

**IN THE SUPREME COURT OF OHIO**

Matrix Technologies, Inc.

Supreme Court Case No. **08-0885**

Appellant,

v.

On Appeal from the Lucas County Court of Appeals, Sixth Appellate District

Kuss Corporation, et al.

Court of Appeals Case No. L-07-1301

Appellees.

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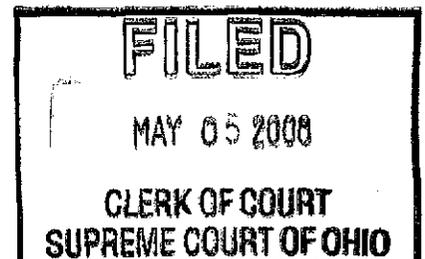
**MEMORANDUM OF MATRIX TECHNOLOGIES, INC.**  
**IN SUPPORT OF JURISDICTION**

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**TABLE OF CONTENTS**

	<b><u>Page</u></b>
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND/OR INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....	1
STATEMENT OF THE CASE AND FACTS .....	3
ARGUMENT IN SUPPORT OF PROPOSITION OF LAW.....	6
<u>Proposition of Law No. 1: Only parties in privity of contract     may compel each other to arbitrate claims arising under     their contract.</u> .....	6
CONCLUSION.....	10
CERTIFICATE OF SERVICE .....	10

APPENDIX	<b><u>Appx. Page</u></b>
Decision and Judgment Entry of the Lucas County Court of Appeals (March 21, 2008).....	1
Opinion and Judgment Entry of the Lucas County Common Pleas Court (August 21, 2007) .....	6

**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND/OR INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

The right of parties to present disputes in court dates back to Magna Carta and is fundamental to the American system of jurisprudence. It would be overstating this case to say that the Court of Appeals decision in this matter threatens the system as a whole. However, it is accurate to state that the incremental erosion of the rights of litigants is a real and not perceived threat.

Ohio courts have been consistent in construing contracts. Ohio courts require privity of contract to make contract terms enforceable. Exceptions to this rule are narrowly defined and rarely applied. Ohio courts also interpret contracts based upon their plain and ordinary meaning to glean the parties' intent. Ohio courts do not re-write contracts and hold ambiguities against the drafter of the contract. *Latina v. Woodpath Dev. Co.* (1991), 57 Ohio St. 3d 212. Only clear and unambiguous terms will be enforced. *Alexander v. Buckeye Pipeline Co.* (1978), 53 Ohio St. 2d 241; *Shifrin v. Forest City Enterprises, Inc.* (1992) 64 Ohio St. 3d 635.

Consistent with these principles, Ohio courts have consistently required that a party's intent to waive its right to present matters in court, by use of arbitration, be clearly demonstrated by a written agreement. *Council of Smaller Enterprises v. Gates McDonald & Co.* (1998, 80 Ohio St. 3d 661).

The issue presented by this appeal is of great public interest because the Court of Appeals decision creates a new exception to the requirement that a party must be in privity of contract with those seeking to enforce contract terms. Such an exception has not been authorized by the legislature or through any decision of this Court. Instead, the Court of Appeals created new law.

Privity of contract has been reasoned to be essential to the enforcement of contracts because it guarantees that the parties embroiled in the dispute originally negotiated the

agreement of its individual terms and agreed to be bound by those terms in entering into the agreement. Therefore, privity is a threshold requirement to enforcement of any agreement.

Yet, the Court of Appeals crafted a new exception to the privity requirement by finding that a subcontractor can be compelled to arbitrate claims by a project owner, even in the absence of privity and an agreement by the subcontractor to do so. The Court of Appeals, ignoring principles of contract interpretation long established, held that the agreement between an owner and general contractor, providing for arbitration of disputes arising under that agreement, also compelled the subcontractor to arbitrate the owners' disputes with the subcontractor, since the subcontractor had agreed to arbitrate disputes arising under its subcontract with the general contractor.

The Court of Appeals decision is contrary to Ohio contract law. That Court found that an agreement to arbitrate a dispute existed when the subcontract contained no such agreement. In essence, the Court found that an agreement to arbitrate disputes arising under one contract amounted to an agreement to arbitrate all disputes arising under any contract on the construction project. The Court based its decision on the agreement by the subcontractor that it would *perform its services* in the same manner and to the same extent required of the general contractor. Nowhere, in the subcontract agreement does Matrix agree to arbitrate claims by parties with which it is not in privity of contract.

The only authority for this result cited by the Court is a case where claims were made that are the opposite of the claims made in the present case. The decision in *Gibbons-Grable Co. v. Gilbane Bldg. Co.*(1986), 34 Ohio App. 3d 170, held that a subcontractor trying to make a claim against a project owner, with whom it was not in privity of contract, was required by the subcontract to arbitrate the dispute. In that case, the subcontractor was trying to use the agreement between the

owner and general contractor as a basis for making a claim against the owner. That being the case, the Court held that arbitration was required because the subcontractor based his claims upon the contract. In the present case, the owner is not trying to use any agreement as the basis for its claims, it is making tort claims. It is only using the contract as a basis to claim that arbitration is required.

All construction agreements with subcontractors are affected by the Court of Appeals decision in this case. The Court gave project owners new rights to force arbitration of disputes with parties with whom they do not have contracts. Not only did the Court's decision extend project owners' ability to force arbitration, it conceivably could be used as authority to claim that project owners now have a right to sue subcontractors directly for economic damage claims, a position clearly contrary to decisions of this Court.

This Court should put a halt to this contradiction of well settled Ohio law. This Court should only permit parties in privity of contract to enforce contract terms.

#### **STATEMENT OF THE CASE AND FACTS**

Matrix Technologies, Inc. (Matrix) has appealed the Sixth District Court of Appeals decision affirming a decision of the Lucas County Court of Common Pleas finding that Matrix, while not a party to an arbitration agreement between a general contractor and project owner, may still be compelled to arbitrate claims against it by the project owner, despite no privity of contract existing between Matrix and the project owner.

Matrix was the mechanical design engineer for the construction of a new manufacturing facility by Kuss Corporation (Kuss). The general contractor on the project was Rudolph Libbe, Inc. (RLI)

Kuss determined its own scope of work for the project by dividing the project into two phases: (1) Construction of the new manufacturing facility and (2) Relocation and connection of

existing machinery used by Kuss in its manufacturing. Kuss and RLI made clear the separation of the two phases of the project in the contract between them. Division 16.5 of the Design/Build Contract, provided that “disconnect and reconnect of existing manufacturing equipment is not included in this proposal. It is assumed to be associated with the equipment moved”.

For this reason, Matrix included zero dollars in its budget for field investigation of Kuss’ existing facility and the machinery used at that facility.

In fulfilling its agreement with RLI, Matrix designed a standard industrial electrical system based upon a 480 volt, 3 wire design. The system provided flexibility for expansion and replacement of old machinery with new. Had Matrix been asked to evaluate Kuss’ existing equipment, it would have designed the same system, but called for additional installation of transformers to connect Kuss’ aging equipment. Matrix’s design was presented to Kuss and its contractor Industrial Power Systems (IPS) without objection.

Kuss reasoned that it could save money on the relocation and reconnection of equipment by having IPS do the work. IPS was familiar with Kuss’ facility and equipment.

When IPS relocated and reconnected the old Kuss equipment, however, it discovered that transformers were needed to connect some of the older machinery to the electrical system designed by Matrix.

To resolve the problem, RLI provided the transformers needed and Kuss demanded that IPS provide the labor as per its guaranty not to exceed contract price for relocating and connecting the equipment.

IPS proceeded with the work, but had time tickets signed by Kuss employees. Kuss did not realize that the time tickets were going to be used by IPS to prosecute an extra labor claim. The contract between IPS and Kuss for relocation and reconnection of equipment required that any

change orders to the agreement be in writing and approved by both parties. No change orders were ever issued.

IPS commenced an action against Kuss in the Hancock County Court of Common Pleas. Kuss moved to have the case stayed while the parties proceeded to arbitration under the contract between Kuss and IPS.

Despite the contract provision requiring that change orders be issued, IPS was successful in the arbitration by convincing the arbitrator that the time tickets signed by Kuss constituted new contracts to pay for extra labor to complete the relocation and reconnection of Kuss' equipment.

In the arbitration, IPS claimed that Matrix erred in its design of electrical system for the new facility by not including a 4 wire system that would have provided lower voltage to connect the older machines. IPS used this argument to suggest that the conditions supporting its initial agreement with Kuss changed, justifying the payment and added expense by Kuss. Because of this allegation, once it paid the judgment entered in favor of IPS, Kuss then demanded arbitration with RLI and Matrix for reimbursement of the extra labor costs paid to IPS allegedly as a result of Matrix's design error.

Matrix objected to the arbitration and commenced an action in the Common Pleas Court seeking injunctive relief and a declaratory judgment that it was not obligated to arbitrate the claims being made by Kuss against it. Matrix argued that the damages paid by Kuss to IPS arose under an agreement to which it was not a party, that there was no written contract between Kuss and Matrix for the design and that the claims made by IPS against Kuss did not arise under any contract to which Matrix was a party containing an arbitration agreement.

The trial court, relying upon the case of *Gibbons-Grable Co. v. Gilbane Bldg. Co.*, *supra*, determined that because there was a contract between RLI and Matrix containing an arbitration

agreement, that Kuss, not a party to that contract, could force Matrix to arbitrate Kuss' claims against it.

The Court of Appeals affirmed the trial court's decision without considering any of the arguments raised by Matrix. The present appeal followed.

**ARGUMENT IN SUPPORT OF PROPOSITION OF LAW**

**Proposition of Law No. 1: Only parties in privity of contract may compel each other to arbitrate claims arising under their contract.**

**I. COURT DECISIONS ERODING PARTIES RIGHTS TO PRESENT THEIR CASES IN COURT RATHER THAN THROUGH ARBITRATION PRESENT AN ISSUE OF GREAT PUBLIC AND GENERAL INTEREST AS WELL AS A SUBSTANTIAL CONSTITUTIONAL QUESTION.**

**1. Ohio Arbitration Standard**

Ohio Revised Code Section 2711.01 provides that a written agreement to settle disputes arising under that contract is valid and enforceable. This authority is in derogation of Ohio's Constitution Article IV, providing original jurisdiction to the Common Pleas Courts and Article I, Section 16, which provides that claims for damage shall be heard at law in open courts. The authority give by the Statute is not unlimited.

The Ohio Supreme Court stated, as follows, in *Council of Smaller Enterprises v. Gates McDonald & Co.* (1998), 80 Ohio St. 3d 661:

Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit . . . . This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed to submit such grievance to arbitration.

(*Id.*, at 665.) It is only where there was a contract "*entered into by the parties* contains an arbitration clause, there is a presumption of arbitrability . . .". *Benjamin v. Pipoly*, (2003) 155 Ohio App. 3d 171. In *Benjamin*, *supra*, the court applied the doctrine enunciated by the Ohio Supreme Court in *Gates McDonald*, *supra*:

However, the court in *Council of Smaller Enterprises* noted that because no party can be required to submit to arbitration when it has not first agreed to do so, in a case where the party resisting arbitration is not a signatory to any written agreement to arbitrate, **a presumption against arbitration arises**. This presumption against arbitration, and the question whether any agreement to arbitrate was made between the parties, are to be dealt with **before** any consideration is given to the “arbitrability” of the particular dispute under the language employed in the arbitration provision.

(*Id.* at 181-2, citing the Supreme Court decision in *Gates McDonald*, *supra*.)

In *Gates McDonald*, *supra*, there was a direct contract between the parties. As a basic principle, arbitration is a matter of agreement. A contract that purports to bind a party to arbitrate, but lacks the party’s signature, is generally not a sufficient basis on which to compel arbitration. *Peters v. Columbia Steel Castings Co.*, 2006 Ohio App. LEXIS 327 (Franklin Co. Jan. 31, 2006), unreported. In this case, the contract that “purports to bind a party to arbitrate” – i.e., the general contract between Kuss and RLI – lacks the signature of Matrix and is not a sufficient basis to compel arbitration.

## **2. Erosion Of Right To Open Courts**

Ohio’s Constitution guarantees that parties’ disputes shall be heard in court, unless the parties agree otherwise. Ohio Constitution, Article I, Section 16. Yet, neither the trial court nor the Court of Appeals was disturbed by the lack of agreement by Matrix to arbitrate the present dispute. Both cited *Gibbons-Grable* as authority for the proposition that separate construction agreements on the same project required the parties to those agreements, even though not in privity of contract with each other, to arbitrate all disputes on the project.

The lower courts found that because Matrix agreed to arbitrate disputes arising under its subcontract with RLI and agreed to provide *services* consistent with RLI’s agreement with Kuss, that the arbitration agreement between Kuss and RLI also bound Matrix to arbitrate claims made by Kuss. The lower courts did not find, nor has it been claimed by Kuss, that Kuss was a third

party beneficiary of the subcontract between RLI and Matrix.<sup>1</sup> The lower court also did not find that Kuss was in privity of contract with Matrix. Instead, the courts relied on RLI's boilerplate Master Services Agreement, revised in 1999, to show that Matrix had agreed to determine disputes arising under the subcontract by arbitration, not with RLI, but parties with whom RLI had *separately* contracted. Nothing in the agreement provided that Matrix agreed to arbitrate claims made by parties with whom it was not in privity of contract. Rather, Matrix only agreed to arbitrate disputes with RLI that arose between them.

By extending the parties' agreement beyond their intentions, the lower courts' decision is in conflict with existing Ohio law and threatens to expand arbitration agreements in construction contracts beyond the scope permitted by the legislature and Ohio contract law.

### **3. Effect Of Privity Of Contract Requirement**

Tort claims by an owner against a subcontractor are not permitted unless there is privity of contract between the project owner and the subcontractor, i.e., the owner cannot maintain an action arising out of the breach of any contract. *Vistein v. Keeney* (1990), 71 Ohio App. 3d 92. This is so because in the absence of privity, no duty arises from the subcontractor to the project owner. *Toman v. Pennsylvania R.Co.* (1943), 39 Ohio Law Abs. 32, 51 N.E.2d 231. Nor can the project owner claim purely economic damages from a subcontractor in the absence of privity. *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 106 Ohio St.3d 412, 2005-Ohio-5409. Moreover, mere knowledge of the identity of the project owner was considered insufficient to create a substitute for privity. *Corporex*, at p 416.

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<sup>1</sup> The Contract form used by RLI predated this project by several years and did not reference any intended beneficiaries.

The reasoning behind the decisions in *Vistein* and *Corporex* is plain. Both uphold the public policy behind Ohio contract law to limit the obligations and benefits of contracts to those parties intending to be bound as parties to those agreements.

What is also plain is that a project owner, not in privity with a subcontractor on that project, cannot enforce, or otherwise benefit from, contract obligations existing between the subcontractor and general contractor. Yet, that is precisely the effect of the lower courts' decision in this case. Ignoring Ohio law that prevents a project owner from suing a subcontractor when no privity of contract exists, the Court of Appeals has permitted that same project owner to enforce contract obligations in an agreement to which it was not a party. Such a result is contrary to Ohio law on contract and tort claims by those not in privity of contract and threatens to expand the scope of arbitration agreements in construction contracts to include those who are not parties to the contract.

The conflict between such a result and Ohio law is evident. Moreover, the lower court's decision provides a basis for other Courts to expand the enforceability of arbitration agreements to those not in privity with the contracting parties. With that potential, it is evident that this matter is one of great public and general interest. Reversal of the lower court in this matter is necessary to prevent an inconsistency in Ohio law and to protect the rights of parties to have their disputes resolved in Court, when they have not contracted to resolve their disputes otherwise.

**CONCLUSION**

Since the Court of Appeals decision extends arbitration agreements beyond the scope permitted by the legislature and in conflict with Ohio law requiring privity of contract to enforce contract obligations, this Court should accept jurisdiction in this matter.

Respectfully submitted,



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Andrew J. Ayers

COUNSEL FOR APPELLANT,  
MATRIX TECHNOLOGIES, INC.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Memorandum of Matrix Technologies, Inc. in Support of Jurisdiction has been sent by regular U.S. mail service on this 2<sup>nd</sup> day of May, 2008, to: Robert J. Colacaro, Esq., Jones Day, North Point, 901 Lakeside Avenue, Cleveland, OH 44114, attorney for Defendant Kuss Corporation; to Audra Zarlenga, Esq., Thompson Hine, 3900 Key Center, 127 Public Square, Cleveland, OH 44114, attorney for Defendant Rudolph-Libbe, Inc.; and to John J. McHugh, III, Esq., 5580 Monroe Street, Sylvania, Ohio 43560, co-counsel for Matrix Technologies, Inc..



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Andrew J. Ayers

COUNSEL FOR APPELLANT,  
MATRIX TECHNOLOGIES, INC.

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COURT OF APPEALS

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COMMON PLEAS COURT  
BERNICE GUILTER  
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

Matrix Technologies, Inc.

Court of Appeals No. L-07-1301

Appellant

Trial Court No. CI0200704418

v.

Kuss Corporation, et al.

DECISION AND JUDGMENT ENTRY

Appellees

Decided:

MAR 21 2008

\*\*\*\*\*

Keith Watkins and Andrew Ayers, for appellant.

Robert Colacarro and John Lewis, for appellees.

\*\*\*\*\*

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas finding appellant subject to a mandatory arbitration clause in a construction contract dispute. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Matrix Inc., sets forth the following single assignment of error:

{¶ 3} "1. The Common Pleas Court erred to the prejudice of Appellant by issuing declaratory judgment that Appellant was required to submit to arbitration demanded by

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MAR 21 2008

Appellee, when Appellant had no contract requiring arbitration with Appellee and has not agreed to any such arbitration."

{¶ 4} The following undisputed facts are relevant to the issues raised on appeal. Appellee, Kuss Corp., owned a manufacturing warehouse facility that was under construction in 2000. Rudolph-Libbe Inc. ("RLI") served as the general contractor for this construction project. RLI engaged various subcontractors, including appellant, Matrix Inc. ("Matrix")

{¶ 5} The role of Matrix in this project was to perform the requisite architectural and engineering design services connected to the construction project. Industrial Power Systems Inc. ("IPS"), another subcontractor, was responsible to perform the electrical and mechanical system installations in accordance with the specifications prepared by Matrix.

{¶ 6} During the course of construction, it was discovered that the electrical system, installed by IPS in conformity with the Matrix specifications, was not adequate to operate Kuss's equipment. This required additional work to be performed by IPS and additional cost to be incurred by Kuss to remedy the defective electrical system.

{¶ 7} In 2001, IPS sued Kuss to recover the added expenses it sustained in correcting the inadequate electrical system. The matter went to arbitration and Kuss was ordered to pay IPS. Subsequently, Kuss submitted a demand for arbitration against Matrix to recover the monies it was ordered to reimburse Kuss. In turn, Matrix, filed a complaint for declaratory judgment seeking a determination that it was not required to submit to arbitration with Kuss. Given this scenario, this case is essentially an indemnification dispute arising from a collection matter.

{¶ 8} On August 21, 2007, the trial court issued a judgment denying Matrix's application for injunctive relief and further finding Matrix subject to mandatory arbitration with Kuss. This appeal stems from the latter portion of the judgment.

{¶ 9} In its single assignment of error, Matrix asserts that the trial court erred in issuing a declaratory judgment finding it subject to the mandatory arbitration clause in the general contract. In support, Matrix alleges that it was not bound by any mandatory contractual arbitration clause under any contract.

{¶ 10} The precise language of the contracts entered into by the parties will be determinative of this dispute. Thus, the emphasis of our review will focus upon the specific terms and provisions incorporated into the contracts governing this construction project.

{¶ 11} An appellate court applies the de novo standard of review when it reviews a trial court's contract interpretation. *Grabnic v. Dorskocil*, 11th Dist. No. 02-P-0116, 2005-Ohio-2887. De novo review requires us to conduct an independent review of the record without deference to the trial court's decision. *Brown v. Cty. Commrs. of Scioto Cty.* (1993), 87 Ohio App.3d 704, 711.

{¶ 12} Article 3.1 of the subcontract executed between RIL and Matrix establishes, "A/E, agrees that all terms and conditions of the Rudolph/Libbe Master Terms and Conditions of Architectural/Engineering Services Agreements (Rev. date 2/1/99) (consisting of Articles 1 through 13; 15 pages) are incorporated herein by reference as if fully rewritten herein and are applicable to this Project. A copy of the Master Terms and Conditions have previously been provided to A/E."

{¶ 13} Significantly, Article 8.1 of the incorporated Master Terms and Conditions expressly stated, "unless a different form of dispute resolution is required under the Prime Contract, any dispute or claim arising out of or related to the agreement or the breach thereof shall be settled by binding arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect, and judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof." The unambiguous terms and conditions of the contracts by which Matrix was bound connected to this project clearly established that Matrix is subject to the mandatory arbitration clause set forth in Article 8.1.

{¶ 14} In conjunction with the above, Article 1.1.2 of the Master Terms and Conditions incorporated into the subcontract with Matrix stated, "In addition to its other obligations under the Agreement, A/E shall cooperate with Contractor and shall be bound to perform its services hereunder in the same manner and to the same extent the Contractor is bound by the Prime Contract between Owner and Contractor to perform such services for Owner."

{¶ 15} In an analogous Third District Court of Appeals construction contract dispute, the court determined that the subcontract language substantively analogous to the above triggered the mandatory arbitration clause contained in the original contract between the general contractor and owner. The subcontract language, read, "The Subcontractor agrees to be bound to and assume toward the Contractor all of the

obligations and responsibilities that the Contractor by those documents, assumes towards the Owner." *Gibbons-Grable Co. v. Gilbane Bldg. Co.* (1986), 34 Ohio App.3d 170.

{¶ 16} Based upon the express incorporation of a mandatory arbitration clause into the Matrix subcontract, as evidenced by reading Articles 3.1 and 8.1 in conjunction with each other, as well as the persuasive rationale established in *Gibbon*, we find that the record of evidence clearly establishes that Matrix is bound to submit to mandatory arbitration. We find appellant's assignment of error is not well-taken.

{¶ 17} Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

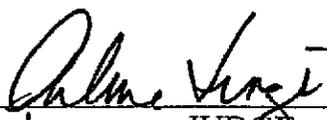
JUDGMENT AFFIRMED.

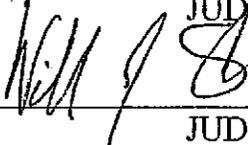
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

William J. Skow, J.

Thomas J. Osowik, J.  
CONCUR.

  
\_\_\_\_\_  
JUDGE

  
\_\_\_\_\_  
JUDGE

  
\_\_\_\_\_  
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

FILED  
LUCAS COUNTY

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COMMON PLEAS COURT  
BERNIE QUILTER  
CLERK OF COURT

**THIS IS A FINAL  
APPEALABLE ORDER**

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Matrix Technologies, Inc.,

Plaintiff,

v.

Kuss Corporation, et al.,

Defendants.

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\* Case No. CI0200704418

\* OPINION AND JUDGMENT ENTRY

\* ~~Hon. Charles J. Doneghy~~

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Following a hearing conducted on August 7, 2007, this action is before the Court on the application for a permanent injunction filed by the plaintiff, Matrix Technologies, Inc. ("Matrix") and a declaration as to the arbitrability of a dispute arising out of a construction project.<sup>1</sup> Upon review of the complaint, oral arguments and documentary evidence, memoranda of the parties, and applicable law, the Court finds that it should overrule Matrix's request for injunction relief and should declare that the underlying dispute is properly subject to arbitration.

<sup>1</sup>At the hearing, Matrix and defendant Kuss Corporation ("Kuss") agreed to merge the permanent injunction issue with the pending request for preliminary injunction and to have the Court rule on the pending matters as argued on that date orally and previously in briefs.

FILED

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## **I. FACTUAL ALLEGATIONS**

On or about October 24, 2000, defendant Rudolph-Libbe ("R-L") entered to a contract ("General Contract") to construct a manufacturing-warehouse facility for Kuss. (Complaint paras. 1-2.) The General Contract listed Matrix as "Architect/Engineer" for the project. (Kuss Exh.A.) To facilitate its role, Matrix entered into a separate contract ("Matrix Contract") with R-L specifying Matrix's duties. (Complaint para.3.) R-L entered into one or more sub-contracts ("IPS Contract") with Industrial Power Systems, Inc. ("IPS") calling on IPS to execute the electrical/mechanical installations for the project. (Complaint paras.4-5.) The General Contract, the Matrix Contract, and the IPS Contract all contain mandatory arbitration provisions. A dispute arose between Kuss and the others over the suitability of the construction work ("construction dispute"). Kuss entered into a separate time and materials contract ("Time/Materials Contract") with IPS to do subsequent work on the project.

Following its completion of the subsequent work, IPS sued Kuss for payment under the Time/Materials Contract. Kuss successfully petitioned the Common Pleas Court of Hancock County to compel arbitration of the payment issue pursuant to the General and IPS Contracts. Following arbitration, IPS petitioned the Hon. Denise Dart of this Court to confirm the arbitration award made in IPS's favor. Judge Dart confirmed the arbitration award.

Following that confirmation, Kuss filed a demand for arbitration with the American Arbitration Association ("AAA") against R-L and Matrix for payment/indemnification of costs Kuss incurred in remedying alleged "errors and omissions" of R-L and Matrix on the project that made up the construction dispute. Matrix filed the instant action against Kuss seeking to enjoin the arbitration and seeking a declaration that the construction dispute was not a proper matter for

arbitration. Matrix named R-L and the AAA as defendants. R-L cross-claimed against Kuss seeking a declaration that the construction dispute was not a proper subject for arbitration.

## **II. STANDARD FOR INJUNCTIVE RELIEF**

A permanent injunction is an equitable remedy which a court will issue only where the act sought to be enjoined will cause immediate and irreparable injury to the complaining party and there is no adequate remedy at law. Franklin County Dist. Bd. of Health v. Paxson, 152 Ohio App.3d 193, 2003-Ohio-1331, at ¶25. "The purpose of an injunction is to prevent a future injury, not to redress past wrongs." *Id.*, quoting Lemley v. Stevenson (1995), 104 Ohio App.3d 126, 136, 661 N.E.2d 237. The court determining whether to issue injunctive relief must balance the equities between the parties. *Id.* To obtain injunctive relief, the candidate must prove its case by clear and convincing evidence. Proctor & Gamble Co. v. Stoneham (2000), 140 Ohio App.3d 260, 267, 747 N.E.2d 268; Lemley v. Stevenson, 104 Ohio App.3d at 136, 661 N.E.2d 237.

## **III. DISCUSSION**

The parties do not dispute that public policy favors and encourages arbitration of properly arbitrable disputes. Gibbons-Grable v. Gilbane Bldg. Co. (1986), 34 Ohio App.3d 170, 172, 517 N.E.2d 559; West v. Household Life Ins. Co., 10th Dist. No. 06AP-906, 2007-Ohio-845, at ¶¶8,9. Additionally, "[a]rbitrability 'should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" Gibbons-Grable, at 173.

In its application, Matrix argues that it will be irreparably harmed if it is forced to

arbitrate the construction dispute with Kuss and R-L because the dispute is not properly subject to arbitration; Kuss has no direct contract with Matrix, and Matrix is not willing to voluntarily arbitrate the matter. Kuss argues that Matrix will not be irreparably harmed by arbitrating the matter, and the construction dispute is the proper subject of arbitration pursuant to provisions of the General and Matrix Contracts.

As to irreparable harm, the Court finds that Matrix has not established irreparable harm. "An irreparable injury is one for the redress of which, after its occurrence, there could be no plain, adequate and complete remedy at law, and for which restitution in specie (money) would be impossible, difficult or incomplete." Cleveland v. Cleveland Elec. Illuminating Co. (1996), 115 Ohio App.3d 1, 12, 684 N.E.2d 343. Matrix has failed to establish how money damages will not fully compensate it if the arbitration resolves in its favor. In Union Twp. v. Union Twp. Professional Firefighters' Local 3412 (Feb. 14, 2000), 12th Dist. No. CA99-08-082, 2000 Ohio App. Lexis 475, the court ruled that a party forced to arbitrate has adequate remedies at law to cure any impropriety with being compelled to arbitrate. *Id.* at \*24-25.

As to whether the construction dispute is the proper subject of arbitration, Matrix argues that it has no direct contract signed with Kuss mandating that disputes must be arbitrated, thus Matrix may not be forced to arbitrate the construction dispute. Matrix along with R-L argue in their joint reply brief, that Kuss is attempting through its demand for arbitration to recover the judgment confirmed against it in favor of IPS; they contend that IPS judgment arises from the Time/Materials Contract and not from any contract involving R-L and/or Matrix.

For two separate reasons, the Court finds that the matter is properly arbitrable. First, Kuss has demanded arbitration against both R-L and Matrix. There is no dispute that Kuss has a

direct contract with R-L, the General Contract, which provides for arbitration of disputes between them.<sup>2</sup> Also, the Matrix Contract between R-L and Matrix provides for mandatory arbitration of disputes relating to the project.<sup>3</sup> Because both R-L and Matrix are respondents in Kuss's demand for arbitration, the Matrix Contract arbitration provision requiring arbitration of any dispute "related to the [Matrix Contract]" mandates that the construction dispute be arbitrated. Additionally, while Kuss's Demand For Arbitration seeks recovery of the amount of the judgment entered in favor of IPS by Judge Dart, the Court finds that the gravamen of the demand seeks recovery against R-L and Matrix for their negligence and breach of contract. It is the damage arising from those breaches that Kuss claims was remedied by the subsequent work from IPS; that work, not Judge Dart's judgment, is the measure of damages allegedly owed by R-L and Matrix.

Second, the Matrix Contract contains the following provision: "In addition to its other obligations under the [Matrix Contract], [Matrix] shall cooperate with [R-L] and shall be bound to perform its services hereunder in the same manner and to the same extent that [R-L] is bound by the [General Contract] to perform such services for [Kuss]." The court in Gibbons-Grable v. Gilbane Bldg. Co., 34 Ohio App.3d 170, 517 N.E.2d 559, held that similar language contained in a sub-contract activated the mandatory arbitration clause contained in the contract between the general contractor and owner; the sub-contract had no arbitration provisions. The Gibbons-Grable

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<sup>2</sup>In relevant part the General Contract provides as follows:

"9.1 All claims, disputes and other matters in question between [Kuss] and [R-L] arising out of or relating to either's obligations to the other under [the General Contract] shall be decided by arbitration \* \* \*." (Emphasis added.)

<sup>3</sup>In relevant part the Matrix Contract provides as follows:

"8.1 Unless a different form of dispute resolution is required under the [General Contract] any dispute or claim arising out of or related to the [Matrix Contract] shall be settled by binding arbitration \* \* \*." (Emphasis added.)

court also observed that "it is common in the construction industry for certain documents within the contractor/owner's contract to be incorporated by reference into the subcontractor's contract with the contractor." Id. at 173.

Based on the foregoing, the Court finds that Matrix has failed to establish its entitlement to injunctive relief or to a declaration in its favor. Accordingly, the Court will overrule Matrix's application for injunction and will declare that Matrix and R-L are not relieved of their contractual duty to arbitrate the construction dispute.

**JUDGMENT ENTRY**

The Court hereby ORDERS that the plaintiff's application for permanent injunction is overruled. The Court further ORDERS and DECLARES that the plaintiff and defendant Rudolph-Libbe are not relieved of their contractual obligations to defendant Kuss Corporation to arbitrate the dispute between them arising out Kuss's construction project. The Court finds no just reason for delay.

Aug - 14, 2007

pc: Andrew J. Ayers/Keith J. Watkins  
John Q. Lewis/Robert J. Colacarro

Charles J. Doneghy  
Charles J. Doneghy, Judge