

Not To Be Published:

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

ROBERT H. VAN HORN, a/k/a
ROBERT VAN HORN a/k/a R.H. VAN
HORN,

Plaintiff,

vs.

WILLIAM VAN HORN and JUNE
LINDER,

Defendants.

No. C04-4020-MWB

**MEMORANDUM OPINION AND
ORDER REGARDING
DEFENDANTS' MOTION TO
DISMISS OR FOR JUDGMENT ON
THE PLEADINGS; OR, IN THE
ALTERNATIVE, MOTION FOR
STAY PENDING MANDATORY
ARBITRATION**

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I. INTRODUCTION AND FACTUAL BACKGROUND

Plaintiff Robert H. Van Horn, also known as Robert Van Horn or R.H. Van Horn (“R.H. Van Horn”), is the father of four children: William Van Horn (“William”), June Linder (“June”), John C. Van Horn (“John”) and Jane Thompson (“Jane”). R.H. Van Horn is also the President of the Glidden First National Holding Company (“Holding Company”), an entity organized in 1979 that owns all of the outstanding shares in the First Bank & Trust Company in Glidden, Iowa (“Bank”). At the time the Holding Company was formed, shareholders of the Bank exchanged their shares in the Bank for shares of stock in the Holding Company. Eventually a dispute arose between R.H. Van Horn and two of his children, defendants William and June, as to the nature and extent of ownership of the shares in the Holding Company. R.H. Van Horn contends that he is the sole and only owner of *all* of the shares of stock in the Holding Company. Conversely, William and June contend that they have had ownership of a portion of the Holding Company’s shares since its inception.

This dispute culminated in R.H. Van Horn filing a complaint with this court on April 5, 2005, seeking declaratory judgment that he is the sole and only owner, legal and equitable, of all the shares of the Holding Company. (Doc. No. 2). In his complaint, R.H.

Van Horn alleged jurisdiction was proper on diversity of citizenship grounds under § 1332(a)(1) as complete diversity existed between the parties and the amount in controversy exceeded \$75,000.00. Complete diversity was premised on R.H. Van Horn's Iowa citizenship, William's Colorado citizenship and June's Illinois citizenship. The Answer and Counterclaims of William Van Horn and June Linder (Doc. No. 8) was filed by the defendants on July 6, 2004. In their answer, the defendants denied R.H. Van Horn's claims to full ownership of the Holding Company stock, and asserted a number of affirmative defenses. Additionally, the defendants filed three counterclaims, the first seeking declaratory judgment on the issue of their ownership of shares in the Holding Company, the second claiming a breach of fiduciary duty on the part of R.H. Van Horn, and the third alleging that R.H. Van Horn wrongfully converted their shares of stock. R.H. Van Horn filed an Answer By Plaintiff (Defendant to Counterclaim) to Counterclaim of Defendants William Van Horn and June Linder (Doc. No. 11) on August 26, 2004, in which he categorically denied all pertinent facts relating to the defendants' counterclaims.

On October 15, 2004, the defendants filed a Motion to Bring in Third-Party Defendants John Van Horn and Glidden First National Holding Company pursuant to Federal Rule of Civil Procedure 14. (Doc. No. 19). R.H. Van Horn resisted the defendants' motion, and requested oral argument on the matter. (Doc. No. 21). William and June filed a reply in which they conceded that Rule 14 did not allow for the filing of a third-party complaint against John and the Holding Company in this particular situation. However, in light of the fact that their original argument was moot, William and June asserted that pursuant to Rule 12(h)(2) their motion should be considered as a motion to dismiss for failure to join indispensable parties under Rule 19(b), or as one for judgment on the pleadings. (Doc. No. 25). On November 19, 2004, United States Magistrate Judge Paul A. Zoss entered an order declining William and June's invitation to treat the pending

motion as a motion to dismiss under Rule 12(h)(2), and likewise denied the defendants' motion to file a third-party complaint. (Doc. No. 27). Judge Zoss further stated that the defendants were "free to file a proper motion to dismiss, if desired, providing the plaintiffs (sic) with the opportunity to respond to such a motion." *Id.*

On December 23, 2004, William and June filed a Motion to Dismiss or for Judgment on the Pleadings; or, in the Alternative, Motion for Stay Pending Arbitration. (Doc. No. 33). In this motion, the defendants asserted that this matter should be dismissed for failure to join indispensable parties under Rule 19, and that joinder of these parties would destroy complete diversity and deprive the court of subject matter jurisdiction. Alternatively, the defendants asserted that an agreement between the parties and federal and state banking regulators at a teleconference on December 10, 2003—memorialized in a letter dated December 11, 2003 ("the Letter")—required the parties to submit any ongoing disputes regarding ownership of the Holding Company's shares to arbitration. Therefore, the defendants requested that the suit be dismissed, or stayed, pending arbitration. On January 6, 2005, R.H. Van Horn filed his resistance in which he generally asserted that joinder of John and the Holding Company was not necessary for adjudication, and that if they must be joined as indispensable parties, they should be aligned as plaintiffs, not defendants—thus preserving diversity jurisdiction. (Doc. No. 39). Moreover, R.H. Van Horn asserts that the Letter, which defendants hold out as an agreement to arbitrate, was never signed by R.H. Van Horn, and that the letter merely requires the parties to commit to a mechanism designed to resolve their dispute, which is exactly what the plaintiff contends he did in filing this suit. William and June filed their reply brief on January 15, 2005, contending that John and the Holding Company were indispensable parties—and while conceding that John could be aligned as an involuntary plaintiff, pursuing their position that the Holding Company was most properly aligned as a

defendant. (Doc. No. 44). Additionally, the defendants continued to assert that the parties agreed to submit issues surrounding ownership of the Holding Company shares to binding arbitration, that the plaintiff did sign the December 12, 2003, Letter, and that the matter should be stayed pending arbitration as mandated by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, and/or Iowa Code chapter 679A. The matter is now fully submitted and ready for a determination by this court. The court will address each of the contested issues in turn—first, whether John and the Holding Company are indispensable parties, and second, whether there is a binding agreement to arbitrate that requires a stay or dismissal of this action.

II. MOTION TO DISMISS FOR FAILURE TO JOIN INDISPENSABLE

PARTIES

A. Arguments Of The Parties

William and June allege that John and the Holding Company are indispensable parties that should be joined. They assert that John is not only the plaintiff's child, but he is a shareholder in, and a director and secretary of, the Holding Company. Further, the defendants aver that John had access to documents pertaining to the ownership of the Holding Company and is allegedly involved in the redistribution of the shares that are in dispute in this matter. For these reasons, the defendants assert that he should be joined under Rule 19 as an involuntary plaintiff, as John's Iowa residency, if joined as a defendant, would destroy diversity jurisdiction. Turning to the Holding Company, the defendants assert that it should be added as a party because it has an equitable interest in the determination of its ownership and it has a fiduciary duty to protect itself and its shareholders against potential liability from the alleged actions of R.H. Van Horn. Further, the defendants argue that the Holding Company has reporting obligations to

federal and state banking officials and the duty to avoid tax consequences from inaccurate or faulty reporting. The defendants contend that the only possible alignment for joinder of the Holding Company would be as a defendant, which, as the Holding Company is an Iowa entity, would destroy complete diversity. The defendants contend that the court, using its discretion under Rule 19(b), should join the Holding Company as an ‘indispensable party’ aligned with the defendants, and that as such joinder would destroy subject matter jurisdiction, the suit should be dismissed pursuant to Rule 12(h)(3). *See* FED. R. CIV. P. 12(h)(3) (allowing a court to dismiss, even on its own motion, a case in which it no longer has subject matter jurisdiction).

R.H. Van Horn resists, claiming that joinder is not necessary for just adjudication of the issues before the court. R.H. Van Horn claims that unlike William and June, John has *no* issue with R.H. Van Horn’s claimed stock ownership in the Holding Company. Further, R.H. Van Horn contends that the ownership of the shares of the Holding Company as between R.H. Van Horn, William, June, and John is immaterial to the Holding Company. For these reasons, R.H. Van Horn asserts that neither John nor the Holding Company are ‘indispensable parties’ as contemplated by Rule 19. In the alternative, R.H. Van Horn contends that if the court finds them to be parties, both John and the Holding Company should be joined as involuntary plaintiffs under Rule 19(a). R.H. Van Horn asserts the following reasons for aligning John and the Holding Company as plaintiffs: (1) the Holding Company’s interests are consistent with those of its long time CEO, R.H. Van Horn; (2) neither John nor the Holding Company have filed a motion to intervene as defendants, which they could have done had either felt their interests were counter to those of the plaintiff; and (3) neither John nor the Holding Company have any substantial controversy with R.H. Van Horn. R.H. Van Horn recognizes that joinder of either John or the Holding Company as defendants would destroy complete diversity and

divest this court of subject matter jurisdiction. However, R.H. Van Horn adamantly asserts that looking at the heart of this litigation, it is evident that if John or the Holding Company are ‘indispensable parties’ under Rule 19, they should be added as involuntary plaintiffs.

In reply, the defendants assert that John, as a shareholder and officer, clearly has an interest in the outcome of these proceedings as any determination of share ownership in the Holding Company will affect John’s ownership in the Holding Company. Further, defendants indicate that John’s interest is not adequately represented by R.H. Van Horn, and that changes in stock ownership instigated by R.H. Van Horn could have drastic tax implications for *all* shareholders in the Holding Company, including John. Defendants also contend that as an officer of the Holding Company, John himself may have also breached fiduciary duties he owed to the defendants. Though the defendants insist that John be joined as an ‘indispensable party’ under Rule 19, they do not object to John’s alignment as an involuntary plaintiff with R.H. Van Horn. Turning to the Holding company, the defendants reiterate their position that it should be added as an indispensable party for the following reasons: (1) its rights and liabilities are affected by this action; (2) it has a fiduciary duty to protect itself and shareholders against potential liability stemming from the acts of its officers; (3) it has a regulatory obligation to provide truthful information to federal and state bank officials; and (4) without its joinder, questions would remain as to the finality of any relief ordered. Further, the defendants argue that the Holding Company’s interests are not aligned with the plaintiffs as both R.H. Van Horn and John have caused the Holding Company to file false reports with federal and state banking officials, have engaged in mismanagement of the Holding Company, and have distributed profits without board approval. William and June, in closing, assert that considerations of “equity” and “good conscience” pursuant to Rule 19 mitigate in favor of joining the

Holding Company as a defendant in this case. Therefore, as the Holding Company's joinder as a defendant would destroy diversity jurisdiction, the matter should be dismissed.

B. The Law

The defendants have moved for dismissal pursuant to Federal Rule of Civil Procedure 12(h)(2). Rule 12(h)(2) allows a party, even after it has filed an answer, to raise a “defense of failure to join a party indispensable under Rule 19 . . . by motion for judgment on the pleadings” under Rule 12(c). FED. R. CIV. P. 12(h)(2) (2005), Advisory Committee Note (“A person may be added as a party at any stage of the action on motion or on the court’s initiative; and a motion to dismiss, on the ground that a person has not been joined and justice requires that the action should not proceed in his absence, may be made as late as the trial on the merits.”) (citations omitted). Therefore, the defendants’ motion is timely in spite of the fact that it was filed at least five months after they filed their answer to the complaint. *See* FED. R. CIV. P. 12(b)(7) (requiring a motion asserting a defense of failure to join a party under Rule 19 be filed “before pleading if a further pleading is permitted.”). Though the motion was made under Rule 12(h)(2), the standards for dismissal are the same as those under Rule 12(b)(7)—which governs dismissal for failure to join an indispensable party. Pursuant to Rule 12(b)(7), a party may move to dismiss a complaint for “failure to join a party under Rule 19.” FED. R. CIV. P. 12(b)(7). Rule 19, in turn, provides, in pertinent part, as follows:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person’s absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the

disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

FED. R. CIV. P. 19(a) & (b) (2005).

As this court recently explained, the process for disposition of a motion to dismiss pursuant to Rule 12(b)(7) involves a two-step process. *See Storm v. Van Beek*, 2004 WL 1950367 at *5-6 (N.D. Iowa Sept. 2, 2004). First, the court must determine whether the absent party satisfies the threshold requirements of Rule 19(a), and if it does, the court must then determine whether to dismiss the action if that party cannot feasibly be joined

by weighing the four additional factors specified in Rule 19(b). *See DeWit v. Firststar Corp.*, 879 F. Supp. 947, 991 (N.D. Iowa 1995) (citing *Boulevard Bank Nat'l Ass'n v. Philips Med. Sys. Int'l*, 15 F.3d 1419, 1422-23 (7th Cir. 1994)). At the first step in the process, the Seventh Circuit Court of Appeals has read the requirement under Rule 19(a) that “[a] person . . . whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party,” *see* FED. R. CIV. P. 19(a), to mean that “a person should *not* be joined as a party if that joinder would deprive the court of jurisdiction where . . . complete relief otherwise could be accorded among those already parties.” *Culbertson v. Libco Corp.*, 983 F.2d 82, 85 (7th Cir. 1993) (emphasis added). Moreover, at the first step in the process, where joinder is sought pursuant to Rule 19(a)(1), the proponent of a motion to dismiss under Rule 12(b)(7) must show that “in the person’s absence complete relief cannot be accorded among those already parties.” FED. R. CIV. P. 19(a)(1). Where joinder is sought pursuant to Rule 19(a)(2), “[t]he proponent of a motion to dismiss under FED. R. CIV. P. 12(b)(7) has the burden of producing evidence showing the nature of the interest possessed by an absent party and that the protection of that interest will be impaired by the absence.” *Dewit*, 879 F. Supp. at 992. As to the second step in the process, the Eighth Circuit Court of Appeals has explained,

Rule 19(b) authorizes a district court to exercise its equitable powers to dismiss an action if a party regarded as “indispensable” cannot be joined. “Whether a person is ‘indispensable,’ that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation.” *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968). We therefore review a district court’s decision to dismiss an action for failure to join an indispensable party under the highly deferential abuse-of-discretion standard. *United States*

Electrolux rel. Steele v. Turn Key Gaming, Inc., 135 F.3d 1249, 1251 (8th Cir. 1998).

Spirit Lake Tribe v. North Dakota, 262 F.3d 732, 746 (8th Cir. 2001). With these principles in mind the court now turns to an examination of the parties' arguments for and against joinder of John and the Holding Company.

C. Analysis

The key issue to be resolved on the defendants' motion to dismiss for failure to join indispensable parties boils down to whether the parties can pursue their claims without also suing John and the Holding Company. The court turns first to the question of whether John should be added as a party to this litigation pursuant to Rule 19. In this case, R.H. Van Horn contends that he is the sole owner of all stock in the Holding Company. Conversely, William and June contend that the ownership of the Holding Company's stock is divided between themselves, R.H. Van Horn and John. According to R.H. Van Horn, John does not take issue with his claim that he is the sole shareholder of the Holding Company's stock. Further, the defendants contend that certain actions by John, in his capacity as an officer of the Holding Company, could have amounted to a breach of the fiduciary duty John owed to them. As John would most likely dispute any claimed breach of fiduciary duty to William and/or June, and being as he does not dispute R.H. Van Horn's claimed sole ownership and therefore would implicitly reject William and June's claim that they are shareholders in the Holding Company—he would most properly be aligned as an involuntary plaintiff in this litigation. The parties are in agreement that should John be joined, he should be joined as an involuntary plaintiff—which, considering John's Iowa citizenship, would preserve this court's subject matter jurisdiction. *See* FED. R. CIV. P. 19(a) (“A person . . . whose joinder *will not deprive the court of jurisdiction*

over the subject matter shall be joined as a party in the action if. . . .”). Further, as R.H. Van Horn, William, June, and John are the only potential individuals amongst whom the shares of the Holding Company could be divided (should the defendants’ position have merit), the court finds that John should be joined as a necessary party to this action pursuant to Rule 19 as a party in whose absence “complete relief cannot be accorded among those already parties,” FED. R. CIV. P. 19(a)(1), and whose absence could impair his ability to protect any interest he could have in the Holding Company. *Id.* at 19(a)(2)(i); *see DeWit*, 879 F. Supp. at 992; Charles A. Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE § 1604 (3d Ed. 2004) (noting the joinder decision is predicated on the policies of “avoiding multiple litigation, providing the parties with complete and effective relief in a single action and protecting the absent persons from the possible prejudicial effect of deciding the case without them.”). As John’s joinder as an involuntary plaintiff does not divest the court of subject matter jurisdiction over the present action, the court need not consider the factors set forth in Rule 19(b). As a full adjudication of the ownership dispute requires the joinder of John to this action, the defendants’ motion for judgment on the pleadings, as it relates to joinder of John under Rule 19, is **granted in part**.

The court now turns to the more contested issue of whether the Holding Company is an indispensable party. The Holding Company is an Iowa corporation, therefore joinder is not feasible under Rule 19(a) unless, as R.H. Van Horn proposes, the Holding Company would be aligned as an involuntary plaintiff. *See Capitol Indemnity Corp. v. Russellville Steel Co., Inc.*, 367 F.3d 831, 835 (8th Cir. 2004) (stating that “complete diversity exists where no defendants hold citizenship in a state where any plaintiff holds citizenship.”) (citing *Owen Equipment & Erection v. Kroger*, 437 U.S. 365, 373, 98 S. Ct. 2396, 57 L. Ed. 2d 274 (1978)). Joinder as a defendant would divest the court of diversity jurisdiction,

thus requiring an evaluation of the equitable factors in Rule 19(b) to determine whether joinder is appropriate. The basic question here is whether, under the facts of this case, a corporation is a necessary and indispensable party in a suit to determine the ownership of all of the shares in said corporation as between four family members. At this point, John has been added as an involuntary plaintiff, so all potential shareholders of the Holding Company are now parties to this litigation.

First, the court finds unpersuasive R.H. Van Horn's argument that the Holding company should be aligned as an involuntary plaintiff as its interests are the same as those of its long-time CEO—namely, himself. There does not seem to be any legal basis for so aligning the Holding Company as a plaintiff merely because its CEO is a plaintiff. Further, looking at William and June's counterclaims for breach of fiduciary duty, it is clear that the Holding Company, were it an indispensable party, would not be aligned with the party against whom allegations of such a nature are lodged. As joinder of the Holding Company as a defendant would destroy complete diversity, and consequently divest the court of subject matter jurisdiction, the court must look to the pragmatic considerations enumerated in Rule 19(b) to determine if the action should be dismissed for failure to join an indispensable party.

Evaluating this case under the Rule 19(b) considerations leads this court to *decline* to join the Holding Company as an indispensable party. The first consideration is the extent to which a judgment rendered in the Holding Company's absence could be prejudicial to the Holding Company or those persons already parties. This suit centers on a dispute between the parties as to the ownership of the Holding Company—essentially, do William and June own a portion of the shares in the Holding Company, or is R.H. Van Horn the sole owner and shareholder? Though, abstractly, the Holding Company could be said to have an interest in its ownership, the reality is that the current parties comprise

a discrete group of the *only* potential Holding Company shareholders. Even without joining the Holding Company, the ownership dispute can be fully and completely adjudicated between the current parties. As there is no prejudice in not joining the Holding Company in this ownership dispute, the second factor considering the means by which the judgment could be shaped to avoid prejudice to the parties is largely inapplicable. Additionally, the Holding Company will not be prejudiced by its absence in this lawsuit because its absence will not deprive the parties, or the Holding Company, of a full judgment regarding ownership—thus, the third factor considering the adequacy of the judgment weighs in favor of nonjoinder. Finally, the fourth consideration looks to the adequacy of the plaintiff’s remedy if the action is dismissed for nonjoinder. In this case, it is possible for R.H. Van Horn, should the suit be dismissed for nonjoinder, to pursue this action in a state court—mitigating in favor of joinder. However, in balancing the factors in this specific instance, and primarily as full adjudication of the issue at the heart of this case—ownership in the Holding Company—can take place in the Holding Company’s absence, the court finds that the Holding Company is not an indispensable party as defined by Rule 19(b). As the court finds that considerations of equity do not mandate joinder of the Holding Company under Rule 19(b), and that adjudication of the ownership dispute between R.H. Van Horn, William, June and John, will not be prejudiced by the Holding Company’s absence, the defendants’ motion to dismiss for failure to join the Holding Company is **denied**. Therefore, the court continues to address the defendants’ claim for alternative relief—namely, that this proceeding be stayed and the parties be compelled to arbitrate.

III. MOTION TO COMPEL ARBITRATION

A. December 11, 2003, Letter

Before delving into the arguments of the parties, the law, and an analysis of the issue, a brief review of the letter the defendants allege contains an agreement to arbitrate any disputes is in order. Due to the controversy surrounding the share ownership in the Holding Company, the distribution of any dividends required approval by the Federal Reserve Bank of Chicago (“FRB Chicago”). A conference call was held on December 10, 2003, in which R.H. Van Horn, William, June, John, and representatives from the FRB Chicago and the Iowa Division of Banking (“IDOB”) were present. A December 11, 2003, letter from the Regional Director of IDOB to R.H. Van Horn, William, June and John, “memorialize[d] an agreement between the shareholders and directors of Glidden concerning resolution of Glidden ownership issues as that agreement relates to a request on behalf of Glidden to declare and pay a cash dividend to those shareholders by December 15, 2003.” Deft.s’ Reply, Doc. No. 44, Exhs. A, B & C (“the Letter”). The letter indicates that in exchange for FRB Chicago’s and the IDOB’s approval of a request by the Holding Company to pay dividends,

Robert H. Van Horn, John Carl Van Horn, William Van Horn, and June Linder, in their capacities as both directors and shareholders of Glidden (“directors/shareholders”) commit to the following:

2. The directors/shareholders will undertake all reasonable efforts to resolve their differences concerning Glidden ownership by March 15, 2004.
3. In the event such efforts produce no definitive agreement, the directors/shareholders further agree to provide to the FRB Chicago and the IDOB a legal process that provides a binding resolution to this matter by no later than April 15, 2004.
4. In the event that the conditions of item #3 are not met by April 15, 2004, the directors/shareholders further agree to

submit the matter to binding arbitration.

5. The arbitrator will be retained no later than May 6, 2004.

6. The directors/shareholders will submit to the FRB Chicago and the IDOB a copy of the contract with the arbitrator for review and objection. The contract with the arbitrator shall include a timetable for completion of its ruling.

7. The arbitrator will be instructed to promptly notify the FRB Chicago and the IDOB of its findings.

8. The directors/shareholders shall submit evidence to the FRB Chicago and the IDOB that the books and records of Glidden have been amended as necessary to reflect the findings of the arbitrator. . . .

Id. A copy of this letter was sent to R.H. Van Horn, William, June and John, with directions for each of them to sign and notarize the document in the appropriate location—the letter indicated that all parties must sign, notarize, and return the document in order to enable the distribution of dividends. Each of the four individuals did sign and notarize their copy of the document in the appropriate location. *See* Deft.s’ Reply, Doc. No. 44, Exhs. A, B, & C.

B. Arguments Of The Parties

William and June assert that by executing the Letter, R.H. Van Horn entered into an agreement to submit the ongoing ownership dispute to binding arbitration. Further, the defendants note that, for the Federal Arbitration Act (“FAA”) to be applicable to the agreement to arbitrate, the contract must involve matters fitting a liberal definition of “commerce.” The defendants contend that transactions involving the Holding Company, as an entity under the jurisdiction of the FRB Chicago, by definition must touch upon commerce as contemplated by the FAA. Therefore, as an agreement to arbitrate matters concerning commerce was executed by all parties, the defendants assert that the court must

minimally stay the action pending arbitration pursuant to section 3 of the FAA. Further, the defendants contend that “with binding arbitration specifically directed to the only issue being litigated, dismissal would be an appropriate alternative to a stay.” Deft.s’ Brief, Doc. No. 33, at 4. Finally, the defendants contend that even were the court to find the FAA inapplicable to this particular arbitration agreement, a stay remains appropriate as the matter would be subject to arbitration under Iowa law.

R.H. Van Horn vigorously resists the defendants’ motion to compel arbitration. First, he claims that the Letter, is not a binding agreement as it does not say the parties “agree” to arbitration, but rather only that they will “commit to the following. . . .” Second, R.H. Van Horn asserts that whatever the effect of the Letter, its intent has been fulfilled as the parties have taken all reasonable efforts to resolve their differences concerning the Holding Company’s ownership. Further, R.H. Van Horn contends that by filing this suit on April 5, 2004, he was in compliance with the Letter, in that he offered a “legal process that provides a binding resolution to this matter by no later than April 15, 2004.” Plf.’s Resistance, Doc. No. 39, at 4 (quoting the Letter at ¶ 3). Finally, the plaintiff contends any ‘agreement’ reached by the Letter, has been abandoned as no arbitrator was obtained by May 6, 2004, as directed by the agreement, nor has a contract with an arbitrator or a timetable for completion of arbitration been submitted to the FRB Chicago or the IDOB. Alternatively, R.H. Van Horn contends that the agreement does not fall within the ambit of the FAA, as the disputed ownership of shares of stock in the Holding Company—as between a father and his children—does not amount to “commerce.” Further, R.H. Van Horn argues that the Letter does not constitute a “written provision of a contract” as required by the FAA. Finally, R.H. Van Horn contends that arbitration is equally inappropriate under Iowa law as no valid agreement to submit this dispute to arbitration exists.

In reply, the defendants assert that R.H. Van Horn’s naked assertion that any agreement to arbitrate was abandoned has no basis in fact or law—and R.H. Van Horn cites no authority for his position because there is no such authority. Further, William and June argue that the agreement embodied in the Letter does affect commerce as required for application of the FAA. This is so because bank and bank holding companies are subject to regulation from numerous federal agencies. The defendants contend that the liberal definition of “commerce” includes contracts involving a federally regulated company like the Holding Company. Finally, the defendants reiterate their position that even if the court finds the FAA inapplicable, Iowa Code section 679A would apply and would likewise require a stay pending arbitration.

C. Analysis

1. General principles governing arbitration

Congress enacted the FAA to abolish “the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts. . . .” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S. Ct. 1647, 1651, 114 L. Ed. 2d 26 (1991); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11, 94 S. Ct. 2449, 2452-53, 41 L. Ed. 2d 270 (1974). A primary goal of the FAA was to “‘place [arbitration] agreements upon the same footing as other contracts.” *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265, 270-72, 115 S. Ct. 834, 838, 130 L. Ed. 2d 753 (1995) (quoting *Volt Information. Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468, 474, 109 S. Ct. 1248, 1253, 103 L. Ed. 2d 488 (1989)). The Eighth Circuit Court of Appeals has observed that the FAA comprises a “statutory scheme for effectuating the federal policy of encouraging arbitration as a less costly and less complicated alternative to litigation.” *Morgan v. Smith, Barney, Harris*

Upham & Co., 729 F.2d 1163, 1165 (8th Cir. 1984). Sections two through four of the FAA are key to the present motion. Section two provides that arbitration agreements contained in contracts involving maritime transaction or commerce are “valid, irrevocable, and enforceable.” 9 U.S.C. § 2. Section three empowers federal courts to stay proceedings of issues referable to arbitration. *Id.* § 3. Section four directs courts, in certain circumstances, to compel the parties to arbitration pursuant to the terms of their written arbitration agreement. *Id.* § 4.

If the Letter falls within the scope of the FAA as an arbitration agreement, the court must engage in a two-part inquiry to ascertain whether the dispute is “arbitrable” before it orders the parties to proceed with arbitration. *Daisy Mfg. Co., Inc. v. NCR Corp.*, 29 F.3d 389, 392 (8th Cir. 1994) (citing *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990)). First, the court must determine whether a valid agreement to arbitrate exists between the parties. *Id.* Second, the court must determine whether the specific dispute or disputes fall within the scope of that agreement. *Id.* If these requirements are met, the FAA allows the court to stay proceedings and compel the parties to arbitrate.

The court now turns the relevant considerations, starting with a determination of whether the FAA applies to the Letter, and then addressing whether the Letter constitutes a valid agreement to arbitrate the specific dispute raised in this litigation.

2. Does the FAA apply?

The first inquiry requires the court to answer the threshold question of whether the FAA applies to this matter—a question hotly disputed by the parties in this action. Section two of the FAA provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part

thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The statute sets forth a two-fold inquiry: (1) is the arbitration agreement written?; and, if so (2) is it part of a maritime transaction or a transaction involving interstate commerce? As to the first inquiry, while the plaintiff contends that the December, 11, 2003, Letter was not an agreement to arbitrate, there is no contention that it was not written. Therefore, the first requirement is met.

The second inquiry, specifically whether it was part of a transaction involving interstate commerce, is vigorously contested by the parties. R.H. Van Horn claims that an ownership dispute between a father and his children over a holding company does not fall within the ambit of “commerce” as contemplated by the FAA. On the other hand, William and June contend that any transaction involving a federally regulated entity such as the Holding Company falls within the liberal definition accorded to the FAA’s “commerce” requirement. The Supreme Court recently discussed the interpretation of the “involving commerce” requirement of section 2:

We have interpreted the term “involving commerce” in the FAA as the functional equivalent of the more familiar term “affecting commerce”—words of art that ordinarily signal the broadest permissible exercise of Congress’ Commerce Clause power. *Allied-Bruce Terminix Cos.*, 513 U.S. at 273-74, 115 S. Ct. 834. Because the statute provides for “the enforcement of arbitration agreements within the full reach of the Commerce Clause,” *Perry v. Thomas*, 482 U.S. 483, 490, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987), it is perfectly clear that the FAA encompasses a wider range of transactions than those actually “in commerce”—that is, “within the flow of interstate commerce,” *Allied-Bruce Terminix Cos.*, *supra*, at 273, 115 S.

Ct. 834 (internal quotation marks, citations and emphasis omitted). . . . Congress' Commerce Clause power "may be exercised in individual cases without showing any specific effect upon interstate commerce" if in the aggregate the economic activity in question would represent "a general practice . . . subject to federal control." *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236, 68 S. Ct. 996, 92 L. Ed. 2d 1328 (1948). *See also Perez v. United States*, 402 U.S. 146, 154, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971); *Wickard v. Filburn*, 317 U.S. 111, 127-28, 63 S. Ct. 82, 87 L. Ed. 122 (1942). Only that general practice need bear on interstate commerce in a substantial way. *Maryland v. Wirtz*, 392 U.S. 183, 196-97, n.27, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968); *NLRB v. Jones & Lauhglin Steel Corp.*, 301 U.S. 1, 37-38, 57 S. Ct. 615, 81 L. Ed. 893 (1937).

Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56-57, 123 S. Ct. 2037, 2040, 156 L. Ed. 2d 46 (2003). In light of the Supreme Court's discussion, it is evident that the Letter *does*, indeed, "implicate commerce" as required for application of the FAA. First, the Holding Company—as a company holding all of the shares of stock in the First Bank & Trust Company—by the nature of its business, is federally regulated by a number of agencies, as well as subject to a number of federal statutes regulating banking practices. *C.f.*, 12 U.S.C. § 241 (creating the Federal Reserve Board); 12 U.S.C. § 1842 (requiring approval by the Federal Reserve Board for a company to become a bank holding company and for a bank holding company to acquire shares and/or assets in a bank, among other actions). Further, the import of the Letter was that the parties (R.H. Van Horn, William, June and John) agreed to undertake certain measures to resolve their ownership disputes of the Holding Company in exchange for the approval by the FRB Chicago and the IDOB of a request to declare and pay a cash dividend to the parties. Payment of this dividend necessarily involved interstate commerce as the director/shareholders are residents of

different states—R.H. Van Horn = Iowa; John = Iowa; William = Colorado; and June = Illinois. So, payment of these dividends by the Holding Company necessarily implicated “commerce” as contemplated by section 2 of the FAA. Having found the FAA applicable, the court now turns to a determination of whether, by endorsing the Letter, the parties agreed to arbitrate their ownership disputes.

3. *Did the parties agree to arbitrate this dispute?*

The court must now turn to the issue of whether the Letter constituted an agreement to arbitrate the matters at issue in this litigation. *See International Ass’n of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Shopman’s Local 493 v. EFCO Corp. and Const. Products, Inc.*, 359 F.3d 954 (8th Cir. 2004) (“whether the parties have a valid arbitration agreement that binds them is a question for judicial determination”) (citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943-46, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995)); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 833-34 (8th Cir. 1997) (considering whether the parties agreed to arbitrate); *Houlihan v. Offerman & Co., Inc.*, 31 F.3d 692, 694 (8th Cir. 1994) (noting that before a party can be compelled to arbitrate, the district court must determine whether a valid agreement to arbitrate exists). As the FAA contains no substantive rules for contract interpretation, state contract law governs the question. *Lyster v. Ryan’s Family Steak House, Inc.*, 239 F.3d 943, 945-46 (8th Cir. 2001). In determining which state’s contract law to apply, a federal court sitting in diversity applies the choice of law rules of the forum state—in this case, Iowa. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941). Though the parties do not argue that anything other than Iowa law should apply, as the issue is not specifically addressed by the Letter, the court finds it necessary to briefly determine which state’s law should apply to determine whether, in executing the Letter, the parties entered into a binding agreement to arbitrate. Iowa law employs the

Second Restatement's "most significant relationship" test to determine which state's law will govern a contract's interpretation. *See Walker v. State Farm Mut. Auto. Ins. Co.*, 973 F.2d 634, 637 (8th Cir. 1992) (recognizing that Iowa had "adopted the Second Restatement of Conflicts as its choice-of-law provision," and that the Second Restatement "applies the law of the state with the most significant interests in the litigation."); *Cole v. State Auto. & Cas. Underwriters*, 296 N.W.2d 779, 781 (Iowa 1980) (noting that in contract cases "it is clear that choice-of-law questions are now to be determined under the Restatement (Second) test: intent of the parties or the most significant relationship."). In this instance the court finds that Iowa has the most significant relationship to the claims at issue in this litigation for the following reasons: (1) the Holding Company is incorporated in Iowa and is an Iowa entity; (2) two of the parties, R.H. Van Horn and John, are residents of Iowa; (3) two of the parties, R.H. Van Horn and John, executed the Letter in Iowa; and (4) in exchange for the execution of the Letter, dividends were paid from the Holding Company (in Iowa) to the parties in this litigation. *See* Restatement (Second) of Conflicts of Laws § 188 (absent a choice by the parties, court should consider place of contracting, of negotiation, of performance, of contract's subject matter, and parties' domiciles, residences, nationalities, places of incorporation and places of business).

Under Iowa law, the elements of a valid contract are offer, acceptance, and consideration. *E.g. Taggart v. Drake Univ.*, 549 N.W.2d 796, 800 (Iowa 1996); *McBride v. City of Sioux City*, 444 N.W.2d 85, 91 (Iowa 1989) (same). In this case, all three are clearly present. In this case the letter itself states that "in *consideration* of the FRB Chicago and the [IDOB] approving a request by Glidden to pay a dividend, Robert H. Van Horn, John Carl Van Horn, William Van Horn, and June Linder, in their capacities as both directors and shareholders of Glidden . . . commit to the following. . . ." The document was signed and notarized by all parties. There is no evidence presented that the

dividend was *not* paid by the Holding Company in consideration for the parties executing this agreement. Further, R.H. Van Horn’s contention that “commit to” is not the same as “agree to,” therefore making the arbitration language in the Letter unenforceable, is wholly unpersuasive and is a distinction without a difference in this instance. The court finds equally unpersuasive R.H. Van Horn’s argument that by instituting this litigation on April 5, 2004, he was in compliance with the terms of the agreement. The Letter indicates that if the parties could not, on their own, resolve their ownership differences, by paragraph 3 they “further agree[d] to *provide to the FRB Chicago and the IDOB* a legal process that provides a binding resolution to this matter by no later than April 15, 2004.” Deft.s’ Reply, Exhs. A, B, & C (emphasis added). While R.H. Van Horn may have instigated this suit prior to the April 15, 2004, deadline set forth in paragraph 3, the agreement clearly indicates that the choice of binding legal process must be provided to FRB Chicago and the IDOB—and there is no evidence, nor is there even any argument, that R.H. Van Horn consulted with William, June, John, the FRB Chicago, or the IDOB before commencing this lawsuit. Equally, there is no argument or evidence that the FRB Chicago or the IDOB approved the filing of this suit as an adequate means by which to resolve the ownership dispute, as required by paragraph 3. In the event that the conditions of paragraph 3 are not met by April 14, 2004, the parties “further agree[d] to *submit the matter to binding arbitration.*” *Id.* It is crystal clear, from the Letter, that the matter the parties agreed to submit to arbitration was their dispute surrounding ownership of the Holding Company—the *precise* issue at the heart of this suit. The issues in this suit fall *squarely* within the agreement to arbitrate memorialized in the Letter. Therefore, barring any defenses to arbitrability raised by the plaintiff, the FAA requires that this litigation be stayed and that the court order the parties to arbitrate this dispute. *See* 9 U.S.C. §§ 3-4.

4. Waiver

R.H. Van Horn's argument that, by letting the deadlines in the Letter lapse, the defendants have abandoned any right to arbitration conferred by the letter, can only be construed as one claiming that William and June have waived their rights to arbitrate. An argument of waiver in the context of arbitrability of a dispute is analyzed "against the backdrop that '[i]n light of the strong federal policy in favor of arbitration, any doubts concerning waiver or arbitrability should be resolved in favor of arbitration.'" *Dumont v. Saskatchewan Gov't Ins.*, 258 F.3d 880, 886 (8th Cir. 2001) (quoting *Ritzel Communications v. Mid-American Cellular*, 989 F.2d 966, 968-69 (8th Cir. 1993)). The court will find a waiver of arbitrability by the party claiming the right to arbitrate where that party "(1) knew of an existing right to arbitration; (2) acted inconsistently with that right; and (3) prejudiced the other party by these inconsistent acts." *Dumont*, 258 F.3d at 886 (quoting *Ritzel*, 989 F.2d at 968-69). Here, as William and June were personally present during the December 10, 2003, teleconference memorialized in the Letter, there is no doubt that they knew of the arbitration provisions in the Letter. William and June did act inconsistently with the right to arbitrate only in the sense that they never sought to pursue that right until five months after this litigation had already been pending—however, the defendants acted inconsistently only by failure to assert the right, they did not partake in the 'traditional' inconsistent action of invoking litigation machinery before asserting their right to arbitration. *See Kelly v. Golden*, 352 F.3d 344, 349 (8th Cir. 2003). Despite the fact that the first two prongs of the analysis are met, the "prejudice" requirement clearly is not. The Eighth Circuit Court of Appeals has held that "[d]elay in seeking to compel arbitration does not itself constitute prejudice." *Stifel, Nicolaus & Co. Inc. v. Freeman*, 924 F.2d 157, 159 (8th Cir. 1991) (citing *Rush v. Oppenheimer & Co.*, 779 F.2d 885, 887 (2d Cir. 1985)) *see North Central Construction, Inc. v. Siouxland Energy*

& Livestock Co-op, 232 F. Supp. 2d 959, 964 (N.D. Iowa 2002) (finding the delay caused by the plaintiff’s pursuit of a judicial remedy minimal considering plaintiff asserted right to arbitration two months after filing suit). In this case, the defendants did not “substantially invoke the litigation machinery before requesting arbitration,” but merely failed to assert their right to arbitration until after R.H. Van Horn had filed this suit. Therefore, as the court finds that William and June’s actions, or rather inaction, is not sufficient to constitute the prejudice necessary to overcome the strong federal policy in favor of arbitration, the defendants’ Motion to Stay Pending Mandatory Arbitration is **granted**.

IV. CONCLUSION

In conclusion, the court finds that John Van Horn should be joined as an involuntary plaintiff to this action pursuant to Rule 19, but that the Holding Company is not an indispensable party and should not be joined under Rule 19—in these regards the defendants’ motion is **granted in part** and **denied in part**, respectively. As John’s joinder as an involuntary plaintiff does not divest the court of diversity jurisdiction, and as the Holding Company is not an indispensable party, and need not be joined, the defendants’ motion for dismissal for failure to join an indispensable party is **denied**. Further, the court finds that this lawsuit, arising from a dispute between the parties as to proper ownership of the Holding Company, should be stayed and the dispute arbitrated according to the Letter. Therefore, the defendants’ motion to compel arbitration and stay these proceedings is **granted**.

The ultimate disposition of the defendants’ motion is as follows:

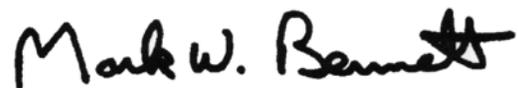
1. **Granted in part** as to the joinder of John Van Horn as an involuntary plaintiff under Rule 19;

2. **Denied in part** as to the joinder of the Holding Company as an indispensable party under Rule 19;
3. **Denied** as to the motion to dismiss for failure to join an indispensable party;
and
4. **Granted** as to the motion to stay proceedings and compel arbitration pursuant to the Letter.

With regard to the granting of the motion to compel arbitration, as the deadlines set forth in the Letter have lapsed, the court orders the parties to procure an arbitrator and initiate the arbitration process within sixty (60) days from the date of this order. Further, the parties are also directed to notify the FRB Chicago and the IDOB of the initiation of arbitration proceedings as to this dispute. Additionally, the parties are ordered to file a status report with this court **on or before May 5, 2005**, detailing the arbitrator selected, the date the issues are to be, or were, submitted for arbitration, and averring that the FRB Chicago and the IDOB have been notified of the arbitration in accordance with this order and the Letter.

IT IS SO ORDERED.

DATED this 4th day of February, 2005.



MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA