UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: AUTOMOTIVE PARTS ANTITRUST LITIGATION	Master File No. 12-md-02311 Hon. Marianne O. Battani
IN RE: SHOCK ABSORBERS	Case No. 2:15-cv-03301 Case No. 2:16-cv-13616
THIS DOCUMENT RELATES TO ALL DIRECT PURCHASER ACTIONS	

OPINION AND ORDER DENYING DEFENDANTS KYB CORPORATION AND KYB AMERICAS CORPORATION'S MOTION TO DISMISS DIRECT PURCHASER PLAINTIFF'S COMPLAINT OR IN THE ALTERNATIVE, DISMISS CERTAIN CLAIMS AND STAY ALL REMAINING CLAIMS PENDING ARBITRATION

Before the Court is Defendants KYB Corporation (KYB) and KYB Americas Corporation's (KAC) (collectively "KYB Defendants") Motion to Dismiss Direct Purchaser Plaintiff's Complaint or in the Alternative, Dismiss Certain Claims and Stay All Remaining Claims Pending Arbitration (ECF No. 2). KYB Defendants ask the Court to dismiss all federal claims against them pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1, et seq. or in the alternative to dismiss all claims subject to arbitration and stay the remaining claims until arbitration has concluded.

The Court has reviewed all the relevant filings and finds oral argument will not aid in the resolution of this dispute. See E. D. Mich. LR 7.1(f)(2). For the reasons that follow, the motion is **DENIED**.

I. INTRODUCTION AND PROCEDURAL BACKGROUND

Direct Purchaser Plaintiffs V.I.P., Inc. (VIP) and Performance Internet Parts, LLC (Performance) (together "DPPs") filed their putative class action complaint on October

11, 2016. DPPs allege KYB Defendants, Hitachi, Ltd., Hitachi Automotive Systems, Ltd., Hitachi Automotive Systems Americas, Inc., Showa Corporation, and American Showa, Inc., engaged in antitrust violations related to the sale of shock absorbers during the Class Period, from January 1, 1995, though December 31, 2012. (ECF No. 1 ¶ 9 in 16-13616, hereinafter Compl.). According to the Complaint, DPPs purchased shock absorbers directly from KAC. (Compl. ¶¶ 33, 41-50, 95-103; ECF No. 2, Ex. A ¶ 6). KYB, the parent company of KAC, does not sell aftermarket shock absorbers into the United States (ECF No. 2, Ex. A ¶ 7).

Mike Firoito, Vice President of Aftermarket Sales for KAC, asserts that during the relevant period, VIP and Performance were aftermarket retailers that purchased aftermarket shock absorbers from KAC. (ECF No. 3, Ex. A ¶ 6). Because consumers are unable to purchase aftermarket shock absorbers directly from KAC, they use companies such as Performance and VIP to purchase replacement shock absorbers for their vehicles. (Id. ¶ 7). These purchases are subject to the terms and conditions of the Limited Warranty. (Id. ¶¶ 8, 9).

Under the Limited Warranty, effective January 1, 2016, KYB "warrants to the original retail purchaser that each new KYB product. . .purchased from an authorized KYB products seller shall be free from defects in material and workmanship. . .starting from the date of purchase, when used on private passenger cars and light trucks for personal use under normal operating conditions." (ECF No. 3, Ex. 2). The Limited Warranty specifies that it covers "defects in material and workmanship" and limits "KYB's sole and exclusive obligation and the original retail purchaser's sole and exclusive remedy under this warranty" [ ] "to the exchange/replacement of a defective

covered KYB product. . . ." (Id.) The "warranty is not assignable or otherwise transferable to any subsequent purchasers. . .and any sale or other transfer of the product shall void this warranty. . . ." (Id.)

The Limited Warranty instructs an original retail purchaser how to make a warranty claim. The product must be presented to the "original or point of purchase," to be inspected to verify whether it qualifies for replacement. Id. The Limited Warranty "is in lieu of and excludes all other warranties, express, implied, statutory, or otherwise created under applicable law. . . ."

Of particular importance to the parties' positions here is the Resolution Process-Binding Arbitration provision. It reads:

> **Any disagreement, dispute, controversy or claim arising out of or relating to this Limited Warranty or the KYB product(s) must be brought in the original retail purchaser's individual capacity** and shall be settled by binding bilateral arbitration located in Indiana before one arbitrator in accordance with the Rules of the American Arbitration Association (AAA) and the Federal Arbitration Act (FAA). The original retail purchaser will not be able to bring a lawsuit for any dispute relating to the covered products. Instead, the original retail purchaser must submit any and all disputes through the AAA, which includes mandatory bilateral arbitration that is binding on both KYB and the purchaser.

(ECF No. 3, Ex. 3) (emphasis added).

Because the purchases at issue in this lawsuit were made in the aftermarket, the shock absorbers were installed as replacements for existing shock absorbers. (ECF No. 2, Ex. A ¶ 5). The parties dispute whether the purchases by DPPs are subject to an arbitration provision found in KAC's Limited Warranty.

Performance is a wholesale distributor of shock absorbers, (ECF No. 17, Decl. of John D'Onfrio, Chief Executive Officer of Performance, ¶ 2), not the "original retail purchaser" of KYB shock absorbers. (Id. ¶ 4). Performance began buying shock

absorbers from KAC around 2005 and sells them on the internet. (Id. ¶ 3). In May of 2011, Performance joined a buying group, CMB Network Buying Group, that negotiated the terms and conditions of sales with KAC on behalf of the individual members as well as prices, rebates, and warranty allowances. (Id. ¶ 16; ECF No. 3, Ex. A ¶ 17). Prior to March 2013, a sales representative from KAC would visit Performance on a quarterly basis, inspect any returned shock absorbers and determine whether they were defective under the Limited Warranty. (ECF No. 17 ¶¶ 7, 8, 10). In February 2013, the Off-Invoice Warranty Confirmation went into effect. (ECF No. 3, Ex. 6). Performance does not open the boxes containing KYB shock absorbers before they are sold to Performance's customers. (ECF No. 17 ¶ 6). Its website does not contain KYB's warranty or a hyperlink to KAC's website. (Id. ¶ 5).

VIP also was an authorized KYB product seller, not a retail purchaser. (ECF No. 19, Decl. of Allan Kirkland, Chief Financial Officer of VIP, ¶ 3). It purchased shock absorbers from 2008 through 2010. (Id. ¶ 4). It also sells KYB shock absorbers on the internet. (Id. ¶ 3). When a VIP customer returned a KYB shock absorber because it was defective, VIP provided a replacement part. (Id. ¶¶ 5, 6). VIP then sought a credit from a KAC representative. (Id. ¶¶ 7-9). VIP belonged to the Pronto Buying Group. (ECF No. 3, Ex. 2 ¶¶ 22, 23).

Under the 2016 Pronto Program Specification, the Distributor [VIP] is "responsible for warranty authentication" of covered KYB products.

> An off-invoice warranty program is available for credit. In exchange for the warranty allowance, **KYB Americas requires that you honor the terms and conditions of the current KYB Limited Warranty; make KYB's Limited Warranty available to all purchasers before and after purchase of KYB products** as required by the Federal Trade Commission; and if applicable, provide KYB with contact information for your retail and/or internet customer support. A copy of KYB's Limited

> Warranty is available at kyb.com. Both KYB and you agree that sufficient and adequate consideration has been provided.

(ECF No. 3, Ex. 3) (emphasis added). Performance's buying group agreed to the same provision. (ECF No. 3, Ex. 5).

II. STANDARD OF REVIEW

A Federal Rule of Civil Procedure 12(b)(1) motion to dismiss for lack of subject matter jurisdiction places the burden on the plaintiff to demonstrate that jurisdiction is proper. Moir v. Greater Cleveland Reg'l Transit Auth., 895 F.2d 266, 269 (6th Cir. 1990). There are two types of attacks on subject matter jurisdiction: facial and factual. United States v. Ritchie, 15 F.3d 592, 598 (6th Cir.1994). A facial attack challenges the pleading itself, and the court will review the pleading as a Rule 12(b)(6) motion to dismiss, accepting all factual allegations as true and viewing it in the light most favorable to the nonmoving party. Id. A factual attack challenges the "factual existence of subject matter jurisdiction" and the court is not required to presume that all factual allegations are true. Id. "[T]he court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." Id. If at any point the court determines that it does not have subject matter jurisdiction, it must dismiss the case. See Fed. R. Civ. P. 12(h)(3).

III. ANALYSIS

Defendants claim that all federal claims against KAC must be dismissed and submitted to arbitration because DPPs' purchases are governed by the arbitration provision contained in KAC's Limited Warranty. In the alternative KYB Defendants ask the Court to dismiss all claims subject to arbitration and stay the remaining claims until

the arbitration proceeding is concluded. Lastly, KYB Defendants ask the Court to dismiss the complaint against KYB on equitable estoppel grounds.

Before turning to the parties' specific arguments, the court observes that federal policy favors arbitration, and federal courts are to "rigorously enforce agreements to arbitrate." Wilson Elec. Contractors, Inc. v. Minnotte Contracting Corp., 878 F.2d 167, 169 (6th Cir. 1989). Moreover, "[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . . ." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). In particular, "Section 2 embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts:

> A written provision in. . .a contract. . .to settle by arbitration a controversy thereafter arising out of such contract. . .or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract. . .shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id.

Nevertheless, when the dispute involves who has the power to decide–the court or the arbitrator–the outcome turns on whether the parties agreed to arbitrate that specific issue. Thus, if, "the parties agreed to submit the arbitrability question itself to arbitration, "the court's standard for reviewing the arbitrator's decision about that matter should not differ from the standard courts apply when they review any other matter that the parties have agreed to arbitration." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995) (emphasis omitted). "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakeabl[e] evidence that they did so. Id. at 943 (quoting AT&T Tech., Inc. v. Commc's Workers, 475 U.S. 643, 649 (1968)).

Even if the Limited Warranty required that gateway questions must be arbitrated, the Court would have to review whether the parties before this Court agreed to arbitrate the dispute. Javitch v. First union Sec., Inc., 315 F.3d 619, 624 (6th Cir. 2003).

A. Jurisdiction to Decide Arbitrability

KYB Defendants maintain that the application of the language of the Limited Warranty favors their position that this dispute must be arbitrated, and that the arbitrator, not the Court must determine gateway questions. The law provides that KYB Defendants cannot prevail on this issue of whether the court has the power to determine the issue of arbitrability unless the parties "clearly and unmistakably provide it is not for judicial determination." AT&T Techs., 475 U.S. at 649. See First Options of Chicago, Inc., 514 U.S. 944-45 (observing that as to this issue "the law reverses the presumption" in favor of arbitration). Consequently, the Court interprets "silence or ambiguity" on the question of arbitrability in favor of a judicial determination.

As support for their position that the issue of arbitrability should be decided by the arbitrator, KYB Defendants rely on the inclusion of clause in the 2016 Limited Warranty that incorporates the American Arbitration Association's ("AAA") rules into the agreement. Specifically, Rule 7(a) of the AAA Rules expressly grants to the arbitrator "the power to rule on his or her jurisdiction." Therefore, KYB Defendants conclude that they have unambiguously established the issue of arbitrability is not for this Court to decide.

The Court is cognizant that other circuits have reached the conclusion that the incorporation of AAA rules into the parties' agreement meets the "clear and unmistakable" standard required to permit the arbitrator to decide the question of arbitrability. See e.g. Fadal Machining Centers, LLC v. Compumachine, Inc., 461

Fed.Appx. 630, 632 (9th Cir. 2011); Haire v. Smith, Currie & Hancock LLP, 925 F. Supp. 2d 126, 132 (D.D.C.2013) (collecting federal appellate and district court cases). However, KYB Defendants' argument is not grounded in dispositive authority as neither the Supreme Court nor Sixth Circuit has decided this issue. See e.g. Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. __ (Jan. 8, 2019) ("express[ing] no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator" but reaffirming "that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence.").

The most relevant authority from the Sixth Circuit deals with the arbitrability question in the context of incorporation of § 35 of the Code of Arbitration Procedure for the National Association of Securities Dealers. Smith Barney, Inc. v. Sarver, 108 F.3d 92, 96–97 (6th Cir. 1997), abrogated on other grounds by Vaden v. Discover Bank, 556 U.S. 49 (2009). Section 35 gives the arbitrator the power to interpret the Code. The appellate court declined to hold the incorporation of § 35 meets the standard set forth in First Options of Chicago, Inc. Id. Accord Securities Serv. Network, Inc. v. Cromwell, No. 94–5778, 1995 WL 456374 (6th Cir. Aug. 1, 1995). See also Oblix, Inc. v. Winiecki, 374 F.3d 488, 490 (7th Cir. 2004) (holding that the mere acceptance that arbitration be conducted under AAA rules does not meet the clear and unmistakable standard).

Moreover, the analysis is not as straightforward as KYB Defendants contend. Because for the reasons set forth below, there is no agreement between KYB Defendants and DPPs to arbitrate any dispute.

B. Applicability of the Arbitration Provision in the Limited Warranty

The parties agree that Indiana law governs the arbitration provision in the Limited Warranty. Under that law, a contract is valid if it contains an offer, acceptance and consideration. Homer v. Burman, 743 N.E.2d 1144, 1146 (Ind. Ct. App. 2001). After reviewing the Limited Warranty, the Court agrees with DPPs that the Limited Warranty is a pass-through warranty between KAC and the original retail purchasers and does not make DPPs a party to the Limited Warranty.

The plain language of the Limited Warranty clearly governs the rights of an original retail purchaser. The Limited Warranty specifies that it is between KYB Americas Corp. and the original retail purchaser who purchased a covered KYB products from "an authorized KYB product seller." (ECF No. 3, Ex. 2). DPPs are authorized product sellers. The Limited Warranty describes an original retail purchaser as the owner of a private passenger car or light truck on which the shocks were installed. (Id.) Moreover, the Limited Warranty is good only "for as long as the original retail purchaser owns the vehicle on which the KYB products were originally installed." (Id.) It cannot be assigned or transferred. (Id.) The Limited Warranty identifies a list of online retailers. (Id.) It is clear that the Limited Warranty does not bind DPPs to the arbitration provision, and the Court flatly rejects KYB Defendants' assertion that the DPPs are the original retail purchasers.

This conclusion does not resolve the dispute because KYB Defendants also argue that the aftermarket shock absorber purchases from KAC are subject to the terms and conditions negotiated by the buying groups, and those negotiations resulted in the incorporation of the arbitration clause. Specifically, in 2016, Performance was offered a credit to serve the Limited Warranty offered to original retail purchasers. It determined

whether returned shock absorbers were defective and provided a replacement to the original purchasers. (ECF No. 17, Ex. 3, Decl. of Mike Fiorini ¶ 2; Ex. 5 at 2). VIP agreed to the same warranty allowance from KAC. Under the terms of the buying program specifications, "[i]n exchange for the warranty allowance, [KAC] requires that. . .the terms and conditions of the current KYB Limited Warranty. . .Limited Warranty" be honored; and that KYB's Limited Warranty [be] available to all purchasers before and after purchase of KYB products. . . ." (ECF No. 3, Ex. A-6).

According to KYB Defendants, when DPPs accepted the warranty servicing provision, they accepted the arbitration provision, and Named DPPs purchased shock absorbers under the terms and conditions of the Limited Warranty. Therefore, KYB Defendants conclude that a valid arbitration agreement exists between DPPs and KAC under the laws of the state of Indiana.

Without question, contract terms may be incorporated by reference to a separate document. Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1131 (7th Cir. 1997 (citation omitted). Moreover, the promise to arbitrate in one document may be contained in another document. Id. at 1131.

Nevertheless, the Court disagrees with KYB Defendants' position. Without question, DPPs, as distributors, agreed to be responsible for warranty authentication. Notably, the 2016 agreement between KYB Defendants and buying groups provides that KAC would no longer handle warranty claims. DPPs agreed to service the warranties and agreed to service them under the terms of KYB's agreement with retail customers. Therefore, the agreement between KYB and DPPs which mentions the Limited Warranty applies only to disputes involving the Limited Warranty.

The invoices from KAC to DPPs make no mention of the arbitration provision. There is no evidence showing the parties contemplated arbitration with respect to disputes involving the purchase contract or invoice. The arbitration provision found in the Limited Warranty is limited to disagreements between the original retail purchasers and KAC. Had KYB Defendants intended that the arbitration provision apply to DPPs' rights and remedies, they should have so specified. DPPs are responsible for warranty authentication. Their agreement with KAC to service the warranty, does not render them parties to the arbitration agreement contained in the Limited Warranty.

Finally, because the Court finds that DPPs' claims against KAC are not subject to arbitration, KYB's equitable estoppel argument fails.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** Defendants' motion.

IT IS SO ORDERED.

Date: January 29, 2019

s/Marianne O. Battani
MARIANNE O. BATTANI
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Order was served upon counsel of record via the Court's ECF System to their respective email addresses or First Class U.S. mail to the non-ECF participants on January 29, 2019.

s/ Kay Doaks
Case Manager