

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JON SADER, ET AL.

CIVIL ACTION

VERSUS

NO: 15-2874

DAVID E. GRISWOLD, ET AL.

SECTION: "A" (3)

ORDER AND REASONS

Before the Court is a **Motion to Vacate the Stay or Reopen Case and Motion to Compel Joinder of David Griswold to the Arbitration (Rec. Doc. 29)** filed by plaintiffs Jon Sader, Sader Power Enterprises, LLC, and Sader Power, LLC (collectively “the Sader Parties”). Defendants David E. Griswold and Griswold Power, LLC (collectively “the Griswold Parties”) oppose the motion. The motion, scheduled for submission on November 16, 2016, is before the Court on the briefs without oral argument.¹

This lawsuit arises out of a sophisticated, multi-faceted business venture between the Sader Parties and the Griswold Parties. The venture involved a plan to install solar panel arrays on homes in Louisiana and to fund those installations with federal tax grants and Louisiana tax credits. Jon Sader and David Griswold each formed business entities to effectuate the plan. Sader contributed his ideas, expertise, and time while Griswold supplied the funds to make their vision a reality. In November 2011, the parties agreed to a business plan; it is undisputed, however, that no written agreement exists to govern all aspects of the business relationship. Among the written agreements executed by the parties were three Residential Solar Purchase Agreements (“RSPAs”), each of which contained a broad-form

¹ The Griswold parties have requested oral argument but the Court is not persuaded that oral argument would be helpful in light of the issues presented.

arbitration clause. But neither Sader nor Griswold was a signatory in his individual capacity to the RSPAs.

On October 24, 2014, Griswold Power, LLC filed a demand for arbitration with the American Arbitration Association (“AAA”) against the Sader Parties, including Jon Sader individually. Griswold Power’s claims against the Sader Parties were based on the parties’ various agreements, including the RSPAs. On July 6, 2015, the Sader Parties answered the demand but Jon Sader appeared solely to contest the arbitrators’ jurisdiction over him.

On July 22, 2015 the Sader Parties filed the instant complaint against the Griswold Parties, including David Griswold individually. The Sader Parties assert that they filed suit in this Court because certain causes of action were beyond the scope of the RSPAs’ arbitration clauses and because neither Sader nor Griswold were signatories to the RSPAs, and therefore could not be joined as parties to the arbitration. Thus, they envisioned this lawsuit would “close any holes” left open by the limited scope of the arbitration clauses.

On November 17, 2015, the Griswold Parties filed a motion to stay this lawsuit until after the resolution of the pending arbitration proceeding. (Rec. Doc. 11). In that motion the Griswold Parties explained the clear overlap between the arbitration demand and the Sader Parties’ complaint and how the arbitration was expected to resolve many, if not all, of the issues raised in this Court. (Rec. Doc. 11-1 at 2). The Court granted several consent extensions with respect to that motion.

On January 15, 2016, the AAA Panel issued its Interim Ruling on Jurisdiction (Rec. Doc. 29-5, Exhibit 4). In that decision, the Panel determined that it had jurisdiction to determine arbitrability, and that all of the claims asserted were arbitrable, (Rec. Doc. 29-5).

Those determinations are not before the Court at this time.² Of note for purposes of the instant motion, the Panel also determined that it would “tentatively” continue with Sader as a party even though the question whether a non-signatory can be compelled to arbitrate is generally a matter for a court. The Panel indicated that it would tentatively continue with Sader as a party pending a ruling by the court.

The Sader Parties then moved the Panel to join Griswold individually in the arbitration proceeding arguing inter alia that Griswold and Sader should be treated in the same way since both were non-signatories to the contract that contained the arbitration clauses. The Sader Parties also pointed out that with Griswold joined in the arbitration nearly all, if not all, of the claims between the parties would be resolved. Griswold opposed that motion.³

While the motion to join Griswold was pending before the Panel, the Sader Parties filed in this Court an unopposed motion to stay the Griswold Parties’ motion to stay until after the arbitration panel ruled on the joinder motion. (Rec. Doc. 27). After explaining that the Court does not carry motions on its docket without date, the Court ordered the Clerk to administratively close this matter pending a change of circumstances. (Rec. Doc. 28, March 2, 2016 Order). The case remains closed at this time.

On May 4, 2016, the AAA Panel issued its Order Regarding Joinder of David Griswold, Individually (Rec. Doc. 31-15). The Panel denied the motion to join Griswold but without prejudice to the Sader Parties’ right to reurge the motion when the federal court (this Court) has ruled on the propriety of joinder. The Panel reiterated that the question whether

² The Court agrees with the Panel’s conclusions as to these issues.

³ The Griswold Parties’ opposition to the motion strikes the Court as being somewhat ironic because it was Griswold who first stepped outside the corporate formalities by including Jon Sader in the arbitration demand.

a non-signatory can be compelled to arbitrate is for a court and not the Panel. The Panel reiterated that Sader was being tentatively continued as a party because he had been named as a respondent party in the original demand and because of the potential that the Court might order him to arbitrate. (*Id.* at 7).

The Sader Parties now move the Court to either compel joinder of Griswold individually in the arbitration proceedings or to dismiss Sader in his individual capacity from the arbitration. The Sader Parties point out that the only difference between the arbitration and this suit is the exclusion of Griswold and that the claims will be treated in a piecemeal fashion unless all claims and all parties are handled in the arbitration. The Sader Parties urge that both Mr. Sader and Mr. Griswold should be treated the same, whether both are included in or excluded from the arbitration. The Sader Parties advise that they will agree to continue with Mr. Sader as a party to the arbitration if the Court orders that Mr. Griswold also be joined.

The Griswold Parties, on the other hand, argue that none of the legal theories that would allow a court to compel a non-signatory to arbitrate apply in this case. The Griswold Parties also deny that David Griswold and Jon Sader are similarly situated.

Ordinary principles of contract and agency law may be called upon to bind a non-signatory to an arbitration agreement. *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 356 (5th Cir. 2003). Six theories for binding a non-signatory to an arbitration agreement have been recognized: 1) incorporation by reference, 2) assumption, 3) agency, 4) veil-piercing/alter ego, 5) estoppel, and 6) third-party beneficiary. *Id.* (citing *Thomson-C.S.F. v. Am. Arb. Ass'n*, 64 F.3d 773, 776 (2nd Cir. 1995); *E.I. Dupont v. Rhone Poulenc*, 269 F.3d 187, 195-97 (3d Cir. 2001)).

As the party attempting to compel arbitration by a non-signatory, the Sader Parties

must establish that one of the theories applies. The Sader Parties rely upon direct-benefits estoppel. Direct-benefits estoppel “involves non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract.” *Noble Drilling Servs., Inc. v. Certex USA, Inc.*, 620 F.3d 469, 473 (5th Cir. 2010) (quoting *Hellenic Inv. Fund, Inc. v. Det Norske Veritas*, 464 F.3d 514, 517-18 (5th Cir. 2006)). A non-signatory can embrace a contract containing an arbitration clause in two ways: 1) by knowingly seeking and obtaining “direct benefits” from that contract, or 2) by seeking to enforce the terms of that contract or asserting claims that must be determined by reference to that contract. *Id.*

The Court is not persuaded that Sader has established that direct-benefits estoppel applies so it will not compel joinder of Griswold. But the Griswold Parties’ arguments cut both ways because the Court is likewise unpersuaded that any theory supports the Griswold Parties’ arbitration demand against Sader in his personal capacity. Like Griswold, Sader was not a signatory to any contract with an arbitration agreement, and any contracts that Sader did sign were executed in his capacity as an officer or manager, not personally. The Griswold Parties’ attempt to distinguish the positions of Sader and Griswold is unpersuasive, and the prejudice and unfairness to Sader of forcing him to arbitrate without similarly compelling Griswold is obvious. Simply, the AAA Panel exceeded its jurisdiction when it decided to exercise tentative jurisdiction over Jon Sader individually.

That said, the Court can envision no greater waste of time and money than for the parties to arbitrate their dispute without addressing all claims and all parties. The Court urges the parties to pursue the reasonable approach and to submit the entire case to arbitration. The Sader Parties have already agreed to do this. But if Griswold will not consent to the jurisdiction of the arbitration panel then the arbitration will likewise proceed

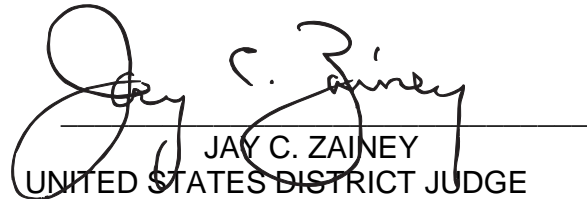
without Sader in his individual capacity.

Accordingly;

IT IS ORDERED that the **Motion to Vacate the Stay or Reopen Case and Motion to Compel Joinder of David Griswold to the Arbitration (Rec. Doc. 29)** filed by plaintiffs Jon Sader, Sader Power Enterprises, LLC, and Sader Power, LLC is **GRANTED** as explained above. Defendants David E. Griswold and Griswold Power, LLC are enjoined from proceeding against Sader in his individual capacity in the upcoming arbitration proceeding unless by consent of the parties both Jon Sader and David Griswold are joined in the arbitration proceedings;

IT IS FURTHER ORDERED that this matter remain stayed and closed pending the conclusion of the arbitration.

March 23, 2017


JAY C. ZAINY
UNITED STATES DISTRICT JUDGE