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NO. 53018-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Sprint Solutions, Inc. and Annette Jacobs,

Appellants,

v.

Pagecom Inc.,

Respondent.

Reply Brief of Appellants Sprint Solutions, Inc. and Annette Jacobs

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I. SUMMARY OF ARGUMENT

Try as it might, Respondent Pagecom cannot turn this appeal into a decision on the merits of the parties' underlying claims. The sole issue before the Court is whether the parties are required to arbitrate pursuant to a *mandatory arbitration clause*, to which Pagecom *agreed* to be bound.

Tellingly, Pagecom fails to quote the Dispute Resolution Clause (which governs the issue before the Court) even *once* in its Response Brief. Perhaps this is because the Dispute Resolution Clause *requires* arbitration of *all* disputes arising under the Agreement. Indeed, the Dispute Resolution Clause requires disputes brought by Pagecom against Sprint may first be subject to mediation. Pagecom can file arbitration upon the earliest of the following to occur: Sprint does not require mediation; mediation fails; or more than 45 days pass after either party submits a request for mediation:

Mediation. In the event of a Dispute pursued by [Pagecom], Sprint, may require that the Dispute be submitted to mediation. The mediation will occur at a location chosen by Sprint.¹

Arbitration. [Pagecom] may not commence arbitration until a Dispute has been subject to mediation in accordance with this Agreement. Either party may initiate arbitration with respect to a Dispute by filing a written demand for arbitration pursuant to the Wireless Industry Arbitration Rules of the AAA. [Pagecom] may only initiate arbitration after the 45th calendar day following the date that a request

¹ CP 108, Section 2.

for mediation of such Dispute was first submitted, or, if earlier, the date that mediation is terminated.²

Should any doubt remain (it should not), the Agreement *confirms* the parties waive “their rights to litigate Disputes in court.” It is obvious why Pagecom omits the governing Dispute Resolution Clause from its Response Brief.

Instead, Pagecom attempts to avoid the Dispute Resolution Clause altogether, by arguing the clause is unconscionable and that Sprint waived its right to arbitrate through pre-litigation conduct.³ However, Pagecom provides no support evidencing the Dispute Resolution Clause is procedurally or substantively unconscionable. Instead, Pagecom repeatedly claims Sprint’s *behavior* towards Pagecom was ‘callous,’ and therefore Pagecom should not be bound to the Agreement it signed. Even if this was true (which it is not), callousness does not render a contract substantively unconscionable or provide a party with the right to void an enforceable provision of a contract. Nor is the Dispute Resolution Clause procedurally unconscionable. It is undisputed Pagecom and its owner are experienced, sophisticated wireless retailers. Pagecom had a meaningful choice to enter into the Agreement.

² CP 109, Section 3.

³ Pagecom also mistakenly asserts it is a Franchisee under the Franchise Investment Protection Act (“FIPA”), Chapter 19.100 RCW. As set forth below, Pagecom’s FIPA argument addresses the merits of the parties’ dispute—not whether this dispute should be decided by an arbitrator (the issue before the Court).

Moreover, Sprint in no way waived its right to arbitrate through pre-litigation conduct. In support of its mistaken waiver argument, Pagecom asserts Sprint ‘blocked’ Pagecom’s attempts to pursue “Alternative Dispute Resolution.” However, Sprint’s position has remained the same throughout this dispute: Pagecom has no right to require mediation (only Sprint has a right to require mediation). This does not ‘block’ Pagecom from initiating arbitration. The Agreement expressly states Pagecom can arbitrate its dispute after mediation fails, if Sprint declines to mediate, or 45 days after Pagecom requests mediation. Pagecom’s unilateral confusion over the difference between mediation and arbitration does not void Sprint’s bargained-for right to have an arbitrator decide the merits of the parties’ claims.

This Court should reverse the trial court’s Order Denying Defendants’ Motion to Compel Arbitration and Dismiss and instead, direct the trial court to compel arbitration as required under the Agreement.

II. ARGUMENT

A. Clarification of the Standard of Review.

All parties agree questions of arbitrability are reviewed *de novo* and the trial court’s factual findings are reviewed for clear error. Opening Brief, p. 16; Response Brief, p. 15. However, Pagecom erroneously attempts to create a “heightened deference” standard where a trial court was “thorough

and careful” in setting forth its factual findings. Response Brief, p. 15 (citing *N. Kitsap Sch. Dist. V.K.W.*, 130 Wn. App. 347, 361, 123 P.3d 469 (2005)). *Kitsap Sch. Dist.* sets forth a “heightened deference” standard in the unique context of an appeal from an Administrative Law Judge (ALJ). The Court specifically noted that courts “must defer to [the school authority’s] ‘specialized knowledge and experience’ by giving ‘due weight’ to the decisions of the states’ administrative bodies,” particularly where the ALJ was thorough and careful in their findings. *Id.* No deference to an administrative body is necessary in this case. This Court reviews the denial of Sprint’s motion to compel *de novo* and the trial court’s factual findings for clear error.

B. Pagecom Misrepresents the Federal Arbitration Act’s (“FAA”) Preference for Arbitration.

Pagecom mistakenly argues “arbitration is not preferred to litigation” under the FAA. Response Brief, p. 16. The *opposite* is true. Indeed, the U.S. Supreme Court has said the FAA “establishes ‘a liberal federal policy favoring arbitration agreements.’” *Epic Sys. Corp. v. Lewis*, -- U.S. --, 138 S. Ct. 1612, 1621 (2018) (emphasis added). The FAA’s preference for arbitration is evident because any doubt regarding whether a dispute is arbitrable should be resolved in favor of arbitration under the FAA. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1,

25, 103 S. Ct. 998 (1983) (emphasis added). The FAA favors arbitration.

C. The Arbitrator—Not the Court—Should have Decided Issues of Arbitrability because the Dispute Resolution Clause Delegates Resolution of All Disputes to the Arbitrator.

Pagecom mistakenly argues the trial court, not the arbitrator, should decide whether the parties' dispute is subject to arbitration. In support of its mistaken argument, Pagecom asserts the parties did not delegate the issue of arbitrability to an arbitrator and claims the dispositive caselaw cited by Sprint is distinguishable. Pagecom's arguments are unavailing.

As an initial matter, Pagecom acknowledges the arbitration provision in *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 130 S. Ct. 2772 (2010) required the *arbitrator*, not the trial court, to decide issues of arbitrability. The arbitration provision at issue in *Rent-A-Ctr.* stated the arbitrator had:

exclusive authority to resolve any dispute relating to the *enforceability* . . . of [the] Agreement including, but not limited to any claim that all or any part of [the] Agreement is void or voidable.

Response Brief, p. 18 (emphasis in original). In its attempt to distinguish the Dispute Resolution Clause from the arbitration provision in *Rent-A-Ctr.*, Pagecom does not quote the Dispute Resolution Clause. Instead, Pagecom simply asserts "there is not a remotely similar delegation of authority to any arbitrator in this case." Response Brief, p. 18.

Perhaps if Pagecom *had* cited the Dispute Resolution Clause,

Pagecom would recognize the Dispute Resolution Clause is *substantially similar* to the arbitration clause in *Rent-A-Ctr.* The Dispute Resolution Clause requires arbitration of:

*all controversies, disputes, or claims of every kind and nature arising out of or in connection with the negotiation, construction, validity, interpretation, performance, enforcement, operation, breach, continuation, or termination of this Agreement.*⁴

Contrary to Pagecom's bald assertion, requiring an arbitrator to decide all disputes (*Rent-A-Ctr.*) and requiring all disputes to be arbitrated (the Dispute Resolution Clause) is a distinction without a difference. The Dispute Resolution Clause requires the arbitrator decide arbitrability.

Pagecom makes a similarly weak attempt to distinguish *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193 (2d Cir. 1996). Pagecom acknowledges *PaineWebber* stands "for the proposition that in a case with language submitting 'any and all controversies' to arbitration, the parties have delegated arbitrability to the arbitrator." Response Brief, p. 18. Again, rather than quote the Dispute Resolution Clause, Pagecom summarily states the language at issue in *PaineWebber* is "plainly unlike the case before this court. The contract language is different from the language in this case, entirely unequivocal and somewhat unique." Response Brief, p. 19.

⁴ CP 108 (emphasis added).

Tellingly, Pagecom fails to explain how the contract language in *PaineWebber* (which submits “any and all controversies” to arbitration) delegates issues of arbitrability to the arbitrator but the Dispute Resolution Clause (which submits “all controversies, disputes, or claims of every kind” to arbitration) does not. If the contract language in *PaineWebber* ‘unequivocally’ delegates issues of arbitrability to the arbitrator, so does the Dispute Resolution Clause.

Rent-A-Ctr. and *PaineWebber* are dispositive. The trial court erred by failing to delegate the decision of arbitrability to an arbitrator as required by the Dispute Resolution Clause.

D. The Dispute Resolution Clause is Not Unconscionable.

Pagecom argues it should not be bound by the terms of the Dispute Resolution Clause (to which it agreed) because the Dispute Resolution Clause is unconscionable. In support, Pagecom asserts only that: (1) the Dispute Resolution Clause is unconscionable because Pagecom had no ability to “initiate the ADR process;” and (2) Sprint engaged in “unconscionable behavior.” Pagecom’s first assertion is a blatant misrepresentation of the Dispute Resolution Clause already rejected by the courts. Pagecom’s second assertion fails to demonstrate *the terms* of the Dispute Resolution Clause are so shockingly one-sided that the Dispute Resolution Clause should be deemed unconscionable.

1. The Dispute Resolution Clause is Not Unconscionable because Pagecom Unequivocally Had the Right to Initiate Arbitration.

To demonstrate substantive unconscionability, Pagecom must prove the Dispute Resolution Clause is so one-sided or overly harsh that it “shock[s] the conscience,” is “monstrously harsh,” or “exceedingly calloused.” *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 345, 103 P.3d 773 (2004). To this end, Pagecom repeatedly asserts the Dispute Resolution Clause is substantively unconscionable because Pagecom could not initiate the ADR process, only Sprint could. Response Brief, p. 20 (asserting it is “undisputed that Sprint told Pagecom that Pagecom could not initiate the ADR process but that only Sprint could.”). Pagecom’s argument is demonstrably false.

(a) Pagecom Misrepresents the Record Before the Court.

As an initial matter, and particularly troubling, Pagecom blatantly misrepresents the record to the Court. Sprint *never stated* only it may initiate arbitration. A cursory review of Pagecom’s own exhibits and references to the record evidences Pagecom is misstating facts:

- Sprint did not agree for mediation to be held in Washington (the Dispute Resolution Clause provides for mediation to be held in a location chosen by Sprint); CP 317.

- Sprint asserted its belief that mediation would not result in resolution and that “[i]f a settlement could not be made, it may be more prudent to move to arbitration.” CP 321.
- Sprint did not desire to participate in mediation; CP 328.

Nowhere did Sprint assert Pagecom could not initiate arbitration. Sprint stated only that it would not participate in mediation (it had no obligation to) *and that the parties should proceed to arbitration.* Pagecom’s disingenuous assertion that Sprint “advised that only Sprint could initiate the ADR process” is a falsification of the record before the Court.

(b) Pagecom Misconstrues the Dispute Resolution Clause.

Moreover, Pagecom’s assertion that only Sprint could initiate the “ADR process” is a blatant misrepresentation of the Dispute Resolution Clause. Unquoted by Pagecom, the Dispute Resolution Clause states:

Mediation. In the event of a Dispute pursued by [Pagecom], Sprint, may require that the Dispute be submitted to mediation. The mediation will occur at a location chosen by Sprint.⁵

Arbitration. [Pagecom] may not commence arbitration until a Dispute has been subject to mediation in accordance with this Agreement. . . . [Pagecom] may only initiate arbitration after the 45th calendar day following the date that a request for mediation of such Dispute was first submitted, or, if earlier, the date that mediation is terminated. This

⁵ CP 108, Section 2.

applies to all causes of action, whether nominally a “claim,” “counterclaim”, or “cross-claim”, arising under common law or any state or federal statute.⁶

Nowhere does the Dispute Resolution Clause prohibit Pagecom from initiating arbitration. To the contrary, it is clear Pagecom can file arbitration if Sprint does not require mediation, mediation fails, or more than 45 days pass after either party requests mediation. Pagecom’s misinterpretation of the Dispute Resolution Clause does not make it unconscionable.

(c) Courts have Held Similarly Worded Arbitration Provisions Enforceable.

In fact, courts have held arbitration provisions substantially similar to the Dispute Resolution Clause enforceable. For example, in *Mobile Now, Inc. v. Sprint Corp.*, 393 F. Supp. 3d 56 (D.D.C. 2019), the court held an arbitration provision *nearly identical* to the Dispute Resolution Clause enforceable. The arbitration provision at issue in *Mobile Now* provided that:

AR may not commence arbitration until a Dispute has been subject to mediation (if required by Sprint in Section 2 above). AR may only initiate arbitration after the 45th calendar day following the date that a request for mediation of such Dispute was first submitted, or, if earlier, the date that mediate is terminated. (Underline added).

Like Pagecom in this case, *Mobile Now* argued the arbitration provision was unconscionable because “the Agreement bars [Mobile Now]

⁶ CP 109, Section 3 (underline added).

from arbitrating disputes so long as Sprint declines to mediate.” *Id.* (underline added). The court flatly rejected Mobile Now’s argument, holding such an interpretation “misconstrues the plain text of the contract.” *Id.* (underline added). The court further explained that:

The relevant provisions say only that arbitration is not immediately available if Sprint elects to mediate the dispute. If Sprint declines that option, the Agreement provides that disputes shall be arbitrated. And even if Sprint requires mediation, disputes may still be submitted for arbitration after 45 days. (Internal citations omitted).

A copy of *Mobile Now, Inc. v. Sprint Corp.*, 393 F. Supp. 3d 56 (D.D.C. 2019) is attached as Appendix A.

Similarly, in *L2 Wireless, LLC v. Sprint Sols., Inc.*, 3:18-CV-2729-K, 2019 WL 3974826 (N.D. Tex. Aug. 22, 2019), the court found a substantially similar arbitration provision was not so one-sided that it should be deemed unconscionable. Like the Dispute Resolution Clause, the arbitration provision at issue in *L2 Wireless* provided that:

ABR may not commence arbitration until a Dispute has been subject to mediation (if required by Sprint per Section 2 above). ABR may only initiate arbitration after the 45th calendar day following the date that a request for mediation of such Dispute was first submitted, or, if earlier, the date that mediation is terminated.

The court found the provision was not so oppressive and unfairly surprising, that it should be deemed unconscionable. A copy of *L2 Wireless, LLC v.*

Sprint Sols., Inc., 3:18-CV-2729-K, 2019 WL 3974826 (N.D. Tex. Aug. 22, 2019) is attached as Appendix B.⁷

Here, the Dispute Resolution Clause (like the arbitration provisions at issue in *Mobile Now* and *L2 Wireless*) provides that:

[Pagecom] may not commence arbitration until a Dispute has been subject to mediation in accordance with this Agreement. . . . [Pagecom] may only initiate arbitration after the 45th calendar day following the date that a request for mediation of such Dispute was first submitted, or, if earlier, the date that mediation is terminated.

Contrary to Pagecom’s assertions, the Dispute Resolution Clause does not “bar [Pagecom] from arbitrating disputes so long as Sprint declines to mediate.” Instead, as noted in *Mobile Now* and *L2 Wireless*, the Dispute Resolution Clause provides that disputes shall be arbitrated and that Pagecom may submit its claims for arbitration 45 days after requesting mediation. The Dispute Resolution Clause is not unconscionable. The trial court erred in holding to the contrary.

2. Sprint’s Alleged “Unconscionable Behavior” Does Not Make the Dispute Resolution Clause Unconscionable.

Finally, Pagecom mistakenly argues Sprint *behaved* unconscionably after the Agreement was executed, and thus the Dispute Resolution Clause

⁷ Both *Mobile Now* and *L2 Wireless* were decided after the filing of Sprint’s Opening Brief. The local rules of the D.C. and N.D. of Texas Courts do not limit citation of unpublished cases. The circuit rules for both circuits include similar language to FRAP 32.1, and prevent federal courts of that circuit from limiting citations of Federal opinions or orders issued after January 1, 2007.

is unconscionable. Even if Sprint engaged in unconscionable behavior (it did not), unconscionable behavior post-execution of a contract does not make a provision in the Agreement unconscionable. Indeed, Sprint is aware of no legal authority, and Pagecom cites none, standing for the proposition that a party's post-execution *behavior* can transmogrify a contract term to make it unconscionable. The terms of the Dispute Resolution Clause remain unchanged and are not so overly one-sided or monstrously harsh that it should be deemed unconscionable.

Moreover, an unbiased review of the record demonstrates Sprint in no way behaved unconscionably. Sprint denied any obligation to mediate because Sprint is not obligated to mediate under the Dispute Resolution Clause, and Sprint believed mediation would be unsuccessful. Sprint never "advised" Pagecom that it could not initiate arbitration. Sprint asserted its belief that the parties should move *straight to arbitration*. Sprint's "behavior" was not unconscionable. Instead, Pagecom simply prefers to litigate this matter because it believes arbitration will somehow "benefit" Sprint and because Pagecom does not want to incur the expense of travel.⁸ Behavior cannot transmogrify the Dispute Resolution Clause and make it unconscionable. The trial court erred in holding to the contrary.

⁸ RP Vol. II, p. 46:3-47:10 (Pagecom's attorney noting that he does not want to travel or incur the expense involved in traveling).

E. Sprint Did Not Waive its Right to Arbitrate.

Pagecom also asserts Sprint waived its right to arbitrate because Sprint “blocked” Pagecom’s attempts to engage in ADR, leaving Pagecom with no forum other than court in which it could bring its dispute. Response Brief, p. 23-25. Pagecom asserts this pre-litigation conduct constitutes waiver of Sprint’s right to arbitrate. Pagecom ignores the law, misrepresents the facts, and misconstrues the Dispute Resolution Clause.

1. Clarification of the Correct Legal Standard.

At the outset, Pagecom asserts the legal authority cited by Sprint employs a “strict prejudice requirement for waivers of arbitration” and should be disregarded. Response Brief, p. 25. However, the legal authority relied upon by Pagecom sets forth the same standard as the legal authority cited by Sprint. As recognized by Pagecom, most federal courts employ a three-part test for waiver. *Schuster v. Prestige Senior Management, L.L.C.*, 193 Wn. App. 616, 376 P.3d 412 (2016). To this end, “the party opposing arbitration must demonstrate [the compelling party’s] (1) knowledge of an existing right to compel arbitration, (2) acts inconsistent with that existing right, and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts.” *Schuster*, 193 Wn. App. at 633. “[W]aiver is not a favored defense to compelling arbitration.” *Id.* at 632 (underline added). Moreover, “Courts wish to encourage parties to resolve their legal disputes

by arbitration.” *Id.* “Therefore, a party seeking to prove waiver [in this case, Pagecom] has a heavy burden of proof.” *Id.* (underlined added).

As set forth below, Pagecom fails to meet its heavy burden of proving Sprint waived its right to arbitrate because Sprint’s right to arbitrate arose when Pagecom improperly filed this lawsuit; Sprint acted consistently with its right to arbitrate; and Pagecom suffered no prejudice.

2. Sprint’s Right to Arbitrate Arose When Pagecom Improperly Commenced Litigation.

Concerning the first element, Pagecom confusingly asserts Sprint should have initiated arbitration against Pagecom if Sprint intended to preserve its right to arbitration. Response Brief, p. 24, 25 (“Sprint could have demanded ADR regarding Pagecom’s alleged breach of contract.”). It is unclear how Sprint’s choice *not to sue* Pagecom waives Sprint’s right to arbitrate Pagecom’s claims against Sprint. Nor was Sprint required to sue itself. In fact, Pagecom’s argument misses the point. Sprint’s right to arbitrate arose *after* Pagecom improperly filed this lawsuit. *Harsco Corp. v. Crane Carrier Co.*, 122 Ohio App. 3d 406, 413, 701 N.E.2d 1040 (Ohio Ct. App. 1997) (noting opportunity to invoke arbitration arose only after filing of complaint). Prior to Pagecom’s initiation of litigation in court (the wrong forum), Sprint had *no existing right to compel arbitration.*

3. Sprint Acted Consistently with its Right to Arbitrate.

Once Pagecom improperly initiated litigation, it is undisputed Sprint

acted promptly to enforce its contractual right to arbitrate. As such, Pagecom asserts Sprint's *pre-litigation* conduct waived its right to arbitrate. In support, Pagecom cites a single case for the proposition that "pre-litigation conduct can constitute waiver." Response Brief, p. 25 (citing *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388 (6th Cir. 2008)).

JPD, Inc. is entirely distinguishable from the instant case. In *JPD, Inc.*, the Sixth Circuit merely declined to make a bright line rule that pre-litigation conduct can *never* waive the right to arbitrate. *Id.* at 393. Instead, the Court found that a litigant must "act in a manner 'directly at odds' with its current desire to arbitrate" for it to waive its right to arbitrate. *Id.* In this context, the Court held a letter from the defendant, which objected to the plaintiff's initiation of the arbitration process, was not "completely inconsistent" with the defendant's right to arbitrate. *Id.* at 394. The Sixth Circuit later clarified its holding in *JPD, Inc.*, noting that even a refusal to arbitrate or silence in response to a request to arbitrate **does not** waive the right to arbitrate. *Shy v. Navistar Int'l Corp.*, 781 F.3d 820, 827 (6th Cir. 2015) ("We have repeatedly determined that there was no waiver when a party refused to arbitrate, prior to the commencement of litigation, on the grounds that its opponent's claims were substantively weak."). To be clear, courts require "completely inconsistent" conduct before determining a litigant has waived its right to arbitrate. *See, e.g., Shy*, 781 F.3d at 827;

Harsco Corp., 122 Ohio App. 3d at 413 (pre-litigation attempts to resolve dispute not considered waiver).

Here, Sprint’s actions are in no way “completely inconsistent” with its right to arbitrate. The record evidences only the following pre-litigation conduct: the parties engaged in unsuccessful discussions to resolve this matter for six months; Pagecom requested *mediation* to be held in Washington (to which Sprint would not agree); the parties agreed to hold Pagecom’s *mediation* request in abeyance until Pagecom provided additional financial information to Sprint; and Pagecom asked whether Sprint planned on opposing litigation (arbitration or otherwise) in Washington.⁹ Sprint even informed Pagecom that, absent settlement, it may be prudent to move to arbitration.¹⁰ These pre-litigation acts do not constitute waiver. Sprint never ‘advised’ Pagecom that it could not initiate arbitration; Sprint never asserted Pagecom’s claims were not subject to arbitration; and Sprint never denied any request to arbitrate—actions found not to constitute waiver in *Shy*.

Sprint’s pre-litigation actions are not “completely inconsistent” with its right to arbitrate. The trial court erred in ruling to the contrary.

⁹ CP 309, 320–21.

¹⁰ CP 321.

4. Pagecom Cannot Demonstrate it was Prejudiced by any Alleged Waiver.

Finally, Pagecom apparently acknowledges it has not suffered any prejudice, save for alleged delay in pursuing its claims. In an effort to satisfy the prejudice element of the waiver analysis, Pagecom asserts first that prejudice is not necessary to demonstrate waiver, and second, that even if prejudice is required (it is), Pagecom suffered prejudice as a result of delay. Pagecom's arguments are unavailing.

First, Pagecom cites *Schuster v. Prestige Senior Management, L.L.C.*, for the proposition that prejudice is not required to demonstrate waiver. Response Brief, p. 26. Pagecom's reliance is misplaced. Indeed, in *Schuster*, Division III of the Court of Appeals reserved the issue of whether prejudice is required to demonstrate waiver "for another day." *Schuster*, 193 Wn. App. at 639. However, even if the Court in *Schuster* had created such a rule (which it did not), the rule would be contrary to the vast majority of Federal Circuit Court decisions. As the *Schuster* court noted, the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits all require the party opposing arbitration demonstrate varying degrees of prejudice to find waiver.¹¹ *Id.* Prejudice is required to

¹¹ Only the Seventh Circuit and D.C. Circuit do not require prejudice to demonstrate waiver. *Id.*

demonstrate a party waived their right to arbitrate.

As a result, Pagecom argues it suffered prejudice due to “Sprint’s lengthy, repeated, tactical delays.” Response Brief, p. 26. In support of its mistaken assertion, Pagecom cites a single, unpublished case for the proposition that “delay alone is prejudice in the absence of any explanation.” Response Brief, p. 27 (citing *Graham v. Mascio*, No. 76967-7-I (Wash. Ct. App. Dec. 3, 2018) (unpublished)). Pagecom is incorrect.

In fact, a number of courts have made a bright line rule that “delay in seeking to compel arbitration does not itself constitute prejudice.” *Schuster*, 193 Wn. App. at 643 (citing *Stifel, Nicolaus & Co. v. Freeman*, 924 F.2d 157 (8th Cir. 1991); *Rush v. Oppenheimer & Co.*, 779 F.2d 885 (2d Cir. 1985)). Moreover, *Graham* concerned a particularly egregious set of facts where the party opposing arbitration filed an arbitration demand at the request of the defendant. However, the defendant thereafter refused to communicate with the arbitration association, resulting in dismissal of the arbitration demand. The party opposing arbitration filed an arbitration demand *again*, and *again* the defendant ignored the requirements of the arbitration association, resulting in dismissal of the second arbitration demand. The defendant provided “no good excuse for its delay” and the defendant “refused to engage in AAA’s process for reasons that are not justified.” *Id.* at 8.

Unlike the plaintiff in *Graham*, Pagecom never attempted to file arbitration, and Sprint never refused to participate in arbitration. Instead, Pagecom created its own self-inflicted delay by choosing to initiate litigation, despite agreeing to arbitrate all disputes in accordance with the mandatory arbitration provision in the Agreement.

Further, a careful review of the cases collected in *Schuster* (on which Pagecom relies) demonstrates delay results in prejudice where a party seeks to compel arbitration after engaging in litigation because the party opposing arbitration was forced to expend funds in litigation. *Id.* at 640-644 (citing *Restoration Pres. Masonry, Inc. v. Grove Eur. Ltd.*, 325 F.3d 54, 61 (1st Cir.2003) (prejudice may be inferred from delay when that delay is accompanied by sufficient litigation activity); *Cotton v. Slone*, 4 F.3d 176, 179 (2d Cir. 1993) (prejudice where party made motions going to the merits of the claim and engaged in discovery not available in arbitration); *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 925 (3d Cir.1992) (11-month delay, multiple motions, and extensive discovery not available in arbitration found prejudicial); *Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.*, 380 F.3d 200, 208 (4th Cir. 2004) (no waiver despite eight month delay in asserting right to arbitrate and the fact that court ruled on motion and parties engaged in discovery); *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 698 (9th Cir. 1986) (no waiver where party opposing

arbitration engaged in litigation, despite knowledge of arbitration agreement, because any alleged prejudice was “self-inflicted”).

Finding prejudice due to delay only where the party is forced to incur sufficient expense litigating arbitrable disputes—not where the parties engaged in pre-litigation negotiation—makes sense because the opposing party will incur litigation costs and face lost value for time spent litigating claims subject to arbitration. *Schuster*, 193 Wn. App. at 639-40. No such prejudice exists in this case. Sprint immediately moved to compel arbitration following Pagecom’s improper filing of this lawsuit. No discovery has occurred, and the trial court did not rule on any motions dealing with the merits of the case.

Finally, as noted above, any alleged prejudice to Pagecom is *self-inflicted*. Pagecom *knew of and agreed to* the mandatory arbitration provision. Pagecom nevertheless *chose* to file this improper lawsuit because it prefers not to incur the expense of traveling to arbitrate this matter. It is highly disingenuous for Pagecom to argue it suffered prejudice, when such prejudice (if any), resulted solely from Pagecom’s *own actions*. The trial court erred in holding Sprint waived its right to arbitrate.

F. Pagecom’s Franchisee/FIPA Argument Improperly Requires the Court to Consider the Merits of the Parties’ Claims.

The trial court did not rule on the issue of whether Pagecom is a

franchisee entitled to protections under FIPA, and therefore the issue is not before this Court. However, even if such the issue *was* before the Court (it is not) Pagecom’s franchisee/FIPA argument fails for a myriad of reasons.

First, the FAA prohibits targeting of specific arbitration agreements and “recognizes only defenses that apply to ‘any’ contract.” *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622-23, 200 L. Ed. 2d 889 (2018). Pagecom’s application of FIPA is not a generally applicable contract defense, but instead a specific attack on a particular type of arbitration. Thus, any alleged “illegality” under FIPA is preempted by the FAA.

Further, to analyze Pagecom’s FIPA/franchisee argument the Court would first need to resolve the central issue of whether Pagecom is in fact a franchisee.¹² Well-established law holds that it is improper for a court to decide the merits of the litigation in order to decide the question of the validity of the arbitration agreement. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, 87 S. Ct. 1801 (1967). Thus, Pagecom’s franchisee/FIPA argument fails for the additional reason that it is improper

¹² On this point, Pagecom claims it has presented “uncontroverted evidence” that “AR agreements are franchises.” Response Brief, p. 28. Sprint requests the Court scrutinize Pagecom’s use of the term “uncontroverted,” because Pagecom repeatedly asserts facts are “uncontroverted” when they are not. Although not before the Court, Sprint *controverts* that Pagecom is a franchisee. In order to qualify as a franchisee entitled to protection under FIPA, Pagecom must pay a franchisee fee to Sprint. RCW 19.100.010(4)(a). Pagecom pays no such fees and is not a franchisee. Moreover, Pagecom lacks a claim under FIPA, cannot prove a CPA claim, and is barred by the statute of limitations.

for a court to decide the merits of the parties' claims in deciding the validity of the parties' arbitration agreement.

G. The Trial Court Erred in Not Severing Any Allegedly Unconscionable Provisions of the Dispute Resolution Clause.

Pagecom also asserts the Dispute Resolution Clause is so pervasively unconscionable that “a massive rewrite [of the Dispute Resolution Clause] would be required, making severance improper.” Response Brief, p. 22. However, unless an insidious pattern of unconscionably one-sided provisions exist, courts should sever unconscionable provisions and enforce the remainder of the agreement. *Adler*, 153 Wn.2d at 358-59. The Agreement also requires severance.¹³

Assuming the Dispute Resolution Clause is unconscionable because it prohibits Pagecom from initiating the ADR process (which it does not), only one sentence in the Dispute Resolution Clause would need to be severed to make it enforceable:

Arbitration. ~~[Pagecom] may not commence arbitration until a Dispute has been subject to mediation in accordance with this Agreement.~~ Either party may initiate arbitration with respect to a Dispute by filing a written demand for arbitration pursuant to the Wireless Industry Arbitration Rules of the AAA. [Pagecom] may only initiate arbitration after the 45th calendar day following the date that a request

¹³ CP 58, ¶ 18.7.

for mediation of such Dispute was first submitted, or, if earlier, the date that mediation is terminated.¹⁴

Removal of this one sentence removes any perceived ambiguity which allegedly renders the Dispute Resolution Clause unconscionable. This is hardly a “massive rewrite.” The trial court erred in not severing the allegedly unconscionable sentence above to enforce the primary intent of the parties to arbitrate their disputes.

H. The Provision for Disputes Concerning Termination is not Unconscionable, is Irrelevant, and is Severable

Pagecom also mistakenly asserted a provision for disputing termination of the Agreement is unconscionable because it does not allow Pagecom to dispute termination until the termination has gone into effect. Pagecom’s argument is a red herring. Unquoted by Pagecom, the provision states the “dispute resolution process may only be invoked regarding Sprint’s right to terminate the AR Agreement after the termination has gone into effect.”¹⁵ Stated differently, if Sprint terminates the Agreement, Pagecom cannot challenge Sprint’s right to terminate the agreement during the time period between receiving notice of the termination and the termination’s effective date, a challenge which would delay any termination indefinitely. Such a term is not unconscionable. *See Mobile Now, Inc. v.*

¹⁴ CP 109, Section 3.

¹⁵ CP 282, Section 1.

Sprint Corp., 393 F. Supp. 3d 56 (D.D.C. 2019) (holding nearly identical provision was not so egregious as to be unconscionable).

However, even if the termination provision *was* unconscionable Sprint retracted its termination notice at Pagecom's request. Thus, the termination provision is not even in issue. Finally, *even if* the termination provision was unconscionable (which it is not) and *even if* it was relevant to this appeal (which it is not), the provision is peripheral to the parties' basic agreement to arbitrate disputes and is severable. The trial court erred in not severing allegedly unconscionable provisions and enforcing the parties' intent to arbitrate.

III. CONCLUSION

Pagecom agreed to resolve disputes through binding arbitration and waived its right to litigate in court. Pagecom's misinterpretation of the Dispute Resolution Clause does not make it unconscionable. Nor does Pagecom's misrepresentation of the record. The Dispute Resolution Clause is enforceable and requires the parties arbitrate their disputes.

The trial court erred by resolving questions of arbitrability, finding the Dispute Resolution Clause unconscionable, and holding Sprint's conduct amounted to a waiver of its right to arbitrate. This Court should reverse the trial court's Order Denying Sprint's Motion to Compel and direct the trial court to compel arbitration.

RESPECTFULLY SUBMITTED this 9th day of October, 2019.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

On the date give below, I caused to be served in the manner noted a true and correct copy of the Reply Brief of Appellants on all attorneys and pro se parties of record:

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DATED this 9th day of October, 2019, at Seattle, Washington.



Leslie Preskitt

APPENDIX A

2019 WL 3891156

Only the Westlaw citation is currently available.
United States District Court, District of Columbia.

MOBILE NOW, INC., Plaintiff,
v.
SPRINT CORPORATION, Defendant.

Civil Action No. 19-918 (JDB)
|
Filed 08/19/2019

MEMORANDUM OPINION

JOHN D. BATES United States District Judge

*1 Sprint is one of the largest wireless telecommunications carriers in the United States. For years, Mobile Now acted as one of Sprint’s “authorized representatives,” selling Sprint-branded products in brick-and-mortar stores and online in return for certain payments and commissions. In 2019, Sprint terminated its contracts with Mobile Now, alleging that the company had engaged in fraudulent practices. Mobile Now has since brought this action against Sprint alleging, among other things, fraud, breach of contract, and defamation. Currently pending before the Court is [24] Sprint’s motion to compel arbitration. Sprint argues that Mobile Now executed an agreement with Sprint containing a dispute resolution procedure that mandates binding arbitration of Mobile Now’s claims. Mobile Now does not dispute that it executed the agreement, but argues, among other things, that the dispute resolution procedure is unenforceable because it was fraudulently induced and is unconscionable. For the reasons that follow, the Court will grant Sprint’s motion to compel arbitration.

BACKGROUND

I. FACTS

In 2018, Sprint Solutions, Inc. and Mobile Now, Inc. executed an Authorized Representative Agreement. Am. Compl. [ECF No. 15] ¶¶ 48–49; Ex. 1 to Am. Compl. (“Agreement”) [ECF No. 29-1].¹ The Agreement, a version of which the parties negotiated and renewed every few years, set forth the parties’ basic business relationship and granted Mobile Now the non-exclusive right to sell customers Sprint products and services.

See Agreement at 2–3. The Agreement covered, among other things, compensation—including for selling Sprint service plans and “Sprint Prepaid” services—and, in a three-page exhibit, dispute resolution. See Agreement at 2–3, 61–63;² Am. Compl. ¶¶ 92–95. The parties separately executed a Prepaid Distribution Agreement, which pertained to Mobile Now’s distribution of certain Sprint prepaid products and services. Am. Compl. ¶¶ 92–95; Def.’s 2nd Mot. & Mem. of Law in Supp. of Mot. to Compel Arbitration (“Mot. to Compel”) [ECF No. 24] at 17 n.7.

¹ Although the Court largely cites the redacted version of the Agreement, it has considered the full text of the sealed Agreement. See Ex. 1 to Compl. (“Sealed Agreement”) [ECF No. 2-2] at 43–46.

² Because the Agreement and the exhibits thereto contain no page numbers, the Court will refer to the page number of the cited PDF document at ECF No. 29-1.

The dispute resolution exhibit set forth detailed procedures governing any “Dispute,” defined broadly to include “any controversy, dispute, or claim of every kind ... and nature arising out of or relating to the negotiation, construction, validity, interpretation, performance, enforcement, operation, breach, continuation or termination” of the Agreement. Agreement at 61. Except as elsewhere provided in the Agreement, Mobile Now and Sprint “each waive[d] its respective right ... [t]o litigate Disputes in court.” *Id.* at 62. If a Dispute arose, Sprint first “ha[d] the right to require that [it] be submitted to mediation.” *Id.* at 61. If Sprint decided not to elect mediation or if mediation failed, Disputes could be pursued “by filing an arbitration.” *Id.* “[A]rbitration [would] be governed by the Wireless Industry Arbitration Rules of the [American Arbitration Association],” at a location chosen by Sprint, by arbitrators chosen by both parties, with each party paying one-half of the arbitrator’s expenses. *Id.* The dispute resolution procedure “continue[d] in full force and effect after the expiration or termination of” the Agreement. *Id.* at 63. Finally, the Agreement provided that “[i]t [was] expressly understood by [Mobile Now] that this dispute resolution process may only be invoked regarding Sprint’s right to terminate the ... Agreement after the termination has gone into effect.” *Id.* at 61.

*2 Mobile Now does not dispute that the parties negotiated the Agreement containing this dispute resolution procedure for almost a year. See Am. Compl. ¶¶ 28–32. During that time, the parties agreed to various changes memorialized in an Addendum. See Ex. 3 to Pl.’s Sealed Mot. for Leave to

File Docs. Under Seal (“Addendum”) [ECF No. 2-3] at 2–6. The Addendum did not alter or affect the Agreement’s dispute resolution procedure. See id. Instead, the dispute resolution provisions remained substantively identical to the procedure Mobile Now had agreed to in previous years. Compare Agreement at 61–63, with Ex. A to Keen Decl. in support of First Mot. to Compel Arbitration (“2011 Authorized Representative Agreement”) [ECF No. 20] at 59–61, and Ex. B to Keen Decl. in support of First Mot. to Compel Arbitration [ECF No. 21] (“2014 Authorized Representative Agreement”) at 97–100.

On March 19, 2019, Sprint sent Mobile Now a notice that it was terminating the Agreement. Am. Compl. ¶¶ 64–65; Ex. 3 to Compl. [ECF No. 18] at 1. Sprint alleged in its notice that Mobile Now had engaged in a fraudulent practice called “slamming” or “cramming,” which involved “automatically enrolling new customers into [value-added service programs] irrespective of whether the customer(s) knew of or asked to join those programs.” Mot. to Compel at 4 (emphasis omitted); Am. Compl. ¶¶ 67. The same day, Sprint sent a notice that it was terminating the Prepaid Distribution Agreement on the same grounds. Am. Compl. ¶ 96.

II. PROCEDURAL HISTORY

Mobile Now brings five claims against Sprint.³ Am. Compl. ¶¶ 103–142. Count One alleges that Sprint engaged in a fraudulent scheme to induce Mobile Now to sign the Agreement. Id. at ¶¶ 103–12. Count Two alleges that Sprint breached the Agreement by, among other things, failing to pay Mobile Now certain amounts owed under its terms. Id. at ¶¶ 113–16. Count Three alleges that Sprint breached the Prepaid Distribution Agreement by failing to pay commissions owed under that contract. Id. at ¶¶ 117–19. Count Four alleges that Sprint breached a contract implied in fact concerning the resale of certain Sprint products and accessories in exchange for commissions. Id. at ¶¶ 120–27. Count Five alleges that Sprint defamed Mobile Now by sharing the notice of termination of the Agreement with at least two third parties in the telecommunications industry. Id. at ¶¶ 128–39.

³ The complaint also includes a sixth count seeking a declaratory judgment that the Agreement’s arbitration clause is “invalid, unenforceable, illusory, or otherwise void for lack of mutuality.” Am. Compl. ¶¶ 140–42.

In response, Sprint has filed a motion to compel arbitration of all five claims under the Agreement’s dispute resolution procedures. Mot. to Compel at 16–18. Mobile Now opposes

the motion, arguing, among other things, that the dispute resolution procedure was fraudulently induced and is unconscionable. Mem. in Opp’n to Mot. to Compel (“Opp’n”) [ECF No. 26] at 1, 28–29, 36–37. Mobile Now further contends that, even if the dispute resolution procedure is valid, at least two of Mobile Now’s claims fall outside the scope of the Agreement’s dispute resolution procedures. Id. at 35–36. The motion has been fully briefed and is ripe for resolution.⁴

⁴ Six weeks after briefing on the motion to compel concluded, Mobile Now filed what it styled a “notice of supplemental authority.” See Notice of Suppl. Authority [ECF No. 35]. The notice, however, does not alert the Court to any relevant intervening authority. Instead, it attaches five new exhibits in response to Sprint’s reply. See id. at 1–2. Because Mobile Now’s “notice” is effectively an untimely surreply filed without leave of the Court, it need not be considered. See United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc., 238 F. Supp. 2d 270, 276 (D.D.C. 2002) (“A surreply may be filed only by leave of Court, and only to address new matters raised in a reply, to which a party would otherwise be unable to respond.”). Even were the Court to consider the surreply, however, it would not alter the result. The new exhibits Mobile Now has submitted are tangential to the issues presented and otherwise unpersuasive.

LEGAL STANDARD

*3 The standard governing a motion to compel arbitration is the same one used to resolve summary judgment motions pursuant to Federal Rule of Civil Procedure 56(c). The motion is treated “as if it were a request for summary disposition of ... whether or not there had been a meeting of the minds on the agreement to arbitrate.” Aliron Int’l, Inc. v. Cherokee Nation Indus., Inc., 531 F.3d 863, 865 (D.C. Cir. 2008) (internal citation and quotation marks omitted). The party moving to compel—here, Sprint—must first present evidence sufficient to show an enforceable agreement to arbitrate. Skrynnikov, 943 F. Supp. 2d at 175–76. The burden then shifts to the party opposing arbitration—here, Mobile Now—to establish a genuine issue of material fact as to the making or validity of that agreement. Id. “The Court will compel arbitration if the pleadings and the evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Mercadante v. XE Servs., LLC, 78 F. Supp. 3d 131, 136 (D.D.C. 2015) (quoting Haire

[v. Smith, Currie & Hancock LLP](#), 925 F. Supp. 2d 126, 129 (D.D.C. 2013)).

ANALYSIS

Neither party disputes that this case is governed by the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1–14. See Mot. to Compel at 8; Opp’n at 19–20. The FAA “create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.” [Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.](#), 460 U.S. 1, 24 (1983). “[E]nacted ... in response to widespread judicial hostility to arbitration agreements,” the FAA “reflect[s] both a liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract.” [AT&T Mobility LLC v. Concepcion](#), 563 U.S. 333, 339 (2011) (internal citations and quotation marks omitted).

Section 2 of the FAA provides that:

A written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. When a party moves to arbitrate in a case governed by section 2 of the FAA, a court’s role is limited to determining whether there is a valid agreement to arbitrate, and whether the specific dispute falls within the scope of the arbitration agreement. [Shelton v. The Ritz Carlton Hotel Co.](#), 550 F. Supp. 2d 74, 79 (D.D.C. 2008); see also [Nelson v. Insignia/Esg, Inc.](#), 215 F. Supp. 2d 143, 149–150 (D.D.C. 2002). In so doing, courts must, “as a matter of federal law,” resolve “any doubts concerning the scope of arbitrable issues ... in favor of arbitration.” [Moses H. Cone](#), 460 U.S. at 24–25.

I. VALIDITY OF THE AGREEMENT TO ARBITRATE

To determine whether the parties have executed a valid arbitration agreement, federal courts apply state contract law. [Doctor’s Assocs., Inc. v. Casarotto](#), 517 U.S. 681, 686–87 (1996); [First Options of Chicago, Inc. v. Kaplan](#), 514 U.S. 938, 944 (1995). Before turning to the merits, the Court must therefore address the parties’ preliminary dispute concerning what state law applies. Sprint contends that Kansas law applies, pointing to a choice-of-law provision in the Agreement. See Mot. to Compel at 10. Mobile Now disagrees, arguing that, because the entire Agreement is unenforceable as a matter of law, the choice-of-law provision is unenforceable and Kansas law does not apply. See Opp’n at 21–22. Instead, Mobile Now contends, either Virginia law or D.C. law applies. See [id.](#)

To determine which state law applies, “federal courts use the conflict of law principles applied by the state in which they sit.” [Samenow v. Citicorp Credit Servs., Inc.](#), 253 F. Supp. 3d 197, 202 (D.D.C. 2017) (quoting [McMullen v. Synchrony Bank](#), 164 F. Supp. 3d 77, 87 (D.D.C. 2016)). “Under District of Columbia choice-of-law principles, the absence of a true conflict compels the application of District of Columbia law by default.” [Samenow](#), 253 F. Supp. 3d at 202 (quoting [Signature Tech. Sols. v. Incapsulate, LLC](#), 58 F. Supp. 3d 72, 80 (D.D.C. 2014)). A true conflict is absent when D.C. law and the other state’s law are “[1] the same; [2] different but would produce the same outcome under the facts of the case; or [3] when the policies of one state would be furthered by the application of its laws while the policy of the other state would not be advanced by the application of its laws.” [Id.](#) at 203 (quoting [Greaves v. State Farm Ins. Co.](#), 984 F. Supp. 12, 14 (D.D.C. 1997), [aff’d](#), 172 F.3d 919 (D.C. Cir. 1998)).

*4 Here, the Court finds “no relevant, substantive difference” between D.C., Kansas, and Virginia contract principles with respect to the issues presented, “and to the extent there are differences, they do not affect the outcome of this case given the factual circumstances.” [Samenow](#), 253 F. Supp. 3d at 203 (taking the same approach in resolving a motion to compel arbitration); [Brown v. Dorsey & Whitney, LLP](#), 267 F. Supp. 2d 61, 71 (D.D.C. 2003) (same). Hence, the Court will analyze the agreement under D.C. law, and will cite Kansas and Virginia law only to the extent necessary to resolve arguments that applying those states’ laws would produce a different result.

Having decided to apply D.C. law, the Court turns first to whether the parties entered a valid agreement to arbitrate. Because under the FAA “an arbitration provision is severable

from the remainder of the contract,” [Rent-A-Center, W. Inc. v. Jackson](#), 561 U.S. 63, 71 (2010) (citation omitted), that question is limited to whether the parties agreed to the specific provisions in the Agreement mandating arbitration. Section 2 of the FAA “does not permit ... federal court[s] to consider claims of fraud in the inducement [or other grounds of invalidity] of the contract generally.” [Prima Paint Corp. v. Flood & Conklin Mfg. Co.](#), 388 U.S. 395, 404 (1967); see also [Rent-A-Center](#), 561 U.S. at 71 (“[A] party’s challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate.”).

Under D.C. law, “[f]or an enforceable contract to exist, there must be both (1) agreement as to all material terms; and (2) intention of the parties to be bound.” [United House of Prayer for All People v. Therrien Waddell, Inc.](#), 112 A.3d 330, 337–38 (D.C. 2015) (citation omitted). “[A]greement as to material terms ‘is most clearly evidenced by the terms of a signed written agreement’ ” [Id.](#) at 338 (quoting [Kramer Assocs., Inc. v. Ikam, Ltd.](#), 888 A.2d 247, 252 (D.C. 2005)). The intention to be bound by the terms of an agreement “can be found from written materials, oral expressions and the actions of the parties.” [Duffy v. Duffy](#), 881 A.2d 630, 637 (D.C. 2005).

Mobile Now has conceded that it “accepted Sprint’s offer ... and counter-signed” the Agreement, a copy of which is filed on the record. See Am. Compl. ¶ 48. It has further conceded that it signed the Agreement despite knowing that it contained the “dispute resolution [procedure] in question,” [id.](#) ¶ 109, and that it operated under those provisions until Sprint terminated the Agreement for cause, see [id.](#) ¶ 64. As described above, the dispute resolution procedure mandates mediation, if Sprint so elects. If Sprint declines to mediate, or mediation continues beyond a certain number of days, the parties may initiate arbitration. See Agreement at 61–63. Sprint, for its part, has submitted (1) two previous signed agreements between the parties that contain substantively the same dispute resolution procedures covering the period between 2011–2018, see 2011 Authorized Representative Agreement, 59–61; 2014 Authorized Representative Agreement, 97–100; (2) a declaration from one of its senior executives averring that between 2017 and 2018 the parties “engaged in nine months of review and negotiations” before executing the Agreement, Ex. 1 to Mot. to Compel [ECF No. 24-1] at ¶ 12; and (3) a 2017 email from Mobile Now expressing its general counsel’s specific concerns with language in a draft of the Agreement, including with aspects of the dispute resolution

provisions, see Ex. C to First Mot. to Compel Arbitration [ECF No. 8-3] at 1–3.

*5 Based on these materials and Mobile Now’s concessions, the Court finds that Sprint has satisfied its initial burden to “present evidence sufficient to demonstrate an enforceable agreement to arbitrate.” [Skrynnikov](#), 943 F. Supp. 2d at 175–76 (citation omitted). Hence, the burden shifts to Mobile Now “to show that there is a genuine issue of material fact as to the making of the agreement [to arbitrate].” [Id.](#) at 175–76.

Mobile Now argues that the agreement to arbitrate is unenforceable on essentially two grounds: it was fraudulently induced and it is unconscionable. The Court will address each argument in turn.

A. Fraudulent Inducement

To succeed on a claim of fraudulent inducement, Mobile Now must establish the classic elements of fraud: (1) a false representation, (2) made in reference to a material fact, (3) made with knowledge of its falsity, (4) with intent to deceive, and (5) action taken that is in reliance upon the representation. See [Hercules & Co. v. Shama Rest. Corp.](#), 613 A.2d 916, 924 (D.C. 1992). “[I]n cases involving commercial contracts negotiated at arm’s length, there is the further requirement (6) that the defrauded party’s reliance be reasonable.” [Id.](#); see also [Jacobson v. Hofgard](#), 168 F. Supp. 3d 187, 195 (D.D.C. 2016) (summarizing D.C. law).

In the context of a challenge to the enforceability of an arbitration clause, the fraud must be in the inducement of the agreement to arbitrate, not “in the inducement of the contract generally.” [Prima Paint Corp.](#), 388 U.S. at 404; see [Rent-A-Center](#), 561 U.S. at 70–71. As the D.C. Court of Appeals put it, “a party who seeks to avoid arbitration on the grounds of fraudulent inducement [must] challenge the ‘making’ of the arbitration clause itself, and not merely the making of the contract in which the arbitration clause is contained or the ‘scheme’ by which both were allegedly negotiated.” [Hercules & Co.](#), 613 A.2d at 924. Moreover, when the “policy that favors arbitration of disputes ... is considered together with the requirement that fraud be pleaded with particularity and proved by clear and convincing evidence, parties to arbitration agreements should not be readily permitted to avoid them simply by invoking in their pleadings the pejorative cry of fraud.” [Id.](#) at 923 (internal citations and quotation marks omitted). In other words,

Mobile Now must clear a high bar, alleging—specifically as to the agreement to arbitrate—“the time, place and content of the false [representations], the fact misrepresented and what was retained or given up as a consequence of the fraud.” [Xereas v. Heiss](#), 933 F. Supp. 2d 1, 10 (D.D.C. 2013) (first alteration in original) (quoting [Kowal v. MCI Commc’ns Corp.](#), 16 F.3d 1271, 1278 (D.C. Cir. 1994)).

