CLOSED CIVIL CASE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
Case Number: 16-20107-CV-14341-DLG

JPAY, INC.,

Plaintiff,

v.

OUMER SALIM,

Defendant
_____/

ORDER

THIS CAUSE came before the Court upon Plaintiff/ Counter-Defendant JPay, Inc.'s Motion to Stay Counterclaim [D.E. 11], and Defendant Oumer Salim's Response in Opposition to JPay's Motion to Stay Counterclaim; and Defendant's Motion to Compel Arbitration and Stay Proceedings [D.E. 16].

THE COURT having considered the motions, and being otherwise fully advised in the premises, denies Plaintiff's motion to stay counterclaim, and grants Defendant's motion to compel arbitration and stay proceedings for the reasons set forth below.

I. Background

Plaintiff JPay, Inc. ("JPay") is a provider of corrections-related services in more than thirty states

across the country, as well as a provider of Video Visits for individuals in community corrections. JPay maintains its headquarters in Miami, Florida. Defendant Oumer Salim ("Salim") is a citizen of Texas and resides in Colleyville, Texas. Salim purchased Video Visits through JPay to communicate with an inmate in Noble Correctional Institution in Ohio.

On December 1, 2015, Salim filed a Demand for Class Arbitration ("Demand") of a business dispute before the American Arbitration Association ("AAA"). Salim filed his Demand against JPay, individually and on behalf of "all natural persons who paid a fee to JPay for a 30 minute Video Visitation session and received less than a 30 minute session and who agreed to arbitrate their claims with JPay (the "Class")." See [D.E. 1-2, p. 7 at ¶28]. Salim requested that the matter proceed as a class action arbitration in accordance with the version of JPay's Video Visitation Terms of Service ("Terms of Service" or "Agreement") in effect at the time of the filing of his demand on December 1, 2015. [D.E. 1-2]. The Terms of Service as of December 1, 2015, provides: 1) for Arbitration pursuant to the Rules of AAA; 2) that the matter be filed in Miami, Florida; and 3) the Agreement be governed by New York law. Id. Two weeks after Salim filed his Demand, JPay

revised its Terms of Service to changing the governing law from New York to the State of Florida. The revised Terms of Service also included a "Dispute Resolution" section that outlined new arbitration procedures including: that all disputes be resolved through arbitration administered by JAMS, pursuant to JAMS rules; that all disputes be arbitrated on an individual basis; express waiver of any participation in a class action lawsuit; and that enforceability of class action waiver be "determined exclusively in the Federal District Court for the Southern District of Florida and not by JAMS or any Arbitrator". [D.E. 1-4, p. 12].

On January 5, 2016, JPay filed this lawsuit in Miami-Dade Circuit Court, seeking a declaration and injunctive relief that the purported class action arbitration filed by Salim is not lawful. [D.E. 1-4]. Attached to JPay's complaint is the revised version of its Terms of Services posted on its website on December 16, 2015, two weeks after receipt of Salim's Demand. Id. In its Complaint, JPay asserts that the Agreement provides consent to bilateral arbitration, and not consent to any form of class arbitration. [D.E. 1-4, p. 6 at ¶16]. Based thereon, JPay moves the court to declare that JPay never consented to class arbitration and to compel bilateral arbitration

consistent with the parties' Agreement. [D.E. 1-4, p. 7 at ¶22]. Also, JPay seeks an order staying the class arbitration pending before the AAA. [D.E. 1-4].

On January 7, 2016, Salim timely removed this action to federal court on the basis of diversity jurisdiction. [D.E. 1]. On February 5, 2016, Salim filed his Answer and compulsory counterclaims. [D.E. 10]. Salim's counterclaims all relate to the same alleged grievances with the services JPay provided raised in his Demand. Id.

On February 29, 2016, JPay filed the instant Motion to stay Salim's counterclaims on the grounds that they must be decided in bilateral arbitration. [D.E. 11]. In response, Salim opposes JPay's motion to stay his counterclaim, and moves to compel arbitration and stay the entire proceedings, pursuant to Federal Arbitration Act, 9 U.S.C. §§ 3 and 4. [D.E. 16]

II. Standard of Review

The Federal Arbitration Act ("FAA") "requires a court to either stay or dismiss a lawsuit and to compel arbitration upon a showing that (a) the plaintiff entered into a written arbitration agreement that is enforceable 'under ordinary state-law' contract principles and (b) the claims before the court fall within the scope of that agreement." Lambert v. Austin Ind., 544 F.3d 1192, 1195

(11th Cir. 2008) (citing 9 U.S.C. §§ 2-4). The Supreme court has interpreted the FAA to "manifest a liberal federal policy favoring arbitration agreements," E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 289, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002), and has mandated that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). However, the FAA does not require parties to arbitrate when they have not agreed to do so ... nor does it prevent parties who do agree to arbitrate from precluding certain claims from the scope of their arbitration agreement." Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior Univ., 489 U.S. 468, 478, 109 S.Ct. 1248, 1255, 103 L.Ed.2d 468 (1989). That is, "arbitration agreements are, essentially, creatures of contract" and the parties "may limit by contract the issues which they will arbitrate." Id. at 469, 109 S.Ct. at 1256; Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 F.3d 381, 383-84 (11th Cir. 1995). Thus, the Court must look to the parties' agreement to determine their intentions. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627, 105 S.Ct. 3346, 3354, 87 L.Ed.2d 444 (1985) (as

with any contract, parties' intentions regarding the arbitrability of a claim control). To be clear, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 F.3d 381, 384 (11th Cir. 1995)(internal citations omitted); see also, Opalinski v. Robert Half International Inc., 761 F.3d 326, 329, 335-36 (3d Cir.2014), cert. denied, --- U.S. ----, 135 S.Ct. 1530, 191 L.Ed.2d 558 (2015)(the availability of class arbitration constitutes a "question of arbitrability" to be decided by the courts—and not the arbitrators—unless the parties' arbitration agreement "clearly and unmistakably" provides otherwise). While federal law establishes the enforceability of arbitration agreements, state law governs the interpretation and formation of such agreements. Employers Insurance of Wausau v. Bright Metal Specialties, Inc., 251 F.3d 1316, 1322 (11th Cir.2001).

III. **Discussion**

JPay asserts that this Court is the proper adjudicator of the question of whether, under the terms of the Agreement, the parties' arbitration should proceed as bilateral or class arbitration. [D.E. 11]. JPay contends that the Agreement provides that a dispute between any

individual user and JPay must be submitted to bilateral arbitration administered by the AAA under their Consumer or Commercial Rules. Id. Further, JPay asserts that the Agreement does not provide for, nor consent to, class arbitration. Id. According to JPay, its lawsuit seeks only to resolve the gateway issue of consent to class arbitration with the court before returning to arbitration. [D.E. 27].

Conversely, Salim argues that: 1) § 3 of the FAA Requires enforcement of the arbitration provision in the JPay Terms of Service; 2) the parties agreed to arbitrate arbitrability; 3) JPay's terms of service includes an agreement to the AAA Supplementary Rules for Class Arbitration; and 4) in light of the Parties' Agreement, JPay's Declaratory Judgment Action is itself improper. [D.E. 16].

Although JPay attached the post December 16, 2015 Terms of Service as an exhibit to the complaint, JPay contends that it was a clerical error. [D.E. 27]. Notwithstanding JPay's "clerical error" resulting in the attachment of a revised version of the Agreement to its complaint, the parties agree that the December 1, 2015 version of JPay's Terms of Service is controlling. [D.E. 27]. JPay maintains that the Terms of Service in existence

as of December 1, 2015, before the December 16, 2015 revisions, do not consent to class arbitration. [D.E. 27]. JPay's Terms of Service as of December 1, 2015 provides in relevant part:

> GOVERNING LAW
>
> (a) In the event of any dispute, claim or controversy among the parties arising out of or relating to this Terms of Service that involves a claim by the User for less than $10,000, exclusive of interest, arbitration fees and costs, shall be resolved by and through arbitration administered by the American Arbitration Association ("AAA") under its Arbitration Rules for the Resolution of Consumer Related Disputes. ***Any other dispute, claim, or controversy among the parties arising out of or relating to this Terms of Service shall be resolved by and through arbitration administered by the AAA under its Commercial Arbitration Rules. The arbitrability of the dispute, claim or controversy shall likewise be determined in the arbitration.*** The arbitration proceeding shall be conducted in as expedited a manner as is then permitted by the rules of the American Arbitration Association. Both the foregoing Terms of Service of the parties to arbitrate any and all such disputes, claims and controversies, and the results, determinations, findings, judgments, and/or awards rendered through any such arbitration shall be final and binding on the parties and may be specifically enforced by legal proceedings in any court of competent jurisdiction.
>
> (b) The arbitrator(s) shall follow any applicable federal law and New York State law in rendering an award.

[D.E. 15-1A] (emphasis added).

As JPay concedes at page 6 of its Response, "this Court may only compel JPay to arbitrate consent to class arbitration if JPay clearly, unmistakably, and unambiguously delegated that issue to the arbitrator." [D.E. 27, p. 6]. "The availability of classwide arbitration constitutes a question of arbitrability because it implicates 'whose claims the arbitrator may adjudicate' as well as 'what types of controversies the arbitrator may decide.'" Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746, 756 (3d Cir. 2016). Moreover, "[t]he availability of classwide arbitration is a substantive 'question of arbitrability' to be decided by a court absent clear agreement otherwise." Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746, 753 (3d Cir. 2016)(citing Opalinski, 761 F.3d at 329). "The burden of overcoming the presumption is onerous, as it requires express contractual language unambiguously delegating the question of arbitrability to the arbitrator." Id.

"When general positions in a contract are qualified by the specific provisions, the rule of construction is that the specific provisions in the agreement control." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 F.3d 381, 384 (11th Cir. 1995)(citations omitted). In paragraph 8(a)

of the parties' Agreement, they dictate that "[t]he arbitrability of the dispute, claim or controversy shall likewise be determined in the arbitration." [D.E. 11-1]. JPay argues that although it "readily admits this clause delegates questions of arbitrability to the arbitrator in bilateral arbitrations," "that is the extent of the delegation." [D.E. 27] (original emphasis). However, the express language of the delegation provision in paragraph 8 of the Agreement does not mention bilateral arbitration and does not differentiate between bilateral and class arbitration. Nowhere does the Agreement reference, mention, or distinguish, bilateral or class arbitrability. By its terms, the parties' agreement clearly and unmistakably delegates the question of arbitrability to the arbitrators. See Merrill Lynch at 384 (11th Cir. 1995). As such, because arbitration agreements are a matter of contract, the Court finds that the propriety of classwide arbitration in this case is to be decided by the arbitrator, and not the Court.

Lastly, the parties agreed that regardless of whether a dispute was consumer related or commercial, the AAA rules would apply. However, given the actual contractual language of the parties' agreement, this Court need not decide whether incorporation of the AAA rules by reference is enough to be a clear and unmistakable delegation of

jurisdiction to the arbitrators to determine the threshold question of arbitrability. Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746, 749 (3d Cir. 2016) (citing Commercial Rule R7).

III. Conclusion

In light of the presumption favoring arbitration, and the language of the Agreement, this action is stayed and the parties are directed to arbitrate their dispute, including, but not limited to the issue of the availability of class arbitration. Based thereon it is,

ORDERED and ADJUDGED that Plaintiff JPay, Inc.'s Motion to Stay Counterclaim [D.E. 11] is **DENIED**. It is further

ORDERED and ADJUDGED that Defendant Oumer Salim's Motion to Compel Arbitration and Stay Proceedings [D.E. 16] is **GRANTED**. Accordingly, the Court hereby compels arbitration in this matter consistent with the terms of the December 1, 2015 version of the Agreement. It is further

ORDERED AND ADJUDGED that this action is **STAYED** pending arbitration. The clerk is directed to terminate any pending motions and to administratively **CLOSE** the case pending notice from a party that the arbitration is complete.

DONE AND ORDERED in Chambers at Miami, Florida this 21st day of May, 2016.

DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record