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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MONEY MAILER, LLC,
Plaintiff,

v.

WADE G. BREWER,
Defendant.

NO. C15-1215RSL

ORDER DENYING MOTION FOR
SUMMARY JUDGMENT AND
DENYING MOTION TO COMPEL
ARBITRATION

WADE G. BREWER,
Counterclaim Plaintiff,
v.
MONEY MAILER, LLC and MONEY
MAILER FRANCHISE CORP., a Delaware
corporation,
Counterclaim Defendants.

This matter comes before the Court on “Money Mailer Franchise Corp.’s Motion for Summary Judgment Dismissing All Counterclaims Against It” (Dkt. # 20) and “Defendant and Counterclaim Plaintiff Brewer’s Motion to Compel Arbitration” (Dkt. # 29). Having reviewed the materials submitted by the parties and the remainder of the record, and having heard oral argument on April 6, 2016, the Court finds as follows.

BACKGROUND

Money Mailer Franchise Corporation (MMFC) contracts with franchisees to operate

1 direct mail advertising businesses within a franchised territory. Dkt. # 12 (Counterclaims) at
2 ¶ 3.1. MMFC requires that all franchisees use the same printing, freight, and postage system by
3 contracting with Money Mailer, LLC (MMLLC). Dkt. # 22 (Carr Decl.) at ¶ 3; Dkt. # 22-1
4 (MMFC Franchise Disclosure Document) at 11. Defendant/counterclaim plaintiff Wade Brewer
5 signed a franchise agreement with MMFC that required arbitration of “any controversy or claim
6 arising out of or relating to this Agreement, or any default of it” Dkt. # 22-5 (Franchise
7 Agreement) at 19. MMLLC’s standard agreement, however, does not require arbitration. Dkt.
8 # 9-1 (MMLLC Standard Purchase Terms and Conditions). Brewer denies that he ever signed a
9 separate agreement with MMLLC, but does not dispute that he entered into a franchise
10 agreement with MMFC. See Dkt. # 26 (Declaration of Wade Brewer) at ¶ 2.

11 MMFC and MMLLC were formed as separate entities. Dkt. # 22 ¶ 4. There is, however,
12 significant overlap between the two. Senior managers are the same for both companies: Gary M.
13 Mulloy was identified as the chairman, president, and chief executive officer for both MMFC
14 and MMLLC (Dkt. # 22-1 at 14, Dkt. # 26-2 at 2); Joseph Craciun was identified as a senior vice
15 president and general counsel for both companies (Dkt. # 22-1 at 14, Dkt. # 26-1 at 113); and
16 John Patinella was identified as the senior vice president of franchise operations for both
17 companies (Dkt. # 22-1 at 14, Dkt. # 27 at 292). MMLLC also collects various fees on behalf of
18 MMFC. Dkt. # 22-1 at 20-21. A Notice of Default sent to defendant Wade Brewer was on
19 letterhead for both MMLLC and MMFC and sought to collect past due balances for both entities.
20 Dkt. # 30-1 at 10.

21 On July 31, 2015, MMLLC, filed a complaint for breach of contract and money due and
22 owing against Brewer. Dkt. # 1. MMFC became a party to this action when Brewer asserted
23 counterclaims against it. Dkt. # 12. MMFC moved for summary judgment dismissing all
24 counterclaims against it on the basis that Brewer is contractually required to pursue these claims
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1 through arbitration rather than through litigation. Dkt. # 20.

2 DISCUSSION

3 A. Summary Judgment

4 1. Legal Standard

5 Summary judgment is appropriate if, viewing the evidence in the light most favorable to
6 the nonmoving party, “the movant shows that there is no genuine dispute as to any material fact
7 and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); L.A. Printex
8 Indus., Inc. v. Aeropostale, Inc., 676 F.3d 841, 846 (9th Cir. 2012). The moving party “bears the
9 initial responsibility of informing the district court of the basis for its motion.” Celotex Corp. v.
10 Catrett, 477 U.S. 317, 323 (1986). It need not “produce evidence showing the absence of a
11 genuine issue of material fact” but instead may discharge its burden under Rule 56 by “pointing
12 out . . . that there is an absence of evidence to support the nonmoving party’s case.” Id. at 325.
13 Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-
14 moving party fails to designate “specific facts showing that there is a genuine issue for trial.” Id.
15 “The mere existence of a scintilla of evidence in support of the non-moving party’s position is
16 not sufficient”; the opposing party must present probative evidence in support of its claim or
17 defense. Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 919 (9th Cir. 2001); Intel
18 Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991). “An issue is
19 ‘genuine’ only if there is a sufficient evidentiary basis on which a reasonable fact finder could
20 find for the nonmoving party.” In re Barboza, 545 F.3d 702, 707 (9th Cir. 2008) (internal
21 citations omitted).

