STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED: January 29, 2020)

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. In the Court's decision rendered on December 16, 2019 denying Respondents' respective motions for dismissal, the parties were instructed to submit memoranda addressing the

narrow issue of who determines whether the ADA Disputes are arbitrable: the Court or the arbitrator. *See Canwell, LLC v. High Street Capital Partners, LLC*, No. KM-2019-0948, KM-2019-1047, 2019 WL 7041421, at *1 (R.I. Super. Dec. 16, 2019) (12/16/19 Decision). The Court defined the ADA Disputes to be those "disputes involving the alleged termination of the ADA and the alleged violation of the non-competition provision in the ADA . . ." *Id.* at *7.

I

Facts and Travel

In light of its 12/16/19 Decision, whose Facts and Travel section is incorporated herein, the Court will engage in only a brief recitation of the facts and history of this case in order to put the matter presently before the Court in proper perspective.

A

The Parties

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 aspects of the cannabis industry including cultivation, extraction, processing, alternative dosage development, and dispensing. CanWell owns the most significant interest in the CanWell

Subsidiaries. Respondent the Wellness and Pain Management Connection, LLC (WPMC) owns a three-percent interest in both state-specific CanWell Subsidiaries,[1] 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)[2]

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

Northeast[3] 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.

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

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[1] 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.

[2] 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.

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

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.[4] The 12/16/19 Decision concluded that whether Acreage is subject to arbitration is dependent on whether Acreage is found to be WPMC's successor-in-interest and alter-ego.

B

The Agreements

There are several agreements which are central to the issues involved in this case but, for purposes of this Decision, the arbitration provisions contained therein are the focus.

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.

The ADA 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 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

[4] 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.

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]." *Id.* § 13.7.

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).

The WPMC OAs contain an Arbitration Clause which Petitioners assert as the basis of their Second Petition. That clause 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 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.

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.[5] Northeast is not a party to these agreements. The CanWell OAs include the ADA as a defined term and expressly incorporate by reference the noncompete covenant contained in the ADA. *See* CanWell OAs §§ 1.1, 3.9, 4.16, 5.8.

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

More importantly, 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 otherwise . . . 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, in accordance with the Rules of the Superior Court of the State of Rhode Island* with the arbitrator designated by the Board of Managers;. . . ." *Id.* at Art. 17, as amended (emphasis added).

This arbitration clause is found in the First Amendment to the Operating Agreement adopted as of May 4, 2019. Prior to that Amendment, Article 17 provided as follows:

> "The parties hereby agree that unless otherwise . . . 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 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, in accordance with the commercial rules of the American Arbitration Association*." *Id.* at Art. 17 (emphasis added).

C

The Litigation

1. The Petitions

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 (*i.e.*, the First Petition). Petitioners base their argument for

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. Northeast is not a named Respondent in the First Petition nor a party to the CanWell OAs.

On September 16, 2019,[6] CanWell (individually) filed a Miscellaneous Petition for Mandating Arbitration Pursuant to Contract and Request for a Temporary Restraining Order (*i.e.*, the Second Petition). In the Second Petition, Petitioner couches its argument for arbitration in the 2015 WPMC OA 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.

2. Prior Rulings

While the Court has issued a number of orders in this matter, for purposes of this Decision it is important to note that the Court has already referred to arbitration: (1) a dispute arising under the 2015 WPMC OA concerning WPMC's alleged redemption of CanWell's interest in WPMC; and (2) a dispute arising under the CanWell OAs concerning WPMC's alleged withdrawal from CanWell RI and CanWell ME.

Most recently, the 12/16/19 Decision denied Respondents' respective motions to dismiss the two petitions.[7] In that decision, the Court held 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."

[6] On September 3, 2019, Northeast filed a Complaint in the Superior Court of Maine regarding Canwell's alleged breach of the ADA and other issues regarding Northeast and WPMC's alleged termination of the ADA. Proceedings in that case have been stayed until early February 2020 awaiting this Court's ruling.

[7] The Court denied the motions to dismiss except as they pertained to Murphy, which the Court granted without prejudice.

Canwell, 2019 WL 7041421, at *16. The parties have briefed the issue, and argument was held on January 23, 2020.

II

Issue Presented

The Court pauses to emphasize the narrow scope of the issue currently before it. This case presents three layers of issues: (1) the merits of the ADA Disputes; (2) who will decide the merits, an arbitrator or the Superior Court of Maine; and (3) the threshold issue of who decides, this Court or the arbitrator, whether the ADA Disputes are arbitrable. Stated more succinctly, the issues are (1) the merits, (2) the forum for deciding the merits and (3) who decides which forum. The only issue to be addressed by the Court in this Decision is the third issue. While the parties present many arguments that address the second issue of substantive arbitrability, that issue is not yet before the Court, if at all.

In summary, the Court is not determining whether the ADA Disputes are subject to arbitration but, rather, it is determining *who* will decide the gateway question of substantive arbitrability.

III

Choice of Law

Before the Court examines a choice-of-law issue, it must first determine whether there is conflict between the laws and whether that conflict would affect the outcome of the case. *National Refrigeration, Inc. v. Standen Contracting Co., Inc.*, 942 A.2d 968, 973-74 (R.I. 2008) ("A motion justice need not engage in a choice-of-law analysis when no conflict-of-law issue is presented to the court."); *see General Accident Insurance Co. of America v. American National Fireproofing, Inc.,* 716 A.2d 751, 758 (R.I. 1998) (affirming trial justice's decision not to reach a choice-of-law

issue because, regardless of what law applied, the contract language barred recovery for the claims at issue); *Avco Corp. v. Aetna Casualty & Surety Co.*, 679 A.2d 323, 330 (R.I. 1996) (holding choice-of-law contention was "feckless" because the court's finding would have been the same regardless of what law was applied).

The Court notes, and rejects, Respondent Northeast's argument that Maine law, rather than Delaware law, should apply to the issue at hand because the law on arbitrability differs between the two states. There is no choice-of-law issue for the Court to determine because the United States Supreme Court holds that arbitration contracts involving interstate commerce (like the CanWell OAs and 2015 WPMC OA) are governed by the Federal Arbitration Act (FAA).[8]

The Court is determining who decides what is arbitrable pursuant to the arbitration clauses contained in the CanWell OAs and/or the 2015 WPMC OA, making this an issue of contract interpretation. "The FAA does not create a body of federal contract law; rather, it simply requires that contracts with arbitration clauses be interpreted in accordance with the ordinary principles of contract interpretation that would otherwise govern." *Willie Gary LLC v. James & Jackson LLC*, No. Civ. A. 1781, 2006 WL 75309, at *5 (Del. Ch. Jan. 10, 2006) (hereinafter, *Willie Gary*, Chancery Court).

The 2015 WPMC OA and the CanWell OAs, which form the basis of Petitioners' demands for arbitration in the First and Second Petitions, are to be "construed and enforced in accordance with the internal laws of the State of Delaware." The 2015 WPMC OA § 16.3; CanWell OAs

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[8] In *Southland Corp. v. Keating,* the United States Supreme Court decided that Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases and concluded that the Federal Arbitration Act pre-empts state law. 465 U.S. 1 (1984). The Court in *Allied-Bruce Terminix Companies, Inc. v. Dobson* went on to determine that the Federal Arbitration Act is applicable to contracts involving interstate commerce based on the wording of the Act. 513 U.S. 265, 270–72 (1995).

§ 16.3. Accordingly, pursuant to the plain language of the contracts containing the subject arbitration clauses, Delaware law is proper.

IV

Standard of Review

"When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

Delaware courts distinguish questions of substantive arbitrability and procedural arbitrability. *See James & Jackson, LLC v. Willie Gary*, 906 A.2d 76, 79 (Del. 2006) (hereinafter, *Willie Gary,* Supreme Court). "Substantive arbitrability issues are gateway questions about the scope of an arbitration provision and its applicability to a given dispute." *Id.* The well-established presumption favoring arbitrability is reversed when applying contract law principles to determine substantive arbitrability:

> "Although the Court has also long recognized and enforced a 'liberal federal policy favoring arbitration agreements,' it has made clear that there is an exception to this policy: The question whether the parties have submitted a particular dispute to arbitration, *i.e.* the 'question of arbitrability,' is 'an issue for judicial determination [u]nless the parties *clearly and unmistakably* provide otherwise.'"

Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (emphasis added) (quoting *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986)).

Delaware has "adopt[ed] the majority federal view that reference to the AAA rules evidences a clear and unmistakable intent to submit arbitrability issues to an arbitrator." *Willie Gary*, Supreme Court, 906 A.2d at 80.

> "The majority view does not, however, mandate that arbitrators decide arbitrability in *all* cases where an arbitration clause incorporates the AAA rules. Rather, it applies in those cases where

> the arbitration clause generally provides for arbitration of all disputes and also incorporates a set of arbitration rules that empower arbitrators to decide arbitrability." *Id.* (distinguishing where an arbitration clause requiring arbitration in accordance with AAA also expressly authorized the parties to obtain remedies in the courts).

Thus, to determine whether the parties agreed to arbitrate arbitrability, *Willie Gary* requires the Court to engage in a two-step inquiry: (1) the arbitration clause must generally provide for arbitration of all disputes; and (2) the arbitration clause incorporates a set of arbitration rules that empower arbitrators to determine arbitrability (such as the AAA Rules).

In *McLaughlin v. McCann*, 942 A.2d 616, 626-27 (Del. Ch. 2008), the Delaware Court of Chancery added a third prong to the *Willie Gary* standard: "absent a clear showing that the party desiring arbitration has essentially no non-frivolous argument about substantive arbitrability to make before the arbitrator, the court should require the signatory to address its arguments against arbitrability to the arbitrator." This "non-frivolous" third prong articulated in *McLaughlin* is the same as the "wholly groundless"[9] exception that the United States Supreme Court struck down in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, as being inconsistent with the Federal Arbitration Act. ___ U.S. ___, 139 S. Ct. 524 (2019) (Kavanaugh, J.). In that case, the arbitration clause incorporated the AAA rules but excluded injunctive relief and intellectual property disputes. The respondent sued the petitioner requesting injunctive relief, and the petitioner sought to refer the matter to arbitration. *Id.* at 528. The United States District Court for the Eastern District of Texas denied the motion to compel arbitration, citing "the wholly groundless" exception to submitting arbitrability to the arbitrator. *Id.* Justice Kavanaugh, in a unanimous opinion, ruled there was no "wholly groundless" exception to the Federal Arbitration Act. *Id.* at 531. He wrote: "But if a valid

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[9] In fact, Vice-Chancellor Strine uses the term "wholly groundless" at least twice in his decision. *McLaughlin*, 942 A.2d at 626, 627.

agreement exists and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue." *Id*. at 530. He later opined: "Arbitrators can efficiently dispose of frivolous cases by quickly ruling that a claim is not in fact arbitrable." *Id*. at 531.

Notwithstanding the *Willie Gary* test, Petitioners have urged the Court to look at the Supreme Court of Delaware's established standard for determining the scope of an arbitration provision and whether an issue is arbitrable in *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 155 (Del. 2002) (hereinafter, *Parfi*). However, *Parfi* addressed the question of whether an issue was arbitrable and not who decides arbitrability, which is the only issue before the Court. Thus, the *Parfi* standard does not apply and the Court must examine the various arbitration provisions in this case to determine if they satisfy the *Willie Gary* test.

V

Analysis

A

The Applicability of *Willie Gary*

Before the Court applies *Willie Gary*, it must address Respondents' contention that where there is a competing forum selection clause, Delaware case law requires the court not the arbitrator to determine arbitrability. This Court does not read those cases as Respondents do.

