IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL R. NELSON,	:	**CIVIL ACTION**
Plaintiff,	:	
v.	:	**NO. 17-3232**
DAVID L. BROWN, et al.,	:	
Defendants.	:	

CONSOLIDATED MEMORANDUM OF LAW IN OPPOSITION TO MOTIONS TO DISMISS, AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION TO COMPEL ARBITRATION AND FOR STAY PENDING ARBITRATION

I. INTRODUCTION

Plaintiff, Michael R. Nelson, Esquire has brought this action against his former law partners, seeking an Order enforcing the Defendants' binding promises to resolve through alternative dispute resolution any and all disputes arising out of, or relating to, the two agreements which governed the affairs of their former law firm (hereinafter the "Firm"). Both agreements expressly provided that each of the signatories agreed that any and all disputes arising out of, or relating to, either of the agreements would be submitted to the Pennsylvania Bar Association's Lawyer Dispute Resolution Program ("PBA Program") for mediation, in the first instance, and arbitration, in the event that mediation was unsuccessful. Defendants have refused to participate in the alternative dispute resolution ("ADR") process.

After several Defendants moved to dismiss the original Complaint for lack of specificity, this Court held a conference, which resulted in an Order granting Plaintiff leave to file an Amended Complaint to plead with greater specificity the claims subject to ADR. In his

Amended Complaint, Plaintiff Nelson has now set forth the claims that are subject to ADR with greater specificity, thus mooting the argument that Plaintiff's claims fail to satisfy the *Twombly* and *Iqbal* standard.

The other arguments set forth in Defendants' renewed Motions to Dismiss fail as well. Defendants contend that the claims at issue belong to the Firm, not to Nelson individually. But this ignores both the applicable law and the actual allegations in the Amended Complaint. Defendants also argue that Plaintiff Nelson waived his right to arbitrate these claims by virtue of a previous action filed in the Montgomery County Court of Common Pleas ("Montgomery Action"). This argument, however, mischaracterizes the limited scope of the Montgomery Action.

Under the Federal Arbitration Act, there is a strong presumption in favor of arbitrability. *Moses H. Cone Hosp. v. Mercury Const. Corp*., 460 U.S. 1, 24, 103 S.Ct. 927, 941 (1983). A request to arbitrate should not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Techs., Inc. v. Comms. Workers of America*, 475 U.S. 643, 649, 106 S.Ct. 1415, 1418-19 (1986). The two questions for this Court to decide are whether there exists an agreement to arbitrate, and whether the claims at issue fall within the scope of that agreement. *Century Indem. Co. v. Certain Underwriters at Lloyd's London*, 584 F.3d 513, 523 (3d Cir. 2009). In our case, it is clear the answer to both questions is yes. Accordingly, Plaintiff respectfully requests that this Court deny the Motions to Dismiss, and grant Plaintiff's Cross-Motion to Compel Arbitration and for a Stay pending arbitration.

II. STATEMENT OF FACTS

The facts, as stated in the Amended Complaint, the documents attached thereto or referred to therein, and the exhibits attached to the motion papers, are these:

This matter arises out of the dissolution of the law firm Nelson Levine DeLuca & Hamilton, P.C. (Am. Complaint, ¶ 1). Plaintiff and each of the Defendants (collectively, the "Parties") were members of the Firm. (Am. Complaint, ¶ 16). The rights and obligations of the members of the Firm are set forth in, and governed by, two contracts, each dated August 29, 2013: the Amended and Restated Limited Liability Company Operating Agreement ("Operating Agreement") and the Amended and Restated Buy-Sell Agreement ("Buy-Sell Agreement") (collectively, the "Agreements"). (Am. Complaint, ¶¶ 2, 17 and Exhibits A and B thereto). Each of the Defendants is a signatory to both of the Agreements, as is Nelson. The Firm is a party to the Buy-Sell Agreement, but is not a party to the Operating Agreement. (Exhibits A and B to the Am. Complaint).

Each of the Agreements contains a provision requiring each of the parties thereto to submit to ADR any and all claims and disputes which arise under, or relate to, the respective Agreements. Specifically, the Agreements call for all such disputes to be submitted to the PBA Program for resolution through mediation, in the first instance, and (only if mediation is unsuccessful) for resolution through arbitration. (Am. Complaint, ¶ 2). In Section 9.13 of the Operating Agreement, the Parties agreed:

> Subject to a party's right to seek injunctive relief and/or specific performance pursuant to Section 9.3 hereof, ***any and all claims, controversies and disputes*** (each, a "DISPUTE") ***arising under or relating to this AGREEMENT*** *shall be settled through mediation conducted in accordance with the then-existing rules of the Pennsylvania Bar Association Dispute Resolution Program* (the "PBA Program"). Any *DISPUTE* not resolved through such mediation shall be submitted to binding arbitration conducted in accordance with the then-existing rules of the PBA Program. If the PBA Program ceases to exist, all *DISPUTE*s shall be settled in accordance with the then-existing Commercial Arbitration Rules of the American Arbitration Association. Any award rendered shall be final, binding and non-appealable, and judgment thereon may be entered in any court having jurisdiction thereof.

(Operating Agreement, § 9.13 (emphasis added); Am. Complaint, ¶ 20). In Section 7.13 of the Buy-Sell Agreement, the Parties agreed to precisely the same method of dispute resolution:

> Subject to a party's right to seek injunctive relief and/or specific performance pursuant to Section 7.3 hereof, ***any and all claims, controversies and disputes*** (each, a "DISPUTE") ***arising under or relating to this BUY-SELL AGREEMENT*** *shall be settled through mediation conducted in accordance with the then-existing rules of the Pennsylvania Bar Association Dispute Resolution Program* (the "PBA Program"). Any *DISPUTE* not resolved through such mediation shall be submitted to binding arbitration conducted in accordance with the then-existing rules of the PBA Program. If the PBA Program ceases to exist, all *DISPUTE*s shall be settled in accordance with the then-existing Commercial Arbitration Rules of the American Arbitration Association. Any award rendered shall be final, binding and non-appealable, and judgment thereon may be entered in any court having jurisdiction thereof.

(Buy-Sell Agreement, § 7.13 (emphasis added); Am. Complaint, ¶ 21). Because the PBA Program remains in full force and effect (Am. Complaint, ¶ 22), all disputes arising out of or relating to either Agreement must be submitted thereto.

The PBA Program provides a confidential and inexpensive forum for lawyers to resolve disputes with their current or former members or partners through mediation and, if necessary, arbitration, without subjecting the members or partners to the burden, expense and publicity

associated with litigation before a court. (Am. Complaint, ¶ 23 and Exhibit C thereto. *See*, *also*, PBA Program Website, https://www.pabar.org/public/committees/dispreso/disput.asp--excerpts of which are attached hereto as Exhibit 1).

The PBA Program's website informs lawyers engaged in a law firm dispute that they should call the Pennsylvania Bar Association at the phone number provided. (PBA Program Website excerpt, Ex. 1). The General Rules and Procedures of the PBA Program, in effect as of Feb. 14, 2013 and continuing until today (the "PBA General Rules and Procedures") (copy attached to the Am. Complaint as Exhibit C), provide that a request for mediation "shall describe the dispute and shall provide contact information for all parties to the dispute." (PBA General Rules and Procedures, § II(B)). There is no requirement of specificity. The Rules further provide that the PBA will hold an initial conference to discuss, *inter alia*, the "submission of preliminary memoranda" and "rules governing the mediation, including confidentiality and communications with the mediator." (*Id.*, §II(F)(1)). Furthermore, the PBA Program's website, in addition to emphasizing the confidential and informal nature of the ADR proceedings, expressly states that even where parties prefer to proceed directly to arbitration, an initial mediation session will be held "to determine the issues for arbitration." (Exhibit 1) (emphasis added).

On January 23, 2017, Mr. Nelson invoked the mediation and arbitration process under the rules of the PBA Program by sending the appropriate notice to the Pennsylvania Bar Association, and to all Defendants (the "January 23 Notice") (Am. Comp., Ex. D, at pp. 4-5).[1] The January

[1] Although the allegations of the Amended Complaint must be accepted as true, Defendants previously questioned whether there may have been an earlier claim, pointing to Mr. Nelson's remark that the January 23 Notice "follows my notice to the Pennsylvania Bar Association." In fact, Mr. Nelson had simply followed the direction on the PBA website and called the phone number provided; he was then directed to submit an e-mail to Ms. Louann Bell, and did so in the January 23 Notice. (*See* Nelson Dec. in opposition to Clark Summary Judgment Motion, at ¶3) (ECF 27-1). Resolution of this issue is not necessary to deciding the pending Motions.

23 Notice stated the existence of claims and disputes among the members of the Firm that require resolution. (Am. Complaint, ¶24 and Exhibit D thereto).

On February 6, 2017, the PBA Program, which had no problem recognizing the January 23 Notice as a request for ADR, sent a letter to all of the Defendants notifying them of the request for dispute resolution under the PBA Program, and requesting that they sign the standard agreement and pay the required fee ($150 for Pennsylvania Bar Association members, and $250 for non-members). (Am. Complaint, ¶ 25 and Exhibit E). None of the Defendants have signed the mediation agreement; none of the Defendants have paid the required fee; all of the Defendants have failed and refused to participate in the mediation and arbitration process under the PBA Program, notwithstanding their express agreement to submit all claims to that body. (Am. Complaint, ¶¶ 26-27). An order from this Court, directing the Defendants to proceed with mediation and, if necessary, arbitration in the PBA Program, is required in order to commence the dispute resolution process to which the Defendants agreed. (Am. Complaint, ¶ 28).

