UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 17-23320-CIV-MARTINEZ/AOR

VERO WATER, INC.,

Plaintiff,

v.

CHRISTOPHER SHYMANSKI and
PARDSY, LLC d/b/a LOCAL H2O,

Defendants.
_____/

REPORT AND RECOMMENDATION

THIS CAUSE came before the Court upon Defendants Christopher Shymanski ("Shymanski") and Pardsy, LLC d/b/a Local H2O's ("H2O") (collectively, "Defendants") Motion to Dismiss or Compel Arbitration (hereafter, "Motion to Dismiss" and "Motion to Compel Arbitration") [D.E. 17]. This matter was referred to the undersigned pursuant to 28 U.S.C. § 636 by the Honorable Jose E. Martinez, United States District Judge [D.E. 21]. The undersigned held a hearing on this matter on June 14, 2018 [D.E. 26]. For the reasons stated below, the undersigned respectfully recommends that the Motion to Compel Arbitration be GRANTED IN PART AND DENIED IN PART and the Motion to Dismiss be DENIED.

FACTUAL AND PROCEDURAL BACKGROUND

This action arises out of a post-employment dispute between Plaintiff Vero Water, Inc. ("Plaintiff" or "Vero Water") and its former employee, Shymanski, and his company, H2O. See Compl. [D.E. 1]. Vero Water employed Shymanski from August 21, 2012 until June 1, 2016. Id. at 4. On May 13, 2013, Shymanski signed a Confidentiality and Non-Competition Agreement (hereafter, the "Agreement"). See Agreement [D.E. 1-4]. The Agreement provided that its

terms would be enforced by the courts and stated that it "may not be modified or amended except in writing signed by the parties." Id. at 4-5.

On May 5, 2015, Vero Water issued the Vero Water Inc. Employee Handbook (hereafter, the "Handbook"). See Handbook [D.E. 17-1]. Section 1.1 of the Handbook stated, in pertinent part:

> This Handbook applies to all employees, and compliance with the Company's policies is a condition of employment. This Handbook supersedes all previous employment policies, written and oral, express and implied. . . . This Employee Handbook is not a binding contract between the Company and its employees, nor is it intended to alter the at-will employment relationship between the Company and its employees. The Company reserves the right to interpret the policies in this Handbook and to deviate from them when, in its discretion, it determines it is appropriate.

Id. at 5. Section 1.4 of the Handbook (hereafter, "Arbitration Policy") provided:

> In consideration of your employment with Vero Water Inc., its promise to arbitrate all employment-related disputes, and your receipt of the compensation, pay raises, and other benefits paid to you by the company, at present and in the future, you agree that any and all controversies, claims, or disputes with anyone (including the company and any employee, officer, director, or benefit plan of the company, in their capacity as such or otherwise), whether brought on an individual, group, or class basis, arising out of, relating to, or resulting from your employment with Vero Water Inc. or the termination of your employment with the company, including any breach of this agreement, shall be subject to binding arbitration under the terms and conditions set forth in the at-will employment, confidential information, invention assignment, and arbitration agreement between you and Vero Water Inc. (or such other confidentiality agreement between you and the company, each the "confidentiality agreement"). In the event the confidentiality agreement between you and Vero Water Inc. does not contain an arbitration provision, then you nevertheless agree to arbitrate any and all claims set forth above in a neutral, mutually agreeable forum according to the applicable minimum standards for arbitration.

Id. at 6.

On May 18, 2015, Shymanski signed an At-Will Employment Agreement and Acknowledgment of Receipt of Employee Handbook (hereafter, the "Acknowledgment"). See Acknowledgment [D.E. 18-1]. The Acknowledgment stated that Shymanski understood and

agreed "that the policies described in the [H]andbook are intended as a guide only and do not constitute a contract of employment." Id. at 2. On June 1, 2016, Vero Water terminated Shymanski's employment. See Compl. [D.E. 1 at 5].

On September 1, 2017, Vero Water brought this action against Defendants asserting claims for breach of contract; tortious interference; breach of fiduciary duty and duty of loyalty; and misappropriation of trade secrets under the Defend Trade Secrets Act ("DTSA"), 18 U.S.C. § 1836, and under Florida law. See Compl. [D.E. 1]. Specifically, Vero Water alleges that Shymanski transmitted confidential information to third-parties during his employment, and then, after he was terminated, used confidential information to create H2O and to solicit Vero Water's clients, in violation of the Agreement. Id. at 5-8.

On January 29, 2018, Defendants filed the instant Motion to Compel Arbitration and Motion to Dismiss, seeking an order directing the parties to arbitrate the case and dismissing the action, or in the alternative, staying the proceedings pending the resolution of the arbitration [D.E. 17]. Defendants argue that all of Vero Water's claims fall within the scope of the Arbitration Policy, requiring that the instant case be dismissed and the claims be arbitrated. Id. at 4. On February 12, 2018, Vero Water filed its Response, arguing that there was no enforceable agreement to arbitrate, or alternatively, that its claims are outside the scope of the Arbitration Policy [D.E. 18]. On February 20, 2018, Defendants filed their Reply [D.E. 19].

APPLICABLE LAW

"The validity of an arbitration agreement is generally governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (the "FAA"), which was enacted in 1925 to reverse the longstanding judicial hostility toward arbitration." Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1367 (11th Cir. 2005) (citing Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614,

626-27 (1985); Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1312 (11th Cir. 2002)). "The FAA embodies a liberal federal policy favoring arbitration agreements." Id. (citations omitted). Pursuant to the FAA, a written arbitration provision in a "contract evidencing a transaction involving commerce" is "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. To determine whether parties should be compelled to arbitrate a dispute, courts consider: (1) whether an enforceable written agreement to arbitrate exists; (2) whether the issues are arbitrable; and (3) whether the party seeking arbitration has waived the right to arbitrate. Etienne v. Hang Tough, Inc., No. 08-CV-61682, 2009 WL 1140040, at *1 (S.D. Fla. Apr. 28, 2009).

"[I]n determining whether a binding agreement arose between the parties, courts apply the contract law of the particular state that governs the formation of contracts." Caley, 428 F.3d at 1368. Under Florida law, mutual assent is a prerequisite for the formation of any contract and is evaluated by analyzing the parties' agreement process in terms of offer and acceptance. Kolodziej v. Mason, 774 F.3d 736, 741 (11th Cir. 2014) (citations omitted). The parties' intent controls a contract's interpretation, and the best evidence of intent is the plain language of the contract. Tranchant v. Ritz Carlton Hotel Co., LLC, No. 2:10-CV-233-FTM-29DNF, 2011 WL 1230734, at *3 (M.D. Fla. Mar. 31, 2011) (citations omitted). It is not necessary for the party opposing arbitration to have signed the arbitration agreement in order for it to be enforced; but rather, assent can be established through a course of conduct. Mays v. Keiser Sch., Inc., No. 10-61921-CIV, 2011 WL 1539675, at *2 (S.D. Fla. Mar. 31, 2011) (citations omitted), report and recommendation adopted, 2011 WL 1496774 (S.D. Fla. Apr. 19, 2011). See also Sundial Partners, Inc. v. Atl. St. Capital Mgmt. LLC, No. 8:15-CV-861-T-23JSS, 2016 WL 943981, at *5 (M.D. Fla. Jan. 8, 2016) ("Because the object of a signature is to show mutuality or assent, a

contract may be binding on a party notwithstanding the absence of a signature if the parties assented to the contract in another manner."), report and recommendation adopted, 2016 WL 931135 (M.D. Fla. Mar. 11, 2016). Moreover, the FAA does not require that an arbitration agreement be signed by the parties. Id.; 9 U.S.C. § 2.

Generally, "policy statements contained in employment manuals do not give rise to enforceable contract rights in Florida unless they contain specific language which expresses the parties' explicit mutual agreement that the manual constitutes a separate employment contract." Etienne, 2009 WL 1140040, at *2 (quoting Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1273 (11th Cir. 2009) (citations omitted)). However, if an employee handbook or manual expressly provides that an employee's employment would be deemed acceptance of the employer's arbitration policy, a court may conclude that there was an enforceable agreement to arbitrate. Id. If an employee handbook does not contain an enforceable arbitration agreement, the court may focus on the language used in the acknowledgment form that documents an employee's receipt of the handbook to decide whether the acknowledgment itself is a binding agreement to arbitrate. Id. "Where an acknowledgment form expressly contains arbitration language, courts have compelled arbitration." Id.

"Absent some ambiguity in the agreement . . . it is the language of the contract that defines the scope of disputes subject to arbitration." E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 291 (2002). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Doe v. Princess Cruise Lines, Ltd., 657 F.3d 1204, 1213 (11th Cir. 2011) (holding that some claims arose out of the plaintiff's employment and were thus arbitrable, while other claims were not) (citations omitted). Section 3 of the FAA provides that the court, "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an

agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3.

DISCUSSION

Vero Water argues that neither the Arbitration Policy nor the Acknowledgment created an enforceable agreement between Vero Water and Defendants to arbitrate the claims raised in the Complaint. See Response [D.E. 18 at 5-10].[1] The undersigned addresses Plaintiff's contention as to each defendant.

I. Shymanski

Relying on Etienne, in which an employee contested the employer's arbitration policy, Vero Water contends that, because the Handbook specifically disclaimed the creation of any contractual relationship and the Acknowledgment was silent as to arbitration, the Arbitration Policy was not an enforceable agreement to arbitrate. See Response [D.E. 18 at 7-8]; Etienne, 2009 WL 1140040, at *2. However, unlike the employee handbook at issue in Etienne, here the Handbook stated that Shymanski's compliance with the policies contained therein was a condition of his employment. See Handbook [D.E. 17-1 at 5]. Moreover, the Arbitration Policy in the Handbook stated that Shymanski's agreement to arbitrate was in consideration of his employment, his compensation and benefits, and Vero Water's own promise to arbitrate all employment-related disputes. Id. at 6. Thus, the plain language of the Arbitration Policy indicates that Vero Water intended for itself and Shymanski to be bound to an agreement to arbitrate. See Tranchant, 2011 WL 1230734, at *3. Consequently, the undersigned finds that the Arbitration Policy was an enforceable agreement and need not consider whether the Acknowledgment on its own constituted an agreement to arbitrate. See Etienne, 2009 WL 1140040, at *2.

[1] Vero Water does not argue that Defendants waived their rights to arbitrate; therefore, the undersigned need only address whether there was an enforceable arbitration agreement and whether the issues raised in the Complaint are subject to that agreement. See Etienne, 2009 WL 1140040, at *1.

Vero Water additionally argues that because the Agreement, which did not provide for arbitration, could "not be modified or amended except in writing signed by the parties," the Arbitration Policy could not modify the terms of the Agreement without a signature from a representative of Vero Water. See Response [D.E. 18 at 8]. However, Vero Water's actions in disseminating the Handbook and requiring its employees to comply with policies contained therein, including the Arbitration Policy, constitute assent. See Mays, 2011 WL 1539675, at *2; Sundial Partners, 2016 WL 943981, at *5. Thus, a signature from a Vero Water representative was not required to bind it to its own Arbitration Policy. Id. Further, the Arbitration Policy expressly states that even though the Agreement did not contain an arbitration provision, Shymanski "nevertheless agree[d] to arbitrate any and all claims . . . ." See Arbitration Policy [DE. 17-1 at 6]. Therefore, Vero Water's current position that it never intended to modify the Agreement by issuing the Arbitration Policy has no merit.

As to the arbitrability of Vero Water's claims against Shymanski, the undersigned looks to the plain language of the Arbitration Policy to determine whether the claims fall within its scope. See Waffle House, 534 U.S. at 291. The Arbitration Policy subjects to arbitration "any and all controversies, claims, or disputes with anyone . . . *arising out of, relating to, or resulting from your employment* with Vero Water Inc. . . ." See Arbitration Policy [D.E. 17-1 at 6] (emphasis added). The undersigned finds that all of Vero Water's allegations against Shymanski, which involve his transmittal of confidential information and using it to create a competing company and to solicit Vero Water's clients, are rooted in his employment with the company. See Compl. [D.E. 1]. That most of the conduct alleged in the Complaint occurred after Shymanski was terminated from Vero Water does not change this result.

Given these considerations, the undersigned finds that the Arbitration Policy created an

enforceable agreement for Vero Water to arbitrate all of its claims against Shymanski.

II. H2O

Although there is an enforceable arbitration agreement between Vero Water and Shymanski, there is no evidence of such an agreement between Vero Water and H2O, and Defendants' Motion to Compel Arbitration is silent on this point. See Motion to Compel Arbitration [D.E. 17]. At the June 14, 2018 hearing, Defendants argued that because the Arbitration Policy included claims brought on an "individual, group, or class basis," Vero Water's claims against H2O must also be arbitrated. See Arbitration Policy [D.E. 17-1 at 6]. However, the undersigned does not find that such language mandates that Vero Water arbitrate against H2O because Vero Water cannot be compelled to arbitrate against a party with whom it has no contractual agreement to arbitrate. See Telecom Italia, SpA v. Wholesale Telecom Corp., 248 F.3d 1109, 1114 (11th Cir. 2001) ("A party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.") (citations omitted). Therefore, there was no enforceable agreement that Vero Water arbitrate its claims against H2O.

Because Vero Water's claims against Shymanski are subject to arbitration, but those against H2O are not, the undersigned recommends that the case be stayed and administratively closed pending arbitration of the claims against Shymanski.

RECOMMENDATION

Based on the foregoing considerations, the undersigned RESPECTFULLY RECOMMENDS that the Motion to Compel Arbitration be GRANTED as to Shymanski and DENIED as to H2O. The undersigned further RESPECTFULLY RECOMMENDS that the Motion to Dismiss be DENIED and that the case be stayed and administratively closed pending arbitration proceedings as to Shymanski.

Pursuant to Local Magistrate Judge Rule 4(b), the parties have **fourteen days** from the date of this Report and Recommendation to file written objections, if any, with the Honorable Jose E. Martinez. Failure to timely file objections shall bar the parties from attacking on appeal the factual findings contained herein. See Resolution Tr. Corp. v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (11th Cir. 1993). Further, "failure to object in accordance with the provisions of [28 U.S.C.] § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions." See 11th Cir. R. 3-1 (I.O.P. - 3).

RESPECTFULLY SUBMITTED in Chambers at Miami, Florida this 30th day of August, 2018.

ALICIA M. OTAZO-REYES
UNITED STATES MAGISTRATE JUDGE

cc: United States District Judge Jose E. Martinez
Counsel of Record