UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-CIV-62092-BLOOM/Valle

ESTATE OF PHYLLIS M. MALKIN, by its Personal Representative, Toni Ellen Guarnero,

Plaintiff,

v.

SAIL FUNDING TRUST II, a Delaware Statutory Trust, c/o its Trustee, Wells Fargo Bank, N.A.,

Defendant.
_______________________________________/

ORDER

This cause is before the Court upon Defendant Sail Funding Trust II's Motion to Compel Arbitration and Stay Judicial Proceedings, ECF No. [14] ("Motion to Compel"), and Motion Stay Discovery ("Motion to Stay"), ECF No. [15] (collectively, the "Motions"). This Court has reviewed the Motions, all supporting and opposing filings, the record in this case, and is otherwise fully advised in the premises. For the reasons set forth below, arbitration is required.

I. BACKGROUND

Phyllis M. Malkin ("Malkin") passed away on September 13, 2014, in Miami, Florida. *See* Complaint (hereinafter, "Original Complaint"), ECF No. [1] at ¶ 9. At the time of her death, a $4 million life insurance policy, issued by American General Life Insurance Company ("American General"), was in force (the "Policy"). *See id.* at ¶¶ 9, 47-58. This action, commenced on October 5, 2015, by Plaintiff, the Estate of Phyllis M. Malkin, by its Personal Representative, Toni Ellen Guarnero (the "Estate"), seeks to recover the Policy's $4 million

death benefit on the basis that it was improperly paid to Defendant Sail Funding Trust II ("SFT"). *Id.* at ¶ 9.

Poring over the Estate's allegations reveals that this litigation, in its most elementary form, involves an issue of "stranger-originated life insurance" (or stranger-owned life insurance"), or "STOLI," for short. *See id.* at ¶¶ 98-113; *see also* First Amended Complaint ("FAC"), ECF No. [27] at ¶¶ 10-14. In a related case, this Court acknowledged the recent proliferation of STOLI policies:

> As recognized by the Southern District in *Pruco Life Ins. Co. v. Brasner*, No. 10-80804-CIV-COHN, 2011 WL 134056 (S.D. Fla. Jan. 7, 2011), a large secondary market for life insurance has emerged. In this market, existing life insurance policies are sold to third parties who lack an insurable interest in the insured's life. If acquired for a legitimate purpose at the inception of the policy, this type of sale generally raises no issues. On the other hand, where the policy lacks an insurable interest at inception and is procured for the purpose of re-sale to investors on the secondary market, questions concerning the validity of the policy are raised. Over a century ago, Justice Holmes cautioned that "[a] contract of insurance upon a life in which the insured has no interest is a pure wager that gives the insured a sinister counter interest in having the life come to an end."

Sun Life Assurance Co. of Canada v. U.S. Bank Nat'l Ass'n, No. 14-CIV-62610-Bloom/Valle, 2016 WL 161598, at *1 (S.D. Fla. Jan. 14, 2016) (quoting *Grigsby v. Russell*, 222 U.S. 149, 154 (1911)). According to the Estate, the Policy was precisely this: a policy procured by stranger entities who lacked an insurable interest in Malkin's life and sought to wager on her life and ultimately profit from her demise. *See* Original Complaint at ¶¶ 98-113; FAC at ¶¶ 10-14.

As part of the STOLI scheme, Malkin, acting on behalf of the purported stranger entities, established the "Phyllis Malkin Revocable Trust" (the "Revocable Trust"), the "sole and exclusive purpose" of which was "to own the limited liability company member interest" in an entity known as the "Phyllis Malkin, LLC" (the "Malkin LLC" or "LLC"). *See* Original

Complaint at ¶¶ 10-13; FAC at ¶¶ 90-93; *see also* Phyllis Malkin Revocable Trust Agreement ("Trust Agreement"), ECF No. [27-15] at 2. Wells Fargo Bank, N.A. ("Wells Fargo") was designated as trustee under the Trust Agreement. *See* Trust Agreement, ECF No. [27-15] at 2. Pursuant to the Trust Agreement, upon the establishment of the Malkin LLC, the LLC was to enter into and perform its obligations under a "Positive Financial Premium Finance II Financing Agreement." *See id.* On March 13, 2006, the Malkin LLC was registered as a Georgia limited liability company with the Revocable Trust listed as sole member, Wells Fargo as manager, and Lawrence Weiner, a Florida attorney as "special manager." FAC at ¶ 108; Operating Agreement of Phyllis Malkin, LLC ("Operating Agreement"), ECF No. [27-17] at 2. Thereafter, SFT, Wells Fargo, the Malkin LLC, and Malkin seemingly followed through with the intentions detailed in the Trust Agreement, entering into a financing agreement, effective as of March 20, 2006. *See* Positive Financial Premium Finance Financing Agreement (the "Financing Agreement" or "Agreement"), ECF No. [27-20]. The Financing Agreement does not indicate when the Malkin signatures were affixed to the signature page. *See id.* at 7.

Under the Financing Agreement, SFT was obligated to provide advances to the Malkin LLC for the purpose of funding premiums on the Policy and performed, providing the LLC with a $60,000 upfront advance. *See id.* In return, SFT was to be repaid by the Malkin LLC from the death benefit of the Policy, which had been assigned to SFT under the Agreement as collateral. *See id.* at 11 (Section 1.03, Payment). Accordingly, upon Malkin's passing, the Malkin LLC, through Wells Fargo, transferred the Policy's death benefit to SFT. FAC at ¶ 166. The Estate contends that the transfer to SFT was improper given the true nature of the Policy.

As initially pled, two of the three counts asserted by the Estate were directly related to the aforementioned Financing Agreement: Count II sought a declaratory judgment that the Financing

Agreement is unenforceable or, in the alternative, should be reformed; and Count III sought damages for breach of contract predicated upon a violation of the Financing Agreement. *See* Original Complaint at ¶¶ 123-138. SFT filed the instant Motions, seeking to compel arbitration pursuant to an arbitration clause in the Financing Agreement. Thereafter, on December 28, 2015, with leave from the Court, the Estate filed its First Amended Complaint. While the FAC did not substantially modify the ultimate conclusion that the Policy lacked an insurable interest at inception, it did adjust the causes of action. Count II of the FAC mimics the claim pursued under Count I of the Original Complaint, namely, seeking recovery of insurance proceeds on the basis that the Policy lacked an insurable interest at its inception. *Compare* Original Complaint at ¶¶ 114-22 *with* FAC at ¶¶ 186-88 (noting that "[i]f a person to whom the proceeds of a [life] insurance policy are paid lacks an insurable interest and is, therefore, not entitled to the proceeds, he or she holds them as a trustee for the person lawfully entitled to them."). However, the Estate's amendment removed reference to the Financing Agreement, instead seeking a declaratory judgment that the Policy lacks an insurable interest (Count I) and, relatedly, that to permit SFT to retain the death benefit in light of this fact would amount to unjust enrichment (Count III). *See* FAC at ¶¶ 178-85, 189-91. SFT now requests that the Court enforce one of the provisions contained in the Financing Agreement as to the claims set forth in the Estate's operative pleading.

Section 8.11 of the Financing Agreement contains a "Dispute Resolution" provision, which provides that "[a]ll controversies or disputes arising out of or in connection with this Agreement ("Disputes") shall be resolved" as follows:

> All Disputes shall in the first instance be discussed amicably between the parties with a view to resolving such Dispute, commencing upon one party giving other parties written notice of such Dispute. In the event that such Dispute is not resolved within

> thirty (30) days after such notice (or such longer period as the parties may agree in writing with respect to any such Dispute), *any party may submit such Dispute to be finally settled by arbitration administered under the Rules by a panel of three arbitrators sitting in Atlanta, Georgia.*
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> * * *
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> The award of the arbitrators shall be final and binding upon the parties, and shall not be subject to any appeal or review. The parties agree that such award may be recognized and enforced in any court of competent jurisdiction. The parties agree to submit to the personal jurisdiction of the federal and state courts sitting in Fulton County, Georgia, for the sole purpose of enforcing this Agreement (including, where appropriate, issuing injunctive relief), the agreement to arbitrate contained herein and any award resulting from arbitration pursuant to this Section 8.11 and, to the fullest extent permitted by law, waive any objection which they may have at any time to the laying of venue of any proceedings brought in such court and any claim that such proceedings have been brought in an inconvenient forum.

Financing Agreement at 29-30 (emphasis supplied). The "Rules" referenced in Section 8.11 are explicitly defined by the Financing Agreement as "the Commercial Arbitration Rules of the American Arbitration Association." *See id.* at 34. According to SFT, this provision, allegedly agreed to by Malkin and, therefore, applicable to her Estate, requires that the Court send this matter to arbitration.

II. DISCUSSION[1]

The presence of a valid arbitration provision raises a strong presumption of enforcement. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 630-31 (1985) (stressing that the enforcement of a mutually agreed upon arbitration or forum-selection serves as an "indispensable precondition to the achievement of the orderliness and predictability essential

[1] The Estate first asserts that SFT's Motion to Compel has been rendered moot by the filing of the First Amended Complaint. However, SFT has affirmatively requested that the Court apply the Motion to the current pleading. *See* Def. Reply, ECF No. [33] at 2 ("[SFT] respectfully requests that this Court treat its motion as being directed to the [First] Amended Complaint."). Accordingly, the Court declines to deem the Motion to Compel moot and addresses it in the manner SFT requests.

to any international business transaction"). Indeed, the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* "embodies a 'liberal federal policy favoring arbitration agreements.'" *Hemispherx Biopharma, Inc. v. Johannesburg Consol. Investments*, 553 F.3d 1351, 1366 (11th Cir. 2008) (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Accordingly, the FAA requires courts to "rigorously enforce agreements to arbitrate." *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc.*, 312 F.3d 1349, 1357-58 (11th Cir. 2002) *abrogated on other grounds by Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Engineers & Participating Employers*, 134 S. Ct. 773 (2014) (quoting *Mitsubishi Motors*, 473 U.S. at 625-26); *Hemispherx*, 553 F.3d at 1366 ("The role of the courts is to rigorously enforce agreements to arbitrate.") (internal citation and quotation omitted). Under the FAA, a written agreement to arbitrate is "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.

Despite the courts' proclivity for enforcement, a party will not be required to arbitrate where the party has not agreed to do so. *Nat'l Auto Lenders, Inc. v. SysLOCATE, Inc.*, 686 F. Supp. 2d 1318, 1322 (S.D. Fla. 2010) *aff'd*, 433 F. App'x 842 (11th Cir. 2011) (citing *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). It is axiomatic that the determination of whether parties have agreed to submit a dispute to arbitration is an issue of law subject to judicial resolution. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010). Generally, this determination requires the district court to apply standard principles of contract garnered from the applicable state-law. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 939 (1995) (citation omitted); *see also P & S Business Machines, Inc. v. Canon USA, Inc.*, 331 F.3d 804, 807 (11th Cir. 2003). When presented with a motion to

compel arbitration, a district court will consider three factors: (1) whether a valid agreement to arbitrate exists, (2) whether an arbitrable issue exists, and (3) whether the right to arbitrate was waived. *Nat'l Auto Lenders*, 686 F. Supp. 2d at 1322 (citation omitted); *see also Sims v. Clarendon Nat. Ins. Co.*, 336 F. Supp. 2d 1311, 1326 (S.D. Fla. 2004) (citing M*arine Envtl. Partners, Inc. v. Johnson*, 863 So. 2d 423, 426 (Fla. 4th DCA 2003); and *Seifert v. U.S. Home Corp.*, 750 So. 2d 633 (Fla. 1999)) ("Under both federal and Florida law, there are three factors for the court to consider in determining a party's right to arbitrate: (1) a written agreement exists between the parties containing an arbitration clause; (2) an arbitrable issue exists; and (3) the right to arbitration has not been waived.").

"By its terms, the [FAA] leaves no room for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 213 (1985) (emphasis in original). Thus, if the aforementioned criteria are met, the Court is required to issue an order compelling arbitration. *John B. Goodman Ltd. P'ship v. THF Const., Inc.*, 321 F.3d 1094, 1095 (11th Cir. 2003) ("Under the FAA, 9 U.S.C. § 1 *et seq.*, a district court must grant a motion to compel arbitration if it is satisfied that the parties actually agreed to arbitrate the dispute.").

In addressing SFT's request to compel arbitration in this matter, the Estate challenges the application of the Financing Agreement's arbitration provision on the first and second basis: (1) that no valid agreement exists; and (2), even assuming, *arguendo*, that the Financing Agreement was valid, the scope of the claims set forth in the First Amended Complaint do not fall within the scope of the arbitration clause or the Financing Agreement generally. As will be revealed

shortly, due to the unique circumstances of this case, questions concerning the two are intertwined and, ultimately, the Court is required to send this matter to arbitration.

A. A Valid Contract Exists

The first issue to be resolved involves whether Malkin entered into the contract containing the arbitration clause. According to the Estate, Malkin never signed the purported Financing Agreement. *See* FAC at ¶¶ 133-59. As noted, a party cannot be compelled to arbitration where it has not agreed to do so. *Nat'l Auto Lenders*, 686 F. Supp. 2d at 1322 (citation omitted). Logically, "[i]f a party has not signed an agreement containing arbitration language, such a party may not have agreed to submit grievances to arbitration at all." *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 854 (11th Cir. 1992); *see also Magnolia Capital Advisors, Inc. v. Bear Stearns & Co.*, 272 F. App'x 782, 785 (11th Cir. 2008) ("Because it is well established that parties cannot be forced to submit to arbitration if they have not agreed to do so, a district court, rather than a panel of arbitrators, must decide whether a challenged agreement to arbitrate is enforceable against the parties in question.") (internal quotation and citation removed); *CT Miami, LLC v. Samsung Elecs. Latinoamerica Miami, Inc.*, No. 3D15-641, 2015 WL 5247160, at *6 (Fla. 3d DCA Sept. 9, 2015) ("Arbitrators have no inherent authority over a dispute or the parties to that dispute; the only authority vested in the arbitrator is that contractually designated in the parties' agreement. Thus, in the absence of an agreement to allow the arbitrator to decide the dispute, the arbitrator has no authority to determine anything."); *Lepisto v. Senior Lifestyle Newport Ltd. P'ship*, 78 So. 3d 89, 93 (Fla. 4th DCA 2012) ("'The issue of the contract's validity is different from the issue [of] whether any agreement between the alleged obligor and obligee was ever concluded.' Therefore, it is for a court, not an arbitrator, to

decide in the first instance whether a party signed a contract and assented to its terms." (quoting and citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006))).

Where a party seeks to avoid arbitration on the basis that it is not subject to the agreement in question, the party "must unequivocally deny that an agreement to arbitrate was reached and must offer some evidence to substantiate the denial." *Magnolia Capital*, 272 F. App'x at 185 (citing *Chastain*, 957 F.2d at 854). Substantiating the denial requires "enough evidence to make the denial colorable." *Id.* (quoting *Wheat, First Secs., Inc. v. Green*, 993 F.2d 814, 819 (11th Cir. 1993)). Adopting a standard elucidated by the Third Circuit, the Eleventh Circuit has stated that "[o]nly when there is no *genuine* issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such an agreement." *Id.* (quoting *Par–Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 (3d Cir. 1980)) (emphasis added). Akin to the standard applied when ruling on an issue of summary judgment, the district court considering the agreement "should give to the [party denying the agreement] the benefit of all reasonable doubts and inferences that may arise." *Id.* (citation omitted); *Sims v. Clarendon Nat. Ins. Co.*, 336 F. Supp. 2d 1311, 1314 (S.D. Fla. 2004) (noting that "[t]he party opposing a motion to compel arbitration or to stay litigation pending arbitration has the affirmative duty of coming forward by way of affidavit or allegation of fact to show cause why the court should not compel arbitration" and that "[t]his burden is not unlike that of a party seeking summary judgment") (citation omitted).

Unfortunately, the party whose signature remains the focus of this question, Malkin, has passed away and is, logically, unable to offer her testimony as to whether she signed the Financing Agreement. As a result, the Estate is forced to rely upon purported discrepancies in the copy of the Financing Agreement supplied to the Court in order to support its contention that

Malkin did not sign or agree to the terms therein. According to the Estate, Malkin's signature was obtained in Florida on a signature page referencing a distinct document, a "Positive Financial II – Financing Agreement," which was then faxed from Florida and later inserted, without Malkin's knowledge or consent, into a different set of papers, a set of papers which SFT now contends is the supposed Financing Agreement. *See* FAC at ¶¶ 133-59; Pl. Omnibus Response ("Pl. Resp."), ECF No. [28] at 16-18. Specifically, the Estate directs the Court to one discrepancy, occurring in two locations: the inclusion of a Roman numeral "II" in the footer of the document on the signature page and on "Annex A," the portion of the Agreement containing the Agreement's terms and conditions, including, *inter alia*, the arbitration provision. It is the presence or absence of this single Roman numeral on the various pages that forms the primary support for the Estate's argument.

The Financing Agreement begins by introducing its innards via a table of contents. *See* Financing Agreement at 2. Executed between SFT, the Malkin LLC, Wells Fargo, in its capacity as securities intermediary, and Malkin herself, the Agreement notes that it is "subject to the Terms and Conditions attached" at Annex A. *Id.* The Agreement proceeds to set forth various details, such as applicable interest rates and contact information for the contracting parties, as well as certain payment terms. *Id.* For instance, under the Financing Agreement, the Malkin LLC was to receive an upfront advance of $60,000, and advances for monthly premiums on the eighteenth day of every month in the amount of approximately $10,401.00. *Id.* Following these initial provisions is the signature page, which bears the uncontested signatures of SFT, the Malkin LLC, Wells Fargo, and Malkin. *Id.* at 4. After designating the Policy to which the premiums are to be applied, the twenty-six page Annex A begins. *See id.* at 8-34. The aforementioned items appear in the precise order set forth in the table of contents. *See id.* at 2.

Further, the signature page of the Financing Agreement—admittedly containing the Roman numeral "II"—and the first page of Annex A, match: Annex A is titled "Terms and Conditions for Positive Financial Premium Finance *II* Financing Agreement Among SFT Trust II, the LLC, and the Insured." *See id.* at 9 (emphasis added).

The discrepancy that exists as a result of the absence of the Roman numeral II on the Agreement's title page and initial statement, without more, does not amount to a "genuine" issue that would allow a reasonable trier of fact to find that Malkin never entered into the contract at issue. *See generally Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1243 (11th Cir. 2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)) (determining that an issue is "genuine" if "a reasonable trier of fact could return judgment for the non-moving party"). As SFT aptly notes, at most, the Estate has produced evidence of a scrivener's error. Such a minute inconsistency presented in the face of overwhelming cohesion, "more likely evidence[s] poor administrative practices than a lack of mutuality" or fraud. *CPR--Cell Phone Repair Franchise Sys., Inc. v. Nayrami*, 896 F. Supp. 2d 1233, 1241 (N.D. Ga. 2012) (holding that differences in forty-five-page contract regarding price and location of signature block were insufficient to undermine the validity of the contract); *cf. Bradshaw Constr. Corp. v. Underwriters at Lloyd's, London*, 108 F. Supp. 3d 1287, 1290 (S.D. Fla. 2015) (declining to grant motion to compel arbitration where parties had produced competing policies containing noteworthy discrepancies); *Williams v. MetroPCS Wireless, Inc.*, No. 09-22890-CIV-Altonaga, 2010 WL 62605, at *8 (S.D. Fla. Jan. 5, 2010) (finding denial "colorable" where the Estate submitted sworn declaration and additional evidence substantiating the denial).

The fact that the signature page was faxed does not cast doubt on the preceding conclusion.[2] Contracting parties routinely circulate agreements and, of course, the corresponding signature pages via fax. In the same vein, the date of the fax, March 22, 2006, fails to create a genuine issue. Although the fax was sent *after* the Agreement's March 20, 2006 effective date, the date of the fax does not clearly indicate the date on which Malkin signed the Agreement.

Additional circumstances refute the Estate's contention. It is undisputed that SFT performed in accord with the Agreement and that the Malkin LLC received certain benefits thereunder, notably, a $60,000 upfront advance, and monthly premium payments on the Policy. *See* Statement of Larry Bryan, ECF No. [27-2] at 5 (confirming that Malkin accepted the $60,000 advance); *see also* FAC at ¶ 65 (asserting that Malkin never paid the premiums associated with the Policy), ¶ 159 (stating that "SFT paid all premiums for the Policy"). From 2008 to 2014, SFT provided Malkin and the Malkin LLC with annual notices regarding the Financing Agreement. *See* Affidavit of Paul Fritz ("Fritz Aff."), ECF No. [33-1] at ¶ 7; Exhibit "B" to Fritz Aff., ECF No. [33-2] at 25-27; Exhibit "C" to Fritz Aff., ECF No. [33-2] at 29-46. More critically, the Trust Agreement forming the Revocable Trust, a document that currently remains unchallenged, evinces Malkin's intention to enter into the Financing Agreement: the Trust Agreement explicitly notes that the Malkin LLC, upon its establishment, was to enter into and perform its obligations under a "Positive Financial Premium Finance II Financing Agreement." *See* Trust Agreement, ECF No. [27-15] at 2.

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[2] The location from which it was faxed also fails to create a genuine issue. Merely because the page was faxed from a location affiliated with Larry Bryan, an individual involved in the purported STOLI scheme does not, in any way, inform the conclusion that Malkin did not sign the Financing Agreement.

In short, the Estate's assertion that "signature page was [] faxed from Florida and later inserted, without [] Malkin's knowledge, into a disparate set of papers" lacks evidentiary support and is, therefore, simply speculation.[3] "A party cannot place the making of the arbitration agreement in issue simply by opining that no agreement exists." *Chastain*, 957 F.2d at 855. That is precisely what the Estate has done here. Faced with an otherwise valid agreement, the Estate has injected an interesting anecdote to explain away the terms it may now find itself subject to. However, this anecdote lacks a foundation in truth. Consequently, no question of fact exists as to whether Malkin, through her LLC, entered into the Financing Agreement.

The inquiry does not end here, however. The Estate contends that it cannot be bound by the decisions Malkin made while she was still alive and, further, that the claims asserted fall outside the scope of the arbitration provision. As discussed below, these arguments do not prevent enforcement of the arbitration provision contained in the Financing Agreement.

B. The Estate is bound by the Financing Agreement

The Estate is not a signatory to the Financing Agreement and, therefore, believes that it cannot be bound by the terms and conditions contained therein. However, "[n]on-signatories may be bound by an arbitration agreement if dictated by ordinary principles of contract law and agency." *Martha A. Gottfried, Inc. v. Paulette Koch Real Estate*, 778 So. 2d 1089, 1090 (Fla. 4th DCA 2001) (citation omitted); *see also Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009) ("'[T]raditional principles' of state law allow a contract to be enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel' . . . ." (quoting

[3] The cited portion of Larry Bryan's testimony does not confirm that Malkin signed a "blank" signature form, which was then affixed to a document she never reviewed. *See* Deposition of Larry Bryan, ECF No. [27-1] at 284:7-23 (stating that documents were not signed in Georgia but, rather, at offices in Florida).

21 R. Lord, Williston on Contracts § 57:19, p. 183 (4th ed. 2001))). Here, the language of the Financing Agreement supports the conclusion that the Estate is bound. Section 8.08 of the Financing Agreement provides the contract is binding upon the parties "and their respective successors and permitted assigns." *See* Financing Agreement at 28. Thus, the plain language of the contract at issue indicates that Malkin's successors, to wit, her Estate and personal representative, will be subject to the terms and conditions contained within.[4]

Further, the Estate "stand[s] in the shoes of the decedent for purposes of whether the defendant is liable and [is] bound by the decedent's actions and contracts . . . ." *Laizure v. Avante at Leesburg, Inc.*, 109 So. 3d 752, 762 (Fla. 2013) (discussing wrongful death actions). While *Laizure* admittedly involved a question concerning wrongful death actions, the logic contained therein provides a useful analogy. Contrary to the Estate's position, the claims asserted in the First Amended Complaint bear a "significant relationship" to the Financing Agreement. *See id.* at 758 (emphasizing that there was a "significant relationship" between the wrongful death claim and the contract containing the arbitration provision). The Estate's claims seek to render the Policy void *ab initio* for lack of an insurable interest. As it stands, the harm stemming from the alleged STOLI scheme currently inures to the Estate; however, that is not to say that STOLI policies do not harm the individuals upon whom the wager is placed. This Court has already acknowledged that other "courts and Florida's agencies have recognized the procurement of STOLI policies to be an unscrupulous practice detrimental to Florida's senior citizens." *Sun Life*, 2016 WL 161598, at *13; *see also* Florida Office of Insurance Regulation

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[4] The Estate contends that the language of Section 8.08 bolster's its contention that it is not subject to the Agreement based on the fact that the Agreement explicitly limits the terms to the parties to the contract and notes that there are no third-party beneficiaries. *See* Pl. Resp., ECF No. [28] at 20-21. This construction casually omits the pertinent portion of Section 8.08 referencing the parties' successors.

Report, Stranger-Originated Life Insurance ("STOLI") and the Use of Fraudulent Activity to Circumvent the Intent of Florida's Insurable Interest Law (January 2009) ("It is imperative that [Florida] act to protect its seniors and all Floridians from becoming victims of fraudulent STOLI transactions."); *Sciarretta v. Lincoln Nat. Life Ins. Co.*, 778 F.3d 1205, 1207 (11th Cir. 2015) ("We are all, in the long view, born astride the grave. But allowing parties to use life insurance policies to bet on when an unrelated person will drop off into the grave raises public policy concerns, which have led to restrictions on the practice."). Thus, the wrongdoing attributable to a STOLI engagement harms not only any potential heirs or successors but, more importantly, the senior citizen who has been lured into effecting the transaction. *See Laizure*, 109 So. 3d at 759-60 (noting that a wrongful death action is derivative because it is "dependent on a wrong committed against the decedent"). While the Estate attempts to distinguish wrongful death actions such as *Laizure* from this case, it fails to support the assertion that the Estate should not be bound to a contract executed by its decedent with citation to pertinent authority and, therefore, is unable to sway the Court. *See generally Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995) ("[T]he onus is upon the parties to formulate arguments."); P*hillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 800 n.10 (10th Cir. 2001) ("A litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority or in the face of contrary authority, forfeits the point. The court will not do his research for him." (quoting *Pelfresne v. Vill. of Williams Bay*, 917 F.2d 1017, 1023 (7th Cir. 1990) (Posner, J.) (internal formatting omitted))).

Having determined that the Estate must abide by the terms of the Financing Agreement, the Court must next address the scope and applicability of the arbitration clause, and whether the claims asserted in the First Amended Complaint fall within its purview.

C. The Financing Agreement Delegates Questions Concerning Arbitrability

SFT contends that the question of whether the Estate's claims fall within the scope of the arbitration provision is a matter for the arbitrator to decide, not the Court. "Ordinarily, 'the question of arbitrability . . . is undeniably an issue for judicial determination[] [u]nless the parties clearly and unmistakably provide otherwise . . . ." *U.S. Nutraceuticals, LLC v. Cyanotech Corp.*, 769 F.3d 1308, 1311 (11th Cir. 2014) (quoting *AT & T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648-49 (1986)). Thus, parties are free to agree to arbitrate such "threshold" or "gateway" questions of arbitrability, for instance, "whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010) (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-85 (2002); and *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 (2003)). "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 69. The Eleventh Circuit has stated that "when parties incorporate the rules of the [American Arbitration] Association into their contract, they 'clearly and unmistakably agree[] that the arbitrator should decide whether the arbitration clause [applies].'" *U.S. Nutraceuticals*, 769 F.3d at 1311 (quoting *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005)). Here, the Financing Agreement indisputably incorporates the Commercial Arbitration Rules of the American Arbitration Association (the "AAA Rules"). These Rules explicitly require threshold jurisdictional questions concerning scope to be resolved by the arbitrator.

After the parties to the Financing Agreement have attempted to resolve a dispute amicably, they may then submit their dispute "to be finally settled *by arbitration administered*

under the Rules." Financing Agreement at 29-30. As noted, the "Rules" referenced in the preceding sentence are defined by the Agreement as the AAA Rules. *See id.* at 34. Rule 7 of the AAA Rules governs the arbitrator's jurisdiction and provides 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." Commercial Arbitration Rules and Mediation Procedures, American Arbitration Association (as amended October 1, 2013). The Rules also grant the arbitrator authority to determine "the existence or validity of a contract of which an arbitration clause forms a part." *Id.* The incorporation of the Rules and the Agreement's application of those Rules to all disputes "arising out of or in connection with [the] Agreement," "clearly and unmistakably" indicate that the parties "contracted to submit questions of arbitrability to an arbitrator." *U.S. Nutraceuticals*, 769 F.3d at 1311 (citing *Terminix*, 432 F.3d at 1332).

Because this Court operates under the binding mandate of both *U.S. Nutraceuticals* and *Terminix*, the Court is obligated to compel arbitration in these circumstances.[5] The arbitrator may then entertain the Estate's remaining arguments concerning the existence, scope, or validity of the arbitration provision in the Financing Agreement. This includes any possible ambiguities regarding the arbitration panel's jurisdiction as well as the purported unconscionability of the provision, in accord with Rule 7 of the AAA Rules.

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[5] *Terminix* embodies a logical result: where the parties agree to resolve "*all* disputes pursuant to AAA Rules," Rule 7 applies. *Id.* at 1319. The Financing Agreement explicitly reserves to the arbitrator the authority concerning *all* disputes "arising out of or in connection with [the] Agreement." As the Financing Agreement was an integral part of the STOLI scheme alleged in the FAC, the AAA Rules are expressly applicable.

III. CONCLUSION

At first blush, this Court would be inclined to find that the Estate's claims, as presented in the operative pleading, lie outside the realm of the Financing Agreement. However, as set forth above, this determination lays in the hands of the arbitration panel. "Courts are required to indulge every reasonable presumption in favor of arbitration recognizing it as a favored means of dispute resolution." *Spivey v. Teen Challenge of Florida, Inc.*, 122 So. 3d 986, 992 (Fla. 1st DCA 2013) (quoting *Am. Int'l Grp., Inc. v. Cornerstone Bus., Inc.*, 872 So.2d 333, 338 (Fla. 2d DCA 2004)). Upon consideration of the record and the arguments of the parties, the Court compels arbitration of this matter.

It is, therefore, **ORDERED AND ADJUDGED** that Defendant Sail Funding Trust II's Motion to Compel Arbitration and Stay Judicial Proceedings, **ECF No. [14]**, is **GRANTED** and its Motion Stay Discovery, **ECF No. [15]**, is **DENIED AS MOOT**. This action is **STAYED** pending resolution of arbitration or the arbitrator's determination that the claims in the First Amended Complaint fall outside of the scope of the arbitration provision.

The Clerk is instructed to **CLOSE** this case for administrative purposes only and either party may seek to reopen the case should it be deemed necessary.

DONE AND ORDERED in Miami, Florida, this 1st day of February, 2016.

BETH BLOOM
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record