

Some time after defendants placed significant assets under plaintiff's management, Eugene Lebovitz observed what he considered unacceptable losses and contacted plaintiff about his concerns. Plaintiff offered Lebovitz \$25,000 to resolve his dispute, to which Lebovitz verbally assented. Lebovitz thereafter signed a form of agreement that articulated the settlement offer and purportedly released plaintiff from any further liability. Subsequently, Lebovitz became disenchanted with plaintiff's offer and contacted plaintiff to communicate his displeasure. Plaintiff did not increase the settlement offer and, instead, returned the form of agreement along with a letter that allegedly stated that Lebovitz must initial the last page in order to validate the parties' settlement agreement.

Lebovitz did not initial or return the form of agreement and instead secured counsel. Defendants' counsel contacted plaintiff regarding Lebovitz's dissatisfaction with the settlement agreement. In response, plaintiff deposited \$25,000 in defendants' account with plaintiff and then closed the account, sending defendants a check for \$24,642.19 (apparently after subtracting certain fees and expenses). Defendants have not cashed the check and their attorneys have deposited the proceeds in an escrow account.

On July 24, 2003, defendants filed a Statement of Claim for arbitration through the NASD.

II. Analysis

The parties agree that as a member of the NASD, plaintiff is subject to the NASD Code of Arbitration Procedure ("NASD Code"). Rule 10301(a) of the NASD Code, entitled "Required Submission" states:

Any dispute, claim, or controversy eligible for submission under the Rule 10100 Series between a customer and a member and/or associated person arising in connection with the business of such member or in connection with the activities of such associated persons shall be arbitrated under this Code, . . . upon the demand of the customer.

Rule 10101, of the Rule 10100 Series, defines “Matters Eligible for Submission”:

This Code of Arbitration Procedure is prescribed and adopted pursuant to Article VII, Section 1(a)(iv) of the By-Laws of the Association for the arbitration of any dispute, claim, or controversy **arising out of or in connection with the business of any member of the Association**, or arising out of the employment or termination of employment of associated person(s) with any member, with the exception of disputes involving the insurance business of any member which is also an insurance company:

- (a) between or among members;
- (b) between or among members and associated persons;
- (c) between or among members or associated persons and public customers, or others;

(emphasis added).

In addition to the obligations of the NASD Code, the parties, at the outset of their business relationship, entered into an agreement to arbitrate any future disputes. As part of initiating defendants’ account with plaintiff, the parties signed a “Standard Option Agreement,” one clause of which provides:

I/We agree that all controversies which may arise between us, including, but not limited to, those involving any transaction or the construction, performance, or breach of this or any other agreement between us, whether entered into prior, on, or subsequent to the date hereof, shall be determined by Arbitration. Any arbitration under this agreement shall be conducted only before the New York Stock Exchange, Inc., the American Stock Exchange, Inc., or Arbitration facility provided by any other exchange, the National Association of Securities, Inc.

As a customer of plaintiff, defendants assert that the NASD Code and the parties’ Standard Option Agreement authorizes them to compel arbitration of the parties’ dispute. Plaintiff argues, however, that the release the parties signed bars defendants’ claims against plaintiff and precludes defendants from bringing their claims before an arbitrator. According to plaintiff, the issue of the validity and enforceability of the

release did not arise out of or in connection with plaintiff's business relationship with defendants, and, therefore, plaintiff cannot be compelled to enter into arbitration.

In essence, plaintiff contends that the parties' present dispute does not fall within the scope of the parties' arbitration agreement. The Tenth Circuit already has held that the phrase "arising out of" in NASD Rule 10101 "must be broadly construed to mean 'originating from,' 'growing out of,' or 'flowing from.'" *Williams v. Imhoff*, 203 F.3d 758, 765 (10th Cir. 2000). Likewise, the Ninth Circuit has interpreted expansively the phrase "arising in connection with" in holding that it "reaches every dispute between the parties having a significant relationship to the contract and all disputes having their origin or genesis in the contract." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999).

The court concludes that the parties' dispute and the enforceability of the release easily fall within the scope of the parties' arbitration agreement. Defendants initially complained about plaintiff's actions in managing defendants' account. Plaintiff thereafter offered to defendants terms of settlement, which led to Lebovitz allegedly signing the release. No matter the phrasing preferred, the release "originated from," "grew out of," "flowed from," or "had its origin or genesis" in plaintiff's business dealings with defendants. Indeed, there is no other way to interpret the facts surrounding the release other than resulting from the parties' business relationship, particularly since defendants were still clients of plaintiff when the settlement offer was made and the release allegedly signed.

Further, there are no facts indicating that the release impaired or affected in any way the parties' contractual obligation to arbitrate their disputes. Under the Standard Option Agreement, the parties agreed to arbitrate any dispute arising from a transaction, contract, or agreement either on, before, or subsequent to the day the parties signed the document. Even assuming that Lebovitz signed the release, there is nothing in

the release nullifying the parties' obligation to enter into arbitration rather than bring their claims to court. Therefore, as the release is an alleged contract entered into subsequent to the signing of the Standard Option Agreement, resolution of the validity and enforceability of the release falls squarely within the scope of the parties' arbitration agreement.¹

In actuality, the dispute presented to the court does not touch upon the arbitrability of defendants' claims. This is not a question of the parties foregoing their contractual obligation to arbitrate their dispute. Rather, the issue is whether defendants contractually waived their rights to sue plaintiff at all. This is an issue properly decided in arbitration.

III. Order

IT IS THEREFORE ORDERED that defendants' Motion to Dismiss and to Compel Arbitration With Supporting Suggestions (Doc. 5) is granted and plaintiff's Motion for Injunction to Stay Arbitration Proceeding Pending Decision on Declaratory Judgment (Doc. 3) is denied. The court concludes that defendants' claims against plaintiff are subject to arbitration and hereby dismisses plaintiff's case.

IT IS FURTHER ORDERED that the parties shall proceed to arbitration in accordance with the provisions of the arbitration clause.

¹ Plaintiff asserts that in *Riley Manufacturing Company v. Anchor Glass Container Corporation*, 157 F.3d 775 (10th Cir. 1998), the Tenth Circuit confronted a similar factual scenario and held that the arbitration agreement in the original contract did not require arbitration of the parties' dispute. In *Riley*, plaintiff and defendant entered into a distribution agreement that contained an arbitration clause. A dispute arose between the parties that they resolved by a settlement agreement, which did not contain an arbitration provision and did contain a merger provision to supercede the original distribution agreement.

Riley is readily distinguishable from the present case. Here, the release did not include a merger provision or in any way alter the terms of the parties' arbitration agreement.

IT IS FURTHER ORDERED that this court shall retain jurisdiction to review, modify, or vacate any arbitration awards, should any party choose to seek such action as permitted by law or agreement.

Dated this 12th day of May 2004, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge