IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JULIA BARLOW,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 3:08-CV-1442-N
	§	
RUSSELL STOVER CANDIES, INC.,	§	
	§	
Defendant.	§	

ORDER

This Order addresses Defendant Russell Stover Candies, Inc.'s ("Russell Stover") motion to compel arbitration [7]. Because the agreement provides that an arbitrator will decide questions of arbitrability, this Court grants Defendant's motion.

For on-the-job injuries, in place of providing workers' compensation insurance coverage, Russell Stover has established the Russell Stover Candies, Inc. Texas Employee Injury Benefit Plan (the "Plan"). Employees who want to be eligible for Plan benefits must sign the Election and Arbitration Agreement. Plaintiff Julia Barlow brings a negligence lawsuit against her former employer Russell Stover, arising out of an alleged on-the-job injury occurring around August 18, 2006. Russell Stover moves to compel arbitration of Barlow's negligence claim, citing the Election and Arbitration Agreement that Barlow signed on November 3, 2003, *see* Def. App. 41, and arguing that she futher ratified her agreement to arbitrate by accepting and retaining disability benefits under the Plan. Barlow challenges the Plan's validity on substantive grounds and also challenges the arbitration provision's

enforceability with regards to her. She argues that she is not subject to the Election and Arbitration Agreement because she never checked either of the boxes on its signature page indicating whether she accepted or rejected its terms, though she signed it.

The Fifth Circuit, citing Supreme Court precedent, has identified the starting point for resolving this type of dispute. First, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which [s]he has not agreed to submit. *Tittle v. Enron Corp.*, 463 F.3d 410, 418 (5th Cir. 2006) (citing *AT&T Techs., Inc. v. Commc'ns Workers of America*, 475 U.S. 643, 648 (1986) (internal citation omitted)). Given that arbitrators derive their authority from an agreement between the parties to arbitrate, the question of arbitrability is thus usually an issue for judicial determination. *See id.* However, while the general rule is that "question[s] of whether the parties agreed to arbitrate [are] to be decided by the court, not the arbitrator," an exception applies in cases where the parties unmistakably provide for the arbitrator to decide. *Agere Sys., Inc. v. Samsung Elecs. Co. Ltd.*, 560 F.3d 337, 339 (5th Cir. 2009) (quoting *AT&T Techs., Inc.*, 475 U.S. at 649). Thus, even the issue of arbitrability "may be submitted to binding arbitration . . . if there has been a clear demonstration that the parties contemplated it." *Id.* (citing *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Indep. Truck Drivers Union, Local No. 1*, 611 F.2d 580, 584 (5th Cir. 1980)).

Allowing the arbitrator to rule on threshold questions of arbitrability, including the validity of the arbitration agreement itself, opens up the possibility of the arbitrator invalidating the very contract from which he derives his authority to begin with. *See*

Terminix Int'l Co. V. Palmer Ranch Ltd., 432 F.3d 1327, 1331-32 (11th Cir. 2005). On the other hand, a contrary approach, in which courts in all instances decided gateway arbitrability issues notwithstanding the parties' agreement otherwise, would permit courts to deny effect to an arbitration provision they later find to be perfectly enforceable. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448 (2006). The "clear and unmistakable" standard thus strikes the necessary balance in "ensur[ing] judicial enforcement of privately made agreements to arbitrate." *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-945 (1995) (quoting, at 945, *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-220 (1985)).

The Arbitration Agreement in this case states that procedures will be governed by the American Arbitration Association's National Rules for the Resolution of Employment Disputes (the "AAA Rules"). *See* Def. App. 23-24. Rule 6 of the AAA Rules states, "The arbitrator shall have the power to rule on his own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." *See id.* at 58. Though there is no Fifth Circuit precedent directly on point, other Circuits have held that an arbitration agreement incorporating the AAA rules authorizing the arbitrator to decide arbitrability is "clear and unmistakable" evidence of the parties' intent to submit gateway questions of arbitrability to the arbitrator. *See, e.g., Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005); *Terminix Int'l Co. v. Palmer Ranch Ltd.*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 472-473 (1st Cir. 1989) (dealing with

analogous arbitration rules of the International Chamber of Commerce). In addition, a pertinent provision of the Election and Arbitration Agreement in this case states, "The type of claims covered by this Agreement include, but are not limited, to any and all . . . claims challenging the validity or enforceability of the Agreement (in whole or in part) or challenging the applicability of this Agreement to a particular dispute or claim." *See* Def. App. 39. The Court finds that the incorporation of AAA Rule 6 and the relevant provision of the Election and Arbitration agreement itself are enough to constitute clear and unmistakable evidence that the parties agreed to submit the threshold question of arbitrability, i.e., whether there was an enforceable agreement to arbitrate in this case, to the arbitrator.

Accordingly, the Court grants Defendant's motion to compel arbitration and orders Plaintiff to submit any claims she has to binding arbitration in accordance with the terms of the Election and Arbitration Agreement, including any challenges to the enforceability of the agreement. Because all of the issues are arbitrable in this case, dismissal is appropriate. *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992). Thus, the Court dismisses the action without prejudice.

Signed May 11, 2009.

David C. Godbey
United States District Judge