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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	:	

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

June 11, 2010

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Plaintiff, Bassam Y. Alghanim ("Bassam"), respectfully submits this supplemental memorandum of law in further opposition to Defendants' motions to dismiss the First Amended Complaint and/or stay this action pending arbitration ("Defendants' Motion").[1]

OVERVIEW

This supplemental memorandum of law updates the Court on a number of legal and factual developments bearing directly on Defendants' Motion.

First, recent federal case law confirms that, contrary to Defendants' assertion that the Court should review the question of the scope of the alleged dispute resolution clauses in this case by reference to federal case law, to the exclusion of Kuwait law, Kuwait law governs this issue. (*See* Point I below.)

Second, contrary to Defendants' assertions, made in their Reply papers, that Plaintiff's experts may have been "misled" when opining that Bassam's claims in this case are not capable of being arbitrated in Kuwait, Plaintiff's experts now confirm that (a) they were not misled, (b) they fully understood the nature of Plaintiff's claims when rendering their original opinions, and (c) Bassam's claims in the First Amended Complaint are not capable of arbitration in Kuwait. (*See* Point II below.)

Third, in light of a recent opinion issued by the Court of Cassation prosecution in Kuwait, it now appears that the Court of Cassation, the highest court in Kuwait, will find that the alleged

[1] Unless otherwise indicated herein, abbreviations and capitalized terms have the same meaning as in Plaintiff's December 18, 2009 Memorandum of Law. This Memorandum also refers to: (1) the Supplemental Declaration of Meshari Al Osaimi ("Al Osaimi 2d Decl."), (2) the Second Declaration of Reema Ali ("Ali 2d Decl."); (3) the Second Declaration of Ahmed El-Kosheri ("El-Kosheri 2d Decl."); and (4) the Supplemental Declaration of John L. Gardiner ("Gardiner Decl.").

arbitration clauses in the March Instruments are *not* valid arbitration clauses at all. Plainly, if that were to occur, it would sound the death knell to Defendants' Motion. (*See* Point III below).[2]

Fourth, even if the Court were to analyze the question of arbitrability, in the first instance, through the prism of federal law (as Defendants urge), Defendants' Motion would still have to be denied. The United States Supreme Court has recently reaffirmed that arbitration is a matter of consent, not coercion, and the unrebutted evidence on this motion is that Bassam never agreed to arbitrate these claims with Kutayba, much less with Omar and Waleed Moubarak, with whom he has no agreement on any subject. (*See* Point IV below).

Fifth, even if the Court concludes that Bassam's email hacking claims fall within the scope of the alleged arbitration clauses under federal law, a recent decision by the Second Circuit makes clear that, unless Defendants *clearly demonstrate* that Bassam's email hacking claims, including his statutory claims, can be vindicated in arbitration in Kuwait, the motion to compel arbitration must be denied. (*See* Point V below.)

Finally, there is simply no valid basis for Omar and Waleed Moubarak's claim, as non-signatories, that they can compel arbitration of the causes of action alleged against them. As a result, the action herein against them must proceed regardless of the scope of the alleged arbitration clauses between Kutayba and Bassam. (*See* Point VI below).

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[2] As the Court is aware, Bassam had assumed, *arguendo*, for purposes of this motion only that the dispute resolution clauses in the March Instruments were binding arbitration clauses – while noting that he was continuing to contest this issue before the Kuwait courts. (Pl. 12/18/09 Mem. at 2 n.2.) In light of the Court of Cassation prosecution's opinion that the clauses are not valid arbitration clauses at all, it appears that this threshold issue is likely to be resolved in Bassam's favor in Kuwait and that would render moot Defendants' Motion.

I. Recent Appellate Jurisprudence Confirms that Kuwait Law, Not FAA Case Law, Applies in Determining the Scope of the Alleged Dispute Resolution Clauses

As the Court is aware, Bassam has maintained that the laws of Kuwait govern all issues of arbitrability in this motion, including issues of scope. (Pl. 12/18/09 Mem. at 12-14.) Defendants, however, argue that the Court should interpret the scope of the so-called arbitration clauses (and who can compel arbitration under them) according to principles of "federal law." (Def. 11/23/09 Mem. at 10.)

Recent federal court appellate jurisprudence, however, expressly confirms that *Kuwait law* (the law of the state), not federal case law, governs the disputed issues of arbitrability in this case, and requires rejection of Defendants' attempts to apply federal case law in determining (a) the scope of the alleged arbitration clauses and (b) the question of whether the non-signatories, Omar and Waleed Moubarak, can compel arbitration.

In *Todd v. Steamship Mutual Underwriting Ass'n (Bermuda) Ltd.*, 601 F.3d 329 (5th Cir. 2010), the Fifth Circuit considered the impact of the United States Supreme Court's decision in *Arthur Anderson LLP v. Carlisle*, 129 S. Ct. 1896 (2009) on the question of which law governs arbitrability in cases, like the present one, arising under the New York Convention. Quoting *Carlisle*, the Fifth Circuit held that a federal district court must look to "'principles of *state contract law*,'" not federal law, in order to determine the scope of arbitration agreements. *See Todd*, 601 F.3d at 333-34 (emphasis added) (quoting *Carlisle*, 129 S. Ct. at 1902).[3]

Of critical importance since it relates to the claims in this case against Omar and Waleed Moubarak, neither of whom is a party to the March Instruments, *Todd* also unequivocally held

[3] In *Todd*, the Fifth Circuit reversed a ruling by the district court that an injured worker, Anthony Todd, could not be compelled to arbitrate and remanded the case for a determination of the issue under the applicable state law.

that "[i]n *Carlisle,* the Supreme Court *made clear* that state law controls whether an arbitration clause can apply to nonsignatories." *Id.* (emphasis added) (citing *Carlisle*, 129 S. Ct. at 1902).[4]

II. The Claims Brought in this Action Are Not Arbitrable Under Kuwait Law

Plaintiff has presented expert testimony on Kuwait law from Ms. Reema Ali, whose expert testimony on Kuwait law has been accepted on numerous occasions by United States courts (Ali 1st Decl. ¶¶ 1-2),[5] and Dr. Ahmed El-Kosheri, a senior member of the Egyptian bar[6] and internationally-renowned jurist and arbitration expert who is not only an expert on Kuwait law but has also practiced as a senior legal advisor to, and advocate for, the Kuwait government (El-Kosheri 1st Decl. ¶¶ 1-6). Ms. Ali and Professor El-Kosheri have demonstrated, by reference to extensive authority, that:

(1) The email hacking claims are not capable of arbitration in Kuwait because they are matters that implicate criminal behavior and public order – which are reserved exclusively for the courts as a matter of Kuwait law. (Ali 1st Decl. ¶¶ 6(c), 23, 36-38; El-Kosheri 1st Decl. ¶¶ 11(i)-(ii), 15-32, 39-41.)

(2) Article 173 of the Kuwait Civil & Commercial Procedures Code 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 a matter of Kuwait law, *solh* is prohibited in matters affecting "public order," such as intentional tortious conduct. (Ali 1st Decl. ¶¶ 11-19; El-Kosheri 1st Decl. ¶¶ 20-27.)

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[4] Although *Carlisle* primarily dealt with appellate jurisdiction under 9 U.S.C. § 16, it also addressed choice of law issues in cases governed by the FAA. Specifically, the Supreme Court noted that, although Section 2 of the FAA requires courts "to place [arbitration] agreements upon the same footing as other contracts," and while Section 3 of the FAA "allows litigants already in federal court to invoke agreements made enforceable by § 2," "*[n]either provision purports to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)*." *Carlisle*, 129 S. Ct. at 1901-02 (emphasis added). Thus, the issue of whether non-signatories could be bound by (or invoke) arbitration agreements was one of "state law." *Id.* at 1902.

[5] *See, e.g., Robertson v. Am. Life Ins. Co.*, No. 05C-07-108, 2006 Del. Super. LEXIS 413, at *7 (Del. Super. Ct. Oct. 13, 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.").

[6] The Individual Defendants' experts admit that Egyptian law has "great influence on the implementation of Kuwaiti law." (Al Zaid 1st Decl. ¶ 10.)

(3) Moreover, arbitration clauses in Kuwait are construed narrowly, meaning that the alleged dispute resolution clauses in the March Instruments will be 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 1st Decl. ¶¶ 20-28; El-Kosheri 1st Decl. ¶¶ 32-34.) Any contrary interpretation not only would unreasonably conflict with the parties' stated intentions (Bassam Decl. ¶ 2; *see also* Ali 1st Decl. ¶ 28; El-Kosheri 1st Decl. ¶¶ 11(iii); 34), it would also violate Article 173 of the Kuwait Civil & Commercial Procedures Code. (Ali 1st Decl. ¶¶ 23-26.)

