UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GREAT LENGTHS UNIVERSAL HAIR EXTENSIONS S.r.L. and HAIRUWEAR, INC.,

Plaintiffs,

-against-

DAVID GOLD, THOMAS GOLD, JESSICA GOLD, KATIE-JANE GOLDIN, BARRY SCALLAN, HELEN GOLD, RICKY GOLDIN, GOLD HAIR ENTERPRISES LTD., RED HOUSE LTD., MAYOOR BALSARA, CHRISTOPHE SCHOMBERG, GOLD HAIR USA CORP., RATHAPPLE LTD. (F/K/A GREAT LENGTHS IRELAND DISTRIBUTORS LTD., PAUL GOLDIN LTD., GREAT HAIR INSPIRATION LTD. (F/K/A KATIE-JANE GOLD ENTERPRISES LTD.), VISTRA NOMINEES I LTD., ZOLOTOV DISTRIBUTORS LTD. (F/K/A JETBLACK DISTRIBUTORS LTD.), LANAI HAIR HOLDINGS LTD., MAESTRO FULFILMENT SERVICES LTD., AURA UNIVERSAL LTD., S.D.T.C. EXPORTS PVT. LTD., JOHN DOE CORPORATION NO. 1, JOHN DOE CORPORATION NO. 2, and JOHN DOE CORPORATION NO. 3,

Defendants.

MEMORANDUM DECISION AND ORDER

16 Civ. 193 (GBD) (GWG)

GEORGE B. DANIELS, United States District Judge:

Plaintiffs Great Lengths Universal Hair Extensions S.r.l ("Great Lengths") and HairUWear, Inc. ("HairUWear") (together, "Plaintiffs") allege fifteen causes of action against twenty-one different defendants. Three defendants, David Gold, Thomas Gold and Jessica Gold (together the "Gold Defendants"), move to compel arbitration and for a stay of this action under the Federal Arbitration Act, (the "FAA"), 9 U.S.C.A. §§ 3, 4 and 206, pursuant to an arbitration clause in a share purchase agreement between the Gold Defendants and Matteo Antonino, shareholders of Great Lengths. Plaintiffs are not parties to that agreement.

The Gold Defendants' motion to compel arbitration is GRANTED. This action is stayed pending the arbitration.

I. PROCEDURAL HISTORY

On December 18, 2015, Plaintiffs commenced an action in the Supreme Court of the State of New York, Commercial Division captioned *Great Lengths Universal Hair Extensions S.r.l. et al. v. Gold et al.*, Index Number 654311/2015 (Sup. Ct. N.Y. Cnty. Dec. 18, 2015). (ECF Nos. 3-4.) In addition to filing a complaint, Plaintiffs also sought a temporary restraining order and preliminary injunction. (ECF Nos. 5-9.) On January 11, 2016, the Gold Defendants removed the action to this Court, alleging that the court has jurisdiction under the FAA. (ECF No. 1.) On February 3, 2016, this Court denied Plaintiffs' motion for a preliminary injunction. (ECF. No. 78.) Plaintiffs filed their First Amended Complaint ("FAC") on February 18, 2016. (ECF No 80.) On March 30, 2016, the Gold Defendants filed the instant motion. (ECF Nos. 86-89.)

II. FACTUAL BACKGROUND

A. The Gold Defendants and Antonino's Share Purchase Agreement

Great Lengths is an Italian company in the hair extension business. (FAC ¶ 2.) HairUWear is Great Lengths' exclusive U.S. distributor. (*Id.*) Prior to 2011, the Gold Defendants were controlling shareholders of Great Lengths with Matteo Antonino and his family ("Antonino") holding a minority share. (*Id.*) On February 10, 2011, the Gold Defendants and Antonino entered into an Italian "Private Agreement for the Transfer of Shares" whereby the Gold Defendants agreed to sell their entire stake in Great Lengths to Antonino in phases (the "February 2011 Agreement," together with subsequent amendments, the "Share Purchase Agreement"). (FAC ¶ 3; *see also* Pls.'s Opp'n. to Mot. to Compel Arbitration and Stay this Action ("Pls.'s Opp'n."), at 4-5.) Through this transaction Antonino acquired "the goodwill, know-how, brand, name and, generally speaking anything that could be attributed to Great Lengths." (FAC ¶ 3.) The February 2011

Agreement prohibited the Gold Defendants from competing directly or indirectly with Great Lengths. (Pls.'s Opp'n. at 5.)

B. Amendments to the Share Purchase Agreement

After the completion of the first phase of the share transfer in February 2012, the Gold Defendants and Antonino amended the payment schedule of the Share Purchase Agreement and provided for the second phase of the transaction (the "February 2012 Amendment"). (Decl. of Anthony Candido, dated Mar. 30, 2016 ("Candido Decl."), ECF No. 87, Ex. 4.) The February 2012 amendment did not alter the terms and conditions of the February 2011 Agreement and incorporated it therein. (*Id.*)

The arbitration clause in question appears for the first time in an October 23, 2012 amendment to the Share Purchase Agreement (the "October 2012 Amendment"). The October 2012 Amendment provides for the third phase of the share transfer. (FAC, Ex. 2 § 12.) The arbitration clause states:

> All claims and disputes arising under or relating to this agreement and any eventual integration or modification are to be settled by binding arbitration after having attempted conciliation, and can be solicited, even by just one party, that shall be conducted during a dedicated assembly in the place of this contract. Each party will have the right to name a single arbitrator who will require, by the regional tribunal (TAR), the appointment of another arbitrator with the function of Chairman of the board.[1]

(*Id.*) The agreement also contains a non-compete provision prohibiting the Gold Defendants from doing anything that may give rise to the:

> poaching of suppliers, customers, personnel, distributors, partners, external collaborators, banks, or third parties, that may to any degree cause harm to the general progress and credibility of the company in general.

[1] This is the original translation certified by Plaintiffs and attached as Exhibit 2 to their FAC. The Gold Defendants dispute this translation and provided their own. After the Gold Defendants filed their motion and in opposition to the motion, Plaintiffs filed another certified translation that is starkly different from their original version. This issue is discussed in detail *infra* IV(B).

(*Id.*, Ex. 2 § 6.) The October 2012 Amendment expressly "modif[ied], supplement[ed] and partially edit[ed] the agreements . . . on 10/02/2011 [February 2011 Agreement] and 7/02/2012 [February 2012 Amendment]." (*Id.*)

On May 12, 2014, Antonino and the Gold Defendants amended the Share Purchase Agreement one more time in order to transfer the remaining 8% of Great Lengths shares. (Candido Decl., Ex. 15.) That amendment also expressly stated that it was modifying "the private deed for the transfer of shares of the Great Lengths business group entered into on 23 October 2012 [the October 2012 Amendment]." (*Id.*)[2]

C. The Transfer Deeds and Payment Receipts

To effectuate the share transfers, the Gold Defendants and Antonino executed a number of documents titled "Sale of Company Shares" (hereinafter, the "Transfer Deeds"). These Transfer Deeds are dated September 2011, July 2012, February 2013, June 2013, December 2013, March 2014, April 2014, and May 2014. (*See* Candido Decl., Exs. 2, 16; FAC, Exs. 22, 24-28.) Some of the Transfer Deeds contained non-compete clauses. In between this period, Antonino made a number of "installment payment[s] due pursuant to the terms governing" the Share Purchase Agreement which the Gold Defendants memorialized with receipts. (*See* Candido Decl., Exs. 3, 5, 8, 10, 12, 14, 17.)

Plaintiffs in this action are not signatories to any agreement discussed including the Share Purchase Agreement (and subsequent amendments) and the Transfer Deeds.

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[2] Antonino and the Gold Defendants entered into two other agreements related to share transfers in a company called "China Region" and an Austrian company. (*See* FAC, Ex. 10 (July 2014 Agreement); *Id.*, Ex. 11 (August 2014 Agreement.)) Both agreements referenced the Share Purchase Agreement and contained arbitration clauses.

D. The Allegations in the FAC

Plaintiffs allege that beginning in late 2010 or early 2011, David Gold and Thomas Gold devised a fraudulent scheme to either push Antonino out of the Great Lengths business or, if that did not work, to develop a competitive business and poach Great Lengths' customers. (FAC ¶ 3.) Plaintiffs allege that the Gold Defendants falsely "represented to Antonino that they would relinquish control of Great Lengths and exit the hair extension business" and that "[b]ased upon the Gold Defendants' representations, in February 2011, Antonino entered into" the Share Purchase Agreement. (*Id.*) Plaintiffs further allege that the representations were false because the Gold Defendants "never intended to relinquish control of Great Lengths and exit the hair extension business." (*Id.*) Plaintiffs claim that the Gold Defendants began competing against Great Lengths even before they completed the transfer of their shares. (*Id.* ¶ 7.) They allege that in collaboration with other named defendants and "in anticipation of the debut of their competing business," the Gold Defendants circulated "defamatory statements about Great Lengths to its customers." (*Id.* ¶ 6.)

Plaintiffs' FAC asserts 15 claims, each against one or more of the Gold Defendants, alleging: breach of contract, breach of an implied covenant not to solicit under New York common law and Italian Civil Code § 2557, fraud, tortious interference with existing and prospective business relations, RICO violations, trademark infringement, trademark dilution, blurring and tarnishment, and unfair competition.

III. LEGAL STANDARD

The FAA[3] provides that "[a] written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of [the] contract . . . shall be valid, irrevocable, and

[3] The FAA applies here because (1) there is a written agreement; (2) the writing provides for arbitration in Italy, a signatory to the New York Convention; (3) the subject matter is commercial as it involves the sale

enforceable." 9 U.S.C. § 2. The Supreme Court has repeatedly instructed that the FAA "embod[ies] [a] national policy favoring arbitration." *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011) (second alteration in original) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)). Thus, federal courts must enforce arbitration agreements rigorously. *See Hall St. Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008).

"The question of 'substantive arbitrability' is for the court not for the arbitrator to decide." *Livingston v. John Wiley & Sons, Inc.*, 313 F.2d 52, 55 (2d Cir. 1963) (citing *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962)). In order to determine whether a particular dispute is arbitrable, a court must decide "[i] whether the parties agreed to arbitrate, and if so, [ii] whether the scope of that agreement encompasses the asserted claims." *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 45 (2d Cir. 1993) (quoting *David L. Threlkeld & Co. v. Metallgesellschafr Ltd.*, 923 F.2d 245, 149 (2d Cir. 1991)). While there is a strong federal policy favoring arbitration, a party may only be compelled to arbitrate a dispute to the extent he or she has agreed to do so. *See Bell v. Cedent Corp.*, 293 F.3d 563, 566-67 (2d Cir. 2002); *John Hancock Life Ins. v. Wilson*, 254 F.3d 48, 58 (2d Cir. 2001). Where the scope of the arbitration agreement is ambiguous, any doubt should be resolved in favor of arbitration. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). "Another way of expressing this is to say that arbitration must not be denied unless a court is positive that the clause it is examining does not cover the asserted dispute." *Spear, Leeds & Kellogg v. Cent. Life Assur. Co., et al.*, 85 F.3d 21, 28 (2d Cir. 1996) (citing *AT & T Techs., Inc. v. Commc'ns Workers of America, et al.*, 475 U.S. 643, 650 (1986)). District courts must stay proceedings once "satisfied

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of corporate shares, and (4) the subject matter is not entirely domestic in scope since it relates to transfer of shares in Italian companies between foreign nationals. *See U.S. Titan v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 146 (2d Cir. 2001) (laying out these four factors).

that the parties have agreed in writing to arbitrate an issue or issues underlying the district court proceeding." *WorldCrisa Corp. v. Armstrong*, 129 F.3d 71, 74 (2d Cir. 1997) (quoting *McMahan Sec. Co. v. F. Cap. Mkts. L.P.*, 35 F.3d 82, 85 (2d Cir. 1994)).

In deciding motions to compel, courts apply a "standard similar to that applicable for a motion for summary judgment." *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003) (internal citations omitted). The summary judgment standard requires a court to "consider all relevant, admissible evidence submitted by the parties and contained in pleadings, depositions, answers to interrogatories, and admissions on file, together with . . . affidavits." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 229 (2d Cir. 2016) (internal citations omitted). In doing so, the court must draw all reasonable inferences in favor of the non-moving party. *See Wachovia Bank, Nat. Ass'n v. VCG Spec. Opportunities Master Fund, Ltd.*, 661 F.3d 164, 171-72 (2d Cir. 2011). "If there is a genuinely disputed factual issue whose resolution is essential to the determination of the applicability of an arbitration provision, a trial as to that issue will be necessary; but where the undisputed facts in the record require the matter of arbitrability to be decided against one side or the other as a matter of law, [a court] may rule on the basis of that legal issue and 'avoid the need for further court proceedings.'" *Wachovia Bank*, 661 F.3d at 172. (internal citations omitted).

IV. MOTION TO COMPEL ARBITRATION

The Gold Defendants filed the instant motion to compel the Plaintiffs to arbitrate their claims pursuant to the arbitration clause in the Share Purchase Agreement. (Defs.'s Mot. to Compel Arbitration and Stay this Action ("Defs.'s Mot."), ECF No. 89, at 1.) It is undisputed that the Share Purchase Agreement has a valid arbitration provision.

A. The Arbitration Clause Applies to Plaintiffs

Plaintiffs contend that the arbitration clause does not apply to them because (i) they are not signatories to the Share Purchase Agreement and (ii) they are suing under a separate non-compete clause in the Transfer Deeds, which do not require arbitration. (Pls.'s Opp'n. at 1.) The Gold Defendants argue that Plaintiffs are subject to the arbitration clause by principles of estoppel because they are suing under the Share Purchase Agreement and thereby asserting a claim to its benefits. (Defs.'s Mot. at 16.) *See American Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) ("[a] nonsignatory is estopped from denying its obligation to arbitrate when it receives a 'direct benefit' from a contract containing an arbitration clause.")

Contrary to Plaintiffs' contention, the Share Purchase Agreement and the Transfer Deeds are related, integrated contracts given that the obvious purpose of the entire transaction was to sell all of Great Lengths' shares to Antonino. The transfers were done in phases with Antonino making payments evidenced by receipts he received from the Gold Defendants and the parties executing Transfer Deeds, which effectuated the share transfer.[4] Plaintiffs attempt to bifurcate the transaction and allege that they are only seeking to enforce the non-compete clause in the Transfer Deeds, but this Court's "analysis is not controlled by the characterization of [the claims] in the pleading." *Collins & Aikman Prod. Co. v. Bldg. Sys., Inc.*, 58 F.3d 16, 20 (2d Cir. 1995). Courts "look at the conduct alleged and determine whether or not that conduct is within the reach of the . . . arbitration

[4] The Gold Defendants submitted an affidavit from Italian counsel, Monica Riva, explaining why the parties needed to execute Transfer Deeds under Italian law. Questions of foreign law are treated as questions of law, and the Court "may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1. According to Riva, "under Article 2470 of the Italian Civil Code, the transfer of quotas (shares) . . . must be effected with a deed signed by the buyer and seller before a Public Notary." (Decl. of Monica Riva, dated March 29, 2016 ("Riva Decl."), ECF No. 88, at ¶ 10.) Plaintiffs do not rebut that Italian law has such a requirement. Therefore, the parties must have contemplated the need to enter into the Transfer Deeds under the Share Purchase Agreement, supporting a finding that the Share Purchase Agreement and the Transfer Deeds were indeed integrated contracts.

clause." *Id.* The crux of Plaintiffs' claims is that the Gold Defendants devised a scheme to defraud Antonino by lying about their intensions to exit the hair extension business when in fact they did just the opposite to unfairly compete against Plaintiffs. The Share Purchase Agreement contains an express non-compete clause prohibiting the Gold Defendants from "poaching . . . suppliers, customers, personnel, distributors, partners, external collaborators, banks, or third parties" and from doing anything that "may to any degree cause harm to the general progress and credibility of the company in general." (FAC, Ex. 2.) Plaintiffs' claims fall squarely within this non-compete clause, and thus are subject to arbitration.

Plaintiffs further argue that the arbitration clause does not apply to them because they are not parties to the Share Purchase Agreement.[5] While "[a]rbitration is a matter of contract" and "a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit," *Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F.3d 125, 131 (2d Cir. 2003) (citation and quotation marks omitted), "[i]t does not follow . . . that . . . an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision." *Thomson-CSF, S.A. v. Am. Arb. Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995). The Second Circuit has recognized a number of instances when non-signatories may be bound by an arbitration agreement, including estoppel. *See Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993). Under the theory of estoppel, "a company knowingly exploiting [an] agreement [with an arbitration clause can be] estopped from avoiding arbitration despite having never signed the agreement." *Mag Portfolio Consult., Gmbh v. Merlin Biomed Grp. Llc*, 268 F.3d 58, 61 (2d Cir. 2001); *see also American Bureau of Shipping*, 170 F.3d at 353 (2d Cir. 1999); *Int'l Paper Co. v. Schwabedissen*

[5] Plaintiffs are also not a party to the Transfer Deeds that they seek to enforce. To allow Plaintiffs to cherry-pick which provisions of the entire transaction to enforce against the Gold Defendants while avoiding arbitration ignores the Gold Defendants' contractual and bargained-for right to arbitrate claims related to the agreement.

Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000) ("To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act."). In order for estoppel to bind a non-signatory to an arbitration agreement, the non-signatory must receive a direct benefit from the contract containing the arbitration clause. *See Mag Portfolio Consult.*, 268 F.3d at 61. Here, in bringing this action, Plaintiffs are seeking to enforce the non-compete which is expressly provided for in the Share Purchase Agreement and are receiving a direct benefit under that agreement. Thus, Plaintiffs are estopped from avoiding the burdens of the Share Purchase Agreement and are subject to its arbitration clause.

B. The Broad Arbitration Clause Encompasses All of Plaintiffs' Claims

Plaintiffs are bound by the arbitration clause and the asserted claims fall within the scope of that agreement. To determine whether a particular dispute falls within the scope of an agreement's arbitration clause, a court has to first classify the particular clause as either broad or narrow. *See Mehler v. Terminix Int'l Co.*, 205 F.3d 44, 49 (2d Cir. 2000); *Peerless Imps., Inc. v. Wine, Liquor & Distillery Workers Union Loc. One*, 903 F.2d 924, 927 (2d Cir. 1990). As explained by the Second Circuit in *Collins*:

> If the arbitration clause is broad, there arises a presumption of arbitrability; if, however, the dispute is in respect of a matter that, on its face, is clearly collateral to the contract, then a court should test the presumption by reviewing the allegations underlying the dispute and by asking whether the claim alleged implicates issues of contract construction or the parties' rights and obligations under it. If the answer is yes, then the collateral dispute falls within the scope of the arbitration agreement.

Collins, 58 F.3d at 23.

Before this Court are three translated versions of the arbitration clause in question, all of which demonstrate that the parties intended the arbitration clause to be broad. Plaintiffs' first translation, "***[a]ll claims and disputes arising under or relating to*** this agreement . . . shall be

settled by binding arbitration," (FAC, Ex. 2), is the classic example of a broad arbitration clause. *See e.g.*, *Collins*, 58 F.3d at 20 (finding that, "***[a]ny claim or controversy arising out of or relating to*** this agreement shall be settled by arbitration" was broad). The Gold Defendants' translation, "[a]ny dispute that may arise between the parties in relation to the ***interpretation and performance*** of the aforementioned agreements . . . will be resolved . . . by . . . arbitration," (Riva Decl., at ¶ 15), is also broad. *See, e.g., Abram Landau Real Est. v. Bevona*, 123 F.3d 69, 71 (2d Cir. 1997) (finding that, "[c]ontract Arbitrator shall have the power to decide all differences arising between the parties to this agreement as to ***interpretation, application or performance*** of any part of this agreement" was broad). After the Gold Defendants filed their motion, Plaintiffs submitted another certified translation of the clause that is starkly different from their original version as follows: "[a]ny dispute that may arise between the parties in relation to the ***interpretation and execution*** of the aforementioned agreements . . . shall be resolved . . . by an arbitration panel." (Decl. of Frank T. Spano, dated Sept. 9, 2016, ECF No. 98, Ex. 2.) Courts have found similar language to be broad, applying the strong judicial presumption which favors arbitration so that "any doubt concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 25; *see e.g.*, *Rimac Internacional Cia De Seguros Y Reaseguros, S.A. v. Exel Glob. Logistics, Inc.*, No. 08 CIV. 3915, 2009 WL 1868580, at *3 (S.D.N.Y. June 29, 2009) (classifying an arbitration clause where the parties agreed to arbitrate "[a]ny dispute arising from the ***interpretation or execution***" of the contract as broad because "the language of the clause, taken as a whole, evidences the parties' intent to have arbitration serve as the primary recourse for disputes connected to the agreement containing the clause") (citing *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 225 (2d Cir. 2001)). The arbitration clause in the Share Purchase Agreement is broad and therefore there is a presumption of arbitrability.

Given that the Share Purchase Agreement contained a non-compete clause, the breach of contract claim (Count 14) falls squarely within the scope of the arbitration clause. However, Plaintiffs additionally argue that their non-contractual claims are not arbitrable. When analyzing collateral claims, courts are to "focus on the allegations in the complaint rather than the legal causes of action asserted. *If the allegations underlying the claims 'touch matters' covered by the parties' . . . agreements,* then those claims must be arbitrated, whatever the legal labels attached to them." *Collins*, 58 F.3d at 20-21 (citing *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987)) (emphasis added). Plaintiffs concede that the "touch matters" test is applicable under Second Circuit law (*see* Pls.'s Opp'n. at 19), however they rely heavily on an Eastern District of New York case to argue that plaintiffs are "*not* bound to arbitrate their claims that arose out of actions the parties could have undertaken had the contract containing the arbitration clause never existed." (*see id.* citing *Kuklachev v. Gelfman*, 600 F. Supp. 2d 437, 463 (E.D.N.Y. 2009)). However, *Kuklachev v. Gelfman*, did not change the Second Circuit's "touch matters" standard. In *Kuklachev*, the claims that the court found not subject to arbitration concerned issues that were not addressed nor even contemplated by the parties' contract and therefore did not require "contract construction or [implicate] the parties' rights and obligations under it."[6] *See Collins*, 58 F.3d at 23.

[6] In *Kuklachev*, the parties entered into a contract for defendants to arrange and market plaintiff's performances in the U.S. 600 F. Supp. 2d at 452. Defendants agreed not to promote other performances in the U.S. that use animals during the contract term. *Id.* The crux of plaintiffs' complaint, the court found, "is not that [defendants] promoted animal performances during the contract period, but rather that the [defendants] allegedly stole plaintiff's intellectual material." *Id.* at 462-63. Unlike here, the contract in *Kuklachev* does not contain a broad non-compete clause. It is a narrow contract and therefore, the "alleged copying and intentional infringement by [defendants] was beyond the scope of anything discussed in or contemplated by the contract." *Id.* at 463.

i. Fraud (Count 1)

Plaintiffs allege that prior to entering the Share Purchase Agreement, the Gold Defendants made misrepresentations to Antonino regarding their intent to leave the hair extension industry. (FAC ¶ 186.) Antonino relied on the misrepresentations and but for the misrepresentations, Antonino would not have entered into the agreement. (*Id.* ¶ 187.) Plaintiffs further allege that the Gold Defendants took actions to "poach customers from Great Lengths and otherwise compete against Great Lengths" in furtherance of their fraudulent scheme. (*Id.* ¶ 188.)

Plaintiffs are essentially alleging a fraudulent inducement claim as it relates to the Share Purchase Agreement. Fraudulent inducement claims challenging the making of a contract in general, as opposed to the making of the arbitration clause, must be arbitrated. *See Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 666 (2d Cir. 1997) ("[w]hile a 'fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate' may be adjudicated by the court, 'the statutory language [of the FAA] does not permit the federal court to consider claims of fraud in the inducement of the contract generally.'" (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04, 87 S.Ct. 1801, 1805-06 (1967); *see also Campaniello Imports, Ltd.*, 117 F.3d at 666-67 (affirming the district court's order compelling arbitration after the district court found that the complaint did "not demonstrate that the claims of fraudulent inducement and misrepresentation relate only to the arbitration clause, as opposed to the entire agreement."); *Castro v. Marine Midland Bank, N.A.*, 695 F.Supp. 1548, 1551 n.1 (S.D.N.Y.1988) ("plaintiff must demonstrate that whatever fraud occurred misled plaintiff as to the arbitration agreement itself"); *Rush v. Oppenheimer & Co.*, 681 F.Supp. 1045, 1053 (S.D.N.Y.1988) (finding that courts retain jurisdiction only over "claims that statements pertaining to the underlying agreement were fraudulent with respect to the arbitration agreement"). Given

that Plaintiffs' fraudulent inducement and misrepresentation claims relate to the Share Purchase Agreement, not the making of the arbitration clause, these claims must be arbitrated.

Further, there is no question that Plaintiffs' fraudulent inducement allegations "touch matters" related to the Share Purchase Agreement because they relate to the contract itself and go to the Gold Defendants' obligations under the non-compete clause; further supporting a finding that these claims are arbitrable.

ii. RICO (Counts 2-3)

Plaintiffs claim that the Gold family hair extension business is an "enterprise" comprised of all named defendants, created for the purpose of "defrauding, defaming and unfairly competing with Plaintiffs." (FAC ¶ 190-229; *see also* Pls.'s Opp'n. at 21.) These claims too are arbitrable as they relate to the Gold Defendants, since they "touch matters" and obligations under the Share Purchase Agreement, in particular the non-compete clause. *See Shearson/American Express v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332 (1987) (claims for violations of RICO are arbitrable).

iii. Tortious Interference (Counts 4-5)

The crux of Plaintiffs' tortious interference claims is that the Gold Defendants, along with other named defendants, persuaded Great Lengths employees, distributors, and customers to leave Great Lengths. (FAC ¶¶ 236-253.) "The mere fact that [a complaint alleges] a tort claim, rather than one for breach of [contract], does not make the claim any less arbitrable." *Collins*, 58 F.3d at 23. Plaintiffs are clearly alleging conduct that is expressly prohibited under the Share Purchase Agreement and therefore the tortious interference claims are also arbitrable. (*See* FAC, Ex. 2) (prohibiting "poaching of suppliers, customers, personnel, distributors . . . .")

iv. Defamation (Count 6)

Plaintiffs allege that David Gold, Thomas Gold, and other named defendants distributed false and damaging videos and made false statements to distributors, customers, and other third parties about the source of Great Lengths' hair. (FAC ¶¶ 254-260.) Plaintiffs contend that nothing about these allegations implicate the parties' rights and obligations under the Share Purchase Agreement. To the contrary, the agreement prohibits the parties from doing anything "that may to any degree cause harm to the . . . *credibility* of the company in general." (FAC, Ex. 2) (emphasis added). Thus, the defamation claim is also subject to arbitration.

v. Trademark Infringement, Dilution, Blurring and Tarnishment, and Unfair Competition (Counts 7-12)

Plaintiffs allege that the Gold Defendants and other named defendants are misusing, misappropriating and damaging the Great Lengths trademark by associating themselves with Great Lengths and making disparaging remarks in an effort to take away customers. (FAC ¶¶ 261-311.) In determining whether a trademark claim is arbitrable, courts in this Circuit apply the same "touch matters" standard applied to other claims. *See e.g.*, *Mann v. N.A.S.A. Int'l, Inc.*, No. 99 CIV. 11936(AGS), 2000 WL 1182823, at *4 (S.D.N.Y. Aug. 21, 2000) (applying the "touch matters" standard to trademark claim); *Gen. Media, Inc. v. Shooker*, No. 97 Civ. 510, 1998 WL 401530, at *10 (S.D.N.Y.) (applying the "touch matters" standard to trademark claim). Like all of Plaintiffs' claims, the trademark claims arise out of the same alleged acts, namely that the Gold Defendants unfairly competed with Plaintiffs through fraud, defamation, tortious interference with customers and other actions that violated the terms of the contract and caused harm to Plaintiffs. These acts are prohibited by the non-compete clause in the Share Purchase Agreement and thus are arbitrable. *See e.g.*, *Mann*, 2000 WL 1182823, at *4 ("although the arbitration clause does not specifically

provide for settlement of trademark disputes, plaintiffs' Latham Act claim may be deemed to "touch matters" covered by the arbitration agreement, and consequently the claim is arbitrable.").

vi. New York Common Law and Italian Civil Code Duty Not to Solicit (Counts 13, 15)

Finally, Plaintiffs make the same allegations but under New York common law and Italian Civil Code § 2557 claiming that as sellers of a business, the Gold Defendants have breached implied legal obligations to "refrain from soliciting and diverting away Great Lengths' customers." (FAC ¶¶ 312-15, 322-25.) Based on these allegations and without reaching the merits of the claims, this Court finds that Counts 13 and 15 "touch matters" covered under the Share Purchase Agreement.[7]

V. STAY OF THIS PROCEEDING

Under section 3 of the FAA, if there are issues before the court that are properly under the scope of an arbitration agreement, the court shall issue a stay of the proceedings pending the outcome of arbitration. 9 U.S.C. § 3. "The decision to stay the balance of the proceedings pending arbitration is a matter largely within the district court's discretion to control its docket." *Mann*, 2000 WL 1182823, at *5-6 (S.D.N.Y. Aug. 21, 2000) (citing *Genesco*, 815 F.2d at 856). Stays are appropriate where they "promote judicial economy, avoidance of confusion and possible inconsistent results and would not work undue hardship or prejudice" against the parties. *Id.* *6 (internal citations omitted). A stay is particularly compelling in this case given that all of Plaintiffs' claims relate largely to contractually prohibited conduct allegedly committed by some or all of the Gold Defendants. Having found that all of Plaintiffs' claims against the Gold

[7] The Gold Defendants argue that these implied duties do not even apply where, as here, there is an express agreement regulating the parties' obligation not to compete or solicit customers. (Defs.'s Mot. at 22.). Having found that these claims are subject to arbitration, the merits of the claims are for the arbitrators to decide.

Defendants are subject to arbitration, there is a risk of confusion and a possibility of inconsistent results were this Court to allow litigation to move forward against the other named defendants based on the very same allegations and causes of action.

This action is hereby stayed pending arbitration.

VI. CONCLUSION

The Gold Defendants' motion to compel arbitration and stay these proceedings is GRANTED.

The Clerk of Court is directed to close the motion at ECF No. 86.

Dated: New York, New York
March 28, 2017

MAR 29 2017

SO ORDERED.

George B. Daniels

GEORGE B. DANIELS
United States District Judge