IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

NIDHAL BEN-SALAH,

Plaintiff,

v.

STERLING JEWELERS INC. OF DELAWARE, a Delaware corporation, dba Jared Galleria of Jewelry,

Defendant.

Case No. 3:17-cv-907-YY

ORDER

Michael H. Simon, District Judge.

United States Magistrate Judge Youlee You issued Findings and Recommendation in this case on November 15, 2017. ECF 16. Judge You recommended that Defendant's motion to dismiss (ECF 5) be granted, because Plaintiff's claims are subject to mandatory arbitration.

Under the Federal Magistrates Act ("Act"), the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). If a party files objections to a magistrate's findings and recommendations, "the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.*; Fed. R. Civ. P. 72(b)(3).

Plaintiff timely filed an objection. ECF 18. Plaintiff objects to Judge You's finding that the decision to equitably toll the limitation period contained in the RESOLVE arbitration agreement is for the arbitrator, and not the court, to decide.[1] The Court has reviewed *de novo* those portions of Judge You's Findings and Recommendation to which Plaintiff has objected, as well as Plaintiff's objections and Defendant's response. The RESOLVE arbitration agreement provides that

> procedural questions which grow out of the dispute and bear on the final disposition are . . . matters for the arbitrator. However, where a party already has initiated a judicial proceeding, a court may decide procedural questions that grow out of the dispute and bear on the final disposition of the matter (e.g., one (1) year for filing a claim).

ECF 6-2 (RESOLVE Arbitration Agreement) at 4.

Because the agreement "clearly and unmistakably provide[s]" that a court may resolve questions relating to the agreement's one year limitation on filing a claim, whether to resolve the question of equitable tolling is subject to this Court's discretion. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 at 83 (2002) (certain questions are for the arbitrator and others are for judicial determination "[u]nless the parties clearly and unmistakably provide otherwise.") (quoting *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986)). In *Blanco v. Sterling Jewelers, Inc.*, the case on which Plaintiff relies, a court in the District of Colorado chose to exercise such discretion. 2010 WL 466760 at *5 (D. Co. February 9, 2010). In

[1] Plaintiff also purports to object to Judge You's Findings and Recommendations "in general based on Plaintiff's briefing and oral argument." ECF 18 at 1. Plaintiff includes specific argument, however, only as to Judge You's finding on the issue of equitable tolling. A "general" objection to a Finding and Recommendation does not meet the "specific written objection[]" requirement of Rule 72(b) of the Federal Rules of Civil Procedure. *See, e.g., Velez-Padro v. Thermo King de Puerto Rico, Inc.*, 465 F.3d 31, 32 (1st Cir. 2006) ("Conclusory objections that do not direct the reviewing court to the issues in controversy do not comply with Rule 72(b)"). The Court thus construes Plaintiff's objection as challenging only Judge You's finding on equitable tolling and reviews *de novo* only that issue.

that case, the court chose to equitably toll the limitation period in the same RESOLVE agreement at issue in this case in order to rule that the limitation period may not run while a plaintiff is exhausting the administrative procedures that are required for that plaintiff to bring his claims. *Id.* at *7. The court in *Blanco* noted that such a ruling was necessary to avoid injustice and loss of the efficiencies of an arbitration agreement. *Id.* Plaintiff in this case has not identified a similarly pressing issue requiring that this Court, and not an arbitrator, resolve the question of equitable tolling. Thus, the presumption that such a question is for the arbitrator, and not a federal judge, controls. *See Howsam*, 537 U.S. at 592 (finding that the applicability of a time limit rule in an arbitration agreement is "presumptively for the arbitrator, not for the judge."). Although the Court *may* decide the issue, the Court agrees with Judge You's finding that the question of equitable tolling is presumptively for the arbitrator. The Court ADOPTS this portion of the Findings and Recommendation.

For those portions of a magistrate's findings and recommendations to which neither party has objected, the Act does not prescribe any standard of review. *See Thomas v. Arn*, 474 U.S. 140, 152 (1985) ("There is no indication that Congress, in enacting [the Act], intended to require a district judge to review a magistrate's report to which no objections are filed."); *United States. v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (holding that the court must review *de novo* magistrate's findings and recommendations if objection is made, "but not otherwise"). Although in the absence of objections no review is required, the Magistrates Act "does not preclude further review by the district judge[] *sua sponte* . . . under a *de novo* or any other standard." *Thomas*, 474 U.S. at 154. Indeed, the Advisory Committee Notes to Fed. R. Civ. P. 72(b) recommend that "[w]hen no timely objection is filed," the Court review the magistrate's recommendations for "clear error on the face of the record."

For those portions of Judge You's Findings and Recommendation to which neither party has objected, this Court follows the recommendation of the Advisory Committee and reviews those matters for clear error on the face of the record. No such error is apparent.

The Court **ADOPTS** Judge You's Findings and Recommendation (ECF 16) as supplemented herein. Sterling's Motion to Dismiss or in the Alternative Motion to Stay proceedings and Compel Arbitration (ECF 5) is GRANTED. This action is DISMISSED.

IT IS SO ORDERED.

DATED this 25th day of January, 2018.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

NIDHAL BEN-SALAH,

Plaintiff,

v.

STERLING JEWELERS INC. OF DELAWARE, a Delaware corporation dba Jared Galleria of Jewelry,

Defendant.

Case No. 3:17-cv-00907-YY

FINDINGS AND RECOMMENDATIONS

YOU, Magistrate Judge:

INTRODUCTION

Plaintiff, Nidhal Ben-Salah ("Ben-Salah"), filed this action against his former employer, Sterling Jewelers Inc. of Delaware, dba Jared Galleria of Jewelry ("Sterling"), on June 8, 2017. Ben-Salah alleges two claims under ORS 659A.030(1)(b) for discrimination and retaliation based on religion (First Claim) and race (Second Claim).

Ben-Salah is a citizen[1] of Washington. Complaint, ¶ 4. Sterling is a Delaware corporation with a principle place of business in Ohio, registered to do business in Oregon. *Id.*,

[1] Ben-Salah alleges only that he is a "resident" of Clark County, Washington, not that he is a "citizen" of Washington. Complaint, ¶ 4. Citizenship, not residency, is the critical requirement for the exercise of jurisdiction based on diversity of citizenship. However, Ben-Salah also

¶ 5. Sterling has a retail location in Clackamas, Oregon, where Ben-Salah was employed. *Id.* The prayer does not specify the exact amount of damages Ben-Salah seeks, but the pleadings allege that the amount in controversy exceeds $75,000. *Id.*, ¶ 2. Accordingly, this court has jurisdiction over Ben-Salah's claims under 28 USC § 1332.

Now before the court is Sterling's Motion to Dismiss or in the Alternative Motion to Stay Proceedings and Compel Arbitration (ECF #5). Sterling asserts that this case is subject to mandatory arbitration under the Federal Arbitration Act ("FAA"), 9 USC §§ 1-16, based on Ben-Salah's act of electronically signing—prior to starting his job with Sterling—an online "Acknowledgement of Receipt" that stated he was "responsible for reading and understanding" and "agree[d] to the[] provisions" of 10 documents, including one titled "RESOLVE Arbitration Agreement." *See* Declaration of Jamie Broadhead (ECF #7) ("Broadhead Decl."), ¶ 4 and Ex. 1. For the reasons that follow, the motion should be GRANTED and this action should be DISMISSED in favor of mandatory arbitration as dictated under the terms of the "RESOLVE Arbitration Agreement," the provisions of which Ben-Salah agreed to at the inception of his employment with Sterling.

BACKGROUND FACTS

Ben-Salah commenced employment with Sterling on October 16, 2014. Broadhead Decl., ¶ 4. On that same date, Ben-Salah claims he was told he could not work for Sterling before electronically signing documents, which his manager represented contained "company policies." Declaration of Nidhal Ben-Salah in Support of Plaintiff's Response (ECF #13) ("Ben-Salah Decl."), ¶ 4. Ben-Salah claims he was presented with "hundreds of pages of boilerplate

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alleges complete diversity of citizenship, and Sterling has not challenged that assertion. Accordingly, for purposes of this motion, this court assumes that Ben-Salah is also a citizen of Washington and that complete diversity of citizenship exists.

documents," and he was "told to simply scroll through them." *Id.*, ¶ 3. He was not asked to sign copies of the individual documents, but instead was directed to click on 10 individual boxes next to the titles of the documents and then electronically sign the Acknowledgment of Receipt ("Acknowledgement"), which stated:

> **Acknowledgement of Receipt:** The Company requires each employee to acknowledge receipt of the company policy summaries listed below. The documents were distributed electronically and you have acknowledged, by clicking the "Acknowledgement" checkbox, that you are responsible for reading and understanding all of the documents.
>
> [List of 10 documents.]
>
> Electronic Signature
>
> I confirm that I am responsible for reading and understanding all of these documents, and I agree to adhere to their provisions. I understand that these policies are extremely important and agree to seek immediate clarification of any issues unclear to me.

Broadhead Decl., Ex. 1.[2]

Ben-Salah asserts that he "was not aware of the existence of an arbitration agreement" because he "was not allowed to review the documents" at hire. Ben-Salah Decl., ¶ 2. However, the list of 10 documents referenced in the Acknowledgement included a document clearly titled "RESOLVE Arbitration Agreement" ("RAA"), and evidence shows that Ben-Salah clicked on the box next to the RAA on October 16, 2014, at 4:49 PM. Broadhead Decl., Ex. 1. The RAA, a two-page document, sets forth a series of terms pertaining to the use of the "RESOLVE Program," Sterling's dispute resolution program, which involves a multi-step review culminating in binding arbitration. *Id.*, Ex. 2. Specifically, the RAA:

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[2] The 10 documents contained only one document specifically identified as a "Policy" in its title, namely item 4, an "Information Security Policy and Acknowledgement HR Rev 1009." *Id.* The remaining documents set out such things as Sterling's standards of conduct, training plan, benefits plan, options to receive pay, and the like. Broadhead Decl., Ex. 1.

- States the employee agrees to "utilize the Sterling RESOLVE Program to pursue any pre-employment, employment, or post-employment dispute, claim or controversy . . . against Sterling," regarding "any alleged unlawful act" regarding the employee's employment, including "claims under . . . any . . . state or federal law. . . ."

- States that as "consideration" for the employee signing the RAA, Sterling agrees to use the RESOLVE Program for any claims against the employee and pay $25 of the employee's arbitration filing fee.

- Waives "the parties['] rights to obtain any legal or equitable relief . . . through any court [and] to commence any court action . . . provided that either party may seek equitable relief to preserve the status quo pending final disposition under the RESOLVE Program."

- Allows the parties to "seek and be awarded any remedy through the RESOLVE Program that they could receive in a court of law" and allows parties to file charges or complaints with appropriate governmental administrative agencies, but waives their right to any remedy or relief as a result of such charges to the extent permissible by law and provides that "the time limitation set forth in RESOLVE will continue to run during an administrative charge or any other action filed in any other forum."

- Sets out a multi-step process for the resolution of claims culminating in the use of arbitration and a one-year limitation on initiating a claim under the RESOLVE Program, specifying that "[f]ailure expressly to demand use of RESOLVE, in writing, within that time limitation shall serve as a waiver and release with respect to all such claims."

- Contains a choice-of-laws provision stating: "Any claim under this Agreement shall be governed by the law of the jurisdiction in which the claim arose. This Agreement shall be governed and shall be interpreted in accordance with the laws of the State of Ohio."

- Contains a severability clause stating: If any term or provision of this Agreement is declared illegal or unenforceable and cannot be modified to be enforceable, such term or provision shall immediately become null and void, leaving the remainder of this Agreement in full force and effect."

- States in bold type at the bottom: "**I acknowledge that I have received and read or have had the opportunity to read this arbitration agreement. I understand that this arbitration agreement requires that disputes that involve the matters subject to this agreement be submitted to mediation or arbitration pursuant to the arbitration agreement rather than to a judge and jury in court.**"

Id. (emphasis in original).

Ben-Salah filed this action on June 8, 2017, alleging a failure by his supervisors to adequately respond to his complaints of discriminatory treatment by coworkers and termination by Sterling on July 2, 2016, in retaliation for making those complaints. After being served with a copy of the complaint on July 25, 2017, Sterling demanded that Ben-Salah dismiss this case as a result of his agreement to the terms of the RAA, including use of the RESOLVE Program. Declaration of James M. Barrett in Support of Defendant's Motion to Dismiss (ECF #6) ("Barrett Decl."), ¶¶ 2-3.

FINDINGS

Sterling invokes the FAA and contends that it mandates recognition and enforcement of the RAA and dismissal of Ben-Salah's complaint.

I. The Court's Role and Issues Raised by Ben-Salah

In evaluating a challenge to arbitration, the court's role is limited to determining: "(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue. If the response is affirmative on both counts, then the [FAA] requires the court to enforce the arbitration agreement in accordance with its terms." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 130 (9th Cir. 2000) (citations omitted); *see also Cox v. Ocean View Hotel Corp*., 533 F.3d 1114, 1119 (9th Cir. 2008) (quoting *Chiron*).

In this case, there is no dispute that the discrimination claims Ben-Salah alleges fall within the extremely broad scope of the RAA, if the RAA is a valid agreement to arbitrate. Ben-Salah raises three challenges to stave off arbitration, namely that: (1) the RAA is not a contract at all, but an unenforceable "policy" that attempts to disguise an arbitration agreement; (2) he

was fraudulently induced into signing the Acknowledgement; and (3) the RAA is unconscionable. In addition, Ben-Salah contends that, even if the RAA is enforceable, this court should equitably toll the RAA's one-year statute of limitations. As discussed below, two of these issues are reserved for the arbitrator and the remaining two offer Ben-Salah's claims no refuge from arbitration.

II. Formation Issues: Whether the RAA is an Enforceable Contract

Ben-Salah first argues that his signature on the Acknowledgement did not bind him to the terms of the RAA because the RAA is not a "contract" but instead is a "company policy" that is not binding on him. In particular, Ben-Salah argues that his signature was not an unambiguous acceptance of an offer, but instead was simply an acknowledgement that he was responsible for reading the referenced company policies, would adhere to the provisions of the policies, and that the policies are important. Ben-Salah further asserts that Sterling "obscured a contract within a set of policies and procedures" and that he is not bound by the terms of the RAA, although he acknowledges that he would have been bound had he separately signed a copy of the RAA.

The undisputed facts do not support the distinction Ben-Salah attempts to draw. Instead, they reveal that Ben-Salah electronically signed the Acknowledgement, which expressly stated "I agree to adhere to their provisions," which included the RAA. Broadhead Decl., Ex. 1. The Acknowledgement also places squarely on Ben-Salah's shoulders the responsibility for reading and understanding the 10 incorporated documents and for seeking immediate clarification of any unclear issues. *Id.* This court discerns no ambiguity in the Acknowledgement sufficient to call into question the formation of an agreement by Ben-Salah to abide by the provisions of the RAA. Accordingly, to the degree Ben-Salah challenges arbitration based on arguments about formation of a contract, his arguments should be rejected.

