MICHELE M. FOX
RICHARD S. SWARTZ
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
A Pennsylvania Limited Liability Partnership
Plaza 1000 – Suite 500
Main Street
Voorhees, NJ 08043-4636
Attorneys for Defendants Northwest Direct Teleservices, Inc. and Timothy Rote

MAX ZWEIZIG, Plaintiff, v. TIMOTHY ROTE, Individually and d/b/a NORTHWEST DIRECT TELESERVICES, INC., as well as NORTHWEST DIRECT TELESERVICES, INC., a Corporate Entity, as well as JOHN DOES 1-5 and JOHN DOES 6-10, Defendants.	:	SUPERIOR COURT OF NEW JERSEY GLOUCESTER COUNTY LAW DIVISION CIVIL ACTION DOCKET NO. GLO-L-473-04

DEFENDANTS' BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO STAY PROSECUTION OF LITIGATION AND COMPEL ARBITRATION

TABLE OF CONTENTS

Arb Ex 79
Page 2

CO1249

EXHIBIT D, page 9

TABLE OF AUTHORITIES

FEDERAL CASES **Page**

Arb Ex 79
Page 3

STATE CASES

FEDERAL STATUTES

Defendants, Northwest Direct Teleservices, Inc. and Timothy Rote, submit this Brief in Support of the Motion to Stay Prosecution of the Litigation and Compel Arbitration.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Defendant, Northwest Direct Teleservices, Inc. ("Northwest") is an Oregon Corporation with its principal place of business located at 5285 S.W. Meadows Road, #440, Lake Oswego, Oregon. Northwest is engaged in the business of telemarketing and owns two active subsidiaries, Northwest Direct of Eugene (Oregon) and Northwest Direct of Iowa. Defendant Timothy Rote is, and was at all times relevant to this lawsuit, the President and Chief Executive Officer of Northwest. (Certification of Timothy Rote ("Rote Certification") ¶ 1.)

Northwest employed Plaintiff as its Director of Information Technology ("I.T.") pursuant to an Employment Agreement ("Agreement") signed by Rote on August 18, 2001. As the Director of I.T., Plaintiff supervised the I.T. personnel of the company and oversaw the company's computer systems, both of which were stationed primarily in Oregon and Iowa. Plaintiff did so remotely from an office in Delaware, and subsequently from his home in New Jersey.[1] (Rote Certification ¶ 2.)

---

[1] Initially, plaintiff was hired to work remotely from Northwest's office in Delaware, for a Delaware subsidiary, Northwest Direct Marketing, Inc. Plaintiff worked from Delaware for more than one year (and more than half his tenure with Northwest) before that office closed. After the Delaware office closed on or around December 31, 2002, Northwest agreed, as a convenience to plaintiff, to permit him to work from his home in New Jersey. (Rote Certification ¶ 3.)

Arb Ex 79
Page 5

CO1252

The terms of the Agreement were negotiated with Plaintiff over a period of approximately four months. The Agreement was first presented to Plaintiff on April 14, 2001, and, in the months that ensued, contract negotiations between Plaintiff and Rote took place over the telephone and during in-person meetings in Delaware and Iowa. In May 2001, Northwest revised the terms of the Agreement in accordance with Plaintiff's suggestions, including a twenty-five percent (25%) increase in Plaintiff's proposed salary. (Rote Certification ¶ 5.)

On August 17-18, 2001, Plaintiff and Rote met in Iowa to continue negotiations over Plaintiff's employment. There, Plaintiff negotiated additional revisions to the Agreement. Plaintiff came prepared to do so, presenting Rote with handwritten additions and strikethroughs to the previously revised Agreement. Rote signed the Agreement, as revised by Plaintiff, during their August 18, 2001 meeting. (Rote Certification ¶ 5.)

Plaintiff, however, did not sign the Agreement at the August 18th meeting. Rather, Plaintiff advised Rote that he wanted to take the Agreement home so that he could think about it more and discuss it with his attorney. Previously, Plaintiff had represented to Rote (and to others at Northwest) that he was being represented by counsel throughout the course of negotiations. (Rote Certification ¶ 6.) Ultimately, Plaintiff signed the Agreement on August 20, 2001, before commencing work for Northwest on September 1, 2001. (Rote Certification ¶ 6.) A copy of the fully executed Agreement is attached to the Rote Certification as Exhibit 1.

Significantly, during the more than four month period that negotiations took place concerning the Agreement, neither Plaintiff nor his attorney raised any objections or sought to change any terms to Section V of the Mediation and Arbitration section of the Agreement, which

section unambiguously sets forth the parties' agreement to resolve through mediation, and, if necessary, through arbitration, all disputes "arising out of or related to": (1) Plaintiff's employment, (2) any breach of the Employment Agreement, or (3) the termination of Plaintiff's employment, including but not limited to disputes alleging violations of "federal, state and/or local statutes," "public policy," or "contractual or common-law rights of either party . . . ." (See Exhibit 1 to Rote Certification ¶ 7, Employment Agreement ¶ 5.)

With respect to mediation, the agreement provides, in relevant part:

> **5.1.1 Mediation**. ***Employee agrees to submit to mediation***, at no administrative cost to him/her, any dispute of the parties arising out of or related to: (1) Employee's employment with the Company; (2) any breach of this Agreement (excepting the injunctive relief provided in paragraph 4.3 above); or (3) the termination of Employee's employment with the Company (hereafter "Disputes"). Such Disputes include, but are not limited to, any alleged violations of federal, state and/or local statutes[,] . . . violation of public policy or . . . other alleged violation of statutory, contractual or common-law rights of either party . . . .
>
> * * *
>
> (ii) Location; Mediator Selection; Costs. The mediation will be conducted in Multnomah County through the mediation services of Arbitration Service of Portland, Inc. ("ASP") . . . .

(See Employment Agreement, Exhibit 1, ¶ 5.1.1.)

With respect to arbitration, the agreement provides, in relevant part:

> **5.1.2. Arbitration**. In the event the Dispute is not successfully resolved through mediation, ***the parties agree that such Dispute will be resolved exclusively through final and binding arbitration*** in Multnomah County, Oregon, through a mutually agreed upon arbitration service, or, if no agreement can be reached, through the arbitration services and procedures of

> [Arbitration Service of Portland, Inc.,] except as such rules are modified herein. . . .
>
> * * *
>
> (iv) Power of Arbitrator(s); Applicable Law. The arbitrator shall have ***the same authority to award remedies and damages as provided to a judge and/or jury under applicable law*** . . . Except as provided herein, ***Oregon State law*** (excluding choice of law provisions) ***and applicable federal law will govern and be applied by the arbitrator in deciding all substantive aspects of the Dispute***, and all procedural issues not covered by the applicable arbitration rules.

(See Employment Agreement, Exhibit 1, ¶ 5.1.2.)

Other provisions of the Employment Agreement relevant to the resolution of Defendants' instant motion, which plaintiff did not seek to alter, include Severability and Choice of Law provisions:

> 6.2 **Separate and Severable.** The parties agree that the provisions in this Agreement are separable and that in the event any provision is deemed ineffective or unenforceable, they are severable from the remaining provisions of the Agreement, which provisions shall remain binding on the parties.
>
> * * *
>
> 6.5 **Choice of Law.** ***The laws of the State of Oregon shall govern all questions relative to interpretation and construction of this Agreement*** and its enforcement regardless of the jurisdiction or venue of any proceeding brought hereunder.

(Employment Agreement, Exhibit 1, ¶ 6.2, 6.5) (emphasis added.)

In July of 2003 plaintiff was advised by Rote of the latter's decision to terminate plaintiff's employment. Plaintiff was given the opportunity to remain in his position for a few more months, affording plaintiff the opportunity to seek other employment while providing

DMEAST #3187922 v2

Arb Ex __79____
Page __8____

CO1255

EXHIBIT D, page 15

Northwest time to find plaintiff's replacement. By way of letter dated October 2, 2003, Rote officially provided plaintiff with written notice of his termination in accordance with his Agreement, to be effective November 15, 2003. (A true and correct copy of the termination letter is attached to the Rote Declaration as Exhibit 2.) Plaintiff's employment terminated in mid-November as previously scheduled. (Rote Certification ¶ 8.)

On October 28, 2003, more than three weeks after plaintiff had been notified of his termination in writing, Northwest received a letter from an *Oregon* attorney advising of that attorney's representation of plaintiff in connection with plaintiff's decision to report to the *Oregon* Attorney General alleged suspicions he had about alleged billing practices of Northwest, citing the *Oregon* whistleblower law. Despite the fact that notice of plaintiff's termination preceded by nearly three weeks plaintiff's report to the Oregon Attorney General, following his termination Plaintiff, through New Jersey counsel, informed Northwest that he believed that his termination was in retaliation for his report to the Oregon Attorney General. (Rote Certification ¶ 9.)

Although bound by the terms of the Agreement, Plaintiff refused to either mediate or arbitrate his claims in accordance with the terms of the agreement. (Rote Certification ¶ 10.) He subsequently filed a Complaint in the Superior Court of New Jersey, Gloucester County, Law Division on March 18, 2004. The Complaint alleges that Plaintiff was terminated by Northwest because of his report to the Oregon Attorney General, in violation of the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq. ("CEPA") and New Jersey common law. Defendants subsequently removed the lawsuit to the United States District Court

for the District of New Jersey and, thereafter, filed a motion to dismiss the Complaint based on various grounds, including Plaintiff's failure to abide by the terms of the arbitration agreement and lack of personal jurisdiction over Rote. That motion was denied, *without prejudice*, and, on January 7, 2005. Defendants filed a motion to transfer the lawsuit to Oregon pursuant to the terms of the Agreement. While that motion was pending, the District Court, *sua sponte*, remanded the lawsuit back to this Court, citing deficiencies in Defendants' original removal papers.

After the matter had been remanded to the State Court, the parties reached an agreement whereby an arbitration proceeding pending before the Arbitration Service of Portland with respect to Northwest's claims against the plaintiff would be stayed, defendants would file an Answer and Counterclaims and, prior to discovery and the filing of motions, the parties would submit their disputes to mediation. The mediation was held on September 30, 2005. (Certification of Michele M. Fox, Esq.) As the mediation was unsuccessful, this motion by defendants to Stay Prosecution and Compel Arbitration is now before the Court.

II. LEGAL ARGUMENTS

A. This Court Must Stay Prosecution of the Litigation and Compel Arbitration.

1. The FAA Governs The Arbitration Agreement.

The Federal Arbitration Act (FAA) governs arbitration provisions contained in "contract[s] evidencing a transaction involving commerce . . . ." 9 U.S.C. § 2. The contract at issue "need have only the slightest nexus with interstate commerce." Sarbak v. Citigroup Global Mkts., Inc., 354 F. Supp. 2d 531 (D.N.J. 2004) (quoting Crawford v. West Jersey Health Systems

Arb Ex 79
Page 10

(Voorhees Div.), 847 F. Supp. 1232, 1240 (D.N.J. 1994)). See also Wilbur-Ellis Co. v. Hawkins, 155 Or. App. 554, 557, 964 P.2d 291 (1998).

Here, it cannot be disputed that the Employment Agreement clearly meets the "commerce" requirement for application of the FAA. Northwest's business involved and continues to involve interstate commerce. Thus, the FAA is applicable to the analysis of the instant motion to stay prosecution and compel arbitration of Plaintiff's lawsuit.

In that regard, there is no doubt that the FAA creates a strong presumption in favor of enforcement of arbitration agreements. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002); Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); Great Western Mortgage Corp. v. Peacock, 110 F. 3d 222, 228 (3d. Cir. 1997); Farmland Dairies, Inc. v. Milk Drivers & Dairy Employees Union Local 680, 956 F. Supp. 1190, 1194 (D.N.J. 1997); Bush v. Paragon Prop., Inc., 165 Ore. App. 700, 710 (Or. Ct. App. 2000).

Indeed, the FAA "declares written provisions for arbitration 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" Doctor's Assocs. v. Casarotto, 517 U.S. 681, 683 (1996) (citing 9 U.S.C. § 2). Where no such grounds exist, a court "***shall*** on application of one of the parties ***stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*** . . ." 9 U.S.C. § 3 (emphasis added). See also Harris v. Green Tree Fin. Corp., 183 F.3d 173, 179 (3d Cir. 1999) (the presence of an enforceable arbitration provision means that a court "must" refer the case to arbitration pursuant to § 4 of the FAA). See also Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 475 (9th Cir. 1991), cert. denied, 503 U.S. 919 (1992) (this

"'liberal federal policy favoring arbitration agreements' . . .is at bottom a policy guaranteeing the enforcement of private contractual agreements . . . . Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability"); Bush, 165 Ore. App. at 710.

It is also well settled that the substantive protections of the FAA of agreements to arbitrate apply irrespective of whether arbitrability is raised in federal or state court. Martindale v. Sandvik, Inc., 173 N.J. 76, 84 (2002); Bush, 165 Ore. App. at 711. See also Moses H. Cone, 460 US at 24-25 ("Federal law in the terms of the arbitration Act [FAA] governs [arbitrability] in either state or federal court.") Further, arbitration agreements "may not be subjected to more burdensome contract formation requirements than that required for any other contractual topic." Martindale, 173 N.J. at 83. See also Bush, 165 Ore. App. at 711 ("The principal purpose of the FAA is to ensure that arbitration agreements are enforced by courts in the same manner as other contracts.")

Accordingly, the FAA's strong presumption in favor of arbitration supports the grant of Defendants' instant Motion to Stay Prosecution and Compel Arbitration.

2. New Jersey and Oregon State Law Create A Strong Presumption In Favor Of Arbitration.

The New Jersey Arbitration Act, N.J.S.A. 2A:24-1, "mirrors the FAA and provides that any provision to arbitrate an existing or future controversy shall be valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of a contract." Young v. Prudential Ins. Co., 297 N.J. Super. 605, 616-17 (App. Div.

1997), certif. denied, 149 N.J. 408 (1997). New Jersey law, like federal law, expresses a strong policy favoring arbitration and requires the liberal construction of contracts in favor of arbitration. Marchak v. Claridge Commons, Inc., 134 N.J. 275, 281 (1993); Young, 297 N.J. Super. at 617. Indeed, "the affirmative policy of [New Jersey], both legislative and judicial, favors arbitration as a mechanism of resolving disputes." Martindale, 173 N.J. at 92. See also Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 131 (2001) ("our jurisprudence has recognized arbitration as a favored method for resolving disputes"); Marchak, 134 N.J. at 281 (stating that "arbitration is a favored form of relief" and that "arbitrators function with the support, encouragement, and enforcement power of the State"). *Similarly*, Oregon's "state counterpart to [the] FAA also promotes enforcement of arbitration agreements." Bush, 165 Or. App. at 710. See also Peter Kiewit Sons' Co. v. The Port of Portland, 291 Or. 49, 53–55, 628 P.2d 720 (1981); Russell v. Kerley, 159 Or. App. 647, 650, 978 P.2d 446 (1999).

Accordingly, under federal, New Jersey or Oregon law, a strong presumption mandates that Plaintiff be compelled to arbitrate his claims against the Defendants, as he had agreed to do when he negotiated and voluntarily entered into the Agreement at issue.

3. The Employment Agreement That Plaintiff Negotiated Is Valid And Enforceable.

When deciding whether a matter must be referred to arbitration, a court need only determine: (1) whether a valid agreement to arbitrate exists and (2) whether the specific disputes fall within the substantive scope of the agreement. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626-28 (1985); John Hancock Mut. Life Ins. Co. v. Olick, 151

F.3d 132, 137 (3d Cir. 1998). If the questions are answered in the affirmative, the court "***must*** refer the matter to arbitration without considering the merits of the dispute." PaineWebber, Inc. v. Hartmann, 921 F.2d 507, 511 (3d Cir. 1990) (emphasis added).

In the present case, there is a valid agreement to arbitrate between the parties,[2] as evidenced by Section 5 of the Agreement. The Agreement expressly sets forth the parties' agreement to arbitrate all disputes between them relating to Plaintiff's former employment with Northwest, including the termination thereof and related claims. (See Employment Agreement, Exhibit 1, ¶ 5.1.2) ("***the parties agree that such Dispute will be resolved exclusively through final and binding arbitration . . . .***")

Moreover, the Agreement was negotiated between Plaintiff and Northwest over a period of four months, and, during the course of negotiations, Plaintiff indicated that he was represented by an attorney. (Rote Certification ¶ 6.) Neither Plaintiff nor his attorney raised any objections, at any time, to any provisions of the Agreement set forth in paragraph five of the Agreement. (Rote Certification ¶ 7.) Thus, the Agreement, a product of arm's length negotiations and consent, should be enforced as written.

Plaintiff's claims are clearly subject to arbitration as they are within the types of "disputes" governed by the Agreement. The Agreement governs all disputes "arising out of or

---

2 That Rote was not a "party" to the Employment Agreement is immaterial; the Arbitration Agreement of the Employment Agreement also requires Plaintiff to arbitrate his claims against Rote individually. Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110 (3rd Cir 1993); Leitizia v. Prudential Bache Securities, Inc., 802 F.2d 1185, 1188 (9th Cir 1985).

related to": (1) Plaintiff's employment, (2) any breach of the Employment Agreement, or (3) the termination of Plaintiff's employment, including but not limited to disputes alleging violations of "federal, state and/or local statutes," "public policy," or "contractual or common-law rights of either party . . . ." (See Employment Agreement. Exhibit 1, ¶ 5.) This language is more than sufficient to encompass Plaintiff's claims. Martindale, 173 N.J. at 96 (application for employment completed by plaintiff indicating that "all disputes relating to [her] employment with [the corporation] or termination thereof shall be decided by an arbitrator" was enforceable as a matter of law and required submission of plaintiff's statutory claims to arbitration). See also Young, 297 N.J. Super. at 613-14 (employee's whistleblower claims (CEPA and common law retaliatory discharge claims) were subject to arbitration because he agreed to arbitrate "any dispute, claim or controversy" with his employer). Moreover, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ." Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). See also Brayman Const. Corp. v. Home Ins. Co., 319 F.3d 622, 625 (3d Cir. 2003) (the FAA "mandates that 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'"); Sharon Steel Corp. v. Jewell Coal & Coke Co., 735 F.2d 775, 778 (3d Cir. 1984) (as long as a party's claim to arbitration of an issue is "plausible," the issue must be "passed on to the arbitrator"). See also Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.2d 1126, 1130 (9th Cir. 2000); United

Food & Commercial Workers Union, Local 770 v. Geldin Meat Co., 13 F.3d 1365, 1368 (9th Cir. 1994).[3]

Accordingly, Plaintiff's claims against Northwest and Rote are within the scope of the valid arbitration paragraphs of the Agreement and must therefore be arbitrated.

III. CONCLUSION

For the reasons set forth above, Defendants respectfully request that this Court grant the Motion to Stay Prosecution of the Litigation and Compel Arbitration.

DATED: December 1, 2005

MICHELE M. FOX
RICHARD S. SWARTZ
Ballard Spahr Andrews & Ingersoll, LLP
Plaza 1000, Suite 500
Main Street
Voorhees, NJ 08043-4636
(856) 761-3400
Attorneys for Defendants Northwest Direct Teleservices, Inc. and Timothy Rote

[3] It should also be noted that it is Plaintiff's burden to prove that his claims are not within the scope of the arbitration agreement. Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 91 (2000). See also Paulson v. Dean Witter Reynolds, Inc., 905 F.2d 1251, 1255 (9th Cir. 1990).