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

KENNETH MERRITT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 2:24-cv-2196-TLP-atc**
	)	
SQUARE CAPITAL, LLC,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION TO COMPEL ARBITRATION AND ORDER DENYING MOTION TO STRIKE

Before the Court by Order of Reference[1] is the motion to compel arbitration, or, alternatively, to dismiss for failure to state a claim by Defendant Block, Inc. ("Block"),[2] filed on April 4, 2024. (ECF No. 7.) Plaintiff Kenneth Merritt filed a response in opposition to the motion on April 9, 2024. (ECF No. 8.) On April 23, 2024, Block filed a reply. (ECF No. 9.) On April 30, 2024, Merritt filed a document styled "Objection to the Motion to Compel Arbitration," which is effectively a surreply. (ECF No. 10.) On May 15, 2024, Block filed a motion to strike that surreply (ECF No. 12), and, on May 20, 2024, Merritt filed a response to the motion to strike. (ECF No. 13.) For the reasons stated below, Block's motion to strike is DENIED, and it is recommended that Block's motion to compel arbitration be GRANTED.

[1] On April 1, 2024, United States District Judge Thomas L. Parker referred the case to the undersigned for management of all pretrial matters for determination or report and recommendation, as appropriate. (ECF No. 6.)

[2] Block asserts that it is formerly known as Square, Inc. and has been incorrectly identified as "Square Capital, LLC" in the caption and the amended complaint. (ECF No. 7-1, at 1.)

ORDER ON MOTION TO STRIKE MERRITT'S SURREPLY

Blocks asks that Merritt's surreply to the motion to compel arbitration, filed without leave of Court, be stricken. (ECF No. 12.) Merritt responds that Federal Rules of Civil Procedure allow "plaintiffs the right to respond to motions filed by defendants" and asks for sanctions against Block's counsel for filing the motion to strike. (*Id.* at 3.)

Though Merritt is correct that he is entitled to file a response to Block's motion to compel arbitration, he is not entitled to do so twice. Merritt filed his first response, entitled "Objection to Motion to Compel Arbitration," on April 9, 2024. (ECF No. 8.) Then, after Block filed a reply (as permitted by the Local Rules) (ECF No. 9),[3] Merritt filed another document, also titled "Objection to Motion to Compel Arbitration," making new arguments, not raised in his prior filing, in opposition to Block's request to compel arbitration. (ECF No. 10.) This second "Objection," filed after Block's reply, is properly considered a surreply to the motion to compel. And surreplies are not permitted without leave of Court. *West v. AFSCME Bldg. Corp.*, No. 2:22-cv-02235-JTF-cgc, 2022 WL 18141568, at *4 n.5 (W.D. Tenn. Oct. 25, 2022) (citing L.R. 12.1).

Merritt did not file a motion for leave to file a surreply before he filed his second "Objection" to the motion to compel, and thus that filing was improper. Given Merritt's pro se status, however, the Court will consider Merritt's surreply. The motion to strike is therefore

[3] Local Rule 12.1(c) permits a party to file a reply in support of a motion to dismiss without leave of Court. Because Block's motion to compel alternatively seeks dismissal, it falls under Local Rule 12.1, and thus Block was not required to seek leave of Court to file its reply.

denied.[4] Merritt is to familiarize himself with the Local Rules, and the Court may not consider other unauthorized filings in the future.

REPORT AND RECOMMENDATION ON MOTION TO COMPEL ARBITRATION

I. Proposed Findings of Fact

A. Factual Background

This suit arises from Merritt's use of Cash App, an application offered by Block that allows users to send and receive money. Merritt alleges that Block improperly closed his Cash App account and kept his money, asserting claims of breach of contract, fraud, retaliation, and bad faith and seeking $85,000 in compensatory damages, $200,000 in punitive damages, and $2,000 in fees and costs. (ECF No. 1-1, at 150–57.)

Block contends, however, that Merritt's claims are subject to arbitration due to the Cash App terms of service. (ECF No. 7, at 2.) According to Block, on February 28, 2019, Merritt used a mobile device to install the Cash App application and create an account. (ECF No. 7-2 ¶ 8.) The application first prompted Merritt to enter his phone number and directed him to verify that number. (*Id.* ¶¶ 8, 9.) Block then sent Merritt a text message containing a one-time verification code and stating: "Cash App: [code] is your sign-in code. By entering, you agree to the Terms, E-Sign Consent, and Privacy Policy: http://squareup.com/legal/cash-ua." (*Id.* ¶ 9.) The hyperlink led to the General Terms of Service ("GTOS") in effect as of February 28, 2019. (*Id.* ¶ 10.) After receiving that text message, Merritt entered the verification code into the application to continue setting up his account. (*Id.* ¶¶ 11, 14.) Merritt then linked a debit card to his Cash App account and received his first payment. (*Id.* ¶¶ 12, 13.)

