SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THOMAS E. GAYNOR; ABIGAIL T. REARDON; JINJIAN HUANG; STEPHEN REIL; MARIA S. SWIATEK,

Petitioners,

For a Judgment Pursuant to Article 75 of the New York Civil Practice Laws and Rules

-against-

NIXON PEABODY, LLP,

Respondent.

Index No. _____

VERIFIED ARTICLE 75 PETITION

Petitioners Thomas E. Gaynor, Abigail T. Reardon, Jinjian Huang, Stephen Reil, and Maria S. Swiatek (collectively, "Petitioners"), by and through their attorneys Emery Celli Brinckerhoff Abady Ward & Maazel LLP, allege as follows:

1. Respondent Nixon Peabody, LLP ("Nixon" or "Respondent") is committed to restricting its partners from practicing law where they choose and punishing partners who leave the firm by, among other things, trying to claw back earned bonuses while at the same time retaining for itself the entirety of fees collected on account of the completed and ongoing referred work of departing partners prior to their departure from the firm, and wrongfully withholding wages, earned equity distributions, and capital account monies.

2. Petitioners are all former Nixon partners. Nixon awarded each of them bonuses for their exceptional performances based on fees earned, collected, and distributed by the firm for their work during fiscal year 2018, which ended on January 31, 2019. When Petitioners resigned from the firm in June 2019, Nixon sought to claw those bonuses back in their entirety,

retained all fees collected on account of Petitioners' work for fiscal year 2019, from February 1, 2019 through the date of their resignation, and wrongfully withheld 2019 earned wages, equity distributions, and capital due and owing to Petitioners as of the date of their departure in an amount not presently known but which Petitioners believe exceeds several million dollars. The upshot is that Nixon has retained and distributed to its partners the fruit of Petitioners' efforts from February 1, 2019 through July 2019, withheld wages and equity distributions due to Petitioners for that same period, and converted to its own use funds in Petitioners' capital accounts. Yet Nixon still wants Petitioners to be ordered to return monies paid to them on account of work performed, fees collected, and profits distributed by Nixon to its partners, for 2018.

3. Petitioners concluded, based on the wishes of their clients and the opportunities available to them, that their practices and their clients would be best served at another firm. Now, Nixon is seeking to punish them for that decision, which was made based on Petitioners' clients' demonstrated needs. Nixon presented Petitioners with a Hobson's choice: they could either (i) stay at Nixon and disregard the needs of their clients, resulting in a likely substantial diminishment of their practices, just so they could "keep" a bonus they earned for the previous year's significant work: or (ii) leave Nixon and face the loss of substantial previously earned compensation.

4. Petitioners chose to prioritize their clients and their practice needs, which meant having to leave Nixon—and they did so as a group, joining another law firm together. In response, Nixon unduly delayed Petitioners' departure from the firm and immediately demanded that Petitioners each repay to the firm in full the bonuses they had earned based on work done in fiscal year 2018.

5. Petitioners refused Nixon's demand. Nixon's efforts to claw back bonuses Petitioners earned simply because Petitioners chose to practice elsewhere constitute an undue restriction on Petitioners' rights to practice law. Provisions in partnership agreements that purport to restrict a lawyer's right to practice law are unenforceable, particularly under New York law, which applies to all disputes arising under the Partnership Agreement.

6. Nixon disregarded the priorities of Petitioners' clients, continued to insist on payment in full from Petitioners, and invoked the dispute resolution procedure set forth in its Partnership Agreement, which requires the parties to first negotiate in good faith, then mediate, and finally, as a last resort, arbitrate.

7. Not content to shamelessly seek to enforce a claw back provision that is repugnant to New York law and put its own interests ahead of clients' interests, Nixon failed to abide by the dispute resolution procedure in its Partnership Agreement. Nixon never negotiated with Petitioners in good faith. It never mediated with Petitioners. Instead, it jumped ahead to arbitration.

8. The Partnership Agreement expressly provides parties with the right and obligation to mediate disputes that arise under it. Here, no such mediation has occurred because no mediator has been appointed or selected by the parties. The COVID-19 global pandemic interfered. A proposed mediator that the parties initially identified was never retained because he was not willing to conduct the mediation on terms that are mutually agreeable to the parties.

9. Rather than abide by the Partnership Agreement and reasonably work with Petitioners to appoint and select a mediator who can preside over a process during COVID-19 that is acceptable to both parties, Nixon has decided to ignore Petitioners' contractual rights, skip mediation, and try to bully Petitioners into costly arbitrations all over the country.

10. The Partnership Agreement does not allow Nixon to do so. The Court should therefore order the parties to mediate their dispute, and stay the arbitrations Nixon purported to commence until the parties have had an opportunity to settle on a mediator and a mediation process during COVID-19 and have tried to resolve their dispute through mediation, all as the Partnership Agreement requires.

PARTIES

11. Petitioner Thomas Gaynor is an individual who currently resides in New York.

12. Petitioner Abigail Reardon is an individual who currently resides New York.

13. Petitioner Jinjian Huang is an individual who currently resides in California.

14. Petitioner Stephen Reil is an individual who currently resides in California.

15. Petitioner Maria Swiatek is an individual who currently resides in California.

16. Respondent Nixon Peabody, LLP is a New York limited liability partnership that is headquartered in New York State and has an office and conducts business in New York County.

FACTS

Nixon Awards Petitioners Bonuses for Their Performances in Fiscal Year 2018

17. Petitioners are all former partners at Nixon.

18. In 2019, Nixon paid its partners according to the terms of the Nixon Peabody LLP Amended and Restated Article of Partnership, effective as of February 1, 2018 (the "Partnership Agreement"), and the incorporated Nixon Peabody LLP Partnership Evaluation and Compensation Plan, commencing February 1, 2018 (the "Compensation Plan").[1]

[1] The Compensation Plan is not included with this Petition because it is confidential. Petitioners can provide the Court with a copy of the Compensation Plan if the Court believes it would be helpful to its analysis.

19. Pursuant to the Partnership Agreement and the Compensation Plan, partners were eligible to receive bonuses following the end of a fiscal year.

20. Bonus awards were determined by a Compensation Committee, and approved by Nixon's Managing Partner, based on formulas set forth in the Compensation Plan that take into account, primarily, fees collected on account of the individual partner's work.

21. For fiscal year 2018, which ended on January 31, 2019, Nixon awarded each Petitioner a bonus of $100,000 or more.

22. Nixon awarded these bonuses to Petitioners to compensate them for their extraordinary performance during fiscal year 2018.

23. By approximately June 14, 2019, each Petitioner had been paid their bonus in full.

24. On or about June 24, 2019, Petitioners all gave notice that they intended to resign from Nixon so they could meet their clients' demonstrated needs.

25. Nixon did not allow Petitioners to start working with their clients at their new firm until July 16, 2019.

Nixon's Claw Back Provision & Dispute Resolution Procedures

26. Nixon's Compensation Plan imposes a severe penalty on any partner who chooses to resign, essentially requiring partners to remain at the firm for an additional full year to avoid a claim that they should return money fully earned during the previous year.

27. The Compensation Plan states that partners who receive "bonus awards of $100,000 or greater are required to repay the firm any award or portion thereof paid to them during any fiscal year in which they later cease to be a partner in the firm due to" voluntary resignation (the "Claw Back Provision").

28. After Petitioners gave notice of their intention to resign as Nixon partners, Nixon invoked the Claw Back Provision and demanded repayment of the bonuses that Petitioners earned for their performance during the fiscal year that ended on January 31, 2019.

29. The Partnership Agreement sets forth a process for resolving disputes that arise out of or relate to the Partnership Agreement or the Compensation Plan. *See* Exhibit A § 11.12.[2]

30. First, the parties are required to negotiate in good faith. *See id.* § 11.12(c).

31. The parties have "thirty days from delivery of notice of a dispute by one party to another to engage in such negotiation." *Id.*

32. If the parties cannot resolve their dispute within this time frame, any party "may commence mediation by providing notice in writing to the other party or parties and the [American Arbitration Association (the "AAA")] under its Commercial Mediation Rules then in effect." *Id.* § 11.12(d).

33. Finally, "[i]f a Dispute is not settled through mediation within 60 days of selection or appointment of a mediator, any party to that Dispute may commence arbitration by making a demand in writing complying with the Commercial Arbitration Rules of the AAA then in effect." *Id.* § 11.12(e).

34. The Partnership Agreement states it "shall in all respects be governed by and construed in accordance with the substantive law of New York," *id.* § 11.11, and that New York law shall be the "substantive law applicable to the resolution" of a dispute arising under or relating to the Partnership Agreement or the Compensation Plan, *id.* § 11.12(e)(iii).

[2] All exhibits cited herein are appended to the Affirmation of Andrew G. Celli, Jr. in Support of Article 75 Petition, dated September 15, 2020, and filed herewith. The Partnership Agreement is being filed under seal pursuant to an agreement of the parties. Petitioners intend to file an application as soon as possible for a Court order permitting the Partnership Agreement to be filed under seal.

Nixon Fails to Abide by the Dispute Resolution Procedures in the Partnership Agreement

35. On or around July 12, 2019, Nixon sent a letter to Petitioners demanding repayment of Petitioners' 2018 bonuses and formally providing notice to Petitioners of a dispute, pursuant to Section 11.12(a) of the Partnership Agreement.

36. In support of its campaign to claw back Petitioners' bonuses, Nixon withheld earned wages, equity distributions, and capital from Petitioners, in an amount exceeding several million dollars.

37. Petitioners refused to relinquish the bonuses they had earned because the Claw Back Provision is an undue restriction on the practice of law and thus is contrary to and unenforceable under New York law.

38. Petitioners were prepared to negotiate in good faith with Nixon, but Nixon refused.

39. On or around November 6, 2019, Nixon served Petitioners with requests for mediation with the AAA.

40. The request Nixon served on Petitioner Reardon sought a mediation in New York City.

41. The requests Nixon served on Petitioners Gaynor, Huang, Reil, and Swiatek all sought mediations in California.

42. Petitioners urged Respondent to agree to a single mediation process conducted in New York, under New York law, which governs the Partnership Agreement and this dispute.

43. In or around January 2020, Petitioners and Respondent, through counsel, agreed to consolidate the five mediations into a single mediation to be conducted in New York.

44. The parties, through counsel, then proceeded to discuss potential mediators.

45. In or around late January and early February of 2020, the parties, through counsel, identified Hon. Richard T. Andrias as a potential mediator.

46. Since Justice Andrias was not affiliated with the AAA, Respondent withdrew all of its mediation requests with the AAA on or around February 10, 2020 and February 12, 2020.

47. The AAA never appointed a mediator in response to any of Respondent's requests for mediation.

48. Neither Petitioners nor Respondents ever signed an engagement agreement with Justice Andrias to serve as a mediator.

49. Justice Andrias never sent Petitioners an invoice in connection with this matter.

50. Upon information and belief, Justice Andrias never sent Respondent an invoice in connection with this matter.

51. Petitioners never paid Justice Andrias any money in connection with this matter.

52. Upon information and belief, Respondent never paid Justice Andrias any money in connection with this matter.

53. Neither Petitioners nor Respondent ever submitted any writing to Justice Andrias concerning the merits of their dispute.

54. Neither Petitioners nor Respondent ever presented orally to Justice Andrias concerning the merits of their dispute.

55. A mediation was tentatively scheduled to occur with Justice Andrias in person in New York City on April 29, 2020, but then the COVID-19 pandemic intervened.

56. In early April 2020, the parties agreed to postpone the mediation because of the COVID-19 pandemic and applicable shelter-in-place orders that precluded travel. The parties

informed Justice Andrias that they wanted to postpone the mediation to a later date when they could hopefully all appear in person.

57. On or around May 18, 2020, counsel for the parties had a call with Justice Andrias during which Petitioners' counsel stated that Petitioners did not believe a remote mediation was likely to be successful in this matter and that Petitioners were not prepared to agree to any mediation process that did not involve an in-person mediation.

58. On May 23, 2020, Petitioners' counsel confirmed to Respondent's counsel that Petitioners would agree to a mediation process only if, at a minimum, Petitioners Gaynor and Reardon could be physically present with the mediator during the mediation, since Petitioners Gaynor and Reardon, as opposed to the other Petitioners, were located in and near New York City.

59. Petitioners' counsel also told Respondent's counsel that Petitioners had no objection to Respondent appearing remotely at the mediation.

60. Following additional emails and discussions, the parties agreed to conduct a mediation in New York on August 11, 2020, at which at least Petitioners Gaynor and Reardon and the mediator would appear in person, with other parties—including representatives of Nixon—having the option to appear in person or by videoconference.

61. On June 25, 2020, Justice Andrias informed the parties that, due to the COVID-19 pandemic, he was not comfortable conducting an in-person mediation on August 11, 2020.

62. Petitioners, through counsel, then reiterated their position that any mediation process had to allow, at the least, for Petitioners Gaynor and Reardon, who are in and near New York City, to meet in person with the mediator.

63. Respondent, through counsel, urged Petitioners to agree to a fully-remote mediation process with Justice Andrias, but Petitioners made clear to Respondent that they would not agree to any process—including any mediator—that would not allow at least Petitioners Gaynor and Reardon to meet in person with the mediator.

64. No mediator was ever appointed by the AAA or anyone else.

65. No mediator was ever selected by the parties.

66. While the parties did identify Justice Andrias as a potential mediator, Petitioners made it clear they were not willing to agree to any mediation process—including any mediator—unless at least two of the Petitioners could meet in person with the mediator.

67. Petitioners never agreed to select Justice Andrias to conduct a remote mediation.

68. The parties never selected any mediator who could conduct a mediation at which Petitioners Gaynor and Reardon could meet in person.

69. Petitioners suggested adjourning the mediation until Justice Andrias felt comfortable conducting an in-person mediation, given the COVID-19 pandemic.

70. Respondent refused and failed to propose any alternative dates for mediation.

71. Instead, on August 31, 2020, even though the parties had not selected or appointed a mediator, let alone conducted a mediation, Respondent served on Petitioners two arbitration demands that had been filed with the AAA. *See* Exhibits B-C.

72. The first demand was directed to Petitioner Reardon only and demanded an arbitration in New York City. *See* Exhibit B.

73. The second demand was directed to Petitioners Gaynor, Huang, Reil, and Swiatek and demanded an arbitration in San Francisco. *See* Exhibit C.

74. None of Petitioners has answered or otherwise responded to Respondent's arbitration demands, or participated in the purported arbitrations in any way.

75. Respondent has not served any Petitioner with an application to compel arbitration.

CAUSE OF ACTION
(CPLR 7503(b))

76. Petitioners repeat and reallege the preceding paragraphs as though fully set forth herein.

77. The Partnership Agreement does not authorize Respondent to file for arbitration until 60 days after the "selection or appointment of the mediator."

78. Respondent did not comply with the express terms of the Partnership Agreement when it purported to commence an arbitration before a mediator had been appointed or selected by the parties.

79. As a result of the foregoing, Petitioners are entitled to an order under Article 75 of the CPLR ordering the parties to mediate, and staying the two arbitrations Respondent purported to initiate, until 60 days after the parties have selected a mediator who can accommodate the parties' mediation positions or a mediator has been appointed.

WHEREFORE, Petitioners demand judgment as follows:

a. An Order, pursuant to CPLR 7503(b), staying the two arbitrations Respondent purported to initiate, until 60 days after the parties have selected a mediator who can accommodate the parties' mediation positions or a mediator has been appointed;

b. An Order compelling Respondent to participate in mediation, as required by the Partnership Agreement; and

c. Granting such other and further relief as is just and proper in the circumstances.

Dated: September 15, 2020
New York, New York

EMERY CELLI BRINCKERHOFF
ABADY WARD & MAAZEL LLP

/s

Andrew G. Celli, Jr.
Samuel Shapiro

600 Fifth Avenue, 10th Floor
New York, New York 10020
(212) 763-5000

Attorneys for Petitioners

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THOMAS E. GAYNOR; ABIGAIL T. REARDON; JINJIAN HUANG; STEPHEN REIL; MARIA S. SWIATEK,

Petitioners,

For a Judgment Pursuant to Article 75 of the New York Civil Practice Laws and Rules

-against-

NIXON PEABODY, LLP,

Respondent.

Index No. _____

VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF WESTCHESTER)

ABIGAIL T. REARDON, being duly sworn, deposes and says:

I am one of the Petitioners in the above-captioned proceeding. I have read the Verified Article 75 Petition and its contents are true to the best of my knowledge. For matters alleged upon information and belief, I believe them to be true.

ABIGAIL T. REARDON

Sworn to before me this 15th day of September, 2020

NOTARY PUBLIC

AVANIKA SHARDA
NOTARY PUBLIC-STATE OF NEW YORK
No. 01SH6365179
Qualified in Kings County
My Commission Expires 10-02-2021