UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DNM CONTRACTING, INC.,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 4:20-CV-1790
	§	
WELLS FARGO BANK, N.A.,	§	
	§	
Defendant.	§	

ORDER

Before the Court are Defendant's Motion to Compel Arbitration and Dismiss Plaintiff's Complaint (the "Motion") (Doc. #12), Plaintiff's Response to the Motion (Doc. #13), and Defendant's Reply in Support of the Motion. Doc. #14. Having considered the parties' arguments and applicable law, the Court grants the Motion.

Plaintiff DNM Contracting, Inc. brings this putative class action against Defendant Wells Fargo Bank, N.A. in connection with the Paycheck Protection Program ("PPP") enacted by Congress in the Coronavirus Aid, Relief, and Economic Security Act. Pub. L. No. 116-136, § 1102, 134 Stat. 281, 286–294 (Mar. 27, 2020). On April 5, 2020, Defendant announced that it would "distribute a total of $10 billion to small business customers under the requirements of the PPP." Doc. #12, Ex. 2 at 1. Only applicants that "ha[d] a Wells Fargo Business checking account as of Feb. 15, 2020 and [were] enrolled in business online" could obtain a PPP loan with Defendant. *Id.*, Ex. 3 at 1.

On April 14, 2020, Plaintiff submitted a PPP loan application to Defendant. Doc. #1, Ex. 3 ¶ 11. Shortly thereafter, Plaintiff "learned that funding for the PPP program had been

exhausted."[1] *Id.* ¶ 12. On April 24, 2020, Plaintiff sued Defendant in state court on behalf of itself and a class of "[a]ll Wells Fargo Bank small business customers who utilized Wells Fargo Bank for assistance with and processing of their PPP loans." *Id.* ¶ 15. In its Original Petition, Plaintiff alleges that "Defendant did not actually submit Plaintiff's application for approval" and "never processed or properly submitted . . . the loan applications of many other small businesses," instead prioritizing "bigger 'small businesses' for loan processing and submission." *Id.* ¶¶ 13–14. Specifically, Plaintiff alleges claims for fraud, fraudulent inducement, breach of fiduciary duty, breach of contract, negligence, and violations of the Texas Deceptive Trade Practices Consumer Protection Act. *Id.* ¶¶ 25–47. Defendant timely filed a Notice of Removal on May 22, 2020. Defendant now moves to compel arbitration of Plaintiff's claims pursuant to the arbitration provisions in the "Business Account Application" signed by Plaintiff on March 12, 2015 (the "Account Application") and "Deposit Account Agreement" effective July 24, 2019 (the "DAA").[2] Doc. #12.

In reviewing a motion to compel a party to arbitration, the court performs a two-step inquiry to determine (1) whether the parties entered into a valid arbitration agreement and (2) whether that arbitration agreement covers the dispute. *Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 201

[1] On April 16, 2020, Defendant issued a press release stating that the Small Business Administration had announced that the $349 billion in congressional funding for the PPP had been fully allocated to participating lenders, including Defendant. Doc. #12, Ex. 4. Eight days later, the same day that Plaintiff initiated this case, Congress allocated another $310 billion in funding for the PPP. Pub. L. No. 116–139, §101(a), 134 Stat 620, 620 (April 24, 2020).

[2] When Plaintiff signed the Account Application on March 12, 2015, a "Business Account Agreement" was in effect, not the DAA. Doc. #12, Ex. 8. Like the DAA, the Business Account Agreement contained a binding arbitration agreement. *Id.* at 4. The Business Account Agreement also stated that Plaintiff's continued use of its account "following the effective date of any modification will show [its] consent to that modification." Thus, the DAA is now the operative agreement in this case, a fact that Plaintiff does not dispute.

(5th Cir. 2016). "Ordinarily, whether a claim is subject to arbitration is a question for a court," but "if the parties have clearly and unmistakably agreed to arbitrate arbitrability, certain threshold questions—such as whether a particular claim is subject to arbitration—are for the arbitrator, and not a court, to decide." *Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 261 (5th Cir. 2014) (internal citation omitted). In the Fifth Circuit, "express incorporation" of American Arbitration Association ("AAA") rules "constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Id.* at 262–263 (citing *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir.2012)).[3]

Here, Plaintiff does not dispute the validity of the Account Application and DAA. *See* Doc. #13 ¶ 9. Rather, Plaintiff argues that its claims do not fall within the scope of the arbitration provision in the Account Application. *Id.* ¶¶ 15–21. By contrast, Defendant contends that the parties expressly delegated the question of arbitrability to the arbitrator, citing the plain language of the arbitration agreement in the DAA and its reference to AAA rules. Doc. #12 at 5–8. Thus, the Court must determine whether the Account Application and DAA cover Plaintiff's claims.

The Account Application contains a provision stating that Plaintiff agrees to be bound by Defendant's "account agreement that includes the Arbitration Agreement under which any dispute between [Plaintiff] and [Defendant] relating to [Plaintiff's] use of any Bank deposit account, product or service will be decided in an arbitration proceeding before a neutral arbitrator as described in the Arbitration Agreement." Doc. #12, Ex. 1 at 4. In the DAA, Plaintiff agreed "to

[3] Under AAA Rule 7(a), "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDICATION PROCEDURES 13 (2013), https://www.adr.org/sites/default/files/Commercial% 20Rules.pdf.

submit to binding arbitration all claims, disputes, and controversies between or among [Defendant] and [Plaintiff] . . . whether in tort, contract or otherwise arising out of or relating in any way to [Plaintiff's] account(s) and/or service(s), and their negotiation, execution, administration, modification, substitution, formation, inducement, enforcement, default, or termination." *Id.*, Ex. 7 at 6. A dispute includes "a disagreement about this Arbitration Agreement's meaning, application, and enforcement." *Id.*, Ex. 7 at 4. Further, the DAA provides that Defendant and Plaintiff agree that "[AAA] will administer each arbitration and the selection of arbitrators according to the AAA's Consumer Arbitration Rules." *Id.*

Because the Arbitration Agreement expressly incorporates AAA rules, the Court finds "clear and unmistakable evidence" that the parties agreed to arbitrate arbitrability. *See Crawford*, 748 F.3d at 263. Therefore, the threshold question of whether Plaintiff's claims are subject to arbitration is for the arbitrator, not this Court. *See Crawford*, 748 F.3d at 261; *see also Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531, 202 L. Ed. 2d 480 (2019) ("When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract."). Because Plaintiff must submit its claims to the arbitrator to determine whether the Arbitration Agreement applies, this case should be dismissed without prejudice. *Ruiz v. Donahoe*, 784 F.3d 247, 249–50 (5th Cir. 2015) (quoting *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992)) (explaining that Fifth Circuit allows court to dismiss claims pending arbitration, instead of staying the case, "when all of the issues raised in the district court must be submitted to arbitration"); *Jureczki v. Banc One Texas, NA*, 252 F. Supp. 2d 368, 380 (S.D. Tex.), *aff'd sub nom. Jureczki v. Bank One Texas, NA*, 75 F. App'x 272 (5th Cir. 2003) (dismissing without prejudice in light of court's conclusion that plaintiffs be compelled to arbitrate all of their claims); *The Shipman Agency, Inc. v. TheBlaze Inc.*, 315 F. Supp.

3d 967, 976 (S.D. Tex. 2018) (dismissing without prejudice because court "concluded that all Plaintiff's claims must be submitted to arbitration," so "retaining jurisdiction and staying the action will serve no purpose").

Accordingly, the Motion is GRANTED, and this case is hereby DISMISSED without prejudice.

It is so ORDERED.

December 18, 2020
Date

The Honorable Alfred H. Bennett
United States District Judge