

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

DECLARATION OF OMAR AL-ESSA

Omar Al-Essa, pursuant to 28 U.S.C § 1746, declares as follows:

1. I am an attorney registered to practice before the Kuwaiti Court of Cassation and the Kuwaiti Constitutional Court, a member of the Kuwaiti law firm Al Essa & Partners, and head of the Kuwait Bar Association. I serve as counsel to Kutayba Y. Alghanim (“KYA”) in connection with various legal matters in Kuwait, including negotiations and litigations concerning the agreement dated March 12, 2008 (the “March 12 Agreement”), and the Memorandum of Understanding, dated March 27, 2008 (the “MOU”), entered into by and between Bassam Y. Alghanim (“BYA”) and KYA, which are described in my declaration dated November 18, 2009 (“First Al-Essa Declaration”). I submit this declaration to provide the Court with additional evidence in support of Defendants Kutayba Y. Alghanim and Omar K. Alghanim’s Motion to Dismiss the Amended Complaint or, in the Alternative, Stay this



Action Pending Arbitration. I have personal knowledge of the facts stated herein and, if called as a witness, I could and would competently testify thereto.

YAAS 50/50 Action

2. As described in the First Al-Essa Declaration, on October 13, 2009, BYA brought an action against KYA and Yusuf Ahmed Alghanim and Sons Co. W.L.L. (“YAAS”) whereby he requested the court to declare that BYA owns fifty percent of YAAS, and to compel KYA and YAAS to amend YAAS’s Memorandum of Association so as to give BYA a fifty percent ownership interest in YAAS (“the YAAS 50/50 Action”). (First Al-Essa Decl. ¶ 10, Ex. N.) As I mentioned in my declaration dated April 4, 2010 (“Third Al-Essa Declaration”), the Kuwaiti Court of First Instance dismissed the action against all defendants in favor of arbitration, including YAAS – a non signatory to either the March 12 Agreement or the MOU . (Third Al Essa Declaration, ¶ 4, Ex. 2.) BYA appealed this decision to the Appellate Court, which on May 30, 2010, affirmed the decision of the Court of First Instance. A true and correct copy, along with a certified translation into English, of the Appellate Court’s written opinion in the YAAS 50/50 Action is annexed hereto as Exhibit 1. Among other arguments, BYA objected at both the Court of First Instance and the Appellate Court levels that YAAS is not a party to either the March 12 Agreement or the MOU and should not be covered by the arbitration agreements contained in such agreements. The Appellate Court decision is binding and enforceable on the parties. To date, BYA has not appealed the Appellate Court’s decision to the Court of Cassation.

YAAS Accounting Action

3. As described in the First Al-Essa Declaration, the case filed by BYA against KYA and YAAS requesting the court to appoint an expert to calculate the profits of YAAS



for the fiscal years 2007 and 2008 and order KYA and YAAS to pay BYA his share of profits (the “YAAS Accounting Action”) was dismissed by the Court of First Instance in favor of arbitration, including as to YAAS – a non signatory to either the March 12 Agreement or the MOU. (First Al-Essa Declaration, ¶ 8, Ex. K.) I further described in my second declaration dated January 7, 2010 (“Second Al-Essa Declaration”) and also in the Third Al-Essa Declaration, that the decision of the Court of First Instance was affirmed by the Appellate Court in a judgment dated December 27, 2009. (Second Al-Essa Declaration ¶ 2, Ex. 1; Third Al-Essa Declaration ¶ 3, Ex. 1.) Among other arguments, BYA objected at both the Court of First Instance and the Appellate Court levels that YAAS is not a party to either the March 12 Agreement or the MOU and should not be covered by the arbitration agreements contained in such agreements. The Appellate Court decision is binding and enforceable on the parties.

Court of Cassation Procedures

4. As mentioned in Mr. Al Osaimi’s declaration dated June 10, 2010 (“Second Al-Osaimi Declaration”), BYA appealed the Appellate Court’s decision in the YAAS Accounting Action. Under Kuwaiti law, parties in general have the right to appeal any judgment of the Appellate Court to the Court of Cassation irrespective of the amount involved or the subject matter of the dispute. Appeals to the Court of Cassation do not suspend the execution of appealed judgments, and the December 27, 2009 Appellate Court judgment continues to be binding and enforceable on the parties.

5. In Kuwait, there are three levels of courts: the Court of First Instance, the Appellate Court and the Court of Cassation, with the latter being the final court of Appeal. Since many cases are appealed, the Court of Cassation cannot possibly hear all of them. The selection of cases that will be heard by the Court of Cassation is conducted through a process



in accordance to Article 154 of the CCPC. A true and correct copy, along with a certified translation into English, of Article 154 of the CCPC is annexed hereto as Exhibit 2.

6. The selection process operates in the following manner:
 - a. The clerk of the Court of Cassation records appeals that are submitted to the court.
 - b. Once the appeal is recorded, a prosecutor for the Court of Cassation (the “Cassation Prosecutor”) is required to opine as to whether the Court of Cassation should hear the appeal. The Cassation Prosecutor falls under the jurisdiction of the Court of Cassation and is not a member of the prosecutorial office that brings criminal charges in Kuwait.
 - c. Following receipt of the Cassation Prosecutor’s recommendation, an advisory committee composed of five Court of Cassation judges (the “Advisory Committee”) decides whether the Court of Cassation should hear the appeal. If the Advisory Committee does not refer a case to the Court of Cassation, the appealed judgment becomes non-appealable, and the Advisory Committee issues a written decision. If on the other hand the Advisory Committee refers the case to the Court of Cassation, no written decision is issued.

7. On May 4, 2010, the Cassation Prosecutor recommended that the Court of Cassation should hear the appeal of the Appellant Court’s judgment in the YAAS Accounting Action. (The Cassation Prosecutor’s opinion is annexed to the Second Al-Osaimi’s Declaration as Exhibit A.). The Cassation Prosecutor’s recommendation is not binding on the Court of Cassation or on any other court. The decisions of the Appellate Court in the YAAS Accounting Action and the YAAS 50/50 Action remain binding and enforceable.

8. For example, in the YAAS 50/50 Action, oral argument was held and the decision of the Appellate Court was issued after the Cassation Prosecutor issued his



recommendation. Nonetheless, the Appellate Court ruled in favor of KYA and YAAS, and dismissed the action in favor of arbitration.

9. The Court of Cassation is not in any way bound by Cassation Prosecutor recommendations or Advisory Committee decisions. Rather, it will make a thorough examination of each case and the pleadings submitted by the parties, and not just merely follow such recommendations and decisions. Based on my long experience as an advocate before the Court of Cassation, Cassation Prosecutor recommendations and Advisory Committee decisions are not a reliable indicator of how the Court of Cassation will decide, and the Court of Cassation follows these recommendations and decisions as often as it does not.

Status of Appeal to the Court of Cassation

10. The Advisory Committee decided on June 23, 2010 to refer the YAAS Accounting Case to the Court of Cassation. I understand that the first hearing has been scheduled for the last week of the year although a specific date has not been confirmed. In my experience, it is likely to take at least one year from the day of the first hearing before the Court of Cassation issues a judgment in this matter.

11. As stated above, the Cassation Prosecutor's recommendation and the Advisory Committee's decision to place the appeal on the Court of Cassation's docket do not in any way suggest that the Appellate Court's decision will be reversed. To the contrary, in my experience, it is quite common for the Court of Cassation to affirm a decision of the Appellate Court even though the Cassation Prosecutor has recommended reversal and the Advisory Committee has accepted the appeal.



Complaint Presented to the Kuwaiti Stock Exchange

12. In Kuwait, direct shareholders of publicly traded companies have to disclose their interest in such companies if they represent 5% or more of the public company's equity, pursuant to specific requirements and procedures not discussed in this Declaration. If the shareholder is a holding company, it must also disclose the identity of its registered shareholders as they appear on its memorandum of association, including changes as they occur from time to time. The failure to disclose such interests may lead to the temporary freezing of the right to vote shares at shareholders meetings.

13. On March 18, 2009, Chakkully Sathianathan, a former employee of YAAS who has worked for BYA since the execution of the March 12 Agreement, in his capacity as a shareholder of Gulf Bank, submitted a complaint to the Kuwait Stock Exchange (the "KSE") against YAAS, Alghanim Industries Co. W.L.L., Alghanim Trading Co. W.L.L., Shamsin General Trading and Contracting Co. W.L.L., and Alamana Investment Co. S.A.K. (closed) (collectively, the "Companies"), KYA and BYA in respect of alleged violations of the Companies' obligation to disclose the beneficial interest of KYA and BYA in Gulf Bank held through them. A true and correct copy, along with a certified translation into English, of this complaint (the "KSE Complaint") is annexed hereto as Exhibit 3.

14. As evidence of his claim, Mr. Sathianathan submitted a copy of the MOU and requested that the shares in Gulf Bank held by the Companies lose their voting rights for the prescribed period. It is noteworthy that Mr. Sathianathan did not complain about Expansion Trading and Contracting Company W.L.L., a similarly situated company that is identified in the MOU and that is controlled by BYA.

15. The Companies offered a number of defenses. Those that own less than 5% of Gulf Bank argued that they are not subject to the disclosure requirement. The other Companies responded that they had already made the required disclosures (that is their



shareholding in Gulf Bank and the list of their registered shareholders), and in addition that they are not party to the MOU and could not be held accountable for the actions of the parties thereto.

16. On September 13, 2009, the KSE rejected the KSE Complaint. (See Second Al-Osaimi Decl. Ex. D.) Mr. Sathianathan appealed the decision of the KSE to the Administrative Circuit at the Court of First Instance. The Court of First Instance is scheduled to hear the claim on September 27, 2010.

17. With the introduction to this Court of a description of the KSE Complaint, Mr. Al-Osaimi seeks to discredit the arguments presented by some of the defendants to the Amended Complaint that the Alleged Claims should be dismissed in favor of arbitration (See Second Al-Osaimi Declaration at ¶ 21). The identical argument presented by Mr. Al-Osaimi – counsel to both Mr. Sathianathan and to BYA – was previously raised by BYA in the YAAS 50/50 Action, both in the Court of First Instance and the Appellate Court. At 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. A true and correct copy, along with a certified translation into English of the relevant sections, of BYA’s memorandum of appeal submitted in the YAAS 50/50 Action is annexed hereto respectively as Exhibit 4.


18. The subject matter of the KSE Complaint is distinguishable from the subject matter of the YAAS 50/50 Action. The former relates to a claim that the Companies should have disclosed the identity of indirect shareholders, a standard that is not required by the law. Whether or not the Companies should have made such a disclosure, the disclosure itself would have no impact on the distribution of assets under the MOU and would otherwise not have hindered the implementation thereof. On the other hand, the subject matter of the YAAS 50/50 Action related directly to KYA’s and BYA’s rights and obligations under the



MOU, and BYA's claim in the YAAS 50/50 Action, if successful, would have undermined a core MOU concept and adversely affected the implementation thereof.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 24, 2010.


Omar Al-Essa 