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.	:	
	:	
	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S 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.

Under the Federal Arbitration Act, there is a strong presumption in favor of arbitrability. *Moses H. Cone Memorial 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 grant Plaintiff's 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 contain 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 DISPUTEs 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 DISPUTEs 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). The January 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).

Procedural Background.

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 a 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 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.

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. Plaintiff Nelson opposed the Motions to Dismiss, and cross-moved to compel arbitration. By Order dated April 24, 2018, this Court denied the

Motions to Dismiss, and denied without prejudice Nelson's Cross-Motion to Compel Arbitration, finding that the Cross-Motion was premature because it was filed before the pleadings were closed. The pleadings are now closed. Plaintiff thus renews his Motion to Compel 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.,* 584 F.3d at 523. 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*, 460 U.S. 1, 24, 103 S.Ct. 927, 941. 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*, Misc. No. 14-MC-0421, 2014 WL 4792386, at *3 (M.D.Pa. Sep. 24, 2014). 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.*[1]

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

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.

The three sets of claims set forth at paragraph 18 of the Amended Complaint 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

[1] 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.

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.**

This Court previously denied various Defendants' Motions to Dismiss the Amended Complaint. To the extent Defendants seek to renew any of those arguments in response to this Motion to Compel, Nelson incorporates by reference his response to the Motion to Dismiss the Amended Complaint.

C. **This Case Should Be Stayed Pending Arbitration.**

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 Court grant this Motion to Compel Arbitration and for a Stay.

Respectfully submitted,

Dated: 6-1-18

/s Michael LiPuma

Michael LiPuma, Esq.
325 Chestnut Street, Suite 1109
Philadelphia, PA 19106
(215) 922-2126

CERTIFICATE OF SERVICE

I certify that on 6-1-18, 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.