STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED: December 16, 2019)

CANWELL, LLC, CANWELL PROCESSING (RI), LLC and CANWELL PROCESSING (ME), LLC,	:	
Petitioners	:	
v.	:	**C.A. No. KM-2019-0948**
HIGH STREET CAPITAL PARTNERS, LLC, d/b/a ACREAGE HOLDINGS, INC., and as the Successor-in-interest to THE WELLNESS AND PAIN MANAGEMENT CONNECTION, LLC, and KEVIN MURPHY JOHN AND JANE DOES 1-20,	:	
Respondents.	:	
CANWELL, LLC,	:	
Petitioner	:	
v.	:	**C.A. No. KM-2019-1047**
THE WELLNESS AND PAIN MANAGEMENT CONNECTION, LLC and Its Successor in Interest, HIGH STREET CAPITAL PARTNERS, LLC d/b/a ACREAGE HOLDINGS, INC., NORTHEAST PATIENTS GROUP d/b/a WELLNESS CONNECTION OF MAINE LLC, KEVIN MURPHY, and JOHN DOES 1-20,	:	***(Consolidated for Administrative Purposes)***
Respondents.	:	

DECISION

LICHT, J. Petitioners, *see infra* pp. 2-3, have filed two different Miscellaneous Petitions for Mandating Arbitration Pursuant to Contract seeking to compel Respondents, *see infra* pp. 3-4, to

arbitrate certain claims in Rhode Island. Each of the Respondents has moved under various provisions of Super. R. Civ. P. 12 to dismiss the petitions. Since the facts and travel relating to each petition are so similar, there will be one opinion dealing with both petitions. The Court will, however, identify those areas where different facts apply.

I

Facts and Travel[1]

A

The Parties

These matters involve a complicated collection of corporate entities that operate and/or invest in the State-authorized cannabis industry; therefore, the Court begins by delineating the various parties in turn.

1. Petitioners: CanWell, LLC (CanWell), CanWell Processing (RI), LLC (CanWell RI), and CanWell Processing (ME), LLC (CanWell ME)

CanWell, a Delaware limited liability company, formed on December 1, 2014. CanWell is headquartered in Rhode Island and is involved in the alternative dosage, otherwise referred to as "edibles," aspect of the cannabis industry. CanWell's state-specific subsidiaries, CanWell RI and CanWell ME, are also Delaware limited liability companies involved in the alternative dosage side of the cannabis industry. All three CanWell entities are registered and authorized to do business in Rhode Island and maintain business addresses within the state. The CanWell entities provide intellectual property and production services to state-licensed cannabis businesses in Rhode Island, Maine, and Massachusetts. The CanWell entities' operational expertise includes all

[1] The facts regarding the various parties and agreements in this matter are gleaned from the First Petition, filed on August 21, 2019, the Second Petition, filed on September 16, 2019, and the relevant documents attached thereto.

aspects of the cannabis industry including cultivation, extraction, processing, alternative dosage development, and dispensing. CanWell owns the most significant interest in the CanWell Subsidiaries. The members of CanWell itself are "unknown" to the Court at this time.[2] Respondent The Wellness and Pain Management Connection, LLC (WPMC) owns a three-percent interest in both state-specific CanWell Subsidiaries,[3] and Wellness Connection Consulting, LLC (WCC) owns a four-percent interest in the same.

2. Respondents

a. High Street Capital Partners, LLC, d/b/a Acreage Holdings, Inc. (Acreage)[4]

Acreage is a Delaware limited liability company formed on April 29, 2014. Its members include Kevin Murphy, the Chief Executive Officer, Acreage Holdings America, Inc., and various minority investors. By 2018, Acreage had become a high-growth cannabis operator with operations in at least nineteen states comprised of cultivation, processing, and dispensing.

b. Kevin Murphy (Murphy)

Murphy is the Chief Executive Officer of Acreage and the President of WPMC.

c. Northeast Patients Group d/b/a Wellness Connection of Maine LLC (Northeast)

[2] There was a newspaper article published in the Providence Sunday Journal identifying some of CanWell's members, which the Court acknowledged on the record. However, there is no mention of CanWell's members in any of the pleadings or memoranda.

[3] WPMC's alleged withdrawal from the CanWell entities is currently in dispute and this Court has referred that dispute to arbitration in Rhode Island before retired Rhode Island Supreme Court Chief Justice Frank Williams.

[4] Respondent Acreage maintains that it has never done business as "Acreage Holdings, Inc." and assumes that Petitioners intended to name only High Street Capital Partners, LLC (High Street) as a party to this action. Acreage Holdings, Inc. is a public corporation formed under the laws of British Columbia. High Street has, at times, done business as "Acreage Holdings." The Court notes that this Respondent is consistently referred to as "Acreage" throughout the pleadings by all parties in this case and, as such, will be referred to as Acreage throughout this decision.

Northeast[5] is a Maine nonprofit corporation formed on June 16, 2010. In 2010, Northeast was awarded license rights by the state of Maine to cultivate and dispense medical marijuana at four medical marijuana dispensaries that Northeast owns and operates. It was also allowed to develop and run facilities to accommodate such operations.

d. The Wellness and Pain Management Connection, LLC (WPMC)

WPMC is a Delaware limited liability company formed on August 3, 2011. Currently, WPMC is a Maine-based for-profit service provider for Northeast involved in the "flower" side of the cannabis industry. Acreage, Northeast, and CanWell are all members, or "Class A Shareholders," of WPMC. Acreage currently owns a 97.4% interest in WPMC; Northeast owns a 2% interest; and CanWell owns a 0.1% interest.[6] Petitioners allege that Acreage is WPMC's successor-in-interest and alter-ego.[7]

3. Other Relevant Persons or Entities Not Parties

a. Terrence Fracassa (Fracassa)

Fracassa is CanWell's Chief Executive Officer.

b. Wellness Connection Consulting, LLC (WCC).

WCC is a for-profit affiliate of Respondents, established by the Northeast Board Members as a for-profit entity to house Northeast's intellectual property.

B

[5] Throughout the documents and pleadings Northeast is referred to as WCM but, to avoid confusion with WPMC, the Court refers to it as Northeast.

[6] WPMC is alleged to have wrongfully redeemed CanWell's interest in WPMC. This issue is in dispute and, on October 17, 2019, this Court referred that dispute to arbitration.

[7] In support, Petitioners assert that Acreage dismantled WPMC's Board of Directors to replace it with a five-member Board consisting of Acreage principals; changed WPMC's business address in Rhode Island to Acreage's Boston address; and took over day-to-day operations and financial control of WPMC. First Pet. Ex. D at ¶¶ 47–48.

The Agreements

There are several agreements which are central to the issues involved in these cases.

1. The Alternative Dosage Services Agreement (ADA)

On October 1, 2015, CanWell entered into the ADA with Northeast, WCC, and WPMC to sublicense the edible side of the Maine cannabis industry, specifically, by providing proprietary extraction equipment, processing best practice, intellectual property, and production facilities by and through WPMC for the benefit of Northeast. *See* ADA §§ 2, 3. In consideration of CanWell's obligations under the ADA, CanWell secured a significant royalty stream: Northeast would remit royalty payments to WPMC, and WPMC would retain a percentage and remit the balance payment to CanWell. *Id.* § 4.1. The initial term of the ADA was eight years from its effective date (October 1, 2015); the Agreement was to be automatically renewed for a succeeding second term of eight years, then automatically renewed for a third term of seven years, subject to termination by either written mutual consent of the parties or upon material breach by Northeast or CanWell, provided certain conditions were met in the instance of breach (*e.g.*, the opportunity to cure). *Id.* § 4.2.

The ADA also contained a noncompete covenant, providing that Northeast, WPMC, WCC, "and their respective successors or assigns shall not pursue contracts or operations similar to that which is contemplated herein within Maine or other States within New England without the prior written consent of Canwell." *Id.* § 5.2. The noncompete covenant was to remain in effect during the term of the agreement and for two years after termination. In recognition of the noncompete covenant, WPMC and WCC would receive three-percent and four-percent equity interests, respectively, in each of the state-specific CanWell Subsidiaries (CanWell RI and CanWell ME).[8]

[8] This agreement was memorialized in the CanWell Subsidiary Operating Agreements, discussed *infra*.

The ADA also contained a forum-selection clause, which provides that the ADA is "governed by and construed in accordance with the laws of Maine," and that "[e]ach of the parties hereby submits to the exclusive jurisdiction of the courts of Maine, with respect to any dispute between the parties pertaining to [the ADA]."[9] *Id.* § 13.7.

On January 1, 2018, CanWell assigned its entire interest in the ADA to CanWell ME. On that same day, all of the parties to the ADA reaffirmed that all "terms and conditions of the [ADA] remain in effect and unchanged." Resp't Acreage, WPMC, and Murphy's Mot. to Dismiss Ex. D (Assignment and Assumption of Agreement).

2. WPMC Operating Agreements

As of May 3, 2012, WPMC was formed pursuant to an Operating Agreement (the 2012 WPMC OA). Included as Class A Shareholders or members were Northeast, Murphy, and Fracassa. As of October 26, 2015, WPMC, Northeast, CanWell, Acreage, and others executed an Amended and Restated Operating Agreement (the 2015 WPMC OA). For purposes of this litigation, the only significant difference between the 2012 WPMC OA and the 2015 WPMC OA is that the latter agreement changed the forum for arbitration pursuant to the clause discussed below from Portland, Maine to Providence, Rhode Island and that CanWell replaced Fracassa as a Shareholder. In KM-2019-1047, CanWell cites the Arbitration Clause in the 2015 WPMC OA as the basis why WPMC, Northeast, Acreage, and Murphy must submit to arbitration in Rhode Island, which provides:

> "The parties hereby agree that unless otherwise specifically required by law, any and all disputes, and legal and equitable claims arising between or among the Shareholders, the Directors, the officers, the Company, or any of them or any combination of them, which relate

[9] Notably, CanWell's Petition makes no reference to the ADA forum-selection clause and, instead, CanWell relies on the WPMC Operating Agreement's Arbitration Clause and the CanWell Subsidiary Operating Agreements' Arbitration Clause.

> to the rights and obligations of such Persons *under the terms of this Agreement, any agreement contemplated hereby, or any future agreement, understanding or instrument to which two or more such Persons may be parties, shall be submitted to binding arbitration in Providence, Rhode Island* in accordance with the commercial rules of the American Arbitration Association." The 2015 WPMC OA, Art. 17. (emphasis added).

The 2015 WPMC OA makes no specific mention of the ADA. Further, the Court has already referred a dispute arising under the 2015 WPMC OA to arbitration in Rhode Island in accordance with Article 17 of the 2015 WPMC OA; namely, WPMC's alleged redemption of CanWell's interest in WPMC.

3. CanWell RI and CanWell ME Subsidiary Operating Agreements (CanWell OAs)

On January 1, 2018, CanWell, CanWell RI, CanWell ME, WPMC, and WCC executed the CanWell OAs for CanWell RI and CanWell ME.[10] Northeast is not a party to these agreements. The CanWell OAs memorialized WPMC's three-percent interest and WCC's four-percent interest in both the state-specific CanWell Subsidiaries. CanWell maintained the remaining ninety-three-percent membership interests. Article III of the CanWell OAs governs Members, Article IV governs Managers, and Article V governs Officers; each of these Articles references the noncompete covenant in the ADA and expressly incorporates it by reference into the CanWell OAs. *See* CanWell OAs §§ 3.9, 4.16, 5.8. The CanWell OAs list "Alternative Dosage Agreement" as a defined term meaning "that certain Alternative Dosage Agreement effective as of October 1, 2015 by and among Northeast [], CanWell, LLC or its designee, [WCC], and [WPCM]. *Id.* § 1.1. Pertinent here, Section 3.9 of the CanWell OAs provides:

> "Notwithstanding anything in here to the contrary, all Members and parties hereto and their respective successors or assigns shall be and hereby are at all times bound and restricted by, and shall at all times

[10] For purposes of this matter, the Operating Agreements for CanWell RI and CanWell ME are identical.

> adhere to and comply with, the last sentence of Section 5.2 of the Alternative Dosage Agreement, which sentence is hereby incorporated herein by reference and which provision and Alternative Dosage Agreement the Members and parties hereto hereby acknowledge and agree was the basis for, and was detrimentally relied upon by, Canwell, LLC and Company in their expenditure of time, resources and energy, incurring of opportunity costs, and formation of this Agreement and all of the rights, covenants, duties, obligations and other provisions contained herein. The Members and parties hereto acknowledge and agree, and covenant, to make their respective successors or assigns aware of and agree to the provisions of this Agreement as such applies by reference or otherwise to such Persons and their obligations with respect thereto, and in particular the provisions of this Section 3.9. The Members and parties hereto hereby acknowledge and agree that they shall be liable to the Company with respect to any violations of Section 3.9 by any of their respective successors or assigns."[11] *Id.* § 3.9.

Also, the CanWell OAs each contain identical arbitration provisions, which CanWell cites in its First Petition as a basis for Respondents to submit to arbitration in Rhode Island, providing:

> "The parties hereby agree that unless . . . required by law, *any and all disputes, and legal and equitable claims arising between or among the Members, the Managers, the officers, the Company,* or any of them or any combination of them, which relate to the rights and obligations of such Persons under the terms of this Agreement, *any agreement contemplated hereby, or referenced herein, or any future agreement, understanding or instrument to which two or more such Persons may be parties, shall be submitted to binding arbitration in . . . Rhode Island . . .*" *Id.* at Art. 17 (emphasis added).

The Court has already referred a dispute arising under the CanWell OAs to arbitration in Rhode Island in accordance with Article 17 of the CanWell OAs; namely, WPMC's alleged withdrawal from CanWell RI and CanWell ME.

[11] The same language is in Sections 4.16 and 5.8 except instead of "all Members and parties hereto and their respective successors or assigns," it states, "the Insiders and Managers and officers, agents, trustees, beneficial interest holders and Affiliates thereof," *id.* § 4.16, and "the officers of the Company and their respective Affiliates," *id.* § 5.8.

C

The Litigation

The Court pauses to note that the complicated web of transactions and occurrences underlying these Petitions have voyaged into five different forums: (1) Petitioners' two Petitions Demanding Arbitration pending before this Court; (2) this Court referred WPMC's alleged withdrawal from CanWell to arbitration before retired Rhode Island Supreme Court Chief Justice Frank Williams; (3) this Court referred WPMC's alleged redemption of CanWell's membership in WPMC to arbitration before the American Arbitration Association (AAA); (4) Northeast filed a Complaint in Maine alleging CanWell breached its obligations under the ADA; (5) and, most recently, Respondents filed suit in Delaware seeking declaratory judgment.[12]

Beyond the two issues already referred to arbitration, there are two events that triggered the pending litigation in these consolidated cases. First, in 2018, Acreage entered into an agreement to acquire ownership interest in Greenleaf Compassion Care Center in Portsmouth, Rhode Island. Second, on July 12, 2019, Northeast and WPMC served a "Termination Notice," attempting to terminate the ADA because CanWell and CanWell ME allegedly breached their obligations under the ADA. *See* ADA § 4.2.

1. KM-2019-0948 (First Petition)

On August 21, 2019, Petitioners CanWell, CanWell RI, and CanWell ME filed a Miscellaneous Petition for Mandating Arbitration Pursuant to Contract and Request for a Stay of Proceedings in Aid of Arbitration (the First Petition). Petitioners base their argument for

[12] The Court has not been presented with any of the pleadings pursuant to the Delaware litigation but, at December 3, 2019's oral argument, counsel for Respondents stated that it was seeking declaratory relief on claims regarding whether some of the entities involved in this dispute are alter-egos and/or successors-in-interest to each other.

arbitration on the two CanWell OAs and/or the ADA. Although Acreage is not a signatory to the ADA or CanWell OAs, the First Petition alleges that Acreage is a successor-in-interest or alter-ego of WPMC and is therefore bound by the noncompete covenant and other restrictions therein. *See* First Pet. at 4, ¶ 3. Notably, Northeast is not a named Respondent in the First Petition nor a party to the CanWell OAs. In their Demand for Arbitration, Petitioners request arbitration in Rhode Island regarding Respondents' alleged breach of the ADA's noncompete covenant, First Pet. Ex. D at 26–32, and Respondents' alleged wrongful termination of the ADA, *id.* at 34–41. Petitioners allege that if Respondents are not enjoined from competing with CanWell in Rhode Island and the other New England states and from successfully terminating the ADA, CanWell will face significant irreparable harm in the form of economic and reputational damage. Petitioners assert causes of action for Breach of Contract, specifically the ADA and CanWell OAs, Breach of the Covenant of Good Faith and Fair Dealing, Breach of Fiduciary Duties, Tortious Interference with Contract, Tortious Interference with Prospective Economic Advantage, Unjust Enrichment, Conversion, Declaratory Judgment, and Permanent Injunction. *See* First Pet. Ex. D.

2. *Northeast Patients Group, LLC, d/b/a Wellness Connection of Maine v. CanWell, LLC,* Civil Action No. CV-19-0357 (Cumberland County Superior Court for the State of Maine) (the Maine Litigation)

On September 3, 2019, Northeast filed a Complaint in Maine regarding CanWell's alleged breach of the ADA and other issues regarding Northeast and WPMC's alleged termination of the ADA.

3. KM-2019-1047 (Second Petition)

On September 16, 2019, CanWell (individually) filed a Miscellaneous Petition for Mandating Arbitration Pursuant to Contract and Request for a Temporary Restraining Order (the Second Petition). In the Second Petition, Petitioner couches its argument for arbitration in the

2015 WPMC OA and/or the ADA and named Northeast as a party. CanWell asserts that disputes arising under the ADA are arbitrable because the ADA is a "future agreement" or "contemplated agreement" as referenced in the 2015 WPMC OA arbitration provision. In its Second Petition, CanWell seeks to arbitrate: Northeast and WPMC's alleged failure to pay CanWell its royalty fee under the ADA for the 2019 year, Second Pet. ¶¶ 16(b), 16(c); Northeast, WPMC, and Acreage's alleged violation of the noncompete covenant in the ADA, *id.* at ¶¶ 16(d), 16(f)(vii); and Northeast, WPMC, and Acreage's alleged attempt to terminate the ADA, *id.* at ¶ 16(d). In the Second Petition, Petitioner also claims Acreage, WPMC, and Northeast: breached the 2015 WPMC OA and refuse to submit to arbitration pursuant to the arbitration clause found in Article 17 of that agreement; breached their fiduciary duties to CanWell and its affiliates; tortiously and intentionally interfered with CanWell's contracts, including the ADA; tortiously interfered with CanWell's business opportunities in Maine, Rhode Island, and Massachusetts; and aided and abetted each other in a tortiously intentional manner to breach their contractual and membership obligations. *See generally*, *id*. at ¶ 16(f).

4. Prior Orders

On August 23, 2019, the Court issued its first Order in this matter, issuing a Temporary Restraining Order (TRO) enjoining the Rhode Island Department of Business Regulations (DBR) from issuing a final decision on the Change in Control Application of Greenleaf Compassionate Care Center, Inc. (the Greenleaf Application), a Rhode Island nonprofit corporation involved in the medical marijuana industry. The Court issued an additional TRO tolling the cure period set forth in Section 4.2 of the ADA until further order of the Court. Aug. 23, 2019 Order ¶¶ 1–2.

On September 11, 2019, the Court modified its August 23, 2019 Order based on the effective withdrawal of the Greenleaf Application. The Court ordered that Respondents give

Petitioner immediate written notice of any filing, application, or submission they make to the DBR and that Respondents preserve any and all documents and/or communications with the DBR in relation to the Greenleaf Application. Sept. 11, 2019 Order ¶¶ 1(a)–(c).

On October 7 and 8, 2019, the Court heard lengthy argument on Petitioners' Motion for an Expedited Discovery Schedule. At the hearing, the Court determined that discovery was permissible, but its scope should be "relatively narrow" to show "what the[] parties intended when they wrote the arbitration provision and when they incorporated the [ADA] or at least the non-competition [agreement] into the [WPMC] Operating Agreement." Hr'g Tr. 56:22-57:2, Oct. 7, 2019. The Court only permitted discovery to assist in deciphering the inconsistencies between the various operative agreements. On October 25, 2019, the Court issued its Discovery Order, limiting the scope to:

> "2. [T]he intent of the parties, with regard to incorporating provisions of the Alternative Dosage Agreement (the "ADA") into the CanWell Processing (RI), LLC ("CPRI") and CanWell Processing (ME), LLC ("CPME") Operating Agreements and employing a binding arbitration provision, which requires arbitration in Rhode Island and the ADA which contains a forum selection clause.
> "3. [T]he intent of the parties to the Wellness Pain Operating Agreement and the ADA, wherein the Wellness Pain Operating Agreement, as amended, requires binding arbitration in the State of Rhode Island regarding disputes and the ADA which contains a forum selection clause.
> "4. [T]he intent of the parties, including course of conduct, with regard to those agreements, the provisions therein, and any alleged inconsistencies and/or consistencies.
> "5. [T]he structure of and who are the various members, shareholders, principals, and/or managers of the various entities named in this proceeding." Oct. 25, 2019 Order ¶¶ 2–5.

Discovery remains ongoing in this matter.

The Court issued a separate Order on October 25, 2019, in which it referred the dispute of WPMC's alleged withdrawal from CanWell RI and CanWell ME to arbitration before retired

Rhode Island Supreme Court Chief Justice Frank Williams and the dispute of WPMC's alleged redemption of CanWell's membership in WPMC to arbitration in accordance with the American Arbitration Association Commercial Arbitration Rules. Oct. 25, 2019 Order ¶¶ 1(A), 1(B).

5. Pending Motions

The issues that remain for this Court to decide are whether the remaining disputes identified in the First Petition under the two CanWell OAs and/or the ADA are subject to arbitration, and whether the remaining disputes identified in the Second Petition under the 2015 WPMC OA and/or the ADA are subject to arbitration. Specifically, those disputes are whether Respondents' alleged wrongful termination of the ADA is subject to arbitration and whether Respondents' alleged violation of the noncompete covenant is subject to arbitration.

On September 30, 2019, Respondent Northeast filed its Motion to Dismiss Claimant's Second Petition under various provisions of Super. R. Civ. P. 12. On October 3, 2019, Respondents WPMC, Acreage, and Murphy filed a joint Motion to Dismiss the First Petition and a separate Motion to Dismiss the Second Petition also under various provisions of Rule 12. On December 3, 2019, the Court heard argument on Respondents' Motions to Dismiss and reserved its ruling.

II

Standard of Review

"'The sole function of a motion to dismiss is to test the sufficiency of the complaint. . . .'" *Palazzo v. Alves*, 944 A.2d 144, 149 (R.I. 2008) (quoting *R.I. Affiliate, ACLU, Inc. v. Bernasconi*, 557 A.2d 1232, 1232 (R.I. 1989)). As our Supreme Court has stated, "[t]he policy behind these liberal pleading rules is a simple one: cases in our system are not to be disposed of summarily on

arcane or technical grounds." *Hendrick v. Hendrick*, 755 A.2d 784, 791 (R.I. 2000) (citing *Haley v. Town of Lincoln*, 611 A.2d 845, 848 (R.I. 1992)).

"A motion under Rule 12(b)(1) questions a court's authority to adjudicate a particular controversy before it." *Boyer v. Bedrosian*, 57 A.3d 259, 270 (R.I. 2012). In so ruling, '"a court is not limited to the face of the pleadings [and] may consider any evidence it deems necessary to settle the jurisdictional question."' *Id.* (quoting *Morey v. State of Rhode Island*, 359 F. Supp. 2d 71, 74 (D.R.I. 2005)). Further, "[i]n order to withstand a defendant's Rule 12(b)(2) motion to dismiss a complaint for lack of in personam jurisdiction, a plaintiff must allege sufficient facts to make out a prima facie case of jurisdiction." *Bendick v. Picillo*, 525 A.2d 1310, 1311-12 (R.I. 1987) (citing *Ben's Marine Sales v. Sleek Craft Boats*, 502 A.2d 808, 809 (R.I. 1985)).

In Rhode Island, "a Rule 12(b)(6) motion to dismiss is appropriate 'when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff's claim.'" *Barrette v. Yakavonis*, 966 A.2d 1231, 1234 (R.I. 2009) (citing *Palazzo*, 944 A.2d at 149-50). "But unless amendment could avail the plaintiff nothing, the order of dismissal should usually be with leave to amend." Robert B. Kent et al., *Rhode Island Civil and Appellate Procedure*, § 12:9.

In making its Rule 12(b)(6) determination, a court '"assumes the allegations contained in the complaint to be true and views the facts in the light most favorable to the plaintiffs."' *Giuliano v. Pastina*, 793 A.2d 1035, 1036 (R.I. 2002) (quoting *Martin v. Howard*, 784 A.2d 291, 297-98 (R.I. 2001)). In so ruling, the Court is free to consider all the allegations in the pleadings, the documents incorporated therein, and the relevant contracts that are expressly linked to claims in the complaint. *See Mokwenyei v. R.I. Hospital*, 198 A.3d 17, 22 (R.I. 2018) (holding when factual allegations are expressly linked to documents (and authenticity of those documents is not

challenged), the '"document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6)"' (quoting *Jorge v. Rumsfeld*, 404 F.3d 556, 559 (1st Cir. 2005))).

III

Analysis

The greater the number is of the words . . . the less clear is the discourse which they compose."
- Jeremy Bentham

The parties have provided mountains of paper, and the Court has engaged in hours of oral argument in this case thus far, yet the Court is not being asked to decide the merits of the underlying dispute. The issue before the Court is whether certain portions of the underlying dispute are subject to arbitration.

While the Respondents have conceded that they are parties to the arbitration agreements in the 2015 WPMC OA and the CanWell OAs (*see* 2015 WPMC OA § 17; CanWell OA § 17), they contend that the disputes involving the alleged termination of the ADA and the alleged violation of the non-competition provision in the ADA (the ADA Disputes) are, as a matter of law, not subject to arbitration because of the forum selection clause in the ADA. Thus, they have moved to dismiss the Petitions to the extent the Petitions seek arbitration under those provisions. Northeast has moved to dismiss pursuant to Super. R. Civ. P. 12(b)(1), 12(b)(2) and 12(b)(6) while the remaining Respondents have moved to dismiss the First Petition pursuant to Super. R. Civ. P. 12(b)(3), 12(b)(6) and 12(b)(7) and to dismiss the Second Petition pursuant to Super. R. Civ. P. 12(b)(3) and 12(b)(6). Rather than deal with each motion separately, the Court will address the various sections of Rule 12 and where the analysis is different for either Petition it will so state.

1. Rule 12(b)(1) Subject Matter Jurisdiction

Respondent Northeast has moved under Rule 12(b)(1) to dismiss the Second Petition for lack of subject matter jurisdiction. However, this claim is misplaced: determination of whether the ADA Disputes are arbitrable is separate and distinct from the question of this Court's subject matter jurisdiction over the dispute.

Before the Court are two Petitions for Mandating Arbitration Pursuant to Contract. The authority for the relief sought in the First and Second Petitions is based upon G.L. 1956 § 10-3-4. Section 10-3-4 states, in pertinent part:

> "The party aggrieved by the alleged failure, neglect, or refusal of another to perform under a written agreement for arbitration may petition the superior court for the county in which any of the parties reside or has his or her place of business for an order directing that the arbitration proceed in the manner provided for in the agreement."

In the Second Petition, WPMC, Northeast, and Acreage are all signatories to the 2015 WPMC OA, which contains a Rhode Island arbitration clause. The 2015 WPMC OA represents a large basis for the claims in the Second Petition. The Respondents have refused to submit to arbitration in Rhode Island, making it proper for Petitioners to file the petitions with this Court. Accordingly, this Court has subject matter jurisdiction over the Petitions pursuant to Section 10-3-4.

2. Rule 12(b)(2) Personal Jurisdiction Over Northeast

Respondent Northeast moves to dismiss under Super. R. Civ. P. 12(b)(2) for lack of personal jurisdiction, arguing that this Court does not have specific jurisdiction over it because Petitioners' claims did not arise out of or relate to a Rhode Island contract and that Petitioners' claims against it pertain entirely to the ADA, which was performed entirely in Maine and contained a Maine forum-selection clause.

"It is well established that to withstand a defendant's Rule 12(b)(2) motion to dismiss a complaint for lack of *in personam* jurisdiction, a plaintiff must allege sufficient facts to make out a *prima facie* case of jurisdiction." *Cerberus Partners, L.P. v. Gadsby & Hannah, LLP*, 836 A.2d 1113, 1118 (R.I. 2003) (citing *Ben's Marine Sales*, 502 A.2d at 812). Rhode Island General Laws Section 9-5-33(a) allows Rhode Island courts to exercise personal "jurisdiction over nonresident defendants to the fullest extent allowed by the United States Constitution." *Rose v. Firstar Bank*, 819 A.2d 1247, 1250 (R.I. 2003). "To ensure constitutional due process to a nonresident defendant, certain minimum contacts with the forum state are required 'such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'" *Cerberus Partners, L.P*, 836 A.2d at 1118 (quoting *Kalooski v. Albert-Frankenthal AG*, 770 A.2d 831, 832-33 (R.I. 2001)) (internal citation omitted). The fundamental inquiry is "whether 'the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" *Id.* (quoting *Bendick*, 525 A.2d at 1312) (internal citation omitted).

The United States Supreme Court has recognized a "variety of legal arrangements" by which a litigant may give "express or implied consent to the personal jurisdiction of the court." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). One example of this is when parties "stipulate in advance to submit their controversies for resolution within a particular jurisdiction." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985); *see National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964). As such, "[a]n enforceable forum-selection clause . . . waive[s] a potential challenge to personal jurisdiction . . . ." *Sidell v. Sidell*, 18 A.3d 499, 507 (R.I. 2011).

Northeast is a Class A Shareholder and Member of WPMC and it executed the 2015 WPMC OA. That agreement states in capital letters:

> "AS A MATERIAL INDUCEMENT FOR EACH SHAREHOLDER TO BECOME A PARTY TO THIS AGREEMENT, *EACH OTHER SHAREHOLDER HEREBY CONSENTS TO THE JURISDICTION AND VENUE OF THE COURTS OF THE STATE OF RHODE ISLAND* . . . FOR PURPOSES OF ANY LITIGATION ARISING DIRECTLY OR INDIRECTLY FROM THIS AGREEMENT, INCLUDING ENFORCEMENT OF ANY ARBITRATOR'S AWARD, UNDER SECTION 17, AND EACH SHAREHOLDER HEREBY WAIVES ANY AND ALL RIGHTS SUCH SHAREHOLDER MAY OTHERWISE HAVE TO CONTEST THE JURISDICTION AND VENUE OF SUCH COURTS . . . ." 2015 WPMC OA § 16.3 (emphasis added).

More specifically, the 2015 WPMC OA provides for arbitration in Rhode Island of "any . . . disputes, and legal and equitable claims arising between or among the Shareholders. . . ." 2015 WPMC OA § 17. Signing a document that consented to jurisdiction in Rhode Island and consenting to a Rhode Island forum arbitration clause creates reasonable foreseeability of being "haled into court []here." *Ben's Marine Sales*, 502 A.2d at 810; *see Microfibres, Inc. v. McDevitt-Askew*, 20 F. Supp. 2d 316, 322 (D.R.I. 1998) (finding waiver of personal jurisdiction challenge because party consented to jurisdiction by signing an agreement with a forum selection clause); *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Lecopulos*, 553 F.2d 842, 844 (2d Cir. 1977) (holding that agreeing to arbitration in New York constituted consent to personal jurisdiction in New York).

Additionally, Northeast's assertion that all the claims against it in the Second Petition pertain entirely to the ADA Disputes is without merit. Petitioner specifically alleges that Northeast must submit to arbitration in Rhode Island because of its alleged breach of the 2015 WPMC OA. *See* Second Pet. at ¶ 16(f)(i). Petitioner refers to the 2015 WPMC OA consistently throughout the Second Petition, asserting claims that arise from and relate to the 2015 WPMC OA, such as breach of fiduciary duties, breach of loyalty, and tortious and intentional interference with contracts and

business opportunities. That alone is sufficient to exercise personal jurisdiction. Section 16.3 of the 2015 WPMC OA contemplates enforcing an arbitration in Rhode Island courts. It is only logical to conclude that such consent would also include a petition to send a matter to arbitration. Whether the ADA Disputes are arbitrable or not remains pending before the Court and, pursuant to the Rhode Island arbitration clauses in the CanWell OAs and the 2015 WPMC OA, determination of that issue will be made in Rhode Island. It would make no sense if the Court had jurisdiction to make that determination for the other Respondents and not for Northeast.

Even if this Court were to find that Northeast did not consent to jurisdiction for the ADA Disputes, it would find personal jurisdiction under a minimum contacts and Gestalt Factors analysis. Rhode Island courts may exercise specific personal jurisdiction over a party "if the claim sufficiently relates to or arises from any of a defendant's purposeful contacts with the forum." *Rose v. Firstar Bank*, 819 A.2d 1247, 1251 (R.I. 2003). "The determination of whether there is specific jurisdiction over the defendant requires a two-step inquiry: (1) determining whether there are sufficient minimum contacts with the forum state; and (2) determining that litigation in the forum state does not 'offend traditional notions of fair play and substantial justice."' *St. Onge v. USAA Federal Savings Bank*, ___ A.3d ___, 2019 WL 6205044, at *4 (R.I. Nov. 21, 2019) (quoting *Rose*, 819 A.2d at 1250) (internal citation omitted).

In the Second Petition, CanWell alleges that in exchange for the unique services of CanWell, Northeast was obligated to pay a royalty fee of its gross sales to WPMC, and WPMC, in turn, was to pay a royalty fee to CanWell based upon the gross sales of Northeast. Second Pet. ¶ 16(b).

The United States Supreme Court has held that the payment of premiums by the plaintiff to the defendant from the forum was considered a significant contact in *McGee v. International*

Life Insurance Co., 355 U.S. 220, 224 (1957). Our Supreme Court has noted that *McGee* allowed a single contract to form the basis for exercising personal jurisdiction, 355 U.S. at 223, and has interpreted *McGee* to mean that "a single act having impact in and connection with the forum state can satisfy the minimum-contact test of *International Shoe Co*." *Trustees of the Sheppard and Enoch Pratt Hospital v. Smith*, 114 R.I. 181, 184, 330 A.2d 804, 806 (1975).

Beyond the payments made to CanWell on behalf of Northeast, Respondent traveled to Rhode Island a few times for consulting services. Although CanWell's services to Northeast occurred mostly in Maine, Northeast made several trips to Rhode Island, "four to six" occasions by Northeast's own admission, *see* Resp't Northeast's Mem. at 2, to receive training and consulting from CanWell pursuant to the ADA. By conducting activities pursuant to the ADA in Rhode Island, Respondent "purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Cassidy v. Lonquist Management Co., LLC*, 920 A.2d 228, 233 (R.I. 2007) (quoting *Rose*, 819 A.2d at 1251).

"[T]he relationship among the defendant, the forum, and the litigation need not be terribly robust to support exercising [specific] jurisdiction. . . ." *Cerberus Partners, L.P.*, 836 A.2d at 1119. In sum, the royalty payments made to CanWell on behalf of Northeast in conjunction with the occasions Northeast traveled to Rhode Island to conduct business pursuant to the ADA is sufficient to meet the minimum contacts test.

The Court's inquiry does not end here. Once minimum contacts are established, the Court must determine whether litigation in the forum state offends traditional notions of fair play and substantial justice by applying the '"so-called '[G]estalt factors' to determine whether the exercise of personal jurisdiction is reasonable."' *St. Onge*, 2019 WL 6205044, at *5 (quoting *Cerberus Partners, L.P.*, 836 A.2d at 1121).

The first Gestalt factor looks to the burden on the defendant. *Cerberus Partners, L.P.*, 836 A.2d at 1121. Northeast does not assert that travel from Maine to Rhode Island would be difficult or unduly burdensome. Maine is not very far in distance from Rhode Island, and Respondent has had no problem retaining counsel to defend this lawsuit, who has already made many trips to Rhode Island to litigate this matter.

The second factor is the forum state's interest in adjudicating the dispute. *Id.* CanWell is a Rhode Island-based company, and it is settled policy that a forum state has an interest in adjudicating disputes brought by its residents and protecting the rights of its citizens who do business with out-of-state parties. *See Rose*, 819 A.2d at 1253. Additionally, Rhode Island has an interest in litigating this dispute in one forum. Although the collective Respondents are separate and distinct from each other, the issue to be decided in each case is substantially the same: whether the ADA Disputes are subject to arbitration. It is uncontested that Respondents Acreage, Murphy, and WPMC are subject to personal jurisdiction in Rhode Island and, should Northeast be dropped from the suit and bring that same issue into the courts of Maine, it may yield different results on the same issue. Rhode Island certainly has an interest in seeing a consistent result in this case.

The third factor is the plaintiff's interest in obtaining the most effective resolution of the controversy. *Id.* With the First Petition being filed in August 2019, litigation on whether disputes arising under the ADA are arbitrable is already well under way in Rhode Island. This Court has the benefit of being familiar with the complex nuances of this case, having already referred two specific disputes to arbitration. Moreover, resolution of this claim in Rhode Island in Northeast's absence might expose Petitioner to inconsistent obligations and result in relitigation of the identical issue raised in this action should Northeast pursue this issue in Maine. Moreover, currently there are cases in three states and the matter is pending in two arbitration hearings. While this may serve

the Respondents' litigation strategy, it in no way furthers judicial economy or leads to an effective resolution of the controversy among the parties.

The final factor is the shared interest of the several states in furthering fundamental substantive social policies. *Id.* The interests of judicial economy and expeditious litigation leans strongly in favor of exercising personal jurisdiction over Respondents to allow the Court to adjudicate the global dispute arising between various corporate entities and to avoid inconsistent judgments. The Maine court has stayed the action pending before it and has denied issuing Respondents injunctive relief by noting that this Court "will be addressing the same arguments."

Because all four Gestalt factors weigh in favor of Petitioners, litigation in Rhode Island with regard to this matter would not be unreasonable or offend traditional notions of fair play and substantial justice. Accordingly, personal jurisdiction over Respondents is proper.

3. Rule 12(b)(3) Improper Venue

Respondents Acreage, WPMC, and Murphy move to dismiss under Super. R. Civ. P. 12(b)(3) for improper venue, arguing that the forum selection clause contained in the ADA requires that this action be litigated in Maine.

The United States Supreme Court has held that forum selection clauses are "prima facie valid . . ." and should be upheld unless it is shown to be "unreasonable" by the resisting party under the circumstances. *M/S Bremen vs. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972); *see Docksider, Ltd. v. Sea Technology, Ltd.*, 875 F.2d 762, 764 (9th Cir. 1989) ("The prevailing rule is clear . . . that where venue is specified with mandatory language the clause will be enforced."). "An enforceable forum-selection clause . . . settles the proper venue for the case." *Sidell,* 18 A.3d at 507.

The only matters before the Court are the two Petitions to Arbitrate pursuant to the 2015 WPMC OA or the CanWell OAs in congruence with the ADA, not the ADA alone. The Petitioners cite the 2015 WPMC OA and CanWell OAs as a legal basis for their Demand for Arbitration in Rhode Island. The CanWell OAs and the 2015 WPMC OA leave no doubt that arbitration under those agreements is a Rhode Island matter. Specifically, the CanWell OAs provide for "binding arbitration in . . . Rhode Island," and the 2015 WPMC OA requires "binding arbitration in Providence, Rhode Island in accordance with the commercial rules of the American Arbitration Association." CanWell OA Art. 17; 2015 WPMC OA Art. 17. The 2015 WPMC OA and CanWell OAs also contain a provision, in all capital letters, noted *supra*, consenting to the "jurisdiction and *venue of the courts of the State of Rhode Island . . .* for purposes of any litigation arising directly or indirectly . . . ." CanWell OA § 16.3; 2015 WPMC OA § 16.3 (emphasis added). Thus, the parties explicitly consented to venue in this Court. Whether the ADA Disputes are subject to arbitration is a different matter, but it does not go to the issue of venue.

To go a step further, venue in civil actions is governed by G.L. 1956 §§ 9-4-2 to 9-4-6. All actions brought in the Superior Court, except for actions concerning realty, "shall be brought in the county in which one of the plaintiffs or defendants resides or where one of the defendants shall be found." Robert B. Kent et al., *Rhode Island Civil and Appellate Procedure* § 12.7 (2016–17 ed.); *see* § 9-4-3. In this case, Petitioners CanWell, CanWell RI, and CanWell ME maintain principle places of business in Warwick, Rhode Island, and Kent County Superior Court is the proper venue for Warwick cases. Thus, venue is proper.

4. Rule 12(b)(6) Failure to State a Claim

All Respondents in this case have moved to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. As previously noted, in making its Rule 12(b)(6)

determination, the Court "assumes the allegations contained in the complaint to be true and views the facts in the light most favorable to the plaintiffs." *Giuliano*, 793 A.2d at 1036 (quoting *Martin*, 784 A.2d at 297-98). The Court also considers the documents incorporated in the petition and the relevant contracts that are expressly linked to claims in the petition. *See Mokwenyei*, 198 A.3d at 22.

Specifically, the ADA and the 2015 WPMC OA are attached to and relied upon in the Second Petition (Second Pet. Ex. A, Ex. B), and the ADA and the CanWell OAs are attached to and relied upon in the First Petition (First Pet. Ex. A, Ex. B, Ex. C). These agreements are also attached to or cited by the Respondents in their respective Motions to Dismiss. Further, the Petitioners' factual allegations are "expressly linked to" and "dependent upon" the aforementioned agreements, rendering them central to Petitioners' claims. *Jorge*, 404 F.3d at 559. Accordingly, the Court will consider these agreements in ruling on the instant Motions to Dismiss.

Respondents assert that the ADA grants the courts of Maine exclusive jurisdiction "with respect to any dispute between the parties pertaining to this Agreement," ADA § 13.7, and therefore, as a matter of law, the Court must dismiss both Petitions to the extent they seek to arbitrate the ADA Disputes.

Further, Respondents contend that Acreage and Murphy were not signatories to the ADA, so they cannot be compelled to arbitrate the ADA Disputes. The Court will turn first to Acreage and Murphy and then will address the two Petitions.

(a) Acreage

(1) The First Petition

The First Petition rests upon the CanWell OAs, which Acreage did not sign. However, "[t]here are, under principles of contract and agency common law, certain exceptions that allow

for a contract . . . to be enforced against nonparties to that agreement." *Kuroda v. SPJS Holdings, LLC.*, No. C.A. 4030-CC, 2010 WL 4880659, at *3 (Del. Ch. Nov. 30, 2010). "Specifically, courts have recognized several theories under which a nonsignatory to a contract may nonetheless be bound by an arbitration provision contained in the agreement, including: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil piercing/alter ego; (5) third-party beneficiary; and (6) equitable estoppel." *Id.*

Petitioners allege that Acreage, who has a 97.4% interest in WPMC, is an alter-ego and/or successor-in-interest of WPMC and, thus, assumed all WPMC's rights and obligations under the agreements. *See* First Pet. Ex. D at ¶¶ 47–48. WPMC is a signatory to the CanWell OAs and the ADA. In the First Petition, Petitioners pled sufficient facts to support an alter-ego theory for purposes of a Rule 12(b)(6) motion to dismiss, namely, Petitioners assert that Acreage dismantled WPMC's Board of Directors to replace it with a five-member Board consisting of Acreage principals; changed WPMC's business address in Rhode Island to Acreage's Boston address; and took over day-to-day operations and financial control of WPMC. *Id.* "[A]ssum[ing] the allegations contained in the complaint to be true and view[ing] the facts in the light most favorable to the plaintiffs," Acreage is subject to the arbitration agreement contained in the CanWell OAs to the same extent as WPMC vis-à-vis its alter-ego relationship with WPMC. *Giuliano*, 793 A.2d at 1036 (quoting *Martin*, 784 A.2d at 297-98).

(2) The Second Petition

As a signatory to the 2015 WPMC OA, the basis for the Second Petition, Acreage is subject to the arbitration provision contained therein.

(b) Murphy

Looking at the First Petition, the CanWell OAs incorporate the noncompete provision of the ADA by reference in Sections 3.9 (Members), 4.16 (Managers and Insiders), and 5.8 (Officers). Murphy cannot be bound under Section 3.9 of the CanWell OAs because he is not a "Member" or Shareholder in the CanWell entities. Petitioners make no allegation that Murphy is a "Manager" of the CanWell entities. Murphy is also not an "Insider" under the CanWell OAs; "Insider" is a defined term meaning "Fracassa and Pierce" who are in turn defined as Fracassa or Pierce "or any trust, limited partnership, limited liability or other company or entity which is controlled directly or indirectly by" Fracassa or Pierce.[13] CanWell OA §§ 4.13 and 1.1. Lastly, Petitioners make no allegation that Murphy is an "Officer" of any CanWell entity and, thus, he cannot be bound pursuant to Section 5.8.

As to the Second Petition, Murphy is not a party to the 2015 WPMC OA nor a member of WPMC. Unlike what is discussed above with Acreage, there is no allegation that Murphy is the alter-ego of WPMC.

Since CanWell offers no specific basis in the First or Second Petition to bind Murphy to the operative agreements, Respondents' Motion to Dismiss both Petitions as it pertains to Murphy is granted.

(c) Rule 12(b)(6) and the First Petition

The CanWell arbitration clause requires "any and all disputes, and legal and equitable claims arising between or among the Members . . . which relate to the rights and obligations of

[13] The Court acknowledges that it at first thought that the language in Section 4.16 referring to "officers, agents, trustees, beneficial interest holders and Affiliates thereof" might encompass people and entities beyond Fracassa and Pierce. However, when reading the definitions of Fracassa and Pierce in Section 1.1., the Court concludes that Section 4.16 is limited to CanWell Managers and Fracassa and Pierce as defined in the CanWell OAs.

such Persons under the terms of this Agreement, any agreement contemplated hereby or referenced herein, or . . . understanding or instrument to which two or more such Persons may be parties, shall be submitted to binding arbitration in the State of Rhode Island . . . ." CanWell ME OA Article 17 as amended.

The CanWell OA refers to the ADA as a defined term. *Id.*§ 1.1. As discussed above, it specifically binds all Members to the noncompete provision of Section 5.2 of the ADA. CanWell ME OA § 3.9. WPMC is a Member of CanWell ME. The purpose of CanWell LLC refers specifically to "alternative dosage form platforms." CanWell OA ME § 2.6.

These provisions can lead to no other conclusion than the ADA is most definitely an "agreement contemplated" and an instrument between at least two "Persons." Specifically, the ADA is an agreement explicitly pertaining to alternative dosage, and the ADA is an instrument between two or more "Persons" who are also signatories to the CanWell OAs. Thus, reading the CanWell ME OA alone, there is no ambiguity that WPMC agreed to arbitrate the ADA Disputes in Rhode Island. However, the Court cannot ignore the forum selection clause of the ADA. *See* ADA § 13.7.

The Court has stated on several occasions that neither the CanWell arbitration clause nor the ADA forum selection are ambiguous but that they are inconsistent. To resolve this apparent inconsistency, the Court needs to look to Delaware law. *See* CanWell ME OA § 16.3.[14]

It is well settled that courts "give effect to the terms of private agreements to resolve disputes in a designated judicial forum out of respect for the parties' contractual designation."

[14] While the questions of subject matter jurisdiction, venue, and personal jurisdiction are procedural in nature and, thus, governed by Rhode Island law, the parties have agreed in Section 16.3 of the CanWell OAs and Section 16.3 of the 2015 WPMC OA that the agreements "shall be construed and enforced in accordance with the internal laws of the State of Delaware."

Troy Corp. v. Schoon, No. C.A. 19590-VCL, 2007 WL 949441, at *2 (Del. Ch. Mar. 26, 2007). However, "[i]f the contractual language is not crystalline, a court will not interpret a forum selection clause to indicate the parties intended to make jurisdiction exclusive." *Duff v. Innovative Discovery LLC*, No. C.A. 7599-VCP, 2012 WL 6096586, at *11 (Del. Ch. Dec. 7, 2012) (internal quotation omitted). "Contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language." *Id.* (citation omitted).

In *Duff*, the Delaware Court of Chancery handled a dispute involving two separate agreements with inconsistent forum selection provisions in the context of a motion to dismiss. *Id.* at *11–12. In that case, there was a License Agreement that contained a forum selection provision providing for the "sole jurisdiction and venue for actions related to the subject matter [t]hereof" to be in the federal courts of California. *Id.* There was also a Redemption Agreement that contained a Delaware forum selection clause and that incorporated the License Agreement by reference. *Id.* Thus, the forum selection clause in the Redemption Agreement could arguably be applied to the attached License Agreement. *Id.*

The *Duff* court noted that "Delaware law holds that where a contract incorporates another contract by reference, the two contracts will be read together as a single contract," and "where a contract contains two conflicting provisions, the document is rendered ambiguous." *Id.* at 12. "To that end, Delaware courts only will declare a forum selection clause 'strictly binding' when the parties use 'express language clearly indicating that the forum selection clause excludes all other courts before which those parties could otherwise properly bring an action.'" *Id.* (citation omitted). The *Duff* court denied the motion to dismiss, holding that the parties' intent as to the contractual

choice of forum did not meet the "crystalline" standard[15] because the two forum selection provisions were in conflict.

The First Petition appears to have the same pattern as *Duff*. While the Delaware Chancery Court used the term "conflicting" provisions and this Court used the term "inconsistent" provisions in prior rulings, the principle is the same. The ADA is a defined term in the CanWell OAs and Section 5.2 of the ADA is incorporated by reference in Sections 3.9, 4.16, and 5.8 of the CanWell OAs. The CanWell OAs were executed after the ADA. Based on Delaware law, the documents must be read as one and the inconsistent or conflicting provisions make the forum selection clauses less than "crystalline." As such, it can be concluded, at least for purposes of ruling on a Rule 12(b)(6) motion, that Maine is not the "exclusive" forum for the ADA Disputes.

Respondents argue that while the noncompetition dispute may be subject to arbitration in Rhode Island, the termination of the ADA is not, and that should be litigated in Maine. But Respondents overlook the fact that "any and all disputes . . ." are to be arbitrated. CanWell OA Article 17. Therefore, if any dispute is subject to arbitration and, for purposes of this Motion, the noncompetition dispute is, then all disputes are subject to arbitration.

Lastly, the Respondents have argued that the phrase "unless otherwise specifically required by law" in Article 17 of the CanWell OAs prevents arbitration in Rhode Island because "contract law" requires the parties to litigate in Maine. The previous analysis of Delaware law leads to a different conclusion, and the Court rejects that contention.

[15] "A standard dictionary defines 'crystalline' as 'strikingly clear or sparkling.'" *Duff*, 2012 WL 6096586, at *12 n.77 (quoting Merriam–Webster's Collegiate Dictionary 302 (11th ed. 2004)).

The Court concludes that taking all the allegations as true and looking at the facts in the light most favorable to the Petitioners, the First Petition states a claim upon which relief can be granted.

(d) Rule 12(b)(6) and the Second Petition

The Second Petition is based on the 2015 WPMC OA which does not specifically incorporate the ADA by reference; therefore, the Court's analysis is somewhat different.

First of all, the Second Petition raises issues beyond the ADA Disputes. As previously stated, Petitioners allege that Respondents breached their fiduciary duties to CanWell and its Affiliates; tortiously and intentionally interfered with CanWell's contracts, including the ADA; tortiously interfered with CanWell's business opportunities in Maine, Rhode Island, and Massachusetts; and aided and abetted each other in a tortiously intentional manner to breach their contractual and membership obligations. *See generally*, Second Pet. at ¶ 16(f). Since these issues arise out of the parties' relationships as Members of WPMC, they are certainly subject to arbitration in Rhode Island.

Furthermore, Petitioners argue that the ADA is incorporated in the 2015 WPMC OA by virtue of it being a "future agreement" as referenced in the arbitration provision of the 2015 WPMC OA. *See* 2015 WPMC OA Art. 17. The 2012 WPMC OA is identical to the 2015 version except that it changes the forum for arbitration from Portland, Maine to Providence, Rhode Island. Article 17 of the 2012 WPMC OA provides that "any agreement contemplated hereby, or any future agreement, understanding or instrument to which two or more Persons may be parties, shall be submitted to binding arbitration . . . ." 2012 WPMC OA Art. 17. The stated purpose of the WPMC company is to "render certain consulting services and assistance to WCM pursuant to agreements between the Company and WCM . . . ." 2012 WPMC OA § 2.6. Therefore, the ADA was both a

"future" and a "contemplated" agreement subject to arbitration under the 2012 WPMC OA when it was executed on October 1, 2015. The Respondents contend that the 2015 WPMC OA "amends, restates, and supersedes" the 2012 WPMC OA. *See* 2015 WPMC OA §16.10. Thus, they contend that the ADA could not be a future or contemplated agreement because it already existed when the 2015 WPMC OA was executed. However, the word "supersede" in the boilerplate language of Section 16.10 does not mean erase. A plausible interpretation of this language is that if there is anything inconsistent or in conflict between the 2012 WPMC OA and the 2015 WPMC OA, the latter agreement controls. It does not necessarily mean that the ADA, which was subject to arbitration on October 25, 2015, ceases to be subject to arbitration upon the execution of the restated and amended version of the WPMC OA on October 26, 2015. However, once again there are conflicting or inconsistent provisions between the 2015 WPMC OA and the ADA which, according to Delaware law, creates an ambiguity. To resolve the issue, the Court must determine the intent of the parties when entering into these agreements. Such an exercise requires fact finding which is not an exercise to be conducted when considering a Rule 12(b)(6) Motion to Dismiss. *See Chase v. Nationwide Mutual Fire Insurance Co.*, 160 A.3d 970, 973 (R.I. 2017) (holding dismissal under Rule 12(b)(6) appropriate to "dispos[e] of a case early in the litigation process when the material facts are not in dispute").

The Court cannot conclude that it is beyond a reasonable doubt that Petitioners cannot prove facts that would enable it to subject the ADA Disputes to arbitration in Rhode Island.

5. Rule 12(b)(7)

Respondents Acreage, WPMC, and Murphy argue that Northeast is an indispensable party to the First Petition because it arises out of Northeast's alleged termination of the ADA, and Northeast is the company to whom CanWell was providing services under the ADA. However,

Northeast was not a party to CanWell OAs (the basis for the First Petition) and, thus, cannot be compelled to arbitrate pursuant to those agreements. Northeast is a signatory to the 2015 WPMC OA, and Petitioners have brought Northeast in as a party pursuant to that agreement in its Second Petition. Moreover, this issue was not fully briefed by the Respondents, nor was it addressed in any meaningful way during oral argument. "The burden is on the party raising the defense to show that the person who was not joined is needed for a just adjudication." 7 Wright & Miller, *Federal Practice and Procedure* § 1609 at 142 (3d ed. 2001). The Court finds Respondents' Rule 12(b)(7) argument without merit. "[T]he rule should be employed to promote the full adjudication of disputes with a minimum of litigation effort," and full adjudication is not at issue here as Northeast is already involved in this litigation under the Second Petition. *Id.* at § 1602.

IV

Conclusion

The Court finds that the parties, other than Murphy and Acreage,[16] have entered into valid arbitration agreements and, for purposes of the Rule 12(b)(6) Motions, there is a valid claim that the ADA Disputes are subject to arbitration. For the reasons stated herein, the Court denies the Motions to Dismiss the First and Second Petitions, except that it is granted as to Murphy without prejudice.

However, the Court is not currently sending the ADA Disputes to arbitration. The Court finds that the next step in this litigation is for it to determine who decides whether the ADA Disputes are arbitrable: the Court or the arbitrator. In light of the stay in the Maine litigation, which expires on January 3, 2020, the Court wants memoranda submitted by December 23, 2019

[16] Whether Acreage is subject to arbitration is dependent on whether it is found to be the alter-ego of WPMC.

addressing this issue. The memoranda should also address what would be the next steps after a decision on who decides arbitrability. Reply memoranda may be submitted by December 30, 2019.

Counsel shall confer and present the appropriate orders.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**CanWell, LLC, et al. v. High Street Capital Partners, LLC, d/b/a/ Acreage Holdings, Inc., et al.** **and** **CanWell, LLC v. The Wellness and Pain Management Connection, LLC, et al.**
CASE NO:	**KM-2019-0948 and KM-2019-1047**
COURT:	**Kent County Superior Court**
DATE DECISION FILED:	**December 16, 2019**
JUSTICE/MAGISTRATE:	**Licht, J.**
ATTORNEYS:	
For Plaintiff:	**Vincent A. Indeglia, Esq.** **John C. Revens, Jr., Esq.** **William M. Russo, Esq.** **Thomas A. Tarro, III, Esq.**
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