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

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| OTG EXPERIENCE, LLC, and OTG CONSOLIDATED HOLDINGS, INC., | : | OCTOBER TERM, 2014 |
| | : | NO. 00715 |
| Plaintiffs, | : | COMMERCE PROGRAM |
| v. | : | |
| MICHAEL SCHULSON, and GABRIEL FERRARO, | : | |
| Defendants. | : | |

**OPINION**

Defendant Michael Schulson appeals from this court's March 23, 2015 Order overruling his Preliminary Objections to the Complaint. In those Preliminary Objections, Mr. Schulson alleged that any dispute between him and plaintiff OTG Experience LLC ("Experience") is subject to an arbitration provision in a contract between him and a non-party, OTG Management Inc. ("Management").[1]

In the Complaint, plaintiffs, Experience and OTG Consolidated Holdings, Inc. ("Consolidated"), which apparently operate numerous airport restaurants, assert claims against two of their former employees: Mr. Schulson, and his alleged co-conspirator, defendant Gabriel Ferraro. Plaintiffs allege that Mr. Ferraro and Mr. Schulson, working in combination on behalf of a non-party, solicited employees from, and disparaged, plaintiffs.

Plaintiffs assert claims against both defendants for injunctive relief, breach of their respective contracts with plaintiffs, and civil conspiracy. Plaintiffs also assert a claim for breach

[1] Experience alleges Management assigned that contract to Experience.

of fiduciary duty against Mr. Schulson and a claim against Mr. Ferraro for aiding and abetting Mr. Schulson's breach of fiduciary duty.

Experience bases its breach of contract claim against Mr. Schulson on a 2010 contract between Mr. Schulson and Management entitled "Restaurant Concept Development Agreement" (hereinafter the "Development Agreement"). Under this Agreement, Mr. Schulson agreed "to assist [Management] and one of more of its affiliates in the development of a[n] Asian bistro and sushi restaurant concept for the [Philadelphia] Airport." The Development Agreement contains Non-Competition, Non-Solicitation, and Non-Disparagement clauses, as well as an Arbitration clause.

Consolidated bases its breach of contract claim against Mr. Ferraro on a 2007 contract between Mr. Ferraro and Consolidated "and all of OTG's direct and indirect subsidiaries and affiliated companies" which is entitled "Agreement Regarding Post Employment Competition" (hereinafter the "Competition Agreement"). That Agreement contains Non-Disclosure, Non-Disparagement, Non-Competition, and Non-Solicitation clauses. Mr. Ferraro's Competition Agreement does not contain an Arbitration provision. Therefore, neither plaintiffs nor Mr. Ferraro can be compelled to arbitrate plaintiffs' claims against Mr. Ferraro.

If plaintiffs' claims against Mr. Schulson were easily severable from plaintiffs' claims against Mr. Ferraro, this court would send at least the breach of contract claim against Mr. Schulson to arbitration pursuant to the terms of the Development Agreement. However, plaintiffs' claims against the two defendants are inextricably intertwined, as evidenced by the following allegations in the Complaint:

> 23. In July 2014, Defendant Schulson opened the Independence Beer Garden ("IBG"), a full-service restaurant and bar located on Independence Mall in Philadelphia.

24. In the run-up to IBG's opening, Defendant Ferraro-while still employed at OTG-secretly acted as a recruiting agent for Defendant Schulson. In this regard, Defendant Ferraro utilized, inter alia, his Facebook and OTG email accounts in an effort to poach OTG employees for the benefit of Schulson's IBG venture and otherwise disparage OTG.

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26. Effective August 6, 2014, Defendant Ferraro resigned from OTG and thereafter joined Defendant Schulson at IBG.

27. Defendant Ferraro was successful in recruiting OTG employee Tom Ksiazek to leave OTG on or about August 14, 2014 and join Defendant Schulson at IBG.

28. Defendants Schulson and Ferraro attempted to recruit OTG manager Ed Dingler for employment at IBG, with Schulson offering him a $65,000 annual salary and the opportunity to buy into the business.

29. Defendant Ferraro, acting on behalf of Defendant Schulson, also attempted to recruit OTG manager Nick Meisberger for employment at IBG.

30. Upon information and belief, Defendant Ferraro has engaged in numerous other instances of disparagement of OTG and solicitation of OTG employees to work for Defendant Schulson at IBG.

31. Defendant Schulson breached the Development Agreement, and continues to violate his obligations to OTG thereunder, by, inter alia, employing Messrs. Ferraro and Ksiazek at IBG and by inducing Defendant Ferraro to solicit Mr. Ksiazek and other OTG employees to work at IBG.

32. Defendant Ferraro breached the Non-Compete Agreement, and continues to violate his obligations to OTG thereunder by, inter alia, recruiting OTG employees to work at IBG and disparaging OTG's businesses.

If this court sent the claim against Mr. Schulson to arbitration, the claims against Mr. Ferraro would remain pending here, and this court and the arbitrator(s) would have to proceed with two separate actions involving the same wrongful acts of solicitation and disparagement,

> [E]nforcement of an arbitration provision where, as here, the underlying dispute includes parties not subject to the arbitration process, would frustrate rather than foster the objectives of alternate dispute resolution. Requiring [plaintiffs] to arbitrate [their breach of contract] claim against [Mr. Schulson] would force [plaintiffs] to relitigate the same liability and damages issues in two separate forums, before two different fact-finders; such repetitious litigation would be uneconomical for the court as well as the parties involved. Thus, in this case, arbitration would not promote the swift and orderly resolution of claims; instead, it would engender a protracted, piecemeal disposition of the dispute. Under these circumstances, public policy interests are best served by [keeping the sole arbitrable claim before this court], which would allow for resolution of the involved disputes at one time with all parties present.[2]

[2] Sch. Dist. of Philadelphia v. Livingston-Rosenwinkel, P.C., 690 A.2d 1321, 1323 (Pa. Commw. 1997).

If the parties proceeded with such intertwined claims in both arbitration and litigation, they could easily end up with inconsistent outcomes against alleged co-conspirators.[3] To avoid such duplicative proceedings and conflicting judgments, this court declined to send plaintiffs' claim against Mr. Schulson to arbitration.

For all the foregoing reasons, this court respectfully requests that its March 23rd Order overruling Mr. Schulson's Preliminary Objections based on the Arbitration provision in the Development Agreement be affirmed on appeal.

**BY THE COURT**

**PATRICIA A. McINERNEY, J.**

[3] *See* Taylor v. Extendicare Health Facilities, Inc., ___ A.3d ___, 2015 WL 1514487 (Apr. 2, 2015) (court recognized "the potential for inconsistent liability and duplicative damage determinations" and ordered that survival claims not go to arbitration, but instead be tried with non-arbitrable wrongful death claims.)