SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 38

GARY M. GOLDBERG,	:	Index No. 159280/2019 (Action No. 1)
Plaintiff,	:	
-against-	:	DECISION & ORDER
BRUDERMAN BROTHERS, LLC; BRUDERMAN ASSET MANAGEMENT, LLC; JAMES M. BRUDERMAN; and MATTHEW J. BRUDERMAN,	:	
Defendants.	:	
BRUDERMAN BROTHERS, LLC, and BRUDERMAN ASSET MANAGEMENT, LLC,	:	Index No. 656979/2019 (Action No. 2)
Plaintiffs,	:	
-against-	:	
GARY M. GOLDBERG,	:	
Defendant.	:	

LOUIS L. NOCK, J.

Motions in the above-captioned related actions are consolidated for disposition. In the first above-captioned action ("Action No. 1") the defendants therein (the "Bruderman Parties") move for a protective order in respect of certain discovery sought by plaintiff therein (motion seq. no. 005), and to compel arbitration on the grounds that that action seeks to litigate an arbitrable dispute pursuant to agreements entered into by the parties (motion seq. no. 007), and, to varying extents, for dismissal of the second verified amended complaint on grounds independent of arbitrability (motion seq. no. 008).

In the second above-captioned action ("Action No. 2"), plaintiffs therein (the "Bruderman Companies") move for a preliminary injunction (motion seq. no. 002) and for certain discovery (motion seq. no. 003). The defendant therein cross-moves (motion seq. no. 001) to dismiss the complaint.

Action No. 1

The second amended verified complaint in Action No. 1, dated November 12, 2019, alleges as follows:

The plaintiff, Gary M. Goldberg, ran a financial planning business generally known as Gary Goldberg Financial Services. On September 24, 2014, Mr. Goldberg entered into agreements whereby he sold his said business to the Bruderman Companies. Those agreements consist of an Asset Purchase Agreement between Gary Goldberg & Co., Inc., and Bruderman Brothers, Inc.; and an Asset Purchase Agreement between Gary Goldberg Planning Services, Inc., and Bruderman Asset Management, LLC (NYSCEF Doc. Nos. 22, 23) (the "Asset Purchase Agreements").

Relatedly, the parties entered into an Employment Agreement on January 2, 2015 (the "Employment Agreement"), whereby Mr. Goldberg would work for the Bruderman Companies for a five-year period (NYSCEF Doc. No. 69). As a result of this transaction, Gary Goldberg Financial Services would function as an autonomous division of the Bruderman Companies, run by Mr. Goldberg. Allegations describing the actual gravamen of the action can first be found at paragraphs 16 and 17 of the complaint, which allege the following:

> Goldberg's success commanded such power within the Bruderman Companies that, pursuant to the Employment Agreement, the Bruderman Companies were required to pay Goldberg extraordinary sums of money.
>
> Believing that a financial advisor that was younger than Goldberg's seventy-nine (79) years of age, who would require less financial compensation, could operate Gary

> Goldberg Financial Services, Defendants took steps to make Goldberg's work environment unsustainable. In this regard, and in an effort to force Goldberg out of the Bruderman Companies, Defendants sought to hire a younger, cheaper replacements [*sic*] for Goldberg.

(Second Amended Verified Complaint ¶¶ 16-17.) "Among other actions taken" by the Bruderman Parties "to interfere with Goldberg's employment" are alleged withholding of compensation, denial of access to a business e-mail account, and disparaging statements to Goldberg's clients and to "governing authorities" (*id.*, ¶ 18). Other adverse employment actions are alleged, including termination of the employment and the filing with the Financial Industry Regulatory Authority (FINRA)[1] of a false Form U5 containing allegedly false disparaging information concerning Mr. Goldberg (*see, id.*, ¶¶ 19-31).

The Second Amended Verified Complaint asserts a cause of action for a declaratory judgment that the Form U5 is false (the first cause of action); a cause of action for an injunction against disseminating the Form U5 (the second cause of action); and causes of action for age discrimination under New York State and New York City law (the third through fifth causes of action).

