UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 17-cv-80983-BLOOM/Hopkins

INFERNO GROUP HOLDINGS, LLC,

Plaintiff,

vs.

1000 DEGREES PIZZERIA FRANCHISE, INC.,

Defendant.

ORDER ON MOTION TO COMPEL ARBITRATION

THIS CAUSE is before the Court upon Defendant's Consolidated Motion to Compel Arbitration and Stay Litigation, or in the Alternative, Motion to Transfer Venue and Strike Plaintiff's Demand for Jury Trial, ECF No. [9], (the "Motion"). The Court has carefully reviewed the Motion, the applicable law, the parties' supporting and opposing briefs, and is otherwise fully advised of the record in this case. For the reasons that follow, the Motion is granted.

I. BACKGROUND

Plaintiff, a franchisee, filed this lawsuit seeking rescission and damages from Defendant, a franchisor, under theories of fraud in the inducement and breach of the Florida Franchise Act.[1] *See* ECF No. [1-1] at ¶ 1. In the Complaint, Plaintiff alleges that it entered into an Area Development Agreement ("ADA") with Defendant. *Id.* at ¶ 6-7. The ADA provides Plaintiff the right to open and operate Defendant's franchise locations in the Development Area, which in this

[1] Plaintiff originally filed this lawsuit in the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. *See* ECF No. [1-1]. Defendant subsequently removed this action to the District Court for the Southern District of Florida. *See* ECF No. [1].

case included nineteen South Florida counties. *Id.* at ¶¶ 36 and 38. The ADA provides that no franchise shall be licensed or operated within the area granted to Plaintiff, and to the extent restaurants are opened within that area, they are considered Development Area Restaurants. *Id.* at ¶ 37.

According to Plaintiff, Defendant fraudulently induced it to enter into the ADA based on a series of misrepresentations contained within the franchise disclosure document ("FDD"). *Id.* at ¶ 9. For example, Plaintiff alleges that Defendant misrepresented the total investment necessary to begin operations of the franchise, selectively disclosed only certain litigation in violation of franchise law, misrepresented the historical financial performance of certain restaurants, misrepresented gross sales expectations, misrepresented the number of franchises in the pipeline, and misrepresented the franchise growth rate and failure rate. *Id.* at ¶¶ 10, 14, 15, and 22-25. In addition, Plaintiff alleges that Defendant induced it to enter into the ADA by offering a complete package in which it recommended realty and construction professionals that would purportedly adhere to industry standards and assist in the development of the franchises. *Id.* at ¶ 30-31. Defendant's recommended contractor allegedly misappropriated $85,000 in funds to be used for construction of the franchise, failed to complete the project, and failed to pay multiple subcontractors. *Id.* at ¶ 32-33. In addition, Plaintiff alleges that between November of 2015 and November of 2016, Defendant sold franchises within the Development Area without any notification to Plaintiff and without making appropriate payment to Plaintiff for the sale of those franchises. *Id.* at ¶ 39.

Based on these allegations, Plaintiff seeks monetary damages and complete rescission of the ADA and the FDD. *Id.* at ¶ 46. In Count I, Plaintiff alleges a claim for violation of the

Florida Franchise Act, Fla. Stat. § 817.416, and, in Count II, Plaintiff asserts a claim for fraud in the inducement. *Id.* at ¶¶ 47-54. Plaintiff's Complaint demands a trial by jury.

In response to the Complaint, Defendant moves to compel mediation and arbitration under the ADA and other franchise contracts and seeks a stay of litigation in this Court while the mediation and arbitration process are ongoing. *See* ECF No. [9]. In the alternative, Defendant moves to transfer this case to the United States District Court for the District of New Jersey pursuant to 28 U.S.C. § 1404(a) and to strike Plaintiff's demand for a jury trial. *Id.* Plaintiff filed a timely Response in Opposition and Defendant filed a timely Reply. *See* ECF Nos. [21] and [23]. The Motion is now ripe for review.

II. LEGAL STANDARD

The Federal Arbitration Act ("FAA") provides that pre-dispute agreements to arbitrate "evidencing a transaction involving commerce" are "valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA reflects "a liberal federal policy favoring arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Section 3 of the FAA further states:

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

9 U.S.C. § 3.

"Under both federal and Florida law, there are three factors for the court to consider in determining a party's right to arbitrate: (1) a written agreement exists between the parties containing an arbitration clause; (2) an arbitrable issue exists; and (3) the right to arbitration has

not been waived." *Sims v. Clarendon Nat. Ins. Co.*, 336 F. Supp. 2d 1311, 1326 (S.D. Fla. 2004) (citing *Marine Envtl. Partners, Inc. v. Johnson*, 863 So. 2d 423, 426 (Fla. 4th DCA 2003) and *Seifert v. U.S. Home Corp.*, 750 So. 2d 633 (Fla. 1999)). Where the claim is statutory in nature, the court must consider if the authorizing legislative body intended to preclude the claim from arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 627 (1985) ("Just as it is the congressional policy manifested in the [FAA] that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable."); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) ("Although all statutory claims may not be appropriate for arbitration, having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.") (citation omitted).

Confronted with a facially valid arbitration agreement, the burden is on the party opposing arbitration to demonstrate that the agreement is invalid or the issue is otherwise non-arbitrable. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 92 (2000) ("[T]he party seeking to avoid arbitration bears the burden of establishing that Congress intended to preclude arbitration of the statutory claims at issue."); *In re Managed Care Litig.*, No. 00-1334-MD, 2009 WL 856321, at *3 (S.D. Fla. Mar. 30, 2009) ("It is the burden of the party challenging a facially valid arbitration agreement to demonstrate that the agreement is in fact unconscionable."). "By its terms, the [FAA] leaves no room for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213,

213 (1985) (emphasis in original). Thus, if the aforementioned criteria are met, the Court is required to issue an order compelling arbitration. *John B. Goodman Ltd. P'ship v. THF Const., Inc.*, 321 F.3d 1094, 1095 (11th Cir. 2003) ("Under the FAA, 9 U.S.C. § 1 *et seq.*, a district court must grant a motion to compel arbitration if it is satisfied that the parties actually agreed to arbitrate the dispute."); *Hemispherx Biopharma, Inc. v. Johannesburg Consol. Invs.*, 553 F.3d 1351, 1366 (11th Cir. 2008) ("The role of the courts is to rigorously enforce agreements to arbitrate.") (citation omitted).

III. DISCUSSION

Defendant seeks to compel pre-suit/pre-arbitration mediation and, if mediation is unsuccessful, arbitration pursuant to the terms and conditions set forth in the ADA and the Franchise Agreement signed by both parties.[2] The Court will, therefore, analyze whether the ADA and the Franchise Agreement require mediation, arbitration, or both. To do so, the Court must look to the specific language and provisions in these agreements regarding alternate dispute resolution.

A. Mediation

Starting with Defendant's request to attend pre-suit/pre-arbitration mediation, the ADA provides as follows:

> 8.1 The parties have reached this Agreement in good faith and with the belief that it is advantageous to each of them. In recognition of the strain on time,

[2] Defendant also attached franchise agreements signed by entities affiliated with Plaintiff, Inferno Holdings Delray Place, LLC and Inferno Holdings Shaddowwood Square, LLC. These affiliated entities, however, are not parties to this litigation. The Court will therefore limit its review to consideration of the ADA and the Franchise Agreement, which were signed by Plaintiff. *See* ECF No. [1-1] at 19-40 and [9-1] at 4-96. Although the Complaint does not explicitly make reference to the Franchise Agreement, it does so implicitly by seeking rescission of the ADA, the FDD "and all agreements flowing from them as unenforceable." *See* ECF No. [1-1] at 15. Significantly, Plaintiff does not contest the authenticity of the Franchise Agreement or otherwise dispute its applicability to this lawsuit. *See* ECF No. [21]. Rather, Plaintiff objects to arbitration as a whole without making reference to a specific contractual arbitration provision or an agreement. *See* ECF No. [21].

> unnecessary expense and wasted resources potentially associated with litigation and/or arbitration, and in the spirit of cooperation, the parties pledge to try to resolve any dispute amicably, without litigation or arbitration. Other than an action brought by [Defendant] under Section 8.3 of this Agreement, and with the exception of injunctive relief or specific-performance actions, **before the filing of any arbitration, you and we agree to mediate any dispute, controversy or claim** between us and/or any of our affiliates, officers, directors, managers, shareholders, members, owners, guarantors, employees or agents (each a "Franchisor Related Party"), on the one hand, and you and/or any of your affiliates, officers, directors, managers, shareholders, members, owners, guarantors, employees or agents (each a "Developer Related Party"), including without limitation, **in connection with any dispute, controversy or claim arising under, out of, in connection with or in relation to: (a) this Agreement;** (b) the parties' relationship; or **(c) the events occurring prior to the entry into this Agreement.** Good faith participation in these procedures to the greatest extent reasonably possible, despite lack of cooperation by one or more of the other parties, is a precondition to maintaining any arbitration or legal action, including any action to interpret or enforce this Agreement.

ECF No. [1-1] at § 8.1 (emphasis added).[3]

At the outset, the Court notes that Plaintiff does not dispute the scope or validity of this provision requiring pre-suit/pre-arbitration mediation. *See* ECF No. [21]. In fact, Plaintiff does not voice any opposition to Defendant's request to compel such mediation. *Id.* The Court finds that the mediation provision above applies to the claims pled in the Complaint in that they are claims arising under, out of, and in connection with the ADA to the extent that Plaintiff seeks rescission of the ADA in Count II. *See* ECF No. [1-1] at 10. Further, Plaintiff's claims in Counts I and II are premised upon Defendant's allegedly fraudulent conduct that induced it to sign the ADA, the FDD, and "all agreements flowing from them;" therefore, such claims arise under, out of, and in connection with "events occurring prior to the entry of" the ADA. As such, Plaintiff's claims are subject to the pre-suit/pre-arbitration mediation requirement of § 8.1. Based on the Court's review of this provision as applied to Plaintiff's allegations and claims pled

[3] The Franchise Agreement also contains a provision requiring that "before beginning any legal action or arbitration, the parties agree to mediate any dispute, controversy or claim between" them "in connection with or in relation to (a) this Agreement . . . (e) events occurring prior to the entry into this Agreement . . ." ECF No. [9-1] at § 24.2.

in the Complaint and Plaintiff's failure to object to the applicability or validity of this provision, the Court finds that the parties have agreed to participate in a good faith mediation in advance of filing a lawsuit or in advance of pursuing arbitration of the claims. In accordance with Section 8.1 of the ADA, the parties have agreed to mediate Plaintiff's claims before any further arbitration or litigation may take place.

B. Arbitration

As to arbitration, however, Plaintiff vehemently disputes whether the Court should enforce the arbitration provision in the ADA and the Franchise Agreement. Specifically, Plaintiff challenges the validity of the arbitration agreement, arguing that it is fraudulent and unconscionable, as well as the scope of the provision, arguing that Plaintiff's claims do not fall within the arbitration provision's purview. *See* ECF No. [21] at 1. The Court will address each argument in turn.

1. Validity of the Arbitration Agreement

Challenging the validity of the arbitration agreement, Plaintiff argues that it is procedurally unconscionable because it was offered on a take-it-or-leave-it basis and is substantively unconscionable because it "forecloses remedies otherwise available to [Plaintiff] while carving out judicial relief that is exclusively available to Defendant." ECF No. [21] at 6-7. Defendant, on the other hand, argues that the parties have delegated the question of the validity of the arbitration agreement to the arbitrator. The Court agrees with Defendant.

To address this argument, the Court must look to the language within the arbitration provision. The ADA provides, in part, as follows:

> **8.2 Arbitration**
>
> Except as qualified below and in Section 8.3, any dispute between you and us or any of our or your affiliates arising under, out of, in connection with or in relation

> to (a) this Agreement, (b) the parties' relationship, (c) the events leading up to the entry into this Agreement, (d) the Development Area, (e) the scope or **validity of the arbitration obligation under this Section 8.2 shall be submitted to binding arbitration under the authority of the Federal Arbitration Act and must be determined by arbitration** administered by the American Arbitration Association pursuant to its then-current commercial arbitration rules and procedures.
>
> . . .
>
> Further, **the arbitrator shall decide all factual, procedural or legal questions relating in any way to the dispute between the parties, including, without limitation, questions relating to whether Section 8.2 is applicable and enforceable** as against the parties; the subject matter, timeliness, and scope of the dispute, any available remedies; and **the existence of unconscionability and/or fraud in the inducement**.

ECF No. [1-1] at § 8.2 (emphasis added).

The Franchise Agreement signed by Plaintiff also contains an arbitration provision that states:

> 24.3 Arbitration. Except as provided in Article 24.4, and if not resolved by the negotiation and mediation procedures described under Section 24.2 above, any dispute, controversy or claim between you and/or a Franchisee Related Party, on the one hand, and 1000º DPFC and 1000º DPFC Related Party, on the other hand, including, without limitation, any dispute, controversy or claim arising under, out of, in connection with or in relation to: (a) this Agreement; . . . (c) the events leading up to the entry into this Agreement . . . (i) any claim based in tort or any theory of negligence; (j) or the scope or **validity of the arbitration obligation under this Article; shall be determined in New Jersey by the AAA**. The arbitration will be administered by the AAA pursuant to its Commercial Arbitration Rules then in effect by one arbitrator. . . .

ECF No. [9-1] at § 24.3 (emphasis added).

Plaintiff's first objection relates to the validity of the arbitration provisions quoted above. Section 2 of the FAA "requires the courts to enforce an arbitration provision within a contract unless 'such grounds exist at law or in equity for the revocation of any contract.'" *Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1146 (11th Cir. 2015). The Eleventh Circuit has instructed that "[a]rbitration provisions will be upheld as valid unless defeated by fraud, duress,

unconscionability, or another 'generally applicable contract defense.'" *Id.* (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67-68 (2010). It is a general rule that "[t]he arbitrability of disputes—in other words, the determination of whether the agreement applies to the parties' claims—is generally a gateway issue to be determined by the courts." *Robinson v. J & K Admin. Mgm't Sers., Inc.*, 817 F.3d 193, 195 (5th Cir. 2016) (citing *AT&T Tech., Inc. v. Comm'ns Workers of Am.*, 475 U.S. 643, 649 (1986)). "'[W]hether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy' are two examples of questions of arbitrability." *Fed. Nat'l Mortg. Ass'n v. Prowant*, 209 F. Supp. 3d 1295, 1309 (N.D. Ga. 2016) (quoting *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003)). "And if there is doubt about [whether the arbitrator should decide a certain issue,] we should resolve that doubt "'in favor of arbitration.'" *Bazzle*, 539 U.S. at 452 (quoting *Mitsubishi Motors*, 473 U.S. at 626).

However, "parties may agree to commit even threshold determinations to an arbitrator, such as whether an arbitration agreement is enforceable" and the Supreme Court has upheld such provisions, dubbed "delegation provisions," as valid. *Jackson*, 561 U.S. at 68; *Parnell*, 804 F.3d at 1146. Specifically, the Supreme Court recognizes that parties can enter into agreements "to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Jackson*, 561 U.S. at 69. Such a gateway question "is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Id.* When a party challenges the contract as a whole or another provision of the contract, it does not prevent a court from enforcing the arbitration clause because "an arbitration provision is severable from the remainder of the contract." *Id.* at 71.

Even when a party challenges the validity of an arbitration agreement, "where an arbitration agreement contains a delegation provision—committing to the arbitrator the threshold determination of whether the agreement to arbitrate is enforceable—the courts only retain jurisdiction to review a challenge to that specific provision." *Parnell*, 804 F.3d at 1144.

Here, the arbitration agreement contains such a delegation provision. It states in relevant part: "any dispute between you and us or any of our or your affiliates arising under, out of, in connection with or in relation to . . . (e) the scope or **validity of the arbitration obligation** under this Section 8.2 shall be submitted to binding arbitration under the authority of the Federal Arbitration Act and must be determined by arbitration administered by the American Arbitration Association pursuant to its then-current commercial arbitration rules and procedures." ECF No. [1-1] at § 8.2 (emphasis added). The arbitration agreement extends further to delegate "all factual, procedural or legal questions relating in any way to . . . the existence of unconscionability and/or fraud in the inducement" to the arbitrator. *Id.* As applied, this Court must address whether Plaintiff challenges the unconscionability of this delegation provision or whether it challenges the arbitration agreement as a whole.

In *Jackson*, the plaintiff argued that the "arbitration agreement as a whole [wa]s substantively unconscionable" and that he "opposed the motion to compel on the ground that the entire arbitration agreement, including the delegation clause, was unconscionable." *Jackson*, 561 U.S. at 73. Here, similar to the plaintiff in *Jackson*, nowhere in the Response does Plaintiff mention, much less challenge, the delegation provision within the arbitration agreement. *See* ECF No. [21]. Tellingly, Plaintiff does not even acknowledge the existence of the delegation clause, arguing that "'the question of arbitrability,' is an issue for this Court to decide." *Id.* at 5. To that end, Plaintiff generally argues that "[t]he alleged arbitration agreement here is not legally

binding because it is unconscionable," "'[t]he arbitration provision is substantively unconscionable because it forecloses remedies otherwise available to Inferno," and "the alleged agreement directly limits the remedies available to Inferno" without any suggestion that the delegation provision, standing alone, is unconscionable. Although Plaintiff generally challenges the arbitration provision as both procedurally and substantively unconscionable under Florida law, the Court need not consider these arguments as they are not specific to the delegation provision at issue. *Jackson*, 561 U.S. at 73 ("But we need not consider that claim [referring to the arbitration agreement's procedural and substantive unconscionability] because none of Jackson's substantive unconscionability challenges was specific to the delegation provision."). Consistent with the Supreme Court's instructions, Plaintiff's failure to specifically challenge the delegation provision requires that this Court "treat it as valid under § 2 [of the FAA], and [] enforce it under §§ 3 and 4, leaving any challenge to the validity of the [a]greement as a whole for the arbitrator." *Id.* at 72; *see also Parnell*, 804 F.3d at 1149 ("[T]he result in this case merely follows the directive set forth in [*Jackson*] and emphasizes that when a would-be plaintiff seeks to challenge an arbitration agreement containing a delegation provision, he or she must challenge the delegation provision directly."). This does not preclude Plaintiff from challenging, before the arbitrator, the validity of the arbitration agreement or from otherwise challenging the enforceability of the ADA and the Franchise Agreement.

2. Scope of the Arbitration Agreement

Plaintiff next objects to arbitration on the ground that its claims do not fall within the arbitration provision's scope. In support of this argument, Plaintiff argues that "the scope clause here only includes claims that have a 'significant relationship' to the contract, or where a 'contractual nexus' exists between the claims and the contract." *See* ECF No. [21] at 8.

Expanding upon that argument, Plaintiff contends that because a claim does not have a nexus to a contract if it pertains to a duty otherwise imposed by law and Plaintiff's claims here are based on duties imposed by Florida statutory and common law (Florida Franchise Act and fraud in the inducement), Plaintiff's claims fall outside the scope of the arbitration provision. This argument, however, fails to quote or cite to any language from the arbitration provision supporting such an interpretation and fails to acknowledge that the parties have delegated this decision to the arbitrator.

The arbitration provision of the ADA provides in part: "any dispute between you and us . . . arising under, out of, in connection with or in relation to (e) **the scope** or validity **of the arbitration obligation under this Section 8.2 shall be submitted to binding arbitration** under the authority of the Federal Arbitration Act and must be determined by arbitration administered by the American Arbitration Association pursuant to its then-current commercial arbitration rules and procedures." ECF No. [1-1] at § 8.2 (emphasis added). Similarly, the arbitration provision of the Franchise Agreement states in part: "any dispute, controversy or claim between you . . . and 1000º DPFC . . . including, without limitation, any dispute, controversy or claim arising under, out of, in connection with or in relation to . . . the **scope** or validity **of the arbitration obligation under this Article; shall be determined in New Jersey by the AAA**. . . ." ECF No. [9-1] at § 24.3 (emphasis added).

Much like the parties delegated any disputes surrounding the validity of the arbitration provision to the arbitrator, they have likewise delegated the scope of the arbitration provision to the arbitrator. As explained above, although Plaintiff may have challenged the arbitration provision as a whole on grounds of procedural and substantive unconscionability, Plaintiff has not specifically challenged the delegation provision. Thus, the Court remains bound to find it

valid under § 2 of the FAA and is required to enforce it under §§ 3 and 4. *Jackson*, 561 U.S. at 72. Plaintiff is not precluded from raising, before the arbitrator, any challenges to the scope of the arbitration provision.

C. Alternate Relief

Defendant has requested alternative forms of relief, such as enforcement of a forum selection clause, choice-of-law clause, and a request to strike Plaintiff's claim for a jury demand. In light of the Court's conclusion that this matter is subject to mediation, followed by arbitration if mediation proves unsuccessful, the Court need not decide the alternative forms of relief requested in the Motion. To the extent that Plaintiff disputes the applicability of New Jersey law as it does in its Response here, Plaintiff may raise this objection before the arbitrator. For the reasons explained above, Defendant's Motion is granted.

IV. CONCLUSION

For the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant's Consolidated Motion to Compel Arbitration and Stay Litigation, or in the Alternative, Motion to Transfer Venue and Strike Plaintiff's Demand for Jury Trial, **ECF No. [9]**, is **GRANTED.**
2. The parties shall mediate all issues raised in Plaintiff's Complaint in accordance with § 8.1 of the Area Development Agreement.
3. Should the parties reach an impasse at mediation, they shall submit all claims asserted in the Complaint to arbitration in accordance with § 8.2 of the Area Development Agreement and § 24.3 of the Franchise Agreement.
4. This matter is **STAYED** pending the mediation and arbitration of Plaintiff's claims, and is therefore administratively **CLOSED**. The Clerk of Court is directed

to **CLOSE** this matter for administrative purposes. After mediation and arbitration have concluded, either party may seek to reopen the case.

5. All pending motions are **DENIED AS MOOT**, and any pending deadlines are **TERMINATED.**

DONE AND ORDERED in Miami, Florida, this 27th day of November, 2017.

BETH BLOOM
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record