Fritschler v Draper Mgt., LLC
2020 NY Slip Op 34000(U)
December 2, 2020
Supreme Court, New York County
Docket Number: 652056/2019
Judge: Marcy Friedman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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CHARLES FRITSCHLER, CURATOR, LLC, BOSTON WOODS ONE LLC, and EB5OVERSEER LLC,

Plaintiffs,

-against-

DRAPER MANAGEMENT, LLC, LAWRENCE JASENSKI, JR., MARK DESO, BROOKS CHURCH, ROBERT HURLEY, SUBWAY FRANCHISE DEVELOPMENT OF BOSTON, LLC, DOCTOR'S ASSOCIATES, INC., DOCTOR'S ASSOCIATES, LLC, SUBWAY IP INC., FRANCHISE WORLD HEADQUARTERS, LLC, SUBWAY REAL ESTATE CORP., SUBWAY REAL ESTATE LLC,

Defendants.

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Index No. 652056/2019

DECISION & ORDER

Motion Seq. Nos.: 001 & 003

MARCY S. FRIEDMAN, J.:

This action arises out of plaintiff Charles Fritschler's purchase of seven Subway franchises and the subsequent failure of those franchises. The complaint alleges that all defendants materially breached the franchise agreements and that certain defendants breached a separate agreement for the management of the franchises. The complaint also seeks damages for defendants "repeated acts of negligence and fraud. . . , including material misrepresentations made to the Plaintiffs to induce them to enter into and to continue investing in Subway® sandwich shop franchise agreements and ancillary agreements, including subleases for the locations of the sandwich shops." (Compl., ¶ 1.)

In Motion Seq. 001, defendants Doctor's Associates, Inc., Doctor's Associates, LLC, Subway IP Inc., Franchise World Headquarters, LLC, Subway Real Estate Corp., and Subway Real Estate LLC (collectively, the Subway Defendants) seek, among other things, to stay this action pending arbitration. (Notice of Motion, NYSCEF Doc. No. 28.) In Motion Seq. No. 003,

defendants Mark Deso, Brooks Church, Robert Hurley, and Subway Franchise Development of Boston, LLC (collectively, the Business Development Agent Defendants or BDAs) separately seek, among other things, to stay this action pending arbitration. (Order to Show Cause, NYSCEF Doc. No. 68.)[1] In response to both motions, plaintiffs cross-move for expedited discovery and a jury trial to resolve disputed issues of fact as to arbitrability, and for a stay of arbitration on the ground that a valid agreement was not made. (Notice of Cross-Motion, Motion Seq. No. 1 [NYSCEF Doc. No. 49]; Motion Seq. No. 3 [NYSCEF Doc. No. 91].)

As alleged in the complaint, Fritschler executed seven Franchise Agreements with defendant Doctor's Associates, Inc. between 2014 and 2015, for the purchase of the franchises (the Subway franchises or the Subway® franchises). (Compl., ¶¶ 27-29; Franchise Agreement, Recitals.) Defendant Doctor's Associates, LLC "is the assignee of certain franchise and development agent agreements entered into by Doctor's Associates, Inc." (Compl., ¶ 19.)[2] Plaintiffs EB5Overseer, LLC [EB5] and Boston Woods One, LLC [Boston Woods One] "invested capital in Fritschler's Subway® franchises." (Compl., ¶ 30.) Plaintiff Curator, LLC "managed" EB5 and Boston Woods One. (Id.) Plaintiff EB5 entered into a Management Agreement with defendant Draper Management, LLC (Draper), effective on or about February 14, 2014, with respect to the management of plaintiff Fritschler's Subway franchises. (Compl., ¶ 5.)

[1] Plaintiffs allege that defendant Jasenski is also a Business Development Agent Defendant. (Compl., ¶ 31.) He has not formally joined in the motion of the other named BDAs but stated at the oral argument of the motions that his position is that the matter should be arbitrated. (Transcript, at 21 l 21-24.) Defendant Draper Management LLC has not appeared or moved for any relief.

[2] According to defendants, Doctor's Associates, LLC assumed the rights and obligations that Doctor's Associates, Inc. held under the Franchise Agreements. (Motion Seq. No. 1, Defs.' Memo. In Supp., at 1-2 [NYSCEF Doc. No. 29].) Doctor's Associates, Inc. and Doctor's Associates, LLC are referred to collectively as Doctor's Associates or DAL.

