COURT OF APPEALS

STATE OF NEW YORK

ANDREW KOLCHINS,

Respondent,

-against-

NO. 31

EVOLUTION MARKETS, INC.,

Appellant.

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20 Eagle Street
Albany, New York
February 13, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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CHIEF JUDGE DIFIORE: The next matter on this afternoon's calendar is Appeal number 31, Kolchins v. Evolution Markets.

Counsel?

MR. WECHSLER: May it please the court, my name is David Wechsler with the law firm of Wechsler & Cohen on behalf of the appellant. It is truly a privilege and a pleasure to appear before you.

There are two distinct - - -

CHIEF JUDGE DIFIORE: Counsel, do you care to reserve any rebuttal time?

MR. WECHSLER: Yes, I should have said that. I'd like to reserve two minutes, please.

CHIEF JUDGE DIFIORE: Certainly.

MR. WECHSLER: There are two distinct issues before the panel today. One is whether or not the motion to dismiss, which was denied with respect to an alleged production bonus under an existing agreement, should have been dismissed, and the other has to do with the formation, or the lack of a formation, of a contract. I'll go with what I think is the narrower issue to begin with, which is the production bonus.

And basically, as I said, that is entirely distinct. It arises under a 2009 employment agreement. That employment agreement - - -

JUDGE RIVERA: In this case, what's - - - what's the movant's burden?

MR. WECHSLER: The movant's burden?

JUDGE RIVERA: What the movant has to show?

MR. WECHSLER: The movant's burden has to show that number one - - - first of all, there's documentary evidence. There's a 2009 agreement here and whether the agreement is clear, unambiguous, and its plain meaning on its face. And consistent with the law, which is the Pachter and Truelove case, all right, whether or not the agreement unambiguously states, as the parties are allowed to state, that there are conditions to receiving a bonus.

In this case, there are two conditions, or I should say one condition.

JUDGE STEIN: But - - - but - - - but - - -

MR. WECHSLER: Yes?

JUDGE STEIN: - - - there are certainly provisions under the Labor Law and - - - that would counteract that and - - - based on public policy, right? And - - - and one of them has to do with whether it was a discretionary bonus and can - - - can we tell that as a matter of law, based on the documents here?

MR. WECHSLER: You can.

JUDGE STEIN: How can we tell that?

MR. WECHSLER: Well, first of all, you don't have

to find whether it was discretionary or not, in the sense that since the agreement says one must be actively employed in order to be eligible - - - and I will get back to your point - - -

JUDGE STEIN: No, no, but you're - - - you're putting - - - you're putting the tail before the - - -

MR. WECHSLER: No, I'm not, Your Honor. I'll tell you why. Because the Pachter and Truelove cases say that the parties are free to go away from the common law, all right. So they are allowed to determine whether or not you have to be actively employed in order to be eligible. And if you find - - -

JUDGE RIVERA: But what they're not - - - what - - - what an employer's not free to do is to not pay someone for the work that they've done.

MR. WECHSLER: Which goes - - -

JUDGE RIVERA: And that's - - - that's the nub of the question.

MR. WECHSLER: Well, that goes to whether or not under the Labor Law, which goes to Judge Stein's question, it was an earned bonus, alright. And the law is no. And why is it discretionary? If you look at the actual contract clause, the contract clause says, "On the terms set forth below, you are eligible to be paid a bonus on a trimester basis, based on your performance." I'll get back

to that in a moment. "Any such bonus will be paid within two months of the close of a given trimester. The total bonus pool available to the desk will be no less than fifty-five percent of the earnings of the desk."

The Labor Law says that if there is a direct linkage between your performance and what you're getting paid, so - - -

JUDGE STEIN: Well, he was in charge of that desk, right?

MR. WECHSLER: He was in charge of the desk, but that - - -

JUDGE WILSON: But didn't you just read the words "based on your performance" right out of the agreement?

MR. WECHSLER: No, Your Honor. All right. Because there's a bonus pool, and if you look at the law, there's no formula for Mr. Kolchins to get paid directly. There's just a pool. The employer gets to determine how much of that pool he gets, but there's a pool for everybody on the desk. And if you look at Mr. Kolchins' own brief, all right, on page 31, I believe, of his own brief, he admits that "The contract language specifies how the bonus was supposed to be earned, no less than fifty-five percent of the net earnings of Mr. Kolchins' trading desk."

So there's a desk that earns a pool. The employer then decides how to allocate that pool. Mr.