Here, Mobile Now alleges that Sprint executives failed to make good on extracontractual promises that Mobile Now would receive certain payments if it signed the Agreement. Specifically, Mobile Now alleges that “Sprint ... intentionally made numerous false representations of fact” concerning its alleged promise that, upon signing the Agreement, Sprint would reimburse to Mobile Now \$400,000 that it previously had paid to Sprint as part of a settlement. Am. Compl. ¶ 105; see also *id.* ¶¶ 35, 51. This false promise was “an inducement for [it] to sign the [] Agreement,” Mobile Now claims, and was intentionally deployed to “mislead.” *Id.* ¶ 108. And it “not only [went] to the heart of the [] Agreement,” but “also to the dispute resolution [procedure] in question.” *Id.* ¶ 109. Sprint denies that it ever made this promise. Def.’s Reply to Opp’n (“Reply”) [ECF No. 31] at 2, 6–7.

*6 These allegations fail to support a claim of fraudulent inducement. When an agreement contains an integration clause, as here, see Agreement at 24, “any alleged prior representations that a party will or will not do something in the future that are not included in that written contract generally do not support a fraud-in-the-inducement claim.” [Drake v. McNair](#), 993 A.2d 607, 624 (D.C. 2010). Such assertions typically “fail[] to demonstrate that the representations at issue were either material or reasonably relied upon because they were not included in the final, fully integrated agreement between [the parties].” *Id.* at 623. That is the case here. Indeed, “[i]f [Mobile Now] considered these [alleged] assurances important enough to induce it to agree to the contract (including the [dispute resolution procedure]), it could have conditioned its agreement on the explicit inclusion of those representations in the contract.” [Hercules](#), 613 A.2d at 932. And if Sprint “refused to go along, [Mobile Now] could have walked away from the deal.” *Id.* But Mobile Now did none of these things and instead signed the contract. It is therefore “bound by the terms of the instrument to which it affixed its name, and cannot now be heard to complain that it was ‘browbeaten’ or fraudulently induced into agreeing to arbitrate.” *Id.* at 933.

Moreover, Mobile Now has not met its burden to establish a genuine issue of material fact as to whether it was fraudulently induced to enter the agreement to arbitrate. The purported false promise of payment went to the “heart” of its agreement to arbitrate, Mobile Now alleges, because it “indicated ‘major concerns’ as to the one-sided nature of the dispute resolution [procedure],” and it “ultimately only agreed to sign the documents upon reliance that Sprint would fulfill its pre-contractual promise to pay the \$400,000.” Compl. ¶ 109. But Mobile Now has provided no evidence of communications or other materials suggesting that anyone at Sprint ever made the purported false promise. Nor do any of the records of negotiation and communication that Sprint has submitted mention such a promise. See, e.g., Ex. 1 to Reply [ECF No. 30-1] at 1–7; Ex. 2 to Reply [ECF No. 30-2] at 1–3; Ex. 3 to Reply [ECF No. 30-3] at 1–4; Ex. C to First Mot. to Compel Arbitration at 1–3. Hence, the Court rejects Mobile Now’s contention that the agreement to arbitrate is unenforceable because it was fraudulently induced.

B. Unconscionability⁵

⁵ Mobile Now contends at the outset that Sprint is collaterally estopped from arguing that the agreement to arbitrate is enforceable because a Washington state court ruled that a nearly identical dispute resolution procedure in another Sprint distribution Agreement was unconscionable. Opp’n at 1–3, 24; see Ex. 1 to Opp’n (“[Pagecom](#) Order”) [ECF No. 26-1]. But for collateral estoppel, or issue preclusion, to apply, “the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case.” [Martin v. Dep’t of Justice](#), 488 F.3d 446, 454 (D.C. Cir. 2007) (quoting [Yamaha Corp. of Am. v. United States](#), 961 F.2d 245, 254 (D.C. Cir. 1992)). The [Pagecom](#) case involved a different party, different legal issues, and different facts. See [Pagecom](#) Order ¶¶ 1.1–1.14. For instance, the court there emphasized that Sprint’s pre- and post-litigation conduct was “callous and unconscionable,” and that its conduct “would fairly be considered a waiver of the Dispute Resolution process.” *Id.* ¶¶ 1.9–1.14. Because the Court’s unconscionability analysis here involves different factual and legal questions, issue preclusion is inapplicable.

Under D.C. law, unconscionability renders a contract unenforceable if the contract is both procedurally and substantively unconscionable.⁶ [Fox v. Computer World Servs. Corp.](#), 920 F. Supp. 2d 90, 97 (D.D.C. 2013) (citing [Urban Invs., Inc. v. Branham](#), 464 A.2d 93, 99 (D.C.

1983)). “A contract is procedurally unconscionable where a party lacked meaningful choice as to whether to enter the agreement.” Id. at 97. To assess whether the parties had a meaningful choice, “the Court must ask whether each party to the contract, ‘considering his obvious education or lack of it, ha[d] a reasonable opportunity to understand the terms of the contract, or [whether] the important terms [were] hidden in a maze of fine print and minimized by deceptive [] practices.’” White v. Four Seasons Hotels and Resorts, 999 F. Supp. 2d 250, 257 (D.D.C. 2013) (quoting Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965)).

6 Mobile Now suggests that Virginia applies a different standard that does not require both substantive and procedural unconscionability, possibly resulting in a different outcome. See Opp’n at 25. The Court disagrees. Under Virginia law, a contract is unconscionable if “no man in his senses and not under a delusion would make [it], on the one hand, and [] no fair man would accept [it], on the other.” Smyth-Bros.-McCleary-McClellan Co. v. Beresford, 104 S.E. 371, 382 (Va. 1920); see also Chaplain v. Chaplain, 682 S.E. 2d 108, 113 (Va. Ct. App. 2009) (same). Courts interpreting this standard have held that it requires establishing both substantive and procedural unconscionability. Lee v. Fairfax Cty. School Bd., 621 F. App’x. 761, 763 (4th Cir. 2015) (“Unconscionability has both a substantive and procedural element.”) (applying Virginia law); Sanders v. Certified Car Ctr., Inc., CL-2016-3834, 2016 WL 9076185, at *2 (Va. Cir. Ct. May 24, 2016) (“[A] court will not enforce a contract or contract provision if it is both procedurally and substantively unconscionable.”).

*7 Mobile Now did not lack a meaningful choice here. This was not a contract of adhesion between a powerful corporation and an individual consumer. Mobile Now is a sophisticated party—self-described as “a business with a conservative valuation of somewhere around \$50,000,000,” Am. Compl. ¶ 69—that had the benefit of counsel. Not only did Mobile Now have ample opportunity to negotiate the Agreement, but it actually did so, participating in a nearly year-long, arms-length bargaining process during which it negotiated for alterations to the Agreement.⁷ Am. Compl. ¶¶ 31–38; see Ex. 1 to Mot. to Compel ¶ 12; Ex. 1 to Reply at 1–6 (emails evidencing ongoing negotiations); Ex. C to First Mot. to Compel Arbitration at 2–3 (email from Mobile Now to Sprint containing “initial comments from [Mobile Now’s] legal counsel on the contract”). Courts have rejected claims of procedural unconscionability under similar circumstances. See Kenyon Ltd. P’ship v. 1372 Kenyon St. Nw. Tenants’ Ass’n, 979 A.2d 1176, 1186 (D.C. 2009) (noting

that entity could not have established a lack of meaningful choice because it was “a sophisticated group, represented by counsel” that entered a contract “for the purpose of taking advantage of” its benefits); Hart v. Vt. Inv. Ltd. P’ship, 667 A.2d 578, 586 (D.C. 1995) (“In this case, given the sophistication of the negotiating parties, and the arm’s length bargaining which occurred, we cannot say [the plaintiff] was denied a meaningful choice.”).

7 Mobile Now’s response that it did not, in the end, receive much benefit from these alterations, see Opp’n at 12 & n.7, is irrelevant to whether it could understand the terms of, and hence had a meaningful choice to enter, the Agreement. See White, 999 F. Supp. 2d at 257.

Mobile Now responds that it lacked meaningful choice because Sprint allegedly owed it a substantial amount of money, which Sprint would only repay if Mobile Now signed the Agreement. See Opp’n at 11. This argument is unconvincing. Mobile Now could have walked away from the negotiating table and sought money that it was purportedly owed through mediation, arbitration, or litigation, as appropriate. There is no plausible allegation, or any record evidence, suggesting that signing the Agreement was Mobile Now’s only option. Moreover, the relevant agreement is the agreement to arbitrate, and Mobile Now previously had chosen to enter contracts with Sprint containing substantively the same dispute resolution procedure in both 2011 and 2014. See 2011 Authorized Representative Agreement at 59–61; 2014 Authorized Representative Agreement at 97–100.

Because Mobile Now has not plausibly claimed—or submitted any evidence to suggest—that it somehow lacked a meaningful choice to execute the Agreement, the Court finds no procedural unconscionability.⁸

8 Mobile Now also argues at length that the arbitration clause is procedurally unconscionable or otherwise void because Sprint delivered the Agreement as a document written in nine-point type. Opp’n at 32–33. Mobile Now points to a Virginia statute requiring contracts, “where printed,” to be written in ten-point type or larger. Va. Code § 11-4 (emphasis added). Even if Virginia law applies, this argument does not survive even the most cursory scrutiny. The parties clearly exchanged the Agreement electronically. See Opp’n at 8 (“By June 5, 2017, Sprint finally provided Mobile Now with a version of the [] Agreement in MS Word format”). A Word document is not a “printed” contract. If Mobile Now had trouble reading the document, it

could have electronically increased the size of the type. Moreover, decisions interpreting the cited ten-point type requirement have held that it “merely changes the rule of evidence” in cases involving the sale of goods, permitting “the introduction of oral evidence by [a] purchaser [that contradicts] provisions of [a] contract ... printed in small type.” [Moore v. Aetna Cas. & Sur. Co.](#), 155 S.E. 707, 713 (Va. 1930). Those circumstances are not relevant here.

Ordinarily, when an agreement to arbitrate is not procedurally unconscionable, substantive unconscionability alone will not render it unenforceable. See [Urban Invs.](#), 464 A.2d at 99. There is, however, an exception to this rule: substantive unconscionability alone may render a contract unenforceable “in an egregious situation.” *Id.* (citation omitted). This exception is narrow; indeed, “there do not appear to be any reported D.C. cases finding such an ‘egregious’ scenario.” [Ruiz v. Millennium Square Residential Ass’n](#), 156 F. Supp. 3d 176, 180 (D.D.C. 2016). Nevertheless, the Court will consider Mobile Now’s objections to the dispute resolution procedure under the “egregious” exception.

*8 Mobile Now objects to the provision providing that “[i]t is expressly understood by [Mobile Now] that this dispute resolution process may only be invoked regarding Sprint’s right to terminate the ... Agreement after the termination has gone into effect.” Agreement at 61. Sprint issued a notice of termination on March 19, 2019, but “delayed the effective date of the termination until April 18, 2019.” Opp’n at 27. Because it could not initiate the dispute resolution process during that one-month period, Mobile Now says, “[it] was left to die on the vine without any access to any dispute resolution forum,” causing it to suffer “significant and expanding damage for every day that pass[ed].” *Id.* at 27–28. Sprint responds that this provision is hardly unconscionable—it merely prevented Mobile Now from challenging Sprint’s right to terminate the Agreement “during the time period between receiving notice of termination for cause and the termination’s effective date,” a challenge which would delay any termination indefinitely. Reply at 12.

The Court is not convinced that the provision resulted in so “egregious [a] situation” as to render the agreement to arbitrate unenforceable. The Court may have been more sympathetic if, for instance, Mobile Now had sought injunctive or other emergency relief upon receiving the notice of termination, and then argued that, to the extent the Agreement foreclosed any possibility of timely relief in any forum, it was unenforceable. But that is not what occurred here. Instead, Mobile Now filed this lawsuit weeks after

the termination notice and has litigated it over the course of months. Although the provision in question undoubtedly favors Sprint, it is difficult to see, under such circumstances, what is so “egregious” about this situation.⁹

⁹ Moreover, even if somehow unenforceable, this provision is severable. Unconscionable provisions of an arbitration clause can be severed if they are not integral to the agreement to arbitrate. See [Rent-A-Center](#), 561 U.S. at 70–71. This provision about the timing of arbitration—which delays Mobile Now’s right to challenge a termination on the grounds that the termination is improper until after it has gone into effect—is peripheral to the parties’ basic agreement to arbitrate disputes. Indeed, Mobile Now argues that the provision impermissibly limited its access to arbitration, not its right to sue in court. Hence, it cannot be said that the parties’ mutual assent to arbitrate disputes somehow hinged on this provision.

Next, Mobile Now complains that the dispute resolution procedure “precludes the use of attorneys” at arbitration, and therefore violates the policies underlying the Sixth Amendment right to counsel. Opp’n at 31–32. For this argument, Mobile Now relies exclusively on a clause stating that “only” a “corporate officer or Owner/Proprietor ... or person holding a position of equivalent or greater authority within” Mobile Now “may direct the resolution of a Dispute” between the parties. Agreement at 61. But that clause says nothing about, and relates in no way to, the parties’ right to use or employ counsel. Indeed, the only mention of counsel in the dispute resolution procedure is to state that the parties are permitted to “bring counsel and/or other representatives of the party” to any mediation. *Id.* The Court therefore rejects this argument.

In a similar vein, Mobile Now contends that the Agreement bars it from arbitrating disputes so long as Sprint declines to mediate. Opp’n at 28–29. This misconstrues the plain text of the contract. The relevant provisions say only that arbitration is not immediately available if Sprint elects to mediate the dispute. See Agreement at 61 (providing that Mobile Now “may not commence arbitration until a Dispute has been subject to mediation ... if required by Sprint [pursuant to] [Section 2](#)”). If Sprint declines that option, the Agreement provides that disputes shall be arbitrated. See *id.* And even if Sprint requires mediation, disputes may still be submitted for arbitration after 45 days. See *id.*

*9 Finally, the Court rejects Mobile Now’s argument that the dispute resolution procedure is unconscionable because it is “ambiguous and vague throughout.” Opp’n at 25. To start, the Court finds no authority to support the proposition that vagueness, without more, is a ground for substantive unconscionability. The cases Mobile Now cites for the proposition that vague contracts are unenforceable all hold that agreements to agree are too vague to enforce. [Beazer Homes Corp. v. VMIF/Anden Southbridge Venture](#), 235 F. Supp. 2d 485, 491–92 (E.D. Va. 2002); [Kay v. Prof’l Realty Corp.](#), 281 S.E. 2d 820, 822 (Va. 1981); [Allen v. Aetna Cas. & Sur. Co.](#), 281 S.E. 2d 818, 819–20 (Va. 1981).¹⁰ Regardless, the Court finds that the dispute resolution process is not vague; the relevant provisions clearly provide that the parties mutually agree to arbitrate disputes arising out of or relating to the Agreement.

¹⁰ Mobile Now elsewhere argues that the arbitration clause is an unenforceable illusory promise and an “agreement to agree.” Opp’n at 30 n.24. But that argument is premised, again, on the notion that Sprint can forever bar Mobile Now’s right to arbitration by simply declining to initiate mediation. *Id.* As already discussed, this misreads the relevant dispute resolution provisions. Hence, the Court rejects this argument.

For the foregoing reasons, the Court finds that the relevant provisions of the Agreement are not unconscionable.¹¹ Having disposed of Mobile Now’s various challenges to the Agreement’s validity, the only remaining question is whether Mobile Now’s claims fall within its scope.

¹¹ Mobile Now also argues that the arbitration clause lacks mutuality because it is one-sided. Opp’n at 28 & n.19. Lack of mutuality does not render an agreement to arbitrate unenforceable so long as the agreement is supported by consideration. See [King v. Indus. Bank of Wash.](#), 474 A.2d 151, 156 (D.C. 1984) (“Mutuality of obligation is merely another name for the requirement of consideration in bilateral contracts.”); [United States ex. rel. Harbor Constr. Co. v. T.H.R. Enters., Inc.](#), 311 F. Supp. 3d 797, 803 (E.D. Va. 2018) (“[C]onsideration is essential; mutuality of obligation is not, unless the want of mutuality would leave one party without a valid or available consideration for his promise.”) (quoting [Turner & Happersett v. Hall & Connor](#), 104 S.E. 861, 863 (Va. 1920)). In this case, it is indisputable that the arbitration clause was supported by consideration. Mobile Now responds that there was no mutuality because Mobile Now was “forbidden from obtaining relief [for some claims during certain times] in any

forum.” Opp’n at 28 n.19. But that argument goes to unconscionability, not to mutuality. Hence, the Court rejects Mobile Now’s mutuality argument.

IV. SCOPE OF THE AGREEMENT TO ARBITRATE

The Agreement provides that the dispute resolution procedure applies to “any controversy, dispute, or claim of every kind ... and nature arising out of or relating to the negotiation, construction, validity, interpretation, performance, enforcement, operation, breach, continuation or termination of this Agreement.” Agreement at 61. Mobile Now argues that Count Three, which alleges Sprint’s failure to pay commissions owed under the Prepaid Distribution Agreement, falls outside the scope of that provision. Opp’n at 19; *see* Reply at 16–17. Prepaid products and services, Mobile Now explains, permit consumers to pay for mobile phone services in advance rather than through a monthly plan, and are “branded under separate names—in Sprint’s case, “Virgin Mobile, Boost, and Broadband2Go.” Am. Compl. ¶¶ 90–95. According to Mobile Now, the Agreement largely covers Mobile Now’s role as a distributor of Sprint’s post-paid products, such as monthly service plans, whereas the Prepaid Distribution Agreement, a separate contract, covers its role as a distributor of Sprint’s prepaid products. *See id.* The Prepaid Agreement, Mobile Now alleges, contains no arbitration clause, and therefore is not within the scope of the arbitration clause. *See* Opp’n at 35–36. Sprint responds that the Prepaid Distribution Agreement and the Agreement are closely linked, and therefore Count Three is nonetheless a claim arising out of or relating to the Agreement’s breach, continuation or termination. *See* Mot. to Compel at 17 n.7.

*10 The Court agrees with Sprint. Where a valid agreement to arbitrate exists, “there is a presumption of arbitrability in the sense that “[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” ” [AT&T Techs., Inc. v. Comme’ns Workers of Am.](#), 475 U.S. 643, 650 (1986) (citation omitted). “Such a presumption is particularly applicable where,” as here, “the clause is ... broad.” *Id.*

In light of that presumption, the Court finds that Count Three “relat[es] to” the Agreement’s “operation,” Agreement at 61, and is therefore arbitrable. The substance of Count Three is that Sprint failed to pay commissions it owed to Mobile Now for the sale of Sprint’s prepaid products. Am. Compl. ¶¶ 117–19. In addition to setting up the basic business relationship

between the parties and mentioning prepaid products and services at various points throughout, see, e.g., Agreement at 3, 21, 59, the Agreement contains an entire exhibit specifically detailing the commissions and other relevant terms that govern prepaid products and services under the heading “Sprint Prepaid Wireless Commission Plan,” Sealed Agreement at 43–46. At minimum, then, a claim which alleges Sprint’s failure to pay commissions owed on prepaid products and services “relates to” the Agreement. Moreover, Sprint has alleged that the Prepaid Distribution Agreement contains a provision permitting it to “offset any and all amounts owed” by amounts owed under the Agreement. See Mot. to Compel at 17 n.7.

Mobile Now perhaps could have rebutted the presumption of arbitrability had it filed a copy of the Prepaid Distribution Agreement, adequately responded to Sprint’s argument that the contracts are intertwined, and explained how the alleged breach concerning commissions on prepaid products does not even “relate” to the myriad terms governing prepaid products and services in the Agreement. But Mobile Now has done none of those things. Instead, it has summarily asserted that Count Three arises under a different contract concerning prepaid products (that this Court has not seen), and that arbitration is therefore unwarranted. That is not enough for the Court to say with “positive assurance” that the Agreement’s dispute resolution process does not cover the asserted dispute. Hence, the Court finds that Count Three falls within the agreement to arbitrate, and is arbitrable. ¹²

¹² Mobile Now separately contends that its “fraud claim challenging the validity of the contract’s arbitration clause and the contract as a whole” falls outside the scope of the arbitration agreement. Opp’n at 36. If the arbitrator finds that the agreement to arbitrate was fraudulently induced, Mobile Now reasons, then the case never should

have proceeded to arbitration to begin with, proving that the fraud claim is outside the scope of the arbitration clause. See id. This argument confuses validity and scope. The scope inquiry assumes a valid arbitration agreement. To the extent Mobile Now’s fraud claim merely repeats its claim that the agreement to arbitrate is unenforceable because it was fraudulently induced, the Court has rejected that claim above. To the extent the fraud claim goes beyond that allegation, it arises out of and relates to the Agreement, and is arbitrable.

The only remaining matter is whether to stay or dismiss the case. Although the D.C. Circuit has not firmly resolved whether dismissal or stay is warranted when a motion to compel arbitration is granted, courts in this district have held that when “there are no issues left for this [C]ourt to resolve, ... ‘it is appropriate to dismiss this case in its entirety.’” Dist. No. 1, Pac. Coast Dist., Marine Eng’rs’ Beneficial Ass’n, AFL-CIO v. Liberty Mar. Corp., Civil Case No. 18-1618 (RJL), 2019 WL 224291, at *6 (D.D.C. Jan. 15, 2019) (citation omitted); see Aliron Int’l, Inc. v. Cherokee Nation Indus., Inc., Civil Action No. 05-151 (GK), 2006 WL 1793295, at *3 (D.D.C. June 28, 2006) (dismissing case after holding that “all of Plaintiff’s claims must be submitted to arbitration”). Because all of plaintiff’s claims are arbitrable, the Court will take that approach here and dismiss this case.

CONCLUSION

*11 For the foregoing reasons, the Court will grant Sprint’s motion to compel arbitration, and will dismiss the amended complaint. A separate order will issue on this date.

All Citations

Slip Copy, 2019 WL 3891156

APPENDIX B

2019 WL 3974826

Only the Westlaw citation is currently available.

United States District Court,
N.D. Texas, Dallas Division.

L2 WIRELESS, LLC, Plaintiff,

v.

SPRINT SOLUTIONS, INC. and
Sprint Nextel Corp., Defendants.

Civil Action No. 3:18-CV-2729-K

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Signed 08/22/2019

Attorneys and Law Firms

[Christopher Stephen Norcross](#), [Keith C. Cramer](#), Gordon & Rees LLP, Dallas, TX, for Plaintiff.

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MEMORANDUM OPINION AND ORDER

[ED KINKEADE](#), UNITED STATES DISTRICT JUDGE

*1 Before the Court is Defendants Sprint Solutions, Inc. and Sprint Nextel Corp.'s Motion to Compel Arbitration and Dismiss, or in the Alternative, Stay Proceedings (Doc. No. 8). After careful consideration of the motion, the response, the reply, the supporting exhibits, the applicable law, and any relevant portions of the record, the Court **GRANTS** the motion and **dismisses with prejudice** Plaintiff's claims.

A. Factual and Procedural Background

Plaintiff L2 Wireless, LLC ("Plaintiff") served as an Authorized Business Representative ("ABR") of Defendants Sprint Solutions, Inc. and Sprint Nextel Corp. (collectively "Defendants") for approximately 14 years. Plaintiff and Defendants entered into their most recent Authorized Business Representative Agreement ("the Agreement") in February 2017. Under the Agreement, Plaintiff acted as an ABR of Defendants, soliciting and subscribing customers to Defendants' services and selling Defendants' products. Defendants would then pay Plaintiff commissions for the subscribed services and products sold.

In August 2017, Defendants notified Plaintiff by letter that the Agreement was being terminated immediately because Defendants uncovered "a pattern and practice" by Plaintiff that violated the Agreement. Plaintiff contends that the Agreement was terminated without warning and without details of the alleged violations of the Agreement. Furthermore, Plaintiff complains it was not given an opportunity to cure. Upon the termination, Defendants stopped payment of any further compensation, and any compensation Plaintiff had already earned was subject to an offset of any amounts it owed to Defendants.

Plaintiff filed this lawsuit in this Court on the basis of diversity jurisdiction. Plaintiff asserts claims for breach of contract, fraud, negligent misrepresentation, tortious interference, unjust enrichment, defamation, and quantum meruit. Defendants subsequently filed this motion to compel arbitration arguing an arbitration provision in the Agreement requires Plaintiff to submit its claims to arbitration.

B. Applicable Law

The Federal Arbitration Act ("FAA") provides that a written agreement to arbitrate disputes arising out of a contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The statute does not permit the trial court to exercise any discretion, "but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

On a motion to compel arbitration, the court conducts a two-step analysis. *Webb v. Investacorp., Inc.*, 89 F.3d 252, 257-58 (5th Cir. 1996). The Court first determines whether there is a valid agreement between the parties to arbitrate a dispute. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 429 (5th Cir. 2004). In making this determination, the court looks to (1) whether the arbitration agreement is valid and enforceable and (2) whether the claims fall within the scope of that arbitration agreement. *Banc One*, 367 F.3d at 429; see *Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476, 486 (5th Cir. 2002) ("Courts are limited to determinations regarding whether a valid agreement to arbitrate exists and the scope and enforcement of the agreement."). Once the court determines there is a valid arbitration agreement, the strong federal policy favoring the enforcement of arbitration agreements applies, and all

ambiguities must be resolved in favor of arbitration. *Banc One*, 367 F.3d at 429. In the second step, the Court must determine “ ‘whether legal constraints external to the parties’ agreement foreclosed the arbitration of those claims.’ ” *Webb*, 89 F.3d at 258 (quoting *Mitsubishi Motors*, 473 U.S. at 628).

*2 “The party seeking to compel arbitration need only prove the existence of an agreement to arbitrate by a preponderance of the evidence.” *Grant v. Houser*, 469 F. App’x. 310, 315 (5th Cir. 2012)(per curiam). The party opposing arbitration bears the burden of establishing the invalidity of the agreement or that the claims are outside the scope of the agreement. See *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 297 (5th Cir. 2004).

C. Application of the Law to the Facts

In their motion, Defendants contend the Agreement between the parties contains a valid agreement to arbitrate disputes. In support of this contention, Defendants submit the Dispute Resolution provision (“Arbitration Provision”), which is incorporated as Exhibit E to the Agreement. According to Defendants, this Arbitration Provision governs the resolution of disputes arising under or related to the Agreement and encompasses all of Plaintiff’s claims; therefore, the Court must compel Plaintiff to arbitration. Plaintiff responds that the Arbitration Provision is invalid and unenforceable because: (1) it violates Kansas state law in limiting Defendants’ liability and precluding certain remedies available to Plaintiff; (2) it is unconscionable on several grounds and, therefore, void; and (3) Plaintiff’s claims do not fall within the scope of the Arbitration Provision. In their reply, Defendants again contend that the Arbitration Provision is valid, and argue that Plaintiff failed to sufficiently establish the Arbitration Provision is invalid and unenforceable for any of the reasons it asserts.

1. Agreement to Arbitrate Between the Parties

The threshold question for the court is whether the parties agreed to arbitrate the dispute. *Mitsubishi Motors*, 473 U.S. at 628. In determining whether an agreement to arbitrate exists, courts apply state law. *Banc One*, 367 F.3d at 429. In accordance with state law, the court must decide (1) whether the parties have a valid agreement to arbitrate and (2) whether the dispute falls within the scope of that arbitration agreement. *Id.* at 429-30. In this case, the parties contracted in the Agreement for a choice-of-law provision agreeing to Kansas law. The parties do not dispute the validity of that provision,

therefore the Court applies Kansas law. See *Overstreet v. Contigroup Cos., Inc.*, 462 F.3d 409, 411 (5th Cir. 2006).

a. Valid Agreement to Arbitrate

Turning first to whether there is a valid agreement to arbitrate, Plaintiff does not dispute the existence of the Agreement with Defendants. Instead, Plaintiff contends the Arbitration Provision is invalid and unenforceable because: (1) the Arbitration Provision violates Kansas public policy because it unlawfully limits Defendants’ liability and precludes Plaintiff from recovering certain damages; and (2) the Arbitration Provision is unconscionable for several reasons, including unequal bargaining power between Plaintiff and Defendants. At first blush, Plaintiff’s arguments appear to challenge the validity or enforceability of the Arbitration Provision which would be a determination for this Court to make rather than the arbitrator. However, upon review of Plaintiff’s arguments, it is readily apparent that Plaintiff’s challenges go to the Agreement itself, and not solely to the Arbitration Provision.

*3 There are two categories of challenges to the validity of an arbitration agreement: (1) a challenge to the validity of the arbitration agreement itself; and (2) a challenge to “ ‘the contract as a whole, either on a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that the illegality of one of the contract’s provisions renders the whole contract invalid.’ ” *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 70 (2010) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006)). It is only this first type of challenge that “is relevant to a court’s determination whether the arbitration agreement at issue is enforceable.” *Rent-a-Center*, 561 U.S. at 70. The Supreme Court has remarked that Section 2 of the FAA provides that a written agreement to arbitrate “ ‘is valid, irrevocable, and enforceable’ without mention of the validity of the contract in which it is contained.” *Id.* Unless the “validity” or “enforceability” challenges go specifically to the arbitration provision itself, the determination of the validity or enforceability of the contract generally is for the arbitrator to decide. *Buckeye Check Cashing*, 546 U.S. at 445-46; see *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) (the court may determine a challenge that “goes to the ‘making’ of the agreement to arbitrate” only because “the statutory language *does not permit* the federal court to consider [challenges to the contract] generally.”)

1) Limitation on Liability and Damages

In its first argument, Plaintiff complains the Arbitration Provision unlawfully limits Defendants' liability for "gross negligence and willful or wanton misconduct" and precludes Plaintiff from recovering damages it would otherwise be entitled to recover under Kansas law. Because of that, Plaintiff contends that the Arbitration Provision is unenforceable because it violates public policy and Kansas law. Plaintiff cites the Court to specific language in the Arbitration Provision that arguably limits certain damages. However, the problem for Plaintiff is that in that same argument, Plaintiff also cites to Section 12 of the Agreement improperly limiting liability and damages in contravention to Kansas law.

The Arbitration Provision provides in relevant part:

(D) *Award.* The arbitrator or arbitration panel ... will have the authority to render an appropriate decision or award, including the power to grant all legal remedies consistent with the terms of this [Arbitration Provision] and the law in Kansas. The arbitrator or arbitration panel will have no power to award: damages for lost profits, which are expressly excluded per Section 12 in the ABR Agreement; punitive damages of any kind; or any damages that are prohibited elsewhere in this Agreement.

Ex. A to Pl. Resp. at 56 (Doc. No. 13-1). Reading this section of the Arbitration Provision in its entirety, rather than the isolated context given by Plaintiff, it is obvious that Section 12 of the Agreement, not the Arbitration Provision itself, is the source of the limitation as it limits liability and damages in the first instance. Section 12 provides:

12. Except for a party's indemnification obligations in this Agreement, or any claims resulting from a party's breach of its obligations under Sections 4-Order Placement, 8-Privacy, 9-Confidentiality, or 10-

Use of Trademarks and Marketing, in no event will either party be liable for special, indirect, incidental, consequential or punitive damages of any kind, including without limitation, lost profits or other monetary loss arising from this Agreement.

Id. at 17.

First, Plaintiff's argument specifically attacks Section 12, a provision of the Agreement, along with the same limiting language in the Arbitration Provision as being invalid for violating Kansas public policy. Plaintiff's specific challenge to the validity and enforceability of a provision of the underlying contract precludes the Court from considering this challenge. *See Buckeye Check Cashing*, 546 U.S. at 445-46 (court may decide "validity" or "enforceability" challenges that goes specifically to the arbitration provision, but validity or enforceability challenges that go to the contract generally is for the arbitrator to decide); *see Prima Paint*, 388 U.S. at 404 ("the statutory language *does not permit* the federal court to consider [challenges to the contract]")

*4 Even without Plaintiff's own specific reference to Section 12, Plaintiff's argument is ultimately an attack on the validity or enforceability of the Agreement because it is Section 12 of that contract that limits a party's liability and precludes certain damages. Therefore, the Court would necessarily have to determine the enforceability and validity of Section 12 of the Agreement because these limitations are not set forth separately and independently in the Arbitration Provision. "[A] party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate." *Rent-A-Center*, 561 U.S. at 70; *see also Buckeye*, 546 U.S. at 444-45 (citing *Prima Paint*, 388 U.S. at 403-04). Therefore, Plaintiff's challenge to any limitations on liability and damages must be submitted to the arbitrator as part of the underlying dispute. *See Buckeye*, 546 U.S. at 445-46; *see also PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 407 (2003) ("In short, since we do not know how the arbitrator will construe the remedial limitations, the questions whether they render the parties' agreements unenforceable and whether it is for the courts or arbitrators to decide enforceability in the first instance are unusually abstract", so compelling arbitration was the proper decision").

2) Unconscionability

Plaintiff next argues that the Arbitration Provision is void because it is procedurally and substantively unconscionable for the following reasons: (1) there is vast inequality of bargaining power between the parties; (2) the provisions are incomprehensible to the layperson; (3) the Arbitration Provision was not signed by Plaintiff because it was hidden and not in the body of the Agreement; (4) Plaintiff is required to pay half the arbitration costs which penalizes Plaintiff; and (5) the provisions are one-sided in Defendants' favor.

Kansas law provides that “ ‘a party who freely enters a contract is bound by it even though it was unwise or disadvantageous to the party, so long as the contract is not unconscionable.’ ” *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 300 F. Supp. 2d 1107, 1125 (D. Kan. 2003) (quoting *Moler v. Melzer*, 24 Kan.App.2d 76, 77 (Kan. Ct. App. 1997)). Unconscionability is considered in the context of the specific facts of each case. *Wille v. Sw. Bell Tel. Co.*, 219 Kan. 755, 758 (Kan. 1976); see *John Deere Leasing Co. v. Blubaugh*, 636 F. Supp. 1569, 1573 (D. Kan. 1986). The party attacking the contract has the burden of establishing the provision is unconscionable, and Kansas courts require the party to show “ ‘additional factors such as deceptive bargaining conduct’ ” for a contract to be rendered unconscionable. *In re Universal*, 300 F. Supp. 2d at 1125; *Wille*, 219 Kan. at 759; see *Oesterle v. Atria Mgmt. Co., LLC*, No. 09-4010-JAR, 2009 WL 2043492, at *3 (D. Kan. July 14, 2009) (unconscionability requires a showing of “additional deceptive bargaining practices in the execution of the agreement”). Recognizing the extreme situations unconscionability is intended to remedy, the Kansas Supreme Court confirmed:

[T]he doctrine of unconscionability is used by the courts to police the excesses of certain parties who abuse their right to contract freely. It is directed against one-sided, oppressive and unfairly surprising contracts, and not against the consequences per se of uneven bargaining power or even a simple old-fashioned bad bargain.

Wille, 219 Kan. at 759-60.

Plaintiff’s argument regarding inequality of bargaining power begins and ends with references to the Agreement and “when the Agreement was signed.” The entirety of this argument addresses the parties’ bargaining power only as it pertains to the Agreement, not the Arbitration Provision. Unless the “validity” or “enforceability” challenges go specifically to the arbitration provision itself, the determination of the validity or enforceability of the contract generally is for the arbitrator to decide. *Buckeye Check Cashing*, 546 U.S. at 445-46; see *Prima Paint*, 388 U.S. at 403-04 (the court may determine a challenge that “goes to the ‘making’ of the agreement to arbitrate” only because “the statutory language *does not permit* the federal court to consider [challenges to the contract]”); see also *Universal Serv. Fund*, 300 F. Supp. 2d at 1125 (citing *Aves ex rel. Aves v. Shah*, 258 Kan. 506, 520 (1995)) (“Mere inequality of bargaining power is insufficient to render a contract unconscionable.”); *Adams v. John Deere Co.*, 13 Kan.App.2d 489, 494 (Kan. Ct. App. 1989)(quoting *Wille*, 219 Kan. at 759) (inequality of bargaining power may be factor for the court to consider, but “mere disparity of bargaining strength, without more, is not enough to make out a case of unconscionability.... [T]here must be additional factors such as deceptive bargaining conduct as well as unequal bargaining power to render the contract between the parties unconscionable.”). This challenge by Plaintiff is for the arbitrator to decide, not this Court.

*5 The remainder of Plaintiff’s unconscionability arguments do address the Arbitration Provision specifically, therefore the Court can properly consider these challenges. The Court notes at the outset that Plaintiff does not cite any case law in support of these unconscionability arguments and submits nothing more than mere conclusory statements with no citations to the record. This does not satisfy Plaintiff’s burden in resisting arbitration. See *Carter*, 362 F.3d at 297. For these reasons alone, the Court is unpersuaded by these challenges. Even upon the Court’s consideration of them, these unconscionability arguments are without merit.

Plaintiff contends the terms of the Arbitration Provision are “incomprehensible to the layman” and “an ancillary” wireless communications company like Plaintiff “would not be familiar with these complicated provisions” as would be Defendants, “a large, powerful wireless-communications company.” Yet, Plaintiff fails to identify any of these allegedly “incomprehensible” terms in the Arbitration Provision. The Arbitration Provision at issue is slightly more than two (2) pages in length, uses plain language, and sets forth numbered

and lettered sections and sub-sections in bold and italicized type with clearly designated titles. “The arbitration clause is written in relatively plain language, not confusing terms, and emphasizes important aspects in bold all-capital lettering.” *In re Universal*, 300 F. Supp. 2d at 1126 (applying Kansas state law in finding no basis on unconscionability principles regarding language used in arbitration provision in long-distance carrier contract with customers).

Of noteworthy importance to the Court, Section 11.6 of the Agreement, entitled “Review of Agreement,” expressly states:

[Plaintiff] represents that it has carefully reviewed this Agreement and has had sufficient opportunity to consult with a lawyer, accountant, or other professional advisor. [Plaintiff] represents that, if it did not use a professional advisor, it is satisfied in relying on its own education, experience, and skill in evaluating the merits of and entering into this Agreement.

Doc. No. 1-1 at 18. Plaintiff does not claim it did not have time to read the Agreement, and, by virtue of Section 11.6, Plaintiff represents that it did indeed “carefully review[] this Agreement”. This would include reading Section 17 which specifically incorporates the Arbitration Provision and explicitly references Exhibit E [the Arbitration Provision]. *Id.* at 23. Again, by virtue of Section 11.6, Plaintiff unequivocally represents that if it did not consult with a professional, then “[Plaintiff] is satisfied in relying on its own education, experience, and skill” in relation to the Agreement. Plaintiff cannot now claim that it is not as savvy as Defendants to understand these provisions and, therefore, the Arbitration Provision is unconscionable. See *In re Universal*, 300 F. Supp. 2d at 1126 (rejecting unconscionability argument where “Sprint’s customers had ample time to review those terms and conditions, whether they chose to do so or not, and cancel their service with Sprint if they did not wish to be bound by them”). This argument fails.

Plaintiff next complains that the Arbitration Provision was “hidden” and Plaintiff did not sign it because “[Defendants] buried [the provisions] in a multitude of attachments to the

Agreement, and were not in the Agreement’s body.” The Court is uncertain whether Plaintiff’s argument centers on the Arbitration Provision being “hidden” in an exhibit to the Agreement, or whether the absence of Plaintiff’s signature is the fatal flaw, or both. Regardless, this challenge fails. The fact that Plaintiff did not sign the Arbitration Provision itself is irrelevant and does not establish unconscionability. The FAA requires only that an agreement to arbitrate be written; it does not require signature of the parties for it to be enforceable. 9 U.S.C. § 2; see *Bellman v. i3Carbon, LLC*, 563 F. App’x. 608, 614 (10th Cir. 2014); *Med. Dev. Corp. v. Indus. Molding Corp.*, 479 F.2d 345, 348 (10th Cir. 1973); *Howard v. Ferrellgas Partners, L.P.*, 92 F. Supp. 3d 1115, 1131 (D. Kan. 2015). Plaintiff has submitted no argument or controlling authority to the contrary.

*6 To the extent this unconscionability argument centers on the Arbitration Provision being “hidden” in an exhibit to the Agreement rather than the body of the Agreement, the Court can quickly dispose of this argument as the record before this Court do not support Plaintiff’s characterization of the Arbitration Provision. Section 17 of the Agreement itself, entitled “**Dispute Resolution**”, specifically provides that “[d]isputes under this Agreement will be resolved according to Exhibit E.” Doc. No. 1-1 at 23. This language clearly directs Plaintiff to the specific exhibit containing the Arbitration Provision and its unambiguous language. Moreover, Section 18.10 of the Agreement specifically incorporates the exhibits by reference. See *id.* at 24. Finally, as the Court already noted, Plaintiff unequivocally represents it has “carefully reviewed this Agreement” by virtue of Section 11.6 of the Agreement. Plaintiff does not establish that the Arbitration Provision was “hidden”. See *Adams*, 13 Kan.App.2d at 492 (party is bound by the contract it enters into “regardless of a failure to read the contract or inclusion of terms disadvantageous to one party” unless the party establishes “procedural abuses arising out of the contract formation or because of substantive abuses relating to the terms of the contract.”). More importantly, Plaintiff wholly fails to establish that even if the Arbitration Provision was “hidden”, it is unconscionable. Plaintiff is required to make a sufficient showing of additional factors that would establish unconscionability; Plaintiff did not submit any “additional deceptive” factors. See *In re Universal*, 300 F. Supp. 2d at 1125; *Osterle*, 2009 WL 2043492, at *3. This argument fails. See *Wille*, 219 Kan. at 759-60.

Plaintiff also argues that the Arbitration Provision is unconscionable because Plaintiff is forced to pay half the

costs of any arbitration proceeding. The Supreme Court has recognized that, under certain facts, excessive arbitration costs could render an arbitration agreement unconscionable. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91-92 (2000). However, “a party seeking to avoid arbitration on the ground that arbitration would be prohibitively expensive” bears the burden of showing the likelihood of incurring prohibitive costs. *Id.* Here, Plaintiff fails to argue, let alone establish, that arbitration costs would be “prohibitively expensive”; instead, Plaintiff contends only that it was “penalize[d]” by Defendant in being responsible for half of any arbitration costs. Plaintiff failed to make the required showing, therefore this argument fails. *See id.* at 90 n.6 (party resisting arbitration asserted only unsupported statements regarding arbitration costs, completely failing to provide any basis for the Supreme Court to conclude she “would in fact have incurred substantial costs in the event her claim went to arbitration.”).

Finally, Plaintiff argues the Arbitration Provision terms are “unduly one-sided” in favor of Defendants. The law is clear that Plaintiff, as the party attacking the agreement, has the burden of establishing additional factors, like deceptive bargaining practices, to establish unconscionability. *See In re Universal*, 300 F. Supp. 2d at 1125; *Oesterle*, 2009 WL 2043492, at *3 (unconscionability requires a showing of “additional deceptive bargaining practices in the execution of the agreement”). Plaintiff does not satisfy its burden. While Plaintiff may consider some of these provisions to be disadvantageous or less-than-desirable, that allegation will not, without more, support a finding of unconscionability. *See Wille*, 219 Kan. at 759-60 (“[Unconscionability] is directed against one-sided, oppressive and unfairly surprising contract, and not against the consequences per se of uneven bargaining power or even a simple old-fashioned bad bargain.”). This argument fails.

In conclusion, the Court finds there is a valid and enforceable agreement to arbitrate a dispute between the parties.

b. Claims Within Scope of Arbitration Agreement

The Court must next determine whether Plaintiff’s claims fall within the scope of the Arbitration Provision. *See Banc One*, 367 F.3d at 429. Plaintiff argues that its claims are outside the scope of the Arbitration Provision because the arbitrator is precluded from awarding the type of remedies Plaintiff seeks as damages for Defendants’ alleged “gross negligence and

willful or wanton misconduct”. The Court disagrees and finds Defendants have established Plaintiff’s claims fall squarely within the broad scope of the clear language of the Arbitration Provision. *See also Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)(FAA requires any doubts regarding the arbitrability of the claims at issue to be resolved in favor of arbitration).

*7 The Arbitration Provision provides, in relevant part:

1. Dispute Resolution. All Disputes under this Agreement are subject to the following dispute resolution process. A “Dispute” means any controversy, dispute, or claim of every kind (including claims, counterclaims and cross claims), and nature arising out of or relating to the negotiation, construction, validity, interpretation, performance, enforcement, operation, breach, continuation or termination of this Agreement, whether arising out of common law or state or federal law.

Doc. No. 10-1 at 3. It is well-established that the use of language providing for “any controversy or claim arising out of or relating to this Agreement” being subject to arbitration is considered a broad arbitration clause. *See, e.g., Prima Paint*, 388 U.S. at 398; *Newmont U.S.A. Ltd. v. Ins. Co. of N. Am.*, 615 F.3d 1268, 1274-75 (10th Cir. 2010) (use of the language “arising out of” in the arbitration clause left the court with “little trouble determining” provision is broad); *Brown v. Coleman Co., Inc.*, 220 F.3d 1180, 1184 (10th Cir. 2000) (arbitration clause including “all disputes or controversies arising under or in connection with this Agreement” is “the very definition of a broad arbitration clause.”). Use of a broad provision “gives rise to a presumption of arbitrability of any claims connected with the Agreement.” *Trading Places Aeronautica S.L. v. Raytheon Aircraft Corp.*, 35 F. Supp. 2d 1308, 1311 (D. Kan. 1999). The presumption of arbitrability can be overcome only “if ‘it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.’ ” *Id.* (quoting *ARW Expl. Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir. 1995)).

In this case, Plaintiff asserts state law claims against Defendant for: (1) breach of contract; (2) fraud; (3) negligent misrepresentation; (4) tortious interference with an economic relationship; (5) tortious interference with a prospective economic relationship; (6) unjust enrichment; (7) defamation and defamation per se; and (8) quantum meruit. Based on Plaintiff's own allegations in its Complaint, each of these claims turns on the parties' Agreement and the terms therein, more specifically the formation, performance, enforcement, breach, and termination of the Agreement. The Court concludes each of Plaintiff's claims fall within the very broad scope of the Arbitration Provision pursuant to its clear language.

Plaintiff's only argument that its claims fall outside the scope of the Arbitration Provision centers on the Arbitration Provision language limiting any award the arbitrator may fashion. In certain of its claims, Plaintiff makes a single sentence allegation that Defendants' conduct was "willful, malicious and oppressive" and it seeks damages based upon such conduct. Plaintiff argues that, because it makes this allegation, its claims fall outside the scope of the Arbitration Provision because an arbitrator is precluded from awarding damages for "gross negligence and willful or wanton misconduct". This argument goes to the limitations on liability and damages set forth originally in the Agreement which the Court previously determined must be submitted to the arbitrator. The Arbitration Provision also provides specifically that any dispute regarding the validity of the Agreement must be submitted to arbitration. *See* Doc. No. 10-1 at 3. This argument goes to the validity of the Agreement's provision limiting the liability and damages, and therefore it must be submitted to the arbitrator as part of the underlying dispute. Finally, regardless of any limiting language, the Arbitration Provision clearly vests the arbitrator with authority "to render an appropriate decision or award, including the power to grant all legal remedies consistent with" Kansas law. The Court does not know how the arbitrator will interpret any limitation on damages in light of his authority to craft an appropriate award consistent with Kansas law; therefore, the Court concludes arbitration is "the proper decision." *PacifiCare*, 538 U.S. at 407 ("In short, since we do not know how the arbitrator will construe the remedial limitations, the questions whether they render the parties' agreements unenforceable and whether it is for the courts or arbitrators to decide enforceability in the first instance are unusually abstract ... the proper course is to compel arbitration.").

*8 "Once the court determines there is a valid arbitration agreement, any remaining arguments that target the validity of the contract as a whole are questions for the arbitrator." *Edwards v. Doordash, Inc.*, 888 F.3d 738, 744 (5th Cir. 2018). Simply alleging this type of conduct and seeking damages related thereto cannot and does not take the claims outside the scope of the Arbitration Provision. This argument fails and the Court finds all of Plaintiff's claims are subject to arbitration.

2. Conclusion

Defendants proved by a preponderance of the evidence that there is a valid agreement to arbitrate between the parties. *See Grant*, 469 F. App'x. at 315. Plaintiff did not meet its burden to establish the Arbitration Agreement is invalid and unenforceable or that Plaintiff's claims are outside its scope. *See Carter*, 362 F.3d at 297. Nothing before the Court establishes any legal constraints would preclude the arbitration of all of Plaintiff's claims. "If there is a valid agreement to arbitrate, and there are no legal constraints that foreclose arbitration, the court must order the parties to arbitrate their dispute." *See Celaya v. Am. Pinnacle Mgmt. Servs., LLC*, Civil Action No. 3:13-CV-1096, 2013 WL 4603165, at *2 (Aug. 29, 2013)(Fitzwater, CJ). Accordingly, Plaintiff is required to arbitrate all of its claims against Defendant pursuant to the valid Arbitration Provision and the Court must grant Defendant's motion.

3. Stay or Dismissal of Action

Defendants ask the Court to dismiss Plaintiff's claims with prejudice or, in the alternative, to stay the case. The Court must stay the action upon application of one of the parties. 9 U.S.C. § 3. "This rule, however, was not intended to limit dismissal of a case in the proper circumstances. If all of the issues raised before the district court are arbitrable, dismissal of the case is not inappropriate." *Fedmet Corp. v. M/V Buyalyk*, 194 F.3d 674, 678 (5th Cir. 1999). Having determined all of Plaintiff's claims are subject to binding arbitration, the Court concludes there is no other reason to retain jurisdiction over this case and dismissal of this action is more appropriate rather than to stay and abate the case as no purpose would be served by a stay. *See Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992) (dismissal of case preferred when staying the case and the court retaining jurisdiction serves no purpose). Accordingly, because the Court orders all of Plaintiff's claims must be submitted to arbitration, this case is **dismissed with prejudice**. *See* 9 U.S.C. §§ 3 & 4; *Vican, Inc. v. Incipio Techs., Inc.*, 3:15-

CV-2720-L, 2016 WL 687155, at *1 (N.D. Tex. Feb. 2, 2016)(Lindsay, J.).

D. Conclusion

For the foregoing reasons, the Court **grants** Defendant's motion to compel arbitration of Plaintiff's claims and the case is hereby **dismissed with prejudice** except to being

reasserted in arbitration and in actions upon the arbitration award. *See* 9 U.S.C. §§ 3 & 4.

SO ORDERED.

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