UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DOCTOR'S ASSOCIATES, INC., Plaintiff,	:	CIVIL ACTION NO. 3:17-CV-2019 (JCH)
v.	:	
JACK EL TURK, Defendant.	:	FEBRUARY 28, 2018

RULING ON PETITION TO COMPEL ARBITRATION (DOC. NO. 1) AND MOTION TO DISMISS PETITION TO COMPEL ARBITRATION (DOC. NO. 19)

This case comes before the court pursuant to a Petition to Compel Arbitration ("Petition") (Doc. No. 1) filed by Doctor's Associates, Inc. ("DAI") in connection with counterclaims and a third-party complaint filed by the defendant, Jack El Turk ("El Turk"), in Ohio state court. El Turk, in turn, filed an Opposition and Motion to Dismiss the Petition (Doc. No. 19), arguing that DAI's Petition lacks standing, that this court lacks jurisdiction to decide it, that DAI may not compel arbitration of claims brought against non-parties to the arbitration agreement, and that the claims El Turks raised in Ohio state court are not subject to the arbitration agreement. See generally Motion to Dismiss ("Def.'s Mot.").

For the reasons stated below, DAI's Petition to Compel Arbitration is granted, and El Turk's Motion to Dismiss is denied.

I. FACTUAL BACKGROUND

DAI, a Florida corporation with its principal place of business in Connecticut, is the franchisor of Subway sandwich shops. See Petition at ¶ 1; Def.'s Mot. at 3. El Turk is a resident of Ohio. Petition at ¶ 3; Def.'s Mot. at 3. On or about May 11, 2007, DAI and El Turk executed a written contract, Franchise Agreement # 4582 (the "Franchise

Agreement'), allowing El Turk to operate a Subway franchise in the western part of Cuyahoga County, Ohio. See Exh. 2, Petition ("Franchise Agreement") (Doc. No. 1-5). Paragraph 10 of the Franchise Agreement is a broadly worded arbitration clause, which provides, in pertinent part, as follows:

> a. Any dispute, controversy or claim arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration. . . .
>
> b. The parties agree that Bridgeport, Connecticut shall be the site for all arbitration hearings held under this Paragraph 10 . . . .
>
> c. If you breach the terms of your Sublease, the Sublessor, whether us or our designee, may exercise its rights under the Sublease, including to evict you from the franchised location. Any action brought by the Sublessor to enforce the Sublease, including actions brought pursuant to the cross-default clause in Paragraph 6 of the Sublease (which provides that a breach of the Franchise Agreement is a breach of the Sublease), is not to be construed as an arbitrable dispute.
>
> . . . .
>
> d. You may only seek damages or any remedy under law or equity for any arbitrable claim against us or our successors or assigns. You agree that our Affiliates, shareholders, directors, officers, employees, agents and representatives, and their affiliates, shall not be liable nor named as a party in any arbitration or litigation proceeding commenced by you where the claim arises out of or relates to this Agreement. You further agree that the foregoing parties are intended beneficiaries of the arbitration clause; and that all claims against them that arise out of or related to this Agreement must be resolved with us through arbitration. If you name a party in any arbitration or litigation proceeding in violation of this Subparagraph 10.d, you will reimburse us for reasonable costs incurred, including but not limited to, arbitration fees, court costs, lawyers' fees, management preparation time, witness fees, and travel expenses incurred by us or the party.
>
> . . . .

> f. Any disputes concerning the enforceability or scope of the arbitration clause shall be resolved pursuant to the Federal Arbitration Act, 9 U.S.C. § et seq. ("FAA"), and the parties agree that the FAA preempts any state law restrictions (including the site of the arbitration) on the enforcement of the arbitration clause in this Agreement. . . . If, prior to the Arbitrator's final decision, either we or you commence an action in any court of a claim that arises out of or relates to this Agreement (except for the purpose of enforcing the arbitration clause or as otherwise permitted by this Agreement), that party will be responsible for the other party's expenses of enforcing the arbitration clause, including court costs, arbitration filing fees and other costs and attorney's fees.

Franchise Agreement at ¶ 10.

