SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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FFS DATA CORPORATION

Plaintiff,

- v -

THE OLB GROUP, INC.,

Defendant.

INDEX NO. 653247/2022

MOTION DATE 10/12/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20

were read on this motion to COMPEL ARBITRATION.

Defendant The OLB Group ("OLB") moves for an order compelling arbitration of this action based on a dispute resolution provision contained in an Asset Purchase Agreement entered into by OLB and Plaintiff FFS Data Corporation ("FFS"). As discussed below, the provision upon which OLB's motion is based is a marvel of linguistic misdirection. Although it references arbitration, it does so obliquely at the end of a lengthy paragraph that otherwise indicates an intention that disputes be litigated in court. In addition, the agreement elsewhere provides that "any claims of any kind arising out of or relating to the Agreement or the transactions contemplated hereby … shall be tried before a judge of a court having jurisdiction without a jury." All things considered, the Court finds that OLB has not met its burden of demonstrating that the parties agreed to mandatory arbitration of disputes under the Asset Purchase Agreement. Accordingly, its motion to compel arbitration is denied.

BACKGROUND

On August 31, 2022, OLB filed a Demand for Arbitration with the American Arbitration Association ("AAA") against FFS (NYSCEF 9 ¶ 4 ["Alberts Aff."]). FFS thereafter commenced this action, on September 7, 2022, asserting, among other things, claims under an Asset Purchase Agreement dated November 15, 2021 (NYSCEF 1 ["Compl."]; NYSCEF 2 ["APA"]). On September 8, 2022, the AAA emailed counsel for the parties, noted that "the parties ['] agreement does not list the use of AAA for this arbitration" and asked if the parties were in agreement to utilize the AAA's Commercial Arbitration Rules (NYSCEF 10). On September 9, 2022, counsel for FFS objected to arbitration on the ground, *inter alia*, that the "parties contract makes arbitration permissive, not mandatory. . ." (*id.*). On September 21, 2022, the AAA informed the parties that the arbitration "is being closed as 'no AAA authority' as of September 20th, 2022" (NYSCEF 17). OLB then moved to compel arbitration (NYSCEF 7). The Court heard oral argument on this motion on March 9, 2023.

Two sections of the APA are central to resolution of OLB's motion. First, Section 6.9 provides as follows:

> 6.9 Choice of Law; Venue. This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of New York without regard to its choice of law principles. In the event of any legal or equitable action arising under this Agreement, the parties hereto hereby agree that jurisdiction and venue for such action shall lie exclusively within either [sic] the state courts of New York located in New York County, New York. The parties hereby specifically waive any and all objections to venue in such courts, including without limitation any objection based on a claim of inconvenient forum. The parties also agree that a final judgment in any such action shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law. The parties agree to enter into mediation prior to trial in any suit, action, or proceeding arising out of or relating to this agreement. Purchaser and Seller each irrevocably and unconditionally waives, to the fullest extent permitted by applicable law, any and all rights

> to trial by jury in connection with any litigation or proceeding arising out of or relating to this Agreement or the transactions contemplated hereby. Any and all disputes may be resolved by means of mediation between the parties. Foregoing [sic] this or in the absence of reaching an agreement through mediation, the parties shall agree to binding arbitration with the prevailing party entitled to recovery of all cost including but not limited to attorney fees. Venue shall be New York.

(APA §6.9).

Second, Paragraph 6.15 provides:

> 6.15 Waiver of Jury Trial. EACH OF THE PARTIES HERETO WAIVES ALL RIGHTS TO TRIAL BY JURY OF ANY CLAIMS OF ANY KIND ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY. THE PARTIES HERETO ACKNOWLEDGE THAT THIS IS A WAIVER OF A LEGAL RIGHT AND REPRESENT TO EACH OTHER THAT THESE WAIVERS ARE MADE KNOWINGLY AND VOLUNTARILY AFTER CONSULTATION WITH COUNSEL OF THEIR CHOICE. ***EACH OF THE PARTIES HERETO AGREES THAT ALL SUCH CLAIMS SHALL BE TRIED BEFORE A JUDGE OF A COURT HAVING JURISDICTION WITHOUT A JURY***.

(APA §6.15) [emphasis added; capitalization in original]).

DISCUSSION

The threshold question in assessing a motion to compel arbitration "is whether there is a valid and binding arbitration agreement," which is "a question for the Court to decide" (*Gol v TNJ Holdings, Inc.*, 68 Misc 3d 1216(A) [Sup Ct, NY County 2020]). In this case, that threshold question is determinative.

"Although arbitration is favored as a matter of public policy, equally important is the policy that seeks to avoid the unintentional waiver of the benefits and safeguards which a court of law may provide in resolving disputes. Indeed, unless the parties have subscribed to an

arbitration agreement it would be 'unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent'" (*TNS Holdings, Inc. v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998] [citations omitted]). Thus, "a party will not be compelled to arbitrate . . . absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes. The agreement must be clear, explicit and unequivocal . . . and must not depend upon implication or subtlety" (*Matter of Waldron [Goddess]*, 61 NY2d 181, 183 [1984] [citations omitted]). Although this standard is often invoked when assessing whether *non-signatories* are bound to an otherwise clear arbitration agreement (*e.g.*, *Pursuit Inv. Mgt., LLC v Alpha Beta Capital Partners, L.P.*, 127 AD3d 565, 565 [1st Dept 2015]; *TBA Glob., LLC v Fidus Partners, LLC*, 132 AD3d 195, 202 [1st Dept 2015]), it is not limited to those instances (*see e.g.*, *Bd. of Managers of 825 W. End Condominium v Grunstein*, 192 AD3d 500, 500 [1st Dept 2021] [holding that "there was no clear, explicit, and unequivocal agreement" between the parties to arbitrate their dispute because the applicable contractual clause called for arbitration only if one party first elected to proceed to mediation, and that party had not done so])

Accordingly, "[w]here, as here, the parties dispute not the scope of an arbitration clause but whether an obligation to arbitrate exists, the general presumption in favor of arbitration does not apply" (*TBA Glob.*, 132 AD3d at 202 [citation and internal quotations omitted]). In the end, the proponent of arbitration (here, OLB) has the burden of demonstrating that the parties agreed to arbitrate the dispute at issue (*Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 [1st Dept 2007]).

1. There is no clear, explicit and unequivocal agreement to arbitrate.

Dissection of the relevant language of Section 6.9 of the APA is not for the squeamish. First, it provides that "[i]n the event of any legal or equitable action arising under this

Agreement, the parties hereto hereby agree that jurisdiction and venue for such action shall lie exclusively within either [sic] the state courts of New York located in New York County, New York." Putting aside that the word "either" is not joined by its typical companion "or," the sentence certainly suggests an intention that "any" action arising under the agreement would be litigated in court. Although it is possible in some cases to read such exclusive jurisdictional language as narrowly applying only to ancillary proceedings *in aid of arbitration*, to avoid conflicting with an otherwise clear arbitration provision (*Isaacs v Westchester Wood Works, Inc.*, 278 AD2d 184, 185 [1st Dept 2000]), that is made more difficult here by three succeeding sentences in Section 6.9. Those sentences provide that a "final judgment in any such [state court] action shall be conclusive," that the parties "agree to enter into mediation prior to trial in any suit, action, or proceeding arising out of or relating to this agreement," and that the parties waive the right to a jury trial "in connection with any litigation or proceeding arising out of or relating to this Agreement or the transactions contemplated hereby." The most natural reading of those sentences is that they envision a proceeding on the merits of the dispute, rather than simply an ancillary proceeding in aid of arbitration.

It is at this point, however, that Section 6.9 seems to make a U-turn. First, it states the option that "[a]ny and all disputes *may* be resolved by means of mediation between the parties" (emphasis added). That is followed by the curious sentence upon which OLB's hopes for arbitration turn: "Foregoing [sic] this or in the absence of reaching an agreement through mediation, the parties shall agree to binding arbitration with the prevailing party entitled to recovery of all cost including but not limited to attorney fees." OLB's efforts to read this sentence (which does not make clear which "this" the parties might be "foregoing/forgoing" or whether "shall agree to binding arbitration" is an agreement or an agreement to agree), in

isolation, as an unequivocal selection of arbitration as the exclusive and mandatory dispute resolution mechanism is unavailing.

Sound "principles of contract construction require that 'all terms of an agreement to be read together and harmonized whenever reasonably possible'" (*WSC Riverside Dr. Owners, LLC v McCabe*, 2011 WL 11166419 [Sup Ct, NY County 2011], *quoting HGCD Retail Services, LLC v 44-45 Broadway Realty Co.*, 37 AD3d 43, 49–50 [1st Dept 2006]). Here, in addition to the dispute resolution language contained elsewhere in Section 6.9, which points directly to a court proceeding on the merits, there is this clear statement all capital letters in Section 6:15: "EACH OF THE PARTIES HERETO AGREES THAT [ANY CLAIMS OF ANY KIND ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY] SHALL BE TRIED BEFORE A JUDGE OF A COURT HAVING JURISDICTION WITHOUT A JURY." Although this language is not contained in a "dispute resolution" paragraph per se, it would be difficult to square its express terms with a reading of Section 6.9 that would *prohibit* bringing an action to a bench trial in New York State court.

Pulling together the various provisions cited above, and seeking to avoid negating any unequivocal contractual language, the Court finds that the most natural and harmonious reading is that the arbitration sentence at the end of Section 6.9 is triggered if, and only if, the parties first elected the option of pursuing mediation *in lieu of* a court proceeding. Such a procedure would be similar to that set forth in the contractual provision at issue in *Bd. of Managers of 825 W. End Condominium v Grunstein* (192 AD3d 500, 500 [1st Dept 2021]), in which the court found there was no binding agreement to arbitrate absent an election by the board of managers to mediate the dispute.

In sum, OLB has not carried its burden of establishing that the parties had a clear, explicit and unequivocal agreement mandating that they arbitrate disputes arising under the APA.

Accordingly, it is

ORDERED that OLB's motion to compel arbitration is **DENIED**; it is further

ORDERED that the parties upload a copy of the transcript of the proceedings to NYSCEF upon receipt.

This constitutes the Decision and Order of the Court.

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3/28/2023
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE