IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

CHOCTAW NATION OF OKLAHOMA,
Plaintiff/Appellee,

v.

(1) FLINTCO, LLC
Defendant/Appellant;
(2) WORTH GROUP ARCHITECTS, P.C.;
(3) SPECIFIED TECHNOLOGIES, INC.;
(4) ABC ENTITIES I-X, and,
(5) JOHN DOES I-X,
Defendants.

Supreme Court Case No. 122098

BRIEF-IN-CHIEF OF APPELLANT FLINTCO, LLC

Appeal from the District Court of Bryan County, Oklahoma
Case No. CJ-2023-230
The Honorable Mark. R. Campbell
Denial of Motion to Compel Arbitration

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INTRODUCTION

This appeal arises from the district court's denial of the motion to compel arbitration filed by Defendant/Appellant Flintco, LLC ("Flintco"). The district court's denial rests on its erroneous determination that the fraud claim asserted by Plaintiff/Appellee Choctaw Nation of Oklahoma (the "Nation") is not within the scope of the subject dispute resolution clause as governed by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), and the Oklahoma Uniform Arbitration Act, Okla. Stat. tit. 12, § 1851 *et seq.* ("OUAA").

In 2005, Flintco and the Nation entered into a Construction Management Contract (the "Contract") wherein Flintco agreed to provide construction management services to the Nation in connection with several of its construction and renovation projects in Oklahoma. The Contract includes a dispute resolution clause, which provides, "Any Claim arising under this Agreement . . . shall be submitted to a dispute resolution conference, and if the dispute is not resolved in conference, then to Mediation. If the dispute is not resolved in Mediation it will be submitted to binding arbitration."

There is no question that the dispute resolution clause is valid, enforceable, and irrevocable. Likewise, there is no question that the dispute resolution clause is clear, unambiguous, and explicit in making arbitration the agreed-to, mandatory mechanism to resolve any "Claim" and/or "dispute" under the Contract. Finally, there is no question that the Nation has not alleged that it was "fraudulently induced" into the Contract, generally, or the dispute resolution clause, specifically.

The sole issue presented in this appeal is whether the Nation's fraud claim, which is based upon Flintco's performance under the Contract, is within the scope of the dispute resolution clause under the FAA and OUAA.

As set forth below, the district court erred in denying the motion to compel arbitration. The Nation's fraud claim falls within the purview of the dispute resolution clause.

SUMMARY OF THE RECORD

1. In 2005, the Nation and Flintco entered into a Construction Management Agreement (the "Contract"). *See* ROA, Doc. 1, Petition, ¶ 13.

2. The Contract, contains a dispute resolution clause, which provides,

> **Any Claim**[1] **arising under this Agreement that cannot be resolved between the Project Officer and the Project Manager for Flintco shall be submitted to a dispute resolution conference, and if the dispute is not resolved in conference, then to Mediation. If the dispute is not resolved in Mediation it will be submitted to binding arbitration**. The dispute resolution conference shall consist of the submission of the dispute to the Contracting Official and the Chief Executive Officer of Flintco who shall meet to attempt to resolve the dispute prior to mediation. Mediation shall not be commenced by either party until the Contracting Official and Chief Executive Officer of Flintco have had twenty (20) days to attempt to resolve the Claim. If the dispute cannot be settled within twenty (20) days the parties shall submit to mediation with a mediator to be agreed upon by the parties. **If the dispute is not resolved in mediation it will be submitted to binding arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association (the "AAA Rules") within sixty (60) days of the unsuccessful mediation**. Enforcement of an arbitration award shall be sought in either the Choctaw Tribal Court, or a Federal Court with jurisdiction. Should there be no Federal Court with jurisdiction; either party may seek enforcement of an arbitration award in the State Court in Tulsa County, Oklahoma. Regardless of venue, enforcement of an arbitration award shall be consistent with the principles of the Federal Arbitration Act, 9 U.S.C. 1, *et seq.*

See ROA, Doc. 4, Defendant's Motion to Compel Arbitration and Brief in Support, p.2 (emphasis added).

3. In 2008, the Nation executed a Council Bill, modifying the dispute resolution clause as follows,

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[1] Despite being capitalized, the term "Claim" is not defined in the dispute resolution clause or the Contract.

> **In order to compel arbitration or to allow for enforcement of any arbitrator's award, the Owner agrees to a partial waiver of sovereign immunity for the sole purpose of submitting disputes arising under this Agreement to the jurisdiction of an arbitrator or arbitration panel, giving full legal effect to any order, judgment or award resulting from an arbitration proceeding, and allowing for the enforcement of an arbitration order, judgment or award.**
>
> Any Claim[2] arising under this Agreement that cannot be resolved between the Project Officer and the Project Manager for Flintco shall be submitted to a dispute resolution conference, and if the dispute is not resolved in conference, then to mediation. If the dispute is not resolved in Mediation it will be submitted to binding arbitration. The dispute resolution conference shall consist of the submission of the dispute to the Contracting Official and the Chief Executive Officer of Flintco who shall meet to attempt to resolve the dispute prior to Mediation. Mediation shall not be commenced by either party until the Contracting Official and Chief Executive Officer of Flintco have had twenty (20) days to attempt to resolve the claim. If the dispute cannot be settled within twenty days the parties shall submit to mediation with a mediator to be agreed upon by the parties. If the dispute is not resolved in mediation it will be submitted to binding arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association (the "AAA Rules") within sixty (60) days of the unsuccessful mediation. Enforcement of an arbitration award shall be sought in either the Choctaw Tribal Court, or a Federal Court with jurisdiction. Should there be no Federal Court with jurisdiction; either party may seek enforcement of an arbitration award in a State Court of Oklahoma. Regardless of venue, enforcement of an arbitration award shall be consistent with the principles of the Federal Arbitration Act, 9 U.S.C. 1, *et seq*.

See ROA, Doc. 4, Defendant's Motion to Compel Arbitration and Brief in Support, pp. 2–3 (emphasis added).

4. On October 31, 2023, the Nation filed this lawsuit against Flintco, alleging, *inter alia*, fraud relating to certain construction projects performed pursuant to the Contract. The Nation claims that Flintco committed fraud by purposefully and intentionally failing to construct the projects as required by applicable code requirements and the Contract, failed to disclose to and intentionally concealed from the Nation that the projects did not comply with

[2] Despite being capitalized, the term "Claim" is not defined in the dispute resolution clause or the Contract.

the Contract, and made false representations to the Nation that the completed projects met all Contract requirements. *See* ROA, Doc. 1, Petition, ¶¶ 40–56.

5. On January 5, 2024, Flintco filed a Motion to Compel Arbitration, noting that the dispute resolution clause in the Contract was "broad," and that the fraud claim related to and arose from Flintco's performance under the Contract. *See* ROA, Doc. 4, Defendant's Motion to Compel Arbitration and Brief in Support.

6. On February 5, 2024, the Nation filed a Response and Objection to Defendant's Motion to Compel Arbitration, arguing that it did not consent to arbitrate its fraud claim and that the arbitration clause at issue is too narrow in scope to compel arbitration of its fraud claim. *See* ROA, Doc. 5, Plaintiff's Response and Objection to Defendant's Motion to Compel Arbitration and Brief in Support.

7. On February 20, 2024, Flintco filed a Reply Brief in Support of Defendant, Flintco, LLC's Motion to Compel Arbitration, arguing that the arbitration clause is broad enough to require arbitration of the Nation's fraud claim, which arises from Flintco's alleged failure to perform under the Contract. *See* ROA, Doc. 6, Reply Brief in Support of Defendant, Flintco, LLC's Motion to Compel Arbitration.

8. On March 15, 2024, the district court denied Flintco's motion to compel arbitration, finding and ordering as follows,

> Defendant Flintco, LLC's Motion to Compel Arbitration should be, and hereby is, **DENIED**. Mores specifically, the Court finds that the Plaintiff has alleged fraud, and the Court further finds that the issue of an allegation of fraud was not contemplated by the language of the Arbitration Clause.

See ROA, Doc. 9, Court's Order Regarding Defendant Flintco LLC's Motion to Compel Arbitration.

QUESTION PRESENTED

Whether the district court erred as a matter of law in denying the *Motion to Compel Arbitration and Brief in Support* pursuant to the Federal Arbitration Act (9 USC § 1 *et seq.*), the Oklahoma Uniform Arbitration Act (Okla. Stat. tit. 12, § 1851 *et seq.*), and applicable case law interpreting those statutes.

JURISDICTION

"The FAA controls substantive rights, but the Oklahoma Uniform Arbitration Act (OUAA) controls the procedure for enforcing the FAA." *Williams v. TAMKO Bldg. Products, Inc.*, 2019 OK 61, ¶ 5, 451 P.3d 146, 150 (citing *Rogers v. Dell Computer Corp.*, 2005 OK 51, ¶ 15, 138 P.3d 826, 830).

Both the FAA and the OUAA allow appeals from arbitration orders that are a final decision. *See* 9 U.S.C. § 16(a)(1)(B) ("An appeal may be taken from--(1) an order--. . .(B) denying a petition under section 4 of this title to order arbitration to proceed"); Okla. Stat. tit. 12, § 1879 ("A. An appeal may be taken from: 1. An order denying a motion to compel arbitration").

On March 15, 2024, the district court denied Flintco's motion to compel arbitration. On April 11, 2024, Flintco filed its *Petition in Error*. Therefore, this appeal is timely. *See* Okla. Sup. Ct. R. 1.61.

STANDARD OF REVIEW

The question as to the existence of a valid enforceable agreement to arbitrate the fraud claim asserted by the Nation is a question of law to be reviewed on appeal by a *de novo* standard, without deference to the lower court. *Oklahoma Oncology & Hematology P.C. v. US Oncology, Inc.*, 2007 OK 12, ¶ 19, 160 P.3d 936, 944; *Thompson v. Bar-S Foods Co.*, 2007 OK

75, ¶ 9, 174 P.3d 567, 572 ("We review an order granting or denying a motion to compel arbitration *de novo*, the same standard of review employed by the trial court").

ARGUMENTS AND AUTHORITIES

Proposition 1: The district court erred as a matter of law in denying the *Motion to Compel Arbitration and Brief in Support* pursuant to the Federal Arbitration Act (9 USC § 1 *et seq.*), the Oklahoma Uniform Arbitration Act (12 O.S. § 1851 *et seq.*), and applicable case law interpreting those statutes.

I. THE FEDERAL ARBITRATION ACT APPLIES TO THE DISPUTE RESOLUTION CLAUSE.

A. The Dispute Resolution Clause.

"An arbitration agreement's existence is governed by state law principles." *Williams v. TAMKO Bldg. Products, Inc.*, 2019 OK 61, ¶ 8, 451 P.3d 146, 151. The dispute resolution clause must be interpreted to give effect to the mutual intent of the parties, as it existed at the time of contracting. Okla. Stat. tit. 15 § 152. The language of the dispute resolution clause itself governs its interpretation, if its language is clear and explicit. Okla. Stat. tit. 15 § 154. The words of the dispute resolution clause "are to be understood in their ordinary and popular sense[.]" Okla. Stat. tit. 15 § 160.

"'Absent illegality, the parties are free to bargain as they see fit, and this Court will neither make a new contract, [n]or rewrite the existing terms.'" *Berry & Berry Acquisitions, LLC v. BFN Properties LLC*, 2018 OK 27, ¶ 13, 416 P.3d 1061, 1068 (quoting *JPMorgan Chase Bank, N.A. v. Specialty Rests., Inc.*, 2010 OK 65, ¶ 9, 243 P.3d 8, 13). "Courts cannot supply material stipulations or read into a contract words or terms it does not contain; the law will not make a better contract than the parties themselves have seen fit to enter into, or alter it for benefit of one party to detriment of another." *Dismuke v. Cseh*, 1992 OK 50, ¶ 9, 830 P.2d 188, 190 (citing *King-Stevenson Gas and Oil Co. v. Texam Oil Corp.*, 1970 OK 45, ¶ 25, 466 P.2d 950, 954).

Here, the parties agreed to a claim resolution process that requires all unresolved Claims and disputes[3] arising under the Contract to be submitted to binding arbitration. The terms of the dispute resolution clause are clear and unambiguous. Therefore, according to the plain language of the dispute resolution clause, the Nation's fraud claim must be submitted to arbitration consistent with the principles of the FAA.

B. The Federal Arbitration Act ("FAA") Applies to the Contract.

The Federal Arbitration Act provides, in pertinent part,

> A written provision in . . . a contract evidencing a transaction involving commerce[4] to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . 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.

i. The Projects involve "commerce."

The United States Supreme Court interprets the phrase "involving" commerce broadly, identifying it as the functional equivalent of "affecting" commerce. *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273-74 (1995); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003). "Many courts have held that contracts to design and construct a project within a state between parties domiciled in the state may involve commerce and, thus, fall within the scope of the FAA when construction materials, other contractors or workers on the

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[3] "A conflict or controversy, esp. one that has given rise to a particular lawsuit." DISPUTE, Black's Law Dictionary (11th ed. 2019).

[4] "Commerce" is defined by the FAA as "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation[.]" 9 U.S.C. § 1.

project came from out of state." *S. Oklahoma Health Care Corp. v. JHBR-Jones-Hester-Bates-Riek, Inc.*, 1995 OK CIV APP 94, ¶ 17, 900 P.2d 1017, 1021 (collecting cases).

In this case, there is no dispute the parties executed a written contract or that the Contract involves "commerce."[5] *See* ROA, Doc. 1, Petition, ¶ 12; *see also* 9 U.S.C. § 1. Therefore, the FAA applies to the dispute resolution clause.

ii. The FAA requires the fraud claim to be arbitrated.

"The FAA embodies a liberal policy favoring enforcement of arbitration agreements." *Oklahoma Oncology & Hematology P.C. v. US Oncology, Inc.*, 2007 OK 12, ¶ 21, 160 P.3d 936, 944 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983)). "It requires state and federal courts to honor arbitration agreements duly entered into by the parties and to order the parties to arbitrate their disputes when they have agreed to do so." *Id. See also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) ("The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'") (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

For this reason, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983); *see also Perry v. Thomas*, 482 U.S. 483, 490 (1987) (stating that

[5] The construction projects in the Contract include, "Broken Bow Health Center, Broken Softball Fields, Poteau Remodel, McAlester project, Durant Oasis Pool, Durant Event Center, Grant Casino Hotel, McAlester Casino, Stringtown Casino, Tribal Office Complex, Choctaw Casino and Hotel in Durant, Grant Casino Hotel, McAlester Casino, Parking Structure, Choctaw Casino in Idabel, Durant waste water treatment plant renovations, and Cultural Center in Tuska Homma." *See* ROA, Doc. 1, Petition, ¶ 12.

arbitration agreements falling within the scope of the FAA must be "rigorously enforce[d]") (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

"Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts." *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984). Rather, "courts must enforce arbitration contracts according to their terms." *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 586 U.S. 63, 67 (2019).

C. The Oklahoma Uniform Arbitration Act ("OUAA") Requires Arbitration.

The OUAA provides, in pertinent part,

> A. An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.
>
> B. If necessary, a court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

Okla. Stat. tit. 12, § 1857. "The Federal Arbitration Act and Oklahoma Uniform Arbitration Act both recognize a policy favoring the arbitration of private disputes." *Magel v. Nuveen*, 2023 OK CIV APP 13, ¶ 19, 529 P.3d 928, 933.

"In Oklahoma state courts, the Oklahoma version of the Uniform Arbitration Act, 12 O.S. 2011, § 1851 et seq., determines how proceedings on an application to compel arbitration shall be conducted so long as the Act does not frustrate the purposes underlying the FAA." *Sutton v. David Stanley Chevrolet, Inc.*, 2020 OK 87, ¶ 8, 475 P.3d 847, 852.

Under the OUAA, the application and motion must be made to the court and heard in the manner provided by law or rule of court for making and hearing motions. Okla. Stat. tit. 12, § 1856(A). "[T]he party seeking to compel arbitration must present a statement of the law and facts showing an enforceable agreement to arbitrate the issues presented by the petition."

Rogers v. Dell Computer Corp., 2005 OK 51, ¶ 16, 138 P.3d 826, 830, *as corrected* (Nov. 16, 2005), *as corrected* (Nov. 29, 2005).

"'[C]ourts generally look with favor upon arbitration provisions as a shortcut to substantial justice with a minimum of court interference.'" *Willco Enterprises, LLC v. Woodruff*, 2010 OK CIV APP 18, ¶ 14, 231 P.3d 767, 772 (quoting *Long v. Degeer*, 1987 OK 104, ¶ 5, 753 P.2d 1327, 1328).

In this case, there is no question that the dispute resolution clause is valid, enforceable, and irrevocable. *See* ROA, Doc. 5, Plaintiff's Response and Objection to Defendant's Motion to Compel Arbitration and Brief in Support. Likewise, there is no question that the dispute resolution clause is clear, unambiguous, and explicit in making arbitration the agreed-to, mandatory mechanism to resolve any "Claim" and/or dispute under the Contract. *See* ROA, Doc. 5, Plaintiff's Response and Objection to Motion to Compel Arbitration and Brief in Support.

The sole issue presented in this appeal is whether the Nation's fraud claim is within the scope of the dispute resolution clause.[6] As set forth below, the district court erred in denying Flintco's motion to compel arbitration. The motion should have been granted: the dispute resolution clause is valid, enforceable, and irrevocable; and the Nation's fraud claim falls within the purview of the dispute resolution clause.

[6] The Nation has asserted its "fraud" claim in an attempt to get around the long-expired statute of limitations. In reality, the Nation's claim is for breach of contract for alleged deficiencies in Flintco's performance under the Contract. *See* ROA, Doc. 2, Defendant Flintco, LLC's Motion to Dismiss and Brief in Support.

II. THE DISPUTE RESOLUTION CLAUSE REQUIRES THE NATION'S FRAUD CLAIM TO BE ARBITRATED.

Compelling parties to arbitration requires analysis of only two issues: (1) whether a valid contract to arbitrate exists; and (2) whether the particular dispute falls within the scope of the contract to arbitrate. *See AT&T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 647–52 (1986). As discussed *infra*, both elements of this inquiry require this Court to compel the parties to arbitrate the disputes in this lawsuit.

A. The dispute resolution clause was validly executed, and its terms are enforceable and unambiguous.

The dispute resolution clause is a valid contract to arbitrate. There is no dispute that the Nation and Flintco voluntarily entered into the dispute resolution clause, negotiated its terms, and executed the Contract. There is likewise no dispute that the dispute resolution clause is unambiguous.

In *Choctaw Nation of Oklahoma v. Robins & Morton Corp.*, the Court of Civil Appeals of Oklahoma ("COCA") had an opportunity to review a substantially similar arbitration provision as the one *sub judice*. 2022 OK CIV APP 22, ¶ 1, 513 P.3d 563, 564. In that case, the arbitration provision provided,

> All disputes arising under this Construction Management Services contract that remain unresolved after good faith negotiations between the parties first shall be the subject of a dispute resolution conference. Either party may initiate a dispute resolution conference ("DRC") by providing written notice (the "Dispute Notice") to the other party. The written notice shall contain a short summary of the facts. Within five (5) days of receiving the Dispute Notice, a dispute resolution conference between Contracting Official, Project Director and the Construction Manager's representative(s) shall occur. If the parties are unable to resolve the dispute at the DRC, the parties will have an additional five (5) days from the date of the DRC to resolve the dispute. If either party fails to participate in the DRC or if no resolution is achieved by the DRC process, then the dispute shall be submitted to the American Arbitration Association as agreed to below.

> If no resolution is achieved by the DRC process, the parties agree that unresolved dispute shall be submitted to the American Arbitration Association pursuant to the Construction Arbitration Rules and Mediation Procedures. The parties further agree that the mediation and arbitration procedures selected herein shall be the exclusive manner by which disputes that are still unresolved at the DRC stage are to be resolved.

Id., 2022 OK CIV APP 22, ¶ 5, 513 P.3d at 565. COCA held that the arbitration clause was valid and enforceable,[7] reversed the district court's order that denied the motion to compel arbitration, and remanded the matter for proceedings consistent with its opinion. *Id.*, 2022 OK CIV APP 22, ¶ 20, 513 P.3d at 569.

Like the arbitration provision in *Robins & Morton Corp.*, the subject dispute resolution clause is clear and unambiguous. It states,

> Any Claim arising under this Agreement that cannot be resolved between the Project Officer and the Project Manager for Flintco shall be submitted to a dispute resolution conference, and if the dispute is not resolved in conference, then to mediation. If the dispute is not resolved in Mediation it will be submitted to binding arbitration. The dispute resolution conference shall consist of the submission of the dispute to the Contracting Official and the Chief Executive Officer of Flintco who shall meet to attempt to resolve the dispute prior to Mediation. Mediation shall not be commenced by either party until the Contracting Official and Chief Executive Officer of Flintco have had twenty (20) days to attempt to resolve the claim. If the dispute cannot be settled within twenty days the parties shall submit to mediation with a mediator to be agreed upon by the parties. If the dispute is not resolved in mediation it will be submitted to binding arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association (the "AAA Rules") within sixty (60) days of the unsuccessful mediation. Enforcement of an arbitration award shall be sought in either the Choctaw Tribal Court, or a Federal Court with jurisdiction. Should there be no Federal Court with jurisdiction; either party may seek enforcement of an arbitration award in a State Court of Oklahoma. Regardless of venue, enforcement of an arbitration award shall be consistent with the principles of the Federal Arbitration Act, 9 U.S.C. 1, *et seq*.

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[7] Specifically, COCA held that the arbitration provision in that matter was not void under Title 12, Section 1855(D) of the Oklahoma Statutes. *See Choctaw Nation of Oklahoma v. Robins & Morton Corp.*, 2022 OK CIV APP 22, ¶ 18, 513 P.3d 563, 569.

See ROA, Doc. 4, Defendant's Motion to Compel Arbitration and Brief in Support, pp. 2–3. Therefore, the dispute resolution clause demonstrates that the parties intended to abide by the arbitration terms therein. In its response to the motion to compel, the Nation asserts that its consent to the dispute resolution clause was procured by fraud. As explained in § III, *infra*, the Nation's argument is without merit. This Court should find that the first prong of the arbitration analysis is met, as the dispute resolution clause is "valid and enforceable." *Choctaw Nation of Oklahoma v. Robins & Morton Corp.*, 2022 OK CIV APP 22, ¶ 19, 513 P.3d at 569.

B. The dispute resolution clause applies to the Nation's fraud claim.

The Nation's fraud claim falls squarely within the scope of the subject dispute resolution clause. *See Sanchez v. Nitro-Lift Techs., L.L.C.*, 762 F.3d 1139, 1146 (10th Cir. 2014). As stated by the Tenth Circuit Court of Appeals, to determine whether a claim falls within an arbitration provision, the court should perform a three-point analysis:

> First, recognizing there is some range in the breadth of arbitration clauses, a court should classify the particular clause as either broad or narrow. Next, if reviewing a narrow clause, the court must determine whether the dispute is over an issue that is on its face within the purview of the clause, or over a collateral issue that is somehow connected to the main agreement that contains the arbitration clause. *Where the arbitration clause is narrow, a collateral matter will generally be ruled beyond its purview. Where the arbitration clause is broad, there arises a presumption of arbitrability and arbitration of even a collateral matter will be ordered if the claim alleged implicates issues of contract construction or the parties' rights and obligations under it.*

Sanchez v. Nitro-Lift Techs., L.L.C., 762 F.3d 1139, 1146 (10th Cir. 2014) (emphasis in original) (quoting *Cummings v. FedEx Ground Package Sys., Inc.*, 404 F.3d 1258, 1261 (10th Cir. 2005)).

i. The dispute resolution clause, which applies to claims "arising under" the Contract, is broad in scope.

When construing the clause "arising under" in the context of an arbitration clause, the Circuit Courts of Appeals overwhelmingly agree that such language is entitled to a broad interpretation. *See, e.g.*, *Sanchez v. Nitro-Lift Techs., L.L.C.*, 762 F.3d 1139, 1146–47 (10th Cir. 2014) (collecting cases) ("Many courts have concluded that an arbitration clause applying to disputes 'arising under' or 'in connection with' the agreement constitutes a broad arbitration clause."); *Dialysis Access Ctr., LLC v. RMS Lifeline, Inc.*, 638 F.3d 367, 381-83 (1st Cir. 2011) (finding arbitration clause that covered "any dispute that may arise under this Agreement" was sufficiently broad to encompass a fraudulent inducement claim); *Battaglia v. McKendry*, 233 F.3d 720, 727 (3d Cir. 2000) ("When phrases such as 'arising under' and 'arising out of' appear in arbitration provisions, they are normally given broad construction, and are generally construed to encompass claims going to the formation of the underlying agreements."); *Gregory v. Electro–Mech. Corp.*, 83 F.3d 382, 383–86 (11th Cir. 1996) (noting that an arbitration provision that applied to disputes that "may arise hereunder" was broad); *Cincinnati Gas & Elec. Co. v. Benjamin F. Shaw Co.*, 706 F.2d 155, 160 (6th Cir. 1983) (noting that an arbitration agreement that applied to "Any controversy or claim arising out of this Agreement" is "extremely broad"); *Sweet Dreams Unlimited, Inc. v. Dial–A–Mattress Int'l, Ltd.*, 1 F.3d 639, 642 (7th Cir. 1993) ("We find, however, that 'arising *out of*' reaches all disputes having their origin or genesis in the contract, whether or not they implicate interpretation or performance of the contract per se."); *Mar–Len of Louisiana, Inc. v. Parsons–Gilbane*, 773

F.2d 633, 634, 636 (5th Cir. 1985) (noting that the arbitration provision that applied to "any dispute arising under this subcontract" was broad).

"When a contract contains a broad arbitration clause, matters that touch the underlying contract should be arbitrated." *Brown v. Coleman Co.*, Inc., 220 F.3d 1180, 1184 (10th Cir. 2000) (citing *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 624 n.13 (1985)). "Where the arbitration clause is broad, there arises a presumption of arbitrability and arbitration of even a collateral matter will be ordered if the claim alleged implicates issues of contract construction or the parties' rights and obligations under it." *See Cummings v. FedEx Ground Package Sys., Inc.*, 404 F.3d 1258, 1261 (10th Cir. 2005).

As stated by COCA,

> When considering whether a claim is arbitrable, "[W]e evaluate the factual underpinnings of the complaint rather than merely considering the labels attached to each of the causes of action it contains." . . . "If the allegations underlying the claims touch matters covered by the parties' [arbitration agreement], then those claims must be arbitrated, whatever the legal labels attached to them." . . . Oklahoma law mandates that ambiguities are to be resolved in favor of arbitration, unless the court can say with "positive assurance" that the matter is not subject to arbitration.

High Sierra Energy, L.P. v. Hull, 2011 OK CIV APP 77, ¶ 17, 259 P.3d 902, 907 (citations omitted). In this case, the factual underpinnings of the fraud claim reveal that it is premised upon allegations that should, in fact, be a breach of the Contract. In its Petition, the Nation alleges,

> ¶ 15. According to the Construction Management Agreement, Flintco's tasks as the Construction Manager also included but were not limited to reviewing all plans and specifications submittals and advising on site, foundations, systems and materials, construction feasibility, availability of labor and materials, time requirements for procurement, installation and construction, relative costs, and providing written recommendations for economies as appropriate.

* * *

¶ 17. The Construction Management Agreement further provides that "[t]he contractor shall, without additional expense to the Owner, be responsible for obtaining any necessary license and permits, and for complying with any Federal, State and municipal laws, codes, and regulations applicable to the performance of the work."

* * *

¶ 25. In November of 2021, the Nation discovered that the Projects have numerous deficient conditions that stem from the construction and/or renovation of the Projects by Flintco.

¶ 26. The building conditions and code compliance of the Projects were evaluated, and several deficient conditions were found that fell short of the Projects' safety and design requirements, such as building and mechanical codes and minimum fire resistive requirements.

* * *

¶ 29. Many of the deficient conditions discovered were required to be implemented pursuant to the design and code requirements of the Projects.

¶ 30. The Defendants purposefully failed to construct and/or renovate the Projects in a way that would comply with the Construction Management Agreement and all design code and requirements, and the Nation discovered in November 2021 that various shortcuts were taken during construction and/or renovation of these Projects.

* * *

¶ 35. Defendants made representations to the Nation that the Projects were completed and met all requirements contained in the Construction Management Agreement, including that the Projects satisfied all design and safety requirements.

¶ 36. However, these representations turned out to be untrue.

* * *

¶ 38. In addition to the false representations made, Defendants actively and fraudulently concealed the deficient conditions of the Projects by purposefully failing to report these conditions to the Nation despite having legal and contractual duties to do so.

* * *

¶ 43. Defendants committed fraud by purposefully and intentionally failing to construct and/or renovate the Projects in accordance with the design and code requirements of the Projects, as well as the Construction Management Agreement.

* * *

¶ 45. Defendants failed to construct and install numerous items that were required by the design and code requirements of the Projects and caused

other deficient conditions. For example, several of the Projects had missing fire walls, fire stops were not installed, there were undersized water pipes, and other fireproofing and life safety related issues were present.

* * *

¶ 49. Defendants made representations to the Nation that the Projects were completed and met all requirements contained in the Construction Management Agreement, including that the Projects satisfied all design and code/safety requirements

* * *

¶ 51. Defendants actively and fraudulently concealed the design and code/safety failures, as well as other deficient conditions of the Projects, by purposefully failing to report these failures and conditions to the Nation despite having legal and contractual duties to do so.

ROA, Doc. 1, Petition, ¶¶ 15, 17, 25, 26, 29, 30, 35, 36, 38, 43, 45, 49, 51. According to extant law, which is legion, the dispute resolution clause is broad, and the Nation's fraud claim, which constantly references the parties' rights and obligations under the Contract, must be compelled to arbitration.

ii. The dispute resolution clause does not narrowly limit arbitration to specific disputes.

"[T]he parties may agree upon a narrow language in the arbitration clause by deviating from the broad standard provisions and by limiting arbitration only to a subset of disputes that may arise out of the contract." *Papalote Creek II, L.L.C. v. Lower Colorado River Auth.*, 918 F.3d 450, 455 (5th Cir. 2019). Courts have found that an arbitration provision has narrow application when "the parties clearly manifested an intent to narrowly limit arbitration to specific disputes[.]" *Cummings v. FedEx Ground Package Sys., Inc.*, 404 F.3d 1258, 1262 (10th Cir. 2005).

In *Papalote Creek II, L.L.C. v. Lower Colorado River Auth.*, the arbitration provision applied to any disputes with "respect to either Party's performance" of the subject contract. 918 F.3d at 456. The Fifth Circuit Court of Appeals concluded that the arbitration provision

was narrow because it "clearly signifies the parties' intent to limit arbitration to performance-related disputes only, and the arbitration clause neither requires nor authorizes arbitration of disputes that are not performance-related disputes, such as disputes related to the interpretation of the Agreement." *Id.*

In *Chelsea Family Pharmacy, PLLC v. Medco Health Sols., Inc.*, the arbitration provision applied to "[a]ny controversy or claim arising out of or relating to payments to [Chelsea] by Medco or audit issues, but not relating to termination of [Chelsea]'s Agreement with Medco or [Chelsea]'s Termination from Medco's Networks." 567 F.3d 1191, 1196 (10th Cir. 2009). The Tenth Circuit Court of Appeals concluded that the arbitration provision was narrow because it "exclude[s] matters such as termination of the agreement and limits itself to matters 'arising out of or relating to payments.'" *Id.*, 567 F.3d at 1196 (footnote omitted).

In *Local 827, Int'l Bhd. of Elec. Workers, AFL-CIO v. Verizon New Jersey, Inc.*, the arbitration provision provided, "[o]nly the matters specifically made subject to arbitration [in specific provisions] ... shall be arbitrated" and then listed five specific issues. 458 F.3d 305, 311 (3d Cir. 2006). The Third Circuit Court of Appeals concluded that the arbitration provision was narrow because the arbitration clause "clearly forecloses the possibility that other issues could be arbitrated by providing that the list is exclusive." *Id.*

In this case, the dispute resolution clause does not narrow or limit its application to specifically enumerated matters (*e.g.*, interpretation or performance of the Contract). Instead, it applies to any "Claim" and/or "dispute" arising under the Contract. *See* ROA, Doc. 4, Defendant's Motion to Compel Arbitration and Brief in Support, pp. 2–3. Moreover, the Nation readily concedes that its fraud claim "arises under" the Contract. *See* ROA, Doc. 1, Petition, ¶

12 ("These causes of action arises [sic] from several construction and/or renovation projects in which Flintco was hired by the Nation as the Construction Manager[.]").

For this reason, the Nation's "fraud" claim easily falls within the scope of the dispute resolution clause, and this matter must be compelled to arbitration. *See Dialysis Access Ctr., LLC v. RMS Lifeline, Inc.*, 638 F.3d 367, 378 (1st Cir. 2011) ("This latter claim (i.e., fraud in the performance of the MSA) easily falls within the scope of the Arbitration Clause's 'arising under' language and does not warrant further discussion. Accordingly, we find that said claim is encompassed under the Arbitration Clause.").

iii. The Nation's fraud claim is not collateral to the Contract.

Even if the dispute resolution clause is narrow, the Nation's fraud claim is not collateral to the Contract. As explained in *Cummings v. FedEx Ground Package Sys., Inc.*, an issue is "collateral" if it is not "reasonably factually related to a dispute" that is subject to an arbitration agreement. 404 F.3d 1258, 1262 (10th Cir. 2005).

In this case, the Nation's fraud claim is not "collateral" to the Contract; instead, it is "reasonably factually related to a dispute" with the Contract. *See* ROA, Doc. 1, Petition, ¶¶ 15, 17, 25, 26, 29, 30, 35, 36, 38, 43, 45, 49, 51. Indeed, even the Nation admits as much. *See* ROA, Doc. 1, Petition, ¶ 12 ("These causes of action arises [sic] from several construction and/or renovation projects in which Flintco was hired by the Nation as the Construction Manager[.]").

Importantly, COCA recently addressed whether a lawsuit filed by the Nation should be compelled to arbitration. *See Choctaw Nation of Oklahoma v. Robins & Morton Corp.*, 2022 OK CIV APP 22, ¶ 1, 513 P.3d 563, 564. In that case, Robins & Morton Corp. ("R&M") and the Nation entered into a Construction Management Contract pursuant to which R&M was to

provide to the Nation construction management services associated with the construction of a medical center. *Id.*, 2022 OK CIV APP 22, ¶ 2, 513 P.3d at 565. After completion of construction, the Nation filed suit in Bryan County, Oklahoma, asserting claims about the design and construction defects allegedly caused by R&M. *Id.*, 2022 OK CIV APP 22, ¶ 4, 513 P.3d at 565. R&M filed a motion to compel arbitration based on the dispute resolution clause in the construction contract, which was denied by the district court. *Id.*, 2022 OK CIV APP 22, ¶ 1, 513 P.3d at 564. On appeal, COCA reversed the district court's order that denied the motion to compel arbitration, and remanded the matter for proceedings consistent with its opinion. *Id.*, 2022 OK CIV APP 22, ¶ 20, 513 P.3d at 569.

The parties, the construction contract, the arbitration provision, the claim at issue, and the factual underpinnings of the claim at issue in this case are substantially similar to the ones presented in *Robins & Morton Corp.* In fact, the lawsuits were filed in the District Court of Bryan County, Oklahoma, and the motions to compel arbitration were denied by the same district court judge (the Honorable Mark R. Campbell). In both cases, the Nation recast its claim for breach of contract into tort: 1. negligence (in *Robins & Morton Corp.*) and 2. fraud (in this action).

In this case, as in *Robins & Morton Corp,* the Nation entered into a construction management agreement, wherein a contractor agreed to provide construction management services to the Nation. After the contractor completed construction of the projects, the Nation filed a lawsuit alleging a cause of action in tort based on construction defects allegedly caused by the contractor. The contractor filed a motion to compel arbitration based on the dispute

resolution clause in the construction management agreement. The district court denied the motion to compel arbitration.

Just like in *Robins & Morton Corp*, this Court should find that the arbitration clause in the Contract is valid and enforceable, reverse the district court's order that denied the motion to compel arbitration, and remand the matter to the district court for further proceedings.

Placing the "tort" label on the claim does not exclude it from the scope of the dispute resolution clause. *See High Sierra Energy, L.P. v. Hull*, 2011 OK CIV APP 77, ¶ 17, 259 P.3d 902, 907 ("If the allegations underlying the claims touch matters covered by the parties' [arbitration agreement], then those claims must be arbitrated, whatever the legal labels attached to them.") (quoting *Chelsea Family Pharmacy, PLLC v. Medco Health Sols., Inc.*, 567 F.3d 1191, 1198 (10th Cir. 2009)); *P & P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 871 (10th Cir. 1999) ("[A]ll claims with 'a significant relationship to the [Agreement,] regardless of the label attached' to them, arise out of and are related to the Agreement."); *Gregory v. Electro-Mech. Corp.*, 83 F.3d 382, 384, 386 (11th Cir. 1996) (finding that all claims in the complaint, including those sounding in tort, fall within the scope of the arbitration clause where "the structure of the complaint and the allegations of fact reflect that these claims all arose under the agreement."); *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l, Ltd.*, 1 F.3d 639, 643 (7th Cir. 1993) ("We have routinely held that a party may not avoid a contractual arbitration clause merely by 'casting its complaint in tort.' . . . The touchstone of arbitrability in these circumstances is 'the relationship of the claim to the subject matter of the arbitration clause.'") (citations omitted); *Acevedo Maldonado v. PPG Indus., Inc.*, 514 F.2d 614, 616 (1st Cir. 1975) ("The contracts provide for arbitration of 'any controversy or claim arising out of or relating to this Agreement or the breach thereof'. Broad language of this nature covers contract-

generated or contract-related disputes between the parties however labeled: it is immaterial whether claims are in contract or in tort[.]") (citation omitted) (footnote omitted).

The cornerstone of the Nation's fraud claim is one sounding in breach of the Contract. *See* ROA, Doc. 1, Petition, ¶¶ 15, 17, 25, 26, 29, 30, 35, 36, 38, 43, 45, 49, 51. Therefore, the fraud claim is arbitrable. *See, e.g., S. Oklahoma Health Care Corp. v. JHBR-Jones-Hester-Bates-Riek, Inc.*, 1995 OK CIV APP 94, ¶ 8, 900 P.2d 1017, 1020 ("Clearly, breach of contract is the cornerstone of Hospital's action, and arbitration of that dispute is appropriate.").

III. THE NATION HAS NOT ALLEGED, NOR PROVIDED ANY EVIDENCE, THAT ITS CONSENT TO THE CONTRACT, GENERALLY, OR THE DISPUTE RESOLUTION CLAUSE SPECIFICALLY, WAS INDUCED BY FRAUD.

Title 9, Section 4 of the United States Code provides, in pertinent part,

> The court shall hear the parties, and upon 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 . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.

9 U.S.C. § 4. Title 9, Section 4 of the United States Code "does not permit the federal court to consider claims of fraud in the inducement of the contract generally." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). "[R]egardless of whether it is brought in federal or state court, a challenge to the validity of a contract as a whole, and not specifically to the arbitration clause within it, must go to the arbitrator." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006). "[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Id.* at 445.

Thus, a party may only dispute the validity of a contract's arbitration provision if there was fraud in the inducement of the arbitration provision itself. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967); *see also Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010) ("[A] party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate").

"In order to protect against a fraud in the inducement allegation from swallowing up the time-honored rule that the plain, unambiguous terms of a written contract are binding on the parties, Oklahoma requires that the fraud must be established by clear and convincing evidence." *Thrifty Rent-A-Car Sys., Inc. v. Brown Flight Rental One Corp.*, 24 F.3d 1190, 1195 (10th Cir. 1994). As stated by COCA,

> Generally, if a party to a contract can read and has the opportunity to read the contract but fails to do so, he cannot escape its liability. . . . In fact, one has a duty to apprise himself of the contents of a contact. . . . However, this rule is overcome when there is a strong showing of fraud or some equally valid excuse for such ignorance.

First Nat. Bank & Tr. Co. of El Reno v. Stinchcomb, 1987 OK CIV APP 1, ¶ 9, 734 P.2d 852, 854 (citations omitted). In this case, the Nation has failed to plead, much less prove, that it was fraudulently induced into entering the dispute resolution clause. The Petition does not contain so much as a whisper of "fraud in the inducement" as to the Contract, generally, or the dispute resolution clause, specifically. *See* ROA, Doc. 1, Petition.

There is no allegation that Flintco misled the Nation about the existence, or the terms, of the dispute resolution clause. *See* ROA, Doc. 1, Petition. Indeed, the Nation would be hard pressed to make such an allegation as it expressly waived its sovereign immunity for the purpose of entering into the dispute resolution clause. It is undisputed that the Nation was aware of, and consented to, the inclusion of the dispute resolution clause in the Contract.

CONCLUSION

The dispute resolution clause explicitly, clearly, and unambiguously requires the Nation's fraud claim to be submitted to arbitration. The Federal Arbitration Act and the Oklahoma Uniform Arbitration Act make the dispute resolution clause valid, enforceable, and irrevocable. The district court erred when it found that Nation's fraud claim was outside the scope of the subject dispute resolution clause. The fraud claim is entirely premised upon Flintco's performance of the Contract and therefore "arises under" the Contract and is subject to the dispute resolution clause. Flintco respectfully requests this Court to reverse the district court's order, find that the Nation's fraud claim falls within the scope of the dispute resolution clause, and remand the case to the district court with instructions to compel arbitration of the Nation's fraud claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2024, I caused to be mailed in the United States Mail with proper postage fully prepaid thereon, a true and correct copy of the above and foregoing upon the following:

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