IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

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LPS INTEGRATION, INC.,	)	
	)	
Plaintiff,	)	
	)	NF
vs.	)	No. 15-1532-BC
	)	
INGENUITY ASSOCIATES, LLC,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER: (1) ALTERING AND AMENDING MARCH 9, 2016 ORDER TO CONDUCT EVIDENTIARY HEARING ON ARBITRATION AGREEMENT FORMATION; (2) GRANTING DEFENDANT'S MOTION TO STAY LTIGATION; (3) DENYING PLAINTIFF'S MOTION TO COMPEL; AND (4) SETTING MAY 6, 2016 11:00 A.M. CONFERENCE

Pending before the Court are two motions: (1) Defendant's motion for a stay of this litigation during its appeal of a March 9, 2016 order denying arbitration and (2) Plaintiff's motion to compel responses to discovery. In researching these motions, the Court determined that the March 9, 2016 order denying arbitration was premature and that an evidentiary hearing must first be conducted.

Under these circumstances, the Court alters and amends the March 9, 2016 Order pursuant to Tennessee Civil Procedure Rule 54.02 and *White v. Empire Exp., Inc.*, 2011 WL 6182091 (Dec. 13, 2011 Tenn. Ct. App); sets a May 6, 2016 11:00 a.m. conference to set an evidentiary hearing on the arbitration agreement formation issues; grants the Defendant's motion to stay the litigation while the arbitration issues are being disposed of; and denies the Plaintiff's motion to compel at this time.

The context for the foregoing is that the Plaintiff was retained by the Defendant to perform technology integration services as part of a project the Defendant had been hired to perform. Over the course of several invoices the Plaintiff billed the Defendant a total of $478,777.55. The Plaintiff alleges that the Defendant has been paid in full for the project. The Defendant has not paid the Plaintiff. The lawsuit seeks recovery of the invoiced amount.

In its Verified Complaint the Plaintiff asserts the causes of action of sworn account and breach of contract to obtain recovery. In support of those claims the Plaintiff's factual allegations refer to conversations, pricing, statements and invoices in reference to the parties' agreement for payment of the $478,777.55 to the Plaintiff. No contract document is alleged, referred to or appended to the Verified Complaint as per Tennessee Civil Procedure Rule 10.03.

The issue of arbitration arose in the Defendant's filing of a February 19, 2016 motion asserting that the Court is required to compel arbitration.

In a March 9, 2016 Memorandum and Order the Court denied Defendant's motion because the Court found from the record that existed[1] there was an issue on whether the parties had an agreement to arbitrate. Seeing from the case law Counsel had cited that mutual assent to arbitration is an essential element to compel arbitration, the Court denied Defendant's motion. The legal conclusion for denying arbitration was that under circumstances where the record contained competing understandings and inferences, "the

[1] The record consisted of the Verified Complaint and an affidavit of party representatives filed by each side detailed herein.

Defendant has not demonstrated mutual assent, the essential element of an enforceable agreement, and the predicate for compelling arbitration." *Memorandum and Order Denying Defendant's Motion to Compel Arbitration, Stay Proceedings and Enter Protective Order*, March 9, 2016 at 4. Directions were then provided in the March 9, 2016 Order to proceed with the litigation.

On March 11, 2016, the Defendant filed an appeal of the March 9, 2016 denial of arbitration pursuant to Tennessee Code Annotated section 29-5-319(a)(1). Additionally, the Defendant filed the pending motion to stay the litigation while it appeals the March 9, 2016 order denying arbitration. Oral argument was conducted on that motion and the Court took the matter under advisement.

In researching the motion to stay, the Court located Tennessee law which provides that if there are factual issues of formation of an arbitration agreement, such as in this case, on whether the parties actually agreed to arbitrate, a court does not decide that issue, as this Court did, by applying a burden of proof to the proponent of arbitration upon affidavits like a Tennessee Civil Procedure Rule 65 proceeding. Instead, when the arguments opposing arbitration require resolution of factual issues such as whether the arbitration agreement was in fact formed, the law requires an additional step of conducting an evidentiary hearing to decide these gateway issues:

> When resolving these "gateway" issues, a court is frequently called upon to consider matters outside of the pleadings, but this does not convert the motion to compel arbitration into a motion for summary judgment under Tennessee Rule of Civil Procedure 56. This Court has previously rejected a plaintiff's contention in a challenge to arbitration that the trial court's consideration of matters outside the pleadings meant that the motion was transformed into a motion for summary judgment. *Thompson v. Terminix*

Int'l Co ., LP, 2006 WL 2380598, at *4 (Tenn.Ct.App. Aug. 16, 2006). Indeed, a proper motion to compel arbitration is not even a true motion to dismiss. *See id.* at *3. "The correct procedure to be followed by the trial court upon a motion to compel arbitration, therefore, is, if it determines the matter is subject to arbitration, to enter an order compelling arbitration of that matter and staying the matter." *Id.* As such, in that case, this Court reversed the trial court's dismissal of the action and remanded for entry of an order staying the proceedings pending arbitration. *Id.* at *6.

In considering opposition to a motion to compel arbitration, a court must distinguish between those arguments attacking the agreement which can be resolved solely as a matter of law and those arguments which require resolution of factual issues. While the former category mirrors a case in which a court is called upon to interpret contractual language and apply it to uncontested facts, the latter requires the trial court to receive evidence and resolve the relevant disagreements before deciding the motion. *See* T.C.A. § 29-5-303. Although it appears that neither this Court nor our Supreme Court has had occasion to make this principle explicit, prior decisions have nonetheless illustrated the necessity of an evidentiary hearing when facts related to an arbitration agreement are disputed. *See, e.g., Howell v. NHC Healthcare-Fort Sanders, Inc.,* 109 S.W.3d 731, 732-35 (Tenn.Ct.App.2003) (discussing trial court's evidentiary hearing and findings); *see also Raiteri v. NHC Heathcare/Knoxville, Inc.,* 2003 WL 23094413, at *4 (Tenn.Ct.App. Dec. 30, 2003); *cf. Guffy v. Toll Bros. Real Estate, Inc.,* 2004 WL 2412627, at *6-7 (Tenn.Ct.App. Oct. 27, 2004) (remanding case to trial court for determination of additional facts).

