SUPERIOR COURT
OF THE
STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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March 28, 2013

(VIA E-FILED)

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RE: *Vituli v. Carrols Corporation, et al.*
C.A. No. 12C-08-224 FSS

Upon Defendants' Motion to Dismiss and Compel Arbitration - *DENIED.*

Dear Counsel:

Plaintiff, who was Defendants' ex-CEO, filed suit alleging, among other things, breach of his December 2008 employment contract. Going beyond the case's initial pleadings, Defendants argue that Plaintiff's claims are subject to a mandatory, company-wide arbitration program that Plaintiff instituted while CEO in 2005. The December 2008 employment contract, however, neither mentions nor much less incorporates the program, nor any other arbitration agreement. The simple question, therefore, is whether, as a matter of law, the 2005 program automatically applies to the 2008 contract, even if the contract does not directly or indirectly acknowledge the program.

I.

Plaintiff was Defendants' CEO and Chairman of the Board from 1987 through 2012. In 2005, under Plaintiff's leadership, the parties implemented a mandatory arbitration program (MAP), subjecting "all employees'" claims to arbitration. Because Defendants have several thousand employees, MAP was implemented via a companywide memo, detailing the program and binding any employee who reported to work on or after August 1, 2006. Significantly, after August 1, 2006, all new hires were required to sign an "Agreement for Resolution of Disputes Pursuant to Binding Arbitration Between Carrols Corporation and [Employee]." Plaintiff never signed that document, not in 2005, nor in 2008 when he started working under the new employment agreement, discussed next.

On December 13, 2008, the parties signed an "Amended and Restated Employment Agreement." The agreement's section 14(d) integration clause reads, in pertinent part:

> This agreement represents the entire understanding of the parties . . . supercedes in its entirety the provisions of the Prior Employment Agreement, and neither this Agreement nor any provisions hereof may be modified . . . except by an agreement in writing signed by the party against whom enforcement of any waiver, charge, discharge, or termination is sought.

Apart from its applying New York law and permitting injunctive relief in the event Plaintiff breached, the 2008 agreement is silent as to dispute resolution. Subsequently, the parties renewed and amended the contract on October 27, 2010 and November 1, 2010. None of the amendments refers to or incorporates the 2005 program.

On November 1, 2011, the parties signed an agreement detailing Plaintiff's resignation and intent not to renew the contract beyond December 31, 2011. The November 1, 2011 letter also described Plaintiff as "the non-executive

Chairman of Fiesta," an anticipated spin-off company. Ultimately, in February 2012, the Fiesta board voted to remove Plaintiff. This suit followed, with Plaintiff claiming breach of the 2008, 2010, and 2011 agreements.

II.

Despite the fact that the contract has no arbitration clause nor does it incorporate the company's general arbitration policy, Defendants filed their motion on September 24, 2012. Oral argument was held on December 28, 2012, and the transcripts were filed on January 23, 2013. Defendants argue that MAP is a "valid, written agreement to arbitrate" and, as such, the case must be sent to arbitration. Furthermore, Defendants contend that arbitrability is a matter for the arbitrator. Defendants rely heavily on *United Engineers*[1] and the United States Supreme Court's recent *Nitro-Lift*[2] case for their position arbitrability, itself, should be heard by an arbitrator.

An arbitrability issue arises when the parties "disagree about whether they agreed to arbitrate [the case's] merits."[3] Arbitrability is "an issue for judicial determination unless the parties clearly and unmistakably provide otherwise."[4] "A party cannot be forced to arbitrate the merits of a dispute . . . [absent] a clear

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[1] *United Engineers & Constructors, Inc. v. IMO Indus., Inc.*, 1993 WL 43016 (Del. Ch. Feb. 16, 1993).

[2] *Nitro-Lift Technologies LLC v. Eddie Lee Howard, et al.*, 568 U.S. ––– , 133 S.Ct. 500 (Nov. 26, 2012).

[3] *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942.

[4] *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 78 (Del. 2006) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)); *see also, SBC Interactive, Inc. v. Corp. Media Partners*, 714 A.2d 758, 761 (Del. 1998) ("In a proceeding to stay or compel arbitration, the question of whether the parties agreed to arbitrate, commonly referred to as 'substantive arbitrability,' is generally one for the courts and not for the arbitrators.").

expression of such intent in a valid agreement."[5] A basic arbitration principle is that "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."[6] Therefore, "a party who has not agreed to arbitrate will normally have a right to a court's decision . . . ."[7]

As the court discussed during the hearing, Defendants' position puts the rabbit in the hat. Defendants' argument is premised on the assumption that an enforceable arbitration clause is clearly present. But, as explained above, the contract does not refer to the 2005 MAP. Thus, the court will not simply assume MAP applies to the contract signed in 2008, and its amendments.

In all the cases cited by Defendants, an arbitration clause, or reference to national arbitration rules, is in the contract at issue. Defendants do not cite, and the court cannot find, a case where arbitration was compelled despite a contract's complete lack of an arbitration clause or reference to arbitration. Even if such a case exists, it stands against the host of "arbitrability" cases that all turn on some mention of arbitration in the contract at issue.

The court knows that Delaware favors arbitration.[8] Nevertheless, the policy favoring arbitration does not cast aside basic contract principles, such as not forcing parties to a contract to do something they have not agreed to do.[9] So, even if

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[5] *DMS Properties-First, Inc. v. P.W. Scott Associates, Inc.*, 748 A.2d 389, 391 (Del. 2000).

[6] *Willie Gary, LLC*, 906 A.2d at 78.

[7] *Kaplan*, 514 U.S. at 942.

[8] *See, e.g., SBC Interactive, Inc.*, 714 A.2d at 761.

[9] *See Hough Associates, Inc. v. Hill*, 2007 WL 148751 (Del. Ch. Jan. 17, 2007) (Strine, C.) ("It is true that the public policy of this State favors enforcing agreements to arbitrate. But, at bottom, that policy is only a manifestation of our State's respect for contractual freedom. As

Plaintiff drafted the MAP in 2005, he did not agree, directly or indirectly, in 2008 that it applied to his new employment agreement.

Had Defendants wanted to bind Plaintiff to MAP, they could have referenced it in the contract or obtained Plaintiff's signature on an "Agreement for Resolution of Disputes Pursuant to Binding Arbitration Between Carrols Corporation and [Employee]," like they obtained from other employees. Defendants' unilateral intent that Plaintiff be bound by MAP is not enough, as a matter of law, to bind Plaintiff.

For the fore going reasons, Defendants' Motion to Dismiss and Compel Arbitration is **DENIED.**

IT IS SO ORDERED.

Very truly yours,

/s/ Fred S. Silverman

FSS:mes
oc: Prothonotary (Civil)

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such, courts should err on the side of enforcing arbitration when the issue of arbitrability is a close one, but should be wary that the policy that favors alternative dispute resolution mechanisms, such as arbitration, does not trump basic principles of contract interpretation.").