The Bruderman Parties move to compel arbitration on the ground that section 12.8 of the Employment Agreement is an express, comprehensive, and exclusive arbitration clause requiring the parties to submit any and all controversies relating to the agreement to binding and final arbitration before JAMS.[2] Notably, though: it is clear from the record in this case that the parties have been deeply involved in arbitration already, before JAMS, as evident from the notice of commencement of arbitration issued by JAMS, dated October 8, 2019 (NYSCEF Doc. No. 62)

[1] FINRA is "the successor to the National Association of Securities Dealers ('NASD')" (*Metro Life Ins. Co. v Bucsek*, 919 F3d 184, 187 [2d Cir]), *cert denied* 140 S Ct 256 [2019].

[2] Acronym for "Judicial Arbitration and Mediation Services." In addition to the Employment Agreement, the Asset Purchase Agreements also contain broad arbitration clauses, at section 10.09 thereof.

and from a detailed arbitration order issued by Hon. Shirley W. Kornreich, Arbitrator, dated November 1, 2019 (NYSCEF Doc. No. 51), which thoroughly goes through the details of the Asset Purchase Agreements and Employment Agreement. This court concurs with, and adopts, the reasoning of that order (incorporated herein by reference) which leads to the conclusion that the disputes currently underway before JAMS are arbitrable disputes pursuant to the parties' agreements.[3] As that order indicates, the only matters left for consideration by this court are applications for injunctive relief and specific performance (*see*, Arbitration Order at 19. *See also, id.*, at 18 ["The broad arbitration clauses in the agreements provide for arbitration of all disagreements, disputes and controversies between the parties except injunctive relief. The merits of those claims are a determination to be made at arbitration."]).

Insofar as the second amended verified complaint asserts claims for age discrimination, the court is mindful of the provisions of CPLR 7515, enacted in 2018, which nullify arbitration clauses insofar as they seek to apply to "any allegation or claim of discrimination." However, it is indisputable that the claims asserted under the thinly-veiled guise of age "discrimination" in the second amended verified complaint are, by no stretch of the imagination, claims falling within the purview of CPLR 7515. That is because the second amended verified complaint itself openly concedes that the reasons for the termination of Mr. Goldberg and any related adverse employment actions were motivated purely for economic reasons; and not directly and specifically on account of his age *per se* (*see*, *inter alia*, complaint ¶¶ 16-17). Adverse

[3] The parties are in conflict with one another whether this court, or their chosen arbitration forum, should be the decisionmaker as to the question of arbitrability of the parties' dispute altogether. Arbitrator Kornreich has already spoken on the question, concluding that the parties' dispute is arbitrable. As noted in the text, this court concurs with Arbitrator Kornreich's opinion on the question (*see, e.g., Zachariou v Manios*, 68 AD3d 539 [1st Dept 2009] [reference to arbitration rules in a contractual arbitration provision does not constitute clear evidence of intent to refer the question of arbitrability to the arbitrator]). The question of who decides arbitrability is, thus, academic in this instance because this court fully concurs with Arbitrator Kornreich's analysis and conclusion that the parties' substantive dispute in these related cases is, in fact, arbitrable.

employment actions "for economic reasons are a legitimate nondiscriminatory basis for termination of employment" (*Smith v Federal Defenders of N.Y., Inc.,* 161 AD3d 506, 507 [1st Dept 2018]).

A substantial controversy exists among the parties as to whether the instant dispute, if arbitrated, ought to be venued in the parties' expressly selected JAMS arbitral forum (a position embraced by the Bruderman Companies) or (as Mr. Goldberg posits) before a FINRA arbitral forum pursuant to FINRA Rule 16-25 (July 2016). That regulatory rule was promulgated by FINRA in the aftermath of several federal appellate court decisions that held that forum selection clauses vesting decision-making authority in arbitral forums other than FINRA do not override FINRA's authority to determine disputes with member firms (*see,* FINRA Rule 12200; *see also,* Regulatory Notice 16-25, *Forum Selection Provisions Involving Customers, Associated Persons and Member Firms* [available at www.finra.org/rules-guidance/notices/16-25]).[4] However, this courts draws contrary guidance from the fairly recent holding of the United States District Court for the Southern District of New York, as follows.

In *New York Bay Capital, LLC v Cobalt Holdings, Inc.* (2020 WL 1989485 [SDNY April 27, 2020]),[5] a dispute arose among the defendant in that case – Cobalt Holdings, Inc. ("Cobalt") – and the plaintiff in that case – New York Bay Capital, LLC) ("NYBAY") – in connection with their contract whereby NYBAY agreed to assist Cobalt with its financing needs. NYBAY was a member firm of FINRA, in the same manner that Bruderman Brothers LLC is. Cobalt initiated FINRA arbitration of its dispute with NYBAY, in the same manner that Mr. Goldberg has done with regard to Bruderman Brothers LLC. NYBAY then commenced the above-referenced federal action to enjoin the FINRA arbitration in favor of the parties' contractually selected

[4] All FINRA rules are available at www.finra.org/rules-guidance/rulebooks/finra-rules .
[5] 456 F Supp 3d 564.

forum (in that particular instance, federal district court). The court in the above-referenced federal action held that the parties' express contractual forum selection clause "supersedes" any existing regulation to arbitrate before FINRA, such as FINRA Rule 16-25.

The court in *New York Bay Capital* began its analysis with the recognition that "[u]nder New York law, the 'fundamental neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent'" (*New York Bay Capital, supra*, at *5). "'Thus, a written agreement that is complete, clear and unambiguous on its face must be [interpreted] according to the plain meaning of its terms[.]'" (*Id.* [brackets in original].) The court then found, as is the case in these related actions, that "The Contract forum selection clause is unambiguous" (*id.*). The court then held that "[t]he forum-selection clause displaces" otherwise applicable regulations which identify FINRA as the appropriate arbitral form (*id.*).[6]

The court in *New York Bay Capital* went on to specifically address FINRA Rule 16-25, as follows:

> Cobalt resists this conclusion by pointing to FINRA Regulatory Notice 16-25 (July 2016), in which FINRA stated that "FINRA rules are not mere contracts" but rather "have the force of federal law.". . . But the Court is bound to apply the Second Circuit's clear holding . . . that "[t]he arbitration rules of an industry self-regulatory organization such as FINRA are interpreted like contract terms[.]"

(*New York Bay Capital, supra,* at *6.) That court, accordingly, applied the parties' expressly selected forum selection clause over FINRA arbitration notwithstanding "FINRA guidance on [the] issue" (*id.*).

This court's preference is to respect the expressly stated principles and holdings of the above-noted federal courts, issued directly out of the United States Court of Appeals for the

[6] That court's holding was predicated on prior Second Circuit case law (*see, New York Bay Capital, LLC v Cobalt Holdings, Inc.*, 2020 WL 1989485 at *5 [SDNY April 27, 2020]).

Second Circuit and the United States District Court for the Southern District of New York.[7] Per those federal courts, an express and unambiguous forum selection clause – such as the JAMS forum selection clause found in no less than three agreements executed by the parties herein – must be applied to the exclusion of any other suggested forum, including FINRA, and notwithstanding FINRA's self-promulgated rules. Accordingly, the parties' dispute is to arbitrated – and said arbitration will continue to be arbitrated before JAMS.[8]

Action No. 2

The complaint in Action No. 2, dated November 22, 2019, revolves around the same business relationship that is the subject of the parties' Asset Purchase Agreements and Employment Agreement. The plaintiffs in this action – the Bruderman Companies – allege that Mr. Goldberg has wrongfully taken their property and confidential information, transferring same to his own exclusive control in violation of the Asset Purchase Agreements and Employment Agreement. It is further alleged that Mr. Goldberg has wrongfully solicited the Bruderman Companies' customers and personnel in similar violation.

The complaint asserts a cause of action for a permanent injunction enforcing restrictive covenants in the Asset Purchase Agreements which prohibit Mr. Goldberg from soliciting the Bruderman Companies' customers, employees, contractors, or suppliers (the first cause of action); a cause of action for a permanent injunction prohibiting Mr. Goldberg from entering

[7] Naturally, the federal courts treating this issue – which is an issue directly raised by the parties in the case presently before this court – are especially deserving of substantial deference within the context of this issue due to the fact that FINRA is, itself, a creature of federal legislation (*see*, Securities Exchange Act of 1934, section 15A; *see also, UBS Fin. Servs. v W. Va. Univ. Hosps., Inc.*, 660 F3d 643 [2d Cir 2011]).

[8] As alluded to in the text, the record indicates that a concurrent FINRA arbitration has already gone forward, at least with regard to the single Bruderman Company which is a FINRA member; to wit, Bruderman Brothers LLC (*see*, FINRA Letter, dated December 24, 2019 [NYSCEF Doc. No. 96]). By virtue of this court's holding that the parties' dispute is unquestionably arbitrable before JAMS, said FINRA arbitration will cease, and the issues raised or anticipated to be raised in that FINRA arbitration are hereby referred to, and merged with, the JAMS arbitration that this court has just directed to continue.

onto the Bruderman Companies' offices (the second cause of action); and a cause of action for a permanent injunction prohibiting Mr. Goldberg from taking or utilizing the Bruderman Companies' confidential information and property, and compelling him to account for and return any such information and property taken. As noted at the outset hereof, and as recognized by Arbitrator Kornreich, presently before the court for disposition is the Bruderman Companies' motion for preliminary injunctive relief mirroring, to a limited degree, the permanent injunctive relief just iterated above. Indeed, after rendering a thorough opinion which concluded that the parties' substantive dispute is arbitrable before JAMS, Arbitrator Kornreich closed by stating:

> However, before the arbitrator now are motions by claimants [i.e., the Bruderman Companies] requesting injunctive relief and specific performance, the very relief allowed by the agreements but withheld from the arbitrator's jurisdiction. The parties here structured their agreements to provide for broad arbitration of disputes but to exclude injunctive relief and specific performance from arbitration. . . . Although claimants are free to move for such relief, under the agreements, they must do so before a New York court.

(NYSCEF Doc. No. 4 at 19.)

The History and Nature of the Pending Motions for Preliminary Injunctions

In motion sequence no. 001, the Bruderman Companies moved the court, by order to show cause dated November 27, 2019 (NYSCEF Doc. No. 17), for the following relief, as essentially stated immediately hereinafter:[9]

- Prohibiting Mr. Goldberg from competing with the Bruderman Companies pending this action;
- Prohibiting Mr. Goldberg from soliciting any of the Bruderman Companies' employees, customers or suppliers pending this action;
- Prohibiting Mr. Goldberg from entering upon the Bruderman Companies' offices;
- Prohibiting Mr. Goldberg from taking or utilizing any confidential information or other property belonging to the Bruderman Companies, and compelling him to return any such information and property to them, including a file known as "Gary households.xlsx"; and

[9] The reader is referred to the actual order to show cause for a precise recitation of the requested relief.

- Compelling Mr. Goldberg to furnish to the Bruderman Companies a sworn statement confirming his deletion on said file and identifying anyone who is a prior recipient of same.

A temporary restraining order ("TRO") was also requested by the Bruderman Companies. This court granted it to the extent of restricting Mr. Goldberg's access to the Bruderman Companies' offices and restraining Mr. Goldberg's use and dissemination of the Bruderman Companies' confidential information, including the above-referenced file (*see*, NYSCEF Doc. No. 17). That TRO was continued pending this decision, by order dated December 19, 2019 (NYSCEF Doc. No. 23).

In motion sequence no. 002, the Bruderman Companies made a similar motion, by order to show cause dated June 29, 2020, for temporary and preliminary injunctive, but tracking the pendency of the parties' then-pending FINRA arbitration,[10] distinct of the pendency of this action as motion seq. no. 001 did (*see*, NYSCEF Doc. No. 37). That motion sought the following relief, essentially:[11]

- Prohibiting Mr. Goldberg from competing with the Bruderman Companies pending arbitration;
- Prohibiting Mr. Goldberg from soliciting any of the Bruderman Companies' employees or customers pending arbitration; and
- Compelling Mr. Goldberg to furnish to the Bruderman Companies a sworn statement identifying any customers of the Bruderman Companies with whom he communicated after his termination from the Bruderman Companies.

A TRO was also requested by the Bruderman Companies. This court granted it to the extent of restraining Mr. Goldberg from soliciting any of the Bruderman Companies' customers or competing with the Bruderman Companies.

[10] Obviously, in light of this decision's referral of the dispute to JAMS arbitration, this court will consider the subject motion as one seeking relief pending such arbitration.
[11] *See, supra,* note 9.

The Standards on a Motion for a Preliminary Injunction in Aid of Arbitration

The Legislature has addressed the standards for the granting of preliminary injunctive in two places: CPLR article 63, which applies generally; and CPLR article 75, which applies to the specific context of injunctive relief in aid of arbitration, with which this decision is now directly concerned. CPLR 7502 (c) expressly provides that injunctive relief by the court in aid of arbitration is appropriate "only upon the ground that the [arbitration] award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." Indeed, that statute goes on to state that this is "the sole ground for the granting of the remedy," i.e., the remedy of an injunction in aid of arbitration. This statutory linguistic has led to earlier-era appellate court decisions embracing the view that the tripartite analysis traditionally applicable to preliminary injunction analysis under CPLR article 63 (likelihood of success, irreparable harm, and balancing the equities) is not applicable to motions under CPLR article 75 for injunctive relief in aid of arbitration (*see, Wagner Acquisition Corp. v Giove*, 250 AD2d 857 [2d Dept 1998]; *see also, International Union of Operating Engineers, Local No. 463 v City of Niagara*, 191 Misc 2d 375 [Sup Ct Niagara County] [same], *affd sub nom Bathurst v City of Niagara Falls*, 298 AD2d 1010 [4th Dept], *lv denied* 99 NY2d 504 [2002]).

Although earlier-era decisions emanating from our Judicial Department – the Appellate Division, First Department – seem to be in concurrence with the aforesaid policy (*see, Guarini v Severini*, 233 AD2d 196 [1st Dept 1996], *lv denied* 90 NY2d 802 [1997]; *H.I.G. Capital Mgt., Inc. v Ligator*, 233 AD2d 270 [1st Dept 1996]), the trend of more recent decisions emanating from our Judicial Department embraces a contrary view; to wit, that the traditional tripartite analysis applicable in CPLR article 63 motions apply, as well, in the CPLR article 75 context (*see, Erber v Catalyst Trading, LLC*, 303 AD2d 165 [1st Dept 2003]; *In re Cullman Ventures,*

Inc., 252 AD2d 222 [1st Dept 1998]. *See also*, Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C7502:6 at 20 [Thomson Reuters 2013] ["the party who seeks a preliminary injunction in aid of arbitration must show, in addition to the potential ineffectiveness of the award, the usual three elements for equitable relief"] [citing First and Second Department cases decided in 2009 and 2008, respectively]). Under this view, the single ground noted by the Legislature in CPLR 7502 (c) – potential ineffectiveness – is "an indispensable but not necessarily exclusive element of a successful application" for injunctive relief in aid of arbitration (Practice Commentaries, *supra*).

