

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

DAVID B. DUNNING; PETER B.
DUNNING, for Himself and as
Representative and Attorney-in-Fact for
his Grandchildren; CLAIRE BAKER;
RACHAEL BAKER; TIMOTHY
BAKER; MEGHAN E. DUNNING;
CHARLES B. DUNNING; BAILEY W.
DUNNING; COREY STEVEN
SHEEHAN; and HAZEL R. DUNNING,

Plaintiffs,

vs.

LAWRENCE P. BUSH; JOSEPH D.
BUSH; GREGORY J. BUSH;
BARBARA S. JOHNSON; THOMAS
M. BUSH; PETER A. BUSH; MARY P.
WALSH; and FRANCIS P.
McCARTHY,

Defendants.

No. 3:05-cv-00050-JAJ

ORDER

This matter comes before the court pursuant to defendants' December 23, 2008 motion to strike jury demand [dkt. 99]. Plaintiffs resisted defendants' motion on January 7, 2009 [dkt. 104], to which defendants replied on January 8, 2009 [dkt. 105]. This motion was argued at the final pretrial conference, held before this court on January 9, 2009.

Defendants move to strike plaintiffs' jury demand on the ground that the Stock Purchase Agreement at issue in this litigation contains a provision expressly waiving the parties' right to a jury trial:

9.9 Waiver of Jury Trial. Each of the Parties hereby waives, to the extent permitted by applicable law, trial by jury in any litigation in any court with respect to, in connection with, or arising out of this Agreement or the validity, protection, interpretation, collection or enforcement thereof.

Defendants note that plaintiff Peter Dunning, who signed the agreement both individually and as attorney in fact for all plaintiffs, was founder, director and chairman of the board at the time he signed the agreement. The agreement was not a boilerplate agreement, but rather was negotiated by both sides who were represented by counsel. Defendants further argue that the terms of the waiver provision were clear and comprehensive, and that plaintiffs will suffer no prejudice by the court enforcing the waiver.

Plaintiffs resist defendants' motion, arguing that they included a jury demand in their complaint, filed on May 4, 2005, and the court set this matter for a jury trial on all claims in an order dated October 14, 2008. Plaintiffs contend that defendants' delay in filing their motion to strike is inexcusable and that they will be prejudiced if their jury demand is struck at this late stage in the litigation. Alternatively, plaintiffs argue that the waiver clause is only applicable to plaintiffs' breach of contract claims. Finally, plaintiffs suggest that the court utilize an advisory jury on the breach of contract claims.

The Seventh Amendment to the United States Constitution preserves “[i]n Suits at common law . . . the right of trial by jury.” U.S. Const. amend. VII. Federal Rule of Civil Procedure 38 provides that “[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.” Fed. R. Civ. P. 38(a). Regardless, this right may be waived. Bostic v. Goodnight, 443 F.3d 1044, 1047 (8th Cir. 2006); Cooperative Fin. Ass’n, Inc. v. Garst, 871 F. Supp. 1168, 1171 (N.D. Iowa 1995) (“Parties may waive a jury either expressly or impliedly under the terms of a contract between them.”). For such a waiver to be effective, however, it must be both “voluntary” and “knowing” based on

the facts of the case. Id. (citing Brookhart v. Janis, 384 U.S. 1, 4-5 (1966)). Because the right to a jury trial is fundamental, “courts indulge every reasonable presumption against waiver.” Id. (citations omitted). As summarized by Judge Bennett, several factors are relevant in determining whether the waiver was knowing and voluntary:

Courts have considered a number of factors to determine whether a contractual waiver of the right to a jury was knowing and voluntary. They have considered whether the waiver provision is on a standardized form agreement or newly-drafted document, in fine print or in large or bold print, set off in a paragraph of its own, in a take-it-or-leave-it or negotiated contract, and the length of the contract. See e.g., Leasing Serv. Corp., 804 F.2d at 833 (waiver provision in fine print, not set off in a paragraph on its own, on back of standardized agreement); Phoenix Leasing, Inc. v. Sure Broadcasting, Inc., 843 F. Supp. 1379, 1384-85 (D. Nev. 1994) (opportunity to negotiate terms, conspicuousness of provision); Connecticut Nat’l Bank, 826 F. Supp. at 60-61 (court considered parties’ ability to negotiate terms or only to accept a preprinted contract, conspicuousness of provision in light of print size and length of contract, and surveying application of these and other factors by other courts). They have also considered whether the waiving party was represented by counsel, whether the waiving party was a sophisticated business person aware of the consequences of the waiver, whether the parties were manifestly unequal in bargaining power, and whether there was an opportunity to review all of the terms of the contract and whether the waiving party did so. See, e.g., Leasing Serv. Corp., 804 F.2d at 833 (parties not manifestly unequal in bargaining power and sophistication in business, participated in extensive negotiations, and carefully reviewed the entire contract); Connecticut Nat’l Bank, 826 F. Supp. at 60-62 (court considered sophistication of parties, representation by counsel, equality of bargaining power).

Cooperative Fin. Ass’n, 871 F. Supp. at 1172.

The court has carefully considered all pertinent factors and finds that the plaintiffs in this matter knowingly and voluntarily waived their right to a jury trial on all claims. The agreement at issue was negotiated between equally sophisticated business people who were represented by very able counsel. The waiver clause was contained in a separate provision in the same typeface as the rest of the agreement. There is no evidence in the record suggesting that the plaintiffs were not aware of the consequences of the waiver. The plaintiffs have not demonstrated that they will, in fact, be prejudiced by trying this matter to the court. Defendants' motion was filed nearly a month before the scheduled trial date. A bench trial is precisely what the parties bargained for.

Further, the court rejects the plaintiffs' narrow construction of the waiver provision, *i.e.*, that it only applies to their breach of contract claims. The parties expressly waived their right to a trial by jury "with respect to, in connection with, or arising out of this Agreement or the validity, protection, interpretation, collection or enforcement thereof." This encompasses not only plaintiffs' breach of contract claims, but also their breach of fiduciary duty claim, and their insider trading claim.

Upon the foregoing,

IT IS ORDERED that defendants' December 23, 2008 motion to strike plaintiffs' jury demand [dkt. 99] is granted.

DATED this 12th day of January, 2009.



JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA