IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Dry Ground Specialists, Inc.,	)	
	)	
Plaintiff,	)	
	)	**ORDER GRANTING DEFENDANT'S**
vs.	)	**MOTION TO DISMISS AND COMPEL**
	)	**ARBITRATION**
	)	
Newfield Exploration Company,	)	Case No. 1:16-cv-27
	)	
Defendant.	)	

Before the Court is the Defendant Newfield Exploration Company's "Motion to Dismiss and Compel Arbitration" filed on March 11, 2016. See Docket No. 4. The Plaintiff, Dry Ground Specialists, Inc., filed a response in opposition to the motion on April 1, 2016. See Docket No. 10. The Defendant filed a reply brief on April 15, 2016. See Docket No. 16. For the reasons set forth below, the Defendant's motion is granted.

I. BACKGROUND

Plaintiff Dry Ground Specialists, Inc. ("Dry Ground"), a Colorado company, transports water used at oil wells as part of the hydraulic fracturing ("fracking") oil extraction process. Defendant Newfield Exploration Company ("Newfield Exploration"), a Delaware company, explores for and produces oil and natural gas. Dry Ground has provided water transportation services to Newfield Exploration since 2011. On March 1, 2011, the parties entered into a "Master Work or Service Contract" to govern their business relationship. See Docket No. 6-1. Dry Ground commenced this action on February 16, 2016, alleging claims for breach of contract, account stated, and quantum meruit, all based upon Newfield Exploration's alleged failure to pay for water-transportation services rendered under the Master Work or Service Contract.

Newfield Exploration seeks to dismiss Dry Ground's complaint and compel arbitration under paragraph XVII of the Master Work or Service Contract:

XVII. ARBITRATION

Any and all disputes claims or controversies arising out of or in connection with this Contract or the furnishing of products and/or services hereunder [herein "Dispute"] shall be referred to and determined by binding arbitration as the sole and exclusive remedy of the parties as to the Dispute. Such arbitration shall be conducted in accordance with the rules of the American Arbitration Association by three (3) independent and impartial arbitrators of whom each party shall appoint one (1). The third arbitrator, appointed by the two (2) arbitrators selected by the parties, and who shall be the presiding arbitrator, must be a member of the Society of Petroleum Engineers, or hold membership in an equivalent society organization, have at least fifteen (15) years experience in directional and horizontal drilling and hold a college degree in petroleum engineering. A majority decision of the arbitrators shall constitute the decision of the arbitration and a judgment upon the award rendered by the arbitrators may be entered by any court having jurisdiction thereof. The place of arbitration shall be in Houston, Texas, unless otherwise agreed to by the parties hereto.

It is agreed that it is the desire of the parties that any Dispute be resolved quickly and at the lowest possible cost. The parties agree that the arbitration proceedings shsll be conducted an concluded as soon as reasonably practical, but in any event, within one hundred-twenty (120) days following the selection of the presiding arbitrator, and that the parties, including the arbitrators, shall act in a manner consistent with these intentions, including limiting discovery to only that which is absolutely necessary to enable the arbitrators to render a fair decision which reflects the parties' intent set forth in this Agreement.

The arbitrators are not empowered to award consequential, indirect, punitive or exemplary damages, and each party hereby irrevocably waives any damages in excess of actual damages.

See Docket No. 6-1, pp. 7-8. Newfield Exploration argues Dry Ground's complaint must be dismissed because Dry Ground can only pursue its claims through arbitration, as required by the express terms of the Master Work or Service Contract. Dry Ground contends the arbitration clause is both procedurally and substantively unconscionable, and therefore unenforceable. Specifically, Dry Ground argues there was a great disparity in bargaining power in favor of Newfield Exploration, and the requirement that the third arbitrator be from the Society for Petroleum Engineers makes it impossible to have a fair arbitration because the Society for Petroleum Engineers is closely aligned with Newfield Exploration.

II. LEGAL DISCUSSION

The Federal Arbitration Act (FAA) makes all agreements to arbitrate "valid, irrevocable, and enforceable." 9 U.S.C. § 2. The FAA "mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985) (emphasis in original). It is well-established that federal courts are to interpret arbitration clauses liberally and any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Barker v. Golf U.S.A., Inc., 154 F.3d 788, 793 (8th Cir. 1998).

Dry Ground and Newfield Exploration entered into the Master Work or Service Contract in which the parties agreed to submit to arbitration. See Docket No. 6-1. Dry Ground argues the arbitration clause is unconscionable and unenforceable because Newfield Exploration held a superior bargaining position. Specifically, Dry Ground contends that the Master Work or Service Contract is procedurally unconscionable because it is a form document offered on a "take it or leave it" basis. Dry Ground also contends the arbitration clause is substantively unconscionable because the clause unfairly benefits Newfield Exploration as it requires the presiding arbitrator to a member of the Society of Petroleum Engineers ("SPE"), or a similarly related entity,. Dry Ground asserts the core mission of the SPE is to serve Newfield Exploration and other oil production companies, thereby making it impossible for an entity like Dry Ground to receive a fair hearing.

Newfield Exploration contends the arbitration clause is not unconscionable because membership in SPE is open to entities like Dry Ground that provide services to the oil and gas industry. Newfield Exploration also claims that Dry Ground's unconscionability arguments fail because Dry Ground will select its own arbitrator, who then must work with Newfield Exploration's arbitrator, to select a third arbitrator . Newfield Exploration contends this process provides Dry Ground with a sufficient

mechanism with which to block a third arbitrator with an unacceptable bias. Newfield Exploration also lists several equivalent organizations that may be able to provide an arbitrator that does not have significant ties to the SPE. See Docket No. 16, p. 5.

A. GOVERNING LAW

Dry Ground dedicates a significant portion of its response to discussing whether Texas or North Dakota law applies to the interpretation of the Master Work or Service Contract. It is undisputed the Master Work or Service Contract provides that "the laws of the State of Texas" apply to disputes arising under the contract, to the extent no maritime law or federal statutes apply. See Docket No. 6-1, p. 7. Despite the presence of this provision, Dry Ground asserts North Dakota law applies because Texas has no substantial relationship to the parties or the transaction, and the application of Texas law would be contrary to the fundamental policy of North Dakota. Newfield Exploration contends Dry Ground's argument about the applicable law is purely academic, as there is no appreciable difference between Texas and North Dakota law regarding allegations of unconscionability. For the purposes of deciding the issue before the Court, the Court defers to the express language of the Master Work or Service Contract. Accordingly, the Court applies the substantive law of the state of Texas, but notes that North Dakota law requires a very similar inquiry to determine whether a contract is procedurally or substantively unconscionable. See Rutherford v. BNSF Ry. Co., 2009 ND 88, ¶ 22, 765 N.W.2d 705, 714. The Court's ultimate holding would not be different under North Dakota law.

B. UNCONSCIONABILITY

Texas law strongly favors arbitration and the burden of proving the unconscionability of an arbitration provision falls on the party opposing the contract. Royston, Rayzor, Vickery, & Williams, LLP v. Lopez, 467 S.W.3d 494, 500 (Tex. 2015). "Unconscionability" has no precise legal definition

because it is not a concept but a determination to be made in light of a variety of factors. Delfingen US-Texas, L.P. v. Valenzuela, 407 S.W.3d 791, 798 (Tex. App. 2013). A contract or arbitration provision will be found unconscionable if "given the parties' general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract." In re Poly-America, L.P., 262 S.W.3d 337, 348 (Tex. 2008). Unconscionability is to be determined in light of a variety of factors, which aim to prevent oppression and unfair surprise; in general, a contract will be found unconscionable if it is grossly one-sided. Id. In determining whether a contract is unconscionable under Texas law, a court must examine (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. Delfingen, 407 S.W.3d at 798. (Internal citations omitted).

Arbitration agreements may be substantively or procedurally unconscionable, or both. Royston, Rayzor, Vickery, & Williams, 467 S.W.3d at 499. "Substantive unconscionability refers to the fairness of the arbitration provision itself, where as procedural unconscionability refers to the circumstances surrounding adoption of the arbitration provision." Id. (quoting In re Palm Harbor Homes, Inc., 195 S.W.3d 672, 677 (Tex. 2006)). "The grounds for substantive abuse must be sufficiently shocking or gross to compel the court to intercede, and the same is true for procedural abuse–the circumstances surrounding the negotiations must be shocking." Delfingen, 407 S.W.3d at 798. The Court looks to the totality of the circumstances of the time the contract was formed.

1. PROCEDURAL UNCONSCIONABILITY

Dry Ground generally contends the arbitration provision is procedurally unconscionable because Newfield Exploration was in a superior bargaining position at the time the parties entered into the Master

Work or Service Contract. Due to the superior bargaining power of Newfield Exploration, Newfield Exploration effectively dictated the terms of the contract by offering it on a "take-it-or-leave-it" basis. Under Texas law, claims of unsophistication and a party's inability to understand do not establish procedural unconscionability. See In re Palm Harbor Homes, 195 S.W.3d at 679. "The principles of unconscionability do not negate a bargain because one party to the agreement may have been in a less advantageous bargaining position." Id. Unconscionability principles are applied to prevent unfair surprise or oppression.

The Court finds the record reveals no unfair surprise or oppression in the circumstances surrounding the negotiations of the Master Work or Service Contract between Dry Ground and Newfield. The only evidence Dry Ground presents is the statement of Sandi Davis, its Chief Operating Officer, that the Master Work or Service Contract was drafted by Newfield Exploration and that Dry Ground had no opportunity to negotiate the terms. See Docket No. 14, p. 2. Newfield Exploration disputes this contention and argues there is no evidence in the record that Newfield Exploration precluded Dry Ground from negotiating any terms of the Master Work or Service Contract when the offer was first extended. See Docket No. 17-1. Dry Ground has failed to show any procedural abuses leading to surprise or oppression that are sufficiently shocking that the Court feels compelled to intercede and invalidate the arbitration clause. The mere claim of lack of bargaining power, absent more, is not sufficient to invoke procedural unconscionability under Texas law. Dry Ground has the burden of proving procedural unconscionability and it has failed to show any evidence regarding negotiations with Newfield Exploration that show oppression or lead to unfair surprise. Therefore, the Court finds that Dry Ground has failed to meet its burden of showing the arbitration provision of the Master Work and Service Contract is procedurally unconscionable.

2. SUBSTANTIVE UNCONSCIONABILITY

Dry Ground contends the arbitration provision is substantively unconscionable due to the inherent bias of having an SPE-affiliated arbitrator. Such a contention is mere speculation and is not sufficient to render an arbitration clause substantively unconscionable. Moreover, the arbitration provision clearly allows Dry Ground to appoint a qualified neutral of its choice who will then, in conjunction with the arbitrator selected by Newfield Exploration, agree upon a presiding arbitrator. Nothing prevents Dry Ground from directing its arbitrator to block the selection of a presiding arbitrator with an unacceptable bias. The Court is not shocked by the arbitration provision, nor does it find the provision grossly one-sided in favor of Newfield Exploration. Accordingly, the Court finds the arbitration provision is valid and enforceable. The Court finds, as a matter of law, that the arbitration provision included in the Master Work or Service Contract is not substantively unconscionable.

C. QUANTUM MERUIT

Newfield Exploration also seeks to dismiss Dry Ground's claim for quantum meruit for a failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Specifically, Newfield Exploration contends that the Master Work or Service Contract is a valid and enforceable contract, therefore the equitable claim of quantum meruit fails to state a claim for relief. Dry Ground contends its claim for quantum meruit is an alternative claim that should persist on the chance the Master Work or Service Contract is found to be an unenforceable contract. Quantum meruit is an equitable remedy based on an implied promise to pay for benefits received. Houston Med. Testing Servs., Inc. v. Mintzer, 417 S.W.3d 691, 695 (Tex. App. 2013). Recovery under quantum meruit is barred where there is a valid contract covering the services from which the claim stems. Id. . The Court finds that Dry Ground has sufficiently plead a claim for quantum meruit to satisfy the pleading requirements of Federal Rule of

Civil Procedure 8 at this stage and, therefore, the claim survives a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).

For the reasons stated above, the Court compels arbitration on Dry Ground's breach of contract and account stated claims. In doing so, the Court has found the arbitration provision enforceable. The Court further finds that Dry Grounds quantum meruit claim is arbitrable under the arbitration provision. The arbitration provision contemplates that "any and all disputes claims or controversies arising out of or in connection with this Contract **or** the furnishing of products and/or services" be referred to binding arbitration. (emphasis added). See Docket No. 6-1, p. 7. The arbitration provision not only contemplates disputes arising directly out of the Master Work or Service Contract, but disputes stemming from Dry Ground and Newfield's business relationship generally. If the panel of arbitrators finds the Master Work or Service Contract to be void, for whatever reason, it is clear to the Court that Dry Ground's quantum meruit claim is contemplated by the valid arbitration provision, and is therefore arbitrable.

III. CONCLUSION

For the reasons set forth above, the Court **GRANTS** the Defendant's "Motion to Dismiss and Compel Arbitration" (Docket No. 4). Accordingly, Dry Ground's complaint is **DISMISSED WITH PREJUDICE**, and the parties are compelled to arbitration pursuant to the term of the arbitration clause of the Master Work or Service Contract.

IT IS SO ORDERED.

Dated this 9th day of May, 2016.

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court