FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIMITRI SHIVKOV, individually and as a trustee of the Phoenix 2010 Revocable Trust; VASSIL ZHIVKOV; KRISTINA TSONEV; SPECTRA SERVICES, INC.; DVS HOLDINGS LLC; ROBERT C. MILLER; BRENDA MAE MILLER; BRUCE G. ROBINSON; SARA VAN ALSTYNE ROBINSON; SYMPHONY HOMES LLC; SYMPHONY DEVELOPMENT CORPORATION; KEITH BUTLER; REBECCA M. BUTLER; ERIC K. WILKE; JULIE T. WILKE; JOHN LINDER; NINA LINDER; AFFILION OF COBRE VALLEY LLC; AFFILION OF HUNTSVILLE PLLC; AFFILION OF TEXAS PLLC; TAYLORWILKE HOLDINGS LLC; TRADITIONS EMERGENCY MEDICINE PA; TREADSTONE EQUITY GROUP LLC; UTA INVESTMENTS LLC; BOOMERANG WB LLC; AZ STORAGE 1 LLC; AZ STORAGE 2 LLC; BOOMERANG SONORAN LLC; RV STORAGE LLC; STONE HAVEN LODGE LLC; UTA HOLDINGS LLC; WILKE MEDICAL DIRECTION PLLC; 5T CAPITAL FUND II LLC; 5T CAPITAL HOLDINGS LLC; 5T CAPITAL LLC; INGENUITY AUTO	No. 19-16746 D.C. No. 2:18-cv-04514-SMM OPINION

LEASING LLC; INGENUITY AVIATION LLC; INGENUITY EQUITY GROUP II LLC; INGENUITY EQUITY GROUP III LLC; INGENUITY EQUITY GROUP LLC; INGENUITY LEASING COMPANY II LLC; INGENUITY LEASING COMPANY LLC; INGENUITY MATRIX, INC.; INGENUITY PROFESSIONAL SERVICES PLLC; BOURNE TEMPE LAND LLC, on behalf of themselves and all others similarly situated; PAUL M. MCHALE; CYNTHIA MCHALE; KEITH E. PEREIRA, Individually and as a trustee of The Blaser Family Revocable Trust Dated March 10, 2006; KIMBERLY BLASER, Individually and as a trustee of The Blaser Family Revocable Trust Dated March 10, 2006; BRIAN R. TIFFANY; RYAN P. FRANK; KATHERINE S. FRANK; CATION LLC; FLORIDA CITRUS HOLDINGS LLC; MCHALE CAPITAL MANAGEMENT LLC; PS BAILEY LLC; BLASER MANAGEMENT LLC; BLUE HORIZON HOLDINGS LLC; BUTLER MEDICAL GROUP, INC.; DEVOTION HOMES LLC; GLASS HOUSE LLC; MAUI LUXURY RENTALS LLC; SILVER MEADOW INVESTING LLC; T&G INVESTMENTS LLC; TREADSTONE CORE3 LLC; TW MANAGEMENT LLC; KAMAOLE LUXURY RENTALS LLC; KANNAPALI

BEACH HOLDINGS LLC; OUR RETIREMENT LLC; RESILIANT LLC; NADIM B. BIKHAZI; KAREN A. KOSTLUK-BIKHAZI; BRADLEY S. BULLARD; CATHLEEN M. BULLARD; BLAKE G. WELLING; STEPHANIE G. WELLING; BLAKE WELLING MD PC; BRIAN TIFFANY MD PC; UTAH SPINE CARE LLC; WESTERN STATES MEDICAL LLC; OGDEN CLINIC PROFESSIONAL CORPORATION; BORSIGHT, INC.,
Plaintiffs-Appellants,

v.

ARTEX RISK SOLUTIONS, INC.; TSA HOLDINGS LLC, FKA Tribeca Strategic Advisors LLC; TBS LLC, DBA PRS Insurance; KARL HUISH; JEREMY HUISH; JIM TEHERO; ARTHUR J. GALLAGHER & COMPANY; DEBBIE INMAN EPSILON ACTUARIAL SOLUTIONS LLC; JULIE A. EKDOM; AMERISK CONSULTING LLC; PROVINCIAL INSURANCE PCC; TRIBECA STRATEGIC ACCOUNTANTS LLC; TRIBECA STRATEGIC ACCOUNTANTS PLC,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona
Stephen M. McNamee, District Judge, Presiding

Argued and Submitted July 7, 2020
Seattle, Washington

Filed September 9, 2020

Before: MICHAEL DALY HAWKINS, D. MICHAEL FISHER,* and MILAN D. SMITH, JR., Circuit Judges.

Opinion by Judge Milan D. Smith, Jr.

SUMMARY**

Arbitration

The panel affirmed the district court's order compelling individual arbitration and dismissing a putative class action alleging violations of the Racketeer Influenced and Corrupt Organizations Act and Arizona law.

Plaintiffs alleged that pursuant to agreements between themselves and two defendants, defendants formed captive insurance companies that plaintiffs owned, and to which they paid insurance premiums. Plaintiffs claimed the payments as tax-deductible business expenses without recognizing them as taxable

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* The Honorable D. Michael Fisher, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

income. The IRS audited plaintiffs, issued delinquency notices, and sought to impose penalties. After settling with the IRS, plaintiffs filed suit, alleging that the captives were illegal and abusive tax shelters, about which defendants failed to inform or advise them.

The panel affirmed the district court's order compelling arbitration pursuant to an arbitration clause in the parties' agreements. First, the panel held that the agreements were not unenforceable on the grounds plaintiffs raised. Although plaintiffs asserted that defendants breached a fiduciary duty to point out and fully explain an arbitration clause, they identified no state law authority recognizing such a duty. Addressing an issue of first impression concerning the survival of arbitration obligations following contract termination, the panel held that the agreements did not expressly negate the presumption in favor of post-termination arbitration or clearly imply that the parties did not intend for their arbitration obligations to survive termination.

Second, the panel held that under Arizona contract law, the arbitration clause encompassed all plaintiffs' claims.

Third, joining other circuits, the panel held that the availability of class arbitration is a gateway issue that a court must presumptively decide. The panel concluded that the parties' agreements did not clearly and unmistakably delegate that issue to the arbitrator. Because the agreements were silent on class arbitration, they did not permit class arbitration.

Finally, the panel concluded that pursuant to Arizona law on alternative estoppel, all non-signatory defendants could compel arbitration pursuant to the agreements.

COUNSEL

W. Ralph Canada Jr. (argued), David R. Deary, Jim L. Flegle, Wilson E. Wray, John McKenzie, Donna Lee, and Tyler M. Simpson, Loewinsohn Flegle Deary Simon LLP, Dallas, Texas; Garrett W. Woktyns and James A. Bloom, Schneider Wallace Cottrell Konecky Wotkyns, LLP, Scottsdale, Arizona; for Plaintiffs-Appellants.

Stephen V. D'Amore (argued), Scott P. Glauberman, Michael A. Skokna, and Reid F. Smith, Winston & Strawn LLP, Chicago, Illinois; Barbara J. Dawson, Joseph G. Adams, and Taryn J. Gallup, Snell & Wilmer LLP, Phoenix, Arizona; for Defendants-Appellees Artex Risk Solutions Inc., Arthur J. Gallagher & Company, and Debbie Inman.

Karl M. Tilleman (argued) and Erin E. Bradham, Dentons, Phoenix, Arizona; for Defendants-Appellees TSA Holdings LLC, TBS LLC, Karl Huish, Jeremy Huish, Jim Tehero, Provincial Insurance PCC, and Tribeca Strategic Accountants LLC.

J. Steven Sparks and Vincent Miner, Sanders & Parks, Phoenix, Arizona, for Defendants-Appellees Epsilon Actuarial Solutions LLC and Julie A. Ekdom.

J. Michael Low and Paul Gerding, Jr., Kutak Rock, Scottsdale, Arizona, for Defendant-Appellee AmeRisk Consulting LLC.

Michael J. Plati and Michael S. Rubin, Dickinson Wright PLLC, Phoenix, Arizona, for Defendant-Appellee Tribeca Strategic Accountants PLC.

OPINION

M. SMITH, Circuit Judge:

Plaintiffs[1], some eighty-one individuals and related business entities, variously entered into agreements (the Agreements) with Defendants Artex Risk Solutions, Inc. (Artex) and TSA Holdings, LLC, formerly Tribeca Strategic Advisors, LLC (Tribeca). Pursuant to these Agreements, Artex and Tribeca formed and managed captive insurance companies that Plaintiffs owned, and to which Plaintiffs paid insurance premiums. Plaintiffs claimed the payments as tax-deductible business expenses without recognizing them as taxable income. Although this arrangement offered the prospect of tax benefits, that prospect proved fleeting. The IRS audited Plaintiffs, issued delinquency notices, and sought to impose penalties.

[1] Because the Plaintiffs are so numerous, and are each named in the caption, we do not recount the names of all of them in the body of this opinion.

After settling with the IRS, Plaintiffs brought this putative class action suit against Defendants.[2] Plaintiffs allege that the captives were illegal and abusive tax shelters, about which Defendants failed to inform or advise Plaintiffs. Plaintiffs' pursuit of this suit, however, faced a roadblock: the Agreements contain an arbitration clause (the Arbitration Clause or Clause). The district court granted Defendants' motion to compel arbitration and dismissed the operative complaint without prejudice. Plaintiffs appeal.

We resolve several issues here. *First*, we hold that the Agreements are not unenforceable on the grounds Plaintiffs raise. Although Plaintiffs assert that Artex and Tribeca breached a fiduciary duty to point out and fully explain an arbitration clause, they identify no state law authority recognizing such a duty. Addressing an issue of first impression in our circuit concerning the survival of arbitration obligations following contract termination, we hold that the Agreements do not expressly negate the presumption in favor of post-termination arbitration or clearly imply that the parties did not intend for their arbitration obligations to survive termination. *Second*, we hold that the

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[2] In addition to Artex and Tribeca, Plaintiffs sued officers of Artex, Tribeca, and the parent company of Artex, namely, Defendants Karl Huish, Jeremy Huish, Jim Tehero, and Arthur J. Gallagher & Co. Plaintiffs also sued TBS LLC d/b/a PRS Insurance; Debbie Inman (an Artex employee); Epsilon Actuarial Solutions, LLC, Julie A. Ekdom (CEO of Epsilon); AmeRisk Consulting, LLC; Provincial Insurance, PCC; Tribeca Strategic Accountants, LLC; and Tribeca Strategic Accountants, PLC. We refer to all as the "Defendants."

Arbitration Clause encompasses all Plaintiffs' claims. *Third*, we join seven of our sister circuits in holding that the availability of class arbitration is a gateway issue that a court must presumptively decide. The Agreements here do not clearly and unmistakably delegate that issue to the arbitrator. Because the Agreements are silent on class arbitration, they do not permit class arbitration. *Finally*, we conclude that all non-signatory Defendants may compel arbitration pursuant to the Agreements. Thus, we affirm.

BACKGROUND

I. The Agreements and the Arbitration Clause

Between 2009 and 2012, the various groups of Plaintiffs retained Artex and Tribeca, both insurance management companies, to provide services concerning the formation and management of captive insurance companies for Plaintiffs.[3] Pursuant to the Agreements, Artex and Tribeca, with support from the other Defendants, conducted feasibility studies concerning the creation of the respective captives, created and managed the captives, calculated the captives' estimated federal tax payments, caused annual federal tax returns for the captives to be prepared and filed, maintained the captives' accounting records, and reinsured the captives.

[3] Artex acquired Tribeca in 2010.

As is relevant here, the Agreements contain an Arbitration Clause:

> You and we agree that in the event of any dispute that cannot be resolved between the parties, that we will agree to seek to resolve such disputes through mediation in Mesa, Arizona, and if that fails, that all disputes will be subject to binding arbitration in Mesa, Arizona, with arbitrators to be agreed upon by the parties, and if no agreement is reached, then arbitrated by the American Arbitration Association (AAA). Each party shall bear its own costs in such mediation and arbitration. To reduce time and expenses, we each waive our right to litigate against one another regarding the services provided and obligations pursuant to this Agreement, and instead you and we have chosen binding arbitration. All claims or disputes will be governed by Arizona law.

Several Agreements also contain a Termination and Withdrawal section, which includes a clause concerning the survival of the terms of that section following termination of the Agreement.[4]

II. This Litigation

After settling with the IRS for tax liability issues arising from deductions that they claimed for the

[4] The Agreements of the following Plaintiffs contain this section: Shivkov, Miller, Linder, Bikhazi, Welling, Bullard, Frank, and McHale, as well as their corresponding entities. The Agreements of Plaintiffs Butler, Wilke, Pereira, and Tiffany do not contain this section.

premiums that they paid to the captives, Plaintiffs filed a putative class action complaint in the District of Arizona. In the operative one hundred seventy-page First Amended Complaint (FAC), Plaintiffs raised claims against all Defendants for breach of fiduciary duty, negligence, negligent misrepresentation, disgorgement, rescission, breach of contract and the duty of good faith and fair dealing, fraud, civil conspiracy, aiding and abetting breach of fiduciary duty and fraud, violations of the federal Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. § 1961 *et seq.*, and violations of the Arizona RICO statute, Ariz. Rev. Stat. § 13-2301 *et seq*. Defendants moved to compel arbitration, and separately moved to dismiss. The district court granted the motion to compel, ordered Plaintiffs to arbitrate their claims on an individual basis, and dismissed the FAC without prejudice. Plaintiffs timely appealed.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1291 and 9 U.S.C. § 16(a)(3). *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89 (2000); *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1074 (9th Cir. 2014). "We review a district judge's order to compel arbitration *de novo*." *Casa del Gaffe Vergnano S.P.A. v. ItalFlavors, LLC*, 816 F.3d 1208, 1211 (9th Cir. 2016). We review factual findings for clear error, and the interpretation and meaning of contract provisions de novo. *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014).

ANALYSIS

Subject to certain exceptions not at issue here, the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, governs arbitration agreements in contracts involving interstate commerce. "The FAA reflects both a 'liberal federal policy favoring arbitration' . . . and the 'fundamental principle that arbitration is a matter of contract,'. . . ." *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1126 (9th Cir. 2013) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). "The basic role for courts under the FAA is to determine '(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.'" *Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1058 (9th Cir. 2013) (en banc) (quoting *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000)). State law governs the validity, revocability, and enforceability of a contract. *Id.* Federal substantive law governs the scope of an arbitration agreement. *Kramer*, 705 F.3d at 1126.

I. The Arbitration Clause is Enforceable

We turn first to the enforceability of the Clause. Pursuant to the FAA, "[a] written provision in any . . . 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 savings clause of this provision permits a

party to challenge an arbitration agreement pursuant to a generally applicable state law contract defense, such as fraud, duress, or unconscionability. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996); *Kilgore*, 718 F.3d at 1058. "As arbitration is favored, those parties challenging the enforceability of an arbitration agreement bear the burden of proving that the provision is unenforceable." *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1157 (9th Cir. 2013). Plaintiffs challenge the enforceability of the Arbitration Clause on two grounds. First, for all Agreements, Plaintiffs argue that Artex and Tribeca breached a state law fiduciary duty concerning arbitration clauses. Second, for only some Agreements, Plaintiffs argue that the Clause did not survive termination of the Agreements. We address each challenge in turn.

A. The Breach of Fiduciary Duty Challenge

Plaintiffs aver that Artex and Tribeca had a fiduciary duty to point out and explain the Arbitration Clause, which they failed to do. Thus, Plaintiffs claim, Artex and Tribeca effectively suppressed its existence in the less than ten-page Agreements that Plaintiffs received and signed, and thereby committed the legal equivalent of fraud.[5] Fraud is a basis to revoke a

[5] Plaintiffs made a similar argument in challenging the Clause as procedurally unconscionable. The district court rejected that argument, finding that that the record demonstrates that "Plaintiffs are sophisticated people and businesses capable of negotiating this type of commercial relationship." The court further explained that although Plaintiffs argued that Artex and Tribeca rushed them into signing the Agreements, only one Plaintiff

contract under Arizona law. *U.S. Insulation, Inc. v. Hilro Constr. Co., Inc.*, 705 P.2d 490, 493-94 (Ariz. Ct. App. 1985). However, to show fraud on the ground raised here, Plaintiffs must show that Artex and Tribeca owed the fiduciary duty that Plaintiffs claim exists under Arizona law. We will assume *arguendo* that a fiduciary relationship arose between Plaintiffs and Artex at some point in Defendants' provision of captive insurance services.[6] Even assuming so, Plaintiffs have not shown that, under Arizona law, it would encompass a duty to point out and fully explain an arbitration clause.

Plaintiffs direct us to a federal district court decision interpreting Arizona law. *See Katt v. Riepe*, No. CV-14-08042-PCT-DGC, 2014 WL 3720515 (D. Ariz. July 25, 2014). However, "we must adhere to state court decisions—not federal court decisions—as the authoritative interpretation of state law." *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1223 (9th Cir. 2015). Neither did the underlying Arizona state court decision on which *Katt* relied hint at the existence of a duty that would require a contracting party to point out and fully explain an arbitration clause. *See Leigh v. Loyd*, 244 P.2d 356 (Ariz. 1952); *Lerner v. DMB Realty, LLC*, 322 P.3d 909 (Ariz. Ct. App. 2014). Although these

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identified a time frame for signing an Agreement, which spanned "a few weeks." Plaintiffs do not challenge in this appeal the court's determination that the Clause is not unconscionable.

[6] Because we assume this relationship, it is unnecessary to address Plaintiffs' request for additional discovery about whether a fiduciary relationship existed.

decisions articulated a fiduciary duty to disclose all material facts, that duty arose in the context of the fiduciary relationship between a real estate broker and the broker's principal. *See Leigh*, 244 P.2d at 358 ("It is well settled that a confidential relation exists between a real estate agent and his principal," which "impose[s] a duty on [the agent] to disclose the true facts."); *Lerner*, 322 P.3d at 919 ("A [real estate] broker owes a fiduciary duty to disclose material facts to its client."). No such relationship existed here.

The case before us is like one that the Arizona Court of Appeals has already considered. In *Dueñas v. Life Care Centers of America, Inc.*, 336 P.3d 763 (Ariz. Ct. App. 2014), the plaintiff challenged the enforceability of an arbitration agreement by arguing that an asserted fiduciary's failure to obtain the plaintiff's signature for the agreement rendered the agreement unenforceable. *Id.* at 771. The court rejected that argument because the plaintiff had identified no authority establishing that the duties involved in a fiduciary relationship extend to "the purely commercial aspects of their relationship." *Id.* Like the plaintiff there, Plaintiffs fail to identify any Arizona authority that would subject Artex and Tribeca to a fiduciary duty in connection with an arbitration clause. Thus, Plaintiffs have failed to show that the Clause is unenforceable on this ground.

B. The Arbitration Clause Survival Challenge

Plaintiffs next argue that the Arbitration Clause in only *some* of their Agreements is unenforceable because it did not survive termination of the Agreements.[7] Whether a party has agreed to arbitrate disputes following contract termination depends upon whether the arbitration obligations created under that contract remain enforceable. *See Biller v. S-H OpCo Greenwich Bay Manor, LLC*, 961 F.3d 502, 513-14 & n.9 (1st Cir. 2020). We first address the framework applicable to post-termination arbitration and then apply it here.

1. The Applicable Framework

Although the Supreme Court has not addressed the issue of post-termination arbitration of disputes in the FAA context, the Court has addressed this issue in the collective bargaining context. In *Litton Financial Printing Division v. NLRB*, the Court recognized a "presumption in favor of postexpiration arbitration of matters unless 'negated expressly or by clear implication' [for] matters and disputes arising out of the relation governed by contract." 501 U.S. 190, 204 (1991) (quoting *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionary Workers Union, AFL-CIO*, 430 U.S. 243,

[7] Plaintiffs raise this argument only for Plaintiffs Shivkov, Miller, Linder, Bikhazi, Welling, Bullard, Frank, and McHale, as well as their corresponding entities. Thus, this argument does not apply to Plaintiffs Butler, Wilke, Pereira, and Tiffany.

255 (1977)). The Court explained that "[w]e presume as a matter of contract interpretation that the parties did not intend a pivotal dispute resolution provision to terminate for all purposes upon the expiration of the agreement." *Id.* at 208. For the presumption to apply, the parties' dispute must have "its real source in the contract." *Id.* at 205. This occurs "only where [the dispute] involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, *or* where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement." *Id.* at 206 (emphasis added).

Although we have not addressed *Litton's* application to the FAA context, five sister circuits have. *See Biller*, 961 F.3d at 513; *Breda v. Cellco P'ship*, 934 F.3d 1, 7 (1st Cir. 2019); *Huffman v. Hilltop Cos., LLC*, 747 F.3d 391, 395-96 (6th Cir. 2014); *Wolff v. Westwood Mgmt., LLC*, 558 F.3d 517, 520-21 (D.C. Cir. 2009); *Koch v. Compucredit Corp.*, 543 F.3d 460, 465-66 (8th Cir. 2008); *CPR (USA) Inc. v. Spray*, 187 F.3d 245, 254-56 (2d Cir. 1999), *abrogated on other grounds as explained in Accenture LLP v. Spreng*, 647 F.3d 72, 76 (2d Cir. 2011). We are persuaded that the presumption also applies here. As the Sixth Circuit has explained, "the need for an arbitration provision to have post-expiration effect is intuitive, because if 'the duty to arbitrate automatically terminated upon expiration of the contract, a party could avoid his contractual duty to arbitrate by simply waiting until the day after the contract

expired to bring an action regarding a dispute that arose while the contract was in effect.' " *Huffman*, 747 F.3d at 395 (citation omitted). Thus, we also apply the *Litton* framework here.

2. The Application of the *Litton* Presumption Here

We do not doubt that the dispute here has "its real source in the contract," *Litton*, 501 U.S. at 205, because Plaintiffs raised no argument on this issue in their opening brief and thus waived the issue. *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[O]n appeal, arguments not raised by a party in its opening brief are deemed waived."). Plaintiffs argue, however, that the parties expressly negated the presumption, or clearly implied that their arbitration obligations under the Agreements at issue would not survive termination. Plaintiffs point to the following text in the "Termination and Withdrawal" section:

> The terms of this section shall survive the termination of this Agreement and/or the dissolution or other effective termination of the business of [Artex or Tribeca] or the insurance company.

Invoking the doctrine of *expressio unius est exclusio alterius*, Plaintiffs contend that the survival clause contains an exclusive list of the provisions that survive termination which excludes the Arbitration Clause and thus expressly negates the presumption or clearly implies that the parties did not intend for their

arbitration obligations to survive termination. *See Herman Chanen Constr. Co. v. Guy Apple Masonry Contractors Inc.*, 453 P.2d 541, 543 (Ariz. Ct. App. 1969) ("[T]he expression in a contract of one or more things of a class, implies the exclusion of all things not expressed. . . .").

The Sixth Circuit has already addressed the impact of a survival clause on post-termination arbitration obligations. *See Huffman*, 747 F.3d at 394-98. In *Huffman*, the Sixth Circuit determined that the free-standing survival clause there—which included half the agreement's provisions but not the arbitration clause—was insufficient to overcome the presumption in favor of post-termination arbitration. *Id.* Acknowledging that the *expressio unius* doctrine "present[ed] a trick[y] question," the Sixth Circuit determined that "considering the contract *as a whole*—the survival clause and its relationship to the other clauses in the agreement—is the correct way to determine whether the parties unambiguously intended for the arbitration clause to expire with the contract." *Id.* at 397 (emphasis added). The Sixth Circuit adopted this mode of analysis due to "the strong federal policy in favor of arbitration," *id.* at 394, pursuant to which a court "resolv[es] *any doubts as to the parties' intentions in favor of arbitration*," *id.* at 395 (quoting *Nestle Waters N. Am., Inc. v. Bollman*, 505 F.3d 498, 503 (6th Cir. 2007)). The Sixth Circuit also noted that the presumption of arbitrability should not be denied for "broadly-worded arbitration clauses" unless it may be said with positive assurance that the arbitration clause is not susceptible

of an interpretation that covers the asserted dispute. *Id.*

We are persuaded that looking to the Agreements as a whole is the proper mode of analysis here. The FAA "establishes 'a liberal federal policy favoring arbitration agreements." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U. S. 1, 24 (1983)); *see also Kramer*, 705 F.3d at 1126 (recognizing strong federal policy in favor of arbitration). Although Plaintiffs contend that the Arbitration Clause is not as broadly worded as the clause in *Huffman*, we reject that argument in Part II and thus the scope of the Clause also lends support to looking to the contract as a whole. Finally, Arizona law also looks to the contract as a whole to ascertain the parties' intent. *Elm Ret. Ctr., LP v. Callaway*, 246 P.3d 938, 941-42 (Ariz. Ct. App. 2010) ("To determine the parties' intent, we 'look to the plain meaning of the words as viewed in the context of the contract as a whole.'" (quoting *United Cal. Bank v. Prudential Ins. Co.*, 681 P.2d 390, 411 (Ariz. Ct. App. 1983))).

Looking to the Agreements as a whole, the survival clause is insufficient to expressly negate the presumption in favor of post-termination arbitration or clearly imply that the parties intended for their arbitration obligations to terminate with the Agreements. The Agreements lack an exhaustive survival clause. Instead, the clause here appears in and concerns only the insular terms established by the "Termination and Withdrawal" section. We doubt that the parties

intended for an insular survival clause tucked into a section establishing unique obligations and duties upon the termination of the Agreement to comprehensively identify the Agreement terms that would survive termination.[8] That doubt grows here because, as in *Huffman*, the Agreements contain severability and integration clauses outside the section with the survival clause. 747 F.3d at 397. "[I]t is illogical to conclude that upon expiration of the contract, the parties no longer intended" for these provisions to apply. *See id.*

Other provisions of the Agreements also suggest ambiguity about the survival clause on which Plaintiffs rely. The Agreements contain sections that disclaim liability for any underwriting losses and impose general limitations on liability, whether direct or indirect, arising out of, in connection with, or related in any way to an Agreement or services provided pursuant to it. The latter provision expressly precludes certain types of damages that may be recovered, including, in relevant part, punitive damages, taxes and interest due to any taxing authority or government agency, penalties payable to any taxing authority or government agency, and attorneys' fees. These are limitations that the parties are unlikely to have intended to terminate with the Agreements, particularly given the broad

[8] Although Plaintiffs argue that reading the contract as a whole renders the survival clause mere surplusage, that argument circularly justifies not looking to the entire contract by presupposing that the clause has the meaning Plaintiffs ascribe it. The point of the analysis here is to ascertain whether the clause plainly bears that meaning or not.

scope of the limitations on liability and the fact that the limitations plainly concern events that are likely to occur post-termination.

Considering the Agreements as a whole, we cannot find that the parties expressly negated the presumption in favor of post-termination arbitration, or clearly implied that their arbitration obligations would not survive termination. We might have arrived at a different conclusion if the survival clause stated that only the terms of that section and no other terms in the Agreement would survive termination, if the Agreement included a comprehensive survival clause, or even if the Arbitration Clause explicitly stated that it does not survive termination. Of course, the Agreements contain no such language. Because "we cannot say with certainty that the parties did not intend for the arbitration clause to survive expiration of the contract," the parties' arbitration obligations remain intact. *See id.* at 398.

II. The Arbitration Clause Encompasses Plaintiffs' Claims

We turn next to whether the Arbitration Clause encompasses all of Plaintiffs' claims here. "[A] party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945 (1995). "When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the

formation of contracts." *Id.* at 944. Under Arizona law, a contract is ambiguous when it "can be reasonably construed in more than one manner" *Leo Eisenberg & Co., Inc. v. Payson*, 785 P.2d 49, 52 (Ariz. 1989). "[A]s with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). In the face of any ambiguity, "under the federal presumption in favor of arbitration, an arbitrator would have jurisdiction to arbitrate claims." *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1285 (9th Cir. 2009).

The Clause provides in the first instance (with emphasis added) that: "You and we agree that in the event of *any dispute* that cannot be resolved between the parties, that we will agree to seek to resolve *such disputes* through mediation . . . and if that fails, that *all disputes* will be subject to binding arbitration." Defendants understandably rely on this sweeping language to conclude that the Clause includes all Plaintiffs' claims.

Plaintiffs, however, draw our attention to other language in the Clause which they argue narrows its scope. Plaintiffs focus on the Clause's third sentence: "[t]o reduce time and expenses, we each waive our right to litigate against one another regarding the services provided and obligations pursuant to this Agreement, and instead you and we have chosen binding arbitration." It is a "standard rule of contract interpretation" that "specific terms control over general ones." *United States ex rel. Welch v. My Left Foot Children's Therapy, LLC*, 871 F.3d 791, 797 (9th Cir. 2017) (quoting *S. Cal.*

Gas Co. v. City of Santa Ana, 336 F.3d 885, 891 (9th Cir. 2003)); *see also Elm Ret. Ctr., LP*, 246 P.3d at 942 ("[B]ecause specific contract provisions express the parties' intent more precisely than general provisions, specific provisions qualify the meaning of general provisions.").[9] Treating the Clause's third sentence as a more specific term concerning scope, we discern that the parties intended to arbitrate "any" and "all disputes" "regarding the services provided and obligations pursuant to this Agreement." So understood, the Clause still remains broad. *See, e.g.*, *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 720 (9th Cir. 1999) (concluding that a clause encompassing "[a]ll disputes arising in connection with this Agreement" should be construed and applied liberally); *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 479 (9th Cir. 1991) (similar). The district court methodically explained why all of the claims here are subject to arbitration on this reading.

Plaintiffs nonetheless tell us that the district court erred in sending their various non-breach of contract claims to arbitration by pointing to a disclaimer in the Agreements, pursuant to which Artex and Tribeca explained that they "do[] not provide any legal, tax, or

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[9] We will assume that Plaintiffs meant to rely on this standard and directly applicable contract rule because Plaintiffs' reliance on *Mesquite Lake Assocs. v. Lurgi Corp.*, 754 F. Supp. 161 (N.D. Cal. 1991), is unpersuasive. Unlike in *Mesquite*, the Clause does not limit its scope through a provision that "any controversy or dispute between the Parties concerning this Agreement and *specifically subject to resolution pursuant to this Article shall be subject to arbitration*. . . ." *Id.* at 162 (emphasis added).

accounting advice." Plaintiffs aver that "tax or legal advice" was not among the services and obligations under the Agreements, and thus their claims concerning such advice are excluded from arbitration. This argument hinges entirely on the meaning of "tax or legal advice." Curiously, Plaintiffs do not offer *any* interpretation of those terms. Repeating a bare assertion that this phrase excludes their non-contract claims without supporting argument does not make it so.[10] *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1079 n.26 (9th Cir. 2008) (en banc) ("It is well-established that a bare assertion in an appellate brief, with no supporting argument, is insufficient to preserve a claim on appeal."). Because the Agreements provide that Artex and Tribeca would prepare federal tax returns and calculate estimated tax payments for the captives, Plaintiffs' argument, at best, points to ambiguity that we must resolve in favor of arbitration. *See Comedy Club*, 553 F.3d at 1286. Thus, we still conclude that the Clause encompasses all Plaintiffs' claims.

III. The Availability of Class Arbitration

Plaintiffs brought this suit as a putative class action against Defendants involving "hundreds if not

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[10] Although Plaintiffs rely on *Khan v. BDO Seidman, LLP*, 935 N.E.2d 1174 (Ill. App. Ct. 2010), that case says nothing about the issue here, namely the meaning of the phrase "tax or legal advice" for the Agreements at issue. Thus, apart from the fact that we are not bound by that decision, Plaintiffs' list of factual comparisons with that case does nothing to overcome their failure to offer any meaning of these terms in the Agreements here.

thousands" of class members. The district court, however, ordered individual arbitration. We must determine next (1) whether the availability of class arbitration is a "gateway question" that a court must presumptively decide and, if so, (2) whether the parties nevertheless clearly and unmistakably delegated the issue to the arbitrator, and (3) if not, whether the Agreements permit class arbitration. We address each issue in turn.

A. The Availability of Class Arbitration is a Gateway Issue for a Court to Presumptively Decide

The Supreme Court has distinguished between two categories of issues, each of which has a different presumption as to whether a court or an arbitrator should decide them. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002); *Martin v. Yasuda*, 829 F.3d 1118, 1122-23 (9th Cir. 2016). In the first category of issues are "potentially dispositive gateway question[s] . . . of arbitrability" that "contracting parties would likely have expected a court to . . . decide[ ]." *Howsam*, 537 U.S. at 83 (internal quotation marks omitted). "This category includes issues . . . such as 'whether the parties are bound by a given arbitration clause' or whether 'an arbitration clause in a concededly binding contract applies to a particular type of controversy.'" *Martin*, 829 F.3d at 1123 (quoting *Howsam*, 537 U.S. at 84). "These disputes are 'for judicial determination unless the parties clearly and unmistakably provide otherwise.'" *Id.* (quoting *Howsam*, 537 U.S. at 83). The second category encompasses

"procedural" issues, which are "presumptively not for the judge, but for an arbitrator, to decide." *Id.* (quoting *Howsam*, 537 U.S. at 84). Examples of issues in this category are whether a party has satisfied the arbitral forum's statute of limitations for filing a case, whether a party has satisfied certain requirements of a procedural grievance, and "allegation[s] of waiver, delay, or a like defense to arbitrability." *Howsam*, 537 U.S. at 8485 (quoting *Moses H. Cone*, 460 U.S. at 25).

The Supreme Court has not had occasion to decide whether the availability of class arbitration is a gateway issue for a court to decide pursuant to this framework. *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417 n.4 (2019) (not deciding the question because the parties agreed that the issue was one for the court to decide); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 n.2 (2013) (not deciding the question because the parties agreed that the issue was one for the arbitrator to decide); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 680 (2010) (not deciding the question because the parties entered into a supplemental agreement that expressly assigned the issue of the availability of class arbitration to the arbitration panel).

Seven of our sister circuit courts, however, have concluded that the availability of class arbitration is a gateway question for a court to presumptively decide.[11]

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[11] The Second and Tenth Circuits have assumed without deciding that the availability of class arbitration is a gateway issue that is presumptively for a court to decide. *See Dish Network, L.L.C. v Ray*, 900 F.3d 1240, 1245 (10th Cir. 2018)

See 20/20 Commc'ns, Inc. v. Crawford, 930 F.3d 715, 718-19 (5th Cir. 2019); *Herrington v. Waterstone Mortg. Corp.*, 907 F.3d 502, 506-07 (7th Cir. 2018); *JPay, Inc. v. Kobel*, 904 F.3d 923, 935-36 (11th Cir. 2018); *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 972 (8th Cir. 2017); *Del Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 873 (4th Cir. 2016); *Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326, 334-35 (3d Cir. 2014); *Reed Elsevier, Inc. v. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 598-99 (6th Cir. 2013). We have also concluded that the availability of class arbitration is a gateway issue in an unpublished and nonprecedential memorandum disposition. *See Eshagh v. Terminix Int'l Co.*, 588 F. App'x 703, 704 (9th Cir. 2014).

Faced with whether class arbitration is a gateway question here, we see no reason to create an unnecessary circuit split, or to depart from what we have already suggested. We find persuasive the three reasons that the Seventh Circuit has succinctly identified for why class arbitration is a gateway issue. *See Herrington*, 907 F.3d at 507-08. The first and second reasons assimilate the issue of class arbitration into what we have already recognized are gateway issues presumptively for a court to decide: "(1) whether there is an agreement to arbitrate between the parties; and (2) whether the agreement covers the dispute." *Brennan v.*

(acknowledging the consensus among "many circuits" but assuming the issue and concluding that the parties clearly and unmistakably delegated the issue to an arbitrator); *Wells Fargo Advisors, L.L.C. v. Sappington*, 884 F.3d 392, 395 (2d Cir. 2018) (same).

Opus Bank, 796 F.3d 1125, 1130 (9th Cir. 2015) (citing *Howsam*, 537 U.S. at 84). The third reason concerns the Supreme Court's treatment of class arbitration. We briefly consider each of these reasons.

The Seventh Circuit has explained first that "[t]he availability of class . . . arbitration involves a foundational question of arbitrability: whether the potential parties to the arbitration agreed to arbitrate." *Herrington*, 907 F.3d at 507. This is the familiar gateway question of whether there is an agreement to arbitrate *between the parties*. *See Brennan*, 796 F.3d at 1130. Plaintiffs filed a putative class complaint, seeking to represent "hundreds if not thousands of possible class members. The availability of class arbitration raises the question whether any of those possible class members have actually agreed to arbitration in the first place as well as the question whether the Agreements show that Artex and Tribeca agreed to arbitrate rather than litigate with those members. Thus, answering this question "resolves the foundational question of 'with whom' [Artex and Tribeca] chose to arbitrate." *See Herrington*, 907 F.3d at 508 (quoting *Stolt-Nielsen*, 559 U.S. at 683).

Relatedly, the Seventh Circuit has explained that "whether a contract permits class . . . arbitration involves a second . . . question of arbitrability: whether the agreement to arbitrate covers a particular controversy." *Id.* This is the familiar gateway question of scope. *See Brennan*, 796 F.3d at 1130. Notably, the Clause here provides that "[y]ou and we agree that in the event of any dispute that cannot be resolved

between the parties," "such disputes" will be resolved by mediation and arbitration. The availability of class arbitration raises the question whether Artex and Tribeca agreed to arbitrate particular disputes not only with the Plaintiffs, but also with possible class members. Answering this question resolves the question of whether the parties agreed to arbitrate particular disputes.

Third, and "most important[ly]," the Seventh Circuit has explained that class arbitration belongs to the gateway category because "the structural features of class arbitration make it a 'fundamental' change from the norm of bilateral arbitration." *Herrington*, 907 F.3d at 509 (quoting *Stolt-Nielsen*, 559 U.S. at 686). The Supreme Court has all but endorsed this reason for treating class arbitration as a gateway issue. According to the Court, class arbitration: (1) "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment," *Concepcion*, 563 U.S. at 348, (2) "*requires* procedural formality" because "[i]f procedures are too informal, absent class members would not be bound by the arbitration," *id.* at 349, and (3) "greatly increases risks to defendants," *id.* at 350. In short, "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen*, 559 U.S. at 685. As seven circuits have recognized, the Court's discussion of class arbitration is a weighty thumb on the scale in favor of

treating class arbitration as a gateway issue for a court to presumptively decide. *See 20/20 Commc'ns*, 930 F.3d at 719; *Herrington*, 907 F.3d at 509; *JPay*, 904 F.3d at 933-34; *Catamaran Corp.*, 864 F.3d at 971-72; *Del Webb Cmtys.*, 817 F.3d at 875-76; *Opalinski*, 761 F.3d at 333-34; *Reed Elsevier*, 734 F.3d at 598.

We are not persuaded by Plaintiffs' arguments for why we should not treat the availability of class arbitration as a gateway issue for a court. Plaintiffs rely on a concurrence that is concededly not the law of any circuit. *See Dish Network, L.L.C.*, 900 F.3d at 1252-57 (Tymkovich, C.J., concurring). That concurrence criticizes the third reason we have identified as nothing more than "Supreme Court dicta and good policy." *Id.* at 1255. But when the Court speaks, we should take notice. *See Zal v. Steppe*, 968 F.2d 924, 935 (9th Cir. 1992), *as amended* (July 31, 1992) (Noonan, J, concurring in the result in part and dissenting in part) ("[D]icta of the Supreme Court have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold. We should not blandly shrug them off because they were not a holding."). As we have explained, the Supreme Court has repeatedly underscored why class arbitration is different and thus should be treated differently. *See Stolt-Nielsen*, 559 U.S. at 685; *Concepcion*, 563 U.S. at 348-50. Naturally, seven circuits have taken notice, and so do we.

Plaintiffs also argue that class arbitration is a procedural issue for an arbitrator to decide in light of the Court's passing references to class actions as "procedures" in *Epic Systems*, 138 S. Ct. at 1624-25, and the

fact that the Federal Rules of Civil Procedure treat class actions as procedural. We are not persuaded. As the Seventh Circuit has observed, *Epic Systems* did not decide whether class arbitration is a gateway question, *see Herrington*, 907 F.3d at 506, and thus that decision is not of any help. More fundamentally, that a class action is a "classically" procedural mechanism in federal court under Federal Rule of Civil Procedure 23, *Dish Network, L.L.C.*, 900 F.3d at 1254 (Tymkovich, C.J., concurring), is of no moment here. In the arbitration context, we are concerned with whether *the parties* to the requested arbitration have *agreed* to that particular dispute resolution, and, if so, what the scope of *that agreement is. See Stolt-Nielsen*, 559 U.S. at 687 (underscoring "the consensual basis of arbitration"). Therefore, the relevant metric is not the labeling of a particular mechanism in federal court as "procedural", but rather the categories of gateway issues in reviewing an arbitration agreement that the Court has instructed determine whether an issue is presumptively for a court or an arbitrator to decide absent *further agreement* by the parties. *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 69 (2010) (describing gateway questions for a court as issues "*such as* whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy" (emphasis added)).

We have already explained how the question of the availability of class arbitration interlocks with gateway issues that a court must presumptively decide. Plaintiffs offer no persuasive reason for why we should

nevertheless treat class arbitration as akin to the exemplary questions for an arbitrator to presumptively decide, nor do we see one that would warrant a circuit split. *See Howsam*, 537 U.S. at 85 (identifying as "procedural" questions presumptively for an arbitrator as "whether prerequisites such as *time limits*, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met"); *see also Global Linguist Solutions, LLC v. Abdelmeged*, 913 F.3d 921, 923 (9th Cir. 2019) (reaching result partly to avoid an unnecessary circuit split). Thus, we conclude that class arbitration is a gateway issue for a court to presumptively decide.

B. The Parties Did Not Clearly and Unmistakably Delegate the Issue of Class Arbitration to the Arbitrator

Having resolved that class arbitration is a gateway issue, Plaintiffs tell us that the Clause evidences a clear and unmistakable intent to delegate the issue to the arbitrator as follows: (1) the Clause refers to the AAA (*i.e.*, the American Arbitration Association), (2) which renders the AAA Rules applicable, (3) which in turn encompass the AAA's Supplementary Rules, (4) which include Supplementary Rule 3's instruction that "the arbitrator shall determine as a threshold matter . . . whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class," and (5) thus the parties delegated the issue of class arbitration to the arbitrator.

Plaintiffs' argument touches on a circuit split on whether incorporation of the AAA Rules is sufficient evidence that the parties clearly and unmistakably delegated the issue of class arbitration to the arbitrator. *Compare Catamaran Corp.*, 864 F.3d at 973 (concluding that an arbitration agreement's incorporation of the AAA Rules without specific reference to class arbitration is insufficient); *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 761 (3d Cir. 2016) (same), *cert. denied*, 137 S. Ct. 40 (2016), *Reed Elsevier*, 734 F.3d at 599 (concluding that a clause which incorporated the AAA Rules "does not clearly and unmistakably assign to an arbitrator the question whether the agreement permits classwide arbitration"), *with JPay*, 904 F.3d at 936-42 (reasoning that incorporation of the AAA Rules is sufficient and explaining disagreement with Third, Sixth, and Eighth Circuits).

