SO ORDERED,

Judge Jamie A. Wilson
United States Bankruptcy Judge
Date Signed: July 5, 2022

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

BACALLAO GRANITE AND MARBLE, LLC,	**CASE NO. 21-00807-JAW**
DEBTOR.	**CHAPTER 11**
BACALLAO GRANITE AND MARBLE, LLC	**PLAINTIFF**
VS.	**ADV. PROC. NO. 22-00003-JAW**
POSEIDON INDUSTRIES, INC. AND ENGS COMMERCIAL FINANCE CO.	**DEFENDANTS**

ORDER DENYING POSEIDON INDUSTRIES, INC.'S MOTION TO COMPEL ARBITRATION OF CERTAIN CLAIMS AND DISMISS COMPLAINT OF THOSE CLAIMS AGAINST POSEIDON INDUSTRIES, INC.

In this adversary proceeding, Bacallao Granite and Marble, LLC (the "Debtor") asserts claims against Poseidon Industries, Inc. ("Poseidon") arising out of its payment for equipment that Poseidon never delivered and Poseidon's refusal to repair equipment purchased by the Debtor in an earlier, separate transaction. Poseidon seeks to enforce arbitration only of the Debtor's refusal-to-repair claims in paragraph XIX of the Complaint. The parties' dispute requires the Court to consider whether the Debtor formed an agreement to arbitrate certain claims against Poseidon and, if so, whether the scope of the arbitration agreement encompasses the equipment made the basis of paragraph XIX.

This matter came before the Court for hearing on June 7, 2022 (the "Hearing"), on the following: Poseidon Industries, Inc.'s Motion to Compel Arbitration of Certain Claims and Dismiss Complaint of Those Claims Against Poseidon Industries, Inc. (the "Motion") (Adv. Dkt. #12)[1] filed by Poseidon; Poseidon's Memorandum Brief in Support of Motion to Compel Arbitration of Certain Claims and Dismiss Complaint of Those Claims Against Poseidon Industries, Inc. (Adv. Dkt. #13) filed by Poseidon; Defendant Engs Commercial Finance Co.'s Response to Poseidon Industries, Inc.'s Motion to Compel Arbitration [Dkt. #12] (Adv. Dkt. #20) filed by Engs Commercial Finance Co. ("Engs"); Defendant Engs Commercial Finance Co.'s Brief in Response to Poseidon Industries, Inc.'s Motion to Compel Arbitration [Dkt. #12] (Adv. Dkt. #21) filed by Engs; the Objection to Poseidon's Motion to Compel Arbitration (Adv. Dkt. #22) filed by the Debtor; Plaintiff's Memorandum in Support of Objection to Poseidon's Motion to Compel Arbitration (Adv. Dkt. #23) filed by the Debtor; Poseidon Industries, Inc.'s Reply to Plaintiff, Bacallao Granite and Marble, LLC's Objection to Motion to Compel Arbitration (Adv. Dkt. #25) filed by Poseidon; and Poseidon Industries, Inc.'s Reply to Co-Defendant Engs Commercial Finance Co.'s Response to Motion to Compel Arbitration (Adv. Dkt. #26) filed by Poseidon in the Adversary. At the Hearing, Kathy K. Smith and Jim F. Spencer, Jr. represented Poseidon; R. Michael Bolen represented the Debtor; and Chad J. Hammons represented Engs. During the Hearing, five exhibits were introduced into evidence.[2] Two witnesses testified at the hearing, Joe Alva ("Alva"), Poseidon's chief executive officer, and Yoel Bacallao ("Bacallao"),[3] the Debtor's managing member and sole

[1] Citations to the record are as follows: (1) citations to docket entries in the above-styled adversary proceeding (the "Adversary") are cited as "(Adv. Dkt. #)"; and (2) citations to docket entries in the above-styled bankruptcy case (the "Bankruptcy Case") are cited as "(Bankr. Dkt. #)".
[2] The exhibits introduced by Poseidon are cited as "(P. Ex. #)", and those introduced by the Debtor are cited as "(D. Ex. #). Engs did not introduce any exhibits into evidence or present any witnesses.
[3] Bacallao's native language is Spanish; he cannot speak, read, or write English. His testimony was presented through a translator, Jacqueline Pacheco.

owner. At the end of the Hearing, Engs announced that it was satisfied that Poseidon's request for arbitration did not encompass Engs and asked the Court for permission to withdraw its response. The Court granted Engs' request. (Adv. Dkt. #31). This Order resolves the remaining dispute between Poseidon and the Debtor. The Court, having considered the pleadings, evidence, and arguments of counsel, finds that there is no applicable arbitration agreement for the claims in question for the reasons set forth below.[4]

Jurisdiction

This Court has jurisdiction over the parties to and the subject matter of this Adversary pursuant to 28 U.S.C. § 1334. Notice of the Motion was proper under the circumstances.

Facts and Procedural History

The Debtor is a limited liability corporation formed under the laws of Mississippi by Bacallao in 2015. (Bankr. Dkt. #115 at 4). The Debtor operates a business installing granite, quartz, quartzite, and marble countertops in newly constructed and remodeled homes. (Bankr. Dkt. #115 at 4-5). On occasion, the Debtor purchased machinery and equipment for cutting and polishing natural stone from Poseidon, a Florida corporation formed by Alva in 2011. The Debtor purchased a "T-Rex" and MiterSplash (D. Exs. 2, 5) from Poseidon in 2018. (Test. of Alva at 10:16) (June 7, 2022).[5] The Debtor also purchased a Trident Supreme 6S (D. Ex. 2), although the date of that purchase is unknown. These transactions were sporadic and distant in time.

More recently, in 2019, Bacallao met with Alva in Florida to discuss the Debtor's purchase of a "Vantage V Axis CNC Saw," serial number VAN19-1-695 (the "Vantage Saw") for

[4] Pursuant to Rule 52 of the Federal Rules of Civil Procedure, as made applicable to the Adversary by Rule 7052 of the Federal Rules of Bankruptcy Procedure, the following constitutes the findings of fact and conclusions of law of the Court.

[5] The Hearing was not transcribed. Citations to testimony are to the timestamp of the audio recording.

$212,500.00. To finance this purchase, the Debtor obtained a loan from Engs, a commercial finance company in California.[6]

In connection with the loan from Engs, Bacallao signed the following loan documents on February 19, 2019: (1) the Commercial Finance Agreement (the "CFA") (P. Ex. 3; Bankr. Dkt. #30 at 7-12); (2) the Prefund Addendum and Acceptance Certificate (the "Prefund Addendum") (Bankr. Dkt. #30 at 13-14); and (3) the Payment Adjustment Addendum (the "Payment Addendum") (Bankr. Dkt. #30 at 15). In the CFA, the Debtor granted Engs a security interest in the Vantage Saw and agreed to repay the loan by making two "advance payment(s)" of $4,047.86 and thereafter 70 installment payments. In the schedule of installment payments, the Debtor agreed to pay Engs $99.00 for the first six months and $4,047.86 for the remaining 64 months of the 72-month term of the loan, with the first payment of $99.00 due on April 1, 2019. (Adv. Dkt. #1-2). The last payment of $4,047.86 would become due on July 1, 2024.

In the CFA, the Debtor agreed to sign "a separate delivery and acceptance" upon its receipt of the Vantage Saw, at which time Engs "may pay [Poseidon] for said collateral and accept this CFA." (Bankr. Dkt. #30 at 12). The Prefund Addendum changed the timing of Engs' payment to Poseidon. Because Poseidon required payment of all or some of the purchase price before the delivery of the Vantage Saw, Engs agreed to immediately pay Poseidon, and the Debtor, in turn, agreed to immediately commence payments to Engs under the CFA. (Bankr. Dkt. #30 at 13-14). The Payment Addendum, which the Debtor also signed, set forth the interest rate applicable to the installment payments. (Bankr. Dkt. #30 at 15).

[6] Engs had an agreement with Poseidon to offer such financing to Poseidon's customers.

The Debtor made the ongoing payments to Engs as scheduled in the loan documents, and Engs paid Poseidon the purchase price of $212,500.00. For reasons that are in dispute and that not relevant to the Motion, Poseidon never delivered the Vantage Saw to the Debtor.

Bankruptcy Case

The Debtor filed a voluntary petition for relief (the "Petition") (Bankr. Dkt. #1) under subchapter V of chapter 11 of the Bankruptcy Code on May 4, 2021. Sometime during that same month and unbeknownst to the Debtor, Engs persuaded Poseidon to return $176,000.00 of the purchase price paid for the Vantage Saw. (Test. of Alva at 10:26-10:27). The Debtor did not pay Engs any more installment payments after the Petition date.

Poseidon's Proof of Claim

On September 1, 2021, Poseidon filed a proof of claim (Cl. #11-1) in the Bankruptcy Case asserting an unsecured claim of $67,700.03 for "goods sold, services performed." The Debtor objected to Poseidon's claim on the ground that the Vantage Saw had never been delivered. (Bankr. Dkt. #121). Poseidon filed a reply to the Debtor's objection, revealing that the principals of Poseidon and the Debtor had reached an agreement resolving the claim. (Bankr. Dkt. #126).

The reply was signed by Poseidon's counsel, Aleida Martinez-Molina ("Martinez-Molina"), a Florida attorney, who is not a member of the Mississippi Bar and had not applied for admission *pro hac vice*.[7] *See* MISS. BANKR. L.R. 9010-1. The Clerk's office issued a notice of deficiency to Martinez-Molina instructing her to remedy the oversight. (Bankr. Dkt. #127). She did not file a *pro hac vice* application by the deadline provided in the notice, and the Court issued an order to show cause. (Bankr. Dkt. #133). The Court set the hearing on the show cause order contemporaneously with the hearing on the Debtor's objection to Poseidon's proof of claim.

[7] Poseidon later retained local counsel to represent it in the Adversary.

Before that hearing, Martinez-Molina filed a Stipulation of Settlement (Bankr. Dkt. #136), which was signed by her and Bacallao but not by the Debtor's counsel. In the Stipulation of Settlement, the Debtor and Poseidon agreed to a mutual release of all claims. (Bankr. Dkt. #136). The Debtor, through its counsel, filed a motion asking the Court to strike the Stipulation of Settlement on multiple grounds, including that the Debtor's counsel had previously rejected the settlement and Martinez-Molina was not a member of the Mississippi Bar or admitted *pro hac vice*. (Bankr. Dkt. #138). Neither Martinez-Molina nor any other attorney appeared at the hearing on Poseidon's behalf, and the Court entered an order striking Poseidon's reply and disallowing its proof of claim (the "Order Disallowing Claim") (Bankr. Dkt. #144) on November 19, 2021. The Debtor alleges, in essence, that the disposition of the objection disallowing Poseidon's claim in the Bankruptcy Case led to the events underlying paragraph XIX of the Complaint, namely, Poseidon's refusal to repair a T-Rex machine.

Adversary

On February 16, 2022, the Debtor filed the Complaint (Adv. Dkt. #1) seeking turnover and avoidance of the payments it made to Engs for the purchase and financing of the undelivered Vantage Saw and asserting a separate cause of action against Poseidon related to the T-Rex machine.

A. Undelivered Vantage Saw

Based on the loan documents filed by Engs in the Bankruptcy Case, the Debtor estimates that the payments to Engs totaled $86,400.06. The Debtor seeks damages in that amount, plus attorneys' fees of 50% and court costs, against Engs and Poseidon, jointly and severally. The Debtor alleges that Poseidon reimbursed or paid Engs some unknown amount or made some agreement with Engs to make it whole.

The Debtor contends that the $86,400.06 in payments to Engs are voidable either as preferences under 11 U.S.C. § 547 or as fraudulent conveyances under 11 U.S.C. § 548 and are recoverable under 11 U.S.C. § 550. It also asserts that the money it paid to Engs constitutes estate property that should be turned over to the Debtor pursuant to 11 U.S.C. § 542. All of these claims purportedly arise in or under the Bankruptcy Code, and all stem from the refusal of either Engs or Poseidon to return the payments the Debtor made to Engs for the purchase of the Vantage Saw which was never delivered.[8]

B. T-Rex

In addition to bankruptcy-law claims, the Debtor alleges separate claims against Poseidon in paragraph XIX of the Complaint. In paragraph XIX, the Debtor seeks compensation "for its lost business resulting from Poseidon's indefensible refusal to make necessary repairs to the machinery and equipment purchased from it by [the Debtor]." (Adv. Dkt. #1 at 6). The Debtor contends that it has been unable to locate any other company with the ability to make the necessary repairs but that Poseidon has refused to do any business with the Debtor because of the Order Disallowing Claim. The Debtor surmises that Poseidon's refusal is a litigation strategy to force the Debtor into abandoning its request that either Poseidon or Engs refund the money the Debtor paid for the undelivered Vantage Saw. Paragraph XIX does not identify the specific piece of equipment that Poseidon allegedly refused to repair. As discussed below, the equipment was later identified by the Debtor's counsel as the T-Rex machine.

[8] A clue as to why the Debtor continued paying Engs from April 1, 2019 to May 4, 2021 for equipment that it never received may be found in the Subchapter V Plan of Reorganization filed in the Debtor's Bankruptcy Case where the Debtor admitted that its "books and records were in disarray when this case was filed requiring the assistance of certified public accountants." (Bankr. Dkt. #115).

C. Answer to Complaint

Poseidon filed an answer to the Complaint (Adv. Dkt. #11) denying any liability and alleging "that it returned any money it received from Engs" without identifying the amount or the recipient of the refund. Poseidon also asserts numerous affirmative defenses in its answer, including that "some of the Debtor's claims against it are subject to arbitration." (Adv. Dkt. #11 at 1).

Status Conference

The Court held a status conference before the Hearing on the Motion. Until then, the identity of the "machinery and equipment" mentioned in paragraph XIX was unknown. The Debtor's counsel clarified at the status conference that the subject of its claims against Poseidon in paragraph XIX is the piece of equipment known as a "T-Rex."

Motion

Invoking the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*., Poseidon asks the Court in the Motion and in its supporting brief to order the arbitration of the claims asserted against it in paragraph XIX and to dismiss those claims from the Complaint. (Adv. Dkt. #12, #13). Poseidon alleges that "[i]n connection with [the Debtor's] previous purchases of machinery and equipment from Poseidon," the Debtor agreed to settle by arbitration "[a]ny controversy or claim arising out [sic] or relating to this contract, or the alleged breach thereof." (Adv. Dkt. #12 at 1). To be clear, Poseidon does not seek to compel arbitration of any of the bankruptcy-law claims alleged in the Complaint related to the Vantage Saw, but only seeks to compel arbitration as to paragraph XIX of the Complaint related to the T-Rex machine.

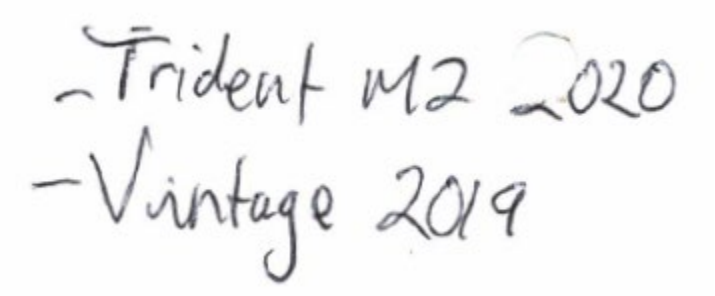
Sales Document

The arbitration provision appears as part of an unsigned and undated eight-page document (the "Sales Document") (P. Ex. 1) and is based on a standard form drafted by Poseidon. Each page is

printed on Poseidon's letterhead. There is no title on the first page, and no signature page at the end. The following headings appear in all capital letters and bold font: Sales Terms & Conditions; Shipping & Installation; Machine Safety & Indemnity; Pre-Installation Requirements; Water and Air Quality and Requirements for Corrosion Protection; Training; and Warranty. Lines for the "Buyers Initials" appear next to most of these main headings. The letters "YB" or "Y__B," with an illegible middle letter, are handwritten on each line.

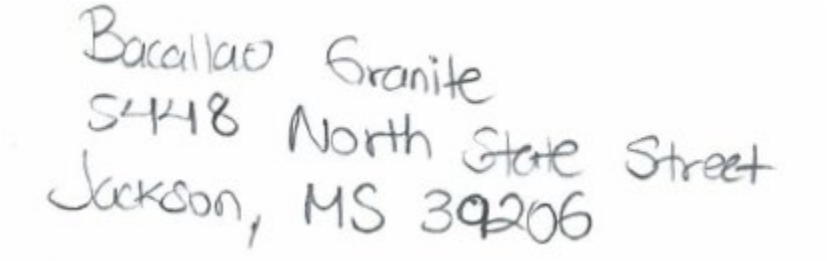
Importantly, the Sales Document does not provide any lines or spaces for: (1) the name or description of the machinery or equipment being purchased, (2) the sale price, (3) the buyer, (4) the seller (except for the letterhead), or (5) the date of the sale. Most of that information is deliberately omitted from the Sales Document because of Poseidon's practice of using only one general sales contract per customer. Some of the information included in its standard form, however, is missing from the Sales Document. Specifically, the Sales Document does not include the final page from Poseidon's standard form where there are lines and spaces for the customer's name and signature. Alva stated that his efforts to locate the missing page have been unsuccessful. (Test of Alva at 10:44-10:45).

On the first page of the Sales Document, the names of two machines, "Trident M2 2020" and "Vintage 2019," are handwritten in the upper left-hand corner.[9]



[9] There is no dispute that "Vintage" is a misspelling of "Vantage."

These handwritten notes are the only references to any specific equipment or machinery in the Sales Document. Alva speculates, without firsthand knowledge, that an employee of Poseidon wrote that information after the sale of the T-Rex for unexplained reasons. (Test. of Alva at 10:18). Handwritten on the opposite corner of the Sales Document is the Debtor's name and address:



Again, Alva speculates that a Poseidon employee wrote that information after the sale of the T-Rex although why she did so is unclear.

There is no dispute that Bacallao did not sign his full name anywhere on the Sales Document and that nowhere in the Sales Document is Bacallao identified as the Debtor's authorized agent. In addition, there was conflicting testimony at the Hearing about whether Bacallao even initialed the Sales Document. Bacallao, whose full initials are "YMB," testified that he did not recall ever initialing the Sales Document and questioned whether the initials in the Sales Document are in his handwriting. During Bacallao's testimony, the Debtor's counsel handed him a blank sheet of a paper on which to write his initials. Bacallao wrote his initials six times across the page. (D. Ex. 4). The parties dispute whether this demonstration was definitive.

In further support of his position, Bacallao testified that he never uses his middle initial "M," but one set of initials in the Sales Document contains an illegible middle letter. Bacallao also testified that he cannot read, write, or speak English, and there was no testimony or evidence that a Spanish language version of the Sales Document was provided to him. Alva testified that he speaks

Spanish and communicated directly with Bacallao rather than through a translator. (Test. of Alva at 10:15-10:17).

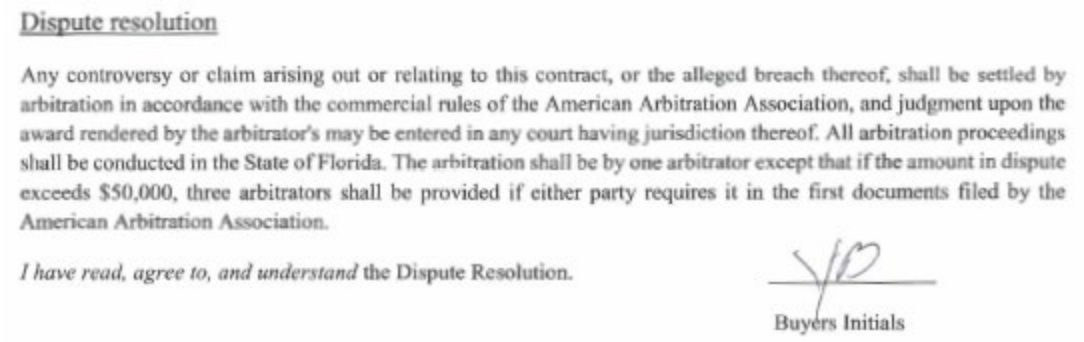
In contrast to Bacallao's testimony, Alva testified that he remembered observing Bacallao initial the Sales Document in connection with the Debtor's purchase of the T-Rex and MiterSsplash in 2018. According to Alva, their meeting in Florida was memorable because most customers preferred to transact business by email rather than in person. Alva testified that he was sure the Sales Document was entered into in 2018 because the warranty provisions of the "general sales contract" form changed in 2019.

Poseidon argues that Bacallao's signature on the Sales Document is unnecessary to demonstrate the Debtor's assent to the arbitration provision because of the following paragraph that appears on page 8:

> **CONTRACT IS REQUIRED TO BE SIGNED AND RETURNED TO POSEIDON TO ACTIVATE WARRANTY. IF DEPOSIT IS SENT FOR EQUIPMENT WITHOUT SIGNED CONTRACT WHEN CONTRACT HAS BEEN SENT TO CUSTOMER FOR REVIEW WITH INVOICE, IT IS UNDERSTOOD THAT THE AFOREMENTIONED TERMS AND CONDITIONS ARE AGREED TO BY CUSTOMER.**

(P. Ex. 1 at 8). Poseidon posits that the above paragraph binds a customer to the terms and conditions of the Sales Document, even without the customer's signature, if the customer has paid the deposit and the "contract has been sent to customer for review with invoice." (P. Ex. 1 at 8). Although this paragraph mentions an invoice, no such invoice or any other document related to the sale of the T-Rex was introduced into evidence.

Poseidon's argument in the Motion that the Debtor should be required to arbitrate the claims in paragraph XIX of the Complaint revolves around the following paragraph that appears on page eight:



Dispute resolution

Any controversy or claim arising out or relating to this contract, or the alleged breach thereof, shall be settled by arbitration in accordance with the commercial rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator's may be entered in any court having jurisdiction thereof. All arbitration proceedings shall be conducted in the State of Florida. The arbitration shall be by one arbitrator except that if the amount in dispute exceeds $50,000, three arbitrators shall be provided if either party requires it in the first documents filed by the American Arbitration Association.

I have read, agree to, and understand the Dispute Resolution.

Buyers Initials

(P. Ex. 1 at 8). Poseidon maintains that the above paragraph relates to any disputes associated with the purchase of any equipment by the Debtor, present or future. The Debtor opposes the Motion. (Adv. Dkt. #22, #23).

The Debtor views the Sales Document, at best, as "an offer to purchase or what is commonly referred to as a purchase order." (Adv. Dkt. #23 at 3). According to the Debtor, there is no evidence of any acceptance of the offer, a required element for the formation of a binding contract under Mississippi law. The Debtor argues that because the Sales Document has no binding effect, the arbitration clause is unenforceable.

The Debtor makes additional arguments based on the appearance of "Vintage" in handwriting that appears on the first page of the Sales Document. To the extent that the Sales Document relates to the purchase of the Vantage Saw, the Debtor alleges that the arbitration provision, even if valid, would not apply to the claims in paragraph XIX related to the unidentified T-Rex because its allegations do not concern repairs to that machine (since the Vantage Saw was never delivered to the Debtor). The Debtor also alleges that the Sales Document lacks consideration for the same reason.

Finally, the Debtor argues that its Complaint seeks the adjudication of core bankruptcy matters under 11 U.S.C. §§ 542, 547, 548, and 550, and this Court has discretion to refuse to enforce an otherwise valid arbitration provision if doing so would conflict with the purpose of the Bankruptcy Code. (Adv. Dkt. #23 at 4) (citing *Ins. Co. of N. Amer. v. NGC Settlement Tr. & Asbestos Claims*

Mgmt. Co. (In re Nat'l Gypsum Co.), 118 F.3d 1056 (5th Cir. 1997) and *Henry v Educ. Fin. Servs. (In re Henry)*, 944 F.3d 587 (5th Cir. 2019)).

In its reply, Poseidon insists that the Motion "has nothing to do" with the Debtor's purchase of the Vantage Saw in 2019, and agrees with the Debtor that "Poseidon does not have an agreement that covers that piece of machinery." (Adv Dkt. #25 at 1). Poseidon instead insists that the arbitration clause covers the unidentified T-Rex referenced in paragraph XIX. Poseidon describes the Debtor's argument that the Sales Document falls short of the requirements under Mississippi law for a valid contract as "weak," "odd," and "disingenuous." (Adv. Dkt. #25 at 2-3). Poseidon frames the Debtor's challenge to the sufficiency of the Sales Document's material terms as based largely on the absence of the term "contract" in its title. The omission of that label, according to Poseidon, does not relegate the Sales Document to the status of a mere "purchase order" because the term "contract" appears in two paragraphs on the last page—the dispute-resolution paragraph,[10] which provides, in part, "[a]ny controversy or claim arising out of or related to this *contract*," and the paragraph, previously quoted, that begins, "[*c*]*ontract* is required to be signed and returned to Poseidon to activate warranty." (P. Ex. 1 at 8) (emphasis added).

Discussion

Congress enacted the FAA to overcome the historic judicial hostility to arbitration agreements. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n.14 (1985). Section 2 of the FAA provides:

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

[10] The Court notes that the purported arbitration provision is not entitled "Arbitration" in the Sales Document but instead falls under the heading "Dispute Resolution." That heading is the only one in the Sales Document that does not appear in all capital letters and in bold font.

9 U.S.C. § 2. Section 4 of the FAA allows a party to seek court enforcement of an arbitration agreement when another party fails to comply. 9 U.S.C. § 4.

The U.S. Supreme Court has long acknowledged that the FAA evinces a federal "policy favoring arbitration when the parties contract for that mode of dispute resolution." *Preston v. Ferrer*, 522 U.S. 346, 349 (2008); *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). Recently, the Supreme Court clarified that the FAA's policy favoring arbitration means that courts must enforce arbitration agreements the same as other contracts, but not more so. *Morgan v. Sundance*, 142 S. Ct. 1708, 1713-14 (2022). "[A] court may not devise novel rules to favor arbitration over litigation." *Id*. Instead, "courts must place arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

At bottom, "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." *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). Any challenge to the existence of an arbitration agreement, therefore, is a threshold issue for the courts to decide. *Bowles v. OneMain Fin. Grp., L.L.C.*, 954 F.3d 722, 725 (5th Cir. 2020); *Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 201-02 (5th Cir. 2016). That first step has two parts. Courts must determine both whether there is a valid agreement to arbitrate the claims and, if so, whether the specific dispute falls within the scope of that agreement. *Tower Loan of Miss., L.L.C. v. Willis (In re Willis)*, 944 F.3d 577, 579 (5th Cir. 2019). The second step requires courts to consider whether any federal statute or policy renders the claims nonarbitrable. *Nat'l Gypsum*, 118 F.3d at 1069. The Court addresses first whether the Debtor and Poseidon entered into a valid agreement to arbitrate a set of claims.[11]

[11] Poseidon's attempt to compel the Debtor to arbitrate its claims is a shift from its previous counsel's litigation strategy in the Bankruptcy Case, but the Debtor does not raise the issue of waiver. *See Forby v.*

A. Did the Debtor and Poseidon enter into an agreement to arbitrate claims?

The arbitration clause in question appears on the last page of the Sales Document under the heading "Dispute Resolution," which, unlike the main headings, is not in all capital letters and bold font. The letters "YB" appear nearby. The introductory sentence of that paragraph requires the parties to arbitrate "claims arising out [sic] or relating to this contract, or the alleged breach thereof."

Poseidon contends that the application of "[o]rdinary contract principles" under Mississippi law demonstrate that the Sales Document is a binding agreement.[12] (Adv. Dkt. #13 at 4). In contrast, the Debtor insists that no written agreement covers its purchase of the T-Rex. The Debtor views the Sales Document, at best, as an offer to purchase.

Where an arbitration provision appears as part of a larger contract, rather than as a standalone document, the separability doctrine allows a court to "consider only issues relating to the making and performance of the agreement to arbitrate" and not issues relating to the making of the contract generally. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). Challenges to the validity of the contract as a whole must be presented instead to the arbitrator. When parties have admitted signing a contract that contains an arbitration provision, the parties have presumptively agreed to arbitrate any dispute about the validity of the contract in general. The *Prima Paint* rule, however, does not apply to challenges to the formation and existence of a contract that includes a disputed arbitration clause. If a party has not signed an agreement containing an arbitration clause, that party may not have agreed to arbitration at all. Because the Debtor denies the formation

One Techs., L.P., 13 F.4th 460 (5th Cir. 2021).

[12] In support of its contention that the parties entered into a valid contract, Poseidon assiduously cites and relies on general contract principles under Mississippi law. (Adv. Dkt. #13, #25). Absent from Poseidon's discussion is any mention of the Uniform Commercial Code ("UCC"), which governs the sale of goods, or any of the UCC's gap-filling provisions. MISS. CODE ANN. § 75-2-1 *et seq*.

and existence of the Sales Document that includes the disputed arbitration clause, its challenge falls outside the *Prima Paint* rule and may be properly determined by this Court. Poseidon does not argue otherwise.

Poseidon, however, does urge the Court to resolve any doubts about whether the Sales Document constitutes a binding contract in its favor. (Adv. Dkt. #13 at 5). The cases that Poseidon cites in its brief in support of its argument are inapposite. (Adv. Dkt. #13 at 5). Those decisions applied federal substantive law, including the federal presumption in favor of arbitration, in determining the scope of an arbitration agreement, not its existence or formation. *See Jones v Regions Bank*, 719 F. Supp. 2d 711, 715 (S.D. Miss. 2010) ("Any doubt concerning the scope of an arbitration clause must be resolved in favor of coverage."); *Page v. Captain D's LLC*, No. 2:12CV105-KS-MTP, 2012 WL 5930611, at *5 (S.D. Miss. Nov. 27, 2012) (holding that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration") (quotation omitted). The federal policy favoring arbitration "does not apply to the determination of whether there is a valid agreement to arbitrate between the parties." *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1073-74 (5th Cir. 2002); *see also Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1998) ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so."). For that threshold question, state law principles governing the formation of contracts apply, and the burden of establishing the existence of an arbitration agreement, in line with the burden of establishing the existence of a contract under state law, rests on Poseidon. *Edwards v. Doordash, Inc.*, 888 F.3d 738, 745 (5th Cir. 2018); *Mariner Healthcare, Inc. v. Green*, No. 4:04CV246, 2006 WL 1626581 (N.D. Miss. June 7, 2006).

In Mississippi, a valid arbitration provision exists if the elements of a contract are present in the agreement. The elements of a valid contract are: (1) two or more contracting parties, (2) consideration, (3) an agreement that is sufficiently definite, (4) parties with the legal capacity to make a contract, (5) mutual assent, and (6) no legal prohibition precluding contract formation. *GGNSC Batesville, LLC v. Johnson*, 109 So. 3d 562, 565 (Miss. 2013). The Debtor's challenge to the formation and existence of the Sales Document pertains to the third and fifth elements, and, therefore, requires the Court to consider whether the Sales Document is sufficiently definite and whether there was mutual assent or a "meeting of the minds" as to essential terms. These elements may overlap because the absence of material terms may indicate the lack of mutual assent.

1. Are the material terms of the Sales Document reasonably complete and its essential terms reasonably certain?

In Mississippi, a contract is sufficiently definite to be enforceable "if it contains matter which will enable the court under proper rules of construction to ascertain its terms, including consideration of the general circumstances of the parties and if necessary relevant extrinsic evidence." *Duke v. Whatley*, 580 So. 2d 1267, 1274 (Miss. 1991) (quoting *McGee v. Clark*, 343 So. 2d 486, 489 (Miss. 1977)). Here, the Sales Document does not mention the Debtor or Bacallao, is unsigned by the Debtor, does not identify the T-Rex or any other equipment as the goods sold, and does not include the purchase price.

The Debtor's name and address appear in handwriting in the upper corner of the first page of the Sales Document, but that information was added by an employee of Poseidon after the fact. The letters "YB" or "Y _ B," and some illegible letter in the middle, appear next to some of the paragraphs, but Bacallao testified that he did not recall ever having initialed the Sales Document. Moreover, nowhere in the Sales Document are the initials "YB" identified as belonging to Bacallao, and nowhere is Bacallao identified as the Debtor's authorized agent.

There is no reference in the Sales Document to the sale of a T-Rex, a fact that Poseidon's counsel admitted at the Hearing only when pressed to do so by the Court.[13] (Hr'g at 11:38-11:39). Two machines, "Trident" and "Vintage," are identified in handwriting on the upper corner, but like the Debtor's name and address, that information was added by an employee of Poseidon after the fact. Finally, no purchase price is included. Price, in particular, has been held in Mississippi to be an essential term of any sales contract. *See Duke*, 580 So. 2d at 1274-75 (holding that when price is missing in a sales contract, the contract fails).

The Mississippi Supreme Court has held that a contract does not exist if it does not contain enough information to "enable the court under proper rules of construction to ascertain its terms." *Hunt v. Coker*, 741 So. 2d 1011, 1014 (Miss. 1999) (quoting *Leach v. Tingle*, 586 So. 2d 799, 802 (Miss. 1991)). Searching the Sales Document and finding numerous missing essential terms, the Court concludes that it is not sufficiently definite and complete to be legally enforceable under Mississippi law. Here, not only the price is missing but so also are the name of the customer and the identity of the machine sold. Whether the result of poor draftsmanship or missing paperwork, the sparseness of the terms in the Sales Document is fatal. Even if the Sales Document were legally sufficient to constitute an offer, it lacks mutual assent. The Court turns to that related issue next.

2. Was there mutual assent to all essential terms?

In Mississippi, a meeting of the minds is essential for the formation of a binding contract. *See Union Planters Bank, Nat'l Ass'n v. Rogers*, 912 So. 2d 116, 120 (Miss. 2005) ("A cardinal rule of construction of a contract is to ascertain the mutual intentions of the parties."). The parties'

[13] The only mention of a T-Rex in the Sales Document is under the "Training" heading where Poseidon agreed to "provide 3-days of training for Viking II CNC Saw, Guardian CNC, and T-REX models." (P. Ex. at 5). In this generic paragraph, the T-Rex is listed as one of three "CNC" machines guided by computer software which, if purchased, would require training by Poseidon.

signatures on a contract are normally a prerequisite to show mutual assent. *Byrd v. Simmons*, 5 So. 3d 384, 389 (Miss. 2009). Here, there are no signatures because of the missing final page. Poseidon argues that the manifestation of the Debtor's assent is illustrated by other means. The Court rejects Poseidon's arguments.

First, Poseidon points to the letters "YB" next to "each pertinent paragraph" of the Sales Agreement. (Adv. Dkt. #13 at 4-5). Under different facts, an uncontested initial may be enough to show assent, but here the printed form that Poseidon used as a template for the Sales Document included a mechanism for the Debtor to indicate its assent—the final signature page—which is missing from the Sales Document. Bacallao's initials were never intended to stand in place of his full signature, as shown by Alva's testimony admitting that Poseidon did not "follow up as well as we should have, making him do the paperwork like we do nowadays." (Test. of Alva at 10:21-10:22).

Moreover, Bacallao testified that he did not recall initialing the paragraphs. During his testimony, he prepared a writing sample to demonstrate that his handwritten initials differ from the initials on the Sales Document.[14] A cursory comparison shows some dissimilarities, but the Court hesitates to rely on the handwriting sample because of the likelihood that it is self-serving and unreliable. Other evidence, however, corroborates Bacallao's testimony. For example, all other handwriting on the Sales Document belongs to different employees of Poseidon, so it is possible that the initials were added after the fact by someone other than Bacallao. Also, although Alva's

[14] Poseidon, who squarely put Bacallao's purported initials on the Sales Document at issue in its case-in-chief, objected to the demonstration solely on grounds of relevancy. The Court overruled its objection because the handwriting sample is relevant to the Debtor's argument that he did not initial the Sales Document, and, therefore, did not assent to the arbitration clause. FED R. EVID. 401, 402. In addition, Rule 901(b)(3) of the Federal Rules of Evidence explicitly provides that a trier of fact may make comparisons between handwriting samples for authentication purposes. Nevertheless, the Court's findings do not substantially rely on the handwriting sample because even if Bacallao did initial the Sales Document, his initials would still be ineffective to compel arbitration of a claim predicated on the sale of an unidentified piece of equipment for an unknown price.

testimony that he met with Bacallao in Florida in 2018 to discuss the purchase of the T-Rex was credible, his testimony that he observed Bacallao initialing the Sales Document was not as straightforward when considered in tandem with his inability to explain the missing signature page or the handwriting on the first page.

A second manifestation of the Debtor's assent, according to Poseidon, is the underlined paragraph on page 8 of the Sales Document that binds a customer to the terms of the Sales Document after payment of the deposit "when contract has been sent to customer for review with invoice." Poseidon, however, failed to show the Debtor's acceptance of the Sales Document in the manner required by that paragraph for the formation of a contract absent a signature. *See* RESTATEMENT (SECOND) OF CONTRACTS § 30, comment a, illus. 1.[15] Poseidon presented no other evidence at the Hearing related to the purchase of the T-Rex.

Next, Poseidon asserts that even if Bacallao, who does not read, write, or speak English, did not understand what he was signing, it was his legal duty to read and understand it before he signed it. *See United Credit Corp. v. Hubbard*, 905 So. 2d 1176, 1178 (Miss. 2004). That legal proposition is unhelpful to Poseidon because it assumes rather than demonstrates that the Debtor signed the Sales Document.

The Court finds that Poseidon has not met its burden of proving that the Debtor agreed to the Sales Document. The Court reaches this conclusion not only because of the missing signatures and Bacallao's testimony but also because of the absence of numerous essential terms from the Sales Document, such as a description of the equipment being purchased and the sale price.

[15] The absence of an invoice has other legal consequences. The invoice, for example, could have served as a gap filler for some or all of the essential terms missing from the Sales Document.

3. Conclusion

As a whole, the evidence presented by Poseidon at the Hearing fell short of proving either a sufficiently definite agreement or a meeting of the minds. Because the FAA was not enacted to force parties to arbitrate in the absence of an agreement, the Court finds that the Motion should be denied. This ruling does not address the merits of the Debtor's claims in paragraph XIX of the Complaint. That determination will be made by the Court after trial.

The Court's conclusion that the parties did not agree to arbitrate any claims renders it unnecessary to address either the argument by Poseidon that the particular claims referenced in paragraph XIX fall within the scope of the arbitration clause or the argument by the Debtor that arbitration would present an inherent conflict with the Bankruptcy Code. However, for the sake of thoroughness, the Court will address these arguments briefly.

B. Does the dispute in question fall within the scope of the arbitration provision?

Assuming arguendo that there were a valid contract related to the purchase of the "Trident" and "Vintage," the second part of the inquiry in determining the existence of an arbitration agreement is whether the Debtor's claims in paragraph XIX regarding the T-Rex fall within the scope of the arbitration provision. The Debtor's counsel represented to the Court at the Hearing that the refusal-to-repair claims in paragraph XIX are not based on a written warranty or a breach of the Sales Document, but he did not further clarify the legal basis. The arbitration provision covers "[a]ny controversy . . . relating to this contract." [16] (P. Ex. 1). Poseidon insists that this language

[16] Beyond the issue as to whether a specific dispute is covered by an arbitration clause, a question sometimes arises as to what forum should determine whether the dispute is arbitrable. When a "party seeking arbitration points to a purported delegation clause" that empowers the arbitrator, not the court, to determine arbitrability issues, the Court's analysis is limited to that of contract formation. *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010). Here, Poseidon does not allege in the Motion or in its briefs, and did not argue at the Hearing, that the arbitration provision contains a delegation clause. To the contrary, Poseidon expressly asks this Court to rule that the arbitration agreement covers the claims in question. (Adv. Dkt. #13 at 6-7) ("[I]t is beyond dispute that the claims asserted by [the Debtor] in paragraph XIX of the

is expansive enough to include all present and future claims arising out of any and all transactions between Poseidon and the Debtor, whether based in contract or tort.

Boiled down, the Sales Document does not refer to the purchase of a "T-Rex." To adopt Poseidon's position would require this Court to find that the arbitration provision in the Sales Document is limitless—that it applies to all machinery and equipment whether identified at the time of the signing or not and whether purchased now or in the future. The Sales Document does not say that. The provision in question limits its reach to "*this* contract." At best, and even assuming that the Sales Document covers the pieces of equipment identified in handwriting (the "Trident" and "Vintage"), "*this* contract" does not cover the T-Rex. For that reason, the Court finds that the arbitration provision does not cover disputes related to the T-Rex.

C. Would arbitration of the claims conflict with the purpose of the Bankruptcy Code?

Bankruptcy courts may decline to enforce an arbitration clause if the proceeding requires the adjudication of statutory rights conferred by the Bankruptcy Code and if enforcement would conflict with the purpose of the Bankruptcy Code. *Henry*, 944 F.3d at 590-91 (citing *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987)); *Nat'l Gypsum,* 118 F.3d at 1069. The Debtor, as the party opposing arbitration, bears the burden of showing that Congress intended the Bankruptcy Code to preclude arbitration of the claims in paragraph XIX. *Lentz v. Parkland Legal Grp., PL (In re Gaughf)*, No. 19-06031-KMS, 2020 WL 1271595 (Bankr. S.D. Miss. Mar. 12, 2020).

Paragraph XIX does not specify the legal basis for the claims against Poseidon. Because the claims derive from Poseidon's alleged post-Petition conduct taken in response to the Order Disallowing Claim, it is possible that they are governed by 11 U.S.C. § 105 of the Bankruptcy Code

---

Complaint are entirely within the scope of the arbitration agreement"); (Adv. Dkt. #25 at 6) (arguing that the claims in paragraph XIX fall within the arbitration clause).

and fall within the definition of a core proceeding under 28 U.S.C. § 157(b)(2)(A) for "matters concerning the administration of the estate," but the Debtor did not cite either statute in paragraph XIX. The claims also could be based solely on state law, but, if so, the Complaint does not indicate whether they are contract claims, tort claims, or both. Accordingly, the Court finds that the Debtor has not met its burden of proving that arbitration of these claims would inherently conflict with the purpose of the Bankruptcy Code.

Conclusion

For the above and foregoing reasons, the Court concludes that Poseidon has failed to prove the existence of an agreement to arbitrate, and the Motion should be denied. The Sales Document is too indefinite and nonspecific to evidence a meeting of the minds. Even if the Sales Document constitutes a binding contract, the claims in paragraph XIX do not fall within the scope of the arbitration clause. Finally, the Court rejects the Debtor's argument that enforcement of the arbitration clause would inherently conflict with the purpose of the Bankruptcy Code, but that conclusion does not change the grounds for the Court's denial of the Motion.

IT IS, THEREFORE, ORDERED that the Motion is hereby denied.

##END OF ORDER##