IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FATT KATT ENTERPRISES, INC. d/b/a Granite Transformations of Atlanta,	
Plaintiff,	**CIVIL ACTION FILE**
	NO. 1:17-CV-1900-MHC
v.	
ROCKSOLID GRANIT (USA), INC.,	
Defendant.	

ORDER

This case comes before the Court on Rocksolid Granit (USA), Inc.'s ("Defendant's") Motion to Stay or Dismiss and to Compel Arbitration [Doc. 14] ("Motion to Compel Arbitration").

I. BACKGROUND[1]

Defendant is a franchisor of a construction materials installation company that primarily installs reconstituted granite slabs over kitchen countertops, vanities, and other surfaces in residential and commercial settings. See Compl. [Doc. 1] ¶ 8. Plaintiff entered into a Franchise Agreement with Defendant on April 17, 2007.

[1] The facts relied upon in this Order are taken from the Complaint and are construed in the light most favorable to Plaintiff as the non-moving party.

Id. ¶ 9; Franchise Agreement dated April 17, 2007 [Doc. 1-1] ("Franchise Agreement"). The Franchise Agreement permits Plaintiff as franchisee to use Defendant's proprietary trademarks, service marks, trade dress, and other construction contracting services within a specific area in and around Atlanta, Georgia. Compl. ¶ 9. The Franchise Agreement has two restrictive covenant provisions. See Franchise Agreement §§ 15.1, 15.2. Section 15.1 provides for the term of the Franchise Agreement:

> During the term of this Agreement, neither [Plaintiff] nor any of [Plaintiff's] principals shall, directly or indirectly, through corporations, partnerships, limited liability companies, trusts, associations, joint ventures, or other unincorporated businesses, perform any services for, engage in or acquire, participate or have any financial or other interest in any other business offering resurfacing services or other services or products offered by Granite Transformations; provided, however, that this provisions shall not apply to the operation of any other Granite Transformations franchised business pursuant to a valid franchise agreement with [Defendant].

Franchise Agreement § 15.1. Section 15.2 covers the two years after the term of the Franchise Agreement expires:

> For a period of 2 years following termination or expiration of this Agreement, or the termination of any principal's interest in the Business, neither [Plaintiff] nor any of [Plaintiff's] principals shall, directly or indirectly, through corporations, partnerships, limited liability companies, trusts, associations, joint ventures, or other unincorporated businesses, perform any services for, engage in or acquire, participate or have any financial of other interest in any other business offering refacing services or other services or products

> offered by Granite Transformation Businesses: (1) within the Designated Territory; (2) within a 50 mile area surrounding the perimeter of the Designated Territory; or (3) within a 10 mile radius of any Granite Transformations franchised business in existence on the date of expiration or termination of this Agreement; provided, however, that this provision shall not apply to the operation of any other Granite Transformations franchised business pursuant to a valid franchise agreement with [Defendant]. The aforesaid 2 year period shall be tolled during any period of non-compliance.

Franchise Agreement § 15.2. The Franchise Agreement also includes the following dispute resolution provision:

> Arbitration. All disputes and claims relating to this Agreement or any other agreement entered into between the parties, the rights and obligation of the parties, or any other claims or causes of action relating to the making, interpretation, or performance of either party under this Agreement, shall be settled by arbitration in Dade County, Florida before and in accordance with the arbitration rules of Franchise Arbitration and Mediation, Inc. ("FAM") or, if FAM is unable to conduct the arbitration, before the American Arbitration Association ("AAA"), except that there shall be no class action arbitration. The right and duty of the parties to this Agreement to resolve any disputes by arbitration shall be governed by the Federal Arbitration Act, as amended. The following shall supplement and, in the event of a conflict, shall govern any arbitration: If the claim is for less than $30,000 than [sic] the matter shall be heard before a single arbitrator. If the claim, or a counterclaim, is for $30,000 or more, the matter shall be heard before a panel of three arbitrators and each party shall appoint its own arbitrator, and the appointed arbitrators shall appoint a "neutral" arbitrator from the AAA's list of arbitrators. Each party must bear its own costs of arbitration including the fee for their respective arbitrator; provided, however, that the neutral or the single arbitrator's fee shall be shared equally between the parties.

Franchise Agreement § 20.4.

Defendant terminated the Franchise Agreement on March 28, 2017, citing Plaintiff's purported breach of Section 15.1. Compl. ¶ 20. Thereafter, Plaintiff filed the above-styled lawsuit on May 24, 2017, seeking, *inter alia*, a declaration that the arbitration provision in Section 20.4 and restrictive covenants in Sections 15.1 and 15.2 are unenforceable. Id. ¶¶ 6, 22-29. Defendant filed the present Motion to Compel Arbitration arguing that the arbitration provision is valid and enforceable and that this Court should dismiss the above-styled suit in favor of arbitration. See Def.'s Mem. of Law in Supp. of its Mot. to Compel Arbitration [Doc. 14-1] ("Def.'s Br.").

II. LEGAL STANDARD

The Supreme Court has stated that "whether parties have agreed to submit a particular dispute to arbitration is typically an issue for judicial determination." Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 296 (2010) (internal punctuation and citation omitted); see also Rent-A-Car, W., Inc. v. Jackson, 561 U.S. 63, 67 (2010). The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* (2012), "reflects the fundamental principle that arbitration is a matter of contract." Id. Section 2 of the FAA provides:

> 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 thereby places arbitration agreements on an equal footing with other contracts and requires courts to enforce them according to their terms." Rent-A-Car, 561 U.S. at 67 (citations omitted). Parties may contract around the general rule and agree to submit questions of arbitrability to the arbitrator in the first instance. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995); see also Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1332-33 (11th Cir. 2005). However, regardless of whether the parties have delegated arbitrability to the arbitrators, before a court can compel a party to arbitration, it must be satisfied that the parties actually agreed to arbitrate. AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648 ("[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.").

The FAA "provisions manifest a liberal federal policy favoring arbitration agreements." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991) (quotation omitted); see also Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (holding that the FAA's "federal policy favoring arbitration" requires that courts "rigorously enforce agreements to arbitrate."). Therefore, "questions of arbitrability must be addressed with a healthy regard for the federal

policy favoring arbitration" and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). Consequently, arbitration provisions are to be generously construed in favor of arbitration. Id.

Notwithstanding the strong federal policy favoring arbitration, no party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate. Doe v. Princess Cruise Lines, Ltd., 657 F.3d 1204, 1214 (11th Cir. 2011); Kemiron Atl., Inc. v. Aguakem Int'l, Inc., 290 F.3d 1287, 1290 (11th Cir. 2002). However, the parties may narrow the Court's inquiry if they clearly and unmistakably agree to arbitrate the very issue of arbitrability. Martinez v. Carnival Corp., 744 F.3d 1240, 1246 (11th Cir. 2014) (citing Rent-A-Center, 561 U.S. at 79). For example, "when parties incorporate the rules of the [American Arbitration] Association into their contract, they 'clearly and unmistakably' agree[] that the arbitrator should decide whether the arbitration clause [applies]." U.S. Nutraceuticals, LLC v. Cyanotech Corp., 769 F.3d 1308, 1311 (11th Cir. 2014) (quoting Terminix, 432 F.3d at 1332).

III. ANALYSIS

Defendant has moved the Court to compel arbitration pursuant to the FAA and the parties do not dispute that the FAA is applicable to the Franchise

Agreement at issue here. Mot. to Compel Arbitration at 1; Pl.'s Br. in Opp'n to Def.'s Mot. to Compel Arbitration [Doc. 17] ("Pl.'s Resp.") at 7; see also Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868, 874 (11th Cir. 2005) ("The FAA makes enforceable a written arbitration provision in 'a contract evidencing a transaction involving commerce.'") (quoting 9 U.S.C. § 2). Plaintiff opposes Defendant's Motion to Compel Arbitration, arguing that the Franchise Agreement containing the arbitration provision should not be enforced because it is substantively and procedurally unconscionable. Pl.'s Resp. at 2, 14-21. As discussed below, the Court finds that the arbitrability of the Franchise Agreement should be decided by an arbitrator because (1) the parties expressly agreed to arbitrate, and (2) Plaintiff's claim of unconscionability relates to the contract as a whole, not specifically to the arbitration provision.

A. The Parties Expressly Agreed to Arbitrate Matters of Formation.

An important threshold issue regarding a motion to compel arbitration is "who is supposed to decide what in considering challenges to a contract containing an arbitration clause." Solymar Invs., Ltd. v. Banco Santander S.A., 672 F.3d 981, 985 (11th Cir. 2012). The "what" issue to be decided in this case is the alleged unconscionability of the Franchise Agreement. The delegation provision in the

arbitration clause of the Franchise Agreement appears to commit unconscionability challenges to resolution by an arbitrator by providing that

> All disputes and claims relating to this Agreement or any other agreement entered into between the parties, the rights and obligation of the parties, or any other claims or causes of action relating to the making, interpretation, or performance of either party under this Agreement, shall be settled by arbitration . . . .

Franchise Agreement § 20.4. In this case, the terms of the delegation provision of the arbitration section in the Franchise Agreement clearly and unmistakably commits "making, interpretation, or performance" of the Franchise Agreement to resolution by an arbitrator.

Furthermore, the Franchise Agreement incorporates the AAA Rules, which indicates that the parties agreed that an arbitrator should decide whether the arbitration section applies. U.S. Nutraceuticals, 769 F.3d at 1311 ("[W]hen parties incorporate the rules of the Association into their contract, they clearly and unmistakably agree that the arbitrator should decide whether the arbitration clause applies.") (quotation and internal omitted). The Franchise Agreement provides that disputes related to the Agreement "shall be settled by arbitration in Dade County, Florida before and in accordance with the arbitration rules of Franchise Arbitration and Mediation, Inc. ('FAM') or, if FAM is unable to conduct the arbitration, before the American Arbitration Association ('AAA')." Franchise

Agreement § 20.4. AAA Commercial Rule 7 dictates that the arbitrator "shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part" and "shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim[.]" Am. Arbitration Ass'n, Commercial Arbitration Rules, https://www.adr.org/sites/default/files/ Commercial%20Rules.pdf; see also Terminix, 432 F.3d at 1332 ("By incorporating the AAA Rules . . . into their agreement, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid.").

Accordingly, under Nutraceuticals, Terminix, and the AAA Rules, the parties here have clearly and unmistakably agreed to let an arbitrator decide whether the claims in this case are arbitrable. Therefore, unless the Franchise Agreement (specifically the delegation provision of the arbitration section), is found to be unconscionable, it is for the arbitrator to decide arbitrability of the Franchise Agreement.

B. Plaintiff's Unconscionability Arguments Are Not Directed to the Delegation Provision Within the Arbitration Clause.

As outlined above, arbitration is a matter of contract and "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." Martinez, 744 F.3d at 1246 (quoting Rent-A-Center, 561 U.S. at 68-69). When parties do clearly and unmistakably delegate those issues, courts "require the basis of challenge to be directed specifically to the agreement to arbitrate before the court will intervene." Rent-A-Center, 561 U.S. at 71; see also Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 406 (1967).

In Prima Paint, the plaintiff sought to rescind a contract—and thereby avoid arbitration— based on fraudulent inducement where the defendant represented that it was solvent when in fact it was not. Prima Paint, 388 U.S. at 398. The Supreme Court "concluded that because the fraudulent inducement claim related to the underlying contract generally, and not to the arbitration clause specifically, it was a matter to be resolved by the arbitrator, not the federal court." Jenkins, 400 F.3d at 877 (citing Prima Paint, 388 U.S. at 406). In other words, unless the party opposing arbitration contests "the delegation provision specifically," the Court must treat the arbitration agreement as valid and enforceable, "leaving any challenge to the validity of the Agreement as a whole for the arbitrator." Rent-A-Center, 561 U.S. at 72; see also Jones v. Waffle House, Inc., 866 F.3d 1257, 1264 (11th Cir. 2017) ("We may examine a challenge to a delegation provision only if

the claimant 'challenge[d] the delegation provision directly.'") (quoting Parnell v. CashCall, Inc., 804 F.3d 1142, 1144 (11th Cir. 2015)).

Plaintiff's arguments are not directed to the delegation provision of the Franchise Agreement. See Pl.'s Br. at 2, 14-21. Although Plaintiff argues that "the arbitration provisions are unconscionable," and claims that it "does not contend that the entire Franchise Agreement is, in whole, unconscionable," it is clear that Plaintiff's arguments of substantive and procedural unconscionability are not directed specifically at the delegation provision.

The crux of Plaintiff's argument that the Franchise Agreement is substantively unconscionable is limited to the restrictive covenants in Sections 15.1 and 15.2. See Pl.'s Resp. at 18-21 (couching the unconscionability argument in terms whether the Franchise Agreement is an unlawful restraint on trade, pointing out that "[t]he Franchise Agreement's two provisions relating to restrictive covenants are unenforceable under Georgia law" and arguing that by allowing arbitration in Florida, applying Florida law, "would allow Defendant to circumvent Georgia public policy," and would require the parties to litigate in Florida, making it too "too expensive and time consuming for Plaintiff to bring a dispute as to not be commercially worthwhile."). This public policy argument, challenging the entire Franchise Agreement rather than the delegation provision specifically, is

precisely the type of dispute which the Supreme Court has ruled is inappropriate for judicial resolution in circumstances where the parties have agreed to arbitrate this gateway issue. See Rent-A-Center, 561 U.S. at 72 ("[U]nless [plaintiff] challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator."). The contract at issue in Rent-A-Center was an arbitration agreement, and the Court still required plaintiff to challenge the delegation provision specifically because "an arbitration provision is severable from the remainder of the contract." Id. at 71 (quoting Buckeye Check Cashing, Inc. v. Cardenga, 546 U.S. 440, 445 (2006)). This does not change just because the arbitration section here is contained within a larger Franchise Agreement, because the "[a]pplication of the severability rule does not depend on the substance of the remainder of the contract." Id. at 72; Jones, 866 F.3d at 1265 ("As we read this record, Jones did not directly challenge the delegation provision. Instead, the heart of his argumentation was directed at the agreement as a whole."). As Plaintiff's substantive unconscionable challenge is to the Franchise Agreement as a whole, this is an appropriate question for the arbitrator, not this Court.[2] Accordingly,

[2] Resolution of Plaintiff's policy objections is clearly within the scope of the delegation clause, which mandates arbitration for "[a]ll disputes and claims relating to this [Franchise] Agreement . . . relating to the making, interpretation, or

Plaintiff has failed to demonstrate that the Franchise Agreement is substantively unconscionable.

