The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

MICROSOFT CORPORATION, Plaintiff, v. TIVO INC., Defendant.	No. 2:11-cv-00134 RSM **DECLARATION OF ERIC CARSTEN** NOTE ON MOTION CALENDAR: FRIDAY, MARCH 18, 2011

I, Eric Carsten, hereby declare as follows:

1. I am an attorney at the law firm of Irell & Manella LLP, counsel of record for Defendant TiVo Inc. ("TiVo") in this matter. I submit this Declaration in support of Defendant's Reply in Support of Motion to Stay Pursuant to 28 U.S.C. § 1659 and to Transfer Venue Pursuant to 28 U.S.C. § 1404(a). Except where stated, I have personal knowledge of the facts set forth in this Declaration and, if called as a witness, could and would testify competently to such facts.

2. Attached hereto as Exhibit 1 is a true and correct copy of Defendants' Motion To Dismiss, Stay Pending Arbitration, Or Transfer Venue, filed on July 2, 2008, in the matter *Moura v. Personal Business Advisors, LLC, et al.*, Case No. C08-5403-BHS (W.D. Wash.), which I retrieved online from the public PACER website for the Western District of Washington.

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3. Attached hereto as Exhibit 2 is a true and correct copy of an email I received from Shane Cramer, counsel for Microsoft, on March 17, 2011.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 18th day of March, 2011 at Los Angeles, California.

By _____
Eric Carsten

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EXHIBIT 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RUI MOURA, an individual, Plaintiff, v. PERSONAL BUSINESS ADVISORS LLC, a Florida limited liability company, FIRST MEDIA CLUB GmbH, a corporation organized under the laws of Germany, UWE BRETTMANN, an individual, AXEL ZACHARIAS, an individual, JUDITH GROTE, an individual Defendants.	NO. C08-5403-BHS DEFENDANTS' MOTION TO DISMISS, STAY PENDING ARBITRATION, OR TRANSFER VENUE NOTE ON MOTION CALENDAR: August 1, 2008

I. RELIEF REQUESTED

Defendants Uwe Brettmann ("Brettmann") and Personal Business Advisors, LLC ("PBA") (collectively "Defendants") request an order dismissing them from this action pursuant to FRCP 12(b)(2) because this Court lacks personal jurisdiction over Defendants. In the alternative, Defendants request an order dismissing this action pursuant to FRCP 12(b)(1) because this Court does not have jurisdiction over an action subject to arbitration in Las, Vegas Nevada, pursuant to FRCP 12(b)(6)

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because Plaintiff's complaint fails to state a claim upon which relief can be granted, and/or pursuant to FRCP 12(b)(3) because venue in this action is improper.

In the alternative to dismissal under any of the above grounds, Defendants request an order staying this litigation pursuant to 9 U.S.C. § 3. If the Court denies Defendants' motion to dismiss or stay the action regarding any claims, Defendants request an order transferring venue for such remaining claims to the United States District Court for the District of Nevada-Las Vegas for convenience of parties and witnesses under 28 U.S.C. § 1404.

II. FACTS

The facts are fully set forth in the declarations of Uwe Brettmann and Benjamin I. VandenBerghe on file herein and summarized as follows:

A. Parties

Brettmann is a German citizen and resident alien residing in Texas. Brettmann is chief executive officer, chairperson of the board, and greater than 40% owner of PBA. Brettmann has never resided, visited for business purposes, or vacationed in Washington State. Brettmann has never owned property in Washington State.[1]

PBA is a Florida limited liability company with its principal place of business in Texas. PBA is in the business of introducing senior executives to jobs and other business opportunities. PBA has never maintained an office, employee, telephone, mailing address, or registered agent in Washington. PBA has never owned or leased property in Washington State. PBA does not advertise within the State of Washington, does not conduct business here, and outside of the business

[1] Brettmann passed through Washington State once over ten years ago during a motor home trip from California to Alaska. Declaration of Uwe Brettmann filed in Support of this Motion, p. 1, ¶ 2.

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relationship with plaintiff Rui Moura ("Moura"), has never entered into a contract with a Washington State resident.[2]

B. Moura and the Licensing Agreement

In February of 2006, Moura began communicating with a PBA senior advisor about business alternatives to corporate employment. Moura was informed of three different possible opportunities, including the rights to develop the 3aArt business in North America. 3aArt is a unique patented art display and framing system. The intellectual property rights to the 3aArt technology and system are owned by a German company, Defendant First Media Club ("FMC"). Defendant Axel Zacharias ("Zacharias") is the Chief Executive Officer of FMC. On May 5, 2006, Moura traveled to Texas to visit Brettmann and view the 3aArt technology and products. Thereafter, on July 7, 2006, Moura and Brettmann traveled to Germany to meet with Zacharias to discuss the 3aArt product and the possible structure of a relationship and distribution or licensing contract for the development of 3aArt in North America. At the meeting, Moura represented to Defendants that he was a high net worth individual investor competent to develop the 3aArt business given his past experience as a stockbroker, director of Corporate Marketing and Communications at Frank Russell Company, and high level executive for various other financial services, hedge funds, start ups and sales and marketing companies. Moura presented elaborate financial flip charts and represented to Brettman and Zacharias that he would generate tens of millions of dollars in revenue applying his experience and marketing methods to the development of the 3aArt business in North America. Moura also represented that he was working with an experienced franchise and product distribution lawyer, an accounting firm and an arbitrage/merger consultant in the United States who were

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[2] Brettmann Declaration, p. 2, ¶ 3.

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advising him on the options, structure and the legal requirements to assure compliance with state and federal laws for the expansion of the 3aArt distribution business.[3]

The only licensed manufacturer and sole producer of 3aArt products in the United States, Tri Media USA, Inc. ("Tri Media") is a corporation located in Nevada. Moura wanted his new 3aArt business to be in proximity to Tri Media and represented that he would form a Nevada LLC to become the master licensee/distributor of the 3aArt technology and its principal place of business and distribution of 3aArt would be in Nevada.[4]

Despite written demands from Zacharias and representations from Moura that the LLC, and other legal compliance and structure for distribution would be in place earlier, on or about October 16, 2006, Moura finally formed Nova Arts International LLC ("Nova") in Nevada to develop the 3aArt business. Moura made himself CEO, President, Secretary and Treasurer of Nova.[5]

The initial Members of Nova were Moura, Zacharias, Brettmann and Defendant Judith Grothe.[6] On October 16, 2006, Moura traveled to Texas to execute the 3aArt Master License Agreement with FMC ("License Agreement").[7] Zacharias signed the License Agreement for FMC as Master Licensor. Moura signed the License Agreement for the Master Licensee, Nova. Additionally, Moura, Zacharias, and

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[3] Brettmann Declaration, p. 2, ¶ 4. Defendants further note that Mr. Duvall is a recognized franchise attorney from Dorsey & Whitney LLP.

[4] Brettmann Declaration, p. 3, ¶ 5.

[5] Brettmann Declaration, p. 3, ¶ 6.

[6] Brettmann Declaration. Brettmann Declaration, p. 3, ¶ 7. Defendants believe that named defendant Judith Grote's last name is actually spelled "Grothe."

[7] A true and correct copy of the Licensing Agreement is attached to the Brettmann Declaration as Exhibit A.

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Brettmann signed the License Agreement in their individual capacities as guarantors.[8]

C. Specific Provisions of the License Agreement

1. The 3aART Product is Produced Outside of Washington State.

Section 1.01 of the License Agreement grants Nova rights to distribute the 3aArt Product as the Master Licensee in the Exclusive Territory, which is defined as the "United States of America, Canada, and Mexico." Section 1.02 of the License Agreement states that "Master Licensee expressly acknowledges and agrees that all 3aArt® products for the United States of America are exclusively produced and distributed by Tri Media USA, Inc. located at 6100 Neil Road, Suite 500, Reno, Nevada."[9]

2. The Guaranty Section of the License Agreement Binds Each Guarantor to *Every* Provision in the License Agreement.

Section 22.01 of the License Agreement provides that each guarantor of the License Agreement:

> agrees to be **personally bound by**, and personally liable for, each and **every provision in [t]his Agreement**, both monetary obligations and **obligations to take or refrain from taking specific actions** or to engage or refrain from engaging in specific activities, including without limitation, the provisions of Section 16.01 of this Agreement." (Emphasis added).

3. The License Agreement Provides that Texas Law Governs.

Section 23.06 of the License Agreement provides that "[t]his Agreement shall be governed by the laws of the State of Texas."

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[8] Brettmann Declaration, p. 3, ¶ 7. During the negotiation process, Moura was represented by attorney Gary R. Duvall, who provided input on the proposed License Agreement and suggested revisions thereto

[9] 3aArt products are also produced in Germany and Los Angeles. Brettmann Declaration, p. 4, ¶ 8.

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4. The License Agreement Contains a Broad and Binding Arbitration Clause.

Exhibit B to the License Agreement, which is made a part of the License Agreement pursuant to Section 23.09, contains an arbitration clause (the "Arbitration Clause"), providing in pertinent part that:

> a. Except for controversies, disputes, or claims set forth in Section 21.3 below,[10] **every claim or dispute** arising out of or relating to the negotiation, performance or non-performance of this Agreement, including, without limitation, **any alleged torts**, and specifically including **any claims regarding the validity, scope, and enforceability of this Section** shall be determined by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA"), or as otherwise agreed by the parties. **The place of arbitration shall be Las Vegas, Nevada.**
>
> b. In the event of any such claim or dispute, the parties shall first attempt to resolve the matter through good faith, informal negotiations, including **non-binding mediation**. In the event that the parties are unable to resolve the dispute, either party hereto may demand arbitration by written notice to the other party and to the **AAA in Las Vegas, Nevada.** (Emphasis added).

The parties discussed the arbitration provision and agreed that any mediation, dispute resolution, or arbitration would be in Nevada because: Nova is a Nevada LLC; the United States entity producing 3aArt, Tri Media is also a Nevada corporation whose agreements with FMC provide for arbitration in Nevada; and Nevada is a convenient location for all of the parties, with the air travel time to Nevada from Washington and Texas being roughly the same.[11]

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[10] Defendants note that Section 21.3 is a typo. This actually refers to Section 1 of the Arbitration Clause, which allows 3aArt to proceed to a competent court for certain provisional remedies not relevant to the claims alleged in this action.

[11] Brettmann Declaration, p. 5, ¶ 12. Thus, most of the witnesses to this dispute are located outside of Washington State.

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D. The Nova Entity

At all relevant times herein Moura was in charge of forming the business structure of Nova and handling the structure and all legal compliance for the sale and distribution of 3aArt products in North America. Moura formed Nova as a Nevada LLC and made himself the Chief Executive Officer, President, Secretary and Treasurer of Nova. Moura was also the sole employee of Nova and earned yearly salary of around $120,000.00, which he drew from Nova until about September, 2007 (until the working capital was exhausted). Moura paid his own Nova salary despite his failure to follow through on his representations to other Nova members and FMC to promptly set up a legal product distribution system for 3aArt and, Nova's failure to make any profits. During April of 2007, Moura became the majority owner and controlling member of Nova, thereby effectively controlling all actions of Nova. The Nova operating agreement ("Operating Agreement") provides that it is to be governed by Nevada law and also states that all disputes arising from the Operating Agreement "shall be decided by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association."[12]

E. Prior Negotiations

A few months after executing the License Agreement and the Operating Agreement, it became apparent that Moura's performance did not live up to his representations. As a result of Moura's non-performance, Moura and Zacharias had a falling out and Zacharias threatened legal action against Moura. Brettmann arranged for the parties to go to Las Vegas under the terms of the Arbitration Clause to attempt to resolve the dispute informally through mediation as they had all agreed to. Moura and Brettmann both agreed to and traveled to Las Vegas as required by

[12] Brettmann Declaration, p. 5, ¶ 13. A true and correct copy of the Nova operating agreement is attached, in relevant part, to the Brettmann Declaration as Exhibit B.

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the Arbitration Clause, but Zacharias could not attend and the parties were unable to resolve the dispute.[13]

F. Procedural History

Ignoring the binding arbitration clauses in both the License Agreement and the Operating Agreement, the Nova entity he formed in Nevada, and other facts set forth herein, Moura filed this lawsuit in Washington, in his individual capacity, alleging, among other things, that all of the defendants worked together to misrepresent certain facts and to mislead Moura into entering into the License Agreement (which he refers to argumentatively as the "franchise agreement"). Moura's complaint does not specify which defendants made the specific alleged "misrepresentations." He brought claims against all defendants under the Washington Franchise Investment Protection Act, the Washington Consumer Protection Act, and general common law principles of detrimental reliance and unjust enrichment. To date, Defendants are the only parties who have been served.[14]

Defendants demanded that Moura dismiss or stay this action pending arbitration with the American Arbitration Association ("AAA") in Nevada and then promptly removed the action on diversity grounds and pursuant to the Federal Arbitration Act. Since then, Defendants have repeated the demand that Moura dismiss or stay this action and participate in arbitration in Las Vegas, Nevada to resolve all of the parties' claims.[15]

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[13] Brettmann Declaration, p. 6, ¶ 14.

[14] Declaration of Benjamin I. VandenBerghe filed in Support of this Motion, p. 1, ¶ 2. Given Defendants' prior interactions with Moura, and Moura's lack of performance under either the License Agreement or Operating Agreement, Defendants believe that Moura is attempting to avoid his promise to arbitrate in Nevada and has filed this action in Washington as a defensive attempt to avoid venue and arbitration in Nevada and use a minority investor in Nova, Brettmann, and PBA (who are easily served as they are located in the United States) in order to bring Zacharias and FMC to the table given the expense and difficulties inherent in serving international parties.

[15] VandenBerghe Declaration, p. 2, ¶ 3.

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III. ISSUES

1. Should the Court dismiss Defendants for lack of jurisdiction?

2. Should the Court dismiss this action, stay this action pending arbitration, or alternatively, transfer venue to United States District Court, for the District of Nevada-Las Vegas?

IV. EVIDENCE RELIED UPON

This motion is based upon:

1. Complaint for Rescission and Additional Relief under the Washington Franchise Investment Protection Act, the Washington Consumer Protection Act, and the General Common Law Principles of Detrimental Reliance and Unjust Enrichment. ("Complaint");

2. Declaration of Uwe Brettmann in Support of Defendants' Motion to Dismiss; Stay Pending Arbitration; or Transfer Venue.

3. Declaration of Benjamin I. VandenBerghe in Support of Defendants' Motion to Dismiss; Stay Pending Arbitration; or Transfer Venue.

V. AUTHORITY AND ARGUMENT

A. The Court Should Dismiss Defendants from this Lawsuit Because Washington State Lacks Personal Jurisdiction over Defendants.

The plaintiff bears the burden of establishing that personal jurisdiction over Defendants exists. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). On a Rule 12(b)(2) motion to dismiss, courts inquire into whether the pleadings and affidavits make a prima facie showing of jurisdictional facts; the plaintiff cannot simply rest on the bare allegations in his complaint. *Amba Marketing Systems, Inc. v. Jobar International, Inc.*, 551 F.2d 784,787 (9th Cir. 1977).

Because Brettmann resides in Texas and PBA is incorporated in Florida with its principal place of business in Texas, and neither Brettmann nor PBA owns property,

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maintains offices, or conducts business in Washington State, Moura can only establish personal jurisdiction over Defendants if he can show that 1) Washington's long-arm statute confers personal jurisdiction over Defendants; and 2) that the exercise of jurisdiction comports with the constitutional principles of due process. *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1404-05 (9th Cir. 1994).

Washington's long-arm statute permits the exercise of jurisdiction to the same extent as the U.S. Constitution. *Id.*; RCW 4.28.185. Hence, this court must consider only the constitutional principles of due process, which require that the defendants have minimum contacts with Washington "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *E.g., Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158 (1945).

There are two types of personal jurisdiction: general and specific. General jurisdiction may be found over a non-resident defendant without regard to whether the cause of action is related to the defendant's contacts with the forum state. For general jurisdiction to exist, the nonresident must be engaged in substantial, continuous, and systematic activities in the forum state. *See Brand v. Menlove Dodge*, 796 F.2d 1070, 1073 (9th Cir. 1986) (stating that the term "substantial" sets a fairly high standard for general jurisdiction); *Helicopteros Nacionales de Columbia S.A. v. Hall*, 466 U.S. 408, 416-19, 104 S.Ct. 1868, 1872-74 (1984) (holding no general jurisdiction despite sales negotiations, purchasing of equipment, and training of personnel in forum state).

Even if defendants have not had the continuous and systematic contacts sufficient to confer general jurisdiction, a plaintiff may establish specific jurisdiction if three requirements are met: 1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum; or perform some act

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by which he purposefully avails himself of the privileges of conducting activities in the forum, thereby invoking the benefits and protections of its laws; 2) the claim must be one which arises out of or relates to the defendant's forum related activities; and 3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable. *FDIC v. British-American Ins. Co., Ltd.*, 828 F.2d 1439, 1442 (9th Cir. 1987).

1. Washington Lacks General Jurisdiction over Defendants.

Moura alleges that PBA and Brettmann are subject to a Washington court's jurisdiction because they "conducted business in Washington by offering for sale and selling a franchise to Plaintiff." Complaint at p. 2. On its face, the Complaint fails to allege sufficient facts to support general jurisdiction, and the fact that Moura points to a specific event giving rise to jurisdiction demonstrates that Defendants' contacts with the forum state are not substantial or continuous.

Brettmann does not own property within Washington State and has never taken a trip for business or even a vacation to Washington State. Brettmann's only time within Washington state borders was over 10 years ago, when on a vacation for pleasure, he passed through Washington in a motor home on his way from California to Alaska. Brettmann does not own property in Washington State, and aside from the instant License Agreement with Moura, does not transact business with Washington State residents. PBA does not have offices or employees in Washington, has never sent employees to Washington and, aside from the transaction with Moura, has not entered into any business transactions with Washington State residents. Additionally, Defendants' limited contacts with Moura occurred either electronically or telephonically or in person in Texas, Nevada, or Germany. In sum, Defendants' isolated electronic communications with Moura fail to meet the substantial,

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continuous, and systematic requirement set forth in *Helicopteros* and the high standard for general jurisdiction set forth in *Menlove Dodge.*

2. Washington Lacks Specific Jurisdiction over Defendants

To find specific jurisdiction, courts require a showing that the defendant 1) "purposefully availed" itself of the privilege of conducting activities in the forum state; 2) the plaintiff's claims "arise out of" those activities; and 3) the exercise of personal jurisdiction is not constitutionally unreasonable. *British American*, 828 F.2d at 1442. The requirements are in the conjunctive, thus, all three must be met. *Id.*

Purposeful availment does not exist where the defendant merely visits the forum state to execute a contract or enters into a contract with a resident of the forum state. *See, e.g.*, *Gray & Co. v. Firstenberg Machinery Co.* 913 F.2d 758, 760-61 (9th Cir. 1990) (contract with resident of forum); *British American*, 828 F.2d at 1443 (mere visit to forum state).

The facts of this case are materially indistinguishable from the facts of *Marathon Oil Co. v. A.G. Ruhrgas*, 182 F.3d 291 (5th Cir. 1999). Marathon and its subsidiaries sued Ruhgras, a German entity, in Texas alleging fraud, breach of fiduciary duty, and conspiracy in the execution of an agreement with Marathon. The agreement concerned a sale from Marathon's subsidiary of its licensing rights in certain gas fields to Ruhgras. The agreement provided for arbitration in Sweden and for the application of Norwegian law. During negotiations, Ruhgras visited Texas three times to discuss the transaction. Ruhgras also made correspondence and phone calls to Marathon. The Fifth Circuit upheld the district court's dismissal for lack of personal jurisdiction over Ruhgras in Texas because:

> [Ruhgras'] mere presence at the three meetings in Houston, together with the noted correspondence and phone calls, is not sufficient to establish the requisite minimum contacts because the record is devoid of evidence that Ruhgras made false statements

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> at the meetings or that the alleged tortuous conduct was aimed at activities in Texas. Further, Ruhgras could not reasonably have expected to be brought into Texas courts because of its presence at the meetings inasmuch as the meetings dealt with the Heimdal Agreement, a contract governed by Norwegian Law and providing specifically for Swedish Arbitration.

Marathon Oil, 182 F.3d at 295.

Here, Defendants have not purposefully availed themselves of the privilege of conducting activities in the forum state. During the negotiation of the License Agreement, neither Brettmann nor any PBA employees traveled to Washington. Instead, Moura traveled to Texas and Germany for negotiations and to Nevada for post-License Agreement discussions. Moura's complaint fails to allege that any of the alleged misrepresentations occurred in Washington State. In addition, the License Agreement has a Texas choice of law clause, requires arbitration in Nevada, and affirmatively states that the 3aArt product is to be produced by Tri Media, which is a Nevada corporation that produced the 3aArt product in Nevada, Germany, and California. Like Ruhgras, when Defendants participated in the negotiations of the License Agreement, they could not have reasonably anticipated being haled into court in Washington State under these circumstances.

Finally, even assuming Defendants had purposefully availed themselves of the privilege of conducting activities in the forum state (they did not), the exercise of personal jurisdiction over the Defendants would be manifestly unreasonable in this case. Courts examine the following factors to evaluate whether the exercise of jurisdiction over a nonresident comports with fair play and substantial justice:

> 1) the extent of purposeful interjection into the forum state; 2) the burden on the defendant of defending in the forum; 3) the extent of conflict with the sovereignty of the defendants' state; 4) the forum state's interest in adjudicating the dispute; 5) the most efficient judicial resolution of the controversy; 6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and 7) the existence of an alternative forum.

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British-American, 828 F.2d at 1443 (9th Cir. 1987).

Here, as described above, Defendants have not purposefully interjected themselves into Washington's affairs in any relevant manner. The burden on Defendants to defend in Washington is high where Defendants have no ongoing relationship with Washington State and would be forced to travel to Washington State to defend. Washington is an inefficient forum for this dispute, because the parties have **agreed to resolve their disputes in Nevada** and all of Defendants' witnesses are located outside of Washington State. The evidence in this action is located not in Washington State, but in Texas, Nevada, and Germany (where the parties met and their interactions were witnessed, where the 3aArt product is developed and produced, and where Nova was formed). Moura's prior visit to Nevada indicates that a Nevada forum would not be unduly burdensome on him. The parties agreed to arbitrate in Nevada because Nova and Tri-Media are Nevada entities, the production agreement with Tri-Media states that arbitration shall be in Nevada, the 3aArt product is produced in Nevada, and Nevada was a convenient location for both the Nevada and Washington parties. Finally, an alternative forum exists for the dispute: AAA arbitration in Las Vegas in accordance with the License Agreement.

Because Moura's Complaint does not establish that Washington has personal jurisdiction over defendants, jurisdiction is not proper and the Complaint should be dismissed.

B. The Court Should Dismiss Defendants this Lawsuit, or Alternatively Stay this Lawsuit Pending Arbitration, Because Moura's Claims are Subject to Arbitration in Nevada and this Court is the Improper Forum for Such Claims.

In the event the Court determines that it has personal jurisdiction over either of the Defendants, Defendants request an order dismissing or alternatively staying the action pending arbitration in accordance with the License Agreement.

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1. Moura's Claims Should be Dismissed Because Moura's Claims are Subject to Arbitration and Moura has Relinquished his Right to Apply to State or Federal Courts for Relief.

It is unclear whether a motion to dismiss based on an arbitration agreement with a venue selection clause should be most appropriately brought under FRCP 12(b)(1) for lack of subject matter jurisdiction; 12(b)(3) for improper venue; or 12(b)(6) for failure to state a claim upon which relief can be granted. *Silvia v. Britannica Inc.*, 239 F.3d 385, 387-88 n. 3 (1st Cir. 2001) (collecting cases in the context of a forum selection clause which is similar to an agreement to arbitrate with a forum selection clause in another state). As a result, Defendants bring this motion pursuant to all three subsections. Regardless of which subsection applies, a court in Washington State is the improper forum for a dispute that is subject to arbitration in Nevada.

The plaintiff bears the burden of establishing that subject matter jurisdiction and venue exists. *See Stock West, Inc. v. Confederated Tribes of Collville Reservation*, 873 F.2d 1221 (9th Cir. 1989) (subject matter jurisdiction); *Airola v. King*, 505 F. Supp. 30, 31 (D. Ariz. 1980) (venue).

All of Moura's claims against Defendants are subject to arbitration in Las Vegas, Nevada. Moura agreed that he would not look to the courts to resolve disputes concerning the License Agreement. As a result, a Washington court lacks subject matter jurisdiction over this action, venue in a Washington court is improper, and this Court cannot grant Moura's requested relief. In sum, this Court is the improper forum to hear Moura's claims and the action should be dismissed.

2. Applicable Law, the Licensing Agreement, and the Facts of this Case Militate for Moura's Claims to be Stayed Pending Arbitration in Las Vegas.

If the Court will not dismiss Defendants or this lawsuit, the action should be stayed pending arbitration.

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The Federal Arbitration Act ("FAA"), 9 U.S.C. §1 *et seq.*, provides that a written agreement to arbitrate a dispute is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA applies to an arbitration provision in "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. The License Agreement evidences commerce because it provides for the development of the 3aArt business throughout the United States, Mexico and Canada. Accordingly, the FAA applies to the License Agreement.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") requires enforcement of arbitration clauses in international contracts unless the clause is null and void. *See* 9 U.S.C. §§ 201-208 (containing the United States' Implementation of the Convention). Even when an arbitration agreement is subject to the Convention, the FAA still applies to the extent it is not inconsistent with the Convention to fill any gaps not covered by the Convention. *See* 9 U.S.C. § 208; *Yusuf Ahmed Alghanim & Sons. W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 20 (2d Cir. 1997). An arbitration agreement is governed by the Convention unless it is between two United States citizens, involves property located in the United States, and has no reasonable relationship with one or more foreign states. *See Yusef Ahmed*, 126 F.3d at 19; 9 U.S.C. § 202.

Both Germany and the United States are signatories to the Convention. The License Agreement provides for arbitration of the claims alleged in the Complaint, with the locus of arbitration in the United States. The License Agreement concerns the licensing of 3aArt product in the United States, Mexico, and Canada and is thus an international commercial legal relationship. Finally, FMC is a German entity while

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Zacharias and Grothe are German citizens. As a result, the Convention applies to this Arbitration Clause.

The Supreme Court has consistently upheld the policy of providing for the rigorous enforcement of agreements to arbitrate. *Dean Witter Reynolds, Inc., v. Byrd*, 470 U.S. 213, 221, 105 S.Ct. 1238, 1243 (1985). The federal policy favoring arbitration is even stronger in international transactions governed by the Convention. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 631, 105 S.Ct. 3346, 3357 (1985); *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 665 (2d Cir. 1997).

a. The court should undertake only a limited inquiry in determining whether to stay this action pending arbitration.

Pursuant to Section 3 of the FAA, 9 U.S.C. § 3, if "the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . ." Under this provision, an issue is "referable to arbitration," and litigation thereon must be stayed pending such arbitration, where 1) a valid written agreement to arbitrate exists between the parties; and 2) an arbitrable issue exists, i.e., the dispute in question falls within the scope of the arbitration agreement. *See Howard Elec. and Mechanical Co., Inc. v. Frank Briscoe Co., Inc.*, 754 F.2d 847, 850 (9th Cir. 1985) (discussing analysis in context of motion to compel arbitration). Further, all doubts as to the scope of arbitrability must be resolved in favor of arbitration. *Volt Info. Sci. v. Bd. of Tr. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 475-76, 109 S.Ct. 1248, 1253-54 (1989); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 942-43 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts

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concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.").

b. The Court's limited inquiry into the arbitrability of claims is further circumscribed because the parties explicitly agreed that the arbitrator is to determine arbitrability.

Although the issue of arbitrability is typically a matter for the court to decide initially, the parties may contractually delegate the questions of arbitrability to an arbitrator and the court must defer to the parties' intent. *See Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583, 80 S.Ct. 1347, 1354 n.7 (1960).

In this case, the Arbitration Clause clearly and explicitly provides that the arbitrator should resolve questions of arbitrability:

> every claim or dispute arising out of or relating to the negotiation, performance or non-performance of this Agreement, including, without limitation, any alleged torts, and **specifically including any claims regarding the validity, scope, and enforceability of this Section** shall be determined by arbitration. (Emphasis added).

The parties unequivocally agreed that all claims related to the License Agreement would be arbitrated including the issue of arbitrarily itself. As such, this Court should allow the arbitrator to determine any questions of arbitrability that might be asserted by Moura.

In sum, there is a very strong presumption of arbitrability of international arbitration agreements, federal courts normally engage in a limited inquiry of arbitrability to determine if a stay of litigation should be granted, and such an inquiry is even further circumscribed when the parties explicitly agree that the arbitrator shall determine questions of arbitrability.

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c. Moura and Brettmann are signatories to the Arbitration Clause and Moura is estopped from asserting the Arbitration Clause does not apply to his claims against PBA

As a starting point, the FAA creates a presumption in favor of arbitrability and therefore, "any doubts concerning the scope of arbitrable provisions should be resolved in favor of arbitration." *Mitsubishi Motors Corp.*, 473 U.S. at 626, 105 S.Ct. at 3346. "Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Id.* Here, the Arbitration Clause is broadly drafted and does not limit arbitration to certain persons: "**every** claim or dispute arising out of or relating to the **negotiation**, performance or non-performance of this Agreement ... shall be determined by arbitration." All of Moura's claims arise out of or relate to the License Agreement and are subject to arbitration.

Moura is bound by the Arbitration Clause because he signed the License Agreement both as CEO of Nova[16] and in his individual capacity as guarantor. By signing as guarantor, Moura agreed in Section 22.01 of the License Agreement to be "personally bound by, and personally liable for, each and every provision in [t]his Agreement." One of the provisions of the License Agreement is the Arbitration Clause. Brettmann also signed the License Agreement as guarantor and similarly agreed to be bound by all terms of the License Agreement, including the Arbitration Clause. As such, both Moura and Brettmann are signatories to the Arbitration Clause and Moura's claims against Brettmann are subject to arbitration.

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[16] In addition to the argument set forth above, Moura was not only the CEO, but also the president, director, treasurer, secretary, and sole employee of Nova, and later became the majority member of Nova Arts, LLC, thereby effectively controlling all actions of Nova. Moura personally obtained benefits as a result of signing the Licensing Agreement for Nova (the yearly salary and right to sell 3aArt products and licenses), and as a result, should not now be allowed to claim he is not personally bound by the Arbitration Clause. *See Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349 (2d Cir. 1999); *Johnson v. Polaris Sales, Inc.*, 257 F.Supp.2d 300 (D. Me. 2003).

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Even though PBA is a non-signatory to the Arbitration Clause, non-signatories to arbitration agreements can compel arbitration of the claims against them under certain circumstances. *See e.g.*, *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999); *JLM Indus., Inc. v. Stold Nielsen S.A.*, 387 F.3d 163, 178 (2d Cir. 2004) (holding that non-signatory parent company could compel arbitration of claims asserted against parent and signatory subsidiaries); *In re Vesta Ins. Group, Inc.,* 192 S.W.3d 750, 763 (Tex. 2006) (allowing non-signatory affiliate of signatory to compel arbitration).

In *Ms Dealer*, the Eleventh Circuit held that the general principle of equitable estoppel allows a non-signatory to compel arbitration under at least two circumstances. First, when a signatory to a written agreement containing an arbitration clause "must rely on the terms of the written agreement in asserting [its] claims" against the non-signatory, arbitration is appropriate. *Ms Dealer*, 177 F.3d at 947. This means that the signatory's claims against the non-signatory must either make reference to or presume the existence of the written agreement. Second, arbitration is appropriate when the signatory to the contract containing the arbitration clause raises allegations of "substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract." *Id.* Otherwise, the arbitration proceedings would be rendered meaningless and the "federal policy in favor of arbitration effectively thwarted." *Id.*

Here, each of Moura's claims is premised in part on the "sale" of an alleged "franchise,"[17] which "sale" was memorialized by the License Agreement containing an Arbitration Clause. It is of no import that Moura has cast its claims against PBA as statutory/tort claims because "it is well established that a party may not avoid broad

[17] Defendants dispute the License Agreement constitutes the sale of a franchise.

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language in an arbitration clause by attempting to cast its complaint in tort rather than contract." *Id.* at 948 n.4. Furthermore, Moura's allegations against Brettmann are based on the same facts and are inherently inseparable from his allegations against PBA. Indeed, Moura does not even separate his allegations against Brettmann and PBA in the complaint. Finally, PBA's contacts with Moura are almost entirely coextensive with Brettmann's contacts with Moura because Brettmann is the CEO, chairperson of the board, and greater than 40% owner of PBA. In sum, it would thwart the strong policy in favor of enforcement of international arbitration agreements if Moura were allowed to avoid his agreement to arbitrate and this Court should stay the claims against both Brettmann and PBA.

d. Moura's claims are within the scope of the Arbitration Clause.

Any doubts regarding the scope of an arbitration clause should be resolved in favor of arbitration. *Mitsubishi Motors Corp.*, 473 U.S. at 626, 105 S.Ct. at 3354. Here, all of Moura's claims fall within the Arbitration Clause.

The Arbitration Clause provides for arbitration of:

> **every** claim or dispute **arising out of or relating to** the **negotiation**, performance or non-performance of this Agreement, including, without limitation, any **alleged torts**, and specifically including any claims regarding the validity, scope, and enforceability of this Section shall be determined by arbitration. (emphasis added).

This Arbitration Clause is exceedingly broad in scope. Moura's claims are all related to the negotiation and performance of the License Agreement. Therefore, all of Moura's claims and this entire action are subject to the terms of the Arbitration Clause. *See e.g.*, *Prima Paint Corp v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 397-98, 87 S.Ct. 1801, 1802-03 (1967) (clause using terms "arising out" and "relating to" was deemed a broad arbitration clause capable of expansive reach).

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Moreover, Moura's claims are the types of claims which can be made subject to arbitration. Claims involving fraudulent inducement and statutory rights are generally subject to arbitration. *See e.g., Prima Paint.,* 388 U.S. at 402-04, 87 S.Ct at 1806 (fraudulent inducement); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 238, 107 S.Ct. 2332, 2344 (1987) (statutory rights including securities fraud). Furthermore, it is clear that Moura's Washington Franchise Investment Protection Act ("WFIPA") and Washington Consumer Protection Act ("CPA") claims are subject to arbitration. *See Allison v. Medicab Intern., Inc.*, 92 Wn.2d 199, 204, 597 P.2d 380, 383 (Wash. 1979) (holding that arbitration was proper for claims alleging that defendants made fraudulent misrepresentations which induced plaintiffs to enter into the agreement, and that defendants failed to file a registration statement in violation of WFIPA); *Garmo v. Dean Witter*, 101 Wn.2d 585, 590, 681 P.2d 253, 255 (Wash. 1984) (holding that CPA claims are subject to arbitration).

Here, the Arbitration Clause is fully valid and enforceable and the Court should stay this lawsuit pending completion of the arbitration in Las Vegas, Nevada. Finally, because the parties agreed that an arbitrator should determine arbitrability; this Court should stay this litigation without engaging in analysis of the scope of the Arbitration Clause or any other issues regarding arbitrability.

C. Alternatively, to the Extent Any of Plaintiff's Claims are Not-Stayed, Defendants Request that the Court Transfer Venue to the United States District Court, for the District of Nevada-Las Vegas.

In the event any of Moura's claims are not dismissed or stayed, and given all of the aforementioned facts indicating that a Washington court is the improper forum, this matter should be transferred to the District Court in Las Vegas.

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have

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been brought. 28 U.S.C. § 1404(a).[18] This action might have been brought in the United States District Court, for the District of Nevada-Las Vegas because diversity jurisdiction exists between the parties under 28 U.S.C. § 1332. A Nevada District Court would have personal jurisdiction over the parties because they agreed to arbitrate in Nevada, thus waiving arguments over whether jurisdiction in Nevada is proper. *See Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1407 (9th Cir. 1994). The facts here overwhelmingly support a transfer for the convenience of the parties, as follows: 1) this Court lacks personal jurisdiction over Defendants; 2) the parties have an express agreement to arbitrate in Nevada; 3) Nova is a Nevada limited liability company, 4) the 3aArt product is produced in Nevada by Tri Media, a Nevada corporation; 5) Nevada is a midpoint in travel time between Washington and Texas; 6) most of Defendants' witnesses are located outside of Washington State. Finally, even if Moura ever served Zacharias, Grothe and FMC, a Washington Court would likely lack personal jurisdiction over such defendants, and because all of the parties agreed to arbitrate in Nevada, jurisdiction over all the parties is more likely in a Nevada Court.

In sum, Moura, a sophisticated business person with substantial means (who received counsel from attorneys specializing in franchise and distribution law for months before structuring Nova and negotiating and signing the License Agreement), agreed to arbitrate all claims arising out of or relating to the License Agreement in Nevada. Now, Moura is attempting by artful pleading of claims and parties to avoid the Arbitration Clause, with the result of causing the Defendants to incur substantial

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[18] Defendants note that the Court could also choose to transfer venue to the District Court of Nevada pursuant to 8 U.S.C. § 1631 (transfer to cure want of jurisdiction) or 28 U.S.C. § 1406(a) (improper venue) if the Court agrees with Defendants that personal jurisdiction is lacking or venue is improper, but does not wish to completely dismiss the case or inquire into whether a stay of the action is proper.

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defense costs related to litigating in Washington that the parties expressly agreed to avoid. Moura is abusing the Washington court system and the Defendants by filing this action in the improper forum. It is in the interest of justice and judicial efficiency that the court transfer venue of this action to the United States District Court for the District of Nevada-Las Vegas if it is not dismissed or stayed.

VI. CONCLUSION

For the reasons stated above, Defendants move the Court to dismiss them for lack of personal jurisdiction, or alternatively to dismiss or stay this action pending arbitration of Moura's claims, or alternatively, to transfer venue of any claims which are not stayed to the United States District Court for the District of Nevada, together with such other and further relief in Defendants' favor as the Court deems just and proper.

DATED this 2nd day of July, 2008.

MONTGOMERY PURDUE BLANKINSHIP & AUSTIN, PLLC

By: _____
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CERTIFICATE OF SERVICE

VERNA M. GARTON declares as follows:

1. That I am, and at all times herein mentioned have been, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-mentioned action, and competent to be a witness herein.

2. On the date given below, I caused to be served by email a copy of the Defendants' Motion to Dismiss, Stay Pending Arbitration, or Transfer Venue; Declaration of Benjamin I. VandenBerghe in Support of Defendants' Motion to Dismiss, Stay Pending Arbitration, or Transfer Venue; and Declaration of Uwe Brettmann in Support of Defendants' Motion to Dismiss, Stay Pending Arbitration, or Transfer Venue addressed as follows:

- charleswright@dwt.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 2nd day of July, 2008, at Seattle, Washington.

Verna M. Garton

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EXHIBIT 2

Carsten, Eric

From: Shane Cramer [shanec@dhlt.com]

Sent: Thursday, March 17, 2011 11:24 AM

To: Carsten, Eric

Cc: Lipner, Joseph; ~Wion, Christopher; ~Harrigan, Arthur W. Jr.; ~Davis, Mark; ~Demasi, Timothy; Muzzy, Lucy

Subject: RE: Microsoft v. TiVo -- No. 2:11-cv-00134 (W.D. Wash), Investigation No. 337-TA-761 (ITC)

Eric,

Your understanding is correct.

Regards,

Shane

-----Original Message-----
From: Carsten, Eric [mailto:ECarsten@irell.com]
Sent: Wednesday, March 16, 2011 4:40 PM
To: Shane Cramer; Chris Wion; Arthur Harrigan; ~Davis, Mark; ~Demasi, Timothy
Cc: Lipner, Joseph
Subject: Microsoft v. TiVo -- No. 2:11-cv-00134 (W.D. Wash), Investigation No. 337-TA-761 (ITC)

Counsel:

My understanding is that as Microsoft's counsel, your firms will be representing each of the individual investors named on the '838, '258, '844, and '604 patents in the above-referenced litigations, and should be contacted in connection with these actions solely through you. Please confirm if this is the case by the end of the day tomorrow. Thank you for your attention to this matter.

Regards,
Eric

Eric J. Carsten
Irell & Manella LLP
1800 Ave. of the Stars, Suite 900
Los Angeles, CA 90067
(310) 203-7031

CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 18th day of March, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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