The following constitutes the ruling of the court and has the force and effect therein described.

Signed May 3, 2021

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In re:	§	
	§	Chapter 11
ZPOWER TEXAS, LLC and	§	
ZPOWER, LLC,	§	Case No. 20-41157-ELM
	§	
Debtors.	§	Jointly Administered
	§	
ZPOWER, LLC,	§	
	§	
Plaintiff,	§	
v.	§	Adversary No. 20-04026
	§	
WIDEX, a Danish Company, and	§	
WIDEX USA, INC.,	§	
	§	
Defendants.	§	

ORDER GRANTING IN PART, AND DENYING IN PART, THE WIDEX DEFENDANTS' MOTIONS TO DISMISS OR STAY PROCEEDINGS AND COMPEL ARBITRATION
(Re: Docket Nos. 21 and 26)

Before the Court for determination in this adversary proceeding are the following two motions: (1) *Defendant Widex A/S's Notice of Motion and Motion to (I) Dismiss the Complaint and Compel Arbitration, (II) Alternatively, Stay the Proceeding and Compel Arbitration, and (III) Alternatively, Dismiss the Complaint, and Notice of Hearing* [Docket No. 21] (the "**Widex A/S**

Motion") filed by Defendant Widex, a Danish Company ("**Widex A/S**"); and (2) *Defendant Widex USA, Inc.'s Notice of Motion and Motion to (I) Dismiss the Complaint, (II) Alternatively, Dismiss the Complaint and Compel Arbitration, and (III) Alternatively, Stay the Proceeding and Compel Arbitration* [Docket No. 26] (the "**Widex US Motion**" and together with the Widex A/S Motion, the "**Motions**") filed by Defendant Widex USA, Inc. ("**Widex US**" and together with Widex A/S, the "**Widex Defendants**"). In support of their respective Motions, Widex A/S has filed its *Memorandum of Law in Support* [Docket No. 23] (the "**Widex A/S Brief**"), Widex US has filed its *Memorandum of Law in Support* [Docket No. 28] (the "**Widex US Brief**" and together with the Widex A/S Brief, the "**Widex Briefs**"), and the Widex Defendants have filed their *Appendix in Support* [Docket Nos. 25 and 30] (the "**Widex Appx.**") and *Declaration of David A. Wender* [Docket Nos. 24 and 29] (the "**Wender Declaration**").

In response to the Motions, Plaintiff ZPower, LLC (the "**ZPower**") has filed its *Response in Opposition* [Docket No. 31] (the "**Response**").

In reply to the Response, Widex A/S has filed its *Reply in Support of Memorandum of Law in Support* [Docket No. 32] (the "**Widex A/S Reply**") and Widex US has filed its *Reply in Support of Memorandum of Law in Support* [Docket No. 33] (the "**Widex US Reply**" and together with the Widex A/S Reply, the "**Replies**").

The Court heard oral arguments on the Motions at a hearing conducted on August 24, 2020 (the "**Dismissal Hearing**").

Having considered ZPower's *Original Complaint* [Docket No. 1] (the "**Complaint**"), the Motions, the Widex Briefs, the Widex Appx., the Wender Declaration, the Response, and the Replies, and having considered the arguments of counsel from the Dismissal Hearing, the Court finds and concludes as follows:

FACTUAL BACKGROUND[1]

1. Through at least March 24, 2020, ZPower manufactured and sold patented, rechargeable silver-zinc microbatteries to the medical equipment market, including the hearing aid market.

2. Through at least the same date, Widex A/S and its affiliates manufactured and distributed hearing aids globally, being one of the largest international suppliers of hearing aids with sales in more than 100 countries. Widex A/S operated in the United States through Widex US, its wholly owned subsidiary.

A. The Supply Agreement

3. Prior to the Petition Date, ZPower entered into a Supply Agreement with Widex A/S "and its affiliates" (collectively referred to as "**Widex**" in the Agreement), effective September 4, 2017 (the "**Agreement**"), pursuant to which, subject to the terms and conditions thereof, ZPower agreed to supply, and Widex agreed to purchase, certain quantities of ZPower microbatteries, battery door modules, and chargers (collectively, "**Products**"). *See generally* Widex Appx., Exh. 1 (copy of the Agreement), §§ 1.3, 1.4, 3, 6, 8, 9, 12.

4. The Agreement includes, among other things, certain procedures for the supply and purchase of Products. For example, section 6 of the Agreement requires Widex to provide on a rolling quarterly basis a 12-month forecast of its anticipated Product orders, which breaks out (a) Products with the description "Released" (the "**Released Products**"), as to which the first three months of the forecast are deemed to constitute firm purchase commitments binding upon Widex, and (b) Products with the description "Unreleased" (the "**Unreleased Products**"), as to which no

[1] Portions of the factual background set forth herein are taken from the factual allegations of the Complaint which, for purposes of considering dismissal pursuant to Federal Rule 12(b)(1) and (b)(6), are accepted as true.

portion of the forecast is binding on Widex and all quantities of desired Unreleased Products must be confirmed by separate purchase orders. *See* Agreement, § 6.1.

5. In relation to the Released Products, section 6 further provides that in the event Widex fails to order the Released Products during the binding three-month period, then Widex is required to pay ZPower for the purchase price of such Products within ten business days of the expiration of the three-month period, provided ZPower has manufactured and placed such forecasted Released Products on stock and supplies the Released Products to Widex within the same ten business day period. *See* Agreement, § 6.2.

6. The Agreement was to have an initial term of seven years. *See* Agreement, § 22.1. Unless terminated pursuant to section 22.2 of the Agreement or on at least three months' notice prior to expiration of the term, however, the Agreement would automatically renew at the end of the initial term for another one-year period and continue thereafter to renew on an annual basis for another one-year period until such time as the Agreement is terminated pursuant to section 22.2 or the three months' notice of termination is provided. *See* Agreement, §§ 22.1, 22.2.

7. Section 22.2 of the Agreement includes an insolvency provision. It provides, among other things, that if bankruptcy or similar proceedings are commenced against one of the parties and such proceedings remain undismissed or unstayed for a period of thirty days, then either party may terminate the Agreement at any time and with immediate effect by written notice to the other party. *See* Agreement, § 22.2.2 (the "**Insolvency Provision**"). In the event of any termination, neither of the parties is released from fulfilling any of the obligations incurred prior to the termination. *See* Agreement, § 22.3.

8. Finally, with respect to dispute resolution, the Agreement includes both a Danish choice of law provision, *see* Agreement, § 24.1, and the following agreement to arbitrate:

> Any dispute arising out of or in connection with this Agreement and any Appendices hereto, including any disputes regarding the existence, validity or termination thereof, shall be settled by arbitration administered by The Danish Institute of Arbitration in accordance with the rules of arbitration procedure adopted by The Danish Institute of Arbitration and in force at the time when such proceedings are commenced.

Agreement, § 24.2 (the "**Arbitration Provision**").

B. ZPower's Bankruptcy Filing and the Widex Reaction

9. By early 2020, Product purchases by the Widex Defendants accounted for approximately 40% of ZPower's gross revenue.

10. In February 2020, the Widex Defendants informed ZPower that the quarterly forecast that had been provided to ZPower on or about December 19, 2019 would also serve as the second quarter 2020 12-month forecast (the "**2Q 2020 Forecast**"), thereby committing Widex to purchase the Released Products forecast therein for the months of April, May and June 2020.

11. On March 17, 2020 (the "**Petition Date**"), ZPower filed its voluntary petition for relief under chapter 11 of the United States Bankruptcy Code, thereby initiating Case No. 20-41158 with the Court (the "**Bankruptcy Case**"). By order of the Court, the Bankruptcy Case is being jointly administered with the bankruptcy case of ZPower's affiliate ZPower Texas, LLC under Case No. 20-41157.

12. ZPower asserts that, as of the Petition Date, the Widex Defendants owed $2,287,973.00 to ZPower for Product purchases that had already been made (the "**Prepetition Receivable**").

13. On March 24, 2020, one week after the ZPower bankruptcy filing, a Widex e-mail blast was sent out to Widex customers in regards to the ZPower bankruptcy (the "**Widex Customer E-Blast**"). After explaining therein that ZPower had filed for chapter 11 bankruptcy relief, the Widex Customer E-Blast stated the following:

> Regardless of the outcome of [the ZPower bankruptcy] proceedings, Widex will continue to service all our hearing aids, including ZPower rechargeable units for as long as we are able. However, we have made the decision to no longer sell ZPower rechargeable hearing aids effective immediately.

14. When questioned about the Widex Customer E-Blast on March 25, 2020, senior representatives of the Widex Defendants confirmed to ZPower personnel that, while the Widex Defendants desired to continue purchasing replacement goods from ZPower for already sold hearing aids, because of the ZPower bankruptcy filing they had made the decision to discontinue selling the hearing aid models that utilized ZPower batteries in the United States. In line with such stance, in response to ZPower's demand for the Widex Defendants to fulfill their purchase obligations, the Widex Defendants refused to purchase any of the ZPower Products that had been included in the 2Q 2020 Forecast.

15. ZPower asserts that, facing the loss of a substantial portion of its gross revenue from the termination of new Product purchases by the Widex Defendants, ZPower was forced to discontinue production of the Products as of March 30, 2020.

C. The Adversary Complaint and the Motions

16. On April 30, 2020, ZPower commenced this adversary proceeding with the filing of its Complaint against the Widex Defendants. Pursuant to the Complaint, ZPower has asserted the following causes of action:

Count 1: *Anticipatory Repudiation*. Asserting that the Widex Customer E-Blast and the Widex Defendants' refusal to purchase any of the Products forecast for purchase during the April-June 2020 timeframe under the 2Q 2020 Forecast constituted the Widex Defendants' positive and unequivocal repudiation of the Agreement, ZPower requests relief in the form a declaration that the Widex Defendants anticipatorily repudiated, and thereby terminated, the Agreement.

Count 2: *Intentional Violation of Automatic Stay*. Asserting that the above actions taken by the Widex Defendants to repudiate and terminate the Agreement constituted actions to remove property of ZPower's bankruptcy estate or to

exercise dominion and control over such estate property in violation of the automatic stay of 11 U.S.C. § 362(a), ZPower requests relief in the form of a monetary judgment against the Widex Defendants for all damages, including all consequential damages, suffered by ZPower, plus reasonable attorneys' fees and expenses and punitive damages, if deemed appropriate by the Court, on account of the Widex Defendants' intentional violation of the automatic stay.

Count 3: *Breach of Contract – Anticipatory Repudiation*. Premised again on the assertion that the above-described actions constituted the Widex Defendants' anticipatory repudiation and wrongful termination of the Agreement, ZPower requests relief in the form of a monetary judgment against the Widex Defendants for all damages resulting from the anticipatory repudiation, wrongful termination, and breach of the Agreement, including all consequential damages.

Count 4: *Breach of Contract – Prepetition Receivable*. Focusing on the Prepetition Receivable, ZPower asserts that the Widex Defendants breached the Agreement by failing to pay and requests relief in the form of a monetary judgment against the Widex Defendants for the Prepetition Receivable.

See Complaint, ¶¶ 30-51.

17. In response to the Complaint, on June 15, 2020, the Widex Defendants timely filed the Motions.

18. Pursuant to the Widex A/S Motion, Widex A/S asserts that each of the Counts against it is subject to resolution by arbitration in accordance with the Arbitration Provision of the Agreement. Therefore, pursuant to Rule 12(b)(1) and (b)(3) of the Federal Rules of Civil Procedure (the "**Federal Rules**"), made applicable to this adversary proceeding by Rule 7012(b) of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"), Widex A/S requests entry of an order dismissing each of the Counts against it and compelling arbitration of such Counts before The Danish Institute of Arbitration (the "**DIA**"), or alternatively staying the adversary proceeding and compelling arbitration of the Counts before the DIA. Otherwise, pursuant to Federal Rule 12(b)(6), also made applicable to this adversary proceeding by Bankruptcy Rule

7012(b), Widex A/S asserts that each of the Counts against it should be dismissed for failure of the Complaint to assert any claims for which relief may be granted.

19. Widex US takes a slightly different approach pursuant to the Widex US Motion. Widex US initially asserts that it is not a party to the Agreement and that ZPower has failed to allege facts that plausibly establish that Widex A/S both intended to, and legally could, bind Widex US to the Agreement. Therefore, pursuant to Federal Rule 12(b)(6), Widex US first requests dismissal of all Counts against it based upon the assertion that the Agreement is not binding on it. If and to the extent the Court determines otherwise, however, then pursuant to Federal Rule 12(b)(1) and (b)(3), Widex US joins Widex A/S in requesting entry of an order dismissing each of the Counts against it and compelling arbitration of such Counts before the DIA, or alternatively staying the adversary proceeding and compelling arbitration of the Counts before the DIA. Finally, in the absence of all other relief, Widex US reverts to Federal Rule 12(b)(6), asserting that even if it were determined to be bound to the Agreement, each of the Counts against it must nevertheless be dismissed for failure of the Complaint to assert any claims for which relief may be granted.

DISCUSSION

A. Consideration of Dismissal on Jurisdictional Grounds

20. Federal courts are courts of limited jurisdiction and absent jurisdiction conferred by statute lack the power to adjudicate claims.[2] Thus, jurisdiction is a threshold issue that the

[2] *See Stockman v. Federal Election Comm'n*, 138 F.3d 144, 151 (5th Cir. 1998); *MCI Comms. Servs., Inc. v. Arizona Tel. Co. (In re Intramta Switched Access Charges Litig.)*, 158 F. Supp.3d 571, 574 (N.D. Tex. 2015).

Court must address before considering any substantive request for relief.[3] Indeed, in the absence of jurisdiction, the Court has no ability to provide any such substantive relief.[4]

21. Federal Rule 12(b)(1) provides that a request for dismissal on the basis of lack of subject matter jurisdiction may be made by motion.[5] A Federal Rule 12(b)(1) motion can mount either a facial or factual challenge to jurisdiction. A facial challenge is raised without evidence, whereby the lack of jurisdiction is alleged based upon the face of the pleadings alone. A facial challenge follows the same approach as applied to Federal Rule 12(b)(6) motions to dismiss, in that all well-pleaded facts are treated as true for purposes of assessing whether the pleadings, alone, present a facial basis for the exercise of subject matter jurisdiction.[6] When a facial attack to the subject matter jurisdiction of the court is placed in issue by a defendant's motion to dismiss under Federal Rule 12(b)(1), the plaintiff bears the burden of establishing that jurisdiction exists.[7]

22. A factual challenge, on the other hand, is a challenge that is reliant upon the presentment of extraneous evidence. Where a factual challenge is raised by a defendant, once the defendant presents sufficient evidence to place the existence of jurisdiction into question, the plaintiff must prove the existence of subject matter jurisdiction by a preponderance of the evidence.[8]

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[3] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998).

[4] In this regard, the Court notes that Widex US has presented its jurisdictional challenge as a secondary basis for dismissal only after its initial Rule 12(b)(6) request for dismissal. In the absence of jurisdiction, however, the Court has no authority to consider the Rule 12(b)(6) request for dismissal.

[5] *See* Fed. R. Civ. P. 12(b)(1).

[6] *See Intramta*, 158 F.Supp.3d at 574; *see also Parker v. Prairie View A&M Univ.*, 145 F.Supp.3d 702, 704 (S.D. Tex. 2015).

[7] *See Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001), *cert. denied sub nom. Cloud v. United States*, 536 U.S. 960 (2002); *see also Intramta*, 158 F.Supp.3d at 574.

[8] *See Intramta*, 158 F.Supp.3d at 574; *Walch v. Adjutant Gen.'s Dep't of Tex., 533 F.3d 289, 293 (5th Cir. 2008); Parker*, 145 F.Supp.3d at 704.

23. With the foregoing in mind, the Widex Defendants present their Federal Rule 12(b)(1) request for dismissal based upon the Arbitration Provision of the Agreement. In particular, the Widex Defendants assert that because each of the claims for relief in the Complaint is predicated upon the Widex Defendants' anticipatory repudiation, termination and/or breach of the Agreement, and because ZPower agreed that any dispute arising out of or in connection with the Agreement, including any dispute regarding the existence, validity or termination of the Agreement, would be settled by arbitration before the DIA, then the Court is deprived of jurisdiction to determine the claims.

24. Inasmuch as the jurisdictional challenge is dependent upon the Arbitration Provision of the Agreement and the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*. (the "**FAA**"), and not just the Complaint alone, the jurisdictional challenge is a hybrid of a facial and factual challenge. Whether facial or factual in nature, ZPower has the burden of establishing that jurisdiction exists.

25. Pursuant to the Complaint, ZPower asserts that the Court has subject matter jurisdiction of the proceeding pursuant to, among other provisions, section 1334 of title 28 of the United States Code. Pursuant to section 1334, Congress has vested the United States district courts with subject matter jurisdiction of "all civil proceedings arising under title 11, or arising in or related to cases under title 11."[9] Pursuant to 28 U.S.C. § 157, each district court may, in turn, refer to the bankruptcy judges for the district "any or all proceedings arising under title 11 or arising in or related to a case under title 11."[10] And in this district, the United States District Court for the

[9] *See* 28 U.S.C. § 1334(b).

[10] *See* 28 U.S.C. § 157(a).

Northern District of Texas has, in fact, referred all such proceedings to the Bankruptcy Court for the Northern District of Texas.[11]

26. Thus, based upon the provisions of sections 1334 and 157 of title 28, the Court possesses subject matter jurisdiction of this adversary proceeding if it "arises under" title 11 or has "arisen in" or is "related to" a case under title 11. The most remote of these alternative bases is "related to" jurisdiction. Thus, for purposes of determining whether the Court has jurisdiction of this adversary proceeding, it is necessary only to determine whether the proceeding is at least "related to" the associated ZPower Bankruptcy Case.[12]

27. The Fifth Circuit has explained that "related to" is a term of art in bankruptcy jurisdiction.[13] "A proceeding is 'related to' a bankruptcy if 'the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.'"[14] "'Related to' jurisdiction includes any litigation where the outcome could alter, positively or negatively, the debtor's rights, liabilities, options, or freedom of action or could influence the administration of the bankrupt estate."[15]

28. Here, there is little doubt about the "related" nature of the adversary proceeding to ZPower's Bankruptcy Case. As of the Petition Date, both ZPower and Widex (which, for purposes of considering dismissal on jurisdictional grounds, will be deemed to include Widex US as alleged in the Complaint) had material, continuing obligations under the Agreement – ZPower remained

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[11] *See Miscellaneous Order No. 33: Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc* (N.D. Tex. Aug. 3, 1984).

[12] *Walker v. Cadle Co. (In re Walker)*, 51 F.3d 562, 569 (5th Cir. 1995); *Wood v. Wood (In re Wood)*, 825 F.2d 90, 93 (5th Cir. 1987).

[13] *Bass v. Denney (In re Bass)*, 171 F.3d 1016, 1022 (5th Cir. 1999).

[14] *Id*.

[15] *Collins v. Sidharthan (In r KSRP, Ltd.)*, 809 F.3d 263, 266 (5th Cir. 2015) (quoting *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 386 (5th Cir. 2010) (quoting *Edge Petroleum Operating Co. v. GPR Holdings, LLC (In re TXNB Internal Case)*, 483 F.3d 292, 298 (5th Cir.*), cert. denied*, 552 U.S. 1022 (2007))).

obligated to supply Product and Widex remained obligated to purchase, at a minimum, the portion of Released Products forecast for purchase during the first three months of the 2Q 2020 Forecast, in each case subject to the terms and conditions of the Agreement. As such, the Agreement constituted an executory contract as of the Petition Date,[16] and upon the commencement of the Bankruptcy Case, ZPower's contractual rights under the Agreement, even if terminable, became property of its bankruptcy estate (the "**Estate**").[17]

29. Consequently, because each of the Counts of the Complaint requests relief against the Widex Defendants for actions allegedly taken in relation to the Estate's contractual rights in the Agreement, the adversary proceeding is, at a minimum, related to the ZPower Bankruptcy Case, thereby providing a basis for subject matter jurisdiction.

30. Notwithstanding same, the Widex Defendants assert that the Court must dismiss the adversary proceeding for want of subject matter jurisdiction because of the FAA's mandate to arbitrate. The Court disagrees. Congressional jurisdictional provisions are generally, if not exclusively, set out in title 28 of the United States Code. With that in mind, the Widex Defendants have failed to point the Court to any provision within title 28 that expressly excepts arbitrable claims under the FAA from the jurisdictional grasp of sections 1334 and 157. In reality, while the FAA may serve as the basis upon which to prevent the Court from *exercising* the subject matter jurisdiction that it has over an arbitrable dispute *if urged by a party to an enforceable agreement to arbitrate*, that is different than depriving the Court of subject matter jurisdiction *ab initio*. To illustrate this point further, while "no action of the parties can confer subject-matter jurisdiction

[16] *See RPD Holdings, LLC v. Tech Pharmacy Servs. (In re Provider Meds, LLC)*, 907 F.3d 845, 851 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1347 (2019).

[17] *See* 11 U.S.C. § 541(a)(1) (commencement of case creates an estate comprised of, among other property interests, all legal or equitable interests of the debtor in property as of the commencement of the case); *Bonneville Power Admin. v. Mirant Corp. (In re Mirant Corp.)*, 440 F.3d 238, 251-52 (5th Cir. 2006).

upon a federal court,"[18] it is well-established that where the parties to an enforceable arbitration agreement *agree* to waive the right to arbitrate in favor of having a federal court determine the dispute, the federal court may do so (assuming the dispute is within the subject matter jurisdiction of the court).[19]

31. In other words, while the FAA may require a court to stay all proceedings in relation to an arbitrable claim and/or to compel the arbitration of an arbitrable claim, that is not the same thing as outright eliminating the court's subject matter jurisdiction of the proceeding.[20] Thus, finding that the Court, at a minimum, has "related to" subject matter jurisdiction of the adversary proceeding pursuant to 28 U.S.C. §§ 1334 and 157, the Motions will be denied to the extent presented as a request for dismissal for want of jurisdiction pursuant to Federal Rule 12(b)(1).

B. Widex US' Initial Request for Dismissal Pursuant to Federal Rule 12(b)(6)

32. With the jurisdictional issue resolved, before considering the Widex Defendants' request to stay the proceedings pursuant to Federal Rule 12(b)(3) and compel arbitration, the Court must first consider Widex US' initial request for dismissal under Federal Rule 12(b)(6) predicated on the assertion that ZPower has not plausibly alleged that Widex US is a party to the Agreement. Necessarily, if ZPower has failed to plausibly allege that Widex US is a party to the Agreement, then there is also no basis upon which to compel arbitration given Widex US' position that it is not a party to the Agreement.[21]

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[18] *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

[19] *See, e.g., Forby v. One Techs., LP*, 909 F.3d 780, 783 (5th Cir. 2018) ("the right to arbitrate – like all contract rights – is subject to waiver").

[20] *See also Polyflow, LLC v. Specialty RTP, LLC*, 993 F.3d 295 (5th Cir. 2021) (discussing jurisdictional analysis of arbitrability disputes).

[21] *See* 9 U.S.C. § 2 (written agreement to arbitrate required by FAA).

33. Federal Rule 8, made applicable to adversary proceedings by Bankruptcy Rule 7008, simply requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief," with each allegation in support thereof to be "simple, concise and direct."[22] That said, pursuant to Federal Rule 12(b)(6), on motion of a defendant filed prior to the filing of such party's answer, the claim is subject to dismissal if the pleading in which the claim is asserted fails to state a claim upon which relief can be granted.[23]

34. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[24] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[25] In assessing facial plausibility, a court is to accept as true all well-pleaded factual allegations set forth within the complaint, even if doubtful in fact.[26] But the allegations must consist of more than mere labels and conclusions.[27] "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[28] Additionally, the well-pleaded complaint rule is inapplicable to legal conclusions.[29] Courts "are not bound to accept as true 'a legal conclusion couched as a factual allegation.'"[30]

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[22] Fed. R. Civ. P. 8(a)(2), (d)(1).

[23] *See* Fed. R. Civ. P. 12(b)(6).

[24] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Baron v. Sherman (In re Ondova Ltd. Co.)*, 914 F.3d 990, 992-93 (5th Cir. 2019).

[25] *Iqbal*, 556 U.S. at 678.

[26] *Twombly*, 550 U.S. at 555; *Allen v. Walmart Stores, LLC*, 907 F.3d 170, 177 (5th Cir. 2018).

[27] *Twombly*, 550 U.S. at 555.

[28] *Iqbal*, 556 U.S. at 678; *see also Allen*, 907 F.3d at 177 (explaining that "'naked assertion[s]' devoid of 'further factual enhancement'" are not sufficient to prevent dismissal) (quoting *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557)).

[29] *Iqbal*, 556 U.S. at 678.

[30] *Ondova Ltd. Co*., 914 F.3d at 993 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

35. Subject to application of the foregoing principles, the determination of facial plausibility is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[31] While "[t]he plausibility standard is not akin to a 'probability requirement,' [ ] it asks for more than a sheer possibility that a defendant has acted unlawfully."[32] Thus, to avoid dismissal, the "[f]actual allegations must be enough to raise a right to relief above the speculative level[.]"[33]

36. With the foregoing in mind, Widex US asserts that it was not a party to the Agreement and is, therefore, not bound to it. According to Widex US, Widex A/S was the sole Widex party to the Agreement and ZPower has not alleged otherwise. Additionally, Widex US asserts that ZPower has not pled any facts to establish that Widex A/S had either the intent or ability to bind Widex US to the Agreement, instead only baldly alleging on information and belief that Widex A/S had the authority to bind Widex US.

37. In response, ZPower points out that the Agreement[34] defines "Widex" as Widex A/S "and its affiliates," that the Agreement was signed by two individuals for Widex (without specifying the particular Widex entity(ies) on whose behalf they were signing),[35] and that the Complaint includes assertions that Widex US is wholly owned by Widex A/S, that Widex A/S operates in the United States through Widex US, and that ZPower communicated with

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[31] *Iqbal*, 556 U.S. at 679.

[32] *Id.* at 678.

[33] *Twombly*, 550 U.S. at 555.

[34] While ZPower references the Agreement throughout the Complaint, it did not attach the Agreement to the Complaint due to confidentiality concerns. *See* Complaint, ¶ 8 n.1. However, inasmuch as the Widex Defendants have supplied the Agreement in support of their Motions, it is appropriate for the Court to consider the content of the Agreement in considering the Motions. *Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co*., 920 F.3d 890, 900 (5th Cir. 2019) ("When a defendant attaches documents to its motion that are referenced in the complaint and are central to the plaintiff's claims, however, the court can also properly consider those documents"), *cert. denied*, 140 S. Ct. 2506 (2020).

[35] One of the individuals is reflected as having the title "Vice President, Global Supply Chain" and the other is reflected as having the title "SVP Global Research & Development." *See* Agreement, ¶ 26.

representatives of both Widex Defendants in addressing the Widex Customer E-Blast and the Widex Defendants' intent as to future performance of the Agreement. ZPower asserts that such allegations are sufficient to plausibly state a claim that Widex US is a party to the Agreement. The Court agrees.

38. A court's role at the dismissal stage is to gauge whether the plaintiff has presented a plausible claim for relief – not to evaluate the ultimate merits of the claim. Here, based upon the Agreement's expansive definition of "Widex," the Complaint's allegations with respect to the affiliate relationship of Widex A/S to Widex US, and the generic execution of the Agreement by signatories for "Widex," there is a sufficient basis to allow each of the Counts against Widex US to move forward. Accordingly, Widex US's Motion will be denied to the extent that it requests dismissal pursuant to Federal Rule 12(b)(6) on the basis of Widex US allegedly not being a party to the Agreement.

C. The Request to Stay the Proceeding and Compel Arbitration of All Counts

39. This, then, takes the Court to the Widex Defendants' request for entry of an order staying the proceeding and compelling the arbitration of all Counts. Relying upon the FAA, the Widex Defendants have effectively made the request as part of its challenge to the venue of the proceeding pursuant to Federal Rule 12(b)(3).[36]

40. Congress adopted the FAA in 1925 in response to a perception that courts were unduly hostile to arbitration.[37] Pursuant to section 2 of the FAA, "[a] written provision in any … contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any

[36] *See* Fed. R. Civ. P. 12(b)(3).

[37] *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018).

part thereof, … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

41. To give effect to section 2, the FAA includes provisions for the stay of proceedings brought in contravention of an agreement to arbitrate and to compel arbitration upon the request of a party to the agreement. First, section 3 of the FAA provides as follows:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3. Section 4 of the FAA provides that the party aggrieved by the failure or refusal to arbitrate may also petition the court for an order directing that the arbitration proceed in the manner provided by the parties' agreement to arbitrate. 9 U.S.C. § 4. In combination, the foregoing provisions reflect the FAA's principal purpose of ensuring that private arbitration agreements are enforced according to their terms.[38]

42. The Widex Defendants assert that, in entering into the Agreement, ZPower agreed pursuant to the Arbitration Provision of the Agreement to have any dispute arising out of or in connection with the Agreement, including any dispute regarding the existence, validity or termination of the Agreement, determined by arbitration before the DIA. Thus, based upon the FAA, the Widex Defendants request that the adversary proceeding be stayed and that ZPower be compelled to arbitrate each of the Counts of the Complaint before the DIA.

43. In response, ZPower predominantly focuses on Count 2 of the Complaint (Intentional Violation of the Stay), arguing that it is not subject to arbitration because it involves a

[38] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

core statutory bankruptcy right implicating the contempt powers of the Court and that, as such, the Court has the discretion to, and should, refuse to compel arbitration of Count 2 because requiring such arbitration would conflict with the purposes of the Bankruptcy Code. With respect to the other Counts of the Complaint, ZPower asserts that they should be tried in this Court along with Count 2 to avoid piecemeal litigation and to foster efficiency.

44. To put ZPower's arguments in context, while the FAA's objective of facilitating the enforcement of valid agreements to arbitrate is clear, "the FAA is not the only statute on the books, and its 'mandate may be overridden by a contrary congressional command.'"[39] Here, the other statute at issue is obviously the Bankruptcy Code.

45. To establish the existence of such a "contrary congressional command," the party opposing arbitration must "show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue[,]" which intent "'will be deducible from [the statute's] text or legislative history,' or from an inherent conflict between arbitration and the statute's underlying purposes."[40] "A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow. The intention must be clear and manifest."[41]

46. In the case of the Bankruptcy Code, there is no statutory language included within the Bankruptcy Code that expressly states that the FAA does not apply, in whole or in part, to bankruptcy or bankruptcy-related proceedings. Therefore, based upon the principles delineated by the Supreme Court, the Fifth Circuit has adopted the following two guidelines to the evaluation

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[39] *Henry v. Educational Fin. Serv. (In re Henry)*, 944 F.3d 587, 590 (5th Cir. 2019) (quoting *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987)).

[40] *McMahon*, 482 U.S. at 226-27 (citations omitted) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

[41] *Epic Sys. Corp.*, 138 S. Ct. at 1624 (citations and quotation attributions omitted).

of whether an inherent, unavoidable conflict exists between the FAA and particular provisions of the Bankruptcy Code. First, "it is generally accepted that a bankruptcy court has no discretion to refuse to compel the arbitration of matters not involving 'core' bankruptcy proceedings under 28 U.S.C. § 157(b)…."[42] On the other hand, "[a] bankruptcy court does possess discretion, however, to refuse to enforce an otherwise applicable arbitration agreement when the underlying nature of a proceeding derives *exclusively* from the provisions of the Bankruptcy Code and the arbitration of the proceeding *conflicts with the purpose of the Code*."[43] Such purposes of the Code include "the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders."[44]

47. Thus, based upon the Fifth Circuit's first guideline above, it is clear that the Court has no discretion to refuse to compel the arbitration of Counts 1, 3 and 4 of the Complaint.[45] Each of those Counts sounds in breach of contract and is predicated upon ZPower's prepetition legal rights under the Agreement. While the Counts are related to the Bankruptcy Case for jurisdictional purposes, they are nevertheless non-core in nature under 28 U.S.C. § 157(b), neither involving a substantive right provided by title 11 nor involving a matter that, by its nature, could only arise in the context of a bankruptcy case.[46] And while the Fifth Circuit has, in limited circumstances,

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[42] *Gandy v. Gandy (In re Gandy)*, 299 F.3d 489, 495 (5th Cir. 2002).

[43] *Id*. (emphasis added) (citing *Insurance Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (In re National Gypsum Co.)*, 118 F.3d 1056, 1067 (5th Cir. 1997)).

[44] *See National Gypsum*, 118 F.3d at 1069.

[45] Among the other arguments made by ZPower in opposition to arbitration are (1) concerns with respect to the potential delays and/or other complications that may arise on account of travel restrictions imposed in Copenhagen, Denmark (the site of the arbitration) due to the coronavirus pandemic, and (2) the expense associated with arbitration and travel in connection therewith. None of these factors, however, serves as a sufficient legal basis to decline to compel arbitration. *See, e.g*., 9 U.S.C. § 2 (limiting challenges to "such grounds as exist at law or in equity for the *revocation* of *any* contract") (emphasis added).

[46] *See Wood*, 825 F.2d at 97.

recognized the ability of a bankruptcy court to refuse to compel the arbitration of certain non-core claims or issues where the heart of the complaint concerns core bankruptcy claims that "implicate[] non-bankruptcy … issues 'in only the most peripheral manner,'"[47] it can hardly be said that the contractual-based anticipatory repudiation, termination and breach issues in the case at bar are only "the most peripheral" in nature.[48]

48. Turning to the second guideline and Count 2 of the Complaint, the Court may decline to enforce the Arbitration Provision of the Agreement if the following two requirements are met: "First, the proceeding must adjudicate statutory rights conferred by the Bankruptcy Code and not the debtor's prepetition legal or equitable rights. Second, requiring arbitration of the proceeding will conflict with the purposes of the Bankruptcy Code."[49]

49. Count 2 satisfies the first of the two requirements insofar as the Count exclusively seeks to adjudicate statutory rights conferred by the Bankruptcy Code. In this regard, section 362(a) of the Bankruptcy Code provides that the filing of a bankruptcy petition operates as a stay applicable to all entities of, among other things, "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."[50] According to the Fifth Circuit, such language prohibits a non-debtor counterparty to an executory contract from terminating the contract without first obtaining modification or relief from the stay.[51] Pursuant to section 105(a) of the Bankruptcy Code, a bankruptcy court has the power to award

[47] *Gandy*, 299 F.3d at 497 (quoting *National Gypsum*, 118 F.3d at 1067)).

[48] *See also Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-21 (1985) (the mandates of the FAA may not be overridden based upon the mere possibility of bifurcated proceedings, piecemeal resolution, and inefficiency).

[49] *Henry*, 944 F.3d at 590-91.

[50] 11 U.S.C. § 362(a)(3).

[51] *See Mirant*, 440 F.3d 251-53; *see also* 11 U.S.C. §§ 365(e)(1)(B), 541(c)(1)(B) (invalidating *ipso facto* termination clauses of contracts).

compensatory contempt sanctions for violation of the automatic stay.[52] Thus, insofar as Count 2 seeks to exclusively adjudicate statutory rights conferred by sections 362(a) and 105(a) of the Bankruptcy Code, the first requirement for discretionary denial of the request to compel arbitration under the FAA is satisfied.

50. In relation to the second of the two requirements, the Court additionally finds that requiring the arbitration of rights that exclusively arise under sections 362(a) and 105(a) of the Bankruptcy Code would conflict with the purposes of the Bankruptcy Code. The automatic stay is perhaps the single most important and fundamental protection provided to a debtor in bankruptcy.[53] Not only does the automatic stay protect the debtor, but it also protects the estate and, indirectly, the interests of all other creditors in the case hoping to obtain a recovery from property of the estate. In fact, Congress had deemed the protection of property of the bankruptcy estate to be so important that it has vested exclusive jurisdiction of such property with the district court having jurisdiction of the bankruptcy case (and, by extension, the bankruptcy court upon referral pursuant to 28 U.S.C. § 157).[54] Corollary and essential to such protections is that any disputes with respect to the applicability, violation and enforcement of the automatic stay be centralized and handled by the court in which the bankruptcy case is proceeding.

51. The centralized resolution of such disputes also serves to protect both creditors and, if applicable, a reorganizing debtor from the hazards of piecemeal litigation involving automatic stay issues. In the bankruptcy forum, for example, all creditors are given the opportunity to be

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[52] *See, e.g., Maritime Asbestosis Legal Clinic v. LTV Steel Co., Inc. (In re Chateaugay Corp.)*, 920 F.2d 183, 186-87 (2nd Cir. 1990); *Wilson v. Arbors of Central Park ICG, LLC (In re Wilson)*, 610 B.R. 255, 279 (Bankr. N.D. Tex. 2019); *In re Talsma*, 468 B.R. 809, 817 (Bankr. N.D. Tex. 2012).

[53] *Wilson*, 610 B.R. at 275; see also H.R. Rep. No. 95-595, at 340-41 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97 ("The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws").

[54] *See* 28 U.S.C. § 1334(e)(1).

heard on issues involving the automatic stay. This is important because their respective objectives, concerns and sensitivities in relation to the dispute may be vastly different than those of only the debtor and its counterparty to an arbitration agreement.

52. Finally, the determination of whether a party should be held in contempt for violation of the automatic stay is inherently a court-specific task to be resolved by the court having jurisdiction of the underlying bankruptcy case. In fact, it is highly doubtful that any arbitrator possesses the power to make a contempt or quasi-contempt determination.

53. In short, based upon the inherent conflict that exists between arbitration and the underlying purposes of section 362(a) of the Bankruptcy Code (and section 105(a) as applicable to enforcing or implementing section 362(a)), as explained above, the Court finds that Congress intended to preclude, or at least provide discretion to a court having jurisdiction of a bankruptcy case to preclude, a waiver of judicial remedies for disputes involving the applicability, violation or enforcement of the automatic stay in such a bankruptcy case. Thus, applying such discretion, the Court declines to compel the arbitration of Count 2 of the Complaint, to the extent that it seeks to exclusively adjudicate statutory rights conferred by sections 362(a) and 105(a) of the Bankruptcy Code.

54. Such determination, however, does not end the discussion. What complicates the analysis of Count 2 is that Count 2 does not *exclusively* seek to adjudicate such statutory rights. It also seeks a predicate determination that the Widex Defendants anticipatorily repudiated and/or terminated the Agreement – a factual question that is subject to arbitration as part of Counts 1, 3 and 4, as previously explained. As to that factual question, and only that question,[55] insufficient

[55] For the avoidance of doubt, the factual question of whether there was an anticipatory repudiation and/or termination of the Agreement by one or both of the Widex Defendants does not include whether any such action was contractually permitted or excusable, not whether any such action was taken with knowledge or intent in relation to the automatic stay, etc.; it is simply whether there was an anticipatory repudiation and/or termination with all other relevant factual

grounds exist to deny the request to compel arbitration in light of the status of the Bankruptcy Case and the particular facts and circumstances of the case.[56] Therefore, the Court will grant the request to compel arbitration of that question and stay further litigation of Count 2 in this Court until the question has been determined by arbitration.

55. In summary and based upon all of the foregoing, the Court will (a) grant the Motions to the extent that they request a stay of Counts 1, 3 and 4 of the Complaint and entry of an order compelling arbitration of such Counts, and (b) grant in part, and deny in part, the Motions to the extent that they request a stay of Count 2 of the Complaint and entry of an order compelling arbitration of such Count, (i) compelling arbitration of only the factual question of whether the Widex Defendants, or either of them, anticipatorily repudiated and/or terminated the Agreement, (ii) staying the adversary proceeding with respect to Count 2 pending such determination by the arbitrator(s), and (iii) denying all other requested relief.

D. Residual Alternative Requests for Dismissal Pursuant to Federal Rule 12(b)(6)

56. Finally, with respect to the Widex Defendants' remaining alternative requests for dismissal pursuant to Federal Rule 12(b)(6): (a) to the extent that the requests are focused on Counts 1, 3 and 4, the Motions will be denied as moot because all such issues will be addressed in connection with the arbitration of such Counts, and (b) to the extent that the requests are focused on Count 2, the Motions will be denied as moot because the Motions attack the plausibility of ZPower's claim that the Widex Defendants anticipatorily repudiated and/or terminated the

and legal determinations to thereafter be made by this Court with the benefit of the determination of repudiation/termination made by the arbitrator(s).

[56] As alleged by ZPower in the Complaint, it ceased production of the Products as of March 30, 2020. Since that time, ZPower, along with its affiliate ZPower Texas, LLC, has confirmed a joint plan of liquidation. *See, e.g.*, Docket Nos. 295, 303 and 311 in Case No. 20-41157 (chapter 11 joint plan of liquidation and order confirming such plan).

Agreement and that factual question, as stated above, will be addressed in connection with the arbitration.

ORDER

For all of the foregoing reasons, it is hereby:

ORDERED that the Motions be and are hereby GRANTED IN PART, AND DENIED IN PART, as follows:

1. The Widex Defendants' request for the dismissal of all Counts of the Complaint against them for want of jurisdiction pursuant to Federal Rule 12(b)(1) is DENIED.

2. The request by Widex US under the Widex US Motion for the dismissal of all Counts of the Complaint against it pursuant to Federal Rule 12(b)(6) on the basis of Widex US allegedly not being a party to the Agreement is DENIED.

3. The Widex Defendants' alternative request to compel the arbitration of all Counts of the Complaint against them and stay the adversary proceeding pursuant to Federal Rule 12(b)(3) and 9 U.S.C. §§ 3 and 4 is:

(a) GRANTED with respect to Counts 1, 3 and 4 of the Complaint;

(b) GRANTED with respect to Count 2 of the Complaint solely and exclusively with respect to the factual question of whether the Widex Defendants, or either of them, anticipatorily repudiated and/or terminated the Agreement; and

(c) DENIED in all other respects.

To the extent granted, ZPower and the Widex Defendants (collectively, the "**Parties**") are ordered to arbitrate the applicable Counts and factual question in accordance with the Arbitration Provision of the Agreement.

4. All other alternative requests for relief set forth within the Motions are DENIED AS MOOT.

IT IS FURTHER ORDERED that all further proceedings in the adversary proceeding be and are hereby STAYED pending conclusion of the ordered arbitration and the issuance of an arbitral award or determination. The Parties shall promptly request a status conference with the Court once such arbitral award or determination has been issued.

IT IS FURTHER ORDERED that, in the event such a status conference is not requested by April 30, 2022, then a status conference shall be conducted on **May 2, 2022, at 1:30 p.m. (prevailing Central Time)** before the Honorable Edward L. Morris. Said hearing will be conducted by WebEx videoconference at https://us-courts.webex.com/meet/morris.

END OF ORDER # #