**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF CALIFORNIA**

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| JUSTIN SUNDQUIST, an individual; HENRY KINGI, an individual, and EAGLE FLIGHTS STUNTS, INC., a California corporation,<br><br>Plaintiffs,<br><br>v.<br><br>UBIQUITY, INC., an unknown business entity, and CHRISTOPHER CARMICHAEL, an individual; and DOES 1-10, inclusive,<br><br>Defendants. | Case No.: 3:16-cv-02472-H-DHB<br><br>**ORDER GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION**<br><br>[Doc. No. 6] |

On October 3, 2016, Plaintiffs Justin Sundquist, Henry Kingi, and Eagle Flights Stunts, Inc. (together "Plaintiffs") filed a complaint against Defendants Ubiquity, Inc., Christopher Carmichael, and certain unidentified individuals (together "Defendants"). (Doc. No. 1.) The complaint alleges Plaintiffs were defrauded by Defendants in the course of investing in Ubiquity, Inc. (Id.) On November 30, 2016, Defendants moved to compel arbitration and stay the litigation. (Doc. No. 6.) Defendants claim that each Plaintiff agreed to arbitrate the present claims when they signed a Private Placement Memorandum ("PPM") in conjunction with their purchase of Ubiquity, Inc. stock. (Id.)

Plaintiffs filed a response on January 3, 2017, (Doc. No. 10), and Defendants replied on January 10, 2017, (Doc. No. 12).

## BACKGROUND

Plaintiffs' allegations arise from their purchase of Ubiquity, Inc. stock via private offer. In moving to compel arbitration, Defendants produced PPMs signed by each of the Plaintiffs. (See Doc. Nos. 7-1, 7-2, 7-3.) Each PPM contains a 51-page memorandum, audited financial statements (Exhibit A), a Subscription Agreement (Exhibit B), a Subscription Agreement signature page, an appendix, and a subscriber signature page. (Id.) Aside from the initialing and signature pages, Plaintiff's PPMs are identical. Particularly relevant here, each Subscription Agreement contains an arbitration clause:

> 6.8 Arbitration. Any dispute arising under, out of, in connection with, or in relation to this Agreement, or any breach hereof, shall be determined and settled by arbitration in the state of Delaware pursuant to the rule then obtaining of the American Arbitration Association . . . .

(Doc. Nos. 7-1 at 70; 7-2 at 70; 7-3 at 70.)

Along with the PPMs, Defendants filed a declaration by Christopher Carmichael in his capacity as Ubiquity's co-founder, chairman, and Chief Creative Architect. (Doc. No. 7.) Mr. Carmichael declared, under penalty of perjury, that each of the Plaintiffs had signed their subscription agreement. (Id. at ¶¶ 6-8.)

Plaintiffs opposed Defendants' motion to compel on the grounds that they never entered into an agreement to arbitrate. (Doc. No. 10.) In support of this argument, Defendants' filed a declaration by Mr. Kingi, one of the Plaintiffs and President of Eagle Flights Stunts, Inc. (Doc. No. 10-1.) Mr. Kingi's declaration states he does not recall signing the agreement to arbitrate and the first time he saw the arbitration provision was in connection with this litigation. (Id.) Furthermore, Mr. Kingi claims that, had he agreed to the arbitration clause, he would have initialed that page. (Id.) Defendants argue Mr. Kingi's recollection is supported by the fact that his signature page does not contain the same footer as the Subscription Agreement. (Doc. No. 10 at 4).

## DISCUSSION

### I. LEGAL STANDARDS

The Federal Arbitration Act ("FAA") established a clear preference for enforcing arbitration agreements. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements."); accord Mortensen v. Bresnan Comm., LLC, 722 F.3d 1151, 1160 (9th Cir. 2013) ("the FAA's purpose is to give preference (instead of mere equality) to arbitration provisions"). Accordingly, the FAA "mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985) (emphasis in original). This preference, however, is not without limit; "[a]rbitration is a matter of contract and a party cannot be required to submit any dispute which he has not agreed so to submit." AT&T Tech., Inc. v. Commc'n Workers of Am., 475 U.S. 643, 648 (1986); accord Sanford v. MemberWorks, Inc., 483 F.3d 956, 962 (9th Cir. 2007) ("Issues regarding the *validity* or *enforcement* of a putative contract mandating arbitration should be referred to an arbitrator, but challenges to the *existence* of a contract as a whole must be determined by the court prior to ordering arbitration.") (emphasis in original). Federal courts apply state contract law to determine whether a party agreed to arbitrate a dispute. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995); Cox v. Ocean View Hotel Corp., 533 F.3d 1114, 1121 (9th Cir. 2008).

A motion to compel arbitration mirrors a motion for summary judgment. Cox, 533 F.3d at 1119 ("denial of a motion to compel arbitration has the same effect as a grant of partial summary judgment") (citing Craft v. Campbell Soup Co., 117 F.3d 1083 (9th Cir. 1999)); accord Hancock v. Am. Tel. & Tel. Co., 701 F.3d 1248, 1261 (10th Cir. 2012) (applying summary judgment standard to motion to compel). The party seeking to enforce an arbitration agreement bears the burden of showing that the agreement exists and covers the dispute in question. Cox, 533 F.3d at 1119. Once the moving party satisfies this initial burden, the burden shifts to the opposing party to establish that a

genuine issue of material fact exists. E.E.O.C. v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 746 (9th Cir. 2003). The Court will view the evidence in the light most favorable to the opposing party, id., and where there are material issues of fact as to the "making of the arbitration agreement . . . the court shall proceed summarily to the trial thereof." 9 U.S.C. § 4. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts" in assessing whether a genuine issue of material fact exists. Scott v. Harris, 550 U.S. 372, 380 (2007). Furthermore, "[a] conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact." F.T.C. v. Publ'g Clearing House, Inc., 104 F.3d 1168, 1171 (9th Cir. 1997).

## II. ANALYSIS

Plaintiffs' only argument in opposing Defendants' motion to compel is that Plaintiffs never agreed to arbitrate their claims and Defendants' have not carried their burden of showing that an arbitration agreement between the parties exists. (Doc. No. 10 at 5.) Because this argument attacks the existence of an agreement to arbitrate, and not just its validity or enforcement, it is a question for the court and not the arbitrator. First Options of Chi., Inc., 514 US at 944. However, Plaintiffs' argument fails because Defendants have provided ample evidence showing a binding arbitration agreement exists and Plaintiffs have failed to raise any genuine issue of material fact.

### A. Defendants' Evidence

Defendants bear the burden of showing that an arbitration agreement exists between the parties and covers the dispute in question. Cox, 533 F.3d at 1119. In support of their motion to compel, Defendants provided three PPMs; one signed by each of the Plaintiffs. Plaintiffs do not dispute the authenticity of their signatures on the PPMs, nor that they entered into an agreement with Ubiquity, Inc. in connection with their purchase of Ubiquity stocks. (Doc. No. 10-1 at 2.) Above each Plaintiffs' signature, the PPM reads "the undersigned has executed this Subscription Agreement as

of the date set below." (See e.g., Doc. No. 7-2 at 77.) The Subscription Agreement immediately precedes the signature page and is Exhibit B of the PPM. (Id. at 69-76.) Section 6.8 of the Subscription Agreement contains the arbitration agreement by which the individual subscriber agreed to arbitrate "any dispute arising under, out of, in connection with, or in relation to this Agreement, or any breach hereof," (Doc. No. 7-2 at 76). Furthermore, Mr. Carmichael's declaration states unequivocally that Plaintiffs signed the Subscription Agreements containing the arbitration clause. (Doc. No. 7 at ¶¶ 6-9.)

This evidence is sufficient to meet Defendants' burden. Plaintiffs' signature page, which they admit to having signed, expressly references a Subscription Agreement. In California, "one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it." Randas v. YMCA of Metropolitan Los Angeles, 17 Cal.App.4th 158, 163 (1993). Thus Plaintiffs' are bound by the terms of the Subscription Agreement even if they failed to read it.

**B. Plaintiff's Arguments**

Plaintiffs' raise three arguments as to why Defendants have not met their burden. First, Plaintiffs claim Mr. Carmichael's declaration admits the produced PPMs are not authentic because they are "representative examples." (Doc. No. 10 at 2.) Second, Plaintiffs argue the absence of the footer on Plaintiffs' signature page demonstrates they were not originally part of the document containing the arbitration clause. (Id. at 4.) Finally, Plaintiffs argue that Kingi's original agreement did not contain the arbitration clause because he did not initial that page. (Doc. No. 10-1 at ¶¶ 2-3.) None of these arguments have any merit.

Plaintiffs read Paragraph 11 of Mr. Carmichael's declaration to mean the PPMs are only "representative samples" of the documents Plaintiffs' purportedly signed and not the actual contracts signed. (Doc. No. 10 at 2-3.) However, this is at odds with prior statements in the declaration, as well as the full text of Paragraph 11. Mr. Carmichael does not equivocate about the authenticity of the PPMs in question. For example, in

Paragraph 7, with regard to Mr. Kingi's PPM, Mr. Carmichael states "'Exhibit B' hereto is a true and correct copy of a document titled 'Private Placement Memorandum Henry Kingi,' dated May 21, 2013, including the Subscription Agreement which governs certain Ubiquity common stock purchased by Kingi (the 'Kingi Subscription Agreement'). On or about May 21, 2013, Kingi signed the Kingi Subscription Agreement." (Doc. No. 7 at ¶ 7.) This clearly states that the PPM included as Exhibit B is accurate and was signed by Mr. Kingi. Furthermore, a close reading of Paragraph 11 makes clear that Mr. Carmichael's comment about "representative examples" is not an attempt to hedge his statements on the authenticity of the PPMs, but rather an effort to connect the PPMs to the documents Plaintiffs had admitted to having executed in their Complaint. (Doc. No. 7 ¶ 11) ("the corresponding PPMs . . . are representative examples of . . . documents signed by Plaintiffs in connection with their purchases of shares of Ubiquity common stock, *as alleged in the Complaint*") (emphasis added). Viewed properly, Paragraph 11 does not address the authenticity of the PPMs but simply attempts to tie them into the factual framework already created by Plaintiffs.

Plaintiffs next argue that the PPMs provided by Defendants are not the originals because they contain a unique footer that is lacking on the signature page. Plaintiffs point out that almost all the PPM pages have the footer "DOCSOC/1348029v1/100386-0004" in the bottom left hand corner but the signature page for the Subscription Agreement does not. Thus, Plaintiffs reason, the signature page must be from a different document than the PPM, confirming their claim that the arbitration clause was not originally included in their agreement. This perceived inconsistency in the documents, however, does not withstand scrutiny. The Sundquist PPM is identical to the PPMs signed by Mr. Kingi—including the presence of the footer on most pages besides the signature page. (Compare Doc. No. 7-1 with Doc. No. 7-2, 7-3.) One difference, however, is that the Sundquist PPM is initialed by a signator on the bottom right hand corner of every single page. This initialing proves that the Sundquist PPM—which is identical to the other PPMs—is the same document the Sundquists originally signed. Notably, with regards to Plaintiffs'

argument, the Sundquists signature page also does not have a footer, even though all of the other pages do. Given the Sundquists PPM has no footer on the signature page there is no reason to think that Kingi and Eagle Stunts' PPMs should be otherwise. Furthermore, Plaintiffs' argument that the footer indicates a different document than the one they signed fails because the pages they admitted to initialing have the footer. (See e.g., Doc. No. 7-2 at 5, 6, 9.) If anything, this supports the conclusion that they had the complete PPM at the time of execution.

Finally, the argument that Mr. Kingi would have initialed the arbitration agreement had he seen it has no merit. In his declaration, Mr. Kingi states "Had I agreed to arbitrate, I would have initialed the page acknowledging such a provision" and cites, as example, three pages of his PPM where he did initial. (Doc. No. 10-1 at ¶ 2.) However, these were the only pages Mr. Kingi initialed and in each of these instances, the PPM provided a separate line on which he was prompted: "Acknowledged _____." (Doc. No. 7-2 at 5, 6, 9.) In contrast, Mr. Kingi did not initial any page on which he was not prompted. Given this pattern of behavior, and the fact that there is no prompt on the page containing the arbitration agreement, the Court sees no reason to believe Mr. Kingi's claim he would have initialed the arbitration clause. Indeed, if Mr. Kingi's logic is true, and he initialed every page he agreed to, then Mr. Kingi only agreed to a three-page agreement, i.e. the pages he initialed. But it strains the imagination to believe a sophisticated business man like Mr. Kingi would think that a PPM was only three pages long with non-sequential numbering.

Aside from these meritless arguments, Plaintiffs have provided no evidence to support their claim they never entered into the agreements to arbitrate. Plaintiffs do not contest that they signed the PPMs, or that the signature pages expressly reference the Subscription Agreement. They only claim they did not agree to the arbitration clause. (Doc. No. 10 at 3.) If, on the one hand, the argument is that they simply did not review that portion of the PPM, this is irrelevant because "one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before

signing it." Randas, 17 Cal.App.4th at 163. If, on the other hand, the argument is they agreed to a different Subscription Agreement than the one produced by Defendants, they have offered no facts to support such a conclusion or raise a material question of fact. Indeed, Plaintiffs' only evidence as to the arbitration clause is that Mr. Kingi "[did] not recall ever signing an agreement to arbitrate." (Doc. No. 10-1.) This lack of recollection is consistent with the conclusion that Mr. Kingi simply did not review the entire PPM and in no way necessitates the conclusion that the PPMs produced by Defendants are different than the ones signed. Indeed, the fact the Sundquist PPM was initialed on every page by the signator and is identical to the Kingi and Eagle Stunt PPM weighs heavily in favor of the conclusion that the PPMs are authentic and should compel the parties to arbitrate. Obviously there would be a question of fact were Plaintiffs to produce a different Subscription Agreement that was allegedly executed absent the arbitration agreement. However that is not the case. And absent an evidence to the contrary, the PPMs produced by Defendants appear to be authentic.

## CONCLUSION

Defendants have satisfied their burden by producing signed PPMs containing arbitration clauses covering Plaintiffs' claims. In contrast, Plaintiffs have failed to show that material questions of fact exists as to the existence of the agreements. Plaintiffs' arguments are borderline frivolous and they have provided no evidence to support them. Scott, 550 U.S. at 380. Although Mr. Kingi signed a declaration claiming not to recall ever signing an agreement to arbitrate, this is nothing more than a self-serving, conclusory declaration that cannot raise a material question of fact. Publ'g Clearing House, Inc., 104 F.3d at 1171. Because the parties agreed to arbitrate all disputes arising from their subscription agreement the Court grants Defendants' motion to compel arbitration. Furthermore, because Defendant Carmichael was acting as an agent of Ubiquity at all times, the claims against him are also covered by the arbitration agreement. Letizia v. Prudential Bache Securities, Inc., 802 F.2d 1185, 1187-88 (1986). The parties must proceed with Plaintiffs' claims via arbitration in accordance with the

terms of the agreement. The Court continues all dates, if any, until the completion of arbitration but reserves the right to dismiss the action if the parties do not diligently pursue their claims before the arbitrator, or for any reason justifying dismissal.

**IT IS SO ORDERED.**

DATED: January 17, 2017

Hon. Marilyn L. Huff
United States District Judge