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

NUVIA AREVALO, RAUL GONZALEZ, RUBEN GUEVARA, ISRAEL MARTINEZ, JOSE NAVA, RODRIGO NEVAREZ, GUADALUPE ONOFRE, JESUS ABUNDIS, JUANITA ABUNDIS, ALFONSO ALDANA, ELIDA ALDAZ, IVAN J. ANGELES, LUIS AREVALO, MARIA BARRETO, ISMAEL CISNEROS, ARNULFO ESPINO, ARTURO ESPINOSA, GERALDO GONZALEZ, JESUS GONZALEZ, MARIA MARQUEZ, JOSE IVAN MUNOZ, LAURA OCAMPO, CLAUDIA RAMIREZ, CIRILIA RODRIGUEZ, MARIA SAVIN, LUZ MARIA VALLEJO, MARIA VALLEJO, MARTIN VALLEJO, and CONCEPCION ZARATE, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
vs.	)	**No. 11-2339 AJT/TMP**
UMH PROPERTIES, INC., UMH SALES AND FINANCE, INC., and GAIL WHITTEN,	)	
Defendants.	)	

ORDER ON DEFENDANTS' MOTION TO STAY CASE PENDING ARBITRATION

Before the court by order of reference is the Motion to Stay Case Pending Arbitration ("Motion to Compel Arbitration") filed by defendants UMH Properties, Inc., UMH Sales and Finance, Inc., and Gail Whitten. (ECF No. 9.) For the reasons below, the defendants'

motion is GRANTED in part and DENIED in part.[1]

I. BACKGROUND

[1]This motion has been referred to the undersigned magistrate judge for determination on a non-dispositive motion under Fed. R. Civ. P. 72(a). There has been disagreement among the district courts over whether motions to stay litigation and compel arbitration are dispositive, and thus require that a magistrate judge issue a report and recommendation, or are non-dispositive and may be decided by a magistrate judge by an order. The First Circuit is the only Court of Appeals that has decided this issue, holding that such motions are non-dispositive under 28 U.S.C. § 636(b)(1)(A) and Rule 72(a). Powershare, Inc. v. Syntel, Inc., 597 F.3d 10, 14 (1st Cir. 2010) (stating that "a federal court's ruling on a motion to stay litigation pending arbitration is not dispositive of either the case or any claim or defense within it. . . . Although granting or denying a stay may be an important step in the life of a case . . . in the last analysis a stay order is merely suspensory."). The Fifth Circuit noted the issue in a recent opinion, but did not resolve it. Lee v. Plantation of La., L.L.C., 454 F. App'x 358, 360 n.3 (5th Cir. 2011) ("Because we conclude jurisdiction is lacking, we need not reach the question of whether a motion to compel arbitration is a dispositive or non-dispositive motion for purposes of the standard of review by the district judge of the magistrate judge's order."). Subsequent to Powershare, several decisions from district courts from other circuits have likewise concluded that motions to compel arbitration are non-dispositive motions. See Painters Dist. Council 16, Local Union 294 v. Color New Co., No. 12-cv-0570-LJO-BAM, 2012 WL 3235101, at *1 n.1 (E.D. Cal. Aug. 6, 2012) (finding that motion to compel arbitration is non-dispositive); Vernon v. Qwest Commc'ns Int'l, No. 09-cv-01840, 2012 WL 768125, at *2-3 (D. Colo. Mar. 8, 2012) (same); Wilken Partners, L.P. v. Champps Operating Corp., No. 11-cv-1005-EFM-KGG, 2011 WL 1257480, at *1 (D. Kan. Apr. 4, 2011) (noting that "district courts that have considered the nature of an order to stay proceedings pending arbitration and to compel arbitration have concluded that these are non-dispositive orders"); Chen-Oster v. Goldman, Sachs & Co., 785 F. Supp. 2d 394, 399 n.1 (S.D.N.Y. 2011) (finding that motion to compel arbitration is non-dispositive motion). But see Young v. Cty. of Hawaii, No. 11-00580 ACK-RLP, 2012 WL 2359933, at *1 n.3 (D. Haw. Apr. 3, 2012) (noting split of authority and issuing report and recommendation "in an abundance of caution and in accordance with the local practice"). Based on Powershare, and consistent with the order of reference, the undersigned enters an order as opposed to a report and recommendation.

The twenty-nine named plaintiffs are current and former residents of Memphis Mobile City ("Mobile City"), a manufactured housing community located in the Frayser area of Memphis, Tennessee.[2] Mobile City is owned by non-party United Mobile Homes of TN, Inc., a wholly owned subsidiary of defendant UMH Properties, Inc. ("UMH Properties").[3] Plaintiffs and nearly all of the residents of the approximately 150 manufactured homes in Mobile City are persons of Mexican descent and have very limited proficiency in the English language. Plaintiffs' allegations stem from their purchases of manufactured homes and leases of lots in Mobile City from either UMH Properties or defendant UMH Sales and Finance, Inc. ("UMH Finance"), a wholly owned subsidiary of UMH Properties. Defendant Gail Whitten is the manager of Mobile City and, according to the complaint, she is "the highest-ranking local official" of UMH Properties.

The residents of Mobile City either own their manufactured homes or they rent their homes.[4] In addition, the residents lease the lots upon which their manufactured homes sit. Many of the

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[2]The following facts are based on the allegations contained in the 104-page complaint and exhibits attached to the parties' briefs.

[3]Plaintiffs allege in their complaint that UMH Properties owns and operates manufactured housing communities in at least five states, including Tennessee, and that it owns a portfolio of thirty manufactured housing communities containing approximately 7,200 home sites.

[4]As of May 2010, of the approximately 150 homes in Mobile City, about 35 of them are rental homes.

residents purchased their homes by obtaining a loan.[5] Those who financed the purchase of their homes entered into a Manufactured Home Retail Installment Contract and Security Agreement ("Security Agreement") with UMH Finance, although in some instances UMH Properties was the signatory company.[6] The financing periods for these plaintiffs range between two to fifteen years. The Security Agreements contain a "no move" clause, which prohibits the residents from removing their homes from Mobile City until their loans are paid in full.

As part of the financing arrangement, the plaintiffs' Security Agreements give UMH Finance or UMH Properties a security interest in the manufactured home. The agreements also state that there are "no warranties of any type" covering the manufactured home and that the buyer is purchasing the home "AS IS and WITH ALL FAULTS and THE ENTIRE RISK AS TO THE QUALITY AND PERFORMANCE OF THE MANUFACTURED HOME IS WITH [the buyer]." The agreements provide that "I agree that any implied warranty of merchantability and any implied

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[5]The manufactured homes sold by the UMH defendants are often fabricated in states other than Tennessee and then transferred to Tennessee. (See Decl. Of Christine Lindsey ¶ 7.) Many of the parts in the manufactured homes were often fabricated in states other than Tennessee. (Id. ¶ 10.)

[6]The defendants attached copies of nineteen Security Agreements as exhibits to their Motion to Compel Arbitration. Of these, fifteen are Security Agreements, while four are Assumption of Mortgage agreements with an accompanying Security Agreement. Sixteen of the nineteen agreements have UMH Finance as a signatory, while the remaining three are signed by UMH Properties.

warranty of fitness for a particular purpose are specifically excluded and do not cover the Manufactured Home."

All of the Security Agreements contain an arbitration provision that appears on the same page as the parties' signatures. The arbitration provision reads as follows:

> All actions, disputes, claims or controversies arising from or relating to this Contract, the breach of this Contract or the relationship of the parties thereto, including the validity of this arbitration clause and the entire agreement, shall be resolved by binding arbitration by one arbitrator selected jointly by Seller and Buyer, in accordance with the Commercial Arbitration Rules of the American Arbitration Association (www.adr.org). This agreement is made pursuant to a transaction in interstate commerce and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1, et seq. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties understand that they have a right to litigate disputes in court, but that they prefer to resolve their disputes through arbitration, except as provided herein. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY YOU (AS PROVIDED HEREIN), AS WELL AS THE RIGHT TO ACT AS A CLASS REPRESENTATIVE. The parties agree and understand that all disputes arising under case law, statutory law and all other laws including, but not limited to, all contract, tort and property disputes will be subject to binding arbitration in accordance with this Contract. The parties agree and understand that claims arising under statutory law include, but are not limited to, claims involving laws against discrimination and laws pertaining to consumer fraud, whether brought under federal or state law. The parties agree that the arbitrator shall have all powers provided by law, the Contract and the agreement of the parties. These powers shall include all legal and equitable remedies including, but not limited to, money damages, declaratory relief and injunctive relief. Notwithstanding anything hereunto the contrary, Seller retains an option to use judicial (filing a lawsuit) or non-judicial relief to enforce the monetary obligation secured by the Manufactured Home or

> to foreclose on the Manufactured Home. The institution and maintenance of a lawsuit to foreclose upon any collateral, to obtain a monetary judgment or to enforce the security agreement shall not constitute a waiver of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in this Contract, including the filing of a counterclaim in a suit brought by Seller pursuant to this provision. . . . The parties understand that they have a right to consult with a person of their choosing, including an attorney, before signing this document.

(See, e.g., Security Agreement of Juanita Abundiz, ECF No. 9-3, ¶ 19).

In May 2010, several areas in and around Memphis were flooded, resulting in extensive damage. One of the flooded areas included Mobile City. Flood waters rose up to nine feet within the mobile home park, necessitating coordinated rescue efforts to evacuate residents who were stranded in high water. According to the complaint, a representative of Mobile City assured rescue workers that the company would find alternative temporary housing for the residents. However, the representative left the park without making any arrangements for the residents, leaving them with no shelter. In the wake of this flooding, plaintiffs allege they became aware of several "deceptive and exploitative" policies and contract terms governing their purchase and lease agreements with the defendants.

Specifically, plaintiffs allege that Mobile City is located in a designated flood plain and had a history of serious flood problems, but that the defendants did not disclose the flood

problems to the plaintiffs and took no meaningful action to protect the residents from flooding. Plaintiffs further allege that defendants specifically marketed to and targeted Spanish-speaking purchasers for manufactured homes, knowing that they could not comprehend the terms of agreements that were all written in English. Plaintiffs also take issue with the length of their financing agreements, which allegedly exposed plaintiffs to unconscionable amounts of interest as well as very high monthly lease payments for their lots. Plaintiffs contend that the defendants unilaterally and arbitrarily raised the monthly rent amounts. Plaintiffs additionally attack the "no move" clause in the Security Agreements.[7] They claim that "the structure of these transactions, combining a purchase of the mobile home with an undisclosed long-term lease obligation, has prevented residents . . from moving [their homes] away from the site where it is likely to be flooded again." Plaintiffs assert that by structuring the transaction as a sale of a home - as opposed to what it truly was, a high-priced rent-to-own of a rapidly depreciating asset - the defendants have effectively shifted the responsibility for payment of property taxes, maintenance, and insurance premiums to the plaintiffs, thus leaving them with "the burdens of home ownership

[7]Defendants assert that this practice is common within the land lease industry and serves as the primary protection that lenders have for their collateral until a loan is satisfied. (See Decl. Of Christine Lindsey ¶ 11.)

without any of the benefits."

Plaintiffs bring this putative class action on behalf of themselves and other current and former residents of Mexican descent of Mobile City, alleging class claims based on violations of the Fair Housing Act of 1968, 42 U.S.C. §§ 3601 et seq., and the state companion statute, the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101 et seq. Plaintiffs contend that the defendants violated these fair housing laws by targeting people of Mexican descent and by depriving them of a racially and ethnically diverse community.[8] Plaintiffs also allege class claims based on violations of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101 et seq., and common law claims for breach of the common law duty to disclose a latent defect (based on failure to disclose Mobile City's flood history); breach of the common law warranty of habitability (based on damage caused by the flood); breach of contract (based on increased rents, excessive taxes, and the "no move" clause); conversion (based on collection of taxes not

[8]The first part of plaintiffs' fair housing claim alleges that the defendants engaged in "reverse redlining," which "occurs when a lender unlawfully discriminates by extending credit to a neighborhood or class of people (typically living in the same neighborhood) on terms less favorable than would have been extended to people outside the particular class at issue." Wiltshire v. Dhanraj, 421 F. Supp. 2d 544, 554 (E.D.N.Y. 2005) (internal quotation marks omitted). The second part of plaintiffs' fair housing claim alleges that because Mobile City is predominantly Hispanic and because African-Americans constitute a majority of the population in Memphis, "it is highly unlikely, if not impossible, that this situation could exist without discriminatory manipulation of the resident selection process." (Compl. ¶ 56.)

owed by residents and removing personal property from homes); and intentional misrepresentation (based on failure to disclose the flood history and misrepresenting the amenities offered by Mobile City).

In their current motion, defendants ask the court to compel all plaintiffs to arbitrate their claims, based on the arbitration provision in the Security Agreements. Although it is undisputed that not all of the plaintiffs signed Security Agreements, defendants nonetheless argue that the non-signatory plaintiffs should be compelled to arbitrate under the doctrine of equitable estoppel, because "the non-signatory Plaintiffs cannot seek benefits under [Security Agreements] yet avoid the arbitration provision." These non-signatory plaintiffs include Ruben Guevara, Israel Martinez, Jose Nava, Rodrigo Nevarez, Guadalupe Onofre, Elida Aldaz, Ivan Angeles, Arnulfo Espino, Claudia Ramirez, Cirila Rodriguez, and Maria Vallejo.[9] Defendants also argue that even

[9]On page 7 of the plaintiffs' response brief, they state that "at least ten named plaintiffs" did not sign Security Agreements. However, they only identify nine names. Among those nine names, it appears that one of them (Luz-Maria Vallejo) did, in fact, sign a Security Agreement containing an arbitration provision. (ECF No. 20-12, Ex. 13.) In addition, based on the court's review of the Security Agreements filed by the defendants, there is no evidence that agreements were ever signed by three additional plaintiffs: Israel Martinez, Guadalupe Onofre, and Maria Vallejo (who is different from Luz Maria Vallejo). Based on the court's review, the eleven non-signatory plaintiffs are Ruben Guevara, Israel Martinez, Jose Nava, Rodrigo Nevarez, Guadalupe Onofre, Elida Aldaz, Ivan Angeles, Arnulfo Espino, Claudia Ramirez, Cirila Rodriguez, and Maria Vallejo.

though UMH Properties did not sign most of the Security Agreements (and Whitten did not sign any), they should be allowed to enforce the arbitration provision because the plaintiffs raise allegations of concerted misconduct by the signatory and non-signatories. Furthermore, the defendants contend that any challenges to the validity and scope of the arbitration provision should be decided by the arbitrator, and not the court, based on the presence of a delegation provision within each Security Agreement. These delegation provisions purportedly call for "gateway" questions of arbitrability to be decided by an arbitrator. Finally, the defendants argue that, even if the court chooses to address plaintiffs' challenges to the validity of the arbitration clause, these challenges are without merit.

II. ANALYSIS

A. Federal Arbitration Act

The Federal Arbitration Act's ("FAA") principal purpose is to "'ensur[e] that private arbitration agreements are enforced according to their terms.'" AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011) (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)). Section 2 of the FAA states in relevant part:

> 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 Supreme Court has described this provision "as reflecting both a liberal federal policy favoring arbitration" and the "fundamental principle that arbitration is a matter of contract." Concepcion, 131 S. Ct. at 1745 (internal quotation marks and citations omitted). "The FAA places arbitration agreements on an equal footing with other contracts and requires courts to enforce them according to their terms." Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2776 (2010) (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006) and Volt Info., 489 U.S. at 478). The saving clause in § 2, however, "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." Concepcion, 131 S. Ct. at 1746 (quoting Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996)).

The FAA provides that a court may stay a case pending arbitration in accordance with the terms of an arbitration agreement once the court is satisfied that the issues involved are referable to arbitration. See 9 U.S.C. § 3. A district court considering a motion to compel arbitration has four tasks: (1) it must determine whether the parties agreed to arbitrate; (2) it must determine the scope of that agreement; (3) if federal statutory

claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and (4) if the court concludes that some, but not all, of the claims in the action are subject to arbitration, it must determine whether to stay the remainder of the proceedings pending arbitration.[10] Fazio v. Lehman Bros., Inc., 340 F.3d 386, 392 (6th Cir. 2003).

B. Whether the Parties Agreed to Arbitrate

1. Whether Non-Signatory Plaintiffs Must Arbitrate

The court first addresses whether the non-signatory plaintiffs should be compelled to arbitrate. "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648 (1986) (citing United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)). Arbitration agreements apply to non-signatories only in rare circumstances. Westmoreland v. Sadoux, 299 F.3d 462, 465 (5th Cir. 2002). The Sixth Circuit has recognized five theories for binding non-signatories to arbitration agreements: (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing/alter ego, and (5) estoppel. Javitch v. First Union Sec., Inc., 315 F.3d 619, 629 (6th Cir. 2003) (citing

[10]The plaintiffs do not argue that Congress intended their federal Fair Housing Act claim to be nonarbitrable. See Kothe v. AIMCO, No. 06-2097-CM, 2007 WL 2725975, at *2 (D. Kan. Sept. 17, 2007) (rejecting plaintiffs' argument that compelling arbitration would be inappropriate because the FHA allegedly overrides the FAA).

Thomson-CSF v. Am. Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995)).

The defendants argue that the doctrine of equitable estoppel applies in this case. Specifically, they argue that "[a]ll of the Plaintiffs chose to assert identical causes of action based on [Security Agreements] containing arbitration agreements. The non-signatory Plaintiffs cannot seek benefits under [the Security Agreements] yet avoid the arbitration provision." In Javitch, the Sixth Circuit described the equitable estoppel theory as follows:

> The court in Thomson held that a non-signatory may be bound to an arbitration agreement under an estoppel theory when the non-signatory seeks a *direct* benefit from the contract while disavowing the arbitration provision. Id. at 778-79. When only an indirect benefit is sought, however, it is only a signatory that may be estopped from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the underlying contract. Id. at 779. See Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen, 206 F.3d 411, 418 (4th Cir. 2000) (nonsignatory asserting breach of contract and breach of contract claims under the contract could not avoid the arbitration agreement in the contract).

Id. at 624. "[N]onsignatories have been held to arbitration clauses where the nonsignatory 'knowingly exploits the agreement containing the arbitration clause despite having never signed the agreement.'" Comer v. Micor, Inc., 436 F.3d 1098, 1101 (9th Cir. 2006) (quoting E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, 269 F.3d 187, 199 (3d Cir. 2001)); see also Int'l Paper Co., 206 F.3d at 418 (stating that "[i]n the arbitration context, the doctrine [of equitable estoppel]

recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.").

Plaintiffs state in their opposition brief that the non-signatory plaintiffs "are not trying to enforce contract provisions or avail themselves of the benefits of contract terms." The court agrees. Although the 104-page complaint does not clearly distinguish between the claims brought by the signatory plaintiffs and those brought by the non-signatory plaintiffs, it is apparent that none of the non-signatory plaintiffs are seeking to enforce or "knowingly exploit" any terms of the Security Agreement to their benefit. Moreover, even assuming, *arguendo*, that the non-signatory plaintiffs are somehow seeking to enforce a benefit under some unidentified contract, there is no suggestion that the contract they seek to enforce (whatever that contract might be) contains an arbitration provision. For these reasons, the motion to compel arbitration is DENIED as to the non-signatory plaintiffs.

2. Whether Non-Signatory Defendants May Invoke the Arbitration Provision

The court next addresses whether UMH Properties and Whitten, as non-signatories, may compel arbitration with the remaining plaintiffs who are signatories to Security Agreements with UMH

Finance.[11] A non-signatory to a contract with an arbitration provision may seek to enforce an arbitration agreement against a signatory under a theory of equitable estoppel. Grigson v. Creative Artists Agency L.L.C., 210 F.3d 524, 526-27 (5th Cir. 2000); see also Comer, 436 F.3d at 1101 ("*signatories* have been required to arbitrate claims brought by nonsignatories "at the nonsignatory's insistence because of the close relationship between the entities involved") (quoting Thomson, 64 F.3d at 779 and Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757 (11th Cir. 1993)) (internal quotation marks omitted). Equitable estoppel may be asserted by a non-signatory defendant to compel arbitration in two circumstances. Grigson, 210 F.3d at 527 (citing MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999)). The first circumstance occurs when the signatory to an agreement must rely on the terms of the agreement in asserting its claims against the non-signatory. Id. The second circumstance occurs when the signatory to an agreement brings "allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." Id. The court finds that the latter circumstance applies in this

[11]As noted above, UMH Finance is the signatory on the vast majority of the Security Agreements. However, three of the Security Agreements are signed by UMH Properties. For the same reasons discussed above, UMH Finance, as a nonsignatory, may nevertheless enforce the arbitration provisions for those agreements signed by UMH Properties.

case, because the plaintiffs allege substantially interdependent and concerted misconduct by UMH Finance, UMH Properties, and Whitten collectively.

In addition, a non-signatory parent company may, under certain circumstances, enforce or be bound by an arbitration agreement signed by its subsidiary. Int'l Paper, 206 F.3d at 416-17. When a claim against a "parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the agreement." Id. at 417 (quoting J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-321 (4th Cir. 1998). Based on the nature of the allegations brought by the plaintiffs, UMH Properties is entitled to enforce the arbitration provision in the Security Agreements signed by its wholly owned subsidiary, UMH Finance. Likewise, under agency principles, Whitten, as the Manager of Mobile City and "the highest ranking local official" of UMH Properties, may compel the signatory plaintiffs to arbitrate. Javitch, 315 F.3d at 629.

C. Scope of the Agreement

As described earlier, the arbitration provisions in the Security Agreements contain the following language:

> All actions, disputes, claims or controversies arising from or relating to this Contract, the breach of this Contract or the relationship of the parties thereto, including the validity of this arbitration clause and the entire agreement, shall be resolved by binding arbitration . . . . The parties agree and understand

> that all disputes arising under case law, statutory law and all other laws including, but not limited to, all contract, tort and property disputes will be subject to binding arbitration in accordance with this Contract. The parties agree and understand that claims arising under statutory law include, but are not limited to, claims involving laws against discrimination and laws pertaining to consumer fraud, whether brought under federal or state law.

The signatory plaintiffs and the defendants agree that this broad language covers all of the claims in the complaint. The issue, then, is whether the court may address the signatory plaintiffs' challenges to the arbitration provision in light of the clause that specifically delegates to the arbitrator disputes relating to "the validity of this arbitration clause." The Supreme Court analyzed the significance of delegation provisions in Rent-A-Center, West, Inc. v. Jackson. In that case, the plaintiff, Jackson, filed an employment discrimination suit against his former employer, Rent-A-Center. Rent-A-Center filed a motion under the FAA to compel arbitration based on an agreement that Jackson had signed as a condition of his employment. The agreement provided for arbitration for all disputes arising out of Jackson's employment with Rent-A-Center. The agreement also provided that "[t]he 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 including, but not limited to any claim that all or any part of this Agreement is void or voidable." 130

S. Ct. at 2775 (internal quotation marks omitted). Jackson opposed arbitration, arguing that the arbitration agreement was unenforceable because it was unconscionable under Nevada law. Rent–A-Center contended that the unconscionability claim was not properly before the court because the delegation provision required the arbitrator to resolve any disputes about the enforceability of the agreement. The district court granted the motion to compel arbitration. On appeal, the Court of Appeals reversed in part, holding that where "a party challenges an arbitration agreement as unconscionable, and thus asserts that he could not meaningfully assent to the agreement, the threshold question of unconscionability is for the court." Id. at 2776 (internal quotation marks omitted). The Supreme Court reversed:

> The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement. We have 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. . . . An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other. The additional agreement is valid under § 2 "save upon such grounds as exist at law or in equity for the revocation of any contract," and federal courts can enforce the agreement by staying federal litigation under § 3 and compelling arbitration under § 4.
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> . . . .
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> Here, the "written provision . . . to settle by arbitration a controversy," 9 U.S.C. § 2, that Rent-A-Center asks us to enforce is the delegation provision -

> the provision that gave the arbitrator "exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this Agreement." The "remainder of the contract," is the rest of the agreement to arbitrate claims arising out of Jackson's employment with Rent-A-Center. . . . Accordingly, unless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2, and we must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator.
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> . . . [Jackson] contended that the Agreement was both procedurally and substantively unconscionable. It was procedurally unconscionable, he argued, because it "was imposed as a condition of employment and was non-negotiable." But we need not consider that claim because none of Jackson's substantive unconscionability challenges was specific to the delegation provision. First, he argued that the Agreement's coverage was one sided in that it required arbitration of claims an employee was likely to bring - contract, tort, discrimination, and statutory claims - but did not require arbitration of claims Rent-A-Center was likely to bring - intellectual property, unfair competition, and trade secrets claims. This one-sided coverage argument clearly did not go to the validity of the delegation provision.
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> Jackson's other two substantive unconscionability arguments assailed arbitration procedures called for by the contract - the fee-splitting arrangement and the limitations on discovery - procedures that were to be used during arbitration under *both* the agreement to arbitrate employment-related disputes *and* the delegation provision. . . . Jackson, however, did not make any arguments specific to the delegation provision; he argued that the fee-shifting and discovery procedures rendered the *entire* [arbitration] Agreement invalid.

Id. at 2777, 2779-80 (internal citations omitted) (emphasis in original.)

In the case at bar, the arbitration provision includes a clear and unmistakable statement that delegates questions of arbitrability to the arbitrator. The plaintiffs, in their

opposition brief, do not raise any challenges to the delegation provision, despite the fact that defendants' motion clearly raises this issue and discusses Rent-A-Center at length. The plaintiffs challenge the entire arbitration agreement, but do not specifically challenge the delegation clause itself. Plaintiffs' failure to do so, as explained in Rent-A-Center, precludes this court from addressing the merits of plaintiffs' arguments attacking the arbitration agreement.

On page two of their complaint, the plaintiffs make a single, brief reference to "fraud in the inducement of an arbitration agreement." Even if the court were to liberally construe the plaintiffs' nonspecific fraud allegation as an attack on the delegation provision, the court nevertheless would conclude that the challenge fails. Plaintiffs do not identify - either in the 104-page complaint or in their opposition brief - exactly what statement or material omission *relating to the arbitration provision* was fraudulent. As best as the court can tell from its review of the complaint and opposition brief, the plaintiffs' misrepresentation claims are based on the defendants' failure to disclose Mobile City's flood history, failure to disclose the "no move" restriction, failure to disclose the ability by defendants to unilaterally raise the rents, failure to disclose taxes, and misrepresenting the amenities offered at Mobile City. These alleged misrepresentations and omissions relate to the Security

Agreement more generally, and do not relate to the validity of the arbitration provision, much less the delegation provision itself.[12] See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967) ("if the claim is fraud in the inducement of the arbitration clause itself - an issue which goes to the 'making' of the agreement to arbitrate - the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.").

