IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROLAND MOYER,	:	**Civil No. 3:17-CV-2088**
	:	
Plaintiff	:	**(Judge Mariani)**
	:	
v.	:	**(Magistrate Judge Carlson)**
	:	
WELLS FARGO, et al.,	:	
	:	
Defendants	:	

REPORT AND RECOMMENDATION

I. Statement of Facts and of the Case

This case, which comes before us for consideration of a motion to compel arbitration, (Doc. 8), is an action brought by an investor, Roland Moyer, against his investment broker, Wells Fargo, and its agent, George Venizelos. (Doc. 1.) In his complaint, Moyer alleges that Venizelos, acting on behalf of Wells Fargo, fraudulently induced Moyer in 2014 to convert his brokerage accounts from a per transaction basis fee account to a flat-fee/total asset/percentage fee account, a fee conversion that redounded to the detriment of Moyer and the financial benefit of the defendants. (Id., ¶¶1-23.)

Cast against the backdrop of these well-pleaded facts, Moyer brings four claims against Venizelos and Wells Fargo, alleging that the defendants' actions constituted: (1) a breach of contract; (2) a breach of fiduciary duties; (3) fraud; and

(4) a civil RICO racketeering claim premised on fraud. (Id.) The complaint, however, clearly reveals on its face that the brokerage agreement between Moyer and Wells Fargo was subject to an arbitration clause. Specifically, Moyer has attached as Exhibit C to his complaint portions of the agreement between these parties which include a signature block titled "Client Authorization," in which Moyer "acknowledge[d] . . . receipt of the Agreement and Disclosure Document and that you have made all of the designated selections above. THE AGREEMENT CONTAINS A PRE-DISPUTE ARBITRATION CLAUSE LOCATED IN SECTION I, NO. 5 OF THE CLIENT AGREEMENT." (Doc. 1, Ex. C., p. 4)(All capitals in original).

A complete copy of this agreement is attached as an exhibit to the brief in support of the defendants' motion to compel arbitration. (Doc. 9-1.) This agreement, which is referenced in Moyer's complaint and the authenticity of which has not been contested by any party, contains a global arbitration provision, which provides as follows:

> **5. PRE-DISPUTE ARBITRATIONAGREEMENT**
>
> **This Agreement contains a pre-dispute arbitration clause. By signing an arbitration agreement, the Parties agree as follows. Party or Parties means you and WFA, together with their Affiliates, collectively:**

All of the Parties to this Agreement are giving up the right to sue each other in court, including the right to a trial by jury, except as provided by the rules of the arbitration forum in which the claim is filed.

Arbitration awards are generally final and binding; a Party's ability to reverse or modify an arbitration award is very limited. The ability of the Parties to obtain documents, witness statements and other discovery is generally more limited in arbitration than in court proceedings.

The arbitrators do not have to explain the reason(s) for their award unless, in an eligible case, a joint request for an explained decision has been submitted by all parties to the panel at least 20 days prior to the first scheduled hearing date.

The panel of arbitrators typically will include a minority of arbitrators who were or are affiliated with the securities industry.

The rules of some arbitration forums may impose time limits for bringing a claim in arbitration. . . . . In some cases, a claim that is ineligible for arbitration may be brought in court.

The rules of the arbitration forum in which the claim is filed, and any amendments thereto, shall be incorporated into this Agreement.

No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action; or who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until:

i) the class certification is denied; or
ii) the class is decertified; or
iii) the client is excluded from the class by the court.

Such forbearance to enforce an agreement to arbitrate shall not constitute a waiver of any rights under this Agreement except to the extent stated herein.

With respect to controversies or disputes which may arise between you and WFA (and/or its clearing agent), (collectively .us.), under this Agreement concerning matters involving alleged violations of the Investment Advisers Act of 1940 (.Investment Advisers Act.) or applicable state investment advisory laws, it is understood that the Securities and Exchange Commission and various state securities regulatory agencies believe that an agreement to submit disputes to arbitration does not constitute a waiver of any rights provided under the Investment Advisers Act or applicable state investment advisory laws, including the right to choose a forum, whether by arbitration or adjudication, in which to seek the resolution of disputes.

It is agreed that all controversies or disputes which may arise between you and WFA, including controversies or disputes with WFA's clearing agent (collectively, us), concerning any transaction or the construction, performance or breach of this Agreement or any other agreement between us, whether entered into prior to, on, or subsequent to the date of this Agreement, including any controversy concerning whether an issue is arbitrable, shall be determined by arbitration conducted before, and only before, an arbitration panel set up by either the Financial Industry Regulatory Authority ("FINRA") in accordance with its arbitration procedures. Any of us may initiate arbitration by filing a written claim with FINRA. Any arbitration under this Agreement will be conducted pursuant to the Federal Arbitration Act and the Laws of the State of New York. The state or federal statute of limitations, statute of repose, non claim statute or any other time bar that would be applicable to any claim filed in a court of competent jurisdiction shall be applicable to any claim filed in arbitration.

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(Doc. 9-1, SECTION I, NO. 5 OF THE CLIENT AGREEMENT)(Bold in original).

Given the broad language of this arbitration agreement, an agreement whose terms were expressly acknowledged in writing by Moyer in 2014, the defendants have moved to compel arbitration in this case. (Doc. 8.) This motion to compel arbitration is fully briefed by the parties and is, therefore, ripe for resolution.

For the reasons set forth below, it is recommended that this motion to compel arbitration be granted.

II. Discussion

A. Standard of Review

When deciding a motion to compel arbitration, a district court may rely either upon the standards governing motions to dismiss under Federal Rule of Civil Procedure 12(b)(6), or the standards governing motions for summary judgment supplied by Federal Rule of Civil Procedure 56. See Guidotti v. Legal Helpers Debt Resolution, L.L.C., 716 F.3d 764, 771-76 (3d Cir. 2013). In this regard, the Third Circuit has provided some guidance as to which standard may be appropriate under the given circumstances in a particular case:

> [W]hen it is apparent, based on the face of the complaint, and documents relied upon in the complaint, that certain of a party's claims are subject to an enforceable arbitration clause, a motion to compel arbitration should be considered under a Rule 12(b)(6) standard without discovery's delay. But if the complaint and its supporting documents are unclear regarding the agreement to arbitrate, or if the plaintiff has responded to a motion to compel arbitration with additional facts sufficient to place the agreement to arbitrate in issue,

> then the parties should be entitled to discovery on the question of arbitrability before a court entertains further briefing on the question.

Id. at 776 (citation omitted) (internal quotation marks omitted). Any time that a court finds that it must make findings in order to determine arbitrability, pre-arbitration discovery may be warranted. Id. at 775 n.5. If a court elects to deny a motion to compel arbitration under Rule 12(b)(6) in order allow discovery on the question of arbitrability, "[a]fter limited discovery, the court may entertain a renewed motion to compel arbitration, this time judging the motion under a summary judgment standard. Id. at 776.

In considering this legal question under the Rule 12(b)(6) motion to dismiss standard of review, the court generally may rely on the complaint, attached exhibits, and matters of public record. Sands v. McCormick, 502 F.3d 263, 268 (3d Cir.2007). The court may also consider "undisputedly authentic document[s] that a defendant attaches as an exhibit to a motion . . . if the plaintiff's claims are based on the [attached] documents." Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir.1993). Moreover, "documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered." Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 560 (3d Cir.2002); see also U.S. Express Lines, Ltd. v. Higgins, 281 F.3d 383, 388 (3d Cir. 2002) (holding that "[a]lthough a district court

may not consider matters extraneous to the pleadings, a document integral to or explicitly relied upon in the complaint may be considered without converting the motion to dismiss into one for summary judgment.").

Here our analysis of the arbitrability of this dispute is guided and controlled by the express terms of the parties' agreement, terms that were acknowledged by Moyer in a writing attached as an exhibit to his complaint. Moreover, no party disputes the authenticity of the arbitration agreement. Therefore, we will consider this motion to compel arbitration under the standards governing a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. See Guidotti v. Legal Helpers Debt Resolution, L.L.C., 716 F.3d 764, 771-76 (3d Cir. 2013).

B. The Scope of the Federal Arbitration Act (FAA)

The Federal Arbitration Act (FAA) provides in part as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be 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 then provides parties whose federal court disputes may also be subject to arbitration with a specific means of compelling pre-litigation arbitration of

their dispute. Under the FAA:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.
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> 9 U.S.C. § 4.

When the court determines that a particular dispute brought in federal court is subject to an arbitration agreement, the FAA prescribed the course which we must follow, and states that:

> 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.
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> 9 U.S.C. § 3.

The FAA "creates a body of federal substantive law establishing and governing the duty to honor agreements to arbitrate disputes." Century Indem. Co., v. Certain Underwriters at Lloyd's London, 584 F.3d 513, 522 (3d Cir. 2009). Congress enacted the FAA in order "to overrule the judiciary's longstanding

reluctance to enforce agreements to arbitrate and its refusal to put such agreements on the same footing as other contracts, and in the FAA expressed a strong federal policy in favor of resolving disputes through arbitration." Id. (citations omitted).Because arbitration is a contractual matter, prior to compelling arbitration pursuant to the FAA, a court must first determine that (1) an enforceable agreement to arbitrate exists, and (2) the particular dispute falls within the scope of the agreement. Kirleis v. Dickie, McCamey & Chilcote, P.C., 560 F.3d 156, 160 (3d Cir. 2009) (citation omitted). The FAA, which was specifically designed to overcome what was seen as judicial antipathy for arbitration agreements, however, creates a clear statutory preference for arbitration. Accordingly, in considering motions to compel arbitration, arbitration should not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." First Liberty Inv. Grp. v. Nicholsberg, 145 F.3d 647, 653 (3d Cir. 1998) (internal quotation marks omitted).

In short:

> The Arbitration Act thus establishes a "federal policy favoring arbitration," Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983), requiring that "we rigorously enforce agreements to arbitrate." Dean Witter Reynolds Inc. v. Byrd, supra, 470 U.S., at 221, 105 S.Ct., at 1242. This duty to enforce arbitration agreements is not diminished

> when a party bound by an agreement raises a claim founded on statutory rights. As we observed in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals" should inhibit enforcement of the Act " 'in controversies based on statutes.' " 473 U.S., at 626-627, 105 S.Ct., at 3354, quoting Wilko v. Swan, supra, 346 U.S., at 432, 74 S.Ct., at 185. Absent a well-founded claim that an arbitration agreement resulted from the sort of fraud or excessive economic power that "would provide grounds 'for the revocation of any contract,' " 473 U.S., at 627, 105 S.Ct., at 3354, the Arbitration Act "provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability." Ibid.

Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 226, 107 S. Ct. 2332, 2337, 96 L. Ed. 2d 185 (1987).

Adopting this approach it has been held in the context of civil RICO claims brought by investors against stock brokers that there is:

> [N]o basis for concluding that Congress intended to prevent enforcement of agreements to arbitrate RICO claims. [Plaintiffs] may effectively vindicate their RICO claim in an arbitral forum, and therefore there is no inherent conflict between arbitration and the purposes underlying § 1964(c). Moreover, nothing in RICO's text or legislative history otherwise demonstrates congressional intent to make an exception to the Arbitration Act for RICO claims. Accordingly, . . . [a civil] RICO claim is arbitrable under the terms of the Arbitration Act.

Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 242, 107 S. Ct. 2332, 2345–46, 96 L. Ed. 2d 185 (1987).

Likewise, courts have resisted efforts to carve out an exception to the arbitration act for claims, like those made here, which rest upon general allegations that an investor was fraudulently induced to enter into a disadvantageous agreement.

On this score, the courts distinguish between a fraudulent inducement to enter into a contract generally, and a more specific claim that a party was fraudulently induced to agree to arbitrate contractual disputes. Only the latter may be exempted from the FAA, not the former. As the Supreme Court has explained:

> Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04, 87 S. Ct. 1801, 1806, 18 L. Ed. 2d 1270 (1967)(footnote omitted). Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445-6, 126 S. Ct. 1204, 1209 (2006) (holding that whether a contract containing an arbitration provision was void for illegality was to be determined by arbitrator, not court)*;* Merritt-Chapman & Scott Corp. v. Pennsylvania Turnpike Com'n, 387 F.2d 768, 771 (3d Cir. 1967) (following Prima Paint and holding that a general attack on a contract as being the product of fraud is to be decided under the applicable arbitration provision by the arbitrator).

Finally, in a case such as this where the arbitration agreement also clearly states that any dispute concerning whether a particular controversy is arbitrable is subject in the first instance to arbitration, courts should defer to the plain language of the arbitration agreement and allow the question of arbitrability to be addressed in

the first instance in the arbitration forum. See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943, 115 S. Ct. 1920, 1923, 131 L. Ed. 2d 985 (1995).

C. The Motion to Compel Arbitration Should Be Granted

Guided by these legal benchmarks, we recommend that this motion to compel arbitration be granted. In this case, the documents attached to Moyer's complaint include a written acknowledgement signed by Moyer which agrees that disputes with Wells Fargo would be subject to an arbitration agreement. The terms of that arbitration agreement, in turn, are cast globally and call for arbitration of all controversies and disputes between the parties, including any disputes regarding whether specific matters are arbitrable. Given this clear contractual language, and mindful of the fact that arbitration should not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," First Liberty Inv. Grp. v. Nicholsberg, 145 F.3d 647, 653 (3d Cir. 1998) (internal quotation marks omitted), we find in this case that (1) an enforceable agreement to arbitrate exists, and (2) this particular dispute falls within the scope of the agreement. Kirleis v. Dickie, McCamey & Chilcote, P.C., 560 F.3d 156, 160 (3d Cir. 2009) (citation omitted).

While Moyer attempts to defeat this motion to compel arbitration by generally arguing fraud, duress, and unconscionability, these efforts are unavailing in the face

of the plain language of the parties' agreement. At the outset, we note that Moyer advances these claims of fraud and unconscionability in a summary fashion without any further factual or evidentiary support. More is needed here to prove such claims and avoid arbitration. Rather, it is clear that the party challenging an arbitration contract provision as unconscionable generally bears the burden of proving unconscionability. Harris v. Green Tree Fin. Corp., 183 F.3d 173, 181 (3d Cir. 1999). Accordingly, Moyer's naked assertion of unconscionability, which is unadorned by any proof, fails to meet this burden of proof and persuasion on the question of unconscionability

Moreover, Moyer's fraudulent inducement claim seems to conflate the question of fraudulent inducement to enter into the revised brokerage agreement generally with the issue of fraudulent inducement to arbitrate. Fairly construed, Moyer's complaint brings a general claim that he was fraudulently induced to enter into a revised brokerage agreement which had unfavorable fee provisions. (Doc. 1.) Moyer's complaint does not allege, and he does not otherwise demonstrate, that he was fraudulently induced to agree to arbitration. Quite the contrary, the documents attached by Moyer to his complaint reveal that the defendants were wholly transparent about their intent to arbitrate disputes since those exhibits include a signature block titled "Client Authorization," in which Moyer "acknowledge[d] . . .

receipt of the Agreement and Disclosure Document and that you have made all of the designated selections above. THE AGREEMENT CONTAINS A PRE-DISPUTE ARBITRATION CLAUSE LOCATED IN SECTION I, NO. 5 OF THE CLIENT AGREEMENT." (Doc. 1, Ex. C., p. 4)(All capitals in original).[1]

We recognize that the Supreme Court has carefully delineated between fraudulent inducement generally and fraudulent inducement to arbitrate, and has held that: "if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally." Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04, 87 S. Ct. 1801,

[1] In his filings, Moyer suggests in passing that despite this clear notice he did not actually read the arbitration agreement before signing this contract. Such an assertion is not a defense since the "failure to read and consider the significance of the arbitration clause is not a basis for finding the clause unenforceable. See Faulkenberg v. CB Tax Franchise Sys., LP, 637 F.3d 801, 809 (7th Cir. 2011) ('Ignorance of the contract's arbitration provision is no defense if [the plaintiff] failed to read the contract before signing.'); Davis, 26 F. Supp. 3d at 738 ('by signing the retainer agreement, [the plaintiff] acknowledged that she read and understood the terms of the agreement including the arbitration clause. Therefore, [the plaintiff's] argument that no one informed her that there was an arbitration clause in the agreement or what that arbitration clause meant is immaterial.'); Dorsey v. H.C.P. Sales, Inc., 46 F. Supp. 2d 804, 807 (N.D. Ill. 1999) ('[A] party's failure to read a contract does not invalidate unread contractual terms or excuse that party's performance under the contract.")." Short v. Grayson, No. 16 C 2150, 2016 WL 7178463, at *3 (N.D. Ill. Dec. 9, 2016).
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1806, 18 L. Ed. 2d 1270 (1967)(footnote omitted). In the instant case, Moyer has not shown that he was fraudulently induced to arbitrate; instead, he has simply alleged that he was fraudulently induced to change his fee agreement with Wells Fargo. Given the "federal policy favoring arbitration," Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983), which requires that "we rigorously enforce agreements to arbitrate," Dean Witter Reynolds Inc. v. Byrd, 470 U.S.213, 221 (1985), this general assertion of fraud is insufficient to defeat a motion to compel arbitration. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04, 87 S. Ct. 1801, 1806, 18 L. Ed. 2d 1270 (1967).[2]

Finally, we note that the arbitration agreement, by its terms, places the threshold responsibility of determining what is arbitrable with the arbitrator. We are obliged to honor this clear contractual language and defer to the arbitrator in the first instance on the question of what is arbitrable, a matter consigned by the parties in their agreement to arbitration. Given this plain language of the agreement, consistent

[2] In reaching this conclusion we do not mean to suggest that Moyer could never show fraudulent inducement to arbitrate a dispute. For example, if Moyer presented evidence which indicated that his prior agreements with Wells Fargo did not contain arbitration provisions, but one was surreptitiously included in the 2014 agreement which changed the fee structure between the parties, then he might make the showing required to void an otherwise clear arbitration agreement. We simply note that no such showing has been made here by the plaintiff.

with the policies favoring arbitration embodied in the FAA, this motion to compel arbitration should be granted, and this case stayed pending arbitration.[3]

III. Recommendation

Accordingly, IT IS HEREBY RECOMMENDED THAT:

1. The motion to compel arbitration (Doc. 8) should be GRANTED and the parties ordered to participate in arbitration.

2. This federal action should be STAYED pending the outcome of the arbitration proceedings.

The parties are further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The

[3] Once it has been shown that arbitration of a dispute is appropriate, the FAA requires a court to grant a stay in favor of arbitration unless the parties have "clearly and unequivocally excepted a certain dispute from arbitration." In re Prudential Ins. Co., 133 F.3d 225, 231 (3d Cir. 1998). No such showing has been made here. Therefore this case should be stayed pending arbitration.

judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions

Submitted this 27th day of September, 2018.

S/Martin C. Carlson
Martin C. Carlson
United States Magistrate Judge