UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

AtriCure, Inc.,

Plaintiff, Case No. 1:19-cv-00054

v. Judge Michael R. Barrett

Dr. Jian Meng, et al.,

Defendants.

ORDER

This matter is before the Court upon Defendants'—Dr. Jian Meng ("Meng") and Beijing Medical Scientific Co. Ltd ("Med-Zenith")—Motion for an Immediate Stay of All Judicial Proceedings Pending International Arbitration and Memorandum in Support of that Motion.[1] (Docs. 42, 43). Plaintiff filed a Response in Opposition (Doc. 48) and Defendants filed a Reply (Doc. 51).

I. Background

Plaintiff AtriCure is an Ohio-based medical device company that develops and sells surgical ablation systems used for the treatment of atrial fibrillation. (Doc. 1, ¶ 1). Defendant Meng is the Founder of non-party ZenoMed, a Chinese company that distributes cardiovascular devices, and President of Defendant Med-Zenith, a Chinese company that develops, manufactures, and sells medical equipment. (Doc. 22-1, ¶¶ 2,

[1] Defendant Dr. Guanglu Bai ("Bai") has not been served as of the date of this Order.

Moreover, although Defendants request oral argument in the caption of their Motion, they do not state the grounds for that request in their Motion (Doc. 42) or Memorandum in Support (Doc. 43); *see* S.D. Ohio Civ. R. 7.1(b)(2). Oral argument is not essential to the fair resolution of this matter and Defendants' request is **DENIED**. *See id.*

3, 9,).

In 2005, Defendant Meng contacted Plaintiff to develop a partnership wherein he would, through one of his entities, secure certain distribution and marketing rights for Plaintiff's medical devices in China and serve as Plaintiff's exclusive distributor in China. (Doc. 32-1, Exhibit A, ¶ 31). From 2005 to 2017, ZenoMed and Plaintiff entered into a series of agreements regarding ZenoMed's acting as a distributor for Plaintiff's products. (Doc. 22 at PageID 178); (Doc. 22-1, ¶ 10). Pertinent here, on January 1, 2016, Plaintiff and ZenoMed entered into a Distribution Agreement ("the Agreement"). (Doc. 1-2). The Agreement contained an arbitration provision that provides that "[a]ny dispute, controversy or claim arising out of, in connection with or relating to this Agreement (or the interpretation, breach, termination, or validity thereof) shall be resolved through arbitration" and that arbitration shall be conducted by the China International Economic and Trade Arbitration Commission ("CIETAC"). (*Id.,* § 15.2, at PageID 47-48). Plaintiff and ZenoMed renewed the Agreement on January 1, 2017. (Doc. 1-3). The Agreement expired and terminated on December 31, 2017. (Doc. 1, ¶ 22).

On May 30, 2018, Plaintiff provided written notice by courier to ZenoMed, demanding that ZenoMed fulfill its continuing obligations under the Agreement. (Doc. 1-4). Among other things, Plaintiff demanded payment of an outstanding balance, a report of remaining inventory, and the destruction of any expired or damaged inventory. *Id.* On September 9, 2018, Plaintiff provided written notice by courier to ZenoMed, demanding payment of the outstanding balance and a report of inventory. (Doc. 1-7).

On January 22, 2019, Plaintiff filed its Complaint in this Court against Defendants Meng, Bai, and Med-Zenith. (Doc. 1).

On March 13, 2019, Plaintiff submitted its Request for Arbitration with ZenoMed to CIETAC per the Agreement's arbitration provision. (Doc. 43-1); *see* (Doc. 1-2, § 15.2, at PageID 47-48).

On March 21, 2019, Defendants Meng and Med-Zenith filed a Motion to Dismiss for Lack of Personal Jurisdiction or Under *Forum Non Conveniens*. (Doc. 21).

On April 8, 2019, Plaintiff provided written notice by courier to ZenoMed, informing ZenoMed that it has submitted the disputes arising from the Agreement between AtriCure and ZenoMed to CIETAC for arbitration and stated that CIETAC would contact ZenoMed. (Doc. 48-1).

On May 22, 2019, Defendants filed their Reply in Support of their Motion to Dismiss. (Doc. 33).

On July 18, 2019, ZenoMed was served with Plaintiff's request for arbitration, presumably by CIETAC. (Doc. 43 at PageID 1176).

On July 22, 2019, Defendants notified the Court of the pending arbitration between Plaintiff and ZenoMed. (Doc. 37). On August 7, 2019, in response to Plaintiff's objection to the notice of the pending arbitration, Defendants informed the Court that, "in the event this Court should decide that it can assert jurisdiction over the Defendants, they will likely seek to stay this action pending the outcome of the arbitration." (Doc. 39).

On October 8, 2019, Defendants filed their Motion for an Immediate Stay of All Judicial Proceedings Pending International Arbitration. (Doc. 42). Later that day, the Court denied Defendants' Motion to Dismiss. (Doc. 44). The parties finished the briefing in this matter (Docs. 48, 49) and it is ripe for review.

II. The Parties' Arguments

The parties agree that Defendants are not signatories to the Agreement between Plaintiff and ZenoMed. (Doc. 43 at PageID 1178); (Doc. 48 at PageID 1243).

Defendants assert that they can invoke Section 3 of the Federal Arbitration Agreement ("FAA"), as non-signatories to the Agreement, and the FAA mandates staying this action. Alternatively, Defendants argue that the Court should use its discretion to stay this matter. Plaintiff contends that Defendants cannot invoke Section 3 of the FAA and a discretionary stay is not warranted.

III. Analysis

a. Waiver

Plaintiff argues that Defendants waived any right to compel arbitration. (Doc. 48 at PageID 1248-51). "[A] party may waive an agreement to arbitrate by engaging in two courses of conduct: (1) taking actions that are completely inconsistent with any reliance on an arbitration agreement; and (2) 'delaying its assertion to such an extent that the opposing party incurs actual prejudice.'" *Aracri v. Dillard's, Inc.*, No. 1:10CV253, 2011 WL 1388613, at *6 (S.D. Ohio Mar. 29, 2011) (quoting *Hurley v. Deutsche Bank Trust Co. Americas*, 610 F.3d 334, 338 (6th Cir. 2010)). Both courses of conduct are required. *See id.*

As a threshold matter, and relating to the first course of conduct, it has not escaped the Court's attention that, in their Motion to Dismiss, Defendants argued that the only appropriate forum for this case is a *court* of competent jurisdiction *in China*; although Meng was a founder of ZenoMed, he has only acted as a consultant for ZenoMed since 2006; and "Med-Zenith was not a party to the ZenoMed Distribution Agreement" and, "[i]n

fact, Med-Zenith has never done business of any kind with AtriCure, nor ever entered into an agreement of any kind with AtriCure." (Doc. 22). Moreover, in their Memorandum Supporting their Motion to Dismiss, Reply in Support of that Motion, Notice to the Court of the International Arbitration, and Response in support of that Notice, Defendants acknowledged the Agreement's arbitration provision, but did not assert any rights as non-signatories under the Agreement. (Docs. 22, 33, 37, 39).

Notwithstanding the above, the Court finds that the delay caused by Defendants' failure to challenge the availability of arbitration does not rise to the level of conduct found to constitute a waiver by the Sixth Circuit. *See e.g.*, O*.J. Distrib., Inc. v. Hornell Brewing Co.*, 340 F.3d 345, 358 (6th Cir. 2003); *Gen. Star Nat. Ins. Co. v. Administratia Asigurarilor de Stat*, 289 F.3d 434, 438 (6th Cir. 2002). Accordingly, Defendants did not waive their right to assert their right to invoke arbitration.

b. <u>Mandatory Stay</u>

"[A] litigant who was not a party to the relevant arbitration agreement may invoke § 3 [of the FAA] if the relevant state contract law allows him to enforce the agreement." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 632 (2009). Here, Ohio state contract law applies.

In their Motion, Defendants assert that, pursuant to state contract law and agency principles, they can invoke the Agreement's arbitration provision as non-signatories under the FAA. (Doc. 43 at PageID 1178-82). In their Reply, however, Defendants assert that Ohio law does not govern the question of whether they may invoke the Agreement's arbitration provision, because "*Arthur Andersen*'s holding that state law governs non-signatory standing applies narrowly to *domestic* arbitration agreements governed by

Chapter 1 of the FAA," "here, a *foreign* arbitration agreement is at issue" and, because a foreign arbitration agreement is at issue, Chapter 2 of the FAA and federal law on the issue of non-signatory standing governs. (Doc. 51 at PageID 1297) (emphasis in original). *But see Bishop v. Oakstone Acad.*, 477 F. Supp. 2d 876, 889 (S.D. Ohio Mar. 5, 2007) ("[I]t is well established that a moving party may not raise new issues for the first time in its reply brief."). Regardless of Defendants' failure to raise this argument in their Motion, the Court does not read *Arthur Andersen* as narrowly as Defendants would like.

In *Arthur Andersen*, the Supreme Court of the United States explained that Section 2 of the FAA "creates substantive federal law regarding the enforceability of arbitration agreements, requiring courts to place such agreements upon the same footing as other contracts." 556 U.S. at 630. The Supreme Court explained that Section 3 of the FAA, "allows litigants already in federal court to invoke agreements made enforceable by § 2" by requiring courts, "'on application of one of the parties' to stay the action if it involves an 'issue referable to arbitration under an agreement in writing.'" *Id.* (citing 9 U.S.C. § 3). The Supreme Court emphasized that neither Section 2 nor 3 of the FAA "purports to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." *Id.* The Supreme Court concluded that "[s]tate law, therefore, is applicable to determine which contracts are binding under § 2 and enforceable under § 3 *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Id.* at 630-31 (emphasis in original) (internal quotations omitted). The Supreme Court then stated that "'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference,

third-party beneficiary theories, waiver and estoppel.'" *Id.* at 631 (citing 21 R. Lord Williston on Contracts § 57:19, p. 183).

The Court reads *Arthur Andersen* to hold that federal law regarding arbitration, including whether certain parties have agreed to resolve a dispute through arbitration, requires courts to apply state contract law so long as that state contract law governs contracts generally. *See id.* at 630-31. Turning to Ohio contract law, Defendants assert that Ohio courts recognize agency and estoppel "theories for binding non-signatories to arbitration agreements" and they can enforce the Agreement's arbitration provision through those theories.[2] (Doc. 43 at PageID 1179).

i. Agency Theory

Defendant Meng contends that he can invoke the Agreement's arbitration provision because he is an agent of ZenoMed. (Doc. 43 at PageID 1179-80).

"Traditional principles of agency may be applied to bind a nonsignatory to an arbitration agreement." *I Sports v. IMG Worldwide, Inc.*, 2004-Ohio-3113, ¶ 13. "[T]he agency exception may be invoked when the relationship between the signatory and nonsignatory defendants is sufficiently close that only by permitting the nonsignatory to invoke arbitration may evisceration of the underlying arbitration agreement between the signatories be avoided." *Id.* at ¶ 29 (internal quotations omitted). Here, Plaintiff does not bring its claims against Defendant Meng in an attempt to avoid the Agreement's arbitration provision. Plaintiff specifically requested arbitration with ZenoMed before CIETAC regarding disputes arising from the Agreement and that arbitration is ongoing.

[2] The Court notes that "[t]he test for determining whether a nonsignatory can force a signatory into arbitration is different from the test for determining whether a signatory can force a nonsignatory into arbitration." *Reilly v. Meffe*, 6 F. Supp. 3d 760, 778 n.11 (S.D. Ohio 2014).

(Doc. 43 at PageID 1176); (Doc. 43-1). The Court finds that Defendant Meng's agency theory for binding a non-signatory to an arbitration agreement does not apply here.

ii. Estoppel Theory

Defendants Meng and Med-Zenith contend that they can invoke the Agreement's arbitration provision under the doctrine of equitable estoppel. (Doc. 43 at PageID 1180-82).

"[A] willing nonsignatory seeking to arbitrate with a signatory that is unwilling may do so under what has been called an alternative estoppel theory." *Reilly*, 6 F. Supp. 3d at 778 n.11 (quoting *Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F.3d 125, 131 (2d Cir. 2003)). Ohio allows non-signatories to compel a signatory to arbitrate under this theory: "arbitration may be compelled by a nonsignatory against a signatory due to the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract, . . . and [the fact that] the claims were intimately founded in and intertwined with the underlying contract obligations." *I Sports*, 2004-Ohio-3113, ¶ 14 (internal quotations omitted). "Where estoppel has been extended to intertwined claims, it is generally applied in two circumstances: 1) where a signatory must rely on the terms of the written agreement in asserting claims against a nonsignatory; and 2) where the signatory alleges substantially interdependent and concerted misconduct by both the nonsignatory and one or more signatories to the contract." *Id.* at ¶ 16 (internal quotations omitted).

Here, the Court finds that neither situation is present. The Court agrees that, regarding the second circumstance, Defendants failed to include any argument in their Motion. *Compare* (Doc. 43 at PageID 1180-82), *with* (Doc. 48 at PageID 1258). *See*

Bishop, 477 F. Supp. 2d at 889. Moreover, Plaintiff need not rely on the terms of the Agreement to assert its claims against Defendants Meng and Med-Zenith. Similar to *I Sports*, although Plaintiff's tort claims may depend on establishing ZenoMed's breach of the Agreement, Plaintiff does not need to rely on the terms of the Agreement in asserting its tort claims. *See id. Cf. AtriCure, Inc. v. Jian Meng*, No. 1:19-CV-00054, 2019 WL 4957915, at *4 (S.D. Ohio Oct. 8, 2019) ("Meng, as an individual, availed himself of Ohio law using, in part, Med-Zenith. Therefore, though the ZenoMed Distribution Agreement itself is subject to arbitration in China, the torts alleged against Meng personally and in connection with Med-Zenith may be heard under Ohio's long-arm statute."). Stated otherwise, the contractual terms of the Agreement between Plaintiff and ZenoMed underlie the issues in the CIETAC arbitration; Plaintiff's allegations of fraudulent and tortious conduct by Defendant Meng to steal Plaintiff's technology and produce counterfeit products through Defendant Med-Zenith underlie the issues in this case. The Court is not convinced that Defendants' alternative estoppel theory for binding non-signatories to arbitration agreements applies in this matter.

In sum, as the Court finds that Defendants cannot enforce the Agreement's arbitration provision via agency or estoppel theories, the Court finds that Defendants may not invoke Section 3 of the FAA and that a mandatory stay of this matter is not required.

c. Discretionary Stay

Defendants alternatively ask the Court to exercise its inherent power to stay this case, as the issues in this case are inextricable intertwined with the matters in the CIETAC arbitration, to increase judicial economy and avoid contrasting outcomes, and because Plaintiff will not experience any prejudice. (Doc. 43 at PageID 1184).

Courts may stay proceedings pending the conclusion of an arbitration involving non-parties. *See Gray v. Bush*, 628 F. 3d 779, 785 (6th Cir. 2010) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.") (citing *Landis v. North American Co*., 299 U.S. 248, 254 (1936)); *see also Liedtke v. Frank*, 437 F. Supp. 2d 696, 700 (N.D. Ohio 2006) ("explaining that courts have discretion to stay claims against nonarbitrating parties") (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 n. 23 (1983)).

The Court finds that a stay in this matter is not appropriate in light of the prejudice Plaintiffs will suffer if a stay is granted. Plaintiff has filed a Motion for Preliminary Injunction against Defendants, as Plaintiff alleges that Defendants' production and sale of the allegedly dangerous and counterfeit medical devices must be stopped. (Doc. 34). Plaintiff alleges that "[e]ach passing day results in further irreparable harm to AtriCure's profits and reputation as well as potentially harming unsuspecting patients through the use of unapproved and untested dangerous devices for open-heart surgery, none of which is at issue in the CIETAC Arbitration." (Doc. 48 at PageID 1260). The Court is persuaded by Plaintiff's distinction of the matters involved in each forum and Plaintiff's argument that the interests is seeks to protect in this lawsuit "can only be protected here, and cannot be protected in the CIETAC Arbitration against a different party not producing the counterfeits for contractually based claims." *Id.* at 1261. Thus, the Court declines to use its discretion to stay this matter pending the CIETAC arbitration.

IV. Conclusion

For the foregoing reasons, it is hereby **ORDERED** that Defendants' Motion for an

Immediate Stay of All Judicial Proceedings Pending International Arbitration (Doc. 42) is **DENIED**.

IT IS SO ORDERED.

_s/ Michael R. Barrett_____
Michael R. Barrett, Judge
United States District Court