

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
TRIAL DIVISION – CIVIL**

PREMIER MAGNESIA, LLC,	:	SEPTEMBER TERM, 2010
	:	
Plaintiff,	:	NO. 02567
	:	
v.	:	COMMERCE PROGRAM
	:	
THOMAS M. MILLER,	:	Control Nos.: 10100305, 10103291
	:	
Defendant.	:	

**ORDER**

**AND NOW**, this 21<sup>st</sup> day of December, 2010, upon consideration of plaintiff's Petition for Preliminary Injunction, defendant's Petition to Compel Arbitration, the responses thereto, and all other matters of record, and in accord with the Opinion issued simultaneously, it is

**ORDERED** as follows:

1. The Petition for Preliminary Injunction is **DENIED**.
2. The Petition to Compel Arbitration is **GRANTED in part**.
3. The parties' dispute is arbitrable under the arbitration provisions of the parties' 2001 Employment Agreement, and the parties shall proceed with the AAA arbitration filed by the defendant.
4. The remainder of the Petition to Compel Arbitration is **DENIED**.
5. This action is **DISMISSED**.

**BY THE COURT:**

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**ARNOLD L. NEW, J.**

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Defendant.	:	

**OPINION**

Defendant Thomas M. Miller (“Miller”) is a former high level employee of plaintiff Premier Magnesia, LLC (“Premier”). In 2001, the parties entered into an Employment Agreement with a three year term. The Employment Agreement contained the following arbitration provision:

Any dispute or controversy arising out of or relating to this Agreement, or any breach thereof, shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment upon such award rendered by the three Arbitrators may be entered in any court having jurisdiction thereof.

The Employment Agreement also contained as “Exhibit A” a Phantom Stock Plan (the “Plan”) by which Premier gave Miller phantom stock appreciation rights (“PARs”) in the company. The Plan provided the PARs would “vest in equal installments over a three-year period.” The Plan also set forth when and how Miller would be paid for his PARs upon termination of his employment.

The term of the Employment Agreement expired in 2004, and the parties never entered into a subsequent employment agreement. In 2008, the parties entered into a Loan Agreement, Promissory Note and Non-Compete Agreement (“Loan Agreement”) which also contained an

“Exhibit A” entitled “Phantom Stock Plan” (the “Amended Plan”).<sup>1</sup> This Amended Plan recites the language of the original Plan and also states:

The following Phantom Stock Plan was part of an Employment Agreement between the Company and Miller dated March 16, 2001. Such Employment Agreement has since expired, however, both the Company and Miller acknowledge and agree that Miller’s rights under the Phantom Stock Plan have vested and will be paid upon a subsequent sale of the Company to a third party.

Miller retired from his employment with Premier in 2010 and sought payment for his PARs. Premier refused, so Miller filed a claim with the American Arbitration Association (“AAA”) in which he alleged Premier breached the Plan. Premier then filed this action and a Petition for Preliminary Injunction seeking to prevent the arbitration from proceeding. This Petition is presently before the court.

In addition, Miller filed a Petition to Compel Arbitration in this action which is also before the court. In it, he claims the issue of arbitrability raised in Premier’s Petition must be decided by the arbitrators under the following provision of AAA’s Employment Arbitration Rules and Mediation Procedures (“AAA Rules”):

The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

The United States Supreme Court recently held the threshold issue of arbitrability should be decided by the court, unless the parties “clearly and unmistakably” provide for the arbitrators to decide arbitrability.<sup>2</sup> In that case, the Court found enforceable an arbitration agreement

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<sup>1</sup> The court uses the term “Amended Plan” for convenience only and makes no determination as to whether and how the “Amended Plan” altered the parties’ agreement as set forth in the original Plan.

<sup>2</sup> Rent-A Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2778 (2010).

granting “exclusive authority” to the arbitrators to resolve issues of “interpretation, applicability, enforceability or formation” of the arbitration agreement.<sup>3</sup>

The arbitration provision in the Employment Agreement at issue here does not expressly provide for the issue of arbitrability to be decided by the arbitrators. The provision of AAA’s Rules, to which Miller cites and which is arguably incorporated by reference into the Employment Agreement’s arbitration provision,<sup>4</sup> does not preclude a court from deciding the issue of arbitrability. It simply gives the arbitrators the power to decide arbitrability issues when the parties ask the arbitrators to do so. The provision does not, by itself, give the arbitrators exclusive jurisdiction over such issues. Since Premier and Miller did not clearly and unmistakably provide in their Employment Agreement for the arbitrators to decide the threshold issue of arbitrability, the court must decide the issue.

Where, as here, “one party to an agreement seeks to enjoin the other from proceeding to arbitration, judicial inquiry is limited to the questions of (1) whether an agreement to arbitrate was entered into and (2) whether the dispute involved comes within the ambit of the arbitration provision.”<sup>5</sup> Miller’s arbitration claim is based on an alleged breach of the payment provisions of the original Plan, which was attached as Exhibit A to the Employment Agreement. The Employment Agreement contains an arbitration provision governing “any dispute or controversy arising out of or relating to this Agreement, or any breach thereof.” The parties agree the three year term of the Employment Agreement expired in 2004. However, the expiration of the term does not necessarily invalidate the arbitration provision. Since the Plan is part of the

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<sup>3</sup> *Id.*, 130 S. Ct. at 2775.

<sup>4</sup> Plaintiff argues this provision of the AAA Rules did not exist when the parties entered into the Employment Agreement.

<sup>5</sup> Messa v. State Farm Ins. Co., 641 A.2d 1167, 1168 (Pa. Super. 1994).

Employment Agreement, any claim for breach of the Plan is a claim for breach of the Employment Agreement. Since any claim for breach of the Agreement must be arbitrated, Miller's claim for breach of the Plan must be arbitrated.

In this action, Premier asserts a claim for declaratory judgment under the Amended Plan. This claim is presumably also his defense to Miller's claim in arbitration. Premier claims the Amended Plan modified the payment terms of the original Plan. Specifically, Premier claims it is not obligated to pay Miller for his PARs until the Company is sold, whereas Miller claims the Plan provides for payment upon termination of his employment.

Premier also argues both its and Miller's claims are not arbitrable because the Loan Agreement to which the Amended Plan is attached does not contain any arbitration provision. However, the Amended Plan references, and purportedly amends, the original Plan, which is subject to the arbitration provision of the Employment Agreement. Nothing in the Amended Plan, or the Loan Agreement, states the Amended Plan is not also subject to the arbitration provision governing the original Plan. Therefore, the parties' entire dispute regarding the Plan and its alleged amendment must be submitted to the arbitrators for decision.

For all the foregoing reasons, plaintiff's Petition for Injunctive Relief is denied and defendant's Petition to Compel Arbitration is granted in part and denied in part.

**BY THE COURT:**

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**ARNOLD L. NEW, J.**