IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Curtis F. Nelson and Ted E. Amsbaugh,	)	
	)	
Plaintiffs,	)	
	)	**ORDER**
vs.	)	
	)	
Riina Klaas, Radcrete Pacific Pty LTD.,	)	
an Australian corporation,	)	Case No. 1:16-cv-042
	)	
Defendants.	)	

Before the Court is a "Motion to Join Additional Counter-Defendant" filed by the Defendants on August 22, 2017. See Docket No. 39. The Plaintiffs did not respond to the motion. For the reasons set forth below, the motion is denied.

I. BACKGROUND

Plaintiff Curtis F. Nelson resides in Bottineau, North Dakota. Nelson is the majority member, principal manager, and governor of Tech-Crete, LLC, a limited liability company whose principal place of business is also in Bottineau. Plaintiff Ted E. Amsbaugh is a minority member of Tech-Crete, LLC who resides in Montana. Defendant Edward Byrne resides in New South Wales, Australia, and is the director and principal shareholder of Defendant Radcrete Pacific Pty Ltd. ("Radcrete"), as well as a minority member of Tech-Crete, LLC. On January 29, 2018, the Court granted a motion to substitute Riina Klaas for Edward Byrne after Byrne passed away. See Docket No. 47.

Nelson is the inventor of a product now called Radcon #7, a waterproof seal for concrete and concrete products (the "Product"). In March of 1990, Nelson entered into an agreement with

Radcrete (the "Initial Agreement"), which granted Radcrete the right to sell the Product. See Docket No. 6-1. The Initial Agreement contained an arbitration clause requiring all disputes to be submitted to arbitration before the filing of a lawsuit. See Docket No. 1, ¶ 15(b). Nelson, Radcrete, and Byrne simultaneously executed a document they refer to as the "Deed," which granted Byrne the exclusive right to market, sell, and distribute the Product globally, while Nelson retained the exclusive right to manufacture the Product, as well as the non-exclusive right to market and distribute it in the United States. See Docket No. 11-1. Nelson later formed Tech-Crete, Inc., a North Dakota corporation, to assist in manufacturing the Product and to which he assigned his rights to the Product.

In July of 1993, Nelson and Tech-Crete, Inc. entered into another agreement (the "1993 Agreement") with Radcrete, amending the Initial Agreement. Under the 1993 Agreement, the term of the Initial Agreement was extended for ten years, Tech-Crete, Inc. agreed to adhere to the terms of the Initial Agreement, and Radcrete agreed that it had no objection to Tech-Crete, Inc. manufacturing the Product.

In January of 1995, Nelson filed Articles of Organization for Tech-Crete, LLC with the North Dakota Secretary of State. Nelson owned eighty percent (80%) membership interest in Tech-Crete, LLC, and Amsbaugh owned twenty percent (20%). Tech-Crete, LLC is a successor in interest to Tech Crete, Inc.

On January 29, 1996, Nelson and Amsbaugh entered into a Member Control Agreement regarding Tech-Crete, LLC, which addressed the different membership interests in Tech-Crete, LLC. See Docket No. 6-3. The Member Control Agreement contained provisions covering membership

interests, including the transfer of membership interests, allocation of net income and net losses, operating and liquidating distributions, capital accounts, and tax matters.

In May of 1996, Nelson, Amsbaugh, Byrne, and Radcrete entered into an Agreement (the "1996 Agreement"), under which Byrne received a part ownership interest in Tech-Crete, LLC. See Docket No. 6-2. After this assignment, the membership interests in Tech-Crete, LLC were:

Nelson - fifty-two percent (52%)
Amsbaugh - thirteen percent (13%)
Byrne - thirty-five percent (35%)

The 1996 Agreement contained the following arbitration clause:

> Any disputes arising under this Agreement, the [Initial] Agreement or the Deed shall be submitted to binding arbitration to be conducted in Denver, Colorado pursuant to the rules of the American Arbitration Association governing commercial disputes. Any arbitration shall be conducted by a panel of three arbitrators with expertise in the disputed area, selected as follows: Byrne and Radcrete shall jointly select one arbitrator, Nelson and Amsbaugh shall jointly select another arbitrator, and the parties shall agree on the third arbitrator. If they cannot agree, the third arbitrator shall be selected by the other two arbitrators.

("Arbitration Clause"). See Docket No. 6-2, ¶ 10(b). A choice of law provision in the 1996 Agreement provides for the agreement to be governed by Colorado law. See Docket No. 6-2, ¶ 10(a).

The parties have had numerous disputes over their business relationship over the years. Four disputes have gone to arbitration. The first arbitration was brought by Byrne and Radcrete against Nelson and Tech-Crete, LLC in 2006. A final award was entered in 2008. The second arbitration was brought by Byrne and Radcrete against Nelson, Amsbaugh, and Tech-Crete, LLC in 2009, and a final award was entered in 2010. The third arbitration was brought in 2013 by Byrne against Nelson and Tech-Crete, LLC. A final award was entered in 2014. In February of 2015, Byrne and Radcrete commenced the fourth arbitration by filing a Demand for Arbitration against Nelson,

Amsbaugh, and Tech-Crete, LLC, before the American Arbitration Association entitled Edward L. Byrne and Radcrete Pacific Pty Ltd., Claimants v. Curtis F. Nelson, Ted E. Amsbaugh, and Tech-Crete L.L.C., Respondents, Case No. 01-15-0002- 7444 ("fourth arbitration"). In their Amended Statement of Claim, Byrne and Radcrete alleged claims for breach of contract, breach of the duty of good faith and fair dealing, accounting, breach of fiduciary duty, equitable relief, and declaratory judgment. See Docket No. 11-3. On January 5, 2016, the Arbitration Panel made a preliminary determination that all the claims were arbitrable, although the decision of the Arbitration Panel is not part of the record before the Court. It is this fourth arbitration which is the focus of the federal case now before the Court.

Tech-Crete, LLC declined to appear in the fourth arbitration. In addition, in the spring of 2015 Tech-Crete, LLC brought a lawsuit in state court in Colorado against Radcrete and Byrne seeking a declaration that it cannot be required to arbitrate. See Docket No. 1-2, p. 5. On July 15, 2016, the Colorado court found Tech-Crete, LLC is bound by the arbitration clause in the 1996 Agreement, denied a motion to stay the fourth arbitration, granted a motion to compel arbitration, and ordered the parties to proceed with the fourth arbitration. See Docket No. 34-1.

In February of 2016, Nelson and Amsbaugh commenced a declaratory judgment action against Byrne, Radcrete, and Tech Crete, LLC in District Court, Bottineau County, North Dakota, seeking to stop the fourth arbitration pending before the American Arbitration Association in Denver, Colorado. See Docket No. 1-2. On February 29, 2016, Byrne and Radcrete removed the Bottineau County action to federal court based on diversity jurisdiction. See Docket No. 1. In their notice of removal, Byrne and Radcrete contend Tech-Crete, LLC was fraudulently joined as a Defendant in order to destroy diversity and defeat federal subject matter jurisdiction.

On October 3, 2016, the Court dismissed Tech-Crete, LLC after finding it had been fraudulently joined as a Defendant and that its presence destroyed diversity and thus the Court's jurisdiction. See Docket No. 36. The Court also granted Defendants Byrne and Radcrete's motion to compel arbitration and stayed the case pending the outcome of the arbitration. The arbitration was held between April 24, 2017, and May 2, 2017. The arbitrators issued their final award on July 11, 2017. See Docket No. 37-1. A motion to confirm the arbitration award was filed on August 18, 2017. See Docket No. 37. However, the parties have asked the Court not to do so until they stipulate as to a receiver and special master. See Docket No. 41. Now before the Court is the Defendants' "Motion to Join Additional Counter-Defendant," that being Tech-Crete LLC. See Docket No. 39.

II. LEGAL ANALYSIS

The Defendants contend Tech-Crete, LLC should be joined, pursuant to Rules 19 and/or 20 of the Federal Rules of Civil Procedure, as a Defendant. The Defendants contend this is necessary because Tech-Crete, LLC was a party to the arbitration and confirmation of the arbitration award will affect the interests of Tech-Crete, LLC. The Defendants maintain Tech-Crete, LLC is subject to both permissive joinder under Rule 20 and compulsory joinder under Rule 19. While the presence of Tech-Crete LLC in this case is clearly advantageous, it raises serious questions regarding jurisdiction.

In an order dated October 3, 2016, the Court determined that Tech-Crete, LLC's inclusion as a defendant in this case destroys diversity. See Docket No. 36. In its Order dismissing Tech-Crete, LLC, the Court explained that Tech-Crete, LLC's inclusion as a Defendant was fraudulent and

that its interests were aligned with the Plaintiffs. Indeed, Tech-Crete, LLC was aligned with Nelson and Amsbaugh as respondents in the arbitration. See Docket No. 37-1. Nelson owns 52% of Tech Crete, LLC and therefore is the controlling member. The Court cannot now join Tech-Crete, LLC as a Defendant because doing so would put Nelson on both sides of this lawsuit and deprive the Court of subject matter jurisdiction. OnePoint Solutions, LLC v. Borchert, 486 F.3d 342, 346 (8th Cir. 2007) ("complete diversity of citizenship exists where no defendant holds citizenship in the same state where any plaintiff holds citizenship").

The Court finds the Defendants' contention that it has common law ancillary jurisdiction[1] over related proceedings unpersuasive as such ancillary jurisdiction is typically invoked in proceedings involving bankruptcy, mandamus, suits by receivers, garnishment proceedings, and generally to protect and enforce federal judgments. 13 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, Richard D. Freer, Federal Practice and Procedure § 3523.2 (3d ed. 2008). Such proceedings are separate from the initial case. Id.

This case involves confirming an arbitration award. This case does not implicate protecting or enforcing a federal judgment. The motion to confirm the arbitration award is not an ancillary proceeding, but rather the "original cause" as this matter has yet to be concluded. See Local Loan Co., v. Hunt, 292 U.S. 234, 239 (1934) (enforcing bankruptcy judgment). If the Defendants desired to have Tech-Crete, LLC as a party to this case, they should not have removed the case from state court to federal court. As the Court remains convinced the presence of Tech-Crete, LLC will destroy diversity, the motion to join it as a Defendant is denied. See Cook v. Toidz, 950 F. Supp. 2d 386, 390 n.4 (D. Conn. 2013) (concluding, that where LLC members are adverse parties, inclusion of the

[1] Not to be confused with supplemental jurisdiction under 28 U.S.C. § 1367.

LLC itself as a party destroys diversity regardless of whether the LLC is aligned as a plaintiff or defendant).

III. CONCLUSION

For the reasons set forth above, the motion to join additional counter-defendant (Docket No. 39) is **DENIED**. The stay is lifted. The parties are directed to notify the Court of the status of their efforts to find a special master/receiver within seven (7) days from the date of this order

IT IS SO ORDERED.

Dated this 5th day of March, 2018.

/s/ Daniel L. Hovland
Daniel L. Hovland, Chief Judge
United States District Court