UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

MATTHEW DICKSON and JENNIFER DICKSON, individually and on behalf of all others similarly situated,	§	
PLAINTIFFS,	§	
v.	§	CASE NO. 5:16-cv-05027-PKH
GOSPEL FOR ASIA, INC., GOSPEL FOR ASIA-INTERNATIONAL, K.P. YOHANNAN, GISELA PUNNOSE, DANIEL PUNNOSE, DAVID CARROLL, and PAT EMERICK,	§	
DEFENDANTS.	§	

Plaintiffs' Opposition to Defendants' Motion to Compel Arbitration

Matthew and Jennifer Dickson donated money to GFA only because GFA promised it would use 100% of every donation exactly as the Dicksons directed: to help destitute people in India. When the Dicksons later learned that GFA diverted their donations into for-profit businesses, they sued on behalf of themselves and tens of thousands of other donors, alleging fraud, violations of RICO and Arkansas' consumer protection statute, and unjust enrichment.

As it happens, the Dicksons each signed a "Statement of Agreement" ("Statement") while serving as GFA staff in Texas seven years ago. Even though the Statement has nothing to do with the Dicksons' allegations in this case—and even though the Dicksons left GFA years ago—Defendants move to compel arbitration based on two sentences in the Statement that refer to arbitration.

But these two sentences are not a valid agreement to arbitrate. They lack the consideration required for enforcement of an arbitration clause. As well, the first of these sentences is so vague, it could never be enforced. Moreover, the Dicksons' allegations do not depend at all on their former relationship with GFA, making the Statement they signed legally irrelevant to their claims based on fraudulently-induced donations.

Because Defendants fail to carry their burden of proving the existence of a valid, enforceable arbitration agreement, and because the claims in this case are nonetheless outside the scope of the arbitration language in the Statement, the Court should deny GFA's motion to compel arbitration.

The Statement and its arbitration language

Defendants describe the Dicksons as "former members of the Christian religious order, GFA," having left in 2012, and Matthew Dickson as "also a former employee of GFA."[1] Defendants' Motion [Doc. 23] at 2 (¶¶2-3) (citing Declaration of David Carroll ("Carroll Dec.") [Doc. 23-1] ¶¶3-5). The Dicksons each signed a copy of the Statement in 2009 when they lived in Texas and served as GFA staff. Carroll Dec. [Doc. 23-1] ¶¶4-5.[2] The Statement is divided by four topics or subheadings: "Mission Statement," "Statement of Faith," "Moral Convictions and

[1] Plaintiffs use the term "GFA" throughout this Opposition to refer jointly to Defendants Gospel for Asia, Inc. and Gospel for Asia-International. While Defendants claim that Gospel for Asia-International "does not currently exist," Defendants' Motion [Doc. 23] at 1 n.1, Defendants' Brief [Doc. 24] at 1 n.1, the Court need not reach this issue to decide this motion.

[2] Matthew Dickson also signed a near-identical copy of the Statement in 2007. Carroll Dec. [Doc. 23-1] ¶3. Because there are no substantive differences in the language of the 2007 and 2009 Statements, Plaintiffs' references to the Statement apply equally to any of the three exhibits attached to the Carroll Dec. [Doc. 23-1].

Lifestyle," and "Further Commitments and Understandings." Carroll Dec. [Doc. 23-1] Ex. 1-A, 1-B, 1-C.

In the Statement, the signatories say they will help GFA with its mission; they affirm their religious beliefs; and they assert they will live morally and frugally. Carroll Dec. [Doc. 23-1] Ex. 1-A, 1-B, 1-C. But while the Statement includes recitation after recitation of the signatories' beliefs and commitments (*e.g.*, "I agree to maintain a daily personal devotional life of Bible reading, worship and prayer," Carroll Dec. [Doc. 23-1] Ex. 1-A at 3, Ex. 1-B at 2, Ex. 1-C at 2), nowhere in the Statement does GFA obligate itself to do anything at all, nor does it agree to provide the signatories with anything of value in exchange for any of their recitations. *See generally* Carroll Dec. [Doc. 23-1] Ex. 1-A, 1-B, 1-C. And—in contrast to the Dicksons—neither GFA nor anyone acting on its behalf signed or acknowledged the Statement. *Id.*

The arbitration language in the Statement consists of two sentences, which are the sole basis of Defendants' request for arbitration. Defendants' Motion [Doc. 23] at 2 (¶5); Defendants' Brief [Doc. 24] at 4. The first sentence is "I agree that any and all disputes of any kind arising out of the relationship between myself and GFA, *or any other GFA member*, shall be resolved by way of conciliation, or mediation, the parties agreeing that *the matter* will be submitted to final and binding arbitration in accordance with the rules and procedures set forth in the *Unified Arbitration Act*." Carroll Dec. [Doc. 23-1] Ex. 1-A at 4, Ex. 1-B at 3, Ex. 1-C at 3 (emphasis added). The material terms of this sentence—"GFA member," "matter," and "Unified Arbitration Act"—are not defined elsewhere in the Statement. *See generally* Carroll Dec. [Doc. 23-1] Ex. 1-A, 1-B, 1-C.

The second sentence is clearer: "Accordingly, I knowingly and willingly waive any and all rights to initiate any action before any administrative agency or court of law or equity."

Carroll Dec. [Doc. 23-1] Ex. 1-A at 4, Ex. 1-B at 3, Ex. 1-C at 3. Equally clearly, neither GFA nor any other Defendant makes any reciprocal waiver here or elsewhere in the Statement. *Id*; *see generally* Carroll Dec. [Doc. 23-1] Ex. 1-A, 1-B, 1-C.

Applicable legal standards and burdens

Defendants state accurately that the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA") governs the Court's disposition of their motion, and that Texas law controls the issue of whether there is a valid agreement to arbitrate. *See* Defendant's Brief [Doc. 24] at 5-6. And Defendants are correct about the two hurdles they must clear: "In general, a party seeking to compel arbitration under the FAA must establish that: (1) there is a valid arbitration agreement, and (2) the claims raised fall within that agreement's scope." *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005); Defendants' Brief [Doc. 24] at 6.

Defendants are also right that doubts regarding an agreement's *scope* are resolved in favor of arbitration under a liberal federal policy. Defendants' Brief [Doc. 24] at 5. But this presumption "arises only after the party seeking to compel arbitration proves that a valid arbitration agreement exists." *In re Kellogg Brown & Root,* 166 S.W.3d at 737-38 (quoting *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003)). Put another way:

> When deciding whether a party has met its burden to establish a valid agreement to arbitrate, we do not resolve doubts or indulge a presumption in favor of arbitration. *J.M. Davidson, Inc.*, 128 S.W.3d at 227. Rather, the party attempting to compel arbitration must show that the arbitration agreement meets all requisite contract requirements. *Id.* at 228. If the trial court determines that a valid agreement exists, the burden shifts to the party opposing arbitration to raise an affirmative defense to enforcement of the arbitration agreement. *Id.* at 227–28. Nonetheless, although a court may enforce agreements to arbitrate disputes, a court cannot order arbitration in the absence of such an agreement.

Mendivil v. Zanios Foods, Inc., 357 S.W.3d 827, 830 (Tex.App.—El Paso 2012, no pet.) (citations in original).

Argument and Authorities

1. Defendants fail to prove the Statement includes a valid agreement to arbitrate

No Defendant establishes the existence of a valid agreement to arbitrate between any of them and the Dicksons. The two sentences of arbitration language in the Statement do not constitute a valid agreement; under well-settled Texas law, they lack the necessary element of consideration. The law is likewise clear that the arbitration language in the Statement is too vague to be enforceable. Because all Defendants fail to prove a valid arbitration agreement, the Court should go no further. It should deny Defendants' motion.

A. The arbitration language in the Statement lacks consideration

Each Defendant indisputably bears the initial burden of proving a valid agreement to arbitrate between it and the Dicksons. *In re Kellogg Brown & Root,* 166 S.W.3d at 737-38; *J.M. Davidson, Inc.*, 128 S.W.3d at 227-28; *Mendivil*, 357 S.W.3d at 830. Defendants attempt to discharge this burden in conclusory fashion, claiming that all elements of a valid contract under Texas law are satisfied by the Dicksons signing the Statement. Defendants' Brief [Doc. 24] at 6-7. This attempt falls short.

"An agreement to arbitrate, like other contracts, must also be supported by consideration." *Mendivil*, 357 S.W.3d at 831 (citing *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 676 (Tex. 2006)); *see also J.M. Davidson, Inc.*, 128 S.W.3d at 235-36 ("When illusory promises are all that support a purported bilateral contract, there is no contract.") (Schneider, J., dissenting) (quoting RESTATEMENT (SECOND) OF CONTRACTS §§ 2 cmt. e; 77 cmt. a.).

Texas law is very well settled that an arbitration clause is illusory—and therefore unenforceable from the outset—if one party can change the terms of the agreement to avoid

arbitration. *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 205-06 (5th Cir. 2012) (discussing *Morrison v. Amway Corp.*, 517 F.3d 248 (5th Cir. 2008)). "[T]he fundamental concern driving this line of case law is the unfairness of a situation where two parties enter into an agreement that ostensibly binds them both, but where one party can escape its obligations under the agreement by modifying it." *Carey*, 669 F.3d at 209.[3]

Even where a party does not expressly retain the right to alter the provisions of an agreement, the same concern applies if the party can escape arbitration. *See, e.g.*, *Mendivil*, 357 S.W.3d at 832. For example, in *Mendivil*—a case involving an employment agreement—only the employee (but not the company) agreed to waive a trial by jury, leaving the court unable to discern from the arbitration language that the company made a mutual, binding promise to the employee. *Id*. The court concluded that the arbitration language lacked the requisite consideration and was illusory, finding: "[the company] failed to prove the existence of a valid arbitration agreement in the trial court. Because there was no valid arbitration agreement, the trial court erred in compelling arbitration." *Id*. at 833.

Here, as in *Mendivil*, the signatories of the Statement purport to "waive any and all rights to initiate any action before any administrative agency or court of law or equity." Carroll Dec. [Doc. 23-1] Ex. 1-A at 4, Ex. 1-B at 3, Ex. 1-C at 3. But there is no reciprocal waiver on the part of GFA or any other Defendant. *Id*. If GFA (or any other Defendant) initiated an action against the Dicksons in court, the Dicksons plainly could not invoke the arbitration language in the Statement on the basis that GFA (or any other Defendant) waived their right to proceed, making

[3] The analogous concept manifests in recent Arkansas case law as "lack of mutuality of obligation" rather than "illusoriness." *See, e.g., Alltel Corp. v. Rosenow*, 2014 WL 4656609, *8 (Ark. Sept. 18, 2014) ("This court has been resolute that there is no mutuality of obligation where one party uses an arbitration agreement to shield itself from litigation, while reserving to itself the ability to pursue relief through the court system.").

the language illusory and lacking the requisite consideration. *Mendivil*, 357 S.W.3d at 832; *see also Carey*, 669 F.3d at 209. This is underscored by the fact that no Defendant—neither of the GFA entities, nor any individual Defendant—signed or otherwise acknowledged the Statement.[4] *See generally* Carroll Dec. [Doc. 23-1] Ex. 1-A, 1-B, 1-C.

In sum, because there is no consideration supporting the arbitration language in the Statement, this Court should hold that all Defendants have failed to carry their burden of proving the existence of a valid agreement to arbitrate, and it should deny their motion accordingly.

B. The terms of the arbitration language in the Statement are unenforceably vague

It is a basic principle of Texas contract law that "[a] contract is legally binding only if its terms are sufficiently definite to enable a court to understand the parties' obligations." *Playoff Corp. v. Blackwell*, 300 S.W.3d 451, 455 (Tex.App.—Fort Worth 2009, pet. denied); *see also T.O. Stanley Boot Co., Inc. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992). Where elements of a contract are indefinite and material, a court is not free to supply them. *T.O. Stanley Boot Co., Inc.*, 847 S.W.2d at 222.

In the arbitration context, even if a document includes a reference to arbitration or otherwise shows an intention to arbitrate, provisions that are unclear may not be enforceable. For example, the Second Circuit affirmed the denial of a motion to compel arbitration in an employment dispute where the employee admitted signing an arbitration agreement, but the company could only produce the first page of the agreement (which nonetheless included such language as "the Federal Arbitration Act shall govern the interpretation, enforcement and all

[4] Notably, while Defendant Carroll declares that co-Defendants "K.P. Yohannan, Gisela Punnose, Daniel Punnose, and Pat Emerick and myself are each committed to Biblical dispute resolution and arbitration[,]" Carroll Dec. ¶10, Defendants do not assert (and therefore offer no evidence) that any of them actually signed the Statement. *See generally* Defendants' Motion [Doc. No. 23]; Carroll Dec. [Doc. 23-1]; Defendants' Brief [Doc. 24].

proceedings pursuant to this Agreement."). *Dreyfuss v. Etelcare Global Solutions-U.S. Inc.*, 349 Fed. Appx. 551, 552 (2d Cir. 2009). The court held the company failed to prove the existence of an enforceable arbitration agreement because "[i]t is undisputed that [the company] cannot demonstrate [the employee's] assent to an entire range of matters relevant to the conduct of arbitration proceedings." *Id*. at 554; *see also Bates v. MTH Homes-Texas, L.P.*, 177 S.W.3d 419, 423-24 (Tex.App.—Houston [1st Dist.] 2005, orig. proceeding) ("the clause on which [the homebuilder] relies, although it includes the word 'arbitration,' is not sufficient to constitute an agreement to arbitrate because it does not clearly indicate the intent to arbitrate.").

The language Defendants use as the basis for their motion is contained in this sentence: "I agree that any and all disputes of any kind arising out of the relationship between myself and GFA, *or any other GFA member*, shall be resolved by way of conciliation, or mediation, the parties agreeing that *the matter* will be submitted to final and binding arbitration in accordance with the rules and procedures set forth in the *Unified Arbitration Act*." Carroll Dec. [Doc. 23-1] Ex. 1-A at 4, Ex. 1-B at 3, Ex. 1-C at 3 (emphasis added). The first problem is the vagueness created by the wording in the first part of the sentence, as undefined terms such as "GFA member" (who does this include, exactly?) and "matter" (does this refer to a resolved or unresolved "conciliation" or "mediation"?) render the sentence all but meaningless. Even Defendants do not attempt to explain what, specifically, this language actually means; instead, they carefully skirt the issue, suggesting (without explicitly asserting) that a mere "attempt to reconcile" satisfies whatever this language ostensibly requires as much as a formal arbitration demand. *See* Defendants' Brief [Doc. 24] at 4 (complaining that Plaintiffs "did not: •Attempt to reconcile; •Seek to mediate; *or* • Request arbitration.") (emphasis of "or" added).

Second, the Statement problematically directs that the "matter" (whatever that means) "*will* be submitted to final and binding arbitration in accordance with *the rules and procedures set forth in the Unified Arbitration Act*." Carroll Dec. [Doc. 23-1] Ex. 1-A at 4, Ex. 1-B at 3, Ex. 1-C at 3 (emphasis added). In the United States, there is no "Unified Arbitration Act," and whatever rules and procedures it purportedly requires likewise do not exist. Most problematically, the requirement that the matter "will be submitted" to these nonexistent rules and procedures is the clearest part of this sentence—it imposes an absolute requirement that arbitration be conducted under imaginary rules.

Where an arbitration clause requires the use of rules that cannot be applied, courts routinely decline to compel arbitration. *See, e.g.*, *Ranzy v. Tijerina*, 393 Fed. Appx. 174, 175 (5th Cir. 2010) (affirming denial of motion to compel arbitration based on clause requiring "arbitration by and under the Code of Procedure of the National Arbitration Forum" where forum had ceased handling such claims); *Inetianbor v. CashCall, Inc*., 768 F.3d 1346, 1348 (11th Cir. 2014) (affirming denial of motion to compel arbitration based on clause requiring "[a]rbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules" where such rules did not exist). In cases like these, courts apply the rules of contract construction and decline to substitute an arbitration forum under §5 of the FAA. *Ranzy*, 393 Fed. Appx. at 175; *Inetianbor*, 768 F.3d at 1349-51.

The Court should accordingly deny Defendants' request to compel arbitration based on the vague first sentence of arbitration language in the Statement and the nonexistent rules and procedures it explicitly requires. To give any effect at all to this language, the Court would essentially have to rewrite it by filling in enormous gaps in meaning and imposing choices that

no party even arguably agreed to, such as a particular arbitral forum or existing sets of rules and procedures. This is indisputably not the role of the Court; instead, it should find that Defendants failed to meet their burden, and it should deny Defendants' motion.

2. The Dicksons' claims are outside the scope of the arbitration language

Even if the Court finds that each of the Defendants carried their burden of proving the existence of a valid agreement to arbitrate, it should nonetheless deny Defendants' motion, because the Dicksons' claims in this case are plainly not within the scope of the arbitration language in the Statement.

"When deciding whether a claim falls within the scope of an arbitration agreement, courts 'focus on factual allegations in the complaint rather than the legal causes of action asserted.'" *Jones v. Halliburton Co.*, 583 F.3d 228, 240 (quoting *Waste Mgmt., Inc. v. Residuos Industriales Multiquim, S.A. de C.V.*, 372 F.3d 339, 344 (5th Cir. 2004)). Courts examine the facts giving rise to the action and determine whether the action could be maintained without reference to the agreement. *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 141 F.3d 243, 250-51 (5th Cir. 1998). Courts may limit even broad arbitration clauses where the dispute lacks a significant relationship to the agreement. *See Jones*, 583 F.3d at 238-39 ("If 'relate to' were taken to the furthest stretch of its indeterminacy", the phrase would not have much limiting power because "[r]eally, universally, relations stop nowhere") (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co*., 514 U.S. 645, 655 (1995)).

Thus, in *Jones*, the Fifth Circuit held that claims based on the dispute in question—the alleged rape of the plaintiff—were not subject to the arbitration clause in her employment contract covering "any and all claims that you might have against Employer related to your employment, including your termination, and any and all personal injury claim[s] arising in the

workplace" even though her alleged rape occurred on the job. 583 F.3d at 231. And it held that a doctor's false advertising claim against an HMO did not fall within the scope of a clause in his agreement with the HMO requiring arbitration of all disputes "arising out of or relating to" the agreement, because the doctor's allegations that the HMO was misleading consumers existed independently of the agreement. *Ford*, 141 F.3d at 252 ("In other words, the fact that an agreement exists between Dr. Ford and the HMOs is legally irrelevant and indeed can be treated as nonexistent as far as his false advertising claim is concerned.").

The dispute giving rise to this case is about donations to GFA. Complaint [Doc. 1] ¶¶42-45. Specifically, Matthew and Jennifer Dickson allege that that they donated money to GFA only because GFA represented to them that it would apply 100% of every donation exactly as the Dicksons designated—but GFA did not do so and, instead, misdirected the money. *Id*. Crucially, the Dicksons' claims based on these allegations do not depend at all on the fact that the Dicksons once served as GFA staff in Texas and signed the Statement. *Compare* Carroll Dec. [Doc. 23-1] ¶¶4-5 *with* Complaint [Doc. 1] ¶¶42-45; 55-77. They depend on duties imposed by law on Defendants that exist independently of the Statement, such as the duty not to defraud or mislead.

Indeed, Defendants attempt to use the circumstance of the Dicksons' earlier service to GFA to foreclose claims any other donor could bring in court based on essentially the same allegations. Defendants' only argument that this dispute falls within the scope of the arbitration language is based entirely on the breadth of the word "relationship" in the Statement; they implicitly concede that allegations based on contributions the Dicksons made after becoming "former members" of GFA are outside the scope of the arbitration language but for the fact that the Statement "is devoid of any temporal limitation." Defendants' Brief [Doc. 24] at 8-9.

But, as is well established in the arbitration context, "even broad clauses have their limits." *Jones*, 583 F.3d at 235 (quoting *Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1067 (5th Cir. 1998)). A finding that the arbitration language in the Statement bars the Dicksons from filing suit on the fraudulently-induced donations of money they made to GFA regardless of when they made them would require the Court to completely ignore the specific allegations of the case based only on the word "relationship" in the Statement. The law strongly suggests the Court should not make such a finding. *See, e.g., Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511, 1516 (10th Cir. 1995) ("For example, if two small business owners execute a sales contract including a general arbitration clause, and one assaults the other, we would think it elementary that the sales contract did not require the victim to arbitrate the tort claim because the tort claim is not related to the sales contract. In other words, with respect to the alleged wrong, it is simply fortuitous that the parties happened to have a contractual relationship.").

To avoid reaching an absurd and unfair result, the Court should find that the Statement is legally irrelevant to the dispute over the donations the Dicksons allege Defendants fraudulently induced. The Court should therefore hold that the Dicksons' claims in this case are outside the scope of the Statement's arbitration language.

Conclusion

Defendants have entirely failed to carry their burden of proving the existence of a valid arbitration agreement. The arbitration language in the Statement lacks consideration and is helplessly vague. Moreover, the Statement is palpably irrelevant to the dispute the Dicksons have brought before the Court for redress: the deliberate misleading of tens of thousands of similiarly-situated donors resulting in Defendants' enrichment. Rather than allowing Defendants to evade

responsibility for their conduct based on the happenstance of the Dicksons' former and terminated status as "members" of GFA, the Court—following well-settled precedent—should deny Defendants' motion in its entirety.

DATED this 29th day of April, 2016.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that on April 29th, 2016, the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system and by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's system.

/s/ Woodson W. Bassett III
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