**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

RAYMOND AUYEUNG,	)	
	)	
Plaintiff,	)	
	)	**No. 19 C 278**
v.	)	
	)	**Judge Jorge L. Alonso**
TOYOTA MOTOR SALES, USA, INC.,	)	
	)	
Defendant.	)	
	)	

ORDER

Defendant's motion to compel arbitration [13] is granted. This case is stayed pending arbitration proceedings pursuant to the terms of the parties' agreement. This case is transferred to this Court's inactive docket. The parties shall move to restore the case to the Court's active docket after arbitration proceedings are complete.

STATEMENT

Plaintiff, Raymond Auyeung, purchased a vehicle from defendant, Toyota Motor Sales, USA, Inc. ("Toyota"). As an optional upgrade, plaintiff also purchased an Entune Premium Audio System, "an in-dash entertainment and digital concierge system" (Compl. ¶ 2, ECF No. 1-1), at an additional cost of $345. The Entune system has a variety of features, including a satellite navigation system, destination search functionality, vehicle safety and emergency features, satellite radio, HD radio, AM/FM cache radio, voice recognition, and Bluetooth connectivity to mobile devices. (Decl. of Brian Inouye ¶ 4, ECF No. 16; Suppl. Decl. of Brian Inouye ¶ 5, ECF No. 27.) At the time of plaintiff's purchase, the Entune system also included the Entune App Suite, which "provided customers with access to certain third-party software applications," including Pandora, Open Table, and Facebook Places, "through each customer's mobile phone." (Inouye

Decl. ¶ 5.) Plaintiff alleges that in September 2018, approximately two years after plaintiff initially purchased the Entune system, defendant notified plaintiff that it would "no longer support and offer access" to the third-party applications then available via the Entune system. (Compl. ¶ 18.) Plaintiff alleges that he would not have purchased the Entune system if he had known that defendant would discontinue support for the third-party applications (*see id*. ¶¶ 20-24), and he asserts claims against defendant for violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq*., breach of express warranty, and unjust enrichment.

I. Background: Contract Formation and Key Terms

To use the Entune App Suite, plaintiff had to register, which he did by downloading defendant's Entune App Suite application to his mobile phone, providing personal information via the mobile phone application, and clicking the "Sign Up" button. After plaintiff clicked "Sign Up," a screen popped up that informed plaintiff, "By tapping 'Agree,' you agree to the Terms of Use and Privacy Policy," and presented plaintiff with a choice of four buttons to tap, which were labeled as follows: "View Terms of Use," "View Privacy Policy," "Agree," and "Cancel." (Pl.'s Decl. ¶¶ 5-7, ECF No. 25-2; Inoye Decl. ¶¶ 7-8.) To use the app, customers were required to click "Agree," and defendant's records show that plaintiff completed registration on October 29, 2016. (Inouye Decl. ¶¶ 10.) Plaintiff admits that, before he did so, he viewed the Terms of Use and read the System License Agreement that popped up upon pressing the "View Terms of Use" button. (Pl.'s Decl. ¶ 6; *see* Inouye Decl. ¶ 8.)

In pertinent part, the license agreement provides as follows:

> TOYOTA MOTOR SALES, U.S.A., INC. "ENTUNE® APP SUITE"
> APPLICATION
> APP LICENSE AGREEMENT
> Effective as of September 2016
> PLEASE CAREFULLY READ THIS APPLICATION END USER LICENSE AGREEMENT ("AGREEMENT") BEFORE DOWNLOADING, ACCESSING,

> ACTIVATING, REGISTERING FOR, OR OTHERWISE USING THE TOYOTA 'ENTUNE' APPLICATION OR ITS RELATED SERVICES OR CONTENT (THE "APPLICATION"). IF YOU DO NOT AGREE WITH THE TERMS OF THIS AGREEMENT, INCLUDING THE INFORMATION COLLECTED, USED, TRANSMITTED OR RETAINED BY THIS APPLICATION, DO NOT DOWNLOAD, ACCESS, ACTIVATE OR REGISTER FOR THE APPLICATION. BY CLICKING ON THE "DOWNLOAD" BUTTON OR USING THE APPLICATION, YOU AGREE TO BE BOUND BY THIS AGREEMENT, AND REPRESENT AND WARRANT THAT YOU HAVE THE RIGHT, AUTHORITY, AND CAPACITY TO ENTER INTO THIS AGREEMENT. . . . YOUR ACCESS TO AND USE OF THE APPLICATION IS SUBJECT TO THIS AGREEMENT AND ALL APPLICABLE LAWS.
>
> A. Description of the Application. This Application allows you to access and use a variety of third party applications with various information and infotainment services (the "Services") all within one application via the compatible multi-media system in your Toyota Vehicle through the available Bluetooth connection to your mobile device.
> . . .
> R. Disputes/Arbitration.
> If you and we have a disagreement related to Services, we'll try to resolve it by talking with each other. If we can't resolve it that way, WE BOTH AGREE, TO THE FULLEST EXTENT PERMITTED BY LAW, TO USE ARBITRATION, NOT LAWSUITS (except for small claims court cases as described below) TO RESOLVE THE DISPUTE.

(Inouye Decl. Ex. 1, Entune App Suite Application License Agreement, §§ A, R, ECF No. 16-1.) Under the terms of the license agreement, customers have the right to choose the American Arbitration Association or the Better Business Bureau to conduct arbitration proceedings, but they "expressly waive the right to request or maintain any class arbitrations even if [governing arbitration] procedures or rules would permit them." (*Id.* § R.) "In exchange" for the class action waiver, Toyota will "pay . . . for any filing fee charged" by the presiding arbitration organization and "any further administrative and arbitrator fees," upon plaintiff's timely request, and "the arbitrator may award [plaintiff] any fees and charges that are necessary to ensure the enforceability of this arbitration provision." (*Id.*) The arbitrator may also "award the same damages and relief . . . as a court would," subject to the "limitations" in the license agreement (*id.*), which limits

Toyota's liability for damages to direct, compensatory damages of no more than "fifty cents ($.50)" (*id.* § J).

According to the arbitration provision, the parties "acknowledge that this Agreement affects interstate commerce and that the Federal Arbitration Act and other federal arbitration law apply." (*Id.* § R.) To whatever extent federal law does not supply the necessary substantive rules of decision, "the laws of the State of Texas shall apply, except that Texas laws concerning choice of law or conflicts shall not apply if they would cause the substantive law of another jurisdiction to apply." (*Id.* § R.)

II. Legal Standards

Motions to compel arbitration concern venue and are properly addressed under Federal Rule of Civil Procedure 12(b)(3). *Grasty v. Colo. Tech. Univ.*, 599 F. App'x 596, 597 (7th Cir. 2015) (citing *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 773 (7th Cir. 2014)); *Johnson v. Orkin, LLC*, 556 F. App'x 543, 544 (7th Cir. 2014) (an arbitration clause is "simply a type of forum-selection clause," and a motion seeking dismissal based on an agreement to arbitrate therefore should be decided under Rule 12(b)(3)). The Court may consider materials outside the pleadings when evaluating such a motion. *Johnson*, 556 F. App'x at 544-45.

The Federal Arbitration Act ("FAA") governs the enforceability of arbitration clauses in state and federal courts. *Jain v. de Méré*, 51 F.3d 686, 688 (7th Cir. 1995). Under the FAA, an arbitration agreement in "a contract evidencing a transaction involving commerce . . . 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 Court must grant a motion to compel arbitration under the FAA where the parties have a written arbitration agreement and the asserted claims are within its scope. 9 U.S.C. §§ 3-4; *Sharif v. Wellness Int'l Network, Ltd.*, 376 F.3d 720, 726 (7th

Cir. 2004). In deciding a motion to compel arbitration, the court's duty is simply to determine whether the parties' dispute belongs in arbitration, not to rule on the potential merits of the underlying claim. *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). The party opposing arbitration bears the burden of establishing why the arbitration provision should not be enforced. *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 91-92 (2000). "[T]he evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor." *Tinder v. Pinkerton Security*, 305 F.3d 728, 735 (7th Cir. 2002).

III. Analysis

Defendant argues that the FAA requires this Court to grant its motion to compel arbitration and stay this litigation because the parties entered into a valid arbitration agreement; plaintiff's claims are within the scope of the agreement; and the agreement's arbitration provision is enforceable.

A. *Valid Arbitration Agreement*

Plaintiff argues that the parties never entered into any valid arbitration agreement because plaintiff never accepted an offer. Plaintiff was only asked to agree to terms of use when he downloaded the mobile application to his phone, *after* he had already purchased the vehicle and the Entune system, and he reasonably believed, he argues, that the license agreement only applied to his use of the mobile application on his phone, not the use of third-party applications on the Entune system itself. Based on this belief, plaintiff argues that there was no "meeting of the minds" as to arbitration of disputes arising out of the operation of third-party applications on the Entune system, so he cannot have validly accepted any offer to agree to arbitrate those disputes. (Pl.'s Mem. in Opp'n at 6-7, ECF No. 25.)

Plaintiff cites no authority supporting this argument, and the Court is not persuaded. "[T]he formation of a contract does not actually require that the parties come to a subjective and congruent understanding." *Wells Fargo Funding v. Draper & Kramer Mortg. Corp.*, 608 F. Supp. 2d 981, 985 (N.D. Ill. 2009) (citing *Navair, Inc. v. IFR Americas, Inc.*, 519 F.3d 1131, 1139 (10th Cir. 2008) ("[T]he [contract formation] inquiry will focus not on the question of whether the subjective minds of the parties have met, but on whether their outward expression of assent is sufficient to form a contract.") and Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 464 (1897) ("[T]he making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs not on the parties having meant the same thing but on their having said the same thing.")). Plaintiff uses the phrase "meeting of the minds," which, though a "handy shorthand," is "misleading if taken literally," as plaintiff does here. *Wells Fargo Funding*, 608 F. Supp. 2d at 985. A "meeting of the minds" is not strictly necessary, if what plaintiff means by that is that the parties need to have had the exact same subjective understanding of the scope of the arbitration clause; that is not the law. *See Sherman v. AT & T Inc.*, No. 11 C 5857, 2012 WL 1021823, at *3 (N.D. Ill. Mar. 26, 2012) ("Sherman's assent when he activated his service constituted acceptance of the Terms, regardless of whether he believes he participated in a "meeting of the minds" when he placed his order with an AT & T sales representative."). The fact that, years after entering into an agreement, the parties disagree as to the meaning of the contract terms does not mean there was no "meeting of the minds" sufficient to form a contract.

As defendant explains in reply, plaintiff does not actually dispute that he clicked "Agree" and entered into the license agreement, so the concept of acceptance is out of place in his brief; plaintiff's real concern is better expressed by his related argument about the *scope* of the agreement, not its existence.

B. *Scope of Arbitration Agreement*

Plaintiff argues that his claims are outside the scope of the parties' arbitration agreement because the parties agreed to arbitrate only claims concerning the Entune mobile app on plaintiff's smartphone, not claims concerning the Entune system in plaintiff's vehicle. According to plaintiff, the license agreement applies only to a "license to use the Application on the applicable mobile device that you own or control" (License Agreement § B), and it treats separately the "multimedia system" in a customer's vehicle. (*Id.* §§ A, C, D, F, I, J, N, S).

The Court agrees with defendant that plaintiff's argument lacks merit, based on the plain language of the agreement. Plaintiff's cherry-picked language, lifted from unrelated portions of the license agreement, does not alter the meaning of the agreement's most pertinent language in section R, governing "Disputes/Arbitration," which makes clear that the parties agreed to arbitrate all claims related to the use of the third-party applications. Section R provides, "If you and we have ***a disagreement related to Services***, . . . WE BOTH AGREE, TO THE FULLEST EXTENT PERMITTED BY LAW, TO USE ARBITRATION, NOT LAWSUITS . . . TO RESOLVE THE DISPUTE" (bold/italicized emphasis added). The agreement defines "Services" in section A: "This Application allows you to access and use a variety of third party applications with various information and infotainment services (the "Services") . . . via the compatible multi-media system in your Toyota Vehicle through the available Bluetooth connection to your mobile device." Thus, the parties agreed to arbitrate disputes related to "Services," and "Services" refers to those services provided by the third-party applications that were available via the "multi-media system in [plaintiff's] Toyota Vehicle," which the mobile application merely allowed plaintiff to "access and use." These very "services," the services provided by the Entune System's third-party applications, are the subject of plaintiff's complaint.

Plaintiff's position is at odds with the plain language of the license agreement, and the Court therefore rejects it. Even if there were any doubt about the scope of the parties' arbitration agreement, the Court would have to resolve it in favor of arbitration. *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418 (2019) ("[W]e have repeatedly held that ambiguities about the scope of an arbitration agreement must be resolved in favor of arbitration."). Plaintiff's claim is within the scope of the arbitration provision of the license agreement.

C. *Unconscionability*

Plaintiff argues that the arbitration provision of the license agreement is unenforceable because it is both procedurally and substantively unconscionable.

Initially, the parties appear to disagree as to which state's law to apply to determine whether the arbitration provision is unconscionable. Defendant argues, based on the license agreement's choice of law provision, that Texas law applies. Without responding to defendant's argument or addressing the choice of law issue at all, plaintiff applies Illinois law in his response brief. The Court agrees with defendant that, under these circumstances, plaintiff has waived any argument to apply Illinois law. It makes no difference, however, because even under Illinois law, as the Court will explain below, plaintiff is unable to demonstrate that the agreement is unconscionable.

"[A] contract is procedurally unconscionable if an impropriety in the process of forming the contract deprived a party of a meaningful choice. On the other hand, a contract is substantively unconscionable when a clause or term in the contract is totally one-sided or harsh. A contract or a clause within a contract may be unenforceable for either reason." *Hanover Ins. Co. v. N. Bldg. Co.*, 751 F.3d 788, 794 (7th Cir. 2014) (citations omitted) (applying Illinois law).[1]

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[1] The law of Texas is similar. *See In re Palm Harbor Homes, Inc*, 195 S.W.3d 672, 678 (Tex. 2006), *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 757 (Tex. 2001), *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 499 (Tex. 1991) (Gonzalez, J., concurring).

1. Procedural Unconscionability

"Procedural unconscionability refers to a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it, and also takes into account a lack of bargaining power." *Razor v. Hyundai Motor Am.*, 854 N.E.2d 607, 622 (Ill. 2006). Plaintiff argues that the arbitration agreement is procedurally unconscionable because it was only conveyed to plaintiff after he purchased the vehicle and the Entune system, so he had no meaningful opportunity to reject the terms. Further, according to plaintiff, he had no meaningful choice because, even if he had seen the arbitration provision of the license agreement before purchasing the car, he would have understood it to refer only to claims arising out of the use of the mobile application, not the use of the in-dash system's third-party applications.

Defendant replies that (1) the terms of the license agreement were available online at the Toyota Entune website, where plaintiff could have viewed them before making his purchase; (2) plaintiff was never required to download and use the Entune App Suite mobile application to access the many features of the system *other* than the third-party applications that are the subject of this suit, so there was nothing unconscionable about selling plaintiff the Entune system before he read the mobile application's license agreement; and (3) plaintiff's subjective belief that the arbitration provision related only to the mobile application is irrelevant because the arbitration provision was not hidden or misleading.

The Court agrees with defendant. On the issue of the timing of the disclosure of the terms of the license agreement, plaintiff relies on *Razor* and *Bess v. DirecTV*, 885 N.E.2d 488 (Ill. App. Ct. 2008), but these cases do not support her position. In *Razor*, the Illinois Supreme Court held that the consequential damages disclaimer in the limited warranty on plaintiff's vehicle was unconscionable based on the "lack of evidence that the warranty . . . had been made available to

the plaintiff at or before the time she signed the sale contract" and the lack of evidence that the plaintiff "could have seen the clause" prior to entering into the sales contract. 854 N.E.2d at 623. This case is different because there *is* evidence that plaintiff could have read the license agreement prior to purchasing the vehicle by searching for it on the Toyota website. (Inouye Suppl. Decl. ¶¶ 3-4). *See also Zobrist v. Verizon Wireless*, 822 N.E.2d 531, 541 (Ill. App. Ct. 2004) (arbitration agreement not procedurally unconscionable although arbitration clause was contained "within a brochure separate from the actual contract documents the plaintiff signed"), *abrogation in part on other grounds recognized in Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 263 (Ill. 2006).

Additionally, the challenged contract term is an arbitration provision in a license agreement that includes within its scope only one potential use of the Entune system (the use of third-party applications on the in-dash system via the mobile application), which is not essential to the use of the Entune system itself. Plaintiff himself specifically asserts, "I purchased the Entune System because I believed it would allow me to play music directly through my vehicle." (Auyeung Decl. ¶ 2, ECF No. 25-2.) Plaintiff could have done exactly that without ever downloading the mobile application or using the Entune App Suite third-party applications; even without them, plaintiff could use the "Bluetooth connectivity" of the Entune system to "stream music" from his phone. (Inouye Suppl. Decl. ¶ 5(g).) Thus, even if the Court assumes—apparently counterfactually—that plaintiff would not have been able to find the license agreement online or anywhere else until after purchasing the Entune system and attempting to download the mobile application, the Court fails to see why this would have deprived plaintiff of a meaningful choice. If he was unwilling to accept the license agreement's terms, he could have declined them and done without access to the third-party applications, which were not essential to his use of the Entune system.

Bess, as defendant explains, provides more support for defendant's position than plaintiff's. In *Bess*, after the plaintiff ordered satellite television service from DirecTV, DirecTV activated her service and mailed her a "Customer Agreement," which included an arbitration clause, along with an initial billing statement. 885 N.E.2d at 490-91. The Customer Agreement specified that the customer should notify DirecTV immediately if she did not accept the terms, and DirecTV would cancel her service immediately; by receiving DirecTV service without notifying DirecTV of any objections to the agreement, the customer was deemed to have accepted the terms. *Id.* at 491. The record was silent as to when, on what terms, and for how much money the plaintiff had purchased the satellite equipment she would need to use DirecTV's service, but generally, DirecTV customers "first purchase[d] from an independent retailer the equipment necessary to receive a satellite signal," then contacted DirecTV to set up service. *Id.* at 505 (Stewart, P.J., dissenting in part) (internal quotation marks omitted).

The court held that, while there was a "degree of procedural unconscionability" in DirecTV's process, it was "insufficient to render the arbitration provision unenforceable." *Id.* at 497-98 (majority op.). "Although [the plaintiff] did not receive the Customer Agreement at the time she ordered service, . . . she was not bound by its terms until after she had read the Customer Agreement and continued to receive the service." *Id.* at 496-97. The court distinguished *Razor*, explaining that the challenged term in *Bess* was not a warranty disclaimer but an arbitration provision, and such provisions are favored by "strong public policy" in Illinois, they are "typical" in modern commerce, and they are supported by valid "practical considerations." *Id.* at 497 (citing, *inter alia*, *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997)).

Thus, in *Bess*, the plaintiff purchased certain equipment necessary to use the defendant's service prior to reading the agreement that would govern the service's terms, but she was not

deprived of a meaningful opportunity to reject the service upon reading the agreement, so the agreement was not unenforceable for reasons of procedural unconscionability. This case is no different. Indeed, the logic of *Bess* applies even more strongly in this case, where the record demonstrates that the equipment had other functions and uses to suit plaintiff's interests apart from the service governed by the challenged agreement.

For these reasons, the agreement is not procedurally unconscionable.

2. Substantive Unconscionability

Initially, plaintiff argues that the arbitration agreement is substantively unconscionable because he had no meaningful choice, having been presented with the agreement only after purchasing the vehicle and the Entune system. This argument relates to the circumstances of contract formation, not an imbalance in the parties' rights and obligations, so it belongs in a discussion of procedural, not substantive, unconscionability. Indeed, it duplicates the argument that plaintiff made on procedural unconscionability, which the Court has already rejected.

Plaintiff also argues that the license agreement's arbitration provision is unenforceable on grounds of substantive unconscionability because of two other provisions: (1) the limitation of liability provision and (2) the class action waiver.

a. Limitation of liability

Plaintiff argues that the license agreement is substantively unconscionable because the limitation of liability provision in section J essentially required plaintiff to release any claims against Toyota and, to the extent any claims survive the release, to exclude any liability for indirect, consequential, or punitive damages and limit Toyota's aggregate liability to fifty cents in direct, compensatory damages. According to plaintiff, this tilts the balance of obligations so far in defendant's favor that defendant is essentially not bound by the agreement. Further, plaintiff

argues, the agreement purports to waive forms of relief such as punitive damages that are unwaivable under the Illinois Consumer Fraud and Deceptive Business Practices Act, which governs plaintiff's claim in Count I of the complaint.

Defendant replies that, even if plaintiff is correct, it makes no difference for purposes of the present motion to compel arbitration because the limitation of liability provision, contained in section J of the agreement, is "entirely separate" from the arbitration provision, which appears in section R, and "[t]he validity of ancillary provisions is an issue for the arbitrator." *See Marzano v. Proficio Mortg. Ventures, LLC,* 942 F. Supp. 2d 781, 796 (N.D. Ill. 2013) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) ("[A] challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.")). The Court agrees that the enforceability of the license agreement's limitation of liability provision is an issue separate from and "ancillary" to the enforceability of the arbitration provision, and therefore is it for the arbitrator, not this Court, to consider.

Additionally, even if the Court were to consider whether the limitation of liability provision is substantively unconscionable, it doubts whether any defect in the limitation of liability provision would require denying defendant's motion to compel arbitration. First, while the parties' limitations of liability are not exactly symmetrical, both parties waive substantial rights, so the limitations of liability are not entirely one-sided.[2] *See Tortoriello v. Gerald Nissan of N. Aurora, Inc.*, 882 N.E.2d 157, 178 (Ill. App. Ct. 2008) ("The parties to a contract need not have identical rights and obligations[, so long as] each party has given sufficient consideration for the other's promise.") (internal quotation marks omitted); *see also Halloran & Yauch, Inc. v. Roughneck*

[2] Texas law may be even less favorable to plaintiff on this point. *See In re Palm Harbor Homes, Inc.*, 195 S.W.3d at 678 (arbitration agreement was not so one-sided as to be substantively unconscionable although customers were bound to arbitrate but manufacturer was not).

Concrete Drilling & Sawing Co., 2013 IL App (1st) 131059-U, ¶ 52 ("[P]laintiff does not persuade us to accept its substantive unconscionability claim because we do not find the limitation of damages provision to be inordinately one-sided."). More importantly, to the extent some or all of the limitation of liability provision is unconscionable and unenforceable, it can be severed from the rest of the contract, including the arbitration provision, and the rest remains enforceable. *See Tortoriello*, 882 N.E.2d at 179-80.[3]

b. Class action waiver

Plaintiff argues that the arbitration agreement is substantively unconscionable because it imposes "significant cost-price disparity," *Williams v. Jo-Carroll Energy, Inc.*, 890 N.E.2d 566, 569 (Ill. App. Ct. 2008), by requiring customers to waive their right to hire an attorney to bring a class action lawsuit on their behalf, despite the fact that there is no other cost-effective way for plaintiff to vindicate his rights, particularly considering the low dollar-amount of his claim and the agreement's requirement that he pay his own fees and costs.

Defendant argues that the United States Supreme Court's decisions in *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 237-38 (2013), and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351-52 (2011), foreclose this argument. In *AT&T Mobility*, the Court held that the FAA preempted a state-law rule that prohibited parties from enforcing class-action waivers in arbitration contracts. In *American Express*, relying heavily on *AT&T Mobility*, the Court held that a class-action waiver in an arbitration agreement is not unenforceable under the FAA merely because a class action is the only means "worth the expense of proving" a violation of plaintiff's rights under a federal statute. 570 U.S. at 237-38.

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[3] *See also In re Poly-Am., L.P.*, 262 S.W.3d 337, 360 (Tex. 2008); *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 565 (Tex. 2006).

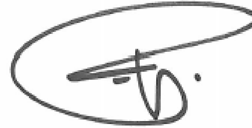
The Court agrees with defendant. It is clear that "the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." *AT&T Mobility*, 563 U.S. at 336; *see id.* at 352. Plaintiff has objected to nothing else in the arbitration provision except the clause requiring the parties to bear their own costs and fees, which, because it is a mutual obligation, does not tip the balance toward unconscionability. The thrust of plaintiff's argument is simply that it is not cost-effective for plaintiff to assert his claim under the arbitration agreement because of the class-action waiver, and defendant is correct that the Supreme Court rejected that very reasoning in *American Express*. *See Lewis v. Advance Am., Cash Advance Centers of Illinois, Inc.*, No. 13 C 942, 2014 WL 47125, at *3 (S.D. Ill. Jan. 6, 2014) ("While the Illinois Supreme Court may have found [class-action] waivers unconscionable and unenforceable in some situations [in *Kinkel,* 857 N.E.2d at 275-76], the United States Supreme Court disagrees, . . . [which] means that the *Kinkel* rule is preempted by the FAA in favor of enforcing the parties' agreement to arbitrate on an individual basis only, . . . regardless of the fact that the amount of damages [plaintiff] can recover pales in comparison to the cost of individual dispute resolution.") (citing *AT&T Mobility* and *American Express*). To whatever extent state law might hold that plaintiff's arbitration agreement is substantively unconscionable because of the class-action waiver, the FAA preempts the state-law rule and requires enforcement of the agreement.

For the foregoing reasons, the Court concludes that plaintiff entered into a valid arbitration agreement; his claims in this case fall within the scope of that agreement; and the agreement is not unconscionable or otherwise unenforceable. Therefore, the Court grants defendant's motion to compel arbitration. While arbitration proceedings are pending, this case will be stayed. *See Halim v. Great Gatsby's Auction Gallery, Inc.*, 516 F.3d 557, 561 (7th Cir. 2008); *Cont'l Cas. Co. v. Am.*

Nat. Ins. Co., 417 F.3d 727, 732 (7th Cir. 2005); *Tice v. Am. Airlines, Inc.*, 288 F.3d 313, 317-18 (7th Cir. 2002).

SO ORDERED.

ENTERED: July 1, 2019



HON. JORGE L. ALONSO
United States District Judge