

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CUMMINGS & LOCKWOOD, P.C.,	:
Plaintiff,	:
	:
v.	: Civ. No. 3:01cv422 (PCD)
	:
Robert G. SIMSES,	:
Defendant.	:

RULING ON EXPEDITED MOTIONS

This case presents the issue of whether a lawyer and his former law firm must arbitrate a dispute involving their financial dealings. The law firm seeks to compel arbitration, and in furtherance thereof, moves for an order pendente lite. The lawyer objects to arbitration in Connecticut and moves to dismiss, or in the alternative, to transfer or stay the proceedings.

I. JURISDICTION

Plaintiff sues to compel arbitration under the Federal Arbitration Act (“FAA”), 9 U.S.C. § 4, which provides subject matter jurisdiction along with 28 U.S.C. § 1332.

II. BACKGROUND

A. Factual Background

Cummings & Lockwood (“C&L”) is a Connecticut law firm, with Connecticut and Florida offices and its principal office in Stamford, Connecticut. C&L has always been a general partnership. Defendant began as an attorney for C&L in 1981 and became an equity partner in 1988.

On January 1, 1993, C&L changed its structure from a general partnership of individual attorneys to a general partnership of seven corporations, one of which was

Plaintiff, Cummings & Lockwood, P.C. (“C&L Connecticut”), a Connecticut corporation. The other six corporate partners were Florida professional associations,¹ one for each C&L office in Florida.² C&L collected all fees and paid all expenses centrally. Monies were periodically transferred from C&L to a corporate partner’s bank account for distribution in turn to individual attorneys.

As part of this change, each former individual partner gave up his or her partnership interest in C&L and became a shareholder and employee of one corporate partner. Defendant entered into a written employment agreement with C&L Connecticut, which provided that “[a]ny controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in Connecticut.” The agreement mandated Connecticut choice-of-law, provided that the agreement may be modified only if signed and in writing, and provided that it would automatically renew for one-month periods unless not renewed by Defendant in writing or by C&L Connecticut upon a vote.

Defendant also entered into a stockholder’s agreement with C&L Connecticut, which similarly provided that “[a]ny controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in Connecticut” and provided that Defendant would be bound by the new partnership agreement, which also provided for arbitration in Connecticut.

In 1996, Defendant relocated to Florida to practice at the law firm’s Naples office.

¹ A professional association is the Florida equivalent of a professional corporation.

² The reorganization was intended to avoid Connecticut income tax liability for C&L attorneys practicing in Florida.

As part of this move, a relocation agreement provided only for compensation for the move and did not expressly alter any of the 1993 agreements.

In late 1996, C&L was debating two changes (“the 1997 amendments”) to the general partnership agreement, one of which was a more detailed arbitration provision.³ The 1993 partnership and stockholder’s agreements permit such modifications by the unanimous vote of the corporate partners. On September 27, 1996, a meeting was held to discuss the proposed changes.⁴ The revised arbitration provision was specifically discussed. The stockholders voted to adopt the changes, effective January 1, 1997.⁵ On December 10, 1996, C&L distributed an amended employment agreement incorporating the two approved changes verbatim. Defendant did not sign the amended employment agreement. Although the distribution did request the signature page be executed and returned, signatures were not collected from any of the stockholders.

On December 31, 1998,⁶ C&L changed the general partnership structure again. The six Florida associations were merged into a single Florida professional association, Cummings & Lockwood Florida, P.A. (“C&L Florida”). C&L remained a general partnership, now with C&L Florida and C&L Connecticut the sole corporate partners.

³ The other change involved the elimination of a non-funded retirement benefit.

⁴ C&L Connecticut asserts Defendant attended the September 27, 1996 meeting by telephone from Florida. Defendant asserts he does not recall this.

⁵ C&L Connecticut asserts Defendant raised no objections and that he voted. Defendant asserts he did not vote to amend the employment agreement and stockholder agreement.

⁶ Defendant’s March 15, 2001 affidavit, his memorandum in support of his Motion to Dismiss, or in the Alternative, to Transfer or Stay Proceedings, and his memorandum in opposition to application for order to proceed with arbitration all recite the date as January 1, 1998. However, C&L’s merger plan and articles of incorporation, as well Defendant’s April 11, 2001 affidavit, recite the date as on or about December 31, 1998.

On January 16, 2001, Defendant resigned to start his own firm. Since then various financial issues arising out of his departure have been unresolved. On February 2, 2001, C&L Connecticut served Defendant with a Notice of Demand for Arbitration.

B. Procedural History

On February 9, 2001, Defendant filed a declaratory judgment action in the U.S. District Court for the Southern District of Florida, seeking inter alia to enjoin the arbitration. The present case was filed by C&L Connecticut on February 21, 2001 in the Connecticut Superior Court for the Judicial District of Stamford/Norwalk. Defendant removed the case to this court on March 16, 2001. After filing the present motions, C&L Connecticut moved for expedited resolution which was granted. After submission of memoranda, affidavits, and any other matters outside the pleadings, the motions are now resolved seriatim. See FED. R. CIV. P. 12(b), 56.

III. PLAINTIFF'S APPLICATION FOR ORDER TO COMPEL ARBITRATION

If a written arbitration agreement exists between the parties and the agreement covers the underlying dispute, a district court must compel the parties to arbitrate. See Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 844 (2d Cir. 1987). “[T]he question of arbitrability . . . is undeniably a judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.” AT&T Techs., Inc. v. Communications Workers of Am., 475 U.S. 643, 649 (1986) (suit to compel arbitration pursuant to Labor Management Relations Act (“LMRA”), 29 U.S.C. § 185(a)).

The only arbitration provisions at issue are those within the 1993 employment

agreement and the 1997 amendments. It is not disputed that the current controversy does not arise out of or relate to the stockholder's agreement or the partnership agreements and so does not trigger their arbitration provisions.

As of 1995, the parties essentially agree on Defendant's status. He lived and worked in Connecticut and was an employee and shareholder of C&L Connecticut. His 1993 employment agreement with C&L Connecticut required him to arbitrate in Connecticut accordingly to Connecticut law. This agreement automatically renewed for one-month periods unless not renewed by Defendant in writing or by C&L Connecticut upon a vote and could be modified only if signed and in writing, neither of which occurred.

A. Scope of the 1993 Employment Agreement Arbitration Provision

Defendant argues the underlying dispute is not within the scope of the 1993 employment agreement arbitration provision because the dispute concerns allocation of funds between January 1, 1998 and January 16, 2001,⁷ and because during this period he was not an employee of C&L Connecticut, but of C&L Florida.⁸

The scope of the 1993 arbitration provision is broad but not unlimited. See Rochdale Vill., Inc. v. Pub. Serv. Employees Union, Local No. 80, 605 F.2d 1290, 1296

⁷ The Notice of Arbitration requests an accounting of all consideration received by Defendant from January 1, 1998 until January 16, 2001 and damages arising from a failure to work or bill for client services from October 2000 until January 16, 2001. However, other requested relief is not limited to these dates. For instance, C&L Connecticut requests damages for all remuneration received by Defendant which belongs, in whole or in part, to C&L Connecticut.

⁸ Defendant leaves unaddressed the twelve-month period from January 1, 1998 until January 1, 1999 when he asserts he was an employee of Robert G. Simses, P.A. See date discrepancy infra note 6.

(2d Cir. 1979) (suit to compel arbitration pursuant to LMRA). The 1993 arbitration provision is limited to “controvers[ies] or claim[s] arising out of or relating to this Agreement.” It is therefore necessary to determine whether the dispute is within the scope of the 1993 arbitration provision as C&L Connecticut claims. “[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) (suit to compel arbitration pursuant to LMRA); McAllister Bros., Inc. v. A&S Transp. Co., 621 F.2d 519, 522 (2d Cir. 1980) (“if the arbitration agreement cannot reasonably be construed to cover [the] disputes . . . , arbitration need not be compelled”).

“[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.” Moses H. Cone Memorial Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24 (1983). Indeed, the “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). This heavy presumption in favor of arbitrability is based on public policy considerations of the need for speedy and efficient decisions “not subject to delay and obstruction in the courts.” Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967).

Thus, “[i]f the arbitration clause is broad and arguably covers disputes concerning contract termination, arbitration should be compelled and the arbitrator should decide any claim that the arbitration agreement, because of substantive or temporal limitations, does not cover the underlying dispute.” McAllister Bros., 621 F.2d at 522. Moreover, “any

doubts regarding the scope of an arbitration agreement must be resolved in favor of arbitration.” McMahan Sec. Co. v. Forum Capital Markets L.P., 35 F.3d 82, 88 (2d Cir. 1994) (citation omitted); see Warrior & Gulf Navigation, 363 U.S. at 582-83 (“[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute”); Abram Landau Real Estate v. Benova, 123 F.3d 69, 74 (2d Cir. 1997) (“when parties disagree whether a particular dispute falls within the scope of an otherwise valid arbitration agreement, the presumption is in favor of arbitration”) citing First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920, 1294 (1995).

Defendant argues that as of and after January 1, 1999, he was no longer an employee of C&L Connecticut but of C&L Florida. First, he asserts that in late 1994, the acting managing partner of C&L proposed that Defendant move his law practice to Florida, establish his own Florida professional association, and terminate his employment with C&L Connecticut. He asserts that approximately twelve months later, he “agreed to accept” the proposal. Second, he asserts that on January 2, 1996, he commenced employment with Robert G. Simses, P.A., a new Florida personal association. Third, he argues that since January 1, 1999,⁹ he has been an employee of C&L Florida, being paid out of funds distributed to C&L Florida, the same mechanism by which C&L Florida attorneys were paid. He puts forward a typical earnings statement, showing payment from

⁹ See date discrepancy infra note 6.

C&L Florida during this period.¹⁰

Defendant's argument is meritless. The first question is whether the 1993 employment agreement remained in force between Defendant and C&L Connecticut during the relevant period, by reason of its renewal provision. The second question is whether his relevant acts while an attorney practicing in Florida "ar[ose] out of or relat[ed] to" the 1993 employment agreement, with any doubts resolved in favor of compelling arbitration. For the reasons noted below, the 1993 employment agreement is found to have remained in force during the relevant period and Defendant's relevant acts are found to arise out of or relate to the 1993 employment agreement and are hence within the scope of its arbitration provision.

The 1993 employment agreement, by its explicit terms, requires any termination by Defendant to be in writing. There is no such writing. There has been no termination by either side. Moreover, there are additional obstacles to finding Defendant terminated his employment with C&L Connecticut at the start of 1996.

There is no evidence of the acting manager's proposal to him other than the bare assertion in his affidavit that it was in late 1994.

Defendant offers no evidence of his acceptance of the acting manager's proposal other than the bare assertion in his affidavit that it was approximately twelve months after the proposal. Moreover, whether or not an offer was accepted is not a fact to be averred

¹⁰ He also puts forward a W-2 statement showing payment from Robert G. Simses, P.A. While C&L Connecticut acknowledges this paperwork, it disputes inter alia the conclusion that flows from it. It argues that under the single-employer doctrine, the name on an earnings statement or W-2 statement is not dispositive. This court does not reach the question of the applicability of the single-employer doctrine.

but rather a legal conclusion for a tribunal to make.¹¹

Defendant asserts that the termination was effective on or about January 1, 1996. He states no reason for that date of termination, nor its imprecision.¹²

Defendant does not put forward any documents that show his conduct as if he had resigned from C&L Connecticut. His relocation agreement to Florida made no mention of any resignation or reorganization of his employment status. Defendant does not dispute C&L Connecticut's assertion that it has no record to reflect such a change. Defendant does not dispute C&L Connecticut's assertion that it did not know of or recognize any termination of his 1993 employment agreement.

Defendant never tendered his C&L Connecticut stock despite the obligation to do so within thirty days of termination of the 1993 employment agreement per his 1993 stockholder's agreement.

Defendant's evidence is largely in his affidavits. Other evidence undercuts his credibility. For instance, he asserts that he "incorporated Robert G. Simses, P.A. under the laws of the State of Florida and commenced the practice of law . . . as an employee of that corporation." Thus he supports his argument that he left C&L Connecticut's employ and started employment with Robert G. Simses, P.A. However, the Florida Secretary of

¹¹ Under general principles of contract law, the power to accept an offer terminates after the lapse of a reasonable amount of time. RESTATEMENT (SECOND) OF CONTRACTS § 41. The parties do not address whether under Connecticut contract law twelve months is unreasonably long and if Defendant's power to accept the acting manager's proposal, if such a proposal was made, had already terminated.

¹² There are two dates proximate in time to January 1, 1996. Defendant asserts that Robert G. Simses, P.A. was incorporated on January 2, 1996 and that he has resided in Florida since approximately January 1, 1996. However, he fails to show how the mere formation of a corporate entity or the relocation of his home would have the legal effect of terminating a binding contract.

