

IN THE CIRCUIT COURT OF MILLER COUNTY, ARKANSAS
THIRD DIVISION

JO MURRAY, *individually and*
on behalf of An Arkansas class of similarly situated persons PLAINTIFF

VS. CASE NO. CV 2010 – 093-3

PRO SAT AND HOME ENTERTAINMENT and
DIRECTV, INC. DEFENDANTS

MEMORANDUM OPINION and ORDER DENYING DEFENDANT'S
MOTION TO DISMISS OR STAY PROCEEDINGS PENDING
ARBITRATION AND TO COMPEL ARBITRATION AND GRANTING
PLAINTIFF'S MOTION TO STRIKE

Before the Court is Defendant DIRECTV's ("DIRECTV") Motion to Dismiss or Stay Proceedings Pending Arbitration (the "Arbitration Motion") filed on May 7, 2010. The parties have thoroughly briefed the Arbitration Motion, have provided supplemental legal memorandums, and the Court heard arguments from counsel for the parties at a hearing on November 8, 2010. In addition, Plaintiff has moved to strike certain proof offered with DIRECTV's Arbitration Motion for reasons related to the competency of such proof. Upon consideration, based on the pleadings and filings of record, and the arguments of counsel, and for the reasons stated herein, the Court finds that the Arbitration Motion should be and hereby is **denied**. Plaintiff's motion to strike is **granted**.

BACKGROUND

This is a purported class action lawsuit brought by Plaintiff Jo Murray on behalf of a class of Arkansas citizens that were former subscribers to DIRECTV's satellite television services and paid an early cancellation fee after terminating the

service. Plaintiff alleges that DIRECTV's enforcement and collection of its early cancellation fee violates Arkansas law in that it is deceptive and unconscionable, and thus, is in violation of the Arkansas Deceptive Trade Practices Act ("ADTPA").

In response to the action, DIRECTV moved to dismiss or stay the case in favor of arbitration and to compel arbitration. In essence, DIRECTV argues that Plaintiff would have received its Customer Agreement containing an agreement to arbitrate after service began in her first billing statement, and tacitly agreed to arbitration by continuing to use DIRECTV's services thereafter. As such, DIRECTV says this case should be arbitrated.

Plaintiff argues that DIRECTV has failed to meet its burden of proof on the motion, because DIRECTV submits only the affidavit of one of its employees providing testimony without personal knowledge as to the actions of another third party vendor. Plaintiff also argues that the Arbitration Motion is not adequately supported with proof, because DIRECTV offers only certain exemplar documents as evidence rather than properly authenticated documents specifically related to the Plaintiff and her previous DIRECTV account. Plaintiff contends further that the arbitration agreement was not adequately communicated to the Plaintiff, and even if it had been communicated that Plaintiff never agreed to arbitration given that she cancelled so quickly after any possible receipt of the agreement. Finally, Plaintiff also argues that the arbitration clause at issue is not valid, because it fails Arkansas' law requiring mutual obligations between parties to a contract.

The parties have also provided supplemental briefings related to a recent opinion from the United States Supreme Court, *AT&T Mobility LLC v. Concepcion*, 563 U.S. ____ (2011)(“*Concepcion*”), which this Court has also considered in rendering this Order.

SUMMARY OF FACTUAL RECORD

The Court finds the following facts from the factual record developed thus far in this action.

1. DIRECTV admits that its Texarkana, Arkansas independent sales agent, PRO SAT, purposely failed to provide Plaintiff any DIRECTV documentation or DIRECTV forms typically required by DIRECTV in accordance with its approved procedures and practices for its independent agents.

2. DIRECTV has no documentary proof related to Plaintiff at either the point of sale, or when its agent was installing the DIRECTV equipment in her home.

3. Additionally, DIRECTV has no documentary proof signed by the Plaintiff in support of its Arbitration Motion, such as a signed form containing the subject arbitration clause.

4. Instead, DIRECTV relies on an affidavit from its employee Valerie W. McCarthy stating that another third party vendor, DST Output, produces and mails its monthly billing statements to its customers, which also sometimes contain other documents directed to customers.¹

¹ Ms. McCarthy’s Affidavit was provided as Exhibit A to the Arbitration Motion. Paragraph references to this affidavit will be “McCarthy Aff. Para. ____.”

5. Ms. McCarthy states that DIRECTV's contracted vendor should have mailed its Customer Agreement containing the subject arbitration clause to the Plaintiff with her first monthly billing statement.

6. Ms. McCarthy's affidavit, dated May 5, 2010, and its exhibits provide the following:

- a. DST Output is DIRECTV's vendor responsible for producing and mailing customer billing statements. McCarthy Aff. Para. 4.
- b. DST Output has an operating center in Hartford, Connecticut. McCarthy Aff. Para. 4.
- c. DST Output uses automated equipment to print out customer bills, insert other documents into billing envelopes, and to mail the billing statements and any inserts to DIRECTV's. McCarthy Aff. Para. 5.
- d. Billing statement inserts could be remittance envelopes, customer agreements, and promotional material. McCarthy Aff. Para. 5.
- e. Approximately 500,00 bills (and sometimes 1,000,000) are mailed to DIRECTV customers daily. DST Output addresses the envelopes, sorts the statements by zip code, and then deposits the billing statements into the U.S. Mail. McCarthy Aff. Para. 7.

- f. On January 25, 2007, Plaintiff Jo Murray ordered DIRECTV's satellite television service through a retail dealer in Texarkana, Arkansas (identified in this litigation as PRO SAT). McCarthy Aff. Para. 8.
- g. The next day, on January 26, 2007, Plaintiff Murray's DIRECTV service was activated. McCarthy Aff. Para. 8.
- h. To Ms. McCarthy's knowledge, DST Output should have mailed Ms. Murray her first billing statement "on or about" January 27, 2007, which should have included DIRECTV's Customer Agreement "then in effect." McCarthy Aff. Para. 9.
- i. Ms. McCarthy's affidavit provides a copy of an exemplar first monthly billing statement, but fails to provide a copy of any billing statement specifically related to Plaintiff Murray. The affidavit also provides a copy of a Customer Agreement. Exhibits 1, 2 and 3 to the McCarthy Aff.
- j. On February 5, 2007, Plaintiff Murray cancelled DIRECTV's service. McCarthy Aff. Para. 12.

7. DIRECTV submitted a supplemental affidavit by Ms. McCarthy with its reply memorandum in further support of the Arbitration Motion.²

8. Ms. McCarthy's supplemental affidavit is dated June 11, 2010, and provides an electronic record apparently stored in DIRECTV's data systems. In her supplemental affidavit, Ms. McCarthy states that she knows DIRECTV's

² Paragraph references to Ms. McCarthy's supplemental affidavit will be "Supp. McCarthy Aff. Para. ___."

vendor DST Output should have mailed Plaintiff Murray her first billing statement "on or about January 27, 2007," based upon the attached electronic record attached to the affidavit.

9. Based upon DIRECTV's offered proof, Plaintiff Murray would have ordered DIRECTV's services on January 25, 2007, which was a Thursday.

10. Plaintiff Murray's DIRECTV service was activated on the following day, Friday, January 26, 2007.

11. Ms. McCarthy opines that DST Output would have printed and mailed Plaintiff Murray her first billing statement "on our about" that Saturday, January 27, 2007.

12. The Customer Agreement inserted into the first billing statement was neither mailed nor received until after Plaintiff Murray had ordered, activated, and began using DIRECTV's service.

13. According to Ms. McCarthy's original affidavit, Plaintiff Murray terminated DIRECTV's services on February 5, 2007, which was the following Monday.

14. DIRECTV's proof is silent as to where the first billing statement would have been mailed, but presumably it could have been mailed from Hartford, Connecticut where DST Output has its operations center.

15. It is likely that mail from Hartford, Connecticut to Texarkana, Arkansas could take several business days. Even if the first billing statement was mailed on Saturday, January 27, 2007, it could not have been received until Monday, January 29, 2007, which is highly unlikely given the distance between

the two cities and that the billing statement was most likely sent inexpensively, and thus, slowly. Regardless, Plaintiff Murray terminated DIRECTV's services within five business days of even a next business day delivery of the first billing statement.

16. Obviously, Plaintiff Murray terminated the satellite television service very quickly after it began, and certainly immediately after any possible receipt of the first billing statement containing the Customer Agreement and arbitration clause. Ms. McCarthy's original affidavit suggesting otherwise ignores the closeness of all of these events. McCarthy Aff. Para. 9.

17. Moreover, DIRECTV fails to provide a copy of Plaintiff Murray's first billing statement in support of its Arbitration Motion. Instead, it relies on an exemplar document of what a first billing statement would have appeared. Exhibits 2 and 3, McCarthy Aff. This is especially problematic given the testimony in the record from Plaintiff Murray.³

18. Plaintiff Murray testified that she did not receive the Customer Agreement in the mail. Murray Depo. 34:8-12. She also said that she did not remember "ever seeing a document like that ever" when shown a copy of the Customer Agreement. Murray Depo. 37:6-7.

19. The Customer Agreement contains the agreement to arbitrate at issue.

³ A copy of deposition transcript of Plaintiff Murray's testimony was provided in DIRECTV's class certification opposition materials as Exhibit L-2 (Exhibit 2 of Annalisa Peterson's Affidavit in opposition to Plaintiff's motion for class certification).

LEGAL ANALYSIS

Several months after the hearing was held on the Arbitration Motion, the United States Supreme Court published the *Concepcion* opinion. While the Supreme Court in *Concepcion* validated the class action waiver in AT&T Mobility's arbitration agreement, there are many distinguishing facts in this case requiring a different result. Most importantly, the parties in *Concepcion* stipulated that the arbitration agreement at issue there was adequately communicated to plaintiffs, and agreed that the arbitration provisions at issue were controlling. *Concepcion*, slip op., at 1-2. Here, Plaintiff challenges the communication of the arbitration provision, and moreover, even the sufficiency of the proof offered to establish such communication.

A. The Adequacy of DIRECTV's Proof

DIRECTV's proof in support of its Arbitration Motion is insufficient. Ms. McCarthy's original affidavit explains the actions and procedures of DIRECTV's third party and independent billing statement preparer and mailing vendor. This Court agrees with the analysis found in *Fitch v. Ellis*, 2007 Ohio 4517, 2007 Ohio App. LEXIS 3775 (Ohio Ct. App. 2007), and finds that Ms. McCarthy's original affidavit to be failing based upon her lack of personal knowledge. As such, her affidavit is not admissible under Arkansas Rule of Evidence ("ARE") 602. DIRECTV certainly could have asked its vendor for an affidavit, or taken its deposition, but decided not to do so.

Additionally, the exemplar billing statement documents attached to Ms. McCarthy's original affidavit are also inadmissible under ARE 901 in that they are not properly authenticated, and moreover, are not pertinent to Plaintiff's customer account with DIRECTV. Copies of Plaintiff's Murray's actual billing statements would have been relevant under ARE 401 and could have been properly authenticated under ARE 901, but DIRECTV chose not to take this proper course of action as well.

Similarly, Ms. McCarthy's supplemental affidavit filed with DIRECTV's opposition memorandum to Plaintiff's motion to strike fails to properly authenticate the attached document under ARE 901. More importantly, Ms. McCarthy's testimony by way of affidavit fails to demonstrate how the attached record is proof of what its third party independent vendor actually did. Again, proof from the vendor could have and should have been produced in order to prove the third party's actions. In addition, both of Ms. McCarthy's affidavits are inadmissible hearsay under AREs 801 and 802. For all of these reasons, the Court grants Plaintiff's motion to strike.

B. Contract Analysis.

Even if the Court were to presume that all of DIRECTV's proof filed in support of its Arbitration Motion is admissible and true, the Arbitration Motion must still be denied. In making this decision, this Court is mindful of the recent United States Supreme Court decision in *Concepcion*.

Concepcion invalidated a California state specific law that invalidated arbitration agreements that included class action bans within them. But the facts

in this case are very different from those in *Concepcion*. To begin with, the parties in *Concepcion* stipulated to the existence and substance of the arbitration agreement in question in that action. In other words, the *Concepcion* plaintiffs admitted to the applicability the arbitration agreement, and that it had been adequately communicated to them. Here, however, Plaintiff challenges the existence of any such agreement.

It is established law that in order to make a contract there must be a meeting of the minds as to all terms, using objective indicators. *Alltel Corp. v. Sumner*, 360 Ark. 573, 576 (2005). Likewise, all parties must manifest assent to the particular terms of the contract. *Id.* Finally, “[f]or a party to assent to a contract, the terms of the contract must be effectively communicated.” *Id.* at 577. This remains the law even after *Concepcion* as the concurring opinion noted that “Contract formation is based on the consent of the parties, and we have emphasized that ‘[a]rbitration under the [FAA] is a matter of consent.’” *Concepcion*, *Id.* (Thomas, J., concurring) (additional citations omitted).

Here, as in the *Sumner* case, DIRECTV asks this Court to infer that its independent vendor followed its billing statement preparation and mailing procedures based solely upon an affidavit, not of its vendor, but instead by one of DIRECTV’s employees. In *Sumner*, the Arkansas Supreme Court held that “there must be *specific evidence* that the company implemented those practices and procedures such that notice to the affected party can be reasonably inferred from the circumstances.” *Id.* at 578 (Emphasis added). Contrary to this ruling, DIRECTV has not provided the requisite “*specific evidence*” as to the billing

statement preparation and mailing practices of the vendor, or anything specific to Plaintiff Murray (such as copies of her own billing statements). The lack of specific proof from DST Output and the billing statements pertinent to Plaintiff Murray require the denial of DIRECTV's Arbitration Motion under *Sumner*.

This Court also finds that even if this Court were to presume that the arbitration agreement was adequately communicated to Plaintiff as required by *Sumner*, that it is still not effective. First, the arbitration agreement was communicated after service had already begun. Second, Plaintiff Murray terminated DIRECTV's service so quickly after she could have possibly received the first billing statement, that the arbitration clause could not have been accepted by her continued use of DIRECTV's services. It is even possible that Plaintiff Murray terminated the services before she received and read the agreement at issue.

C. Mutuality of Obligations

Finally, unlike *Concepcion* and the California law at issue there, Arkansas law does not place arbitration agreements on a different footing than any other contract. In Arkansas, "The same rules of construction and interpretation apply to arbitration agreements as apply to agreements in general." *Id.* at 576; citing, *Cash in a Flash Check Advance of Arkansas, LLC, v. Spencer*, 348 Ark. 459, 74 S.W.3d 600 (2002). Further, the Arkansas Supreme Court has held: The construction of contracts under Arkansas law remains applicable in equal force with respect to agreements to arbitrate. These essential elements include: (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement, and (5) mutual

obligations. *Alltel Corp.*, *supra* at 576; *The Money Place*, *supra* at 414 and *Showmethemoney*, *supra* at 119-120. Because Arkansas law's mutuality concepts apply to any contract interpreted under Arkansas law, this Court will not run afoul of *Concepcion* by not enforcing DIRECTV's Customer Agreement at issue here.

Agreements to arbitrate may still be declared unenforceable by "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Concepcion*, slip op., at 5 (additional citations omitted). Moreover, *Concepcion* did not disturb otherwise applicable state law contract defenses, such as lack of mutuality, and these remain applicable to arbitration agreements. The applicability of the FAA only becomes an issue if this court "determines that the arbitration agreement is valid and enforceable." *Id.* See also *The Money Place, LLC v. Barnes*, 349 Ark. 411, 413 (2002) ("Before we may consider how the arbitration clause might be enforced under the FAA or otherwise, we must determine whether there is an arbitration clause that may be enforced. The threshold issue then is whether there is a valid arbitration clause to enforce. That analysis is made under state law."). The ruling in *Barnes* is consistent with *Concepcion* and the FAA, which expressly provide that state contract law is applicable to arbitration provisions.

DIRECTV's Customer Agreement is not a valid and enforceable contract under Arkansas law. The Court agrees with Plaintiff and finds that the Customer Agreement is merely an exhaustive list of self-serving disclaimers and obligations imposed on DIRECTV's customers, and the document fails to place any obligation on DIRECTV that could cause it to breach it. As such, the Customer

Agreement does not contain *any* mutual obligations, and therefore, is not enforceable under Arkansas contract law. *E-Z Cash Advance, supra*, at 139, 60 S.W.3d at 440-441; *Townsend v. Standard Indus., Inc.*, 235 Ark. 951, 363 S.W.2d 535 (1962).

In addition, the arbitration clause in the Customer Agreement also fails to provide mutual obligations on the parties. First, DIRECTV's customers must waive their right to a jury regarding any possible claim they may have against DIRECTV, but DIRECTV saves for itself an ability to sue its customers in many instances. This reservation by DIRECTV invalidates the clause for lack of mutuality. *Showmethemoney, supra* at 121, 27 S.W.3d at 367; *Hawks Enters. v. Andrews*, 75 Ark. App. 372, 57 S.W.3d 778 (2001); *E-Z Cash Advance, supra*; *The Money Place, supra*; *Cash in a Flash Check Advance of Ark. v. Spencer*, 348 Ark. 459, 74 S.W.3d 600 (2002) Second, DIRECTV's Customer Agreement also forbids its customers from asserting claims together as a class. Although the clause purportedly binds DIRECTV to the same provision, it poses no realistic limitation upon DIRECTV. As such, there is no imposition of any "real liability" on DIRECTV, thus, invalidating the arbitration provision for lack of mutual obligations. *Showmethemoney, supra*; *Townsend v. Standard Indus., Inc., supra*.


CONCLUSION

For all of the reasons detailed above, Plaintiff's motion to strike is granted and Defendant's Arbitration Motion is denied.

So ORDERED this 30th day of June, 2011,



HONORABLE JUDGE KIRK JOHNSON

FILED
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MARY PARKER
BY  DEPUTY CLERK