SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

BGC NOTES, LLC,	:	Index No. 651808/14
Plaintiff,	:	
-against-	:	
KEVIN J. GORDON,	:	
Defendant.	:	

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO COMPEL ARBITRATION AND FOR A STAY OF THIS ACTION

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Defendant Kevin J. Gordon ("Gordon") respectfully submits this memorandum of law in support of his motion for an order: (1) pursuant to Sections 3 and 4 of the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (the "FAA") and/or CPLR § 7503(a) compelling plaintiff BGC Notes, LLC ("BGC Notes") to litigate the claims underlying this action in arbitration under the Rules of the Financial Industry Regulatory Authority, Inc. ("FINRA") and staying this action pending the resolution of such arbitration; (2) pursuant to CPLR § 2201, staying this action, including but not limited to BGC Notes' motion for summary judgment in lieu of complaint, pending the hearing and determination of Gordon's motion to compel arbitration herein; and (3) awarding Gordon such other and further relief as this Court shall deem just and proper.[1]

PRELIMINARY STATEMENT

This action involves an employment related disputed in the securities industry regarding an element of an employee's compensation. Gordon worked as a securities broker and rendered services for BGC Financial, L.P. ("BGC Financial") and, in consideration thereof, received a compensation package that included an upfront bonus of $700,000. That bonus was specifically provided for in Gordon's employment agreement with BGC Financial, which stated that BGC Notes, its affiliate, would advance the $700,000 as a forgivable "loan" on favorable terms to Gordon in exchange for a promissory note.

The reason that BGC Financial and BGC Notes structured Gordon's compensation package this way (and indeed structure many brokers' compensation packages this way) is apparently to allow BGC Financial to receive the benefit of FINRA arbitration under applicable FINRA rules, to which it is bound, while attempting to relieve its affiliate, BGC Notes, of the

[1] Rule 19 of the Rules of practice for the Commercial Division provides, in part that, "[a]bsent advance permission, reply papers shall not be submitted on orders to show cause." Uniform Rule § 202.70 (g). In light of the many issues raised by this motion, Gordon respectfully requests permission to submit reply papers.

"burden" of litigating promissory note disputes in that forum. Simply put, by utilizing BGC Notes, a non-FINRA member and non-signatory to any arbitration provision, as the "lender" under the relevant promissory notes, BGC Financial attempts to wrongfully free BGC Notes from any arbitration requirement so that it can move for summary judgment in lieu of a complaint under CPLR § 3213 in the event it claims the right to recover on any given promissory note, as it did here.[2]

BGC Financial does not even attempt to conceal its blatant attempt to flout its arbitration obligations. On the contrary, the chosen name for BGC Notes strongly suggests that, upon information and belief, that entity is nothing more than BGC Financial's financing arm designed to advance "loans" as upfront bonuses as part of the compensation packages for BGC Financial's brokers and to receive promissory notes in this scheme to attempt to avoid arbitration.

Unfortunately for BGC Financial and BGC Notes, courts do not take too kindly to such schemes designed solely to avoid FINRA arbitration. In fact, in the last few years, two different courts in this county denied motions under CPLR § 3213 seeking to enforce this precise compensation arrangement for securities brokers and granted motions to compel arbitration because to hold otherwise would effectively force the broker to waive his right to FINRA arbitration in violation of public policy. Merrill Lynch Int'l Fin., Inc. v. Donaldson, 27 Misc. 3d 391 (Sup. Ct. N.Y. Cty. 2010); Merrill Lynch Int'l Fin., Inc. v. Gutkin, Index No. 601176/2009 (Sup. Ct. N.Y. Cty. Dec. 17, 2009). (Kotler Aff. Exs. E & F.) Gordon respectfully submits that

[2] In doing so, BGC Financial likely violated FINRA Rule 2010 requiring that a "member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade." See IM-13000 of the FINRA Code ("It may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2010 for a member or a person associated with a member to: (a) fail to submit a dispute for arbitration under the Code as required by the Code...") (See exhibits I & J annexed to the affidavit of Jonathan Kotler, sworn to July 24, 2014 (the "Kotler Aff.").)

the holdings in Donaldson and Gutkin are equally applicable here and require that Gordon's motion to compel arbitration be granted. (Point II(B).)

Furthermore, although it is not a party to Gordon's employment agreement, which includes an arbitration provision, BGC Notes directly benefited from the express provision of that agreement requiring that Gordon give it a promissory note, and thus should be estopped from avoiding the requirement in that agreement that this dispute proceed to arbitration. (Point II(C).)

As explained in Point III below, to the extent that BGC Notes attempts to argue in opposition that this dispute falls outside the scope of the relevant arbitration provisions, which it does not, any such argument should be referred to and resolved by the FINRA arbitration panel.

Finally, Gordon respectfully submits that he is entitled to a stay of BGC Notes' motion for summary judgment in lieu of complaint pending the hearing and determination of this motion to avoid litigating the merits of this dispute and possibly raising an issue that he waived his right to arbitrate and/or impacting the FINRA arbitration pending between the parties. (Point IV.)

For all the foregoing reasons, and as discussed further below, Gordon respectfully requests that his motion be granted in its entirety.

FACTUAL BACKGROUND

The facts relevant to this motion are set forth more fully in the accompanying affidavit of Kevin J. Gordon, sworn to July 23, 2014 (the "Gordon Aff."), the Kotler Aff. and the accompanying affidavit of Aegis J. Frumento, sworn to July 23, 2014 (the "Frumento Aff."), and are summarized herein for the convenience of the Court.

