2022 WL 2903440
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United States Court of Appeals, Sixth Circuit.

ALLIANCE HEALTH AND LIFE INSURANCE COMPANY, Plaintiff-Appellant,
v.
AMERICAN NATIONAL INSURANCE COMPANY, Defendant-Appellee.

No. 21-2995
|
FILED July 22, 2022

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Attorneys and Law Firms

Joseph M. Infante, Stephen M. Ragatzki, Miller Canfield, Grand Rapids, MI, for Plaintiff-Appellant.

Kenneth Bennett Chapie, Annabel Frances Shea, Giarmarco, Mullins & Horton, Troy, MI, for Defendant-Appellee.

Before: BOGGS, LARSEN, and DAVIS, Circuit Judges.

Opinion

LARSEN, Circuit Judge.

***1** Alliance Health and Life Insurance Company sued American National Insurance Company for breaching a Medical Excess Reinsurance Agreement. American National moved to dismiss, seeking to enforce an arbitration provision in the Agreement. The parties quarreled about whether a three-year limitation in the contract on commencing arbitration precluded arbitration. Recognizing that this was a question for an arbitrator, not the court, the district court dismissed the complaint. We AFFIRM.

I.

Alliance Health and Life Insurance Company and American National Insurance Company entered into a Medical Excess Reinsurance Agreement, effective January 1, 2016. American National agreed "to reinsure [Alliance Health] as a result of any loss or losses which may occur during the term of this Agreement arising out of any and all claims for a medical service or supply incurred during the term of this Agreement that is covered under a Policy." The Agreement contained an arbitration provision, which provided that, "[a]s a precedent to any right of action under this Agreement, if any dispute shall arise between [Alliance Health] and [American National] with reference to the interpretation of this Agreement or their rights with respect to any transaction involved, whether such disputes arise before or after termination of this Agreement, such dispute, upon the written request of either party, shall be submitted to three arbitrators." The Agreement also provided that "[n]o arbitration may be commenced more than 3 years after the Effective Date of this Agreement."

An individual insured by Alliance Health presented a claim for benefits. Alliance Health initially denied the claim on April 27, 2017, but changed course on June 29, 2018, providing coverage retroactively from January 1, 2014 through December 31, 2016. On December 20, 2018, Alliance Health sought almost $1 million in reinsurance coverage from American National for the claim. American National rejected the claim on the ground that the claimant was "not an eligible employee under the Group PPO purchased by her employer." It did so on September 23, 2019, which was more than three years after the effective date of the Agreement.

Invoking the court's diversity jurisdiction, Alliance Health sued American National in federal court. American National moved to dismiss on the ground that the Agreement required Alliance Health to submit its claim to arbitration. Alliance Health responded that because the claim was outside the Agreement's three-year limit for commencing arbitration, it could proceed in federal court. In reply, American National argued that the question whether the three-year time limitation applied was for an arbitrator, not the court, to decide. The district court agreed with American National and accordingly dismissed the suit. The court later clarified that the dismissal was without prejudice and that Alliance Health could refile its claim in federal court if the arbitrator did not resolve the entire dispute. Alliance Health appeals.

II.

***2** "The Federal Arbitration Act reflects the basic principles that 'arbitration is a matter of contract' and that contracts must be enforced 'according to their terms.' " *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 844 (6th Cir. 2020) (quoting *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67

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(2010)). Parties may contract "to have an arbitrator decide not only the merits of a particular dispute but also 'gateway' questions of 'arbitrability.' " *Id.* (quoting *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019)).

The Supreme Court has drawn a distinction between two types of "questions of arbitrability." On the one hand, substantive questions, such as whether parties are bound by an arbitration clause or whether an arbitration clause covers a dispute, are presumptively for a judge to decide. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84–85 (2002). Courts will send those questions to an arbitrator only if there is "clear and unmistakable evidence that the parties agreed to have an arbitrator decide such issues." *Blanton*, 962 F.3d at 844 (citation omitted and internal quotation marks omitted). On the other hand, procedural questions of arbitrability that " 'grow out of the dispute and bear on its final disposition' are presumptively *not* for the judge, but for an arbitrator, to decide." *Howsam*, 537 U.S. at 84 (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)). Examples of procedural issues include questions involving "*time limits*, notice, laches, [and] estoppel." *Id.* at 85 (citation omitted).

Alliance Health presents both substantive and procedural questions on appeal. It argues that the dispute here is beyond the scope of an arbitration clause—a substantive question of arbitrability presumptively for a judge to decide. But Alliance Health did not raise this argument below. Although American National's motion to dismiss claimed that the dispute fell within the scope of the arbitration clause, Alliance Health did not respond to that point on the merits. Nor did it claim that questions regarding the scope of an arbitration clause are presumptively questions for judicial resolution. Instead, Alliance Health's only response was that that the dispute fell outside the arbitration time limit. Alliance Health therefore has forfeited its substantive argument. *See United States ex rel. Dorsa v. Miraca Life Scis., Inc.*, 33 F.4th 352, 358–59 (6th Cir. 2022) (recognizing that the appellant had forfeited arguments regarding the scope of an arbitration clause by not raising them in the district court).

With respect to the time limit, Alliance Health renews its claim that the contract's three-year time limit applies; so in its view, the case should be in federal court, not arbitration. But the application of a contractual time limit is a quintessential question of procedural arbitrability. *See Howsam*, 537 U.S. at 85 (concluding that whether a six-year time limit on arbitration applied was a question "within the class of gateway procedural disputes" and was "a matter presumptively for the arbitrator, not for the judge"); *United Steelworkers of Am. v. Saint Gobain Ceramics & Plastics, Inc.*, 505 F.3d 417, 422 (6th Cir. 2007) (en banc) ("What emerges [from Supreme Court caselaw] is a fairly straightforward rule: A time-limitation provision involves a matter of procedure; it is a condition precedent to arbitration; and it thus is presumptively a matter for an arbitrator to decide." (internal citations and quotation marks omitted)).

***3** A presumption is, of course, just a presumption, and the opposing party may rebut it by pointing to contract language indicating that the parties agreed to leave the issue to the judge. *See Howsam*, 537 U.S. at 85; *United Steelworkers*, 505 F.3d at 422. But the time-limit provision here is not materially different than the one at issue in *Howsam*. There, the contract provided that "no dispute shall be eligible for submission [to an arbitrator] ... where six (6) years have elapsed from the occurrence or event giving rise to the ... dispute." *Howsam*, 537 U.S. at 82 (alterations in original). Here, the contract provides that "[n]o arbitration may be commenced more than 3 years after the Effective Date of this Agreement." And Alliance Health points to no other language that might suggest an intent to assign the time-limit question to a judge. Consequently, the question whether the time limit applies is a procedural matter for an arbitrator to decide. *Id.* at 85.

Because Alliance Health fails to appreciate the distinction between substantive and procedural questions of arbitrability, its arguments as to who decides miss the mark. Alliance Health repeatedly casts the arbitration clause as "narrow." We are skeptical. After all, the clause covers "any dispute ... with reference to the interpretation of this Agreement or their rights with respect to any transaction involved." And that language encompasses the determination of whether the contractual time limit precludes arbitration. Alliance Health also asserts that the arbitration clause contains no delegation clause or other clear and unmistakable evidence that the parties agreed to send questions of arbitrability to an arbitrator. But that argument is relevant only to Alliance Health's unpreserved substantive argument regarding the scope of the agreement, not to the procedural question of whether the time limit precludes arbitration. *See Howsam*, 537 U.S. at 85.

The district court did not err by sending this threshold question to the arbitrator.

* * *

We AFFIRM.

All Citations

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United States District Court, D. Massachusetts.

AMERICAN GRAPHICS INSTITUTE, LLC, Plaintiff,
v.
NOBLE DESKTOP NYC, LLC, Defendant.

Civil Action No. 22-cv-11404-ADB
|
Signed July 27, 2023

Attorneys and Law Firms

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MEMORANDUM AND ORDER

BURROUGHS, UNITED STATES DISTRICT JUDGE

***1** American Graphics Institute, LLC ("AGI") brings this action against Noble Desktop NYC, LLC ("Noble") alleging copyright and trademark infringement as well as unfair competition under Massachusetts common law and Mass. Gen. Laws ch. 93A. See [ECF No. 13 ("Am. Compl.")]. Currently before the Court is Noble's motion to dismiss and compel arbitration. [ECF No. 19]. For the reasons set forth below, Noble's motion, [ECF No. 19], is GRANTED in part and DENIED in part.

I. BACKGROUND

A. Factual Background

The Court draws the following facts from the complaint and the affidavits and documents submitted in support of the motion to dismiss and compel arbitration, see Cullinane v. Uber Techs., Inc., 893 F.3d 53, 55 (1st Cir. 2018) (citation omitted), "construe[s] the record in the light most favorable to the non-moving party[,] and draw[s] all reasonable inferences in its favor," Air-Con, Inc. v. Daikin Applied Latin Am., LLC, 21 F.4th 168, 175 (1st Cir. 2021).

1. The Parties

AGI is a Massachusetts limited liability company ("LLC") that provides "professional development and technical training to companies, organizations, and employees on topics relating to graphics, design, and marketing." [Am. Compl. ¶¶ 1, 12]. AGI hosts training sessions in suburban Boston and Philadelphia, in its own facilities, and across the country, in third-party facilities. [Id. ¶ 17]. Since at least 2002, AGI has also hosted live online classes. [Id.]. AGI's website, www.agitraining.com ("AGI Website"), "includes titles and descriptions for courses offered and sold by AGI" including classes on programs like Photoshop and InDesign, and classes on web design. [Id. ¶ 18]. AGI registered copyrights for its website on November 3, 2004, December 10, 2004, and February 4, 2022. [Id. ¶ 19].

AGI incorporated as a Massachusetts LLC in 2009, but a company operating under the trade names "American Graphics Institute" and "AGI," has been in existence since 1995. [Am. Compl. ¶¶ 20–21].[1] Since at least 1999, the company has "sold, and offered for sale, professional development training to companies, organizations, and individuals on topics relating to graphics, design, and marketing" using the trade name "American Graphics Institute" or "AGI." [Id.]. The company has used the marks "AMERICAN GRAPHICS INSTITUTE" and "AGI," continuously since October 1999. [Id. ¶ 24].

The company has also used the following stylized mark ("AGI Stylized Mark"), continuously since at least 2013. [Am. Compl. ¶ 26].

AGI's trade names and AGI marks "have become distinctly connected with AGI and its professional development training goods and services." [Am. Compl. ¶ 28].

Noble is a New York LLC. [Am. Compl. ¶ 13]. Noble operates a "professional development training business" that is "substantially similar" to AGI, in the state of New York. [Id. ¶ 33]. Like the AGI Website, Noble's website, www.nobledesktop.com ("Noble Website"), "lists course

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names and descriptions for professional development training classes," though unlike those listed on AGI's website, these classes are offered both by Noble and third parties, including AGI. [Id.].

2. The April/May 2020 Agreements and the Arbitration Provision

***2** *Independent Contractor Agreement.* As outlined in the Complaint, on May 1, 2020, Noble entered into an Independent Contractor Agreement ("ICA") with AGI, in which Noble agreed to perform "some or all" of a number of services for AGI, including "assist[ing] with and consult[ing] on the roll-out of new website features and designs to optimize conversions" and "[a]ssist[ing] with digital ad placement and optimization of online advertising." [ECF No. 13-17 ("ICA"), Ex. A]; see also [Am. Compl. ¶ 44]. This contract does not have an arbitration provision.

AGI License and Purchase Agreements and the Arbitration Provision. Although not referenced in the Complaint, AGI and Noble executed several other agreements at the same time. First, as relevant here, the parties and their owners executed an agreement through which Noble purchased AGI's New York business and Noble's owner acquired an interest in AGI's remaining business ("Purchase Agreement"). Second, the parties executed an agreement through which Noble licensed certain AGI materials ("AGI License Agreement"). See [ECF Nos. 22-3, 22-4; ECF No. 23 at 4-5; ECF No. 24-10 at 2].

As to the specific scope of the AGI License Agreement, it provides:

> [S]ubject to the terms and conditions set out in this Agreement, [AGI] hereby grants to [Noble] a limited, non-exclusive and non-transferable right by way of license to make, reproduce and use the **Licensed Materials** solely for preparation by the Licensee of **Course Materials** for use solely in the Territory during the Term and for the purposes set forth in **Section 4.1** below.

[ECF No. 22-3 ¶ 2.1]. [2]

The AGI License Agreement incorporates certain provisions of the Purchase Agreement. [ECF No. 22-3 ¶ 11.1]. [3] As relevant here, one of the incorporated provisions, Section 6.3(a) (the "Arbitration Provision"), provides:

> Each of the parties hereto agrees that it will attempt to settle **any dispute, claim or controversy arising under, out of, in connection with or relating in any way to this Agreement** ... through non-binding mediation administered by an established, neutral mediation service with experience in joint venture disputes. **Any such dispute, claim or controversy that cannot be resolved by the parties through non-binding mediation** within 60 days of notification to all the parties of the commencement of the dispute resolution procedures of this Section **will then be resolved solely and exclusively by binding arbitration conducted in accordance with the then effective Commercial Arbitration Rules of the American Arbitration Association** by a sole arbitrator with experience in joint venture disputes and the provisions of this Section....

***3** [ECF No. 22-4 ¶ 6.3 (emphasis added)]. [4]

The parties agree that Noble terminated the AGI License Agreement on April 26, 2021. [ECF No. 20 at 9; ECF No. 23 at 4].

3. Noble's Conduct following the April/May 2020 Agreements

AGI alleges that through its consulting services to AGI, Noble "learn[ed] [about AGI's] internal sales, marketing, promotional tactics, technical processes, and strategies,"

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and gained "access to AGI's copyrighted works and branding efforts." [Am. Compl. ¶ 9]. Noble then "expanded into a competing business" and used "AGI's well-known trademarks, copyrighted works, and goodwill to attract customers to its competing business." [Id.]. AGI specifically alleges that "[f]rom April 27, 2021 until at least February 2022," Noble "copied the AGI Website," which was protected by each of its registered copyrights, "without AGI's authorization, consent, or knowledge, and without any remuneration to AGI." [Id. ¶¶ 47, 49, 52]. The Noble Website also repeatedly uses AGI's marks, "AMERICAN GRAPHICS INSTITUTE." "AGI," and the AGI Stylized Mark. [Id. ¶ 35].

4. The 2021 Arbitration

On April 29, 2021, Noble commenced an arbitration against AGI, raising various claims related to AGI's alleged breaches of several of the parties' contracts, including the AGI License Agreement. [ECF No. 20 at 7]; see also Noble NYC, LLC, et al. v. Am. Graphics Inst., LLC, et al., No. 01-21-0003-6637 (AAA 2021) ("2021 Arbitration"). In the 2021 Arbitration, AGI asserted several counterclaims, including that Noble breached the AGI License Agreement.

B. Procedural Background

After filing an original complaint on August 31, 2022, AGI filed an amended complaint on October 6, 2022, alleging copyright infringement (Count I), [Am. Compl. ¶¶ 64–73], false designation of origin, in violation of the Lanham Act (Count II), [id. ¶¶ 74–80], infringement of common law trademarks and trade name infringement (Counts III and IV), [id. ¶¶ 81–89], unfair competition under state common law (Count V), [id. ¶¶ 90–95], and unfair or deceptive acts, in violation of Mass. Gen. Laws ch. 93A (Count VI), [id. ¶¶ 96–102]. Noble filed the instant motion to dismiss and to compel arbitration on November 4, 2022. [ECF No. 19]. AGI opposed the motion on December 5, 2022. [Id.]. The parties subsequently filed several additional rounds of briefing. See [ECF Nos. 25, 29, 32, 41, 42].

II. LEGAL STANDARD

***4** This Court's review of Noble's motion is governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16. See 9 U.S.C. § 4. "[T]he FAA requires courts to treat arbitration as 'a matter of contract' and enforce agreements to arbitrate 'according to their terms.' " Air-Con, 21 F.4th at 174 (quoting Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 529 (2019)); and then citing 9 U.S.C. § 4. The FAA does not compel "a party ... to submit to arbitration any dispute which [it] has not agreed so to submit[,]" McCarthy v. Azure, 22 F.3d 351, 354 (1st Cir. 1994) (citations omitted), but "a court must hold a party to its arbitration contract just as the court would to any other kind" of contract, Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1713 (2022).

> Thus, a party that attempts to compel arbitration "must show [1] that a valid agreement to arbitrate exists, [2] that the movant is entitled to invoke the arbitration clause, [3] that the other party is bound by that clause, and [4] that the claim asserted comes within the clause's scope."

Hogan v. SPAR Grp., Inc., 914 F.3d 34, 38 (1st Cir. 2019) (quoting Ouadani v. TF Final Mile LLC, 876 F.3d 31, 36 (1st Cir. 2017)).

In "evaluat[ing] motions to compel arbitration under the FAA[,]" "district courts ... apply the summary judgment standard." Air-Con, 21 F.4th at 175. Under this standard, "[i]f the non-moving party puts forward materials that create a genuine issue of fact about a dispute's arbitrability, the district court 'shall proceed summarily' to trial to resolve that question." Id. (citing 9 U.S.C. § 4; Neb. Mach. Co., Inc. v. Cargotec Sols., LLC, 762 F.3d 737, 744 (8th Cir. 2014)). In conducting this review, the Court "construe[s] the record in the light most favorable to the non-moving party and draw[s] all reasonable inferences in its favor." Id. (citations omitted).

III. DISCUSSION

Noble asserts that each of the requirements to compel arbitration are met: (1) a valid arbitration agreement exists (2) Noble is entitled to invoke the arbitration clause, (3) AGI is bound by that clause, and (4) AGI's asserted claims come within the clause's scope. [ECF No. 20 at 18–24]. Further, Noble argues AGI's claims are subject to arbitration because the "underlying facts (which are necessary elements of the claims) have already been arbitrated and decided between the exact same parties, as to the exact same 'course descriptions' (copyright) and 'logos' (trademark) on the exact same website ... for the exact same period ...." [Id. at 5].

AGI responds that its "claims in this litigation are distinct from the terms in the AGI License Agreement due to; i) timing; ii) location; iii) content; and iv) manner of use [and] the AGI License has no relationship to any claims or defenses," and therefore do not fall within the scope of the Arbitration Provision. [ECF No. 23 at 16]. AGI also argues

that Desktop Noble's "mere assertions that the dispute about the Defendants' infringement of the AGI Website Copyrights is covered by the" Arbitration Provision are insufficient to trigger arbitration even as to the threshold issue of whether an arbitrator, not the Court, should decide the issue of arbitrability. [Id. at 2]. AGI also responds that the 2021 Arbitration has no bearing on this litigation, because AGI does not raise the same factual allegations or any of the same claims. [Id. at 16–19].

"When a dispute arises, the parties sometimes may disagree not only about the merits of the dispute but also about the threshold arbitrability question—that is, whether their arbitration agreement applies to the particular dispute." Henry Schein, 139 S. Ct. at 527. In such a case,

> ***5** [w]hen the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.

Henry Shein, 139 S. Ct. at 529.

"Where there is a clear and unmistakable delegation of arbitrability issues, the court's proper inquiry 'before referring a dispute to an arbitrator' is limited to 'determin[ing] whether a valid arbitration agreement exists .... [I]f a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue.' " Bosse v. New York Life Ins. Co., 992 F.3d 20, 28 (1st Cir. 2021) (quoting Henry Schein, 139 S. Ct. at 530).

Although AGI argues that Noble's termination of the AGI License Agreement means that this dispute, involving conduct following that termination, is not covered by the Arbitration Provision, AGI does not specifically challenge the validity of the Arbitration Provision itself. Specifically, there is no suggestion that the Arbitration Provision was invalid when formed. Further, to the extent that the termination of the AGI License Agreement could have also terminated the Arbitration Provision, an issue AGI describes as "immaterial," [5] the Court finds that there is no indication that it did. [6]

***6** The Court therefore moves on to address whether the Arbitration Provision evinces clear and unmistakable delegation of arbitrability issues. The Arbitration Provision states that

> any dispute, claim or controversy arising under, out of, in connection with or relating in any way to this Agreement ... that cannot be resolved by the parties through non-binding mediation ... will then be resolved solely and exclusively by binding arbitration **conducted in accordance with the then effective Commercial Arbitration Rules of the American Arbitration Association**.

[ECF No. 22-4 ¶ 6.3 (emphasis added)].

Rule 7(a) of the AAA's Commercial Arbitration Rules and Mediation Procedures ("AAA Commercial Rules"), effective at the time this litigation was filed, states that the "arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." Am. Arb. Ass'n, Com. Rules and Mediation Procs., Rule 7(a) (2013). [7]

Although the Supreme Court has not taken a position on whether the incorporation of the AAA Commercial Rules is clear and unmistakable evidence of intent to delegate arbitrability, [8] federal courts of appeals, including the First Circuit, have consistently (and recently) concluded that it does. See Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 11 (1st Cir. 2009) ("Rule 7(a) [of the AAA Commercial Rules] ... is about as clear and unmistakable as language can get, meeting the standard we have followed." (internal quotation marks omitted)); see also Mendoza v. Fred Haas Motors, Ltd., 825 F. App'x 200, 202 (5th Cir. 2020) ("Incorporating the [AAA Commercial] rules into the agreement 'presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.' " (quoting Petrofac, Inc. v. DynMcDermott Petrol. Operations Co., 687 F.3d 671, 675 (5th Cir. 2012)));

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Blanton v. Domino's Pizza Franchising LLC, 962 F.3d 842, 846 (6th Cir. 2020); Richardson v. Coverall N. Am., Inc., 811 F. App'x 100, 103 (3d Cir. 2020); Dish Network L.L.C. v. Ray, 900 F.3d 1240, 1246 (10th Cir. 2018); Brennan v. Opus Bank, 796 F.3d 1125, 1130 (9th Cir. 2015); Fallo v. High-Tech Inst., 559 F.3d 874, 878 (8th Cir. 2009); Contec Corp. v. Remote Sol., Co., 398 F.3d 205, 208 (2d Cir. 2005); Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1332 (11th Cir. 2005). Thus, because the Arbitration Provision incorporates the AAA's Commercial Rules, the Court finds that the authority to determine arbitrability has been delegated to an arbitrator who must determine whether each of AGI's claims in this litigation constitutes a "dispute, claim or controversy arising under, out of, in connection with or relating in any way to" the AGI License Agreement. [ECF No. 22-4 ¶ 6.3].

***7** Accordingly, Noble's motion to compel arbitration is GRANTED insofar as AGI must now submit its claims to an arbitrator for a decision as to arbitrability.

Noble further requests that if the Court grants its motion to compel arbitration, the Court also dismiss this case. [ECF No. 19].

> Section 3 of the FAA requires that where issues brought before a court are arbitrable, the court shall "stay the trial of the action until such arbitration has been had in accordance with the terms of the [arbitration] agreement." However, a court may dismiss, rather than stay, a case when all of the issues before the court are arbitrable.

Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141, 156 n.21 (1st Cir. 1998) (citations omitted); see also Dialysis Access Ctr., LLC v. RMS Lifeline, Inc., 638 F.3d 367, 372 (1st Cir. 2011) ("Where one side is entitled to arbitration of a claim brought in court, in this circuit a district court can, in its discretion, choose to dismiss the law suit, if all claims asserted in the case are found arbitrable." (internal quotation omitted)). Because the Court has found only that the threshold issue of arbitrability is arbitrable, the Court declines to exercise its discretion to dismiss the case, and Noble's motion to dismiss is therefore DENIED. Instead, this action is STAYED, pending a decision by an arbitrator as to the arbitrability of AGI's claims.

IV. CONCLUSION

For the above reasons, Noble's motion to compel arbitration, [ECF No. 19], is GRANTED in part and DENIED in part. Should AGI wish to proceed, it must submit its claims to an arbitrator for a decision as to arbitrability. The action is STAYED pending resolution of those proceedings.

SO ORDERED.

All Citations

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Footnotes

1 Although the nature of the relationship between these various entities is not entirely clear from the Amended Complaint, the Court infers that they are related and the specifics of the relationship do not matter for purposes of this Order.

2 **Licensed Materials** are defined as "the **Works** described in **Schedule I** of th[e] Agreement." [ECF No. 22-3 at 2]. **Works** are defined as

> all materials used to create the course, including, but not limited to, all text, editorial content, images, graphics, logos, illustrations, photographs, video, audio, and other materials, as well as the designs, icons, layout, "look and feel," and all other graphical elements of the course and all copyrights, trademarks, service marks, tradenames, patents and other intellectual property rights in any of the foregoing.

[Id.] In turn, **Schedule I** defines "Licensed Materials" as "Design Curriculum Materials" and explains that this "means any course [AGI] is offering as a group class, private tutoring, or corporate training now or in the future." [Id. at 8].

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Course Materials are defined as the "compilation of photocopied extracts of Licensed Materials, designed in advance to be used in support of a Course of Study." [ECF No. 22-3 at 1].

Finally, **Section 4.1** states that Noble may only "make, reproduce or use the Licensed Materials for preparation of Course Materials" for "instruction by [Noble's] instructors in relation to any Course of Study provided by [Noble] to [Noble's] students in [New York]" or "distribution to [Noble's] students for teaching, learning, discussion or classroom use in relation to any Course of Study provided by [Noble] in [New York]." [ECF No. 22-3 at 3]. It adds that "[Noble] may allow its instructors and students to retain the Course Materials for subsequent reference." [Id.].

3 Section 11.1 of the ICA states: "The terms and provisions of Sections 6.3, 6.4, 6.5, 6.6, 6.7, 6.8, 6.9, 6.10, 6.11, 6.13, 6.14 and 6.15 of the Purchase Agreement are incorporated in this Agreement by reference." [ECF No. 22-3 ¶ 11.1]. The Purchase Agreement, in turn, is defined as "that certain Purchase Agreement, dated as of April 30, 2020, by and among the Licensor [AGI], the Licensee [Noble], Kattan and the Smiths." [Id. at 2].

4 Section 6.3 carves out several sections of the Purchase Agreement to which the Arbitration Provision does not apply (Section 4.4: Non-Compete of Sellers; Section 4.5: Non-Solicitation; Section 4.6: Reasonableness of Restrictions; Section 4.7: Confidentiality). [ECF No. 22-4 ¶ 6.3]. Neither party contends these exceptions are relevant here.

5 See [ECF No. 23 at 16 ("Noble's assertions that the Arbitration Agreement survives the termination of the AGI License is immaterial as the Arbitration Agreement is limited to claims connected to the AGI License, of which AGI's current infringement claims are not.")].

6 As the First Circuit explained in Biller v. S-H OpCo Greenwich Bay Manor, LLC, 961 F.3d 502, 512 (1st Cir. 2020), "unless the parties provided otherwise, an arbitration provision 'is severable from the remainder of the contract.' " Id. (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006)). Further, it is "presume[d] that the arbitration clause (independent as it is) survives the underlying contract," and "[e]ven if the rest of the parties' contractual rights and obligations ended ... that [does] not mean their duties to arbitrate their contract-related disputes ended, too." Id. at 512–13. "In theory, this presumption reflects commercial custom: When two parties commit to arbitrate disputes arising under a contract, they ordinarily mean to bind each other to arbitrate such disputes even if the grievant doesn't complain until after the contract expires." Id. at 513 (citing Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B., 501 U.S. 190, 205, 208 & n.3 (1991)). Thus, "to successfully argue that an arbitration agreement terminated and no longer governs any claim," a party must "mount an 'independent' challenge to the arbitration agreement itself." Id. at 514 (citing Large v. Conseco Fin. Servicing Corp., 292 F.3d 49 (1st Cir. 2002)).

AGI has raised no such "independent challenge" here and the plain language of the AGI License Agreement supports that the parties did not intend to deviate from these presumptions. The "severability" provision of the Purchase Agreement, also incorporated into the AGI License Agreement, expressly provides that "[t]he invalidity or unenforceability of any provision hereof shall in no way affect the validity or enforceability of any other provision." [ECF No. 22-3 ¶ 11.1; ECF No. 22-4 ¶ 6.10]. Additionally, there is nothing in the broad Arbitration Provision indicating that the parties intended it to be time limited.

7 Similarly, Rule 7(a) of the current AAA's Commercial Rules, effective September 2022, states that the "arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim, without any need to refer such matters first to a court." Am. Arb. Ass'n, Com. Rules and Mediation Procs., Rule 7(a) (2022).

8 On remand in Henry Schein, 935 F.3d 274 (5th Cir. 2019), the Fifth Circuit concluded that the parties' contract, which incorporated the AAA Commercial Rules, did not delegate arbitrability of the claims at issue because there was a carve-out in the arbitration clause for actions seeking injunctive relief. Id. at 281–82. The Fifth Circuit noted, however, that, in the absence of such a carve-out, incorporation of the AAA's rules is evidence of intent to arbitrate arbitrability. Id. at 279–81. Both parties sought further Supreme Court review, Schein regarding the Fifth Circuit's holding with respect to the contractual carve-out provision, see Cert. Pet., Henry Schein, Inc. v. Archer and White Sales, Inc., No. 19-963, 2020 WL 529195, at *I (Jan. 31, 2020), and Archer and White regarding whether incorporation of the AAA's rules is clear and unmistakable evidence of intent to arbitrate arbitrability, see Conditional Cross-Pet., Archer and White Sales, Inc. v. Henry Schein, Inc., No. 19-1080, 2020 WL 1391910, at *I (Mar. 2, 2020). The Supreme Court granted Schein's petition, see Henry Schein, Inc. v. Archer and White Sales, Inc., 141 S. Ct. 107 (2020), but denied Archer and White's, see Archer and White Sales, Inc. v. Henry Schein, Inc., 141 S. Ct. 113 (2020), suggesting that it was not troubled by the state of the law regarding the incorporation of the AAA rules. After oral argument regarding the issue raised in Schein's appeal, the Supreme Court dismissed the writ of certiorari as improvidently granted. Henry Schein, Inc. v. Archer and White Sales, Inc., 141 S. Ct. 656 (2021).

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Stiffler v. Hydroblend, Inc., Idaho, September 8, 2023

59 F.4th 1011
United States Court of Appeals, Ninth Circuit.

Teresa ARMSTRONG, Plaintiff-Appellant,
v.
MICHAELS STORES, INC.; Does, 1-100, inclusive, Defendants-Appellees.

No. 21-15397
|
Filed February 13, 2023
|
Argued and Submitted July 26, 2022 San Francisco, California

Synopsis
Background: Employee filed putative class action in state court against employer alleging violations of state wage-and-hour laws. After removal, employee amended complaint to add claim under California's Private Attorney General Act (PAGA). The United States District Court for the Northern District of California, Lucy H. Koh, J., 2018 WL 6505997, granted employer's motion to compel arbitration and dismissed PAGA claim. Employee appealed.

[Holding:] The Court of Appeals, McKeown, Circuit Judge, held that employer did not waive its right to arbitrate employee's claim.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Compel Arbitration.

West Headnotes (9)

[1] **Alternative Dispute Resolution** Arbitration favored; public policy

There is no special rule favoring arbitration; rather, courts must hold party to its arbitration contract just as court would to any other kind, but may not devise novel rules to favor arbitration over litigation.

4 Cases that cite this headnote

[2] **Alternative Dispute Resolution** Waiver or Estoppel

It is error to require parties arguing waiver of right to arbitration to demonstrate prejudice because usual federal rule of waiver does not include prejudice requirement.

[3] **Alternative Dispute Resolution** Arbitration favored; public policy

There is no strong federal policy favoring enforcement of arbitration agreements.

5 Cases that cite this headnote

[4] **Alternative Dispute Resolution** Evidence

Although party opposing arbitration bears burden of showing waiver, burden is no longer heavy; instead, burden for establishing waiver of arbitration agreement is same as burden for establishing waiver in any other contractual context.

6 Cases that cite this headnote

[5] **Alternative Dispute Resolution** Waiver or Estoppel

Party asserting waiver of right to arbitrate dispute must demonstrate knowledge of existing right to compel arbitration and intentional acts inconsistent with that existing right.

18 Cases that cite this headnote

[6] **Alternative Dispute Resolution** Scope and standards of review

Court of Appeals reviews de novo question of whether undisputed facts of party's pretrial participation in litigation waived right to arbitrate dispute.

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[7] **Alternative Dispute Resolution** Suing or participating in suit

To assess whether party took acts inconsistent with its right to arbitration, court must consider totality of parties' actions, asking whether those actions holistically indicate conscious decision to seek judicial judgment on merits of arbitrable claims, which would be inconsistent with right to arbitrate.

14 Cases that cite this headnote

[8] **Alternative Dispute Resolution** Suing or participating in suit

Party generally acts inconsistently with exercising right to arbitrate when it (1) makes intentional decision not to move to compel arbitration and (2) actively litigates case's merits for prolonged period of time in order to take advantage of being in court.

17 Cases that cite this headnote

[9] **Alternative Dispute Resolution** Suing or participating in suit

Employer did not waive its right to arbitrate employee's claim that it was violating state wage-and-hour laws, even though it had removed case to federal court, participated in case management conference, and served interrogatories and requests for documents; employer pleaded arbitration as affirmative defense in its answers to both original complaint and amended complaint, explicitly and repeatedly stated its intent to move to compel arbitration in both case management statements and in initial case management conference before district court, and did not actively litigate case's merits for prolonged period.

1 Case that cites this headnote
More cases on this issue

***1012** Appeal from the United States District Court for the Northern District of California, Lucy H. Koh, District Judge, Presiding, D.C. No. 5:17-cv-06540-LHK

Attorneys and Law Firms

Thomas A. Segal (argued) and Shaun Setareh, Setareh Law Group, Beverly Hills, California, for Plaintiff-Appellant.

Aileen M. McGrath (argued), and Michael J. Weisbuch, Akin Gump Strauss Hauer & Feld LLP, San Francisco, California; Gregory W. Knopp and Jonathan S. Christie, Akin Gump Strauss Hauer & Feld LLP, Los Angeles, California; for Defendants-Appellees.

Before: M. Margaret McKeown and William A. Fletcher, Circuit Judges, and Richard D. Bennett, * District Judge.

OPINION

McKEOWN, Circuit Judge:

***1013** Litigation in this case was bookended by two Supreme Court decisions on arbitration. In *Epic Systems Corp. v. Lewis*, ––– U.S. ––––, 138 S. Ct. 1612, 200 L.Ed.2d 889 (2018), the Court held that arbitration agreements requiring individual arbitration, not class or collective arbitration, are enforceable, and in *Morgan v. Sundance, Inc.*, ––– U.S. ––––, 142 S. Ct. 1708, 212 L.Ed.2d 753 (2022), the Court concluded that the Federal Arbitration Act restricts courts from creating arbitration-favoring procedural rules. These two cases inform our resolution of this appeal.

Teresa Armstrong agreed to arbitrate any disputes regarding the terms and conditions of her employment with Michaels Stores, Inc. But, when a dispute arose, Armstrong filed a complaint in federal district court. The district court ordered Armstrong to take her claim to arbitration, and the arbitrator ruled in favor of Michaels. Armstrong now appeals the district court's order compelling arbitration. She argues that Michaels waited too long to move for arbitration and therefore waived its right to the arbitral forum.

We affirm the district court's order because the record does not establish that Michaels chose to forego arbitration. Michaels repeatedly reserved its right to arbitration, did not ask the district court to weigh in on the merits, and did not engage in any meaningful discovery. Indeed, the only significant motion filed was Michaels's motion to compel arbitration. Although

Michaels did not immediately move to compel arbitration, its actions do not amount to a relinquishment of the right to arbitrate.

I. BACKGROUND

Armstrong filed a putative class action against Michaels in California state court in October 2017, alleging violations of state wage-and-hour laws. Michaels answered, asserting its right to arbitration as an affirmative defense, and removed the action to federal district court under the Class Action Fairness Act. Armstrong then amended her complaint to add a claim under California's Private Attorney General Act ("PAGA"), and Michaels again answered and asserted its right to arbitration as an affirmative defense.

In February 2018, the parties submitted a joint case management statement listing the legal issues in the case, including whether Armstrong agreed to arbitrate her claims. Michaels represented that it planned to move to compel arbitration after conducting discovery. At the initial case management conference, Michaels reiterated its intent to move to compel arbitration. Discovery began in February 2018. Michaels served five interrogatories and required Armstrong to produce twenty-eight pages of documents relevant to Armstrong's non-arbitrable PAGA claim as well as her arbitrable claims. Except for a request for a stipulated protective order, neither party filed any discovery motions.

While discovery was ongoing, the Supreme Court decided *Epic Systems*, overruling Ninth Circuit precedent and holding that arbitration agreements that require individual arbitration, rather than class or collective actions, are enforceable under the Federal Arbitration Act. *See* 138 S. Ct. at 1632; *see also O'Connor v. Uber Techs., Inc.*, 904 F.3d 1087, 1094 (9th Cir. 2018) (explaining that *Epic Systems* foreclosed the argument that "arbitration agreements are unenforceable because they contain class action waivers that violate the National ***1014** Labor Relations Act of 1935"). Two weeks after the *Epic Systems* decision, Michaels wrote to Armstrong requesting that she voluntarily dismiss her non-PAGA claims in view of *Epic Systems.* Armstrong did not oblige. In a case management statement in July 2018, Michaels represented its intention to move to dismiss or compel arbitration.

Michaels moved to compel arbitration in August 2018. Armstrong opposed the motion on the grounds that Michaels had waived its right to arbitration due to delay. The district court ruled in favor of Michaels and sent the case to arbitration. The arbitrator awarded summary judgment to Michaels, and the district court dismissed Armstrong's PAGA claim. Armstrong timely appealed the district court's order compelling arbitration.

II. ANALYSIS

During the pendency of Armstrong's appeal, the Supreme Court issued a second decision central to the resolution of this case, holding that the plain language of the Federal Arbitration Act restricts courts from creating arbitration-favoring procedural rules. *See Morgan*, 142 S. Ct. at 1713–14. Prior to *Morgan*, to give voice to the FAA's "policy favoring enforcement of arbitration agreements," we held that waiver of the right to arbitration was disfavored. *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986). Like most circuits, we had crafted an arbitration-specific waiver test: parties arguing that their opponent waived the right to arbitrate bore "the heavy burden of demonstrating: (1) knowledge of an existing right to compel arbitration; (2) intentional acts inconsistent with that existing right; and (3) prejudice to the person opposing arbitration from such inconsistent acts." *Newirth ex rel. Newirth v. Aegis Senior Cmtys., LLC*, 931 F.3d 935, 940 (9th Cir. 2019).

[1] [2] The Court in *Morgan* clarified that the pro-arbitration "federal policy is about treating arbitration contracts like all others, not about fostering arbitration." 142 S. Ct. at 1713. Put differently, the pro-arbitration federal policy is "to make 'arbitration agreements as enforceable as other contracts, but not more so.' " *Id.* (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)). No longer is there a "special" rule favoring arbitration. Rather, courts "must hold a party to its arbitration contract just as the court would to any other kind" but "may not devise novel rules to favor arbitration over litigation." *Id.* And it is error to require parties arguing waiver of the right to arbitration to demonstrate prejudice because "the usual federal rule of waiver does not include a prejudice requirement." *Id.* at 1714. In short, contractual waiver generally requires "an existing right, a knowledge of its existence, and an actual intention to relinquish it, or conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished," with no required showing of prejudice. *See United States ex rel. Army Athletic Ass'n v. Reliance Ins. Co.*, 799 F.2d 1382, 1387 (9th Cir. 1986) (internal quotation

marks omitted) (quoting *Mardirosian v. Lincoln Nat'l Life Ins. Co.*, 739 F.2d 474, 477 (9th Cir. 1984)).

[3] **[4]** **[5]** We recognize that *Morgan* overruled our prior precedents in two respects. First, *Morgan* teaches that there is no "strong federal policy favoring enforcement of arbitration agreements." *Fisher*, 791 F.2d at 694. The federal policy is to treat arbitration agreements like other contracts. Although the party opposing arbitration still bears the burden of showing waiver, the burden is no longer "heavy." ***1015** Instead, the burden for establishing waiver of an arbitration agreement is the same as the burden for establishing waiver in any other contractual context. Second, as we recently noted, *Morgan* abrogates our precedents to the extent they required the party opposing arbitration to demonstrate prejudice. *See Hill v. Xerox Bus. Servs.*, No. 20-35838, 59 F.4th 457, 468-69 (9th Cir. Feb. 3, 2023). In view of *Morgan*, the party asserting waiver must demonstrate: (1) knowledge of an existing right to compel arbitration and (2) intentional acts inconsistent with that existing right. *Id.*

[6] The parties agree that Armstrong satisfied the first prong, so we consider only whether Armstrong has established that Michaels's intentional acts were inconsistent with its right to compel arbitration. We review de novo the question of whether "the undisputed facts of [Michaels's] pretrial participation in the litigation" satisfy the waiver standard. *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1074 (9th Cir. 2013) (per curiam) (quoting *Fisher*, 791 F.2d at 693).

[7] **[8]** **[9]** Because there is no "concrete test," for assessing whether Michaels took acts inconsistent with its right to arbitration, "we consider the totality of the parties' actions." *Hill*, 59 F.4th at 471 (quoting *Newirth*, 931 F.3d at 941). We ask whether those actions holistically "indicate a conscious decision ... to seek judicial judgment on the merits of the arbitrable claims, which would be inconsistent with a right to arbitrate." *Id.* at 473 n.19 (quoting *Martin v. Yasuda*, 829 F.3d 1118, 1125 (9th Cir. 2016)). Under our precedent, a party generally "acts inconsistently with exercising the right to arbitrate when it (1) makes an intentional decision not to move to compel arbitration and (2) actively litigates the merits of a case for a prolonged period of time in order to take advantage of being in court." *Newirth*, 931 F.3d at 941. Neither of those circumstances is present here.

First, the record is unequivocal that Michaels did not make an intentional decision not to move to compel arbitration. In *Martin*, we concluded that the defendants intentionally refrained from moving to compel arbitration after they failed to raise their right to arbitrate for nearly a year after the case was filed and, after noting their right to arbitrate, "told the district judge and opposing counsel that they were likely 'better off' in federal court'" than in arbitration. 829 F.3d at 1126. In marked contrast, Michaels pleaded arbitration as an affirmative defense in its answers to both the original complaint and amended complaint, and explicitly and repeatedly stated its intent to move to compel arbitration in both case management statements and in the initial case management conference before the district court. Additionally, Michaels moved to compel arbitration promptly after the Supreme Court decided *Epic Systems* and Armstrong declined to dismiss her non-PAGA claims voluntarily. Although a "party's extended silence and delay in moving for arbitration may indicate a 'conscious decision to continue to seek judicial judgment on the merits of [the] arbitrable claims,' " *id.* at 1125 (alteration in original), Michaels was consistently vocal about its intent to move to compel arbitration.

Second, Michaels did not actively litigate the merits of the case for a prolonged period to take advantage of being in court. Obviously, "[s]eeking a decision on the merits of a key issue in a case indicates an intentional and strategic decision to take advantage of the judicial forum." *Newirth*, 931 F.3d at 941. For good reason, we have held that a defendant waived the right to arbitrate after litigating in federal court ***1016** for two years and then filing a motion to dismiss on the merits. *See Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 759 (9th Cir. 1988). Likewise, a party that litigated in federal court for over a year, filed a motion to dismiss "on a key merits issue," and received an adverse ruling before moving to compel arbitration was found to have waived the right to arbitration. *Martin*, 829 F.3d at 1126. Unlike either *Van Ness* or *Martin*, Michaels never wavered from the view that it had a right to arbitration, as evidenced by Michaels moving to compel arbitration within a year after Armstrong filed the complaint, never seeking or obtaining a ruling on the merits, and never waffling about whether to arbitrate or stay in district court. Finally, Michaels's limited discovery requests did not evince a decision to take advantage of the judicial forum. The very limited requests were related at least in part to Armstrong's non-arbitrable PAGA claim. *See Fisher*, 791 F.2d at 697.

Following *Epic Systems* and *Morgan*, we recognize that there is no longer a thumb on the scale in favor of arbitration, and that the party opposing arbitration no longer bears a

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"heavy burden" to show waiver of the right to arbitration. Even in this new landscape, Armstrong has failed to establish that Michaels acted inconsistently with exercising its right to arbitrate. We affirm the district court's order compelling arbitration.

AFFIRMED.

All Citations

59 F.4th 1011, 23 Cal. Daily Op. Serv. 1395, 2023 Daily Journal D.A.R. 1143

Footnotes

* The Honorable Richard D. Bennett, United States District Judge for the District of Maryland, sitting by designation.

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CEBV, LLC, as assignee of AMERIS BANK, Plaintiff, v. **ABC HOLDCO, Inc., *et al.*,** Defendants.	SUPERIOR COURT OF NEW JERSEY GLOUCESTER COUNTY LAW DIVISION DOCKET NO. GLO-L-00856-22 Civil Action

THIS MATTER having come before the Court on the application of Lamb McErlane, PC, attorneys for Clear Blue Specialty Insurance Company ("Clear Blue") for an Order, pursuant to Rule 4:6-2(e), dismissing Plaintiff's Complaint against it with prejudice, and the Court having considered the papers submitted in support thereof and in any opposition thereto, oral argument from the parties, and for good cause shown:

IT IS ORDERED that Defendant Clear Blue's Motion is hereby **GRANTED**. Count~~s~~ II ~~and IX~~ of Plaintiff's Complaint against Clear Blue ~~are~~ is dismissed with prejudice.

This the 15 day of December, 2022.

This motion was:

xx Opposed

____ Unopposed

/S/ James R Swift
Hon. James R. Swift, J.S.C.

Defendant's motion to dismiss Count IX (aiding and abetting) is hereby stayed pending the outcome of the Florida action consistent with the prior order of this court. Should plaintiff be unsuccessful in the Florida action, this motion along with those similar will be re-heard.

DARAG Deutschland AG v LOGO, LLC
2022 NY Slip Op 30683(U)
March 3, 2022
Supreme Court, New York County
Docket Number: Index No. 654800/2021
Judge: Laurence Love
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE LOVE** **PART** **63M**

Justice

---X

DARAG DEUTSCHLAND AG

Petitioner,

- v -

LOGO, LLC,

Respondent.

---X

INDEX NO. 654800/2021

MOTION DATE 09/24/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for STAY .

Upon the foregoing documents, it is

The following read on a Notice of Petition to i) grant a permanent stay of Arbitration, per CPLR 7503, for Respondent's failure to prove Petitioner was properly served with a valid Arbitration Demand per CPLR 7503; ii) that the dispute between DARAG Deutschland AG ("DARAG") and LOGO, LLC ("LOGO") is an arbitrable claim per the narrow terms of the Arbitration Clause; iii) the assigned rights and reinsurance recoverables assigned to LOGO includes recoverables owed by DARAG/Imperio; iv) that LOGO has standing to demand Arbitration per the terms of the Assignment and Surplus Treaties; or v) that Respondent's claims are not barred by the statute of limitations and/or barred by LOGO's failure to present claims within a reasonable time; and

LOGO cross-moves for security costs, per CPLR 8501(a). This litigation involves an aggregate amount of $306,657.00 generated by uncollected reinsurance recoverables in relation to a Liquidation.

BACKGROUND

Baltica Skandinavia Reinsurance Company of America, Inc. ("ICM") entered into Non-Obligatory First Surplus Retrocession Agreements with multiple Retrocessionaires ("Surplus Treaties"), including Imperio Reinsurance Company (U.K.) Ltd. Imperio was part of Hanseatic U.K. and transferred its liabilities via a loss portfolio transfer to the German entity Hanseatic Ruck and was dissolved on March 16, 2012. DARAG Deutschland AG ("DARAG") then acquired the liabilities of Hanseatic Ruck on May 28, 2013. The Surplus Treaties contain an Arbitration Clause that stipulates New York as the location of arbitration. In 2013, ICM went into liquidation … The Liquidator asserted that under the treaties, ICM is entitled to reinsurance recoverables on paid losses and certain other balances totaling $303,657.00. The Liquidator sought an assignment of the Reinsurance recoverables to another entity. After negotiations, the Liquidator and Logo, LLC ("LOGO") entered into an Assignment Agreement which was affirmed by the Liquidation Court on July 21, 2017" (see NYSCEF Doc. No. 1 Pars. 6 – 8, 16).

The affirmation of Michael S. Chuven for Petitioner – DARAG affirms, "DARAG'S Petition should be granted because a valid agreement to arbitrate does not exist between DARAG and Respondent LOGO; the purported agreement to arbitrate has not been complied with: LOGO failed to effectuate proper service of its demand to arbitrate" (see NYSCEF Doc. No. 2 Par. 3).

The Surplus Treaties contain an Arbitration Clause

Article 16

> [i]f any dispute shall arise between the Reinsured and the Retrocessionaires with reference to the interpretation of this Agreement or their rights with respect to any transaction involved … such dispute, upon the written request of either party, shall be submitted to three arbitrators.
>
> Article 17
>
> In the event of the failure of Retrocessionaires hereon or any of them to pay any amount claimed to be due hereunder, Retrocessionaires

> hereon, at the request of the Reinsured, will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of each Court.

Respondent's affirmation states, "Article 17 of the Reinsurance Treaty authorizes the service of process, in the United States, upon the law firm of Mendes and Mount. Mendes has since relocated. Service was made by Registered Mail. Additionally, service was attempted directly upon DARAG by Registered Mail, Return Receipt Requested in Germany" (see NYSCEF Doc. No. 17 Pars. 15 – 16).

Respondent's affirmation continues, "Petitioner DARAG Deutschland AG is a foreign corporation. Section 8501(a) of the CPLR reads: Security for Costs. As of right. … [t]he Court or a judge thereof shall order security for costs to be given by the plaintiffs where none of them is a domestic corporation" (see NYSCEF Doc. No. 15 Pars. 4, 6).

Respondent highlights *Clement v. Durban*, "[s]ecurity for costs is a device ordinarily used against a nonresident plaintiff to make sure that if he loses the case he will not return home and leave defendant with the costs judgment that can be enforced only in plaintiff's home stated" and because by "directing a nonresident to post a bond, the defendant is protected from frivolous suits and is assured that, if successful, he will be able to recover costs from the plaintiff" (see *Clement v. Durban*, 147 AD3d 39 [2nd Dept 2016]).

"It is the opinion of this court that service by mail, in the fair sense of the statute, is effected on the date when the postal authorities deliver or first attempt to deliver the registered or certified mail" (see *In the Matter of Arbitration between Finest Restaurant Corp. and L&A Music*, 52 Misc. 2d 87, 275 NYS2d 1 [NY County 1966]).

> "New York 'favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting

> parties' (*Smith barney Shearson Inc. v. Sacharow*, 91 NY2d 39, 49-50 [1997]). Under the federal Arbitration Act, which governs any agreement to arbitrate contracts evidencing a transaction involving commerce, 'questions of arbitrability must be addressed with a healthy regard for the federal policy … [and] any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration' (*Singer v. Jefferies & Co., Inc.* 78 NY2d 76, 81-82 [1991]).

ADJUDGED that the petition to stay the subject arbitration is denied in all respects, and the petition is dismissed, with costs and disbursements to respondent; and it is further

ADJUDGED that the parties shall proceed to arbitration forthwith and respondent's counsel shall serve a copy of this judgment upon the arbitral tribunal.

3/3/2022
DATE

LAURENCE LOVE, J.S.C.

CHECK ONE:	X	**CASE DISPOSED**				**NON-FINAL DISPOSITION**		
		GRANTED	X	**DENIED**		**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**		**REFERENCE**

KeyCite Blue Flag – Appeal Notification
Petition for Certiorari Docketed by GRUPO UNIDOS POR EL CANAL S.A., ET AL. v. AUTORIDAD DEL CANAL DE PANAMA, U.S., December 19, 2023

78 F.4th 1252
United States Court of Appeals, Eleventh Circuit.

GRUPO UNIDOS POR EL CANAL, S.A., Sacyr, S.A., WeBuild, S.P.A., Jan De Nul, N.V., Plaintiffs-Appellants,
v.
AUTORIDAD DEL CANAL DE PANAMA, Defendant-Appellee.

No. 21-14408
|
Filed: 08/18/2023

Synopsis
Background: Consortium of companies that designed and constructed new set of locks to expand the Panama Canal brought actions seeking to vacate partial and final international arbitration awards in favor of canal authority on consortium's contractual claims. After actions were consolidated, the United States District Court for the Southern District of Florida, No. 1:20-cv-24867-RNS, Robert N. Scola, Jr., J., 2021 WL 5834296, denied consortium's motion to vacate awards and granted canal authority's cross-motion to confirm awards. Consortium appealed.

Holdings: The Court of Appeals, Marcus, Circuit Judge, held that:

[1] late-disclosed relationship between two of three arbitrators did not constitute "evident partiality" under Federal Arbitration Act (FAA) that would warrant vacating awards;

[2] late-disclosed relationship between arbitrator nominated by consortium and one of canal authority's attorneys did not constitute "evident partiality" that would warrant vacating awards;

[3] late-disclosed relationship between arbitrator nominated by canal authority and one of its attorneys in unrelated arbitration proceeding before subject arbitration proceeding began did not constitute "evident partiality" that would warrant vacating awards;

[4] late-disclosed relationship between arbitrator nominated by canal authority, in which arbitrator served as arbitrator in unrelated arbitration proceeding where member of canal authority's counsel represented a party, did not constitute "evident partiality" that would warrant vacating awards;

[5] public policy defense under New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards did not apply;

[6] defense under Convention for when tribunal was not in accordance with agreement of parties did not apply; and

[7] defense under Convention for inability of a party to present its case did not apply.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Withdraw as Counsel; Motion to Confirm Arbitration Award; Motion to Set Aside or Vacate Arbitration Award.

West Headnotes (24)

[1] **Alternative Dispute Resolution** What law governs

International arbitration awards in favor of canal authority on contractual claims by consortium of companies that designed and constructed new set of locks to expand the Panama Canal fell under New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and thus, Federal Arbitration Act (FAA) provided basis, if any, for vacatur of awards, since awards arose out of commercial relationship among parties that were not domiciled in United States, arbitration was seated in Florida, and parties agreed FAA would govern arbitration. 9 U.S.C.A. §§ 10(a), 201 et seq.

More cases on this issue

[2] **Alternative Dispute Resolution** Enforcement and recognition of awards

Court of Appeals reviews denial of motion to vacate and confirmation of international arbitration awards de novo.

[3] **Alternative Dispute Resolution** Impeachment or Vacation

Federal court can vacate arbitral award only in exceptional circumstances.

[4] **Alternative Dispute Resolution** Nature and Form of Proceeding

Alternative Dispute Resolution Review, Conclusiveness, and Enforcement of Award

In accordance with the liberal federal policy favoring arbitration, arbitration is a complete method of dispute resolution, not merely a prelude to a more cumbersome and time-consuming judicial review process.

[5] **Alternative Dispute Resolution** Finality

An arbitral award should almost always represent the end, not the start, of a legal dispute.

[6] **Alternative Dispute Resolution** Enforcement and recognition of awards

Presumption against vacatur of an arbitral award applies with even greater force when federal court reviews award rendered during international arbitration.

[7] **Alternative Dispute Resolution** Enforcement and recognition of awards

The goal of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the principal purpose underlying American adoption and implementation of it, is to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced, in recognition of the fact that the complex system of international commerce functions only if its disputes are given consistent and predictable resolutions around the world. 9 U.S.C.A. § 201 et seq.

[8] **Alternative Dispute Resolution** Competency

Alternative Dispute Resolution Proceedings

Under both federal arbitration law and International Chamber of Commerce rules of arbitration, arbitrators must disclose to parties any dealing that might create impression of possible bias.

[9] **Alternative Dispute Resolution** Proceedings

Federal Arbitration Act (FAA) allows for arbitration award to be vacated due to evident partiality of arbitrator when arbitrator knows of, but fails to disclose, information which would lead reasonable person to believe that potential conflict exists. 9 U.S.C.A. § 10(a)(2).

[10] **Alternative Dispute Resolution** Prejudice or partiality and interest in subject matter

Movant seeking to vacate arbitration award may prove evident partiality in the arbitrator when either actual conflict exists or arbitrator knows of, but fails to disclose, information which would lead reasonable person to believe that potential conflict exists. 9 U.S.C.A. § 10(a)(2).

[11] **Alternative Dispute Resolution** Prejudice or partiality and interest in subject matter

The evident partiality exception under the Federal Arbitration Act (FAA) to enforcement of an arbitral award is to be strictly construed, and the alleged partiality of the arbitrator must be direct, definite, and capable of demonstration

rather than remote, uncertain, and speculative. 9 U.S.C.A. § 10(a)(2).

[12]
Alternative Dispute Resolution Proceedings

Late-disclosed relationship between two of three arbitrators, in which one arbitrator nominated second arbitrator to serve as president of separate arbitration tribunal during course of subject arbitration, did not constitute "evident partiality" under Federal Arbitration Act (FAA) that would warrant vacating international arbitration awards in favor of canal authority on contractual claims by consortium of companies that designed and constructed new set of locks to expand the Panama Canal; there was absence of any undisclosed business relationship or dealings between arbitrators, and there were sound and impartial reasons for appointment of second arbitrator, as he had extensive experience with construction arbitration cases. 9 U.S.C.A. § 10(a)(2).

More cases on this issue

[13]
Alternative Dispute Resolution Proceedings

Late-disclosed relationship of arbitrator nominated by consortium of companies that designed and constructed new set of locks to expand the Panama Canal, in which arbitrator and one of canal authority's attorneys served as co-arbitrators in unrelated arbitration while subject arbitration was ongoing, did not constitute "evident partiality" under Federal Arbitration Act (FAA) that would warrant vacating international arbitration awards in favor of canal authority on consortium's contractual claims; assuming arbitrator would be improperly influenced by co-arbitrator in unrelated proceeding, contrary to arbitrator's affirmation of neutrality and independence in subject arbitration, would be remote, uncertain, and speculative. 9 U.S.C.A. § 10(a)(2).

More cases on this issue

[14]
Alternative Dispute Resolution Proceedings

Late-disclosed relationship of arbitrator nominated by canal authority, in which arbitrator and one of canal authority's attorneys served as co-arbitrators in unrelated arbitration proceeding before subject arbitration proceeding began, did not constitute "evident partiality" under Federal Arbitration Act (FAA) that would warrant vacating international arbitration awards in favor of canal authority on contractual claims by consortium of companies that designed and constructed new set of locks to expand the Panama Canal; arbitrator was experienced and sought-after arbitrator in field of construction arbitration, such that fact that arbitrator and canal authority's counsel overlapped in unrelated, prior arbitration was not a conflict. 9 U.S.C.A. § 10(a)(2).

More cases on this issue

[15]
Alternative Dispute Resolution Prejudice or partiality and interest in subject matter

Standing alone, the fact that an arbitrator had previous contacts with counsel for one of the parties does not suggest "evident partiality," as a ground for vacating an award under the Federal Arbitration Act (FAA). 9 U.S.C.A. § 10(a)(2).

[16]
Alternative Dispute Resolution Proceedings

Late-disclosed relationship of arbitrator nominated by canal authority, in which arbitrator served as arbitrator in unrelated arbitration proceeding where member of canal authority's counsel represented a party, did not constitute "evident partiality" under Federal Arbitration Act (FAA) that would warrant vacating international arbitration awards in favor of canal authority on contractual claims by consortium of companies that designed and constructed new set of locks to expand the Panama Canal; repeated appearances among elite members of small international arbitration community established only familiarity, and familiarity did not indicate bias. 9 U.S.C.A. § 10(a)(2).

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[17] **Alternative Dispute Resolution** Prejudice or partiality and interest in subject matter

Repeated appearances establish only familiarity, and familiarity does not indicate bias that would suggest "evident partiality," as a ground for vacating an award under the Federal Arbitration Act (FAA). 9 U.S.C.A. § 10(a)(2).

[18] **Alternative Dispute Resolution** Enforcement and recognition of awards

Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the public policy defense to an arbitral award is construed narrowly in light of the presumption favoring enforcement of international arbitral awards. 9 U.S.C.A. § 207.

[19] **Alternative Dispute Resolution** Proceedings

Public policy defense under New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, based on arbitrators' late-disclosed relationships among each other and with canal authority's counsel, did not apply to prevent confirmation of international arbitration awards in favor of canal authority on contractual claims by consortium of companies that designed and constructed new set of locks to expand the Panama Canal, even though there was public policy in United States against evident partiality of arbitrators; late-disclosed relationships did not amount to evident partiality. 9 U.S.C.A. §§ 10(a)(2), 207.

More cases on this issue

[20] **Alternative Dispute Resolution** Enforcement and recognition of awards

To vacate an international arbitration award pursuant to the public policy defense under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the moving party must prove violations of an explicit public policy that is well-defined and dominant and is ascertained by reference to laws and legal precedents, not from general considerations of supposed public interests. 9 U.S.C.A. § 207.

[21] **Alternative Dispute Resolution** Enforcement and recognition of awards

The public policy defense to an arbitral award under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards applies only when confirmation or enforcement of a foreign arbitration award would violate the forum state's most basic notions of morality and justice. 9 U.S.C.A. § 207.

[22] **Alternative Dispute Resolution** Enforcement and recognition of awards

The party opposing enforcement of an international arbitral award pursuant to the public policy defense under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has the burden of proving the violation of an explicit public policy. 9 U.S.C.A. § 207.

[23] **Alternative Dispute Resolution** Proceedings

Defense under New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards for when tribunal was not in accordance with agreement of parties, based on arbitrators' late-disclosed relationships among each other and with canal authority's counsel, did not apply to prevent confirmation of international arbitration awards in favor of canal authority on contractual claims by consortium of companies that designed and constructed new set of locks to expand the Panama Canal; parties agreed to follow International Chamber of Commerce rules of arbitration, and proper procedure under rules was followed in

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appointing arbitrators and resolving consortium's challenge to late disclosures. 9 U.S.C.A. § 207.

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[24] **Alternative Dispute Resolution** Proceedings

Defense under New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards for inability of a party to present its case, based on arbitrators' late-disclosed relationships among each other and with canal authority's counsel, did not apply to prevent confirmation of international arbitration awards in favor of canal authority on contractual claims by consortium of companies that designed and constructed new set of locks to expand the Panama Canal, even if defense required adherence to basic due process principles of United States; consortium had robust opportunity to present evidence and confront canal authority's evidence. U.S. Const. Amend. 5; 9 U.S.C.A. § 207.

More cases on this issue

***1256** Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:20-cv-24867-RNS

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Before William Pryor, Chief Judge, and Hull, and Marcus, Circuit Judges.

Opinion

Marcus, Circuit Judge:

This appeal requires us to decide whether the losing party to an international arbitration can obtain a vacatur of the award because the arbitrators failed to disclose their involvement in unrelated arbitrations. After Grupo Unidos por el Canal, S.A., received two adverse awards amounting to more than a quarter-billion dollars in an arbitration arising out of its construction work on the Panama Canal, Grupo Unidos sought wide-ranging disclosures from each of the three members of the panel pertaining to possible bias. Each arbitrator disclosed for the first time that he had served on panels in other, unrelated arbitrations in which an arbitrator or counsel involved in Grupo Unidos's arbitration also participated.

Following the disclosures of the new information, Grupo Unidos challenged the impartiality of the arbitrators before the International Court of Arbitration ("ICA") ***1257** of the International Chamber of Commerce. The ICA agreed that some arbitrators failed to make a few disclosures but, notably, did not find any basis for removal and rejected Grupo Unidos's challenges on the merits. Thereafter, Grupo Unidos moved -- unsuccessfully -- for the vacatur of the awards in the United States District Court for the Southern District of Florida. Autoridad del Canal de Panama, in turn, cross-moved for confirmation of the awards, which the district court granted.

Grupo Unidos timely appealed this decision in our Court, arguing that the awards should either be vacated or not confirmed under three different provisions of Article V of the New York Convention. But, after oral argument, this Court, sitting *en banc*, held that Chapter 1 of the Federal Arbitration Act -- not Article V of the New York Convention -- provides the proper grounds for vacatur of international arbitration awards where the New York Convention governs and the United States is the primary jurisdiction. *Corporación AIC, SA v. Hidroeléctrica Santa Rita S.A.*, 66 F.4th 876, 880 (11th Cir. 2023) (en banc). Thus, the questions for us are whether the two arbitral awards at issue in this case should be vacated under Chapter 1 of the Federal Arbitration Act or not confirmed under Article V of the New York Convention.

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Because we agree with the International Court of Arbitration and the district court that Grupo Unidos has presented nothing that comes near the high threshold required for vacatur, we affirm the denial of vacatur and the confirmation of the awards.

I.

A.

Grupo Unidos, an incorporated consortium of European companies (collectively "Grupo Unidos"), won a multibillion-dollar bid to design and construct a new set of locks to expand the Panama Canal. Construction began in 2009, and the consortium planned to finish its work by October 2014. But after complications caused progress to be "severely delayed and disrupted," Grupo Unidos did not complete construction until over twenty months past the deadline. Liability disputes soon followed. As of last count, the parties had entered into seven arbitrations; this appeal concerns one of them -- the Panama 1 Arbitration, where Grupo Unidos brought several contractual claims against the canal authority, Autoridad del Canal de Panama.

Grupo Unidos's contract with the canal authority required that any disputes be resolved through arbitration in Miami, Florida, under the Rules of Arbitration of the International Chamber of Commerce ("ICC Rules"). Pursuant to the ICC Rules, both parties nominate one arbitrator for confirmation by the ICA. ICC Rules arts. 12(4), 13. Then, the ICA appoints a president of the tribunal, unless the parties agree upon a different procedure. *Id.* arts. 12(5), 13.

In March 2015, Autoridad del Canal nominated Dr. Robert Gaitskell, an engineer and a lawyer who specializes in construction cases. The next month, Grupo Unidos nominated Claus von Wobeser, a lawyer and the former president of the Mexican chapter of the ICC. The ICA confirmed both men in July 2015. The parties agreed on their own procedure to appoint a president, which led to the nomination of Pierre-Yves Gunter, a lawyer who heads the international arbitration group at a Swiss firm. The ICA confirmed him, too, in April 2016. All three arbitrators had considerable experience in international ***1258** arbitration, collectively boasting more than 500 arbitrations over the course of their combined careers, and each bringing relevant expertise to this construction contract dispute.

After confirmation, and with the panel all set, the ICC Rules required each arbitrator to submit "a statement of acceptance, availability, impartiality and independence," including "any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties" or "could give rise to reasonable doubts as to the arbitrator's impartiality." *Id.* art. 11(2)–(3). Accordingly, each of the three arbitrators submitted a form entitled "ICC Arbitrator Statement Acceptance, Availability, Impartiality and Independence."

Gaitskell accepted his appointment "with disclosure." He submitted a statement of impartiality in conformity with the ICC Rules. He also noted that, "[a]s the parties [were] aware, [he was] already a co-arbitrator in [an] associated case," which was one of the several other arbitrations over the canal. And he disclosed that he was an arbitrator in twenty-two pending proceedings, eight as a sole arbitrator or tribunal chair and fourteen as a co-arbitrator.

Von Wobeser checked off an identical statement of impartiality. In his "[a]nnex" to the statement, he also "confirm[ed] that there [were] no circumstances which could lead ... any of the parties in this arbitration to question [his] independence or impartiality of judgement in this case" and that he had "not had any professional, work relationship or any other nature with the parties to this arbitration." He acknowledged that "[b]oth ... counsel in this arbitration are important law firms active in international arbitration and therefore [he had] and ha[s] professional relationship[s] with both law firms," and that he "was appointed by Panama" in another international arbitration "which ha[d] already concluded." He reassured the parties that none of these circumstances "in any way affect [his] impartiality of judgement in the present arbitration." Finally, he reported that he was taking part in fourteen pending arbitrations: one as a sole arbitrator or tribunal chair, seven as a co-arbitrator, and six as counsel.

Gunter submitted two statements. In each, he indicated that he had "[n]othing to disclose," and ticked a box confirming the following statement:

> I am impartial and independent and intend to remain so. To the best of my knowledge, and having made due enquiry, there are no facts or circumstances, past or present, that I

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> should disclose because they might be of such a nature as to call into question my independence in the eyes of any of the parties and no circumstances that could give rise to reasonable doubts as to my impartiality.

He also noted that he was involved in twenty pending arbitrations -- eight as a sole arbitrator or tribunal chair, seven as a co-arbitrator, and five as counsel -- and two pending court litigations as counsel. At that time, neither party requested any additional information from any of the three arbitrators.

Over the next five years, the arbitration took place. The proceedings included over 3,500 pages of pleadings; 78 fact witnesses; 63 expert witnesses; over 3,500 exhibits; a 20-day merits hearing; and around 1,290 pages of post-hearing briefs. On September 21, 2020, the tribunal issued a Partial Award, which addressed liability and the main damages determinations. The Partial ***1259** Award dismissed most of Grupo Unidos's claims but awarded it $26,838,878.20. Meanwhile, the tribunal awarded Autoridad del Canal $265,299,500.00, resulting in a net win of $238,460,621.80 plus interest.

Three weeks after the Partial Award was rendered, Grupo Unidos began to question the impartiality of the arbitrators. On October 15, 2020 -- for the first time since the arbitration began five years earlier -- Grupo Unidos asked for additional disclosures from each of the arbitrators of "any facts or circumstances that may affect [the arbitrators'] independence in the eyes of any of the Parties or that could give rise to reasonable doubts as to their impartiality." More specifically, it asked each of them to describe the relationships amongst and between the arbitrators, and with other arbitrators in related arbitration matters between the parties, and with the parties' counsel in any related or unrelated and pending or closed arbitrations.

Gunter, writing for the tribunal, responded that these requests were "different and much broader than" the examples given in the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration. Nevertheless, each member of the tribunal provided additional disclosures. Gunter wrote that he had no disclosures "pursuant to the applicable rules as [he] under[stood] them," but offered some additional disclosures based on Grupo Unidos's request that went "beyond [his] disclosure obligations." Von Wobeser followed suit with a few additional disclosures but "reaffirm[ed] that there are no circumstances that could lead any of the Parties in this arbitration to question [his] independence or impartiality of judgment in this case." Gaitskell offered disclosures of his own, also denying any improper relationships.

Dissatisfied with these additional disclosures, Grupo Unidos sought more, this time asking for information on any relationships between Gunter's firm and the parties since 2013 in any unrelated matters, and the process that led to Gunter's and Gaitskell's appointments in other arbitrations. The arbitrators once again responded, providing still more contacts between themselves and the parties.

Four disclosures made during these inquiries are relevant to this appeal. First, while the Panama 1 Arbitration was pending, Gaitskell served as an arbitrator in an unrelated arbitration in which Gaitskell and his co-arbitrator nominated (and the ICA confirmed) Gunter to serve as tribunal president. That arbitration involved entirely different counsel and different parties. Second, while the Panama 1 Arbitration was ongoing, von Wobeser served as an arbitrator in an unrelated arbitration with a co-arbitrator Andres Jana, who serves as one of Autoridad del Canal's attorneys in the instant arbitration. Third, several years before the Panama 1 Arbitration began, Gaitskell served as an arbitrator in an unrelated arbitration with another co-arbitrator James Loftis, also one of Autoridad del Canal's attorneys. Fourth, since 2016, Gaitskell has been serving as an arbitrator in an unrelated arbitration in which a different party is represented by Manus McMullan, another of Autoridad del Canal's attorneys in the Panama 1 Arbitration.

Prior to the issuance of a Final Award, Grupo Unidos filed an application with the ICA seeking the removal of each of the tribunal members based on three of these four disclosures and other, similar pieces of information. *See* ICC Rules art. 14. Grupo Unidos argued that "all three members of the Tribunal ... withheld important ***1260** connections" that were "highly problematic" and that brought their neutrality into question. After weeks of proceedings, including written submissions and arguments, the ICA found that there was no conflict warranting disqualification, concluding that there was no merit in any of Grupo Unidos's challenges. The ICA did observe that Gaitskell should have disclosed his arbitration where McMullan appeared, and that von Wobeser should have disclosed his arbitration when he was serving with Jana. But none of these facts led it to question the arbitrators' independence or impartiality, and the ICA rejected Grupo Unidos's challenges.

Having survived an attempt to disqualify each of its members, the tribunal issued a Final Award on February 17, 2021. The award addressed the remaining issues of liability and the main damages determination, ultimately resulting in a final award of some $285 million for Autoridad del Canal. [1] Grupo Unidos has since paid the damages in full.

On November 25, 2020, while its challenge to the arbitrators was still pending with the ICA, Grupo Unidos moved to vacate the Partial Award in the Southern District of Florida. A few months later, on April 19, 2021, Grupo Unidos moved to vacate the Final Award in a separate action. Grupo Unidos made the same basic argument that the arbitrators had evinced evident partiality, asserting that the arbitrators' nondisclosures implicated three defenses to the enforcement of the award under the New York Convention, the agreement that governs international arbitration that the United States has joined and is codified in Chapter 2 of the Federal Arbitration Act ("FAA"). *See* 9 U.S.C. § 201 *et seq.*; *see also* Compl., *Grupo Unidos por el Canal, S.A. v. Autoridad Del Canal De Panama*, No. 21-cv-21509 (S.D. Fla. Apr. 19, 2021). Specifically, Grupo Unidos pointed to Articles V(2)(b), V(1)(d), and V(1)(b) of the New York Convention, provisions that protect the losing party from the enforcement of an international arbitral award if, respectively, enforcement "would be contrary to the public policy" of the United States, the "arbitral procedure was not in accordance with the agreement of the parties," or the party was "unable to present his case." *See* New York Convention arts. V(1)(b), V(1)(d), V(2)(b).

The district court consolidated both cases and directed the parties to file a consolidated motion to vacate and a consolidated cross-motion to confirm the awards. The district court found that none of the three New York Convention defenses applied to the awards, and it concluded that Grupo Unidos's arguments "depend[ed] on multiple speculative assumptions, each assuming the worst in [the arbitrators'] character," and that "[n]o reasonable person would follow [Grupo Unidos] down this conspiratorial web." Thus, the court denied Grupo Unidos's motion to vacate and granted Autoridad del Canal's cross-motion to confirm the awards.

B.

Prior to this Court's recent *en banc* opinion in *Corporación AIC*, our case law had long held that international arbitral awards rendered by tribunals seated in the United States were subject to vacatur on ***1261** the grounds found in Article V of the New York Convention. *Corporación AIC* overruled our prior case law, ruling instead that "in a New York Convention case where the arbitration is seated in the United States, or where United States law governs the conduct of the arbitration, Chapter 1 of the FAA provides the grounds for vacatur of an arbitral award." 66 F.4th at 890.

[1] It is undisputed that this case falls under the New York Convention because the awards arose out of a commercial relationship among parties that are not domiciled in the United States; that this arbitration was seated in Miami, Florida; that the parties agreed the FAA would govern the arbitration; and, therefore, that the FAA provides the proper basis, if any, for vacatur. The parties further agreed that, although the initial round of briefing focused on the New York Convention, the dispute over vacatur really boiled down to an argument about the FAA's evident partiality exception. Grupo Unidos added that its Article V arguments remain valid grounds for this Court to refuse confirmation of the awards, even if vacatur was inappropriate.

We agree with the parties that *Corporación AIC* changed the statutory foundation for vacatur, but it did not affect our analysis in any real way, or the results we reach. The parties' arguments on vacatur -- while framed as arising out of the New York Convention -- were really grounded in the FAA, so we will consider them as FAA arguments. And their disputes about confirmation are properly based on the New York Convention. With that, we turn to the merits.

II.

[2] We review the denial of a motion to vacate and the confirmation of international arbitration awards *de novo*. *Técnicas Reunidas de Talara S.A.C. v. SSK Ingeniería y Construcción S.A.C.*, 40 F.4th 1339, 1343 (11th Cir. 2022); *Gianelli Money Purchase Plan & Tr. v. ADM Inv. Serv., Inc.*, 146 F.3d 1309, 1311 (11th Cir. 1998).

A.

[3] **[4]** **[5]** If there is one bedrock rule in the law of arbitration, it is that a federal court can vacate an arbitral award only in exceptional circumstances. *See Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568, 133 S.Ct. 2064,

186 L.Ed.2d 113 (2013); *Gianelli*, 146 F.3d at 1312. In accordance with this country's "liberal federal policy favoring arbitration," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) (citation omitted), our courts understand arbitration as a complete method of dispute resolution, not "merely a prelude to a more cumbersome and time-consuming judicial review process," *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 588, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008) (citation omitted). So, almost always, an arbitral award should represent the end, not the start, of a legal dispute. *See AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 508 F.3d 995, 1001 (11th Cir. 2007) ("Because arbitration is an alternative to litigation, judicial review of arbitration decisions is 'among the narrowest known to the law.' " (citation omitted)).

[6] **[7]** The presumption against vacatur applies with even greater force when a federal court reviews an award rendered during an international arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). As the ***1262** Supreme Court has explained, "[t]he goal of the [New York] Convention, and the principal purpose underlying American adoption and implementation of it, was ... to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced," in recognition of the fact that the complex system of international commerce functions only if its disputes are given consistent and predictable resolutions around the world. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974); *see also Mitsubishi Motors*, 473 U.S. at 629–31, 105 S.Ct. 3346. Against this legal backdrop, U.S. courts refrain from unilaterally vacating an award, rendered under international arbitral rules, in all but the most extreme cases. It is no surprise, then, that although the losing parties to international arbitrations often raise defenses to award enforcement before our courts, those efforts "rarely" succeed. *See Cvoro v. Carnival Corp.*, 941 F.3d 487, 496 (11th Cir. 2019) (citation omitted).

Grupo Unidos contends that the Panama 1 Arbitration presents this Court with one of those rare exceptions. It argues that the panel's non-disclosures concealed information related to the arbitrators' possible biases and thereby "deprived [Grupo Unidos] of ... [its] fundamental right to a fair and consensual dispute resolution process." In particular, it reasons that Gaitskell's nomination of Gunter to serve as president of another arbitral panel, a position that sometimes pays hundreds of thousands of dollars, possibly influenced Gunter to side with Gaitskell. And it asserts that the arbitrators' work with the canal authority's lawyers in other arbitrations allowed them to become familiar with each other, creating a potential conflict of interest.

[8] **[9]** Grupo Unidos is correct that both the ICC Rules and this country's arbitration law require arbitrators to disclose information liberally. Arbitrators must "disclose to the parties any dealing that might create an impression of possible bias." *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1338 (11th Cir. 2002) (quoting *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968)). And the FAA allows for "an arbitration award [to be] vacated due to the 'evident partiality' of an arbitrator" when "the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists." *Id.* at 1339 (citation omitted). So, Grupo Unidos's point that arbitrators should err on the side of greater, not lesser, disclosure is well-taken.

But to the extent that Grupo Unidos seeks to have the entire arbitral awards vacated under this standard simply because the arbitrators worked with each other and with related parties elsewhere, Grupo Unidos finds itself on much shakier footing. To rule for Grupo Unidos, we would need to hold, in essence, that mere indications of professional familiarity are reasonably indicative of possible bias.

[10] **[11]** Chapter 1 of the FAA offers four grounds that may permit the district court to "make an order vacating the award upon the application of any party to the arbitration." 9 U.S.C. § 10(a). Grupo Unidos points to only one of those four grounds: "where there was evident partiality or corruption in the arbitrators." *Id.* § 10(a)(2). A movant may prove evident partiality "when either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists." ***1263** *Univ. Commons*, 304 F.3d at 1339 (citation omitted). That said, "the 'evident partiality' exception is to be strictly construed," and "[t]he alleged partiality must be 'direct, definite and capable of demonstration rather than remote, uncertain and speculative.' " *Gianelli*, 146 F.3d at 1312 (quoting *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1202 (11th Cir. 1982)).

[12] Grupo Unidos points to four late-disclosed relationships as proof of evident partiality and grounds for vacatur under § 10(a)(2). The first point Grupo Unidos makes is that Dr. Gaitskell nominated Gunter to serve as the president

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of another tribunal during the course of the Panama 1 Arbitration. This falls far short of meeting the exacting standard for vacatur.

Grupo Unidos has not provided us with a single case where this Court considered the act of an appointment of one arbitrator by another in a separate case standing alone to be enough evidence to justify vacatur. *Cf. Lozano v. Md. Cas. Co.*, 850 F.2d 1470, 1473 (11th Cir. 1988) (holding that the fact "that arbitrators appoint each other to panels does not *per se* manifest 'evident partiality or corruption' " (citation omitted)). Nor can we find any. There must be more. Thus, for example, we keep an eye out for "undisclosed business relationship[s]" and "dealings" between arbitrators. *Commonwealth Coatings*, 393 U.S. at 147–49, 89 S.Ct. 337. But there was no evidence of any such dealings in this case. This record is barren of any indication that Gunter evinced bias or that he was in any way influenced in the Panama I Arbitration because he was selected to serve in another arbitration proceeding.

Nobody has disputed that there were many sound and impartial reasons for the parties to have chosen Gunter in this case. The record evidence also offers many sound and impartial reasons for Gaitskell's appointment of Gunter in the other arbitration. In one of Gunter's disclosures, Gunter wrote that when Gaitskell nominated him in the unrelated case, "Gaitskell ... explained to [Gunter] that [the tribunal was] looking for a President who had experience with construction arbitration cases." Indeed, the record also establishes the nature and extent of Gunter's extensive experience. He has served, at different times, as an arbitrator or counsel in over 220 arbitrations, as a member of the Board of Directors of the Singapore International Arbitration Centre, as a co-chair of the International Arbitration Committee of the American Bar Association, and as a member of the Arbitration Committee of the Geneva Chamber of Commerce's Industry and Services division. Additionally, he is regularly ranked in Who's Who Legal -- and, notably, recommended for his expertise in construction matters. Finally, we repeat that Gunter affirmed in this very case that he was "impartial and independent and intend[ed] to remain so." On this record, a reasonable person would not suspect bias simply because Gaitskell appointed Gunter in an unrelated proceeding.

[13] The second alleged conflict cited by Grupo Unidos is said to inhere in von Wobeser's service with Jana as co-arbitrators in an unrelated arbitration while the Panama 1 Arbitration was ongoing. Grupo Unidos cites *University Commons* to support its claim of evident partiality. The problem with the argument is that in *University Commons*, an arbitrator represented co-defendants in a different, ongoing case with a member of counsel appearing before him in the arbitration. 304 F.3d at 1340. Although we thought that relationship posed a potential conflict, the relationship ***1264** between co-arbitrators is fundamentally different than the relationship between two counsel representing co-defendants. Arbitrators do not represent a client. Their job is simple: to hear the case and apply the law in a fair, reasonable, and impartial manner.

Nothing in the record evidence we have seen would cause a reasonable person to suspect that von Wobeser somehow was improperly influenced by Jana. And von Wobeser himself affirmed that he was "impartial and independent and intend[ed] to remain so." Without anything more, it would be "remote, uncertain and speculative" to assume the arbitrator would violate his affirmation of neutrality and independence. *Gianelli*, 146 F.3d at 1312–13; *see also Lifecare Int'l, Inc. v. CD Med., Inc.*, 68 F.3d 429, 433–35 (11th Cir. 1995).

[14] **[15]** The third point Grupo Unidos makes is that Gaitskell served along with Loftis as co-arbitrators in a separate, unrelated arbitration before the Panama 1 Arbitration began, and Loftis now serves as a member of the canal authority's counsel. But "standing alone, the fact that an arbitrator ... had previous contacts with counsel for one of the parties does not suggest evident partiality." *Univ. Commons*, 304 F.3d at 1340. When an arbitrator and counsel had "frequent interactions" in various "arbitrations, mediations, and litigations prior to the arbitration in [that] case," this Court noted that "a large number of ... encounters" might "imply an inappropriately close association between arbitrator and counsel," but "[c]loser inspection reveal[ed]" that the interactions "result[ed] [from] the fact that both specialize[d] in construction law in Birmingham, Alabama." *Id.* at 1339–40. We concluded that "[s]uch familiarity due to confluent areas of expertise does not indicate bias." *Id.* at 1340.

Moreover, because Gaitskell served with Loftis as co-arbitrators in an unrelated case before the Panama 1 Arbitration had begun, the link is even more attenuated than von Wobeser and Jana's. Regardless, Gaitskell is an experienced and sought-after arbitrator in this field, and the fact that these individuals overlapped in unrelated, prior arbitrations was hardly a conflict at all, let alone a conflict that requires vacatur. *See Técnicas Reunidas*, 40 F.4th at 1345; *see*

also In re Andros Compania Maritima, S.A. (Marc Rich & Co., A.G.), 579 F.2d 691, 701–02 (2d Cir. 1978) (declining to vacate an award where an arbitrator failed to disclose his past service as co-arbitrator on nineteen panels with an interested party's agent).

[16] **[17]** For the fourth and final alleged conflict, Grupo Unidos cites the fact that Gaitskell serves as an arbitrator in an unrelated case where McMullan, a member of Autoridad del Canal's counsel, represented a party. We're hard pressed to see how this in any way questions Gaitskell's impartiality. Repeated appearances establish only familiarity, and familiarity "does not indicate bias." *Univ. Commons*, 304 F.3d at 1340. This connection, too, is a non-issue.

It is little wonder, and of little concern, that elite members of the small international arbitration community cross paths in their work. As one of the canal authority's expert witnesses testified, "[w]orldwide, there are only several dozen arbitrators who would be attractive candidates" for "a proceeding such as the Panama 1 Arbitration." We refuse to grant vacatur simply because these people worked together elsewhere. The record reveals no evidence of *actual* bias in the Panama 1 Arbitration. And as to *possible* bias, Grupo Unidos has established only that some of the arbitration's ***1265** participants were otherwise familiar with each other, and "familiarity due to confluent areas of expertise does not indicate bias." *Id.* We affirm the order of the district court denying the application to vacate.

B.

Having found no reason to vacate the awards under Chapter 1 of the FAA, 9 U.S.C. § 10(a)(2), the only remaining question is whether we should decline to confirm the awards under Article V of the New York Convention. *See Corporación AIC*, 66 F.4th at 884 & n.5; *see also* 9 U.S.C. § 207. Grupo Unidos suggests that three different provisions in Article V of the New York Convention -- Articles V(2)(b), V(1)(d), and V(1)(b) -- offer defenses to confirmation and provide separate reasons for denying confirmation. At the end of the day, these arguments are the same ones we have already rejected, although the nomenclature is a little different. We are, therefore, unpersuaded that any of these provisions offer a defense to confirmation.

1.

[18] **[19]** The first defense is whether any of the arbitrators' late-disclosed relationships violated Article V(2)(b) of the New York Convention, which provides a defense to an arbitral award if "[t]he recognition or enforcement of the award would be contrary to the public policy of that country." New York Convention art. V(2)(b). This defense, too, is "construed narrowly in light of the presumption favoring enforcement of international arbitral awards," *Cvoro*, 941 F.3d at 496, and is "rarely successful," *Técnicas Reunidas*, 40 F.4th at 1344.

[20] **[21]** **[22]** To vacate an award under the public policy defense, the moving party must prove "violations of an 'explicit public policy' that is 'well-defined and dominant' and is ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.' " *Cvoro*, 941 F.3d at 496 (citation omitted). "Put another way, the defense 'applies only when confirmation or enforcement of a foreign arbitration award would violate the forum state's most basic notions of morality and justice.' " *Técnicas Reunidas*, 40 F.4th at 1345 (citation omitted). "The party opposing enforcement of the award, here [Grupo Unidos], has the burden of proving" the violation. *Cvoro*, 941 F.3d at 495.

Undeniably, there is a public policy in the United States against "evident partiality." 9 U.S.C. § 10(a)(2); *see also Commonwealth Coatings*, 393 U.S. at 147, 89 S.Ct. 337. But, as we have already discussed, that public policy was not violated in this case. Thus, for the same reasons we denied the application to vacate on evident partiality grounds, we cannot refuse to confirm them.

2.

[23] Next up is whether the tribunal "was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place." New York Convention art. V(1)(d). The parties agreed to follow the ICC Rules and the FAA. Grupo Unidos argued that the composition of the tribunal violated both the ICC Rules and the FAA because the four late disclosures all evinced a level of partiality that Grupo Unidos would not have consented to. Again, the nondisclosures did not violate this country's prohibition ***1266** against evident

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partiality. So, here, we focus only on the claim that the arbitration violated the ICC Rules.

The record does not reflect an issue with the composition of the tribunal due to the arbitrators' late disclosures. The ICC Rules were properly followed and enforced. The parties appointed arbitrators, who affirmed their independence and disclosed any potential conflicts. ICC Rules art. 11(2)–(3). Grupo Unidos challenged the arbitrators based on the late disclosures, and the ICA followed the proper procedure when denying that challenge. *Id.* art. 14. True, the ICA noted that Gaitskell should have disclosed his case where McMullan appeared and that von Wobeser should have disclosed his case with Jana. But it did not disqualify either arbitrator for those reasons because it did not find any facts that led it to question either arbitrator's independence or impartiality. As for Gaitskell, the ICA said that the "mere fact" that the counsel appeared in front of him before "is not such as to cast reasonable doubts as to Mr Gaitskell's continued independence or impartiality," and that "is not changed by [his] failure to timely disclose this circumstance." As for von Wobeser, the ICA observed that, while "Mr von Wobeser's more recent role as arbitrator in an [International Centre for Settlement of Investment Disputes] case sitting together with Mr Jana should have been disclosed as a professional relationship pursuant to the ICC Note," the ICA "does not consider that role to be such that it calls into question Mr von Wobeser's continued independence or impartiality." Thus, while it may have been prudent for Gaitskell and von Wobeser to provide broader disclosures, the ICA did not find any reason to believe that these two arbitrators actually violated ICC Rule 11.

The record shows that "the parties 'explicitly settled on a form' for the arbitration, and 'their commitment [was] respected.' " *Andes Petroleum Ecuador Ltd. v. Occidental Expl. & Prod. Co.*, No. 21-3039-cv, 2023 WL 4004686, at *2 (2d Cir. June 15, 2023) (alteration in original) (citation omitted). Everything suggests that the ICA reasonably construed its own rules. *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte Int'l GmbH*, 921 F.3d 1291, 1304 (11th Cir. 2019), *overruled on other grounds by Corporación AIC*, 66 F.4th at 880. So, we see no reason to refuse confirmation of the awards.

3.

[24] The final issue raised is whether Grupo Unidos "was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present [its] case." New York Convention art. V(1)(b). Grupo Unidos argues that this provision mandates "[f]undamental procedural fairness." *See* Restatement (Third) of U.S. Law of Int'l Comm. Arb. § 4.11 cmt. a (Am. L. Inst. Proposed Final Draft, 2019). According to the Restatement, "this exception is interpreted narrowly and protects only against serious procedural defects that have a material effect on arbitral proceedings, rendering them fundamentally unfair." *Id.* Similarly, other courts have interpreted it to require the forum state's basic due process standards. *See Soaring Wind Energy, L.L.C. v. Catic USA Inc.*, 946 F.3d 742, 756 (5th Cir. 2020); *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 592 (7th Cir. 2001); *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145–46 (2d Cir. 1992). Even assuming the provision requires adherence to this country's basic due process principles, Grupo Unidos cannot succeed on this defense. The bare minimum of due process is an impartial proceeding, during which ***1267** the parties had the opportunity to present evidence and confront and rebut what is offered by the other side. *See Harper v. Pro. Prob. Servs. Inc.*, 976 F.3d 1236, 1241 (11th Cir. 2020). There is no indication in this record that Grupo Unidos did not have a robust opportunity to present evidence and confront the other side's evidence. And as we have already observed, there is no evidence of partiality in this proceeding.

Accordingly, we affirm the order of the district court denying the application for vacatur and confirming the arbitral awards. [2]

AFFIRMED.

All Citations

78 F.4th 1252, 30 Fla. L. Weekly Fed. C 106

Footnotes

1 The increase in amount due to the canal authority from the Partial Award to the Final Award came from a few lingering merits claims undisposed of at the Partial Award-stage, as well as costs due to the canal authority having prevailed on most claims.

2 The unopposed motion to withdraw as counsel by Caroline Edsall Littleton is also granted.

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KeyCite Yellow Flag - Negative Treatment
Not Followed on State Law Grounds Desert Regional Medical Center, Inc. v. Miller, Cal.App. 4 Dist., December 13, 2022

142 S.Ct. 1708
Supreme Court of the United States.

Robyn MORGAN, Petitioner
v.
SUNDANCE, INC.

No. 21-328
|
Argued March 21, 2022
|
Decided May 23, 2022

Synopsis
Background: Employee brought putative collective action against employer under the Fair Labor Standards Act (FLSA). The United States District Court for the Southern District of Iowa, John A. Jarvey, Chief Judge, 2019 WL 5089205, denied employer's motion to compel arbitration under the Federal Arbitration Act (FAA). Employer appealed. The United States Court of Appeals for the Eighth Circuit, Grasz, Circuit Judge, 992 F.3d 711, reversed and remanded. Certiorari was granted.

[Holding:] The Supreme Court, Justice Kagan, held that prejudice is not a condition of finding that a party, by litigating too long, waived its right to stay litigation or compel arbitration under the FAA; abrogating *Erdman Co. v. Phoenix Land & Acquisition, LLC*, 650 F. 3d 1115; *Joca-Roca Real Estate, LLC v. Brennan*, 772 F. 3d 945; *O. J. Distributing, Inc. v. Hornell Brewing Co.*, 340 F. 3d 345; *PaineWebber Inc. v. Faragalli*, 61 F. 3d 1063; *S & H Contractors, Inc. v. A. J. Taft Coal Co.*, 906 F. 2d 1507; *Miller Brewing Co. v. Fort Worth Distributing Co.*, 781 F. 2d 494; *ATSA of Cal., Inc. v. Continental Ins. Co.*, 702 F. 2d 172; and other cases.

Vacated and remanded.

Procedural Posture(s): Petition for Writ of Certiorari; On Appeal; Motion to Compel Arbitration.

West Headnotes (11)

[1] **Estoppel** Nature and elements of waiver

A federal court assessing waiver does not generally ask about prejudice.

18 Cases that cite this headnote
More cases on this issue

[2] **Estoppel** Nature and elements of waiver

"Waiver" is the intentional relinquishment or abandonment of a known right.

39 Cases that cite this headnote
More cases on this issue

[3] **Contracts** Waiver

Estoppel Nature and elements of waiver

To decide whether a waiver has occurred, the court focuses on the actions of the person who held the right and seldom considers the effects of those actions on the opposing party; this analysis applies to the waiver of a contractual right, as of any other.

38 Cases that cite this headnote
More cases on this issue

[4] **Contracts** Waiver

A contractual waiver normally is effective without proof of detrimental reliance.

1 Case that cites this headnote
More cases on this issue

[5] **Alternative Dispute Resolution** Constitutional and statutory provisions and rules of court

The Federal Arbitration Act's (FAA) policy favoring arbitration does not authorize federal courts to invent special, arbitration-preferring procedural rules. 9 U.S.C.A. § 1 et seq.

126 Cases that cite this headnote
More cases on this issue

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[6]

Alternative Dispute Resolution Constitutional and statutory provisions and rules of court

The policy of the Federal Arbitration Act (FAA) favoring arbitration is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts. 9 U.S.C.A. § 1 et seq.

66 Cases that cite this headnote
More cases on this issue

[7]

Alternative Dispute Resolution Constitutional and statutory provisions and rules of court

The policy of the Federal Arbitration Act (FAA) is to make arbitration agreements as enforceable as other contracts, but not more so. 9 U.S.C.A. § 1 et seq.

126 Cases that cite this headnote
More cases on this issue

[8]

Alternative Dispute Resolution Construction

Under the Federal Arbitration Act (FAA), a court must hold a party to its arbitration contract just as the court would to any other kind. 9 U.S.C.A. § 1 et seq.

102 Cases that cite this headnote
More cases on this issue

[9]

Alternative Dispute Resolution Constitutional and statutory provisions and rules of court

Despite Federal Arbitration Act's (FAA) policy favoring arbitration, a court may not devise novel rules to favor arbitration over litigation; if an ordinary procedural rule would counsel against enforcement of an arbitration contract, then so be it. 9 U.S.C.A. § 1 et seq.

188 Cases that cite this headnote
More cases on this issue

[10]

Alternative Dispute Resolution Constitutional and statutory provisions and rules of court

Federal Arbitration Act's (FAA) directive to a federal court to treat arbitration applications "in the manner provided by law" for all other motions is simply a command to apply the usual federal procedural rules, including any rules relating to a motion's timeliness, or, put conversely, it is a bar on using custom-made rules, to tilt the playing field in favor of, or against, arbitration. 9 U.S.C.A. § 6.

7 Cases that cite this headnote
More cases on this issue

[11]

Alternative Dispute Resolution Suing or participating in suit

Prejudice is not a condition of finding that a party, by litigating too long, waived its right to stay litigation or compel arbitration under the Federal Arbitration Act (FAA); abrogating *Erdman Co. v. Phoenix Land & Acquisition, LLC*, 650 F. 3d 1115; *Joca-Roca Real Estate, LLC v. Brennan*, 772 F. 3d 945; *O. J. Distributing, Inc. v. Hornell Brewing Co.*, 340 F. 3d 345; *PaineWebber Inc. v. Faragalli*, 61 F. 3d 1063; *S & H Contractors, Inc. v. A. J. Taft Coal Co.*, 906 F. 2d 1507; *Miller Brewing Co. v. Fort Worth Distributing Co.*, 781 F. 2d 494; *ATSA of Cal., Inc. v. Continental Ins. Co.*, 702 F. 2d 172; and other cases. 9 U.S.C.A. §§ 3, 4, 6.

31 Cases that cite this headnote
More cases on this issue

****1709** *Syllabus* [*]

***411** Petitioner Robyn Morgan worked as an hourly employee at a Taco Bell franchise owned by respondent Sundance. When applying for the job, Morgan signed an agreement to arbitrate any employment dispute. Despite that agreement, Morgan filed a nationwide collective action asserting that Sundance had violated federal law regarding overtime payment. Sundance initially defended against the

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lawsuit as if no arbitration agreement existed, filing a motion to dismiss (which the District Court denied) and engaging in mediation (which was unsuccessful). Then—nearly eight months after Morgan filed the lawsuit—Sundance moved to stay the litigation and compel arbitration under the Federal Arbitration Act (FAA). Morgan opposed, arguing that Sundance had waived its right to arbitrate by litigating for so long.

The courts below applied Eighth Circuit precedent, under which a party waives its right to arbitration if it knew of the right; "acted inconsistently with that right"; and "prejudiced the other party by its inconsistent actions." *Erdman Co. v. Phoenix Land & Acquisition, LLC*, 650 F.3d 1115, 1117. The prejudice requirement is not a feature of federal waiver law generally. The Eighth Circuit adopted that requirement because of the "federal policy favoring arbitration." *Id.*, at 1120. Other courts have rejected such a requirement. This Court granted certiorari to resolve the split over whether federal courts may adopt an arbitration-specific waiver rule demanding a showing of prejudice.

Held: The Eighth Circuit erred in conditioning a waiver of the right to arbitrate on a showing of prejudice. Federal courts have generally resolved cases like this one as a matter of federal law, using the terminology of waiver. The parties dispute whether that framework is correct. Assuming without deciding that it is, federal courts may not create arbitration-specific variants of federal procedural rules, like those concerning waiver, based on the FAA's "policy favoring arbitration." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765. That policy "is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 302, 130 S.Ct. 2847, 177 L.Ed.2d 567 ***412** (internal quotation marks omitted). Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation. See *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218–221, 105 S.Ct. 1238, 84 L.Ed.2d 158. The federal policy is about treating arbitration contracts like all others, not about fostering arbitration.

The text of the FAA makes clear that courts are not to create arbitration-specific procedural rules like the one here. Section 6 of the FAA provides that any application under the statute—including an application to stay litigation or compel arbitration—"shall be made and heard in the manner provided by law for the making and hearing of motions" (unless the statute says otherwise). A directive to treat arbitration applications "in the manner provided by law" for all other motions is simply a command to apply the usual federal procedural rules, including any rules relating to a motion's timeliness. Because the usual federal rule of waiver does not include a prejudice requirement, Section 6 instructs that prejudice is not a condition of finding that a party waived its right to stay litigation or compel arbitration under the FAA.

Stripped of its prejudice requirement, the Eighth Circuit's current waiver inquiry would focus on Sundance's conduct. Did Sundance knowingly relinquish the right to arbitrate by acting inconsistently with that right? On remand, the Court of Appeals may resolve that question, or determine that a different procedural framework (such as forfeiture) is appropriate. The Court's sole holding today is that it may not make up a new procedural rule based on the FAA's "policy favoring arbitration." Pp. 1712 - 1714.

992 F.3d 711, vacated and remanded.

KAGAN, J., delivered the opinion for a unanimous Court.

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Opinion

Justice KAGAN delivered the opinion of the Court.

***413** ****1710** When a party who has agreed to arbitrate a dispute instead brings a lawsuit, the Federal Arbitration Act

(FAA) entitles **1711 the defendant to file an application to stay the litigation. See 9 U.S.C. § 3. But defendants do not always seek that relief right away. Sometimes, they engage in months, or even years, of litigation—filing motions to dismiss, answering complaints, and discussing settlement—before deciding they would fare better in arbitration. When that happens, the court faces a question: Has the defendant's request to switch to arbitration come too late?

Most Courts of Appeals have answered that question by applying a rule of waiver specific to the arbitration context. Usually, a federal court deciding whether a litigant has waived a right does not ask if its actions caused harm. But when the right concerns arbitration, courts have held, a finding *414 of harm is essential: A party can waive its arbitration right by litigating only when its conduct has prejudiced the other side. That special rule, the courts say, derives from the FAA's "policy favoring arbitration."

We granted certiorari to decide whether the FAA authorizes federal courts to create such an arbitration-specific procedural rule. We hold it does not.

I

Petitioner Robyn Morgan worked as an hourly employee at a Taco Bell franchise owned by respondent Sundance. When applying for the job, she signed an agreement to "use confidential binding arbitration, instead of going to court," to resolve any employment dispute. App. 77.

Despite that agreement, Morgan brought a nationwide collective action against Sundance in federal court for violations of the Fair Labor Standards Act. Under that statute, employers must pay overtime to covered employees who work more than 40 hours in a week. See 29 U.S.C. § 207(a). Morgan alleged that Sundance routinely flouted the Act—most notably, by recording hours worked in one week as instead worked in another to prevent any week's total from exceeding 40. See App. 12.

Sundance initially defended itself against Morgan's suit as if no arbitration agreement existed. Sundance first moved to dismiss the suit as duplicative of a collective action previously brought by other Taco Bell employees. In that motion, Sundance suggested that Morgan either "join" the earlier suit or "refile her claim on an individual basis." *Id.*, at 39. But Morgan declined the invitation to litigate differently, and the District Court denied Sundance's motion. Sundance then answered Morgan's complaint, asserting 14 affirmative defenses—but none mentioning the arbitration agreement. Soon afterward, Sundance met in a joint mediation with the named plaintiffs in both collective actions. The other suit settled, but Morgan's did not. She and *415 Sundance began to talk about scheduling the rest of the litigation.

And then—nearly eight months after the suit's filing—Sundance changed course. It moved to stay the litigation and compel arbitration under Sections 3 and 4 of the FAA. See § 3 (providing for a stay of judicial proceedings on "issue[s] referable to arbitration"); § 4 (providing for an order "directing the parties to proceed to arbitration"). Morgan opposed the motion, arguing that Sundance had waived its right to arbitrate by litigating for so long. Sundance responded that it had asserted its right as soon as this Court's decision in *Lamps Plus, Inc.* v. *Varela*, 587 U. S. ——, 139 S.Ct. 1407, 203 L.Ed.2d 636 (2019), clarified that the arbitration would proceed on a bilateral (not collective) basis.

The courts below applied Eighth Circuit precedent to decide the waiver issue. See 992 F.3d 711, 713–715 (2021); No. 4:18–cv–316 (ND Iowa, June 28, 2019), App. to Pet. **1712 for Cert. 21–33. Under that Circuit's test, a party waives its contractual right to arbitration if it knew of the right; "acted inconsistently with that right"; and—critical here—"prejudiced the other party by its inconsistent actions." *Erdman Co. v. Phoenix Land & Acquisition, LLC*, 650 F.3d 1115, 1117 (C.A.8 2011). The prejudice requirement, as explained later, is not a feature of federal waiver law generally. See *infra*, at 1712 - 1713. The Eighth Circuit adopted the requirement in the arbitration context because of the "federal policy favoring arbitration." *Erdman*, 650 F.3d at 1120; see *id.*, at 1117.

Although the District Court found the prejudice requirement satisfied, the Court of Appeals disagreed and sent Morgan's case to arbitration. The panel majority reasoned that the parties had not yet begun formal discovery or contested any matters "going to the merits." 992 F.3d at 715. Judge Colloton dissented. He argued that Sundance had "led Morgan to waste time and money" opposing the motion to dismiss and "engaging in a fruitless mediation." *Id.*, at 717. *416 More fundamentally, he raised doubts about the Eighth Circuit's prejudice requirement. Outside the arbitration context, Judge Colloton observed, prejudice is not needed for waiver. See *id.*, at 716. In line with that general principle, he continued,

"some circuits allow a finding of waiver of arbitration without a showing of prejudice." *Id.*, at 716–717.

We granted certiorari, 595 U. S. ––––, 142 S.Ct. 482, 211 L.Ed.2d 292 (2021), to resolve that circuit split. Nine circuits, including the Eighth, have invoked "the strong federal policy favoring arbitration" in support of an arbitration-specific waiver rule demanding a showing of prejudice. [1] Two circuits have rejected that rule. [2] We do too.

II

We decide today a single issue, responsive to the predominant analysis in the Courts of Appeals, rather than to all the arguments the parties have raised. In their briefing, the parties have disagreed about the role state law might play in resolving when a party's litigation conduct results in the loss of a contractual right to arbitrate. The parties have also quarreled about whether to understand that inquiry as involving rules of waiver, forfeiture, estoppel, laches, or procedural timeliness. We do not address those issues. The Courts of Appeals, including the Eighth Circuit, have generally resolved cases like this one as a matter of federal law, ***417** using the terminology of waiver. For today, we assume without deciding they are right to do so. We consider only the next step in their reasoning: that they may create arbitration-specific variants of federal procedural rules, like those concerning waiver, based on the FAA's "policy favoring arbitration." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). They cannot. For that reason, the Eighth Circuit was wrong ****1713** to condition a waiver of the right to arbitrate on a showing of prejudice.

[1] **[2]** **[3]** **[4]** Outside the arbitration context, a federal court assessing waiver does not generally ask about prejudice. Waiver, we have said, "is the intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (internal quotation marks omitted). To decide whether a waiver has occurred, the court focuses on the actions of the person who held the right; the court seldom considers the effects of those actions on the opposing party. That analysis applies to the waiver of a contractual right, as of any other. As Judge Colloton noted in dissent below, a contractual waiver "normally is effective" without proof of "detrimental reliance." 992 F.3d at 716; see *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (C.A.7 1995) (Posner, C. J., for the Court). So in demanding that kind of proof before finding the waiver of an arbitration right, the Eighth Circuit applies a rule found nowhere else—consider it a bespoke rule of waiver for arbitration.

The Eighth Circuit's arbitration-specific rule derives from a decades-old Second Circuit decision, which in turn grounded the rule in the FAA's policy. See *Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 (C.A.2 1968); *Erdman*, 650 F.3d at 1120, n. 4 ("trac[ing] the origins of [the Eighth Circuit's] prejudice requirement to *Carcich*"). "[T]here is," the Second Circuit declared, "an overriding federal policy favoring arbitration." *Carcich*, 389 F.2d at 696. For that reason, the court held, waiver of the right to arbitrate "is not to be lightly inferred": "[M]ere delay" in seeking a stay ***418** of litigation, "without some resultant prejudice" to the opposing party, "cannot carry the day." *Ibid.* Over the years, both that rule and its reasoning spread. Circuit after circuit (with just a couple of holdouts) justified adopting a prejudice requirement based on the "liberal national policy favoring arbitration." *Carolina Throwing Co. v. S & E Novelty Corp.*, 442 F.2d 329, 331 (C.A.4 1971) (*per curiam*); see, *e.g.*, *PaineWebber Inc. v. Faragalli*, 61 F.3d 1063, 1068–1069 (C.A.3 1995); *Shinto Shipping Co. v. Fibrex & Shipping Co., Inc.*, 572 F.2d 1328, 1330 (C.A.9 1978).

[5] **[6]** **[7]** **[8]** **[9]** But the FAA's "policy favoring arbitration" does not authorize federal courts to invent special, arbitration-preferring procedural rules. *Moses H. Cone*, 460 U.S. at 24, 103 S.Ct. 927. Our frequent use of that phrase connotes something different. "Th[e] policy," we have explained, "is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 302, 130 S.Ct. 2847, 177 L.Ed.2d 567 (2010) (internal quotation marks omitted). Or in another formulation: The policy is to make "arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation. See *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218–221, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). If an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it. The federal policy is

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about treating arbitration contracts like all others, not about fostering arbitration. See *ibid.*; ****1714** *National Foundation for Cancer Research v. A. G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (C.A.D.C. 1987) ("The Supreme Court has made clear" that the FAA's policy "is based upon the enforcement of contract, ***419** rather than a preference for arbitration as an alternative dispute resolution mechanism").

[10] **[11]** And indeed, the text of the FAA makes clear that courts are not to create arbitration-specific procedural rules like the one we address here. Section 6 of the FAA provides that any application under the statute—including an application to stay litigation or compel arbitration—"shall be made and heard in the manner provided by law for the making and hearing of motions" (unless the statute says otherwise). A directive to a federal court to treat arbitration applications "in the manner provided by law" for all other motions is simply a command to apply the usual federal procedural rules, including any rules relating to a motion's timeliness. Or put conversely, it is a bar on using custom-made rules, to tilt the playing field in favor of (or against) arbitration. As explained above, the usual federal rule of waiver does not include a prejudice requirement. So Section 6 instructs that prejudice is not a condition of finding that a party, by litigating too long, waived its right to stay litigation or compel arbitration under the FAA.

Stripped of its prejudice requirement, the Eighth Circuit's current waiver inquiry would focus on Sundance's conduct. Did Sundance, as the rest of the Eighth Circuit's test asks, knowingly relinquish the right to arbitrate by acting inconsistently with that right? See *supra*, at 1711 - 1712. On remand, the Court of Appeals may resolve that question, or (as indicated above) determine that a different procedural framework (such as forfeiture) is appropriate. See *supra*, at 1712. Our sole holding today is that it may not make up a new procedural rule based on the FAA's "policy favoring arbitration."

* * *

For the reasons stated, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

All Citations

596 U.S. 411, 142 S.Ct. 1708, 212 L.Ed.2d 753, 22 Cal. Daily Op. Serv. 4707, 2022 Daily Journal D.A.R. 5158, 29 Fla. L. Weekly Fed. S 290

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 *Joca-Roca Real Estate, LLC v. Brennan*, 772 F.3d 945, 948 (C.A.1 2014); see *O. J. Distributing, Inc. v. Hornell Brewing Co.*, 340 F.3d 345, 355–356 (C.A.6 2003); *PaineWebber Inc. v. Faragalli*, 61 F.3d 1063, 1068–1069 (C.A.3 1995); *S & H Contractors, Inc. v. A. J. Taft Coal Co.*, 906 F.2d 1507, 1514 (C.A.11 1990); *Miller Brewing Co. v. Fort Worth Distributing Co.*, 781 F.2d 494, 497 (C.A.5 1986); *ATSA of Cal., Inc. v. Continental Ins. Co.*, 702 F.2d 172, 175 (C.A.9 1983); *Carolina Throwing Co. v. S & E Novelty Corp.*, 442 F.2d 329, 331 (C.A.4 1971) (*per curiam*); *Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 (C.A.2 1968).

2 See *St. Mary's Medical Center of Evansville, Inc., v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 590 (C.A.7 1992); *National Foundation for Cancer Research v. A. G. Edwards & Sons, Inc.*, 821 F.2d 772, 774, 777 (C.A.D.C. 1987).

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VARIOUS INSURERS, REINSURERS AND RETROCESSIONAIRES SUBSCRIBING TO POLICY NUMBERS 106/IN/230/0/0, 28807G19, B080130181G19 B080131297G19, B080127577G19, B080130231G19, B080130291G19, B080130328G19, B080128807G19 and B080130331G19 DBD as subrogee of SHARIKET KAHRABA HADJRET EN NOUSS,

Plaintiff,

v.

GENERAL ELECTRIC INTERNATIONAL, INC., GENERAL ELECTRIC COMPANY, GE POWER SERVICES ENGINEERING, GE POWER, and VARIOUS JOHN DOE CORPORATIONS,

Defendants.

Civil Action No.
1:21-cv-04751-VMC

ORDER

Before the Court is Defendants' Motion to Compel Arbitration or, Alternatively, to Dismiss the First Amended Complaint ("Motion," Doc. 21).[1] The Parties agreed to stay briefing and defer consideration of the Motion except as to

[1] Defendants' first Motion to Compel Arbitration (Doc. 15) is denied as moot.

the issue of arbitrability. (Doc. 25). Plaintiffs filed a Response in Opposition to the Motion ("Response," Doc. 26). Defendants filed a Reply in Support of the Motion ("Reply," Doc. 27).

Background

This case arises from a catastrophic equipment failure at the Hadjret En Nouss Power Plant located in Tipaza, Algeria (the "Power Plant"). On October 14, 2019, a GE 9371 Frame FB gas turbine Stage 1 Blade designed, manufactured, and installed by the Defendants[2] became detached, or "liberated," from its housing in a power train at the Power Plant while rotating at 3,000 revolutions per minute. This liberation resulted in significant damages to, among other things, the power train that housed the turbine blade, as well as the other components contained within the power train (the "Incident"). (Am. Compl. ¶ 1, Doc. 18). Shariket Kahraba Hadjret En Nouss ("SKH")—the owner of the Power Plant—alleges that it has sustained tens of millions of dollars in business interruption losses and property damage. (*Id.* ¶ 2). SKH has retained partial indemnification for said losses from its direct insurer, which has in turn been partially reimbursed by its reinsurers and retrocessionaires for sums it paid arising from the Incident. (*Id.*).

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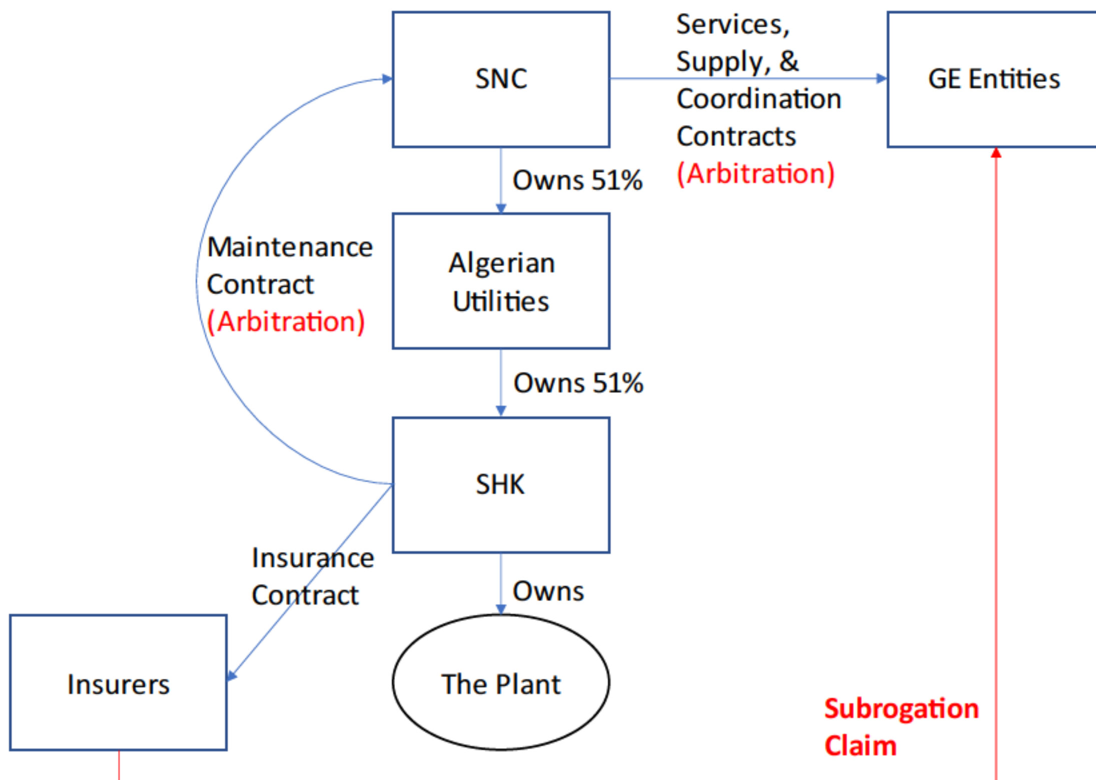
[2] The Court uses the term "Defendants" generally to refer to Defendants General Electric International, Inc., General Electric Company, GE Power Services Engineering and GE Power. While certain of the contracts at issue or products that were manufactured only concern one of these Defendants, the Court's use of the term "Defendants" should be read to refer to the relevant parties based on context.

Plaintiffs (as SKH's subrogees) now seek reimbursement from the Defendants for losses they have allegedly incurred in connection with the Incident that was caused by the Defendants. (*Id.* ¶ 3). Plaintiffs allege that Defendants (and possibly others) held themselves out to SKH, and others, as being capable of the safe and secure design, manufacture, and installation of a sophisticated piece of commercial equipment—i.e., the gas turbine blade that ultimately malfunctioned—and that Defendants failed in this regard. (*Id.*).

The Power Plant was constructed by SNC-Lavalin Constructeurs International Inc. ("SNC"). (*Id.* ¶ 43). SNC served as the operator of the Power Plant pursuant to an Operation and Maintenance Contract entered into between SKH and SNC on or about July 15, 2006 ("O&M Contract"), which contained an arbitration clause. (*Id.* ¶ 44; Mot. Ex. 6, Doc. 21-8). SNC, in that role, entered contracts with one or more of the Defendants, including a 2006 Supply Contract (Mot. Ex. 2), a 2006 Services Contract (*Id.* Ex. 1), a 2006 Installation Contract (*Id.* Ex. 3), and a 2006 Coordination Contract (*Id.* Ex. 4) (collectively, the "GE Contracts"). All of the GE Contracts contained arbitration clauses, as discussed below.

According to SNC's 2021 Annual Report, SNC owns a 26% interest in SKH (Resp. Ex. A at 34, Doc. 26-2). However, as Defendants assert in their Reply, "[t]he most widely read newspaper in Canada stated '*SKH is a recently created company … 51-per-cent owned by Algerian Utilities International Ltd.*, and 49-per-cent owned by

… the Algerian government …. *Algerian Utilities is 51-per-cent owned by SNC….'"* Reply at 4 n.4) (quoting Bertrand Marotte, *SNC Wins Contracts for Power Plant in Algeria*, The Globe & Mail (July 18, 2006)). Assuming for present purposes that this is accurate (and Plaintiffs have not suggested otherwise), the following graphic depicts the relationships between all of these entities.



Legal Standard

"Arbitration is a matter of contract and of consent." *JPay, Inc. v. Kobel*, 904 F.3d 923, 928 (11th Cir. 2018). "[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such

grievances to arbitration." *Id.* (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648–49 (1986)). "The Federal Arbitration Act ("FAA"), Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. § 1 et seq.), treats contractual agreements to arbitrate 'on an equal footing with other contracts,' and 'imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion." *Id.* at 928–29 (quoting *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010) and *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010), respectively)). "The FAA 'reflect[s] both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract.'" *Id.* at 929 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). "Where the parties have agreed to arbitrate their dispute, the job of the courts -- indeed, the obligation -- is to enforce that agreement." *Id.* (citing *Stolt-Nielsen*, 559 U.S. at 682). "At the same time, courts may not require arbitration beyond the scope of the contractual agreement, because 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Id.* (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)).

"Under the Federal Arbitration Act, parties to a contract may agree that an arbitrator rather than a court will resolve disputes arising out of the contract. When a dispute arises, the parties sometimes may disagree not only about the

merits of the dispute but also about the threshold arbitrability question—that is, whether their arbitration agreement applies to the particular dispute." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527 (2019). "A question of arbitrability is one of a narrow range of 'potentially dispositive gateway question[s],' specifically one that 'contracting parties would likely have expected a court to . . . decide[ ].'" *JPay*, 904 F.3d at 930 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)). "These are fundamental questions that will determine whether a claim will be brought before an arbitrator, and include questions about whether particular parties are bound by an arbitration clause and questions about whether a clause 'applies to a particular type of controversy.'" *Id.* (quoting *Howsam*, 537 U.S. at 84).

While courts "presume that parties would have expected a court to answer questions of arbitrability, . . .[t]he Supreme Court has made clear that 'parties can agree to arbitrate 'gateway' questions of 'arbitrability' because 'arbitration is a matter of contract.'" *Id.* at 930, 936 (quoting *Rent-A-Center*, 561 U.S. at 68–69). "An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Id.* at 936 (quoting *Rent-A-Center*, 561 U.S. at 70). The Eleventh Circuit has held that by incorporating AAA rules into an agreement, parties clearly and

unmistakably evince an intent to delegate questions of arbitrability. *Id.* at 937 (collecting cases).

Discussion

Defendants seek enforcement of the arbitration clauses under the GE Contracts or, in the alternative, the O&M Contract, pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (the "Convention"), and its implementing legislation, 9 U.S.C. §§ 202–208 (2002) (the "Convention Act"). *See Bautista v. Star Cruises*, 396 F.3d 1289, 1292 (11th Cir. 2005).

"In deciding a motion to compel arbitration under the Convention Act, a court conducts 'a very limited inquiry.'" *Id.* at 1294 (citations omitted).

> First, the Court must consider whether the four jurisdictional perquisites are met under the Convention Act. These four require that (1) there is an agreement in writing within the meaning of the Convention; (2) the agreement provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and (4) a party to the agreement is not an American citizen, or that the commercial relationship has some reasonable relation with one or more foreign states.

Id. at 1295 n.7 (citing *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 449 (3d Cir. 2003)). Assuming these prerequisites are satisfied, the Court must order

arbitration unless "one of the Convention's affirmative defenses applies." *Id.* at 1294–95. (citations omitted).

The sole issue in this case is the first jurisdictional prerequisite: whether there exists a written agreement to arbitrate. There is no dispute that no written arbitration agreement executed by Plaintiffs and Defendants exists[3]—Plaintiffs' insured, SHK, did not execute any written arbitration agreement with Defendants. Nonetheless, Defendants assert that the either the Services Contract or one of the other GE Contracts between SNC and Defendants satisfies the requirement of a written agreement to arbitrate. Section 25.2 of the Services Contract provides as follows:

> The Parties agree that any or all disputes arising from this Agreement or concerning it . . . shall be definitively resolved on the basis of the Conciliation and Arbitration Rules of the International Chamber of Commerce ICC (hereinafter referred to as the "Rules") by three arbitrators appointed by the ICC Court of Arbitration (hereinafter referred to as the "Court of Arbitration") in accordance with these Rules, the decisions of which shall be final and not open to appeal.

[3] There appears to be no dispute that, to the extent SHK is bound by an arbitration clause, that Plaintiffs are likewise bound, because "an insurer-subrogee stands in the shoes of its insured." *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) (quoting *Gibbs v. Hawaiian Eugenia Corp.*, 966 F.2d 101, 106 (2d Cir. 1992)).

(Mot. Ex. 1; Br. Supp. Mot. at 9–10). Defendants assert that Plaintiffs may be compelled to arbitrate under the Services Contract under third-party beneficiary and estoppel theories. In *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1648 (2020), the Supreme Court held that the "Convention does not conflict with the enforcement of arbitration agreements by nonsignatories under domestic-law equitable estoppel doctrines."

Plaintiffs resist the Motion on two grounds: first, that the dispute in this case is not within the scope of the arbitration provision, and second, that those doctrines do not apply to it. As an initial matter, Plaintiffs essentially conflate the scope and enforceability questions by arguing that "for either [non-signatory doctrine to apply, the non-signatory (here, SKH) must actually be seeking to enforce or assert rights under the contract at issue." (Resp. at 12]. While the Eleventh Circuit has held that "[t]he plaintiff's actual dependance on the underlying contract in making out the claim against the nonsignatory defendant is . . . always the *sine qua non* of an appropriate situation for applying equitable estoppel," *In re Humana Inc. Managed Care Litig.*, 285 F.3d 971, 976 (11th Cir. 2002), *rev'd sub nom. on other grounds PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003), it has also noted that "it is well established that a party may not avoid broad language in an arbitration clause by attempting to cast its complaint in tort rather than contract." *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 948 (11th Cir. 1999),

abrogated on other grounds by Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 631 (2009) (quoting *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 759 (11th Cir. 1993), *abrogated on other grounds by Arthur Anderson*, 556 U.S. 624)).

As Defendants note, "estoppel can bind a non-signatory to an arbitration clause when that non-signatory has reaped the benefits of a contract containing an arbitration clause" in order to prevent "a non-signatory from cherry-picking the provision of a contract that it will benefit from." *Invista S.A.R.L. v. Rhodia, S.A.*, 625 F.3d 75, 85 (3d Cir. 2010); *see also Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) ("A party is estopped from denying its obligation to arbitrate when it receives a 'direct benefit' from a contract containing an arbitration clause."). Moreover, under federal common law, arbitration clauses can be enforced by—and less commonly against—nonsignatories "when the parties to a contract together agree, upon formation of their agreement, to confer certain benefits thereunder upon a third party, affording that third party rights of action against them under the contract." *Franklin*, 177 F.3d at 947 (quoting *Boyd v. Homes of Legend, Inc.,* 981 F.Supp. 1423, 1432 (M.D. Ala. 1997), *vacated on other grounds,* 188 F.3d 1294, 1300 (11th Cir. 1999)).

The Court finds that Plaintiffs' insured was conferred a benefit as a result of SNC's entry into the Services Contract, and that enforcement of the agreement under a third-party beneficiary doctrine is warranted under the facts of this case.

First, the Court looks at the language of the Services Contract itself.[4] The recital of the contract notes that SNC "is responsible for operating and maintaining a power station . . . pursuant to an O&M Agreement entered into with the Project Owner . . . [and] the Operator wishes to use the Service Provider's services to provide Maintenance Services for the Power Train Sets that form part of the Power Station." (MTD Ex. 1, Doc. 21-3 at 9). Moreover, the Services Contract defines "Scheduled Maintenance" to include "[p]eriodic inspection, testing, **repair, and/or replacement** of components of the Power Train Set." (*Id.* § 1.35) (emphasis added). Thus, providing parts for the Power Plant for the benefit of the "Project Owner" was a basic objective of the contract at the time of its formation.

Moreover, Section 9.9 of the Services Provider states that:

> The Service Provider warrants to the Operator that the Parts and Machinery delivered during the term of this Agreement, and the Parts and Tools in the Initial Inventory, shall be free from defects in material, workmanship and title and that the Services performed during the term of this Agreement shall be performed in a competent, diligent manner.

[4] The Court notes that the Services Contract, as well as the O&M Contract, appear to be the product of negotiations between sophisticated parties and not a contract of adhesion. Where contract terms are drafted by sophisticated parties that presumably understand the legal impact of conferring a substantial benefit on a non-executing third party, the equities further favor application of non-signatory doctrines.

(*Id.* § 9.9). Defendants warranted that the parts delivered to the Power Plant during the term of the agreement would be free from defects. While the warranty was directed to SNC, Plaintiffs' insured received the benefit of this warranty, which would appear to cover the Incident.

Nevertheless, Plaintiffs assert that they only received an incidental benefit, pointing to the First Circuit's decision in *InterGen N.V. v. Grina*, 344 F.3d 134, 147 (1st Cir. 2003). But that case involved an allegation that a parent company benefitted from performance of an agreement based on its equity stake. *Id.* Here, the Service Contract conferred direct tangible benefits in form of replacement parts which Plaintiffs' insured would own as a result of their ownership of the Power Plant, and legal benefits in the form of Defendants' warranty of those parts.

Finally, the Court considers the fact that the defective parts in question were obtained from Defendants during the term of the contract. The Amended Complaint alleges that "Defendants breached their duty of care to the Plaintiffs by, *inter alia*, (i) installing GEN1 S1Bs in Power Train 3 in or around April 2018, when such blades were being phased out due to recurring issues with their performance," *i.e.*, during the term of the contract. (Am. Compl. ¶ 89). Defendants argue that the blades in question were installed "[e]*xclusively* in performance of—and *solely* because of—the Services Contract." (Br. Supp. Mot. at 3). Plaintiffs do not appear to dispute this fact, but argue that a mere "but-for" relationship

between contract and the claims is insufficient under Eleventh Circuit law, citing *Bahamas Sales Assoc., LLC v. Byers*, 701 F.3d 1335, 1340–41 (11th Cir. 2012). But that case also held that "[a] claim 'relates to' a contract when "the dispute occurs as a fairly direct result of the performance of contractual duties." *Id.* (quoting *Telecom Italia, SpA v. Wholesale Telecom Corp*., 248 F.3d 1109, 1116 (11th Cir. 2001)). There was no dispute in *Byers* that the claims did not implicate performance of the underlying contract; here, the facts necessary to establish Plaintiffs' claims would necessarily constitute a breach of the Services Contract. The Court thus agrees with Defendants that the facts of the case support application of the third-party beneficiary doctrine.[5]

Next, even assuming that the Services Contract applies to it as a non-signatory, Plaintiffs essentially argue that their claims are not "arising from [the] Agreement or concerning it," and therefore are outside of the scope of the Services Contract. Plaintiffs argue that their claims arise in tort or statutory law, not contract. In turn, Defendants make much of the fact that the Original Complaint filed by Plaintiffs sought ""equitable relief, including but not limited to a declaration that Defendants are in violation of their respective contractual duties." (*See* Br. Supp. Mot at 17). Plaintiffs downplay the significance of this sentence and

[5] Defendants also assert that because, among other reasons, the original Complaint referenced their contractual duties, there is a basis to apply equitable estoppel as well. The Court need not reach this issue.

point out that they deleted it in their Amended Complaint. Ultimately, the Court does not reach the issue of whether Plaintiffs' claims are within the scope of the Services Contract's arbitration provision, because the Court finds that the provision in question delegates questions of arbitrability, including scope, to the arbitrator.

In *Terminix International Co., LP v. Palmer Ranch Ltd. Partnership*, 432 F.3d 1327, 1332 (11th Cir. 2005), the Eleventh Circuit held that incorporation of the American Arbitration Association's (AAA) rules into the arbitration clause constituted a clear and unmistakable agreement to delegate the issue of arbitrability to the arbitrator in light of AAA Rule 8's provision that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."

