IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 12/27/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

PC ONSITE, LLC, an Arizona limited liability company, Plaintiff/Appellant, v. MASSAGE EN V, LLC, aka MASSAGE ENVY, LLC; MASSAGE ENVY LIMITED, LLC dba MASSAGE ENVY; ENVY ACQUISITION HOLDINGS, LLC; MASSAGE ENVY CO-OP MARKETING, LLC; MASSAGE ENVY DELAWARE CORPORATION; MASSAGE ENVY ELEMENTS, LLC; MASSAGE ENVY FRANCHISING, LLC; JOHN LEONESIO; DAVID CRISALLI; GREG ESGAR; DOUGLAS PAYNE, Defendants/Appellees.	)	1 CA-CV 10-0879 DEPARTMENT A **MEMORANDUM DECISION** Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-005388

The Honorable Edward O. Burke, Judge

AFFIRMED

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By Eric E. Lynch
Ryan G. Pierce
And
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By Abel A. Leal (Admitted *Pro Hac Vice*)

And

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B A R K E R, Judge

¶1 This appeal requires the court to determine whether Plaintiff/Appellant PC Onsite, LLC, ("PC Onsite"), which has asserted breach of contract claims against nonsignatories to a contract, may resist the nonsignatories' invocation of an arbitration clause contained in the contract. The trial court determined that PC Onsite was bound by the arbitration clause. We affirm.

Facts and Procedural History

¶2 PC Onsite is a company that provides both computer goods and services to its clients. PC Onsite was engaged to design, develop, and maintain a custom software program for Defendants' massage services franchise venture. The arbitration agreement at issue was contained in one of two contracts that were signed on the same day. Pursuant to the agreements, PC Onsite built custom software in one agreement (the Software Agreement, or "SA") and provided service regarding that software

in another agreement (the Service Level Agreement, or "SLA"). Only the SLA contained an arbitration clause.

¶3 One of the matters at issue is the number of related entities being sued and each particular entity's status concerning the arbitration clause in the SLA. The SA was signed by Massage Envy, LLC; Massage Envy Limited, LLC; and PC Onsite; although the agreement purports in its opening paragraph to be between Massage EN V, LLC and PC Onsite. The SLA was signed by Massage Envy Limited, LLC and PC Onsite. Both the SA and the SLA contain exactly the same payment terms (including the same monthly sublicense fee to be paid by the franchisees and the same monthly service and referral fees to be paid by Defendants).

¶4 When the relationship between the parties deteriorated a few years later, PC Onsite sued not only Massage Envy Limited, LLC (the defendant that signed the SLA), but also a number of other companies each of which PC Onsite alleged to be in breach of one or both of the agreements.[1] Specifically, PC Onsite also

[1] PC Onsite's claims included (1) "Breach of Contract [Software Agreement] by Massage Envy and ME Limited," (2) "Breach of Contract [SLA] by Massage Envy and ME Limited," (3) "Breach of the Implied Duty of Good Faith and Fair Dealing by Massage Envy and ME Limited," (4) "Fraud by Massage Envy, ME Limited and Leonesio," (5) "Aiding and Abetting Fraud and Conspiracy to Commit Fraud by Leonesio, Crisalli, Esgar and Payne," (6) "Breach of Fiduciary Duty by Massage Envy and ME Limited," (7) "Aiding and Abetting Breach of Fiduciary Duty by Leonesio, Crisalli, Esgar, and Payne," (8) "Negligence by

sued Massage Envy Acquisition Holdings, LLC; Massage Envy Co-op Marketing, LLC; Massage Envy Delaware Corporation; Massage Envy Elements, LLC; Massage Envy Franchising, LLC; Massage Envy, LLC; and Massage EN V, LLC (collectively "the Nonsignatories").[2]

¶5 Instead of filing an answer, Defendants filed a motion to compel arbitration. This motion was based on the arbitration clause found in the SLA, which provided that "[a]ny unresolved dispute should be referred to a qualified independent arbitrator."

¶6 After hearing oral argument, the trial court entered an order on September 14, 2010, granting Defendants' motion to

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Massage Envy and ME Limited," (9) "Intentional interference with contractual relations by Leonesio and Payne," (10) "Commercial disparagement/injurious falsehood by Payne," (11) "Punitive Damages," (12) "Unjust Enrichment by Massage Envy and Leonesio," (13) "Constructive Trust due to Fraud by Massage Envy and ME Limited," and (14) "Constructive Trust due to Breach of Fiduciary Duty by Massage Envy and ME Limited."

[2] PC Onsite also sued a variety of individuals who allegedly had worked for one or more of Defendants. PC Onsite does not challenge the trial court's ruling that the individuals are subject to the arbitration clause contained in the SLA even though PC Onsite argues that Defendants "made no evidentiary showing that any nonsignatory exception applied to them" because PC Onsite "believ[es] that such showing could likely be made for the individual defendants." However, PC Onsite states that "by waiving its right to challenge the individual defendants," PC Onsite "does not waive its right to require such a showing as to the Corporate Defendants."

PC Onsite also sued two other entities, Massage Envy Holdings Corp. and Massage Envy USA, LLC; however, these entities are not part of this appeal.

compel arbitration on September 14, 2010. Eight days later, the trial court granted PC Onsite's motion for leave to amend its First Amended Complaint. On October 7, 2010, PC Onsite moved for reconsideration of the order compelling arbitration while simultaneously requesting an evidentiary hearing (or alternatively, for the court to certify the order pursuant to Rule 54(b)). The trial court denied the motion for reconsideration and the request for an evidentiary hearing, and entered a Rule 54(b) judgment on October 18, 2010. PC Onsite then timely filed this appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

Discussion

¶7 When reviewing a trial court's order compelling arbitration, this court "must defer, absent clear error, to the factual findings upon which the trial court's conclusions are based." *Harrington v. Pulte Home Corp.*, 211 Ariz. 241, 246-47, ¶ 16, 119 P.3d 1044, 1049-50 (App. 2005). However, we review the trial court's conclusions of law de novo. *Turley v. Ethington*, 213 Ariz. 640, 643, ¶ 6, 146 P.3d 1282, 1285 (App. 2006). "We may affirm the trial court's ruling if it is correct for any reason apparent in the record." *Forszt v. Rodriguez*, 212 Ariz. 263, 265, ¶ 9, 130 P.3d 538, 540 (App. 2006).

¶8 Public policy favors encouraging arbitration.[3] Generally, a party may not be compelled to arbitrate when it has not agreed to do so unless that party is (1) a third party beneficiary of the contract, (2) a successor in interest to the contract, or (3) an agent, officer or employee of the party signing the contract.[4] *Britton v. Co-op Banking Grp.*, 4 F.3d 742, 744-46 (9th Cir. 1993).[5] A party to an arbitration clause permanently binds itself to arbitrate disputes raised by the other contracting party, or by a successor/assignee of the other contracting party, if the disputes in question are within the

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[3] The Federal Arbitration Act provides that agreements to arbitrate 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 (1947). Arizona's Revised Uniform Arbitration Act similarly provides that written agreements to arbitrate are "valid, enforceable and irrevocable except on a ground that exists at law or in equity for the revocation of a contract." A.R.S. § 12-3006(A).

[4] Individuals who fall into the third category must also prove that the allegedly wrongful acts arose out of or were related to the contract. *Britton v. Co-op Banking Grp.*, 4 F.3d 742, 743, 746-47 (9th Cir. 1993).

[5] Although *Britton* has not been adopted by any Arizona state court, both parties agree that it sets out the proper test to govern this dispute. While the *Britton* panel appears to have adjudicated the dispute under California substantive law, several Arizona district courts have since adopted its test. *See, e.g.*, *Magellan Real Estate Inv. Trust v.* Losch, 109 F. Supp. 2d 1144, 1161 (D. Ariz. 2000); *Converged IT, L.L.C. v. Bus. Dev. Solutions, Inc.*, CV 05-2489 PHX ECV., 2006 WL 322468 *1-2 (D. Ariz. 2006); *A.M.R. Enter. v. City of Phoenix*, CIV-94-2007-PHX-ROS(BGS), 1997 WL 150104 *10 (D. Ariz. 1997).

scope of the arbitration clause. 9 U.S.C. § 2; A.R.S. § 12-3006(A). If this were not the rule, arbitration clauses would be meaningless, as any party who wished to avoid them could simply assign its rights under the contract to another entity.

¶9 PC Onsite, however, argues the trial court erred in compelling arbitration for its claims against the Nonsignatories - the Massage Envy entities which did not sign the SLA. In essence, PC Onsite contends the trial court erroneously relied on the relatedness of these Massage Envy entities as a basis for compelling arbitration.

¶10 PC Onsite, however, alleged in its First Amended Complaint that the Nonsignatories were "successors/assignees" of Massage Envy Limited, LLC, the entity that signed the SLA, which is the contract containing the arbitration clause. We recognize the trial court did not base its ruling directly on a "successor/assignee" theory. However, we are free to affirm the court's ruling for any reason in the record. *Forszt*, 212 Ariz. at 265, ¶ 9, 130 P.3d at 540.

¶11 We now address the effect of PC Onsite's statements in its complaint regarding the relationships between these Massage Envy entities.

1. The Admissions in PC Onsite's First Amended Complaint

¶12 Defendants argue that PC Onsite is bound by judicial admissions contained in PC Onsite's First Amended Complaint;

namely, that the Nonsignatories in question were "successors/assignees" of Massage Envy Limited, the entity that signed the contract containing the arbitration clause. The First Amended Complaint was the version of the complaint that was pending before the trial court at the time of its decision.[6] PC Onsite's complaint stated that "[u]pon information and belief," all the Massage Envy entities in question, except for Massage EN V, LLC and Massage Envy Limited, LLC, were "successor[s]/assignee[s] of Massage EN V and ME Limited." Massage Envy argues that these statements constituted judicial admissions that conclusively bound PC Onsite to this theory. This argument does not apply to one of the Nonsignatories, Massage EN V, LLC; however, Defendants argue that PC Onsite is bound with respect to this entity due to its judicial admission that Massage EN V, LLC breached the SLA. PC Onsite defined "Massage Envy" to include "Massage EN V, LLC" in the first sentence of the First Amended Complaint: "Plaintiff PC Onsite, LLC ('PC Onsite') files this its First Amended Complaint seeking monetary damages against Defendants Massage EN V, LLC, aka Massage Envy, LLC ('Massage EN V' or 'Massage Envy')." In paragraphs fifty-four through fifty-eight of its First Amended Complaint, PC Onsite alleged that "Massage Envy [defined

[6] Unless otherwise specified, all subsequent references to the complaint refer to the First Amended Complaint.

previously to include Massage EN V, LLC] . . . entered into the SLA" and that "Massage Envy materially breached [its] duties and obligations under the SLA." Thus, PC Onsite squarely asserted that Massage EN V, LLC entered into, and breached, the contract containing the arbitration clause.

¶13 Judicial admissions contained in pleadings are conclusively binding upon a party; a party becomes estopped from later denying them. *Black v. Perkins*, 163 Ariz. 292, 293, 787 P.2d 1088, 1089 (App. 1989) ("When a party by pleading . . . has agreed to a certain set of facts, he may not contradict them . . . absent an amendment of the pleadings."). However, if a party amends its pleading, the original pleading is no longer a judicial admission with conclusive, binding effect in that particular action. *See id.* It becomes evidence that is admissible in that proceeding. *Id*. We now turn to the question of whether the First Amended Complaint had itself been amended at the time of the proceedings at issue.

2. The Effect of PC Onsite's Pending Motion to Amend

¶14 PC Onsite points out in its reply brief that it moved to amend its First Amended Complaint, "prior to but contemporaneous with," the filing of its response to the motion to compel arbitration. Because of its pending motion to amend, PC Onsite argues that the judicial admissions contained in its

First Amended Complaint did not provide a sufficient basis for the trial court to compel arbitration.

¶15 However, PC Onsite did not raise with the trial court its pending motion to amend during oral argument on the motion to compel. Moreover, when the court asked PC Onsite questions related to its complaint, PC Onsite conceded it had alleged that the entities were liable as successor entities yet failed to assert that there was a pending motion to amend the complaint:

> The Court: Do you want to comment on the irony of your position as characterized by the defendants that the – even though ME Limited is the only defendant that signed the SLA, the plaintiff sued eight other corporate entities, none of which signed the SLA?
>
> [PC Onsite]: Absolutely. First – well, first of all, Your Honor –
>
> The Court: But they say you allege that – I haven't looked back at the complaint, but you allege – or your client alleges that all eight entities breached the SLA.
>
> [PC Onsite]: Well, I claim, Your Honor, that they were liable as successor entities.

At no point in this dialogue (or at any time during oral argument) did PC Onsite assert it had moved to amend the complaint because its legal theory had changed and that this change was important to the court's decision regarding arbitration. Even the then-pending motion to amend did not

advise the court that the motion to amend would affect, let alone resolve, the motion to compel arbitration.

¶16 For the first time on appeal, PC Onsite asserts that because its motion to file a revised Second Amended Complaint was pending, it should not be held to the admissions contained in its First Amended Complaint. This argument has been waived. *See K.B. v. State Farm Fire & Cas. Co.*, 189 Ariz. 263, 268, 941 P.2d 1288, 1293 (App. 1997) (noting appellate court does not consider arguments "raised for the first time on appeal").

3. PC Onsite's Belated Request for an Evidentiary Hearing

¶17 PC Onsite also argues the trial court erred by failing to hold an evidentiary hearing regarding the nature of the relationship between the Massage Envy entities prior to compelling arbitration. It contends the trial court had no evidence on which it could base its ruling that the Nonsignatories were subject to the arbitration agreement.

¶18 However, as Defendants point out, PC Onsite did not ask the trial court for an evidentiary hearing until it filed its motion for reconsideration, twenty-two days after the court granted the motion to compel arbitration. Because PC Onsite's request was belated, the trial court's decision was a reasonable exercise of the court's discretion in managing its docket. *Findlay v. Lewis*, 172 Ariz. 343, 346, 837 P.2d 145, 148 (1992) ("A trial court has broad discretion over the management of its

docket."). As the party claiming that disputed issues of fact precluded the motion to compel arbitration, PC Onsite had the burden of requesting an evidentiary hearing in a timely manner. *See Ruesga v. Kindred Nursing Ctrs., L.L.C.*, 215 Ariz. 589, 596, ¶ 24, 161 P.3d 1253, 1260 (App. 2007) ("[A]s the party denying the existence of a valid or enforceable arbitration agreement, the estate was required to request an evidentiary hearing if it believed that issues of fact remained."). PC Onsite argues the Massage Envy entities had the burden of proof because they were the ones claiming the agency relationship; however, PC Onsite is the party that first claimed the agency relationship between the Massage Envy entities in its First Amended Complaint when it alleged that the Nonsignatories were the successors/assignees of Massage Envy Limited. As the party claiming that disputed issues of fact prevented the court from compelling arbitration, PC Onsite has the burden of proof for this issue as well as the ultimate burden of proof at trial of proving the allegations contained in its complaint. Thus, the trial court did not abuse its discretion in denying PC Onsite's untimely request for an evidentiary hearing.

¶19 Having satisfied ourselves that all the parties involved in this appeal are subject to the arbitration clause contained in the SLA, and that there was no error in denying the

belated hearing request, we next turn to the scope of the arbitration clause.

4. The Scope of the Arbitration Clause Contained in the SLA

¶20 PC Onsite contends the arbitration clause is limited to alleged breaches of the SLA and does not include alleged breaches of the SA. Because arbitration is strictly a matter of consent, parties may only be compelled to arbitrate those disputes the parties have agreed to submit to arbitration. *Granite Rock Co. v. Int'l Bhd. Of Teamsters*, 130 S. Ct. 2847, 2857 (2010). However, once an arbitration clause is determined to apply to a particular party, "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

¶21 In a similar case, the Tenth Circuit interpreted the arbitration clause contained in one of two closely related agreements to require arbitration of all claims relating to either agreement. *Nat'l Am. Ins. Co. v. SCOR Reinsurance Co.*, 362 F.3d 1288, 1292 (10th Cir. 2004) (explaining that "when two agreements are at issue, one with an arbitration clause and one without, the fact that one agreement references the other supports arbitrating claims arising from either agreement").

The Tenth Circuit explicitly rejected the notion that "disputes arising out of an agreement that lacks an arbitration clause are *ipso facto* not subject to the arbitration clause of a related contract." *Id.* at 1292. Instead, the court looked to the terms of the arbitration clause itself, as well as the contract as a whole, when interpreting the scope of the arbitration clause. *Id.* The court held that the two agreements at issue were "more than related" because they were "dependent on each other." *Id.* This inter-relatedness, combined with the parties' broad agreement to arbitrate "any irreconcilable dispute," meant that disputes arising under either agreement "must be arbitrated." *Id*. at 1291-92.

¶22 A number of other cases have also held that when only one of two closely related agreements contains an arbitration clause, claims relating to either agreement are subject to arbitration. *See Cara's Notions, Inc. v. Hallmark Cards, Inc.*, 140 F.3d 566, 571 (4th Cir. 1998) (holding that the arbitration clause in one franchise agreement applied to a closely related franchise agreement based on the broad language in the arbitration clause); *Consol. Brokers Ins. Servs., Inc. v. Pan-Am Assurance Co.*, 427 F. Supp. 2d 1074, 1083 (D. Kan. 2006) (applying the arbitration clause contained in one contract to a different, but related contract; "[b]ecause [Contract A's] arbitration provision covers 'any dispute between the parties,'

and [Contract A] and [Contract B] appear essentially to be interrelated parts of one transaction, the Court finds that the claims of Plaintiffs arising under [Contract B], like those under [Contract A], should be submitted to arbitration"); *Armed Forces Ins. Corp. v. Allenbrook, Inc.*, No. CIV. A. 00-2435-GTV, 2001 WL 699735 *3 (D. Kan. 2006) ("Because the Software License Agreement contains no express provision excluding claims arising from the Support Services Agreement, Plaintiff may avoid arbitration of its claims only by presenting 'the most forceful evidence of a purpose to exclude the claim[s] from arbitration.'" (quoting *United States Steelworkers of Am. v. Warrior & Gulf Navig. Co.*, 363 U.S. 574 (1960))).

¶23 PC Onsite argues that these cases are single-party cases and therefore inapplicable to the present dispute because "PC Onsite never *agreed* to arbitrate its claims with Massage EN V or the Corporate Defendants." However, based on the procedural history of this case, we have already determined that PC Onsite's pleading in the First Amended Complaint was, at a minimum, sufficient evidence for a finding that all the parties in question are subject to the arbitration clause. *See supra*, ¶¶ 11-20. PC Onsite's attempts to distinguish these cases confuse the question of *who* is subject to arbitration with the question of *which issues* are subject to arbitration.

¶24 Critical to our analysis is the language of the arbitration clause itself, which is not self-limiting. It provides:

> *Any unresolved dispute* should be referred to a qualified independent arbitrator acceptable to both parties. The arbitrator will have no authority to award any damages that are excluded by the terms of this Agreement. In the event that a suitable independent arbitrator cannot be identified and agreed on by both parties, then the courts shall be requested to appoint one.

(Emphasis added.) The question we must now resolve is whether the parties meant "any unresolved dispute" to include only those disputes relating to the SLA, or whether the parties meant this phrase to cover all aspects of the plan for PC Onsite to develop, license, and support the CMS software for Defendants and their franchisees.

¶25 PC Onsite explained that the parties "[c]oncurrently" entered into both the SA and the SLA in order to "reduc[e] and memorializ[e] their oral agreement into a written agreement." As PC Onsite summarized, PC Onsite had "agreed to 'custom-build' and implement a clinic management software system that became known as 'CMS' for Massage EN V and ME Limited." The SA dealt with licensing of the custom-built software, while the SLA dealt with support services. Notably, the two contracts were signed on the same day. As Defendants point out, "[t]he existence of one agreement depends on, and is premised on, the existence of

the other." Without the software, there would be no need for software service, maintenance, and support. Without software service, maintenance, and support, the software would be useless. Thus, the two contracts are clearly interrelated.

¶26 Further, while each document purports to be the entire agreement between the parties, we note that the payment terms for both agreements are identical, suggesting that the parties viewed the SA and SLA as separate documentation of different aspects of the same overarching agreement. The payment terms are as follows:

> a. It is the express understanding of the parties that the Client shall sublicense the CMS software to its franchisees. As compensation for the successful performance of the work and services to be performed hereunder, including the grant of an exclusive license in and to the CMS software only for its specific use in its specific industry, it is agreed that Client franchisees shall directly pay to Supplier a monthly fee of $375.00 for use of the CMS software and the Documentation. It is also agreed that the Client franchisees shall pay to Supplier a one time Secure Socket Layer (SSL) and installation fee of $350.00. The said fee is to be collected as set forth in the Active Server Pages (ASP) license agreement.
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> b. Upon execution, Client agrees to pay directly to Supplier a fee in the amount of $7,250 per month. Upon execution of the forty-second (42nd) sublicense agreement, Client will pay Supplier an additional referral fee in the amount of One Hundred Seventy-Five dollars ($175) per month for each and every subsequent sublicense after

> the 42nd. All applicable fees are to be paid to supplier via an ACH bank transfer, due on the 15th of each month or on the next business day. Any fees not received will [be] assessed a charge of $5.00 per day, per clinic until said fees are paid.
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> c. Client shall pay Supplier a minimum of 3% increased amount for their proportional share for any increase received by Client[7] above the $375 monthly fee paid by Franchisee on a Franchisee by Franchisee basis.

These terms are identical in both the SA and the SLA, reinforcing the interrelated nature of the agreements.[8] Moreover, during oral argument, PC Onsite conceded that the monthly fees referenced in the payment terms of each agreement were not paid twice per month (as would be expected if they were indeed two separate contracts) but only once per month (again demonstrating their interrelationship).

¶27 Even if the foregoing considerations were not conclusive, "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25; *see also City of Cottonwood v. James L. Fann Contracting, Inc.*, 179 Ariz. 185, 189, 877 P.2d

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[7] The SLA uses "Company" where the SA uses "Client."

[8] Upon close examination, we note that the subsections of both provisions use "a. b. c." divisions rather than "(a), (b), (c) . . ." or "1, 1.1, 1.2 . . ." Thus, they are both consistent with each other (in using "a. b. c.") but internally inconsistent with the documents in which they are found.

284, 288 (App. 1994) (stating that an arbitration clause is to be "construed liberally and any doubts about whether a matter is subject to arbitration are resolved in favor of arbitration"). The trial court concluded the parties intended the arbitration clause to apply to any dispute arising out of or relating to the agreement that PC Onsite would create, license, maintain, and provide support for the CMS software as documented by the SA and the SLA. Because of the identical payment terms contained in the SA and the SLA, the interrelatedness of the two agreements, the fact that they were signed on the same day, and the breadth of the arbitration clause (that "any unresolved dispute" would be subject to arbitration), we find no error.

5. The Nature of PC Onsite's Claims

¶28 We next analyze whether the claims asserted by PC Onsite against the Nonsignatories arise out of or relate to the parties' agreement that PC Onsite would create, license, maintain, and provide support for the CMS software as reflected in either the SA or SLA.

¶29 The first through third claims in the First Amended Complaint include two breach of contract claims (one each for the SA and the SLA) and one for breach of the implied duty of good faith and fair dealing. The fourth claim is for fraud, specifically "promissory fraud," or the allegation that certain of the Defendants entered the agreements with no intention to

honor the promises contained therein. The fifth claim is against the individual Defendants for aiding and abetting fraud and conspiracy to commit fraud. The sixth claim alleges breach of fiduciary duty by Massage Envy and Massage Envy Limited for failing to collect the $375-per-month usage and licensing fee from its franchisees. The seventh claim is against the individual Defendants for aiding and abetting breach of fiduciary duty. The eighth claim alleges Massage Envy and Massage Envy Limited were negligent in failing to secure sublicense agreements from the franchisees, which allegedly would have resulted in the franchisees paying the $375-per-month fee under the SA and the SLA. The ninth claim is for intentional interference with contractual relations against two of the individual defendants, who allegedly interfered with Massage Envy's performance of the SA and the SLA. The tenth claim is for "[c]ommercial disparagement/injurious falsehood" against a Massage Envy employee, whose statements allegedly caused Massage Envy to breach or repudiate the SA and the SLA. The eleventh claim seeks punitive damages and alleges that Defendants' "willful and wanton, oppressive" and "malicious" conduct in disregarding PC Onsite's rights under the SA entitles PC Onsite to punitive damages. The twelfth claim is for unjust enrichment and alleges that certain of the Defendants collected fees from the franchisees pursuant to the SA and the SLA but

failed to remit those fees to PC Onsite. Finally, the thirteenth and fourteenth claims are for constructive trust, which is a remedy sought for the breach of fiduciary duty alleged in the fourth and sixth claims.

¶30 All these claims, even the negligence, breach of fiduciary duty, and fraud claims, arise out of or relate to the SA and the SLA. Thus, the trial court did not err by concluding that claims urged by PC Onsite were of the sort contemplated by the arbitration clause, which was to cover "[a]ny unresolved dispute" between the parties.

6. Fees

¶31 Both parties seek fees under A.R.S. § 12-341.01(A), as this matter arises out of a contract. "Our authority to award fees under section 12-341.01(A) is discretionary." *Deutsche Credit Corp. v. Case Power & Equip. Co.*, 179 Ariz. 155, 164, 876 P.2d 1190, 1199 (App. 1994). In the exercise of our discretion we decline to award Defendants their fees. We award Defendants their costs.

Conclusion

¶32 For the reasons set forth above, we affirm the trial court's order compelling arbitration and award Defendants their costs.

/s/
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DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
ANN A. SCOTT TIMMER, Presiding Judge

/s/
_____
PATRICK IRVINE, Judge