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STATE OF MICHIGAN  
IN THE SUPREME COURT

DEAN ALTOBELLI,  
  
Plaintiff-Appellee,

FOR PUBLICATION  
November 4, 2014  
9:05 a.m.

v

No. 313470  
Ingham Circuit Court  
LC No. 2012-000635-CZ

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COAKLEY, M. ANNA MAIURI, JOSEPH M.  
FAZIO, DOUGLAS M. KILBOURNE, JOHN D.  
LESLIE, and JEROME R. WATSON,

*P Manderheld*

Defendants-Appellants.

*ok*

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DEFENDANTS' APPLICATION FOR LEAVE TO APPEAL

**FILED**

DEC 15 2014

LARRY S. ROYSTER  
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MICHIGAN SUPREME COURT

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## ORDER APPEALED FROM AND RELIEF SOUGHT

Defendants-Appellants, who are the former CEO and current or former Managers of the law firm of Miller, Canfield, Paddock and Stone, P.L.C. (“Miller Canfield” or “the Firm”), apply for leave to appeal from the published decision of the Court of Appeals issued November 4, 2014. (Exhibit A.) The Court of Appeals affirmed in part, and reversed in part, a November 7, 2012 order of the Ingham County Circuit Court. (Exhibit B.) This application is timely filed within 42 days of the Court of Appeals’ decision pursuant to MCR 7.301(A)(2), and MCR 7.302(C)(2)(b) and (C)(4)(a), which decision warrants review and reversal by this Court.

### THE STANDARD FOR LEAVE TO APPEAL IS MET HERE

Two of the criteria this Court uses to determine whether a case merits its attention are whether:

. . . the issue involves legal principles of major significance to the State’s jurisprudence; [and]

. . . [the] decision of the Court of Appeals . . . is clearly erroneous and will cause material injustice, or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals . . .

MCR 7.302(B)(3), (B)(5). These requirements are resoundingly met. The Court of Appeals’ holding threatens to negate arbitration clauses commonly used by business entities throughout Michigan by endorsing avoidance of arbitration through the simple expedient of suing the agents of the business, but not the business, with which the claimant has a dispute. This stratagem has long been disapproved by other courts, including other panels of the Court of Appeals. As the Sixth Circuit said in *Arnold v Arnold Corp*, 920 F2d 1267, 1281 (CA 6, 1990), “[if a] plaintiff could avoid the practical consequences of an agreement to arbitrate by naming . . . signatory parties in their individual capacities only, the effect of the rule requiring arbitration would, in

fact, be nullified.” Yet in this case the Court of Appeals, through a crabbed reading of a law firm operating agreement that clearly destined for arbitration all claims that by their nature are claims against the Firm, has allowed this plaintiff to accomplish just that.

The Court of Appeals’ holding ignores well established case law encouraging arbitration, and in the process insubordinately ignores the principle recently reaffirmed by this Court in *Hall v Stark Reagan*, 493 Mich 903; 823 NW2d 274 (2012), that the nature of the dispute must be examined with a strong preference for bringing the claim under the coverage of the arbitration clause. And the panel’s holding even scoffs at MCR 7.205(J)(1), which mandates that it follow its precedential decision in *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146 (2007), by pretending that *Rooyakker* addressed a different issue. The panel’s decision is clearly erroneous, and its disrespect for established legal principles should not be allowed to stand.

Unless it chooses to preemptorily reverse, this Court should grant leave to appeal, reverse the panel’s misguided approach, and reaffirm the common sense rule that disputes with an entity’s agents who made the decisions at issue are subject to the entity’s arbitration agreement, which cannot be avoided by artful pleading.

## QUESTION PRESENTED

Plaintiff, a former principal of Miller Canfield, sued seven Managers of the Firm for alleged undercompensation and expulsion from the Firm, in circumstances that the Firm considered to have been a voluntary withdrawal. Plaintiff had announced that he intended to work on Nick Saban's University of Alabama football coaching staff beginning in mid-2010, and asked for a leave of absence. The Firm, acting through its duly authorized Chief Executive Officer and Managing Directors, declined to grant Plaintiff's request and treated his departure thereafter as a voluntary withdrawal. Plaintiff initially filed a demand to arbitrate with the Firm pursuant to the arbitration clause in Section 3.6 of the Firm's Operating Agreement, which states:

Alternative Dispute Resolution: Mandatory Arbitration. Any dispute, controversy or claim (hereinafter "Dispute") between the Firm or the Partnership and any current or former Principal or Principals of the Firm or current or former partner or partners of the Partnership (collectively referred to as the "Parties") of any kind or nature whatsoever (including, without limitation, any dispute controversy or claim regarding step placement, or compensation, or the payment or non-payment of any bonus, the amount or change in amount of any bonus) shall be solely and conclusively resolved according to the following procedure . . . .

The Court of Appeals accepted Plaintiff's mistaken argument, and the trial court's erroneous holding, that the instant dispute between Plaintiff and his former Firm was not arbitrable, reading the arbitration clause as confined to disputes between a "principal" and "the Firm," and therefore not extending to a claim against Firm Managers whose actions – as Managers – are the source of the dispute.

Should this Court grant leave to appeal and reverse the Court of Appeals' erroneous decision that the parties' arbitration agreement did not encompass this dispute, a decision that directly conflicts with existing precedent?

Defendants answer "Yes."

## I. INTRODUCTION

Dean Altobelli was a Miller Canfield equity principal. In the summer of 2010, he asked its CEO (defendant Hartmann) and its Managing Directors (defendants Maiuri, Leslie, Fazio, Kilbourne, and Watson) for a leave of absence *with a guaranteed right of return to his equity position* so that he could try his hand at coaching football on Nick Saban's staff at the University of Alabama. The Managing Directors considered and denied Altobelli's request. Nevertheless, he left the Firm, transitioned his clients to other principals, and left for Tuscaloosa, where he has served on the Alabama coaching staff for the last 4 1/2 years.

Exercising his right under the firm's Operating Agreement, Altobelli filed an arbitration demand against the Firm contesting the last 5 years' compensation decisions by his practice group head (defendant Coakley) and the Managing Director defendants, as well as the Managing Directors' decision to treat his departure from the firm as a relinquishment of his equity principalship. After both he and the Firm had selected arbitrators, Altobelli had a change of heart and sought a change of venue.

Recharacterizing the very same claims as torts, Altobelli sued those who had made the Firm's decisions rather than the Firm itself. In his Circuit Court complaint, he again challenged Firm management's compensation decisions and its determination that he had abandoned his principalship position. Circuit Judge Manderfield denied Miller Canfield's motion to dismiss the claims based on the Operating Agreement's arbitration clause. The Court of Appeals panel upheld this decision.

The Court of Appeals panel reached the wrong conclusion because it addressed the wrong question. The panel focused on the identity of the actors, not the nature of the claim. This Court has ruled that the nature of the claim, not the identity of the actors, governs decisions

on arbitrability. Focus on the actors leads to easily manipulated results, such as occurred here. In *Hall v Stark Reagan*, 493 Mich 903; 823 NW2d 274 (2012), this Court emphasized the need for this type of analysis, yet the panel disregarded its obligation to follow the Court's directive. The fact that this is the first appellate decision to deal with *Stark Reagan* strongly suggests that this issue needs resolution at this time and by this Court.

The Court of Appeals panel also ignored its own published precedent, *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146; 742 NW2d 409 (2007), which it was required by MCR 7.215(J)(1) to follow, as well as a host of other decisions.

Leave to appeal should be granted to restore consistency and predictability to Michigan arbitration law.

## **II. CONCISE STATEMENT OF MATERIAL FACTS AND PROCEEDINGS**

### **A. The Nature of Plaintiff's Claim.**

Despite its extraordinary length, Plaintiff's Circuit Court Complaint (Exhibit C) has a narrow focus: his status with the Firm, the Firm's handling of his request for a leave of absence to work for Nick Saban in Alabama, and his dissatisfaction with the amount of his compensation before and after his departure. Plaintiff practiced law at Miller Canfield from 1993 until July 31, 2010, becoming a senior principal in the Firm's litigation group in January 2006. (Exhibit C, ¶¶ 5, 16.) Plaintiff devotes much of his Complaint to describing himself as an outstanding performer who was undercompensated by the Firm's management. While Plaintiff was a valued member of the Firm until his withdrawal, his performance is not relevant here. What is material to the issues here, as highlighted in his Complaint, are his complaints about (1) the supposed failure of the Firm to allocate to him appropriate distributions of the Firm's income, and (2) the

Firm's refusal to grant him a leave of absence -- all of which, he claims, violated the Firm's Operating Agreement. (Exhibit C, ¶¶ 48-51, 54-55, 59, 138, 142, 151, 152, 157, 162, 163, 172.)

The dispute between Plaintiff and the Firm grew out of a watershed decision he made in 2010, which he described in his Complaint:

In late May or early June 2010, Dean [Altobelli] was offered a temporary career enhancing opportunity to spend time at the University of Alabama ("Alabama") athletic program. Dean had a background and interest in football and athletics, and the temporary opportunity allowed Dean a chance to explore his interests while gaining experience that could help the Firm expand its legal practice. (Exhibit C, ¶ 66.)

Plaintiff requested a leave of absence to work for the University of Alabama, which the Firm's Managers denied in accordance with the terms of the Firm's Operating Agreement. Instead of abandoning his plans to join Nick Saban's coaching staff after his request was denied, Plaintiff left Michigan for Alabama, where the University's website currently lists him as a "Football Analyst."<sup>1</sup>

Plaintiff complains that the Defendant Managers' actions violated the Firm's Operating Agreement and that they were taken in "bad faith." For instance, paragraph 138 of the Complaint asserts that the Operating Agreement required "action taken by the managers under the agreement" to be taken in good faith. Paragraph 142 catalogs a series of wrongs allegedly committed against him that violated the Operating Agreement. Subparagraph 142(a) complains of his exclusion from Firm committees; subparagraph (b) asserts that significant Firm information was withheld from him; subparagraphs (c), (e), and (f) allege misallocation of income, and that the Managers acted "beyond their authority to wrongfully terminate [Plaintiff's] ownership position without a vote of the Firm's Owners"; and further subparagraphs charge the

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<sup>1</sup> See <http://directory.ua.edu/person/daltobelli>, accessed December 7, 2014.

Managers with failing to allocate an appropriate part of Firm income to him after the termination of his ownership interest. (Exhibit C, ¶ 142 (i), (j).)

Still other Complaint allegations confirm that the Operating Agreement and basic issues of Firm governance are intertwined with Plaintiff's claims. Paragraph 151 acknowledges that a lawyer's membership in the Firm should be governed by the Operating Agreement, which requires "a 2/3 supermajority vote to grant an attorney an ownership interest and . . . a 2/3 supermajority vote to terminate an attorney's ownership interest." (Exhibit C, ¶ 152.) Paragraph 157 asserts incorrectly that the Operating Agreement does not give Managing Directors the right to decide what is or is not a voluntary withdrawal from the Firm, and paragraph 162 asserts that the Defendants lacked authority to terminate Plaintiff's ownership position without obtaining the required 2/3 approval. *Id.* Paragraph 163 alleges that the Defendants "knowingly and willfully violated the law by disregarding limits the Operating Agreement placed on their power." And paragraph 172 avers that Defendants "deprived [Plaintiff] of his property without due process required by law – the process required by the Operating Agreement." *Id.*

Plaintiff's allegations that Defendants acted in violation of the Operating Agreement place that Agreement at the center of this dispute. Plaintiff's claims directly and centrally involve the Operating Agreement and therefore the Firm, and thus fall within the Agreement's arbitration clause.

**B. Pertinent Provisions Of The Firm's Operating Agreement.**

**1. All Senior Principals Are Entitled To The Benefit Of All Of The Operating Agreement's Provisions, Including Its Arbitration Clause.**

Section 3.3 of the Operating Agreement provides that the "covenants and agreements herein contained shall inure to the benefit of and be binding upon the parties hereto and their

respective executors, administrators and assigns” (emphasis added). All Firm principals, including Plaintiff and each individual Defendant, had signed and were “parties” to the Operating Agreement when this dispute began, and all were entitled to coverage under its arbitration clause. (Cited sections of the Operating Agreement are collected at Exhibit D.)

**2. The Firm’s Management Structure.**

The Operating Agreement states that the Firm’s principals elect its Managing Directors (Section 2.9). The Managing Directors are vested with full authority “to manage and administer the business and affairs of the Firm” and, pursuant to Section 2.14, to appoint the Firm’s CEO. The CEO is to carry out day-to-day “administration of the business and affairs of the Firm between meetings of the Managing Directors.” Section 2.33(b) requires the Managing Directors to keep principals advised of “all significant decisions made and problems encountered, to the end that the principals shall be informed of all developments significant to the welfare of the Firm.”

In 2010, Defendant Michael Hartmann was the Firm’s CEO. Of the other six individual Defendants Plaintiff sued personally, four were then Managing Directors; Defendant Michael Coakley was Head of the Commercial Litigation Practice Group; and Defendant Anna Maiuri had ceased to be a Managing Director before Plaintiff left the Firm.

**3. Responsibilities Of Senior Principals.**

Section 2.17 of the Operating Agreement outlines the responsibilities of principals and provides that a principal “shall devote his or her full time and best efforts to the success of the Firm except as otherwise approved in writing by the CEO with the approval of the Managing Directors.” Section 2.17(ii) prohibits a principal from acting as an employee “or in another similar capacity for any corporation, . . . or other business entity . . . or (iii) governmental office”

without the written approval of the CEO and the Managing Directors. Principals can be expelled from the Firm only by a vote of two-thirds of its members. Section 2.8(c).

#### **4. Compensation Of Senior Principals.**

The compensation of senior principals is governed by Section 2.8(a), and its incorporated "Senior Principal Compensation Plan." Sections 2.24 and 2.25 further define the distribution of Firm profits and the principals' bonus entitlement. Section 2.33 provides for at least two meetings of the principals each year "at which matters of mutual concern shall be discussed."

#### **5. Arbitration Of Disputes Over Application Of The Operating Agreement.**

Finally, Section 3.6 is entitled "Alternative Dispute Resolution: Mandatory Arbitration."

At the heart of the instant dispute is the language that describes the arbitration provision's scope:

Alternative Dispute Resolution: Mandatory Arbitration. Any dispute, controversy or claim (hereinafter "Dispute") between the Firm or the Partnership and any current or former Principal or Principals of the Firm or current or former partner or partners of the Partnership (collectively referred to as the "Parties") of any kind or nature whatsoever (including, without limitation, any dispute controversy or claim regarding step placement, or compensation, or the payment or non-payment of any bonus, the amount or change in amount of any bonus) shall be solely and conclusively resolved according to the following procedure . . . .

The procedure then outlines these steps and procedural rules:

In the event of a Dispute, the Parties agree to first try in good faith to settle the dispute directly. If the parties are unable to resolve the dispute, they shall submit the dispute to third party neutral facilitation in accordance with the mediation rules of the American Arbitration Association ("Mediation"). If the Dispute is not resolved by a signed Settlement Agreement within ninety (90) days of a written request for Mediation given to one Party by the other identifying the Dispute, the Dispute shall be settled by binding arbitration ("Arbitration") in accordance with the internal laws of the State of Michigan. The Arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association except as specifically provided

herein. Judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. There shall be three (3) arbitrators; one of whom shall be appointed by the Firm, one by the Principal(s) and/or partner(s) (as applicable) and the third of whom shall be appointed by the first two arbitrators. The hearing shall be held in the Detroit metropolitan area.

As already noted, because all “covenants and agreements” contained in the Operating Agreement inure to the benefit of all parties to the Agreement (i.e., all senior principals), every senior principal who is a party to it is entitled to the benefit of the arbitration clause.

**C. Plaintiff Demands Arbitration With the Firm.**

On November 29, 2011, after mediation through the American Arbitration Association (“AAA”), as required by the arbitration clause, had proved unsuccessful, Plaintiff filed a Demand for Arbitration with AAA. (Exhibit E.) He attached a description of the “Nature of the Dispute” that parallels the claims he later asserted in his lawsuit. He outlined:

- “Bad faith discrimination,” including for required contributions to the Firm, allocation of income, and “other Firm matters”;
- “Bad faith violations of [the] operating agreement,” including termination of his position as principal, violation of the contribution and income allocation provisions, and bad-faith self-dealing;
- “Bad faith misrepresentations, estoppel, and unjust enrichment” related to the above actions;
- “Bad faith conspiracy to improperly exclude [him] from the Firm”;
- “Bad faith abuse of operating agreement”; and
- “Violation of MCL 450.4515 [prohibiting shareholder oppression].”

