UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LA AMAPOLA, INC., a California Corporation,

Plaintiff,

v.

HONEYVILLE, INC., a corporation doing business in California, and DOES 1 thru 100,

Defendants.

Case No. CV 17-01946-AB (ASx)

ORDER **DENYING** MOTION TO COMPEL ARBITRATION

Pending before the Court is Third-Party Defendant Gavilon Grain, LLC's ("Gavilon") Motion to Dismiss the Third-Party Complaint or to Compel Arbitration and Stay the Third-Party Claims. ("Motion," Dkt. No. 19.) Third-Party Plaintiff Honeyville, Inc. ("Honeyville") filed an Opposition and Gavilon filed a Reply. (Dkt. Nos. 34, 35.) For the following reasons, the Court **DENIES** Gavilon's Motion.

///

///

I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

Honeyville purchased 91,596.85 bushels of white corn from Gavilon for $547,361.78. (Third-Party Compl. at ¶ 25.) Honeyville cleaned the corn and prepared it for shipment to its customers. (*Id*. at ¶ 23.) Honeyville alleges it did nothing to the corn that would alter its nature or grade. (*Id*.) Shortly after Honeyville began selling Gavilon's corn, Honeyville received a complaint from La Amapola, one of its customers. (*Id*. at ¶ 26.) La Amapola claimed it used the corn it purchased from Honeyville to make masa, a dough its customers use to make tamales. (*Id*.) La Amapola reported that its customers were complaining because the masa failed to properly form into the tamale dough. (*Id*.) La Amapola has paid more than $500,000 in refunds due to the defective white corn it purchased from Honeyville. (*Id*. at ¶ 28.)

On February 6, 2017, La Amapola filed a lawsuit against Honeyville in the Superior Court of the State of California, Los Angeles County, and the action was subsequently removed to this Court on March 10, 2017. (*Id*. at ¶ 27.) La Amapola alleges the following claims against Honeyville: 1) breach of implied warranty of merchantability; 2) breach of implied warranty of fitness for a particular use; and 3) negligent misrepresentation. (*See* Compl.) Honeyville in turn filed a Third-Party Complaint against Gavilon on the ground that its potential liability results from Gavilon's defective, substandard, and unfit for any proper purpose white corn. (Third-Party Compl. at ¶ 30.) Honeyville alleges the following claims against Gavilon: 1) implied contractual indemnity; 2) breach of implied warranty of merchantability; 3) breach of implied warranty of fitness for particular purpose; 4) breach of express warranty; and 5) breach of written agreement. (*See Id*.) Gavilon responded to Honeyville's initial Third-Party Complaint by filing the current Motion.

///

///

II. LEGAL STANDARD

Gavilon moves to dismiss under Fed. R. Civ. Proc. 12(b)(1), 12(b)(3), and 12(b)(6), and in the alternative, to compel arbitration. The various bases for Gavilon's Motion are all founded on the same argument: that Honeyville should be compelled to arbitrate its claims pursuant to an arbitration agreement. The Court therefore treats this as a motion to compel arbitration.

The Federal Arbitration Act ("FAA") applies to "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. Any arbitration agreement within the scope of the FAA "shall be valid, irrevocable, and enforceable" and a party "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate" may file a petition in a district court for an order compelling arbitration. 9 U.S.C. §§ 2, 4. "[U]pon being satisfied that the making of the agreement for arbitration [] is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4.

"By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). The FAA evinces a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1985). However, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986) (internal citation omitted).

When deciding a motion to compel arbitration, the Court must look to whether 1) a valid agreement to arbitrate exists, and 2) whether the dispute falls within the scope of the arbitration clause. *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 477-78 (9th Cir. 1991). Under the FAA, "state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the

validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 493 (1987).

III. DISCUSSION

This motion turns on whether Honeyville agreed to the arbitration clause Gavilon invokes. In brief summary, the parties negotiated and consummated their contract over email. Honeyville contends that the contract it signed did not include any arbitration agreement, so it never agreed to arbitrate. Gavilon in effect concedes that it did not include the arbitration agreement in any of the draft contracts it emailed to Honeyville but claims that Honeyville is nevertheless bound by it.

A. Honeyville's Claims Fall Within the Scope of the Agreement.

For the arbitration agreement to be enforceable, Honeyville's claims must fall within the agreement's scope. Gavilon claims that the agreement includes terms and conditions ("Terms and Conditions") that has the following provision: "Except as modified or limited by the terms and conditions stated herein, the Contract shall be governed by and construed in accordance with the applicable rules and regulations of the exchange, board or association designated on the face hereof, or, if none is designated or Seller is not a member of said exchange, board, or association, then the applicable trade rules of the National Grain and Feed Association in effect on the date hereof, and, to the extent not inconsistent therewith, the applicable provisions of the Uniform Commercial Code." (Motion, Ex. A.) Rule 29 of the National Grain and Feed Association ("NGFA") states, "Where a transaction is made subject to these rules in whole or in part, whether by express contractual reference or by reason of membership in this Association, then the sole remedy for resolution of any and all disagreements or disputes arising under or related to the transaction shall be through arbitration proceedings before the [NGFA] pursuant to the NGFA Arbitration Rules; provided, however, that at least one party to the transaction must be a NGFA member entitled to arbitrate disputes under the NGFA Arbitration Rules." (*Id.*) Honeyville does not dispute that the foregoing constitutes an agreement to arbitrate. Nor, given

the broad scope of the arbitration agreement—it applies to "any and all disagreements or disputes arising under or related to the transaction" —does Honeyville dispute that its claims would be governed by the arbitration agreement. The Court therefore deems this element conceded.

B. There is No Valid Agreement to Arbitrate.

Honeyville argues that it never agreed to arbitrate disputes with Gavilon because the Terms and Conditions that include the arbitration agreement were not in any of the drafts of the contract it exchanged over email with Gavilon, or in the final contract it signed. Rather, after Honeyville signed and returned the contract, Gavilon added the Terms and Conditions to a hard copy that it subsequently mailed to Honeyville.

1. Honeyville Did Not Agree to Arbitrate

When determining whether an arbitration agreement is enforceable upon the parties, the Court must look to see whether the parties have a valid agreement to arbitrate. *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 477-78 (9th Cir. 1991). No party may be forced into arbitration unless it has actually agreed to arbitration. *Lounge-A-Round v. GCM Mills, Inc.*, 109 Cal. App. 3d 190, 195 (1980). "As a threshold condition for contract formation, there must be an objective manifestation of voluntary, mutual assent." *Anderson v. United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003).

To determine whether Honeyville agreed to arbitrate, the Court reviews the parties' negotiations. Honeyville provided a complete explanation and supporting evidence, as follows. (*See generally* Declaration of Samuel Evans ("Evans Decl.") Dkt. No. 34-1.)

Beginning on or around November 30, 2016, Honeyville representatives contacted Gavilon representatives by phone and email to purchase white corn, and on December 5, 2016, the parties reached an oral agreement and negotiated the terms of the sale via email. (Evans Decl. ¶¶ 2-4.) On December 5, 2016, Gavilon sent

Honeyville an email with the contract that did not include the Terms and Conditions. (Evans Decl. ¶ 7, Ex. B.) This contract incorrectly listed Honeyville as the "seller," so Gavilon sent a corrected version on December 6, 2016. (*Id*. ¶ 9, Ex. C.) This version, too, lacked the Terms and Conditions. (*Id*.) Then, on December 7, 2016, Gavilon emailed Honeyville an "updated contract" with a handwritten notation regarding the "overrun bushels" that had been loaded. (*Id*. ¶ 10, Ex. D.) Again, the Terms and Conditions were not included with this updated contract. (*Id*.) Honeyville argues it signed this third version of the contract without the additional Terms and Conditions included and emailed it back to Gavilon. (Evans Decl. ¶ 10, Ex. D.) Honeyville contends that the contract was complete once it emailed the signed contract back to Gavilon. (*Id*., Ex. E.) Honeyville also states that Gavilon never mentioned the Terms and Conditions or the arbitration provision. (Evans Dec. ¶¶ 18.) Lastly, Honeyville states the Terms and Conditions Mr. Broekemeier withheld contained unusual and non-standard terms that favored Gavilon, and Honeyville would have disagreed to them. (*Id*. at ¶ 19.)

Gavilon concedes that the contracts it emailed to Honeyville did not include the Terms and Conditions. Gavilon's Dale Broekemeier ("Broekemeier"), who negotiated the contract with Honeyville, states "[i]t was my practice and custom when I entered into sale contracts on behalf of Gavilon to email the front page of the contract to the buyer and then to mail a complete signed copy of the contract, including the terms on the back of the contract, to the buyer. As was my usual practice, I emailed a copy of the front page of that contract signed by me to Honeyville, Inc., and Honeyville, Inc. returned a signed copy of that page." (Declaration of Dale Broekemeier ("Broekemeier Decl.," Dkt. No. 19-1), ¶¶ 3-4.) Broekemeier states he then mailed Honeyville a complete copy of the contract, including the Terms and Conditions on the back of the contract. (Broekemeier Decl. ¶ 5.) Broekemeier affirms Honeyville's claim that the Terms and Conditions were not included in the emailed contract and only were included in the mailed contract.

However, Gavilon argues that Honeyville is nevertheless bound by the Terms and Conditions, including the arbitration agreement, for three reasons: 1) incorporation; 2) the mailbox rule; and 3) Honeyville assented to the additional terms. (*See* Reply at 2.)

a. The Terms and Conditions Were Not Incorporated

Although Gavilon admits it never attached the Terms and Conditions to the contract it emailed, it argues that Honeyville should nevertheless be bound by the Terms and Conditions because they were incorporated into the document. Specifically, the emailed version of the contract stated, "(BUYER) SUBJECT TO THE TERMS AND CONDITIONS STATED ON THE FACE AND BACK THEREOF." (Evans Decl. ¶ 8, Ex. B.) Gavilon argues that this clause incorporated the Terms and Conditions into the contract.

A contract need not recite that it "incorporates" another document, so long as it "guide[s] the reader to the incorporated document." *Shaw v. Regents of Univ. of Cal.*, 58 Cal. App. 4th 44, 54 (1977). Here, however, incorporation does not apply because Honeyville was not guided to the incorporated document. Gavilon relies on *Koffler Elec. Mech. Apparatus Repair, Inc. v. Wartsila North America, Inc.*, 2011 WL 1086035 (N.D. Cal. March 24, 2011) to argue that Honeyville is bound to the Terms and Conditions purportedly on the back of the contract. However, in *Koeffler* it was clear the contract included terms and conditions not attached to the document because it stated "THE COMPANY WILL SUPPLY COPIES OF THE GENERAL TERMS AND CONDITIONS UPON REQUEST." *Id.* at *4. Here, each version of the contract Gavilon sent to Honeyville stated, "(BUYER) SUBJECT TO THE TERMS AND CONDITIONS STATED ON THE FACE AND BACK THEREOF," but the back of the contract was blank. (*See* Evans Decl. ¶ 10, Ex. D.) Thus, Honeyville was not guided to the Terms and Conditions because they were not on the "back thereof." Rather, Gavilon guided Honeyville to a blank page. Also, the mailed contract did not include a transmittal letter or any other notation that would alert Honeyville to the

Terms and Conditions that Gavilon attempted to add. (Evans Decl. ¶ 9.) Thus, the Terms and Conditions were not incorporated into the contract.

b. The Mailbox Rule Does Not Bind Honeyville

Gavilon also asserts that the mailbox rule binds Honeyville to the Terms and Conditions. The mailbox rule provides that the proper and timely mailing of a document raises a rebuttable presumption that the document has been received by the addressee in the usual time. *Schikore v. BankAmerica Supplemental Retirement Plan*, 269 F.3d 956, 961 (9th Cir. 2001). "[The mailbox rule] is a tool for determining, in the face of inconclusive evidence, whether or not receipt has been accomplished." *Id.* However, Honeyville does not dispute it received the mailed contract; it disputes agreeing to that version of the contract. (Evans Decl. ¶ 14.) Given Honeyville's admission of receipt, the mailbox rule is irrelevant.

c. **Section 2207 Does Not Bind Honeyville**

Alternatively, Gavilon argues that Honeyville assented to the Terms and Conditions as additional terms. Section 2207 of the California Commercial Code controls contract interpretation when the parties have exchanged conflicting forms. *Textile Unlimited, Inc. v. A..BMH and Co., Inc.*, 240 F.3d 781, 787 (9th Cir. 2001). Section 2207(1) states, "[a] definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms." *Id.* Under, § 2207(2) "[t]he additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: they materially alter it." *Id.* To materially alter the contract, the additional terms must result in surprise or hardship if incorporated without express awareness by the other party. Cal. Com. Code § 2207. Here, the additional terms materially alter the contract because Honeyville did not know about the purported arbitration agreement until Gavilon brought its Motion to compel arbitration. (*See*

Evans Decl. ¶ 12.) Further, the arbitration agreement would be a hardship for Honeyville because it limits Honeyville's potential monetary recovery. (*Id*. at ¶ 19.) Under the arbitration clause, Gavilon's liability is limited to the purchase price of the corn, which is substantially less than the amount La Amapola seeks from Honeyville. (*Id*.) Honeyville also states that it would not have agreed to arbitrate because Honeyville was not familiar with the NGFA and did not apply their rules to its transactions. *See* Declaration of Wayne Watkins ("Watkins Decl.," Dkt. No. 34-2), ¶ 3. This was the first transaction between Gavilon and Honeyville, so Honeyville was not familiar with Gavilon's practice. *Id*. Overall, Gavilon's claim that Honeyville assented to the Terms and Conditions as additional terms under Section 2207 fails because the arbitration agreement materially alters the contract.

The Court therefore finds that Honeyville did not agree to the arbitration agreement that Gavilon invokes. Because Honeyville cannot be bound to a term to which it did not agree, it cannot be compelled to arbitrate.

IV. CONCLUSION

In light of the foregoing, the Court **DENIES** Gavilon's Motion to Compel Arbitration.

IT IS SO ORDERED.

Dated: July 28, 2017

HONORABLE ANDRÉ BIROTTE JR.
UNITED STATES DISTRICT COURT JUDGE