SUNTERRA CORPORATION, et al.	*	IN THE
Plaintiffs	*	CIRCUIT COURT
v.	*	FOR
ERNST & YOUNG LLP	*	BALTIMORE CITY
Defendant	*	Part 20
	*	Case No.: 24-C-02-002963 [*2003 MDBT 1*]
	*	

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MEMORANDUM AND OPINION

1. Case Summary

Plaintiff Sunterra Corporation ("Sunterra") filed the present action in this Court on May 30, 2002 against defendants, Ernst & Young LLP, EYT, Inc. and Cap Gemini Ernst & Young U.S. LLC (collectively "E&Y"), alleging fraud (Count I), fraudulent concealment (Count II), negligent misrepresentation (Count III) and negligence/professional malpractice (Count IV) in connection with the performance of their duties as expert information technology consultants during the period 1998-99. On June 27, 2002 plaintiff filed an amended complaint, adding allegations that the May 20, 1998 arbitration agreement was induced by fraud. Plaintiff claims to have suffered millions of dollars in damages.

Defendant E&Y responded to the amended complaint with a motion to dismiss or, in the alternative, to stay pending arbitration, demanding that the mediation/arbitration provisions of the written contracts between the parties deprive the Court of jurisdiction to determine even the arbitrability of plaintiff's claims. Sunterra opposed E&Y's motion and filed its own motion

for stay of arbitration, contending that the mediation/arbitration provisions of the written agreements were invalid and unenforceable and that this Court, not the arbitrators, should make the initial determination of whether there are claims subject to arbitration. Prior to the hearing in this matter, plaintiff filed six affidavits in support of its opposition and motion for stay of arbitration, setting forth factual assertions and/or opinions by fact witnesses and experts. Defendant insisted that the Court consider dispositive the language of the binding mediation/arbitration agreements entered into by the parties and dismiss this case for failure to state a cause of action upon which relief can be granted.

A hearing on the motions was held before the Court on December 2, 2002 and the motions were then held *sub curia*, pending this written memorandum and opinion. Thereafter, on December 17, 2002 E&Y filed a motion to supplement the record with an extensive affidavit of Richard Gibbs Vandercook, E&Y's engagement partner for the information technology consulting work with Sunterra. On December 24, 2002 plaintiff responded with a motion to exclude and/or strike the affidavit as untimely and a memorandum in opposition to E&Y's motion to supplement the record. Defendant then filed an opposition on January 9, 2003 to plaintiff's motion to strike the affidavit and a reply to plaintiff's opposition to the motion to supplement the record.

The Court will address these motions in the course of its opinion, *infra*.

2. <u>The Arbitrability of Plaintiff's Claims</u>

1. The Appropriate Forum for Determination of Arbitrability

Maryland law provides that:

> A written agreement to submit any existing

> controversy to arbitration or a provision in a written contract to submit to arbitration any controversy arising between the parties in the future is valid and enforceable, and is irrevocable, except upon grounds that exist at law or in equity for the revocation of a contract.

Md. Code Ann. [Cts. & Jud. Proc.] §3-206.

> If a party to an arbitration agreement described in §3-202 refuses to arbitrate, the other party may file a petition with the court to order arbitration.
>
> If the opposing party denies existence of an arbitration agreement, the Court shall proceed expeditiously to determine if the agreement exists.
>
> If the court determines that the agreement exists, it shall order arbitration. Otherwise it shall deny the petition.

Md. Code Ann. [Cts. & Jud. Proc.] §3-207.

Following Maryland's adoption of the Uniform Arbitration Act, its courts have recognized an established policy in favor of the settlement of disputes through the arbitration process. *Bel Pre Medical Ctr., Inc. v. Frederick Contractors,* 21 Md. App. 307, *aff'd.*, 274 Md. 307 (1975). When an arbitration agreement exists, or is alleged to exist, the courts are generally enjoined by the statute from interfering with the arbitration process. Indeed, the court's jurisdiction may properly be invoked in but two limited contexts -- to compel arbitration or to stay it. *Stauffer Constr. Co. v. Board of Educ.*, 54 Md. App. 658, *cert denied*, 297 Md. 108 (1983).

The Maryland Arbitration Act provides that, in adjudicating a petition for an order of arbitration or a stay pending arbitration, the consideration of the existence of an

arbitration agreement is severable; the scope of the court's involvement thus extends only to a determination of an arbitration agreement. *Holmes v. Coverall N. Am., Inc.*, 336 Md. 534, 546 (1994). Therefore, at this stage of these proceedings, the Court's authority is limited to a determination of whether the parties have heretofore reached a valid agreement to arbitrate Sunterra's claims.

As to this threshold issue, there are two written agreements for the Court to consider, the first executed by plaintiff's senior vice president, Chuck Frey, on May 21, 1998 and the latter dated January 1, 1999 and signed by Gibbs Vandercook for E&Y and Colin Drummond on behalf of Sunterra. Plaintiff contends that the May 21, 1998 agreement is the relevant instrument and that it was obtained by fraud. Defendant (while denying plaintiff's allegations) asserts that the January 1, 1999 agreement is clearly related to the earlier contract, is unrelated to Sunterra's fraud claims and controls the determination of arbitrability.

Both agreements contain virtually identical language limiting E&Y's liability for Sunterra's claims here to the amount of fees paid under the respective agreements and relating to mediation/arbitration as follows:

> Any controversy or claim arising out of or relating to this Agreement or the Services provided by E&Y pursuant thereto (including any such matter involving any parent, subsidiary, affiliate, successor in interest, or agent of Company or of E&Y) shall be submitted first to voluntary mediation, and if mediation is not successful, then to binding arbitration, in accordance with the dispute resolution procedures set forth in [the] Exhibit attached hereto. Judgment on any arbitration award may be entered in any court having proper jurisdiction.

Annexed to both agreements are Dispute Resolution Procedures, setting forth the process for initiating mediation and, if that is unsuccessful ninety days after written notice, binding arbitration pursuant to the Arbitration Rules for Professional Accounting and Related Services Disputes of the AAA. Those procedures further state, in pertinent part, that:

> Any issue concerning the extent to which any dispute is subject to arbitration, or concerning the applicability, interpretation, or enforceability of these procedures, including any contention that all or part of these procedures are invalid or unenforceable, shall be governed by the Federal Arbitration Act and resolved by the arbitrators.

Additionally, E&Y points out that the Terms and Conditions of the agreements warranted that the services would be provided with "due professional care and competence" and that Sunterra was to provide E&Y with written notice of any deficiencies in the services within 90 days of completion and be given an opportunity to re-perform the services as warranted. This provision appears in both agreements and would limit plaintiff's recovery, if the services were not re-performed satisfactorily, to the fees paid to E&Y for the defective services.

Relying on the above provisions, E&Y contends that Sunterra never provided written notice of deficiencies in service and, instead, executed the second contract in January of 1999, containing virtually identical provisions governing limited liability and arbitration. Moreover, defendant argues that the mediation/arbitration clauses in these agreements were standard in all E&Y engagement letters then utilized, including one executed on June 3, 1999 between plaintiff and defendant relating to tax advice. E&Y also points out that

Sunterra entered into other significant agreements containing arbitration clauses, such as its software licensing agreement with Resort Computer Corporation of December, 1997, which gave rise to the need for E&Y's consulting services, according to the amended complaint.

Defendant, therefore, urges this Court to find that plaintiff has failed to allege facts sufficient to dispute the validity of the 1998 arbitration agreement and that, in any event, the arbitration provisions of the 1999 agreement would control, as a mere continuation of the original E&Y engagement, and require that issues of arbitrability be submitted to the arbitrators for determination.

Sunterra, on the other hand, believes the Court should make the determination of arbitrability and find that the arbitration clause in the May, 1998 agreement is unenforceable. Referring to the allegations in the amended complaint and the six affidavits filed concurrently, plaintiff asserts that there is compelling proof of Mr. Vandercook's breach of fiduciary duty and misrepresentation in procurement of the 1998 arbitration agreement. Because the Maryland Arbitration Act permits an arbitration agreement to be invalidated on any grounds that would justify invalidation of any other contract under Maryland law (Md. Code Ann., *Cts. & Jud. Proc.* §3-202), plaintiff asks this Court to set aside the May, 1998 arbitration agreement for fraud or negligent misrepresentation or to rescind it on the basis of constructive fraud. Contending that the 1999 agreement relates only to claims accruing after the date of its execution (not alleged here), Sunterra insists that its arbitration provisions are irrelevant to this Court's determination of the existence of a valid and enforceable arbitration agreement between the parties.

Referring to the Maryland Arbitration Act, the Court of Appeals has stated

that "[t]he same policy favoring enforcement of arbitration agreements is present in both our own and the federal acts. ... We therefore rely on decisions interpreting the Federal Arbitration Act ..." for purposes of interpreting the Maryland Act. *Holmes v. Coverall N. Am., Inc.*, 336 Md. 534, 541 (1994).

The Court's review of both the federal and Maryland authorities interpreting those Acts reveals certain salient principles. The first of these is that "[A]rbitration 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." *Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588, 591 (2002) citing *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960) and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942-43 (1995). Secondly, the same policy favoring enforcement of arbitration agreements is present in both the Maryland and federal Acts. *Holmes v. Coverall N. Am., Inc., supra*, at 541. (Citing *Moses H. Cone Memorial Hospital v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983)). Thirdly, "[W]hile arbitration serves important public interests, an agreement to arbitrate -- like any other contract -- is fundamentally about private choice. 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. Despite the public benefits of arbitration, the determination of what disputes are arbitrable is focused on the intent of the parties. ... Generally, the parties -- not the courts -- control which disputes will be arbitrated." *Carson v. Giant Food, Inc.*, 175 F.3d 325, 328-29 (CA 4 1999) and cases cited therein. Thus, although a court is not to rule on the potential merits of underlying claims, the question of arbitrability is undeniably an issue for judicial determination, unless the parties clearly and unmistakably provide otherwise. *AT&T Technologies, Inc. v. Communication Workers of*

America, 475 U.S. 643, 649 (1986).

As indicated earlier, the language contained in the parties' 1998 and 1999 agreements are virtually identical. Both call for arbitration of all disputes arising out of the agreement and both require that issues related to the arbitrability of claims be submitted to the arbitrators, not the courts. In the usual case, therefore, the Court would apply principles of contract construction and the presumption in favor of arbitration and stay these proceedings, requiring the parties to submit their disputes to arbitration pursuant to their written agreement. But this is not the usual case. Rather, Sunterra has alleged that the arbitration provisions in these agreements[1] are unenforceable because they were induced by fraud.

Other important principles come into play in determining who will decide the arbitrability of claims when there is an assertion of fraud in the inducement of the contracts containing the arbitration clauses. In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) the Supreme Court upheld a broad arbitration clause in a commercial contract and ordered that the issue of whether the contract had been induced by fraud be submitted to arbitration, rather than be determined by a federal court. Where no claim had been advanced by Prima Paint that F&C fraudulently induced it to enter into the agreement to arbitrate, the court pointed out that under Second Circuit law, except where the parties otherwise intend, arbitration clauses are "separable" from the contracts in which they are embedded, a principle adopted in Maryland. *See Holmes v. Coverall N. Am., Inc.*, 336 Md. 534, 545 (1994) (broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by

[1] Actually, plaintiff asserts that the 1998 arbitration agreement was induced by fraud. As to the 1999 arbitration agreement, it asserts that it is irrelevant to the issue before the Court and, in any event, unenforceable as violative of public policy.

fraud.) *Prima Paint Corp. v. Flood & Conklin Mfg. Co., supra*, 388 U.S. at 402.

In the situation, however, where a plumbing and heating contractor attacked not only his subcontracts with the prime contractor, but also the arbitration clauses contained therein, as having been procured through fraud, the Supreme Court previously held that the issue of fraud should first be adjudicated by the federal court before the rights of the parties under the subcontracts can be determined. *Moseley v. Electronic and Missile Facilities, Inc.*, 374 U.S. 167, 170-71 (1963).

More recently, when the Supreme Court was called upon to review a decision of the Third Circuit in a case where a stock trader and his wife challenged an arbitration demand from a clearinghouse seeking to hold them responsible for a debt, the court pointed out that the determination of whether the parties agreed to arbitrate a certain matter is generally determined by ordinary state law principles governing the formation of contracts. Citing its decision in *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 649 (1986) and *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583, n.7 (1960), the Supreme Court stated: "The [C]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Because the Kaplans did not clearly agree to submit the question of arbitrability to arbitration, the *First Options* court affirmed the Court of Appeals finding that the arbitrability of the Kaplan/First Options dispute was subject to independent review by the courts. *Id*, 514 U.S. at 947. Decisions in the other federal cases are in line with these principles. *See, e.g.*, *Myers v. State Farm Ins. Co.*, 842 F.2d 705, 707-08 (CA 3 1988); *Carson v. Giant Food, Inc.*, 175 F.3d 325, 329-30 (CA 4 1999).

The Maryland cases are in accord with these general principles as well. In an action by a developer to vacate an arbitration award in favor of a subcontractor, the Maryland Court of Appeals interpreting the Maryland Uniform Arbitration Act, held that "The final determination of whether a valid contract to arbitrate existed between the parties must be made by a court, not an arbitrator." *Messersmith v. Barclay Townhouse Associates*, 313 Md. 652, 661 (1988). Following the Supreme Court's rationale in *Prima Paint Corp. v. Flood & Conklin Mfg. Co., supra*, the Court of Appeals of Maryland later reviewed a challenge to a franchise agreement containing an arbitration clause and held that the arbitration agreement was severable from the rest of the franchise contract. Accordingly, in the absence of specific allegations that the agreement to arbitrate had been fraudulently induced, the parties were required to arbitrate the merits of the underlying franchise agreement. *Holmes v. Coverall N. Am., Inc.*, 336 Md. 534, 546-47 (1994). In *Coverall* the Court of Appeals stated: "The Court must determine that there are no infirmities in the formation of the arbitration agreement itself; that is, that there is a mutual exchange of promises to arbitrate. Once a court determines that the making of the agreement to arbitrate is not in dispute, its inquiry ceases, as the agreement to arbitrate has been established as a valid and enforceable contract." *Id*., 336 Md. at 544. Even more recently, in addressing a challenge to an arbitration provision in a property settlement agreement between divorcing parties, the Maryland Court of Special Appeals reiterated these propositions stating: "when, as here, the parties are in dispute as to whether the arbitration provision is enforceable, the resolution of that issue is for the court." *Bloch v. Bloch*, 115 Md. App. 368, 374-75 (1997).

The lesson to be learned from these authorities is fairly simple in theory. Arbitration agreements are severable from the other terms of a contract. Claims of fraud in the

inducement must go directly to the arbitration provisions themselves and not merely to the underlying contract. Both the federal and Maryland Act limit the court's jurisdiction to the determination of whether or not a valid and enforceable agreement to arbitrate exists. If so, a court is not to delve into the merits of the dispute, but rather to order same to be determined in arbitration. Moreover, where the subject matter of the dispute is better left to qualified arbitrators accustomed to dealing with disputes in a specialized substantive area of the law, courts are cautioned to limit their role to contract construction and a determination of whether a valid and enforceable agreement exists and not to enmesh themselves in the particulars of the underlying dispute. This admonition is clearly set forth by the Supreme Court in Justice Brennan's concurring opinion in *AT&T Technologies, Inc. v. Communication Workers of America*, *supra*, 475 U.S. at 652-56, where the underlying dispute related to a grievance concerning layoffs under the terms of a collective bargaining agreement in an action filed under the Labor Management Relations Act. The same deference to the expertise of the arbitrators is evident in Justice Breyer's opinion for the Supreme Court in *Howsam v. Dean Witter Reynolds, Inc.*, *supra*, 123 S. Ct. at 593, where the underlying dispute was to be submitted to arbitration before the National Association of Securities Dealers.

In practice, however, the role described by the case law for the court to perform in cases like the one before this Court requires something in the nature of a tightrope walk. Sunterra's amended complaint contains more than 40 pages of allegations of fraud and concealment, misrepresentation and negligence, which will form the basis for the underlying dispute between plaintiff and defendant. In a series of paragraphs beginning at 61 through 68, the amended complaint contains specific allegations that the arbitration agreement in the May,

1998 contract was induced by fraud. These particularized allegations challenge the validity and enforceability of the arbitration agreement in that contract, an issue that must be determined by this Court, despite the difficulty of doing so without deciding the underlying dispute. The Court does not believe that the subject matter of this action brings into play the deference accorded arbitrators to determine arbitrability under specialized statutory schemes and, therefore, will not adopt that rationale to dodge its responsibility, however perilous it may seem.

Sunterra has alleged a fraudulent scheme, which includes the procurement of the mediation/arbitration agreement in the 1998 contract. In the Court's judgment, the allegations raise a substantial and bona fide dispute as to the existence of an agreement between the parties to arbitrate plaintiff's claims. The allegations here assert a substantial relationship between the alleged fraud and the agreement to arbitrate, including contentions that defendant's purpose was to shield itself from liability for past misdealings and anticipated losses to be soon inflicted when the SWORD project was installed at its first location.

E&Y relies on a series of cases which are somewhat supportive of its contention that this case should go to arbitration now. Those cases are *Dougherty v. Mieczkowski*, 661 F. Supp. 267 (D. Del. 1987), *Rosen v. Waldman*, 1993 U.S. Dist. LEXIS 14076 (S.D.N.Y. 1993) and *Garten v. Kurth*, 265 F.3d 136 (CA2 2001). All of those decisions enforced arbitration agreements in the face of claims of fraudulent inducement, with some similarities to the present action.

But, as Judge Calabresi points out in his opinion in *Garten v. Kurth*, writing for a panel of the Second Circuit:

> We have recognized that some tension

> between the cases may exist and we have concluded that 'the only way to reconcile *Prima Paint* with *Moseley* is to require some substantial relationship between the fraud or misrepresentation and the arbitration clause in particular.' *Campaniello*, 117 F. 3d at 667. This 'substantial relationship,' we have held, requires more than a mere claim that the 'arbitration clause is an element of the scheme to defraud,' it must include 'particularized facts specific to the ... arbitration clause which indicate how it was used to effect the scheme to defraud.' *Id*.

In the Court's judgment, plaintiff has met this pleading burden and thereby thrust on this Court the duty to decide the threshold issue of arbitrability.

Sunterra also contends that Maryland's legislative preference for enforcing valid arbitration agreements might be undermined to the extent that those provisions first call for a period of mediation. The Court agrees that there is no realistic way for a mediator to adjudicate anything, much less the arbitrability of plaintiff's claims in this case. Relying on two federal decisions which denied motions to stay litigation and require arbitration, where the provisions set up conditions precedent to the arbitration process, Sunterra contends that arbitration is a "last resort" here and that the statutory scheme should not even come into play. *See Kemiron Atlantic, Inc. v. Aguakem International, Inc.*, 290 F.3d 1287 (CA 11 2002) and *HIM Portland, LLC v. DeVito Builders, Inc.*, 211 F. Supp. 2d 230 (D.Me. 2002).

While the Court is not prepared to read these cases as standing for the proposition that a court should not require arbitration where mediation is a contractual condition precedent, they do lend support to plaintiff's claim that a court should determine arbitrability

before requiring the parties to undertake a protracted dispute resolution process. Indeed, the factual questions concerning satisfaction of the contractual conditions precedent to arbitration must be addressed by the court. *Kemiron Atlantic, Inc. v. Aguakem International, Inc., supra*, 290 F.3d at 1289-90.

2. The January 19, 1999 Agreement Between the Parties

Notwithstanding the allegations in the amended complaint that the 1998 agreement to arbitrate was induced by fraud, E&Y takes the position that the exact same arbitration provisions are contained in a valid and enforceable 1999 agreement between the parties. Citing the Fourth Circuit's opinion in *Drews Distributing, Inc. v. Silicon Gaming, Inc.*, 245 F.3d 347 (CA 4 2001), E&Y urges the Court to find that the subject matter of the 1999 agreement "relates to" the subject matter of the 1998 agreement, bringing it within the scope of the latter's arbitration provisions. In *Drews*, the two documents at issue were a letter agreement and a subsequent distribution agreement involving the purchase of video gambling machines. The lower federal court determined that the controversy arose under the letter agreement and not the distributor agreement. Relying on the merger clause in the latter agreement which "excepted" the letter agreement from the subject matter of the distributor agreement, the Court reasoned that it was not related to the latter agreement and not subject to arbitration. Judge Diana Motz, writing for a panel of the Fourth Circuit, interpreted the agreements under the Federal Arbitration Act and recited the principles enumerated hereinabove that there is a presumption of arbitrability where the parties agree in writing to arbitrate their disputes and that it is the court's responsibility to determine whether a valid agreement to arbitrate exists. Despite the fact that the letter agreement contained no arbitration provision, the federal Court of Appeals held that the

controversy "related to" the distributor agreement based on an examination of the factual allegations of the complaint. Thus, it compelled arbitration of the dispute between the parties. The merger clause was deemed to be merely a way to acknowledge the pre-existing obligation in the letter agreement and to avoid it from being superseded by the distributor agreement, executed later.

While it is undisputed that the services performed by E&Y under the 1999 agreement with Sunterra represent a continuation of the project for which it was engaged initially, there is a dispute as to whether it represents merely the final phase of the project or whether it memorializes the terms under which E&Y's services were to be phased out in anticipation of its termination from the project. Unlike *Drews*, however, the factual allegations in the amended complaint here do not relate specifically to the services to be performed under the 1999 agreement. The only actual reference to that time period in the amended complaint is contained in paragraph 78, which alleges that Sunterra's new Chief Information Officer, Colin Drummond, took steps to diminish E&Y's position and by May, 1999 that he terminated E&Y altogether. The remaining factual allegations that post-date the 1998 agreement all relate to plaintiff's claims for damages. Consequently, this Court is unable to hold that the factual allegations of the amended complaint are "related to" the 1999 agreement between the parties. [2] E&Y further argues that Sunterra waived its contention that the 1998 arbitration clause was invalid when it insisted on performance of the contract after learning of the alleged fraud, continued to pay millions of dollars to E&Y for subsequent performance and signed yet another

[2] The Court's ruling that the 1999 arbitration agreement does not control here renders it unnecessary to address plaintiff's contentions that the 1999 agreement is otherwise invalid.

agreement, containing similar arbitration provisions. Citing *Howsam v. Dean Witter Reynolds, Inc.*, *supra*, 123 S. Ct. at 592, defendant argues that the question of waiver is a "gateway question" that does not constitute a challenge to arbitrability and which is for an arbitrator, not a court, to decide. The Court disagrees. In this Court's judgment, those issues amount to factual contentions as to whether or not Sunterra's actions constitute a ratification of the 1998 agreement, after it discovered the alleged fraud. To the extent that those contentions are relevant to the existence of a valid agreement to arbitrate here, they will be decided by the Court in ruling on the threshold issue of arbitrability.

The Court does not believe that the Court of Appeals' decision in *Nelley v. Mayor & City Council of Baltimore*, 224 Md. 1 (1960) compels a different result. The record in that case clearly established ratification of the arbitration agreement by utilization of the very arbitration process later challenged. As plaintiff points out, the case pre-dates the Supreme Court and Court of Appeals' rulings that arbitration clauses are severable and is factually and procedurally distinguishable from the present action.

3. The Pending Motions

Following the December 2, 2002 hearing on the motions to dismiss or, in the alternative, to stay and the plaintiff's motion to stay arbitration, E&Y filed a motion to supplement the record with a detailed affidavit of Richard Gibbs Vandercook and the motion was opposed by Sunterra with its own motion to strike the affidavit as untimely.

Plaintiff takes the position that defendant's failure to supplement the record earlier was a deliberate strategy by which it should now be bound and that the Court must accept the uncontested facts contained in Sunterra's affidavits under Md. Rule 2-311(d) in ruling on the

motion to dismiss or stay and its own motion to stay arbitration.

For purposes of the motion to dismiss, of course, the Court is required to assume the truth of all well-pleaded facts. Since that motion and its alternative, to stay these proceedings, actually challenge the jurisdiction of the Court to proceed in the face of an arbitration agreement, they require the Court to look to matters outside the pleadings for adjudication. The Maryland rules permit the Court to look beyond the amended complaint and to consider as part of the record affidavits filed by the respective parties under these circumstances and to treat the preliminary motion like a motion for summary judgment. Md. Rule 2-322 (c).

Having determined above that the allegations of the amended complaint are sufficient to require the Court to decide whether the 1998 arbitration agreement was procured through fraud, the Court must then either base its decision on the record now before it or proceed to a limited hearing on the validity of the 1998 arbitration agreement. Even if the Court were to permit E&Y to supplement the record at this late hour with the Vandercook affidavit, it is not convinced that the critical ruling it is called upon to make can be rendered properly on the basis of a paper record. It is an understatement to indicate that the facts will be hotly contested here. The Court believes that questions of credibility may play an important role in reaching an appropriate determination of them. Accordingly, the Court will conduct a scheduling conference with counsel promptly to address discovery and a hearing on the issue of the enforceability of the 1998 arbitration agreement. The pending motions are thus rendered **MOOT**.

ALBERT J. MATRICCIANI, JR.
Judge
January 30, 2003

cc: Arnold M. Weiner, Esquire
Paul F. Strain, Esquire
Irvin B. Nathan, Esquire

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O R D E R

With respect to all motions pending before the Court, upon consideration of the memoranda of law filed by the respective parties in support of those motions and/or in opposition thereto, as well as the oral arguments presented by counsel before the Court on December 2, 2002, and for the reasons more fully set forth in the accompanying Memorandum and Opinion of this date, it is this 30th day of January, 2003, by the Circuit Court for Baltimore City, Part 20,

ORDERED as follows:

1. Defendant's motion to dismiss the amended complaint or, in the alternative, to stay pending arbitration is **RESERVED**.
2. Plaintiff's motion for stay of arbitration is **GRANTED** in part and **RESERVED** in part.
3. Defendant's motion to supplement the record is **DENIED** as moot.
4. Plaintiff's motion to strike the Vandercook affidavit as untimely is **DENIED** as moot.

Counsel shall advise the Court within ten (10) days of the issuance of this Order as to their availability for a scheduling conference. The conference will address the scope of discovery and the specific issues to be addressed at the hearing on the existence of a valid arbitration agreement between the parties. Discovery deadlines and a hearing shall be scheduled at that time.

ALBERT J. MATRICCIANI, JR.
Judge
January 30, 2003

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Paul F. Strain, Esquire
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