SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK J.S.C. Justice PART 39

Index Number : 650560/2012
KAGA INVESTMENTS S.A.
vs.
SIMONSEN, STUART
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7/16/13

_____, J.S.C.
BARBARA R. KAPNICK

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 39

----------X

KAGA INVESTMENTS S.A. and CIEL MARITIME S.A., as members of AXIOQUANTUM CAPITAL PARTNERS LLC, suing derivatively on behalf of AXIOQUANTUM CAPITAL PARTNERS LLC, and BERTA TRADING S.A. as a member of AXIODYN CAPITAL PARTNERS LLC, suing derivatively on behalf of AXIODYN CAPITAL PARTNERS, LLC,

Plaintiffs,

- against -

STUART SIMONSEN, SOREN NEILS MANAGEMENT, LLC, and GMS DEVCO LLC,

Defendants

----------X

DECISION/ORDER
Index No. 650560/12
Motion Seq. No. 001

BARBARA R. KAPNICK, J.:

Defendants Stuart Simonsen ("Simonsen"), Soren Neils Management, LLC ("Soren Neils"), and GMS Devco LLC ("GMS") move pursuant to CPLR 3211 (a) (5), (a)(7) and (a)(8), to dismiss the Complaint.

Background

Plaintiffs Kaga Investments S.A. ("Kaga") and Ciel Maritime S.A. ("Ciel") are corporations organized under the laws of Panama and are members of Axioquantum Capital Partners LLC ("AxioQ"), a Delaware limited liability company, qualified to do business in New York. Kaga and Ciel each own 20% of AxioQ. (Complaint, ¶¶ 1, 12).

Plaintiff Berta Trading S.A. ("Berta") is also a corporation organized under the laws of Panama, and is one of the members of

Axiodyn Capital Partners LLC ("AxioD"), a Delaware limited liability company, qualified to do business in New York. Berta owns 20% of AxioD. (*Id.*, ¶¶ 2, 7).

Defendant Simonsen is a citizen and resident of Montana, and is a member and manager of AxioQ and of AxioD. (*Id.*, ¶ 3). Defendant Soren Neils is a Montana limited liability company with a business address in Billings, Montana whose sole member and manager is Simonsen. (*Id.*, ¶ 4). Defendant GMS is a Nevada limited liability company with the same Billings, Montana business address and is owned and operated by Simonsen. (*Id.*, ¶ 5).

A. AxioD

On or about May 15, 2009, Simonsen, Berta, non-party Simon Posen ("Posen") and non-party Anthony Birbilis ("Birbilis") executed an operating agreement for AxioD (the "AxioD Agreement"). (*Id.*, ¶ 8; Ex. 1). Simonsen, Posen, Birbilis and non-party Andreas Galanos ("Galanos") are the managers of AxioD. (*Id.*, ¶ 10). AxioD acts as an investment manager for Axiodyn Master Fund, L.P. and its two feeder funds, Axiodyn Offshore Fund, Ltd. and Axiodyn Fund L.P. (collectively, the "AD Funds"). (*Id.*, ¶ 11).

B. AxioQ

On or about February 16, 2010, Simonsen, non-party the Kayla Simonsen Trust, non-party the Alyssa Simonsen Trust Axioquantum

GRAT, Kaga, Ciel, non-party Axio NYC Holdings LLC and Birbilis, as members, executed an operating agreement for AxioQ (the "AxioQ Agreement"). (*Id.*, ¶ 13; Ex. 2). Simonsen, Birbilis and Galanos are the managers of AxioQ. (*Id.*, ¶ 14). AxioQ acts as investment manager for Axioquantum Master Fund, L.P. and its two feeder funds, Axioquantum Offshore Funds, Ltd. and Axioquantum Fund, L.P. (collectively, the "AQ Funds"). (*Id.*, ¶ 15).

C. Intellectual Property

By an assignment dated May 15, 2009 ("AxioD IP Assignment"), Simonsen assigned to AxioD all of his right, title and interest in and to all Trading Models (including mathematical algorithms), Trading Strategies (including the Jarvis Trader platform), explanations, documentation and associated intellectual property. (*Id.*, ¶ 16; Ex. 3). In Section 10.3 of the AxioD Agreement, Simonsen and the other members of AxioD confirmed that the Intellectual Property, as defined in the AxioD IP Assignment (the "AxioD IP"), is the "sole property of [AxioD] and that no Member has any personal ownership in such Intellectual Property." (*Id.*, ¶ 17). Section 10.3 of the AxioD Agreement further restricted any member from, among other things, divulging, communicating or making available the AxioD IP to any person, except in furtherance of AxioD's business. (*Id.*). AxioD uses the AxioD IP in its capacity as the investment manager for the AD Funds. (*Id.*, ¶ 18).

By an assignment dated February 16, 2010 ("AxioQ IP Assignment"), Simonsen assigned to AxioQ all of his right, title and interest in and to all Trading Models (including mathematical algorithms), Trading Strategies, explanations, documentation and associated intellectual property. (*Id.*, ¶ 19; Ex. 4). Section 10.2 of the AxioQ IP Agreement is similar to Section 10.3 of the AxioD IP Agreement in its definition of ownership and restrictions. (*Id.*, ¶ 20). Likewise, AxioQ uses the AxioQ IP in its capacity as the investment manager for the AQ Funds. (*Id.*, ¶ 21). The AxioQ IP is similar to the AxioD IP but contains less aggressive trading strategies and models. (*Id.*, ¶ 22).

D. Causes of Action

In December 2008 and March 2009, affiliates of Kaga loaned Simonsen a total of $950,000, by paying $500,000 and $450,000 respectively to Simonsen's designee, Soren Neils (the "Simonsen Loan"). (*Id.*, ¶ 29). Kaga assigned the right of repayment of the Simonsen Loan to AxioQ. (*Id.*, ¶ 30).

The first cause of action is on behalf of AxioQ against Simonsen seeking reimbursement in the sum of $852,485 plus interest from February 16, 2010 for the outstanding monies owed on the Simonsen Loan.

The second cause of action is on behalf of AxioQ against Simonsen, Soren Neils and GMS and seeks an accounting against all three defendants for the funds paid to Simonsen directly or indirectly through his two LLCs, in the total amount of $3,062,500 ostensibly as reasonable expenses for the operation of AxioQ, pursuant to the AxioQ Agreement.

The third cause of action asserts an accounting claim on behalf of AxioD against Simonsen and Soren Neils for alleged reasonable expenses in the total amount of $1,015,710 paid to Simonsen directly or indirectly through the LLC, pursuant to the AxioD Agreement.[1]

The fourth through sixth causes of action involve both AxioD and AxioQ and the intellectual property rights held by both in their respective Agreements and the IP Assignments given by Simonsen to each entity. (Complaint, ¶¶ 16-22, 55-56). The fourth cause of action seeks an injunction against Simonsen and anyone acting in concert with him from any further use of the AxioD IP and AxioQ IP. The fifth cause of action seeks to impose a constructive trust on Simonsen and any transferee or recipient of the AxioD IP or the AxioQ IP for the value of the transferred property and all

[1] The second and third causes of action also seek, in the alternative, the return of the amounts paid.

income derived therefrom. Finally, the sixth cause of action seeks recovery of the value of the IP transferred and any income derived therefrom.

Discussion

Defendants now argue that the action should be dismissed because (a) the Court lacks personal jurisdiction over the defendants; (b) the AxioQ Agreement dated February 16, 2010 provides a release which bars the claims asserted; and (c) the first and second causes of action are barred by the provisions of the Karla Agreement[2] and the AxioQ Agreement which make advances payable only from trading profits.

A. Personal Jurisdiction

Defendants argue that there is no allegation that any of the defendants is or was present in New York or transacted business in New York. According to defendants, the only link to New York is based on plaintiffs' allegations that plaintiffs AxioD and AxioQ have their principal offices in New York and are authorized to do business here.[3]

---

[2] The Karla Agreement was the venture between Simonsen, Yannis V. Vardinoyannis ("Yannis") and the team of Birbilis, Richard Steinberg and Michael Asch, created under the Investment Term Sheet Memorandum dated March 13, 2008.

[3] The Court denied the motion to dismiss on personal jurisdiction grounds as to defendant Simonsen on the record at

Plaintiffs argue that the Court also has jurisdiction over defendants Soren Neils and GMS Devco which are both owned and controlled by Simonsen, since each company was the recipient of funds from AxioQ and AxioD investors, pursuant to directions from Simonsen that expenses payable to him under the entities' agreements be directly transferred to these two defendants. Plaintiffs argue that it is exactly these transfers of funds from the Axio investors to both corporate defendants which are at issue in this case.

Additionally, plaintiffs note that Joanne Beringer, who is listed as an employee and CFO of GMS Devco, also traveled to New York to provide services to the Axio companies. Plaintiffs have also proffered evidence that Simonsen held meetings in New York to raise funds specifically for GMS Devco. Plaintiffs argue that personal jurisdiction for transacting business in New York is appropriate over these two entities both on the grounds of Simonsen's actions on their behalf that are connected to New York, and their own position as the recipients of funds from the Axio investors, *citing JPS Capital Partners, LLC v. Silo Point Holding LLC*, 24 Misc3d 1234(A) (Sup Ct, NY Co. 2009).

---

the end of oral argument on August 1, 2012

On a motion to dismiss pursuant to CPLR 3211(a)(8), on the ground that the Court lacks jurisdiction of the person, the burden is on the party asserting jurisdiction to show that jurisdiction exists (*Arroyo v. Mountain School,* 68 AD3d 603 [1st Dep't 2009]; *Copp v. Ramirez,* 62 AD3d 23, 28 [1st Dep't 2009], *lv denied* 12 NY3d 711 [2009]). "If the defendant moves to dismiss due to the absence of a basis of personal jursidiction, the plaintiff must come forward with sufficient evidence, through affidavits and relevant documents, to prove the existence of jurisdiction" (*Fischbarg v. Doucet,* 9 NY3d 375, 381 n. 5 [2007], quoting Vincent C. Alexander, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR C302:5). The party asserting jurisdiction need only show that facts justifying jurisdiction "may exist" (*Peterson v. Spartan Indus.,* 33 NY2d 463, 466 [1974]).

Here, defendants have clearly had substantial contacts with New York in connection with the investments that are the subject of the instant dispute.

CPLR 302(a)(1) provides that "'a court may exercise personal jurisdiction over any non-domiciliary...who in person or through an agent...transacts any business within the state'" if the cause of action asserted arises out of that transaction" (*Ehrenfeld v. Bin Mahfouz,* 9 NY3d 501, 508 [2007]). To determine whether a party has

transacted business in New York, courts must look at the totality of circumstances (*Scheuer v. Schwartz,* 42 AD3d 314, 316 [1st Dep't 2007]). One need not be physically present in New York to be subject to the long-arm jurisdiction of our courts. CPLR 302(a)(1) provides long-arm jurisdiction over commercial actors and investors using electronic and telephonic means to project themselves into New York to conduct business transactions (*Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.,* 7 NY3d 65, 71 [2006], *cert den* 549 US 1095 [2006]). As long as the defendant's activities here were purposeful, CPLR 302(a)(1) long-arm, jurisdiction exists even where a defendant never enters New York. Although it is impossible to precisely fix those acts that constitute a transaction of business, it is the "quality of the defendants' New York contacts that is the primary consideration" (*Fischbarg v. Doucet,* 9 NY3d at 380).

The Court has already found on the record that plaintiffs have jurisdiction over defendant Simonsen, and now also concludes that jurisdiction is appropriate over defendants Soren Neils and GMS Devco, as the defendant companies, through Simonsen, purposefully entered New York in pursuit of several multi-million dollar transactions which concluded with the receipt of substantial payments (*see JPS Capital Parnters, supra*). Moreover, the exercise of jurisdiction in this case does not violate the constitutional guarantee of due process because it complies with "traditional

notions of fair play and substantial justice." (*International Shoe Co. v. State of Washington*, 326 US 310, 316 [1945]).

B. The Release and the Covenant Not to Sue

The AxioQ Agreement entered into as of February 16, 2010 provides in section 10.5 as follows:

> Section 10.5 Certain Releases. Each of the Members hereby irrevocably and **unconditionally releases and forever discharges**...the Axiodyn Entities, the Members [of whom Mr. Simonsen is one]...from all actions, causes of action, suits, complaints, controversies, agreements, undertakings, damages, liabilities, judgments, executions, rights, obligations, promises (express or implied), claims, expenses, debts and demands, in law or equity, whether known or unknown, that any Member ever had in the past, now has or hereafter may have,...including but not limited to the Karla account, the Axiodyn Entities, its intellectual property or any other assets or properties of either the Axiodyn Entities or the Axiodyn Members.

(emphasis added). Defendants argue that the release bars the claims asserted here by its terms. Defendants further argue that section 10.6 of the AxioQ Agreement also bars the claims in the Complaint.

The AxioQ Agreement specifically provides as follows:

> Section 10.6 Covenenant Not to Sue. Each of the Members covenants and agrees that it will not directly or indirectly bring any action, complaint, claim, lawsuit or arbitration proceeding, at law or in equity, against the Axiodyn entities or any of the Members asserting any rights, claims or interests released as set forth in Section 10.5 above, including but not limited to any rights, claims or interests in the Karla account, the Axiodyn Entities or its intellectual property or any of their assets or properties.

Plaintiffs assert numerous reasons why the release provisions do not provide grounds for dismissal of any claims in the Complaint or as to any of the three defendants. First, plaintiffs contend that the first two causes of action in the Complaint contain claims that relate to and predate the AxioQ Agreement. Plaintiffs argue that the other four causes of action relate to IP Assignments and AxioD, and cannot be said to be barred by the release language in sections 10.5 and 10.6 of the AxioQ Agreement.

Next, plaintiffs point out that the releasors listed in the release provision are the members of AxioQ, but that this action was commenced derivatively on behalf of AxioQ, who is the real party in interest here.

Additionally, plaintiffs argue that the subject matter of the releases at sections 10.5 and 10.6 of the AxioQ Agreement do not relate in any way to the first two causes of action asserted against defendants. Plaintiffs maintain that the releases in these two sections of the AxioQ Agreement are: (i) the Axiodyn Entities (defined in the preceding section 10.4 as AxioD and "one or more collective or pooled investment vehicles, funds and/or managed accounts" for which AxioD acts as general partner and/or investment manager); (ii) the Axiodyn Members (defined also in section 10.4 as certain of the members of AxioQ or their shareholders, partners,

members or affiliates which are also members of AxioD); and (iii) their respective shareholders, members, partners and affiliates. Plaintiffs argue that while Simonsen is both a member of AxioD and AxioQ and thus within the definition of the Axiodyn Members which are being released, the subject matter of the release provisions relate only to his role as an AxioD member.

In addition, plaintiffs assert that the first two causes of action do not relate to AxioD or the AxioD Entities. The first cause of action seeks repayment of the loan proceeds to AxioQ, and the repayment of the loan by Simonsen is specifically provided for under Section 4.4(d) of the AxioQ Agreement, an obligation that is restated contemporaneously with the purported releases. Plaintiffs argue that AxioQ was assigned the right to the repayment, and this this cause of action should stand.

Plaintiffs further assert that the second cause of action seeks an accounting for expenses paid to Simonsen by AxioQ pursuant to Section 4.3(g) of the AxioQ Agreement, which provides that AxioQ is "specifically authorized to reimburse Stuart Simonsen $62,500 on a monthly basis...for any such reasonable expenses incurred by him on behalf of the Company." Plaintiffs argue that these payments to Simonsen for "reasonable expenses" and working capital are not

released but instead are required to be reflected as contributions "specially allocated to the Contributing Member."

Further, plaintiffs argue that the release, and the following covenant not to sue, directly relate to "the Karla account, the Axiodyn Entities, its intellectual property or any other assets or properties of either the Axiodyn Entities or the Axiodyn Members." Plaintiffs maintain these are the only specifics given, and nothing more can be read into these provisions. Thus, plaintiffs argue that Simonsen's repayment of the loan to AxioQ (first cause of action) and his accounting for the reasonable expenses paid to him by AxioQ (second cause of action) are unrelated to any of the matters specified by the releases and the release provisions in the AxioQ Agreement cannot be read to bar the claims asserted against Simonsen or his companies in this case.

In reply, defendants assert that the Davison Williams email to Simonsen of November 18, 2011, attached as Ex. 9 to Simonsen's Reply Affidavit, confirms that the parties released one another and agreed not to sue. The email states in relevant part that the AxioQ Agreement

> seems to say pretty clearly that any disagreements and claims that may have arisen among the partners in connection with the Karla account were resolved. The partners gave each other releases and promised not to sue each other for any claims related to the Karla

> account...The [AxioQ] Agreement also says that it supersedes the 3/13/08 MOU...

Defendants argue that plaintiffs' counsel's admissions as to the release binds plaintiffs. (*see Jaywyn Video Prods. v. Servicing All Media,* 179 AD2d 397, 398 [1st Dep't 1992])(admission by defendant's officer that it received money from customers without remitting any portion to others entitled to distributions was sufficient to establish entitlement to summary judgment against defendant).

It is clear from reading sections 10.5 and 10.6 of the AxioQ Agreement that the release and covenant not to sue bar plaintiffs from pursuing the third through sixth causes of action. The first two causes of action, however, do not relate to AxioD or the AxioD Entities, and even the Williams email referenced by defendants indicates that "[t]he only thing that seems to have survived all of this was a $950k loan by the Company to you [Simonsen], of which $852,485 was outstanding at the time the [AxioQ] agreement was signed."

Accordingly, the third through sixth causes of action are dismissed as against defendants Simonsen and Soren Neils.

C. The Provisions of the Karla Agreement and the AxioQ Make Advances Payable Only From Trading Profits

[* 16]

Defendants maintain that the supposed loans or advances referred to in the first two causes of action were made to support, among other things, the ongoing development of the software and supplying the software with all the trading data from the relevant markets on a real-time basis, and were repayable only from trading profits, as the agreements show. The earliest of the agreements, the Karla Agreement, dated March 13, 2008, provides in paragraphs 4 and 5 as follows:

> 4. Investor [Yannis] will pay to Specialist [Simonsen], monthly in advance, the amount of USD 125,000 ("Working Capital") with the understanding that the Working Capital necessary for the operations will be paid out of the trading profits of the Investor Account, rather than by the Investor, as soon as possible...
>
> 5. Profits made for Investor Account under NewCo management will be distributed as follows on a quarterly basis: (i) First, 100% of profits will be used to repay any advances for Working Capital by the Investor, as well as monthly Working Capital needs of Specialist in the amount of USD 125,000...

Defendants argue that the AxioQ Agreement is no different in its operation:

> Section 4.4 Distributions
> (d) Stuart Simonsen Member Loan. The parties acknowledge that the Company has loaned $950,000 to Stuart Simonsen, of which $852,485 remains outstanding. In connection with the repayment of such amount, the Company shall withhold 30% of any distributions otherwise payable to Simonsen pursuant to this Section 4.4 and

> distribute such withheld amounts to all of the Members (including Simonsen) in accordance with their respective Participating Percentages.

AxioQ Agreement, § 4.4(d).

Defendants argue that under the express terms of the agreement, Simonsen was not responsible for the advances personally, except as payments from trading profits, and thus the first and second causes of action lack merit and should be dismissed for failure to state a claim under CPLR 3211(a)(7).

Plaintiffs argue that nowhere is it stated in section 4.4(d) of the AxioQ Agreement that the $852,485 payable by Simonsen to AxioQ is to be payable only as a deduction from his distribution. Moreover, plaintiffs assert that even if section 4.4(d) were to be read to admit the possibility that the parties intended the Simonsen Loan to be "only" repayable out of distributions, at most it would raise a potential ambiguity in the contract language that must be resolved by the trier of fact (*see Telerep, LLC v. US Intl. Media, LLC*, 74 AD3d 401, 402 [1st Dep't 2010]).

Plaintiffs also assert that defendants' argument that the Investment Term Sheet Memorandum dated March 13, 2008 bars plaintiffs' second cause of action for an accounting for working capital and other funds paid to defendants is nonsensical. First

of all, plaintiffs assert that section 10.17 of the AxioQ Agreement specifically states that the AxioQ Agreement "supersedes all prior discussions and agreements between the parties with respect to the subject matter hereof (including, but not limited to, that certain Investment Term Sheet Memorandum dated March 13, 2008....) and this Agreement contains the sole and entire agreement between the parties with respect to the matters covered hereby."

Even were the Court to permit this Memorandum to be submitted as parole evidence, plaintiffs assert, there is nothing there that allows the defendants to use the over $3 million allegedly paid to them for purposes other than AxioQ's, nor is there any provision therein that prevents AxioQ, or its members derivatively, from compelling defendants to account for their use of company money.

Defendants, in reply, again refer to the Davison Williams email of November 18, 2011 which defendants argue confirms that the $852,485 Karla balance was to be recovered only from profits, before distributions were made to customers. Defendants assert that their understanding as to payment only from profits is the same understanding plaintiffs' agent Galanos had two years earlier, on December 2, 2009, when he wrote:

> The partnership has an obligation to pay Stuart USD 62,500 per month to cover various expenses of his (data

> feeds, technical personnel, hardware etc)....This expense is deemed as a top priority expense of the partnership and is been substracted [sic] from any trading profits before any distributions are made to the partners....[Yannis] would have to get these back before any distribution of profits takes place in the future.

(emphasis added).

Defendants argue that plaintiffs' admissions as to the manner in which advances for expenses were to be repaid - or not repaid, if there were no profits - binds plaintiffs (*see Jaywyn Video Prods. v. Servicing All Media, supra*).

It appears to this Court, however, that the AxioQ Agreement does not specifically state that repayment of this money must be made exclusively from trading profits, as defendants allege. Thus, it would be inappropriate to dismiss these two causes of action on a pre-answer motion to dismiss.

Conclusion

Accordingly, for all the reasons stated herein, defendants' motion to dismiss is granted only to the extent of dismissing plaintiffs' third through sixth causes of action based on the release contained in the AxioQ Agreement. The first and second causes of action are severed and continued.

Defendants have 30 days from the date of this Decision to file and serve an Answer to the first and second causes of action.

Counsel for the parties are directed to appear for a further conference to schedule all outstanding discovery in IA Part 39, 60 Centre St., Room 208 on September 18, 2013 at 10:00 am.

This constitutes the decision and order of this Court.

Dated: July 16, 2013

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.