IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-00518-RM-NYW

FIROOZEH DUMAS, an individual,

Plaintiff,

v.

WARNER LITERARY GROUP, LLC, a Colorado limited liability company,

Defendant.

ORDER AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Nina Y. Wang

This matter comes before the court on Defendant Warner Literary Group, LLC's ("WLG" or "Defendant") Motion to Compel Arbitration and to Stay ("Motion to Compel and Stay"). [#33, filed April 26, 2016]. The Motion is before the court pursuant to the Order of Reference dated April 14, 2016 [#25], 28 U.S.C. § 636(c), Fed. R. Civ. P. 73, and D.C.COLO.LCivR 72.2. This court has carefully considered the Motion and related briefing, the entire case file, and the applicable case law. For the following reasons, the Motion to Compel and Stay is GRANTED, and I respectfully RECOMMEND that the case be administratively closed.

BACKGROUND

Plaintiff Firoozeh Dumas initiated this civil action on March 2, 2016, by filing a Complaint premised on business dealings that occurred between her and WLG while WLG was acting as Plaintiff's literary agent. Plaintiff asserts five claims for breach of contract, breach of fiduciary duty, fraudulent misrepresentation/inducement, interference with prospective business

advantage, and declaratory judgment. [#1 at 1, 6-12]. Plaintiff is a United States citizen who currently lives in Germany, [#16-1 at ¶ 2], and WLG is a Colorado limited liability company. [#1 at ¶ 2]. Plaintiff pleads federal subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a) because complete diversity exists between her and Defendant and she seeks damages in excess of $75,000.[1]

Ms. Dumas is a published author who engaged WLG to act as her literary agent "for the purposes of publicizing, marketing and attempting to sell publishing and licensing rights to a novel she [had] written." [#1 at ¶ 3]. In June 2014, Ms. Dumas entered into an Agency Representation Agreement ("Agency Agreement") with WLG, whereby WLG agreed to market and negotiate publishing and/or licensing agreements for a novel titled *It Ain't So Awful, Falafel*, which was ultimately published by Houghton Mifflin Harcourt ("HMH"). [*Id.* at ¶ 11]. In her Complaint, Plaintiff describes the Agency Agreement as "a valid, binding and legally enforceable contract supported by adequate consideration." [*Id.* at ¶ 21]. The Agency Agreement states that WLG will provide services, "in a manner reasonably consistent with the generally accepted standards of care, quality, and diligence generally applicable to the nature of [WLG's] professional services within the field," ("Standard of Care Provision"). [*Id.* at ¶ 13]. Plaintiff alleges that while WLG assisted in negotiating the publishing agreement between her and HMH, it breached the Standard of Care Provision in other business transactions. [*Id.* at ¶¶ 13-15].

Ms. Dumas also claims that WLG falsely represented its "knowledge, expertise, qualifications and capabilities with regard to the publishing industry, negotiation of international

[1] The issue of the Parties' citizenship was the subject of this court's March 10, 2016 Order to Show Cause [#6]. On March 23, 2016, Plaintiff filed a Response that sufficiently demonstrated to this court that she is a domiciliary of California. *See* [#16, #38].

publishing contracts, and ability to manage the legal and accounting systems necessary to protect Ms. Dumas' interests"; WLG knew the representations were false and intended Plaintiff to rely on them; and Plaintiff indeed relied on the representations in entering the Agency Agreement." [#1 at ¶¶ 34-38].

Ms. Dumas represents that she "revoked and terminated WLG's authority to act as her agent" in December 2015, as a result of WLG's "numerous wrongful or improper actions and inactions (including WLG's breaches of contract and/or fiduciary duties), Ms. Dumas' lack of confidence and trust in WLG, and the overall deterioration of Ms. Dumas' professional relationship with WLG." [*Id.* at ¶ 47]. As part of her claim for Declaratory Judgment, Plaintiff asks the court to declare that she "properly terminated the Agency Agreement and that the Agency Agreement is unenforceable by WLG." [*Id.* at ¶ 49].

On April 21, 2016, Mr. Theodore E. Laszlo entered his appearance on behalf of WLG. [#28]. On April 26, 2016, WLG filed the Motion to Compel and Stay pursuant to Federal Rules of Civil Procedure 12(b)(1) and (3). [#33]. The Motion to Compel and Stay refers to Section IX of the Agency Agreement:

> **IX. Arbitration**
>
> Agent and Author look forward to a long and mutually beneficial relationship. However, if any dispute shall arise between Author and Agent regarding this Agreement, such disputes shall be referred to binding private arbitration in the County of Boulder, State of Colorado, in accordance with the Rules of the American Arbitration Association, and any arbitration award may be entered and shall be fully enforceable as a judgment in any court of competent jurisdiction.

[#33 at 2; #33-1 at 4]. It also refers to Section X of the Agency Agreement:

> **X. Agreement**
>
> This Agreement shall be binding upon and inure to the benefit of the successors, assigns, executors, administrators, and legal representatives of the parties. This Agreement represents the entire understanding of the parties and may not be

> modified unless made in writing and signed by both parties. This Agreement shall be governed by the laws of the State of Colorado. Any dispute arising under this Agreement, the formation and/or breach hereof, shall be litigated solely in the State or Federal Courts of the State of Colorado, however this shall not be construed or interpreted to conflict with the parties' agreement to refer disputes to arbitration as set forth above.

[*Id.*] On May 12, 2016, Plaintiff filed a Response arguing that the arbitration clause is not enforceable, and even if it were, it should be set aside for fraud in the inducement. [#42] Defendant filed a Reply the same day. [#44]. This court has determined that oral argument would not materially assist in the disposition of the instant motion.

ANALYSIS

I. Applicable Law

A. Applicability of 28 U.S.C. § 636(b)(1)

As a threshold matter, this court recognizes that the law in the Tenth Circuit is unclear as to whether motions to compel arbitration are dispositive for purposes of 28 U.S.C. § 636(b)(1). *Compare Vernon v. Qwest Commc'ns Int'l, Inc.*, 925 F. Supp. 2d 1185, 1189 (D. Colo. 2013) (electing to assume that motion to compel was dispositive, giving consideration to the fact that the court would apply a de novo review to the magistrate judge's application of state contract law) *with Adetomiwa v. College*, No. 15-cv-01413-PAB-NYW, 2015 WL 9500787, at *1 (D. Colo. Dec. 31, 2015) (conducting *de novo* review of recommendation that motion to compel be granted, but suggesting that the motion was not dispositive and the court could apply a "clearly erroneous or contrary to law" standard of review). Two courts of appeal have considered the issue and held that motions to compel arbitration are not dispositive. *See PowerShare, Inc. v. Syntel, Inc.*, 597 F.3d 10 (1st Cir. 2010) (holding that a motion to compel arbitration is not dispositive because a district court retains authority to dissolve stay or review arbitration award); *Virgin Islands Water & Power Auth. v. Gen. Elec. Int'l Inc.*, 561 F. App'x 131, 133 (3d

Cir. 2014) (unpublished) ("A ruling on a motion to compel arbitration does not dispose of the case, or any claim or defense found therein. Instead, orders granting this type of motion merely suspend the litigation while orders denying it continue the underlying litigation."). This court follows the rationale that because the court retains jurisdiction a motion to compel arbitration is not dispositive, as reflected in a recent order in *Cook v. PenSa, Inc.*, No. 13–cv–03282–RM–KMT, 2014 WL 3809409, at *6 (D. Colo. Aug. 1, 2014) (citing *Vernon v. Qwest Commc'ns Int'l, Inc.*, 857 F. Supp. 2d 1135, 1140–41 (D. Colo. 2012)). The arbitration agreement at issue here specifies that the Rules of the American Arbitration Association will govern, the arbitration will be binding, and any court of competent jurisdiction may enter a judgment on the arbitration award. [#33-1 at 4]. Thus, a District Judge may ultimately confirm, modify, or vacate any arbitration award involving the Parties to this action. *See Vernon*, 857 F. Supp. 2d at 1141 (quoting *Jackman v. Jackman*, No. 06–1329–MLB–DWB, 2006 WL 3792109, at *1–2 (D. Kan. Dec. 21, 2006)).[2]

B. The Federal Arbitration Act

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 4, does not create an independent basis for federal subject matter jurisdiction. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 n.32 (1983); *P&P Industries, Inc. v. Sutter Corp.*, 179 F.3d 861, 866 (10th Cir. 1999). As stated above, this court is satisfied of its jurisdiction pursuant to diversity of citizenship under 28 U.S.C. § 1332(a)(1).

With respect to standing and redressability, Section 4 of the FAA provides in pertinent part:

[2] Furthermore, the presiding judge, the Honorable Raymond P. Moore, may in his discretion apply 28 U.S.C. § 636(b)(1) to his review of this Order should he determine that the Motion to Compel and Stay is dispositive in nature.

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4. Indeed, the Parties here dispute the enforceability of the arbitration provision contained in the Agency Agreement. The law is well established that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (citation omitted). Accordingly, this court will apply the long-settled two-step inquiry for whether to enforce an arbitration clause: (1) did the Parties agree to arbitrate the dispute; (2) and if so, is there statutory law or policy that renders the claims non-arbitrable. *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth*, 473 U.S. 614, 626 (1985); *Williams v. Imhoff*, 203 F.3d 758, 764 (10th Cir. 2000).

An arbitration agreement is enforceable if there exists a valid agreement to arbitrate, and if the dispute falls within the scope of that agreement. *See, e.g., National American Insurance Co. v. SCOR Reinsurance Co.*, 362 F.3d 1288, 1290 (10th Cir. 2004). "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Riley Manufactoring Co., Inc. v. Anchor Glass Container Corp.*, 157 F.3d 775, 779 (10th Cir. 1998). Where the parties dispute whether an arbitration agreement exists, the party moving to compel arbitration bears a burden similar to what a movant for summary judgment faces. *Hancock v. Am. Tel. & Tel. Co., Inc.*, 701 F.3d 1248, 1261 (10th Cir. 2012). If the moving party carries this burden, the burden shifts to the non-moving party to show a genuine issue of material of fact about the formation of the agreement to arbitrate. *Id.*

In addition, Section 3 of the FAA provides for a stay of this action pending the ultimate outcome of an arbitration:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3. This court now turns to the Parties' arguments.

II. The Parties' Agreement

A. Ambiguity

WLG asserts that the Parties entered into a binding Agency Agreement by which they agreed to arbitrate any dispute arising out of the Agreement, and that the disputes presented in the Complaint arise out of the Agreement. *See generally* [#33]. Ms. Dumas concedes that the dispute at issue arises out of the Agreement, but disputes that there is a binding agreement to arbitrate. Specifically, she contends that in signing the Agency Agreement, she did not anticipate relinquishing her right to litigate a dispute arising under the Agreement, and that the arbitration clause contained in Section IX of the Agreement is ambiguous when read in conjunction with Section X. Plaintiff further asserts that WLG's representative, Ms. Sarah Warner, did not "in any way communicate to [her] that the Agency Agreement precluded litigation, and if Ms. Warner would have done so Ms. Dumas would not have signed the Agency Agreement without consulting with an attorney." [#43 at 5-6]. Finally, Plaintiff argues that the ambiguity created by the two Sections must be decided against WLG because it was the "sole drafter of the Agency Agreement." [*Id.* at 6].

The court applies state law in considering whether parties agreed to arbitrate. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). *See also Hardin v. First Cash Financial Services, Inc.*, 465 F.3d 470, 475 (10th Cir. 2006). The Agency Agreement provides that it shall be governed by the laws of the State of Colorado. [#33-1 at 4]. In Colorado "[t]he primary goal of contract interpretation is to determine and give effect to the intention of the parties." *LPG Holdings, Inc. v. Casino America, Inc.*, 232 F.3d 901, 4 (10th Cir. 2000) (unpublished) (quoting *USI Properties East, Inc. v. Simpson*, 938 P.2d 168, 173 (Colo. 1997)). Such intent "is to be determined primarily from the language of the instrument itself." *Id.* Only when the terms of the agreement are ambiguous may the court look beyond the four corners of the agreement to determine the intended meaning of the parties. *Id.*

Colorado law recognizes a contract only upon finding a "meeting of the minds." *Bellman v. i3Carbon, LLC*, 563 F. App'x 608, 613 (10th Cir. 2014) (quoting *Schulz v. City of Longmont, Colo.*, 465 F.3d 433, 438 n.8 (10th Cir. 2006)). "Interpretation of a written contract and the determination of whether a provision in the contract is ambiguous are questions of law." *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 912 (Colo. 1996) (en banc) (quoting *Fibreglas Fabricators, Inc. v. Kylberg*, 799 P.2d 371, 374 (Colo. 1990)). An ambiguity does not arise merely because the parties differ on their interpretations of an instrument. *Id.* In determining whether a contractual provision is ambiguous, the court shall examine the instrument's language and construe it "'in harmony with the plain and generally accepted meaning of the words used,' with reference to all of the agreement's provisions." *Id.* (citation omitted). *Accord Allstate Insurance Co. v. Juniel*, 931 P.2d 511 (Colo. App. 1996). A provision is ambiguous "if it is fairly susceptible to more than one interpretation," *Dorman*, 914 P.2d at 912; however, "the potential for more than one interpretation does not, in itself, create ambiguity." *Rocky Mountain*

Health Maintenance Org., Inc. v. Colorado Dep't of Health Care Pol'y and Financing, 54 P.3d 913, 919 (Colo. App. 2001), *cert. denied*, (Colo. 2002) (citation omitted). Colorado courts apply a presumption in favor of arbitration where the agreement to arbitrate is ambiguous. *Lane v. Urgitus*, 145 P.3d 672, 678 (Colo. 2006). *See also Roddy v. Rosewood Resources, Inc.*, No. 13–cv–00871–RBJ, 2013 WL 3713915, at *3 (D. Colo. July 16, 2013) (applying Colorado law from *Lane* for proposition that with respect to ambiguities in arbitration agreement, the court must "afford the parties a presumption in favor of arbitration and resolve all doubts about the scope of the arbitration clause in favor of arbitration.").

In determining whether a contract is ambiguous, a court may consider extrinsic evidence as to the meaning of the written terms, including evidence of local usage and of the circumstances surrounding the making of the contract. *Rocky Mountain Health Maintenance Org., Inc.*, 54 P.3d at 919. However, "the court may not consider the parties' own extrinsic expressions of intent." *Id.* (citing *Cheyenne Mountain School District # 12 v. Thompson*, 861 P.2d 711 (Colo. 1993)). *See also White River Village, LLP v. Fidelity and Deposit Company of Maryland*, No. 08–cv–00248–REB–MEH, 2014 WL 985103, at *11 (D. Colo. Mar. 12, 2014). "Once a contract is determined to be ambiguous, its interpretation becomes an issue of fact for the trial court to decide in the same manner as other disputed factual issues." *Rocky Mountain Health Maintenance Org., Inc.*, 54 P.3d at 919 (citing *Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310, 1314 (Colo. 1984)).

This court reviews the arbitration clause and Agency Agreement with these legal principles in mind. First, I find that the plain language of the Sections is not ambiguous. Section IX clearly instructs that "any dispute" that arises between the Author, Ms. Dumas, and the Agent, WLG, "regarding this Agreement…shall be referred to binding private arbitration…"

[#33-1 at 4]. And while the language of Section X, that "[a]ny dispute arising under this Agreement, the formation and/or breach hereof, shall be litigated solely in the State or Federal Courts of the State of Colorado," may arguably cause confusion if read in isolation, the entire provision puts the forum selection clause in context. First, Section X entitled "Agreement," comes immediately after Section IX entitled "Arbitration." The first sentence of Section X refers to the effect of the Agreement upon "the successors, assigns, executors, administrators, and legal representatives of the parties." [*Id.*]. This signals that the Parties are referring to disputes between individuals and entities, other than the Author and the Agent, who may be bound by the Agreement. Even assuming some ambiguity exists as to the interplay between the two Sections with respect to other parties potentially affected by the Agreement, there is no ambiguity that the Agreement requires Ms. Dumas, defined as "Author" [#33-1 at 5], and WLG, defined as "Agent" [*id.*], to submit covered disputes to arbitration. [*Id.* at 4]. Indeed, the second clause of the sentence clarifies the Parties' intent: "however this shall not be construed or interpreted to conflict with the parties' agreement to refer disputes to arbitration as set forth above." [*Id.*] Accordingly, I interpret the Agreement, read as a whole, as follows: Section IX provides for arbitration of disputes arising from the performance of the Agency Agreement between Ms. Dumas and WLG; and Section X serves as a forum selection clause for matters the Parties intended a court to resolve, for instance, whether a particular issue falls within the arbitration clause or whether an individual is an "assign" so that the Agreement inures to her.

Moreover, Colorado courts have expressly held that "[a] choice of law or choice of forum provision…does not supersede an arbitration clause." *In re Marriage of Dorsey*, 342 P.3d 491, 494-96 (Colo. App. 2014) (citing *Ahluwalia v. QFA Royalties, LLC*, 226 P.3d 1093, 1099 (Colo. App. 2009)). *But see PDX Pro Co., Inc. v. Dish Network, LLC*, No. 12–CV–01699–RBJ, 2013

WL 3296539, at *3, *4 (D. Colo. July 1, 2013) (finding that first-in-time forum selection clause and last-in-time arbitration clause were each mandatory and could not be read together). As the *In re Marriage of Dorsey* court explained in distinguishing *PDX Pro Co.*, that case involved two separate agreements entered into at different times; one required arbitration and the other designated a forum in which to resolve disputes. The *PDX Pro Co.* court found an irreconcilable conflict between the arbitration clause and forum selection clause, relying in large part on a Second Circuit decision in which the arbitration and forum selection clauses were found in separate agreements, and the first agreement, which required arbitration, specifically contemplated that the parties would enter into a subsequent, more formal agreement setting forth the terms of the first agreement. *See PDX Pro Co.*, 2013 WL 3296539, at *4 (citing *Applied Energetics, Inc. v. NewOak Capital Markets, LLC*, 645 F.3d 522, 523–25 (2d Cir. 2011)). The *In re Marriage of Dorsey* court found it significant that the arbitration and forum selection clauses before it were from the same agreement, and there was no indication that the parties intended the separate forum selection clause to supersede or revoke the arbitration clause. *In re Marriage of Dorsey*, 342 P.3d at 495-96. The Agreement at issue here is more analogous to the agreement examined in *In re Marriage of Dorsey*, than the circumstances considered in *PDX Pro Co.*

I also find, as the court found in *In re Marriage of Dorsey*, that the two clauses herein considered are not fundamentally incompatible. *See In re Marriage of Dorsey*, 342 P.3d at 496 ("the agreement as a whole can reasonably be interpreted, as the district court did, in a manner effectuating the broad arbitration provision agreed to by the parties") (citing *Glencore Ltd. v. Degussa Engineered Carbons L.P.*, 848 F. Supp. 2d 410, 435 (S.D.N.Y. 2012)). *Cf. Bellman*, 563 F. App'x at 610, 614-15 (affirming that an unsigned operating agreement specifying arbitration and a signed subscription agreement with a forum selection provision that required

any disputes arising out of it to be adjudicated by a court in Denver did not result in a meeting of the parties' minds to arbitrate). *Cf. In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 838 F. Supp. 2d 967, 992 (C.D. Cal. 2012) (finding that customer agreements that delegated to arbitrator the determination of whether a claim must be submitted to binding arbitration were not only ambiguous but fundamentally incompatible with warranty booklets from same transaction that allowed customer to invoke a dispute resolution procedure that would bind Toyota but not the customer).

Nor are the clauses mutually exclusive; the Parties can dispute matters that arise outside of that which they have agreed to arbitrate, and such disputes would require judicial intervention. *See Weis Builders, Inc. v. Kay S. Brown Living Trust*, 236 F. Supp. 2d 1197, 1202 (D. Colo. 2002) ("The question of arbitrability whether a [contract] creates a duty for the parties to arbitrate a particular grievance—is undeniably an issue for judicial determination.") (quoting *Riley Manufacturing Co.*, 157 F.3d at 779). Indeed, with the understanding that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit," the Supreme Court has recognized that judicial intervention is necessary where parties raise a "question of arbitrability," which is confined to a "narrow circumstance where contracting parties would likely have expected a court to have decided [a] gateway matter." *Howsam*, 537 U.S. at 83 (quoting *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986)). Gateway matters include whether an arbitration clause bound parties that did not sign the agreement, whether an arbitration agreement survived a change of corporate structure, or whether a particular type of controversy fell within the arbitration clause. *Id.* at 84.

Having determined that the language of the two Sections is not ambiguous, the court will not pass on Plaintiff's extrinsic expressions of intent that she did not understand that Sections IX and X required her to forgo the right to litigate certain disputes and that she did not intend to relinquish those rights. *See Rocky Mountain Health Maintenance Org., Inc.*, 54 P.3d at 919.

B. Fraud in the Inducement

Ms. Dumas contends in the alternative that, even if the arbitration clause is enforceable, the court should invalidate it. Specifically, she argues that Defendant "fraudulently induced her into entering into the Agency Agreement," and that her fraud claim "provides a basis for invalidating any agreement to arbitrate contained within the Agency Agreement." [#43 at 8]. She further asserts that her fraud claim "at a minimum creates genuine issues of material fact that preclude Defendant's Motion to Compel." [*Id.*] I respectfully disagree.

There can be no mistake in reading Plaintiff's Complaint and her Response to the Motion to Compel that she avers WLG fraudulently induced her into entering the Agency Agreement, [#1 at ¶¶ 34-39; #43 at 7-8], and thus she challenges the authenticity of that Agreement as a whole, not simply the arbitration provision.[3] This question was squarely addressed by the Supreme Court in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, in which it held that "if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the making of the agreement to arbitrate—the federal court may proceed to adjudicate it. But [§ 4 of the FAA] does not permit the federal court to consider claims of fraud in the inducement of the contract generally." 388 U.S. 395, 403-04 (1967). *Cf. Telum, Inc. v. E.F. Hutton Credit*

[3] Indeed, it would be difficult for Plaintiff to avoid the consequences of Section XI, in which each party acknowledges: "(i) this document shall be deemed to have been drafted by both parties and that no presumptions shall be made against either party on the actual drafting of this Agreement, and (ii) he or she is entering into this Agreement freely and voluntarily," without attacking the enforceability of the entire Agreement. [#33-1 at 4-5].

Corp., 859 F.2d 835, 837 (10th Cir. 1988) ("allegations of fraud in the inducement relating specifically to an arbitration provision may suspend application of such a provision.").[4] More recently, the Supreme Court applied this principle in *Buckeye Check Cashing, Inc. v. Cardegna*, in the context of whether an arbitrator or the court should decide if a purportedly usurious contract containing an arbitration clause was void. 546 U.S. 440, 445-46 (2006) ("unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance.").

As was the case in *Prima Paint*, there is no evidence before me that the Parties intended to withhold the claim of fraud in the inducement from arbitration. Indeed, the Agency Agreement states that it "represents the entire understanding of the parties," [#33-1 at 4], and courts have consistently found that the scope of the agreement to arbitrate as set forth in Section IX constitutes a broad arbitration clause. *See Prima Paint*, 388 U.S. at 397-98. *Accord P&P Industries, Inc. v. Sutter Corp.*, 179 F.3d 861, 866 (10th Cir. 1999) (finding broad an arbitration clause which stated "[a]ny controversy, claim, or breach arising out of or relating to this Agreement" shall be arbitrable). "A contract with a broad arbitration clause gives rise to a presumption of arbitrability which is overcome only if 'it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *Barton v. Horowitz*, No. Civ.A. 97 N 1980, 2000 WL 35346163, at *9 (D. Colo. Mar. 6, 2000) (quoting *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir. 1995)). The breadth of such a clause requires arbitration when the "allegations underlying the claims 'touch matters' covered by the parties'…agreements…, whatever the legal labels attached to them." *Id.*

[4] Even if Plaintiff were to argue post hoc that she intended to assert fraud in the inducement as to the arbitration clause only, she has not pled such fraud with the specificity required by Federal

(quoting *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 846 (2d Cir. 1987)). This court concludes that whether WLG fraudulently induced Plaintiff to enter the Agency Agreement is a matter for the arbitrator.

As final matters, Plaintiff does not argue, and this court has no basis for finding, that statutory law or certain policy renders her claims non-arbitrable. And, this court has the authority to compel the Parties to arbitration in Boulder, Colorado. *See Roe v. Gray*, 165 F. Supp. 2d 1164, 1173 (D. Colo. 2001) ("if an arbitration agreement contains a forum selection clause, only the district court in that forum can issue a § 4 order compelling arbitration."). Thus, having satisfied itself in accordance with Section 4 of the FAA that "the making of the agreement for arbitration…is not in issue," this court orders the Parties to proceed to arbitration as specified by their agreement.

CONCLUSION

Accordingly, for the forgoing reasons, **IT IS ORDERED**:

(1) Defendant Warner Literary Group, LLC's Motion to Compel Arbitration and to Stay [#33] is **GRANTED**;

(2) The Parties shall proceed to arbitration before the American Arbitration Association in Boulder, Colorado;

(3) The Scheduling Conference currently set for September 13, 2016 is **VACATED**, to be re-set if necessary, and

(4) The Parties shall file a Joint Status Report on or before **January 27, 2017**, advising the court as to the status of their dispute.

Rule of Civil Procedure 9(b). *See Echostar Satellite Corp. v. General Electric Co.*, 797 F. Supp. 855, 857 (D. Colo. 1992).

In addition, I respectfully **RECOMMEND** that:

(4) The court direct the Clerk of the Court to **ADMINISTRATIVELY CLOSE** the case pursuant to D.C.COLO.LCivR 41.2, pending completion of arbitration pursuant to the Parties' Arbitration Agreement; and

(5) The court, following any final order of arbitration, permit the Parties to move to re-open the case upon good cause, including to enforce the arbitration award.[5]

DATED: August 8, 2016

BY THE COURT:

s/ Nina Y. Wang
United States Magistrate Judge

[5] Within fourteen days after service of a copy of the Recommendation, any party may serve and file written objections to the Magistrate Judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *In re Griego*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the District Court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." *United States v. One Parcel of Real Property Known As 2121 East 30th Street, Tulsa, Oklahoma*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the District Judge of the Magistrate Judge's proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (District Court's decision to review a Magistrate Judge's recommendation *de novo* despite the lack of an objection does not preclude application of the "firm waiver rule"); *International Surplus Lines Insurance Co. v. Wyoming Coal Refining Systems, Inc.*, 52 F.3d 901, 904 (10th Cir. 1995) (by failing to object to certain portions of the Magistrate Judge's order, cross-claimant had waived its right to appeal those portions of the ruling); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (by their failure to file objections, plaintiffs waived their right to appeal the Magistrate Judge's ruling). *But see, Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (firm waiver rule does not apply when the interests of justice require review).