SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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HUNTSMAN INTERNATIONAL, LLC,

Plaintiff,

Index No.: 650672/2017
Mot. Seq. Nos. 001, 002

ALBEMARLE CORPORATION, ROCKWOOD SPECIALTIES GROUP, INC., ROCKWOOD HOLDINGS, INC., SEIFOLLAH "SEIFI" GHASEMI, ANDREW M. ROSS, THOMAS J. RIORDAN, AND MICHAEL W. VALENTE,

Defendants.

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**ANDREA MASLEY, J.S.C.:**

In motion sequence number 001, defendants Ablemarle Corporation, Rockwood Holdings, Inc., and Rockwood Specialties Group, Inc. (collectively, the Albemarle Defendants) move, pursuant to CPLR 7503 (a) and 9 U.S.C. §§ 4 and 6, to compel arbitration and stay proceedings before this court pending arbitration.

In motion sequence number 002, individual defendants Seifollah Ghasemi, Andrew M. Ross, Thomas J. Riordan, and Michael W. Valente (collectively, the Individual Defendants) move, pursuant to CPLR 7503 (a) and 9 U.S.C. §§ 4 and 6, to compel arbitration and stay proceedings before this court pending arbitration.

Motion sequence numbers 001 and 002 are consolidated for disposition.

**BACKGROUND**

The following summary describes the facts as alleged by plaintiff.

The crux of this dispute involves the sale of purported sham technology promising an alternate cost efficient means of pigment production. The sale also included the transfer of ownership to production facilities located domestically. After the sale closed, plaintiff discovered that the technology underlying the sale never functioned

as promised.

Plaintiff Huntsman International, LLC (Huntsman) is a chemical company that manufactures a range of materials, pigments, and polyurethanes for consumer and industrial use. Defendant Rockwood Specialties Group, Inc. (Rockwood) is engaged in the production of color pigments.[1]

This matter arises from a billion-dollar transaction between Huntsman and Rockwood. On October 1, 2014, the parties executed a Stock Purchase Agreement (SPA) whereby Huntsman acquired several of Rockwood businesses, including its color pigments business. These businesses produced specialty chemicals, such as color pigments, which would support and augment Huntsman's overall pigment business. Under the SPA, Huntsman purchased twenty facilities owned by Rockwood, including a facility central to this dispute located in Augusta, Georgia (the Augusta Facility). Section 4.27(i) of the SPA governs disputes related to the Augusta Facility and Cost Overrun Reimbursement under Section 1.6. It states:

> "In the event of any disputes between Parent and Buyer regarding the terms and conditions of, and the parties respective obligations under, Section 1.6 and this Section 4.27, including whether (i) Mechanical Completion has occurred at the Augusta Facility, (ii) Final Completion has occurred at the Augusta Facility, (iii) the amount of the Augusta Construction Costs or (iv) the Augusta Facility has successfully completed the Performance Test.... In the event Representatives of Parent and Buyer are unable to resolve such dispute within such thirty (30) day period, either party shall have the right, following the end of such thirty (30) day period, to submit such dispute to be resolved by arbitration administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules. The arbitration shall be commenced by written request of any party, made in accordance with the notice provisions of this Agreement, and shall be conducted by a single arbitrator (the 'Arbitrator') with experience in disputes of this nature appointed in accordance with the Commercial Rules in New

[1] Albemarle Corporation acquired Rockwood Holdings and Rockwood Specialties Group, Inc. on January 12, 2015.

> York, New York. Parent and Buyer agree that the procedure set forth in this Section 4.27(i) for resolving disputes with respect to items referred to in the first sentence of this Section 4.27(i) shall be the sole and exclusive method for resolving such dispute..."

In 2013, Rockwood and Huntsman began negotiations to purchase Rockwood's pigments business. Rockwood represented that it possessed proprietary technology, called "Bluebird Technology," that would eliminate reliance on expensive overseas materials currently necessary for pigment production. During negotiations, Rockwood claimed that it had built and implemented the Bluebird technology in their facility in Turin, Italy, with great success. According to Rockwood, the Bluebird technology would be integrated into the Augusta Facility, which it was in the process of constructing. The Augusta Facility would rely exclusively on Bluebird for its production of yellow and red pigments. Rockwood claimed that the Bluebird technology would obviate the need for several of Rockwood's existing pigment plants, which did not use Bluebird. Rockwood also planned to consolidate all pigment production in the Augusta Facility and close the other facilities.

Between March and September 2014, prior to closing, the Individual Defendants executed three amendments to the SPA on behalf of Rockwood. The amendments reduced the overall transaction price and reaffirmed existing representations, warranties, and covenants in the SPA. Defendant Seifollah Ghasemi, Chairman and Chief Executive Officer of Rockwood Holdings and Rockwood Specialties, executed the first amendment to the SPA. Defendant Thomas J. Riordan, Executive Vice President of Law and Administration and Corporate Secretary of Rockwood Specialties and Rockwood Holdings, executed the second amendment to the SPA. Huntsman states in

¶112 of the complaint that Rockwood and Huntsman executed the third amendment on September 30, 2014, but does not identify the signatory to the amendment. Defendant Andrew M. Ross is President and CEO of Pigments and Additives. Defendant Michael W. Valente is Vice President, General Counsel and Assistant Secretary of Rockwood Specialties.

The transaction closed on October 1, 2014. Since Rockwood had not finished constructing the Augusta Facility, under the SPA, Huntsman assumed responsibility for completing its construction subject to various conditions. In particular, the SPA required Huntsman to run a "Performance Test." The Performance Test would confirm, through a simulated month of pigment production, the functionality of the Bluebird technology as implemented at the Augusta Facility, and that the Augusta Facility met certain performance requirements for pigment production.

By November 2015, Huntsman completed construction of the Augusta Facility and tested the Bluebird technology in accordance with the SPA. After numerous trials, Huntsman concluded that the Bluebird technology did not, and never would, work.

On February 6, 2017, Huntsman filed this action alleging eleven claims including fraudulent misrepresentation, breach of contract, negligent misrepresentation, unjust enrichment, and seeking declaratory judgment. Huntsman claims that Rockwood's representations under the SPA were false and that Rockwood knew of its falsity and likewise knew that its Turin facility encountered problems related to the Bluebird technology. According to Huntsman, Rockwood failed to satisfy its obligations under the SPA to inform Huntsman of these defects.

Defendants moved to compel arbitration and stay proceedings before this court

pending arbitration. Huntsman opposes both motions.

**DISCUSSION**

**A. *The Albemarle Defendants' Motion To Compel Arbitration (001)***

The Albemarle Defendants move, pursuant to CPLR 7503, to compel arbitration and stay the proceedings. The core of the dispute is competing interpretations of an arbitration clause in the SPA, Section 4.27 (i), which governs claims relating to the Augusta Facility. The Albemarle Defendants' principal argument is that Section 4.27 (i) expressly requires arbitration because the clause's broad "any disputes" language includes all claims related to the Augusta Facility. The Albemarle Defendants insist that the clause also forecloses to the court the question of arbitrability.

The Federal Arbitration Act represents an "'emphatic' national policy favoring arbitration" (*Singer v Jefferies & Co.*, 78 NY2d 76, 81 [1991]). Under the Federal Arbitration Act, arbitration provisions will be enforced if: (1) there is a valid agreement to arbitrate; and (2) the dispute falls within the scope of that agreement (*Hartford Accident & Indem. Co. v Swiss Reinsurance Am. Corp.*, 246 F3d 219, 226 [2d Cir 2001]). Arbitrability is "initially one for the courts to determine" (*see Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 [1st Dept 2007]).

New York courts require arbitration where the parties contractually agree to arbitrate their disputes (*State of New York v Philip Morris Inc.*, 30 AD3d 26, 31 [1st Dept 2006] [recognizing that "[a]rbitration is strongly favored under New York law"]). A party seeking to compel arbitration has the burden of establishing that the parties intended to abitrate their dispute (*see Eiseman Levine Lehrhaupt & Kakoyiannis*, 44 AD3d at 583). New York law favors arbitration (*Singer*, 78 NY2d at 81). A clause expressly excluding

particular disputes from arbitration will not support a finding of arbitrability (*see Pharmacia & Upjon Co. v Elan Pharms., Inc.*, 10 AD3d 331, 334 [1st Dept 2004] [explaining that expressly excluding certain disputes from arbitration evinces the parties' intent on arbitrable items]). Finally, lingering doubts about the scope of arbitrable issues are resolved in favor of arbitration (*Philip Morris Inc.*, 30 AD3d at 31).

The Albemarle Defendants argue that the clause's "any disputes" language reaches all claims concerning the Augusta Facility, even those grounded in fraud. The clause clearly establishes the parties' intentions to arbitrate "any disputes" arising under Sections 1.6 and 4.27. Count VI and VII of Huntsman's breach of contract claim fall squarely within the purview of the arbitration clause. In both claims, Huntsman alleges that the Albemarle Defendants failed, under Section 4.27 (f), to notify Huntsman of "reasonable concerns" about whether the Augusta Facility could achieve successful completion of the Performance Test.[2] The balance of Huntsman's fraud claims, which share the same factual predicate as the breach of contract claims, go to the heart of the transaction: the material misrepresentations giving rise to the underlying transaction. They must also be arbitrated (*see Matter of National Union Fire Ins. Co. of Pittsburgh, PA v St. Barnabas Community Enters., Inc.*, 48 AD3d 248, 249 [1st Dept 2008] [explaining that fraudulent inducement claims must be determined by arbitration]). Unlike attacks on the validity of an arbitration clause, attacks on the validity of the contract must be resolved by an arbitrator (*Matter of Monarch Consulting, Inc. v National Union Fire Ins. Co. of Pittsburgh, PA*, 26 NY3d 659, 675 [2016]).

[2] To date, Huntsman has not completed a successful Performance Test. Huntsman asserted at argument, "there's never going to be an allegation that it was successfully completed" because "[they] know this plant isn't going to work" (Tr at 30).

Huntsman advances several arguments opposing arbitration. First, Huntsman claims that arbitration is triggered in only two instances: (1) after the completion of the Performance Test; and (2) for disputes under both Section 1.6 and 4.27. Section 1.6 authorizes reimbursement for expenditures exceeding the construction budget for the Augusta Facility. Huntsman argues that because 4.27 (i) authorizes arbitration for disputes under "Section 1.6 and [] 4.27," the pairing of these provisions constitutes dual pre-requisites to arbitration. This conjunction argument, however, is refuted by the different temporal obligations under 1.6 and 4.27 (1.6 addresses cost overruns *after* the Performance Test; 4.27 addresses construction obligations *before* completing the Performance Test). Instead the better approach is an interpretation that harmonizes these seemingly divergent provisions (*Officemax, Inc. v United States*, 428 F3d 583, 589 [6th Cir. 2005] [explaining that courts have interpreted "and" disjunctively to avoid an incoherent reading of a text]). Applying principles of contract construction, the court adopts an interpretation that gives meaning to every provision in the contract (*Black Bull Contr., LLC v Indian Harbor Ins. Co.*, 135 AD3d 401, 406 [1st Dept 2016]). The arbitration carve-out conveys the parties' intent that disputes about the Augusta Facility be treated differently from those concerning the other nineteen facilities. The forum selection provision, Section 10.8(b), therefore, serves as a catch-all for residual claims that do not involve the Augusta Facility or Cost Overruns.

Second, Huntsman argues that Section 4.27 applies only to construction related disputes, not claims of fraud. Huntsman points to the language of Subsection (f), mandating arbitration be administered by the American Arbitration Association in accordance with the Construction Industry Arbitration Rules. The Construction Industry

Arbitration Rules, however, merely inform the process for arbitration under 4.27; the fit and suitability of the arbitrator is determined by the Commercial Rules. Section 4.27(i) ensures the appointment of an arbitrator "experienc[ed] in disputes of this nature" in accordance with the Commercial Rules. This clause is not the characteristically sweeping formulation of broad arbitration clauses. Rather the clause is limited to "any dispute" arising under 4.27, the Augusta Facility. Because the subject of the dispute is the Augusta Facility, arbitration is required.

As a general matter, "[d]oubts should be resolved in favor of coverage" (*Hartford Accident & Indem. Co.*, 246 F3d at 227). A party resisting arbitration must overcome the presumption of arbitrability by establishing "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" (*id*). Absent an express provision excluding certain disputes from arbitration, the resisting party must provide "forceful evidence of a purpose to exclude the claim from arbitration" (*United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Local 4-5025 v E.I. DuPont de Nemours & Co.*, 565 F3d 99, 102 [2d Cir 2009]). Huntsman has not done so.

The Albemarle Defendants' motion to compel arbitration is granted.

***B. Individual Defendants' Motion To Compel Arbitration (002)***

The Individual Defendants seek to compel arbitration despite being non-signatories to the arbitration agreement. The Individual Defendants argue that agents to signatories of an arbitration agreement may benefit from arbitration agreements entered into by their principals. If the alleged conduct "relates to their behavior as officers or directors or in their capacities as agents of the corporation," then non-

signatories may compel arbitration (*Hirschfeld Prods. v Mirvish*, 88 NY2d 1054, 1056 [1996]). Huntsman opposes on the theory that New York law forbids a non-signatory from compelling arbitration "unless the right of the non-signatory is expressly provided for in the agreement" (*Greater N.Y. Mut. Ins. Co. v Ranking*, 298 AD2d 263, 263 [1st Dept 2002]). Huntsman construes Section 10.11 of the SPA, stating "[t]his Agreement is not intended to confer upon any other Person any rights or remedies hereunder," to exclude the Individual Defendants from coverage under the arbitration clause.

The court rejects Huntsman's argument. Individual defendants may seek to compel arbitration as former directors of a signatory (*see Nardi v Povich*, 12 Misc 3d 1188 [A], [Sup Ct, NY County 2006] [holding that "[I]t is *not* the case that an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision"]). The obligation can also attach where agents seek to enforce arbitration agreements entered into by their principal so long as the "alleged misconduct relates to their behavior ...as agents of the corporation" (*Hirschfeld Prods.*, 88 NY2d at 1056).

Guided by these principles, the court finds that the Individual Defendants may join the arbitration. It is true that the Individual Defendants are non-signatories to the SPA, but each defendant was nevertheless high-level executives of the signatory company, possessing varying degrees of knowledge about, and control over, the disputed transaction. Two of the Individual Defendants were charged with possessing "knowledge" under Section 4.27 (f); two of the Individual Defendants executed separate amendments to the SPA; and three of the Individual Defendants received hundreds of thousands to millions in cash bonuses for helping close the underlying transaction. Litigation will be stayed where non-signatories were "closely related to the signatories

and is alleged to have engaged in substantially the same improper conduct" (*PromoFone, Inc. v PCC Mgt.*, 224 AD2d 259, 260 [1st Dept 1996]).

Accordingly, it is ORDERED that defendants' motion to compel arbitration and to stay this action is granted; and it is further

ORDERED that plaintiff Huntsman shall arbitrate its claims against defendants in accordance with Section 4.27 (i) of the SPA; and it is further

ORDERED that all proceedings in this action are hereby stayed, except for an application to vacate or modify the stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon the final determination of the arbitration.

Dated: 1/3/18

ENTER:

J.S.C.