UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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CHRISTINE GERENA,

Plaintiff,

-against-

REPORT AND RECOMMENDATION
CV 15-4634 (JMA)(GRB)

NEUROLOGICAL SURGERY, P.C., and
DR. MICHAEL BRISMAN,

Defendants.
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GARY R. BROWN, United States Magistrate Judge:

Before the undersigned is a motion to compel arbitration under Section 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, which has been referred by the Honorable Joan M. Azrack for report and recommendation. Docket Entry ("DE") 23; Order Referring Mot. dated Jan. 6, 2015. For the reasons stated herein, the undersigned respectfully recommends that the motion be GRANTED, and the case be stayed pending the completion of arbitration.

BACKGROUND

Plaintiff Christine Gerena, a physician assistant, commenced this action by filing a complaint on August 7, 2015 against her former employer, defendant Neurological Surgery, P.C. ("NSPC"), and its Chief Executive Officer ("CEO"), defendant Dr. Michael Brisman. Compl., DE 1. Plaintiff asserts disability discrimination and retaliation claims under the Americans with Disabilities Act ("ADA") against NSPC, disability and retaliation claims under the New York State Human Rights Law ("NYSHRL") against both defendants, an aiding and abetting claim under the NYSHRL against Dr. Brisman, and a whistleblower retaliation claim under New York Executive Law § 215 against both defendants. *Id.* at ¶¶ 68-94.

In sum and substance, and as relevant herein, plaintiff alleges as follows: Plaintiff suffered from a serious medical condition related to her back. *Id.* at ¶¶ 1, 14. Starting January 2015, she was assigned to certain surgeries, primarily performed by Dr. Brisman, where she was required to stand in an operating suite and wear a heavy lead vest. *Id.* at ¶¶ 30-32. Because of plaintiff's back condition, it was difficult for her to attend these surgeries because of the impact of the vest's weight on her back. *Id.* at ¶ 33. Over a period of two months, plaintiff complained to, and requested accommodation from Linda Sofio, the officer manager of NSPC, but no accommodation was granted. *Id.* at ¶¶ 33-39. Upon information and belief, Dr. Brisman, as CEO of NSPC and the physician performing the subject surgeries, was aware of plaintiff's back condition and her complaints. *Id.* at ¶ 41. On March 9, 2015, Dr. Brisman purportedly terminated Ms. Gerena's employment based on her disability. *Id.* at ¶¶ 40-42. After plaintiff's termination, and allegedly in retaliation for pursuing legal remedies, NSPC and Dr. Brisman attempted to persuade her subsequent employer that she was bound by a restrictive covenant, and as a result, she was transferred, demoted, and terminated by her new employer. *Id.* at ¶¶ 64-67. The complaint alleges that Dr. Brisman directly participated in the disability discrimination and retaliation, and aided and abetted NSPC's discrimination. *See, e.g.*, *id.* at ¶¶ 41-42, 61-63.

At the heart of the instant motion is an Employment Agreement between plaintiff and NSPC, which was signed by plaintiff and Dr. Brisman on behalf of NSPC. Melo Decl. Ex. B., DE 23; Gottlieb Decl. Ex. B., DE 26. In particular, the parties dispute the potential legal effect of the enforcement of the Dispute Resolution Provisions, specifically Paragraph 12(a) of the Employment Agreement, which provides as follows:

> In the event of a dispute arising under this Agreement, including a dispute concerning enforcement of this Article "12", such dispute shall be submitted to the attorneys for the Corporation and Employee who shall mutually select an appropriate professional, including themselves (the "Arbiter"), to whom such dispute shall be submitted. The

> Arbiter shall be entitled to consult with any outside party as he shall deem necessary and appropriate. The fees and any out of pocket disbursements incurred by the Arbiter, including any fees of any outside parties consulted, shall be paid equally by the parties. In the event either party is not satisfied with the written determination of the Arbiter, such dispute shall then be submitted to binding arbitration under the rules of the American Health Lawyers Association (the "AHLA"). Such arbitration shall be conducted in New York County. The law of the State of New York shall be the substantive law applicable to the dispute. Pre-arbitration discovery shall be governed by the Federal Rules of Civil Procedure.

Melo & Gottlieb Decls. Ex. B ¶ 12(a).

Defendants argue that Paragraph 12(a) expressly provides that "any disputes arising under the employment contract, including those disputes arising under the arbitration clause, go to arbitration." Defs.' Reply Br. 2 n.4, DE 27; Tr. 5:1-22, 30:21-23. Defendants' argument is based on the language that the parties should proceed to arbitration "[i]n the event of a dispute arising under this Agreement, *including a dispute concerning enforcement of this Article '12'*." Melo & Gottlieb Decls. Ex. B ¶ 12(a) (emphasis added). While plaintiff disputes, as a matter of law, whether this case should be sent to arbitration, plaintiff concedes the plain language of "Article '12'" refers to the "ADR provision itself." Tr. 5:9.

LEGAL STANDARD

The FAA "creates a body of federal substantive law of arbitrability applicable to arbitration agreements . . . affecting interstate commerce," which the parties agree governs the instant motion. *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 121 (2d Cir. 2010) (quotation omitted); Defs.' Br. 7, DE 24; Pl's Br. 3, DE 25. Section 4 of the FAA allows "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4

(2016). "The standard for review of petitions to compel arbitration pursuant to the FAA, 9 U.S.C. § 4, is akin to the standard for motions for summary judgment." *Arshad v. Transp. Sys., Inc.*, No. 15-CV-2138 (NRB), 2016 WL 1651845, at *3 (S.D.N.Y. Apr. 25, 2016); *see also Ryan v. JPMorgan Chase & Co.*, 924 F. Supp. 2d 559, 561 (S.D.N.Y. 2013). "Accordingly, the Court must grant a motion to compel arbitration [only] if the pleadings, discovery materials before the Court, and any affidavits show there is no genuine issue as to any material fact and it is clear that the moving party is entitled to a judgment as a matter of law." *Ryan*, 924 F. Supp. 2d at 561 (citations omitted). Here, no genuine issues of material fact exist because the instant dispute turns on an interpretation of the Dispute Resolution Provisions of the Employment Agreement. *See* Melo & Gottlieb Decls. Ex. B ¶ 12; *cf. Arshad*, 2016 WL 1651845, at *3.

Three types of disagreements commonly arise in cases involving arbitration: "1) the merits of the dispute; 2) whether the dispute is to be arbitrated—the so called 'question of arbitrability';[1] and 3) whether a court or an arbitrator is to decide the question of arbitrability." *VRG Linhas Aereas S.A. v. MatlinPatterson Global Opportunities Partners II L.P.*, 717 F.3d 322, 325 (2d Cir. 2013) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)). Courts must answer the "questions in reverse order, since Question Three asks who will answer Question Two (the question of arbitrability), and Question Two in turn asks who will answer Question One (the decision on the merits)." *Id.* at 326. In sum, the "issue of who will decide the arbitrability question" is "preliminary." *Id.*

The framework of *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) governs the issue of who decides the question of arbitrability when a motion is brought under Section 4

[1] "'Questions of arbitrability' is a term of art covering disputes about [1] whether the parties are bound by a given arbitration clause as well as disagreements about [2] whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." *VRG*, 717 F.3d at 326 n.2.

of the FAA. *Bell v. Cendant, Corp.*, 293 F.3d 563, 566 (2d Cir. 2002); *see also Arshad*, 2016 WL 1651845, at *3. Under that framework, "there is a general presumption that the issue of arbitrability should be resolved by the courts." *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 208 (2d Cir. 2005). Accordingly, "the issue of arbitrability may only be referred to the arbitrator if there is *clear and unmistakable evidence* from the arbitration agreement, as construed by state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator." *Contec*, 398 F.3d at 208 (emphasis original); *see also Shaw Grp. Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 120-21 (2d Cir. 2003); *Bell*, 293 F.3d at 566; *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1198-99 (2d Cir. 1996).

The parties agree that New York law applies here. Tr. 41:14-17.[2] Under New York law, "[c]lear and unmistakable evidence exists when an arbitration clause explicitly delegates arbitrability determinations to the arbitrator, or when it incorporates by reference arbitration rules that do so." *Arshad*, 2016 WL 1651845, at *3 (citing *Contec*, 398 F.3d at 208); *see also New Avex, Inc. v. Socata Aircraft Inc.*, No. 02 CIV.6519 DLC, 2002 WL 1998193, at *5 (S.D.N.Y. Aug. 29, 2002) (citing *PaineWebber*, 81 F.3d at 1199)); *Washington v. Wm. Morris Endeavor Entm't, LLC*, No. 10 Civ. 9647 (PKC)(JCF), 2011 WL 3251504, at *6 (S.D.N.Y. July 20, 2011).[3]