At least one court has held that an incorporation of "[t]he Rules of Arbitration of the International Chamber of Commerce" similarly constituted an agreement to delegate arbitrability. *PPT Rsch., Inc. v. Solvay USA, Inc.*, No. CV 20-2645, 2021 WL 2853269, at *3 (E.D. Pa. July 7, 2021). The *PPT Research* court noted that, like the AAA rules, the ICC rules state that "any decision as to the jurisdiction of the arbitral tribunal, . . . shall then be taken by the arbitral tribunal itself." *PPT Rsch., Inc. v. Solvay USA, Inc.*, No. CV 20-2645, 2021 WL 2853269, at *3 (E.D. Pa. July

7, 2021).[6] The Court finds the *PPT Research* opinion persuasive, and given that the Services Contract provides that disputes "shall be shall be definitively resolved on the basis of the Conciliation and Arbitration Rules of the International Chamber of Commerce," the Court will refer the issue of whether Plaintiffs' claims fall within the scope of the Services Contract's arbitration provision to the arbitrator.[7]

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[6] In *Terminix*, the Eleventh Circuit hyperlinked the AAA rules, which indicates that the Court make take judicial notice of publicly available arbitration rules. 432 F.3d at 1332. Article 6 of the ICC Rules provide that "[i]n all cases referred to the Court *i.e.*, International Court of Arbitration of the International Chamber of Commerce] . . . the Court shall decide whether and to what extent the arbitration shall proceed. The arbitration shall proceed if and to the extent that the Court is prima facie satisfied that an arbitration agreement under the Rules may exist. . . .
In all matters decided by the Court under Article 6(4), any decision as to the jurisdiction of the arbitral tribunal, except as to parties or claims with respect to which the Court decides that the arbitration cannot proceed, shall then be taken by the arbitral tribunal itself. . . Unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the parties' respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void." 2021 Arbitration Rules, ICCWBO.org, https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_6

[7] In a footnote, Plaintiffs briefly contend (without citing case law or evidence) that the non-signatory Defendants should not be able to compel arbitration as to Plaintiffs. Defendants assert that they are able to based on a "sufficiently close relationship," citing *Olsher Metals Corp. v. Olsher*, No. 03-12184, 2004 WL 5394012, at *1 (11th Cir. Jan. 26, 2004) and allegations in the Complaint. Plaintiffs' cursory footnote in response is insufficient to create a dispute as to this issue, which the Court finds in Defendants' favor for the purpose of this motion, without prejudice to any determination by the arbitrator as to the merits.

Conclusion

For the above reasons, it is

ORDERED that Defendants' Motion to Compel Arbitration or, Alternatively, to Dismiss the First Amended Complaint (Doc. 21) is **GRANTED IN PART** to the extent it seeks an order compelling arbitration of this dispute. It is

FURTHER ORDERED that Defendants' initial Motion to Compel Arbitration (Doc. 15) is **DENIED AS MOOT**. It is

FURTHER ORDERED the Clerk is **DIRECTED** to administratively close the case. The Parties may move to reopen this case at any time for the purpose of confirming or seeking to vacate any arbitral award or for any other relief in furtherance of the arbitration permitted by applicable law.

SO ORDERED this 17th day of March, 2023.

Victoria Marie Calvert
United States District Judge

KeyCite Blue Flag – Appeal Notification
Appeal Filed by RSM PROD v. GAZ DU CAMEROUN, 5th Cir., December 4, 2023

2023 WL 7305061
Only the Westlaw citation is currently available.
United States District Court, S.D. Texas, Houston Division.

RSM PRODUCTION CORP., Plaintiff,
v.
GAZ DU CAMEROUN, S.A., Defendant.

Civil Action No. 4:22-CV-03611
|
Signed November 4, 2023
|
Entered November 6, 2023

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MEMORANDUM OPINION AND ORDER

Drew B. Tipton, UNITED STATES DISTRICT JUDGE

***1** This case centers on an arbitration award issued in favor of Plaintiff RSM Production Corporation ("RSM") against Defendant Gaz du Cameroun, S.A. ("GdC"). While RSM prevailed in arbitration, it seeks to vacate the Tribunal's modification of the award, which lowered what was originally a $10,578,123.28 award to $6,566,497.38. GdC previously filed a Motion to Dismiss for Lack of Personal Jurisdiction, (Dkt. No. 16), which this Court denied, (Dkt. No. 29). The Court now turns to the merits of RSM's Motion to Partially Vacate and Partially Confirm Arbitration Award, (Dkt. No. 2). After careful consideration, the Motion is **GRANTED**.

I. BACKGROUND [1]

RSM and GdC entered into a contract in connection with a natural gas production and distribution project. (Dkt. No. 1 at 2). A dispute formed over the timing of when RSM was entitled to receive payment. (*Id.* at 4). RSM argued that GdC had claimed costs that it should not have. (*Id.*). RSM states that that the payout date was supposed to be February 1, 2016, but that GdC's improper inclusion of additional costs artificially delayed payout until June 1, 2016, thereby decreasing RSM's cut of the production. (*Id.*). In accordance with their contractually agreed-upon arbitration clause, the Parties arbitrated their multiple accounting and breach-of-contract disputes before a Tribunal of three arbitrators in accordance with the International Chamber of Commerce ("ICC") Rules. (*Id.* at 3–4). The Tribunal ruled in RSM's favor on most claims, including a finding that GdC had wrongfully included certain royalties in its expenses. (Dkt. No. 4-1 at 56). RSM was awarded $10,578,123.28. (*Id.*).

After the Partial Final Award was issued, the Parties jointly applied to correct two errors that resulted in a net increase of $47,710 to RSM, and the Tribunal agreed and made these corrections. [2] (Dkt. No. 4-8 at 8–9). However, GdC also separately filed a contested Rule 36 "Application to Correct Award and Address Omitted Claims." (Dkt. No. 4-5). After briefing and oral argument, the Tribunal agreed with GdC that it had miscalculated RSM's damages, and reduced RSM's recovery by more than $4 million. (Dkt. No. 4-8 at 20). The Tribunal issued a revised Addendum Award, citing its authority to correct "computational" errors. (*Id.* at 16–18).

RSM now requests that the Court vacate the portion of the Addendum Award that reduced its recovery by roughly $4 million and confirm the remaining portions of the Addendum Award and Partial Final Award. (Dkt. No. 2 at 28). RSM argues that the arbitrators exceeded their power under the Federal Arbitration Act ("FAA"), namely their power to correct computational errors, and impermissibly "conduct[ed] [a] do-over[ ] of their substantive relief or reasoning." (*Id.* at 18); (*see generally id.* at 15–26). In response, GdC argues that judicial review of the Tribunal's decision is very limited, and this case is no exception, because it simply corrected a computational error when issuing the Addendum Award. (*See* Dkt. No. 33 at 11–17). With briefing complete, the Court turns to the merits of the Motion.

II. LEGAL STANDARD

***2** "In light of the strong federal policy favoring arbitration, judicial review of an arbitration award is extraordinarily narrow." *Rain CII Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469, 471–72 (5th Cir. 2012) (quoting *Brook v. Peak*

Int'l, Ltd., 294 F.3d 668, 672 (5th Cir. 2002)). Indeed, this standard has been described as "one of the most deferential standards known to the law." *Commc'ns Workers of Am., AFL-CIO v. Sw. Bell Tel. Co.*, 953 F.3d 822, 826 (5th Cir. 2020) (cleaned up). Vacatur of an arbitration award cannot be based on the merits of the award, even if it is shown that the arbitrator committed a "serious error." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569, 133 S.Ct. 2064, 2068, 186 L.Ed.2d 113 (2013). "Because the parties bargained for the arbitrator's construction of their agreement, an arbitral decision even arguably construing or applying the contract must stand, regardless of a court's view of its (de)merits." *Id.* (internal quotations omitted); *see id.* at 572–73, 133 S.Ct. at 2070–71 (explaining that "an arbitrator's error—even his grave error—is not enough" and that "the price for agreeing to arbitration" is that "[t]he arbitrator's construction holds, however good, bad, or ugly").

Section 10 of the FAA "provides 'the only grounds upon which a reviewing court may vacate an arbitrative award.' " *Rain CII Carbon*, 674 F.3d at 472 (quoting *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 672 (5th Cir. 2002)); *see also* 9 U.S.C. § 10. An award may be vacated:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). When a party seeks to vacate an arbitration award, that party bears the burden of proving that one of these grounds applies, and "any doubts or uncertainties must be resolved in favor of upholding [the award]." *Cooper v. WestEnd Cap. Mgmt., L.L.C.*, 832 F.3d 534, 544 (5th Cir. 2016).

III. DISCUSSION

RSM primarily argues (1) that the Tribunal impermissibly revisited the merits of the arbitration award after the award was issued, and (2) that this renewed process was not the type of "computational error" that the Tribunal was permitted to fix. (*See* Dkt. No. 2 at 17–26). These two points are closely intertwined, so the Court will consider them before turning to the remaining portions of the Partial Final Award.

A. THE PARTIAL FINAL AWARD AND ADDENDUM AWARD

The Court will first summarize the relevant dispute and the Tribunal's two rulings. The Court begins by outlining RSM's claims against GdC relevant to this Motion before turning to the Tribunal's holdings on those claims.

1. RSM's Claims 1–3 Against GdC

RSM and GdC entered into multiple agreements with respect to a natural gas production and distribution project. (Dkt. No. 2 at 7). Under those agreements, GdC was the operator of the project and advanced the costs for the project's first two wells. (*Id.*). The Parties stipulated that for GdC's services, RSM would assign GdC a 60% participating interest, retaining 40% for itself. (*Id.*). Once the wells began to produce, GdC was entitled to recuperate 100% of their costs before RSM was entitled to begin receiving its 40% share. (*Id.*). While the contractual dispute and arbitration involved a litany of claims,[3] the present Motion only concerns RSM's Claim Nos. 1, 2, and 3, as labeled by the Tribunal, and focuses on the Tribunal's resolution of the question of *when* RSM was entitled to begin receiving its 40% share, and the amount of damages to which RSM is accordingly due.

***3** The Parties' agreement provided that payout would occur "on the first day of the calendar month following the calendar month in which [GdC recovered 100% of their costs]." (Dkt. No. 4-1 at 41). As GdC would have it, GdC did not fully recover its costs until some time in May 2016, which would mean a payout date of June 1, 2016. (*Id.* at 43). RSM contended that GdC fully recovered its costs in January 2016, which would mean that payout should have occurred on February 1, 2016, and RSM should have received revenue from that date through May 31, 2016. (*Id.* at 41). RSM alleged that GdC entered into a Royalty Agreement (the "CHL Royalty Agreement") with another company, adding over $8 million of costs which, according to RSM, should not have been treated as recoverable. (*Id.*). RSM asserted that GdC employed this tactic to artificially delay the date for which GdC is considered to have fully recovered its costs, and

this maneuver cost RSM its rightful share of $10,578,123.28. (*Id.*).

Albeit technical, the breakdown of RSM's claimed $10,578,123.28 bears on the resolution of this case. As RSM explains it, that amount "is derived in three steps." (Dkt. No. 4-2 at 18). First, the bulk of the $10,578,123.28 is revenue accrued from February 1, 2016, through May 31, 2016; this period's total revenue was $16,416,243.46, which means RSM's 40% is $6,566,497.38. (*Id.*). Second, RSM claimed that it was also entitled to sales proceeds received on or after February 1, 2016, for petroleum delivered prior to that date; the revenue for this totaled $9,666,541.74, meaning RSM's 40% is $3,866,616.70. (*Id.* at 18–19). And third, RSM claimed that it was also entitled to sales proceeds received by GdC between the date in January 2016 when GdC achieved full cost recovery and February 1, 2016. (*Id.*). This amount totaled $362,523.00, meaning RSM's 40% is $145,009.20. (*Id.* at 19).

RSM asserted its claim to the $10,578,123.28 based on the above three-part breakdown, which the Tribunal categorized as "RSM Claim No. 1: GdC's Inclusion of the CHL Royalty in the Calculation of 'Payout.' " (Dkt. No. 4-1 at 40). In the alternative, RSM argued that it still would have been underpaid even if the Tribunal held that the payout date was not improperly delayed. (*Id.* at 61). These claims, which the Tribunal categorized as "RSM Claim Nos. 2 and 3," are essentially the same as RSM's arguments in Claim No. 1 with respect to its second and third steps of its three-step damages calculation concerning the pre- and post-payout proceeds. (*See id.*). In Claim Nos. 2 and 3, RSM argued that even if the Tribunal found that the payout date was not improperly delayed—i.e., that the June 1, 2016, date was proper—RSM would still be under-credited because it was entitled to: (1) sales proceeds received on or after June 1, 2016, for petroleum delivered prior to that date, and (2) sales proceeds received by GdC between the date in May 2016 that GdC achieved full cost recovery and June 1, 2016. (*Id.*).

2. <u>The Tribunal's (Two) Rulings</u>

The Court first summarizes the Tribunal's initial decision and the Partial Final Award before turning to the Addendum Award.

a. <u>The Partial Final Award</u>

In its initial Partial Final Award, the Tribunal ruled in favor of RSM as to Claim No. 1, finding that GdC "wrongfully included the CHL Royalty in its Payment calculation[.]" (Dkt. No. 4-1 at 56). As a result, RSM was awarded $10,578,123.28. (*Id.*). But recall, the inclusion of the CHL Royalty delayed the payout date from February 1, 2016, to June 1, 2016. The revenue that accrued from February 1, 2016, through May 31, 2016, was $6,566,497.38, not $10,578,123.28. The two other demands, however,—(1) for revenue accrued but not received prior to February 1, 2016, and (2) revenue received between the full cost recovery date in January 2016, and February 1, 2016—would bring GdC's liabilities on this claim to $10,578,123.28.

Although the Tribunal's decision on Claim No. 1 awarded RSM $10,567,123.28 ostensibly based on its determination "that the CHL royalty should not have been included in the calculation of Payout[,]" (Dkt. No. 4-1 at 56), the decision later explicitly endorsed RSM's two other unpaid revenue percentages. (*See id.* at 60–61) ("As explained by RSM, and as adopted by the Tribunal, this process is accomplished *in three steps* ...") (emphasis added). On the revenue accrued but not received prior to February 1, 2016, the Tribunal wrote that "in accord with Article 3.5 of the Farmin Agreement, the Joint Account should be credited with sales proceeds received from February 1, 2016 for petroleum that was delivered prior to February 1, 2016." (*Id.* at 60). The Tribunal listed the calculations and explained that RSM's 40% share was $3,866,616.70. (*Id.* at 60–61). Then, the Tribunal endorsed the third and final component of RSM's calculations, explaining that "the Joint Account must be credited for sales proceeds received in January 2016 after GdC achieved 100% cost-recovery, but before the February 1, 2016 date of Payout," which amounts to $145,009.20. (*Id.* at 61).

***4** The Tribunal ruled fully in RSM's favor on Claim No. 1, including that the payout date should have been February 1, 2016, instead of June 1, 2016. Then, the Tribunal found Claim Nos. 2 and 3 to be moot because they were based on the alternative possibility, which did not occur, that the Tribunal would deem June 1, 2016, the proper payout date. (*Id.*).

b. <u>The Addendum Award</u>

On the heels of the Partial Final Award, GdC filed an ICC Rule 36 application requesting that the Tribunal correct the amount awarded on RSM's Claim No. 1 and decide Claim Nos. 2 and 3 because they were not moot. (Dkt. No. 4-5 at 3). GdC did not challenge the Tribunal's holding that GdC should not have included the CHL Royalty in its payout calculation, and that February 1, 2016, was the proper payout date. (*Id.*). Rather, GdC argued that the Tribunal erred by including damages for claims related to revenue on production that occurred prior to payout despite the fact that RSM only prevailed in the Partial Final Award with respect to the improper inclusion of the CHL Royalty. (*See id.* at 3–6). GdC asserted that by doing so, the Tribunal erroneously factored into the award two calculations "which the Tribunal did not address," and GdC implored the Tribunal to "address and decide" those calculations, which GdC argued were "not moot." (*Id.* at 3).

The Tribunal agreed with GdC, finding that the Tribunal had authority to address computational errors before holding that it "miscalculate[ed] the appropriate relief due to RSM in respect of its Claim No. 1." (*See* Dkt. No. 4-8 at 16–18). With minimal discussion, the Tribunal concluded that it erred "by factoring two calculations that the claim did not encompass[.]" (*Id.* at 18). The Tribunal then reasoned that the correction to Claim No. 1 "raises the matter of a proper resolution of RSM's Claim Nos. 2 and 3." (*Id.* at 19). Finally, the Tribunal concluded that "to the extent that [the computational error in Claim No. 1] incorporates Claim Nos. 2 and 3, the Tribunal corrects that error and finds that GdC prevails as to Claim Nos. 2 and 3." (*Id.* at 20). The Tribunal accordingly reduced the amount awarded to RSM under Claim No. 1 from the original $10,578,123.28 to $6,566,497.38. (*Id.* at 21).

B. SETTING ASIDE AN AWARD UNDER SECTION 10(a)(4)

Under the common law doctrine of *functus officio*, an arbitrator is barred from revisiting the merits of an award once the award has been issued. *See Brown v. Witco Corp.*, 340 F.3d 209, 218 (5th Cir. 2003) (citing *Bayne v. Morris*, 68 U.S. (1 Wall.) 97, 99, 17 L.Ed. 495 (1863)). However, the FAA provides four statutory bases upon which an arbitration award may be vacated. *See* 9 U.S.C. § 10(a); *supra* Part II (reciting the four bases). RSM contests the Addendum Award on the basis that it violates 9 U.S.C. § 10(a)(4), which provides, in relevant part, that an arbitration award may be vacated "where the arbitrators exceeded their powers[.]" (*See* Dkt. No. 2 at 15–17). RSM asserts that the 2017 ICC Rules, which governed the arbitration in this case, grant arbitrators only the power to correct "a clerical, computational, or typographical error, or any errors of similar nature contained in an award." [4] (*Id.* at 18); *see* 2017 ICC Art. 36(1). According to RSM, appropriate exercise of this power includes, for example, an inadvertent omission of the word "not" or an accidental use of a period instead of a comma to separate numeric digits. (Dkt. No. 2 at 18). GdC responds that the Addendum Award is also subject to the exceedingly narrow and deferential review of arbitration awards in general. (Dkt. No. 33 at 11–14). GdC argues that changes made in the Addendum Award correct a "computational error," and the Tribunal is entitled to extreme deference on the interpretation of its power, including what constitutes a "computational error." (*Id.* at 13–17). Finally, GdC maintains that the damages RSM seeks to recover are "completely disconnected" from the contract and therefore fail the "essence" test. (*Id.* at 17–19).

***5** A party seeking to set aside an arbitration award under Section 10(a)(4) "bears a heavy burden," as that provision is no exception to the deferential and narrow review that generally applies to judicial reviews of arbitration awards. *Oxford Health Plans*, 569 U.S. at 569, 133 S.Ct. at 2068. Because arbitration is a matter of contract, one way an arbitrator can exceed their powers is by acting contrary to express contractual provisions. *Rain CII Carbon*, 674 F.3d at 472. "If the contract creates a plain limitation on the authority of an arbitrator, [the reviewing court] will vacate an award that ignores the limitation." *Id.* (quoting *Apache Bohai Corp. LDC v. Texaco China BV*, 480 F.3d 397, 401 (5th Cir. 2007)). Such limitations must be unambiguous, and a reviewing court must still "resolve all doubts in favor of arbitration." *Id.* (quoting *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 672 (5th Cir. 2002)).

1. Computational Error vs. Merits Re-Do

The present case turns on whether the Tribunal was correcting a computational error when it issued the Addendum Award. If not, the Tribunal acted outside of its authority and the Addendum Award is invalid. After a close examination of exactly what happened in the initial Partial Final Award, the answer is clear.

As previously discussed, RSM claimed $10,578,123.28 in connection with the CHL Royalty. (*See* Dkt. No. 4-2 at 14–34). Of this amount, $6,566,497.38 is attributable to the revenues accrued that RSM did not receive due to the delayed payout. (*Id.* at 18). However, regardless of the correct payout date, RSM sought *other additional damages* whose

calculations depended on whether the operative payout date was February 1, 2016, or June 1, 2016. (*See id.* at 18–19, 34–41). RSM claimed that if the Tribunal agreed that February 1, 2016, should be the payout date, RSM should recover an additional $4,011,625.82 in connection with those *other additional damages.* (*See id.* at 18–19). This $4,011,625.82 would, together with the $6,566,497.38, add up to the total claimed $10,578,123.28. RSM also claimed those *other additional damages* based on a June 1, 2016, payout date, but only in the event that the Tribunal decided that RSM was not entitled to the $6,566,497.38. (*Id.* at 34–41).

In making its damages claim in connection with a February 1, 2016, payout date, RSM explicitly listed three components that added up to $10,578,123.28. (*See* Dkt. No. 4-2 at 18–19). RSM's briefing did not ascribe specific claim numbers, including when RSM broke down how it was entitled to recover $10,578,123.28. (*Id.* at 14–34). The Tribunal's Partial Final Award, however, categorized that sum under what it titled "RSM Claim No. 1: GdC's Inclusion of the CHL Royalty in the Calculation of 'Payout.' " (Dkt. No. 4-1 at 40). That title is, perhaps, misleading. After all, RSM sought more than the revenue accrued from February 1, 2016, through May 31, 2016; that revenue was only the first of three steps, and the latter two steps were *other additional damages* based on a February 1, 2016, payout date. (*See* Dkt. No. 4-2 at 18–19). However, while the Tribunal did consider the $6,566,497.38 from the first step, it did not stop there. As discussed earlier, the Tribunal noted that "the proper amount due to the Joint Account with a Payout date of February 1, 2016" is "accomplished in three steps[.]" (Dkt. No. 4-1 at 60). The Tribunal explicitly endorsed RSM's proposed step two calculation, "in accord with Article 3.5 of the Farmin Agreement." (*Id.*). On the second step, the Tribunal determined that "the Joint Account should be credited with sales proceeds received from February 1, 2016[,] for petroleum that was delivered prior to February 1, 2016." (*Id.*). In accordance with this conclusion, the Tribunal offered a comprehensive breakdown as to how this amount came to be $3,866,616.70. (*Id.* at 60–61).

***6** Then, the Tribunal similarly endorsed the third and final component of RSM's calculations, explaining that "the Joint Account must be credited for sales proceeds received in January 2016 after GdC achieved 100% cost-recovery, but before the February 1, 2016, date of Payout." (*Id.* at 61). Like with the second step, the Tribunal offered a comprehensive breakdown as to why this amount was $145,009.20. (*Id.*). Moreover, in discussing Claim Nos. 2 and 3, the Tribunal noted that it had already "determined that RSM would be entitled to its 40% share of *all* revenues from the date of Payout (or cost-recovery), regardless of when that revenue accrued." (*Id.*) (emphasis added).

To summarize, RSM sought a payment of $10,578,123.28 and that sum had three components. While the Tribunal arguably *titled* RSM's bid for that sum as only one of those three components, (*see* Dkt. No. 4-1 at 40), the *substance* of its decision expressly determined that RSM was entitled to recover on each of the three components that made up the $10,578,123.28 award. (*See id.* at 60–61).

Subsequently, at GdC's urging, (*see* Dkt. No. 4-5), the Tribunal issued an Addendum Award wherein the Tribunal determined that it "erroneously computed the CHL Royalty damages for Claim No. 1 by factoring two calculations that the claim did not encompass, thus miscalculating the appropriate relief due to RSM in respect of its Claim No. 1." (Dkt. No. 4-8 at 18). This characterization is incorrect, as the Tribunal conflates the *title* of its original decision with its *substance.* The argument GdC advanced was that the Partial Final Award should not have included the second and third components of the total $10,578,123.20 because the title of "Claim No. 1" reflected only the first component. (*See* Dkt. No. 4-5 at 3). The Tribunal agreed with GdC. (Dkt. No. 4-8 at 18).

The Parties agree that the Tribunal cannot modify the substance of its otherwise final rulings, or that their authority to revise such a ruling is limited to corrections of computational errors. (*See generally* Dkt. Nos. 2, 33, 37) (containing no discussions of any other grounds for the Tribunal to modify its award). In this case, a careful review of RSM's claims and the Tribunal's Partial Final Award reveals that the Tribunal has committed a textbook case of reversing course on a substantive legal issue it previously decided. The Tribunal explicitly determined that RSM should prevail as to the second and third components of the full $10,578,123.20 sum, and then un-did that determination under the guise of a computational error.

According to GdC, the Tribunal awarded damages for "completely separate claims" for which it "did not find in favor of RSM[.]" (Dkt. No. 33 at 14). If this were true, GdC's position would be more persuasive.[5] But that characterization of the Partial Final Award is patently inconsistent with its substance. RSM specifically broke down each of the three components that added up to

$10,578,123.20, (*see* Dkt. No. 4-2 at 18–19), and the Tribunal unmistakably determined that RSM was entitled to each component, (*see* Dkt. No. 4-1 at 60–61). Therefore, what the Tribunal chalked up to a "miscalculation" was not a miscalculation at all, but rather a re-calculation in the Addendum Award. The Tribunal did not award damages for two calculations that it had not decided; the Tribunal had decided, and determined that RSM prevailed, on *each and every component* of RSM's bid for the full $10,578,123.20. (*See* Dkt. No. 4-1 at 60–61).

***7** In reviewing the substance of the Tribunal's Partial Final Award, the Court cannot conclude, even when giving tremendous deference to the Tribunal, that the Tribunal issued the Addendum Award in accordance with its authority to correct computational errors. As courts that have explored the issue have made clear, this case involves modifications that far exceed clerical or computational errors. In many instances where courts found a computational error, the determination was quite straightforward. *See, e.g., Martel v. Ensco Offshore Co.*, 449 F.App'x 351, 354 (5th Cir. 2011) (per curiam) (permitting an amended award because it involved "a clerical error" where the arbitrator had forgotten a zero, originally basing the calculation on a figure of $300,000.00 instead of $3,000,000.00); *Chase v. Cohen*, 519 F.Supp.2d 267, 280 (D. Conn. 2007) (permitting a change to the original award which had inadvertently referred to "Rhoda Chase" instead of her daughter, "Cheryl Chase."). On the other hand, courts have consistently vacated awards under Section 10(a)(4) when the arbitrator re-visited their determinations of legal issues. *See, e.g., Credit Agricole Corp. & Inv. Bank v. Black Diamond Cap. Mgmt., LLC*, No. 1:18-CV-07620, 2019 WL 1316012, at *8 (S.D.N.Y. Mar. 22, 2019) (holding that the changes in the calculation method were not merely "computational error"); *T. Co. Metals LLC v. Dempsey Pipe & Supply, Inc.*, No. 1:07-CV-07747, 2008 WL 11512391, at *4 (S.D.N.Y. July 8, 2008) (determining that the amended award, issued in accordance with the arbitrator's own purported oversights in accurately calculating the award, was based in impermissible re-interpretations of the record).

The Tribunal unmistakably concluded, in the Partial Final Award, that RSM was entitled to damages with respect to the second and third components of the $10,578,123.20. The Tribunal effectively reversed that determination in the Addendum Award by holding that RSM was not entitled to those damages. (*Compare* Dkt. No. 4-1 at 60–61 *with* Dkt. No. 4-8 at 20). The original award had no "evident material miscalculation of figures," and the Tribunal plainly re-determined a substantive issue of law. *See Credit Agricole*, 2019 WL 1316012 at *8. The Court therefore finds that the Tribunal exceeded its authority by modifying the award in a way forbidden by the plain text of the agreement. *See Smith v. Transp. Workers Union of Am., AFL-CIO Air Transp. Loc. 556*, 374 F.3d 372, 375 (5th Cir. 2004) (explaining that a presumption in favor of arbitrability cannot be stretched so as to permit disregard or modification of the agreement). The Court vacates the portion of the Addendum Award that removed $4,011,625.90 from RSM's damages.

2. The Essence Test

The essence test provides that a court will sustain an arbitrator's award so long as the decision "draws its essence" from the contract, i.e., has not "utterly contorted the evident purpose and intent of the parties[.]" *Timegate Studios, Inc. v. Southpeak Interactive, L.L.C.*, 713 F.3d 797, 802–03 (5th Cir. 2013). This test looks at whether the decision is based on the contract's terms, or instead is a simple reflection of "the arbitrator's own notions of industrial justice." *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62, 121 S.Ct. 462, 466, 148 L.Ed.2d 354 (2000) (quoting *Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38, 108 S.Ct. 364, 371, 98 L.Ed.2d 286 (1987)).

In light of the Court's determination that the Tribunal acted in excess of its authority in issuing the Addendum Award, the Court need not consider the Parties' arguments as to whether the Tribunal's decisions drew their essence from the Parties' contractual terms. [6]

C. CONFIRMATION OF THE OTHER RULINGS

The Tribunal decided that its computational correction as to RSM's Claim No. 1 "raise[d] the matter of a proper resolution of RSM's Claim Nos. 2 and 3." (Dkt. No. 4-8 at 19). In light of the Court's holding that the Tribunal's decision in the Addendum Award as to Claim No. 1 was in excess of the Tribunal's authority, the Court also finds that the Tribunal's Addendum Award should be vacated with respect to its determinations on Claim Nos. 2 and 3, which are moot. [7]

***8** Finally, RSM asks the Court "to confirm the remaining portions of the [Partial Final Award] and Addendum Award." (Dkt. No. 2 at 28). "Under the FAA, courts 'must' confirm an award unless the award is vacated under Section 10 or modified or corrected under Section 11." *Cooper*, 832 F.3d

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at 544 (quoting *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582, 128 S.Ct. 1396, 1402, 170 L.Ed.2d 254 (2008)). Because the Court finds that the Addendum Award is improper with respect to its determinations as to RSM's Claim Nos. 1–3, those portions of the Addendum Award are vacated. However, the Addendum Award is confirmed with respect to the remaining portions. (Dkt. No. 4-8 at 7). Likewise, the unchallenged portions of the Partial Final Award are confirmed.

IV. CONCLUSION

Considering the foregoing analysis, the Court **GRANTS** RSM's Motion to Partially Vacate and Partially Confirm Arbitration Award, (Dkt. No. 2). The Court hereby **VACATES** the portion of the Addendum Award that reduced RSM's recovery by $4,011,625.90 in damages previously awarded in the Partial Final Award. All remaining portions of the Addendum Award and Partial Final Award not vacated are hereby **CONFIRMED.**

RSM is **ORDERED** to submit a proposed final judgment that conforms with this ruling by November 17, 2023.

It is SO ORDERED.

All Citations

--- F.Supp.3d ----, 2023 WL 7305061

Footnotes

1 The Court makes the following factual findings for the sole purpose of this Memorandum Opinion and Order.

2 The Parties agreed that RSM was entitled to an additional $200,000 as the prevailing party, and that $152,290 previously paid to RSM by GdC in the form of an overriding royalty should be deducted from the damages. (Dkt. No. 4-8 at 9). These agreements resulted in a net increase of $47,710. (*See id.*).

3 In total, RSM asserted twenty-three claims, and GdC asserted three counterclaims. (*See* Dkt. No. 4-1 at 7–11).

4 The Parties do not argue that there were any alternative avenues for the Tribunal to modify its otherwise final ruling. (*See* Dkt. Nos. 2, 33, 37). Regardless, the Tribunal unmistakably based its authority to make these corrections on Rule 36 of the 2017 ICC Rules. (*See* Dkt. No. 4–8).

5 Under this characterization of the Tribunal's decision, the Partial Final Award would have never opined at all on the second and third components of the full $10,578,123.20 sum. The Tribunal would have only considered the first component ($6,566,497.38) before holding that RSM should fully prevail, to the tune of $10,578,123.20—an amount which reflects that RSM prevailed on the second and third components as well.

6 Both Parties' essence test arguments boil down to re-hashing whether the Tribunal's legal analysis led to the correct conclusion, which in any event is not proper grounds for vacating an arbitration award. *See Oxford Health Plans*, 569 U.S. at 569, 133 S.Ct. at 2068.

7 The Court notes that Claim Nos. 2 and 3 were made in the alternative because they sought damages in connection with a June 1, 2016, payout date in the event the Tribunal rejected their argument that the proper payout date was February 1, 2016. Because the Tribunal found that February 1, 2016, was the proper payout date in the Partial Final Award—and the Addendum Award did not disturb that finding—Claim Nos. 2 and 3 remain moot.

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621 F.Supp.3d 169
United States District Court, D. Massachusetts.

SPARTA INSURANCE COMPANY (as successor in interest to SPARTA Insurance Holdings, Inc.), Plaintiff,
v.
PENNSYLVANIA GENERAL INSURANCE COMPANY (now known as Pennsylvania Insurance Company), Defendant.

Civil Action No. 21-11205-FDS
|
Signed August 9, 2022

Synopsis
Background: Insurer brought action against reinsurer seeking relief under Declaratory Judgment Act related to stock-purchase and reinsurance agreements. Reinsurer moved to dismiss for lack of subject matter jurisdiction and failure to state a claim.

Holdings: The District Court, F. Dennis Saylor IV, Chief Judge, held that:

[1] insurer adequately alleged certainly impending injuries to constitute injury in fact, as required for Article III standing;

[2] insurer plausibly alleged that it was likely insurer's claimed injuries would be redressed by a decision in its favor, as required for Article III standing;

[3] insurer plausibly alleged hardship prong for ripeness;

[4] insurer plausibly alleged fitness prong for ripeness;

[5] District Court would decline to exercise its discretion at pleading stage to dismiss insurer's action seeking relief under Declaratory Judgment Act; and

[6] insurer's allegations were sufficient to state claims for relief under Declaratory Judgment Act as to parties' rights and obligations under the agreements.

Motion denied.

Procedural Posture(s): Motion to Dismiss for Lack of Subject Matter Jurisdiction; Motion to Dismiss for Lack of Standing; Motion to Dismiss for Failure to State a Claim.

West Headnotes (36)

[1]
Federal Civil Procedure Matters considered in general

Summary Judgment Motion to dismiss

On a motion to dismiss, the court may properly take into account four types of documents outside the complaint without converting the motion into one for summary judgment: (1) documents of undisputed authenticity; (2) documents that are official public records; (3) documents that are central to plaintiff's claim; and (4) documents that are sufficiently referred to in the complaint.

[2]
Federal Courts Presumptions and burden of proof

On motion to dismiss for lack of subject matter jurisdiction, party invoking jurisdiction of federal court carries burden of proving its existence. Fed. R. Civ. P. 12(b)(1).

1 Case that cites this headnote

[3]
Federal Courts Presumptions and burden of proof

If party seeking to invoke federal jurisdiction fails to demonstrate basis for jurisdiction, motion to dismiss for lack of subject matter jurisdiction must be granted. Fed. R. Civ. P. 12(b)(1).

1 Case that cites this headnote

[4]
Federal Courts Pleadings and motions

Federal Courts Presumptions and burden of proof

When ruling on motion to dismiss for lack of subject matter jurisdiction, court must credit plaintiff's well-pleaded factual allegations and draw all reasonable inferences in plaintiff's favor. Fed. R. Civ. P. 12(b)(1).

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1 Case that cites this headnote

[5] **Federal Civil Procedure** 🔑 Insufficiency in general

To survive a motion to dismiss for failure to state a claim, complaint must state a claim that is plausible on its face. Fed. R. Civ. P. 12(b)(6).

[6] **Federal Civil Procedure** 🔑 Insufficiency in general

For a claim to be plausible, as required to withstand a motion to dismiss for failure to state a claim, factual allegations must be enough to raise a right to relief above the speculative level. Fed. R. Civ. P. 12(b)(6).

[7] **Federal Civil Procedure** 🔑 Insufficiency in general

Plausibility standard on motion to dismiss for failure to state a claim is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Fed. R. Civ. P. 12(b)(6).

[8] **Federal Civil Procedure** 🔑 Construction of pleadings

Federal Civil Procedure 🔑 Matters deemed admitted; acceptance as true of allegations in complaint

On motion to dismiss for failure to state a claim, court must assume the truth of all well-pleaded facts and give the plaintiff the benefit of all reasonable inferences. Fed. R. Civ. P. 12(b)(6).

[9] **Federal Civil Procedure** 🔑 Insufficiency in general

Dismissal for failure to state a claim is appropriate if the complaint fails to set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory. Fed. R. Civ. P. 12(b)(6).

[10] **Federal Civil Procedure** 🔑 In general; injury or interest

Article III standing is a prerequisite for subject matter jurisdiction. U.S. Const. art. 3, § 2, cl. 1.

[11] **Federal Civil Procedure** 🔑 In general; injury or interest

Plaintiff bears the burden of pleading facts necessary to demonstrate Article III standing. U.S. Const. art. 3, § 2, cl. 1.

[12] **Federal Civil Procedure** 🔑 In general; injury or interest

Federal Civil Procedure 🔑 Causation; redressability

Heartland of Article III standing is composed of the amalgam of injury in fact, causation, and redressability. U.S. Const. art. 3, § 2, cl. 1.

[13] **Federal Civil Procedure** 🔑 In general; injury or interest

Each element of Article III must be supported in the same way as any other matter on which the plaintiff bears the burden of proof. U.S. Const. art. 3, § 2, cl. 1.

[14] **Federal Civil Procedure** 🔑 Pleading

At pleading stage, plaintiff must demonstrate Article III standing under plausibility standard applicable to motion to dismiss for failure to state a claim. U.S. Const. art. 3, § 2, cl. 1; Fed. R. Civ. P. 12(b)(6).

[15] **Declaratory Judgment** 🔑 Necessity

Declaratory Judgment 🔑 Nature and elements in general

Declaratory Judgment 🔑 Proper Parties

Courts often combine multiple justiciability concepts, such as ripeness, standing, and the

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prohibition against advisory judicial rulings, when discussing the statutory requirement of an actual controversy under the Declaratory Judgment Act. 28 U.S.C.A. § 2201(a).

More cases on this issue

[16] **Declaratory Judgment** Necessity

Declaratory Judgment Nature and elements in general

"Case of actual controversy" required under the Declaratory Judgment Act refers to the types of "case" and "controversies" that are justiciable under Article III. U.S. Const. art. 3, § 2, cl. 1; 28 U.S.C.A. § 2201(a).

More cases on this issue

[17] **Federal Civil Procedure** In general; injury or interest

Injury in fact, as required for Article III standing, must be both concrete and particularized and actual or imminent, not conjectural or hypothetical. U.S. Const. art. 3, § 2, cl. 1.

[18] **Federal Civil Procedure** In general; injury or interest

Threatened injury must be certainly impending to constitute injury in fact, as required for Article III standing; allegations of possible future injury are insufficient. U.S. Const. art. 3, § 2, cl. 1.

[19] **Declaratory Judgment** Contracts

Insurer's allegations that claims under policies from second insurance company that it had acquired were no longer being administered or paid by reinsurer, and that reinsurer failed to confirm that it would honor its contractual obligations under stock-purchase and reinsurance agreements to administer and pay the claims adequately alleged certainly impending injuries to constitute injury in fact, as required for Article III standing to seek relief under Declaratory Judgment Act as to parties' rights and obligations under the stock-purchase and reinsurance agreements. U.S. Const. art. 3, § 2, cl. 1; 28 U.S.C.A. § 2201(a).

1 Case that cites this headnote
More cases on this issue

[20] **Federal Civil Procedure** Causation; redressability

Redressability element of Article III standing requires that requested relief directly redress injury alleged. U.S. Const. art. 3, § 2, cl. 1.

[21] **Federal Civil Procedure** Causation; redressability

To satisfy redressability element of Article III standing, plaintiff must establish that it is likely, as opposed to merely speculative, that its claimed injuries will be redressed by a favorable decision. U.S. Const. art. 3, § 2, cl. 1.

[22] **Declaratory Judgment** Contracts

Insurer's allegations that claims under policies from second insurance company that it had acquired were not being administered or paid by reinsurer, in violation of the parties' stock-purchase and reinsurance agreements, and seeking an interpretation and declaration of insurer's contractual rights in light of particular set of existing facts, did not merely seek a declaration to "obey your contract" and thus plausibly alleged that it was likely insurer's claimed injuries would be redressed by a decision in its favor, as required for Article III standing to seek relief under Declaratory Judgment Act as to parties' rights and obligations under the agreements. U.S. Const. art. 3, § 2, cl. 1; 28 U.S.C.A. § 2201(a).

More cases on this issue

[23] **Federal Courts** Nature of dispute; concreteness

Ripeness doctrine is intended to prevent the adjudication of claims relating to contingent future events that may not occur as anticipated,

or indeed may not occur at all. U.S. Const. art. 3, § 2, cl. 1.

[24] **Federal Courts** Ripeness; Prematurity
Federal Courts Nature of dispute; concreteness

To be ripe, complaint must show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of the judicial relief sought. U.S. Const. art. 3, § 2, cl. 1.

[25] **Federal Courts** Fitness and hardship

Ripeness analysis has two prongs: hardship and fitness. U.S. Const. art. 3, § 2, cl. 1.

[26] **Federal Courts** Fitness and hardship

In evaluating hardship prong of ripeness analysis, court should consider whether challenged action creates direct and immediate dilemma for parties. U.S. Const. art. 3, § 2, cl. 1.

[27] **Federal Courts** Fitness and hardship
Federal Courts Prudential concerns

Hardship prong of ripeness analysis is wholly prudential and concerns the harm to the parties seeking relief that would come to those parties from the court withholding decision. U.S. Const. art. 3, § 2, cl. 1.

[28] **Declaratory Judgment** Insurance

Insurer's allegations that claims under policies from second insurance company that it had acquired were not being administered or paid by reinsurer, in violation of the parties' stock-purchase and reinsurance agreements, and that reinsurer failed to confirm that it would honor its contractual obligations under agreements appeared to allege a blanket refusal by reinsurer to comply with its contractual obligations at all, rather than one or more specific individual coverage disagreements, and thus plausibly alleged hardship prong for ripeness of action seeking relief under Declaratory Judgment Act as to parties' rights and obligations under the agreements; sought-after declaration would be of practical assistance in setting the underlying controversy to rest. 28 U.S.C.A. § 2201(a).

More cases on this issue

[29] **Constitutional Law** Ripeness; prematurity
Federal Courts Ripeness; Prematurity

Fitness prong of ripeness analysis has both jurisdictional and prudential components; the jurisdictional component concerns whether there is a sufficiently live case or controversy, at the time of the proceedings, to create jurisdiction in the federal courts, while the prudential component concerns whether resolution of the dispute should be postponed in the name of judicial restraint from unnecessary decision of constitutional issues. U.S. Const. art. 3, § 2, cl. 1.

[30] **Declaratory Judgment** Insurance

Insurer's allegations that claims under policies from second insurance company that it had acquired were not being administered or paid by reinsurer and that reinsurer failed to confirm that it would honor its contractual obligations under the parties' stock-purchase and reinsurance agreements demonstrated sufficiently live case or controversy with no reason to postpone resolution of dispute in the interest of judicial restraint, and thus plausibly alleged fitness prong for ripeness of action seeking relief under Declaratory Judgment Act as to parties' rights and obligations under the agreements. 28 U.S.C.A. § 2201(a).

More cases on this issue

[31] **Declaratory Judgment** Discretion of Court

Even if there is a case or controversy within the meaning of Article III, it does not follow, of course, that a declaratory judgment should issue. U.S. Const. art. 3, § 2, cl. 1; 28 U.S.C.A. § 2201(a).

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[32] **Federal Courts** Right to Decline Jurisdiction; Abstention

Generally, district courts have virtually unflagging obligation to exercise jurisdiction conferred on them by Congress.

[33] **Declaratory Judgment** Discretion of Court

In declaratory judgment context, district court has substantial discretion to decline to enter such relief. 28 U.S.C.A. § 2201(a).

[34] **Declaratory Judgment** Insurance

District Court would decline to exercise its discretion at pleading stage to dismiss insurer's action seeking relief under Declaratory Judgment Act, alleging that claims under policies from second insurance company that it had acquired were not being administered or paid by reinsurer, in violation of the parties' stock-purchase and reinsurance agreements, as that, in effect, would be a decision on the merits, and at pleading stage there was far from sufficient information for the court to make such a decision, including whether the requested declarations had a mere advisory quality or raised a plausible basis for abstention. 28 U.S.C.A. § 2201(a).

More cases on this issue

[35] **Declaratory Judgment** Insurance

Insurer's allegations that claims under policies from second insurance company that it had acquired were not being administered or paid by reinsurer and that reinsurer failed to confirm that it would honor its contractual obligations under the parties' stock-purchase and reinsurance agreements were sufficient to state claims for relief under Declaratory Judgment Act as to parties' rights and obligations under the agreements. 28 U.S.C.A. § 2201(a).

More cases on this issue

[36] **Federal Civil Procedure** Clear or certain nature of insufficiency

Dismissal for failure to state a claim is only appropriate if the complaint, so viewed, presents no set of facts justifying recovery. Fed. R. Civ. P. 12(b)(6).

Attorneys and Law Firms

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MEMORANDUM AND ORDER ON DEFENDANT'S MOTION TO DISMISS

SAYLOR, Chief Judge

This is a dispute arising from a stock-purchase agreement between two insurance companies. Plaintiff SPARTA Insurance Company has sued Pennsylvania General Insurance Company seeking relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, related to a stock-purchase agreement and reinsurance agreement.

Defendant has moved to dismiss the complaint on different grounds, including lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and failure to state a claim under Fed. R. Civ. P. 12(b)(6). For the following reasons, the motion will be denied.

I. Background

A. Factual Background

The following facts are set forth as alleged in the complaint.

SPARTA Insurance Company, formerly known as SPARTA Insurance Holdings, Inc., is a Connecticut corporation with headquarters in Farmington, Connecticut. (Compl. ¶ 7).

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Pennsylvania General Insurance Company ("PGIC"), now known as Pennsylvania Insurance Company, is a Pennsylvania corporation with headquarters in Omaha, Nebraska. (*Id.* ¶ 8).

American Employers' Insurance Company ("AEIC") is a Massachusetts insurance corporation that has been acquired by SPARTA. (*Id.* ¶ 2).

[1] On June 15, 2005, AEIC and PGIC entered into a reinsurance agreement, under which AEIC's liabilities were apparently transferred and assumed by PGIC. (*Id.* ¶ 15; Reinsurance Agreement). [1] AEIC and PGIC agreed to the following provision in the reinsurance agreement:

> [PGIC] shall assume as 100% reinsurance ... the following insurance business which is in force as of the Effective Date and Time: (a) the historical bond insurance business of [AEIC] (the "Retained Bonding Business") and (b) the historical insurance business of [AEIC] in those states in which such business has unearned premium or unpaid loss and in which [PGIC] does not have an insurance license (the "Retained Non-Bonding Business", and together with the Retained Bonding Business, the "Retained Business") ... [PGIC] shall, at its sole expense, perform any and all administrative functions for such Retained Business, including without limitation claims handling, underwriting and regulatory functions, and shall reimburse [AEIC] for any and all out of pocket expenses related thereto. [PGIC] ***174** shall 100% reinsure [AEIC] with respect to, and [AEIC] shall cede to [PGIC], all premiums, losses and expenses relating to such Retained Business as of the Effective Date and Time and as renewed by [AEIC] thereafter pending regulatory approvals....

(Reinsurance Agreement § 6). [2]

On March 12, 2007, SPARTA and PGIC entered into a stock-purchase agreement, which resulted in SPARTA acquiring AEIC from PGIC. (Compl. ¶¶ 2, 13). The transaction was structured such that SPARTA would obtain AEIC as a "clean shell" effectuated in part by the reinsurance agreement, with no liabilities remaining in AEIC after consummation of the transaction. (*Id.* ¶ 14). The reinsurance agreement was incorporated into the stock-purchase agreement in several sections. (*Id.* ¶ 16). The parties also agreed to the following provision on indemnity in the stock-purchase agreement:

> [PGIC] agrees to indemnify and hold [SPARTA] harmless of and from any loss, cost, expense, claim, interest, fine, penalty, deficiency, obligation, liability or damage, including, without limitation, reasonable attorneys' fees, accountants' fees and other investigatory fees and out-of-pocket expenses, actually expended or incurred by [SPARTA] or [AEIC] (collectively, "Losses"), arising out of or resulting from (i) any breach of representation or warranty (including any misrepresentation in, or omission from, any certificate or other document furnished or to be furnished by [PGIC] to [SPARTA] hereunder), or nonfulfillment of any covenant or agreement on the part of [PGIC] under this Agreement; (ii) the failure by [PGIC] to perform any of its obligations under the Reinsurance Agreement; (iii) any Loss arising out of or resulting from the existence of [AEIC] prior to the Closing or the conduct of the Business or other operations by or of [AEIC] prior to the Closing; ... and (vi) all actions, suits, proceedings, demands, assessments, judgments, costs and expenses incident to any of the foregoing (any and all of which are hereafter referred to as a "Claim").
>
> [SPARTA] shall give [PGIC] written notice by certified or registered mail or overnight courier of any Claim with respect to which [SPARTA] seeks indemnification. [PGIC] shall have ten business days from the date of receipt of such notice to notify [SPARTA] that [PGIC] will assume the entire control of the defense, compromise or settlement (any and all of which are hereinafter referred to as "Defense") of such Claim through its own attorneys, which attorneys must be reasonably acceptable to [SPARTA], and at its own expense. If [PGIC] shall assume such Defense, it shall promptly advise [SPARTA] of its activities and efforts in connection therewith and of the ultimate resolution of such Claim. [PGIC] shall have the right to settle, compromise or adjust any such Claim.... If [PGIC]

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fails to notify [SPARTA] that it has assumed the Defense or does not in fact assume the Defense, [SPARTA] may, but shall not be required to, pay, compromise or settle such Claim, or take such action to settle such Claim, provided that [SPARTA] shall notify [PGIC] of such action. ***175** In such event, [SPARTA] shall be fully entitled to indemnification hereunder.

(*Id.* ¶¶ 3, 17; Stock Purchase Agreement § 8.1).

That transaction closed on August 7, 2007. (Compl. ¶ 18). For more than a decade afterward, SPARTA and its affiliates have tendered liabilities for insurance policies issued by AEIC, which were administered and paid pursuant to the stock-purchase and reinsurance agreements. (*Id.* ¶¶ 3, 19). According to the complaint, in May 2021, SPARTA learned that claims made pursuant to AEIC policies were no longer being administered or paid. (*Id.* ¶¶ 4, 20). In each of May, June, July, August, and September 2021, SPARTA contacted PGIC concerning requests for indemnity for claims arising out of AEIC policies. (*Id.* ¶¶ 4, 21). SPARTA allegedly requested confirmation that PGIC would satisfy its contractual obligations under the stock-purchase and reinsurance agreements to administer and pay all claims arising out of AEIC policies. (*Id.*). According to the complaint, as of the filing of this lawsuit, PGIC had not agreed to do so. (*Id.*).

B. Procedural Background

On October 4, 2021, SPARTA filed an amended complaint seeking declaratory judgment. The amended complaint asserts two claims. Count 1 asserts a claim for declaratory judgment pursuant to 28 U.S.C. §§ 2201, 2202 seeking judicial determination of SPARTA and PGIC's rights under the stock-purchase agreement. (Compl. ¶¶ 24-27). Count 2 similarly asserts a claim for declaratory judgment pursuant to 28 U.S.C. §§ 2201, 2202 seeking judicial determination of SPARTA and PGIC's rights under the reinsurance agreement. (*Id.* ¶¶ 28-30).

PGIC has moved to dismiss the complaint for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and failure to state a claim under Fed. R. Civ. P. 12(b)(6).

II. Standard of Review

A. Fed. R. Civ. P. 12(b)(1)

[2] [3] [4] On a motion to dismiss for lack of subject-matter jurisdiction, "the party invoking the jurisdiction of a federal court carries the burden of proving its existence." *Johansen v. United States*, 506 F.3d 65, 68 (1st Cir. 2007) (quoting *Murphy v. United States*, 45 F.3d 520, 522 (1st Cir. 1995)). If the party seeking to invoke federal jurisdiction "fails to demonstrate a basis for jurisdiction," the motion to dismiss must be granted. *Id.* When ruling on a motion to dismiss under Rule 12(b)(1), the court "must credit the plaintiff's well-[pleaded] factual allegations and draw all reasonable inferences in the plaintiff's favor." *Merlonghi v. United States*, 620 F.3d 50, 54 (1st Cir. 2010).

B. Fed. R. Civ. P. 12(b)(6)

[5] [6] [7] [8] [9] To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the complaint must state a claim that is plausible on its face. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). For a claim to be plausible, the "[f]actual allegations must be enough to raise a right to relief above the speculative level ...." *Id.* at 555, 127 S.Ct. 1955 (internal citations omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955). When determining whether a complaint satisfies that standard, a court must assume the truth of all well-pleaded facts and give the plaintiff the benefit of all reasonable inferences. *See* ***176** *Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 5 (1st Cir. 2007) (citing *Rogan v. Menino*, 175 F.3d 75, 77 (1st Cir. 1999)). Dismissal is appropriate if the complaint fails to set forth "factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." *Gagliardi v. Sullivan*, 513 F.3d 301, 305 (1st Cir. 2008) (quoting *Centro Medico del Turabo, Inc. v. Feliciano de Melecio*, 406 F.3d 1, 6 (1st Cir. 2005)).

III. Analysis

Defendant contends that this declaratory judgment action is not ripe for judicial resolution or redressable by the relief requested in the amended complaint. It further asserts that the complaint fails to state a claim and that the court should exercise its discretion under the Declaratory Judgment Act to dismiss the claims.

A. Standing

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[10] [11] [12] [13] [14] Article III of the Constitution limits the jurisdiction of federal courts to "cases" and "controversies." U.S. Const. art III, § 2. Article III standing is a prerequisite for subject-matter jurisdiction, and "the plaintiff bears the burden of pleading facts necessary to demonstrate standing." *Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 730 (1st Cir. 2016) (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990)). "The heartland of constitutional standing is composed of the familiar amalgam of injury in fact, causation, and redressability." *Id.* at 731 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Each element "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof," *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130, which here is "the plausibility standard applicable under Rule 12(b)(6)," *Hochendoner*, 823 F.3d at 730.

Standing issues are frequently implicated in actions brought pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201. *See, e.g.*, *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007). The Declaratory Judgment Act provides as follows:

> In a case of actual controversy within its jurisdiction, ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

[15] [16] 28 U.S.C. § 2201(a). Courts often combine multiple justiciability concepts, "such as ripeness, standing, and the prohibition against advisory judicial rulings," when discussing the statutory requirement of an "actual controversy." *See* *EMC Corp. v. Chevedden*, 4 F. Supp. 3d 330, 335 (D. Mass. 2014) (quoting *In re Columbia Univ. Patent Litig.*, 343 F. Supp. 2d 35, 43 (D. Mass. 2004)). "[T]he phrase 'case of actual controversy' in the Act refers to the types of 'Cases' and 'Controversies' that are justiciable under Article III." *MedImmune*, 549 U.S. at 127, 127 S.Ct. 764.

1. Injury in Fact

[17] [18] "An injury in fact must be both 'concrete and particularized and actual or imminent, not conjectural or hypothetical.' " *Van Wagner Bos., LLC v. Davey*, 770 F.3d 33, 37 (1st Cir. 2014) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014)). A "threatened injury must be *certainly impending* to constitute injury in fact"; "allegations of *possible* future injury" are insufficient. *See* *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013).

***177 [19]** Count 1 seeks a declaration concerning the parties' rights and obligations under the SPA, particularly the indemnification provision. Count 2 similarly requests a declaration concerning the parties' rights and obligations under the reinsurance agreement. Defendant contends that both counts fail to allege a "certainly impending" injury because there are no allegations in the complaint about specific unreimbursed claims. It further asserts that no injury in fact results from its mere "failure to confirm" that it will honor its contractual obligations.

The complaint is somewhat cryptic in parts, which makes a detailed analysis difficult. It alleges that in May 2021, "SPARTA learned that claims made pursuant to AEIC policies were no longer being administered or paid." (Compl. ¶¶ 4, 20). It alleges that "SPARTA has tendered numerous claims to PGIC for indemnity, but PGIC has repeatedly failed to confirm that PGIC will honor its contractual obligations under the SPA and Reinsurance Agreement to administer and pay the claims made pursuant to insurance policies issued by AEIC." (*Id.* ¶ 4). And it alleges that on at least five occasions in 2021, "SPARTA contacted PGIC concerning SPARTA's requests for indemnity," that it requested confirmation that defendant would "administer and pay all such claims," and that defendant "has not agreed to do so." (*Id.* ¶ 21).

While it is far from clear, it appears that the complaint thus alleges that claims are not being administered or paid on a wholesale basis in violation of the SPA and the reinsurance agreement. In other words, it appears to allege that claims are not being declined on an individualized basis, according to individualized coverage determinations, but that all claims are being declined, regardless of the underlying issues. (Compl. ¶ 20).

Under the circumstances, the complaint is sufficient to allege "certainly impending" injuries. *See Clapper*, 568 U.S. at 409, 133 S.Ct. 1138.

The cases cited by defendant are largely inapposite, as they address the duty of an insurer to indemnify an insured under a specific policy. In a duty-to-indemnify case, the insured's liability remains undetermined, but the insurance company may be required, at some point in the future, to pay a resulting judgment. Courts often dismiss such claims for lack of standing. *See, e.g.*, *Trustgard Ins. Co. v. Collins*, 942 F.3d 195, 200 (4th Cir. 2019) (rejecting injury in fact based on mere possibility that "[insurance company] might have to guarantee a future judgment against [insured]," which depended on whether state-court plaintiff would receive judgment). [3] As framed by the complaint, this dispute, however, appears to be in substance a contractual dispute between businesses, not a coverage dispute arising out of particular policy language.

Defendant argues that the cryptic nature of the complaint is deliberate, and that plaintiff is concealing critical facts concerning the relationship between the parties. That may well prove to be true at the end of the day. For present purposes, however, the Court is confined to the allegations of the complaint, which are sufficiently plausible to confer standing. [4]

***178** For those reasons, the complaint plausibly alleges an injury in fact.

2. Redressability

[20] **[21]** The redressability element of standing requires that the requested relief directly redress the injury alleged. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 105-09, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Plaintiff must establish that it is "likely," as opposed to merely "speculative," that its claimed injuries will be redressed by a favorable decision. *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130.

[22] Defendant contends that the requested relief is merely a declaration that it must comply with the contract and thus does not redress any alleged injury. It further asserts that plaintiff seeks "an opinion advising what the law would be upon a hypothetical state of facts." *MedImmune*, 549 U.S. at 127, 127 S.Ct. 764. However, the complaint, read broadly, does not merely seek a declaration to "obey your contract." *Compare Kuhns v. Scottrade, Inc.*, 868 F.3d 711, 718 (8th Cir. 2017). Rather, plaintiff is seeking an interpretation and declaration of its contractual rights in light of a particular set of existing facts—specifically, that no claims are being administered or paid, in violation of defendant's contractual obligations.

Therefore, the complaint plausibly alleges that it is likely that plaintiff's claimed injuries will be redressed by a decision in its favor. *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. The motion to dismiss for lack of standing will therefore be denied.

B. Ripeness

[23] **[24]** **[25]** The ripeness doctrine is intended to "prevent the adjudication of claims relating to 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' " *Reddy v. Foster*, 845 F.3d 493, 500 (1st Cir. 2017) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985)). To be ripe, a complaint must "show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of the judicial relief sought." *Reddy*, 845 F.3d at 500 (quotation marks and citations omitted). Ripeness analysis has two prongs: hardship and fitness. *See Texas v. United States*, 523 U.S. 296, 301, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998).

1. Hardship

[26] **[27]** In evaluating hardship, "the court should consider whether the challenged action creates a direct and immediate dilemma for the parties." *Verizon New England, Inc. v. Int'l Bhd. of Elec. Workers, Loc. No. 2322*, 651 F.3d 176, 188 (1st Cir. 2011) (internal citations and quotation marks omitted). This prong is "wholly prudential" and "concerns the harm to the parties seeking relief that would come to those parties from our withholding of a decision at this time." *Reddy*, 845 F.3d at 501 (internal quotation marks and citations omitted).

[28] Defendant asserts that plaintiff has failed to establish the requisite harm, because its alleged failure to confirm that it will honor its contractual obligations does not create a "direct and immediate dilemma." Again, however, the complaint appears to allege a blanket refusal by defendant to comply with its contractual obligations at all, rather than one or more specific individual coverage disagreements.

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Under the circumstances, "the sought-after declaration would be of practical assistance ***179** in setting the underlying controversy to rest," and therefore a plausible claim of hardship has been alleged. *See State of R.I. v. Narragansett Indian Tribe*, 19 F.3d 685, 693 (1st Cir. 1994).

2. Fitness

[29] "The fitness prong 'has both jurisdictional and prudential components.' " *Reddy*, 845 F.3d at 501 (quoting *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 89 (1st Cir. 2013)). "The jurisdictional component ... concerns 'whether there is a sufficiently live case or controversy, at the time of the proceedings, to create jurisdiction in the federal courts.' " *Id.* "The prudential component ... concerns 'whether resolution of the dispute should be postponed in the name of judicial restraint from unnecessary decision of constitutional issues.' " *Id.*

[30] Defendant asserts that the allegations of the complaint, coupled with its interpretation of the SPA and reinsurance agreements, confirm there is no ripe dispute. For the reasons set forth above, it appears that there is a sufficiently live case or controversy, and that there is no reason to postpone resolution of this dispute in the interest of judicial restraint. Again, it is certainly possible that as information is revealed through discovery, defendant's characterization of the dispute proves to be correct. And the Court may revisit questions of justiciability, including ripeness and Article III standing, as may be necessary or appropriate during the course of the litigation. Nonetheless, at this stage it appears that the ripeness requirement is satisfied.

In summary, at this stage, the complaint has alleged sufficient facts to establish both the fitness and hardship prongs of ripeness. There is thus an actual controversy between the parties, and defendant's motion to dismiss will be denied.

C. Declaratory Judgment Act

[31] **[32]** **[33]** Even if there is a case or controversy within the meaning of Article III, it does not follow, of course, that a declaratory judgment should issue. Generally district courts "have a 'virtually unflagging obligation' to exercise the jurisdiction conferred on them by Congress." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 284, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)). However, in the declaratory judgment context, a district court has substantial discretion to decline to enter such relief. *See DeNovellis v. Shalala*, 124 F.3d 298, 313 (1st Cir. 1997).

> By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants. Consistent with the nonobligatory nature of the remedy, a district court is authorized, in the sound exercise of its discretion, to stay or to dismiss an action seeking a declaratory judgment before trial or after all arguments have drawn to a close. In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.

Wilton, 515 U.S. at 288, 115 S.Ct. 2137.

[34] Defendant urges the court to exercise that discretion here. But that, in effect, would be a decision on the merits, and at this stage, there is far from sufficient information for the court to make such a decision. Among other things, the Court cannot determine whether the requested declarations have a mere "advisory quality," or raise a plausible basis for abstention. *Cf.* ***180** *AIG Prop. Cas. Co. v. Green*, 150 F. Supp. 3d 132, 137 (D. Mass. 2015) ("[W]here another suit involving the same parties and presenting opportunity for ventilation of the same state law issues is pending in state court, a federal court may abstain from exercising jurisdiction over a declaratory judgment action") (internal quotation marks omitted) (quoting *Wilton*, 515 U.S. at 283, 115 S.Ct. 2137). For those reasons, the Court declines at this time to exercise its discretion to dismiss plaintiff's claims.

D. Failure to State a Claim

[35] Finally, defendant contends that the complaint fails to state a claim, essentially restating many of the same arguments it raises as to justiciability. Specifically, it asserts

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that it was under no general duty to confirm that it would abide by the agreement; that the SPA's claim procedures were not followed by plaintiff; and that the complaint does not allege that plaintiff demanded reimbursement for any particular claims.

[36] Taking the allegations as a whole, the complaint provides sufficiently plausible factual allegations to survive a motion to dismiss. While additional facts and details will surely be critical to resolve a motion for summary judgment, "their absence does not support a motion to dismiss." *Raytheon Co. v. Cont'l Cas. Co.*, 123 F. Supp. 2d 22, 31 n.7 (D. Mass. 2000). "Dismissal under Fed. R. Civ. P. 12(b)(6) is only appropriate if the complaint, so viewed, presents no set of facts justifying recovery." *Cooperman v. Individual, Inc.*, 171 F.3d 43, 46 (1st Cir. 1999); *see also* *Raytheon Co.*, 123 F. Supp. 2d at 27-28 (rejecting arguments that allegations of complaint are "too general" and "more details are needed regarding each specific [claim]"); *Tocci Bldg. Corp. of New Jersey v. Virginia Sur. Co.*, 750 F. Supp. 2d 316, 326 (D. Mass. 2010) (denying motion to dismiss after finding it "inappropriate to interpret those policies or provisions at this time because the level of detail required to interpret the relevant policies exceeds any requirement of notice pleading") (internal quotation marks and citation omitted).

Accordingly, the allegations of the complaint are sufficient to survive a motion to dismiss. The motion to dismiss for failure to state a claim will therefore be denied.

IV. Conclusion

For the foregoing reasons, defendant's motion to dismiss is DENIED.

So Ordered.

All Citations

621 F.Supp.3d 169

Footnotes

1 The complaint also refers to the reinsurance agreement as a "transfer and assumption agreement." (*See, e.g.*, Compl. ¶ 2).

2 On a motion to dismiss, the court may properly take into account four types of documents outside the complaint without converting the motion into one for summary judgment: (1) documents of undisputed authenticity; (2) documents that are official public records; (3) documents that are central to plaintiff's claim; and (4) documents that are sufficiently referred to in the complaint. *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993); *see also* *Arturet-Velez v. R.J. Reynolds Tobacco Co.*, 429 F.3d 10, 13 n.2 (1st Cir. 2005) ("The court can consider ... implications from documents incorporated into the complaint").

3 By contrast, in a duty-to-defend case, the court is addressing the issue of who is required to pay the costs of defending a lawsuit prior to judgment. The latter type of case normally does not present issues of Article III standing.

4 Defendant's motion to dismiss is a facial challenge to subject-matter jurisdiction. (*See* Def. Mem. at 2 n.1). "Facial attacks on a complaint require the court merely to look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in [plaintiff's] complaint are taken as true for purposes of the motion." *See* *Torres-Negron v. J & N Recs., LLC*, 504 F.3d 151, 162 (1st Cir. 2007) (internal quotation marks and citation omitted).

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Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.

Heather SWANSON, Plaintiff,
v.
SOUTHWEST AIRLINES CO., INC., Defendant.

Case No. 21-cv-05595
|
Signed August 26, 2023

Attorneys and Law Firms

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Kevin S. Simon, Scott C. Fanning, Fisher & Phillips LLP, Chicago, IL, for Defendant.

MEMORANDUM OPINION AND ORDER

Martha M. Pacold, Judge

***1** Defendant Southwest Airlines moves to compel arbitration in this retaliatory discharge case. [20]. [1] For the reasons set forth below, the court grants Southwest's motion. This case is hereby stayed pending the outcome of the arbitration.

FACTUAL BACKGROUND

The court accepts Swanson's recitation of the facts in her complaint for the purpose of deciding this motion. Southwest hired Heather Swanson to be a ramp employee at Chicago's Midway airport in April 2014. [1-1] ¶ 3. Southwest promoted her to ramp supervisor later that year. *Id.* ¶ 4. Swanson suffered a head injury on the job in 2014. *Id.* ¶ 5. She filed an application for adjustment of claim about 18 months after the injury, *id.*, but she reported it to her supervisor immediately, *id.* ¶ 6. Two years later, in July 2016, Swanson suffered another injury at work, sustaining damage to her hip, back, neck, and right leg. *Id.* ¶¶ 7–8. She again reported her injury immediately and she filed an application for adjustment of claim two months later. *Id.*

Swanson saw many doctors for her injuries. *Id.* ¶¶ 9–15. Her own doctors concluded that her injuries were too severe to permit her to return to work; Southwest's doctor concluded the opposite. *Compare id.* ¶¶ 9–13, 15, *with id.* ¶ 14. Swanson returned to work in October 2016 consistent with Southwest's doctor's assessment. *Id.* ¶ 16. Her supervisors promised that they would put her on light duty given her recent injuries. *Id.* ¶ 19. But Swanson "was taken off her light duty position and put out on the ramp at full duty." *Id.* She reinjured herself in that attempt, *id.*, and her primary care physician took her off work and filled out paperwork to allow her to take a leave of absence, *id.* ¶ 21. Southwest's workers' compensation insurance carrier denied her claims the next day and ordered her back to work. *Id.* ¶ 22. The complaint is not clear on Swanson's work status for the next two months, but seemingly, she was only doing light work despite Southwest's position that she should have been on full duty. *See id.* ¶¶ 23–25. Southwest terminated Swanson's employment on December 10, 2016, alleging that she violated her light work restrictions by carrying her grandmother's groceries. *Id.* ¶ 26. Swanson received significant medical treatment related to these injuries over the next two years. *Id.* ¶¶ 27–32.

PROCEDURAL HISTORY

Swanson sued Southwest Airlines in the Circuit Court of Cook County alleging that Southwest discharged her as retaliation for exercising her rights under the Illinois Workers' Compensation Act. *Id.* ¶ 37. Southwest removed the case to this court. [1]. In answering the complaint, Southwest asserted five affirmative defenses: (1) Swanson failed to mitigate damages; (2) Swanson's claim for punitive damages was barred because Southwest's conduct was not willful; (3) Southwest was not liable for injuries or damages caused by Swanson's preexisting conditions; (4) Swanson's claims were barred by the statute of limitations; and (5) Swanson's claims were barred by "laches, waiver, estoppel, and/or unclean hands." [11] at 14–15.

***2** Nearly eight months after Swanson filed her complaint in state court and nearly six months after the court referred the case to Judge Cummings for discovery, Southwest asserted for the first time that Swanson's claim was subject to a mandatory arbitration provision in her employment contract. [20]. Southwest moved to compel arbitration under the Federal Arbitration Act ("the FAA") and the Texas Arbitration Act ("the TAA"), and it moved to stay this case pending the outcome of the arbitration. *Id.* at 1. Swanson

responded that Southwest had waived mandatory arbitration by not asserting it as an affirmative defense or disclosing it during certain aspects of the discovery process that had gotten underway by that point. [26] at 1–2.

After Southwest filed its motion, the Supreme Court decided two cases that directly impact this one. First, in *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022), the Court held that the FAA's supposed "policy favoring arbitration" did not permit the federal courts to craft a prejudice requirement when determining whether a party waived mandatory arbitration as a defense to a suit. *Id.* at 1711; *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Second, in *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022), the Court held that Southwest's ramp supervisors belong to a "class of workers engaged in foreign or interstate commerce" and are thus exempt from the FAA's coverage. *Id.* at 1787. Swanson was a ramp supervisor for Southwest. [1-1] ¶ 4.

The combination of these cases shifted the legal sands on which the parties' arguments rest. First, Swanson was exempt from the FAA because she was a ramp supervisor.[2] *Saxon*, 142 S. Ct. at 1787. Thus, the law governing the arbitration clause became state law, not the FAA. *Cf. Saxon v. Southwest Airlines Co.*, 993 F.3d 492, 502 (7th Cir. 2021), *aff'd*, *Saxon*, 142 S. Ct. 1783. Second, the standard for determining whether Southwest waived mandatory arbitration possibly changed due to *Morgan*. Southwest removed this case pursuant to the court's diversity jurisdiction. [1] ¶ 4. And now that the issue in the motion is a question of state law rather than the FAA, the court is bound to follow the substantive law of the forum state (Illinois) and federal procedural law. *Hanna v. Plumer*, 380 U.S. 460, 465 (1965) ("federal courts are to apply state substantive law and federal procedural law"). If the elements of waiver are procedural, the rule announced in *Morgan* governs this motion: "a federal court assessing waiver does not generally ask about prejudice." 142 S. Ct. at 1713. Waiver is simply "the intentional relinquishment or abandonment of a known right." *Id.* (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)).

But state law points the court in a different direction. Illinois's choice-of-law rules (which the court is bound to follow as it sits in diversity, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97 (1941)), require the court to respect the choice-of-law provision in Swanson's employment contract so long as the contract is valid and the law chosen is not contrary to Illinois's fundamental public policy. *Fulcrum Fin. Partners v. Meridian Leasing Corp.*, 230 F.3d 1004, 1011 (7th Cir. 2000). The contract's choice-of-law clause selects Texas as an alternative to the FAA. [20-2] at 5. Like nine federal courts of appeals prior to *Morgan*, the Texas Supreme Court requires a showing of prejudice before a court can hold that a party waived mandatory arbitration. *Perry Homes v. Cull*, 258 S.W.3d 580, 589–90 & n.36 (Tex. 2008). So if the elements of waiver are substantive for *Erie* purposes, Swanson would be required to show that Southwest "substantially invok[ed] the judicial process to [her] detriment or prejudice." *Id.* at 589–90.

***3** Because the parties understandably did not address this *Erie* issue in their first round of briefing, the court ordered supplemental briefing on whether the elements of waiver are substantive or procedural and whether Southwest waived mandatory arbitration in this case under either rule. [28].

LEGAL STANDARD

On a motion to compel arbitration under Texas law, the moving party bears the initial burden to establish the arbitration agreement's existence and to show that the claims asserted against it fall within the arbitration agreement's scope. *In re Estate of Guerrero*, 465 S.W.3d 693, 699 (Tex. Ct. App. 2015). The movant must also show that the opposing party has refused to arbitrate. Tex. Civ. Prac. & Rem. Code § 171.021(a)(2). If the movant makes these showings, the nonmovant can contest the movant's proof or present its own evidence supporting the elements of a defense to enforcing the arbitration agreement. *Estate of Guerrero*, 465 S.W.3d at 700. If there are genuine disputes of material fact whether the agreement exists, the court cannot summarily grant or deny the motion and must resolve the disputed material facts. *Id.* Whether an arbitration agreement is enforceable is a question of law. *Id.*

ANALYSIS

I. The Arbitration Agreement

The arbitration agreement at issue here is contained in a document entitled "Southwest Airlines Dispute Resolution Program." [20-2] at 2. It provides that the ADR program "is intended to be a substitute for the legal process, and may only be invoked to resolve employment-related wage and hour claims/causes of action and claims under state or local leave laws." *Id.*

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A. Valid Arbitration Agreement

The arbitration agreement is valid. "A written agreement to arbitrate is valid and enforceable if the agreement is to arbitrate a controversy that (1) exists at the time of the agreement; or (2) arises between the parties after the date of the agreement." Tex. Civ. Prac. & Rem. Code § 171.001(a). "A party may revoke the agreement only on a ground that exists at law or in equity for the revocation of a contract." *Id.* § 171.001(b). The ADR program is in writing, [20-2], and Swanson accepted it on July 31, 2016, [20-2] ¶ 8. The dispute between the parties arose on December 10, 2016 when Southwest terminated Swanson' employment. [1-1] ¶ 26.

Swanson makes two arguments that the agreement is unenforceable: (1) that it is unconscionable and (2) that it is void as against public policy. [26] at 9–15.

Unconscionability. Swanson argues that the ADR program is substantively unconscionable. *Id.* "Substantive unconscionability refers to the fairness of the arbitration provision itself[.]" *Delfingen US-Texas, L.P. v. Valenzuela*, 407 S.W.3d 791, 797 (Tex. Ct. App. 2013). Because unconscionability "lacks precise legal definition," Texas courts look to five factors to determine whether the substantive abuse is "sufficiently shocking or gross to compel the court to intercede[.]" *Id.* The five factors are:

> (1) the "entire atmosphere" in which the agreement was made; (2) the alternatives, if any, available to the parties at the time the contract was made; (3) the "non-bargaining ability" of one party; (4) whether the contract was illegal or against public policy; and (5) whether the contract is oppressive or unreasonable.

Id.[3] Swanson has forfeited any argument that any of these factors shows substantive unconscionability. As Southwest points out, Swanson cites, attaches, and argues about an ADR policy to which she was never subject—the ADR policy at issue in the Supreme Court's *Saxon* case. [27] at 7 (citing [26-6] (district court documents from the *Saxon* case, 1:19-cv-00403)). For that reason alone, Swanson's argument that the ADR policy to which she agreed was unconscionable is forfeited. *See* *United States v. Hathaway*, 882 F.3d 638, 641 (7th Cir. 2018) ("Forfeiture is the accidental or *neglectful* failure to timely assert a right." (Emphasis added)).

***4** Even assuming that Swanson is challenging the correct contract, she points to no decision of any Texas court holding a similar mandatory arbitration provision substantively unconscionable. Indeed, the Texas Supreme Court has upheld the validity of mandatory arbitration agreements in the face of substantive unconscionability challenges, even where the provision at issue was a condition of employment and a so-called "contract of adhesion" that was not the subject of any bargaining. *See, e.g.*, *In re Halliburton Co.*, 80 S.W.3d 566, 572 (Tex. 2002); *cf.* *In re U.S. Home Corp.*, 236 S.W.3d 761, 764 (Tex. 2007) ("Adhesion contracts are not automatically unconscionable, and there is nothing per se unconscionable about arbitration agreements." (Citation omitted)). Without any authority on which to base its reasoning, the court declines to make an "*Erie* guess" that the Illinois Supreme Court would find the standard arbitration agreement at issue here to be "sufficiently shocking or gross to compel the court to intercede[.]" *Delfingen US-Texas, L.P.*, 407 S.W.3d at 797.

Void as against public policy. Illinois, the forum state, will not enforce contracts that are against its fundamental public policy. *Maher & Assocs., Inc. v. Quality Cabinets*, 640 N.E.2d 1000, 1005 (Ill. App. Ct. 1994). Swanson argues that the entire ADR program is against Illinois public policy and no part of it can be severed. [26] at 13–15. For this proposition, Swanson cites the Illinois Workplace Transparency Act. 820 ILCS 96/1-1 *et seq.* But Swanson's argument runs headlong into its own admissions. She concedes that the Act applies to "contract[s] executed, modified, or extended on or after January 1, 2020." [26] at 13; 820 ILCS 96/1-10(c). Swanson's contract terminated on December 10, 2016, more than three years before the Act's effective date. [26] at 4. Thus, the Workplace Transparency Act cannot serve as a basis to void the application of an otherwise valid provision of a contract. *See* *Nanberg v. 21st Century Flooring, LLC*, No. 21-cv-6623, 2022 WL 4482761, at *3 n.3 (N.D. Ill. Sept. 27, 2022) (holding the same).

Neither Swanson's original briefing nor her supplemental briefing provides any reason why the arbitration agreement is void as against Texas's public policy. Any argument on this point is forfeited. *See* *Scheidler v. Indiana*, 914 F.3d 535, 540 (7th Cir. 2019).

B. The Claims Fall Within the Agreement to Arbitrate

Southwest has satisfied its burden to show that Swanson's claims fall within the scope of the agreement to arbitrate. The ADR program "applies to any covered claim ... between Southwest Airlines ... and an ADR Employee of Southwest Airlines ... even after the employment relationship has ended." [20-2] at 2. Swanson alleges that Southwest terminated her in retaliation for exercising her rights under Illinois's Workers' Compensation Act. [1-1] ¶¶ 37, 40; *see* 820 ILCS 305/1 *et seq.* Southwest contends that Swanson's claim is covered under two clauses in the ADR program as: (a) a "retaliation claim[ ]" related to "other compensation" and (b) a "retaliation claim" related to "medical leave." [20] at 9–10 (citing [20-2] at 3).

Swanson's responsive briefing, [26], does not argue that her claim is not covered by the arbitration agreement. Yet because the movant bears the burden on this point, *Estate of Guerrero*, 465 S.W.3d at 699, the court analyzes the issue without responsive briefing, *cf. Marcure v. Lynn*, 992 F.3d 625, 631–32 (7th Cir. 2021); *Nabozny v. Podlesny*, 92 F.3d 446, 459 n.9 (7th Cir. 1996).

Swanson's claim is covered because it is a "retaliation claim[ ] for having exercised or attempted to exercise rights under" an applicable law for "other compensation." [20-2] at 3. The Illinois Workers' Compensation Act provides for "compensation" when an employee sustains certain kinds of injuries on the job. *See* 820 ILCS 305/8 (setting out compensation schedule). Swanson claims that Southwest fired her in retaliation for attempting to exercise her rights under the statute. [1-1] ¶ 37. Thus, the ADR program's language covers her claim.

C. Refusal to Arbitrate

***5** Swanson refuses to arbitrate this claim. [26-4] at 1. Southwest has met its burden on this point.

*

Because Southwest has met its burden on each of the three necessary elements under Texas law, the court concludes that Swanson's claim is subject to the arbitration agreement contained in the ADR program. [20-2].

II. Waiver

Swanson's primary argument against compelling arbitration is that Southwest has waived reliance on the arbitration clause through its conduct. [26] at 1–3, 5–9. Swanson makes two separate points. *First*, she claims that Southwest's litigation conduct constitutes waiver because it failed to raise mandatory arbitration as an affirmative defense, and it waited too long to assert its rights. *Id.* at 1–2. *Second*, she argues that Southwest waived mandatory arbitration by failing to follow its own procedures set out in the ADR program. *Id.* at 8–9.

Southwest responds that its conduct does not show that it waived its right to enforce the arbitration agreement and that Swanson was not prejudiced by Southwest's late assertion of mandatory arbitration. [20] at 12–13; [27] at 3–7; [30] at 6–7.

A. Legal Landscape

Because of the novelty and complexity in this area, the court begins with some background on the relevant law. When courts assess whether a party has waived an argument or right, they ordinarily ask whether the party has intentionally relinquished or abandoned it. *Morgan*, 142 S. Ct. at 1713 (quoting *Olano*, 507 U.S. at 733). If a court finds that a party has waived reliance on a right or argument, the court will not consider it. *See United States v. Seals*, 813 F.3d 1038, 1045 (7th Cir. 2016).

Prior to the Supreme Court's decision in *Morgan*, a circuit split had developed over the proper test for determining whether a litigant had waived reliance on a mandatory arbitration agreement governed by the FAA. Nine circuits had created an arbitration-specific rule that nonmovants had to show they were prejudiced by a movant's failure to assert its right to arbitrate at some earlier point. *Morgan*, 142 S. Ct. at 1712 & n.1. Two circuits (including the Seventh Circuit) had rejected it. *Id.* at 1712 & n.2. *Morgan* resolved the split by holding that the FAA did not command an arbitration-specific rule. *Id.* at 1712. But it left open a host of other questions including the "the role state law might play" and whether waiver is even the proper framework for considering whether a litigant asserted its right to mandatory arbitration too late to be considered. *Id.*

Morgan arose under the FAA. Because of the Court's holding in *Saxon*, 142 S. Ct. at 1787, the arbitration clause in Swanson's employment contract is now governed by state law. This case arises under the court's diversity jurisdiction, so under *Erie*, the court decides the case under the substantive law of the forum state (here Illinois) using federal procedural law. *Hanna*, 380 U.S. at 465. Illinois choice-of-law rules require the court to respect the choice-of-law provision in the employment contract, which, as discussed above, selects Texas. *See* Procedural History, *supra.* Texas courts assessing

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an alleged waiver of a right to mandatory arbitration ask slightly different questions than the inquiry posed by *Olano*. Instead of determining whether the party attempting to compel arbitration intentionally relinquished or abandoned a known right to arbitrate, they ask whether that party "substantially invoked the litigation process" and if so, whether "the opposing party proves that it suffered prejudice as a result." *Perry Homes*, 258 S.W.3d at 593 (citation omitted).

***6** This background raises the question whether the elements that constitute waiver of a right to arbitrate based on state arbitration law are substantive or procedural under *Erie*.

B. Waiver of a Right to Arbitrate Is Substantive

It is as true today as it was 58 years ago that "the cases following [*Erie*] have not succeeded in articulating a workable doctrine governing choice of law in diversity actions." *Hanna*, 380 U.S. at 474 (Harlan, J., concurring); *see* 19 Arthur R. Miller, *Federal Practice and Procedure* § 4511 (3d ed. 2022). *Erie* problems are particularly difficult where the matter in question falls "within the uncertain area between substance and procedure." 19 Wright & Miller, *supra* § 4511 (quoting *Hanna*, 380 U.S. at 472).

Because no Federal Rule of Civil Procedure governs waiver of contractual rights, the court applies the "relatively unguided" *Erie* analysis, which calls on the court "to determine whether the rules at issue or substantive or procedural." *In re County of Orange*, 784 F.3d 520, 527 (9th Cir. 2015); *see generally Houben v. Telular Corp.*, 309 F.3d 1028, 1030–36 (7th Cir. 2002) (background). Substantive rules are those that create rights or obligations or are so bound up with state-created rights and obligations that a federal court is required to apply them. *See Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 535 (1958). Procedural rules, by contrast, define "a form and mode of enforcing" a substantive right. *Id.* at 536. Because of the imprecision of these definitions, courts have turned to policy-rooted tests to guide the inquiry. One is the "outcome-determinative" test first announced in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). That test instructed courts to apply the state rule where applying the federal rule would "significantly affect the result of a litigation." *Id.* at 109. *Hanna* added some nuance, reading the outcome-determinative test with reference to the "twin aims" of *Erie*: discouraging forum shopping and avoiding the inequitable administration of the law. 380 U.S. at 468; *see County of Orange*, 784 F.3d at 528 (calling the choice between state and federal law "more informed" by the policy tests than the labels of substance or procedure).

Utilizing this "unguided analysis," the court concludes that waiver of the right to compel arbitration in this case is substantive for *Erie* purposes. The Texas rule requiring substantial invocation of the litigation process and prejudice is "bound up with [Southwest's] rights and obligations in such a way that its application in the federal court is required." *Byrd*, 356 U.S. at 535.

Texas courts have referenced substantive policies when justifying Texas's two-prong waiver rule. In the main case on this issue—*Perry Homes v. Cull*—the Texas Supreme Court noted that the hurdle to showing that a party had waived arbitration was "a high one" "[d]ue to the strong presumption against waiver of arbitration." 258 S.W.3d at 589–90; *see also Kenny Hodges, L.L.P. v. Gobellan*, 433 S.W.3d 542, 543 (Tex. 2014) (per curiam). As one Texas appellate court put it, "[b]ecause public policy favors arbitration, there is a strong presumption against finding that a party has waived its right to arbitration; the burden to prove waiver is thus a heavy one." *Southwind Grp., Inc. v. Landwehr*, 188 S.W.3d 730, 735 (Tex. Ct. App. 2006). The Texas courts thus see the elements and test for waiving arbitration as tied to substantive rights of those asserting mandatory arbitration.

***7** *Herremans v. Carrera Designs, Inc.*, 157 F.3d 1118 (7th Cir. 1998), presents an analogous scenario where the court held that the state-law waiver rule governed. The plaintiff sued his former employer for breach of contract and violations of Indiana's wage payment statute. *Id.* at 1120. In part, the plaintiff alleged that his employer breached a contract by failing to pay his additional bonus in annual installments. *Id.* at 1122. The district court held that this oral promise was unenforceable due to Indiana's statute of frauds, despite the fact that the defendant had failed to raise this defense in its answer as required by Rule 8(c). *Id.* "By its silence," the Seventh Circuit explained, "Carrera had forfeited that defense under the principles of procedural waiver or forfeiture enforced in the federal courts." *Id.* Ordinarily, federal procedural rules (like the rule requiring the statute of frauds to be pled as an affirmative defense) govern federal litigation. *Id.* at 1123 (citing *Metfirst Fin. Co. v. Price*, 991 F.2d 414, 415 (7th Cir. 1993)).

In spite of the Federal Rule of Civil Procedure directly on point (an attribute the federal rule on waiver of arbitration does not possess), *Herremans* held that applying it would

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interfere with substantial state interests. *Id.* The court explained that this exception is "more likely to be applicable when the state waiver rule is limited to some particular body of substantive law and is therefore more likely to reflect state substantive policies than is a procedural rule of general applicability." *Id.* In *Herremans*, application of the state waiver rule ended up working against the appellee because the state rule was stricter than the federal one. *Id.* The court chose to apply the state rule because it was "intended ... to discourage breaches of contract and thus to advance substantive state policy." *Id.*

Applying *Herremans* here, the state rule is the correct selection. Unlike in *Herremans*, there is no Federal Rule of Civil Procedure directly on point. And applying the federal rule—which lacks a prejudice requirement—would interfere with Texas's stated policy favoring arbitration, which serves as one justification for the presumption against waiver and the strict two-prong test developed by Texas's courts in this context. *See Southwind Grp.*, 188 S.W.3d at 735. As in *Herremans*, this waiver rule is tied to a "particular body of substantive law" and is not "a procedural rule of general applicability." 157 F.3d at 1123. *Perry Homes* explains this well. The defendants in that case asked the Texas Supreme Court to reexamine the prejudice requirement it had developed because "Texas law does not require a showing of prejudice for waiver." 258 S.W.3d at 594. Indeed, the ordinary Texas waiver rule is the same as the federal rule announced in *Olano*: intentional relinquishment of a known right. *Id.* But the Texas Supreme Court declined to claw back the prejudice requirement, unlike the U.S. Supreme Court in *Morgan*. *Id.* The Texas Supreme Court recognized that waiver generally does not require a showing of prejudice, but borrowing from the law of estoppel, the court determined that waiver by litigation conduct involves the question of reliance, and thus upheld the prejudice requirement. *Id.* at 595. Thus, the Texas Supreme Court has treated this rule as an arbitration-specific rule, not one of general applicability.

Since the Supreme Court decided *Morgan*, fourteen Texas appellate courts have discussed *Morgan*'s applicability in state-court cases applying either the FAA or the TAA. [4] All fourteen have continued to apply a prejudice standard despite *Morgan* or have declined to address the issue.

***8** Wright & Miller provides further guidance. While waivers of constitutional and other federal rights are generally assessed as a matter of federal law, waivers of nonfederal rights, arguments, and defenses are often assessed under state law (though there are some discrepancies). 19 Wright & Miller, *supra* § 4511.1 n.59 (collecting cases). [5]

Texas's two-prong waiver rule is "bound up with [Southwest's] rights and obligations in such a way that its application in the federal court is required." *Byrd*, 356 U.S. at 535. Thus, the court treats the test for waiver of mandatory arbitration as substantive and applies the state rule in this case. [6]

*

Though not clearly explained, Swanson at least preserved an argument that waiver is procedural rather than substantive. Swanson quotes *Morgan* describing the Eighth Circuit's arbitration-specific waiver rule as procedural. [29] at 1–2. Indeed, *Morgan* describes the Eighth Circuit rule as "procedural" seven separate times. 142 S. Ct. at 1711–14. *Yakus v. United States*, 321 U.S. 414 (1944), called forfeiture (of which waiver is a variant) a "procedural principle," *id.* at 444. And waiver of a right to demand arbitration could well fall within *Byrd*'s definition of a procedural rule: one that is merely "a form and mode of enforcing" a substantive right. 356 U.S. at 536.

But for reasons explained above, the waiver rule is tied to Texas's substantive policy favoring arbitration. *E.g.*, *Perry Homes*, 258 S.W.3d at 590; *Kenny Hodges*, 433 S.W.3d at 543. And it is not a procedural rule of general applicability; it is tied to the specific substantive area of arbitration. *Perry Homes*, 258 S.W.3d at 593–95.

C. Southwest Did Not Waive Mandatory Arbitration

As discussed, the waiver standard in TAA cases has two prongs: (1) substantial invocation of the judicial process and (2) prejudice to the opposing party. *Pepe Int'l Dev. Co. v. Pub Brewing Co.*, 915 S.W.2d 925, 931 (Tex. Ct. App. 1996). The court need not determine whether Southwest has substantially invoked the judicial process because Swanson has not shown that she was prejudiced.

1. Prejudice

Swanson's briefing does not explain how or why she was prejudiced. Her response to the motion to compel arbitration, [26], did not address whether she was prejudiced by Southwest's late assertion of mandatory arbitration; she

relied on *Morgan*'s holding that waiver of arbitration in federal FAA cases does not have a prejudice requirement, *id.* at 5–6. Swanson argued that going to arbitration as opposed to litigating the case here would prejudice her, [26] at 10–11, but that is not the correct inquiry. Under Texas law on waiver of arbitration, "prejudice refers to the inherent unfairness in terms of delay, expense, or damage to a party's legal position that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue." *Perry Homes*, 258 S.W.3d at 597 (quoting *Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 346 (5th Cir. 2004), *abrogated by* *Morgan*, 142 S. Ct. 1708).

***9** The court gave Swanson another opportunity to brief the issue by asking, "[u]nder either [*Morgan* or *Perry Homes*] did Southwest actually waive arbitration through its litigation conduct in this case?" [28]. But Swanson's briefing in response to that prompt did not make any argument that she was prejudiced either; it merely rehashed previous arguments based on Southwest's alleged failure to follow the dictates of the ADR program. [29] at 7–10. Thus, Swanson likely forfeited an argument that Southwest's recent assertion of mandatory arbitration prejudiced her. *See* *Scheidler*, 914 F.3d at 540.

For completeness, however, the court also finds on the merits that nothing in the record suggests Swanson was prejudiced. Southwest has made no substantial motions and the parties have exchanged limited written discovery that, according to Southwest, will also be relevant in arbitration. *See* [27] at 4; [30] at 7. Swanson alleges no additional expenses that have been incurred because of the delay and no damage to her legal position that Southwest has caused by litigating the case until May 2022. Swanson has not shown that Southwest's conduct created "inherent unfairness." *Perry Homes*, 258 S.W.3d at 597 (quoting *Republic Ins. Co.*, 383 F.3d at 346).

2. Failing to Abide by ADR Program Procedures

Swanson spends significant time arguing that Southwest waived arbitration here by failing to abide by the procedures in the ADR program document, [20-2]. *See* [26] at 8–9; [29] at 7–10. Southwest responds only on the merits, arguing that Swanson—not the company—failed to abide by the ADR program's terms. [27] at 11–12. These arguments are beside the point. Swanson cites no case holding that a party moving to compel arbitration waives arbitration by failing to abide by the arbitration clause's procedures. Neither does she make any logical, policy, or practical argument that such a failure would waive reliance on the arbitration agreement. Thus, the argument is forfeited. *See* *Krebs v. Graveley*, 861 F. App'x 671, 673–74 (7th Cir. 2021) (order); *Beard v. Whitley Cnty. REMC*, 840 F.2d 405, 408–09 (7th Cir. 1988).

CONCLUSION

The court holds four things. (1) The arbitration agreement is valid. (2) Swanson's claim falls within the scope of the arbitration agreement. (3) Waiver of the arbitration clause is substantive for *Erie* purposes because Texas's waiver rule is tied to the state's substantive policies favoring arbitration. (4) Southwest did not waive arbitration because Swanson has not shown that she was prejudiced by Southwest's delay in relying on the ADR program's mandatory arbitration clause. For those reasons, Southwest's motion to compel arbitration and stay the case, [20], is granted. Because of the stay, the court strikes Swanson's motion to strike and compel, [21], without prejudice to reinstatement pending the outcome of the arbitration.

All Citations

Slip Copy, 2023 WL 5509357

Footnotes

1 Bracketed numbers refer to docket entries and are followed by page and / or paragraph numbers. Page numbers refer to the CM/ECF page number.

2 Southwest preserves in a footnote that Swanson's job duties differed from those of the *Saxon* plaintiff (as the Supreme Court assumed they existed) such that Swanson was not exempt from the FAA. [27] at 2 n.1. At

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this stage of the case and for the purpose of resolving this motion, the court concludes that Swanson's duties included "step[ping] in to load and unload cargo alongside ramp agents." *Saxon*, 142 S. Ct. at 1787; *see* [20-4] ¶ 8 (declaration stating that ramp supervisors can "assist" ramp agents—whose jobs actually included loading and unloading cargo—"in a management capacity"); *see also* [27] at 2 (agreeing that the court need not resolve the fact question of Swanson's duties).

3 The court assesses the fourth factor separately under Illinois law and then Texas law as Illinois also does not permit the enforcement of contracts that are against its fundamental public policy. *Fulcrum Fin. Partners*, 230 F.3d at 1011.

4 *E.g.*, *Mac Haik Chevrolet, Ltd. v. Parker*, No. 01-11-685-cv, 2023 WL 1786163, at *6 n.6 (Tex. Ct. App. Feb. 7, 2023) (declining to address); *Turnbull Legal Grp. PLLC v. Microsoft Corp.*, No. 01-20-00851-cv, 2022 WL 14980287, at *15 n.10 (Tex. Ct. App. Oct. 27, 2022) (declining to address); *Alarcon Constr. Grp. LLC v. Santoyo*, 05-21-00885-cv, 2022 WL 4923461, at *5–6 & n.3 (Oct. 4, 2022); *F.T. James Constr. Inc. v. Hotel Sancho Panza, LLC*, No. 08-20-00096-cv, 2022 WL 4538870, at *4–9 (Tex. Ct. App. Sept. 28, 2022); *Green v. Velocity Invs., LLC*, No. 05-20-00795-cv, 2022 WL 3655232, at *5–6 (Tex. Ct. App. Aug. 25, 2022); *see also id.* at *9 n.4 (Schenck, J., dissenting) ("Whether [*Morgan*] would govern in state court as a matter of procedure generally, or in cases said to be subject to state arbitration statutes, is unsettled and a matter for the Texas Supreme Court to determine in the first instance.").

5 *Compare, e.g.*, *Manning v. Hayes*, 212 F.3d 866, 871 (5th Cir. 2000) (ERISA); *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 759–63 (9th Cir. 1997) (federal rights generally); *Davis v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1396 (9th Cir. 1991) (federal constitutional rights); *Romero v. Allstate Ins. Co.*, 1 F. Supp. 3d 319, 429 (E.D. Pa. 2014) (federal discrimination claim); *Allied Sanitation, Inc. v. Waste Mgmt. Holdings, Inc.*, 97 F. Supp. 2d 320, 334 n.12 (E.D.N.Y. 2000) (FAA), *with* *Hollywood Fantasy Corp. v. Gabor*, 151 F.3d 203, 207 n.3 (5th Cir. 1998) (objection to enforcement of a contract); *Blue Cross of Idaho Health Serv., Inc. v. Atl. Mut. Ins. Co.*, 2011 WL 162283, at *5, *10–15 (D. Idaho Jan. 19, 2011) (whether insurer waived late notice as a defense).

6 Because the court concludes that the waiver rule is substantive based on *Byrd* and *Herremans*, the court does not need to utilize the secondary, policy-based *Erie* analysis applied in more difficult cases. *E.g.*, *Gasperini v. Ctr. for Humans., Inc.*, 518 U.S. 415, 426–39 (1996); *County of Orange*, 784 F.3d at 528; *see generally* 19 Wright & Miller, *supra* § 4511.

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2023 WL 2647023
United States District Court, D. New Hampshire.

TIG INSURANCE COMPANY
v.
NATIONAL INDEMNITY COMPANY

Case No. 22-cv-165-SE
|
Signed March 27, 2023

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ORDER

Samantha D. Elliott, United States District Judge

***1** At issue in this case is the scope of in-state activity necessary to establish specific jurisdiction over an out-of-state declaratory-judgment defendant after a successor party to the subject contract has relocated to the forum state. TIG Insurance Company ("TIG") argues that this court has personal jurisdiction over an out-of-state insurance company, Defendant National Indemnity Company ("NICO"), for the purpose of a declaratory judgment action determining the rights and obligations of the parties to a reinsurance contract originally issued in 1973. The contract was formed out of state and had not yet been breached when this suit was filed. Relying on Baskin-Robbins Franchising LLC v. Alpenrose Dairy, Inc., 825 F.3d 28 (1st Cir. 2016), TIG argues that the court has jurisdiction because NICO's communications relating to the claim were directed to TIG in New Hampshire beginning in 2018. But there is no evidence that TIG's asserted claim meaningfully implicates any of NICO's contacts with New Hampshire. Rather, it involves only the rights and obligations of the parties under a previously existing agreement with respect to an extrajurisdictional settlement. Consequently, the court does not have jurisdiction and the case is dismissed.

Background

NICO is an insurance company based in Nebraska that issued liability insurance to the State of Montana in effect from July 1, 1973, until July 1, 1975 ("Montana liability policy"). The Montana liability policy covered Montana for, among other things, claims asserted against the state that alleged bodily injury arising out of the state's errors or omissions.

To mitigate the potential for loss under the Montana liability policy, NICO bought reinsurance coverage from several insurance companies, including TIG's predecessor, Skandia Insurance Company Ltd. ("Skandia"). Skandia, a foreign insurance company based in Stockholm, Sweden with a U.S. Branch in New York, issued the reinsurance contract through a broker based in Chicago, Illinois. TIG succeeded Skandia at some point after Skandia and NICO entered into the reinsurance contract.

Beginning in 2000, workers at the Liberty Mine in Libby, Montana ("Libby Mine"), brought claims against the State of Montana to recover for asbestos-related injuries they allegedly suffered from working in the mine. Montana tendered the claims to NICO in 2002. NICO and Montana litigated and negotiated NICO's defense and indemnity obligations over the next 20 years as claims continued to be made against Montana.

In 2009, Montana and certain Libby Mine claimants entered into a settlement agreement in the amount of $43 million. In 2011, NICO paid Montana a portion of the settlement amount under the Montana liability policy. NICO submitted a reinsurance bill to TIG for a portion of the amount NICO had paid. TIG paid part of the amount NICO billed in 2017. [1]

NICO brought a declaratory judgment action against Montana in February 2012 in Montana state court, seeking a determination of NICO's rights, liabilities, and duties, if any, under the Montana liability policy. Montana brought a counterclaim, seeking coverage for the miners' claims. Nat'l Indem. Co. v. State of Montana, XDDV-20120-140. Litigation related to that case lasted more than a decade. Montana and NICO eventually resolved it by entering a settlement agreement on April 19, 2022. The Montana court approved the settlement on May 25, 2022.

***2** While in litigation with Montana, NICO sent status reports to TIG and its other reinsurers. Prior to 2018, TIG

managed and received communications from NICO regarding the reinsurance contract, including NICO's litigation status reports, through TIG's affiliate in Connecticut. Beginning in 2018, TIG began managing and receiving communications from NICO regarding the reinsurance contract through a different affiliate, RiverStone Claims Management, LLC. RiverStone is located in New Hampshire.

After NICO and Montana entered into the April 2022 settlement agreement, NICO advised TIG that it would bill TIG under the reinsurance contract for part of the settlement amount after the Montana court approved the settlement. On May 11, 2022, before the Montana court approved the settlement, and before NICO billed TIG, TIG filed this declaratory judgment action. TIG alleges that any amount NICO owes under the settlement agreement is not covered under the reinsurance contract. Doc. no. 1, ¶ 29. TIG alleges only one cause of action, seeking a declaratory judgment “regarding the parties' rights and obligations under the [reinsurance contract] in connection with or arising out of the ‘loss’ and ‘loss expense’ actually incurred by NICO under” the Montana liability policy. Id., ¶ 33. On or around the same day TIG filed this action, two other reinsurers brought similar suits against NICO in other jurisdictions. See Global Reinsurance Corp. of Am. v. Nat'l Indem. Co., 22-cv-3785(JSR) (S.D.N.Y. May 10, 2022); R&Q Ins. Co. v. Nat'l Indem. Co., C.A. No. 2:22-cv-01807-NIQA (E.D. Pa. May 10, 2022).

On June 6, 2022, after the Montana court approved the settlement, NICO billed its reinsurers, including TIG, for the portions of the settlement amount it believed due under their respective reinsurance agreements. On the same day, NICO filed a declaratory judgment action in the District of Nebraska against its reinsurers, including TIG. Nat'l Indem. Co. v. Aioi Nissay Dowa Ins., et al., 8:22-cv-199 (D. Neb. June 6, 2022).[2] The suits brought by the other reinsurers in the Southern District of New York and the Eastern District of Pennsylvania have since been dismissed without prejudice by agreement of the parties in favor of litigation in the District of Nebraska. Therefore, the cases currently proceeding in the District of Nebraska include all of the reinsurers for NICO's obligations under the Montana liability policy. TIG's suit here is the only case regarding reinsurance obligations for the Montana liability policy that is not proceeding in the District of Nebraska.

NICO now moves to dismiss, arguing that the court lacks personal jurisdiction over NICO. Alternatively, NICO argues that the court should transfer the case to Nebraska. TIG objects, arguing that this court can exercise personal jurisdiction over NICO and that transfer to Nebraska would be inappropriate.

I. Personal Jurisdiction

NICO contends that this court lacks personal jurisdiction over it because NICO has not had sufficient contacts with New Hampshire to support general personal jurisdiction and its contacts with TIG in New Hampshire related to this case do not support specific personal jurisdiction. In response, TIG contends that specific personal jurisdiction exists based on the parties' communications and NICO's other contacts with New Hampshire.

A. Standard of Review

***3** When, as here, the court does not hold an evidentiary hearing on a Rule 12(b)(2) motion, the prima facie approach applies. Rodriguez-Rivera v. Allscripts HealthCare Solutions, Inc., 43 F.4th 150, 157 (1st Cir. 2022). Under that approach, the court acts “as a data collector” but not as a factfinder. Id. (quotation omitted).

As a data collector, the court takes the plaintiff's “properly documented evidentiary proffers as true and construe[s] them in the light most favorable to [the plaintiff's] jurisdictional claim.” A Corp. v. All Am. Plumbing, Inc., 812 F.3d 54, 58 (1st Cir. 2016). The plaintiff cannot establish jurisdiction based on allegations in the complaint but instead “must put forward evidence of specific facts to demonstrate that jurisdiction exists.” Id. The court “also consider[s] facts offered by [the defendant], to the extent that they are not disputed.” Id. The plaintiff bears the burden of showing that specific personal jurisdiction exists. Rodriguez-Rivera, 43 F.4th at 160.

B. Specific Personal Jurisdiction

Because subject matter jurisdiction is based on diversity in this case, the court “must determine whether the defendant's contacts with the state satisfy both the state's long-arm statute as well as the Due Process Clause of the Fourteenth Amendment.” Vapotherm, Inc. v. Santiago, 38 F.4th 252, 258 (1st Cir. 2022). New Hampshire's long-arm statute permits personal jurisdiction over an out-of-state defendant to the extent allowed by due process. Id. TIG relies on specific personal jurisdiction, which “exists when there is a demonstrable nexus between a plaintiff's claims and a

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defendant's forum-based activities, such as when the litigation itself is founded directly on those activities." Massachusetts Sch. of L. at Andover, Inc. v. Am. Bar Ass'n, 142 F.3d 26, 34 (1st Cir. 1998). To show that specific jurisdiction exists over a defendant, a plaintiff must prove all three of the following elements:

> (1)[its] claim directly arises out of or relates to the defendant's forum-state activities; (2) the defendant's contacts with the forum state represent a purposeful availment of the privilege of conducting activities in that state, thus invoking the benefits and protections of that state's laws and rendering the defendant's involuntary presence in that state's courts foreseeable; and (3) the exercise of jurisdiction is ultimately reasonable.

Vapotherm, 38 F.4th at 258. "Contacts made after the filing of the complaint are not considered in the analysis of personal jurisdiction." AmTrans Health, LLC v. Z-Medica Corp., No. CV 08-0044ML, 2008 WL 11388106, at *2 (D.R.I. Aug. 20, 2008) (citing Harlow v. Children's Hosp., 432 F.3d 50, 61, 64–65 (1st Cir. 2005) and Noonan v. Winston, 135 F.3d 85, 93 n.8 (1st Cir. 1998)); see also Matlin v. Spin Master Corp., 921 F.3d 701, 707 (7th Cir. 2019).

1. Relatedness

In the context of a contract claim, determining whether a claim is related to the defendant's contacts with the forum requires the court to examine the defendant's contacts during "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 479 (1985). Where the "cause[ ] of action sound[s] in contract.... the relatedness inquiry hinges on whether the defendants' contacts were instrumental in either the formation or breach of the agreements in question." Carreras v. PMG Collins, LLC, 660 F.3d 549, 554 (1st Cir. 2011); see Vapotherm, 38 F.4th at 258-59.

***4** Here, TIG points to no evidence to show that NICO's contacts with New Hampshire were instrumental to either the formation or breach of the reinsurance contract for purposes of the relatedness inquiry. It is undisputed that TIG's predecessor, a Sweden-based company with a New York branch, issued the reinsurance contract through a Chicago broker to NICO, a Nebraska company. Thus, regardless of the exact location where the agreement was formed, it is plain that it was not formed in New Hampshire.

In addition, neither TIG nor NICO had breached the reinsurance contract at the time TIG initiated this action. At that point, the Montana court had not yet approved NICO's settlement with Montana, NICO had not yet billed TIG for coverage under the reinsurance contract, and TIG had not yet denied coverage. [3] Therefore, NICO's contacts with New Hampshire cannot have been "instrumental" to any alleged breach of the reinsurance contract. See, e.g., Harlow, 432 F.3d at 64–65.

TIG argues that, nevertheless, its claim arises out of or relates to NICO's activities in New Hampshire. TIG concedes that the Montana liability policy, the litigation between NICO and Montana, and all communications between TIG and NICO regarding the reinsurance contract prior to 2018, are unrelated to New Hampshire. [4] It contends that the relatedness prong is satisfied, however, because, beginning in 2018, "all material activities, communications, and demands from NICO relating to the Reinsurance Claim were directed to TIG in New Hampshire." Doc. no. 20-1 at 14. These activities and communications purportedly include:

- NICO regularly communicated and corresponded with TIG regarding the Reinsurance Claim in New Hampshire;
- NICO regularly provided information relating to the Reinsurance Claim to TIG in New Hampshire;
- NICO provided regular updates to TIG in New Hampshire, including, significantly, how NICO intended to allocate and bill the Reinsurance Claim once the State/NICO settlement was approved by the court in Montana;
- TIG, in New Hampshire, reviewed and evaluated the information that had been provided by NICO and made the determination that NICO's intended approach did not comply with the parties' contract;
- NICO provided its formal notice and report of the finalized settlement to TIG in New Hampshire;

- NICO issued its demand for payment under the Reinsurance Contract to TIG in New Hampshire, in the amount of $56,808.283, and NICO demanded that TIG issue that payment from New Hampshire; and
- NICO now alleges that TIG has breached the Reinsurance Contract by virtue of its activities and determinations, including its refusal to make the demanded payment, all of which occurred in New Hampshire.

***5** Id. at 14-15.

In support of its contention that the above activities satisfy the relatedness element, TIG relies on Baskin-Robbins Franchising LLC v. Alpenrose Dairy, Inc., 825 F.3d 28 (1st Cir. 2016), which it calls "instructive." Doc. no. 21 at 15. In Baskin-Robbins, Alpenrose, a dairy-products manufacturer located in Oregon, entered into a franchise agreement in 1965 with Baskin-Robbins, which then had its principal place of business in California. Id. at 32. The agreement, which the parties negotiated in California, gave Alpenrose the right to operate Baskin-Robbins franchises in Washington and Oregon for a six-year term. Id. The agreement also gave Alpenrose the option to renew its franchises for successive six-year terms so long as it gave Baskin-Robbins written notice at least one year prior to the expiration of the current term. Id. In 1998, Baskin-Robbins moved its headquarters from California to Massachusetts. Id. at 33.

Alpenrose sent Baskin-Robbins formal notice of its election to renew the agreement every six years through 2007. Id. Alpenrose sent the 2001 and 2007 renewal notices to Baskin-Robbins' headquarters in Massachusetts. Id.

In December 2013, shortly before its deadline to notify Baskin-Robbins of its intent to renew the agreement for another six-year term, Alpenrose gave Baskin-Robbins written notice that it would not renew the agreement. Id. The parties then began negotiating the terms of Alpenrose's transition out of the franchise arrangement. Id. In July 2014, after negotiations stalled, Alpenrose wrote to Baskin-Robbins that it wished to revoke its decision not to renew, and instead requested another six-year extension. Id. Alpenrose's letter also stated that if Baskin-Robbins did not agree to renew, Alpenrose would be due compensation under Washington law. Id.

Baskin-Robbins responded that Alpenrose had waited too long and was not entitled to renew the agreement or to receive any compensation. Id. Baskin-Robbins then brought suit in the District of Massachusetts seeking judicial declarations that the agreement would expire on December 8, 2014, and that Alpenrose was not entitled to compensation under the agreement. Id.

***6** Alpenrose moved to dismiss for lack of personal jurisdiction or in the alternative to transfer the case to the Western District of Washington. Id. The district court concluded that it did not have personal jurisdiction and dismissed the case. Id. On appeal, the First Circuit Court of Appeals concluded that Baskin-Robbins had satisfied the elements of personal jurisdiction and reversed, remanding the case for further proceedings. Id. at 41.

With regard to the relatedness element of the analysis, the First Circuit stated: "In its complaint, Baskin–Robbins seeks declarations both that Alpenrose's second letter did not effectively renew the Agreement (with the result that the Agreement expired on December 8, 2014) and that Alpenrose is not entitled to any compensation in connection with the expiration of the Agreement." Id. at 35. In resolving that those claims arose directly out of Alpenrose's in-forum contacts, the First Circuit concluded that "[a]lthough it is transparently clear that the Agreement itself ultimately determines the effect of Alpenrose's two letters (that is, whether those letters collectively resulted in renewal of the Agreement), it is the letters that set the present controversy in motion." Id. at 36. Because the letters were sent to Baskin-Robbins in Massachusetts, the First Circuit held that there was "a sufficient nexus between Alpenrose's letters and Baskin–Robbins' claims" to satisfy the relatedness prong of the jurisdictional analysis. Id.

TIG argues that, as with Alpenrose, NICO's contacts with TIG in New Hampshire are what "set the present controversy in motion." TIG contends that, as such, they are sufficient to establish the relatedness prong of the jurisdictional analysis. The court disagrees.

In Baskin-Robbins, the plaintiff sought a declaration that the defendant's letters did not effectively renew the parties' agreement (and therefore that it owed no damages). The court held that the fact that those letters — the legal effect of which were the subject of and basis for the declaratory judgment action — were sent to Massachusetts created a sufficient nexus to satisfy the relatedness standard.

Unlike the plaintiff in Baskin-Robbins, TIG does not seek a declaration as to the meaning or legal effect of any document sent to New Hampshire. Instead, it seeks a declaration of its rights and obligations under the reinsurance contract as it pertains to the settlement agreement. Both the reinsurance contract and the settlement agreement were negotiated and formed outside of New Hampshire. Neither had been breached, here or elsewhere, at the time that NICO filed this suit.

Nonetheless, TIG contends that NICO's purported activity and communications with TIG in New Hampshire regarding the Reinsurance Claim are sufficient to satisfy the relatedness prong. There are two problems with that argument. The first is that TIG, which bears the burden of adducing evidence of specific facts to show the existence of personal jurisdiction, provides almost no specifics about NICO's communications and activity. Rather, it states simply that NICO "regularly" communicated and gave information regarding the claim, without offering any details as to the content or frequency of that activity. Indeed, TIG points to and incudes with its objection only a single pre-litigation communication from NICO to TIG in New Hampshire: an April 21, 2022 email advising TIG that NICO has finalized its settlement agreement with Montana and which states that a "reinsurance billing will be submitted after court approval is received." Doc. no. 20-20 at 2. Thus, TIG has not offered specific facts to show that NICO had regular contact with New Hampshire regarding the Reinsurance Claim or the reinsurance contract.

***7** Second, even if TIG had provided those details, it offers no support for its contention that those communications would bring this case within Baskin-Robbins' ambit. Baskin-Robbins does not establish relatedness over every party who sends communications into the forum with respect to an existing contract. As mentioned, in that case, the defendant's connections to the forum state that the court deemed sufficient to establish the relatedness prong were the defendant's letters sent to the forum state attempting to renew the parties' agreement. Whether those letters successfully renewed the agreement was the issue before the court. The contacts were not, as TIG offers here to support jurisdiction, communications generally about the parties' dispute or the plaintiff's own activity in the forum state evaluating the parties' contract. TIG cites to no authority extending Baskin-Robbins' holding to the lengths it urges here.

At bottom, to support relatedness, TIG is left with NICO's notice of its not-yet-approved settlement with Montana and its notice of how it intended to bill TIG and other reinsurers when and if the Montana court approved the settlement. TIG believes that the fact that NICO sent these communications to it in New Hampshire is enough to satisfy the relatedness prong of the personal jurisdiction analysis. Neither Baskin-Robbins, on which TIG primarily relies, nor other First Circuit case law, supports that contention. See Connell Ltd. P'ship v. Associated Indem. Corp., No. 1:22-cv-10639, 2023 WL 122136 (D. Mass. Jan. 6, 2023). As such, TIG has failed to carry its burden to show relatedness.

2. Remaining Factors

TIG's failure to demonstrate relatedness between its claim in this case and NICO's contacts with New Hampshire means that this court cannot exercise personal jurisdiction over NICO in this case. A Corp., 812 F.3d at 59. Therefore, the court does not address whether TIG has carried its burden to show that NICO purposefully availed itself of the privilege of conducting activities within the forum state or whether the exercise of personal jurisdiction would be reasonable.

II. Transfer

NICO also moves in the alternative to transfer the case to the District of Nebraska, where its suit against TIG and other reinsurers is proceeding, relying on 28 U.S.C. § 1404(a). Because the court grants NICO's motion to dismiss on personal jurisdiction grounds, it does not address whether transfer would be appropriate if it could exercise personal jurisdiction over NICO.

Conclusion

For the foregoing reasons, the defendant's motion to dismiss (document no. 7) is granted.

SO ORDERED.

All Citations

Slip Copy, 2023 WL 2647023, 2023 DNH 029

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Footnotes

1 The 2009 settlement and TIG's 2017 payment are not part of this case.

2 NICO also brought a separate declaratory judgment action against certain other reinsurers in Nebraska on that same day. See Nat'l Indem. Co. v. Liberty Mutual Insur. Co., et al., 22-cv-200 (D. Neb. Apr. 6, 2022). The reason for, and the existence of, the second Nebraska declaratory judgment action are not material to the court's order.

3 The circumstances that existed when the complaint was filed could raise a jurisdictional question as to whether a live case or controversy existed at that time. Although neither party raised subject matter jurisdiction as an issue, the court has a responsibility to inquire sua sponte into its own jurisdiction. Amyndas Pharmas., S.A. v. Zealand Pharma A/S, 48 F.4th 18, 27 (1st Cir. 2022). The court is satisfied that the Article III jurisdictional requirements are met here because the legal issues pertaining to the parties' obligations under the reinsurance contract were "certainly impending" when the complaint was filed, the relief requested would address those issues, and the dispute is ripe. SPARTA Ins. Co. v. Penn. Gen. Ins. Co., ––– F. Supp. 3d ––––, 2022 WL 3214947, at *3-*7 (D. Mass. Aug. 9, 2022); Tocci Bldg. Corp. of N.J., Inc. v. Virginia Sur. Co., 750 F. Supp. 2d 316,320-25 (D. Mass. 2010).

4 In support of its motion, TIG relies on the declaration of William Bouvier, the Vice President, Director, Assumed Reinsurance for RiverStone. Doc. 20-2. The declaration states that although TIG's affiliate in Stamford, Connecticut "handled" matters related to the Reinsurance Claim until 2018, Bouvier, who was located in New Hampshire, was "responsible for supervising the handling of the Reinsurance Claim since 2014." Id., ¶ 7. This supervision purportedly meant that either Bouvier or someone of more senior management in New Hampshire had to give "approval for financial transactions for large claims (such as the Reinsurance Claim)." Id. TIG does not appear to contend that NICO had any pre-2018 contact with New Hampshire regarding the Reinsurance Claim or the reinsurance contract to support the exercise of personal jurisdiction. To the extent that TIG intended to make that contention based on these statements in Bouvier's declaration, that argument is not sufficiently developed to alter the court's analysis.

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THE TRAVELERS INDEMNITY COMPANY	:	Civ. No. 3:21CV00909(SALM)
v.	:	
ALTO INDEPENDENT SCHOOL DISTRICT, GRAPELAND INDEPENDENT SCHOOL DISTRICT, and GUSTINE INDEPENDENT SCHOOL DISTRICT	:	July 28, 2022

RULING ON AMENDED PETITION TO COMPEL ARBITRATION [DOC. #23]

Petitioner The Travelers Indemnity Company ("Travelers" or "petitioner") has filed an Amended Petition to Compel Arbitration. See Doc. #23. Respondents Alto Independent School District ("Alto"), Grapeland Independent School District ("Grapeland"), and Gustine Independent School District ("Gustine"), have filed a joint response to the petition, see Doc. #27, Doc. #28, to which Travelers has filed a reply. See Doc. #37. For the reasons stated herein, Travelers' Amended Petition to Compel Arbitration [**Doc. #23**] is **DENIED.**

I. Background

Travelers brought this "action to compel arbitration pursuant to Section 4 of the Federal Arbitration Act ('FAA')[]" on July 2, 2021. Doc. #1 at 1.

Travelers "is a corporation organized under the laws of the State of Connecticut and has its principal place of business in Hartford, Connecticut." Doc. #23 at 1.

Respondents are Texas school districts, see id. at 1, each of which "obtained first-party property insurance coverage from the Texas Rural Education Association Risk Management Cooperative ('TREA'), providing coverage for the Respondents' buildings. The terms, conditions, and exclusions of the insurance provided to each Respondent are set forth in a 'coverage document.'" Id. at 2. The Court refers to these collectively as "the Insurance Policies."

"Travelers agreed to reinsure a portion of the coverage that TREA provides to the Respondents subject to the terms, conditions, and exclusions of reinsurance contracts[.]" Id. at 3. Travelers' rights and obligations under these contracts are set forth in a Facultative Certificate. See id.

Pursuant to the Facultative Certificate, Travelers undertook the duty to investigate, adjust, and defend certain claims arising under the Insurance Policies. See Doc. #23-2 at 11. Specifically, the Facultative Certificate provides:

> Although [TREA] has the obligation and duty to investigate and defend claims or suits affecting this Reinsurance and to pursue such claims and lawsuits to a final determination, [TREA] has requested that once the claim exceeds the retention specified in the reinsurance declarations, [Travelers] assume these duties for the

> purposes of this CERTIFICATE. ... [Travelers] has assumed these duties.

Id.

The Facultative Certificate contains an arbitration provision, which states, in part:

> As a condition precedent to any right of action hereunder, any dispute between [TREA] and [Travelers] arising out of, or relating to the formation, interpretation, performance or breach of this CERTIFICATE, whether such dispute arises before or after termination of this CERTIFICATE, shall be submitted to arbitration. Arbitration shall be initiated by the delivery of a written notice of demand for arbitration sent certified or registered mail or by other carrier services providing receipt of delivery by one party to the other.

wait this isn't with the school districts though

Id. at 12.

"Each of the Respondents submitted a claim or claims to TREA as a result of purported storm damage to their properties. The Respondents claim that they have not received full compensation for their alleged losses related to each claim." Doc. #23 at 3.

wait so the districts are the plaintiffs...?

As a result of this dispute, "[e]ach of the Respondents filed a lawsuit ... naming both TREA and Travelers as defendants." Id. The claims set forth in each of these lawsuits are virtually identical. Compare Doc. #23-3 with Doc. #23-4 and Doc. #23-5. Each respondent "assert[s] extra-contractual claims against Travelers for alleged Violations of the Texas Insurance Code, Fraud, Conspiracy to Commit Fraud, Violations of the Texas

Deceptive [Trade] Practices Act, Misrepresentation, and Negligence." Doc. #23 at 4.

Travelers has "filed motions to dismiss or stay ... in favor of arbitration[]" in each of the underlying suits. Id. at 5. "The Texas [state trial] courts denied Travelers' motions in the Underlying Lawsuits, and Travelers ... filed interlocutory appeals." Doc. #38 at 5. "On May 25, 2022, the Texas Court of Appeals issued a Memorandum Opinion AFFIRMING the trial court's denial of the relief requested by Travelers in Alto ISD's suit." Doc. #47 at 2; see also Travelers Indem. Co. v. Alto ISD, No. 12-21-00143-CV, 2022 WL 1668859, at *6 (Tex. App. Ct. May 25, 2022).[1] On June 30, 2022, the Twelfth Court of Appeals for the State of Texas dismissed Travelers' appeal against Grapeland for lack of jurisdiction because "the record does not show that a decision on Travelers's motion was announced orally in open court or by memorandum filed with the clerk[.]" Travelers Indem. Co. v. Grapeland ISD, No. 12-21-00204-CV, 2022 WL 2374403, at *1 (Tex. App. Ct. June 30, 2022). Travelers' appeal in the Gustine case remains pending. See Doc. #47 at 2.

[1] Travelers filed a Motion for Rehearing of this decision on June 24, 2022. Alto ISD, No. 12-21-00143-CV, (Tex. App. Ct. June 24, 2022). The Texas Court of Appeals summarily denied Travelers' Motion for Rehearing on July 5, 2022. See Alto ISD, No. 12-21-00143-CV, (Tex. App. Ct. July 5, 2022).

On July 2, 2021, while Travelers' motions to dismiss were pending before the Texas state trial courts, Travelers filed its original Petition to Compel Arbitration in this Court. See Doc. #1. Travelers filed an Amended Petition to Compel Arbitration on September 15, 2021. See Doc. #23.[2] Respondents have filed an opposition to that petition. See Doc. #27, Doc. #28. In addition, respondents have filed a Motion to Dismiss for Lack of Personal Jurisdiction (Doc. #24), as well as a "Motion for Abstention with Respect to and/or Dismissal of, Petition to Compel Arbitration[.]" Doc. #26 at 1.

deny travelers' motion to compel arbitration

For the reasons set forth herein, Travelers' Amended Petition to Compel Arbitration [**Doc. #23**] is **DENIED.** The denial of the Amended Petition renders respondents' Motion to Dismiss for Lack of Personal Jurisdiction [**Doc. #24**] and Motion for Abstention [**Doc. #26**] **moot**, and those motions are therefore **TERMINATED.**[3]

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[2] Travelers' Amended Petition to Compel Arbitration is substantially similar to Travelers' original Petition to Compel Arbitration, but no longer names Mason Independent School District as a respondent. Compare Doc. #1 with Doc. #23.

[3] Respondents assert that abstention is warranted under the Colorado River doctrine. See Doc. #26. Some courts in this Circuit have held that, where a party moving to dismiss pursuant to Colorado River "also moves to dismiss on other grounds, the Court must consider the [Colorado River] motion first." Pappas Harris Cap., LLC v. Bregal Partners, L.P., No. 20CV06911(VEC), 2021 WL 3173429, at *2 (S.D.N.Y. July 27, 2021). Here, however, the Court need not reach the Colorado River argument because

II. Legal Standard

The FAA, 9 U.S.C. §1, et seq., requires enforcement of agreements to arbitrate, embodying "'a national policy favoring arbitration.'" Nicosia v. Amazon.com, Inc., 834 F.3d 220, 228–29 (2d Cir. 2016) (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 346 (2011)). Still, arbitration "is a matter of consent, not coercion," and therefore the FAA "does not require parties to arbitrate when they have not agreed to do so[.]" Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478–79 (1989).

Courts follow a two-part test to determine whether a claim is subject to arbitration, considering "(1) whether the parties have entered into a valid agreement to arbitrate, and, if so, (2) whether the dispute at issue comes within the scope of the arbitration agreement." In re Am. Express Fin. Advisors Sec. Litig., 672 F.3d 113, 128 (2d Cir. 2011). A party seeking to compel arbitration "must make a prima facie initial showing that an agreement to arbitrate existed before the burden shifts to the party opposing arbitration to put the making of that agreement in issue." Hines v. Overstock.com, Inc., 380 F. App'x 22, 24 (2d Cir. 2010) (quotation marks omitted).

Travelers has failed to establish that the parties agreed to arbitrate their claims.

"Courts deciding motions to compel [arbitration] apply a standard similar to the one applicable to a motion for summary judgment." Starke v. SquareTrade, Inc., 913 F.3d 279, 281 n.1 (2d Cir. 2019). "Where the undisputed facts in the record require the matter of arbitrability to be decided against one side or the other as a matter of law, [the Court] may rule on the basis of that legal issue and avoid the need for further court proceedings." Id. at 288 (citation and quotation marks omitted).

III. Choice of Law

"While the FAA expresses a strong federal policy in favor of arbitration, the purpose of Congress in enacting the FAA was to make arbitration agreements as enforceable as other contracts, but not more so." Cap Gemini Ernst & Young, U.S., L.L.C. v. Nackel, 346 F.3d 360, 364 (2d Cir. 2003) (citation and quotation marks omitted) (emphasis in original). "In determining whether the parties have agreed to arbitrate -- i.e., whether an arbitration agreement has been formed -- the court applies state substantive law." Byrne v. Charter Commc'ns, Inc., --- F. Supp. 3d ---, No. 3:20CV00712(CSH), 2022 WL 138020, at *3 (D. Conn. Jan. 14, 2022); see also Cap Gemini Ernst & Young, U.S., L.L.C., 346 F.3d at 364 ("[I]n evaluating whether the parties have entered into a valid arbitration agreement, the court must look to state law principles."). To that end, "[c]ourts within this

INTERESTING. really??

Circuit have ... applied state-law principles to determine whether an arbitration agreement may bind, or be enforced by, nonparties." Johnston v. Electrum Partners LLC, No. 17CV07823(KPF), 2018 WL 3094918, at *5 (S.D.N.Y. June 21, 2018).

"Travelers cites Texas law in [its] memorandum, because the Respondents' property is in Texas, and the Respondents' claims in the Underlying Lawsuit included causes of action specific to Texas." Doc. #2 at 10-11 n.1. Respondents "agree Texas substantive law should be applied" to determine "the enforceability of an arbitration agreement against a nonparty/nonsignatory who has not agreed or otherwise consented to arbitration." Doc. #28-1 at 16. The Court therefore applies Texas law.

IV. Discussion

The Court finds that respondents are not required to arbitrate their claims. Travelers bases its Amended Petition to Compel Arbitration on the Facultative Certificate's arbitration clause. See Doc. #23. Travelers concedes that respondents were not parties to the Facultative Certificate. See Doc. #2 at 7 ("The Respondents, as the original insureds with TREA, do not have a direct contractual relationship with Travelers, the reinsurer. No contract exists between Respondents and Travelers."). Nevertheless, Travelers contends that "Respondents are subject to the arbitration clause of the Facultative

duh

that's a fair point.

Certificates, because their claims necessarily arise out of or relate to that reinsurance contract -- absent the existence of these reinsurance contracts, they have no potential claims against Travelers." Id. at 10. Travelers relies on a theory of "direct-benefits estoppel," which it contends "applies when a non-signatory either (1) sues on the contract; or (2) otherwise seeks the direct benefits of the contract." Id. at 11.

DIRECT BENEFITS ETOPPEL DOESN'T APPLY

In opposition, respondents contend that "direct-benefits estoppel does not apply, and the Texas School Districts may not be compelled to arbitrate[,]" Doc. #28 at 3, because their "claims arise[] from general obligations imposed by state law, including the Texas Insurance Code, [the Texas Deceptive Trade Practices Act], and the common law, not the TREA-Travelers Reinsurance Certificates." Doc. #28-1 at 30-31. The Court agrees.

> Direct-benefits estoppel applies to parties who seek to derive a direct benefit from a contract with an arbitration agreement. This estoppel theory precludes a plaintiff from seeking to hold the non-signatory liable based on the terms of an agreement that contains an arbitration provision while simultaneously asserting the provision lacks force because the defendant is a non-signatory. Simply put, a person cannot both have his contract and defeat it too. When a claim depends on the contract's existence and cannot stand independently -- that is, the alleged liability arises solely from the contract or must be determined by reference to it -- equity prevents a person from avoiding the arbitration clause that was part of that agreement. But when the substance of the claim arises from general obligations imposed by state law, including statutes, torts and other common law duties, or federal law, direct-benefits

> estoppel is not implicated even if the claim refers to or relates to the contract or would not have arisen 'but for' the contract's existence.

Jody James Farms, JV v. Altman Grp., Inc., 547 S.W.3d 624, 637 (Tex. 2018) (citations, quotation marks, and footnotes omitted). "[W]hether a claim seeks a direct benefit from a contract containing an arbitration clause turns on the substance of the claim, not artful pleading." In re Weekley Homes, L.P., 180 S.W.3d 127, 131-32 (Tex. 2005).

Where, as here, the Court addresses a question of Texas state law, the Court must "apply [Texas] law as the [Texas Supreme Court] would apply it." Goodlett v. Kalishek, 223 F.3d 32, 36 (2d Cir. 2000). Absent a clear directive from a state's highest court, a federal court must "predict how the state's highest court would resolve the uncertainty or ambiguity." Chufen Chen v. Dunkin' Brands, Inc., 954 F.3d 492, 499 (2d Cir. 2020) (citation and quotation marks omitted). In doing so, the federal court "is bound to apply the law as interpreted by a state's intermediate appellate courts unless there is persuasive evidence that the state's highest court would reach a different conclusion." V.S. v. Muhammad, 595 F.3d 426, 432 (2d Cir. 2010).

applying texas law, not federal law, to this analysis

This Court need not predict how Texas appellate courts would address this issue, because the Texas Court of Appeals has already held that Alto is not bound by the Facultative Certificate's arbitration provision. See Travelers Indem. Co.,

2022 WL 1668859, at *6. Indeed, the Texas Court of Appeals specifically determined that direct-benefits estoppel did not apply to Alto's claims against Travelers. In making that determination, the Texas Court of Appeals stated:

> Alto ISD alleges it was damaged by receiving an inappropriate settlement for its claims under the Policy -- not the Reinsurance Contract, and that Travelers's liability, if any, is premised on insurance code, tort, and DTPA duties that are general, noncontract obligations arising from its role as the adjuster of the claims under the Policy -- not the reinsurer of TREA's liability under the Reinsurance Contract. Accordingly, we conclude Travelers has not carried its burden of establishing that direct benefits estoppel applies in this case.

key - claims arise from tort/ insurance code not contract

Id.

This analysis applies to each of the respondents' claims. Travelers concedes that "[a]lthough the specific allegations of each underlying petition vary based on the particulars of the individual Respondents' insurance claims, they share the same overarching allegations." Doc. #2 at 13. The Court finds no meaningful difference in the analysis as to Grapeland and Gustine. Accordingly, the reasoning behind the Texas Court of Appeals' determination that Alto is not required to arbitrate its claims applies with equal force to each of the respondents' claims.

This Court agrees with the Texas Court of Appeals' analysis. Respondents do not assert claims against Travelers for breach of contract. See Doc. #23-3; Doc. #23-4; Doc. #23-5.

Instead, they bring claims for "alleged Violations of the Texas Insurance Code, Fraud, Conspiracy to Commit Fraud, Violations of the Texas Deceptive [Trade] Practices Act, Misrepresentation, and Negligence." Doc. #23 at 4. Such claims "arise[] from general obligations imposed by state law, including statutes, torts and other common law duties[.]" Jody James Farms, JV, 547 S.W.3d at 637 (citation and quotation marks omitted).

Travelers nevertheless contends that direct-benefits estoppel applies because "[t]he Respondents cannot directly seek benefits related to or arising from the Facultative Certificates (or enforce obligations that it contends that the Facultative Certificates impose on Travelers) and then disclaim the arbitration clause in those very same contracts." Doc. #2 at 11. In Travelers' view, respondents "artfully plead their claims to make them sound as if Travelers' alleged liability arises from general obligations imposed on those engaged in the business of insurance under the Texas Insurance Code and the common law." Doc. #37 at 3-4. Whatever the causes of action actually pled in the Texas complaints, Travelers asserts that direct-benefits estoppel applies because the substance of respondents' claims "depends on, and cannot be determined without reference to, Travelers' obligations under the Facultative Certificate." Id. at 1.

huh... sounds convincing

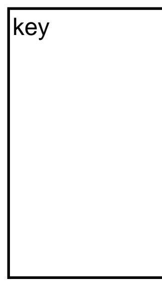
To support this argument, Travelers points to Alto's allegations that Travelers: (1) "fail[ed] to attempt in good faith to effectuate a prompt, fair, and equitable settlement of the claims, even though Defendants TREA and Travelers['] liability under the policy was reasonably clear," Doc. #23-3 at 9; (2) "[f]ail[ed] to promptly provide Plaintiff a reasonabl[e] explanation ... for Defendants TREA and Travelers['] denial of a claim or offer of a compromise settlement of a claim[,]" id. at 11; (3) "fail[ed] within a reasonable time to affirm or deny coverage of Plaintiff's claims[,]" id. at 9; (4) "refus[ed] to pay Plaintiff's claims without conducting a reasonable investigation[,]" id. at 10; and (5) knowingly and recklessly made false representations regarding the handling and payment of Alto's claims, see id. at 13-14. See Doc. #37 at 4.

Travelers argues that such allegations establish that its liability must be determined by referencing the Facultative Certificate:

> To the extent that the Respondents have any rights vis-à-vis Travelers with respect to the adjustment, settlement, and payment of their claims, those rights arise directly from Travelers' obligations in the Facultative Certificate, i.e., there is a specific contractual basis for Travelers' claim-handling obligations. They do not derive from general obligations imposed on those engaged in the business of insurance under Texas law.

Id. at 4-5. The Court disagrees.

Of course, Travelers' claim-handling obligations would not have arisen if there were no Facultative Certificate. However, a "non-signatory plaintiff cannot be compelled to arbitrate on the sole ground that, but for the contract containing the arbitration provision, it would have no basis to sue." In re Kellogg Brown & Root, Inc., 166 S.W.3d 732, 740 (Tex. 2005). Thus, the mere fact that Travelers' duty to perform such obligations only came to be because of the Facultative Certificate is insufficient to invoke direct-benefits estoppel. See Weekley Homes, L.P., 180 S.W.3d at 132 ("While [defendant's] duty to perform those repairs arose from the Purchase Agreement, a contractor performing repairs has an independent duty under Texas tort law not to injure bystanders by its activities, or by premises conditions it leaves behind." (footnotes omitted)).



Indeed, "direct-benefits estoppel does not apply simply because the claim refers to the contract." Jody James Farms, 547 S.W.3d at 638 (citation, quotation marks, and footnote omitted).

> Instead, the party must seek to derive a direct benefit -- that is, a benefit that stems directly -- from that contract. The claim must depend on the existence of the contract, and be unable to stand independently without the contract. The alleged liability must arise solely from the contract or must be determined by reference to it.

G.T. Leach Builders, LLC v. Sapphire V.P., LP, 458 S.W.3d 502, 527–28 (Tex. 2015) (citations and quotation marks omitted).

Travelers' alleged liability does not "arise solely from the" Facultative Certificate, and need not "be determined by reference to" the Facultative Certificate. Id. Respondents do not argue that Travelers "breached any specific provision of the [Facultative Certificate] or that" Travelers did not handle respondents' claims "in accordance with the [Facultative Certificate]." Taylor Morrison of Tex., Inc. v. Ha, No. 14-20-00749-CV, 2021 WL 6050648, at *6 (Tex. App. Ct. Dec. 21, 2021). Travelers' liability is instead "premised on insurance code, tort, and DTPA duties that are general, noncontract obligations[.]" Travelers Indem. Co., 2022 WL 1668859, at *6. Such duties are separate and distinct from any potential breach of contract. See Barbara Techs. Corp. v. State Farm Lloyds, 589 S.W.3d 806, 825 (Tex. 2019)("A breach of contract claim, however, is distinct and independent from a claim that an insurer violated the Insurance Code."); see also USAA Tex. Lloyds Co. v. Menchaca, 545 S.W.3d 479, 489 (Tex. 2018) ("An insured's claim for breach of an insurance contract is 'distinct' and 'independent' from claims that the insurer violated its extra-contractual common-law and statutory duties.").

Travelers points to several allegations in Alto's Complaint to support its argument that direct-benefits estoppel applies. See Doc. #37 at 4. But these allegations suggest that Travelers'

potential liability arises from obligations that are separate and distinct from the Facultative Certificate. For example, Alto asserts that Travelers violated the Texas Insurance Code by "refusing to pay Plaintiff's claims without conducting a reasonable investigation[.]" Doc. #23-3 at 10. While Travelers' duty to investigate respondents' claims arises under the Facultative Certificate, Travelers' liability is determined by examining whether it conducted a "reasonable investigation with respect to the claim" under the Texas Insurance Code. See Tex. Ins. Code §541.060(a)(7).

Similarly, Alto alleges that Travelers violated the Texas Insurance Code by "failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of the claims, even though ... Travelers['] liability under the policy was reasonably clear[.]" Doc. #23-3 at 9. Here too, Travelers' duty to "effectuate a prompt, fair, and equitable settlement" of the claims arises not from the Facultative Certificate, but from the Texas Insurance Code. Tex. Ins. Code §541.060(a)(2). This conclusion is not altered by Alto's reference to "liability under the policy" in its complaint. Doc. #23-3 at 9. As the Texas Court of Appeals explained: "The petition excerpts [Travelers] cites as evidence that Alto ISD is seeking insurance funds from Travelers, especially when taken in context of the petition as a whole, show that Alto ISD alleges it was damaged

by receiving an inappropriate settlement for its claims under the Policy -- not the Reinsurance Contract[.]" Travelers Indem. Co., 2022 WL 1668859, at *6. As a result, Travelers' liability does not depend on the terms of the Facultative Certificate. Rather, it is premised upon the Texas Insurance Code and the Insurance Policies.

This analysis is not altered by Travelers' argument that "[e]ach of the Respondents alleges that it submitted an insurance claim to TREA, which was reinsured by Travelers, and that TREA **and Travelers have failed to pay its claims in full.**" Doc. #37 at 5 (emphases in original).[4] Direct-benefits estoppel does not apply merely because the claimed "measure of loss ... equates to the amount of a contract loss[.]" Jody James Farms, JV, 547 S.W.3d at 638. As the Texas Court of Appeals recognized when addressing Alto's complaint:

> Alto ISD has no rights under the Reinsurance Contract. Without contractually mandated rights, Alto ISD would be

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[4] Travelers relies on Weekley Homes, L.P., 180 S.W.3d at 131-32, and Ace Am. Ins. Co. v. Huntsman Corp., 255 F.R.D. 179 (S.D. Tex. 2009), to support this argument. See Doc. #2 at 12-13. However, in each of those cases, the party seeking to avoid arbitration both sought and obtained substantial benefits under the contract before initiating the litigation. See Weekley Homes, L.P., 180 S.W.3d at 133; Ace Am. Ins. Co., 255 F.R.D. at 206. Such cases provide little guidance here because "Travelers alleges only that [respondents are] seeking benefits of the Reinsurance Contract through [their] claims in the lawsuit, not that [they] sought and obtained substantial benefits of the [Reinsurance C]ontract apart from the litigation." Travelers Indem. Co., 2022 WL 1668859, at *5.

> unable to maintain a contract claim against Travelers under the Reinsurance Contract even if it were inclined to do so. Therefore, instead of enforcing expectations created by the Reinsurance Contract, any liability of Travelers is necessarily extracontractual, and direct benefits estoppel is not shown.

Travelers Indem. Co., 2022 WL 1668859, at *4. It is thus irrelevant whether the damages respondents seek are identical to the measure of respondents' contract loss, because respondents' claims are not premised on the Facultative Certificate.

In sum, Travelers has failed to establish that direct-benefits estoppel applies because it has not shown that respondents' claims "arise[] solely from the contract or must be determined by reference to it[.]" Jody James Farms, JV, 547 S.W.3d at 637 (citation, quotation marks, and footnote omitted). Because direct-benefits estoppel does not apply, Travelers has not shown that "the parties have entered into a valid agreement to arbitrate[.]" In re Am. Express Fin. Advisors Sec. Litig., 672 F.3d at 128. In the absence of such an agreement, this Court lacks the authority to compel arbitration. Travelers' Amended Petition to Compel Arbitration [**Doc. #23**] is therefore **DENIED.**

V. Conclusion

Thus, for the reasons stated, Travelers' Amended Petition to Compel Arbitration [**Doc. #23**] is **DENIED.** The denial of the Amended Petition renders respondents' Motion to Dismiss for Lack

of Personal Jurisdiction [**Doc. #24**] and Motion for Abstention [**Doc. #26**] **moot,** and those motions are therefore **TERMINATED.**

The Clerk shall close this case.

It is so ordered at Bridgeport, Connecticut, this 28th day of July, 2022.

/s/
HON. SARAH A. L. MERRIAM
UNITED STATES DISTRICT JUDGE

206 A.D.3d 1666, 170 N.Y.S.3d 753, 2022 N.Y. Slip Op. 03815

****1** Utica Mutual Insurance Company, Respondent-Appellant,
v
Abeille General Insurance Co., Now Known as 21st Century National Insurance Co., et al., Appellants-Respondents, et al., Respondents.

Supreme Court, Appellate Division, Fourth Department, New York
189, 21-00536
June 10, 2022

CITE TITLE AS: Utica Mut. Ins. Co. v Abeille Gen. Ins. Co.

HEADNOTES

Conflict of Laws
What Law Governs
Failure to Establish Conflict between New York and Pennsylvania Law

Insurance
Umbrella Policy
No Coverage of Defense Costs in Underlying Actions

Insurance
Reinsurance
Follow-the-Settlements Doctrine

Norton Rose Fulbright US LLP, New York City (John F. Finnegan of counsel), for defendants-appellants-respondents.
Hunton Andrews Kurth LLP, Washington, D.C. (Syed S. Ahmad, of the Washington, D.C. Bar, admitted pro hac vice, of counsel), for plaintiff-respondent-appellant.

Appeal and cross appeal from an order of the Supreme Court, ***1667** Oneida County (Patrick F. MacRae, J.), entered January 22, 2021. The order, among other things, denied the motion of defendants-appellants and the cross motion of plaintiff for partial summary judgment.

It is hereby ordered that the order so appealed from is unanimously modified on the law by granting the motion and granting judgment in favor of defendants-appellants as follows:

It is adjudged and declared that plaintiff is not entitled to recover from defendants-appellants reimbursement under the reinsurance contracts for defense costs paid by plaintiff to Burnham Corporation in the underlying actions under the umbrella policies of insurance, and as modified the order is affirmed without costs.

Memorandum: Plaintiff, Utica Mutual Insurance Company, issued primary policies and umbrella policies of insurance to nonparty Burnham Corporation (Burnham) covering, as relevant to this appeal, a period from 1977 to 1983. Plaintiff obtained from defendants reinsurance coverage for the same period related to the umbrella policies. Burnham was sued by individuals who were allegedly injured by exposure to a boiler that was manufactured by Burnham and that contained asbestos (underlying actions). There is no dispute that, with respect to the underlying actions, plaintiff paid defense costs and losses to Burnham under the primary insurance policies. A dispute arose between plaintiff and Burnham regarding plaintiff's obligation to pay defense costs and losses under the umbrella policies once the coverage under the primary insurance policies was exhausted. Plaintiff and Burnham entered into a settlement whereby plaintiff agreed to pay defense costs and losses under the umbrella policies for those occurrences that had triggered coverage under the then-exhausted primary policies. Plaintiff, in turn, sought reimbursement from defendants for those costs under the reinsurance policies. Defendants refused to pay, contending that plaintiff was not obligated under the umbrella policies to pay and, thus, the reinsurance contracts were not triggered.

Plaintiff thereafter commenced this action, asserted causes of action for breach of contract and declaratory judgment, and sought, inter alia, enforcement of the reinsurance policies. Defendants-appellants (hereafter, defendants) moved for partial summary judgment seeking a declaration that plaintiff may not recover from defendants any of the disputed defense costs ****2** plaintiff paid under the umbrella policies to defend Burnham in the underlying actions. Plaintiff cross-moved for partial summary judgment on the amended complaint insofar as the ***1668** amended complaint sought a finding that defendants breached their obligations to pay certain amounts billed by plaintiff under the reinsurance

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contracts and a declaration that defendants are obligated to pay their respective shares of plaintiff's "future expense billings." Supreme Court agreed with defendants that the unambiguous terms of the umbrella policies established that the disputed defense costs were not covered under those polices and thus were likewise not covered under the reinsurance policies. Nevertheless, the court denied the motion and the cross motion, finding that issues of fact existed regarding the follow-the-settlements doctrine. Defendants appeal, and plaintiff cross-appeals.

Addressing first the cross appeal, we reject plaintiff's contention that the court erred in applying New York law and not Pennsylvania law to its analysis of the umbrella policies, the latter being the location of Burnham's facility and the main location of the insured risk. "[B]ecause New York is the forum state, i.e., the action was commenced here, 'New York's choice-of-law principles govern the outcome of this matter' " (*Burnett v Columbus McKinnon Corp.*, 69 AD3d 58, 60 [4th Dept 2009]). "The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved" (*Matter of Allstate Ins. Co. [Stolarz—New Jersey Mfrs. Ins. Co.]*, 81 NY2d 219, 223 [1993]). "If no conflict exists, then the court should apply the law of the forum state in which the action is being heard" (*Excess Ins. Co. v Factory Mut. Ins. Co.*, 2 AD3d 150, 151 [1st Dept 2003], *affd* 3 NY3d 577 [2004]). Here, plaintiff failed to establish the existence of "any conflict between New York and Pennsylvania law with respect to the issues raised in the [cross] motion, and therefore we need not engage in any choice of law analysis" (*Farnham v MIC Wholesale Ltd.*, 176 AD3d 1605, 1606 [4th Dept 2019]).

Contrary to plaintiff's further contention on the cross appeal, we conclude that the court properly determined that defendants established that their interpretation of the umbrella policies, i.e., that those policies did not cover defense costs in the underlying actions inasmuch as those costs were covered by the primary insurance policies, is the only fair construction thereof (*see Albert Frassetto Enters. v Hartford Fire Ins. Co.*, 144 AD3d 1556, 1557 [4th Dept 2016]; *cf. Utica Mut. Ins. Co. v McAteer & FitzGerald, Inc.*, 78 AD3d 1612, 1612 [4th Dept 2010]; *see generally Arrow Communication Labs. v Pico Prods.*, 206 AD2d 922, 923 [4th Dept 1994]). We consider first the language of the umbrella policies (*see W.W.W. Assoc. v Giancontieri* ***1669** , 77 NY2d 157, 162 [1990]), which provides that: "With respect to *any occurrence not covered by* the policies listed in the schedule of underlying insurance or any other insurance collectible by the insured, but covered by the terms and conditions of this policy (including damages wholly or partly within the amount of the retained limit), the company shall: (a) defend any suit against the insured . . . ." (emphasis added). As the Second Circuit determined in *Utica Mut. Ins. Co. v Munich Reins. Am., Inc.* (7 F4th 50, 57 [2d Cir 2021] [*Munich*]), "[t]he phrase 'occurrence not covered by' unambiguously refers to the umbrella policy's . . . coverage of risks that were not already insured under the primary policy." There is no dispute here that the primary policies covered Burnham's defense costs in the underlying actions.

Plaintiff urges this Court to interpret the provision to mean that the defense costs are covered under the umbrella policies because they ceased being covered under the primary policies once the primary policies had been exhausted. However, as in *Munich*, we conclude that "neither the umbrella nor the primary polic[ies] suggest[ ] that an occurrence is no longer a 'covered' risk after exhaustion; what ceases is the obligation to pay for liabilities arising from the risks that are covered" (*id.* at 57-58). Although plaintiff notes certain differences between the umbrella policies at issue here and those in *Munich* (*see Utica Mut. Ins. Co. v Clearwater Ins. Co.*, 2022 WL 823932, *5, 2022 US Dist LEXIS 48999, *13-14 [ND NY, Mar. 18, 2022, 6:13-cv-1178 (GLS/TWD)]), the differences are not material to, and do not alter, the unambiguous meaning of the phrase "occurrence not covered by." Thus, the unambiguous terms of the umbrella policies establish that defendants were not required to reimburse plaintiff under the reinsurance contracts for the disputed defense costs related to the underlying actions.

With respect to the appeal, we agree with defendants that, contrary to the court's determination, the follow-the-settlements doctrine does not alter the analysis. It is undisputed that the reinsurance policies at issue each contain a follow-the-settlements clause. Where it ****3** applies, the follow-the-settlements doctrine "ordinarily bars challenge by a reinsurer to the decision of [the cedent] to settle a case for a particular amount" (*United States Fid. & Guar. Co. v American Re-Ins. Co.*, 20 NY3d 407, 418 [2013], *rearg denied* 21 NY3d 923 [2013]). Specifically, under that doctrine, "a reinsurer is required to indemnify for payments reasonably within the terms of the original policy, even if technically not covered by it. A reinsurer cannot second guess the good faith liability ***1670** determinations made by its reinsured . . . The rationale behind this doctrine is two-fold: first, it meets the goal of maximizing coverage and settlement and second, it streamlines the reimbursement

process and reduces litigation" (*Travelers Cas. & Sur. Co. v Certain Underwriters at Lloyd's of London*, 96 NY2d 583, 596 [2001] [internal quotation marks omitted]). There are, however, limitations to the doctrine. The follow-the-settlements doctrine "insulates a reinsured's liability determinations from challenge by a reinsurer unless they are fraudulent, in bad faith, or the payments are clearly beyond the scope of the original policy or in excess of [the reinsurer's] agreed-to exposure" (*Allstate Ins. Co. v American Home Assur. Co.*, 43 AD3d 113, 121 [1st Dept 2007], *lv denied* 10 NY3d 711 [2008] [internal quotation marks omitted]; *see also North Riv. Ins. Co. v Ace Am. Reins. Co.*, 361 F3d 134, 141 [2d Cir 2004]). Here, the reimbursement sought by plaintiff from defendants was beyond the scope of coverage in the umbrella policies and, thus, the follow-the-settlements doctrine does not apply under the circumstances (*see Utica Mut. Ins. Co. v Fireman's Fund Ins. Co.*, 957 F3d 337, 347 [2d Cir 2020]; *cf. Christiania Gen. Ins. Corp. of N.Y. v Great Am. Ins. Co.*, 979 F2d 268, 280 [2d Cir 1992]).

We have considered plaintiff's remaining contentions and conclude that they are without merit. We therefore modify the order by granting defendants' motion and granting judgment in their favor declaring that plaintiff is not entitled to recover from defendants reimbursement under the reinsurance contracts for defense costs paid by plaintiff to Burnham in the underlying actions under the umbrella policies of insurance. Present—Whalen, P.J., Smith, NeMoyer, Winslow and Bannister, JJ.

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218 A.D.3d 1283
Supreme Court, Appellate Division,
Fourth Department, New York.

UTICA MUTUAL INSURANCE COMPANY, Plaintiff-Respondent,
v.
AMERICAN RE-INSURANCE COMPANY, Now Known as Munich Reinsurance America, Inc., Defendant-Appellant.

488
|
CA 22-01242
|
Entered: July 28, 2023

Synopsis
Background: Umbrella liability insurer brought action against reinsurer for breach of contract after ceasing payments to reimburse plaintiff for defense costs in underlying litigation. Defendant asserted counterclaim seeking reimbursement of amounts paid to plaintiff, alleging that plaintiff breached reinsurance contracts by billing defendant for defense costs that defendant did not owe. The Supreme Court, Oneida County, Gregory R. Gilbert, J., granted plaintiff's motion for summary judgment dismissing defendant's first counterclaim. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] reinsurer was not collaterally estopped from seeking reimbursement of improperly paid defense costs, and

[2] voluntary payment doctrine barred reinsurer's claim seeking reimbursement of amounts paid to umbrella liability insurer.

Affirmed as modified.

See also, 381 F.Supp.3d 185.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (8)

[1]
Insurance Particular matters concluded

Reinsurer was not collaterally estopped from seeking reimbursement of improperly paid defense costs from umbrella liability insurer based on ruling in another case that involved policies issued to a different insured; although there were similarities between the facts in the other case and the present matter, the issue presented in present matter was not identical to the issue previously raised.

More cases on this issue

[2]
Res Judicata Issues or Questions in General

Res Judicata Necessity of identity

Collateral estoppel applies only if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the party had a full and fair opportunity to litigate the issue in the earlier action.

[3]
Res Judicata Events Giving Rise to Proceedings; Factual Basis

Collateral estoppel will not apply to cases where the prior determination was based upon different facts.

[4]
Payment Voluntary Payments in General

"Voluntary payment" doctrine is a common-law principle that bars recovery for payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law.

[5]
Payment Protest

Under the voluntary payment doctrine, the onus is on a party that receives what it perceives as an improper demand for money to take its position

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at the time of the demand, and litigate the issue before, rather than after, payment is made.

[6] **Payment** Protest

Payment Evidence

There is presumption that payments are voluntary, and any protest thereto must be made at time of payment.

[7] **Payment** Diligence and waiver

Voluntary payment doctrine barred reinsurer's claim seeking reimbursement of amounts paid to umbrella liability insurer to reimburse it for defense costs in underlying litigation, alleging that umbrella liability insurer breached reinsurance contracts by billing reinsurer for defense costs that reinsurer did not owe; reinsurer never made any effort to learn what its legal obligations were, and instead simply made payments without objection, assuming that the charges submitted to it were covered by language in the umbrella policies that reinsurer never obtained prior to making those payments.

More cases on this issue

[8] **Payment** Mistake of Law

Payment Diligence and waiver

Although a mistake of material fact or law is an exception to the voluntary payment doctrine, if a payment is made based upon a party's own lack of diligence, the voluntary payment doctrine will bar recovery.

***595** Appeal from an order of the Supreme Court, Oneida County (Gregory R. Gilbert, J.), entered June 29, 2022. The order, inter alia, granted plaintiff's motion for summary judgment dismissing defendant's first counterclaim.

Attorneys and Law Firms

RUBIN, FIORELLA, FRIEDMAN & MERCANTE LLP, NEW YORK CITY (BRUCE M. FRIEDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

HUNTON ANDREWS KURTH LLP, WASHINGTON, D.C. (SYED S. AHMAD, ADMITTED PRO HAC VICE, OF COUNSEL), AND FELT EVANS, LLP, CLINTON, FOR PLAINTIFF-RESPONDENT.

PRESENT: PERADOTTO, J.P., BANNISTER, MONTOUR, AND GREENWOOD, JJ.

***596** MEMORANDUM AND ORDER

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: The facts and prior procedural history of this case are fully set forth in our decision on the prior appeal (*Utica Mut. Ins. Co. v. American Re-Insurance Co.*, 211 A.D.3d 1587, 180 N.Y.S.3d 452 [4th Dept. 2022]). As relevant to this appeal, plaintiff issued primary and umbrella policies of insurance to nonparty Burnham Corporation (Burnham) covering a period from 1977 to 1984. Plaintiff obtained from defendant reinsurance coverage for the same period related to the umbrella policies. When Burnham was sued, plaintiff paid certain defense costs under the umbrella policies after plaintiff allegedly exhausted the primary policies and sought reimbursement from defendant for those defense costs. After paying plaintiff approximately $2,000,000 for defense costs, defendant concluded that it was not obligated to cover those costs because those costs were not covered under the umbrella policies and ceased future payments. Plaintiff thereafter commenced this action. Defendant answered and asserted counterclaims, including its first counterclaim alleging that plaintiff had breached the reinsurance contracts by billing defendant for defense costs that defendant did not owe, causing defendant to pay plaintiff for amounts it was not obligated to cover. Defendant sought reimbursement of the amounts paid to plaintiff for defense costs. Plaintiff moved for summary judgment dismissing defendant's first counterclaim, and defendant moved for summary judgment on its first counterclaim. Supreme Court granted plaintiff's motion, denied defendant's motion, and dismissed the first counterclaim. Defendant appeals.

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[1] [2] [3] We agree with defendant that, to the extent the court determined that defendant was collaterally estopped from obtaining reimbursement of the improperly paid defense costs based upon the ruling in (*Utica Mut. Ins. Co. v. Munich Reinsurance Am., Inc.*, 381 F.Supp.3d 185 [N.D.N.Y. 2019], *affd* 7 F.4th 50 [2d Cir. 2021] [*Munich Reinsurance Am., Inc.*]), any such determination was error. Collateral estoppel "applies only 'if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the [party] had a full and fair opportunity to litigate the issue in the earlier action' " (*City of New York v. Welsbach Elec. Corp.*, 9 N.Y.3d 124, 128, 848 N.Y.S.2d 551, 878 N.E.2d 966 [2007], quoting *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349, 690 N.Y.S.2d 478, 712 N.E.2d 647 [1999]; *see Plumley v. Erie Blvd. Hydropower, L.P.*, 114 A.D.3d 1249, 1249, 980 N.Y.S.2d 855 [4th Dept. 2014]). Thus, collateral estoppel will not apply to cases where the prior determination was based upon different facts (*see Matter of Henson v. City of Syracuse*, 119 A.D.3d 1340, 1341, 989 N.Y.S.2d 729 [4th Dept. 2014]; *see generally Jones v. Town of Carroll*, 122 A.D.3d 1234, 1238, 996 N.Y.S.2d 804 [4th Dept. 2014], *lv denied* 25 N.Y.3d 910, 2015 WL 3618846 [2015]). *Munich Reinsurance Am., Inc.*, which was decided after a bench trial, involved policies issued to a different insured, as well as communications between plaintiff and defendant regarding those policies that raised concerns regarding the policy language long before the disputed payments were made (381 F.Supp.3d at 189-190, 220-221). The decision in *Munich Reinsurance Am., Inc.* was "[b]ased upon [those] facts" specific to the insured and the policy at issue (*id.* at 221). Although there are certainly similarities between those facts and the present matter, the issue presented on this appeal is not identical to the issue previously raised and collateral estoppel does not apply.

***597 [4] [5] [6]** Nevertheless, we conclude that plaintiff established its entitlement to summary judgment dismissing the first counterclaim based upon the voluntary payment doctrine. The voluntary payment doctrine is a common-law principle that bars recovery for "payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law" (*Dillon v. U-A Columbia Cablevision of Westchester, Inc.*, 100 N.Y.2d 525, 526, 760 N.Y.S.2d 726, 790 N.E.2d 1155 [2003]; *see Hedley's, Inc. v. Airwaves Global Logistics, LLC*, 130 A.D.3d 872, 873, 15 N.Y.S.3d 84 [2d Dept. 2015], *lv denied* 26 N.Y.3d 911, 2015 WL 7289433 [2015]; *Merchants Mut. Ins. Group v. Travelers Ins. Co.*, 24 A.D.3d 1179, 1180, 806 N.Y.S.2d 813 [4th Dept. 2005]). Under that doctrine, "[t]he onus is on a party that receives what it perceives as an improper demand for money to take its position at the time of the demand, and litigate the issue before, rather than after, payment is made" (*DRMAK Realty LLC v. Progressive Credit Union*, 133 A.D.3d 401, 403, 18 N.Y.S.3d 618 [1st Dept. 2015] [internal quotation marks omitted]; *see Lonner v. Simon Prop. Group, Inc.*, 57 A.D.3d 100, 109, 866 N.Y.S.2d 239 [2d Dept. 2008]). "There is a presumption that payments are voluntary," and any protest thereto must be made "at the time of payment" (*Overbay, LLC v. Berkman, Henoch, Peterson, Peddy & Fenchel, P.C.*, 185 A.D.3d 707, 709, 128 N.Y.S.3d 56 [2d Dept. 2020]; *see ECI Fin. Corp. v. Resurrection Temple of Our Lord, Inc.*, 213 A.D.3d 735, 736, 184 N.Y.S.3d 96 [2d Dept. 2023]).

[7] [8] Although a "mistake of material fact or law" is an exception to the voluntary payment doctrine (*Dillon*, 100 N.Y.2d at 526, 760 N.Y.S.2d 726, 790 N.E.2d 1155), if a payment is made based upon a party's own lack of diligence, the voluntary payment doctrine will bar recovery (*see Eighty Eight Bleecker Co., LLC v. 88 Bleecker St. Owners, Inc.*, 34 A.D.3d 244, 246, 824 N.Y.S.2d 237 [1st Dept. 2006]; *Gimbel Bros., Inc. v. Brook Shopping Ctrs., Inc.*, 118 A.D.2d 532, 535, 499 N.Y.S.2d 435 [2d Dept. 1986]; *see also Citicorp N. Am., Inc. v. Fifth Ave. 58/59 Acquisition Co., LLC*, 70 A.D.3d 408, 409, 895 N.Y.S.2d 39 [1st Dept. 2010]). Here, plaintiff's submissions on its motion established that defendant never made "any effort to learn what [its] legal obligations were," and instead simply made payments without objection, assuming that the charges submitted to it were covered by language in the umbrella policies that defendant never obtained prior to making those payments (*Citicorp N. Am., Inc.*, 70 A.D.3d at 409, 895 N.Y.S.2d 39; *see Munich Reinsurance Am., Inc.*, 381 F.Supp.3d at 221-222). In opposition, defendant failed to raise a triable issue of fact (*see generally Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 [1980]).

Defendant contends that the voluntary payment doctrine is inapplicable here in light of plaintiff's alleged bad faith. We reject that contention. To the extent that defendant relies on *Metropolitan Prop. & Cas. Ins. Co. v. GEICO Gen. Ins. Co.*, 186 A.D.3d 1513, 130 N.Y.S.3d 847 (2d Dept. 2020), its reliance is misplaced because, unlike here, that case involved an excess insurer that contributed to a settlement of the underlying action while reserving its rights against the primary insurer and thereafter sought to recover that contribution, not, as here, a voluntary payment to the primary insurer (*see id.* at 1514-1515, 130 N.Y.S.3d 847).

We have considered defendant's remaining contention and conclude that it lacks merit.

***598** Inasmuch as plaintiff met its initial burden on its motion by establishing that the voluntary payment doctrine applied and defendant failed to raise a triable issue of fact in opposition, the court properly granted plaintiff's motion (*cf. Eighty Eight Bleecker Co., LLC*, 34 A.D.3d at 246-247, 824 N.Y.S.2d 237; *see also Munich Reinsurance Am., Inc.*, 381 F.Supp.3d at 221-222; *see generally Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]). For the same reasons, we conclude that defendant failed to meet its initial burden on its motion and that the court therefore properly denied that motion.

In light of our determination, we need not address plaintiff's alternative grounds for affirmance.

All Citations

218 A.D.3d 1283, 193 N.Y.S.3d 594, 2023 N.Y. Slip Op. 04042

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31 F.4th 800
United States Court of Appeals,
District of Columbia Circuit.

VANTAGE COMMODITIES FINANCIAL SERVICES I, LLC, Appellant
v.
ASSURED RISK TRANSFER PCC, LLC, et al., Appellees

No. 21-7033
|
Argued January 31, 2022
|
Decided April 22, 2022

Synopsis
Background: Insured commercial lender brought action against credit insurer's reinsurers, insurance broker, and others, asserting breach of contract, negligence, and related claims. The United States District Court for the District of Columbia, Trevor N. McFadden, J., 321 F.Supp.3d 49, dismissed in part, and subsequently, 531 F.Supp.3d 153, granted summary judgment in favor of defendants. Insured appealed.

Holdings: The Court of Appeals, Tatel, Circuit Judge, held that:

[1] insured lacked direct contractual relationship with reinsurers, as required to support breach of contract claim;

[2] no implied contract existed between insured and reinsurers;

[3] no agency relationship existed to support insured's promissory estoppel and unjust enrichment claims against reinsurers; and

[4] economic loss rule barred insured's negligence claims against brokers.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim; Motion for Summary Judgment.

West Headnotes (9)

[1] **Federal Courts** Pleading
Federal Courts Summary judgment

The Court of Appeals reviews de novo a district court's rulings on motions to dismiss for failure to state a claim and motions for summary judgment.

[2] **Insurance** Rights of Original Insured or Others

Under District of Columbia law, insured commercial lender lacked direct contractual relationship with its credit insurer's reinsurers, as required to support insured's breach of contract claim against reinsurers, where reinsurance agreements created no such contractual relationship.

More cases on this issue

[3] **Insurance** Rights of Original Insured or Others

Under District of Columbia law, a reinsurer generally does not have a direct contractual relationship with the original insured unless the terms of the reinsurance agreement create such a relationship.

[4] **Insurance** Rights of Original Insured or Others

Under District of Columbia law, neither credit insurance policy provision requiring insured commercial lender to pay premiums to credit insurer in the amount of 12 percent of the policy limit in exchange for credit insurance, nor reinsurance agreements obligating credit insurer to pay $800,000 in premiums to the reinsurers as consideration for their reinsurance obligations amounted to consideration sufficient to support existence of implied contract between insured and reinsurers, absent any independent consideration received by reinsurers for obligating them to cover insured directly.

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More cases on this issue

[5] **Estoppel** Future events; promissory estoppel

Implied and Constructive Contracts Unjust enrichment

Under District of Columbia law, neither captive credit insurer backed by reinsurance nor reinsurance broker had actual authority entitling them to serve as agents of reinsurers, as required to support insured's claims for promissory estoppel and unjust enrichment seeking reinsurance coverage; no agreements between reinsurers and either insured or broker granted them broad authority to act on behalf of reinsurers, and no statements or conduct by reinsurers otherwise conferred such authority.

1 Case that cites this headnote
More cases on this issue

[6] **Insurance** Miscellaneous duties and liabilities

Under District of Columbia law, insured and insurance brokers did not have close nexus as would have allowed for application of special relationship exception, and thus economic loss rule barred insured's negligence claims against brokers, in proceeding on insured's claims stemming from dispute over reinsurance agreements on underlying credit insurance policy; there was no contractual privity or its equivalent between parties, brokers were one step removed from insured with captive insurer in between, and had little communication or direct contact.

More cases on this issue

[7] **Negligence** Economic loss doctrine

Under District of Columbia law, the "economic loss doctrine" prohibits claims of negligence where a claimant seeks to recover purely economic losses.

[8] **Negligence** Economic loss doctrine

Under District of Columbia law, the economic loss doctrine, which generally prohibits claims of negligence where a plaintiff seeks to recover purely economic losses, carves out a limited "special relationship exception," which applies when the defendant has an obligation to care for the plaintiff's economic well-being or an obligation that implicates the plaintiff's economic expectancies.

[9] **Insurance** Miscellaneous duties and liabilities

Under District of Columbia law, insurance broker did not misrepresent terms of reinsurance agreement by stating in credit insurance binders that reinsurance was issued on same terms and conditions as original credit insurance policy, and insured commercial lender could not reasonably have relied on any such misrepresentations, as required to support insured's negligent misrepresentation claim; there was no showing that representations were false when made or that broker failed to exercise reasonable care in making such representations, and binders explicitly stated that they were issued for review or illustrative purposes only.

More cases on this issue

***802** Appeal from the United States District Court for the District of Columbia (No. 1:17-cv-01451)

Attorneys and Law Firms

John Gibbons argued the cause for appellant. With him on the briefs was Steven J. Roman.

G. Richard Dodge, Jr. argued the cause for Reinsurer appellees. With him on the brief were Alanna Clair, Mary Ann D'Amato, and William Davis.

Christopher J. St. Jeanos argued the cause for Willis appellees. With him on the brief was Elizabeth J. Bower.

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Before: Henderson and Tatel, Circuit Judges, and Ginsburg, Senior Circuit Judge.

Opinion

Tatel, Circuit Judge:

****284** In this insurance coverage dispute, an insured company seeks to sidestep its insurer by collecting a $22 million claim from ten reinsurers and insurance brokers. The district court concluded that these entities are not liable for the insured company's losses. We agree.

I.

This case involves a complex network of insurance and reinsurance agreements between several companies. Appellant Vantage Commodities Financial Services I, LLC ("Vantage"), a company that finances retail energy companies, entered into a loan agreement extending credit to Glacial Energy Holdings ("Glacial"). Seeking to mitigate the risk of Glacial defaulting on its loan, Vantage retained Equifin Risk Solutions LLC ("Equifin") to create and manage Assured Risk Transfer PCC LLC ("ART"), a special purpose "captive" insurance entity backed by reinsurance. Equifin in turn retained Willis Towers Watson Management (Vermont) Ltd. ("Willis Vermont") to assist in the formation, licensing, and management of ART.

After forming ART, Equifin President Paul Palmer began looking for reinsurers. In December 2012, reinsurers Hannover Ruckversicherung AG ("Hannover Re") and Partner Reinsurance Europe plc ("Partner Re") committed to reinsure ART for a portion of insurance payments made to Vantage under the primary insurance policy, confirming their commitments in signed reinsurance placement slips. Willis Vermont, on behalf of ART, then issued a Credit Insurance Binder ("2012 Binder") which confirmed that Vantage's credit insurance had been bound with ART, noted that ART had secured reinsurance coverage, and outlined the general terms of the insurance and reinsurance agreements. Am. Compl. Ex. 5. Two weeks later, ART ***803** ****285** issued a formal Credit Insurance Policy, insuring Vantage for up to $22 million for one year against any nonpayment or losses from lending to an energy service company, such as Glacial. Am. Compl. Ex. 1. The policy made no mention of reinsurance.

In the months following the issuance of the Credit Insurance Policy, ART entered into a formal reinsurance contract with Hannover Re and Partner Re whereby each reinsurer agreed to cover a share of ART's limit of liability in insuring Vantage. Am. Compl. Ex. 8. ART also entered into a reinsurance agreement with five additional reinsurers ("Panel Reinsurance Agreement"). Am. Compl. Ex. 7. The two reinsurance agreements (collectively, "Reinsurance Agreements") covered about 90 percent of the $22 million limit of liability in ART's Credit Insurance Policy with Vantage. Both Reinsurance Agreements stated that they were "solely between [ART] and the Reinsurer[s], and nothing contained in th[ese] Agreement[s] shall create any obligations or establish any rights against the Reinsurer[s] in favor of any person or entity not a party hereto." Am. Compl. Ex. 7 at 2, Ex. 8 at 4.

Thereafter, Vantage requested that Palmer send another copy of the 2012 Binder. In response, Palmer sent Vantage an updated version of the binder ("2013 Binder"), which included an updated list of reinsurers and stated that the "revised Binder is being issued for review/illustrative purposes only." Am. Compl. Ex. 6.

When Glacial defaulted on its loan, Vantage submitted a claim to ART seeking over $19 million in payment. Vantage and ART disputed the claim in arbitration, and the arbitration panel held that Vantage was entitled to recover over $25 million, consisting of $22 million under the Credit Insurance Policy plus interest and costs. ART had insufficient funds to pay the arbitration award itself. Before it submitted a claim under the Reinsurance Agreements, however, the seven reinsurers (collectively, "Reinsurers") notified ART that any future claim would be denied because ART had failed to comply with the terms of the Reinsurance Agreements. In particular, ART failed to notify the Reinsurers of Vantage's claims or provide the Reinsurers with proof of Vantage's losses within the time limit provided by the Reinsurance Agreements.

After the Reinsurers notified ART that they would deny any claims for reinsurance, Vantage filed suit in the U.S. District Court for the District of Columbia against ART, Willis Vermont, and the Reinsurers. Am. Compl. ¶¶ 5–6, 9–15. Vantage also named as defendants Willis Limited and Willis Re Inc., reinsurance intermediaries that share the same parent company as Willis Vermont. *Id.* ¶¶ 7–8 & Ex. 7 at 3. Vantage raised claims against the Willis Defendants for negligence, professional negligence, negligent undertaking,

and negligent misrepresentation. *Id.* ¶¶ 173–81, 186–197. As for the Reinsurers, Vantage alleged claims for breach of contract, breach of implied contract, promissory estoppel, and unjust enrichment. *Id.* ¶¶ 161–64, 198–214. Vantage also sought a declaration of "the obligations of [the Reinsurers] under the contractual agreements to pay" for Vantage's losses. *Id.* ¶¶ 165–72.

[1] The district court dismissed Vantage's claims for breach of contract and declaratory judgment. *Vantage Commodities Financial Services I, LLC v. Assured Risk Transfer PCC, LLC*, 321 F. Supp. 3d 49, 61–63 (D.D.C. 2018) (*Vantage I*). After discovery, the court granted summary judgment for the Reinsurers and the Willis Defendants as to the remaining claims against them. *Vantage Commodities Financial Services I, LLC v. Willis Ltd.*, 531 F. Supp. 3d 153, 166–79 (D.D.C. 2021) (*Vantage II*). Vantage appealed. We review ***804** ****286** de novo the district court's rulings on the defendants' motions to dismiss and motions for summary judgment. *Physicians for Social Responsibility v. Wheeler*, 956 F.3d 634, 642 (D.C. Cir. 2020) (for dismissal); *Arrington v. United States*, 473 F.3d 329, 333 (D.C. Cir. 2006) (for summary judgment).

II.

[2] **[3]** We affirm the district court's dismissal of Vantage's breach of contract and declaratory judgment claims because, as the district court concluded, Vantage failed to plead facts sufficient to show a contractual relationship with the Reinsurers. Vantage alleged that the Reinsurers "created a direct contractual relationship when Willis and ART ..., acting on behalf of [the Reinsurers] as their agents, provided the Credit Insurance Binders to Vantage." Am. Compl. ¶ 65. But the binders' disclosures of a reinsurance policy and description of that policy did not create a direct contractual relationship between Vantage and the Reinsurers. As the district court explained, a reinsurer generally "does not have a direct contractual relationship with the original insured unless the terms of the reinsurance agreement create such a relationship." *Vantage I*, 321 F. Supp. 3d at 60 (citing *Bruckner-Mitchell v. Sun Indemnity Co. of New York*, 82 F.2d 434, 444 (D.C. Cir. 1936)). The Reinsurance Agreements here created no contractual relationship with Vantage, stating instead that the agreements were "solely between [ART] and the Reinsurer[s]" and that "nothing contained in th[e] Agreement[s] shall create any obligations or establish any rights against the Reinsurer[s] in favor of any person or entity not a party hereto." Am. Compl. Ex. 7 at 2, Ex. 8 at 4.

Vantage cites several cases explaining that, in certain circumstances, the reinsurer may become directly liable to the insured. *See, e.g.*, *World Omni Financial Corp. v. Ace Capital Re, Inc.*, No. 02-cv-0476, 2002 WL 31016669, at *1 (S.D.N.Y. Sept. 10, 2002) (Reinsurer and original insured "dealt directly with each other," and reinsurer "consistently treated [original insured] as if it were [the reinsurer's] direct insured."); *Executive Risk Indemnity, Inc. v. Charleston Area Medical Center, Inc.*, 681 F. Supp. 2d 694, 724 (S.D. W. Va. 2009) ("[Reinsurer] dealt with [insured] directly[.]"). But unlike those cases, Vantage's complaint contains no allegations that the Reinsurers dealt directly with Vantage or otherwise treated Vantage as if it were directly insured by them. Accordingly, Vantage's breach of contract and declaratory judgment claims are not "plausible on [their] face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (internal quotation marks omitted).

III.

[4] The district court properly granted summary judgment for the Reinsurers on Vantage's remaining claims against them. Beginning with the implied contract claim, Vantage points to no record evidence of any consideration to support its alleged implied contract with the Reinsurers. *See Paul v. Howard University*, 754 A.2d 297, 311 (D.C. 2000) (To establish an implied-in-fact contract, a plaintiff must show "all the necessary elements of an express contract—including offer, acceptance, and consideration[.]"). As the district court observed, the record reveals only two exchanges of consideration, neither of which occurred between Vantage and the Reinsurers. First, the Credit Insurance Policy required Vantage to pay premiums to ART in the amount of 12 percent of the policy limit in exchange for the insurance provided by ART to Vantage. *Vantage II*, 531 F. Supp. 3d at 175–76. Second, the Reinsurance ***805** ****287** Agreements obligated ART to pay $800,000 in premiums to the Reinsurers as consideration for their reinsurance obligations to ART. *Vantage II*, 531 F. Supp. 3d at 176. Because Vantage identifies no evidence of any "consideration that the Reinsurers received for allegedly obligating themselves to cover Vantage directly *and on top of* the risk that [the Reinsurers] assumed on behalf of ART," *Vantage II*, 531 F. Supp. 3d at 176, the implied contract claim cannot survive summary judgment. *See, e.g.*, *Steele v. Isikoff*, 130 F. Supp. 2d 23, 33 (D.D.C.

2000) (finding insufficient evidence to support "the alleged second contract ... because it lacks any independent, valid consideration").

[5] Vantage's promissory estoppel and unjust enrichment claims also suffer from the absence of any evidentiary support. As pled, both claims depend on the existence of an agency relationship between the Reinsurers and either ART or the Willis Defendants. *See* Am. Compl. ¶ 206 (alleging that the Reinsurers "effectively promised" to pay Vantage's losses by "providing Vantage with the Credit Insurance Binders through [the Reinsurers'] agents, ART ... and Willis"); *id.* ¶ 212 (alleging that "Vantage conferred a benefit on [the Reinsurers] by paying premiums to them through their agents, ART ... and Willis"). Vantage asserts that ART and the Willis Defendants had "actual authority" to act as the Reinsurers' agents in their "dealings with Vantage." Appellant's Br. 51; *see* Restatement (Third) of Agency § 3.01 (2006) ("Actual authority ... is created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent take action on the principal's behalf."). But Vantage points to no evidence of statements or conduct by the Reinsurers that authorized ART or the Willis Defendants to act on their behalf. Nor does Vantage point to any evidence that ART or the Willis Defendants interpreted any of the Reinsurers' statements or conduct as a manifestation of consent to act on their behalf. Although the Panel Reinsurance Agreement described Willis Limited and Willis Re Inc. as "intermediaries ... through whom all communications and payments relating [to the reinsurance contract] shall be transmitted," Am. Compl. Ex. 7 at 3, the use of these entities as intermediaries granted them no broad authority to act on behalf of the Reinsurers as their agents. As the district court explained, " 'handling of such routine matters' as transmitting communications or even premium payments 'is certainly not ... sufficient to make [a broker] an agent of the [Reinsurers].' " *Vantage II*, 531 F. Supp. 3d at 171 (quoting *Travelers Indemnity Co. v. Booker*, 657 F. Supp. 280, 287 (D.D.C. 1987)).

Changing tack from the agency theory presented in its complaint, Vantage argued on summary judgment that it need not establish agency to prevail on its promissory estoppel claim because the Reinsurers "directly assented to the promises transmitted to Vantage." Appellant's Br. 48. But the Credit Insurance Binders Vantage cites contain no promise that the Reinsurers would pay for Vantage's losses under its Credit Insurance Policy. As noted above, these binders merely disclose the existence and terms of a reinsurance agreement between ART and the Reinsurers.

Because Vantage's claims of implied contract, promissory estoppel, and unjust enrichment are wholly unsupported by record evidence, the Reinsurers are entitled to summary judgment. *See* Fed. R. Civ. P. 56(a) (Summary judgment shall be granted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

*806 **288 IV.

[6] **[7]** **[8]** Vantage's claims against the Willis Defendants fare no better than its claims against the Reinsurers. To begin with, its claims of negligence, professional negligence, and negligent undertaking are barred by the District of Columbia's "economic loss doctrine," which prohibits claims of negligence where, as here, a claimant seeks to recover purely economic losses. *See Aguilar v. RP MRP Washington Harbour, LLC*, 98 A.3d 979, 985–86 (D.C. 2014). The economic loss doctrine carves out a "limited" special relationship exception, which applies when the defendant has "an obligation ... to care for [the plaintiff's] economic well-being or an obligation that implicate[s the plaintiff's] economic expectancies." *Whitt v. American Property Construction, P.C.*, 157 A.3d 196, 205 (D.C. 2017) (internal quotation marks omitted). But as the district court explained, Vantage and the Willis Defendants had nothing approaching the "close" or "intimate" nexus needed to fall within the special relationship exception. *Vantage II*, 531 F. Supp. 3d at 177–79 (internal quotation marks omitted); *see Aguilar*, 98 A.3d at 985 n.3 (analogizing the District of Columbia's special relationship exception to those in other jurisdictions that require an " 'intimate nexus' " or " 'close nexus' " between the parties). Although Willis Limited served as an intermediary between ART and the Reinsurers, it had no contact with Vantage. Willis Re Inc., though listed as an intermediary in the Panel Reinsurance Agreement, had no involvement with any of the transactions in this dispute. *Vantage II*, 531 F. Supp. 3d at 172 n.14 ("[T]he Willis Defendants contend that Willis Re Inc. ... was not involved in these transactions," and "Vantage never disputes this fact."). Willis Vermont assisted Equifin in its formation, licensing, and management of ART but had minimal direct contact with Vantage. Because "there was no mutually agreed upon relationship" between Vantage and the

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Willis Defendants, *Aguilar*, 98 A.3d at 985, the economic loss doctrine applies and bars Vantage's claims.

Next, we turn to Vantage's claim of negligent misrepresentation. Under District of Columbia law, "[o]ne who ... supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." Restatement (Second) of Torts § 552 (1977); *Remeikis v. Boss & Phelps, Inc.*, 419 A.2d 986, 990 (D.C. 1980) (adopting the definition of negligent misrepresentation set forth in the Restatement (Second) of Torts).

[9] Vantage alleges that the Willis Defendants misrepresented the terms of the Reinsurance Agreements when they stated in the Credit Insurance Binders that reinsurance was ceded on the "same terms, conditions and settlements" as the original insurance policy, a statement Vantage construed as a commitment to pay claims covered by its policy with ART. Am. Compl. ¶¶ 193–94 (internal quotation marks omitted). But this statement is identical to the language in Hannover Re's and Partner Re's reinsurance placement slips, which confirmed their reinsurance commitments at the time that the 2012 Binder was issued. And Willis Vermont obtained these placement slips to document the reinsurers' commitments prior to issuing the 2012 Binder on behalf of ART. Vantage points to no record evidence suggesting that the 2012 Binder's representations were false when made or that Willis Vermont "fail[ed] to exercise reasonable care or competence in obtaining or communicating ***807 **289** the information" in the 2012 Binder. Restatement (Second) of Torts § 552; *see id.* cmt. e ("[T]he defendant is subject to liability if, but only if, he has failed to exercise the care or competence of a reasonable man in obtaining or communicating the information."). As for the 2013 Binder, Vantage could not have reasonably relied on its representations because the binder stated explicitly that it was "being issued for review/illustrative purposes only." Am. Compl. Ex. 6; *see, e.g., In re U.S. Office Products Co. Securities Litigation,* 251 F.Supp.2d 58, 74 (D.D.C. 2003) ("[T]he plaintiff [must] reasonably rel[y] on the alleged misrepresentation.").

Vantage next asserts that the Willis Defendants "committed a misrepresentation [by failing] to send Vantage's demand for arbitration to the Reinsurers after Willis had informed Vantage that it would pass information to Reinsurers." Vantage Cross Motion for Partial Summary Judgment and Opposition to Defendants' Motions for Summary Judgment at 46, *Vantage Commodities Financial Services I, LLC v. Assured Risk Transfer PCC, LLC*, No. 17-cv-1451, ECF No. 144-1. In support, Vantage cites a single email from Willis Vermont stating that Vantage's insurance premium "should ... be paid to [ART]" and that "[u]pon receipt, Willis [Vermont] as manager of ART will remit payment to ART's reinsurers ... as is customary." Am. Compl. Ex. 10. Because this email includes no indication that the Willis Defendants represented that they would pass information to the Reinsurers, it provides no support for Vantage's negligent misrepresentation claim.

Vantage insists that the district court erred because it applied the economic loss doctrine to Vantage's claim of negligent misrepresentation. But we need not address this argument. As discussed above, and as the Willis Defendants argued before the district court, the evidentiary record creates no genuine dispute of material fact regarding Vantage's claim of negligent misrepresentation. Accordingly, we affirm the district court's grant of summary judgment for the Willis Defendants. *See EEOC v. Aramark Corp., Inc.*, 208 F.3d 266, 268 (D.C. Cir. 2000) ("[B]ecause we review the district court's judgment, not its reasoning, we may affirm on any ground properly raised.").

V.

For the foregoing reasons, we affirm.

So ordered.

All Citations

31 F.4th 800, 456 U.S.App.D.C. 282

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2023 WL 1818920
Only the Westlaw citation is currently available.
United States Court of Appeals, Eleventh Circuit.

Brad WARRINGTON, Plaintiff-Appellee
v.
ROCKY PATEL PREMIUM CIGARS, INC., Rakesh Patel, Defendant-Appellants

No. 22-12575
|
Non-Argument Calendar
|
Filed: 02/08/2023

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 2:22-cv-00077-JES-KCD

Attorneys and Law Firms

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Alex R. Figares, Matthew B. Devisse, Dylan Maier, Coleman Yovanovich & Koester, PA, Naples, FL, for Defendant-Appellants.

Before Newsom, Grant, and Luck, Circuit Judges.

Opinion

Per Curiam:

***1** Rocky Patel Premium Cigars, Inc. and Rakesh Patel [1] appeal the district court's denial of their motion to stay and compel arbitration. We affirm. *See* 9 U.S.C. § 16(a)(1)(A); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 627 (2009) (Under 9 U.S.C. section 16(a)(1)(A), "any litigant who asks for a stay under § 3 [of the Federal Arbitration Act] is entitled to an immediate appeal from denial of that motion —regardless of whether the litigant is in fact eligible for a stay.").

This case is about a shareholder dispute. Brad Warrington, the minority shareholder in Rocky Patel Premium Cigars, wants to divest from his holdings in the company. To do so, he must comply with the terms of the buy–sell agreement governing ownership in the company, under which the company has the right of first refusal. The agreement also includes a provision under which "any controversy or claim arising out of this [a]greement [that] cannot be settled by the parties ... shall be settled by arbitration."

In 2015, when Warrington told Patel he wanted out, Patel decided to purchase Warrington's shares and made an offer based on a valuation he'd commissioned. Warrington thought the offer was too low and counteroffered. A dispute ensued. Patel accused Warrington of failing to make a bona fide offer, and Warrington accused Patel of various bookkeeping and disclosure improprieties.

Six years later, Warrington found a private buyer and notified Patel that he intended to sell. Patel refused to acknowledge the notice and facilitate the sale, claiming the notice was inadequate. When Patel didn't respond within the thirty-day period required under the agreement, Warrington tried to proceed with the sale. In July 2021, Patel sued Warrington in Florida state court seeking a declaratory judgment that he'd complied with the requirements governing the information Warrington requested in the process of selling his shares under the agreement. A few months later, Patel amended his complaint to include claims for breach of contract and breach of good faith and fair dealing, seeking specific performance of the agreement's purchase option provision. Warrington moved to dismiss, and Patel later filed for voluntary dismissal.

While the state action was pending, Warrington sued Patel in federal court in February 2022, bringing seven counts: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) tortious interference; (4) breach of fiduciary duty (direct action); (5) breach of fiduciary duty (shareholder derivative action); (6) securities fraud; and (7) punitive damages. In light of Patel's still-pending state court lawsuit, Patel moved to dismiss, remand, abate, or stay, which the district court denied. In June 2022, Patel moved to stay and compel arbitration under the agreement. The district court denied that motion, too, finding that Patel had waived his right to arbitrate because he'd both filed (and amended) the initial action in state court and moved to dismiss or remand Warrington's action in the district court. Patel appealed the district court's denial.

***2** We review de novo a district court's denial of a motion to compel arbitration on the ground that the movant waived its right to arbitrate. *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1316 (11th Cir. 2002). Like any other right or obligation under a contract, an agreement to arbitrate may be waived. *Id.* at 1315. "A party has waived its right to

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arbitrate if, under the totality of the circumstances, the party has acted inconsistently with the arbitration right....” *S & H Contractors, Inc. v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990) (cleaned up), *abrogated on other grounds by Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022).

There's no set rule as to what constitutes waiver of an arbitration agreement, so we review whether a waiver has occurred based on the facts of each case. *Burton–Dixie Corp. v. Timothy McCarthy Constr. Co.*, 436 F.2d 405, 408 (5th Cir. 1971). “A key factor in deciding this is whether a party has substantially invoked the litigation machinery prior to demanding arbitration.” *Gutierrez v. Wells Fargo Bank, NA*, 889 F.3d 1230, 1236 (11th Cir. 2018) (cleaned up). “[T]he purpose of the waiver doctrine is to prevent litigants from abusing the judicial process.” *Id.* “Acting in a manner inconsistent with one's arbitration rights and then changing course mid-journey smacks of outcome-oriented gamesmanship played on the court and the opposing party's dime.” *Id.* “[T]he key ingredient in the waiver analysis is fair notice to the opposing party and the [d]istrict [c]ourt of a party's arbitration rights and its intent to exercise them.” *Id.*

We agree with the district court that Patel has waived his right to arbitration. As the district court explained, Patel initially filed suit in state court to enforce his rights under the agreement, then he attempted to force Warrington's federal action down to the state court to be joined with his action there —all before seeking to compel arbitration.

Patel argues that he hasn't “substantially invoked the litigation machinery” and therefore never waived his right to arbitrate. Patel points to the district court's finding, in its order denying his motion to dismiss or remand, that both actions were in the “beginning stages” and that “discovery ha[d] yet to commence in either action” at that point.

True, neither case on its own had made it very far. But viewing the facts “under the totality of the circumstances,” as we must, we conclude (as the district court did) that Patel evinced a clear intent to litigate this matter prior to asserting his right to arbitrate and thus “has acted inconsistently with [his] arbitration right.” *S & H Contractors*, 906 F.2d at 1514.

Patel initially sued Warrington in state court and even amended his complaint to expand the scope of rights under the agreement he sought to assert in that forum. Once Warrington brought the matter to federal court, Patel participated in the district court's case management proceedings. He then moved to dismiss, abate, stay, or remand Warrington's federal complaint, arguing that the case should be remanded to state court because it contained “the exact same issues” as Patel's state suit. Patel then filed for multiple extensions in the district court, forcing Warrington to file a motion to compel discovery. Only after nearly a year of trying to get this dispute into state court did Patel attempt to invoke his right to arbitrate.

Taken together, Patel substantially invoked the litigation machinery prior to demanding arbitration. Accordingly, the district court's order denying Patel's motion to stay and compel arbitration is affirmed.

***3 AFFIRMED.**

All Citations

Not Reported in Fed. Rptr., 2023 WL 1818920

Footnotes

1 We will refer to them together as Patel.

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2022 WL 1171385
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

WASHINGTON SCHOOLS RISK
MANAGEMENT POOL, Plaintiff,
v.
AMERICAN RE-INSURANCE
COMPANY et al., Defendants.

Case No. C21-0874-LK
|
Signed 04/20/2022

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ORDER GRANTING MOTION TO SEAL MATERIALS FILED IN CONNECTION WITH REPLY

S. KATE VAUGHAN, United States Magistrate Judge

***1** This matter comes before the Court on Defendant Sompo International Reinsurance's Motion to Seal Materials Filed in Connection with Reply, Dkt. 37. For the foregoing reasons, the Court GRANTS the Motion.

I. BACKGROUND

This is an insurance dispute concerning Plaintiff Washington Schools Risk Management Pool's ("WSRMP") entitlement to reinsurance payments from Defendants Sompo and American Re-Insurance Company. *See* Dkt. 27. Sompo and WSRMP dispute whether WSRMP's claims against Sompo must be arbitrated pursuant to the terms of an arbitration clause in the reinsurance policy between them. On July 15, 2021, WSRMP filed a Motion for Partial Summary Judgment, Dkt. 14, asking the Court to rule as a matter of law that the arbitration clause in the reinsurance policy is void and inapplicable to this dispute. On September 1, 2021, Sompo filed a Motion to Compel Arbitration and Dismiss WSRMP's Amended Claims. Dkt. 32. In conjunction with its Reply to this Motion, Sompo filed the present Motion to Seal. Dkt. 37.

Sompo asks the Court to seal (1) Exhibit 1 to the Declaration of Kevin Finnerty, Dkt. 40, and (2) an unredacted version of Sompo's Reply (collectively, the "Arbitration Information") because this information "constitute[s] materials and information emanating from the arbitration proceedings pending between Sompo and WSRMP." Dkt. 37 at 2. Per Sompo, the reinsurance industry's standard arbitration confidentiality form, the ARIAS-US Form Confidentiality Agreement and Protective Order (the "ARIAS-US Form"), requires parties to seek to file information that pertains to arbitration (like the Arbitration Information) either in redacted form or under seal in court. *Id.*

The ARIAS-Form broadly protects information related to arbitration, *see* Dkt. 37-1 § 2, but several exceptions apply. One such exception permits a party to disclose information "as is necessary in connection with court proceedings relating to any aspect of the arbitration, included but not limited to motions to confirm, modify, vacate or enforce an award issued in this arbitration." *Id.* at § 3(b). However, the ARIAS-US Form requires that, "[i]n connection with any disclosures pursuant to [this exception], the parties agree, subject to court approval, that all submissions of Arbitration Information to a court shall be sealed and/or redacted so as to limit disclosure of Arbitration Information." *Id.* at § 3.

Neither the parties nor the arbitration panel have executed the ARIAS-US Form at this time. Dkt. 37 at 3. Sompo contends, however, that "there appears to be a substantial likelihood that they (and the Arbitration Panel) ultimately will execute the ARIAS-US Form, 'as is' or as modified in response to revisions to be proposed by WSRMP." *Id.* As a result, the arbitration panel may order Sompo to seek the Court's permission to seal the Arbitration Information in accordance with the ARIAS-US Form's requirements. *Id.* at 2. Given this, Sompo's Motion preemptively "seeks to comply with the ARIAS-US Form." *Id.* at 4.

***2** On September 24, 2021, Sompo conferred with WSRMP regarding Sompo's request to file the Arbitration Information

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under seal. Dkt. 37 at 1. WSRMP declined to take a position on Sompo's request. *Id.* at 2.

On April 20, 2022, the Court entered a Report and Recommendation, which recommended compelling arbitration pursuant to the terms of the parties' arbitration agreement and dismissing WSRMP's claims against Sompo. Dkt. 47.

II. DISCUSSION

All documents filed with the Court are presumptively public. *San Jose Mercury News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1103 (9th Cir. 1999). "[T]he courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016) (citation omitted). Accordingly, a party seeking to seal a judicial record bears the burden of overcoming the strong presumption in favor of public access. *Id.*

Two standards generally govern requests to seal documents: the "compelling reasons" standard for documents directly related to the underlying causes of action, such as documents attached to summary judgment briefs, and the lesser "good cause" standard for documents only tangentially related to the underlying causes of action, such as some discovery documents. *See Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006); *see also Ctr. for Auto Safety, LLC*, 809 F.3d at 1098; *Pintos v. Pac. Creditors Ass'n*, 605 F.3d 665, 678 (9th Cir. 2010).

It is unclear which standard Sompo alleges governs here. Because the "compelling reasons" standard results in greater access to the public, the Court will apply it to Sompo's Motion to Seal. Doing so, the Court concludes that sealing is warranted.

The Court has recommended compelling arbitration and dismissing WSRMP's claims against Sompo. The ARIAS-US Form (or some modified version thereof) will therefore apply in the arbitration proceedings, requiring the parties to seal and/or redact any court filings that disclose arbitration information. If the Court denies Sompo's Motion at this juncture, Sompo (who presumably will no longer be a party to this action) will be required to return to this Court at a later date to move to seal the Arbitration Information.

Given that (1) the ARIAS-US Form requires the parties to seal and/or redact court filings that disclose arbitration information; (2) Sompo contends, and WSRMP does not dispute, that the parties will adopt the ARIAS-US Form in arbitration; and (3) WSRMP does not oppose Sompo's Motion to Seal, the Court finds sealing the Arbitration Information warranted. *See GEA Grp. AG v. Flex-N-Gate Corp.*, 740 F.3d 411, 420 (7th Cir. 2014) (holding as a matter of comity that the presumption to public access to the judicial record was overcome by a German arbitration rule that required confidentiality of the arbitration evidence, which the parties were bound by); *Mastronardi Int'l Ltd. v. Sunselect Produce (California), Inc.*, No. 1:18-CV-00737-AWI-JLT, 2020 WL 469351, at *2 (E.D. Cal. Jan. 29, 2020) (granting motion to seal applying the "compelling reasons" standard when the arbitration rules governing the parties' arbitration required confidentiality).

III. CONCLUSION

***3** For the foregoing reasons, Sompo's Motion to Seal Materials Filed in Connection with Reply, Dkt. 37, is GRANTED.

All Citations

Not Reported in Fed. Supp., 2022 WL 1171385

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Woodham v. Morgan Stanley, D.N.J., October 31, 2023

61 F.4th 334
United States Court of Appeals, Third Circuit.

Thomas Roger WHITE, Jr.; Patricia Cauley, on behalf of themselves and all others similarly situated
v.
SAMSUNG ELECTRONICS AMERICA, INC.; Sony Electronics Inc.
Samsung Electronics America, Inc., Appellant

No. 22-1162
|
Argued December 6, 2022
|
(Filed: March 7, 2023)

Synopsis
Background: Consumers brought putative class action against television manufacturer, alleging manufacturer was illegally monitoring consumers' usage of internet-enabled services on their televisions. Manufacturer filed motion to compel arbitration, and the United States District Court for the District of New Jersey, Madeline Cox Arleo, J., 2021 WL 6750766, denied the motion. Manufacturer appealed.

[Holding:] The Court of Appeals, Fuentes, Circuit Judge, held that manufacturer acted inconsistently with intent to assert its right to arbitrate and thus waived right to arbitrate.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Compel Arbitration.

West Headnotes (10)

[1] **Alternative Dispute Resolution** Scope and standards of review

Court of Appeals' review of district court order denying motion to compel arbitration is plenary over district court's determination as to whether party, through its litigation conduct, waived its right to compel arbitration; to extent that district court makes factual findings in making this determination, Court of Appeals reviews those findings for clear error.

2 Cases that cite this headnote

[2] **Alternative Dispute Resolution** Validity

Alternative Dispute Resolution Disputes and Matters Arbitrable Under Agreement

To compel arbitration, a court must consider whether (1) valid agreement to arbitrate exists and (2) the particular dispute falls within the scope of that agreement.

3 Cases that cite this headnote

[3] **Alternative Dispute Resolution** Constitutional and statutory provisions and rules of court

The policy of the Federal Arbitration Act (FAA) favoring arbitration agreements is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts. 9 U.S.C.A. § 1 et seq.

3 Cases that cite this headnote

[4] **Alternative Dispute Resolution** Constitutional and statutory provisions and rules of court

The policy of the Federal Arbitration Act (FAA) is to make arbitration agreements as enforceable as other contracts, but not more so. 9 U.S.C.A. § 1 et seq.

2 Cases that cite this headnote

[5] **Alternative Dispute Resolution** Waiver or Estoppel

Under the Federal Arbitration Act (FAA), the inquiry for waiver of arbitration rights must be identical to the inquiry for waiver of other contractual rights. 9 U.S.C.A. § 1 et seq.

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3 Cases that cite this headnote

[6] **Alternative Dispute Resolution** Construction

Under the Federal Arbitration Act (FAA), parties have the entire contractual toolbox available to them to seek to enforce or oppose an arbitration provision. 9 U.S.C.A. § 1 et seq.

1 Case that cites this headnote

[7] **Alternative Dispute Resolution** Waiver or Estoppel

In the context of the right to arbitrate, "waiver" occurs where party has intentionally relinquished or abandoned known right.

8 Cases that cite this headnote

[8] **Alternative Dispute Resolution** Waiver or Estoppel

In analyzing whether waiver of right to arbitrate has occurred, court focuses on actions of party who held right and is informed by circumstances and context of each case.

5 Cases that cite this headnote

[9] **Alternative Dispute Resolution** Suing or participating in suit

Television manufacturer acted inconsistently with intent to assert its right to arbitrate and thus waived right to arbitrate, in proceeding on consumers' putative class action alleging manufacturer was illegally monitoring consumers' usage of internet-enabled services on their televisions; manufacturer was on notice from outset of litigation that claims could be arbitrable as each plaintiff had necessarily agreed to terms and conditions to use televisions' internet-enabled services, manufacturer continuously agreed to stays in discovery to pursue motions to dismiss on merits, motions resulted in dismissal of all but one claim, and manufacturer clearly sought to have case dismissed on merits and did not attempt to arbitrate until after it was apparent further litigation would be required.

5 Cases that cite this headnote
More cases on this issue

[10] **Alternative Dispute Resolution** Suing or participating in suit

Motions to dismiss will not always evince an intent to litigate instead of arbitrate.

***336** On Appeal from the United States District Court for the District of New Jersey (D.C. No. 2-17-cv-01775), District Judge: Honorable Madeline C. Arleo

Attorneys and Law Firms

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Simon J. Frankel [*] [ARGUED], Covington & Burling, 415 Mission Street, Suite 5400, San Francisco, CA 94105, John A. Boeglin, Covington & Burling, 850 10th St., N.W., One City Center, Washington, DC 20001, Brielle A. Basso, Michael R. McDonald, Gibbons, One Gateway Center, Newark, NJ 07102, Counsel for Appellant

Before: SHWARTZ, MATEY, and FUENTES, Circuit Judges

OPINION OF THE COURT

FUENTES, Circuit Judge.

In this putative class action, the District Court for the District of New Jersey determined that defendant Samsung Electronics America, Inc. (Samsung) waived its right to arbitrate. Samsung appeals the District Court ruling, arguing that *Morgan v. Sundance, Inc.*, ––– U.S. ––––, 142 S. Ct. 1708, 212 L.Ed.2d 753 (2022), abrogated this Court's prejudice-based approach to analyzing waiver of arbitration rights and requires reversal. Because we conclude that Samsung waived its arbitration rights under *Morgan*, we will affirm the order of the District Court.

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FACTS AND PROCEDURAL HISTORY

Plaintiffs are owners of Samsung SmartTVs who allege that Samsung, among others, was illegally monitoring their usage of Internet-enabled services on their televisions. [1] They claimed that Samsung SmartTVs used automatic tracking software to collect personally identifying information about them, such as the videos or streaming services they watch, and transmit that data to third party advertisers and data brokers. In turn, these third parties allegedly used the collected information to display targeted advertisements to consumers.

When setting up their SmartTVs, plaintiffs had to agree to certain Terms and Conditions to access the Internet-enabled services. On some SmartTVs, the Terms and Conditions contained the following arbitration provision:

> By using the Services, the User unconditionally consents and agrees that: (a) any claim, dispute or controversy (whether in contract, tort, or otherwise) the User may have against any Samsung entity ... arising out of, relating to, or connected in any way with the Services ***337** or the determination of the scope or applicability of this clause, will be resolved exclusively by final and binding arbitration[.] [2]

According to Samsung, not all of its SmartTVs have arbitration provisions. [3] Samsung is able to tell by the Model Number on a SmartTV whether that Model contains an arbitration clause in the Terms and Conditions. The Serial Number specific to each SmartTV can be used to confirm whether a user agreed to the Terms and Conditions.

In their 2017 complaint, then-plaintiffs Thomas Roger White, Jr., David Espinoza, and Christopher Mills did not provide the Model or Serial Numbers for their SmartTVs. It was clear from this complaint, however, that plaintiffs were SmartTV users who were able to access Internet-enabled services, which they claimed Samsung was unlawfully monitoring. Defendants jointly moved to dismiss the complaint, but the parties agreed to a stay and administrative termination of the case. In order to reactivate the case, plaintiffs were directed to file a letter with the Court by December 2017 requesting that the case be restored, along with a proposed amended complaint for filing. The case was reactivated and in January 2018 plaintiffs submitted a proposed amended complaint.

Defendants moved again to dismiss the amended complaint, arguing that plaintiffs had not resolved the insufficiencies of the original complaint, and that plaintiffs failed to meet federal pleading standards for stating a claim as to each count. While that motion was pending, defendants submitted a proposed discovery plan in which they did not mention a possible right to arbitrate. Defendants also moved for a stay pending the outcome of their motion to dismiss, which was granted.

In April 2018, prior to the District Court's decision on the motion to dismiss, plaintiffs submitted their initial disclosures, which contained the Model and Serial Numbers for all of plaintiffs' SmartTVs. [4] Thereafter, the Court granted the motion to dismiss in full, and plaintiffs indicated that they would submit a second amended complaint. Plaintiffs filed a second amended complaint in November 2018, removing former-plaintiff Mills from the action, keeping White as a plaintiff, and adding Patricia Cauley as a plaintiff. The second amended complaint included the Model Numbers for both White's and Cauley's SmartTVs, as well as the Serial Numbers for White's SmartTVs. Defendants once again moved to dismiss. The District Court granted in part and denied in part this motion to dismiss and dismissed all of plaintiffs' claims except for the Wiretap Act claims. Samsung moved for reconsideration of the Court's order, which was denied.

Samsung notified the Court in May 2020 that it would move to compel individual arbitration. In response, counsel for plaintiffs stated that Samsung had waived its arbitration rights. Nevertheless, Samsung filed a motion to compel arbitration in May 2020, which was denied without prejudice for docket management purposes. Samsung refiled the motion in May 2021, arguing, as relevant here, that it did not waive its right to arbitrate because "the prerequisites of waiver—extensive discovery and ***338** prejudice—are lacking, and the [relevant] factors do not support a finding of waiver." [5] Plaintiffs opposed.

The District Court denied the motion in a letter order, explaining that Samsung waived its right to arbitrate, and

that compelling arbitration would cause plaintiffs to suffer significant prejudice. The District Court diligently reviewed the factors set forth in *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 926-27 (3d Cir. 1992), determining that of the six relevant factors, five weighed in favor of finding that Samsung had waived its right to arbitrate. Samsung appeals.

JURISDICTION & STANDARD OF REVIEW

[1] The District Court had jurisdiction pursuant to 28 U.S.C. § 1332(d)(2) (the Class Action Fairness Act) and 28 U.S.C. § 1331. This Court has jurisdiction under 9 U.S.C. § 16(a)(1)(B) because the District Court's order denied a motion to compel arbitration under the Federal Arbitration Act (FAA). [6] Our review of a district court order denying a motion to compel arbitration is plenary over the Court's determination as to "whether a party[,] through its litigation conduct, waived its right to compel arbitration." [7] "To the extent that a district court makes factual findings" in making this determination, the Court reviews those findings for clear error. [8]

DISCUSSION

Samsung originally argued that the District Court's holding was in error under the *Hoxworth* factors; however, while this case was pending, the Supreme Court issued a decision in *Morgan v. Sundance, Inc.* As Samsung pointed out in supplemental briefing, in *Morgan* the Supreme Court "expressly 'rejected' the prejudice-based waiver analysis undergirding the *Hoxworth* line of cases and similar prejudice-focused approaches of other Circuits." [9] We now analyze the facts of this case under the standard emphasized in *Morgan.*

[2] **[3]** **[4]** To compel arbitration, a court must consider whether (1) "valid agreement to arbitrate exists" and (2) "the particular dispute falls within the scope of that agreement." [10] The FAA provides that "[a] written provision ... to settle by arbitration a controversy ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." [11] Decades ago, the Supreme Court discussed 9 U.S.C. § 2 as "a congressional declaration of a liberal federal policy favoring arbitration agreements." [12] But as *Morgan* explained, that "phrase" "is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." [13] Or in ***339** another formulation: The policy is to make "arbitration agreements as enforceable as other contracts, but not more so." [14]

Simply put, *Morgan* clarified that § 2 never permitted Courts of Appeals to create "arbitration-specific variants of federal procedural rules, like those concerning waiver, based on the FAA's 'policy favoring arbitration.' " [15] Specifically, in the context of waiver of the right to arbitration, this Court and others had created tests that placed prejudice to the party not seeking arbitration as the focus of the waiver inquiry. [16] The Court stated, however, that the FAA does not authorize the courts to invent arbitration-preferential rules. [17] Thus, the Court directed the Courts of Appeal to "hold a party to its arbitration contract just as the court would to any other kind[, b]ut ... not devise novel rules to favor arbitration over litigation." [18]

[5] **[6]** In support of this directive, the Supreme Court rejected the prejudice-focused inquiry established by this and other Courts of Appeals. Instead, the inquiry for waiver of arbitration rights must be identical to the inquiry for waiver of other contractual rights. [19] Indeed, the Court emphasized that any defense existing in contract law, "whether of waiver or forfeiture or what-have-you," [20] is available to a party resisting arbitration. [21] This result flows directly from the plain language of the FAA, which states clearly that an arbitration provision is valid, except "upon such grounds as exist at law or in equity *for the revocation of any contract.*" [22] Thus, parties have the entire contractual toolbox available to them to seek to enforce or oppose an arbitration provision.

[7] **[8]** **[9]** For purposes of resolving this case, we need only address one of the tools at the parties' disposal—waiver. Applying the general rule for waiver as *Morgan* directs, waiver occurs where a party has "intentional[ly] relinquish[ed] or abandon[ed] ... a known right." [23] In analyzing whether waiver has occurred, a "court focuses on the actions of the p[arty] who held the right" [24] and is informed by the "circumstances and context of each case." [25] ***340** We therefore must now decide whether Samsung acted inconsistently with an intent to assert its right to arbitrate. [26]

Samsung's litigation actions here evince a preference for litigation over arbitration. As Samsung itself states, it was aware that pursuant to its standard Terms and Conditions, certain SmartTVs require users to agree to arbitration to utilize the Internet-based services of the television. Thus, from the outset of litigation, Samsung was on notice that plaintiffs' claims could be arbitrable, as each plaintiff had necessarily agreed to Terms and Conditions to utilize their SmartTVs' Internet-enabled services. It was also always aware that the Model and Serial Numbers of the specific TVs were necessary to determine with accuracy whether plaintiffs agreed to arbitrate their claims. Samsung's actions, despite this awareness to invoke the litigation process, demonstrates a waiver of its alleged right to arbitrate.

[10] Samsung also continuously sought and agreed to stays in discovery—which may have resulted in receipt of the necessary Model and Serial Numbers—to pursue motions to dismiss on the merits. Those motions to dismiss were favorable to Samsung, resulting in all but one claim being dismissed. On the surviving claim, Samsung moved for reconsideration. Although motions to dismiss will not always evince an intent to litigate instead of arbitrate,[27] Samsung clearly sought to have this case dismissed by a court on the merits. Only after it was apparent that further litigation would be required, and it could not get the case fully dismissed before discovery, did Samsung attempt to arbitrate the remaining claim.

Samsung also engaged in multiple instances of non-merits motion practice and acquiesced to the District Court's pre-trial orders. Considering just the activity after the filing of the second amended complaint, Samsung submitted an unopposed pro hac vice application, sought leave to file a reply in further support of its motion for reconsideration, requested additional time to file a response to the second amended complaint, and filed a motion for certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). It further assented to all of the District Court's pre-trial orders and participated in numerous court conferences.

Several facts compound this apparent preference for litigation. First, as part of the discovery plan, the parties were asked if the case was subject to court-annexed arbitration. While this particular case would not necessarily be subject to that form of arbitration, arbitration was mentioned in the plan and completeness would suggest that Samsung should have disclosed that another type of arbitration may be applicable. Samsung did not inform plaintiffs of the potential for arbitration at any point during the litigation before May 2020, when it informed them seven days in advance that it intended to raise it to the Magistrate Judge. Next, plaintiffs provided Samsung with Model and Serial Numbers for plaintiffs' SmartTVs in their April 2018 initial disclosures.[28] Given that all ***341** plaintiffs had activated their SmartTVs, Samsung should have been aware at this point, given the Model Numbers, that plaintiffs had agreed to arbitrate their claims. By November 2018, Samsung had the Model Number for newly added plaintiff Cauley's Samsung television. Thus, by November 2018, Samsung should have known definitively that plaintiffs had agreed to arbitrate in this case.[29] Samsung, however, continued to pursue dismissal on the merits through litigation. Samsung's pursuance of dismissal of the action and failure to notify plaintiffs or the Court of its right to arbitrate, prior to May 2020, demonstrated a decision to pursue the benefits of litigating its arbitrable claims and is inconsistent with an intent to arbitrate. Contrary to Samsung's contention, a motion to compel arbitration—or at the very least notice of an intent to seek arbitration—would not have been "futile."[30]

Through its actions expressing an intent to litigate, Samsung waived its right to arbitration. As the District Court noted, Samsung is "a large and sophisticated corporate leader in electronics" and as such is "uniquely positioned to ... know exactly which models had arbitration agreements for its products."[31] Therefore, even without the Serial Numbers, Samsung should have known it could arbitrate plaintiffs' claims and yet expressly went forward with litigation. There is no clear error in the factual findings of the District Court and, pursuant to *Morgan*, Samsung waived its right to arbitrate.

CONCLUSION

For the foregoing reasons, we will affirm the District Court's order holding that Samsung waived its right to arbitrate.

All Citations

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Footnotes

* Attorney Simon J. Frankel argued the appeal, but withdrew his appearance on 02/27/2023.

1 All defendants except for Samsung and SONY Electronics, Inc. were dismissed from the action upon consent of the parties. The claims against SONY were eventually severed from those against Samsung and dismissed with prejudice.

2 JA 4, 658, 661.

3 Only one of White's TVs had an arbitration provision.

4 The Serial Number for one of White's Samsung SmartTVs was missing a number.

5 JA 628.

6 *See* *O'Hanlon v. Uber Techs., Inc.*, 990 F.3d 757, 762 (3d Cir. 2021).

7 *Gray Holdco, Inc. v. Cassady*, 654 F.3d 444, 450-51 (3d Cir. 2011) (internal quotation marks and citation omitted).

8 *Id.* at 451.

9 Samsung Supp. Br. at 1. *Morgan*, 142 S. Ct. at 1712-13.

10 *Trippe Mfg. Co. v. Niles Audio Corp.*, 401 F.3d 529, 532 (3d Cir. 2005).

11 9 U.S.C. § 2.

12 *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

13 *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 302, 130 S.Ct. 2847, 177 L.Ed.2d 567 (2010) (citation and quotation marks omitted).

14 *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967).

15 *Morgan*, 142 S. Ct. at 1712 (internal citation omitted).

16 *Id.* at 1711; *see, e.g.*, *PaineWebber Inc. v. Faragalli*, 61 F.3d 1063, 1068-69 (3rd Cir. 1995); *Shinto Shipping Co. v. Fibrex & Shipping Co., Inc.*, 572 F.2d 1328, 1330 (9th Cir. 1978).

17 *Morgan*, 142 S. Ct. at 1713; *see* 9 U.S.C. § 6 (providing that any application under the statute "shall be made and heard in the manner provided by law for the making and hearing of motions").

18 *Morgan*, 142 S. Ct. at 1713.

19 *Id.* at 1714 (focusing on whether the moving party "knowingly relinquish[ed] the right to arbitrate by acting inconsistently with that right"); *see* *Simko v. U.S. Steel Corp.*, 992 F.3d 198, 205 (3d Cir. 2021) ("Waiver is the intentional abandonment of an argument."); *Barna v. Bd. of Sch. Dirs. of Panther Valley Sch. Dist.*, 877 F.3d 136, 146-47 (3d Cir. 2017) (applying this same waiver rule in this Circuit in a non-arbitration context); *In re RFE Industries, Inc.*, 283 F.3d 159, 164 (3d Cir. 2002) (same).

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20 That "what-have-you" list might also include, for instance, estoppel, laches, and procedural timeliness. *See* *Morgan*, 142 S. Ct. at 1712.

21 *Id.* at 1713-14.

22 9 U.S.C. § 2 (emphasis added).

23 *Morgan*, 142 S. Ct. at 1713.

24 *Id.*

25 *Gray Holdco, Inc.*, 654 F.3d at 451.

26 *See* *Nat'l Found. for Cancer Rsch. v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774-75 (D.C. Cir. 1987).

27 *Cf.* *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 596-98 (3d Cir. 2004) (defendant did not waive its right to arbitrate when it moved to compel arbitration within 22 days of filing its motion to dismiss on procedural grounds, for insufficiency of process).

28 JA 758, 760 ("Thomas Roger White, Jr.: Samsung, Model No. UN55KU6300F, Serial No. 05HX3CAHB11790N; ... Samsung, Model No. UN32J5500AF, Serial No. 03NL3CGG90593M").

29 By November 2018, Samsung knew plaintiffs' SmartTV Model Numbers and that plaintiffs used the smart features on their SmartTVs. So, Samsung had the requisite information to determine that plaintiffs' SmartTVs had an arbitration provision based on the Model Numbers, and that plaintiffs consented to arbitration in order to use the smart features.

30 Samsung Opening Br. at 19-20, citing *Chassen v. Fidelity Nat'l Fin., Inc.*, 836 F.3d 291 (3d Cir. 2016).

31 JA 5.

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