

STATE OF MICHIGAN

SAGINAW COUNTY CIRCUIT COURT

SAGINAW PRODUCTS CORPORATION,
d/b/a CIGNYS, ELAINE RAPANOS,
CHRISTINE RAPANOS, and JASON
RAPANOS,

Plaintiffs/Counter-Defendants,

v.

CHARLES LANGE, TODD GENSHEIMER,
JEFF LANGE, and JPSC IV, INC.,

Defendants/Counter-Plaintiffs,

and JOHN HUTCHINSON,

Defendant.

Case No. 2014-024807-CB

Judge: M. Randall Jurens (P27637)

**OPINION and ORDER GRANTING
PLAINTIFFS' MOTION FOR
RECONSIDERATION OF JPS
DEFENDANTS' RENEWED
MOTION FOR SUMMARY
DISPOSITION**

Mantese Honigman PC
By: Ian M. Williamson (P65056)
Attorneys for Plaintiffs
1361 E. Big Beaver Road
Troy, Michigan 48083
Telephone: (248) 457-9200
iwilliamson@manteselaw.com

Mahlberg Brandt Gilbert & Thompson
By: Donald A. Gilbert (P37421)
Attorneys for Defendant Charles Lange
715 Court Street
Saginaw, Michigan 48602
Telephone: (989) 799-2111
gilbert@lawyersbuilding.org

Wiener & Gould, PC
By: S. Thomas Wiener (P29233)
Attorneys for Defendant Todd Gensheimer,
Jeff Lange, and JPSC VI, Inc.
950 W. University Drive, Suite 350
Rochester, Michigan 48307
Telephone: (248) 841-9400
twiener@wiennergould.com

Smith Bovill PC
By: Robert A. Jarema (P31537)
Attorneys for John Hutchinson
200 St. Andrews Road
Saginaw, Michigan 48638
Telephone: (989) 792-9641
rjarema@smithbovill.com

Having concluded there was no genuine issue regarding the “existence” of various Sales Contracts in which CIGNYS and JPS agreed to arbitrate their disputes, the court issued its Opinion and Order Granting JPS Defendants’ Renewed Motion for Summary Disposition on February 1, 2016.

On February 22, 2016, plaintiffs filed a motion for reconsideration, *MCR 2.119(F)*, and requested oral argument which the court allowed and conducted on March 23, 2016.

Unlike their earlier efforts, plaintiffs now particularly argue that the Sales Contracts (which contain arbitration agreements) are so “unusual and extraordinary” that they fall outside president Lange’s otherwise broad authority to conduct CIGNYS’s business.¹

Accordingly, the court once again considers the question of *who* – the court or the arbitrator – is to decide challenges to an arbitration agreement.

In this regard, as observed in the court’s previous opinion, the doctrine of severability dictates that an arbitration provision is severable from the remainder of a contract and, unless the challenge is to the arbitration clause itself, the issue of the contract’s enforceability is to be considered by the arbitrator in the first instance. *Prima Paint Corp v Flood & Conklin Mfg Co*, 388 US 395 (1967).

However, *Prima Paint* did not grapple with what is to be done when a party contends not that the underlying contract is merely unenforceable, but rather that no contract ever existed. *Drake Ins Ltd v All American Ins Co*, 256 F3d 587, 590-591 (CA 7, 2001); *Sandvik AB v Advent Int’l Corp*, 220 F3d 99, 105 (CA 3, 2000); *Three Valleys Mun Water Dist v E F Hutton & Co, Inc*, 925 F2d 1136, 1141 (CA 9, 1991). This is an important distinction because, unlike challenges to the enforceability of a contract containing an arbitration agreement, challenges to the very existence of the contract must be addressed by the court. *Granite Rock Co v Int’l Brotherhood of Teamsters*, 561 US 287, 296-297 (2010) (“It is [] well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide”).²

¹ This is a variation on plaintiffs’ previous argument that President Lange did not bind CIGNYS to the Sales Contracts because he did not possess actual authority or apparent authority, and, due to the nature of the contracts, Lange’s execution constituted a breach of fiduciary duty (see Plaintiff/Counter-Defendants’ Response Opposing the JPS Defendants’ Renewed Motion Under MCR 2.116(C)(7), pp 11-15).

² As noted in the court’s prior opinion, fn 4, distinguishing between contract formation and contract validity for purposes of determining who is to resolve arbitration disputes has not been universally embraced. In addition to previously cited examples, recent research reveals MacNeil, Speidel and Stipanowich, *Federal Arbitration Law* (1999 Supplement), § 15.3.3.1, pp 15:28-15:29:

Prima Paint established that the issue of whether a contract, undoubtedly “made,” is voidable for fraud is to be determined by the arbitrator. Suppose, however, that one party contends that no contract was ever created at all. This question can arise in many different ways. These include, for example: . . . that the arbitration agreement was made by someone without authority to bind th[e] alleged party. Neither the wording of the FAA nor the language of *Prima Paint* justifies distinguishing any of these cases from the alleged fraud in the inducement in *Prima Paint*.

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In its prior opinion, the court concluded that, given the broad actual/implied/apparent authority enjoyed by long-time president Lange, plaintiffs' challenge to the Sales Contracts – written, signed, and now fully performed contracts effectuating the seemingly common and beneficial practice of engaging independent agents to facilitate sales of goods for a principal engaged in the manufacture and sale of goods – implicated their enforceability rather than their existence³. The court did not particularly consider whether the Sales Contracts were so beyond the ordinary course of CIGNYS's business as to exceed Lange's presumptive authority to bind the corporation.

As plaintiffs now stress, absent an affirmative grant, agents do not have authority to bind principals to extraordinary obligations.⁴ *Cutler v Grinnell Bros*, 325 Mich 370, 376; 38 NW2d 893 (1949)⁵; *Mayhew v Edward G. Budd Mfg Co*, 258 Mich 381, 383; 242 NW 737 (1932)⁶;

Once it is established, as it was in *Prima Paint*, that “agreement for arbitration” in FAA § 4 means “arbitration clause” rather than “agreement containing an arbitration clause,” the court is concerned only about the “making” of the arbitration clause. We must add to that the *Prima Paint* conclusion that an issue going to the making of the entire contract, rather than one going to the making of the arbitration clause itself treated separately, is not an issue concerned only with the making of the arbitration clause.

With the foregoing combination, nothing in the language of the FAA or of *Prima Paint* logically permits distinguishing any of the no-contract-was-made examples from fraud in the inducement or the many other bases which been held to be under the *Prima Paint* rule. Further add the strong FAA policy favoring arbitration and it seems that the courts should turn over to the arbitrator all questions concerning the making of the overall agreement. All that would be left for the courts to decide would be challenges to the making of the arbitration clause itself going beyond mere challenges to the alleged agreement containing the arbitration clause.

However, the quality and quantity of learned scholars' arguments to the contrary notwithstanding, state courts are bound by the decisions of the United States Supreme Court construing federal law, *Chesapeake & O R Co v Martin*, 283 US 209, 220-221 (1931).

³ This conclusion seemed appropriate particularly to the extent plaintiffs' challenge was premised merely on allegations of breach of fiduciary duty which, while supporting a principal's claim for damages resulting from (or even avoidance of) an offending agreement, does not render the agreement nonexistent.

⁴ This appears to be a corollary of the rule that principals are not bound by their agent's acts where the third party knows or has reason to know of the agent's want of authority (which destroys the estoppel on which apparent authority rests):

The apparent or implied authority of an agent cannot be so extended as to permit him to depart from the usual manner of accomplishing what he is employed to effect. Nor can he enlarge his powers by unauthorized representations and promises. Of course, the principal is not bound where the agent exceeds the scope of his apparent authority and his want of authority is known to the person dealing with him, or if the third person actually knows, or should know, the limitation of the agent's authority. [*Modern Globe, Inc v 1425 Lake Drive Corp*, 340 Mich 663, 667; 66 NW2d 92 (1954)]

⁵ In *Cutler*, after the defendant corporation's store manager had received and implemented authority to hire the plaintiff for remodeling its leased space in a multi-tenant building, it was determined that the basement wiring

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Laird v Michigan Lubricator Co, 153 52, 55; 116 NW 534 (1908)⁷. In accord, *Sacks v Helene Curtis Industries*, 91 NE2d 127, 132; 340 Ill App 76 (1950); *DiPizio Constr Co, Inc v Erie Canal Harbor Dev Corp*, 134 AD3d 1418, 1420; 23 NYS 3d 762 (2015).⁸

Where the agent lacks authority to bind the principal, it necessarily follows that, without more, a contract is not formed. *Weitting v McFeeters*, 104 Mich App 188, 195-196; 304 NW2d 525 (1981)⁹.

Here, plaintiffs assert the Sales Contracts are “unusual and extraordinary” in material ways, including:

needed to be replaced before the new wiring could be connected. Without again seeking his principal’s approval, the manager told the plaintiff to go ahead with the basement work. When the plaintiff sought payment, the defendant corporation argued its manager did not have actual or apparent authority to bind it to pay for the additional work. The Supreme Court agreed:

Obviously, a manger is in general charge of the store. He makes contracts for sale or purchase of merchandise, and the conduct of the local business, which are binding on his principal. They are within the ambit of apparent authority. But we decline to hold that the manager of a local store has apparent authority to contract for construction work of an extensive nature which, in this case, would benefit not only his principal, but also the owners of the building and other tenants of the premises. Such an act was not within the apparent authority of [the manager], and the defendant is not bound thereby.

⁶ In *Mayhew*, beginning in 1924, the defendant corporation employed the plaintiff for nearly five years, paying him \$25 per day, later changed to \$70 per month. The plaintiff alleged the corporation’s president, Budd, separately agreed to pay him \$30,000 per year which was renewed annually, but went unpaid. This separate agreement was not disclosed to the corporation’s board of directors. When the plaintiff sued on the unpaid contracts, the Supreme Court held that the president,

Budd had no power . . . to enter into [the side agreements] on behalf of the corporation. Budd was not the corporation. It had a board of directors, which had not abdicated. Budd, it appears, could bind the corporation on employment contracts made in due and usual course of business, but the contracts here asserted were most extraordinary. * * * That Budd had no authority, express, inferred, or implied, to enter into such contracts, plaintiff, from the very nature of them, must have known.

⁷ In *Laird*, the plaintiff sued on an employment contract signed by the defendant corporation’s general manager (who also served as corporate secretary-treasurer) which provided him compensation of \$1,500 per year for a term of three years. There was no evidence of similar contracts being made with other employees, nor evidence that the board of directors had knowledge of the plaintiff’s contract. The Supreme Court concluded, “[N]o presumption of law can be indulged in that, because a person acts as such a manager, he has the power to bind his principal to contracts of an extraordinary nature.”

⁸ Decisions from foreign jurisdictions are not binding but may be considered as persuasive authority. *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006).

⁹ In *Weitting*, McFeeters, desiring to sell her farm, executed a listing agreement with a broker, Fair. The plaintiffs, Weitting, signed an offer to purchase and gave Fair a \$1,000 deposit. Although McFeeters name was typed beneath a signature line, she never signed the document. Despite the absence of McFeeters signature, plaintiffs alleged that Fair, by virtue of the listing agreement, had authority to accept their offer, and did accept the offer thereby binding McFeeters to the sale of her farm. Since the listing agreement did not specifically confer upon Fair authority to sell the land, the Court of Appeals concluded that, absent the requisite authority, there was no contract binding McFeeters to sell the land.

- CIGNYS never previously granted an independent sales representative the exclusive right to sell the totality of its product lines (Plaintiffs’ Ex 7, 13, 15, and 16, ¶ 1; Plaintiffs’ Ex 2, Affidavit of C Tobin, ¶ 5; Plaintiffs’ Ex 4, dep of C Lange, p 105)
- CIGNYS never previously appointed an outside entity to “act[] as the ipso facto Vice President of Sales” (including responsibility for supervision of CIGNYS’s own internal sales staff) (Plaintiffs’ Ex 7, 13, 15, and 16, ¶1(a); Plaintiffs’ Ex 4, dep of C Lange, pp 59-60)
- CIGNYS never previously paid sales representatives a straight percentage of gross corporate revenue (Plaintiffs’ Ex 7, 13, 15, and 16, ¶¶ 4-5; Plaintiffs’ Ex 4, dep of C Lange, p 105)
- CIGNYS never previously paid sales commissions without the agent being the procuring cause (Plaintiffs’ Ex 7, 13, 15, and 16, ¶¶ 4-5; Plaintiffs’ Ex 2, Affidavit of C Tobin, ¶ 7; Plaintiffs’ Ex 3, dep of J Lange, pp 73-74)
- CIGNYS never previously allowed a sales representative to unilaterally terminate its contractual obligations upon a “change in control” of CIGNYS (Plaintiffs’ Ex 13, 15, and 16, ¶ 16; Plaintiffs’ Ex 4, dep of C Lange, pp 94-97), a distinction magnified by JPS’s right to receive commissions on renewable business for 2 years following termination based on CIGNYS’s total corporate revenue regardless of procuring cause (Plaintiffs’ Ex 13, 15, and 16, ¶¶ 4 and 11(c))

Moreover, plaintiffs argue circumstances corroborate the unusual and extraordinary nature of the Sales Contracts:

- since 2006, Lange [and later Gensheimer] had pursued purchase of CIGNYS (Plaintiffs’ Exs 5, 6, 9, 10, 12, 19, and 21)
- since 2009, Lange’s son, Jeff, was vice president of JPS (Plaintiffs’ Ex 8) and would potentially succeed his father at CIGNYS if successfully purchased (Plaintiffs’ Ex 3, dep of J Lange, p 68)
- Lange did not seek legal review of the Sales Contracts by corporate counsel (Plaintiffs’ Ex 4, dep of C Lange, pp 30 and 62)
- while acknowledging his obligation to disclose “major things” to CIGNYS’s Board, Lange did not disclose the Sales Contracts (Plaintiffs’ Ex 4, dep of C Lange, pp 12, 30, 61, 97, and 105; Plaintiff’s Ex 18)
- the Board was considering selling CIGNYS, and Lange concedes that a potential buyer could properly expect disclosure of the Sales Contracts (Plaintiffs’ Ex 4, dep of C Lange, pp 63, 72-73, and 96)
- even though the Sales Contracts indicated “JPS’s commission is earned when CIGNYS accepts an order” (Plaintiffs’ Exs 7, 13, 15, and 16, ¶ 5), Lange did not reflect earned but unpaid commissions due JPS as accounts payable on CIGNYS’s books until products were shipped (Plaintiffs’ Ex 4, dep of C Lange, p 30)
- CIGNYS’s Board would not have approved the Sales Contracts had they been disclosed (Plaintiffs’ Ex 18)

- the 2011 and 2012 multi-year Sales Contracts were discarded and supplanted mid-term with terms favoring JPS (e.g. increased rate of commission, longer term) without known cause (Plaintiffs’ Exs 13, 15, and 16; Plaintiffs’ Ex 4, dep of C Lange, p 109)

Conversely, the JPS defendants adamantly assert the Sales Contracts represent nothing out of the ordinary:

- CIGNYS’s Board did not function in a meaningful way (JPS Defendants’ Renewed Motion, Ex M, dep of E Rapanos, p 34; 35; C Lange dep vol 1, p 114; E Rapanos dep, pp 34-35)
- CIGNYS’s stockholders have been characterized as “absentee ownership” (JPS Defendants’ Renewed Motion, Ex N, ¶ 15)
- CIGNYS’s Board did not restrict president Lange’s power or authority (JPS Defendants’ Renewed Motion, Ex M, E Rapanos dep, p 183)
- over the years, the Board allowed Lange substantial autonomy in managing CIGNYS’s business, including selling a corporate division, changing the company name, hiring and firing key personnel, and entering into multi-million dollar contracts, all without input from the Board (C Lange dep, vol 2, p ___¹⁰)
- in the ordinary course, Lange did not submit contracts to the Board for approval (JPS Defendants’ Renewed Motion, E Rapanos dep, pp 65-66)
- it is not unusual in business for sales agents have to have “exclusive” rights to sell their principal’s products
- JPS was identified as the “Exclusive Account Representative for CIGNYS” in the parties’ 09-01-09 Joint Venture Agreement (JPS Defendants’ Renewed Motion Ex Q, ¶ 1(a))
- earning commissions on sales of goods when not the procuring cause was justified under the Sales Contracts because JPS was involved in every sale, including sales procured by CIGNYS’s internal sales staff which it supervised
- the 2-year “tail” on commissions was actually a limitation on commissions JPS might otherwise potentially claim
- the “change in control” provision was legitimately added to the 2011 and subsequent Sales Contracts to protect JPS’s investment in its relation with CIGNYS (e.g. in case a purchaser changed business direction)
- re-writing Sales Contracts mid-term was justified because of changing economic conditions (e.g. recognition of JPS’s growing investment)
- CIGNYS had previously employed relatives (JPS Defendant’s Renewed Motion Ex M, dep of E Rapanos, pp 31-32)
- CIGNYS’s principal, Elaine Rapanos, expressed awareness of and appreciation for Gensheimer/JPS’s relationship with CIGNYS (JPS Defendants’ Renewed Motion Ex T)
- the Sales Contracts are not dissimilar from sales representative agreements JPS has with other clients (e.g. Jay Industries)

¹⁰ See JPS Defendants’ Renewed Motion Brief, p 6.

- on 03-09-11, Lange referenced “our business development company, J. P. Sales Company” in a letter to stockholders (Plaintiffs’ Ex 10)
- on 05-27-11, the role of JPS Sales was discussed with CIGNYS’s principals (C Lange dep, vol 2, pp ____)¹¹
- on 05-09-13, Lange, in a letter to CIGNYS’s principals regarding future strategy, confirmed that “[t]oday we rely on a much larger organization (JP Sales) to help us with our sales, marketing and business development requirements” (JPS Defendants’ Renewed Motion Ex S)

Clearly, although each party recognizes that agents do not have authority to bind their principals to extraordinary contracts, they strongly disagree whether president Lange’s execution of the Sales Contracts violated this limitation. Although “at times such a question is one of law that neither requires nor permits the submission of the issue to a jury”, *Gronholz v Saginaw Savings & Loan Ass’n*, 41 Mich App 735, 736; 201 NW2d 95 (1972), the authority of an officer or agent of a corporation to act is generally a question of fact. *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 246; 533 NW2d 15 (1995); *Hage v EL Wellman Co*, 217 Mich 537, 545; 187 NW 404 (1922).

Here, in light of plaintiffs’ refined arguments, and having considered the documentary evidence submitted by the parties, and giving plaintiffs the benefit of all reasonable doubts and permissible inferences, the court concludes that reasonable minds could differ whether president Lange’s signatory power extended to the Sales Contracts. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). This threshold issue -- contract formation -- must be addressed before consideration of whether the Sales Contracts are enforceable. And, unlike contract enforceability (which is to be determined by the arbitrator unless there is a challenge to the arbitration agreement itself, *Prima Paint, supra*), contract formation is an issue that must be settled in the first instance by the court (or jury upon a party’s request). *Granite Rock, supra; Par-Knit Mills, Inc v Stockbridge Fabrics Co, Ltd*, 636 F2d 51, 54-55 (CA 3, 1980).

Accordingly, upon reconsideration, the court is persuaded to vacate its February 1, 2016 Opinion and Order and now denies the JPS Defendants’ Renewed Motion for Summary Disposition.

IT IS SO ORDERED.

Date: April 19, 2016

_____/s/_____
M. Randall Jurens, Circuit Judge (P27637)

¹¹ See JPS Defendants’ Renewed Motion Brief, pp 7-8.