IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

STANLEY CARDER, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 3319-VCP
	)	
CARL M. FREEMAN COMMUNITIES, LLC, a Delaware Limited Liability Company and FIRST REPUBLIC MORTGAGE CORPORATION,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: September 29, 2008
Decided: January 5, 2009

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K. William Scott, Esquire, SCOTT AND SHUMAN, LLC, West Fenwick, Delaware, *Attorney for Defendant Carl M. Freeman Communities, LLC*

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PARSONS, Vice Chancellor.

This is an action by a residential home purchaser against the developer of the property and an affiliated mortgage company. The purchaser alleges he was fraudulently induced to enter into a contract of sale for the property, because he was told he qualified for a mortgage even though he could not document part of his income. The purchaser further alleges he relied on that representation in signing the contract of sale, which did not include a financing contingency. When it came time to close, the mortgage company refused to provide a mortgage on the same terms as it initially offered. The purchaser was unable to close on the contract, and the developer retained the deposit of approximately ten percent of the purchase price, claiming the purchaser had forfeited it.

The purchaser seeks rescission of the contract and return of his deposit based on fraud, misrepresentation, and mistake of fact. Defendants have moved to dismiss for lack of subject matter jurisdiction based on an arbitration clause in the contract of sale. Based on my reading of the contract of sale and the relevant precedents, the question of whether the purchaser's claims fall within the scope of the arbitration clause must be decided by the arbitrator, not the court. Accordingly, I dismiss this action without prejudice so that the parties may pursue their respective arguments in arbitration.

I. BACKGROUND

A. Parties

Plaintiff, Stanley Carder ("Carder"), is an individual who signed a contract of sale with Defendant Carl M. Freeman Communities, L.L.C. ("Freeman"), for a property in Bayside, described as an "upscale golf community," located in Sussex County,

Delaware.[1] The second Defendant, First Republic Mortgage Corporation ("First Republic"), is a limited liability company in the mortgage business that allegedly is a wholly-owned subsidiary or close affiliate of Freeman.

B. Facts

Carder wanted to buy a property in Bayside, so in early July 2005 he met with Freeman sales agents. The sales contract Freeman provided required those purchasers using financing to complete a mortgage application with First Republic, which had its mortgage sales agents on-site. Before he entered into a sales contract, Carder had an interview with First Republic regarding the possibility of his obtaining a mortgage to purchase the Bayside property. During the interview, First Republic asked Carder for his annual income. Carder allegedly responded that he made approximately $154,000 from various jobs, but could not document part of his income.

First Republic completed the application, noted $154,000 as "Salary per year," and instructed Carder to sign the application. Carder executed the First Republic application on July 3, 2005. After Carder received pre-qualification approval from First Republic, Freeman offered Carder a contract to purchase a property, including a home to be built by Freeman, in Bayside at a price of $558,399.00.

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[1] The facts recited in this memorandum opinion are derived from the well-pleaded allegations in Carder's Complaint.

The contract of sale did not include a financing contingency. Additionally, section 9 of the contract, entitled "Default," contains an arbitration clause. That clause reads, in part:

> Seller and Purchaser agree that all disputes arising in any way under the Agreement shall be decided by arbitration between the parties, in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and the decision by the arbitrator shall be absolutely binding upon the parties. Notice of any demand for arbitration shall be sent in writing to Carl M. Freeman Communities. Such arbitration shall be conducted in Sussex County, Delaware. The parties shall share equally all costs associated with such arbitration, but each party shall be responsible for their own legal fees and other costs.[2]

On July 9, 2005, Freeman accepted Carder's deposit check in the amount of $56,189.80. In the last quarter of 2006, Defendants advised Carder that First Republic would not commit to a mortgage loan on the same terms and conditions it had offered before Carder signed the Contract. Nevertheless, Freeman demanded that Carder close on the property. Carder would not do so, however, because he could not obtain financing on the same terms as those offered by First Republic without putting more money down. Freeman has refused to return Carder's deposit.

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[2] The contract of sale (the "Contract") is attached to Defendant First Republic Mortgage Corporation's Opening Brief in Support of its Motion to Dismiss as Exhibit 2. In this opinion, First Republic's opening and reply briefs are cited to as FROB and FRRB, respectively. Freeman's opening brief is referred to as FOB, and its reply as FRB, while Plaintiff's answering brief is cited to as PAB.