As a consequence of the more modern viewpoint noted directly hereinabove, this court is constrained to apply the three traditional standards, even in this arbitration-related context, but mindful of what seems to be a legislative bias toward requiring a finding, if it *can* be found, that the requested injunction is essential to preventing a possibly ineffective arbitration award absent the injunction.

At the outset of the analysis, though, this court deems it necessary to remind the parties that any grant or denial of the requested provisional relief will have absolutely no bearing whatsoever on the independent merits analysis which Arbitrator Kornreich will be engaging in as she continues with the arbitration of the parties' substantive dispute; nor will she be bound by any of the provisional findings this court is about to make in disposition of the instant motions for preliminary injunctions in aid of arbitration (*see, e.g., J.A. Preston Corp. v Fabrication Enterprises, Inc.*, 68 NY2d 397 [1986]; *American Para Professional Sys., Inc. v Hooper Holmes, Inc.*, 13 AD3d 167 [1st Dept 2004]). The following analysis will be mindful of what the court considers to be the prime consideration, as expressly set forth by the Legislature in CPLR article 75; to wit, whether a future arbitration award in favor of the Bruderman Companies may be

rendered ineffectual if this court does not grant their requested motion for a preliminary injunction in aid of the arbitration.[12]

Application of the Likelihood of Success on the Merits Element

Restrictive covenants incident to the sale of a business are enforceable (*Mohawk Maintenance Co., Inc. v Kessler*, 52 NY2d 276 [1981]; *Purchasing Assocs., Inc. v Weitz*, 13 NY2d 267 [1963], *rearg denied* 14 NY2d 584 [1964]). Here, the Bruderman Companies purchased all the assets of Mr. Goldberg's broker/dealer and investment advising businesses (Asset Purchase Agreements § 2.01 [a] at 12). The Asset Purchase Agreements contain a restraint on Mr. Goldberg from engaging in that business "on the last to occur of . . . the six (6) year anniversary of the Closing Date and . . . the two (2) year anniversary of the date" Mr. Goldberg ceases his employment with the Bruderman Companies (Asset Purchase Agreements § 6.09 [b]). Those agreements also contain a restraint on Mr. Goldberg from soliciting customers or employees of the Bruderman Companies "[f]or a period ending on the last to occur of . . . the ten (10) year anniversary of the Closing Date; and . . . the five (5) year anniversary of the date"

[12] It is of the parties' making that this court must now engage a limited merits analysis, albeit provisional and albeit only "likelihood" based, in a matter whose actual substantive merits and final determination are to be decided by a different decision-maker – the arbitrator. As Arbitrator Kornreich correctly observed, the parties structured their agreements in a manner that splits the decision-making process as among the arbitrator, for merits determination, and the court, for facilitative injunctions (*see*, NYSCEF Doc. No. 51 at 17, 19) (*see*, *HSBC Bank USA v National Equity Corp.*, 279 AD2d 251, 254 [1st Dept 2001] ["arbitration clauses, as contractual agreements, must be enforced according to their terms . . . ."]). Had the parties vested the arbitrator with blanket authority – including injunctive authority – the delicate exercise of having a court opine on a provisional basis in a matter where an arbitrator is left to opine on a final basis would not transpire, as it does now.

Naturally, under the older viewpoint treated in the text, which limited Article 75 injunction practice to the "sole ground" of potential ineffectiveness of a future arbitration award, this type of decision-making split presents much less of an issue, if at all, as that standard does not ask the court to engage in a merits analysis at the provisional stage. However, under the more modern viewpoint, which this court feels constrained to apply based on the more recent First Department authority noted in the text, we must engage this decision-making split while cautioning the parties that the court's provisional opinion has no bearing on, and creates no restraint on, the arbitrator's ultimate decision-making autonomy and authority.

Mr,. Goldberg ceases to be employed by the Bruderman Companies (Asset Purchase Agreements § 6.09 [b]).

Consequently, it would appear at this provisional stage that Mr. Goldberg may not compete with the Bruderman Companies until January 2, 2021, and he may not solicit customers or employees of the Bruderman Companies until October 21, 2024.

Moreover, sections 6.09 (c) and (f) of the Asset Purchase Agreements contain the acknowledgment that a breach of the foregoing constraints by Mr. Goldberg would constitute "irreparable harm" to the Bruderman Companies and, in such event, an injunction to remedy that breach would be authorized.

Although Mr. Goldberg has asserted that his termination was wrongful and that he is owed certain compensation by the Bruderman Companies, the Asset Purchase Agreements provide that such challenges do not stand in the way of the foregoing constraints and remedial injunction pending such time as the parties' controversy is finally determined in arbitration (*see*, Asset Purchase Agreement § 6.09 [g] at 48). Insofar as Mr. Goldberg's challenges are concerned, his rights will be preserved in arbitration where, if found to have merit, can be addressed through an ultimate award in his favor or, if deemed appropriate by the arbitrator, through the fashioning of a set-off (*see, Frank May Assocs., Inc. v Boughton*, 281 AD2d 673 [3d Dept 2001] [plaintiff was able to show likelihood of success on the merits for preliminary injunction purposes given defendant's ability to recoup commissions owed by way of set-off]).

Thus, at this provisional stage, and purely in aid of arbitration, this court finds that, at a bare minimum, the Bruderman Companies have made a threshold showing of likelihood of success on the merits. As noted, the arbitrator is uninhibited by this provisional finding.

Application of the Irreparable Harm Element

Apart from the fact that the Asset Purchase Agreements acknowledge any breach of the covenants to constitute "irreparable harm" (Asset Purchase Agreements §§ 6.09 [c], [f]), it is recognized that a loss of customers and goodwill can constitute irreparable harm for preliminary injunction analysis (*Gunderman & Gunderman Ins. v Brassill*, 46 AD3d 615 [2d Dept 2007]).

Application of the Balancing of the Equities Element

The court appreciates that in an asset sale involving millions of dollars tendered in consideration of the covenants bargained for and agreed to by the parties weighs measurably in favor of restraining activity which, on its face, appears to violate them. Maintaining the *status quo* pending final determination – in this case, by the arbitrator – through such a preliminary restraint is an appropriate balance, given the parties' competing interests in this controversy (*see, Masjid Usman, Inc. v Beech 140, LLC*, 68 AD3d 942 [2d Dept 2009]).

Application of the Potential Ineffectiveness Standard

Were Mr. Goldberg to remain free to compete and solicit in facial contravention of the parties' agreements, any future arbitration award in favor of the Bruderman Companies will have been rendered ineffectual due to the loss of the customer base they bargained for and attendant goodwill; and the loss of valued employees would similarly dilute the effectiveness of such an award (*see, H.I.G. Capital Mgt., Inc., supra, at* 270 ["The uncontrolled disposal of respondents' assets, which might render an award ineffectual, presents a risk of irreparable harm."]).

That said, this court does not go so far, at this provisional stage, to grant the affirmative injunctions requested on this motion; to wit, compelling Mr. Goldberg to return files and to identify customer contacts. As stated at the outset of this decision's analysis of the elements and standard for the granting of injunctive relief under CPLR Article 75, the prime purpose at this

stage is to preserve the effectiveness of the JAMS arbitration that has been directed by this court to continue. That interest is served by granting the negative injunctions which would preliminarily prohibit Mr. Goldberg from competing and soliciting adverse to the Bruderman Companies. Going the extra step of compelling him to return files and identify customer contacts would be proper considerations for an arbitrator in her final determination, should that be her inclination; but this court does not view such measures as necessary for preserving the effectiveness of the arbitration. Accordingly, the motions for preliminary injunctions in aid of arbitration are granted to the extent of the negative injunctive relief sought therein.

Naturally, the motions by the parties, respectively, for discovery-related relief (motion seq. no. 005 in Action No. 1; motion seq. no. 003 in Action No. 2) are denied due to the remand of this matter to arbitration; and the motion to dismiss the second verified amended complaint in Action No. 1 on grounds independent of arbitrability (motion seq. no. 008 in Action No. 1) is denied for the same reason. The motion to compel arbitration (motion seq. no. 007 in Action No. 1) and the motion for preliminary injunctive relief (motion seq. no. 002 in Action No. 2) are granted to the extent set forth herein.

Accordingly, it is

ORDERED that the motion to compel arbitration of the matters raised in the above-captioned two related actions is granted, and that said arbitration shall proceed further and to conclusion before the JAMS arbitral forum previously involved in said matters, as previously assigned to Hon. Shirley W. Kornreich, Arbitrator; and it is further

ORDERED that any arbitration proceeding presently pending among the parties before FINRA shall be stayed, and that the matters raised and anticipated to be raised by the parties in said FINRA proceeding shall be merged with the JAMS arbitration proceeding referred to in the

immediately preceding decretal paragraph, for determination in said JAMS arbitration proceeding; and it is further

ORDERED that the parties' respective discovery-related motions are denied, without prejudice to renewal in the JAMS arbitration proceeding referred to in the immediately preceding decretal paragraph; and it is further

ORDERED that the motion to dismiss the second amended verified complaint in the above-captioned first action on grounds independent of arbitrability is denied as moot by virtue of the within remand to JAMS arbitration; and it is further

ORDERED that the motions by the Bruderman Companies for preliminary injunctive relief is granted to the following extent:

(1) Pending the JAMS arbitration referenced hereinabove, Gary M. Goldberg shall be enjoined from engaging in any business that is competitive with Bruderman Brothers, LLC, and/or Bruderman Asset Management, LLC, within the United States;

(2) Pending the JAMS arbitration referenced hereinabove, Gary M. Goldberg shall be enjoined from causing any client or customer of Bruderman Brothers, LLC, and/or Bruderman Asset Management, LLC, and any former client or customer of Gary Goldberg & Co., Inc., or Gary Goldberg Planning Service, Inc., to terminate his, her, or its relationship with Bruderman Brothers, LLC, and/or Bruderman Asset Management, LLC;

(3) Pending the JAMS arbitration referenced hereinabove, Gary M. Goldberg shall be enjoined from soliciting any client or customer of Bruderman Brothers, LLC, and/or Bruderman Asset Management, LLC, or any of their employees, and any former client or customer of Gary Goldberg & Co., Inc., or Gary Goldberg Planning Service, Inc.;

(4) Pending the JAMS arbitration referenced hereinabove, Gary M. Goldberg shall be enjoined from entering onto any offices operated by Bruderman Brothers, LLC, and/or Bruderman Asset Management, LLC;

(5) Pending the JAMS arbitration referenced hereinabove, Gary M. Goldberg shall be enjoined from taking anything from the custody of the offices operated by Bruderman Brothers, LLC, and/or Bruderman Asset Management, LLC; and

(6) Pending the JAMS arbitration referenced hereinabove, Gary M. Goldberg shall be enjoined from utilizing any tangible or intangible property owned by Bruderman Brothers, LLC, and/or Bruderman Asset Management, LLC;

and it is further

ORDERED that counsel for the Bruderman Companies shall furnish a copy of this decision and order to JAMS, Attention: Hon. Shirley W. Kornreich, Arbitrator, and to FINRA, no later than ten business days from the date hereof; and it is further

ORDERED that the above-captioned two related actions are hereby deemed dismissed and finally disposed for any substantive purpose; but shall remain procedurally accessible to the parties solely in order to provide any future requested meritorious injunctive relief in aid of the arbitration directed hereinabove.

This will constitute the decision and order of the court.

Dated: New York, New York
October 20, 2020

ENTER:

Hon. Louis L. Nock, J.S.C.