IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JULIE N. BROWN, an individual,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 3190-VCP
	)	
T-INK, LLC,	)	
a Delaware limited liability company,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: October 3, 2007
Decided: December 4, 2007
Revised: December 18, 2007

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PARSONS, Vice Chancellor.

This is an action by one party to an LLC agreement, Julie N. Brown, against another party to that agreement, T-Ink, LLC, seeking to enjoin T-Ink from proceeding with an arbitration before the American Arbitration Association ("AAA"). The matter is currently before this Court on T-Ink's motion to dismiss for lack of subject matter jurisdiction and Brown's renewed motion for preliminary injunction. The key issue as to both motions is one of substantive arbitrability and who should decide that issue, the court or the arbitrator.

I. BACKGROUND AND PROCEDURAL HISTORY

A. The Parties

Plaintiff, Julie N. Brown, is an individual who resides in Wayne County, Michigan.[1] Brown is the founder and principal shareholder of Plastech Engineered Products, LLC, a company located in Michigan. Plastech is a Tier-1 supplier of highly engineered plastic products to the automotive industry, with annual revenues over $1 billion.[2]

Defendant, T-Ink, LLC, is a Delaware limited liability company whose principal place of business is in New York, New York.[3] T-Ink invents, develops, and markets conductive ink technology.[4]

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1 Verified Compl. for Inj. Relief ("Compl.") ¶ 1.

2 *Id.* ¶ 3.

3 *Id.* ¶ 2.

4 Aff. of Andrew Ferber ("Ferber Aff.") ¶ 2.

B. The LLC Agreement

In early 2006, Brown and T-Ink entered into discussions about bringing conductive ink technology to the automotive industry.[5] Brown alleges that T-Ink made various representations to her to induce Brown to enter into business with it by way of a limited liability company agreement, and to contribute millions of dollars to that business. T-Ink's representations included that its conductive ink technology was "unique" and had numerous potential automotive applications, that it was "production ready" for applications to replace wires and switches, among other things, that the technology was protected by seven United States patents, and that T-Ink had a manufacturing facility in Florida. Brown alleges that she relied on these representations to her detriment, but they turned out to be false.[6]

On or about May 30, 2006, Brown and T-Ink formed Ink-Logix LLC, a Delaware limited liability company.[7] The members of Ink-Logix are Brown (45%), T-Ink (45%), and Jeffrey R. Engel (10%), each of whom is a signatory to the Limited Liability Company Agreement of Ink-Logix, f/k/a P-Inc, LLC (the "LLC Agreement").[8]

For disputes among the parties, the LLC Agreement states, in relevant part:

> 16.15 WAIVER OF JURY TRIAL. EACH OF THE PARTIES HERETO HEREBY IRREVOCABLY WAIVES

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5 Aff. of Julie N. Brown ("Brown Aff.") ¶ 3; Ferber Aff. ¶ 4.

6 Compl. ¶¶ 8-12, 16.

7 Ink-Logix was formerly known as P-Inc Holdings, LLC, a Delaware limited liability company.

8 Compl. Ex. A, LLC Agreement, § 11.1.

ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY.

16.16 Resolution of Conflicts; Arbitration.

(a) In the event that any dispute arises between the parties hereto *concerning the interpretation or performance of this Agreement*, the objecting party shall serve upon the non-objecting parties written notice of its objection. Each of the parties shall attempt in good faith to resolve such dispute within thirty (30) days after receipt by the non-objecting party of such written notice. If the parties should successfully resolve their dispute, a memorandum setting forth such agreement shall be prepared and signed by such parties.

(b) If no such agreement can be reached after a good faith negotiation during the thirty (30) day period provided in subparagraph (a) above, then either the objecting party or any of the non-objecting parties may, by written notice to the other, demand arbitration of the matter. Any such arbitration shall be administered by the American Arbitration Association (the "AAA"). The arbitration shall be conducted in accordance with the Commercial Rules of Arbitration of the AAA in effect at the time of the arbitration, except as they may be modified by agreement of the parties. The sole arbitrator shall be selected by the AAA and shall be experienced in commercial transactions and arrangements similar to those comprising the subject matter of the arbitration. The decision of the sole arbitrator shall be final, binding and conclusive upon the parties. This agreement to arbitrate and any order or judgment rendered by the sole arbitrator pursuant hereto shall be specifically enforceable in any court of competent jurisdiction. Jurisdiction of such sole arbitrator shall be exclusive as to any dispute arising hereunder. The arbitration shall be conducted in the state of Delaware.[9] The counsel fees, witness costs and expenses, and

[9] Section 5702(a) of the Delaware Uniform Arbitration Act ("DUAA") provides: "The making of an agreement described in § 5701 providing for arbitration in this State confers jurisdiction on the Court to enforce the agreement under this chapter

> all other costs and expenses incurred, directly or indirectly, by the parties in connection with said arbitration shall be divided between the parties pro rata in accordance with the extent to which they have prevailed on their claims, unless the sole arbitrator for good cause determines otherwise in his or her order. The parties agree to cooperate in the timely conduct of any such arbitration proceedings.[10]

Section 16.16, therefore, provides for arbitration before the AAA of any dispute arising between the parties to the LLC Agreement "concerning the interpretation or performance of th[e] Agreement." In addition, the arbitration clause requires a two-step process. First the objecting party must give written notice of its objection to the nonobjecting parties, after which all the parties must attempt in good faith to resolve the dispute through negotiation. If after thirty days the parties are still unable to agree, the second step is for a party to demand arbitration of the matter.

C. T-Ink's June 13, 2007 Letter

After a number of months, a dispute arose between T-Ink and Brown regarding Ink-Logix. On June 13, 2007, T-Ink sent a letter to Brown (the "June 13 Letter"), providing written notice of its grievances against Brown, purportedly pursuant to § 16.16(a) of the LLC Agreement.[11] In six enumerated paragraphs, T-Ink aired its grievances, albeit in an uncategorized fashion. By way of example, numbered paragraphs 1 and 2 state:

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and to enter judgment on an award thereunder . . . ." 10 *Del. C.* § 5702(a). Here, the term "Court" refers to the Delaware Court of Chancery.

[10] Compl. Ex. A §§ 16.15, 16.16 (emphasis added).

[11] Brown Aff., Ex. A, the June 13 Letter.

> 1. Since the beginning of 2007 even after we met, agreed and approved going to the Magic Show in Las Vegas to help drive the textile business, you stopped all funding of the Textile Series. T-Ink picked up the expense of the show and has continued all funding of the Textile Series. We have requested that Gary Borushko [Plastech's CFO] set up a meeting with the T-Ink CFO to not only review the expenses that T-Ink continues to incur on behalf of Ink-Logix but understand if on an ongoing basis what your commitment to the Series will be.
>
> 2. In 2006 in accordance with the Ink-Logix budget, T-Ink submitted reports detailing expenses that T-Ink incurred in support of Ink-Logix. You confirmed in e-mails to me [Andrew Ferber] and John [Gentile] that you would reimburse T-Ink for these expenses. The expenses were submitted in two parts and both were approved. T-Ink received a check from Plastech for the first grouping of expenses but there is still a balance of approximately $85,000 for the second grouping. I am requesting that you follow through on your email commitment and reimburse all monies you agreed to, to T-Ink immediately.

In addition to the enumerated paragraphs, T-Ink made a few other points in the June 13 Letter. For example, T-Ink asserted that it was "anxious to agree (if possible) on the terms of [Brown's] exit" from the Ink-Logix joint venture, but noted that Brown continued to bear contractual commitments and fiduciary responsibilities to the joint venture and that in the interim certain issues needed to be resolved. T-Ink also reminded Brown to "maintain the confidentiality of Ink-Logix in terms of its technology, customer contacts and all other matters pertaining to the business." The letter concluded by stating that it represented written notice under § 16.16(a) of the LLC Agreement of T-Ink's objections to the manner in which Brown was performing under the Agreement and expressing the hope that the parties could settle their differences and avoid arbitration.

D. Actions Taken on July 23, 2007

The parties failed to resolve their differences after the June 13 Letter. Consequently, the parties each took certain actions on July 23, 2007. The order in which these actions occurred is not entirely clear, but it is not relevant to my decision.

1. Federal Court Action

Brown, on or about July 23, 2007, filed a complaint against T-Ink in a federal district court in Michigan (the "Federal Court Action").[12] The complaint alleged, among other things, that T-Ink fraudulently induced Brown to enter into the LLC Agreement by making various misrepresentations.[13] Based on the alleged misrepresentations, Brown asserted claims for dissolution of Ink-Logix and recission of the LLC Agreement.[14]

2. State Court Action

Also, on July 23, 2007, T-Ink and Ink-Logix filed a lawsuit against Plastech, Brown's company and the vehicle through which she participated in Ink-Logix, in

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[12] Aff. of Philip M. Smith ("Smith Aff."), Ex. A, Fed. Ct. Action Compl. The filing stamp on the Federal Court Action Complaint indicates that it actually was filed on July 24, 2007, rather than on July 23, as Brown alleged.

[13] Specifically, Brown alleged that T-Ink representatives falsely claimed that: (1) the T-Ink technology was unique; (2) the technology had numerous potential automotive applications; (3) the technology was "production ready"; (4) automotive technology applications could be marketed, sold, and manufactured under the protection of seven U.S. patents; (5) T-Ink had a manufacturing facility in Florida that could be used in the venture; (6) by entering into the LLC Agreement, Brown would receive valuable rights in the LLC and the technology; (7) the arbitration clause contained in the LLC Agreement was just and reasonable under the circumstances; and (8) Brown's multi-million dollar investment would be profitably invested in the manufacturing, selling, and marketing of the technology. Fed. Ct. Action Compl. ¶ 20.

[14] Fed. Ct. Action Compl. ¶¶ 19-39.

Michigan state court (the "State Court Action").[15] Although it does not name Brown as a defendant, T-Ink's complaint alleges that Brown, individually and through Plastech, misappropriated Ink-Logix technology and sold goods utilizing the Ink-Logix technology. T-Ink also asserted an array of common law tort claims, which include: misappropriation of Ink-Logix's trade secrets; conversion of the Ink-Logix technology and customer account funds; defamation regarding Ink-Logix's continued existence as a company and the viability of the Ink-Logix technology; unfair competition based on Plastech's alleged selling and marketing of goods with Ink-Logix technology; and unjust enrichment through Plastech's alleged use of the Ink-Logix technology without having incurred the development costs.[16] The relief sought in the State Court Action includes a request for an injunction to enjoin Plastech from using the Ink-Logix technology for its own purposes, defaming T-Ink and Ink-Logix, and otherwise unfairly competing with T-Ink and Ink-Logix.[17]

The Michigan state court denied a request by T-Ink for a temporary restraining order, but agreed to conduct a preliminary injunction hearing, originally scheduled for September 12, 2007. T-Ink, however, unilaterally adjourned that hearing until a future, unspecified date.[18] Plastech has asserted third-party claims against John Gentile and Andrew Ferber, agents of T-Ink, as well as a counterclaim against T-Ink and Ink-Logix.

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15 Smith Aff., Ex. B, State Ct. Action Compl.

16 *Id.* ¶¶ 20-46.

17 *Id.* ¶¶ 46-55.

18 Smith Aff. ¶5.

Citing the fact that a substantial portion of T-Ink's allegations in the State Court Action pertain to her individually, Brown moved to intervene in that case. The Michigan state court granted Brown's motion over T-Ink's objections.

3. Demand for Arbitration

On July 23, 2007, T-Ink also submitted a demand for arbitration to the AAA, thereby initiating that proceeding (the "Arbitration"). In the demand, T-Ink described the nature of the dispute as involving claims for fraud, breaches of contract, and breaches of fiduciary duty. Specifically, T-Ink asserted that Brown fraudulently induced T-Ink, by making material misrepresentations that T-Ink relied upon, to enter into the May 2006 LLC Agreement to form and operate Ink-Logix and to contribute certain proprietary intellectual property. Additionally, T-Ink claimed that after the execution of the LLC Agreement, Brown materially breached her contractual obligations. In terms of relief, T-Ink sought recission of the LLC Agreement, an injunction, and an award of damages suffered by T-Ink as a result of Brown's "improper conduct including, but not limited to, [Brown's] alleged fraud, breaches of contract, and breaches of fiduciary duty," as well as attorney fees, interest, and arbitration costs.[19]

E. The Delaware Action

Brown filed a complaint and motion for preliminary injunction in this Court on August 29, 2007 (the "Delaware Action"), seeking to enjoin T-Ink from proceeding against her in the Arbitration and to stay the Arbitration pending final resolution of the

[19] Compl. Ex. B, Initial Arbitration Demand.

parties' claims in the Michigan courts.[20] T-Ink moved to dismiss Plaintiff's complaint on September 11, for lack of subject matter jurisdiction. The Court scheduled argument on both of those motions for October 3, 2007.

F. First Amended Demand for Arbitration

On October 1, 2007, on the eve of argument in the Delaware Action, T-Ink amended its demand for arbitration before the AAA. In the amended demand, T-Ink abandoned its claims of fraud and material misrepresentation. Thus, T-Ink limited its claims in the Arbitration to breaches of contract and breaches of fiduciary duty. Specifically, T-Ink alleged that Brown materially breached her obligations under the LLC Agreement and her fiduciary duties to T-Ink. T-Ink continued to seek all appropriate remedies, including without limitation, recission of the LLC Agreement, an injunction, and damages, as well as attorney fees, interest, and arbitration costs.

