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

Curtis F. Nelson and Ted E. Amsbaugh, Plaintiffs, vs. Edward Byrne, Radcrete Pacific Pty LTD., an Australian corporation, and Tech-Crete, LLC, a North Dakota Limited Liability Company, Defendants.	)	**ORDER** Case No. 1:16-cv-042

Before the Court is a motion to compel arbitration and stay the civil action filed by Defendants Edward Byrne and Radcrete Pacific Pty Ltd ("Radcrete"). on February 29, 2016. See Docket No. 5. Plaintiffs Curtis F. Nelson and Ted E. Amsbaugh filed a combined motion to stay arbitration and response to Defendants' motion to compel arbitration on March 14, 2016. See Docket Nos. 9 and 11. Defendants Byrne and Radcrete filed a combined response and reply on March 29, 2016. See Docket No. 19. The Plaintiffs filed a reply on April 4, 2016. See Docket No. 22. Also before the Court is the question of whether the Plaintiffs fraudulently joined Defendant Tech-Crete, LLC, in order to defeat diversity jurisdiction. On May 6, 2016, the Court ordered the parties to brief the issue. See Docket No. 25. The matter has now been fully briefed. See Docket Nos. 26 and 32. For the reasons set forth below, the Court finds Defendant Tech-Crete, LLC was improperly joined, the motion to compel arbitration is granted, and the motion to stay arbitration 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.

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. The Court will need to resolve the fraudulent joinder issue before ruling on the pending motions to stay or compel arbitration. See Wivell v. Wells Fargo Bank, N.A., 773 F.3d 887, 893 (8th Cir. 2014) (stating the doctrine of fraudulent joinder permits a district court to temporarily assume jurisdiction over a facially non-diverse case in order to resolve the fraudulent joinder issue and determine whether it has jurisdiction).

II. LEGAL ANALYSIS

A. DIVERSITY

There is no dispute that the inclusion of Tech-Crete, LLC as a party destroys diversity absent a finding of fraudulent joinder. To invoke federal diversity jurisdiction over state law claims requires both the amount in controversy to exceed $75,000 and complete diversity among litigants. 28 U.S.C. § 1332(a). Diversity of citizenship is determined at the time the action is filed. Associated Ins. Mgmt. Corp. v. Ark. Gen. Agency, Inc., 149 F.3d 794, 796 (8th Cir. 1998). "Complete diversity of citizenship exists where no defendant holds citizenship in the same state where any plaintiff holds citizenship." OnePoint Solutions, LLC v. Borchert, 486 F.3d 342, 346 (8th

Cir. 2007). The citizenship of a limited liability company is the citizenship of each of its members. Id. Because Defendant Tech-Crete, LLC is owned by Nelson, Amsbaugh, and Byrne, and Nelson is a Plaintiff, diversity is not complete.

However, Byrne and Radcrete contend that Tech-Crete, LLC was fraudulently joined and should be dismissed. The fraudulent joinder doctrine "allows a district court to assume jurisdiction over a facially nondiverse case temporarily and, if there is no reasonable basis for the imposition of liability under state law, dismiss the nondiverse party from the case and retain subject matter jurisdiction over the remaining claims." Wivell, 773 at 893. A party is fraudulently joined if "no reasonable basis in fact and law exists for the claim brought against it." Id. Therefore, this Court may temporarily assume jurisdiction to decide whether there exists a reasonable basis in fact and law for the Plaintiffs to join Tech-Crete, LLC as a defendant, and if no such reasonable basis is found, dismiss Tech-Crete, LLC and retain jurisdiction over the other claims.

The Plaintiffs contend Tech-Crete, LLC is a necessary party because it has an interest in the action as a party to the underlying arbitration and because Byrne, Nelson, and Amsbaugh are all members of Tech-Crete, LLC. The Plaintiffs also contend Tech-Crete, LLC was joined as a "nominal," "formal," or "unnecessary" party that "has no controlling significance for removal purposes" and which the Court may ignore in its determination of whether diversity jurisdiction exists. Midwestern Indem. Co. v. Brooks, 779 F.3d 540, 544 (8th Cir. 2015).

The underlying arbitration was commenced by Byrne and Radcrete against Nelson, Amsbaugh, and Tech-Crete, LLC. Tech-Crete, LLC also brought its own action against Byrne and Radcrete in state court in Colorado seeking an order to obtain a declaration that it cannot be required to arbitrate and to stop the Colorado arbitration. The interests of Tech-Crete, LLC, Nelson, and

Amsbaugh are therefore clearly aligned. As such, it is difficult to understand why Nelson and Amsbaugh would name Tech-Crete, LLC as a Defendant in this case along with Byrne and Radcrete when it was named as a respondent in the fourth arbitration along with Nelson and Amsbaugh. The Court finds the Plaintiffs' arguments for joining Tech-Crete, LLC as a Defendant unpersuasive. Tech-Crete, LLC may properly have been joined as a Plaintiff, but to join it as a Defendant confounds reason, even if it was joined as a "nominal" or "formal" party. The complaint itself supports this conclusion as the Plaintiffs seek no relief as to Tech-Crete, LLC. See Docket No. 1-2, pp. 6-8. The Court finds there was no reasonable basis in fact or law to include Tech-Crete, LLC as a Defendant in this lawsuit.

B. ARBITRABILITY

The issue before the Court is whether the six claims for relief asserted by Byrne and Radcrete in the fourth arbitration fall within the scope of the Arbitration Clause in the 1996 Agreement. The amended statement of claim contains 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. Nelson and Amsbaugh contend they are being forced to arbitrate claims which relate to the Member Control Agreement and which are not covered by the Arbitration Clause in the 1996 Agreement. Byrne and Radcrete maintain the claims are arbitrable under the 1996 Agreement.

The court should decide the threshold issue of whether the arbitration agreement itself is valid. Neb. Mach. Co. v. Cargotec Sol., LLC, 762, F.3d 737, 740-41 (8th Cir. 2014). It is well-established that federal courts are to interpret arbitration clauses liberally and any doubts

concerning the scope of arbitrable issues should be resolved in favor of arbitration. Barker v. Golf U.S.A., Inc., 154 F.3d 788, 793 (8th Cir. 1998). The 1996 Agreement states that "any disputes arising under this Agreement, the [Initial] Agreement or the Deed shall be submitted to binding arbitration." See Docket No. 6-2, ¶ 10(b). It is undisputed that a valid arbitration agreement exists between the parties in this case.

A determination as to whether the court or the arbitrator has the "primary power to decide arbitrability turns upon what the parties [have] agreed [upon]." First Options of Chi., Inc.v. Kaplan, 514 U.S. 938, 943 (1995) (internal citations omitted). Courts should not find that parties agreed to arbitrate the question of arbitrability "[u]nless the parties clearly and unmistakably provide otherwise." AT & T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986). Accordingly, the Court looks to the arbitration clause of the agreement to determine this issue. The Arbitration Clause in the 1996 Agreement states that "[a]ny disputes arising under this Agreement, . . . shall be submitted to binding arbitration to be conducted . . . pursuant to the rules of the American Arbitration Association governing commercial disputes." See Docket No. 6-2, ¶ 10(b). The Eighth Circuit of Appeals has held that incorporating the American Arbitration Association ("AAA") rules is clear evidence of the parties' intent to leave the question of arbitrability to the arbitrator. See Fallo v. High-Tech Institute, 559 F.3d 874, 878 (8th Cir. 2009) (noting Rule 7(a) of the AAA rules provides that the arbitrator shall have the power to rule on the question of arbitrability); Green v. SuperShuttle Intern., Inc., 653 F.3d 766, 769 (8th Cir. 2011) (finding the threshold question of arbitrability should be left to the arbitrator when the parties incorporated the AAA rules); Wootten v. Fisher Investments, Inc.. 688 F.3d 487, 493 (8th Cir. 2012) (same). The Court finds the Arbitration Clause in the 1996 Agreement explicitly incorporates the AAA rules for

commercial disputes, and therefore the parties have specifically agreed to leave the question of arbitrability to an arbitrator.

III. CONCLUSION

Accordingly, Tech-Crete, LLC is **DISMISSED** without prejudice for lack of subject matter jurisdiction. The motion to compel arbitration and stay the civil action (Docket No. 5) is **GRANTED** and the motion to stay arbitration (Docket No. 9) is **DENIED**. The motion for hearing (Docket No. 10) is **DENIED**.

IT IS SO ORDERED.

Dated this 3rd day of October, 2016.

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