We need not take sides in this circuit split here because Plaintiffs fail to clear a threshold hurdle. The crux of Plaintiffs' argument is our decision in *Brennan v. Opus Bank*. The arbitration clause there provided that "any controversy or claim arising out of this [Employment] Agreement or [Brennan's] employment with the Bank or the termination thereof . . . shall be settled by binding arbitration *in accordance with the Rules of the American Arbitration Association*." 796 F.3d at 1128 (alterations in original; emphasis added). We concluded that, at least in a contract between sophisticated parties, "incorporation of the AAA Rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate

arbitrability." *Id.* at 1130 (internal quotation marks omitted; emphasis added). Thus, we sided with "'[v]irtually every circuit to have considered the issue.'" *Id.* (first alteration in original; quoting *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013)). Unlike the arbitration clause in *Brennan*, the Clause does not incorporate the AAA Rules, and thus *Brennan* does not apply.

Unable to identify a textual reference to the AAA Rules, Plaintiffs nonetheless contend that the "obvious and unavoidable implication of an agreement to arbitrate before the AAA is an agreement to submit to the AAA's arbitration rules." But we have never held that a mere reference to the AAA shows clear and unmistakable intent to delegate a gateway issue to an arbitrator, and Plaintiffs identify no authority from any sister circuit holding as much. Even if we thought the "obvious and unavoidable implication" of a reference to the AAA is consent to the AAA Rules when a clause refers *only* to the AAA, the Clause here does not do so. The Clause provides first for mediation, second for arbitration by an arbitrator selected by the parties, and, only if the parties cannot agree on an arbitrator, arbitration before the AAA. We cannot find clear and unmistakable evidence that the parties intended to delegate the gateway issue of class arbitration to the arbitrator by virtue of the AAA Rules when arbitration

before the AAA is but the final option in the dispute procedure that the Clause outlines.[12]

In light of the Clause here, Plaintiffs' reliance on *Belnap v. Iasis Healthcare*, 844 F.3d 1272 (10th Cir. 2017), is misplaced. The arbitration clause there provided that "*[t]he arbitration shall be administered by JAMS and conducted in accordance with its Streamlined Arbitration Rules and Procedures (the "Rules"), except as provided otherwise herein*." *Id.* at 1276. Rejecting the plaintiff's argument that the agreement left open the rules that would govern arbitration because the parties could choose another dispute resolution service, the Tenth Circuit explained that "[t]he plain language of the Agreement establishes the JAMS Rules as the default controlling rubric." *Id.* at 1282. The Clause here, however, neither refers to the AAA Rules, nor does it establish those Rules as the "default controlling rubric." *See id.* Although the Clause provides for the possibility that arbitration may occur before the AAA if the parties cannot agree on an arbitrator, "such a possibility is not enough for us to say that" the AAA Rules are the Clause's "ordinary controlling standard." *See id.* Because Plaintiffs do not claim that any other provision demonstrates a clear and unmistakable intent to delegate the availability of class arbitration to the arbitrator, we conclude that the

[12] Plaintiffs contend that only the non-AAA portions of the Clause are an unenforceable bare agreement to agree and thus the AAA is the default option. The FAA and Arizona's Revised Uniform Arbitration Act, however, *both* permit enforcement of an agreement regarding the method of naming or appointing an arbitrator. *See* 9 U.S.C. § 5; Ariz. Rev. Stat. § 12-1503.

availability of class arbitration remains a gateway issue.

C. The Agreements Do Not Permit Class Arbitration

The final issue that we must decide on class arbitration is straightforward. "Neither silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself," *Lamps Plus*, 139 S. Ct. at 1417, namely, "the individualized form of arbitration envisioned by the FAA," *id.* at 1416. As the district court concluded, because the Agreements are silent on class arbitration, they do not permit it. Thus, the court properly compelled individual arbitration pursuant to the Agreements.

IV. The Non-Signatory Defendants May Compel Arbitration

The final issue for us is whether all Defendants may compel arbitration of Plaintiffs' claims. Several Defendants are not signatories to the Agreements (the Non-Signatory Defendants). Although only Jim Tehero and Karl Huish signed the Agreements on Artex and Tribeca's behalf, Plaintiffs concede that these Defendants as well as Jeremy Huish and Arthur J. Gallagher & Co. may compel arbitration. Nevertheless, Plaintiffs

argue that no other Non-Signatory Defendant may compel arbitration.[13] We disagree.

"[A] litigant who is not a party to an arbitration agreement may invoke arbitration under the FAA if the relevant state contract law allows the litigant to enforce the agreement." *Kramer*, 705 F.3d at 1128 (citing *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 632 (2009)). Arizona law recognizes alternative estoppel, pursuant to which a non-signatory may compel arbitration of a signatory's claims. *Sun Valley Ranch 308 Ltd. P'ship ex rel. Englewood Props., Inc. v. Robson*, 294 P.3d 125, 134-35 (Ariz. Ct. App. 2012). A non-signatory may compel arbitration when "each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement," such that "the signatory's claims arise out of and relate directly to the written agreement." *Id.* at 135 (quoting *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 798 (8th Cir. 2005)).[14] As the district court concluded, all

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[13] The remaining Non-Signatory Defendants include TBS LLC d/b/a PRS Insurance; Debbie Inman; Epsilon Actuarial Solutions, LLC; Julie A. Ekdom; AmeRisk Consulting, LLC; Provincial Insurance, PCC; Tribeca Strategic Accountants, LLC; and Tribeca Strategic Accountants, PLC.

[14] Alternative estoppel may also apply when "the relationship between the signatory and nonsignatory defendants is sufficiently close that only by permitting the nonsignatory to invoke arbitration may evisceration of the underlying arbitration agreement between the signatories be avoided." *Sun Valley*, 294 P.3d at 134 (quoting *CD Partners*, 424 F.3d at 798). Because Defendants do not invoke this ground, we decline to address whether Plaintiffs would be estopped on this basis.

Non-Signatory Defendants may compel arbitration pursuant to this standard.[15]

Plaintiffs' allegations about Defendants' misconduct regarding the captive insurance services presume and "intimately rel[y]" on the existence of the Agreements. *See Kramer*, 705 F.3d at 1132. We have already determined in Part II that Plaintiffs' claims are subject to arbitration even if we construe the Clause as limited to the services and obligations under the Agreements. It follows that Plaintiffs' claims necessarily presume the existence of the Agreements. Indeed, the entire complaint concerns Defendants' captive insurance services, which encompassed the formation, oversight, operation, and management of captive insurance companies for Plaintiffs pursuant to the Agreements. The Agreements also provide that Artex and Tribeca would hire third parties in connection with the services, thus underscoring that the claims presume the existence of the Agreements even for the Non-Signatory Defendants. *See Sun Valley*, 294 P.3d at 135 (finding that the nonsignatory "may nevertheless compel plaintiffs to arbitrate their claims against him" because "the trier of fact will be required to consider the [underlying agreements] in resolving plaintiffs' claims, and [the non-signatory's] conduct is intertwined with that of other defendants who signed the [underlying agreement].").

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[15] It is unnecessary for us to resolve the parties' dispute about the standard of review for the district court's decision. Whether we review de novo or for an abuse of discretion, we affirm the district court.

We are not persuaded by Plaintiffs' counterarguments. Plaintiffs aver that they could bring all their claims against the Non-Signatory Defendants regardless of whether the Agreements existed, and thus alternative estoppel does not apply. This argument proves nothing because it is not the relevant test under Arizona law. *See id.*

Relying on *Kramer*, 705 F.3d at 1133, Plaintiffs argue further that mere allegations of substantially interdependent and concerted misconduct by signatories and non-signatories, standing alone, are insufficient to permit non-signatories to compel arbitration. But in *Kramer* we rejected the non-signatory defendants' invocation of equitable estoppel based only on "sparse portions" of the pleadings concerning interdependent conduct by the defendants. *Id.* In contrast, the FAC makes pervasive allegations of concerted conduct by the Defendants. We have also explained why Plaintiffs' claims presume the existence of the Agreements even for the Non-Signatory Defendants. Thus, we conclude that all Non-Signatory Defendants can compel arbitration.

CONCLUSION

For the foregoing reasons, the district court correctly granted Defendants' motion to compel and ordered arbitration of Plaintiffs' claims on an individual basis.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Dimitri Shivkov, et al., Plaintiffs, v. Artex Risk Solutions Incorporated, et al., Defendants.	No. CV-18-04514-PHX-SMM **ORDER** (Filed Aug. 5, 2019)

Before the Court is Defendants' Renewed Joint Motion to Compel Individual Arbitrations (Doc. 37) and Defendants' Joint Motion to Dismiss Amended Complaint (Doc. 41). The motions have been fully briefed and are ripe for review. (See Docs. 46-47, 62-63.) Plaintiffs and Defendants requested oral argument. (Doc. 37 at 1; Doc. 47 at 1.) The Court denies the request because the issues have been fully briefed and oral argument will not aid the Court's decision. See Fed. R. Civ. P. 78(b) (court may decide motions without oral hearing); LRCiv 7.2(f) (same). For the reasons that follow, the Court will grant the Renewed Joint Motion to Compel Individual Arbitrations (Doc. 37) and deny as moot the Joint Motion to Dismiss Amended Complaint (Doc. 41).

I. BACKGROUND

Plaintiffs are a number of individuals and corporate entities who separately contracted with either

Defendant Artex Risk Solutions Inc. ("Artex") or Defendant TSA Holdings LLC f/k/a Tribeca Strategic Advisors LLC ("Tribeca") to create captive insurance companies that Plaintiffs believed would alleviate their tax burden while also providing insurance benefits. According to Plaintiffs, Artex and Tribeca, along with Defendants TBS LLC d/b/a PRS Insurance, Karl Huish, Jeremy Huish, Jim Tehero, Arthur Gallagher & Co., Debbie Inman, Epsilon Actuarial Solutions LLC, Julie A. Ekdom, AmeRisk Consulting LLC, Provincial Insurance, Tribeca Strategic Accountants LLC, and Tribeca Strategic Accountants PLC (collectively, "Defendants") made material misrepresentations and omissions to induce Plaintiffs to hire Artex or Tribeca to set up and manage captive insurance companies for Plaintiffs, even though Defendants knew the captive insurance products could not and were not delivering the advantages Defendants promised. (Doc. 31 at 24-32.)

A captive insurance company is an insurance company that is owned by its own insured. (Id. at 33.) There are two advantages to owning one's own insurance company. First, for the insured, the premium paid to the captive is deductible to the insured for tax purposes. (Id.) Second, for the captive and its owners, the premiums received are not taxable as income. (Id.) The captive must satisfy certain criteria for the Internal Revenue Service (the "IRS") to consider the captive as a bona fide insurance company and recognize the associated tax benefits. (Id. at 33-34.)

Artex and Tribeca[1] assist owners of closely held companies to form captives. (Id. at 36. According to Plaintiffs, Artex and Tribeca followed the same policies, practices, and procedures for each client in forming these captives. (Id.) First, Artex or Tribeca gave clients a sales presentation regarding captive insurance. (Id.) Then, if the client indicated that he or she wished to proceed, Artex or Tribeca arranged for the preparation of a feasibility study, which was paid for by the client. (Id. at 36-37.) If the client elected to retain Artex or Tribeca to form a captive, Artex or Tribeca would then form the captive and manage all captive operations, for which Artex and Tribeca would charge a fee. (Id. at 37.)

Each Plaintiff either hired Artex or Tribeca or had some interest in an entity that hired Artex or Tribeca to form, operate, and manage their captive(s). (Id. at 42, 65, 74, 83.) These arrangements were formalized in engagement agreements between a Plaintiff or Plaintiff's representative and either Artex or Tribeca (the "Agreements").[2] (Docs. 38-2, 383, 38-4, 38-5.) The

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[1] According to Plaintiffs, Tribeca was established by Defendant Karl Huish in 1999. (Doc. 31 at 36.) In December 2010, Artex acquired substantially all of the assets of Tribeca, and Karl Huish and his associates continue to operate in Arizona through Artex. (Id.) In some sections, the FAC appears to discuss Artex and Tribeca as if they are the same entity. However, because they are separate entities that formed contractual relationships with different Plaintiffs at different times, the Court will designate them separately.

[2] There are twelve Agreements at issue before the Court. (Docs. 38-2, 38-3, 38-4, 385.) Some were countersigned by Tribeca and some were countersigned by Artex. They vary in some

Agreements outline the responsibilities of the parties, the fees to be paid for Artex's or Tribeca's services, and the legal relationship between the parties. (See, generally, id.) Plaintiffs allege that Defendants[3] made material misrepresentations to Plaintiffs at each stage of the process outlined above to induce Plaintiffs to hire them to form and manage their captives in exchange for substantial fees. (Doc. 31 at 29-30.) While Plaintiffs identify many specific, alleged misrepresentations and omissions, the crux of their allegations is that Defendants represented to Plaintiffs that the captives qualified as bona fide insurance companies and, as such, would allow Plaintiffs to obtain beneficial tax treatment. (Id. at 99.) After Plaintiffs had paid substantial fees to Defendants for formation and management of their captives and had claimed the tax benefits of owning a captive insurance company, the IRS disallowed the tax benefits claimed by Plaintiffs, requiring Plaintiffs to pay substantial back taxes, penalties, and interest to the IRS. (Id. at 65, 73, 82, 91.)

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particulars. However, all of the Agreements are essentially identical in the portions at issue in the instant motion. Therefore, the Court focuses its analysis on the Agreement between Artex and Plaintiff Dimitiri Shivkov as representative of the Artex Agreements (Doc. 38-2 at 1-9), and the Agreement between Tribeca and Plaintiff Keith Butler as representative of the Tribeca Agreements (Doc. 38-2 at 19-34).

[3] Plaintiffs plead most of their allegations generally against "Defendants," as a collective. Because the Court lacks further factual detail at this stage of litigation, the Court repeats Plaintiffs' group pleading here.

On December 6, 2019, Plaintiffs, on behalf of themselves and others similarly situated, filed suit against Defendants with a putative class of "hundreds if not thousands." (Doc. 1 at 74; Doc. 31 at 94.) Defendants[4] then filed a Joint Motion to Compel Individual Arbitrations (Doc. 22) and a Joint Motion to Dismiss (Doc. 24). Plaintiffs subsequently filed their First Amended Complaint (the "FAC") on March 29, 2019, mooting the previous motions.[5] (Doc. 31.) The FAC brings claims for breach of fiduciary duty, negligence, negligent misrepresentation, disgorgement, rescission, breach of contract and duty of good faith and fair dealing, fraud, civil conspiracy, aiding and abetting breach of fiduciary duty and fraud, as well as violations of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO") and Arizona's RICO statute. (Doc. 31 at 25.) Defendants[6] then filed their Renewed Joint Motion to Compel Individual Arbitrations and their Joint Motion

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[4] Defendants Tribeca Strategic Accountants LLC and Tribeca Strategic Accountants PLC were not named as defendants in the original complaint and were not parties to this motion.

[5] For this reason, the Joint Motion to Compel Individual Arbitrations and the Joint Motion to Dismiss will be denied as moot.

[6] The motion was originally filed by Defendants Artex, Arthur J. Gallagher & Co., Debbie Inman, Epsilon Actuarial Solutions LLC, Julie A. Ekdom, and AmeRisk Consulting LLC. (Doc. 37; see also Doc. 73 (noting that counsel for some Defendants on the motion had failed to appear as counsel of record, thus disallowing those Defendants' joinder in the motion).) Defendants TSA Holdings LLC f/k/a Tribeca Strategic Advisors LLC, TBS LLC d/b/a PRS Insurance, Karl Huish, Jeremy Huish, Jim Tehero, Provincial Insurance PCC, Tribeca Strategic Accountants LLC, and Tribeca Strategic Accountants PLC later joined the motion. (Docs. 72, 77.)

to Dismiss Amended Complaint on April 12, 2019, and April 19, 2019, respectively. (Docs. 37, 41.) Because the Court finds each of Plaintiffs' claims against Defendants are subject to a binding arbitration clause, the Court will grant the Renewed Joint Motion to Compel Individual Arbitrations and deny as moot the Joint Motion to Dismiss Amended Complaint.

II. LEGAL STANDARD

Outside of a few exceptions, the Federal Arbitration Act (the "FAA") "governs the enforceability of arbitration agreements in contracts involving interstate commerce." Kramer v. Toyota Motor Corp., 705 F.3d 1122, 1126 (9th Cir. 2013) (citing 9 U.S.C. § 1 *et seq.*). Under the FAA, "arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms." Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 529 (2019) (citing Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 67 (2010)). However, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1131 (9th Cir. 2000) (quoting Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25 (1983)).

In determining whether an issue is subject to arbitration, the court must determine: "(1) whether there is an agreement to arbitrate between the parties; and (2) whether the agreement covers the dispute." Brennan v. Opus Bank, 796 F.3d 1125, 1130 (9th Cir. 2015)

(citing Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002)). "If the answer is yes to both questions, the court must enforce the agreement." Lifescan, Inc. v. Premier Diabetic Servs., Inc., 363 F.3d 1010, 1012 (9th Cir. 2004) (citing Chiron Corp., 207 F.3d at 1130). The court's role "is strictly limited to determining arbitrability and enforcing agreements to arbitrate, leaving the merits of the claim and any defenses to the arbitrator." Chiron Corp., 207 F.3d at 1131 (quoting Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 478 (9th Cir. 1991)).

"The scope of an arbitration agreement is governed by federal substantive law," Kramer, 705 F.3d at 1126 (citing Tracer Research Corp. v. Nat'l Envtl. Servs. Co., 42 F.3d 1292, 1294 (9th Cir. 1994)), while state law "govern[s] issues concerning the validity, revocability, and enforceability of contracts generally." Kilgore v. KeyBank, Nat'l Ass'n, 718 F.3d 1052, 1058 (9th Cir. 2013) (quoting Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 685-87 (1996)); see also Rent-A-Ctr., 561 U.S. at 68 (quoting Doctor's Assocs., 517 U.S. at 687) (holding arbitration agreements "may be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability"). The court "interpret[s] the contract by applying general state-law principles of contract interpretation, while giving due regard to the federal policy in favor of arbitration by resolving ambiguities as to the scope of arbitration in favor of arbitration." Wagner v. Stratton Oakmont, Inc., 83 F.3d 1046, 1049 (9th Cir. 1996) (citing Intel Corp. v.

Advanced Micro Devices, Inc., 12 F.3d 908, 914 (9th Cir. 1993)).

Where an issue is subject to arbitration, a court has authority, upon application of one of the parties, to stay the case pending arbitration. 9 U.S.C. § 3. However, where all claims in a suit are barred by an arbitration clause, the court may grant a dismissal. Johnmohammadi v. Bloomingdale's, Inc., 755 F.3d 1072, 1074 (9th Cir. 2014) (citing Sparling v. Hoffman Const. Co., 864 F.2d 635, 638 (9th Cir. 1988)).

III. ANALYSIS

Each of the twelve Agreements signed by Plaintiffs[7] include an identical dispute resolution provision (the "Arbitration Clause" or "Clause"), which reads:

> You and we agree that in the event of any dispute that cannot be resolved between the parties, that we will agree to seek to resolve such disputes through mediation in Mesa, Arizona, and if that fails, that all disputes will be subject to binding arbitration in Mesa, Arizona, with arbitrators to be agreed upon by the parties, and if no agreement is reached, then arbitrated by the American Arbitration Association (AAA). Each party shall bear its own costs in such mediation and arbitration. To reduce time and expenses, we each waive our right to litigate against one another regarding the services provided and obligations

[7] No party contests that the Agreements are binding on all Plaintiffs.

> pursuant to this Agreement, and instead you and we have chosen binding arbitration. All claims or disputes will be governed by Arizona law.

(Doc. 38-2 at 7, 29-30.) In their Renewed Joint Motion to Compel Individual Arbitrations, Defendants argue that under this Arbitration Clause, all of Plaintiffs' claims must be arbitrated individually. (Doc. 37 at 2.) Plaintiffs do not dispute that the Agreements signed by Plaintiffs include the Arbitration Clause. However, they argue that the Clause is unenforceable because: (1) Defendants breached their fiduciary duties in obtaining the agreement to arbitrate; (2) the Arbitration Clause is substantively and procedurally unconscionable; (3) the terms of the Arbitration Clause were beyond Plaintiffs' reasonable expectations; and (4) the Arbitration Clause terminated when the Agreements ended. (Doc. 47 at 8-9.) Plaintiffs further contend that, even if the Arbitration Clause is enforceable, it only governs Plaintiffs' breach-of-contract claim against Artex and Tribeca. (Id. at 9.) All other Defendants, Plaintiffs argue, are not signatories to the Agreements and, therefore, may not enforce it; and all other claims fall outside the scope of the Arbitration Clause. (Id.) The Court considers each of these arguments in turn.

A. There Is an Enforceable Agreement to Arbitrate

1. Breach of Fiduciary Duty

Plaintiffs argue that the Arbitration Clause is invalid because Defendants breached their fiduciary duties by failing to notify Plaintiffs of the Arbitration Clause and explain its meaning. (Doc. 47 at 9.) Defendants dispute that they had any fiduciary relationship with Plaintiffs. (Doc. 63 at 7-8.)

A fiduciary duty arises when "the fiduciary holds 'superiority of position' over the beneficiary." Standard Chartered PLC v. Price Waterhouse, 945 P.2d 317, 335 (Ariz. Ct. App. 1996) (quoting Rhoads v. Harvey Publ'ns, Inc., 700 P.2d 840, 847 (Ariz. Ct. App. 1984)). This superiority of position exists largely when the degree of confidence in the other constitutes "substitution of that other's will for his in the material matters involved." In re Guardianship of Chandos, 504 P.2d 524, 526 (Ariz. Ct. App. 1972) (quoting 15A C.J.S. Confidential, p. 352). "Mere trust in another's competence or integrity" is insufficient to create a fiduciary relationship. Standard Chartered, 945 P.2d at 335 (citing Stewart v. Phoenix Nat'l Bank, 64 P.2d 101, 106 (Ariz. 1937); Rhoads, 700 P.2d at 84647). Nor is a fiduciary relationship established where the alleged beneficiary defers to the superior knowledge of the alleged fiduciary, "unless the knowledge is of a kind beyond the fair and reasonable reach of the alleged beneficiary and inaccessible to the alleged beneficiary through the exercise of reasonable diligence." Id. at 336 (citing Denison

State Bank v. Madeira, 640 P.2d 1235, 1242 (Kan. 1982)). While the existence of a fiduciary duty is generally a question of fact, the court may resolve the issue where there is insufficient evidence for a jury to conclude such a relationship exists. Id. at 335 (citing Gemstar Ltd. v. Ernst & Young, 917 P.2d 222, 233-34 (Ariz. 1996)).

Plaintiffs contend that a fiduciary relationship arose between the parties because Defendants had superior knowledge of captive insurance and tax law and Defendants influenced Plaintiffs in deciding to pursue the captive insurance strategy. (Doc. 47 at 10.) While such superior knowledge and influence may have created a fiduciary duty at some point in the parties' relationship – a question the Court does not resolve here – Plaintiffs provide no evidence or case law to support the proposition that such a duty extended to the negotiation of commercial terms between the parties. See Duerias v. Life Care Ctrs. of Am., Inc., 336 P.3d 763, 771 (Ariz. Ct. App. 2014) (finding arbitration clause enforceable because plaintiff failed to cite authority subjecting defendant nursing facility to a fiduciary duty "in connection with the purely commercial aspects of their relationship," including the arbitration agreements). Instead, Plaintiffs rely wholly upon the district court's holding in Katt v. Riepe, No. CV-14-08042-PCT-DGC, 2014 WL 3720515 (D. Ariz. July 25, 2014), for the proposition that a fiduciary owes a general duty to identify and explain an arbitration clause to a beneficiary. (Doc. 47 at 9-10.) However, in Katt, the defendant brokers, while acting in their fiduciary capacity,

inserted an arbitration clause into a contract they were negotiating with a third party on behalf of the plaintiffs. Id. at *2. The defendants did not inform the plaintiffs that the arbitration clause would alter the contractual terms the plaintiffs and defendants had already negotiated and agreed to in a previous contract. Id. Unlike in Katt, there are no allegations here that any Defendant was acting on behalf of Plaintiffs in negotiating the Agreements, or that the Arbitration Clause altered an already existing contractual relationship between fiduciary and beneficiary.

The Agreements created a commercial relationship between the parties and outlined the duties and obligations of the parties in that relationship. Plaintiffs offer no evidence to support the claim that Defendants had superior knowledge or expertise in negotiating such terms; nor was technical information regarding the Arbitration Clause beyond the reach of Plaintiffs or inaccessible through reasonable diligence. See Standard Chartered, 945 P.2d at 336 (quoting Denison State Bank, 640 P.2d at 1242). Therefore, mere trust in the competence of Defendants during negotiation of the Agreements did not create a fiduciary duty to explain all the terms of the contract, including the Arbitration Clause. See id. at 335 (citing Stewart, 64 P.2d at 106; Rhoads, 700 P.2d at 846-47). Accordingly, the Court finds Defendants did not breach any fiduciary duty by failing to identify and explain the Arbitration Clause.

2. Unconscionability

Next, Plaintiffs argue that the Arbitration Clause is procedurally and substantively unconscionable. (Doc. 47 at 11-15.) "It is well-established that unconscionability is a generally applicable contract defense, which may render an arbitration provision unenforceable." Coup v. Scottsdale Plaza Resort, LLC, 823 F. Supp. 2d 931, 947 (D. Ariz. 2011) (citing Doctor's Assocs., 517 U.S. at 686-87). Procedural unconscionability addresses the fairness of the bargaining process, while substantive unconscionability is concerned with the fairness of the actual terms of the contract. Duerias, 336 P.3d at 76869. Each doctrine provides an independent ground to invalidate an agreement. Id. (citing Maxwell v. Fidelity Fin. Servs., Inc., 907 P.2d 51, 59 (Ariz. 1995)). The plaintiff bears the burden of proving unconscionability. Pinto v. USAA Ins. Agency Inc. of Texas (FN), 275 F. Supp. 3d 1165, 1170 (D. Ariz. 2017) (citing Maxwell, 907 P.2d at 56; Taleb v. AutoNation USA Corp., No. CV06-02013-PHX-NVW, 2006 WL 3716922, at *2 (D. Ariz. Nov. 13, 2006)). The determination of unconscionability is made by the court as a matter of law. Maxwell, 907 P.2d at 56 (citing A.R.S. § 47-2302).

i. Procedural Unconscionability

Procedural unconscionability "is concerned with 'unfair surprise,' fine print clauses, mistakes or ignorance of important facts or other things that mean bargaining did not proceed as it should." Maxwell, 907

P.2d at 57-58 (quoting Dan B. Dobbs, 2 Law of Remedies 706 (2d ed. 1993)). In determining procedural unconscionability, a court considers factors such as: "age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, whether there were alternative sources of supply for the goods in question." Id. at 58 (quoting Johnson v. Mobil Oil Corp., 415 F. Supp. 264, 268 (E.D. Mich. 1976)).

Here, Plaintiffs fail to offer any evidence that Plaintiffs were not of adequate age, education, intelligence, business acumen, or experience to enter into the Agreements, including the Arbitration Clause. In fact, Plaintiffs attempt to obscure this aspect of the analysis by omitting these factors from the legal standard entirely. (See Doc. 47 at 13 (citing Maxwell, 907 P.2d at 58).) The fact that Plaintiffs negotiated agreements to pay "substantial" annual fees to avoid tax liability indicates that Plaintiffs are sophisticated people and businesses capable of negotiating this type of commercial relationship. (See Doc. 31 at 32.)

Nonetheless, Plaintiffs argue the Arbitration Clause is procedurally unconscionable because the Clause was in a "standardized contract" that Plaintiffs understood to be nonnegotiable; Plaintiffs were not notified of or explained the Clause; the Clause was not clearly disclosed in the Agreement; and the Clause does not explicitly state that Plaintiffs were waiving their right to a jury. (Doc. 47 at 13-15.) These objections

are insufficient to render the Clause unenforceable on unconscionability grounds.

While the Agreements may have been non-negotiable, standardized contracts, that fact alone does not render the terms of the Agreements unenforceable. See Coup, 823 F. Supp. 2d at 948 (citing Equal Emp't Opportunity Comm'n v. Cheesecake Factory, Inc., No. CV08-1207-PHX-NVW, 2009 WL 1259359, at *3 (D. Ariz. May 6, 2009)). Even an adhesion contract "is fully enforceable according to its terms unless certain other factors are present which, under established legal rules – legislative or judicial – operate to render it otherwise." Broemmer v. Abortion Servs. of Phoenix, Ltd., 840 P.2d 1013, 1016 (Ariz. 1992) (alterations omitted) (quoting Graham v. Scissor–Tail, Inc., 623 P.2d 165, 172 (Cal. 1981)).

The fact that Defendants did not identify or explain the Arbitration Clause to Plaintiffs also does not render the provision unenforceable. Even where a standardized contract is at issue, "a party to a contract is assumed to have read and understood the terms of a contract he or she signs." Coup, 823 F. Supp. 2d at 949 (citing Flores v. ADT Sec. Services, Inc., No. CIV 10-036-TUC-FRZ, 2011 WL 1211769, at *3 (D. Ariz. Jan. 31, 2011)). There is no indication that Plaintiffs were the "weaker parties" when negotiating the commercial transactions with Defendants; therefore, Defendants' failure to explain the Clause carries no weight. See Maxwell, 907 P.2d at 58 (quoting Johnson, 415 F. Supp. at 268) (identifying "whether the terms were explained

to the weaker party" as a factor in determining procedural unconscionability).

Plaintiffs further contend that the Clause was unconscionable because it was found in a section entitled "About this Agreement" and was not capitalized or bolded or separately initialed, and thus, it was obscured. (Doc. 47 at 13-14.) However, the Clause was neither obscured nor hidden. It was in the regular text of relatively short contracts and written in the same font and spacing as every other portion. (Doc. 38-2 at 7, 29-30.) Despite Plaintiffs' emphasis on the fact that the contracts were "8 to 15 **single-spaced** pages long," (Doc. 47 at 14 (emphasis in original)), there is no reason to believe that parties of Plaintiffs' sophistication were not capable of reading a contract of such length, particularly when they knew the Agreements obligated them to pay "substantial fees." (Doc. 31 at 32.)

Plaintiffs' claim that, in many cases, the Agreements were signed with other documents in a 'hurry up' fashion" is also not supported by the evidence. (See Doc. 47 at 14.) Plaintiffs do not cite any portion of the record to support this assertion. Upon its own review of the declarations submitted by Plaintiffs, the Court found only one Plaintiff who stated how long he had to review the Agreement, and he stated that he did not return the Agreement for "a few weeks." (Doc. 48 at 3.) While some Plaintiffs did state that there was pressure on them to sign and return the Agreements "so they could continue the steps that were already in process," such vague statements are not sufficient to establish that Plaintiffs were rushed in a fashion that would

make the Arbitration Clause procedurally unconscionable. (Doc. 51 at 4; Doc. 54 at 4; Doc. 55 at 4; Doc. 56 at 4; Doc. 58 at 3-4.)

Lastly, Plaintiffs do not cite any case law to support their assertion that Defendants were required to clearly state that Plaintiffs were waiving their right to a jury trial. The Court is also aware of none. Furthermore, the Arbitration Clause states that the parties "each waive our right to litigate against one another." (Doc. 38-2 at 7.) This may not include the word "jury," but it is sufficiently clear for the average businessperson to understand that he was waiving his right to a jury trial. Therefore, the Court finds this argument unpersuasive.

For these reasons, Plaintiffs have failed to establish that the Arbitration Clause is procedurally unconscionable.

ii. Substantive Unconscionability

Plaintiffs also contend that the Agreements are substantively unconscionable because they include a "Limitation of Liability" provision (the "Liability Provision") that would prevent any recovery in this case. (Doc. 47 at 12-13.) The Liability Provision states:

> [Y]ou agree that Artex shall have no liability (whether direct or indirect, in contract, tort or otherwise) to you, or to any other person or entity related to or affiliated with you, for any losses, claims, demands, damages, liabilities, costs or expenses arising out of, in connection

> with, in relation to, as a result of, or by reason of this Agreement or the assistance and services rendered or contemplated hereunder (collectively, "losses"), other than losses incurred by the insurance company that have resulted primarily from our gross negligence.[8]

(Doc. 38-2 at 6.) Plaintiffs argue that as a result of this provision the Agreements fail "to provide for all of the types of relief that would otherwise be available in court," and are, therefore, unenforceable under Arizona law. (Doc. 47 at 13 (quoting Williams v. Atl. Specialty Ins. Co., No. CV-18-00061-TUC-DCB, 2018 WL 2046999, at *6 (D. Ariz. May 2, 2018)).) However, the Liability Provision is not part of the Arbitration Clause. It applies to any dispute between the parties whether the parties resolve their disputes in arbitration or in court. Thus, Plaintiffs' objection to the Liability Provision goes to the validity of the Agreements as a whole, not the Arbitration Clause. The Supreme Court has clearly

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[8] The provision is slightly different in some Tribeca Agreements. It reads:

> You agree that Tribeca (and its owners, officers, employees, affiliates, vendors and agents) shall have no liability (whether direct or indirect, in contract, tort or otherwise) to you or any person or entity related to or affiliated with you for any losses, claims, taxes, demands, damages, liabilities, costs or expenses arising out of, in connection with, in relation to, as a result of, or by reason of this agreement or the services rendered or contemplated hereunder (collectively, "losses") other than the losses incurred by you which have resulted primarily and directly Tribeca's reckless and willful misconduct.

(Doc. 38-2 at 30; Doc. 38-3 at 21; Doc. 38-4 at 31, 47.)

held that "an arbitration provision is severable from the remainder of the contract[,]" and "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445-46 (2006). Therefore, Plaintiffs' argument that the Liability Provision is substantively unconscionable must be resolved by the arbitrator, not by the Court.

3. Reasonable Expectations

Plaintiffs also argue that the Clause is unenforceable because it violates the reasonable-expectations doctrine. (Doc. 47 at 15-16.) Under Arizona law, a term in a standardized contract may be unenforceable "if one party to the contract 'has reason to believe that the [other party] would not have accepted the agreement if he had known that the agreement contained the particular term.' " Harrington v. Pulte Home Corp., 119 P.3d 1044, 1050 (Ariz. Ct. App. 2005) (alteration in original) (quoting Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388, 396-97 (Ariz. 1984)). A party's reason to believe the other party would not have assented to a term may be "(1) shown by the prior negotiations, (2) inferred from the circumstances, (3) inferred from the fact that the term is bizarre or oppressive, (4) proved because the term eviscerates the non-standard terms explicitly agreed to or (5) proved if the term eliminates the dominant purpose of the transaction." Id. (internal quotations omitted) (quoting Darner Motor Sales, 682 P.2d at

397). "Additionally, the doctrine of reasonable expectations (6) requires drafting of provisions which can be understood if the customer does attempt to check on his rights and consideration of (7) any other facts relevant to the issue of what the party reasonably expected in this contract." Coup, 823 F. Supp. 2d at 945 (internal quotations and alterations omitted) (quoting Harrington, 119 P.3d at 1051). A term is presumptively valid unless the reasonable-expectations limitation is shown to apply. Harrington, 119 P.3d at 1050.

Plaintiffs argue the Arbitration Clause violates the reasonable-expectations doctrine because (1) Defendants did not specifically inform Plaintiffs of the Clause and the fact that they were waiving their right to a jury trial, and (2) the Clause was obscurely placed in the "About this Agreement" section of the Agreement "when **all other** headings in the Agreement are specifically labeled." (Doc. 47 at 15-16 (emphasis in original).) Both arguments fail.

Arizona courts have specifically rejected any application of the reasonable-expectations doctrine that predicates the enforceability of an arbitration agreement solely upon either an express waiver of a jury trial or evidence that the right to a jury trial was knowingly, voluntarily, and intelligently waived. See Harrington, 119 P.3d at 1052, 1054. Plaintiffs argue that the Arizona Supreme Court's decision in Broemmer v. Abortion Servs. of Phoenix, Ltd., 840 P.2d 1013 (Ariz. 1992), imposed such a requirement, but Plaintiffs read the court's analysis far too broadly. It is true that in finding an arbitration clause in a standardized

contract beyond the reasonable expectations of a young woman seeking an abortion, the Broemmer court noted that there was no explicit waiver of the plaintiff's right to jury trial in the agreement or evidence of knowing, voluntary, and intelligent waiver by the plaintiff. Id. at 1017.[9] However, the court relied upon multiple additional factors, not present here, in finding the arbitration clause unenforceable. Id. The court found the plaintiff was a young woman seeking an abortion and experiencing a great deal of stress. Id. She had only a high school education and did not understand what arbitration was. Id. The court also emphasized the fact that the arbitration provision favored the defendants by requiring the arbitrator to be a licensed obstetrician/gynecologist. Id. Thus, the Broemmer court considered the relevant factors under the reasonable-expectations doctrine and concluded that the arbitration clause, based on the facts before the court, violated the plaintiff's reasonable expectations. See Harrington, 119 P.3d at 1054 (discussing Broemmer). None of the factors present in Broemmer are present in this

[9] Plaintiffs also cite a California state court case for the proposition that "[t]he essential factor in determining whether a contract term is within the reasonable expectations of the weaker party is whether that 'party is . . . given plain and clear notice of the contract term.' " (Doc. 47 at 16 (citing Marin Storage & Trucking, Inc. v. Benco Contracting & Eng g, Inc., 89 Cal. App. 4th 1042, 1057 (Cal. Ct. App. 2001)). However, the California court applies California law and directly contradicts the holding of an Arizona court that "the lack of a conspicuous and explicit waiver of the right to jury trial does not mean [an] arbitration clause [is] beyond [a party's] reasonable expectations." Harrington, 119 P.3d at 1053.

case, which involves a commercial transaction between sophisticated parties and a neutral arbitration provision that does not favor either party. Therefore, the Court finds that the Arbitration Clause did not violate the reasonable-expectations doctrine because it failed to include an explicit waiver of the right to a jury trial.

Plaintiffs second argument regarding the obscurity of the Arbitration Clause is unpersuasive for the reasons already discussed. The Clause had the same font, spacing, and structure as every other provision in relatively short Agreements and was, therefore, not obscured. Accordingly, the Court finds that the Arbitration Clause does not violate the reasonable-expectations doctrine. See Harrington, 119 P.3d at 1053 (upholding arbitration clause where "[t]he font size for the text was neither abnormally small nor different from the other contract provisions").

4. Termination of the Agreement

Finally, Plaintiffs argue the Arbitration Clause is unenforceable because, for most Plaintiffs, the agreement to arbitrate ended when the Agreements were terminated pursuant to the Agreements' "Termination and Withdrawal" section (the "Termination Provision").[10] (Doc. 47 at 17-18.) The Termination Provision

[10] The Termination Provision is found in the Agreements with Plaintiffs Dimitri Shivkov, Robert C. Miller, John Linder, Nadim B. Bikhazi, Blake G. Welling, Bradley S. Bullard, Ryan P. Frank, and Paul M. McHale. (Doc. 38-2 at 5, 13; Doc. 38-3 at 5, 29; Doc. 38-4 at 5, 15; Doc. 38-5 at 5, 14.) It is identical in each

outlines how the Agreements may be terminated by either party and then provides a survival clause (the "Survival Clause") that reads: "The terms of this section shall survive the termination of this Agreement and/or the dissolution or other effective termination of the business of [Artex or Tribeca]." (Doc. 38-2 at 5.) Plaintiffs contend that because the Survival Clause only applies to the Termination Provision itself, under the rule of *expressio unius est exclusion alterius*, meaning "to express or include one thing implies the exclusion of the other," there is a clear implication that the parties did not intend the Arbitration Clause to survive termination of the Agreements. (Doc. 47 at 17-18.) Expressio Unius Est Exclusio Alterius, BLACK'S LAW DICTIONARY (11th ed. 2019).

It is well established that termination of an agreement does not automatically extinguish the duty to arbitrate disputes arising under an agreement. Operating Eng'rs Local Union No. 3 v. Newmont Min. Corp., 476 F.3d 690, 693 (9th Cir. 2007) (citing Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionary Workers Union, 430 U.S. 243, 251-52 (1977)). There is a presumption that, absent a contrary indication, a valid arbitration clause continues to bind parties after termination of the agreement if the relevant dispute arises under that agreement. See Nolde Bros., 430 U.S. at 255; Operating Eng'rs, 476 F.3d at 693 (quoting Litton Fin. Printing Div., Inc. v. NLRB, 501 U.S. 190, 206

Agreement, except to the extent that it identifies Artex or Tribeca for purposes of the dissolution and effective termination clause.

(1991)). This presumption "must be negated expressly or by clear implication." Nolde Bros., 430 U.S. at 255.

The Ninth Circuit Court of Appeals has not addressed whether failure to list an arbitration clause in a survival clause is sufficient to override the presumption that an arbitration agreement continues to apply post-expiration. The Sixth Circuit, however, addressed this question in Huffman v. Hilltop Companies, LLC, 747 F.3d 391 (6th Cir. 2014). The Huffman Court held that in answering this question a court should consider "the contract as a whole – the survival clause and its relationship to the other clauses in the agreement – . . . to determine whether the parties unambiguously intended for the arbitration clause to expire with the contract." Id. at 397. Applying this standard, the Sixth Circuit noted that neither the agreement's severability nor integration clauses were listed in the survival clause and that it was illogical to conclude the parties did not intend these clauses to remain in effect after expiration of the agreement. Id. As a result, the court concluded there was ambiguity as to whether the survival clause was meant to be exhaustive and the fact that the arbitration clause was not listed in the survival clause was insufficient to overcome the presumption in favor of post-expiration arbitration. Id. At least one Ninth Circuit district court has adopted this rationale. See OwnZones Media Network, Inc. v. Sys. in Motion, LLC, No. C14-0994JLR, 2014 WL 4626302, at *7 (W.D. Wash. Sept. 15, 2014).

The Court confronts nearly identical facts here. The Agreements contain integration and severability

clauses that, like the Arbitration Clause, are not included in the Survival Clause. (Doc. 38-2 at 6, 15; Doc. 38-3 at 6, 30-31; Doc. 38-4 at 6-7, 16; Doc. 38-5 at 6, 15.) Under the interpretation offered by Plaintiffs, the only provisions which would survive termination of the Agreements are those included within the Termination Provision that dictate how fees and services will be finalized and related documents distributed. (Doc. 382 at 5.) Just as in Huffman, "it is illogical to conclude that upon expiration of the contract, the parties no longer intended the agreement to be severable" or intended "the ban on extrinsic evidence to be in effect only prior to the agreement's expiration." 747 F.3d at 397. Thus, it is ambiguous whether the Survival Clause is an exhaustive list of provisions intended to survive expiration of the Agreements.

Plaintiffs, however, contend that Huffman and OwnZones are distinguishable because they "involve and hinge on the combination of a broad arbitration clause and a free-standing 'survival' clause, neither of which is present here." (Doc. 47 at 18 n.15 (citing Bonner v. Michigan Logistics Inc., 250 F. Supp. 3d 388, 395-96 (D. Ariz. 2017) (citing Huffman, 747 F.3d at 397-98; OwnZones, 2014 WL 4626302, at *7)).) The Court disagrees. Huffman may have noted that the arbitration clause at issue was broadly worded and, therefore, entitled to a greater presumption of arbitrability, but the Sixth Circuit applied the "clear implication" standard set out in Nolde, which applies no matter the breadth of the arbitration clause. Id. at 395, 397-98. That is the standard the Court applies here.

There is also no indication that the "free-standing" nature of the survival clauses at issue in Huffman and OwnZone played any role in the courts' reasoning. If anything, the fact that the Survival Clause here was included within the Termination Provision, weakens Plaintiffs' argument that it was intended to be an exhaustive list of provisions surviving expiration, as it suggests that the parties simply wanted to make clear that provisions governing dissolution of the Agreements survived termination. An exhaustive survival clause was more likely to be free standing.

Because it is ambiguous whether the Survival Clause is exhaustive, there is no clear implication that the parties did not intend the Arbitration Clause to survive termination of the Agreements and the presumption in favor of arbitrability dictates that the Clause survives expiration.

As Plaintiffs do not contest that they signed the Clause and have failed to show that it is unenforceable, the Court must next determine whether the Clause covers the claims and Defendants at issue in this matter. See Brennan, 796 F.3d at 1130 (citing Howsam, 537 U.S. at 84) (holding a court must determine "(1) whether there is an agreement to arbitrate between the parties; and (2) whether the agreement covers the dispute").

B. The Arbitration Clause Covers All Claims Against Each Defendant

1. Claims Covered by the Arbitration Agreement

Plaintiffs argue that every claim, but their breach-of-contract claim, falls beyond the scope of the Arbitration Clause. (Doc. 47 at 18-20.) Their argument relies upon the unusual structure of the Clause. In its first sentence, the Clause states broadly that the parties "agree that in the event of *any dispute* that cannot be resolved between the parties, that [they] agree to seek to resolve such disputes through mediation . . . , and if that fails, that *all disputes* will be subject to binding arbitration." (Doc. 38-2 at 7, 29-30 (emphasis added).) However, the paragraph then goes on to state: "To reduce time and expenses, we each waive our right to litigate against one another *regarding the services provided and obligations pursuant to this Agreement*, and instead you and we have chosen binding arbitration." (Id. (emphasis added).) Plaintiffs argue that the latter sentence narrows the broader first sentence by enumerating the specific subjects that are subject to arbitration – those "regarding the services provided and obligations pursuant to this Agreement." (Doc. 47 at 19.) They contend that another provision, which provides that "Artex does not provide any legal, tax or accounting advice,' excludes tax and legal advice from the scope of the Agreements. (Id.) Because Plaintiffs' claims "stem from Defendants' erroneous legal and tax

advice,"[11] they argue, their claims do not regard the services and obligations under the Agreements and are, thus, not subject to arbitration. (Id. at 20.) This argument is unpersuasive.

Assuming, as Plaintiffs contend, that the Arbitration Clause is limited to those disputes "regarding the services provided and obligations pursuant to this Agreement," the Clause is nevertheless broadly worded to encompass each of Plaintiffs' claims. Plaintiffs argue that the Arbitration Clause here is similar to that at issue in Mesquite Lake Assocs. v. Lurgi Corp., which the Northern District of California held to have a "narrow definition of arbitrable issues." 754 F. Supp. 161, 163 (N.D. Cal. 1991). However, in Mesquite Lake, the arbitration clause stated that "any controversy or dispute between the Parties concerning this Agreement *and* specifically subject to resolution pursuant to this Article shall be subject to arbitration." Id. at 162 (emphasis added). The Mesquite Lake court then identified "[t]hree other clauses in the contract [that] delineate the areas of dispute which are 'specifically subject to resolution' by arbitration." Id. Here, there is no "specifically subject to resolution" limitation in the Arbitration Clause; it covers any dispute "regarding the services provided and obligations pursuant to this Agreement." (Doc. 38-2 at 7.)

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[11] This is found in the Agreement with Plaintiff Shivkov. The other Agreements provide similar, although not always identically worded, limitations. (Doc. 38-2 at 15, 30; Doc. 383 at 7, 21, 31; Doc. 38-4 at 7, 17, 31, 47; Doc. 38-5 at 7.)

In practical effect, the Arbitration Clause is largely indistinguishable from arbitration clauses covering "[a]ll disputes arising in connection with" an agreement, which the Ninth Circuit has held should be liberally construed. See Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 721 (9th Cir. 1999). The Court finds no substantive difference between those disputes "arising in connection with" and those "regarding" an agreement. See Family Prod. LLC v. Infomercial Ventures P'ship., No. CV0700926JVSCWX, 2010 WL 11519420, at *2 (C.D. Cal. Apr. 14, 2010) (finding language subjecting "any dispute regarding this Agreement" to arbitration, "substantively identical" to "[a]ll disputes arising in connection with" the agreement). Moreover, a contract of the type at issue here consists primarily, if not entirely, of services and obligations; so, it is unclear what aspects of the Agreements, if any, fall beyond the services and obligations under the Agreements. If there is a limitation effected by the restriction of the Arbitration Clause to "services" and "obligations," that limitation does not restrict the reach of this otherwise broadly worded clause into any matters regarding those services and obligations. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 624 n.13 (1985) (holding "the exclusion of some areas of possible dispute from the scope of an arbitration clause does not serve to restrict the reach of an otherwise broad clause in the areas in which it was intended to operate"). Therefore, the Arbitration Clause is broadly worded and should be liberally construed. See Simula, 175 F.3d at 721.

Where an arbitration agreement is broadly worded, the factual allegations underlying a claim need only "touch matters" covered by the arbitration agreement in order for the claim to be sent to arbitration. Mitsubishi Motors, 473 U.S. at 624 n.13; see also Simula, 175 F.3d at 720 (citing Mitsubishi Motors, 473 U.S. at 624 n.13; Genesco, Inc. v. Kakiuchi & Co., 815 F.2d 840, 846 (2d Cir. 1987)) (applying the "touch matters" standard in determining the scope of arbitration clause covering 101 disputes arising in connection with" the agreement). Applying the standard here, the Court must determine whether the factual allegations underlying Plaintiffs' claims "touch matters" regarding the services provided and obligations pursuant to the Agreements. The Court finds each of Plaintiffs' claims satisfy this standard.

Although some portions of Plaintiffs' claims do stem from "Defendants' erroneous legal and tax advice," each of Plaintiffs' claims is fundamentally about Defendants' role in inducing Plaintiffs to engage Artex or Tribeca to form and manage captive insurance companies and for their alleged failure to do so in a manner that provided the benefits Plaintiffs were promised.[12]

[12] The focus of Plaintiffs' claims makes this matter distinguishable from Khan v. BDO Seidman, LLP, 935 N.E.2d 1174 (Ill. App. Ct. 2010), upon which Plaintiffs rely to argue that their claims fall outside the scope the Arbitration Clause. (See Doc. 47 at 20.) In Khan, the plaintiffs sued for financial harm resulting from the defendants "(1) giving them dishonest investment advice, (2) preparing defective income-tax returns for them, and (3) conspiring with law firms to issue bogus opinion letters attesting to the legality of losses claimed in the tax returns." Khan, 935 N.E.2d at 1178. The court found this type of tax and legal advice

Thus, each claim relates directly to how the Agreements were created and how the services and obligations under those Agreements were performed. For example, Plaintiffs' fiduciary-duty claim states that Defendants breached their fiduciary duties by, *inter alia*, "[o]rchestrating the design, development, implementation, operation, and management of the Captive Insurance Strategies" and "[a]dvising, instructing, and assisting Plaintiffs . . . in the purchase and execution of the captive insurance policies." (Doc. 31 at 139, 142.) These allegations would require a jury to assess the services promised under the Agreements and the services ultimately provided. The same factual allegations underlie Plaintiffs' RICO, negligent misrepresentation, and fraud claims. (Id. at 114, 117, 149, 157, 160.) Therefore, each of these claims is covered by the Arbitration Clause.

Plaintiffs' disgorgement and rescission claims are even more directly related to the services and obligations under the Agreements. Plaintiffs seek disgorgement of the fees Defendants charged for their services related to the captives. (Id. at 151.) Under the Agreements, Plaintiffs agreed to pay thousands of dollars annually for the formation and management of their captives. (See, e.g., Doc. 38-2 at 3-4, 21-22.) Therefore, Plaintiffs' disgorgement claim is, at least in part, about the parties' obligations under the Agreements.

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was excluded from the scope of the agreement. Id. at 1194-95. Here, Plaintiffs' claims are focused on the formation and management of the captives, actions related to the services and obligations under the Agreement.

Plaintiffs' rescission claim is also specifically about the parties' obligations under the Agreements as it seeks rescission of those Agreements. (Doc. 31 at 152-53.)

Plaintiffs' negligence claim also relies on the Agreements. Actual damages are a necessary element of any negligence claim. Gipson v. Kasey, 150 P.3d 228, 230 (Ariz. 2007) (citing Ontiveros v. Borak, 667 P.2d 200, 204 (Ariz. 1983)) ("To establish a claim for negligence, a plaintiff must prove four elements: (1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages.") Plaintiffs allege that they suffered damages in the form of fees and premiums paid to Defendants "for insurance . . . advice" and that Defendants' negligence caused those damages. (Doc. 31 at 147-48.) As noted above, Plaintiffs paid thousands to Defendants for the formation and management of their captives under the terms of the Agreements. (See e.g., Doc. 38-2 at 3-4, 21-22.) Therefore, Plaintiffs' negligence claim requires construction of and reliance on the Agreements to show damages and is, therefore, subject to the Arbitration Clause.

Finally, Plaintiffs' conspiracy and aiding-and-abetting claims are derivative of all other claims and, therefore, subject to the Arbitration Clause. As a result, each of Plaintiffs' claims touches matters regarding the services provided and obligations pursuant to the Agreements and is subject to arbitration.

2. All Defendants May Compel Arbitration

While all claims are subject to arbitration, Artex and Tribeca are the only Defendants who are parties to the Agreements. Defendants argue that those Defendants who are not parties to the Agreements may nevertheless compel arbitration under estoppel principles. (Doc. 37 at 13 n.4; Doc. 63 at 12.) Plaintiffs contend that Defendants have failed to satisfy the elements of equitable estoppel and thus only Artex and Tribeca, as signatories to the Agreements, may compel arbitration. (Doc. 47 at 20-21.)

Under the FAA, a non-signatory to an agreement may invoke arbitration if the relevant state contract law allows the non-signatory to enforce the agreement. Kramer, 705 F.3d at 1128 (citing Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 632 (2009)). Arizona courts have adopted the "alternative estoppel" theory to determine whether a non-signatory to an arbitration agreement may compel arbitration by a signatory. Sun Valley Ranch 308 Ltd. P'ship ex rel. Englewood Props., Inc. v. Robson, 294 P.3d 125, 134-35 (Ariz. Ct. App. 2012). A non-signatory may enforce an arbitration clause against a signatory when: (1) "the relationship between the signatory and nonsignatory defendants is sufficiently close that only by permitting the non-signatory to invoke arbitration may evisceration of the underlying arbitration agreement between the signatories be avoided"; or (2) "each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement," such that "the signatory's claims arise out of and relate

directly to the written agreement." Id. at 134-35 (quoting CD Partners, LLC v. Grizzle, 424 F.3d 795, 798 (8th Cir. 2005)).

Here, the Court finds that the non-signatory Defendants may compel arbitration because Plaintiffs' claims arise out of and relate directly to the Agreements. Plaintiffs pleaded each of their claims against "Defendants" as a whole, rarely distinguishing between the signatory and non-signatory Defendants. And, as the Court determined above, all of Plaintiffs' claims relate to the services and obligations provided under the Agreements.[13] Therefore, each of the claims against the non-signatory Defendants sufficiently arise out of and relate to the Agreements to allow for the non-signatory defendants to rely on the Arbitration Clause through estoppel principles. See Sun Valley Ranch, 294 P.3d at 135 (finding alternative estoppel standard met where the court had already determined that each claim arose out of and related to the

[13] Plaintiffs argue in their responses to the notices of joinder that the non-signatory Defendants have not been sued for breach of the Agreements and, therefore, may not rely on estoppel for purposes of the breach-of-contract claim. (Doc. 79 at 3; Doc. 83 at 3.) The FAC alleges that Plaintiffs were third-party beneficiaries of agreements between Defendants and these agreements included promises that Defendants "would provide services in connection with forming, managing, calculating premiums for, analyzing risks for, calculating taxes for, and filing tax returns for captive insurance companies." (Doc. 31 at 155.) As the Court noted above, the formation and management of the captives occurred under the Agreements. Therefore, any benefits Plaintiffs received from unidentified agreements between the various Defendants relate to the services and obligations provided under the Agreements.

agreement in determining which claims were subject to the arbitration agreement).

C. The Court Must Compel Individual Arbitration

Lastly, Defendants request that the Court compel individual, rather than class, arbitration. (Doc. 37 at 17.) Plaintiffs argue that the Court should allow the arbitrator to decide whether class arbitration is available. (Doc. 47 at 21.) The Court first addresses who should decide whether the dispute is subject to class arbitration and then considers whether the Court should compel class arbitration here.

Generally, whether a particular dispute is subject to arbitration – the question of arbitrability – is "an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" Howsam, 537 U.S. at 83 (quoting AT & T Techs., Inc. v. Commc'ns Workers, 475 U.S. 643, 649 (1986)); see also Local Joint Exec. Bd. v. Mirage Casino-Hotel, Inc., 911 F.3d 588, 595-96 (9th Cir. 2018). Questions of arbitrability exist "where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." Howsam, 537 U.S. at 83-84. On the other hand, questions the parties would typically expect to

be resolved by an arbitrator, such as procedural questions, "which grow out of the dispute and bear on its final disposition," are presumptively resolved by the arbitrator, not the court. Id. at 84 (quoting John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964)).

Neither the Supreme Court nor the Ninth Circuit has yet concluded whether determination of class availability is a question of arbitrability presumptively for a court to resolve. However, nearly every circuit court to have considered the question has found that class arbitrability is a gateway question for judicial determination. See JPay, Inc. v. Kobel, 904 F.3d 923, 936 (11th Cir. 2018) (deciding that the question of class arbitration lies with the courts); Catamaran Corp. v. Towncrest Pharmacy, 864 F.3d 966, 972 (8th Cir. 2017) (same); Del Webb Cmtys., Inc. v. Carlson, 817 F.3d 867, 876-77 (4th Cir. 2016) (same); Opalinski v. Robert Half Int'l Inc., 761 F.3d 326, 334 (3d Cir. 2014) (same); Reed Elsevier, Inc. ex. rel. LexisNexis Div. v. Crockett, 734 F.3d 594, 599 (6th Cir. 2013) (same); but see Robinson v. J & K Admin. Mgmt. Servs., Inc., 817 F.3d 193, 197 (5th Cir. 2016) (deciding that questions of class arbitrability should be deferred to an arbitrator). These courts generally reasoned that the differences between class and bilateral arbitration are so fundamental and substantial that the availability of class arbitration is a gateway question "that determines what type of proceeding will determine the parties' rights and obligations" and "that contracting parties would expect a court to decide." JPay, Inc., 904 F.3d at 936; see also Catamaran Corp., 864 F.3d at 972; Del Webb Cmtys.,

817 F.3d at 869; Opalinski, 761 F.3d at 334; Reed Elsevier, 734 F.3d at 598-99.

Supreme Court precedent supports the circuit courts' reasoning. Although a plurality of the Supreme Court held that class arbitrability is a question for the arbitrator in Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452-53 (2003), since that time, the Supreme Court has "given every indication, short of an outright holding, that classwide arbitrability is a gateway question." Reed Elsevier, 734 F.3d at 598. In determining whether parties to an arbitration agreement agreed to class arbitration, the Supreme Court held that class arbitration "changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010). Addressing the same question in another case, the Court emphasized that class arbitration "sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416 (2019) (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011)). It also "raises serious due process concerns by adjudicating the rights of absent members of the plaintiff class . . . with only limited judicial review." Id. (citing Concepcion, 563 U.S. at 349). Because of these differences, the Supreme Court has held that "courts may not infer consent to participate in class arbitration absent an affirmative 'contractual basis for concluding

that the party *agreed* to do so.'" Id. (emphasis in original) (quoting Stolt-Nielsen S.A., 559 U.S. at 684).

The Supreme Court's reasoning is equally applicable to the question of *who* resolves the question of class arbitrability. See Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 575 (2013) (Alito, J., concurring) (noting that because class arbitration seeks to bind class members who have not consented to an arbitrator's authority, courts should be wary of allowing an arbitrator to decide questions of class arbitrability). Given the fundamental differences between bilateral and class arbitration, the Court follows the majority of circuit courts in holding that the availability of classwide arbitration is a gateway question of arbitrability decided by the Court, unless there is clear and unmistakable evidence that the parties intended the arbitrator to decide. See Howsam, 537 U.S. at 83.

The Agreements at issue here are silent as to who should decide the question of class arbitrability. Plaintiffs argue that clear and unmistakable evidence that the parties intended for the arbitrator to decide the issue can be found in the fact that the Agreements incorporate the American Arbitration Association ("AAA") rules into the Arbitration Clause. (Doc. 47 at 21-22.) But Plaintiffs' argument misrepresents the Arbitration Clause.

The relevant portion of the Clause states that arbitration will occur "with arbitrators to be agreed upon by the parties, and if no agreement is reached, then arbitrated by the American Arbitration Association

(AAA)." (Doc. 38-2 at 7.) Thus, the Arbitration Clause does not explicitly refer to AAA rules and it indicates that the AAA will arbitrate only if the parties fail to agree upon an arbitrator. Both factors make the Clause ambiguous as to whether the parties intended to allow an arbitrator to decide questions of arbitrability.

Relying on the Eleventh Circuit's decision in Spirit Airlines, Inc. v. Maizes, 899 F.3d 1230, 1232 (11th Cir. 2018), Plaintiffs argue that the Agreements' reference to the AAA as an arbitrator is sufficient to incorporate the AAA rules. (Doc. 47 at 21-22.) They contend that Spirit Airlines holds that an arbitration agreement making reference to the AAA, but not specific AAA rules, indicates that the parties plainly chose AAA rules. (Doc. 47 at 21.) But the agreement at issue in Spirit Airlines stated that any dispute would be resolved "in accordance with the rules of the American Arbitration Association then in effect." 899 F.3d at 1232. Therefore, the case simply does not support Plaintiffs' proposition.

Plaintiffs also argue that the condition precedent of failing to agree to an arbitrator has been satisfied by their refusal to arbitrate, making the AAA rules binding, or, at the very least, indicating that an arbitrator should decide whether the condition has been satisfied. (Doc. 47 at 23.) However, a court should analyze the parties' intent from the time the parties entered into the contract. Taylor v. State Farm Mut. Auto. Ins., 854 P.2d 1134, 1139 (Ariz. 1993). Thus, the satisfaction of a condition precedent is irrelevant to the Court's determination of Plaintiffs' and Defendants' intent when

they entered into the Agreements. The fact that the AAA rules were not incorporated explicitly into the Clause and an AAA arbitrator is designated only as backup arbitrator makes the parties' intent ambiguous at the time of contract formation, regardless of whether the condition precedent for selecting an AAA arbitrator was later met. Therefore, the Agreements do not contain clear and unmistakable evidence that the parties intended for an arbitrator to determine class arbitrability and the question remains with the Court.

Defendants ask the Court to compel individual arbitration, arguing there is no contractual basis to conclude the parties agreed to class arbitration. (Doc. 37 at 17.) A court may not compel class arbitration unless there is a clear contractual basis for concluding the parties agreed to do so. Stolt-Nielsen S.A., 559 U.S. at 684. Neither silence nor ambiguity in a contract is sufficient to show that the parties agreed to class arbitration. Lamps Plus, 139 S. Ct. at 1416. Here, the Agreements are silent as to class arbitration and Plaintiffs' offer no argument for how the Agreements indicate that the parties agreed to class arbitration. Accordingly, the Court must compel individual arbitration.

IV. CONCLUSION

For the reasons above, the Court finds that Defendants' Renewed Joint Motion to Compel Individual Arbitrations (Doc. 37) should be granted. Plaintiffs must individually arbitrate their claims against

Defendants. Because all claims in this suit are barred by the Arbitration Clause, the Court will dismiss without prejudice this action in its entirety. See Johnmohammadi, 755 F.3d at 1074 (citing Sparling, 864 F.2d at 638). All pending motions are denied as moot.

Accordingly,

IT IS HEREBY ORDERED granting Defendants' Renewed Joint Motion to Compel Individual Arbitrations (Doc. 37).

IT IS FURTHER ORDERED that Plaintiffs must individually arbitrate their claims against Defendants.

IT IS FURTHER ORDERED denying as moot Defendants' Joint Motion to Compel Individual Arbitrations (Doc. 22); Joint Motion to Dismiss (Doc. 24); and Joint Motion to Dismiss Amended Complaint (Doc. 41).

IT IS FURTHER ORDERED dismissing without prejudice the claims against Defendants Artex Risk Solutions Inc., TSA Holdings LLC f/k/a Tribeca Strategic Advisors LLC, TBS LLC d/b/a PRS Insurance, Karl Huish, Jeremy Huish, Jim Tehero, Arthur Gallagher & Co., Debbie Inman, Epsilon Actuarial Solutions LLC, Julie A. Ekdom, AmeRisk Consulting LLC, Provincial Insurance, Tribeca Strategic Accountants LLC, and Tribeca Strategic Accountants PLC.

IT IS FURTHER ORDERED directing the Clerk of Court to enter judgment in favor of Defendants and against Plaintiffs.

Dated this 5th day of August, 2019.

/s/ Stephen M. McNamee
Honorable Stephen M. McNamee
Senior United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DIMITRI SHIVKOV, individually and as a trustee of the Phoenix 2010 Revocable Trust; VASSIL ZHIVKOV, on behalf of themselves and all others similarly situated; KRISTINA TSONEV, on behalf of themselves and all others similarly situated; SPECTRA SERVICES, INC., on behalf of themselves and all others similarly situated; DVS HOLDINGS LLC, on behalf of themselves and all others similarly situated; ROBERT C. MILLER, on behalf of themselves and all others similarly situated; BRENDA MAE MILLER, on behalf of themselves and all others similarly situated; BRUCE G. ROBINSON, on behalf of themselves and all others similarly situated; SARA VAN ALSTYNE ROBINSON, on behalf of themselves and all others similarly situated; SYMPHONY HOMES LLC, on behalf of themselves and all others similarly situated; SYMPHONY DEVELOPMENT CORPORATION, on behalf of themselves and all	No. 19-16746 D.C. No. 2:18-cv-04514-SMM District of Arizona, Phoenix ORDER (Filed Oct. 28, 2020)

others similarly situated; KEITH BUTLER, on behalf of themselves and all others similarly situated; REBECCA M. BUTLER, on behalf of themselves and all others similarly situated; ERIC K. WILKE, on behalf of themselves and all others similarly situated; JULIE T. WILKE, on behalf of themselves and all others similarly situated; JOHN LINDER, on behalf of themselves and all others similarly situated; NINA LINDER, on behalf of themselves and all others similarly situated; AFFILION OF COBRE VALLEY LLC, on behalf of themselves and all others similarly situated; AFFILION OF HUNTSVILLE PLLC, on behalf of themselves and all others similarly situated; AFFILION OF TEXAS PLLC, on behalf of themselves and all others similarly situated; TAYLOR-WILKE HOLDINGS LLC, on behalf of themselves and all others similarly situated; TRADITIONS EMERGENCY MEDICINE PA, on behalf of themselves and all others similarly situated; TREADSTONE EQUITY

GROUP LLC, on behalf of themselves and all others similarly situated; UTA INVESTMENTS LLC, on behalf of themselves and all others similarly situated; BOOMERANG WB LLC, on behalf of themselves and all others similarly situated; AZ STORAGE 1 LLC, on behalf of themselves and all others similarly situated; AZ STORAGE 2 LLC, on behalf of themselves and all others similarly situated; BOOMERANG SONORAN LLC, on behalf of themselves and all others similarly situated; RV STORAGE LLC, on behalf of themselves and all others similarly situated; STONE HAVEN LODGE LLC, on behalf of themselves and all others similarly situated; UTA HOLDINGS LLC, on behalf of themselves and all others similarly situated; WILKE MEDICAL DIRECTION PLLC, on behalf of themselves and all others similarly situated; 5T CAPITAL FUND II LLC, on behalf of themselves and all others similarly situated; 5T CAPITAL HOLDINGS LLC, on behalf of themselves and all others similarly situated; 5T CAPITAL

LLC, on behalf of themselves and all others similarly situated; INGENUITY AUTO LEASING LLC, on behalf of themselves and all others similarly situated; INGENUITY AVIATION LLC, on behalf of themselves and all others similarly situated; INGENUITY EQUITY GROUP II LLC, on behalf of themselves and all others similarly situated; INGENUITY EQUITY GROUP III LLC, on behalf of themselves and all others similarly situated; INGENUITY EQUITY GROUP LLC, on behalf of themselves and all others similarly situated; INGENUITY LEASING COMPANY II LLC, on behalf of themselves and all others similarly situated; INGENUITY LEASING COMPANY LLC, on behalf of themselves and all others similarly situated; INGENUITY MATRIX, INC., on behalf of themselves and all others similarly situated; INGENUITY PROFESSIONAL SERVICES PLLC, on behalf of themselves and all others similarly situated; BOURNE TEMPE LAND LLC, on behalf of themselves and all others similarly

situated; PAUL M. MCHALE; CYNTHIA MCHALE; KEITH E. PEREIRA, Individually and as a trustee of The Blaser Family Revocable Trust Dated March 10, 2006; KIMBERLY BLASER, Individually and as a trustee of The Blaser Family Revocable Trust Dated March 10, 2006; BRIAN R. TIFFANY; RYAN P. FRANK; KATHERINE S. FRANK; CATION LLC; FLORIDA CITRUS HOLDINGS LLC; MCHALE CAPITAL MANAGEMENT LLC; PS BAILEY LLC; BLASER MANAGEMENT LLC; BLUE HORIZON HOLDINGS LLC; BUTLER MEDICAL GROUP, INC.; DEVOTION HOMES LLC; GLASS HOUSE LLC; MAUI LUXURY RENTALS LLC; SILVER MEADOW INVESTING LLC; T&G INVESTMENTS LLC; TREADSTONE CORE3 LLC; TW MANAGEMENT LLC; KAMAOLE LUXURY RENTALS LLC; KANNAPALI BEACH HOLDINGS LLC; OUR RETIREMENT LLC; RESILIANT LLC; NADIM B. BIKHAZI; KAREN A. KOSTLUK-BIKHAZI; BRADLEY S. BULLARD; CATHLEEN M. BULLARD; BLAKE G.

WELLING; STEPHANIE G. WELLING; BLAKE WELLING MD PC; BRIAN TIFFANY MD PC; UTAH SPINE CARE LLC; WESTERN STATES MEDICAL LLC; OGDEN CLINIC PROFESSIONAL CORPORATION; BORSIGHT, INC.,

Plaintiffs-Appellants,

v.

ARTEX RISK SOLUTIONS, INC.; TSA HOLDINGS LLC, FKA Tribeca Strategic Advisors LLC; TBS LLC, DBA PRS Insurance; KARL HUISH; JEREMY HUISH; JIM TEHERO; ARTHUR J. GALLAGHER & COMPANY; DEBBIE INMAN; EPSILON ACTUARIAL SOLUTIONS LLC; JULIE A. EKDOM; AMERISK CONSULTING LLC; PROVINCIAL INSURANCE PCC; TRIBECA STRATEGIC ACCOUNTANTS LLC; TRIBECA STRATEGIC ACCOUNTANTS PLC,

Defendants-Appellees.

Before: HAWKINS, D.M. FISHER,* and M. SMITH, Circuit Judges.

The full court has been advised of the petition for rehearing en banc (Mt. 50), and no judge of the court has requested a vote on it. Fed. R. App. P. 35. Accordingly, the petition for rehearing en banc is DENIED.

* The Honorable D. Michael Fisher, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

U.S.C. Title 9 - ARBITRATION

§ 4 Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is

within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

(July 30, 1947, ch. 392, 61 Stat. 671; Sept. 3, 1954, ch. 1263, §19, 68 Stat. 1233.)