IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

HOME BUYERS WARRANTY CORPORATION and NATIONAL HOME INSURANCE COMPANY,	)	
Plaintiffs-Petitioners,	)	
v.	)	
ROBERT JORDAN and MARY JORDAN,	)	**16-cv-2340-JTF-tmp**
Defendants-Respondents.	)	

REPORT AND RECOMMENDATION

Before the court by order of reference is Defendants-Respondents Robert and Mary Jordan's ("Respondents") motion to dismiss Plaintiffs-Petitioners Home Buyers Warranty Corporation and National Home Insurance Company's ("Petitioners") petition to compel arbitration and stay various state law claims brought by Respondents against Petitioners in the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis. (ECF No. 11.) Respondents assert three grounds for dismissal: lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, and failure to join an indispensable party. See Fed R. Civ. P. 12(b)(1), (6), (7), & (19). Also pending is Petitioners' motion to compel arbitration (ECF No. 14) and Respondents' motion to stay that motion (ECF

No. 20).[1] For the reasons stated below, it is recommended that Respondents' motion to dismiss be granted and the petition to compel be dismissed without prejudice.

I. PROPOSED FINDINGS OF FACT

On December 22, 2015, Respondents filed suit against Chamberlain and McCreery, Inc. ("Chamberlain"), Home Buyers Warranty Corporation ("HBW") and National Home Insurance Company ("NHIC") in the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis. (See ECF No. 1-8.) In their state court complaint, Respondents allege breach of contract, inducement to breach a contract, negligence, fraudulent misrepresentation, and violations of the Tennessee Unfair Claims Practice Act and Tennessee Consumer Protection Act in connection with a new home Respondents purchased from Chamberlain in February 2006, and an express warranty on the home between Respondents and Chamberlain administered by HBW and insured by NHIC. According to their state court complaint, on February 17, 2006, Respondents contracted to purchase a new house in Arlington, Tennessee from Chamberlain, a Tennessee-based

[1]Because a federal court must consider its subject matter jurisdiction as a threshold matter, the undersigned magistrate judge does not address Petitioners' motion to compel arbitration (styled as a motion for summary judgment pursuant to Rule 56) in this report and recommendation. Should the presiding district judge adopt the recommendation to grant the motion to dismiss, the motion to compel arbitration and Respondents' related motion to stay would be rendered moot.

homebuilder. Respondents allege that at the closing, J. Michael Murphy ("Murphy"), a representative of Chamberlain, informed them that they would be given a free "2-10 warranty" on their new home. The 2-10 warranty is so named because it covers defects in workmanship for one year, systems defects for two years, and structural defects for ten years. Under the terms of the 2-10 warranty as set out in the Warranty Booklet ("Booklet"), the warranty agreement is between Respondents as homeowners and Chamberlain as the builder and warrantor. HBW administers the warranty program, and NHIC is the selected insurer of the builders as warrantors. The Booklet also contains a detailed arbitration clause, which provides that

> [a]ny and all claims, disputes and controversies by or between the homeowner, the Builder, the Warranty Insurer and/or HBW, or any combination of the foregoing, arising from or relating to this Warranty, to the subject Home, to the defect in or to the subject Home by the Builder, including without limitation, any claim of breach of contract, negligent or intentional misrepresentation or nondisclosure in the inducement, execution or performance of any contract, including this arbitration agreement, and any breach of any alleged duty of good faith and fair dealing, shall be settled by binding arbitration.

(ECF No. 1-7 at 7-8.) On the afternoon of the closing, Murphy allegedly told Respondents they needed to sign a Builder Application for Home Enrollment ("Application") that day in order to get the free 2-10 warranty. (See ECF No. 1-5.) Respondents claim Murphy neither showed them the Booklet

containing the full terms of the warranty nor explained any of the terms to them at the time they signed the Application. Instead, he allegedly told them they would receive the Booklet in the mail after their enrollment was approved. Respondents allege that while the Application they signed refers to an arbitration clause, they had no knowledge of the substance of the arbitration clause at the time they signed the Application. They allege the arbitration clause renders the warranty unconscionable under Tennessee law. They also claim Chamberlain falsely led them to believe that their 2-10 warranty was insured, when in fact NHIC insured Chamberlain, as the warrantor, against any claims made by Respondents. HBW approved Respondents' Application on February 27, 2006.

The Respondents further allege that at the time of the closing, Chamberlain knew that the home Respondents purchased did not meet residential construction standards for Shelby County, Tennessee, and that Chamberlain improperly concealed its negligent workmanship, which it knew would likely lead to future structural defects. According to their state court complaint, on June 14, 2010, Respondents submitted a structural defect claim under the warranty to HBW. Respondents claimed, among other things, that a window had separated from its frame, allowing moisture to enter and cause damage. NHIC denied this claim twice in 2010, each time after receipt of a written report

of an engineer hired by NHIC to inspect the home. NHIC concluded that the damage Respondents complained of was not a structural defect within the definition of the 2-10 warranty. Respondents allege that the reports of the engineer actually supported their claim of a structural defect.

Respondents resubmitted their claim in February 2015, claiming the previous problems had gotten worse. NHIC again denied the claim on March 12, 2015, and Respondents again allege the denial was contrary to the report submitted by the engineer sent by NHIC to inspect the house. Respondents later retained a different engineer and a foundation repair company to inspect the house and foundation. Respondents allege the engineer noted various code violations, and opined that the house had structural defects as defined by the 2-10 warranty. Respondents then contracted for the repair of the foundation and other related problems, allegedly at a cost more than $30,000. Their complaint alleges that NHIC and HBW denied their structural defect claim in bad faith to avoid having to pay for the claim under the policy and to conceal the defects in Respondents' home caused by Chamberlain's alleged negligence. Respondents filed their suit against Chamberlain, HBW, and NHIC in state court on December 22, 2015.

On May 18, 2016, Petitioners filed a Petition to Compel Arbitration and Stay Action in the United States District Court

for the Western District of Tennessee. (ECF No. 1.) Petitioners invoke subject matter jurisdiction under 28 U.S.C. § 1332 and 9 U.S.C. § 4, and ask the court to compel Respondents to submit all of their state law claims against Petitioners to binding arbitration pursuant to the arbitration clause in the 2-10 warranty and to stay the pending state law case, Jordan v. Chamberlain and McCreery, Inc., et al, No. CT-005208-15. Chamberlain, the first named defendant in the state law case, is not a party in the case before this court.

Respondents filed their motion to dismiss on June 16, 2016. They argue the court lacks subject matter jurisdiction over the petition because Petitioners have failed to satisfy the amount in controversy requirement, Petitioners have failed to state a claim upon which relief can be granted, and alternatively, Chamberlain is an indispensable party under Federal Rule of Civil Procedure 19. (ECF No. 11.) Before filing their response to the motion to dismiss, Petitioners filed a motion to compel arbitration, styled as a motion for summary judgment pursuant to Rule 56.

II. PROPOSED CONCLUSIONS OF LAW

A. The Federal Arbitration Act

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, *et seq.* provides that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by

arbitration a controversy thereafter arising out of such contract . . . 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 further provides that

> 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 . . . 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.

9 U.S.C. § 4. "Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute . . . ." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26 n.32 (1983); see also Vaden v. Discover Bank, 556 U.S. 49, 59-60 (2009).

Petitioners invoke the court's diversity jurisdiction under 28 U.S.C. § 1332, which provides for original jurisdiction over cases and controversies between parties of different states. A foundational requirement of diversity jurisdiction is that all parties on one side of the case must be completely diverse from all of the parties on the other side. See Caterpillar Inc. v. Lewis, 519 U.S. 61, 68 (1996).

Respondents do not dispute that they are completely diverse from the two named petitioners, HBW and NHIC. Respondents are citizens of Tennessee, while HBW and NHIC are both incorporated and have their principal place of business in Colorado. See 28 U.S.C. 1332(a)(1) & (c)(1). Respondents argue, however, that diversity jurisdiction does not exist because the amount in controversy requirement has not been satisfied. They further argue that Chamberlain is an indispensable party under Federal Rule of Civil Procedure 19. Because joinder of Chamberlain, which is incorporated in Tennessee, would destroy complete diversity, Respondents contend that the case must be dismissed for lack of subject matter jurisdiction.

B. Amount in Controversy Requirement

In addition to the requirement of complete diversity, Congress has also limited diversity jurisdiction to cases in which the amount in controversy exceeds $75,000, exclusive of costs and fees. 28 U.S.C. § 1332(a). In determining whether a petition to compel arbitration satisfies the amount in controversy requirement, the court applies the "legal certainty" test. Metlife Sec., Inc. v. Holt, No. 2:16-CV-32, 2016 WL 3964459, at *4 (E.D. Tenn. July 21, 2016) (citing Woodmen of the World/Omaha Woodmen Life Ins. Soc'y v. Scarbro, 129 F. App'x 194, 196 (6th Cir. 2005) (per curiam)); see also Geographic Expeditions, Inc. v. Estate of Lhotka ex rel. Lhotka, 599 F.3d

1102, 1107 (9th Cir. 2010); Woodmen of the World Life Ins. Soc'y v. Manganaro, 342 F.3d 1213, 1216-17 (10th Cir. 2003); Doctor's Assocs., Inc. v. Hamilton, 150 F.3d 157, 160-61 (2d Cir. 1998). "Under the legal certainty standard, a party's good-faith allegation that the amount in controversy exceeds $75,000 is sufficient unless 'it is obvious that the suit cannot involve [that] amount' based on the pleading's face." Metlife, 2016 WL 3964459 at *4 (quoting St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 292 (1938)) (alteration in original).

In Woodmen of the World, the Sixth Circuit explained that in assessing the asserted value of a petition to compel arbitration, a district court should look to "the value of the object of the litigation . . . from the perspective of the plaintiff, with a focus on the economic value of the rights he seeks to protect." Woodmen of the World, 129 F. App'x at 196. In determining the value of a petitioner's request that another party be compelled to submit state court claims against the petitioner to arbitration, both the amount that would be at stake in arbitration and the amount in controversy in the state court litigation are relevant. See id; Metlife, 2016 WL 3964459 at *4; see also CMH Homes, Inc. v. Goodner, 729 F.3d 832, 837-38 (8th Cir. 2013) ("To resolve the jurisdictional question in this case, therefore, we consider whether the amount in controversy between the [parties] satisfies the jurisdictional minimum by

looking through to 'the entire, actual controversy between the parties, as they have framed it.'"); Republic Bank & Trust Co. v. Kucan, 245 F. App'x 308, 314 (4th Cir. 2007) ("When determining whether the jurisdictional amount is satisfied in a case involving a petition to compel arbitration, it is appropriate to look through the petition to compel to the controversy underlying the arbitration request."); Jumara v. State Farm Ins. Co., 55 F.3d 873, 877 (3d Cir. 1995) ("The amount in controversy in a petition to compel arbitration . . . is determined by the underlying cause of action that would be arbitrated."). But see Webb v. Investacorp, Inc., 89 F.3d 252, 256 (5th Cir. 1996) ("[T]he amount in controversy in a motion to compel arbitration is the amount of the potential award in the underlying arbitration proceeding.").

In applying the legal certainty test, the court must look to Respondents' state court complaint to assess the amount at issue in the underlying dispute between the parties.[2] Petitioners allege that "the amount in controversy . . . exceeds $75,000, exclusive of interests and costs." (ECF No. 1 at 2.) Respondents argue this assertion is insufficient because

> the Circuit Court Complaint asks for no specific amount of damages, and in fact Petitioners had prior knowledge that on October 21, 2015 the Jordans submitted to NHIC a letter supported by documentation

[2]Respondents' state court complaint is attached as an exhibit to the Petition to Compel Arbitration. (See ECF No. 1-8.)

> that the cost of repairs, actual damages, amounted to $30,256.99. [Respondents], being of the opinion that the additional damages they suffered were outside of the warranty agreement and thus not subject to arbitration, demanded a total of $60,000.00, which figure included the actual cost of repair, to settle the case.

(ECF No. 11 at 8.) Respondents further contend that under Petitioners' interpretation of the warranty, if Respondents' claims were submitted to arbitration, Respondents could recover only the actual cost of repairs, with the rest of their state law claims being superseded by the warranty.

After examining Respondents' state court complaint, the court is not persuaded that Petitioners' good-faith assertion that more than $75,000 is at stake in the underlying controversy fails the legal certainty standard. Even if the actual damages Respondents allege are less than $75,000, their complaint also alleges that Petitioners induced Chamberlain to breach its contract with Respondents, which if proven under Tennessee law, would subject Petitioners to treble damages that could exceed $75,000. Specifically, Respondents

> charge that [HBW] and [NHIC], unlawfully induced [Chamberlain] to breach its contract with [Respondents] . . .
>
> T.C.A. § 47-50-109 provides:
>
> Procurement of breach of contracts unlawful-Damages
>
> It is unlawful for any person, by inducement, persuasion, misrepresentation, or other means, to induce or procure the breach or violation, refusal or

> failure to perform any lawful contract by any party thereto; and, in every case where a breach or violation of such contract is so procured, the person so procuring or inducing the same shall be liable in treble the amount of damages resulting from or incident to the breach of the contract. The party injured by such breach may bring suit for the breach and for such damages.

(ECF No. 1-8 at 15.)

In determining the amount at issue in the state court litigation, the court must consider a claim for treble damages "unless it is apparent to a legal certainty that such [damages] cannot be recovered." See Great Tenn. Pizza Co. v. BellSouth Telecomm, Inc., No. 3:10-CV-151, 2011 WL 1636234, at *8 (E.D. Tenn. Apr. 29, 2011) (quoting Hayes v. Equitable Energy Resources Co., 266 F.3d 560, 572 (6th Cir. 2001)). Here, § 47-50-109 of the Tennessee code, which Respondents quote in full in their complaint, provides that a defendant who induces and in fact causes a breach of contract "*shall be liable* for treble the amount of damages resulting from the breach." (Emphasis added); see Polk & Sullivan, Inc. v. United Cities Gas Co., 783 S.W.2d 538, 542 (Tenn. 1989) ("T.C.A § 47-50-109 . . . provides for mandatory treble damages in the event that there is a clear showing that the defendant induced the breach."). Given that treble damages are mandatory upon a clear showing of a violation of § 47-50-109, Petitioners face potential damages of more than $90,000. There is nothing on the face of Respondents' state

court complaint that suggests, to a legal certainty, that Respondents could not succeed on a claim under Tenn. Code Ann. § 47-50-109. Accordingly, Petitioners have satisfied the amount in controversy requirement of § 1332(a).[3]

C. The Rule 19 Framework

The court now addresses Respondents' contention that Chamberlain is an indispensable party under Federal Rule of Civil Procedure 19. In determining whether Chamberlain is indispensable, the court must employ a three-step analysis. See PaineWebber, Inc. v. Cohen, 276 F.3d 197, 200 (6th Cir. 2001). First, the court must determine whether Chamberlain is "necessary to the action and should be joined if possible." See id. Rule 19(a) provides that:

> (1) *Required Party*. A person who is subject to service of process and whose joinder will not deprive the court of subject matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) That person claims an interest relating to the subject of the action, and is so situated

[3]The court recognizes that, given the procedural posture of the Petition to Compel Arbitration, there is a certain irony in the parties' positions as to the amount in controversy in this case. The court's view that Petitioners have satisfied the amount in controversy is informed by the fact that Respondents, as the masters of their state court complaint, included an allegation that Petitioners committed a violation of Tennessee law which, if proven, would subject Petitioners to treble damages which could be in excess of $75,000.

> that disposing of the action in the person's absence may:
>
> (i) As a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) Leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations.

Fed. R. Civ. P. 19(a)(1)(A)-(B). If an absent party is deemed to be necessary under Rule 19(a), the court must then determine if joinder of the party will deprive the court of subject matter jurisdiction. See PaineWebber, 276 F.3d at 200. If joinder would deprive the court of subject matter jurisdiction, the court must finally determine "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." See id. In making this determination, the court must consider the following four factors:

> (1) The extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) The extent to which any prejudice could be lessened or avoided by:
>
> (A) Protective provisions in the judgment
>
> (B) Shaping the relief; or
>
> (C) Other measures
>
> (3) Whether a judgment rendered in the person's absence would be adequate; and

> (4) Whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b)(1)-(4).[4] "The Rule 19(b) inquiry is guided by pragmatic considerations, rather than technical or formalistic legal distinctions." Hooper v. Wolfe, 396 F.3d 744, 749 (6th Cir. 2005).

D. Home Buyer's Warranty Corp. v. Hanna and PaineWebber v. Cohen

In conducting its Rule 19 inquiry, the court finds the Fourth Circuit's decision in Home Buyer's Warranty Corp. v. Hanna, 750 F.3d 427 (4th Cir. 2014) highly persuasive, given that Hanna involved substantially similar facts and legal issues to those in the present case. In their response to Respondents' motion to dismiss, Petitioners argue that Hanna was wrongly decided and directly conflicts with the Sixth Circuit's decision in PaineWebber, Inc. v. Cohen, 276 F.3d 197 (6th Cir. 2001). The court disagrees.

Hanna involved a dispute between a West Virginia homeowner (Lois Hanna) and the same petitioners in this case, HBW and NHIC, over a 2-10 home warranty similar to the one at issue in

[4]Due to stylistic amendments to Rule 19, the term "necessary" no longer appears in the text of Rule 19(a), and "indispensable" no longer appears in the text of Rule 19(b). Because the amendments that removed these terms from the rule were not intended to substantively change the rule, and the relevant cases continue to use them, the court will also use the terms "necessary" and "indispensable." See Fed. R. Civ. P. 19 advisory committee's note to 1987 amendment, 2007 amendment.

this case. Hanna contracted with several West Virginia builders for the construction of a new home. As part of the contract, the builders provided her with a builder's warranty covering workmanship for one year, systems and appliances for two years, and the structure of the home for ten years. Hanna, 750 F.3d at 430. Before closing, the builders enrolled Hanna's home in a 2-10 warranty program administered by HBW and insured by NHIC. Id. The coverage of the 2-10 warranty in the HBW program was similar to the builder's warranty previously given to Hanna by the builders, but the 2-10 warranty also contained an arbitration clause stating that "any and all claims, disputes and controversies by or between the owner, the Builder/Seller, the Warranty Insurer and/or Home Buyers Warranty Corporation or any combination of the foregoing arising from or relating to this warranty shall be settled by binding arbitration." Id. at 430-31.

Hanna subsequently notified the builders of what she believed were defects with her home, and the builders filed claims with HBW and NHIC. Id. at 431. After receiving what she found to be an unsatisfactory response, Hanna filed suit against the builders, HBW, and NHIC in West Virginia state court, alleging state law claims of negligent construction, breach of the construction contract, breach of implied warranties of habitability and merchantability, breach of the 2-10 warranty,

bad faith denial of benefits under the 2-10 warranty, and fraud as to the 2-10 warranty. Id. She alleged the builders had enrolled her home in the HBW 2-10 warranty program without her knowledge or consent, and therefore she had not agreed to the arbitration clause in the 2-10 warranty. Id. She also claimed that the arbitration clause was unenforceable under West Virginia contract law. Id.

HBW and NHIC subsequently filed a petition to compel arbitration in the United States District Court for the Southern District of West Virginia, arguing that the arbitration clause in the 2-10 warranty required Hanna to submit all her state law claims against them to arbitration. Id. The West Virginia builders were not named as parties in that case. Id. Hanna filed a motion to dismiss, arguing the district court did not have subject matter jurisdiction because the underlying case or controversy included non-diverse parties, or alternatively, that the missing West Virginia builders were indispensable parties under Rule 19. Id. at 432.

Although the district court in Hanna granted the motion to dismiss, it did so on abstention grounds, relying on Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). Id. On appeal, the Court of Appeals did not reach the abstention issue, but instead held that the case had to be dismissed for lack of subject matter jurisdiction because the

missing West Virginia builders were indispensable parties under Rule 19(b). Id. at 436.

In conducting its Rule 19 analysis, the court found that the builders were necessary parties under the criteria of Rule 19(a)(1)(B).[5] Rule 19(a)(1)(B)(i) focuses on the ability of an absent party to protect an interest it has in the subject of the action, and the court noted that the builders had "a direct pecuniary interest in the dispute through the 2-10 warranty." Id. at 434. Moreover, the court reasoned that, because of Hanna's allegations that she did not consent to the terms of the 2-10 warranty entered into by the builders, "[the builders] are critical to the question of whether or not the arbitration clause is enforceable in the first place" and "the outcome of the petition could very well turn on a determination of whether [the builders'] enrollment of Hanna's home in the 2-10 warranty was consensual and legally binding on Hanna." Id. Accordingly, "fairness requires that [the builders] be joined as necessary parties to protect their own interests in the determination of the legal significance of their actions." Id.

After determining that the West Virginia builders were necessary parties under Rule 19(a), and that their joinder would defeat complete diversity, the Hanna court proceeded to apply

[5]The Hanna court also found that the builders were necessary parties under Rule 19(a)(1)(A). Id. at 435.

the four-factor balancing test under Rule 19(b). The court noted that the first factor – the extent to which a judgment in the party's absence would prejudice the absent party or present parties – "speaks to many of the same concerns addressed by the necessity analysis under Rule 19(a)(1)(B)." Id. at 435; see also Owens-Illinois, Inc. v. Meade, 186 F.3d 435, 441 (4th Cir. 1999). The court found "a high probability of prejudice to the builders if [HBW and NHIC's] petition advances." Id. As in its Rule 19(a)(1)(B) analysis, the court was particularly concerned with the fact that the builders were "allegedly responsible for enrolling Hanna in the 2-10 warranty program" because these actions likely would be highly relevant to the enforceability of the arbitration clause, which was the key legal question before the district court. Id.

The court also found that factors two, three, and four weighed in favor of a finding that the builders were indispensable parties. As to factor two, the court found that it was unclear how the district court could "lessen or avoid the prejudicial impact of proceeding in the non-joined party's absence." Id. The court noted that "[d]ifferent tribunals might be required to rule on the validity of the arbitration provision and each must address the existence and extent of construction defects in Hanna's home, which could result in inconsistent judgments and conflicting obligations on the

parties." Id. at 436. As to the third factor, the court found that parallel proceedings could produce "incomplete, inconsistent, and inefficient rulings." Id. Under the final factor, the court found that the pending state court case, to which all the parties were joined, would provide HBW and NHIC with an adequate remedy if the federal action were dismissed. Id. Having found that all four Rule 19(b) factors pointed to the builders being indispensable parties, the court ordered the petition dismissed for lack of subject matter jurisdiction. Id.

PaineWebber involved a dispute between an executor (Alfred Cohen) of a decedent's estate, PaineWebber, and one of its employees (Richard Wilhelm) over the decedent's brokerage account with PaineWebber. PaineWebber, 276 F.3d at 199. After Cohen filed suit against PaineWebber and Wilhelm for conversion and fraudulent concealment in Ohio state court, PaineWebber filed a petition in federal district court, based on diversity jurisdiction, to compel arbitration of the claims pursuant to an arbitration clause in the decedent's client agreement with PaineWebber. Id. at 199-200. Wilhelm, who was not diverse from the decedent, was not named as a party in the federal case. Id. The district court granted Cohen's motion to dismiss, finding that Wilhelm was both a necessary and an indispensable party under Rule 19(a) and (b). Id. On appeal, the Court of Appeals found that the district court had not abused its discretion in

finding that Wilhelm was a necessary party under Rule 19(a), but held that the district court erred as a matter of law by finding that he was an indispensable party under Rule (19)(b).[6] Id. at 200, 206.

In applying the four-factor test under Rule 19(b), the court found that while the fourth factor weighed in favor of a finding that Wilhelm was indispensable, the first three factors weighed against such a finding. In examining the first factor, the court characterized the prejudice asserted by Cohen as being "the potentially inconsistent legal obligations that might result from conflicting interpretations of the arbitration clauses by state and federal courts," as well as "the possibility of being involved with proceedings in both federal and state court" and "the risk of conflicting and inconsistent schedules, arbitration awards, discovery processes, and legal

[6]In the Sixth Circuit, a district court's finding that a party is necessary under Rule 19(a) is reviewed for abuse of discretion, while a finding that a party is indispensable under Rule 19(b) is reviewed *de novo*. See PaineWebber, 276 F.3d at 200; Keweenaw Bay Indian Cmty. v. State, 11 F.3d 1341, 1346 (6th Cir. 1993). There is a circuit split as to whether a district court's Rule 19(b) determination should be reviewed *de novo* or for abuse of discretion. Compare PaineWebber, 276 F.3d at 200 with Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 132 (2d Cir. 2013) (dismissal pursuant to Rule 19(b) reviewed for abuse of discretion); Washington v. Daley, 173 F.3d 1158, 1165 (9th Cir. 1999) (same); National Union Fire Ins. Co. v. Rite Aid of South Carolina, Inc., 210 F.3d 246, 250 (4th Cir. 2000) ("We review the district court's findings of fact underlying its Rule 19 determination for clear error."); see also Republic of Philippines v. Pimentel, 553 U.S. 851, 864 (2008) (declining to address the appropriate standard of review for Rule 19(b)).

doctrines." Id. at 202. Although the court recognized these concerns as serious, it cited several factors that "indicate[d] that the potential prejudice to Cohen or Wilhelm is minimal." Id. First, as the Supreme Court stated in Moses H. Cone, 460 U.S. at 20, "the possibility of piecemeal litigation is a necessary and inevitable consequence of the FAA's policy that strongly favors arbitration." Id. at 203. The court found it important that "the possibility of having to proceed simultaneously in both state and federal court" was "a direct result of Cohen's decision to file a suit naming PaineWebber and Wilhelm in state court rather than to demand arbitration." Id. at 202. It noted that the question before the court - whether to compel arbitration of Cohen's claims - was "a matter of contract interpretation for which Wilhelm's presence and input is not necessary." Id. at 203. In effect, the court found that such burdens "[have] nothing to do with Wilhelm's absence from the petition to compel arbitration," and also noted that "it is possible to view Cohen's naming of Wilhelm in the state court action as a strategy solely designed to preclude PaineWebber from removing the action to federal court." Id. at 203-204. Accordingly, the court weighed the first factor against dismissal. Id. at 205.

Given its determination that any prejudice that would follow from Wilhelm's absence would be "minimal, if it exists at

all," the court explained that "the extent to which prejudice can be reduced or eliminated by protective provisions in the judgment, by the shaping of relief of other measures becomes less important." Id. (internal quotation marks omitted). Consistent with its analysis under the first factor, the court reasoned that "the possibility of Cohen having to arbitrate his claims against PaineWebber while proceeding with his claims against Wilhelm in state court does not render a judgment between Cohen and PaineWebber inadequate" for purposes of the third factor. Id.

While the court noted that "the final factor . . . favors dismissal because the state court presents an alternative forum in which Cohen can bring his claims against both PaineWebber and Wilhelm . . . the potential existence of an alternative forum does not, in and of itself, outweigh a plaintiff's right to the forum of his or her choice." Id. Having found only the fourth favor to weigh in favor of a finding that Wilhem was indispensable, the court held that Wilhelm was not indispensable, and that the district court erred in dismissing the petition. Id. at 206.

Petitioners' argument to the contrary, the court does not find either the reasoning or the result in Hanna to be inconsistent with PaineWebber. The PaineWebber court found that piecemeal litigation in multiple forums, parallel proceedings,

and potentially inconsistent judgments – all which resulted from the state court plaintiff's strategic choice to sue Wilhelm in addition to PaineWebber – did not constitute sufficient prejudice to render Wilhelm indispensable. The Hanna court found that the absence of the non-diverse builders created a significant risk of substantial prejudice because the alleged wrongful actions of the builders were directly relevant to the merits of the petition to compel arbitration before the federal court.

Rule 19 requires a case-by-case inquiry based on the specific facts before the court. See Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 118–19 (1968) ("Whether a person is indispensable . . . can only be determined in the context of particular litigation . . . . [A] court does not know whether a particular person is indispensable until it had examined the situation to determine whether it can proceed without him."). Hanna does not conflict with Sixth Circuit precedent, and the court is inclined to follow it given that it carefully analyzed the same legal issues involving substantially similar facts (and two of the same parties) that are before the court in the present case.

E. Chamberlain is Both a Necessary and Indispensable Party Under Rule 19

1. Chamberlain is a Necessary Party Under Rule 19(a)

In assessing Chamberlain's ability to protect its interest in the subject of the action before the court under Rule 19(a)(1)(B)(i), the court finds it significant that, as was true in Hanna, the alleged fraudulent actions of Chamberlain are directly relevant to the merits of the petition to compel arbitration. Petitioners claim that the arbitration clause in the 2-10 warranty is valid and requires Respondents to arbitrate all of their state law claims against Petitioners as well as any claims relating to the enforceability of the arbitration clause. Respondents contend that the arbitration clause is unenforceable because it is unconscionable, and because Chamberlain fraudulently induced them to sign the Application by misrepresenting the nature of the warranty and concealing the substance of the arbitration clause and other terms. If the court were to proceed to adjudicate the petition to compel arbitration on the merits, one of the key issues would be whether or not Chamberlain fraudulently induced Respondents to agree to the arbitration clause in the 2-10 warranty.[7]

[7]Under 9 U.S.C. § 4, arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Accordingly, "[l]ike other contracts . . . they may be invalidated by generally applicable contract defenses, such as

Chamberlain's absence would risk substantial prejudice to all parties regarding to the court's determination of this issue. Respondents are also pursuing state law fraud claims against Chamberlain in state court based on the same conduct, and thus Chamberlain has "a direct pecuniary interest in the dispute." Hanna, 750 F.3d at 434. Accordingly, Chamberlain is a necessary party under Rule 19(a)(1)(B).

2. Joinder of Chamberlain Would Deprive the Court of Subject Matter Jurisdiction

It is undisputed that joinder of Chamberlain is not feasible because it would deprive the court of subject matter jurisdiction by destroying complete diversity. Chamberlain is incorporated and has its principal place of business in Tennessee, and is thus a Tennessee citizen for diversity purposes. See 28 U.S.C. § 1332(c)(1). Because Respondents are

---

fraud, duress, or unconscionability. Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 68 (2010) (internal citations omitted). The Supreme Court has distinguished "two different types of validity challenges under § 2: One type challenges specifically the validity of the agreement to arbitrate, and [t]he other challenges the contract as a whole, either on a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid." Id. at 70. (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444–45 (2006)) (internal quotation marks omitted). The Court has held that "only the first type of challenge is relevant to a court's determination whether the arbitration agreement at issue is enforceable." Id.

also Tennessee citizens, joinder of Chamberlain as a party adverse to Respondents would eliminate complete diversity.

3. Chamberlain is an Indispensable Party Under Rule 19(b)

Because Chamberlain cannot feasibly be joined, the court must dismiss the petition for lack of subject matter jurisdiction if, under the four-factor test of Rule 19(b), Chamberlain is an indispensable party. The first factor – the extent to which a judgment in Chamberlain's absence would prejudice it or the existing parties - "speaks to many of the same concerns addressed by the necessity analysis under the court's previous analysis under Rule 19(a)(1)(B)." Hanna, 750 F.3d at 435. As described above, both Chamberlain and the parties face a substantial risk of prejudice if the petition is addressed on the merits without Chamberlain present as a party. Importantly, the 2-10 warranty is an agreement between Respondents and Chamberlain. Moreover, the court's decision as to whether to compel arbitration could turn on whether or not Chamberlain fraudulently induced Respondents to sign the Application by concealing the substance of the arbitration clause and other terms of the warranty agreement. Deciding that question in Chamberlain's absence risks subjecting Chamberlain to serious prejudice. The first factor therefore weighs in favor of a finding that Chamberlain is indispensable.

Regarding the second factor, and as was true in Hanna, it is unclear how the court could implement protective measures to lessen or avoid the substantial prejudicial impact of proceeding in Chamberlain's absence. The second factor therefore also weighs in favor of a finding that Chamberlain is indispensable. Under the third factor, given that Chamberlain's absence would certainly prejudice the parties regarding the court's determination of the enforceability of the arbitration clause, a judgment rendered in Chamberlain's absence would not be adequate. Finally, the fourth factor weighs in favor of finding Chamberlain to be indispensable. As was true in Hanna, there is a case pending in state court involving all of the state law claims at issue here in which all the relevant parties are present. To the extent either Petitioners or Chamberlain believe that the claims brought by Respondents must be submitted to arbitration, the FAA "applies with as much force in state courts" as it does in federal courts. See Hanna, 750 F.3d at 437 (citing Moses H. Cone, 460 U.S. at 25). The court, after balancing the four Rule 19(b) factors, finds that Chamberlain is an indispensable party.

The PaineWebber court noted that "a major policy consideration [] weigh[ing] against the conclusion that Wilhelm is an indispensable party" was that "any ruling to the contrary would virtually eliminate the availability of federal courts to

enforce arbitration clauses in diversity cases by the simple expedient of one of the parties filing a preemptive suit in state court with at least one non-diverse defendant." PaineWebber, 276 F.3d at 205. The court continued, quoting the Second Circuit's opinion in Doctor's Assocs., Inc. v. Distajo, 66 F.3d 438, 445 (2d. Cir. 1995) that

> the FAA would be fatally undermined if "the parties" described in § 4 could be expanded to include persons who had not signed the arbitration clause but who allegedly were involved in the "underlying controversy." If such a rule were adopted, a party resisting arbitration could defeat federal jurisdiction simply by suing someone from the same state, plus the party seeking to compel arbitration, in a separate state lawsuit. Diversity would be destroyed simply by claiming that the local defendants in the parallel action were "indispensable parties" to the petition to compel.

Id. at 205-06 (quotation marks in original). As noted above, the court suggested that the state court plaintiff in PaineWebber may have named a non-diverse defendant simply as a way to defeat federal diversity jurisdiction. Id. at 203-04.

The policy consideration raised by the PaineWebber court is not implicated in this case. Chamberlain plays a central, rather than supporting, role in this controversy. Chamberlain contracted with Respondents for the sale of the house at issue. Chamberlain, Respondents allege, negligently constructed the house. Chamberlain allegedly engaged in fraud to induce Respondents to sign the Application for the 2-10 warranty

containing the relevant arbitration clause. Notwithstanding the parties' disagreement as to the proper forum for Respondents' underlying claims, Chamberlain is at the center of the claims, not the periphery. Because Chamberlain is indispensable to the federal action brought by Petitioners, and its presence would destroy complete diversity, the case must be dismissed.

III. RECOMMENDATION

For the reasons stated above, the undersigned finds that Chamberlain is both a necessary and indispensable party to the Petition to Compel Arbitration. The undersigned therefore recommends that Respondents' motion to dismiss be granted, and the Petition to Compel be dismissed without prejudice.

Respectfully submitted,

s/ Tu M. Pham
TU M. PHAM
United States Magistrate Judge

December 30, 2016
Date

NOTICE

WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THIS REPORT AND RECOMMENDED DISPOSITION, ANY PARTY MAY SERVE AND FILE SPECIFIC WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS. ANY PARTY MAY RESPOND TO ANOTHER PARTY'S OBJECTIONS WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b)(2); L.R. 72.1(g)(2). FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.