



## UBS Financial Services Inc. v. Bounty Gain Enterprises, Inc.

2016 | Cited 0 times | S.D. Florida | December 27, 2016

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA CASE NO.  
14-81603-CV- MATTHEWMAN

UBS FINANCIAL SERVICES, INC. ,

Plaintiff,

BOUNTY GAIN ENTERPRISES, INC. ,

Defendant.

### ORDER ON BOUNTY GAIN ENTERPRISES, INC. 'S MOTION FOR RELIEF FROM ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

THIS CAUSE is before the Court upon Defendant, Bounty Gain Enterprises, Inc.'s (ks Bounty Gain') Motion for Relief from Order Granting Plaintiff's Motion for Preliminary Injunction (sd Motion') (DE 137). Plaintiff, UBS Response in Opposition (DE

Financial Services, Inc. (st UBSFS') filed a 1441, Bounty Gain filed a Reply (DE 1451, and UBSFS filed a Sur-reply (DE 1461). The Court held a hearing on the matter on December 7, 2016. The matter is now ripe for review.

**BACKGROUND** On December 24, 2014, UBSFS filed a Complaint for Declaratory Judgment and Injunctive Relief (DE 11) against Bounty Gain asserting that it is not required to submit to FINRA arbitration with Bounty Gain because Bounty Gain was never a customer of UBSFS. After an evidentiary hearing, a Preliminary Injunction was entered on November 19, 2015, stating ('UBSFS is not required to submit to FINRA arbitration.' See DE 59, p. 4. After the evidentiary hearing, but shortly before the Court entered the Order on the preliminary injunction, Bounty

Gain filed an Amended Statement of Claim in the FINRA arbitration, adding Roger Sen Boom Lam as a party to the arbitration, who worked for UBSFS at the time Bounty Gain's claims arose. See DE 55.

Subsequent to receiving the Court's Preliminary Injunction Order (DE 591), FINRA Dis



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put e Resol ut i on st at ed t hat Bount y Gai n was l s enjoi ned f rom pr oceedi ng i n t hi s az bi t ra t i on against both Respondents UBS Fi nancial Servi ces, l nc. and Roger Sen Boom Lam. Therefore, Bounty Gai n Ent emrises wi ll remai n i nacti ve i n t hi s mat ter absent a Court order expressl y stati ng ot herwise. ' ' See DE 137-4.

### A. Bounty Gain's M otion for Rel ief from Order Granting Pl ainti frs Moti on for

Prel i mi nary Injunct i on Bount y Gai n fi l ed t hi s Mot i on for Rel i ef g DE 1371 r eques t i ng ent r y of an t s an Or der rel i evi ng Bount y Gai n from an unwri tt en and uni nt ended consequence of thi s Court ' s November 19, 2015 Or der Gr ant i ng Pl ai nt i ff s Mot i on for Pr el i mi nar y I n junct i on. ' ' g DE 137, p. 1q . Bount y Gai n as ks t he Court s peci f i cal l y t o cl ar i fy t hat t he Pr el i mi nar y I njunct i on Or der does not appl y t o Roger Sen Boom Lam a/k/ a Roger Lam, a former empl oyee of UBSFS. 1d. Bounty Gai n cl ai ms t hat Roger Lam S i mus t ei t her accept t hi s Court ' s j ur i s di ct i on ( t he power of whi ch i s pr ot edi ng hi m f r om t he FI NRA ar bi t rat i on) or r e j ed i t and appear i ndi vi dual l y i n t he FI NRA pr oceedi ng. ' ' 1d. at p. 2. Accordi ng to Bount y Gai n, FI NRA Di spute Resol uti on i ntended t o proceed wi th the FI NRA arbi t rat ion sol el yagai nst Roger Lam i n hi s i ndi vi dual capaci ty, but UBSFS t il ed a bri ef assert i ng t hat Roger Lam coul d not be compel led to arbit rate because thi s Court ' s preli mi nary i n junct i on ext ended t o UBSFS' S S t r espect i ve of f i cer s, agent s, s ervant s, empl oyees, and

FI NRA Di spute Resol uti on t hen issued a l ett er prevent i ng Bount y att orneys. ' ' 1d. at pp. 3-4. Gai n from proceeding i n t he arbi trati onagai nst bot h UBSFS and Roger Lam C t absent a Court order expressl y stat i ng ot herwise. ' ' 1d. at p. 4. Bounty Gai n argues t hat Roger Lam no l onger

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wor ks f or UBSFS and t herefor e t he pr el i mi nar y i nj undi on does not a ppl y t o hi m. 1d. at p. 5.

Bount y Gai n as sert s t hat é \$ a j udgment i s voi d under Rul e 60( b) ( 4) i f t he court t hat r ended i t l acked j ur i s di ct i on of t he subj ect mat ter , or of t he part i es , or i f i t act ed i n a mar mer i nconsist ent wi th due process of l aw. ' ' 1d. at p. 6. Accordi ng to Bount y Gain

, because UBSFS has consi s t ent l y argued t hat t hi s Court does not ha ve j ur i s di ct i on ovex Roger Lnm, t he pr el i mi nar y i njunct i on Or der i s voi d as t o Roger Lnm, who i s not a part y t o t he pr oceedi ng i n t hi s Court . 1d. Bount y Gai n cont ends t hat Roger Lam i s not s ubj ect t o t he pr el i mi nar y i njunct i on Or der pur s uant t o Rul e 65( d) becaus e Lam i s no l onger an agent , ser vant , empl oyee, or at t or ney of UBSFS, as Lam now works for UBS AG i n Hong Kong. 1d. at pp. 7-8. Therefore, Bount y Gai n asks the Court t o decl are the November 19, 2015 Order Granti ng Pl ai nt i ff s Moti on for Pr el i mi nar y I n junct i on ( DE 59) voi d as t o Roger Lam, t o i ns t r uct FI NRA Di sput e Resol ut i on t hat Bounty Gai n i s not restrai ned from pursui ng i ts cl ai msagai nst Roger Lam i n t he FI NRA arbit rat ion, and any other rel i ef as the Court deems appropriat e. 1d.



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at pp. 8-9.

### B. UBSFS' S Response

In its Response ( DE 144j), UBSFS claims that this Court's Preliminary Injunction Order states that Bounty Gain cannot compel UBSFS or any associated person of UBSFS to arbitrate, which includes Roger Lam because he was a former financial advisor with UBSFS in Hong Kong. ( DE 144, pp. 1- 21. According to UBSFS, the scope of this Court's Preliminary Injunction Order extends to UBSFS's officers, directors and attorneys, as well as persons in active concert with UBSFS, which includes Roger Lam. f#. at pp. 7- 8. UBSFS contends that %l i n j u n c t i o n s a f f e c t non- parties to the case in which the injunction issues. ' ' 1 d. at p. 9. UBSFS also asserts that the Preliminary Injunction Order is not void as to Roger Lam and that Bounty Gain's cited cases are distinguishable from the instant case. 1d. at pp. 10-11. Finally, UBSFS argues that Bounty

Gain is essentially seeks an order from this Court requiring FINRA Dispute Resolution to allow Bounty Gain to proceed with its claims against Mr. Lam. ' ' 1d. at p. 12. UBSFS claims that this is improper because FINRA Dispute Resolution is not a party to this case. f#. Therefore, UBSFS asks that the Court deny the Motion. 1d. at pp. 12-13.

### C. Bounty Gain's Reply

Bounty Gain reiterates in its Reply g DE 1451 that UBSFS has argued that this Court does not have jurisdiction over Roger Lam; and therefore, Bounty Gain dares that the preliminary injunction Order is void as to him and does not preclude Bounty Gain from pursuing its claims against Roger Lam in the FINRA arbitration. ( DE 145, pp. 2- 3) . According to Bounty Gain, it only asks the Court to respond to FINRA Dispute Resolution's invitation to issue an order stating that Roger Lam is not subject to the Preliminary Injunction Order. 1 d. at p. 4. Bounty Gain contends that Roger Lam is not an employee of UBSFS and is not acting c t i n concert ' ' with UBSFS. 1d. at p. 5. According to Bounty Gain, it is merely asserting that UBSFS is stretching the bounds of the Preliminary Injunction Order beyond its intended scope and misrepresents to FINRA Dispute Resolution that the Court intended to enjoin Bounty Gain from all so pursuing arbitration against Roger Lam. 1d. at p. 7.

### D. UBSFS'S Surreply

UBSFS filed a Surreply ( DE Order precluding Bounty Gain from

146) re-asserting that the Court's Preliminary Injunction arbitration against UBSFS or any associated person of UBSFS applies to both UBSFS and Roger Lam. ( DE 146, p. 21. According to UBSFS, if FINRA Dispute Resolution had any questions regarding the Court's Preliminary



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yl njunct i on Order, i t coul d have sought cl arif icat ion from t hi s Court on i ts own. 1d. at p. 4. UBSFS clai ms that t l Bount y Gain has not establ ished t he exi stence of any wri t ten agreement to ar bi t rate wi th

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UBSFS or any associ at ed person of UBSFS, incl udi ng Mr.Lam, ' ' whi ch means Bounty Gai n cannot force ei t her t o arbi t rat e. 1d. at p. 5.

### E. The December 7, 2016 Hearing

At t he heari ng, each part y approached t he Moti on f rom a different perspect i ve. Bounty Gai n' s couns el cl ai med t hat t hi s was a j ur i s di ct i onal i ss ue and t hat t he Court needed t o deci de whet her i t had j ur i s di ct i on over Roger Lam i n or der t o al l ow t he Pr el i mi nar y l njunct i on Or der t o appl y t o hi m. However, UBSFS contended that this was an issue of whet her Roger Lam is i ncl uded i n t he s cope of t he i njunct i on under Rul e 65( d) becaus e, at t he t i me t he al l eged cl ai ms arose, Roger Lam was an empl oyee and t d associ at ed person' ' of UBSFS. Bounty Gai n responded t hat t he scope of t he i nj t mct i on under Rul e 65( d) appl i es at t he t i me t he i njunct i on i s i s sued, not at t he t i me t he acts compl ai ned of took pl ace. The Coul ' t took the mat ter under advi sement.

II. LEGAL STANDARD Federal Rul e of Ci vi l Pr ocedure 60( b) st at es: On mot i on and j ust t enus, t he court may rel i eve a part y or i t s l egal repr esent at i ve f r om a f i nal j udgment , order , or pr oceedl ng f or t he f ol l owi ng r eas ons: ( 1 ) mi s t ake, i nadvert ence, s umr i s e, or excus abl e negl ect ; ( 2) newl y di scover ed evi dence t hat , wi th reasonabl e di li gence, could not have been di scovered i n t i me t o move for a new t ri al under Rul e 59( b); ( 3) f r aud ( whet her previ ousl y cal l ed i nt r i nsi c or ext r i nsi c), mi s r epr esent at i on, or mi s conduct by an opposi ng par t y ( 4) t he judgment i s voi d; ( 5) t he judgment has been sat i sf i ed, r el eased, or di scharged; i t i s bas ed on an ear l i er judgment t hat has been r ever sed or vacat ed; or appl yi ng i t pr os pect i vel y i s no l onger equi t abl e; or ( 6) any ot her r eas on t hat j us t i f i es r el i ef . Bount y Gai n ar gues t hat S ' g bj as ed on UBSFS' S own ar gument s. . . t he Pr el i mi nar y I n junct i on Order i s voi d as to non- part y Mr. Lam and cannot reach hi m' ' because the Court did not have pers onal juri s di ct i on over Mr. Lam and becaus e Mr . Lam i s not a part y t o t hi s act i on. g DE 137, p. 61.

Fur t her, Feder al Rul e of Ci vi l Pr ocedur e 65( d) , t i t l ed i û cont ent s and Scope of Ever y

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l njunct i on and Rest r ai ni ng Or der' ' s t at es, i n pert i nent part :

The order bi nds onl y the foll owi ng who recei ve actual noti ce of i t by personal s er vi ce or ot her



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wi se: ( A ) t he par t i es; ( B ) t he part i es' of t icers , agent s , servant s, empl oyees, and at t or neys; and ( C ) ot her per sons who are i n act i ve concert or par t i ci pat i on wi t h anyone des cri bed i n Rul e 65( d ) ( 2 ) ( A ) or ( B ) . Fed. R. Ci V. P. 65( d ) ( 2). Al t hough Roger Lam i s not cur r ent l y an empl oyee of UBSFS, he was worki ng for UBSFS Hong Kong duri ng the ti me t hat Bount y Gai n' s all eged clai ms arose. See DE 43, pp. 28, 32.

111. DISCUSSION I n r ef er ence t o Rul e 65( d), t he Supreme Court has s ta t ed: Thi s i s der i ved f r om t he common l aw doct r i ne t hat a decree of i njunct i on not onl y bi nds t he part i es defendant but al so those identi fi ed wi th them i n i nt erest, i n d pr i vi t y' wi t h t hem, r epr esent ed by t hem or s ubject t o t hei r cont r ol . I n essence i t i s t hat defendants may not null i fy a decree by carrying out prohi bi ted acts through ai ders and abett ors, al though t hey were not part i es t o the origi nal proceedi ng. Regal Kni t wear Co. v. NL RB, 324 U. S. 9, 14 (1945) . A r eadi ng of t he case l aw r el at ed t o Rul e 65( d ) ( 2) reveal s t hat i t was meant t o r ef er t o t he s cope of an i nj unc t i on and t he par t i es t hat i t bi nds, or enjoins, not necessa ri l y t he part i es t hat i t pr ot ect s.

Bount y Gai n woul d l i ke f or t he Cour t t o decl ar e t ha t t he Pr el i mi nar y I nj unc t i on Or der does not appl y t o Roger Lam because Roger Lam was not named i n t he Pr el i mi nary I njundi on Order and becaus e t hi s Court al l egedl y does not have j uri sdi ct i on over Roger Lam. However, t he Cour t does not s ee t hi s as ajur i sdi ct i onal i s sue.

Bounty Gai n fi led a FI NRA arbi t rat ion cl ai magai nst UBSFS, and later, Roger Lnm. Roger Lam was onl y added as a part y t o t he FI NRA ar bi t rat ion aft er condusion of the evi dent i m' y heari ng on t he pr el i mi nary i njunct i on, aher t he unders i gned i ss ued a Repor t and Recommendat i on, and s hort l y bef or e t he Cour t i s sued i t s Prel i mi nar y l nj unc t i on Or der. The Pr el i mi nar y I nj unc t i on Or der was i ss ued i n or der t o pr ohi bi t Bount y Gai n f r om f or ci ng UBSFS

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t o arbi trate because, i nt er ali a, UBSFS demonstrated t hat i t had a substant ial l i keli hood of success on the meri ts as i t had shown t hat Bount y Gai n' s cl ai m i s not arbit abl eagai nst UBSFS due t o the f act t hat Bount y Gai n was never a customer of UBSFS, or an associat ed person of UBSFS, under t he FI NRA Rul es. See DE 43, p. 36.

Al t hough Judge Mar r a' s 4- page Pr el i mi nar y l njunc t i on Or der( DE 59) adopt i ng and affi rmi ng the Report and Recommendati on does not ment ion Roger Lam, t he undersigned' s Report and Recommendat i on g DE 431 does f i nd t hat Roger Lnm, as a repr esent at i ve of UBSFS, handled an account for Mr. Cheung but di d not handle any account for Bounty Gain. In ot her words, Roger Lam acted as ç ' an associ ated person' ' of a FI NRA member in handl ing Mr. Cheung' s account, but di d not handle any account for Bounty Gai n. An associ ated person i ncl udes 1 û a per s on f or merl y associ ated wi t h a member . ' FI NRA Rul e 13100( r ). Ther ef or e, Roger Lam was, and st i l l i s, an associ ated person of UBSFS.



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The Court sees no difference between Bounty Gain forcing UBSFS to arbitrate in the FINRA arbitration and Bounty Gain forcing Roger Lam to arbitrate in the FINRA arbitration. A preliminary injunction does not have to be broad enough to be effective, and the appropriate scope of the injunction is left to the district court's sound discretion. 'Russian Media Group, LLC v. Cable America, Inc.', 589 F.3d 302, 307 (7th Cir. 2010). Bounty Gain's claims against Roger Lam in the FINRA arbitration arise out of the same exact set of factual circumstances as its claims against UBSFS in the FINRA arbitration. Therefore, Bounty Gain attempts to make a distinction without a difference. The Preliminary Injunction Order would apply to Roger Lam equally as it does to UBSFS.

IV. CONCLUSION For the foregoing reasons, it is hereby ORDERED that Bounty Gain's Motion for Relief

from Order Granting Plaintiff's Motion for Preliminary Injunction DE 1371 is DENIED.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, in the

S' 1 day of December

, 2016. Southern District of Florida, this

< c = WILLIAM MATTHEW UNITED STATES MAGISTRATE JUDGE