Seven months later, having asserted these claims in arbitration against the Firm, Plaintiff withdrew his demand for arbitration “without prejudice,” and filed this lawsuit (Exhibit C). All of the theories of how he was allegedly wronged by the Firm reappeared in the six counts of his Complaint against the Firm’s Managers: breach of fiduciary duty; shareholder oppression;

conversion (which focused on the termination of his ownership interest and his right to income from the firm); bad faith misrepresentation; tortious interference with business expectancy; and civil conspiracy.

**D. Proceedings in the Lower Courts.**

After Plaintiff filed his First Amended Complaint on June 26, 2012, the parties filed cross-motions for summary disposition. Plaintiff contended, among other things, that the Operating Agreement did not specify precisely what constituted withdrawal from the Firm, and he therefore could not be deemed to have withdrawn. Defendants argued that the dispute belonged in arbitration, and that Plaintiff's account misrepresented the facts surrounding his departure and the meaning of the Operating Agreement.

Ingham County Circuit Judge Paula J.M. Manderfield ruled in a November 7, 2012 Opinion and Order that, as a matter of law, "Defendants acted outside of their authority by depriving Plaintiff of his ownership interest in the Firm" by treating his leaving the Firm as a withdrawal, whereas the agreement did not so provide. (Exhibit B, p. 17.) The corollary, she said, was that Plaintiff must have been involuntarily terminated. Since this occurred without the vote of two-thirds of the Firm's principals, he had been wrongfully deprived of his status as a Miller Canfield principal.

On the question of arbitrability, the trial court, while recognizing that Michigan law favors arbitration, deemed the language of the Operating Agreement's arbitration clause to be "crystal clear" in limiting arbitration to disputes "between the Firm . . . and any current or former principal or principals of the Firm." In the trial court's view, the lack of specific reference to "disputes between current or former principals" meant that Miller Canfield had to be one named party to the dispute and no exceptions were contemplated. Otherwise, the trial court believed, it

would be “impos[ing] ambiguity on clear contract language.” (Exhibit B, p. 9.) The court did not analyze *Rooyakker* or the array of other decisions Defendants had cited, brushing them aside because none contained language identical to the Miller Canfield arbitration clause. The trial court did rely on the Court of Appeals’ decision in *Hall v Stark Reagan, PC*, 294 Mich App 88; 818 NW2d 367 (2011), which this Court would reverse one month later.

The Michigan Court of Appeals granted Defendants’ application for leave to appeal on April 16, 2013. The panel issued its published opinion on November 4, 2014 (Exhibit A). Although it reversed the trial court’s grant of summary disposition to Plaintiff on the merits of the case, the panel affirmed the trial court’s denial of Defendants’ motion for summary disposition on the threshold question of whether this dispute was covered by the Operating Agreement’s arbitration clause.

Avoiding Defendants’ arguments and authorities as to the arbitrability of the dispute, the panel attempted to salvage the trial court’s decision by distinguishing its own on-point decision in *Rooyakker & Sitz, PLLC v. Plante & Moran, PLLC, supra*, 276 Mich App at 163-164. (Exhibit A, pp. 8-10.) On the key question of “whether the disputed issue is arguably within the arbitration clause,” *id.* at 9, the panel agreed with the trial judge that “the Operating Agreement [contained no language] from which [a] Court could infer that the arbitration provision contemplated [arbitration of] disputes between principals, i.e., between Plaintiff and the Firm managers he has sued.” *Id.* at 10. The panel upheld the trial court’s false approach that, because the Firm was not a named Defendant in the lawsuit, the case presented “a dispute solely between current or former principals.” *Id.* It brushed *Stark Reagan* aside as completely distinguishable. The panel also rejected out of hand Miller Canfield’s principal argument that arbitrability turns not on which parties are named, but rather on the essence or core of the dispute – here, Plaintiff’s

claims that the Firm, through its managing agents, had taken actions violative of its Operating Agreement. It escaped the panel's attention that the individual Defendants were acting on behalf of the Firm, that they had made decisions as Firm Managers acting within specifically delegated authority, and that they were also signatory parties entitled to the benefit of the Operating Agreement's arbitration clause.

### III. STANDARD OF REVIEW

Appellate courts conduct de novo review of determinations regarding whether an issue is subject to arbitration. *In re Nestorovski Estate*, 283 Mich App 177, 184; 769 NW2d 720 (2009).

### IV. ARGUMENT

#### A. **The Obligation To Arbitrate Depends On The Essential Nature of the Claim -- Not The Label Or The Opponents The Claimant Chooses.**

A party who has agreed to arbitrate its disputes with a business entity cannot make an "end run" around arbitration by bringing its claims against principals and other agents of the business – in other words, by re-labeling the dispute with the business entity as tort claims against the individuals responsible for making and implementing the entity's decisions. Courts have long rejected such tactics because, as the Sixth Circuit explained in *Arnold v Arnold Corp*, 920 F2d 1267, 1281 (CA 6, 1990), "[i]f [a] plaintiff could avoid the practical consequences of an agreement to arbitrate by naming . . . signatory parties [as defendants] in their individual capacities only, the effect of the rule requiring arbitration would, in effect, be nullified" (citations omitted).<sup>2</sup>

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<sup>2</sup> *Arnold* and other federal authorities cited in this application were decided under the Federal Arbitration Act, 9 USC 1 *et seq.*, which evinces a strong preference for arbitration and is binding upon state courts. *Decaminada v Coopers & Lybrand, LLP*, 232 Mich App 492, 496; 591 NW2d 364 (1998).

Here, Plaintiff's tort claims against the Firm's decision makers are substantively indistinguishable from those previously asserted in arbitration against the Firm. The only difference is that in his Circuit Court Complaint he re-clothed them as tort claims against the decision makers who had met their obligations under the Operating Agreement to decide whether or not the Firm would grant Plaintiff a leave of absence and how much compensation he should receive.

Michigan case law addressing the issue has consistently blocked would-be litigants like Plaintiff from evading arbitration through such a strategy, holding that individuals who made the entity's decisions or acted as its agent can claim the benefit of a contractual arbitration clause. Defendants will initially focus on four particularly instructive Michigan cases:

1. The published Court of Appeals' opinion in *Rooyakker & Sitz, supra*;
2. The Court of Appeals' unpublished opinion in *Cullen v Klein*, issued September 21, 2010 (Docket No. 291810, attached as Exhibit F);
3. The Court of Appeals' unpublished opinion in *Beaver v Cosmetic Dermatology & Vein Centers Of Downriver, PC*, issued August 16, 2005 (Docket No. 253568, attached as Exhibit G);
4. The Court of Appeals' unpublished opinion in *Vandkerckhove v Scarfone*, issued October 11, 2012 (Docket No. 303130, attached as Exhibit H).<sup>3</sup>

In *Rooyakker* the plaintiffs were Plante & Moran accountants who had signed a Practice Staff-Relationship Agreement that, among other things, prevented them from servicing the accounting firm's existing clients for a period of two years after they left. The Agreement also included an arbitration provision that obligated them to arbitrate "any dispute or controversy arising out of or relating to [the] Agreement," which was between each individual and the Firm.

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<sup>3</sup> We ordinarily would not cite to this Court unpublished opinions of the Court of Appeals. We do so in this Application only to demonstrate how clearly the panel departed from the Court of Appeals' own holdings. A total of nine respected judges joined in the four opinions listed above.

276 Mich App at 149. After Plante & Moran closed the Gaylord office where they worked, Rooyakker and Sitz set up their own practice. When Plante & Moran learned that the fledgling firm was servicing former clients of Plante & Moran, it initiated arbitration proceedings which sought disgorgement of substantial fees. Rooyakker & Sitz, PLLC and its individual principals countered with a Circuit Court lawsuit against Plante & Moran and two of its principals, claiming that they had interfered with the new firm's business expectations or relationships and had defamed Rooyakker and Sitz in the community. *Id.* at 150-151.

All defendants successfully moved for summary disposition, arguing that Plante & Moran's arbitration clause barred all of their former colleagues' Circuit Court claims, including their claims against the individual Plante & Moran principals. In affirming, the Court of Appeals reasoned:

In this case, the broad language of the arbitration clause—"any dispute or controversy arising out of or relating to" the agreement—vests the arbitrator with the authority to hear plaintiffs' tortious interference and defamation claims, even if they involve non-parties to the agreement. Further, Michigan courts clearly favor keeping all issues in a single forum. . . . Therefore, we do not believe that the trial court erred in referring plaintiffs' tortious interference and defamation claims to arbitration because they arise out of or relate to the individual plaintiffs' past employment with Plante and Moran. *Id.* at 163-164 (emphasis added).

In *Cullen v Klein, supra* (Exhibit F) four pediatric surgeons set up a professional corporation ("PC"). Each signed an employment agreement and stock purchase agreement with the PC that included a provision for arbitration of "[a]ny dispute or controversy arising out of or relating to [the] Agreement" between the signing individuals and the PC. (Exhibit F, p. 2). As in *Rooyakker* (and the instant case), the agreement in *Cullen* did not expressly provide for arbitration of disputes between individual shareholders. Subsequently, Dr. Cullen's claim that a medical condition made it difficult for him to utilize the PC's new computerized billing system led to conflict among the PC's shareholders, and the other shareholders voted to end Cullen's

employment with the PC. Cullen filed suit against those shareholders individually (not the PC), claiming that their decisions gave rise to an array of statutory and common law claims similar to Plaintiff's laundry list here: (1) violations of the Persons with Disabilities Civil Rights Act, (2) statutory corporate interference claims under MCL 450.1489, (3) defamation, (4) intentional infliction of emotional distress, (5) tortious interference with business relationships, and (6) civil conspiracy. As happened in this case, the trial court refused to send those claims to arbitration because it believed the claims against the individual defendants were outside the scope of what the parties had agreed to arbitrate.

The Court of Appeals reversed. Relying on the broad ("any dispute") language of the arbitration clause, the *Cullen* panel rejected the view that claims by one shareholder against another stood outside the arbitration commitment. *Id.* at 4. The Court of Appeals reasoned that those claims were encompassed because they necessarily were "intimately intertwined [1] with the employment and stock purchase agreements, [2] [Cullen's] relationship to his co-employees, and [3] coemployees' behavior as officers and directors of [the PC]." *Id.* The Court of Appeals also found the fact that the parties "contemplated ongoing, long-term relationships governed by the terms of the . . . agreements" to weigh in favor of arbitration. *Id.* at 5. It also drew guidance from *Arnold v Arnold Corp, supra*, 920 F2d at 1282 (CA 6, 1990), an influential federal case that reaffirms "the well-settled principle affording agents the benefits of arbitration agreements made by their principal."

In the instant case, as in *Arnold* and *Cullen*, the alleged wrongful acts related to the "defendants' behavior as officers and directors or in their capacities as agents." *Cullen*, p. 6. Also, in this case, the individual Defendants were indisputably acting in their role as Managing Directors charged with making Firm decisions, and thus as agents of the Firm. Whether those

decisions were somehow flawed must be resolved in the proper forum – arbitration. It is legally irrelevant that, were arbitration not agreed to, Plaintiff could have sued these individuals personally under a common law tort theory.

In *Beaver v Cosmetic Dermatology & Vein Centers, supra* (Exhibit G), the Court of Appeals held that the individual defendant, the sole owner and doctor of the defendant PC, was entitled to have the former employee plaintiff's tort claims against him arbitrated pursuant to the arbitration clause in the plaintiff's employment agreement with the PC. Looking to federal authorities (including *Arnold*) that have defined numerous situations in which non-signatories will be bound to an arbitration agreement, the Court of Appeals held that the doctor could enforce the agreement under an agency theory: "[H]is actions toward his employees in a business setting, and concerning business matters, fall under the principle of agency." That logic should be all the more applicable here, where the Managers who were agents of the Firm were also signatories to the agreement containing the arbitration clause.

In *Vandekerckhove v Scarfone*, unpublished opinion per curiam of the Court of Appeals, issued October 11, 2012 (Docket No. 303130) (Exhibit H), the plaintiff retained the defendant attorney's law firm to assist her in handling her deceased son's estate and related legal issues. She signed two separate documents entitled "Fee Arrangement For Legal Services" at different times. Both agreements stated that they were entered into between the plaintiff and the law firm and that legal services would be provided by employees of the law firm; both contained an arbitration clause. The attorney signed the second agreement, but not the first.

The plaintiff filed an action seeking a declaratory judgment that she was not required to arbitrate her fee dispute with the attorney, arguing that the fee agreements were between her and the law firm, but not with attorney Scarfone as an individual. Scarfone responded that as the sole

shareholder and owner of the law firm and the person who performed the legal services, he was entitled to the benefit of the arbitration agreement. Relying on *Rooyakker, supra*, the Court of Appeals held that the dispute was arbitrable, saying:

*Rooyakker* impliedly recognizes the reality that a corporation does not provide services, its employees do. A person may retain an accounting or law firm or a medical practice, but the actual services are provided by individual accountants, lawyers and doctors. Therefore, an arbitration agreement covering claims related to the services rendered must apply to the employees performing those services.” Exhibit H, p. 4.<sup>4</sup>

The Court of Appeals’ published decision below did not cite or address *Cullen*, or *Beaver*, or *Vandekerckhove*, and its attempt to distinguish *Rooyakker* is simply wrong. The panel first posited that the central question here “is whether plaintiff can sue the firm managers as individuals, or whether plaintiff is required to arbitrate his claims against them,” and that this question “was not at issue in *Rooyakker*.” (Exhibit A, p. 9.) But that was indeed at issue, as the excerpt quoted on page 12 demonstrates. The undesirability of splitting a party’s claims between two forums -- which the panel in this case characterized as the primary holding of *Rooyakker* -- was only a secondary point in the *Rooyakker* opinion’s analysis. The panel next reasoned that the Miller Canfield arbitration clause’s phrase “[a]ny dispute, controversy or claim” was modified by “between the Firm. . . and any current or former Principal . . . .” It asserted that this

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<sup>4</sup> See also *DeCaminada, supra*, 232 Mich App at 496-497 (employment-related age discrimination and wrongful conversion claims against business entity and other owners of the business were subject to binding arbitration); *Rouleau v Orchard, Hiltz & McCliment, Inc*, unpublished opinion of the Court of Appeals, issued October 25, 2012 (Docket No. 308151) (implicitly finding that the obligation to arbitrate extends to nonparties where the dispute arises from an agreement that contains an arbitration provision); *Detroit Police & Fire Retirement Sys v GSC CDO Fund, Ltd*, unpublished opinion of the Court of Appeals, issued May 11, 2010 (Docket No. 289185) (“any controversy” arbitration language barred all circuit court claims, including claims asserted against individual brokers); *Tobel v AXA Equitable Life Ins Co*, unpublished opinion of the Court of Appeals, issued February 21, 2012 (Docket No. 298129) (“all controversies” arbitration language barred circuit court claims against “non-signatories”). (The three unpublished opinions just cited are provided in alphabetical order at Exhibit I.)

difference meant that the “arbitration provision [in *Rooyakker*] is not . . . even analogous” to the Miller Canfield provision, *id.*, and that the language at issue “clearly and unambiguously” contemplated only arbitration of disputes between “the Firm” and “a principal,” not disputes between current or former principals. *Id.* at 10.

The Court of Appeals apparently thought it significant that the Operating Agreement did not define the category of disputes meant for arbitration by some modifier along the lines of “relating to this agreement.” Exhibit A, pp. 9-10. That was fallacious. The arbitration clause was part of an overarching agreement among Miller Canfield’s principals and it mandated arbitration of “[a]ny dispute, controversy or claim,” of “any kind or nature whatsoever.” Plaintiff’s complaints about how he was treated by the Firm, although now nominally asserted against the decision makers, are certainly a dispute of a principal with the Firm falling within the clause’s scope.

With all due respect to the panel below, its reasoning is so far from the mark that it violates its obligation to follow its own published precedent. MCR 7.205(J)(1). *Rooyakker* is directly on point and controlling.

Federal case law fully aligns with *Rooyakker* and with this Court’s decision in *Hall v Stark Reagan* in recognizing that Plaintiff’s claims against the Firm’s decision makers are necessarily claims against “the Firm.” It is axiomatic that the Firm, as an entity, “can only act through its employees [here, principals], and an arbitration agreement would be of little value if it did not extend to [them].” *Pritzker v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 7 F3d 1110, 1122 (3<sup>rd</sup> Cir. 1993). See also *Arnold v. Arnold Corp.*, 920 F2d at 1281; quoted *supra* at p. 10 (plaintiff could not avoid arbitration by suing officers and directors individually for corporate decisions he did not like); and *Roby v. Corporation of Lloyd's*, 996 F2d 1353, 1360 (2<sup>nd</sup> Cir.

1993) (“If it were otherwise, it would be too easy to circumvent the [arbitration] agreements by naming individuals as defendants instead of the [entities] themselves”).

Miller Canfield’s principals clearly expressed in the Operating Agreement their intention that all disputes connected with the business relationship between themselves and the Firm, a relationship that includes actions of the Firm’s Managers, would be resolved through arbitration. To prescribe arbitration for “[any] dispute, controversy or claim . . . of any kind or nature whatsoever,” without making any exclusion, is to use all-encompassing language about all disputes that could arise in carrying on the business of the Firm. As the Court said in *Personal Security & Safety Systems, Inc v Motorola Inc*, 297 F3d 388, 393 (CA 5 2002), quoting *Pennzoil Exploration and Production Co v Ramco Energy Ltd*, 139 F3d 1061, 1067 (CA 5 1998):

Where . . . an arbitration provision purports to cover all disputes ‘related to’ or ‘connected with’ the agreement, . . . the provision is ‘not limited to claims that literally ‘arise under the contract’ but rather embrace[s] all disputes between the parties having a significant relationship to the contract regardless of the label attached to the dispute. (Emphasis added.)

It goes without saying that all parties to this case had “a significant relationship to the contract”; all were signatories who joined together in the long-term enterprise of carrying on the business of the Firm.

Plaintiff’s characterization that Defendants’ decisions were *ultra vires* is of no consequence. Whether fully authorized or *ultra vires* (no one but Plaintiff says they were), it is undisputable that the decisions he complains about were made by Defendants in their capacity as Firm decision makers. These were not casual interactions among individual principals, but actions delegated to the Managing Directors by the Operating Agreement that impacted the membership and business of the Firm as well as Plaintiff. His quarrel with those decisions is a

“dispute, controversy, or claim” within the scope of the broad arbitration clause that he and all Firm principals agreed to. All of them, by signing the Agreement, bound themselves to arbitration, whether as a claimant or a respondent.

**B. The Principles That Require Reversal In This Case Grow Out Of The General Rule Favoring Arbitration.**

The authorities in the preceding section applied in a particular context the established preference for arbitration as a matter of public policy. That preference discourages readings that strain to exclude disputes from the reach of arbitration clauses. Although this Court is familiar with those principles, we shall briefly review them here.

An arbitration clause creates a presumption of arbitrability, and a particular request for 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. Doubt should be resolved in favor of coverage.” *United Steelworkers of America v Warrior & Gulf Navigation Co*, 363 US 574, 582-583; 80 S Ct 1347 (1960). This principle was also recognized by the Michigan Supreme Court in *Kaleva-Norman-Dickson School Dist No 6 v Kaleva-Norman-Dickson School Teachers Ass’n*, 393 Mich 583; 227 NW2d 500 (1975). See also, *AFSCME Council 25 v Wayne Co*, 290 Mich App 348, 353-354; 810 NW2d 53 (2010).

Michigan’s “long-standing preference for arbitration as a means of resolving disputes,” *Amoudlian v Zadeh*, 116 Mich App 659, 669; 323 NW2d 502 (1982), was expressed in the former Michigan Arbitration Act (“MAA”), MCL 600.5001 *et seq.* and is continued in the successor statute, MCL 691.1681 *et seq.*, which took effect on July 1, 2013 (modeled on the 2000 version of the Uniform Arbitration Act).

Arbitration is a matter of contract, and arbitration agreements must be enforced according to their terms to effectuate the parties’ intent. *Bayati v Bayati*, 264 Mich App 595, 598-99; 691

NW2d 812 (2004). To ascertain whether a particular dispute must be arbitrated, a court considers (a) whether the parties have a contractual arbitration provision, (b) whether the disputed issue or claim is on its face or arguably within the arbitration clause, and (c) whether the dispute is instead expressly exempted from arbitration by the terms of the contract. See *In re Nestorovski Estate, supra*, 283 Mich App at 202; *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000). Here, the Court of Appeals paid only lip service to these bedrock principles, quoting them from *Fromm v MEEMIC Ins Co*, 264 Mich App 302, 305-306; 690 NW2d 528 (2004). (Exhibit A, p. 8.)

A broad arbitration clause authorizes arbitration of tort claims arising out of a commercial relationship, even against agents who are non-parties to the agreement. *Rooyakker & Sitz, supra*, 276 Mich App at 163 (requiring arbitration of defamation and intentional interference claims against individual Plante Moran principals). Furthermore, Michigan courts favor keeping all issues in a single forum and will not segregate issues into arbitrable and non-arbitrable categories where the language of the agreement does not require it. *Id.*; see also *DAIIE v Reck*, 90 Mich App 286, 289; 282 NW2d 292 (1979).

**C. The Court of Appeals Ignored The Lesson Of This Court's *Hall v Stark Reagan* Decision.**

This Court's 2012 order in *Hall v Stark Reagan, PC*, reversing the Court of Appeals, reinforces that Michigan courts must give arbitration clauses a broad reading. Unfortunately, the panel in the instant case – the first Court of Appeals decision to discuss that order – chose to brush its guidance aside on the incongruous rationale that its own (reversed) opinion in that case

had not really shaped the trial court's decision. In doing so this panel ignored the lesson this Court's order meant to impart.<sup>5</sup>

In *Stark Reagan* two former shareholders of a law firm sued, alleging that the termination of their shareholder status voted on by other shareholders was motivated by age discrimination. In language reminiscent of the panel's approach in this case, the Court of Appeals held that the arbitration clause in the firm's shareholder agreement, requiring submission of "[a]ny dispute regarding interpretation or enforcement of any of the parties' rights or obligations [under the shareholder agreement]," did not cover the discrimination claims because the question of illegal motive did not fall within the scope of the issues specifically addressed in the agreement. The *Stark Reagan* panel stated:

The shareholders' agreement embodies the parties' intentions concerning the transfer, purchase, and sale of Stark Reagan stock.

\* \* \*

Our review of [the plaintiffs'] complaint reveals no allegation that defendants violated a term of the shareholders' agreement or disregarded the procedures for stock redemptions . . . . Simply put, [the plaintiffs] have not advanced any claim or argument germane to the subject matter of the shareholders' agreement, or having its genesis in that agreement. 294 Mich App at 95-96.

After granting leave and hearing argument, this Court reversed the Court of Appeals by order, holding that it was not necessary for the dispute to involve only the disposition of stock under the agreement or the interpretation of specific contract language. The parties' dispute concerned how and why the defendant shareholders had invoked the separation provisions of the shareholders' agreement. As such, the dispute necessarily related to the "interpretation or enforcement of . . . the parties' rights or obligations' under the Shareholders' Agreement, and

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<sup>5</sup> The Court of Appeals' cursory treatment of *Stark Reagan* was especially peculiar because its now reversed decision in *Stark Reagan* was the chief authority Plaintiff had relied on in the trial court.

[was] therefore subject to binding arbitration.” 493 Mich 903. Similarly, Plaintiff’s claims here are rooted in rights or benefits allegedly owed him by the Firm under the Operating Agreement, and the dispute is arbitrable because it is a dispute with the Firm.

The dispute here, as in *Stark Reagan*, involves the interpretation and application of an agreement that governs relationships among the owners of a law firm. Plaintiff claims he should have been allowed to take a leave of absence from the Firm to work for another employer, and that he deserved more compensation from the Firm. But it was the Firm that implemented the decisions of its duly elected and authorized agents – the managers. Whether the underlying decisions made by the CEO and Managing Directors were made for improper motives – as Plaintiff alleges – does not take Plaintiff’s complaints outside this arbitration clause any more than the intent-based claims alleged in *Stark Reagan* were outside that firm’s arbitration clause.

This Court’s message in *Stark Reagan*, though not heeded by the panel below, is clear: the nature of the dispute and its relationship to the underlying agreement determines its arbitrability. Courts should apply this analysis with due regard for Michigan’s strong preference for arbitration and should not strain to find readings that will exclude a dispute from arbitration.

## V. CONCLUSION AND RELIEF REQUESTED

Plaintiff Dean Altobelli's claims in this lawsuit belong in arbitration. There was an agreement to arbitrate, his claims fall within the scope of that agreement, and nothing in that agreement exempts his claims against Firm decision makers from the arbitration clause. In fact, in Section 3.3 the Operating Agreement expressly extends the benefit of its provisions – including the arbitration clause – to every senior principal.<sup>6</sup>

Plaintiff has not denied that he is bound by the Operating Agreement, including its arbitration provision. Tellingly, he first pressed his claims by participating in mediation with the Firm under Section 3.6, and then filed with AAA a Demand for Arbitration of his dispute with the Firm, thus acknowledging that his dispute is with the Firm. He has now merely disguised it as a dispute with the Firm's Managers – a tactic soundly rejected by countless court decisions.

The claims Plaintiff asserts in this lawsuit fall within the scope of the obligation to arbitrate imposed by the Operating Agreement. Every issue that Plaintiff wants to litigate in court -- his compensation, the events surrounding his departure, and the decisions made by the Firm's managers on those subjects – involves his relationship with the Firm. The Court of Appeals' own prior decisions have recognized this, in conformity with many other judicial precedents. Plaintiff cannot escape that outcome by a simple act of artful pleading.<sup>7</sup>

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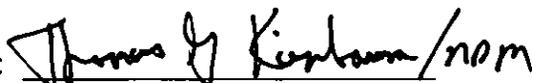
<sup>6</sup> As noted earlier, that Section states: "The covenants and agreements herein contained shall inure to the benefit of and be binding upon the parties hereto and their respective executors, administrators and assigns." That is to say, each principal who is a party to the Operating Agreement is entitled to both the benefits and the burdens of the Agreement's provisions, including the arbitration provision.

<sup>7</sup> If the rule were as posited by the Court of Appeals' decision, any vindictive former principal could easily craft a lawsuit that escaped a broad arbitration clause, purely for the purpose of harassment.

The published decision of the Court of Appeals will create uncertainty in Michigan arbitration law and cloud the meaning of this Court's *Stark Reagan* decision. It should either be peremptorily reversed, or leave to appeal should be granted.

Respectfully submitted,

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