Gordon is a broker registered with FINRA. (Gordon Aff. ¶ 3, Ex. A.) From April through November 2012, Gordon worked as a broker on the Asset Backed Swaps Desk of BGC Financial, which firm is a Member of FINRA. (Gordon Aff. ¶ 4, Ex. B.) During that time,

Gordon was registered under the auspices of, and thus associated with, BGC Financial for FINRA purposes. (Gordon Aff. ¶ 5.)

The Relevant Employment Documents

The terms of Gordon's employment with BGC Financial were set forth in several documents, all of which stemmed from his employment agreement that he signed on or about August 1, 2011 (the "Employment Agreement"). (Gordon Aff. ¶ 7, Ex. C.) Gordon signed the Employment Agreement at the same time that he signed the Cash Advance Distribution Agreement and Promissory Note that is the subject of this action and also is dated August 1, 2011 (the "Promissory Note"). (Gordon Aff. ¶ 11, Ex. D.)

In addition to the Employment Agreement and the Promissory Note, and in compliance with his obligations under the FINRA By-Laws and the Employment Agreement,[3] Gordon executed a Uniform Application for Securities Industry Registration or Transfer Rev. Form U4 (05/2009) (the "Form U-4"). (Gordon Aff. ¶ 12, Ex. E.)

The Employment Agreement Contains All Material Terms of Gordon's Compensation with BGC Financial, Including the Upfront Bonus Styled as a "Loan" Under the Promissory Note

Pursuant to the Employment Agreement, Gordon was paid an annual salary of $150,000. (Gordon Aff. ¶ 15, Ex. C, ¶ 3(a).) In addition to his salary, Gordon was promised commissions equal to 60% of all revenue that he generated for BGC Financial, to be paid on a quarterly basis net of certain expenses. (Gordon Aff. ¶ 16, Ex. C, ¶ 3(b).)

[3] See Section 7(b) of the Employment Agreement ("Great importance is attached to the observance of...all Federal and State laws and regulations...and the rules of [FINRA] or any other applicable self-regulatory organization. Material breach of any of these obligations may be regarded as misconduct and may result in summary dismissal for Cause.") (Gordon Aff. Ex. C, ¶ 7(b).)

Most relevant to this motion, as consideration for Gordon's contemplated services for BGC Financial, Gordon was paid an upfront bonus of $700,000 as set forth in Section 3(d) of the Employment Agreement:

> In consideration for services performed after the Start Date and as consideration for Employee's consent to enter this Agreement, [BGC Financial] will cause BGC Notes, LLC to make a one-time loan to Employee in the amount of seven hundred thousand dollars ($700,000) (the "**Loan**"), payable the later of (x) thirty (30) days after the Employee's execution of a promissory note for the amount of the Loan; and (y) thirty (30) days of Employee's Start Date. The terms and conditions of the repayment of the Loan shall be set forth in the applicable promissory note and other documents executed by Employee.

(Gordon Aff. ¶ 17, Ex. C, ¶ 3(d).)

Despite receiving this payment from BGC Notes, Gordon was never employed by, nor did he render any services to, BGC Notes. (Gordon Aff. ¶ 18.) Indeed, upon information and belief, BGC Notes is not a Member of FINRA. (Gordon Aff. ¶ 19, Ex. B.) Upon further information and belief, as its name suggests, BGC Notes operates solely as BGC Financial's financing arm to advance "loans" as upfront bonuses as part of the compensation packages for BGC Financial's brokers and to receive promissory notes in exchange therefor. (Gordon Aff. ¶ 20.)

Although BGC Notes was the entity making this payment, the Employment Agreement makes clear that it was on account for BGC Financial:

> For the avoidance of doubt, where [BGC Financial] procures that any payment, award, benefit, or loan of money or property (including without limitation distributions in respect of such award and the application of any distributions) (each an "**Award**") pursuant to this Agreement or otherwise, is provided to Employee by [BGC Financial] or an Affiliate, Employee agrees that [BGC Financial] shall be entitled to treat such Award as being in satisfaction of any of its own obligations to Employee which [sic]

> respect to the Award, including but not limited to under Section 3(d) herein.

(Gordon Aff. ¶ 21, Ex. C, ¶ 3(c).)

Moreover, though styled as a "loan," it is clear based on the favorable terms of the Promissory Note that this "loan" was really intended to be a de facto upfront bonus in consideration for Gordon's services under the Employment Agreement. (Gordon Aff. ¶ 22.)

First, the Promissory Note did not contemplate that Gordon make regular out-of-pocket payments to BGC Notes. Instead, payments of principal and interest were to be taken from Gordon's net partnership distributions from BGC Holdings, L.P. ("BGC Holdings"), which he assigned to BGC Notes. (Gordon Aff. ¶ 23, Ex. D, ¶ 1; see also affidavit of Andrew M. Kofsky in support of BGC Notes' motion for summary judgment in lieu of complaint sworn to June 13, 2014 (the "Kofsky Aff.") ¶¶ 11-12.)

Second, as BGC Notes admits, the interest payable on the loan is only 1.15%. (Gordon Aff. ¶ 24, Ex. D, ¶ 3; Kofsky Aff. ¶ 10.)

Third, as BGC Notes admits, BGC Notes agreed not to enforce the Promissory Note if Gordon was still a Partner in BGC Holdings at the expiration of the term of the Employment Agreement. (Gordon Aff. ¶ 25, Ex. D, ¶ 1; Kofsky Aff. ¶¶ 10, fn. 1, 15-16.)

Gordon Resigned From BGC Financial and BGC Notes Initially Chose Not to Enforce the Promissory Note

In November 2012, Gordon resigned from BGC Financial and took a job with Credit Suisse Securities (USA) LLC ("Credit Suisse"), BGC Financial's largest customer. (Gordon Aff. ¶ 26.) Gordon worked at Credit Suisse for a little over a year and a half, during which time he gave substantial business to BGC Financial. (Gordon Aff. ¶ 27.)

Notwithstanding BGC Notes' position that it could have accelerated the Promissory Note on July 15, 2012 or, at the latest, November 9, 2012 (See Kofsky Aff. ¶¶ 25-26), BGC Notes deliberately chose not to commence this action until June 2014 because BGC Financial was earning substantial commissions likely in excess of $1 million -- more than BGC Notes claims is owed on the Promissory Note -- from the Credit Suisse business that Gordon gave them. (Gordon Aff. ¶ 28.)

All Employment Disputes Must be Submitted to FINRA Arbitration

Pursuant to Section 9 of the Employment Agreement, subject to provisions not relevant here:

> [A]ny disputes, differences or controversies arising under this Agreement or Employee's employment shall, to the maximum extent permitted by applicable law, be settled and finally determined by arbitration before a panel of three arbitrators in New York, New York, according to the rules of [FINRA] (if required) (or, if not so required, the American Arbitration Association) now in force and hereafter adopted and the laws of the state of New York then in effect...
>
> It is expressly agreed that arbitration as provided herein shall be the exclusive means for determination of all matters arising in connection with this Agreement and neither party hereto shall institute any action or proceeding in any court of law or equity other than: (a) to request enforcement of the arbitrators award hereunder; or (b) by [BGC Financial] to bring an action or proceeding seeking injunctive relief from a court of competent jurisdiction as set forth in paragraph 8. The foregoing sentence shall be a bona fide defense to any action or proceeding instituted contrary to this Agreement.

(Gordon Aff. ¶ 31; Ex. C, ¶ 9.)

Similarly, as set forth in more detail below, the FINRA Code of Arbitration Procedure for Industry Disputes (the "FINRA Code") requires arbitration of employment-related disputes between Members (BGC Financial) and Associated Persons (Gordon). (Kotler Aff. Exs. K & L.)

Lastly, paragraph 5 of the Form U-4 includes Gordon's promise that:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my *firm*, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the *SROs* indicated in Section 4 (SRO REGISTRATION) as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent *jurisdiction*.

(Gordon Aff. ¶ 33; Ex. E, p. 15; italics in original.)

Procedural History

BGC Notes commenced this action on June 13, 2014 by filing a summons and notice of motion for summary judgment in lieu of complaint pursuant to CPLR § 3213. (Kotler Aff. ¶ 5; Exs. A & B.) Gordon's opposition to BGC Notes' motion is currently due on July 25, 2014. (Kotler Aff. ¶ 19; Ex. G.)

Shortly before making this motion, Gordon commenced an arbitration proceeding under the FINRA Code against BGC Financial, BGC Notes, BGC Holdings and a principal of those entities asserting several claims for relief based, in part, on the facts underlying this action (the "FINRA Proceeding"). (Kotler Aff. ¶ 7; Exs. C & D.)

* * *

Based on the foregoing, and for the reasons set forth more fully below, Gordon respectfully submits that BGC Financial should not be allowed to circumvent its mandatory obligation to resolve employment disputes such as these in binding FINRA arbitration by employing a financing arm to advance "loans" as upfront bonuses as part of the compensation packages for its brokers. Accordingly, Gordon respectfully requests that this Court grant his motion and compel BGC Notes to resolve this dispute in the FINRA Proceeding.

ARGUMENT

POINT I

THE APPLICABLE STANDARDS UNDER BOTH THE FAA AND CPLR ARTICLE 75 REQUIRE ARBITRATION OF THIS DISPUTE

Federal law, under the FAA, and New York state law, under CPLR Article 75, both provide statutory mechanisms for judicial enforcement of arbitration provisions. New York state courts routinely apply the FAA where, as here, the dispute concerns employment in the securities industry. Singer v. Jefferies & Co., Inc., 78 N.Y.2d 76, 81 (1991); Fitzgerald v. Fahnestock & Co., Inc., 48 A.D.3d 246 (1st Dep't 2008). The Court of Appeals also has held that it is "embedded in our case law, that the enforceability of the arbitration clause contained in ... U-4 Form applications is governed by the FAA." Fletcher v. Kidder, Peabody & Co., Inc., 81 N.Y.2d 623 (1993). Thus, the FAA applies here and, as described below, requires that Gordon's motion herein be granted.

The public policy underlying the FAA is well settled and strongly favors arbitration. Section 2 of the FAA states that arbitration provisions "shall be valid, irrevocable, and enforceable" and, thus, embodies "a liberal federal policy favoring arbitration agreements." CompuCredit Corp. v. Greenwood, 132 S.Ct. 665, 669 (2012) (citations and internal quotation marks omitted). The FAA "establishes an 'emphatic' national policy favoring arbitration which is binding on all courts, State and Federal." Singer, supra, 78 N.Y.2d at 81.[4]

To achieve this well founded public policy, Section 3 of the FAA provides that:

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[4] To the extent New York law applies, the public policy considerations are the same. See CPLR § 7501 ("A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute."); State v. Philip Morris Inc., 30 A.D.3d 26, 31 (1st Dep't 2006) aff'd, 8 N.Y.3d 574 (2007) ("Arbitration is strongly favored under New York law... Any doubts as to whether an issue is arbitrable will be resolved in favor of arbitration.") (citations omitted).

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3.

Furthermore, Section 4 of the FAA states that:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court...for an order directing that such arbitration proceed in the manner provided for in such agreement...The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4.[5]

Thus, pursuant to the FAA, the role of courts is "limited to determining two issues: i) whether a valid agreement or obligation to arbitrate exists, and ii) whether one party to the agreement has failed, neglected or refused to arbitrate." Shaw Grp. Inc. v. Triplefine Int'l Corp., 322 F.3d 115, 120 (2d Cir. 2003) (citation and internal quotations omitted).

Here, there is no dispute that BGC Notes failed to arbitrate by commencing this action. Moreover, as described in Point II below, BGC Notes is bound by a valid agreement to arbitrate. Therefore, Gordon's motion herein should be granted in its entirety.

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[5] See also CPLR § 7503(a) ("A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with...the court shall direct the parties to arbitrate.")

POINT II

BGC NOTES IS BOUND BY THE ARBITRATION PROVISIONS IN THE EMPLOYMENT AGREEMENT, FINRA CODE AND FORM U-4

As highlighted above and explained more fully below, Gordon and BGC Financial are bound by the arbitration requirements in the Employment Agreement, the FINRA Code and the Form U-4. Furthermore, BGC Notes also is bound to submit this dispute to arbitration. The fact that BGC Notes is neither a signatory to the relevant provisions nor a member of FINRA does not warrant a contrary result because (a) the insertion of BGC Notes into Gordon's employment relationship with BGC Financial is designed to force Gordon to waive his right to compel arbitration of employment disputes in violation of public policy; and (b) BGC Notes directly benefited from Gordon's employment relationship with BGC Financial, particularly the Employment Agreement, and thus should be estopped from avoiding the requirement that this dispute proceed to arbitration.

A. Gordon and BGC Financial Are Required to Arbitrate Their Disputes

As discussed above, Section 9 of the Employment Agreement clearly states that:

> [A]ny disputes, differences or controversies arising under this Agreement or Employee's employment shall, to the maximum extent permitted by applicable law, be settled and finally determined by arbitration...according to the rules of [FINRA]...
>
> It is expressly agreed that arbitration as provided herein shall be the exclusive means for determination of all matters arising in connection with this Agreement and neither party hereto shall institute any action or proceeding in any court of law or equity other than: (a) to request enforcement of the arbitrators award hereunder; or (b) by [BGC Financial] to bring an action or proceeding seeking injunctive relief from a court of competent jurisdiction as set forth in paragraph 8. The foregoing sentence shall be a bona fide defense to any action or proceeding instituted contrary to this Agreement.

(Gordon Aff. Ex. C, ¶ 9; emphasis added.)

Rule 13200(a) of the FINRA Code, as incorporated by reference in the Employment Agreement, provides that:

> Except as otherwise provided in the Code, a dispute must be arbitrated under the Code if the dispute arises out of the business activities of a member or an associated person and is between or among:
>
> - Members;
> - Members and Associated Persons; or
> - Associated Persons.

(Kotler Aff. Ex. L.)

It is beyond dispute that BGC Financial is a Member of FINRA.[6] Moreover, it is beyond dispute that Gordon is an Associated Person.[7]

Lastly, paragraph 5 of the Form U-4 includes Gordon's promise that:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my *firm*, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the *SROs* indicated in Section 4 (SRO REGISTRATION) as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent *jurisdiction.*

(Gordon Aff. Ex. E, p. 15; italics in original.)

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[6] Rule 13100(o) of the FINRA Code defines a "Member" as "any broker or dealer admitted to membership in FINRA, whether or not the membership has been terminated or cancelled; and any broker or dealer admitted to membership in a self-regulatory organization that, with FINRA consent, has required its members to arbitrate pursuant to the Code and/or to be treated as members of FINRA for purposes of the Code, whether or not the membership has been terminated or cancelled." (Kotler Aff. Ex. K.)

[7] Rule 13100(a) of the FINRA Code defines an "Associated Person" as "a person associated with a member, as that term is defined in paragraph (r)." Rule 13100(r) defines a "person associated with a member" as "(1) A natural person who is registered or has applied for registration under the Rules of FINRA; or (2)...a natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by a member, whether or not any such person is registered or exempt from registration with FINRA under the By-Laws or the Rules of FINRA." Subsection (r) further clarifies that "For purposes of the Code, a person formerly associated with a member is a person associated with a member." (Kotler Aff. Ex. K.)

Based on the foregoing, it is clear that the terms of Gordon's employment with BGC Financial as reflected in the Employment Agreement, the FINRA Code and Form U-4 represent a valid, binding agreement that any dispute between Gordon and BGC Financial be resolved in FINRA arbitration.

In fact, Rule 13806 of the FINRA Code establishes Promissory Note Proceedings specifically designed for situations such as these. Rule 13806(a) expressly provides that "[t]his rule applies to arbitrations solely involving a member's claim that an associated person failed to pay money owed on a promissory note." (Kotler Aff. Ex. N.) See also Granite Associates, Inc. v. Rolon, 69 A.D.3d 854, 855 (2d Dep't 2010) ("Regardless of the validity of the arbitration clause in the parties' registered representative agreement, arbitration of the parties' dispute about the negotiable promissory note given by the appellant to the respondent was proper pursuant to the broad arbitration clause in the Form U-4...").

Thus, there can be no dispute that, if BGC Financial was the lender under the Promissory Note rather than BGC Notes, any attempt by BGC Financial to collect on the Promissory Note from Gordon would be subject to arbitration under the FINRA Code.[8]

[8] In its motion papers for summary judgment in lieu of complaint, BGC Notes cites to language in the Promissory Note purportedly authorizing BGC Notes to make this motion under CPLR § 3213 and stating that the Promissory is allegedly an independent agreement. (Kofsky Aff. ¶¶ 17, 19, 21.) To the extent these provisions are not deemed void as against policy (Point II(B)), which they are, and/or BGC Notes is not estopped from enforcing these provisions (Point II(C)), which it is, the arbitration provisions in the Employment Agreement supersede the provisions of the Promissory Note because they were executed together as part of one transaction. See U.C.C. § 3-119(1) ("As between the obligor and his immediate obligee or any transferee the terms of an instrument may be modified or affected by any other written agreement executed as a part of the same transaction..."); Liberty USA Corp. v. Buyer's Choice Ins. Agency LLC., 386 F. Supp. 2d 421 (S.D.N.Y. 2005) (forum selection clause in asset purchase agreement superseded forum selection clause in promissory note where both documents executed together as part of the same transaction).

B. BGC Notes May Not Force Gordon to Waive His Right to Compel Arbitration of This Dispute

The foregoing arbitration provisions must be applied to BGC Notes because to hold otherwise would essentially force Gordon to waive his right to arbitrate this dispute, which is a de facto dispute with his former employer which is otherwise bound to arbitrate, in the FINRA Proceeding. Several courts have held that such waivers are unenforceable as violating public policy.

Donaldson, 27 Misc.3d 391, is directly on point. In that case, defendant Donaldson was formerly employed as a financial advisor and registered broker at non-party Merrill Lynch Pierce Fenner & Smith ("MLPFS"), which was a member of FINRA and a wholly-owned subsidiary of BofA/Merrill Lynch & Co. Inc. ("BofA"). Id. at 393. Plaintiff Merrill Lynch International Finance, Inc. ("MLIFI") was also a subsidiary of BofA, and an affiliate of MLPFS, but was not a member of FINRA and extended forgivable loans to brokers such as Donaldson conditioned upon their continued employment with MLPFS in exchange for promissory notes. Id.

Donaldson's employment agreement with MLPFS and the Form U-4 required that any dispute between Donaldson and MLPFS be resolved in arbitration under the FINRA Code. Id. The promissory note between Donaldson and MLIFI, however, did not contain an arbitration provision but instead had a forum selection clause designating New York state courts as the forum to resolve disputes. Id.

After Donaldson's resignation, as here, plaintiff MLIFI filed a motion for summary judgment in lieu of complaint pursuant to CPLR § 3213 seeking to recover the unpaid balance of the note. Id. at 394. The Court denied MLIFI's motion, and its motion for leave to reargue, and granted Donaldson's motion to compel FINRA arbitration. Id. at 392.

In so holding, the Court first observed that "[i]t is undisputed that the loan-retention program between MLPFS and its employee brokers would be subject to mandatory arbitration under FINRA's rules." Donaldson, 27 Misc.3d at 394. The Court subsequently explained that:

> Here, the essential contract was an agreement between Donaldson and MLPFS to enhance the terms of his compensation in order to induce him to continue as a broker for MLPFS during and after the takeover; the loan was part of his employment contract. The loan, on favorable terms, was offered as part of his compensation package with MLPFS, which by FINRA rules requires arbitration when a dispute arises. MLIFI had no reason to offer a "sweetheart" loan, which this was, other than to work in concert, merely as a financing arm, with, and as an agent of, MLPFS to fund the loan on behalf of MLPFS and BofA in return for Donaldson's agreement to stay on as an employee of MLPFS and BofA. MLIFI contends, in this case, that the loan was an independent promise for repayment, but the contention is belied by the very fact that the loan was unusually favorable, without customary consideration for the favorable terms, and conditions upon employment with MLPFS or its successor which came due solely because Donaldson left his employment with MLPFS. In simple terms, it was an employment benefit made to induce continued employment. FINRA's arbitration requirement cannot be avoided simply by having an affiliate of MLPFS or a subsidiary of BofA fund the employment agreement.

Id. at 397.

This holding is equally applicable here. Gordon, like Donaldson, was employed by a FINRA member, BGC Financial, pursuant to an Employment Agreement and Form U-4 that required that any disputes be resolved under the FINRA Code. BGC Notes, similar to MLIFI, is a non-FINRA member and affiliate of BGC Financial that was used as a financing arm of BGC Financial to make a "loan" to Gordon as part of his compensation package from BGC Financial, in exchange for a Promissory Note that included very favorable terms for Gordon.

Plainly -- like BofA, MLPFS, and MLIFI before them -- BGC Holdings, BGC Financial and BGC Notes concocted this scheme for the sole purpose of forcing Gordon to waive his right

to compel arbitration of any dispute regarding this portion of his compensation. Any such waiver is unenforceable and void as against public policy. Thomas James Associates, Inc. v. Jameson, 102 F.3d 60, 66-7 (2d Cir. 1996) (holding that a waiver of an employee's right to arbitrate under the NASD Code is void as against public policy)[9]; Donaldson, 27 Misc.3d at 395 ("Recognizing that FINRA's arbitration clause is non-waivable, a signature by Donaldson on an employment related compensation arrangement which purports to bypass arbitration is without significance."); id. 27 Misc. 3d at 397-8 ("FINRA's arbitration requirement is non-waivable and cannot be circumvented by simply substituting an affiliate as a party in an employment-related dispute."); Gutkin (granting motion to compel FINRA arbitration in a substantially identical case to this case and Donaldson because otherwise it "would be tantamount to forcing Gutkin to waive his right to arbitrate what is clearly an employment-related dispute" and "to permit MLPFS to avoid compulsory FINRA arbitration by simply inserting a non-FINRA member in its place would be a clear violation of public policy"). (Kotler Aff. Ex. E, p. 3.)[10]

C. BGC Notes is Bound by BGC Financial's Agreement to Arbitrate Even Though It Is a Non-Signatory to The Employment Agreement

Additionally, despite being a non-signatory to the Employment Agreement, BGC Notes should be estopped from avoiding its obligation to submit to arbitration under the FINRA Code. It is well settled that where a signatory to an arbitration agreement seeks to compel a non-signatory to litigate a dispute in arbitration, the signatory may rely on five possible theories (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and/or (5)

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[9] FINRA was formed on or about July 30, 2007 and took over the regulatory functions of, inter alia, the National Association of Securities Dealers (the "NASD"). FINRA rules thus incorporate the NASD's rules and regulations. McMahan Sec. Co. L.P. v. Aviator Master Fund, Ltd., 20 Misc. 3d 386, 387 n.1 (Sup. Ct. N.Y. Cty. 2008) aff'd, 57 A.D.3d 326 (2008).

[10] See IM-13000 of the FINRA Code ("It may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2010 for a member to require associated persons to waive the arbitration of disputes contrary to the provisions of the Code of Arbitration Procedure.") (Kotler Aff. Ex. J.)

estoppel. Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 352 (2d Cir. 1999).

Where, as here, a party seeks to compel a non-signatory to arbitrate on an estoppel theory, the non-signatory "is estopped from denying its obligation to arbitrate when it receives a 'direct benefit' from a contract containing an arbitration clause." Id. at 353 (holding that a group of investors in a racing yacht who were not signatories to the operative arbitration agreement received direct benefits thereunder in the form of lower insurance rates and the ability to sail under the French flag); Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S., 9 F.3d 1060, 1064 (2d Cir. 1993) ("In addition, Noraudit knowingly accepted the benefits of the Agreement through its continuing use of the name 'Deloitte.' Thus, Noraudit is estopped from denying its obligation to arbitrate under the 1990 Agreement."); see also Matter of SSL Int'l, PLC v. Zook, 44 A.D.3d 429 (1st Dep't 2007); HRH Const. LLC v. Metro. Transp. Auth., 33 A.D.3d 568 (1st Dep't 2006).

"[B]enefits are direct – and therefore will lead to estoppel when knowingly exploited – when arising specifically from the unsigned contract containing the arbitration clause." Life Technologies Corp. v. AB Sciex Pte. Ltd., 803 F. Supp. 2d 270, 276 (S.D.N.Y. 2011). In addition, "benefits are direct when specifically contemplated by the relevant parties." Id. Here, BGC Notes received direct benefits from the Employment Agreement and is estopped from avoiding the arbitration provision therein.

Life Technologies Corp. is instructive. That case involved an asset purchase agreement whereby one of the defendants ("DH Tech") purchased a mass spectrometry business from one of the plaintiffs ("Life Tech"). Id. at 272. The asset purchase agreement required Life Tech and its affiliate ("Biosystems") to execute a license agreement whereby they licensed their

trademarks to DH Tech's affiliate ("AB Sciex"). Id. The asset purchase agreement with DH Tech had an arbitration provision but the license agreement with AB Sciex did not. Id. at 272-3. Life Tech and Biosystems filed a demand for arbitration of various claims against both DH Tech and AB Sciex and AB Sciex moved to enjoin the arbitration as against it. Id. at 273.

The Court held that AB Sciex was estopped from avoiding arbitration because it received a direct benefit by using the trademarks in connection with DH Tech's mass spectrometry business, and allegedly, other business. Id. at 276. The Court explained:

> True that AB Sciex is not a signatory to the Purchase Agreement. But the Purchase Agreement explicitly contemplates the license of the relevant trademarks to DH Tech or one of its affiliates, and the License Agreement explicitly references the Purchase Agreement in its recitals. In addition, AB Sciex's benefit was provided for by [the] Purchase Agreement, even if it was not ultimately transferred until the execution of the License Agreement.

Id. at 276-7.

The Court further elaborated:

> AB Sciex knowingly accepted and exploited benefits provided for in, and contemplated by, a contract containing an arbitration provision. It executed the License Agreement only because that agreement was called for by the Purchase Agreement; and it obtained trademarks and used those trademarks in commerce only because the Purchase Agreement required that Life Tech or its affiliates license the marks to DH Tech or its affiliates. The DH Tech affiliate eventually chosen, AB Sciex, is therefore bound to the arbitration clause in the Purchase Agreement.

Id. at 277-8.[11]

[11] The Court also rejected AB Sciex's argument, which BGC Notes will undoubtedly make, that it is not bound by the arbitration provision in the purchase agreement because AB Sciex's rights and plaintiffs' claims are grounded in the license agreement. Id. at 278. The Court explained that "the doctrine of estoppel is intended to address that precise issue; and the cases that apply it despite the existence of collateral agreements...belie AB Sciex's argument." Id.

This logic is equally applicable here. The Employment Agreement, containing an arbitration provision, expressly provided in Section 3(d) that BGC Financial would cause BGC Notes to make a "loan" in exchange for the Promissory Note. Absent this provision, BGC Notes would not have made any "loan" to Gordon or received the Promissory Note at all. Based solely on this provision in the Employment Agreement, BGC Notes received direct benefits in the form of the Promissory Note that gave BGC Notes the right to receive payments of principal and interest from Gordon and a security interest in his net partnership distributions. See also Mark Ross & Co., Inc. v. XE Capital Mgmt., LLC, 46 A.D.3d 296, 297 (1st Dep't 2007) ("MRC is also estopped from seeking a stay of arbitration because it derived direct benefits from the Agreement, via a Services Agreement, that provided that MRC was to receive a monthly service fee.").

Additionally, similar to Life Technologies Corp., the fact that the direct benefits were ultimately transferred in the Promissory Note does not alter this conclusion. See also Alfa Laval U.S. Treasury Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 857 F.Supp.2d 404, 414-415 (S.D.N.Y. 2012) ("The Indemnity Agreements thus require National Union to issue the insurance policies, and the non-signatory plaintiffs received insurance coverage from those policies. Accordingly, the non-signatory plaintiffs have received a direct benefit from the Indemnity Agreements and are estopped from denying their obligation to arbitrate as the Agreements require.")

Therefore, although BGC Notes is not a signatory to the Employment Agreement, it knowingly accepted benefits arising thereunder and is estopped from denying its obligations to arbitrate this dispute and should be compelled to arbitrate this dispute in the FINRA Proceeding.

POINT III

ANY ISSUES OF ARBITRABILITY SHOULD BE REFERRED TO THE FINRA ARBITRATION PANEL

Upon reaching the conclusion that BGC Notes is bound to arbitrate this dispute in the FINRA Proceeding, as it respectfully should, the Court need not analyze the scope of the relevant arbitration provisions. Gordon respectfully submits that any issue regarding whether this dispute is arbitrable within the scope of those provisions, which there should not be, should be decided by the arbitration panel in the FINRA Proceeding.

The law is clear that any issues of arbitrability should be left for the arbitrator if there is "clear and unmistakable evidence" that the parties intended to submit those issues to arbitration. Alliance Bernstein Inv. Research & Mgmt., Inc. v. Schaffran, 445 F.3d 121, 125 (2d Cir. 2006); Offshore Exploration & Prod. LLC v. Morgan Stanley Private Bank, N.A., 986 F. Supp. 2d 308 (S.D.N.Y. 2013).[12]

Courts have routinely held that clear and unmistakable evidence of an agreement to refer issues of arbitrability to the arbitrator was present where, as here, the parties' arbitration agreement covers "any" and/or "all" disputes and/or explicitly incorporates arbitration rules that empower an arbitrator to decide issues of arbitrability. Life Receivables Trust v. Goshawk Syndicate 102 at Lloyd's, 66 A.D.3d 495 (1st Dep't 2009) aff'd, 14 N.Y.3d 850 (2010) (affirming Supreme Court's denial of motion to stay arbitration where the parties' agreement specifically incorporated by reference the AAA rules, including the rule authorizing the AAA to determine the issues regarding the scope and validity of the arbitration agreement); Shaw Grp., Inc., 322 F.3d at 124-5 ("In sum, because the parties' arbitration agreement is broadly worded to require

[12] In the addition to the FAA, New York contracts law applies to the issue of arbitrability. Alliance Bernstein Inv. Research & Mgmt., Inc., 445 F.3d at 125.

the submission of 'all disputes' concerning the Representation Agreement to arbitration, and because it provides for arbitration to be conducted under the rules of the ICC, which assign the arbitrator initial responsibility to determine issues of arbitrability, we conclude that the agreement clearly and unmistakably evidences the parties' intent to arbitrate questions of arbitrability.").

This Court has reached a similar conclusion. See Wear v. Forex Capital Markets LLC, 2011 WL 675243 (Sup. Ct. N.Y. Cty. Feb. 17, 2011) (Scarpulla, J.) (granting motion to compel arbitration based on an arbitration provision incorporating by reference the National Futures Association Code of Arbitration).

Furthermore, this rule applies even to parties like BGC Notes that are non-signatories but nevertheless are bound to arbitrate on a direct benefits estoppel theory. Ryan, Beck & Co., LLC. v. Fakih, 268 F. Supp. 2d 210, 220-222 (E.D.N.Y. 2003) (holding that Ryan Beck was bound to the arbitration agreements with the Fakihs and Jones under a theory of estoppel and the terms of the arbitration agreement and the NASD Code require that questions or arbitrability be referred to the arbitrators); see also Triumph Const. Corp. v. Cemusa NY, LLC, 2014 WL 1682837 (Sup. Ct. N.Y. Cty. Apr. 28, 2014).

The Court of Appeals' decision in Matter of Smith Barney Shearson Inc. v. Sacharow, 91 N.Y.2d 39 (1997) is instructive. In that case, the customer agreements provided that "[a]ny controversy...shall be settled by arbitration" in accordance with the rules of the NASD Code. Id. at 43-4. The NASD Code stated that the arbitrators "shall be empowered to interpret and determine the applicability of all provisions under this Code..." Id. at 46-7. Based on the breadth of the arbitration provision in the contract and the language of the NASD Code, the Court held that the parties agreed to submit the issue of arbitrability to the arbitrator. Id. at 49.

Similarly, here, Section 9 of the Employment Agreement requires that, "any disputes, differences or controversies arising under this Agreement or Employee's employment shall, to the maximum extent permitted by applicable law, be settled and finally determined by arbitration...according to the rules of [FINRA]..." Section 9 continues that arbitration is the exclusive means for resolving "all matters in connection with this Agreement." Moreover, Rule 13413 of the FINRA Code, like the NASD Code before it, states that, "The panel has the authority to interpret and determine the applicability of all provisions under the Code. Such interpretations are final and binding upon the parties." (Kotler Aff. Ex. M.)

Accordingly, any issue regarding the arbitrability of this dispute should be referred to the FINRA arbitration panel presiding over the FINRA Proceeding.[13]

POINT IV

THE COURT SHOULD STAY BGC NOTES' MOTION FOR SUMMARY JUDGMENT IN LIEU OF COMPLAINT AND THE BALANCE OF THE ACTION PENDING ITS HEARING AND DETERMINATION OF GORDON'S MOTION HEREIN

CPLR § 2201 provides that, "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." A stay pursuant to CPLR § 2201 is appropriate to "prevent prejudice to a party by preserving the status quo pending a judicial determination in the same action, as by a stay

[13] Without waiving the foregoing, even if issues of arbitrability should be resolved by this Court, which respectfully they should not, this employment-related dispute falls within the scope of the relevant arbitration provisions. It is well settled that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Guyden v. Aetna, Inc., 544 F.3d 376, 382 (2d Cir. 2008) (citations and internal quotation marks omitted). "Thus, arbitration must be preferred unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Thomas James Associates, Inc., 102 F.3d at 65 (citations and internal quotation marks omitted). Here, it cannot be said with positive assurance that Section 9 of the Employment Agreement is not susceptible of any interpretation to cover this dispute. The facts of this dispute clearly "aris[e] under this Agreement or Employee's employment" and are encompassed in "all matters in connection with this Agreement" as required by Section 9 because the Promissory Note and the "loan" evidenced thereby were specifically set forth in the Employment Agreement and were exchanged as part of Gordon's employment compensation package.

contained in an order to show cause pending hearing of the motion..." Weinstein, Korn & Miller, New York Civil Practice, ¶ 2201.02[1] (2014).

In this case, Gordon respectfully submits that the Court grant the order show cause including a stay of BGC Notes' motion for summary judgment in lieu of complaint in order to preserve the status quo and prevent him from suffering prejudice pending the determination of this motion. Gordon's opposition to BGC Notes' motion is currently due on July 25, 2014. (Kotler Aff. Ex. G.) Absent a stay, Gordon will be forced to defend the merits of this dispute, which could potentially raise an argument that he waived his right to arbitration and, thus, undermine his motion herein.[14] In addition, if Gordon is forced to litigate the merits of this dispute while his motion to compel arbitration is pending, it raises the possibility that this Court will make findings of fact and/or conclusions of law that may affect Gordon's claims in the FINRA Proceeding.

By contrast, BGC Notes will not suffer any prejudice by virtue of a stay. Even if Gordon's motion to compel arbitration is ultimately denied, which it should not be, any stay granted by this Court will not affect the merits of BGC Notes' motion for summary judgment in lieu of complaint and may, at worst, minimally delay the resolution thereof. In light of BGC Notes' almost two-year delay in bringing this action in the first place, any further delay solely to resolve this motion to compel will not prejudice BGC Notes and would not require that Gordon's request for a stay be denied.

Accordingly, Gordon respectfully requests that the Court grant his order to show cause and order that, until further order of this Court and pending the hearing and determination of

[14] Gordon is specifically not including his defenses to BGC Notes' motion for summary judgment in lieu of complaint in this motion in order to avoid that result. In any event, whether this dispute is ultimately litigated in the FINRA Proceeding or before this Court, Gordon plans to assert several meritorious defenses to BGC Notes' claim based on, inter alia, BGC Notes' delay in enforcing the Promissory Note.

Gordon's motion to compel arbitration, all prior and pending motions, disclosure and proceedings in this action be stayed. Further, Gordon respectfully requests that his time within which to respond to BGC Notes' motion for summary judgment in lieu of complaint be stayed until ten (10) days after service with notice of entry of any decision denying this motion to compel arbitration.

CONCLUSION

For the reasons set forth above and in the accompanying affidavits, it is respectfully submitted that Gordon's motion should be granted in its entirety.

Dated: New York, New York
July 24, 2014

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