UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

RICHARD A. PITINO, PLAINTIFF, v. ADIDAS AMERICA, INC. DEFENDANT.	NO. 3:17-CV-639-DJH

ADIDAS'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO DISMISS OR, ALTERNATIVELY, TO TRANSFER VENUE

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PRELIMINARY STATEMENT

Pitino's Response concedes or fails to contest the key points requiring dismissal of his outrage claim. Pitino does not dispute the "uncontroversial principle" that the parties' arbitration agreement requires an arbitrator, not the Court, to determine whether his outrage claim arises from the same commercial relationship underlying Pitino's pending contract claim. (Resp. at 9 ("adidas recites familiar and uncontroversial principles favoring arbitration").) He also acknowledges that he already has commenced the contractual dispute resolution process to assert a breach of contract claim that involves the same set of facts as this tort action. And his own statement of facts alleges that adidas's commercial relationship with Pitino and UofL motivated the alleged scheme to secure a basketball player's commitment to UofL. The Court should compel arbitration on Pitino's concessions alone.

Pitino also does not dispute that the forum selection clause in his agreement with adidas is valid or the "uncontroversial principles" supporting adidas's motion to enforce the forum selection clause. (*Id.* at 12 ("adidas recites uncontroversial principles requiring enforcement of valid forum-selection clauses, supporting a broad reading of clauses, and rejecting 'artful pleading' to rework contract claims into tort claims").) Instead, he cites a line of irrelevant cases concerning the enforceability of choice-of-law provisions—which, of course, are governed by different legal standards than the forum selection clause. Putting these irrelevant citations aside, Pitino accepts that under Kentucky law, the test for whether a contractual forum selection clause applies to a tort claim turns on whether the tort and contract claim arise from the same common nucleus of facts. (*Id.*) Pitino's concession that his contract and tort claims substantially overlap, (*id.* at 15), should end the inquiry, resulting in a transfer of this action to the parties' contractually agreed-upon forum.

Should the Court reach the merits of Pitino's outrage claim, the claim fails as a matter of law. Pitino's Response conflates the proximate cause element of his outrage claim with the separate requirement that adidas's conduct be "directed at" Pitino. The "directed at" requirement—which Pitino ignores, likely because he cannot meet it—severely limits the class of plaintiffs who may assert outrage claims under Kentucky's restrictive law, and Pitino's foreseeability theory of outrage has been explicitly rejected. Pitino's reliance on *Burgess v. Taylor*, a case involving hair-raising facts seemingly inspired by a Stephen King horror story, is unavailing because the defendants there repeatedly lied directly to the plaintiff and destroyed her property, telling her they would care for her two beloved Appaloosa horses while instead selling them to slaughter and then lying to her about it. The *Burgess* defendants' conduct unquestionably was directed at the plaintiff and her property, unlike adidas's alleged conduct which, by Pitino's own allegations, was directed at UofL and not Pitino. Nor can Pitino's allegations reach the high bar of "outrageousness" under Kentucky law, which, as demonstrated by numerous cases, including *Burgess*, requires substantially more egregious conduct than Pitino has alleged.

ARGUMENT

I. The Court Should Dismiss or Stay this Action in Favor of Mandatory Arbitration.

The Endorsement Agreement's dispute resolution provision, which Pitino has already invoked, requires that an arbitrator decide the arbitrability of this dispute. This threshold procedural point is apparently undisputed: Pitino neither addresses nor contests the case law cited in adidas's brief stating that the parties' agreement to arbitrate before the American Arbitration Association ("AAA")—which by rule provides that an arbitrator decide the arbitrability of a dispute—demonstrates an unmistakable agreement to submit

questions concerning the scope of their arbitration agreement to the arbitrator. *See Lowry v. JPMorgan Chase Bank, N.A.*, 522 F. App'x 281, 283 (6th Cir. 2013) ("[C]ourts should determine whether an arbitrator has jurisdiction over the merits of a dispute unless the parties have clearly and unmistakably agreed that an arbitrator is to resolve issues of arbitrability."); *Western Land Co., LLC v. Francis*, 2013 WL 3992499, at *2 (W.D. Ky. Aug. 5, 2013) (holding that parties' selection of the AAA Rules "provide[s] a clear and unmistakable delegation of authority to the arbitrator to decide objections related to the scope or validity of the arbitration provision"). The parties' clear and unmistakable intent to delegate disputes over the scope of the arbitration clause, particularly in light of Pitino's concession that the tort claim and contract claim share overlapping facts, (Resp. at 14), requires dismissing the Complaint and granting adidas's motion to compel arbitration.

Although the parties' apparent agreement on this issue should end the matter, if the Court were to make the threshold determination of arbitrability, the cases cited in Pitino's brief reinforce that arbitration is the proper forum. *Nestle Waters N. Am., Inc. v. Bollman*, 505 F.3d 498, 505 (6th Cir. 2007), held that "if an action can be maintained without reference to the contract or relationship at issue, the action is likely outside the scope of the arbitration agreement." *See also NCR Corp. v. Korala Assocs., Ltd.*, 512 F.3d 807, 814 (6th Cir. 2008) (reaffirming *Nestle Waters* as "the standard we apply to determine whether a particular claim or dispute falls within the scope of an arbitration agreement"). (Resp. 10.) In determining whether Pitino's tort action could be maintained without reference to the Endorsement Agreement or the relationship between adidas and Pitino formed by the Endorsement Agreement, the Court must resolve doubts concerning the scope of arbitrable issues in favor

of arbitration, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983), a principle Pitino admits is "uncontroversial." (Resp. at 9.)

Pitino's argument focuses exclusively on whether the elements of his outrage claim require reference to the Endorsement Agreement, (*see id.* at 10–11), but ignores that his claim necessarily refers to adidas's commercial relationship with him and UofL, which is inextricably linked to the Endorsement Agreement. Pitino admits that his outrage claim arises from the same operative facts as his pending parallel claim for breach of contract. (*Id.* at 14–15.) In order to create the critical link between adidas's corporate interests and the conduct of its employee, Jim Gatto, the Complaint repeatedly cites adidas's commercial stake in the success and prominence of the universities it outfits. (Compl. ¶¶ 13, 15, 21.) The Complaint goes on to cite the longstanding endorsement deal between adidas and UofL as an explanation for Pitino's multiple phone calls to Gatto prior to high school athlete Brian Bowen's decision to attend UofL. (*Id.* at ¶ 28.) In his Response, Pitino continues to highlight adidas's commercial interests in its endorsement deals, citing adidas's desire to promote the success of schools it sponsors and suggesting that the scheme to secure Bowen's commitment to attend UofL centered on an effort to "help one of [adidas's] flagship schools . . . secure a five star caliber kid." (Resp. at 2, 4 (citing Compl. ¶¶ 13, 21).) These allegations demonstrate that Pitino cannot extricate his tort claim from his broader commercial relationship with adidas. Because Pitino's contract and tort claims are intertwined, an arbitrator should consider them together in the dispute resolution process Pitino already has initiated.

Pitino's attempt to show that not every dispute between the parties should be resolved via arbitration resorts to an absurd and irrelevant hypothetical in which one of

adidas's employees maims him with a car. (*Id.* at 11 n.3.) The point of this hypothetical is apparently to demonstrate that only claims related to the parties' commercial relationship are subject to arbitration, but it misses the mark: unlike Pitino's vehicular-assault hypothetical, the allegations in the Complaint make clear that the dispute in this action *is* linked to the parties' commercial relationship and therefore should be arbitrated.

II. The Court Should Dismiss this Action, or Transfer It to the Proper Venue, Pursuant to the Parties' Contractual Forum Selection Clause.

Even if this case could proceed in court, the more permissive test controlling the scope of a contractual forum selection clause, which focuses only on whether a common factual nexus exists between the tort claim and contract claims, requires transferring this action to the U.S. District Court in Multnomah County, Oregon (or dismissing it to be re-filed there). Pitino's effort to avoid the forum selection clause relies exclusively on cases discussing *choice-of-law* provisions, which concern the substantive law to apply to a particular dispute. (*Id.* at 12–14.) The operative rules applied in those cases (which vary based on the choice of law rules of the forum state) do not apply to forum selection clauses. With the sole exception of *Moses v. Business Card Express, Inc.*, 929 F.2d 1131 (6th Cir. 1991), none of the cases relied on even mention forum selection provisions—and in *Moses* the language Pitino cites (and the key issue in the case) concerns only choice-of-law analysis. *Id.* at 1136, 1140.

Despite this detour through inapposite cases, Pitino correctly identifies that the issue "is whether Coach Pitino's tort of outrage claim is related to the parties' commercial relationship." (Resp. at 12.) A forum selection clause applies to a tort claim that arises from the same common nucleus of facts as a contract dispute, or where the two claims raise substantially related factual and legal issues. *See Ky. Ins. Guar. v. S&A Constructors, LLC*, 2017 WL 3090304, at *3 (W.D. Ky. 2017); *Wireless Props., LLC v. Crown Castle Int'l Corp.*, 2011

WL 3420734, at *7 (E.D. Tenn. Aug. 4, 2011); *Travelers Prop. Cas. Co. of Am. v. Centimark, Corp.*, 2005 WL 1038842, at *2 (S.D. Ohio May 3, 2005). Pitino does not dispute that the forum selection clause is valid, and he concedes that his two claims share substantial "factual overlap" and will require resolution of similar discovery issues. (Resp. at 11–12, 14–15.) Although there are necessarily some distinct *legal* issues with each claim, the allegations in his Complaint (repeated in his brief) highlighting adidas's commercial relationship with UofL and identifying the conduct of adidas's employee described in the Criminal Complaint as giving rise to both a breach of the Endorsement Agreement and his tort claim, (*id.* at 2–4 (citing Compl. ¶¶ 12, 13, 15, 21)), leave little doubt that the two claims present substantially related *factual* issues (with material overlap as to many legal issues, too).

Pitino's attempt to avoid the forum selection clause by arguing that "an arbiter in Oregon can apply issue preclusion from this Court's judgment as well as it can from an Oregon federal court's judgment," (*id.* at 15), ignores Supreme Court precedent that forum selection clauses should be enforced except under limited circumstances unrelated to the convenience of the parties. That a ruling on the merits from this Court could preclude an inquiry into the same issues in the forum agreed to by the parties is precisely why this action should be dismissed (or transferred to Oregon) consistent with the parties' expectations. And the relative convenience of hearing Pitino's tort claim in Kentucky versus Oregon is of no consequence to the enforceability of the parties' choice of forum clause. *Atl. Marine Constr. Co., Inc. v. U.S. District Court for the W. District of Texas*, 134 S.Ct. 568, 581 (2013) ("Only under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion be denied."). The parties agreed to an Oregon court as the

fallback forum for disputes not subject to arbitration. Pursuant to that agreement, to the extent this action is not subject to the Arbitration Clause, Pitino's concession that his tort claim shares the same operative facts with his contractual claim requires dismissing the claim or transferring the action to Oregon.

III. The Court Should Dismiss Pitino's Complaint for Failure to State a Claim.

As set forth more fully in adidas's moving brief, Pitino's outrage claim is facially deficient because none of the conduct allegedly attributable to adidas was directed at Pitino. Additionally, although adidas takes the allegations described in the Complaint seriously, they fall far short of the "atrocious and utterly intolerable" behavior required to support a claim for outrage under Kentucky's stringent standard. The principal argument raised in Pitino's Response, that the alleged conduct would foreseeably cause Pitino emotional distress—even if true—is entirely beside the point. Because the alleged conduct was not directed at Pitino and was not "outrageous" under Kentucky law, the Complaint must be dismissed.

A. Because No Conduct Was Directed at Pitino, Pitino Cannot Recover for His Alleged Emotional Distress.

The Complaint alleges no conduct by adidas *directed at* Pitino. Indeed, the Complaint expressly states that any "fraudulent actions were *directed at the University of Louisville*," not at Pitino; that adidas "*had no desire to adversely affect* [*Pitino's*] contracts with his employer or others"; and that any gains adidas realized were *not at Pitino's expense*. (Compl. ¶ 38 (emphasis added).) Although Pitino now attempts to characterize these allegations as unimportant and irrelevant to the substance of his claim, suggesting that they were included only to show that no other traditional tort applied, (Resp. at 22 n.7), he cannot pick and choose which allegations can be considered and for what purpose. Taking the allegations in

the Complaint as true, by Pitino's own admission he is a third party to the allegedly tortious conduct and so cannot recover under Kentucky law.

Pitino's characterization of the alleged conduct only reinforces that he cannot show conduct directed at him. Every act described in the Response to establish that adidas engaged in outrageous conduct was directed at other people and institutions. Pitino alleges that adidas's payments to Bowen's family were "structured so as to conceal [them] from the NCAA and officials at the University of Louisville," and that the conspirators made "false certifications to [UofL]." (*Id.* at 4.) Although Pitino may see no distinction between himself and the UofL basketball program, they are not one and the same. Actions directed at the university are not directed at him, much like Kentucky courts have made clear that only the targeted family member has a cause of action for conduct that could foreseeably injure an entire family. *See, e.g.*, *Allen v. Clemons*, 920 S.W.2d 884, 887 (Ky. App. 1996) (rejecting wife's claim due to status as third-party victim even though neighbor's erection of billboard identifying wife's husband as convicted child molester caused her extreme embarrassment).

Pitino's argument that "the favorably-construed facts show that [he] was a victim of adidas' misconduct" cannot salvage an outrage claim based on conduct directed at others. (Resp. at 1; *see id.* at 20, 21.) Kentucky law specifically does not provide a cause of action to everyone aggrieved by outrageous conduct or even those who may foreseeably be affected by outrageous conduct. *See Mineer v. Williams*, 82 F. Supp. 2d 702, 706–07 (E.D. Ky. 2000) (Kentucky has declined to adopt subsection (2) of the Restatement that would broaden the class of plaintiffs who could assert outrage claims in certain circumstances); *see also Cooper v. Bd. of Educ.*, 2009 WL 2581239, at *4–5 (Del. Super. Aug. 20, 2009) ("As a general principle, courts will not consider a plaintiff to be a direct victim of the defendant's conduct

where that conduct more directly targeted another victim. . . . That [parents] might foreseeably have been caused emotional distress by the alleged tortious conduct does not imply that the defendants' actions were 'directed at' them to the same extent that it directly targeted [the child]."); *accord* Restatement (Second) of Torts § 46 cmt. l (describing the policy for additional requirements under subsection (2) that third party "plaintiffs [be] present at the time [of the allegedly outrageous conduct]" rather than "discover later what has occurred").

Kentucky law imposes the "directed at" requirement specifically to limit the class of plaintiffs who can assert outrage claims. *See* Restatement (Second) of Torts § 46 cmt. l ("The limitation [requiring presence in subsection (2)] may be justified by the practical necessity of drawing the line somewhere, since the number of persons who may suffer emotional distress at the news of an assassination of the President is virtually unlimited."). Unsurprisingly, Pitino cites no case law supporting the radical expansion of Kentucky law needed to sustain his claim. And he makes no effort to distinguish the cases dismissing outrage claims arising from conduct directed at third parties, (Resp. at 21), even where that conduct—such as erecting a billboard outside the plaintiff's home announcing that her husband is a convicted sex offender—is both intentional and inevitably will harm the plaintiff. *Allen*, 920 S.W.2d at 885–86.

Burgess v. Taylor, 44 S.W.3d 806 (Ky. App. 2001), relied on by Pitino as somehow "the case fatal to [adidas's] argument," (Resp. at 20), in reality only underscores the demanding standard for an outrage claim in Kentucky. Pitino's assertion that *Burgess* demonstrates that defendants can be liable for outrageous conduct where defendants' "direct action was to another," (*id.* at 22), ignores that the outrageous conduct in *Burgess* was clearly

directed at the plaintiff, even though the physical harm was done to the plaintiff's property. Defendants there promised plaintiff they would keep and care for the plaintiff's horses, but, instead, without plaintiff's permission, sold the horses to slaughter. After selling the horses to "a known slaughter-buyer," the defendants repeatedly lied to the plaintiff when she inquired about the horses' whereabouts and expressed a desire to visit them. The defendants then gave the plaintiff "vague directions to a fictitious location" where they falsely told her she could find the horses in a pasture, choosing to inflict upon her "emotional torment [that was] heartless, flagrant, and outrageous" rather than admit what they had done. *Burgess*, 44 S.W.3d at 810, 812 (quoting Restatement (Second) of Torts § 46 cmt. f). The slaughtering *of the plaintiff's property* and misrepresentations *to the plaintiff* in *Burgess* satisfied the "directed at" requirement, and the plaintiff there was a direct target of the defendants' conduct, rather than a third party to it.[1] Pitino's Complaint, in contrast, contains no allegations that adidas destroyed Pitino's property, lied to him, or even lied *about him* to others. Because Pitino has not alleged that adidas directed its allegedly tortious conduct at him—and indeed expressly alleges that adidas's conduct was *not* directed at him but directed at other people and institutions—the outrage claim fails as a matter of law.

B. The Conduct Alleged Was Not Outrageous Under Kentucky Law.

Pitino concedes, as he must, that it is a question for the Court, in the first instance, whether the conduct alleged is so "extreme and outrageous" to permit recovery under Kentucky's restrictive law of outrage, and courts routinely dismiss outrage claims at the pleading stage for failure to allege sufficiently outrageous conduct. *See Street v. United States*

[1] The slaughtering of the plaintiff's treasured horses and repeated lies to the plaintiff in *Burgess* also serve as a grisly touchstone for the level of outrageousness sufficient to support an outrage claim under Kentucky law. (*See below* Part III.B.)

Corrugated, Inc., 2011 WL 304568, at *7 (W.D. Ky. Jan. 25, 2011). (*See also* cases cited in adidas's Op. Mem. at 13–14, ECF No. 7.)

Even if Kentucky law permitted outrage claims by bystanders like Pitino, which it does not, neither the Complaint nor the Response describes conduct so atrocious and utterly intolerable as to surpass all possible bounds of decency. Pitino attempts to align the alleged conduct in this case with the few cases in which an outrage claim survived the pleading stage, but a review of these cases makes plain that the scheme described in the Complaint, while serious, does not meet Kentucky's demanding standard. *See Wilson v. Lowe's Home Ctr.*, 75 S.W.3d 229, 237–38 (Ky. App. 2001) (plaintiff subjected to denigrating racial remarks at his workplace for seven years); *Brewer v. Hilliard*, 15 S.W.3d 1, 4, 7 (Ky. App. 1999) (plaintiff's co-worker frequently engaged in lewd name calling, obscene sexual gestures, unsolicited touching, and sexual harassment of plaintiff). There is no allegation that Pitino was the victim of physical menacing that endangered his personal safety, *see Craft v. Rice*, 671 S.W.2d 247, 248 (Ky. 1984), or that he shared any special relationship of trust with adidas that could have exacerbated conduct to such a degree as to possibly satisfy the demanding standards for outrage. *See Osborne v. Payne*, 31 S.W.3d 911, 914 (Ky. 2000). To the contrary, Pitino was a sophisticated counterparty engaged in a long term, and highly lucrative, commercial relationship with adidas. Nothing about the parties' relationship suggests that adidas's alleged conduct, which also forms the basis for Pitino's breach of contract claim, can be characterized as utterly atrocious or intolerable.

The cases relied on by Pitino demonstrate why the allegations in the Complaint fall short of what constitutes "outrageous" conduct directed at the plaintiff under Kentucky law. In *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187 (Ky. 1994), the defendant concealed from

the plaintiff that the pipes he was removing from a building were covered in asbestos, resulting in the plaintiff returning home to his pregnant wife "covered with asbestos dust" for five months. *Id.* at 189. The defendant's willful failure to warn the plaintiff of a known dangerous condition gave rise to a palpable fear that he and his family would contract a painful, and almost invariably fatal, disease. Pitino obviously does not claim that he feared for his life or that adidas engaged in a months-long campaign of harassment. *Compare Craft*, 671 S.W.2d at 248, 250 (finding outrageous conduct where defendant sheriff harassed plaintiff during two-to-three month period, including by forcing her vehicle across a median into oncoming traffic). Pitino's Complaint requests a significant and unwarranted change in Kentucky law that would substantially lower the bar for what constitutes actionably outrageous conduct.

Pitino attempts to bolster his claim that the alleged conduct was outrageous by arguing that these events have been extensively covered in the media, but the newsworthiness and level of coverage of sports like college basketball is not the relevant question. (Resp. at 17–18.) It is the public's reaction to the conduct reported in those news reports—specifically, whether the news causes them to shout "Outrageous!" in response to adidas's alleged conduct—and not the fact of the reporting, that is relevant to whether the underlying conduct is actionable.

Pitino himself questions what conclusions the public could draw from the publicity surrounding the Criminal Complaint, and in doing so undermines his outrage claim. In disputing the characterization of Pitino as an "unindicted co-conspirator," (Resp. at 20 n. 6), the Response notes that the DOJ Criminal Complaint does not identify Pitino as such, and only includes an "inherently dubious" boast by one of the indicted parties "bragging

about Coach Pitino's involvement." (*Id.*) Pitino seeks compensation from adidas for the alleged perception that he was complicit in the scheme described in the Criminal Complaint, (Compl. ¶¶ 1, 4, 33), but at the same time denies that the Criminal Complaint supports any such inference. Whatever embarrassment Pitino suffered as a result of being mentioned in the Criminal Complaint, Kentucky courts routinely dismiss outrage claims based on conduct that causes much more direct and intentional embarrassment to the plaintiff. In *Klotz v. Shular*, for example, the court dismissed an outrage claim brought by a mother who was arrested without probable cause and handcuffed in public in front of her young son, even though she alleged that the defendants made misrepresentations as part of a scheme devised specifically to obtain her arrest. 2015 WL 4556267, at *1, 4 (W.D. Ky. July 28, 2015). In contrast to the plaintiff in *Klotz*, who was unjustly arrested and forced to appear as a defendant in court, Pitino alleges that he was merely implicated in a criminal scheme, but not in a manner that justifies characterizing him as an unindicted co-conspirator. (Resp. at 20.) Because conduct far more egregious has been found insufficient as a matter of law, Pitino's allegations do not satisfy Kentucky's stringent standard for outrage claims.

CONCLUSION

The Court should dismiss the Complaint, or transfer this action to the U.S. District Court for the District of Oregon, Portland Division.

Respectfully submitted,

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Certificate of Service

I certify that I served the foregoing document on all counsel of record through CM/ECF on January 5, 2018.

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