

NOT FOR PUBLICATION

WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

PSEG Energy Resources & Trade LLC,

Plaintiff,

vs.

Onyx Renewable Partners, L.P., and Blackstone
Energy Partners, LLC,

Defendants.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION: ESSEX COUNTY

DOCKET NO.: L-6932-16

Civil Action

OPINION

Decided: March 6, 2017

Lawrence Lustberg for plaintiff (Gibbons P.C., attorneys).

Jonathan Wolfe and Daniel Perry for defendants (Skoloff & Wolfe, P.C. and Milbank, Tweed, Hadley & McCloy, LLP, attorneys).

By: Stephanie A. Mitterhoff, J.S.C.

This matter is before the court on Plaintiff PSEG Energy Resources & Trade LLC's ("Plaintiff" or "PSEG") Order to Show Cause to compel Defendant Onyx Renewable Partners, L.P. ("Onyx" or "Defendant") and Blackstone Energy Partners L.P. ("Blackstone") to resolve the parties' disputes in an arbitration proceeding pursuant to a purported contract between the parties. The underlying contract involved PSEG's attempted purchase of Solar Renewable Energy Credits ("SREC's") from Onyx. The two issues to be resolved by the court are whether

the parties entered into a binding agreement, and, if so, whether the arbitration clause contained in an addendum to the contract is enforceable.

I. Background

A. The Transaction

PSEG is a Delaware limited liability company with offices in Newark, New Jersey. Onyx Renewable Partners, L.P. is a Delaware limited partnership with offices in New York, New York. Blackstone Energy Partners L.P. is a Delaware limited partnership with offices in New York, New York.

PSEG, as an energy supplier, must purchase a certain quantity of SREC's each Energy Year in order to meet the Renewable Portfolio Standards, a New Jersey regulation created to induce energy suppliers to procure a certain percentage of the electricity they sell from facilities that generate electricity from solar panels. When a facility generates electricity from solar panels (and meets certain other criteria), it is issued SREC's based on the amount of electricity generated. SREC's are transferrable and are traded in a competitive market.

On November 12, 2014, PSEG and Onyx entered into negotiations for a proposed trade pursuant to which Onyx was to sell to PSEG 20,000 New Jersey Solar Renewable Energy Credits per year in Energy Years 2016-2020 (5 years) at the proposed price of \$171 per SREC. Although PSEG and Onyx reached agreement on the trade date with respect to price, quantity, and term, the transaction was entered into, as is customary, subject to the parties reaching agreement with respect to other terms and conditions that remained open, including credit support. The parties could have made the trade binding on that date but intentionally left it open to continued negotiations over material economic terms. The primary reason the deal was not

finalized on the trade date was because the parties did not have an established trading relationship.

B. Negotiations

Beginning in December 2014, the parties began exchanging drafts of the contract in order to consummate the transaction. In March 2015, Onyx made clear in edits to a draft of the Cover Sheet that neither Blackstone (an alternative asset management firm whose affiliates have invested in Onyx through Blackstone Solar Holdco LP) nor a Blackstone affiliate would be providing a parent guaranty or other credit support. Credit support, in this commercial context, is typically a letter of credit designed to assist the buyer in making itself whole in the event the seller defaults on its obligation to deliver the promised SREC's. Nothing in the November 2014 trade confirmation required (or even mentioned) that Blackstone or its affiliates would provide a guarantee or other support for the transaction at issue. Nevertheless, in April 2015, in response to the clarification that Blackstone would not provide any credit support to Onyx, PSEG demanded a \$15 million letter of credit to support the transaction. Onyx asserts that it was shocked by the demand claiming that: 1) it is not customary in the industry that a buyer of SREC's demand a guarantee from a private equity fund; 2) a \$15 million letter of credit for an approximately \$17 million sale over five years makes no commercial sense for a seller; and 3) Onyx could never have acceded to this type of financial demand—paying roughly 8% per year (\$1.2 million) to fund the letter of credit.

In September 2015, after months of negotiation, there was still no understanding between the parties on the form or level of credit support required for the parties to reach mutual agreement on the proposed transaction. Over the course of the next thirteen months, PSEG and

Onyx negotiated the terms of the transaction, with the central continuing issue in contention being the form and amount of credit support to be provided by Onyx.

Central to the court's determination in this case are events that transpired in early December 2015. In that regard, PSEG has submitted the December 2, 2016 certification of Joseph P. Roenbeck. Mr. Roenbeck is an energy trader at PSEG. According to Mr. Roenbeck, he is responsible on behalf of PSEG for complying with the NJ Renewable Portfolio standard through the buying and selling of renewable energy credits. Mr. Roenbeck certified that on December 3, 2015 he participated in a conference call with Matthew Rosenblum, the Chief Executive Officer of Onyx Renewable Partners L.P., and Ryan Marrone, Onyx's Chief Legal Officer. Sean Adams and Lynn Manganaro, the Manager and Director of Enterprise Credit Risk at PSEG, were also on the call. During that call, according to Roenbeck, Rosenblum and Marrone offered on behalf of Onyx to issue to PSEG a \$1.25 million letter of credit as a proposed resolution of the credit security terms for the subject transaction. Rosenblum also requested that PSEG move the agreed-upon delivery date for Energy Year 2016 from July 2016 to September 2016. According to Roenbeck, Rosenblum stated that Onyx agreed to consummate the transaction and sign all necessary contractual documents if those two conditions were met.

Roenbeck further certified that the following day, December 4, 2015, another conference call took place between Roenbeck, Sean Adams, and Lynn Manganaro on behalf of PSEG and Marrone on behalf of Onyx, in which PSEG accepted the terms proposed by Rosenblum in the previous day's conference call. Roenbeck certified that at no time did anyone on behalf of Onyx indicate that Mr. Marrone did not have the authority to bind Onyx.

The Certifications of Lynn Manganaro and Sean Adams, both dated December 2, 2016, confirm that Manganaro and Adams participated in the December 3, 2015 telephone conference

with Rosenblum, Marrone, and Roenbeck. Both Certifications corroborate that Marrone and Rosenblum offered a proposal to lower the required credit and change the delivery dates.

Over the next few weeks following the December 3d and 4th telephone conferences, the parties finalized the written documents and Onyx sent PSEG a proposed form of the letter of credit, which PSEG confirmed was acceptable. On January 25, 2016, Onyx and PSEG agreed upon a phrase clarifying when a potential Event of Default would be deemed to have occurred. In an email dated January 29, 2016, Mr. Marrone requested that PSEG forward a fully executed package of documents for Mr. Rosenblum [Onyx's President and CEO] to sign. PSEG sent execution versions of the Master Agreement and Confirmation Letter. At the time these documents were transmitted to Onyx, PSEG itself had not signed the agreements.

According to the Roenbeck certification, PSEG purchased additional SREC's from parties other than Onyx in March, April, and June 2016, at prices between \$271.00 and \$296.00 per SREC. Roenbeck indicated that the decision to purchase what he characterized as "replacement" SREC's was based on two factors. The first factor was that PSEG by mid-March had doubts whether Onyx would actually supply the quantity of SREC's required by the agreement in light of Onyx's evasive conduct after January 2016, most particularly its failure to provide the agreed-upon letter of credit or an executed agreement. Secondly, PSEG wanted to ensure it would have enough SREC's to avoid the Alternative Compliance Payment for Energy Year 2016, which was \$323.00, far more than the price at which it would have paid Onyx.

In further support of its motion, PSE&G submitted a December 2, 2016 certification of Shawn P. Leyden. Ms. Leyden certified that she is the Vice-President and Deputy General at PSEG Services Corporation. By January 29, 2016, Ms. Leyden averred that "PSEG believed it was bound by its agreement with Onyx Renewable Partners L.P." Moreover, Ms. Leyden

certified that “PSEG contacted Onyx on numerous occasions in February, March, and April 2016 to inquire as to when it would receive an executed copy of the Agreement.” Finally, according to Ms. Leyden, prior to July 26, 2016, Mr. Marrone did not deny that Onyx was bound by the agreement, now did any representative of Onyx indicate that Mr. Marrone did not have the authority to bind Onyx.

In opposition to the foregoing certifications by PSEG personnel, Onyx has provided the Certifications of Ryan A. Marrone and Matthew Rosenblum. In Marrone’s Certification dated November 22, 2016, he confirmed his position as Chief Legal Officer of Onyx. Marrone certified that after careful consideration, balancing PSEG’s large presence in the industry and Onyx’s financial interests, Onyx decided not to agree to the \$1.25 million letter of credit. That determination was based on the fact that Onyx would still have to pay roughly 8% per year to fund the letter of credit, yielding an annual cost of \$100,000.00 for the first year of the contract alone, and at a cost of \$500,000.00 over the life of the contract.

Marrone denied telling PSEG that Onyx had agreed to the terms set forth in the January 29, 2016 agreements. He also certified that he did not have the authority to bind PSEG. In that regard, Marrone attached to his certification Onyx’s Policies and Procedures Manual, which was formally adopted in July 2015 (“PPM”). The PPM sets forth specific Approval Levels and Delegation of Authority that control when procuring goods and services for the company. The PPM identifies the appropriate authority procedures for purchases within specified dollar valuations. The PSEG trade represented qualifying goods or services in the annual amount of \$3,420,00.00 (20,000 SREC’s at the price of \$171.00 per SREC). Given the size of the trade, Marrone certified, the only Onyx employee with sufficient authority to bind the agreement was the CEO of Onyx, Matthew Rosenblum. Consistent with that policy, Marrone certified that

when PSEG sent the draft agreements on January 29, 2016, he told them that he would present them to Matt Rosenblum, Onyx's CEO, for review and execution. Ultimately, Rosenblum decided not to execute the draft agreements.

Marrone certified that as late as June 2016, there were ongoing negotiations concerning the trade at issue. PSEG did not inform Onyx of its position that a binding agreement was formed by virtue of the January 29, 2016 email until June 14, 2016, when it sent Onyx a letter to that effect. It was not until October 25, 2016, that PSEG sent Onyx a Notice of Early Termination Payment Amount. It was also in October 2016 that Onyx first learned that PSEG as early as March 2016 had been purchasing what it characterized as "replacement SREC's." According to Marrone, PSEG's conduct was inconsistent with its position that there was a binding agreement between PSEG and Onyx. Specifically, Marrone certified that the draft agreement required PSEG to serve a Notice of Default and commence an agreed-upon liquidation procedure before engaging in any "replacement trades." Neither of those contractual requirements were observed until July and September 2016, respectively, when it was clear that litigation was likely.

Matthew Rosenblum certified that he has engaged in renewable energy credit trading since 2000 and he does not recall ever having been asked by a buyer to provide a parent or other form of guarantee as credit support for a trade. Based on his experience, Rosenblum certified that the proposed transaction with PSEG for 20,000 NJ SREC's with a request for \$15 million in credit support was contrary to market conditions at the time and contrary to his experience in the industry. Although PSEG ultimately agreed to lower the credit terms to \$1.25 million in December 2015, Rosenblum determined that even the reduced level of credit guarantee in the context of this transaction was still too economically disadvantageous for Onyx. Rosenblum

certified that on May 26, 2016, he met with PSEG in order to work towards finalizing the agreement. At that meeting Rosenblum advised PSEG that the requested credit amount was still too high and that Onyx was having difficulty raising the collateral for that large a letter of credit. On June 2, 2016, Rosenblum emailed Shahid Malik, the CEO of PSEG, with an alternate proposal. In response, on June 14, 2016, he received a response indicating that PSEG was taking the position that there was a binding contract between the parties as of January 29, 2016. Rosenblum certified that contrary to PSEG's position, he did not accept the terms of the draft agreement, nor did he authorize anyone to accept those terms. Moreover, Rosenblum certified that neither Onyx nor PSEG ever took any steps to perform pursuant to the draft agreement.

According to the Complaint, the proposed transaction was designated as "Firm LD," or liquidated damages. In a Firm LD transaction, if a seller fails to deliver the contracted-for energy or SREC's to the buyer, the seller is obligated to pay the buyer the difference between the contract price and the buyer's cost of obtaining a substitute. As a consequence, Rosenblum certified, the financial capability of the parties to meet their respective payment obligations is of critical importance.

The allegations of the Complaint largely corroborate Rosenblum's version of the events in 2016. In that regard, the Complaint alleges that on May 26, 2016, Rosenblum had a meeting with PSEG in which he indicated that the draft agreement was "too far out of the money" for Onyx and that Onyx was having difficulty raising the collateral for a \$1.25 million letter of credit. Onyx requested an increased contract price for 2016. In response, on June 14, 2016, PSEG offered to accept the amended contract price provided Onyx provide a higher amount of collateral security in Energy Years 2016 and 2017. The counter proposal was open only until June 26, 2016 and was conditioned on Onyx delivering all executed documents to PSEG by that

time. Unless those conditions were met, the counter proposal was to be rendered rejected and null and void. According to the Complaint. On June 28, 2016, Rosenblum sent an email to PSEG in which he referenced the counter proposal saying “we are 100% on board.” He requested “a few more days” to obtain the necessary letter of credit. On June 29, 2016, PSEG granted the extension but required that the executed Agreement and letter of credit be provided to PSEG no later than July 6, 2016 for the counter-proposal to be accepted. By email dated July 6, 2016, Onyx apologized for its “inability” to meet that day’s deadline and requested another small extension to comply with PSEG’s counter-proposal. Again, PSEG agreed but demanded assurance it would receive the executed Agreement and letter of credit no later than close of business on July 8, 2016. According to the Complaint, Onyx expressed on July 6, 2016 that it wanted to “close out this trade.” After Onyx missed both the July 8 and a subsequent extension, PSEG wrote to Onyx on July 13, 2016 to advise that its counter-proposal was null and void and withdrawn. PSEG demanded that Onyx provide a letter of credit of \$1.25 million.

On July 20, 2016, PSEG sent Onyx a Notice of Default letter stating that Onyx’s failure to provide collateral security in the form of the agreed- upon Letter of Credit constitutes an Event of Default under Sections 5.1(c) and (e) of the Agreement. Section 5.1(c) provides that “the failure to perform any material covenant or obligation” under the Agreement will be deemed an Event of Default. According to the Complaint, the “Collateral Security” provision of the Confirmation Letter states that “[t]he failure by Onyx to deliver a Letter of Credit on the Effective date of February 1, 2016 will be an Event of Default under the Section 5.1(c) of the Master Agreement.” PSEG alleges that Onyx’s failure to deliver a Letter of Credit by the Effective Date was a breach of the Agreement.

By email dated July 29, 2016, PSEG asserted that the Agreement, not PSEG's null and void counter proposal, was binding. Although stating that it expected that Onyx would perform to meet the original contractual agreement, PSEG nonetheless invited Onyx to submit a "different and complete proposal to amend that agreement." After PSEG did not accept Onyx's counter proposal, representatives from Onyx, Blackstone and PSEG met on September 29, 2016, in an unsuccessful attempt to resolve the dispute without litigation. That same day, PSEG served Onyx with a Notice of Early Termination that designated September 30, 2016 as the Early Termination Date on which all transaction between the parties would be liquidated and terminated. Onyx responded by again denying the existence of a binding agreement between the parties.

PSEG alleges that the parties' obligations under the Agreement are "Firm," meaning that "the Party to whom performance is owed shall be entitled to receive from the Party which failed to schedule and/or deliver Liquidated damages as its sole and exclusive remedy." In this case, PSEG claims that "liquidated damages shall be equal to the positive difference, if any, between the Replacement Price and the Contract Price multiplied by the Contract Quantity not delivered by [Onyx], plus reasonable costs actually incurred or expended by [PSEG] in enforcement of its rights under this Agreement."

It is undisputed that throughout the entire time these negotiations were ongoing, neither party performed any obligations created by the contract.

PSEG brings the present action seeking a ruling that the parties entered into a binding agreement, which calls for the parties to proceed to arbitration to resolve their disputes.

C. Draft Agreement at Issue

PSEG's complaint relies on: 1) the Purchase and Sale of Firm Solar Renewable Energy Credits Transaction Confirmation Letter, dated February 1, 2016 ("Confirmation Letter"); 2) the General Terms and Conditions of the Master Power Purchase and Sale Agreement ("the Master Agreement"); 3) the Cover Sheet to the Master Agreement ("Cover Sheet"); and 4) the Addendum to the Master Agreement ("the Addendum") (collectively, the "Draft Agreements"). There is no dispute that neither party signed any of the foregoing documents.

The Confirmation Letter states:

IN WITNESS WHEREOF, and intending to be legally bound, the Parties have executed this Agreement by their undersigned duly authorized representative as of the date below to be effective as of the Effective Date hereof.

Section 10.2 of the Master Agreement states in relevant part:

On the Effective date and the date of entering into each Transaction, each Party represents and warrants to the other Party that: ... (iii) the execution, delivery and performance of the Master Agreement and each Transaction ... are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contract to which it is a party or any law, rule, regulation order or the like applicable to it; (iv) this Master Agreement, each Transaction ... and each other document executed and delivered in accordance with this Master Agreement constitutes its legally valid and binding obligation enforceable against it in accordance with its terms ...

The Master Agreement further states in section 10.8 that:

Except to the extent herein provided for, no amendment or modification of this Master Agreement shall be enforceable unless reduced to writing and executed by both Parties.

An Addendum to the unexecuted Master Agreement contains a broad arbitration provision. Section 10.13 of the Agreement, entitled "Alternative Dispute Resolution", provides, in pertinent part, that "all disputes arising under or directly or indirectly connected with this Master Agreement are subject to the following sole and exclusive procedures." The procedures are detailed as follows: 1) Pursuant to Section 10.13(i), the parties must first attempt to resolve

through good faith negotiation any “Dispute,” defined to include “any claim or dispute arising out of or relating to this Master Agreement or breach, termination, or validity thereof.” If the parties cannot resolve their Dispute through the good faith negotiation process, either party is entitled to initiate arbitration in accordance with Section 10.13(ii).

II. Arguments of the Parties

PSEG argues that the sole issue before the court is whether an enforceable agreement to arbitrate exists. PSEG argues that the parties finalized an agreement for the purchase and sale of SREC’s on January 29, 2016 when Marrone sent an email requesting an execution form of the agreement. It argues that Onyx’s failure to sign the agreement is immaterial because a contract was formed by Onyx’s unambiguous indication of its assent to the agreement in numerous communications that took place in January 2016. PSEG argues that only after PSEG expressed its expectation that Onyx would fulfill its contractual commitments did Onyx disclaim any existing obligation to perform. Moreover, PSEG argues that Onyx’s evasiveness and tactical maneuvering over the course of the negotiations was done in an attempt to make the deal more profitable in light of how the SREC market developed over that time.

Further, PSEG argues that the agreement contains a broad and unambiguous arbitration provision requiring “all disputes arising under or directly or indirectly connected with” the agreement be resolved through mandatory arbitration. The agreement also expressly permits any party to seek to compel arbitration should another party refuse to honor its obligations. PSEG argues that the New Jersey Arbitration Act vests this court with the authority to require that Onyx make good on its commitments. Moreover, PSEG argues that the Agreement’s arbitration provision is binding and enforceable, even absent a signature.

Finally, PSEG argues that Blackstone should also be compelled to arbitrate, even though not directly a party to the agreement, because it has an agency or alter ego relationship with Onyx. PSEG points to the homepage of Onyx's website, where it features its "Partnership with Blackstone" and describing Blackstone as having created Onyx, "a company capitalized and owned by funds managed by Blackstone on behalf of its private equity limited partners." Moreover, PSEG argues that Onyx represented repeatedly to PSEG that Blackstone would "back stop" Onyx's performance by providing the necessary credit support.

In opposition, Onyx argues that the parties were never able to conclude the extensive negotiations with a final signed agreement and therefore there is no binding agreement between the parties. Onyx argues that even if this court were to find that the parties had agreed to all the terms, the plain language of the agreements themselves makes them unenforceable absent signed execution by both parties. That is, the parties engaged in negotiations understanding that they would not be bound unless there was a signed contract. Without a valid binding contract, Onyx argues, PSEG cannot compel Onyx and/or Blackstone to arbitrate.

Further, Onyx argues that PSEG's own conduct belies any claim that it believed the January 29, 2016 email formed a binding contract. In that regard, without informing Onyx, in March, April and May 2016 PSEG purchased "replacement" SREC's for Energy Years 2016 through 2020 as a direct result of Onyx's apparent unwillingness and/or inability to purchase the quantity of SREC's required by the Agreement. Onyx notes that PSEG at that time did not declare an event of default under the Draft Agreements. Onyx argues that if Plaintiff truly believed that the Draft Agreements were binding, § 5.2 of those Agreements required notices of default and a negotiated procedure to liquidate the trades prior to any attempt to cover. Instead, PSEG failed to observe the contractual requirements until July 20, 2016, at a time when it was

clear that litigation was likely. Moreover, Onyx notes that the first time PSEG asserted the transmission of the unexecuted Draft Agreements in January 2016 was binding on the parties was in a letter dated June 14, 2016. That letter also made a counter-proposal that was conditioned upon acceptance “as evidenced by delivery of executed documents, including letter of credit.”

As a policy matter, Onyx argues that if this court were to find that there is a binding agreement, contracting parties would not be able to engage in open, transparent dialogue for fear that the counterparty could take constructive progress and statements of optimism in the negotiations and try to twist that into a formal offer and acceptance. Here, Onyx argues where two sophisticated parties negotiate a multimillion-dollar contract to be performed over several years, the law requires a signed contract.

III. Discussion

PSEG asks this court to proceed summarily in accordance with the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 (the “Arbitration Act”). The Arbitration Act provides, in relevant part, that “the court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.” N.J.S.A. 2A:23B-6(b). All applications for judicial relief under the Act must “be made upon commencement of a summary action with the court and heard in the manner provided for in such matters by the applicable court rules.” N.J.S.A. 2A:23B-5(a). Consistent with the strong public policy favoring arbitration, the Act requires the court to summarily “order the parties to arbitrate unless it finds that no enforceable agreement to arbitrate exists.” N.J.S.A. 2A:23B-7(a)(2).

Because this matter comes before the court as a summary action, “findings of fact must be made, and a party is not entitled to favorable inferences such as are afforded to the respondent

on a summary judgment motion for purposes of defeating the motion.” Grabowsky v. Tp. of Montclair, 221 N.J. 536, 549 (2015) (quoting Pressler & Verniero, Current N.J. Court Rules, comment 1 on R. 4:67-1). In order to render its findings of fact, the court may either adopt the uncontested facts in the pleadings after concluding that there are no genuine issues of fact in dispute, or by conducting an evidentiary hearing.

A. Validity and Enforceability of Agreement

The central issue here in dispute is whether a valid agreement to arbitrate exists between PSEG and Onyx. While New Jersey has a strong public policy in favor of arbitration, a party cannot be forced to arbitrate until it is first established by a court that the party willingly manifested assent to the underlying contract. Hall v. Healthsouth Rehab. Hosp. of Vineland, 2013 WL 3581263, at *7 (N.J. Super. Ct. App. Div. July 16, 2013). An agreement to arbitrate, like any other contract, “must be the product of mutual assent, as determined under customary principles of contract law.” Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 442 (2014), cert. denied, 135 S. Ct. 2804 (2015). As the proponent of arbitration, PSEG has the burden to establish by a preponderance of the evidence that there is an enforceable agreement to arbitrate. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cantone Research, Inc., 427 N.J. Super. 45, 59 (App. Div. 2012). Courts apply “state contract law to determine whether a valid agreement to arbitrate exists.” Bernetich, Hayzell, & Pascu, LLC v. Med. Records Online, Inc., 445 N.J. Super. 173, 179-80 (App. Div. 2016). “When deciding whether the parties agreed to arbitrate a certain matter... courts generally,, should apply ordinary state-law principles that govern the formation of contracts” Ibid. (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995)). To determine the parties’ intent to be bound under New Jersey law,

Courts have referred to a number of elements in the evidential panorama underlying a factual finding of intent and enforceability. These elements include the document itself

and the underlying facts relating to the negotiations leading to its execution... whether performance that was agreed to by the parties was undertaken, the prior dealings of the parties, and industry practice.

J & P Int'l Enter., Inc. v. Cancer Treatment Services, Int'l L.P., 2010 WL 331865 at *7 (D.N.J. Aug. 19 2010).

Because the arbitration agreement at issue is appended to an unsigned contract between the parties, a key threshold question is whether the contract itself is a binding agreement.

To establish a valid contract, a party must prove: 1) meeting of the minds, that is, the parties reached an agreement to do what is alleged; 2) offer and acceptance, that is, one party communicated a willingness to enter into the agreement and the other party gave some outward indication that the agreement was accepted; 3) consideration—each party gave or promised something of value to the other; and 4) certainty that the terms of the agreement were reasonably certain. N.J. Jury Instr. Civ. 4.10 C; see also Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435, (1992). The New Jersey Supreme Court has held that “it is requisite that there be an unqualified acceptance to conclude the manifestation of assent.” Johnson & Johnson, 11 N.J. 526, 539. An offeree may manifest assent to the terms of an offer through words, creating an express contract, or by conduct, creating a contract implied-in-fact. See Restatement (Second) of Contracts § 19(1) (1981).

PSEG argues that the fact that the contract was never executed is immaterial as the parties' agreement on the material terms and conditions of the agreement coupled with their outward manifestations of assent established a binding contract. In that regard, PSEG refers to the following settled tenets of contract law:

If a written draft of an agreement is prepared, submitted to both parties, and each of them expressed unconditional assent thereto, there is a written contract. So far as the common law is concerned, the making of a valid contract requires no writing whatever; and even if

there is a writing, there need be no signatures unless the parties have made them necessary at the time they express their assent and as a condition modifying that assent.

An unsigned agreement, all the terms of which are embodied in a writing, unconditionally assented to by both parties, is a written contract. It is true that the act that they have expressed unconditional assent must be proved by testimony of their unwritten expressions; it is not evidenced by the writing itself. But the same is true of a writing that has been signed by both parties.

1-2 Corbin on Contracts § 2.10 (2016).

PSEG notes that New Jersey law firmly embraces these fundamental principles. In Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992), the Supreme Court held that if the parties “agree on essential terms and manifest an intention to be bound by those terms, they have created an enforceable contract.” Where, as here, the issue of intent is disputed, the parties’ objective manifestations govern. See, Hagrish v. Olson, 254 N.J. Super. 133, 138 (App. Div. 1992) (it is the “parties’ objective intent [that] governs. A contracting party is bound by the apparent intention he or she outwardly manifests to the other party. It is immaterial that he or she has a different, secret intention from that outwardly manifested.”) In that regard, “[t]he court will view the mutual assent of the parties only as it is manifested from one party to the other.” Pagani-Braga-Kimmel Urologic Assoc., P.A. v. Chappell, 407 N.J. Super. 21, 27-28 (Law Div. 2008). “When looking for mutual assent, a court will take these outward expressions and ask ‘what meaning the words should have conveyed to a **reasonable person** cognizant of the relationship between the parties and all of the antecedent and surrounding facts and circumstances.” Id. at 28 (quoting Esslinger’s Inc. v. Alachnowicz, 68 N.J. Super. 339, 344 (App. Div. 1961) (emphasis in original).

In this case, it is undisputed that the transaction between PSEG and Onyx contemplated an executed contract. It is also undisputed that the contract was never signed by either party. In that regard, the documents sent to Onyx for execution pursuant to the January 29, 2016 email had

not been executed by PSEG. Each document within the Draft Agreements included a provision that a signature was contemplated for the agreement to be legally binding:

- Confirmation Letter states:
 - IN WITNESS WHEREOF, and **intending to be legally bound, the Parties have executed this Agreement** by their undersigned duly authorized representative as of the date below to be effective as of the Effective Date hereof.
 -
- Master Agreement states:
 - “...that the Master Agreement and any other **documents executed and delivered** hereunder...”
 - “each party represents and warrants to the other party that: ... (iii) **the execution, delivery and performance of the Master Agreement and each Transaction . . . are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contract to which it is a party or any law, rule, regulation, order of the like applicable to it; (iv) this Master Agreement, each Transaction . . . and each other document executed and delivered in accordance with this Master Agreement constitutes its legally valid and binding obligation enforceable against it** in accordance with its terms.”
 - “except to the extent herein provided for, **no amendment or modification of this Master Agreement shall be enforceable unless reduced to writing and executed by both parties.**”
- Addendum states:
 - “IN WITNESS WHEREOF, the parties have caused this Master Agreement to be duly executed as of the date first above written”
 - “For purposes of clarity and avoidance of doubt, this Master Agreement may not be modified or amended through language contained in a Confirmation, but **can only be modified or amended through a written and fully executed amendment** hereto that is specific to the Master Agreement.”

In Leodori v. CIGNA Corp., 175 N.J. 293 (2003), the New Jersey Supreme Court held that when one party presents a contract for to another party for its signature, the omission of that other party's signature is a significant factor in determining whether the two parties mutually have reached an agreement. In Leodori, an employer distributed a handbook to the employee plaintiff that included an arbitration clause. The plaintiff signed a form acknowledging receipt of

the handbook. The employer also gave the plaintiff a separate form acknowledging agreement to the terms contained in the handbook. This form specifically mentioned that arbitration was a condition of continued employment. The plaintiff then received the following e-mail from the employer:

Upon reflection, and based on your feedback, we are removing the link between signing the Handbook receipt and future compensation and benefits actions. We now believe that the recent high level of visibility and dialogue around the Handbook more than meets the test of ensuring that everyone is fully aware of company policy and eliminates the need for potential penalties.

For those of you who have not yet acknowledged receipt of the Handbook, a simplified form similar to those we have used in prior years is available from your supervisor. For those who already have signed the original receipt, you need take no further action; however, if you would like, you can request and sign the revised form.

Although finding the actual waiver-of-rights provision in the handbook unambiguous, the Court in *Leodori* was unable to conclude that the plaintiff clearly agreed to it and therefore held the provision invalid, as applied to the plaintiff. In so holding, the Court noted that while signatures are customary and desirable, a contract may be enforceable upon proof of some other explicit indication of intent to be bound. *Id.* at 305. However, “when one party ... presents a contract for signature to another party, the omission of that other party's signature is a significant factor in determining whether the two parties mutually have reached an agreement.” *Id.* Further, the Court noted that when “defendant’s own documents contemplated plaintiff’s signature as a concrete manifestation of his assent. . . Our contract law does not permit defendant to contemplate or require plaintiff’s signature on an agreement and then successfully to assert that the omission of that signature is irrelevant to the agreement’s validity. *Id.* at 306. See also *Open Solutions Inc. v. Granite Credit Union*, 2013 WL 5435105, at *2 (D.Conn. Sept. 29, 2013) (“On the last page of the Agreement, it states ‘ACCEPTED AND AGREED TO BY OPEN SOLUTIONS, INC.’ above a blank space for OSI’s signature Had it been the intent of the

parties to not require OSI's signature, this section likely would not have been included."); Pacific Photocopy, Inc. v. Canon U.S.A., Inc., 646 P.2d 647, 649-50 (Or.Ct.App. 1982) ("The document was written and contained a signature line for approval by defendant. Even though paragraph 23 does not specifically require a signature of defendant's authorized agent, it appears from the character and form of the document that the parties contemplated signatures by both parties to complete the agreements."); Ergon Asphalt & Emulsions, Inc. v. Capriati Const. Corp, Inc., 2015 WL 1959851, at *2 (D. Nev. Apr. 29, 2015) (finding the unsigned agreement was not binding and that Defendant contemplated that a signature was required for plaintiff to accept the terms of the draft agreement since the draft agreement contained signature blocks preceded by the statement "the parties hereto have executed this purchase agreement for themselves. . . and defendant's agent had emailed to ask when plaintiff was "going to sign").

As in Leodori, the contract at issue in this case contemplated signatures by the parties. As in Leodori, this court does not find that fact alone dispositive; however, under the facts of this case it is a significant factor in the determination whether Onyx, or PSEG for that matter, intended it to be binding in the absence of its execution. The court finds it noteworthy that PSEG, based on its own admitted lack of trust and confidence that Onyx was willing or able to perform its obligations under the draft agreement, purchased SREC's from other vendors in March, April and June 2016. In that regard, according to the Roenbeck certification, the decision to purchase what he characterized as "replacement" SREC's was based on two factors. The first factor was that PSEG by mid-March had doubts whether Onyx would actually supply the quantity of SREC's required by the agreement in light of Onyx's evasive conduct after January 2016, most particularly its failure to provide the agreed-upon letter of credit or an executed agreement. Secondly, PSEG wanted to ensure it would have enough SREC's to avoid the

Alternative Compliance Payment for Energy Year 2016, which was \$323.00, far more than the price at which it would have paid Onyx. Although the second factor could properly be characterized as mitigation, the court finds that as to the first factor, PSEG itself viewed both the provision of a letter of credit and an executed contract as essential to cementing an enforceable agreement. This conclusion is further supported by the conduct of PSEG as evidenced by Ms. Leyden's certification that "PSEG contacted Onyx on numerous occasions in February, March, and April 2016 to inquire as to when it would receive an executed copy of the Agreement." The court finds that based on PSEG's conduct it was clearly essential to PSEG to receive both an executed contract and the letter of credit to cement the transaction because, according to the Complaint, the financial capability of the parties to meet their respective payment obligations is of critical importance in a "Firm LD" or liquidated damages, transaction. Thus, without a Letter of Credit, PSEG would have no assurance it would be made whole in the event of a default.

Furthermore, the court finds that there are otherwise insufficient objective indicia of unambiguous assent to the terms of the agreement for the court to find that a binding agreement was formed in the absence of a signed contract. See J & P Int'l Enter., Inc. v. Cancer Treatment Services, Int'l L.P., supra, 2010 WL 331865 at *7 (elements to determine intent to be bound under New Jersey law include the document itself, the underlying facts relating to the negotiations leading to its execution, whether performance that was agreed to by the parties was undertaken, the prior dealings of the parties, and industry practice). Here, there were no prior dealings between the parties. In fact, this was a transaction that was fraught from its inception by mutual distrust on both sides of the deal. The proposed transaction was quickly derailed in or about April 2015 after PSEG, under a mistaken understanding that Blackstone would be

providing a parent guaranty or other credit support, blindsided Onyx with a demand of a \$15 million letter of credit to support the transaction. What transpired thereafter was a continuous and never fully consummated negotiation, primarily focused on the level of credit support that would be required for the transaction.

Although PSEG wishes the court to focus myopically on the telephone conferences that occurred on December 4 and 5, 2015, the court believes it is wiser to view the entire trajectory of the negotiations before and after those two days. While it is true that over the ensuing weeks the parties finalized the written documents and Onyx sent PSEG a proposed form of the letter of credit, no actual letter of credit was ever obtained or provided. While it is true that in an email dated January 29, 2016, Onyx requested that PSEG forward a fully executed package of documents for Mr. Rosenblum to sign, it is undisputed that Rosenblum never signed them in fact. Indeed, at the time these documents were transmitted to Onyx, PSEG itself had not signed the agreement. PSEG's claim that Marrone bound Onyx to the agreement by his January 29, 2016 email requesting the transmission of the agreement for signature is undermined by Onyx's Policies and Procedures Manual, setting forth specific Approval Levels and Delegation of Authority that control when procuring goods and services for the company. The PPM identifies the appropriate authority procedures for purchases within specified dollar valuations. The PSEG trade represented qualifying goods or services in the annual amount of \$3,420,00.00 (20,000 SREC's at the price of \$171.00 per SREC). Given the size of the trade, the only Onyx employee with sufficient authority to bind the agreement was the CEO of Onyx, Matthew Rosenblum. It is undisputed that Mr. Rosenblum did not attend the December 4, 2015 conference call which purported to bind Onyx to the draft agreement.

Another factor that is significant to the court's decision is PSEG's delay in exercising its alleged rights under the agreement. PSEG did not inform Onyx of its position that a binding agreement was formed by virtue of the January 29, 2016 email until June 14, 2016, when it sent Onyx a letter to that effect. It was not until October 25, 2016, that PSEG sent Onyx a Notice of Early Termination Payment Amount. It was also in October 2016 that Onyx first learned that PSEG as early as March 2016 had been purchasing what it characterized as "replacement SREC's." Moreover, PSEG did not observe the contractual requirements of serving a Notice of Default and commencing an agreed-upon liquidation procedure until July and September 2016, respectively, when it was clear that litigation was likely. The court finds that PSEG's belated exercise of its contractual rights is inconsistent with its position that there was a binding agreement between PSEG and Onyx as early as December 4, 2015 and at the latest by January 29, 2016.

Finally, it is clear to the court that far from manifesting unambiguous assent to the terms of the draft agreement as of January 29, 2016, both parties continued long after January 29, 2016 to actively negotiate various terms of the contract, primarily related to the level of credit support required for the transaction. On May 26, 2016, Rosenblum had a meeting with PSEG in which he indicated that the draft agreement was "too far out of the money" for Onyx and that Onyx was having difficulty raising the collateral for \$1.25 million letter of credit. Onyx requested an increased contract price for 2016. In response, on June 14, 2016, PSEG offered to accept the amended contract price provided Onyx provide a higher amount of collateral security in Energy Years 2016 and 2017. The counter proposal was open only until June 26, 2016 and was conditioned on Onyx delivering all executed documents to PSEG by that time. Unless those conditions were met, the counter-proposal was to be rendered rejected and null and void. PSEG

agreed to extend the time for Onyx to close the deal but demanded assurance it would receive both the executed Agreement and letter of credit no later than close of business on July 8, 2016. After Onyx missed both the July 8 and a subsequent extension, PSEG wrote to Onyx on July 13, 2016 to advise that its counter-proposal was null and void and withdrawn. Nonetheless, PSEG nonetheless invited Onyx to submit a “different and complete proposal to amend that agreement.” Tellingly, each proposal and counter proposal by PSEG was conditioned on receipt of both an executed contract and a letter of credit.

Bowles v. N.Y. Liberty, 2014 WL 7148916, at *1 (D.N.J. Dec. 15, 2014), cited by PSEG, is not to the contrary. In that case, the court held that a settlement in a trip and fall was enforceable in the absence of a signed release where the plaintiff explicitly consented to the terms of the settlement on the record before a magistrate judge. The court in Bowles noted that “if the negotiations are finished and the contract between the parties is complete in all its terms and the parties intend that it shall be binding, then it is enforceable, although lacking in formality and although the parties contemplate that a formal agreement shall be drawn and signed.” Id. at *2. In this case, in contrast, there was no formal acceptance on the record and insufficient evidence of an intent to be bound by the draft agreement. In that regard, the court finds that the January 29, 2016 email simply requesting the draft agreement be forwarded for execution is not a sufficient expression of unambiguous assent, particularly in light of the continuing negotiations, proposals and counter proposals that followed. Nor do expressions such as “we’re 100% on board” or “we really want to close this trade” have sufficient clarity to construe them as expressions of unambiguous acceptance of the draft agreement.

Similarly, the court does not find persuasive the case of Sanofi-Aventis U.S. LLC v. Sandoz, Inc., 2009 WL 3230867 (D.N.J. Oct. 2, 2009). In that case, as in this matter, the parties

set forth the essential terms of their deal in a Letter of Intent and Term Sheet, while continuing to work out the finer details of the agreement. On June 4, 2009, the plaintiff offered a final round of changes to the settlement agreement, and indicated to the defendant that with these “logistical” changes the deal was complete, as there was nothing left to negotiate. Unlike the facts of this case, however, the defendant executed the agreement and there was evidence of assent because the plaintiff acknowledged to the defendant that most of the signatures (80%) on the formal written agreement had been obtained by both parties. The fact that plaintiff failed to complete its execution of the written copies of the settlement agreement was not a bar to finding that a binding settlement had been reached. In this case, in contrast, neither PSEG nor Onyx executed any of the documents and there is scant indication that PSEG, let alone Onyx, truly believed a binding contract was formed in the absence of an executed contract.

In short, although none of the factors individually might bar a finding of contract formation, cumulatively, the court concludes that these factors: the failure of the parties to execute the contract; the lack of prior dealings between the parties; the size of the transaction; PSEG’s conduct in delaying enforcement of the contract; the failure of PSEG to observe the contract requirements in the event of default; PSEG’s unwavering insistence on receiving an executed contract and a letter of credit; PSEG’s purchase of SREC’s from another vendor in early 2016 without notice to Onyx; and the lack of any performance by either party pursuant to the terms of the contract; compel the conclusion that there is no enforceable agreement between PSEG and Onyx.

As a final note, the court finds that because there is no dispute as to the objective facts in this case, there is no need for a plenary hearing. The court anticipates that such a hearing would focus on the parties’ subjective understanding of whether they each believed there was a binding

contract. Because it is the parties' objective conduct that governs the court's determination in this case, see Hagrish, supra, 254 N.J. Super. at 138 (it is the "parties' objective intent [that] governs. A contracting party is bound by the apparent intention he or she outwardly manifests to the other party. It is immaterial that he or she has a different, secret intention from that outwardly manifested,") the court finds that a plenary hearing would not meaningfully add information that would inform the court's decision.

Because of the court's conclusion that there is no enforceable contract between PSEG and Onyx, the court need not separately analyze whether the arbitration provision is enforceable or whether Blackstone can be compelled to arbitrate.

IV. Conclusion

For the foregoing reasons, PSEG's Order to Show Cause to compel arbitration is DENIED.