UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.16-20242-CIV-MORENO/O'SULLIVAN

KWEST COMMUNICATIONS, INC.,
a Florida corporation,

Plaintiff,
vs.

UNITED CELLULAR WIRELESS INC.,
a Texas corporation, and
SPRINT SOLUTIONS, INC.,
a Delaware corporation,

Defendants.
_____/

REPORT AND RECOMMENDATION

THIS MATTER comes before the Court on the Defendants' Motion to Compel Arbitration (DE# 8; 1/27/16). This matter was referred to the undersigned by the Honorable Federico A. Moreno, United States District Judge for the Southern District of Florida (DE# 10; 2/8/16). The plaintiff's response contains a Motion to Stay Arbitration to stay the arbitration until this Court determines the issues of arbitrability of KWEST's claims. See Response at p. 20-21 (DE# 15, 2/19/16). Having carefully considered the motion, the response and the reply thereto, the parties' respective declarations and exhibits, the court file and the applicable law, the undersigned recommends that the Defendants' Motion to Compel Arbitration (DE# 8; 1/27/16) be **GRANTED** and KWEST's Motion to Stay Arbitration should be **DENIED as moot**.

I. INTRODUCTION

The defendants, United Cellular Wireless, Inc. ("United") and Sprint Solutions, Inc. ("Sprint"), seek to compel KWEST Communications, Inc. ("KWEST") to arbitrate its

claims against them. KWEST alleged eight causes of action against one or both defendants. KWEST's claims against United arise out of United's alleged breach of an oral agreement with KWEST for the operation of a Sprint retail store in Miami, Florida and other tortious and wrongful conduct related to the business relationship. In this action, KWEST alleges that United breached an alleged oral sub-dealer agreement with KWEST when United insisted on making periodic bonus payments directly to Ravin Nawalrai as regular W-2 compensation, rather than making these payments to KWEST. Amended Complaint ¶ 29. The act of not making payments to KWEST forms the basis of six of KWEST's seven claims, namely: accounting, breach of contract, breach of implied contract, unjust enrichment, conversion, and breach of implied duty of good faith and fair dealing. KWEST's remaining claim for tortious interference is based on United's alleged interference with KWEST's alleged attempt to transfer the Miami Store away from United to Communications to Go, Inc., another authorized Sprint dealer. Amended Complaint ¶¶ 32-35. Additionally, KWEST filed two claims against Sprint for unjust enrichment and civil theft.

The defendants contend that there are three valid, broad-form arbitration agreements: 1) the Sprint-Bhella Authorized Representative Agreement (the "Sprint-Bhella AR Agreement"); 2) the Sprint-United Authorized Representative Agreement (the "Sprint-United AR Agreement"), and 3) the Arbitration Agreement in United's 2014 Employee Handbook. The defendants argue that Florida law permits this Court to compel arbitration even though KWEST is not a signatory to these agreements. The defendants argue further that all of KWEST's claims are arbitrable under the broad scope of these arbitration agreements.

KWEST opposes the motion to compel arbitration on the grounds that the defendants cannot establish that a valid arbitration agreement exists between KWEST and them because KWEST is not a party to those agreements and did not agree to be bound by them. Additionally, KWEST argues that it does not seek to enforce any rights or benefits under the dealer agreements, but seeks to enforce its completely separate oral agreement with United and sues Sprint for certain business torts and statutory wrongs. Finally, KWEST argues that United waived its purported arbitration rights when it filed an action in a Texas state court against the Nawalrais, KWEST and Bhella Trust, Inc. ("Bhella") in which it obtained an Order Granting Plaintiff's Application for Temporary Restraining Order (DE#18-6, 2/29/16).

II. FACTUAL BACKGROUND

Bhella operated only one Sprint-branded store located at 10836 S.W. 104th Street in Miami, Florida (the "Miami Store"). Ravin Nawalrai signed the Sprint-Bhella AR Agreement on behalf of Bhella on or about September 22, 2008. The Sprint-Bhella AR Agreement contains a broad-form arbitration clause:

> **1. Dispute Resolution.** All Disputes under this Agreement are subject to the following dispute resolution process. A Dispute means all controversies, disputes, or claims of every kind and nature arising out of or in connection with the negotiation, construction, validity, interpretation, performance, enforcement, operation, breach, continuation or termination of this Agreement.
>
> **2. Mediation.** In the event of a Dispute, either party may submit the Dispute for mediation under the Commercial Mediation Procedures and Rules of the American Arbitration Association (AAA).
>
> ***
>
> **3. Arbitration.** No party may commence arbitration until a Dispute has been subject to mediation in accordance with this Agreement. Either party may initiate arbitration with respect to a Dispute by filing a written

> demand for arbitration pursuant to the Wireless Industry Arbitration Rules of the AAA at any time after the 45th calendar day following the date that a request for mediation of such Dispute was first submitted, or, if earlier, the date that mediation is terminated. This applies to all causes of action, whether nominally a "claim", "counterclaim", or "cross-claim", arising under common law or any state or federal statute....
>
> **6. Injunctive Relief.** If Sprint determines that it may suffer irreparable harm as a result of AR's breach, or threatened breach, of this Agreement, then Sprint may, without complying with any other dispute resolution procedures in this Exhibit E, seek injunctive relief from a court of competent jurisdiction.

Exhibit E to the Sprint-Bhella AR Agreement (DE# 8-4, Ex. D; 1/27/16).

United, like Bhella, was an authorized Sprint dealer. The Sprint-United AR Agreement contained an identical Dispute Resolution provision as the Sprint-Bhella AR Agreement as well as the express injunction exception to the arbitration provision. ("Sprint-United AR Agreement") (DE# 8-5, Ex. E; 1/27/16).

KWEST asserts that in or about 2010, Sprint engaged in a campaign to reduce the number of authorized dealers in its dealer network and required all dealers to have a minimum of five (5) retail stores. Sprint encouraged small dealers, like Bhella, to merge with larger dealers, like United. In 2011, with Sprint's consent, Bhella sold the Miami Store to United and assigned its rights in the Sprint-Bhella AR Agreement to United pursuant to an Assignment, Assumption and Consent Agreement (the "A&A Agreement"). Under the A&A Agreement, Bhella assigned United all of its rights to the Sprint-Bhella AR Agreement:

> 1. As of the Effective Date, Bhella Trust assigns, transfers, sells and conveys to United Cellular all right, title and interest of Bhella Trust in and to the [Sprint-Bhella] AR Agreement, including all commissions and Continuing Service Awards due Bhella Trust, regardless of when the activations occurred.

> 2. United Cellular assumes and agrees to perform all obligations (including Products purchased by Bhella Trust under Exhibit B of the [Sprint-Bhella] AR Agreement) of Bhella Trust under the [Bhella] AR Agreement arising from and after the effective date.

A&A Agreement. See Amended Complaint ¶ 16; Sprint Decl. ¶ 3, Ex. C.

As part of the Bhella United transactions, KWEST assigned the Miami Store's commercial lease to United via a Lease Assignment Agreement. United Decl. ¶ 4, Ex. H ("Assignment of Lease with Consent of Landlord") (DE# 8-8, 1/27/16). Mr. Ravin Nawalrai represented to United that KWEST was operating the Miami Store under the Sprint-Bhella AR Agreement. United took over the operation of the Miami Store pursuant to the A&A Agreement. The Nawalrais wanted to remain employed at the Miami Store notwithstanding these transactions. United hired them as at-will employees. Ravin Nawalrai, as the Miami Store's manager, was eligible for bonus pay based on the Miami Store's performance. On Ravin Nawalrai's insistence, United agreed to pay Ravin Nawalrai's bonus to KWEST.

The Sprint-United AR Agreement specifically prohibits United from engaging in any "sub-dealer" relationship with any entity:

> *1.2 No Sub-dealers/Limitations on Subcontractors/AR Responsibility for Actions.*
>
> (A) Sub-dealers. AR may not use third parties to perform sales or sales support activity (including order fulfillment service providers) under this Agreement....

Sprint Decl. ¶ 4. KWEST maintains that because United had no prior experience in the South Florida telecommunications market and no staff capable of operating the Miami Store, and pursuant to Sprint's recommendation, KWEST entered into an oral sub-dealer agreement with United in 2011 to own and operate the Miami Store (the "Oral

Sub-Dealer Agreement"). Pursuant to the alleged Oral Sub-Dealer Agreement, KWEST served as a sub-agent or sub-dealer of United whereby it paid United a royalty or administrative fee per box on each equipment sale made in the Miami Store. KWEST contends that all fees realized from the sale of equipment over the administrative fee or royalty were property of KWEST. Sprint paid all fees from the sale of equipment to United and United paid KWEST all amounts in excess of the administrative fee, less certain operational expenses of the Miami Store. United accounted for all deductions for operational expenses on the monthly profit and loss statement tendered to KWEST.

KWEST contends that from 2011 forward, KWEST maintained full ownership and operational control of the Miami Store and was responsible for all staff and operational costs, such as rent, payroll tax, improvements, etc. KWEST obtained and held all operational licenses required for the operation of the Miami Store in its name. Ravin Decl. , Ex. 1, 2. United and Sprint deny that there was any sub-dealer agreement with KWEST. United Decl. ¶ 6 (DE# 8-1; 1/27/16); Sprint Decl. ¶ 4 (DE# 8-2; 1/27/16). From June 2011 through June 2015, on a monthly basis, United would pay all profits from the operation of the Miami Store to KWEST. In or around June 2015, United unilaterally ceased making payments to KWEST. KWEST asserts that it continued to perform under the Oral Sub-Dealer Agreement through December 31, 2015. Although KWEST maintains that Ravin Nawalrai, Ramesh Nawalrai and Sheila Nawalrai were KWEST's employees, KWEST concedes that Sprint and United required them to be directly compensated by United. Each of these individuals executed certain employment documents with United.

As employees of United, Ravin Nawalrai, Ramesh Nawalrai and Sheila

Nawalrai's terms and conditions of employment were partly set by United's Employee Handbook. In 2011 and 2012, the Nawalrais executed certain employment documents including the acknowledgments of the 2011 and 2012 Employee Handbooks, which did not contain any arbitration provision. Acknowledgment of Receipt and Understanding of Employee Handbook (DE# 8-7 at pp. 6-7,15, 24, 27). KWEST notes that each Acknowledgment states that the signatory "understand[s] that this handbook is neither a contract of employment nor a legally binding agreement". Id. at 7. The Acknowledgment further states

> I accept the terms of the handbook. I also understand that it is my responsibility to comply with the policies contained in this handbook, and any revisions made to it. I further agree that if I remain with the Company following any modifications to the handbook, I thereby accept and agree to such changes.

Id.

In June 2014, United issued a revised Employee Handbook that contains the following Arbitration Agreement:

> United Cellular, Inc. (the "Company") requires arbitration for all disputes related to employment. In order to continue employment with the Company, you must read and sign this Agreement.
>
> Any controversy between Employee and the Company or any of its owners, employees, officers, agents, affiliates, or benefit plans, arising from or in any way related to this Agreement, Employee's employment with the Company, or the termination of the Employee's employment with the Company, shall be resolved exclusively by the terms of this Agreement.

See 2014 United Employee Handbook, p. 23, Ex. F to Defendants' Motion to Compel Arbitration (DE# 8-6 p.23; 1/27/26). United promptly sent the revised 2014 Employee Handbook to each of its employees, including Ravin, Ramesh and Sheila Nawalrai. All

United employees were required to be bound by Arbitration Agreement as a condition to their continued employment with United. The Nawalrais never executed any acknowledgment for the 2014 Employee Handbook. The Nawalrais continued to work for United for an additional eighteen months after receiving the revised 2014 Employee Handbook, until United terminated their employment in December 2015.

In response to his impending employment termination at the end of December 2015, United contends that Ravin Nawalrai usurped control of the Miami Store, claiming ownership through KWEST and locking out United management. To regain control of its own store, United commenced a state court lawsuit in Texas to obtain a temporary restraining order against Ravin Nawalrai, Ramesh Nawalrai, Sheila Nawalrai, Bhella and KWEST. The Nawalrais removed the Texas state court action to the federal district court and filed a motion to dismiss or transfer. On January 22, 2016, after KWEST filed the present action in state court in Florida and after KWEST sought removal and dismissal of United's Texas state court action, United voluntarily dismissed the Texas action. On January 22, 2016, United filed a Demand for Arbitration against KWEST, Bhella Trust and the Nawalrais.

Sprint contends that it did not consent to United assigning its operation of the Miami Store to any party, including Bhella, KWEST, and/or Ravin Nawalrai. Sprint contends that it did not consent to allow United to use any sub-dealers to operate the Store, including KWEST, Bhella, and/or Ravin Nawalrai. The dispute resolution provision requires binding arbitration under Exhibit E of the of the Sprint-United AR Agreement.

Ravin Nawalrai is one of the principal owners of KWEST and is also the principal

of Bhella. KWEST never executed an arbitration agreement with either Sprint or United. KWEST maintains that its principals, including Ravin and Ramesh Nawalrai, and associated employees, such as Sheila Nawalrai, never executed an arbitration agreement or consented to any arbitration agreement with United.

III. STANDARD OF REVIEW

The Eleventh Circuit treats a motion to compel arbitration as a Rule 12(b)(1) motion to dismiss for lack of subject matter consideration. Shriever v. Navient Solutions, Inc., 2014 WL 7273915, at *2 (M.D. Fla. Dec. 19, 2014)(citing McElmurray v. Consol. Gov't of Augusta-Richmond Cnty., 591 F.3d 1244, 1251 (11th Cir. 2007)). Accordingly, in ruling on a motion to compel arbitration, the Court may consider matters outside of the four corners of the complaint. Mamani v. Sanchez Berzain, 636 F. Supp. 2d 1326, 1329 (S.D. Fla. 2009).

"Federal law establishes the enforceability of arbitration agreements, while state law governs the interpretation and formation of arbitration agreements." Employers Ins. of Wausau v. Bright Metal Specialties, Inc., 251 F.3d 1316, 1322 (11th Cir. 2009) (citing Perry v. Thomas, 482 U.S. 483 (1987)). "Federal law counsels that questions of arbitrability, when in doubt, should be resolved in favor of arbitration." Id. (citing Moses H. Cone Mem'l Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); Klay v. All Defendants, 389 F.3d 1191, 1200 (11th Cir. 2004) (explaining that "it is the role of courts to rigorously enforce agreements to arbitrate and to construe any doubt in favor of arbitrability")). The [Federal] Arbitration Act [("FAA")] established that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract

language itself or an allegation of waiver, delay, or a like defense to arbitrability." Mercury Construction, 460 U.S. at 24-25 (footnote omitted).

"Under the [FAA], no party can be compelled to arbitrate unless that party has entered into an agreement to do so." Id. (citation omitted). State-law principles of contract law govern the determination of whether an arbitration agreement exists. Courts have held that non-signatories may be bound to the arbitration agreements of others based on various theories that arise out of common law principles of contract and agency law. Lawson v. Life of the South Ins. Co., 648 F.3d 1166, 1170 (11th Cir. 2011); Bright Metal Specialties, Inc., 251 F.3d at 1322.

To compel arbitration under the FAA, the movant must establish that: 1) a written agreement to arbitrate exists; 2) a nexus to interstate commerce exists; and 3) the arbitration clause covers the claims. Steele v. Santander Consumer USA, Inc., No. 14-60741-CIV-FAM (S.D. Fla. August 15, 2015) (Moreno, J.) (citing Gilmore v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)).

IV. ANALYSIS

To compel arbitration under the FAA, the movant must establish that: 1) a written agreement to arbitrate exists; 2) a nexus to interstate commerce exists; and 3) the arbitration clause covers the claims. Steele v. Santander Consumer USA, Inc., No. 14-60741-CIV-FAM (S.D. Fla. August 15, 2015) (Moreno, J.) (citing Gilmore v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)). The Court must also determine whether the right to arbitration was waived. See Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999) (citation omitted).

A. Valid Written Agreements to Arbitrate Exist

1. Three Valid and Enforceable Arbitration Provisions Exist

The arbitration provision contained in the Sprint-United AR Agreement and the Spring-Bhella AR Agreement are identical and have been held to be a mandatory broad-form arbitration clause by at least two federal courts. See Till v. Spring Solutions, Inc., 2010 WL 1257643 (E.D. Pa. March 30, 2010); Haisha Corp. v. Sprint Solutions, Inc., 2015 WL 224407 (S.D. Ca. Jan. 15, 2015). The third arbitration agreement is an employment arbitration agreement. Florida and federal law recognize that an at-will employee is bound by an arbitration provision found in an employment handbook. See Order Granting Motion to Compel Arbitration (DE# 17, 11/12/15) in *Hernandez v. Acosta Tractors, Inc.*, No. 15-23486-CIV (S.D. Fla. Nov. 12, 2015) (Moreno, J.). Additionally, KWEST, a non-signatory to the agreements, is bound to the arbitration provisions under Florida contract law as discussed below.

The express terms of the arbitration provision contained in the Sprint-United AR Agreement make it all inclusive and mandatory: "All Disputes under this Agreement are subject to the following dispute resolution process. A Dispute means all controversies, disputes, or claims of every kind and nature arising out of or in connection with the negotiation, construction, validity, interpretation, performance, enforcement, operation, breach, continuation or termination of this Agreement." Exhibit E Dispute Resolution to Sprint-United AR Agreement (DE# 8-4; 1/27/16). It further provides: "... This applies to all causes of action, whether nominally a 'claim', 'counterclaim', or 'cross-claim', arising under common law or any state or federal law." Id.

The undersigned finds that the arbitration provisions in the Sprint-United AR Agreement, the Sprint-Bhella AR Agreement, and the Arbitration Agreement in the 2014 Employee Handbook are valid and enforceable. See Klay v. All Defendants, 389 F.3d 1191, 1200 (11th Cir. 2004).

2. A Non-Signatory May Be Bound by an Arbitration Provision

"Florida law governs the issue whether a contract may be enforced by or against a nonparty." Kong v. Allied Professional Ins. Co., 750 F.3d 1295, 1302 (11th Cir. 2014) (citations omitted). Under Florida law, a non-signatory may be bound to arbitrate under the following five theories: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil piercing/alter ego; and 5) estoppel. Johnson v. Pires, 968 So. 2d 700, 701 (Fla. 4th DCA 2007) (citing Thomson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d 773, 776 (2nd Cir. 1995)); see MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999).

"'Under Florida law, the assignment of a contract right does not entail the transfer of any duty to the assignee, unless the assignee assents to assume the duty.'" Kong, 750 F.3d at 1302 (quoting Shaw v. State Farm Fire & Cas. Co., 37 So.2d 329, 332 (Fla. DCA 2010, disapproved of on other grounds by Nunez v. Geico Ins. Co., 117 So. 2d 388 (Fla. 2013)). Florida law holds that a "'nonsignatory to an arbitration agreement may be bound to arbitrate if the nonsignatory has received something more than an incidental or consequential benefit of the contract.'" Id. (quoting Germann v. Age Inst. of Fla., Inc., 912 So. 2d 590, 592 (Fla. DCA 2005)). In Kong, the district court found that "Florida law treats arbitration as a 'remedial mechanism' that is included in any assignment" and not "as a duty that requires [the nonparty's] assent before [it] can be

subject to the policy's arbitration provision." Id. at 1303. In Kong, the district court held that the nonparty "[was] bound by the insurance policy's arbitration clause as a matter of Florida law." Id.

a. Estoppel

The theory of equitable estoppel may bind a nonsignatory to arbitration (1) "where a nonsignatory plaintiff sues a signatory defendant, based upon an agreement that contains an arbitration clause between the defendant and a third-party to whom the plaintiff is affiliated," or (2) where a company's "non-signatory affiliate is compelled to arbitrate." In re Managed Health Care Litigation, 132 F. Supp. 2d 989, 994-97 (S.D. Fla. 2000) (Moreno, J.) (applying equitable estoppel, agency and third-party beneficiary theories), rev'd on other grounds, In re Humana, Inc. Managed Care Litigation, 333 F.3d 1247 (11th Cir. 2003). Additionally, equitable estoppel applies (3) "where a signatory to a written agreement must rely on the terms of the agreement in asserting its claims against the nonsignatory." Id. at 995 (citing MS Dealer Service Corp. v. Franlin, 177 F.3d 942, 947 (11th Cir. 1999)).

In Allied Professionals Ins. Co. v. Fitzpatrick, 169 So. 3d 138 (Fla. 4th DCA 2015), the plaintiffs sued a chiropractor for negligence and later joined the chiropractor's insurer as a defendant. Id. at 140. The insurer sought to compel arbitration based on the arbitration provision in the chiropractor-insurer agreement, to which the plaintiffs were not a party. The Fitzpatrick court held that estoppel applies to bind to the plaintiffs to arbitration. The Fitzpatrick court explained that the plaintiffs cannot claim they are entitled to the benefit of the policy's coverage provision while simultaneously attempting to avoid the burden of the policy's arbitration provision. Id. at

142 (citing Bahamas Sales Assoc., LLC v. Byers, 701 F.3d 1335 (11th Cir. 2012)("In essence, equitable estoppel precludes a party from claiming the benefit of some of the provisions of a contract while simultaneously attempting to avoid the burden that some other provisions of the contract impose.")(citation omitted)).

In the present case, KWEST claims that United and Sprint owe it money because it was a purported sub-dealer of United and Sprint. KWEST alleges that whenever KWEST signed-up a new Sprint customer, Sprint was required to pay United a commission under the Sprint-United AR Agreement, and based on the purported sub-dealer agreement with United, United was required to pay the commission to KWEST. In the Amended Complaint, KWEST alleges:

> Sprint paid all fees from the sale of equipment to [United] and [United] paid KWEST all amounts in excess of the administrative fee, less certain operational expenses ... in or around June 2015, [United] unilaterally ceased making payments to KWEST[.]

See Amended Complaint ¶¶ 22-24 (DE# 11; 2/16/16). The undersigned finds that based on its own allegations, KWEST is estopped to deny that it is bound by the arbitration provision in the Sprint-United AR Agreement.

Similarly, the undersigned finds that KWEST is bound by the Arbitration Agreement in the 2014 Employee Handbook because the claims arise out of the Nawalrais' employment with United. Page 23 of the 2014 United Employee Handbook expressly states that it is an "Arbitration Agreement." See 2014 United Employee Handbook, p. 23; Ex. F to Motion to Compel. The Arbitration Agreement requires mandatory, binding arbitration of all disputes related to the agreement, the employee's employment with United or its affiliates, etc., or the termination of employment. Id.

The arbitration agreement creates an enforceable obligation against each of United's employees, including the Nawalrais, regardless of whether they signed it. The Arbitration Agreement provides in pertinent part: "[United] (the "Company") requires arbitration for all disputes related to employment. In order to continue employment with the Company, you must read and sign this Agreement." Id. Such language distinguishes the United 2014 Employee Handbook provision from the handbook provision in Etienne v. Hang Tough, Inc., 2009 WL 1140040, at *3 (S.D. Fla. April 28, 2009), which did "not state that Plaintiff's employment would be deemed acceptance of the Defendant's arbitration policy." KWEST acknowledges that "if a[n] [employee] handbook expressly provides that an employee's employment would be deemed an acceptance of the company's arbitration policy, a court may conclude that an enforceable agreement to arbitrate exists." See Response at 15-16 (citing Pope v. Monroe Regional Medical Center, 2005 WL 5959765 at *3 (M.D. Fla. Sept. 1, 2005)).

KWEST claims that the Nawalrais' compensation under their respective at-will employment agreements with United actually represented the "income and profits" from the Miami Store. See Amended Complaint ¶ 23. KWEST further claims that United breached the alleged sub-dealer agreement by paying the Miami Store's "income and profits" directly to the Nawalrais as W-2 compensation. See Amended Complaint ¶ 25. Because KWEST's claims arise out of the benefits of the Nawalrais' employment with United, KWEST is estopped to deny that it is bound by the Arbitration Agreement in the 2014 Employee Handbook. See Order Granting Motion to Compel Arbitration (DE# 17, 11/12/15) in *Hernandez v. Acosta Tractors, Inc.*, No. 15-23486-CIV (S.D. Fla. Nov. 12, 2015) (Moreno, J.) (finding that the continued employment of the plaintiff, who signed

an agreement to arbitrate as a condition of his employment, served as sufficient consideration for his agreement to arbitrate).

Finally, KWEST is estopped to deny that it is bound by the arbitration provision in the Sprint-Bhella AR Agreement. A nonsignatory is bound to arbitrate "if its claims are based upon an agreement that contains an arbitration clause between the defendant and a third-party to whom the plaintiff is affiliated." In re Managed Care Litigation, 132 F. Supp. 2d at 996. Bhella is a signatory to the Sprint-Bhella AR Agreement which contains an arbitration provision that is identical to the one in the Sprint-United AR Agreement. The Sprint-Bhella AR Agreement obligates Bhella to arbitrate any of its claims against Sprint. KWEST alleges that it was Bhella's "operating entity" with respect to the Miami Store. See Amended Complaint ¶ 67. KWEST and Bhella share the same directors and officers. Ex. J; Ex. I to the Motion to Compel Arbitration (DE# 8; 1/27/16).

KWEST's cited case law actually supports the defendants' position regarding estoppel. In Core Property Capital, L.L.C. v. Profor Securities, L.L.C., 2015 WL 4606124, at *4 (M.D. Fla. July 30, 2015), the court rejected the plaintiff's equitable estoppel theory on the ground that "Florida courts have held that non-signatories are not bound by arbitration clauses simply because the contract in question generates income that ultimately flows to the non-signatory." The Core Property Capital court acknowledged the general rule that "[t]he prototypical estoppel cases are those where a non-signatory is a third-party beneficiary of the contract in question or where a non-signatory has been assigned rights under the contract and is seeking to enforce those rights." Id.

KWEST also cites Thomson-CSF, S.A. v. Am. Arb. Ass'n, 64 F.3d 773 (2d Cir. 1995), which supports the defendants' position. Although the Thomson-CSF court found the estoppel theory inapplicable, the court distinguished other estoppel cases on the ground that "[t]hese estoppel cases all involve claims which are integrally related to the contract containing the arbitration clause. The same cannot be said for the case at hand." Id. at 779-780. Unlike Thomson-CSF, KWEST's claims are integrally related and necessarily depend on the rights and obligations created by the Sprint-United AR Agreement. KWEST claims that Sprint and United failed to pay KWEST funds pursuant to those rights.

KWEST's claims are based on rights and obligations that arise under the underlying AR Agreements, which mandate arbitration of all disputes. Additionally, because KWEST is Bhella's affiliate, it is bound by Bhella's arbitration agreement with Sprint to arbitrate its claims against Sprint. This Court should find that KWEST is estopped to deny that it is obligated to arbitrate its claims against the defendants pursuant to the Sprint-United AR Agreement, the 2014 Employee Handbook, and the Sprint-Bhella AR Agreement.

b. Assumption

Additionally, KWEST is bound by the arbitration provisions under the theory of assumption. Under Florida law, an assignee or successor who assumes the rights of a party to an agreement with a mandatory arbitration provision is also bound by that arbitration provision. See Akin Bay Co., LLC v. Von Kahle,180 So. 3d 1180, (Fla. 3d DCA 2015) (binding the nonsignatory creditor assignee to the arbitration provision in the underlying agreement between the financial advisor assignor and the debtor); see also

Cone Constructors, Inc. V. Drummond Cmty. Bank, 754 So. 2d 779, 780 (Fla. 1st DCA 2000) (finding that assignee was bound by the terms of the assigned contract, including the arbitration provision).

KWEST alleges it is United's "sub-dealer" and that pursuant to the parties alleged oral sub-dealer agreement, KWEST was the owner and operator of the Miami Store and was entitled to all of the commissions due to United under the Sprint-United AR Agreement. See Amended Complaint ¶¶ 14-19. In its Response, KWEST attempts to re-characterize its agreement with United "to operate and manage the Miami Store [as] a standard management agreement." Response at 13 (DE# 15, 2/19/16). KWEST argues that "[t]he title of the agreement is of no consequence." KWEST argues that "[p]ursuant to the sub-dealer or management agreement, KWEST is owed certain compensation for its operation and management of the Miami Store irrespective of the [underlying] dealer agreements." Id. KWEST attempts to distinguish the defendants' case law by arguing that KWEST does not seek to enforce any rights or benefits of the underlying dealer agreements. Id. at 14. KWEST maintains that its seeks to enforce its completely separate agreement with United. KWEST's argument is unpersuasive.

United obtained its authorized-Sprint-dealer rights under the Sprint-United AR Agreement that includes a mandatory arbitration provision. Additionally, Bhella assigned its authorized-Sprint-dealer rights to United in the Bhella-United A&A Agreement. The underlying Sprint-Bhella AR Agreement contained the same arbitration provision as the Sprint-United AR Agreement. Whatever rights KWEST purportedly has as an alleged "sub-dealer" of United originate from either the Sprint-United AR Agreement or the Sprint-Bhella AR Agreement that was assigned to United.

The mandatory arbitration provisions contained in both underlying agreements obligate KWEST to arbitrate its claims against the defendants on the theory of assumption. Accordingly, this Court should grant the defendants' motion to compel arbitration.

B. A Nexus to Interstate Commerce Exists

The defendants have shown that valid and enforceable arbitration provisions exist. They must also show that the contracts that contain the arbitration provisions have a nexus to interstate commerce. Steele v. Santander Consumer USA, Inc., No. 14-60741-CIV (S.D. Fla. Aug. 15, 2015) (Moreno, J.). Under the FAA, commerce is broadly construed so as to be co-extensive with the congressional power to regulate under the Commerce Clause. See Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 273-74 (1995).

The Sprint-United AR Agreement, the Sprint-Bhella AR Agreement and the 2014 Employee Handbook have a nexus to interstate commerce. Sprint and United, and in the past Bhella, are in the business of operating retail stores and providing telecommunications services to the public. Each of the parties is located in different states. Sprint is a Delaware corporation with its principal place of business in Kansas. United is a Texas corporation with its principal place of business in Texas. Bhella is a Florida Corporation with its principal place of business in Florida. United's 2014 Employee Handbook governed the Nawalrais' employment relationship with United's Miami Store.

As the purported "sub-dealer" of the defendants, KWEST maintains that it owns and operates the Miami Store and is the true beneficiary of the commissions due under the Sprint-United Agreement. See Amended Complaint at ¶ 17 (DE# 11, 2/16/16). The

undersigned finds that the defendants have shown that the contracts that contain the subject arbitration provisions have a strong nexus to interstate commerce.

C. The Arbitration Clause Covers the Claims

In order to compel arbitration, the Court must determine the third issue: whether KWEST's claims fall within the scope of the subject arbitration provisions. See Steele, No. 14-60741-CIV (S.D. Fla. Aug. 15, 2015) (Moreno, J.) (citing Gilmer, 500 U.S. at 26 (1991)). In the Eleventh Circuit, "[t]o determine what disputes the parties agreed to arbitrate, [the court] begin[s], as [it] must, with the language of the applicable arbitration provision, keeping in mind 'that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" World Rentals and Sales, LLC v. Volvo Const. Equipment Rents, Inc., 517 F.3d 1240, 1245 (11th Cir. 2008) (quoting Klay v. All Defendants, 389 F.3d 1191, 1201 (11th Cir. 2004)).

"Whether a claim falls within the scope of an arbitration agreement turns on the factual allegations in the complaint rather than the legal causes of action asserted." H.S. Gregory v. Electro-Mechanical Corp., 83 F.2d 382, 384 (11th Cir. 1996) (citations omitted). In H.S. Gregory, the Eleventh Circuit determined that

> [a]lthough couched in various terms and theories of action, every claim in this complaint targets the fact that the plaintiffs did not receive the amount of money that they thought they should have for their stock and that the buyer caused that loss.
>
> The structure of the complaint and the allegations of fact reflect that these claims all arose under the agreement. There are seven counts, and every count incorporates all of the facts alleged in the count denominated as a breach of contract claim. Thus, the complaint itself says that the facts constituting defaults under the contract are a critical part of the so-called tort claims. If the buyer had fully complied with the contract, as interpreted by the plaintiffs, there would be no tort claims.

Id. at 384-85.

Similarly, all of KWEST's claims except for tortious interference and civil theft in its Amended Complaint seek compensation for its alleged work as a purported sub-dealer of United. The alleged right to compensation either originates from the Sprint-United AR Agreement or the Sprint-Bhella AR Agreement, depending on which agreement provides the basis for KWEST's alleged sub-dealer rights. Even the tortious interference claim addresses KWEST's alleged sub-dealer rights. All of the claims asserted in KWEST's Amended Complaint incorporate by reference the general allegations in paragraphs 1 through 35 of the Amended Complaint, which generally allege non-payment of compensation based on KWEST's alleged sub-dealer agreement with United to operate the Miami Store. See Amended Complaint (DE# 11, 2/16/16).

In the present case, the arbitration clause includes "claims of every kind and nature arising out of or in connection with the negotiation, construction, validity, interpretation, performance, enforcement, operation, breach, continuation or termination of [the Sprint-Bhella AR or the Sprint-United AR] Agreement." Ex. D, E to the Motion to Compel Arbitration (DE# 8;1/27/16). The undersigned finds that arbitration provision in the Sprint-United AR Agreement, which is identical to the arbitration provision in the Sprint-Bhella AR Agreement, is a broad form arbitration clause that covers all of the claims asserted by KWEST. The defendants have met their burden of showing that the claims are covered by the arbitration provisions and the arbitration provision is valid and enforceable. Next, this Court must determine whether United waived its right to compel arbitration by seeking and obtaining temporary injunctive relief against the Nawalrais, Bhella, and KWEST in the earlier-filed Texas

state court action.

B. Waiver

KWEST argues that United waived any arbitration right it may have had when United initiated litigation in Texas state court to obtain injunctive relief and damages against non-party Bhella and the Nawalrais on December 28, 2015. "[A]n agreement to arbitrate, 'just like any other contract ..., may be waived.'" Grigsby & Assocs., Inc. v. M Securities Investment, __ F.3d __, No. 13-15208, 2105 WL 9461341, at *2 (11th Cir. Dec. 28, 2015) (quoting Ivax Corp. v. B. Braun of America, Inc., 286 F.3d 1309, 1315 (11th Cir. 2002) (quoting Burton-Dixie Corp. v. Timothy McCarthy Const. Co., 436 F.2d 405,407 (5th Cir. 1971)).[1]

To determine whether a party waived its right to arbitrate, the Eleventh Circuit established a two-prong test. First, the court determines whether "'under the totality of the circumstances,'" the party "'has acted inconsistently with the arbitration right.'" Second, the court determines "whether by doing so, that party 'has in some way prejudiced the other party.'" Id. (quoting S&H Contractors, Inc. v. A.J. Taft Coal Co., 906 F.2d 1507, 1514 (11th Cir. 1990) (citations omitted in original). "There is no set rule ... as to what constitutes a waiver ... of the arbitration agreement." Id. (quoting Burton-Dixie Corp., 436 F.2d at 408). "Whether waiver has occurred 'depends upon the facts of each case.'" Id.

"A party who 'substantially invokes the litigation machinery prior to demanding

[1]The Eleventh Circuit in Bonner v. City of Prichard, 661 F. 2d 1206, 1207 (11th Cir. 1981) (en banc), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

arbitration may waive its right to arbitrate.'" Id. (quoting S&S Contractors, Inc., 906 F.2d 1514 (alterations and internal quotations omitted in original)). When determining prejudice, courts may consider "'the length of delay in demanding arbitration and the expense incurred by [the other] party from participating in the litigation process.'" Id. (quoting S&S Contractors, Inc., 906 F.2d 1514). The party asserting waiver "'bears a heavy burden of proof.'" Id. (quoting Krinsk v. SunTrust Banks, Inc., 654 F.3d 1194, 1200 n.17) (internal quotation omitted)). "A district court retains jurisdiction to consider an application for a preliminary injunction even if the matter has already been referred to arbitration, and in some cases, even after the arbitrator himself has refused to grant injunctive relief." Acquaire v. Canada Dry Bottling, 906 F. Supp. 819, 831 (E.D.N.Y. 1995) (citing Roso-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co., 749 F.2d 124, 125-26 (2d Cir. 1984)).

Additionally, under Florida law, "[e]xercise of an express injunction exception to arbitration does not waive the party's right to arbitration." Ayco Farms, Inc. v. Peeler, 89 So. 3d 977 (Fla. 1st DCA 2012) (citations omitted) (reversing the trial court's finding of waiver where the party seeking to compel arbitration previously sought and obtained injunctive relief pursuant to the express injunction exception contained in the agreement to arbitrate). In Peeler, the Florida appellate court found that there was no waiver of the right to arbitrate because "the injunction preserved the status quo and did not change the status of either party." Id. at 979 (citation omitted). "[C]ongressional desire to enforce arbitration agreements would frequently be frustrated if courts were precluded from issuing preliminary injunctive relief to preserve the status quo pending arbitration...." Teradyne, Inc. v. Mostek Corp., 797 F.2d 43, 51 (1st Cir. 1986); see

Frontier Bank v. R&L Trucking Co., No. 3:05-CV-901-F, 2005 WL 2654038 (M.D. Ala. Oct. 17, 2005) (following the majority rule that finds that federal courts have jurisdiction to entertain a request for injunctive relief where claims are subject to arbitration). In American Express Financial Advisors, Inc. v. Makarewicz, 122 F.3d 936, 940 (11th Cir. 1997), the Eleventh Circuit held that the district court erred in denying injunctive relief on the ground that the parties intended the arbitrator to decide whether to grant such relief where the parties' agreement expressly provided that a court of competent jurisdiction could provide injunctive relief.

The undersigned finds that United did not waive its right to seek arbitration by filing the Texas state court action. United's Texas action sought injunctive relief in the form of a temporary retraining order to maintain the status quo between the parties. Less than a month later, on January 22, 2016, United voluntarily dismissed the Texas action. Given the extremely limited nature of the proceedings before United voluntarily dismissed the Texas action, KWEST could not have expended more than minimal time and resources defending the Texas action and failed to submit evidence of either. KWEST has failed to establish prejudice that is necessary for a finding of waiver of the right to arbitrate. See Grigsby & Assoc., Inc., 2015 WL 9461341, at * 4. Because KWEST has failed to carry its heavy burden of establishing waiver, this Court should grant the defendants' motion to compel arbitration.

RECOMMENDATION

Based on the foregoing, the undersigned respectfully **RECOMMENDS** that the Defendants' Motion to Compel Arbitration (DE# 8; 1/27/16) be GRANTED and

KWEST's Motion to Stay Arbitration contained in it's response (DE# 15, 2/19/16) should be **DENIED as moot**.

The parties have fourteen (14) days from the date of receipt of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable Donald L. Graham, United States District Court Judge. Failure to file objections timely shall bar the parties from attacking on appeal the factual findings contained herein. LoConte v. Dugger, 847 F. 2d 745 (11th Cir. 1988), cert. denied, 488 U.S. 958 (1988); RTC v. Hallmark Builders, Inc., 996 F. 2d 1144, 1149 (11th Cir. 1993).

RESPECTFULLY SUBMITTED in Chambers at Miami, Florida this 7 day of April, 2016.

JOHN J. O'SULLIVAN
UNITED STATES MAGISTRATE JUDGE

Copies provided to:
United States District Judge Moreno
All counsel of record