UNITED STATES DISTRICT COURT **EASTERN DISTRICT OF TEXAS**

GUY COVINGTON and RUSSELL COVINGTON,	§	
	§	
Plaintiffs,	§	
	§	
versus	§	CIVIL ACTION NO. 1:10-CV-5
	§	
ABAN OFFSHORE LIMITED f/k/a ABAN LOYD CHILES OFFSHORE, LTD.,	§	
	§	
Defendant.	§	

MEMORANDUM AND ORDER

Pending before the court is Defendant Aban Offshore Limited f/k/a Aban Loyd Chiles Offshore, Ltd.'s ("Aban") Motion to Stay Proceedings and Compel Arbitration (#6). Aban contends that Plaintiffs Guy Covington ("Guy") and Russell Covington ("Russell") (collectively, "the Covingtons") are bound by the arbitration agreement that forms the basis of the Covingtons' suit for declaratory judgment and, therefore, are obligated to arbitrate this dispute. Having considered the pending motion, the submissions of the parties, the pleadings, and the applicable law, the court is of the opinion that Aban's motion should be granted.

I. Background

On or about September 13, 2005, Aban entered into a contract ("the Contract") with Beacon Maritime, Inc. ("Beacon"), a marine construction and engineering corporation headquartered in Orange, Texas, to refurbish a self-elevating offshore drilling rig. Article XX of the Contract contains an arbitration clause requiring that all disputes "arising hereunder or related to the work to be performed on the Vessel by [Beacon]" be submitted to arbitration after the parties attempt to resolve the dispute through informal discussions and non-binding mediation.

Article XX further states that arbitration proceedings "shall be governed by and conducted pursuant to, and enforceable in accordance with, the provisions of the Federal Arbitration Act codified in the United States Code." At the time the Contract was executed, Russell and Guy were, respectively, President and Vice-President of Beacon, but neither was a signatory to the Contract.

Subsequently, a dispute arose regarding the cost and quality of Beacon's work, and on March 7, 2008, Aban filed a lawsuit against Beacon in the Southern District of Texas. In that case, Beacon filed a motion to dismiss Aban's complaint and to compel arbitration, which United States District Judge Vanessa D. Gilmore granted on June 20, 2008. On June 5, 2009, Aban served its first amended arbitration complaint on Beacon, naming both Beacon and the Covingtons as Respondents. In its amended complaint, Aban alleges that, prior to the execution of the Contract, the Covingtons falsely represented that they were capable of providing the skill, resources, and management necessary to complete the project successfully. Aban asserts causes of action against the Covingtons for negligent misrepresentation, common law fraud, and fraud in the inducement.

On November 23, 2009, the Covingtons filed their original petition in the 128th Judicial District Court of Orange County, Texas, seeking a declaration that they are not required to arbitrate their dispute with Aban. The Covingtons maintain that, because they are not signatories to the Contract, they are not bound by the arbitration provision it contains. On January 7, 2010, Aban removed the case to federal court on the basis of diversity of citizenship, claiming that complete diversity exists among the parties and that the amount in controversy exceeds

$75,000.00, exclusive of interest and costs. On January 27, 2010, Aban filed the instant motion to compel arbitration.

II. Analysis

The Federal Arbitration Act ("FAA") provides that "a written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable . . . ." 9 U.S.C. § 2. "Whether a contract requires arbitration of a given dispute is a matter of contract interpretation and a question of law for the court." *Smith v. Transport Workers Union of Am.*, 374 F.3d 372, 374 (5th Cir. 2004); *accord Bridas S.A.P.I.C. v. Government of Turkmenistan*, 345 F.3d 347, 353 (5th Cir. 2003), *cert. denied sub nom. State Concern Turkmenneft v. Bridas S.A.P.I.C.*, 541 U.S. 937 (2004). Courts employ a two-step analysis to determine whether a party can be compelled to arbitrate. *Jones v. Halliburton Co.*, 583 F.3d 228, 233 (5th Cir. 2009). First, the court must determine whether the parties agreed to arbitrate the dispute in question. *Id.* at 233-34; *Sherer v. Green Tree Servicing LLC*, 548 F.3d 379, 381 (5th Cir. 2008); *Safer v. Nelson Fin. Group, Inc.*, 422 F.3d 289, 293 (5th Cir. 2005). If this question is answered in the affirmative, the court then determines whether any federal statute or policy renders the parties' claim non-arbitrable. *Jones*, 583 F.3d at 234; *Sherer*, 548 F.3d at 381; *JP Morgan Chase & Co. v. Conegie*, 492 F.3d 596, 598 (5th Cir. 2007). Because neither party contends that a federal statute or policy prevents arbitration in the instant case, the court limits its analysis to the first step.

When determining whether the parties agreed to arbitrate the dispute in question, the court must decide: (1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of the arbitration agreement. *Jones*, 583

F.3d at 234; *Sherer*, 548 F.3d at 381; *Safer*, 422 F.3d at 293. Although there is a strong federal policy favoring arbitration, "the policy does not apply to the initial determination whether there is a valid agreement to arbitrate." *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 429 (5th Cir. 2004); *accord Sherer*, 548 F.3d at 381; *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 214 (5th Cir. 2003). Nevertheless, once a court determines that a valid agreement exists, the court must resolve any doubts concerning the scope of an arbitration agreement in favor of arbitration. *Safer*, 422 F.3d at 294; *Banc One Acceptance Corp.*, 367 F.3d at 429. Accordingly, a valid arbitration clause should be enforced "'unless it can be said with positive assurance that [the] arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.'" *Jones*, 583 F.3d at 235 (quoting *Personal Sec. & Safety Sys. v. Motorola, Inc.*, 297 F.3d 388, 392 (5th Cir. 2002)); *Safer*, 422 F.3d at 429.

A. Validity of the Arbitration Agreement

The parties do not dispute that a valid arbitration agreement exists between Aban and Beacon. Rather, they contest whether the Covingtons, as non-signatories, are bound by it. Normally, courts apply the contract law of the particular state that governs an arbitration agreement to determine its validity. *JP Morgan Chase & Co.*, 492 F.3d at 598; *Washington Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 264 (5th Cir. 2004). There is less certainty, however, over the law that governs whether a non-signatory should be compelled to arbitrate. *Graves v. BP Am., Inc.*, 568 F.3d 221, 223 (5th Cir. 2009); *see JP Morgan Chase & Co.*, 492 F.3d at 598; *Ace Am. Ins. Co. v. Huntsman Corp.*, 255 F.R.D. 179, 191 n.4 (S.D. Tex. 2008). Cases within the Fifth Circuit have applied both federal and state law on this issue. *See Washington Mut. Fin. Group, LLC*, 364 F.3d at 267 n.6 (applying federal law); *Bridas S.A.P.I.C.*, 345 F.3d at 355-56

(applying federal law); *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1074 (5th Cir. 2002) (applying state law). The court finds it unnecessary to decide the choice-of-law issue because, in this case, federal and the applicable state law[1] "dovetail to provide the same outcome." *Graves*, 568 F.3d at 223.

Both federal and Texas state courts recognize that "under certain circumstances, principles of contract law and agency may bind a non-signatory to an arbitration agreement." *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 738 (Tex. 2005) (citing *Fisser v. International Bank*, 282 F.2d 231, 233 (2d Cir. 1960)). The United States Court of Appeals for the Fifth Circuit and Texas state courts have also acknowledged "six theories, arising out of common principles of contract and agency law, that may bind non-signatories to arbitration agreements: (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel; and (6) third-party beneficiary." *Id.* at 739; *accord Bridas S.A.P.I.C.*, 345 F.3d at 356; *see Sherer*, 548 F.3d at 381-82 & n.2; *In re Wells Fargo Bank, N.A.*, 300 S.W.3d 818, 824 (Tex. App.—San Antonio 2009, orig. proceeding [mand. pending]); *Rapid Settlements, Ltd. v. Green*, 294 S.W.3d 701, 707 (Tex. App.—Houston [1st Dist.] 2009, no pet.); *Stanford Dev. Corp. v. Stanford Condo. Owners Ass'n*, 285 S.W.3d 45, 48-49 (Tex. App.—Houston [1st Dist.] 2009, no pet.). Under the agency theory, federal and Texas state courts have allowed non-signatory agents, employees, and representatives of a signatory principal to compel arbitration when the non-signatories' alleged wrongful acts relate to their behavior as agents and fall within the scope of the arbitration agreement. *See Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110,

[1] Article XVIII of the Contract contains a general choice-of-law provision stating, "[t]his contract shall be governed by the laws of the State of Texas without reference to its conflict of laws doctrine . . . ." Thus, to the extent that state law applies, Texas law governs.

1121-22 (3d Cir. 1993); *Arnold v. Arnold Corp.—Printed Commc'ns for Bus.*, 920 F.2d 1269, 1281-82 (6th Cir. 1990); *Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1188 (9th Cir. 1986); *In re Vest Ins. Group, Inc.*, 192 S.W.3d 759, 762-63 (Tex. 2006); *In re Wells Fargo Bank, N.A.*, 300 S.W.3d at 825; *McMillan v. Computer Translation Sys. & Support, Inc.*, 66 S.W.3d 477, 481 (Tex. App.—Dallas 2001, no pet.).

The Covingtons attempt to distinguish these cases, arguing that the courts compelled arbitration *in favor* of non-signatories who sought the benefit of arbitration. Federal courts, however, have applied the same reasoning to compel arbitration *against* non-signatories who, like the Covingtons, resisted arbitration. *See Lee v. Chica*, 983 F.2d 883, 886-87 (8th Cir.), *cert. denied*, 510 U.S. 906 (1993) (holding that an arbitration agreement between a brokerage firm and its customer was also binding on the non-signatory brokerage agent); *Doran v. Bondy*, No. 5:04-CV-99, 2005 WL 1907252, at *6-7 (W.D. Mich. Feb. 18, 2005) (holding that a non-signatory investment agent could be compelled to arbitrate because her "alleged misconduct occurred while she was acting in her capacity as an agent . . . ."); *Creative Telecomms., Inc. v. Breeden*, 120 F. Supp. 2d 1225, 1240-41 (D. Haw. 1999) (holding that a non-signatory company representative who participated in sale negotiations could be compelled to arbitrate claims arising from the sales agreement). The Covingtons present no argument or authority suggesting that Texas state courts would deviate from federal law on this point. In fact, Texas state courts have noted the importance of maintaining uniformity between federal and state arbitration law. *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 203 (Tex. 2007); *In re Vesta Ins. Group, Inc.*, 192 S.W.3d at 763 ("We remain mindful of the importance of keeping federal and state law uniform so that arbitrability does not depend on where one seeks to compel it."); *In re Kellogg Brown &*

Root, Inc., 166 S.W.3d at 739 ("[W]e recognize that it is important for federal and state law to be as consistent as possible in this area, because federal and state courts have concurrent jurisdiction to enforce the FAA.").

Accordingly, the court finds that the Covingtons can be compelled to arbitrate claims that arise from their behavior as Beacon's agents and fall within the scope of the arbitration agreement. The parties do not dispute that the Covingtons' alleged conduct occurred while they were acting as Beacon's agents. Therefore, the sole remaining issue is whether Aban's claims against the Covingtons fall within the scope of the arbitration agreement.

B. Scope of the Arbitration Agreement

When defining the scope of an arbitration agreement, courts apply state rules of contract interpretation. *Tittle v. Enron Corp.*, 463 F.3d 410, 419 (5th Cir. 2006); *Banc One Acceptance Corp.*, 367 F.3d at 429. Nevertheless, "'due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself must be resolved in favor of arbitration.'" *Webb v. Investacorp, Inc.*, 89 F.3d 252, 258 (5th Cir. 1996) (quoting *Volt Info. Scis., Inc. v. Board of Trustees of Leland Stanford*, 489 U.S. 468, 476 (1989)); *accord Banc One Acceptance Corp.*, 367 F.3d at 429. When determining whether the parties' claims fall within the scope of an arbitration agreement, courts focus on the factual allegations underlying the parties' claims rather than the parties' characterization of them. *Harvey v. Joyce*, 199 F.3d 790, 794-95 (5th Cir. 2000); *Gray v. Sage Telecom, Inc.*, 410 F. Supp. 2d 507, 510 (N.D. Tex. 2006); *Coffman v. Provost-Umphrey Law Firm, L.L.P.*, 161 F. Supp. 2d 720, 730 (E.D. Tex. 2001), *aff'd*, 33 F. App'x 705 (5th Cir.), *cert. denied*, 537 U.S. 880 (2002).

The arbitration agreement at issue covers "[a]ll disputes arising hereunder or related to the work to be performed on the Vessel by [Beacon] . . . ." In cases involving similar arbitration agreements, federal and Texas state courts have held that the terminology "related to" is "extremely broad" and "capable of expansive reach." *Kirby Highland Lakes Surgery Ctr., L.L.P. v. Kirby*, 183 S.W.3d 891, 898 (Tex. App.—Austin 2006, no pet.); *see Jones*, 583 F.3d at 235; *Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1067-68 (5th Cir. 1998); *Graham-Rutledge & Co., Inc. v. Nadia Corp.*, 281 S.W.3d 683, 690 (Tex. App.—Dallas 2009, no pet.); *Dennis v. College Station Hosp., L.P.*, 169 S.W.3d 282, 286 (Tex. App.—Waco 2005, pet. denied). In these cases, the courts generally concluded that it is sufficient for the parties' claims to "touch" the subject matter of the agreement. *Pennzoil Exploration & Prod. Co.*, 139 F.3d at 1068; *Kirby Highland Lakes Surgery Ctr.*, 183 S.W.3d at 898; *Dennis*, 169 S.W.3d at 285.

Here, the language "related to the work to be performed on the Vessel," implies a somewhat narrower scope than the agreements in the cases cited above, which covered matters related to the entire contract. Nevertheless, the court finds that the agreement is sufficiently broad to include the dispute in question. The "work to be performed" under the Contract is the refurbishment of a self-elevating offshore drilling rig. Aban's arbitration complaint alleges that the Covingtons misrepresented that "they were capable of providing the resources needed to successfully undertake [the refurbishment] and that they had sufficient and competent management and administrative staff, front line supervision, skilled craftsmen and yard resources to ensure each project was accurately completed on time and on budget." Aban further alleges that the Covingtons falsely represented that "the work could be done for the quoted price and in the

allotted time period." Resolving all ambiguities in favor of arbitration, the court finds that these allegations "touch" on the work to be performed under the Contract. Therefore, the arbitration agreement is susceptible to an interpretation that covers the dispute at issue. *See Jones*, 583 F.3d at 234. Accordingly, the parties' dispute falls within the scope of the arbitration agreement, and the agreement is enforceable against the Covingtons.

C. Procedural Arbitrability

The Covingtons contend that Aban's motion to compel arbitration is nonetheless improper at this time because Aban has not fulfilled its contractual obligations under Article XX of the Contract. Article XX provides that, prior to arbitration, all disputes "shall be attempted to be resolved by informal discussions, or . . . non-binding mediation." The Covingtons maintain that Aban has failed to participate in informal discussions or non-binding mediation regarding any of its claims against them. The Covingtons argue, therefore, that Aban's motion is premature.

"Questions of timeliness or whether a party fulfilled the procedural requirements of an arbitration provision are considered questions of procedural arbitrability." *Perez v. Lemarroy*, 592 F. Supp. 2d 924, 937 (S.D. Tex. 2008); *accord General Warehousemen & Helpers Union v. Albertson's Distribution, Inc.*, 331 F.3d 485, 488 (5th Cir. 2003); *Oil, Chem. & Atomic Workers' Int'l Union v. Chevron*, 815 F.2d 338, 341 (5th Cir. 1987); *Sabine Indep. Seagoing Officers Ass'n v. Sabine Towing & Transp. Co.*, 805 F. Supp. 430, 433 (E.D. Tex. 1992), *aff'd*, 68 F.3d 468 (5th Cir. 1995). Questions of procedural arbitrability are generally decided by the arbitrator, not the court. *General Warehousemen & Helpers Union*, 331 F.3d at 488; *Perez*, 592 F. Supp. 2d at 937. This general rule, however, has one exception: a court may deny arbitration on procedural grounds when the procedural provision in question operates to bar arbitration

altogether. *General Warehousemen & Helpers Union*, 331 F.3d at 488; *Perez*, 592 F. Supp. 2d at 937. In other words, "a court will not order arbitration if 'no rational mind' could question that the parties intended for a procedural provision to preclude arbitration and that the breach of the procedural requirement was clear." *Oil, Chem. & Atomic Workers' Int'l Union*, 815 F.2d at 342 (quoting *Rochester Tel. Corp. v. Communication Workers of Am.*, 340 F.2d 237, 239 (2d Cir. 1965)); *accord General Warehousemen & Helpers Union*, 331 F.3d at 488. "[S]uch cases are likely to be rare indeed." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 558 (1964); *General Warehousemen & Helpers Union*, 331 F.3d at 488; *Perez*, 592 F. Supp. 2d at 937.

The objection the Covingtons raise (*i.e.*, that Aban failed to attempt to resolve its dispute with them through informal discussions and non-binding mediation prior to arbitration) is one of procedural arbitrability. *See Perez*, 592 F. Supp. 2d at 937-38. There is nothing in Article XX suggesting that failure to comply with this requirement would bar arbitration of Aban's claims. Therefore, the exception to the general rule does not apply, and the Covingtons' objection must be decided by the arbitrator. Accordingly, the Covingtons' objection is not properly before this court and presents no obstacle to Aban's motion to compel arbitration. *See id.*

III. Conclusion

For the reasons discussed above, the court finds that a valid arbitration agreement exists between Aban and the Covingtons, and the current dispute between the parties falls within the scope of that agreement. Furthermore, because no policy or procedural reasons exist to preclude arbitration in this case, Aban's motion to compel arbitration is granted.

SIGNED at Beaumont, Texas, this 15th day of March, 2010.

Marcia A. Crone

MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE