APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[DATE STAMP]
FILED
OCT 22 2018
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Dean Krogstadt,
Plaintiff,

v.

Loan Payment Administration, LLC,
Defendant,

v.

Nationwide Biweekly Administration, Inc.,
Third-party-plaintiff-Appellant,

v.

BMO Harris Bank, N.A.,
Third-party-defendant-Appellee.

No. 17-15964
D.C. No. 2:16-cv-00465-APG-CWH

Appeal from the United States District Court
for the District of Nevada
Andrew P. Gordon, District Judge, Presiding

MEMORANDUM*

Submitted October 18, 2018**
San Francisco, California

Before: M. SMITH and HURWITZ, Circuit Judges, and EATON,*** Judge.

After being named as a defendant in a putative class action, Nationwide Biweekly Administration, Inc. ("NBA") filed a third-party complaint against BMO Harris Bank ("BMO"), alleging that any potential harm to the putative class was caused by BMO's breach of a contract with NBA. BMO in turn sought to enforce an arbitration clause in its contract with NBA. The district court granted BMO's motion to compel arbitration and dismissed the third-party complaint. We have jurisdiction over NBA's timely appeal pursuant to 9 U.S.C. § 16 and affirm.

1. 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. NBA argued that the arbitration

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** Richard K. Eaton, Judge of the United States Court of International Trade, sitting by designation.

provision in its agreement with BMO was invalid because it (1) prohibited the parties from bringing class or representative actions against each other and (2) also included a "blow provision," mandating that "if a court decides that this paragraph's prohibition of class or representative actions and/or consolidation is invalid or unenforceable, then the entirety of this arbitration provision will be null and void."

The district court correctly rejected these arguments. The "blow provision" only applies if a court finds that "*this paragraph's prohibition* of class or representative actions" (emphasis added) is invalid. No court has done so; indeed, albeit in different contexts, the Supreme Court has repeatedly rejected arguments that class action waivers are invalid. *See generally AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (holding that the Federal Arbitration Act preempted a state court rule against class action waivers); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (finding that the National Labor Relations Act does not invalidate class action waivers in labor agreements with arbitration provisions). Moreover, the arbitration clause in the NBA-BMO agreement provides only that the parties will not bring class action or representative claims *against each other*. NBA's third-party complaint against BMO, although filed in a case initiated by the filing of a putative class complaint, is not itself a class or representative action. There was thus no warrant for the district court in this case to consider the enforceability of the class action waiver.

2. NBA also argues that arbitration would abridge

its "right" to file a third-party complaint under Federal Rule of Civil Procedure 14(a). Because this argument was not raised below, we decline to consider it. *See Hillis v. Heineman*, 626 F.3d 1014, 1019 (9th Cir. 2010).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA.

Dean Krogstadt, on behalf of himself and others similarly situated,
Plaintiff,

v.

Loan Payment Administration, LLC and Nationwide Biweekly Administration, Inc.,
Defendants,

v.

Nationwide Biweekly Administration, Inc.,
Third-Party Plaintiff,

v.

BMO Harris Bank, N.A.,
Third-Party Defendant.

Case No. 16-CV-00465-APG-CWH

ECF No. 51

Signed April 13, 2017

ORDER GRANTING MOTION TO COMPEL ARBITRATION AND DISMISS THIRD-PARTY COMPLAINT

Third-Party Defendant BMO Harris Bank, N.A. moves to dismiss the third-party claims asserted against it by Nationwide Biweekly Administration, Inc. (NBA). ECF No. 51. Because those claims are subject to a valid arbitration agreement, I grant BMO's motion.

BMO and NBA are parties to a Master Agreement. ECF No. 40-1. That contract contains a provision mandating the arbitration of all disputes "arising out of or relating to" the agreement or services provided under that agreement. Id. at 20. The parties concede the validity of the Master Agreement and arbitration provision, and that the claims at issue in the Third-Party Complaint fall within that provision. NBA tries to avoid arbitration by focusing on one specific part of the arbitration provision that it refers to as the "blow provision":

> If a court decides that any part of this arbitration provision (other than the prohibition of class or representative actions and/or consolidation) is invalid or unenforceable, the other parts of this arbitration provision will still apply. However, if court decides that this paragraph's prohibition of class or representative actions and/or consolidation is invalid or unenforceable, then the entirety of this

> arbitration provision will be null and void.

Id. at 2 1, § 20(b). NBA argues that because courts have invalidated arbitration provisions prohibiting class or representative actions in the employment context, the "blow provision" renders the entirety of the Master Agreement's arbitration provision null and void. ECF No. 61 at 2. This argument fails for two reasons. First, this is not an employment case and NBA's claims against BMO do not constitute a class action. Second, no court has invalidated this arbitration provision in the Master Agreement. The "blow provision" focuses on "*this paragraph's* prohibition of class or representative actions and/or consolidation." ECF No. 40-1 at 21, § 20(b) (emphasis added). It is not concerned with provisions in other contracts and other cases. Because no court has invalidated the arbitration provision in the Master Agreement, NBA's claims must be arbitrated.

Finally, NBA argues for a stay, rather than dismissal, of its claims against BMO under section 3 of the Federal Arbitration Act. 9 U.S.C. § 3. That section "gives a court authority . . . to grant a stay pending arbitration, but does not preclude summary judgment when all claims are barred by an arbitration clause." *Sparling* v. *Hoffman Const. Co.,* 864 F.2d 635, 638 (9th Cir. 1988). As in *Sparling,* section 3 of the FAA does not limit my authority to dismiss NBA's claims because all of NBA's claims against BMO are subject to arbitration. Thus, there is no reason for me to retain jurisdiction over them and I dismiss the third-party complaint against

BMO.

IT IS THEREFORE ORDERED that Third-Party Defendant BMO Harris Bank, N.A.'s motion **(ECF No. 51) is GRANTED**. Should Nationwide Biweekly Administration, Inc. decide to pursue its claims against BMO, it is compelled to submit them to arbitration. The claims asserted against BMO by NBA in this case are dismissed without prejudice.

DATED this 13th day of April, 2017.

/s
ANDREW P. GORDON
UNITED STATES DISTRICT COURT JUDGE

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1367:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such

rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--
(1) the claim raises a novel or complex issue of State law,
(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
(3) the district court has dismissed all claims over which it has original jurisdiction, or
(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

9 U.S.C. § 2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.