(4) Plaintiff's claims against Omar and Moubarak cannot possibly be arbitrated in Kuwait because, 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 Kuwait law. (Ali 1st Decl. ¶¶ 6(b), 29-33; El-Kosheri 1st Decl. ¶¶ 11(v), 35-38.)

In their Reply, Defendants submitted two further declarations from their Kuwait law experts, Drs. Al Zaid and Al-Samdan. Although Defendants' experts concede many of the points made by Ms. Ali and Dr. El-Kosheri, they continue to claim that Plaintiff's email hacking claims are capable of arbitration under Kuwait law, notwithstanding the limitations on arbitration of "public order" matters imposed by Article 173 of the Kuwait Civil & Commercial Procedures Code and the principle of *Solh*. (Al Zaid 2d Decl. ¶¶ 8-29; Al-Samdan 2d Decl. ¶¶ 9-28.) Tellingly, however, Defendants' experts' *only* basis for claiming that "public order" is not implicated in the present case is their conclusory claim – unsupported by any authority, and contradicted by the authorities cited by Plaintiff's experts – that "public order" can never arise in any civil case, but only arises in criminal cases.

In an effort to explain the difference between the conclusions of their experts and Plaintiff's experts, Defendants suggested that Plaintiff's experts were "likely misled by the description of plaintiff's causes of action evidently provided to them by [plaintiff's] counsel," which, Defendants speculated, "confuse[d]" them into thinking that the present proceeding was a criminal prosecution. (Reply at 1, 12 n.8.)

Defendants' speculation that Plaintiff's highly qualified and experienced experts – one of whom is a former judge of the International Court of Justice and the other a commercial lawyer of over 25 years' experience, including testifying as an expert before the courts in the United States – were "misled" was, on its face, without basis. It became doubly so when one examined the supposedly "misl[eading]" document – which is a plain vanilla (and completely accurate) summary of Plaintiff's ten causes of action. (*See* Ali 1st Decl. Ex. B.)

In all events, lest there be any doubt about this issue, the Second Declarations of Ms. Ali and Dr. El-Kosheri make clear that neither of them has been laboring under any misunderstanding as to the nature of this proceeding. (*See* Ali 2d Decl. ¶¶ 4, 6-8; El-Kosheri 2d Decl. ¶¶ 4-7.) Having addressed that baseless assertion by Defendants, both Ms. Ali and Dr. El-Kosheri make clear that:

- In their opinion – and contrary to the conclusory opinion of Defendants' experts that "Public Order" issues can never preclude arbitration of a civil claim (Al Zaid 2d Decl. ¶¶ 12-15, 18; Al-Samdan 2d Decl. ¶¶ 15-18), Kuwait law is clear that "Public Order" is implicated in any case where, as here, a claim raises *issues* of criminal misconduct. (Ali 2d Decl. ¶¶ 9-25; El-Kosheri 2d Decl. ¶¶ 8-13.) Because the e-mail hacking claims at issue in the First Amended Complaint thus raise matters of "Public Order" that are incapable of *solh* they are non-arbitrable as a matter of Kuwait law. (Ali 2d Decl. ¶¶ 22, 32; El-Kosheri 2d Decl. ¶ 9.)

- Moreover, notwithstanding Defendants' experts' conclusory claims that parties are free to agree to arbitration of future, as yet uncommitted intentional torts and statutory violations (Al Zaid 2d Decl. ¶¶ 16-17; Al-Samdan 2d Decl. ¶¶ 23-25), Article 173 of the Kuwait Civil & Commercial Procedures Code does not permit parties to agree to arbitrate such matters. (Ali 2d Decl. ¶¶ 26-31; El-Kosheri 2d Decl. ¶ 18.)

- If the claims in the First Amended Complaint were presented to a Kuwait arbitrator, the Kuwait arbitrator would be obligated to refrain from deciding them, because they would be outside his or her permitted jurisdiction under Kuwait law. (Ali 2d Decl. ¶¶ 25, 32(b); El-Kosheri 2d Decl. ¶¶ 16-20.)

