IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

DALLAS LOCKETT AND MICHELLE LOCKETT ,	§	
Plaintiffs,	§	CIVIL ACTION NO. 4:16-CV-703-ALM-CAN
v.	§	
CONN APPLIANCES, INC., CONNS, INC., CONN CREDIT CORP., INC., and CONN CREDIT I LP,	§	
Defendants.	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Pending before the Court is Defendant Conn Appliances, Inc.'s Amended and Supplemental Motion to Dismiss and Compel Arbitration ("Conn Appliances' Motion to Compel Arbitration") [Dkts. 35; 37]. After reviewing the Motion to Compel Arbitration, Response [Dkt. 36], Reply [Dkts. 38], Sur-Reply [Dkt. 39], and all other relevant pleadings [including Dkts. 45; 48], the Court recommends that the Motion to Compel Arbitration be **GRANTED**, and that Plaintiff's suit against Defendant Conn Appliances, Inc. be stayed pending a ruling from the arbitrator on the gateway issue of arbitrability.

RELEVANT FACTUAL BACKGROUND

Conn Appliances argues the claims raised in Plaintiffs' First Amended Complaint are subject to binding arbitration under the terms of the Retail Installment Contracts between the Parties. Conn Appliances, therefore, seeks an order dismissing this case or, in the alternative, staying the case against Conn Appliances pending the outcome of arbitration.

In support of its Motion to Compel Arbitration, Conn Appliances submitted four Retail Installment Contracts (the "Contracts") underlying the debt allegedly owed by Plaintiffs; one signed by Plaintiff Dallas Lockett on May 31, 2014, and three signed by Plaintiff Michelle Locket on each of April 23, 2014, April 26, 2014, and October 5, 2014, respectively [Dkt. 37]. The Contracts are identical. The front page of each of the Contracts includes the principal, interest, and payment terms, along with the following language in the paragraph directly above Plaintiffs' signature line:

> THE ADDITIONAL DISCLOSURES AND CONTRACT TERMS INCLUDING SECURITY INTEREST APPEAR ON REVERSE SIDE HEREOF AND ARE A PART OF THIS CONTRACT.
>
> NOTICE TO BUYER. Do not sign this contract before you read it or if it contains blank spaces. . . .
>
> ACKNOWLEDGEMENT OF RECEIPT OF RETAIL INSTALLMENT CONTRACT and DISCLOSURE, as well as, CONN'S FINANCIAL INFORMATION PRIVACY NOTICE.
>
> The undersigned buyers understand that the Seller will rely upon this representation and acknowledgement in accepting their obligation and granting them credit. They do herewith acknowledge receipt of the Retail Installment Contract and the disclosures contained in it. . . .

[Dkt. 37-1 at 2].

As to each of the Contracts, the following language also appears on the reverse side.

> ARBITRATION: You agree that any claim, dispute or controversy arising from or relating to this Agreement, including, but not limited to, disputes relating to any documentation governing your obligations under this Agreement, any claim, dispute, or controversy alleging fraud, misrepresentation, or other claim, whether under common law, equity, or pursuant to federal law, state, or local statute or regulation, any dispute relating to collection activities taken by Conn's, our affiliates, subsidiaries, agents, officers, employees, servicers, directors, or assigns regarding monies owed under this Agreement, or the scope and validity of this arbitration clause (including disputes as to the matters subject to arbitration), or the enforcement or interpretation of any other provision of this Agreement, shall be resolved by binding individual (and not class) arbitration by and under the administration of: (1) the National Arbitration Forum ("NAF") in accordance with

> its Code of Procedure in effect at the time the claim is filed, (2) the American Arbitration Association ("AAA") in accordance with its Arbitration Rules in effect at the time the claim is filed . . . . You and we are waiving the right or opportunity to litigate disputes in a court of law . . . This arbitration clause is made pursuant to a transaction involving interstate commerce and shall be governed by the Federal Arbitration Act (9 U.S.C. §§ 1-16), and not by any state law that might otherwise apply. . . .
>
> This arbitration clause does not apply to any legal remedies that may be pursued to collect monies owed under the Agreement . . . .

[Dkt. 37-1 at 3].

> MISCELLANEOUS: . . . This contract shall be governed by the laws of the State of Oklahoma, except as may be preempted by federal law.

Id.

ANALYSIS

Defendants argue that pursuant to the above-referenced arbitration clause, Plaintiffs claims are subject to binding arbitration under the Federal Arbitration Act, ("FAA"), 9 U.S.C. §§ 1-16. Defendants assert that because all issues before the Court are subject to arbitration, the Court must dismiss Plaintiffs' case or refer Plaintiffs' claims to arbitration. Plaintiffs argue, to the contrary, that the arbitration clause within the Contracts is unconscionable and unenforceable because it is "a standard form fine-print clause on the reverse side of the signature page of the contract . . . drafted by the Defendant and given to Plaintiffs to sign," such that Plaintiff had to "take-it-or-leave-it," [Dkt. 36 at 8]. Plaintiffs argue the clause requires them to submit disputes to arbitration while allowing Conn Appliances to pursue debt collection through the courts [Dkt. 36 at 11]. Plaintiffs also contend enforcement of arbitration would require Plaintiffs to incur the unknown costs of arbitration while eliminating their right of access to the courts guaranteed under the Oklahoma Constitution and statutes [Dkt. 36 at 13].

I. Referral to Arbitration

Under section 2 of the FAA:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

The FAA "is a congressional declaration of a liberal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). By enacting the FAA, Congress clearly intended "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Id.* at 22. To effectuate this purpose, Congress specifically authorized enforcement of arbitration agreements through court orders which require the parties to engage in the arbitration process. *Id.* "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration of any dispute which [it] has not agreed so to submit." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986). The Court applies a two-step analysis in determining whether to compel arbitration. It must first decide whether the parties agreed to arbitrate the dispute. This determination involves two considerations: (1) whether there is a valid agreement to arbitrate the claims, and (2) whether the dispute in question falls within the scope of that arbitration agreement. *Sherer v. Green Tree Servicing LLC,* 548 F.3d 379, 381 (5th Cir. 2008); *see also AT & T Techs.*, 475 U.S. at 649; *Webb v. Investacorp, Inc.*, 89 F.3d 252, 258 (5th Cir. 1996). If the Court concludes the parties agreed to arbitrate the dispute, the Court then considers whether "any federal statute or policy renders the claims nonarbitrable." *Sherer*, 548 F.3d at 381. But where, as in this case, neither party argues that a

federal statute or policy would bar arbitration, the Court's review is limited to analyzing the arbitration clause under the first step. *Id*.

To reiterate, Plaintiffs argue the arbitration clause is invalid. Conn Appliances argues that, under the terms of the Parties' Contracts, the "validity of this arbitration clause" itself is an issue which must be decided through arbitration [Dkt. 36 at 9]. An agreement to "arbitrate 'gateway' questions of 'arbitrability,' such as . . . whether [the parties'] agreement covers a particular controversy," is referred to as a delegation provision. *Douglas v. Regions Bank*, 757 F.3d 460, 462 (5th Cir. 2014) (citing *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010)). Delegation provisions are enforceable provided their language is clear and unmistakable. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *AT & T Techs.*, 475 U.S. at 649).

Here, the Court finds that, by incorporating the AAA rules and specifically stating disputes regarding "the scope and validity of this arbitration clause (including disputes as to the matters subject to arbitration)" must be submitted to arbitration, the language of the arbitration clause at issue evidences a clear intent to submit disputes regarding arbitrability to arbitration. *Alvarado v. Conn Appliances, Inc.*, No. 1:16-CV-464, 2016 WL 6834020 (W.D. Tex. Nov. 17, 2016) (interpreting an identical arbitration clause); *Edwards v. Conn Appliances, Inc.*, No. 3:14-CV-3529, 2015 WL 1893107, at *6 (N.D. Tex. Apr. 24, 2015) (same).

But the fact that delegation provisions are enforceable does not mean they are unassailable. *Rent-A-Center*, 561 U.S. at 71. "If there is a delegation clause, the motion to compel arbitration should be granted in almost all cases." *Reyna v. Int'l Bank of Commerce*, 839 F.3d 373, 378 (5th Cir. 2016). However, "[i]f a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4." *Rent-A-Center*, 561 U.S. at 71. The Court must determine whether the

delegation clause within an arbitration clause is valid. *Reyna*, 839 F.3d at 378. Where, as in this case, Plaintiffs seemingly argue the delegation clause is an unenforceable adhesion contract, the Court must first decide whether the delegation clause is unconscionable and invalid before referring any remaining issues to arbitration. *Rent-A-Center,* 561 U.S. at 71; *see also Ruppelt v. Laurel Healthcare Providers, LLC*, 293 P.3d 902, 905–06 (N.M. Ct. App. 2012) ("[A] district court is precluded from deciding a party's claim of unconscionability unless that claim is based on the alleged unconscionability of the delegation provision itself."). Ordinary state-law principles govern the determination of whether the terms of an arbitration clause are valid. *First Options of Chic., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Conn Appliance's initial brief argued Texas law applies to the interpretation of the Contracts; citing the language of the Contracts themselves; Plaintiffs argue Oklahoma law applies. As to issues decided by application of state law, a federal court must follow the choice of law rules of the forum state. *Resolution Tr. Corp. v. Northpark Joint Venture*, 958 F.2d 1313, 1318 (5th Cir. 1992) (citing *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)). For this lawsuit, the Court must therefore apply Texas choice of law rules. Under Texas state law, if a contract includes an enforceable choice of law clause, the law of the chosen state—in this case, Oklahoma—must be applied. *Resolution Tr. Corp*., 958 F.2d at 1318. The Court, thus, applies Okahoma law in connection with its further analysis.

Plaintiffs allege the arbitration clause in the Parties' Contracts is unconscionable because it is an adhesion contract, drafted by Conn Appliances and offered to Plaintiffs on a "take it or leave it" basis.

> An adhesion contract is a standardized contract prepared entirely by one party to the transaction for the acceptance of the other. These contracts, because of the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected on a "take it or leave it" basis without opportunity for bargaining—the services contracted for cannot be obtained except by acquiescing to the form agreement.

Grindstaff v. Oaks Owners' Ass'n, Inc., 386 P.3d 1035, 1042 (Okla. Civ. App. 2016). But contracts of adhesion are not "in themselves illegal or inequitable. They are often used in commerce and allow the party proposing the contract a measure of standardization among the contracts it lets and equal treatment among its contractees." *Towe Hester & Erwin v. Kansas City Fire & Marine Ins. Co.*, 947 P.2d 594, 597 (Okla Civ. App. 1997). The Oklahoma Courts have held that, even when included within adhesion contracts, arbitration clauses are enforceable under Oklahoma law. *Id*. (reversing and ordering referral to arbitration based on a clause in a pre-printed contract; concluding the clause was neither unconscionable nor illegal); *Barker v. Golf U.S.A., Inc.*, 154 F.3d 788, 792-93 (8th Cir. 1998) (finding that a contract's status as "standardized" does not suffice to establish that it is unconscionable under Oklahoma law; instead, must show party lacked a meaningful choice as to the provision and the provision unreasonably favors the drafter/other party); *Lloyd v. Northrop Grumman Sys. Corp*., No. CIV-07-887-C, 2008 WL 320021, at *2-3 (W.D. Okla. Feb. 4, 2008) (noting that a "take-it-or-leave-it" arbitration clause is not per se unconscionable and finding that where details of clause were not hidden in maze of fine print but contained within two clearly written documents terms were not unconscionable).

The delegation provision within the arbitration clause in the Contracts is not an unconscionable adhesion contract. It assigns to the arbitrator the responsibility of determining whether the arbitration clause is valid and enforceable, and whether Plaintiffs' claims fall within the scope of that agreement. Plaintiffs' claims against Defendant Conn Appliances should be

referred to arbitration to determine whether the arbitration clause within the Contracts in valid and enforceable, and if so, to adjudicate the merits of Plaintiffs' claims against Conn Appliances.[1]

II. Dismissal or Stay of Litigation

When claims are referred to arbitration, upon application of one of the parties, the Court must stay the trial of the action until the arbitration is complete. 9 U.S.C. § 3. But the court may also, in its discretion, dismiss the case "when all of the issues raised in the district court must be submitted to arbitration." *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992).

As to Plaintiffs' claims against Conn Appliances, if the arbitrator concludes the arbitration clause is not valid or enforceable, the matter must return to the court to resolve the merits of this case. Since Plaintiffs' claims against Conn Appliances may return to this forum for resolution (and also because Plaintiffs' claims against the other named Defendants remain pending before the Court), this case should be stayed rather than dismissed at this time. However, beginning July 10, 2017, Defendant Conn Appliances, Inc. shall electronically file a status report with the Court which explains the current status of the pending arbitration, with similar reports filed every 90 days thereafter until the arbitration or this case is dismissed. Defendant Conn Appliances, Inc. shall also notify the Court within 10 days after the arbitrator decides whether the arbitration clause is valid, and if it is found to be valid, the Court may further evaluate dismissal of Plaintiff's claims against Conn Appliances, Inc.

[1] Plaintiffs also argue that the arbitration clause is unconscionable because it is an adhesion contract, denies Plaintiffs' right to access to the courts, and unfairly preserves Defendants right to pursue debt collection in the courts. Since these claims of unconscionability challenge the arbitration clause as a whole, and not just the delegation provision, they must be decided by the arbitration forum. *W.L. Doggett LLC v. Paychex, Inc.*, 92 F. Supp. 3d 593 (S.D. Tex. 2015).

CONCLUSION AND RECOMMENDATION

For the foregoing reasons, the Court recommends that Defendant Conn Appliance's Amended and Supplemental Motion to Dismiss and Compel Arbitration [Dkts. 35; 37] be **GRANTED**, and that Plaintiff's suit against Defendant Conn Appliances, Inc. be stayed pending a ruling from the arbitrator on the gateway issue of arbitrability.

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

SIGNED this 11th day of April, 2017.

Christine A. Nowak
UNITED STATES MAGISTRATE JUDGE