IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

GUY COVINGTON and RUSSELL COVINGTON,	§	
	§	
PLAINTIFFS,	§	
	§	
VS.	§	CIVIL ACTION NO. 1:10-cv-00005
	§	
ABAN OFFSHORE LIMITED, F/K/A ABAN LOYD CHILES OFFSHORE, LTD.,	§	JURY DEMANDED
	§	
DEFENDANT.	§	

ABAN OFFSHORE LIMITED'S MOTION TO
STAY PROCEEDINGS & COMPEL ARBITRATION

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TO THE HONORABLE JUDGE MARCIA A. CRONE:

Aban Offshore Limited, f/k/a Aban Loyd Chiles Offshore Ltd. ("Aban") files this Motion to Stay Proceedings & Compel Arbitration of its claims against Guy and Russell Covington (jointly and severally "the Covingtons" or "Defendants"), respectfully showing the Court as follows:

I. INTRODUCTION

1. This dispute comes before the Court in an unusual procedural posture. Typically it is the defendant who seeks to compel arbitration of a plaintiff's claims. In this case, the Defendants, the Covingtons, are resisting arbitration and it is the Plaintiff, Aban, who seeks to compel the Covingtons to engage in arbitration. What makes this case even more peculiar is that the Covingtons have, on behalf of their company, Beacon Maritime, Inc. ("Beacon"), already

sought and obtained an order from another federal court compelling Aban to arbitrate these claims. Their maneuvering can only be described as procedural gamesmanship intended to avoid addressing the merits of Aban's claims and delay the resolution of this dispute. Aban asks the Court to find that the Covingtons are bound by the arbitration provision at issue and compel Aban's claims against them to arbitration.

II. RELEVANT PROCEDURAL HISTORY[1]

2. Russell and Guy Covington are, respectively, President and Vice President of Sales & Marketing of Beacon. Russell Covington is also a director of the company.

3. Aban entered into a contract ("Agreement") with Beacon under which Beacon agreed to refurbish a jack-up offshore drilling rig owned by Aban called the ABAN VII. A dispute developed and on March 7, 2008 Aban filed suit against Beacon for breach of contract, breach of express warranty for services, breach of implied warranty of good and workmanlike services, negligence, gross negligence, negligence per se, negligent misrepresentation, negligent hiring and supervision, common law fraud, fraud in the inducement and for an accounting. That case, Civil Action No. 4:08-cv-00761, was filed in the Southern District of Texas, Houston Division (the "Houston Federal Court Action") and was assigned to the Honorable Judge Vanessa Gilmore. *See* Notice of Removal [Doc. # 1] at ¶ 2.

4. The Agreement contains an arbitration provision. On April 22, 2008 Beacon filed in the Houston Federal Court Action a motion to dismiss Aban's complaint and to compel arbitration of the dispute. Notice of Removal [Doc. #1] at ¶ 3. On June 20, 2008, Judge Gilmore granted the motion to compel arbitration and denied the motion to dismiss as moot. *Id.* She

[1] The procedural history set forth herein restates the relevant procedural history in Aban's Notice of Removal. It is reproduced in this motion for the Court's convenience.

further administratively closed the Houston Federal Court Action but granted leave for the parties to reinstate the case at the conclusion of the arbitration proceedings. *Id*.

5. The parties engaged in settlement discussions and mediation after they were ordered to arbitrate. On February 13, 2009, Aban notified Beacon that settlement negotiations had reached and impasse and initiated an arbitration proceeding (the "Arbitration") alleging the same causes of action and the same amount in controversy that were at issue in the Houston Federal Court Action, including claims of fraud and fraudulent inducement. Notice of Removal [Doc. #1] at ¶ 4.

6. Russell and Guy Covington engaged in, authorized or ratified the wrongful conduct which forms the basis of Aban's fraud claims against Beacon. Thus, on June 5, 2009, Aban amended its Arbitration complaint to name the Covington's individually as respondents. Notice of Removal [Doc. #1] at ¶ 5. Both of the Covingtons filed an answer to Aban's First Amended Complaint in the Arbitration proceeding. Notice of Removal [Doc. #1] at ¶ 3.

7. More than six months after being named as respondents in the Arbitration, on November 20, 2009 the Covingtons filed suit against Aban in Orange County State District Court in Case No. A-090-627-C; *Guy Covington, et al v. Aban Offshore Limited*; In the District Court of Orange County, Texas, 128th Judicial District. Aban removed the case to this Court on January 7, 2010. Notice of Removal [Doc. #1].

8. On December 21, 2009 the Covingtons also filed a motion to stay the Arbitration on the grounds that the Covingtons are not bound by the arbitration clause at issue. On January 12, 2010, the Arbitration panel granted, in part, the Covingtons motion to stay pending a ruling from a court on the question of whether the Covingtons are, indeed, bound by the arbitration provision. Def. Ex. 8, Order Staying Arbitration.

III. STATEMENT OF UNDISPUTED MATERIAL FACTS

9. The following material facts are undisputed:

- On or about September 15, 2005, Aban and Beacon executed the Agreement attached hereto as Exhibit 1.

- Guy Covington executed the Agreement on behalf of Beacon as it Vice President. Def. Ex. 1, Agreement at p. 13.

- Guy Covington was employed as the Vice President of Sales & Marketing of Beacon on September 15, 2005, and he does not assert that his employment has been terminated or that has held any other position with Beacon since then. *See* Def. Ex. 2, Guy Covington Aff. at ¶ 2.

- Russell Covington was employed as the President of Beacon on September 15, 2009, and he does not assert that his employment has been terminated or that has held any other position with Beacon since then. *See* Def. Ex. 3, Russell Covington Aff. at ¶ 2.

- Russell Covington has been a director of Beacon during the relevant time period. *See* Def. Ex. 4, Beacon Franchise Tax Public Information Reports filed in 2004-2007.

- Russell and Guy Covington did not sign the Agreement in their individual capacities.

- The Agreement contains a mandatory arbitration clause. Def. Ex. 1 at Article XX, p. 12.

- Russell and/or Guy Covington authorized Beacon to file, and Beacon did file, a Motion to Dismiss and Compel Arbitration of Aban's claims in Civil Action No. 4:08-cv-00761; *Aban Offshore Limited v. Beacon Maritime, Inc*.; In the United States District Court for the Southern District of Texas, Houston Division ("Houston Federal Court Action"). Def. Ex. 5.

- Beacon's Motion to Compel Arbitration was granted. Def. Ex. 6.

- Aban and Beacon are currently engaged in an Arbitration proceeding that was filed on February 13, 2008.

- On June 5, 2008, Aban asserted claims in the Arbitration against the Covingtons alleging that they knowingly and negligently made false

representations of material facts to Aban and are individually liable to Aban therefor. *E.g.*, Def. Ex. 7, Aban First Am. Arb. Compl. at ¶¶ 8-11, 15-17, 45-48, 52-61, 65-69.

IV. STATEMENT OF THE ISSUES

10. The sole issue herein is whether the Covingtons are bound by the arbitration clause in the Agreement when the claims alleged against them individually are based on their conduct in the course and scope of their employment with Beacon.

V. SUMMARY OF THE ARGUMENT

11. The Covingtons are bound by the arbitration clause in the Agreement because (i) there exists a valid agreement to arbitrate, (ii) even as non-signatories to the arbitration agreement, the Covingtons are bound by the arbitration clause under ordinary principles of state contract law, and (iii) the policies underlying the Federal Arbitration Act, as we all principles of judicial economy and efficiency, weigh heavily in favor of compelling the Covingtons to arbitration.

VI. ARGUMENT AND AUTHORITIES

12. The transaction between Aban and Beacon involves interstate commerce, and Aban and Beacon agreed that the Federal Arbitration Act ("FAA") would govern all disputes arising under or relating to the Agreement. Def. Ex. 1, Agreement at Article XX, p. 12. The Arbitration now pending between Beacon and Aban is being conducted pursuant to the FAA.

A. APPLICABLE STANDARDS

13. There is a long-standing national policy, embodied in FAA, in favor of arbitrating disputes. *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984). This policy is so strong that the Supreme Court has held that "any doubts concerning the scope of arbitrable issues should be

resolved in favor of arbitration. . . ." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24-25 (1983) (emphasis added). Orders on motions to compel arbitration are reviewed *de novo*. *Safer v. Nelson Financial Group, Inc.*, 422 F.3d 289, 293 (5th Cir. 2005).

1. Validity of Arbitration Agreement

14. When a party applies for an order staying proceedings and compelling arbitration, the court must determine two things. First, it must decide whether there is a valid agreement to arbitrate between the parties. *Safer*, 422 F.3d at 293-294. "Disputes over the validity of agreements to arbitrate are analyzed under ordinary state law principles of contract construction." *Jureczki v. Banc One Texas, N.A.*, 252 F.Supp.2d 368, 371 (S.D. Tex. 2003) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995)). *See also Neal v. Hardee's Food Systems, Inc*., 918 F.2d 34, 37 n. 5 (5th Cir. 1990). In this case, the parties agreed that the contract would be governed by Texas state law and the Agreement was executed and performed in Texas, *see* Def. Ex. 1, Agreement at XVIII, p. 11, so the Court should apply the laws of Texas as interpreted by the Texas Supreme Court. *Id*. *See also Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 355 (5th Cir. 2003) (quoting *McCarthy v. Azure*, 22 F.3d 351, 355 (1st Cir. 1994)) (noting that federal common law "dovetails precisely with general principles of contract law"). Naturally, "the judicial task in construing a contract is to give effect to the mutual intentions of the parties." *Bridas*, 345 F.3d at 355 (quoting *McCarthy v. Azure*, 22 F.3d 351, 355 (1st Cir. 1994)). In construing the Agreement before the Court, it should be remembered that "when contracting parties agree to arbitrate all disputes 'under or with respect to' a contract…they generally intend to include disputes about their agents' actions because as a general rule, the actions of a corporate agent on behalf of the corporation are deemed the

corporation's acts." *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 762 (Tex. 2006) (some internal citations omitted).

15. Though the general rule in Texas is that a non-signatory may not be required to submit to arbitration, there are a number of exceptions. *See Bridas*, 345 F.3d at 356 (identifying six theories under which non-signatories may be bound by an arbitration provision). One such exception—applicable here—is when an officer, director or employee or agent of a signatory is alleged to be individually liable under principles of contract and agency law for fraudulent and other tortious conduct. *Id.*

2. Scope of Arbitration Agreement

16. Second, a court should decide "whether the dispute in question falls within the scope of [the] arbitration agreement." *Safer*, 422 F.3d at 293-294. In conducting its analysis a court should limit its inquiry to ascertaining "only whether the arbitration clause covers the allegations at issue." *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 471 (5th Cir. 2002). The merits of the case are not to be considered. *Id.* Importantly, a claim against a non-signatory "that is based upon the same operative facts and is inherently inseparable from the claims against a signatory will always contain issues referable to arbitration under an agreement in writing. . . ." *Hill v. G E Power Systems, Inc.*, 282 F.3d 343, 347 (5th Cir. 2002) (citing *Moses H. Cone*, 460 U.S. 1, 24-25) (internal quotations omitted).

B. THERE EXISTS A VALID AGREEMENT TO ARBITRATE

17. The Fifth Circuit has said that "so long as there is *some* written agreement to arbitrate, a third party may be bound to submit to arbitration." *Bridas*, 345 F.3d at 355 (emphasis in original). As noted, Judge Gilmore has already determined that there is a valid agreement to arbitrate. Def. Ex. 6, Order Compelling Arb. The issue is whether the Covingtons,

as agents of Beacon, are bound by the arbitration agreement under ordinary principles of state contract law.

1. A Non-Signatory May be Bound to Arbitrate When He is an Officer, Director, or Employee of a Signatory

18. Russell Covington is an officer (President), director, and employee of Beacon. *See* ¶ 9, *supra*. Guy Covington is the Vice President of Sales & Marketing and an employee of Beacon, and he executed the Agreement as an authorized representative of Beacon. *Id*. The Covingtons have been sued individually in the Arbitration for fraudulent and tortious acts they committed while acting in the course and scope of their employment with Beacon. Def. Ex. 7, Am. Arb. Compl. at ¶¶ 52-61. The Covingtons contend they are not bound by the arbitration clause in the Agreement merely because they are signatories to it.

19. It is a centuries-old, fundamental principle of law that a corporation's officers, directors, employees and agents can be held individually liable for tortious conduct, even when such conduct is committed in the capacity of a corporate representative. *Barclay v. Johnson*, 686 S.W.2d 334, 336-337 (Tex. App.—Houston [1st Dist.] 1988) (citing *Seale v. Baker*, 70 Tex. 283, 7 S.W. 742 (1888)). The Texas Supreme Court recently reiterated this principle in *In re Merrill Lynch Trust Co. FSB*, where it explained:

> Corporations can act only through human agents, and many business-related torts can be brought against either a corporation or its employees. If a plaintiff's choice between suing the corporation or suing the employees determines whether an arbitration agreement is binding, then such agreements have been rendered illusory on one side.

235 S.W.3d 185, 188-189 (Tex. 2007).

2. A Reasonable Construction of the Agreement Forces the Conclusion That the Covingtons Are Bound by the Arbitration Clause

20. The arbitration clause at issue provides that "all disputes arising hereunder"[2] shall be submitted to arbitration. Def. Ex. 1, Article XX, p. 13 (emphasis added). Despite the unambiguous nature of the this language, the Covingtons position appears to be that the phrase "all disputes arising hereunder" can reasonably be interpreted, and should be interpreted, to mean that the parties intended to engage in duplicate litigation in different forums, where claims against the entity proper would have to be filed in arbitration, but claims against the entity's agents acting in the course and scope of their employment could be brought only in a court. As noted by the Texas Supreme Court such an interpretation would be a strained one, at best. *In re Vesta Ins. Group, Inc*., 192 S.W.3d at 762. ("when contracting parties agree to arbitrate all disputes 'under or with respect to' a contract…they generally intend to include disputes about their agents' actions because as a general rule, the actions of a corporate agent on behalf of the corporation are deemed the corporation's acts."). In fact, there is no clear intention expressed on the face of the Agreement to carve out an exception for claims against a party's employees that are factually intertwined with claims against an entity. Aban submits that the Covingtons suggested construction of the phrase "all disputes arising hereunder" is patently unreasonable. There are, at the very least, doubts as to the arbitrability of Aban's claims against the Covingtons. Because "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *Moses H. Cone*, 460 U.S. at 24-25, the Court should rule that Aban's claims against the Covingtons should be sent back to the pending Arbitration.

[2] The Agreement contains a lengthy description of pre-suit dispute resolution efforts that must be taken prior to filing arbitration.

3. *In re Merrill Lynch Trust Co. FSB*

The rationale of the *Merrill Lynch* case is instructive. 235 S.W.3d 185. In that case, investor plaintiffs whose contracts with Merrill Lynch contained arbitration provisions sought to avoid arbitration by suing one of Merrill Lynch's financial advisor employees in state court rather filing a claim against the Merrill Lynch corporate entity. The plaintiffs argued that claims against the advisor could be brought in state court because that employee was not a party to, *e.g.*, did not personally sign, the arbitration agreement. The Texas Supreme Court held that the plaintiffs' claims were subject to the arbitration clause in spite of the fact that the employee was not personally a signatory to the agreement. The court reasoned that "[i]f arbitration clauses only apply to contractual signatories, then this intent can only be accomplished by having every officer and agent (and every affiliate and its officers and agents) either sign the contract or to be listed as third-party beneficiary." *Merrill Lynch*, 235 S.W.3d at 188-189 (parenthetical in original). This, the court said, "would not place such clauses on an equal footing with all other parts of a corporate contract." *Id.* In other words, "[i]f a plaintiff's choice between suing the corporation or suing the employees determines whether an arbitration agreement is binding, then such agreements have been rendered illusory on one side." *Id.*

21. The same rationale applies here. If Aban is prohibited from enforcing its rights against the Covingtons in a pending arbitration against their employer for actions they took in the course and scope of their employment, then the arbitration clause is illusory. We know that the parties obviously did not intend such a result given that one federal court has already ruled the clause is valid and enforceable and has, accordingly, referred the case to arbitration. Def. Ex. 6, Order Compelling Arb.

C. ABAN'S ALLEGATIONS AGAINST THE COVINGTONS "ARISE UNDER" THE AGREEMENT

22. The arbitration clause in the Agreement at issue herein provides that "all disputes arising hereunder" shall be submitted to arbitration. Def. Ex. 1, Agreement at Art. XX, p. 12. Tort claims can "arise under" a contract such that they are subject to an arbitration clause. *E.g.*, *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 847-856 (2d Cir. 1987) (RICO claims, Robinson-Patman Act claims, common law fraud claims, unfair competition claims, and unjust enrichment claims held to be arbitrable because they arose under an arbitration agreement). Aban has alleged that the Covingtons engaged in tortious conduct for which they may be individually liable. For example, Aban has alleged that the Covingtons knowingly made numerous false representations of material facts, including, without limitation, misrepresentations relating to (i) the work performed, (ii) the cost of the project, (iii) Beacon's ability to plan, staff, and supervise the project; and (iv) Beacon's experience and ability to undertake a job of this magnitude. Def. Ex. 7, Aban Am. Arb. Compl. at ¶¶ 52-56. *See also id.* at ¶¶ 45-48 and 57-61. Aban further alleged that the Covingtons knowingly made such false representations with the intent and for the purpose of deceiving Aban and to induce Aban into the Agreement in order to get the work and Aban's money, and that Aban relied on the Covingtons representations to their detriment. *Id.* Aban's allegations against the Covingtons clearly "arise under" the Agreement.

D. PRINCIPLES OF JUDICIAL ECONOMY & EFFICIENCY FAVOR JOINING THE COVINGTONS IN THE ARBITRATION

23. As noted, Aban's dispute with Beacon and the Covingtons are one and the same. It would be antithetical to the principles and policies of judicial economy and efficiency underlying the FAA to require Aban to litigate its claims against Beacon in the Arbitration, but

force it to enforce its rights against the Covingtons which are inherently inseparable from the claims against Beacon, in a separate forum. Not to mention, there is the attendant risk of inconsistent outcomes if the same dispute is litigated in two forums. Moreover, a finding that the Covingtons are not required to participate in the Arbitration would effectively give them two bites at the proverbial apple: if there is a favorable outcome for Beacon in the Arbitration, the Covingtons would argue that *res judicata* and *collateral estoppel* principles bar Aban's claims against the Covingtons in court, and if the Arbitration outcome is unfavorable then the Covingtons would have a roadmap to prepare for the second case. Both outcomes waste judicial resources and would unfairly prejudice the rights of Aban.

VII. CONCLUSION

24. Aban's claims against the Covingtons individually are based on the same operative facts as its claims against Beacon, and they are "inherently inseparable" from its claims against Beacon. *See Hill*, 282 F.3d at 347. Aban's claims against the Covingtons thus contain issues referable to arbitration. *Id*. A reasonable construction of the arbitration provision at issue compels the conclusion that Aban's claims against the Covingtons should be heard in the pending Arbitration.

WHEREFORE, PREMISES CONSIDERED, Aban respectfully requests that the Court grant this motion to stay proceedings and compel arbitration; declare that the Covingtons are bound by the arbitration agreement at issue herein; issue an order staying proceedings and referring Aban's claims against the Covingtons to arbitration; grant to Aban all necessary and reasonable attorney's fees pursuant to section § 37.009 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE, and grant to Aban all other relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2010, a copy of the above and foregoing pleading has been served on all counsel of record via the ECF system or otherwise in accordance with the FEDERAL RULES OF CIVIL PROCEDURE as follows:

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