STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PRODUCTION SERVICES MANAGEMENT, INC.,

Plaintiff,

Case No. 2019-177385-CB

v.

Hon. Martha D. Anderson

MAGNA POWERTRAIN OF AMERICA, INC., And MAGNA POWERTRAIN USA, INC.,

Defendants.
_____/

OPINION AND ORDER RE: DEFENDANTS' AMENDED MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8) OR MCR 2.116(C)(10)

This matter is before the Court on Defendants' Amended Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) or MCR 2.116(C)(10). The Court dispenses with oral argument in accordance with MCR 2.119(E)(3).

By way of background, Plaintiff and Production Services Management de Mexico Operations S. de R. L. de C. V. entered into an Indirect Purchasing Service Agreement with Magna Powertrain de Mexico S. A. de C. V. ("Magna Mexico") on November 17, 2010, in which Plaintiff agreed to provide purchasing-related services and technology support, primarily for Defendants' facilities in Coahuila, Mexico, in exchange for payment for those services. Addendums to the 2010 Agreement were subsequently executed on February 20, 2013 and May 19, 2016. Plaintiff and Magna Mexico also entered into an agreement on January 12, 2018 regarding a cost savings gap due to delays in implementation and approval of ideas. Thereafter, Plaintiff filed this lawsuit on October 17, 2019 and against Defendants Magna Powertrain of

America, Inc. and Magna Powertrain USA, Inc. on allegations that Defendants have failed to pay approximately $525,188.43 as required under the aforementioned agreements.

Defendants are seeking summary disposition pursuant to MCR 2.116(C)(8) or (C)(10) in order to dismiss Plaintiff's Complaint in its entirety. A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). When analyzing such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dept of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). A (C)(8) motion may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* And, when deciding such a motion, the Court considers only the pleadings. MCR 2.116(G)(5).

"A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties...in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood, supra*; *Quinto v Cross & Peters Co.*, 451 Mich 358, 362; 547 NW2d 314 (1996).

In their motion, Defendants argue that this lawsuit should be dismissed for the following reasons: (1) there are valid forum-selection clauses in the parties' Agreement[1] that establish jurisdiction in Mexico; and (2) there is no contract between Plaintiff and Defendants.

[1]A forum-selection clause is also contained in Section 42(b) of the Purchase Order Terms and Conditions, which is incorporated into the 2010 Agreement as Schedule E.

With respect to their first argument, Defendants contend that the parties under the forum-selection clause of the Agreement clearly submitted to the jurisdiction of the courts in Monterrey, Nuevo Leon in Mexico. Pursuant to Section 13 of the Indirect Purchasing Service Agreement:

> "[t]he Parties hereby irrevocably submit to the jurisdiction of the competent courts in Monterrey, Nuevo Leon [Mexico], expressly waiving the jurisdiction of any other courts to which they may be entitled by virtue of their present or future domicile or for any other reason."[2]

Defendants also note that Section 42(b) of the Purchase Order Terms and Conditions provides in pertinent part that:

> "[a]ny claim or proceeding by Seller against Buyer may be brought by Seller only in the court having jurisdiction over the location of Buyer from which this Order issued. Seller irrevocably waives and agrees not to raise any objection it might now or hereafter have to any such claim or proceeding in any such court, including any objection that the place where such court is located in [sic[an inconvenient forum or that there is any other claim or proceeding in any other place relating in whole or in part to the same subject matter."[3]

Pursuant to MCL 600.745(3), Defendants seek dismissal of this action in light of the aforementioned forum-selection clauses in the Agreement.

"It is undisputed that Michigan's public policy favors the enforcement of contractual forum-selection clauses and choice-of-law provisions. Enforcement of contractual forum-selection clauses is premised on the parties' freedom to contract." *Robert A. Hansen Family Tr. v FGH Indus., LLC*, 279 Mich App 468, 476; 760 NW2d 526 (2008). "Although a valid forum-selection clause does not *divest* the Michigan courts of personal jurisdiction over the parties, it evinces the parties' intent to forgo personal jurisdiction in Michigan and consent to *exclusive*

---

[2] See Exhibit A of Plaintiff's Complaint. Pursuant to MCR 2.113(C)(2), "an exhibit attached or referred to under subrule (C)(1)(a) or (b) is part of the pleading for all purposes."

[3] See Exhibit A of Plaintiff's Complaint. Pursuant to MCR 2.113(C)(2), "an exhibit attached or referred to under subrule (C)(1)(a) or (b) is part of the pleading for all purposes."

jurisdiction in another forum." *Turcheck v Amerifund Fin., Inc.*, 272 Mich App 341, 344; 725 NW2d 684 (2006).

In opposition, Plaintiff argues that Section 42(b) of the Purchase Order Terms and Conditions presents conflicting forum-selection provisions that create an ambiguity within the document.

Plaintiff defers to the language of Section 42(b) that states:

> "Any litigation on contractual claims arising from this Order may be brought by Buyer in any court having jurisdiction over Seller or, at Buyer's option, in any court having jurisdiction over any Buyer's locations specified in this Order...Any claim or proceeding by Seller against Buyer may be brought by Seller only in the court having jurisdiction over the location of Buyer from which this Order issued."[4]

Based upon this language, Plaintiff contends that the two provisions conflict with one another. As a result, Plaintiff presents extrinsic evidence in the form of affidavits by Grant Church, an employee of Magna Powertrain of America, Inc., and Todd Markel, Plaintiff's employee, to support its argument that the parties intended for jurisdiction to be in Michigan, not Mexico. See Exhibits A and F to Plaintiff's Response.

"[I]f two provisions of the same contract irreconcilably conflict with each other, the language of the contract is ambiguous. Further, courts cannot simply ignore portions of a contract in order to avoid a finding of ambiguity or in order to declare an ambiguity. Instead, contracts must be construed so as to give effect to every word or phrase as far as practicable." *Klapp v United Ins. Grp. Agency, Inc.*, 468 Mich 459, 467; 663 NW2d 447 (2003).

"[E]xtrinsic evidence is admissible to prove the existence of the ambiguity, and, if a latent ambiguity is proven to exist, extrinsic evidence may then be used as an aid in the

[4] See Exhibit A of Plaintiff's Complaint.

construction of the contract." *City of Grosse Pointe Park v Michigan Mun. Liab. & Prop. Pool*, 473 Mich 188, 201; 702 NW2d 106 (2005).

Upon review of the Indirect Purchasing Service Agreement, the Court observes that "Buyer" is identified as Magna Powertrain de Mexico, S. A. de C. V. The "Buyer's Premises" are designated by the Agreement as the Buyer's facility located at Calle Uno #104 Parque Industrial Santa Maria C.P. 25903 at Ramos Arizpe, Coahuila Mexico or an alternative facility specified in writing by the Buyer. See 1.1 of the Definitions section of the Agreement. Additionally, Section 13 of the Agreement provides that "[t]he Parties hereby irrevocably submit to the jurisdiction of the competent courts in Monterey, Nuevo Leon, expressly waiving the jurisdiction of any other courts to which they may be entitled by virtue of their present or future domicile or for any other reason." The Court notes further that Section 42(b) of the Purchase Order Terms and Conditions provides that '"[a]ny claim or proceeding by Seller against Buyer may be brought by Seller only in the court having jurisdiction over the location of Buyer from which this Order issued."

"The primary goal in the construction or interpretation of any contract is to honor the intent of the parties...We must look for the intent of the parties in the words used in the instrument. This court does not have the right to make a different contract for the parties or to look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning...If the contract language is clear and unambiguous, its meaning is a question of law...Contractual language is construed according to its plain and ordinary meaning, and technical or constrained constructions are to be avoided." *UAW-GM Human Res. Ctr. v KSL Recreation Corp.*, 228 Mich App 486, 491–92; 579 NW2d 411 (1998). (Citations omitted).

In consideration of the contractual language of Section 13 of the Agreement, it is clear that the parties expressly agreed to submit to the jurisdiction of the courts in Mexico. Under Section 42(b) of the Purchase Order Terms and Conditions, the parties also expressly agreed that any legal proceeding by Seller against Buyer, namely Magna Mexico, would be brought before the courts having jurisdiction over the location of Magna Mexico from which the Agreement issued. The location of Magna Mexico was, and is, in Mexico.

With regard to the 2013 and 2016 addendums, Defendants maintain that these addendums did not modify or override the forum-selection clauses of the Agreement, nor did the January 12, 2018 letter that was executed by Plaintiff and Magna Mexico. Conversely, Plaintiff argues that the new governing law provisions of the addendums superceded the old provisions that reference forum-selection or jurisdiction. Plaintiff contends further that since the 2013 addendum was signed by Magna Powertrain/Driveline Systems, NA, Plaintiff is permitted to commence the lawsuit in Michigan based upon the location of Magna Powertrain/Driveline Systems, NA being in Troy, Michigan.

While each addendum expressly changed the choice of law provision to Michigan law, the documents did not change the forum-selection clauses. Without a doubt, neither the addendums nor the 2018 letter reflects an intent by the parties to change the forum-selection clause to the State of Michigan. Moreover, the contractual language of both Section 13 and Section 42(b) clearly designates Mexico as the proper jurisdictional forum. In light of the foregoing analysis, and pursuant to the parol evidence rule, extrinsic evidence is not admissible in this matter to modify the unambiguous forum-selection clauses in the Agreement.

Should the Court find that the Agreement contains valid forum-selection clauses, Plaintiff offers an alternative argument. That is, Plaintiff asserts that Michigan still has personal jurisdiction over the parties under MCL 600.715 and MCL 600.711. Yet, the Court notes from

the case law that forum-selection clauses demonstrate the parties' intent to forego personal jurisdiction in Michigan in favor of exclusive jurisdiction elsewhere. "A party seeking to avoid a contractual forum-selection clause bears a heavy burden of showing that the clause should not be enforced. Accordingly, the party seeking to avoid the forum-selection clause bears the burden of proving that one of the statutory exceptions of MCL 600.745(3) applies." *Turcheck, supra* at 348. (Citations omitted).

Plaintiff's only recourse to avoid the subject forum-selection clauses is to prove that one of the following will occur in order to change the jurisdiction to Michigan:

> "(3) (a) The court is required by statute to entertain the action.
> (b) The plaintiff cannot secure effective relief in the other state for reasons other than delay in bringing the action.
> (c) The other state would be a substantially less convenient place for the trial of the action than this state.
> (d) The agreement as to the place of the action is obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means.
> (e) It would for some other reason be unfair or unreasonable to enforce the agreement."
> MCL 600.745(3)(a)-(e).

In its response, Plaintiff argues that Mexico would be a substantially less convenient forum for the parties to litigate this matter. Additionally, the subject Mexican facility is not even owned by Defendant at this point in time. Plaintiff also contends that it ordered and obtained the vast majority of products from Michigan and any products that were shipped, were sent to a location of Defendants' in the United States. What is more, all payments made to Plaintiff were posted to a bank account in the United States. Therefore, Plaintiff argues that this Court has personal jurisdiction over both Defendants and it is the proper forum for this action in light of the parties' agreements and Michigan statutory law.

Conversely, Defendants assert that Plaintiff is unable to meet the heavy burden to set the subject forum-selection clauses aside. Specifically, Plaintiff cannot prove that: (1) a statute

requires this Court to entertain the action; (2) Plaintiff cannot secure effective relief in the Mexican courts if warranted; (3) Mexico is a substantially less convenient place for trial when the services at issue were largely performed by Production Services Management de Mexico Operations S. de R. L. de C. V. and the key witnesses reside in Mexico; (4) the Agreement was obtained by misrepresentation, duress, the abuse of economic power, or any unconscionable means; or (5) that the enforcement of the forum-selection clause would be unfair when the services at issue were performed by a Mexican corporation for another Mexican corporation in Mexico.

The Court agrees with Defendants that Plaintiff has not been able to demonstrate that the forum-selection clauses should not be enforced. First, there is no statutory requirement that the courts in Michigan entertain this lawsuit. Second, Plaintiff has not provided any evidence to convince this Court, nor does this Court have any reason to believe, that "the competent courts in Monterrey, Nuevo Leon"[5] would not provide effective relief in this matter. Third, Mexico is not a substantially less convenient place for the reason that the alleged goods were sold to Magna Mexico and shipped to the Apodaca facility.[6] Again, Magna Mexico, the corporate entity that allegedly failed to pay for these goods, is located in Mexico. Fourth, Plaintiff has not alleged that the Agreement was obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means. And finally, Plaintiff has not sufficiently demonstrated that there is some other reason that would render the enforcement of the terms of the Agreement unreasonable or unfair. Based upon the foregoing analysis, the Court finds that forum-selection clauses in the original Agreement are valid and enforceable.

[5] See Section 13 of the Indirect Purchasing Service Agreement.
[6] See Exhibit F of Plaintiff's Response – Commercial Invoices.

Therefore, this lawsuit falls within the jurisdiction of the proper Mexican court in Monterrey, Nuevo Leon.

Next, Defendants argue that there is simply no contract between Plaintiff and Defendants. Rather, Plaintiff has a contract with Magna Mexico, which is a legal corporation formed under Mexican law and operating in Mexico. Defendants note further that Magna Mexico is not a d/b/a of either Defendant as evidenced by the Michigan Department of Licensing and Regulatory Affairs documents, attached as Exhibit Two to the Motion.

In contrast, Plaintiff argues that the 2013 addendum to the original Indirect Purchasing Service Agreement was executed by an American "Magna Powertrain" company based in Troy, Michigan. In particular, the 2013 addendum was signed by Grant M. Church, the Director of Purchasing for "Magna Powertrain/Driveline Systems, NA," who listed an address of 1870 Technology Drive in Troy, Michigan. Plaintiff attaches as Exhibit E to its Response the Department of Licensing and Regulatory Affairs' corporate record for Defendant Powertrain USA, Inc to illustrate that the corporation operated under the assumed names of "Magna Powertrain" and "Magna Drivetrain" during the 2013 timeframe. Plaintiff also presents the 2014-2016 LARA Foreign Corporation Information Updates for Magna Powertrain USA, Inc. to demonstrate that the business address for half of the officers and directors was 1870 Technology Drive in Troy, Michigan. See Exhibit H to Plaintiff's Response.

Further, Plaintiff offers multiple emails from 2016 that contain signature blocks from Grant M. Church in which he identifies Michigan Powertrain as Magna Powertrain of America, Inc. The signature blocks also contain the 1870 Technology Drive address. See Exhibit F to Plaintiff's Response. Plaintiff also points out in its Exhibit I that both Defendants conduct business as "Magna Powertrain" and that they both have the same officers, directors, and Troy business locations.

With regard to the 2013 addendum, however, Defendants assert that this addendum is merely a supplement to the original Agreement. While the 2013 addendum was signed by a Magna employee in Troy, Michigan, the addendum did not change the designation of Magna Mexico as "Buyer" in the Agreement. Defendants maintain that the commercial invoices presented by Plaintiff support their position as they only reference Magna Mexico, and not Defendants. Defendants also point out that the 2018 letter was executed by Magna Mexico, not Defendants.

In their Reply Brief, Defendants present the argument that a contracting agent, namely the U.S.-based agent, acting on behalf of a disclosed principal, namely Magna Mexico as the Buyer, does not become a party to the contract on account of the 2013 addendum and, cannot be held liable under the contract absent an agreement to the contrary. "[A]n agent who contracts with a third party on behalf of a disclosed principal is generally not liable to the third party in the absence of an express agreement to be held liable." *Howard & Howard Attorneys P.L.L.C. v Jabbour*, 311 Mich App 524, 525–26; 880 NW2d 1 (2015); See also *Huizenga v Withey Sheppard Assocs.*, 15 Mich App 628, 633; 167 NW2d 120 (1969).[7]

With regard to Plaintiff's Breach of Contract claims in the Complaint, Plaintiff asserts that Magna Powertrain, the collective reference of Defendants Magna Powertrain of America, Inc. and Magna Powertrain USA, Inc., breached the Indirect Purchasing Service Agreement and the Cost Savings Agreement, namely the January 12, 2018 letter.

[7] For the first time in their Reply Brief, Defendants raise the argument of agency in support of their position. Since this argument was not raised in Defendants' principal brief so that Plaintiff had an opportunity to respond, the Court will not address Defendants' new argument at this time. "Reply briefs may contain only rebuttal argument..." *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252, 673 NW2d 805 (2003).

"A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." *Miller-Davis Co. v Ahrens Const., Inc.*, 495 Mich 161, 178 (2014).

The Court observes from the Indirect Purchasing Service Agreement that Magna Mexico, not Defendants, executed the contract with Plaintiff and Production Services Management de Mexico Operations S. de R. L. de C. V. Additionally, Count One of this lawsuit concerns Magna Mexico's alleged nonpayment for services rendered at the Apodaca facility between the time frame of December 2018 and June 2019. See Exhibit B of the Complaint. Interestingly, the 2016 addendum, which was executed by Magna Mexico and not Defendants, related to operations at the Apodaca facility. The Court observes further that Count Two of the Complaint involves the 2018 Cost Savings Agreement, which was executed by Plaintiff and Magna Powertrain Monterrey or Magna Mexico, not Defendants.

In consideration of the 2013 addendum[8], Black's Law Dictionary defines an addendum as "[s]omething to be added, usu. to a document; esp., a supplement to a speech, book, contract, or other document to alter its contents or give more information." Black's Law Dictionary (11th ed. 2019). The 2013 addendum to the original Agreement only supercedes the original Agreement where the two documents are in conflict.

While the 2013 addendum was executed by Grant Church, the Director of Purchasing for Magna Powertrain/Driveline Systems, NA, the addendum did not expressly impose liability upon Defendants. Stated otherwise, this particular addendum did not change the identity of the Buyer as Magna Mexico under the Agreement and so Magna Mexico remains the party to

[8] The 2013 addendum is the document that Plaintiff primarily relies upon in support of its Breach of Contract claims against Defendants.

the subject contracts. Neither of Defendants are parties to the Indirect Purchasing Service Agreement, subsequent addendums, or 2018 Cost Savings Agreement. Consequently, the allegations in Plaintiff's Complaint are insufficient to demonstrate that a breach of contract occurred by either Defendant in this matter.

Having considered the admissible evidence submitted by the parties in a light most favorable to Plaintiff, the Court finds that there is no genuine issue of material fact as to jurisdiction in Mexico and the impossibility of Defendants' breach of the subject contracts to which they were not parties. MCR 2.116(C)(10). Furthermore, Plaintiff's Breach of Contract claims against Defendants are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. MCR 2.116(C)(8); *Wade, supra.*

Accordingly, Defendants' Amended Motion for Summary Disposition is GRANTED pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10) and Plaintiff's Complaint is DISMISSED with prejudice.

Further, Defendants' request for costs and attorneys' fees is DENIED.

IT IS SO ORDERED.

This Opinion and Order resolves the last pending matter and closes the case.

Martha D Anderson

HON. MARTHA D. ANDERSON
Business Court Judge

Dated: 3/6/2020.