As a final matter, the plaintiffs, relying on New Jersey law, argue that the class action waiver clause in the arbitration

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[12]Plaintiffs also contend that they were not able to understand the terms of the Security Agreements because they have a very limited understanding of the English language. However, under well-established contract principles, "[i]n the absence of fraud, the fact that an offeree cannot read, write, speak, or understand the English language is immaterial to whether an English-language agreement the offeree executes is enforceable." See Morales v. Sun Constructors, Inc., 541 F.3d 218, 222 (3d Cir. 2008) (enforcing arbitration agreement against Spanish-speaking plaintiff and stating that "Morales, in essence, requests that this Court create an exception to the objective theory of contract formation where a party is ignorant of the language in which a contract is written. We decline to do so."); Washington Mut. Fin. Group, LLC v. Bailey, 364 F.3d 260, 264 (5th Cir. 2004) (holding that defendant's illiteracy did not bar enforcement of an arbitration agreement which the defendant signed but denied he understood); Paper Express, Ltd. v. Pfankuch Maschinen, 972 F.2d 753, 757 (7th Cir. 1992) (addressing a contract dispute between an Illinois corporation and a German corporation and holding that parties should be held to contracts, even if the contracts are in foreign languages or the parties cannot read or understand the contracts due to blindness or illiteracy). As stated above, the plaintiffs have not alleged any fraudulent conduct on the part of the defendants relating to the arbitration provision.

agreement is invalid because it is contrary to the public policy of New Jersey.[13] Plaintiffs cite Cohen v. Chase Bank, N.A., 679 F. Supp. 2d 582 (D.N.J. 2010), in which the court relied upon Muhammad v. Cty. Bank of Rehoboth Beach, 189 N.J. 1 (2006), in support of its holding that the class action waiver was contrary to New Jersey public policy and unenforceable. Cohen, 679 F. Supp. 2d at 595-96. However, the plaintiffs make no mention of the Supreme Court's recent opinion in AT&T Mobility LLC v. Concepcion, in which the court held that California's Discovery Bank rule - which provides that class waivers in consumer arbitration agreements are unconscionable if the agreement is an adhesion contract, involves small amounts of damages, and involves a scheme to cheat large numbers of consumers out of small sums of money - is preempted by the FAA. The Third Circuit has held that "[w]e understand the holding of Concepcion to be both broad and clear; a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with, and therefore preempted by, the FAA, irrespective of whether class arbitration is desirable for unrelated reasons." Litman v. Cellco Partnership, 655 F.3d 225, 231 (3d Cir. 2011). The Litman court further observed that "we must hold that . . . the rule established in Muhammad is preempted by the FAA. It follows that the arbitration

[13]The Security Agreements provide that New Jersey law applies to the agreement. Both parties have relied upon New Jersey law in addressing the class waiver issue.

clause at issue here must be enforced according to its terms, which requires individual arbitration and forecloses class arbitration." Id.; see also G.R. Homa v. Am. Express Co., No. 11-3600, 2012 WL 3594231, at *4-5 (3d Cir. Aug. 22, 2012). While Concepcion does not mandate that all class-action waivers be deemed *per se* enforceable, the plaintiffs, other than relying on Muhammad, have not presented the court with any other arguments for invalidating the class action waiver provision.

III. CONCLUSION

For the reasons above, the defendants' Motion to Compel Arbitration is DENIED as to the non-signatory plaintiffs. The motion is GRANTED as to the signatory plaintiffs. The non-signatory plaintiffs' claims shall be severed from those brought by the signatory plaintiffs, and the litigation shall proceed as to the non-signatory plaintiffs and shall be stayed as to the signatory plaintiffs.

IT IS SO ORDERED.

s/ Tu M. Pham
TU M. PHAM
UNITED STATES MAGISTRATE JUDGE

September 30, 2012
DATE