

**Cricket Stockholder Rep, LLC v Project Cricket
Acquisition, Inc.**

2019 NY Slip Op 32469(U)

August 21, 2019

Supreme Court, New York County

Docket Number: 651454/2016

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

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CRICKET STOCKHOLDER REP, LLC,

INDEX NO. 651454/2016

Plaintiff,

MOTION DATE 12/20/2018,

- v -

N/A

PROJECT CRICKET ACQUISITION, INC.,USES
HOLDING CORP.,

MOTION SEQ. NO. 007 009

Defendants.

**DECISION + ORDER ON
MOTION**

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HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 146, 147, 148, 149, 157

were read on this motion to/for ENFORCEMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 172, 173, 174, 175, 176

were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT.

Upon the foregoing documents, it is

Plaintiff Cricket Stockholder Rep, LLC (“CSR”) moves to confirm the report of the special referee dated July 3, 2019 (the “Report”). Defendant Project Cricket Acquisition, Inc. (“Project Cricket”) and USES Holding Corp. (“USES”) do not oppose CSR’s motion to confirm the Report, but it objects to the application of New York’s statutory rate for prejudgment interest.

Project Cricket purchased USES from the sellers in a related action, *Project Cricket Acquisition, Inc. v. Florida Capital Partners, Inc., et. al*, New York County Index No. 652524/2015 (“First Action”). The First Action alleges false and misleading representations about USES in the purchase and sale agreement (“Agreement”). As a

representative of the sellers in the First Action, CSR commenced this action to recover tax refunds (“Tax Refunds”) that Project Cricket received for the period prior to the Agreement’s closing date. In a decision and order dated May 10, 2018, I granted CSR’s motion for summary judgment against Project Cricket for a total of \$2,773,406.00 in Tax Refunds. However, the Agreement entitled CSR to “interest . . . from the date of receipt of such funds[,]” and I referred to a special referee to hear and report on the issue of when interest began to accrue on each of the thirteen Tax Refunds. I also referred the issue of attorneys’ fees that CSR is entitled to recover from Project Cricket, pursuant to the Agreement.

Thereafter, the parties attempted to settle the issue before Special Referee Jeremy R. Feinberg (“Referee Feinberg”). However, a dispute arose regarding whether an enforceable settlement had been reached. Project Cricket subsequently filed a motion by order to show cause to enforce the purported settlement. In an interim order dated January 2, 2019, I referred to Referee Feinberg to hear and report on the additional issue of whether the parties entered into an enforceable settlement agreement.

After a six-day hearing, Referee Feinberg first reported and recommended that the parties did not enter into an enforceable settlement agreement. Referee Feinberg further reported and recommended that six of the thirteen Tax Refunds accrue interest from the dates of receipt.¹ As for the remaining seven Tax Refunds, Referee Feinberg reported

¹ The six Tax Refunds and its corresponding accrual dates are as follows: (1) the 2013 North Dakota Tax Refund for \$2,882.00 accrues from July 23, 2014; (2) the 2013 Arkansas Tax Return for \$33,749.00 accrues from August 5, 2014; (3) the 2012 Alabama CPT Tax Refund for \$11,954.35 accrues from October 16, 2014; (4) amended 2010

and recommended that interest should accrue from the date of commencement of this action, *i.e.*, March 18, 2016, because there was not sufficient evidence to show when the Tax Refunds were received.² Lastly, after calculating certain deductions, Referee Feinberg reported and recommended an attorneys' fee award of \$257,573.03 in fees together with \$10,000.00 in disbursements.

CPLR § 4403 states that upon the motion of any party or upon the judge's initiative, the judge "may confirm or reject, in whole or in part, the verdict of an advisory jury or the report of a referee to report." The recommendations and report of a referee will be confirmed "whenever the findings are substantially supported by the record, and the Referee has clearly defined the issues and resolved matters of credibility." *Stone v Stone*, 229 A.D.2d 388 (2d Dep't 1996). Here, CSR moves to confirm the Report, and Project Cricket does not oppose the motion except to the extent CSR requests the application of New York's statutory rate for prejudgment interest.

Review of the Report indicates that the record amply supports Referee Feinberg recommendation, and I confirm the Report. The Report does not specifically address the issue of whether New York or Delaware's statutory interest rate applies to prejudgment interest because that is beyond the scope of the issue referred.

Mississippi Tax Refund for \$66,684.00 accrues from January 19, 2015; (5) amended 2013 Arkansas Tax Refund for \$4,904.15 accrues from January 19, 2015; and (6) amended 2013 Mississippi Tax Refund for \$2,771.00 accrues from February 25, 2015.

² The remaining seven Tax Refunds are as follows: (1) the 2013 Louisiana USES Tax Refund for \$89,398.00; (2) 2013 Alabama CPT Tax Return for \$5,938.00; (3) amended 2013 Federal Tax Return for \$17.58; (4) amended 2013 North Dakota Tax Return for \$376.92; (5) amended 2013 Federal Tax Return for \$169,845.53; (6) Federal NOL Carryback 03.31.14 for \$1,814,785.55; and (7) IRS Notice for \$570,099.92.

In any event, it is undisputed that the Agreement is governed by Delaware law. “In a contract action with a choice of law provision, the substantive law of the chosen jurisdiction controls the award of prejudgment interest.” *PNCEF, LLC v Omni Watch and Clock Co., LLC*, 2010 WL 3861009 at 7 (EDNY Sept. 28, 2010). Therefore, I direct plaintiff Cricket Stockholder Rep, LLC to submit a proposed judgment for the Tax Refund amount of \$2,773,406.00 and also showing the calculation of prejudgment interest for each of the individual Tax Refunds and its corresponding accrual date as confirmed herein.

The proposed judgment need not actually calculate the interest amount due on each Tax Refund (that calculation will be made by the judgment clerk) but simply set forth the individual Tax Refund amount upon which interest is due, the date interest began to accrue, and the applicable interest rate.

In accordance with the foregoing, it is

ORDERED that plaintiff Cricket Stockholder Rep, LLC’s motion to confirm the Report (motion no. 009) is granted; and it is further

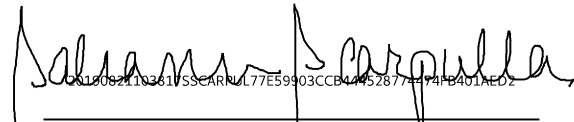
ORDERED that defendant Project Cricket Acquisition, Inc.’s motion to enforce a settlement agreement (motion no. 007) is denied; and it is further

ORDERED that plaintiff Cricket Stockholder Rep, LLC is directed to submit a proposed order and judgment consistent with this decision and order.

This constitutes the decision and order of the Court.

8/21/2019

DATE


SALIANN SCARPULLA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE