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United States District Court, S.D. New York.

SPARTAN CAPITAL SECURITIES, LLC, Plaintiff,
v.
Joseph STONBELY, Defendant.

18-CV-6819 (LAK) (JLC)
|
Signed 11/21/2018

Attorneys and Law Firms

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REPORT & RECOMMENDATION

JAMES L. COTT, United States Magistrate Judge

***1 To the Honorable Lewis A. Kaplan, United States District Judge:**

In January 2018, defendant Joseph Stonbely initiated an arbitration proceeding against plaintiff Spartan Capital Securities, LLC before the Financial Industry Regulatory Authority. Stonbely brought claims arising out of financial losses he alleges were caused by improper investments of his assets by Spartan, a broker-dealer, including a $50,000 investment in a company called IneedMD. On September 5, 2018, Spartan moved for a preliminary injunction in this Court, seeking to enjoin Stonbely from arbitrating any claims arising from the $50,000 investment. On September 28, 2018, Spartan revised its motion, and now seeks temporary restraints and a permanent injunction enjoining Stonbely from pursuing his IneedMD claims in arbitration. Stonbely has cross-moved to dismiss the complaint. For the following reasons, I recommend that Spartan's motion be denied and Stonbely's cross-motion be granted.

I. BACKGROUND

A. Facts

On January 20, 2010, Stonbely completed an application to open a brokerage account with Spartan. *See* Declaration of Kim Monchik dated September 27, 2018 ("Monchik Decl."), Exhibit ("Ex.") A: Account Application Documents ("Account Applications") at 2–4, Dkt. No. 16-1. [1] The application contained the language: "I understand that this account is being governed by the predispute arbitration provision in Section 13 of the Customer's Agreement on page 4 of this document." *Id.* at 3. [2] Since 2010, Stonbely dealt primarily with Ralph Metz, a registered representative of Spartan, who purchased and sold securities on Stonbely's account. *See* Brief In Support of Order to Show Cause Seeking Temporary Restraints and Permanent Injunction ("Pl. Brief") at 3, Dkt. No. 15.

On January 17, 2014, Spartan was retained by IneedMD, Inc. "to provide certain investment banking services." Monchik Decl., Ex. B: Investment Banking Agreement at 1, Dkt. No. 16-2. In June 2014, Metz contacted Stonbely regarding IneedMD. *See* Pl. Brief at 4. [3] Metz provided Stonbely with a Private Offering Memorandum ("POM") dated June 11, 2014, which stated that IneedMD had "retained Spartan Capital, LLC, a broker-dealer that is a member of the Financial Regulatory Authority ("FINRA"), as the exclusive placement agent for the Offering." Monchik Decl., Ex. C: POM at 3, Dkt. No. 16-3. [4]

***2** On June 17, 2014, Stonbely submitted another account-opening application with Spartan. Supplemental Declaration of Kim Monchik dated October 26, 2018 ("Monchik Supp. Decl."), Ex. A: Complete Copy of 2014 Second Client Account Information ("Supp. Application"), Dkt. No. 25-1. Stonbely alleges that he opened this new account at the direction of Metz "in order for [Stonbely] to get involved [in the IneedMD private placement]." Monchik Decl., Ex. F: FINRA Statement of Claim ("FINRA Claim") at 4, Dkt. No. 16-6. This application contained the following language: "I understand that this account is being governed by the predispute arbitration provision in Section 14 of the Customer's Agreement on page 7 of this document." Supp. Application at 4. Page 7 of the document contained the following arbitration agreement:

> **14. ARBITRATION. I AGREE THAT ALL CONTROVERSIES THAT MAY ARISE BETWEEN ME, MY INTRODUCING BROKER, AND RBC CM, OR ANY OF RBC CM'S AFFILIATES, EMPLOYEES OR AGENTS, CONCERNING ANY TRANSACTION(S), OR THE CONSTRUCTION, PERFORMANCE, OR BREACH OF THIS OR ANY OTHER AGREEMENT BETWEEN ME AND RBC CM PERTAINING TO SECURITIES AND OTHER PROPERTY, WHETHER ENTERED INTO PRIOR, ON OR SUBSEQUENT TO THE DATE HEREOF, SHALL BE DETERMINED BY ARBITRATION.**

Id. at 7 (emphasis in original). [5]

On the same date, Stonbely signed two other forms. The "Client RBC Express Credit Account Agreement and Application" included the following language: "This agreement contains a predispute arbitration clause. By signing an arbitration agreement the parties agree ... [to] giv[e] up the right to sue each other in court...." Account Applications at 13. The "Options Client Agreement and Approval Form" included the following language: "This agreement contains a predispute arbitration clause, listed on page 4 in bold print." Monchik Supp. Decl. Ex. B: Complete Copy of 2014 Option Client Agreement ("Supp. Options Agreement") at 5, Dkt. No. 25-2. Page 4 of the Options Client Agreement and Approval Form provided the following language:

> **I agree, and by carrying any account for me you agree, that all controversies between me and RBC CM, the introducing broker or any of their present or former agents or employees concerning any transaction or the construction, performance or breach of this or any agreement between us, whether the transaction or the agreement is entered into prior, on, or subsequent to the date hereof, shall be settled by arbitration ...**

Id. at 4 (emphasis in original).

On July 2, 2014, Stonbely executed a Subscription Agreement with IneedMD and paid $50,000 to acquire 50,000 shares of the company. Monchik Decl., Ex. E: Subscription Agreement ("Agreement") at 20, Dkt. No. 16-5. Unlike Stonbely's agreement with Spartan, the Subscription Agreement, which was signed by Stonbely and the Chief Executive Officer of IneedMD, contained the following provisions: "5.3 ... this Agreement shall be binding upon and inure to the benefit of the parties hereto and to their respective heirs, legal representatives, successors and assigns ..."; "5.5 ... Each of the parties hereto expressly and irrevocably (1) agrees that any legal suit, action or proceeding arising out of or relating to this Agreement will be instituted exclusively in New York State Supreme Court, County of New York, or in the United States District Court for the Southern District of New York ..."; and "5.11 Nothing in this Agreement shall create or be deemed to create any rights in any person or entity not a party to this Agreement." *Id.* at 15–16.

B. Procedural History

On January 8, 2018, Stonbely filed a Statement of Claim against Spartan with FINRA. Cross-Motion to Dismiss at 2, Dkt. No. 20. Stonbely contended that "the stock [of IneedMD] sits at 20 cents with little to no trading volume. [He] has not heard from the company, and a Google search reveals that it is permanently closed." FINRA Claim at 4–5. Over the course of Stonbely's business with Spartan, he alleged that he also lost approximately $87,000 from investments in other companies, in addition to the $50,000 loss from IneedMD. *Id.* at 5. He thus brought claims for fraud, unsuitability, breach of fiduciary duty, breach of contract, and negligence. *Id.* Stonbely sought a minimum of $500,000 in compensatory damages. *Id.* at 25.

***3** On May 3, 2018, Spartan filed its answer to Stonbely's Claim. *See* Monchik Decl., Ex. G: FINRA Answer, Dkt. No. 16-7. In the answer, Spartan contended that it "reserves the right to make an appropriate motion to

stay these proceedings while [it] seeks declaratory relief relating to the arbitrability of [Stonbely's] claim in a court of competent jurisdiction." *Id.* at 15.

On July 30, 2018, Spartan filed a complaint in this Court seeking a declaration that FINRA had no jurisdiction over Stonbely's claims regarding IneedMD. *See* Complaint ("Compl."), Dkt. No. 1. On July 31, 2018, Spartan moved to stay the arbitration of Stonbely's IneedMD claim with FINRA. Declaration of Matthew N. Fiorovanti dated September 27, 2018 ("Fiorovanti Decl."), Ex. A: Motion to Stay, Dkt. No. 17-1. On August 20, 2018, a FINRA panel denied the motion. Fiorovanti Decl., Ex. B: Order Denying Motion to Stay, Dkt. No. 17-2.

On September 5, 2018, Spartan moved for a preliminary injunction in this Court. Dkt. Nos. 7–9. [6] On September 6, 2018, Judge Kaplan referred this case to me for general pre-trial supervision and a report and recommendation on any dispositive motions. Dkt. No. 10. After an initial conference on September 21, 2018, the parties agreed that Spartan would file a revised motion for both preliminary and permanent injunctive relief as well as for a stay of the FINRA arbitration. Dkt. No. 14.

On September 28, 2018, Spartan filed its revised motion, requesting an order permanently enjoining Stonbely from pursuing his IneedMD claims in the FINRA arbitration and a temporary restraining order ("TRO") immediately staying the arbitration in its entirety. Dkt. Nos. 15–18. On October 4, 2018, Judge Kaplan denied the TRO after a show cause hearing. On October 19, 2018, Stonbely filed his opposition to Spartan's motion and cross-moved to dismiss the complaint ("Def. Opp."). Dkt. No. 20. On October 26, 2018, Spartan filed its reply ("Pl. Reply"). Dkt. No. 23. [7]

II. DISCUSSION

A. Legal Standards

To obtain a preliminary injunction, "a moving party must show four elements: (1) likelihood of success on the merits; (2) likelihood that the moving party will suffer irreparable harm if a preliminary injunction is not granted; (3) that the balance of hardships tips in the moving party's favor; and (4) that the public interest is not disserved by relief." *JBR, Inc. v. Keurig Green Mountain, Inc.*, 618 F. App'x 31, 33 (2d Cir. 2015) (citing *Salinger v. Colting*, 607 F.3d 68, 79–80 (2d Cir. 2010)). [8] "Irreparable harm is 'the *sine qua non* for preliminary injunctive relief.' " *trueEX, LLC v. MarkitSERV Ltd.*, 266 F. Supp. 3d 705, 726 (S.D.N.Y. 2017) (quoting *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1295 (2d Cir. 1995)). "As such, the moving party must first demonstrate that irreparable harm would be 'likely' in the absence of a preliminary injunction 'before the other requirements for the issuance of [a preliminary] injunction will be considered.' " *JBR, Inc.*, 618 F. App'x at 33 (quoting *Rodriguez ex rel. Rodriguez v. DeBuono,* 175 F.3d 227, 234 (2d Cir. 1998)).

***4** "The standard for a preliminary injunction is essentially the same as for a permanent injunction," except the plaintiff must show actual success on the merits for a permanent injunction rather than a likelihood of success. *Aretakis v. Caesars Entm't*, 16-CV-8751 (KPF), 2018 WL 1069450, at *13 (S.D.N.Y. Feb. 23, 2018) (quoting *Amoco Prod. Co. v. Vill. of Gambell, AK,* 480 U.S. 531, 546, n.12 (1987)); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008). Failure to prevail on a permanent injunction claim results in dismissal of the complaint. *See, e.g., Fort v. Am. Fed'n of State, Cty. & Mun. Employees,* 375 F. App'x 109, 112 (2d Cir. 2010) ("Plaintiffs' patent inability to demonstrate imminent and irreparable harm further supports the dismissal of their complaint seeking permanent injunctive relief.") (citing *Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006)).

B. Analysis

1. The FINRA Arbitration Should Not Be Stayed

Spartan sought a TRO immediately staying the entire FINRA arbitration proceeding initiated by Stonbely. On October 4, 2018, the parties appeared at a show cause hearing before Judge Kaplan, at which he denied the TRO. As a result, Stonbely states in his cross-motion: "As the Court has already denied Plaintiff's application for a TRO, [Stonbely's] argument will be limited to [Spartan's] application for a permanent injunction." Def. Opp. at 5. However, because it appears Judge Kaplan denied the TRO primarily on timing grounds, I will, as a threshold

matter, address the question of whether this Court should stay the arbitration. [9]

Because Congress enacted the Federal Arbitration Act ("FAA") "to declare 'a national policy favoring arbitration,' " "arbitration agreements in contracts 'involving commerce' are 'valid, irrevocable, and enforceable.' " *Vaden v. Discover Bank*, 556 U.S. 49, 58 (2009) (restating sections of FAA). In situations where there are both arbitrable and non-arbitrable claims, under New York law, "[a] court will not stay arbitration[.] ... If there is a least one arbitrable issue, arbitration should proceed." *Republic of Ecuador v. Chevron Corp.*, 09-CV-9958 (LBS), 2010 WL 1028349, at *1 (S.D.N.Y. Mar. 16, 2010) (internal citations omitted), *affirmed by*, 638 F.3d 384 (2d Cir. 2011). [10]

In this case, four arbitration agreements signed by both Spartan and Stonbely constitute "clear and unmistakable evidence that the parties agreed to arbitrate" any disputes they had. *Schneider v. Kingdom of Thailand,* 688 F.3d 68, 71 (2d Cir. 2012) (citing *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944, 947 (1995)). Spartan has not presented any evidence to suggest that the arbitration agreements were not validly entered into by either party, and does not dispute that the majority of Stonbely's claims are subject to binding arbitration agreements. Therefore, the claims involving other investments on Stonbely's account with Spartan are "valid, irrevocable, and enforceable," and must be arbitrated. *Vaden*, 556 U.S. at 58.

***5** Because there are arbitrable issues in this case, the Court should not stay the entire arbitration pending judicial proceedings as Spartan requests. Indeed, Spartan in its reply papers acknowledges that this is the correct result: "[T]he Supreme Court concluded that when faced with arbitrable and nonarbitrable claims arising out of the same transaction, the courts must compel arbitration of the arbitrable claims, 'even where the result would be possibly inefficient maintenance of separate proceedings in different forums.' " Pl. Reply at 2–3 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985)). This statement undermines Spartan's own request to stay the entire arbitration. [11] For these reasons, the FINRA arbitration should not be stayed.

2. Spartan Is Not Entitled to a Permanent Injunction

Spartan also seeks a permanent injunction enjoining Stonbely from pursuing his claims related to IneedMD in arbitration. In seeking this relief, it contends that it can enforce the forum selection clause of a contract to which it is not a party. However, Spartan has not demonstrated that it is entitled to such relief. It has not established irreparable harm, the *sine qua non* of injunctive relief. More specifically, it has not shown that it will be irreparably harmed by resolving the IneedMD claim in arbitration. In addition, it has not demonstrated success on the merits, and the balance of hardships tips in Stonbely's favor.

a. Spartan Cannot Establish Irreparable Harm

i. Spartan Is Not a Party to the Subscription Agreement between Stonbely and IneedMD

As a threshold matter, Spartan is not a party to the Subscription Agreement between Stonbely and IneedMD, and therefore does not have the ability to enforce its forum selection clause. In its moving papers, Spartan "recognizes that it is not a signatory to the Subscription Agreement." Pl. Brief at 19. Instead, it cites to cases where courts held that a nonparty could invoke a forum selection clause when that nonparty "is 'closely related' to one of the signatories.... The relationship between the nonparty and the signatory in such cases must be sufficiently close so that enforcement of the clause is foreseeable by virtue of the relationship between them." *Id.* at 20 (quoting *Freeford Ltd. v. Pendleton,* 53 A.D.3d 32, 39 (1st Dep't 2008)).

Spartan argues that it was the exclusive placement agent retained by IneedMD, and "[g]iven the fact that the entirety of Stonbely's communications regarding the purchase of shares of IneedMD were with Spartan, and that Stonbely decided to proceed with the purchase as a result of those discussions with Spartan, Spartan's enforcement of the forum clause is foreseeable." Pl. Brief at 22. However, it provides no authority to support its position that its relationship with IneedMD can be characterized as "closely related." Instead, Spartan refers

to several cases, citing only to their disposition rather than considering the circumstances of each case. Though Spartan contends "the question [of whether a non-party is closely related] is factual, not legal, and is resolved by considering the relevant facts of the matter," it does not undertake a comparison of the facts of the cases it cites to its relationship with IneedMD. Pl. Reply at 9. Because Spartan failed to do so, I will conduct such an analysis of the four cases Spartan has cited.

In *Freeford Ltd.*, the plaintiff sought to enforce an agreement with a forum selection clause that it did not sign based on another agreement it had signed the same day. Both agreements were related to the same financing of a corporation; the corporate defendant owned substantial shares of that corporation and the individual defendant was co-chairman and executive director of that corporation. 53 A.D.3d at 33–35. In that case, the court held that "[e]ven a cursory examination of these two agreements makes clear that [defendants] had every reason to foresee that [plaintiff] would seek to enforce the forum selection clause against them." *Id.* at 40–41 (emphasis added). No such circumstance exists here. In fact, Spartan and Stonbely had just executed an agreement two weeks prior to the Subscription Agreement stating that "all controversies between [Stonbely] and ... the introducing broker ... concerning any transaction or the construction, performance or breach of this or any agreement between us, whether the transaction or the agreement is entered into prior, on, or subsequent to the date hereof, shall be settled by arbitration." Supp. Options Agreement at 4 (emphasis added). Even a cursory examination of the two agreements makes clear that Stonbely could not have foreseen that Spartan would seek to invoke the forum selection clause in the Subscription Agreement.

***6** In *Magi XXI, Inc. v. Stato della Citta del Vaticano,* Magi, a New York corporation, entered into sublicense agreements with Second Renaissance, a California corporation, to produce products with the name, logo, and seal of the Vatican Library. 714 F.3d 714, 718 (2d Cir. 2013). Second Renaissance had previously entered into a Master License Agreement with the Vatican to produce and market such products "and, subject to certain conditions, to sublicense those rights." *Id.* The Second Circuit held that the Vatican State could enforce the forum selection clause entered into between Magi and Second Renaissance, because the Vatican State and Second Renaissance were closely related. "Several observations inform[ed] [the Court's] reasoning, [but] [i]n sum, the Vatican State was known by Magi as the source of the contractual authority granted to Magi by the Sublicense Agreements. The Sublicense Agreements also specifically provided for the extensive and continuing involvement of the Vatican State in the execution of Magi's obligations and authority under the Sublicense Agreements." *Id.* at 723–24. [12]

In this case, the Subscription Agreement between Stonbely and IneedMD did not make any reference to Spartan holding any authority over the agreement. Indeed, the Agreement specifically states: "Nothing in this Agreement shall create or be deemed to create any rights in any person or entity not a party to this Agreement." Agreement at 16. [13] Stonbely could not have foreseen that Spartan would enforce the Subscription Agreement on behalf of IneedMD based on the language of the Agreement itself.

In *Thibodeau v. Pinnacle FX Investments*, the court upheld a forum selection clause invoked by individual defendants Bell and Francis because they were allegedly principals of the corporate defendant Pinnacle, were being sued in connection with their activities at Pinnacle, and were thus closely related to Pinnacle, which had entered into a contract with the plaintiff that had a forum selection clause. 08-CV-1662 (JFB) (ARL), 2008 WL 4849957, at *5, n.4 (E.D.N.Y. Nov. 6, 2008). Spartan's relationship to IneedMD is not analogous. Finally, in *In re Optimal U.S. Litig.*, the court noted the close relationship between the defendants and the party with which the plaintiffs signed a forum selection clause: "Plaintiffs are not suing SBT; they are suing Santander U.S., Banco Santander (its parent), OIS (another Banco Santander subsidiary), and Clark (an OIS employee)." 813 F. Supp. 2d 351, 369 (S.D.N.Y. 2011). Spartan does not have a similarly close relationship to IneedMD. In sum, none of the cases cited by Spartan demonstrates that the relationship between Spartan and IneedMD is sufficiently close that Stonbely could have foreseen Spartan's enforcement of IneedMD's forum selection clause.

ii. Spartan Explicitly Agreed to Arbitration of "Controversies" Arising under Stonbely's Account

***7** FINRA members like Spartan "must arbitrate a dispute under the Code if: [a]rbitration under the Code is either: (1) [r]equired by a written agreement, or (2) [r]equested by the customer; [t]he dispute is between a customer and a [FINRA] member ...; and [t]he dispute arises in connection with the business activities of the member." FINRA Rule 12200. [14]

Spartan contends that courts in this District have upheld forum selection clauses subsequently entered into by parties where Rule 12200 would otherwise apply. *See, e.g., J.P. Morgan Sec. LLC v. Quinnipiac Univ.*, 14-CV-429 (PAE), 2015 WL 2452406, at *4 (S.D.N.Y. May 22, 2015) (collecting cases). Courts in this District have provided injunctive relief to plaintiffs in some cases because, "[a]s a matter of law, there is irreparable harm when a party is 'compelled to arbitrate ... without having agreed to arbitration' because that party is 'forced to expend time and resources arbitrating an issue that is not arbitrable.' " *NASDAQ OMX Group, Inc. v. UBS Secs. LLC,* 13-CV-2244 (RWS), 2013 WL 3942948, at *12 (S.D.N.Y. June 18, 2013) (quoting *UBS Sec. LLC v. Voegeli,* 684 F.Supp.2d 351, 354 (S.D.N.Y. 2010)). Though Spartan contends that, as a matter of law, it too has suffered irreparable harm, the line of reasoning employed by the cases it has cited is distinguishable from the facts of this case.

In *J.P. Morgan Sec. LLC*, the defendant, Quinnipiac University, was a customer of J.P. Morgan Securities and sought to arbitrate under the second prong of FINRA Rule 12200: "[r]equested by the customer." 2015 WL 2452406, at *2. Likewise, the Second Circuit held that a forum selection clause superseded the obligation to an arbitration "[r]equested by the customer." *Goldman, Sachs & Co. v. Golden Empire Sch. Fin. Auth.*, 764 F.3d 210, 214 (2d Cir. 2014) (hereinafter *Golden Empire*). These courts have made a distinction between a default obligation to arbitrate when requested by a customer and a written agreement to arbitrate.

In this case, the arbitration sought by Stonbely is not only "[r]equested by the customer," but also "[r]equired by a written agreement." FINRA Rule 12200. Here, Spartan explicitly agreed to arbitration with Stonbely. Account Applications at 3, 13; Supp. Application at 4, 7; Supp. Options Agreement at 4, 5. Stonbely is thus not merely relying on the default obligation to arbitrate under FINRA 12200. Three of these agreements to arbitrate were executed just weeks before Stonbely signed the Subscription Agreement with IneedMD. Spartan cannot now argue that it is "compelled to arbitrate ... without having agreed to arbitration," and has thus not suffered irreparable harm. *NASDAQ OMX Group, Inc.*, 2013 WL 3942948, at *12 (quoting *UBS Sec. LLC,* 684 F. Supp. 2d at 354).

In its reply brief, Spartan continues to ignore its multiple arbitration agreements with Stonbely. Indeed, Spartan begins its argument by omitting the provision of FINRA 12200 that parties must arbitrate a dispute if "(1) [r]equired by a written agreement." Pl. Reply at 4. Spartan only includes the second prong — "(2) [r]equested by the customer." *Id.* Spartan then cites to cases where "different or additional contractual arrangements for arbitration can supersede the rights conferred on [a] customer by virtue of [a] broker's membership in a self-regulating organization such as [FINRA]." *Id.* at 5, 7 (quoting *Kidder, Peabody & Co. v. Zinsmeyer Trusts P'ship*, 41 F.3d 861, 864 (2d Cir. 1994); *In re American Exp. Financial Advisors Sec. Litig.*, 672 F.3d at 132) (emphasis added). But again, these cases refer to arbitration requested by customers rather than required by agreement. The same is not true in this case given that Spartan executed written arbitration agreements with Stonbely.

***8** For all these reasons, Spartan has not demonstrated irreparable harm in seeking to enjoin the FINRA arbitration as it cannot enforce the forum selection clause in the Subscription Agreement, and it agreed multiple times to arbitration with Stonbely.

b. Spartan Cannot Establish Success on the Merits

Spartan has failed to demonstrate success on the merits of its claim for many of the same reasons. Spartan attempts to analogize this case with *Golden Empire*: "[t]his Court should similarly apply the holding in *Golden Empire* and conclude that Stonbely's claims ... must be instituted in court...." Pl. Brief at 26. As discussed above, *Golden Empire* is distinguishable from this case. Spartan restates *Golden Empire's* "holding that 'a forum selection clause requiring all actions and proceedings to be brought in

federal court supersedes an earlier agreement to arbitrate.' " *Id.* at 24 (quoting *Golden Empire*, 764 F.3d at 215). However, the facts of *Golden Empire* demonstrate that the "earlier agreement to arbitrate" in that case was the default agreement under FINRA Rule 12200, rather than separate, explicit written agreements to arbitrate, as here. *Golden Empire*, 764 F.3d at 214. Spartan has not demonstrated success on the merits.

c. The Balance of Hardships Favors Stonbely

Spartan seeks to "permanently enjoin Stonbely from prosecuting any claims arising from his purchase of 50,000 shares of ... [IneedMD] in a private placement transaction in the FINRA Arbitration." Pl. Brief at 1. However, Stonbely brought claims concerning other investments he made that are not subject to the forum selection clause in the Subscription Agreement. [15] Over the course of Stonbely's business with Spartan, he alleged that he also lost approximately $80,000 from investments in speculative energy companies and approximately $7,000 from Novavax, a speculative biopharmaceutical company. FINRA Claim at 5. Spartan and Stonbely executed written arbitration agreements that would cover these claims, which Spartan does not dispute in its motion. These claims would still need to be adjudicated in the FINRA arbitration, even if Spartan prevailed in this Court.

In a balance of hardships analysis, courts must "ask[ ] which of the two parties would suffer most grievously if the preliminary injunction motion were wrongly decided." *J.P. Morgan Sec. LLC*, 2015 WL 2452406, at *6 (quoting *Golden Empire*, 764 F.3d at 444). Spartan contends that if it must proceed through arbitration, it would lose the benefits of the judicial process, including broad discovery rules and the possibility of sanctions. *See* Pl. Brief at 29. However, whether or not the injunction it seeks is granted, Spartan will still proceed through arbitration as to Stonbely's other claims, will not be able to avail itself of those purported benefits, and will likely present a similar defense. At the heart of Stonbely's claims is the conduct of Spartan representative Ralph Metz. Stonbely's FINRA claim contends that Metz "would constantly push to try new stocks, but would not keep [him] informed about what was going on in the account or the market or his strategy...." FINRA Claim at 2–3. Stonbely even asserts that his investment in Novavax was tied to his investment in IneedMD. *Id.* at 4 ("[Metz] also said that in order for [Stonbely] to get involved [in the IneedMD placement], [he] would need to open up a new account at [Spartan] and purchase at least one security, so [he] would have to add an additional ~$9,000 as well, which [Metz] invested in Novavax (NVAX), a speculative biopharmaceutical company."). Thus, in responding to Stonbely's claims, whether or not the IneedMD claims are excluded from arbitration, Spartan will likely provide the same testimony from Metz, conduct similar discovery related to Stonbely's account, and make similar arguments for damage calculations. Spartan would thus experience the same alleged hardships it seeks to avoid even if this Court were to grant its motion for an injunction.

***9** Moreover, Stonbely claims a financial hardship: "While [Spartan] may have unlimited funds to litigate across multiple forums, [Stonbely] does not." Def. Opp. at 19. Spartan contends that Stonbely will not be harmed by an injunction because "Stonbely can simply re-file the exact same claims that he has already filed with FINRA ... Stonbely will have the same exact claim, with the same requested relief, simply in a different forum in the same city." Pl. Brief at 29. But Spartan does not acknowledge that the other claims Stonbely has against Spartan are bound by the arbitration agreements both parties signed. Stonbely cannot "simply" re-file his claims in New York state or federal court. He would have to litigate claims with the same underlying facts in two separate proceedings, which may lead to inconsistent results and will certainly lead to added expense. Unlike in the many cases cited by Spartan, the parties here are not two corporate entities. Considering the relative hardships of proceeding in two separate forums for an individual party, the balance of hardships tips decidedly in Stonbely's favor.

For all these reasons, Spartan's motion for permanent injunctive relief should be denied, and Stonbely's cross-motion to dismiss should be granted.

3. Stonbely Is Not Entitled to Attorney's Fees

In opposing Spartan's motion, Stonbely makes a cursory argument to recover his attorney's fees. Def. Opp. at 18–19. Stonbely cites to the federal courts' power to "award

counsel fees to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* (citing *Klipsch Grp., Inc. v. ePRO E-Commerce Ltd.*, 880 F.3d 620, 632, n.6 (2d Cir. 2018)) (internal citations and quotations omitted). Stonbely contends in seeking this sanction that Spartan "did not even have a colorable argument in filing this action and motion," and:

> [Spartan's] bad faith is further illustrated by its purposeful omission of the parties' multiple FINRA arbitration agreements (for example, as shown above, Plaintiff includes pages 1-3 and 5 of the options agreement, specifically leaving out page 4, the page with the FINRA arbitration clause ...), despite this specific issue being raised by [Stonbely's] counsel at the court conference and a warning from the Court that any documents submitted as exhibits had to be complete.

Id. at 18–19.

"Federal courts possess certain 'inherent powers,' not conferred by rule or statute, 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.' " *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017) (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 630–31 (1962)). "[O]ne permissible sanction is an 'assessment of attorney's fees' ... instructing a party that has acted in bad faith to reimburse legal fees and costs incurred by the other side." *Id.* at 1186 (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991)).

"[T]o impose sanctions under [the court's inherent powers or 28 U.S.C. § 1927], a court must find clear evidence that (1) the offending party's claims were entirely without color, and (2) the claims were brought in bad faith—that is, motivated by improper purposes such as harassment or delay." *Adkins v. Gen. Motors Acceptance Corp.*, 479 F. App'x 386, 387 (2d Cir. 2012) (quoting *Eisemann v. Greene*, 204 F.3d 393, 396 (2d Cir. 2000)) (internal quotations omitted). "[A] claim is colorable 'when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim.' " *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 337 (2d Cir. 1999) (quoting *Nemeroff v. Abelson*, 620 F.2d 339, 348 (2d Cir. 1980)). Bad faith is established when the "actions taken are 'so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose.' " *Id.* at 338 (quoting *People of the State of New York v. Operation Rescue Nat'l*, 80 F.3d 64, 72 (2d Cir. 1996)). "[T]he court's factual findings of bad faith must be characterized by a high degree of specificity." *Id.* (quoting *Milltex Indus. Corp. v. Jacquard Lace Co.*, 55 F.3d 34, 38 (2d Cir. 1995)) (internal quotations omitted).

***10** In reviewing the totality of the record, I do not recommend imposing sanctions on Spartan. Spartan's arguments were without merit, but its actions do not rise to the level of bad faith required to invoke the court's inherent sanction powers.

As discussed, Spartan does not provide a colorable argument for either staying the entire arbitration or for the injunctive relief it seeks. Spartan ignores established law regarding a district court's ability to stay an arbitration when a valid, binding arbitration agreement exists. It seeks to stay the entire arbitration, even though it is aware of, and eventually cites to, cases holding that courts must compel arbitration of any arbitrable claims. In its main brief, Spartan makes no mention of the multiple arbitration agreements signed by Spartan and Stonbely. Its legal analysis, even in its reply, is based on cases where there were no written arbitration agreements signed by the parties. Spartan also attempts to use its allegedly close relationship with IneedMD to invoke a forum selection clause in a contract to which it is not a party. Spartan is unable, however, to provide appropriate comparisons to case law that demonstrates its relationship with IneedMD is sufficiently close. Its attempt to characterize itself as a "legal representative" of IneedMD is also unavailing. Finally, and tellingly, Spartan never explains why it waited for many months after Stonbely filed his FINRA claim to seek emergency relief in this Court.

Nonetheless, Spartan's actions do not rise to the level of bad faith. *See, e.g.*, *Schlaifer Nance & Co.*, 194 F.3d at 340 ("[A]lthough the District Court concluded that

SNC's claim was objectively frivolous and that SNC's own documents and witnesses indicated so, we cannot conclude that the continuation of SNC's action was anything more than the result of poor legal judgment."). Stonbely refers to Spartan's inclusion of pages 1–3 and page 5 of the Options Client Agreement and Approval Form, but not page 4, as a demonstration of bad faith. This omission is egregious, especially given the key information on page 4 concerning the exact terms of the arbitration agreement (a pattern repeated with the 2010 and 2014 account applications). But in my conference with the parties on September 21, 2018, I requested complete documents by the time the motion was fully submitted. Tr. 9:3–5. Spartan did eventually provide the complete documents (though a few days after the motion was fully submitted). While its explanations for not timely including the documents are not entirely persuasive, its actions can be attributed to carelessness rather than to bad faith. Indeed, the complete pages provided with the Monchik Supplemental Declaration were dated October 26, 2018, the date the motions were to be fully submitted. In recent cases where the court has awarded sanctions invoking its inherent powers, the offending party's demonstrations of bad faith were cumulative and could only be attributed to improper motives. *See, e.g., In re Petrobras Sec. Litig.*, 14-CV-9662 (JSR), 2018 WL 4521211, at *6 (S.D.N.Y. Sept. 21, 2018) ("The only likely motive for this misconduct is ... extortion. Any doubt that this is his bad faith motivation is erased by Furman's established history ... of filing appeals on behalf of objectors and then voluntarily dismissing them in exchange for payments.").

***11** While Spartan's actions in pursuing this motion do not have colorable basis, the bad faith bar is difficult to satisfy and should be invoked with restraint. *See, e.g., Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 78–79 (2d Cir. 2000). Spartan has not acted in a way that would require sanctions under the court's inherent powers. Therefore, I recommend denying Stonbely's request for attorney's fees.

III. CONCLUSION

For the foregoing reasons, I recommend that Spartan's motion for injunctive relief be denied and Stonbely's cross-motion to dismiss be granted. I further recommend that no attorney's fees be awarded to Stonbely.

All Citations

Slip Copy, 2018 WL 6070001

Footnotes

1 Pin cites to Exhibit A of the Monchik Declaration refer to the pagination of the document as it appears on the ECF filing because there are duplicate original page numbers. In addition, because this exhibit, as well as many others Spartan has filed, includes Stonbely's personal identifying information in either unredacted or poorly redacted form, the Court in an order issued today has directed the Clerk to seal certain filings pursuant to Rule 5.2 of the Federal Rules of Civil Procedure.

2 Page 4 of this account-opening application from 2010 containing the exact arbitration provision was not included in any of Spartan's submissions. Spartan contends that it "no longer has a complete copy of this application in its possession, custody and control." Supplemental Declaration of Kim Monchik dated October 26, 2018 at ¶ 3, Dkt. No. 25. However, Spartan did provide a complete copy of an account-opening application from 2014, which will be discussed below.

