

DISTRICT COURT, CITY & COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED February 11, 2025 10:00 AM CASE NUMBER: 2024CV31211
Plaintiff: VICKI RAY, a Colorado individual,  v.  Defendant: KROENKE SPORTS & ENTERTAINMENT, LLC, a Delaware limited liability company.	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p> Case Number: 24CV31211  Courtroom: 424
<b>ORDER RE: MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(1)</b>	

THIS MATTER comes before the Court on Defendant Kroenke Sports & Entertainment, LLC’s (“Defendant”) Motion to Dismiss (“Motion”) Plaintiff Vicki Ray’s (“Plaintiff”) claims pursuant to Colorado Rule of Civil Procedure 12(b)(1), filed November 21, 2024. The Court, having reviewed the filings and the Court’s file, FINDS and ORDERS as follows:

### INTRODUCTION

This case arises from a contractual dispute between parties. Plaintiff’s Amended Complaint, filed May 10, 2024, claims Defendant breached its contract with Plaintiff, that Defendant breached its covenant of good faith and fair dealing inherent in all contracts, and Plaintiff is claiming intentional infliction of emotional distress due to the lack of due process, transparency, and fairness of Defendant’s actions. Defendant first filed a motion to dismiss on May 24, 2024, for failure to state a claim upon which relief can be granted. The Court denied this motion. Defendant then filed an Answer on July 10, 2024, denying Plaintiff’s claims. Defendant made several affirmative defenses: (1) the claims are barred for failure to state a claim upon which relief can be granted; (2) the claims are barred by unclean hands, estoppel, laches, and equity;

(3) the claims are barred because they were waived; (4) the claims are barred due to setoff and Plaintiff's failure to mitigate her damages; and (5) the claims are barred due to failure to comply with conditions precedent.

On November 21, 2024, Defendant filed this Motion and a motion for summary judgment. On January 2, 2025, Defendant filed a motion to stay discovery. Then on January 6, 2025, Defendant filed a motion to strike Plaintiff's expert disclosure. Plaintiff responded to each of Defendant's motions. In this Motion, Defendant claims the Court lacks subject matter jurisdiction over this case because the parties are bound by a valid and enforceable arbitration clause in the contract, with which Plaintiff has failed to comply. Plaintiff maintains that Defendant waived its right to compel arbitration at this point in the proceedings, and the Court should therefore deny the Motion.

### **STANDARD OF REVIEW**

On a motion to dismiss for lack of subject matter jurisdiction, the plaintiff has the burden of proving jurisdiction, and the court is authorized to make appropriate factual findings. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). The court does not have to treat the facts alleged by the non-moving party as true. *Id.* The court is permitted to weigh the evidence and determine whether it has the power to hear the case. *Id.* "A 'motion to compel arbitration is a motion to dismiss for lack of subject matter jurisdiction.'" *Tolle v. Steeland, LLC*, 541 P.3d 24, 27 (Colo. App. 2023). The defendants have the burden to establish that the matter is subject to arbitration. *Id.*

## APPLICABLE LAW

### 1. Valid Arbitration Clause

“A valid and enforceable arbitration provision divests the court of jurisdiction over all arbitrable issues.” *Eychner v. Van Vleet*, 870 P.2d 486, 489 (Colo. App. 1993). The court decides the question of arbitrability. *Id.* To resolve a motion to compel arbitration, the court inquires whether a valid agreement to arbitrate exists between the parties, and whether the disputed issues are within the scope of the agreement. *Id.*

### 2. Waiver of Arbitration

In Colorado, arbitration is a favored method of dispute resolution, with the state constitution, statutes, and case law supporting agreements to arbitrate. *Waldman v. Old Republic Nat. Title Ins. Co.*, 12 P.3d 835, 837 (Colo. App. 2000). However, the right to arbitrate can be waived when a party takes actions inconsistent with the right to arbitrate, in circumstances where other parties will be prejudiced. *Id.* Whether a waiver has occurred is dependent on the facts and circumstances of each case. *Id.* Merely filing a counterclaim does not constitute waiver of the right to arbitration. *City & Cnty. of Denver v. Dist. Ct. In & For City & Cnty. of Denver*, 939 P.2d 1353, 1369 (Colo. 1997). In determining whether a party has acted inconsistently with its right to seek alternative dispute resolution, the Court considers the following factors:

- (1) whether the party has actually participated in the lawsuit or has taken other action inconsistent with his rights;
- (2) whether litigation has substantially progressed by the time the intention to arbitrate was communicated by the party moving to dismiss;
- (3) whether there has been a long delay seeking a stay and whether the defendant filed counterclaims without asking for a stay;
- (4) whether a request to compel arbitration was initiated close to trial;
- (5) whether the party seeking arbitration has taken unfair advantage of discovery proceedings which would not have been available in arbitration; and
- (6) whether the other party was affected, misled, or prejudiced by the delay.

*Id.* (citations omitted). Waiver can be explicit, through either oral or written abandonment of the right, or it may be implied, such as when a party engages in conduct that manifests intent to relinquish such right or privilege or acts inconsistent with a party's assertion. *Harper Hofer & Assocs., LLC v. Nw. Direct Mktg., Inc.*, 412 P.3d 659, 663 (Colo. App. 2014).

In *City and County of Denver*, the Colorado Supreme Court found that the City and County of Denver ("Denver") did not waive its right to seek alternative dispute resolution. 939 P.2d at 1369. Denver had filed a motion to dismiss and a motion to stay before ultimately filing its answer to the complaint when these motions were denied. *Id.* No discovery had been conducted. *Id.* In its answer, Denver asserted affirmative defenses, including that the court lacked subject matter jurisdiction, and that Plaintiff had failed to exhaust the alternative dispute resolution procedures in the contract. *Id.* The Court found no showing of prejudice to the objecting parties. *Id.*

Alternatively, in *Waldman*, after considering the factors from *City and County of Denver*, the Colorado Court of Appeals found the defendant did waive its right to arbitration. 12 P.3d at 837. The court found the defendant had clearly participated in the lawsuit, by removing the action to federal court, filing an answer there, and not raising the arbitration clause as an affirmative defense. *Id.* The court found the defendant had additional opportunities to request arbitration but did not, and the defendant even conceded it was initially willing to waive arbitration while the case was in federal court and was proceeding on that basis. *Id.* The case was pending for more than six months, and in that time defendant conducted substantial discovery: depositions of both plaintiffs, requests for production, requests for admissions, and inspections of the property at issue in the case. *Id.* This discovery caused prejudice to the plaintiffs due to the significant time and resources expended. *Id.* If the case had been in arbitration, it would have been subject to the

arbitrator's discretion. *Id.* The court found that because the case had been litigated for six months, removed to federal court, and discovery had been conducted, the defendant waived its right to arbitrate. *Id.*

## ANALYSIS

### **1. Validity and Enforceability of Arbitration Clause**

Defendant's motion to dismiss for lack of subject matter jurisdiction is a motion to compel arbitration. Defendant bears the burden of establishing that this matter is subject to arbitration. Plaintiff does not dispute that the arbitration clause is valid. Accordingly, the Court finds that the arbitration clause within the contract is valid and enforceable.

### **2. Defendant's Waiver of Right to Arbitrate**

Despite the arbitration clause's validity and enforceability, the Court finds the Defendant waived its right to arbitrate. The Court considers the factors set forth in *City & Cnty. of Denver*, 939 P.2d at 1369 :

- 1) Defendant has clearly participated in the litigation. Defendant first filed a motion to dismiss, a motion for summary judgment, a motion to stay, a motion to strike, and filed an Answer to the Complaint. Defendant failed to raise the issue of arbitration in any of these filings.
- 2) Litigation has progressed to the point that a jury trial has been set, on April 14, 2025, less than two months out. While no discovery had been completed at the filing of this Motion, Plaintiff has since requested discovery.
- 3) There was a six-month delay in seeking a stay and motion to compel arbitration. This Motion was filed approximately five months prior to trial.

- 4) There is no evidence Defendant has benefitted substantially from any discovery, as no discovery had been disclosed at the time Defendant filed this Motion.
- 5) Plaintiff will have incurred costs and fees in litigating Defendant's first motion to dismiss, this Motion, Defendant's motion for summary judgment, Defendant's motion to stay, and Defendant's motion to strike.

Defendant's actions since initiation of this case are inconsistent with its desire to pursue arbitration. Due to its participation in litigation, delay in moving to compel arbitration, proximity to the trial date, and Plaintiff's considerable time and costs incurred in litigating Defendant's motions, the Court finds Defendant has waived its right to arbitrate.

#### **CONCLUSION**

For the foregoing reasons, Defendant's Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) is DENIED.

DATED February 11, 2025

BY THE COURT:



Hon. Ericka F. H. Englert  
District Court Judge