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> The petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination. No jury trial is available for a petition to compel arbitration.

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> The trial court's role, then, is not just to determine if there is an issue regarding enforceability. It must also determine if the agreement is in fact enforceable. Even if the party challenging the arbitration agreement interposes such defenses as fraud in the inducement, unconscionability, or lack of authority, it is up to the trial court to resolve such issues and make a clear ruling as to whether or not the agreement is enforceable. Therefore, the trial court must proceed expeditiously to an evidentiary hearing when it faces disputed issues of fact that are material to a party's motion to compel arbitration; it may not decline to resolve the question until trial of the underlying case. Where material facts are not contested, however, no such evidentiary hearing is required.

Raines v. Nat'l Health Corp., No. M2006-1280-COA-R3-CV, 2007 WL 4322063, at *4-6 (Tenn. Ct. App. Dec. 6, 2007) (Citations omitted).

Applying the foregoing to this case, the Court concludes that it must first conduct an evidentiary hearing before it can rule on the Defendant's motion to compel arbitration. The Court therefore must alter and amend the March 9, 2016 order, conduct an evidentiary hearing, and decide whether or not the parties agreed to arbitrate.

This additional step of an evidentiary hearing to resolve the forum for this dispute delays the objective of the Business Court Pilot Project of expedited resolution. *See Tennessee Supreme Court Order Establishing the Davidson County Business Court Pilot Project*, March 16, 2015 at 1. The Pilot Project Court, however, as all trial courts, must follow the law. When the policies of established state law precedent overlap with the objectives of the Business Court, the Pilot Court is required to apply the established policy of the state. Moreover, ultimately, either forum, arbitration or the Pilot Project, both have as their objective prompt resolution of disputes.

It is therefore ORDERED that pursuant to Tennessee Civil Procedure Rule 54.02, the Court maintains the analysis of the March 9, 2016 Memorandum and Order but alters

and amends that order to withdraw denial of Defendant's Motion to Compel Arbitration and to hold that Motion in abeyance for the Court to conduct an evidentiary hearing on the issue of whether the parties formed an agreement to arbitrate.

It is further ORDERED that until the Court has performed its gateway function under Tennessee law of ruling on the arbitration formation issue, the proceedings in this case are stayed, and Plaintiff's pending motion to compel is denied, consistent with the stay.

It is additionally ORDERED that on Friday, May 6, 2016, at 11:00 a.m. the Court shall conduct a conference on Counsel's preparation needs for and the timing of an evidentiary hearing on the arbitration formation issue.

In entering this Rule 54.02 Order, the Court has concluded as a matter of procedural law that its March 9, 2016 Memorandum and Order was not a final order and, therefore, is authorized for revision by the Court at any time. *See White v. Empire Exp., Inc.*, 2011 WL 6182091 (Dec. 13, 2011, Tenn. Ct. App).

The reasoning and authority on which the foregoing is based are as follows.

State Preference For Arbitration

It has long been the policy and preference[2] that "[a]rbitration agreements are favored in Tennessee by both statute and case law." *Glassman, Edwards, Wyatt, Tuttle &*

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[2] The Tennessee Uniform Arbitration Act, which was enacted in 1983, is based on the version of the Uniform Arbitration Act adopted in 1956. *Morgan Keegan & Co. v. Smythe*, 401 S.W.3d 595, 603 (Tenn. 2013) (citing *See Merrimack Mut. Fire Ins. Co. v. Batts*, 59 S.W.3d 142, 149 (Tenn. Ct. App. 2001)).

Cox, P.C. v. Wade, 404 S.W.3d 464, 466 (Tenn. 2013) (citations omitted). The preference for arbitration over litigation as a forum of dispute resolution has evolved over time:

> Arbitration was not a favored procedure by early common law courts. The effectiveness of arbitration as a swift and inexpensive alternative to litigation was severely limited by two common law rules. First, either party could revoke the arbitration agreement at any time before the rendering of the award and second, a civil action was required to enforce the award. In combination, these two rules nullified the purpose and advantages of arbitration by fostering uncertainty and forcing the successful party into expensive and time-consuming litigation. Maynard E. Pirsig, *Some Comments on Arbitration Legislation and the Uniform Act,* 10 Vand.L.Rev. 685 (1957).
>
> Attitudes towards arbitration changed as time passed. This change was reflected in the courts by judicial decisions praising arbitration and in society by the passage of statutes embracing arbitration as an alternative forum for dispute resolution. The effectiveness of modern arbitration statutes has been measured in terms of their inclusion of provisions making agreements to arbitrate irrevocable and initiating a time-saving procedure for compelling arbitration. *See* Stanley D. Henderson, *Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice,* 58 Va.L.Rev. 947, 949 (1972). The Uniform Arbitration Act, promulgated by the National Conference on Uniform State Laws in 1955, contains both provisions and has been adopted by most states. Moreover, the Act embodies a legislative policy favoring enforcement of agreements to arbitrate.

Buraczynski v. Eyring, 919 S.W.2d 314, 317 (Tenn. 1996).

In recognition of this preference, Tennessee "has now acknowledged that both the Federal Arbitration Act and the Tennessee Uniform Arbitration Act were adopted (1) 'to promote private settlement of disputes,' and (2) to ensure the enforceability of private agreements to arbitrate. Agreements to arbitrate in private contracts are now favored in Tennessee both by statute and existing case law:

> [a]rbitration is attractive because it is a more expeditious and final alternative to litigation.

> The very purpose of arbitration is to avoid the courts insofar as the resolution of the dispute is concerned. The object is to avoid what some feel to be the formalities, the delay, the expense and vexation of ordinary litigation. Immediate settlement of controversies by arbitration removes the necessity of waiting out a crowded court docket....

Arnold v. Morgan Keegan & Co., 914 S.W.2d 445, 449 (Tenn. 1996) (quoting *Boyd v. Davis,* 127 Wash.2d 256, 897 P.2d 1239, 1242 (1995) (*en banc*) (citation omitted)).

<u>Disputed Issues Of Fact Regarding Mutual Assent</u>

The basis for the Defendant's argument that this case is subject to arbitration is a Master Service Agreement attached to an April 20, 2015 email between the parties. The email with the attached MSA was located by the Defendant in its files in reviewing information to respond to Plaintiff's discovery. Section 9(f) of the Master Service Agreement contains an arbitration provision stating that "[a]ny controversy or claim arising out of or relating to this Agreement, or any breach thereof, must be resolved by confidential binding arbitration in Nashville, Tennessee in accordance with the Commercial Arbitration Rules of the American Arbitration Association..."

The email correspondence attached to the *Reply In Support Of Defendant's Motion To Compel Arbitration; Stay Proceedings And Enter Protective Order* stated:

> From: Lisa Smith
> Sent: Monday, April 20, 2015 2:18 PM
> To: Katie Williams
> Cc: Butch Stroupe; Thomas A. Swann
> Subject: RE: New Customer Form – Ingenuity Associates
> Attachments: MSA – Ingenuity Associates.pdf
>
> Hi Katie!

We do need just one more document signed, please. Attached is our Master Service Agreement (MSA). This just allows us to perform the services for you. Please let me know if you have any questions. If not, please sign and return and I will send you a counter signed MSA for your records. Thank you!

Lisa C. Smith | LPS Integration, Inc.
Director of Sales Operations

From: Katie Williams
Sent: Thursday, April 16, 2015 10:08 AM
To: Lisa Smith
Cc: Butch Stroupe
Subject: New Customer Form – Ingenuity Associates
Importance: High

Lisa,

Please see the attached new customer form for Ingenuity Associates **along with our W9.** Let me know if you need anything else.

Best,

Katie Williams

Chief of Staff

Exhibit A, p. 1 (Mar. 2, 2016).

As of yet, however, there is no evidence that the MSA containing the arbitration provision was ever signed, and the Plaintiff denies that the MSA was ever entered into by the parties. The Plaintiff asserts that its work and payment therefor were agreed to in the conversations, statements, pricing and invoices alleged in the Verified Complaint.

To the contrary and in addition to the email, the Defendant filed the *Affidavit of Katie Williams*, the Chief of Staff of Ingenuity Associates which asserted the parties were operating under the terms of the MSA:

> 2. I am the Chief of Staff of Ingenuity Associates, and I have held this position since August 2014. As part of my job duties with Ingenuity Associates, I am primarily responsible for engagements with new vendors such as LPS Integration, Inc. (hereinafter "LPS").
>
> 3. On April 20, 2015, Lisa Smith, the Director of Sales Operations for LPS sent me and [sic] email, carbon copying Butch Stroupe and Thomas Swann, both employees of Ingenuity Associates. That email included a copy of LPS's Master Services Agreement (hereinafter "MSA") that was to govern the relationship between the parties. The email, with the attached MSA, attached hereto as Exhibit A.
>
> 4. I have reviewed the MSA and the email exchange between agents of LPS and Ingenuity Associates attached hereto as Exhibit A. On behalf of Ingenuity Associates, I understood that the terms of LPS's MSA were part of the agreement for LPS to perform certain work associated with the Ingenuity Associate engagement at the Sharon Regional Medical Center (hereinafter "Sharon Project").
>
> 5. LPS offered to perform work for Ingenuity Associates pursuant to its MSA, and Ingenuity Associates received and reviewed those terms, assented to them and had LPS begin work on the basis of those terms and the Limited Statements of Work (hereinafter "LSOW") submitted by LPS.
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> 6. In her April 20, 2015 email, Lisa Smith stated the MSA "allow[ed] [LPS] to perform the services for [Ingenuity]."
>
> 7. By commencing work on the Sharon Project, LPS began performing under the terms of the MSA.

Affidavit of Katie Williams, ¶¶ 2-7 (Mar. 2, 2016).

After reviewing this proof, the analysis the Court used in its March 9, 2016 order denying arbitration was that the Defendant had not shown arbitration was compelled

because there was a genuine issue of material fact as to whether the parties actually agreed (*i.e.*, whether there was mutual assent) to the MSA, including the arbitration provision, or whether another contract governed the relationship between the parties, and that competing inferences could be drawn about whether the MSA governed the parties' work on the project. On that basis, the Court denied the Defendant's motion to compel arbitration. The Court did not take the next step required by Tennessee law of resolving and deciding whether an agreement to arbitrate had been formed by the parties. The *Memorandum And Order Denying Defendant's Motion To Compel Arbitration, Stay Proceedings And Enter Protective Order*, pp. 2-4 (Mar. 9, 2016) states the following:

> The basis for Defendant's claim to arbitration is section 9 of a Master Services Agreement (the "MSA"), attached to the Defendant's *Motion*. Defendant asserts it discovered the MSA in reviewing information to respond to discovery.
>
> Review of the MSA reveals that it is dated December 4, 2013, and it is unsigned. Section 9 of the MSA does contain an arbitration provision.
>
> Further relevant is that the allegations of the *Verified Complaint* assert that the Plaintiff provided services on the Project, the parties discussed pricing arrangements, and the Plaintiff submitted invoices to the Defendant throughout 2015. The *Verified Complaint*, however, does not make any reference to the MSA. Moreover, the MSA is not attached to the *Verified Complaint* as per Tennessee Civil Procedure Rule 10.03 which provides that when a claim or defense is founded upon a written instrument a copy of the instrument shall be attached to the pleading as an exhibit. That the MSA is not attached to the *Verified Complaint* indicates that the Plaintiff is not relying upon it as a basis for its recovery. Additionally in its February 29, 2016 opposition to arbitration and the attached affidavit of Todd Sanford, the CEO for Plaintiff, he states that the MSA was proposed by the Plaintiff to the Defendant in December of 2013 but it was "never accepted and was not signed." Mr. Sanford further testifies that the parties did not assent to the MSA's terms, and the parties never operated under the MSA. "The MSA does not control the parties' relationship and never did. The only contact between the parties regarding the actions alleged in the

Verified Complaint was negotiated in 2015 and is described in the *Verified Complaint*. *See* Compl. ¶¶ 9-21." *Affidavit of Todd Sanford*, Feb. 29, 2016, at ¶ 4.

In reply the Defendant attaches an April 20, 2015 email from an employee of the Plaintiff which refers to the MSA as follows:

> Hi Katie!
>
> We do need just one more document signed, please. Attached is our Master Service Agreement (MSA). This just allows us to perform the services for you. Please let me know if you have any questions. If not, please sign and return and I will send you a counter signed MSA for your records. Thank you!

Based upon this April 20, 2015 email, the Defendant argues that the MSA was mutually assented to by the parties, and, therefore, constitutes an enforceable contract, including its section 9 arbitration provision. The Defendant's legal argument is that a written contract does not have to be signed to be binding on the parties. "What is critical is mutual assent to be bound by the terms of the contract, which can be established based on the dealings of the parties." *Reply in Support of Defendant's Motion to Compel Arbitration; Stay Proceedings and Enter Protective Order*, March 2, 2016, at p. 2.

The legal lynchpin of Defendant's argument is that because there is mutual assent the MSA is an enforceable contract; the factual lynchpin is the Plaintiff's April 20, 2015 email seeking Defendant's signature to the MSA. Mutual assent, however, is not established by the present record. The April 20, 2015 email constitutes, at best, production of the MSA by the Plaintiff to the Defendant for signature. After that, competing inferences can be drawn about whether the MSA governed the parties' work on the project. The March 2, 2016 Declaration of Defendant's representative, Katie Williams, asserts in paragraph 5 that the Defendant assented to the MSA governing the parties' relationship on the Project. There is, however, no objective evidence of that in the present record such as a signed version or an email. There is a course of performance by the Plaintiff, but the Plaintiff's version of events, as asserted in the February 29, 2016 *Affidavit of Todd Sanford*, CEO of the Plaintiff, quoted above, is that the MSA was not accepted by the Defendant, and the course of dealing does not show the MSA controlled the parties' relationship. Under these circumstances of competing understandings and inferences, the Defendant has not

demonstrated mutual assent, the essential element of an enforceable agreement, and the predicate for compelling arbitration.

Evidentiary Hearing Required To Resolve Factual Disputes

When faced with a motion to compel arbitration where the opposing party disputes the validity/enforceability of the arbitration agreement, under Tennessee law a court is required to stay the proceedings and resolve the arbitration issue prior to proceeding on the merits of the case:

> The purpose of arbitration is to promote the settlement of disputes without judicial involvement. *Arnold,* 914 S.W.2d at 448 n. 2. The [Tennessee Uniform Arbitration Act] effectuates this purpose by limiting the authority of a trial court to conduct proceedings on the merits prior to determining whether arbitration should be enforced. The language of the [Tennessee Uniform Arbitration Act] clearly and unambiguously instructs courts to determine whether arbitration is required before delving into the merits of the case Discovery is appropriate if it is limited to matters raised in the motion to compel arbitration. The trial court, however, must stay all other proceedings, including discovery unrelated to the issue of arbitrability.

Glassman, Edwards, Wyatt, Tuttle & Cox, P.C. v. Wade, 404 S.W.3d 464, 467-68 (Tenn. 2013) (footnote omitted). Other cases with contract formation issues provide further support.[3]

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[3] Specifically, the Court reviewed the following cases: *Glassman, Edwards, Wyatt, Tuttle & Cox, P.C. v. Wade*, 404 S.W.3d 464 (Tenn. 2013); *Wofford v. M.J. Edwards & Sons Funeral Home Inc*, No. W201500092COAR3CV, 2015 WL 7428743 (Tenn. Ct. App. Nov. 23, 2015); *Capps v. Adams Wholesale Co.*, No. E201401882COAR3CV, 2015 WL 2445970 (Tenn. Ct. App. May 21, 2015); *Clayton v. Davidson Contractors, LLC*, No. E201302296COAR3CV, 2015 WL 1880973, (Tenn. Ct. App. Apr. 24, 2015); *Skelton v. Freese Const. Co.*, No. M2012-01935-COA-R3CV, 2013 WL 6506937 (Tenn. Ct. App. Dec. 9, 2013); *Webb v. First Tennessee Brokerage, Inc.*, No. E2012-00934-COA-R3CV, 2013 WL 3941782 (Tenn. Ct. App. June 18, 2013); *Broadnax v. Quince Nursing & Rehab. Ctr., LLC*, No. W200802130COAR3CV, 2009 WL 2425959 (Tenn. Ct. App. Aug. 10, 2009); *Wilson v. Battle Creek Milling & Supply, Inc.*, No. M200702830COAR3CV, 2008 WL 5330498 (Tenn. Ct. App. Dec. 19, 2008); *Robert J. Denley Co. v. Neal Smith Const. Co.*, No. W2006-00629-COA-R3CV, 2007 WL 1153121 (Tenn. Ct. App. Apr. 19, 2007); *J.C. Bradford & Co., LLC v. Kitchen*, No. M200200576COAR3CV,

Preliminary resolution by a court is mandatory when an issue arises of contract formation of the parties' arbitration agreement. *Clayton v. Davidson Contractors, LLC*, No. E201302296COAR3CV, 2015 WL 1880973, at *6 (Tenn. Ct. App. Apr. 24, 2015) (quoting *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287, 297 & 299 (2010); 9 U.S.C.A. § 4.) ("'A court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*.'.... "To satisfy itself that such an agreement exists, the court must resolve: (1) any issue questioning the formation of the parties' arbitration agreement; and (2) absent a valid delegation provision, any issue regarding the enforceability or applicability of the arbitration agreement to the dispute.").

Other legal principles which are relevant are that under Tennessee law it is clear that "[a]lthough there is a federal policy favoring arbitration, that policy does not override the principle of consent." *Clayton v. Davidson Contractors, LLC*, No. E201302296 COAR3CV, 2015 WL 1880973, at *7 (Tenn. Ct. App. Apr. 24, 2015) (citation omitted); see also *Wofford v. M.J. Edwards & Sons Funeral Home Inc*, No. W201500092COAR3CV, 2015 WL 7428743, at *6 (Tenn. Ct. App. Nov. 23, 2015) (citations omitted) ("Despite the favorability of arbitration agreements, parties 'cannot be forced to arbitrate claims that they did not agree to arbitrate.'").

2003 WL 21077643 (Tenn. Ct. App. May 14, 2003); *Evans v. Matlock*, No. M2001-02631-COA-R9CV, 2002 WL 31863294 (Tenn. Ct. App. Dec. 23, 2002); *T.R. Mills Contractors, Inc. v. WRH Enterprises, LLC*, 93 S.W.3d 861 (Tenn. Ct. App. 2002); *Carolyn B. Beasley Cotton Co. v. Ralph*, 59 S.W.3d 110 (Tenn. Ct. App. 2000); *Rebound Care Corp. v. Universal Constructors, Inc.*, No. M1999-00868-C0A-R3-C, 2000 WL 758610 (Tenn. Ct. App. June 13, 2000); *C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 716 F. Supp. 307 (W.D. Tenn. 1989).

Furthermore, the factual/legal determination of whether there is mutual assent to form an enforceable arbitration agreement is for the Court,[4] not an arbitrator:

> In a contest involving an arbitration agreement, a court has to decide "certain gateway matters, such as whether the parties have a valid arbitration agreement at all." *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444, 452 (2003) (citations omitted); *Taylor v. Butler,* 142 S.W.3d 277, 283–84 (Tenn.2004) (citations omitted) ("Generally, whether a valid agreement to arbitrate exists between the parties is to be determined by the courts."). "In determining whether there is a valid agreement to arbitrate, 'courts generally ... should apply ordinary state-law principles that govern formation of contracts.' " *Taylor,* 142 S.W.3d at 84. (quoting *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944 (1995)); *see also Clayton v. Davidson Contractors, LLC,* No. E2013–02296–COA–R3–CV, 2015 WL 1880973, at *7–8 (Tenn.Ct.App. Apr. 24, 2015) (requiring the trial court to consider whether a contract was formed before compelling arbitration).
> A contract, either written or oral, "must result from a meeting of the minds of the parties in mutual assent to the terms, must be based upon a sufficient consideration, free from fraud or undue influence, not against public policy and sufficiently definite to be enforced." *Higgins v. Oil, Chem. and Atomic Workers Int'l Union,* 811 S.W.2d 875, 879 (Tenn.1991) (internal quotation and citation omitted). Tennessee courts have also defined a contract more simply as "'an agreement, upon sufficient consideration, to do or not to do a particular thing.'" *Calabro v. Calabro,* 15 S.W.3d 873, 876 (Tenn.Ct.App.1999) (quoting *Smith v. Pickwick Elec. Coop.,* 367 S.W.2d 775, 780 (Tenn.1963) (internal citation omitted)).

Capps v. Adams Wholesale Co., No. E201401882COAR3CV, 2015 WL 2445970, at *3 (Tenn. Ct. App. May 21, 2015).[5]; see also *Webb v. First Tennessee Brokerage, Inc.*, No.

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[4] This preliminary determination by the Court as to whether there was a meeting of the minds is also confirmed by Tennessee's Uniform Arbitration Act which states:

> (a) On application of a party showing an agreement described in § 29-5-302, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, *the court shall proceed summarily to the determination of the issue so raised* and shall order arbitration if found for the moving party; otherwise, the application shall be denied.

TENN. CODE ANN. § 29-5-303 (West 2016) (emphasis added).

E2012-00934-COA-R3CV, 2013 WL 3941782, at *16 (Tenn. Ct. App. June 18, 2013) ("'Tennessee law contemplates judicial resolution of contract formation issues.' Accordingly, the trial court properly concluded that it had jurisdiction to address the issues regarding whether the agreement (including the arbitration agreement) was unenforceable.").

"In 'deciding whether parties agreed to arbitrate a particular issue,' the court should ''ascertain the intention of the parties by a fair construction of the terms and provisions of the contract, by the subject matter to which it has reference, by the circumstances of the particular transaction giving rise to the question, and by the construction placed on the agreement by the parties in carrying out its terms.''" *Wofford v. M.J. Edwards & Sons Funeral Home Inc*, No. W201500092COAR3CV, 2015 WL 7428743, at *6 (Tenn. Ct. App. Nov. 23, 2015) (citation omitted).[6]

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[5] A legal distinction to this rule was recognized in *Clayton v. Davidson Contractors, LLC*, where the Court recognized that *contract validity* issues may be determined by an arbitrator if the arbitration clause at issue has a valid delegation provision delegating threshold issues concerning the arbitration agreement to the arbitrator. No. E201302296COAR3CV, 2015 WL 1880973, at *4 & *7 (Tenn. Ct. App. Apr. 24, 2015) (citations omitted) ("Threshold issues may include whether the parties have agreed to arbitrate any dispute at all, whether the agreement covers a particular controversy, or whether the agreement is enforceable....Where there is a delegation provision, an arbitrator decides a party's challenge to the *validity* of the contract as a whole. Therefore, when a party claims it never concluded an agreement at all, it is for the court, not the arbitrator, to determine whether the parties agreed to the arbitration provision upon which the party seeking arbitration relies."). The arbitration provision in this case does not contain a delegation provision.

[6] Requiring a Court, rather than an arbitrator, to determine contract formation issues first is also sound public policy and consistent with the procedure followed in other jurisdictions:

> Requiring the court to resolve the [Plaintiff's] claim that a contract was never formed is sound policy. Compelling a party to arbitrate whether he actually agreed to arbitrate a dispute is "hopelessly circular." *Bruni v. Didion*, 73 Cal.Rptr.3d 395, 408 (Cal.Ct.App. 2008). Judicial determination of the [Plaintiff's] formation issue also avoids a serious "bootstrapping" problem regarding the arbitrator's authority. *Id.* at 406; *see also Matterhorn, Inc. v. NCR Corp.*, 763 F.2d 866, 869 (7th Cir. 1985). If the [Plaintiffs] were compelled to arbitrate whether they agreed to the warranty contract, including the

No Authority to Refer to Mediation

Considering the delay and expense of an evidentiary hearing on the arbitration agreement formation issue, the Court was evaluating referral to mediation. The Court concludes, however, that with an outstanding issue as to whether the case shall proceed to arbitration, mediation is not an option:

> The TUAA also limits the trial court's authority to order Rule 31 mediation on the merits of an issue that is subject to an arbitration agreement. When the parties have deemed arbitration to be the chosen method of alternative dispute resolution, the dispute is governed by the TUAA rather than Tennessee Supreme Court Rule 31. *See Tuetken v. Tuetken,* 320 S.W.3d 262, 269 (Tenn. 2010). The TUAA explicitly confers jurisdiction on the

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> delegation provision, the arbitrator would determine his own authority to decide the parties' dispute. If the arbitrator concluded the parties did not have a contract, the arbitrator had no authority to decide the dispute. If the arbitrator concluded the parties did have a contract, the arbitrator effectively granted himself jurisdiction. *See In re Morgan Stanley,* 293 S.W.3d at 193 (Hecht, J., dissenting). Finally, this outcome is consistent with arbitration law's focus on the parties' consent to arbitrate a particular dispute. *Granite Rock,* 561 U.S. at 302 (citing *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943 (1995)).
>
> Requiring the court to resolve the [Plaintiff's] claim that a contract was never formed is also consistent with the decisions of other courts. *See, e.g., Bruni,* 73 Cal.Rptr.3d at 406 (concluding that a court must consider a contract formation challenge before compelling arbitration in a dispute involving home buyers, builders, and an HBW warranty); *Thompson v. Lithia Chrysler Jeep Dodge of Great Falls, Inc.,* 185 P.3d 332 (Mont. 2008); *Spahr v. Secco,* 330 F.3d 1266 (10th Cir. 2003); *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.,* 256 F.3d 587 (7th Cir. 2001); *Sandvik AB v. Advent Int'l Corp.,* 220 F.3d 99 (3d Cir. 2000); *Chastain v. Robinson–Humphrey Co.,* 957 F.2d 851 (11th Cir. 1992). Although these cases were decided before *Rent–A–Center,* that decision did not address a scenario where a party argued that no agreement "was ever concluded." *Rent–A–Center,* 561 U.S. at 70, n.2. Moreover, *Granite Rock* confirms that courts must satisfy themselves that the parties agreed to arbitrate a particular dispute before compelling arbitration. 561 U.S. at 297; *see also Kum Tat Ltd. v. Linden Ox Pasture, LLC,* No. 14–CV–02857–WHO, 2014 WL 6882421, at *5 (N.D.Cal. Dec. 5, 2014) (appeal pending); *In re Morgan Stanley,* 293 S.W.3d at 188.

Clayton v. Davidson Contractors, LLC, No. E201302296COAR3CV, 2015 WL 1880973, at *8 (Tenn. Ct. App. Apr. 24, 2015).

> trial court to enforce the arbitration agreement and to enter judgment on the arbitration award. Tenn. Code Ann. § 29–5–302(b). The rules of the Tennessee Supreme Court cannot expand the scope of a trial court's jurisdiction to permit adjudication of matters over which it has no authority. *See Haley v. Univ. of Tenn.–Knoxville,* 188 S.W.3d 518, 522 (Tenn.2006) ("[J]urisdiction of the subject matter is conferred by the constitution and statutes") (quoting *Kane v. Kane,* 547 S.W.2d 559, 560 (Tenn.1977)); *see also* Tenn. Code Ann. § 16–3–403 (2009) ("The rules prescribed by the supreme court ... shall not abridge, enlarge or modify any substantive right, and shall be consistent with the constitutions of the United States and Tennessee.").

Glassman, Edwards, Wyatt, Tuttle & Cox, P.C. v. Wade, 404 S.W.3d 464, 468 (Tenn. 2013).

No Waiver of Arbitration Due to Belated Assertion

Lastly, during oral argument, the Plaintiff emphasized that the Defendant's motion to compel arbitration was belated in the sense that it was asserted on the eve of Defendant's discovery responses being due. In further support of its belated argument, the Plaintiff argued that the Defendant failed to assert arbitration as an affirmative defense in its *Verified Answer* filed prior to the *Motion To Compel* on January 21, 2016. In connecting these facts to an applicable legal principle, the Court researched whether a contractual right to arbitration may be waived by a party based upon its corresponding action in proceeding to litigation.

The law in Tennessee is clear that "the right to arbitrate can be waived just like any other contract right." *Robert J. Denley Co. v. Neal Smith Const. Co.*, No. W2006-00629-COA-R3CV, 2007 WL 1153121, at *8 (Tenn. Ct. App. Apr. 19, 2007) (citation

omitted). In determining whether arbitration has been waived, the case law provides this guidance:

- We hold that a determination of waiver in arbitration cases controlled by federal law necessarily implicates prejudice to the party opposing arbitration; otherwise the issue evolves into a simple, mechanistic election of remedies inimical to the entire process. The appellant argues that the record reveals no prejudice to the plaintiffs whatsoever, and we agree. The appellees argue that the Sixth Circuit has adhered to the principle that a determination of waiver requires a finding only that the defaulting party has acted inconsistently with the right to arbitrate, the issue of prejudice aside. *See, Germany v. River Terminal Ry. Co.,* 477 F.2d 546 (6th Cir.1973). But we think the recent case of *General Star Ins. Co. v. Administratia Asigurarilor de Stat,* 289 F.3d 434 (6th Cir.2002), decided after the trial court's ruling herein, clarifies the issue.

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  > But "an agreement to arbitrate may be waived by the actions of a party which are completely inconsistent with any reliance thereon." *Germany v. River Terminal Ry. Co.,* 477 F.2d 546 (6th Cir.1973) (per curiam). Although a waiver of the right to arbitration is "not to be lightly inferred," *MicroStrategy, Inc. v. Lauricia,* 268 F.3d 244, 249 (4th Cir.2001) (internal quotation marks omitted), a party may waive the right by delaying its assertion to such an extent that the opposing party **incurs actual prejudice.** *Doctor's Assocs., Inc. v. Distajo,* 107 F.3d 126, 131 (2d Cir.1997) (recognizing that a party waives the right to arbitrate where it delays the invocation of that right to the extent that the opposing party incurs "unnecessary delay or expense") (internal quotation marks omitted).

  ****

  We hold that the party in opposition to arbitration is burdened with the responsibility to show such party was prejudiced in some material way by the judicial action. Here, no actual prejudice was shown, and no prejudice resulted.

J.C. Bradford & Co., LLC v. Kitchen, No. M200200576COAR3CV, 2003 WL 21077643, at *3-4 (Tenn. Ct. App. May 14, 2003) (citations omitted).

- Our Supreme Court has noted that the right to arbitration can be waived under the equitable principles of estoppel, *laches,* or waiver.

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In Annotation, Defendant's Participation in Action as Waiver of Right to Arbitration of Dispute Involved Therein, 98 ALR3d 771, it is stated:

> In general, even in those jurisdictions where a contract for arbitration is irrevocable, the right to arbitration under the contract may be waived either by express words or by necessary implication, for example, where the conduct of a party clearly indicates an intent to waive the right to arbitrate. In those cases involving the issue of whether the defendant's participation in an action constitutes a waiver of the right to arbitrate the dispute involved therein, no general rules are readily apparent for determining waiver other than the general adherence by the courts to the principle that waiver is to be determined from the particular facts and circumstances of each case, or other than the rule, applied by the courts in some recent cases, that it is the presence or absence of prejudice, and not the inconsistency of the defendant's conduct, which is determinative of the issue of waiver of the right to arbitration.

Rebound Care Corp. v. Universal Constructors, Inc., No. M1999-00868-C0A-R3-C, 2000 WL 758610, at *6-7 (Tenn. Ct. App. June 13, 2000) (citation omitted).

- "'[A]n agreement to arbitrate may be waived by the actions of a party which are completely inconsistent with any reliance thereon.' " *Wilson v. Battle Creek Milling & Supply, Inc.*, No. M2007–02830–COA–R3–CV, 2008 WL 5330498, at *3 (Tenn.Ct.App. Dec. 19, 2008) (quoting *J.C. Bradford & Co., L.L.C. v. Kitchen,* No. M2002–00576–COAR3–CV, 2003 WL 21077643, at *3 (Tenn.Ct.App. May 14, 2003)). As recently explained by this Court,

> Waiver "may be proved by express declaration; or by acts and declarations manifesting an intent and purpose not to claim

> the supposed advantage; or by a course of acts and conduct." *Chattem, [Inc. v. Provident Life & Acc. Ins. Co.,]* 676 S.W.2d [953,] 955 [Tenn.1984]. Stated another way, "waiver is proven by a clear, unequivocal and decisive act of the party, showing a purpose to forgo the right or benefit which is waived." *E & A Ne. Ltd. P'ship [v. Music City Record Dist., Inc.,* No. M2005-01207-COA-R3-CV,] 2007 WL 858779, at *7 [Tenn. Ct.App. Mar. 21, 2007]. "The law will not presume a waiver, and the party claiming the waiver has the burden of proving it by a preponderance of the evidence." *Jenkins Subway, Inc. v. Jones,* 990 S.W.2d 713, 722 (Tenn.Ct.App.1998). Generally, whether a waiver of a contractual provision has occurred in a given factual setting is a question of fact [.] *Gaston v. Tenn. Farmers Mut. Ins. Co.,* 120 S.W.3d 815, 819 (Tenn.2003).

Skelton v. Freese Const. Co., No. M2012-01935-COA-R3CV, 2013 WL 6506937, at *4-5 (Tenn. Ct. App. Dec. 9, 2013) (footnotes omitted).

- In Tennessee, the right to arbitrate can be waived just like any other contract right. *Leon Williams Gen. Contractor, Inc. v. Hyatt,* No. E2001-00434-COA-R3-CV, slip op. at 3 (Tenn.Ct.App.E.S. Feb. 7, 2002). "One of the aims of arbitration is to avoid the expense and time involved in litigation. This purpose is not served by compelling arbitration after the litigation is complete." *Mitchell v. Owens,* 185 S.W.3d 837, 840 (Tenn.Ct.App.2005) (citing *Stahl v. McGenty,* 486 N.W.2d 157, 159 (Minn.Ct.App.1992)). However, to be consistent with the public policy in favor of arbitration, there is a generally recognized presumption against waiver of the right to arbitrate. *Chapman v. H & R Block Mortgage Corp.,* No. E2005-00082-COA-R3-CV, slip op. at 13 (Tenn.Ct.App.E.S.Nov.28, 2005). A party seeking to prove waiver of an agreement to arbitrate bears a heavy burden. *Id.* In order to prevail on this claim, he must show that the other party knew of their right to arbitrate, acted inconsistently with that right, and, in doing so, prejudiced the complaining party by their actions. *Id.* (citing *Owner-Operator Indep. Drivers Ass'n, Inc., v. Swift Transp. Co., Inc.,* 288 F.Supp.2d 1033, 1034 (D.Ariz.2003)). "[T]he court must resolve any doubt as to whether a waiver occurred in favor of a finding of arbitrability." *Id.*

  By way of example, a party was deemed to have waived his right to arbitrate claims when a trial court dismissed his request for arbitration, and he did not appeal the order at that time but proceeded to trial and a final judgment. *Mitchell v. Owens,* 185 S.W.3d 837, 838 (Tenn.Ct.App.2005).

> On the other hand, a party who filed a complaint in a chancery court and later demanded arbitration of the claims was found *not* to have waived his right to arbitrate. *Leon Williams Gen. Contractor, Inc. v. Hyatt,* No. E2001-00434-COA-R3-CV, slip op. at 4 (Tenn.Ct.App.E.S. Feb. 7, 2002). In another case, a party did not waive its right to arbitrate claims even though it answered the complaint, discovery had commenced and it responded to interrogatories, two motions had been filed and heard, restraining orders had been entered, and a default judgment was entered against a separate defendant. *Chapman,* slip op. at 15. The Court of Appeals in that case found that the activity was "neither so inconsistent with arbitration as to show an abandonment of that right, nor has it prejudiced Ms. Chapman to such a degree as to warrant a finding of waiver." *Id.*
>
> *Robert J. Denley Co. v. Neal Smith Const. Co.*, No. W2006-00629-COA-R3CV, 2007 WL 1153121, at *8-9 (Tenn. Ct. App. Apr. 19, 2007).

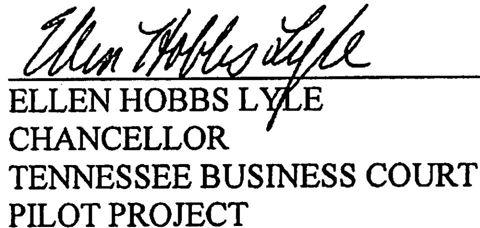
Applying the law to the facts, the Court concludes that the Defendant's conduct to date in this case does not state a claim for waiver because Defendant's actions or that of its Counsel do not reach the level of inconsistency and prejudice to constitute a waiver. In reaching this conclusion, the Court has considered particularly the case of *Robert J. Denley Co. v. Neal Smith Const. Co.*, No. W2006-00629-COA-R3CV, 2007 WL 1153121, (Tenn. Ct. App. Apr. 19, 2007) because of the factual similarity to this case. In *Robert J. Denley Co. v. Neal Smith Const. Co.*, as in this case, the defendants filed an answer setting forth affirmative defenses but did not mention an arbitration clause. The plaintiff in *Robert J. Denley Co. v. Neal Smith Const. Co.*, just like the Plaintiff here, served the defendants with interrogatories and requests for production of documents, but the defendants did not respond, instead filed a motion to compel arbitration.

In determining whether these procedural facts satisfied the requirements of waiver, the Court in *Robert J. Denley Co. v. Neal Smith Const. Co.* held:

> Next, we consider Denley's contention that the defendants waived their right to arbitrate by filing an answer in the chancery court and waiting until after Denley had served the defendants with interrogatories and requests for production of documents to demand that the disputes be arbitrated.
>
> ****
>
> Similarly, we find that the defendants' filing of an answer in this case was not so inconsistent with the right to arbitrate as to demonstrate an abandonment of that right, and Denley was not prejudiced by their delay in demanding arbitration. Thus, the defendants did not waive their right to arbitrate the disputes.

Robert J. Denley Co. v. Neal Smith Const. Co., No. W2006-00629-COA-R3CV, 2007 WL 1153121, at *9 (Tenn. Ct. App. Apr. 19, 2007).

It is the foregoing law and analysis on which the Court bases its decision to alter and amend the March 9, 2016 Order, proceed with an evidentiary hearing, stay this litigation in the meantime and deny at this time Plaintiff's motion to compel.



ELLEN HOBBS LYLE
CHANCELLOR
TENNESSEE BUSINESS COURT
PILOT PROJECT

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