Kolchins has no formula. He has no minimum guarantee. He has no fixed sum. It's purely discretionary coming from a pool, and there's never any money allocated to Mr. Kolchins under this.

JUDGE FAHEY: Isn't this, though, from our point of view, I - - - I - - - really a question of what standard of review that we're going to be applying? Isn't it really a question if a 3211 standard of review, the burden's on you? You've got a situation where one party - - - one side says - - - I point to the email. It says, "I accept; please send me the contract." The response is "Mazel tov, I look forward to working together." The other side says, we didn't complete this contract; there was no consideration; we hadn't finished it. The - - - the five elements haven't been met here.

That's a - - - that's a perfectly legitimate summary judgment argument, but it's not a 3211 argument.

MR. WECHSLER: It is a 3211 argument, because - - -

JUDGE FAHEY: Okay, tell me why.

MR. WECHSLER: - - - when you start out with the general notion that yes, allegations in a complaint have to be deemed true for purposes of a motion to dismiss, and that reasonable inferences have to be given to the plaintiff. You then go over to the second and that is

where there's document - - - documentary evidence that refutes an allegation or inference, then the documentary evidence will supersede. So the question now, and it's a matter of law before the court, and we'll - - - before the lower court - - - is whether or not the documentary evidence refutes.

Now this a unique case, because the parties all agree that you have all the documentary evidence. There's no dispute that it's complete. The parties all agree that it's accurate that's before you. There's never been an allegation that anything before you is not complete or not accurate. There's never been an allegation by the plaintiff that there was something - - -

JUDGE STEIN: But the question is whether the - - -

MR. WECHSLER: - - - additional or oral - - -

JUDGE STEIN: The issue is, is whether the question can be decided on that documentary evidence or whether there is additional evidence that needs to be brought to the floor before he can be decided.

MR. WECHSLER: And I would submit to you it can be decided. It's a matter of law. If you look at the - - - at the Spier case, where - - -

JUDGE STEIN: Well, it seems to me that there's a perfectly reasonable view of this record - - -

MR. WECHSLER: Yes.

JUDGE STEIN: - - - based on the - - - I - - - I may mess up the dates here, but the - - - the June 12th and the July 16th emails that there was an offer and there was an acceptance. And then what happens after that - - - and - - - and the offer sets forth the terms pretty clearly. And after that, there's a whole lot of discussion and the whole thing dissolves. But if at that point there was a contract, then what happened after - - - after that is - - - is superfluous. But - - -

MR. WECHSLER: It's not superfluous.

JUDGE STEIN: Well, if there was a contract at that point, it was. But now there's maybe another view of the evidence that says, no, wait a minute. There's a custom and practice here. There's some other things going on, and in fact, there was no meeting of the minds at that point. But getting back to Judge Fahey, why is that not a summary judgment question rather than a 3211 question?

MR. WECHSLER: Well, if you look at the Spier case, which admittedly is the First Department, not the Court of Appeals, it says that this is a matter of the law. Interpretation of documents is a matter of the law before the court; it's not a matter of fact.

JUDGE STEIN: But that doesn't mean that every - - - every view of documents will give you the answer to the

question that you're looking to answer.

MR. WECHSLER: There's - - - agreed, but what I was about to say before is, is there's no allegation here that there's been any oral statements or oral promises in addition to what's before the record.

JUDGE WILSON: Okay, is - - - isn't there - - -

JUDGE RIVERA: Well, you don't have to. You've just - - - you've got the documents. Mr. Kolchins has one narrative; you've got a counter narrative. And that's the point. That can't be enough on a 3211.

MR. WECHSLER: But it is under 3211 if the documents refute the allegations. That's why you have the 3211 document - - -

JUDGE RIVERA: You're saying if there's only way - - - if there's only one way to read the documents. Isn't that what you're saying?

MR. WECHSLER: Well, I'm saying under the law, if the documents refute the allegations.

JUDGE STEIN: Utterly refute. Conclusively refute.

MR. WECHSLER: It does say utterly refute.

JUDGE STEIN: There can't be another reasonable interpretation in order for you to win on a 3211 motion.

MR. WECHSLER: And I believe, all right, if you - - - and Justice Friedman laid this out in a nineteen-page

dissent - - - that there's no way to read these documents. That the majority looked at three documents. There were twenty emails. There were three draft agreements. There was a letter. And if you look at the case law, the case law says that, when there are ongoing negotiations, when there are drafts, when the parties have historical context of having entered into a written agreement in 2005, a written agreement in 2006.

JUDGE WILSON: Well, but the historical context is also that Mr. Kolchins performed before the agreements were - - - were finalized, no?

MR. WECHSLER: No.

JUDGE WILSON: That's not? Is that a disputed fact?

MR. WECHSLER: On one of the agreements, which was the 2006 agreement, which although it goes into effect on September 1, he signed it in December. I think that's what you're referring to. But the agreement before that had no turn. He was an employee "at will." It was only the 2006 one where he had his first three-year term.

JUDGE WILSON: So for the first one, they - - - they performed without a written contract, and for the second one, he performed before the contract was signed?

MR. WECHSLER: No. If I obtuse, I apologize. The first one was a written contract, which just was

terminable by either party on thirty days' notice.

JUDGE WILSON: And he began performing before it was signed or after?

MR. WECHSLER: No. He began preforming pursuant to that contract. The 2006 agreement, which wasn't signed until December and was retroactive until September, that was signed after, but he was still operating under the written agreement, the 2005 agreement.

JUDGE GARCIA: Because counsel, I'm sorry to clarify - - - because that 2005 agreement had no - - - no definite termination date?

MR. WECHSLER: It just had a thirty - - - either party could terminate on thirty days' notice. Unlike the other contracts, which were three-year contracts, subject to automatic renewal and subject to termination for good - - -

JUDGE GARCIA: I see.

MR. WECHSLER: - - - for cause, and things like that.

JUDGE GARCIA: Thank you.

CHIEF JUDGE DIFIORE: Thank you, Counsel.

MR. WECHSLER: The time goes fast.

CHIEF JUDGE DIFIORE: You have your rebuttal. Counsel?

MR. HAMID: Good afternoon, may it please the

court, Joe Hamid, at Debevoise & Plimpton, for Mr. Kolchins.

I'll turn first to the extension agreements, if I could. And I think the - - - the lynch pin of our position here is obviously that email exchange that concluded on July 16th, 2012, that's at pages 112 through 113 of the record. And I think - - - the things I'd like to emphasize about that email exchange are its clarity. It's crystal clear. It's unambiguous. It's comprehensive and it's quite formal actually.

The subject line in the email is "In writing," and drawing all inferences in the favor of Mr. Kolchins as you must at this procedural stage, what does that mean? It means that what was intended was that this would have the formality of a writing. It was something that could be depended on. It was something that would make the offer clear and capable of acceptance.

You then have a recitation of the material terms, but it goes beyond that. You then also have the - - - the statement that, if there are any issues unaddressed by my email, refer to the existing contract that we're extending. So you really have every single issue covered in that email in a crystal clear email that appellant was at pains was to say was in writing. And - - -

CHIEF JUDGE DIFIORE: And what's the impact of

the issues that were negotiated after?

MR. HAMID: Well, I think Your Honors' questions about the procedural posture here are very apt. The - - - it's undeniable that the attempt to memorialize this agreement in a more formal instrument broke down. But there are multiple inferences that can be drawn from that fact. There are different arguments about why that happened, and there are different arguments about what it means that that happened.

We contend that all that shows is that at some point along the way Evo Markets decided to renege on the agreement, and they therefore injected new terms that were different from what had already been agreed on July 16th. And what the Supreme Court said and the First Department said, which was correct, is that you can't choose between these warring inferences here on a motion to dismiss.

JUDGE WILSON: Counsel, your view of the facts is that on July 13th, before that email is sent, there's some kind of meeting. And it's at that meeting where they essentially agree to these terms?

MR. HAMID: No, Your Honor. It - - - that - - - it is alleged in the complaint, there was a meeting on July 13th. That's where Mr. Kolchins asked to have the offer in writing so that it would be crystal clear, so that he could see it in writing and respond to it in writing. And that

confirmed that the - - - I'm sorry. That the - - - the offer had already been put in the email. He wanted to confirm that it was still there. They discussed it, and then he accepted in on - - - on July 16th.

JUDGE GARCIA: And what specifically is that offer in writing? What email is that?

MR. HAMID: So that's the one that is on page 113 of the record and reading up goes to 112. The offer that was made in June by Mr. Ertel, who is the CEO of the company. And Mr. Kolchins then discusses that offer on July 13th; there were other discussions as well, but there was a meeting on July 13th. And after the meeting on July 13th, he accepts the offer.

JUDGE RIVERA: So - - - so what does it mean in this email that we're talking about from - - - oh, God - - - July 15th at 11:49 a.m. where it says at the end, of course, you do have your existing contract, but before that says, that this is the contract, other than a clarification around the issue of departed members. How is there a meeting of the mind if there's a significant issue that they haven't agreed to?

MR. HAMID: Well, I wouldn't call a significant issue. I think the law - - - the Cobble Hill case of this court says, you don't need to have every single issue ironed out. Certainly, all material terms have been

agreed. The compensation, the term of the agreement, the dispute resolution, the restrictive covenants, all of that is covered by this email exchange. They're saying there's going to be one issue that needs to be - - -

JUDGE RIVERA: Well, would you say it was the existing agreement, right?

MR. HAMID: Yes, by which - - -

JUDGE RIVERA: Isn't this what this email says? The existing agreement - - -

MR. HAMID: By which he means the 2009 to 2012 - - -

JUDGE RIVERA: So, all - - -

MR. HAMID: - - - agreement.

JUDGE RIVERA: Meaning all terms hold except we've got this one little thing we've got to clarify?

MR. HAMID: Exactly right, and that - - - that's how I read the email. I think we're entitled to that inference, certainly at this stage. And I believe that's what discussed at the July 13th meeting that Judge Garcia asked about as well. So you - - - you - - - you really do have all material terms covered.

JUDGE WILSON: Ultimately, the question is whether the parties intended to be bound by the - - - before the signed writing, or were going to wait for a signed writing, right?

MR. HAMID: That's right. And what the Stonehill case says, your - - - this court's precedent in Stonehill, as well the First Department case in Kowalchuk says, what you need if you don't want to be bound by a - - - a writing like this, is some expressed reservation of intent not to be bound. And what you don't have anywhere in the record of this case is anybody saying we're not bound. That's just not there at all. And that's why there are - - -

JUDGE STEIN: "Please send contract" isn't good enough?

MR. HAMID: "Please send contract" is absolutely not good enough. To contend that that is an expressed reservation of intent not to be bound, especially at the motion-to-dismiss stage, I would argue is - - - is untenable. And especially in light of this court's precedent in Stonehill where you talked about the phrase - - -

JUDGE GARCIA: Stonehill was such a different case, wasn't it? As I remember Stonehill, it was bid, right? It was some kind of - - -

MR. HAMID: It was a bid, yes.

JUDGE GARCIA: This is very different than a bid. A bid, I accept. And then they were working out different terms related to payment and other issues. This is an exchange of different emails and different conditions and

then it's - - - I accept; please send contract, but if you read that in light of all the other things, it's seems that there are conditions that haven't come out and they're waiting for a formal writing to resolve, though.

MR. HAMID: They - - - they are waiting for a formal instrument. There's no question about that. But there's lots of cases that say, just because you anticipate a - - - a more formal instrument, doesn't mean you don't have a meeting of the minds. And I would argue, Your Honor, that this email exchange is not at all confusing, actually. The 112 to 113 record email exchange is crystal clear. It's comprehensive. It's formal. They chose to label it in writing for a reason.

JUDGE RIVERA: Okay, so - - - so if they label it - - -

MR. HAMID: And what we're arguing about here - - -

JUDGE RIVERA: If they label it in writing, then why is he using the word "contract"?

MR. HAMID: So he's - - -

JUDGE RIVERA: Doesn't that suggest that perhaps he's only viewing this as some negotiation of what will be the final terms?

MR. HAMID: I think that's a perfectly fair argument for the defendant to make to the factfinder at

trial.

JUDGE FAHEY: Does the - - -

MR. HAMID: What does that mean?

JUDGE FAHEY: Does the fact that there's a merger clause make any difference?

MR. HAMID: Well, there would be a merger clause if they had reached the point of memorializing this, but there's no merger clause that's applicable here.

JUDGE WILSON: Well, but - - - except that there was one in the prior contract, and you're saying the terms are carried over to the contract you have now.

MR. HAMID: Right, so it's - - - it's intended.

JUDGE WILSON: So there is a merger clause.

MR. HAMID: Well, if you - - - I guess if you look at it that way, then there's a merger clause that says anything prior to July 16th is superseded, so we're stuck with where we are on July 16th. And that's fine. I think that - - - that means that we have agreement on all material terms.

CHIEF JUDGE DIFIORE: Counsel, move for a moment to the production bonus.

MR. HAMID: Sure. Two quick comments I would make on the production bonus. Again, I think the questions from the court about the procedural posture are very apt. This is only a motion to dismiss. The other point I would

make about that - - -

JUDGE STEIN: What about the absence, though, of - - - of any amount or formula or anything in - - - in the contract for how that bonus would be determined?

MR. HAMID: Well, there isn't an absence. There is - - - it's fifty-five percent of net revenues, and that is specific - - -

JUDGE STEIN: It's the pool - - - but how much of that pool do you get?

MR. HAMID: Right. What it is missing from this record that will be developed - - - actually it has already been; we're in this strange posture where we're talking about the motion to dismiss after discovery - - - there is ample evidence in the record of how this bonus pool was treated and calculated, and it absolutely was not discretionary. It absolutely was treated as guaranteed.

I was surprised to hear my adversary say that that production bonus is discretionary. If you look at the language of the contract, it doesn't have the word discretion in it anywhere. It doesn't say that management will decide how much of this pool you get. And the - - - these are - - -

JUDGE RIVERA: But it says you're eligible?

MR. HAMID: It says you - - - you will be eligible.

JUDGE RIVERA: It doesn't say you will definitely get. You will receive. It says you are eligible.

MR. HAMID: And contrast that with these parties' know-how to use the word discretion when that's what they mean. There's also a discretionary management override where it actually talks about discretion.

There's also Mr. Kolchins' prior contracts where what is now the production bonus, effectively, functionally, used to be called the discretionary bonus. And it used to say this is a bonus that you will get at our sole discretion. And then as he got more senior, that language got changed, and the word discretion got taken out, and it no longer says anything about discretion.

So to - - - to call it a discretionary bonus I think is, at best, a - - - another argument of fact that could be made to the factfinder at trial, but it certainly has a - - - is inconsistent with the language of the actual agreement and the use of words elsewhere in the agreement and in the parties' history of - - - of prior agreements.

If Your Honors have no further questions, I'll rest on my brief.

CHIEF JUDGE DIFIORE: Thank you, sir.

MR. HAMID: Thank you.

CHIEF JUDGE DIFIORE: Counsel?

MR. WECHSLER: Thank you.

Judge Rivera, you brought up the fact about the departing members, and I think that's not one little thing. When a departing member leaves, whether or not that departing member's discretionary bonus stays in the pool or doesn't stay in the pool, goes to the firm, or goes back into the pool is significant. And that was - - -

JUDGE STEIN: Well, isn't - - - but isn't that in itself a - - - you know, a - - - a subject of other evidence? We don't know that - - - he says it's not significant at all. You say it's significant. Again, isn't that inappropriate for us to decide that on a 3211 motion?

MR. WECHSLER: It's not - - - be - - - my - - - my - - - respectfully. The test here, all right, under Zheng, under Brown Brothers, is totality of the circumstances. And Judge Garcia, you touched upon this a little bit when you said, in light of all the other things, all right.

And I believe what happened here was the First Department paid lip service to the totality of - - - of circumstances test but then focused on three emails, which Judge Friedman calls three sketchy emails, and ignored seventeen emails and ignored - - - and I think this is critical - - - seven different requests - - - and you didn't hear this from my - - - from my adversary - - -

seven different requests by Mr. Kolchins to change the agreement, seeking to increase his noncompete payment to more than what was in the prior agreement; seek - - - whether other employees' bonuses would limit Kolchins' eligibility for - - - for management override; where the bonuses for commissions received by Evo Markets in the second trimester would be counted against his guarantee. These are all by him. Who would ever at Evo Markets could approve management overrides? Whether Kolchins would serve on the management committee; to whom Kolchins needed to disclose potential employment opportunities, and the effect of the claw back to the bonus. Those are seven material items - - -

JUDGE RIVERA: And those are all after the July 16th email where he says, I accept?

MR. WECHSLER: Yes, and if you look at Galesi and if you look at Spier and if you look at - - - I think it's Yeoman, they all say that you take into account everything that occurred, prior history. You take into account future. You take into account future negotiations. You take into account drafts of agreements. And you look at the whole picture. You don't look at a little isolated portion, which is what the First Department here did and what Justice Friedman had a problem with.

The last thing I'll say is on the production

bonuses there was a question as to whether it's discretionary. By definition, it's discretionary, because there's no methodology on how much he's going to be paid, so by definition it is.

The last thing I'll say to you is, in footnote 2 of the - - - of the decision, the court says that "Mazel" means congratulations. I will correct the court. It means good luck. So the panel, mazel to you the rest of the year.

CHIEF JUDGE DIFIORE: Thank you, Counsel.

(Court is adjourned)

C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Andrew Kolchins v. Evolution Markets, Inc., No. 31 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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