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 SUPPLEMENTAL 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's claims are no doubt "related to" the "subject matter" of the March Agreements and governed by their arbitration provisions. According to the Amended Complaint, defendants engaged in an alleged "hacking" scheme for the very purpose of denying plaintiff his rights under those same agreements. Plaintiff's latest attempt to shift the Court's focus away from this obvious fact – by turning the central issue before the Court into one of Kuwaiti law and public policy – is a failure. The additional round of briefing initiated at plaintiff's request merely confirms that plaintiff is unable to point to any authority to justify his assertion that the Court should apply Kuwaiti law for the purpose of resolving the questions before the Court. And even if it did apply, Kuwaiti law is not materially different than U.S. law and therefore similarly compels dismissal of plaintiff's claims in favor of arbitration.

ARGUMENT

I. U.S. LAW APPLIES IN ALL RESPECTS

Defendants' briefs demonstrate that U.S. courts: (i) apply federal law to determine what and with whom a party agreed to arbitrate when agreements are silent as to choice of law; and (ii) look to U.S. public policy when deciding whether a subject is "capable of arbitration" under the New York Convention. (See Defs. Br. at 10; Defs. Reply at 3-4 (collecting cases).) Plaintiff's opposition papers, on the other hand, suffer from a glaring omission: plaintiff cannot point to any authority that actually supports his claim that foreign law governs the questions presented here. There can therefore be no doubt that U.S. law applies in all respects.

In his supplemental brief, plaintiff claims that the Fifth Circuit's recent decision in Todd v. Steamship Mutual Underwriting Association (Bermuda), Limited, 601 F.3d 329 (5th Cir. 2010), "confirms" that Kuwaiti law governs matters of contractual interpretation because that Court applied "principles of state contract law," not federal law, in order to determine the

scope of arbitration agreements. (Pl. Supp. at 3.) Steamship Mutual is entirely unremarkable, and irrelevant. There, the parties' agreement included an explicit choice of law clause. Here, the agreements do not. In the absence of a choice of law clause, federal law applies. (See Defs. Br. at 10; Defs. Reply at 3-4.) Steamship Mutual says nothing to the contrary.

II. PLAINTIFF'S CLAIMS ARE ARBITRABLE UNDER U.S. LAW

Plaintiff attempts to sidestep the choice of law issue altogether by arguing that this Court should refuse arbitration because plaintiff's claims are not "capable of vindication in an arbitration proceeding held in Kuwait before the Kuwaiti Prime Minister." (Pl. Supp. at 9-10.) But the authority on which he relies – Ragone v. Atlantic Video at Manhattan Center, 595 F.3d 115 (2d Cir. 2010) – provides no support for plaintiff's argument.

In Ragone, the Second Circuit expressed concern that an agreement to arbitrate in the United States violated U.S. public policy because its very terms diminished the plaintiff's substantive rights under Title VII by imposing limitations prohibited by federal law. Id. at 125-26. In stark contrast, the March Agreements contain no analogous terms. Rather, both contracts permit the parties to arbitrate "any disputes" without restricting their rights. (Declaration of Omar Al-Essa ("First Al-Essa Decl."), dated Nov. 18, 2009, Exs. B, C.)

Moreover, in Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, a case on which plaintiff relies and that also involved claims arising under a federal statute that provided for both civil and criminal liability, the Supreme Court warned that U.S. courts asked to compel arbitration under the Convention should not decline to enforce agreements to arbitrate in foreign countries based on speculation as to how a foreign arbitrator might resolve the dispute. 473 U.S. 614, 636-37 (1988). Rather, Supreme Court guidance is clear that when asked to compel arbitration under the Convention, a court is to consider the parties' intent as expressed by

the plain language of the arbitration agreement in light of the "emphatic" federal policy in favor of arbitration. Id.

III. PLAINTIFF'S CLAIMS ARE ARBITRABLE UNDER KUWAITI LAW

Plaintiff expends much effort to make a familiar concept (settlement), sound foreign (solh, or conciliation). But as explained by Dr. Al Zaid, "[a] simple way of determining whether a dispute can be conciliated and therefore arbitrated is to determine whether the parties can settle the matter outside of the courts." (Third Al Zaid Decl. ¶ 19.) Kuwaiti law does not materially differ from U.S. law in this respect.

Nor does Kuwaiti law differ from U.S. law with respect to the fact that certain matters of public order are not capable of settlement, and therefore arbitration. According to Dr. Al-Samdan, under Kuwaiti law, "[t]he general framework that is provided for determining whether a subject matter pertains to Public Order is, however, whether the issue is reserved to be handled by the State Judiciary." (Second Al-Samdan Decl. ¶ 13.)[1] Similarly, 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 n.21. Plaintiff cannot, however, argue that U.S. Congress intended for U.S. courts to exercise exclusive jurisdiction over the types of claims alleged in this action – it is generally accepted that plaintiff's claims are arbitrable under U.S. law. (Defs. Reply at 2-3.) This fact, which plaintiff ignores, is fatal to his argument. A Kuwaiti court would have no basis whatsoever to decide that the nature of plaintiff's claims are in fact criminal, and thus not capable of settlement under

[1] Plaintiff argues that Drs. Al-Samdan and Al-Zaid misunderstand the concept of public order to be limited to criminal matters. (Pl. Supp. at 5.) However, even a cursory review of their declarations makes clear that Drs. Al-Samdan and Al Zaid's understanding of public order is much broader. (Third Al-Samdan Decl. ¶ 7; Third Al Zaid Decl. ¶ 19.)

Kuwaiti law, if the law under which they arise permits those claims to be settled by private parties through arbitration. (Pl. Supp. at 4-8.)

In his supplemental brief, plaintiff offers no new arguments or law to respond to the opinions offered by defendants' Kuwaiti law experts. Instead, plaintiff recycles the opinions his experts offered in connection with his opposition brief. (Pl. Supp. at 4-6.) Plaintiff's experts essentially do the same, using their second declarations as an opportunity to review and restate the opinions they previously expressed in their first declarations.

Plaintiff's experts make four primary points, all of which are without merit.

First, plaintiff's experts opine that plaintiff's tort claims are not capable of solh because they are really criminal in nature. (Id.) Initially, Dr. El-Kosheri and Ms. Ali opined that Kuwaiti law would prohibit arbitration of the present dispute because an arbitrator cannot determine criminal guilt or impose criminal penalties. (See Ali Decl. ¶¶ 19, 28, 28(e); El-Kosheri Decl. ¶¶ 14-28.) Having acknowledged that plaintiff's claims are civil, they nonetheless insist that they are not capable of settlement in Kuwait because they concern criminal conduct. According to plaintiff's experts, plaintiff's claims "relate to" public order because many of the facts required to establish civil liability are also potentially relevant to establish criminal guilt. (See Second El-Kosheri Decl. ¶¶ 5-13; Second Ali Decl. ¶¶ 5-25.)

Plaintiff's attempt to recast his expert's opinions does not make them any more valid or relevant to the instant motion. It is beyond dispute that the instant lawsuit involves civil claims that can be resolved by conciliation. It also is beyond dispute that resolution of the instant lawsuit does not require a determination of criminal liability and will not establish criminal liability against a party. Those facts alone undermine plaintiff's position. Moreover, this lawsuit involves a dispute about the financial consequences of defendants' alleged improper conduct.

And both parties' experts agree that Kuwaiti law permits the arbitration of financial rights arising from the commission of a crime. (Third Al Zaid Decl. ¶ 16, Second Al-Samdan Decl. ¶ 13; Second Ali Decl. ¶ 23.)

Furthermore, plaintiff's insistence that "'Public Order' is implicated in any case where, as here, a claim raises issues of criminal misconduct" proves too much. (Pl. Supp. at 6.) It is often the case that civil disputes, such as those concerning breach of contract claims, allege facts that arguably raise issues of criminal misconduct. For example, if the plaintiff alleges that the defendant made a material misrepresentation at the time the agreement was reached, the facts relevant to proving those allegations may also raise issues of criminal fraud. Plaintiff's interpretation of Kuwaiti law would allow plaintiffs to escape arbitration merely by styling contract claims as claims sounding in fraud. As explained by Drs. Al-Samdan and Al Zaid, this is not the law in Kuwait.

Second, Ms. Ali opines that civil claims may not be the proper subject of arbitration if they arise from a contract whose subject matter is unlawful. (See Second Ali Decl. ¶ 16.) This doctrine – which is similar to U.S. law[2] – is inapplicable because there is no allegation that the subject matter of the March Agreements is unlawful. To the contrary, the agreements address two private parties' rights arising out of and related to the division of their family's assets and business.

Third, Ms. Ali's second declaration repeats her opinion that Article 254 of the Kuwaiti civil code prohibits parties from entering agreements to arbitrate future torts. (Second Ali Decl. ¶¶ 17-21.) However, the plain language of Article 254 makes clear that Article 254

[2] 15-79 Corbin on Contracts § 79.1 ("A contract may be contrary to public policy because the performance that is bargained for is against public policy. For example, a contract to set up a gaming business may be contrary to public policy because the creation of a gaming enterprise and gaming are illegal.")

only bars agreements to arbitrate future torts if the agreement "has the effect of exonerating liability from the tort." (Art. 254, attached as Ex. D to Ali Decl.) Indeed, even Ms. Ali's own authorities make clear that this provision may mean that the parties "'may not agree to waive tort liability or mitigation of liability.'" (Second Ali Decl. ¶ 18 (quoting Al-Sanhuri, Al-Waseet Fi Sharh El Qanoon El Madani, vol. 1 p. 980 (1952), attached as Ex. 2).) This doctrine – which once again is comparable to U.S. law[3] – has no application here. As Drs. Al-Samdan and Al Zaid point out, the March Agreements contain no terms that exonerate liability. (Third Al-Samdan Decl. ¶ 11; Third Al Zaid Decl. ¶ 14.) In fact, the arbitration clauses in the March Agreements permit the parties to arbitrate "any disputes" without restricting their rights, specifically because the parties intended to provide an alternative forum for the resolution of their rights. (First Al-Essa Decl., Exs. B, C; Third Al-Samdan Decl. ¶ 11; Third Al Zaid Decl. ¶¶ 14-15.)

Finally, in her second declaration, Ms. Ali repeats her opinion that parties can only agree to arbitrate future contractual disputes and not non-contractual ones under Article 173. (Second Ali Decl. ¶¶ 26-31.) Neither the actual language nor the application of Article 173 is as limiting as Ms. Ali suggests. (Third Al-Samdan Decl. ¶¶ 15-20.) As Dr. Al-Samdan explains, and according to the official Kuwaiti Ministry of Justice's English version of the statute, Article 173 allows parties to agree to arbitrate "all disputes arising from the implementation of a certain contract." (Id. ¶ 16. See also Al-Samdan Decl., Ex. E.) Accordingly, arbitration clauses will not be interpreted to be limited to contractual disputes unless such restriction is expressly agreed upon by the parties. (Third Al-Samdan Decl. ¶¶ 17-20.) This principle is demonstrated not only in the most relevant Kuwaiti Court of Cassation

[3] See Ragone, 595 F.3d at 125-26 (questioning enforceability of an arbitration provision that limited plaintiff's remedies for future misconduct).

decision (Third Al-Samdan Decl. ¶ 17 (explaining Second Al-Samdan Decl., Ex. Q)), but also in the authority cited by Dr. El-Kosheri (Third Al-Samdan Decl. ¶ 19 (explaining El-Kosheri Decl., Ex. 9)). The arbitration clauses contained in the March Agreements do not express any such restrictions and instead provide broadly that "any dispute arising in the future between [the parties] related to the subject matter of this agreement" will be resolved by arbitration. (First Al-Essa Decl., Exs. B, C; Third Al-Samdan Decl. ¶ 20, Second Al Zaid Decl. ¶ 25.)

IV. THE ARBITRATION AGREEMENTS ARE VALID UNDER KUWAITI LAW

In his response to defendants' motion, plaintiff explicitly stated that he assumes for the purpose of defendants' motion "that the March Instruments are binding contracts and that the dispute resolution clauses contained therein are binding arbitration agreements." (Pl. Opp. at n.2.) Despite this concession, plaintiff now, for the first time, appears to challenge those agreements based on the Cassation prosecutor's recommendation that the Court of Cassation review one of the two appellate court judgments holding that the agreements to arbitrate are valid. (Pl. Supp. at 7-8.)

Although the Advisory Committee decided on June 23, 2010 to send the appeal to the Court of Cassation for review, that decision is not indicative of the Court of Cassation's ultimate judgment. (Third Al-Samdan Decl. ¶ 28; Fourth Al-Essa Decl. ¶¶ 9, 11.) Each of the four Kuwaiti courts that has been presented with the question (a total of 12 judges) has decided that the arbitration clauses in the March Agreements are valid and binding, and therefore such courts do not have jurisdiction to hear disputes related to those agreements. These decisions remain binding and enforceable rulings of the Kuwaiti courts. (Third Al-Samdan Decl. ¶¶ 28-29; Fourth Al-Essa Decl.¶ 7.) Plaintiff nonetheless suggests that this Court deny defendants' motion based solely on speculation by plaintiff's Kuwaiti counsel (Mr. Al-Osaimi) concerning how the Court of Cassation will decide the case. Plaintiff's argument should be rejected out of hand. To

the extent this Court looks to the law of Kuwait, it should follow the decisions of the Kuwaiti courts, not the speculation of plaintiff's lawyer.[4]

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

Plaintiff also argues that even if his claims are arbitrable against defendant Kutayba, the Supreme Court's recent decision in Stolt-Nielsen v. AnimalFeeds International Corporation, 130 S. Ct. 1758 (2010), forecloses the ability of defendants Omar and Moubarak to compel arbitration. (Pl. Supp. at 8-9.) However, plaintiff fails to mention that Stolt-Nielsen addressed a very specific question of law that is not before this Court: whether class arbitration can be imposed where there was "no agreement" on the issue. Citing the unique policy considerations raised by class actions – including that it requires the resolution of "many disputes between hundreds or perhaps even thousands of parties" and the adjudication of the rights of "absent" parties – the Court held that it could not. Id. at 1776.

The concerns that animated the Supreme Court's decision in Stolt-Nielsen are entirely absent here. Plaintiff does not assert class claims, and the non-signatories not only are affiliated with a party to the agreements and were involved in their negotiation and performance, but also are alleged to be part of a single conspiracy to deprive plaintiff of his rights under a single set of agreements. Moreover, the factual allegations in the Amended Complaint are indistinguishable as pled with respect to these defendants Kutayba, Omar and Moubarak. (See, e.g., Am. Compl. ¶¶ 13, 14, 57, 67, 73, 80, 84, 108, 112, 117, 124, 137, 148, 158, 166, 171, 186, 189.) Under firmly-rooted Second Circuit law, such relatedness is sufficient to estop a party from avoiding arbitration. (See Defs. Reply at 14-20 (collecting cases).)

[4] Obtaining a reversal in that case is not as easy as plaintiff's Kuwaiti counsel suggests. To the contrary, plaintiff faces many obstacles. As explained by Dr. Al-Samdan, plaintiff would first need to persuade the Court of Cassation to "overturn existing legal principles and introduce new requirements to the law of arbitration," before the Court could rule in his favor. (Third Al-Samdan Decl. ¶ 30.)

Plaintiff also relies on the Fifth Circuit's decision in Steamship Mutual to argue that state law applies to determine whether non-signatories can compel arbitration. As discussed above, Steamship Mutual involved an explicit choice of law provision, and did not in any way disturb the law in this Circuit that federal law applies in the absence of a choice of law clause. (See Defs. Br. at 10; Defs. Reply at 3-4.) This applies equally to the question of whether non-signatories may compel arbitration.

Plaintiff's reliance on Arthur Andersen LLP v. Carlisle, 129 S. Ct. 1896 (2009), is equally misplaced. As a starting point, Carlisle involved a dispute regarding appellate jurisdiction, and the question of which state law applied was not before the Court or even briefed. Id. at 1903. Moreover, while the Court ruled that – consistent with the strong federal policy favoring arbitration – non-signatories (such as Omar and Moubarak) can enforce arbitration rights to the extent permitted by state law, it did not render invalid numerous other federal cases that recognize non-signatory rights pursuant to federal law. Indeed, in Ragone, a case decided nearly one year after Carlisle, the Second Circuit found its prior decisions on the issue undisturbed. 595 F.3d at 126-27 ("Under principles of estoppel, a non-signatory to an arbitration agreement may compel a signatory to that agreement to arbitrate a dispute where a careful review of [the facts and circumstances] . . . discloses that 'the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.'") (citing Choctaw Generation Ltd. P'ship v. Am. Home Assurance Co., 271 F.3d 403, 406 (2d Cir. 2001)).

In any event, even if Kuwaiti law did apply, the outcome would be the same. Kuwaiti law, like federal law, permits non-signatories to arbitrate their claims against a signatory to an arbitration agreement. (Second Al Zaid Decl. ¶¶ 30-32; Second Al-Samdan Decl. ¶¶ 39-

41.) Plaintiff's experts' second declarations are silent on the issue and do not respond to the opinions offered by Drs. Al-Samdan and Al Zaid in their reply declarations. Plaintiff's experts similarly ignore the Kuwaiti appellate court opinions that specifically held that plaintiff's claims against non-signatories to the March Agreements are arbitrable pursuant to the same arbitration agreements at issue here. (Second Al Zaid Decl. ¶¶ 32; Second Al-Samdan Decl. ¶¶ 41.)

Finally, plaintiff points to a complaint filed with the Kuwaiti Stock Exchange in 2009 – alleging violations of requirements for disclosure of participations in Kuwaiti publicly traded companies – in an attempt to manufacture an internal inconsistency between the arguments made before this Court and those before the Kuwaiti Stock Exchange with respect to the relationship between the March Agreements and non-signatories. (Pl. Supp. at 10-11.) There, certain non-signatory companies that own shares in Gulf Bank (a public company) argued that their obligation to disclose such ownership includes the obligation to disclose the list of their own registered shareholders and not, as complainant argued, the beneficial ownership thereof by plaintiff and defendant Kutayba as per the terms of the March Agreements. (Declaration of Omar Al-Essa, dated June 24, 2010 ("Fourth Al-Essa Decl.") ¶¶ 12-14.) Mr. Al-Osaimi previously raised this argument on behalf of plaintiff in the YAAS 50/50 Action, both before the Court of First Instance and the Appellate Court. As explained by Mr. Al-Essa, "[a]t both levels, the courts held that the case should be dismissed in favor of arbitration, effectively rejecting BYA's argument that the case against YAAS (a non-signatory to the March 12 Agreement and the MOU) should not be dismissed." (Id. ¶ 17.) This Court should do the same. Unlike the subject matter of the case before this Court and the YAAS Accounting Action and the YAAS 50/50 Action – which are intimately related to the March Agreements – the remedy sought by the

complainant in the Kuwaiti Stock Exchange case would not affect the distribution of assets under the March Agreements.

CONCLUSION

For the foregoing reasons, and for the reasons stated in defendants' initial and reply briefs 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
June 25, 2010

Respectfully submitted,

By: _____

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