State has certified that no such corporate entity exists or has existed.

There is no evidence of any partnership agreement between Robert G. Simses, P.A. and any C&L entity. When the six Florida professional associations merged on January 1, 1999, Robert G. Simses, P.A. was not included.

Defendant never had an employment agreement with C&L Florida.¹³ He was never a shareholder in C&L Florida. Until his resignation on January 16, 2001, he was compensated pursuant to the financial terms of the 1993 employment agreement.

Every relevant C&L agreement before this court contained an arbitration provision. The arbitration provision of all Florida-based “partner-level” attorneys were identical to those of all Connecticut “partner-level” attorneys.¹⁴

B. Enforceability of the 1997 Amendments

The 1997 amendments were intended to replace the 1993 arbitration provision with a more detailed arbitration provision. Defendant argues that the 1997 amendments are not enforceable against him because he did not sign them.¹⁵ The mere fact that he did not sign the 1997 amendments does not per se mean he is not bound to arbitrate under

¹³ Defendant never had an employment agreement with Robert G. Simses, P.A. from January 1, 1998 until January 1, 1999, a twelve-month period covering part of the disputed allocation of funds. See infra note 8.

¹⁴ Defendant asserts C&L attorneys in Florida offices do not have written employment agreements with C&L Florida. However, he makes no showing, apart from a conclusory statement in his affidavit, to this effect. Also, he fails to limit his assertion to “partner-level” attorneys. That “associate-level” attorneys do not have written employment agreements would be irrelevant.

¹⁵ The FAA, 9 U.S.C. § 4, does not require arbitration agreements to be signed. In arguing that the 1997 amendments are not binding, Defendant relies instead on the 1993 employment agreement provision which requires modifications to be signed. Contradictorily, however, he unambiguously argues in another part of his memoranda and asserts under oath that the 1993 employment agreement was terminated on or about January 1, 1996.

their terms. Ordinary principles of contract and agency determine whether he would be so bound. See Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, Inc., 198 F.3d 88, 97 (2d Cir. 1999), cert. denied, 121 S. Ct. 51 (2000).

The enforceability of the 1997 amendments need not be resolved. As the 1993 employment agreement remained in effect throughout, any disputed modification of its terms would be a “controversy or claim arising out of or relating to” the 1993 employment agreement, and thus would be arbitrable. See Abram Landau Real Estate, 123 F.3d at 73; Rochdale Vill., 605 F.2d at 1296.

Defendant argues against that C&L Connecticut seeks to enforce only the 1997 arbitration provision against him and enforcing the 1993 arbitration provision would be outside the scope of the relief sought. He points to the February 2, 2001 Notice of Arbitration and the February 14, 2001 Application for Order to Proceed with Arbitration. These documents do not support the argument. Both refer to the 1993 arbitration provision as a basis for the relief sought, though not exclusively.¹⁶ Moreover, Defendant concedes that C&L Connecticut “seeks to compel arbitration based on the . . . provision in the 1993 employment agreement” and cites the Application for Order to Proceed with Arbitration in support of this proposition. (See Def.’s Mem. in Supp. of Mot. to Dismiss,

¹⁶ The Notice of Arbitration reads, “Pursuant to an Employment Agreement dates as of January 1993 and a First Amendment to Employment Agreement dated as of January 1, 1997, . . . C&L [Connecticut] hereby gives notice of its election to commence arbitration” The Application for Order to Proceed with Arbitration reads, “On January 1, 1993, [C&L Connecticut] and [D]efendant entered into . . . agreements which contained [an] arbitration provision These written agreements, which were amended as of January 1, 1997, also contained an amended arbitration provision [D]efendant has failed to abide by and perform according to the aforementioned arbitration provisions WHEREFORE, [C&L Connecticut] claims an Order directing [D]efendant to proceed with arbitration in compliance therewith.”

or in the Alternative, to Transfer or Stay Proceedings at 15.)

C. Resolution

The Application for Order to Proceed with Arbitration is granted.¹⁷ The parties shall arbitrate in accordance with the 1993 employment agreement.¹⁸ Having so decided, the applicability and enforceability of the 1997 arbitration provision is not before the court.

IV. DEFENDANT’S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

A complaint may not be dismissed under Rule 12(b)(6) unless movant shows “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see FED. R. CIV. P. 12(b)(6). The factual allegations are presumed to be true, and all factual inferences are drawn in Plaintiff’s favor. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

Defendant asserts two bases for his motion, that the issues to be arbitrated are outside the scope of the arbitration agreements and that the 1997 amendments are not enforceable against him since he did not sign them. These arguments are resolved above. Defendant’s relevant acts are found to be within the scope of the 1993 arbitration provision. Enforceability of the 1997 amendments is irrelevant to enforceability of the

¹⁷ C&L Connecticut’s Application for Order to Proceed with Arbitration is treated procedurally as a motion. See 9 U.S.C. § 6.

¹⁸ The 1993 arbitration provision calls for arbitration pursuant to the “Connecticut Rules of the American Arbitration Association.” Defendant notes that he is not aware of these “Connecticut Rules.” This is a distinction without a difference. The parties shall arbitrate in accordance with the rules of the American Arbitration Association, as modified by any rules applicable to Connecticut.

1993 arbitration provision. The motion to dismiss is denied.

V. DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Questions of personal jurisdiction in a diversity action require a two-part inquiry: (1) whether Plaintiff has shown that Defendant is amenable to service of process under the forum state's laws; and (2) whether this court's assertion of jurisdiction under these laws comports with the requirements of due process. See Metro. Life. Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir. 1996). Personal jurisdiction may be created by consent or waiver. United States Trust Co. v. Bohart, 197 Conn. 34, 39 (1985).

Defendant's motion, see FED. R. CIV. P. 12(b)(2), argues that he does not have sufficient contact with Connecticut and therefore is not subject to personal jurisdiction here. This argument need not be resolved as Defendant has consented to jurisdiction. Where an arbitration provision contains a location for the arbitration, the provision acts as a consent to jurisdiction. Doctor's Assocs., Inc. v. Distajo, 107 F.3d 126, 136 (2d Cir. 1997); Maria Victoria Naviera, S.A. v. Cementos Del Valle, S.A., 759 F.2d 1027, 1032 (2d Cir. 1985). The 1993 arbitration provision specifies Connecticut as the arbitration location. The motion to dismiss for lack of personal jurisdiction is denied.

VI. DEFENDANT'S MOTION TO DISMISS UNDER FIRST-FILED RULE

The first-filed rule provides that "[w]here an action is brought in one federal district court and a later action embracing the same issue is brought in another federal court, the first court has jurisdiction to enjoin the prosecution of the second action." Meeropol v. Nizer, 505 F.2d 232, 235 (2d Cir. 1974). "The application of the first-filed rule should not be slavish, however, and a district court should . . . examine the

circumstances closely to determine if there are special considerations.” S-Fer Int’l, Inc. v. Paladion Partners, Ltd., 906 F. Supp. 211, 216 (S.D.N.Y. 1995). In considering a departure from the first-filed rule, courts apply the same factors considered on a motion to transfer pursuant to 28 U.S.C. § 1404(a). See 800-Flowers, Inc. v. Intercontinental Florist, Inc., 860 F. Supp. 128, 133 (S.D.N.Y. 1994). These factors include “(1) the convenience of the witnesses; (2) the location of relevant documents and the relative ease of access to sources of proof; (3) the convenience of the parties; (4) the locus of operative facts; (5) the availability of process to compel attendance of unwilling witnesses; (6) the relative means of the parties; (7) a forum’s familiarity with the governing law; (8) the weight accorded a plaintiff’s choice of forum; and (9) trial efficiency and the interests of justice, based on the totality of the circumstances.” Id. The balancing of these factors “should be left to the sound discretion of the district courts.” William Gluckin & Co. v. Int’l Playtex Corp., 407 F.2d 177, 178 (2d Cir. 1969).

Defendant’s declaratory judgment action was filed twelve days earlier in the Southern District of Florida, involved the same parties, and involved the same subject matter. With this foundation, each of the above factors are weighed in turn.

Witnesses’ convenience is balanced as they are likely to be located in both Connecticut and Florida.

Relevant documents are likely located in both Connecticut, C&L Connecticut’s home office, and in Florida, Defendant’s business office, and are equally accessible.

Each party would clearly find their home state more convenient. Neither would find the other state wholly inconvenient. C&L maintains other offices in Florida.

Defendant, through his wife, maintains a Connecticut residence.

The locus of operative facts more likely favors Florida, as the present inquiry centers around Defendant's acts while in Florida and whether he breached duties owed C&L Connecticut while working there.

As to the availability of process to compel attendance of unwilling witnesses, the parties do not present any unwilling prospective witnesses.

As to the parties' relative means, C&L Connecticut's success as a law firm and Defendant's earnings statements reflect no disadvantage to either.

As to a forum's familiarity with the governing law, this factor clearly favors Connecticut. As the 1993 employment agreement contains a Connecticut choice-of-law provision, any arbitration would be pursuant to Connecticut law.

As to the weight accorded a plaintiff's choice of forum, Defendant is the first-filed plaintiff. However, this is only because upon receiving C&L Connecticut's Notice of Arbitration and realizing an action to compel the arbitration was imminent in Connecticut, he immediately filed his declaratory action in Florida district court. As such, little weight is accorded his choice of forum.¹⁹ Factors, Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 219 (2d Cir. 1978) (“[w]hen the declaratory judgment action has been triggered by a notice letter, this equitable consideration may be a factor in the decision to allow the later filed action to proceed to judgment in the plaintiff's chosen forum”), overruled on other grounds by Pirone v. MacMillan, Inc., 894 F.2d 579 (2d Cir. 1990); Fed. Ins. Co. v. May

¹⁹ Not reached is whether, in order to uphold and further the purposes of the FAA, 9 U.S.C. § 4, the notice of arbitration could or should be construed as the “first-filed action.”

Dep't Stores Co., 808 F. Supp. 347, 350 (S.D.N.Y. 1992) (“the misuse of the Declaratory Judgment Act to gain a procedural advantage and preempt the forum choice of the plaintiff in the coercive action militates in favor of dismissing the declaratory judgment action”). Moreover, Defendant’s 1993 employment agreement through its arbitration provision recognized Connecticut as the site of any arbitration. Through the contract, he bargained for the choice of forum that manifests itself now. His relocation to Florida does not change this because he did not terminate his 1993 employment agreement; moreover, all the Florida “partner-level” attorneys now practicing and living in Florida have, through their employment agreements with C&L Florida,²⁰ recognized Connecticut as the site of dispute resolution.

As to trial efficiency and the interests of justice based on the totality of the circumstances, this factor clearly favors Connecticut, the site of the arbitration. It “is usually against the interests of justice [to transfer] when a petition to compel arbitration is brought in the same forum in which the parties have agreed to arbitrate.” Maria Victoria Naviera, 759 F.2d at 1031.

The balance of the factors favors Connecticut over Florida. The conclusion is further reinforced when, as here, there is a minimal time difference between the filing of the two competing actions and there has been a lack of progress in either litigation. See Lever Bros. Co. v. Procter & Gamble, Co., 23 F. Supp. 2d 208, 211 (D. Conn. 1998)

²⁰ Defendant asserts C&L attorneys in Florida offices do not have written employment agreements with C&L Florida. However, he makes no showing, apart from a conclusory statement in his affidavit, to this effect. Also, he fails to limit his assertion to “partner-level” attorneys. That “associate-level” attorneys do not have written employment agreements would be irrelevant.

citing Riviera Trading Corp. v. Oakley, Inc., 944 F. Supp. 1150, 1158 (S.D.N.Y. 1996).

The motion to dismiss under the first-filed rule is denied.

VII. DEFENDANT’S MOTION TO TRANSFER

Section 1404(a) provides that “for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” 28 U.S.C. § 1404(a). For the same reasons for denial of Defendant’s motion to dismiss under the first-filed rule, Defendant’s motion to transfer is denied.

VIII. DEFENDANT’S MOTION TO STAY

“[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.” Landis v. North Am. Co., 299 U.S. 248, 254 (1936). Other than the bare request to stay the present action, Defendant offers no argument or citation to authority why staying this case would be appropriate. Presumably, he wants the Florida declaratory action to preclude arbitration and determine the outcome. For the same reasons that the motion to transfer was denied, the motion to stay is denied.

IX. PLAINTIFF’S MOTION FOR ORDER PENDENTE LITE

C&L Connecticut moves, pursuant to CONN. GEN. STAT. § 52-422, for an order regarding Defendant’s legal fees and commissions, since January 15, 2001 and into the future, earned in his capacity as executor, personal representative of, and legal counsel to numerous estate administrative matters and in his capacity as trustee and co-trustee of various trusts. C&L Connecticut moves for an accounting of these fees, a prohibition on

their transfer, a placement of these fees into an escrow account, and a prohibition on the destruction of records concerning these fees.

Connecticut courts are empowered to issue pendente lite relief in aid of arbitration. Goodson v. Connecticut, 232 Conn. 175, 179 (1995). Such interim relief may be ordered to maintain the status quo while a dispute is pending before an arbitrator. Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 910 F.2d 1049, 1053 (2d Cir. 1990). It is a prerequisite to pendente lite relief under CONN. GEN. STAT. § 52-422 that there be a “pending arbitration.” See Goodson, 232 Conn. at 180.

Defendant’s objection to pendente lite relief on due process grounds is not reached under the principle of constitutional avoidance. See Harmon v. Thornburgh, 878 F.2d 484, 494 (D.C. Cir. 1989) (court should “avoid unnecessary . . . constitutional rulings” and this concern is “heightened by the absence of meaningful argument”); see also Ashwander v. TVA, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (noting well-established rule that federal courts should avoid deciding constitutional issues if narrower grounds for decision exist).

C&L Connecticut’s request concerns the proper allocation of legal fee income. To make such relief appropriate, C&L Connecticut has the burden to show waiting for a final determination on the merits would cause it irreparable harm. See CONN. GEN. STAT. § 52-422 (“such order or decree . . . as may be necessary to protect the rights of the parties pending the rendering of the award and to secure the satisfaction thereof when rendered”) (emphasis added); NCO Teleservices, Inc. v. Northeast Mortgage, LLC, No. CV000159012S, 2000 WL 1528900 (Conn. Super. Ct. Sept. 21, 2000) (temporary

injunction standard); Lester Telemarketing v. Pagliaro, No. PJRCV980414347S, 1998 WL 638453 (Conn. Super. Ct. Sept. 3, 1998) (same); Reichenbach v. McIvor, No. CV930135577, 1994 WL 690655, at *3-4 (Conn. Super. Ct. Dec. 2, 1994) (same). This burden is not met. The motion for an order pendente lite is denied.

To warrant the prohibition on fee transfer and placement of fees into an escrow account, C&L Connecticut cites Florida's "notorious" homestead exception, which permits debtors to defeat creditors by shielding assets inside the value of a home. It next asserts Defendant's legal expertise in the management of assets, which qualifies him to protect assets. Lastly, it asserts that by his affidavits, Defendant has perjured himself and thus has shown a propensity for deceitfulness.

Defendant, as shown by his earning statements while at C&L Connecticut, has significant earning power. C&L Connecticut presents no convincing justification why Defendant's future income stream, above and beyond any assets which would provide an additional basis, would render any judgment unenforceable. This is more so when the dispute income is a fixed income stream derived as executor, personal representative of, and legal counsel to numerous estate administrative matters and in his capacity as trustee and co-trustee of various trusts. Such an income stream would be otherwise accountable and readily garnishable.

An accounting may be appropriate as final relief, should the arbitrator(s) include such in an award. There is no allegation or credible inference that an accounting would not be available at the conclusion of, if not as a part of, the arbitration.

As to a prohibition on the destruction of records concerning fees, Defendant is an

officer of the court involved in litigation. Independent from pendente lite relief, sanctions and inferences against him are available should he destroy, conceal, or alter any records.

X. CASE STATUS

With the merits to be arbitrated, nothing remains for this court and the case is ordered dismissed without prejudice to renewal and ordered closed subject to reopening to enforce any arbitration decision. Jurisdiction of this matter is retained for that purpose.

XI. CONCLUSION

Plaintiff's application for an order to proceed with arbitration, (Dkt. No. 1), is **granted**. Defendant's motion to dismiss for failure to state a claim, for lack of personal jurisdiction, and under the first-filed rule, (Dkt. No. 6-1), is **denied**. Defendant's motion to transfer, (Dkt. No. 6-2), is **denied**. Defendant's motion to stay, (Dkt. No. 6-3), is **denied**. Plaintiff's motion for an order pendente lite, (Dkt. No. 5), is **denied**. By order of the court, the case is ordered **dismissed** without prejudice. The Clerk shall close the case.

SO ORDERED.

Dated at New Haven, Connecticut, July __, 2001.

Peter C. Dorsey
Senior United States District Judge