STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
	SUPERIOR COURT DIVISION
COUNTY OF WAKE	15 CVS 15061

JAMES V. TAGGART	)	
	)	
Plaintiff,	)	**ORDER ON MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION**
	)	
v.	)	
	)	
PHYSICIANS PHARMACY ALLIANCE, INC.,	)	
	)	
	)	
Defendant.	)	

THIS MATTER comes before the Court on Defendant Physician Pharmacy Alliance, Inc.'s Motion to Stay Proceedings and Compel Arbitration ("Motion"), pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, and the North Carolina Revised Uniform Arbitration Act, N.C. Gen. Stat. § 1-569.7 (hereinafter, references to the General Statutes will be to "G.S."), and;

THE COURT, having considered the Motion, briefs in support of and opposition to the Motion, the evidentiary materials filed by the parties, and other appropriate matters of record, FINDS and CONCLUDES as follows:

Background Facts

1. In 2002, Plaintiff James Taggart ("Plaintiff") created Physicians Pharmacy Alliance, Inc., ("Defendant") a prescription medication management and delivery service. The business was successful and drew the attention of multiple potential purchasers. On January 4, 2011, Plaintiff sold Defendant to The Riverside Company ("Riverside") through a Stock Purchase Agreement for $52,500,000.[1] As part of the sale to Riverside, Plaintiff was

[1] Compl. ¶ 2; Stock Purchase Agreement § 2.2(a). Taggart entered into the Stock Purchase Agreement with "PPA Acquisition Company," a subsidiary created by Riverside for purposes of PPA. After the transaction, PPA Acquisition Company merged into Defendant PPA. Although the Stock

given a position on Defendant's Board of Directors, and he purchased 15% of the outstanding shares.[2] During the negotiations of that agreement, Plaintiff was represented by the law firm of Hunton & William LLP.

2. The Stock Purchase Agreement contains a mandatory arbitration agreement by which Plaintiff and Defendant agreed to arbitrate "any claim, controversy or other matter in question based upon, arising out of, or otherwise in respect of this Agreement," including "any dispute arising under any Claim made pursuant to Article 10," which governs indemnification claims.[3] The agreement provides that Plaintiff and Defendant will participate in the selection of the arbitrator, will split the arbitration fee, and will be responsible for their own costs. The procedures permits the parties to submit to the arbitrator within 15 days following his selection "presentations," "arguments and position statements," "exhibits," and "testimony in the form of affidavits" The procedure does not allow for responses to the other party's submissions. The arbitrator is required within 30 days following the submissions to "choose one of the Party's positions based solely upon the written presentation[s]." The arbitrator must provide a written determination. The arbitration agreement also provides that:

> It is the desire and intent of the Parties that such arbitration be held without any discovery, deposition or motion practice, that the arbitrator receive evidence solely through the written submissions and not hold an evidentiary hearing, and that the arbitrator has no ability to extend dates or apply rules that conflict with these provisions.[4]

3. In the Stock Purchase Agreement, Plaintiff also agreed to indemnify "the [b]uyer, [Defendant] and their respective shareholders, officers, directors, employees, agents

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Purchase Agreement containing the arbitration agreement was entered into between Taggart and PPA Acquisition Company, the transaction was effectively the purchase by one corporation of another.

[2] Compl. ¶ 23.

[3] Stock Purchase Agreement § 11.14

[4] *Id.*

and Affiliates" for any losses arising out of "any inaccuracies in or any breach of any representation or warranty of [Plaintiff] contained in this Agreement."[5]

4. In September 2012, the United States Department of Justice ("DOJ") initiated an investigation of Defendant ("Investigation"). The Investigation involved Defendant's alleged use of gift cards to induce various sources to refer clients to Defendant and Defendant's alleged waiver of certain Medicaid and Medicare co-payments. In April 2015, Defendant and various federal and State parties entered into a settlement whereby Defendant agreed to pay over $5 million to settle the claims. Defendant did not allow Plaintiff to review or approve the terms of settlement prior to entering into the signed settlement agreement.

5. Defendant provided multiple notices to Plaintiff of Defendant's intent to seek indemnification under Section 10.1 of the Stock Purchase Agreement for losses arising from the DOJ's investigation. Plaintiff has refused to indemnify Defendant.

6. Defendant currently seeks indemnification from Plaintiff for its losses arising out of the Investigation. Defendant seeks to arbitrate its claims for indemnification against Plaintiff pursuant to the arbitration provision in the Stock Purchase Agreement. On October 5, 2015, Defendant provided Plaintiff's counsel with the necessary forms to initiate arbitration with the American Arbitration Association. Plaintiff has refused to participate in the arbitration process.

7. On November 4, 2015, Plaintiff filed his Verified Complaint for Injunctive and Declaratory Relief and Motion for Temporary Restraining Order and for Preliminary and Permanent Injunction ("TRO Motion"). The TRO Motion sought an order "prohibiting Defendant from proceeding with any claim against Mr. Taggart in arbitration" on the

[5] *Id.* § 10.1(a).

grounds that Stock Purchase Agreement's mandatory arbitration provision was "procedurally and substantively unconscionable."[6]

8. On November 19, 2015, the Court entered its Order on Motion for Temporary Restraining Order and for Preliminary and Permanent Injunction ("TRO Order"). The TRO Order denied Plaintiff's TRO Motion, finding that Plaintiff was unlikely to succeed on his claim that the arbitration provision was unconscionable.

9. On November 24, 2015, Defendant filed its Motion to Stay Proceedings and Compel Arbitration. The Motion is fully briefed and is ripe for determination.

Discussion

10. As a preliminary matter, the parties agree that the arbitration provision at issue in this case is governed by the Federal Arbitration Act ("FAA").[7] Even when the FAA applies, however, "in a case where the validity and enforceability of an arbitration provision is disputed, general principles of state contract law must be applied to determine these threshold issues." *T.M.C.S., Inc. v. Marco Contrs., Inc.*, 2015 N.C. App. LEXIS 994 (Dec. 1, 2015) (citations omitted); *Collie v. Wehr Dissolution Corp.*, 345 F.Supp. 2d 555, 558 (W.D.N.C. 2004). In considering a motion to compel arbitration under North Carolina law, this Court must determine (1) whether the parties have a valid agreement to arbitrate, and (2) whether the subject of the dispute is covered by the scope of the arbitration agreement. *Earl v. CGR Dev. Corp.*, ___ N.C. App. ___, 773 S.E.2d 551, 554 (N.C. Ct. App. 2015) (citing *Slaughter v. Swicegood*, 162 N.C. App. 457, 461 (2004)).

11. In this case, Plaintiff does not contend that Defendant's claims are not within the scope of the arbitration agreement. It is undisputed that Plaintiff and Defendant entered

[6] Pl.'s Mot. for TRO, pp. 3.
[7] Def.'s Br. Supp. M. Stay Proceedings and Compel Arbitration, pp. 4; Pl.'s Response to Def.'s M. Stay Proceedings and Compel Arbitration, pp. 3.

into the written Stock Purchase Agreement and that the agreement contains an arbitration provision by which Plaintiff and Defendant agreed to arbitrate "any claim, controversy or other matter in question based upon, arising out of, or otherwise in respect of this Agreement," including "any dispute arising under any Claim made pursuant to Article 10." The claims Defendant seeks to arbitrate against Plaintiff arise out Defendant's claim for indemnification under Article 10 of the Stock Purchase Agreement and are within the scope of the agreement.

12. Plaintiff contends only that the parties did not have a valid agreement to arbitrate. The Stock Purchase Agreement provides, and the parties agree, that Delaware substantive law governs the construction and enforcement of the arbitration provision.[8] Accordingly, applying the law of Delaware, the Court must proceed summarily to decide the question of "whether an enforceable agreement to arbitrate exists." G.S. §1-569.7(a)(2); *Cold Springs Ventures, LLC v. Gilead Sciences, Inc.*, 2015 NCBC LEXIS 1, *6-10 (N.C. Super. Ct. 2015).

13. Plaintiff argues that the arbitration agreement is unconscionable and that this voids any valid agreement to arbitrate.[9] Plaintiff contends that the arbitration agreement is unconscionable because: (1) it precludes Plaintiff from fairly presenting his claims; (2) it is one-sided.[10]

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[8] The Stock Purchase Agreement is "governed by and construed and enforced in accordance with the laws of the State of Delaware without regard to principles of conflicts of law." Stock Purchase Agreement § 11.11.

[9] Pl.'s Br. Opp. to Mot. Compel, pp. 4-5 (citing *Worldwide Ins. Group v. Klopp*, 603 A.2d 788, 792 (Del. 1992)).

[10] All of Plaintiff's arguments relate to his position that the arbitration agreement was "substantively" unconscionable. Plaintiff does not argue that the agreement is procedurally unconscionable (e.g., that PPA possessed greater bargaining power, that PPA drafted the terms of the agreement, or that the arbitration agreement was presented to Plaintiff as a "take it or leave it" proposition).

14. To determine whether a contract is unenforceable as unconscionable, a court examines the "facts surrounding the commercial setting, purpose and effect of a contract *at the time it was made*." *Tulowitzki v. Atl. Richfield Co.,* 396 A.2d 956, 961 (Del. 1978) (internal citation omitted; emphasis added). "The traditional test is this: a contract is unconscionable if it is 'such as no man in his senses and not under delusion would make on the one hand, and as no honest or fair man would accept, on the other.'" *Id.* at 960 (quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (D.C. Cir. 1965)). In order to show that a contract provision is unconscionable there must "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Progressive Int'l Corp. v. E.I. Du Pont de Nemours & Co.,* 2002 WL 1558382, at *11 (Del. Ch. July 9, 2002) (quoting Farnsworth on Contracts § 4.28 (2d ed. 2000)).

15. Delaware does not lightly let commercial entities and sophisticated business parties escape obligations their contracts, but instead "upholds the freedom of contract and enforces as a matter of fundamental public policy the voluntary agreements of sophisticated parties." *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 840 (Del. Ch. 2011) (quoting *NACCO Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 35 (Del. Ch. 2009)); *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1061–62 (Del. Ch. 2006) ("[T]he common law ought to be especially chary about relieving sophisticated business entities of the burden of freely negotiated contracts."); *Progressive Int'l Corp*, *supra*, 2002 WL 1558382, at *2 ("[I]t would be highly unusual for a court to conclude that the terms of a negotiated . . . agreement between two commercial entities were so fundamentally unfair that a court must act as a guardian for one of the parties.").

16. Plaintiff's primary argument is that the arbitration procedure's "complete ban on discovery or motions practice" makes the arbitration unfair and substantively

unconscionable.[11] Plaintiff contends that because Defendant "is in exclusive possession of the information relevant to the parties' claims", the arbitration provision achieves an unconscionable result."[12] Of course, under Delaware law this Court is required to determine whether the arbitration agreement was unconscionable at the time it was entered into, not when later circumstances make the agreement appear unfair in hindsight. *Tulowitzki,* 396 A.2d at 961. The cases cited by Plaintiff in which courts held that arbitration agreements that did not permit discovery were unconscionable involved contracts of adhesion between parties of greatly unequal bargaining power.[13] In each of the cases the Court concluded that the agreement was procedurally unconscionable since it was presented to the plaintiff as a "take it or leave it" proposition leaving the party with no meaningful choice. On the other hand, in *Tierra Right of Way Servs. v. Abengoa Solar Inc.*, No. CV-11-00323, 2011 U.S. Dist. LEXIS 61876, *15-16 (D. Ariz. June 9, 2011), the district court held that the failure of an arbitration agreement to provide for discovery in a contract between two corporate entities was not unconscionable. Absent any showing that Defendant took advantage of unequal bargaining power or obtained Plaintiff's agreement to the arbitration provision through some other unfair or fraudulent means, this Court concludes that the lack of a means by which the parties can take discovery does not render the agreement unconscionable.

17. Plaintiff further contends that the arbitration agreement is "one-sided" because "[w]hile the terms of the provision are facially neutral, they clearly favor

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[11] Pl.'s Br. Opp. to Mot. Compel, p. 8.
[12] *Id.* at 8.
[13] *Id.* at 9; In *Booker v. Robert Half Int'l, Inc.*, 315 F. Supp. 2d 94 (D.D.C. 2004), the court concluded that the arbitration provision in an employment agreement was not unconscionable, but held that because the agreement did not provide for discovery, it was unenforceable pursuant to circuit precedent requiring that arbitration provisions in employment agreements "provide[] for more than minimal discovery." *Id.* at 102-03.

Defendant."[14] Plaintiff states that once he sold his business to Defendant, Plaintiff "lost access to any of the company's files."[15] He contends that, consequently, he does not have access to the information with which Defendant will attempt to prove its damages and attorneys' fees claims in arbitration. Plaintiff also contends that procedural defenses such as the statute of limitations that "would be a complete defense to a claim are lost in the baseball-style arbitration here that requires a party to submit a [damages] number lest it be stuck with the opponent's submission."[16] The Court disagrees. As noted above, the fact that the parties have agreed that they will arbitrate without a procedure for discovery does not, by itself, make the arbitration agreement unconscionable. The arbitration provision does not relieve Defendant of providing adequate evidentiary proof of its claims, but only limits Plaintiff's ability to review that proof in advance. In addition, the Court does not read the arbitration agreement as precluding the parties from raising any procedural defense that they may possess, or from taking the position in arbitration that the appropriate result is no recovery at all. Plaintiff has the opportunity to brief the issue of the statute of limitations and argue that any claims or damages arising after a particular date should be time barred or are not claims or damages for which Plaintiff can be held responsible.

18. The Plaintiff and Defendant were "sophisticated" commercial parties who negotiated the Stock Purchase Agreement at arms-length with the representation of counsel, and agreed that it was in the parties' interests to resolve disputes by arbitration. Plaintiff expressly agreed that "[i]t is the *desire and intent of the Parties that such arbitration be held without any discovery, deposition or motion practice*." Plaintiff seeks to be relieved of its agreement, and argues that the sophistication of the parties cannot save a contract provision

[14] Pl.'s Br. Opp. to Mot. Compel, pp. 11-12.
[15] *Id.*
[16] *Id.* p. 13.

that is substantively unconscionable. The cases he cites in support of this argument, however, are inapposite. In *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93 (2008), the arbitration agreement was contained in a form loan contract drafted by the defendant company and over which the plaintiff consumers had no opportunity to negotiate. *Id.* at 95. A plurality of justices concluded that the agreement was unconscionable in large part because of the "inequality of bargaining power between the parties and the oppressive and one-sided nature" of the agreement. *Id.* at 108. Similarly, in *Unimax Express, Inc. v. Cosco N. Am., Inc.*, No. CV 11-02947, 2011 U.S. Dist. LEXIS 136110 (C.D. Cal. Nov. 28, 2011), the district court found unconscionable an arbitration agreement contained in a "standardized" contract of adhesion that was drafted by the defendant and presented to plaintiffs as a "take it or leave it" proposition. *Id.* at *9-10.

19. In summary, this Court agrees with the reasoning stated by the court in *Tierra Right of Way Servs.*, as follows:

> Indeed, the Supreme Court has recognized that although arbitration procedures "might not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" An agreement between two corporate parties to decrease expected litigation costs is not unconscionable, particularly when both sides must adhere to the same prohibitions. Ultimately, this Court is unwilling to interfere with the parties' desire to choose arbitration rules aimed at minimizing potential litigation expense simply because actual litigation has now come to pass.

2011 U.S. Dist. LEXIS at *15-16 (arbitration agreement between two commercial corporate entities that did not permit discovery was not unconscionable; citations omitted).

20. The parties had a valid agreement to arbitrate that is not unconscionable[17], and the specific dispute in this action falls squarely within the scope of the arbitration

[17] Defendant contends, and Plaintiff denies, that the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011) foreclosed challenges to arbitration agreements on the grounds that the agreement is unconscionable under state law. Based on its

provision contained in the Stock Purchase Agreement. Defendant's Motion to Compel Arbitration should be GRANTED.[18]

21. Pursuant to G.S. § 1-569.7(g), "[i]f the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration." As the Complaint's allegations are defenses to Defendant's indemnification claim, and as Defendant's indemnification claim is subject to arbitration, the Court concludes that the current action should be stayed. Defendant's Motion to Stay Proceedings should be GRANTED.

THEREFORE, IT IS ORDERED that Defendant's Motion to Stay Proceedings and Compel Arbitration is GRANTED and this action is hereby STAYED pending arbitration.

This the 15th day of January, 2016.

/s/ Gregory P. McGuire
Gregory P. McGuire
Special Superior Court Judge
for Complex Business Cases

conclusion that the arbitration agreement here is not unconscionable the Court need not address this argument.

[18] Plaintiff's alternative request that the Court enforce the arbitration agreement pursuant to Del. Code. tit. 6, § 2-302(1) is denied because the Court concludes that the agreement was not unconscionable at the time it was made.