Case No. 18-14832

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SEBASTIAN CORDOBA,
individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

DIRECTV, LLC, individually and as successor through merger to DIRECTV, Inc.,

Defendant-Appellant.

Appeal from an Order of the United States District Court
for the Northern District of Georgia
Case No. 1:15-cv-03755-MHC

BRIEF OF DEFENDANT-APPELLANT DIRECTV

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

IN ACCORDANCE with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, counsel for Defendant-Appellant DIRECTV, LLC hereby certifies that, to the best of counsel's knowledge, the following is a complete list of trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that may have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

1. AT&T Inc. (stock ticker symbol: T)
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3. Cohen, Hon. Mark H.
4. Conger, Ava (Defendant/Appellant's Counsel)
5. Cordoba, A. Sebastian (Plaintiff)
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32. The Chamber of Commerce of the United States of America (*Amicus Curiae* in Related Proceeding)

33. The DIRECTV Group, Inc.

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Defendant-Appellant DIRECTV, LLC hereby certifies that DIRECTV, LLC is wholly owned by DIRECTV Holdings LLC. DIRECTV Holdings LLC is wholly owned by The DIRECTV Group, Inc. The DIRECTV Group, Inc. is wholly owned by DIRECTV Group Holdings, LLC. DIRECTV Group Holdings, LLC is a wholly owned subsidiary of AT&T Inc., a publicly traded company. No entity or person owns more than 10% of the shares of AT&T Inc.

This 30th day of January, 2019.

Respectfully submitted,

/s/ Evan M. Tager

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STATEMENT REGARDING ORAL ARGUMENT

The district court's decision is irreconcilable with binding case law from the U.S. Supreme Court and this Court. Accordingly, DIRECTV submits that oral argument is not necessary for the Court to determine that reversal is required. Of course, if the Court concludes that oral argument would be helpful, DIRECTV stands ready to participate.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

JURISDICTIONAL STATEMENT

Plaintiff-Appellee Rene Romero raises claims against DIRECTV under the Satellite Television Extension and Localism Act ("STELA"), 47 U.S.C. § 338(i). Accordingly, the district court had federal question jurisdiction under 28 U.S.C. § 1331.

This Court has jurisdiction under Section 16(a) of the Federal Arbitration Act ("FAA"), which provides that "[a]n appeal may be taken from * * * an order * * * refusing" a motion to enforce an arbitration agreement. 9 U.S.C. § 16(a)(1)(A).

STATEMENT OF THE ISSUE

After Sebastian Cordoba filed a putative class action against DIRECTV under the Telephone Consumer Protection Act ("TCPA"), Romero joined the lawsuit, alleging that DIRECTV violated the Satellite Television Extension and Localism Act of 2010 ("STELA"), 47 U.S.C. § 338(i), by sharing his personal information with the expert witness it had retained to assist in defending the TCPA claim. Romero was a DIRECTV customer at the time of the alleged STELA violation. Because Romero had repeatedly agreed to arbitrate "all disputes and claims" between him and DIRECTV—including "claims arising out of or relating to any aspect of the relationship between" him and DIRECTV

and claims "based in * * * statute"—DIRECTV moved to compel arbitration of Romero's STELA claim. The district court denied DIRECTV's motion, holding that Romero's arbitration agreement with DIRECTV does not cover his STELA claim because "DIRECTV has not established that Romero's claim arises from" his agreement with DIRECTV. Doc. 163, p. 21.

The question presented is whether the district court erred in holding that Romero's arbitration agreement, which requires him to arbitrate "all disputes and claims" between him and DIRECTV, does not cover Romero's STELA claim.

STATEMENT OF THE CASE

A. Romero Agreed To Arbitrate "All Disputes And Claims" Between Him And DIRECTV.

DIRECTV's Customer Agreement, which sets forth the terms and conditions under which customers receive DIRECTV satellite television service, includes an arbitration provision. When consumers sign up for DIRECTV service, they receive a copy of the Customer Agreement. *See* Doc. 70-7, pp. 2-3. Customers also receive a copy of any updates to the agreement. *Id.*

DIRECTV's records show that Romero first ordered DIRECTV service on November 24, 2014. *See* Doc. 154-2, p. 2. At that time, DIRECTV sent Romero an "Order Confirmation" email that stated the Customer Agreement would be sent in a separate email within 24 hours. *See id.* at 2, 6-7. DIRECTV then sent him a second email containing the full text of the Customer Agreement. *Id.* at 2, 9-18. Romero remained a DIRECTV customer until April 2017. *Id.* at 3, 97.

Three versions of the Customer Agreement were in effect over that period—the original version in effect in November 2014; a revised version effective June 24, 2015 that contained an identical arbitration provision; and a third version of the Customer Agreement that became effective on June 30, 2016. Doc. 154-2, p. 2.

The first paragraph of each version of DIRECTV's Customer Agreement highlighted that it contained a binding arbitration provision. Specifically, the first paragraph of each Agreement stated: "THIS DESCRIBES THE TERMS AND CONDITIONS OF YOUR RECEIPT OF AND PAYMENT FOR DIRECTV SERVICE® AND IS SUBJECT TO ARBITRATION (SECTION 9)." Doc. 154-2, pp. 9, 20, 23. It then informed customers that "IF YOU DO NOT ACCEPT THESE

TERMS, PLEASE NOTIFY US IMMEDIATELY AND WE WILL CANCEL YOUR ORDER OR SERVICE * * *. IF YOU INSTEAD DECIDE TO RECEIVE OUR SERVICE, IT WILL MEAN THAT YOU ACCEPT THESE TERMS AND THEY WILL BE LEGALLY BINDING." *Id.*

Each version also reserved DIRECTV's right to change its terms and conditions of service and stated that if it made any such changes, it would "send [Romero] a copy of [his] new Customer Agreement containing its effective date." Doc. 154-2, pp. 14, 21, 24. And each version further explained that if Romero "elect[ed] not to cancel [his] Service after receiving a new customer agreement, [his] continued receipt of Service [would] constitute[] acceptance of the changed terms and conditions." *Id.*

As noted above, the Customer Agreement was updated twice after Romero became a subscriber but before he cancelled his service in April 2017. DIRECTV complied with the procedures for revising its Customer Agreements, sending Romero a copy of the updated Customer

Agreements effective June 2015 and June 2016.[1] *See* Doc. 70-7, p. 3 (describing DIRECTV's process for sending updated Customer Agreements to subscribers). Romero continued to receive and pay for DIRECTV's services until he terminated his service on April 3, 2017. *See* Doc. 154-2, pp. 3, 97. The 2016 Agreement—which was in effect at the time of the alleged actions giving rise to Romero's claim—contained an arbitration provision that stated, in relevant part:

> **9.2 Arbitration Agreement**
>
> (1) DIRECTV and you agree to arbitrate **all disputes and claims** between us. This agreement to arbitrate is intended to be broadly interpreted. It includes, but is not limited to:
>
> - claims arising out of or relating to any aspect of the relationship between us, whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory; * * * .

[1] DIRECTV also regularly reminded Romero about his Customer Agreement and indicated where DIRECTV's current Customer Agreement could be found on DIRECTV's website. Romero's monthly billing statements reminded him that "[y]ou received your DIRECTV Customer Agreement with your order confirmation," that "[y]our Customer Agreement describes the terms and conditions upon which you accept our service," and that he could look to his "Customer Agreement, which is also available at directv.com/agreement, for complete information about billing and payment on your account." *See, e.g.*, Doc. 154-2, p. 80.

Doc. 154-2, p. 24. It then explained that "this Agreement evidences a transaction in interstate commerce, and thus the Federal Arbitration Act governs the interpretation and enforcement of this provision. This arbitration provision shall survive termination of this Agreement." *Id.*

B. DIRECTV's Arbitration Provision Contains The Same Features That The U.S. Supreme Court Has Concluded Make Consumers Better Off Than They Would Be In Court.

The operative version of DIRECTV's arbitration provision includes several features that ensure that customers have a simple and inexpensive means of resolving any disputes that may arise. DIRECTV's arbitration provision is materially identical to an arbitration provision that the U.S. Supreme Court concluded would make customers "better off * * * than they would" be "as participants in a class action." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011). These consumer-friendly features include:

- **Cost-free arbitration:** For claims up to $75,000, DIRECTV will "pay all [American Arbitration Association ("AAA")] filing, administration, and arbitrator fees" unless the arbitrator determines that the customer's claim "is frivolous or brought

for an improper purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b)).”[2]

- **$10,000 minimum award:** If the arbitrator issues an award in favor of a customer that is greater than the “last written settlement offer made before an arbitrator was selected,” then DIRECTV will pay the customer $10,000 rather than any smaller arbitral award.
- **Double attorneys’ fees:** If the arbitrator awards the customer more than DIRECTV’s last written settlement offer made before an arbitrator was selected, then “DIRECTV will * * * pay [the customer’s] attorney, if any, twice the amount of attorneys’ fees, and reimburse any expenses (including expert witness fees and costs) that [the] attorney reasonably accrues for

[2] Even if an arbitrator concludes that a customer’s claim is frivolous, if the claim is for less than $10,000, the arbitration provision would cap the amount of costs the customer would have to pay at $200, the amount that the consumer is responsible for under the AAA’s consumer arbitration rules. *See* Doc. 154-3, p. 71 (AAA Consumer Arbitration Rules fee schedule).

investigating, preparing, and pursuing [the] claim in arbitration."[3]

- **Small claims court option:** Either party may bring a claim in small claims court as an alternative to arbitration if the claim complies with the jurisdictional requirements for small claims court.
- **Flexible consumer procedures**: Arbitration will be conducted under the AAA's Consumer Arbitration Rules, which the AAA designed with consumers in mind.
- **Choice of in-person, telephonic, or no hearing:** For claims of $10,000 or less, the customer has the exclusive right to choose whether the arbitrator will conduct an in-person hearing, a telephonic hearing, or a "desk" arbitration in which "the arbitration will be conducted solely on the basis of documents submitted to the arbitrator."

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[3] The provision for double attorneys' fees "supplements any right to attorneys' fees and expenses [the customer] may have under applicable law." Doc. 154-2, p. 24. Thus, even if an arbitrator were to award a customer less than DIRECTV's last settlement offer, the customer would be entitled to an attorneys' fees award to the same extent as if his or her individual claim had been brought in court.

- **Conveniently located hearing:** Arbitration will take place "in the county (or parish) of [the customer's] billing address."
- **DIRECTV disclaims right to seek attorneys' fees:** "Although under some laws DIRECTV may have a right to an award of attorneys' fees and expenses if it prevails in an arbitration, DIRECTV agrees that it will not seek such an award."
- **No confidentiality requirement:** Either party may publicly disclose the arbitration and its result.
- **Full individual remedies available:** The arbitrator can award any form of relief on an individualized basis (including statutory and punitive damages, attorneys' fees, and injunctions that would affect the claimant alone) that a court could award.
- **Right to a written decision:** "Regardless of the manner in which the arbitration is conducted, the arbitrator shall issue a reasoned written decision sufficient to explain the essential findings and conclusions on which the award is based."

Doc. 154-2, p. 24.

C. Romero Files A Putative Class Action Against DIRECTV.

In 2015, plaintiff Sebastian Cordoba filed a putative class action against DIRECTV, alleging that DIRECTV violated the TCPA. Doc 1, pp. 32-39.[4] Notwithstanding his agreement to arbitrate his claims with DIRECTV on an individual basis, Romero joined the lawsuit as a named plaintiff on May 30, 2018. Romero alleges that, in the course of opposing class certification in the TCPA litigation, DIRECTV violated STELA by sharing his personal customer information (and the customer information of other potential class members) with its expert witness. Doc. 143, pp. 4-5. Specifically, Romero alleges that DIRECTV created a data file that contained certain customers' account numbers, first and last names, account creation dates, disconnect dates, account status, and home and business telephone numbers, and shared that data file with its expert witness. *Id.* at 25-27. He further alleges that he did not give DIRECTV consent to disclose this personally identifiable

[4] An appeal under Federal Rule of Civil Procedure 23(f) from the district court's order certifying a TCPA class (Doc. 96) is pending before this Court. *See* No. 18-12077.

information. *Id.* at 28. The alleged disclosure occurred on or around November 2016 (*id.*), when Romero was a DIRECTV subscriber.[5]

D. The District Court Denies DIRECTV's Motion To Compel Arbitration.

DIRECTV responded to the complaint by moving to compel arbitration under the arbitration provision in Romero's 2016 Customer Agreement—or, in the alternative, under the 2014 or 2015 versions of the Customer Agreement.

The district court denied DIRECTV's motion. The court first held that Romero received and accepted the 2016 version of DIRECTV's Customer Agreement under settled principles of Maryland contract law. Doc. 163, pp. 9-15.[6] But the court concluded that Romero's STELA claim

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[5] Although it appears that Romero is an absent member of the TCPA class certified by the district court (*see* Doc. 154-1, p. 10; Doc. 64-4), Romero's counsel represented to the district court that "Mr. Romero does not bring a TCPA claim." Doc. 156, p. 20 n.8. And the district court credited that representation, stating that "Romero's allegations relate only to DIRECTV's alleged violations of STELA." Doc. 163, p. 16 n.11. The court therefore did not address DIRECTV's argument that any TCPA claim Romero might have falls within the scope of his arbitration provision. In any event, our arguments below that Romero's STELA claim is within the scope of his arbitration provision apply fully to any TCPA claim that Romero might seek to raise notwithstanding his renunciation of such a claim in the district court.

[6] The district court applied Maryland law because DIRECTV's Customer Agreement provides that it is governed "by the rules and

does not fall within the scope of the arbitration provision contained in the 2016 Customer Agreement. *Id.* at 16-23. The court acknowledged that the arbitration provision expressly covers "all disputes and claims" between Romero and DIRECTV. *Id.* at 16. It nevertheless held that, under the FAA itself and decisions of the Supreme Court, this Court, and other courts of appeals, claims that do not "arise out of the contract between the parties" are categorically exempt from arbitration. *Id.* at 17 (quotation marks and alteration omitted). Having grafted this limitation onto the terms of the arbitration provision, the court then concluded that Romero's STELA claim "does not arise out of his contract with DIRECTV" and thus "is not covered by the arbitration provision in the 2016 Agreement." *Id.* at 23.

STANDARD OF REVIEW

This Court reviews "de novo both the district court's denial of a motion to compel arbitration and the district court's interpretation of an

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regulations of the Federal Communications Commission, other applicable federal laws, and the laws of the state and local area where Service is provided to you" (*e.g.*, Doc. 154-2, p. 23) and Romero is a Maryland resident who received DIRECTV service in Maryland (Doc. 143, p. 4).

arbitration clause." *Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1263 (11th Cir. 2017) (citation omitted).

SUMMARY OF ARGUMENT

The Supreme Court has repeatedly recognized that the FAA's "'principal purpose' * * * is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'" *Concepcion*, 563 U.S. at 344 (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). The district court deviated from this bedrock principle by holding that—whatever an arbitration provision says, and no matter how clearly it does so—claims that do not arise out of the underlying contract are categorically inarbitrable. In disregarding the unambiguous text defining the scope of the matters the parties agreed to arbitrate, the district court flatly violated the FAA's mandate that arbitration agreements be enforced according to their terms. Its decision therefore must be reversed.

The plain text of DIRECTV's arbitration provision requires arbitration of "all disputes and claims" between DIRECTV and Romero—without exception. That language resolves this case. This Court has repeatedly held that similarly broad arbitration agreements

must be enforced as written. The district court's manufactured limitation—requiring that, regardless of the arbitration agreement's language, a dispute must arise out of a contract to be subject to arbitration—is flatly contrary to this Court's precedents. The district court failed to recognize these precedents, and instead misunderstood the cases on which it did rely.

Even if the all-encompassing language "all disputes and claims" were not enough to cover Romero's STELA claim, DIRECTV's arbitration provision also expressly includes as examples (but is not limited to) "claims arising out of or relating to any aspect of the relationship between" DIRECTV and the subscriber. Romero's claim falls squarely within this category as well. Romero alleges that DIRECTV violated STELA by disclosing his subscriber information without his prior consent. But the necessary predicate to that claim is that Romero was a DIRECTV subscriber in the first place—otherwise DIRECTV would not have had Romero's subscriber information.

ARGUMENT

THE DISTRICT COURT ERRED AS A MATTER OF LAW IN REFUSING TO COMPEL ROMERO TO ARBITRATE HIS STELA CLAIM AGAINST DIRECTV.

A. Romero's Agreement To Arbitrate "All Disputes And Claims" Between Him And DIRECTV Must Be Enforced According To Its Plain Terms.

The 2016 Customer Agreement requires arbitration of "**all disputes and claims** between [DIRECTV and Romero]." This language should have marked both the beginning and the end of the district court's analysis. Romero's STELA claim is plainly a claim between him and DIRECTV. Courts must "'rigorously enforce' arbitration agreements according to their terms" (*Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013)), and the terms of the 2016 Customer Agreement clearly encompass Romero's STELA claim.

Despite the arbitration provision's expansive reach, the district court concluded that Romero's STELA claim fell outside the scope of the arbitration provision because it did not "arise out of his contract with DIRECTV." Doc. 163, p. 23.[7] That manufactured limitation finds no

[7] At one point, the district court referred to a "require[ment] that the claim have some relationship to the contract containing the arbitration provision." Doc. 163, p. 18. But everywhere else in the order, the district court emphasized its belief that the claim must "arise out of"

support in the text of the arbitration provision and is directly contrary to binding precedent from this Court.

1. This Court has repeatedly held that provisions requiring arbitration of all disputes between the parties must be enforced as written.

This Court's precedents make it crystal clear that agreements to arbitrate any disputes between the parties must be enforced as written.

The foundational decision is *Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217 (11th Cir. 2000), in which this Court affirmed an order compelling arbitration of an employee's Title VII claims. The provision at issue in *Brown*—which this Court described as "unequivocal and all-encompassing"—required arbitration of "any dispute between [the parties] or claim by either against the other." *Id.* at 1221. This Court concluded that, "[b]y using this inclusive language, the parties agreed to arbitrate any and all claims against each other, ***with no exceptions***." *Id.* (emphasis added). And the Court further

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the contract—including its bottom-line conclusion that Romero's claim "does not arise out of his contract with DIRECTV." *Id.* at 23; *see also id.* at 17, 22. In all events, for the reasons discussed below, the "some relationship to the contract" formulation violates this Court's precedents and the FAA's mandate to enforce arbitration agreements according to their terms every bit as much as the requirement that the claim "arise out of" the agreement.

rejected the plaintiff's argument, similar to the district court's conclusion here, that the provision "is too broad" and "exceeds the scope of § 2 of the FAA by addressing not just those claims arising out of the employment contract, but all claims between the parties, including statutory violations." *Id.* at 1222. As the Court explained, such an argument is just an "attempt to argue that Title VII and other statutory claims are not arbitrable," which is foreclosed by Supreme Court and Eleventh Circuit precedent. *Id.*

Numerous other decisions from this and other courts confirm that there "is nothing unusual about an arbitration clause * * * that requires arbitration of all disputes between the parties to the agreement." *Bd. of Trustees of City of Delray Beach Police & Firefighters Ret. Sys. v. Citigroup Glob. Mkts., Inc.*, 622 F.3d 1335, 1343 (11th Cir. 2010). This Court has "enforced such a clause before because it 'evince[d] a clear intent to cover ***more than just those matters set forth in the contract***.'" *Id.* (emphasis added) (quoting *Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023, 1028 (11th Cir. 1982), *overruled on other grounds by Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 & n.3 (1985)).

The Fourth Circuit has similarly enforced an arbitration clause that "applies to '[a]ny controversy or claim' relating to 'any aspects of the relationship'" between the parties, explaining that "[t]he breadth of the language clearly establishes that the arbitration clause was intended to apply to *all conflicts between the parties* and not only to conflicts regarding [one contract] in particular." *Cara's Notions, Inc. v. Hallmark Cards, Inc.*, 140 F.3d 566, 571 (4th Cir. 1998) (emphasis added; some alterations in original). As one district court in this Circuit has aptly put it, a "broad arbitration provision, such as the one in this case, is not necessarily limited to disputes arising from the agreement in which it is contained." *Day v. Persels & Assocs., LLC*, 2015 WL 413224, at *12 (M.D. Fla. Jan. 30, 2015).[8]

In short, a broad arbitration provision that applies to "all disputes and claims" means what it says. The district court had no basis in the language of the arbitration provision to refuse to enforce it here.

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[8] *See also, e.g.*, *Citi Cars, Inc. v. Cox Enters., Inc.*, 2018 WL 1521770, at *5 (S.D. Fla. Jan. 22, 2018); *Smith v. Davison Design & Dev., Inc.*, 2014 WL 12610156, at *4 (M.D. Fla. Feb. 28, 2014); *Southland Health Servs., Inc. v. Bank of Vernon*, 887 F. Supp. 2d 1158, 1164-65 (N.D. Ala. 2012).

2. The district court's reasons for refusing to enforce Romero's arbitration agreement are wrong.

(a) The FAA does not contain a categorical limitation on the scope of arbitration agreements.

The district court's rationale for deeming Romero's claim to be outside the scope of his arbitration provision rests on the premise that the FAA itself "requires that the controversy 'aris[e] out of' the contract between the parties." Doc. 163, p. 17 (quoting 9 U.S.C. § 2) (alteration in original). In view of the cases from this Court that we cited in the previous section, the district court was not entitled to interpret the FAA in this way. Moreover, as far as we are aware, no court other than the court below has adopted such a Procrustean interpretation of Section 2 of the FAA.

On the contrary, few refrains are more consistent in the Supreme Court's FAA jurisprudence than the directive that Section 2 requires courts to enforce arbitration agreements "according to their terms." *E.g.*, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 2019 WL 122164, at *3 (Jan. 8, 2019); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018); *Am. Express Co.*, 570 U.S. at 233; *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012); *Concepcion*, 563 U.S. at 339; *Rent-A-*

Center, West, Inc. v. Jackson, 561 U.S. 63, 67 (2010); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996); *Volt*, 489 U.S. at 478.

Indeed, the district court's reading of the FAA most resembles one that the unanimous Supreme Court summarily rejected in *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530 (2012) (per curiam). In *Marmet*, West Virginia's highest court declared as a matter of state public policy that personal injury and wrongful death claims are categorically inarbitrable. *Id.* at 532. And in seeking to insulate its public policy rule from FAA preemption, the state court concluded that "'Congress did not intend for the FAA to be, in any way, applicable to personal injury or wrongful death suits that only collaterally derive from a written agreement that evidences a transaction affecting interstate commerce.'" *Id.* (quoting the State court). The U.S. Supreme Court swiftly rejected that "interpretation of the FAA [as] both incorrect and inconsistent with clear instruction in the precedents of this Court." *Id.* "The statute's text includes no exception for personal-injury or wrongful-death claims," the Court continued, but instead "requires courts to enforce the bargain of the parties to arbitrate." *Id.* at 532-33. And while *Marmet* involved state common-law claims, the Supreme

Court has long held that a court's "duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on [federal] statutory rights." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *accord CompuCredit*, 565 U.S. at 98.

The district court's reliance on *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985) (cited at Doc. 163, pp. 17-18) for its interpretation of the FAA is badly misplaced. The Supreme Court's statement in *Dean Witter* that the FAA requires enforcement of "written agreements to arbitrate controversies arising out of an existing contract" (*id.* at 218) was not a holding or even an insinuation that the FAA's reach is limited to such agreements. It reflects only that the arbitration agreement before the Court was limited to claims "'arising out of or relating to this contract or the breach thereof.'" *Id.* at 215 (quoting the arbitration agreement).

(b) The cases relied upon by the district court are inapposite and readily distinguishable.

The district court cited several cases, including a decision of this Court, for the proposition that arbitration agreements cannot apply to "[d]isputes that are not related—with at least some directness—to

performance of duties specified by the contract" because such disputes "do not count as disputes 'arising out of' the contract." Doc. 163, p. 18 (quoting *Telecom Italia, SpA v. Wholesale Telecom Corp.*, 248 F.3d 1109, 1116 (11th Cir. 2001)).

But neither *Telecom Italia* nor any other case that the district court cited supports that proposition. Rather, each involved an arbitration agreement that had express limiting language not present here. For example, the arbitration provision in *Telecom Italia* "required arbitration of all disputes 'arising out of or relating to th[e] service agreement.'" 248 F.3d at 1113. Citing the *Brown* case discussed above, this Court was careful to note that "[a]lthough this language is broad, it is not as broad as a clause requiring arbitration of 'any dispute between them or claim by either [party to the contract] against the other.'" *Id*. at 1114 (quoting *Brown*, 211 F.3d at 1221). In other words, this Court was resting on the particular terms of the clause at issue; and it follows from the Court's rationale that it would have reached the opposite conclusion if the parties had agreed to a broader clause.

The district court also asserted that, "[i]n the Eleventh Circuit, 'the focus is on whether the tort or breach in question was an

immediate, foreseeable result of the performance of contractual duties.'" Doc. 163, p. 19 (quoting *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1218 (11th Cir. 2011)). But again, this Court in *Doe* was interpreting an arbitration provision that had express limiting language that is wholly absent from DIRECTV's provision. The arbitration provision in *Doe* applied to "all disputes, claims, or controversies whatsoever * * * *relating to or in any way arising out of or connected with the Crew Agreement, these terms, or services performed for the Company*." 657 F.3d at 1214-15. This Court held that the employee's claims that she was drugged and sexually assaulted by her crewmembers were not subject to arbitration because they did not relate to her crew agreement. *Id.* at 1213-19.

Here, the claim is very different from the one at issue in *Doe*, and the arbitration agreement here is far broader in scope. Indeed, this Court's analysis in *Doe* ***confirms*** the district court's error: The Court explained that if the company had "wanted a broader arbitration provision" that would apply to all of the plaintiff's disputes against the company, it was free to have drafted the agreement that way. 657 F.3d at 1218. Specifically, the Court noted that the company could

> have left the scope of [the arbitration provision] at "any and all disputes, claims, or controversies whatsoever" instead of including the limitation that narrowed the scope to only those disputes, claims, or controversies "relating to or in any way arising out of or connected with the Crew Agreement, these terms, or services performed for the Company." ***That would have done it***, but the company did not do that.

Id. at 1218 (emphasis added).

Similarly, the arbitration clause at issue in another case cited by the district court was limited to claims "arising out of or pursuant to this Agreement or its interpretation, rectification, breach or termination." *Hemispherx Biopharma, Inc. v. Johannesburg Consol. Invs.*, 553 F.3d 1351, 1355 (11th Cir. 2008). This Court noted that it had "previously focused on foreseeability as [a] proper standard for resolving the scope of an arbitration clause that covers disputes 'arising out of or pursuant to' ***the contract between the parties***." *Id.* at 1367 (emphasis added) (citing *Telecom Italia*, 248 F.3d at 1116). The *Hemispherx* Court reiterated that its prior discussions of foreseeability had taken place "in the context of a class of arbitration agreements that use similar language, such as 'arising from,' 'arising under,' 'pursuant to,' and 'arising during' ***the contract in question***." *Id.* at 1366 n.16 (emphasis added).

Most relevant here, however, the Court also "recognize[d] that ***substantially broader language*** in the arbitration clause ***would alter the result*** of the analysis." *Hemispherx*, 553 F.3d at 1366 n.16 (emphasis added) (citing *Brown*, 211 F.3d at 1221). In other words, "[i]n *Hemispherx*" and "other cases * * *, the court's willingness to compel arbitration was limited because the scope of the agreement in question was itself limited." *Southland Health Servs.*, 887 F. Supp. 2d at 1165. By contrast, here the arbitration provision is not "itself limited," and the district court erred in reading into the provision limiting language that is not there.

The same type of limiting language found in cases such as *Telecom Italia* and *Hemispherx*—and absent here—is also uniformly present in the out-of-circuit cases cited by the district court. *See Jones v. Halliburton Co.*, 583 F.3d 228, 235 (5th Cir. 2009) ("*any and all claims* that you might have against Employer *related to your employment*"); *Brayman Constr. Corp. v. Home Ins. Co.*, 319 F.3d 622, 623 (3d Cir. 2003) ("[i]f any dispute shall arise between the Company and Insured with reference to the interpretation of this Agreement, or their rights with respect to any transaction involved"); *Fazio v. Lehman Bros., Inc.*,

340 F.3d 386, 392 (6th Cir. 2003) ("[a]ny controversy arising out of or relating to any of my accounts, to transactions with you for me, or to this or any other agreement or the construction, performance or breach thereof"); *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 225 (2d Cir. 2001) ("'[a]ny dispute arising from the making, performance or termination of this Charter Party' be arbitrated"); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 720 (9th Cir. 1999) ("*[a]ll disputes arising in connection with this Agreement*"); *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l, Ltd.*, 1 F.3d 639, 641 (7th Cir. 1993) ("[a]ny disputes arising out of the agreement"); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 318 (4th Cir. 1988) ("[a]ll disputes arising in connection with the present contract").[9]

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[9] Two of the cases cited by the district court involved arbitration clauses that were even narrower in scope, because the clauses encompassed only certain types of claims related to the contract. *See 3M Co. v. Amtex Sec., Inc.*, 542 F.3d 1193, 1199 (8th Cir. 2008) (agreement "mandate[d] arbitration '[i]n the event [the parties] cannot agree on any of the following: a) whether a variation has occurred; b) the cause of any variation; or c) the value of a change order amendment'"); *Cummings v. FedEx Ground Package Sys., Inc.*, 404 F.3d 1258, 1262 (10th Cir. 2005) (agreement titled "Arbitration of Asserted Wrongful Termination" applied only "[i]n the event FedEx Ground acts to terminate this Agreement * * * and [plaintiff] disagrees with such termination or

B. Romero's Claim Also Is A "Claim[] Arising Out Of Or Relating To Any Aspect Of The Relationship Between" Romero And DIRECTV.

In addition to the "all disputes and claims" language, the arbitration provision expressly "includes, but is not limited to: claims arising out of or relating to ***any aspect of the relationship between [Romero and DIRECTV]***, whether based in contract, tort, ***statute***, fraud, misrepresentation or any other legal theory." Doc. 154-2, p. 24 (emphasis added). Romero's STELA claim easily falls within the scope of this language as well.

Romero's STELA claim is ineluctably predicated on his status as a subscriber of DIRECTV. Romero alleges that DIRECTV violated Section 338(i)(4) of STELA, which prohibits "a satellite carrier" from disclosing "personally identifiable information concerning any ***subscriber***" without that subscriber's prior consent. 47 U.S.C. § 338(i)(4)(A) (emphasis added). And the statute defines a "subscriber" as "a person or entity that receives a secondary transmission service from a satellite carrier ***and pays a fee for the service, directly or indirectly, to the satellite carrier*** or to a distributor." *Id.* § 338(k)(9) (emphasis added);

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asserts that the actions of [defendant] are not authorized under the terms of this Agreement").

17 U.S.C. § 122(j)(6). Thus, Romero's STELA claim stems directly from his "relationship" to DIRECTV as a paying subscriber to DIRECTV's satellite television service—the very subscriber relationship referenced in the arbitration provision and governed by the Customer Agreement. Indeed, the very first sentence of the Customer Agreement states that the Customer Agreement "**DESCRIBES THE TERMS AND CONDITIONS OF YOUR RECEIPT OF AND PAYMENT FOR DIRECTV® SERVICE AND IS SUBJECT TO ARBITRATION**." Doc. 154-2, p. 23.

In addition, Romero's STELA claim is predicated upon his allegation that DIRECTV did not have his consent to disclose his personally identifiable information to DIRECTV's retained expert in the TCPA class action. *See* 47 U.S.C. § 338(i)(4)(A); Doc. 143, p. 28 ("Romero has never given DIRECTV his prior written or electronic consent."). Whether Romero gave DIRECTV consent (*e.g.*, under the documents governing the provision of services or otherwise) plainly "relat[es] to an[] aspect of the relationship between [Romero and DIRECTV]." Doc. 154-2, p. 24.

The district court rejected these arguments based on the mistaken premise that DIRECTV needed to show that the claim arose out of "performance of contractual duties." Doc. 163, p. 19. But once again, this limitation is nowhere to be found in the Customer Agreement's terms. *See* pages 15-18, *supra*. And this Court has made clear that the universe of potential claims relating to a ***relationship*** between the parties is greater than those relating to the underlying ***contract***. *See* pages 21-26, *supra*; *cf. Hemispherx*, 553 F.3d at 1368 (refusing to read an arbitration provision to cover "practically every dispute arising from [the parties'] relationship" where the provision "***by its own terms*** covers only disputes arising out of or pursuant to the licensing agreement, and not 'the working relationship between the parties'") (emphasis added).

CONCLUSION

The Court should reverse the district court's order denying DIRECTV's motion to compel arbitration and remand the case with instructions to grant DIRECTV's motion.

Dated: January 30, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,669 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 Century Schoolbook.

Dated: January 30, 2019 /s/ *Evan M. Tager*

CERTIFICATE OF SERVICE

I certify that on January 30, 2019, I filed the foregoing via the CM/ECF system and the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

Dated: January 30, 2019 /s/ *Evan M. Tager*