- All of Ms. Ali's and Dr. El-Kosheri's other opinions as stated in their First Reports remain unchanged. (Ali 2d Decl. ¶ 34; El-Kosheri 2d Decl. ¶ 23.)

Accordingly, the credible expert evidence conclusively demonstrates that Bassam's claims are not capable of arbitration as a matter of Kuwait law, even assuming the clauses to be valid arbitration clauses, which is now in serious doubt. (*See* Point III below).

III. The Kuwait Court of Cassation Appears Likely to Find that the March Instruments Do Not Contain Binding Arbitration Agreements At All

Defendants recently submitted a Second and Third Declaration of Omar Al-Essa, Kutayba and Omar's Kuwait counsel, showing that certain intermediate and first-instance courts in Kuwait had interpreted the March Instruments as containing valid and binding arbitration clauses. As is now set forth in the Supplemental Declaration of Meshari Al Osaimi submitted herewith, Bassam has appealed this issue to the Kuwait Court of Cassation, the highest court in Kuwait.

In the context of that appeal, the Court of Cassation office of prosecution (which reviews the merits of an appeal to the Court of Cassation and issues an opinion on whether the appeal should be formally accepted by the full court) recently issued an opinion that the intermediate appellate court decision transmitted to the Court by Mr. Al Essa, holding that the March Instruments contained a valid and binding arbitration clause, is "faulty" and "must be cassated." (Al Osaimi 2d Decl. ¶ 10 & Exhibit A.) The Court of Cassation prosecution has, therefore, recommended that Bassam's appeal be formally accepted by the full Court of Cassation and that the intermediate appellate court decision be overturned. (*Id.*)

As Mr. Al Osaimi notes, the opinion of the Court of Cassation office of prosecution is always taken into consideration by the full Court of Cassation. It is, therefore, Mr. Al Osaimi's view that Bassam's appeal is likely to be successful and that the Court of Cassation will hold that the March Instruments do not contain valid and binding arbitration agreements. (*Id.* ¶ 13.) He

expects that the Court of Cassation is likely to make such decision within the next six to eight months. (*Id.*)

Plainly, if the Court of Cassation rules that the March Instruments do not contain valid arbitration clauses at all, then Defendants' position on arbitrability will become utterly futile and unsupported. A final adjudication by Kuwait's highest court would constitute a definitive ruling on the validity of the dispute resolution clauses and would, thus, constitute a fatal blow to Defendants' attempts to seek arbitration of Bassam's claims here.

IV. The U.S. Supreme Court's Decision in *Stolt-Nielsen* Reaffirms the Fundamental Requirement of "Consent" to Arbitration – Which is Wholly Absent in This Case

The United States Supreme Court's recent decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010), provides confirmation, if it were needed, that arbitration "'is a matter of consent, not coercion.'" 130 S. Ct. at 1773 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). Here, the unrebutted evidence is that Bassam never intended to arbitrate his email hacking scheme allegations with his brother. (*See* Bassam Decl. ¶¶ 2-4 (testifying that it was never contemplated that the March 12 Agreement would represent an open-ended clause covering future criminal activity); *id.* ¶ 8 (Bassam testifying that he never agreed to arbitrate any subject with Omar or Waleed Moubarak, much less the issues arising from their hacking into his private emails).)

As in *Stolt-Nielsen*, any finding that Bassam is required to arbitrate would be "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." 130 S. Ct. at 1775. Standing alone, this warrants denial of Defendants' Motion.

It certainly also delivers a death blow to the disingenuous efforts by Omar and Waleed Moubarak to compel arbitration as non-signatories. *Stolt-Nielsen* confirms that a party cannot be compelled to arbitrate with persons with whom he has not clearly manifested an intention to

arbitrate through his arbitration agreement. There is no way that Omar and Waleed Moubarak can credibly claim that Bassam intended to arbitrate his claims against them for their role in orchestrating the email hacking scheme alleged in the First Amended Complaint - a role that is further amplified and confirmed in the Supplemental Gardiner Declaration submitted herewith.

V. Even if Federal Case Law Were to Apply, the Second Circuit Has Reiterated that Arbitration Cannot Be Compelled in Circumstances Such as the Present Case

Even were the Court to agree with Defendants that federal common law applies to issues of arbitrability, a recent Second Circuit decision makes clear that the Defendants' Motion still must be denied. In *Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115 (2d Cir. 2010), the plaintiff filed an employment discrimination lawsuit under Title VII and various state law analogs. Defendants moved to compel arbitration. Their motion was granted, but only after the Second Circuit provided a "Note of Caution," stating, *inter alia*:

> Although the enforceability of an arbitration agreement is decided in the first place under the applicable body of state law, Section 2 of the FAA also "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the" statute. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Pursuant to this body of law it has long been "clear that statutory claims may be the subject of an arbitration agreement." *Gilmer* [*v. Interstate/Johnson Lane Corp.*], 500 U.S. [20,] 26 [(1991)]. Still, however, ***a federal court will compel arbitration of a statutory claim only if it is clear that "the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum,"*** such that the statute under which its claims are brought "will continue to serve both its remedial and deterrent function." *Mitsubishi* [*Motors Corp. v. Soler Chrysler-Plymouth, Inc.*], 473 U.S. [614,] 637 [(1985)].

Ragone, 595 F.3d at 125 (emphasis added) (parallel citations omitted).[7]

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[7] This statement is fully consonant with Plaintiff's previously-expressed position:

> Defendants' contention that this Court somehow could compel arbitration of Plaintiff's email hacking claims in Kuwait without first determining whether those claims are capable of being arbitrated in Kuwait (an issue of Kuwait law) runs afoul of both (i) the New York Convention (which requires that disputes be shown to be "capable of settlement by arbitration" and that the arbitration agreement be "[]capable of being performed," *see* New York Convention, arts. II(1),

(cont'd)

Here, Defendants have completely failed to offer any credible evidence making it "clear" that Bassam's statutory causes of action, which serve both a remedial and a deterrent function, are capable of vindication in an arbitration proceeding held in Kuwait before the Kuwait Prime Minister. To the contrary, Plaintiff's experts have established that they are not. (*See supra* at 4-7.) In accordance with the Second Circuit's decision in *Ragone*, therefore, this Court should "have little hesitation in condemning the agreement as against public policy." *Ragone*, 595 F.3d at 125 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 at 637 n.19 (1985)).

VI. The Claims Against Omar and Waleed Moubarak Must Proceed In All Events

Even if (a) the clauses are valid arbitration clauses (which is seriously in doubt), (b) Bassam's claims in the First Amended Complaint were held to fall within the scope of the alleged dispute resolution clauses as a matter of Kuwait law (which they should not be), and (c) the claims are capable of being arbitrated as matter of Kuwait law (which also is not the case), nevertheless there is no valid basis for Omar or Waleed Moubarak to compel arbitration of the claims against them. In this regard, as shown in the accompanying Supplemental Declaration of Meshari Al Osaimi, defendants Omar, Yusuf Ahmed Alghanim and Sons W.L.L., and Alghanim Industries Company W.L.L. have successfully argued to the Kuwait Stock Exchange that the MOU is personal to Bassam and Kutayba and, therefore, they have no rights or obligations thereunder. (*See* Al Osaimi 2d Decl. ¶¶ 15-21.) It is wholly inconsistent for them to seek to

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(3)) and (ii) the Supreme Court's statement in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), that the referral of U.S. statutory claims to ***foreign arbitration is acceptable "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum*** . . . ." *Id.* at 637 (emphasis added).

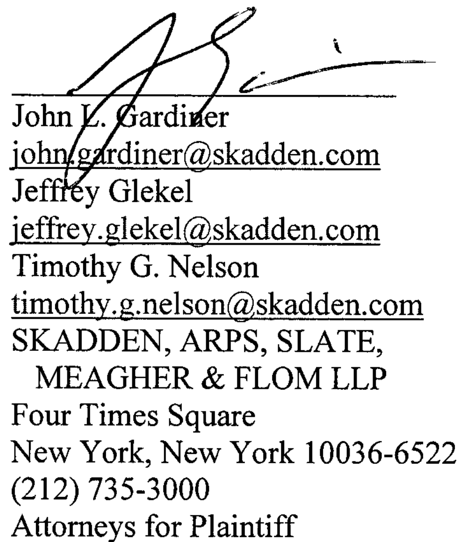
(Pl. 1/29/2010 Ltr. to the Court at 1.)

invoke the alleged dispute resolution clauses in the March Instruments in this proceeding and their efforts to compel arbitration as non-signatories should be rejected for this additional reason.

CONCLUSION

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

Dated: New York, New York
June 11, 2010



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