22 2. Waiver

23 Brewer contends that MMFC waived the right to arbitrate because “MMLLC not only
24 elected to pursue this pending action for breach of contract claims on its own behalf, but also on
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1 behalf of MMFC for the claimed amounts owed for royalties and other charges not related to
2 MMLLC's services and materials." Dkt. # 25 at 15. Brewer argues, among other things, that the
3 three elements necessary for waiver can be found in this case: "(1) knowledge of an existing
4 right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the
5 party opposing arbitration resulting from inconsistent acts." Id. (citing Fisher v. A.G. Becker
6 Paribas Inc., 791 F.2d 691, 694 (9th Cir. 1986)). MMFC responds that Brewer cannot meet the
7 second and third elements of the Fisher test for waiver, and that in any case waiver is a question
8 for the arbitrator to decide. Dkt. # 28 at 5-10. The Court will address whether waiver is an issue
9 it may decide before turning to the elements of the test for waiver.

10 MMFC notes that its agreement with Brewer incorporates the American Arbitration
11 Association (AAA) commercial arbitration rules (Dkt. # 22-5 (Franchise Agreement) at 19), and
12 that the Ninth Circuit recently held that "incorporation of the AAA rules constitutes clear and
13 unmistakable evidence that contracting parties agreed to arbitrate arbitrability." Brennan v.
14 Opus Bank, 796 F.3d 1125, 1130 (9th Cir. 2015). MMFC then points to the Supreme Court's
15 observation that "the arbitrator should decide allegations of waiver, delay, or a like defense to
16 arbitrability." Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002) (internal
17 quotation marks omitted).

18 Brennan, however, left open the possibility that in an agreement involving an
19 unsophisticated party, incorporation of the AAA rules may not evince a "clear and
20 unmistakable" intent to delegate. 796 F.3d at 1131. Brennan had been a long-time partner at
21 Jones Day and had been Senior Vice President, General Counsel, and Deputy Chief Legal
22 Officer of Washington Mutual for seven years, and Opus Bank was "a sophisticated, regional
23 financial institution." Id. In this case, while Brewer had been a small business owner and a
24 sales and general manager, he appears to have had no legal experience. See Dkt. # 28 at 3. He
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1 also had no prior experience as a franchisee. Dkt. # 26 (Declaration of Wade Brewer) ¶ 3.
2 While perhaps more sophisticated with respect to commercial agreements than the luggage
3 delivery driver in Vargas v. Delivery Outsourcing, LLC, 2016 WL 946112 (N.D. Cal. Mar. 14,
4 2016), Brewer certainly is not comparable to the experienced attorney or regional financial
5 institution in Brennan. As the Vargas court observed:

6 [A]n inquiry about whether the parties clearly and unmistakably delegated
7 arbitrability by incorporation should first consider the position of those parties. . . .
8 To a large corporation . . . or a sophisticated attorney . . . , it might be reasonable to
9 conclude that incorporation of the rules clearly and unmistakably evinces an intent
10 to delegate. But applied to an inexperienced individual, untrained in the law, such
11 a conclusion is likely to be much less reasonable.

12 2016 WL 946112, at *7. Incorporation of the AAA rules in this case does not show a “clear and
13 unmistakable” intent to delegate questions of arbitrability.

14 This is particularly so because of the Washington addendum to the franchise agreement,
15 which provides that “if you are a resident of the State of Washington, the Washington Franchise
16 Agreement Addendum will apply, will amend this Agreement and will supersede any contrary
17 terms in this Agreement.” Dkt. # 22-5 (Carr Decl.) at 13. The Washington Addendum, in turn
18 notes that the “State of Washington has a statute, RCW 19.100.180 which may supersede the
19 franchise agreement in your relationship with the franchisor Provisions such as those which
20 unreasonably restrict or limit . . . rights or remedies under the Act such as the right to a jury trial
21 may not be enforceable.” Id. at 31. The Washington Addendum therefore leaves the impression
22 that a Washington franchisee has recourse to the courts in at least some cases, further supporting
23 the conclusion that there is not clear evidence that the question of arbitrability is delegated to the
24 arbitrator. See Vargas, 2016 WL 946112, at *6 (“Other courts analyzing similar conflicts as the
25 one here – an unambiguous delegation clause contradicted by another provision of the contract –
26 have declined to enforce the delegation clause.”).

1 Moreover, the Court is not persuaded that the Ninth Circuit has abandoned its earlier
2 “case law [that] makes clear that courts properly exercise jurisdiction over claims raising (1)
3 defenses existing at law or in equity for the revocation of (2) the arbitration clause itself.” Cox
4 v. Ocean View Hotel Corp., 533 F.3d 1114, 1120, 1124 (9th Cir. 2008) (considering waiver
5 issue). The Ninth Circuit observed that the “reasoning of Howsam is simply inapplicable to
6 resolution of the first gateway issue: whether the parties are *bound* by the arbitration clause.” Id.
7 at 1121; see also, e.g., Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 217-18 (3d Cir. 2007)
8 (“[W]e conclude that the Supreme Court did not intend its pronouncements in Howsam and
9 Green Tree to upset the ‘traditional rule’ that courts, not arbitrators, should decide the question
10 of whether a party has waived its right to arbitrate by actively litigating the case in court.”);
11 RISO, Inc. v. Witt Co., 2014 WL 4627267 (C.D. Cal. Sept. 16, 2014) (observing that several
12 circuits “have interpreted Howsam’s use of the term ‘waiver’ as referring not to conduct-based
13 waiver, but to a defense arising from non-compliance with contractual conditions precedent to
14 arbitration” (internal quotation marks omitted)).

15 Even in circuits that have concluded that incorporation of the AAA rules constitutes a
16 clear and unmistakable agreement that the parties will arbitrate arbitrability, courts have properly
17 addressed the question of waiver through litigation conduct despite incorporation of the AAA
18 rules. See Plaintiff’s Shareholders Corp. v. S. Farm Bureau Life Ins. Co., 486 F. App’x 786,
19 789-90 (11th Cir. 2012) (district court properly addressed waiver based on litigation conduct;
20 incorporation of AAA rules did not “constitute clear and unmistakable evidence of an agreement
21 to arbitrate issues of conduct-based waiver”). This outcome is consistent with the reasons for
22 courts, rather than arbitrators, to decide conduct-based waiver questions: leaving the issue to the
23 decisionmaker with the expertise and power to control its docket and prevent abuse in its
24 proceedings; avoiding the inefficiency of “sending waiver claims to the arbitrator . . . in cases in
25 which the alleged waiver arises out of conduct within the very same litigation in which the party
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1 attempts to compel arbitration”; and preventing the arbitrator from “get[ting] first crack at
2 defenses to a motion to compel arbitration based on waiver[,]” which would essentially require
3 the court to compel arbitration without reviewing the parties’ contentions. Cox, 533 F.3d at
4 1121 n.5; PNC Bank, N.A. v. Presbyterian Ret. Corp., 2015 WL 1931395, at *4 (S.D. Ala. Apr.
5 28, 2015); Discover Prop. & Cas. Ins. Co. v. Tetco, Inc., 2014 WL 685367, at *6 (D. Conn.
6 Feb. 19, 2014).

7 For the reasons above, the Court concludes that notwithstanding Brennan, it has the
8 obligation to determine whether Brewer has raised material issues of fact regarding MMFC’s
9 potential waiver of the right to arbitrate through litigation conduct. MMFC does not dispute that
10 the first element of the Fisher test has been met: knowledge of the right to arbitrate. MMFC
11 vigorously disputes that it has taken any acts inconsistent with its right to arbitrate, the second
12 Fisher element. At the time this motion was briefed, Brewer had neither an answer nor
13 discovery from MMFC. Dkt. # 25 at 13. He claims, however, that in its suit, MMLLC “not only
14 elected to pursue this pending action for breach of contract claims on its own behalf, but also on
15 behalf of MMFC for the claimed amounts owed for royalties and other charges not related to
16 MMLLC’s services and materials.” Id. at 15. This assertion alone would be insufficient to
17 avoid summary judgment, but Brewer submitted a supplemental declaration that raises an issue
18 of fact regarding the amount MMLLC seeks to recover in its lawsuit. See Dkt. # 30. Prior to the
19 lawsuit, MMLLC and MMFC’s collection attempts grouped together amounts allegedly owed to
20 the two entities. See Dkt. # 30-1 at 10-18. On May 29, 2015, MMLLC and MMFC sought to
21 collect a combined \$1,671,637.90. Id. at 10. Two months later, MMLLC filed suit, claiming
22 that Brewer owed it \$1,733,555.00, not including accrued interest. Dkt. # 1 ¶ 18. The fact that
23 the MMLLC-initiated lawsuit sought an amount greater than the combined MMLLC/MMFC
24 demand letter sent just two months earlier raises an issue of fact regarding the amount MMLLC
25 seeks to recover in the lawsuit and whether it includes amounts previously owed to MMFC
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1 under its agreement with Brewer.

2 Brewer objects to the supplemental declaration of Ryan Carr (Dkt. # 31), which attempts
3 to respond to Brewer's claims regarding the source(s) of the amount sought in this litigation.
4 See Dkt. # 33. The Court, for the purposes of this motion, has considered the supplemental Carr
5 declaration and concludes that it does not adequately address the facts Brewer has set forth.
6 Most fundamentally, Carr repeatedly asserts that the lawsuit seeks recovery of funds due to
7 MMLLC, but does not explain how this amount was calculated or whether it includes amounts
8 previously due to MMFC under Brewer's contract with that entity, but assigned to MMLLC.
9 There also remains a question regarding whether this amount includes the fees that MMLLC
10 collects on behalf of MMFC. See Dkt. # 22-1 at 20-21. The Carr declaration also quibbles with
11 the inferences that may be drawn from the facts Brewer presented, but on MMFC's motion for
12 summary judgment, the Court will view the facts in the light most favorable to Brewer.

13 Brewer has adequately raised material issues of fact regarding whether the lawsuit seeks
14 funds originally due to MMFC under the terms of the franchise agreement. Although MMLLC
15 filed the lawsuit, the facts set forth by Brewer, again viewed in the light most favorable to his
16 position, likewise raise the inference that MMFC, by assigning or otherwise authorizing
17 MMLLC to attempt to recover amounts owed under the MMFC contract through litigation, has
18 acted inconsistently with the right to compel arbitration. Cf. United Computer Sys., Inc. v. AT
19 & T Corp., 298 F.3d 756, 765 (9th Cir. 2002) (filing lawsuit inconsistent with right to arbitrate).
20 Although MMFC was not the entity that filed the lawsuit, if it had some involvement in
21 assigning claims to MMLLC for the purposes of seeking relief in court or otherwise assented to
22 MMLLC's actions to recover amounts due to MMFC, those acts would be inconsistent with the
23 right to arbitrate.

24 The Court now turns to the third waiver prong: prejudice. MMFC is correct that
25 arbitration may be compelled "even where the result would be the possibility inefficient
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1 maintenance of separate proceedings in different forums.” Fisher, 791 F.2d at 698. But while
2 MMFC is also correct that in some cases an early request means that the party resisting
3 arbitration is not prejudiced by inconsistent actions, delay is not the only question in an analysis
4 of prejudice. See Brown v. Dillard’s, Inc., 430 F.3d 1004, 1012 (9th Cir. 2005) (analyzing
5 parties’ behavior pre-suit and concluding that plaintiff suffered prejudice); see also Riverside
6 Publ’g Co. v. Mercer Publ’g LLC, 829 F. Supp. 2d 1017, 1021-22 (W.D. Wash. 2011) (“The
7 Ninth Circuit has not, so far as the court is aware, limited the scope of a court’s prejudice
8 inquiry.”). In the circumstances of this case, the Court has little trouble concluding that if
9 MMLLC filed suit to recover amounts Brewer owed to MMFC under the terms of the MMFC
10 agreement, Brewer would suffer prejudice by defending against those claims in federal court
11 while being forced to arbitrate other disputes with MMFC. As noted above, Brewer has raised a
12 factual issue regarding the amount MMLLC seeks to recover, and if the Court draws a favorable
13 inference from those facts, Brewer would suffer prejudice by defending some of MMFC’s
14 claims in federal court while arbitrating others, when all are properly subject to an arbitration
15 clause. This conclusion is bolstered by the fact that waiver is an equitable doctrine, meaning that
16 “courts can apply it to redress injustice in situations where technical requirements prevent the
17 court from otherwise providing adequate legal remedies.” Cox, 533 F.3d at 1125.

18 Because Brewer has raised issues of fact regarding waiver, the Court denies MMFC’s
19 motion for summary judgment at this time. The Court has not considered the parties’ other
20 arguments here because the waiver issue is dispositive. If, after discovery, MMFC can
21 demonstrate that MMLLC is not seeking any amount due under the Brewer/MMFC agreement, it
22 may again move for summary judgment or to compel arbitration.

23 **B. Motion to Compel Arbitration**

24 Brewer filed his motion to compel arbitration as a prophylactic measure in the event that
25 the Court granted MMFC’s motion for summary judgment. Because the Court denied the
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1 motion for summary judgment, it will also deny the motion to compel arbitration at this time.

2 **CONCLUSION**

3 For the foregoing reasons, the Court DENIES without prejudice Money Mailer Franchise
4 Corporation’s motion for summary judgement dismissing all counterclaims against it (Dkt. # 20)
5 and DENIES without prejudice Brewer’s motion to compel arbitration (Dkt. # 29).

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7 DATED this 8th day of April, 2016.

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11 Robert S. Lasnik
12 United States District Judge
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