

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

NUVASIVE, INC.,

**Plaintiff,**

v.

**Case No: 6:17-cv-2206-Orl-41GJK**

**ABSOLUTE MEDICAL, LLC, GREG  
SOUFLERIS, DAVE HAWLEY,  
ABSOLUTE MEDICAL SYSTEMS,  
LLC and RYAN MILLER,**

**Defendants.**

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**ORDER**

THIS CAUSE is before the Court on Defendant Absolute Medical, LLC's Motion to Compel Arbitration and Stay Court Proceedings Pending Arbitration (Doc. 175), to which Plaintiff filed a Response (Doc. 176). For the reasons set forth herein, the Motion will be granted in part and denied in part.

**I. BACKGROUND**

Plaintiff is a medical device company that manufactures products used to treat spine disorders. (Am. Compl., Doc. 68, ¶ 83). Absolute Medical, LLC ("Absolute Medical") became an exclusive distributor of Plaintiff's products. (*Id.* ¶ 32). To assist in the distribution of Plaintiff's products, Absolute Medical hired a team of sales representatives, including Defendants Dave Hawley and Ryan Miller. (*See id.* ¶ 34). Plaintiff and Absolute Medical entered into a Sales Agreement, in which Absolute Medical agreed to distribute Plaintiff's products in a designated sales territory for a five-year term. (Doc. 19-1 at 3). The Sales Agreement also contained an arbitration clause requiring the parties to arbitrate any "controversy, dispute or question" in

connection with the Sales Agreement. (*Id.* at 15–16). However, the arbitration clause allows either party to obtain injunctive or other equitable relief while arbitration is pending. (*Id.* at 16).

Before the end of the five-year term, Defendant Greg Soufleris, president and sole member of Absolute Medical, (Doc. 68 ¶ 90), notified Plaintiff of his intent to end Absolute Medical’s partnership with Plaintiff, (*id.* ¶ 48). Absolute Medical later dissolved. (*Id.* ¶ 11). Meanwhile, Soufleris filed articles of incorporation with the state of Florida to form another company, Absolute Medical Systems, LLC (“AMS”). (*Id.* ¶ 12). AMS was formed by Soufleris to distribute medical products for Alphatec Spine, Inc. (“Alphatec”), Plaintiff’s competitor. (*Id.*). Similarly, Hawley and Miller resigned from Absolute Medical to work for Alphatec. (*Id.* ¶¶ 19, 21).

On December 29, 2017, Plaintiff commenced the instant action, asserting claims for injunctive relief, breach of contract, conversion, and violations of the Florida Deceptive and Unfair Trade Practices Act. (*See generally* Compl., Doc. 1). In response, Absolute Medical filed a Motion to Compel Arbitration (Doc. 43). Plaintiff later filed an Amended Complaint. (*See generally* Doc. 68). As a result, Absolute Medical’s original Motion to Compel Arbitration was denied without prejudice, and a stay was entered, allowing the parties to supplement their initial briefing in light of the Amended Complaint. (*See generally* Mar. 26, 2019 Order, Doc. 170).

## II. LEGAL STANDARD

Section three of the Federal Arbitration Act provides in pertinent part:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement . . . the court in which such suit is pending . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had.

9 U.S.C. § 3. “For arbitrable issues, the language of Section 3 indicates that the stay is mandatory.” *Klay v. All Defendants*, 389 F.3d 1191, 1204 (11th Cir. 2004). “When confronted with litigants advancing both arbitrable and nonarbitrable claims, however, courts have discretion to stay

nonarbitrable claims.” *Id.* (collecting cases). “[C]ourts generally refuse to stay proceedings of nonarbitrable claims when it is feasible to proceed with the litigation.” *Id.* “Crucial to this determination is whether arbitrable claims predominate or whether the outcome of the nonarbitrable claims will depend upon the arbitrator’s decision. *Id.*”

### III. ANALYSIS

Count II of the Amended Complaint alleges a breach of the Sales Agreement and is clearly subject to the arbitration provision.<sup>1</sup> Thus, the Court must determine whether the remaining claims in the Amended Complaint should be stayed pending arbitration.

The outcome of Counts IV and V do not depend upon the arbitrator’s decision regarding Absolute Medical’s alleged breach of the Sales Agreement. Count IV alleges that Hawley and Miller violated the non-competition and non-solicitation provisions of their employment agreements with Absolute Medical, to which Plaintiff was a third-party beneficiary. Count V asserts a claim of conversion against Hawley and AMS for exercising dominion over custom surgical instruments. Neither claim concerns the Sales Agreement. Thus, Counts IV and V are capable of resolution independent of the arbitrator’s decision and will not be stayed.

Counts VI, VII, VIII, and IX are based upon allegations similar to those alleged in Count II. For instance, Counts VI and VII both attempt to hold Soufleris personally liable for Absolute Medical’s alleged breach of the Sales Agreement. Counts VIII and IX assert the same factual allegations that give rise to Plaintiff’s breach of contract claim in Count II. (*Compare* Doc. 68 ¶ 78, *with id.* ¶¶ 124, 130). Permitting these claims to go forward would require Defendants to defend

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<sup>1</sup> Although Plaintiff asserts that arbitration is futile under Delaware law because Soufleris admitted that Absolute Medical would not be able to pay any potential award, Plaintiff has not demonstrated that Delaware law controls in this instance. To the contrary, Plaintiff claims that federal law governs.

similar claims in two separate forums, giving rise to the possibility of inconsistent results. *See Variable Annuity Life Ins. Co. v. Laferrera*, 680 F. App'x 880, 885 (11th Cir. 2017) (granting stay where arbitrable and nonarbitrable claims were based on the same factual allegations). Accordingly, these Counts are due to be stayed pending arbitration.

Counts I and III both contain claims for injunctive relief. Although both Counts are predominated by Plaintiff's arbitrable claim,<sup>2</sup> the arbitration clause provides that either party can seek injunctive relief while arbitration is pending. Thus, Counts I and III will not be stayed to the extent they assert claims for injunctive relief. *See FusionStorm, Inc. v. Presidio Networked Sols., Inc.*, 871 F. Supp. 2d 1345, 1358 (M.D. Fla. 2012) (permitting party to seek injunctive relief despite staying remaining claims pending arbitration where contract provided for such relief). However, Count III also seeks monetary relief, and therefore, that claim will be stayed to the extent that Plaintiff seeks monetary relief.

In its Response, Plaintiff requests that Defendants comply with Magistrate Judge Kelly's Order to produce discovery (Doc. 162). Originally, Defendants were ordered to produce certain discovery on or before March 28, 2019. (*Id.* at 2). In the interim, the Court issued an Order staying the case. (*See generally* Doc. 170). Because the stay will be lifted, Defendants will be ordered to comply with Judge Kelly's Order.

#### IV. CONCLUSION

Accordingly, it is **ORDERED** and **ADJUDGED** as follows:

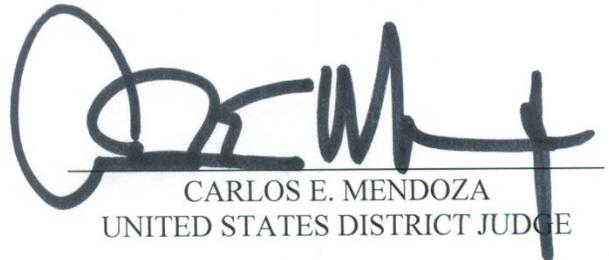
1. Defendant Absolute Medical, LLC's Motion to Compel Arbitration and Stay Court Proceedings Pending Arbitration (Doc. 175) is **GRANTED in part**.

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<sup>2</sup> Like Count II, Counts I and III both assert breaches of the Sales Agreement.

2. **On or before July 1, 2019**, Plaintiff and Absolute Medical, LLC shall proceed to arbitration on Count II in accordance with the terms of their arbitration agreement.
3. Counts III, to the extent that Plaintiff seeks monetary relief, VI, VII, VIII, and IX are **STAYED** pending arbitration.
4. The Motion is **DENIED in all other respects**.
5. The Clerk of Court is directed to lift the stay and administrative closure of this case and to reinstate all motions that were pending at the time the stay was ordered by this Court.
6. Defendants shall comply with Judge Kelly's Order (Doc. 162) on or before **June 7, 2019**.

**DONE and ORDERED** in Orlando, Florida on May 31, 2019.



CARLOS E. MENDOZA  
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record