IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MEMORIAL HERMANN HEALTH SYSTEM,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. H-17-2661
	§	
BLUE CROSS BLUE SHIELD OF TEXAS,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

Plaintiff, Memorial Hermann Health System, initiated this action on August 1, 2017, by filing a petition in the 133rd State District Court of Harris County, Texas, Cause No. 2017-50855, against defendant, Blue Cross Blue Shield of Texas ("BCBSTx"), for breach of contract, quantum meruit/unjust enrichment, and declaratory judgment under the Texas Declaratory Judgment Act, Tex. Civ. Prac. & Rem. Code § 37.003.[1] On September 3, 2017, defendant removed plaintiff's action to this court based on diversity jurisdiction.[2] Pending before the court is Defendant Health Care Service Corporation's Motion to Dismiss Pursuant to Rule 12(b)(3) for Improper Venue and Motion to Compel Arbitration ("Defendant's MD," Docket Entry No. 8). For the reasons set forth below, Defendant's MD will be denied.

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[1]Plaintiff named BCBSTx as the defendant in the state court action. BCBSTx asserts, however, that it is not a corporate entity but, instead, an unincorporated division of Health Care Service Corporation. See Defendant's MD, Docket Entry No. 8, p. 6 n.1.

[2]Notice of Removal, Docket Entry No. 3.

I. Factual Background[3]

Plaintiff is a non-profit, charitable healthcare system. Defendant offers, issues, and administers insurance plans that provide access to healthcare services. Persons covered by policies issued and administered by the defendant ("insureds") receive health care services from the plaintiff. The benefits that the defendant's insureds receive are governed by a number of different types of agreements between individual insureds and the defendant or an employer health plan administered by the defendant. Separate and apart from the agreements between the defendant and its insureds, the defendant and the plaintiff have entered into agreements that govern compensation and billing for services that plaintiff provides to insureds covered by defendant's various types of health insurance plans, e.g., Health Maintenance Organization ("HMO"), Preferred Provider Organization ("PPO"), and Traditional Indemnity Business ("Traditional Indemnity") plans.[4] These agreements provide defendant a contractual discount from the plaintiff's usual and customary charges when its insureds receive health care services at plaintiff's facilities.

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[3]Plaintiff's Original Petition ("Petition"), attached to Notice of Removal, Docket Entry No. 3-1, pp. 7-16 ¶¶ 6-33. See also "Factual Background," Defendant's MD, Docket Entry No. 8, pp. 9-11.

[4]Id. at 7-9 ¶¶ 7-13. See also Defendant's MD, Docket Entry No. 8, p. 9 ("[Plaintiff] alleges that the parties entered into various contracts to govern their relationship, including how [defendant] would reimburse [plaintiff] for services provided to members of various [defendant] health benefit plans.").

One of the agreements that plaintiff and defendant entered into is the "Hospital Contract for Traditional Indemnity Business" ("Indemnity Contract" or "Traditional Contract") executed in 2005. The Traditional Contract provides a discounted rate, i.e., the PAR rate, for insureds covered by defendant's Traditional Indemnity plans. Plaintiff alleges that when the Traditional Contract was negotiated and signed, it was contemplated and agreed that it would cover reimbursement only for medical services provided to members of defendant's Traditional Indemnity plans. Plaintiff alleges that the PAR rate has consistently been applied to claims for all services provided by plaintiff to defendant's insureds covered by a Traditional Indemnity plan. Plaintiff alleges that in 2005 the PAR rate was 80% of billed charges for all inpatient and outpatient claims, excluding co-pays, coinsurance, and non-covered claims. Since 2005, through a series of amendments, the discount increased for the defendant's benefit such that by January 1, 2014, the PAR rate was down to 65% of billed charges, decreasing to 63.6% effective November 1, 2014, 63.2% effective October 15, 2015, 53% effective January 1, 2016, and 52.6% effective August 1, 2016.

In late 2013 defendant began offering health insurance plans over exchanges created under the Affordable Care Act ("ACA"), with effective start dates of January 1, 2014. One of the ACA plans that defendant offered was the Blue Advantage HMO plan ("BAV HMO Plan"). Plaintiff alleges that because defendant wanted to reimburse plaintiff for care provided to BAV HMO Plan members at

rates to which the plaintiff did not agree, defendant excluded the BAV HMO Plan from the parties' HMO contract, and designated the plaintiff as an "out-of-network" provider for BAV HMO Plan members.

Plaintiff alleges that it has a statutory duty under the federal Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd et seq., to treat BAV HMO Plan insureds who present to one of its facilities with an emergency medical condition. Plaintiff alleges that under the Texas Insurance Code, defendant must "pay for emergency care performed by non-network physicians or providers at the usual and customary rate or at an agreed rate," Tex. Ins. Code § 1271.155(a), and must "approve or deny coverage of poststabilization care as requested by a treating physician or provider within . . . one hour from the time of the request." Tex. Ins. Code § 1271.155(c). Plaintiff alleges that when a BAV HMO Plan insured seeks emergency treatment it verifies the insured's coverage and eligibility electronically with the defendant. Plaintiff alleges that if there is a subsequent change in status, such as if the insured is admitted to the hospital, the plaintiff notifies the defendant and requests authorization for treatment. Plaintiff alleges that the defendant typically responds that authorization for treatment is "pending," but neither refuses nor objects to continued treatment, and does not coordinate, facilitate, or provide instructions to transfer the patient to an in-network facility. Because the defendant does not deny such requests for authorization within one hour as required by

the Texas Insurance Code, plaintiff alleges that the defendant must pay for all care, whether emergency or post-stabilization, that plaintiff provides to BAV HMO Plan insureds. Plaintiff alleges that denial of authorization for post-stabilization treatment would require the defendant to coordinate transfer of the patient to an in-network facility and provide transfer instructions to the plaintiff.

Plaintiff alleges that through negotiation in late 2013 conducted via oral and written communications, the parties agreed that the defendant could use the Traditional Contract's PAR rate to pay for healthcare services that plaintiff provided to BAV HMO Plan insureds when they presented with an emergency condition.[5] Plaintiff alleges that for approximately 18 months, from January 2014 through mid-2015, the defendant generally paid the plaintiff the PAR rate for healthcare services provided to BAV HMO Plan insureds both in the emergency room and in the hospital upon admission for continuing care. Plaintiff alleges that contrary to the parties' agreement and practice for 2014 and the first half of 2015, in mid-2015 the defendant took the position that plaintiff was required to transfer BAV HMO Plan insureds to a different,

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[5]Petition, attached to Notice of Removal, Docket Entry No. 3-1, p. 11 ¶ 20 and p. 16 ¶ 35. See also Defendant's MD, Docket Entry No. 8, p. 10 ("Because [plaintiff] was not an 'in-network' provider for the BAV [HMO] Plan . . . [defendant] took the position that the Traditional Contract applied for reimbursement of services provided by [plaintiff] to BAV [HMO] Plan members. . . [Plaintiff] eventually agreed.").

in-network facility once the patient's condition had – in the defendant's post-hoc opinion – stabilized, even if the insured did not want to be transferred.[6] Plaintiff alleges that it has provided emergency healthcare services to over 700 BAV HMO Plan insureds but that despite repeated demands for payment, defendant has not paid for those services.[7]

II. Motion to Dismiss and Compel Arbitration

Plaintiff's Petition asserts claims for breach of contract, quantum meruit/unjust enrichment, and declaratory judgment under the Texas Declaratory Judgment Act, Tex. Civ. Prac. & Rem. Code § 37.003.[8]

Asserting that "[t]he operative" contract is the "Traditional Contract"[9] that "contains a mandatory arbitration agreement requiring that 'any Contract interpretation or claim issue' be resolved 'by arbitration under the commercial rules and regulations of the American Arbitration [("AAA")],'"[10] defendant moves the court to dismiss this action pursuant to Federal Rule of Civil Procedure

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[6] Id. at 13 ¶ 24.

[7] Id. at 16 ¶ 33. See also Defendant's MD, Docket Entry No. 8, p. 10 ("[Plaintiff] alleges that [defendant] breached its contractual obligations with regard to payment of claims submitted for post-emergency care services bo BAV [HMO] Plan members and, as a result, owes the PAR reimbursement rate for hundreds of BAV [HMO] Plan claims.").

[8] Id. at 16-20 ¶¶ 34-50.

[9] Defendant's MD, Docket Entry No. 8, p. 16.

[10] Id. at 11.

12(b)(3) for improper venue and to compel arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 et seq., and/or the Texas General Arbitration Act ("TGAA"), Tex. Civ. Prac. & Rem. Code § 171.021(a).[11] Alternatively, the defendant moves the court to stay this action pending arbitration.[12]

Asserting that it is not suing because defendant breached the Traditional Contract but, instead, because defendant "breached (and continues to breach) a verbal and email-based contract to pay [plaintiff] a particular rate for its treatment of patients covered by the . . . BAV HMO plan . . . (the 'BAV HMO Agreement')," [13] plaintiff urges the court to deny Defendant's MD because the arbitration clause in the Traditional Contract does not apply to the BAV HMO Agreement.[14]

A. Standard of Review and Applicable Law

Defendant's motion to dismiss and to compel arbitration is a challenge to venue based on Federal Rule of Civil Procedure

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[11] Id. at 7. See also Defendant's Reply Brief in Support of Its Motion to Dismiss Pursuant to Rule 12(b)(3) for Improper Venue and Motion to Compel Arbitration ("Defendant's Reply"), Docket Entry No. 16, p. 5.

[12] Id. at 20. See also Defendant's Reply, Docket Entry No. 16, p. 18.

[13] Plaintiff Memorial Hermann Health System's Response to Defendant's Motion to Dismiss for Improper Venue and Motion to Compel Arbitration ("Plaintiff's Response"), Docket Entry No. 14, p. 6.

[14] Id. See also Plaintiff Memorial Hermann Health System's Surreply in Opposition to Defendant's Motion to Dismiss for Improper Venue and Motion to Compel Arbitration ("Plaintiff's Surreply"), Docket Entry No. 17, p. 5.

12(b)(3) and the FAA or, alternatively, the TGAA.[15] The FAA, 9 U.S.C. §§ 1 et seq., creates "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 103 S. Ct. 927, 941 (1983) (citing Prima Paint Corp. v. Flood & Conklin Manufacturing Corp., 87 S. Ct. 1801 (1967)). Section 2 of the FAA states that a written arbitration agreement in any contract involving interstate commerce is valid, irrevocable, and enforceable except on grounds that would permit the revocation of a contract in law or equity. 9 U.S.C. § 2.

Section 3 of the FAA requires federal courts, on a party's motion, to stay litigation of claims subject to arbitration. 9 U.S.C. § 3. District courts may, in their discretion, dismiss an action instead of staying it when the entire controversy between the parties will be resolved by arbitration. See Fedmet Corp. v. M/V Buyalyk, 194 F.3d 674, 678 (5th Cir. 1999) ("If all of the

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[15]Defendant's MD, Docket Entry No. 8, p. 7 & n.2. Acknowledging that the arbitration provision in the Traditional Contract specifically invokes the TGAA but does not expressly exclude application of the FAA, and that a separate provision of the contract provides that the contract will be governed by Texas law, defendant asserts that regardless of whether the pending motion to dismiss and compel arbitration is analyzed under federal or state law, the result would be the same. Plaintiff neither disputes the applicability of the FAA, nor argues that the outcome would be different under the TGAA. See Vujasinovic & Beckcom, PLLC v. Cubillos, Civil Action No. H-15-2546, 2016 WL 5573712, *4 (S.D. Tex. September 29, 2016) (holding that where a contract contained a Texas choice of law provision and an arbitration clause requiring disputes to be resolved pursuant to the TGAA, but did not expressly exclude applicability of the FAA, the FAA and the TGAA both apply).

issues raised before the district court are arbitrable, dismissal of the case is not inappropriate.") (citing Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161, 1164 (5th Cir. 1992)). The Fifth Circuit has explained that dismissal is appropriate in such circumstances because "[a]ny post-arbitration remedies sought by the parties will not entail renewed consideration and adjudication of the merits of the controversy but would be circumscribed to a judicial review of the arbitrator's award in the limited manner prescribed by law." Fedmet, 194 F.3d at 678 (quoting Alford, 975 F.3d at 1164). Although Federal Rule of Civil Procedure 12(b) does not specifically provide for dismissal of an action based on enforcement of an arbitration clause, the parties do not dispute that defendant's motion to dismiss is governed by Rule 12(b)(3).[16] "On a Rule 12(b)(3) motion to dismiss for improper venue, the court must accept as true all allegations in the complaint and resolve all conflicts in favor of the plaintiff." Braspetro Oil Services Co. v. Modec (USA), Inc., 240 F. App'x 612, 615 (5th Cir. 2007)

[16]The Fifth Circuit has not decided whether a motion to compel arbitration should be decided under Rule 12(b)(1) for lack of subject matter jurisdiction, or Rule 12(b)(3) for improper venue. See Noble Drilling Services, Inc. v. Certex USA, Inc., 620 F.3d 469, 472 n.3 (5th Cir. 2010) ("Our court has not previously definitively decided whether Rule 12(b)(1) or Rule 12(b)(3) is the proper rule for motions to dismiss based on an arbitration or forum-selection clause."). Since this action originated in state court, and the defendant removed it to this forum contending that the court has subject-matter jurisdiction because the parties are diverse, defendant could not now argue that the court does not have subject-matter jurisdiction. Moreover, if the court lacked subject-matter jurisdiction, the logical consequence would be remand to state court not dismissal.

(per curiam). The court may look outside of the complaint and its attachments and review extrinsic materials, including affidavits. Ambraco, Inc. v. Bossclip B.V., 570 F.3d 233, 238 (5th Cir. 2009), cert. denied, 130 S. Ct. 1054 (2010). Absent an evidentiary hearing on a Rule 12(b)(3) motion, affidavits and other evidence submitted by the non-moving party are viewed in the light most favorable to that party. Id. (citing Murphy v. Schneider National, Inc., 362 F.3d 1133, 1138-40 (9th Cir. 2004)).

Section 4 of the FAA permits a party to seek an order compelling arbitration if the other party has failed to arbitrate under a written agreement. 9 U.S.C. § 4. Courts apply a two-step inquiry when determining a motion to compel arbitration. See OPE International LP v. Chet Morrison Contractors, Inc., 258 F.3d 443, 445 (5th Cir. 2001) (per curiam) (citing Webb v. Investacorp, Inc., 89 F.3d 252, 257-58 (5th Cir. 1996) (per curiam) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. 3346, 3355 (1985))). The first step is to determine whether the parties agreed to arbitrate their dispute. Id. The second step is to determine "whether legal constraints external to the parties' agreement foreclose[] the arbitration of those claims." Id. at 446 (citing Webb, 89 F.3d at 258).

B. Analysis

1. Did the Parties Agree to Arbitrate Their Dispute?

The determination of whether the parties agreed to arbitrate their dispute requires consideration of two questions:

"(1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement." Webb, 89 F.3d at 258. See Kubala v. Supreme Production Services, Inc., 830 F.3d 199, 201 (5th Cir. 2016) ("Enforcement of an arbitration agreement involves two analytical steps. The first is contract formation—whether the parties entered into *any arbitration agreement at all*. The second involves contract interpretation to determine whether *this* claim is covered by the arbitration agreement."). Challenges to the existence – as opposed to the enforceability, validity, or scope – of an agreement to arbitrate are for a court to decide. See DK Joint Venture 1 v. Weyand, 649 F.3d 310, 317 (5th Cir. 2011) ("[It] is for the courts and not the arbitrator to decide in the first instance[] a dispute over whether the parties entered into any arbitration agreement in the first place."); Will-Drill Resources, Inc. v. Samson Resources Co., 352 F.3d 211, 212 (5th Cir. 2003) ("[when] the very existence of any agreement to arbitrate is at issue, it is for the courts to decide based on state-law contract formation principles"). Courts generally apply "ordinary state-law principles that govern the formation of contracts," Webb, 89 F.3d at 258 (quoting First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920, 1924 (1995)), but must give due regard to the federal policy favoring arbitration and resolve any ambiguities as to the scope of the arbitration clause itself in favor of arbitration. Id. See also Kubala, 830 F.3d at 202 ("Whether they entered [into]

