[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Fried Justice

PART 60m

ACF Industries Holdings

INDEX NO. 600255/05

MOTION DATE

- v -

MOTION SEQ. NO. 001

Wachovia Capital Markets

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED
APR 21 2005
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 4/19/05

BERNARD J. FRIED J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60
----------X

ACF INDUSTRIES HOLDING CORP. and ACF INDUSTRIES LLC,

Plaintiffs,

Index No. 600255/05

-against-

WACHOVIA CAPITAL MARKETS LLC and WACHOVIA CORPORATION d/b/a WACHOVIA SECURITIES,

Defendants.

----------X

FRIED, J.:

Plaintiffs ACF Industries Holding Corp. (Holding) and ACF Industries, LLC (Industries) move by order to show cause for an order staying the arbitration commenced before the American Arbitration Association by defendant Wachovia Capital Markets LLC (Capital) against Holding, on the ground that Holding is not a party to the agreements and has not agreed to arbitrate any disputes with Capital; staying the defendants from commencing any future arbitration against Holding on the ground that Holding is not a party to the agreements; and staying defendants from commencing any arbitration against plaintiffs arising from the underwriting agreement dated November 14, 2003, between Wachovia Corporation d/b/a Wachovia Securities (Securities) (Underwriting Agreement) on the ground that the Underwriting Agreement does not contain an arbitration provision.

Defendants cross-move, pursuant to CPLR 7503, for an order compelling arbitration, or, alternatively, changing the venue of this action to Charlotte, North Carolina, pursuant to CPLR 7502.

Since the time when this motion was filed, defendants filed a second and third amended demand for arbitration. In both of those demands, defendants named only Industries, not Holdings. Therefore, so much of the motion as seeks to stay any arbitration brought against Holdings is now moot.

Industries sells and leases railcars in the United States. Capital and Securities provide investment banking and financial advisory services to clients throughout the world.

On October 22, 2003, Industries and Capital signed an engagement letter (Engagement Letter), pursuant to which Capital was retained to assist Industries in refinancing its fleet of railcars and other assets. Capital undertook to structure the sale-back financing of a portion of Industries' assets, and place the lease equity with private equity investors (Equity Transaction). Capital also was to place the lease debt and subordinate debt as notes through a privately placed securitization (Debt Transaction). Industries was required to pay all reasonable fees and expenses related to these transactions. The Engagement Letter contains an arbitration clause that requires arbitration of any claim or controversy arising out of, or relating to, the Engagement

Letter. The Engagement Letter further provided that the arbitration of any such claim or controversy shall take place in Charlotte, North Carolina, and be governed by North Carolina law.

On November 22, 2003, Industries and Securities entered into a written agreement, pursuant to which Securities agreed to underwrite the Equity Transaction (Underwriting Agreement). The Underwriting Agreement does not contain an arbitration clause, nor does it refer to the Engagement Letter. The Underwriting Agreement provides for certain conditions precedent, including that the closing was to be no later than December 31, 2003. The closing was scheduled for December 30, 2003. However, during December, Capital and Securities made some changes to the deal structure. On December 26, 2003, Securities submitted new pricing information on the transactions, which, according to Industries, materially altered the terms and conditions of the transactions. Industries refused to accept the changes, and stated that it did not intend to consummate the transactions. Therefore, the transactions did not close by December 31, 2003, as required by the Undertaking Agreement.

Capital filed a demand for arbitration before the American Arbitration Association against Holding on December 18, 2004. On January 21, 2005, Holding and Industries filed a summons and complaint in this action seeking to stay arbitration to enjoin any adjudication of Holding's purported obligations under the Underwriting Agreement and Engagement Letter; and to enjoin any arbitration commenced against Holding and

Industries pursuant to the Underwriting Agreement. The complaint also seeks damages resulting from defendants' breach of their obligation to negotiate the Equity Transaction and Debt Transaction in good faith, and for tortious interference with plaintiffs' prospective economic advantage. Plaintiffs also seek a declaratory judgment declaring that they do not have any obligation to reimburse defendants for certain expenses incurred by defendants because of defendants' bad faith and tortious conduct.

Although Holdings is no longer named as a party in the arbitration proceeding, Holding still seeks an injunction against future arbitrations, because it was not a signatory to the Engagement Letter or Underwriting Agreement. Holdings objects to defendants' attempt to reserve the right to bootstrap Holdings back into the case.

While Holdings correctly states that it is not a signatory to the Engagement Letter or Underwriting Agreement, and that it did not sign any arbitration agreement, its request for a stay at this time must be denied. There is no current demand for arbitration, nor has Holdings demonstrated that defendants are threatening or are about to do an act in violation of Holdings' rights. *See* CPLR 6301. If, for some reason, defendants attempt to bring Holdings into the arbitration, Holdings may move for appropriate relief.

Plaintiffs argue that I should not compel arbitration of the Underwriting Agreement because the two agreements were separate, and involved different parties. Industries entered into the Underwriting Agreement with Securities, while the

Engagement Letter was with Capital. Plaintiffs also rely on the fact that defendants admitted in their original arbitration demand that the Underwriting Agreement was a separate agreement. A statement in a pleading constitutes a formal judicial admission, and should be considered evidence of the fact admitted.

Defendants argue that the Underwriting Agreement arises out of the Engagement Letter, and thus the arbitration clause in the Engagement Letter should apply to the Underwriting Agreement as well. However, the Engagement Letter has separate obligations from those in the Underwriting Agreement. Furthermore, the Underwriting Agreement does not refer to the Engagement Letter. There is nothing in either document from which it can be inferred that one is dependent upon the other, or that the terms of one are meant to be carried into the other. In addition, while Industries is a party to both agreements, Securities and Capital are not the same entity. Thus, Industries never agreed to arbitrate any disagreement with Securities.

Defendants argue that this case is analogous to a situation in which a member of NASD must arbitrate even though the member may not have signed an agreement with the party who seeks to commence an arbitration. I disagree. Industries did not make a blanket agreement to arbitrate with anyone who seeks arbitration in relation to anything involving these transactions. Rather, its agreement to arbitrate was limited to disputes that arose out of the Engagement Letter. As discussed above, the disputes arising from the Undertaking Agreement are not disputes that arose out of the Engagement Letter. *See*

TSN Holdings Inc. v MKI Sec. Corp, 92 NY2d 335, 340 (1998); *Sherrill v Grayco Builders, Inc.*, 64 NY2d 261, 273 (1985). Consequently, there is no basis to require Industries to arbitrate disputes arising from the Undertaking Agreement.

I also reject defendants argument that this question is one for the arbitrator to decide, since in the first instant, it is a judicial determination whether the parties have agreed to submit their dispute to arbitration. *Metalink Marine Corp. v NED Chartering & Trading,* 207 AD2d 688, 689 (1st Dept 1994). It is only once that initial determination has been made that the arbitrator determines the scope of the agreed-upon arbitration.

Defendants' argue that the two agreements are "inextricably intertwined". This, however, is not the case. The Engagement Letter set forth Capital's obligations in seeking financing. The Underwriting Agreement was the agreement between Securities and Industries, which set forth the terms of the Debt Transaction and the Equity Transaction. While the two are, without any doubt, related to each other, they are not inextricably intertwined. Each sets forth its own obligations regarding the parties to the agreement. Neither one is dependent upon the other. Consequently, there is no basis to order arbitration regarding the claims under the Underwriting Agreement, nor is there any basis for concluding that those claims must be adjudicated in North Carolina.

Industries contends that the arbitration initiated by Capital against it under the Engagement Letter should be stayed, because without a stay, Industries will be deprived of its due process right to adjudication of its claims in a court of law. Industries argues that it will be adversely affected by the res judicata and collateral estoppel effect of the arbitration rulings when it litigates the Undertaking Agreement. Industries contends that although the two agreements are between different parties, and involve different aspect of Industries' refinancing efforts, the claims, defenses, and most of the issues in this case and in the arbitration are related.

Certainly, Industries cannot successfully argue that the agreements both are, and are not, inextricably interwoven. Having demonstrated that they are not, it cannot argue the opposing position when such an argument is to its benefit. The two agreements may involve similar, and even overlapping issues. However, they are not inextricably interwoven, and each can be litigated separately. Industries agreed to the arbitration clause, and knew that the arbitration clause might involve issues that would be relevant in an undertaking agreement. Its decision not to include an arbitration provision in the Undertaking agreement does not nullify the arbitration provision in the Engagement Letter. Having agreed to arbitrate any disputes arising out of the Engagement Letter, Industries is bound to abide by such arbitration. The fact that it may have an undesired influence on another litigation does not relieve Industries of its commitment. The Undertaking Agreement can be litigated in this forum, while the Engagement Letter is being addressed in arbitration.

Finally, defendants argue that this action should be removed to Charlotte, North Carolina. However, the action regarding the Undertaking Agreement is properly venued in New York. There is no requirement in the Undertaking Agreement that it be brought in North Carolina. Consequently, arbitrability of the Undertaking Agreement is properly before this court. Since I am not staying the arbitration under the Engagement Letter, nor am I adjudicating any claims under that agreement, the concerns regarding the forum are moot.

Accordingly, it is hereby

ORDERED that the motion, insofar as it seeks a stay of arbitration on behalf of ACF Industries Holding Corp., is denied as moot; and it is further

ORDERED that the defendants are hereby stayed from commencing any arbitration against plaintiffs arising under the undertaking agreement dated November 14, 2003, between Wachovia Securities and ACF Industries LLC; and it is further

ORDERED that defendants' cross motion to compel arbitration is granted only to the extent that ACF Industries is ordered to participate in the arbitration with respect to the engagement letter entered into on October 22, 2003, and defendants shall serve a copy

of this order on the arbitral tribunal within 20 days of service of a copy of this order with notice of entry.

Dated: 4/19/05

ENTER:

J.S.C.

BERNARD J. FRIED
J.S.C.

FILED

APR 21 2005

COUNTY CLERK'S OFFICE
NEW YORK