G. The October 3, 2007 Argument

On October 3, 2007, this Court heard argument on T-Ink's motion to dismiss and Brown's motion for a preliminary injunction. One major issue raised by those motions was whether T-Ink and Brown, as parties to the LLC Agreement, had agreed to arbitrate the matters asserted by T-Ink in its arbitration demand. The primary focus of the argument, however, involved the preliminary issue of whether this Court or the arbitrator

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[20] Although Brown initially requested a stay, more recently, in her renewed motion for preliminary injunction, Brown accepted this Court's suggestion that a request for a stay of any arbitrable claims should be addressed to the Michigan courts. Accordingly, Brown effectively has withdrawn that aspect of her original motion, and the Court will not address it further. Pl.'s Renewed Mot. for a Prelim. Inj. ("PRM") at 3 n.1.

had jurisdiction to decide the question of substantive arbitrability, *i.e.*, to decide whether the parties had agreed to submit the claims asserted by T-Ink to arbitration.

On the issue of substantive arbitrability, Brown argued that this Court had jurisdiction to determine arbitrability under well-settled Delaware and federal law which confers such jurisdiction on the Court and not the arbitrator in circumstances, such as this case, where the parties had not clearly and unmistakably agreed that the arbitrator should determine the question of arbitrability. T-Ink interpreted the LLC Agreement differently, and citing the *Willie Gary* decision of the Delaware Supreme Court,[21] argued that because the parties referenced the AAA rules for arbitration and employed a broad arbitration provision in the LLC Agreement, they clearly and unmistakably agreed that the arbitrator should determine questions of arbitrability. At argument I expressed my tentative view, based upon my preliminary reading of the LLC Agreement and the applicable caselaw, that the Court had jurisdiction to determine substantive arbitrability.

As to whether T-Ink had the right to arbitrate the claims it sought to, T-Ink's filing of its first amended demand for arbitration on the eve of the October 3 argument materially changed the nature of that issue. During briefing, T-Ink sought to assert the following three types of claims before the arbitrator: (1) fraud in the inducement; (2) breach of contract; and (3) breach of fiduciary duty. As I indicated at argument, my preliminary view was that the fraud in the inducement claim fell outside the scope of

[21] *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76 (Del. 2006).

what the parties had agreed to submit to arbitration.[22] T-Ink preempted and mooted that issue, however, by omitting any claim for fraud from its amended demand for arbitration. The parties also agreed at argument that claims for breach of the LLC Agreement concerned its "interpretation or performance" and therefore were arbitrable, thus largely mooting that issue, as well. On the remaining category, claims for breach of fiduciary duty, Brown effectively conceded that to the extent any such claim is based on failures to act in accordance with the LLC Agreement or is otherwise tied to the Agreement, the claim would be arbitrable.[23]

Another area of dispute related to whether the June 13 Letter provided sufficient notice of the claims to be arbitrated and whether T-Ink could use certain catch-all language in that letter to submit additional claims to the arbitrator. Yet, by the end of the argument the parties appeared close to agreement on that issue, as well. In particular, counsel for both parties evinced a willingness to proceed on the basis that the arbitration would go forward on the breach of contract and breach of fiduciary duty claims fairly within the scope of the June 13 Letter.[24]

Based on those developments, I indicated that, although I did not expect to grant the motion to dismiss for lack of subject matter jurisdiction, I probably would not

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22 Tr. at 42-43.

23 *See* Tr. at 46.

24 Tr. at 45, 59-60.

preliminarily enjoin the arbitration because there did not appear to be a continuing dispute as to its scope. In addition, I stated:

> If it turns out that we get to the stage in the arbitration that something funny is happening and new things are starting to come in, or whatever, this Court is here and it acts quickly when it needs to. Then probably my views won't be much different than they are today, right at this moment.[25]

At the conclusion of the argument on October 3, Brown's counsel stated that he would confer with T-Ink's counsel to see if they could dispose of the motion for preliminary injunction by stipulation. This Court did not hear from either side again until November 15, 2007.

H. Proceedings before the Arbitrator

Two weeks later, on October 17, 2007, the parties participated in a preliminary conference in the Arbitration before the arbitrator, Lois W. Abraham, and agreed upon an arbitration schedule.[26] On October 23, the arbitrator memorialized the schedule in a scheduling order. As required by the scheduling order, on November 5, both parties submitted opening briefs regarding certain jurisdictional issues. On November 14, the parties submitted opposition briefs on those issues.

In its briefs, T-Ink requested a determination that all of its claims were within the scope of the arbitration clause. Specifically, T-Ink argued that its amended demand for arbitration sought four causes of action: (1) breach of contract; (2) breach of fiduciary

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[25] Tr. at 61, 69.

[26] Letter from Gregory V. Varrallo to the Court dated Nov. 19, 2007, Ex., Arb. Scheduling Order.

duty; (3) recission; and (4) injunctive relief, all of which, T-Ink claimed "arise out" of the "interpretation or performance" of the LLC Agreement.[27] T-Ink also stated that the list of Brown's breaches of the LLC Agreement is not exhaustive, reserving the right to "revise the list as it determines the extent of Brown's wrongdoing through discovery and otherwise."[28] Additionally, T-Ink argued that Brown's claims, asserted in state court, should be arbitrated. Brown's claims include: breach of fiduciary duty, misrepresentation, unjust enrichment, breach of settlement agreement, request for injunctive relief, and recission of the LLC Agreement.[29] Finally, T-Ink requested a determination that it was not required to specifically allege all claims, state all of its factual allegations, or cite to specific provisions in the contract in the June 13 Letter for those claims and allegations to be raised in arbitration.[30]

In her briefs, Brown argued that the LLC Agreement's arbitration clause limited the scope of the arbitration to only those disputes concerning the "interpretation or performance" of the Agreement that were set forth in a written pre-arbitration notice. Brown asserted that T-Ink served a single notice letter on June 13, 2007. According to Brown, the June 13 Letter contained six enumerated items that purportedly fall within the

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27 T-Ink's Opening Br. in Supp. of Jurisdiction of AAA to Resolve T-Ink's and Brown's Claims and in Opp'n to Brown's Expected Req. for a Stay of Proceedings ("T-Ink's Op. Arb. Br.") at 9.

28 *Id.* at 10 n.5.

29 *Id.* at 14.

30 T-Ink's Response Br. to Brown's Op. Br. Regarding Jurisdiction of the Arbitration at 10.

scope of the arbitrable disputes concerning the "interpretation or performance" of the Agreement. Brown contended, however, that most of the enumerated items involved matters that are not subject to arbitration.

I. Brown's Renewed Motion for a Preliminary Injunction

On or about November 15, 2007, Brown filed a renewed motion for preliminary injunction, with an accompanying letter, in which she advised the Court that, contrary to the tenor of the October 3 argument, the arbitrability issues remained unresolved and requested a conference on those issues. Several days later, on November 19, T-Ink responded by letter to Brown's renewed motion, informing the Court that the arbitrator was scheduled to rule on the jurisdictional issues on November 27.[31] Further, T-Ink stated that, based on the positions taken by the parties in Michigan and in the Arbitration, it then appeared that an Order from the Court setting forth its rulings on T-Ink's motion to dismiss and Brown's motion for preliminary injunction might help clarify the situation.

II. ANALYSIS

This case is before the Court on two motions – Brown's renewed motion for preliminary injunction and T-Ink's motion to dismiss. As a threshold matter, I first address whether federal or state law applies.

The Federal Arbitration Act (the "FAA"), 9 U.S.C. § 2, provides that:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or

[31] The parties later agreed jointly to ask the arbitrator to defer any ruling until December 4, 2007.

> transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[32]

The term "commerce" is defined, in relevant part, as "commerce among the several States or within foreign nations."[33] Here, the LLC Agreement contemplates business transactions with a worldwide focus. Therefore, the LLC Agreement arguably falls under the FAA.

Parties may contract, however, for their arbitration to proceed under rules other than the FAA. To do so, the parties must demonstrate unequivocally an intent to displace the default federal standard.[34] Here, the LLC Agreement contains a choice of law clause, which provides that it "shall be governed by and interpreted in accordance with the laws of the State of Delaware (without regard to the conflict of laws provided therein)."[35] Nevertheless, the courts have held that a generic choice-of-law provision, standing alone, such as the provision in the LLC Agreement, is insufficient to support a finding that the parties intended to opt out of the FAA's default standards.[36] Therefore, federal law, and not state law, applies in this case.

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32 FAA, 9 U.S.C. § 2.

33 *Id.* § 1.

34 *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293-300 (3d Cir. 2000); *Jacada, Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 710-12 (6th Cir. 2005).

35 Compl. Ex. A § 16.6.

36 *Roadway Package Sys.*, 257 F.3d at 296; *Jacada, Ltd.*, 401 F.3d at 712.

While federal law applies, the application of either federal or Delaware law likely would produce the same outcome in the pending dispute. As to T-Ink's motion to dismiss for lack of subject matter jurisdiction over questions of substantive arbitrability, both parties rely heavily on *Willie Gary*,[37] a Delaware Supreme Court case that adopted and applied federal law. As the Court noted in *Willie Gary*, Delaware law mirrors federal law on the issue of substantive arbitrability. Thus, the resolution of the two pending motions would be the same whether this Court applied federal or Delaware law.

Similarly, as to T-Ink's motion to dismiss for lack of subject matter jurisdiction over questions of procedural arbitrability, the application of federal or Delaware law would not likely alter the outcome. Although Brown relies on DUAA § 5703(b),[38] even under Delaware law, that section does not apply to the circumstances of this case. Section § 5703(b) provides:

> Subject to subsection (c) of this section, a party who has not participated in the arbitration and who has not been made or served with an application to compel arbitration may file its complaint with the Court seeking to enjoin arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation of § 5702(c).[39]

To invoke § 5703(b), a party must not have participated in the arbitration *and* must not have been made or served with an application to compel arbitration. Because Brown received a demand for arbitration and an amended demand for arbitration, she does not

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37 *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76 (Del. 2006).

38 10 *Del. C.* § 5703(b).

39 *Id.*

satisfy § 5703(b)'s second prerequisite. Further, Brown appears not to have met the other prerequisite either in that she participated in at least one scheduling conference and submitted two rounds of briefing to the arbitrator. Therefore, I consider Brown's reliance on DUAA § 5703(b) misplaced.[40]

A. Motion to Dismiss

T-Ink seeks to dismiss this action on the grounds that the Court lacks subject matter jurisdiction. T-Ink asserts that Brown's complaint addresses two issues – substantive arbitrability (*i.e.*, whether T-Ink's claims are arbitrable) and procedural arbitrability (*i.e.*, whether T-Ink complied with the terms of the arbitration clause of the LLC Agreement). According to T-Ink, both of these issues are committed to the arbitrator, and this Court therefore lacks subject matter jurisdiction over them.

1. Substantive arbitrability

T-Ink contends that Brown and T-Ink, in the LLC Agreement, committed the question of substantive arbitrability to the arbitrator. T-Ink argues that *Willie Gary* adopted the majority federal view that when an arbitration clause generally provides for arbitration of all disputes and also references the AAA rules, the clause evidences a "clear and unmistakable" intent by the parties to submit the question of substantive arbitrability to the arbitrator. T-Ink cites § 16.16(b) for the proposition that the LLC Agreement generally refers all disputes to arbitration and adopts the AAA Commercial

[40] The Court also notes that Brown failed to cite a single case applying § 5703(b) in the manner she urges.

Arbitration rules.[41] Further, T-Ink contends that while the Court in *Willie Gary* found a carve-out provision for actions for injunctions and certain other forms of relief, the LLC Agreement does not include such a carve-out.

To buttress its position, T-Ink cites the *AT&T Technologies* decision of the United States Supreme Court[42] for the proposition that §§ 16.16(a) and 16.16(b) combine to create a broad arbitration agreement. T-Ink asserts that in *AT&T*, the Court characterized the following arbitration clause as broad: "any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder."[43] T-Ink argues that the arbitration clause in the LLC Agreement uses very similar language, and therefore is also a "broad" arbitration clause.

Additionally, T-Ink downplays the significance of § 16.15 upon which Brown relies to demonstrate that § 16.16 does not refer all disputes to arbitration. According to T-Ink, § 16.15 merely constitutes a boilerplate jury-trial-waiver provision that ensures that neither party can claim to have been deprived of its Constitutional right to a jury if arbitration is commenced, and does not counsel against a broad construction of the arbitration clause.

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41 T-Ink quotes § 16.16(b), adding emphasis, as follows: "The arbitration shall be conducted in accordance with the Commercial Rules of Arbitration of the AAA in effect at the time of the arbitration, except as they may be modified by agreement of the parties. . . . Jurisdiction of such sole arbitrator shall be exclusive as to *any dispute arising hereunder*." Def.'s Op. Br. in Supp. of its Mot. to Dismiss and in Opp'n to Pl.'s Mot. for Prelim. Injunction at 6-7.

42 *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643 (1986).

43 *Id.* at 650.

Brown responds that the issues of subject matter jurisdiction and arbitrability are coextensive and conflated by T-Ink's motion. Further, Brown, citing to *Willie Gary*, argues that the Court, not the arbitrator, must determine substantive arbitrability under the LLC Agreement. She contends that, under *Willie Gary*, a court generally decides questions of substantive arbitrability, unless the parties "clearly and unmistakably" provide otherwise. Indeed, Brown, in near agreement with T-Ink, asserts that only when the arbitration clause both serves to refer any and all disputes to arbitration and refers to the AAA rules should an arbitrator decide questions of substantive arbitrability. According to Brown, that is not the case here.

Brown denies that the parties agreed to refer all disputes to arbitration. She draws support for her contention from the relatively narrow language of § 16.16, which refers only those disputes that concern the "interpretation or performance" of the LLC Agreement to arbitration. Brown contrasts this language to the broader language of the AAA's suggested arbitration clause and § 16.15. For drafting a standard arbitration clause, the AAA recommends the following language: "Any controversy or claim *arising out of or relating to this contract, or the breach thereof*, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules . . . ."[44] Similarly, § 16.15, the jury-trial-waiver clause, broadly relates to any legal proceeding "arising out of or related to" the LLC Agreement "or the transactions contemplated hereby." In contrast to the AAA's suggested arbitration clause

[44] http://www.adr.org/sp.asp?id=22440#A2 (emphasis added).

and § 16.15, Brown notes that the arbitration clause refers only to disputes concerning the "interpretation or performance" of the LLC Agreement. Based on these distinctions, Brown argues that the arbitration clause is limited in scope and does not evidence a "clear and unmistakable" intent to refer questions of substantive arbitrability to an arbitrator.

Further, Brown, responding to T-Ink, argues that § 16.15 is not simply a clause inserted out of an abundance of caution to ensure that the arbitration is not subject to a defense that the claims must be tried before a jury. Rather, Brown asserts that the clause contemplates legal proceedings in the courts, as well as potential arbitration claims. Brown also cites §§ 5.5 and 13.1(b)(iii) of the LLC Agreement as additional examples where the parties contemplated judicial involvement in at least some of their disputes relating to the Agreement. Brown argues that these examples bolster the conclusion that the parties did not intend the LLC Agreement to refer any and all disputes to arbitration.

In considering a motion to dismiss for lack of subject matter jurisdiction, the court must address the nature of the wrong alleged and the available remedy to determine whether a legal, as opposed to an equitable remedy, is available and sufficiently adequate.[45] If a claim is properly committed to arbitration, this Court will not accept jurisdiction because, in such circumstances, arbitration is an adequate legal remedy.[46] This comports with Delaware's strong public policy favoring arbitration.[47] Arbitration,

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45 *IMO Indus., Inc. v. Sierra Int'l, Inc.*, 2001 WL 1192201, at *2 (Del. Ch. Oct. 1, 2001).

46 *Id.*

47 *Id.*

however, is a consensual proceeding, and the court may not require arbitration unless the parties have a contract to arbitrate.[48] Thus, if the plaintiffs' claims are subject to arbitration, this Court will dismiss the plaintiffs' complaint for lack of subject matter jurisdiction. Hence, the threshold inquiry is whether the parties have agreed to arbitrate the disputes at issue.

Brown's complaint in the Delaware Action requests a preliminary and permanent injunction enjoining T-Ink from proceeding with the arbitration before the AAA on the ground that the parties did not agree to arbitrate certain of the claims T-Ink seeks to present to the arbitrator. This aspect of the complaint raises an issue of substantive arbitrability. Courts, not arbitrators, generally decide questions of substantive arbitrability. The opposite holds true, however, when there is "clear and unmistakable evidence" that the parties so intended. Adopting the majority federal view, the Delaware Supreme Court, in *Willie Gary*, held that in circumstances where the arbitration clause references the AAA rules and generally refers all controversies to arbitration, the arbitrator, not a court, should decide arbitrability.[49] Therefore, under *Willie Gary*, where an arbitration clause references the AAA rules, the issue boils down to whether the arbitration clause generally refers all controversies to arbitration. If not, under federal and Delaware law as articulated in *Willie Gary*, "the federal majority rule does not apply,

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[48] *Yuen v. Gemstar-TV Guide Int'l, Inc.*, 2004 WL 1517133, at *2 (Del. Ch. June 30, 2004).

[49] *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 80 (Del. 2006).

and something other than the incorporation of the AAA rules would be needed to establish that the parties intended to submit arbitrability questions to the arbitrator."[50]

As in *Willie Gary*, the LLC Agreement's arbitration clause references the AAA rules and refers some but not all controversies to arbitration. Section 16.16 refers disputes concerning the "interpretation or performance" of the LLC Agreement to arbitration, not a broader set of disputes, and certainly not all disputes. This language in § 16.16 is significant, especially when contrasted with the broader language of § 16.15, which provides: "Each of the parties hereto hereby irrevocably waives any and all right to trial by jury in any legal proceeding arising out of or related to this agreement or the transactions contemplated hereby." This language demonstrates that the drafters of the Agreement knew how to use broad language. Further, the language in § 16.15 closely parallels the approach reflected in AAA's suggested arbitration clause and the National Arbitration Forum's ("NAF") sample arbitration clause, which employ the following language, respectively: "arising out of or relating to this contract, or breach thereof,"[51] and "arising from or relating to this agreement or the relationships which result from this

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50 *Id.* at 81.

51 The AAA's suggested arbitration clause provides, in pertinent part:

> "Any controversy or claim *arising out of or relating to this contract, or the breach thereof,* shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules . . . ."

http://www.adr.org/sp.asp?id=22440#A2 (emphasis added).

agreement."[52] Section 16.16 uses far less inclusive language to describe the disputes subject to arbitration under the LLC Agreement.

I also find unpersuasive T-Ink's argument that § 16.15 is simply a boilerplate waiver of jury trial rights and is not inconsistent with their position that § 16.16 refers all disputes to arbitration. Even if § 16.15 is boilerplate, its reference to "legal proceedings," instead of arbitrations, suggests the jury trial waiver applies to both court and arbitration proceedings. The use of such broad language in the provision immediately before § 16.16 supports a reasonable inference that the narrower language of § 16.16 was intentional. Moreover, T-Ink cites the NAF for the proposition that a jury-trial-waiver provision, "[i]llustrates the parties' understanding that they are foregoing their right to a jury trial in order to have any dispute connected with the agreement resolved by binding arbitration." The NAF's sample jury-trial-waiver clause, however, specifically discusses

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[52] The National Arbitration Forum's sample arbitration clause provides, in part:

> We agree that any claim, dispute or controversy between us or claim by either of us[ ] against the other or the employees, agents or assigns of the other and any claim *arising from or relating to this agreement or the relationships which result from this agreement*, no matter against whom made, including the applicability of this arbitration clause and the validity of the entire agreement, shall be resolved by neutral binding arbitration by the National Arbitration Forum, under the *Code of Procedure* then in effect.

Nat'l Arbitration Forum, *Drafting Mediation and Arbitration Clauses* 3-4, available at http://www.adrforum.com/users/naf/resources/DraftingMediationAndArbitrationClauses5.doc (emphasis added). Notably, T-Ink cited to this same source, albeit to a different section.

jury trial waiver in the context of "any disputes decided through arbitration,"[53] unlike § 16.15 which generally references jury trial waiver "in any legal proceeding."

Because, similar to *Willie Gary*, the LLC Agreement's arbitration clause refers some but not all claims to arbitration, the federal majority rule does not apply. T-Ink failed to adduce any sufficient, additional evidence indicating a clear and unmistakable intent of the parties to refer questions of substantive arbitrability to the arbitrator. Therefore, this Court, and not the arbitrator, should resolve such issues.

The *AT&T* case, upon which T-Ink relies, is inapposite. In *AT&T*, the United States Supreme Court held that it was for the Court, not the arbitrator, to decide whether the parties to a nationwide collective bargaining agreement intended to arbitrate grievances concerning whether a layoff was predicated on "lack of work." Although the Court described as broad an arbitration clause covering, "any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder," it did so only in the sense that the disputed issue concerning the interpretation of the collective bargaining agreement had to be decided by an arbitrator. Tort claims that did not involve the "interpretation or performance" of the subject of the agreement were not at issue. Therefore, the circumstances of *AT&T* are distinguishable from this case, and T-Ink's reliance is misplaced.

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[53] The NAF's sample jury-trial-waiver clause provides: "The parties understand that they would have had a right or opportunity to litigate disputes through a court and to have a judge or jury decide their case, but they choose to have *any disputes decided through arbitration.*" Nat'l Arbitration Forum, *Drafting Mediation and Arbitration Clauses* at 4, available at http://www.adrforum.com/users/naf/resources/DraftingMediationAndArbitrationClauses5.doc (emphasis added).

Because this Court, and not the arbitrator, should hear questions of substantive arbitrability, this Court has subject matter jurisdiction over the questions of substantive arbitrability raised by Brown's complaint and her renewed motion for a preliminary injunction. Accordingly, T-Ink's motion to dismiss for lack of subject matter jurisdiction relating to issues of substantive arbitrability is not well-founded.

2. Procedural arbitrability

T-Ink also argues that questions of procedural arbitrability are reserved for the arbitrator and therefore this Court lacks subject matter jurisdiction over those aspects of Brown's claims.

Brown argues that T-Ink ignored DUAA § 5703(b), a provision Brown contends authorizes the Court to enjoin the arbitration "on the ground that the agreement was not made or has not been complied with." In particular, Brown asserts that the June 13 Letter failed to provide notice of the matter it now seeks to arbitrate. Consequently, according to Brown, this Court should enjoin T-Ink under § 5703(b) from presenting any issue not properly noticed to the arbitrator.

Unlike substantive arbitrability, questions of procedural arbitrability are presumptively for the arbitrator, and not the court, to decide.[54] The arbitrator, not the court, should decide prerequisites such as time limits, notice, laches, and estoppel. In other words, questions of procedural arbitrability, *e.g.*, whether the June 13 Letter

[54] *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *Willie Gary, LLC*, 906 A.2d at 79; *SBC Interactive, Inc. v. Corporate Media Partners*, 714 A.2d 758, 762 (Del. 1998).

provided adequate notice, should be decided by the arbitrator. Thus, T-Ink is entitled to dismissal for lack of subject matter jurisdiction of those aspects of Brown's claims premised on issues of procedural arbitrability.

B. Renewed Motion for Preliminary Injunction

Brown moves to enjoin T-Ink from arbitrating matters that do not meet each of two requirements: (1) they must be specifically enumerated in the June 13 Letter; and (2) they must concern the interpretation or performance of the LLC Agreement. Among other things, Brown seeks to enjoin T-Ink from presenting for arbitration any breach of fiduciary duty claim against Brown, except to the extent such claim is specifically identified in the June 13 Letter and arises by virtue of obligations created by the terms of the LLC Agreement, rather than by any statutory, common law, or other requirement that imposes fiduciary duties upon Brown as a consequence of the formation of Ink-Logix.

Brown argues that a preliminary injunction is proper because she is likely to succeed on the merits of her claims; she faces a threat of irreparable harm due to the imminent prospect of having to arbitrate nonarbitrable claims; and the balance of hardships tips in her favor. Regarding her likelihood of success, Brown individually addresses T-Ink's claims for breach of contract, fraud, and breach of fiduciary duty. As to T-Ink's breach of contract claims, Brown acknowledges that at least some of the claims set forth in the June 13 Letter appear to be arbitrable. Additionally, Brown argues that should the Court allow T-Ink's breach of contract claim to proceed to arbitration, in

order to ensure compliance with the precondition specified in § 16.16(a),[55] the Court should limit any arbitration to only those claims identified in the June 13 Letter. In Brown's renewed motion for preliminary injunction, she supplements her position by also asserting judicial estoppel. Brown argues that T-Ink, at the October 3, 2007 argument, represented that it would only arbitrate claims in the June 13 Letter. According to Brown, because T-Ink's counsel took that position, T-Ink should be precluded from reversing field and from pursuing broader claims in the Arbitration.

Regarding T-Ink's fraud claims, Brown argues that the LLC Agreement's arbitration clause is narrow and does not encompass extra-contractual claims for fraud. In support of that contention, Brown makes the same arguments she advanced in opposition to T-Ink's motion to dismiss, discussed in Part II.A.1, *supra*. Based on those arguments, Brown asserts she is likely to succeed in establishing that the arbitration clause in the LLC Agreement is relatively narrow and T-Ink's fraud claims fall outside its scope.

As to T-Ink's fiduciary duty claims, Brown argues that to the extent those claims arise from contractual obligations, they are duplicative of breach of contract claims, and should be precluded as a matter of law. Further, Brown argues that fiduciary duty claims that arise from general fiduciary principles under Delaware law do not, and cannot,

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[55] Section 16.16(a), in relevant part, provides: "In the event that any dispute arises between the parties hereto concerning the interpretation or performance of this Agreement, *the objecting party shall serve upon the non-objecting parties written notice of its objection*." Compl. Ex. A § 16.16(a) (emphasis added).

concern the "interpretation and performance" of the LLC Agreement and thus do not fall within the LLC Agreement's arbitration clause.

T-Ink defends the arbitrability of its claims. Regarding the breach of contract claims, T-Ink asserts that Brown conceded their arbitrability. As to the fraud claims, T-Ink contends that they are arbitrable because the LLC Agreement's arbitration provision is broad.[56] Regarding the breach of fiduciary duty claims, T-Ink argues that because Brown's fiduciary duties arise out of the Agreement and because they are central obligations under the Agreement, such claims are arbitrable. Further, T-Ink contends that because the LLC Agreement created a joint venture, it gave rise to fiduciary duties that are sufficiently related to the Agreement that they may be enforced through arbitration. Finally, T-Ink argues that because its claims are arbitrable, Brown faces no irreparable harm from proceeding with the arbitration.

1. Applicable standard

A preliminary injunction may be granted where the movants demonstrate: (1) a reasonable probability of success on the merits at a final hearing; (2) an imminent threat of irreparable injury; and (3) a balance of the equities that tips in favor of issuance of the requested relief.[57] Though there is no established formula for the relative weight of each element, at least some showing is required for each one. A strong demonstration as to

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[56] T-Ink later amended its arbitration demand, dropping its fraud claims. Further, during the October 3, 2007 hearing, T-Ink represented to the Court that it dropped its fraud claims.

[57] *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998); *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1341 (Del. 1987).

one element may serve to overcome a marginal demonstration of another.[58] A preliminary injunction, however, "will not issue if any of these three factors are not present."[59] It is an extraordinary remedy that is "granted sparingly and only upon a persuasive showing that it is urgently necessary, that it will result in comparatively less harm to the adverse party, and that, in the end, it is unlikely to be shown to have been issued improvidently."[60]

2. Reasonable probability of success on the merits

For purposes of Brown's renewed motion for preliminary injunction, the Court needs to determine which of the claims asserted by T-Ink in the Arbitration are subject to arbitration under the LLC Agreement. To determine whether a particular dispute falls within the scope of an agreement's arbitration clause, a court should undertake a two-part inquiry.[61] First, "a court must determine whether the arbitration clause is either broad or narrow in scope." Next, when evaluating a narrow arbitration clause, as the Court must here, a court "will ask if the cause of action . . . directly relates to a right in the

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58 *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998).

59 *In re Aquila Inc.*, 805 A.2d 184, 189 (Del. Ch. 2002). *See also In re Digex Inc., S'holder Litig.*, 789 A.2d 1176, 1216 (Del. Ch. 2000) (denying a preliminary injunction for one claim based on a failure to demonstrate a likelihood of success on the merits and for another claim based on the failure to demonstrate imminent irreparable harm).

60 *Cantor*, 724 A.2d at 579.

61 *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 155 (Del. 2002).

contract."[62] Absent a clear expression of intent to arbitrate a particular claim, a party has the right to have the merits of that claim adjudicated by a court.[63]

a. Contract claims

Brown acknowledges that T-Ink's breach of contract claims, set forth in the June 13 Letter, are subject to arbitration. Thus, T-Ink may proceed with the arbitration of those claims. The Court will not enjoin them.[64]

The recent briefing before the arbitrator, however, indicates that the parties disagree as to the extent to which the June 13 Letter sets forth breach of contract claims. The letter states that T-Ink "must insist that the following matters, as well as other [unspecified] matters , be resolved so that the venture can continue to operate," and then lists six single-spaced, numbered paragraphs covering a page and a half, reciting T-Ink's specific complaints.[65] In the briefing to the arbitrator, Brown acknowledged that two of those paragraphs (*i.e.*, Nos. 1 and 5) appeared to involve breach of contract claims.

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62 *Id.*

63 *Id.* at 160.

64 Assuming the Arbitration proceeds, the arbitrator's ruling may have issue or claim preclusive effect as to the Federal or State Action. As to which claims should be resolved first, I leave the determination of whether the Arbitration or one of the lawsuits should proceed first or they should proceed concurrently on parallel tracks to the Michigan courts. Parallel or duplicate proceedings are problematic, but may be necessary in some instances. Here, where only some issues go to arbitration, multiple proceedings are not surprising. As a result, questions of issue or claim preclusion or collateral estoppel or res judicata may well arise. The parties and the courts in Michigan dealing with the various substantive claims that have been asserted are in the best position to address how those matters should proceed.

65 Brown Aff., Ex. A, the June 13 Letter.

Paragraph 1 exemplifies that group and is quoted at Part I.C, *supra*. It concerns at least Brown's obligation under the LLC Agreement to fund the Ink-Logix textile series.

Because Brown concedes that paragraphs 1 and 5 of the June 13 Letter involve, at least in part, claims that concern the interpretation or enforcement of the LLC Agreement, she is not likely to succeed in enjoining the arbitration of either of those claims. Brown also challenges the adequacy of the notice given by T-Ink as to all of the paragraphs of the June 13 Letter. For arbitrable matters referred to in those paragraphs, however, questions of procedural arbitrability, such as notice, must be presented to the arbitrator.

Brown argued to the arbitrator that the four remaining paragraphs in the letter (Nos. 2, 3, 4, and 6) do not assert claims for breach of contract, and therefore are not arbitrable. Paragraph 2, for example, states that T-Ink incurred certain expenses on behalf of Ink-Logix and in keeping with its budget, and that representatives of Brown had agreed in emails to reimburse T-Ink for those expenses, but had only partially done so.[66]

The Court cannot tell from the face of the June 13 Letter whether or not paragraph 2 and the other paragraphs Brown challenges "concern the interpretation or performance of the LLC Agreement." T-Ink argues that the Agreement does not require the notice to make explicit reference to alleged breaches of specific sections of the LLC Agreement or to provide exhaustive detail as to the nature of its complaint. I consider that issue one of procedural arbitrability for the arbitrator. Furthermore, on the relatively

[66] Paragraph 2 of the June 13 Letter is quoted in Part I.C, *supra*.

sparse record before me, Brown has not shown that she is likely to succeed on the merits of her claim to enjoin arbitration of paragraphs 2, 3, 4, and 6 on the ground that they do not allege breaches of contract. Thus, I will deny Brown's request for a preliminary injunction as to any of the matters specifically listed in the numbered paragraphs of the June 13 Letter.[67]

The Court's discussion of substantive arbitrability in this opinion, however, should guide the parties as they proceed with the Arbitration. This applies not only to the matters specifically identified in the June 13 Letter, but also to any attempt by T-Ink to expand the scope of the Arbitration by means of the general, catch-all language in the June 13 Letter.

b. Fraud claims

The next issue is whether T-Ink's fraud claims are arbitrable. T-Ink's fraud claims are not arbitrable because such claims fall outside the scope of the LLC Agreement's arbitration clause and because of the doctrine of judicial estoppel.

As discussed above in connection with T-Ink's motion to dismiss, T-Ink's fraud claims fall outside the narrow terms of § 16.16(a), and therefore are not arbitrable. Section 16.16(a) covers disputes between the parties that concern the "interpretation or performance" of the LLC Agreement. That reference is relatively narrow compared to

[67] Both parties allege the other made concessions at the argument on October 3, 2007 inconsistent with the positions they have taken more recently in the Arbitration and this Court regarding the arbitrability of the disputes identified in the June 13 Letter. In deciding the issue of substantive liability, I have not relied on any of those statements. The parties made them in the context of discussing a potential compromise that ultimately fell through.

the broader "arising out of or relating to" language of the AAA's suggested arbitration clause and § 16.15 of the LLC Agreement. Therefore, the drafters of the LLC Agreement knew how to draft broad language. Nevertheless, they fashioned a more particularized arbitration clause that does not cover extra-contractual claims, such as fraud or misrepresentation.

In addition, T-Ink's amendment of its arbitration demand on October 1, 2007, and the arguments it made at the October 3 argument judicially estop T-Ink from arbitrating its fraud claims. "The doctrine of judicial estoppel precludes a party from advancing an argument that contradicts a position it previously persuaded a court to adopt as the basis for a ruling."[68] At the October 3 argument, T-Ink represented to this Court that it amended its arbitration demand to drop claims for fraud in the inducement, leaving only claims for breach of contract and breach of fiduciary duty.[69] Based on T-Ink's argument, this Court concluded that no preliminary injunction was required to prevent T-Ink from pursuing fraud claims in the Arbitration. Therefore, T-Ink is precluded from pursuing fraud in the inducement claims before the arbitrator.

In summary, based on the narrow scope of § 16.16 and judicial estoppel, Brown has demonstrated a reasonable probability of success on the merits of her claim to enjoin T-Ink from arbitrating its fraud claims.

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68 *McQuaide v. McQuaide*, 2005 WL 1288523, at *6 (Del. Ch. May 24, 2005).

69 Tr. at 5-14.

c. Fiduciary duty claims

Regarding the arbitrability of T-Ink's breach of fiduciary duty claims, to the extent those claims are based on common law fiduciary duties of joint venture and cannot be related to specific aspects of the LLC Agreement, they are outside the scope of the arbitration clause. As previously discussed, the LLC Agreement's arbitration clause only applies to disputes between the parties that concern the "interpretation or performance" of the Agreement. As Brown notes, fiduciary duty claims that arise from general fiduciary principles under Delaware law may not concern the "interpretation or performance" of the LLC Agreement, and if they do not, they are outside the scope of the Agreement's arbitration clause. For the reasons previously stated, however, I conclude that T-Ink's breach of fiduciary duty claims that are based, at least in part, on the LLC Agreement are arbitrable.[70] Thus, with respect to fiduciary duty claims that spring from general fiduciary duty principles under Delaware law and are not related to specific aspects of the LLC Agreement, Brown has demonstrated a reasonable probability of success on the merits. She has not made such a showing, however, as to fiduciary duty claims that arise, at least in part, by virtue of specific obligations created by the terms of the LLC Agreement rather than arising by virtue of any statutory, common law, or other

[70] Although a contract-based breach of fiduciary duty claim is arbitrable, it also may be superfluous as to the breach of contract claims. Indeed, a Delaware court has concluded that such a fiduciary duty claim is precluded as a matter of law. *See Solov v. Aspect Res., LLC*, 2004 WL 2694916, at * 4 (Del. Ch. Oct. 19, 2004) ("Because of the primacy of contract law over fiduciary law, if the duty sought to be enforced arises from the parties' contractual relationship, a contractual claim will preclude a fiduciary duty claim.").

requirement that imposes fiduciary duties upon Plaintiff as a consequence of the formation of Ink-Logix and without regard to the specific terms of the LLC Agreement.

d. The other claims T-Ink now seeks to arbitrate

Finally, in the papers T-Ink submitted to the arbitrator within the last few weeks, T-Ink attempts to arbitrate *Brown's* claims of breach of fiduciary duty, misrepresentation, unjust enrichment, breach of settlement agreement, and request for injunctive relief, as asserted in the State Court Action. To the extent Brown's claims are based on her allegations of fraud in the inducement, they are outside the scope of the disputes the parties agreed to arbitrate for the same reasons discussed earlier. Beyond that the Court has not had the benefit of briefing on the arbitrability of the issues raised in Brown's pleading in the State Court Action, and declines to enjoin arbitration of them at this time. Still, the Court assumes the parties will proceed in accordance with the rulings set forth in this Memorandum Opinion.

In addition, T-Ink's amended demand for arbitration states that, based on its claims for breach of contract and breach of fiduciary duties, T-Ink "seeks all appropriate remedies for [Brown's] conduct, including, without limitation and/or in the alternative, rescission of the [LLC] Agreement, an injunction, and/or an award of damages suffered by [T-Ink] as a result of [Brown's] improper conduct . . . , as well as attorney fees, interest, and arbitration costs . . . ."[71] Because all of the requested relief is expressly tied to the contract and fiduciary duty claims, issues related to that relief may be arbitrated to

[71] Aff. of Blake Rohrbacher Ex. A, First Amended Demand for Arbitration.

the same extent as the claims themselves. Thus, Brown has not demonstrated a probability of success on the merits of her claim to enjoin arbitration of this aspect of T-Ink's amended arbitration demand, except to the extent that its breach of fiduciary duty claims are not arbitrable, as discussed above.

3. Irreparable harm

Delaware courts have consistently found that threatened, wrongful enforcement of an arbitration clause constitutes sufficient irreparable harm to justify an injunction.[72] Consequently, to the extent that T-Ink seeks to arbitrate the fraud claims or the nonarbitrable breach of fiduciary duty claims, Brown would suffer irreparable harm.

4. Balance of equities

The balance of equities is not a major factor in the circumstances of this case, but lightly favors Brown. If this Court denies Brown's motion for preliminary injunction, Brown would be forced to arbitrate claims that she did not agree to arbitrate and potentially suffer the harm of inconsistent rulings from the Michigan courts and the AAA. If this Court grants Brown's motion for preliminary injunction, T-Ink would be required to litigate its nonarbitrable claims in a court in Michigan consistent with its rights under the LLC Agreement. Therefore, the balance of equities slightly favors Brown.

In sum, after considering the three factors a movant must demonstrate to prevail on a motion for preliminary injunction, I grant in part and deny in part Brown's motion.

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[72] *Bd. of Educ. of Appoquinimink Sch. Dist. v. Appoquinimink Educ. Ass'n*, 1999 WL 826492, at *4 (Del. Ch. Oct. 6, 1999).

T-Ink is enjoined from arbitrating fraud claims and breach of fiduciary duty claims that spring from general fiduciary duty principles under Delaware law and do not arise, at least in part, by virtue of specific obligations created by the specific terms of the LLC Agreement. T-Ink, however, remains free to present to the arbitrator breach of contract claims set forth in the June 13 Letter and breach of fiduciary duty claims that are based on the LLC Agreement. As to whether T-Ink may arbitrate other claims that concern the interpretation or performance of the LLC Agreement but are not set forth in the June 13 Letter, the Court expresses no opinion beyond the guidance provided by this Memorandum Opinion.

III. CONCLUSION

For the reasons stated, I grant T-Ink's motion to dismiss as to Brown's claims based on issues of procedural arbitrability. In all other respects, I deny the motion to dismiss. Further, I grant in part and deny in part Brown's motion for preliminary injunction as indicated in the attached Order, entered on December 3, 2007, implementing the Court's rulings.