UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

RAY VIRGIL *et al.*
Plaintiffs

v. **Case No. 5:18-cv-00022-KS-MTP**

SOUTHWEST MISSISSIPPI
ELECTRIC POWER ASSOCIATION
Defendant.

DEFENDANT'S MOTION TO COMPEL
ARBITRATION AND STAY THE LITIGATION

Defendant, Southwest Mississippi Electric Power Association ("Southwest" and/or the "Defendant"), by and through the undersigned counsel, hereby files this motion to compel arbitration regarding Plaintiffs' purported class action claims and stay this litigation pending resolution of arbitration, stating as follows:

I. Preliminary Statement

Even though Mississippi law does not recognize class action cases, Plaintiffs[1] make a poorly-veiled attempt to side-step the class action prohibition by asserting that they will join in 25,000 unidentified, additional plaintiffs. *See* Plaintiffs' Complaint at ¶¶ 14-17 attached as **Exhibit 1**. In this putative class action, Plaintiffs assert that Southwest should have returned more patronage capital[2] – i.e. capital credits – to its members, notwithstanding the fact that Southwest

[1] Plaintiff Ray Virgil asserts that he "is a resident of Mississippi and a member of Southwest Mississippi Electric Power Association." Compl. ¶ 14. Southwest contends that it does not have a member, nor ever had a member, under the name Ray Vigil. Nonetheless, if Ray Virgil is a member of Southwest, the claims he asserts in this case would be subject to arbitration.

[2] Patronage capital and capital credits are synonymous terms. Each year, Southwest deducts its operating costs and expenses from its revenue. If there is money remaining, it is allocated on Southwest's books in the names of each member based on their pro rata share, as set forth in the Bylaws. The funds held in the members' names are referred to as patronage capital or capital credits. Portions of those credits are periodically paid to the members at a time in the future when the member-elected Board determines that such payments will not adversely impact the financial

has followed the member's Bylaws with respect to returning member capital. *See generally*, Bylaws at Art. VIII, attached hereto as **Exhibit 2**.

However, the purpose of this Motion is to raise at the earliest practicable time that Plaintiffs' class action allegations should not be before the Court as the parties agreed to arbitrate any disputes related to the Bylaws or patronage capital. This includes an agreement to preclude class action arbitration. Southwest thus invokes the arbitration provision and asks that the Court compel Plaintiffs to individually arbitrate the claims set forth in the Complaint and stay this litigation pending arbitration.

II. Memorandum of Law

Federal policy is clear that district courts are to favor enforcing arbitration agreements. As noted by multiple courts, there is "a strong national policy favoring arbitration of disputes, and all doubts concerning the arbitrability of claims should be resolved in favor of arbitration." *Washington Mut. Finance Group v. Bailey*, 364 F.3d 260, 263 (5th Cir. 2004) citing *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 471 (5th Cir. 2002); *See also Jones v. Regions Bank*, 719 F. Supp. 2d 711, 714 (S.D. Miss. 2010) (noting that the Supreme Court requires district courts to "rigorously enforce agreements to arbitrate.") quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226, 107 S. Ct. 2332 (1987). As such, "[a]ny 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 Memorial Hospital v Mercury Construction Corporation*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 941 (1983). This presumption in favor of arbitration can only be

condition of Southwest and that such payments will not take Southwest out of compliance with the terms of its loans and mortgages. *See generally*, Exhibit 2 at Art. VIII.

overcome "with **clear evidence** that the parties did not intend the claim to be arbitrable." *New South Fed. Sav. Bank v. Anding*, 414 F. Supp. 2d 636, 641 (S.D. Miss. 2005) (emphasis added).

In evaluating a motion to compel arbitration, courts generally conduct a two-pronged inquiry. *See Webb v. Investacorp, Inc.*, 89 F.3d 252, 257-58 (5th Cir. 1996); *see also Anding*, 414 F. Supp. 2d at 641 citing *East Ford v. Taylor*, 826 So.2d 709, 713 (Miss. 2002) The first prong has two considerations: (1) whether there is a valid arbitration agreement and (2) whether the parties' dispute is within the scope of the arbitration agreement. *Id.* The second prong considers whether legal constraints external to the parties' agreement should preclude arbitration of those claims. *Id.*. In this case, and as detailed more fully below, Plaintiffs (as well as the other members of Southwest) and Southwest have a valid arbitration agreement found in the Bylaws, and the class action claims asserted in the Complaint fall within the scope of claims subject to arbitration. There are also no external legal constraints which would prevent arbitrating these claims.

A. The parties have a valid and binding arbitration agreement in the Bylaws.

The arbitration agreement found in the Bylaws is unquestionably valid and binding. Specifically, the arbitration agreement reads as follows:

> **Section 11.05. ALTERNATIVE DISPUTE RESOLUTION.**
>
> **UNLESS OTHERWISE PROHIBITED BY LAW, ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO THESE BYLAWS, OR THE BREACH THEREOF, OR ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO PATRONAGE CAPITAL SHALL BE RESOLVED BY BINDING ARBITRATION ADMINISTERED BY THE AMERICAN ARBITRATION ASSOCIATION IN ACCORDANCE WITH ITS ARBITRATION RULES AFTER ALL CONDITIONS PRECEDENT SET FORTH IN ARTICLE VIII, SECTION 8.01, IF APPLICABLE, HAVE BEEN MET. THIS AGREEMENT INVOLVES INTERSTATE COMMERCE SUCH THAT THE FEDERAL ARBITRATION ACT, 9 U.S.C. § 1, *ET SEQ.* SHALL GOVERN THE INTERPRETATION AND ENFORCEMENT OF THIS ARBITRATION AGREEMENT. THE ARBITRATION SHALL BE HELD IN THE STATE OF MISSISSIPPI AT A LOCATION TO BE DESIGNATED BY THE PARTY NOT MAKING THE INITIAL DEMAND FOR ARBITRATION. A JUDGMENT ON**

THE AWARD RENDERED BY THE ARBITRATOR SHALL BE ENTERED IN ANY COURT HAVING JURISDICTION THEREOF.

THE PARTIES ALSO AGREE TO (I) WAIVE ANY RIGHT TO PURSUE A CLASS ACTION ARBITRATION, OR (II) TO HAVE AN ARBITRATION UNDER THIS AGREEMENT CONSOLIDATED OR DETERMINED AS PART OF ANY OTHER ARBITRATION PROCEEDING. THE PARTIES AGREE THAT ANY DISPUTE TO ARBITRATE MUST BE BROUGHT IN AN INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE CAPACITY. IF ANY PART OF THIS ARBITRATION CLAUSE, OTHER THAN WAIVERS OF CLASS ACTION RIGHTS, IS FOUND TO BE UNENFORCEABLE FOR ANY REASON, THE REMAINING PROVISIONS SHALL REMAIN ENFORCEABLE. IF A WAIVER OF CLASS ACTION AND CONSOLIDATION RIGHTS IS FOUND UNENFORCEABLE IN ANY ACTION IN WHICH CLASS REMEDIES HAVE BEEN SOUGHT, THIS ENTIRE ARBITRATION CLAUSE SHALL BE DEEMED UNENFORCEABLE. IT IS THE INTENTION AND AGREEMENT OF THE PARTIES NOT TO ARBITRATE CLASS ACTIONS OR TO HAVE CONSOLIDATED ARBITRATION PROCEEDINGS. SHOULD THE PARTIES HAVE A DISPUTE THAT IS WITHIN THE JURISDICTION OF THE JUSTICE COURTS OF THE STATE OF MISSISSIPPI, SUCH DISPUTE MAY BE RESOLVED AT THE ELECTION OF EITHER PARTY IN JUSTICE COURT RATHER THAN THROUGH ARBITRATION.

IF THE ARBITRATION CLAUSE IS DEEMED UNENFORCEABLE OR THE PARTIES OTHERWISE LITIGATE A DISPUTE IN COURT, THE PARTIES AGREE TO WAIVE ANY RIGHT TO A TRIAL BY JURY IN ANY PROCEEDING BROUGHT IN COURT.

See **Exhibit 2** at § 11.05 (underline added). Of note, the entire text of the arbitration agreement is set out in its own separate section and is the only section that appears in bolded, all-capital letters in the Bylaws. *See* **Exhibit 2** at § 11.05.

When determining whether an arbitration agreement is valid, federal courts "apply the contract law of the particular state that governs the agreement." *Bailey*, 364 F.3d at 264. Generally, Mississippi law will find an agreement to be enforceable where there is "an offer, an acceptance of that offer, and consideration." *Estate of Davis v. O'Neill*, 42 So. 3d 520, 527 (Miss. 2010). Moreover, valid agreements must contain the following six elements: "(1) two or more contracting parties, (2) consideration, (3) an agreement that is sufficiently definite, (4) parties with legal

capacity to make a contract (5) mutual assent, and (6) no legal prohibition precluding contract formation. *Id.* citing *Rotenberry v. Hooker,* 864 So. 2d 266, 270 (Miss. 2003). Each of these elements exist in this instance.

In this matter, Plaintiffs (and the other 25,000 members who Plaintiffs attempt to improperly join) applied to Southwest to become members in the cooperative and to receive the benefits of such membership. Southwest accepted Plaintiffs' application, and all of its other members, and Plaintiffs were given the status of a "Member" in the "Association" (aka "Southwest Electric Power Association") by and through the Bylaws. *See* Bylaws **Exhibit 2** at § 1.01. After submitting an application for membership, a person only becomes a "member" of Southwest after the person pays a membership fee and agrees to "comply with and be bound by the Certificate of Incorporation of the Association and by these bylaws and any amendments thereto and such rules and regulations as may from time to time be adopted by the Board of Directors." *See* Bylaws, **Exhibit 2** at § 1.01. Similarly, a person who submits a membership application agrees "The Applicant will comply with and be bound by the provisions of the charter and bylaws of the Association and such rules and regulations as may, from time to time, be adopted by the Association." *See* Membership Application at ¶ 2 attached hereto as **Exhibit 3.** As alleged in the Complaint, the Plaintiffs accepted this offer and have been receiving the benefits of being a member of Southwest. *See* Complaint at ¶¶ 14-16. As such, both Southwest and Plaintiffs agreed to be bound by the Bylaws and all provisions stated therein, including the arbitration clause found in Section 11.05.

B. Plaintiffs' claims fall within the scope of the arbitration agreement found in the Bylaws

Having shown that the parties have a valid arbitration provision, the Court should now determine whether the claims alleged by Plaintiffs fall within the scope of the arbitration

agreement. Indeed, "if the allegations underlying [Plaintiffs] claims 'touch matters' covered by the parties' agreements, then those claims must be arbitrated. . . .") *Scruggs and SLF, Inc. v. Wyatt,* 60 So. 3d 758, 766 (Miss. 2011) *citing Waste Mgmt., Inc. v. Residuos Indus. Multiquim, S.A.,* 372 F.3d 339, 344 (5th Cir. 2004). Section 11.05 of the Bylaws, copied *infra*, states that disputes arising out of or relating to patronage capital or the Bylaws must be submitted to binding arbitration. *See* **Exhibit 2** at §11.05 (**"ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO THESE BYLAWS, OR THE BREACH THEREOF, OR ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO PATRONAGE CAPITAL SHALL BE RESOLVED BY BINDING ARBITRATION")**. The arbitration provision in the parties Bylaws is broad applying to "any controversy or claim arising out of or relating to" the bylaws or patronage capital. *See Scruggs and SLF, Inc.,,* 60 So. 3d at 771. *citing MS Caredit Ctr., Inc. v. Horton*, 926 So. 2d 167, 176 (Miss. 2006) (noting "broad arbitration language governs disputes 'related to' . . . a contract.") Plaintiffs' claims and the factual assertions set forth in their Complaint explicitly allege violations that both relate to patronage capital and the Bylaws.

With respect to patronage capital, the Complaint is filled with numerous allegations related to Southwest allegedly withholding patronage capital from its members that were legally required to be distributed. *See, e.g.,* Complaint, **Exhibit 1** at ¶ 6 ("…[t]he amount of [patronage] capital in excess of 30%... should be refunded to [Southwest's] members"), ¶ 13 ("Plaintiffs, therefore seek to have [Southwest] return the excess revenues it has earned to its members…"), ¶ 19 ("[t]his is an action in equity requiring [Southwest] to place excess member capital into a statutory or constructive trust and distribute the same in proper amounts to its members"), ¶ 68 ("[Southwest] is not returning excess revenues in accordance with legal requirements. Instead, it is: returning a

fraction of the excess revenues that it is required to return to its members-ratepayers; improperly overcharging members; and retaining the revenues generated by the overcharges"). As such, Plaintiffs' claims are undoubtedly related to their membership in the cooperative and to patronage capital and thus the claims fall within the scope of the arbitration agreement.

Plaintiffs' claims are also inextricably intertwined with the Bylaws containing the arbitration provision by which they are each bound and the Board's authority granted in the Bylaws. Article VIII of the Bylaws governs Southwest's operation as a non-profit entity and vests power to the Board to ensure it remains a non-profit organization. Specifically, Section 8.01 of the Bylaws could not be more related to Count I of the Complaint. *Compare* **Exhibit 2** at § 8.01 *with* **Exhibit 1** at ¶¶ 75-81. Section 8.01, titled "Apportionment of Excess Revenues," expressly describes how Southwest intends to handle issues related to excess revenues "[i]n accordance with Mississippi Code 77-5-235…." Notably, Count I of Plaintiffs' Complaint is based on an alleged violation of the very same statute addressed in Section 8.01 of the Bylaws. *See* **Exhibit 1** at 15 (styling Count I as a "Violation of Mississippi Code Ann. § 77-5-235 Requirement to Refund Excess Member Equity Prior to July 1, 2016").

Moreover, Section 8.03 governs the exact activity at issue throughout the entire Complaint – namely, the distribution of patronage capital from Southwest to the capital accounts of its members. *See* **Exhibit 2** at § 8.03. Plaintiffs even allude to the Board's decision making obligations with respect to patronage capital under the Bylaws in Plaintiffs' Complaint. *See* **Exhibit 1** at ¶ 66 ("[Southwest] touts the fact that it allocates the excess revenues it earns each year to capital accounts held in the name of its members in an amount determined by the Board of Trustees each year"). As such, the allegations and claims framed by the Complaint can only be

determined by reference to the Bylaws and unquestionably relate to the Bylaws, thus falling squarely within the scope of the arbitration provision.

C. There are no external legal constraints which would preclude arbitration

In determining whether any external legal constraints would preclude arbitration, "courts generally … apply ordinary state-law principles that govern the formation of contracts." *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 827 (S.D. Miss. 2001) quoting *Webb*, 89 F.3d at 257. In the present case, there are no external legal constraints under Mississippi law that would preclude this Court from compelling arbitration. The Bylaws form a valid contract between the Plaintiffs and Southwest. The Plaintiffs have enjoyed the benefits of the provisions of the Bylaws, particularly those relating to patronage capital, throughout their membership. Indeed, the Plaintiffs (and all members who have patronage capital accrued on the books of Southwest) have regularly received and accepted payments of capital credits. As such, there is nothing that would preclude this Court from compelling separate arbitrations of the claims of each named Plaintiff herein and such a ruling is requested by Southwest.

In sum, because Plaintiffs are members of Southwest, meaning that, as a condition to receiving the electric services that they do not deny they received and which are at the center of this lawsuit, they agreed to comply with and be bound by the Bylaws and arbitration agreement contained therein, and because they allege that Southwest improperly retained patronage capital, thereby violating the Bylaws, the Plaintiffs' claims fall squarely within the language of the arbitration clause. der*See Cleveland v. Mann*, 942 So. 2d 108, 119 (Miss. 2006) (reversing a trial court order denying arbitration where the arbitration agreement is valid and enforceable as to the parties in the action); *Anding*, 414 F. Supp. 2d at 652 (granting a motion to compel arbitration premised on a valid, enforceable contractual agreement); *Hellenic Investment Fund, Inc. v. Det*

Norske Veritas, 464 F.3d 514, 518 (5th Cir. 2006) (finding that non-signatories to a valid contract are subject to an arbitration provision where they benefited from the contract terms); *see also Sam Houston Electric Cooperative, Inc. v. Joe D. Berry*, Case No. 09-16-00346-CV (Tex. App.—Beaumont [9th Dist.] Sep. 28, 2017) (enforcing a similar arbitration provision in the electric cooperative context).[3] Thus, separate, individual arbitration of the claims herein by each Plaintiff should be compelled. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218, 105 S. Ct. 1238 (1985) (finding that the Federal Arbitration Act does not give a district court discretion with respect to arbitration, "but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.").

III. Prayer

For all of the above foregoing reasons, Defendant respectfully requests that this Court enter an order compelling each Plaintiff to separately arbitrate any and all claims he or she may have against Southwest; stay the action and all pending deadlines until such time as the Court rules on this Motion and/or arbitration is completed; and for such other and further relief, at law or equity, to which Defendant may be justly entitled.

Respectfully submitted,

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[3] A copy of the Texas appellate court Order in *Sam Houston* is attached hereto as **Exhibit 4**.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served electronically on all known counsel of record on this 2nd day of March, 2018, via the Court's CM/ECF filing portal.

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