III. Fraudulent Inducement

Ben-Salah next argues that the RAA is unenforceable because he was fraudulently induced to sign the Acknowledgement. In essence, Ben-Salah argues that he is not bound by the terms of any of the documents incorporated into the Acknowledgement due to the fraudulent representations made by his supervisor. Thus, his fraudulent inducement argument is directed at all of the documents referenced in the Acknowledgement, comprising the entire alleged agreement between himself and Sterling. Otherwise stated, his fraudulent inducement argument is not specific to the "arbitration clause" embodied by the RAA. As a result, his fraudulent inducement argument is not one this court is at liberty to decide: "[A] federal court may consider a defense of fraud in the inducement of a contract only if the fraud relates specifically to the arbitration clause itself and not to the contract generally." *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1140 (9th Cir. 1991). Based on this authority, the fraudulent inducement argument is one reserved to the arbitrator. This court, therefore, expresses no opinion on the merits of Ben-Salah's claim that he was fraudulently induced to execute the Acknowledgement.

IV. Unconscionability

Next, Ben-Salah argues that the RAA is both procedurally and substantively unconscionable. Because this attack is directed specifically at the terms incorporated into the RAA ("arbitration clause") itself, as opposed to all the provisions of all the documents, the court is properly charged with determining the issue: "[W]hen a plaintiff argues that an arbitration clause, standing alone, is unenforceable—for reasons independent of any reasons the remainder of the contract might be invalid—that is a question to be decided by the court." *Bridge Fund*

Cap. Corp. v. Fastbucks Franchise Corp., 622 F.3d 996, 1000-01 (9th Cir. 2010) (citing *Cox*, 533 F.3d at 1120).

A. Ohio Law on Unconscionability

The parties agree that Ohio law controls the question of whether the RAA is unconscionable. Under Ohio law, the "party asserting unconscionability bears the burden of proving both procedural and substantive unconscionability." *Bowie v. Clear Your Debt, LLC*, 2012 WL 892607 at *3 (N.D. Ohio Mar. 14, 2012) (citing *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 67, 908 N.E.2d 408, 412 (Ohio 2009)). Procedural unconscionability "'considers the circumstances surrounding the contracting parties' bargaining, such as the parties' age, education, intelligence, business acumen and experience, who drafted the contract, whether alterations in the printed terms were possible, and whether there were alternative sources of supply for the goods [or services] in question.'" *Id*. (quoting *Taylor Bldg. Corp of Am. v. Benfield*, 117 Ohio St.3d 353, 361-62, 884 N.E.2d 12, 22-23 (2008)). Substantive unconscionability "involves a review of the terms of the agreement, and a determination as to whether those terms are commercially reasonable." *Id*. (citing *Hayes*, 122 Ohio St.3d at 69, 908 N.E.2d at 414). Although an arbitration clause "will be deemed enforceable unless it is both procedurally and substantively unconscionable," a court may "modify the arbitration terms to avoid the issues of substantive unconscionability." *Id*. at *5.

B. Analysis

In support of his contention that the RAA is procedurally unconscionable, Ben-Salah asserts his supervisor told him that he could not work before signing the Acknowledgement and that the documents were simply "company policies." Ben-Salah Decl., ¶ 4. He also avers that he "was not aware of the existence of an arbitration agreement," "was not allowed to review the

documents . . . provided at hire," "was provided hundreds of pages of boilerplate documents and was told to simply scroll through them," and "had to sign the documents in order [to] start working." *Id.*

The difficulty for Ben-Salah is that Ohio courts have rejected attempts to avoid arbitration agreements in analogous circumstances. In *Bowie*, the court found insufficient to establish procedural unconscionability the use of a "form" document, an inequality of bargaining power, and evidence that the plaintiff felt "rushed" and relied on the agent's summary of the agreement. 2012 WL 892607 at **3-4. The court also noted a lack of evidence that the plaintiff asked for and was denied more time to review the documents, and stated unequivocally that a "consumer of average intelligence and experience is still responsible for reading and understanding the terms of an agreement that she signs and accepts, when those terms are accessible and not hidden or misrepresented in any manner." *Id.* at *4

Ben-Salah claims he was rushed into signing the Acknowledgement, spending less than 30 minutes scrolling through what he describes as hundreds of pages of boilerplate documents. He further claims he relied on his supervisor's representation that the referenced documents were just "company policies." However, this court perceives no means for Ben-Salah to escape his responsibility, described in *Bowie*, for "reading and understanding the terms" of the documents, particularly given the contents of the two sentences just above the electronic signature line—in which he confirmed he was "responsible for reading and understanding all of these documents," "agree[d] to adhere to their provisions," "underst[ood] that these policies are extremely important," and agreed to seek immediate clarification.

Substantively, Ben-Salah contends that the terms of the RAA are unconscionable because they: (1) require the employee to exhaust a three-step, pre-arbitration review process with the

employer; (2) establish a one-year statute of limitations that does not apply to Sterling's potential claims against Ben-Salah; and (3) apply a three-deposition limit. Previous cases applying Ohio law have concluded that the RAA or its previous iterations were not substantively unconscionable. *See Smith v. Sterling Jewelers, Inc.*, 2013 WL 271813 at **2-4 (N.D. Ohio May 28, 2013); *Farsi v. Sterling Jewelers, Inc.*, 2007 WL 2323317 at **2-4 (D. Or. Aug. 9, 2007); *W.K. v. Farrell*, 167 Ohio App.3d 14, 19-27, 853 N.E.2d 728, 732-38 (2006). However, this court need not decide whether the particular provisions cited by Ben-Salah pass muster. The failure of Ben-Salah to establish procedural unconscionability alone forecloses his unconscionability argument, given Ohio law requires proof of both procedural and substantive unconscionability. *Smith*, 2013 WL 271813 at *2 ("To prevail, a plaintiff bears the burden of demonstrating that the arbitration agreement is both procedurally and substantively unconscionable. Both prongs must exist to find a contract unconscionable.") (citations omitted); *see also Bowie*, 2012 WL 892607 at *3. As described above, Ben-Salah's argument regarding procedural unconscionability fails, which in turn is fatal to his contention that the RAA is not enforceable due to unconscionability.

V. Equitable Tolling

Finally, Ben-Salah contends that, even if the RAA is enforceable, this court should nevertheless equitably toll the statute of limitations contained therein. However convincing the reasons may be to equitably toll the statute of limitations on Ben-Salah's claims, the equitable tolling issue is not one the court may decide, at least in the context of this case. None of the cases cited by Ben-Salah address or decide the issue of who the proper decision maker is with regard to the applicability of equitable tolling as to claims subject to arbitration under the FAA. Ample authority indicates that the issue is one for the arbitrator, not this court, to decide: "The

applicability of an arbitration agreement's statute of limitations is a question for the arbitrator, not the court." *Farsi*, 2007 WL 2323317 at *4 (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002)). Accordingly, this court expresses no opinion on the merits of Ben-Salah's request for equitable tolling of the statute of limitations contained in the RAA.

VI. Dismissal

Sterling contends that this case should be dismissed because no issues remain for this court to decide. The claims alleged in Ben-Salah's complaint clearly fall within the broad scope of the RAA and this court discerns no reason to stay, rather than dismiss, this case. Accordingly, this case should be dismissed. *See Olson v. MBO Partners, Inc.*, 2017 WL 2726696 at *3 (D. Or. June 15, 2017) ("Courts in this jurisdiction typically dismiss the case when all disputes are subject to arbitration.").

RECOMMENDATIONS

For the reasons stated above, Sterling's Motion to Dismiss or in the Alternative Motion to Stay Proceedings and Compel Arbitration (ECF #5) should be GRANTED and this action should be DISMISSED.

SCHEDULING ORDER

These Findings and Recommendations will be referred to a district judge. Objections, if any, are due Wednesday, November 29, 2017. If no objections are filed, then the Findings and Recommendations will go under advisement on that date. If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will go under advisement.

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NOTICE

These Findings and Recommendations are not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any Notice of Appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of a judgment.

DATED November 15, 2017.

/s/ Youlee Yim You

Youlee Yim You
United States Magistrate Judge