

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

PRESENT: EDWARD H. LEHNER

PART 19

Justice

NTRADER Pro LLC, Et Al.

INDEX NO.

102334/09

MOTION DATE

Joseph Azevedo Pines,
Et Al.

MOTION SEQ. NO.

1

MOTION CAL. NO.

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

_____ motion is decided in accordance

with accompanying memorandum decision

FILED

APR 21 2009

COUNTY CLERK'S OFFICE
NEW YORK

APR 16 2009

Dated: _____

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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In the matter of the Petition of VTrader Pro, LLC;
Cutler Group, LP; DC Trading Partners LLC;
Everest Trading LLC; and Mog Capital, LLC

Petitioners,

Index No.
102334/09

For an Order Pursuant to Section 3102(c) of the
Civil Practice Law and Rules to Direct the Issuance
of a Subpoena Duces Tecum to Joseph Azevedo Pires,
Kellogg Capital Group LLC and NYSE Euronext,
formerly known as The American Stock Exchange,

Respondents.

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EDWARD H. LEHNER, J.

FILED
APR 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

In this special proceeding Petitioners seek an order, pursuant to CPLR 3102[c], directing the pre-arbitration issuance of judicial subpoenas to Respondents in order to ascertain the identity of other potential parties to the contemplated arbitration proceeding.

Petitioners state that they will be seeking recovery of over \$3.8 million for the allegedly improper trading of shares of Inter Oil Corp. (OIC). They claim that on June 19, 2008, 422,600 shares of OIC stock were wrongfully sold at a 30% premium above the then market price and they intend to commence an arbitration in accordance with the procedures of the Financial Industry Regulatory Authority's (FINRA). Petitioners

do not dispute that FINRA' s Code of Arbitration Procedure for Industry Disputes (Industry Code) provides a mechanism for obtaining discovery during an arbitration, but note that there is no provision therein for discovery in aid of contemplated arbitration. However, they argue that they are entitled to pre-arbitration discovery.

Respondent NYSE Euronext (NYSE) stated in an e-mail dated March 12, 2009 that it "does not intend to appear and/or file any submission in response to the order . . . (and that) [i]f the Court determines that discovery . . . is appropriate at this stage of your dispute, and then issues a subpoena to NYSE . . . , NYSE will respond to such subpoena thereafter".

Respondents Kellogg Capital Group, LLC and Joseph Avazedo Pires object to the subpoenas arguing that: (1) any discovery should be pursuant to the Industry Code, and (2) this court can not issue the subpoenas because the dispute is governed by the Federal Arbitration Act (FAA).

The underlying dispute between various broker-dealer organizations concerns the alleged manipulation of certain securities traded on national securities and exchange markets. As such, the dispute is to be resolved within the context of arbitration. Specifically, the dispute is to be submitted to the FINRA under the Industry Code, which contains, inter alia, a comprehensive system of rules and procedures regarding discovery in arbitration.

In pertinent part, the Industry Code § 13512 states:

- (a) To the fullest extent possible, parties should produce documents and make witnesses available to each other without the use of subpoenas. **Arbitrators shall have the authority to issue subpoenas** for the production of documents or appearances of witnesses. [emphasis added]
- (b) A party may make a **written motion requesting that an arbitrator issue a subpoena** to a party or non-party. [emphasis added]

Section 13505 of the Industry Code further provides that “[t]he parties must cooperate to the fullest extent applicable in the exchange of documents and information to expedite the arbitration”. Industry Code § 13506 prescribes an orderly procedure and time table within which to request and exchange documents or information.

The Petitioners in seeking judicially approved pre-arbitration discovery do not seek to circumvent the jurisdiction of FINRA by commencing a proceeding in this court. Nor are the Petitioners relying upon the arbitration provisions of the CPLR in derogation of the FAA. Rather, the issue at hand is one of timing.

While the Industry Code appears quite comprehensive and unambiguous as to discovery within the context of the actual arbitration, it is silent as to pre-arbitration discovery. The FINRA procedures for obtaining discovery become effective after arbitration has commenced, an arbitration panel has been selected, and a discovery application has been made to the panel. Hence, the applicability and, in this instance,

the demonstrated need for pre-arbitration discovery has been sufficiently established so as to seek and obtain judicial, rather than arbitral, redress.

In pertinent part CPLR § 3102 [c] provides:

Before an action is commenced, disclosure to aid in bringing the action, to preserve information or **to aid in arbitration**, may be obtained, but only by court order.[emphasis added].

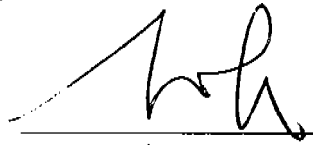
However, pre-action disclosure in connection with an out of court arbitration is frowned upon by the courts. The judicial attitude is that since the parties have chosen an arbitral, rather than judicial, tribunal for their dispute, they should ordinarily seek their disclosure before the arbitrators (see, *DeSapio v. Kohlmeyer*, 35 NY2d 402, 406 [1974]). Nonetheless, there are times when the court can be prevailed upon to act when disclosure is needed to present a “proper case” to the arbitrator (see, *Hendler & Murray, P.C. v Lambert*, 127 AD2d 820 [2d Dept 1987]). One such instance is where, as here, the application under CPLR § 3102 [c] is to obtain limited information as to the identity of potential defendants [respondents] against whom an action [arbitration] may exist (see, *Alexander v. Spanierman Gallery, LLC*, 33 AD3d 411 [1st Dept. 2006]; *Toal v. Staten Island University Hospital*, 300 AD2d 592 [2nd Dept. 2002]; *Matter of Stewart v New York City Tr. Auth.*, 112 AD2d 939 [2d Dept 1985]). Failure to learn the identity of the potential additional parties to the underlying complained of trading activity before the arbitration commences would

likely cause prejudice and unnecessary delay.

Accordingly, the motion of Petitioners is granted solely to the extent of permitting the issuance of subpoenas to enable them to learn the names of the parties against whom they may have a claim in the contemplated arbitration, and is otherwise denied.

This decision and order constitutes the judgment of the court.

Dated: April 16, 2009



J.S.C.

FILED
APR 21 2009
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