On or about October 13, 2015, DAI filed an arbitration seeking to terminate El Turk as a Subway franchisee. Petition at ¶ 10. In that arbitration, DAI alleged damages under $10,000. See Exh. 13, Def.'s Mot. (Doc. No. 19-14). Following an arbitration hearing, in which both parties participated and were represented by counsel, the arbitrator awarded judgment in favor of DAI, terminating El Turk's Franchise Agreement, on January 25, 2017. Petition at ¶ 10; Def.'s Mot. at 5. On February 17, 2017, DAI filed an Application to Confirm the Arbitration Award in Connecticut Superior Court. The parties agreed to a Consent Judgment, which the Connecticut Superior Court entered as a Judgment. See Exh. C, Petition ("Consent Judgment") (Doc. No. 1-7); see also Def.'s Mot. at 5. In relevant part, the Consent Judgment provided the following:

> (a) Franchisee consents to the confirmation of the Final Arbitration Award and further consents to any enforcement of the said award and/or the Judgment.
>
> (b) Franchisee shall consent to the domestication of/recognition of the sister state judgment in the state of Ohio.
>
> (c) Franchisee shall consent to any eviction proceeding initiated by DAI or any of its affiliates.

> (d) Franchisee is afforded the opportunity to sell SUBWAY restaurant number 4582 and will be permitted to do so until a judgment for possession is issued by any court having jurisdiction.

Consent Judgment at 18.

Paragraph 9 of the Franchise Agreement governs "transfer and assignment of the restaurant." Paragraph 9 places conditions on transfer of Subway franchises, including that DAI must "approve your contract with the purchaser" and that "each purchaser [must have] a satisfactory credit rating, and [be] of good moral character." Franchise Agreement at 10–11 ¶ 9.

Following the entry of the Consent Judgment in Connecticut state court, El Turk made two attempts to sell his franchise, both to current Subway franchisees. See Def.'s Mot. at 5–6. DAI declined both transfers. See id.; see also Declaration of David Cousins ("Cousins Aff.") (Doc. No. 1-4) at ¶ 12.

On August 29, 2017, DAI filed an action to domesticate the Connecticut Judgment in Ohio state court, which the Ohio state court granted on October 31, 2017, over El Turk's objection. See Petition at ¶ 12; Def.'s Mot. at 5.

On August 31, 2017, Subway Real Estate, LLC ("SRE"), a leasing company for Subway franchises, served on El Turk a three-day notice to quit pursuant to the cross default provision in El Turk's franchise sublease. See Exh. D, Petition (Doc. No. 1-8) ("You are being evicted from the foregoing premises as a result of the termination of your Sublease pursuant to the Arbitration Award dated January 25, 2017 . . . ."). El Turk did not vacate the premises. On September 12, 2017, SRE filed an eviction action in Berea Municipal Court, Cuyahoga County Ohio (the "Ohio Lawsuit"). See Petition at ¶ 14; Exh. E, Petition (Doc. No. 1-9).

On September 25, 2017, El Turk filed the following documents in the Ohio Lawsuit: (1) a Motion to Dismiss, Exh. 16, Def.'s Mot. (Doc. No. 19-17); and (2) an Answer, Counterclaim, and Third-Party Complaint ("Third-Party Complaint"), Exh. 17, Def.'s Mot. (Doc. No. 19-18). The Third-Party Complaint was alleged against Dan Marcantonio ("Marcantonio"), Charles Lerg ("Lerg"), Thomas Humphries ("Humphries"), and Nick Moschouris ("Moschouris"), who are all employed as Development Agents for DAI.[1] Id. DAI describes the role that DAs play as follows:

> Development Agents are DAI's primary representatives in the field. They provide wide-ranging, day-to-day support and assistance to franchisees in all their operations, including food preparation and safety issues, customer relations, sales, site selection and leasing. Development Agents conduct store inspections to make sure that franchisees are adhering to the long and detailed Subway Operations Manual and maintain certain sales volumes. In addition, Development Agents provide DAI recommendation on whether franchisee candidates should be approved.

Petition at ¶ 19 n.2. In addition to these responsibilities, DAs may acquire and operate their own Subway franchises.

Marcantonio, Lerg, Humphries, and Moschouris (the "DAs") oversee the Western section of Cuyahoga County, Ohio, where El Turk's franchise was located. Cousins Aff. at ¶¶ 9, 11. El Turk alleges that the DAs operate their own franchises and "have been attempting to acquire restaurants in the territory." Def.'s Mot. at 6.

[1] The court notes that, contrary to DAI's statement that "El Turk filed [the] Third-Party claim against DAI and its Development Agents," the Third-Party Complaint lists only Marcantonio, Lerg, Humphries, and Moschouris—not DAI. Petition at ¶ 17; see Third-Party Complaint at 1.

II. DISCUSSION

In his Motion to Dismiss, El Turk raises the following arguments: (1) that DAI lacks standing to compel arbitration, see Def.'s Mot. at 9–11; (2) that Ohio courts have jurisdiction over the Third-Party Complaint and, therefore, any petition to compel arbitration must be filed in that jurisdiction, id. at 11–12; (3) that this court lacks subject matter jurisdiction to resolve this case, id. at 13; and (4) that the arbitration clause in the Franchise Agreement does not apply to the claims raised Ohio Lawsuit for a variety of reasons, id. at 13–15. The court addresses each argument in turn.

