SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

JSO ASSOCIATES, INC. and
JERRY SUNSHINE,

Plaintiffs,

INDEX No. 016167/07

MOTION DATE: Feb. 13, 2008
Motion Sequence # 001

-against-

EDWARD PRICE, GLOBAL TRADING INC., CONGELADORA DEL RIO, S.A., de C.V. and SANDRA PRICE, as the Executrix under the Last Will and Testament of Arthur Price, Deceased,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Reply Affidavit XX
Memorandum of Law..... XX
Reply Memorandum of Law..... X

This motion, by defendants, to dismiss the complaint for lack of personal jurisdiction is **granted** as to defendant Sandra Price but **denied** as to defendants Edward Price, Global Trading, and Congeladora. The motion, by defendants, to dismiss the complaint for failure to state a cause of action is **denied**.

This is an action to recover a finder's fee.

Plaintiff JSO Associates, Inc. is a food broker, specializing in fruits and produce. JSO Associates has its office in Great Neck, and plaintiff Jerry Sunshine is the vice-president of the corporation. Defendant Edward Price is retired from the frozen fruit business. Edward and Jerry's wife are cousins. The two men are not only related by marriage, but also did business together and, for a number of years, were good friends.

Edward and his brother, Arthur Price, were the principal owners of defendant Global Trading Inc. Global Trading was a South Carolina corporation engaged in the business of distributing frozen fruit products. Arthur was the manager of the company. Global Trading was the U.S. distributor for defendant Congeladora Del Rio, S.A., a Mexican corporation which was engaged in the business of processing frozen fruit in Iraputo, Mexico. Edward and Arthur held minority interests in Congeladora and were, to some extent, involved in its operation.

Arthur died in November 2006. Defendant Sandra Price, Arthur's surviving spouse, qualified in probate court in South Carolina as his executrix. After Arthur's death, Edward assumed control of Global Trading but soon became interested in selling his interests in both companies. Sandra was initially disinclined to sell her husband's stock. According to Edward, the reason was that Sandra hoped to retain an interest in Global Trading for the benefit of her children.

In March 2007, Edward spoke with Jerry concerning his efforts to find a purchaser for the companies. In the course of the conversation, Jerry offered to contact a friend who was an employee of SunOpta Inc. SunOpta is a Canadian corporation which is engaged in a number of businesses, including natural organic food, health supplements, and beauty products. Since Jerry's friend had sold his own business to SunOpta, Jerry thought that his friend could facilitate an acquisition of Congeladora and Global Trading. As negotiations with the other prospective purchaser, National Frozen Foods Corp., were proceeding slowly, Edward gave approval for an overture to SunOpta. Jerry then contacted two "friends" at SunOpta, Michael Cleugh and Michael Jacobs. Michael Cleugh is the Vice President of SunOpta Fruit Group. Michael Jacobs is presumably the individual who sold his business to the company. In any event, these men proposed the acquisition of the companies to SunOpta Fruit Group's president, Sergio Varela.

On March 13, 2007, Edward received a letter from Sergio Varela, expressing SunOpta's interest in purchasing all of the outstanding shares of Global Trading and Congeladora for $8.5 million. The purchase price was to be paid as $5 million cash at

closing, less all outstanding debt, and a $3.5 million note payable over three years. In the letter, Varela stated that the acquisition would be subject to, among other conditions, auditing of the companies, regulatory approval, and arrangement of satisfactory financing. Additionally, the combined companies were required to have a minimum equity of $3 million at the date of closing. If Global Trading and Congeladora agreed to disclosure of financial information, SunOpta would maintain the confidentiality of the information until the closing. The three companies were to cooperate in good faith to reach a "definitive" share purchase agreement by April 30, 2007. As drafted by Varela, the letter agreement was to be accepted by Edward, as the representative of the "Seller" corporations. The same day that he received the SunOpta proposal, Edward received a more definite offer from National.

In the days that followed, Jerry advised Edward, or at least listened to his thoughts, concerning the relative merits of the competing proposals. While SunOpta had given only a letter of intent, National appeared to have made a firm offer. Edward 's email indicates that National was offering him a short-term employment contract, with the purchase price for his stock dependent in part upon profits earned over a four year period. While SunOpta was offering a lower purchase price, Edward had no continuing obligation to work for the company. National's offer provided that if the value of inventory, cash, and receivables exceeded $1 million, the difference would be added to the purchase price. There was no similar adjustment for working capital under SunOpta's original proposal. The issue was particularly important to Edward because during the "heavy production season," Global Trading advanced a significant amount of money to Congeladora to obtain sugar and other "raw materials." A related issue concerned whether the purchase price was to be adjusted for accounts payable. Finally, there was the question of whether to structure the deal as a sale of corporate stock or assets, in view of tax considerations in Mexico.

At Jerry's urging, Varela soon agreed to a $100,000 non-refundable deposit. Feeling "comfortable and confident" with SunOpta, Edward accepted the "letter of intent" and began the process of negotiating "definitive agreements" for the two transactions. Although Edward and Arthur had owned only minority interests in Congeladora, there seems to have been no resistance to the acquisition on the part of the company's majority shareholders. Despite her initial desire to retain Global Trading for her children, Sandra also agreed to accept SunOpta's offer.

The acquisitions of Global Trading stock and Congeladora's assets were

eventually consummated by SunOpta's wholly-owned subsidiary, Cleugh's Frozen Foods, Inc. Subsequent to the acquisition, Global Trading was merged into SunOpta. The court notes that an action may proceed against a merged corporation in South Carolina(S.C. Code Ann. § 33-11-106). Since this action could have been maintained against Global Trading in its state of incorporation, it may also proceed in New York (**LaVigne v. Feinbloom**, 255 AD2d 896, 4th Dept., 1998).

This action was commenced on September 12, 2007. The complaint alleges that when Edward hired Jerry as a finder, Edward was acting on his own behalf and as an agent for the other defendants. Plaintiffs seek to recover a finder's fee for promoting the transactions and allege that the reasonable value of their services is at least $500,000. Edward claims that he did not realize that Jerry expected to be paid for his services. Nevertheless, in an email sent to Jerry shortly after receiving SunOpta's proposal, Edward stated, "I set the fees." Thus, Edward appears actually to have thought that the amount of compensation would be subject to his discretion.

According to the affidavits of service, Sandra Price was personally served at her home in Greer, South Carolina on September 17, 2007. Edward Price was personally served by Priority Mail sent to his apartment at 201 East 83rd Street in Manhattan on September 19, 2007. The process server alleges that Edward had agreed to accept personal service, on behalf of himself and the corporations. However, when the process server's father became ill, Edward agreed to accept service by mail. The process server further alleges that on November 21, 2007, he delivered another copy of the summons and complaint to the doorman at Edward's apartment building. On November 26, 2007, the process server mailed yet another copy of the summons and complaint to Edward at the apartment.

Defendants are moving pursuant to CPLR 3211(a)(8) to dismiss the complaint for lack of personal jurisdiction. Edward denies that he agreed to accept service of process and challenges the manner of service on both himself and the corporations. Defendants assert that neither Global Trading, nor Congeladora, nor the estate have sufficient contacts with New York for the court to exercise personal jurisdiction. Alternatively, defendants move to dismiss the complaint pursuant CPLR 3211(a)(7) for failure to state a cause of action. Defendants assert that a contract for a brokerage commission or finder's fee is within the Statute of Frauds and Global Trading received no benefit from Cleugh's acquisition of the corporation.

Plaintiffs maintain that Edward was properly served pursuant to CPLR § 308(2). Plaintiffs argue that Edward was an authorized agent for receipt of process on behalf of both Global Trading and Congeladora. Plaintiffs assert that there is a sufficient basis for personal jurisdiction under CPLR § 302(a)(1) in that defendants transacted business within the state and the cause of action arose from the transaction of business. Plaintiffs argue that the email correspondence, taken as a totality, constitutes a sufficient memorandum of the brokerage contract to satisfy the statute of frauds, at least for the purposes of a quantum meruit action.

CPLR § 308(2) provides that personal service upon a natural person may be made by delivering the summons within the state to a person of suitable age and discretion at the actual dwelling place of the person to be served and by mailing the summons to the person to be served at his last known residence. A doorman or security guard at a multiple-dwelling complex is a person of suitable age and discretion, at least if the process server is denied access to the defendant's actual residence (**DuPont, Forgan & Co. v. Chen**, 41 NY2d 794, 797, 1977). Where, as in the present case, the doorman allows the process server access to defendant's floor, knowing full well that no one is home, the doorman should also be considered a person of suitable age and discretion. When defendant is away from the apartment, delivery of the summons to the doorman, accompanied by the requisite mailing, is more likely to result in defendant's receipt of the summons than is "affix and mail" service. Since leaving the summons with the doorman under those circumstances is more likely to result in actual notice, it results in a valid service.

The delivery and the mailing must occur within 20 days of each other, presumably so that the defendant will appreciate the interrelationship of the two events (**Higher Education Services Corp. v Palmeri**, 167 AD2d 797, 3rd Dept., 1990). It does not matter whether delivery or mailing occurs first, so long as the other service step is performed within 20 days (Alexander, Practice Commentary, McKinney's Cons Law of NY, Book 7B, CPLR 308, pp20-21). Since the second mailing occurred within six days of delivery of the summons to the doorman, the court need not rule upon the sufficiency of the original mail service. The court concludes the service upon defendant Edward Price was proper.

CPLR § 311(a)(1) provides that personal service upon a domestic or foreign corporation shall be made by delivering the summons to an officer, director, managing or general agent of the corporation or to any other agent authorized by appointment or by law to receive service. Edward denies that he was an officer of Global Trading at the

time that the process was served. Nevertheless, under CPLR § 311, a corporation need not follow any particular formality when appointing an agent for receipt of process (**Fashion Page, Ltd. v. Zurich Ins. Co.**, 50 NY2d 265, 272, 1980). If a person exercises judgment and discretion on behalf of a corporation, he may be a "managing agent" for purposes of receiving process, regardless of his formal title (**Daniels v. King Chicken & Stuff, Inc.**, 35 AD3d 345, 2nd Dept., 2006). Clearly, Edward was the managing agent of Global Trading after his brother's death, since he appears to have been single-handedly managing the business. The court concludes that the summons was properly served upon Edward Price as an agent of Global Trading.

The court next considers whether Edward had authority to receive process on behalf of Congeladora. Defendants stress that Edward was not an officer of the Mexican corporation, and the extent to which he may have exercised judgment and discretion on the part of the company is unclear. However, if a corporation clothes an individual with apparent authority to accept service, service upon the apparent agent will be as valid as service upon an agent who has been formally designated by the corporation(CPLR 318; **Eastman Kodak Co. v. Miller & Miller Consulting Actuaries**, 195 AD2d 591, 2nd Dept., 1993). The existence of apparent authority depends upon a factual showing that the third party relied upon the agent's misrepresentation of authority because of some misleading conduct on the part of the principal (**IndoSuez Intern'l Finance v. Nat'l Reserve Bank**, 98 NY2d 238, 245-46, 2002). A third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable(Id at 246).

In asserting that he was "acting alone," Edward contends that he was unauthorized to take any action on behalf of Congeladora for the purpose of selling the company. However, even if an agent's action is initially unauthorized, it may be expressly ratified by the principal (**Standard Funding Corp. v. Lewitt**, 89 NY2d 546, 552 ,1997). Ratification may also be implied where, with knowledge of the material facts, the principal retains the benefit of an unauthorized transaction(Id). The court will discuss Edward's apparent authority to enter into a brokerage or finder's fee agreement with Jerry when considering whether Congeladora transacted business in New York through an agent. For purposes of determining whether Edward was authorized to accept service of process on behalf of the Mexican corporation, the more significant consideration is Edward's authority to "put Congeladora's assets in play," or enter into a contract aimed at selling the company.

Whether or not Edward possessed actual authority to bind Congeladora with respect to the letter of intent, the company clearly ratified Edward's action by entering into the asset sale agreement on substantially the terms which Edward had negotiated. By ratifying Edward's action with respect to the letter of intent, Congeladora clothed Edward with apparent authority to receive process, at least as to claims arising from the stock purchase, asset sale, or brokerage agreements. Moreover, plaintiffs reasonably relied upon Edward's apparent authority by failing to utilize the preferred method of service, delivery of the papers to the U.S. "Central Authority" for transmission to Mexico pursuant to the Inter-American Convention(28 U.S.C. § 1781; **Laino v. Cuprum**, *S.A.*, 235 AD2d 25, 2nd Dept., 1997). Because Edward appeared to be acting on Congeladora's behalf, service was made "in a manner which, objectively viewed, [was] calculated to give the corporation fair notice" (**Fashion Page, Ltd. v. Zurich Ins. Co., supra**, 50 NY2d at 272). Thus, the court concludes that service upon Edward as an agent for Congeladora was proper.

A person subject to the jurisdiction of the courts of this state, or his executor or administrator, may be served with the summons without the state, in the same manner as service is made within the state(CPLR § 313). Thus, if Sandra was subject to personal jurisdiction, personal service upon her in South Carolina was proper. The court will proceed to consider whether there is a basis for exercising personal jurisdiction as to Global Trading, Congeladora, and Sandra Price.

Plaintiffs argue that Congeladora was doing business in New York by virtue of the large volume of sales that were completed in New York through Global Trading's exclusive distributorship arrangement. However, mere sales of a manufacturer's product, through a wholesale distributor in New York, do not make a foreign corporation amenable to suit in this jurisdiction as to claims which do not arise directly from the sale of the product (**Delagi v. Volkswagen**, 29 NY2d 426, 433, 1971). Since Congeladora did not even use a wholesale distributor located in New York, the court concludes that it was not doing business in New York State.

Nevertheless, CPLR § 302(a)(1) provides that, as to a cause of action arising from the transaction of business, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent, transacts any business within the state. The statute "authorizes the court to exercise jurisdiction over non-domiciliaries for tort and contract claims arising from a defendant's transaction of business in this State. It is a ' single act statute' and proof of one

transaction in New York is sufficient to invoke jurisdiction, even though defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted"(**Kreutter v. McFadden Oil Corp**., 71 NY2d 460, 467, 1988).

"Not all purposeful activity, however, constitutes a 'transaction of business' within the meaning of CPLR 302(a)(1)" (**Fischbarg v. Doucet**, 9 NY3d 375, 380, 2007). Thus, merely telephoning a single order to New York, requesting a shipment of goods to another state, will not provide a basis for jurisdiction(Id). Nor will the transitory presence of a corporate official here establish jurisdiction over the corporation(Id). However, an exchange of email communications between a sophisticated institutional trader located outside New York and a purchaser within the state will give rise to personal jurisdiction in New York with respect to a claim arising from the securities transaction (**Deutsche Bank v. Board of Investors**, 7 NY3d 65, 2006).

Email communications to New York may also be of sufficient "quality" to establish a transaction of business in a suit based upon a professional services contract (**Fischbarg v. Doucet**, 9 NY3d at 380). In **Fischbarg** non-residents retained a New York attorney to represent them in litigation in another State and subsequently communicated with the attorney by fax, email, and regular mail. The court reasoned that defendants had "projected themselves" into New York by their regular communication and "purposefully availed themselves of the privileges and protections of our state's laws"(Id at 379, 385). Thus, defendants should have reasonably expected to defend a suit based on their relationship with plaintiff in this jurisdiction (Id at 385). The court held that defendants were subject to personal jurisdiction in a suit by the attorney for breach of contract and unjust enrichment.

In the case at bar, Edward retained not an attorney but a business broker. Nevertheless, because Edward's email established a relationship between the men, which implicated the privileges and protections of New York law, his contacts with New York could be of sufficient quality to constitute a "transaction of business" within the state. While Edward was new to the mergers and acquisitions game, his native acumen and life experience in the frozen fruit business made him a fairly sophisticated "player." Thus, Edward projected himself into New York through his email communications, seeking Jerry's assistance with a contemplated asset sale and stock purchase agreement.

The parties assume that Edward's negotiation of the corporate acquisition, as the

purported agent for Global Trading and Congeladora, is the critical "transaction of business," which must be evaluated to determine whether the court may exercise personal jurisdiction. However, because plaintiffs are suing for a brokerage commission, the transaction which must be examined is Edward's engagement of a business broker. Thus, the court will evaluate the New York contacts relating to Edward's engagement of, and subsequent communication with, Jerry, focusing primarily on the 16 emails which Edward sent.

Plaintiffs note that Edward's email address is "edwardprice83@yahoo.com," an apparent reference to his apartment on 83rd Street. However, the more significant contact is not the place to which the email address refers but rather the location to which the emails were sent. Defendants do not dispute that Jerry was located in New York when the emails relating to his engagement as a broker or finder were received.

While not critical to the question of personal jurisdiction, it is interesting to note that it is far from clear where Edward was located when the emails were sent. On the morning of March 14, 2007, Edward sent Jerry an email, replying to Jerry's email entitled, "a few questions." In his email, Edward indicates that he had been staying at his "house" because he was ill. Thus, Edward appears to have sent the email from his home in South Carolina rather than his apartment in New York. That evening, Edward sent an email entitled, "data request," to Jeanice, who worked for Global Trading, and to Karen, who worked for Congeladora. In the email, Edward requested the women to send him financial information for both of the companies. When that email was sent, Edward was apparently not in Global Trading' s office and, indeed, he was not necessarily even in South Carolina. Since communication technology allows email to be sent or accessed from any location, the email could even have been sent from New York. Nonetheless, the court will assume for purposes of determining jurisdiction that all of the emails were sent by Edward from without the state.

Because Edward's emails to New York were for the purpose of engaging a broker in New York, the court concludes that Edward should reasonably have expected to defend a suit here for breach of the brokerage agreement. Because of Edward's de facto control of Global Trading, a subject of the contemplated acquisition, his engagement of Jerry was clearly undertaken on behalf of that company. The court concludes that Global Trading transacted business in New York through an agent and is subject to personal jurisdiction on a claim arising from the brokerage agreement. Accordingly, defendants Edward Price and Global Trading's motion to dismiss for lack of personal jurisdiction is **denied**.

The court will now consider whether Edward was authorized to engage a business broker on behalf of Congeladora. Marco De Leon, the Administrative Manager of Congeladora, has submitted an affidavit stating that Congeladora did not authorize Edward to "take any actions with respect to third parties to obtain an offer to purchase [the company's] assets." While self-serving, De Leon's denial of express authority is certainly broad enough to cover the retaining of a business broker. The affidavit of Michael Cleugh, Vice President of SunOpta Fruit Group, states that Global Trading was not an agent of Congeladora. Significantly, Cleugh does not address the issue of whether Edward was an agent of that company. In any event, the question of whether Congeladora transacted business in New York turns on whether the company clothed Edward with apparent authority to retain a business broker.

The unilateral activity of one who claims some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum state. However, a non-resident who transacts business in New York through an agent is subject to personal jurisdiction, if the agent is clothed with express or apparent authority (**Ford v. Unity Hospital**, 32 NY2d 464, 472, 1973). The court concludes that Congeladora's acceptance of regular infusions of working capital from Global Trading clothed Edward with apparent authority to retain a business broker on behalf of the Mexican corporation. Edward's email correspondence establishes that Jerry was aware of Global Trading's periodic transfers of funds to Congeladora and Edward's other involvement in the management of the Mexican company. Because of Edward's apparent authority, Congeladora transacted business in New York through an agent by retaining a business broker. Thus, Congeladora is subject to personal jurisdiction as to claims arising from that transaction. Accordingly, defendant Congeladora's motion to dismiss the complaint for lack of personal jurisdiction is **denied**.

Despite Sandra's reluctance to sell the business, Edward may have had implied authority to retain a broker on the estate 's behalf, at least to solicit proposals. However, the court concludes that Edward was not authorized to retain Jerry on behalf of the estate. Jerry's affidavit alludes to a business dispute which he had with Arthur which was serious enough to cause Arthur to cease doing business with JSO Associates as a food broker. On March 14, Jerry sent Edward an email entitled, "This may be morbid, but...." In the email, Jerry indicates that in the event Edward died, "Sandra or Arthur's trustees" might not be willing to pay him for "bringing this deal to fruition." Thus, Jerry indicated that Sandra shared her husband's ill feelings, and they persisted even after Arthur's death. Since Jerry was well aware of the rift with Sandra, he could not reasonably rely upon any apparent authority on Edward's part to represent the estate.

Although Sandra may have invoked the protection of New York law by adopting the stock purchase agreement, she avoided doing so with respect to the engagement of a broker. Thus, the court concludes that Sandra, as executrix, did not transact business through an agent in New York. Accordingly, defendant Sandra Price's motion to dismiss the complaint for lack of personal jurisdiction is **granted**. The court now proceeds to consider the facial sufficiency of the complaint as to the remaining defendants.

General Obligations Law § 5-701(a)(10) provides, "Every agreement, promise, or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise, or undertaking: ...is a contract to pay compensation for services rendered in negotiating ...the purchase, sale, exchange...of a business...including a majority of the voting stock interest in a corporation..." The statute defines "negotiating" as including "procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction(Id)." The requirement of a writing or memorandum applies to "a contract implied in fact or in law to pay reasonable compensation...(Id)." A writing or memorandum will be sufficient if it "identifies the parties to the contract, the subject matter of the contract, and establishes that plaintiff in fact performed" (**Morris Cohon & Co. v. Russell**, 23 NY2d 569, 574, 1979). Where plaintiff sues in quantum meruit, the writing need not specify the rate of compensation(Id at 575).

A memorandum sufficient to satisfy the statute of frauds need not be contained in a single document (**Intercontinental Planning, Ltd. v. Daystrom, Inc**., 24 NY2d 372, 379, 1969). The terms of the agreement may be established by a combination of signed and unsigned documents, letters, or other writings provided that the writing establishing a contractual relationship between the parties bears the signature of the party to be charged or his agent and the unsigned document refers on its face to the same transaction as that set forth in the one that was signed(Id). While extrinsic evidence is not permitted to contradict the writing or create an ambiguity in it, such evidence "may be required to identify the existing facts to which the written description refers" (**Stulsaft v. Mercer Tube & Mfg. Co.**, 288 NY 255, 259, 1942). The court does not violate the statute of frauds when it "fit[s] the description to the facts"(Id).

Early in the morning on March 13, 2007, Edward sent an email to Jerry entitled, "SunOpta." Attached to the email was the "letter of intent" from Sergio Varela, outlining the terms of the proposed transaction. In the email, Edward states, "I'm impressed.....Let's talk this morning. Since this has gone beyond the potential status, tell

me what you want for bringing this together." Clearly, the email, incorporating Varela's letter, identified the subject matter of the brokerage agreement, the proposed acquisition of Global Trading and Congeladora by SunOpta or its subsidiary. The email itself identifies three parties to the brokerage agreement, Jerry, Edward, and Global Trading. Whether the email also identifies Congeladora as a party to the contract depends upon whether the Mexican corporation expressly or impliedly employed Jerry as a broker.

In order for defendant to be liable for a broker's commission, defendant must expressly or impliedly employ plaintiff as a broker or agree to pay him a commission (**Caltabiano v. State Bank**, 59 AD2d 752, 2nd Dept., 1977). Whether Congeladora impliedly hired plaintiff as a business broker presents a question of interpretation of the various emails, amplified to some extent by extrinsic evidence.

The morning of March 14, the day after Edward received the SunOpta proposal, Jerry sent Edward an email entitled, "a few questions." In the email, Jerry states that "Michael and Serge called last night." The email indicates that Jerry had urged the men to "come up with a cash advance in order for you to make the deal with SunOpta." Jerry's affidavit makes clear that "Michael and Serge" are actually Michael Cleugh and Sergio Varela.

Jerry's email was in response to an email which Edward had sent the day before entitled, "phone number at Del Rio." In the email, Edward states, "There is internet phone service at [Congeladora] in case you want to call Michael or Serge today. No need to call a Mexican number." Edward's referring to "Michael or Serge" by their first names suggests that he was already familiar with the prospective purchasers of Global Trading. Moreover, Edward's prompting Jerry to call the SunOpta representatives at Congeladora suggests that they may have been "wearing two hats," holding positions of authority not only with SunOpta but also with the Mexican corporation. If Cleugh and Varela actually held positions with Congeladora, they may also have impliedly employed Jerry as a broker on behalf of the corporation.

Of course, SunOpta Fruit Group may previously have used Congeladora as a principal supplier. Thus, Cleugh and Varela may simply have been visiting Congeladora to discuss business or a possible acquisition of the company. Nevertheless, on a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. The court must accept the allegations of the complaint as true and provide plaintiffs the benefit of every possible favorable inference (**AG Capital Funding Partners v. State**

Street Bank and Trust Co., 5 NY3d 582, 591, 2005). Thus, based on the emails, as supplemented by extrinsic evidence, the court concludes that the memorandum sufficiently identifies Congeladora as a party to the brokerage agreement, if the Mexican corporation actually employed plaintiffs as a broker.

The court will now consider whether the memorandum was signed. Edward Price's name appears in the email address at the top of the "SunOpta" email. However, the email closes, "I'll talk to you later." and, except for Edward's name in the email address, is otherwise unsigned. It has been stated that, "The subscription which the statute [of frauds] demands is a writing at the end of the memorandum" (**Steinberg v. Universal Machinenfabrik**, 24 AD2d 886, 2nd Dept., 1965). Thus, a "scrawl at the top of the memorandum" is insufficient to satisfy the writing requirement(Id). However, **Steinberg** was decided in a different technological era, when email and home computers had not even entered the public imagination. Moreover, the requirement of a signature at the bottom was to minimize the opportunity for fraudulent additions to the memorandum, a practice which is not feasible with electronic communication.

"Electronic signatures" on such formal documents as tax returns or SEC filings are now becoming commonplace (See **Barrett v. Huff**, 6 AD3d 1164, 1167, 4th Dept., 2004). On the other hand, the law is still developing as to the kind and location of signature which will satisfy the statute of frauds for less formal types of electronic communication, such as email and instant messaging. Nonetheless, the court must look for assurance as to the source of the email and the authority of the person who sent it (See **Bloom v. Platinum Fitness Life Style** , 25 AD3d 433, 1st Dept., 2006). While technology has advanced since the Court of Appeals decided **Morris Cohon & Co.**, the decision's rationale still provides helpful guidance, "The Statute of Frauds was designed to guard against the peril of perjury; to prevent the enforcement of unfounded fraudulent claims. But,...the Statute of Frauds was not enacted to afford persons a means of evading just obligations; nor was it intended to supply a cloak of immunity to hedging litigants lacking integrity; nor was it adopted to enable defendants to interpose the Statute as a bar to a contract fairly, and admittedly made"(23 NY2d at 574).

The court holds that where there is no question as to the source and authenticity of an email, the email is "signed" for purposes of the statute of frauds if defendant's name clearly appears in the email as the sender (See **Cloud Corp. v. Hasbro, Inc.**, 314 F.3d 289, 7th Cir. 2002). As noted, Edward Price's name appears as the sender of the "SunOpta" email. Additionally, half an hour later, Edward sent Jerry another email

concerning the SunOpta deal which was signed, "Edward," in the traditional letter writing fashion. Thus, the court concludes that the "SunOpta" email was sufficiently signed by Edward Price to satisfy the statute of frauds signature requirement. For the reasons discussed above, the court also concludes that the complaint sufficiently alleges that Edward signed the memorandum on behalf of Congeladora and Global Trading. Accordingly, the motion of defendants Edward Price, Global Trading, and Congeladora to dismiss the complaint for failure to state a cause of action is **denied**.

This shall constitute the decision and order of the court.

Dated MAR 18 2008

J.S.C.

ENTERED

MAR 21 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE