IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BRYAN GOREE, individually and on behalf of all others similarly situated, *Plaintiff*, v. NEW ALBERTSONS INC. dba JEWEL OSCO, *Defendant*,	Case No.: 1:22-cv-01738 Hon. Martha M. Pacold

PLAINTIFF'S RESPONSE TO ALBERTSONS' MOTION TO COMPEL ARBITRATION

INTRODUCTION

New Albertsons L.P. doing business as Jewel Osco ("Albertsons") faces an insurmountable hurdle to compelling Plaintiff Bryan Goree to arbitrate this dispute: there is no arbitration agreement between them. Lacking such an agreement, Albertsons instead seeks to enforce an arbitration clause contained in an Employment-At-Will And Arbitration Agreement ("Agreement") Mr. Goree signed with his employer, Capstone. But Albertsons is not a party to this contract, and, for the most part, agreements can't be enforced by non-signatories.

In its Motion, Albertsons argues the Agreement should apply to it as an intended third-party beneficiary. Albertsons' Motion must be denied for several reasons: First, Albertsons offers no evidence that the Agreement applies to it and the law says there is a "strong presumption" that third parties do not benefit from contracts. Second, on more than a dozen occasions, the Agreement states that it is between only Capstone and the Plaintiff. For these reasons, Albertsons' motion should be denied.

BACKGROUND

Mr. Goree filed suit against Albertsons in Illinois state court under the Biometric Information Privacy Act, 740 ILCS 14/1 et seq. He alleges that when he worked in a warehouse at Albertsons, he used a Talkman device, manufactured by Honeywell, that collected his biometric information. [Doc. 1-1, ¶¶ 1- 9]

Albertsons removed the suit to this Court and now moves to compel arbitration. It is undisputed that no contract exists between Mr. Goree and Albertsons. Consequently, Albertsons seeks to enforce an arbitration clause in Capstone's Agreement with Mr. Goree.

The Complaint doesn't mention Capstone by name because the case is not against Capstone. There is no information in the record regarding the relationship between Capstone and Albertsons.

The Agreement itself is clear who it applies to. It uses the word "Company" dozens of times and defines that word to include five different entities—Capstone, LMS Intellibound, Progressive Logistics Services, Pinnacle Workforce Logistics, and National Freight Handlers (and their related parties) —not Albertsons. [Doc. 22-6, ¶ 1] The Agreement is clear that it applies to Covered Claims that arise "between me and the Company". [*Id.*, ¶ 2] It also says that it does *not* govern "controversies involving any other…parties". [*Id.*, ¶ 5] As if the Agreement were not clear enough, the Employee Handbook [Docs. 22-5, 22-7] reaffirms Capstone and Plaintiff's intent (and mirror's the Agreement's language) as it spells out that: "The Arbitration Program applies to any legal dispute *between the Company and an Associate* which could be brought in court…". [Docs. 22-5, 22-7]

ARGUMENT

I. Albertsons—A Non-Signatory—Cannot Enforce the Arbitration Clause.

Whether an arbitration agreement can be enforced by a non-signatory to that agreement is determined by state law. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630–31, 129 S.Ct. 1896, 173 L.Ed.2d 832 (2009); *Scheurer v. Fromm Family Foods LLC*, 863 F.3d 748, 752-53 (7th Cir. 2017). "A nonsignatory to a contract typically has no right to invoke an arbitration provision contained in that contract." *Sosa v. Onfido, Inc.,* 8 F.4th 631, 637 (7th Cir. 2021); *Ervin v. Nokia, Inc*., 812 N.E.2d 534, 539 (Ill. App. Ct. 2004); *Caligiuri v. First Colony Life Ins. Co.*, 318 Ill.App.3d 793, 252 Ill.Dec. 212, 742 N.E.2d 750, 755 (2000).

While a "nonsignatory to a contract typically has no right to invoke an arbitration provision contained in that contract" (*Sosa,* 8 F.4th at 637), courts have recognized various contract-based theories under which a non-signatory may be able to enforce an arbitration agreement. *Id*. Here, Albertsons argues that it is an intended third-party beneficiary of the contract between Mr. Goree and his employer, Capstone, based upon one sentence in the Agreement.

Illinois recognizes two types of third-party beneficiaries—intended and incidental. *Cont'l Cas. Co. v. Am. Nat. Ins. Co.*, 417 F.3d 727, 734 (7th Cir. 2005). Only an intended beneficiary has enforceable rights under the contract. *Id*. *See also Thomas v. UBS AG*, 706 F.3d 846, 852 (7th Cir. 2013) ("A third-party beneficiary is someone whom the contracting parties wanted to have the right to enforce the contract."); *Estate of Willis v. Kiferbaum Const. Corp.*, 830 N.E. 2d 636, 643 (Ill. App. Ct. 2005). Albertsons is not an intended beneficiary.

A. Albertsons' Motion Fails From An Evidentiary Basis Because It Has Not Overcome The Presumption Against Third Party Beneficiary Status.

The Court must begin its analysis with the "strong presumption" that the Agreement does not apply to Albertsons. "Illinois law… strongly disfavors finding that a third-party beneficiary relationship exists absent express language creating one" and "there is a strong presumption that the parties to a contract intend that the contract's provisions apply only to them, and not to third parties". *Word v. City of Chicago*, 946 F.3d 391, 397 (7th Cir. 2020). In the context of applying an arbitration agreement to a third party, "[t]o overcome that presumption, the implication that the contract applies to third parties must be so strong as to be practically an express declaration." *Sosa*, 8 F.4th 631, 639; *Estate of Willis*, 830 N.E.2d 636, 642-43 (Ill. App. Ct. 2005) ("presumption can only be overcome by a showing that the language *and* circumstances of the contract manifest an affirmative intent by the parties to benefit the third party."); *Martis* v. *Grinell Mutual,* 905 N.E.2d at 924 (Ill. App. Ct. 2009). ("That the contracting parties know, expect, or even intend that others will benefit from their agreement is not enough to overcome the presumption that the contract was intended for the direct benefit of the parties.").

In the BIPA context, Judge Alonso recently denied a motion to compel arbitration where, other than contractual language, the defendant "put forth no evidence, let alone clear and convincing evidence" to support the motion. *See Giron v. Subaru of Am., Inc.*, 22-CV-75, 2022 WL 17130869, at *5 (N.D. Ill. Nov. 21, 2022). Albertsons too has failed to make that showing here.

Albertsons offers no evidence whatsoever that there was any intent to bind third parties to arbitration. The Declaration from the Capstone employee, for example, does not even mention Albertsons, does not explain the relationship with Albertsons, or say why Capstone would have ever wanted to force one of its customers to arbitrate disputes (or waive, for example, its appellate rights in court). We do not know if Albertsons even knew about the Agreement. To the contrary,

as to the intent, the Capstone Handbook explains that: "The Arbitration Program applies to any legal dispute *between the Company and an Associate* which could be brought in court…". [Doc. 22-5, 22-7](emphasis added).

Presumptions matter. Here, despite having Capstone's cooperation, Albertsons failed to provide the Court with any competent evidence to overcome the "strong presumption" against third party beneficiary status and this is fatal to its argument. *See Warciak v. Subway Restaurants, Inc.,* 880 F.3d 870, 872 (7th Cir. 2018)(without evidence, third party cannot enforce arbitration agreement); *Scheurer v. Fromm Family Foods LLC*, 202 F. Supp. 3d 1040, 1045–46 (W.D. Wis. 2016), *aff'd,* 863 F.3d 748 (7th Cir. 2017)(refusing to enforce arbitration agreement against staffing company when contract was with direct employer and not staffing company even though "virtually all of [Plaintiff's] disputes would involve …clients" by nature of the relationship; further stating that case is "simple" where there was no evidence that defendant even knew about the agreement); *Comer v. Micor, Inc.,* 436 F.3d 1098, 1102 (9th Cir. 2006)(noting that defendant "has not produced any evidence that the signatories … intended to give [third parties] the right to sue under the agreements").

B. The Agreement Does Not Support Third Party Beneficiary Status.

The Agreement's plain language, likewise, does not support a finding that Albertsons was a third-party beneficiary.[1] Many courts have explained what constitutes the types of "express declaration" (*Sosa,* 8 F.4th at 639) necessary to overcome the presumption against third party status. *See Manor v. Copart Inc.*, No. 17-cv-2585, 2017 WL 4785924, at *4 (N.D. Ill. Oct. 24, 2017) (allowing non-signatory subsidiary to enforce arbitration agreement between plaintiff

[1]The first Agreement does not reference customers at all. The second Agreement contains an "entire agreement" clause so it is the only relevant agreement.

and "Company" where agreement expressly defined "Company" as including subsidiaries); *Ervin v. Nokia*, 812 N.E.2d 434, 541(Ill. App. Ct. 2004) ("If AT&T intended that Nokia would be a third-party beneficiary of the [agreement], it could have included Nokia" but instead the agreement used language to refer to "between you and…AT &T Corp"); *Martis v. Grinnell Mut. Reinsurance Co.*, 905 N.E.2d 920, 924 (Ill. App. Ct. 2009) ("It must appear from the language of the contract that the contract was made for the direct, not merely incidental, benefit of the third person.").

In *Sosa v. Onfido*, there was an arbitration agreement between plaintiff and a company named "Offerup". 8 F.4th at 634. The defendant wanted to enforce the agreement, in part, because the contract required permission for the use of the defendant's technology. In rejecting this argument, the court pointed out that the contract's language discussed the arbitration of "any dispute" with "you" and "Offerup" as opposed to "you" and the defendant in that case. *See also Hiser v. NZone Guidance, L.L.C.*, 799 Fed. Appx. 247, 248–49 (5th Cir. 2020)(customer of staffing company could not enforce arbitration agreement where the arbitration provision was "framed in terms of resolving disputes between *you and* [staffing company]"); *Newman v. Plains All Am. Pipeline, L.P.*, 23 F.4th 393, 397 (5th Cir. 2022)(client could not enforce the arbitration agreement between inspectors and their employer).[2]

The Agreement in this case uses the capitalized word "Company" 31 times. It defines "Company" as: Capstone Logistics, LLC and its "parent, subsidiary, and affiliate entities,

[2] Defendant's reliance upon *Brown v. Worldpac, Inc.,* 17 CV 6396, 2018 WL 656082, at *4 (N.D. Ill. Feb. 1, 2018) is misplaced. The arbitration agreement there referenced the defendant's customers 31 times so it was clear that customers were protected. *See Sosa v. Onfido, Inc.*, 1:20 CV 04247, 2021 WL 38141, at *5 (N.D. Ill. Jan. 5, 2021), *aff'd,* 8 F.4th 631 (7th Cir. 2021)(distribuishing *Brown* because the "agreement referred to [customers] dozens of times"). Likewise, its reliance upon *Ziegler v. Whale Sec. Co., L.P.,* 786 F. Supp. 739, 743 (N.D. Ind. 1992) is misplaced because the arbitration agreement explicitly applied to the third party "the terms and conditions of this agreement, including the arbitration provision, shall be applicable to all matters between such other broker-dealer and me.")

including but not limited to LMS Intellibound, Progressive Logistics Services, Pinnacle Workforce Logistics, and National Freight Handlers, and their owners, directors, officers, managers, employees, or agents". [Doc. 22-6, ¶ 1] Albertsons does not argue that it is part of the "Company" which alone weighs against a finding of an intent to apply to Albertsons. *See Johnson v. Mitek Sys., Inc.*, 22 C 349, 2022 WL 1404749, at *3–4 (N.D. Ill. May 4, 2022)(in BIPA claim, refusing to applying arbitration provision to technology provider where the agreement identified that it applied contractual party's "representatives, trustees, directors, officers, shareholders, subsidiaries, employees, attorneys, and agents.")

Here, paragraph 2 of the Agreement is very clear about who must arbitrate: those Covered Claims between "[Plaintiff] and the Company":

> "2. Agreement To Arbitrate. Both **I and the Company** agree to use binding arbitration, instead of going to court, as the sole and exclusive means to resolve any "Covered Claims" that arise or have arisen **between me and the Company**. I understand and agree that arbitration is the only forum for resolving Covered Claims and that both **I and the Company** are waiving and relinquishing our respective rights to trial before a judge or jury in federal or state court in favor of arbitration." (Doc. 22-6, par. 1; emphasis added)

The first sentence of Paragraph 2 sets forth the "Agreement to Arbitrate" by discussing *who* agrees to arbitrate and it is limited to "***me and the Company"/"I and the Company"***. The Agreement, in the class action waiver, also states that: "***This Agreement shall not be construed to allow or permit the*** consolidation or ***joinder of other claims*** or controversies ***involving any other*** employees or ***parties***". [Doc. 22-6, ¶ 5]

Paragraph 2 would be broader if it ended after "Covered Claims" in the first sentence (to excise the "me and Company" limitation). And, it would have been broader if it said between "me and the Company *or the Company's customers"* (like it did in paragraph 3, and like many staffing company arbitration agreements do). Instead, when discussing *who* agrees to arbitration, the parties limited the scope to Covered Claims "between me and the Company." To the extent there

is any ambiguity, the Employee Handbook [Docs. 22-5, 22-7] shows the Parties' intent: "The Arbitration Program applies to any legal dispute *between the Company and an Associate* which could be brought in court…". [Docs. 22-5, 22-7]

This takes us to paragraph 3 which defines the scope of *what* the parties agreed to arbitrate. Albertsons puts all its eggs in a single sentence--the last sentence--which states that "Covered Claims also specifically include but are not limited to any claim, dispute, and/or controversy that I may have against, or that may be related in any way to the services I or the Company provides to, the Company's business partners *or customers* and their employees."

Albertsons's position boils down to this: a "Covered Claim" includes claims against customers so that if there is a claim against Albertsons, Plaintiff also agreed to arbitrate against Albertsons. The problem with Albertsons's argument, however, is that paragraph 2 articulates that it is "me and the Company" who agreed to arbitrate--even if they involved Covered Claims (including those against the Company's customers).

Capstone had good reason to include its customers in paragraph 3: Capstone can be sued for Albertsons' misconduct as a joint employer (even if Capstone was not involved). Typically staffing companies and their clients are deemed joint employers under employment law.[3] If Plaintiff elected to sue Capstone because *Albertsons* (as a joint employer) collected his biometric information (or discriminated against him, for example), Capstone could insist on arbitration because this is a claim "between [Plaintiff] and the Company" even though it is based on a "Covered Claim", *i.e.*, it is related to "the services I or the Company provides to…customers". This is consistent with the Agreement's very first sentence which references that it is in

[3] A BIPA joint employment claim moved forward in *Wordlaw v. Enter. Leasing Co. of Chicago, LLC*, 20 CV 3200, 2020 WL 7490414, at *6 (N.D. Ill. Dec. 21, 2020).

consideration of my "*employer's* mutual promise to arbitrate the *categories of claims*" under the Agreement.[4] Here, Albertsons has not met its burden of demonstrating that Capstone and Plaintiff agreed to have it be a third-party beneficiary of the Agreement.

C. Other Sections of the Agreement Demonstrate That It Does Not Cover Albertsons.

The Agreement (par. 10) says that the "Company" will pay for all costs of the arbitration, but if Capstone is not a party it would not be before the arbitrator where it could be ordered to pay costs (which in arbitration are often tens of thousands of dollars). In a different context, many courts have held imposing prohibitively expensive arbitration costs on individual litigants is unenforceable. *See Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 659 (6th Cir. 2003). The same logic would apply to assuming a non-party wants to assume these arbitration expenses.

Also, Paragraph 5, governing a class action waiver, mandates that "all claims subject to this Agreement shall be brought in the individual capacity of *myself or the Company*" and says nothing about customers. That same paragraph also says the Agreement prohibits "controversies involving any other…parties" such as Albertsons. [Doc. 22-6, ¶ 5]

Paragraph 7 references that "I and the Company" are entitled to discovery but it says nothing about participation by the Company's customers in discovery. Paragraph 6 discusses an internal dispute resolution process through "workplace channels" but Plaintiff did not work for Albertsons. All these factors, particularly when combined with mantra-like repetitive use of the phrase "me and the Company" further demonstrate the intent was not to benefit Albertsons. *See Johnson v. Mitek Sys., Inc.*, 22 C 349, 2022 WL 1404749, at *4 (N.D. Ill. May 4, 2022)(if third

[4] Defendant's theory, if taken to its logical conclusion, would mandate that Plaintiff arbitrate a case against Albertsons if he was injured in the future while grocery shopping off duty---or even against an Albertson employee who shot him in Alaska 10 years after his Capstone employment ended. After all, these situations are both a "claim" that "I may have against…the Company's…customers and their employees".

party beneficiary status was intended in arbitration agreement, there would have been process to provide notice to that party).

If Capstone intended to have the Agreement apply to Albertsons, it would have stated: "Both I and the Company agree to use binding arbitration, instead of going to court, as the sole and exclusive means to resolve any "Covered Claims" that arise or have arisen between me and the Company *or between me and the Company's customers"*. Albertsons, likewise, could have insisted that before workers were placed at its worksite, they agreed to an arbitration with Albertsons. Plaintiff had no role in drafting this Agreement and should not be bound to it with a third party. *Hogan v. SPAR Group, Inc.*, 914 F.3d 34, 40 (1st Cir. 2019)(if the parties intended it to apply to third party, it could have "modified the arbitration clause to make it applicable to "[a]ny dispute between the Parties [and/or any SBS customer]").

Conclusion

For the foregoing reasons, Plaintiff respectfully requests that the Motion to Compel Arbitration be denied.

Dated: December 19, 2022

Respectfully submitted,

/s/David Fish

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing was served via ECM/CF filing system on December 19, 2022 to all counsel of record.

/s/*David Fish*
David Fish