A. Standing

El Turk argues that DAI lacks standing to compel arbitration because DAI is not a party to the Ohio Lawsuit. Def.'s Mot. at 9–11. DAI argues that it has standing to sue to enforce its contractual rights, that the FAA confers standing to a party "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration," see title 9, section 4 of the United States Code, and further that, "because development agents are intended beneficiaries of the arbitration clause in Subway franchise agreements, DAI has standing to seek an order protecting those individuals from litigation improperly brought against them," Pl.'s Mem. at 3–4.

"[T]he irreducible constitutional minimum of standing contains three elements," including: (1) "an 'injury in fact'—an invasion of a legal protected interest"; (2) "a causal connection between the injury and the conduct complained of," and (3) a likelihood that a favorable decision could redress the alleged injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (internal citations and quotations omitted).

With respect to the first requirement, El Turk argues that DAI has not been injured by the pending Ohio Lawsuit because "DAI is not a party to the [Ohio] litigation" and lacks standing to raise the interest of the DAs or SRE. Def.'s Mot. at 10. However, the court agrees with DAI that, under the FAA, a party may be "aggrieved" such that the injury requirement for standing is satisfied even if they are not a party to the underlying litigation. Another court in this District has previously rejected the same argument in a different case where DAI moved to compel arbitration and where the underlying litigation was against owners and agents of DAI but not DAI itself. Doctor's Assocs., Inc. v. Hollingsworth, 949 F. Supp. 77, 83 (D. Conn. 1996). "The fact that the franchisees sued the owners and agents of DAI and did not name DAI as a party does not prevent DAI from being an aggrieved party." Id. This court agrees with the Hollingsworth decision that an alleged violation of the arbitration agreement violates DAI's rights under the Franchise Agreement and the FAA, which satisfies the "injury in fact" requirement.

Having concluded that the Ohio Litigation satisfies the "injury in fact" requirement, there can be little question that it also satisfies the "causal connection" requirement. The causation requirement demands that the injury be "fairly . . . trace[able] to the challenged conduct of the defendant, and not . . . th[e] result [of] independent action of some third party not before the court." Lujan, 504 U.S. at 560 (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976)). Here, the alleged "injury" of the Third-Party Complaint can clearly be traced to El Turk's conduct, as El Turk filed the Third-Party Complaint. Indeed, El Turk's argument to the contrary simply assumes that DAI is not injured by the Ohio Litigation and then argues that any other injury DAI

has experienced has "no reasonable causal connection" to the Ohio Lawsuit. Def.'s Mot. at 11.

Finally, as to the redressability requirement, El Turk argues that this court cannot redress DAI's injury because "DAI has suffered no injury to even be redressed," and, "[e]ven if DAI has somehow suffered an injury[,] . . . this court cannot issue an order to compel arbitration on a claim El Turk did not bring in his action." Id. In light of the court's conclusion that DAI is injured by the Ohio Litigation, however, and because DAI's Petition seeks to compel arbitration of the claims El Turk raised in his Third-Party Complaint in that case, the court concludes that DAI's Petition satisfies the requirement that "a favorable decision could redress the alleged injury." Lujan, 504 U.S. at 560.

B. Ohio State Court Jurisdiction

In his Motion to Dismiss, El Turk argues that this court lacks jurisdiction to decide DAI's Petition because "[t]he Ohio Courts have jurisdiction over the Complaint." Def.'s Mot. at 11. El Turk does not cite any authority for this argument. DAI argues that it has a "statutory right to compel arbitration under 9 U.S.C. § 4," which "is not affected by SRE filing an eviction action in Ohio, or by SRE choosing not to remove that lawsuit to federal court." Pl.'s Mem. at 7.

The Franchise Agreement contains a forum selection clause, which provides that Bridgeport, Connecticut, "shall be the site for all arbitration hearings" and that the Franchise Agreement "will be governed by and construed in accordance with the substantive laws of the State of Connecticut." Franchise Agreement (Doc. No. 1-5) at ¶¶ 10, 13. In his Motion to Dismiss, El Turk does not argue that the forum selection clause is unenforceable, and the court knows of no reason why it would be. See D.H.

Blair & Co. v. Gottdiener, 462 F.3d 95, 103 (2d Cir. 2006) (holding that a forum selection clause is enforceable if it was (1) "reasonably communicated to the parties," (2) not "obtained through fraud or overreaching," and (2) enforcement would not be clearly "unreasonable and unjust"); Doctor's Assocs., Inc. v. Pahwa, No. 3:16-CV-446 (JCH), 2016 WL 7635748, at **10–11 (D. Conn. Nov. 3, 2016) (applying the Gottdiener factors to the same forum selection clause at issue here and concluding it was enforceable).

