UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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STEVEN SCHREIBER, individually and derivatively on behalf of TWO RIVERS COFFEE, LLC,

Plaintiff,

-against-

EMIL FRIEDMAN; E&I INVESTORS GROUP, LLC; E&J FUNDING CO., LLC; E&J MANAGEMENT, INC.; E & JERYG MANAGEMENT CORP., LLC; 24 HOUR OIL DELIVERY CORP.; MB FUEL TRANSPORT, INC.; MB FUEL TRANSPORT I, INC.; ASSOCIATED FUEL OIL CORP.; LIGHT TRUCKING CORP.; 165 STREET REALTY CORP.; PARK AVENUE ASSOCIATES, LLC; NEW YORK BEST COFFEE, INC.; JOHN AHEARN; SYLVIA EZELL; SONIA RIVERA; JORGE SALCEDO; MICHAEL DEVINE; MICHAEL DEVINE, CPA; GEOFFREY HERSKO; GEOFFREY S. HERSKO, P.C.; SOLOMON BIRNBAUM; SINGLE SERVE BEVERAGES DISTRIBUTION; CRAZY CUPS; 26 FLAVORS LLC; and OFFICE COFFEE SERVICES, LLC,

Defendants, and

TWO RIVERS COFFEE, LLC,

Nominal Defendant.

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NOT FOR PUBLICATION
MEMORANDUM & ORDER
15-CV-6861 (CBA) (JO)

AMON, United States District Judge:

This case arises out a dispute concerning the management and operations of Two Rivers Coffee, LLC ("TRC"), which is a joint business venture of Steven Schreiber, Eugene Schreiber, Mayer Koenig, and Emil Friedman. Plaintiff Steven Schreiber (hereinafter, "Schreiber") filed the complaint in this action on December 2, 2015, bringing claims under the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., and New Jersey state law

against Friedman, and a number of individuals and entities associated with Friedman, in connection with the alleged usurpation of control over and despoilment of TRC.

Presently before the Court are defendants' motions to dismiss and compel arbitration and motions to stay this action pending arbitration.

BACKGROUND

The pleadings and filings in this case are extensive, and the Court assumes familiarity with the underlying facts of the case and recounts only the facts necessary to give a general overview for purposes of the instant motions.

I. The Parties

TRC is a New Jersey corporation that manufactures and distributes Keurig-compatible filtered single serve coffee, tea, and related products throughout the United States and Canada. (D.E. # 1 ("Compl.") ¶ 11.) Plaintiff Steven Schreiber is a co-founder and member of TRC, and has served as the Chief Operating Officer of TRC since its founding in 2011. (Id. ¶ 10.) Defendant Emil Friedman is also a member of TRC, and owns or has interests in each of the defendant companies named in the complaint. (Id. ¶ 12.) Schreiber alleges that Friedman, acting in association with the following corporate and individual defendants, engaged in a pattern of racketeering activity to deprive TRC of its property, profits, and operating capital, and to deprive Schreiber of his equity in TRC. (Id. ¶ 1.)

The companies named as defendants in this action are all allegedly owned or under the control of Friedman. Defendant New York Best Coffee Inc. is a corporation that was created in December 2012 for the purpose of holding the lease on TRC's facility at 101 Kentile Road, South Plainfield, New Jersey. (Id. ¶ 15.) According to Schreiber, he and other TRC members understood that they would be members of New York Best Coffee Inc. and each signed the lease for the

premises at 101 Kentile Road as members of New York Best Coffee. (Id.) However, Schreiber alleges that Friedman switched the signature page of the lease, and that Friedman now claims to be the only member of TRC to have rights in New York Best Coffee and to the lease of the premises. (Id.) Defendants E&I Investors Group LLC; E&J Funding Co. LLC; E&J Management, Inc.; and E & Jeryg Management Corp. LLC (collectively, the "E&J companies") are New York corporations that are owned by Friedman. (Id. ¶ 13.) Friedman also owns or has control over the following companies: 24 Hour Oil Delivery Corp.; MB Fuel Transport, Inc.; MB Fuel Transport I, Inc.; Associated Fuel Oil Corp.; Light Trucking Corp.; 165 Street Realty Corp.; and Park Avenue Associates, LLC (collectively, the "Oil and Trucking companies"). (Id. ¶¶ 14, 16.) Schreiber alleges that Friedman has used the E&J companies and the Oil and Trucking companies to improperly extract large sums of money from TRC through fraudulent billings and financial transactions with TRC. (Id. ¶¶ 13–14.)

The individuals named as defendants in this action are Friedman's associates. Defendant John Ahearn is Friedman's associate and a principal in the Oil and Trucking companies. (Id. ¶ 16.) Friedman employs defendants Sylvia Ezell and Sonia Rivera to serve as the bookkeepers for the defendant companies, (id. ¶¶ 17–18), and defendant Jorge Salcedo to serve as a mechanic for TRC and all of Friedman's companies, (id. ¶ 19.) Defendant Michael Devine, of Devine, CPA, is Friedman's personal accountant and serves as the accountant for TRC and Friedman's companies. (Id. ¶¶ 19–20.) Defendant Geoffrey Hersko, who is the principal of Geoffrey S. Hersko, P.C., is Friedman's personal attorney and the attorney for the defendant companies. (Id. ¶¶ 21–22.)

Finally, defendant Solomon Birnbaum has an ownership interest in the following companies (collectively, the "Coffee Companies"): Office Coffee Services LLC; Single Serve Beverages Distribution; Crazy Cups, and 26 Flavors LLC. (Id. ¶ 24.) Schreiber alleges that in

violation of a non-compete clause in the TRC Operating Agreement, Friedman obtained a 40% interest in the Coffee Companies in 2012. (Id.) Furthermore, according to Schreiber, "Friedman and Birnbaum use their corporate structures loosely and do business in a way so as to blur the distinctions between the companies so as to permit revenue and tax liability to be shifted from one company to another at their convenience." (Id. ¶ 29.)

II. TRC Operating Agreement and Distribution Agreement

In December 2011, Eugene Schreiber, Steven Schreiber, and Emil Friedman entered into an Operating Agreement, which governs the management of TRC (the "Operating Agreement"). (D.E. # 225-2, Ex. D ("TRC Op. Agm't").) The Operating Agreement provides that "[a]ll disputes with respect to any claim for indemnification and all other disputes and controversies between the parties hereto arising out of or in connection with this Operating Agreement shall be submitted to a Beth Din arbitration in accordance with the Orthodox Jewish religion." (Id. § 11.2.) The agreement does not specify a particular Beth Din, but calls for the hearing to be held "in the city and state of New Jersey or New York at a location designated by the Beth Din." (Id.) The Operating Agreement, including the Beth Din arbitration clause, is applicable to the members of TRC, each of whom signed the Operating Agreement and Amendment One thereto: Eugene Schreiber, Steven Schreiber, Emil Friedman, and Mayer Koenig.

TRC entered into an agreement (the "Distribution Agreement") with 1 Quick Cup, LLC ("1QC"), which is a not a party to this action. (D.E. # 229, Ex. A ("Distrib. Agm't").) Birnbaum had an ownership interest in 1QC, but 1QC cancelled its corporate existence on August 22, 2012. (Compl. ¶ 25.) The Distribution Agreement provides that TRC will sell its products to 1QC, in so much quantity that the parties shall agree upon, at a cost of 20% below TRC's wholesale price. (Distrib. Agm't at 1) The Distribution Agreement also contains an arbitration clause, which

provides that "[a]ll disputes with respect to any claim for indemnification and all other disputes and controversies between the parties hereto arising out of or in connection with this Agreement shall be submitted to the Beth Din of America for arbitration in accordance with Orthodox Jewish religion." (Id. at 2.) However, the Distribution Agreement states that "[n]otwithstanding anything herein to the contrary, any party may seek from a court any provisional remedy that may be necessary to protect any rights or property of such party pending the establishment of the arbitral tribunal or its determination of the merits of the controversy." (Id.) The Distribution Agreement is undated.

On September 6, 2012, Birnbaum executed a contract assigning 1QC's rights in the Distribution Agreement to Office Coffee Services, LLC. (D.E. # 229, Ex. B.) This contract contains the same arbitration clause as the Distribution Agreement. (Id. at 2.) Three years later, on November 18, 2015, Birnbaum executed another contract assigning the rights of Office Coffee Services, LLC in the Distribution Agreement to 26 Flavors LLC. (D.E. # 229, Ex. D.)

III. Arbitration Proceedings

On December 16, 2014, per the TRC Operating Agreement, Steven Schreiber and Mayer Koenig filed a claim with Bais Din Maysharim ("BDM") against Friedman concerning "partnership improprieties." (D.E. # 225-2, Ex. A.) Friedman was served with a "Hazmana," which summoned him to a hearing before BDM on December 23, 2014. (Id.) Friedman failed to appear at the December 23, 2014 hearing or otherwise respond to the summons, and on January 5, 2015, BDM issued a "Heter Arkaos," allowing Schreiber and Koenig "to submit their claim against [Friedman] in secular court, so long as the defendant fails to accept upon himself the authority of a Rabbinical Court and the burden of Jewish law through signing an arbitration agreement." (See D.E. # 234-7.)

Friedman submitted to the jurisdiction of BDM on June 14, 2015, and requested that BDM withdraw the Heter Arkaos, so "the disputes of all members of Two Rivers can be addressed and resolved . . . ." (See D.E. # 225-2, Ex. N.) On September 25, 2015, BDM issued a "Psak," or arbitration award, which indicated that the Heter Arkaos would be withdrawn provided that Friedman complied with two conditions: (1) Friedman would execute an arbitration agreement by one of three specified Beth Dins: Beth Din of America, Bais Din Tzedek Umishpot, or Bais Havaad L'inyaney Mishpat; and (2) Friedman would "[e]scrow the sum of $250,000 by the Beth Din chosen . . . with an appropriate escrow agreement that gives that Beth Din the sole discretion to release the funds to either party as [the Beth Din] see[s] fit." (See id., Ex. O.) The award further stated that Friedman was liable for the expenses incurred due to Friedman's failure to submit to BDM's jurisdiction, but directed that due to the complexity of the litigation, the Rabbinical Court that handles the underlying dispute should determine the amount owed. (Id.)

On October 13, 2015, Friedman caused a summons from the Bais Din Bais Yosef ("BDBY") to be sent to Schreiber and Koenig ordering them to appear before that Rabbinical Court. (See D.E. # 234-38.) BDBY was not one of the three Beth Dins enumerated in BDM's September 25, 2015 order. Schreiber and Koenig did not appear before BDBY, but Schreiber's counsel submitted letters to BDBY explaining the prior proceedings before BDM, including the September 25, 2015 order. (See D.E. # 234-42, 234-43.) BDBY subsequently issued an order finding that "there is no precedence in Halacha to lift the strict prohibition of going to the civil court," and until Schreiber and Koenig withdrew their case from federal court and accepted the jurisdiction of a Rabbinical Court to which both parties consented, "[t]hey are considered as people that are attacking the Torah . . . ."[1] (D.E. # 225-2, Ex. R.)

[1] The BDBY award, which is written in Hebrew, is purportedly dated December 13, 2015, but it was not postmarked until December 17, 2015. (See D.E. # 243-44.) On December 14, 2015, a hearing was held in this Court before

On January 27, 2016, Friedman signed an agreement to arbitrate before Bais Din Tzedek Umishpot, which is one of the three Beth Dins listed in BDM's September 25, 2015 order. (See D.E. # 234-63.) The next day, BDM issued a second award, finding that Friedman had satisfied the requirements set forth in the September 25, 2015 order and rescinded the Heter Arkaos. (D.E. # 225-2, Ex. C.) The award further states that "the parties have a halachic obligation to adjudicate their dispute in bais din, and to suspend the court proceedings pending the outcome of the din torah." (Id.) In addition, BDM acknowledged that Schreiber and Koenig claimed they had incurred expenses due to Friedman's delay in submitting to arbitration, but directed them to submit this claim to a Rabbinical Court. (Id.)

IV. Litigation in Middlesex County Court and Beth Din of America

On January 9, 2015, 26 Flavors LLC filed an Order to Show Cause and Verified Complaint in Middlesex County Court requesting that the court impose temporary restraints against TRC. (D.E. # 234-10.) 26 Flavors LLC alleged that TRC was selling sample packs in violation of the Distribution Agreement between TRC and 1QC, which had been assigned to Office Coffee Services LLC. (Id. at 2–3.) The Middlesex County Court held a hearing on January 16, 2015, in which the Court denied 26 Flavors LLC's request for a preliminary injunction finding that it had no likelihood of prevailing on the merits of the case. (D.E. # 234-30 at 10.) The court also directed that 26 Flavors LLC file its claims in an appropriate Beth Din within one week, (D.E. # 234-30 at 83–84), and on January 22, 2015, 26 Flavors LLC caused a Hazmana from Beth Din of America ("BDA") to be issued to TRC; the Hazmana was sent to the attention of Steven Schreiber, Eugene

Magistrate Judge Orenstein and a "standstill agreement" was entered in which the parties agreed that neither side would take any action in any Rabbinical Court until a hearing on Schreiber's motion for preliminary injunction could be heard. (D.E. # 82.) The "standstill agreement" remained in place until January 19, 2016.

Schreiber, Koenig, and Friedman. (D.E. # 234-31.) The next day, on January 23, 2015, 26 Flavors LLC filed a notice of dismissal of its lawsuit. (D.E. # 225-2, Ex. E.)

On March 25, 2015, TRC filed a motion for leave to file a third-party complaint seeking to join Friedman as a party for the purpose of seeking an order regarding TRC's retention of counsel and for reimbursement of fees. (Id., Ex. F.) The Middlesex County Court issued an order on May 15, 2015, holding that the voluntary dismissal filed by 26 Flavors LLC would be vacated for the limited purpose of considering TRC's motion for leave to file a third-party complaint and that leave to file the third-party complaint would be granted solely for the purpose of deciding the motion to compel retention of counsel and the reimbursement of fees. (Id., Ex. J.)

A hearing before BDA was convened on April 16, 2015, and at that hearing, Friedman asserted that TRC was not entitled to hire counsel to defend against the claims brought against it. (D.E. # 234-32.) The remaining TRC members disputed that assertion and argued that TRC should be represented by counsel. (Id.) At the end of the hearing, BDA declined jurisdiction until such time as the Middlesex County Court issued a ruling on the issue of TRC's representation. (D.E. # 231, Ex. I at 163:7–10, 166:23–167:7, 181:24–182:2.)

A hearing was held before the Middlesex County Court on June 15, 2015, in which the Court held that: (1) Friedman's motion to dismiss the third-party complaint was denied; (2) TRC must reimburse Steven Schreiber, Eugene Schreiber, and Koenig for attorneys' fees and costs expended in connection with the defense of the temporary restraints sought by 26 Flavors LLC; (3) the issue of attorneys' fees expended in connection with matters other than the provisional remedy sought by 26 Flavors LLC was within the jurisdiction of the Beth Din; and (4) the voluntary dismissal filed on behalf of 26 Flavors LLC was reinstated. (D.E. # 225-2, Ex. L.)

V. Procedural Posture

Currently pending before the Court are five motions to compel arbitration filed by the following sets of defendants: (1) Friedman and New York Best Coffee Inc. (the "Friedman Defendants"), (D.E. # 225 ("Friedman Defs. Mem.")); (2) the E&J Companies (the "E&J Defendants"), (D.E. # 217, 218, 219 ("E&J Defs. Mems.")); (3) Ahearn and the Oil and Trucking Companies (the "Oil and Trucking Defendants"), (D.E. # 222 ("Oil and Trucking Defs. Mem.")); (4) Birnbaum and the Coffee Companies (the "Birnbaum Defendants"), (D.E. # 229 ("Birnbaum Defs. Mem.)); and (5) Ezell, Rivera, and Salcedo, (D.E. # 216 ("Ezell, Rivera, Salcedo Defs. Mem.")). In addition, defendants Geoffrey S. Hersko, and Geoffrey S. Hersko, P.C. (collectively, the "Hersko Defendants"), and defendants Michael Devine and Michael Devine CPA (collectively, the "Devine Defendants"), have filed motions to stay Schreiber's claims against them pending arbitration of the other claims in this action. (See D.E. # 213 ("Devine Defs. Mem."); D.E. # 226 ("Hersko Defs. Mem.").)

The Court has carefully considered all of the parties' submissions with respect to each of the motions. Because there is substantial overlap in the arguments in support of and in opposition to these motions, the Court will address them together in this omnibus opinion.

STANDARD OF REVIEW

On a motion to compel arbitration, "the court applies a standard similar to that applicable for a motion for summary judgment." Nicosia v. Amazon.com, Inc., 834 F.3d 220, 229 (2d Cir. 2016) (quoting Bensadoun v. Jobe-Riat, 316 F.3d 171, 175 (2d Cir. 2003)). The summary judgment standard requires a court to "consider all relevant, admissible evidence submitted by the parties and contained in the pleadings, depositions, answers to interrogatories, and admissions on file, together with . . . affidavits." Chambers v. Time Warner, Inc., 282 F.3d 147, 155 (2d Cir.

2002) (internal quotation marks omitted). In doing so, the Court must draw all reasonable inferences in favor of the non-moving party. Wachovia Bank, Nat'l Ass'n v. VCG Special Opportunities Master Fund, Ltd., 661 F.3d 164, 171–72 (2d Cir. 2011).

"If there is an issue of fact as to the making of the agreement for arbitration, then a trial is necessary." Bensadoun, 316 F.3d at 175 (citing 9 U.S.C. § 4 ("If the making of the arbitration agreement . . . [is] in issue, the court shall proceed summarily to the trial thereof.")). But "where the undisputed facts in the record require the matter of arbitrability to be decided against one side or the other as a matter of law, we may rule on the basis of that legal issue and 'avoid the need for further court proceedings.'" Wachovia Bank, 661 F.3d at 172 (quoting Bensadoun, 316 F.3d at 175).

DISCUSSION[2]

I. Arbitration Under the Federal Arbitration Act

The Federal Arbitration Act ("FAA") provides that a written arbitration provision "in a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and

[2] The Court has serious concerns about the overly aggressive manner in which this case has been litigated and the lack of candor in some of the filings. Defendant Friedman filed a 34-page memorandum of law in support of the motion to compel arbitration. In response, Schreiber filed a 104-page opposition. Not to be outdone, Friedman filed a 104-page reply brief, which is more than three times the length of the original brief.

Of greater concern, Friedman's briefs contain misrepresentations of the record and misleading assertions. For example, Friedman's reply brief states, "Judge McCormick necessarily concluded—based on third-party claims asserted against Friedman under the Two Rivers Operating Agreement—that the existence of the Heter did not vitiate Friedman's rights to arbitration, nor did it vitiate the jurisdiction of the Beth Din to adjudicate matters beyond the scope of any provisional remedy. Had Judge McCormick *not* so held, she would not have held that *any* claims against Friedman 'were within the jurisdiction of the Beth Din,' nor would she have dismissed those claims on that basis." (D.E. # 226 ("Friedman Defs. Reply Mem.") at 37 (quoting D.E. # 225-2, Ex. L).) Judge McCormick made no such conclusion. Rather, Judge McCormick's order states, "the court finding that the issue of attorneys' fees expended in connection with matters other than the provisional remedy sought by plaintiff is within the jurisdiction of the Beth Din." (D.E. # 225-2, Ex. L.)

In his reply brief, Friedman also claims that he was not aware of an email from Rabbi Cohen dated December 14, 2014, which contained a copy of the Hazmana. (Friedman Defs. Reply Mem. at 23.) The brief refers to a portion of Friedman's deposition in which he testified, "Oh. I'm sorry, no. I'm pulling it back, I apologize. No, no, no, no. It says emil@BrooklynBean.com, right? I never opened this e-mail. I don't think so that I had it." (Id. (citing D.E. # 234-4 at 106:1–6).) However, Friedman's brief omits the subsequent portion of his deposition testimony: upon further questioning about receiving an email from Rabbi Cohen about the Hazmana, Friedman admitted, "I did get—I did get something from Rabbi Cohen, yes." (D.E. # 234-4 at 107:8–11.)

enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. That provision evidences "a liberal federal policy favoring arbitration agreements." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). In order to effectuate Congress's "clear intent . . . to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible," the Act authorizes two procedural mechanisms for doing so: an order staying litigation that involves an issue or issues referable to arbitration, 9 U.S.C. § 3; and an order compelling the parties to arbitrate in accordance with the terms of their agreement, id. § 4. Moses H. Cone Mem'l Hosp., 460 U.S. at 22.

The question of whether the parties have agreed to arbitrate, i.e., the "question of arbitrability," is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002). "This principle 'flow[s] inexorably from the fact that arbitration is simply a matter of contract between the parties.'" Wachovia Bank, 661 F.3d at 171 (quoting First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995)). The determination of whether a dispute is arbitrable under the FAA consists of two prongs: "(1) whether there exists a valid agreement to arbitrate at all under the contract in question . . . and if so, (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement." Hartford Acc. & Indem. Co. v. Swiss Reinsurance Corp., 246 F.3d 219, 226 (2d Cir. 2001) (internal quotation marks omitted). To find a valid agreement to arbitrate, a court must apply the "generally accepted principles of contract law." Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 845 (2d Cir. 1987). "[A] party is bound by the provisions of a contract that [it] signs, unless [it] can show special circumstances that would relieve [it] of such obligation." Id.

Because there is "a strong federal policy favoring arbitration . . . where . . . the existence of an arbitration agreement is undisputed, doubts as to whether a claim falls within the scope of that agreement should be resolved in favor of arbitrability." ACE Capital Re Overseas ltd. v. Central United Life Ins. Co., 307 F.3d 24, 28 (2d Cir. 2002) (internal quotation marks and citations omitted). However, although federal policy favors arbitration, it is well-established that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which [it] has not agreed to so submit." Howsam, 537 U.S. 79, 83 (2002) (internal quotation marks omitted).

II. Defendants' Motions to Compel Arbitration Pursuant to the TRC Operating Agreement

Here, the TRC Operating Agreement provides that "[a]ll disputes with respect to any claim for indemnification and all other disputes and controversies between the parties hereto arising out of or in connection with this Operating Agreement shall be submitted to a Beth Din arbitration in accordance with the Orthodox Jewish religion. (TRC Op. Agm't § 11.2.) All of the TRC members signed the Operating Agreement, (id. at 20), and Amendment One thereto, (id., Amend. 1).

Friedman contends that all of Schreiber's claims against him are subject to mandatory arbitration pursuant to the arbitration clause in the TRC Operating Agreement. (Friedman Defs. Mem. at 7–24.) Although Friedman is the only defendant in this action who is party to the TRC Operating Agreement, the following secondary defendants argue that Schreiber's claims against them are also subject to mandatory arbitration pursuant to that agreement: New York Best Coffee, Inc., (id. at 24–26); the E&J Defendants, (E&J Defs. Mems. at 7–13); the Oil and Trucking Defendants, (Oil and Trucking Defs. Mem. at 3–11); Ezell, Rivera, and Salcedo, (Ezell, Rivera, Salcedo Defs. Mem. at 1–6); and the Birnbaum Defendants, (Birnbaum Defs. Mem. at 15–16). These secondary defendants argue that Schreiber should be estopped from refusing to arbitrate his

claims against them because Schreiber's claims against them are sufficiently intertwined with his claims against Friedman and the TRC Operating Agreement. Because the secondary defendants' arguments to compel arbitration depend upon Friedman's rights under the TRC Operating Agreement, the Court will first consider whether Schreiber is required to arbitrate his claims against Friedman.

A. Friedman

1. Waiver

Schreiber does not dispute that the TRC Operating Agreement is a valid contract with a binding arbitration clause.[3] He nevertheless argues that Friedman has waived his right to compel arbitration. (D.E. # 234 ("Pl. Mem. Opp.") at 39–48, 50–51.) Although the presumption in favor of arbitration is strong, "the obligation to arbitrate nevertheless remains a creature of contract." Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc., 252 F.3d 218, 224 (2d Cir. 2001); see also Baker & Taylor, Inc. v. AlphaCraze.Com Corp., 602 F.3d 486, 490 (2d Cir. 2010) (explaining that "[t]here is . . . nothing irrevocable about an agreement to arbitrate" (internal quotation omitted)). Therefore, parties to an arbitration agreement "may abandon this method of settling their differences, and under a variety of circumstances one party may waive or destroy by his conduct his right to insist upon arbitration." Baker & Taylor, Inc., 602 F.3d at 490.

First, a party may waive its right to arbitration by expressly indicating that it wishes to resolve its claims before a court. Apollo Theater Found., Inc. v. Western Int'l Syndication, No. 02-CV-10037 (DLC), 2004 WL 1375557, at *3 (S.D.N.Y. June 21, 2004). Generally, "a party may not freely take inconsistent positions in a lawsuit and simply ignore the effects of a prior filed document." Id. This policy against permitting a party to "play fast and loose with the courts" by

[3] Schreiber has alleged certain improprieties with respect to modifications to the Operating Agreement, (Compl. ¶¶ 76–78, 83, 85, 105–08), but does not dispute that the Operating Agreement contains a valid arbitration clause.

asserting inconsistent positions concerning its intent to pursue arbitration is necessary to prevent delay and ensure the integrity of the judicial process. Id.

Even absent an express waiver, a party may also impliedly waive its right to arbitration by "actively participat[ing] in a lawsuit or tak[ing] other action inconsistent with that right" that prejudices the opposing party. Doctor's Assoc., Inc. v. Distajo, 66 F.3d 438, 455 (2d Cir. 1995) (Distajo I) (quoting Cornell & Co. v. Barber & Ross Co., 360 F.2d 512, 513 (D.C. Cir. 1966) (per curiam)). The determination of waiver of arbitration is a "fact-specific" inquiry and "there are no bright-line rules." S & R Co. of Kingston v. Latona Trucking, Inc., 159 F.3d 80, 83 (2d Cir. 1998). However, "[t]he key to a waiver analysis is prejudice," Thyssen, Inc. v. Calypso Shipping Corp., S.A., 310 F.3d 102, 105 (2d Cir. 2002) (per curiam), and a party claiming waiver must demonstrate prejudice before a waiver will be found, see La. Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith Inc., 626 F.3d 156, 159 (2d Cir. 2010). The Second Circuit has further explained that the "waiver of the right to arbitrate is not to be lightly inferred." Thyssen, Inc., 310 F.3d at 104–05 (quoting Coca-Cola Bottling Co. v. Soft Drink & Brewery Workers Union Local 812, 242 F.3d 52, 57 (2d Cir. 2001)). Indeed, "any doubts concerning whether there has been a waiver are to be resolved in favor of arbitration." Louis Dreyfus, 252 F.3d at 229 (internal quotation marks omitted).

Here, Schreiber contends that Friedman has waived his right to arbitrate. The Court construes Schreiber's papers to raise two separate arguments concerning waiver: (1) Friedman forfeited his right to compel arbitration because he acted in a manner inconsistent with that right by refusing to arbitrate prior to the filing of this action; and (2) Friedman waived his right to compel arbitration through his conduct in litigating the instant action. The former arguments focus on Friedman's pre-litigation conduct, and the latter arguments are based on Friedman's litigation

conduct. Friedman raises two arguments in opposition: (1) the issue of whether he has waived the right to arbitrate must be decided by an arbitrator, and (2) he has not impliedly waived the right to arbitrate. The Court will consider each argument in turn.

a. Who Decides Whether Right to Arbitrate Has Been Waived

As a threshold matter, the Court must determine if it can decide whether Friedman has waived the right to arbitrate or whether this issue must be submitted to arbitration. "The Supreme Court has 'distinguished between questions of arbitrability, which are to be resolved by the courts unless the parties have clearly agreed otherwise, and other gateway matters, which are presumptively reserved for the arbitrator's resolution.'" Republic of Ecuador v. Chevron Corp., 638 F.3d 384, 393 (2d Cir. 2011) (quoting Mulvaney Mech., Inc. v. Sheet Metal Workers Int'l Ass'n, Local 38, 351 F.3d 43, 45 (2d Cir. 2003)). "Questions of arbitrability" is a term of art covering "dispute[s] about whether the parties are bound by a given arbitration clause" as well as "disagreement[s] about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." Howsam, 537 U.S. at 84. Those issues should be decided by a court unless "there is *clear and unmistakable evidence* from the arbitration agreement . . . that the parties intended that [arbitrability] be decided by the arbitrator." Bell v. Cendant Corp., 293 F.3d 563, 566 (2d Cir. 2002) (internal quotation marks omitted).

Traditionally, the Second Circuit has recognized that courts should decide the defense of waiver based on the litigation conduct of the party seeking to compel arbitration. See, e.g., Bell, 293 F.3d at 569–70; Distajo I, 66 F.3d at 456–57. The Second Circuit has also historically decided issues of waiver based on pre-litigation refusals to arbitrate rather than submitting the issue to an arbitrator. See Lane Ltd. v. Larus & Brother Co., 243 F.2d 364 (2d Cir. 1957).

In Howsam, the Supreme Court recognized in dicta a presumption that an arbitrator should decide allegations of waiver, delay, or a similar defense. 537 U.S. at 84. The Supreme Court relied on language from the Revised Uniform Arbitration Act of 2000, which was published by the Uniform Law Commission and provides that an "arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled." Id. (quoting Rev. Unif. Arb. Act § 6(c) (Unif. Law Comm'n 2000)). Following the Supreme Court's decision in Howsam, "two apparently inconsistent lines of cases" developed within the Second Circuit concerning whether the issue of waiver should be determined by a court or submitted to an arbitrator. Les Telecommunications d'Haiti S.A.M. v. Cine, No. 13-CV-6462 (JBW), 2014 WL 2655451, at *7 (E.D.N.Y. June 13, 2014); see also Gov't Employees Ins. Co. v. Grand Med. Supply, Inc., No. 11-CV-5339 (BMC), 2012 WL 2577577, at *7 n.3 (E.D.N.Y. July 4, 2012) (discussing conflicting authority).

On some occasions, the Second Circuit has cited the Supreme Court's dicta in Howsam positively. See Republic of Ecuador, 638 F.3d at 394; Mulvaney Mech., Inc., 351 F.3d at 45. However, even after Howsam, courts within the Second Circuit have routinely evaluated claims that a party waived its right to arbitrate based on its litigation conduct and have continued to apply pre-Howsam case law. See, e.g., LG Electronics, Inc. v. Wi-Lan USA, Inc., 623 F. App'x 568, 569–70 (2d Cir. 2015); La. Stadium, 626 F.3d at 159–61; Baker & Taylor, Inc., 602 F.3d at 490–92; Brookridge Funding Corp. v. Nw. Human Resources, Inc., 170 F. App'x 170, 171 (2d Cir. 2006); Apple & Eve, LLC v. Yantai N. Andrew Juice Co., 610 F. Supp. 2d 226, 229–31 (E.D.N.Y. 2009).[4] In circumstances where the defense of waiver is based on pre-litigation conduct

[4] In addition, five Circuit Courts of Appeals have construed Howsam as presumptively assigning to courts—rather than to arbitrators—questions involving allegations of waiver when the waiver is specifically based on a party's litigation conduct. See Grigsby & Assocs. v. M Sec. Inv., 664 F.3d 1350, 1353–54 (11th Cir. 2011); JPD, Inc. v. Chronimed Holdings, Inc., 539 F.3d 388, 393–94 (6th Cir. 2008); Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 217–19 (3d Cir. 2007); Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am., 97 F. App'x 462, 464 (5th Cir. 2004).

inconsistent with the right to arbitrate, courts in the Second Circuit have continued to apply Lane, see Canada Life Assur. Co. v. Guardian Life Ins. Co. of Am., 242 F. Supp. 2d 344, 353 (S.D.N.Y. 2003), or have simply evaluated the waiver issue without discussing who should resolve that issue, see Zhang v. Wang, 317 F. App'x 26, 27–8 (2d Cir. 2008).[5] In addition, a district court in the Second Circuit recently evaluated a defense of waiver based on a defendant's refusal to submit to arbitration once litigation began. See Apple & Eve, LLC, 610 F. Supp. 2d at 231–34.

The Court is persuaded by the weight of this authority that courts, rather than arbitrators, should evaluate the type of waiver issue raised in this case. The two cases in which the Second Circuit has cited the dicta in Howsam, and submitted the issue of waiver to an arbitrator, are distinguishable from the instant action. In Republic of Ecuador, the Second Circuit found clear and unmistakable evidence from the arbitration agreement of the parties' intent to have arbitrators decide questions of arbitrability. 638 F.3d at 393–95. Mulvaney involved a provision in a collective bargaining agreement ("CBA"), which stated that disputes arising out of negotiations for renewals of the CBA shall be submitted for arbitration, and the union was not permitted to strike unless and until the arbitration board failed to reach a unanimous decision and the union received a written notification of its failure. 351 F.3d at 45–46; see also Mulvaney Mech., Inc. v. Sheet Metal Workers Int'l Ass'n., Local 38, 288 F.3d 491, 494–95 (2d Cir. 2002), cert. granted, judgment vacated sub nom., 538 U.S. 918 (2003). The plaintiff claimed that the union's strike in violation of the CBA precluded the union from invoking the CBA's arbitration clause, and the Second Circuit held that this claim must be submitted to arbitration. Mulvaney, 351 F.3d at 45–

[5] Furthermore, even after Howsam, at least three Circuit Courts of Appeals have continued to decide issues of waiver based on pre-litigation refusals to arbitrate. See Samson v. NAMA Holdings, Inc., 637 F.3d 915, 931–34 (9th Cir. 2010); In re Tyco Int'l Ltd. Sec. Litig., 422 F.3d 41, 44–47 (1st Cir. 2005); O.J. Distrib., Inc. v. Hornell Brewing Co., 340 F.3d 345, 357–59 (6th Cir. 2003).

46. The repudiation claim in Mulvaney thus concerned whether a condition precedent to arbitrability had been fulfilled, which differs from Schreiber's waiver claims in this case.

Accordingly, the Court concludes that the issue of whether defendants' pre-litigation and litigation conduct waived their right to arbitrate is a question for this Court to determine.

b. Friedman's Conduct Waived His Right to Compel Arbitration

i. Friedman's Pre-Litigation Refusals to Arbitrate

Schreiber argues that by repeatedly refusing to arbitrate the instant dispute, Friedman waived his right to compel arbitration. (Pl. Mem. Opp. at 39–48.) The Second Circuit has held that in some circumstances a party's pre-litigation conduct that is inconsistent with the right to arbitrate can amount to a waiver of that right. In particular, in Lane, the Second Circuit explained:

> A party cannot raise unjustifiable objections to a valid demand for arbitration, all the while protesting its willingness in principle to arbitrate and then, when the other side has been forced to abandon its demand, seek to defeat a judicial determination by asking for arbitration after suit has been commenced.

243 F.2d at 367.[6] Accordingly, where a defendant has previously refused to submit to arbitration when the plaintiff was "ready, able and willing to arbitrate its claim and arbitrators were standing by to hear it," the defendant "ought not in fairness be able to shift its position and force arbitration on [the plaintiff]." Farr Whitlock Dixon & Co. v. S.S. Gen. Tsakalotos, 244 F. Supp. 544, 546 (S.D.N.Y. 1965). However, courts in the Second Circuit have declined to find waiver where a party previously objected to arbitration for justifiable reasons. See Canada Life Assur. Co., 242 F. Supp. at 353 (applying the Second Circuit's holding in Lane and concluding that because the defendant previously objected to arbitration for "justifiable" reasons, it did not waive its right to arbitrate).

[6] The Court further notes that at least three other Circuit Courts of Appeals have found that when a defendant refuses to arbitrate for unjustifiable reasons, the defendant forfeits his right to compel arbitration once plaintiff has initiated a lawsuit. See Samson, 637 F.3d at 934; In re Tyco, 422 F.3d at 44–47; O.J. Distrib., Inc., 340 F.3d at 356–59.

Here, the record demonstrates that in accordance with the TRC Operating Agreement, Schreiber filed a claim with BDM against Friedman concerning "partnership improprieties" on December 16, 2014.[7] (D.E. # 225-2, Ex. A.) Friedman was served with a Hazmana, which summoned him to a hearing before BDM on December 23, 2014, (id.), and the Secretary of BDM also sent the Hazmana to Friedman at two different email addresses, (D.E. # 234-2). Friedman, however, failed to appear at the December 23, 2014 hearing or otherwise respond to the summons, and on January 5, 2015, BDM issued a Heter Arkaos, allowing Schreiber and Koenig "to submit their claim against [Friedman] in secular court, so long as the defendant fails to accept upon himself the authority of a Rabbinical Court and the burden of Jewish law through signing an arbitration agreement." (D.E. # 234-8.)

Friedman counters that he was not properly notified that BDM issued a Hazmana and did not timely receive the Heter Arkaos, (Friedman Defs. Reply Mem. at 57), which the Court construes as an argument that Friedman had a justifiable reason for refusing to arbitrate. However, the evidence in the record—including Friedman's own sworn statements—undermines this assertion and demonstrates that Friedman was aware of the summons from BDM and that he nevertheless refused to participate in the arbitration proceedings. Friedman testified at his April 19, 2016 deposition that he was aware of the Hazmana shortly after it was issued. (D.E. # 234-4 at 101–02.) Friedman also maintains that he "understood that under governing Rabbinical law and

[7] Friedman argues for the first time in his reply brief that Schreiber's arbitration claim constituted a bad faith filing, so Schreiber is barred by the doctrine of unclean hands. (Friedman Defs. Reply Mem. at 56.) However, "[a]rguments may not be made for the first time in a reply brief." Knipe v. Skinner, 999 F.2d 708, 711 (2d Cir. 1993); see also McBride v. BIC Consumer Prods. Mfg. Co., 583 F.3d 92, 96 (2d Cir. 2009) (observing that courts ordinarily do not consider issues raised for first time in a reply brief). Even assuming arguendo that Friedman's argument is properly before the Court, the Court finds that it is without merit. The party who invokes the doctrine of unclean hands has the burden of proof. See Pedinol Pharmacal, Inc. v. Rising Pharma, Inc., 570 F. Supp. 2d 498, 505 (E.D.N.Y. 2008). Here, Friedman merely states that Schreiber filed a claim "in retaliation for Friedman's assertion of his rights," (Friedman Defs. Reply Mem. at 56), but does not offer any other evidence showing Schreiber's claim was a bad faith filing. Friedman's speculation about Schreiber's motives are insufficient to meet his burden of proof to invoke the unclean hands doctrine.

practices, he would be entitled to receive two additional summonses before he was required to respond," so he was justified in not responding to the Hazmana. (Friedman Defs. Reply Mem. at 22.) The Hazmana clearly states that Friedman was required to appear before BDM on December 23, 2014, (D.E. # 225-2, Ex. A), yet Friedman failed to do so. Friedman has thus failed to present evidence indicating that he had a justifiable reason for refusing to respond to the Hazmana and participate in arbitration proceedings before BDM.

Friedman also disputes Schreiber's claim that he repeatedly refused to arbitrate and argues that he did, in fact, commence arbitration proceedings before this action was initiated. (Friedman Defs. Reply Mem. at 58–60.) Friedman contends that he: (1) contacted BDM in June 2015 and requested that it rescind the Heter Arkaos, (id. at 59); and (2) commenced an arbitration proceeding against Steven Schreiber, Eugene Schreiber, and Koenig before BDBY in October 2015, (id. at 59–60).[8]

However, upon review of the record, the Court finds that Friedman's conduct demonstrates an intentional pattern of gamesmanship and delay—rather than a willingness to arbitrate this dispute, as he now contends. First, after receiving a summons from BDM, Friedman waited nearly six months to submit to BDM's jurisdiction—despite the fact that the Hazmana required a response within seven days. (D.E. # 225-2, Ex. A.) Friedman subsequently requested that BDM rescind

[8] Friedman also contends that on May 13, 2015, he selected an arbitrator in accordance with the Zabla procedure, thereby initiating arbitration proceedings. (Friedman Defs. Reply Mem. at 58–60; see also D.E. # 231, Ex. J.) However, Friedman raised this argument for the first time in his reply brief, and as discussed above, "[a]rguments may not be made for the first time in a reply brief." Knipe, 999 F.2d at 711. Even assuming arguendo that Friedman's argument is properly before the Court, the Court finds that it is without merit. When Schreiber initiated arbitration proceedings to resolve the management disputes at the core of the instant case, BDM issued a summons that required Friedman to respond within seven days of December 16, 2014. (D.E. # 225-2, Ex. A.) Friedman did not timely respond to the summons, but instead attempted to commence a second arbitration proceeding nearly six months later. The Court finds that such dilatory conduct amounts to a waiver. See Sucrest Corp. v. Chimo Shipping Ltd., 236 F. Supp. 229, 230 (S.D.N.Y. 1964) ("Dilatory conduct or delay, in the face of a known duty to act, constitutes a waiver where such conduct is inconsistent with an intention to reply upon arbitration. . . . The respondent's failure to make any attempt to arbitrate, after it had notice that a dispute had arisen, and despite its knowledge of its obligation [to commence arbitration] . . . can only be construed as conduct inconsistent with an intention to arbitrate. It was an intentional relinquishment or abandonment of a known right." (internal quotation marks and citations omitted)).

the Heter Arkaos, and BDM issued an order stating the Heter Arkaos would be withdrawn provided that Friedman execute an arbitration agreement in one of three enumerated Beth Dins. (Id., Ex. O.) Then, on October 13, 2016, Friedman commenced a new arbitration proceeding in BDBY, which was not one of the three tribunals identified in BDM's September 25, 2015 order.[9] Friedman thus not only waited nearly six months to respond to the initial arbitration summons, but when he did so, failed to comply with the arbitration award that was issued to ensure the dispute would be resolved through arbitration rather than judicial proceedings. Moreover, it was only after Schreiber initiated this action in federal court that Friedman eventually complied with BDM's September 25, 2015 order—by signing an arbitration agreement with Bais Din Tzedek Umishpot on January 27, 2016, (see D.E. # 234-63)—in order to have the Heter Arkaos withdrawn so that Schreiber could not bring his claims to court.

The Court further notes that at the time Schreiber initiated this action, the Heter Arkaos was still in effect, thus permitting Schreiber to resolve his claims in court rather than arbitration. (See D.E. # 234-8.) Although Friedman requested that BDM rescind the Heter Arkaos, BDM did not withdraw the Heter Arkaos until January 28, 2016, (D.E. # 225-2, Ex. C at 1), which was almost two months after Friedman filed the complaint in this action. Furthermore, when BDM revoked the Heter Arkaos, it did so on the basis of Friedman's agreement to arbitrate before Bais Din Tzedek Umishpot, which Friedman executed after Schreiber filed this lawsuit. (Id.)

The Court concludes that Friedman's failure to submit to arbitration, delay tactics, and noncompliance with the Rabbinical Courts' orders amount to a waiver of his right to compel

[9] Friedman argues that Schreiber is the one who refused to arbitrate, (Friedman Defs. Reply Mem. at 59), but upon the Court's independent review of the record, the Court finds that Friedman's argument mischaracterizes the procedural history of the arbitration proceedings. The record indicates that after he received a summons from BDBY, Schreiber sent multiple letters to BDBY indicating that he refused to respond to the summons because Friedman's decision to initiate proceedings in BDBY did not comply with BDM's September 25, 2015 order. (D.E. # 234-42, 234-43.)

arbitration. Indeed, as the Second Circuit has explained, a party cannot refuse to arbitrate, and "then, when the other side has been forced to abandon its demand, seek to defeat a judicial determination by asking for arbitration after suit has been commenced." Lane, 243 F.2d at 367. This is not a case in which the parties failed to arbitrate prior to initiating litigation because they were engaging in good faith negotiations concerning arbitration procedures. See Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co., 304 F.3d 476, 484–85 (5th Cir. 2002) (finding no waiver where each litigant had proposed a different arbitrator, and thus remained in good faith negotiations on that issue). Rather, Friedman's actions demonstrate an "intentional pattern of gamesmanship and delay," Apple & Eve, LLC, 610 F. Supp. 2d at 232, leading the Court to conclude that he has waived his right to compel arbitration. See, e.g., Brown v. Dillard's, Inc., 430 F.3d 1004, 1012–13 (9th Cir. 2005) (finding waiver based on pre-litigation refusals to arbitrate because defendant "concedes that it knew of its right to arbitrate, and its refusal to arbitrate after being served with [plaintiff's] notice of intent to arbitrate was an act inconsistent with that right"); In re Tyco, 422 F.3d at 44–46 (finding waiver because defendant "should not be allowed to reject [plaintiff's] demand for arbitration, stand idle, then submit a motion to compel arbitration after [plaintiff] has been required to commence a court proceeding"); O.J. Distrib., Inc., 340 F.3d at 357–59 (holding that defendant waived its right to compel arbitration because it acted "completely inconsistent with any reliance" upon the arbitration provision for more than a year and delayed its assertion of its right to arbitrate until plaintiff filed suit); Lane, 243 F.2d at 367 (holding that "by refusing to arbitrate the precise questions involved in this suit, [defendant] had forfeited its own right to arbitrate").

ii. Prejudice

The parties dispute whether Schreiber is required to show prejudice in order to establish that Friedman waived his right to compel arbitration. Schreiber contends that Friedman's refusal

to arbitrate "equate[s] to an explicit abandonment of his arbitration rights," and as a result, Schreiber "need not show prejudice in order to defeat the motion to stay and compel arbitration." (Pl. Mem. Opp. at 43 (quoting In re Tyco Int'l, Ltd., No. 02-1335-B, 03-1350-B, 2004 WL 1151541, at *1 (D.N.H. 2004).) Friedman counters that under Second Circuit case law, a showing of prejudice is required to infer waiver of the right to arbitrate. (Friedman Defs. Reply Mem. at 61–64.) Although the Second Circuit has held that a showing of prejudice is not required where a party expressly waives his right to arbitrate, Gilmore v. Shearson/Am. Exp. Inc., 811 F.2d 108, 112 (2d Cir. 1987), it is not clear whether a pre-litigation refusal to arbitrate constitutes an express waiver such that the party claiming waiver need not show prejudice. The handful of cases in which courts in the Second Circuit have found waiver based on pre-litigation refusals to arbitrate do not address the prejudice issue. See Lane, 243 F.2d at 365; Farr Whitlock Dixon & Co., 244 F. Supp. at 546. However, the Second Circuit has emphasized that, in general, prejudice is the key to a waiver analysis. See, e.g., La. Stadium, 626 F.3d at 159; Thyssen, Inc., 310 F.3d at 105. Moreover, other Circuits to consider the issue have concluded that a showing of prejudice is required. See Samson, 637 F.3d at 934; In re Tyco, 422 F.3d at 46–47; O.J. Distrib., Inc., 340 F.3d at 358–59.

Here, the Court need not resolve this unsettled issue of law because even if a showing of prejudice is required, Schreiber has demonstrated that he was prejudiced by Friedman's refusals to arbitrate. The Second Circuit has explained that the prejudice that supports a finding of waiver can be "substantive prejudice to the legal position of the party opposing arbitration, such as when the party seeking arbitration loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration. . . ." Doctor's Assocs., Inc. v. Distajo, 107 F.3d 126, 131 (2d Cir. 1997) (Distajo II) (internal quotation omitted); see also Satcom Int'l Grp. PLC v. Orbcomm Int'l Partners, L.P., 49 F. Supp. 2d 331, 340 (S.D.N.Y. 1999), aff'd, 205 F.3d 1324 (2d Cir. 1999)

(finding waiver where defendant "generally prevailed in [the] action to date and would be forced to start over in arbitration"). Here, there is no substantive prejudice because defendants have not lost a motion on the merits causing them to relitigate the issue by moving to compel arbitration.

The Second Circuit has also recognized that prejudice can exist "due to excessive cost and time delay." La. Stadium, 626 F.3d at 159. Here, due to Friedman's dilatory tactics, the arbitration proceedings were stalled for over a year; Schreiber initially filed his claim with BDM on December 16, 2014, (D.E. # 225, Ex. A), and Friedman only complied with the BDM's procedural requirements to proceed with arbitration on January 27, 2016, (D.E. # 234-63).[10]

Schreiber has also undoubtedly incurred considerable expenses as a result of Friedman's conduct—in submitting his claim for arbitration; in filing his district court complaint; in defending against motions to compel arbitration; and in participating in extensive proceedings before Magistrate Judge Orenstein regarding discovery disputes.[11] Friedman counters that Schreiber has not been prejudiced by the costs he incurred in responding to defendants' motions to compel arbitration and discovery disputes because Schreiber created these costs by opposing defendants' efforts to compel arbitration. (Friedman Defs. Mem. at 21–22; Friedman Defs. Reply Mem. at 67–68.) However, the Court finds this argument unpersuasive. Friedman relies on cases analyzing whether a party has waived the right to arbitrate due to his extensive participation in court

[10] Friedman argues that Schreiber cannot show prejudice because Schreiber himself is responsible for the delays in this action because Schreiber received the Heter Arkaos on January 5, 2015, but did not file suit until December 2, 2015. (Friedman Defs. Reply Mem. at 65–66.) However, the Court does not find this argument persuasive. The case law concerning waiver due to pre-litigation refusals to arbitrate does not require the party who commenced arbitration proceedings to file a lawsuit immediately after the initial refusal to arbitrate. See, e.g., Brown, 430 F.3d at 1008–09 (finding waiver and prejudice based on pre-litigation refusals to arbitrate where party asserting waiver filed suit nine months after initial refusal to arbitrate). Moreover, any delay gave Friedman the opportunity to comply with BDM's orders, which he chose not to do.

[11] In his reply memorandum of law, Friedman argues that Schreiber has not demonstrated prejudice because Schreiber has not shown that he personally incurred any expenses in connection with these proceedings. (Friedman Defs. Reply Mem. at 67.) However, Friedman does not cite to—and the Court is not aware of—any case law requiring that a litigant provide evidence of the exact amount of costs incurred to demonstrate prejudice.

proceedings before moving to compel arbitration. See, e.g., LG Electronics, Inc., 623 F. App'x at 570. In that context, a key inquiry for the Court is whether the party against whom waiver is sought "availed itself of the federal forum," only to seek to compel arbitration at a late stage in the litigation. Leadertex, Inc. v. Morganton Dyeing & Finishing Corp., 67 F.3d 20, 26 (2d Cir. 1995). In contrast, in cases in which courts have considered whether a plaintiff has been prejudiced by a defendant's pre-litigation refusal to arbitrate, courts have concluded that the plaintiff was prejudiced by costs incurred in litigation because those costs are the proximate result of the defendant's failure to abide by the plaintiff's initial choice to arbitrate the dispute. See, e.g., Brown, 430 F.3d at 1012–13. Here, the costs that Schreiber has incurred are the result of the fact that Friedman initially refused to arbitrate and only sought to invoke his right to arbitrate after Schreiber filed suit.

The Court accordingly finds that Schreiber has demonstrated sufficient prejudice to establish waiver.[12] See id. (explaining that plaintiff established prejudice because plaintiff "did not choose to litigate. She chose to arbitrate, and when she was rebuffed by [defendant], she sued as a last resort. In this circumstance, we have no trouble concluding that delay and costs incurred by [plaintiff] are prejudicial for the purpose of waiver analysis"). For these reasons, Friedman's pre-litigation conduct waived his right to compel arbitration.[13]

2. Collateral Estoppel and Res Judicata

Friedman also argues that Schreiber is precluded from challenging the arbitrability of his claims pursuant to the doctrines of collateral estoppel and res judicata. In particular, he contends

[12] The Court further notes that the ongoing discovery proceedings before Magistrate Judge Orenstein have revealed evidence of significant spoliation and deletion of evidence by defendants, (see D.E. # 260, Ex. A; D.E. # 284), which suggests that Friedman's delay has also prejudiced Schreiber due to the loss of potential evidence.

[13] Since Friedman's pre-litigation conduct is sufficient to infer waiver, the Court need not reach Schreiber's arguments concerning waiver based on Friedman's litigation conduct.

that Schreiber is precluded by: (1) a prior lawsuit in Middlesex County Court, in which defendant 26 Flavors LLC sued TRC, (Friedman Defs. Mem. at 72–74); and (2) the findings of BDM in its January 28, 2016 order, (id. at 4).

a. Middlesex County Court

The Court will first consider whether the lawsuit in the Middlesex County Court has any preclusive effect on Schreiber's claims in this lawsuit. Federal courts apply the rules of collateral estoppel and res judicata of the state in which the prior proceedings took place, which is New Jersey in the instant case. See Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81 (1984); Sullivan v. Gagnier, 225 F.3d 161, 166 (2d Cir. 2000). Under New Jersey law, res judicata applies when three circumstances are present: "(1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one." Watkins v. Resorts Int'l Hotel & Casino, Inc., 124 N.J. 398, 412 (1991). Collateral estoppel bars the relitigation of an issue that has already been addressed in a prior matter, if: (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding. First Union Nat'l Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 352 (2007).

Here, Friedman argues that Schreiber's claims against him are barred by res judicata and collateral estoppel. He contends that res judicata applies because TRC, with which Schreiber is in privity, sought and obtained leave to assert claims against Friedman in the New Jersey lawsuit for

breach of the TRC Operating Agreement, breach of implied duty of good faith and fair dealing, and breach of fiduciary duty and duty of loyalty—the same claims that Schreiber now brings in the instant lawsuit—and the New Jersey court determined these claims must be arbitrated. (Friedman Defs Mem. at 14–15.) This is perhaps Friedman's most disingenuous argument.

Schreiber's claims against Friedman are not precluded by either doctrine because the final judgment prong of both res judicata and collateral estoppel is not satisfied. "Claims are considered resolved by final judgment for res judicata purposes if they are pleaded and disposed of by the court." Delacruz v. Alfieri, 145 A.3d 695, 707–08 (N.J. App. Div. 2015). According to Friedman, the Middlesex County Court issued a final judgment on the merits because he contends the court determined that "all disputes between or among members of Two Rivers, other than the issue of the reimbursement of attorneys' fees expended in connection with the provisional remedy sought by 26 Flavors LLC in the New Jersey Lawsuit, are within the jurisdiction of the Beth Din." (Friedman Defs. Mem. at 15–16.) Friedman's argument, however, mischaracterizes the New Jersey court's proceedings and orders. Based on this Court's review, it should have been abundantly clear to anyone who read the record of those proceedings that the New Jersey court did not issue a final judgment on the merits of the arbitrability of Schreiber's partnership claims against Friedman. First, the New Jersey court's June 30, 2015 order concluded that "the issue of attorneys' fees expended in connection with matters other than the provisional remedy sought by plaintiff is within the jurisdiction of the Beth Din." (D.E. # 225-2, Ex. L.) On its face, the order only concerns the arbitrability of the issue of attorney's fees; the order does not—as Friedman contends—include any conclusions or judgments concerning the arbitrability of Schreiber's partnership claims.

Moreover, the transcript of the New Jersey court's proceedings further confirms that the court did not render a judgment concerning the arbitrability of Schreiber's partnership claims

against Friedman. During oral argument regarding TRC's motion to compel retention of counsel and Friedman's motion to dismiss TRC's third-party complaint, the court observed, "There has been no complaint filed before me asking me to resolve [the arbitrability of the partnership issues]. It is way, way beyond the scope of anything I am doing right now." (Id., Ex. K at 37:22–24.) The court then stated that it did not "give permission to amend the complaint to include that issue," (id. at 38:2–3), and that "what [it] viewed would be within [its] province is only the attorneys fees expended on what is the alleged provisional remedy," (id. at 44:19–22).

The Middlesex County Court thus did not issue a final judgment on the merits ordering Schreiber to arbitrate his partnership claims against Friedman, so neither res judicata nor collateral estoppel precludes Schreiber from challenging the arbitrability of his claims.

b. BDM

Friedman also argues the Court should grant his motion to compel arbitration because Schreiber is collaterally estopped from challenging BDM's findings concerning the Heter Arkaos. (D.E. # 360 at 8–9.) The Second Circuit has explained that "[i]t is settled law that the doctrine of issue preclusion is applicable to issues resolved by an earlier arbitration." Khandhar v. Elfenbein, 943 F.2d 244, 247 (2d Cir. 1991) (internal quotation marks, brackets, and citations omitted). However, the Second Circuit has made it equally clear that "collateral estoppel is an equitable doctrine—not a matter of absolute right. Its invocation is influenced by considerations of fairness in the individual case." PenneCom B.V. v. Merrill Lynch & Co., Inc., 372 F.3d 488, 493 (2d Cir. 2004). Because issue preclusion is an equitable doctrine, the Second Circuit and federal courts adhere to the maxim that "[h]e who comes into equity must come with clean hands." Id. (quoting Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 241 (1933)). This principle, known as the "doctrine of unclean hands," is "that the equitable powers of this court can never be exerted

[o]n behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abettor of iniquity." PenneCom B.V., 372 F.3d at 493 (internal quotation marks, brackets, and citations omitted).

Here, as discussed above, the record demonstrates that Friedman engaged in an intentional pattern of gamesmanship and delay in proceeding before the Rabbinical Courts prior to the commencement of this lawsuit. Moreover, Schreiber alleges that the January 28, 2016 BDM award was procured through fraud and improper ex parte communications. (Pl. Mem. Opp. at 60–61; see also D.E. # 178 at 16–17.) Accordingly, the Court finds that application of the equitable doctrine of issue preclusion would be inappropriate. See CBF Industria de Gusa S/A v. AMCI Holdings, Inc., 850 F.3d 58 (2d Cir. 2017); PenneCom B.V., 372 F.3d at 491–93.

B. Remaining Defendants

As discussed above, the following secondary defendants who are not signatories of the TRC Operating Agreement filed motions to compel arbitration on the basis of the arbitration clause in that agreement: New York Best Coffee, Inc.; the E&J Defendants; the Oil and Trucking Defendants; Ezell, Rivera, and Salcedo; and the Birnbaum Defendants.

First, the E&J Defendants request that the Court compel arbitration of Schreiber's claims against them in the event that the Court grant Friedman's motion to compel arbitration. (E&J Defs. Mems. at 2 ("In the event the Court grants the Friedman Defendants' motion to compel arbitration, Plaintiff's claims against E&I Investors should also be subject to the same arbitration provision.")) Because the Court denied Friedman's request to compel arbitration, the Court accordingly denies the E&J Defendants' motions to compel arbitration.

The remaining non-signatory defendants move to compel arbitration of Schreiber's claims against them under principles of equitable estoppel. Courts have "recognized a number of common

law principles of contract law that may allow non-signatories to enforce an arbitration agreement, including equitable estoppel." Ross v. Am. Express Co., 478 F.3d 96, 99 (2d Cir. 2007). If, as here, the question of estoppel goes to the overall arbitrability of the dispute, it is for the Court to answer. See Republic of Ecuador, 638 F.3d at 394.

Under principles of estoppel, "signatories to an arbitration agreement can be compelled to arbitrate their claims with a non-signatory where a careful review of the relationship among the parties, the contracts they signed . . . , and the issues that had arisen among them discloses that the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed." Denney v. BDO Seidman, L.L.P., 412 F.3d 58, 70 (2d Cir. 2005) (internal quotation marks omitted) (quoting Choctaw Generation Ltd. P'ship v. Am. Home Assurance Co., 271 F.3d 403, 406 (2d Cir. 2001)). Courts in the Second Circuit have applied a two-part test in "determining whether the signatory's claims are intertwined with the underlying contract obligations . . . [analyzing] whether (1) the signatory's claims arise under the 'subject matter' of the underlying agreement, and (2) whether there is a 'close relationship' between the signatory and the non-signatory party." Ragone v. Atl. Video at Manhattan Ctr., No. 07-CV-6084 (JGK), 2008 WL 4058480, at *8 (S.D.N.Y. Aug. 29, 2008), aff'd, 595 F.3d 115 (2d Cir. 2010); see also Ross, 478 F.3d at 480–85. The party seeking to compel a signatory to an arbitration agreement to arbitrate its claims bears the burden of proving that equitable estoppel applies. See Local Union No. 38, Sheet Metal Workers' Int'l Ass'n, AFL-CIO v. Custom Air Sys., Inc., 357 F.3d 266, 268 (2d Cir. 2004).

Here, these non-signatory defendants contend that Schreiber must arbitrate his claims against them because these claims are intertwined with Schreiber's claims against Friedman and the TRC Operating Agreement. However, this fact is not dispositive of the estoppel issue. As the

Second Circuit recently explained, estoppel is not warranted simply because "a relationship . . . may be found among the parties to a dispute and their dispute deals with the subject matter of an arbitration contract made by one of them." Sokol Holdings, Inc. v. BMB Munai, Inc., 542 F.3d 354, 359 (2d Cir. 2008). Rather, "there must be a relationship among the parties of a nature that justifies a conclusion that the party which agreed to arbitrate with another entity should be estopped from denying an obligation to arbitrate a similar dispute with the adversary which is not a party to the arbitration agreement." Id.

In the instant action, some of the non-signatory defendants who move to compel arbitration pursuant to the TRC Operating Agreement under principles of equitable estoppel have failed to present arguments concerning the "close relationship" prong of the equitable estoppel test. In particular, the memoranda of law in support of the motions to compel filed by Ezell, Rivera, Salcedo, New York Coffee Company, and the Birnbaum Defendants simply argue that Schreiber's claims against them are intertwined with his claims against Friedman and the TRC Operating Agreement, but do not present any arguments that there is a close relationship between Friedman and these non-signatory defendants. As a result, they have failed to meet their burden of establishing equitable estoppel and their motions to compel arbitration are denied.[14]

[14] In its memorandum of law, New York Best Coffee also asserts that Schreiber's claims against New York Best Coffee are subject to arbitration under a third-party beneficiary theory. (Friedman Defs. Mem. at 24.) Under general contract principles, non-signatories "fall within the scope of an arbitration agreement where that is the intent of the parties." McPheeters v. McFinn, Smith & Co., Inc., 953 F.2d 771, 772 (2d Cir. 1992). Accordingly, third-party beneficiaries of a contract with an arbitration clause can fall within the scope of that clause. See Spear, Leeds & Kellogg v. Cent. Life Assur. Co., 85 F.3d 21, 26 (2d Cir. 1996). However, a third-party beneficiary exists "only if the parties to that contract intended to confer a benefit on him when contracting; it is not enough that some benefit incidental to the performance of the contract may accrue to him." McPheeters, 953 F.2d at 773. Here, New York Best Coffee simply cites to a Second Circuit case discussing the third-party beneficiary theory, but does not offer any substantive arguments to explain why the parties to the TRC Operating Agreement intended to confer a benefit on New York Best Coffee when contracting. (See Friedman Defs. Mem. at 30–31.) The Court accordingly finds that Schreiber should not be compelled to arbitrate his claims against New York Best Coffee under a third-party beneficiary theory. See Trepel v. City of New York, No. 98-CV-6327 (JG), 2000 WL 1364362, at *6 (E.D.N.Y. Sept. 11, 2000) ("The party claiming third-party beneficiary status bears the burden of establishing its right to enforce the contract.").

Finally, the Oil and Trucking Defendants argue the alleged relationship between Friedman and the Oil and Trucking Defendants requires arbitration of Schreiber's claims against them. In particular, they contend the close relationship requirement is satisfied because the complaint alleges that the Oil and Trucking companies "are all companies that are owned or under the control of Friedman," and that Friedman allegedly "has used these companies to extract large sums in fraudulent billings and financial transactions from Two Rivers." (Oil and Trucking Defs. Mem. at 10 (quoting Compl. ¶ 14).) The Oil and Trucking Defendants rely on Ross v. American Express Co., 547 F.3d 137, 143–45 (2d Cir. 2008), to argue that estoppel is warranted when a non-signatory defendant owns or controls a signatory defendant. However, under Sokol, in order to find that Schreiber must arbitrate his claims against the non-signatory defendants, the Court would need to conclude that Schreiber's promise to arbitrate was "reasonably seen on the basis of the relationships among the parties as extending" not only to members of TRC, the contractual counterparties, but also to the Trucking and Fuel Defendants. 542 F.3d at 361. In order to reach this conclusion, the Court would have to find that the Trucking and Fuel Defendants were, or "would predictably become," with Schreiber's knowledge and consent, "affiliated or associated with [the TRC members] in such a manner as to make it unfair to allow [Schreiber] to avoid [his] commitment to arbitrate on the ground" that the Trucking and Fuel Defendants were not the very parties with which Schreiber had a contract. Id.

Here, the Oil and Trucking Defendants were not mentioned in the TRC Operating Agreement, and Schreiber had no reason to believe he was entering into any agreement with those defendants. See Laumann v. Nat'l Hockey League, 989 F. Supp. 2d 329, 341 (S.D.N.Y. 2013). Moreover, nothing in the complaint, or in the non-signatory defendants' briefing, suggests the "inevitable or predictable intervention" of these defendants into TRC's operations. See Winter

Investors, LLC v. Panzer, No. 14-CV-6852 (KPF), 2015 WL 5052563, at *10 (S.D.N.Y. Aug. 27, 2015); see also The Republic of Iraq v. BNP Paribas USA, 472 F. App'x 11, 14 (2d Cir. 2012) (finding that "even if the contract between the [signatories] [could] give rise to third-party claims, there [was] no evidentiary basis for concluding that the [signatories] bound themselves to resolve such claims through arbitration"). As in Sokol, therefore, "there would be no unfairness" in allowing Schreiber, the alleged victim of fraud, unjust enrichment, and various other torts, to insist that, "while [he] agreed to arbitrate with his contractual counterparty . . . he in no way consented to extend that agreement to [entities and individuals] which tortiously subverted his rights under the agreement." Sokol, 542 F.3d at 362; see also Ross, 547 F.3d at 146 (holding that the requirements of equitable estoppel were not established where the non-signatory's "only relation with respect to the cardholder agreements was as a third party allegedly attempting to subvert the integrity of the cardholder agreements"). The Trucking and Fuel Defendants have thus failed to establish the close relationship prong of the equitable estoppel test.

For the foregoing reasons, the non-signatory defendants' motions to compel arbitration pursuant to the TRC Operating Agreement are denied.

III. The Birnbaum Defendants' Motions to Compel Arbitration Pursuant to the Distribution Agreement

The Birnbaum Defendants also move to compel arbitration pursuant to the arbitration clause in the Distribution Agreement. The Distribution Agreement provides that "[a]ll disputes with respect to any claim for indemnification and all other disputes and controversies between the parties hereto arising out of or in connection with this Agreement shall be submitted to the Beth Din of America for arbitration in accordance with Orthodox Jewish religion." (Distrib. Agm't at 2.) However, the Distribution Agreement states that "[n]otwithstanding anything herein to the contrary, any party may seek from a court any provisional remedy that may be necessary to protect

any rights or property of such party pending the establishment of the arbitral tribunal or its determination of the merits of the controversy." (Id.) The Distribution Agreement was executed by TRC and 1QC, but was subsequently assigned to Office Coffee Services, LLC. (D.E. # 229, Ex. B.) The agreement was thereafter assigned to 26 Flavors LLC. (Id., Ex. D.) The contract assigning the Distribution Agreement to Office Coffee Services LLC contains the same arbitration clause as the Distribution Agreement. (Id., Ex. B at 2.) Under New Jersey law,[15] an arbitration clause is generally held to apply to the assignee of a contract. See Bel-Ray Co., Inc. v. Chemrite (Pty) Ltd., 181 F.3d 435, 441–43 (3d Cir. 1999) (applying New Jersey law and holding that assignee was bound by arbitration clauses in contracts). There is no evidence in the record that Crazy Cups and Single Serve Beverages Distribution are parties to the Distribution Agreement or have been assigned rights thereto.

As discussed above, the determination of whether a dispute is arbitrable under the FAA consists of two prongs: (1) whether there exists a valid agreement to arbitrate at all under the contract in question, and if so, (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement. Hartford Acc., 246 F.3d at 226.

A. Waiver

Here, Schreiber does not dispute that the Distribution Agreement contains a valid arbitration clause. Rather, he argues that the Birnbaum Defendants have waived their right to compel arbitration.[16] In particular, he contends: (1) Friedman's pre-litigation refusals to arbitrate

[15] Here, the relevant contracts do not contain a choice-of-law provision. In their memoranda of law, however, the parties rely on New Jersey law and fail to address the issue of choice of law. As a result, the Court finds that the parties have implicitly consented to application of New Jersey contract law and that their implied consent "is sufficient to establish choice of law" on the question. Krumme v. WestPoint Stevens Inc., 238 F.3d 133, 138 (2d Cir. 2000) (internal quotation marks omitted); see also Allied Irish Banks v. Bank of Am., N.A., 240 F.R.D. 96, 102–03 (S.D.N.Y. 2007) (finding implied consent to apply New York law where the parties did not address the choice of law and cited New York cases).

[16] For the reasons stated above, the Court concludes that it may evaluate Schreiber's waiver arguments rather than submitting the issue to arbitration.

waived the Coffee Company Defendants' right to arbitrate, (Schreiber Mem. Opp. at 48–50); and (2) the Birnbaum Defendants' litigation conduct forfeited their right to compel arbitration, (id. at 50–51).

1. Waiver of the Birnbaum Defendants' Right to Arbitrate Based on Friedman's Pre-Litigation Conduct

Schreiber first argues that the Coffee Company Defendants have waived their right to arbitrate because Friedman refused to allow TRC to retain counsel in arbitration before BDA and Friedman is a minority member of the Coffee Companies. The Court finds this waiver argument unpersuasive. Schreiber does not cite—and the Court is not aware of—any cases indicating that the conduct of the minority members of a company can waive that company's right to compel arbitration. In light of the Second Circuit's guidance that waiver of the right to arbitrate is not to be lightly inferred, Thyssen, Inc., 310 F.3d at 104–05, the Court concludes that Friedman's pre-litigation conduct did not waive the Coffee Company Defendants' right to compel arbitration.

2. Waiver of the Birnbaum Defendants' Right to Arbitrate Based on Their Litigation Conduct

The Court also finds that the Birnbaum Defendants' litigation conduct is insufficient to waive their right to arbitrate. A party is deemed to have waived its right to arbitration if it "engages in protracted litigation that results in prejudice to the opposing party." Cotton, 4 F.3d at 179. Although waiver of arbitration is not to be lightly inferred, the issue is fact-specific and there are no bright-line rules. See Leadertex, 67 F.3d at 25. Factors for the Court to consider include: "(1) the time elapsed from the commencement of the litigation to the request for arbitration; (2) the amount of litigation (including exchanges of pleadings, any substantive motions, and discovery); and (3) proof of prejudice, including taking advantage of pre-trial discovery not available in arbitration, delay, and expense." S & R Co., 159 F.3d at 83.

Prejudice is "[t]he key to a waiver analysis," Thyssen, Inc., 310 F.3d at 105, and "there can be no waiver unless that conduct resulted in prejudice to the other party," Leadertex, Inc., 67 F.3d at 26. As discussed above, prejudice in the waiver context can be substantive or due to excessive cost and delay. Here, there is no substantive prejudice because the Birnbaum Defendants have not lost a motion on the merits causing them to relitigate the issue by moving to compel arbitration.

Prejudice can also exist due to excessive cost and delay in a party's litigation conduct. In particular, prejudice exists where a party against whom waiver is asserted: (1) engages in discovery procedures not available in arbitration, (2) delays invoking arbitration rights while the adversary incurs unnecessary delay or expense, or (3) makes motions going to the merits of an adversary's claims. See Cotton, 4 F.3d at 179. Here, Schreiber contends that all of the defendants, including the Birnbaum Defendants, have made extensive discovery requests, but the record indicates that Schreiber has not, in fact, submitted any documents in response to these requests. Moreover, the Birnbaum Defendants have not filed any motions to compel discovery. As a result, this factor weighs against a finding of prejudice.[17] See Polit v. Global Foods Int'l Corp., No. 14-CV-7360 (JPO), 2015 WL 1780161, at *4 (S.D.N.Y. Apr. 20, 2015) ("There has been no motion practice other than the instant motion, and while [plaintiff] has made various requests for discovery, [defendant] has neither responded to these requests nor requested discovery itself. Thus, this factor also weighs against a finding of waiver."); E. Fish Co. v. S. Pacific Shipping Co., Ltd., 105 F. Supp. 2d 234, 240–41 (S.D.N.Y. 2000) (finding no waiver where "[l]ittle discovery ha[d] been conducted," and "[w]hile notices of deposition ha[d] been served on both sides, no deposition(s)

[17] The Court notes that defendants moved for a stay of discovery pending the Court's resolution of their motions to compel arbitration, (see D.E. # 104), which Magistrate Judge Orenstein denied, (see D.E. dated Feb. 3, 2016). Defendants appealed Magistrate Judge Orenstein's order to this Court, (see D.E. # 126), and this Court affirmed Magistrate Judge Orenstein's order, (see D.E. dated Mar. 9, 2016). The Court further ordered that "[g]eneral document discovery may proceed as to both sides. Further, plaintiff may conduct discovery of defendant Friedman (including by deposing him) as to 1) Friedman's relationships with the other defendants; and 2) the arbitrability of the claims at issue in this case (which encompasses the communications of Friedman and his agents with various beth dins)." (Id.)

ha[d] been conducted"); cf Leadertex, Inc., 67 F.3d at 26 (finding waiver where the party against whom waiver was sought "availed itself of the federal forum by its energetic pursuit of discovery").

The Birnbaum Defendants also did not delay in invoking their arbitration rights. The Birnbaum Defendants filed a letter requesting a pre-motion conference on their proposed motion to compel arbitration less than two months after Schreiber initiated this action, (see D.E. # 104), and timely filed their motion to compel in accordance with the schedule set by the Court at that pre-motion conference, (see D.E. # 229, 230). This time period is not, by itself, long enough to infer waiver. See, e.g., PPG Indus., Inc. v. Webster Auto Parts, Inc., 128 F.3d 103, 104 (2d Cir. 1997) (holding that a five-month delay is not enough to infer waiver). Regarding the final factor, the Birnbaum Defendants have not submitted motions concerning the merits of Schreiber's claims other than the instant motion.

Moreover, the likelihood of prejudice here is "greatly reduced" by the fact that Schreiber has been on notice that the Birnbaum Defendants would seek to arbitrate when they filed a letter requesting a pre-motion conference on their proposed motion to compel arbitration on January 29, 2016. Polit, 2015 WL 1780161, at *5. This was a "clear indication" of defendants' "intention to invoke [their] arbitration rights." PPG Indus., Inc., 128 F.3d at 109; see also E. Fish Co. v. S. Pac. Shipping Co., 105 F. Supp. 2d 234, 241 (S.D.N.Y. 2000) (finding no prejudice where "Plaintiffs were on notice that Defendants might seek arbitration as soon as Defendants raised the arbitration issue in the answer").

In light of the Second Circuit's guidance that the "waiver of the right to arbitrate is not to be lightly inferred," Thyssen, Inc., 310 F.3d at 104–05, the Court concludes that Schreiber has failed to demonstrate prejudice as a result of defendants' litigation conduct sufficient to infer waiver.

B. Scope of the Arbitration Agreement

The second step of the arbitrability analysis requires the Court to determine whether Schreiber's claims against the Birnbaum Defendants fall within the scope of the arbitration clause of the Distribution Agreement. As noted above, only some of the Birnbaum Defendants are parties or assignees of the Distribution Agreement. The Court will first consider whether Schreiber's claims against the non-signatories to the agreement are within the scope of the agreement's arbitration clause, and then will consider the scope of the arbitration clause with respect to the signatories.

1. Non-Signatories of the Distribution Agreement

There is no evidence in the record—and the Birnbaum Defendants do not contend—that Crazy Cups and Single Serve Beverages Distribution are parties to the Distribution Agreement, so there is no express agreement between Schreiber and these defendants to arbitrate. As discussed above, in some circumstances, the Second Circuit has held that a non-signatory may compel arbitration under a theory of equitable estoppel. The party seeking to compel arbitration bears the burden of proving that equitable estoppel applies. See Custom Air Sys., Inc., 357 F.3d at 268. Here, however, the Birnbaum Defendants have not offered any arguments concerning why Schreiber should be estopped from refusing to arbitrate his claims against Crazy Cups and Single Serve Beverages Distribution under the Distribution Agreement. Because these non-signatory defendants have failed to meet their burden, their motion to compel arbitration pursuant to the Distribution Agreement is denied.

2. Signatories of the Distribution Agreement

The Court will next consider whether Schreiber's claims against the parties to the Distribution Agreement and its assignees—Birnbaum, Office Coffee Services LLC, and 26 Flavors

LLC—fall within the arbitration clauses of those agreements. The Second Circuit has established a three-part inquiry for determining whether a particular dispute falls within the scope of an arbitration agreement. See Louis Dreyfus, 252 F.3d at 224. First, "a court should classify the particular clause as either broad or narrow." Id. Second, if the clause is narrow, "the court must determine whether the dispute is over an issue that 'is on its face within the purview of the clause,' or over a collateral issue that is somehow connected to the main agreement that contains the arbitration clause." Id. (quoting Rochdale Vill., Inc. v. Public Serv. Employees Union, 605 F.2d 1290, 1295 (2d Cir. 1979)). Third, if the arbitration clause is broad, "there arises a presumption of arbitrability and arbitration of even a collateral matter will be ordered if the claim alleged 'implicates issues of contract construction or the parties' rights and obligations under it'" or "[i]f the allegations underlying the claims 'touch matters' covered by the parties' . . . agreements." Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs, Inc., 369 F.3d 645, 654 (2d Cir. 2004) (quoting Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l Inc., 198 F.3d 88, 99 (2d Cir. 1999)); see also ACE Capital Re Overseas Ltd., 307 F.3d at 34 ("[W]hen parties use expansive language in drafting an arbitration clause, presumably they intend all issues that 'touch matters' within the main agreement to be arbitrated." (quoting Louis Dreyfus, 252 F.3d at 225) (internal citation omitted)).

At the first step, there are no "fixed rules" governing the determination of whether an arbitration clause is broad or narrow. Id. at 225. Instead, the Court "must determine whether, on the one hand, the language of the clause, taken as a whole, evinces the parties' intent to have arbitration serve as the primary recourse for disputes connected to the agreement containing the clause, or if, on the other hand, arbitration was designed to play a more limited role in any future dispute." Id. At the subsequent steps of the analysis, courts must "focus on the factual allegations

in the complaint rather than the legal causes of action asserted." JLM Indus. v. Stolt-Nielsen S.A., 387 F.3d 163, 174 (2d Cir. 2004) (internal quotation marks and citation omitted).

Here, the Distribution Agreement provides that "[a]ll disputes with respect to any claim for indemnification and all other disputes and controversies between the parties hereto arising out of or in connection with this Agreement shall be submitted to a Beth Din arbitration in accordance with the Orthodox Jewish religion." (Distrib. Agm't at 2; see also D.E. # 229, Ex. B at 2.) The language the parties chose indicates that they intended arbitration to be the primary method for resolving disputes, rendering it a broad arbitration provision. See Ace Capital Re Overseas Ltd., 307 F.3d at 26 (classifying as broad the phrase "any dispute [that] shall arise between the parties . . . with reference to the interpretation of this Agreement or their rights with respect to any transaction involved"); Collins & Aikman Prods. Co. v. Building Sys., Inc., 58 F.3d 16, 20 (2d Cir. 1995) (holding that a clause "submitting to arbitration 'any claim or controversy arising out of or relating to the agreement,' is the paradigm of a broad clause" (brackets omitted)); Mehler v. Terminix Int'l Co. L.P., 205 F.3d 44, 49 (2d Cir. 2000) (describing clause providing for arbitration of "all disputes relating to th[e] Agreement (excepting any dispute relating to intellectual property rights)" as broad).

The Court next applies the arbitration clause to each of Schreiber's claims against Birnbaum, Office Coffee Services LLC, and 26 Flavors LLC, mindful of the presumption of arbitrability. The Second Circuit has made clear that a party seeking to overcome a presumption of arbitrability carries a heavy burden, and arbitration should be ordered unless "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that [it] covers the asserted dispute." WorldCrisa Corp. v. Armstrong, 129 F.3d 71, 74 (2d Cir. 1997)

(quoting Assoc. Brick Mason Contractors of Greater New York, Inc. v. Harrington, 820 F.2d 31, 35 (2d Cir. 1987)).

Some of Schreiber's claims against Birnbaum, Office Coffee Services LLC, and 26 Flavors LLC arise directly from the Distribution Agreement. In particular, Schreiber claims that Office Coffee Services breached the Distribution Agreement, (Compl. ¶¶ 656–61), and this breach of contract claim constitutes a dispute among the parties to the agreement arising out of or in connection with the agreement, see, e.g., Haining Zhang v. Schlatter, 557 F. App'x 9, 13 (2d Cir. 2014) (finding the plaintiff's breach of contract claim was "unambiguously subject to arbitration" where the arbitration agreement covered "[a]ny controversy, dispute or claim regarding the interpretation or performance of this Agreement"). In addition, Schreiber alleges that Birnbaum fraudulently induced him into entering the Distribution Agreement, (Compl. ¶¶ 708–14), and courts in the Second Circuit have held that such fraudulent inducement claims fall within broad arbitration clauses that cover disputes arising out of or in connection with the arbitration agreement, see, e.g., ACE Capital Re Overseas Ltd., 307 F.3d at 33–34.

Schreiber brings a number of other claims against Birnbaum, Office Coffee Services LLC, and 26 Flavors LLC that do not directly arise from the Distribution Agreement, including[18]: replevin, (Compl. ¶¶ 937–39); embezzlement and theft, (id. ¶¶ 582, 584); common law equitable fraud, (id. ¶¶ 746–50); civil conspiracy, (id. ¶¶ 756–62); violations of the Federal Civil RICO Act, (id. ¶¶ 763–88); violations of the New Jersey Civil RICO Act, (id. ¶¶ 789–813); unjust enrichment, (id. ¶¶ 845–48); commercial bad faith, (id. ¶¶ 849–58); conversion, (id. ¶¶ 859–64); violations of the New Jersey Consumer Fraud Act, (id. ¶¶ 925–36); accounting, (id. ¶¶ 940–46); and intentional spoliation of evidence, (id. ¶¶ 947–56). Schreiber does not offer any arguments as to why these

[18] The Court notes that Schreiber brings many of these claims against all defendants, rather than the Birnbaum Defendants specifically.

claims do not fall within the scope of the broad arbitration clause—despite the fact that a presumption of arbitrability can only be overcome by "positive assurance that the arbitration clause is not susceptible of an interpretation that it covers the asserted dispute." WorldCrisa Corp., 129 F.3d at 74.

In any event, in light of the broad scope of the arbitration clause and the presumption in favor of arbitrability, the Court finds these claims are within the scope of the arbitration clause of the Distribution Agreement. The allegations underlying these claims "touch matters" covered by the Distribution Agreement, so these claims must be arbitrated, "whatever the legal labels attached to them." Norcom Elecs. Corp. v. CIM Usa Inc., 104 F. Supp. 2d 198, 203–04 (S.D.N.Y. 2000) (quoting Collins, 58 F.3d at 21). Indeed, courts in the Second Circuit have commonly compelled arbitration where plaintiffs brought common law and statutory claims that fell within the scope of a broad arbitration clause. See, e.g., Protostorm, LLC v. Antonelli, Terry, Stout & Kraud, LLP, No. 08-CV-931 (NGG), 2010 WL 785316, at *6 (E.D.N.Y. Mar. 8, 2010) (compelling company and co-founder to arbitrate contract and common law claims against former company counsel); Simply Fit of N. Am., Inc. v. Poyner, 579 F. Supp. 2d 371, 378–79 (S.D.N.Y. 2008) (holding that broad arbitration clause encompassed fraudulent inducement and RICO claims); Coffer v. Serv. Asset Mgmt. Co., No. 02-CV-9934 (DC), 2003 WL 22493425, at *3 (S.D.N.Y. Nov. 4, 2003) (compelling employees to arbitrate claims, including tortious interference, against former employer); Norcom Elecs. Corp., 104 F. Supp. 2d at 203–06 (finding that claims of, inter alia, tortious interference, unfair competition, and conspiracy "touch[ed] upon matters covered by" the distribution agreement and therefore were arbitrable).

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For these reasons, the Court grants in part and denies in part the Birnbaum Defendants' motion to compel arbitration pursuant to the Distribution Agreement; the motion is granted as to Birnbaum, Office Coffee Services LLC, and 26 Flavors LLC, but is denied as to Crazy Cups and Single Serve Beverages Distribution.

IV. Motions for Stay of Non-Arbitrable Claims

Where, as here, the Court concludes that some, but not all, of the claims in the case are arbitrable, "it must then decide whether to stay the balance of the proceedings pending arbitration." JLM Indus., 387 F.3d at 169 (quoting Oldroyd v. Elmira Sav. Bank, FSB, 134 F.3d 72, 75–76 (2d Cir. 1998)).[19] The following defendants have moved for the Court to grant a stay of non-arbitrable claims: the Hersko Defendants, (see Hersko Defs. Mem.); the Devine Defendants, (see Devine Defs. Mem.); the E&J Defendants, (see E&J Defs. Mems. at 14–15); and the Oil and Trucking Defendants, (see Oil and Trucking Defs. Mem. at 11–13).

The Court's power to grant a stay flows from its inherent power to control its docket, see Citrus Mktg. Bd. of Israel v. J. Lauritzen A/S, 943 F.2d 220, 225 (2d Cir. 1991), and the decision is committed to the Court's discretion, Genesco, 815 F.2d at 856. As one court explained, "[w]hen there are several arbitrable issues that are central to the overall matter and only one closely related non-arbitrable issue, it seems more reasonable for the court to stay the proceedings. On the other hand, if there is one small arbitrable issue that will not affect several non-arbitrable issues, a court could conclude that the proceedings should continue." F.D. Import & Export Corp. v. M/V REEFER SUN, 248 F. Supp. 2d 240, 251 (S.D.N.Y. 2002). A discretionary stay is particularly

[19] The Court must stay the claims that it has deemed arbitrable. 9 U.S.C. § 3. The discussion in the succeeding text concerns the non-arbitrable claims, which are not subject to the mandatory § 3 stay. See Citrus Mktg. Bd. of Israel v. J. Lauritzen A/S, 943 F.2d 220, 225 (2d Cir. 1991).

appropriate "where there is significant factual overlap between the remaining claims and the arbitrated claims." Panzer, 2015 WL 5052563, at *11 (listing cases). In such cases, a stay is warranted in part because the arbitration proceedings are likely to have preclusive effect over some or all of the claims not subject to arbitration. See Bear, Stearns & Co. v. 1109580 Ont., Inc., 409 F.3d 87, 91 (2d Cir. 2005) (explaining that, under certain conditions, "[a]n arbitration decision may effect collateral estoppel in a later litigation or arbitration if the proponent can show with clarity and certainty that the same issues were resolved" (internal quotation marks omitted)).

The Court must also consider factors such as "the desirability of avoiding piecemeal litigation" and "the degree to which the cases necessitate duplication of discovery or issue resolution." Admin. Comm. of the Time Warner, Inc. Benefit Plans v. Biscardi, No. 99-CV-12270 (DLC), 2000 WL 565210, at *2 (S.D.N.Y. May 8, 2000) (quoting Rattner v. Bd. of Trustees of Vill. of Pleasantville, 611 F. Supp. 648, 653 (S.D.N.Y. 1985)). Broad stay orders are appropriate if the stay will "promote judicial economy, avoidance of confusion and possible inconsistent results" without working an undue hardship or prejudice against the plaintiff. Louis Berger Grp., Inc. v. State Bank of India, 802 F. Supp. 2d 482, 490 (E.D.N.Y. 2011) (quoting Birmingham Assocs. Ltd. v. Abbott Labs., 547 F. Supp. 2d 295, 302 (S.D.N.Y. 2008)). Still, "no hard-and-fast rules . . . provide resolution of this discretionary decision." Martima de Ecologia, S.A. de C.V. v. Sealion Shipping Ltd., No. 10-CV-8134 (DLC), 2011 WL 1465744, at *5 (S.D.N.Y. Apr. 15, 2011) (quoting Biscardi, 2000 WL 565210, at *2).

The Court finds that a stay would not be appropriate here because the Court has determined that the majority of the claims in this action are non-arbitrable. Indeed, only Schreiber's claims against Birnbaum, Office Coffee Services LLC, and 26 Flavors LLC are arbitrable; his claims against the other twenty-three defendants in this action are not subject to arbitration. The

determination of these arbitrable claims will have minimal bearing on the remaining issues in this action. Moreover, this is not a case in which "arbitrable claims predominate the lawsuit." See Genesco, 815 F.3d at 856. As defendants acknowledge, Schreiber's claims against Friedman predominate this action and Schreiber's claims against the secondary defendants arise from his claims against Friedman. (See E&J Defs. Mems. at 14 ("In the case at bar, the claims against E&I Investors are peripheral to and grow out of those against Friedman."); Devine Defs. Mem. at 3 ("Plaintiffs claims against Friedman predominate this action."); Hersko Defs. Mem. at 4 (same).) Because the central claims in this action—those against Friedman—are not arbitrable, this factor further weighs against granting a stay of non-arbitrable claims.

The Devine and Hersko Defendants argue that a stay of Schreiber's claims against them is appropriate because those claims are without merit. (Devine Defs. Mem. at 4–6; Hersko Defs. Mem. at 4–8.) Although the Second Circuit has indicated that "[b]road stay orders are particularly appropriate if the arbitrable claims predominate the lawsuit and the nonarbitrable claims are of questionable merit," Genesco, 815 F.2d at 856, courts routinely deny applications for a stay of non-arbitrable claims without analyzing the merits of those claims, see, e.g., Sokol, 542 F.3d at 363; Benihana of Tokyo, LLC v. Benihana Inc., 73 F. Supp. 3d 238, 257–58 (S.D.N.Y. 2014); Kuklachev v. Gelfman, 600 F. Supp. 2d 437, 468 (E.D.N.Y. 2009). In any event, although the motion practice in this case has focused almost exclusively on the issue of arbitrability rather than the substantive merits of Schreiber's claims, the Court has already granted Schreiber a temporary restraining order because he has demonstrated a likelihood of success on the merits. (See D.E. # 4.) In light of the fact that non-arbitrable claims predominate this action, a broad stay order in this case would be inappropriate.

For these reasons, the Court declines to grant a stay of non-arbitrable claims in this action.

CONCLUSION

For these reasons, the Court denies the Friedman Defendants' motion to dismiss and compel arbitration; grants the motion to compel arbitration and stay the claims as to Birnbaum, Office Coffee Services, LLC, and 26 Flavors LLC; denies the motions to compel arbitration as to all other defendants; and denies all other defendants' motions for a stay pending arbitration.

SO ORDERED.

Dated: March 31, 2017
Brooklyn, New York

s/Carol Bagley Amon

Carol Bagley Amon
United States District Judge