As further alleged in the complaint, the Business Development Agent Defendants "are responsible for developing and servicing Subway® franchises in geographic 'territories'. They do so through separate legal entities that they own and operate. BDAs are compensated by DAL. They receive from DAL a percentage of the royalties paid by franchisees in their territories, as well as a percentage of franchise fees and transfer fees for franchises sold and transferred in their territories." (Compl., ¶ 32.)

The Franchise Agreements all contain identical arbitration provisions.[3] These Agreements provide:

> "Any dispute, controversy or claim arising out of or relating to this Agreement or the breach thereof will be settled by arbitration to be administered by either the American Arbitration Association or its successor ('AAA') or the American Dispute Resolution Center or its successor ('ADRC') at the discretion of the party first filing a demand for arbitration. AAA will administer the arbitration in accordance with its administrative rules (including, as applicable, the Commercial Rules of the AAA and the Expedited Procedures of such rules). ADRC will administer the arbitration in accordance with its administrative rules (including, as applicable, the Rules of Commercial Arbitration or under the Rules for Expedited Commercial Arbitration). . . ."

(Franchise Agreement, § 10 [a].) The Franchise Agreements further provide:

> "You [franchisee] may only seek damages or any remedy under law or equity for any arbitrable claim against us or our successors or assigns. You agree our intended beneficiaries of the arbitration clause including our Affiliates, shareholders, directors, officers, employees, agents and representatives, and their affiliates, will be neither liable nor named as a party in any arbitration or litigation proceeding commenced by you where the claim arises out of or relates to this Agreement. . . ."

(Franchise Agreement, § 10 [d].) The Franchise Agreements also contain a choice of law provision, which states:

> "Any disputes concerning the enforceability or scope of the arbitration clause will be resolved pursuant to the Federal Arbitration Act, 9 U.S.C. §

[3] A representative Franchise Agreement is annexed to the complaint as Exhibit 2. The Subway Defendants do not dispute that this agreement is materially identical to Fritschler's other Franchise Agreements. (Motion Seq. No. 1, Defs.' Memo. In Supp., at 3.)

> 1, et seq. ('FAA'), and the parties agree that the FAA preempts any state law restrictions (including the site of the arbitration) on the enforcement of the arbitration clause in this Agreement. The parties agree to waive any right to disclaim or contest this pre-dispute arbitration agreement."

(Franchise Agreement, § 10 [f].) The Management Agreement, entered into between EB5 and Draper, provides that Draper will act as the "sole and exclusive manager" for the Subway franchises. (Management Agreement, § 1.01.) Pursuant to the terms of the Management Agreement, Draper "shall be responsible for and shall make [defendant Lawrence Jasenski's] services available for the purposes of the Restaurants' development and operation consistent with the Brand and the Franchise Agreement. . . ." (Id., § 5.01 [a].) The Management Agreement does not have an arbitration provision. In the event of a dispute under the Management Agreement, the parties' representatives must make a good faith attempt to resolve the dispute. If that attempt is unsuccessful, a party "may avail itself of litigation to be filed exclusively in a court of competent jurisdiction located in New York City." (Id., § 10.01.)

Discussion

As a threshold matter, the court holds that the FAA (9 USC § 1 et seq.) governs the Franchise Agreements and these motions. The parties do not dispute its applicability. (Motion Seq. No. 1, Defs.' Memo. In Supp., at 6-7; Motion Seq. No. 1, Pls.' Memo. In Opp., at 9-12 [NYSCEF Doc. No. 46]; Motion Seq. No. 3, Defs.' Memo. In Supp., at 7-8 [NYSCEF Doc. No. 61]; Motion Seq. No. 3, Pls.' Memo. In Opp., at 5-6 [NYSCEF Doc. No. 82].) Nor could they do so, given the express terms of the Franchise Agreements. Section 10 (a) of these Agreements provides that "[a]ny dispute, controversy or claim arising out of or relating to this Agreement or the breach thereof will be settled by arbitration. . . ." Section 10 (f) provides that "[a]ny disputes concerning the enforceability or scope of the arbitration clause will be resolved pursuant to the Federal Arbitration Act. . . ." The FAA applies to a contract involving interstate commerce that

provides for arbitration of disputes arising out of the contract. (9 USC §§ 1, 2.) Here, there can be no question that the FAA applies, as the Franchise Agreements involve entities and individuals resident or doing business in different states regarding franchises located in another state. (See Compl., ¶¶ 8-23; Motion Seq. No. 3, Defs.' Memo. In Supp., at 3.)

The court turns to critical issue of whether it is for the court or the arbitrator to determine issues of arbitrability—i.e., issues as to the scope, validity, and enforceability of the arbitration agreement. Defendants contend that the Franchise Agreements evidence the parties' clear intent to delegate issues of arbitrability to the arbitrator, and that "whether Plaintiffs can or cannot bring claims against certain of the Defendants is an issue for the arbitrator, not the Court, to decide." (Motion Seq. No. 1, Defs.' Memo. In Supp., at 19.) Plaintiffs contend that "the majority of claims are clearly outside the scope of the Arbitration Provision, the majority of parties are not signatories to the Provision, and the Provision is not clear, explicit and unequivocal." (Motion Seq. No. 1, Pls.' Memo. In. Opp., at 3.) They further contend that "[t]he court, not an arbitrator, determines whether the subject in dispute falls within the scope of the arbitration agreement." (Id., at 4.)

"Under the FAA, there is a general presumption that the issue of arbitrability should be resolved by the courts." (Contec Corp. v Remote Solution, Co., Ltd., 398 F3d 205, 208 [2d Cir 2005], citing First Options of Chicago, Inc. v Kaplan, 514 US 938, 944–45 [1995].) As explained by the Supreme Court, when applying the FAA "courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." (Henry Schein, Inc. v Archer and White Sales, Inc., __ US __, 139 S Ct 524, 531 [2019] [internal quotation marks and citation omitted].) As further explained by the Second Circuit, in order to determine whether the parties clearly and unmistakably intended to refer the question of

arbitrability to the arbitrator, the courts will construe the arbitration agreement under "relevant state law." (Contec Corp., 398 F3d at 208; see also All Metro Health Care Servs., Inc. v Edwards, 25 Misc 3d 863, 867-868 [Sup Ct, NY County 2009] [this court's decision reviewing authorities].)

In applying the FAA, the Second Circuit has held that where the "parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." (Contec Corp., 398 F3d at 208; accord Doctor's Assocs., LLC v Tripathi, 794 Fed Appx 91, 94 [2d Cir 2019] [Summary Order].) New York courts applying the FAA have held, similarly, that when the parties' agreement both specifically incorporates by reference the rules of an arbitration organization that permit the arbitrator to decide the scope of the arbitration agreement and "employs language referring all disputes to arbitration," the issue of arbitrability will be left to the arbitrator. (Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's, 66 AD3d 495, 496 [1st Dept 2009] [internal quotation marks and citation omitted], affd 14 NY3d 850 [2010], rearg denied 15 NY3d 769 [2010], cert denied 562 US 962 [2010]; see also Vectra Capital, LLC v Cosgrove, 656751/2016, 2017 WL 2900482, * 3 [Sup Ct, NY County 2017] [this court's decision collecting New York authorities, including Matter of Smith Barney Shearson Inc. (v Sacharow), 91 NY2d 39, 46-47 (1997)].)

Here, the court holds that the parties' agreements evidence a clear and unmistakable intent to delegate arbitrability questions to the arbitrator. The arbitration provision is unquestionably broad. (See Vectra Capital, LLC, 2017 WL 2900482, at * 4 [citing authorities].) Moreover, contrary to plaintiffs' contention (Motion Seq. No. 1, Pls.' Memo. In Opp., at 18), section 10 (a) of the Franchise Agreement expressly incorporates the rules of the AAA by

providing that the "AAA will administer the arbitration in accordance with its administrative rules (including, as applicable, the Commercial Rules of the AAA and the Expedited Procedures of such rules)." The rules of the AAA provide: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." (AAA Commercial Arbitration Rule 7 [a] [https://www.adr.org/sites/default/files/Commercial%20Rules.pdf].) As the Second Circuit has held, these rules delegate to the arbitrator the power to rule on issues of arbitrability. (Contec Corp., 398 F3d at 208; accord Doctor's Assocs., LLC v Tripathi, 794 Fed Appx at 94.)

In holding that issues of arbitrability are delegated to the arbitrator, the court rejects plaintiffs' contention that the arbitration provision was procured by fraud. (Motion Seq. No. 1, Pls.' Memo. In Opp., at 13-14.) The alleged fraud, as described by plaintiffs, is based on the following acts: "Defendants, through the negotiation and execution of the Management Agreement, represented to Plaintiffs that claims against Defendants would be subject to judicial determination in this Court. As experienced Subway BDAs, franchise sellers and unit owners, Defendants knew the falsity of the representation. The negotiation of the dispute resolution provisions of the Management Agreement were [sic] intended to induce Plaintiffs to execute the Management Agreement and then become Subway franchisees." (Motion Seq. No. 1, Pls.' Memo. In Opp., at 13.) In addition, defendants only provided Fritschler with one FDD (Franchise Disclosure Document), and the FDD and Franchise Agreement "omit the following material facts with respect to arbitration: that BDAs may not be sued in court by franchisees and may not be held liable to franchisees; that arbitrators shall determine jurisdiction and arbitrability; that all claims against DAL and/or its BDAs must be arbitrated without regard to

the genesis, scope and nature of the claims; that the parties may not obtain judicial review of errors of law or fact made by arbitrators; and, that an arbitration award is subject to only minimal judicial review." (Id., at 13-14, citing Compl., ¶¶ 211-216.)

As held by the Supreme Court, it is for the court, not the arbitrator, to consider a challenge to the validity of a provision requiring arbitration, while it is for the arbitrator to consider a challenge to the validity of the agreement as a whole. (Rent-A-Center, West, Inc. v Jackson, 561 US 63, 70-72 [2010].) Here, assuming that, as plaintiffs contend, their challenge is to the provision requiring arbitration, the court holds that plaintiffs fail to demonstrate, or to raise a triable issue of fact as to whether, the arbitration provision was procured by fraud.

The parties agree that the standard on a motion to compel or stay arbitration is similar to that on a motion for summary judgment. (Motion Seq. No. 1, Defs.' Reply Memo., at 2; Motion Seq. No. 1, Pls.' Memo. In Opp., at 10; see Hines v Overstock.com, Inc., 380 Fed Appx 22, 24 [2d Cir 2010].) Section 10 (a) of each Franchise Agreement, quoted above, unambiguously provides for arbitration of "[a]ny dispute, controversy or claim arising out of or relating to this Agreement. . . ." Plaintiff Fritschler submits an affidavit stating that, at the time he signed the Franchise Agreements, he did not understand that he would be required to arbitrate his claims and that he "could not sue the [BDAs] in court or that [they] could not be found liable for their own acts." He also states that "[n]obody explained" these consequences to him. (Fritschler Aff., ¶¶ 29-49 [NYSCEF Doc. No. 83].) Plaintiffs cite no authority whatsoever in support of their contention that the types of omissions and misrepresentations cited by Fritschler, regarding the meaning or effect of the arbitration provision, can support a claim of fraudulent inducement. (See Motion Seq. No. 1, Pls.' Memo. In Opp., at 13-15.) As defendants correctly argue, Fritschler's "subjective confusion about the [arbitration] provision's meaning do[es] not create

an issue of fact." (Motion Seq. No. 1, Defs.' Reply Memo., at 2.) "One who enters into a plain and unambiguous contract cannot avoid the obligation by merely stating that he erred in understanding its terms. . . . " (Touloumis v Chalem, 156 AD2d 230, 232 [1st Dept 1989] accord Avetine Inv. Mgt. v Canadian Imperial Bank of Commerce, 265 AD2d 513, 514 [2d Dept 1999].)

Significantly also, the terms of the Franchise Agreements contradict Fritschler's claim of lack of understanding of the arbitration provision. For example, Recital J of the Agreements expressly provides, all in capital letters: "You [Fritschler] understand all disputes or claims arising out of or relating to this agreement, except for certain claims of ours [DAI] described in subparagraph 10.E., will be arbitrated in Connecticut, under paragraph 10 below, if not otherwise resolved."[4] (See also Franchise Agreement, Recitals E [Fritschler's acknowledgment that he had an opportunity to consult with a lawyer], G [Fritschler's acknowledgment that no representation was made as to "actual or potential sales, earnings, or net or gross profits"], H [Fritschler's representation that he understands the risks of owning a Subway restaurant, and "recognize[s] some SUBWAY® restaurants have failed and more will fail in the future"].) Fritschler also signed Franchise Disclosure Questionnaires in which he marked "Yes" in response to questions 13 (A) and (C) regarding the scope of the arbitration provision. (NYSCEF Doc. Nos. 30, 34, Question 13 [A]: "Do you understand all disputes or claims you may have arising out of or relating to the Franchise Agreement must be arbitrated in Connecticut, if not resolved informally or by mediation?"; Question 13 [C]: "Do you understand the sole entity or person against whom

[4] Section 10 (e) of the Franchise Agreements, which is not relevant here, authorizes a court action to be brought by DAI for infringement of intellectual property rights in the marks or in copyright items or for disclosure of confidential information.

you may bring a claim under the Franchise Agreement is us [DAI]? [See Subparagraph 10.d. of the Franchise Agreement].")

In sum, plaintiffs fail to raise an issue of fact as to whether the arbitration provision was procured by fraud, or to make any showing that discovery may lead to relevant evidence on this issue or on any of their fraud claims. The acts alleged by plaintiffs in support of their fraud claims are patently insufficient to support the claims.

Plaintiffs also assert that the arbitration provision is unenforceable due to lack of mutuality, lack of consideration, and unconscionability. As recently held by the Second Circuit, the threshold question for the court is "whether the parties have indeed agreed to arbitrate." (Doctor's Assocs., Inc. v Alemayehu, 934 F3d 245, 250 [2d Cir 2019] [internal quotation marks and citation omitted]. The issue of whether an agreement to arbitrate is supported by sufficient consideration concerns the formation of the contract and is therefore for the court, not the arbitrator, to decide. (Id., at 250-252.) Here, plaintiffs cite no authority in support of their conclusory claim that the arbitration provision lacks consideration "because DAL and the other Defendants give nothing up in order to be bound to the Provision" or because the provision limits damages. (See Motion Seq. No. 1, Pls.' Memo. In Opp., at 15; Motion Seq. No. 3, Pl.'s Reply Memo., at 1-4.) Nor do plaintiffs attempt to explain how a lack of consideration could be found given that, by means of the Franchise Agreements containing the arbitration provision, DAI afforded Fritschler licenses to use the Subway "System," including marks, to own and operate restaurants. (Franchise Agreement, Recitals C, D.) Plaintiffs also cite no authority in support of their conclusory claims that the arbitration provision is unenforceable due to lack of mutuality and unconscionability. (See Motion Seq. No. 1, Pls.' Memo. In Opp., at 15-16; Pls.' Reply Memo., at 3.) In addition, they cannot distinguish contrary authority. (E.g. Kroll v Doctor's

Assocs., Inc., 3 F3d 1167, 1170 [mutuality held to exist where the franchise agreements provided, as here, that the parties "must arbitrate all disputes arising out of or relating to the franchise agreements"].) The court holds that plaintiffs fail to raise an issue of fact as to whether the arbitration provision is unenforceable on these grounds or to make any showing that discovery may lead to evidence relevant to support these grounds.

A significant further dispute between the parties is whether the non-signatories to the Franchise Agreements may be compelled to arbitrate. Plaintiffs other than Fritschler (the non-signatory plaintiffs) contend that they are not required to arbitrate because they are not signatories to the Franchise Agreements. (Motion Seq. No. 1, Pls.' Memo. In Opp., at 5.) They further contend that "[t]he damages or benefits Plaintiffs assert derive directly from the Management Agreement and contacts with the BDAs, not from the Franchise Agreements." (Id., at 21.) Defendants counter that the non-signatory plaintiffs are obligated to arbitrate because "[t]hey are asserting claims arising directly from the Franchise Agreements, the franchise relationship, and the Franchises." (Motion Seq. No. 1, Defs.' Memo. In Supp., at 15, citing Compl. ¶¶ 116, 117, 119; Defs.' Reply Memo., at 16-17.)

Plaintiffs do not appear to contest that DAL, as successor to DAI, the defendant signatory to the Franchise Agreements, is entitled to seek to enforce the arbitration provision. In fact, the complaint pleads that "DAL is the franchisor. . . ." (Compl., ¶ 2.)[5] Plaintiffs, however, contest the entitlement of the non-signatory BDAs to enforce the arbitration provision. (Motion Seq. No. 3, Pls.' Memo. In Opp., at 16-20.) The court assumes that it must make a threshold or preliminary determination as to whether the non-signatory defendants have a "sufficient

[5] The complaint refers to Doctor's Associates, Inc. and Doctor's Associates, LLC collectively as DAL. (Compl., Opening Paragraph.)

