UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO: 15-cv-22776-CMA

HENRY ZELCER,

Plaintiff,

vs.

BRENT R. MARTINI

Defendant.
_____/

DEFENDANT BRENT MARTINI'S MOTION TO DISMISS AND COMPEL ARBITRATION, OR, IN THE ALTERNATIVE, TO COMPEL ARBITRATION AND STAY PROCEEDINGS

Defendant, BRENT R. MARTINI ("Defendant" or "Martini"), by and through his undersigned counsel and pursuant to Rule 7.1 of the Southern District Local Rules, the Federal Arbitration Act, 9 U.S.C. §§1, *et seq.* (the "FAA"), and Federal Rule of Civil Procedure 12(b)(1), respectfully moves for an Order compelling Plaintiff Henry Zelcer ("Plaintiff" or "Zelcer") to arbitrate the claims brought by Zelcer in this action and dismissing the action with prejudice. In the alternative, Defendant seeks to compel arbitration and a stay of these proceedings pending the result. Defendant submits the following memorandum in support:

MEMORANDUM OF LAW

I. Introduction and Factual Background

On July 2, 2015, Plaintiff filed his nine count Complaint in the 11th Judicial Circuit in and for Miami-Dade County, Florida. The Complaint seeks (1) damages for the breach of an oral partnership agreement pertaining to the creation of Racing Sport

Concepts, LLC ("RSC") and Marzel LLC ("Marzel"); (2) damages for breach of fiduciary duty in connection with the partnership which formed those entities; (3) fraudulent inducement in obtaining certain promissory notes and mortgages in connection with capital contributions into RSC; (4) negligent misrepresentation regarding those promissory notes and mortgages; (5) rescission of the promissory notes and mortgages – which rescission is predicated on the alleged fraudulent inducement and negligent misrepresentation; (6) reformation of the promissory notes and mortgages – which reformation is predicated on the alleged fraudulent inducement and negligent misrepresentation; and (7) an accounting as to financial status of RSC and Marzel at all times during which they conducted business. DE 1-1.

According to Zelcer, in 2007 he and Martini entered a partnership agreement whereby they each made capital contributions to RSC. *Id* at ¶¶6-8. Zelcer alleges that in 2008, 2009, 2010, 2012 he made additional capital contributions into RSC due to the unprofitability of the enterprise. *Id* at ¶¶12-13, 16-17, 19-20. Zelcer further alleges that he did not have the financial wherewithal to make the capital contributions in 2008, 2009, 2010, and 2012; and instead he entered into certain promissory notes with Martini in exchange for Martini putting Zelcer's share of the additional capital into RSC. *Id* at ¶¶14, 17, and 20. The outstanding promissory notes were then rolled into a mortgage agreement which was later modified by the Parties. *Id* at ¶¶12, 28, 30.

With respect to the promissory notes, however, Zelcer alleges that (1) RSC did not need the additional capital contributions; and (2) Martini did not make his contributions as agreed. *Id* at ¶52, 72-74, 80-86, 89-92, 98-102; 106-107. As such, Plaintiff claims that the promissory notes and the mortgage backing them were induced

by fraud and negligent misrepresentation and should be rescinded or reformed. *Id* at ¶¶87-103.

Despite Plaintiff's assertion that an oral partnership agreement exists between the Parties, the Parties are actually bound by a written Operating Agreement (the "Agreement"). Exhibit A – Operating Agreement. Section 16.11(a) of the Agreement provides, "If any dispute arises between or among the Company and/or any Members with respect to the interpretation or enforcement of this Agreement, the parties agree to work in good faith to resolve such dispute or disagreement in good faith, and if they are unable to resolve the dispute, they shall submit to binding arbitration." Exhibit A at pgs. 23-24. Defendant now moves to enforce the arbitration provision of the Agreement.

II. Standard

Though the Federal Arbitration Act (the "FAA") is substantive law, it applies in diversity cases due to Congressional intent for it to so apply. *See, Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 271 (1995). Under the FAA, "[a] written provision in any… contract evidencing a transaction involving commerce to settle by arbitration a controversy… shall be valid, irrevocable, and enforceable..." 9 U.S.C.A. § 2. "In reviewing a motion to compel arbitration, a district court must consider three factors: (1) whether a valid written agreement to arbitrate exists, (2) whether an arbitrable issue exists, and (3) whether the right to arbitrate was waived." *Mercury Telco Grp., Inc. v. Empresa De Telecommunicaciones De Bogota S.A. E.S.P.*, 670 F. Supp. 2d 1350, 1354 (S.D. Fla. 2009). See also, *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). In determining whether an arbitrable issue exists, Courts are counseled "…that questions of arbitrability must be addressed with a healthy regard for

the federal policy favoring arbitration..." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

III. A Valid Written Agreement to Arbitrate Exists

a. Operating Agreement Involves Commerce

The Federal Arbitration Act (the "FAA") defines commerce as "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation…" 9 U.S.C.A. § 1. The Operating Agreement is contract evidencing such commerce.

The Operating Agreement outlines how the Members of RSC will conduct themselves in relation to one another and to RSC, which, according to Plaintiff, was "a company specializing in the manufacture and distribution of aftermarket parts for exotic European car brands such as Ferrari, Lamborghini and Aston Martin." DE 1-1 at ¶7. These aftermarket parts were shipped to clients throughout the United States and abroad. The molds used to create the aftermarket parts were purchased from suppliers throughout the United States and abroad. Further, at all times relevant hereto, Plaintiff was a resident of the State of Florida and Defendant was a resident of the State of California. (Exhibit B – Foreign LLC Filing). Thus it is readily apparent that the Operating Agreement is a contract "evidencing a transaction involving commerce" as that term is defined by the Act. *See Port Erie Plastics, Inc. v. Uptown Nails, LLC*, 350 F. Supp. 2d 659, 663 (W.D. Pa. 2004) aff'd, 173 F. *App'x* 123 (3d Cir. 2006)(concluding that Operating Agreement fell under FAA where there was (1) diversity among the members; and (2) goods produced by partnership were sold throughout the United States and abroad).

b. Operating Agreement Contains Enforceable Arbitration Provision

The first task of a court asked to compel arbitration is "to determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 626 (1985). In the instant case, the parties agreed to arbitration. In May 2007, Plaintiff and Defendant formed a California Limited Liability Company called Racing Sport Concepts LLC. *See* Ex. A at 1. In connection with the formation of RSC, the parties negotiated and entered an Operating Agreement. *Id.* Pursuant to the terms of the Operating Agreement, and in reliance on the terms contained therein, Martini contributed $300,000.00 in initial capital to the Company. *Id* at p. 6 (3.1(a)). Also pursuant to the Operating Agreement, Zelcer – but not Martini – became an employee of RSC and received a salary from RSC. *Id* at p. 13 (5.9). The Operating Agreement contains an arbitration provision that provides: "If any dispute arises between or among the Company/or any Members with respect to the interpretation or enforcement of this Agreement . . . they shall submit it to binding arbitration." *Id* at pp. 22-23 (16.11). As such, the parties have agreed to arbitration.

IV. Arbitrable Issues Exist

a. Determination of Which Claims are Arbitrable is Itself Arbitrable

The Parties have expressly agreed to allow the arbitrator decide which claims are arbitrable. Section 16.11(b) of the Operating Agreement provides, in relevant part, that "The arbitration shall be conducted in Orange County, California pursuant to the Commercial Rules of the American Arbitration Association." Ex. A at p. 24. Rule R-7(a) of the Commercial Rules of the American Arbitration Association (the "AAA") provides in turn that, "the arbitrator shall have the power to rule on his or her own

jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim."

By incorporating the Commercial Rules of the AAA, including Rule 7, into their agreement, the Parties demonstrated their unmistakable intent to allow the arbitrator to determine the threshold question of which claims fall under the scope of the arbitration provision. *See Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship,* 432 F.3d 1327, 1332 (11th Cir. 2005)(holding that where parties incorporated AAA rules into agreement to arbitrate, parties demonstrated intent to allow arbitrator to determine validity of arbitration clause); *U.S. Nutraceuticals, LLC v. Cyanotech Corp.*, 769 F.3d 1308, 1311 (11th Cir. 2014)("[W]hen parties incorporate the rules of the Association into their contract, they clearly and unmistakably agree that the arbitrator should decide whether the arbitration clause applies.")(internal quotations omitted); and *Zenelaj v. Handybook Inc.*, 2015 WL 971320, at *3 (N.D. Cal. Mar. 3, 2015)("The Court recognizes that the question of whether the incorporation of the AAA Rules is *always* "clear and unmistakable" evidence of the parties' intent to arbitrate arbitrability is not a clearly settled question of law in the Ninth Circuit. Nonetheless, the overwhelming consensus of other circuits, as well as the vast majority of decisions in this district, support Defendant's claim that, in the context of this case, incorporation of the AAA Rules effectively delegates jurisdictional questions, including arbitrability and validity, to the arbitrator.")

Because the Parties demonstrated their unmistakable intent to have the arbitrator decide issues of arbitrability, the Court here should not reach the question of which specific claims are arbitrable and should send the entire matter to arbitration.

b. Each of the Claims Presented is Arbitrable

Should this Court elect to decide which of Plaintiff's claims are arbitrable, the relevant caselaw lends overwhelming support to the proposition that all of Plaintiff's claims are arbitrable. "[T]he preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, a concern which requires that we rigorously enforce agreements to arbitrate." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985)(internal quotations and citations omitted). In enforcing such agreements, the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration…" *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765 (U.S. 1983). Thus, it has become well settled that "the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91, 121 S. Ct. 513, 522, 148 L. Ed. 2d 373 (2000).

Like arbitration clauses utilizing the language, "relating to," the arbitration clause at issue here broadly covers "any dispute" "**with respect to** the interpretation or enforcement" of the Operating Agreement. Ex. A at 23-24 (emphasis added). *See Hospicecare of Se. Florida, Inc. v. Major*, 968 So. 2d 117, 118 (Fla. 4th DCA 2007)("Clauses that use the words 'arising under' are typically interpreted narrowly, while clauses that use the words 'arising out of or relating to' are typically interpreted broadly.") In the face of such a broad and inclusive arbitration provision, the presumption in favor of arbitrability must carry the day. *See AT & T Technologies, Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986)("Such a presumption is

particularly applicable where the clause is as broad as the one employed in this case, which provides for arbitration of 'any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder....'"). Because, "the present action has its roots in the relationship between the parties which was created by" the Agreement, the claims are most assuredly arbitrable. *Merrick v. Writers Guild of Am., W., Inc.*, 130 Cal. App. 3d 212, 219, 181 Cal. Rptr. 530, 534 (Ct. App. 1982).

Even under a narrow reading of the arbitration provision, the claims are arbitrable. Relying on a narrow interpretation of the arbitration clause at issue, the Court in *Titan Mar. LLC* held that certain tort claims did not arise under the agreement containing an arbitration provision. *Cape Flattery Ltd. v. Titan Mar. LLC,* 607 F. Supp. 2d 1179, 1192 (D. Haw. 2009) *aff'd,* 647 F.3d 914 (9th Cir. 2011). In reaching the result there, the Court reasoned that because the claims did not require the fact finder to decide what the Defendant was required to do under the Agreement or whether the Defendant adequately performed under the Agreement, the claims could not be sent to arbitration. *Id* at 1191. In contrast, Plaintiffs claims here require the fact finder to determine both what the Parties were required to do and whether or not they did so.

Taken as a whole, Plaintiff's allegations amount to the following:

- Defendant was required under the partnership agreement(s) to maintain the books and records of RSC and Marzel; DE 1-1 at ¶¶44, 60
- Because he maintained custody of the books and records, Defendant was able to induce Plaintiff to make additional capital contributions into RSC despite the fact that Defendant was not making such contributions; DE 1-1 at ¶¶73-75; 80-85

- Because Plaintiff did not have liquid funds available to make the contributions, Defendant made the contributions and Plaintiff executed certain promissory notes and mortgages to repay Defendant; DE 1-1 at ¶¶ 13-14, 17, 20, 27-30
- These promissory notes and mortgages were induced by Defendant's fraudulent misrepresentation of the amount of his own contributions; DE 1-1 at ¶72
- These promissory notes and mortgages were executed based upon Defendant's negligent misrepresentations regarding the amount of his own contributions; DE 1-1 at ¶83
- The misrepresentations and fraud constitute grounds for rescission of the notes and mortgages; DE 1-1 at ¶91
- The promissory notes and mortgages are defective in that they do not represent the Parties intent to make equal contributions into the business and should therefore be reformed; DE 1-1 at ¶98-102

Each of these allegations – which are prerequisites to the causes of action to which they apply – requires the fact finder to make determinations regarding the interpretation or enforceability of the Agreement. For each claim, the fact finder must decide what the Defendant was required to do under the Agreement and whether the Defendant adequately performed those obligations. The claims are subject to arbitration.

i. Accounting

Plaintiff demands an accounting as to both RSC and Marzel. Based upon the allegations, it is clear that the requested Accounting relates to the interpretation and enforcement of the Agreement and is the proper subject of arbitration.

The outcome of the Accounting, in turn, will be dispositive of the remaining claims. If Martini was required under the Agreement to maintain the books and records, the Accounting will determine if he did so and either prove or disprove the claims for breach of the agreement and Martini's fiduciary duties. If Martini was required under the Agreement to contribute funds on par with Zelcer, an Accounting will determine if he did so and could serve to disprove the claims for fraudulent inducement and negligent misrepresentation. All of these claims, in turn, are necessary to Plaintiff's claims for rescission and reformation, as the notes and mortgages at issue were executed in relation to Plaintiff's capital contributions. In short, once this Court decides that the Accounting claim is arbitrable, the claims for which the Accounting is necessary are necessarily arbitrable.

In requesting the accounting, Plaintiff lumps together all of the allegations pertaining specifically to RSC together with allegations regarding Marzel and requests an accounting regarding both entities. DE 1-1 at ¶104-111. That lumping together, together with the specific allegations regarding Marzel, makes clear that the two entities were affiliated and the claims regarding each should be sent to arbitration.

ii. Breach of Oral Partnership Agreement

Plaintiff's claim for breach of an oral partnership agreement alleges that Martini breached the agreement by failing to provide promised capital and failing to accurately maintain the books and records. DE 1-1 at ¶44. Putting aside the fact that any oral agreement that may have existed between the Parties was incorporated into the written Operating Agreement, several sections of the Agreement must be interpreted in order for these claims to be decided. Section three of the Agreement denotes how capital

contributions will be made. Ex. A at p. 7. Section four of the Agreement lays out RSC's accounting practices. *Id* at pp. 7-12. Finally, section five of the Agreement designates the responsibilities of the Members. *Id* at pp. 12-14. Based upon the language of these sections, Count 1 necessarily involves a determination of the duties of the Members under the Agreement and whether they carried out those duties in accordance therewith. As such, a dispute exists between the Parties as to both the interpretation of the Agreement and the enforcement of the provisions thereof as to each Member.

As to the Marzel claim, it is clear from the allegations that the Marzel entity arose out of the pre-existing relationship between the Parties evidenced by the Agreement. RSC was formed by the Parties in 2007. DE 1-1 at ¶7. The Parties formed Marzel in 2011. *Id* at ¶21. That the two entities were affiliated is equally clear. RSC was an entity "specializing in the manufacture and distribution of aftermarket parts for exotic European car brands[.]" *Id* at ¶7. Marzel was an entity "which offered exotic vehicles for rental use." *Id* at ¶21. Plaintiff's allegations regarding the roles of the Members evidences that the agreement between the Members was markedly similar. Regarding RSC, Plaintiff alleges that he "handled the sales and operational aspects of the business" while Defendant handled the "financial management of RSC, acted as its financial officer and had custody of its books and records." *Id* at ¶¶9-10. Regarding Marzel, Plaintiff alleges that he handled "the sales and daily operational aspects of the business" while Martini "undertook to manage the financial aspects of the business." *Id* at ¶¶58, 65.

These allegations, taken together, evidence the Parties intent that they be bound by the same Operating Agreement as was agreed between the Parties with respect to the RSC entity. As such, the Marzel claims are also ripe for arbitration.

iii. Breach of Fiduciary Duty

Plaintiff alleges that "by virtue of being directors of the entity, both partners owed fiduciary duties to one another." DE 1-1 at ¶¶50, 66. Enforcement of Martini's fiduciary duty to Zelcer necessarily involves enforcement of the Operating Agreement under which those duties are given substance. *See Vianna v. Doctors' Mgmt. Co.*, 27 Cal. App. 4th 1186, 1189, 33 Cal. Rptr. 2d 188, 189 (1994)("The agreement to arbitrate 'any dispute' regarding 'enforcement' of the provisions of the contract plainly covers [Plaintiff]'s claim for breach of the covenant of good faith and fair dealing.")

iv. Fraudulent Inducement

The Agreement contains certain representations and warranties of the Members. Amongst those representations is the following:

> The Member either has a preexisting personal or business relationship with the Company of any of its Members or, by reason of his or her business or financial experience or the business or financial experience of his or her professional advisors, who are unaffiliated with and not compensated by the Company, directly or indirectly, has the capacity to protect his or her own interests in connection with this investment. The Member is able to bear the economic risk of an investment in his, her or its Interest and can afford to sustain a total loss on such investment. The nature and amount of the Member' investment in such Interest is consistent with his or her objectives, abilities and resources.

Ex. A at p. 22. A determination of what this clause means – or an interpretation of the clause – is a necessary predicate to a determination of whether Martini could have "used his superior business acumen" to prey upon Zelcer. DE 1-1 at ¶72. As such, Zelcer's claim for fraudulent inducement is arbitrable.

v. Negligent Misrepresentation

In order for the finder of fact to determine the outcome of this claim, it will first have to determine whether Martini was required to maintain the books and records of the company. DE 1-1 at ¶79. The fact finder will then have to determine whether additional capital contributions were required in order to support the business. *Id* at ¶80. Finally, the fact finder will have to determine whether the Parties (1) agreed to equal additional contributions; and, if so, (2) made equal additional contributions. *Id* at ¶81, 83. These fact finding functions relate to the interpretation and enforcement of the Agreement. As such, the claim is arbitrable. *See Titan Mar. LLC, supra* 607 F. Supp. 2d 1179, 1191.

vi. Rescission and Reformation

The promissory notes at issue are for capital contributions into RSC. DE 1-1 at ¶¶89-90. Those promissory notes are backed by certain mortgages. DE 1-1 at ¶¶27-30. Plaintiff has brought claims for both rescission and reformation of these notes and the mortgage. Taking Plaintiff's allegations as true, the notes and mortgage evidence funds Defendant states are owed for capital contributions into RSC. The Agreement, however, determines how capital contributions are to be made. Ex. A at p. 7. In order to reach the merits of these claims, the fact finder will have to interpret the Agreement and rule on the enforceability of the Agreement based upon that interpretation. As such, the claims are subject to arbitration.

V. Proceedings Should be Dismissed in Favor of Arbitration

As noted *supra,* the Parties evidenced their intent to delegate the issue of arbitrability of Plaintiff's claims to the arbitrator by incorporating the Commercial Rules of the AAA into the Agreement. Ex. A at p. 23. Where, as here, there is clear

unmistakable evidence of the parties' intent to leave the decision of arbitrability of specific claims to the arbitrator, "the Court may grant Defendant's motion to dismiss the action in favor of arbitration to allow the arbitrator to determine the arbitrability of Plaintiff's claims." *Mercury Telco Grp., Inc. v. Empresa De Telecommunicaciones De Bogota S.A. E.S.P.*, 670 F. Supp. 2d 1350, 1355 (S.D. Fla. 2009). As such, Plaintiff's entire action should be dismissed for want of subject matter jurisdiction.

In the alternative, these proceedings should be stayed until the conclusion of arbitration. Pursuant to Section 3 of the FAA, a district court must stay entire proceeding "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration" under a valid arbitration agreement. 9 U.S.C. § 3; *Klay v. All Defendants*, 389 F.2d at 1203-04; *Solymar Investments Ltd. v Banco Santander S.A.*, 2011 WL 1790116, *5 (S.D. Fla. Mar. 14, 2011). By these express terms, the FAA does not provide for the exercise of discretion by a court, but instead mandates that once a district court finds an issue in the proceedings to be arbitrable, the entire matter must be stayed pending the resolution of arbitration. *See, e.g., Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699 (11th Cir. 1992); *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987).

CONCLUSION

Based upon the foregoing, Defendant Brent Martini respectfully requests this Court enter an Order dismissing Plaintiff's claims with prejudice and compelling arbitration of the same. In the alternative, Defendant requests that this Court enter an Order compelling arbitration and staying these proceedings until such time as arbitration is completed.

CERTIFICATE OF CONFERENCE

Pursuant to Local Rule 7.1(a)(3), counsel for Defendant certifies that he has conferred with Plaintiff's counsel regarding the relief requested in this motion. Plaintiff's counsel is unable to consent to the relief requested herein given the complexity of the issues raised in the motion and the need to confer with their client regarding same.

Dated: August 6, 2015

Respectfully submitted,

By: s/ *Nathan M. Saunders*

Jonathan E. Pollard
Florida Bar No.: 83613
jpollard@pollardllc.com

Nathan M. Saunders
Florida Bar No.: 0107753
nsaunders@pollardllc.com

Jonathan Pollard, LLC
401 E. Las Olas Blvd. #1400
Fort Lauderdale, FL 33301
Telephone: 954-332-2380
Facsimile: 866-594-5731

Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a true and correct copy of the foregoing to be electronically filed on August 6, 2015. All registered counsel are to receive notice of the filing via the Court's electronic case filing system.

By: s/ *Nathan Saunders*