On July 20, 2017, Nelson filed his Complaint in this action. In response, several Defendants filed Motions to Dismiss, and Defendant Clark filed a summary judgment motion. Among other things, those motions challenged whether the Complaint was sufficiently specific to state claim. On October 31, 2017, this Court held a conference to discuss the arguments in the Motions to Dismiss. On November 2, 2017, the Court entered an order permitting Nelson to file an Amended Complaint, to set forth in greater detail the claims subject to ADR. Nelson filed his Amended Complaint on November 10, 2017 (the hard copy of the Amended Complaint was filed on November 13, 2017).

The Amended Complaint sets forth two claims to compel ADR. Count I is asserted under the Federal Arbitration Act, 9 U.S.C. §4. Count II is asserted under Pennsylvania State Law, 42

Pa.C.S. §7304. The only change between the original Complaint and Amended Complaint is at paragraph 18. Paragraph 18 of the Amended Complaint now pleads as follows:

> Nelson's underlying claims, and the underlying controversies and disputes, arise out of:
>
> (a) the repayment of a $4 million line of credit with First Niagara Bank. Plaintiff Nelson has had to contribute more than his proportionate share to repay that line of credit, and he has also had to pay income taxes on certain sources of income used for the repayment. This implicates the Defendants' duty, pursuant to Section III of the Operating Agreement and paragraph 3.1.1 of the Buy-Sell Agreement, to contribute capital. Plaintiff Nelson further seeks indemnification from the Defendants for the amounts he has paid beyond his proportionate share of liability.
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> (b) Defendants taking advance draws that exceeded their entitlement to distributions for 2014, in violation of Section IV of the Operating Agreement. Despite demand, Defendants have refused to repay the excess advance draws that they received and, instead, Defendants have tried to characterize those advance draws as guaranteed payments. This has diluted Nelson's interest. In addition to constituting breaches of the Operating Agreement, this conduct by Defendants also constitutes breaches of the fiduciary duties that the Defendants owe to Plaintiff Nelson. This conduct, and the fact that all of the Defendants left the firm without giving proper notice, also implicates the winding-up process set forth at Section VII of the Operating Agreement, by placing undue burdens on Nelson.
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> (c) While all Defendants took advance draws to which they were not entitled, Defendants Clark, de Luca, and Levine took advance draws in 2014 simultaneously with planning and preparing the launch of their (respective) new, competing law firms, at a time when they were supposed to be devoting all of their professional time and efforts to the law firm they shared with Plaintiff Nelson. This conduct violates paragraph 5.3 of the Operating Agreement, and also constitutes additional breaches of fiduciary duty by these Defendants.

On November 20, Defendants de Luca and Levine filed a renewed Motion to Dismiss (ECF 44). So did Defendant Hamilton (ECF 43), Defendant Clark (ECF 41) and Defendants Mullen and McCarron (ECF 45). Defendants Krekstein (ECF 42) and Brown (ECF 46) each filed an Answer to the Amended Complaint. With the instant filing, and pursuant to 9 U.S.C.

§§3-4, Plaintiff has now cross-moved to compel arbitration as to all Defendants, and for a stay pending arbitration.

III. ARGUMENT

A. The Claims At Issue Must Be Submitted to ADR.

1. Legal Standard

Section 4 of the FAA authorizes this Court to order parties to arbitrate where they have agreed in writing to do so. 9 U.S.C. §4. In deciding whether to compel arbitration, this Court must engage in a two-part inquiry: (1) whether there is an agreement to arbitrate; and (2) whether the dispute at issue falls within the scope of that agreement. *Century Indem. Co. v. Certain Underwriters at Lloyd's, London*, 584 F.3d 513, 523 (3d Cir. 2009). Arbitration should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute; doubts should be resolved in favor of coverage. *AT&T Techs.*, 475 U.S. at 649, 106 S.Ct. at 1418-19. Questions of arbitrability "must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941 (1983). Arbitration clauses with the phrases "arising under" and "arising out of" "are normally given broad construction." *Renfrew Centers, Inc. v. Uni/Care Systems Inc.*, 920 F.Supp. 2d 572, 574 (E.D.Pa. 2013).

