Kramer Levin Naftalis & Frankel LLP v Cornell
2016 NY Slip Op 32863(U)
July 14, 2016
Supreme Court, New York County
Docket Number: 653381/2016
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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KRAMER LEVIN NAFTALIS & FRANKEL LLP, STEVEN M. GOLDMAN, AND ROBERT N. HOLTZMAN,

Petitioners,

-against-

MICHAEL C. CORNELL, ALAN R. CORNELL, CORNELL HOLDINGS II, LLC, MCC CAPITAL PARTNERS, LLC, MCC CAPITAL PARTNERS II, LLC; AND MICHAEL C. CORNELL AND MCC CAPITAL PARTNERS II, derivatively and on behalf of PROPEL EQUITY PARTNERS II, LLC; AND CORNELL HOLDINGS II, LLC, derivatively and on behalf of PROPEL MANAGEMENT HOLDINGS, LLC

Respondents.

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DECISION AND ORDER

Index No.: 653381/2016

Permanent Stay of Arbitration Pursuant to CPLR 7503(b)

HON. ANIL SINGH:

Background

In this special proceeding for, *inter alia*, a permanent stay of arbitration pursuant to CPLR 7503(b), petitioners seek an order from this court directing that petitioners are not compelled to arbitrate in a pending Judicial Arbitration and Mediation Service ("JAMS") proceeding. Respondents' oppose and move for this proceeding to be dismissed based upon improper venue, petitioner's alleged failure to join necessary parties and move to seal the record.

Facts

In 2012, Michael Cornell allegedly founded a private equity firm which focused primarily on the children's toy market. Propel Management Holdings, LLC ("Propel Fund") raises investor capital in order to make acquisitions and also holds individual investors' accounts (including the investor accounts of Cornell Holdings II, LLC ("Cornell Holdings") and Propel Equity Partners II, LLC ("PEP II"), as manager of the Propel Fund.) POOF-Slinky, LLC ("POOF-Slinky) is a portfolio company of the Propel Fund that holds the assets comprising the POOF-Slinky business, whose brand includes the well-known children's toy Slinky. Michael Cornell was a member and director of Propel Fund and an employee of POOF-Slinky and several of the other entities affiliated with the Propel Fund.

On February 5, 2016, Michael Cornell, POOF-Slinky and the Propel Fund and their related entities entered into a Separation and Release Agreement (the "Separation Agreement"), which detailed Mr. Cornell's termination and all manner of issues regarding Michael Cornell's separation from the Propel Fund. Kramer Levin Naftalis & Frankel, LLP ("Kramer Levin" or "petitioner") represented POOF-Slinky and the Propel Fund in connection with the Separation Agreement. Michael Cornell was represented by the law firm of Boies, Schiller & Flexner LLP. The Separation Agreement was made by and among, "[e]ach of PMH [Propel Fund], PEP I [Propel Equity Partners, LLC], PEP II, PEP III [Propel Equity Partners III, LLC,

Executive [Michael Cornell], the Company [POOF-Slinky], Belniak, Farinhold, Friedman and DicMichele are referred to herein as the 'Parties' and each individually as a 'Party.'" Petition, ¶ 15. Noticeably absent from the list of parties are Kramer Levin, Alan Cornell, Cornell Holdings II, LLC, MC Capital Partners, LLC (MCCCP"), and MCC Capital Partners II, LLC ("MCCCP II"), all of whom are listed as claimants in the Demand with JAMS.

