APPENDICES TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

Order of the Superior Court of Arizona (Apr. 5, 2017)

Michael K. Jeanes, Clerk of Court
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04/07/2017 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV2016-052899 04/05/2017

HONORABLE JOHN R. HANNAH JR.

CLERK OF THE COURT
W. Tenoever
Deputy

MARTIN OGDEN

v.

DIGITAL INTELLIGENCE SYSTEMS LLC

RULING

The Court has read and considered plaintiff Martin Ogden's Petition to Compel Arbitration, the Opposition filed by defendant Digital Intelligence Systems, LLC and the plaintiff's reply, in the context of the record in this case.

Mr. Ogden's petition refers to the settlement agreement entered by the parties to resolve his employment-related claims against Digital Intelligence Systems. The Opposition includes a copy of the settlement agreement. In the reply Mr. Ogden acknowledges the authenticity of the settlement agreement, but he asserts that Digital Intelligence Systems breached it by not paying all the monies owed.

The question whether Digital Intelligence Systems breached the settlement agreement must be resolved before the parties resume the process of arbitrating the employment claims. The settlement agreement does not contain an arbitration provision. Arbitration therefore is not the proper forum for determining whether Digital Intelligence Systems breached the settlement agreement. Instead a court must determine whether Digital Intelligence Systems materially breached the agreement. Furthermore, if the court does find Digital Intelligence Systems in breach, it will then have to decide whether Mr. Ogden is entitled to a remedy, such as rescission, that frees Mr. Ogden from his obligations under the agreement and gives him the right to reassert the employment claims. Only after judicial decisions to that effect will Mr. Ogden be entitled to require his former employer to return to arbitration.

In this proceeding Mr. Ogden has not asserted a breach of contract claim against Digital Intelligence Systems alleging a breach of the settlement agreement. He has simply stated as a conclusion that the defendant breached that agreement. He therefore is not entitled to an order compelling arbitration of the employment claims.

IT IS THEREFORE ORDERED dismissing the Petition to Compel Arbitration.

IT IS FURTHER ORDERED any motion or application for attorneys' fees must be filed within 20 days of the date on which the Clerk files this order. Ariz. R. Civ. P.

APPENDIX B

Memorandum of the Arizona Court of Appeals (Dec. 13, 2018)

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MARTIN OGDEN,
Plaintiff/Appellant,
v.
DIGITAL INTELLIGENCE SYSTEMS LLC,
Defendant/Appellee.

No. 1 CA-CV 17-0406
Appeal from the Superior Court in Maricopa County
No. CV2016-052899
The Honorable John R. Hannah, Jr., Judge
FILED 12-13-2018
AFFIRMED

COUNSEL
Martin Ogden, Glendale
Plaintiff/Appellant

Littler Mendelson, PC, Phoenix
By Joshua Waltman
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge Diane M. Johnsen delivered the decision of the Court, in which Judge Maria Elena Cruz and Judge Randall M. Howe joined.

J O H N S E N, Judge:

¶1 Martin Ogden appeals the superior court's dismissal of his petition to compel arbitration of claims against Digital Intelligence Systems, LLC ("DISYS"). For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Ogden began working for DISYS in December 2013. Shortly thereafter, he executed an arbitration agreement with the company, which stated:

> 1. Arbitration Agreement & Procedures. As a condition of Employee's employment at DISYS, Employee agrees that any controversy or claim arising out of, or relating to, Employee's employment relationship with DISYS or the termination of that relationship, must be submitted for non-binding mediation before a third-party neutral and, if necessary, for final and binding resolution by a private and impartial arbitrator . . . .

¶3 DISYS terminated Ogden's employment in June 2015. Shortly thereafter, Ogden asserted various claims against DISYS and pursued them as provided in the arbitration agreement. Eventually, Ogden and DISYS agreed to settle Ogden's claims. They executed a Settlement and Release Agreement (the "Settlement Agreement"), which provided in relevant part:

> The Parties have agreed to resolve any and all disputes and claims that Ogden now has or has ever had against DISYS, whether known or unknown, including the Litigation, pursuant to the terms of this Agreement.
>
> 2. Release and Covenant Not To Sue
>
> a. Ogden . . . hereby fully and without limitation releases, covenants not to sue, and forever discharges DISYS . . . from any and all rights, claims, demands, liabilities, actions, and causes of action, whether in law or in equity, suits, damages, losses, attorneys' fees, costs, and expenses, of whatever nature whatsoever, known or unknown, fixed or contingent, suspected or unsuspected ("Claims"), that Ogden . . . now have, or may ever have, against DISYS . . . or are in any way related to: (i) Ogden's employment by DISYS; and (ii) any acts or omissions by DISYS or the DISYS Releasees occurring prior to the date that Ogden executes this Agreement.

¶4 Sometime after signing the Settlement Agreement and receiving payment from DISYS, Ogden attempted to initiate an arbitration. DISYS, however, refused to pay the required arbitration filing fee, asserting that nothing was left to arbitrate after Ogden released his claims in the Settlement Agreement.

¶5 Ogden then filed a petition in the superior court to compel DISYS to arbitrate. His petition asserted that his termination "will result in a number" of claims against DISYS, including claims for unpaid wages, wrongful termination, unjust enrichment, breach of contract and breach of the duty of good faith and fair dealing in an employment agreement.

¶6 In response, DISYS argued that by signing the Settlement Agreement, Ogden had released the claims he identified for arbitration. In his reply, Ogden admitted that the Settlement Agreement would constitute a release of all of his claims against DISYS but argued DISYS had breached its payment obligation under the Settlement Agreement.

¶7 The court denied Ogden's motion to compel arbitration and entered a final judgment. Ogden timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2018) and -2101(A)(1) (2018).[1]

[1] Absent material revision, we cite the current version of a statute or rule.

DISCUSSION

A. Denial of the Motion to Compel Arbitration.

¶8 We review the denial of a motion to compel arbitration *de novo*. *Sun Valley Ranch 308 Ltd. P'ship v. Robson*, 231 Ariz. 287, 291, ¶ 9 (App. 2012). Contract interpretation is a question of law we review *de novo*. *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 593, ¶ 9 (App. 2009). We consider the plain meaning of the words in the context of the contract as a whole. *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 259 (App. 1983). "A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." A.R.S. § 12-1501 (2018).

¶9 As Ogden argues, the arbitration agreement he executed when he began work at DISYS applied to "any controversy or claim arising out of, or relating to [Ogden's] employment relationship with DISYS or the termination of that relationship." The employment-based claims that Ogden identified in his petition to compel arbitration arguably would fall within the arbitration agreement because they arose out of his employment relationship with DISYS. In the Settlement Agreement,

however, Ogden explicitly "agreed to resolve any and all disputes and claims that [he] now has or has ever had against DISYS." In the Settlement Agreement, he released, discharged and promised not to sue DISYS and all of its agents from or for "any and all rights, claims, demands, liabilities, actions, and causes of action." Given his release and discharge of DISYS from all his employment-related claims, the superior court did not err by denying his motion to compel arbitration of those claims. Simply put, none of those claims remained to be arbitrated.

¶10 Ogden nevertheless argues that DISYS breached the Settlement Agreement by failing to pay him what it had agreed to pay. He argues that DISYS's asserted breach of the Settlement Agreement is an issue to be arbitrated because it is a claim that arises out of his employment relationship with DISYS. We take judicial notice that, as shown in the record in a companion appeal between these same two parties, Ogden has filed a civil complaint alleging that DISYS breached the Settlement Agreement by paying him $10,341 when it had promised to pay him $13,810.

¶11 Ogden's claim for breach of the Settlement Agreement, however, does not arise out of the employment relationship but instead arises solely out of the Settlement Agreement, which itself has no arbitration provision. *Cf. S. Cal. Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, 51, ¶ 11 (1999) ("Although it is commonly said that the law favors arbitration, it is more accurate to say that the law favors arbitration of disputes that the parties have agreed to arbitrate."). The Settlement Agreement in effect constituted a novation of all prior agreements respecting Ogden's employment with DISYS, including the arbitration agreement. *See Western Coach Corp. v. Roscoe*, 133 Ariz. 147, 152 (1982) (novation is "a new, valid contract" that extinguishes previous obligations).

B. Attorney's Fees.

¶12 DISYS asks for attorney's fees on appeal under A.R.S. § 12-341.01 (2018) and the arbitration agreement. Although § 12-341.01 allows a court to grant attorney's fees to the successful party in an action arising out of a contract, it does not allow a fees award that would be contrary to "an express contractual provision governing recovery of attorney's fees." *Am. Power Prods., Inc. v. CSK Auto, Inc.*, 242 Ariz. 364, 368, ¶ 14 (2017) (quotation omitted).

¶13 The relevant provision in the parties' arbitration agreement is in § 1(F)(ii), which provides:

> Excluding the initial filing fee, which shall be borne by the claimant, DISYS agrees to pay the administrative fees and the arbitrator's fees and expenses as provided in the AAA Employment Arbitration Rules and Mediation Procedures. All other costs and expenses associated with the arbitration, including, without limitation, each party's respective attorneys' fees, shall be borne by the party incurring the expense.

¶14 Ogden argues this provision bars DISYS's claim for fees because it states that each party will bear its own fees "associated with the arbitration." To be sure, any attorney's fees that DISYS incurred in the arbitration would be "associated with the arbitration" and would be borne by DISYS under the terms of the arbitration agreement. But fees incurred in responding to a petition to compel arbitration filed in superior court are not "associated with the arbitration." *See WB, The Bldg. Co., LLC v. El Destino, LP*, 227 Ariz. 302, 311-13, ¶¶ 23-31 (App. 2011) (superior court may award fees under § 12-341.01 to a defendant who successfully challenged applicability of an arbitration agreement); *City of Cottonwood v. James L. Fann Contracting, Inc.*, 179 Ariz. 185, 195 (App. 1994) (affirming award under § 12-341.01 of fees "associated with the judicial proceedings to defeat the motion for stay [of arbitration]").

¶15 Accordingly, DISYS is entitled to its costs and, in the exercise of our discretion, we award DISYS its reasonable attorney's fees incurred on appeal, contingent on compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶16 For the foregoing reasons, we affirm the superior court's order denying Ogden's motion to compel arbitration.

APPENDIX C

Order of the Arizona Court of Appeals (Jan. 17, 2019)

IN THE

COURT OF APPEALS

STATE OF AREONA

DIVISION ONE

MARTIN OGDEN, Plaintiff/Appellant, v. DIGITAL INTELLIGENCE SYSTEMS Defendant/Appellee.	Court of Appeals Division One No. 1 CA-CV 17-0406 Maricopa County Superior Court No. CV2016-052899

ORDER DENYING MOTION FOR RECONSIDERATION

The court has considered appellant's motion for reconsideration.

IT IS ORDERED denying the motion.

_____/s/_____
Diane M. Johnsen
Presiding Judge

A copy of the foregoing
was sent to:

Martin Ogden
Joshua Waltman

APPENDIX D

Order of the Arizona Supreme Court (Jun. 7, 2019)

Supreme Court
STATE OF ARIZONA

June 7, 2019

RE: MARTIN OGDEN v DIGITAL INTELLIGENCE SYSTEMS LLC Arizona Supreme Court No. CV-19-0039-PR Court of Appeals, Division One No. 1 CA-CV 17-0406 Maricopa County Superior Court No. CV2016-052899

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on June 7, 2019, in regard to the above-referenced cause:

ORDERED: Petition for Review to the Arizona Surpeme Court = DENIED.

A panel composed of Chief Justice Bales, Justice Bolick, Justice Gould and Justice Lopez participated in the determination of this matter.

Janet Johnson, Clerk

APPENDIX E

FILE DATE: SEPTEMBER 25, 2018

Martin Ogden
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Glendale, AZ 85304
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Representing Self

COURT OF APPEALS

STATE OF ARIZONA, DIVISION ONE

Martin Ogden, Plaintiff/Appellant, *v.* Digital Intelligence Systems, LLC, Defendant/Appellee.	No. 1 CA-CV 17-0406 Maricopa County Superior Court No. CV2016-052899

SUPPLEMENTAL CITATION OF AUTHORITY

Pursuant to Rule No. 17 of the Arizona Rules of Civil Appellate Procedure, Plaintiff/Appellant, Martin Ogden, supplements his Opening Brief by citing *Sun Valley Ranch 308 Ltd. P'ship v. Robson* (Ariz.Ct. App. 2012), ¶¶ 12-17, in support of the portion of his Opening Brief [See pp.15-17] where he alleges that the trial court erred in its finding:

> "The settlement agreement does not contain an arbitration provision. Arbitration therefore is not the proper forum for determining whether Digital Intelligence Systems breached the settlement agreement," [IR#18; p.1]

and in its further finding:

> "Instead a court must determine whether Digital Intelligence Systems materially breached the settlement agreement." [IR#18; p.1]

More specifically, and most importantly, Ogden cites the portion of *Sun Valley Ranch* that reads:

> "[W]here there are two agreements at issue, one with an arbitration clause and one without, the courts first examined the breadth of the arbitration clause." [*Id*, ¶ 12]

as this reading underscores the very same set of circumstances present in the instant action, while he also cites the portion that reads:

> "The arbitration clause at issue here encompasses "any" controversies or disputes "aris[ing] out of or relating to" the Partnership Agreement. It is "the paradigm of a broad clause." *See Collins & Aikman Prods. Co. v. Bldg. Sys., Inc.*, 58 F.3d 16, 20 (2d Cir.1995)(describing a clause requiring arbitration of "[a]ny claim or controversy arising out of or relating to th[e] agreement" as "the paradigm of a broad clause"). The duty to arbitrate attaches not only to controversies arising under the Partnership Agreement, but also to disputes "relating to" that agreement. "Relating to" is broader than "arising from." *See Bama's Best Hous., Inc. v. Hodges*, 847 So.2d 300, 303 (Ala.2002) (an arbitration clause "that applies to claims 'arising out of or relating to ' the contract ... has a broader application than an arbitration clause that refers only to claims 'arising from' the agreement"); *Karl Storz Endoscopy–Am., Inc. v. Integrated Med. Sys., Inc.*, 808 So.2d 999, 1013 (Ala.2001) ("[I]t is often observed that the words 'relating to' in the arbitration context are given a broad construction."). [*Sun Valley Ranch*, ¶ 14]

as this latter reading not only supports Ogden's stating in his Opening Brief:

> "[t]he issue regarding the disputed validity of the Settlement Agreement is, indisputably, a "controversy" or "claim" for which arose out of, or

APPENDIX F

Accounting of instances in which Ogden established that his petition was brought forth pursuant to § 4 of the Federal Arbitration Act (9 U.S.C. § 4)

Instance No.1: Plaintiff, Martin Ogden), appearing "pro se", respectfully requests the Court to grant this 9 U.S.C. § 4 Petition to Compel ("§ 4 Petition") defendant, Digital Intelligence Systems, LLC, (or "DISYS") (IR #14 p.1-middle)

Instance No.2: [t]hiş action is brought pursuant to 9 U.S.C. § 4 (IR #14 p.2-middle)

Instance No.3: The limited role of the courts in a Petition to Compel Arbitration is summarized by the language to 9 U.S.C. § 4 (IR #14 p.6-top)

Instance No.4: For a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court for an order directing that such arbitration proceed in the manner provided for in such agreement. See § 4 of the Federal Arbitration Act (9 U.S.C. § 4). (IR #14 p.7-top)

Instance No.5: [t]he following authority not only fully supports the point(s) Plaintiff argues, above, in this sub-section 'B' to his "§ 4 Petition" (IR #14 p.8-middel)

Instance No.6: [t]he proper and lawful course of action for the Court to follow in this matter regarding Plaintiffs' "§ 4 Petition" (IR #14 p.9-top)

Instance No.7: And where the following authorities not only validate the points argued by Plaintiff herein this sub-section 'D', but are binding upon the Court with respect to the ruling(s) it makes in response to his "§ 4 Petition", as well: (IR #14 p.11-bottom)

Instance No.8: For all of the foregoing reasons, Plaintiff respectfully asks that the Court grant approval for this "§ 4 Petition" of the Federal Arbitration Act (IR #14 p.14-top)

Instance No.9: As an initial matter, Petitioner believes it is materially relevant to make note, here, of the fact that his Petition to Compel Arbitration

was brought forth before the Court under section four (4) of the Federal Arbitration Act (9 U.S.C. § 4) (IR #19 p.1-bottom)

Instance No.10: The manner used by the Superior Court to resolve Plaintiffs' Petition to Compel Arbitration (under 9 U.S.C. § 4) was by means of an order for said action's dismissal, based on the record in the case. (Case Management Statement: Aug 8, 2017- B(3))

Instance No.11: [b]ringing to the Superior Courts' attention that with his Petition to Compel Arbitration being brought forth under 9 U.S.C. § 4(Case Management Statement: Aug 8, 2017- B(4)(b))

Instance No.12: Ogden will then pursue the only means available for resolving DISYS' refusal to complete the (alternate) dispute resolution process with the initial filing of his Petition to Compel Arbitration (pursuant to 9 U.S.C § 4) [IR #1] with the Superior Court on August 30, 2016, and with the amended filing [IR #17] on December 30, 2016. (Appellants' Opening Brief: p.5-bottom / p.6-top)

Instance No.13: [t]he fact that Ogden's Petition to Compel Arbitration was brought forth before the Superior Court pursuant to 9 U.S.C. § 4 (Appellants' Opening Brief: p.6-middle)

Instance No.14: In bringing before the Superior Court his Petition to Compel Arbitration pursuant to 9 U.S.C. § 4 (Appellants' Opening Brief: p.6-bottom)

Instance No.15: [t]he Superior Court has a very limited role in an action brought before it pursuant to 9 U.S.C. § 4 (Plaintiff/Appellants' Opening Brief: p.8-middle)

Instance No.16: [c]ompletely lost will be the fact that the action brought before the Superior Court was a Petition to Compel Arbitration pursuant to 9 U.S.C. § 4, and therefore federal law governs in the action while the cited federal cases are binding on the Courts' decision-making (Appellants' Opening Brief: p.8-bottom / p.9-top)

Instance No.17: In an action involving a Petition to Compel Arbitration brought forth under 9 U.S.C. §4 (Appellants' Opening Brief: p.9-middle)

Instance No.18: With the policy of this Court being that the Federal Arbitration Act ("FAA") and federal law shall govern its decision-making in an action brought before the Superior Court pursuant to 9 U.S.C. § 4, and supported by the application of federal cases. See, Brake Masters Sys., Inc. v. Gabbay, 206 Ariz. at 364, ¶ 11, 78 P.3d at 1085 (Ariz. Ct. App. 2003). Appellant, therefore, requests that the Court invoke this policy in this action. (Appellants' Opening Brief: p.10-middle)

Instance No.19: When a Petition to Compel Arbitration pursuant to 9 U.S.C. § 4, is brought before a court in Arizona, (Appellants' Opening Brief: p.11-bottom)

Instance No.20: And with the other error to this finding by the Superior Court resting in not only the fact that it would be improper for Ogden to pursue a breach of contract claim against defendant under cover of a "9 U.S.C. § 4" Petition to Compel Arbitration (Appellants' Opening Brief: p.19-middle)

Instance No.21: Because DISYS' Employee Arbitration Agreement is "a contract evidencing a transaction involving commerce", it is therefore subject to the "Federal Arbitration Act", which provides that any arbitration agreement within the scope of the "FAA", "shall be valid, irrevocable, and enforceable," 9 U.S.C. § 2, and permits a party "aggrieved by the alleged . . . refusal of another to arbitrate" to petition any federal district court3 for an order compelling arbitration in the manner provided for in the agreement, id. At § 4 (Appellants' Opening Brief: p.24-middle)

Instance No.22: Noting here that because the governing law in Ogden's Petition to Compel Arbitration, is federal law, the Superior Court, in effect, was functioning as a substitute for the U.S. District Court, District of Arizona. (Appellants' Opening Brief:. Footnote No.3 p.24-bottom)