UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:23-cv-20364-KMM

DOMENICO CALCATERRA,

Plaintiff,

v.

BAPTIST HEALTH SOUTH FLORIDA, INC., and
BETHESDA HEALTH PHYSICIAN GROUP, INC.

Defendant.
_____/

ORDER

THIS CAUSE came before the Court upon Defendants Baptist Health South Florida, Inc. ("Baptist") and Bethesda Health Physician Group, Inc.'s ("Bethesda") (collectively, "Defendants") Renewed Motion to Compel Arbitration or in the Alternative, Motion to Dismiss Amended Complaint. ("Mot.") (ECF No. 11). Plaintiff Domenico Calcaterra ("Plaintiff") filed a response in opposition. ("Resp.") (ECF No. 13). Defendants filed a reply. ("Reply") (ECF No. 14). The matter is now ripe for review.

I. BACKGROUND[1]

Plaintiff brings this action against his former employers, Bethesda and Bethesda's owner, Baptist, alleging that his employment was terminated in retaliation for complaining about various issues, in violation of the False Claims Act ("FCA"), 31 U.S.C. § 3730(h). *See generally* Am. Compl.

In January 2020, Plaintiff was employed as Chief of Cardiac Surgery by Bethesda and Baptist, companies in the business of providing hospital and other medical services. *Id.* ¶ 18. In

[1] The background facts are taken from Plaintiff's Amended Complaint, ("Am. Compl.") (ECF No. 9) and are accepted as true for purposes of ruling on the Motion. *Bacon v. McKeithen*, No. 5:14-CV-37-RS-CJK, 2014 WL 12479640, at *1 (N.D. Fla. Aug. 28, 2014).

consideration for his employment, Plaintiff and Defendant Bethesda duly signed a Physician Employment Agreement (the "Employment Agreement"). *See* Mot. at 18; (ECF No. 11-1). The Employment Agreement contains an arbitration provision, which requires the Parties to arbitrate any claim "arising out of or relating to" the Employment Agreement (the "Arbitration Clause"):

> Except as otherwise provided herein, any controversy, dispute, disagreement or claim arising out of or relating to this Agreement, or any alleged breach thereof, or the subject matter thereof, shall be settled exclusively by binding arbitration, which shall be conducted in Palm Beach County, Florida in accordance with the American Health Lawyer's Association, Alternative Dispute Resolution Service, Rules of Procedure for Arbitration, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction. EACH PARTY EXPRESSLY AND IRREVOCABLY WAIVES ALL RIGHTS TO ANY TRIAL BY JURY IN ALL LITIGATION RELATING TO OR ARISING OUT OF THIS AGREEMENT.

Mot. at 3; (ECF No. 11-1) at 12–13.

Defendants fired Plaintiff in March 2021. Am. Compl. ¶ 76. Thereafter, notwithstanding the Arbitration Clause, Plaintiff initiated this action in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, which Defendants subsequently removed to federal court. *See* (ECF No. 1). Now, Defendants seek an order either compelling arbitration and staying this action or, alternatively, dismissing the case for failure to state a claim. *See generally* Mot.

II. LEGAL STANDARD

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, *et seq*., provides a federal "policy favoring arbitration." *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022). But "[t]he federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Id*. (citation omitted). Under both federal and Florida law, a party has a right to arbitrate where: (1) a valid, written agreement exists between the parties containing an arbitration clause; (2) an arbitrable issue exists; and (3) the right to arbitration has not been waived. *Sims v.*

Clarendon Nat. Ins. Co., 336 F. Supp. 2d 1311, 1326 (S.D. Fla. 2004); *see also Marine Envtl. Partners, Inc. v. Johnson*, 863 So. 2d 423, 426 (Fla. 4th DCA 2003); *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999).

The FAA provides that pre-dispute agreements to arbitrate "evidencing a transaction involving commerce" are "valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA further states:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3.

Confronted with a facially valid arbitration agreement, "district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 213 (1985). Thus, if the aforementioned criteria are met, the Court is required to issue an order compelling arbitration. *See John B. Goodman Ltd. P'ship v. THF Const., Inc.*, 321 F.3d 1094, 1095 (11th Cir. 2003) ("Under the FAA, 9 U.S.C. § 1 *et seq.*, a district court must grant a motion to compel arbitration if it is satisfied that the parties actually agreed to arbitrate the dispute."); *Hemispherx Biopharma, Inc. v. Johannesburg Consol. Invs.*, 553 F.3d 1351, 1366 (11th Cir. 2008) ("The role of the courts is to rigorously enforce agreements to arbitrate.").

A motion to compel arbitration is treated generally as a Federal Rule of Civil Procedure 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. *See, e.g., Shea v. BBVA Compass Bancshares, Inc.*, 2013 WL 869526 at *2 n.3 (S.D. Fla. 2013). Accordingly, the Court

may consider matters outside the four corners of the complaint. *Mamani v. Sanchez Berzain*, 636 F. Supp. 2d 1326, 1329 (S.D. Fla. 2009).

III. DISCUSSION

In the instant Motion, Defendants move the Court for an order directing Plaintiff to arbitrate the dispute and staying the instant Action pending the completion of arbitration. *See generally* Mot. Defendants further request that, if the Court declines to compel arbitration, the Amended Complaint be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. *See id.* In response, Plaintiff argues that the language in the Arbitration Clause of the Employment Agreement should be construed narrowly. *See* Resp. ¶ 3. Plaintiff further asserts that his claim under the FCA would exist independent of the Employment Agreement, thus indicating that the FCA claim is not an arbitrable issue. Here, the Court concludes that arbitration is appropriate because (1) the Employment Agreement includes a valid arbitration agreement as to both Defendants, (2) the instant dispute is an arbitrable issue, and (3) the right to arbitration has not been waived. *See Sims*, 336 F. Supp. 2d at 1326.

A. The Arbitration Agreement Is Valid as to Both Defendants

The Court's analysis begins with an examination of the FAA. Pursuant to the FAA, "[a] party aggrieved by the alleged failure . . . of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. The FAA also provides that arbitration agreements "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. Further, the FAA mandates that a district court must stay its proceedings should it find an issue is arbitrable under the arbitration agreement, and empowers a district court to compel arbitration if

there has been a failure to arbitrate under an otherwise valid agreement to do so. 9 U.S.C §§ 3–4. The FAA thus "establishes a federal policy favoring arbitration requiring that we rigorously enforce agreements to arbitrate." *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (internal quotations and citations omitted).

Defendant Bethesda and Plaintiff are parties to the Employment Agreement and are indisputably subject to the Arbitration Clause therein. Defendant Baptist, however, is not a signatory nor a party to the Employment Agreement. Mot. at 8, (ECF No. 11-1) at 2. At issue in this analysis is whether the Arbitration Clause is valid as to Defendant Baptist. Defendants argue that even as a non-signatory, Defendant Baptist may enforce the Arbitration Clause. *Id.* at 8. Plaintiff does not appear to dispute the validity of an Arbitration Clause as to both Defendants, in effect conceding the issue. *See Ramsey v. Bd. of Regents of Univ. Sys. of Georgia, No. 1:11-CV-3862-JOF-JSA,* 2013 WL 1222492 (N.D. Ga. 2013), *aff'd,* 543 F. App'x 966 (11th Cir. 2013) ("When a party fails to address a specific claim, or fails to respond to an argument made by the opposing party, the Court deems such claim or argument abandoned."). The Court nevertheless will address whether the Arbitration Agreement is valid as to both Defendants.

Florida law governs the Employment Agreement and the Arbitration Clause therein. *See* Mot. at 3; (ECF No. 11-1) at 12 ("This Agreement is made and delivered in, and shall be governed by and construed in accordance with, the applicable laws of the State of Florida."). Accordingly, for purposes of determining whether Baptist may enforce the Arbitration Clause, the Court must apply Florida law. *See, e.g.*, *Judge v. Unigroup, Inc.*, No. 8:17-CV-201-T-23TGW, 2017 WL 3971457, at *4 (M.D. Fla. Sept. 8, 2017) (applying Florida law where agreement stated it was governed by Florida law, applying Ohio law where agreement stated it was governed by Ohio law, and applying Virginia law where agreement stated it was governed

by Virginia law); *see also Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 255 (5th Cir. 2014) ("The relevant Arizona law, made controlling by the Provider Agreement's choice-of-law clause, supports the non-signatory Defendants' motion to enforce the agreement to arbitrate against the Plaintiffs based on state-law equitable estoppel doctrine.").

Under Florida law, ordinarily, non-parties to a contract cannot compel parties to a contract to arbitrate. *See Florida Power & Light Co. v. Road Rock, Inc.*, 920 So. 2d 201, 203 (Fla. 4th DCA 2006). There is, however, an exception: a non-signatory can compel arbitration if it is determined that the party is a third-party beneficiary to the contract. *Id.* at 203 (citing *Nestler-Poletto Realty, Inc. v. Kassin*, 730 So. 2d 324, 326 (Fla. 4th DCA 1999)). "A third party is an intended beneficiary, and thus able to sue on a contract, only if the parties to the contract intended to primarily and directly benefit the third party." *Aetna Cas. & Sur. Co. v. Jelac Corp.*, 505 So. 2d 37, 38 (Fla. 4thDCA 1987). "Florida looks to the 'nature or terms of a contract' to find the parties' clear or manifest intent that it 'be for the benefit of a third party.'" *Jenne v. Church & Tower, Inc.*, 814 So. 2d 522, 524 (Fla. 4th DCA 2002) (quoting *Am. Sur. Co. of N.Y. v. Smith*, 130 So. 440, 441 (Fla. 1930)).

Defendants argue that Defendant Baptist can enforce the arbitration provision pursuant to the doctrine of equitable estoppel. Mot. at 8. In support, Defendants rely on this Court's decision in *Smith v. Beverly Hills Club Apartments,* LLC, 2016 WL 344975 (S.D. Fla. Jan. 28, 2016). In that case, this Court recognized that pursuant to the doctrine of equitable estoppel under Florida law, "a non-signatory may compel arbitration 'when the signatory to the contract containing the arbitration clause raises allegations of concerted conduct by both the non-signatory and one of more of the signatories of the contract.'" *Id.* at *7 (quoting *Armas v. Prudential Sec., Inc.*, 842 So. 2d 210, 212 (Fla. 3d DCA 2003)). Here, Defendants argue that Plaintiff used a "broad

brush" to allege liability against Defendants, "grouping them together throughout the Complaint and Amended Complaint." Mot. at 10. They further argue that, given the claims against both Defendants "are premised on the same facts and allegations," Defendant Baptist may enforce the Arbitration Clause. *Id.*

The Court agrees. Consistent with this Court's holding in *Smith*, Plaintiff's Amended Complaint "raises allegations of concerted conduct by both the non-signatory" and Defendant Bethesda. *Smith*, 2016 WL 344975, at *7; *see also* Am. Compl. ¶¶ 8–13. Specifically, the Amended Complaint raises allegations of misconduct against Defendants Baptist and Bethesda together, describing Defendants Baptist and Bethesda as a "single entity" with Bethesda's human resource functions "fully integrated" with that of Baptist. *Id.* ¶¶ 9, 10. As such, the Court finds a valid arbitration agreement as to both Defendants exists in the Employment Agreement.

B. Plaintiff's Claim Is Within the Scope of the Arbitration Clause

Having concluded that the Arbitration Clause in the Employment Agreement is valid, the Court must next determine whether Plaintiff's claim falls within the scope of the Employment Agreement. "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr, Corp.*, 460 U.S. 1, 24–25 (1983). "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986). "In the absence of any express provision excluding a particular grievance from arbitration . . . only the

most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Steelworkers v. Warrior & Gulf Navig. Co.*, 363 U.S. 574, 584–85 (1960).

In the instant case, the plain language of the Arbitration Clause states that any claim "*arising out of or relating to this Agreement* or any alleged breach thereof, or the subject matter thereof, shall be settled exclusively by binding arbitration." Mot. at 3; (ECF No. 11-1) at 12 (emphasis added). Defendants make several arguments in support of the proposition that the language "arising out of or relating to" in the Arbitration Clause should be broadly construed to encompass the FCA claim. Mot. at 11. Defendants first rely on several decisions that have construed the language "arising out of or relating to" broadly for contracting parties, including this Court's decision in *Shea v. BBVA Compass Bancshares, Inc.*, 2013 WL 869526, at *5 (S.D. Fla. 2013), where the language in the arbitration clause "arising out of or relating to" was deemed broad enough to encompass "virtually all disputes between contracting parties." *See also Schatt v. Aventura Limousine & Transportation Serv., Inc.,* No. 10–CV–22353, 2010 WL 4942654, at *4 (S.D. Fla. Nov. 30, 2010) ("[T]he phrase 'arising out of or relating to' the contract has been interpreted broadly as to encompass virtually all disputes between contracting parties." (quoting *Seifert,* 750 So.2d at 636)); *Brown v. ITT Consumer Fin. Corp.,* 211 F.3d 1217, 1221–22 (11th Cir. 2002) (rejecting argument that arbitration provision was too broad and holding that agreement to arbitrate "all claims between the parties" applied not just to claims arising out of the parties' contract).

