

STATE OF NORTH CAROLINA
COUNTY OF FORSYTH

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
10 CVS 5977

CHAD WILLIAMS, TODD TUCKER,
BEYOND THE BOX, LLC, ED TEAGUE,
SECURITY CONSULTANTS
INTERNATIONAL, INC., BETTY
CLOUD, CHARLES PELLER, and
MELISSA PELLER, individually and
derivatively on behalf of EYEBORGS,
LLC,

Plaintiffs,

v.

CRIMSON WOLF PRODUCTIONS,
LTD., FRAN E. CLAYBAUGH,
RICHARD CLABAUGH, and JOHN
RUSHTON, individually and as current or
former managers of EYEBORGS, LLC,

Defendants,

- and -

EYEBORGS, LLC, a North Carolina
Limited Liability Company,

Nominal Defendant.

**ORDER ON MOTION TO COMPEL
ARBITRATION AND MOTION FOR
INDEMNIFICATION**

THIS MATTER is before the Court on Defendants' Motion to Compel Arbitration and Plaintiff and Defendant-Counterclaimant Charles Peller's Motion for Indemnification.

I. INTRODUCTION

Plaintiffs invested in nominal Defendant Eyeborgs, LLC ("Eyeborgs"), which is a special purpose entity formed for the production of a movie. Corporate Defendant Crimson Wolf Productions, Ltd. ("Crimson Wolf") is manager of Eyeborgs. Plaintiff Charles Peller ("Peller") was not only an investor in Eyeborgs, but also one of its

managers and a former officer of Crimson Wolf. Defendants asserted counterclaims. Some counterclaims were presented in common against all plaintiffs. Separate individual counterclaims were presented against Peller dealing with his roles as Eyeborgs manager and former Crimson Wolf officer. Defendants first moved to have all claims and counterclaims resolved by arbitration, but have since indicated they would stay claims presented solely against Peller while the arbitration proceeds. Peller seeks indemnity and an advance of costs for claims against him. An advance of expense is of less immediacy if the individual claims are stayed.

II. THE ARBITRATION PROVISION

The arbitration demand is based on provisions of Eyeborg's Amended and Restated Operating Agreement ("Operating Agreement"), which was executed by and between Eyeborgs; the "Class A Members" of Eyeborgs, of which Plaintiffs constitute a majority; and Defendants. The provision states:

Except for the Company's right to seek injunctive and/or appropriate equitable relief, which at the Company's option may be brought in any court of competent jurisdiction, *any dispute arising out of this Agreement* shall be submitted to and resolved by binding arbitration conducted in Forsyth County, North Carolina under the North Carolina Uniform Arbitration Act, and to the extent permitted by such Act, the Commercial Arbitration Rules of the American Arbitration Association. The arbiter, in his or her discretion may award attorney's fees and expenses, the arbiter's fees and expenses, and other costs of arbitration.

(Compl., Ex. A: Operating Agreement (emphasis added).)

III. FACTS

When Plaintiffs filed the Complaint, they were all investors in Eyeborgs, a company formed in 2005 to produce an original feature film. The Complaint asserts both derivative and direct claims. Plaintiffs assert the following derivative claims: accounting, breach of fiduciary duty and/or aiding and abetting, gross mismanagement, breach of contract for failure to abide by the Eyeborgs Operating Agreement and Private Placement Memorandum, unjust enrichment, civil conspiracy, constructive fraud, conversion, wrongful distribution, and piercing the corporate veil of Crimson Wolf. Plaintiffs assert

the following direct claims: dissolution and appointment of receiver, breach of fiduciary duty and/or aiding and abetting, breach of contract for failure to abide by the Eyeborgs Operating Agreement and Private Placement Memorandum, civil conspiracy, constructive fraud, fraud, conversion, wrongful distribution, negligent misrepresentation, piercing the corporate veil of Crimson Wolf, and unfair and deceptive trade practices.

Defendants responded to the Complaint and asserted various counterclaims. Certain claims were presented against all Plaintiffs collectively, including: breach of contract for failure to abide by the Eyeborgs Operating Agreement and the Private Placement Memorandum, breach of fiduciary duty, unfair and deceptive trade practices, abuse of process, civil conspiracy, injunctive relief, a derivative claim for violation of the North Carolina Trade Secrets Protection Act, and Rule 11 sanctions. Defendants filed separate individual claims against Chad Williams, which have been dismissed, and against Peller in his capacity as chief financial officer and treasurer of Crimson Wolf, including: breach of implied contract, breach of fiduciary duty, conversion, indemnification, and contribution. Peller then retained separate counsel.

After an unsuccessful mediation, Defendants moved to compel arbitration pursuant to the North Carolina Revised Uniform Arbitration Act, N.C. Gen. Stat. § 1-569.7, and the arbitration provision of the Operating Agreement. On February 3, 2011, counsel then representing all Plaintiffs consented to arbitrate all claims and counterclaims except claims asserted against Peller individually. On February 4, 2011, Peller's new separate counsel objected to mandatory arbitration of any claim involving Peller. The Court heard oral argument after supplemental briefing on the motions.

IV. THE MOTIONS

A. The Motion to Compel Arbitration

To determine whether a dispute is subject to arbitration, the trial court must ascertain “both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement.” *Ellison v. Alexander*, ___ N.C. App. ___, 700 S.E.2d 102, 105–06 (2010). “An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except

upon a ground that exists at law or in equity for revoking a contract.” N.C. Gen. Stat. § 1-569.6(a). Peller is a party to the Operating Agreement both as an investor in Eyeborgs and a former officer of Crimson Wolf. He does not contest the validity of the arbitration provision.

Thus, the Court is left to determine whether Defendants’ claims against Peller are contained within the scope of the Operating Agreement’s arbitration provision. North Carolina public policy strongly favors arbitration. *In re W.W. Jarvis & Sons*, 194 N.C. App. 799, 803, 671 S.E.2d 534, 536 (2004). “Any doubts regarding the scope of arbitrable issues should be resolved in favor of arbitration.” *Hobbs Staffing Serv., Inc. v. Lumbermens Mut. Cas. Co.*, 168 N.C. App. 223, 225, 606 S.E.2d 708, 710 (2005). “Unless it can be said with confident authority that the arbitration clause cannot be read to include the asserted dispute, the court should grant a parties’ [sic] motion to arbitrate the particular grievance.” *Id.* at 226, 606 S.E.2d at 710.

The parties agreed to arbitrate “any dispute arising out of [the Operating] Agreement” (Compl., Ex. A: Operating Agreement.) Defendants argue that all claims in this matter arise under the Operating Agreement, but they concede that their position with respect to its counterclaims against Peller individually is not as compelling as is its position with respect to its counterclaims against all Plaintiffs. Defendants consent, in any event, to a stay of the counterclaims against Peller individually while the remaining claims are arbitrated.

The Court concludes that Defendants’ counterclaims against all Plaintiffs collectively arise under a common set of facts and have a substantial relationship to the Operating Agreement such that they are contained within its scope. *See Ellison*, 700 S.E.2d at 110–111. Defendants’ Motion to Compel Arbitration as to all claims except those against Peller individually is GRANTED. The Court retains jurisdiction over the counterclaims asserted against Peller individually, but such claims are STAYED pending the conclusion of the arbitration proceeding.

B. The Motion for Indemnification

Peller’s Motion for Indemnification and Amended Motion for Indemnification claim that he is entitled both to be indemnified and to have his expenses advanced

because claims against him arise out of his duties as an officer of Crimson Wolf and manager of Eyeborgs. He relies on N.C. Gen. Stat. §§ 55-8-51 and 55-8-54. As Eyeborgs is a limited liability company, its authority to indemnify members and managers is controlled by Chapter 57C of the General Statutes, the North Carolina Limited Liability Company Act. Sections 55-8-51 and 57C-3-32 provide corporations and limited liability companies, respectively, the authority to indemnify directors, members, managers, or executives under certain circumstances. Those statutes provide discretionary authority to corporate management. Peller, rather, seeks to have the Court order indemnification as well as an advance. He argues that he meets the requirements of Section 55-8-54, which provides:

The director is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not he met the standard of conduct set forth in G.S. 55-8-51 or was judged liable as described in G.S. 55-8-51(d), but if he was so liable, his indemnification is limited to reasonable expenses incurred.

N.C. Gen. Stat. § 55-8-54(2).

Peller posits that this statute is intended to grant the Court power to impose equity, and argues that he is in equity entitled to indemnification and an advance because the claims against him for mismanagement relate to his conduct as an officer and manager. He emphasizes that there is no allegation that he acted in bad faith and stresses that it would be unfair for the corporation to advance funds on behalf of those who remain officers while at the same time requiring him to defend his conduct as an officer at his own expense. Defendants respond that the Court does not have authority in the first instance to order indemnification or advance as requested, and further, that there would be no equitable basis to exercise such power in this case even if it existed.

There is no case law interpreting N.C. Gen. Stat. § 55-8-54, and the Court concludes that it need not on these facts wade into this uncharted area of the law. With individual claims against Peller being stayed, corporate funds are not necessary to prosecute and/or defend the individual claims against Peller. The Court need not then at this time consider whether there are facts to justify the Court's exercise of power it might find. Accordingly, Peller's Motion for Indemnification is DENIED. This Order is,

however, without prejudice to Peller's right to renew his request for indemnification at a later point in time, which request may include expenses he has incurred to date.

IT IS SO ORDERED, this 5th day of May, 2011.

/s/ James L. Gale
James L. Gale
Special Superior Court Judge
for Complex Business Cases