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

PRESENT: HON. EILEEN BRANSTEN PART 3

Index Number : 650972/2010
OXBOW CALCINING USA INC. AND
VS.
AMERICAN INDUSTRIAL
SEQUENCE NUMBER : 002
COMPEL/STAY ARBITRATION

INDEX NO. 650972/10
MOTION DATE 11/29/10
MOTION SEQ. NO. 2
MOTION CAL. NO. ____

this motion to/~~for~~ Stay/Dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2-2-11

Ellen Branstein J.S.C.
HON. EILEEN BRANSTEN

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------X

OXBOW CALCINING USA INC.
and OXBOW CARBON LLC,

Plaintiffs,

-*against*-

Index No. 650972/10
Motion Date: 11/29/10
Motion Sequence No.: 002

AMERICAN INDUSTRIAL PARTNERS,
AMERICAN INDUSTRIAL PARTNERS
CAPITAL FUND II, L.P., AMERICAN
INDUSTRIAL PARTNERS CAPITAL FUND
III, L.P., THEODORE ROGERS,
and W. RICHARD BINGHAM,

Defendants.

----------X
PRESENT: EILEEN BRANSTEN, J:

Defendants American Industrial Partners ("AIP"), American Industrial Partners Capital Fund II, L.P. ("AIP II"), American Industrial Partners Capital Fund III, L.P. ("AIP III") (collectively, "the AIP Entities"), Theodore Rogers ("Rogers") and W. Richard Bingham ("Bingham") (collectively, "Defendants") move for an order, pursuant to CPLR § 7503 (a) and Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*. compelling arbitration and for an order, pursuant to CPLR 3211 (a) (1), (5) and (7) dismissing the First Amended Complaint on the grounds that all claims are subject to arbitration, untimely and facially deficient. In the alternative, Defendants move for an order, pursuant to CPLR § 2201, staying this action in favor of a pending arbitration before the American Arbitration Association in Houston, Texas. Plaintiffs Oxbow Calcining USA Inc. ("Oxbow Calcining USA") and Oxbow Carbon LLC ("Oxbow Carbon LLC") (collectively, "Plaintiffs") oppose this motion.

002

BACKGROUND

Relevant Procedural History

The Pending Arbitration

On July 16, 2010, Oxbow Calcining LLC ("Arbitration Plaintiff Oxbow Calcining LLC"), formerly known as Great Lakes Carbon LLC, filed a Demand for Arbitration in Houston, Texas against Port Arthur Steam Energy, L.P. ("Arbitration Defendant PASE"). Oxbow Calcining LLC brought the arbitration pursuant to a February 25, 2005 Heat Energy Agreement ("HEA") between Great Lakes Carbon LLC and PASE and pursuant to the American Arbitration Association's Commercial Arbitration Rules. In its Demand for Arbitration, Oxbow Calcining LLC alleges breach of contract and related duties arising out of the HEA, as well as Arbitration Defendant PASE's failure to pay damages its actions have caused to Oxbow Calcining LLC (Affirmation of Maura Barry Grinalds in Support of Defendants' Motion to Compel Arbitration And Dismiss the First Amended Complaint ["Grinalds Affirmation"], Ex. D, Demand for Arbitration). This arbitration is currently pending.

The Instant Litigation

On August 30, 2010, Plaintiffs filed their First Amended Complaint ("FAC") against Defendants for fraud, breach of fiduciary duty and concealment and failure to disclose.

On September 20, 2010, Defendants filed the instant Motion to Compel Arbitration and Dismiss the First Amended Complaint, or in the Alternative, to Stay Proceedings Pending Arbitration. Plaintiffs oppose Defendants' motion. The court held oral argument on the matter on November 29, 2010.

Identity of Parties

Plaintiff Oxbow Carbon LLC is a Delaware limited liability company with its principal place of business in Florida. Oxbow Carbon LLC is the immediate parent and sole owner of Oxbow Calcining USA.

Plaintiff Oxbow Calcining USA is a Delaware corporation with its principal place of business in Florida. Oxbow Calcining USA was formerly known as Great Lakes Carbon USA Inc. ("Great Lakes Carbon USA").

Defendant AIP is a Delaware general partnership with its principal place of business in New York. AIP was the former controlling stockholder of Great Lakes Carbon USA. Defendants AIP II and AIP III are Delaware limited partnerships and subsidiaries of AIP. Defendants Rogers and Bingham are individual principals in AIP and also formerly served on the Board of Directors of Great Lakes Carbon USA.

Plaintiff Oxbow Calcining USA is the parent of Arbitration Plaintiff Oxbow Calcining LLC. As the predecessor to Arbitration Plaintiff Oxbow Calcining LLC, Great Lakes Carbon LLC is a direct signatory to the HEA containing the arbitration clause.

Defendant AIP partnered with non-party Integral Power to form Arbitration Defendant PASE. Arbitration Defendant PASE is a limited partnership and a direct signatory to the HEA containing the arbitration clause.

Factual Background

Arbitration Plaintiff Oxbow Calcining LLC[1] has operated a petroleum coke calcining plant ("the calcining plant") in Port Arthur, Texas since 1935. Kilns at the calcining plant heat

[1] Formerly operated as Great Lakes Carbon LLC.

petroleum coke at extremely high temperatures to create anodes, which are essential to the production of aluminum and other industrial metals (Grinalds Affirmation, Ex. A, FAC, , pp. 3, 4). This process is known as the calcining process.

During the calcining process, the calcining plant kilns discharge excess or "waste" heat. (*id.*, p. 4). Dynegy Power Corp. ("Dynegy") operated a steam plant ("the steam plant") immediately adjacent to the calcining plant between 1982 and 2000. During that time the calcining plant transferred waste heat to the steam plant pursuant to an agreement between Arbitration Plaintiff Oxbow Calcining LLC, known then as Great Lakes Carbon LLC, and Dynegy. The steam plant used the waste heat to produce steam to generate electricity (*id.*).

The steam plant discharged non-useable flue gas in the steam production process. Great Lakes Carbon LLC owned the regulatory permits by which the flue gas was released (*id.*). In or about 1998, Defendant AIP, through AIP II, acquired all of the stock of Great Lakes Carbon USA and its subsidiary businesses, including Great Lakes Carbon LLC. In 1999, testing of the boiler stacks that discharged the flue gas indicated that the steam plant required the installation of a new pollution control system, remedial measures and extensive repairs to comply with environmental regulations. Dynegy closed the steam plant in 2000. Great Lakes Carbon LLC then purchased the steam plant that same year (*id.*, p. 5).

Great Lakes Carbon LLC owned both the calcining plant and the steam plant as of 2000. In 2003, Defendant AIP sold off a portion of its stock in the Great Lakes Carbon entities. In or about November 2004, Defendants offered to purchase the steam plant from Great Lakes Carbon LLC's parent, Great Lakes Carbon USA (*id.*, p. 8).

At the time of Defendants' offer to purchase the steam plant, Defendants Rogers and Bingham were both Principals of AIP and Directors of Great Lakes Carbon USA. Further, Defendant AIP still maintained a controlling interest in the Great Lakes Carbon entities. Thus, Defendants had relationships on both sides of the proposed steam plant transaction.

Plaintiffs allege that during negotiations for the steam plant's purchase, Defendants indicated to Great Lakes Carbon USA that Defendants intended to install electrostatic precipitators as a pollution control system when they completed the purchase (*id.*, p. 9). Electrostatic precipitators reduce particulate from flue gases so that emissions do not exceed environmental permits.

During negotiations to buy the steam plant, Defendants began collaborating with a third company, Integral Power, to form the limited partnership Arbitration Defendant PASE (*id.*, p. 7). PASE was to operate for the sole purpose of the actual purchase and refurbishment of the steam plant (*id.*).

Upon Great Lakes Carbon USA's acceptance of Defendants' offer to purchase the steam plant, Great Lakes Carbon LLC and PASE signed the Asset Purchase Agreement ("APA") on February 25, 2005. The APA set forth the terms of the purchase and sale of the steam plant (*id.*, p. 10). Great Lakes Carbon LLC and PASE simultaneously signed the Heat Energy Agreement ("HEA"). The HEA set forth the terms of operating and maintaining the steam plant (*id.*).

In August of 2005, Defendant AIP sold off another portion of its interest in the Great Lakes Carbon entities. In 2006, AIP sold off its remaining interest in the Great Lakes Carbon entities to an unaffiliated third party, Rain Commodities (USA) Inc.

Plaintiffs Oxbow Carbon and Oxbow Calcining USA had no affiliation with the Great Lakes Carbon entities when PASE purchased the steam plant from Great Lakes Carbon LLC. Oxbow Carbon purchased shares of Great Lakes Carbon USA in or about May of 2007, well after the HEA and APA were entered into between Great Lakes Carbon LLC and PASE.

After Arbitration Defendant PASE purchased the steam plant from Great Lakes Carbon LLC in 2005, PASE installed an injection system for flue gas pollution control, rather than the electrostatic precipitators system that Defendants had discussed with Plaintiffs during purchase negotiations (*id.*, p. 11).

Oxbow Carbon and Oxbow Calcining USA, formerly known as Great Lakes Carbon USA, now allege that Defendants breached their fiduciary duty to Great Lakes Carbon USA and concealed material facts regarding the type of pollution control system they intended to install in the steam plant. Plaintiffs contend that the installed injection pollution control system is defective, unreliable and does not sufficiently reduce particulate from the plant's flue gases to comply with environmental regulations. Plaintiffs contend that they have been forced to install their own pollution control equipment, at a cost of between $6 and $9 million, to treat the flue gases and to ensure that the steam plant's emissions do not violate environmental regulations (*id.*, pp. 18-27). Plaintiffs contend that they sue Defendants not in Defendants' capacity as affiliates or parents of Arbitration Defendant PASE, but rather, in Defendants' capacity as fiduciaries of Great Lakes Carbon USA.

Defendants argue that Plaintiffs' claims are subject to the arbitration commenced July 16, 2010. Defendants assert that Plaintiffs' claims, like those in arbitration, arise out of or in

connection with the HEA. Defendants further claim that the litigation parties, though not direct signatories to the arbitration agreement, are contractually bound thereto because of their respective proximities to the arbitration parties.

Plaintiffs oppose, and argue that the litigation parties are separate and distinct entities from the arbitration parties and their claims arise out of Defendants' fiduciary relationship with Plaintiffs, rather than out of any contractual transaction pursuant to the HEA.

ANALYSIS

I. Motion to Compel Arbitration

A. CPLR § 7503 (a), 9 USC § 1

While it is the policy of both the state of New York and the Federal Arbitration Association to enforce and encourage valid arbitration agreements, this policy is not without limitation.[2] Under CPLR § 7503 (a), "[w]here there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court." While both Plaintiffs and Defendants concede that a valid arbitration agreement was entered into under the terms of the HEA, Plaintiffs question whether the parties to the litigation are bound to the arbitration agreement and whether the claims asserted in the litigation are within the scope of the arbitration agreement.

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[2] 9 USC § 1; *Exercycle Corp. v Maratta*, 9 NY2d 329, 334 (1961); *Singer v Jefferies & Co.*, 78 NY2d 76, 81 (1991) ("[t]he FAA establishes an 'emphatic' national policy favoring arbitration which is binding on all courts, state and federal.").

Despite the public policy strongly in favor of arbitration, Plaintiffs' arguments warrant scrupulous review of the arbitration agreement language, the relationships between the parties and the claims at issue. "Only persons who expressly agree to arbitrate can be compelled to do so" (*Brookfield Clothes, Inc. v Tandler Textiles, Inc.*, 78 AD2d 841, 841 [1st Dept. 1980]); *Lerman v Russell*, 207 AD2d 746 [1st Dept. 1994]). "A party seeking to enforce a valid agreement to arbitrate in New York under CPLR [§] 7503 (a) is entitled, as a matter of course, to injunctive relief against further prosecution of proceedings in tribunals of other jurisdictions concerning matters within the scope of the arbitration agreement" (*Curtis, Mallet-Prevost, Colt & Mosle, LLP v Garza-Morales*, 308 AD2d 261, 263-264 [1st Dept. 2003]).

B. The Arbitration Clause under the Heat Energy Agreement (HEA)

The HEA's arbitration clause gives broad effect to the types of disputes subject to arbitration. However, the HEA specifically and narrowly defines the identity of the "Parties" actually bound to the agreement.

HEA, article 14, titled "Dispute Resolution and Arbitration," states that "[e]very dispute of any kind or nature between the Parties arising out of or in connection with this agreement shall be resolved in accordance with Article 14, to the extent permitted by law." The HEA defines "Parties" as Great Lakes Carbon LLC and PASE (Affirmation of Maura Bary Grinalds ["Grinalds Aff."], Ex. D, HEA, Art. 1, p. 8). The HEA specifically defines Great Lakes Carbon LLC as "Great Lakes Carbon LLC or any of its subsidiaries or the duly authorized representative(s) of said Limited Liability Company or its subsidiaries" and PASE as "Port Arthur Steam Energy LP or any of its subsidiaries or the duly authorized representative of said partnership or partnerships."

The HEA also takes care to define "Affiliates" and "Associated Parties." An "Affiliate" is "when used with reference to a specified Person, any other Person that directly, or indirectly through one or more intermediaries, controls, is controlled by or is under common control with the Person specified.... The foregoing notwithstanding, neither PASE nor AIP nor any Equity Owner shall be deemed an Affiliate of GLC hereunder, nor shall GLC be deemed to be an Affiliate of any other PASE or AIP Affiliate other than Huron Carbon ULC, GLC Carbon USA Inc., GLC Securityholder LLC, Great Lakes Carbon Income Fund,..., none of which shall be considered to be an Affiliate of PASE, AIP, or any Equity Owner for purposes of this Agreement" (*id.*, Art. 1, pp. 2, 3). An "Associated Party" is "with respect to any Party, any Affiliate of Such Party, and any officer, director, trustee, fiduciary, employee, shareholder, partner, manager, member, agent, representative, contractor or subcontractor of such Party or of any such Party's Affiliates, in each case acting within the scope of their authority" (*id.*, Art. 1, p. 3).

The HEA therefore clearly defines those entities specifically bound to the HEA, and thus, to the HEA's arbitration clause. The court is mindful that the general policy in favor of arbitration is largely rooted in deference to private contractual rights between consenting parties. Thus, to subject non-consenting parties and non-signatories to a private contract is inconsistent with any policy in favor of arbitration.

i. The Successor in Interest Theory

Defendants first argue that as Arbitration Plaintiff Oxbow Calcining LLC is bound to the HEA as successor in interest to HEA signatory Great Lakes Carbon LLC, Plaintiffs, as grandparent and parent corporations of Oxbow Calcining LLC, are also successors in interest to

Great Lakes Carbon LLC and therefore bound to the HEA. Plaintiffs refute Defendants' argument and contend that they are too far removed from signatory Great Lakes Carbon LLC to be subjected to the arbitration clause under the HEA. The court agrees with Plaintiffs.

Plaintiffs Oxbow Carbon LLC and Oxbow Calcining USA are not bound to the arbitration agreement under a theory of successor in interest. The successor in interest to HEA signatory Great Lakes Carbon LLC is Arbitration Plaintiff Oxbow Calcining LLC. Arbitration Plaintiff Oxbow Calcining LLC is a subsidiary of Oxbow Calcining USA, itself a subsidiary of Oxbow Carbon LLC. It does not follow that Oxbow Calcining USA and Oxbow Carbon LLC are also successors in interest to HEA signatory Great Lakes Carbon LLC because of their respective relationships to Arbitration Plaintiff Oxbow Calcining USA. To make such a supposition would be to entirely ignore the corporate form and to engage in an unjustified exercise in veil-piercing.

While the First Department has bound a non-signatory successor in interest to an arbitration agreement entered into by its predecessor, it has done so only in circumstances where the non-signatory successor in interest "knowingly assumed performance of the [agreement] and derived direct benefit therefrom" (*H.R.H. v Metro. Trans. Auth.*, 33 AD3d 568, 569 [1st Dept. 2006]). Defendants have made no showing that Plaintiffs knowingly assumed performance of the HEA and derived direct benefit therefrom. The court is therefore not compelled to brand Plaintiffs as successors in interest to Great Lakes Carbon LLC as a result of their affiliation with the actual, direct successor in interest, Arbitration Plaintiff Oxbow Carbon LLC (*see also In the Matter of SSL Intl., PLC, et al v Zook*, 44 AD3d 429, 430 [1st Dept. 2007] [finding a determination to compel arbitration appropriate as appellants derived benefit from the arbitration agreement).

The First Department has also bound a non-signatory to an arbitration agreement where the non-signatory participated for nearly seven months in the preliminary stages of the arbitration without objection, attempted to compel signatories to arbitrate related claims and derived direct benefits from the agreement (*Mark Ross & Co., Inc. v XE Capital Mgt., LLC*, 46 AD3d 296, 297 [2007]). Unlike the non-signatory in *Mark Ross & Co.*, Plaintiffs here did not submit to or participate in arbitration without objection. Further, unlike Defendants here, defendants in *H.R.H* and in *Mark Ross & Co.* were actual signatories to the arbitration agreement in question. Defendants' successor in interest theory is unavailing.

ii. The Agency Theory

Defendants next contend that as Rogers and Bingham are being sued for actions allegedly taken as representatives or agents of Arbitration Defendant PASE, Rogers and Bingham should be considered parties to the HEA and claims against them must be brought in arbitration. Plaintiffs argue in response that they sue Rogers and Bingham not as principals of AIP or agents of PASE, but in their fiduciary capacities as former directors of Great Lakes Carbon USA. Plaintiffs argue that Rogers and Bingham therefore should not be considered parties to the HEA nor should claims against the two be decided in arbitration.

In support of their argument, Defendants cite *Hirschfeld Productions Inc. v. Mirvish*, in which the Court of Appeals held that "[t]he rule [affording agents the benefit of arbitration agreements entered into by their principals] is necessary not only to prevent circumvention of arbitration agreements but also to effectuate the intent of the signatory parties to protect individuals acting on behalf of the principal in furtherance of the agreement" (88 NY2d 1054,

1056 [1996]). It is true that individual Defendants Rogers and Bingham were principals of Defendant AIP, which partnered with non-party Integral Power, to form Arbitration Defendant PASE for the sole purpose of purchasing the steam plan from Great Lakes Carbon LLC. However, the actions for which Defendants Rogers and Bingham are sued by Plaintiffs in the instant litigation are not actions taken on behalf of PASE in furtherance of the HEA. Rather, Plaintiffs sue Defendants Rogers and Bingham for actions taken by them as former directors and fiduciaries of Great Lakes Carbon USA during the time Defendant AIP negotiated with Great Lakes Carbon USA for the sale of the steam plant.

A theory of liability based on fiduciary duty arises out of the relationship between Defendants Rogers and Bingham and Great Lakes Carbon USA; it does not arise out of any duties or obligations imposed on Defendants Rogers and Bingham as agents of PASE pursuant to the HEA. In *Nardi v. Povich*, the non-signatory parties considered "parties" as a result of their agent status, were "officers, directors, supervisors, managers, employees and/or agents" of [the direct signatory] and "acted within the scope of their duties" (2006 NY Slip Op 51487U, 3 [2006]). In this case, the alleged actions for which Plaintiffs now sue Defendants Rogers and Bingham were actually taken by Rogers and Bingham at a time when PASE had not yet even been formed by AIP and non-party Integral Power. The suggestion that Defendants Rogers and Bingham "acted within the scope of their duties" as agents of PASE then, is without real merit.

Further, even if Defendants Rogers and Bingham were considered parties or signatories to the arbitration agreement, Plaintiffs remain non-signatories to the arbitration agreement. The First Department is generally hesitant to permit a signatory to compel a non-signatory to arbitration. In *Insurance Corp. of N.Y. v Kenning Mgt. of Conn. LLC*, the First Department

declined to permit signatory defendant to compel arbitration with non-signatory plaintiff, the parent corporation to signatory non-party. The First Department held that the [arbitration] agreement did not cover either the corporate or individual parties to this action (60 AD3d 420, 420 [1st Dept. 2009]).

Similarly, in *Accessory Corp. v Capco Wai Shing, LLC*, the First Department declined to compel plaintiff to arbitrate when plaintiff had an arbitration agreement with one defendant, but not with the other related defendants. The First Department held that "a party will not be compelled to arbitrate and, thereby, to surrender the right to resort to the courts, absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes" (2007 NY Slip Op 3199, 1 [1st Dept. 2007]). Where Defendants have proffered no evidence indicating that litigation Plaintiffs expressly consented to the arbitration agreement in question, the court will not compel non-signatory Plaintiffs to arbitrate, despite their relationship with Arbitration Plaintiffs (*see*, *id.*).

iii. Equitable Estoppel

Defendants further argue, under a theory of equitable estoppel, that Plaintiffs should be compelled to arbitrate this dispute with Defendants because courts routinely permit a non-signatory to compel a signatory to arbitration "if there is a close relationship between the parties and the controversies involved and if the signatory's claims against the non-signatory are 'intimately founded in and intertwined' with the underlying agreement containing the arbitration clause" (*Denney v Jenkens & Gilchrist*, 412 F Supp 2d 293, 297 [SD NY 2005]). Defendants' equitable estoppel argument necessarily relies on the assumption that Plaintiffs are signatories to the HEA as successors in interest, an assumption that this court has previously dispelled.

Even were this assumption upheld however, the First Department has not officially adopted the doctrine of equitable estoppel. In *Rosenbach v Diversified Group, Inc.*, the court held that "even if the doctrine of equitable estoppel were in theory available in this jurisdiction to enable a non-signatory to compel signatories to an arbitration agreement to arbitrate, it would not avail [defendants] in this matter since plaintiffs' claims against [defendants] . . . are not 'founded in and intertwined' with the operating agreement" (39 AD3d 271, 271 [1st Dept 2007]). The First Department's hesitancy to adopt a theory of equitable estoppel weighs against Defendants' argument in favor of arbitration.

Moreover, to discern whether the claims are "founded in and intertwined with the operating agreement," *Denney* suggests the court decide whether Plaintiffs would still have valid causes of action against Defendants even if the arbitrator were to find the contract void, invalid or unenforceable (*see Denney*, 412 F Supp 2d at 299 (*citing Miron v BDO Seidman, L.L.P.*, 342 F Supp 2d 324, 333-334 [ED Pa. 2004]). In this case, if the arbitration pending in Texas determined the HEA to be void, invalid, or unenforceable, Plaintiffs' claims against Defendants in the instant litigation would not be affected as they do not depend on the existence of the HEA. Plaintiffs' first claim against Defendants for fraud, relies upon the alleged misrepresentations made by Defendants to Great Lakes Carbon USA when Defendant AIP was a controlling stockholder of Great Lakes Carbon USA and when Defendants Rogers and Bingham were Directors of Great Lakes Carbon USA. The alleged misrepresentations were made in Defendants' capacity as fiduciaries of Great Lakes Carbon USA.