The FAA states that petitions to compel arbitration may be filed in "any United States district court which, save for such agreement, would have jurisdiction . . . of the subject matter of a suit arising out of the controversy between the parties." 9 U.S.C. § 4. Because the District of Connecticut would be a proper forum to litigate the merits of the claims arising under the Franchise Agreement absent the arbitration clause, the court agrees with DAI that the District of Connecticut is a proper forum for DAI's Petition.

It is unclear from El Turk's Motion whether he is attempting to argue that, by filing an eviction action in the Ohio municipal court, SRE waived its right and/or the right of DAI to enforce the arbitration clause in the Franchise Agreement. See Def.'s Mot. ("By deciding to file an action in Berea Municipal Court, SRE selected its forum and cannot now, through DAI, attempt to change the forum."). Assuming, for the sake of argument, that SRE could waive DAI's right to enforce the arbitration clause in the Franchise Agreement, the Second Circuit has already held that initiating eviction proceedings does not waive an arbitration clause with respect to other claims. See Doctor's Assocs., Inc. v. Distajo, 107 F.3d 126, 132–33 (2d Cir. 1997) [hereinafter "Distajo II"] (holding that initiation of eviction proceedings in state court "did not constitute 'protracted' litigation,

which could result in a waiver of its right to arbitrate" and agreeing with DAI that "[t]here is no conceivable policy justification for a rule that, by exercising the reasonable business judgment to sue to evict someone from leased premises or to collect a debt of less than $10,000, a party waives for all time its right to arbitrate every other dispute imaginable . . . .").

El Turk also argues that, because "none of the parties [to the Ohio Lawsuit] moved to remove the [Ohio Lawsuit] to Federal Court, the matter is not properly before the Federal Court and the Ohio Courts must rule on any allegation that claims are arbitrable." Def.'s Mot. at 12. El Turk provides no supporting argument or authority for this statement, and the court is aware of none. Because the Franchise Agreement and the FAA confer authority on this court to decide DAI's Petition, it is irrelevant that SRE and the DAs did not move to remove the Ohio Lawsuit to federal court.

Finally, El Turk argues that the Rooker-Feldman doctrine bars this court from deciding DAI's Petition because it "is an attempt to engage in a premature appeal of the State Court actions." Def.'s Mot. at 12. The Rooker-Feldman doctrine "rests on the principle that 'a United States District Court has no authority to review final judgments of a state court in judicial proceedings.'" Distajo II, 107 F.3d at 137 (quoting D.C. Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983)). This argument fails because there are no allegations by either DAI or El Turk that the Ohio court has ruled such that DAI is attempting to appeal a state court judgment. See id. at 138; see also id. (noting that the Second Circuit was aware of no case "applying the Rooker-Feldman doctrine to deprive a district court of subject matter jurisdiction over a petition to compel arbitration under [the FAA]"). Indeed, as both parties describe, the Ohio state court has ruled in SRE's

favor repeatedly, over El Turk's objections. Notably, El Turk cites this court to no state court ruling that DAI is allegedly attempting to appeal in a federal forum, but merely argues in general that the Petition is a "premature appeal and attempt to circumvent the Ohio action." Def.'s Mot. at 12.

In support of its Rooker-Feldman argument, El Turk cites the court to a single case, from the Fourth Circuit, in which the court concluded that "the order in which the federal action was filed and the state decision issued is a relevant, but not controlling, consideration in answering the key question of 'whether a party seeks the federal district court to review a state court decision and thus pass upon the merits of that state court decision.'" American Reliable Ins. Co. v. Stillwell, 336 F.3d 311, 318 (4th Cir. 2003) (quoting Jordahl v. Democratic Party of Virginia, 122 F.3d 192, 202 (4th Cir. 1997)). In American Reliable, however, the Fourth Circuit relied heavily on the procedural history of the state and federal cases, which strongly suggested that the appellants had filed their petition to compel arbitration prior to a state ruling in order to circumvent the Rooker-Feldman doctrine, and had no intention of following through on the petition to compel arbitration if they received a favorable ruling in state court. As the Fourth Circuit described:

> Appellants filed their federal action to compel arbitration prior to the state court's decision on Appellants' identical motion in state court. Appellants did not serve the [Appellees] with the complaint, however, intending 'to let the federal complaint sit in the Clerk's office without serving it while awaiting the state-court decision' and to pursue it only if Appellants lost in state court. And, in fact, Appellants served process two days after the state court rendered them an unfavorable decision, and immediately filed an identical motion to compel arbitration in federal district court.

Id. (internal citations omitted). This procedural history bears no resemblance to DAI's actions in this case. Not only has the state court not issued a ruling on any of the issues raised by El Turk in his Third-Party Complaint, but all the rulings they have issued have been favorable to DAI and its agents. Perhaps most importantly, DAI filed its Petition approximately two-and-a-half months after El Turk filed his Third-Party Complaint, and served its Petition and related filings two weeks later. See First Affidavit of Service (Doc. No. 9). Therefore, there is no indication that DAI intentionally delayed filing or serving its Petition in order to circumvent the Rooker-Feldman doctrine. Without more, the court cannot conclude that Rooker-Feldman applies to block the Petition.

In sum, although El Turk has raised a number of arguments about the jurisdiction of the Ohio state court to decide DAI's Petition or the lack of this court to do so, the court finds none of these arguments persuasive in light of the authority conferred on this court by the Franchise Agreement and the FAA.

C. Subject Matter Jurisdiction

In its Petition, DAI asserts that this court has diversity jurisdiction to rule on its Petition. Petition at ¶ 4. Pursuant to title 28, section 1332 of the United State Code, federal district courts may decide cases if the parties are "citizens of different States" and the amount in controversy "exceeds the sum or value of $75,000, exclusive of interests and costs." 28 U.S.C. § 1332. El Turk argues that this court lacks diversity jurisdiction because the parties lack diversity of citizenship and the amount in controversy is less than $75,000. Def.'s Mot. at 13.

1. Diversity of Citizenship

With respect to the diversity of citizenship issue, the parties do not dispute that El Turk is a citizen of Ohio and that DAI is a Florida corporation with its principal place of business in Connecticut. See Def.'s Mot. at 13 (acknowledging that "there is diversity between DAI and El Turk"). El Turk's argument on the subject of diversity of citizenship is far from clear: he argues that "DAI's citizenship is not relevant as DAI is not a proper party," while simultaneously arguing that "one cannot consider the citizenship of SRE, Marcantonio, Lerg, Humphries nor Moscouris as they are not parties to this action." Id. However, even liberally construing this as an argument that SRE and the DAs are necessary parties to the above-captioned litigation whose joinder would destroy diversity of citizenship, this argument fails. In a lengthy analysis in a different DAI case, the Second Circuit considered this argument in a very similar factual context, rejecting the defendants' argument that DAI's development agents were or should have been parties to the case, therefore destroying diversity:

> The "parties" to which § 4 of the FAA refers are the parties to the petition to compel. As with any federal action, diversity of citizenship is determined by reference to the parties named in the proceeding before the district court, as well as any indispensable parties who must be joined pursuant to Rule 19 of the Federal Rules of Civil Procedure. Where joinder of a party would destroy subject matter jurisdiction, the court must dismiss the action if that party is "indispensable" to the litigation. But individuals who are not parties to the arbitration agreement cannot be "indispensable" parties under Rule 19(b) if they do not meet either of the threshold tests of Rule 19(a).

Doctor's Assocs., Inc. v. Distajo, 66 F.3d 438, 445–46 (2d Cir. 1995) [hereinafter "Distajo I"] (internal citations omitted). Pursuant to Rule 19, in order to be a "required" party, the court must find either that "in that person's absence, the court cannot accord

complete relief among existing parties" or the absence of that person may "impair or impede the person's ability to protect the interest" or "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." Fed. R. Civ. P. 19(a). In Distajo I, the Second Circuit found the first threshold requirement was not satisfied where, as here, the relief requested as "an order compelling arbitration," which could be ordered "regardless of whether DAI's development agents (nonparties to the arbitration agreement) [were] present." Distajo I, 66 F.3d at 446. As to the second threshold requirement, the Second Circuit found that risk was "overcome in this context by the FAA's strong bias in favor of arbitration." Id. ("Indeed, the Supreme Court has categorically stated that the FAA requires courts to enforce an arbitration agreement 'nothwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.'" (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20 (1983)).

In this case, the court concludes that the Second Circuit's reasoning in Distajo I is not only persuasive but controlling. Therefore, to the extent that El Turk is arguing that SRE or the DAs are required parties to this litigation such that diversity of citizenship is destroyed, the court does not agree.

2. Amount in Controversy Requirement

In his Motion to Dismiss, El Turk argues that the amount in controversy is less than $75,000 because "DAI claimed in its arbitration demand that the amount in controversy relating to the dispute between it and El Turk was under $10,000." See Exh. 13, Mot. to Dismiss (Doc. No. 19-14) at ¶ 3. However, as DAI points out, the relevant question for determining the amount in controversy in the context of a petition

to compel arbitration is the amount in controversy in the underlying litigation. See Doctor's Assocs., Inc. v. Hamilton, 150 F.3d 157, 160 (2d Cir. 1998) ("In the context of a petition to compel arbitration, we have advised district courts to look through to the possible award resulting from the desired arbitration since the petition to compel arbitration is only the initial step in a litigation which seeks as its goal a judgment affirming the award.").

In the Ohio Lawsuit, El Turk alleges that he was twice prevented from transferring his store and has attached copies of sales contracts reflecting proposed sales prices of $265,000 and $275,000. See Exh. 7, Def.'s Mot. (Doc. No. 19-8) (contract between Jack El Turk, Fred Fannon, and Imad Nader); Exh. 9, Def.'s Mot. (Doc. No. 19-10) (contract between Jack El Turk and Rajesh Patel); see also Exh. 20, Def.'s Mot. (Doc. No. 19-21) (El Turk's Objection to Magistrate's Decision in the Ohio Lawsuit, in which El Turk argues that his "alleged damages are genuine" as evidence by "[t]he attached purchase offers"). Given the fact that El Turk himself asserts damages well in excess of $75,000 in the Ohio Lawsuit, the court concludes that DAI has satisfied the amount-in-controversy requirement in its Petition. See also Hamilton, 150 F.3d at 160–61 (holding that the amount in controversy is determined by claims raised in underlying litigation); Doctor's Assocs., Inc. v. Repins, No. 17-CV-323 (JCH), 2018 WL 513722, at *5 (D. Conn. Jan. 22, 2018) (same).

The court concludes that DAI has satisfied the amount-in-controversy requirement for diversity jurisdiction.

D. Parties to the Arbitration Clause

In his Motion to Dismiss, El Turk argues that DAI cannot compel arbitration of claims that El Turk brought against non-parties to the arbitration agreement, including SRE and the DAs. See Def.'s Mot. at 13–14. Pursuant to the Franchise Agreement, however, DAI may compel arbitration of "[a]ny dispute, controversy, or claim arising out of or relating to this Agreement or breach thereof." Franchise Agreement at ¶ 10. The Franchise Agreement further provides that DAI's

> Affiliates, shareholders, directors, offers, employees, agents and representatives, and their affiliates, shall not be liable nor named as a party in any arbitration or litigation proceeding commenced by you where the claim arises out of or relates to this Agreement. You further agree that the foregoing parties are intended beneficiaries of the arbitration clause, and that all claims against them that arise out of or relate to this Agreement must be resolved with us through arbitration.

Id. at ¶ 10(d) (emphasis added). Based on the language of the Franchise Agreement, then, the operative question is not against whom claims were brought in the Third-Party Complaint but whether those claims "arise out of or relate to" the Franchise Agreement.

El Turk argues that arbitration cannot be compelled as to claims against SRE or the DAs because SRE and the DAs were not parties to the Franchise Agreement and therefore there is no "privity or consideration." Def.'s Mot. at 13. However, DAI is the only party who filed a Petition to Compel Arbitration, and as the court has already concluded above, see supra Section II(C)(2), SRE and the DAs need not be joined as parties to this action. It is, therefore, irrelevant that SRE and the DAs were not parties to the Franchise Agreement.

El Turk further argues that the contract that does exist between he and SRE—a sublease agreement—contains no arbitration clause. Def.'s Mot. at 14. This argument

fails for the same reason that the lack of privity or consideration between El Turk and SRE or the DAs is irrelevant: SRE did not petition to compel arbitration, DAI did. It is therefore irrelevant whether the sublease agreement contains an arbitration clause or not.

El Turk also argues that "DAI cannot bootstrap non-parties to the Franchise Agreement into the arbitration terms in the Franchise Agreement" because "[t]he requirement that El Turk take 'affiliates' to arbitration is unenforceable and ambiguous." Id. El Turk cites no authority for the argument that the arbitration clause at issue in this case is "unenforceable," and the court knows of none. Furthermore, El Turk misstates the substance of the arbitration clause: the Franchise Agreement does not state that El Turk must arbitrate all conflicts with DAI's affiliates and agents, but rather that El Turk must arbitrate all claims arising out of or related to the Franchise Agreement with DAI. In fact, as the language quoted above reflects, the Franchise Agreement expressly prohibits El Turk from naming affiliates or agents as parties to arbitration or litigation that arises out of the Franchise Agreement. See Franchise Agreement at ¶ 10(d). Therefore, this argument fails for the same reason that the last two fail: DAI is not petitioning to compel arbitration between SRE or the DAs and El Turk, but only between DAI and El Turk, for which the Franchise Agreement expressly provides.

In addition, El Turk asserts that the use of the word "affiliates" in the Franchise Agreement is ambiguous, and, because DAI drafted the Franchise Agreement, that ambiguity should be construed against DAI, presumably to exclude SRE and the DAs. See Def.'s Mot. at 14. The court does not dispute El Turk's legal argument that ambiguities in a contract are to be construed against the drafter. See Imperial Cas. and

Indem. Co. v. State, 246 Conn. 313, 329 (1998). However, this argument fails for the same reason that the preceding three arguments failed: the operative question for this court is whether the claims alleged in the Third-Party Complaint should be arbitrated, not whether SRE and the DAs are "affiliates" of DAI. El Turk's attempt to argue otherwise rests on the false assumption that "the Franchise Agreement declares that El Turk will take DAI's affiliates to arbitration," a statement which is plainly contradicted by the Franchise Agreement itself. Def.'s Mot. at 14.

Finally, El Turk argues that he cannot be forced to arbitrate his claims with SRE and the DAs because, even if the arbitration agreement bound him to do so, it would be unenforceable for lack of "mutuality of obligation" because SRE may bring eviction actions in state court, but El Turk must arbitrate all his claims. Id. at 15. Once again, this argument misconstrues the substance of the Franchise Agreement—arbitration of disputes with DAI—and the relief sought in the Petition—arbitration with DAI. Whether there is a lack of mutuality between El Turk and SRE or the DAs is irrelevant to DAI's Petition.

In addition, even construing this argument as an argument that mutuality is lacking between El Turk and DAI, that argument also fails. In a prior DAI case before the Second Circuit, franchisees argued that the arbitration clause was "void for lack of mutuality" because "it requires a franchisee to submit all controversies to arbitration but reserves to DAI (through its leasing companies) the right to seek summary eviction against the franchisees." Distajo I, 66 F.3d at 451. The Second Circuit described the doctrine of mutuality of obligation as "largely [a] dead letter[ ]," id., and held that "where the agreement to arbitrate is integrated into a larger unitary contract, the consideration

for the contract as a whole covers the arbitration clause as well," id. at 453 (quoting W.L. Jorden & Co., Inc. v. Blythe Indus., Inc., 702 F. Supp. 282, 284 (N.D. Ga. 1988)). Therefore, to the extent that El Turk intended to raise this argument as to DAI as well as SRE and the DAs, the court concludes that the arbitration clause is not void for lack of mutuality.

E. Scope of the Arbitration Clause

In his Sur-Reply to DAI's Reply, El Turk asserts that his Third-Party Complaint against the DAs is alleged against the DAs in their capacity as fellow franchisees, not "Affiliates" of DAI. Defendant's Reply to Petitioner's Reply ("Def.'s Reply") (Doc. No. 24) at 2 ("Notably missing from the arbitration requirement are fellow franchisees."). The court agrees with El Turk to a limited degree: the Franchise Agreement does not require that franchisees arbitrate disputes with other franchisees. See Franchise Agreement at ¶ 10. However, as noted repeatedly above, the Franchise Agreement does require that El Turk arbitrate disputes arising out of or related to the Franchise Agreement.

To that point, El Turk asserts that "El Turk's counterclaim relates to the [DAs'] actions as franchisees." Def.'s Reply at 3. The court is skeptical of that assertion, as the claims El Turk raises in his Third-Party Complaint explicitly accuse the DAs of abusing their positions as development agents. See, e.g., Third-Party Complaint (Doc. No. 19-18) at ¶¶ 16–19. Regardless of the merit of this argument, however, this court lacks the authority to deny DAI's Petition on this basis, because the Franchise Agreement explicitly delegates questions of the scope of the arbitration agreement to the arbitrator. See Franchise Agreement at ¶ 10(f) ("Any disputes concerning the enforceability or scope of the arbitration clause shall be resolved pursuant to the [FAA]

. . . ."). Whether the claims that El Turk raises in his Third-Party Complaint are alleged against the DAs as franchisees and do not arise under the Franchise Agreement is, therefore, a question for the arbitrator to decide.

Ordinarily, it is the role of the district court to determine whether a dispute is arbitrable based on "(1) whether the parties have entered into a valid agreement to arbitrate, and, if so, (2) whether the dispute at issue comes within the scope of the arbitration agreement." In re Am. Express Fin. Advisors Sec. Litig., 672 F.3d 113, 128 (2d Cir. 2011). However, "the issue of arbitrability may [ ] be referred to the arbitrator if there is clear and unmistakable evidence from the arbitration agreement, as construed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator." Contec Corp. v. Remote Sol., Co., 398 F.3d 205, 208 (2d Cir. 2005) (quoting Bell v. Cendant Corp., 293 F.3d 563, 566 (2d Cir. 2002)); see also All. Bernstein Inv. Research & Mgmt., Inc. v. Schaffran, 445 F.3d 121, 125 (2d Cir. 2006). As the Supreme Court has explained, a

> delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement. [The Supreme Court has] recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. . . . An agreement to arbitrate a gateway issue 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. The additional agreement is valid under § 2 'save upon such grounds as exist at law or in equity for the revocation of any contract,' and federal courts can enforce the agreement by . . . compelling arbitration under § 4.

Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 68–70 (2010) (internal quotation marks and citations omitted).

In light of the delegation provision in the Franchise Agreement, the court concludes that the question whether the claims alleged in the Third-Party Complaint should be arbitrated is a threshold matter for the arbitrator to decide.

In his Sur-Reply, El Turk also argues that DAs are not "affiliates" within the meaning of the arbitration clause, nor are they otherwise encompassed by the arbitration clause, Def.'s Reply at 3, and further asserts that disputes arising out of sublease agreements are excluded from the arbitration agreement, id. at 4–5. These arguments, too, raise scope questions reserved to the arbitrator pursuant to the delegation provision. Because the parties—El Turk and DAI—agreed that "[a]ny dispute concerning the enforceability or scope of the arbitration clause" would be decided by the arbitrator, and because such clauses are valid and enforceable, it is not within this court's purview to determine whether and what claims arise out of the Franchise Agreement and are therefore subject to the arbitration clause.

III. COSTS AND FEES

In its Memorandum in support of its Petition, DAI asserts that El Turk "has failed, neglected and/or refused to arbitrate in accordance with the Franchise Agreement's arbitration provision" and is, therefore, "responsible for paying all of DAI's expenses, including costs and attorneys' fees for this action as well as those incurred in connection with the Ohio [Lawsuit]." Memorandum in Support of Petition to Compel Arbitration ("Pl.'s Mem.") at 9.

The Franchise Agreements state that,

> If, prior to the Arbitrator's final decision, either we or you commence an action in any court of a claim that arises out of or relates to this Agreement (except for the purpose of enforcing the arbitration clause or as otherwise permitted by

> this Agreement), that party will be responsible for the other party's expenses of enforcing the arbitration clause, including court costs, arbitration filing fees and other costs and attorney's fees.
>
> If a party [ ] commences action in any court, except to compel arbitration, or except as specifically permitted under this agreement, prior to an arbitrator's final decision . . . then that party is in default of this Agreement. . . . The defaulting party will be responsible for all expenses incurred by the other party, or the improperly named person or entities, including lawyers' fees.

Franchise Agreement at ¶ 10(f)–(g). Thus, based on the face of the Franchise Agreements, Repins appears to have agreed to pay the attorney's fees and costs associated with the Wisconsin Lawsuit, the First Federal Lawsuit, and the present lawsuit.

El Turk does not specifically address DAI's argument as to fees and costs. See Defendant's Answer (Doc. No. 20) at ¶ 21. However, DAI does not cite any authority for the proposition that a court may award attorney's fees and costs in a case such as that at bar. See Pl.'s Mem. at 9 (simply asserting that El Turk is responsible for paying these expenses). As discussed above, this court compels arbitration pursuant to the Franchise Agreements' delegation provision, thereby allowing an arbitrator to decide whether the contract's arbitration clause is valid and applicable. It is not for this court to decide whether the contract's arbitration clause is valid and applicable. See Franchise Agreement at ¶ 10(f) ("Any disputes concerning the enforceability or scope of the arbitration clause shall be resolved pursuant to the Federal Arbitration Act."). If the contract's arbitration clause is determined to be inapplicable to the claims that El Turk has alleged against SRE and the DAs, El Turk will not be required to pay expenses.

Therefore, until that initial question is decided by the arbitrator, this court has no basis upon which to order El Turk to pay attorney's fees or costs.

DAI's Petition to Compel Arbitration is denied to the extent that it seeks attorney's fees and costs.

IV. CONCLUSION

For the foregoing reasons, DAI's Petition to Compel Arbitration (Doc. No. 1) is **GRANTED IN PART** and El Turk's Motion to Dismiss (Doc. No. 19) is **DENIED**. El Turk is ordered to arbitrate the claims that he raised or could have raised against DAI or any of its affiliates, including but not limited to SRE and the DAs, in an arbitration against DAI in the manner provided by the Franchise Agreement. The case is closed.

SO ORDERED.

Dated this 28th day of February 2018 at New Haven, Connecticut.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge