

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

O' SULLIVAN FILMS, INC.,

*

Plaintiff,

*

v.

*

PRECISION ROLL GRINDERS, INC.,

*

Civil Action No. 5:09CV00062

Defendant,

*

v.

*

WALZEN IRLE GMBH

*

Third-Party Defendant.

*

DEFENDANT PRECISION ROLL GRINDERS, INC.'S OPPOSITION TO
THIRD-PARTY DEFENDANT WALZEN IRLE GMBH'S
MOTION TO DISMISS OR IN THE
ALTERNATIVE, TO STAY THIRD-PARTY COMPLAINT

COMES NOW Defendant/Third-Party Plaintiff PRECISION ROLL GRINDERS, INC.,
(hereinafter "**Precision**") by and through its attorneys, JEFFREY R. SCHMIELER, LISA N.
WALTERS and SAUNDERS & SCHMIELER, P.C., pursuant to the Federal Rules of Civil
Procedure, and hereby files its Opposition to Third-Party Defendant Walzen IRLE GMBH's
(hereinafter "**Walzen**") Motion to Dismiss or in the Alternative, to Stay the Third-Party Complaint
and in support thereof states as follows:

1. Precision has stated claims upon which relief may be granted by this Court in its
Third-Party Complaint against Third-Party Defendant Walzen.

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2. Precision has averred in its Third-Party Complaint that Walzen, as manufacturer of a calender roll (hereinafter "**Calender Roll #4**"), is responsible for any and all claims by the Plaintiff, as it made and breached expressed warranties to the Plaintiff, **unrelated to the Distributor Agreement** entered into between Precision and Walzen.¹
3. Precision has averred in its Third-Party Complaint that Walzen, as manufacturer of Calender Roll #4, is responsible for any and all claims by the Plaintiff, as it made and breached implied warranties to the Plaintiff, **unrelated to the Distributor Agreement** entered into between Precision and Walzen.²
4. Pursuant to the Third-Party Complaint, Precision has set forth a claim for **common law indemnification** against Walzen predicated upon Walzen's breach of express and implied warranties that Calender Roll #4 was of good and workmanlike quality, free of any and all defects inclusive of cracks on the roll's surface and manufactured to meet the technical specifications required by the Plaintiff.³
5. Pursuant to the Third-Party Complaint, Precision has set forth a claim for **common law contribution** against Walzen predicated upon Walzen's breach of express and implied warranties which was the primary, active and effective cause of the Plaintiff's alleged injuries and damages as set forth in the Complaint.⁴

¹ See Third Party Complaint at ¶ 15.

² See Third Party Complaint at ¶ 16.

³ See Third Party Complaint at ¶ 19-23.

⁴ See Third Party Complaint at ¶ 24-27.

6. Pursuant to the Third-Party Complaint, Precision has set forth a claim for contractual indemnification against Walzen, predicated upon the Distributor Agreement between Precision and Walzen in addition to the express warranty provided by Walzen regarding Calendar Roll #4.⁵
7. Pursuant to the Third-Party Complaint, Precision has set forth a claim for breach of contract against Walzen, predicated upon the Distributor Agreement between Precision and Walzen in addition to the express warranty provided by Walzen regarding Calendar Roll #4.⁶
8. Accordingly, Precision's Third-Party Complaint is not subject to the arbitration clause set forth in the Distributor Agreement.
9. Furthermore, Walzen's request for a stay of this matter is untimely, severely prejudicial to Precision, and lacking any showing that Precision refused to arbitrate the issues presented in the Third-Party Complaint.
10. For the reasons, arguments, and authorities set forth more fully in the attached memorandum of law, Precision is entitled to judgment as a matter of law and Walzen's Motion to Dismiss or in the Alternative, to Stay Third-Party Complaint should be denied.

⁵ See Third Party Complaint at ¶ 28-34.

⁶ See Third Party Complaint at ¶ 35-41.

Respectfully submitted,

/s/ Jeffrey R. Schmieler

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Plaintiff,

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PRECISION ROLL GRINDERS, INC.,

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Civil Action No. 5:09CV00062

Defendant,

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v.

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WALZEN IRLE GMBH

*

Third-Party Defendant.

*

**DEFENDANT PRECISION ROLL GRINDERS, INC.'S MEMORANDUM OF LAW
AND AUTHORITIES IN SUPPORT OF ITS OPPOSITION TO THIRD-PARTY
DEFENDANT WALZEN IRLE GMBH'S MOTION TO DISMISS OR IN THE
ALTERNATIVE, TO STAY THIRD-PARTY COMPLAINT**

COMES NOW Defendant/Third-Party Plaintiff **PRECISION ROLL GRINDERS, INC.**, (hereinafter "**Precision**") by and through its attorneys, **JEFFREY R. SCHMIELER, LISA N. WALTERS** and **SAUNDERS & SCHMIELER, P.C.**, pursuant to the Federal Rules of Civil Procedure and, hereby files its Opposition to Third-Party Defendant Walzen IRLE GMBH's (hereinafter "**Walzen**") Motion to Dismiss or in the Alternative, to Stay the Third-Party Complaint and in support thereof states as follows:

STATEMENT OF FACTS

1. Plaintiff, **O'SULLIVAN FILMS, INC.** is a Delaware corporation with its principal place of business located at 1944 Valley Avenue, Winchester, Virginia. **O'SULLIVAN FILMS,**

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INC. (hereinafter “O’Sullivan”) is engaged in the business of producing calendered vinyl and alloy films for various uses, including in the automotive industry for vacuum-formed instrument panels.

2. Precision is a Pennsylvania Corporation with its principal place of business located at 6356 Chapmans Road, Allentown, Pennsylvania. Precision is engaged in the business of distributing calender rolls, which are long metal cylinders used in various industrial processes.
3. Walzen is a German Corporation with a principal place of business located at Hüttenweg 5, 57250 Netphen, Germany. Walzen is engaged in the business of manufacturing calender rolls and other products.
4. Precision contracted with Walzen to serve as the exclusive distributor of calender rolls manufactured by Walzen.
5. Precision is the exclusive distributor of Walzen’s products in the United States.
6. O’Sullivan alleges that on or about May 17, 2005, O’Sullivan and Precision entered into a contract in which they agreed that Precision would sell two calender rolls to O’Sullivan that met the company’s specifications. O’Sullivan’s Complaint focuses on one of those two calender rolls, Calender Roll #4. Plaintiff alleges that it paid \$110,000.00 to Precision for Calender Roll #4.⁷
7. When Precision received the two calender rolls from Walzen, the rolls included the following representations and warranties made on behalf of Walzen:

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⁷ See O’Sullivan’s Complaint at ¶ 7, attached to the Third-Party Complaint as Exhibit B.

IRLE represents and warrants (a) that the **rolls will be of good and workman like quality and free of any and all defects** of relevance for the operation in materials and workmanship (b) that the material properties like tonsile strength, etc. are within the specification given in the material data sheet (c) that **there will be no cracks on the roll surface under regular operating conditions** (4000 PLI separating force in the nip and at 1600 PSI roll bending pressure) due to a material fault; damages caused by external circumstances, not attributable to the roll material, are explicitly excluded from IRLE's warranty and (d) that rolls supplied under this contract [the O'Sullivan contract] will meet the technical specifications of the purchasing agreement.⁸

8. O'Sullivan alleges that Precision delivered the calender rolls on January 25, 2006, and further alleges that it put the calender rolls into service in its Calender #3 machine on February 12, 2007. O'Sullivan claims that shortly thereafter, it discovered a crack in the surface of Calender Roll #4 on April 3, 2007.
9. O'Sullivan further alleges that the rolls were removed from its Calender #3 machine, replaced with spares, and shipped to Germany for evaluation by Walzen. According to O'Sullivan, Walzen examined Calender Roll 4 and determined that it had been cracked in an un-repairable fashion.
10. O'Sullivan further alleges that Walzen's analysis of Calender Roll #4 revealed that the roll suffered from manufacturing defects related to HARDNESS, CHILL DEPTH and CASTING DEFECTS, such that the roll contained "cracks that started on the barrel surface with axial orientation."⁹
11. At all times relevant hereto, Walzen was required to comply with the terms of the representations and warranties that Walzen made regarding Calendar Roll #4 in question.

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⁸ See Exhibit C attached to the Third-Party Complaint.

⁹ See O'Sullivan's Complaint at ¶ 16, attached to the Third-Party Complaint as Exhibit B.

12. O'Sullivan alleges that Precision breached its contract and its warranties that Calendar Roll #4 would meet O'Sullivan's specifications, would be merchantable, and would be fit for the particular purpose of allowing O'Sullivan to produce films through operation of its Calendar #3 machine.¹⁰
13. Walzen made and breached express warranties to O'Sullivan regarding its Calendar Roll #4.
14. Walzen made and breached implied warranties to O'Sullivan regarding its Calendar Roll #4.
15. Walzen was the manufacturer of Calendar Roll #4 which is the subject of the allegations contained in O'Sullivan's Complaint, and therefore Walzen is responsible for any and all claims and damages averred by O'Sullivan.

ARGUMENT

- A. The claims alleged against Walzen in Precision's Third-Party Complaint are based on O'Sullivan's third-party tort claim for breach of express and implied warranties made by Walzen, arising out of a defect in the manufacture of Calendar Roll #4. The third-party complaint is not predicated upon a dispute, controversy or claim arising out of the breach, termination or invalidity of the Distributor Agreement.**

Walzen has incorrectly alleged that Precision has substantially based its right to recover on the Distributor Agreement entered into between the parties. Specifically, Walzen has alleged that the causes of action and remedies sought in Precision's Third-Party Complaint constitute disputes within the meaning of the arbitration provision contained in the Distributor Agreement and

¹⁰ See O'Sullivan's Complaint at ¶ 21, attached to the Third-Party Complaint as Exhibit B.

therefore this Court lacks subject matter jurisdiction over the Third-Party Complaint.¹¹ As set forth below, Walzen's claims are without merit for several reasons.

Pursuant to O'Sullivan's purchased order received June 10, 2005, Precision received the two calender rolls from Walzen, one of which was Calender Roll #4. The rolls included the following representations and warranties made on behalf of Walzen:

IRLE represents and warrants (a) that the **rolls will be of good and workman like quality and free of any and all defects** of relevance for the operation in materials and workmanship (b) that the material properties like tensile strength, etc. are within the specification given in the material data sheet (c) that **there will be no cracks on the roll surface under regular operating conditions** (4000 PLI separating force in the nip and at 1600 PSI roll bending pressure) due to a material fault; damages caused by external circumstances, not attributable to the roll material, are explicitly excluded from IRLE's warranty and (d) **that rolls supplied under this contract [the O'Sullivan contract] will meet the technical specifications of the purchasing agreement.**¹²

By virtue of this warranty provided by Walzen, Precision has valid causes of action against Walzen, for any and all tortious claims levied against it by O'Sullivan, as a result of manufacturing defects in Calender Roll #4. Accordingly, Precision has averred in its Third-Party Complaint that Walzen, as manufacturer of Calender Roll #4, is responsible for any and all claims by O'Sullivan, as it made and breached **expressed** warranties to O'Sullivan, **unrelated to the Distributor Agreement** entered into between Precision and Walzen.¹³ Precision has further alleged that Walzen, as manufacturer of Calender Roll #4,

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¹¹ See Walzen's Motion to Dismiss at ¶ 4-5, attached hereto as "Exhibit A."

¹² See Exhibit C attached to the Third-Party Complaint.

¹³ See Third Party Complaint at ¶ 15.

is responsible for any and all claims by O'Sullivan, as it made and breached implied warranties to O'Sullivan, **unrelated to the Distributor Agreement** entered into between Precision and Walzen.¹⁴

Additionally, pursuant to the Third-Party Complaint, Precision has set forth a claim for **common law indemnification** against Walzen predicated upon Walzen's breach of express and implied warranties that Calendar Roll #4 was of good and workmanlike quality, free of any and all defects inclusive of cracks on the roll's surface and manufactured to meet the technical specifications required by O'Sullivan.¹⁵ The Third-Party Complaint also sets forth a claim for **common law contribution** against Walzen predicated upon Walzen's breach of express and implied warranties which was the primary, active and effective cause of O'Sullivan's alleged injuries and damages as set forth in the Complaint.¹⁶

Pursuant to the Third-Party Complaint, Precision has set forth a claim for contractual indemnification against Walzen, **in addition to** the express warranty provided by Walzen regarding Calendar Roll #4.¹⁷ Finally, Precision has set forth a claim for breach of contract against Walzen in its Third-Party Complaint, **in addition to** the express warranty provided by Walzen regarding Calendar Roll #4.¹⁸

¹⁴ See Third Party Complaint at ¶ 16.

¹⁵ See Third Party Complaint at ¶ 19-23.

¹⁶ See Third Party Complaint at ¶ 24-27.

¹⁷ See Third Party Complaint at ¶ 28-34.

¹⁸ See Third Party Complaint at ¶ 35-41.

Based on the foregoing, it is clear that Precision's Third-Party Complaint does not consist of a dispute, controversy or claim arising out of the Distributor Agreement entered into between Precision and Walzen as to the terms of which there is no controversy. Rather, it is predicated upon Walzen's breach of express and implied warranties regarding the alleged defects of Calender Roll #4 and resulting from a dispute, controversy or claim arising out of O'Sullivan's third-party tort claim of product's liability and ultimate liability to O'Sullivan.

B. The relevant case authority supports a finding that arbitration should not be compelled where the claim is tortious in nature as is the case in the matter at bar, and therefore contrary to Walzen's assertions, this court properly has jurisdiction to over the instant case.

Walzen's memorandum in support of its motion to dismiss cites Virginia and federal cases to support its claim that this court should compel arbitration. Importantly, Walzen cites only Virginia and federal cases despite the fact that the contract clearly states that Pennsylvania law shall be applied in interpreting the contract inclusive of the arbitration clause.¹⁹ Moreover, the memorandum fails to clearly establish that the dispute between the parties regarding indemnification falls within the purview of the arbitration clause. Walzen posits that this court is required to compel arbitration because a) a valid arbitration agreement exists, and b) the issues at hand fall within the purview of that agreement.²⁰ The memorandum also notes the federal public policy favoring arbitration.²¹ Without any further analysis to support its arguments, Walzen then

¹⁹ See Exhibit A attached to the Third-Party Complaint at Article XII "Governing Law and Arbitration" ¶1.

²⁰ See Walzen's Memorandum in Support of Its Motion to Dismiss at ¶ 3-6.

²¹ *Id.*

asserts that the case should be dismissed. As more fully set forth below, Walzen's arguments are without merit because (1) the scope and effect of the arbitration clause is governed by Pennsylvania law and (2) the issues presented in Precision's Third-Party Complaint do not solely fall within the reach of the arbitration clause.

Pennsylvania courts have held that arbitration should not be compelled where cause of action sued upon is tortious in nature. *Hazleton Area Sch. Dist. v. Bosak*, 671 A.2d 277, 283 (1996). Pursuant to Pennsylvania law, the scope of arbitration clauses should not be expanded, unless there is evidence of an agreement between the contracting parties for such expansion. See *id.* In *Hazleton Area School District v. Bosak*, the Commonwealth Court of Pennsylvania held that that if a claim is tortious in nature then arbitration should not be compelled. *Hazleton Area Sch. Dist. v. Bosak*, 671 A.2d 277, 283 (1996).²² In *Hazleton*, the parties entered into a contract for the design, engineering and construction of a new high school, which included contained the following arbitration provision:

Claims, disputes or other matters in question between the parties to this Agreement arising out of or relating to this Agreement or breach thereof shall be subject to and decided: by arbitration . . . unless the parties mutually agree otherwise . . . Demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association . . . No arbitration arising out of or relating to this Agreement shall include, by consolidation, joinder or in any other manner, an additional person or entity not a party to this Agreement, except by written consent containing a specific reference to this Agreement signed by the Owner, Architect, and any other person or entity sought to be joined.

²² *Cf. Highmark, Inc. v. Hosp. Serv. Ass'n*, 785 A.2d 93, 98 (Pa. Super. Ct. 2001) (holding that if the parties have clearly and unmistakably agreed to arbitrate, then every reasonable effort should be made to favor that agreement unless the court can determine with positive assurance that the arbitration clause in question cannot possibly be interpreted to cover the dispute at hand.)

Id. at 279. Shortly after the high school became occupied, the roof collapsed under the weight of snow. *See id.* As a result, the School District filed suit alleging defects in the design and/or the construction of the high school. *Id.* Mr. Bosak the engineer in charge of the construction objected to the claim, stating that the dispute should be governed by the arbitration provisions as set forth in the construction contract between the parties. *Id.*

The Commonwealth Court of Pennsylvania concluded that if the parties had intended for the clauses to include tort claims, they would have included specific language to that effect. *Id.* at 282.²³ In reaching its decision, the Court emphasized that the Pennsylvania Supreme Court “has stated that a court must be careful not to extend an arbitration agreement by implication beyond the clear, express and unequivocal intent of the parties as manifested by the writing itself.” *Id.* The Court went further to state that “because arbitration is a matter of contract, a particular issue cannot be arbitrated absent an agreement between the parties to arbitrate that issue.” *Id.*

The following test was set forth in the *Hazleton* case for guiding judicial inquiry as to whether arbitration is appropriate: (1) whether an agreement to arbitrate was entered into between the parties; and (2) whether the particular issue or claim comes within the ambit of an arbitration provision. *See id.*

Applying the test set forth in *Hazleton* to the case at bar, arbitration of this matter should not be compelled and litigation should proceed. Here, O’Sullivan has asserted against Precision,

²³ The Court distinguished the facts in *Hazleton* from those in *Muhlenberg Township* as the arbitration clause in the latter included language that covered tort claims. *See Muhlenberg Twp. Sch. Dist. Auth. v. Pa. Fortunato Const. Co.*, 333 A.2d 184, 186 (1975) (“should either party to this Contract suffer damage in a any manner because of the wrongful act or *neglect* of the other party . . . claims . . . shall be adjusted by agreement or arbitration.”) (emphasis added).

a claim for “Breach of Contract -- Warranty” for defects existing in Calender Roll #4.²⁴ Accordingly, this matter involves a products liability cause of action which is classified as a tort. Pursuant to the court’s ruling in *Hazelton*, because the parties did not expressly provide in the Distributor Agreement for tortious claims to be arbitrated, this matter should proceed in litigation.

The scope of the arbitration provision contained in the Distributor Agreement is limited to “any dispute, controversy or claim arising out of or relating to this Agreement or the breach, termination or invalidity thereof.”²⁵ The arbitration clause is undeniably silent with respect to the enforcement of the indemnity provision contained in the Distribution Agreement. The clause, which is clear and unambiguous provides the following:

PRGI [Precision] shall not be liable for any claims whatsoever due to any act or omission on the part of IRLE [Walzen] and **IRLE [Walzen] agrees to defend, indemnify and hold PRGI [Precision] harmless from and against any claim, cause of action loss or liability of any kind** arising solely out of IRLE’s [Walzen’s] activities under this agreement.²⁶

This court should follow the ruling of the court in *Hazelton* case as controlling authority, and find that because the parties did not expressly provide in the Distributor Agreement for tortious claims to be arbitrated, this matter will proceed in litigation.

Other courts have similarly, held that arbitration clauses should not be expanded beyond the scope intended by the contracting parties. In *Midwest Window*, the U.S. Court of Appeals for the Seventh Circuit examined the issues of whether or not a contractual obligation to arbitrate a

²⁴ See O’Sullivan’s Complaint at ¶ 20-24, attached to the Third-Party Complaint as Exhibit B.

²⁵ See Exhibit A attached to the Third-Party Complaint at Article I “Appointment of the Distributor” ¶ 1-3.

²⁶ See Exhibit A attached to the Third-Party Complaint at Article IX “Warranty and Indemnity” ¶ 3.

dispute arising between two parties to a Distributorship agreement was waived. *Midwest Window Sys., Inc. v. Amcor Indus., Inc.*, 630 F.2d 535, 535 (7th Cir. 1980). In the *Midwest Window* case, Midwest Window Systems was engaged in the business of selling and installing window systems, which it purchased through a distributorship agreement from Amcor Industries, Inc. *See id.* The distributorship agreement in question, provided that any dispute arising concerning the interpretation or application of any provisions of the agreement should be submitted to arbitration. *See id.*

Subsequently, a dispute arose between the parties, whereby Midwest Window Systems accused Amcor Industries, Inc. of, among other things, selling a defective product. *See id.* at 536. The parties were able to reach an agreement which dictated new terms to govern the parties' interaction in exchange for the issuance of two promissory notes to secure payment by Midwest Window. *See id.* The business relationship later deteriorated and Midwest Systems instituted an action against Amcor Industries, Inc. alleging breach of warranties, breach of contract and fraud. *See id.* In response, Amcor Industries, Inc. moved to stay the proceeding and to compel arbitration. *See id.* The court held that it was an error to compel arbitration for a dispute arising out of the second agreement because the dispute was not encompassed within the contractual provision providing for arbitration of a dispute "concerning the interpretation or application of any of the provisions" of the original agreement between the parties. *Id.* at 537.²⁷ The instant matter is factually analogous to the *Midwest Window* case, in that there are two separate documents at issue

²⁷ *See also Industrial Elecs. Corp. v. iPower Distrib. Group*, 215 F.3d 667, 681 (7th Cir. 2000) (holding that a "dispute that arises under one agreement may be litigated notwithstanding a mandatory arbitration clause in a second agreement, even where the two agreements are closely intertwined.")

upon which Precision has based its Third-Party Complaint against Walzen. The first document is the Distributor Agreement which contains the arbitration clause and the second document is Walzen's standard express written warranty provided with the delivery of Calender Roll#4. As set forth fully above, Precision's Third-Party Complaint is not a dispute, controversy or claim arising out of the terms of the Distributor Agreement entered into between Precision and Walzen, as to which there is no controversy. Rather, it is predicated upon Walzen's breach of express and implied warranties regarding the alleged defects of Calender Roll #4 and resulting from a dispute, controversy or claim arising out of O'Sullivan's third-party tort claim of product's liability and ultimate liability to O'Sullivan. Indeed, the Distributor Agreement expressly references Walzen's warranty of its products:

With the exception of any express written warranty provided in connection with any particular sale, there are no warranties, express or implied (including but not limited to the implied warranties of fitness for particular purpose or warranty of merchantability) are made or shall be deemed to have been made by IRLE [Walzen] regarding the Products. **IRLE [Walzen] neither assumes nor authorizes any other person to assume for it any obligations or liability in connection with the sale of the products.**²⁸

It is clear that the Distributor Agreement acknowledges a separate and valid written warranty issued by Walzen which directly and fully places responsibility for the product on Walzen and absolves any third-party including Precision, from liability. Further indicative of the parties intent to narrow the scope of the arbitration clause, is the absence of any arbitration mandate under this section of the Distributor Agreement. Importantly, the parties have included the warranty provision in the same section as the indemnification provision, and have left silent any discussion

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²⁸ See Exhibit A attached to the Third-Party Complaint at Article IX "Warranty and Indemnity" ¶ 1.

of arbitration suggesting that arbitration would not govern this aspect of the contract. Accordingly, the dispute upon which Precision and Walzen are at odds, arises under a separate agreement – the warranty provided by Walzen with Calender Roll #4. As a result, arbitration of this matter should not be compelled.

In *In re NBR Antitrust Litigation*, the arbitration opponent argued that the parties' agreements exhibited an intent to arbitrate all direct disputes over the agreements and litigate any claims for indemnification that relate to underlying third-party claims. *In re NBR Antitrust Litigation*, 207 Fed. Appx. 166, 170 (3d Cir. 2006). The U.S. Court of Appeals for the Third Circuit disagreed with the argument stating that other provisions of the agreements involved provided for arbitration of certain indemnification issues. *Id.* The court also held that the parties did not indicate a clear preference for claims for indemnification to be heard in the same forum as the underlying third-party claims and therefore the indemnification issue was subject to arbitration. *Id.*

Unlike *In re NBR Antitrust Litigation*, in this case the language of the indemnification clause in the Distributor Agreement between Walzen and Precision makes clear that neither Walzen nor Precision intended for that clause to be subject to arbitration. The indemnification clause states that Precision “shall not be liable for any claims whatsoever due to any act or omission on the part of IRLE [Walzen] and IRLE [Walzen] agrees to defend, indemnify and hold PRGI [Precision] harmless from and against any claim, cause of action, loss or liability of any kind arising solely out of [Walzen’s] activities under this Agreement.”²⁹ The language of this clause is indicative of an

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²⁹ See Exhibit A attached to the Third-Party Complaint at Article IX “Warranty and Indemnity” ¶ 3.

intent to litigate such matters, not arbitrate them. Importantly, were the court to compel arbitration, it would defeat the purpose and intent of the indemnity clause in the Distributor Agreement. Walzen expressly and unconditionally agreed to indemnify Precision against **any claims whatsoever due to any act or omission** on Walzen's part. As such, arbitration should not be compelled in this matter.

Similarly, in *Noel v. S.S. Kresge Co.*, the plaintiff Noel filed a products liability action against K-mart for personal injury stemming from defective pliers sold by K-mart and manufactured by a Japanese corporation, Greenhill. *Noel v. S.S. Kresge Co.*, 669 F.2d 1150, 1152 (6th Cir. 1982). In response, K-Mart filed a third-party complaint against the foreign manufacturer, Greenhill seeking indemnification for any recovery Noel may have from K-Mart. *Id.* The indemnification clause was included in the terms and conditions of the Import Order exchanged between the parties. *Id.* According to Greenhill, there was also a Sales Note which included an arbitration clause providing that "in case of dispute arising the case will be settled in Osaka. The dispute should be settled as amicably as possible, failing which the dispute will be referred to The Japan Commercial Arbitration Association in Osaka or Tokyo." *Id.* at 1153. Greenhill argued that the action was subject to arbitration in Japan under this clause and thus the district court lacked jurisdiction. The U.S. Court of Appeals for the Sixth Circuit concluded that the arbitration provision in the Sales Note did not apply to the indemnification claim because the clause only referred to commercial disputes, including controversies over the quality or quantity of goods shipped. The Court held that "the quoted language is from the paragraph of the Sales Note which deals with arbitration. It has no logical relationship to the subject of indemnification". *Id.* at 1155. The Court further held that since the liability which K-Mart sought to enforce against Greenhill

arose from a claim of bodily injury and did not involved the sale of the product, the trial court was not required to surrender jurisdiction to a Japanese Court to try the indemnification claim. *Id.* at 1156.

Here, as in *Noel*, the Distributor Agreement contains a broad indemnification clause. Like the clause in *Noel*, it does not specify a forum of a claim of indemnification. As such, arbitration of this matter would not be appropriate.

C. Under Pennsylvania Law, arbitration can only be compelled, where the opposing party has refused to arbitrate, which Walzen has failed to show.

Pursuant to the Pennsylvania arbitration statute, in order to compel arbitration there must be a showing of an agreement to arbitrate as well as a showing that the party opposing arbitration refused to arbitrate. The statute provides as follows:

On application to a court to compel arbitration made by a party showing an agreement as described in section 7303 (relating to validity of agreement to arbitrate) **and** showing that an opposing party refused to arbitrate, the court shall order the parties to proceed with arbitration.

42 Pa. C.S. § 7304 (a) (2009)(emphasis added). In the instant action, a demand for indemnity and tender of defense was made to Walzen on behalf of Precision on or about September 10, 2009.³⁰ Walzen responded by letter dated September 25, 2009 in which Walzen quoted the arbitration language and defended the manufacture of Calender Roll #4.³¹ Precision, then proceeded to expend substantial time and incur considerable costs in serving Walzen with extra judicial documents

³⁰ See Precision Roll Grinders, Inc. Tender of Defense Letter dated September 10, 2009, attached hereto as “**Exhibit B.**”

³¹ See Walzen’s response to Precision Roll Grinders, Inc. Tender of Defense Letter dated September 25, 2009 , attached hereto as “**Exhibit C.**”

through the Hague Convention, in an effort for Walzen to address the allegations raised by O'Sullivan with respect to Calender Roll #4. At no point from the time of Precision's tender of defense until the date of this motion in opposition, has Walzen filed any arbitration action regarding this matter. Furthermore, Walzen has not provided Precision with any notice of arbitration and upon information and belief, no arbitration action is pending. Certainly, in the event Walzen had a bona fide dispute regarding the interpretation or validity of the Distributor Agreement and desired to arbitrate, it would have made a request to do so prior to the time that its motion to dismiss was filed on March 2, 2010.

Accordingly, based on the Pennsylvania authority clearly mandating a showing of refusal by Precision to arbitrate, and the severe prejudice to be suffered by Precision as a result of the time and expense expended in bringing Walzen into this litigation, it is clear that arbitration should not be compelled in this matter.

D. In the event that this court is inclined to grant Walzen's request to compel arbitration, this Court should stay the litigation of this matter, pending the outcome of any arbitration proceedings.

In the alternative only, if the court agrees that the issues presented in Precision's Third-Party complaint fall within the purview of the arbitration clause in the Distributor Agreement, then and in that event, the court should stay the litigation of this matter pending the outcome of any arbitration proceedings order by the court. The Pennsylvania arbitration statute states:

An action or proceeding, allegedly involving an issue subject to arbitration, shall be stayed if a court order to proceed with arbitration has been made or an application for such an order has been made under this section . . . If the application for an order to proceed with arbitration is made in such action or proceeding and is granted, the court order to proceed with arbitration shall include a stay of the action or proceeding.

42 Pa. C.S. § 7304 (d) (2009). Similarly, the Federal Arbitration Act states:

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 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 stay is not in default in proceeding with such arbitration.

Federal Arbitration Act, 9 U.S.C. § 3. Given Walzen's undisputed agreement to indemnify Precision, a stay of this litigation proceeding is warranted. Dismissal of Precision's Third -Party complaint or allowing both matters to proceed simultaneously would have the effect of nullifying Precision's right to indemnification from Walzen. Therefore, if the court is inclined to compel arbitration, a stay of this litigation is the only appropriate remedy.

CONCLUSION

For the forgoing reasons, Precision is entitled to judgment as a matter of law and Walzen's Motion to Dismiss or in the Alternative, to Stay Third-Party Complaint should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 12th day of April, 2010, a copy of the foregoing *Defendant/Third-Party Plaintiff Precision Roll Grinders, Inc.'s Opposition to Third-Party Defendant's Motion to Dismiss or in the Alternative Motion to Stay Third-Party Complaint* which was electronically filed in this case with the United States District Court for the Western District of Virginia, was mailed via first-class mail, postage pre-paid, to:

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