STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: May 11, 2021

KENNETH R. PALUMBO,	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PC-2020-06960**
	:	
GREGORY L. LUCINI,	:	
Defendant.	:	

DECISION

STERN, J. Before the Court are Defendant, Gregory L. Lucini's (Lucini) Motions for Judgment on the Pleadings, to Confirm Arbitration Award, and to Dismiss Claims in the Amended Complaint; and to Compel Arbitration. Plaintiff, Kenneth R. Palumbo (Palumbo) has objected to Lucini's motions. Also before the Court is Palumbo's Motion to Establish a Scheduling Order to Allow for Expedited Discovery and a Trial on Counts I and II of the Amended Complaint. Lucini has objected to Palumbo's motion. This Court exercises jurisdiction pursuant to G.L. 1956 § 8-2-13 and § 8-2-14.

I

Facts and Travel

Palumbo and Lucini are fifty percent (50%) shareholders and members of several companies with the principal places of business being located in Rhode Island.[1] *See* First Am.

[1] Palumbo and Lucini are shareholders and members of, at the least, the following entities: International Sourcing & Marketing, Ltd.; International Sourcing Management, Ltd.; ISM Capital Corporation; ISM Solar Solutions, LLC; ISM Solar Development, LLC; ISM Holdings, LLC; ISM Battery, LLC; Watershed Solar Development, LLC; ISM Lighting, LLC, a number of special-purpose entities formed in connection with solar development sites. (First Am. Compl. ¶ 4.) For the sake of clarity, the Court will refer to International Solar Sourcing & Marketing, Ltd.,

Compl. ¶¶ 2, 4. At all relevant times, Lucini has been the Chief Executive Officer of the Shared Businesses. (First Am. Compl. and Answer to First Am. Compl. ¶ 8.)

In 2012, Palumbo was diagnosed with a medical condition, which caused him to become less involved in the Shared Businesses. *See* First Am. Compl. ¶¶ 5, 6. Sometime after Palumbo's diagnosis, Lucini and Palumbo's business relationship began to suffer, and Lucini requested that Richard Chassin (Chassin) mediate the disputes between Palumbo and Lucini. *See* First Am. Compl. and Answer to First Am. Compl. ¶ 12. Then, on February 8-9, 2018, Lucini and Palumbo attended a mediation in Providence, Rhode Island. (First Am. Compl. and Answer to First Am. Compl. ¶ 14.) The mediation was unsuccessful.

Following the mediation, in April of 2018, Lucini and Palumbo met again, this time in Florida, to try and solve their disputes. (First Am. Compl. and Answer to First Am. Compl. ¶ 18.) On April 15, 2018, Chassin drafted the Binding Term Sheet Agreement (the BTSA). (First Am. Compl. and Answer to First Am. Compl. ¶ 21.) On May 3, 2018, Lucini advocated a binding arbitration clause be added to the BTSA. (First Am. Compl. and Answer to First Am. Compl. ¶ 24.) The arbitration clause appointed Catherine Sammartino (Sammartino), ISM's corporate counsel, as the mediator and arbitrator in charge of settling disputes regarding the BTSA. *See* First Am. Compl. and Answer to First Am. Compl. ¶ 24.

At some time in May of 2018, Sammartino traveled to Florida and obtained Palumbo's signature on the BTSA. *See* First Am. Compl. ¶¶ 27, 36, 39. On May 15, 2018, Lucini signed the

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International Sourcing Management, Ltd., ISM Capital Corporation, and ISM Lighting, LLC as the "ISM Core Companies" and ISM Solar Development, LLC, ISM Solar Solutions, LLC, Watershed Solar Development LLC, as well as a number of special-purpose entities formed in connection with solar development sites as the "ISM Solar Companies." Finally, the Court will refer to the ISM Core Companies and ISM Solar Companies collectively as the "Shared Businesses."

BTSA in East Providence, Rhode Island. (Answer to First Am. Compl. ¶ 36.) In the final version of the BTSA, Sammartino left out a clause that was meant to keep Palumbo's salary from being lowered and contained the arbitration clause that named Sammartino as mediator and arbitrator of disputes regarding the BTSA. *See* First Am. Compl. and Answer to First Am. Compl. ¶¶ 39, 41. Section 7(a) of the BTSA (the Arbitration Provision) states

> "Arbitration. (a) Notwithstanding anything set forth herein to the contrary, in the event that any disputes of any kind or nature arise between either (i) KRP and/or NP on the one hand, and GLL and/or ML on the other hand, (except dispute(s) between NP and ML as they are not signatories to this Agreement), or (ii) KRP, NP, GLL and/or ML on the one hand and any ISM Enterprise Company on the other hand, any party to this Agreement and NP and ML shall have the right to demand that any dispute be resolved through binding arbitration." (Pl.'s Reply to Def.'s Obj. to Pl.'s Mot. for Scheduling Order, Ex. A. at 4-5.)

The Arbitration Provision provides Sammartino the discretion to determine the procedures for arbitrating disputes and allowed Sammartino to award punitive damages. *See* First Am. Compl. and Answer to First Am. Compl. ¶¶ 42-43. The Arbitration Provision also allowed Sammartino to act as mediator and then "switch" to act as arbitrator. *See* First Am. Compl. and Answer to First Am. Compl. ¶ 44. Finally, the Arbitration Provision provided that if Sammartino would no longer act as arbitrator, Chassin would take over the role. (First Am. Compl. and Answer to First Am. Compl. ¶ 45.)

In early 2020, Sammartino began mediating Palumbo and Lucini's discussions regarding an existing Shareholders Agreement and certain business issues. (First Am. Compl. and Answer to First Am. Compl. ¶ 47.) Sammartino began working with Palumbo, Lucini, and their estate planning attorney to draft revisions to the Shareholder Agreement. (First Am. Compl. and Answer to First Am. Compl. ¶ 48.) In July of 2020, Sammartino drafted a memorandum highlighting open

issues regarding the shareholders' agreement and had a phone call with Lucini and Palumbo in late July 2020. *See* First Am. Compl. and Answer to First Am. Compl. ¶ 50.

On August 3, 2020, Sammartino sent—by email—Palumbo and Lucini the "Arbitrator's Decision" (the Arbitration Decision). (First Am. Compl. and Answer to First Am. Compl. ¶ 52.) Neither Lucini nor Palumbo had made an arbitration demand, as required in § 7(c) of the BTSA. *See* First Am. Compl. and Answer to First Am. Compl. ¶ 53; *and see* Pl.'s Obj. to Def.'s Mot. for J. on the Pleadings, Ex. 1 at 5. Following the Arbitration Decision, the parties attempted another mediation with Chassin; however, that mediation was unsuccessful.

On October 06, 2020, Palumbo filed the complaint in this matter. Then, on December 15, 2020, Palumbo filed a First Amended Complaint—the operative complaint in this matter. Before the Court are three motions: (1) Lucini's Motion for Judgment on the Pleadings, to Confirm Arbitration Award, and to Dismiss Claims in the Amended Complaint (Motion for Judgment on the Pleadings); (2) Palumbo's Motion to Establish a Scheduling Order to Allow for Expedited Discovery and a Trial on Counts I and II of the Amended Complaint (Motion for Scheduling Order); and (3) Lucini's Motion to Compel Arbitration. Each motion has been objected to.

The Court heard oral arguments on each motion during a WebEx hearing, on April 15, 2020. The Court's decision follows.

II

Palumbo's Motion to Establish a Scheduling Order, to Allow for Expedited Discovery and a Trial on Counts I and II of the Amended Complaint

Palumbo asserts that this Court should grant his Motion for a Scheduling Order and a Trial on Counts I and II of the Amended Complaint pursuant to 9 U.S.C. § 4—9 U.S.C. §§ 1 *et seq.*, the Federal Arbitration Act (the FAA)—and G.L. 1956 §§ 10-3-5—§§ 10-3-1 *et seq.*, the Rhode Island Arbitration Act (the RIAA). Palumbo argues that "[t]he question of whether . . . there is a valid

and enforceable arbitration provision . . . is 'an issue for judicial determination[.]'" (Pl.'s Mem. ISO Mot. for Sched. Order at 1 (citing *Canwell, LLC v. High Street Capital Partners, LLC*, Nos. KM-2019-0948, KM-2019-1047, 2020 WL 547664, at *5 (R.I. Super. Jan. 29, 2020)). Thus, Palumbo asserts that a jury must decide the issue of whether the parties have a valid and enforceable agreement to arbitrate.

Meanwhile, Lucini asserts that Palumbo's Motion is not yet ripe, and, therefore, the Court should pass on Palumbo's Motion for Scheduling Order. In the alternative, Lucini asserts that if the motion is ripe, then an arbitrator, not the Court, must decide whether the Arbitration Provision is valid and enforceable, arguing that the parties contracted to have an arbitrator decide "any dispute of any kind or nature," which, Lucini contends, includes issues of substantive arbitrability. *See* Def.'s Combined Reply to Disc. Mots. at 2.

A

Who—Court or Arbitrator—Decides the Issue of Whether the Arbitration Provision is Valid and Enforceable?

A threshold issue in this matter is a determination of who—Court or arbitrator—decides the issue of whether the Arbitration Provision is valid and enforceable. As stated *supra*, Palumbo asserts that the courts are responsible for determining the issue, and Lucini argues that it is an arbitrator that must decide the issue, based upon the "broad" language of the arbitration agreement. As set forth below, the Court agrees with Palumbo's argument and rejects Lucini's.

In *Prima Paint Corp. v. Flood & Conklin Manufacturing Company*, 388 U.S. 395 (1967) and *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the United States Supreme Court addressed the issue presently before this Court. And, in *Bjartmarz v. Pinnacle Real Estate Tax Service*, 771 A.2d 124, 127 (R.I. 2001), our Supreme Court later articulated the same rule of law. *See Bjartmarz*, 771 A.2d at 127 (holding "a claim for fraud in the inducement specifically pertaining to the

acceptance of an arbitration provision in a contract *may* be adjudicated by a court." (Emphasis added)).

Section 2 of the RIAA states,

> "When clearly written and expressed, a provision in a written contract to settle by arbitration a controversy thereafter arising out of such contract . . . or an agreement in writing between two (2) or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract . . . ." Section 10-3-2.

Similarly, § 2 of the FAA states,

> "A written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . 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.

"Challenges to the validity of arbitration agreements 'upon such grounds as exist at law or in equity for the revocation of any contract' can be divided into two types." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006). The first category consists of challenges specifically aimed at the validity of the arbitration agreement. *See id.*; *see, e.g., Southland*, 465 U.S. at 4-5 (challenging the agreement to arbitrate as void under California law insofar as it purported to cover claims brought under the state Franchise Investment Law). The second category is made up of those challenges targeting the contract as a whole, "either on a ground that directly affects the entire agreement (*e.g.*, the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid." *Cardegna*, 546 U.S. at 444. Counts I and II of Palumbo's First Amended Complaint fall into the first category of challenges, the crux of which is the contention that the Arbitration Provision itself is invalid and unenforceable.

In *Prima Paint*, the United States Supreme Court addressed the question of who decides the two categories of challenges. There, the issue before the Supreme Court was "whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators." 388 U.S. at 402. Guided by § 4 of the FAA,[2] the Supreme Court held that "if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the making of the agreement to arbitrate—the [] court *may* proceed to adjudicate it. But the statutory language does not permit the [] court to consider claims of fraud in the inducement of the contract generally." *Id*. at 403-04 (internal quotation marks and footnote omitted) (emphasis added); *see also Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct.

[2] In pertinent part, § 4 of the FAA reads as follows:

> "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court [with jurisdiction] . . . for an order directing that such arbitration proceed in a manner provided for in such agreement . . . . [U]pon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement . . . ."

Section 5 of the RIAA similarly states:

> "If the making of the arbitration agreement or the failure, neglect, or refusal to perform the arbitration agreement is in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded, the court shall hear and determine the issue. Where such an issue is raised, either party may . . . demand a jury trial of the issue, and upon the demand of a jury trial the court shall make an order referring the issue or issues to a jury as in equity causes. If the jury finds that no agreement in writing for arbitration was made, or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury finds that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof."

524, 530 (2019) ("To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists. But if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue." (citations omitted)); *Biller v. S-H OpCo Greenwich Bay Manor, LLC*, 961 F.3d 502, 512 (1st Cir. 2020) (stating that "[w]hen the arbitration-resister specifically challenges the enforceability of the arbitration clause itself (again, unless another provision clearly delegated the issue to the arbitrator) the court *must* decide that challenge before it can compel arbitration." (internal quotation marks omitted) (emphasis added)); *and see Granite Rock Company v. International Brotherhood of Teamsters*, 561 U.S. 287, 301 (2010) (stating same).

Subsequently, in *Southland*, the Supreme Court held that the FAA "create[d] a body of federal substantive law," which was "applicable in state and federal courts." 465 U.S. at 12 (internal quotation marks omitted). Thus, our Supreme Court has applied that federal substantive law in this jurisdiction. *See, e.g.*, *Bjartmarz*, 771 A.2d at 127 (holding "a claim for fraud in the inducement specifically pertaining to the acceptance of an arbitration provision in a contract *may be adjudicated by a court*." (emphasis added)).

Here, Palumbo has specifically challenged the validity and enforceability of the Arbitration Provision. In Palumbo's First Amended Complaint, he "puts at issue the alleged making of an arbitration agreement contained within the [BTSA]." (First Am. Compl. ¶ 68.) He alleges that "Lucini, by and through Sammartino, misrepresented the terms, quality or other aspects *of the arbitration provision*[,]" which "lead Palumbo to agree to and enter into the [A]rbitration [P]rovision with a false impression or understanding of the risk, duties and obligations Palumbo had undertaken." (First Am. Compl. ¶¶ 69-70.) Palumbo also alleges that "Lucini, by and through Sammartino, made false representations regarding the arbitration provision." (First Am. Compl.

¶ 71.) Each allegation in Counts I and II specifically challenges the validity and enforceability of the Arbitration Provision, not the BTSA as a whole. Additionally, Palumbo's Motion for Scheduling Order is aimed at the narrow issue of whether the Arbitration Provision is valid and enforceable. *See* Pl.'s Mem. ISO Mot. for Sched. Order at 1; *and see* Pl.'s Reply Mem. ISO Mot. for Sched. Order at 5-7.

Therefore, under either § 4 of the FAA or § 5 of the RIAA, and as both the United States and Rhode Island Supreme Courts have articulated, because Palumbo has specifically challenged the validity and the enforceability of the Arbitration Provision, the question of validity is for the Court, not an arbitrator. In this instance, Palumbo has reserved his right to a jury trial on Counts I and II of his First Amended Complaint. *See* First Am. Compl. ¶¶ 81, 102. Thus, as Palumbo reserved his right to a jury trial, a jury must decide the question of whether the Arbitration Provision is valid and enforceable.[3] If a jury determines that there is a valid arbitration agreement, then, this Court will rule on the arbitrability of the other issues. However, if a jury determines that the Arbitration Provision is invalid and unenforceable, the remaining issues are left to the Court.

In light of this Court's determination of the need for a jury trial on the narrow issue of whether the Arbitration Provision is valid and enforceable, the Court permits expedited discovery

[3] While this Court is not deciding the issue of whether the RIAA or the FAA is the statute that governs the BTSA, the Court has ordered a jury trial because the RIAA allows for such a trial when "the making of the arbitration agreement or the failure, neglect, or refusal to perform the arbitration agreement is in issue." Section 10-3-5. However, the Court will note that Rhode Island is an outlier in this regard. Rhode Island is one of eight states that have neither adopted the Uniform Arbitration Act (UAA) (1955) nor the Revised Uniform Arbitration Act (RUAA) (2000). As of the date of this Decision, twenty-three states have adopted arbitration acts modeled after the RUAA and an additional eighteen states have adopted arbitration acts modeled after the UAA, of which no state's statute allows for a jury trial. Finally, of the remaining eight states that have not adopted some form of the UAA or RUAA, only four state's statutes contain language similar to the RIAA allowing for a jury trial. Thus, the question of which approach is the correct one, a question this Court will not discuss in this Decision, is a matter of public policy left to the Legislature.

on this issue. The parties shall meet and confer to agree upon an expedited discovery schedule and date(s) for a jury trial. If the parties are unable to agree on such a schedule, within fourteen (14) days of this Decision, then counsel shall contact the Clerk who will schedule a conference with the parties to enter an expedited scheduling order and set down a trial date certain.

III

Lucini's Motion for Judgment on the Pleadings[4]

The next motion before the Court is Lucini's Motion for Judgment on the Pleadings. Lucini asserts the Court should grant his motion because § 15 of the RIAA bars Palumbo from seeking to vacate the Arbitration Decision as the 60-day statute of limitations expired before Palumbo filed

[4] Palumbo asserts that Lucini's Motion for Judgment on the Pleadings is moot because in Lucini's Demand for Arbitration No. 2 (Def.'s Mem. ISO Mot. to Compel Arb., Ex. A), Lucini demands an arbitrator determine whether the BTSA is enforceable. Palumbo argues that Lucini's demand for arbitration on the issue of the BTSA's enforceability is equivalent to a judicial admission that Sammartino did not decide whether the Arbitration Provision or BTSA as a whole were valid and enforceable. Thus, Palumbo concludes that Lucini's Motion for Judgment on the Pleadings is therefore moot. This Court disagrees.

"'A judicially admitted fact is conclusively established."' *DiLuglio v. Providence Auto Body, Inc.*, 755 A.2d 757, 767 (R.I. 2000) (quoting *Martin v. Lilly*, 505 A.2d 1156, 1161 (R.I. 1986)). A judicial admission "precludes the pleader who admitted the fact from challenging it later during the lawsuit in which it has been admitted." *Id.* A "judicial admission is a deliberate, clear, unequivocal statement of a party about a concrete fact within that party's knowledge[,]" which is "considered conclusive and binding as to the party making [it]." *State v. Rice*, 986 A.2d 247, 249 (R.I. 2010) (alteration in original) (citing 29A Am. Jur. 2d *Evidence* § 783 at 48, 49 (2008)); *see also* Black's Law Dictionary 54 (9th ed. 2009) (noting that a judicial admission "relieves an opposing party from having to prove the admitted fact and bars the party who made the admission from disputing it").

Notwithstanding Palumbo's argument, the Court has determined that even if Lucini had judicially admitted that the Arbitration Decision did not conclude that the BTSA was valid and enforceable, this admission would not cause Lucini's Motion for Judgment on the Pleadings to be moot. At best, such an admission would be a defense on certain counts in the First Amended Complaint. Thus, the Court must neither make any determination regarding Palumbo's argument nor address Palumbo's argument any further than it has.

his complaint. Thus, Lucini also requests the Court enter an order confirming the Arbitration Decision and dismissing all Palumbo's claims in the First Amended Complaint.

Palumbo has objected to Lucini's motion, arguing that (1) the Arbitration Decision did not and could not have decided the issues raised in Counts I-VII of the Amended Complaint; and (2) Lucini's argument that the complaint was time-barred is without merit because (a) the Arbitration Decision is void *ab initio*, (b) the FAA applies and, thus, the FAA's 90-day statute of limitations applies, not the RIAA's 60-day statute of limitations, and (c) the Arbitration Decision was never delivered in accordance with the BTSA. With regard to Palumbo's first argument, he also asserts that the Arbitration Decision could not have decided whether the BTSA and Arbitration Provision are void because those are gateway substantive arbitrability issues, which are reserved for the Court.

A

Standard of Review

"Rule 12(c) 'provides a trial court with the means of disposing of a case early in the litigation process when the material facts are not in dispute after the pleadings have been closed and only questions of law remain to be decided.'" *Chase v. Nationwide Mutual Fire Insurance Company*, 160 A.3d 970, 973 (R.I. 2017) (quoting *Chariho Regional School District v. Gist*, 91 A.3d 783, 787 (R.I. 2014)). The Court reviews a motion for judgment on the pleadings under Rule 12(c) using the same standard as a motion to dismiss pursuant to Rule 12(b)(6). *See id*. "'A motion to dismiss may be granted only when it is established beyond a reasonable doubt that a party would not be entitled to relief from the defendant under any set of conceivable facts that could be proven in support of its claim.'" *Id*. (quoting *Tri-Town Construction Company, Inc. v. Commerce Park Associates 12, LLC*, 139 A.3d 467, 478 (R.I. 2016)). When reviewing such a motion, the Court

must assume the allegations in the pleading are true and view '"the facts in the light most favorable"' to the nonmoving party. *Goodrow v. Bank of America, N.A.*, 184 A.3d 1121, 1125 (R.I. 2018) (quoting *Warfel v. Town of New Shoreham*, 178 A.3d 988, 991 (R.I. 2018)). "Therefore, a judgment on the pleadings 'may be granted only when it is established beyond a reasonable doubt that a party would not be entitled to relief from the defendant under any set of conceivable facts that could be proven in support of its claim.'" *Premier Home Restoration, LLC v. Federal National Mortgage Association*, 245 A.3d 745, 748 (R.I. 2021) (quoting *Nugent v. State Public Defender's Office*, 184 A.3d 703, 706-07 (R.I. 2018)).

"Ordinarily, when ruling on a motion to dismiss brought under Rule 12(b)(6) or Rule 12(c), 'a court may not consider any documents that are outside of the complaint, or not expressly incorporated therein, unless the motion is converted into one for summary judgment.'" *Goodrow*, 184 A.3d at 1126 (quoting *Alternative Energy, Inc. v. St. Paul Fire & Marine Insurance Company*, 267 F.3d 30, 33 (1st Cir. 2001)). However, a well-established exception to this rule exists for "'documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint.'" *Goodrow*, 184 A.3d at 1126 (quoting *Chase*, 160 A.3d at 973).

B

Analysis

Lucini asserts that the Court should grant his Motion for Judgment on the Pleadings on each count of Palumbo's First Amended Complaint because RIAA's 60-day statute of limitations applies, and Palumbo filed his complaint one day after the statute of limitations expired. Specifically, Lucini asserts that the FAA does not preempt the RIAA, and the RIAA's shorter statute of limitations does not conflict with the federal policy of ensuring the enforceability of

private arbitration agreements. In making his arguments, Lucini relies on the United States Supreme Court's decision in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 469 (1989) to argue that the FAA neither preempts the RIAA, as the FAA does not have a preemptive provision, nor was Congress's intent to occupy the entire field of arbitration law. *See* Def.'s Mem. ISO Mot. for J. on the Pleadings at 12. Lucini also argues that the RIAA applies because it does not conflict with the federal policy of ensuring the enforceability of private agreements to arbitrate. Thus, Lucini concludes that the RIAA applies, and this Court should apply the RIAA's 60-day statute of limitations.

Meanwhile, Palumbo argues that the Court need not determine whether the FAA or the RIAA apply because the Arbitration Decision was a nullity and *void ab initio*; concluding, Lucini's arguments must fail. In the alternative, Palumbo also asserts that if the Arbitration Decision is not a nullity, the FAA, not the RIAA, governs the BTSA.[5] Specifically, Palumbo asserts there are no choice-of-law issues and the FAA applies because the Shared Businesses engage in interstate commerce, several of the Shared Businesses are registered to do business in different states, the parties to the BTSA are domiciled in different states, the parties negotiated the BTSA and Arbitration Provision in both Rhode Island and Florida, and the BTSA does not contain a choice-of-law provision. Additionally, Palumbo asserts that *Volt* does not apply to this matter because the agreement in *Volt* contained a choice-of-law provision.

Before the Court examines a choice-of-law issue, it must first determine whether there is conflict between the laws and whether that conflict would affect the outcome of the case. *National Refrigeration, Inc. v. Standen Contracting Company, Inc.*, 942 A.2d 968, 973-74 (R.I. 2008) ("A

[5] However, Palumbo first and foremost asserts that the BTSA as a whole and the Arbitration Provision are both void and unenforceable. Palumbo makes the argument that the FAA applies as an argument in the alternative.

motion justice need not engage in a choice-of-law analysis when no conflict-of-law issue is presented to the court."); *see General Accident Insurance Company of America v. American National Fireproofing, Inc.*, 716 A.2d 751, 758 (R.I. 1998) (affirming trial justice's decision not to reach a choice-of-law issue because, regardless of what law applied, the contract language barred recovery for the claims at issue); *Avco Corp. v. Aetna Casualty & Surety Company*, 679 A.2d 323, 330 (R.I. 1996) (holding choice-of-law contention was "feckless" because the court's finding would have been the same regardless of what law was applied). Here, the RIAA and FAA differ in at least one important aspect—the statute of limitations set for filing to vacate an arbitration award. Under § 15 of the RIAA, a party has 60 days to file their motion to vacate, and under § 12 of the FAA, a party has three months to file its motion to vacate. Thus, there is a dispute between the RIAA and the FAA; however, as discussed below, the Court need not determine which law applies at this time.

While the Rhode Island Supreme Court has not addressed the specific question before the Court in the context of an arbitration award, the Supreme Court has addressed an analogous issue—when a court's judgment may be challenged on the grounds for lack of subject-matter jurisdiction. The Supreme Court addressed the question in *Reynaud v. Koszela*, 473 A.2d 281, 284-85 (R.I. 1984).

In *Reynaud*, the plaintiffs brought an action to have a default judgment set aside for, *inter alia*, the court's lack of subject matter jurisdiction. *Id.* There, the court entered a default judgment in January of 1968, and the clerk issued a writ of execution. *Id.* at 282. The execution was levied upon the plaintiffs' real estate and properly recorded. *Id.* Then, ten years (10) later, in December of 1978, plaintiffs instituted an action "to vacate the 1968 default judgment, relying, in their words, on the 'Common Law and statutes of the State of Rhode Island.'" *Id.* at 283. The trial justice found

in favor of the plaintiffs and held that the judgment court never acquired jurisdiction over the plaintiffs. *Id.*

On appeal, the defendant argued that the action should have been barred by the six-year statute of limitations. *Id.* at 284. There, the Supreme Court stated that:

> "In speaking in terms of the statute of limitations . . . the litigants have somehow forgotten that we are dealing with a judgment which is *void because of a lack of jurisdiction over the parties*. In *Lamarche v. Lamarche*, 115 R.I. 472, 475, 348 A.2d 22, 23 (1975), the court noted that a judgment which is *void because of a lack of jurisdiction over the subject matter* . . . is nothing more than a piece of paper which can be expunged from the record at any time. The successful claim of laches cannot give efficacy to a judgment that has no efficacy. The judgment is void at its inception. *It matters not how, or in what way, or at what time the objection to its presence is brought to the court's attention*. Somewhat similar sentiments were also expressed in *Shannon v. Norman Block, Inc*., 106 R.I. 124, 130, 132, 256 A.2d 214, 218, 219 (1969)." *Reynaud*, 473 A.2d at 284-85 (emphasis added).

The Supreme Court held that the statute of limitations did not apply to a claim where the judgment sought to be removed was void. *Id*. at 285; *and see Misco Leasing, Inc. v. Vaughn,* 450 F.2d 257 (10th Cir.1971); 7 Moore, *Federal Practice* ¶ 60.25[4] at 314–15 (2d ed. 1982); 11 Wright & Miller, *Federal Practice and Procedure*: Civil § 28.62 at 197–98 (1973). The Supreme Court concluded that the plaintiffs could have obtained the relief they sought "at *any* time." *Id.* at 285 (emphasis added).

In *Providence Teachers Union v. Providence School Board*, 725 A.2d 282, 283 (R.I. 1999), the Rhode Island Supreme Court explained that "'the right to have [a] grievance heard in arbitration . . . [is] the equivalent of subject matter jurisdiction in the courts.'" *Id.* (alteration in original) (quoting *Rhode Island Brotherhood of Correctional Officers v. State Department of Corrections*, 707 A.2d 1229, 1235 (R.I. 1998)). The Supreme Court concluded that reviewing

courts "are not barred from reaching [the question of arbitrability] *sua sponte*, nor [is] any party . . . precluded from raising it at *any* time." *Id*. (emphasis added).

In *Providence Teachers Union*, neither the plaintiff nor defendant raised the issue concerning the validity of the underlying agreement to arbitrate. *See generally id.* Here, however, Palumbo directly challenges the validity of the BTSA as a whole and the Arbitration Provision itself, and, in effect, challenges the arbitrator's subject-matter jurisdiction and ability to issue the Arbitration Decision. *See* First Am. Compl. ¶¶ 68-102, 134-37. Palumbo also seeks a declaration from this Court that the Arbitration Decision is *void ab initio*. *See* First Am. Compl. ¶¶ 110, 114, 121, 127; *and see* Pl.'s Obj. Mem. to Def.'s Mot. for J. on the Pleadings at 14-15.

1

Counts I-II—A Determination as to Whether the Arbitration Provision in the BTSA is Enforceable

In Counts I and II of the First Amended Complaint, Palumbo seeks a determination, by a jury, on whether the BTSA's Arbitration Provision was procured by fraud, misrepresentation, and/or malfeasance pursuant to RIAA § 5 and FAA § 4. See First Am. Compl. ¶¶ 68-102. Lucini asserts that he is entitled to judgment on the pleadings on Counts I-II because Palumbo failed to file his complaint before the expiration of the RIAA's 60-day statute of limitations.

However, based on this Court's previous ruling in section II(B), the question of whether the Arbitration Provision is valid and enforceable is a question for a jury. Therefore, the Court need not address Counts I-II further than it previously has, and Lucini's Motion for Judgment on the Pleadings is denied as to Counts I-II.

2

Counts III-VI—Declaratory Judgment and Injunctive Relief Regarding the BTSA—Count VII—Constructive Trust—Counts VIII-IX—Vacating the Arbitration Award

In Counts III-VI of the First Amended Complaint, Palumbo seeks a declaratory judgment and injunctive relief regarding the BTSA. *See* First Am. Compl. ¶¶ 103-27. Specifically, Count III seeks (1) a declaration that the BTSA is void for having been induced by and through fraudulent misrepresentation; (2) a declaration that Palumbo is restored his 50 percent ownership interest in the ISM Solar Companies; (3) a declaration that the Arbitration Decision is a nullity and *void ab initio*; (4) an award of reasonable attorneys' fees and expect fees and expenses necessary to enforce such legal rights; (5) an award of costs under the Rhode Island Uniform Declaratory Judgments Act; and (6) such other relief as this Court deems fair and appropriate. (First Am. Compl. at 16-17.) In Count IV of the First Amended Complaint, Palumbo seeks a declaration that the BTSA is void as against public policy and all other relief outlined in Count III. (First Am. Compl. at 18.) In Count V of the First Amended Complaint, Palumbo seeks a declaration that the BTSA is void as substantively and procedurally unconscionable and all other relief outlined in Count III. (First Am. Compl. at 19.) And, in Count VI of the First Amended Complaint, Palumbo seeks a declaration that the BTSA is void for lack of consideration and all other relief outlined in Count III. (First Am. Compl. at 20.)

Then, in Count VII of the First Amended Complaint, Palumbo seeks a judgment enter establishing a constructive trust in his favor over the thirty percent (30%) ownership interest in the ISM Solar Companies, which Palumbo surrendered pursuant to the BTSA. (First Am. Compl. ¶¶ 128-33.) In Counts VIII and IX of the First Amended Complaint, Palumbo request that this Court vacate the Arbitration Decision, pursuant to RIAA § 12 and FAA § 10, because (1) the award was procured by corruption, fraud, or undue means; (2) there was evidence of partiality or

corruption on the part of Sammartino; (3) Sammartino was guilty of misconduct in issuing an arbitration decision and failing to preside over any procedures that should have been due to the parties to an arbitration; (4) Sammartino exceeded her powers; (5) the Arbitration Decision represents manifest disregard for the provisions of the BTSA; (6) the Arbitration Decision represents manifest disregard of the law; (7) Sammartino took it upon herself to rewrite a contract between the parties; (8) the Arbitration Decision is based upon reasoning so palpably faulty that no judge could ever conceivably make such a decision; (9) the Arbitration Decision is the product of a void agreement to arbitrate; and (10) the issues Sammartino decided were never agreed to be arbitrated. (First Am. Compl. ¶¶ 134-37.)

The entirety of Lucini's arguments in support of his Motion for Judgment on the Pleadings rest on the application of the RIAA's 60-day statute of limitations. Lucini asserts that he is entitled to judgment on the pleadings because Palumbo filed his complaint one day after the statute of limitations had expired. However, if the jury determines that the Arbitration Provision is void and unenforceable, then the arbitrator never acquired subject-matter jurisdiction, and the Arbitration Decision is *void ab initio*. And, as our Supreme Court has stated that a party may challenge subject-matter jurisdiction at *any* time, the RIAA's statute of limitations cannot bar Palumbo's complaint. *See Reynaud*, 473 A.2d at 284-85; *Providence Teachers Union*, 725 A.2d at 283.

Therefore, based on this Court's previous ruling in Section II(B) *supra*, the Court may not rule on Lucini's Motion for Judgment on the Pleadings until the validity of the Arbitration Provision is determined because, if the Arbitration Provision is invalid and unenforceable, then Palumbo's challenge of the Arbitration Decision cannot be time-barred, as it is akin to a challenge of subject-matter jurisdiction. However, if a jury determines that the Arbitration Provision is valid,

then the Court must determine the remaining issue. Thus, the Court reserves on Lucini's Motion for Judgment on the Pleadings as it pertains to Counts III-IX.

IV

Lucini's Motion to Compel Arbitration

The final motion before the Court is Lucini's Motion to Compel Arbitration. Lucini's motion seeks to compel arbitration of two disputes: (1) whether the arbitration provision in the BTSA was procured through a fraudulent conspiracy concocted between Lucini and Sammartino; and (2) as a result of the alleged fraudulent conspiracy, the Arbitration Decision is not enforceable. *See* Def.'s Mem. ISO Mot. Compel Arb. at 1. Lucini argues that this Court should order Palumbo to arbitration under § 7(a) of the BTSA. Lucini specifically argues that the language in § 7(a) of the BTSA clearly and unmistakably demonstrates the parties' intent to arbitrate all disputes, and, thus, the Court should compel arbitration.

Meanwhile, Palumbo asserts that based on the above United States Supreme Court precedent, this Court must first determine whether there is a valid and enforceable agreement to arbitrate before compelling arbitration. Specifically, Palumbo argues that allowing an arbitrator to decide whether there is a valid and enforceable agreement to arbitrate would, in essence, deny Palumbo the relief that he seeks without a hearing.

A

Standard of Review

Under Rhode Island law, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *DeFontes v. Dell, Inc.*, 984 A.2d 1061, 1066 (R.I. 2009) (quotations omitted). "The determination of whether the parties have formed an agreement to arbitrate is a matter of state contract law." *Id.* (citations omitted).

The Court's "determination of whether a party has agreed to be bound by arbitration is a question of law[.]" *Id*. (brackets and quotations omitted).

B

Analysis

As set forth *supra*, this Court has determined that the question of whether the Arbitration Provision is valid and enforceable is a question for the courts, not an arbitrator. Thus, the Court need not address Lucini's Motion to Compel Arbitration because once the jury has made a decision on the enforceability of the Arbitration Provision, the parties will either have to submit the question of the arbitrability of issues to an arbitrator, or the issues will be left to the Court. Therefore, the Motion to Compel Arbitration is denied without prejudice.

V

Conclusion

For the foregoing reasons, Palumbo's Motion for Scheduling Order is granted; Lucini's Motion for Judgment on the Pleadings is denied, in part, and the Court reserves on Counts III-IX; and Lucini's Motion to Compel Arbitration is denied. Counsel shall enter the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Kenneth R. Palumbo v. Gregory L. Lucini
CASE NO:	C.A. No. PC-2020-06960
COURT:	Providence County Superior Court
DATE DECISION FILED:	May 11, 2021
JUSTICE/MAGISTRATE:	Stern, J.
ATTORNEYS:	
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