[2] For avoidance of doubt, the Employment Agreement states "[t]he law of the State of New York shall be the substantive law applicable to the dispute." Melo & Gottlieb Decls. Ex. B ¶ 12(a); *cf. Contec*, 398 F.3d at 208 n.1; *Shaw Grp.*, 322 F.3d at 120; *PainWebber*, 81 F.3d at 1199; *Washington v. Wm. Morris Endeavor Entm't, LLC*, No. 10-Civ. 9647 (PKC)(JCF), 2011 WL 3251504, at *6 n.3 (S.D.N.Y. July 20, 2011). Furthermore, the parties are New York residents, and the Employment Agreement concerns plaintiff's employment in New York.

[3] According to the Second Circuit, "New York law . . . follows the same standard as federal law with respect to who determines arbitrability." *Contec Corp.*, 398 F.3d at 208 n.1; *Shaw Grp.*, 322 F.3d at 121. Therefore, even if New York law were to apply, instead of the FAA, the result would be the same.

DISCUSSION

1. NSPC

As to defendant NSPC, the parties chiefly dispute whether Paragraph 12(a) applies to plaintiff's ADA, NYSHRL, and NYLL claims. Defs.' Br. 8-17; Pls.' Br. 1-12; Defs.' Reply Br. 1-7; Pl.'s Sur-Reply 2, DE 33; Defs.' Sur-Sur-Reply 1-2, DE 34. However, as the Second Circuit explained, "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy" is question of arbitrability. *See VRG*, 717 F.3d at 326 n.2. Before deciding the question of arbitrability, courts must first consider the question of whether the question of arbitrability goes to arbitration. *Id.* at 326 (vacating and remanding because "it does not seem that the district court ever asked the initial question of who is to decide the scope of the parties' arbitration agreement").

Here, as to NSPC, the issue of arbitrability must be referred to the arbitrator because there is clear and unmistakable evidence under New York law that the parties intended that the arbitrator decide the question of arbitrability. First, the Employment Agreement explicitly delegates arbitrability determinations to the arbitrator through Paragraph 12(a), which states, "[i]n the event of a dispute arising under this Agreement, *including a dispute concerning enforcement of this Article '12'*," the parties shall "select an appropriate professional. . . to whom such dispute shall be submitted." Melo & Gottlieb Decls. Ex. B ¶ 12(a) (emphasis added); *cf. Arshad*, 2016 WL 1651845, at *3 (holding "[c]lear and unmistakable evidence exists when an arbitration clause explicitly delegates arbitrability determinations to the arbitrator"); *New Avex*, 2002 WL 1998193, at *5 (holding broadly worded arbitration clause of distribution contract which stated that "*'[a]ny* dispute, controversy or claim arising under or *related to* this agreement' shall be subject to arbitration" bound parties to submit question of arbitrability of

dispute to arbitration); *Washington*, 2011 WL 3251504, at *6 ("the Delegation Provision expressly provides that the arbitrator 'shall have the exclusive authority to resolve any dispute relating to interpretation, applicability, enforceability or formation of this Agreement, including but not limited to any claim that all or any part of this Agreement is void or voidable.'").

At oral argument, the undersigned questioned the parties as to the meaning of "Article '12'" in Paragraph 12(a). Tr. 4:23-5:7. Defendants' counsel explained that "[i]t refers to the ADR provision itself." *Id.* at 5:8. Plaintiff's counsel agreed. *Id.* at 5:9. Although plaintiff disputes, as a matter of law, whether this case should be sent to arbitration, she concedes that Paragraph 12(a) plainly sets forth that a dispute concerning enforcement of the Dispute Resolution Provisions should be referred to arbitration. *Id.* Thus, Paragraph 12(a) explicitly delegates arbitrability determinations to the arbitrator.

Second, clear and unmistakable evidence exists because the Employment Agreement incorporates by reference arbitration rules that delegate the question of arbitrability to arbitration. *See Contec*, 398 F.3d at 208; *Arshad*, 2016 WL 1651845, at *3. Paragraph 12(a) requires that "a party not satisfied by the written determination of the Arbiter" to submit the dispute to a "binding arbitration under the rules of the American Health Lawyers Association ("AHLA")." Melo & Gottlieb Decls. Ex. B ¶ 12(a). Rule 3.1 of the AHLA provides that the arbitrator "shall have the power to determine his or her jurisdiction and any issues of arbitrability." Melo Reply Decl. Ex. B. Rule 3.1, DE 27. Thus, Paragraph 12(a) incorporates by reference arbitration rules that delegate the question of arbitrability to arbitration. In sum, there is clear and unmistakable evidence under New York law that the parties intended that the arbitrator decide the question of arbitrability.

"Under Section 3 of the FAA, 9 U.S.C. § 3, a district court 'must stay proceedings if satisfied that the parties have agreed in writing to arbitrate an issue or issues underlying the district court proceeding." *WorldCrisa Corp. v. Armstrong*, 129 F.3d 71, 74 (2d Cir. 1997); *see also Katz v. Cellco P'ship*, 794 F.3d 341, 345-46 (2d Cir. 2015); *Arshad*, 2016 WL 1651845, at *5. Because the question of arbitrability must go to the arbitrator, the undersigned respectfully recommends that the case should be stayed against NSPC.[4]

[4] Despite initially conceding that "the arbitration agreement is enforceable as to the disputes and parties it covers," Pl.'s Br. 3, plaintiff raises for the first time, in a request to file a sur-sur-sur-reply brief, DE 36, that the arbitration agreement is invalid because the agreement is silent as to several essential terms, such as the method for selecting an arbitrator, the arbitral forum, the procedural law to be followed, the substantive law to be applied, and the location where the arbitration should be held. DE 36 at 2 (citing *Dreyfuss v. Etelecare Global Solutions-U.S. Inc.*, 349 F. App'x 551 (2d Cir. 2009); *Opals on Ice Lingerie v. Bodylines, Inc.*, 320 F.3d 362, 369 (2d Cir. 2003)). Procedurally, this argument is waived. *See Dixon v. NBCUniversal Media, LLC*, 947 F. Supp. 2d 390, 396 (S.D.N.Y. 2013) ("It is plainly improper to submit on reply evidentiary information that was available to the moving party at the time that it filed its motion and that is necessary in order for that party to meet its burden" (quotation omitted)); *see also EDP Med. Computer Sys., Inc. v. United States*, 480 F.3d 621, 625 n. 1 (2d Cir.2007) (holding that an argument raised for the first time in reply brief on appeal is waived). However, the undersigned addresses the argument in an abundance of caution.

First, even a cursory review of the Dispute Resolution Provisions reveals that the parties agreed to a process by which the parties can mutually select an initial arbitrator, and then the parties can submit the dispute to further binding arbitration under the AHLA Rules if a party disputes the first arbitral determination, that the binding arbitration under the AHLA Rules shall be conducted in New York County, and New York law applies to the dispute. *See* Melo & Gottlieb Decls. Ex. B.

Second, assuming, *arguendo*, that above-mentioned terms are missing, the terms are non-essential. *See Wework Companies, Inc. v. Zoumer*, No. 16-CV-457 (PKC), 2016 WL 1337280, at *5 (S.D.N.Y. Apr. 5, 2016) (holding that the arbitration clause where the parties "agreed to submit to mandatory binding arbitration any and all claims arising out of or related to your employment with WeWork and the termination thereof . . . which shall be conducted in New York County, New York" was "admittedly terse," it was nonetheless valid because "the language indicates that the parties agreed to be bound" and "[t]he lack of specific terms governing the arbitration's procedure does not invalidate the agreement, considering that the FAA provides an objective method to fill gaps in arbitration agreements" (citing 9 U.S.C. §§ 5, 7)); *see also Katz*, 794 F.3d at 346 n.7 ("Arbitrating parties may return to court, *inter alia*, to resolve disputes regarding the appointment of an arbitrator or to fill an arbitrator vacancy, 9 U.S.C. § 5; to compel attendance of witnesses or to punish witnesses for contempt, *id.* § 7"); *Hojnowski v. Buffalo Bills, Inc.*, 995 F. Sup. 2d 232, 236 (W.D.N.Y. 2014) (holding there is no authority to suggest that the rules and procedures governing arbitration are essential terms). Here, like *Wework*, the Dispute Resolution Provisions are valid because they indicate the parties' intent to be bound by arbitration, and the FAA provides an objective method to fill missing terms. *See Wework*, 2016 WL 1337280, at *5 (citing 9 U.S.C. §§ 5, 7).

Last, plaintiff's citation to *Dreyfuss* and *Opals on Ice* is misplaced because there the Court of Appeals held that "no contract was ever formed" because the parties "could not produce any single document containing an arbitration clause which had been signed by" the parties. *See Dreyfuss*, 349 F. App'x at 554 (citing *Opals on Ice*, 320 F.3d at 371). Here, both parties cite to the controlling language in Paragraph 12(a) of the Employment Agreement in support of their respective arguments. Melo & Gottlieb Decls. Ex. B.

2. Dr. Brisman

As to Dr. Brisman, the parties dispute whether Dr. Brisman, as a non-signatory to the Employment Agreement, or better said, an individual who has signed the agreement but arguably not on his own behalf, can compel arbitration. Pl.'s Br. 12-13; Defs.' Reply Br. 8-9 (citing *Contec*, 398 F.3d at 208).

In general, "just because a signatory has agreed to arbitrate issues of arbitrability with another party does not mean that it must arbitrate with a non-signatory." *Washington*, 2011 WL 3251504, at *8 (quoting *Contec*, 398 F.3d at 209); *see also WorldCrisa*, 129 F.3d at 75. However, in *Contec Corp. v. Remote Solution, Co.*, the Second Circuit held "a non-signatory can compel a signatory to arbitrate under an agreement where the question of arbitrability is subject to arbitration." *Contec*, 398 F.3d at 209-10. The court held that where (1) there was "clear and unmistakable evidence of the parties' intent to delegate [questions of arbitrability] to the arbitrator," and (2) the signatory and the non-signatory had "a sufficient relationship to each other and to the rights created under the agreement," then the non-signatory can "compel arbitration even if, in the end, an arbitrator were to determine that the dispute itself [was] not arbitrable because [the non-signatory could not] claim rights under the [agreement]." *See Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 395 (2d Cir. 2011) (quoting *Contec*, 398 F.3d at 209).[5]

The principle in *Contec* was extended in *Washington v. William Morris Endeavor Entertainment, LLC*. There, plaintiff filed a discrimination and retaliation lawsuit under Title

[5] In *Contec*, the Court of Appeals found the requisite "sufficient relationship" where a non-signatory plaintiff is the successor corporation to the signatory, and the parties conducted themselves subject to the contract regardless of a change in corporate form. 398 F.3d at 209. Similarly, in *Republic of Ecuador v. Chevron*, the Republic of Ecuador argued that it was a non-signatory to a treaty because "a new government came to power." 638 F.3d at 395. The Second Circuit, applying *Contec*, held that since the previous regime signed a treaty that committed the country to arbitrate the question of arbitrability, "Ecuador cannot now 'disown its agreed-to obligation to arbitrate . . . the question[s] of arbitrability." *Id.*

VII of the Civil Rights Act of 1964, NYSHRL, and New York City Human Rights Law against his former employer, a corporate defendant, and two human resource employees of the corporate defendant, the individual defendants. 2011 WL 3251504, at *1. The court applied *Contec* and held that the individual defendants, as non-signatories, can compel plaintiff a signatory to arbitrate where the question of arbitrability is itself subject to arbitration. *Id.* at *8-9. The court found a "sufficient relationship" where (1) the agreement provides for arbitration of "any claim, dispute, and/or controversy" that the employee may have with other employees or agents of the corporate defendant, (2) individual defendants, as human resource employees, are "the actors who carry out company functions," and (3) "[t]he allegations against the Individual Defendants relate to the manner in which they executed their duties as [corporate defendant] employees." *Id.* at *9.

Here, Dr. Brisman, a non-signatory, can at a minimum compel plaintiff, a signatory, to arbitrate under the Employment Agreement on the question of arbitrability. First, as shown above, the question of arbitrability is appropriately referred to arbitration. Second, a sufficient relationship existed between Dr. Brisman and plaintiff and to the rights created under the Employment Agreement, such that Dr. Brisman can compel arbitration on the question of arbitrability because (1) Dr. Brisman is an actor who carried out business functions on behalf of NSPC, *see* Melo & Gottlieb Decls. Ex. B (signing plaintiff's Employment Agreement on behalf of NSPC); Compl. ¶¶ 1-63 (terminating plaintiff's employment, and attempted to enforce the restrictive covenant from the Employment Agreement), and (2) plaintiff's allegations against Dr. Brisman relate to the manner in which Dr. Brisman carried out his duties as NSPC's CEO.

Dr. Brisman, as CEO of NSPC, signed the Employment Agreement on behalf of NSPC when plaintiff was hired. Melo & Gottlieb Decls. Ex. B. Plaintiff was then allegedly assigned to

surgeries, primarily performed by Dr. Brisman, which required the subject lead vest. Compl. ¶¶ 30-32. Dr. Brisman, as the CEO and doctor who performs the subject surgeries, was allegedly aware of plaintiff's complaints and requests for accommodations, but provided plaintiff with none. *Id.* at ¶¶ 33-41. Dr. Brisman then allegedly terminated plaintiff from NSPC because of her disability. *Id.* at ¶¶ 40, 42. Finally, after plaintiff's termination, the complaint alleges that NSPC and Dr. Brisman interfered with her new employment, which resulted in plaintiff's termination from the new employment. *Id.* at ¶¶ 41-42, 61-63.

Based on these circumstances, plaintiff, as a signatory to the Employment Agreement, cannot now disown the mandatory obligation to arbitrate the question of arbitrability, "even if, in the end, an arbitrator were to determine that the dispute itself is not arbitrable because [the non-signatory] cannot claim rights under [the agreement]." *Contec*, 398 F.3d at 211; *compare Washington*, 2011 WL 3251504, at *9 (citing, *inter alia*, *Campaniello Imports Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 668 (2d Cir. 1997) ("Courts in this and other circuits consistently have held that employees or disclosed agents of an entity that is a party to an arbitration agreement are protected by that agreement.")); *Arrigo v. Blue Fish Commodities, Inc.*, 704 F. Supp. 2d 299 (S.D.N.Y. 2010), *aff'd*, 408 F. App'x 480 (2d Cir. 2011) (holding that former employee's claims against employer's CEO for overtime compensation were subject to employment agreement's arbitration provision, even though CEO was not party to agreement, where claims were based on CEO's status as employer's employee and agent); *Arshad*, 2016 WL 1651845, at *6 (granting motion to compel arbitration of corporate defendant with individual defendants, who are managers and owners of the corporate defendant) *with Holzer v. Mondadori*, No. 12 CIV. 5234 NRB, 2013 WL 1104269, at *9 (S.D.N.Y. Mar. 14, 2013) ("Mondadori does not have a sufficiently close relationship to LCB to compel arbitration of arbitrability as a non-

signatory to the Purchase Agreements. Mondadori is not now, nor has she ever been, an officer, director, member, manager, employee, shareholder or agent of LCB."). Therefore, the stay of the action against NSPC should apply to Dr. Brisman as well. *See Katz*, 794 F.3d at 346 (holding that a stay of proceedings, rather than dismissal of complaint, was required when all claims were referred to arbitration).[6]

CONCLUSION

Based on the foregoing, the undersigned respectfully recommends that defendants' motion to compel arbitration under Section 4 of the FAA be GRANTED, and the case be stayed in all respects pending the completion of arbitration.

OBJECTIONS

A copy of this Report and Recommendation is being electronically served upon the representatives of each party via ECF. Any written objections to the Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days of service of this report. 28 U.S.C. § 636(b)(1) (2006 & Supp. V 2011); Fed. R. Civ. P. 6(a), 72(b). Any requests for an extension of time for filing objections must be directed to the district judge assigned to this action prior to the expiration of the fourteen (14) day period for filing objections. **Failure to file objections within fourteen (14) days will preclude further review of this report and recommendation either by the District Court or Court of Appeals.** *Thomas v.*

[6] Even assuming, *arguendo*, that Dr. Brisman cannot compel a stay under 9 U.S.C. § 3 against plaintiff, the court may enter a stay against Dr. Brisman under its inherent powers. *WorldCrisa*, 129 F.3d at 75 (holding that it need not decide whether a non-signatory is bound to the arbitration agreement because the district court may stay the case pursuant to its inherent powers, and the non-signatory would not suffer any prejudice from the stay). Here, the arbitrator's decision on the question of arbitrability may lead to arbitration on the merits of the dispute as against NSPC. As such, the arbitration may lead to a disposition of some issues as to the underlying dispute, and neither plaintiff nor Dr. Brisman would suffer any substantial prejudice from the stay.

Arn, 474 U.S. 140, 145 (1985) ("[A] party shall file objections with the district court or else waive right to appeal."); *Caidor v. Onondaga Cnty.*, 517 F.3d 601, 604 (2d Cir. 2008) ("[F]ailure to object timely to a magistrate's report operates as a waiver of any further judicial review of the magistrate's decision.").

Dated: Central Islip, New York
June 9, 2016

/s/ Gary R. Brown
GARY R. BROWN
United States Magistrate Judge