IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

RICHARD A. BEHRENS	)	**CASE NO: CV 09 689585**
	)	
Plaintiff	)	
	)	
vs.	)	**JUDGE JOHN P. O'DONNELL**
	)	
JAMES A. GRODIN, *et al.*	)	**JOURNAL ENTRY**
	)	**RE: MOTIONS TO STAY**
Defendants	)	**PENDING ARBITRATION**
CASE WESTERN RESERVE UNIVERSITY	)	
	)	
Plaintiff	)	**CASE NO: CV 09 691618**
	)	
vs.	)	
	)	
ARTERIOCYTE, INC.	)	
	)	
Defendant	)	

John P. O'Donnell, J.:

These separate cases both have pending motions to stay the trial court proceedings pending arbitration pursuant to a contractual agreement. Although the cases are not consolidated, the issues on the motions are nearly identical and this joint entry is issued for the court's convenience.

FIRST AMENDED COMPLAINT IN *BEHRENS V. GRODIN, ET AL.*

Plaintiff Richard A. Behrens filed his first amended complaint on July 14, 2009. The plaintiff is a minority shareholder in a closely held Ohio corporation, defendant River Recycling

Industries, Inc. The individual defendants – James A. Grodin, William A. Grodin and Kenneth L. Behrens – are the company's controlling shareholders. The plaintiff was also an employee of the company until being recently terminated.

Attached to the first amended complaint, and forming the explicit basis for at least one of the plaintiff's causes of action, is the "Second Restated and Amended Buy and Sell Agreement Between Shareholders and the River Smelting & Refining Company."[1] All of the signatories to the buy and sell agreement were shareholders. They included Robert B. Grodin and his son, defendant James Grodin; William C. Behrens and his sons, plaintiff Richard A. Behrens and defendant Kenneth L. Behrens; and defendant William A. Grodin.[2]

The buy and sell agreement is 20 pages long and it is not necessary to reproduce it here. The essence of the agreement is that upon the occurrence of a trigger event a shareholder is required to sell his shares to the corporation. Included as a trigger event is the termination of a shareholder's employment.

The purchase price that the company must pay for the shares on a triggered sale is based on their book value as of the last day of the fiscal year ending before the date of the trigger event, including termination of employment.

The agreement also contains the following arbitration clause:

> 21. ARBITRATION. In the event of any dispute under this Agreement, such dispute shall be settled by arbitration in Cleveland, Ohio, in accordance with the rules then obtaining of the American Arbitration Association, and judgment upon the award may be entered in any court having jurisdiction thereof.

The first amended complaint asserts causes of action for breach of fiduciary duty, misappropriation/conversion, breach of contract, tortious interference with contractual relationships, unjust enrichment, and declaratory judgment. The alleged facts supporting these

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[1] The company has since apparently taken on its current name, River Recycling Industries, Inc.

[2] William A. Grodin is apparently Robert B. Grodin's brother.

causes of action include that the defendants gave themselves exorbitant compensation, improperly calculated bonuses, received a lesser price for a division of the company by selling its assets separately, and then engaging in "improper profit taking" on the money received for the sale, manipulated the company's books, misappropriated the company's assets, and undervalued the plaintiff's interest in the company under the buy and sell agreement.

THE AMENDED COMPLAINT IN *CWRU V. ARTERIOCYTE, INC.* [3]

The amended complaint asserts that the parties entered into two separate research agreements.[4] The plaintiff claims that pursuant to these agreements it performed research and provided the results of that research to the defendant. The plaintiff claims it has not been paid more than $300,000 owed under the agreements.

The amended complaint also alleges that the defendant has not paid the plaintiff principal and interest owed under a promissory note for $250,000 executed on June 14, 2004.[5]

Finally, the amended complaint alleges that the parties entered into a license agreement on May 1, 2004, and that the defendant has breached that agreement by not providing plaintiff with periodic financial reports and not paying the plaintiff money owed.[6]

Before undertaking the particular research agreements that are the subject of the amended complaint, the parties entered into a master sponsored research agreement.[7] The agreements attached as exhibits 1 and 2 to the complaint (and described as exhibits to the amended

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[3] The plaintiff's motion for leave to file the amended complaint was filed July 27, 2009, with the proposed amended complaint attached. The motion was granted on August 5, 2009. The amended complaint, however, has not been separately filed since then. The court considers the amended complaint to have been filed on August 5, 2009, but to ensure that the trial court record is unambiguous, the plaintiff is instructed to separately file and serve the amended complaint forthwith.

[4] The research agreements are attached as exhibits 1 and 2 to the original complaint, but are not attached to the proposed amended complaint. When the plaintiff files the amended complaint it should be sure to attach both research agreements.

[5] The promissory note is not attached as an exhibit to the amended complaint and should be included upon filing.

[6] As with the other documents, the license agreement is not attached as an exhibit to the amended complaint. This oversight should be rectified by filing it with the amended complaint as instructed in footnote 3 above.

[7] See exhibit B to the defendant's motion to stay case pending arbitration.

complaint, although not attached) are appendices to the master agreement.[8] The master agreement contains the following arbitration provision:

> 12.1 Governing Law/Disputes. The Agreement will be governed by and construed in accordance with the laws of the State of Ohio. Any dispute or claim arising out of or relating to the Agreement will be settled by arbitration in Cleveland, Ohio in accordance with the rules of the American Arbitration Association and judgment upon award rendered by the arbitrator(s) may be entered in any court having jurisdiction.

The defendant has also included as an exhibit to its motion the license agreement underlying the plaintiff's claim for breach of license in the amended complaint. That agreement also has an arbitration provision that reads as follows:

> 21. DISPUTE RESOLUTION
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> 21.1 Subject to Subsection 21.2, any controversy or dispute arising under this Agreement shall be referred to and finally settled by arbitration in the city of Cleveland, Ohio under the auspices of, and conducted in accordance with, the rules of the American Arbitration Association. . .

The license agreement exempts from this arbitration provision certain actions for injunctive relief including alleged breaches of the defendant's duty to provide quarterly reports to the plaintiff.[9]

THE ENFORCEABILITY OF ARBITRATION AGREEMENTS IN OHIO

Both the Ohio General Assembly and Ohio courts have expressed a strong public policy favoring arbitration.[10] In light of the strong presumption favoring arbitration, all doubts should be resolved in its favor.[11] However, arbitration is a matter of contract and a party cannot be

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[8] Master sponsored research agreement, page 1, section 1.1. Also, see defendant's motion to stay case pending arbitration, unnumbered page 3.
[9] See license agreement, section 21.2 and section 7.
[10] *Hayes v. Oakridge Home*, 122 Ohio St. 3d 63, 2009-Ohio-2054, ¶15.
[11] *Id.*

required to submit to arbitration any dispute which he has not agreed so to submit.[12] The question of whether the parties agreed to arbitrate is to be decided by the court.[13]

An agreement to arbitrate disputes may be enforced pursuant to Ohio Revised Code section 2711.02. That statute allows the court to stay litigation until the case is arbitrated if the court, upon application by one of the parties, is "satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration."

Ohio courts may determine whether a cause of action is within the scope of an arbitration agreement based on the federal standard found in *Fazio v. Lehman Bros., Inc.* (C.A. 6, 2003), 340 F. 3d 386.[14]

The Ohio Supreme Court recently examined the *Fazio* standard and found that it comports with the standard it articulated in *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St. 3d 185, 2006-Ohio-657. In its decision in *Alexander v. Wells Fargo Financial Ohio 1, Inc.*, 122 Ohio St. 3d 341, 2009-Ohio-2962, the court, at 345, noted the following:

> *Fazio* held that "a proper method of analysis here is to ask if an action could be maintained without reference to the contract or relationship at issue. If it could it is likely outside the scope of the Arbitration Agreement." (Citation omitted) Even real torts can be covered by arbitration clauses if the allegations underlying the claims "touch matters" covered by the agreement. (Citations omitted)
>
> The *Aetna* standard asks whether an action can be maintained without reference to the contract or relationship at issue.

Alexander involved a claim by a borrower that the lender failed to file a satisfaction of mortgage within 90 days of final payment on the loan. By statute, that omission results in a $250 penalty. Alexander and her lender had a contract which included an arbitration clause providing that "any claim, dispute or controversy of any kind (whether in contract, tort, or otherwise)

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[12] *Council of Smaller Enterprises v. Gates, McDonald & Co.* (1998), 80 Ohio St. 3d 661, 665.
[13] *Id.*, at 666.
[14] *Alexander v. Wells Fargo Financial Ohio 1, Inc.*, 122 Ohio St. 3d 341, 2009-Ohio-2962, ¶23.

arising out of or relating to your loan agreement, or any prior or future dealings between us" may be subject to arbitration at the election of one of the parties to the agreement.

Alexander was consolidated with the case of Shelton Coleman. Coleman claimed that his lender had failed to file a termination of a financing statement after he paid off his loan. Like the failure to file a satisfaction of mortgage, this failure results in a statutory penalty. The *Coleman* contract included an arbitration clause that covered "all claims and disputes arising out of, in connection with, or relating to your loan" and applied "even if your loan has been . . . paid in full."

The court concluded that both of these broad arbitration agreements covered the statutory claims asserted by each plaintiff even though those claims could not exist until the loans had been paid in full, *i.e.* the plaintiffs had satisfied their obligations to repay the money and the contracts had been fulfilled. The court reached this conclusion because Alexander's claims could not be decided without reference to the mortgage and the mortgagor/mortgagee relationship and because Coleman's claims could not be decided without reference to the loan agreement and the statutory duties that attend the lender/borrower relationship.

Although the arbitration clauses in the cases before this court are not as exhaustive as those in *Alexander* and *Coleman*, they are comparable to the arbitration provision in *Aetna*, which provided that disputes "about the parties' business relationship" were subject to arbitration.[15] An arbitration clause that contains the phrase "any claim or controversy arising out of or related to the agreement" is considered "the paradigm of a broad clause."[16]

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[15] *Aetna*, *supra*, at 185.
[16] *Id.* 188-189.

Both of the arbitration agreements under consideration here must be considered broad clauses and the claims in each case must therefore be examined to determine whether they can be litigated "without reference" to the contractual agreements.

THE PLAINTIFF'S CLAIMS IN *BEHRENS*

Count three of the first amended complaint in *Behrens* is captioned breach of contract and refers to the buy and sell agreement. There can be no doubt that this claim is subject to the arbitration clause. The same applies to count five, the claim for unjust enrichment. That claim, while set forth only generally, is an equitable cause of action that is ordinarily asserted where a contract claim is deficient for some reason. Because of that, it appears impossible to consider count five without reference to all of the facts and circumstances surrounding the parties' relationship, including the buy and sell agreement.

Count six is for declaratory judgment. The plaintiff does not specify what agreement forms the basis for this count, but it is reasonable to assume that the buy and sell agreement is implicated because the amended complaint does not describe another written contract. Therefore, count six cannot be resolved without reference to the buy and sell agreement. Furthermore, a declaratory judgment may be subject to an arbitration agreement if not specifically excluded.[17]

The plaintiff asserts that the defendants have conceded that certain of the plaintiff's claims are not subject to the arbitration clause.[18] This is not correct. Instead, the defendants merely noted that the factual allegations contained at paragraphs 5.g, 5.i, and 6.a are not related to the buy and sell agreement.[19] Otherwise, the defendants contend that the plaintiff's factual allegations, and the causes of action those allegations are purported to support, are related to the

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[17] *Moodie v. Kraftmaid Cabinetry, Inc.* (May 10, 2001), Cuy. App. No. 78755, unreported.
[18] See plaintiff's brief in opposition at pg. 1-2.
[19] See defendants' motion to compel arbitration at pg. 3.

buy and sell agreement. Therefore, it is necessary for the court to consider whether the remaining causes of action are subject to the arbitration agreement.

Count one claims a breach of fiduciary duty. The plaintiff alleges that he is a shareholder in a closely held corporation and that the defendants are the controlling shareholders. As a result, the defendants owe the plaintiff a fiduciary duty. This duty is independent of the buy and sell agreement. Although the limited evidence of record prevents the court from knowing for sure, it is likely that a breach of this duty may be decided without reference to the buy and sell agreement. The agreement only relates to the forced sale of the plaintiff's shares if certain events come to pass. Unless the alleged misconduct in count one implicates a "trigger event" under the buy and sell agreement – which does not appear to be the case – a claim for the breach of fiduciary duty can be fully considered without reference to the buy and sell agreement. However, the plaintiff's damages would be measured, at least in part, by the impairment of the value of his shares. As a result, it would be necessary to refer to the provisions of the buy and sell agreement concerning the method for valuing the shares in order to calculate the plaintiff's damages. Because count one cannot be decided without reference to the contract it is appropriately a subject of arbitration.

Count two is for misappropriation/conversion. The same analysis discussed above with reference to count one applies here. Misappropriation and conversion of the company's assets implicates conduct that impairs the value of the plaintiff's shares in the company, and the buy and sell agreement establishes the method of valuing those shares. Therefore, count two is also subject to the arbitration agreement.

The last cause of action in question is at count four for tortious intereference with the plaintiff's contractual relationships. As described in the first amended complaint the claim is too

general for the court to determine whether it is subject to the arbitration agreement. Suffice to say, if the plaintiff is referring to the buy and sell agreement as the contract with which the defendants interfered, then the cause of action is subject to the arbitration agreement. If the plaintiff is referring to some other contractual relationship, there is simply insufficient information to decide whether the arbitration agreement applies, hence the court is unwilling to order count four to arbitration.[20]

The plaintiff argues that the defendants waived the enforceability of the arbitration agreement by filing a counterclaim based upon the buy and sell agreement. After that counterclaim was filed, the plaintiff filed the first amended complaint. The filing and service of the first amended complaint renders the defendants' previously filed responsive pleading, which included the counterclaim, inoperative. To date the defendants have not interposed a counterclaim and have thus not waived the arbitration clause.

THE PLAINTIFF'S CLAIMS IN *CWRU V. ARTERIOCYTE, INC.*

There is no doubt that the plaintiff's first claim for breach of contract, and fifth claim for breach of license agreement, cannot be decided without reference to those separate agreements, which each contains an arbitration clause. It also seems clear that the second claim, promissory estoppel, and the third claim, unjust enrichment, cannot be decided without reference to the agreements since evidence of the agreements would be necessary to explain the relationship between the parties in the first place.

The fourth claim is for payment on a promissory note. A promissory note is typically an uncomplicated, unconditional promise to pay a certain amount by or at a certain time. However, in this case, the promissory note consists of 13 pages and includes as an attachment the license

[20] The plaintiff knows the evidence he can expect to support this cause of action better than the defendants or the court. If the plaintiff declines to arbitrate count four in favor of litigating it, he risks having count four dismissed if it is later shown that it does "touch matters" covered by the buy and sell agreement.

agreement that contains the arbitration clause. Considering the Supreme Court's opinion in *Alexander*, this court cannot conclude with confidence that a claim under the promissory note can be decided without reference, even in passing, to the license agreement. As a result, the claim for payment on a promissory note is also subject to the arbitration agreement.

The sixth claim is for injunctive relief. The plaintiff is asking the court to order that the defendants provide it the financial reports required by the agreement. The contract itself excepts this claim from the arbitration clause. Therefore, the sixth claim is not subject to the arbitration agreement.

CONCLUSION

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Consistent with the reasons given above, the defendants' motion to stay the trial court proceedings pending arbitration is granted as to the amended complaint except count four. The case will be placed on the court's inactive docket and no action will be taken until a future request by a party.

CWRU v. Arteriocyte, Inc.

Consistent with the reasons given above, the defendant's motion to stay proceedings pending arbitration is granted as to counts one through five, inclusive. Count six will be litigated in this court, but not until after the resolution through arbitration of the other counts. The court will take no action on the remaining claim until a request by one of the parties.

IT IS SO ORDERED:

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JUDGE JOHN P. O'DONNELL

SERVICE

A copy of this journal entry was sent by regular U.S. mail, this _____ day of October, 2009 to the following attorneys in Case No. CV 689585:

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JUDGE JOHN P. O'DONNELL

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