3 While Spartan submitted a declaration from Metz (Dkt. No. 18), the declaration did not include a number of the facts set forth in Spartan's memorandum of law (such as the dates when Metz interacted with Stonbely). It is well-settled that "[a]n attorney's unsworn statements in a brief are not evidence." *Kulhawik v. Holder*, 571 F.3d 296, 298 (2d Cir. 2009).

4 Pin cites to Exhibit C of the Monchik Declaration refer to the pagination of the document as it appears on the ECF filing because the original document does not have page numbers.

5 RBC Capital Markets (CM) is Spartan's clearing agent. *See* Monchik Supp. Decl. at ¶ 2, Dkt. No. 25.

6 Spartan had filed a motion for declaratory judgment and injunctive relief on July 30, 2018 (Dkt. No. 2), but because of a filing error, the motion was terminated.

7 Spartan omitted several pages in its motion papers filed on September 5, 2018. The omitted pages included important arbitration provisions. During the conference held before me on September 21, 2018, Stonbely's attorney mentioned the missing pages, and I responded: "Make sure either between the plaintiff and the defendant the record is completed by the time the motion is fully submitted to the court." Transcript ("Tr.") 9:3–5, September 21, 2018. Notwithstanding this

directive, Spartan did not include the missing pages in its submissions filed on September 28, 2018. Dkt. No. 16. On October 22, 2018, I directed Spartan to submit the missing pages by October 26, 2018. Dkt. No. 21. I issued a second order on October 29, 2018, again directing Spartan to submit these missing pages, as it had failed to do so by the deadline. Dkt. No. 24. Spartan finally submitted the pages on October 29, 2018. Dkt. No. 25.

8 The standards for a TRO are the same as those for a preliminary injunction. *See Tangtiwatanapaibul v. Tom & Toon Inc.*, 17-CV-00816 (LGS), 2018 WL 4405606, at *3 (S.D.N.Y. Sept. 17, 2018) ("It is well established that in this Circuit the standard for an entry of a TRO is the same as for a preliminary injunction.") (quoting *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n,* 17-CV-06761 (KPF), 2017 WL 4685113, at *1 (S.D.N.Y. Oct. 17, 2017)).

9 At the show cause hearing, Judge Kaplan asked: "What irreparable injury is going to befall you before the motion can be heard?" Tr. 4:5–6, October 4, 2018.

10 In *Republic of Ecuador*, the Court "assume[d] without deciding" that it had the power to stay an arbitration. 2010 WL 1028349, at *1. The Court makes the same assumption for purposes of this Report and Recommendation, as it remains an open question in the Second Circuit in circumstances such as the ones presented here whether a court may do so. *See* Def. Opp. at 6; *In re Am. Exp. Fin. Advisors Sec. Litig.*, 672 F.3d 113, 139 (2d Cir. 2011); *Allstate Ins. Co. v. Elzanaty*, 929 F. Supp. 2d 199, 218 (E.D.N.Y. 2013). In *In re Am. Exp. Fin. Advisors Sec. Litig.*, the Circuit found that "at least where the court determines ... that the parties have not entered into a valid and binding arbitration agreement, the court has the authority to enjoin the arbitration proceedings." 672 F.3d at 140 (emphasis added); *see also Goldman, Sachs & Co. v. Golden Empire Sch. Fin. Auth.*, 764 F.3d 210, 213 (2d Cir. 2014) ("Federal courts generally have remedial power to stay arbitration.") (emphasis added).

11 Indeed, Spartan never fully explains why the entire FINRA arbitration should be stayed, and focuses exclusively on the IneedMD claim in the majority of its motion papers.

12 One of the observations the Second Circuit found persuasive was that "the Master License Agreement and Sublicense Agreements had identical forum selection clauses." *Magi XXI, Inc. v. Stato della Citta del Vaticano*, 714 F.3d at 723. In this case, as Stonbely points out, Spartan's own agreement with IneedMD provided that if they had a dispute, it would be arbitrated. Given this fact, it could not have been the intention for Spartan to be included in the forum selection clause of the Subscription Agreement, otherwise the arbitration provision between Spartan and IneedMD would be meaningless. *See* Def. Opp. at 9.

13 Spartan makes an unpersuasive attempt to call itself a "legal representative" under section 5.3 of the Subscription Agreement, which provides that it "shall be binding upon and inure to the benefit of the parties hereto and to their respective heirs, legal representatives, successors and assigns...." Pl. Brief at 23; Agreement at 15. Included as it is with heirs, successors, and assigns, "legal representatives" in this section clearly refers to someone "who manages the legal affairs of another because of incapacity or death...." Def. Opp. at 14 (citing *Matter of Kese Indus. v. Roslyn Torah Found.*, 15 N.Y.3d 485, 490 (2010)).

14 FINRA Rule 12200 is available at http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=4106.

15 In all of the cases cited by Spartan, each involved an issue pertaining to a single claim under arbitration. Pl. Brief at 23–26.