MAXIMUS, INC.	*	IN THE
Plaintiff	*	CIRCUIT COURT
vs.	*	FOR
ALAN FABIAN, ET AL.	*	HOWARD COUNTY
Defendants	*	Case No. 13-C-04-59176

* * * * * * * * *

ORAL RULING

The Court has before it the decision in this case on the individual Defendants' Motions to Dismiss, Counts I to VI, and X, of Plaintiff's verified Complaint. This will constitute the Court's Ruling on these Motions. The Court will reserve the right to correct for form, or citation, or grammar, the Opinion that is issuing here, but will not change it in substance:

On July 14, 2004, Maximus, Inc. filed a complaint against two former employees, Alan Fabian and John Hoffman, and two entities that Maximus alleges they either owned or were substantially involved with. In a nutshell, the overall complaint of Maximus is set out succinctly on the second page of the complaint where Maximus states: "In secret, Fabian and Hoffman orchestrated an elaborate scheme to attempt to bind Maximus to 31 million dollars in guarantees supporting the lease of IT equipment which had no business relation to Maximus. Rather the IT equipment was ultimately for the use of SPI, Inc. and CMAT, two corporate entities owned and/or controlled by Fabian and/or Hoffman." This scheme, is alleged to have occurred while Fabian and Hoffman were employed by Maximus.

Beyond this core assertion, Maximus alleges the following counts: Count I - Breach of Fiduciary Duty (Duty of Loyalty) – Fabian and Hoffman; Count II - Breech of Fiduciary Duty - Fabian and Hoffman; Count III - Constructive Fraud - Fabian and Hoffman; Count IV – Fraudulent Concealment - all Defendants; Count V – Conversion–Fabian and Hoffman; Count VI - Conspiracy – Fabian and Hoffman; Count VII–Tortious Interference with Economic Advantage - SPI, Inc., and CMAT; Count VIII - Fraudulent Concealment–SPI, Inc. And CMAT; Count IX – Conspiracy to Defraud Maximus-SPI and CMAT; Count X – Breach of Employment Contract - Fabian and Hoffman. Among the relief sought by Maximus are:

1. Injunctions against the defendants from employing any Maximus employee in their new ventures.

2. Disgorgement of all sums paid to Fabian and Hoffman for the acquisition of SPI, LLC, which is alleged to be $1,800,000.00.

3. Disgorgement of all compensation paid to Fabian and Hoffman, alleged to be $1,600,000.00.

4. An accounting of all profits received by SPI Inc., and CMAT in connection with any lease purportedly guaranteed by Maximus.

5. Imposition of a constructive trust in Maximus' favor on all profits received by SPI, Inc., and CMAT in connection with any lease purportedly guaranteed by Maximus.

6. Monetary damages and attorneys fees.

Defendants Fabian and Hoffman moved to dismiss with prejudice Counts I to VI and X of the Complaint asserting that the agreements they signed with Maximus required that either party to the

agreements must resolve any "dispute" through attempts at amicable settlement and then through arbitration outside of the court process. Maximus responded by arguing that it was not required to arbitrate the claims in Counts I-VI of its Complaint and that it expressly has the right to pursue all injunctive relief sought in Count X outside of arbitration. A hearing was held on the motion on October 12, 2004, today's date.

As noted earlier in this hearing, plaintiff has voluntarily dismissed Count II -- Breech of Fiduciary Duty as to Fabian and Hoffman. There is thus no need for a ruling on that count.

Certain central issues are not in dispute among the parties: 1. All agree at least for purposes of this Motion that Fabian and Hoffman executed the Executive Employment, Non-compete and Confidentiality Agreements that contain the arbitration provision and no party is contending that the contract does not bind the parties. 2. All agree, at least for purposes of this Motion, that pursuant to Section 4.10 of the agreement that the laws of the Commonwealth of Virginia control construction of the agreement and that Maryland case law requires this court to apply the law of Virginia.

The arbitration provision at issue in this case is in Paragraph 4.11 of the Executive Employment Agreement, and states as to arbitration.

> The parties hereto shall attempt to settle amicably through negotiations, any controversy, claim or dispute between the parties arising out of or relating to this Agreement (a "Dispute"). If a dispute cannot be settled by such means, the parties hereto intend and agree to submit such

> Dispute to final and binding arbitration before an arbitration tribunal which is, and pursuant to arbitration procedures which are, acceptable to all parties. If the parties cannot, or do not otherwise agree within 30 days of the date on which notice of a Dispute is given, any such claim shall be submitted for arbitration by the American Arbitration Association pursuant to the Commercial Arbitration Rules of the American Arbitration Association then in effect. Any arbitration shall be conducted in Virginia.

And the clause goes on and further provides that:

> The parties hereto further intend and agree that the final decision or award of the arbitration tribunal shall be binding on the parties and their successors and fully enforceable by any Court of competent jurisdiction. The parties hereto further intend and agree that facts and other information relating to any arbitration arising out of or in connection with this Agreement shall be kept confidential to the fullest extent permitted by law.
>
> In addition, each party shall bear its own expenses in connection with such arbitration unless otherwise ordered by the arbitrator.

Finally, in that clause, this provision occurs:

> Notwithstanding the foregoing, the provisions of this section do not require arbitration of any claim for injunctive relief within the scope of Paragraph (b) of Section 4.3 above.

The provisions of 4.3 that are particularly applicable here is that which provides that:

> The terms of Sections 2.1, and 2.2 hereof may result in irreparable injury and damage to the Corporation, or its clients, which may not adequately be compensable in monetary damages, that the Corporation may not have an adequate remedy at law therefor, and that the corporation may obtain such preliminary temporary or permanent mandatory restraining injunctions, orders or decrees as may be necessary to protect it against, or on account of, any breach of Sections 2.1 and 2.2. Notwithstanding and as an exception of both Section 4.11 hereof and the arbitration provision contained in the Purchase Agreement, the parties further

> agree and acknowledge that the Corporation may seek such injunctory relief in any court of competent jurisdiction.

Sections 2.1 and 2.2 outline the non-competition and prohibited activities that the injunctive relief provisions apply to.

This Court must apply Virginia law to these provisions and make a determination as to whether or not the Motions should be granted. There is little surprising in Virginia's case law on arbitration. It parallels closely the law as it has developed in Maryland and, more significantly, the law, as derived from the Federal Arbitration Act. The Federal Arbitration Act is the genesis of much of modern judicial decisions deferring to contractual arbitration. Both Maryland and Virginia have adopted the Uniform Arbitration Act. Compare the Maryland Law, Section 3-201 of the Court and Judicial Proceedings Article with the Virginia adoption of the arbitration act, Code Section 8.01-581.01 through 581.016.

The most recent cases that have been relied on by the parties in this case, from the Virginia Supreme Court are *Waterfront Marine Construction, Inc. v. North End 49ers Sandbridge Bulkhead Groups* at *251 Va. 417, 468 SE 2d 894* (1996), *McMullin v. Union Land & Management Company, 242 Va. 337, 410 SE 2d, 636, (1991), and Weitz v. Hudson, 262 Va. 224, 546 SE 2d 732,* (2001).

These cases stand for familiar propositions such as that no party can be compelled to arbitrate a question that is not arbitrable under the agreement between the parties. *White v. Hudson*, supra. The Supreme Court of Virginia has also described

the commonly found phrase "arising out of or relating to" in an arbitration clause as, "very broad in its coverage." *Waterfront Marine Construction, Inc. v. North End 49ers.* The Court noted that "broad language of this nature covers contract-generated or contract-related disputes between the parties however labeled." *McMullin*, 242 Va. At 341."

Virginia Circuit Courts in cases cited by the parties have found that "broad arbitration clauses do not limit arbitration to the literal interpretation or performance of the contract, but embrace every dispute that's a significant relationship to the contract regardless of the label attached to the dispute," adopting the language and logic in federal cases such as the Fourth Circuit's decision in *American Recovery Corp. v. Computerized Thermal Imaging, Inc. 96 F.3d 88, 93 (4th* a Fourth Cir. 1966).

The reach of such clauses, with broad arbitration provisions is not unlimited to encompass all items of dispute between the parties that temporally follow after an agreement to arbitrate. For example, in *Waterfront Marine Construction, Inc. v. North End 49ers*, the Virginia Supreme Court held that a claim for arbitration relating to non-compliance with the first arbitration award was not arbitrable despite there being a very broad arbitration clause. That finding appears to rely as much on the statutory mechanism for enforcing an arbitration award in Virginia rather than any intent to carve back the expansive reach of such arbitration clauses recognized in earlier cases such as *McMullin*.

In this case, there is no doubt that the parties to the

employment agreement intended that any "dispute" between the parties "arising out of or relating to this agreement" would be submitted to final and binding arbitration. The only carve out is that the arbitration clause does not bar "any claim for injunctive relief within the scope of paragraph (b) of Section 4.3 above."

In going back to *McMullin*, that court construing a similar broad arbitration provision said [at 639]: "It is immaterial whether the basis for the claim is in the language of the joint-venture agreement, or the relationship itself", citing *Sindler v. Battleman,* 416 A.2d 238, 243, (D.C. App. 1980). Such a clause, "is not limited to disputes over the terms of the contract or to disputes arising during the performance of the contract." 616, n.6 *Maldonado v. PPG Industries, Inc.*, 514 F.2d 614, a 1975(1st Cir., 1975.) Rather, "broad language of this nature covers contract-generated or contract-related disputes between the parties however labeled." Id. at 616. Indeed, "an arbitration clause covering claims 'relating to' a contract is broader than a clause covering claims 'arising out of' a contract, *Int'l Talent Group, Inc., v. Copyright Management, Inc.*, 629 F. Supp. 587, 592 (S.D.N.Y. 1986)."

In this case, there is little doubt, as this Court discerns it, that the Virginia Supreme Court which has indicated already its adoption of an expansive view of similar arbitrations clauses, and adopting also the U.S. Supreme Court and Federal Circuit Courts of Appeal decisions under the Federal Arbitration Act, will apply similar logic in it's application of Virginia's Uniform Arbitration Act.

In this case, the alleged illegal acts of the individual Defendants flowed directly out of their employment relationship with Maximus, Inc., which was governed, at its source, by the employment contract containing the arbitration clause. Indeed, the only way defendants could have accomplished the illegal acts alleged, was due to their status as employees of Maximus. Maximus sought in entering into the employment agreement to regulate and control the individual defendants conduct as employees. There is now a dispute as to whether the individual defendants exceeded their employment authority or misused it. In such a circumstance the claims here are either generated out of the agreement or perhaps more clearly are "related" to it.

Maximus has urged a more mechanistic approach which is that, if the claim in this Court could be sustained without referring back to the Executive Employment Non-Competing Confidentiality Agreement, that it can, therefore, not only can, but must under Maximus' reading of *McMullin*, and *Waterfront*, must be allowed to proceed without being required to be arbitrated.

The Court does not find the Virginia Supreme Court's decisions to require that result, or even encourage that result. It would truly be an act of legerdemain to pursue the counts asserted by Maximus, in this case, without having as the touch point, and the touchstone, the original Executive Employment & Non-Competing Confidentiality Agreement. The fact that it could be conceivably done as a matter of professional advocacy does not mean that it either bears any relationship to the actual economic relationship

between the employer, and the employee here, or have any semblance of reality to the employment relationship. The employment relationship was grounded, founded, and governed, and regulated by the Executive Employment & Non-Competing Confidentiality Agreement.

To claim that the counts here are not "sufficiently related" to that agreement is not, in this Court's view, a realistic approach, or one that is in the spirit of either the FAA, or the Virginia Arbitration Act.

As indicated, the plaintiff's views require a literal and mechanistic connection between the claims, and the specific obligations under the agreement contained in the arbitration clause.

This Court concludes that the Virginia Supreme Court following its *McMullin* decision will, if faced with the issue, conclude that a more organic approach is required consistent with the law developed under the Federal Arbitration Act. Both the Supreme Court and the U.S. Court of Appeals have characterized similar clauses to the one here to be broad arbitration clauses capable of expansive reach. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 US 395 (1967). Such clauses do not limit arbitration to the literal interpretation or performance of the contract, but embrace every dispute between the parties having a significant relationship to the contract, regardless of the label attached to the dispute, *American Recovery Corporation v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, (1996); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile,* 863 F.2d 315 321, (4th Cir. 1988).

In applying this test there is no question that the claims here have as far as Counts I, III to VI and X have a "significant relationship" to the employment agreement in that the agreement is the main document that defines, controls and regulates the individual defendant's obligations to Maximus. The claims here are thus subject to arbitration unless they fall within the specific carve out that was placed in the arbitration agreement.

As indicated above, and recited above, there is such a carve out for injunctive actions and the carve out is explicit and clear, to this Court, that provides that in Section 4.11 of the agreement; that "notwithstanding the foregoing, the provisions of this section do not require arbitration of any claim for injunctive relief within the scope of Paragraph (b) of Section 4.3 above." Section 4.3(b) recognizes, first, that -- and concedes that there will be irreparable damage, injury and damage, to the corporation and provides that the corporation maintain such preliminary, temporary, or permanent mandatory restraining injunction, orders or decrees, as may be necessary to protect it against, or on account of any breach of Section 2.1 and 2.2.

The individual defendants have argued that that carve out should fall, for practical reasons of judicial economy, and that the overall spirit of the arbitration clause can be met by denying Maximus the right to proceed with injunctive action in this case.

The Court believes that that concern can be taken up as a matter of how this litigation should proceed, but the Court discerns no basis, under interpretation of this arbitration

provision, that would, in any way, restrain, or restrict, or limit Maximus in pursuing its injunctive relief. It couldn't be clearer. It is an explicit expressed carve out that allows Maximus to proceed with injunctive action. Therefore, matters that are included within the request for injunctive relief are carved out, and are not subject to being referred for arbitration, and as indicated, the Court will separately take up whether other prudential reasons may require a stay of those claims.

The Court will, therefore, grant either -- and I'll hear from the parties further on this -- either a Motion to Dismiss, or a Motion to Stay, Counts I, III to VI, because of the requirements of the arbitration provision of the Executive Employment Non-Competing Confidentiality Agreement.

The Court will *not* require arbitration as to matters contained in Count X, "Breach of Employment Contract" by Fabian and Hoffman, since that is covered by the carve-out.

October 12, 2004

Dennis M. Sweeney
JUDGE