relationship" with the signatory defendant to entitle them to seek to compel arbitration. (See Contec Corp., 398 F3d at 209.) This standard of relational sufficiency is met by the BDAs here. As noted above, section 10 (d) of the Franchise Agreements expressly provides that "[y]ou [Fritschler] agree our [DAI's] intended beneficiaries of the arbitration clause including our Affiliates, . . . agents and representatives, and their affiliates, will be neither liable nor named as a party in any arbitration or litigation proceeding commenced by you where the claim arises out of or relates to this Agreement." The complaint pleads that the Draper, Jasenski, Deso, Church, and Hurley are "agents" of DAL. (Compl., ¶ 2.) It further pleads that Deso, Church, Hurley and Subway Franchise Development of Boston, LLC are engaged in the business of Subway business development agent. (Id., ¶¶ 14-17.) Plaintiffs' argument that the BDA's are not third-party beneficiaries or agents within the meaning of section 10 (d) is unpersuasive. (See generally Dormitory Auth. of the State of N.Y. v Samson Constr. Co., 30 NY3d 704, 710 [2018].) As discussed further below, it will, however, be for the arbitrator to determine which of plaintiffs' claims against the non-signatory defendants must be arbitrated and which of the non-signatory defendants are entitled to enforce the arbitration provision.

As to the obligation of the non-signatory plaintiffs to submit their claims to arbitration, courts have recognized a number of theories, arising out of contract and agency law, under which non-signatories may be bound to an arbitration agreement. These theories are incorporation by reference; assumption; agency; veil piercing/alter ego; and estoppel. (Thomson–CSF, S.A. v American Arbitration Assn., 64 F3d 773, 776 [2d Cir 1995].) As the New York Court of Appeals has explained in summarizing New York and federal authority, "[a]rbitration is a matter of contract, grounded in agreement of the parties. As a consequence, notwithstanding the public policy favoring arbitration, nonsignatories are generally not subject to arbitration agreements."

(Matter of Belzberg [v Verus Investments Holdings Inc.], 21 NY3d 626, 630 [2013] [internal quotation marks and citations omitted].) "However, under limited circumstances nonsignatories may be compelled to arbitrate." (Id.) "Under the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory 'knowingly exploits' the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement." (Id., at 631, citing MAG Portfolio Consultant, GmbH v Merlin Biomed Group LLC, 268 F3d 58, 61 [2d Cir 2001].) "Where the benefits are merely 'indirect,' a nonsignatory cannot be compelled to arbitrate a claim. A benefit is indirect where the nonsignatory exploits the contractual relation of the parties, but not the agreement itself." (Matter of Belzberg, 21 NY3d at 631, citing MAG, 268 F3d at 61.)

Here, the court assumes that it must make a threshold or initial determination as to whether the non-signatory plaintiffs may be compelled to submit their claims to arbitration. As discussed further below, review of the complaint shows that these plaintiffs assert a direct benefit arising from the Franchise Agreements. Moreover, while plaintiffs also assert claims under the Management Agreement, which does not contain an arbitration provision, plaintiffs fail to make any showing that the Management Agreement claims differ in any significant respect from, or that they do not substantially overlap with, the Franchise Agreement claims.

The complaint pleads two causes of action for breach of the Management Agreement and breach of implied covenant of good faith and fair dealing, respectively, against Draper and Jasenski. (First and Second Causes of Action.) These causes of action are based on the allegations, among others, that these defendants breached the Management Agreement in that they "failed and refused to act on behalf of EB5, instead acting in their own self-interest" (Compl., ¶ 91); failed to assist EB5 in identifying appropriate restaurant sites and in negotiating

leases (id., ¶¶ 92-93); failed to operate the Subway franchise restaurants in accordance with the Operating Budgets (id., ¶ 94); failed to properly recruit and train staff and to properly manage the restaurants (id., ¶¶ 95, 97, 99); and "fail[ed] to protect and promote the Subway® brand. . . ." (Id., ¶ 98.) These causes of action also allege that Draper and Jasenski breached the Management Agreement by, among other things, "a. Recommending and inducing Plaintiffs to execute Subway® franchise agreements"; "b. Recommending and inducing Plaintiffs to execute Subway® sub-lease agreements"; "c. Recommending and inducing Plaintiffs to execute Subway® sub-lease agreements for certain locations known to Defendants to be likely to fail. . ."; "d. Recommending and inducing Plaintiffs to operate Subway® franchises at inappropriate sites . . . where the rental rates were so high, and other operating costs were so high, that Plaintiffs could not succeed in a Subway® business at such a location." (Id., ¶ 105.)

The remaining 13 causes of action are pleaded against all defendants. These causes of action do not distinguish in any respect between or among the defendants, and are based on allegations that substantially overlap with those pleaded in support of the first two causes of action. The third and fourth causes of action specifically allege that all defendants breached the Franchise Agreements on the grounds, among others, that they failed to provide a representative or development agent for plaintiffs to consult with during business hours regarding the operation of the franchised restaurants and "instead provided BDAs who took advantage of, mislead [sic], and defrauded [plaintiffs] for the benefit of [defendants] to the detriment of [plaintiffs]" (id., ¶ 116); approved sites for restaurants when they "knew or should have known that those locations would fail" (id., ¶ 118); and "failed to protect the Subway® brand, marks and System" (id. ¶ 119). These causes of action further plead that defendants breached the Franchise Agreements by, among other things, "a. Recommending and inducing [plaintiffs] to execute Subway®

franchise agreements"; "b. Recommending and inducing [plaintiffs] to execute Subway® sub-lease agreements"; "c. Recommending and inducing [plaintiffs] to execute Subway® sub-lease agreements for certain locations known to [defendants] to be likely to fail. . ."; and

"d. Recommending and inducing [plaintiffs] to operate Subway® franchises at inappropriate sites . . . where the rental rates . . . and other operating costs were so high, that [plaintiffs] could not succeed in a Subway® business at such a location." (Id., ¶ 120.)

The complaint also pleads several fraud causes of action and a negligent misrepresentation cause of action, and causes of action for violation of state laws, based on allegations that defendants knowingly made false representations that locations were appropriate and that Subway® franchises could be profitable at those locations, or that defendants omitted material information regarding the franchises, sub-leases, and operations of the franchises. (Fifth-Ninth Causes of Action; Tenth-Twelfth Causes of Action.) In addition, the complaint pleads a cause of action for unjust enrichment (Fourteenth Cause of Action), and a cause of action for a declaratory judgment that the Franchise Agreements are unconscionable and unenforceable. (Fifteenth Cause of Action.)

As noted above, the complaint pleads that non-signatory plaintiffs EB5 and Boston Woods One invested in Fritschler's Subway franchises. (Compl., ¶ 30.) The Third through Fifteenth causes of action all allege that all defendants sustained losses as a result of breaches of the Franchise Agreements (Compl., ¶¶ 121, 128) and of misrepresentations or omissions made to induce them to enter into those Agreements. (Id., ¶¶ 138, 144, 148, 154, 165.)

Review of the allegations of the complaint confirms that the non-signatory plaintiffs, like signatory plaintiff Fritschler, claim a direct benefit from the Franchise Agreements, and that they

have sustained loss as a result of defendants' breaches of those Agreements. Federal courts considering claims of investors, including investors in Subway franchises, have held that a non-signatory investor who asserts direct benefits from an agreement containing an arbitration provision will be estopped from avoiding arbitration of the investor's claims. (Lee v Doctor's Assocs., Inc., 2016 WL 7332982 [ED Ky Dec. 16, 2016]; see also Mac Tools v Diaz, 2012 WL 1409395 [SD Ohio Apr. 23, 2012].) The cases cited by plaintiffs are not to the contrary, as they did not involve non-signatories who asserted claims that arose directly from the arbitration agreement. (See Thomson–CSF, S.A. v American Arbitration Assn., 64 F3d 773, supra; E.I. DuPont de Nemours & Co. v Rhone Poulenc Fiber and Resin Intermediates, S.A.S., 269 F3d 187 [3d Cir 2001].)

Here, similarly, the court holds that the non-signatory plaintiffs, like the signatory plaintiff, must submit their claims to arbitration. In so holding, the court does not make a final determination as to which claims are arbitrable or which of the parties must arbitrate their claims—i.e., the court does not make a final determination as to the scope of the arbitrability provision. The court notes that defendants forthrightly acknowledge that at least some of plaintiffs' claims against the BDA defendants may fall outside the scope of the arbitration provision. (Motion Seq. No. 1, Defs.' Memo. In Supp., at 11-12.) As held above, however, given the parties' clear and unmistakable intent to delegate issues of arbitrability to the arbitrator, it will be for the arbitrator to decide which of the claims are arbitrable and which of the parties must arbitrate their claims. Indeed, in a Subway franchise case, the Second Circuit recently held that the enforceability of the provision precluding claims against DAL's agents and affiliates was for the arbitrator in the first instance. (Doctor's Assocs., LLC v Tripathi, 794 Fed Appx, at 93-94 [considering a Franchise Agreement provision materially identical to section 10 (d) here].)

The court further holds that defendants have not waived their right to arbitrate. Contrary to plaintiffs' contention (Motion Seq. No. 3, Pls.' Memo. In Opp., at 2-3), defendants' motion for a stay of this action, and their request for attorney's fees on the motion, clearly do not constitute participation in the litigation of this action that rises to the degree necessary to effect a waiver of the right to arbitrate.[6] (Compare De Sapio v Kohlmeyer, 35 NY2d 402 [1974].) Plaintiffs also assert that "Subway has already chosen not to arbitrate its claims for damages against Fritschler." (Motion Seq. No. 1, Pls.' Memo. In Opp., at 2.) This assertion is based on the commencement in this Court of an action for breach of the restaurant subleases by defendants Subway Real Estate LLC and Subway Real Estate Corp., as sublessors, against plaintiff Fritschler, as sublessee. (Id.) To the extent that plaintiffs claim that defendants have thus waived the right to arbitrate, this claim is precluded by section 10 (c) of the Franchise Agreement. This section expressly provides that "[a]ny action brought by the Sublessor to enforce the Sublease . . . is not to be construed as an arbitrable dispute."

The court has considered plaintiffs' remaining objections to the submission of their claims to arbitration and finds them to be without merit. Finally, the court rejects plaintiffs' contention that, prior to any arbitration, the court must try plaintiffs' non-arbitrable claims involving non-signatory plaintiffs and defendants. (Motion Seq. No. 1, Pls.' Memo. In Opp., at 22-23; Motion Seq. No. 3, Pls.' Memo. In Opp., at 22-23.) As held above, it is for the arbitrator, not the court, to determine issues of arbitrability and thus to determine, in the first instance, which of the claims are non-arbitrable. Moreover, as the above review of the complaint shows, potentially non-arbitrable claims against the BDA defendants under the Management Agreement

[6] In any event, defendants withdraw their claim for attorney's fees. (Motion Seq. No. 3, Defs.' Reply Memo., at 3-4.)

are based on allegations that substantially overlap, or are inextricably intertwined, with the allegations in support of the arbitrable claims arising out of the Franchise Agreements. Determination of the arbitration may accordingly dispose of the issues to be determined in this action. Under these circumstances, the arbitration should proceed prior to the hearing of any non-arbitrable claims. (See e.g. Oxbow Calcining USA Inc. v American Indus. Partners, 96 AD3d 646, 652 [1st Dept 2012]; Fedele v. Ackerman, 20 AD3d 350 [1st Dept 2005]; Kroll, 3 F3d at 1171-1172.) The action will accordingly be stayed, pursuant to FAA 9 USC § 3 and CPLR 7501 and 7503 (a), pending submission by plaintiffs of their claims in this action to arbitration and resolution of those claims.

ORDER

It is accordingly hereby ORDERED that the motion (Motion Seq. No. 1) of defendants Doctor's Associates, Inc., Doctor's Associates, LLC, Subway IP Inc., Franchise World Headquarters, LLC, Subway Real Estate Corp., and Subway Real Estate LLC is granted to the extent of staying this action pending the submission by plaintiffs of their claims in this action to arbitration and the outcome of the arbitration proceeding; and it is further

ORDERED that the motion (Motion Seq. No. 3) of defendants Mark Deso, Brooks Church, Robert Hurley, and Subway Franchise Development of Boston, LLC is granted to the extent of staying this action pending the submission by plaintiffs of their claims in this action to arbitration and the outcome of the arbitration proceeding; and it is further

ORDERED that any party hereto may move to vacate or modify this stay upon the final determination of the arbitrator, and defendants may move for appropriate relief in the event of plaintiffs' failure to promptly submit their claims in this action to arbitration; and it is further

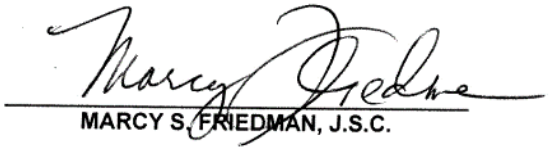
ORDERED that the cross-motions (Motion Seq. Nos. 1 and 3) of plaintiffs Fritschler, Curator, LLC, Boston Woods One LLC, and EB5Overseer LLC are denied in their entirety; and it is further

ORDERED that movants are directed to serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within ten days of the date of entry and the Clerk shall mark this matter stayed as herein provided; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases and/or any procedures that govern service during the pandemic.

This constitutes the decision and order of the Court.

12/2/2020
DATE



MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE