

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

OPTOPICS LABORATORIES CORP. and	:	CIVIL ACTION
NUTRAMAX PRODUCTS, INC.	:	
	:	
v.	:	
	:	
FRANK C. NICHOLAS, et al.	:	NO. 96-8169
	:	
Newcomer, J.		July , 1997

M E M O R A N D U M

Presently before this Court are plaintiffs' brief setting forth why their fraud claim is not arbitrable, and defendants' memorandum of law regarding the arbitrability of count III of the plaintiffs' complaint. For the reasons that follow, this Court orders that Count III of plaintiffs' complaint shall be arbitrated in the same arbitration proceeding as Counts I and II of plaintiff's complaint.

I. Introduction

The narrow issue presently before this Court is whether Count III of plaintiffs' complaint – the fraud count – is arbitrable pursuant to the arbitration provision contained in a merger agreement to which the parties are signatories. In order to address knowledgeably the issue raised by this instant controversy, some understanding of the factual and procedural background of this case is required.

On June 7, 1993, Nutramax Acquisition Corporation ("Surviving Corporation") acquired Optopics Laboratories Corporation ("Optopics") pursuant to a 103-page merger agreement

dated March 2, 1993 ("Merger Agreement").¹ In exchange for their controlling shares of Optopics, defendants Frank C. Nicholas, Jeffrey H. Nicholas, Scott H. Nicholas, Peter K. Nicholas and Lilex Partners ("Lilex") received shares of stock in Surviving Corporation's parent company, Nutramax Products, Inc. ("Nutramax Products").² Twenty five percent of defendants' proceeds from the sale were placed in escrow to be dispersed to them in scheduled installments following the closing. See Merger Agreement § 4(d).

The Merger Agreement contemplated a period of time between signing and closing, not only to permit the parties to take the steps necessary to effectuate the transaction, but also to permit NutraMax time to investigate Optopics's affairs "in order to verify the accuracy and the compliance of Optopics with the provisions of this Agreement." Id. § 11. If it was "dissatisfied" with the results, Nutramax had the absolute right to terminate the Merger Agreement. Id. Nutramax's right of investigation did not limit the effect of any representation, warranty, or obligation defendants made in the Merger Agreement. Id.

As sellers of a going business, defendants made numerous representations and warranties concerning almost every conceivable aspect of Optopics's business. Id. § 6. The representations and warranties are contained in thirty-six subsections, many of which

¹Optopics merged with and into Surviving Corporation, at which time Optopics ceased to exist. Surviving Corporation continued its corporate existence but changed its name to Optopics Laboratories Corporation.

²The Court refers to Surviving Corporation and Nutramax collectively as Nutramax.

contain numerous sub-parts. These representations and warranties did not merge into the conveyance documents at closing but rather survived for the shorter of three years or the applicable statute of limitations (except for six specific warranties which survive without limitation). See id. § 21. Because defendants would continue to operate the business between the Merger Agreement's signing and closing, the Merger Agreement contained numerous covenants by defendants to assure that the business Nutramax purchased in March would be the same business conveyed in June.

In § 13(a) of the Merger Agreement, defendants agreed to indemnify and hold Nutramax harmless "from, against, for and in respect of any and all damages (other than consequential damages, including but not limited to lost profits), losses, obligations, liabilities, claims, lawsuits [uninsured] . . . suffered, sustained incurred or required to be paid" by Nutramax after the closing "by reason or in connection with, or arising out of" six different events. Id. § 13(a)(i)-(iii). The first three events include any misrepresentation or breach of warranty made "in or pursuant to" the Merger Agreement, any breach of any covenants to be performed by defendants prior to closing, and a broad provision covering claims, debts, liabilities, or obligations not properly disclosed in the Merger Agreement. Id. § 13(a)(i)-(iii). Like the representations and warranties themselves, the indemnification obligation survives the closing. Id. § 13(h).

The Merger Agreement establishes the mechanics of resolving indemnity disputes and providing for payment of valid

claims. See id. § 13(e)-(f). Subsection (f) provides that the indemnitor "shall pay" the amount of such claims in cash or by certified check. If such payment is not made as required, Nutramax can set off the amount of the claim against defendants' stock in escrow, and the escrow agent may sell the shares to raise the necessary cash. If the proceeds from the escrow prove insufficient to satisfy the claim, "Nutramax shall have the right to pursue any and all other remedies available to it." Id. § 13(e). If defendants choose to contest such a set-off, they must serve a "Contest Notice" within fifteen days, and an arbitration to be held in Philadelphia will settle the "contested set-off." Id. Section 13 also sets forth the procedures to govern the selection of arbitrators and makes their determination "final, binding and conclusive." Id. § 13(e)(iii).

By letter dated June 27, 1994, Nutramax's counsel and drafter of the Merger Agreement, Eugene M. Schloss, Jr., Esq., formally informed defendants that plaintiffs were asserting an indemnification claim pursuant to § 13 of the Merger Agreement and that they intended to set off against defendants' remaining shares in escrow. Schloss alleged that defendants misrepresented the following:

1. Optopic's ability to sell sixteen-ounce bottles of saline solution;
2. Optopic's ability to sell Naphoptic-A (a generic prescription product);
3. The availability of 38mm caps for sixteen- and thirty-two-ounce bottles of eye wash;
4. Alleged patent infringement pertaining to hypotonic lubricating eye drops;
5. The existence of workers' compensation claims; and

6. A pre-acquisition loss of customers.

By letter dated July 8, 1994, defendant Jeffrey Nicholas, on behalf of all defendants, formally contested plaintiffs' indemnification claim. In this letter, Nicholas made it clear that he considered the asserted claims to be arbitrable:

Please advise as to whether you agree that your June 27, 1994 letter constitutes a notice under Section 13(d) of the Agreement. As I read it, the intent of Section 13(d) is to not conduct the arbitration until after the indemnification claim has been allowed to take shape, and on this understanding I am not at this time asserting a "contest notice" under Section 13(c). If, however, you disagree with my reading of the intent of Section 13(d), then please consider this letter to be a "contest notice."

Optopics Laboratories Corp. v. Nicholas, Civ. Action No. 96-2271, at 5 (D.N.J. December 4, 1996) (Irenas, J.).

Subsequent letters from Schloss to defendants indicate that plaintiffs themselves believed that this matter was arbitrable. On August 4, 1994, a letter from Schloss conceded that Nicholas' earlier letter could be considered a contest notice under § 13(e) of the Merger Agreement. Id. at 5. Approximately two weeks later, Schloss wrote Nicholas again, suggesting an amicable settlement "without the need to progress immediately into arbitration." Id. Almost one year later, correspondence from Nicholas to Schloss still reflected his belief – uncontroverted – that the disputes were arbitrable. Id.

Despite their stated desire to resolve this matter amicably, plaintiffs refused to provide certain information requested by defendants, resisted arbitration, and eventually filed suit in the District of New Jersey seeking a judicial, not

arbitral, resolution of the claims which they had already stated to be arbitrable. This case was assigned to the Honorable Joseph E. Irenas.

As noted by Judge Irenas, it appears that plaintiffs structured its complaint to facilitate its argument against arbitration. The "Factual Background" section of plaintiffs' Complaint, which is comprised of sixty-eight paragraphs, repeats five of the six claims set forth in the original demand letter of June 27, 1994,³ and includes the background of the dispute concerning the GMP litigation.⁴ "Count [One]-Indemnification" starts on page twenty-four of the complaint and merely incorporates paragraphs one through eighty-seven, while the third count for fraud simply incorporates paragraphs one through ninety-two of the complaint. While counts one and two contain no real factual allegations, except by reference to the earlier Factual Background,

³Plaintiffs' complaint omits the second alleged misrepresentation, relating to Naphoptic-A, but almost verbatim repeats the first and third through sixth alleged misrepresentations.

⁴The GMP Litigation is the focus of Count IV of plaintiffs' complaint - the declaratory judgment count. Briefly, the GMP Litigation involved Optopics and GMP Systems, Inc. among others. This litigation concluded with a settlement in which the Surviving Corporation received \$477,601.89 after reduction for litigation expenses. The favorable settlement triggers § 5A of the Merger Agreement, obligating plaintiffs to issue defendants additional shares of Nutramax Products. Because plaintiffs and defendants have been unable to agree as to the number of shares that defendants should receive pursuant to § 5A, plaintiffs have asked the Court to determine the proper meaning of § 5A. The parties agree, and the Court concurs, that Count IV of plaintiffs' complaint does not come within the scope of the Merger Agreement's arbitration provision.

count three repeats the same five factual claims but changes the language to meet the elements of fraud. Defendants have filed an answer which contains counterclaims for breach of contract and unjust enrichment, or in the alternative, reformation of the Merger Agreement.

On September 25, 1996, defendants filed a motion to compel arbitration on the first three counts and to stay them pending the completion of arbitration. In response, plaintiffs argued that their claims fell outside the terms of the Merger Agreement, and thus opposed defendants' motion to compel.

On December 4, 1996, Judge Irenas ruled that plaintiffs' first two counts came within the scope of the Merger Agreement's arbitration clause and stayed them pending the outcome of that arbitration. With respect to the fraud count, Judge Irenas stated that "the Court cannot with certainty determine whether the scope of this claim exceeds that which the parties agreed was arbitrable." In addition, Judge Irenas noted that although "it is tempting to simply rule that the third count is arbitrable," he would stay the third count as well because "[t]he doctrines of issue and claim preclusion will probably resolve all or most of the fraud claim, and the Court will be spared the spectacle of parallel proceedings determining similar issues." However, because that District Court lacked the authority to compel arbitration in the contractually chosen forum of Philadelphia, Judge Irenas transferred this case to the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1404(a).

Upon transfer to this district, the parties agreed to refer Counts I and II of plaintiffs' complaint to arbitration, which, in the face of Judge Irenas' order, was the only alternative available to the parties. Count III remains before this Court, but is presently stayed. Count IV, as well as defendants' counterclaims, also remains before this Court. With respect to Count IV and defendants' counterclaims, plaintiffs moved for summary judgement, which this Court denied by Order dated May 9, 1997.

On May 21, 1997, this Court held a final pretrial conference in this case.⁵ At this conference, the Court raised the issue as to whether plaintiffs' fraud claim was arbitrable, noting that Judge Irenas, in his December 4, 1996 order, had not resolved the issue of arbitrability with respect to Count III. Defendants essentially argued that Count III was arbitrable for the reasons set forth in its motion to compel arbitration. Although plaintiffs professed their desire to have this case decided in one forum, plaintiffs insisted that their fraud count was not arbitrable, and as such, the fraud count should remain in this judicial forum despite the fact that many of the same factual and legal issues

⁵This conference was held for the purposes of (1) exhausting all possibilities of settlement and (2) scheduling a trial date if a settlement was not reached. With respect to the scheduling of trial in this matter, the Court recognizes that there will actually have to be two separate trials in this case. There would be a non-jury trial for the declaratory judgment count and defendants' counterclaims and a jury trial for the fraud count. The Court will only have to hold a non-jury trial on Count IV and defendants' counterclaims if the fraud count is referred to arbitration.

were going to be decided in arbitration. Because the parties could not agree, once again, as to the arbitrability of the fraud count, this Court ordered the parties to submit briefs in support of their respective positions as to the arbitrability of plaintiffs' fraud count. Presently before the Court are the parties' briefs, and thus the issue of the arbitrability of plaintiffs' fraud count is ripe for adjudication.

II. Discussion

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, applies to arbitration provisions in any contract that is in anyway connected to interstate commerce. See 9 U.S.C. § 2; see also Crawford v. West Jersey Health Sys., 847 F. Supp. 1232, 1240 (D.N.J. 1994) (requiring only the "slightest nexus with interstate commerce"). As Judge Irenas has already concluded, the Merger Agreement "easily satisfies" this requirement; thus this Court will not revisit this issue, nor should it under the "law of the case" doctrine. As such, the FAA and its attendant principles guide this Court in its determination of the arbitrability of Count III.

Section 4 of the Arbitration Act enables a litigant to invoke the authority of a federal district court in order to force a reluctant party to arbitrate a dispute. See 9 U.S.C. § 4. More specifically, § 4 requires a federal district court to hear an action brought by "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration." Section 4 further directs the district court to order a reluctant party to arbitrate if, after hearing the

parties, it is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." Section 4 continues, however, that "[i]f the making of the arbitration or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof."

"An 'issue' requiring resolution by the district court arises under § 4 only when the party refusing to arbitrate contends that the dispute is not one that the parties agreed to arbitrate." PaineWebber Inc. v. Hartmann, 921 F.2d 507, 511 (3d Cir. 1990). As the Third Circuit has noted, "no party can be forced to arbitrate unless that party has entered into an agreement to do so." Id. (citing AT&T Technologies v. Communications Workers of America, 475 U.S. 643, 648, 106 S. Ct. 1415, 1418, 89 L. Ed. 2d 648 (1986); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 80 S. Ct. 1347, 1352, 4 L. Ed. 2d 1409 (1960); Morristown Daily Record v. Graphic Communications Union, Local 8N, 832 F.2d 31, 33 (3d Cir. 1987)). Thus, before requiring an unwilling party to arbitrate, the court must "engage in a limited review to ensure that the dispute is arbitrable—i.e., that a valid agreement to arbitrate exists and that the specific dispute falls within the substantive scope of that agreement." Id. (citations omitted). If this Court determines that the dispute falls within the substantive scope of the agreement, it must stay arbitrable counts, see 9 U.S.C. § 3, and "refer the matter to arbitration without considering the merits of the dispute." PaineWebber, 921 F.2d at

511.

In making this determination, a federal district court must proceed under a "presumption of arbitrability in the sense that '[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." AT&T Techs., 475 U.S. at 650 (quoting Steelworkers, 363 U.S. at 582-83, 80 S. Ct. at 1353)). Nonetheless, where an arbitration clause is limited in its substantive scope, courts should not allow "the federal policy favoring arbitration . . . to override the will of the parties by giving the arbitration clause greater coverage than the parties intended.'" PaineWebber, 921 F.2d at 513 (quoting National R.R. Passenger Corp. v. Boston & Maine Corp., 850 F.2d 756, 760-61 (D.C. Cir. 1988)).

In this case, the parties simply do not contest that a valid agreement to arbitrate exists between them. Therefore, the sole issue before this Court is whether it can be said with "positive assurance" that the instant dispute falls outside the substantive scope of the agreement. Defendants argue that the underlying factual allegations of plaintiffs' fraud count fall squarely within the substantive scope of the agreement to arbitrate. Plaintiffs rejoin that the arbitration clause in the Merger Agreement is extremely limited in scope, and its fraud count simply does not fall within its reach. While the Court agrees with plaintiffs that the arbitration clause in the merger agreement is

limited, the Court cannot state with "positive assurance" that the instant dispute with respect to Count III falls outside the substantive scope of the agreement.

It is axiomatic that "[l]ike any contract, an agreement to arbitrate may be limited in its substantive scope in an almost infinite variety of ways." Id. at 511. For example, there can be limitations on the parties and types of claims covered by the agreement. Moreover, the parties may place economic or geographical limitations on their obligation to arbitrate. Id. In this case, the arbitration clause is, by its own terms, limited to specific and narrowly-defined disputes. As noted above, the Merger Agreement contains an indemnification provision whereby the defendants agreed to indemnify plaintiffs upon the happening of certain events. Id. § 13(a)(i)-(iii). Some of these events include any misrepresentation or breach of warranty made "in or pursuant to" the Merger Agreement, any breach of any covenants to be performed by defendants prior to closing, and a broad provision covering claims, debts, liabilities, or obligations not properly disclosed in the Merger Agreement. Id. § 13(a)(i)-(iii).

Subsection (f) of the indemnification provision provides that the indemnitor "shall pay" the amount of such claims in cash or by certified check. If such payment is not made as required, plaintiffs can set off the amount of the claim against defendants' stock in escrow, and the escrow agent may sell the shares to raise the necessary cash. If defendants choose to contest such a set-off, they must serve a "Contest Notice" within fifteen days, and an

arbitration to be held in Philadelphia will settle the "contested set-off." Id. Section 13 also sets forth the procedures to govern the selection of arbitrators and makes their determination "final, binding and conclusive." Id. § 13(e)(iii). If the proceeds from the escrow prove insufficient to satisfy the claim, "Nutramax shall have the right to pursue any and all other remedies available to it." Id. § 13(e).

In sum, the arbitration clause in this case only covers disputes under the following set of circumstances: (1) Nutramax has a right to indemnification under § 13 for the particular event; (2) Nutramax gives defendants written notice of its indemnification claim; (3) by written notice, Nutramax elects to satisfy its indemnification claim via set-off; and (4) plaintiffs choose to contest the set-off by serving a "Contest Notice" on plaintiffs within fifteen days of plaintiffs' notice to set-off. If all of these requirements are satisfied, then an arbitration hearing will be held in Philadelphia to settle the "contested set-off."⁶ Thus, although the arbitration clause is limited in scope, it will and should apply when the requirements to arbitrate have been satisfied.

⁶"To the extent that there shall be insufficient such sums available [via set-off] to compensate Nutramax fully for any indemnification to which it may be entitled, Nutramax shall have the right to pursue any and all other remedies available to it against Controlling Shareholders." Merger Agreement § 13(e). By the language of this provision, it is evident that Nutramax cannot pursue these additional remedies until after the arbitrators determine whether there are sufficient sums available to satisfy plaintiffs' claim via set-off, assuming that plaintiffs are entitled to set-off at all.

With respect to the first two counts of plaintiffs' complaint, Judge Irenas has already determined that the claims asserted therein are arbitrable because the above-mentioned requirements were satisfied with respect to these counts. Judge Irenas noted that the "plaintiffs' first count is little different from their formal notice of intent to set-off . . . which both defendants and plaintiffs' corporate counsel understood to implicate the arbitration provisions" Additionally, Judge Irenas found that the "second count for breach of contract is likewise arbitrable. Not only is this claim based on the same facts as the first count, but an inaccuracy of a warranty or representation known to sellers is clearly a breach of contract." Indeed, the core of Count II of plaintiffs' complaint is that defendants made certain misrepresentations and breached warranties and covenants; these are all claims which specifically fall within the scope of the indemnification provision. See Merger Agreement § 13(a)(i). Since Nutramax specifically elected to satisfy these claims by set-off, provided written notice to defendants, and defendants contested plaintiffs' right to set-off, the claims contained in Count II were correctly found to be arbitrable by Judge Irenas. Judge Irenas, however, did not determine whether Count III was arbitrable but rather stayed it pending the outcome of the arbitration. The Court will now resolve this question.

As mentioned above, "[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." AT&T Techs., 475 U.S. at 650 (quoting Steelworkers, 363 U.S. at 582-83, 80 S. Ct. at 1353)). Because the Court cannot state with "positive assurance" that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute, the Court orders that Count III shall be arbitrated in the same arbitration proceeding as Counts I and II of plaintiffs' complaint.

In making its determination as to whether a claim is arbitrable, the Court's "focus is on the 'factual allegations in the complaint rather than the legal causes of action asserted.'" Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 846 (2d Cir. 1987). "If the allegations of the complaint involve matters covered by the parties' underlying agreement, the claims must be arbitrated, regardless of the legal labels ascribed to the claims." Id. (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627, 105 S. Ct. 3346, 3354, 87 L. Ed. 2d 444 (1985)). The Third Circuit has opined: "So long as the appellant's claim of arbitrability [is] plausible, interpretation of the contract should [be] passed on to the arbitrator." Sharon Steel Corp. v. Jewell Coal and Coke Co., 735 F.2d 775, 778 (3d Cir. 1984).

The underlying factual allegations of Count III, although cast in the nomenclature of fraud, identically mirror the factual allegations of the first and second counts, which merely parrot the language of § 13(d) of the Merger Agreement. Moreover, the five alleged misrepresentations that form the basis of plaintiffs' fraud

count are five of the six misrepresentations upon which plaintiffs' counsel originally claimed the right to indemnification. Based solely on the factual allegations contained in Count III, the Court believes that plaintiffs' fraud claim falls squarely within the scope of the arbitration clause. To begin, subsection (a)(i) specifically provides for indemnification for misrepresentations made by defendants in or pursuant to the Merger Agreement; the five misrepresentations alleged by plaintiffs in Count III fall within this broad language of subsection (a)(i). Additionally, plaintiffs provided defendants with notice of their election to set-off, which defendants promptly contested. Thus, it is evident that these misrepresentations are subject to the arbitration provision in § 13.

However, in an attempt to avoid arbitration of its fraud claim, presumably to further some untold litigation strategy, plaintiffs have set forth boilerplate allegations of scienter and reliance, styling Count III as a fraud claim. Plaintiffs then argue that Count III is not subject to arbitration because the arbitration clause was created to cover only those claims which are based on contractual indemnification, not claims based on common law fraud. Plaintiffs' interpretation of § 13 would seem to frustrate the purposes for having an arbitration provision in the Merger Agreement.

Under plaintiffs' interpretation of § 13, plaintiffs would be able to proceed simultaneously in two separate forums on the same claims. The first avenue would allow plaintiffs to assert

claims of misrepresentation under the indemnification provision upon which they could exercise the right to set-off with the possibility that they may have to submit these claims to arbitration. The second avenue would allow plaintiffs to simultaneously bring a fraud claim in any court of competent jurisdiction based on the very same representations that are being contested in arbitration. The Court submits that this interpretation of § 13 simply does not make sense.

Instead, one could plausibly interpret § 13 to require the parties to arbitrate all claims of misrepresentation that are the subject of a contested set-off. It appears that § 13 of the Merger Agreement lays out a quick and relatively inexpensive method of deciding whether plaintiffs are entitled to set-off, and if so, whether the escrowed shares are sufficient to satisfy plaintiffs' indemnification claims. Although § 13 does not explicitly state that plaintiffs can never bring a judicial action to satisfy its indemnification claims,⁷ the language of § 13 provides that a "contested set-off" be referred to arbitration, and "to the extent that there shall be insufficient such sums available to compensate Nutramax fully for any indemnification to which it may be entitled, Nutramax shall have the right to pursue any and all other remedies available to it against controlling shareholders." See § 13(e). Although Nutramax clearly has the "right to pursue any and all

⁷Indeed, if plaintiffs do not seek to set-off against defendants' escrowed shares, they can immediately seek judicial resolution of their claims.

other remedies available to it against" plaintiffs, which would presumably include a civil lawsuit, Nutramax cannot pursue these remedies until the contested set-off is settled in arbitration. Thus, at a minimum, it would appear that plaintiffs' fraud claim has been filed prematurely because the parties do not know yet know whether the set-off will provide Nutramax with sufficient sums to compensate Nutramax fully for any indemnification to which it may be entitled.

However, beyond whether plaintiffs' fraud claim is premature, the Court finds that a reasonable interpretation of § 13 supports the conclusion that the parties specifically agreed to arbitrate the underlying allegations of plaintiffs' fraud count. As stated above, the five misrepresentations which form the factual basis of the fraud count are covered by § 13(a)(i) and have become the subject of a contested set-off, and thus arbitrable pursuant to § 13(e). Although § 13(a)(1) does not specifically state that the legal claim of fraud can be arbitrated, it does state that any misrepresentation made in or pursuant to the Merger Agreement does provide a basis for an indemnification claim. A reasonable interpretation on why § 13(a) does not specifically state that a fraud claim can provide a ground for indemnification is that § 13(a)(i) specifically eliminates any requirement that the misrepresentation be made with knowledge of its falsity, thus eliminating a necessary element of fraud. In effect, the parties created a provision whereby Nutramax could recover for any damages caused by misrepresentations made by defendants without having to

prove that the defendants committed fraud.

Section 13 is thus susceptible to the interpretation that the parties intended that all claims based on misrepresentations would come within the ambit of § 13(a)(i), which specifically excludes any requirement to prove knowledge of the falsity of the misrepresentation, thus specifically excluding the need to prove fraud. Although subsection (a)(i) would not require the plaintiffs to specifically prove all of the elements of fraud to succeed on their indemnification claim in arbitration, the Court finds that § 13 is susceptible to the interpretation that the parties intended to refer all contested set-off claims based on misrepresentations – whether or not these claims sound in fraud – to arbitration. Thus, the Court concludes that any fraud claim that is brought by plaintiffs based on the same misrepresentations which form the basis of its indemnification claim and are the subject of a contested set-off must be referred to arbitration.

III. Conclusion

Accordingly, for the foregoing reasons, the Court orders that Count III of plaintiffs' complaint shall be arbitrated in the same arbitration proceeding as Counts I and II of plaintiff's complaint.

An appropriate Order follows.

Clarence C. Newcomer, J.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

OPTOPICS LABORATORIES CORP. and	:	CIVIL ACTION
NUTRAMAX PRODUCTS, INC.	:	
	:	
v.	:	
	:	
FRANK C. NICHOLAS, et al.	:	NO. 96-8169

O R D E R

AND NOW, this day of July, 1997, upon consideration of plaintiffs' Brief Setting Forth Why Their Fraud Claim is not Arbitrable, and defendants' Memorandum of law Regarding the Arbitrability of Count III of Plaintiffs' Complaint, it is hereby ORDERED that Count III of plaintiffs' complaint shall be arbitrated in the same arbitration proceeding as Counts I and II of plaintiff's complaint.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.