Furthermore, Defendants' alleged misrepresentations were made prior to the execution of the HEA and independent to any duties arising out of the HEA. Plaintiffs' second claim and

third claim against Defendants for breach of fiduciary duty arises out of Defendants' alleged self-dealing during negotiations for the steam plant with Great Lakes Carbon USA. The second and third claims do not arise out of Defendants' relationship with PASE in the context of the HEA. Similarly, Plaintiffs' fourth cause of action for concealment and failure to disclose is entirely based upon Defendants' "superior knowledge and previous partial disclosures" in their role as Directors and controlling stockholders of Great Lakes Carbon USA; it is not based on their role as parent corporation or agent of HEA signatory PASE. Plaintiffs' claims against Defendants are thus not so "founded in or intertwined" with the HEA to invoke a theory based on equitable estoppel.

II. Defendants' Motion Stay this Litigation, CPLR § 2201, 9 USC § 3

In the alternative, Defendants seek to stay this litigation, pursuant to CPLR § 2201 and 9 USC § 3, pending resolution of the Texas Arbitration.

The court may issue a stay, under CPLR § 2201, where there is another pending related action or arbitration. The First Department has defined the standard by which a stay is proper in the context of pending arbitration: "Where arbitrable and nonarbitrable claims are inextricably interwoven, the proper course is to stay judicial proceedings pending completion of the arbitration, particularly where the determination of issues in arbitration may well dispose of nonarbitrable matters" (*County Glass & Metal Installers, Inc. v Pavarini McGovern*, LLC, 65 AD3d 940, 940 [1st Dept. 2009]). In *County Glass*, the parties to the litigation were also direct signatories to the arbitration agreement. Here, none of the litigants are direct signatories to the arbitration agreement under the HEA. Moreover, an arbitration determination as to whether

Arbitration Defendant PASE breached its specific duties under the HEA will not necessarily determine, or dispose of, the issue as to whether litigation Defendants breached their fiduciary duties to litigation Plaintiffs or engaged in misrepresentation.

III. Defendants' Motion to Dismiss

Under a motion to dismiss, pursuant to CPLR 3211, the court "will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Noonan v City of New York*, 9 NY3d 825, 827 [2007]).

"The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained" (*Stendig, Inc. v Thorn Rock Realty Co.*, 163 AD2d 46, 48 [1st Dept. 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 208 [1st Dept. 1997]). Defendants, as the movants, have the burden "to demonstrate that, based upon the four corners of the complaint liberally construed in favor of [Plaintiffs] the pleading states no legally cognizable cause of action" (*Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept. 2002]).

A. Fraud

Defendants contend that Plaintiffs' allegation of fraud must be dismissed because it is predicated entirely on Defendants' alleged misrepresentation of their intent not to perform their obligations under the HEA and is merely duplicative of Arbitration Plaintiff Oxbow Calcining LLC's breach of contract claim against PASE.

"The elements of fraudulent misrepresentation are: (1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiffs thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of his or her reliance" (*Swersky v Dreyer and Traub*, 219 AD2d 321, 326 [1st Dept. 1996]). Furthermore, under CPLR 3106 (b), "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail."

In the FAC, Plaintiffs state that "Defendants' made numerous misrepresentations to the [Great Lakes Carbon USA] independent committee while the committee was considering competing proposals," "Defendants knew that [Great Lakes Carbon USA] was concerned about environmental risk and would not enter into an agreement without provision to minimize this risk," "Defendants represented to [Great Lakes Carbon USA] that it would install 'reliable' systems and would replace the Injection System if it proved inadequate," "Defendants intended to inflate the apparent value of [Great Lakes Carbon USA] in the short term and to liquidate their interests in the Great Lakes entities at the inflated price, " "Plaintiffs relied upon Defendants' representations, prompting [Great Lakes Carbon LLC] to enter into the HEA," "the Injection System did not operate properly" and that "as a direct and proximate result of Defendants' representations, Plaintiffs have incurred damages" (Grinalds Affirmation, Ex A., FAC, pp. 18-19). The court finds that Plaintiffs have sufficiently plead the four pertinent elements necessary to state a legally cognizable cause of action sounding in fraud. Moreover, the court finds that Plaintiffs have done so with the requisite specificity sufficient to withstand Defendants' motion to dismiss.

Defendants' assertion that Plaintiffs base their claim for fraud only on Defendants' alleged misrepresentation about their future intent not to perform under the HEA is untenable. Plaintiffs' fraud claim against Defendants is not merely duplicative of the arbitration claim for breach of contract because the alleged misrepresentations made by Defendants were collateral to the specific obligations of PASE under the HEA. Defendants cite to *Town House Stock LLC v Coby Hous. Corp.* for the proposition that "[g]eneral allegations that a party entered into a contract with the intention not to perform it are insufficient to support a claim for fraud" (36 AD3D 509, 509 [1st Dept. 2007]). Defendants' alleged misrepresentations to Plaintiffs were extraneous to any obligations specifically outlined for PASE under the contract terms of the HEA. Therefore, Plaintiffs' claims for fraud against Defendants constitute more than general allegations of an intention not to perform under the contract.

The alleged misrepresentations made by Defendants create potential liability because of Defendants' fiduciary role relative to Plaintiffs rather than because of Defendants' contractual obligation to Plaintiffs. "A cause of action for fraud may be maintained where a plaintiff pleads a breach of duty separate from, or in addition to, a breach of contract. For example, if a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also give rise to the plaintiff's breach of contract claim" (*J.A.O. Acquisition Corp. v Stavitsky*, 192 Misc 2d 7, *12 [Sup Ct New York County 2001] *citing First Bank of the Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 291-92 [1st Dept. 1999]). In the FAC, Plaintiffs allege that "Defendants made false representations – first to [Great Lakes Carbon USA'S] board and then to [Great Lakes Carbon USA's] management – that AIP would install 'reliable systems' and would

replace the Injection System if it proved inadequate – all in order to induce [Great Lakes Carbon LLC] to contract with PASE (Grinalds Affirmation, Ex. A, FAC, p. 18). Even if these circumstances are also connected in some way to Arbitration Plaintiffs' breach of contract claim against Arbitration Defendants, Defendants' alleged misrepresentations arise out of Defendants' alleged breach of fiduciary duty, rather than out of Arbitration Defendant PASE's alleged breach of the HEA. Plaintiffs' allegations thus sufficiently allege fraud distinct from any breach of contract claim brought by the Arbitration Plaintiffs against PASE.

Furthermore, Defendants are not and never were parties or signatories to the HEA. Thus, any claims sounding in fraud against Defendants are independent of the contractual obligations binding Arbitration Defendant PASE to the HEA.

B. Breach of Fiduciary Duty

Defendants argue that Plaintiffs' breach of fiduciary duty claims are untimely and should be dismissed. Defendants assert that the applicable New York statute of limitations for breach of fiduciary duty is three years because Plaintiffs seek monetary damages rather than equitable relief. Plaintiffs claim that the applicable New York statute of limitations for its claim for breach of fiduciary duty is six years because Plaintiffs are a corporate entity suing former directors and stockholders. The actions for which Plaintiffs sue Defendants took place in or around Fall of 2004, and, thus, the three year statute of limitations would have passed by August 30, 2010, the date Plaintiffs filed the FAC.

In New York, the statute of limitations period for fiduciary duty claims depend upon the type of relief sought. In *Carlingford Ctr. Point Assocs. v MR Realty Assocs., L.P.*, the First Department held that "[a] breach of fiduciary duty claim is governed by either a three-year or

six-year statute limitation period...[t]he shorter time period applies where monetary relief is sought, the longer where the relief sought is equitable in nature" (4 AD3d 179, 179-180 [1st Dept. 2004]). Plaintiffs argue in favor of a six-year statute of limitations, citing CPLR § 213 (7). However, as stated below, Plaintiff's claim is clearly untimely under applicable Delaware law

Defendants contend that Plaintiffs are "residents" of Delaware under New York's "borrowing statute," CPLR § 202, that Plaintiffs' claims accrued outside of New York and that therefore the claims must be timely under both New York law and Delaware law. Defendants argue that the claims are not timely under the Delaware statute of limitations. Plaintiffs argue that the statute of limitations issue is a question of procedural rather than substantive law, and therefore is governed by the law of the forum state of New York.

Under New York's "borrowing statute," CPLR § 202, if a cause of action accrues (1) in favor of a non-resident and (2) outside of New York, the applicable limitation period is the shorter of either the New York limitation period or the limitation period of the place where the cause of action accrued. Plaintiff Oxbow Carbon LLC is a Delaware Limited Liability Company and Plaintiff Oxbow Calcining USA is a Delaware corporation. Both are therefore considered "non-residents" of New York for purposes of the New York "borrowing statute" despite the fact that they may engage in business in New York (*see Verizon Directories Corp. v Continuum Health Partners, Inc.*, 74 AD3d 416, 416 [1st Dept. 2010] [(f)or purposes of CPLR § 202, deeming plaintiff a "resident" of Delaware, the state of its incorporation, despite contention plaintiff was resident of New York based on its authorization to do business there]).

Second, the cause of action alleged by Plaintiffs accrued outside of New York, in Delaware, where Plaintiffs are incorporated and therefore sustained economic loss (*see Portfolio*

Recovery Assoc., LLC v King, 14 NY3d 410, 416 [2010] ["if the claimed injury is an economic one, the cause of action typically accrues "where the plaintiff resides and sustains the economic impact of the loss"]). Plaintiffs seek only monetary damages for Defendants' alleged breach of fiduciary duty and therefore the injury sustained is an economic one. Thus, the cause of action accrued where Plaintiffs sustained the economic impact of the loss, or where Plaintiffs reside. Therefore, Plaintiffs' cause of action accrued in Delaware, pursuant to CPLR § 202.

Plaintiffs' claims must be timely under both the New York statute of limitations and the Delaware statute of limitations (*see Global Fin Corp. v Triarc Corp.*, 93 NY2d 525, 528 [1999] [holding that where a nonresident sues on a cause of action accruing outside New York, CPLR § 202 requires the cause of action to be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued]). The statute of limitations in Delaware is three years for breach of fiduciary duty claims (10 Del. C. § 8106; *see In re Coca-Cola Enterprises, Inc.*, C.A. No. 1927-CC, 2007 WL 3122370, *4 [Del. Ch. October 17, 2007]). Defendants' alleged breaches occurred in approximately the Fall of 2004. Plaintiffs brought their claim on August 30, 2010. Plaintiffs' claims for breach of fiduciary duty are therefore untimely under Delaware law and must be dismissed.

B. Concealment and Failure to Disclose

Defendants contend that Plaintiffs' cause of action for concealment and failure to disclose must be dismissed because an alleged intention to breach a contract does not give rise to a duty to disclose. Plaintiffs claim that Defendants had a duty to disclose, because of their "superior knowledge and previous partial disclosures" to Great Lakes Carbon USA, separate from and independent of Defendants' alleged intention to breach the HEA.

In *Swersky v Dreyer and Traub,* the First Department held that a duty to disclose will arise when one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair" (219 AD2d 321,327 [1st Dept. 1996]). In the FAC, Plaintiffs allege that Defendants owed a duty to fully disclose all material facts, including the latent dangers in the pollution control system, to the [third parties] when Defendants sold their interest in Great Lakes Carbon USA to such third parties. In addition, Plaintiffs contend that Defendants owed a duty to fully disclose all material facts, including the latent dangers in the pollution control system, to Plaintiffs upon Plaintiffs' purchase of Great Lakes Carbon USA in May of 2007 from the [third parties]. Furthermore, Plaintiffs assert that Defendants had "full access to the facts and knew that Oxbow Carbon did not have knowledge of or access to these material facts" because "the pollution control systems were controlled by PASE" (Grinalds Affirmation, Ex. A, FAC, pp. 26-27). The FAC sufficiently sets forth the basis for Defendants' "superior knowledge," lending viability to Plaintiffs' claim that Defendants' had a duty to disclose.

Defendants' contend that Plaintiffs do not have standing to assert a concealment claim because Defendants alleged failed to disclose such material facts to third parties and not to Plaintiffs. Defendants' contention is misguided. Plaintiffs allege that Defendants' failure to disclose directly caused them harm. If Defendants had reason to expect that Plaintiffs would be harmed by their alleged failure to disclose material facts to certain third parties, Defendants will not be held harmless as to Plaintiffs (*see Wey v New York Stock Exchange, Inc.*, 15 Misc 3d 1127(A), at 4-5 [Sup. Ct. NY County 2007] [citing Restatement (Second) of Torts § 531, "[o]ne who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act"]). Because Plaintiffs assert in the FAC that

Defendants intended to "defraud its potential victims and any subsequent purchases, including Oxbow Carbon" (Grinalds Affirmation, Ex. A, FAC, p. 26), the allegations sounding in concealment and failure to disclose are sufficient to withstand the relatively low threshold for pleading to withstand a motion to dismiss (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Accordingly, it is

ORDERED that Defendants' Motion to Dismiss Plaintiffs' Breach of Fiduciary Duty claim is GRANTED; and

ORDERED that Defendants' Motion, in all other respects, is DENIED.

This constitutes the Decision and Order of the court.

Dated: New York, New York
February 2, 2011

ENTER

Hon. Eileen Bransten, J.S.C.