UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

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| SEMPA SYSTEMS GMBH | ) | |
| | ) | Case No.: 1:16−cv−348 |
| v. | ) | |
| | ) | Magistrate Judge Steger |
| WACKER POLYSILICON | ) | |
| NORTH AMERICA, LLC | ) | |

**MEMORANDUM AND O R D E R**

## I. INTRODUCTION

Defendant, Wacker Polysilicon North America, LLC ("Wacker") moves to stay this action and compel arbitration pursuant to a subcontract between Plaintiff Sempa Systems GMGH ("Sempa") and AdvanceTEC, LLC ("ATEC") [Doc. 6]. For the reasons stated herein, the motion to stay and compel arbitration is GRANTED.

## II. BACKGROUND

This dispute arises out of Plaintiff Sempa's work as a subcontractor to ATEC, a contractor engaged by Wacker to help design and construct Wacker's new multi-billion dollar polysilicon production facility in Bradley County, Tennessee. Part of that facility is the Analytics Building (the "Project"). Issues related to construction of the Project are the subject of Sempa's complaint. Wacker entered into a Design/Build Agreement ("Prime Contract") with ATEC for the Project. ATEC then entered into a written subcontract with Sempa (the "Subcontract") for a portion of the work on the Project.

The claims asserted in Sempa's Amended Complaint arise out of and relate to the work Sempa performed on the Project as subcontractor to ATEC. Sempa's claims, however, are against Wacker. In general, Sempa alleges that Wacker's acts and representations caused it to agree to a disadvantageous price for the Subcontract.

Wacker argues that Sempa's lawsuit against Wacker should be stayed, and that all of Sempa's claims are subject to compulsory arbitration. Sempa disagrees and argues that its claims should be litigated in court rather than arbitrated.

## III. DISCUSSION

### A. The Federal Arbitration Act

A motion to compel arbitration is governed by the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.* Under 9 U.S.C. § 2 of the FAA, arbitration clauses are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see also Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68 (2010) ("[l]ike contracts ... [arbitration agreements] may be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability'") (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). The provisions of the FAA are mandatory; where the parties have agreed to arbitrate a given issue, a court *must* direct the parties to arbitrate. 9 U.S.C. § 3-4; *Rent-A-Center*, 561 U.S. at 67; *Howard v. Rent-A-Center*, No. 1:10-cv-103, 2010 WL 3009515, at *2 (E. D. Tenn. July 28, 2010.) The FAA also establishes procedures to enforce the provisions of the FAA and a parties' agreement to arbitrate. *Rent-A-Center*, 561 U.S. at 68. Under 9 U.S.C. § 3, a party may move the Court to stay an action brought "upon any issue referable to arbitration under an agreement in writing for such arbitration." Under 9 U.S.C. § 4, a party may petition the Court to compel arbitration "in the manner provided for in such agreement." *Rent-A-Center*, 561 U.S. at 68. ("The court 'shall' order arbitration 'upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue.'") *Id.* (quoting 9 U.S.C. § 4).

Pursuant to Section 4 of the FAA, Wacker's motion to stay this action and compel arbitration is properly before this Court.

**B. Arbitration Provisions - Prime Contract and Subcontract**

The Subcontract between Sempa and ATEC contains an arbitration provision. Wacker asserts that this arbitration provision in the Subcontract incorporates the arbitration provisions found in the Prime Contract between ATEC and Wacker. Therefore, Wacker argues, Sempa's lawsuit against Wacker must be governed by the arbitration requirements in the Prime Contract.

To support this conclusion, the Court must first look to the arbitration provision in the Subcontract between Sempa and ATEC to determine whether it incorporates the arbitration provision found in the Prime Contract between ATEC and Wacker. Section 27 of the Standard Conditions to the Subcontract provides that claims that are solely between Sempa and ATEC are subject to arbitration at ATEC's option. [Subcontract ¶ 27, Doc. 7-2, Page ID # 297]. So, it is clear that claims between Sempa and ATEC are subject to arbitration.

The provision then continues with language that clarifies what should happen when a claim includes Wacker. The specific language is set forth below:

> Notwithstanding anything contained herein to the contrary, (i) any disputes which include the Owner [Wacker] or which are expressly required to be resolved in accordance with the dispute resolution mechanism set forth in the Prime Contract . . . shall be determined in accordance with the dispute resolution mechanism set forth in the Prime Contract.

[*Id.*] A straightforward reading of this provision indicates that any dispute involving Wacker is subject to the dispute resolution procedures set forth in the Prime Contract. Sempa disagrees. It argues that the clause, "any disputes which include [Wacker],"

> does not apply to the present case because the present litigation does not "include [Wacker]"; it is instead *exclusively* against [Wacker]. The language

> obviously contemplates a claim or dispute which involves additional, other defendants. The definition of "include" is "to have (someone or something) as part of a group or total: to contain (someone or something) in a group or as a part of something." (http://www.merriam-webster.com/dictionary/including). (Emphasis added). The word "include" necessarily does not apply to litigation *exclusively* against Wacker but instead contemplates litigation against another party which would "include" Wacker. To shoehorn this language into the present case would require the Court to change the English definition of the word "include".

[Sempa's Response at 7, Doc. 14, Page ID # 337].

The Court respectfully disagrees with the meaning that Sempa attempts to ascribe to the word "include" in the context of the contested provision. Scrutinizing the literal meaning of the provision, as Sempa urges the Court to do, the Prime Contract's dispute resolution procedures apply to "any disputes which include [Wacker]." Just as it takes two to tango, it takes two parties to be involved in a dispute.[1] There certainly could be many more parties involved in the dispute, but two is sufficient. A dispute between Wacker and one other party (in this case, Sempa) "includes" Wacker. Had Sempa added several additional defendants to its lawsuit, the dispute would still "include" Wacker and, thus, would trigger the dispute resolution provision in the Prime Contract. The fact that Sempa chose not to add any additional defendants does not avoid the conclusion that the dispute which Sempa initiated "includes" Wacker.

The Court agrees with the parties that this provision in the Subcontract is not a model of clear draftsmanship. Substituting the word "involve" for "include" likely would have saved the parties and the Court quite a bit of time. Regardless, I am persuaded that the commonsense meaning of the provision reflects intent among the parties to incorporate the

[1] When Fred Astaire and Ginger Rogers danced the tango in the 1930s movie, "Swing Time," an accurate description of the event would be that it "included" Fred Astaire and it "included" Ginger Rogers. Had the duo been joined by a chorus line, the description of Fred and Ginger being "included" in the dance would not change. Had Fred danced solo, it would be awkward phrasing to say that the dance "included" him, but we do not have to deal with that issue. We do not have a scenario in which Fred is dancing solo, or in which Wacker's dispute is with itself. The dance and the present lawsuit both involve two parties.

Prime Contract's arbitration provisions into the Subcontract where a dispute arises between Sempa and Wacker.

Turning to those arbitration provisions, the Prime Contract provides, in pertinent part:

> In the case of any claims or disputes in connection with the Work and/or the Contract Documents the Parties shall take all reasonable actions to expeditiously resolve the claim or dispute in accordance with the dispute resolution provisions set forth in Exhibit F hereto attached and incorporated herein ("Dispute Resolution Procedures").

[Prime Contract, Exhibit C, Section 7.1, Doc. 7-1, Page ID # 216]. The Prime Contract defines a claim broadly as follows:

> A claim includes any demand, assertion, request or other claim made with respect to any matter arising out of or related to the [Prime Contract], the contract documents or the work.

[Prime Contract, Exhibit F, Section 1, Doc. 7-1, Page ID # 273].

The Prime Contract dispute resolution provisions require a series of procedures to attempt to resolve the dispute that include an initial meeting, a second meeting, and mediation. [Prime Contract, Exhibit F, Sections 2-5, Doc. 7-1, Page ID # 273-74]. If those procedures do not result in resolution of the claim, then the Prime Contract provides that "the claim shall be submitted to binding arbitration and each party shall act in accordance with the [American Arbitration Association] Rules." [Prime Contract, Exhibit F, Section 6, Doc. 7-1, Page ID # 274]. The default location for the arbitration proceedings is Hamilton County, Tennessee. [Prime Contract, Exhibit F, Section 8.2, Doc. 7-1, Page ID # 274].

I find that the arbitration provision in the subcontract between Sempa and ATEC contains a provision requiring that this dispute between Sempa and Wacker be resolved in accordance with the dispute resolute mechanism set forth in the Prime Contract and that

Sempa is bound by that provision. [Subcontract ¶ 27, Doc. 7-2, Page ID # 297]. Consequently, Sempa's claims against Wacker are subject to binding arbitration as set forth in the Prime Contract.

**C. Waiver of the Right to Arbitrate**

Sempa also argues that Wacker has waived its right to arbitration. Before Sempa filed the present lawsuit (removed from Tennessee state court to this court), Sempa had previously filed a lawsuit against Wacker in a Virginia state court asserting claims identical to those asserted in this action. Instead of demanding arbitration, Wacker filed a motion to dismiss for lack of personal jurisdiction. The Virginia state court granted Wacker's motion and dismissed the lawsuit for lack of personal jurisdiction.

Citing generally *Southern Sys. v. Torrid Oven, Ltd.*, 105 F. Supp. 2d 848 (W.D. Tenn. 2000), Sempra asserts that Wacker's failure to raise arbitration before the Virginia state court constituted a waiver of the right to arbitrate. In *Torrid Oven*, the court explained under what circumstances a waiver might be appropriate:

> Waiver of the right to insist on arbitration may occur in several ways. Conduct such as filing responsive pleadings while not asserting a right to arbitration, filing a counterclaim, filing pretrial motions, engaging in extensive discovery, use of discovery methods unavailable in arbitration, and litigation of issues on the merit have all been considered by courts to amount to a waiver of the right to arbitration. *See, e.g., National Found. for Cancer Research*, 821 F.2d at 778 (finding that the movant's delay in seeking arbitration, its extensive participation in discovery, its motion for summary judgment, and the resulting prejudice to the opposing party constituted waiver); *U.S. v. Darwin Constr. Co.*, 750 F. Supp. 536, 538-539 (D.D.C. 1990) (finding plaintiff's conduct in filing eight motions with the court, conducting extensive discovery, and filing motion to stay two months before trial date inconsistent with intent to enforce arbitration right). There is no rigid rule as to what constitutes waiver of the right to arbitrate; the issue must be decided based on the circumstances of each particular case. *See St. Mary's Med. Ctr. v. Disco Aluminum Prod. Co., Inc.*, 969 F.2d 585, 588 (7th Cir. 1992); *Stifel*, 924 F.2d at 159. Among factors examined by the courts in determining whether there has been a waiver of the right to arbitrate

> are: (1) whether the party's actions are inconsistent with the right to arbitrate; (2) the degree of pretrial litigation; (3) the length of delay in invoking an arbitration right and seeking a stay; (4) the proximity to the trial date; (5) whether a defendant seeking arbitration filed a counterclaim without asking for a stay; and (5) the resulting prejudice to the opposing party. *See Leadertex, Inc. v. Morganton Dyeing & Finishing Corp*., 67 F.3d 20, 25 (2d Cir. 1995); *Metz*, 39 F.3d at 1488.
>
> No one factor is dispositive. *See National Found. for Cancer Research*, 821 F.2d at 774. The "essential question [in determining waiver] is whether, under the *totality of circumstances*, the defaulting party has acted inconsistently with the arbitration right." *Id.*

[Sempa's Response at 9-10, Doc. 14, Page ID # 339-40, citing *Torrid Oven*, 105 F. Supp. 2d at 854 (emphasis added)]. *Torrid Oven* instructs that a party cannot engage in significant action in the underlying litigation before seeking arbitration. Examples of conduct resulting in waiver are inapposite to Wacker's conduct here. In the Virginia litigation, Wacker limited itself to making a "special appearance" solely to assert lack of personal jurisdiction. [*See* Exhibit 1 attached to Wacker's Reply, Doc. 15-1, Page ID # 353]. This limited action was not inconsistent with the right to arbitrate the underlying claim. The Court finds Wacker has not waived its right to arbitrate.

## IV. CONCLUSION

For the reasons stated herein, Wacker's motion to stay litigation and compel arbitration is GRANTED. This action is hereby STAYED pending arbitration. It is ORDERED that the parties shall file a written report every three months (commencing Friday, September 29, 2017 and continuing thereafter) advising the Court of the status of arbitration.

**IT IS SO ORDERED.**

s\ *Christopher H. Steger*
CHRISTOPHER H. STEGER
UNITED STATES MAGISTRATE JUDGE