

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:07-CV-00175

RICHARD P. NORDAN,)
)
Plaintiff,)
)
v.)
)
BLACKWATER SECURITY)
CONSULTING, L.L.C. and)
BLACKWATER LODGE AND)
TRAINING CENTER, INC.,)
)
Defendants.)

MEMORANDUM OF LAW
IN SUPPORT OF MOTION
FOR REMAND

Plaintiff, pursuant to Local Rules 7.1(d) and 7.2, E.D.N.C., hereby submits this Memorandum of Law in Support of his Motion for Remand, in which he shows the Court as follows:

STATEMENT OF THE CASE

Plaintiff's Motion for Remand is before the Court following Defendants' May 14, 2007, Notice of Removal of this action from Wake County Superior Court. This action was filed originally on May 4, 2007, in order to protect the interests of the Plaintiff in light of the Defendants' stated intent to arbitrate claims of breach of contract against him individually, arising from Plaintiff's alleged acts in a related action filed in Wake County Superior Court, styled *Richard P. Nordan, as Ancillary Administrator for the separate Estates of Stephen S. Helvenston, Mike R. Teague, Jerko Gerald Sovko, and Wesley J.K. Batalona, Plaintiff v. Blackwater Security Consulting, LLC; Blackwater*

Lodge and Training Center, Inc., and Justin L. McQuown, Defendants, bearing file number 05 CVS 173 (hereinafter the “Estates Action”). In the Estates Action, Plaintiff appears only in his capacity as Ancillary Administrator of the estates named therein. Richard P. Nordan, individually, the Plaintiff in this action, is NOT a party in the Estates Action.

The instant suit (hereinafter the “Declaratory Judgment Action”), seeks a declaratory judgment from a court of competent jurisdiction stating whether Defendants may act on their stated intent to arbitrate their asserted claims against Plaintiff individually and as a consequence subject his *personal* assets to liability. Plaintiff’s grounds for declaratory relief are essentially that (1) Plaintiff was never a party to any arbitration agreement with the Defendants, (2) the claims Defendants seek to arbitrate against Plaintiff are not within the scope of the arbitration provision upon which Defendants assert their right to arbitrate, and (3) the arbitration of Defendants’ claims against Plaintiff would operate to deny the rights guaranteed to him as a citizen of the State of North Carolina by the North Carolina State Constitution. Plaintiff also sought a permanent injunction, permanently enjoining Defendants from arbitrating claims against him personally, and in the interim, a preliminary injunction set to maintain the status quo until a final adjudication on the merits by way of a declaratory judgment in Wake County Superior Court.

Defendants filed their Notice of Removal in the Declaratory Judgment Action on the eve of a scheduled hearing on Plaintiff’s Motion for a Preliminary Injunction. A copy of their Notice of Removal is attached hereto as Attachment 1. The grounds asserted for removal are the New York Convention as set forth in 9 U.S.C. §

201, *et seq.*, federal question jurisdiction under 28 U.S.C. § 1331, and that Plaintiff's case against the Defendants involves a unique federal interest under 28 U.S.C. §§ 1442 and 1442a. Plaintiff files this Motion for Remand on grounds that none of the statutory provisions cited by Defendants in their Notice of Removal apply to this case, and that there is no federal subject matter jurisdiction upon which this Court can rely to rule upon the declaratory relief sought in Plaintiff's Complaint.¹

STATEMENT OF FACTS

As stated in Plaintiff's verified complaint filed in this action, and in Plaintiff's brief in support of his motion for a preliminary injunction, the facts of this case are relatively simple, albeit made complex by procedural issues and maneuvers which have resulted the filing of two state court actions, multiple attempts at removal, a federal court action, and two arbitration proceeding, all of which have proceeded without the Defendants having filed a single Answer or responsive pleading to any Complaint filed against them.

On January 5, 2005, Plaintiff, acting *solely* as Ancillary Administrator for the Separate Estates of Stephen S. Helvenston ("Helvenston"), Mike R. Teague ("Teague"), Jerko Gerald Zovko ("Zovko"), and Wesley J.K. Batalona ("Batalona") (collectively "the Estates"), filed the Estates Action against Blackwater Security Consulting, LLC, and Blackwater Lodge and Training Center, Inc (collectively "Blackwater" or "Defendants"), and two individual defendants alleging claims of (1) wrongful death, and (2) fraud. On January 24, 2005, Blackwater attempted to remove the

¹ Defendants did not base removal of this action on any alleged diversity, which was the basis for subject matter jurisdiction in the separate action captioned *Blackwater v. Nordan, as Ancillary Administrator*, file no.: 2:06-CV-49-F.

Estates Action to federal court on grounds of complete preemption based on the Defense Base Act and the implication of unique “federal interests” which supposedly bestowed upon the federal court subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

Ultimately, Judge Flanagan remanded the case back to Wake County Superior Court concluding that there was no federal subject matter jurisdiction for the claims of the Estates against Blackwater. Specifically, Judge Flanagan held that the Defense Base Act did not provide appropriate grounds for removal, nor did the facts of the case give rise to a “unique federal interest” such that the case should be decided in federal court.²

Blackwater thereafter appealed Judge Flanagan’s Order to the United States Court of Appeals for the Fourth Circuit. Their appeal was ultimately dismissed on August 24, 2006.³ During the pendency of this appeal, Blackwater filed in the Estates Action an Amended Motion to Dismiss on October 13, 2005, contending, among other things, that the Estates’ claims should be dismissed pursuant to an arbitration clause contained within the agreements signed by each Decedent. A copy of this motion is attached to this Memorandum as Attachment 2. This motion was never ruled upon.

Following dismissal of their appeal by the Fourth Circuit, Defendant Blackwater Security Consulting, LLC (hereinafter “Blackwater Security”) commenced arbitration on December 14, 2006, naming as Respondent Richard P. Nordan, claiming \$10,000,000 in damages for various acts of Richard P. Nordan as Ancillary Administrator for the Estates, and seemingly seeking some type of declaration that they owe no damages to any of the Estates. This arbitration was commenced before the International

² Judge Flanagan’s Order can be found under *Nordan v. Blackwater Security Consulting, LLC*, 382 F.Supp.2d 801 (E.D.N.C. 2005).

³ See *In re Blackwater Security Consulting, LLC*, 460 F.3d 576 (4th Cir. 2006), cert. denied 127 S.Ct. 1381 (2007).

Centre for Dispute Resolution (“ICDR”) division of the American Arbitration Association (“AAA”), bearing Arbitration Case No.: 05 181 T 00524 06 (“the Arbitration”). A copy of Blackwater’s Demand for Arbitration is attached to this memorandum as Attachment 3.

The Arbitration demand was referenced in the December 20, 2006, Petition filed with this Court and captioned *Blackwater Security Consulting, L.L.C., a Delaware Limited Liability Company and Blackwater Lodge and Training Center, Inc., a Delaware Corporation v. Richard P. Nordan, as Ancillary Administrator for the Separate Estates of Stephen S. Helvenston, Mike R. Teague, Jerko Gerald Sovko and Wesley J.K. Batalona, Plaintiff*, U.S. District Court, Eastern District of North Carolina, No. 2:06-CV-00049-F – seeking a Petition for Order Directing Arbitration (“the Federal Petition”). A copy of the Federal Petition is attached hereto as Attachment 4. Nowhere in the Petition does Blackwater indicate that they sought to not only arbitrate the claims of the Estates against them in the Arbitration, but also their own **personal** claims against Plaintiff. Most importantly, the Plaintiff, Richard P. Nordan, individually, was NOT a party to the Federal Petition.

Before this Court could rule upon the Federal Petition against Richard P. Nordan as Ancillary Administrator for the Estates, but after filing their Demand for Arbitration, Blackwater commenced proceedings before the ICDR, and selected an arbitration panel to hear Blackwater’s claims. In response, Plaintiff, in his official capacity as Administrator of the Estates, filed in the Estates Action a motion for a Temporary Restraining Order in order to temporarily halt arbitration proceedings before ICDR until a court could rule on the arbitrability of those disputes. The Estate’s motion

was to be heard and ruled upon by the Wake County Superior Court on April 13, 2007. In anticipation for the hearing on the Estates' motion, on April 12, 2007, Blackwater filed a "Memorandum of Law in Opposition to Issuance of TRO" ("the TRO Memorandum") indicating that they intended not only to arbitrate the Estates' claims against Blackwater, but in addition, that they intended to arbitrate before ICDR claims against Richard P. Nordan in his individual capacity, who was neither a party to the Estates Action nor the Federal Petition seeking an order compelling arbitration, for his alleged breach of the ICSA's signed by each of his decedents. (See TRO Memorandum, ¶'s 6, 9, and 11).

"A further point about the arbitration that Nordan fails to bring to the Court's attention is that while it is true that the arbitration concerns 'the very subject matter of this case' (TRO Motion at 2), that is not all the [sic] arbitrator concerns. Nothing that could ever happen in this case would preclude a separate set of distinct claims Blackwater has asserted against Nordan personally in the arbitration. In this case, Nordan is suing Blackwater for damages in his capacity as ancillary administrator on behalf of the decedents' estates, alleging wrongful death and fraudulent inducement. In the arbitration, Blackwater is claiming damages against Nordan *personally* for breach of contract, ..."

(TRO Memorandum, ¶ 6).

On April 20, 2007, the Court granted Defendants' Petition and ordered the parties to arbitrate Blackwater's claims in accordance with Blackwater's Petition. The Order made no mention of Blackwater's alleged claims against Richard Nordan personally, nor whether such claims were arbitrable. On May 4, 2007, Richard Nordan, individually, for the first time, entered an appearance in the Federal Petition action and filed a Motion for Relief from Judgment, seeking a clarification as to the scope of this Court's order. Also on May 4th, as stated above, Plaintiff initiated the instant Declaratory Judgment Action in Wake County Superior Court seeking a judicial ruling on the arbitrability of Blackwater's claims against him. The sole cause of action sued upon in

the Declaratory Judgment Action is whether Plaintiff, individually, who was not a party to the ICSAs signed by each Decedent, was obligated to arbitrate the subject matter of Blackwater's dispute against him.

In response, on May 7, 2007, Blackwater filed a Motion for Order to Show Cause requesting sanctions against Plaintiff, individually, for requesting such a judicial declaration. The Court entered an Order on May 11, 2007, clarifying the intended effect of the April 20th Order and setting forth that only the claims set forth in the Estates Action against Blackwater had been compelled to arbitration; "[t]he court takes no position on the propriety of Blackwater's Arbitration Breach of Contract Claim"; and that the motion to show cause is denied.

STANDARD OF REVIEW

In the Fourth Circuit, the party seeking removal bears the burden of proving the existence of subject matter jurisdiction. *Morales v. Showell Farms, Inc.*, 910 F.Supp. 244 (M.D.N.C. 1995), *citing*, *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994). If jurisdiction is doubtful, a remand is necessary. *Ibid.* Further, pursuant to 28 U.S.C. § 1446, removing parties are required to state the factual grounds for removal of an action from state court. *Jennings v. Cantrell*, 392 F.Supp. 563, 564 (D.C.Tenn. 1974).

In order to properly remove this Action from Wake County Superior Court to the Eastern District, Defendants have the burden of showing in their Notice of Removal the appropriate grounds of federal subject matter jurisdiction. If this Court has any doubt as to the propriety of such removal, whether it be based on an absence of

supporting facts or that there is no law to support Blackwater's actions, a remand is necessary.

ARGUMENT

The subject of the dispute contained within the Declaratory Judgment action, is solely a question of arbitrability. Plaintiff, in this action, seeks only a judicial declaration of whether he is personally bound to participate in the arbitration against him. The subject matter of the dispute contained within the Declaratory Judgment action does not touch upon the merits of the claims which Defendants seek to bring, nor should the merits of those claims bear upon this Court's determination of subject matter jurisdiction. Plaintiff's motion for remand of this action can be resolved merely by looking at the face of the Complaint, and the relief sought therein.

The very basis for Plaintiff's Complaint for Declaratory and Injunctive Relief is that he was never a party, in his individual capacity, to any agreement to arbitrate any claim, dispute or conflict of any sort with the Defendants, or any entity related to them. There are no pendent claims other than this sole question of arbitrability. No court of these United States, or political subdivision thereof, has ruled upon the preliminary and threshold question of whether Plaintiff is required to arbitrate claims of his own personal liability with the Defendants. Plaintiff's right to relief sounds exclusively in North Carolina contract law, and the attendant state constitutional rights of citizens of the State of North Carolina. Based on the relief sought by the Plaintiff in this action alone, irrespective of any other related claims, it is manifest that Defendants' removal was improper, and that this Court lacks the necessary subject matter jurisdiction to rule upon the Plaintiff's claims.

I. DEFENDANTS GROUNDS ASSERTED FOR FEDERAL QUESTION JURISDICTION UNDER 28 U.S.C. § 1331 ARE BASELESS AND INSUFFICIENT.

A. The Well-Pleaded Complaint Rule Bars any further basis for Removal as stated in the Defendants' Notice of Removal.

As stated in this Court's opinion in *Nordan v. Blackwater Security Consulting, LLC*, 382 F.Supp.2d 801 (E.D.N.C. 2006), "under the 'well-pleaded complaint' rule, a suit raises a federal question only when the plaintiff's statement of his own cause of action shows that it is based on federal law." *Id.* at 806. This court also stated that "[a] defense is not part of the plaintiff's properly pleaded statement of his claim." *Ibid.* Defendant's assertions or grounds for removal stated in Paragraphs 41 through 50 are all disposed of by a simple application of this rule.

There is nothing on the face of the Plaintiff's Complaint which would give rise to a federal cause of action. The claim was "commenced pursuant to G.S. § 1-253, the Uniform Declaratory Judgment Act" seeking a judicial declaration as to whether Plaintiff is personally subject to the arbitration provision in a contract to which he was not a party. Such a claim does not rely upon any federal statute which, in and of itself, is sufficient to give rise to federal subject matter jurisdiction pursuant to Section 1331. Despite the fact that Defendants cite to 28 U.S.C. §§ 1442a and 1442, as grounds for removal, such sections cannot properly be considered as neither are referenced on the face of the Plaintiff's Complaint.

Defendants' reference to the Federal Arbitration Act in their Notice of Removal is misleading. Courts of this judicial circuit have made it clear that "in passing the FAA Congress did not intend to create federal jurisdiction." *Discover Bank v. Vaden*, 396 F.3d 366, 372 (4th Cir. 2005); citing *Moses Cone Mem. Hosp. v. Mercury Const.*

Corp., 460 U.S. 1, 25 (1983). Merely stating that because an arbitration is subject to the FAA, the federal courts have jurisdiction under Section 1331, as Defendants attempt to do in the Notice of Removal, is misleading, because Federal District Courts of North Carolina have held that “state courts and federal courts have concurrent jurisdiction to resolve claims under the Federal Arbitration Act.” *Stafford v. Discover Bank*, 350 F.Supp.2d 695, 698 (M.D.N.C. 2004). Because the sole right of removal rests upon the applicability of the FAA, Plaintiff’s claim is not removable pursuant to Section 1331.

Defendants similarly assert that 28 U.S.C. § 1442a affords them the right to remove Plaintiff’s action to this Court. The basis for their argument is that “Congress enacted 28 U.S.C. § 1442a with the objective of preventing state court interference in national military affairs.” What Blackwater seems to omit, is that national military concerns do not appear on the face of the Plaintiff’s Complaint, and under the “well-pleaded complaint” rule, cannot properly be asserted as a basis for removal under Section 1331. Further, this is the same argument offered by these same Defendants in the Estates Action, which were subsequently denied by Judge Flanagan’s remand of that action. Failing once, Blackwater should not again be allowed to rehash a previously decided issue.

What’s more, this assertion is also *completely* irrelevant to the subject matter of Plaintiff’s suit. National military affairs have nothing to do with Plaintiff’s attempt to prevent Blackwater from denying his right to a trial by jury and arbitrating claims against his personal assets pursuant to a contract to which he was not a party and an arbitration demand that was not personally served on him. The activities of Blackwater in performing acts for the United States have nothing to do with the subject matter of this

action. Plaintiff's action is solely to protect his rights. Preventing an improper claim against himself and his family is not a concern of the United States military.

The same argument as to why Section 1442a does not apply to this suit has equal force as to the inapplicability of Section 1442. This suit was filed only to prevent what would be an improper claim by Blackwater against Richard Nordan.

B. The Doctrine of *Collateral Estoppel* prevents the Defendants from re-litigating the issue of "unique federal interest" in their attempt to remove this case.

As stated above, this is not the Defendants' first attempt to remove a pending action from state to federal court. Similarly, it is not their first attempt at removal on the basis of a "unique federal interest". In their initial Notice of Removal in the Estates Action, Blackwater cites the utilization and reliance on contractors by the United States Military, and that a contractor performing under government contract implicates the interests of the federal government. This language is strikingly similar to the statement in Defendants' Notice of Removal in this case - that "Blackwater has acted at all relevant times under the direction of a federal agency or officer." Acting as a contractor with the authority of the federal government is a common theme in both Notices. As such, Judge Flanagan's original remand order should have a preclusive effect on Blackwater's attempt to re-litigate this issue.

The Fourth Circuit has had multiple occasions to issue a decision based upon the doctrine of collateral estoppel, most recently in *Eddy v. Waffle House, Inc.*, 482 F.3d 674 (4th Cir. 2007). In *Eddy*, the court stated:

For collateral estoppel to apply, the proponent must establish that (1) the issue sought to be precluded is identical to one previously litigated; (2) the issue must have been actually determined in the prior proceeding; (3) determination of the issue was a critical and

necessary part of the decision in the prior proceeding; (4) the prior judgment must be final and valid; and (5) the party against whom preclusion is asserted must have had a full and fair opportunity to litigate the issue in the previous forum.

Id. at 679.

As stated above, Defendants have attempted to remove a related case on the same grounds asserted in the present Notice of Removal. In the Estates Action, on Defendants' first attempt to remove the action, Defendants' cited federal question jurisdiction under the Defense Base Act, and under a theory that the case presented "unique federal interest" such that the case should be resolved by a federal court. A copy of Defendants' Notice in the Original Suit is attached as Attachment 5 to this Memorandum. The references to 28 U.S.C. §§ 1442a and 1442 suggest an attempt to re-litigate the "unique federal interest" question which was ruled upon by Judge Flanagan. Further, the Order of Remand issued by Judge Flanagan must be considered final, and it had the effect of eclipsing federal subject matter jurisdiction in the Estates Action. Additionally, the Defendants themselves must have considered it a final order, due to the fact that they felt they had a right to appeal the decision to the Fourth Circuit, and sought the review of the Supreme Court on the issue as well.

Therefore, the assertions of federal subject matter jurisdiction made by the Defendants in their Notice of Removal are baseless, and insufficient to warrant the removal of Plaintiff's claim. On the face of the Plaintiff's Complaint, there is nothing which gives reference to a claim "arising under the Constitution, laws, or treaties of the United States." Neither the FAA, Section 1442a, nor Section 1442 are invoked by the Plaintiff's action. Further, Blackwater's invocation of the authority of the federal government with respect to a claim against them is not a new issue, and they are

precluded from attempting to relitigate this issue. As a consequence, Defendants' removal of this action was improper.

II. THE NEW YORK CONVENTION IS INAPPLICABLE TO PLAINTIFF'S CLAIM FOR DECLARATORY RELIEF.

Defendants' assertion of the New York Convention's applicability generally ignores the actual requirements found therein. Plainly, the Defendants' argument of applicability ignores the basic necessity of actually having facts which would bring this case within the scope of the Convention. Removal under the New York Convention involves a two-step, statutory analysis. First, there must be an arbitration agreement between the parties which falls within the definition of 9 U.S.C. § 202. Only if Section 202 applies, can a party then remove an action, which under 9 U.S.C. § 205, "relates to" an arbitration agreement between the parties. Because in this case there is no such arbitration agreement in existence, this action itself cannot "relate to" such an arbitration agreement sufficient to remove this action from state court.

A. There is no agreement existing between the Plaintiff, Richard P. Nordan Individually, and the Defendants sufficient to bring Plaintiff's Claim against Defendants within the New York Convention.

Defendants claim in their Notice of Removal that this "Court has subject matter jurisdiction under 9 U.S.C. §§ 202, 203 and 205, and under 28 U.S.C. § 1331, because the New York Convention is applicable here." [Notice of Removal, ¶ 39].

Whether an agreement falls under the ambit 9 U.S.C. § 201, *et seq.*, or as it is commonly referred to "the New York Convention", is stated in 9 U.S.C. § 202, which reads:

An arbitration or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award

arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

Cases interpreting the New York Convention have come up with a four-part test to determine whether the Convention applies to a given dispute:

(1) whether there is an agreement in writing to arbitrate subject of the dispute; (2) whether the agreement provides for arbitration in the territory of a signatory of the Convention; (3) whether the agreement arises out of a legal relationship, contractual or not, which is considered commercial; and (4) whether a party to the agreement is a foreign citizen or the relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation to one or more foreign states.

Jones v. Sea Tow Services Freeport New York, Inc., 828 F.Supp. 1002, 1015 (E.D.N.Y. 1993) *rev'd on other grounds*, 30 F.3d 360.

According to the statutory language of § 202, a threshold question as to whether an arbitration agreement falls under the New York Convention “is whether or not the parties have made any agreement in writing to arbitrate the subject in dispute.” *Hoogovens Ijmuiden Verkoopkantoor, B.V. v. M.V. Sea Cattleya*, 852 F.Supp. 6, 8 (S.D.N.Y. 1994). An “agreement in writing” is defined as “an arbitral clause in a contract or an arbitration agreement, signed by the parties.” *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F.Supp. 1229, 1234 (S.D.N.Y. 1992). “Where no such agreement exists, the court has no jurisdiction under the [New York] Convention.” *Hoogovens*, 852 F.Supp. at 8.

The threshold question which necessarily resolves applicability of the New York Convention to this case is whether the Plaintiff and the Defendants in this particular proceeding, and no other, entered into an agreement in writing to arbitrate the

subject of the dispute. The very nature of this case is not the viability of the underlying dispute or any party's obligation to arbitrate thereunder. To the contrary, a resolution of this Motion for Remand, in a case where Plaintiff in his individual capacity has sued the Defendants for declaratory relief, rests upon the singular issue of whether the parties, meaning Richard P. Nordan individually, and the Blackwater Defendants, have actually agreed to arbitrate their disputes. Because there is a dispute that goes to the very essence of the threshold question of the applicability of the New York Convention, this Court cannot state as a preliminary matter that Plaintiff, meaning, Richard P. Nordan in his individual capacity, has agreed to arbitrate the very question of arbitrability.

The initial question of applicability of the New York Convention to Plaintiff's dispute can only be resolved by this Court in the examination of the actual claims made on the face of Plaintiff's Complaint. The subject of the dispute is set forth in Paragraph 26 of the Complaint, which reads:

This action is commenced pursuant to G.S. § 1-253, the Uniform Declaratory Judgment Act, seeking a declaration of the rights, status, and obligations of Plaintiff and Defendants pursuant to the aforementioned ICOSA Agreements and Defendants' aforementioned Demand for Arbitration.

In Paragraph 37 of the Complaint, Plaintiff goes on to state:

Plaintiff is entitled to a Judgment declaring the following: (1) Plaintiff has never consented or otherwise agreed to arbitrate any matter with either of the Defendants; and (2) Plaintiff is not subject to any alleged claims in any arbitration forum which have been or which may be brought against him in his individual capacity by either of the Defendants, including but not limited to any claims alleged in Defendants' aforementioned Demand for Arbitration.

Based on the plain language used by Plaintiff describing the subject of his dispute, it is evident that in order to bring the Plaintiff's claim within the realm of the New York

Convention, the Defendants must show at the outset in their Notice of Removal that the Plaintiff, meaning, Richard P. Nordan in his Individual Capacity, has previously agreed *in writing* to resolve his dispute regarding the arbitrability of any claim Blackwater may bring against him personally, *in arbitration*. There are however no facts in existence, much less in Defendants' Notice of Removal, which the Defendants can point to in support of this assertion. Further, even a cursory review of relevant North Carolina and Federal Law eliminates even the possibility of the subject matter of Plaintiff's dispute, in this Declaratory Judgment action, being subject to an agreement to arbitrate.

North Carolina courts, the United States Supreme Court, and the Fourth Circuit Court of Appeals have each been unequivocal and unwavering on the arbitrability of whether parties have actually agreed to arbitrate. "The question of whether a dispute is subject to arbitration is an issue for judicial determination." *Raspet v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001); *See also Edwards v. Taylor*, ___ N.C. App. ___, 643 S.E.2d 51 (2007); *Evangelistic Outreach Center v. General Steel Corp.*, ___ N.C. App. ___, 640 S.E.2d 840 (2007). The Fourth Circuit has stated that "[b]ecause the requirement to submit to arbitration is solely a matter of contract, arbitrability is a matter of contract interpretation which is undeniably an issue for judicial determination." *Champion Intern. Corp. v. United Paperworks Intern. Union, AFL-CIO*, 168 F.3d 725, 728 (4th Cir. 1999). Finally, Justice Breyer, writing for the United States Supreme Court, stated that "a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

The claims asserted by the Plaintiff in his Verified Complaint rest solely on the what the Supreme Court has phrased as a “question of arbitrability.” As stated in the Complaint, the very essence of the Plaintiff’s action is for a court to declare that in his individual capacity, Plaintiff is not subject to the arbitration provisions contained within the ICSAs signed by each of the Decedents.

The Supreme Court, Fourth Circuit, and the State of North Carolina are all consistent in holding that such questions are reserved for the Courts. Additionally, Plaintiff has never waived in his argument that prior to being forced to participate in any arbitration proceeding, a court of law must decide whether he is bound to arbitrate Blackwater’s claims against him. The viability of this argument, upon which this entire action is founded, is a decision for the courts, not an arbitration panel. Therefore, because Plaintiff’s claims will never be subject to arbitration, Blackwater cannot assert, nor should this Court entertain, any argument that the Plaintiff has previously agreed to arbitrate the subject of his dispute contained within his Complaint with the Defendants. That argument failing, this Court should hold that the New York Convention does not apply, and that this action should be remanded back to state court.

B. Because the New York Convention is inapplicable to Plaintiff’s Claim, Defendants have no grounds for removal under 9 U.S.C. § 205.

The statute governing removal of cases within the New York Convention is 9 U.S.C. § 205, which reads as follows:

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending.

The statutory requirements for Section 205 are very important, because in order for the section to allow removal, there must be an arbitration agreement between the parties to the lawsuit, or some affiliate thereof, to meet the explicit requirement of having an arbitration agreement which qualifies as “falling under the Convention”. Only after that initial requirement is satisfied, can a court then proceed to address the question of whether the actual arbitration agreement between the parties to the dispute actually relates to the subject matter of the action or proceeding pending in State court between those same parties.

1. *Because there is NO arbitration agreement between the parties, much less one meeting the requirements of 9 U.S.C. § 202, this Court is denied subject matter jurisdiction at the outset, before even addressing the propriety of the removal.*

“For the Convention to permit removal to federal court, there must be a written arbitration agreement between the parties.” *Acosta v. Norwegian Cruise Line, LTD*, 303 F.Supp.2d 1327, 1329-30 (S.D.Fla. 2003). In accordance with the statutory scheme under the New York convention, a defendant seeking removal must meet first, as a preliminary matter, the requirements of Section 202. Failing that, Section 205 does not apply, and a party is prevented from removing thereunder.

As stated above, there is not in existence an agreement or contract entered into between Plaintiff, in his individual capacity, and either of the Defendants. Because there is no agreement, as a consequence, the only conclusion that this Court can come to is that Plaintiff has never, ever, agreed to arbitrate any claims with the Defendant.

Therefore, there cannot be any relation at all, between this Declaratory Judgment Action and an arbitration agreement which, according to the statutory language of Section 202,

shows that the Plaintiff never agreed to arbitrate the question of arbitrability with the Defendants.

Defendants however, in their Notice of Removal seek to bypass this crucial threshold fact, which in effect belies their intent to bootstrap whatever claims they may have against Richard Nordan personally, with a separate agreement that they had with the unrelated Decedents, none of whom are parties to this action. In the Notice of Removal, Defendants cannot point to an agreement of any sort which would form a relationship of any nature between the Plaintiff, individually, and Blackwater. The only purported relationship that they seek to stand on, is the contractual one created by each individual ICSA entered into between themselves and the Decedents. Asserting that the subject matter is therefore related, ignores the absence of an actual agreement to arbitrate, and the absolute distinction under North Carolina law between a person acting as an executor, and that same person acting on his own, individual behalf. *See Beaty v. Gingles, et. al, Ex'rs*, 53 (8 Jones) 302 (1860). The rights of the Estates, whatever they may be, are neither invoked, nor are they asserted in Plaintiff's Complaint. Further, in Plaintiff's Complaint, contrary to the assertion of the Defendants, Plaintiff seeks only a declaration of his rights, and does not seek, in any form or fashion, to prevent what presumably is the proper arbitration of the Estates claims against Blackwater.

Plaintiff in this case was not a party to the ICSA which contained the arbitration clause in question. Further, Defendants have admitted as much in their pleadings before this Court. In Paragraph 7 of the Notice of Removal filed with this Court, Defendants state that "[t]he parties to the Service Agreements are BSC, on the one hand, and each of Wesley J.K. Batalona, Jerko Zovko, Mike R. Tegue, and Stephen S.

Helvenston (the “Decedents”), on the other hand.” There is no dispute that Plaintiff was not a signatory or a party to the ICSA signed by each Decedent. As a consequence, there is no agreement between the Plaintiff, individually, and either of the Defendants, which the Plaintiff may assert is within the New York Convention. Accordingly, the Convention would not permit removal in this case.

2. *The subject matter of this action does not “relate to” any conceivable arbitration agreement between Plaintiff individually and the Defendants, and therefore this action is not subject to removal under Section 205.*

In *Acosta v. Master Maintenance & Const., Inc.*, 52 F.Supp.2d 699, (M.D.La. 1999), the court stated a set of factors designed to resolve questions of whether a dispute was “related to” an arbitration agreement. The factors are:

“(1) whether the plaintiffs themselves were signatories to the arbitration agreement; (2) whether the plaintiffs were seeking damages under the contract containing the allegedly relevant arbitration agreement; (3) whether there was any contractual relationship at all between the plaintiffs and the defendant; and (4) whether the plaintiffs were seeking redress for wrongs done to a signatory of the agreement.

Id. at 707. Defendants cannot show that any of these factors are present in this case.

As is evident in Plaintiff’s Verified Complaint, Plaintiff was not a signatory to the arbitration agreement. Further, on the second factor, Plaintiff is unequivocal in his assertion that he is not seeking damages or a monetary reward from the Defendants. Rather, as stated in the Complaint, Plaintiff is only seeking the protection of the courts, which are judicially empowered in North Carolina to rule upon the arbitability of disputes, and are the only judicial authority endowed to make such a decision. [Complaint, ¶ 37], *See Ellen v. A.C. Schultes of Maryland, Inc.*, 172 N.C. App. 317, 320, 615 S.E.2d 729, 731-32 (2005) (“the trial court must determine whether the

specific dispute is covered by the substantive scope of the agreement and whether the parties had a valid agreement to arbitrate.”). On the third factor stated in *Acosta*, the Defendants’ own assertions in Paragraph 7 of its Notice of Removal, show that the only contractual relationships upon which Defendants can rely are the ones they maintained with the Decedents. Finally, on the fourth factor, Plaintiff’s action is seeking to prevent a wrong from occurring to him personally, by having to defend and perhaps be individually liable for an award granted by ICDR, not to address a wrong done to a signatory of the agreement. According to the four-step analysis in *Acosta v. Master Maintenance*, the dispute for which the Plaintiff seeks a judicial determination does not fall within the ambit of “relates to” sufficient to remove this case to federal court.

The cases likely to be cited by the Defendants arise in the context of a motion to compel arbitration or in a situation where there is little dispute as to the fact that the parties, or some predecessor thereof, actually signed an arbitration agreement with the party with which they ultimately had a dispute. Such cases are therefore inapposite to the question presented by the removal and remand of this action. Defendants will likely cite to *Beiser v. Weyler*, 284 F.3d 665, 669 (5th Cir. 2002), in asserting that this action was properly removed from Wake County Superior Court. The Fifth Circuit in *Beiser* relied upon the statute’s use of the phrasing “relates to”, and suggested that such language was broad enough to encompass the plaintiff’s common law tort claims against the defendant. *Id.* at 669. However, as stated above, the defendants in *Beiser* moved to compel arbitration of the plaintiff’s state law claims, and thus the arbitration clause provided a defense to the plaintiff’s claims. The actual holding of *Beiser* is that “the district court will have jurisdiction under § 205 over just about any suit

in which a defendant contends that an arbitration clause falling under the Convention provides a *defense*.” *Ibid* [emphasis added]. The court goes on to note that the defendants contended that the plaintiff’s claims should be put before an arbitration panel, and as such the arbitration agreements related to his claims such that removal was proper. *Id.* at 669-70.

The critical distinction between the procedural posture of the *Beiser* case and the present case, is the fact that the claims brought by the plaintiff in *Beiser* could theoretically have been arbitrated, whereas in this case, the Plaintiff’s claim rests solely upon the question of arbitrability, which does not belong to the arbitration panel. More telling is the in-depth treatment given to the *Beiser* decision by the court in *Hawkins v. KPMG*, 423 F.Supp.2d 1038. Citing *Beiser* as its authority, the court in *Hawkins* held that “in order to determine whether an arbitration agreement falling under the Convention could *conceivably* affect the outcome of the plaintiff’s case, the court must determine that the clause has some chance of being applied to the claims raised in the lawsuit.” *Hawkins*, 423 F.Supp.2d at 1046. The court’s opinion in *Hawkins* does not attempt to limit the reasoning in *Beiser*, but only to clarify how the *Beiser* court viewed the claims which would “conceivably affect the outcome of the plaintiff’s case.”

The discussion of *Beiser* and *Hawkins* is noteworthy, especially in light of how previous courts have addressed the issue presented in this case. Both stand for the proposition that the action which a defendant seeks to remove actually include claims which are, in and of themselves, arbitrable. Such a question is not presented by this case. As stated above, this case involves what the United States Supreme Court has labeled a “question of arbitrability”, and therefore, the presence of any arbitration clause would

never serve as a defense to Plaintiff's action. The presence of the arbitration clause would have no bearing on the outcome of Plaintiff's Declaratory Judgment Action, and therefore the case does not "relate to" an arbitration agreement sufficient to allow removal under Section 205.

Cases suggesting that courts are precluded from conducting a factual or merits inquiry to determine subject matter jurisdiction are similarly inapplicable. The very question presented in this case rests not on facts or the merits of any legal argument, but rather a "question of arbitrability" and to whom that decision belongs. Further, in those cases where a factual or merits inquiry is frowned upon, the facts are inconsequential because the parties claiming lack of subject matter jurisdiction bore at minimum some form of a legal relationship to actual parties to an arbitration agreement. *See Beiser, supra; Republic of Ecuador v. ChevronTexaco Corp.*, 376 F.Supp.2d 334 (S.D.N.Y. 2005). In this case, there is no relationship at all, factually or legally, between Richard Nordan's personal assets which would be subject to an arbitration award against Richard Nordan personally, and an agreement to arbitrate entered into between each of the Decedents and Blackwater.

The issue of subject matter jurisdiction in both *Republic of Ecuador* or *Beisler*, was questioned by a party bound to arbitrate. In *Beisler*, the party contesting removal was the actual signatory of the arbitration agreement, although he only purportedly did so in his capacity as an officer of a corporation of which he was the only shareholder and employee. *Beisler*, 284 F.3d at 666-67. In *Republic of Ecuador*, the party claiming it was not a signatory to the arbitration agreement but was a successor in interest to the arbitration contract and had previously sought benefits and asserted its

interests under the same, and was precluded by estoppel from denying its obligation to arbitrate. *Republic of Ecuador*, 376 F.Supp.2d at 338 and 356-363. Further, in the *Republic of Ecuador*, by concession of all the parties, there were multiple bases for federal subject matter jurisdiction to the point where no party even contested the defendants' right to remove the action to federal court. *Id.* at 345. That is not the case here, where Plaintiff individually, has always maintained at every turn that Blackwater's claims against him should be settled in North Carolina state court. In fact, the discussion by the court in *Republic of Ecuador* was included with regard to the choice-of-law dispute for the parties' cross-motions for summary judgment, not on the plaintiff's motion to remand. *Id.* at 345-346.

In the present case, the issues which gave rise to the court's discussion in *Republic of Ecuador* are nowhere to be found. In the present case, there is no other basis for federal subject matter jurisdiction, as Blackwater is prevented by the doctrine of *collateral estoppel* from re-litigating the issues originally decided by Judge Flanagan. More important however, is the obvious distinction in the entities which are assertedly subject to the arbitration agreement. In *Republic of Ecuador*, the plaintiff at least entered into one or more agreements which made reference to an arbitration agreement, or sought the benefits of rights guaranteed to them by an agreement containing an arbitration provision. *Id.* at 338-39.

Plaintiff's action seeks a declaration by a court of competent jurisdiction on the question of whether the Plaintiff is a proper party to the pre-initiated arbitration. As stated in the *Hawkins*, alluded to in *Beisler*, and as evident in the statutory language of 9 U.S.C. § 202, in order to be encapsulated within the Section 205 requirement that the

state court claim “relate to” an arbitration agreement, the dispute which a party seeks to remove must actually be arbitrable. *Hawkins*, 423 F.Supp.2d at 1046; *Beiser*, 284 F.3d at 669. Because there is no arbitration agreement existent between the parties to this action, and further, because the nature of this dispute is one which Courts have proclaimed to be unarbitrable, the New York Convention does not apply, and therefore cannot be asserted as a proper ground of removal from North Carolina State court to this Court. Therefore, this Court should remand this action to Wake County Superior Court.

CONCLUSION

The Notice of Removal filed by the Defendants was improper. None of the asserted grounds for removal were satisfactory to prevent a North Carolina State court from exercising jurisdiction over this claim. Therefore, Plaintiff’s Motion for Remand should be granted, and this case should be returned to Wake County Superior Court, for a hearing on Plaintiff’s Motion for a Preliminary Injunction.

Respectfully submitted,

This the 22nd day of May, 2007.

BAILEY & DIXON, L.L.P.

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2007, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system. Notification of such filing was given, as indicated below, by the CM/ECF system to those registered, or by mailing a copy of the same by U.S. Mail, postage paid, to parties who are not registered to receive a Notice of Electronic Filing for this case:

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