C. Procedural History

Carder filed his Complaint on October 29, 2007, seeking rescission of the Contract based on fraud, misrepresentation, and mistake of fact. On February 20, 2008, Freeman and First Republic moved to dismiss the Complaint for lack of subject matter jurisdiction pursuant to Court of Chancery Rule 12(b)(1) based on the applicability of the arbitration clause. The parties briefed that motion, and, at my request, the additional, threshold question of who should decide issues of substantive arbitrability. Having since heard argument on the motion to dismiss, this is my decision regarding it.

D. Parties' Contentions

Defendants essentially argue that the arbitration clause in the Contract controls, and Plaintiff's claims fall within the scope of that provision. Thus, Defendants argue, this case should be dismissed for lack of subject matter jurisdiction. In that regard, Defendants also contend that this Court lacks jurisdiction to decide questions as to the validity or scope of the arbitration provision.

Carder disagrees, and contends that the arbitration clause in the Contract does not apply to his claims and that he is entitled to present them to this Court. According to Carder, this Court has jurisdiction to decide arbitrability, because the arbitration clause does not generally refer all claims related to the Contract to the arbitrator. Carder further maintains that his claims are properly before this Court, because they fall outside the scope of the arbitration clause. In particular, Carder contends his claim for fraudulent inducement of the property sale does not "arise in any way under the Agreement," but

rather arose from circumstances outside the four corners of the Contract, and is therefore not subject to arbitration.

II. ANALYSIS

A. Standard

In considering a motion to dismiss for lack of subject matter jurisdiction, the court must address the nature of the wrong alleged and the remedy sought to determine whether a legal, as opposed to an equitable, remedy is available and adequate.[3] If a claim is arbitrable, *i.e.*, properly committed to arbitration, this Court lacks subject matter jurisdiction because arbitration provides an adequate legal remedy.[4] Delaware's public policy strongly favors arbitration, but arbitration is consensual, so the parties must have agreed to it.[5] Accordingly, if the parties contracted to submit claims, such as those asserted in Carder's Complaint, to arbitration, this Court will dismiss the Complaint for lack of subject matter jurisdiction.[6]

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3 *IMO Indus., Inc. v. Sierra Int'l, Inc.*, 2001 WL 1192201, at *2 (Del. Ch. Oct. 1, 2001).

4 *Id.*

5 *Id.*

6 *See Brown v. T-Ink, LLC*, 2007 WL 4302594, at *10 (Del. Ch. Dec. 4, 2007). Because the parties to the Contract provided for Delaware as the location of the arbitration, the Uniform Arbitration Act, as enacted by Delaware, 10 *Del. C.* §§ 5701-5725 (the "DUAA"), applies. *See* 10 *Del. C.* § 5702(a). In addition, the property in issue is located in Delaware. No party suggested that the Federal Arbitration Act (the "FAA") controls or that it would produce a different result than the DUAA. In this respect, I note that this court previously has held that the DUAA is consistent with the FAA. *See Country Life Homes v. Shaffer*, 2007 WL 3196337, at *3 n.17 (Del. Ch. Jan. 31, 2007). Moreover, the Supreme Court has

B. Who Should Decide Substantive Arbitrability?

In determining whether a claim is subject to arbitration, Delaware courts recognize a dichotomy between questions of "procedural arbitrability" and "substantive arbitrability."[7] Questions of procedural arbitrability deal with whether the parties have complied with the terms of the arbitration clause.[8] For example, a contract might provide that to arbitrate a dispute a party must provide notice to another party within ten days of some event. Whether a party satisfied that requirement would pose a question of procedural arbitrability. There is a presumption that questions of procedural arbitrability will be handled by arbitrators and not by courts.[9]

"Substantive arbitrability" is more complicated. Substantive arbitrability concerns the applicability of an arbitration clause, and includes determining the scope of an arbitration provision, as well as broader issues, such as whether a contract or an arbitration clause is valid and enforceable. The underlying question is "whether the parties decided in the contract to submit a particular dispute to arbitration."[10] Where the parties bargained for an arbitration provision in a contract, Delaware courts generally

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observed that "Delaware arbitration law mirrors federal law." *James & Jackson, LLC v. Willie Gary, LLC* , 906 A.2d 76, 79 (Del. 2006). Therefore, this opinion focuses on the decisions of the Delaware courts whether they arose in the context of the DUAA or the FAA.

7 *Willie Gary*, 906 A.2d at 79.

8 *Brown*, 2007 WL 4302594, at *10.

9 *See Willie Gary*, 906 A.2d at 79.

10 *Id*.

favor arbitration of particular disputes and "ordinarily resolve any doubts in favor of arbitration."[11]

Before determining substantive arbitrability, however, courts must address a threshold question that involves the second-order issue of "who should decide 'whether the parties decided in the contract to submit a particular dispute to arbitration or to a court.'" Justice Breyer accurately described this threshold question as "rather arcane."[12] When sitting at the bargaining table with pen in hand, the parties may not be thinking about the "significance of having arbitrators decide the scope of their own powers."[13] For this reason, the presumption favoring arbitrability is reversed as to this threshold question. In *DMS Properties*, the Delaware Supreme Court held "the question of whether the parties agreed to arbitrate is generally one for the courts to decide and not for arbitrators."[14] In *Willie Gary*, the Supreme Court held that courts should presume the parties did not agree to arbitrate arbitrability, unless there is "clear and unmistakable evidence that they did so."[15]

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11 *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 155-56 (Del. 2002).

12 *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995).

13 *Id.*

14 *DMS Properties-First, Inc. v. P.W. Scott Assoc., Inc.*, 748 A.2d 389, 391-92 (Del. 2000).

15 *Willie Gary*, 906 A.2d at 79 (quoting *First Options*, 514 U.S. at 944).

Thus, this Court's initial task is to determine "who should decide 'whether the parties decided in the contract to submit a particular dispute to arbitration.'" If the answer is the arbitrator, then I would not address whether the particular claims asserted by Carder are covered by the arbitration clause.

In *Willie Gary*, the Supreme Court addressed an example of what would constitute "clear and unmistakable evidence" of the parties' intent to arbitrate arbitrability.[16] The Court adopted the majority federal rule that reference in an arbitration clause to a set of arbitration rules that empower arbitrators to decide arbitrability, such as the American Arbitration Association ("AAA") rules, combined with an "arbitration clause [that] generally provides for arbitration of all disputes" would constitute clear and unmistakable evidence that the parties intended to submit arbitrability issues to an arbitrator.[17]

Thus, *Willie Gary* articulated a two-pronged test for determining whether a reference to the rules of an arbitral body in an arbitration clause would rise to the level of "clear and convincing evidence" of the parties' intent to arbitrate arbitrability. The Supreme Court held that a showing of the following two conditions would satisfy that

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16 *Id.* at 80.

17 Without endorsing the observation, the *Willie Gary* trial court acknowledged that considering a reference to AAA rules, even absent a general clause referring all disputes to arbitration, to be clear and unmistakable evidence of the parties intent to submit arbitrability questions to an arbitrator would be a rational policy choice: "Such a ruling would turn such a reference into a term of art on the subject of arbitrability and arguably be economically efficient as a policy rule." *Willie Gary, LLC v. James & Jackson, LLC*, 2006 WL 75309, at *8 (Del. Ch. Mar. 14, 2006), *aff'd on other grounds*, 906 A.2d 76, 79 (Del. 2006).

evidentiary standard: (1) a statement that generally refers all disputes to arbitration; and (2) a reference to a set of rules that would empower arbitrators to decide arbitrability.

Here, the Contract between Carder and Freeman contains an arbitration clause that reads, in part:

> Seller and Purchaser agree that all disputes *arising in any way under the Agreement* shall be decided by arbitration between the parties, in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and the decision by the arbitrator shall be absolutely binding upon the parties.[18]

The arbitration clause specifically refers to the Construction Industry Arbitration Rules of the AAA (the "AAA Rules"). Rule 8(a) of the AAA Rules provides: "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."[19] Thus, the Contract satisfies the second prong of the *Willie Gary* test.

Whether the first *Willie Gary* prong has been satisfied presents a closer question. The clause in issue reads "all disputes arising in any way under the Agreement . . . ." In *Willie Gary*, the Court acknowledged that the arbitration clause there contained broad language that generally referred all disputes to arbitration, because it applied to "[a]ny controversy or claim *arising out of or relating to* the Agreement . . . ."[20] Ultimately, the

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[18] Contract § 9 (emphasis added).

[19] AAA Construction Industry Arbitration Rule 8(a), *available at* http://www.adr.org/sp.asp?id=22004#ArbRules.

[20] *Willie Gary*, 906 A.2d at 79 (emphasis added).

Supreme Court concluded in *Willie Gary* that the contract language at issue there did not rebut the presumption that a court would decide the arbitrability of arbitrability, because the agreement contained significant carve-outs that recognized the ability of the parties to seek relief from the courts.[21]

Here, there are no such carve-outs. The language "all disputes arising in any way under" the Contract, however, is arguably narrower than the "arising out of or relating to this Agreement or the breach of this Agreement" language in *Willie Gary*. The difference in language conceivably could be important in determining the scope of the arbitration provision in the Contract between Carder and Freeman. Yet, that does not mean the difference is material to determining the threshold question of whether arbitrability is arbitrable. In that regard, I note that, although some of the examples the Supreme Court cited in *Willie Gary* of arbitration clauses that "generally provide[] for arbitration of all disputes" included disputes not only "arising out of," but also "relating to" or "in connection with" an agreement, two others did not. One of those covered "any controversy arising with respect to this Agreement . . .", and the other provided that "any Claim . . . shall be resolved by binding arbitration . . . ."[22] In the context of deciding whether the arbitrator or this Court should determine substantive arbitrability in this case, I am hard pressed to find a material difference between the language in the Contract at issue, *i.e.*, "all disputes arising in any way under the Agreement," and "any controversy

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21 *Id.* at 80.

22 *Id.* at 80 n.9.

arising with respect to this Agreement," which the Supreme Court viewed as generally providing for the arbitration of all disputes. The additional fact that Delaware courts previously have characterized similar "arising under" language as reflecting a broad arbitration provision also supports the view that such language "generally provides for the arbitration of all disputes."[23]

Furthermore, Carder has not pointed to any other provision of the Contract that would suggest the parties did not intend the arbitration clause generally to provide for arbitration of all disputes. In that sense, this case is distinguishable from *Brown v. T-Ink, LLC*[24] in which this Court held that a provision requiring arbitration of any dispute arising between the parties "concerning the interpretation or performance of this Agreement" did not cover a claim for fraud in the inducement of the Agreement. A key fact supporting that conclusion was the parties' use of broader "arising out of or relating to this agreement" language in the immediately preceding paragraph regarding waiver of the right to a jury trial. The use of that broad language suggested that the later use in the same agreement of the arguably narrower "arising in any way under" language was intentional.[25] No analogous facts exist in this case. Therefore, I find that the "arising in

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[23] *See McLaughlin v. McCann*, 942 A.2d 616, 626 (Del. Ch. 2008); *Caproc Manager, Inc., v. Policemen's & Firemen's Ret. Sys. of the City of Pontiac*, 2005 WL 937613, at *2 (Del. Ch. Apr. 18, 2005); *Anadarko Petroleum Corp. v. Panhandle E. Corp.*, 1987 WL 16508, at *2-3 (Del. Ch. Sept. 8, 1987).

[24] 2007 WL 4302594, at *10 (Del. Ch. Dec. 4, 2007).

[25] *Id.* at *11. Similarly, *Matria Healthcare, Inc. v. Coral SR LLC* does not support Plaintiff's position. 2007 WL 763303, at *5 (Del. Ch. Mar. 1, 2007). In that case,

any way under" language in Carder's Contract satisfies the first prong of the *Willie Gary* test.

The clause here also closely parallels the arbitration clause at issue in *McLaughlin v. McCann*, which the court concluded "generally provided for arbitration of all disputes."[26] There, the court found the language "aris[ing] under this agreement" met the first *Willie Gary* prong, even though the party resisting arbitration argued that it compared unfavorably with the broader locution "arising out of *or relating to*" in terms of the *Willie Gary* presumption.[27] Carder makes essentially the same argument. The dispute centers on the relative weight of adding to an arbitration clause, which includes a phrase like "arising under," language such as "related to" or "in connection with," *i.e.*, a phrase that explicitly extends beyond the four corners of the contract.

In *McLaughlin*, Vice Chancellor Strine determined that the "generally provides for arbitration of all disputes" language in *Willie Gary* requires something less than a clause that refers to arbitration every conceivable cause of action related to or in connection with the contract. The court reasoned that if the Supreme Court had meant "all disputes

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the court addressed a situation that is distinguishable in several respects from the facts here: the agreement established four different arbitration processes; the catch-all provision did not contain a reference to a set of arbitration rules; and one clause that did reference arbitration rules expressly excepted certain matters. *Id.*

[26] 942 A.2d at 626. I also note that Carder repeatedly cited *McLaughlin* with approval in his Supplemental Memoranda of Law on Substantive Arbitrability ("Pl.'s Supp. Mem."). Indeed, Carder cites *McLaughlin* as providing the "best explanation" of the *Willie Gary* decision. Pl.'s Supp. Mem. at 1.

[27] *McLaughlin*, 942 A.2d at 625 (emphasis added).

without exception," then the reference to the AAA rules would be without independent legal significance, because a clause that referred all disputes without exception to arbitration in itself could be clear and unmistakable evidence of an intent to refer questions of substantive arbitrability to the arbitrator, even absent any reference to the AAA rules.[28] In *McLaughlin*, Vice Chancellor Strine summarized his understanding of the applicable test as follows:

> What I take away from the "generally provides for arbitration of all disputes" requirement is that the carveouts and exceptions to committing disputes to arbitration should not be so obviously broad and substantial as to overcome a heavy presumption that the parties agreed by referencing the AAA Rules and deciding to use AAA arbitration to resolve a wide range of disputes that the arbitrator, and not a court, would resolve disputes about substantive arbitrability. In a case where there is any rational basis for doubt about that, the court should defer to arbitration, leaving the arbitrator to determine what is or is not before her. By this approach, this court can achieve the efficiency contemplated by the Supreme Court's *Willie Gary* decision. This approach is analogous to the approach recently taken in *BAYPO Ltd. Partnership v. Technology JV, LP*, where this court found that a narrowly tailored exception to an arbitration clause that otherwise submitted all disputes to arbitration did not negate the conclusion that a reference to the AAA Rules provided evidence of the parties' clear and unmistakable intent to arbitrate arbitrability.[29]

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[28] After *Willie Gary*, the premise that the Supreme Court would find arbitrability to be arbitrable based on a very broad clause in the absence of a reference to a set of rules that empowered arbitrators to decide the scope of their own jurisdiction is, at least, debatable.

[29] 942 A.2d at 625 (internal footnotes omitted). In the *Baypo* decision, the court determined that the carve-outs for judicial relief from an otherwise broad arbitration provision in that case did not provide the same "boundless and

I concur with the understanding of the *Willie Gary* test reflected in the *McLaughlin* case, and follow that approach here.

In particular, the arbitration clause at issue in this case references AAA Rules that empower the arbitrator to determine questions as to her own jurisdiction and reflects a decision of the parties to use AAA arbitration to resolve a wide range of disputes. There are no carve-outs and the language of the arbitration clause arguably provides generally for arbitration of all disputes. To the extent there is any basis for doubt about any of these findings, I conclude that consistent with the holding in *McLaughlin* this Court "should defer to arbitration, leaving to the arbitrator to determine what is or is not before her." I, therefore, hold that both prongs of the *Willie Gary* test have been met in this case, and that the parties must present their disputes as to substantive arbitrability to the arbitrator in the first instance.

C. Can First Republic Enforce the Arbitration Clause?

First Republic was not a signatory to the Contract between Carder and Freeman. The question thus arises whether First Republic, as a nonsignatory, can enforce the arbitration agreement. In its papers concerning the underlying question of substantive arbitrability, First Republic argues that it is a third-party beneficiary, and thus has the

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independent access to judicial relief that prompted the ruling in *Willie Gary*." *Baypo Ltd. P'ship v. Tech. JV, LP*, 940 A.2d 20, 26-27 (Del. Ch. 2007). Thus, the court held that an arbitration clause could still generally refer all disputes to arbitration even in the face of limited carve-outs. In *Baypo*, however, the court also noted that the arbitration clause specifically directed "that an arbitrator decide all procedural and substantive issues." *Id.*

right to enforce the Contract, including the arbitration clause. As one leading commentator has stated, "where [a] contract contains an arbitration clause which is legally enforceable, the general rule is that the beneficiary is bound thereby to the same extent that [one of the signatories] is bound."[30]

Demonstrating that a party is a third-party beneficiary requires proof of three elements: (1) an intent between the contracting parties to benefit a third party through the contract; (2) an intent that the benefit serve as a gift or in satisfaction of a preexisting obligation to the third party; and (3) a showing that benefiting the third party was a material aspect to the parties in entering into the contract.[31] Carder denies the existence of any of these elements. He argues that he never intended the Contract to confer a benefit on First Republic, that the transaction was neither a gift nor in satisfaction of a preexisting obligation, and that the selection of a mortgage lender was not material to his Contract with Freeman.

The *McLaughlin* case is instructive on this issue, as well. There, the court determined that "a signatory to an agreement vesting questions of substantive arbitrability to the arbitrator must resolve disputes about arbitrability against a nonsignatory before the arbitrator."[32] The court stated that "absent a clear showing that the party desiring

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30 13 Richard A. Lord, *Williston on Contracts* § 37.24, at 154 (4th ed. 1992).

31 *See Comrie v. Enterasys Networks, Inc.*, 2004 WL 293337, at *3 (Del. Ch. Feb. 17, 2004).

32 *McLaughlin*, 942 A.2d at 625.

arbitration has essentially no nonfrivolous argument about substantive arbitrability to make before the arbitrator, the court should require the signatory to address its arguments against arbitrability to the arbitrator."[33] Applying this standard, I find First Republic has articulated, at least, a nonfrivolous argument that it is an intended third-party beneficiary of the Contract between Carder and Freeman.

As to the first element, whether the parties intended to benefit First Republic, there is no dispute that the Contract specifically identifies First Republic, and gives First Republic an opportunity to provide a mortgage for the purchase by Carder.[34] That business opportunity arguably constitutes a benefit the parties intended to confer on First Republic. Moreover, as to the third element, because Freeman required the purchaser to make an application with First Republic, one reasonably could infer that requirement was material to at least Freeman, if not to Carder. In fact, Carder's Complaint rests on the assertion that he intended to use the financing offered by First Republic. Thus, I cannot say it would be frivolous for First Republic to contest Carder's claim that the selection of First Republic as the mortgage lender was not a material part of the contract between Carder and Freeman.

It is also plausible the second element could be satisfied; that is, that there was an intent that the benefit to First Republic would satisfy a preexisting obligation to the third party. Carder alleges First Republic is either owned by or affiliated with Freeman. It is

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[33] *Id.* at 626-27.

[34] Contract § 3.

conceivable, therefore, that Freeman's inclusion of First Republic in the Contract may have been in satisfaction of an obligation Freeman owed to First Republic to refer potential purchasers to it. In these circumstances, First Republic arguably would be subject to the arbitration agreement, if Carder, instead of First Republic, was the one attempting to enforce the arbitration provision.[35]

In sum, First Republic has nonfrivolous grounds to contend it meets each of the elements for third-party beneficiary status. Thus, First Republic's claim of such status is sufficiently colorable to warrant presenting it to the arbitrator in keeping with Carder and Freeman's apparent agreement to arbitrate arbitrability.[36]

III. CONCLUSION

For the reasons stated, the question of whether Carder's claims fall within the scope of the arbitration clause must be decided by the arbitrator, not this Court. Accordingly, I grant Defendants' motion and dismiss this action without prejudice so that the parties may pursue their respective arguments in arbitration.

IT IS SO ORDERED.

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[35] *See Baypo*, 940 A.2d at 27 (describing how common sense indicates nonsignatories were subject to an arbitration agreement, because the nonsignatories were affiliates of signatories, although the court also noted several other factors that may or may not have been outcome determinative).

[36] *See McLaughlin*, 942 A.2d at 626-27.