SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. BARRY R. OSTRAGER** **PART** **IAS MOTION 61EFM**

Justice

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ASHLAND GLOBAL HOLDINGS, INC.,

Plaintiff,

- v -

SPEEDWAY LLC and VALVOLINE, INC.,

Defendants.

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INDEX NO.	656495/2020
MOTION DATE	
MOTION SEQ. NOS.	003

DECISION + ORDER ON MOTION

HON. BARRY R. OSTRAGER

Before the Court is the motion by defendant Speedway LLC ("Speedway") for an order (1) dismissing this action pursuant to CPLR 3211(a)(1) and (7) based on documentary evidence and failure to state a cause of action, or alternatively, (2) dismissing this action pursuant to CPLR 3211(a)(4) based on a prior action pending or staying this action pending the determination of proceedings pending in Ohio. Plaintiff Ashland Global Holdings, Inc. ("Ashland") has opposed Speedway's motion and cross-moved to stay the pending Ohio proceedings in favor of this action.

Extensive oral argument was held on the record on May 3, 2021 on this motion and the motion by defendant Valvoline, Inc. to dismiss all claims against it, and decision was reserved based on the potential resolution of the claims against Valvoline and an update on the progress of the Ohio proceedings (see Transcript So Ordered on June 1, 2021, NYSCEF Doc. No. 104). Following the oral argument, Ashland filed a Notice of Discontinuance of its claims against Valvoline dated May 28, 2021, which rendered Valvoline's motion moot (NYSCEF Doc. Nos. 102 and 103). Also on May 28 counsel for Ashland and Speedway each filed letters, at the

request of the Court, with updates on the Ohio proceedings, which are discussed more fully below (NYSCEF Doc. Nos. 90-92, 98-100).

For the reasons that follow, the Court grants Speedway's motion to stay this action pending the determination of the Ohio proceedings and denies Ashland's cross-motion to stay the Ohio proceedings in favor of this action.

Background Facts and Underlying Agreements

This dispute centers on the alleged obligation of plaintiff Ashland to acquire and convey to defendant Speedway the land and improvements at 24 specific fuel center and convenience store sites located in Ohio, Kentucky, Wisconsin, Minnesota and South Dakota ("the Sites"). The Sites are presently owned by an entity named SuperAsh Remainderman Ltd. Partnership, leased to Ashland, and subleased to and operated by Speedway.

Three agreements are relevant to the dispute. The first is the Asset Transfer and Contribution Agreement among Marathon Oil Company ("Marathon"), Ashland, Inc., and Marathon Ashland Petroleum LLC ("MAP") dated December 12, 1997 ("ATCA"), entered into as part of a complex joint venture (NYSCEF Doc. No. 24). The key portion of the ATCA applicable here is Appendix B, an eleven-page document entitled "PROCEDURES FOR DISPUTE RESOLUTION" that details the steps the parties must take to resolve disputes.

The next relevant agreement in time is the January 1, 1998 Goldman Sachs Master Sublease Agreement between Speedway SuperAmerica LLC (defendant Speedway's predecessor-in-interest, "SSA"), as Sublessee, and Ashland Inc. (plaintiff Ashland's predecessor-in-interest), as Sublessor ("the Sublease", NYSCEF Doc. No. 22). As discussed more fully below, Sections 6(e)(3) and 7(b) of Appendix B —which is one of the portions of the ATCA incorporated by reference into the Sublease—provide that any dispute arising under the

Agreement that cannot be resolved through negotiation and mediation must be resolved by arbitration in Columbus, Ohio.

The third relevant agreement in time is the March 18, 2004 Master Agreement among Ashland, Inc., ATB Holdings Inc., EXM LLC, New EXM LLC, Marathon Oil Corporation, Marathon, Marathon Domestic LLC, and MAP (the "Master Agreement", NYSCEF Doc. No. 25). Pursuant to the Master Agreement, Ashland transferred its ownership interest in MAP to Marathon.

The parties agree that the Sublease and the Master Agreement relate to the same 24 Sites. However, the two agreements have material differences, and Speedway claims the Sublease provisions are controlling, whereas Ashland claims the Master Agreement controls. Simply stated, Speedway argues that the Sublease controls and imposes on Ashland an ***absolute*** obligation to obtain title to the Sites and transfer them to Speedway for no additional consideration. Ashland argues the Master Agreement controls and imposes on Ashland no absolute duty but simply an obligation to make ***reasonable efforts***. The text follows.

Section 4.1(d)(ii) of the Sublease, entitled "Mandatory Conveyance to Sublessee [Speedway]", provides in relevant part (with emphasis added) that:

> If Sublessor [Ashland] transfers its Membership Interest in the Sublessee to a third party including, without limitation, Marathon or its subsidiaries or Affiliates, **Sublessor [Ashland] shall,** if Sublessor has the right to purchase a Subleased Property, **be required to purchase** from the applicable Original Lessor all of the Subleased Property covered under any then outstanding Sublease Schedule **and contribute and transfer such Property to the Sublessee [Speedway], without further consideration**. If in such case the Sublessor does not have any right to purchase a Subleased Property, Sublessor shall use its commercially reasonable best efforts to acquire such Property for contribution to the Sublessee. If Sublessor is unable to so acquire such Property then the applicable Sublease Schedule shall continue notwithstanding the conveyance of Sublessor's Membership Interest in the Sublessee and Sublessor shall continue to use its commercially reasonable best efforts to acquire such Property for contribution to the Sublessee. ..

In contrast, Section 12.02(c) of the Master Agreement, in the section entitled "Designated Subleases", provides in relevant part (with emphasis added) that:

> Ashland shall use its **reasonable best efforts t**o purchase or otherwise acquire the related Leased Property under such Original Lease and convey title to such Leased Property to MAP or one of its subsidiaries….

Relevant Procedural History

On or about October 23, 2020, Speedway commenced an arbitration in Ohio pursuant to the Dispute Resolution Procedures in Appendix B to the ATCA, which the parties agree is incorporated by reference into the Sublease ("the Arbitration"). In the Arbitration, Speedway sought to enforce the above-referenced Section 4.1(d) of the Sublease, which it claimed imposed on Ashland a requirement to purchase the Sites and convey them to Speedway for no additional consideration. The original Arbitration Notice related only to 16 of the Sites (NYSCEF Doc. No. 15). The 8 sites located in Ohio were not included because an Ohio statute arguably prohibited the arbitration of disputes relating to title to property located in Ohio.

About a month later, on November 23, 2020, Ashland commenced this declaratory judgment action seeking a declaration that the 2004 Master Agreement, and not the Sublease, controlled the parties' rights and obligations related to the Sites, that Ashland had no liability to Speedway, and that Speedway's Arbitration Notice was of no force and effect or should be stayed pending the determination of this action (NYSCEF Doc. No. 2). New York was the chosen forum pursuant to Section 14.10 of the Master Agreement, pursuant to which the parties consented to the jurisdiction of any state or federal court in the Borough of Manhattan in the State of New York and further designated New York as the governing law in Section 14.08.

On or about December 7, 2020, Speedway commenced litigation in Ohio related to the 8 Ohio sites not included in the Arbitration, as it had previously indicated it intended to do.

As indicated earlier, the instant motion by Speedway to dismiss this action was argued in May 2021. In their papers and at oral argument, the parties devoted substantial attention to the issue of arbitrability; that is, whether the Arbitration Panel or this Court should determine whether the parties' dispute is subject to arbitration based on the Sublease or whether instead the Court should determine the dispute raised in this action as to whether Ashland was "required" to purchase the Sites and convey them to Speedway under the Sublease or merely use "reasonable best efforts" pursuant to the Master Agreement. The parties reported that briefing on that very arbitrability issue was also proceeding in the Arbitration, and argument has since been held.

Among the various issues raised in both the Arbitration and this motion to dismiss was the impact, if any, of the fact that the Ohio Arbitration covered only the 16 Sites located outside of Ohio and that Ohio litigation was pending to cover the remaining 8 Ohio Sites. Counsel indicated that the Arbitrators had raised the issue whether the Ohio statute purportedly prohibiting arbitration related to the Ohio sites was preempted by the Federal Arbitration Act. In the most recent update to the Court, each counsel reported in separate letters dated May 28, 2021 that Speedway had filed an Amended Notice of Claim in the Ohio Arbitration that expanded the Arbitration to include the 8 Ohio Sites, in addition to the original 16 non-Ohio Sites (NYSCEF Doc. Nos. 98-100). Speedway's counsel added that "while Ashland has conceded in the arbitration that the Ohio statute prohibiting arbitration of disputes involving title to real estate is preempted by the Federal Arbitration Act, it has not yet done so in this action. Once there is closure on that issue in this action, Speedway intends to dismiss the Ohio action." This development effectively moots Ashland's argument that the arbitration provision in the Sublease is unenforceable by virtue of mutual mistake, the mistake being that the provision called for arbitration when Ohio law purportedly prohibited arbitration related to the 8 Ohio sites.

Analysis

In light of the above facts and recent developments, the threshold issue on this motion is whether this Court, or the Arbitration Panel, should determine the issue of the arbitrability of the parties' dispute. Speedway urges that the Arbitrators should determine the issue based on the briefing they received and argument held in the Arbitration that Speedway insists it properly commenced pursuant to the Sublease. Ashland urges that this Court must first determine whether the Sublease or the Master Agreement controls because, if the Master Agreement controls, the parties are not required to arbitrate their dispute. Should this Court proceed to determine which agreement controls, the Court would need to determine, among other things, which parties are bound to which agreement and the effect of the Master Agreement on Speedway as a non-signatory. Ashland argues a fuller record is needed before such a determination can be made.

Pursuant to both Delaware and New York law, arbitrability is an issue for the court to decide unless it is delegated to the arbitrators, such as when the arbitration clause broadly states that any claim or controversy arising out of or relating to the parties' agreement is subject to arbitration. *See, e.g., See e.g., Li v. Std. Fiber, LLC,* CIV.A. 8191-VCN, 2013 WL 1286202, at *6 (Del Ch Mar. 28, 2013); *SM Sydell Hotels LLC v. Yucaipa U.S. Hosp. Partners Holdings, Inc.,* 2019 WL 1405348, at *5-6 (Sup. Ct. NY Co. March 26, 2019), *citing Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S.Ct. 524, 527 (2019); *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 83-84 (2002); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). *See also Smith Barney Shearson Inc. v. Sacharow,* 238 A.D.2d 155, 156-58 (1st Dept. 1997), *aff'd, Matter of Smith Barney Shearson v. Sacharow,* 91 N.Y.2d 39 (1997).

The arbitration clause in this case is extremely broad. As indicated above, the arbitration requirement is set forth in the 11-page Appendix B to the ATCA, which solely addresses the

dispute resolution procedures and which the parties agree is incorporated into the Sublease in relevant part. Section 1 expressly provides that the arbitration provision applies not only to disputes related to the Agreement, but also to disputes relating to the commercial, economic, or other relationship of the parties, stating (with emphasis added) that:

> Except as otherwise expressly set forth in the Agreement, **all controversies, claims or disputes that arise out of or relate to the Agreement or the construction, interpretation, performance, breach, termination, enforceability or validity of the Agreement, or the commercial, economic or other relationship of the parties** thereto, whether such claim is based on rights, privileges or interests recognized by or based upon statute, contract, tort, common law or otherwise and whether such claim existed prior to or arises on or after the date of the Agreement (a "Dispute") shall be resolved in accordance with the provisions of this Appendix...

Further, Section 7(j)(v) of Appendix B expressly empowers the arbitrators to grant the following relief: "interpretation, including declaratory interpretation, of the provisions of the Agreement," which would include interpreting the provisions in the Agreement governing the purchase and conveyance of the Sites and declaring whether the Sublease or the Master Agreement governs the parties' dispute. Based on this very broad grant of power to the arbitrators, this Court finds that the issue of which agreement – the Sublease or the Master Agreement – governs the parties' dispute as to the 24 Sites was delegated to the arbitrators and should be determined in the Arbitration presently pending in Ohio.

Accordingly, it is hereby

ORDERED that the motion by defendant Speedway LLC is granted to the extent of staying this action pending the determination of the Ohio Arbitration and the Ohio lawsuit, should it proceed, and the cross-motion of plaintiff Ashland Global Holdings, Inc. to stay this action in favor of the Arbitration is denied.

A status conference is scheduled for August 25, 2021 at 2:00 p.m. via Microsoft Teams for an update on the Arbitration using the same appearances for Ashland and Speedway that were used for argument on the motion.

Dated: June 4, 2021

BARRY R. OSTRAGER, J.S.C.

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