a valid arbitration contract turns on state contract law."). Under Texas law the party seeking to compel arbitration has the initial burden to establish the existence of a valid agreement to arbitrate between the parties and that the dispute at issue falls within the scope of that agreement. Cantella & Co., Inc. v. Goodwin, 924 S.W.2d 943, 944 (Tex. 1996) (per curiam). See also Venture Cotton Cooperative v. Freeman, 435 S.W.3d 222, 227 (Tex. 2014) ("A party seeking to compel arbitration . . . must establish that the dispute falls within the scope of an existing agreement to arbitrate."). "Upon such proof, the burden shifts to the party opposing arbitration to raise an affirmative defense to the agreement's enforcement." Id. (citing J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 227 (Tex. 2003)).

(a) The Parties Have a Valid Agreement to Arbitrate

Defendant cites Article 11.C of the Traditional Contract as a valid agreement to arbitrate between the parties that has existed since 2005.[17] That agreement provides:

> After exhausting the remedies contained in this Article 11, any Contract interpretation or claim issue which the HOSPITAL or BCBSTX determines has not been satisfactorily resolved shall be resolved by arbitration under the commercial rules and regulations of the American Arbitration Association, and in accordance with the Texas General Arbitration Act (Chapter 171 Texas Civil Practice and Remedies Code).[18]

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[17]Defendant's MD, Docket Entry No. 8, p. 13.

[18]Traditional Contract, attached to Defendant's MD, Docket Entry No. 8-2, p. 2.

Plaintiff does not dispute that Article 11.C of the Traditional Contract is a valid agreement to arbitrate between the parties.[19] Instead, plaintiff argues that the claims asserted in this action arise not from defendant's breach of the Traditional Contract but from the defendant's breach of "a verbal and email-based contract to pay [plaintiff] a particular rate for its treatment of patients covered by the Blue Advantage HMO ("BAV HMO") plan, a rate that [defendant] paid for about 18 months until it decided to breach that agreement (the 'BAV HMO Agreement')."[20]

Defendant replies:

> The parties in this lawsuit are sophisticated entities whose relationship is governed by complex, heavily negotiated, written contracts. . . [Plaintiff] and [defendant] executed the Traditional Contract, as well as separate HMO and PPO Contracts in 2005. . . There is no dispute that each of those three contracts remains in force. Nor is there any dispute that, for more than a decade, the course of dealing between these parties has been to operate under ***written*** contracts, executed by duly authorized persons in each company with the power to bind their respective employers in contract.

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[19] See Petition, attached to Notice of Removal, Docket Entry No. 3-1, pp. 8-9 ¶¶ 11-13 (alleging existence and key terms of the Traditional Contract including the PAR rate).

[20] Plaintiff's Response, Docket Entry No. 14, p. 6. See also Petition, attached to Notice of Removal, Docket Entry No. 3-1, p. 11 ¶ 20 ("[I]n late 2013, before the BAV [HMO P]lan took effect, [defendant] took the position that it could access and pay the discounted PAR rate for treatment that [plaintiff] provided to BAV insureds who presented to the emergency room or with emergency conditions. Initially, [plaintiff] disagreed and maintained that [defendant] was not entitled to access the PAR rate to pay for treatment provided to BAV insureds who came to [plaintiff] through the emergency room or with emergency conditions. However, through negotiation in late 2013, the parties agreed that [defendant] could use the PAR rate to reimburse [plaintiff] for BAV insureds who were treated [by plaintiff] because they presented to the emergency room or with an emergency condition.").

> Both parties agree that the Traditional Contract at issue in this Motion contains a forum selection provision requiring any contract interpretation or claim issue to be resolved by arbitration. . . The only dispute is whether the Traditional Contract reaches BAV [HMO] Plan members; if it does, then the Court must grant [defendant's] motion to compel arbitration.[21]

By citing Article 11.C of the Traditional Contract defendant has satisfied its burden to show that there is a valid agreement to arbitrate between the parties. Plaintiff does not dispute that the Traditional Contract has been a valid agreement between the parties since 2005 or that Article 11.C of the Traditional Contract contains an arbitration provision. Plaintiff argues that the Traditional Contract does not cover the claims asserted in this action because those claims do not arise from an alleged breach of the Traditional Contract entered in 2005 but, instead, from an alleged breach of an oral and written BAV HMO Agreement entered in 2013. Plaintiff's argument raises the question of contract interpretation not contract formation. See Kubala, 830 F.3d at 201 (the question of contract formation asks "whether the parties entered into *any arbitration agreement at all*"). See also IQ Products Co. v. WD-40 Co., 871 F.3d 344, 348 (5th Cir. 2017) ("The first step is a question of contract formation only – did the parties form a valid agreement to arbitrate some set of claims.").

Whether the Traditional Contract governs the claims asserted in this action is a question of contract interpretation that does not factor into the first question courts consider when deciding if

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[21]Defendant's Reply, Docket Entry No. 16, pp. 6-7.

a valid agreement to arbitrate exists. As the Fifth Circuit explained in Kubala, 830 F.3d at 202, the question at the first step of the analysis is not "whether there is an agreement to arbitrate *the claim currently before the court*. . . [T]he only issue at the first step is whether there is any agreement to arbitrate any set of claims." Plaintiff recognizes as much by citing Buell Door Co. v. Architectural Systems, Inc., No. 3:02-CV-721-AH, 2002 WL 1968223, *6-*7 (N.D. Tex. August 20, 2002), for its holding that the arbitration provision in a written sales agreement did not apply to a dispute arising under a separate, subsequent verbal distributorship agreement.[22] Because the plaintiff in Buell Door – like the plaintiff here – did not dispute the existence of a valid arbitration agreement but, instead, argued that the agreement did not apply to the asserted claims, the court found that "the issue to be addressed is the scope of the Sales Agreement's arbitration provision." Id. at *3.

(b) The Scope of the Arbitration Agreement Is for the Court to Determine

Whether the scope of an arbitration agreement covers the claims asserted in a lawsuit is generally a question for the court to decide. See Howsam v. Dean Witter Reynolds, Inc., 123 S. Ct. 588, 591 (2002) (quoting AT & T Technologies, Inc. v. Communications Workers of America, 106 S. Ct. 1415, 1418 (1986)). "But where the arbitration agreement contains a delegation clause giving the

[22]Plaintiff's Surreply, Docket Entry No. 17, pp. 5-6.

arbitrator the primary power to rule on the arbitrability of a specific claim, the analysis changes." Kubala, 830 F.3d at 201 (citing First Options, 115 S. Ct. at 1923). See also In re David Weekley Homes, L.P., 180 S.W.3d 127, 130 (Tex. 2005) ("[A]bsent unmistakable evidence that the parties intended the contrary, it is the courts rather than arbitrators that must decide 'gateway matters'. . ."). "Delegation clauses are enforceable and transfer the court's power to decide arbitrability questions to the arbitrator. Thus, a valid delegation clause requires the court to refer a claim to arbitration to allow the arbitrator to decide gateway arbitrability issues." Kubala, 830 F.3d at 202.

> [I]f the party seeking arbitration points to a purported delegation clause, the court's analysis is limited. It performs the first step — an analysis of contract formation — as it always does. But the only question, after finding that there is in fact a valid agreement, is whether the purported delegation clause is in fact a delegation clause — that is, if it evinces an intent to have the arbitrator decide whether a given claim must be arbitrated. . . . If there is a delegation clause, the motion to compel arbitration should be granted in almost all cases.

Id.[23] See also Brittania-U Nigeria, Limited v. Chevron USA, Inc., 866 F.3d 709, 713 (5th Cir. 2017) ("In Kubala . . . we provided an

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[23]In a footnote the Kubala court recognized that the Fifth Circuit has carved out a narrow exception to the rule that a valid delegation clause requires the court to refer arbitrability issues to the arbitrator. Id. at 202 & n.1 (citing Douglas v. Regions Bank, 757 F.3d 460, 464 (5th Cir. 2014); the Kubala court stated that "[w]here the argument for arbitration is 'wholly groundless,' we refuse to enforce a delegation clause." But the court cautioned that "[s]uch cases are exceptional, and . . . not a license for the court to prejudge arbitrability disputes more properly left to the arbitrator pursuant to a valid delegation clause." Kubala, 830 F.3d at 202 & n.1. This exception is not relevant here because plaintiff has not argued that it applies.

in-depth explanation of who decides what when a contract includes an arbitration provision."). In making this analysis, courts "will not assume that the parties agreed to arbitrate arbitrability '[u]nless the parties clearly and unmistakably provide otherwise.'" Petrofac, Inc. v. DynMcDermott Petroleum Operations Co., 687 F.3d 671, 675 (5th Cir. 2012) (quoting AT & T Technologies, 106 S. Ct. at 1418). If the court concludes that the parties clearly and unmistakably delegated arbitrability, the court "must refer the claim to arbitration[;]" but if the court concludes that the parties did not, the court "must perform the ordinary arbitrability analysis." Kubala, 830 F.3d at 203. Accordingly, this court must decide if the Traditional Contract contains a delegation clause pursuant to which the plaintiff and defendant clearly and unmistakably provided for the arbitrators to decide arbitrability. Brittania-U Nigeria, 866 F.3d at 714 (citing Petrofac, 687 F.3d at 675). "[T]he party contending that an arbitrator has authority to decide arbitrability 'bears the burden of demonstrating clearly and unmistakably that the parties agreed to have the arbitrator decide that threshold question. . .'" Houston Refining, L.P. v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, 765 F.3d 396, 408 (5th Cir. 2014) (quoting ConocoPhillips, Inc. v. Local 13-0555 United Steelworkers International Union, 741 F.3d 627, 630 (5th Cir. 2014) (citation and internal alteration omitted).

The Traditional Contract does not include an express delegation clause pursuant to which the plaintiff and defendant clearly and unmistakably provided for the arbitrators to decide arbitrability. Nevertheless, citing Petrofac, 687 F.3d at 675, defendant argues that because the arbitration provision in the Traditional Contract specifically incorporates the AAA Commercial Arbitration Rules, which provide that the arbitrator will decide the issue of arbitrability, the determination of whether the claims asserted in this action are governed by the arbitration agreement in the Traditional Contract is for the arbitrator, not the court, to decide.[24]

In Petrofac the Fifth Circuit reviewed the trial court's confirmation of an arbitration award. Id. at 673. The arbitration agreement stated that the parties agreed to resolve claims under their contract through binding arbitration "conducted by the American Arbitration Association under its Construction Industry Arbitration Rules." Id. at 674. The rules granted the arbitrator 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." Id. at 675. The Fifth Circuit joined several other circuits in holding that "express adoption" of the AAA rules in an arbitration agreement constitutes "clear and unmistakable evidence that the parties agreed to arbitrate

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[24]Defendant's MD, Docket Entry No. 8, pp. 13-16. See also Defendant's Reply, Docket Entry No. 16, pp. 12-13.

arbitrability." Id. See also Brittania-U Nigeria, 866 F.3d at 714 ("In Petrofac, 687 F.3d at 675, we concluded that incorporating rules from the American Arbitration Association . . . clearly and unmistakably expressed the parties' intent to leave the question of arbitrability to an arbitrator."). The opinion noted that the decision complied with the circuit's "prior suggestions that the incorporation of the AAA rules 'may be sufficient to show that the parties to those agreements intended to confer that power on the arbitration panel.'" Id. at 675, n.2 (quoting DK Joint Venture 1, 649 F.3d at 317 n.9).

The Petrofac decision makes clear that incorporation of the AAA rules by reference into an arbitration agreement serves as a delegation clause. See Houston Refining, 765 F.3d at 410 & n.28 (citing Petrofac in support of its recognition that "an arbitration agreement need not recite verbatim that the 'parties agree to arbitrate arbitrability' in order to manifest 'clear and unmistakable' agreement"). See also Vujasinovic & Beckcom, 2016 WL 5573712 at *5 ("Even though this arbitration agreement does not contain an explicit delegation clause, the *Petrofac* decision makes clear that incorporating the AAA rules by reference . . . serves as an implicit delegation clause.").

Plaintiff argues that notwithstanding the reference to the AAA rules the court must decide whether the claims asserted in this action fall within the scope of the Traditional Contract's arbitration agreement because the defendant has not carried its

burden of demonstrating clearly and unmistakably that the parties agreed to have the arbitrator decide the threshold question or arbitrability.[25] Citing Lucchese Boot Co. v. Rodriguez, 473 S.W.3d 373, 383-84 (Tex. App. – El Paso 2015, no pet.), Haddock v. Quinn, 287 S.W.3d 158 (Tex. App. – Fort Worth 2009, pet. denied), and Burlington Resources Oil & Gas Co., L.P. v. San Juan Basin Royalty Trust, 249 S.W.3d 34, 39-40 (Tex. App. – Houston [1st Dist.] 2007, pet. denied), plaintiff argues that incorporation of the AAA Commercial Arbitration Rules by reference does not demonstrate clearly and unmistakably that the parties agreed to have the arbitrator decide the threshold question of arbitrability when, as here, the arbitration agreement is a "narrow" provision that only requires arbitration of disputes "concerning the interpretation" of the contract, as opposed to a "broad" provision that requires arbitration of any and all disputes connected with or related to the contract.[26] Plaintiff contends the analysis in the Lucchese Boot, Haddock, and Burlington Resources cases shows that Texas courts have only held that parties have agreed to arbitrate arbitrability "when there is (1) a specific mention of gateway issues like arbitrability[, i.e., an express delegation clause] or (2) a broad arbitration clause that clearly and unmistakably

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[25]Plaintiff's Response, Docket Entry No. 14, pp. 23-28; Plaintiff's Surreply, Docket Entry No. 17, pp. 12-14.

[26]Plaintiff's Response, Docket Entry No. 14, p. 25; Plaintiff's Surreply, Docket Entry No. 17, p. 12.

provides for arbitration of *all* disputes, *plus* an express incorporation of arbitration rules."[27] The courts in each of these cases recognized the majority rule adopted by the Fifth Circuit in Petrofac, 687 F.3d at 675, but found that it did not apply based on specific language in the arbitration agreements at issue. These cases stand for the principle that courts are to review the entire agreement before reflexively applying the rule that the Fifth Circuit adopted in Petrofac.

The Fifth Circuit distinguishes between broad and narrow arbitration clauses. See Pennzoil Exploration & Production Co. v. Ramco Energy, Ltd., 139 F.3d 1061, 1067 (5th Cir. 1998). In Pennzoil the Fifth Circuit held that mandating arbitration of disputes that "relate to" or "are connected with" a subject are "broad arbitration clauses capable of expansive reach," id., but that agreements mandating arbitration of disputes "arising out of" a subject are narrow. Id. Here, the parties agreed to arbitrate "any Contract interpretation or claim issue."[28] Asserting that use of the capitalized defined term "Contract" in the agreement refers solely to the Traditional Contract, plaintiff argues — and defendant does not dispute — that this agreement is narrow because the parties only agreed to arbitrate disputes involving

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[27]Plaintiff's Response, Docket Entry No. 14, p. 25.

[28]Traditional Contract, attached to Defendant's MD, Docket Entry No. 8-2, p. 2, Article 11.C.

interpretation of the Traditional Contract and claim issues covered by that contract.[29] Although citing Petrofac, 687 F.3d at 674-75, defendant argues that "[t]he majority rule in the Fifth Circuit and in Texas is that 'the express incorporation of rules that empower the arbitrator to determine arbitrability' suffices as clear and unmistakable evidence of the parties' intent to allow the arbitrator to decide such issues without reference to whether an arbitration provision is broad or narrow."[30] Petrofac and all of the other cases on which defendant relies appear to have involved broad – as opposed to narrow – arbitration agreements.[31] Moreover, defendant has not cited and the court has not found any authority holding that a narrow arbitration agreement coupled with incorporation by reference of rules giving an arbitrator power to rule on his own jurisdiction is enough to show that the parties clearly and unmistakably agreed to arbitrate arbitrability. Because defendant does not dispute that the arbitration agreement at issue here is narrow, and because defendant has not cited any authority holding that a narrow arbitration agreement coupled with

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[29]Plaintiff's Response, Docket Entry No. 14, pp. 22-23; Plaintiff's Surreply, Docket Entry No. 17, p. 12. See also Defendant's Reply, Docket Entry No. 16, p. 7 (arguing not that the arbitration agreement in the Traditional Contract is broad but, instead, that the "Traditional Contract has a broad reach").

[30]Defendant's Reply, Docket Entry No. 16, pp. 16-17.

[31]See Plaintiff's Response, Docket Entry No. 14, p. 26 & n.5 (collecting cases and arbitration agreements).

incorporation by reference of rules giving an arbitrator power to rule on his own jurisdiction is enough to show that the parties clearly and unmistakably agreed to arbitrate arbitrability and strip the court of power to perform the arbitrability analysis, the court concludes that defendant has failed to carry its burden of "demonstrating clearly and unmistakably that the parties agreed to have the arbitrator decide that threshold question." Houston Refining, 765 F.3d at 408. Accordingly, the court concludes that the scope of the arbitration agreement is for the court — not the arbitrator — to determine.

(c) Plaintiff's Claims Do No Fall Within the Scope of the Arbitration Agreement

Whether a particular dispute falls within the scope of an arbitration agreement is a question of state contract law governed by federal arbitration law and policy. 9 U.S.C. §§ 2, 4; Webb, 89 F.3d at 257-58 (citing Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 109 S. Ct. 1248, 1254 (1989)). See also IKON Office Solutions, Inc. v. Eifert, 2 S.W.3d 688, 694 (Tex. App. — Houston [14th Dist.] 1999, no pet.) ("In determining whether a claim falls within the scope of an arbitration agreement, Texas courts follow federal law and focus on the factual allegations of the complaint rather than the legal cause of action asserted."). Where a contract contains an arbitration clause, "there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should

not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" AT & T Technologies, 106 S. Ct. at 650 (quoting United Steelworkers of America v. Warrior & Gulf Navigation Co., 80 S. Ct. 1347, 1352-53 (1960)). "While ambiguities in the language of the agreement should be resolved in favor of arbitration . . . [courts] do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." E.E.O.C. v. Waffle House, Inc., 122 S. Ct. 754, 764 (2002) (internal citation omitted). "Arbitration under the [FAA] is a matter of consent, not coercion." Id.

The parties agreed to arbitrate "any Contract interpretation or claim issue."[32] As stated in the preceding section, plaintiff argues — and defendant does not dispute — that this arbitration agreement is narrow because it only encompasses disputes involving interpretation of the Traditional Contract and claim issues covered by that contract.[33] See Pennzoil Exploration, 139 F.3d at 1067 ("[C]ourts distinguish 'narrow' arbitration clauses that only

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[32]Traditional Contract, attached to Defendant's MD, Docket Entry No. 8-2, p. 2, Article 11.C.

[33]Plaintiff's Response, Docket Entry No. 14, pp. 22-23; Plaintiff's Surreply, Docket Entry No. 17, p. 12. See also Defendant's Reply, Docket Entry No. 16, p. 7 (arguing not that the arbitration agreement in the Traditional Contract is broad but, instead, that the "Traditional Contract has a broad reach").

require arbitration of disputes 'arising out of' the contract from broad arbitration clauses governing disputes that 'relate to' or 'are connected with' the contract."). "[I]f the clause is narrow, the matter should not be referred to arbitration or the action stayed, unless the court determines that the dispute falls within the clause." Baudoin v. Mid-Louisiana Anesthesia Consultants, Inc., 306 F. App'x 188, 192 (5th Cir. 2009) (quoting Complaint of Hornbeck Offshore (1984) Corp., 981 F.2d 752, 755 (5th Cir. 1993).

Asserting that plaintiff's allegations center on the interpretation of the Traditional Contract and its application to claims for reimbursement submitted by the plaintiff for post-emergency services provided to BAV HMO Plan insureds and are thus contract interpretation disputes about claim issues arising under the Traditional Contract, defendant argues that "the entire dispute falls within the arbitration provision and dismissal is proper."[34] Defendant argues that

> Counts One and Two center on the applicability of the Traditional Contract, or its terms, to BAV Plan claims, thereby making such claims eligible for the reimbursement rates agreed to in the Traditional Contract. . . Thus, reference to and evidence relating to the Traditional Contract is essential for [plaintiff] to maintain its claims. The facts implicated by Count Three for declaratory relief are also "interwoven" with the Traditional Contract because that Count seeks a declaration that [defendant's] claims determinations violate the parties' contract. . . Resolution of this claim is not possible without reference to the Traditional Contract and therefore this claim is also subject to arbitration.[35]

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[34]Defendant's MD, Docket Entry No. 8, p. 16.

[35]Id. at 18-19.

In support of its argument that all of plaintiff's claims fall within the scope of the arbitration agreement defendant refers to the text of the Traditional Contract as evidence that

> [Plaintiff] and [defendant] . . . entered into a broad-ranging Hospital Contract for Traditional Indemnity Business (the "Traditional Contract"). . . . The Traditional Contract provides the "reimbursement mechanism which will be used as the basis for payment of Covered Services by [defendant] to [plaintiff]." (Ex. 1 Traditional Contract Art. 2.A.) The reimbursement rate under the Traditional Contract is known as the PAR rate. . . . The Traditional Contract defines "Covered Services" as "those acute care inpatient and outpatient hospital services for which benefits are available under a Subscriber's health care benefit plan." (*Id.* Art. 1.A.) "Subscriber," in turn, "means any person entitled to receive Covered Services under a health care benefit plan provided or administered by [defendant]." (*Id.* Art. 1.B.)
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> In 2013, [defendant] introduced the Blue Advantage HMO plan (the "BAV Plan"). . . . [Plaintiff] was "out-of-network" for the BAV Plan. . . . Because [plaintiff] was not an "in-network" provider for the BAV Plan . . ., [defendant] took the position that the Traditional Contract applied for reimbursement of services provided by [plaintiff] to BAV Plan members. . . . Plaintiff eventually agreed.
>
> Now, [plaintiff] alleges that [defendant] breached its contractual obligations with regard to payment of claims submitted for post-emergency care services to BAV Plan members and, as a result, owes the PAR reimbursement rate for hundreds of BAV Plan claims.[36]

Plaintiff responds that the defendant's

> sole basis for arguing that [its] BAV HMO claims fall within the scope of the [Traditional] Contract's arbitration clause is an improperly broad, out-of-context reading of the term "Subscriber" that conflicts with the rest of the language of the [Traditional] Contract, is

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[36]Defendant's MD, Docket Entry No. 8, pp. 9-10.

inconsistent with the parties' intent, and is not supported by any evidence.[37]

Plaintiff has asserted claims for breach of contract, quantum meruit/unjust enrichment, and declaratory judgment based on assertions that it has provided healthcare services for defendant's BAV HMO Plan insureds but that defendant has failed to pay for those services. The Traditional Contract is titled, "Hospital Contract for Traditional Indemnity Business," and refers to plaintiff's status as a "contracting hospital with BCBSTX for traditional indemnity business."[38] Defendant's contention that the claims at issue in this action require interpretation of the Traditional Contract ignores the title and other language in that contract referring to "traditional indemnity business." Defendant argues that the Traditional Contract is applicable to BAV HMO Plan insureds because plaintiff's facilities were out-of-network for those insureds, but fails to cite any language in the Traditional Contract showing that the parties intended that contract to apply to out-of-network insureds. The BAV HMO Plan did not exist until 2013 and was not even contemplated in 2005 when the parties entered the Traditional Agreement, and defendant does not dispute plaintiff's evidence that the parties attempted but failed to negotiate amendments to the Traditional Contract that would have

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[37]Plaintiff's Surreply, Docket Entry No. 17, p. 6.

[38]Id. (citing Exhibit 1-A to Plaintiff's Response, Docket Entry No. 14-1, p. 12, Art. 15.

made the Traditional Contract applicable to BAV HMO insureds. The court is therefore persuaded that reading the Traditional Contract to apply to BAV HMO insureds for whom plaintiff's facilities were out-of-network would not only render all language in the Traditional Contract referring to "traditional indemnity business" meaningless, but also would conflict with the parties' other contractual agreements, i.e., the agreements governing their HMO and PPO business.

Because the claims asserted in this action all seek payment for healthcare services provided to BAV HMO Plan insureds, because the Traditional Contract by its plain terms applies only to traditional indemnity business, and because defendant has failed to cite any provision in the Traditional Contract that could plausibly be read to govern claims for services provided to BAV HMO Plan insureds who did not exist and were not even contemplated in 2005 when the Traditional Contract was executed, the court concludes that defendant has failed to show that causes of action asserted in this lawsuit arise from claims issues governed by the Traditional Contract, or that resolution of plaintiff's causes of action require interpretation of the Traditional Contract. Accordingly, the court concludes that plaintiff's claims do not fall within the scope of the arbitration agreement contained in the Traditional Contract and, therefore, that the parties have not agreed to arbitrate the disputes at issue in this action.

2. Do Legal Constraints External to the Parties' Agreement Foreclose Arbitration?

Having determined that plaintiff and defendant did not agree to arbitrate the claims asserted in this action, the court need not reach the second question of the arbitrability analysis, i.e., whether legal constraints external to the parties' agreement foreclose arbitration? See OPE International, 258 F.3d at 445 (citing Webb, 89 F.3d at 257-58).

III. Conclusions and Order

For the reasons stated in §II.B., above, the court concludes that whether the plaintiff's breach of contract claim falls within the scope of the arbitration provision contained in the valid and existing Traditional Contract from 2005 is a question for the court to decide. For the reasons stated in § II.C., above, the court concludes that defendant has failed to carry its burden of establishing that the parties agreed to arbitrate the claims asserted in this action. Accordingly, Defendant Health Care Service Corporation's Motion to Dismiss Pursuant to Rule 12(b)(3) for Improper Venue and Motion to Compel Arbitration (Docket Entry No. 8) is **DENIED.**

SIGNED at Houston, Texas, on this 17th day of November, 2017.

SIM LAKE
UNITED STATES DISTRICT JUDGE