Similarly, Plaintiff's argument that the Franchise Agreement is procedurally unconscionable is directed to the Franchise Agreement as a whole, or various sections of the Franchise Agreement other than the delegation provision. See id. at 16 ("The Franchise Agreement is an adhesion contract."), 17 ("the recovery of attorney's fees under [Section 20.10 of] the Franchise Agreement . . . is one-sided"), ("Other terms of the Franchise Agreement [Sections 20.2 and 20.3] add onerous and unreasonable conditions precedent to bringing the arbitration action or any other action."). Plaintiff argues that the bargaining power of the parties was unequal, the terms of the Franchise Agreement were oppressive, and that Plaintiff lacked a meaningful choice relating to the arbitration section of the Franchise Agreement. Pl.'s Resp. at 16. Indeed, only one of Plaintiff's procedural unconscionability arguments is directed to the arbitration section of the Franchise Agreement, and even this argument does not mention the delegation provision. See id. at 16-17 (arguing that the arbitration provision generally is oppressive because it forces Plaintiff to arbitrate in Florida rather than Georgia).

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performance of either party under this [Franchise] Agreement. Franchise Agreement § 20.4.

As in Rent-A-Center, nothing about Plaintiff's unconscionability arguments addresses or even mentions the delegation provision. See Rent-A-Center, 561 U.S. at 72-73 (finding defendant's unconscionability arguments did not specifically challenge the delegation provision where they were directed at the "entire agreement" and did not mention delegation). The delegation clause provides that an arbitrator shall have authority to resolve "[a]ll disputes and claims relating to this [Franchise Agreement]" including any claims "relating to the making, interpretation, or performance of either party under [the Franchise Agreement]." Pursuant to Rent-A-Center, "whether the parties have agreed to arbitrate" is one of the gateway issues of arbitrability that the parties may delegate to an arbitrator. 561 U.S. at 69. Here they have agreed to arbitrate this issue and Plaintiff fails to argue that this specific provision is unenforceable. See Parnell, 804 F.3d at 1147 (holding that the court did not have jurisdiction to review a challenge to only the "arbitration provision generally" and not a challenge to the delegation specifically).[3]

[3] Assuming *arguendo* that Plaintiff's unconscionability arguments could be construed to challenge the delegation provision in particular, its challenge would still fail. See Jones, 866 F.3d at 1271 (finding that the plaintiff did not directly challenge the delegation provision but, assuming *arguendo* that he did, the provision was not unconscionable). For a contract to be found unconscionable under Georgia law, there must be both procedural and substantive unconscionability. See, e.g., NEC Techs., Inc. v. Nelson, 267 Ga. 390, 394 n.6

IV. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** that Rocksolid Granit (USA), Inc.'s Motion to Stay or Dismiss and to Compel Arbitration [Doc. 14] is **GRANTED**. The parties are hereby **COMPELLED** to arbitrate Plaintiff's claims, including the issues of substantive and procedural unconscionability of the various aspects of the Franchise Agreement.

It is further **ORDERED** that this case be **STAYED** and **ADMINISTRATIVELY CLOSED** pending the outcome of the arbitration. The parties are **DIRECTED** to notify this Court within ten (10) days of the outcome of the arbitration if there are any remaining issues for the Court's consideration.

IT IS SO ORDERED this 11th day of January, 2018.

Mark H. Cohen

MARK H. COHEN
United States District Judge

(1996) (citation omitted). Moreover, the bar for finding unconscionability is very high: "[a]n unconscionable contract is such an agreement as no sane man not acting under a delusion would make, and that no honest man would take advantage of." R. L. Kimsey Cotton Co., Inc. v. Ferguson, 233 Ga. 962, 966 (1975) (internal quotation marks and citation omitted); Mitchell v. Ford Motor Credit Co., 68 F. Supp. 2d 1315, 1319 (N.D. Ga. 1998) ("Unconscionable conduct must 'shock the conscience.") (citation and quotation omitted). Given the high bar for finding unconscionability, the Court concludes that the delegation provision of the Franchise Agreements at issue here was neither substantively nor procedurally unconscionable.