREX Co., 473 U.S. 479, 488-89 (1985). Indeed, Dr. Al-Samdan concluded that when properly understood as civil, "it would be erroneous to claim . . . that [plaintiff's claims] fall 'within the exclusive jurisdiction of the criminal courts,'" and that "where crimes are not arbitrable as a matter of public policy or Public Order, there are no similar restrictions as to the arbitrability of torts." (2d Al-Samdan Decl. ¶¶ 17-18; see also 2d Nasser Decl. ¶¶ 6, 18).

Moreover, while they agree that under Kuwaiti law, arbitration may be used to determine civil compensation for the victim of a crime (see Ali Decl. ¶ 16; El-Kosheri Decl. ¶ 22),[9] Ms. Ali and Dr. El-Kosheri mistakenly conclude that arbitration of such damages is not permissible here because the question of whether defendants are liable must first be decided in a "criminal trial" in New York (see El-Kosheri Decl. ¶ 29; Ali Decl. ¶ 36). Plaintiff's experts misapprehend the nature of civil proceedings involving the statutory claims asserted here – a defendant need not be convicted of a crime in order to be held civilly liable under these statutes. See, e.g., Sedima, 473 U.S. at 487; H. Jud. Comm., Electronic Communications Privacy Act of 1986, H.R. Rep. No. 99-647, at 26 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3580. There is therefore no reason why, under Kuwaiti law, an arbitrator would be precluded from determining questions of both

[8] Plaintiff's foreign law witnesses were likely misled by the description of plaintiff's causes of action evidently provided to them by counsel. (See Ali Decl. Ex. B.) That description clearly could confuse a non-U.S. lawyer as to the nature of plaintiff's claims.

[9] See also Ali Decl. Ex. E § 1.6 ("Arbitration may focus on a merely civil dispute as . . . the due compensation payable for any wrongful act even if it was penal."); id. § 2.5a ("If there were a statutory provision mentioned in a law other than the Criminal Law that imposes penalties for the enforceability of its rules, it does not mean that arbitration is prohibited."); Ex. F at 413 (explaining that "reconciliation is allowed regarding the financial rights related to these affairs," even in cases involving homicide).

liability and damages. (2d Al-Samdan Decl. ¶ 28; 2d Nasser Decl. ¶ 18.)[10] The authorities on which plaintiff's experts rely do not suggest otherwise. (See id.)

2. Agreeing to an Arbitration Clause that Covers Contractual and Non-Contractual Liabilities Is Permissible Under Kuwaiti Law

Plaintiff also argues that the arbitration clauses contained in the March Agreements cover only contractual claims. (See Pl. Opp. at 16-17.) Plaintiff's contention is presumably based on Ms. Ali's opinion that under Kuwaiti law, parties may only enter into an agreement to arbitrate a specific dispute once it has arisen (i.e. not a potential tort), or an agreement to arbitrate all disputes that arise from the performance of a specific contract (i.e. breach of contract claims), but not a broad agreement to arbitrate all contractual and non-contractual liabilities related to the subject matter of the contract. (See Ali Decl. ¶¶ 8-10, 21-28.)

As Dr. Al-Samdan points out, however, the authorities on which Ms. Ali relies not only fail to provide support for her argument, but actually contradict it. According to his opinion, "parties to a contract may agree to arbitrate 'all disputes' between them, both contractual and non-contractual, relating to the subject matter of the contract." (2d Al-Samdan Decl. ¶ 29.) Relying on the same authorities as Ms. Ali and Dr. El-Kosheri, Dr. Al-Samdan explains that "Kuwaiti law does not require an arbitration clause to specify the nature or type of dispute, but rather the subject matter of any dispute that may arise between the parties:

> 'If the arbitration agreement is in the form of a clause, the clause need not specify the dispute in question. This is an elementary matter since the arbitration clause is entered into prior to the occurrence of any dispute. However the arbitration clause like any contract must have a specific subject matter and this subject matter must be specific and

[10] Ms. Ali also opines that Kuwaiti law does not allow a solh regarding a future intentional tort because Article 254 of the Kuwaiti Civil Code provides that "[a]ny agreement that is executed prior to the occurrence of a tort and has the effect of exonerating liability arising from the tort partially or totally shall be void." (See Ali Decl. ¶¶ 10, 15.) However, as Dr. Al-Samdan explains, Ms. Ali's implied argument fails because the purpose of the arbitration clauses is to empower an arbitrator to resolve the brothers' disputes, without any exoneration of potential liability. (2d Al-Samdan Decl. ¶ 20.)

> therefore for an arbitration clause to be valid it must specify the subject matter around which the dispute must arise.'"

(2d Al-Samdan Decl. ¶ 31 (referring to Ali Decl. ¶¶ 23-27 and quoting Kosheri Decl. Ex. 8) (emphasis added).) Here, the requirement that the agreement specify a "subject matter" is indisputably met. (See 2d Al-Samdan Decl. ¶ 31.) In addition, "while parties to a contract may, in the arbitration clause, choose to limit the subject matter of the [sic] dispute arbitrated (such as disputes arising from the interpretation or execution of the contract), in the present case, the Brothers did not stipulate any such limitations in the Agreements." (Id. ¶ 32 (citations omitted).) Thus, the arbitration clauses in the March Agreements are not only permissible under Kuwaiti law, but must be construed to require the arbitration of contractual as well as non-contractual liabilities "related to" the "subject matter" of those agreements. (See id. ¶¶ 32-34; 2d Nasser Decl. ¶ 25.)[11]

III. PLAINTIFF'S CLAIMS AGAINST OMAR AND MOUBARAK SHOULD ALSO BE DISMISSED

Plaintiff's claims against defendants Omar and Moubarak are intimately "intertwined" with his claims against defendant Kutayba. (See Defs. Br. at 21-24.) The factual allegations in the Amended Complaint – which definitively establish the link between the purported conspiracy and the March Agreements – are indistinguishable as pled with respect to these three defendants. (See, e.g., Am. Compl. ¶¶ 13, 14, 57, 67, 73, 80, 84, 108, 112, 117, 124, 137, 148, 158, 166, 171, 186, 189.) Plaintiff even alleges that all three had the same interests in depriving plaintiff of his rights under the March Agreements:

> The participants in this association-in-fact directly or indirectly benefited from the theft of Plaintiff's emails by, among other things: (i) making use of the stolen information in connection with Plaintiff's dispute with his brother and/or elsewhere in order to assert

[11] While Ms. Ali also opines that "[u]nder Kuwaiti Law the ordinary meaning of 'related to the subject matter of this agreement' is matters arising from contractual obligations contained therein and not potential torts" (Ali. Decl. ¶ 23), she provides no authority whatsoever to support her assertion.

> and maintain control over the brothers' joint assets; (ii) benefiting from the unlawful advantage Kutayba received in the dispute; (iii) attempting to illegally secure a resolution of the brothers' dispute in Kutayba's favor; and/or (iv) receiving payment or other compensation to provide assistance in this unlawful enterprise.

(Id. ¶ 84; see also ¶¶ 83, 113, 128, 141, 149, 159, 189.) Plaintiff's own allegations thus readily establish that, while Omar and Moubarak did not sign the March Agreements, they may nonetheless arbitrate the claims plaintiff asserts against them here. See Denney v. BDO Seidman, L.L.P., 412 F.3d 58, 70 (2d Cir. 2005) (a plaintiff will be estopped from avoiding arbitration where he "raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract") (quotations and citations omitted); Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, Inc., 198 F.3d 88, 98 (2d Cir. 1999) (the interrelatedness test is satisfied where plaintiff treats both signatory and non-signatory defendants as "a single unit").

Plaintiff attempts to avoid estoppel by arguing that the claims against Omar and Moubarak are "unconnected with the contract claims" and that he would have been injured by their alleged misconduct regardless of whether he entered into the March Agreements. (Pl. Opp. at 30-32.) But this is just another way of saying that plaintiff's claims against all three defendants (which are identical) are not "related to" the "subject matter" of the agreements in the first place. As conclusively demonstrated in Part II above, plaintiff is wrong.[12]

[12] Although this case fits perfectly within the estoppel rule enunciated by Denney, plaintiff attempts to analogize Omar and Moubarak's estoppel argument to that of the unsuccessful non-signatory defendant in that case. (Pl. Opp. 31-32.) In so doing, plaintiff focuses on the fact that in Denney, the court found that the non-signatory defendant's conduct "[was] not a substantial component of plaintiffs' claim against [the signatory defendant]" and that the contracts containing the arbitration clauses were "only collaterally related to plaintiffs' claims" against the non-signatory defendant. Denney v. Jenkens & Gilchrist, 412 F. Supp. 2d 293, 300-01 (S.D.N.Y. 2005). Indeed, in Denney, plaintiff "expressly exclude[d]" the non-signatory defendant from certain claims alleged only against the signatory defendants. Id. at 299. Here, in contrast, plaintiff makes no effort to distinguish between the nature of the non-signatory and signatory defendants' conduct. The contracts that contain the arbitration agreements at issue establish the very rights defendants allegedly sought to deny plaintiff through their alleged conspiracy. And plaintiff asserts the same claims against all three defendants based on the same factual allegations. The distinction between the non-signatory in Denney and defendants Omar and Moubarak could not be more obvious.

Plaintiff also argues that "although the scheme represents a conspiracy involving all Defendants, this does not mean that the claims against them are 'intertwined.'" (Pl. Opp. at 32.) This misses the point. Defendants do not rely on the labels plaintiff affixed to his claims, but on factual allegations plaintiff pled in support of those claims, which are identical as to each defendant in all material respects. (See Defs. Br. at 23.) Nowhere in his response does plaintiff point to a single fact he alleged concerning Kutayba's role in the conspiracy that he did not also plead against Omar, Moubarak, or both. To the contrary, plaintiff never once cites to his own complaint in the more than four pages in which he responds to defendants' estoppel argument. (See Pl. Opp. at 30-34.)[13]

Plaintiff again seeks to ignore his own allegations when he claims that the relationship between the parties is insufficiently close to justify estoppel because Omar and Moubarak "stand as strangers to the contract."[14] (Pl. Opp. at 33.) According to the Amended Complaint, Omar is involved in the underlying dispute between plaintiff and Kutayba concerning the implementation

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Plaintiff's reliance on Stechler v. Sidley, Austin Brown & Wood, L.L.P., 382 F. Supp. 2d 580 (S.D.N.Y. 2005), is similarly misplaced. (Pl. Opp. at 30-31.) In that case, the court refused to grant a non-signatory's motion to compel arbitration because the plaintiff had not treated the signatory and non-signatory defendants "as though they were interchangeable and as a single unit," but had alleged that they "played different and distinct roles in the alleged conspiracy," id. at 591 (quotations omitted), which is precisely what plaintiff failed to do in this case.

[13] Inviting pure speculation, plaintiff asserts that "[i]t is even possible that Kutayba has defenses that his co-conspirators do not possess, or vice versa." (Pl. Opp. at 32.) Setting aside his failure to identify a single unique fact pled in the Amended Complaint that could support his assertion, it is his allegations that are relevant to the Court's resolution of defendants' present motion, not plaintiff's speculation about the merits of, or defenses to, his claims. Plaintiff studiously avoids the Amended Complaint for good reason – the allegations plaintiff makes in his complaint repeatedly defeat the arguments he makes in his brief.

[14] Appealing to the principal that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit," plaintiff asks this Court to consider "evidence" (i.e. a declaration from him) that he never intended for the arbitration agreements to cover disputes with defendants Omar and Moubarak. (Pl. Opp. at 33.) "But this broad proposition is not applied literally." Carroll v. Leboeuf, Lamb, Greene & MacRae, L.L.P., 374 F. Supp. 2d 375, 378 (S.D.N.Y. 2005). Rather, "the standard that governs [estoppel] looks to the degree to which the issues sought to be arbitrated are intertwined with the agreement that the estopped party has signed, not to evidence that the estopped party actually intended or expected that any dispute with the nonsignatory would be subject to arbitration." Id.

of the March Agreements because he is Kutayba's son, the heir apparent to his father's share of the brothers' assets, and the CEO of Alghanim Industries and YAAS, both of which are subjects of the MOU. (See, e.g., Am. Compl. ¶¶ 2, 23-24, 76-77, 83-86; Al-Essa Decl. Ex. C, Schedule B.) The pleading similarly ties Moubarak closely to the brothers' dispute. As counsel for Kutayba and Omar and chief legal officer of Alghanim Industries and YAAS, he advised Kutayba in the negotiation of the March Agreements, participated in negotiations and litigation regarding the ongoing dispute with plaintiff over their implementation, and also counsels Kutayba and Omar in relation to the management of the assets that are the subject of those agreements. (See id. ¶¶ 78, 87; see also Park Decl. ¶ 6.) Thus, every material allegation against Moubarak describes his conduct as being performed "as counsel for Kutayba and Omar." (See Am. Compl. ¶¶ 56, 87 ("Moubarak, as counsel for Kutayba and Omar . . . benefited from the unlawful advantage his clients received in this scheme . . . He stood to benefit from rewards he might receive from his superiors, Kutayba and Omar . . . .").)[15]

Courts in this Circuit have repeatedly found that where, as here, a non-signatory is affiliated with a party to an agreement, involved in its negotiation or performance, or a successor to a signatory's interest, their relationship is sufficiently close to justify estoppel. See, e.g., Ross, 547 F.3d at 144-46 (collecting cases); Ibar Ltd. v. Am. Bureau of Shipping, 1998 U.S. Dist. LEXIS 7792, at *12 (S.D.N.Y. May 26, 1998) ("Although petitioners are non-signatories attempting to enforce the arbitration clause, they may do so because they are successors in interest to Italversil, which signed the [contract containing that clause].")[16]

[15] Plaintiff cannot rely on Ross v. American Express Co. (see Pl. Opp. at 33), because there, unlike here, the non-signatory had no role in the formation or performance of, and was not even affiliated with any of the parties to, the agreements at issue. 547 F.3d 137, 147 (2d Cir. 2008).

[16] Plaintiff makes the extraordinary argument that the Court should refuse to dismiss or stay this action in favor of arbitration with respect to Omar and Moubarak because it would be inequitable to reward these defendants for breaking the law. (See Pl. Opp. at 33-34.) Not only does he ignore the fact that not a single allegation has been

Omar and Moubarak can bind plaintiff to arbitrate his claims against them for another independent reason: they are alleged to have acted as agents of Kutayba at all times relevant to this dispute. (See Defs. Br. at 22-23.) In his Amended Complaint, plaintiff alleges that Omar and Moubarak each played a significant role in negotiating and performing the March Agreements and managing the businesses and assets that are the subject of those contracts. (See, e.g., Am. Compl. ¶¶ 2, 23-24, 76, 78, 83-87.) Plaintiff further alleges that defendants Omar, Moubarak, and Kutayba "attempt[ed] to illegally secure a resolution of the brothers' dispute in Kutayba's favor" (id. ¶ 84), and that in so doing, "each was the agent of the other" (id. ¶ 29).

Plaintiff again attempts to sidestep his own allegations by arguing that Omar and Moubarak were not "disclosed" agents and that "no such agency existed here with respect to the [March Agreements]." (Pl. Opp. at 34-35.) This is a confused argument. First, agency is premised on allegations concerning the actual relationship between the defendants, not plaintiff's awareness of the subsequent purported misconduct. To apply the test as plaintiff insists would read into the rule a tort exception that plainly defeats its purpose. Not surprisingly, plaintiff's novel theory is contradicted by well-settled law. See Carroll, 374 F. Supp. 2d at 377 (plaintiffs cannot deny agency relationship existed because they alleged defendants acted as agents of each other in conspiracy to plaintiffs' detriment and had "acted together for years" to promote the apparently legitimate business strategy that ultimately harmed plaintiffs); Camferdam v. Ernst & Young, Int'l, Inc., 2004 U.S. Dist. LEXIS 2284, at *20 (S.D.N.Y. Feb. 13, 2004) (finding agency based on plaintiff's allegations that non-signatory and signatory defendants conspired because "[a] civil conspiracy is a kind of partnership, in which each member becomes the agent of the

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proven, he also makes an impermissible appeal to the alleged merits. It is beyond peradventure that the Court may not consider the merits when deciding defendants' motion. See AT&T Tech., 475 U.S. at 649; JLM Indus., 387 F.3d at 171-72.

other") (quotations and citations omitted).[17] Moreover, to the extent that plaintiff is asserting that the agency relationship in connection with the March Agreements and the dispute between the brothers was not known to plaintiff, again, his own pleading and undisputed facts defeat the contention. (See, e.g., Am. Compl. ¶ 23-29, 36 ("after . . . Omar had become active in the businesses in Kuwait, disputes began to develop between [the brothers]); Park Decl. ¶ 6 (Moubarak "advised Kutayba in the negotiations of the Agreements").)

Plaintiff's claims against Omar and Moubarak would also be arbitrable under Kuwaiti law. As explained by Dr. Al-Samdan, it would be appropriate under Kuwaiti law for an arbitrator to hear these claims given that "there is a clear and indisputable relationship between [Omar and Moubarak] and the subject matter of the arbitration including a relationship to both the Plaintiff and defendant Kutayba." (2d Al-Samdan Decl. ¶ 40; see also Al-Samdan Decl. ¶¶ 50-58.) Dr. Nasser agrees. (See Nasser Decl. ¶¶ 50-53.)

While Ms. Ali and Dr. El-Kosheri opine that Kuwaiti law does not permit a court to dismiss plaintiff's claims against Omar and Moubarak in favor of arbitration (see Ali Decl. ¶ 29-33; El-Kosheri Decl. ¶¶ 35-38), their opinions are definitively discredited by the Kuwaiti Court of First Instance's recent decision dismissing for lack of jurisdiction in light of the arbitration agreements a case brought by plaintiff against Kutayba and YAAS (which, like Omar and Moubarak, did not sign the March Agreements). That decision has now been affirmed by the Appellate Court. (See Declaration of Omar Al-Essa, dated Jan. 7, 2010, Ex 1.) Neither plaintiff nor his experts can therefore seriously dispute that Kuwaiti law does in fact permit a signatory's

[17] Contrary to plaintiff's suggestion, Ross did not require that any agency relationship be "disclosed" in order to have effect. Indeed, Ross cited with approval the Carroll decision cited above, which focused on the plaintiffs' allegations that, as here, repeatedly characterized the non-signatory defendants as agents of the signatory defendant. Ross, 547 F.3d at 144-45.

claims against a non-signatory to be arbitrated or that the very arbitration clauses at issue in this case are, on their face, sufficiently broad to apply to defendants Omar and Moubarak.[18]

CONCLUSION

For the foregoing reasons, and for the reasons stated in defendants' initial brief and declarations, defendants' motion to dismiss the Amended Complaint or, in the alternative, stay this action pending arbitration in Kuwait, should be granted.

Dated: New York, New York
January 8, 2010

Respectfully submitted,

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[18] Plaintiff purports to reserve his rights to argue that the "Thomson-CSF theories would violate the New York Convention." (Pl. Opp. at 29 n.26.) Plaintiff was required to make any arguments as to why his claims against defendants Kutayba, Omar, or Moubarak should not be dismissed in favor of arbitration in his opposition brief and waived them when he chose not to do so.