

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

RICHARD A. PLINKE and : CIVIL ACTION  
TERRY A. PLINKE :  
 :  
v. :  
 :  
PNE MEDIA, LLC, ET AL. : No. 00-1817

**Decision Under Fed. R. Civ. P. 52**

Ludwig, J.

April 3, 2001

Defendants<sup>1</sup> move to stay proceedings on counts V-IX pending contractual arbitration. 9 U.S.C. § 3. On January 18, 2001, a hearing was held on the validity of the execution of an agreement containing a binding arbitration provision. Jurisdiction is diversity. 28 U.S.C. § 1332. A decision will be entered in favor of defendants, and this action will be stayed pending arbitration.<sup>2</sup>

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<sup>1</sup> PNE Media LLC, James A. Eatrides, Ashola Varma, Thomas C. Parsons, Frank J. Nataro, PNE Media, Inc., PNE Media Holdings, LLC, Parsons Publicity, Inc., Able, Inc., ALTA/PNE Corp., PNE Investment Partnership, and BancBoston Ventures, Inc.

<sup>2</sup> Count II was dismissed for lack of subject matter jurisdiction. See Order, June 29, 2000. Counts I, III, and IV allege breach of an employment contract between plaintiff Richard Plinke and defendant PNE Media, LLC, Inc. *That* contract does not contain an arbitration provision. See finding ¶ 10 *infra* at 3. However, since some of the issues are interrelated with those in the other counts, the entire action will be stayed until the other counts are arbitrated.

## I. Findings of Fact

A. The following facts are set forth in the parties' prehearing stipulation:<sup>3</sup>

1. Prior to January 5, 1998, Richard A. Plinke was an owner of Outdoor Marketing Systems, LLC, an outdoor advertising company based in Allentown, Pa., and was employed by Outdoor as the president and general manager.

2. Under a Stock Purchase Agreement originally dated December 5, 1997, and amended as of January 5, 1998, PNE Media, LLC, an outdoor advertising company based in Union, N.J., purchased the stock of Outdoor from Plinke and its other shareholders for: (a) \$1,200,000 cash; (b) the assumption of some \$500,000 in debt; and (c) an equity interest in PNE Media Holdings.

3. Under the Stock Purchase Agreement and as part of the issuance of the equity interest in PNE Holdings, Plinke executed a Subscription Agreement and an Investment Letter, each of which referred to a "Limited Liability Company Agreement."

4. On January 5, 1998, the transactions contemplated by the Stock Purchase Agreement and the Subscription Agreement, among others, were completed in the New York City offices of the law firm of Ropes & Gray.

5. On the previous day, January 4, 1998, Plinke had gone to Ropes & Gray's New York office and executed a signature page for a document entitled "Limited Liability Company Agreement."

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<sup>3</sup> However, the references in findings 5, 6, and 7 to "Limited Liability Company Agreement," or "LLC Agreement" are plainly at variance with the trial evidence and, as to findings 6 and 7, the positions of both parties. See note 4 and findings 13 and 19, *infra*. For these reasons, insofar as findings 5, 6, and 7 refer to "Limited Liability Company Agreement" or "LLC Agreement" instead of "Amended and Restated LLC Agreement," they are not adopted as findings of fact.

6. By letter dated January 9, 1998, Frank Vargish, an attorney for PNE, delivered a copy of the LLC Agreement for PNE Holdings to Paul McGinley, an attorney for Plinke.

7. Section 17.5 of the Limited Liability Company Agreement provides:

*Disputed Matters.* Except as otherwise provided in this Agreement, any controversy or dispute arising out of this Agreement, the interpretation of any of the provisions hereof, or the action or inaction of any Member hereunder shall be submitted to arbitration in Boston, Massachusetts before the American Arbitration Association under the commercial arbitration rules then obtaining of said Association. Any award obtained from any such arbitration proceeding shall be final and binding on the parties, and judgment upon any award thus obtained may be entered in any court having jurisdiction thereof. To the fullest extent permitted by law, no action in law or equity based upon any claim arising out of or related to this Agreement shall be instituted in any court by any Member except (a) an action to compel arbitration pursuant to this Section 17.5 or (b) an action to enforce an award obtained in an arbitration proceeding in accordance with this Section 17.5.

B. The following fact findings are based on evidence received at the hearing:

8. Plinke himself received \$400,000 cash and \$300,000 in PNE Holdings stock for the sale of Outdoor to PNE. Tr. 7.

9. Upon the sale, Outdoor became a wholly owned subsidiary of PNE, LLC, with Plinke to be employed as president and general manager. Tr. 8.

10. Plinke's employment was the subject of a written agreement that contains no arbitration provision. Tr. 9-12.

11. The Stock Purchase Agreement covering the sale of Outdoor stock, executed on December 5, 1997, contains an arbitration provision. Tr. 42; exh. D2, D2-A.

12. The "Limited Liability Company Agreement," in its original form, consisted of a three-page document executed only by James Eatrdes for the limited purpose of incorporating PNE Holdings. Tr. 65; defs. findings exh. A.

13. Shortly before, after, and during the closing, the titles “Limited Liability Company Agreement” and “Amended and Restated Limited Liability Company Agreement” were used interchangeably by PNE and its representatives to refer to the Amended and Restated LLC Agreement and its various drafts. Tr. 81-92.<sup>4</sup>

14. Paul McGinley was counsel for plaintiffs and Outdoor during the negotiation of the sale of Outdoor’s stock and Richard Plinke’s employment agreement. Tr. 10-13; exh. P1.

15. As part of the closing Richard Plinke executed a “Subscription Agreement” that referred to the “Amended and Restated Limited Liability Company Agreement” as the governing document of the sale and transfer of units in PNE Holdings. Tr. 33; exh. D3.

16. At some time during Plinke’s January 4, 1998 visit to the Ropes & Gray New York Office, he, Frank Vargish, and James Eatrides, PNE’s principal, were present in a conference room in which there were various documents relating to the closings. Tr. 44-46.

17. While there, and in the presence of the PNE representatives who were working on the closings, Plinke was given a signature page referring to a “Limited Liability Company Agreement.” After reading the top line, including that reference, Plinke signed the page. Tr. 45-46.

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<sup>4</sup> Plaintiffs’ reply and opposition to defendants’ proposed findings specifically dispute this point – arguing that a distinction existed between the amended and restated agreement and the one referred to on the signature page at issue. However, in the pre-hearing joint statement, signed by plaintiffs’ and defendants’ counsel, it was stipulated that the “Section 17.5 of the Limited Liability Company Agreement provides as follows” and thereafter quotes the arbitration provision – which was *not* a part of the original LLC Agreement. It is in the restated agreement. Tr. 65-66, 92. A footnote in plaintiffs’ reply states that the designation in the pre-hearing statement was a “mutual mistake of counsel.” This same “mistake” or confusion of titles, or perhaps short-hand reference to the amended agreement, also occurred frequently at and after the time of closing. Tr. 65-66, 81-92; finding ¶ 19, supra.

18. On January 4, 1998, in New York, prior to executing the signature page, Plinke had received a copy of the Amended and Restated LLC Agreement to which the signature page would eventually be attached. Tr. 78-79, 83-84.

19. The agreement forwarded to Paul McGinley by Vargish on January 9, 1998 was the Amended and Restated LLC Agreement, although the transmittal letter refers to it as the “Limited Liability Company Agreement.” Tr. 75; exh. D6, P1.

20. Upon receipt, McGinley forwarded the Amended and Restated LLC Agreement to Richard Plinke. Exh. P1.

21. Plaintiffs do not appear to have raised an objection to the Amended and Restated LLC agreement and its arbitration provision before they filed this action on April 6, 2000.

## II. Discussion

Plaintiffs make two arguments why they should not be bound by the arbitration provision in the Amended and Restated LLC Agreement. The first is that Richard Plinke, based on the oral representations of PNE’s counsel, believed the signature page, which referred to a “Limited Liability Company Agreement,” was to be attached instead to the Operating Agreement. He had previously read the Operating Agreement, and it did not contain an arbitration provision. Tr. 16-17, 46. Second, the signature page executed by him, which was later attached to the Amended and Restated LLC Agreement, does not contain the words “Amended and Restated” – and, therefore, if anything, plaintiffs entered into the short-form LLC agreement, which also does not call for arbitration.

With regard to the first argument, plaintiffs have not given any explanation for accepting the representation that a signature page referring to a “Limited Liability Company

Agreement” was to have been attached to or made part of the Operating Agreement. No compelling reason is given why PNE’s representatives, Vargish or Eatrides, would have lied to Richard Plinke, or misled him about what he was signing.<sup>5</sup> Plaintiffs do not contest the authenticity of the signature page, and Plinke concedes having read the words on the first line of the signature page – “this Limited Liability Company Agreement.” Findings ¶ 17, tr. 46.

Moreover, he did not testify to being informed that the “Limited Liability Company Agreement” was another name for the Operating Agreement. His uncorroborated testimony that Vargish and Eatrides led him down the garden path about the significance of the signature page was flatly contradicted by defendants’ witnesses. Tr. 78-79, 83-84.

As part of the closing, Richard Plinke executed two other documents – one of which referred to a “Limited Liability Company Agreement” and one that referred to an “Amended and Restated Limited Liability Company Agreement.” Findings ¶¶ 3, 15. Other than his testimony, there is no evidence that he was misled or deceived into executing the signature page – or that the amended agreement containing the arbitration provision was an afterthought fraudulently added by defendants.

Fraud in the execution of a writing must be proven by clear and convincing evidence. Trans Penn Wax Corp. v McCandless, 50 F.3d 217, 232 (3d Cir. 1995). Here, plaintiffs have

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<sup>5</sup> Perhaps plaintiffs’ argument is that because Richard Plinke and his attorney were opposed to arbitration, PNE was trying to hide the amended and restated LLC agreement from him, knowing he would object to its arbitration provision. Tr. 9-12; exh. P1 (affidavit from McGinley stating, “[a]fter I began representing OMS in 1995, Richard Plinke stopped including arbitration language in any agreements, per my specific advice.”). However, before the January 4, 1998 meeting in New York, Plinke had already signed, while represented by McGinley, a Stock Purchase Agreement with a mandatory arbitration clause. Exh. D2, D2-A; Tr. 42-44.

not met that heavy burden of proof.

Plaintiffs' second argument is also unconvincing.<sup>6</sup> The original LLC Agreement is a standard form entity formation document, three pages in length, that lists Eatrides as the only "member" of the company and is executed solely by him.<sup>7</sup> Findings ¶ 12. The Amended and Restated LLC Agreement names 12 members, including Richard Plinke, and contains 70 pages. It would have been odd for Plinke to have been asked to sign a document that had already been fully executed on December 31, 1997, by the only person, Eatrides, who needed to sign it.

On this motion for a stay, what remains is whether or not the parties entered into the Amended and Restated LLC Agreement, which contains the arbitration provision. Contractual arbitration requires proof of a binding agreement to arbitrate – which constitutes a waiver of the right to litigate the action in court. 9 U.S.C. § 3; Harris v. Green Tree Financial Corp., 183 F.3d 173, 178-79 (3d Cir. 1999). While plaintiffs have not succeeded in proving either fraud or the literal relatedness of the signature page to the LLC Agreement, this, by itself, does not necessarily link together the signature page and the amended and restated agreement. That conclusion, however, is fully supported by the salient facts of the case. Moreover, the undeniable circumstantial evidence to that effect opens up the intended meaning of the signature page to extrinsic matters, analogous to a

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<sup>6</sup> It also contradicts the first. Plaintiffs' reply and opposition admits that Richard Plinke signed the signature page for the LLC Agreement, but disputes that he intended it to be the signature page for the amended and restated version. Pltfs. reply at 1.

<sup>7</sup> Though not offered into evidence, defendants attached the original LLC Agreement to their proposed findings of fact. Defs. findings exh. A. Plaintiffs' reply made no objection. It was consistent with the hearing testimony. Tr. 65-66.

verbal ambiguity in a document. See Martin v. Monumental Life Insurance Co., 240 F.3d 223, 233 (3d Cir. 2001).

The closing of the buyout transaction was a protracted and complicated process involving numerous discussions, papers, and revisions. The attorneys themselves referred to the Amended and Restated LLC Agreement as the LLC Agreement – as they again did in their pretrial stipulation in which they went so far as to stipulate that the arbitration provision was contained in the LLC Agreement. See notes 3 and 4, supra. But within this whirlpool of lawyering, what stands out is that the signature page executed by Richard Plinke could not have been for the LLC Agreement. At the closing, he had been given a copy of the Amended and Restated LLC Agreement, which named him and which presumably required his signature. Findings ¶ 15, 18. Whether or not he actually read the agreement, having signed the signature page, he is deemed to be bound by it. See Germantown Savings Bank v. Talacki, 441 Pa. Super. 513, 521, 657 A.2d 1285, 1289 (1995) (quoting Standard Venetian Blind Co. v. American Emp. Ins. Co., 503 Pa. 300, 305, 469 A.2d 563, 566 (1983)). Shortly after the closing, the Amended and Restated LLC Agreement was sent to his attorney, with the executed signature page attached – the transmittal letter incorrectly referred to the LLC Agreement. Finding ¶ 19. The amended and restated agreement was forwarded to Plinke. There is no evidence that defendants were notified of plaintiffs’ present position or of the objection to the arbitration provision until April 6, 2000, some 27 months later, when this action was filed. Finding ¶ 21.

### III. Conclusions of Law

1. This Court has jurisdiction over this action and the parties.
2. Plaintiffs entered into a written agreement that contains an arbitration provision under which the claims set forth in Counts V-IX must be arbitrated. 9 U.S.C. § 3.
3. Plaintiffs have not met their burden of proving that fraud in the execution of the signature page was committed by certain defendants.
4. The signature page executed by Richard Plinke applies to the Amended and Restated LLC Agreement, which, in Section 17.5, sets forth the arbitration provision.
5. Litigation of counts V-IX must be stayed pending arbitration, and the remaining counts will also be stayed for reasons of judicial economy.

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Edmund V. Ludwig, J.

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: No. 00-1817

Order

Ludwig, J.

AND NOW, this        day of April, 2001, this action is stayed pending arbitration.

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Edmund V. Ludwig, J.