Where, as here, it is clear from the face of the Complaint and its supporting documents that a party's claims are subject to an enforceable arbitration clause, a motion to compel arbitration "should be considered under a Rule 12(b)(6) standard without discovery's delay." *Guidotti v. Legal Helpers Debt Resolution, LLC*, 716 F.3d 764, 776 (3d Cir. 2013). *See also Golden Gate Nat. Senior Care LLC v. Addison*, 2014 WL 4792386, at *3 (M.D.Pa. Sep. 24,

2014).[2] This is because "the FAA would favor resolving a Motion to Compel arbitration under a motion to dismiss standard without the inherit delay of discovery." *Guidotti*, 716 F.3d at 774 (citations omitted). This "approach appropriately fosters the FAA's interest in speedy dispute resolution." *Id.*[3]

2. Each Of The Parties Has Agreed To Arbitrate *All* Disputes Arising Out Of Either The Operating Agreement Or The Buy-Sell Agreement.

None of the Defendants, in any of the several Motions to Dismiss, challenge the first prong of this inquiry. There can be no dispute that every one of the Defendants, as well as Nelson, executed two separate agreements on August 29, 2013, each of which provided for mediation and (in absence of successful mediation) arbitration of "any and all claims, controversies and disputes . . . *arising under or relating to* [this] Agreement." (Operating Agreement, § 9.13; Buy-Sell Agreement, § 7.13; Am. Complaint, ¶¶ 20-21). The first prong of the analysis is, indisputably, satisfied.

3. The Complaint Sufficiently Describes The Claims Which Nelson Seeks To Submit To ADR, And Those Claims Fall Within The Scope Of The ADR Clause.

At the October 31, 2017 conference, the Court instructed Plaintiff's counsel to articulate the claims subject to ADR in greater detail. After Plaintiff's counsel did so at the conference, all Defendants (either *pro se* or through counsel) agreed with the Court that if an Amended Complaint set forth the same level of detail as that articulated during the conference, then that

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[2] By contrast, if a complaint and its supporting documents are unclear regarding the agreement to arbitrate, or if a party has responded to a motion to compel arbitration with additional facts sufficient to place the agreement to arbitrate an issue, then the parties should be entitled to discovery on the question of arbitrability before a court entertains further briefing on the question, and after this limited discovery, the court may entertain a new motion to compel arbitration, applying a summary judgment standard. *Guidotti*, 716 F.3d at 776. This prong of the standard is inapplicable in our case.

[3] These general principles for determining arbitrability apply with equal force where the clause at issue requires mediation prior to arbitration *Cf. Golden Gate*, 2014 WL 4792386.

pleading would satisfy the standard set forth in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1965 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937 (2009).

Although the as-filed Amended Complaint sets forth the requisite detail at paragraph 18, Defendants McCarron and Mullen argue again that the Amended Complaint is not sufficiently specific to state a claim under *Twombly* and *Iqbal*. This argument ignores that all Nelson is required to plead is "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Renfrew*, 920 F.Supp. 2d at 574 (quoting *Iqbal*, 556 U.S. at 678). Here, the Amended Complaint has more than plausibly set forth sufficient factual matter to state a claim that the parties' disputes must be submitted to ADR. To the extent that the original Complaint was not sufficiently specific (which is denied), the Amended Complaint has now articulated in greater detail the three categories of claims that Nelson contends must be submitted to alternative dispute resolution. (Am. Comp. at ¶18). For each of the three categories of claims, Nelson has stated the subject matter of the claims, the dates involved, the contractual provisions that are implicated, and how Nelson was personally injured by the alleged conduct. (*Id.*). The "factual content" that Nelson has pled in the Amended Complaint is thus sufficient to allow this Court "to draw the reasonable preference" that the parties must submit the claims to ADR, and that the Amended Complaint states a claim under *Twombly* and *Iqbal*. 556 U.S. at 678.

The three sets of claims also clearly fall within the scope of the ADR clauses in the Operating Agreement and the Buy-Sell Agreement. It is self-evident that claims alleging breach of the Operating Agreement and Buy-Sell Agreement "arise under" and "relate" to those agreements. Thus, the allegations in paragraph 18(a), (b) and (c) regarding the two contracts are, in and of themselves, sufficient to establish that the claims at issue fall within the scope of the

arbitration clauses. *Cf. Bannett v. Hankin*, 331 F.Supp.2d 354, 361 (E.D.Pa. 2004). The claims alleging breach of fiduciary duty also relate to or arise out of the Operating Agreement, by which the parties bound themselves together as owners of the Firm, and are thus arbitrable as well. *Bannett*, 331 F.Supp.2d at 361; *Hannah Furniture Co. v. Workbench, Inc*., 561 F.Supp.1243, 1245 (W.D.Pa. 1983) (holding that breach of fiduciary claim "can only arise out of the contract between" the parties and, therefore, was subject to the arbitration clause within the contract). The fact that the ADR clauses in our case will be "broadly construed" confirms the conclusion that Nelson's claims fall within the scope of those clauses. *Renfrew*, 920 F.Supp. 2d at 574. Nelson thus respectfully requests that this Court grant his Cross-Motion to Compel.

B. None of the Arguments Raised By Defendants Allow Them to Avoid Their Contractual Duty to Participate in ADR

The various Motions to Dismiss all assert that Nelson lacks standing to pursue the claims alleged at paragraph 18 of the Amended Complaint. All specifically argue this case should be dismissed because the Firm is not a party. Defendant Hamilton further argues that the Firm is a necessary and indispensable party that must be joined under Fed.R.Civ.P. 19, and that because joining the Firm as a party would destroy diversity jurisdiction, the case should be dismissed pursuant to Fed.R.Civ.P. 12(b)(7). Defendants de Luca and Levine similarly contend that the Firm must be joined as a party, which would destroy subject matter jurisdiction. All of these arguments fail as a matter of law.

1. Nelson Has Standing

As a threshold matter, it is crystal clear that Nelson has standing to pursue the claims he has alleged in the Amended Complaint. All of the claims stated at paragraph 18 of the Amended Complaint arise out of alleged breaches of the Operating Agreement. Nelson, individually, is a party to the Operating Agreement. He thus has standing to sue for breach of that agreement.

Smaller v. JRK Residential Mgmt. Corp., 2017 WL 616742 at *3 (E.D.Pa. Feb. 15, 2017) (holding that a person who is a party to an agreement containing an arbitration clause has standing to enforce that agreement); *Duda v. Standard Ins. Co*., 2015 WL 1961170, at *16 (E.D.Pa.. Apr. 30, 2015) (rejecting argument that plaintiffs lacked Article III standing and holding that “as a general matter, a party to a contract has standing to enforce it and sue for its breach”) (citations omitted). Nelson’s claims identified in paragraph 18(a) also implicate the Buy-Sell Agreement; Nelson similarly is a party to that contract and thus has standing to sue thereunder. *Id*. The Court need look no further to determine that Nelson has standing.

In addition, however, Nelson has alleged that the Defendants' conduct breached the fiduciary duties they owe to him. Contrary to the arguments of Defendant Clark, owners of a closely-held entity may owe fiduciary duties directly to their fellow owners, and not just to the entity itself. *See Viener v. Jacobs*, 834 A.2d 546, 551-556 (Pa.Super. 2003) (where two of three shareholders combined to form majority and then breached their fiduciary duties to the third shareholder). Questions regarding the scope of such fiduciary duties, and whether they have been breached, are for the mediator and arbitrator. Defendants, however, cannot seriously contend that Nelson lacks individual standing to pursue those claims.

Defendants' arguments also rely on a misreading of the actual allegations in the Amended Complaint. With respect to the claim at paragraph 18(a), Defendants contend that any claim arising out of the failure to repay the line of credit belongs to the Firm, not to Nelson. But Defendants ignore that the particular nature of Nelson's claim is that he individually "has had to contribute more than his proportionate share to repay that line of credit," and that he has suffered certain negative income tax implications as a result. (Am. Comp. ¶18). Thus, the Amended

Complaint clearly alleges injury to Nelson, personally, and not to the Firm. This distinguishes Nelson's claims here from the cases cited by Defendants. [4]

Similarly, paragraph 18(b) alleges that the taking of advance draws by Defendants "has diluted Nelson's interest." This also alleges an injury to Nelson himself, not to the Firm. So does the other allegation in paragraph 18(b), that the failure of Defendants to give proper notice before leaving the Firm has "plac[ed] undue burdens on Nelson. " As with subsections (a) and (b), paragraph 18(c) also alleges that the circumstances under which Defendants Clark, de Luca and Levine left the Firm breached the Operating Agreement and breached these Defendants' fiduciary duties to Nelson. These allegations clearly and unequivocally demonstrate that Nelson does have standing to bring the claims alleged.

2. The Firm Is Not An Indispensable Party and Diversity Jurisdiction Exists

It is also clear that the Firm is not an indispensable party, and there is no threat to this Court's subject matter jurisdiction. Under Fed.R.Civ.P. 19, there is a three-step inquiry to determine whether a case should proceed in the absence of a particular party. *PaineWebber, Inc. v. Cohen*, 276 F.3d 197, 200 (6th Cir. 2001). *See also HB General Corp. v. Manchester Partners, L.P.*, 95 F.3d 1185, 1190 (3d Cir. 1996). First, a court must determine whether the absent party is necessary to the action and should be joined if feasible. *Id*. Second, if the party is necessary, the court must determine if the party can be joined without eliminating the basis for subject matter jurisdiction. *Id*. Third, if the party cannot be joined without destroying subject matter jurisdiction, the question is whether "in equity and good conscience the action should proceed among the parties before" the court, or whether the action should be dismissed, if the absent

[4] For example, Defendants cite *Meade v. Kiddie Academy Domestic Franchising, LLC*, 501 Fed.Appx. 106, 2012 WL 4857183 (3d Cir. 2012), for the proposition that an individual owner did not have standing to seek damages for injuries suffered by the limited liability company he owned. But in that case, the plaintiff did not *allege* that any actions were taken against him in is individual capacity. 2012 WL 4857183 at *2. By contrast, Nelson has alleged injury to himself individually.

party is deemed indispensable. *Id*. If a necessary party is not deemed indispensable pursuant to Rule 19(b), then that potential party does not need to be joined and the action can proceed with the original litigants. *PaineWebber*, 276 F.3d at 200.

There are four factors to consider in deciding whether an absent party is indispensable: (1) the extent to which a judgment rendered in the person's absence might prejudice that person or existing parties; (2) the extent to which any prejudice could be lessened or avoided by protective provisions in the judgment, shaping the relief, or other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have any adequate remedy if the action were dismissed for nonjoinder. *See* Rule 19(b).

For all of the reasons stated above, the Firm is not a necessary party because the claims alleged in the Amended Complaint belong to Nelson, individually, and not to Firm. *See*, *e.g*., *Golden Gate*, 2014 4792386, at *7 (suggesting that absent party was not necessary because "the instant action seeks to compel arbitration; it does not seek to adjudicate the merits of any claim."). But even that were not the case, the Firm is not indispensable to this action. The dispositive factor is the procedural posture of this case: Nelson is not seeking a judgment on the merits but, rather, an order compelling the parties to comply with their duty to submit to ADR the merits of their substantive claims and defenses. In similar circumstances, courts have rejected the argument that the absent party was indispensable to an action seeking to compel arbitration. *Golden Gate*, 2014 WL 4792386, at *6-8; *PaineWebber*, 276 F.3d at 202-205; *Bio-Analytical v. Edgewater Hosp.*, 565 F.2d 450, 452-453 (7th Cir. 1977). By contrast, the cases relied upon by Defendant Hamilton involved plaintiffs seeking substantive relief on the merits; none involved the procedural posture here, in which the plaintiff seeks to compel ADR of the

substantive claims. *Compare Dickson v. Murphy*, 202 Fed.Appx. 5787 (3d Cir. 2006); *Sugartown Worldwide LLC v. Shanks*, 2015 U.S. Dist. LEXIS 36495 (E.D.Pa. 2015).

Applying the four factors set forth in Rule 19(b), it is clear that the Firm is not an indispensable party.

First, a judgment in the instant lawsuit, ordering the parties to proceed to ADR under the PBA Program Rules, will not prejudice the Firm or the existing Defendants. To the contrary, even if the Firm were joined as a party to the instant lawsuit, the Firm would have no authority to override the duty to submit the claims to ADR. The Firm is not even a party to the Operating Agreement, and the Firm is bound by the broad arbitration clause in the Buy-Sell Agreement. If the Firm were a party here, and objected to ADR, that would have no more weight than the objections of the existing Defendants. "Determining whether the dispute is subject to arbitration…is a matter of contract intepretation for which [the absent party's presence] is not necessary." *PaineWebber*, 276 F.3d at 203.

Second, since the Firm is not necessary to a determination of whether there is a duty to submit the claims to ADR, the Rule 19(b)(2) factor (regarding ability to avoid any prejudice) "becomes less important because of the small degree of potential prejudice" if an action to compel arbitration proceeds without the absent party. *PaineWebber*, 276 F.3d at 205.

Third, a judgment rendered in the Firm's absence will be adequate. Here again, the critical factor is that the instant lawsuit does not seek any determination of the merits of the positions of Nelson or Defendants. *Golden Gate*, 2014 WL 4792386, at *7. Thus, "[h]aving to submit claims to arbitration in accordance with a valid arbitration clause…does not raise concerns about the adequacy of a judgment." *PaineWebber*, 276 F.3d at 205.

Fourth, even though Nelson would have an adequate remedy if the instant lawsuit were dismissed for nonjoinder (by bringing an action to compel ADR in state court), this is the only one of the four Rule 19(b) factors that favors Defendants. However, "the potential existence of another forum does not, in and of itself, demand dismissal." *Golden Gate*, 2014 WL 4792386, at *8; *see also PaineWebber*, 276 F.3d at 205. Indeed, while Defendants accuse Nelson of forum shopping, it appears that the Defendants have themselves raised the issue of the Firm's involvement "as a strategy solely designed to preclude" Nelson from proceeding in his chosen forum, and to force him to proceed in the Montgomery County Court of Common Pleas, which Defendants must view as a more favorable forum for themselves. *PaineWebber*, 276 F.3d at 203-205. Regardless, however, a balancing of all four of the Rule 19(b) factors compels the conclusion that the Firm is not an indispensable party and that this action to compel ADR may proceed without the Firm.

Just as in *Golden Gate*, the conclusion that the absent party (in our case, the Firm) is not indispensable also negates the argument that this Court lacks subject matter jurisdiction. 2014 WL 4792386, at *4-6. Pursuant to 28 U.S.C. 1332, diversity jurisdiction exists on the face of Nelson's Amended Complaint, which pleads diversity of citizenship and that the amount in controversy exceeds $75,000, exclusive of interest and costs. (Am. Comp., ¶¶4-14). Defendants Levine and de Luca contend that this Court should nonetheless look past the face of Nelson's allegations to find that (i) Nelson lacks standing; (ii) only the Firm may bring the claims asserted by Nelson; and (iii) the Firm must be joined but cannot be without destroying diversity. As a threshold matter, it is unclear whether this Court may look past the well-pled allegations of the Amended Complaint to ferret out whether there is some argument against the existence of diversity jurisdiction, as opposed to federal question jurisdiction, in cases brought under the

Federal Arbitration Act. *Golden Gate*, 2014 WL 4792386, at *5-7 (distinguishing *Vaden v. Discover Bank*, 556 U.S 49, 59, 129 S.Ct. 1262 (2009), as authorizing a "look-through" the pleadings to determine whether federal question jurisdiction exists, but not authorizing such a look-through to determine if diversity jurisdiction exists). But even if this Court did conduct such an examination, it is clear for all the reasons set forth above that Nelson does have standing, that the Firm is not an indispensable party, and, therefore, that this Court does have diversity jurisdiction.

3. The January 23 Notice Was Proper

The Moving Defendants would have this Court read the January 23 Notice as being made solely on behalf of the Firm, and not also by Nelson in his individual capacity. (Am. Comp., Ex. D, pp.4-5). This is an unfair characterization of the January 23 Notice. The January 23, 2017 e-mail was sent by Nelson, individually; it is a request for ADR of "all disputes *between the shareholders*" (emphasis added), and the notice further states that the "Operating Agreement for the entity noted above requires disputes between the parties to the agreement to be resolved pursuant to this program." (*Id.*). As noted, the only parties to the Operating Agreement are Plaintiff and Defendants; the Firm is not a party. Thus, the January 23 Notice recognizes that claims would be asserted by and against shareholders of the Firm, including any claims which might be raised by shareholders other than Nelson; it raises a request for arbitration *only if* mediation has failed; and it specifically stated that "[t]he law firm is no longer operat[ing] as a law firm and is in the process of concluding its affairs."

Moving Defendants try to turn the subject line of the January 23 Notice ("Nelson Levine de Luca & Hamilton/Nelson Brown & Co.") into evidence that the Notice was submitted solely on behalf of the Firm. This was an appropriate umbrella identification as the "Subject" of the

notice. It does not purport to be a caption for the litigation; nor was it treated as such by Ms. Bell of the PBA who, in her February 6, 2017 letter, makes no identification of claimants and respondents. The "firm" is an appropriate term to refer to all members of the Firm and to encompass all disputes arising out of or relating to the Operating Agreement and the Buy-Sell Agreement.

Clearly, Nelson himself has sought to invoke the alternative dispute resolution process and, as a signatory to both arbitration agreements, he has standing, as an individual, to petition this Court to compel the Defendants to participate. Indeed, from his initial phone call to the PBA, which he placed as directed by the PBA's website, through the filing of this action to compel alternative dispute resolution, Nelson has acted in accordance with the Program's procedures for initiating ADR. Defendants point to no magic language that must be included in a notice to the PBA to initiate ADR. The January 23 Notice is clearly adequate under the PBA Program's Rules, and the wording of that notice is not some silver bullet that would allow Defendants to avoid their contractual duty to submit their claims to ADR.

4. There Has Been No Waiver

Defendants Levine, de Luca and Clark all argue that, by virtue of filing a previous lawsuit in the Montgomery County Court of Common Pleas ("Montgomery Action"), Nelson has waived his right to submit the claims at issue to ADR. There are several reasons why this argument fails.

First, the plaintiff in the Montgomery Action is *not* Michael Nelson, individually, who is the Plaintiff in the instant action. Rather, the Montgomery Action plaintiff is the Nelson Levine de Luca & Hamilton LLC law firm. Thus, as a threshold matter, the filing of the Montgomery Action could not constitute a waiver by Michael Nelson, individually, to seek

mediation/arbitration. Conversely, Defendant Clark has no right to assert waiver as a threshold matter, since he was not a defendant in the Montgomery Action.

Second, the primary purpose of filing the Montgomery Action was to obtain a temporary restraining order. (*See* Montgomery Action Amended Complaint, a copy of which is attached to the Levine de Luca Motion at Exhibit A (ECF 44-3), at ¶¶11, 66-82). It does not appear such a remedy is available under the PBA Program, which make no mention of emergency relief. (Am. Comp., Ex. C). Moreover, the parties' Operating Agreement specifically carved out requests for injunctive relief from the scope of claims to be submitted to ADR under the PBA Program. (*See* Am. Comp., Ex. A at §§9.13 and 9.37). Thus, to try and obtain injunctive relief, the Nelson Levine firm had no choice but to proceed in court, and the Operating Agreement makes it crystal clear that by doing so, there was no waiver of the right to seek ADR as to other issues.

Third, the issue in the Montgomery Action was entitlement to contingency fees in subrogation cases. (Levine de Luca Motion, Exhibit A, at ¶¶11, 14). Even if that Montgomery Action had been brought by Michael Nelson, individually, and even if the filing of that lawsuit could be construed as a waiver of ADR as to the issue in that particular lawsuit--neither of which is the case--there would still be no waiver of Nelson's rights to mediate/arbitrate the broader range of issues, identified at paragraph 18 of his Complaint in the instant lawsuit. Those issues were not in dispute in the Montgomery Action.

Fourth, it appears that Levine, de Luca and Clark argue that the scope of the release in the Montgomery Action constituted a release of the claims asserted by Nelson here. As Levine and de Luca acknowledge, the substantive terms of the Settlement Agreement are confidential, but the Levine de Luca motion accurately excerpts the first paragraph of the Release. (*See* Levine de Luca Motion at ¶21). By its own terms, the scope of the release is restricted to the claims set

forth in the Complaint and Amended Complaint in the Montgomery Action which, as noted, are limited to issues involving contingency fees in subrogation cases. Thus, given the limited scope of the Montgomery Action, the release does not encompass the unrelated claims asserted by Nelson in the instant lawsuit; more importantly, however, whether or not a claim has been released or not is precisely the type of issue that is for an arbitrator to decide, not this Court. *See, e.g., Thomas James Assoc. v. Jameson*, 102 F.3d 60, 68 (2d Cir. 1996) ("Where an agreement to arbitrate concerns disputes arising in the course of an ongoing relationship, a settlement of a single dispute does not terminate the agreement to arbitrate, and the validity of a settlement is properly a matter for the arbitrator to consider as an affirmative defense to the grievance.") (citing *Peerless Imp., Inc. v. Wine, Liquor & Distillery Workers Union*, 903 F.2d 924, 929 (2d Cir. 1990)); *see also United Steel AFL-CIO v. Carlisle Power Transmission Prods. Inc.*, 489 F.Supp.2d 924, 930 (D.Minn. 2007) (holding that "release" was an affirmative defense to be decided by the arbitrator, not the court, and that in any event, the fact that the releases did not expressly repudiate the arbitration clauses precluded the court from finding that the parties intended to forego their arbitration rights). The same reasoning applies to our case: the Operating Agreement and Buy-Sell Agreement contain arbitration clauses that contemplate ongoing dealings and disputes between the parties; the releases in the Montgomery Action does not, on its face, forego the duty to arbitrate; and it is up the PBA, not this Court, to determine the scope of the release.

Finally, where, as here, a party argues that there has been implied waiver, that party must establish that it was misled and prejudiced by the other party's conduct. *Paramount Aviation Corp. v. Agusta*, 178 F.3d 132, 148 (3d Cir. 1999). Moving Defendants have not shown and

cannot show that they have been misled or prejudiced by the filing of the Montgomery Action. Defendants' waiver argument should be rejected.

C. <u>This Case Should Be Stayed Pending Arbitration</u>

Pursuant to 9 U.S.C. §3, this Court shall stay a lawsuit pending arbitration upon a party's application. *See*, *e.g*., *Devon Robotics, LLC v. DeViedma*, 798 F.3d 136, 143-144 (3d Cir. 2015). Plaintiff respectfully requests that this Court stay this matter pending ADR.

IV. CONCLUSION

For all the foregoing reasons, it is respectfully requested that the Motions to Dismiss should be denied, and the Cross-Motion to Compel Arbitration and for a Stay should be granted.

Respectfully submitted,

Dated: December 11, 2017

/s Michael LiPuma

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CERTIFICATE OF SERVICE

I certify that on December 11, 2017, I caused a copy of the foregoing document, together with all supporting papers, to be served by ECF upon all parties and counsel.

/s Michael LiPuma
Michael LiPuma, Esq.