Defendants further make reference to Third and Fourth District Courts of Appeal of Florida decisions that concerned "nearly identical" arbitration clauses in employment agreements as the present case. Reply. at 5; *Delaurier v. Am. Welding Soc., Inc.*, 881 So. 2d 613 (Fla. 3d DCA 2004); *Hospicecare of Se. Fla., Inc. v. Major*, 968 So. 2d 117 (Fla. 4th DCA 2007). Those

decisions held that whistle-blower/retaliation claims under the Florida Whistleblower Act, much like the FCA claim in the present case, are subject to arbitration because they arise out of or relate to the underlying employment agreements. *See Delaurier*, 881 So. 2d at 614 ("It is clear that the appellant's claim against his former employer under the Whistle Blower Act . . . is encompassed by the arbitration clause in the parties' employment contract which provides that '[a]ny controversy or claim . . . *arising out of or relating to this Agreement* shall be submitted to arbitration . . .'"); *Hospicecare of Se. Fla., Inc.* 968 So. 2d, at 119 ("When read together, both the plain language of the employment agreement ['arising out of or relating to'] and the express statutory language of the Florida Whistle-blower's Act direct the conclusion that [plaintiff's] Whistle-blower claim is arbitrable."). Defendants conclude that given the FCA claim relates to Plaintiff's employment termination and conduct throughout his employment, and the Employment Agreement requires the parties to "comply with all applicable federal, state and local laws, rules and regulations" including the FCA, such claim is "arising out of or relating to" the Employment Agreement and must be arbitrated. Reply. at 6.

In response, Plaintiff argues that the arbitration provision should exclude the FCA claim because the language of the provision explicitly limits the scope of the clause to disputes arising from or relating to the Employment Agreement, rather than "claims that more broadly arise from or relate to the relationship between the parties." Resp. at 5. In support, Plaintiff cites to several out of Circuit cases, including the Sixth Circuit case U*.S. ex rel. Paige v. BAE Sys. Tech. Sols. & Servs., Inc.*, 566 F. App'x 500 (6th Cir. 2014). *Id.* There, the Sixth Circuit reversed a district court's holding that arbitration is not required for an FCA retaliation claim because "the terms of the Employment Agreement do not contemplate an FCA retaliation claim." *Paige*, 566 F. App'x at 504. The Sixth Circuit found that the FCA retaliation claim is not "a claim for violation of the

Employment Agreement; it is completely separate from the contract and asserts an independent claim that would exist even without the contract." *Id.*

Even if this Court were persuaded to adopt the Sixth Circuit's decision, along with the other out-of-Circuit cases Plaintiff cites, these cases are inapposite. For example, the arbitration clause in *Paige*—unlike the Arbitration Clause here—contains narrower language limiting "the scope of the clause to 'disputes *arising*' under the terms of [the] agreement and does not include claims '*related*' to the agreement or that arise out of the relationship between the parties." *See Paige*, 566 F. App'x, at 504 (emphasis added). Indeed, the Sixth Circuit distinguished the arbitration clause in question from other Sixth Circuit cases where the clause included the additional language "related to" the Agreement, which broadens the scope of a potential arbitration. *See e.g. NCR Corp. v. Korala Associates, Ltd.,* 512 F.3d 807, 812 (6th Cir. 2008) (addressing the scope of an arbitration provision including "any controversy or claim arising out of or related to" the agreement); *Panepucci v. Honigman Miller Schwartz & Cohn LLP,* 281 F. App'x 482, 486 (6th Cir. 2008) (addressing the scope of an arbitration provision including "a controversy or claim arising under or related to" the contract); *Fazio v. Lehman Bros., Inc.,* 340 F.3d 386, 396 (6th Cir. 2003) (addressing the scope of an arbitration provision covering "[a]ny controversy arising out of or relating to any of my accounts, to transactions with you for me, or to this or any other agreement or the construction, performance, or breach thereof").

Plaintiff also cites to the Eleventh Circuit's decision in *Doe v. Princess Cruise Lines, Ltd*., 657 F.3d 1204 (11th Cir. 2011), which held that some of the plaintiff's claims, which arose from a sexual assault that occurred while the plaintiff was employed for a cruise ship, were not subject to arbitration. However, the Eleventh Circuit explicitly rested those claims' exclusion on language in an arbitration provision that is not applicable in the Arbitration Clause in this case.

Id. at 1218–19. Specifically, the provision at issue provided that the defendant and plaintiff agreed to arbitrate "any and all disputes, claims, or controversies whatsoever . . . relating to or in any way arising out of or connected with the Crew Agreement, these terms, or services performed for the Company." *Id.* at 1214–15. The Eleventh Circuit found that "the plain language of the arbitration provision imposes the limitation that, to be arbitrable, the dispute between Doe and the cruise line must relate to, arise from, or be connected with her crew agreement or the employment services that she performed for the cruise line." *Id.* at 1217–18. The limitation described by the Eleventh Circuit in *Doe* was a function of the text of the arbitration clause in that case.

In relying on *Doe*, this Court in *Haasbroek v. Princess Cruise Lines, Ltd.*, 286 F. Supp. 3d 1352, 1359 (S.D. Fla. 2017) rejected the argument that certain claims arising from an alleged sexual assault were not subject to arbitration where "noticeably absent" from the arbitration clause was "any limitation narrowing the scope to only those disputes, claims, or controversies" set forth in the relevant agreement. Indeed, this Court recognized that claims may still be subject to arbitration, even if they would exist in the absence of an employment relationship pursuant to the underlying agreement. *Id.* at 1358–1359. Moreover, *Doe* and *Haasbroek* concern claims related to sexual assault, in contrast to the present case where Plaintiff's employment retaliation claim derives from his employment status.

Accordingly, the Court finds that Plaintiff has not proffered any meritorious argument that the Arbitration Clause excludes the instant FCA claim. Plaintiff's FCA claim involves a series of complaints and disputes in connection with his Employment Agreement, which include challenging the termination of his employment relationship with Bethesda. Am. Compl. ¶¶ 22–68. The FCA claim is clearly "arising out of or relating to" the underlying Employment

Agreement. The Court therefore finds that Plaintiff's claim is expressly provided for in the Arbitration Clause and Defendants have chosen to arbitrate.

C. Defendants Did Not Waive the Right to Arbitrate

Finally, the Court must determine whether any party has waived the right to arbitrate. *See Sims*, 336 F. Supp. 2d at 1326. Though the right to arbitration can be waived, "federal law favors arbitration [and] any party arguing waiver of arbitration bears a heavy burden of proof." *Stone v. E.F. Hutton & Co.*, 898 F.2d 1542, 1543 (11th Cir. 1990) (per curiam). To determine whether a waiver has occurred, the Court first considers "whether 'under the totality of the circumstances, the party has acted inconsistently with the arbitration right.'" *Gutierrez v. Wells Fargo Bank, NA*, 889 F.3d 1230, 1236 (11th Cir. 2018) (quoting *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1315–16 (11th Cir. 2002)). "A key factor in deciding this is whether a party has 'substantially invoke[d] the litigation machinery prior to demanding arbitration.'" *Id.* (quoting *S & H Contractors v. A.J. Taft Coal Co., Inc.*, 906 F.2d 1507, 1514 (11th Cir. 1990)). If the party has acted inconsistently with the arbitration right, the Court then considers "whether the party's conduct 'has in some way prejudiced the other party.'" *Id.* (quoting *Ivax*, 286 F.3d at 1316).

Here, Defendants have continuously asserted their right to arbitrate, a fact that Plaintiff does not contest. Prior to filing the instant Motion, the only other action Defendants have taken is removing this case to federal court, which is not a waiver of the right to compel arbitration. *See Vanwechel v. Regions Bank*, No. 8:17-CV-738-T-23AAS, 2017 WL 1683665, at *2 (M.D. Fla. May 3, 2017). Indeed, prior to the Parties' filing a Joint Scheduling Report, this Court stated that it would not "construe Defendants' filing of a joint scheduling report in this case as waiving

their right to arbitration." (ECF No. 19). Thus, the Court finds that Defendants have not waived the right to arbitrate.[2]

IV. CONCLUSION

Accordingly, UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that Defendant's Motion to Compel Arbitration (ECF No. 11) is GRANTED. Pursuant to 9 U.S.C. § 3, this Action is hereby STAYED until arbitration has been conducted in accordance with the terms of the agreement. The Clerk of Court is instructed to ADMINISTRATIVELY CLOSE THE CASE until the time when the stay is lifted. All pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 9th day of May, 2024.

K. M. Moore

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

c: All counsel of record

[2] Given the Court finds that arbitration is appropriate, the Court need not address Defendants' Motion to Dismiss.