UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SONIA TORRES, Individually and as Representative of a Class of Participants and Beneficiaries on Behalf of the Greystar 401(k) Plan, Plaintiff, v. GREYSTAR MANAGEMENT SERVICES, L.P., Defendant.	)	CIVIL ACTION NO. SA-19-CA-510-FB

DEFENDANT'S MOTION TO COMPEL INDIVIDUAL ARBITRATION AND DISMISS THE COMPLAINT

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Defendant Greystar Management Services, L.P. ("Greystar") moves this Court to compel arbitration of Plaintiff Sonia Torres's individual claim pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, and to dismiss the Complaint, including the class action allegations, under Federal Rules of Civil Procedure 12(b)(1), 12(b)(3), and 12(b)(6). As set forth below, Ms. Torres signed a Mutual Agreement to Arbitrate Claims (the "Arbitration Agreement" or "Agreement") that not only requires arbitration of her claims against Greystar but delegates to the arbitrator the power to decide questions regarding the applicability and enforceability of the Agreement. Moreover, the Agreement contains a class action waiver foreclosing Ms. Torres from bringing any class or collective action. Accordingly, this Court should grant Greystar's motion, compel Ms. Torres to arbitrate her claims individually, and dismiss the Complaint in its entirety.

INTRODUCTION

The issue before this Court on this motion is exceedingly narrow: "whether the parties entered into *any arbitration agreement at all*." *Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 201 (5th Cir. 2016). As explained below, the Federal Arbitration Act ("FAA") limits the province of this Court to this simple determination. Ms. Torres entered into a valid agreement to arbitrate her claims and relinquished her right to bring any class or collective action. This Court should now enforce the plain terms of the Agreement.

BACKGROUND

Greystar provides end-to-end property management services for residential housing, apartment homes, short-term furnished corporate housing, and mixed-use properties incorporating retail space. *See* https://www.greystar.com/business-services/property-management. With offices in more than 50 cities serving more than 185 markets globally, and more than 500,000 units and student beds under management, Greystar currently ranks first

among the Top 50 US Apartment Managers according to the 2019 National Multifamily Housing Council. *Id*. For the benefit of its employees, Greystar sponsors the Greystar 401(k) Plan (the "Plan"), Compl. ¶ 2, in which Ms. Torres participated. Compl. ¶ 7. Ms. Torres worked for Greystar in Texas between November 2012 and January 22, 2018, and at all times was an at-will employee. Declaration of Nellcine Ford ("Ford Decl."), ¶¶ 9-10.

In July 2016, Greystar implemented a new policy requiring all new and existing employees to enter into the Arbitration Agreement as a condition of employment with Greystar. Ford Decl., ¶ 15; Declaration of Nai-Yuan Sheu ("Sheu Decl."), ¶ 11. All Greystar employees were given notice of the required Arbitration Agreement by email four times between July and September 2016. Ford Decl., ¶¶ 16-20; Sheu Decl., ¶¶ 12-15. To facilitate employees' review of the Arbitration Agreement, the Information Technologies ("IT") department at Greystar created a module on Greystar's employee training portal through which all employees could review the Agreement in full and either accept or decline the Agreement. Ford Decl., ¶ 22; Sheu Decl., ¶¶ 11, 17-20. On August 1, 2016, as a condition of her continued employment, Ms. Torres logged in to the employee portal using her Greystar credentials and assented to the Arbitration Agreement by clicking "I agree" on the appropriate screen in the portal. Ford Decl., ¶ 22; Sheu Decl., ¶¶ 22-23. Ms. Torres later confirmed by email to her supervisor that and all other employees at her property had accepted the Agreement. Declaration of Selina Lazarin ("Lazarin Decl."), ¶¶ 6-7, Ex. A and B; *see also* Declaration of Darrell Reinke, ¶ 6. Greystar subsequently terminated any employees who had not accepted the Arbitration Agreement by October 1, 2016. Ford Decl., ¶ 21.

The Arbitration Agreement requires both Ms. Torres and Greystar to arbitrate any and all legal disputes between the two parties, and it delegates any questions regarding the enforceability

or applicability of the Agreement to the arbitrator. Ford Decl., Ex. A. Specifically, the Agreement provides:

> Except for the claims expressly excluded by this Agreement, ***both you and the Company agree to arbitrate any and all disputes, claims, or controversies ("claim") that the Company may have against you, or that you may have against the Company*** and/or its parent corporation, affiliates, subsidiaries, divisions, officers, directors and agents thereof, which could be brought in a court of law, including, but not limited to, all claims arising out of or relating to your employment with the Company and/or the end of your employment with the Company.[1]

Ford Decl., Ex. A, § A (emphasis added).

The Arbitration Agreement further delegates to the arbitrator any questions regarding the enforceability or applicability of the Agreement:

> The arbitrator, and not any federal, state or local court or agency, shall have exclusive authority to resolve any dispute relating to the applicability, enforceability, or formation of this Agreement . . . .

Ford Decl., Ex. A, § C. The Arbitration Agreement also provides that "all claims must be pursued on an individual basis only," and contains an explicit waiver by Ms. Torres of any right to bring a class or collective action against Greystar:

> **Class/Collective Action Waiver and Jury Waiver.**
>
> The Parties agree that all claims must be pursued on an individual basis only. By signing this Agreement, you waive your right to commence, or be a party to, any class, representative or collective claims or to bring jointly with any other person any claim against the Company.

Ford Decl., Ex. A, § B.

In violation of the plain language of the Arbitration Agreement, on May 13, 2019, Ms. Torres filed the instant putative class action in this Court. *See* Compl. ¶¶ 50-59. On September 4, 2019, 2019, Greystar reminded Ms. Torres of her Arbitration Agreement and asked that she

[1] The Arbitration Agreement defines "Company" to include Greystar Management Services, LP, and "its parent corporation, affiliates, subsidiaries, divisions, officers, directors and agents thereof." Ford Decl., Ex. A.

withdraw the Complaint and proceed with arbitration, but, to date, Ms. Torres has not done so. Declaration of Sarah M. Adams ("Adams Decl."), ¶¶2-3, Ex. A.

PROCEDURAL FRAMEWORK

Neither the FAA nor the Federal Rules of Civil Procedure dictate the manner for responding to a complaint with a motion to compel arbitration. Courts have approached the matter in a variety of ways. Some courts treat such a motion as a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *See, e.g.*, *Geographic Expeditions, Inc. v. Estate of Lhotka*, 599 F.3d. 1102, 1106–07 (9th Cir. 2010); *U.S. ex rel. Lighting & Power Servs., Inc. v. Inferface Constr. Corp.*, 553 F.3d 1150, 1152 (8th Cir. 2009). Other courts have held that motions to compel arbitration should be brought as Rule 12(b)(3) motions to dismiss for improper venue. *See, e.g., Gratsy v. Colo. Tech. Univ.*, 599 F. App'x 596, 597 (4th Cir. 2015). Still other courts require motions to compel arbitration to be presented as motions to dismiss for failure to state a claim under Rule 12(b)(6). *See, e.g., Palko v. Airborne Express, Inc.*, 372 F.3d 588, 597–98 (3d Cir. 2004).

The Fifth Circuit has not resolved the question of which Rule 12 provision applies to a motion to compel arbitration; however, this Court has compelled arbitration on motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1). *See, e.g., Santos v. Progreso, LLC*, No. SA–14–CA–702–FB, 2014 WL 12586858, at *3 (W.D. Tex. Dec. 17, 2014).

Regardless of the procedural framework, courts follow the guidance of the FAA, described immediately below, with respect to dismissal of claims under a motion to compel arbitration.

ARGUMENT

I. The FAA Requires Arbitration of Ms. Torres's Claims.

The FAA sets forth a "strong federal policy in favor of enforcing arbitration agreements." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985). As a result, a court's sole task is to determine whether a valid arbitration agreement has been presented and, to the extent the question is not delegated to the arbitrator, whether the claims alleged are arbitrable. The FAA requires district courts to "compel arbitration of otherwise arbitrable claims, when a motion to compel arbitration is made." *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1147 n.20 (5th Cir. 1985). This Court should do so here.

Indeed, this Court's task is particularly straightforward given that the Arbitration Agreement provides that the arbitrator, rather than a court, should decide questions of arbitrability. "Ordinarily, whether a claim is subject to arbitration is a question for a court. However, 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, 262 (5th Cir. 2014) (citation omitted). The Fifth Circuit has described such a provision that "transfer[s] the power to decide threshold questions of arbitrability to the arbitrator" as a "delegation clause." *Kubala*, 830 F.3d at 201. Where a party asserts that an arbitration agreement contains a delegation clause, the court's analysis is limited to two inquiries: "(1) whether the parties entered into a valid arbitration agreement, and, if so, (2) whether the agreement contains a valid delegation clause." *Reyna v. Int'l Bank of Commerce*, 839 F.3d 373, 378 (5th Cir. 2016) (citing *Kubala*, 830 F.3d at 201–02).

Within the scope of enforcing arbitration agreements, courts must also enforce class action waivers. According to the Supreme Court, "Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for

individualized proceedings." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619, 1631–32 (2018). Since the Arbitration Agreement explicitly requires arbitration on an individualized basis only, Ford Decl., Ex. A, § B, this Court should enforce the plain language of the Agreement and compel Ms. Torres to arbitrate her claims individually.

While the "party moving to compel arbitration bears the initial burden to present the court with the existence of a valid agreement to arbitrate and, where applicable, a valid delegation clause," "[o]nce the moving party has met its initial burden, the burden shifts to the party resisting arbitration to assert a reason that the arbitration agreement is unenforceable." *Butler v. TFS Oilfield Servs., LLC*, No. SA-16-CV-1150-FB, 2017 WL 7052306, at *2 (W.D. Tex. Aug. 24, 2017), *report and recommendation adopted*, 2017 WL 7052277 (W.D. Tex. Sept. 28, 2017). *See also Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 296–97 (5th Cir. 2004) ("[T]here is a strong presumption in favor of arbitration and a party seeking to invalidate an arbitration agreement bears burden of establishing its invalidity."). As described below, Greystar meets this preliminary burden, and thus "the burden shifts to the party resisting arbitration to assert a reason that the arbitration agreement is unenforceable." *Butler*, 2017 WL 7052306, at *2.

A. The Arbitration Agreement is Valid.

1. Ms. Torres Accepted the Agreement by Continuing to Work at Greystar After Receiving Notice of the Change to Her Terms of Employment.

Greystar easily bears its burden to show that Ms. Torres entered into a valid arbitration agreement with a delegation clause. In the Fifth Circuit, whether the parties "entered a valid arbitration contract turns on state contract law." *Kubala*, 830 F.3d at 202. Under Texas law, where, as here, an employee signs an arbitration agreement after employment has commenced, the agreement is enforceable as long as it is a "valid modification of the terms of []

employment." *Kubala*, 830 F.3d at 203.[2] "To demonstrate a modification of the terms of at-will employment, the proponent of the modification must demonstrate that the other party (1) received notice of the change and (2) accepted the change." *Kubala*, 830 F.3d at 203 (citing *In re Halliburton Co.*, 80 S.W.3d 566, 568 (Tex. 2002)). Acceptance of such a change in terms "need not be anything more complicated than continuing to show up for the job and accept wages in return for work. . . . 'If the employee continues working with knowledge of the changes, [she] has accepted the changes as a matter of law.'" *Kubala*, 830 F.3d at 203 (quoting *Hathaway v. Gen. Mills, Inc.*, 711 S.W.2d 227, 229 (Tex. 1986)).

Ms. Torres—like all Greystar employees—received notice of the Agreement on no less than ***four*** occasions. *See* Ford Decl., ¶¶ 16-20; Sheu Decl., ¶¶ 12-15. Ms. Torres then continued to work at Greystar for more than two years after receiving such notice, Ford Decl., ¶¶ 9, 26, thereby accepting the modification of the terms of her employment. Under *Kubala*, these facts alone establish that Ms. Torres entered into a valid agreement to arbitrate. *See Kubala*, 830 F.3d at 203.

