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.
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Case No. 13-021401-CK

Judge: M. Randall Jurrens (P27637)

OPINION AND ORDER DENYING NEXTEER'S MOTION FOR RECONSIDERATION OF ORDER GRANTING MANDO'S MOTION FOR LEAVE TO FILE AMENDED ANSWER AND TO COMPEL ARBITRATION OF ALL CLAIMS

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Six months after being summoned to defend this substantial commercial case, Mando requested leave to file an amended answer to assert and compel enforcement of a pre-existing arbitration agreement with Nexteer.

Following oral arguments and extensive briefing, the court issued its Opinion granting Mando's motion on July 10, 2014.

The parties subsequently submitted, and the court signed on August 22, 2014, a Stipulated Order comporting with the court's Opinion.

On September 12, 2014, Nexteer filed a motion for reconsideration under MCR 2.119(F):

(1) Unless another rule provides a different procedure for reconsideration of a decision (see, e.g. MCR 2.604[A], 2.612), a motion for rehearing or reconsideration of the decision on a motion must be served and filed not later than 21 days after entry of an order deciding the motion.
(2) No response to the motion may be filed, and there is no oral argument, unless the court otherwise directs.
(3) Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

Nexteer asserts the court erred in several ways.

Individual Defendants' Contracts Do Not Contain An Arbitration Provision

Nexteer complains that, while the "[t]he crux of this case involves Nexteer's contractual and common law relationship with [the individual defendants]"[1], the court did not sufficiently consider the lack of an arbitration clause in their employment contracts.

Although discussion of this issue was admittedly limited in the court's Opinion (p 10), the court did not intend to convey a lack of appreciation for the fact that the individual defendants are not signatories to the NDA. Rather, while fully recognizing that contracts do not generally bind non-signatories, *EEOC v Waffle House, Inc*, 534 US 279, 294 (2002), the court explained inclusion of claims against the individual defendants was warranted under ordinary agency principles. *Javitch v First Union Securities, Inc, 315* F3d 619, 628-629 (CA 6, 2003).

Court Misled Regarding Availability of Discovery

Nexteer next argues the court should reconsider ordering arbitration because Mando misled the court regarding the availability of discovery in arbitration; specifically, that, "[d]espite Mando's counsel's claims during oral arguments that '[t]he parties can have depositions' in [ ] arbitration, practically speaking, this is rarely the case."

In fairness, the full text of Mando's counsel's statement to the court regarding discovery in arbitration is somewhat more circumspect than Nexteer's selective quote suggests:

> *Ms. Wald*: There is discovery in arbitration, but the onus is much more on the parties to identify what they want to rely on to prove their claim. So each side goes ahead and identifies what it – what it thinks is the most important and then

[1] With due respect, Nexteer appears to minimize what drove this case into arbitration: (1) its agreement to arbitrate "any dispute, controversy or claim arising out of or in relation to" the June 12, 2012 Non-Disclosure Agreement with Mando (the "NDA"), and (2) its dependence on NDA-related events to plead and support its central claims for threatened misappropriation and tortious interference. *CMI Int'l, Inc v Intermet Int'l Corp*, 251 Mich App 125 (2002).

> you exchange that. Then the arbitrators rule in a pretty kind of fast and dirty way, on, okay, you can each have discovery. The parties can have depositions. Its – it's not that there's no discovery, but it's not the wide ranging discovery that takes place under a kind of general question of is it, [c]ould it possibly bear on your claim? Could it possibly turn up something that one day might be relevant? And I'm not fault[ing] that discovery process, but it can be very expensive, so that's why the interest for my client. (Trans, p 41)

Moreover, further review of the June 3, 2014 hearing transcript discloses representations of the availability of broad discovery in arbitration by counsel for Nexteer:

> *Mr. Watson*: * * * [I]n most arbitrations nowadays, Judge, discovery takes place, a lot of times arbitration take longer than court proceedings and there's just as much discovery. (Trans, p 28)

> *Mr. Watson*: * * * Judge, you go to arbitration, you get the same discovery that you would get if you're in court and a lot of times it takes just as long. (Trans, p 32)

Accordingly, if, in fact, opportunity for discovery in arbitration is "rarely the case", Mando does not appear to be responsible for any misunderstanding. Moreover, regardless of the existence, source, or content of [mis]information, Nexteer has not demonstrated how a different disposition of Mando's motion must result.