Relevant to this action is the arbitration provision contained within the Separation Agreement, wherein the Parties listed above agreed to arbitrate certain disputes between Michael Cornell and a Party or Company Entity. In relevant part, it states,

> [T]he Parties intend to and do hereby establish an out-of-court dispute resolution procedure as the exclusive procedure for resolving any dispute that may arise between them. The Parties therefore agree that any and all controversies, claims or disputes between or among Executive, on the one hand, and any other Party or Company Entity on the other hand, based on, arising out of, or related in any way to this Agreement, the Employment Agreement, Executive's employment by, or service in any capacity on behalf of any Company Entity or any of their past or present parents, subsidiaries or affiliates, any duty or obligation owed to Executive, and the determination of all gateway issues related to such controversies, claims or disputes as described in this Paragraph 26, including but not limited to the jurisdiction of the arbitrator, the arbitrability of any dispute (including the scope, validity and/or enforceability of this agreement to arbitration_, and the proper or permissible parties to any such arbitration, shall exclusively be submitted to neutral, binding arbitration at JAMS pursuant to its Employment Arbitration Rules & Procedures then in effect...and subject to the Minimum Standards of Procedural Fairness contained in

> the JAMS Policy on Employment Arbitration Minimum Standards, before one neutral arbitrator in New York County, New York...

Separation Agmt. ¶ 26(B)(1).

In addition to this arbitration agreement, the Separation Agreement also includes releases between Michael Cornell and the Company Entities in which they released each other and each other's representatives, attorneys, trustees, executors, administrators, heirs and beneficiaries. See Separation Agmt. ¶¶ 7, 9. Additionally, the Separation Agreement prohibits third-party beneficiaries from claiming any interests. See Separation Agmt. ¶ 26(L) ("The provisions of this Agreement are for the sole benefit of the Parties, and do not create any third-party beneficiary rights in any other Person.").

On June 13, 2016, respondents filed the Demand with JAMS. Among other things, the Statement of Claim in the demand contains allegations that Kramer Levin and their individual partners committed professional malpractice, breached fiduciary duties, and made negligent misrepresentations to and/or engaged in fraud against Michael Cornell and certain affiliated entities prior to his execution of the Separation Agreement. Petition ¶ 23. The Demand also claims, in the alternative, derivative claims that Michael Cornell assert on behalf of other current or former Kramer Levin clients to the extent that Kramer Levin is deemed to have been acting as counsel to those clients, rather than Michael Cornell, at the time of the alleged wrongdoing. Id.

Argument

Whether this Court has Proper Venue

Respondents' argument that petitioner cannot bring this proceeding in New York County and therefore, is in the improper venue, is without merit. Respondent argues that CPLR 7502(a)(i) applies and contends that because Michael Cornell resides in Westchester County, the only proper venue for this proceeding is in Westchester. However, respondents' are misguided in their interpretation of the applicable venue provision.

This court finds that CPLR 7502(a)(i), does indeed govern. The provision provides,

> The proceeding shall be brought in the court and county specified in the agreement. If the name of the county is not specified, proceedings to stay or bar arbitration shall be brought in the county where the party seeking arbitration resides or is doing business, and other proceedings affecting arbitration are to be brought in the county where at least one of the parties resides or is doing business or where the arbitration was held or is pending.

CPRL 7502(a)(i).

Respondents have commenced the arbitration proceeding based upon the Separation Agreement, which states that "venue for any action arising from the Agreement shall be exclusively in the City, County and State of New York." Separation Agmt. ¶ 26(C). Respondents cannot simultaneously argue that petitioner

is bound by the language of the Separation Agreement, see *infra*, and then argue that for purposes of venue, petitioner is not bound by the agreement.

Alternatively, even if the provision contained in CPLR 7502(a)(i) did not apply, respondents' claim is still misguided. CPLR 7502(a)(ii) states,

> If there is no county in which the proceeding may be brought under paragraph (i) of this subdivision, the proceeding may be brought in any county.

CPLR 7502(a)(ii). Respondents' argue that under CPLR 7501(a)(i), proper venue is in Westchester County, however, this is only the case if "the county is not specified" in the agreement. Here, if the agreement is inapplicable, CPLR 7502(a)(ii) permits Kramer Levin to bring special proceeding in "any county." Consequently, New York County is the proper venue to bring petitioners action.

Whether the Court Should Permanently Stay the Arbitration

As a preliminary matter, this court disagrees with respondents' claim that all questions of arbitrability are for the arbitrator and not for this court. "A gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide." Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002). As this court has held, "it is a judicial responsibility, and not the arbitrator's, to decide the threshold question of whether the parties are bound by a valid agreement to arbitrate." Feldman v. United Scenic Artists, Local

829, Index No. 653898/2013, 2014 N.Y. Misc. LEXIS 979, at *6 (Sup. Ct. N.Y. Cnty. Mar. 6, 2014). In order for a question of arbitrability to be decided by an arbitrator, there must be "clear and unmistakable evidence" that the *disputing parties* intended arbitrability issues to be decided by an arbitrator rather than a court. See AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986); Monarch Consulting Inc. v. Nat'l Union Fire Ins. Co., 26 N.Y.3d 659, 674-76 (2016).

Respondents' claim that the provisions of the Separation Agreement control. Specifically, Rule 11(b) of the Separation Agreement provides, "[u]nless the relevant law requires otherwise, the Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter." Separation Agmt. §11(b). Furthermore, respondents' contend that the agreement contains language that includes a provision to deal with who is a party to the arbitration,

> [T]he determination of all gateway issues related to such controversies, claims, or disputes…including but not limited to the jurisdiction of the arbitrator, the arbitrability of any dispute (including the scope, validity and/or enforceability of the agreement to arbitrate), and the proper or permissible parties to any such arbitration, shall exclusively be submitted to neutral, binding arbitration at JAMS…

Separation Agmt. §26(B)(1).

Respondent has not provided "clear and unmistakable evidence" that the disputing parties, here respondent and petitioner, intended for an arbitrator to decide

whether this case should be forced to arbitrate. Similarly, the fact that the Arbitration Provision contains the arbitrability provision, *supra*, does not change the analysis as respondents' allege. Kramer Levin is not bound, as a non-signatory, to the arbitration provision because respondent cannot show that Kramer Levin intended to be bound by the provision.

The petition for a permanent stay of arbitration is granted pursuant to CPLR 7503(b). "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960); see also In re Belzberg v. Verus Invs. Holdings Inc., 21 N.Y.3d 626, 630 (2013). In order for a party to be compelled to arbitrate "absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes...the agreement must be clear, explicit and unequivocal." In re Waldron v. Goddess, 61 N.Y.2d 181, 183 (1984). Additionally, "nonsignatories are generally not subject to arbitration agreements." Belzberg, 21 N.Y.3d at 630.

Respondents' argument that arbitration is appropriate under the Separation Agreement as to Kramer Levin is without merit. Kramer Levin is not a party nor a signatory to the Separation Agreement. In interpreting arbitration agreements, courts will "give effect to the parties' intent and reasonable expectations based on the language used in the agreement." DiMartino v. Dooley, 2009 WL 27438, at * 5

(S.D.N.Y. Jan. 6, 2009). Here, the plain language of the arbitration agreement shows that arbitration is only to be imposed upon the Parties and the Company Entities, of which Kramer Levin is neither. Specifically, the arbitration agreement contained within the Separation Agreement states,

> [T]he Parties intend to and do hereby establish an out-of-court dispute resolution procedure as the exclusive procedure for resolving any dispute that may arise between them. The Parties therefore agree that any and all controversies, claims or disputes between or among Executive, on the one hand, and any other Party or Company Entity on the other hand, based on, arising out of, or related in any way to this Agreement, the Employment Agreement, Executive's employment by, or service in any capacity on behalf of any Company Entity or any of its past or present parents, subsidiaries or affiliates...shall exclusively be submitted to neutral, binding arbitration...

Separation Agmt. ¶ 26(B)(1). "Parties may structure arbitration agreements to limit both the issues they choose to arbitrate and 'with whom they choose to arbitrate their disputes.'" Oxbow Calcining USA Inc. v. Am. Indus. Partners, 96 A.D.3d 646, 648-49 (1st Dept 2012) (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 683 (2010)). The language of the arbitration provision in question does not contemplate arbitration between a party and a non-party. Any arbitrable disputes must be between Michael Cornell as an Executive and any other Party or Company Entity, which does not include Kramer Levin.

Respondents' concede that petitioners are non-signatories but argues that they are compelled to arbitrate based upon the theory of allegedly receiving a direct

benefit or, alternatively, through agency. The Federal Arbitration Act ("FAA") applies in this case, as the dispute involves interstate commerce. 9 U.S.C. § 1; see also Cusimano v. Schnurr, 26 N.Y.3d 391, 399 (2015) (FAA applies so long as the type of activity has an effect on interstate commerce). Both the FAA and New York law recognizes multiple situations in which non-signatories are estopped from avoiding arbitration agreements, including "(1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel." Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 777, 776 (2d Cir. 1995); McAllister Bros., Inc., v. A&S Transp. Co., 621 F.2d 519, 524 (2d Cir. 1980); See CDC Capital Inc. v. Gershon, 282 A.D.2d 217, 218 (1st Dept 2001) (recognizing that "the common-law grounds for enforcing an arbitration agreement against a non-signatory" appear in Thomson-CSF, S.A.).

Respondents' allegation that Kramer Levin is compelled to arbitrate based upon the theory of receiving a direct benefit is unavailing. There is no evidence that petitioner, in this case, sought to exploit the benefit of an agreement containing an arbitration clause. Courts have limited the application of the direct benefits doctrine to situations in which a nonsignatory has obtained a real and tangible benefit from the relevant agreement by either taking affirmative steps to exploit a benefit from a contract by bringing an action of their own based upon the language of the contract or through the enjoyment of monetary benefits of a contract by taking over

performance thereunder. See HRH Constr. LLC v. MTA, 33 A.D.3d 568, 569 (1st Dept 2006); Carvant Fin. LLC v. Autogard Advantage Corp., 958 F.Supp.2d 390 (E.D.N.Y. 2013).

In HRH, defendant MTA and HRH Construction Interior, Inc. entered into a construction management agreement. As a result of an arbitration proceeding between the parties, MTA learned HRH Construction LLC had taken over HRH Construction Interior Inc.'s performance of the CMA. The MTA moved to join HRH Construction LLC in the arbitration. HRH, 33 A.D.3d at 568. The First Department held that since HRH Construction LLC undertook the obligations under the construction management agreement and derived a direct benefit of receiving over $7 million for its performance of the construction management agreement, HRH Construction LLC was estopped from avoiding the agreement's obligation to arbitrate. Id. Similarly, in Carvant, the court held that the plaintiff received a direct benefit when he received a lien on each motor vehicle in exchange for financing the Service Contracts under the agreement. Carvant, 958 F.Supp.2d at 397.

Respondents' do not allege that petitioners received any kind of monetary benefit from the Separation Agreement. Rather, respondents' argue that the benefit was the valuable contract right to release, which can be traced directly to the agreement. Respondents' allege that as a result, Kramer Levin stood in the shoes of the signatory to the contract. The Court of Appeals has held that "the guiding

principle [as to whether there is a direct benefit] is whether the benefit gained by the non-signatory is one that can be traced directly to the agreement containing the arbitration clause." Belzberg v. Verus Investments Holdings Inc., 21 N.Y.3d 626, 631 (2013). The "mere existence of an agreement with attendant circumstances that prove advantageous to the nonsignatory would not constitute the type of direct benefits justifying compelling arbitration by a nonparty to the underlying contract." Id. The First Department held in Cammarata v. InfoExchange, Inc., 122 A.D.3d 459, 460 (1st Dept 2014), that there is not a direct benefit where a party "may have 'exploited the contractual relation of the parties, but not the agreement itself.'" Therefore, there must be a tangible and direct benefit that arises directly out of the agreement in question.

Veera v. Janssen, 2005 WL 1606054 (S.D.N.Y. Jul. 5, 2005), is on point. In Veera, plaintiffs', as managing directors of an investment company, engaged in investment management for their clients. The clients entered into a Currency Management and Trading Authorization Agreement and an Investment Management Agreement with the investment company. Id. at *1. Neither plaintiff personally signed these agreements and instead signed as managers of the investment company. Id. Each agreement contained a provision limiting the liability of the manager. The clients suffered substantial losses and sought arbitration with plaintiffs' under the theory of a direct benefit. Id. at *3. The court held that the benefit of the limited

liability provision did not directly flow from the agreement because the "parties did not intend to bind plaintiffs personally, but rather intended to bind only the clients and the investment companies, as the agreements set forth." Id. at *5. Additionally, "even if the clause purporting to limit plaintiffs' liability could be considered a 'valuable asset'...there is no evidence that plaintiffs invoked the limited liability provision..." Id.

Contrary to respondents' contention, Kramer Levin has not invoked, exploited or derived any benefit from the Separation Agreement. The release clause contained in the Separation Agreement is a contingent benefit that may have value in the future if Michael Cornell brings an action seeking to impose liability against Kramer Levin. However, it is not a direct tangible benefit in this claim. Although the release itself is contained within the Separation Agreement, the connection between the release and Separation Agreement is too attenuated to justify an "exception to the usual rule that nonsignatories cannot be compelled to arbitrate." See Belzberg, 21 N.Y.3d at 634. Additionally, respondent has not brought to the attention of this court, nor has this court found any case law compelling a nonsignatory to arbitrate based on a release or any benefit that has not yet materialized.

Respondent relies upon the Court of Appeals decision in Booth v. 3669 Delaware, Inc., 92 N.Y.2d 934 (1998), for the proposition that a release is a "jural act" that is binding on the parties. As a result, respondent alleges that this creates a

legal right, that is equivalent to a lien in that both are tangible benefits. See Oral Arg. pgs. 17-21. A lien is defined as,

> A qualified right of property which a creditor has in or over specific property of his debtor, as security for the debt or charge or for performance of some act. In every ease in which property, either real or personal, is charged with the payment of a debt or duty, every such charge may be denominated a lien on the property.

BLACK'S LAW DICTIONARY 933 (7th ed. 1999). However, liens differ from releases in that they have an actual monetary value because they can bought and sold and are freely transferable. The only value that the release has, if there is any at all, is in this litigation. See also Veera v. Janssen, 2005 WL 1606054 (holding that a limited liability release does not flow directly from the agreement where the parties did not intend to bind the party at issue.) Respondents' reliance on Booth is also misguided because the court did not decide as to whether the release was a direct benefit in an arbitration claim. Rather, the court held that a release is a 'jural act' that will bind the parties that entered into the release itself. Booth, 92 N.Y.2d 934, 935. Here, Kramer Levin is not a signatory to the release agreement, which was contained in the Separation Agreement. Therefore, respondents' allegation that Kramer Levin is compelled to arbitrate based upon the theory of receiving a direct benefit is without merit.

Respondent's allegation that the agency exception is applicable to this case is also misplaced. "An agent for a disclosed principal may still be liable on a contract

in place of the principal if (1) it acted outside the scope of its agency... (2) it acted fraudulently...or (3) it clearly manifested its intention to bind itself instead of, or in addition to, its principal..." Ariel Mar. Grp., Inc. v. Zust Bachmeier of Switzerland, Inc., 762 F.Supp. 55, 60 (S.D.N.Y. 1991); Seguros Banvenez, S.A. v. S/S/ Oliver Drescher, 761 F.2d 855, 860.

In Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349 (2d Cir. 1999), the Court compelled Tencara, a signatory under the construction contract, to arbitrate. The court rejected Tencara's argument that it was acting only as an agent for a disclosed principal, and held that this argument was based on the "mistaken notion that a party must be either solely a principal or solely an agent. [Tencara] clearly acted, at least in part on its own behalf when it contracted with ABS for classification services." Id. at 353. However, this exception outlined by respondent only applies where a signatory agent seeks to invoke against another signatory an arbitration provision to which the agent's principal agreed, so as to confer onto the agent the benefits for which its principal bargained. See Hirschfeld Prods. Inc. v. Mirvish, 88 N.Y.2d 1054, 1056 (1996) (holding that nonsignatory officers of signatory company could enforce arbitration agreement against another signatory); Highland HC, LLC v. Scott, 113 A.D.3d 590, 594 (2d Dept 2014); Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1360 (2d Cir 1993) ("Employees or disclosed agents of an entity that is a party to an arbitration agreement are protected by that agreement.").

Whether the party resisting arbitration is a nonsignatory is decisive. Merrill Lynch Inv. Managers v. Optibase, Ltd., 337 F.3d 125, 131 (2d Cir. 2003). Here, Kramer Levin is not a signatory to the Separation Agreement and therefore cannot be compelled to arbitrate. Furthermore, respondents' themselves argue that there is no evidence that Kramer Levin "acted as agents for a disclosed principal" or was authorized "by [its] alleged principals" to undertake the alleged conduct underlying respondents' claims. Opposition at 15. It is inapposite to rule that Kramer Levin acted as an agent under the Separation Agreement, when the parties themselves agree that Kramer Levin was not, in fact, an agent. Respondents' allegation that the agency exception is applicable here is denied.

Whether this Proceeding Should be Dismissed Based Upon Petitioners' Failure to Join Necessary Parties

Respondents' claim that this proceeding should be dismissed based upon petitioners' failure to join necessary parties is denied. CPLR 1001(a) states "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." CPLR 1001(a); see also Mahinda v. Bd. of Collective Bargaining, 91 A.D.3d 564, 565 (1st Dept 2012).

Propel Fund and PEP II are not necessary parties, as respondents' allege, and therefore, are not required to be joined in this proceeding. Propel and PEP II have

not participated in this proceeding, nor have they engaged in any conduct that would require Kramer Levin to pursue a stay against them. Similarly, a permanent stay against respondents' will provide complete relief to Kramer Levin by enjoining respondents' from taking any action against petitioners in the arbitration.

Respondents' reliance on Am. Transit Ins. Co. v. Carillo, 307 A.D.2d 220 (1st Dept 2003), Cylich v. Riverbay Corp., 74 A.D.3d 646 (1st Dept 2010), Ferrando v. New York City Bd. Of Standards & Appeals, 12 A.D.3d 287 (1st Dept 2004), and Hitchcock v. Boyack, 256 A.D.2d 842 (3d Dept 1998) is without merit. In all of these cases, the absentee parties' interests would have been materially affected without their participation in the proceeding. As discussed, *supra*, Propel Fund and PEP II are not necessary parties, nor would their interests be materially affected without their participation in this proceeding. Therefore, respondents' claim is denied.

Whether the Record Should be Sealed

Respondents' request to seal the record in order to prevent the type of harm that penal law section 135.60 was enacted to prevent is denied.

> Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the

> public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard.

22 N.Y.C.R.R. § 216.1(a). In New York, there is a presumption that "the public is entitled to access to judicial proceedings and court records." Mosallem v. Berenson, 76 A.D.3d 345, 348-49 (1st Dept 2010).

A party seeking to seal records faces a substantial burden in establishing compelling circumstances to justify sealing. Id.; see also Danco Labs., Ltd. v. Chem. Works of Gedeon Richter, Ltd., 274 A.D.2d 1, 6 (1st Dept 2000). Courts will order sealing of the documents in strictly limited circumstances, which consist of documents related to trade secrets or information that could threaten a business' competitive advantage. See Mosallem, 76 A.D.3d at 350; N.Y. Tel. Co. v. Pub. Serv. Comm'n, 56 N.Y.2d 213 (1982).

Respondents' have failed to make the requisite showing of "good cause" under 22 N.Y.C.R.R. § 216.1(a). Respondents' allegation that sealing is required because of the confidentiality provision in the Separation Agreement is misguided. See In re Estate of Hofmann, 284 A.D.2d 92, 94 (1st Dept 2001); see also Individual Practices of Justice Anil C. Singh, Part 45, Practice Rule 6 ("Documents filed with this court will not be sealed merely on the ground that they are subject to a confidentiality agreement."). Similarly, respondents' do not allege, nor could it, that the documents at issue contain trade secrets.

Additionally, respondents allege that petitioners made unlawful threats against the respondent which violates Penal Law Section 135.60[1]. As a result, respondents' allege that allowing the use of court proceedings that force the alleged threats to be publicized would make the court an accessory after the fact to a crime. However, respondents' reliance on Feffer v. Goodkind, Wechsler, Labaton & Rudolf, 152 Misc. 2d 812, 815 (Sup. Ct. N.Y. Cnty. 1991) is misplaced. In that ruling, the court held,

> The new court rule which was adopted (22 N.Y.C.R.R. 216.1) calls for a "presumption of openness," but permits a court to seal a file for good cause. However, litigants ought not be required to wash their dirty linen in public and subjected to public revelation of embarrassing material where no substantial public interest is shown *and* where the material may have been inserted into court documents for the *sole purpose of extracting a settlement of the action.* (emphasis added)

However, "neither the potential for embarrassment or damage to reputation, nor the general desire for privacy, constitutes good cause to seal court records." Mosallem, 76 A.D.3d at 351; see also Liapakis v. Sullivan, 290 A.D.2d 393, 394 (1st Dept 2002). Furthermore, respondents' have not sufficiently shown that

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[1] A person is guilty of coercion in the second degree when he or she compels or induces a person to engage in conduct which the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he or she has a legal right to engage...by means of instilling in him or her a fear that, if the demand is not complied with, the actor or another will:...(5) [e]xpose a secret or publicize an asserted fact, whether true or false attending to subject some person to hatred, contempt or ridicule; or...(9) [p]erform any other act which would not in tself materially benefit the actor but which is calculated to harm another person materially with respect to his or her health, safety, business, calling, career, financial condition, reputation or personal relationships.

petitioner is purposely inserting any material into the court documents "for the sole purpose of extracting a settlement of the action."

Finally, respondents claim that where there is a pending JAMS arbitration there is every reason to seal the record and no good reason not to. Jetblue Airways Corp. v. Stephenson, 31 Misc.3d 1241(A) (Sup. Ct. N.Y. Cnty. 2010). However, the ruling in the Jetblue case was limited to the circumstances in which it was determined that arbitration was required. As discussed, *supra*, there is no requirement that petitioner and respondent engage in arbitration and therefore, no rationale for sealing the record. As a result, respondents' request to seal the record is denied.

Accordingly, it is

ORDERED that the arbitration between petitioners Kramer Levin Naftalis & Frankel LLP, Steven M. Goldman, and Robert N. Holtzman and respondents Michael C. Cornell, Alan R. Cornell, Cornell Holdings II, LLC, MCC Capital Partners, LLC, MCC Capital Partners II, LLC; and Michael C. Cornell and MCC Capital Partners II, derivatively and on behalf of Propel Equity Partners II, LLC, and Cornell Holdings II, LLC, derivatively and on behalf of Propel Management Holdings, LLC, is permanently stayed; and it is further

ORDERED that the temporary sealing order is hereby vacated and all documents contained in the electronic case file are unsealed.

Date: July 14, 2016
New York, New York

Anil C. Singh