INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
International Arbitration Tribunal

In the Matter of the Arbitration between:

Re: 50 148 T 00324 12
Orbixa Technologies Inc.,
f/k/a Orbixa Management Services, Inc
vs
New York Stock Exchange, Llc.,
as successor to New York Stock Exchange, Inc.

FINAL AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement in the Contract entered into between the above-named parties dated July 8, 2008 (the "Contract"), and having been duly sworn, and having duly heard the proofs and allegations of the parties, and for the reasons set forth below, do hereby FIND and AWARD as follows:

The Parties

Orbixa Technologies, Inc ("Orbixa") is a Canadian company headquartered in Toronto. Orbixa had several predecessor entities and is related to other entities, only two of which seem to be relevant to this case. These are called Calm Oceans and Calm Seas. Calm Seas is a general partner of Calm Oceans. All of these entities are controlled directly or indirectly by Peter Beck ("Beck").

The business of Calm Oceans was to provide capital to traders who would trade securities daily. A portion of the profits of such trades were shared by Calm Oceans, which constituted its income. The trades were routed through Orbixa which had them executed on exchanges around the world. The traders, who seem to have numbered as many as 3500, were located in various countries outside of the United States.

New York Stock Exchange, LLC., ("NYSE") is a stock exchange. It also has a substantial business in marketing and distributing proprietary market data for use by institutions and traders worldwide.

The Dispute

This case concerns the sale and distribution of certain market information by NYSE to Orbixa. The principal issues presented are what rate per user of such information is appropriate and whether and to what extent NYSE can retroactively bill for uses that are claimed to have been misreported by Orbixa. Originally, Orbixa sought injunctive relief to prevent NYSE from terminating the contract, but that claim was withdrawn. Orbixa asserts claim for amounts it asserts it was overbilled.

NYSE, by its counter claim, seeks amounts that it asserts are due under the Contract, and also a declaration that it had the right to terminate the Contract.

The parties conducted documentary discovery. There were two days of evidentiary hearing after which both sides rested. The parties filed closing briefs and reply briefs and were heard in oral argument on March 13, 2013.

After review of the record, documents introduced in evidence, my assessment of the credibility of the witnesses and the parties' briefs and oral argument, I find and conclude as follows.

Discussion

Stated in its simplest terms, Orbixa purchased market data from NYSE and redistributed it to Calm Oceans, which in turn provided the data to the several hundred traders. It was Orbixa's practice to distribute the NYSE data to the traders and then to bill them for the cost of such data. The Contract provided for different pricing for the NYSE data depending on whether the users were "Professional" or "Non-Professional." Much of the case involved a discussion of whether the traders of Calm Oceans were in one or the other category. The Contract required Orbixa to report each month on the number and status of the users. The Contract specifically gave to NYSE the right to re-bill if it determined that the users had

been mis-catagorized.

The Contract

Although Orbixa raised possible issues about the Contract, I find that NYSE furnished to Orbixa a complete set of the Contract dated July 8, 2008 and its exhibits. These are as set out in Respondent's Exhibit 1 to its Exhibit 2. These documents represent the parties' agreement and I find and conclude that they are valid, binding and enforceable in accordance with their terms. I find that at all times Orbixa was fully aware of the terms and conditions of the Contract and its obligations thereunder.

Moreover, NYSE sent an email to Orbixa enclosing an "Exhibit A" to be completed by Orbixa as a condition to redistributing data to persons other than Orbixa employees. Exhibit A would allow Orbixa to redistribute the data outside its firm only if it first properly qualified the external recipients' status. Exhibit A did not itself approve any end users for receipt of market data; the qualification criteria were spelled out in NYSE's Vendor Guide. Orbixa completed and returned to NYSE Exhibit A.

NYSE's Vendor Guide, sent to Orbixa in September, 2008, creates a presumption that all users are "professionals," and it clearly placed the burden on Orbixa to establish that users qualified as non-professionals if they were reported as such. Orbixa would be obligated to pay to NYSE the charges for professional users unless it established that some were non-professionals. From 2008 through the fall of 2010, Orbixa reported its users as professionals and paid the appropriate charges. This case involves what happened thereafter.

At about that time, Orbixa determined that the amount it was paying for NYSE data and rebilling to its traders was becoming uncompetitive. It decided that if its traders could be reclassified for professional to non-professional it could retain its competitive position.

Beginning in the fall of 2010, Orbixa attempted to justify lower rates on two theories. I find that it carried the burden of proof on neither.

The Trust Theory

Orbixa was established in 2008 as a successor to Biremis, which had thousands of traders, all of whom were reported to NYSE as professionals. Because Biremis was reporting them as "internal" professionals, it was billed at a rate of more than $20 per user per month, versus the non-professional rate of $1 per user.

Orbixa claimed that it was able to transform these professional traders into non-professionals by creating so-called trusts, based on what Beck called an "exemption" for trust beneficiaries in the Contract. Beck claimed that "[w]e hired a trust lawyer who specializes in trust structures to take a look at it and come up with a structure that would satisfy the New York Stock Exchange's requirements."

Beck testified that Orbixa relied on paragraph 2 of NYSE's Non-Professional Subscriber Policy (the "Non-Pro Policy") for its theory that having a lawyer draft a document labeled a "trust" could allow the professional traders to be treated as non-professionals.

The Non Pro policy provides that trusts do not qualify for Nonprofessional Subscriber rates, subject to certain exceptions, chiefly relating to parent-child relationships. The one Orbixa chose to rely on provided:

"Example 3: A trust is held in corporate form. A trust is established in corporate form for the benefit of an individual. If that individual manages the portfolio in the corporate trust without professional help and is not a "Securities Professional," the corporate trust would qualify for the Nonprofessional Subscriber rate."

I find that the only trust that could qualify for non-professional status is one involving a parent-child relationship. Even where a corporation acts as a surrogate for a trust, the trust must be one "that is described in paragraph 2(a)" – which contains the word "parent" no fewer than three times. It appears to me that each of the three "Examples" must be read in the context of paragraph 2, and paragraph 2 is all about the involvement of the trust beneficiary's parent. For that reason, I find that Orbixa's reading of paragraph 2(a) unpersuasive.

Moreover, I read "Example 3" to apply the trust exception only for trusts benefiting an individual if, among other conditions, "that individual manages the portfolio in the corporate trust without

professional help." Here, the presence of "professional help" is clear: It is undisputed that the relevant securities trading was conducted by day traders who were professionals, as defined in paragraph 1 of the Non-Pro Policy, because none was receiving market data "solely for his/her personal, non-business use." Rather, they were trading Calm Oceans' capital and sharing in the profits – a quintessentially commercial activity. Accordingly, the exception would not apply to professional traders like those at issue in this case.

Finally, the Non-Pro Policy contains provisions specifically addressed to day traders. These make clear that the Calm Ocean traders could not qualify as non-professionals. The relevant provisions are in paragraph 5 of the Non-Pro Policy and state as follows:

Day Traders

Professional status is determined by whether an investor qualifies as a "Securities Professional" and not by trading frequency.

- Example 1: An investor manages his/her own money. If he/she does not assist any other person with investment decisions, nor does he/she share profits, then he/she *is* eligible for the Nonprofessional Subscriber rate, assuming that he/she is not a "Securities Professional."
- Example 2: An investor manages his/her own personal investments. This same investor is receiving office space and equipment in exchange for his/her work as a financial consultant to a firm. He/she *is not* eligible for the Nonprofessional Subscriber rate. He/She is not using the data solely for his/her own personal use.
- Example 3: An investor enters a profit sharing agreement with an organization. The investor *is not* eligible for the Nonprofessional Subscriber rate because his/her use of the data contributes to the success of both the investor and the organization.

There is no dispute that the Calm Oceans traders were day traders. They plainly do not qualify under Examples 1 or 2; Example 3 fits them exactly. Paragraph 3 of the unsigned specimen trust agreement that was sent to NYSE on January 17, 2012 specifically refers to "the Trader" as "a day trader." It is likewise admitted that the traders shared profits with Calm Oceans. I find that they fall within Example 3's description of profit-sharing day traders who do not qualify for non-professional status.

NYSE also notes, moreover, that Orbixa's "trust" theory fails because there was no credible proof that the trusts had ever been created at all.

Although Orbixa said it could represent that each of the traders had entered into a trust agreement on a form sent to NYSE, no evidence was presented to substantiate that claim. Although requested in discovery, Orbixa failed to produce signed trust agreements, claiming that the "[t]o the best of Claimant's knowledge, these documents are electronic documents. They are not in the possession of Claimant."

Asked about the existence of these documents at the hearing Beck said he did not know if they existed.

Even if I were to find the "trust" theory persuasive, and I do not, it would be incumbent on Orbixa to carry the burden of proof that these trust documents had been duly executed. It failed to do so.

Beck also claimed that NYSE was told, prior to 2010, that Orbixa predecessor, Biremis, was using a trust arrangement with its traders. This disclosure was alleged to have been made by Dorothy Hagel, Orbixa's in house counsel at the time, in a "verbal discussion" with someone whom Beck could not identify. Beck admitted that no document substantiates a claim that NYSE was notified about any trust arrangement prior to 2010.

Both of NYSE's witnesses testified that prior to November 2010, they had not been aware of any purported trust arrangement. The flurry of emails among Kelly, Phillips and Tam on April 18, 2011 is corroboration that NYSE did not have the prior knowledge that Beck claims.

Although Beck's declaration about what he was told by Hagel about her conversations with NYSE was admitted into evidence, it remains hearsay. It lacks the force to refute the clear and credible testimony of the NYSE witnesses, particularly Tam, that they had no knowledge of the trust arrangements before November 2010.

Accordingly, I find that the "Calm Seas" trust agreement could not have transformed the Calm Oceans traders into non-professionals even if they had entered into it. Moreover, there is no persuasive evidence in this record that any of them actually did so. Orbital's claim for non professional status on the grounds of its trust theory is not accepted.

The Employee Theory

Under the Contract, in order to be "internal users" and thus entitled to a substantial discount based on the number of terminals in use, the users would have to be employees. Orbixa's other argument is thus that these traders were employees.

If the Calm Oceans traders are recognized as professionals, and they were actually "employees," the per user rate would be $20.75 per month. If as NYSE contends, they were independent contractors they would be subject to a rate of $127.25 for CTA Tape A data and $30.20 for CTA Tape B data. Again, Orbixa has the burden of proving that they were employees. I find that it has not done so.

I find that in the Contract, the term "internal users" refers to employees of Orbixa. Although Calm Oceans' traders were not employees of Orbixa, Orbixa argues that they should be deemed employees of Calm Oceans, eligible for the $20.75 "internal" rate.

First, and highly troubling, according to Orbixa itself, the traders were parties to an Independent Contractor Agreement that repeatedly and emphatically asserted that they were *not* employees. Orbixa drafted and supplied this document to NYSE and affirmatively represented that it sets forth the relationship between the traders and Calm Oceans. At the hearings, Orbixa asserted that the Independent Contractor Agreement and its own representations to NYSE should be disregarded.

I cannot credit that assertion in the light of the Independent Contractor Agreements. The idea that in the face of such agreements Orbixa considered the traders to be really employees is not believable. Orbixa's current in-house counsel, Mario Josipovic, asserted that each of the traders was highly controlled by Calm Oceans, such that they would be deemed employees for tax purposes, in spite of the Independent Contractor Agreement. That assertion cannot be credited. Josipovic admitted that he had never visited a Calm Ocean office and had no personal knowledge of what went on there. Moreover, he based his knowledge on investigations and reports of FINRA and Canadian Securities authorities. Both organizations found Orbixa to have been non-compliant precisely because the traders were not supervised. Although I did not attach weight to these reports to attribute bad motives to Beck or to Orbixa, I find that they are allowable to impeach Josipovic.

NYSE also notes that the internal user rate would not be applicable to the Calm Oceans traders because Calm Oceans never executed the documents required by the contract to permit it to receive the market data and redistribute it to the traders. Nor did the traders sign contractually mandated documentation. Thus by the terms of the Contract, the traders could not be entitled to a preferential user rate that is available only to employees of a qualified data recipient.

For the foregoing reasons, Orbixa has failed to show that it ever was entitled under the Contract to rates other than what NYSE asserts in this arbitration. NYSE has established that the Contract gives it the right to retroactively re-bill for the amounts Orbixa would have had to pay if it had reported its use as found in this award.

Equitable defenses

It is Orbixa's position, however, that NYSE is precluded by law and equity from retroactively invoicing as a result of latches, unconscionability, unjust enrichment, civil penalty, negligence, satisfaction and accord, election of remedies and by the terms of the contract itself which provide the right of termination as the sole remedy for breach.

I do not find any of these theories persuasive. They lack legal authority, foundation in the record or both. I discuss them briefly.

Stated simply, Orbixa wrongly reported its users to NYSE and thereby was under-billed by NYSE for a considerable period of time. That NYSE was negligent in not pursuing Orbixa or that it was guilty of latches for not pursuing Orbixa are both unsound. Orbixa was bound to report correctly under the Contract. NYSE had the right but not the duty to check up on Orbixa. Orbixa's idea that NYSE somehow imposed a trust relationship on Orbixa is farfetched. The only relationship between the parties was the Contract. Orbixa had duties under the Contract that were imposed by the Contract, not by any trust. One of those duties was correct reporting of its users. The situation is not unlike paying taxes. The taxpayer has the duty of reporting income and paying taxes. If the returns are wrong, the taxing authority

can claim and collect for deficiencies. It has no obligation to be on notice that the taxpayer may be under reporting. Similarly, the Contract gives NYSE the right to go back and re-bill for what was misreported.

Orbixa characterizes the Contract as one of adhesion. I note that Contracts of adhesion are still enforceable, if not unconscionable. But this Contract is with Orbixa, which with its predecessors and affiliates is experienced in the securities business and knew precisely what it was agreeing to. It cannot be called a contract of adhesion. It appears that at some point its traders balked at the then higher cost of the NYSE data, which motivated Orbixa to attempt to reduce its payments to NYSE by adopting the trust device, described above. This does not make NYSE "monopolistic" even if such characterization would act as a defense, which it does not.

I have considered Orbixa's claims for damages as Claimant, and find they are no more than a re-argument of its claimed entitlement for lower fees. I have not accepted Orbixa's argument and accordingly find its claims to be without merit.

Damages

NYSE correctly recalculated the amounts owed by Orbxia. I find and conclude that these are set out on Exhibit A to NYSE's closing brief. The Contract also entitles NYSE to interest as provided therein and administrative costs. All of these are fairly presented in Exhibit A. Moreover the Contract entitles NYSE to terminate the Contract.

AWARD

Accordingly I award as follows:

1. Within 30 days of the date of this award Claimant Orbixa will pay to Respondent NYSE the sum of THREE MILLION FIVE HUNDRED SIXTEEN THOUSAND EIGHT HUNDRED FORTY-FOUR U.S. DOLLARS AND FIFTY-EIGHT CENTS (US$3,516,844.58) consisting of $2,594,777.40 for underpayments, $662,589.44 for interest pursuant to the Contract and $259,477.74 for administrative fee pursuant to the

Contract.

2. NYSE is declared to have and to have had the right to terminate the Contract, and its termination of the Contract was lawful and authorized by the terms of the Contract.

3. The costs of the arbitration, including the compensation of the arbitrator shall be borne equally by the parties. Therefore, the administrative filing and case service fees of the AAA/ICDR, totaling TWENTY TWO THOUSAND NINE HUNDRED U.S. DOLLARS ($22,900.00), shall be borne as incurred. The compensation and expenses of the arbitrator, totaling TWENTY SIX THOUSAND ONE HOUNDRED EIGHTY U.S. DOLLARS ($26,180.00), shall also be borne as incurred.

4. All claims of Orbixa are denied.

5. This award is in full satisfaction of all issues submitted to this arbitration, any claim not specifically addressed herein is nonetheless deemed denied.

For purposes of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards this Final Award was made in New York, New York, United States of America.

4/29/13
Date

[signature]
William L.D. Barrett, Arbitrator

State of NY
County of NY } SS:

On this 29 day of April, 2013, before me personally came and appeared William L.D. Barrett, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Robert I. Jones
Notary Public

ROBERT I. JONES
Notary Public - State of New York
No.02JO6018435
Qualified in New York County
My Commission Expires: 01/11/2015