IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEGETA COLE Plaintiff, v. AMERICAN BUILDING MAINTENANCE CO. OF NEW YORK d/b/a ABM JANITORIAL SERVICES Defendant and Third-Party Plaintiff, v. ECOLAB, INC. Third-Party Defendant, and LUMBERMAN'S MUTUAL CASUALTY CO. Third-Party Defendant.	CIVIL ACTION NO.: 04-2239-CKK

MEMORANDUM IN SUPPORT OF ECOLAB INC.'S MOTION TO COMPEL ARBITRATION AND DISMISS OR STAY THIRD-PARTY COMPLAINT

Third-Party Defendant, ECOLAB INC. ("Ecolab"), by counsel, submits this memorandum in support of its Motion to Compel Arbitration and Dismiss or Stay the Third-Party Complaint filed by American Building Maintenance Co. of New York ("ABM").

I. INTRODUCTION

ABM seeks indemnification from Ecolab and Ecolab's insurer, Lumbermans Mutual Casualty Company ("Lumbermans"), under the terms of a November 15, 2000, Product and Services Supply Agreement ("Supply Agreement") between ABM and Ecolab. ABM filed its Third-Party Complaint in violation of Section 12 of the Supply Agreement, which provides, in relevant part, that all disputes, claims and controversies arising between ABM and Ecolab under

the Supply Agreement or arising out of performance of the Supply Agreement shall be resolved by arbitration; and that arbitration in accordance with Section 12 of the Supply Agreement shall be the parties' "sole and exclusive remedy." Accordingly, Ecolab moves for an order dismissing ABM's Third-Party Complaint and compelling ABM to arbitrate its indemnification claims as required by Section 12 of the Supply Agreement and Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3.

II. FACTS

On November 15, 2000, ABM and Ecolab entered into the Supply Agreement which establishes the terms and conditions under which Ecolab is to supply cleaning and sanitizing products to ABM.[1]

On September 19, 2001, Plaintiff, Degeta Cole, slipped and fell on the floor at her place of employment. ABM was responsible for cleaning and maintaining the floor at Cole's work. ABM first notified Ecolab of the incident in April 2003, and demanded that Ecolab indemnify and defend ABM (Third-Party Complaint at Ex. D). Ecolab declined, citing the late notice given by ABM and the absence of any evidence as to how or by whom the Ecolab product had allegedly been applied (*Id.* at Ex. E).

On September 17, 2004, Cole sued ABM alleging that the injuries and damages she sustained in the fall were caused by ABM's negligence (*Id.* at ¶ 2). On December 30, 2004, ABM filed its Third-Party Complaint against Ecolab and Lumbermans seeking indemnification under Section 5 of the Supply Agreement for any liability, costs of defense and attorneys' fees incurred by ABM in defending Cole's negligence action against ABM.

[1] The Supply Agreement is attached to ABM's Third-Party Complaint as Exhibit B.

The very same Supply Agreement on which ABM bases its indemnification claims also contains a mandatory arbitration provision.[2] Section 12 of the Supply Agreement states, in relevant part:

> 12. Arbitration: All Arbitrable Claims (as defined below) arising between the parties in connection with this Agreement shall be finally resolved by arbitration administered by the American Arbitration Association ("AAA") under and in accordance with its Commercial Arbitration Rules in San Francisco, California and judgment on the award rendered by the arbitrator may be entered by any court having competent jurisdiction. "Arbitrable Claims," as used in this Agreement, shall mean claims, disputes, controversies, demands, causes of action, damages, claims or demands for equitable relief, other matters in question between Ecolab or ABM under this Agreement or arising out of the negotiation, execution, delivery or performance of this Agreement, provided the parties have first attempted but been unable to resolve the dispute pursuant to Section 10 above. Disputes shall be identified by the aggrieved party by notice of dispute in writing to the other party setting forth with particularity the issues responsible for the dispute. Upon receipt of such notice, the parties shall attempt in good faith to resolve the dispute pursuant to Section 10 above (if they have not done so already) and if they fail to resolve the dispute, the dispute shall be submitted to arbitration....The parties acknowledge and agree that arbitration in accordance with this Section shall be their sole and exclusive remedy.

ABM's claim for indemnification asserted in its Third-Party Complaint is an "Arbitrable Claim" as defined by the Supply Agreement. ABM's indemnification claim presents a dispute or controversy under the Supply Agreement, and one which arises out of the performance (or alleged non-performance) of the Supply Agreement. Ecolab requested that ABM agree to arbitrate the dispute over indemnification in accordance with Section 12 of the Supply Agreement, and ABM refused.[3] Accordingly, Ecolab moves the Court for an order dismissing ABM's Third-Party Complaint and compelling ABM to arbitrate the claims asserted therein in accordance with the terms of Section 12 of the Supply Agreement.

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[2] In addition to the arbitration provision, the Supply Agreement also contains a Dispute Resolution Procedure in Section 10 and a Waiver of Jury Trial Provision in Section 18, both of which ABM has chosen to ignore in filing this case.

[3] *See* Letter from J. Sear to S. Thomas (Feb. 2, 2005), attached hereto as Exhibit A; Letter from S. Thomas to J. Sear (Feb. 3, 2005), attached hereto as Exhibit B.

III. ARGUMENT

A. The Arbitration Agreement Between ABM And Ecolab Is Governed By The Federal Arbitration Act.

The Federal Arbitration Act, ("FAA"), 9 U.S.C. §§ 1, *et seq.*, applies to all written agreements to arbitrate contained in any contract "evidencing a transaction involving commerce." 9 U.S.C. § 2. Section 2 of the FAA provides, in pertinent part, that:

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

Id.

The "involving commerce" language used in Section 2 must be read broadly to effectuate Congress' intent to extend the FAA's reach to the limits of Congress' Commerce Clause powers. *See Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. 265, 277 (1995); *Perry v. Thomas*, 482 U.S. 483, 490 (1987); *see also Nelson v. Insignia/ESG, Inc.* 215 F. Supp.2d 143, 149 (D.D.C. 2002). To achieve this end, the U.S. Supreme Court has held that the phrase "involving commerce" shall be interpreted as "affecting commerce." *Dobson*, 513 U.S. at 273-74. The transaction in question need not involve the actual movement of persons or goods in interstate commerce. Nor is it required that the parties to the transaction contemplate an interstate transaction. *Id.* at 281. All that is required is that the transaction affects interstate commerce to the extent that it falls within Congress' Commerce Clause powers. *Id.*

Here, there is no question that the Supply Agreement is a contract evidencing a transaction involving commerce. The Supply Agreement is a contract between a California corporation (ABM), and a Delaware corporation with its principal place of business in Minnesota (Ecolab), providing for the sale of products throughout the United States, including the District of Columbia. Clearly, a contract made between corporate citizens of different states, calling for the sale and distribution of goods throughout the United States, constitutes a transaction "affecting

commerce." Because the Supply Agreement evidences a transaction involving commerce within the meaning of the FAA, the arbitration agreement between ABM and Ecolab is governed by the FAA.

B. The Arbitration Agreement Between ABM And Ecolab Must Be Enforced As A Matter Of Federal Law And Policy.

The FAA mandates the enforcement of arbitration agreements, and declares a strong federal policy in favor of arbitration. *See Southland Corp. v. Keating*, 465 U.S. 1, 11 (1983); *see also Nelson*, 215 F. Supp.2d at 149; *Nur v. K.F.C., USA, Inc.*, 142 F. Supp.2d 48, 50 (D.D.C. 2001). The FAA was enacted to combat judicial hostility to the enforcement of arbitration agreements by creating a body of federal substantive law on arbitration that is applicable to any arbitration agreement within the FAA. *See Dobson*, 513 U.S. at 270; *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

The U.S. Supreme Court has held that "[I]n enacting § 2 of the Arbitration Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Keating*, 465 U.S. at 10. From this strong federal policy flows a "broad principle of enforceability" of arbitration provisions. *Id.* at 11. The central purpose of the FAA is to "ensure private agreements to arbitrate are enforced according to their terms." *Mastrobouno v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995). Any doubts regarding the scope of arbitrable issues should be resolved in favor of arbitration. *Id.* at 62 n.8 (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25); *see also Nelson*, 215 F. Supp.2d at 149; *Nur*, 142 F. Supp.2d at 50.

C. ABM Must Arbitrate The Claims Asserted In Its Third-Party Complaint.

In determining whether to compel arbitration, a court must analyze (1) whether the parties entered into a valid and enforceable arbitration agreement; and (2) whether the

arbitration agreement encompasses the claims raised in the complaint. *Nelson*, 215 F. Supp.2d at 149-50; *Nur*, 142 F. Supp.2d at 50-51.

1. ABM entered into a valid, written agreement to arbitrate the dispute with Ecolab.

Under the FAA, a written agreement to arbitrate a dispute arising out of a transaction involving interstate commerce shall be "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.

As discussed above, ABM and Ecolab have entered into a written agreement to arbitrate a dispute that arises out of a transaction involving interstate commerce; and no grounds exist at law or in equity for finding the arbitration provision of the Supply Agreement unenforceable. There is no dispute regarding the making of the Supply Agreement that contains the arbitration agreement. In fact, ABM's Third-Party Complaint is based entirely on the premise that the Supply Agreement that contains the arbitration provision is a valid and enforceable contract.

2. The arbitration agreement between ABM and Ecolab encompasses all of the claims in ABM's Third-Party Complaint.

ABM's claim for indemnification asserted in its Third-Party Complaint is an "Arbitrable Claim" as defined by the Supply Agreement. ABM's indemnification claim presents a dispute or controversy under the Supply Agreement, and one which arises out of the performance (or alleged non-performance) of the Supply Agreement by Ecolab. In fact, ABM concedes as much by claiming and seeking recovery for damages that it has allegedly sustained as a result of Ecolab's "breach of contract fully to indemnify [ABM] under the [Supply] Agreement" (Third-Party Complaint at ¶ 8).

D. Dismissal Of ABM's Third-Party Complaint Is The Appropriate Remedy.

Section 3 of the FAA provides that:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which the suit is pending, 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, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3. While Section 3 authorizes the Court to stay a suit pending completion of arbitration, the Court may also dismiss the suit where all the plaintiff's claims must be submitted to arbitration. *See Cole v. Burns Int'l Security Serv.,* 105 F.3d 1465, 1487 (D.C. Cir. 1997) (affirming district court's order dismissing complaint and compelling arbitration); *Nelson,* 215 F.Supp.2d at 158 (dismissing plaintiff's complaint so that plaintiff can submit her claims to the appropriate arbitral forum); *Nur,* 142 F.Supp.2d at 52 (dismissing complaint for lack of jurisdiction because plaintiff must submit his claims to arbitration). *See also Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.,* 252 F.3d 707, 709-10 (4th Cir. 2001) ("dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable."); *Alford v. Dean Witter Reynolds, Inc.,* 975 F.2d 1161, 1164 (5th Cir. 1992) ("[t]he weight of authority clearly supports dismissal of the case when all of the issues raised in the district court must be submitted to arbitration.").

Here, all of the claims asserted in ABM's Third-Party Complaint must be submitted to arbitration. There is nothing left for the Court to do relative to the indemnification issues raised by the Third-Party Complaint until the required arbitration is completed. Therefore, dismissal of the Third-Party Complaint is the appropriate remedy here. Alternatively, if the Court does not dismiss the Third-Party Complaint, at a minimum, the Court should stay all proceedings relating to the Third-Party Complaint until arbitration has been completed.

IV. CONCLUSION

For the foregoing reasons, Ecolab moves the Court for an order dismissing ABM's Third-Party Complaint and compelling ABM to arbitrate its indemnification claims in accordance with the terms of Section 12 of the Supply Agreement and the FAA.

ECOLAB INC.

By Counsel

/s/

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February 2, 2005

VIA FAX (410.727.5460) and U.S. MAIL

Scott A. Thomas, Esq.
TYDINGS & ROSENBERG LLP
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Baltimore, MD 21202

Re: Cole v. ABM v. Ecolab Inc.

Dear Mr. Thomas:

Thank you for taking time to talk to me today about this case. Thank you also for granting Ecolab and Lumbermen's a 7-day extension of time to respond to the Third-Party Complaint. I understand an appropriate order will be submitted to the Court.

As we discussed, I believe our clients' Product and Services Supply Agreement, including its arbitration and dispute resolution procedures, has a significant bearing upon the resolution of our clients' dispute. From our second conversation today, I understand that you and your client disagree and prefer instead to litigate the matter in court.

Finally, I understand that, given your client's position on litigation, service or delivery of notices to you in accordance with the Federal Rules of Civil Procedure and applicable local rules will constitute adequate and proper notice under Paragraph 17 of the Product and Services Supply Agreement. If my understanding is incorrect, please call me immediately.

Thank you again for your time and cooperation.

Sincerely,

BOWMAN AND BROOKE LLP

John D. Sear

cc: Robert M. Buell, Esq. (via e-mail)

EXHIBIT
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February 3, 2005

FEB 07 2005

VIA FACSIMILE AND U.S. MAIL
John D. Sear, Esq.
Bowman & Brooke, LLP
150 South Fifth Street, Suite 2600
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Re: Degeta Cole v. American Building Maintenance Co. of New York d/b/a ABM Janitorial Services v. Lumbermans Mutual Casualty Co., et al.
United States District Court for the District of Columbia, Case No. 04-2239-CKK

Dear Mr. Sear:

This acknowledges our agreement that Ecolab, Inc. shall have seven additional days within which to respond to the Third-Party Complaint of American Building Maintenance Co. of New York. While we did not discuss a similar extension for Lumbermans, the proposed order provided to me for submission to the court referenced Lumbermans, and I agreed to an extension for it. Please note, however, that Lumbermans is not a party to the agreement that includes the arbitration provision you mentioned to me, and the claim against Lumbermans is therefore not subject to arbitration.

Clearly, the best approach to the Third-Party claims is for Ecolab and Lumbermans to promptly agree to provide the defense and indemnification that were promised in and through the agreement.

Sincerely,

Scott A. Thomas

SAT/smh
Cc: Ms. Serena Trimble
Edward J. Lopata, Esq.

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