In *UPM-Kymmene Corp. v. Renmatix, Inc.*, there was no dispute about arbitrability. Rather, the court was faced with "dueling arbitration clauses" (both of which empowered the arbitrator to determine arbitrability) and could not determine whether the parties intended for one arbitrator over the other to arbitrate the dispute. C.A. No. 2017-0363-AGB, 2017 WL 4461130, at *7 (Del. Ch. Oct. 6, 2017). "[T]he core dispute between the parties [wa]s not whether the claims in [defendant's] [d]emand should be arbitrated or litigated in court—the parties agree[d] that the

claims must go to arbitration—but whether those claims must be arbitrated before the ICC or AAA." *Id.* Accordingly, that case presents an entirely different issue than the case at hand and is simply nonapplicable.

Respondents also rely on *Hough Associates, Inc. v. Hill*, which the Court, again, finds materially distinguishable from the case at hand. No. CIV.A. 2385-N, 2007 WL 148751, at *6 (Del. Ch. Jan. 17, 2007). In *Hough Associates*, the party sought arbitration of claims asserted under a non-compete agreement based on an arbitration provision in an entirely separate agreement. *Id.* The court refrained from applying the *Willie Gary* test and denied the motion to compel arbitration because the two agreements were "function[ally] independent[] and contain[ed] their own terms designed to satisfy their own unique objectives." *Id.* Here, the ADA's stated purpose is that "[Northeast], WPMC and Canwell desire to . . . enter into a products and services arrangement to effect, in addition to Canwell's provision of the Limited Services and Limited Products to be provided to [Northeast] under the WPMC License Agreement . . . ." ADA § 2. As discussed below and in the 12/16/19 Decision, the CanWell OAs specifically refer to the ADA and the WPMC OA "contemplates" the ADA. Thus, in the present matter, the CanWell OAs, the 2015 WPMC OA, and the ADA are not functionally independent and appear to work in tandem to achieve a common objective, *to wit*, operating and investing in the legalized marijuana industry.

Similarly, in *TowerHill Wealth Management, LLC v. Bander Family Partnership, L.P.*, the operating agreements called for disputes to be resolved in the Court of Chancery, and an Investment Advisory Agreement called for arbitration. C.A. No. 3830-VCS, 2008 WL 4615865, at *3 (Del. Ch. Oct. 9, 2008). In that case, the court declined to apply *Willie Gary* because the party sought arbitration under the Investment Advisory Agreement when the claims arose under the operating agreements, which were entirely different contracts that did not contain an arbitration

clause. *Id.* Respondents rely on the sentence, "Here, where there are various dispute resolution clauses in play in various contracts, it is impossible to select one and say it applies generally to all disputes." *Id*. However, Respondents overlook the very next sentence, which states: "Moreover, [the] complaint in arbitration—by its own words—arises primarily from and seeks relief for breach of the Operating Agreements, contracts which call for *binding* dispute resolution to take place *in this court*, not in arbitration." *Id.* (emphasis in original). In contrast, as discussed *supra*, in this case, the contracts at issue all relate to each other, and Petitioners' prayer for relief is premised under contracts that *do* call for arbitration: the CanWell OAs and 2015 WPMC OA. What is more, the *TowerHill* decision does not provide the language of the arbitration clause, so it cannot be compared to the extremely broad language of the clauses at issue in the First and Second Petitions.

B

The First Petition

In determining whether there is "a clear and unmistakable intent to submit arbitrability issues to an arbitrator," the Court employs the *Willie Gary* test and first turns to whether the arbitration clause in the CanWell OAs generally provides for arbitration of all disputes. *Willie Gary*, Supreme Court, 906 A.2d at 80.

The arbitration clause contained in the CanWell OAs require arbitration for "any and all disputes, and legal and equitable claims" arising out of the agreement, "any agreement contemplated hereby, or any future agreement, understanding or instrument to which two or more such Persons may be parties." CanWell OAs § 17. As discussed above and, at great length, in the 12/16/19 Decision, the CanWell OAs arbitration clause is broad enough to include disputes under the ADA. The plain language of this broad agreement to arbitrate appears all-encompassing and, thus, satisfies the first prong of the *Willie Gary* test. The inconsistent forum selection clause of

the ADA may ultimately lead the decider of arbitrability to a conclusion that the ADA Disputes are not arbitrable, but it does not undermine the first prong of the *Willie Gary* test.

Next, the Court must determine whether the arbitration clause incorporates a set of arbitration rules that empower arbitrators to determine arbitrability. *Willie Gary*, Supreme Court, 906 A.2d at 78. The CanWell OAs provide for "binding arbitration in . . . Rhode Island, in accordance with the Rules of the Superior Court of the State of Rhode Island." CanWell OAs § 17, as amended. Rhode Island Superior Court Arbitration Rule 4 states that an arbitration "award must resolve all issues raised by the pleadings." Petitioners pled in the First Petition that the parties' disputes must be sent to arbitration pursuant to the CanWell OAs and ADA, and the Court has already sent one matter arising thereunder to arbitration. Respondents moved to dismiss the First Petition, arguing that the particular ADA Disputes are not arbitrable because of the ADA's forum selection clause. This Court denied the Respondents' motion. Thus, whether the ADA Disputes are arbitrable is an issue that was raised in the pleadings and should be considered and decided by the arbitrator. Because a fair reading of the Rhode Island Superior Court Arbitration Rules empowers the arbitrator to decide all issues, the second prong of *Willie Gary* is met.

The Court would observe that Justice Kavanaugh, in *Henry Schein, Inc.*, rejected the notion that a court could rule on arbitrability even when the request to arbitrate is groundless. 139 S. Ct. at 529. In that case, it was evident on the face of the complaint that the plaintiff was seeking injunctive relief, which had been carved out of the arbitration clause and yet Justice Kavanaugh said the court could not rule on arbitrability. Here, there are no carveouts, and while Petitioners may not ultimately prevail on arbitrability, their claim to arbitrate is far from groundless.

Lastly, the Court addresses Respondents' argument that the amendment of the CanWell OA arbitration clause was invalid and, thus, not binding on Respondents. In oral argument,

Counsel for WPMC contended that the amendment repealed the original arbitration clause and since the amendment was improperly adopted, Respondents in the First Petition might not be bound by the amended clause and, thus, not subject to arbitration at all. The Court totally rejects such an attempt to obtain the best of both worlds. If the adoption of the amendment was improper, then the repeal of the original clause was ineffective, and it would remain in effect. Therefore, assuming, *arguendo*, that the amended version of the arbitration clause is invalid, the Court must look to the original arbitration clause, which brings us back to the *Willie Gary* test.

The only differences between the original and the amended arbitration clauses is that the amended version added language to encompass arbitration for any agreement "referenced herein" and changed the arbitration rules from AAA to the Rhode Island Superior Court Rules. The original arbitration clause called for arbitration of "any and all disputes, and legal and equitable claims" arising out of the agreement, "any agreement contemplated hereby, or any future agreement . . . in the State of Rhode Island, in accordance with the commercial rules of the [AAA]." This clause is broad enough to include the ADA Disputes without the words "referenced herein." For all the reasons stated herein and in the 12/16/19 Decision, the ADA is an agreement contemplated by CanWell OAs. Thus, it satisfies the first prong of the *Willie Gary* test.

Next, the Court must determine whether the original arbitration clause incorporates a set of arbitration rules that empower arbitrators to determine arbitrability. *Willie Gary*, 906 A.2d at 78. AAA Commercial Arbitration Rule 7 provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction." Therefore, the reference to AAA satisfies the second prong of *Willie Gary* and arbitrability is a question for the arbitrator to decide. *See e.g.*, *McLaughlin*, 942 A.2d at 626 (emphasizing the heavy presumption that the parties' reference to the AAA Rules and agreement to submit disputes to AAA arbitration signaled their intent to have disputes over

arbitrability be resolved by an arbitrator); *Willie Gary*, 906 A.2d at 80 ("reference to the AAA rules evidences a clear and unmistakable intent to submit arbitrability issues to an arbitrator").

Accordingly, no matter which version of the CanWell OAs' arbitration clause governs, the result is the same, and the arbitrator is to decide whether the ADA Disputes under the First Petition are arbitrable.

C

The Second Petition

As to the Second Petition, the Court again looks to the *Willie Gary* test and must examine the 2015 WPMC OA to see if it presents "clear and unmistakable" evidence that the parties intended to arbitrate the question of substantive arbitrability in this case.

First, the Court must determine whether the arbitration clause is one that generally provides for arbitration of all disputes. *Willie Gary*, Supreme Court, 906 A.2d at 78.

> "[This] requirement is that the carveouts and exceptions to committing disputes to arbitration should not be so obviously broad and substantial as to overcome a heavy presumption that the parties agreed by referencing the AAA Rules and deciding to use AAA arbitration to resolve a wide range of disputes that the arbitrator, and not a court, would resolve disputes about substantive arbitrability." *McLaughlin*, 942 A.2d at 625.

See e.g., *BAYPO Limited Partnership v. Technology JV, LP*, C.A. No. 2693-VCL, 2007 WL 4788449, at *5 (Del. Ch. Oct. 2, 2007) (holding a narrowly tailored exception to an arbitration clause that otherwise submitted all disputes to arbitration did not negate the conclusion that a reference to the AAA rules provided evidence of the parties' clear and unmistakable intent to arbitrate arbitrability). "In a case where there is any rational basis for doubt about that, the court should defer to arbitration, leaving the arbitrator to determine what is or is not before her." *McLaughlin*, 942 A.2d at 625.

In this case, the arbitration provision found in the 2015 WPMC OA requires arbitration in Rhode Island of "any and all disputes, and legal and equitable claims" arising out of the agreement and any "contemplated" or "future" agreement in accordance with the AAA rules. 2015 WPMC OA § 17. As discussed at length in the 12/16/19 Decision, the ADA is an agreement contemplated by the 2012 and the 2015 WPMC OAs. While it is not specifically mentioned as in the CanWell OAs, the purpose of WPMC is "to render certain consulting services and assistance to WCM pursuant to agreements between the Company and WCM . . ." 2015 WPMC OA § 2.6. Both WCM (referred to herein as "Northeast") and WPMC are parties to the ADA. The parties point to no exceptions or carveouts in the 2015 WPMC OA to that arbitration clause. The broad language of the arbitration clause requires "all disputes" to be referred to arbitration, including, ostensibly, a dispute over arbitrability. *See e.g.*, *Glazer v. Alliance Beverage Distributing Co. LLC*, No. CV 12647-VCMR, 2017 WL 822174, at *2 (Del. Ch. Mar. 2, 2017) (holding arbitration clause stating "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof" satisfied the first prong of *Willie Gary*); *contra Nutzz.com, LLC v. Vertrue Inc.*, No. CIV.A. 1231-N, 2006 WL 2220971, at *6 (Del. Ch. July 25, 2006) (holding arbitration clause stating "[w]ith the exception of seeking injunctive or other relief for violation of Section 12 . . . will be finally settled by arbitration" did not satisfy *Willie Gary* because it contained a carveout). The broad agreement to arbitrate in the 2015 WPMC OA contains no limitations on its scope and certainly satisfies the first prong of the *Willie Gary* test. What is more, even if there were "any rational basis for doubt about that," which there is not, the Court is directed to defer to arbitration and allow the arbitrator to determine arbitrability. *McLaughlin*, 942 A.2d at 625.

The arbitration clause also satisfies the second *Willie Gary* prong. It requires claims arising out of that agreement, any agreement contemplated thereby, and any future agreement "be

submitted to binding arbitration in Providence, Rhode Island in accordance with the commercial rules of the American Arbitration Association." 2015 WPMC OA § 17. As previously discussed, AAA Commercial Arbitration Rule R–7(a) provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." Therefore, the 2015 WPMC OA incorporates a set of arbitration rules that empower the arbitrator to decide arbitrability.

The Respondents have also argued that this Court should exercise judicial comity and defer to the proceeding in the State of Maine. While that may be an argument as to why the ADA Disputes should not be arbitrable, it has no bearing on the question of who decides arbitrability.

VI

Second Petition: Appointment of an Arbitrator

As previously mentioned, this Court has already ordered arbitration under both the First and Second Petitions as to certain issues. Under the First Petition, this Court referred WPMC's alleged withdrawal from CanWell to arbitration before retired Rhode Island Supreme Court Chief Justice Frank Williams. Under the Second Petition, the Court referred WPMC's alleged wrongful redemption of CanWell's membership interest in WPMC to arbitration under the AAA Commercial Arbitration Rules in accordance with Article 17 of the 2015 WPMC OA. However, as to that referral under the Second Petition, Petitioner has asserted that the parties cannot agree on an arbitrator and, pursuant to § 10-3-6, Petitioner has requested the Court appoint retired Rhode Island Supreme Court Chief Justice Frank Williams.

The Court believes that the Federal Arbitration Act (FAA) applies to this case and that Petitioner's request should be reviewed pursuant to 9 U.S.C.A. § 5, which is virtually identical to § 10-3-6. The federal statute, entitled "Appointment of arbitrators or umpire," provides:

> "If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if *for any other reason there shall be a lapse in the naming of an arbitrator* or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator." 9 U.S.C.A. § 5. (emphasis added).

Petitioner argues that there has been a "lapse in the naming of an arbitrator" in the Redemption Arbitration and, thus, the Court should appoint an arbitrator. *See id.* However, in a November 14, 2019 Notice from the Second Petition AAA Case Manager, she states, "Counsel have agreed to hold the AAA arbitration pending further guidance from Judge Licht," in anticipation of the Court's 12/16/2019 Decision. Once that decision was rendered, Respondents informed the Case Manager of the additional briefing requested by this Court, to which the Case Manager wrote that she would "hold [the matter] until further notice." Respondents also provide the Court with an email communication dated January 10, 2020 from Petitioner's counsel stating, "I am in agreement with [Respondents' counsel's] assessment and suggestion regarding the status and how we should proceed." Furthermore, the parties agreed to delay by a month the briefing and argument with respect to the issue being decided in this decision.

Thus, the Court rejects Petitioner's argument that, notwithstanding the parties' *mutual* agreement to pause the AAA arbitration in the Second Petitioner, the words "for any reason whatsoever" empower the Court to name an arbitrator.

The FAA, in 9 U.S.C.A. § 5, mandates that "[i]f in the agreement provision be made for a method of naming or appointing an arbitrator . . . , such method shall be followed[.]" The 2015

WPMC OA states disputes "shall be submitted to binding arbitration in Providence Rhode Island *in accordance with the commercial rules of the American Arbitration Association.*" WPMC OA § 17. The parties are bound by the 2015 WPMC OA and have agreed to use the AAA rules. Thus, AAA rules govern, and selection of an arbitrator must proceed in accordance therewith.[10]

While the Court cannot intervene into the AAA rules process for appointing an arbitrator, it has previously stated that—for purposes of reducing the cost of arbitration, the speed of bringing the arbitration to conclusion, consistency in results, and overall efficiency—it makes sense to

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[10] R-12 of the AAA Rules delineates the process of appointing an arbitrator. R-12 provides:

> "If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner:
>
> "(a) The AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.
>
> "(b) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 14 calendar days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. The parties are not required to exchange selection lists. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable to that party. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.
>
> "(c) Unless the parties agree otherwise, when there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators."

appoint retired Chief Justice Williams, the arbitrator in the First Petition, to be the arbitrator in the Second Petition. The claims involve the same parties as in the First Petition with the addition of Northeast, emanate from the same set of facts, and present common questions of law. However, at this moment, the Court must recognize the method of selection contracted for by the parties and those arguments must be addressed to the AAA.

VII

Conclusion

For the reasons stated herein, the Court finds that the threshold question of substantive arbitrability of the ADA Disputes is one for the arbitrator or arbitrators to decide. Nothing herein or in the 12/16/19 Decision should be interpreted to suggest that this Court has reached any conclusion on substantive arbitrability. Counsel shall confer and submit an order consistent with this Decision.

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:	**January 29, 2020**
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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