

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

HOPKINS & CARLEY, ALC,)	Case No.: 10-CV-05806-LHK
)	
Plaintiff,)	ORDER GRANTING MOTION TO
v.)	COMPEL ARBITRATION
)	
THOMSON ELITE, A DIVISION OF)	
WEST PUBLISHING CORPORATION,)	
and DOES 1 through 25,)	
)	
Defendants.)	
)	

Defendant Thomson Elite moves to compel arbitration and dismiss this action. The Court heard oral argument on March 31, 2011. Having considered the arguments and submissions of the parties, the Court GRANTS Defendant’s motion to compel arbitration. By April 21, 2011, the parties shall file a stipulation dismissing the action without prejudice and providing for tolling of the statute of limitations.

I. Background

This action arises out of a contractual agreement between Plaintiff Hopkins & Carley, ALC (“Plaintiff” or “H&C”) and Defendant Thomson Elite (“Defendant” or “Thomson”). H&C is a California Law Corporation located in San Jose, California. Compl. ¶ 1. Thomson is a software development and consulting firm incorporated under the laws of Minnesota, with its principal place of business in Minnesota. Compl. ¶ 5; Notice of Removal ¶ 7. In 2005, H&C began exploring

1 options to replace its existing accounting and law practice management software. Compl. ¶ 6.
2 After meeting with Thomson and participating in an interactive product demonstration, H&C
3 agreed to purchase Thomson’s Elite financial and practice management system, with certain
4 specified customizations. Compl. ¶¶ 7-8. On June 8, 2006, the parties entered into a Customer
5 Agreement for the Elite software and associated services.¹ Decl. of Melina Rosenberg
6 (“Rosenberg Decl.”) ¶ 2-3 & Ex. A, attached to Def.’s Mot. to Compel Arbitration, ECF No. 9.
7 H&C claims that while it was still in the process of implementing the Elite software, Thomson
8 approached H&C and encouraged it to switch to Thomson’s new 3E software product. Compl. ¶ 9.
9 Thomson allegedly told H&C that the new 3E product was far superior and that H&C could switch
10 to the new product at no additional cost. *Id.* Based on Thomson’s representations, H&C agreed to
11 switch from the older Elite product to the newer 3E product. Compl. ¶ 10. On September 28,
12 2006, the parties executed an Amendment to the Customer Agreement (the “Amendment”) that
13 replaced the Software and Fee Schedule to substitute the 3E software and added certain other
14 provisions. Rosenberg Decl. Ex. B. H&C also agreed to purchase Thomson’s Client Relationship
15 Management (“CRM”) product, which Thomson claimed was easily integrated with the 3E
16 product. Compl. ¶ 11.

17 H&C claims that it spent considerable time and resources implementing that 3E product
18 and eventually switched its entire accounting function to the new 3E platform. Compl. ¶ 12. After
19 3E was operational, however, H&C began to note various problems with its operations. Compl.
20 ¶ 13. H&C claims that at first Thomson represented that these problems were minor bugs that
21 could easily be fixed. Compl. ¶ 14. Despite these early assurances, however, H&C claims that
22 Thomson was never able to make the 3E product function and that the minor “bugs” were in fact
23 serious structural problems that made the product unusable and unfixable. *Id.* Although Thomson
24 allegedly represented that the 3E product was complete and available when H&C agreed to
25 purchase it, H&C believes that the product was actually still in development and was essentially a

26 ¹ Thomson submitted a copy of the Customer Agreement and subsequent Amendment to the
27 Customer Agreement as an exhibit to the motion to compel arbitration. As H&C has not objected
28 to this submission and cites to it in its opposition brief, it appears that the documents submitted by
Thomson are true and correct copies of the parties’ agreement that may be considered by the Court
in ruling on the motion to compel arbitration.

1 prototype that had never before been sold or successfully implemented. Compl. ¶ 15. H&C
 2 therefore believes that Thomson negligently and intentionally misrepresented the status and
 3 availability of the 3E product in order to induce H&C to purchase it. Compl. ¶¶ 15-17. H&C
 4 claims that Thomson compounded the consequences of its actions by taking the 3E system live
 5 even though it knew the system was not ready. Compl. ¶ 17. H&C also claims that the CRM
 6 product was not even in production when H&C agreed to purchase it and believes, contrary to
 7 Thomson’s representations, that the CRM cannot be seamlessly integrated with the 3E system.
 8 Compl. ¶ 20.

9 On September 28, 2010, H&C filed suit in the Superior Court of the County of Santa Clara,
 10 seeking over \$1 million in damages. Thomson was served on November 29, 2010, and removed
 11 the action to federal court on December 21, 2010, on the basis of diversity jurisdiction. H&C’s
 12 Complaint asserts six causes of action: (1) fraudulent performance of contract; (2) fraudulent
 13 inducement of contract; (3) negligent misrepresentation; (4) breach of contract; (5) breach of
 14 express and implied warranty; and (6) rescission. Thomson now argues that each of these claims is
 15 encompassed by the arbitration clause contained in the original Customer Agreement and retained
 16 by the Amendment. Thomson thus moves to compel arbitration and dismiss the action.

17 II. Legal Standard

18 The Federal Arbitration Act mandates that written agreements to arbitrate disputes “shall be
 19 valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the
 20 avoidance of any contract.” 9 U.S.C. § 2. In deciding whether a dispute is arbitrable, a court must
 21 answer two questions: (1) whether the parties agreed to arbitrate, and, if so, (2) whether the scope
 22 of that agreement to arbitrate encompasses the claims at issue. *Chiron Corporation v. Ortho*
 23 *Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). If a party seeking arbitration
 24 establishes these two factors, the court must compel arbitration. 9 U.S.C. § 4; *Chiron*, 207 F.3d at
 25 1130. “The standard for demonstrating arbitrability is not a high one; in fact, a district court has
 26 little discretion to deny an arbitration motion, since the [FAA] is phrased in mandatory terms.”
 27 *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 475 (9th Cir. 1991). Nonetheless,
 28 “arbitration is a matter of contract and a party cannot be required to submit to arbitration any

1 dispute which he has not agreed so to submit.” *AT & T Technologies, Inc. v. Communications*
 2 *Workers of America*, 475 U.S. 643, 648 (1986) (quoting *Steelworkers v. Warrior & Gulf*
 3 *Navigation Co.*, 363 U.S. 574, 582 (1960)).

4 The FAA creates a body of federal substantive law of arbitrability that requires a healthy
 5 regard for the federal policy favoring arbitration and preempts state law to the contrary. *Volt*
 6 *Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S.
 7 468, 475-479 (1989); *Ticknor v. Choice Hotels Intern., Inc.*, 265 F.3d 931, 936-37 (9th Cir. 2001).
 8 State law is not entirely displaced from the federal arbitration analysis, however. *Ticknor*, 265
 9 F.3d at 936-37. When deciding whether the parties agreed to arbitrate a certain matter, courts
 10 generally apply ordinary state-law principles of contract interpretation. *First Options of Chicago,*
 11 *Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Parties may also contract to arbitrate according to state
 12 rules, so long as those rules do not offend the federal policy favoring arbitration. *Volt*, 489 U.S. at
 13 478-79. Thus, in determining whether parties have agreed to arbitrate a dispute, the court applies
 14 “general state-law principles of contract interpretation, while giving due regard to the federal
 15 policy in favor of arbitration by resolving ambiguities as to the scope of arbitration in favor of
 16 arbitration.” *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1044 (9th Cir. 2009) (quoting
 17 *Wagner v. Stratton Oakmont, Inc.*, 83 F.3d 1046, 1049 (9th Cir. 1996)). “[A]s with any other
 18 contract, the parties’ intentions control, but those intentions are generously construed as to issues of
 19 arbitrability.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626
 20 (1985). If a contract contains an arbitration clause, there is a presumption of arbitrability, *AT & T*,
 21 475 U.S. at 650, and “any doubts concerning the scope of arbitrable issues should be resolved in
 22 favor of arbitration.” *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1139
 23 (9th Cir. 1991).

24 III. Discussion

25 Defendant moves to compel arbitration based upon the arbitration clause contained in
 26 § 10.6.2 of the parties’ original Customer Agreement. The arbitration clause reads in full:

27 The parties shall submit **any dispute arising under the Agreement** that the
 28 parties cannot resolve by the procedure set forth in Section 10.6.1 to binding
 arbitration in accordance with the then prevailing Commercial Arbitration Rules

1 of the American Arbitration Association. Any arbitration shall take place in Los
2 Angeles before one arbitrator who shall be experienced in the subject matter of
3 the dispute. The arbitrator shall have no authority to award punitive damages or
4 to treble or otherwise multiply actual damages. Judgment upon any award made
5 in such an arbitration may be entered and enforced in any court of competent
6 jurisdiction.

7 Rosenberg Decl. Ex. A § 10.6.2 (emphasis added). The parties do not dispute that the arbitration
8 clause was incorporated into the Amendment to the Customer Agreement that replaced the Elite
9 Enterprise Software, for which Plaintiff originally contracted, with the Elite 3E Software that is the
10 subject of this dispute. *See* Rosenberg Decl. Ex. B at 1 (“All terms and conditions of the
11 Agreement shall remain in effect unless specifically modified by this Amendment.”). H&C,
12 however, opposes arbitration on two grounds. First, H&C argues that the arbitration clause is
13 narrow in scope and does not cover the claims raised in this lawsuit. Second, H&C claims that the
14 agreement to arbitrate was fraudulently induced and is therefore unenforceable. The Court will
15 consider each of these arguments in turn.

16 **A. Scope of the Arbitration Agreement**

17 H&C’s primary argument in opposition to the motion to compel is that the dispute
18 presented in this action is not subject to the arbitration agreement. Relying on the Ninth Circuit’s
19 decision in *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458 (9th Cir. 1983),
20 H&C argues that the “arising under” language used by the parties creates a relatively narrow
21 arbitration clause that encompasses only disputes related to the interpretation of the contract and
22 matters of performance. H&C contends that the claims in this case are not limited to matters of
23 contract interpretation or performance because they turn on allegations that Thomson employed a
24 “bait and switch” tactic that constituted fraud. While H&C concedes that it agreed to arbitrate
25 disputes “arising out of the product and services Thomson agreed to provide,” H&C claims that
26 “Thomson never delivered that product.” *Opp’n to Mot. to Compel Arbitration and Dismiss*
27 *Action 6, ECF No. 12.* As H&C describes it, “H&C agreed to purchase an orange, and agreed to
28 arbitrate claims ‘[arising] from’ defects with the orange. Thomson delivered an apple.” *Id.* In
essence, H&C argues that it never agreed to arbitrate claims arising from defects with the “apple”
that Thomson actually delivered, and therefore none of its claims fall within the scope of the
arbitration clause.

1 Plaintiff is correct that where a contract mandates arbitration of disputes “arising under” or
2 “arising out of” an agreement, without more, the Ninth Circuit has construed the scope of the
3 agreement to arbitrate relatively narrowly. *See Tracer Research Corp. v. National Environmental*
4 *Services Co.*, 42 F.3d 1292, 1295 (9th Cir. 1994); *Mediterranean Enterprises*, 708 F.2d at 1464. In
5 *Mediterranean Enterprises*, the Ninth Circuit considered a clause that required arbitration of “[a]ny
6 disputes arising hereunder,” which the court considered synonymous with “arising under the
7 Agreement.” 708 F.2d 1461, 1464. Relying on case law from the Second Circuit, the Ninth
8 Circuit found that the phrase “arising under” is “relatively narrow as arbitration clauses go.” *Id.* at
9 1464 (quoting *Sinva, Inc. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 253 F. Supp. 359, 364
10 (S.D.N.Y. 1966)). The court found the omission of broader language, such as “relating to,” to be
11 significant and agreed with the Second Circuit that the language “arising under” restricts arbitration
12 to disputes related to the interpretation and performance of the contract. *Mediterranean*
13 *Enterprises*, 708 F.2d at 1464 (citing *In re Kinoshita & Co.*, 287 F.2d 951, 953 (2d Cir. 1961)).
14 Based on this analysis, the Ninth Circuit found that the district court had properly referred the
15 plaintiff’s breach of contract and breach of fiduciary duty claims to arbitration, and properly
16 refused to compel arbitration of the plaintiff’s claims for quantum meruit, conversion, and
17 conspiracy to induce breach of an entirely separate contract. *Id.* The Ninth Circuit reaffirmed this
18 analysis in *Tracer*, where it considered a clause that covered disputes “arising out of” an
19 agreement, but omitted reference to claims “relating to” an agreement. 42 F.3d at 1295. After
20 determining that such language “is of the same limited scope as the ‘arising under’ language in
21 *Mediterranean Enterprises*,” the court held that the plaintiff’s claim for misappropriation of trade
22 secrets was not arbitrable. *Id.*

23 Thomson makes two arguments in response to H&C’s reliance on *Mediterranean*
24 *Enterprises*. First, Thomson argues that *Mediterranean Enterprises* is inapplicable to the present
25 dispute because the parties chose to have the Customer Agreement governed by California law.
26 *See Rosenberg Decl. Ex A § 10.5* (“This Agreement shall be construed and enforced in accordance
27 with the substantive laws of the State of California.”). Thomson notes that a recent California
28 Court of Appeal decision, relied upon heavily by H&C in its opposition, explicitly considered and

1 rejected the *Mediterranean Enterprises* rule. See *EFund Capital Partners v. Pless*, 150 Cal. App.
 2 4th 1311, 1329-30, 59 Cal. Rptr. 3d 340 (Cal. Ct. App. 2007). In *EFund Capital Partners*, the
 3 California Court of Appeal considered a clause that required arbitration of “[a]ny dispute or
 4 disagreement arising from or out of” the contract. 150 Cal. App. 4th at 1317. Relying on *Tracer*
 5 and *Mediterranean Enterprises*, the trial court had narrowly construed the arbitration clause and
 6 denied the defendants’ motion to compel arbitration of plaintiff’s claims, which included tort
 7 claims for fraudulent inducement and negligent misrepresentation. *Id.* at 1317, 1319. After
 8 providing a lengthy analysis of both California and federal appellate decisions, the California Court
 9 of Appeal reversed the trial court and declined to follow the Ninth Circuit rule.² *Id.* at 1329. The
 10 court found the Ninth Circuit rule to be “a distinctly minority rule” that “no longer finds support in
 11 other federal courts,”³ and appeared to consider the Ninth Circuit’s analysis inconsistent with the
 12 California and federal policies requiring liberal construction of arbitration clauses. *Id.* at 1328-30.
 13 The California court thus concluded that “[u]nder California law, we cannot give arbitration
 14 clauses the ‘relatively narrow’ construction described in *Mediterranean Enterprises*.” *Id.* at 1330.
 15 Thomson argues that because California law governs interpretation of the Customer Agreement,
 16 this Court should follow *EFund Capital Partners* and decline to give the arbitration clause the
 17 relatively narrow construction that Ninth Circuit case law may require.

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 20 ² As Plaintiff points out, the Court of Appeal first distinguished the case from *Mediterranean*
 21 *Enterprises* and *Tracer*, finding the language in the arbitration clause “materially broader” than that
 22 considered by the Ninth Circuit. *EFund Capital Partners*, 150 Cal. App. 4th at 1328. However,
 23 the court then went on to reject the Ninth Circuit rule entirely, noting that “[i]n any event, the
 24 foregoing Ninth Circuit analysis no longer finds support in other federal courts,” and finding the
 25 Ninth Circuit rule inconsistent with both California law and the federal policy requiring liberal
 26 construction of arbitration clauses. *Id.* at 1328-30.

27 ³ The *Mediterranean Enterprises* court relied heavily upon the Second Circuit’s analysis in *In re*
 28 *Kinoshita & Co.*, 287 F.2d 951 (2d Cir. 1961). The Second Circuit has since “recognize[d] . . . that
Kinoshita is inconsistent with the federal policy favoring arbitration” and has limited *Kinoshita* to
 “its precise facts.” *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 854 & n.6 (2d Cir.
 1987). For the same reasons, a number of courts have declined to follow *Kinoshita* and the Ninth
 Circuit’s decision in *Mediterranean Enterprises*. See, e.g., *Battaglia v. McKendry*, 233 F.3d 720,
 727 (3d Cir. 2000) (“we decline to follow the Ninth Circuit, which apparently continues to approve
 the teaching of *Kinoshita*”); *Gregory v. Electro-Mechanical Corp.*, 83 F.3d 382, 385-86 (11th Cir.
 1996) (rejecting *Kinoshita* and noting that “[o]nly the Ninth Circuit seems to have followed the
 decision in *Kinoshita*”).

1 At the motion hearing, both parties agreed that California law governs interpretation of the
 2 arbitration agreement.⁴ Although H&C claimed at the hearing that California law distinguishes
 3 between broad and narrow arbitration clauses, and that California courts would construe this clause
 4 narrowly, H&C has provided no case law to support this contention. Rather, under *EFund Capital*
 5 *Partners* and other California cases, it appears that the parties agreement to arbitrate “any dispute
 6 arising under the Agreement,” Rosenberg Decl. Ex. A § 10.6.2 (emphasis added), is broad enough
 7 to encompass tort claims that relate to the parties’ contractual relationship, including claims of
 8 fraud in the inducement. *See, e.g., EFund Capital Partners*, 150 Cal. App. 4th at 1330, 1317
 9 (agreement to arbitrate any dispute arising from or out of a contract encompasses tort claims,
 10 including fraud in the inducement and negligent misrepresentation); *id.* at 1329 (noting that other
 11 circuits have broadly construed “arising under” language in arbitration provisions); *Coast Plaza*
 12 *Doctors Hosp. v. Blue Cross of California*, 83 Cal. App. 4th 677, 684, 99 Cal. Rptr. 2d 809 (Cal.
 13 Ct. App. 2000) (characterizing contractual language requiring arbitration of “any problem or
 14 dispute” arising under or concerning the terms of the agreement as “very broad”). As Thomson
 15 points out, H&C has identified no meaningful distinction in California case law between the
 16 “arising under” language in the parties’ agreement and the “arising from or out of” language
 17 broadly construed by the California Court of Appeal. Indeed, throughout its opposition brief, H&C
 18 uses such language interchangeably. *See* Opp’n at 6 (“the parties agreed to arbitrate disputes
 19 arising out of the product and services Thomson agreed to provide”) (emphasis added); *id.* (“H&C
 20 . . . agreed to arbitrate claims ‘arriving [sic] from’ defects . . .”) (emphasis added). Thus, the Court
 21 agrees that California law requires a relatively broad interpretation of the arbitration clause in this
 22 case, to encompass at least those tort claims that relate to the parties’ contractual relationship.

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 25 ⁴ At the hearing, Plaintiff conceded that California law governed interpretation of the arbitration
 26 clause, but then suggested that *Mediterranean Enterprise* would nonetheless govern because
 27 federal law preempts state law under the FAA. However, the FAA preempts state law only to the
 28 extent that it stands as an obstacle to the enforcement of arbitration agreements according to their
 terms. *See Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489
 U.S. 468, 477-78 (1989). Here, California law appears to be more favorable to the federal policy
 favoring arbitration than Ninth Circuit law, and therefore there are no grounds for federal
 preemption of California principles of contract interpretation.

1 Because each of H&C's claims, whether based on contract or tort, directly relates to the parties'
2 contractual relationship, they are subject to arbitration under California law.

3 Moreover, Thomson argues, and the Court agrees, that even if *Mediterranean Enterprises*
4 applies, and the arbitration clause is relatively narrowly construed, H&C's claims are still subject
5 to arbitration. The Complaint presents claims for fraudulent performance of contract, fraudulent
6 inducement of contract, negligent misrepresentation, breach of contract, breach of express and
7 implied warranty, and rescission. It is clear, as an initial matter, that H&C's claims of breach of
8 contract, fraudulent performance, and breach of warranty⁵ directly involve matters of contract
9 interpretation and performance and are therefore arbitrable under *Mediterranean Enterprises* and
10 *Tracer*. See *Mediterranean Enterprises*, 708 F.2d at 1464 (finding that claims for breach of
11 contract and breach of the fiduciary duty created by the contract "clearly fall within the scope of
12 the arbitration clause"). H&C's contention that it agreed to arbitrate claims arising from defects
13 with an orange, but Thomson delivered an apple, does not change this analysis. If it did, then any
14 claim that a party provided goods materially different from those promised would not be subject to
15 arbitration. Such an outcome would be inconsistent with the federal policy favoring arbitration and
16 the Supreme Court's instruction that the parties' intentions be "generously construed as to issues of
17 arbitrability." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626
18 (1985).

19 H&C's claims for fraudulent inducement, negligent misrepresentation, and rescission
20 present a somewhat closer question. Nonetheless, the Court finds that these claims, particularly as
21 articulated in H&C's Complaint, are intimately related to the contract and its performance in a way
22 that distinguishes them from the kinds of claims that Ninth Circuit has found not to be arbitrable.
23 The analysis in *Tracer* is instructive. There, the defendant had obtained certain information from
24 the plaintiff under the terms of a licensing agreement. *Tracer*, 42 F.3d at 1293. After the licensing
25 agreement was terminated, the defendant continued to use this information, and the plaintiff sued
26 for misappropriation of trade secrets. *Id.* at 1293-94. In determining that plaintiff's

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28 ⁵ Section 6 of the Customer Agreement provides limited express warranties and also includes a
disclaimer of any other warranties, express or implied. Rosenberg Decl. Ex A §§ 6.1-6.4.

1 misappropriation claim was not subject to arbitration, the Ninth Circuit noted that the issue
2 presented in the case was not whether the licensing agreement gave the defendant the right to use
3 plaintiff's trade secrets (which defendant had not argued), but whether the plaintiff possessed any
4 protectable trade secrets. *Id.* at 1295. The court acknowledged that "the tort claim would not have
5 arisen 'but for' the parties' licensing agreement," but found that this limited causal relationship was
6 not determinative. *Id.* Rather, unlike other claims found to be arbitrable, the trade secrets claim
7 did not require reference to the underlying agreement or interpretation of the parties' contractual
8 relationship. *Id.* Indeed, the claim, if proven, "would constitute an independent wrong from any
9 breach of the licensing and nondisclosure agreements" and would not affect any contractual
10 remedies. *Id.* Simply put, the trade secrets claim did not depend on, and did not affect, the actual
11 agreement between the parties or their performance of that agreement.

12 *Tracer* and *Mediterranean Enterprises* suggest that "arising under" or "arising out of"
13 language covers claims that require reference to the underlying contract, interpretation of the
14 parties' agreement, or examination of performance under the contract, but not claims for wrongs
15 that are only indirectly related to the parties' contractual relationship. Neither case suggests that
16 tort claims are categorically excluded from "arising under" clauses, and neither case addresses
17 claims of fraud in the inducement, negligent misrepresentation during formation and performance,
18 or rescission. Looking to the specific facts pled in H&C's Complaint, the Court finds that the
19 allegations supporting these claims require examination of Thomson's performance under the
20 contract and reference to the promises made through the parties' contractual agreement. For
21 instance, H&C's claims for fraudulent inducement and negligent misrepresentation are premised in
22 part on claims that Thomson misrepresented and concealed its "ability and intention to fulfill its
23 obligations to H&C" and continued to misrepresent its ability to implement and fix the 3E product
24 throughout its performance of the agreement. Compl. ¶¶ 31, 40. Similarly, H&C's claim for
25 rescission is premised on claims that Thomson misrepresented its ability to perform and provide
26 services to implement the 3E and CRM products, Compl. ¶ 58, and that "H&C did not intend or
27 agree to receive the products and services actually delivered." Compl. ¶ 63. These claims thus
28 require interpretation of the obligations Thomson owed H&C under the contract, the services

1 Thomson agreed to perform under the contract, and the product and services H&C contracted to
 2 receive. They also require examination of Thomson's conduct in performing its obligations under
 3 the contract. Unlike the trade secret claim in *Tracer*, which could have been brought without
 4 regard to any breach of the contractual agreement, here all of H&C's claims are inextricably bound
 5 up with questions of contract interpretation, performance, and breach.

6 The Court does not believe that the Ninth Circuit intended district courts to construe
 7 "arising under" clauses so narrowly as to preclude arbitration of claims so closely related to the
 8 contract itself and the parties' performance thereunder.⁶ See *Owner-Operator Independent Drivers*
 9 *Assoc., Inc. v. Swift Transportation Co.*, 288 F. Supp. 2d 1033, 1036-37 (D. Ariz. 2003) (finding
 10 that clause requiring arbitration of "[a]ny disagreement or litigation arising under this Contract"
 11 encompassed federal statutory claims); *Battaglia v. McKendry*, 233 F.3d 720, 729 (3d Cir. 2000)
 12 (finding that "arising under" language encompasses claims going to contract formation).

13 Resolving any ambiguity in favor of arbitration, as required, the Court thus finds that all of H&C's
 14 claims fall within the scope of the arbitration clause, regardless of whether Ninth Circuit or
 15 California law is applied.

16 **B. Enforceability of the Arbitration Agreement**

17 H&C also argues that even if the arbitration clause covers its claims, Thomson's motion to
 18 compel arbitration should be denied because the arbitration clause was fraudulently induced and is
 19 therefore unenforceable. The Supreme Court has recognized that a party opposing arbitration may
 20 raise two types of validity challenges: (1) a challenge specifically to the validity of the agreement
 21 to arbitrate, and (2) a challenge to the validity of the contract as a whole, such as a claim that the
 22 agreement was fraudulently induced. *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772, 2778
 23 (2010); see also *Rosenthal v. Great Western Fin. Securities Corp.*, 14 Cal. 4th 394, 419, 58 Cal.
 24 Rptr. 2d 875 (1996) (distinguishing between "fraud in inducing consent specifically to the
 25 arbitration agreement" and "claims that the contract as a whole was obtained through fraud in the
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27 ⁶ Indeed, in *Scherk v. Alberto-Culver Co.*, the Supreme Court found that fraudulent
 28 misrepresentation claims were arbitrable under a clause requiring arbitration of "any controversy or
 claim ... aris[ing] out of this agreement." 417 U.S. 506, 508-10, 519-20 (1974). The scope of the
 arbitration clause was not at issue before the Court in *Scherk*, however.

1 inducement”). It is well-established that only the first type of challenge is relevant to the court’s
2 determination of arbitrability, and thus a claim of fraud in the inducement of the contract as a
3 whole does not prevent a court from enforcing a specific agreement to arbitrate. *Rent-A-Center*,
4 130 S.Ct. at 2778. It is true that in some cases the fraud that induced the whole contract may have
5 equally induced the specific agreement to arbitration. *Id.* In such cases, however, the Supreme
6 Court has “nonetheless require[d] the basis of challenge to be directed specifically to the agreement
7 to arbitrate before the court will intervene.” *Id.*

8 In determining whether a challenge to validity or enforceability is directed specifically to
9 the arbitration clause, courts look to the “crux of the complaint.” *See Buckeye Check Cashing,*
10 *Inc. v. Cardegna*, 546 U.S. 440, 444 (2006). “[W]hen the crux of the complaint challenges the
11 validity or enforceability of the agreement containing the arbitration provision, then the question of
12 whether the agreement, as a whole, is unconscionable must be referred to the arbitrator. When the
13 crux of the complaint is not the invalidity of the contract as a whole, but rather the arbitration
14 provision itself, then the federal courts must decide whether the arbitration provision is invalid and
15 unenforceable under 9 U.S.C. § 2 of the FAA.” *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257,
16 1263-64 (9th Cir. 2006) (en banc) (citations omitted). In its opposition brief, H&C argues that the
17 same fraud that induced it to enter into the Customer Agreement and Amendment also induced it to
18 agree to arbitrate claims arising under the agreements. That is, if H&C had known that the 3E
19 product was untested and unworkable, it would neither have entered into the contract as a whole,
20 nor agreed to arbitrate claims based on the 3E software. The crux of H&C’s Complaint, however,
21 suggests that H&C’s challenge is directed at the contract as a whole and not specifically to the
22 arbitration agreement. The Complaint is focused on allegations that Thomson made
23 misrepresentations that induced H&C to enter into an agreement to purchase the Elite software, to
24 later switch from that software to the 3E product, and to make payments throughout a prolonged
25 implementation process. Compl. ¶¶ 15, 17, 24, 32. The Complaint also alleges that if H&C had
26 known the true facts, it would never have entered into the agreement to purchase Elite and then to
27 switch to 3E. Compl. ¶ 33, 42, 63. Importantly, however, the Complaint does not allege that
28 Thomson’s misrepresentations induced H&C to agree to arbitrate claims, nor does it allege that if

1 H&C had known the true facts, it would not have agreed to the arbitration clause. Indeed, the
 2 Court has found no mention of the agreement to arbitrate anywhere in the Complaint. The
 3 declaration submitted by H&C's Executive Director likewise does not mention the arbitration
 4 agreement. *See* Decl. of Arthur P. Bernstein in Supp. of Opp'n to Mot. to Compel Arbitration,
 5 ECF No. 13. It thus appears that H&C's claim of fraudulent inducement is directed solely to the
 6 contract as a whole and not specifically to the agreement to arbitrate. Accordingly, under well-
 7 established Supreme Court precedent, H&C's fraud claims are subject to arbitration.⁷

8 C. Stay vs. Dismissal

9 Based on the above analysis, the Court finds that all of H&C's claims are subject to
 10 arbitration, and Thomson's motion to compel arbitration should be granted. Where an arbitration
 11 clause is broad enough to cover all of a plaintiff's claims, the court may compel arbitration and
 12 dismiss the action. *Sparling v. Hoffman Const. Co.*, 864 F.2d 635, 638 (9th Cir. 1988); *see also*
 13 *Dittenhafer v. Citigroup*, No. C 10-1779 PJH, 2010 WL 3063127, at *7 (N.D. Cal. Aug. 2, 2010)
 14 (compelling arbitration and dismissing case); *Underwriters Reinsurance Co. v. Ace American Ins.*
 15 *Co.*, No. CV0208177CASJTLX, 2003 WL 24011931, at *7-8 (C.D. Cal. Feb. 10, 2003) (same).
 16 However, H&C asks the Court to stay, rather than dismiss, the case. At the motion hearing, H&C
 17 expressed concern that it may face statute of limitations problems if the case is dismissed, and the
 18 arbitrator later determines that certain claims should be heard by the court. Thomson indicated that
 19 it would be willing to address this concern by stipulating to a dismissal without prejudice that

20 ⁷ At the motion hearing, H&C argued for the first time that the contract between H&C and
 21 Thomson is "permeated" by fraud, and that under California law such a contract is void and non-
 22 arbitrable. In *Rosenthal*, the California Supreme Court rejected the "permeation doctrine" referred
 23 to by H&C and held that claims that the contract as a whole was obtained through fraud are subject
 24 to arbitration, including "claims of a 'grand scheme' of fraud, or fraud 'permeating' the
 25 transaction." *Rosenthal*, 14 Cal. 4th at 419. H&C is correct that claims that a contract is *void* due
 26 to fraud in the execution or inception must be decided by the court. *Id.* However, fraud in the
 27 execution is limited to claims that "fraud goes to the inception or execution of the agreement, so
 28 that the promisor is deceived as to the nature of his act, and actually does not know what he is
 signing, or does not intend to enter into a contract at all." *Id.* at 415 (quoting *Ford v. Shearson
 Lehman American Express, Inc.*, 180 Cal. App. 3d 1011, 1028, 225 Cal. Rptr. 895 (1986)). H&C's
 complaint is squarely grounded in claims of fraud in the inducement, rather than fraud in the
 inception. H&C clearly intended to enter into an agreement with Thomson and understood the
 nature of that agreement. Thus, this is a case where "the promisor knows what he is signing but his
 consent is *induced* by fraud." *Rosenthal*, 14 Cal. 4th at 419. Under *Rosenthal*, such claims of
 fraud in the inducement are subject to arbitration, even if the entire transaction was permeated by
 fraud.

1 provides for tolling of the statute of limitations if the arbitrator determines that some or all of
2 H&C's claims must be heard by the court. The Court finds this solution preferable to a stay of
3 unknown duration, but which H&C stated at the hearing may be multiple years. Accordingly, the
4 parties are ordered to file, no later than April 21, 2011, a stipulation dismissing the case and
5 providing for tolling of the statute of limitations.

6 **IV. Conclusion**

7 For the foregoing reasons, the Court GRANTS Defendant's motion to compel arbitration.
8 The parties shall file, no later than April 21, 2011, a stipulation dismissing the case without
9 prejudice and providing for tolling of the statute of limitations.

10 **IT IS SO ORDERED.**

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12 Dated: April 6, 2011

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15 LUCY H. KOH
16 United States District Judge
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United States District Court
For the Northern District of California