2. Ms. Torres Affirmatively Accepted the Terms of the Agreement.

Although notice and continued employment suffice to establish a valid arbitration agreement, the validity of the Arbitration Agreement is made all the more clear by Ms. Torres's affirmative agreement to its terms. As set forth in the Declarations of Ms. Ford and Ms. Sheu, Ms. Torres logged into the employee portal, accessed the Arbitration Agreement, and clicked "I agree." Ford Decl., ¶ 24; Sheu Decl., ¶¶ 22-23. Ms. Torres subsequently affirmed to her supervisor that and all other employees at her property had accepted the Agreement. Lazarin

[2] As described in the Background section, Torres assented to the Arbitration Agreement during her employment with Greystar after working at Greystar for more than two years, and then continued to work for Greystar for more than two years after entering into the Arbitration Agreement. *See* Ford Decl., ¶¶ 9, 27.

Decl., ¶¶ 6-7. Indeed, if Ms. Torres had not entered into the Arbitration Agreement, she would have been terminated, as were other employees who declined to consent to the Agreement. Ford Decl., ¶¶ 21, 26. Thus, Ms. Torres clearly "received notice of the change" and "accepted the change" embodied in the Arbitration Agreement, so the Arbitration Agreement was a "valid modification of the terms of [] employment" and thus enforceable. *Kubala*, 830 F.3d at 203.

B. The Delegation Clause is Valid.

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." *Rent–A–Center, West, Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010). The Fifth Circuit has held that ***"[i]f there is a delegation clause, [a] motion to compel arbitration should be granted in almost all cases***." *Kubala*, 830 F.3d at 202 (emphasis added); *see also Reyna*, 839 F.3d at 378 (holding that "[b]ecause the arbitration agreement contains a delegation clause, any dispute about the arbitrability of [plaintiff's claim] or the scope of the arbitration agreement must be decided by the arbitrator, not the courts"). The delegation clause in Ms. Torres's Arbitration Agreement states:

> The arbitrator, and not any federal, state or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement . . . .

Ford Decl., Ex. A, § C.

Significantly, this language is identical to that of a delegation clause upheld as valid by the Supreme Court in *Rent–A–Center*, 561 U.S. at 66, 69–70. The Fifth Circuit has repeatedly relied on similarity to the delegation clause language in *Rent–A–Center* in upholding delegation clauses as valid. *See, e.g.*, *Kubala*, 830 F.3d at 204 (relying on similarity between the delegation clause in *Rent–A–Center* and the clause at issue in that case to find that delegation clause was

valid); *Reyna*, 839 F.3d at 378–79 (same). Thus, the Agreement contains a valid delegation clause under both Supreme Court and Fifth Circuit precedent.

Because the Arbitration Agreement contains a valid delegation clause, the question of whether the instant claim is arbitrable "is plainly the right and responsibility only of the arbitrator." *Kubala*, 830 F.3d at 204. Accordingly, this Court should compel Ms. Torres to resolve her claims in arbitration, and leave the question of arbitrability for the arbitrator to decide.

C. Ms. Torres May Not Proceed With a Class Action Because the Arbitration Agreement Contains a Valid Class Action Waiver.

Beyond the validity of the agreement itself, the Arbitration Agreement raises one additional issue for this Court to decide. Under the plain terms of the Agreement, a court, rather than an arbitrator, must decide the enforceability of the Agreement's class action waiver. The Agreement provides:

> The arbitrator, and not any federal, state or local court or agency, shall have exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this Agreement . . . ***except any determination as to enforceability of the class/collection action waiver shall be made solely by a court of law.***

Ford Decl., Ex. A, § C (emphasis added); *see also id*. ("Any issue concerning the validity or enforceability of the class/collective action waiver must be decided by a court of law.") ("The arbitrator shall have no power under this Agreement to consolidate claims and/or to hear a collective or class action."). Indeed, even in the absence of such an express provision, the default rule in the Fifth Circuit is that "class arbitration is a 'gateway' issue that must be decided by courts, not arbitrators—absent clear and unmistakable language in the arbitration clause to the contrary." *20/20 Commc'ns, Inc. v. Crawford*, 930 F.3d 715, 717 (5th Cir. 2019).

Class action waivers in arbitration agreements are routinely enforced, as evidenced by both Supreme Court and Fifth Circuit precedent. "In the [FAA], Congress has instructed federal

courts to enforce arbitration agreements according to their terms—***including terms providing for individualized proceedings***." *Epic Sys.*, 138 S. Ct. at 1619 (emphasis added); *see also D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 360 (5th Cir. 2013) (holding that class action waivers are enforceable under the FAA); *Carter*, 362 F.3d at 297–98 (same); *Dismuke v. McClinton Energy Grp., L.L.C.*, No. MO:16-CV-00023-RAJ, 2016 WL 7497592, at *4 (W.D. Tex. May 10, 2016) (holding that "the class action waiver [contained in an arbitration agreement] does not render the Arbitration Agreement signed by Plaintiff unenforceable"), *aff'd sub nom. Dismuke v. McClinton*, 670 F. App'x 210 (5th Cir. 2016).

So too, this Court has upheld as valid clauses in arbitration agreements that expressly require individual arbitration and expressly waive the right to pursue class, collective, or representative actions. *See, e.g.*, *Wiatrek v. Flowers Foods, Inc.*, No. SA-17-CA-772-XR, 2018 WL 3040583, at *1, *4 (W.D. Tex. June 16, 2018) (holding that arbitration agreement requiring "individuals to settle claims, disputes, and controversies… through individual arbitration" was a valid collective action waiver); *Dismuke*, 2016 WL 7497592, at *4 (holding that a clause requiring arbitration "on an individual basis" and waiving the right to any "class, collective, or representative proceeding" was enforceable) (emphasis omitted).

Here, the Arbitration Agreement contains a clear and explicit class action waiver:

> **Class/Collective Action Waiver and Jury Waiver.**
>
> The Parties agree that all claims must be pursued on an individual basis only. By signing this Agreement, you waive your right to commence, or be a party to, any class, representative or collective claims or to bring jointly with any other person any claim against the Company. . . .

Ford Decl., Ex. A, § B. By signing the Agreement including this waiver, Ms. Torres has agreed to pursue her claims only on an individual basis and has waived her right to bring them as the

purported class action alleged in the Complaint. For these reasons, this Court should hold the class action waiver to be enforceable and order individual arbitration of Ms. Torres's claims.

II. This Court Should Dismiss the Complaint.

Because Ms. Torres signed an enforceable arbitration agreement containing a valid delegation clause and class action waiver, this Court should dismiss the Complaint. The Fifth Circuit recognizes that district courts have discretion either to stay or to dismiss actions compelled to arbitration. *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992) (holding that a district court that "determined that all of [plaintiff's] claims were subject to arbitration . . . acted within its discretion when it dismissed [the] case with prejudice"); *see also Santos*, 2014 WL 12586858, at *2–3 (recognizing district courts' discretion to stay or dismiss claims subject to arbitration, and granting Rule 12(b)(1) motion to dismiss where all of plaintiff's claims were subject to arbitration). Indeed, dismissal is appropriate "when *all* of the issues raised in the district court must be submitted to arbitration," because in that instance, "retaining jurisdiction and staying the action will serve no purpose." *Alford*, 975 F.2d at 1164 (quoting *Sea-Land Serv., Inc. v. Sea-Land of Puerto Rico, Inc.*, 636 F. Supp. 750, 757 (D.P.R. 1986)). Because all of the claims contained in Ms. Torres's Complaint must be referred to individual arbitration, staying proceedings in this case will serve no purpose. Thus, this Court should act within its discretion to dismiss the Complaint.

CONCLUSION

For the foregoing reasons, Defendant Greystar respectfully requests that this Court enforce the class action waiver, compel individual arbitration of Ms. Torres's claims, and dismiss the Complaint in its entirety.

Dated: September 6, 2019

Respectfully submitted,

/s/ Sarah M. Adams

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CERTIFICATE OF SERVICE

I hereby certify that on 6th day of September, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record in accordance with the Federal Rules of Civil Procedure.

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