IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NATIONWIDE MUTUAL INSURANCE COMPANY, Petitioner, v. LIBERTY MUTUAL INSURANCE COMPANY, Respondent.	)	Civil Action No. 13-cv-12910-PBS **LEAVE TO FILE GRANTED ON JANUARY 23, 2014**

Petitioner's Reply-Memorandum of Law in Continued Support of Its Petition to Compel Arbitration

INTRODUCTION

Liberty Mutual Insurance Company's ("Liberty") Opposition to Nationwide Mutual Insurance Company's ("Nationwide") Motion to Compel Arbitration is notable for what it doesn't argue. First, it does not assert that the present dispute is not arbitrable or subject to the parties' broad arbitration clause. That is because it cannot. The relevant treaties require that "any dispute arising out of the Agreement" shall be arbitrated. Nationwide's demand for arbitration on the issue of whether Liberty breached its obligations under the Access to Record's provision falls within this broad arbitration agreement. Second, it does not argue that this Court lacks jurisdiction to hear or decide this issue. Instead, it suggests that, despite the fact that there is valid diversity jurisdiction, this Court could dismiss or stay this action under the *Colorado River* abstention doctrine. However, in the instant dispute, this limited exception does not

impact this Court's virtually unflagging obligation to exercise the jurisdiction given it. Finally, Liberty does not oppose in any way this Court's authority to, or even the propriety of, ordering the parties to arbitrate the present dispute. The Federal Arbitration Act ("FAA") indisputably grants (actually mandates) this Court authority to issue an order directing the parties to arbitration. Such an order would also comport with the strong policy favoring arbitration.

Instead of attacking Nationwide's Petition to Compel directly, Liberty's opposition merely attempts to muddy the waters. First, Liberty attempts to convince this Court that Nationwide's arbitration demand is identical to the arbitration which Liberty confirmed, and now seeks to "enforce," in the Massachusetts Superior Court. This is not true. The Houdaille Award did not resolve all issues relating to the scope of the Access to Records clause. Nor did it grant Liberty the ability to utterly ignore its obligation under the contract terms to provide Nationwide with full and complete access to records. Any assertion that Nationwide is merely seeking a "second bite at the apple" is patently false.

Second, Liberty's opposition casts aspersions on Nationwide's alleged "forum shopping" without regard or reference to the propriety of its own conduct in the state court case, or this Court's inherent jurisdiction. Instead of filing a separate complaint in support of its effort to bypass arbitration and impose sanctions on Nationwide for its alleged violation of the Houdaille Award – a complaint that would be subject to the right of removal – Liberty filed its Motion to Enforce with the same court that confirmed the award. Presumably, Liberty proceeded in this wholly unsupported fashion because it

believed that it provided Liberty the best chance of success. In an apparent effort to distract the Court from its own forum shopping, Liberty attempts to argue that Nationwide improperly pursued its right to compel arbitration in this Court. However, Congress explicitly granted defendants in a foreign jurisdiction the right to have disputes, such as the one presently before the Court, heard in a federal district court. Exercising that right is not forum shopping.

Finally, perhaps recognizing the obligation to arbitrate the present dispute, Liberty urges this Court to bypass valid contractual obligations and appoint an umpire. However, the FAA, as it relates to arbitrator appointment, begins from the inviolate principle that the parties' agreement must be followed. Here, Liberty has failed to acknowledge the validity of the arbitration, let alone permit its "provisionally" appointed arbitrator to engage in umpire selection. Under the FAA, this circumstance calls for the Court to enforce the parties' agreement, not to appoint a third arbitrator when Liberty's actions have precluded the two party-appointed arbitrators from following the agreed upon method for selection. Therefore, Liberty's request for appointment of an umpire under these circumstances is particularly improper.

For these reasons, Nationwide respectfully requests that this Court compel arbitration and order the parties proceed with appointment of an umpire as provided by the treaties.

FACTUAL BACKGROUND

A. Nationwide's Demand for Arbitration.

On September 11, 2013, Nationwide demanded arbitration against Liberty seeking resolution of whether Liberty breached its contractual obligation to provide access to records and documents with regard to ten separate claims. (Verified Petition at ¶¶ 12-13.) The arbitration demand also sought resolution of some of the issues raised in Liberty's Motion to Enforce. Specifically, with regard to five of the present claims, Nationwide's demand raises issues relating to whether these claims were (1) properly "billed" pursuant to the terms of the Treaties and the Houdaille Award; and (2) "future" billings as specified in the Houdaille Award or whether these claims, which were billed prior to that award, do not fall within its purview.

On October 11, 2013, in compliance with its obligations under the treaty terms, Liberty appointed an arbitrator. (Verified Petition at ¶ 21.) However, Liberty has repeatedly and continually expressed its belief that Nationwide's demand is not valid. Therefore, the party-appointed arbitrators have not communicated regarding this arbitration and have not even discussed appointment of an umpire.

B. State Court Action.

In October 2013, approximately a month after Nationwide demanded arbitration, and, presumably, in an effort to avoid such an arbitration, Liberty filed an action with the Massachusetts Superior Court to confirm a June 26, 2013 order issued in connection with the Houdaille arbitration (the "Houdaille Award"). On October 29, 2013, the court confirmed the Houdaille Award.

On November 4, 2013, before the time for appeal expired, Liberty filed a motion, in the same case, seeking to "enforce" the Houdaille Award on six claims that were not the subject of the Houdaille arbitration. On November 13, 2013, recognizing that Liberty was seeking to cut-off Nationwide's right to arbitrate the parties' dispute over the new claims, Liberty's obligations under the Access to Records provision, and the prospective application of the Houdaille Award, Nationwide filed the instant Petition to Compel. Subsequently, on November 18, 2013, Nationwide filed an opposition to Liberty's Motion to Enforce.

In Nationwide's opposition, it objected to the state court's authority to decide the case on several grounds. First, Nationwide argued that the state court should stay the "enforcement" action in light of Nationwide's Petition to Compel arbitration filed with this Court. Second, Nationwide opposed the manner in which Liberty sought to enforce the Houdaille Award, asserting that Liberty was required to file a separate petition for relief, and by failing to do so, it deprived Nationwide of a myriad of procedural rights, including, the right to remove the action to federal court. Nationwide therefore requested the state court to deny Liberty's improperly submitted motion.

In the alternative, Nationwide asserted that the court should decline to decide the issues raised in Liberty's Motion to Enforce because those matters were properly subject to arbitration for one of two reasons. First, the preclusive effect of an arbitration award should be decided in arbitration; and, second, material factual differences between the Houdaille Award, and the claims upon which Liberty is seeking to enforce the award, precluded the state court from intruding upon the province of an arbitration panel.

C. The Issues in Dispute are not the "Same Access-to-Records Issues" Considered by the Houdaille Panel.

Liberty wants this Court to believe that the issues being presented to the Massachusetts Superior Court are identical to those at issue in Nationwide's present arbitration demand. This is false. Liberty's Motion to Enforce seeks an order compelling Nationwide to make allegedly past due payments on six claims Liberty rebilled after the Houdaille Award was issued, and sanctioning Nationwide for its alleged failure to comply with the Award. As noted above, the propriety of Liberty's request, as well as the format in which it was filed, has been disputed. Briefly setting that dispute aside, however, Nationwide's arbitration demand includes different claims and different issues than those addressed in either the Houdaille Award or the Motion to Enforce filed in state court. In other words, a ruling, however improper by the state court, would not vitiate Nationwide's current demand for arbitration.

In particular, Nationwide's demand for arbitration includes five claims that are not the subject of Liberty's Motion to Enforce currently pending in state court: Dexter Midland Company, Greene Tweed & Company, International Multifoods, Park Motor Sales, and The Riley Company. Liberty has failed to explain how the currently pending motion will resolve the present dispute as it relates to those additional claims. That is because it cannot.

Likewise, the dispute that led to the present arbitration demand was not resolved by the Houdaille Award. It is clear on the face of the Houdaille Award that the panel was asked to address the interplay between the "Access to Records" and "Claims Against

Reinsurers" provisions, and whether the Access to Records clause permits access to "Confidential Materials." (*See* Affidavit of Koehler Ex. A.) The Houdaille Award did not decide, however, whether Liberty's conduct with regard to the ten claims now at issue satisfied its contractual obligations, or whether, as the demand for arbitration frames the issue, Liberty has "improperly restricted Nationwide's rights to have free access to all books and records of [Liberty] and of its agents or attorneys, as required by this Article, in regard to the referenced claims, and as a result, is in breach of its contractual obligations." (*Id.* at Ex. B.) Any suggestion that the Houdaille Award fully resolved the scope of the rights and obligations under the Access to Records provision is therefore wholly misleading.

ARGUMENT

A. The FAA Directs this Court to Order the Parties' to Arbitration.

There is a strong public policy in favor of arbitration. *See Commonwealth v. Philip Morris Inc.*, 488 Mass. 836, 844 (2007). In order to enforce a party's right to have disputes resolved through arbitration, Section 4 of the FAA provides that a party "may petition any United States district court … for an order directing that such arbitration proceed in the manner provided for in [the arbitration] agreement." 9 U.S.C. § 4. Here, Liberty has not disputed that the issues raised in Nationwide's demand for arbitration fall squarely within the parties' broad arbitration clause. That is because it cannot. The Treaties require "any dispute" or any "difference of opinion" "arising" out of the Treaties to be submitted to arbitration. (Verified Petition at ¶ 11.) The present dispute clearly falls within this broad arbitration provision. Therefore, the Court should decline to

entertain Liberty's objections to this arbitration demand and instead order the parties to arbitration.

B. The Court Should Promptly Decide the Issues Before it Rather than Abdicate its Duty in Favor of the Massachusetts State Court.

Liberty erroneously argues that, based on the *Colorado River* abstention doctrine, this Court should dismiss or stay this action because the issues presented here are also before a Massachusetts Superior Court. The pendency, however, of an action in a state court is no bar to proceedings in a federal court. *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 15 (1983); *Cashman Equip. Corp. v. Kimmins Contracting Corp.*, No. 03-10463, 2004 WL 3296, at *7 (D. Mass. Jan. 5, 2004). This is true even when the state court case concerns the same matter. Federal courts have a "virtually unflagging obligation … to exercise the jurisdiction given them." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976)). It is, therefore, only in the most extraordinary of circumstances that a federal court should relinquish its properly acquired jurisdiction over a matter to a state court:

> Abstention from the exercise of federal jurisdiction is the exception, not the rule. The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is *an extraordinary and narrow exception* to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine *only in the exceptional circumstances* where the order to the parties to repair to the State court would clearly serve an important countervailing interest.

Moses H. Cone, 460 U.S. at 14 (quoting *Colorado River*, 424 U.S. at 813) (emphasis added); *see also Paul Revere Variable Annuity Ins. Co. v. Thomas*, 66 F. Supp. 2d 217, 221 (D. Mass. 1999) ("In sum, the party seeking to invoke the *Colorado River* abstention

doctrine faces a heavy burden of proving the existence of "exceptional circumstances" which justify the surrender of jurisdiction by a federal court.") aff'd sub nom. *Paul Revere Variable Annuity Ins. Co. v. Kirschhofer*, 226 F.3d 15 (1st Cir. 2000). This case does not present such extraordinary circumstances.

In deciding whether the extraordinarily narrow circumstances are present, this Court must consider and balance a number of relevant factors giving heavier weight to those favoring the exercise of jurisdiction. *See Moses H. Cone*, 460 U.S. at 16; *Colorado River*, 424 U.S. at 817 ("[o]nly the clearest of justifications will warrant dismissal"). Courts in this jurisdiction have considered the following relevant factors in determining whether the requesting party has met the "heavy burden" for abstention:

> (1) the desirability of avoiding piecemeal litigation;
>
> (2) the order in which the concurrent forums obtained jurisdiction;
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> (3) whether state or federal law controls;
>
> (4) the adequacy of the state forum to protect the parties' rights; and
>
> (5) the vexatious or reactive nature of the federal lawsuit, in other words, the plaintiff's motivation for bringing the federal case.

Paul Revere, 66 F. Supp. 2d at 220 (citing *Villa Marina Yacht Sales, Inc. v. Hatteras Yachts*, 947 F.2d 529, 532 (1st Cir.1991) ("Villa Marina II")). Liberty's cursory analysis of these factors demonstrates that it has not (and cannot) carried its heavy burden supporting abstention.

Liberty mistakenly argues that the first factor – the desirability of avoiding piecemeal litigation – weighs in favor of state court jurisdiction.[1] In support of this assertion, however, Liberty merely asserts "it makes little sense to litigate, or relitigate, the very same issue in this forum." (Opp. Mem. At 8.) The pendency of an overlapping state court suit is, however, insufficient in and of itself to justify abstention. *Paul Revere*, 66 F. Supp. 2d at 223. Indeed, a federal lawsuit should not be dismissed in deference to state litigation even when the two courts would be deciding the same issue. *Moses H. Cone*, 460 U.S. at 20-21; *Villa Marina II*, 947 F.2d at 535. Instead, "the [federal] district court must look beyond the routine inefficiency that is the inevitable result of parallel proceedings to determine whether there is some exceptional basis for requiring the case to proceed entirely in the [state] court." *Villa Marina Yacht Sales, Inc. v. Hatteras Yachts*, 915 F.2d 7, 16 (1st Cir. 1990) ("Villa Marina I"). Liberty has provided none.

Moreover, as discussed above, Nationwide's demand for arbitration does not raise "the very same issue." While some of the issues are similar, the arbitration demand goes far beyond the issues in the Motion to Enforce. Indeed, it seeks a resolution of the broader question of whether Liberty has breached its contractual obligations under the Access to Records provision. A ruling by the state court, therefore, would not preclude the need for the parties to go to arbitration to resolve this dispute. Because the issues in

[1] Liberty argues that: "Separate and apart from the *Colorado River* doctrine, the First Circuit has upheld the stay or dismissal of cases where the interest of 'comity' and 'sound judicial administration' favor deference to parallel state court litigation." (Opp. Mem. at 9.) However, the grounds that Liberty relies upon cannot serve as a separate, independent basis for abstention outside of a recognized abstention doctrine. Instead, like other courts, this Court should consider the interest of comity and sound judicial administration as a component of the *Colorado River* doctrine. *Colorado River*, 424 U.S. at 818.

dispute are broader than the issues raised in state court, efficiency, and the avoidance of piecemeal litigation favors this Court exercising its jurisdiction.

Liberty also places too much emphasis on the fact that it filed its action in state court before Nationwide filed the instant action. As the court in *Arkwright-Boston* observed: consideration of this factor "does not rest on a race to the courthouse." 762 F.2d at 211. Instead, this factor is considered in a common-sense manner by examining how much progress has been made in each forum. *Moses H. Cone*, 460 U.S. at 21-22. A federal court should only abstain from exercising properly-acquired jurisdiction of a case, in favor of a previously-filed state case, when that case has progressed substantially farther than the federal case with respect to the same disputed issue. *Paul Revere*, 66 F. Supp. 2d at 221. Here, the Motion to Enforce was only fully briefed as of November 27, 2013 – mere weeks before the Petition to Compel pending in this Court was fully briefed. Moreover, Nationwide has argued that, under Section 2 of the FAA the state court should stay that proceeding in favor of the present Petition to Compel. The FAA provides that an action, subject to arbitration, *shall* be stayed when an application to compel arbitration has been made. 9 U.S.C. § 2. Because the FAA requires the state court to stay its proceeding pending arbitration, the order in which the jurisdiction was acquired is irrelevant, and thus does not favor abstention.

The third factor – whether state or federal law controls – also weighs against surrender of federal jurisdiction. *See, e.g., Moses H. Cone*, 460 U.S. at 25 ("[T]he presence of federal-law issues must always be a major consideration weighing against surrender."). The FAA governs the resolution of the action filed in this case. *See* 9

U.S.C. § 4. The effect of the FAA is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act and notwithstanding any state substantive or procedural policies to the contrary. *Moses H. Cone*, 460 U.S. at 24. Although, of course, the state court's jurisdiction may run concurrent with this Court's in enforcing the FAA, this Court's task in cases such as this "is not to find some substantial reason for the exercise of federal jurisdiction by the district court; rather, the task is to ascertain whether there exists 'exceptional' circumstances [] to justify the surrender of that jurisdiction." *See id*. at 25 (internal citations omitted). Here, such circumstances are not present.

Similarly, given the concurrent jurisdiction of the federal and state courts to enforce the Act, here, the fourth factor is neutral thus weighing against abstention. Finally, the fifth factor – the plaintiff's motivation for bringing the federal case – provides no support for Liberty's opposition. Nationwide brought this action only after Liberty refused to honor the parties' arbitration agreement. Nationwide was, therefore, forced to bring this action to vindicate its rights to have the pending dispute resolved in arbitration. It did so consistent with the FAA by bringing the instant petition, before the federal district court having jurisdiction. *See* 9 U.S.C. § 4.[2] Nationwide did not engage in "forum-shopping" as Liberty suggests. Indeed, as discussed above, it is Liberty that has

[2] It is notable that Liberty itself filed a motion to compel arbitration and appointed an umpire in this same Court at the outset of the Houdaille Arbitration. *See Liberty Mutual Ins. Co. v. Nationwide Mutual Ins. Co.*, 12-cv-12270 (D. Mass. Dec. 6, 2012). That case involved the same parties and the same treaties as at issue here. It was only when Liberty sought to enforce the Houdaille Award that it flip-flopped by going to state court. Therefore, Liberty itself has explicitly recognized this Court's jurisdiction.

seemingly engaged in forum shopping by filing its enforcement action as a motion instead of as a separate petition subject to removal by Nationwide.

In sum, "[t]here is no bar to bringing related, or even identical, actions simultaneously in state court and federal court." *See Alonzi v. HMK Enterprises, Inc.*, No. 927737D, 1993 WL 818739, at *2 (Mass. Super. June 25, 1993). Here, the Court has a virtually unflagging obligation to exercise the jurisdiction given it. Liberty has not met the heavy burden of showing by a thoroughly convincing analysis of the relevant factors that extraordinary circumstances exist to warrant this Court's abdication of its duty. Instead, as shown above, the factors heavily weigh against abstention and in favor of this Court deciding the issue before it – whether Nationwide's Petition to Compel Arbitration should be granted.

C. The Court Lacks Authority to Appoint an Arbitrator at this Time.

Recognizing that it could not likely overcome the heavy burden of abstention, Liberty argues, in the alternative, that this Court should appoint as umpire in this matter the same umpire that presided over the Houdaille arbitration; an arbitration whose award it, coincidentally, contends should apply to the parties' present dispute.[3] Notably, Liberty cites no contractual or legal support for the relief that it seeks. Indeed, it would be unprecedented (as well as improper) for this Court to appoint an umpire at this early stage of arbitration, especially given that Liberty has not yet recognized the validity of the

[3] Umpires are intended to be neutral and unbiased. Implicit, if not explicit, in Liberty's request for appointment of an umpire is its belief that the umpire it recommends has a bias against Nationwide's position in the parties' present dispute. Such bias make Liberty's umpire nominee improper aside from the issue of the timing of the request.

arbitration demand itself and has, accordingly, failed to engage in the arbitration process required under the parties' contract.

The FAA provides that, if the contract itself includes a provision for selecting an arbitrator, that method must be followed. 9 U.S.C. § 5. Only if there is a lapse in the naming of an umpire, or a party fails to avail itself of the method provided can the court intercede in the umpire selection process. *Id.* Neither of these situations is present here.[4]

Here, each of the contracts has a specific provision that outlines the process for selecting an umpire. Specifically, the arbitration provisions provide, in pertinent part, either that: the umpire shall "be chosen by the two arbiters before they enter arbitration[;]" or that: "the two arbitrators shall choose an umpire before instituting the hearing … [and] [i]n the event the two arbitrators fail to agree on an umpire either party shall have the right to submit the matter to the American Arbitration Association in effect at that time." (Declaration of Keith A. Dotseth, Exhibit 1.)

While the parties have each appointed arbitrators, as they are required to do under the relevant provisions, Liberty made its appointment provisionally because it still openly disputes the arbitrability of Nationwide's demand. (*See* Verified Petition at ¶ 21.) Accordingly, the party-appointed arbitrators have not yet begun to partake in the process for appointing an umpire. Because, under the FAA, courts must first allow the parties to utilize the umpire selection process agreed to in their contracts this Court lacks jurisdiction to appoint an umpire at this time. *See, e.g., National Casualty Co. v. American Bankers Insurance. Co. of Florida*, No. 05-71843, 2005 WL 2291003, at *2

[4] Notably, Liberty has not even suggested that there had been an actual lapse in the process.

(E.D. Mich. Sept. 20, 2005); *see also Liberty Mutual Ins. Co. v. Nationwide Mutual Ins. Co.*, 11-cv-10651 (D. Mass. July 6, 2011) (Order) (directing the arbitrators to proceed with umpire selection as contemplated in the reinsurance treaties).

Moreover, once party-appointed arbitrators begin negotiations for umpire selection, and those negotiations prove to be unsuccessful, many of the contracts also provide for a specific alternative process to allow for the arbitration to proceed – submitting the matter to the American Arbitration Association to appoint an umpire. To date, the party-appointed arbitrators have not (1) attempted to agree and (2) have not employed this alternative method of umpire selection.

Because the treaties provide a process for appointment of an umpire – a process that has not yet been utilized – this Court cannot short-circuit this process and, instead, appoint Liberty's self-selected umpire. Nationwide therefore requests that the Court decline Liberty's unsupported request to appoint an umpire and instead order the parties to precede with umpire selection as directed by the treaty terms.

CONCLUSION

For the foregoing reasons, Nationwide respectfully requests that the Court grant its Petition to Compel Arbitration and direct the parties' to proceed with arbitration pursuant to the treaty terms.

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