Mando Affirmatively Waived Arbitration

Nexteer also asserts the court erred by not concluding Mando affirmatively waived its right to arbitrate, regardless of the absence of prejudice.

Nexteer's argument is premised on the court's "commentary" during oral argument attempting to work through the effect of counsels' prior consensus, manifested in the court's Case Management Order, that an agreement to arbitrate "exists" but "does not apply".

While the court remains concerned with the implications of this aspect of the case, Nexteer's motion provides no new argument/theory/precedent to displace the analysis supporting the court's Opinion, including the need to demonstrate prejudice as an element of waiver. *Burns v Olde Discount Corp*, 212 Mich App 576, 582 (1995).

Court Failed to Adequately Address Prejudice

Nexteer also complains that the court failed to adequately address the alleged prejudice resulting from Mando's failure to raise the arbitration agreement at an earlier stage of the litigation; particularly, when the court proceedings resulted in "dismissal of huge portions of Nexteer's claims".

In fairness, Nexteer's offerings on the subject were fairly limited (see Nexteer's Response to Mando[ ]'s Motion to Amend Answer and Compel Arbitration, p 9; Nexteer's Supplemental Brief as to Mando[ ]'s Waiver of Arbitration, pp 3-4; and Trans, p 48).

Nexteer now argues that, having demonstrated acts inconsistent with a known right to arbitrate[2], the requisite element of prejudice is established by Mando's successful dismissal (in whole or in part) of seven out of nine counts of its complaint, citing *Capital Mortgage Corp v Coopers & Lybrand*, 142 Mich App 531 (1985)[3], *Madison District Public Schools v Myers*, 247 Mich App 583 (2001)[4], and *Best v Park West Galleries, Inc*, unpublished opinion per curiam of the Court of Appeals, issued September 5, 2013 (Docket Nos. 305317 and 308085)[5].

Of the three cases, *Capital Mortgage* appears to contain the most support for Nexteer's current effort to demonstrate prejudice:

> [The defendant] waived its right to arbitration when it filed its motion for summary judgment. A motion for summary judgment indicates an election to proceed other than by arbitration. The rationale for this rule is that summary judgment is the procedural equivalent of a trial and is a judgment on the merits which bars relitigation on principles of res judicata. We find [the defendant's]

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[2] While the court's Opinion focused singularly on Mando's participation in the November 22, 2013 case management conference, and the resulting Case Management Order, it is worth noting that, prior to filing a May 8, 2014 motion to amend answer and compel arbitration, Mando's counsel also, without limitation, filed a December 18, 2013 Motion for Dismissal, participated in a December 20, 2013 status conference, and participated in an April 4, 2014 status conference.

[3] In *Capital Mortgage*, the defendant accounting firm was sued by a client for failing to detect and disclose employee embezzlement. The defendant successfully moved to add the client's insurer as a party plaintiff, and then prevailed on the trial court to send the insurer's claims to arbitration pursuant to a pre-existing arbitration agreement.

[4] In *Madison Public Schools*, at 589-600, the appellate court expressly addressed the element of prejudice, albeit in the context of a plaintiff's belated request for arbitration following the defendant's successful motion for summary disposition on the basis of a release, *MCR 2.117(C)(7)*:

> We find that after expending time and resources to defend himself in litigation against plaintiff's complaint, which sought to enforce the settlement agreement according to the parties' alleged intent, and obtaining a dismissal of plaintiff's complaint on its merits, defendant certainly would endure unfair prejudice were he forced to submit to plaintiff's long-delayed demand for arbitration. *Salesin*, [*v State Farm Fire & Casualty Co*, 229 Mich App 346, 356-357 (1998)] (concluding that the plaintiff would suffer prejudice if the Court vacated the trial court's decision and referred the case to arbitration after the plaintiff expended resources to litigate the merits of the case in the trial court, and this Court, as a result of the defendant's initial refusal to arbitrate). Plaintiff's decision to litigate this matter aggressively for over 1 1/2 years before resorting to arbitration plainly defeats the purpose of arbitration, which is "the 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 Co Drain Comm'r*, 150 Mich App 173, 179-180 (1986)].

[5] In *Best*, the appellate court, not confronted by a successful summary disposition motion in the early stages of litigation but, rather, recognizing that the parties expended significant time and resources in the almost 2½ years before defendants asserted an arbitration agreement, concluded, "prejudice would result if the [ ] defendants [ ] were allowed to invoke the arbitration clause at this late stage of the litigation".

> decision to file a motion for summary judgment before its answer an election not to pursue arbitration. In any event, the act of participating in a lawsuit revoked the arbitration agreement. Accordingly, we find the lower court's decision to compel arbitration to be erroneous and reverse that order. [*Id*. at 536]

Admittedly, by focusing on Nexteer's limited assertion of prejudice -- its unelaborated claim of having invested of "tens of thousands of dollars or more to prepare briefs and motions to be filed in this [case]"[6] (Nexteer's Supplemental Brief as to Mando's Waiver of Arbitration, p 3-4) -- and not having the benefit of Nexteer's current research, the court's Opinion only minimally addressed Mando's failure to raise the arbitration agreement at an earlier stage of the litigation, and wholly omitted discussing possible prejudice resulting from "dismissal of huge portions of Nexteer's claims". But it does not necessarily follow that this omission constitutes error requiring correction.

As counsel may recall, Mando previously cited *Drexel Burnham Lambert, Inc v Mancino*, 951 F 2d 348, 1991 WL 270809 (CA 6 (Ohio))[7], and *Hofmeister Family Trust v FGH Industries, LLC*, 2007 WL 2984188 (ED Mich))[8] (Mando's Brief in Support of Motion to Amend Answer and Compel Arbitration, pp 11-12) to support its position that its delay in invoking the arbitration agreement did not produce the kind of prejudice necessary to establish wavier of its right to arbitrate.

Hofmeister is particularly notable, where, in the course of 10 months of litigation, the defendant filed several motions to dismiss (both for failure to state a claim upon which relief can be granted, *Fed R Civ P 12(b)(6)*, and for lack of genuine dispute as to any material fact, *Fed R Civ P 56*), the federal district court did not find the requisite prejudice:

> It appears that Defendants have attempted to minimize the number of counts that need to be litigated in this court or, alternatively, submitted to arbitration, through the use of pretrial motions. * * * Moreover, there is no evidence that the delay involved in Defendants' attempt to narrow the scope of the lawsuit has caused any actual prejudice to Plaintiffs.

Hofmeister, in turn, cites *Microstrategy, Inc v Lauricia*, 268 F3d 244 (CA 4, 2001)[9], a case distinguished by "remarkably aggressive" litigation strategy in the six months prior to

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[6] Nexteer never explained the nature or purpose of spending "tens of thousands of dollars or more to prepare briefs and motions to be filed in this [case]" (i.e. apparently prospective, never filed, pleadings).

[7] In *Drexel*, the federal appellate court opined that "[a] six-month interval between the filing of the state court proceeding and the Federal Arbitration Act filing does not constitute the type of actual prejudice necessary to support [a claim of waiver]".

[8] In *Hofmeister*, some 9 months after commencement of litigation, and following the defendants filing an answer and affirmative defenses (none of which asserted a right to arbitration) plus four successive motions to dismiss (as well as the plaintiff filing a motion for summary judgment), the defendants requested the court compel arbitration of specified portions of the plaintiff's claims in accord with a pre-existing arbitration agreement.

[9] In *Microstrategy*, after consolidation of two lawsuits filed by the plaintiff- employer and one lawsuit commenced by the defendant-employee, the plaintiff sought to compel enforcement of a written agreement to arbitrate any

invocation of arbitration, which emphasizes, at 249, "the dispositive question is whether the party objecting to arbitration has suffered *actual prejudice*" (emphasis in original). In this regard, "neither delay nor the filing of pleadings by the party seeking a stay will suffice, without more, to establish waiver of arbitration". *Id*.

Here, even though each case of waiver is to be decided on the basis of its particular facts, *North West Michigan Construction Inc v Stroud*, 185 Mich App 649, 651 (1990), Nexteer's argument effectively promotes adoption of a "bright line" test that, by suffering a partially successful dismissal motion, "it is indisputable that Nexteer has been prejudiced by Mando's actions". Implicitly, Nexteer argues that plaintiffs should be able to maintain (at least in arbitration) claims that are legally deficient. With due respect, without more, like the trial judge in *Hofmeister*, the court does not see how Nexteer suffers actual prejudice by having its claims limited pre-arbitration to only legitimate ones.

To the extent *Capital Mortgage* appears inconsistent with this conclusion, the court notes *Capital Mortgage* (1) does not expressly address prejudice, (2) pre-dates cases recognizing prejudice as a separate element of waiver, see *Madison District Public Schools v Myers*, 247 Mich App 583, n 1 (2001)), and (3) equates summary judgment to trial on the merits (citing *City of Detroit v Nortown Theater, Inc*, 116 Mich App 386 (1982), a case in which summary judgment was granted on the basis of res judicata), suggesting it was granted because there was no genuine issue as to any material fact (i.e. then GCR 117.2(3)[10], now MCR 2.116(C)(10)), instead of as here, where portions of Nexteer's claims were summarily dismissed on the pleadings, *MCR 2.116(C)(8)*, thus narrowing the issues to be litigated or, alternatively, submitted to arbitration.

Case Management Order Is A Contract

Nexteer also argues that, regardless of prejudice, the Case Management Order constitutes an agreement, a contract, by Mando to forego arbitration.

With due respect, it is not clear if this is merely a restatement of Nexteer's argument that Mando waived its right to arbitration, albeit in more formal, express terms (in which case a demonstration of prejudice is required, as previously discussed). Conversely, if a new theory, separate from waiver, is being promoted, Nexteer has failed to establish that a court-imposed Order constitutes a contract.[11]

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controversy or claim arising out of the employment relationship. Even though the appellate court recognized the adverse effect upon the defendant by the plaintiff's "remarkably aggressive" approach to litigation, it concluded the defendant failed to carry her "heavy burden" of establishing she suffered legally significant prejudice.

[10] The trial court proceedings in *Capital Mortgage*, commenced in 1978, would have been governed by the Michigan General Court Rules of 1963 (GCR), rather than the current Michigan Court Rules of 1985 (MCR), that were not effective until March 1, 1985, just shortly before the Court of Appeals issued its opinion on May 7, 1985.

[11] However intriguing, this argument is remarkably underdeveloped. A party cannot simply state a position and then leave it to the court to search for authority to sustain or reject that position. *Beauford v Lewis*, 269 Mich App 295, 298 (2005).

Efficiency and Judicial Economy Favor Single Proceeding

Finally, Nexteer asserts that, apparently regardless of the efficacy of any arbitration agreement, it would simply be more efficient to consolidate both its claims (against Mando and the individual defendants) with the individual defendants' claims against it and third-party defendants pending before the court.

Without more, it is not clear if this is intended as a statement of opinion, preference, prejudice, or absolute law.

In any event, the court has not been made aware of any authority directing the conclusion that the mere existence of non-arbitrable claims of non-signatories negates the court's obligation to generally honor parties' agreements to separate arbitrable claims against signatories and their agents.

Conclusion

Nexteer has requested the court reconsider its recent grant of leave allowing Mando to file an amended answer to assert a pre-existing arbitration agreement and to then compel arbitration of its claims.

To succeed, Nexteer "must demonstrate palpable error by which the court and parties have been misled and show that a different disposition of the motion must result from correction of the error", *MCR 2.119(F)(3)*.[12]

After reviewing each of Nexteer's arguments, the court is not persuaded that its Opinion is in error or that a different disposition must result. Accordingly, Nexteer's motion for reconsideration of the court's Order granting Mando's motion for leave to file an amended answer and to compel arbitration of all claims is being denied.

IT IS SO ORDERED.

Date: October 14, 2014 /s/ (P27637)
M. Randall Jurrens, Circuit Judge

[12] The court recognizes that, notwithstanding the rule's seemingly demanding language, it has considerable discretion in determining whether a grant of reconsideration is appropriate in a particular case. *Kokx v. Bylenga*, 241 Mich App 655, 659 (2000); *Fetz Engineering Co v. Ecco Systems, Inc*, 188 Mich App 362, 373 (1991).