

STATE OF MICHIGAN
SAGINAW COUNTY CIRCUIT COURT

NEXTEER AUTOMOTIVE CORPORATION,
a Delaware corporation,

Plaintiff,

v.

MANDO AMERICA CORPORATION,
a Michigan corporation, TONY DODAK,
ABRAHAM GEBREGERGIS,
RAMAKRISHNAN RAJAVENKITASUBRAMONY,
CHRISTIAN ROSS, KEVIN ROSS,
TOMY SEBASTIAN, THEODORE G. SEEGER,
TROY STRIETER, JEREMY J. WARMBIER, and
SCOTT WENDLING, jointly and severally,

Defendants,

and

CHRISTIAN ROSS, KEVIN ROSS,
TOMY SEBASTIAN, THEODORE G. SEEGER,
and TONY DODAK,

Counter/Third-Party Plaintiffs,

v.

NEXTEER AUTOMOTIVE CORPORATION,
a Delaware corporation, LAURENT BRESSON,
and FRANK LUBISCHER,

Counter/Third-Party Defendants.

Case No. 13-021401-CK

Judge: M. Randall Jurrens (P27637)

**OPINION RE: MANDO'S
MOTION FOR LEAVE TO FILE
AMENDED ANSWER AND TO
COMPEL ARBITRATION**

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Mando requests leave to file an amended answer to interpose a pre-existing arbitration agreement with Nexteer, and to then compel arbitration of all of Nexteer's claims. Nexteer demurs, arguing the present litigation is beyond the scope of their agreement.

For the reasons stated in this opinion, the court concludes that Nexteer's claims are arbitrable.

Factual Background

Nexteer and Mando are both engaged in the development, manufacture, and sale of systems and components for the global automobile industry.

Effective June 1, 2012, Nexteer and Mando entered into a Non Disclosure Agreement (“NDA”), for the purpose of “considering the possibility of supplying components and subassemblies to each other”. In order to implement this business relationship, Mando and Nexteer agreed to “exchange information, including documents and samples containing knowledge which is not in the public domain”. Any information disclosed would be treated with “strictest confidentiality and not . . . accessible to third parties”. The NDA confidentiality obligations continued “without limitation in time”. Importantly, the NDA included the following language (emphasis added):

11. This Non-disclosure Agreement shall be construed and the legal relations between the Partners shall be determined in accordance with the substantive laws of Switzerland, with the exclusion of its law of conflict of law provisions. The United Nations Convention on Contracts for the International Sale of Goods (CISG) shall not be applicable.
 - a. As set forth in the Memorandum of Understanding, *any dispute, controversy or claim arising out of or in relation to this Nondisclosure Agreement*, including the validity, invalidity, breach or termination thereof, *shall be settled by arbitration* in accordance with the Rules of Arbitration of the International Chamber of Commerce in force on the date when the Notice of arbitration is submitted in accordance with these Rules.
 - i. The place of the arbitration is Geneva, Switzerland.
 - ii. The arbitration tribunal consists of three arbitrators.
 - iii. The arbitration proceedings shall be conducted in English.
 - b. The procedures specified herein shall be the sole and exclusive procedures for the resolution of disputes between the parties arising out of or relating to this Non-Disclosure Agreement; provided, however, that a Partner may seek a preliminary injunction or other preliminary judicial relief from a court with competent jurisdiction over the other Partner, if in its judgment such action is necessary to avoid irreparable harm or damages. Despite such action the Partners will continue to participate in good faith in the arbitration procedures specified above.

The parties’ collaborative relationship terminated in August 2013. Shortly thereafter, on September 4-5, 2013, five of the individual defendants (all engineers, some high level, working on the next generation of electronic power steering) terminated their employment at Nexteer and began working for Mando. Subsequently, on September 11-13, 2013, the other five individual defendants left Nexteer for Mando.

Procedural Background

On November 5, 2013, Nexteer commenced the present litigation alleging nine causes of action: (1) breach of contract (against all individual defendants), (2) tortious interference with

business relationship/business expectations (against all defendants), (3) tortious interference with contract (against corporate defendant), (4) breach of fiduciary duty (against defendants Ross, Ross, Dodak, and Seeger), (5) aiding and abetting/knowing participation in breach of fiduciary duty (against corporate defendant), (6) violation of Michigan Uniform Trade Secret Act (against all defendants), (7) unjust enrichment/quantum meruit (against all defendants), (8) common law/statutory conversion (against all defendants), and (9) civil conspiracy (against all defendants). The NDA was attached to the Nexteer's complaint as Exhibit 4, with portions of ¶ 11 subparagraph "b" underlined. The NDA was also attached as Exhibit "E" to Nexteer's motion for temporary restraining order and preliminary injunction, which, in addition to underlining portions of ¶ 11 subparagraph "b", noted in the margin "Arbitration provision".

On November 15, 2013, the court conducted a hearing on Nexteer's request for a TRO, attended by Mando's then-attorneys of record, Baran and Horton, as well as Mando's in-house counsel, Taewoo Paul Nam.

On November 22, 2013, the court conducted a case management conference (by telephone conference call) in which Messrs. Baran and Nam participated on behalf of Mando. The conference included discussions regarding the existence and applicability of any arbitration agreement. The resulting Case Management Order ("CMO"), signed November 25, 2013, included the following provision:

17. **Arbitration** [MCL 691.1681 et seq., MCR 3.602]: An agreement to arbitrate this controversy does not exist is unknown exists is/will be the subject of a timely motion is waived is not applicable

Prior to entry, the court circulated the CMO to counsel via email for approval. With the exception of the timing for filing certain motions (¶ 15) which the court then amended, the parties' attorneys each registered their agreement by email.

On December 6, 2013, pursuant to leave granted in the CMO, Nexteer filed a First Amended Complaint and Jury Demand, but without substantively affecting the causes of action.

On December 19, 2013, Mando filed a motion for dismissal and for a protective order, asserting under MCR 2.116(C)(8) that Nexteer's amended complaint failed to state a claim upon which relief could be granted (but, notably, not a motion under MCR 2.116(C)(7) based on "an agreement to arbitrate or litigate in a different forum").

On December 20, 2013, the court conducted a status conference, by conference telephone, with attorneys Baran, Horton and Nam participating for Mando. The NDA arbitration agreement was not raised.

Nexteer's brief in opposition to Mando's motion to dismiss again attached a copy of the NDA (Exhibit "2"), again highlighting portions of the NDA ¶ 11.

On January 14, 2014, Mando filed a motion requesting the court admit Mando's in-house counsel, Georgia attorney Taewoo Paul Nam pro hac vice (which the court granted on January 24, 2014).

On February 26, 2014, following oral arguments and taking the matter under advisement, the court granted in part and denied in part Mando’s motion to dismiss: dismissing claims for breach of fiduciary duty, aiding and abetting, unjust enrichment/quantum meruit, and common law/statutory conversion; limiting claims of tortious interference with business relationship/business expectations, tortious interference with contract, and civil conspiracy; and leaving unaffected claims for breach of contract and violation of the Michigan Uniform Trade Secrets Act.

On April 4, 2014, a second status conference was conducted by telephone in which attorneys Baran and Nam participated for Mando without raising the issue of arbitration.

On April 28, 2014, Mando filed motions for admission pro hac vice to allow New York attorneys Alexandra S. Wald, Mark D. Spatz, and Sang Min Lee to appear on its behalf (which the court granted on May 16, 2014).

On May 8, 2014, Mando filed the present motion for leave to amend its answer to, inter alia, assert arbitration as an affirmative defense and to compel arbitration of all claims.

On June 3, 2014, oral arguments were held and the matter was taken under advisement; with counsel invited to submit supplemental analysis addressing the court’s concern that the issue of arbitration was moot as a result of the CMO, ¶ 17.

Analysis

Amendment Standards

MCR 2.118(A)(2) provides that, subject to inapplicable exceptions, “a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.”

Michigan courts have interpreted subrule (A)(2) as ordinarily authorizing a party to amend its pleading, and have reasoned that a court should deny the opportunity to amend only for the following reasons: (1) undue delay by the moving party; (2) the moving party's dilatory motive or bad faith in seeking amendment; (3) the moving party's “repeated failures to cure deficiencies by amendments previously allowed”; (4) the granting of the motion to amend would cause the opposing party undue prejudice; and (5) futility of the proposed amendment. *Weymers v Khera*, 454 Mich 639, 658–659 (1997), quoting *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 656 (1973).

Governing Arbitration Law

Mando asserts that the present arbitration issue is governed by Michigan’s Uniform Arbitration Act, *MCL 691.1681 et seq.* (“MUAA”). Nexteer counters that the court should apply the Federal Arbitration Act, *9 USC 1 et seq.* (“FAA”).

The FAA governs actions in both federal and state courts arising out of contracts involving interstate commerce. *Allied-Bruce Terminix Cos, Inc v Dobson*, 513 US 265 (1995); *Burns v Olde Discount Corp*, 212 Mich App 576, 580 (1995). When applicable, state courts are bound under the Supremacy Clause, US Const, art VI, § 2, to enforce the FAA's substantive provisions. *Scanlon v P & J Enterprises*, 182 Mich App 347 (1990).

Given the global profile of both Nexteer and Mando, the court assumes the NDA constitutes a transaction in or affecting interstate commerce (although neither party has formally conceded or disputed this underlying issue). But even assuming the FAA controls this case in the event of conflict with the MUAA, neither party has demonstrated any material difference between the two at this juncture.

Arbitration Standards

Both state and federal policy favor arbitration "as an inexpensive and expeditious alternative to litigation." *Rembert v Ryan's Family Steak Houses*, 235 Mich App 118, 123 (1999).

When deciding whether an enforceable arbitration agreement exists, courts generally apply ordinary state-law principles that govern formation of contracts. *First Options of Chicago, Inc v Kaplan*, 514 US 938, 944 (1995).

When determining the arbitrability of an issue, courts apply a three-part test: (1) is there an arbitration agreement in a contract between the parties; (2) is the disputed issue on its face or arguably within the contract's arbitration clause; and (3) is the dispute expressly exempted from arbitration by the terms of the contract. *In re Nestorovski*, 283 Mich App 177, 202 (2009); *DeCaminada v Coopers & Lybrand, LLP*, 232 Mich App 492, 496 (1998);

Arbitration agreements are to be liberally construed. Any doubt about the arbitrability of an issue should be resolved in favor of arbitration. *Campbell v Community Service Ins Co*, 73 Mich App 416, 419 (1977); *Moses H. Cone Mem Hosp v Mercury Constr Corp*, 460 US 1, 24 (1983).

Arbitrability of Dispute

Section 11(a) of the NDA provides (emphasis added):

[A]ny dispute, controversy or claim arising out of or in relation to this Nondisclosure Agreement, including the validity, invalidity, breach or termination thereof, shall be settled by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce in force on the date when the Notice of arbitration is submitted in accordance with these Rules.

Mando asserts that, notwithstanding the original context of the NDA, Nexteer's current claims "arise out of" or "relate to" the NDA. Indeed, as Mando points out, Nexteer has repeatedly referenced the NDA to justify its request for relief (e.g. Amended Complaint, ¶¶ 134-

143, 152, 156, 177, 225, and 234, as well as its arguments against Mando's prior motion to dismiss).

Nexteer demurs, asserting that "the existence and nature of the [NDA] are simply background information about defendant's overall course of conduct" (Nexteer's Response to Mando's Motion to Amend, p 1). Moreover, Nexteer asserts:

None of Nexteer's claims asserts or depends upon whether Mando America breached the Non-Disclosure Agreement. Following amendments and refinements, Nexteer's complaint claims that (1) Nexteer's former employees – the individual defendants – breached their employment contracts; (2) Mando America tortiously interfered with those employment contracts; (3) Mando America and the former employees tortiously interfered with Nexteer's specific customer relationships and business expectancies; (4) all the defendants misappropriated Nexteer's trade secrets in violation of the Uniform Trade Secrets Act, MCL 445.1901; and (5) all the defendants conspired to engage in these torts. [(Nexteer's Response to Mando's Motion to Amend, p 2)]

However, this minimization appears markedly at odds with Nexteer's prior use of NDA-events to its advantage. In addition to ¶¶ 134-143 (separately entitled "Mando and Nexteer Enter Into a Non-Disclosure Agreement") that provide a historical framework to support subsequent allegations of wrongdoing, Nexteer's First Amended Complaint relies on NDA-related events to support various claims:

- ¶ 152 (under "Unable to Legally Gain Access to Nexteer's Product and Losing Market Share, Mando Resorts To Wrongful Actions In An Effort to Compete"):

During the April to August, 2013 timeframe, while the NDA was in effect and Nexteer and Mando were considering working with each other, Mando was actively and surreptitiously soliciting Nexteer employees to work for it. Although the purpose of the potential collaboration was clearly delineated, Mando, in violation of the terms and spirit of the NDA, utilized the potential collaboration to secure information on the key Nexteer employees, operations, products, and technology so that it could obtain the same for its own use.

- ¶ 177, Count II (Tortious Interference with Business Relationships and Business Expectations – Against All Defendants):

* * * Mando, by virtue of . . . the knowledge secured in regard to the NDA project, . . . know of Nexteer's relations and expectations with [Nexteer's] employees and clients.

- ¶ 225, Count VIII (Common Law and Statutory Conversion – All Defendants)¹:

¹ Although the court acknowledges this cause of action was dismissed by its February 26, 2014 Order, it nonetheless demonstrates how Nexteer's claims arise out of or relate to the NDA.

The Defendants are asserting and will continue to assert dominion over this property, wholly inconsistent with . . . the Non-Disclosure Agreement with Mando . . .

■ ¶ 234 Count IX (Civil Conspiracy – All Defendants):

In groups of two or more, the Defendants also acted in concert with the intent to achieve one or more of the following unlawful purposes:

* * *

- e. To surreptitiously solicit Nexteer employees and to secure Nexteer information and property during the NDA consideration process contrary to the purpose, spirit and language of the NDA agreement;

Nexteer further utilized the relation of the joint venture/NDA to fend off the defendants' efforts to dismiss its First Amended Complaint:

Losing bids for new work, losing market share, experiencing technical problems, lacking managerial know how, and having failed on the project seeking to incorporate Nexteer's advanced Modular Power Pack into its steering system, Mando resorted to desperate measures (148) It set out to steal Nexteer's trade secrets, business opportunities, confidential and proprietary information and other property by poaching the ten key employees who could give it that information, several of which employees worked directly with Mando on the MPP consideration project. Ending its joint partnership with Nexteer, it went after the key group involved under the NDA. Over a ten day period, from September 3, 2013 to September 13, 2013, all ten Individual Defendants abruptly resigned their employment giving no notice, and started working for Mando. (99, 107-116, 149) [Nexteer's Brief in Opposition to Defendants' Motion for Dismissal, p 6]

Moreover, during the January 24, 2014 oral arguments on defendants' motion to dismiss, Nexteer's expounded on how the present litigation arose out of/related to the parties' joint venture/NDA (Trans, pp 46-47):

As to the threaten[ed] misappropriation claim . . . they say that all we've alleged is that these employees worked for Nexteer and had accessed information and now they work for a competitor. We've alleged a lot more than that. We've alleged the whole scheme where Mando and the individual defendants surreptitiously worked together while Mando was Nexteer's partner, and the individual defendants were Nexteer's employees to create a competing operation and that spawns a lot of claims and that's duplicitous behavior.

A similar argument was advanced to avoid dismissal of the tortious interference claims [Nexteer's Response to Supplemental Brief of Mando Regarding Motion for Summary Disposition, pp 3-4]:

Here, Nexteer alleged that the Defendants engaged in a variety of duplicitous and unethical conduct. In particular, the complaint details how Mando participated in a premeditated scheme to encourage and capitalize on the disloyalty and deceptiveness of key Nexteer employees in an effort to go from last place among the major North American steering suppliers to a much more competitive position. The allegations include that:

- Mando entered the Non-Disclosure Agreement to collaborate as Nexteer's partner in a joint-venture that had the effect of substantially upgrading its overall system, (See Compl ¶ 134 and Ex 4);
- Under that agreement, Mando could not use the information it learned for any purpose other than advancing the two companies' joint interest in that venture, (135-142);
- Prior to and during the agreement, the proprietary software and electronics in Nexteer's Modular Power Pack (which is a key technology that cannot be legitimately reverse-engineered) and its Electronic Power Steering System gave it a unique competitive advantage that made it the leading North American supplier of EPS systems, (23-25, 92-93);
- Mando and the Individual Defendants misused the joint-venture and confidentiality agreement in a disloyal scheme to take that technology and the particular business relationships and expectancies that went with it, (120, 124, 148, 152); and
- The background circumstances suggest an unethical and wrongful scheme, including that after Mando lost a project to Nexteer, it used the joint-venture relationship to heavily recruit Nexteer's key employees, to tailor its job descriptions to fit employees that it only learned about through that relationship, and to encourage those key employees to violate their non-solicitation agreements with Nexteer by recruiting fellow employees, (123, 127-132, 150).

With due respect, this is not mere "background". Rather, the NDA/joint venture is an integral part of Nexteer's current dispute with Mando. Indeed, these allegations form necessary elements of Nexteer's misappropriation and tortious interference claims, without which they would have been subject to dismissal. *CMI Int'l, Inc v Internet Int'l Corp*, 251 Mich App 125 (2002). Accordingly, the court concludes that the present dispute is "arising out of or in relation to" the NDA.

To the extent that some of Nexteer's claims may not be as clearly subject to the NDA arbitration agreement as others, the court notes the strong public policy in favor of arbitration of all related disputes.

The policy in favor of this expeditious alternate to the judicial system is thwarted if all disputed issues in an arbitration proceeding must be segregated into categories of “arbitrable sheep and judicially-triable goats”. * * *

It is to prevent this dissection of claims that [courts] liberally construe arbitration clauses resolving all doubts about the arbitrability of an issue in favor of arbitration. [*Detroit Automobile Inter-Insurance Exchange v Reck*, 90 Mich App 286, 289-290 (1979) (internal citations and quotations omitted)]

Thus, “there is a presumption of arbitrability unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *Amtower v William C Roney & Co (On Remand)*, 232 Mich App 226, 234-235 (1998). Here, there is nothing in the arbitration agreement expressly exempting any portion of Nexteer’s present claim from arbitration. As observed in *First Options of Chicago, Inc v Kaplan*, 514 US 938, 945 (1995) (internal citation omitted),

the parties likely gave at least some thought to the scope of arbitration. And, given the law’s permissive policies in respect to arbitration, one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter.

There being an arbitration agreement between Nexteer and Mando, with disputed issues appearing within the contract’s arbitration clause, and there being no exemption of any dispute by the terms of the contract, the court concludes that Nexteer’s claims are arbitrable.

Non-signatories

An agreement to arbitrate is a matter of contract. *City of Ferndale v Florence Cement Co*, 269 Mich App 452, 458 (2006). It goes without saying that a contract cannot bind a nonparty. *EEOC v Waffle House, Inc*, 534 US 279, 294 (2002). However, nonsignatories may nonetheless be bound to an arbitration agreement under ordinary contract and agency principles such as incorporation by reference, assumption, agency, veil-piercing/alter-ego, and estoppel. *Javitch v First Union Securities, Inc*, 315 F3d 619, 628-629 (CA 6, 2003).

Here, where, according to Nexteer, “the individual defendants surreptitiously worked together while Mando was Nexteer’s partner, and the individual defendants were Nexteer’s employees to create a competing operation and that spawns a lot of claims”, extending arbitration to claims against non-signatories appears appropriate under ordinary agency principles.

Moreover, the individual defendants have expressly consented to arbitration of Nexteer’s claims against them.²

² See Individual Defendants’ Supplemental Brief Regarding Mando’s Motion to Arbitrate.

Waiver

A waiver is a voluntary and intentional abandonment (or relinquishment) of a known right. *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374 (2003); *Simms v Bayer Healthcare LLC*, __ F3d __ (CA 6, 2014)³. However, as observed in *Burns v Olde Discount Corp*, 212 Mich App 576, 582 (1995) (citations omitted),

[W]aiver of a contractual right to arbitration is not favored. A party arguing there has been a waiver of this right bears a heavy burden of proof. The party must demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with the right to arbitrate, and prejudice resulting from the inconsistent acts.

Here, the November 25, 2013 Case Management Order (the “CMO”) provides:

17. **Arbitration** [MCL 691.1681 et seq., MCR 3.602]: An agreement to arbitrate this controversy does not exist is unknown exists is/will be the subject of a timely motion is waived is not applicable

This provision was the result of telephone conference discussions with then-counsel of record, and was entered only after circulation to counsel for review and comment. It documented counsels’ acknowledgement of the existence of the NDA’s arbitration provision, but collectively, consciously concluded that it did not apply to the present litigation.

Mando, however, argues (1) its then-attorneys did not sufficiently understand, (2) the CMO was only preliminary, (3) the CMO did not indicate that arbitration was “waived”, (4) the CMO expressly reserved any decision on ADR, and (5) the case was not then sufficiently developed to be able to see how the arbitration agreement applied. With due respect, the court finds the arguments disingenuous.

First, Mando’s Michigan attorneys are professional, respected, knowledgeable, experienced business/commercial trial attorneys. Moreover, these able local advocates have, from the beginning, been supplemented by Mando’s Georgia-based corporate counsel (admitted to appear in this case by special Order) who is uniquely positioned to appreciate the client’s history with Nexteer.

Second, the CMO, quite intentionally, occurs in the early stages of litigation. However, as contemplated by MCR 2.401(B), it is intended to facilitate the long-term progress of the case. By opening the document with “the court being preliminarily advised of the following”, the court did not make a “preliminary” Order but, rather, merely documented the parties’ “preliminary” statement of their claims, defenses, relief requested, and stipulated facts/documents, that then formed the foundation for the following court orders. Mando has demonstrated nothing in the course of the case management conference, and nothing in the resulting CMO, limiting its context or application. It is, for a reason, denominated a “case” management order.

³ *Simms* is notable, in part, for its application of the waiver doctrine in the context of a trial court’s case management order; although, unlike here, the objection was not raised until the end of the process.

Third, the CMO did not indicate that arbitration “is waived” because waiver assumes an applicable arbitration agreement existed. Here, the parties agreed the arbitration agreement “exists” but that it “is not applicable”. It would seem inconsistent to “waive” an agreement that is “not applicable”.⁴

Fourth, although paragraph 18 of the CMO provides “This case is not presently being submitted to any form of ADR, but may be subsequently”, the provision is prefaced by reference to MCR 2.410 which governs forms of alternative dispute resolution that proceed ancillary to pending litigation. This is readily distinguishable from an arbitration agreement that constitutes “disposition of the claim before commencement of the action”, *MCR 2.116(C)(7)*, that is commonly governed by MCR 3.602 and, moreover, here, is specifically addressed in ¶ 17 of the CMO.

Finally, although the case management conference occurred prior to Nexteer’s amended complaint, the new pleading did not materially change the legal landscape: i.e. the amended complaint contained the same nine causes of action and the abundant references to and attachment of the NDA (including its highlighted arbitration clause).

Admittedly, no party raised the CMO’s application to Mando’s present motions. Nonetheless, the court was and remains legitimately concerned with the integrity of a process that regularly depends on counsels’ representations. The matter was discussed during the conference and all participating attorneys agreed the NDA’s arbitration provision did not apply. The Order was circulated to counsel before signature. Even upon opportunity to reflect, no objections were received.

However dismayed, the court recognizes that an effective waiver requires not only “knowledge of an existing right to compel arbitrate, [and] acts inconsistent with the right to arbitrate, [but, also] prejudice resulting from the inconsistent acts.” *Burns, supra*.

Here, Nexteer argues prejudice is manifested by its reliance on Mando’s “waiver” and its investment of “tens of thousands of dollars or more to prepare briefs and motions to be filed in this [case]” (Nexteer’s Supplemental Brief As To Mando’s Waiver of Arbitration, pp 3-4). The court appreciates Nexteer’s concern over the cost of commercial litigation, particularly in this case where each corporate party, including Nexteer, has elected to engage multiple law firms. Hopefully, Nexteer may find some consolation in arbitration’s ability to bring “final disposition of differences between parties in a faster, less expensive, more expeditious manner than is available in ordinary court proceedings.” *Joba Const Co, Inc v Monroe Cnty Drain Com’r*, 150 Mich App 173, 179-180 (1986). In any event, the case has not yet wholly emerged from the pleading stage, and discovery in this complex case remains embryonic. Under the circumstances, the court is not persuaded Nexteer has suffered prejudice sufficient to overcome a presumption in favor of arbitration. *Hurley v Deutsche Bank Trust Company Americas*, 610 F3d 334 (CA 6 2010)⁵; *Madison District Public Schools v Myers*, 247 Mich App 583 (2001)⁶.

⁴ Indeed, as the court recalls, the original Case Management Order template had to be modified -- with insertion of a new option, “is not applicable” -- to account for the unusual circumstances of this case where, although counsel recognized the existence of the NDA, they collectively concluded it did not apply.

⁵ In *Hurley*, the federal appellate court affirmed the district court’s determination that the defendant waived its agreement to arbitrate by actively participating in litigation for over two years and waiting until after the court

Leave to Amend Answer

Nexteer argues that its present claims are outside the scope of the NDA's arbitration clause and, accordingly, allowing Mando to amend its answer to interpose it as an affirmative defense would be an unjustified exercise in futility.

However, as analyzed above, the court concludes that Nexteer's claims are arbitrable. Accordingly, in the absence of a persuasive reason to the contrary, MCR 2.118(A)(2) requires Mando be afforded the opportunity to amend its answer to Nexteer's first amended complaint. *Weymers, supra*.

Relief

In addition to requesting leave to file an amended answer to interpose the arbitration agreement, Mando's motion also requests the court enter Orders to (1) compel Nexteer arbitrate its claims, and (2) stay this litigation pending the completion of arbitration.

With regard to compelling arbitration, § 4 of the FAA, 9 USC § 4, provides:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. * * * The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. * * * ^[7]

And with regard to staying litigation pending conclusion of arbitration proceedings, § 2 of the FAA, 9 USC § 3, provides:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an

entered an unfavorable decision, but also causing the plaintiff actual prejudice by incurring costs attendant to extensive discovery, four summary judgment motions, and a change of venue.

⁶ In *Madison*, where the plaintiff extensively litigated its claims for 20 months (but which ultimately suffered dismissal of its complaint) before demanding arbitration under the parties' pre-existing written agreement, the appellate court deemed the elements of waiver clearly established and concluded, "We will not sanction plaintiff's utilization of the court system, with its scarce resources, merely to test the judicial waters until it received an unfavorable ruling . . ."

⁷ The MUA, § 7, MCL 691.1687, similarly provides:

- (1) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate under the agreement, the court shall do both of the following:
 - (a) If the refusing party does not appear or does not oppose the motion, order the parties to arbitrate.
 - (b) If the refusing party opposes the motion, proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.^[8]

Accordingly, the court being satisfied that the issues involved in this litigation are within the scope of the NDA's arbitration clause, and Nexteer having indicated a "failure, neglect, or refusal" to arbitrate under a written agreement for arbitration, it appears appropriate to enter an order directing such arbitration proceed; and, pending completion of the arbitration, to stay trial of Nexteer's claims.⁹

Conclusion

Mando requests leave to file an amended answer to interpose Nexteer's written agreement to arbitrate "any dispute, controversy or claim arising out of or in relation to" the parties' prior joint venture, and to then compel arbitration and stay litigation of Nexteer's claims. Nexteer demurs, asserting that the present litigation falls outside the scope of its agreement to arbitrate.

The court concludes that (1) Nexteer's claims are arbitrable, (2) Mando should be granted leave to file its proposed amended answer, (3) Nexteer's claims should be referred to arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce (per the NDA, but to be conducted within the Eastern District of Michigan in accordance with the FAA), and (4) the present litigation of Nexteer's claims should be stayed.

Upon presentment in accordance with MCR 2.602(B), the court will sign an Order that comports with this opinion.

Date: July 10, 2014

/s/ (P27637)
M. Randall Jurrens, Circuit Judge

⁸ The MUAA, § 7, *MCL 691.1687*, similarly provides:

If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim.

⁹ This stay of the litigation extends to Nexteer's claims only and does not, in and of itself, stay the individual defendants' efforts to assert counter/third-party claims against Nexteer and Messrs. Lubischer and Bresson. Those claims are not formally before the court and, if not placed into the arbitration process and/or stayed by the parties' stipulation, remain an open subject at this time (particularly in light of the recently filed Counter/Third-Party Plaintiffs' First Amended Counterclaim and Third-Party Complaint Against Nexteer Automotive and Third-Party Defendants). In this regard, the court notes the "First Five" have signaled their willingness to "stipulate to stay their Amended Counterclaim pending the resolution of the arbitration so as to avoid litigating the same claims simultaneously in separate forums" (see Individual Defendants' Supplemental Brief Regarding Mando's Motion to Arbitrate, p 2). However, in the absence of a formal stipulation or other appropriate action to resolve this open question, the court anticipates conferring with applicable counsel in the near future.