[4] Because Merritt did not have permission to file the surreply, his request for sanctions against Block's counsel is not well taken. Indeed, it appears that Block's counsel made a good faith effort to inform Merritt of the Local Rules before filing the motion to strike.

The GTOS contains the following provisions:

> 20. Disputes
> "Disputes" are defined as any claim, controversy, or dispute between you and Square, its processors, suppliers or licensors (or their respective affiliates, agents, directors or employees), including any claims relating in any way to these Terms or the Services, or any other aspect of our relationship.
>
> 21. Binding Individual Arbitration
> You and Square agree to arbitrate any and all Disputes by a neutral arbitrator who has the power to award the same individual damages and individual relief that a court can. ANY ARBITRATION UNDER THESE GENERAL TERMS WILL ONLY BE ON AN INDIVIDUAL BASIS; CLASS ARBITRATIONS, CLASS ACTIONS, REPRESENTATIVE ACTIONS, AND CONSOLIDATION WITH OTHER ARBITRATIONS ARE NOT PERMITTED. YOU WAIVE ANY RIGHT TO HAVE YOUR CASE DECIDED BY A JURY AND YOU WAIVE ANY RIGHT TO PARTICIPATE IN A CLASS ACTION AGAINST SQUARE. If any provision of this arbitration agreement is found unenforceable, the unenforceable provision will be severed, and the remaining arbitration terms will be enforced (but in no case will there be a class or representative arbitration). All Disputes will be resolved finally and exclusively by binding individual arbitration with a single arbitrator (the "Arbitrator") administered by the American Arbitration Association (https://www.adr.org) according to this Section and the applicable arbitration rules for that forum. The Arbitrator shall be responsible for determining all threshold arbitrability issues, including issues relating to whether the General Terms and/or Additional Terms (or any aspect thereof) are enforceable, unconscionable or illusory and any defense to arbitration, including waiver, delay, laches, or estoppel. Subject to applicable jurisdictional requirements, you may elect to pursue your claim in your local small-claims court rather than through arbitration so long as your matter remains in small claims court and proceeds only on an individual (non-class or non-representative) basis. The Federal Arbitration Act, 9 U.S.C. §§ 1–16, fully applies. . . . For purposes of this arbitration provision, references to you and Square also include respective subsidiaries, affiliates, agents, employees, predecessors, successors and assigns as well as authorized users or beneficiaries of the Services. . . .

(ECF No. 7-4 ¶¶ 20, 21.) On December 19, 2019, Block amended its Terms of Service by posting the new terms on its website. (ECF No. 7-3 ¶¶ 6, 7.) Those new terms contain an identical arbitration provision. (ECF No. 7-5 ¶¶ 20, 21.)

Merritt does not dispute (or even address) any of the foregoing facts.

Merritt claims that, in May of 2020, he "inadvertently engaged in a Cash App fund that deducted $25 daily from his account." (ECF No. 1-1, at 103.) Upon discovering the withdrawals, Merritt alleges that he contacted his bank, First Tennessee, and initiated a fraud claim. (*Id.* at 103–04.) But Merritt then realized that the funds had not been improperly transferred and "explained his mistake" to First Tennessee, asking it to cancel the fraud claim. (*Id.* at 104.) First Tennessee "reinitiated the claim," however, and "refunded $1,100 to the plaintiff's account without his knowledge," and Cash App thereafter "confiscated all funds, stating the account was closed, offering no explanation other than a chargeback." (*Id.*)

B. Procedural Background

On May 23, 2023, Merritt filed a civil warrant against Block in the General Sessions Court of Shelby County, Tennessee (the "General Sessions Court"), alleging that Cash App "violated Tennessee Code Section 47-18-104 using deceptive practice to induce business." (ECF No. 1-1, at 125.) On August 28, 2023, the General Sessions Court entered an order permitting Block to interplead Merritt's $480 Cash App balance and, on September 18, 2023, entered judgment awarding Merritt $480. (*Id.* at 88, 125.) Merritt appealed that judgment to the Shelby County Circuit Court ("Circuit Court").[5] (*Id.* at 126.) The Circuit Court initially dismissed the case for failure to prosecute but later set that dismissal aside and granted Merritt leave to amend his pleadings. (*Id.* at 116, 142.) On February 27, 2024, Merritt filed his amended complaint. (*Id.* at 150.) On March 28, 2024, Block removed the lawsuit to this Court on diversity jurisdiction grounds. (ECF No. 1.)

[5] Though the judgment was in his favor, Merritt explains that he appealed because the judgment "did not compensate him for the inconvenience and hardship caused by the delay." (ECF No. 10, at 2.)

II. Proposed Conclusions of Law

Block contends that this lawsuit falls within the broad arbitration provision of the GTOS, such that this matter must be referred to arbitration. In response, Merritt does not dispute the breadth or applicability of the arbitration provision but instead argues that his claims should stay in this Court because (1) Block breached the Terms of Service, so "enforcing the arbitration clause now would be unfair," (2) Block's request for arbitration is barred by res judicata, (3) Block has waived its right to compel arbitration, and (4) the arbitration agreement is unenforceable because Block's representatives failed "to disclose its existence during the initial three months of discussion preceding the lawsuit." (ECF Nos. 8, 10.)

In terms of the applicable legal standard, "[b]efore compelling an unwilling party to arbitrate, the court must engage in a limited review to determine whether the dispute is arbitrable; meaning that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement." *Hergenreder v. Bickford Senior Living Grp., LLC*, 656 F.3d 411, 416 (6th Cir. 2011) (quoting *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 624 (6th Cir. 2003)). The party seeking to rely on the arbitration provision bears the initial burden of proving the existence of an agreement to arbitrate. *In re StockX Customer Data Sec. Breach Litig.*, 19 F.4th 873, 880 (6th Cir. 2021) ("StockX, as the movant asserting the existence of a contract, must initially carry its burden to produce evidence that would allow a reasonable jury to find that a contract exists."). The party opposing arbitration then bears the burden of showing that the claims at issue are not subject to the arbitration agreement. *Great Earth Cos. v. Simons*, 288 F.3d 878, 889 (6th Cir. 2002); *see also Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000) (recognizing "our prior holdings that the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for

arbitration"). The standard applicable to these inquiries "mirrors that required to withstand summary judgment in a civil suit." *Id.* (citing *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 129–30 (2d Cir. 1997)). As such, "[c]ourts may consider both the pleadings and additional evidence submitted by the parties and view all facts and inferences in the light most favorable to the nonmoving party." *Adelstein v. Walmart, Inc.*, – F. Supp. 3d –, 2024 WL 1347043, at *3 (N.D. Ohio Mar. 30, 2024) (citing *Great Earth*, 288 F.3d at 889). "[M]ere conclusory and unsupported allegations, rooted in speculation, do not meet that burden." *Townsend v. Stand Up Mgmt., Inc.*, No. 1:18CV2884, 2019 WL 3729266, at *3 (N.D. Ohio Aug. 8, 2019) (quoting *Bell v. Ohio State Univ.*, 351 F.3d 240, 253 (6th Cir. 2003)).

Because the parties' agreement to arbitrate is binding and applicable to the claims at issue, and because Merritt has failed to show otherwise, this matter should be stayed and referred to arbitration.

A. The Formation of the Agreement to Arbitrate

Block has demonstrated the existence of an arbitration agreement. "Because arbitration agreements are fundamentally contracts, we review the enforceability of an arbitration agreement according to the applicable state law of contract formation." *Tillman v. Macy's, Inc.*, 735 F.3d 453, 456 (6th Cir. 2013) (quoting *Seawright v. Am. Gen. Fin. Servs., Inc.*, 507 F.3d 967, 972 (6th Cir. 2007)). Whether the applicable state law is that of Tennessee (the forum state) or California (the state indicated in the GTOS's choice-of-law clause), the result is the same, as clickwrap agreements are routinely upheld in both jurisdictions, "even where the party was required to click on a link to view the terms of the agreement." *Anderson v. Amazon.com, Inc.*, 490 F. Supp. 3d 1265, 1274–75 (M.D. Tenn. 2020) (collecting cases and finding a clickwrap agreement enforceable whether under Tennessee and California law).

Here, Block notified Merritt that, by entering the verification code he received into the Cash App application, he was consenting to the GTOS. The GTOS contains an express and unequivocal agreement to arbitrate any disputes arising out of the parties' relationship. (*See* ECF No. 7-4 ¶¶ 20, 21.) When Merritt proceeded to enter the code and finish setting up his Cash App account, he manifested his assent to the GTOS. And Merritt does not argue otherwise. He argues only that representatives of Block did not specifically alert him to the arbitration provision in the GTOS "during the initial three months of discussions preceding the lawsuit." (ECF No. 10, at 1.) But it is undisputed that he had access to the GTOS, including its arbitration provision, before he set up his Cash App account and throughout the parties' dealings, and his failure to read those terms does not invalidate them or preclude the formation of the contract. *See Anderson*, 490 F. Supp. 3d at 1276 (finding, under both Tennessee and California law, that a party's failure to read a contract is not a defense to enforcement). Block has satisfied its burden of demonstrating the existence of an arbitration agreement.

B. The Validity and Scope of the Arbitration Agreement

As Block has demonstrated that the parties agreed to arbitrate their dispute, the burden then shifts to Merritt to show that the arbitration agreement is invalid or that his claims are beyond its scope. As an initial matter, there is no dispute that the arbitration provision in this case is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1–16 ("FAA"). "[T]o invoke its statutory powers under §§ 3 and 4 [of the FAA] to stay litigation and compel arbitration according to a contract's terms, a court must first know whether the contract itself falls within or beyond the boundaries of §§ 1 and 2." *New Prime Inc. v. Oliveira*, 586 U.S. 105, 111–12 (2019) (describing that inquiry as a "necessarily antecedent statutory inquiry"). Those sections simply require that the contract at issue "involv[es] commerce," that is, "commerce among the several

States." §§ 1, 2. "The term 'involving commerce' in the FAA is 'the functional equivalent of the more familiar term "affecting commerce"—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power.'" *Preferred Care, Inc. v. Howell*, 187 F. Supp. 3d 796, 810 (E.D. Ky. 2016) (quoting *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003)). Block, which is incorporated in Delaware and maintains its principal place of business in California (ECF No. 7-2 ¶ 3), facilitated financial transactions via its Cash App application for Merritt, a Tennessee resident (ECF No. 1 ¶ 9). That financial relationship constitutes interstate commerce, and the FAA applies. The GTOS also expressly provides that the FAA "fully applies." (ECF No. 7-4 ¶ 21.)

The applicability of the FAA means that the GTOS should be interpreted in light of the "strong federal policy in favor of enforcing arbitration agreements." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985). The FAA provides that arbitration agreements are "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 "leaves no place for the exercise of discretion by a district court, but instead mandates that a district court *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Preferred Care*, 187 F. Supp. 3d at 807 (quoting *Dean Witter Reynolds*, 470 U.S. at 218). Courts should resolve contractual ambiguities and doubts about intent in favor of arbitration. *Dean Witter Reynolds*, 470 U.S. at 217.

The final inquiry is the scope of the arbitration agreement. "Where . . . the arbitration clause is broad, 'only an express provision excluding a specific dispute, or the most forceful evidence of a purpose to exclude the claim from arbitration, will remove the dispute from consideration by the arbitrators.'" *Adelstein*, 2024 WL 1347043, at *3 (quoting *Highlands*

Wellmont Health Network, Inc. v. John Deere Health Plan, Inc., 350 F.3d 568, 577 (6th Cir. 2003)) (internal quotations omitted).

Merritt's claims fall within the broad arbitration provision of the GTOS. That provision states that the parties agreed to arbitrate "any and all Disputes," with "Disputes" defined as "any claim, controversy, or dispute between you and [Block], its processors, suppliers or licensors (or their respective affiliates, agents, directors or employees), including any claims relating in any way to these Terms or the Services, or any other aspect of our relationship." (ECF No. 7-4 ¶¶ 20, 21; ECF No. 7-5 ¶¶ 20, 21.) The factual basis of Merritt's claims is that Block closed his Cash App account and "seiz[ed] $480 in September 2020 and fail[ed] to return the funds for four years." (ECF No. 10, at 3.) Because those claims relate to Merritt's relationship with Block, the arbitration provision expressly covers them. The FAA therefore requires that these claims be referred to arbitration.

Moreover, to the extent that Merritt raises threshold arbitrability issues, those matters are also within the scope of the agreement to arbitrate because the GTOS contains a delegation clause. "A delegation provision is 'an [antecedent] agreement to arbitrate threshold issues concerning the arbitration agreement.'" *Becker v. Delek US Energy, Inc.*, 39 F.4th 351, 355 (6th Cir. 2022) (quoting *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010)) ("[T]he very issue of arbitrability is compelled to an arbitrator."); *see also Coinbase, Inc. v. Suski*, – U.S. –, 144 S. Ct. 1186, 1192 (2024) (recognizing that, via a delegation provision, parties "can also 'agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes" (quoting *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 65 (2019))). "The practical effect of a delegation provision is that if arbitrability is challenged, then the arbitrator, not the court, must address the challenge." *Id.*

That result follows whether the challenge is to the coverage/scope or enforceability/validity of the arbitration agreement. *Id.*[6]

The GTOS's delegation clause states that "the Arbitrator shall be responsible for determining all threshold arbitrability issues, including issues relating to whether the General Terms and/or Additional Terms (or any aspect thereof) are enforceable, unconscionable or illusory and any defense to arbitration, including waiver, delay, laches, or estoppel." (ECF No. 7-4 ¶ 21; ECF No. 7-5 ¶ 21.) This language constitutes "clear and unmistakable evidence" that the parties agreed to arbitrate any arbitrability questions. *See Henry Schein*, 586 U.S. at 72 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). In addition, the GTOS incorporate the rules of the American Arbitration Association ("AAA") (ECF No. 7-4 ¶ 21), including its rule that the arbitrator has the power to decide questions of arbitrability (ECF No. 7-7, at R-14(a)). *See Harrison v. Gen. Motors LLC*, 651 F. Supp. 3d 878, 885 (E.D. Mich. 2023) ("The Sixth Circuit has held that incorporation of or reference to the [AAA] rules is 'clear and unmistakable evidence' that there was an agreement to delegate issues of arbitrability, as those rules 'clearly empower an arbitrator to decide questions of "arbitrability."'" (quoting *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 845–46 (6th Cir. 2020))). As such, the Court "must send all arbitrability questions to arbitration." *Coinbase*, 144 S. Ct. at 1194.

C. Merritt's Arguments Against Arbitration

Each of Merritt's arguments against referring this matter to arbitration goes to either the merits of the parties' dispute or the question of arbitrability, all issues that the parties have delegated to the arbitrator. First, Merritt argues that Block breached the GTOS, such that

[6] The only challenge remaining for a court to decide is the validity of the delegation provision itself, *id.*, a challenge Merritt has not raised in this case.

"enforcing the arbitration clause now would be unfair." (ECF No. 8, at 2.) Specifically, Merritt asserts that Block failed to respond to his "multiple attempts" to communicate with Block "regarding the issue in dispute" and that "[t]his lack of response constitutes a potential breach." (*Id.*) Merritt's claim that Block breached the contract does not preclude applicability of the arbitration provision, however, as "breach of the substantive contract is not a permitted objection to arbitrability; it is a merits question." *Sleeper Farms v. Agway, Inc.*, 506 F.3d 98, 104 (1st Cir. 2007) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967)); *see also Local Union No. 721, U. Packinghouse, Food & Allied Workers v. Needham Packing Co.*, 376 U.S. 247, 251–52 (1964) ("Arbitration provisions, which themselves have not been repudiated, are meant to survive breaches of contract, in many contexts, even total breach . . . . Nothing in the agreement itself indicates an intention to except from [the] agreement to arbitrate . . . any dispute which involves or follows an alleged breach . . . ."); *Duncan-Williams, Inc. v. Bonds.com Grp., Inc.*, No. 2:08-cv-02846, 2009 WL 10699716, at *6 (W.D. Tenn. Sept. 18, 2009) ("An agreement to arbitrate would be of little value if a party's alleged breach of the contract were sufficient to preclude arbitration of claims that have arisen between them."). Merritt's argument about Block's breach of the GTOS goes to the merits of this case and is thus subject to the arbitration provision.

Second, Merritt argues that Block's current effort to compel arbitration is barred by res judicata because the General Sessions Court has already entered a judgment in his favor on the underlying dispute. (ECF No. 8, at 2.) If the General Sessions Court had entered a final judgment that this matter is or is not subject to arbitration, that judgment may indeed have precluded consideration of that issue by this Court, whether as res judicata, under the *Rooker-Feldman* doctrine, or otherwise. But it is undisputed that the General Sessions Court did not rule

on arbitrability; its judgment was only as to the merits of the parties' dispute over the funds in Merritt's Cash App account (indeed, as discussed below, Merritt argues that Block "never raised the issue of arbitration" in the General Sessions case). (ECF No. 8, at 3.) The preclusive effect of that judgment on the merits of this dispute is therefore for the arbitrator to resolve. *See, e.g.*, *Constellium Rolled Prods. Ravenswood, LLC v. U. Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union AFL-CIO/CLC*, 18 F.4th 736, 741–42 (4th Cir. 2021) ("The preclusive effect of a prior judgment is a procedural question for the arbitrator. . . . '[R]es judicata [is] for the arbitrator to decide in the first instance.'" (quoting *Klay v. U. Healthgroup, Inc.*, 376 F.3d 1092, 1109 (11th Cir. 2004))); *see also Zurich Am. Ins. Co. v. Watts Indus., Inc.*, 466 F.3d 577, 581 (7th Cir. 2006) (finding that the preclusive effect of a state court judgment on the merits of the dispute "is a matter for the arbitrator to decide because Watts wishes to use the preclusive effect of [that] judgment as a defense to Zurich's attempt to compel arbitration"). Merritt's res judicata argument goes to the merits of this dispute and must therefore be decided in arbitration.

Third, Merritt argues that Block "waived its right to compel arbitration" by never raising the issue of arbitration in the General Sessions lawsuit or the subsequent appeal.[7] (ECF No. 8, at 3–4.) Per the GTOS's delegation clause, however, the parties have expressly agreed that "the Arbitrator shall be responsible for determining all threshold arbitrability issues, including . . . any defense to arbitration, including waiver, delay, laches, or estoppel." (ECF No. 7-4 ¶ 21; ECF

[7] Merritt also argues that Block's representatives failed to disclose the existence of the arbitration provision in the GTOS "during the initial three months of discussion preceding the lawsuit." (ECF No. 10, at 1.) To the extent Merritt is attempting to argue that he was unaware the GTOS contain an arbitration agreement because he did not read the GTOS, that argument is discussed (and rejected) above. To the extent Merritt is attempting to argue that Block waived its right to insist upon arbitration by failing to mention it in its pre-litigation discussions with Merritt, that argument is rejected for the reasons stated in this paragraph.

No. 7-5 ¶ 21.) That agreement accords with Supreme Court precedent holding that procedural questions of arbitrability, including "allegation[s] of waiver, delay, or a like defense to arbitrability," are presumptively for the arbitrator to decide. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)); *see also Creason v. Experian Info. Sols., Inc.*, – F. Supp. 3d –, 2024 WL 1221183, at *4 (W.D. Ky. Mar. 21, 2024) (finding that a comprehensive delegation clause in an arbitration agreement requires that "the arbitrator should decide allegations of waiver" (quoting *Howsam*, 537 U.S. at 83–84)).

Because each of Merritt's arguments goes to the arbitrability or the merits of this dispute, the Court is precluded from considering those arguments due to the broad arbitration and delegation provisions of the GTOS. As Merritt has offered nothing to call into the question the formation, enforceability, or validity of the GTOS, those terms control, and this case should be referred to arbitration.

D. Dismissal or Stay

After determining that some or all of the claims in a given suit are subject to arbitration under the agreement, "the court in which such suit is pending . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . ." 9 U.S.C. § 3. The Supreme Court has recently decided that, "[w]hen a district court finds that a lawsuit involves an arbitrable dispute, and a party requests a stay pending arbitration, § 3 of the FAA compels the court to stay the proceeding." *Smith v. Spizzirri*, 601 U.S. 472, 479 (2024). As discussed above, all of Merritt's claims are subject to arbitration, and Block has requested a stay of this case pending arbitration. (ECF No. 7-1, at 14.) It is therefore RECOMMENDED that this matter be stayed pending resolution of the arbitration.

RECOMMENDATION

For the reasons set forth above, Block's motion to strike is DENIED. The Court further recommends that Block's motion to compel arbitration be granted and that this case be stayed pending arbitration.

Respectfully submitted this 25th day of July, 2024.

s/Annie T. Christoff
ANNIE T. CHRISTOFF
UNITED STATES MAGISTRATE JUDGE

NOTICE

Within fourteen (14) days after being served with a copy of this report and recommendation disposition, a party may serve and file written objections to the proposed findings and recommendations. A party may respond to another party's objections within fourteen (14) days after being served with a copy. Fed. R. Civ. P. 72(b)(2). Failure to file objections within fourteen (14) days may constitute forfeiture/waiver of objections, exceptions, and further appeal.