RICHARD M. RYAN (INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF VJC, LLC, ALSO FORMERLY KNOWN AS VOYAGER JET CENTER, LLC) Appellees v. JAMES J. DOLAN; MICHAEL DOLAN; CHARLES P. FALCE; W. DEAN GENGE; DOUGLAS L. HEIN; VOYAGER GROUP, LP; 1776 HOLDINGS, LLC; VOYAGER JET CENTER, LLC; VOYAGER JET CHARTER SERVICES, LLC; VOYAGER JET CHARTER SERVICES, INC.; VOYAGER JET FUELERS, LLC; JET ACCESS, LLC; DOES 1-10 Appellants	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1561 WDA 2012

Appeal from the Order Entered September 25, 2012
In the Court of Common Pleas of Allegheny County
Civil Division at No(s): GD12-003788

BEFORE: FORD ELLIOTT, P.J.E., MUSMANNO, J., and OTT, J.

MEMORANDUM BY OTT, J.: FILED: November 27, 2013

James J. Dolan; Michael Dolan; Charles P. Falce; W. Dean Genge; Douglas L. Hein; Voyager Group, LP; 1776 Holdings, LLC; Voyager Jet Center, LLC; Voyager Jet Charter Services, LLC; Voyager Jet Charter Services, Inc.; Voyager Jet Fuelers, LLC; Jet Access, LLC; and Does 1-10 (collectively “Defendants”) appeal from the Order denying their Preliminary

Objections seeking compulsory arbitration.[1] Following a thorough review of the submissions by the parties, relevant law, and the certified record, we affirm in part, reverse in part, and remand for further proceedings.

We rely upon the procedural and factual history provided by the Honorable Christine A. Ward, in her 1925(a) Opinion. We quote, in relevant part:

> In its current amended form the Complaint alleges multiple counts of fraudulent misrepresentation, negligent misrepresentation, unjust enrichment, conversion, breach of contract, breach of the PA Uniform Fraudulent Transfer Act, corporate waste/mismanagement, breach of fiduciary duty, tortious interference with contractual relations, wrongful termination, and conspiracy, in relation to actions allegedly taken during the creation and operation of an aircraft management company based out of the Allegheny County Airport (the "Business"). In response to these alleged misdeeds the Plaintiffs request compensatory damages, punitive damages, accounting and restitution, promissory estoppel in regards to Plaintiff Ryan's ownership of the Business, injunctive relief to keep harm from being done to the business and to keep Plaintiff Ryan from being deprived of his assets, and costs, interest, and attorney's fees.
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> On September 25, 2012, oral argument on Defendants' Preliminary Objections occurred before this court. The Defendants raised only one objection, under Pa.R.Civ.P. 1028(a)(6), arguing that the action could not be litigated because it is subject to an agreement to arbitrate. On

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[1] Our jurisdiction for this appeal is derived from Pa.R.A.P. 311(a)(8) (allowing appeals from orders appealable by statute) and 42 Pa.C.S. § 7320(a)(1) (declaring orders denying application to compel arbitration immediately appealable). ***See also***, ***Callan v. Oxford Land Development, Inc.***, 858 A.2d 1229 (Pa. Super. 2004) (acknowledging applicability of Rule 311(a)(8) and Section 7320(a)(1)).

consideration of the arguments presented in the parties' briefs and at argument, this Court declined Defendants' request to transfer any of the counts of Plaintiff's Amended Complaint to arbitration. Upon further consideration, under the Federal Arbitration Act, this Court believes that it should have referred Counts, I, III, V, VI, VIII, X-XIII, XV and XVII-XIX to arbitration as to parties Ryan, Dolan and Voyager Group, LP.

* * *

At this early point in the proceedings the only facts that have been put forth are those presented by the Plaintiffs; the Defendants have not answered the Complaint, and thus have not confirmed or denied any allegations. Consequently, for the sake of making our determination on this motion we therefore rely on the Plaintiffs' alleged facts.

In February, 2001 Plaintiff Ryan and Defendant Dolan (as the Sole Member of Defendant 1776 Holdings, LLC, acting as the General Partner for Defendant Voyager Group, LP) signed an Operating Agreement (the "Agreement") for the purpose of forming a company called Voyager Jet Center, LLC (the "Company"). The purpose of the Company was to operate an aircraft flight center out of the Allegheny County Airport. The contributions of the two signing parties were to be as follows: Voyager Group, LP would contribute $100,000 of capital investment and a small number of jets, and Ryan would assign all his rights and interests in Aviation Manager Services, Inc., a jet management company that Ryan owned and operated for the past year. As a result, Voyager Group, LP would gain a 66.67% interest in the Company, and Ryan would acquire a 33.33% interest in the Company. Ryan and Dolan were listed as Managers of the Company.

The Agreement included the following clauses of note:

- a dispute resolution provision stating that "[a]ny controversy or claim arising out of or relating to the Operating Agreement or any breach thereof shall be settled by binding arbitration in accordance with the United States Arbitration Act [*sic*]…"; (Agreement, ¶ 15.1) and

- a third-party beneficiaries provision, stating that "[t]he provisions of this agreement are intended

> solely for the benefit of the Members and the Managers and create no rights or obligations enforceable by any third party, including creditors of the Company, except as otherwise provided by applicable law." (Agreement, ¶ 15.10).
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> In April, 2005, one or more of the Defendants, without Ryan's knowledge, amended the name of the Company from Voyager Jet Center, LLC to VJC, LLC. Immediately thereafter one or more of the Defendants created a new company with the now available name of Voyager Jet Center, LLC ("Voyager Jet Center II"). From this point on Ryan continued to work for and negotiate leases for "Voyager Jet Center, LLC", unaware that this title now referred to a new entity, and that his efforts were on behalf of a completely different company in which he had no ownership interest. The leases, contracts, and assets of the Company did not appear to change in any way.
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> In January of 2012, Ryan attempted to activate the mandatory buy-out provision included in the Agreement. In response, Ryan was informed that the Agreement did not apply to the "Voyager Jet Center, LLC" that he was working for, and that he had no interest in said company. Upon receiving this information, Plaintiffs immediately began legal proceedings.

Trial Court Opinion, 1/10/13, at 2-6.

Although Judge Ward initially overruled the Preliminary Objections *in toto*, she reconsidered her ruling and now requests our Court to affirm in part and reverse in part. We agree with Judge Ward's current analysis.

Our standard of review is as follows:

> Our review of a claim that the trial court improperly denied the appellant's preliminary objections in the nature of a petition to compel arbitration is limited to determining whether the trial court's findings are supported by substantial evidence and whether the trial court abused its discretion in denying the petition.

Pisano v. Extendicare Homes, Inc., ___A.3d___, 2013 PA Super 323 (8/12/13) (citation omitted).

As Judge Ward noted, "[a]t this early point in the proceedings the only facts that have been put forth are those presented by the Plaintiffs; the Defendants have not answered the Complaint, and thus have not confirmed or denied any allegations." Trial Court Opinion, at 4. Relying upon Plaintiffs' alleged facts, as the trial court did, it appears that the Defendants are seeking to enforce the arbitration clause of the Operating Agreement after they unilaterally absented themselves from the agreement by dissolving the original company and re-forming another, similarly named, company without informing Ryan.

In determining that some of the claims should be decided in arbitration and others should remain before the Court of Common Pleas, the trial court specifically relied on two clauses in the agreement: Paragraph 15.1, regarding dispute resolution and Paragraph 15.10, regarding third-party beneficiaries.

Paragraph 15.1 is broadly stated, encompassing "any controversy or claim arising out of or relating to the Operating Agreement or any breach thereof shall be settled by binding arbitration in accordance with the United States Arbitration Act, Title 9, United States Code…".

However, Paragraph 15.10 limits the effect of paragraph 15.1 (among other paragraphs) to "Members and Managers and creates no rights or

obligations enforceable by any third party, including creditors of the Company, except as otherwise provided by applicable law."

In reviewing the denial of a motion to compel arbitration, we must determine whether the trial court's findings are supported by substantial evidence and whether the trial court abused its discretion in denying the petition (or, as in this matter, preliminary objection). ***Dodds v. Pulte Home Corporation***, 909 A.2d 348 (Pa. Super. 2006). There are multiple benchmarks used to conduct this review.

We employ a two-part test, determining whether there is a valid arbitration agreement and then, whether the dispute falls within the scope of that agreement. ***Elwyn v. DeLuca***, 48 A.3d 457 (Pa. Super. 2012). We are also cognizant of the fact that arbitration is a matter of contract. ***Id***. While "the courts of this Commonwealth strongly favor the settlement of disputes by arbitration",[2] "arbitration agreements are to be strictly construed and such agreement should not be extended by implication."[3] "The scope of an arbitration agreement is determined by the intention of the parties as ascertained in accordance with the rules governing contracts generally." ***Smay v. E.R. Stuebner, Inc.***, 864 A.2d 1266, 1273 (Pa. Super. 2004)

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[2] ***Smith v. Cumberland Group, Ltd.***, 687 A.2d 1167, 1171 (Pa. Super. 1997).

[3] ***Elwyn***, 48 A.3d at 461.

(citation omitted). "In general, only parties to an arbitration agreement are subject to arbitration. However, a non-party, such as a third party beneficiary, may fall within the scope of an arbitration agreement if that is the parties' intent." ***Id.***, at 1271.

We note, too, the Federal Arbitration Act[4] was invoked in Paragraph 15.1. The United States Supreme Court has recognized and accepted the fact that application of a valid arbitration clause may produce piecemeal litigation. ***See KPMG LLP v. Cocchi***, 132 S.Ct. 23 (U.S. 2011) (*per curiam*) *citing* ***Dean Witter Reynolds Inc. v. Byrd***, 470 U.S. 213, 217 (1985).

With these standards in mind, our review of the certified record leads to the conclusion that the trial court's order denying the preliminary objections *in toto* should be affirmed in part and reversed in part, in accordance with the trial court's opinion filed January 10, 2013. Judge Christina A. Ward determined the arbitration clause is facially valid and the scope of the **subject** matter of the clause is broad enough to encompass all of the allegations raised. However, the beneficiary clause, Paragraph 15.10, specifically states that the Agreement is meant to benefit only the "Members and Managers" of the Company. Therefore, those claims involving Ryan, James J. Dolan and the Voyager Group, LP, fall under the terms of the Agreement and are required to be heard in binding arbitration.

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[4] "United States Arbitration Act, Title 9, United States Code." ***See*** ¶ 15.1, Operating Agreement.

We also agree with Judge Ward's determination that the remaining defendants, those other than Dolan and the Voyager Group, LP, cannot be classified as either Members or Managers. Therefore, we believe the trial court also correctly determined that claims raised against those defendants fall outside the intended scope of the Agreement.

There are circumstances in which non-signatory, third parties, such as the remaining defendants here, *can* be included under an arbitration provision. **See *Smay***, ***supra***; ***Dodds***, ***supra***. However, those cases do not require the inclusion of non-signatories in all circumstances. Further, in those cases our Court was only asked to interpret the subject matter clauses to determine the applicability of the arbitration clause and so determined the broad scope of subject matter evidenced the intent to arbitrate the related claims. Therefore, those cases do not address the instant circumstances in which there is other applicable limiting language. Accordingly, the generic language of "other applicable law," found in Paragraph 15.10 of the Operating Agreement, does not act to negate the specific language limiting application of the agreement to Members and Managers, found in the same paragraph.

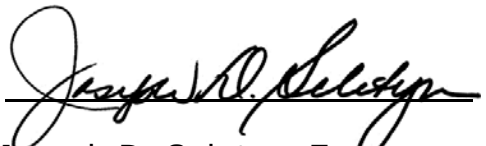
Finally, while judicial economy is served by trying all claims together, as noted, the FAA both contemplates and allows for the piecemeal litigation fashioned by Judge Ward. While judicial economy is a factor to be considered, it should not supplant the intent of the parties.

Therefore, we agree with the trial court that Counts I, III, V, VI, VIII, X-XIII, XV, and XVII-XIX as to Ryan, Dolan and Voyager Group, LP, should be, and hereby are, referred to binding arbitration as set forth in the Agreement. All other counts as they apply to all other defendants are to remain under the jurisdiction of the Court of Common Pleas of Allegheny County.

Because the trial court abused its discretion in denying, *in toto*, Defendants' Preliminary Objections to compel arbitration and based on the foregoing, we affirm in part and reverse in part.

Order affirmed in part and reversed in part. Case remanded for action consistent with this decision. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/27/2013