

STATE OF NORTH CAROLINA  
COUNTY OF CRAVEN

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
07 CVS 00190

ELEANOR B. JOHNSON LIMITED )  
PARTNERSHIP, ELEANOR BATE )  
JOHNSON, Individually and as )  
General Partner of the Eleanor B. )  
Johnson Limited Partnership, and )  
BLAKE M. KINGSLEY, as General )  
Partner of the Eleanor B. Johnson )  
Limited Partnership, Individually and )  
Derivatively on behalf of all other )  
Limited Partners of Bate Land )  
Company, L.P., )

Plaintiffs )

v. )

REDACTEDBALL, TRENT CAPITAL )  
MANAGEMENT ASSOCIATES, )  
INC., and BATE LAND COMPANY, )  
L.P., )

Defendants

**ORDER**

THIS CAUSE, designated a complex business case by Order of the Chief Justice of the Supreme Court of North Carolina, pursuant to section 7A-45.4(b) of the General Statutes of North Carolina, and assigned to the undersigned Special Superior Court Judge for Complex Business Cases, by Order of the Senior Special Superior Court Judge for Complex Business Cases, came before the court for hearing upon (a) the Plaintiffs' October 10, 2007 Motion to Lift Stay and Appoint Receiver, and (b) Defendant Bate Land Company, L.P.'s November 2, 2007 Motion to Compel Arbitration, and was so heard on January 16, 2008; and

THE COURT, having considered the motions, arguments of counsel, appropriate matters of record and the ends of justice, FINDS and CONCLUDES that:

I.

FACTS

A.

THE PARTIES

1. Bate Land Company, Limited Partnership (“Bate Land Company”) is a limited partnership organized and existing pursuant to the laws of the State of Georgia, with a registered office and mailing address in New Bern, North Carolina. It is named as a defendant to this derivative action, brought in and on its behalf, in accordance with the pleading requirements for such actions.

2. Plaintiff Eleanor B. Johnson Limited Partnership is a limited partnership organized and existing pursuant to the laws of the State of Oregon, with a registered office address in Portland, Oregon. It is a Limited Partner in Bate Land Company, and owns a 16.5% interest therein.

3. Plaintiff Eleanor Bate Johnson is a citizen and resident of Riverside County, California. She is a General Partner of the Eleanor B. Johnson Limited Partnership.

4. Plaintiff Blake M. Kingsley is a citizen and resident of Washington County, Oregon. He is a General Partner of the Eleanor B. Johnson Limited Partnership.

5. Defendant Trent Capital Management Associates, Incorporated (“Trent Capital”) is a corporation organized and existing pursuant to the laws of the State of North Carolina with its registered office and mailing address in Craven County, North

Carolina. It is the sole General Partner of Bate Land Company, and owns a 1% interest therein.

6. Defendant Redacted (“Ball”) is a citizen and resident of Craven County, North Carolina. Ball is now the sole shareholder of Trent Capital.

B.

#### PROCEDURAL HISTORY

7. On or about January 30, 2007, Plaintiffs filed a Verified Complaint (the “Complaint”) commencing this civil action.<sup>1</sup> Contemporaneously, the Plaintiffs filed a notice designating this matter as a mandatory complex business case. The Complaint asserts thirteen claims for relief, each derivative in nature, against Ball and Trent Capital.

8. On January 31, 2007, the Chief Justice of the North Carolina Supreme Court designated the case as a mandatory complex business case. On February 6, 2008, the matter was assigned to the undersigned.

9. On February 13, 2007, Bate Land Company filed with this court a Notice of Filing of its Notice of Removal of this action to the United States District Court for the Eastern District of North Carolina, Eastern Division. Removal was sought on the basis of diversity jurisdiction, pursuant to 28 U.S.C. § 1332.

10. On May 9, 2007, United States District Court Judge Terrence W. Boyle entered an order granting the Plaintiffs’ Motion to Remand this matter to this court.

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<sup>1</sup> The court notes Defendant Bate Land Company’s contention that the individual plaintiffs do not have standing to pursue this action. Whether or not that contention is correct, there does not appear to be a dispute over whether the partnership plaintiff has standing, nor does it appear that the individual plaintiffs’ claims are in any way different than the partnership plaintiff’s claims. Accordingly, the determination of the individual plaintiffs’ standing does not appear necessary to the instant dispute. Therefore, without determining such issues, for the purposes of this Order, the court treats the Plaintiffs as if they are each proper parties.

11. On May 11, 2007, Bate Land Company filed a Consent Motion to Stay Pending Mediation and Arbitration. The motion indicated each Party's consent, and no Party has disputed its consent to the motion.

12. On May 17, 2007, this court entered an order granting the Consent Motion to Stay Pending Mediation and Arbitration.

13. The Parties conducted an unsuccessful mediation on or about July 31, 2007.

14. On October 10, 2007, the Plaintiffs filed a Motion to Lift Stay and Appoint Receiver ("Plaintiffs' Motions"). Subsequently, Defendants responded to Plaintiffs Motion, and Plaintiffs replied to such response.

15. On November 11, 2007, Bate Land Company filed a Motion to Compel Arbitration ("Defendants' Motion").<sup>2</sup> Subsequently, Plaintiffs responded to Defendants' Motion, and Defendants replied to such response.

### C.

#### THE PLAINTIFFS' MOTIONS AND THE DEFENDANTS' MOTION

16. The Plaintiffs' motion to lift stay and the Defendants' Motion largely address the same issue: Whether this court may grant provisional equitable relief in this matter when the claims in the Complaint have been submitted to arbitration but not yet arbitrated or otherwise treated by the arbitrator(s).

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<sup>2</sup> Notably, the Defendants are not truly aligned parties. Rather, one is the partnership whose rights this derivative action seeks to vindicate (Bate Land Company), and the others are the alleged violators of such rights (Trent Capital and Ball). Trent Capital and Ball are represented by one law firm and Bate Land Company by another. Presumably, Ball, as the sole shareholder of Trent Capital, caused Trent Capital to hire itself counsel and also, via Trent Capital's role as General Partner in Bate Land Company, caused Bate Land Company to hire itself counsel. The Defendants' papers, however, reflect substantially similar positions, and their oral arguments were collective. Overall, their approach to this matter appears aligned, and the court herein treats them as common interests solely for the purposes of this Order.

17. The Plaintiffs do not contest the Defendants' Motion to the extent that it seeks a determination that this case should, and will, go to arbitration. Rather, the Plaintiffs contest the Defendants' Motion to the extent that it seeks a determination that the pending arbitration and the current stay prohibit the Plaintiffs from seeking provisional remedies from this court during the arbitration process. Such dispute—though raised in Defendants' Motion—is primarily addressed by the Parties in those briefs submitted regarding Plaintiffs' Motions, and its determination is necessary to the determination of Plaintiffs' Motions. Accordingly, the court elects to address the instant dispute in light of Plaintiffs' Motions, which were filed prior to Defendants' Motion.

D.

#### THE PLAINTIFFS' MOTIONS

18. The Plaintiffs' Motions ask this court to lift the stay ordered on May 17, 2007, for the purpose of appointing a receiver for Bate Land Company, pending the resolution of the Plaintiffs' claims against the Defendants.

19. In support of their Motions, the Plaintiffs have offered evidence<sup>3</sup> to date supporting the following:

- a. On or prior to January 12, 1998, Harold H. Bate ("Bate") owned a substantial number of acres of real property in eastern North Carolina.
- b. On January 12, 1998, Bate incorporated Trent Capital, naming himself as its sole shareholder.

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<sup>3</sup> In this regard, for the purposes of the instant dispute and without making any determinations as to admissibility in another stage of this action, the court has considered the affidavits and undisputed documents put before it. The court has also, where appropriate, considered the Verified Complaint. *See Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972) ("A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify.")

- c. On or about January 9, 1998, Bate, Trent Capital, and Ball entered into a Management Agreement (the "Management Agreement").
- d. The Management Agreement, at paragraph 9(b), provides that the "validity, interpretation and performance of this Agreement shall be governed by and construed and enforced with the laws of the State of North Carolina."
- e. The Management Agreement provided that Trent Capital would be the General Partner in two limited partnerships to be funded by Bate, namely "HB Limited Partnership I" and "HB Limited Partnership II."
- f. The Management Agreement provided further that Ball was to provide "management, investment, tax planning and tax compliance services for the protection and continued long-term growth of the Assets" of the two partnerships. For this, Ball was to receive \$185,000.00, per annum, in compensation.
- g. On or about February 13, 1998, Trent Capital and Bate entered a Limited Partnership Agreement (the "Partnership Agreement") forming Bate Land Company, and agreeing that such entity would be treated as the entity referenced by the Management Agreement as "HB Limited Partnership I."
- h. The Partnership Agreement, at paragraph 29(d), provides that it is to be "interpreted and construed in accordance with the laws of the State of Georgia."
- i. As to Bate Land Company, the Partnership Agreement named Trent Capital as the General Partner, with a 1% partnership interest therein, and

named Bate as the sole Limited Partner, with a 99% partnership interest therein.

- j. The Partnership Agreement provided that Bate Land Company's purpose was to

receive contributions of property from the Partners . . . to hold such property for investment, to sell all or any part of such property and to reinvest the proceeds therefrom for investment purposes . . . all in such manner as the General Partners may in their discretion determine in good faith to be for the mutual benefit and for the general furtherance of the respective financial interests of the Partners.

- k. Bate Land Company was funded with 17,000 acres of real property owned by Bate.

- l. A Second Amendment to the Partnership Agreement, effective as of January 22, 2000 (the "Second Amendment"), established a "Board of Advisors" for Bate Land Company, which Board consists of Plaintiff Blake Kingsley and Berleen Bryant Burnette. Generally, the Second Amendment charged the General Partner with certain obligations to consult with the Board of Advisors regarding material undertakings of Bate Land Company. The Second Amendment grants the Board of Advisors the authority to remove the General Partner, and does not provide a mechanism for the resolution of a Board deadlock.

- m. Bate's 99% interest in Bate Land Company was later divided and assigned to several persons, as Limited Partners, including Eleanor Bate Johnson, who subsequently assigned her 16.5% partnership interest in Bate Land Company to the Eleanor B. Johnson Limited Partnership. To

date, the several Limited Partners—whose interests were received from Bate directly or through subsequent transfer—maintain a 99% interest in Bate Land Company.

- n. Upon Bate’s death on August 26, 2000, pursuant to his testamentary instruction, Ball became the sole shareholder in Trent Capital, which continued as the sole General Partner in Bate Land Company.
- o. In or about 2005, Ball, acting as the General Partner of Bate Land Company, began negotiating with at least two companies to sell some or all of the land held by Bate Land Company.
- p. In late 2005 and early 2006, Ball received offers from two prospective buyers, namely Realmark Development, LLC (“Realmark”) and Gary Allen (“Allen”), to purchase part or all of the land held by Bate Land Company.
- q. As to the Realmark offer, on July 25, 2006, Craig A. Dearden (“Dearden”), the Chief Operations Officer and Chief Financial Officer of Realmark, averred that:
  - i. Realmark—a property development company based in Florida—made multiple offers for the purchase of all of the land held by Bate Land Company;
  - ii. During the course of such negotiations Ball told Dearden that he was negotiating with another company for the purchase of all of the land held by Bate Land Company and that this other company had offered Ball, as part of the purchase price, an option on the property

that Ball believed would yield him approximately \$6,000,000.00 personally;

- iii. As part of the negotiations, Realmark offered Ball future employment with Realmark and \$3,000,000.00 to be paid to Ball personally over time, on the condition that such personal benefits would have to be disclosed to the Limited Partners of Bate Land Company;
  - iv. After Realmark made its first offer, of \$56,000,000.00, Ball invited Realmark to lower its offer, which invitation Realmark declined;
  - v. Realmark sent Ball two letters of intent, which each spoke to personal benefits Ball would receive; and
  - vi. Realmark's offers were not accepted.
- r. As to the Allen offer, on August 7, 2006, McQueen Campbell ("Campbell"), an agent with NAI Carolantic Realty ("Carolantic") and representative of Allen, averred that:
- i. Knowing that he may have a client interested in purchasing the land held by Bate Land Company, Campbell went with the owner of Carolantic, namely Steve Stroud ("Stroud"), to visit with Ball and explore the idea of representing Bate Land Company as a selling agent, but did not undertake such representation;
  - ii. Subsequently, Campbell invited Allen to agree to employ both Campbell and Stroud as buyer's agents and to pay them the "full commission", which invitation Allen accepted;

- iii. On January 23, 2006, through his agents, Allen made discrete offers to purchase either all of the land held by Bate Land Company, or some portion thereof. These offers each provided for personal compensation to Ball should Allen purchase the land. In response to these offers, Ball talked with Campbell regarding the amount and structure of Ball's compensation;
- iv. Subsequently, Stroud began searching for additional potential buyers to compete with Allen's effort to purchase the land held by Bate Land Company, one such buyer being Mark Saunders, of Southeastern Timberlands Company, LLC;
- v. On multiple occasions, Stroud, without explanation or provocation, insisted to Campbell that Mark Saunders would not pay any personal incentive to Ball;
- vi. Subsequently, per the instruction of Allen, Campbell separately approached Burleen Burnette—one of the two members of the Board of Advisors—with an April 7, 2006 offer from Allen to purchase all of the land held by Bate Land Company for \$65,000,000.00, payable at closing. Burleen Burnette forwarded Campbell's inquiry to counsel for Bate Land Company, which led to Campbell discussing that same offer with counsel for Bate Land Company and Ball; and
- vii. Bate Land Company never accepted an offer from Allen.

- s. Plaintiffs believe that Ball failed to consult with the Board of Advisors about all material details of the Realmark and Allen offers, including the personal incentives. Ball rejected such offers.
- t. On or about April 14, 2006, Ball, acting as General Partner of Bate Land Company, entered into a contract with Southeastern Timberlands Company, LLC (the "Contract" with "Southeastern") for the purchase of all of the land held by Bate Land Company. Ball had previously presented a letter of intent regarding the principal terms (though a lower price than the Contract price) of the Southeastern deal to the Board of Advisors, which it approved.
- u. The Contract set the purchase price for all tracts of land owned by Bate Land Company at \$65,000,000.00. The Contract called for a down payment of \$9,000,000.00, with the balance to be financed by a purchase money promissory note.
- v. Plaintiffs came to believe that Ball, via Trent Capital, was mismanaging Bate Land Company. Specifically, but not exclusively, they came to believe that the Southeastern Contract was not in the best interest of Bate Land Company and that Ball was concealing personal gains he had received, or was to receive, from Southeastern.
- w. On August 14, 2006, Plaintiff Blake Kingsley, along with certain other Limited Partners, sent Ball and Trent Capital a letter stating their suspicions and demanding that the General Partner bring suit to redress Ball's alleged misconduct (the "Demand Letter").

- x. On August 16, 2006, counsel for Bate Land Company and Trent Capital responded to the Demand Letter. Such response stated that Bate Land Company had concluded that the allegations in the Demand Letter were without merit.
- y. On August 18, 2006, counsel for Plaintiffs responded to the August 16 letter from counsel for Bate Land Company. Such response: (1) requested that Ball sign under oath a denial of any personal financial incentive received from Southeastern; (2) inquired as to the investigation made into the allegations of the Demand Letter; and (3) sought review of certain documents related to the Contract.
- z. On August 25, 2006, counsel for Bate Land Company responded, by two letters, to the August 18 letter from counsel for Plaintiffs. Such response maintained that no impropriety had occurred, and offered that Bate Land Company would proceed with further investigation after Plaintiffs, through the production of documents and arrangement of witnesses, demonstrated the reasonableness of their insistence on further investigation.
- aa. Also on August 25, 2006, counsel for Trent Capital and Ball responded to the August 18, 2006 letter. Accompanying such response was an August 25, 2006 Affidavit of Ball, in which Ball averred that he had not, and would not, receive any personal benefit from Southeastern, but admitted discussing post-sale employment with other potential purchasers.

- bb. Also on August 25, 2006, counsel for Southeastern sent counsel for Plaintiffs a letter stating that there was “no basis for challenging” the Contract.
- cc. The closing of the Contract, originally set for September 15, 2006, occurred on or about September 8, 2006. At that time, most, if not all, of the real property held by Bate Land Company was deeded to the newly-established Bate Land & Timber, LLC (“Bate Land & Timber”).
- dd. On September 12, 2006, Ball sent each Limited Partner of Bate Land Company a letter and distribution check reflecting its respective interest in Bate Land Company and the down payment under the Contract. Such letter represented that the property of Bate Land Company had been sold to Southeastern, and made no mention of Bate Land & Timber.
- ee. The Plaintiffs believe that Ball has acted, or presently acts, as an improper agent of Bate Land & Timber and/or Southeast. In this regard, Plaintiffs contend that:
- i. On June 12, 2006, Ball filed an Application to Reserve a Business Entity Name—specifically, Bate Land & Timber Company—with the North Carolina Department of the Secretary of State. Ball signed such application as the “Managing Member” of Bate Land & Timber;
  - ii. Ball signed a September 24, 2006 agreement between Bate Land & Timber and North Carolina Land Management as an agent for Bate Land & Timber;

- iii. Ball authored an October 16, 2006 letter to the Whitford Hunting Club, which leases land subject to the Contract, on Bate Land Company letterhead. Such letter fails to point out the change in ownership of the land and, rather, suggests that Bate Land Company continues to hold the land under a new name; and
- iv. Pursuant to a July 2, 2007 Release and Substitution of Collateral Agreement, Ball caused property of Bate Land Company to be released in a manner that violated his duties to Bate Land Company.
- ff. On January 18, 2007, Plaintiffs sent a letter to Ball demanding that the General Partner of Bate Land Company file suit on behalf of Bate Land Company for Ball's alleged misconduct (the "Second Demand Letter").
- gg. On January 29, 2007, counsel for Bate Land Company responded to the Second Demand Letter. Such response maintained that no impropriety had occurred, restated Bate Land Company's request that Plaintiffs produce certain documents and witnesses, and attached a January 26, 2007 Affidavit of Ball.
- hh. In his January 26, 2007 Affidavit, Ball avers that any involvement he had with Bate Land & Timber was in the interest of closing the Contract and furthering Bate Land Company's interest.
- ii. To date, Defendants have provided Plaintiffs with certain accountings of Bate Land Company's financial records, including its audited financial statement of 2006. Plaintiffs do not believe this constitutes a sufficient

accounting as they are entitled under applicable law and the Parties' agreements.

- jj. In September 2007, Bate Land Company reimbursed Trent Capital \$3,403.33 in legal fees, and paid its own counsel \$138,804.71. Cumulatively, Bate Land Company spent \$760,170.71 in legal fees from January through September 2007.<sup>4</sup>
- kk. To date, Ball continues to receive compensation from Bate Land Company in an amount provided for in the Management Agreement, totaling \$175,800.00 per annum.
- ll. Upon the completion of the Contract, anticipated to occur on February 15, 2008, Bate Land Company will have no substantial remaining assets or operations.
- mm. In two affidavits, one dated August 25, 2006, and the other January 26, 2007, Ball has denied any wrongdoing as alleged by Plaintiffs.

E.

#### THE ARBITRATION PROVISIONS

20. The Plaintiffs contend that the Management Agreement remains in force and effect and that the arbitration provision contained therein, at paragraph 9(c), is the provision relevant to the issue before the court. Such provision provides, in relevant part, that:

If the parties are unable to resolve the dispute by negotiations as set forth above, such dispute shall be settled by binding arbitration, conducted on a confidential basis, under the Rules of Arbitration of the American Arbitration Association . . . Neither party shall be precluded

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<sup>4</sup> At oral argument, the court invited defense counsel to explain whether Ball's personal legal fees were being paid by Bate Land Company. Defense counsel declined to answer.

hereby from seeking provisional remedies in the courts of any jurisdiction including, but not limited to, temporary restraining orders and preliminary injunctions, to protect its rights and interests, but such remedies shall not be sought as a means to avoid or stay arbitration.

21. The Defendants contend that the Management Agreement has expired upon its express terms, and that it is the arbitration provision contained in the Partnership Agreement, at paragraph 33, that is relevant to the issue before the court. Such provision provides, in pertinent part, that:

In the event a dispute, controversy, difference or claim arising out of, relating to or in connection with this Agreement, any transaction hereunder, or the breach hereof arises, the parties agree first to try in good faith to settle the dispute by mediation in New Bern, North Carolina, under the Commercial Mediation Rules of the American Arbitration Association, before resorting to arbitration, litigation or any other dispute resolution procedure. In the event such mediation does not result in a suitable solution, then any controversy or claim arising out of or relating to this Agreement shall be settled by immediately submitting the same to arbitration in the City of New Bern, North Carolina, for arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association.

## II.

### CONCLUSIONS OF LAW

#### A.

##### THE RELEVANT ARBITRATION PROVISION

1. Whether a dispute is subject to arbitration is a question of law for the court. *Raspet v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001) (citing *AT&T Techs. v. Commc'ns Workers*, 475 U.S. 643 (1986)); *BellSouth Corp. v. Forsee*, 265 Ga. App. 589, 590, 595 S.E.2d 99 (2004). As to this question, the court considers (a) whether the parties had a valid agreement to arbitrate, and (b) whether the specific

dispute between the parties falls within the substantive scope of their agreement.

*Raspet*, 147 N.C. App. at 136, 554 S.E.2d at 678.

2. As discussed above, neither Party disputes that there is a valid agreement to arbitrate and that this action is to be arbitrated. However, the Parties dispute whether it is the arbitration provision in the Management Agreement or the arbitration provision in the Partnership Agreement that is relevant to the instant issue of whether Plaintiffs may seek a provisional remedy from this court. Most of the argument regarding the controlling provision has focused on whether the Management Agreement remains in effect—with the Plaintiffs contending that it does, and the Defendants disagreeing.

3. The duration of the Management Agreement is, however, inconsequential to the determination of which arbitration provision controls.

4. The Plaintiffs bring this action pursuant to their Limited Partner interest in Bate Land Company. That interest flows from Bate's Limited Partner interest in Bate Land Company, which was created and vested in him by the Partnership Agreement. Further, of Plaintiffs' litany of claims against Trent Capital and Ball, each is based on alleged acts or omissions committed as the General Partner of Bate Land Company. Trent Capital's role, and correspondingly Ball's involvement, with Bate Land Company is established by the Partnership Agreement.<sup>5</sup> As a result, virtually every claim in the Complaint refers, either explicitly or by implication, to the Partnership Agreement. *Cf. Green v. Short*, 2007 NCBC 8 ¶¶ 52–63 (N.C. Super. Ct. Mar. 9, 2007), <http://www.ncbusinesscourt.net/opinions/2007%20NCBC%208.pdf> (applying a similar analysis).

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<sup>5</sup> The Management Agreement speaks to Ball's role with Trent Capital, and establishes the interest that led to Trent Capital being the General Partner of Bate Land Company; however, it is the Partnership Agreement that established Bate Land Company and Trent Capital's relationship.

5. Further still, the Partnership Agreement—entered later in time than the Management Agreement—provides, at paragraph 9(e), that the Partnership Agreement “is intended by [Trent Capital and Bate] to be the final expression of their agreement and is the complete and exclusive statement of the terms hereof notwithstanding any representations or statements to the contrary heretofore made.”

6. Accordingly, it is the arbitration provision contained in the Partnership Agreement (hereinafter, the “Arbitration Provision”) that is relevant to Plaintiffs’ Motions.

## B.

### GOVERNING LAW

7. The Partnership Agreement, at paragraph 29(d), purports to be governed by the laws of the State of Georgia and, nothing having been put before the court to the contrary, the court interprets it under such law.<sup>6</sup>

8. Defendants assert, however, that the Federal Arbitration Act, 9 U.S.C.A. §§ 1–16 (2006) (the “FAA”), controls the interpretation of the Arbitration Provision. The court may not ignore this assertion because the FAA preempts conflicting state law on the subject of arbitration. *See, generally, Volt Info. Scis, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989).

9. The FAA governs any “contract evidencing a transaction involving commerce.” 9 U.S.C.A. § 2. Commerce under the FAA is defined broadly as

commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation . . . .

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<sup>6</sup> *See First Union Nat’l Bank v. Brown*, 166 N.C. App. 519, 526–27, 603 S.E.2d 808, 814–15 (2004) (holding that court may proceed on the parties’ assumption of applicable law without analyzing choice of law).

9 U.S.C.A. § 1.

10. In determining whether there is a transaction involving commerce governed by the FAA, a court may look to the contract, affidavits, and the parties' business operations. *Ideal Unlimited Servs. Corp. v. Swift-Eckrich, Inc.*, 727 F. Supp. 75 (D. Puerto Rico 1989).<sup>7</sup>

11. On its face, the Partnership Agreement is a contract—entered by a North Carolina Corporation (Trent Capital) and an individual (Bate)—forming a Georgia Limited Partnership (Bate Land Company), to be funded by contributions from Trent Capital and Bate. Though the court makes no determination as to the citizenry or residence of the late Bate, it is clear that—early in the course of Bate Land Company's business operations—Bate contributed large amounts of real property located in North Carolina to the Georgia Limited Partnership Bate Land Company.

12. Also, the Partnership Agreement, as amended, provides that certain business functions of Bate Land Company must involve the members of the Board of Advisors, one of whom is a citizen and resident of Oregon. Such contemplated involvement exceeds the typical role of a Limited Partner to an extent bordering on inefficient control. *But cf. Mesa Operating Ltd. P'ship v. La. Intrastate Gas Corp.*, 797 F.2d 238, 242–44 (5<sup>th</sup> Cir. 1986) (discussing the often limited role of a Limited Partner).

13. Further, as appearing on the face of the Dearden Affidavit, the business operations of Bate Land Company involved significant business communications from at least one other state, Florida.

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<sup>7</sup> The court recognizes that it is not “bound, as to matters of federal law, by decisions of federal courts other than the United States Supreme Court.” *Enoch v. Inman*, 164 N.C. App. 415, 420–21, 596 S.E.2d 361, 365 (2004).

14. On these facts, the court concludes that the Partnership Agreement involved commerce so as to subject the Arbitration Provision to the FAA.<sup>8</sup> See generally *Mesa Operating Ltd. P'ship*, 797 F.2d 238 (finding—albeit in an opinion largely concerned with diversity jurisdiction—that a contract for the sale of gas involved commerce under the FAA, so as to be subject to its terms, when the gas was produced in Louisiana and sold in Louisiana to Louisiana customers by a Limited Partnership whose control was vested entirely in General Partners residing in Texas who received communications related to the contract and payments in Texas).

### C.

#### THE SCOPE OF THE ARBITRATION PROVISION

15. As discussed above, the Parties agree that this dispute is subject to arbitration. They disagree, however, as to whether, during the pendency of such arbitration, the Plaintiffs may seek a provisional remedy in the form of a Receiver from this court.

16. The Defendants attack Plaintiffs' effort in two primary ways. First, they contend that the FAA mandates that this court enforce the Arbitration Provision by sending all claims and disputes to the arbitrator.<sup>9</sup> (See Bate Land Company's Br. Opp.

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<sup>8</sup> Plaintiffs argue that the FAA does not apply because North Carolina courts are required to apply the FAA "only when the parties contemplated that performance of the contract being litigated involves 'substantial interstate activity.'" (Pl. Reply Supp. Mots. 5 (citing *Paramore v. Inter-Regional Fin. Leasing Co.*, 68 N.C. App. 659, 663, 316 S.E.2d 90, 92 (1984).) It is, however, hard to imagine that two parties—Trent Capital and Bate—entering a contract under which one would convey 17,000 acres of North Carolina real property to a Georgia Limited Partnership did not contemplate that the performance of that contract involved "substantial interstate activity." Notably, most of the Plaintiffs' argument pursuant to *Paramore* relies on the present-day performance of the contract, not the contemplation of the parties who entered the contract. (See Pl. Reply Supp. Mots. 5–7.)

<sup>9</sup> It is not entirely clear whether all provisions of the FAA apply to all state courts. Compare *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 27 n. 34 (1983) (suggesting, strongly, that a state court should enforce section 3 of the FAA) *superseded by statute on other grounds*, 9 U.S.C. § 16(b)(1), as recognized by *Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc.*, 128 F.3d 504 (7th Cir. 1997), with *Volt Info. Scis., Inc.*, 489 U.S. at 477 n. 6 (stating that while the Court has held

Pls.’ Mots. 9–10.) Second, they contend that the court should not lift the present stay because Plaintiffs consented to the May 11, 2007 Consent Motion to Stay Pending Mediation and Arbitration. (See Bate Land Company’s Br. Opp. Pls.’ Mots. 10–12.) These two contentions fold into one inquiry: Does the scope of the contractual Arbitration Provision, as interpreted under applicable law, prohibit a court from granting provisional relief?<sup>10</sup> If interim relief from this court is not excluded by the language of the Arbitration Provision, neither the direct enforcement of that provision nor the indirect enforcement of that provision—via the enforcement of the Stay Order<sup>11</sup>—prevents the Plaintiffs from asking this court for provisional relief.

17. “Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit.” *AT&T Techs.*, 475 U.S. at 648. The United States Supreme Court has declared its “healthy regard for

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sections 1 and 2 of the FAA applicable in state as well as federal court, it has never held that sections 3 and 4 are applicable in state court). Nevertheless, as recognized in *Moses H. Cone*, the North Carolina Supreme Court has held section 3 applicable in state court, *Burke County Public Schools Bd. of Educ. v. Shaver P’ship*, 303 N.C. 408, 279 S.E.2d 816 (1981), and the court here proceeds, under that precedent and the logic of *Moses H. Cone* that “Congress can hardly have meant that an agreement to arbitrate can be enforced against a party who attempts to litigate an arbitrable dispute in federal court, but not against one who sues on the same dispute in state court,” on the assumption that section 3 of the FAA applies to this state court.

<sup>10</sup> The court notes that the “prohibit” language of this inquiry may be read to disregard the precedent of the United States Supreme Court favoring arbitration. The court, however, does not intend its inquiry as the such, but, rather, as an inquiry into what negative obligations the Parties have now that the case is in arbitration (i.e. does agreeing to arbitrate manifest an agreement to not litigate anything, even provisional relief?). Cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1055 (4th Cir. 1985) (stating “the principal issue on appeal is whether § 3 of the [FAA] absolutely precludes a district court from granting one party a preliminary injunction to preserve the status quo pending the arbitration of the parties’ dispute.”) The court starts here because the arbitrability of this matter has largely been conceded.

<sup>11</sup> The May 17, 2007 Order granting the consent motion to stay rests upon the grounds for the consent motion itself, specifically sections 3 and 4 of the FAA and section 9-9-6 of the Georgia Code. Each of these enactments provides that the trial court shall, upon proper finding, refer the action to arbitration to the extent provided for in the arbitration agreement. See 9 U.S.C.A. § 3 (instructing that, upon proper findings, the trial court shall “stay the trial of the action until such arbitration has been had in accordance with terms of the agreement”); Ga. Code. Ann. § 9-9-6 (providing that if the court grants a motion to compel arbitration, “the order shall operate to stay a pending or subsequent action, or so much as is referable to arbitration.”) Accordingly, enforcement of the order to stay only affects the instant dispute if the Arbitration Provision, as interpreted under applicable law, disallows provisional relief. Admittedly, this analysis is confused by Plaintiffs’ motion to lift stay.

the federal policy favoring arbitration” under the FAA. *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24. To that end, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Id.* at 24–25.

18. This “heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.” *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir. 1989) (citing *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 (1960)).

19. The signatories to the Partnership Agreement agreed to arbitrate any “controversy or claim arising out of or related to this Agreement.” By any measure, this clause is a broad one, capable of an expansive reach. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967) (labeling as “broad” a clause that required arbitration of “any controversy or claim arising out of or relating to this Agreement . . . .”).

20. In such a case, courts determine the reach of the arbitration provision by looking to whether “a ‘significant relationship’ exists between the asserted claims and the contract in which the arbitration clause is contained.” *Long v. Silver*, 248 F.3d 309, 316 (4th Cir. 2001); *accord Sloan Fin. Group, Inc., v. Beckett*, 159 N.C. App. 470, 479, 583 S.E.2d 325, 330-31 (2003).

21. As discussed above, the Partnership Agreement established the relationship that forms the basis for the Plaintiffs' immediate claim for the appointment of a Receiver.

22. Accordingly, because the allegations that form the basis of the claim for appointment of a receiver bear a "significant relationship" to the Partnership Agreement, which contains an arbitration clause governed by the FAA, that claim is subject to arbitration. *See Long*, 248 F.3d at 316.

23. The Plaintiffs, however, do not dispute that an arbitrator may award some interim equitable relief, but resist that route here, arguing that such equitable relief could be thwarted by the further delay inherent in re-submitting claims properly before this court, selecting arbitrators, and obtaining a hearing.<sup>12</sup> Ultimately, Plaintiffs argue that though they entered a contract to arbitrate, that contract should be interpreted not to preclude a court from granting interim equitable relief. *Cf. Volt Info. Scis., Inc.*, 489 U.S. at 472 (providing that the thrust of the FAA is that arbitration is strictly a matter of contract).

24. The Plaintiffs' argument is not without foundation. There is a split of authority as to whether a party who has entered an arbitration agreement subject to the FAA may seek provisional equitable relief from a court. *Compare Bradley*, 756 F.2d at 1053–54 (holding that "where a dispute is subject to mandatory arbitration under the [FAA], a district court has the discretion to grant a preliminary injunction to preserve the status quo pending the arbitration of the parties' dispute if the enjoined conduct would

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<sup>12</sup> The court notes the validity of the Defendants' argument that it is the Plaintiffs' own delay that has resulted in the existing urgency to obtain provisional relief. However, the Defendants have not shown that they have been prejudiced by the Plaintiffs' delay. If the Plaintiffs may otherwise properly seek relief from this court, their delay is not so egregious or prejudicial as to bar such relief.

render that process a ‘hollow formality.’”), and *Performance Unlimited, Inc., v. Questar Publishers, Inc.*, 52 F.3d 1373, 1377-80 (6th Cir. 1995) (reaching the same result as that reached by the 4<sup>th</sup> Circuit in *Bradley*, and citing similar holdings of the Second, Third, Seventh, and Ninth Circuits), with *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286, 1291 (8th Cir. 1984) (holding that a grant of injunctive relief in an arbitrable controversy “abrogates the intent of the Federal Arbitration Act and consequently was an abuse of discretion.”). Further, AAA Commercial Arbitration Rule 34(a) appears to allow such relief, stating “a request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.”

25. Accordingly, it does not appear that the scope of the Arbitration Provision, as interpreted under the FAA and resulting precedent, prohibits a court from granting provisional relief. This conclusion is unaffected by whether the Arbitration Provision is enforced directly or indirectly. This determination renders both the Plaintiffs’ Motion to Lift the Stay and the Defendants’ Motion to Compel Arbitration without effect (as, upon the determination that the provisional remedy sought is not prohibited by the Arbitration Provision, as enforced by the stay order, Plaintiffs no longer require that the stay be lifted and Defendants lack grounds on which to receive the relief sought in their motion). Therefore, this court concludes that it retains at least some discretion to enter interim equitable relief,<sup>13</sup> and now turns to consider the propriety of exercising such discretion.

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<sup>13</sup> The conclusion would be similar if the court were applying the Georgia Arbitration Act rather than the FAA. See *infra* Section II ¶ 30 (discussing section 9-9-4(e) of the Georgia Code).

D.

THE PLAINTIFFS' MOTION FOR APPOINTMENT OF A RECEIVER

26. Plaintiffs contend that unless a Receiver is put in place, Ball and/or Trent Capital's continued mismanagement of Bate Land Company will result in depletion of Bate Land Company's assets or other misconduct detrimental to Bate Land Company. Plaintiffs, however, have not contended that Ball is actively stealing from Bate Land Company, nor that he is commencing a fresh fraud. Rather, Plaintiffs contend that Ball has self-dealt or otherwise breached duties to Bate Land Company in the past and his continuing control of Bate Land Company, especially if allowed to survive through dissolution, allows him to conceal and profit from his misdeeds at the expense of Bate Land Company. Plaintiffs further contend that Ball and/or Trent Capital have failed to provide the Plaintiffs a sufficient "accounting," as they are owed under the Partnership Agreement and applicable law.

27. Ultimately, Plaintiffs' current posture appears somewhat reactive to the handling of these matters by Ball, Trent Capital, and Bate Land Company, and their respective counsel. Plaintiffs, having purportedly complied with the law of the State of Georgia regarding derivative actions<sup>14</sup> by filing demands upon Ball and/or Trent Capital, bring this action on behalf and in behalf of Bate Land Company in an effort to recover judgment for the alleged wrongs of Ball and/or Trent Capital. Bate Land Company is, however, through its own counsel, and at great expense to the partnership, resisting that very effort. The complexity of this dilemma is furthered by the fact that Trent Capital is the sole General Partner of Bate Land Company, and, therefore, Ball, via his

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<sup>14</sup> See Ga. Code Ann. § 14-9-1001 ("A limited partner may maintain an action in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or an effort to cause those general partners to bring the action is not likely to succeed.")

control of Trent Capital, is left to unilaterally decide whether Bate Land Company should sue him, and to retain and manage outside counsel for Bate Land Company. Without suggesting any impropriety by counsel for Bate Land Company, the court appreciates how this structure frustrates Plaintiffs' statutory right to bring a derivative action in behalf of Bate Land Company.

28. Upon such allegations and contentions, Plaintiffs move the court, pursuant to section 1-502 of the General Statutes of North Carolina, to appoint a Receiver for Bate Land Company. The court, in its discretion, DENIES such motion. The appointment of a Receiver is a harsh and cumbersome remedy, and is arguably outside the permissible interpretation of the Arbitration Provision under the FAA.

29. However, without passing on the merits of the dispute,<sup>15</sup> the court appreciates that the maintenance of the status quo until the merits of the Complaint may be reached by an arbitrator may prove paramount to the just resolution of this matter. To that end, the court turns to section 9-9-4 of the Georgia Code. Ga. Code Ann. § 9-9-4(d).

30. At section 9-9-4, the Georgia Code provides that "the superior court in the county in which an arbitration is pending . . . may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." Ga. Code. Ann. § 9-9-4.

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<sup>15</sup> The Georgia Arbitration Act provides that "the court shall not consider whether a claim with respect to which arbitration is sought is tenable or otherwise pass on the merits of the dispute." Ga. Code Ann. § 9-9-4(d). Pursuantly, the court does not endeavor in this Order to make any findings or conclusions that are not necessary to the holdings herein. That is, the court strives to only reach the issue presented and recognizes that the shape of this action as before the arbitrator(s) is quite different than that before the court.

31. On the evidence presented to date, the Plaintiffs have shown that the award to which the Plaintiffs may be entitled may be rendered ineffectual without provisional relief. Further, though the immediate relief sought by Plaintiffs is couched as a Receiver, it is fair to interpret the relief sought to really be in the form of a preliminary injunction (i.e. an order keeping Ball from hiding any misdeeds). Accordingly, in the interest of efficiency and the ends of justice, the court deems Plaintiffs' Motion for Appointment of a Receiver to be, in effect, a motion for preliminary injunction. Further, seeing no prejudice to Ball and/or Trent Capital from the issuance of an injunction as structured below, the court concludes that the principles of equity and ends of justice weigh in favor of GRANTING such injunction.

### III.

#### CONCLUSION

1. Based on the foregoing FINDINGS and CONCLUSIONS, the court HEREBY ORDERS, ADJUDGES, and DECREES that:
  - a. Defendant Bate Land Company, L.P.'s Motion to Compel Arbitration is deemed MOOT or otherwise DENIED.
  - b. Plaintiffs' Motion to Lift the Stay is deemed MOOT or otherwise DENIED.
  - c. Plaintiffs' Motion for Appointment of a Receiver is DENIED as submitted; provided such motion is hereby deemed Plaintiffs' Motion for Preliminary Injunction.
  - d. Plaintiffs' Motion for a Preliminary Injunction is GRANTED in that:
    - i. Except upon further order of the court, for good cause shown, Ball and/or Trent Capital, and his or its agents, are hereby ENJOINED

from having any communication with either Southeastern Timberlands Company, LLC or Bate Land & Timber Company, or any agents thereof, unless such communication is in writing, copied to counsel for Bate Land Company;

- ii. Ball and/or Trent Capital, and his or its agents, are hereby ENJOINED from destroying, or otherwise concealing, any records in his or its possession or control regarding or evidencing any transaction entered into by, or communication regarding, Bate Land Company, Southeastern Timberland Company, LLC, or Bate Land & Timber Company;
- iii. Ball and/or Trent Capital are hereby ORDERED to allow Plaintiffs those rights to records or information provided to them in the Partnership Agreement, at paragraph 18<sup>16</sup>, and the Georgia Code, at section 14-9-305<sup>17</sup>;

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<sup>16</sup> Paragraph 18 of the Partnership Agreement provides that each partner shall have access to Bate Land Company's (a) "books of account", and (b) financial statements showing "the results of the operations of the Partnership for [each fiscal year], the balance in each Partner's capital account, the unpaid balance due on all obligations of the Partnership, each Partner's capital account, the unpaid balance due on all obligations of the Partnership, each Partner's share of the net profits or losses of the Partnership, each Partner's distributive share of all tax items in the Partnership, and all other information customarily shown on financial statements prepared in accordance with the cash receipts and disbursements method of accounting."

<sup>17</sup> Section 14-9-305 provides that upon reasonable request, a limited partner may inspect and copy, at the inspector's expense, (a) any partnership record required to be kept by section 14-9-105 of the Georgia Code, (b) other partnership books and records of account, (c) true information regarding the state of the business and financial condition of the partnership, (d) available income tax returns of the partnership, and (e) any other information that is just and reasonable regarding the partnership. Ga. Code Ann. § 14-9-305. The court, pursuant to section 14-9-305(b) of the Georgia Code, hereby deems the Plaintiffs' request for any information regarding Bate Land Company, to the extent such information exists, to be just and reasonable and not subject to a claim by Ball and/or Trent Capital that, pursuant to section 14-9-305(a)(3)(C) of the Georgia Code, such information should be kept confidential from the Plaintiffs. Any copying costs associated with such requests and production shall be born by the Plaintiffs.

- iv. Ball and Trent Capital are hereby ORDERED to hold as trustee for Bate Land Company any profits derived by him or it without the consent the consent of the Limited Partners from any transaction connected with Bate Land Company, as provided by section 14-8-21<sup>18</sup> of the Georgia Code, as applied to Limited Partnerships via section 14-9-403 of the Georgia Code ; and
- v. Bate Land Company is hereby ENJOINED from destroying, or otherwise concealing, any records in its possession or control relating to Ball, Trent Capital, Bate Land Company, Southeastern Timberlands Company, LLC, or Bate Land & Timber Company, or relating to any assets now held or ever held by such individual and entities.

2. The rulings herein shall be effective immediately and shall expire at the time that this matter comes before an arbitrator for consideration of provisional or permanent relief.<sup>19</sup>

3. The rulings herein are in no way meant to prejudice, preempt, or otherwise conflict with the authority of an arbitrator in this matter, and the court grants such arbitrator full authority to moot, amend, or otherwise affect this Order.

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<sup>18</sup> “Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.” Ga. Code Ann. § 14-8-21(a). The court does not intend this provision to encompass that salary provided to Ball by prior agreement.

<sup>19</sup> The American Arbitration Association (“AAA”) Commercial Arbitration Rules—as specifically adopted by the Arbitration Provision—authorize an arbitrator to “take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.” AAA, Commercial Arbitration Rule 34(a) (2005).

SO ORDERED, this the 14<sup>th</sup> day of February, 2008, at 4:55 P.M.

/s/ John R. Jolly, Jr.  
John R. Jolly, Jr.  
Special Superior Court Judge for  
Complex Business Cases