UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-81906-CIV-MIDDLEBROOKS/BRANNON

JON MCDOUGAL, and DAVID FIESSINGER, JR., on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

v.

COMCAST CORPORATION,

Defendant. /

ORDER GRANTING MOTION TO COMPEL ARBITRATION AND DISMISSING CASE

THIS CAUSE is before the Court on Defendant Comcast Corporation's ("Comcast") Motion to Compel Arbitration and Stay Action (DE 19) with supporting declarations (DE 19-1 & DE 19-2), filed January 17, 2017. Plaintiffs Jon McDougal and David Fiessinger, Jr. ("Plaintiffs") filed a Response on January 31, 2017 (DE 25), with supporting affidavits (DE 27 & DE 29), to which Comcast replied on February 14, 2017 (DE 37). Because Plaintiffs agreed to be bound by an arbitration agreement covering the claims alleged in the Complaint, Comcast's Motion to Compel Arbitration is granted. Because the Court finds that dismissal of this action is appropriate, Comcast's Motion to Stay the Action Pending Arbitration is denied.

BACKGROUND

Plaintiffs are current subscribers to Comcast's cable television and Internet services, who allege that Comcast charged them rental fees for their cable modems, even though Plaintiffs allegedly own their cable modems. (DE 1). Comcast moves to compel arbitration, arguing that Plaintiffs agreed to arbitrate "any dispute, claim, or controversy between you and Comcast

regarding any aspect of your relationship with Comcast" by continuing to receive Comcast's services without opting out of arbitration.

Comcast avers that its regular business practice was to mail subscribers a Notice of Arbitration in 2007 and the Comcast Agreement for Residential Services (the "Subscriber Agreement") in 2008, both of which contained an arbitration provision (the "Arbitration Provision"). (DE 19-2 ¶¶ 8-9, 13-14). Comcast further represents that Plaintiff McDougal signed a Work Order in 2011, in which he agreed to be bound by the Subscriber Agreement and acknowledged that he received self-install kits that contained the Subscriber Agreement. (DE 19-1 at 4, 22). Comcast represents that the Subscriber Agreement is available online. (DE 19-1 ¶ 12).

Plaintiffs do not deny that they received the Notice of Arbitration in 2007 and the Subscriber Agreement in 2008, but they deny that they "agreed" to arbitrate disputes with Comcast.[1] (DE 27 & DE 29). Both the Notice of Arbitration and the Subscriber Agreement state that continued use of Comcast's services constitutes acceptance of their terms. (19-2 at 9, 17). The Parties do not dispute that Plaintiff McDougal has continuously used Comcast's services since August 2005, and Plaintiff Fiessinger has continuously used Comcast's services since April 1998. (DE 19-1 ¶¶ 6, 16).

The Arbitration Provision, contained in the Notice of Arbitration and in the Subscriber Agreement, states as follows:

> If you have a Dispute (as defined below) with Comcast that cannot be resolved through an informal dispute resolution with Comcast, you or Comcast may elect

[1] Specifically, Plaintiffs each submit an affidavit, swearing that (1) they were not "aware" that Comcast added the Arbitration Provision to the Subscriber Agreement in 2008, (2) they did not receive additional services in exchange for this modification, and (3) they did not sign an arbitration agreement or agree to arbitration. (DE 27 & DE 29).

> to arbitrate that Dispute in accordance with the terms of this Arbitration Provision rather than litigate the Dispute in court.
>
> xxxx
>
> "Dispute" means any dispute, claim or controversy between you and Comcast regarding any aspect of your relationship with Comcast, whether based in contract, statute, regulation, ordinance, tort . . . , or any other legal or equitable theory, and includes the validity, enforceability or scope of this Arbitration Provision. "Dispute" is to be given the broadest possible meaning that will be enforced.

(DE 19-2 at 9, 49).

