UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In the Matter of
ANDRE MARONIAN, an individual, REBELLION, INC., a Nevada corporation, JAMESON FORTE, an individual, JAMESON FORTE, LLC, a New York limited liability company, and VINCENT BOVENZI, an individual.

Petitioners,

v.

AMERICAN COMMUNICATIONS NETWORK, INC., a Michigan corporation,

Respondent.

Case No. 07 CV 6314 CJS (F)

RESPONDENT AMERICAN COMMUNICATION NETWORK, INC.'S OPPOSITION TO PETITIONERS ANDRE MARONIAN AND REBELLION, INC.'S MOTION TO STAY THE PENDING ARBITRATION

TABLE OF CONTENTS

.

TABLE OF AUTHORITIES

CASES **Page(s)**

Respondent American Communications Network, Inc. ("ACN") respectfully submits this Memorandum of Law in opposition to Petitioners Andre Maronian and Rebellion, Inc.'s belated motion to seek a stay of the presently pending arbitration.

ARGUMENT

I.

PETITIONERS' BELATED MOTION TO STAY FILED MORE THAN SIX MONTHS AFTER THIS COURT'S DECISION AND ORDER REQUIRING THEM TO ARBITRATE IS NOTHING MORE THAN ANOTHER DELAY TACTIC IN AN ATTEMPT TO DEPRIVE ACN OF ITS RIGHT TO ARBITRATE

As this Court is well-aware from its prior experience in this litigation, and as this belated request for a stay evidences, for the past two and a half years Petitioners have engaged in every legal tactic possible to delay and frustrate ACN's right to arbitrate.

After having now participated in the arbitration for more than six months, with discovery coming to a close, and the hearing on the merits now in sight (*see* Declaration of Jamie J. Spannhake, attached hereto), once again Petitioners are engaging in yet another tactic to delay the presently pending arbitration. Under these circumstances, this Court should exercise its discretion and deny Petitioners' belated motion for a stay. *Hirschfeld v. Board of Elections*, 984 F.2d 35, 38 (2d Cir. 1993) (denying motion for stay of judgment under Rule 8(a) because party was "more interested in a delay" than in a determination of the correctness of district court's decision, and it was a "misuse of judicial process"); *N. Am. Airlines, Inc. v. Int'l Brotherhood of Teamsters, AFL-CIO*, No. 04 Civ. 9949, 2005 WL 926969, at *4 (S.D.N.Y. Apr. 19, 2005) (denying motion to stay arbitration pending appeal under Rule 62(c) due to delay when motion filed ten days after district court's decision and eight days after filing notice of appeal); *see also In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 144-45 (2d Cir. 2005) (failure to seek expedited review from the Court of Appeals may be basis for denying stay).

What is most striking in Petitioners' memorandum of law in support of this motion – apart from its brevity – is the absence of any effort to meet the applicable standard warranting a stay or to cite to any authority, legal or otherwise, that this Court failed to address on the previous motion and cross-motion for summary judgment and in its Decision and Order dated July 23, 2008 (the "Order").[1]

When deciding whether to exercise its discretion to issue a stay of an order pending appeal, a court will consider four factors: (1) the likelihood of success on the merits, (2) irreparable injury if a stay is denied, (3) substantial injury to the party opposing a stay if one is issued, and (4) the public interest. *N. Am. Airlines*, 2005 WL 926969 at *4; *Durant, Nichols, Houston, Hodgson & Cortese-Costa, PC v. Dupont*, 397 F. Supp. 2d 386, 388 (D. Conn. 2005). The burden of establishing that a stay is warranted "is a heavy one and more commonly stay requests will be denied." *Emilio v. Sprint Spectrum L.P.*, No. 08 Civ. 7147, 2008 WL 5381222, at *1 (S.D.N.Y. Dec. 12, 2008). In this case, the Court should deny Petitioners' motion because they have failed to meet the applicable standard.

First, Petitioners have not made a strong showing that they are likely to succeed on their appeal. Rather, Petitioners merely rely upon cases already considered by this Court to "submit that this Court did not determine whether it perceived Andre Maronian to have benefitted *directly* or *indirectly* from the subject contract." (Affidavit of Attorney S. Hanna ¶ 7.) However, the Court was absolutely clear in its Order that it considered and determined that exact issue:

[1] The three binding cases that Petitioners rely upon in their memorandum were previously considered by this Court: *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773 (2d Cir. 1995), which appears to be Petitioners' central case in their motion papers, was cited and quoted by this Court at pages 10 and 11 of its Order as the basis for its decision that Maronian and Forte were estopped from avoiding the arbitration clause; *Merrill Lynch Inv. Mgrs v. Optibase, Ltd.*, 337 F.3d 125 (2d Cir. 2003), was cited by Petitioners in their opposition and reply brief; and *Burgher v. Dansey*, No. 242462, 2004 Mich. App. LEXIS 1015 (Apr. 20, 2004), was cited in both ACN's memorandum of law in support of its cross-motion and its reply brief.

> "Under the estoppel theory, . . . [t]he benefits must be direct – which is to say, flowing directly from the agreement."[2]
>
> * * *
>
> There is no genuine issue of material fact that Maronian and Forte each received direct benefits from Rebellion's and Forte LLC's IR agreements.

(Order at 11, 12.) Accordingly, the motion to stay should be denied. *522 W. 38th St. N.Y. LLC v. N.Y. Hotel & Motel Trades Council*, 517 F. Supp. 2d 687, 688-89 (S.D.N.Y. 2007) (denying motion to stay and finding no likelihood of success on the merits "in the absence of material evidence" because "it is doubtful that petitioner has even shown that there are serious issues going to the merits"); *N. Am. Airlines, Inc.*, 2005 WL 926969 at *1 ("Mere repetition of arguments previously considered and rejected cannot be characterized as a 'strong showing' of likelihood of success of the merits.").

Petitioners also have not demonstrated that they will suffer irreparable harm, arguing only that the costs associated with the arbitration that Maronian is incurring constitute the harm to him. This argument is insufficient as a matter of law. *Emery Air Freight Corp. v. Local Union 295*, 786 F.2d 93, 100 (2d Cir. 1986) (the "monetary cost of arbitration certainly does not impose such legally recognized irreparable harm"); *522 W. 38th St. N.Y. LLC*, 517 F. Supp. 2d at 688 (denying motion to stay arbitration because "the costs and disruptive effects of arbitration . . . can be addressed through non-injunctive relief"); *Durant*, 397 F. Supp. 2d at 389 (the "monetary cost of arbitration certainly does not impose . . . legally recognized irreparable harm") (internal quotation omitted).

[2] In fact, this language quoted by the Court in its Order at page 11 is a direct quote from *MAG Portfolio Consultant, GMBH v. Merlin Biomed Group LLC*, 268 F.3d 58, 61 (2d Cir. 2001) with citation to and reliance upon *Thomson*, 64 F.3d at 779.

This argument also fails as a matter of fact. The subject of both this motion to stay and Petitioners' appeal is that Maronian is not bound by the terms of the IR agreement and thus not required to arbitrate. There is no such argument as to Rebellion.[3] Indeed, Mr. Roach, who is counsel for Petitioners in the arbitration, has stated before the arbitrators that the arbitration will proceed against Rebellion regardless of the decision handed down by the Second Circuit. (*See* Declaration of Jamie J. Spannhake ¶ 9.) Since it is undisputed that Maronian is the sole officer and shareholder of Rebellion (Order at 3), the only way that Rebellion can participate in the arbitration is through Maronian. Accordingly, Maronian would be incurring costs associated with the arbitration – and will continue to incur costs – regardless of how the Second Circuit decides Petitioners' appeal.

Furthermore, if this case is not arbitrated, it will have to be litigated. Petitioners necessarily will incur expenses associated with the discovery process and the hearing whether this case is litigated before the arbitrator or before a court, and may likely incur higher costs if this matter is litigated in court. *Emery Air*, 786 F.2d at 100 ("arbitration by itself imposes no such [irreparable] injury to the resisting party," especially where case will be litigated if not arbitrated); *Durant*, 397 F. Supp. 2d at 389 (finding no irreparable harm because plaintiff "necessarily will incur deposition and other discovery expenses whether this case is litigated before the arbitrator or before the Court"); *Odfjell ASA v. Celanese AG*, No. 04 Civ. 1758, 2004 WL 1574728, at *3 (S.D.N.Y. July 14, 2004) (primary benefit of arbitration is its expeditiousness).

Even if the costs of arbitration were legally sufficient to establish irreparable harm, the Court should nonetheless deny Petitioners' motion for a stay because the "irreparability is a

[3] As the Court found in its Order at page 10, "Petitioners have not argued or demonstrated that the Rebellion IR agreement . . . is unenforceable." Petitioners have not appealed this finding, nor do they raise the issue in this motion to stay.

product of the moving party's delay" and is a "tactic that is inequitable to the other party." *Hirschfeld*, 984 F.2d at 39.

Clearly, it is ACN who will suffer substantial injury if a stay is granted at this stage of the proceedings. As noted previously, ACN has already been deprived of its right to arbitrate for nearly two years since filing its arbitration demand as a result of Petitioners continued delay tactics in an attempt to frustrate the arbitration process and ACN. Now, more than six months have passed since this Court's Order directing Petitioners to participate in the arbitration. The Panel of three arbitrators has been convened and has, along with the parties, immersed themselves in the arbitration for the past six months. The arbitration has worked its way through a protracted discovery process and hearing dates have been established.

To order a stay at this late stage will cause substantial injury to ACN because if a stay is granted now for some indefinite period of time, it is not clear whether the Panel will be available at a future date; and if any Panel member were unavailable, whether the arbitration proceeding would effectively need to be started over, further delayed, or whether new arbitrators and hearing dates would need to be chosen. These problems associated with a stay of the arbitration at this late stage of the proceeding would render all prior work in the arbitration ineffective, clearly resulting in substantial harm and prejudice to ACN. Furthermore, these problems could have been avoided if Petitioners had timely sought a stay six months ago when the Panel had been appointed but not yet convened and was not yet involved in the arbitration. Indeed, granting a stay now would "disrupt the . . . status quo, making the injunction now sought in this case akin to a mandatory injunction, which courts are reluctant to grant." *522 W. 38th St. N.Y. LLC*, 517 F. Supp. 2d at 688 n.1; *also N. Am. Airlines, Inc.*, 2005 WL 926969 at *5 (denying issuance of injunction because it "disrupts rather than preserves the status quo" and denies non-movant of

"opportunity to obtain relief in another forum, and further delay[s] the resolution of the issues presented in this case").

Lastly, like all the other factors, public policy favors denial of the requested stay in this case. Allowing the presently-pending arbitration to continue as planned promotes the speedy and efficient resolution of the not-yet-settled claims of the parties. *See, e.g., Phoenix Aktiengesellschaft v. Ecoplas, Inc.*, 391 F.3d 433, 435 (2d Cir. 2004) (recognizing strong public policy favoring resolution of claims through arbitration over litigation); *Emilio*, 2008 WL 5381222 at *3 (recognizing strong public policy in favor of arbitration); *Durant*, 397 F. Supp. 2d at 388 ("arbitration is a preferred method of resolving disputes").

II.

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION IS MERELY IMPROPER REARGUMENT OF THE SAME FACTS AND LAW CONSIDERED BY THIS COURT IN ITS EARLIER DECISION THAT ORDERED MARONIAN AND REBELLION TO PARTICIPATE IN THE ARBITRATION

Because Petitioners' short memorandum of law offers no new facts or argument for this Court to consider, ACN will not burden this Court by repeating its arguments advanced before this Court on the motion and cross-motion for summary judgment previously decided by the Court. Rather, ACN rests on the Court's well-reasoned Order wherein this Court addressed all the issues presented by Maronian and Rebellion on this present motion to stay the arbitration.

CONCLUSION

For the foregoing reasons, ACN respectfully requests this Court deny Petitioners' motion for a stay or to enjoin the presently pending arbitration, with such other and further relief, including sanctions and costs associated with this motion,[4] as the Court deems appropriate.

Dated: February 27, 2009

Respectfully submitted,

DEWEY & LEBOEUF LLP

By: /s/ Jamie J. Spannhake
Jonathan D. Siegfried, Esq.
Jamie J. Spannhake, Esq.
Lead Counsel for Respondent
125 West 55th Street
New York, New York 10019
(212) 424-8000
jsiegfried@dl.com
jspannhake@dl.com

HARTER SECREST & EMERY LLP
Jeffrey J. Calabrese, Esq.
Local Counsel for Respondent
1600 Bausch & Lomb Place
Rochester, New York 14604
(585) 232-6500
jcalabrese@hselaw.com

[4] *See Hirschfeld*, 984 F.2d at 40-41 (imposing double costs and attorney's fees on the party seeking a stay because it brought motion as a delay tactic); *see also PaineWebber Inc. v. Farnam*, 843 F.2d 1050, 1053 (7th Cir. 1988) (court imposed sanctions, including costs and attorneys fees incurred in resisting motion for a stay pending appeal, on party seeking unfounded stay of arbitration); *Classic Components Supply, Inc. v. Mitsubishi Elecs. Am., Inc.*, 841 F.2d 163, 166 (7th Cir. 1988) (same); *Graphic Commn's Union, Chicago Paper Handlers' & Electrotypers' Local No. 2. v. Chicago Tribute Co.*, 779 F.2d 13, 15 (7th Cir. 1985), cited in 1 Domke on Com. Arb. Sec. 22:8 (2008) (stating that stays of arbitration pending appeal are exceptionally hard to get, making casual or reflexive requests presumptively grounds for sanctions).

CERTIFICATE OF SERVICE

I, Jamie J. Spannhake, hereby certify that on February 27, 2009, I caused to be electronically filed ACN's Opposition to Petitioners' Motion to Stay the Pending Arbitration, with the Western District of New York using the CM/ECF System, which sent notification of such filing to the following attorneys:

Woods Oviatt Gilman LLP
Sean T. Hanna, Esq.
700 Crossroads Building
2 State Street
Rochester, NY 14614
(585) 987-2800
shanna@woodsoviatt.com
Attorneys for Petitioners Andre Maronian and Rebellion, Inc.

Harris Beach PLLC
Dale A. Worrall, Esq.
99 Garnsey Road
Pittsford, NY 14534
(585) 419-8800
dworrall@harrisbeach.com
Attorneys for Petitioners Jameson Forte and Jameson Forte LLC

/s/ Jamie J. Spannhake
DEWEY & LEBOEUF LLP
1301 Avenue of the Americas
New York, New York 10019
(212) 259-8000
jspannhanke@dl.com
Attorneys for Respondent