

IN THE SUPREME COURT OF OHIO

Matrix Technologies, Inc.,)	Supreme Court Case No.
)	
Appellant,)	08-0885
)	
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.)	

**APPELLEE KUSS CORPORATION'S
MEMORANDUM IN OPPOSITION TO JURISDICTION**

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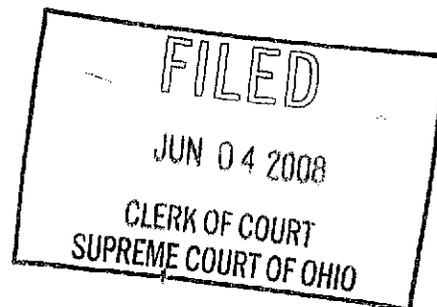
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**EXPLANATION OF WHY THIS IS NOT A CASE
OF PUBLIC OR GREAT GENERAL INTEREST**

This is a construction dispute between private parties involving the interpretation of negotiated terms in specific contracts. Under those distinctive agreements, the Court of Common Pleas determined that Appellant Matrix Technologies, Inc. ("Matrix") had agreed to arbitrate certain contract-related disputes with Appellee Kuss Corporation ("Kuss"). The Court of Appeals correctly affirmed the trial court's ruling and followed settled Ohio case law addressing similar issues under similar circumstances. *See, e.g., Gibbons-Grable Co. v. Gilbane Bldg Co. (1986)*, 34 Ohio App.3d 170, 517 N.E.2d 559.

If ever there were a discretionary appeal that fell short of the "public or great general interest" standard, this is it. *See* S.Ct.Prac.R. II(1)(A)(3). The Court of Appeals made no "new law," and its decision has no broader application than to the unique set of facts that were before it. *See* Appx. 3, ¶ 10 ("The precise language of the contracts entered into by the parties will be determinative of this dispute . . . our review will focus upon the specific terms and provisions incorporated into the contracts governing this construction project.") At bottom, the lower courts' fact-bound application of settled Ohio law simply does not warrant the scarce time and devoted attention of this Court. Review should be denied.

STATEMENT OF THE CASE AND FACTS

1. The Toledo Lucas County Port Authority (the "Port Authority") entered into a general contract (the "General Contract"), dated October 24, 2000, with Rudolph/Libbe Inc. for the completion of a new office, manufacturing and warehouse facility (the "Project").¹ Appx. 7.

¹ As a named third-party beneficiary to the General Contract, Kuss stands in the shoes of the Port Authority.

2. Paragraph 9 of the General Conditions contained in the General Contract provides that all “claims, disputes and other matters in questions between Owner and Contractor arising out of or relating to either's obligations to the other under this Agreement, shall be decided by arbitration . . .” Appx. 10.

3. Rudolph/Libbe entered into a subcontract with Matrix. Appx. 7. Section 1.1.2 of the Master Terms contains language stating that Matrix “shall cooperate with [Rudolph/Libbe] and shall be bound to perform its services hereunder in the same manner and to the same extent that [Rudolph/Libbe] is bound by the Prime Contract between [Kuss] and [Rudolph/Libbe] to perform such services for [Kuss].” Appx. 4.

4. Kuss filed a demand for arbitration with the American Arbitration Association (“AAA”) against Matrix and Rudolph/Libbe seeking damages for breach of contract and indemnification relating to work that Matrix and Rudolph/Libbe performed on the Project.

5. Matrix and Rudolph/Libbe moved the Court of Common Pleas for Lucas County for injunctive relief to prevent the arbitration from moving forward. After a full hearing on the merits, on August 22, 2007, the Court of Common Pleas denied Matrix’s and Rudolph/Libbe’s request for injunctive relief and declared that Matrix was “not relieved of [its] contractual duty to arbitrate the construction dispute” with Kuss. Appx. 11.

6. Matrix filed an appeal with the Sixth District Court of Appeals. After briefing and argument, the Court of Appeals affirmed the ruling of the Court of Common Pleas that Matrix was required by contract to arbitrate its disputes with Kuss. Appx. 5.

ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW

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

This Court should deny jurisdiction because the Court of Appeals conducted a straightforward, fact-based analysis regarding whether Matrix had a contractual duty to arbitrate claims with Kuss under the specific contracts at issue. After carefully reviewing the record, the Court of Appeals found that Matrix was contractually bound to arbitrate disputes with Kuss because of certain, distinctive language contained in the parties' agreements. This case does not present for this Court's consideration any questions of a constitutional nature or of a public or great general interest.

The Court of Appeals decision is completely consistent with settled Ohio law because the court found that Matrix – like thousands of other parties to construction contracts – had agreed through its subcontract to arbitrate contract-related disputes with Kuss. Matrix's entire argument here, however, is premised on the assumption that the lower courts held that Matrix must arbitrate its disputes with Kuss even absent contractual agreement to do so. Not so.

Rather, the lower courts found that the Matrix Subcontract, under which Matrix performed the work that is the subject of Kuss' claims, provides that Matrix is to assume toward Kuss all of the obligations and responsibilities that the general contractor, Rudolph/Libbe, assumes toward Kuss. Appx. 4. Rudolph/Libbe is bound to arbitrate contract-related disputes with Kuss. Appx. 4. Therefore, because of this flow-through obligation, Matrix is also bound – by contract – to arbitrate contract-related disputes with Kuss. The courts below found that this specific contract structure required arbitration of contract-related disputes between Kuss and Matrix. Appx. 5, 11.

Ohio case law supports the lower courts' decisions. Because of Ohio's policy favoring arbitration, any clause in a contract document providing for arbitration 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." *Gibbons-Grable Co. v. Gilbane Bldg. Co.* (1986), 34 Ohio App.3d 170, 173, 517 N.E.2d 559 (quoting *Siam Feather & Forest Prods. Co. v. Midwest Feather Co.* (S.D. Ohio 1980), 503 F.Supp. 239, 241, affirmed (C.A.6, 1981), 663 F.2d 1073). Any doubts must be resolved in favor of coverage. *Id.*

The lower courts followed *Gibbons-Grable*, a case presenting facts nearly identical to those presented here. There, a subcontract stated that 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 toward Owner." *Gibbons-Grable Co. v. Gilbane Bldg. Co.*, 34 Ohio App.3d at 175, 517 N.E.2d 559. After a dispute arose between the subcontractor and owner, the court held that the subcontract incorporated the arbitration provision contained in the general contract and required the parties to arbitrate their dispute. *See id.* at 173-76, 559 N.E.2d 559.

The language contained in ¶ 1.1.2 of the Matrix Subcontract in this case is similar to that contained in *Gibbons-Grable*. Matrix is "bound to perform its services hereunder in the same manner and to the same extent that [Rudolph/Libbe] is bound by the Prime Contract between [Kuss] and [Rudolph/Libbe] to perform such services for [Kuss]." (Appx. p. 4). Thus, Matrix is bound by the arbitration clause contained in the General Contract.

Matrix cites to no case in any jurisdiction that is contrary to *Gibbons-Grable*, or the Court of Appeals decision. And Matrix cites to no Ohio Constitutional issue, no overarching public

policy or interest, and no great general interest, that would warrant intrusion on the Court of Appeals' sound and reasoned decision below. Matrix's request for review should be denied.

CONCLUSION

For the reasons set forth above, Kuss Corporation respectfully requests that the Court deny jurisdiction in this matter.

Dated: June 4, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Memorandum in Opposition to Jurisdiction was served on this 4th day of June 2008 via U.S. Mail on the following counsel of record:

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