The Arbitration Provision permits a subscriber to opt out of arbitration by notifying Comcast within 30 days of the date of receipt of the Arbitration Provision. (*Id.*). It also states that "[y]our decision to opt out of this arbitration provision will have no adverse effect on your relationship with Comcast or the delivery of the services to you by Comcast." (*Id.*). The Parties agree that neither Plaintiff notified Comcast in writing within 30 days of receipt of the Arbitration Provision of an intention to opt out of arbitration. (DE 19-1 ¶¶ 13-14 & p. 8).

STANDARD

In considering the instant Motion, the Court applies the federal substantive law of arbitrability, which applies to any arbitration agreement within the coverage of the Federal Arbitration Act ("FAA"). *See Lawson v. Life of the S. Ins. Co.*, 648 F.3d 1166, 1170 (11th Cir. 2011) (quoting *Klay v. All Defendants*, 389 F.3d 1191, 1200 (11th Cir. 2004)). The FAA covers any "written provision in any . . . contract evidencing a transaction involving commerce," 9 U.S.C. § 2, and the Parties do not dispute that Arbitration Provision is in writing or that the provision of cable television and Internet services evidences a transaction involving commerce. *See, e.g., Kaspers v. Comcast Corp.*, 631 F. App'x 779, 782 (11th Cir. 2015) (applying FAA to arbitration clause in contract with Comcast for cable television and Internet services).

Section 4 of the FAA permits a court to compel arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement. 9 U.S.C. § 4. In reviewing a motion to compel arbitration, the Court applies "a summary judgment-like standard," and "may conclude as a matter of law that parties did or did not enter into an arbitration agreement only if there is no genuine dispute as to any material fact concerning the formation of such an agreement." *Bazemore v. Jefferson Capital Sys., LLC*, 827 F.3d 1325, 1333 (11th Cir. 2016) (internal quotation and citation omitted).

The Court considers three factors: (1) whether a valid written agreement to arbitrate exists, (2) whether an arbitrable issue exists, and (3) whether the right to arbitrate was waived. *See, e.g.*, *Mercury Telco Group, Inc. v. Emprese de Telecommunicaciones de Bogota S.A. E.S.P.*, 670 F. Supp. 2d 1350, 1354 (S.D. Fla. 2009). "Federal law establishes the enforceability of arbitration agreements, while state law governs the interpretation and formation of such agreements." *Emp'rs Ins. of Wausau v. Bright Metal Specialties, Inc.*, 251 F.3d 1316, 1322 (11th Cir. 2001) (citation omitted). When in doubt, questions of arbitrability should be resolved in favor of arbitration. *See Moses H. Cone Mem'l Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). "Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Emp'rs Ins. of Wausau*, 251 F.3d at 1322.

DISCUSSION

Plaintiffs oppose arbitration, arguing that: (1) they did not agree to the Arbitration Provision, (2) the Arbitration Provision does not apply to disputes related to the lease of cable modems, (3) Plaintiffs choose to opt out of arbitration via this lawsuit, and (4) the Arbitration Provision is unconscionable.

(1) Valid Agreement. In their affidavits, Plaintiffs deny that they agreed to the Arbitration Provision. "[P]arties cannot be forced to submit to arbitration if they have not agreed to do so." *Magnolia Capital Advisors, Inc. v. Bear Stearns & Co.*, 272 F. App'x 782, 785 (11th Cir. 2008).

Under Florida law, a valid contract requires "offer, acceptance, consideration and sufficient specification of essential terms."[2] *St. Joe Corp. v. McIver*, 875 So. 2d 375, 381 (Fla. 2004). "[W]hen an arbitration agreement is not signed, we look to a party's words and conduct to determine whether the party assented to the agreement." *Santos v. Gen. Dynamics Aviation Servs. Corp.*, 984 So. 2d 658, 661 (Fla. 4th DCA 2008); *see also Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1369 (11th Cir. 2005) (holding written arbitration agreement need not be signed to be enforceable where agreement provided for acceptance by continued employment). The party asserting a contract must prove its existence by a preponderance of the evidence. *St. Joe Corp.*, 875 So. 2d at 381.

In *Santos*, the defendant employer moved to compel arbitration pursuant to its employment policy, but the plaintiff employee argued that the parties did not have a valid agreement to arbitrate because he never signed the policy. *Id.* at 659-60. The employer updated its employment policy to state that arbitration was the sole forum and remedy for certain claims, and issued it to all employees. *Id.* at 659. The policy stated that "the continuation of employment by an individual shall be deemed to be acceptance of the [arbitration policy]." *Id.*

[2] "As a federal court sitting in diversity, we apply the conflict of law rules of Florida, including Florida contract law, unless the relevant documents provide otherwise." *Emp'rs Ins. of Wausau*, 251 F.3d at 1322 (11th Cir. 2001). The Subscriber Agreement does not specify the applicable state law, and the Parties do not dispute that Florida contract law applies. Therefore, I will apply Florida contract law.

The court held that the employee's continued employment after receipt of the arbitration policy "sufficiently demonstrates his assent to the terms of the arbitration agreement." *Id.* at 661.

Plaintiffs do not deny that they received the Notice of Arbitration in 2007 and the Subscriber Agreement in 2008, both containing the Arbitration Provision. Both the Notice of Arbitration and the Subscriber Agreement state that continued use of the Services constitutes acceptance of their terms. (DE 19-2 at 9, 17). Plaintiffs do not deny that they continued to use Comcast's services after receipt of the Notice of Arbitration and the Subscriber Agreement. In addition, Plaintiff McDougal does not deny that he signed a Work Order in 2011, which states that he "agree[s] to be bound by the Comcast subscriber agreement(s)." (DE 19-2 at 22). Accordingly, under Florida law, Comcast has met its burden of showing a written agreement obligating arbitration exists between the Parties. Plaintiffs' conclusory denials that they "agreed" to the Arbitration Provision are insufficient to rebut the otherwise undisputed evidence that Plaintiffs accepted the Arbitration Provision by continued use of Comcast's services after receipt of the Notice of Arbitration and Subscriber Agreement.[3] *See Santos,* 984 So. 2d at 661; *see, e.g., Losapio v. Comcast Corp.*, 1:10-CV-3428-RWS, 2011 WL 1497652, at *3 (N.D. Ga. Apr. 19, 2011) (holding plaintiff's denial that she received arbitration provision was insufficient to rebut evidence that defendant sent agreement to plaintiff and that plaintiff accepted by continuing to use defendant's services).

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[3] In their affidavits, Plaintiffs state, "If my contract was unilaterally modified by Comcast to include an arbitration provision, I did not receive any additional services or benefits from Comcast for the modification." (DE 27 & DE 29). To the extent Plaintiffs seek to raise an argument that the Subscriber Agreement, as modified to include an Arbitration Provision, lacks sufficient consideration, Florida courts have held that "a mutual obligation to arbitrate" is sufficient consideration to support modification of an existing contract to include an arbitration provision." *Santos*, 984 So. 2d at 661. The Arbitration Provision at issue creates a mutual obligation to arbitrate, and therefore Plaintiffs' argument that the modification lacks consideration fails.

(2) Arbitrable Issue. Plaintiffs argue that their dispute does not fall within the scope of the Arbitration Provision in the Subscriber Agreement because a separate lease agreement governs Comcast's rental of cable modems. "Claims are subject to arbitration where they fall within the scope of a valid and enforceable arbitration agreement." *Herrera Cedeno v. Morgan Stanley Smith Barney, LLC*, 154 F. Supp. 3d 1318, 1323 (S.D. Fla. 2016) (citing *Benoay v. Prudential–Bache Sec., Inc.*, 805 F.2d 1437, 1440 (11th Cir. 1986)). In determining the scope of the arbitration clause, the Court looks at the Parties' intent to submit the dispute to arbitration, starting at the language of the arbitration clause, and construing any doubt in favor of arbitrability in accordance with the strong federal policy favoring arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability."). Under Florida law, "the plain meaning of the actual language used by the parties controls." *Pol v. Pol*, 705 So. 2d 51, 53 (Fla. 3d DCA 1997). Faced with a valid arbitration agreement, "[t]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 92 (2000).

As a preliminary matter, the Court finds that the Subscriber Agreement, and not a separate lease agreement, governs Comcast's rental of cable modems. Plaintiffs' entire argument is that one Florida court defined a "lease" as "[a] contract by which a rightful possessor of real property conveys the right to use and occupy the property," and therefore Comcast must provide evidence of a separate contract that governs its lease of cable modems. *See Let Miami Beach Decide v. City of Miami Beach*, 120 So. 3d 1282, 1289 n.1 (Fla. 3d DCA 2013) (citing Black's Law Dictionary 970 (9th ed. 2009)). However, Black's Law Dictionary, cited in Plaintiffs' case,

clarifies that a lease may refer to "[t]he written instrument memorializing [] a conveyance and its covenants," or it may also refer to the "conveyance" itself. *See* Black's Law Dictionary (10th ed. 2014).

More importantly, the plain language of the Subscriber Agreement expressly covers charges for cable modem rentals. (DE 19-2 §§ 2, 5, 6). Section 2 states: "You agree to pay all charges associated with the Services, including . . . Comcast Equipment." (DE 19-2 § 2). Section 6 defines "Comcast Equipment" as "all new or reconditioned equipment installed, provided or leased to you by us . . ., including . . . cable modems." (DE 19-2 § 6). Section 6 also details the Parties' responsibilities with regard to Comcast Equipment and "Customer Equipment," which is defined as "any equipment, software or services that you elect to use in connection with the Services or Comcast Equipment." (DE 19-2 § 6).

The plain language of the Arbitration Provision reflects the Parties' intent to arbitrate all disputes relating to the Subscriber Agreement. The Arbitration Provision provides for arbitration of "any dispute, claim or controversy between you and Comcast regarding any aspect of your relationship with Comcast, whether based in contract, statute, regulation, ordinance, tort . . . , or any other legal or equitable theory, and includes the validity, enforceability or scope of this Arbitration Provision." (DE 19-2 at 49). This broad language "evidences the parties' intent to have arbitration serve as the primary recourse for disputes connected to the agreement containing the [arbitration] clause." *See Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218 (2d Cir. 2001). Accordingly, because the Subscriber Agreement covers issues related to cable modem rentals and contains an unambiguously broad arbitration clause, the Court finds that it is the clear intention of the Parties to arbitrate the current dispute.[4]

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[4] Indeed, Plaintiffs do not even argue that the Arbitration Provision does not apply to disputes

(3) Opt-out. Plaintiffs argue that the Court should extend the 30-day opt-out deadline in the Arbitration Provision to allow this lawsuit to serve as Plaintiffs' opt-out. However, a court may only use its equitable discretion to alter a *court-ordered* opt-out deadline, not a deadline negotiated between the parties. *See Valley Drug Co. v. Geneva Pharm., Inc.*, 262 F. App'x 215, 218 (11th Cir. 2008). Because the 30-day opt-out deadline is a contractual, rather than a Court-ordered, deadline, the Court may not extend it in order to permit the Parties to opt out of arbitration. Accordingly, the Court finds that the Parties have not opted out of arbitration by virtue of filing this lawsuit.

(4) Unconscionability. Plaintiffs contend that the Arbitration Provision is invalid because it is unconscionable. To support a finding of unconscionability sufficient to invalidate an arbitration clause, Plaintiff has "to establish *both* procedural and substantive unconscionability." *Premiere Real Estate Holdings, LLC v. Butch*, 24 So.3d 708, 711 (Fla. 4th DCA 2009). A Florida Court of Appeals has explained both:

> Procedural unconscionability relates to the manner in which a contract is made and involves consideration of issues such as the bargaining power of the parties and their ability to know and understand the disputed contract terms. Substantive unconscionability, on the other hand, requires an assessment of whether the contract terms are "so 'outrageously unfair' as to 'shock the judicial conscience.'" A substantively unconscionable contract is one that "no man in his senses and not under delusion would make on one hand, and as no honest and fair man would accept on the other."

Bland v. Health Care & Retirement Corp. of Am., 927 So. 2d 252, 256 (Fla. 2d DCA 2006) (citations omitted). While both procedural and substantive unconscionability must be present, they do not need to be present to the same degree:

> Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.

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over issues covered by the Subscriber Agreement.

> In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.

Basulto v. Hialeah Automotive, 141 So. 3d 1145, 1159 (Fla. 2014) (adopting and quoting *Romano ex rel. Romano v. Manor Care, Inc.*, 861 So. 2d 59, 62 (Fla. 4th DCA 2003)).

Plaintiffs argue that the Court must find the Arbitration Provision procedurally unconscionable because Comcast has not offered proof of how many subscribers have opted out. Alternatively, Plaintiffs argue, the record is insufficient as to "how, when, and to what extent Plaintiffs and the Class were allegedly made aware of the arbitration provision," and the Court should allow discovery before determining this issue.

The Court finds that Comcast's evidence is sufficient to apprise the Court of how, when, and to what extent Plaintiffs were made aware of the Arbitration Provision.[5] Comcast avers that it sent all subscribers in Plaintiffs' locations a Notice of Arbitration in 2007, and a Subscriber Agreement in 2008, in their monthly bills.[6] On the first page of both the Notice of Arbitration and Subscriber Agreement, Comcast displayed a bolded notice, alerting Plaintiffs to the Arbitration Provision. (DE 19-2 at 8, 17). The Arbitration Provision explains that "[a]rbitration means you will have a fair hearing before a neutral arbitrator instead of in a court by a judge or

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[5] As to Plaintiffs' request for discovery on how, when, and to what extent other subscribers were made aware of the Arbitration Provision, "[d]iscovery that does not relate to the validity of the plaintiff's own arbitration agreement is irrelevant to the unconscionability inquiry, because it does not assist the court in determining whether the agreement at issue is unconscionable." *See McArdle v. AT & T Mobility LLC*, No. C 09-1117 CW MEJ, 2013 WL 1190277, at *2 (N.D. Cal. Mar. 21, 2013).

[6] Plaintiffs argue Comcast's evidence, in the form of employee affidavits, is hearsay. However, to the contrary, the declarants expressly state that their declarations are based on personal knowledge and that they are employed in a capacity in which they have personal knowledge of and access to the business policies and records in question. Moreover, the business records themselves are admissible under the hearsay exception in Federal Rule of Evidence 803(6). *Cf. Macuba v. Deboer*, 193 F.3d 1316, 1323 (11th Cir. 1999) (holding a court "may consider a hearsay statement in passing on a motion for summary judgment if the statement could be reduced to admissible evidence at trial or reduced to admissible form").

jury," and also describes the arbitration procedure in clear, simple language. (DE 19-2 at 8, 25). In addition, the Arbitration Provision contains a bolded section, describing the steps to opt out of arbitration, via Comcast's website or mail, within 30 days of receipt of the Arbitration Provision. (DE 19-2 at 10, 25).

Based on the foregoing evidence, the Court finds that the Arbitration Provision is not procedurally unconscionable. There was no inequality in the Parties' bargaining power because, according to the Arbitration Provision, Plaintiffs had the option to reject the Arbitration Provision with "no adverse effect on [the subscriber's] relationship with Comcast or the delivery of services to [the subscriber] by Comcast." *See Fonte v. AT&T Wireless Services,* 903 So. 2d 1019, 1026-27 (Fla. 4th DCA 2005) (finding no procedural unconscionability even though contract was presented on a take-it-or-leave-it basis because customer had a period of time to cancel the contract if she was not satisfied). Although Plaintiffs deny that Comcast advised them that they could opt out of arbitration, they do not dispute that the Arbitration Provision describes the steps that Plaintiffs could take to opt out of arbitration. By prominently alerting Plaintiffs to the Arbitration Provision, Comcast provided sufficient notice of the Arbitration Provision, and of its opt-out option, to alert Plaintiffs' to its existence. *See id.* (finding that company's repeated reminders to customer to read contract were sufficient for customer to know the contract's terms, even though arbitration provision was buried on page 38 of a 40 page booklet). Finally, the Arbitration Provision explains both arbitration and the opt-out mechanism in sufficiently clear terms for Plaintiffs to be able to understand the Provision.

Plaintiffs provide no support for their argument that the number of opt-outs that Comcast has received from subscribers is relevant to the unconscionability inquiry, and the Court has found none. *See McArdle*, 2013 WL 1190277, at *2 ("Discovery that does not relate to the

validity of the plaintiff's own arbitration agreement is irrelevant to the unconscionability inquiry, because it does not assist the court in determining whether the agreement at issue is unconscionable."); *see also Hodson v. DirectTV, LLC*, C 12-02827, 2012 WL 5464615, at *8 (N.D. Cal. 2012) (denying arbitration-related discovery focusing on other customers because the only relevant document is the actual arbitration agreement alleged to be unconscionable); *Meyer v. T-Mobile USA Inc.*, 836 F. Supp. 2d 994, 1007 (N.D. Cal. 2013) (disallowing discovery where the requests focused not on plaintiff's arbitration agreement, but instead focused on all agreements, disputes, arbitrations and lawsuits relating to T–Mobile customers). Accordingly, the Court rejects Plaintiffs' argument that it cannot decide procedural conscionability without evidence of the number of Comcast subscriber opt-outs.

Because the Court does not find that the Arbitration Provision is procedurally unconscionable, the Provision is not invalid due to unconscionability. *See Fonte,* 903 So. 2d at 1027 ("As we have found a lack of procedural unconscionability, which is necessary before we could decline to enforce a contract as unconscionable, we need not address substantive unconscionability.").

CONCLUSION

For reasons stated above, the Arbitration Provision is valid and Plaintiffs' claims are covered by the Provision. Accordingly, the Parties are compelled to arbitrate Plaintiffs' claims alleged in the Complaint. As all of Plaintiffs' claims are subject to arbitration, this case is dismissed with prejudice.[7] It is hereby

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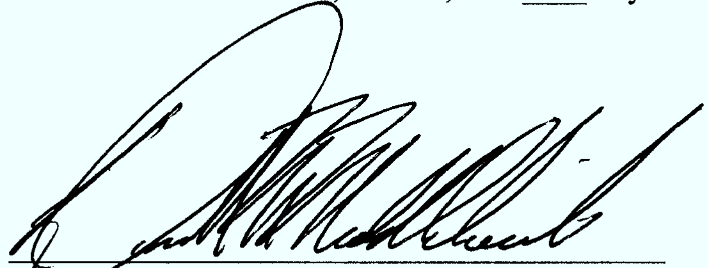
[2] Although Comcast only requests a stay pending arbitration, dismissal of a case in which arbitration has been compelled is appropriate "in the proper circumstances," such as "when *all* the issues raised in . . . court must be submitted to arbitration." *Alford v. Dean Witter Reynolds, Inc.,* 975 F.2d 1161, 1164 (5th Cir. 1992) (concluding that a dismissal with prejudice was

ORDERED AND ADJUDGED that Defendant's Motion to Compel Arbitration (DE 19) is **GRANTED**. The Parties are **COMPELLED** to arbitrate Plaintiffs' claims. This case is **DISMISSED WITH PREJUDICE.** The Clerk of Court shall **CLOSE** this case and **DENY** any pending motions as **MOOT**.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 23 day of February, 2017.



DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record

proper); *see also Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709-10 (4th Cir. 2001) ("Notwithstanding the terms of § 3, however, dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable."); *Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 156 n.21 (1st Cir. 1998) ("However, a court may dismiss, rather than stay, a case when all of the issues before the court are arbitrable.").