UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN HEALTH INFORMATION NETWORK SHARED SERVICES,

Plaintiff,

v.

NOTARYCAM, INC.,

Defendant.
/

Case No. 1:16-CV-342

Hon. Robert J. Jonker

ORDER ON MOTION TO ARBITRATE

This matter is before the Court on Defendant's motion to dismiss the complaint in favor of arbitration. (ECF No.17). This case involves a contract between Plaintiff Michigan Health Information Network Shared Services ("MiHIN") and Defendant NotaryCam, Inc. ("NotaryCam") to find technological solutions to the age-old problem of verifying identities, in this instance in the healthcare context. MiHIN alleges that NotaryCam has violated contract provisions related to intellectual property and soliciting customers. (*See* Compl., ECF No. 1, PageID.9-14). The Court denied MiHIN's emergency motion for a temporary restraining order. (ECF No. 10). The motion for a preliminary injunction to prevent NotaryCam from further disclosing and using confidential information, (ECF No. 4), remains pending and is fully briefed. (ECF No. 13, ECF No. 18, ECF No. 20). NotaryCam has moved to dismiss in favor of arbitration based on language in the contract between the parties. (ECF No. 17). For the following reasons, the Court grants in part the motion to arbitrate based on the contract's arbitration clause, but stays the case instead of dismissing it.

BACKGROUND

MiHIN is a nonprofit corporation that is designated by the state of Michigan to share electronic health information. NotaryCam is a technology company that specializes in electronic notarizations. In 2014, MiHIN engaged NotaryCam to develop an online notarization service that would allow MiHIN customers to remotely prove their identities. This verification is necessary to participate in health information exchanges. The parties signed a nondisclosure agreement ("NDA") in 2014. In January of 2015, the parties signed a master services agreement ("MSA") that laid out terms for the relationship between them. The MSA may have explicitly incorporated the terms of the NDA (Section 7.2), but certainly superceded the NDA with the integration and zipper clauses in Section 12.

Section 5 of the MSA describes how intellectual property was to be handled, which each party retaining rights to certain aspects of the systems and underlying code that were to be developed. It is largely this Section, along with portions of the NDA, that are at the core of the underlying dispute between MiHIN and NotaryCam.

Section 12 of the MSA covers "general provisions," and includes the following:

> Any and all disputes, claims or litigation arising from or related in any way to this Agreement will be resolved exclusively by the courts in the State of Michigan. Contractor [NotaryCam] waives any objections against and agrees to submit to the personal jurisdiction of the state and federal courts in Michigan. The interpretation and enforcement of this Agreement will be governed by the law of the State of Michigan. Any dispute arising under this Agreement shall be subject to binding arbitration by a single Arbitrator, in accordance with its relevant industry rules, if any. The arbitration shall be held in Michigan. The arbitrator shall have the authority to grant injunctive relief and specific performance to enforce the terms of this

> Agreement. Judgment on any award rendered by the arbitrator may be entered in any Court of competent jurisdiction.

(ECF No. 1-2, PageID.42-43).

In its Order denying a temporary restraining order, the Court noted: "Paragraph 12 of the Master Services Agreement contains provisions that, on their face, conflict with each other." (ECF No. 10, PageID.120-121). The Court then pointed to the "exclusive" forum selection clause and the seemingly broad arbitration clause and advised the parties: "For the Court to properly assess the likelihood of success on the merits, the parties will need to address the apparent conflict." (ECF No. 10, PageID.121).

DISCUSSION

An agreement to arbitrate is a waiver of rights to seek relief for certain matters in judicial forums. *See Kennedy v. Superior Printing Co.*, 215 F.3d 650, 653 (6th Cir. 2000). The Federal Arbitration Act ("FAA") favors the enforcement of arbitration agreements, providing in pertinent part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

In *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308 (1998), the Sixth Circuit explained that "the FAA establishes a federal policy favoring arbitration . . . requiring that we rigorously enforce agreements to arbitrate." *Id.* at 322. Courts in the Sixth Circuit have four tasks when asked by a party to compel arbitration:

> First, it must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the action are subject to arbitration, it must determine whether to stay the remainder of the proceedings pending arbitration.

Stout v. J.D. Byrider, 228 F.3d 709, 714 (6th Cir. 2000).

In this case, the Court finds that the parties agreed to arbitrate. While Section 12 of the MSA is not a model of clarity, the Court reads: "Any dispute arising under this Agreement shall be subject to binding arbitration . . . " (ECF No. 1-2, PageID.42), as an agreement to arbitrate disputes. This result is reinforced by the federal policy in favor of arbitration espoused by the FAA. It is further reinforced by language specifying the location for arbitration (Michigan), and the manner of arbitration (industry rules before a single arbitrator). The parties also took care to specify that the arbitrator would have power to order specific performance and provide injunctive relief. This was no casual or accidental arbitration clause.

MiHIN counters that the "exclusive" forum selection clause negates that finding, which brings the Court to the second factor. The forum selection clause states: "Any and all disputes, claims or litigation *arising from or related in any way* to this Agreement will be resolved exclusively by the courts in the State of Michigan." (ECF No. 1-2, PageID.42) (emphasis added). The Court reads the forum selection clause as having a broader scope than the arbitration cause by encompassing disputes "arising from or related in any way" to the contract, in addition to the narrower class of disputes "arising under" the contract. The disputes covered by the forum selection clause but not the arbitration clause may include, as pointed out by NotaryCam, enforcement of arbitration awards. The forum selection clause may also cover tort and employment matters that do

not "arise under" the contract, but are "related in any way" to it. By reading the contract in this way, the Court gives meaning and force to each of the provisions, even though the clauses conflict at first blush.

The claims in this case involve alleged violations of the MSA and the NDA, which was incorporated into the MSA, either explicitly in Section 7.2. (ECF No. 1-2, PageID.40), or as part of the Section 12 integration and zipper clause.[1] The claims involved "arise under" the contract, so fall within the scope of the arbitration agreement. The arbitrator has "authority to grant injunctive relief and specific performance to enforce the terms" of the contract, (ECF No. 1-2, PageID.42-43), so MiHIN's claims for equitable relief can be heard and resolved in arbitration.

For the third factor, there do not appear to be federal statutory claims at issue that Congress intended to be nonarbitrable. Of the twelve counts in the Complaint, the only federal statute invoked is in the count seeking declaratory relief under 28 U.S.C. § 2201. (ECF No. 1, PageID.22). The Court finds no grounds to believe that Congress viewed this statute as nonarbitrable.

Because the Court finds all of the claims in this case to be arbitrable, the fourth factor analyzing appropriateness of a stay on remaining claims is irrelevant. Based on the factors laid out in *Stout* and in light of the federal presumption in favor of arbitration in the FAA, the Court finds that this dispute is within the scope of the arbitration clause.

MiHIN also argues that NotaryCam has waived its right to arbitrate by consenting to personal jurisdiction in Michigan courts. (ECF No. 22, PageID.336). MiHIN wishes to read NotaryCam's

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[1]MiHIN argues that language in Section 7.2 prevents enforcement of the arbitration clause: "In the event of a conflict between the body of this Agreement and the NDA, the NDA shall govern." (ECF No. 1-2, PageID.40). However, the NDA does not address arbitration and states only: "This agreement shall be governed by the laws of the State of Michigan"(¶ 17, ECF No. 1-1, PageID.29). This does not conflict with the choice of Michigan law or with the arbitration clause in the MSA.

agreement not to challenge jurisdiction as an indirect way to make the arbitration clause one-sided, so only MiHIN can invoke arbitration. Courts tend to look at one-sided arbitration clauses with some skepticism. *See Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003) (finding an arbitration clause with extreme one-sided terms to be substantively unconscionable). Skepticism seems appropriate here where the arbitration clause itself does not mention unilateral rights to invoke arbitration. Moreover, the parties expressly provided in Section 12 explicit waiver provisions: "All waivers must be in writing, and failure at any time to require the other Party's performance of any obligation under this Agreement will not affect the right subsequently to require performance of that obligation." (ECF No. 1-2, PageID.42). This anti-waiver language militates against implying waiver from some other part of the MSA itself.

Moreover, the jurisdictional consent is in no way inconsistent with the arbitration clause. As discussed above, the Court reads the arbitration and forum-selection clauses as having independent force, so NotaryCam's consent to personal jurisdiction of Michigan courts is best read as exactly that: no more and no less, and certainly not a waiver of the right to invoke arbitration. Nor does NotaryCam's failure to file an arbitration demand before MiHIN filed the Complaint act to waive NotaryCam's right to invoke arbitration. The anti-waiver language of the MSA precludes that. Further, a race to file rule could conceivably be spelled out in a contract, but does not appear in this one. Instead, NotaryCam has now filed an arbitration demand and invoked this Court's powers under Section 4 of the Federal Arbitration Act "for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. The Court finds this procedure to be appropriate, and not a waiver of Defendant's rights.

CONCLUSION

The Court finds that the parties agreed to arbitrate by including an arbitration clause in their master services agreement. The clause covers disputes "arising under" the contract, which includes the claims in this case. NotaryCam has not waived its right to invoke arbitration, so MiHIN shall proceed to arbitration and the federal case will be stayed pending those proceedings.

ACCORDINGLY, IT IS ORDERED:

1. Defendant NotaryCam's Motion to Dismiss the Complaint in Favor of Arbitration (ECF No. 17) is **GRANTED IN PART** to the extent consistent with this Order, most notably in that MiHIN shall proceed to binding arbitration. The motion is **DENIED** in all other respects, including the request for dismissal of this case.
2. Further proceedings in this federal action shall be **STAYED** under Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3, pending resolution of the arbitration.
3. Plaintiff MiHIN's motion for a preliminary injunction (ECF No. 4) is **DISMISSED WITHOUT PREJUDICE** to the arbitrator's consideration of it on the merits.
3. The parties shall provide the Court with a short, written status report of the arbitration proceedings every three months until the matter is concluded.
4. The Rule 16 conference scheduled for June 6, 2016 is **CANCELED AS MOOT** in light of this Order.
5. Defendant's Motion for Leave to File Sur-Reply (ECF No. 21) is **DISMISSED AS MOOT** in light of this Order.

IT IS SO ORDERED.

Dated: May 31, 2016

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE