STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Infrastructure Consulting & Engineering, PLLC,

Plaintiff,

vs.

Susanne Bender, Peter Valiquette, Jared A. Fralix, Russ Touchberry, and Providence Engineering Consultants, LLC,

Defendants.

IN THE CIRCUIT COURT

Civil Action No.: 2020-CP-40-01865

ORDER DENYING DEFENDANTS' MOTION TO STAY IN FAVOR OF ARBITRATION AND TO COMPEL ARBITRATION

Before the Court is the Motion to Stay in Favor of Arbitration and to Compel Arbitration filed by Defendants Susanne Bender ("Bender"), Peter Valiquette ("Valiquette"), Jared A. Fralix ("Fralix"), Russ Touchberry ("Touchberry"), and Providence Engineering Consultants, LLC ("Providence") (collectively, "Defendants"). A hearing was held on July 24, 2020 at which Plaintiff Infrastructure Consulting & Engineering, PLLC ("Plaintiff") was represented by Susan P. McWilliams and Angus H. Macaulay and Defendants were represented by Jaan Rannick.

I. BACKGROUND

Plaintiff is a professional limited liability corporation transportation, consulting, and design firm that is headquartered in Columbia, South Carolina. Plaintiff has four registered professional engineers who are voting shareholders and together constitute the Managers of Plaintiff. Defendants Touchberry and Valiquette were, along with others, non-voting shareholders (denominated "Members") of Plaintiff until each left Plaintiff's employment. The other Defendants are former employees of Plaintiff.

Plaintiff's Complaint alleges claims against all Defendants for theft of trade secrets, violation of the South Carolina Trade Secrets Act, breach of the Confidentiality and Proprietary Rights Agreement, aiding and abetting a breach of fiduciary duty, tortious interference with contract, conversion, breach of the South Carolina Unfair Trade Practices Act, injunctive relief and civil conspiracy to take Plaintiff's privileged and confidential information and form a new business entity, Providence, with the intent of competing with Plaintiff. Plaintiff also asserted a claim against Defendants Touchberry and Valiquette, as signatories to the Infrastructure Consulting & Engineering, PLLC Operating Agreement ("Operating Agreement"), for breach of contract as well as breach of duty of loyalty and breach of fiduciary duty. Defendants filed a joint Answer to the Complaint and separately filed a Motion to Stay in Favor of Arbitration and to Compel Arbitration (collectively "Motion to Compel Arbitration") and Motion to Transfer Venue. At the motions hearing, counsel for Defendants withdrew Defendants' pending Motion to Transfer Venue, so only the Motion to Compel Arbitration is pending.

After carefully considering the arguments of counsel and reviewing the record before me, I find there was no enforceable agreement between the parties to arbitrate, for the reasons that follow. Accordingly, I deny Defendants' Motion to Compel Arbitration.

II. ANALYSIS

Defendants conceded at oral argument that they could not direct the Court to any actual section or paragraph within the Operating Agreement that constituted an arbitration clause or otherwise demonstrated the signatories to the Operating Agreement had, in fact, agreed to submit all disputes arising under the Operating Agreement to arbitration. Nonetheless, Defendants have advanced two arguments in support of their Motion to Compel. After carefully considering both, The Court finds that neither of these arguments mandates arbitration in this case.

A. Notice Language

Defendants first argue that the Court may compel arbitration based on the statement appearing at the top of page 4 of the Operating Agreement, which states:

THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO THE UNIFORM ARBITRATION ACT OF SOUTH CAROLINA PURSUANT TO S.C. CODE § 15-48-10, ET SEQ.

Notwithstanding that the placement of the notice language does not technically comply with § 15-48-10(a) of the S.C. Uniform Arbitration Act ("SCUAA"),[1] Defendants argue the Court may disregard this technicality. Relying upon *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 542 S.E.2d 360 (S.C. 2001), Defendants argue that the SCUAA, including its statutory notice requirement, is preempted by the Federal Arbitration Act ("FAA") because the Operating Agreement is subject to interstate commerce. When an "agreement involves interstate commerce, the FAA applies and trumps the state arbitration laws." *Thorton v. Trident Medical Ctr., L.L.C.*, 357 S.C. 91, 94-95, 592 S.E.2d 50, 51 (Ct. App. 2003). Thus, argue Defendants, because the Operating Agreement involves interstate commerce,[2] the Court should rely upon this language on page 4 as a substitute for an actual arbitration clause in the Operating Agreement, but disregard any non-compliance with the SCUAA found therein, especially in light of the policy of favoring enforcement of valid arbitration agreements under the SCUAA and the FAA.

This Court is mindful that the strong policy favoring arbitration has been reiterated by the South Carolina Court of Appeals as recently as July 1, 2020, in its opinion in *Doe v. TCSC, LLC*,

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[1] S.C. CODE ANN. § 15-48-10(a) of the SCUAA requires that in order for a contract to be subject to arbitration, it must contain a conspicuous notice that is in all caps and underlined and located on the first page of the contract. If it is not, the contract "shall not be subject to arbitration." *Id.*

[2] The party moving to compel arbitration has the burden of proving the agreement involves interstate commerce. Defendants proferred no affidavits regarding this issue, but this is of no moment, as discussed herein.

Op. No. App. 2017-001216, 2020 WL 3551780 (S.C. Ct. App. filed July 1, 2020) at *1. Yet, invoking the FAA is of no avail to Defendants here because, unlike the facts in *Doe*, where it was undisputed an actual arbitration agreement existed and both parties agreed the FAA applied, such is not the case here. Even assuming that the Operating Agreement related to a transaction involving interstate commerce, under *either* South Carolina law or the FAA, there must still be an enforceable agreement to arbitrate. *See Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir. 1997) ("Even though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate."); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) ("Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.").

Ordinary state law principles governing contract formation are generally applied to determine whether a valid agreement to arbitrate exists. *Wilson v. Willis*, 426 S.C. 326, 337, 827 S.E.2d 167, 173 (2019). Arbitration is predicated on an agreement to arbitrate as it requires the parties to waive their fundamental right to access the courts. *Wilson*, 426 S.C. at 337, 827 S.E.2d at 173. Importantly, the presumption in favor of arbitration does not apply to the existence of an agreement to arbitrate. *Id.* "South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement." *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 435 (2009); *Player v. Chandler,* 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989).

Applying these legal standards for enforceable contracts, the Court concludes that the language on page 4 does not constitute an agreement to arbitrate. Defendants have proffered no authority holding that a notice concerning arbitration, without more, may substitute for an actual

arbitration clause.[3] Accordingly, Plaintiff cannot be compelled to arbitrate its claims against Defendants.

B. Section 7.01(d)

In their Motion, as a second basis for compelling arbitration, Defendants argued that "the Managers "are to "submit to arbitration [. . .] any obligation, suit, liability, cause of action or claim, including taxes, either in favor of or against the Company." Defendants' Motion, p. 1. The Court notes, however, that a review of the actual language of that provision of the Operating Agreement, found under Article VII entitled "MANAGEMENT," reveals that Defendants have excised critical language of the provision to bolster their argument and, in fact, this section in no way constitutes a contract to arbitrate, as required by S.C. CODE ANN. § 15-48-10.

Section 7.01, in fact, delineates the manner in which the Company is to be managed by the four Managers of the Company. In pertinent part, 7.01 provides:

> All management and other responsibilities not specifically reserved to the Members in this Agreement shall be vested in **the Managers**. . . . Specifically, but not by way of limitation, **the Managers** shall be authorized in the name of and on behalf of the Company. . . .
>
> **[. . .]**
>
> (d) to pay, extend, renew, modify, adjust, **submit to arbitration**, prosecute, defend or compromise, upon such terms as **the Managers may determine** and upon such evidence as **the Managers may deem sufficient**, any obligation, suit, liability, cause of action or claim, including taxes, either in favor of or against the Company; . . (emphasis added).

[3] At oral argument, Defendants asserted the absence of an actual arbitration clause in the Operating Agreement, when coupled with the presence of the language on page 4, created an ambiguity and such ambiguity should be construed in a light most favorable to Touchberry and Valiquette as non-drafters. The Court is not persuaded an ambiguity is created that mandates compelling arbitration. As noted above, the language on page 4 is not a part of the Operating Agreement nor does it satisfy the requirements of a contract under South Carolina law. In addition, as discussed below, § 13.04 of the Operating Agreement resolves any possible ambiguity because it sets out the parameters by which disputes are to be resolved, i.e., in the state and federal courts of South Carolina.

Thus, when read in the context of Article VII concerning the management of the Company, § 7.01(d) is actually one of seven separate subparagraphs describing the discretionary authority of the Managers. Section 7.01(d) does not, however, constitute a mandatory obligation to arbitrate nor can the provision be considered a "written contract to submit to arbitration any controversy thereafter arising between the parties." As neither Touchberry nor Valiquette is a Manager, these Defendants cannot exercise any discretionary authority reserved to Managers under the Operating Agreement. The Court concludes that there is simply no basis to compel arbitration when there is no agreement to arbitrate. *Towles*, 338 S.C. at 37, 524 S.E.2d at 843-44.

C. Governing Law Provision

As an additional basis for denying Defendants' Motion, the Court finds that the parties agreed, by virtue of § 13.04 of the Operating Agreement, to resolve disputes in the state and federal courts of South Carolina. This provision provides:

> 13.04 Governing Law. The provisions of this Agreement shall be construed, administered and enforced according to the laws of the State of South Carolina, notwithstanding any rules regarding choice of law to the contrary. Each party irrevocably agrees that any legal action or proceedings against [sic] **with respect to this Agreement may be brought in the courts of the State of South Carolina, or in any United States District Court of South Carolina,** and, by its execution and delivery of this Agreement, each party hereby irrevocably submits to each such jurisdiction and hereby irrevocably waives any and all objections which it may have as to venue in any of the above courts. Each party further consents and agrees that any process or notice of motion or other application to either of said courts or any judge thereof, or any notice in connection with any proceedings hereunder, may be served inside or outside the State of South Carolina by registered or certified mail, return receipt requested, postage prepaid, and be effective as of the receipt thereof, or in such other manner as may be permissible under the rules of said courts. Each party waives trial by jury in any action or proceeding in connection with this Agreement. (emphasis added)

The language of § 13.04 demonstrates the parties specifically contemplated resolution through courts, not arbitration, because it sets out specific details regarding resolution of disputes between

the parties, including the forum and jurisdiction for disputes, service of process procedure, waiver of venue "in any of the [] courts," and waiver of trial by jury.

The Court finds that this provision establishes that the signatories to the Operating Agreement, including Touchberry and Valiquette, agreed that South Carolina law governs claims brought "with respect to" the Operating Agreement and envisioned suits in either State or federal court. It clearly contemplates the use of courts, not arbitration, to resolve disputes. *See also Addie v. Kjaer,* No. CIV. 2004-135, 2005 WL 1130224, at 3–4 (D.V.I. May 10, 2005) (arbitration denied where exclusive forum selection clause in a purchase agreement demonstrated parties' intent to resolve disputes in the courts, even though an escrow agreement contained a general arbitration clause), motion for reconsideration denied, *id.*, 2005 WL 1473847 (D.V.I. June 13, 2005).

CONCLUSION

The Court finds that no enforceable agreement to arbitrate disputes arising under the Operating Agreement exists. Accordingly, Plaintiff cannot be compelled to arbitrate its claims against Defendants and Defendants' Motion is denied.

IT IS SO ORDERED.

L. Casey Manning
Circuit Court Judge

August 5, 2020