UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARCELLA JOHNSON,

Plaintiff,

v.

ORACLE AMERICA, INC.,

Defendant.

Case No.17-cv-05157-EDL

ORDER GRANTING MOTION TO COMPEL ARBITRATION

Re: Dkt. No. 25

Before the Court is Plaintiff's motion to compel arbitration. For the following reasons, the Court GRANTS the motion.

I. FACTUAL BACKGROUND

Plaintiff Marcella Johnson was a sales employee at Defendant Oracle America, Inc. ("Oracle") from March 2013 through July 2014. At the time she was hired in March 2013, Plaintiff entered into an Employment Agreement and Mutual Agreement to Arbitrate on March 1, 2013 ("Agreement #1"). Valerian Decl., ¶ 1, Exs. A & B. Agreement #1 did not address the arbitrability of class claims or include a class action waiver.

As a sales employee, Plaintiff agreed to an Individualized Compensation Plan (the "ICP") for each fiscal year, which set forth her commission agreement and other employment terms. Lutz Decl., ¶ 3. On June 2, 2014, Plaintiff agreed to her FY2015 ICP,[1] which included the following

[1] Plaintiff has filed a copy of the Terms and Conditions of the FY15 ICP, along with a request to file the Terms and Conditions under seal. Dkt. No. 23. The Court previously granted Defendant's motion to seal the FY15 ICP because it included highly sensitive and proprietary information about Defendant's compensation structure. Dkt. No. 20. Defendant filed a statement supporting Plaintiff's sealing motion, arguing that the Terms and Conditions also contain highly sensitive and proprietary information about how Defendant markets its products, incentivizes its sales personnel, and structures its sales strategies and processes. Having reviewed the document and finding that it contains highly sensitive and proprietary information that warrant sealing, the Court grants Plaintiff's request to file the document under seal.

provision:

> I acknowledge receipt of and accept as my FY15 compensation package the Plan, which consists of this document and the FY15 Incentive Compensation Terms and Conditions including the applicable Appendices listed below* (referred to as the "FY15 Terms and Conditions"). I have read and agreed to be bound by the FY Terms and Conditions, including but not limited to the Agreement to Arbitrate Disputes in Appendix 9 if Appendix 9 is listed below as being applicable to me.
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> . . .
>
> *List of Applicable Appendices: . . . Appendix 9: Agreement to Arbitrate Disputes (Applicable to US Employees Only)

Lutz Decl. ¶ 13, Ex. 1. The Agreement to Arbitrate Disputes in Appendix 9 ("Agreement #2") provided for the application of the Federal Arbitration Act, and American Arbitration Association or Judicial Arbitration & Mediation Services rules:

> Arbitration proceedings under this Agreement to Arbitrate Disputes shall be conducted pursuant to the Federal Arbitration Act, and in accordance with the National Rules for the Resolution of Employment Disputes of the American Arbitration Association or the Employment Arbitration Rules and Procedures adopted by Judicial Arbitration & Mediation Services ("JAMS") . . . Any claim by Employee against Oracle which is subject to arbitration . . . must be brought in Employee's individual capacity and not as a plaintiff or class member in any purported class, collective, representative, multiple plaintiffs or similar non-individual proceeding ("class action").

Lutz Decl., ¶ 15, Ex. 2, p. 84.

In contrast to Agreement #1, Agreement #2 included a class action waiver provision:

> Employee expressly waives any and all rights to bring, participate in or maintain in any forum any class action regarding or raising claims which are subject to arbitration . . . The arbitrator shall not have authority to combine or aggregate similar claims or conduct, or conduct any class action or make an award to any person or entity not a party to the arbitration. Any claim that all or part of the class action waiver in this paragraph is unenforceable or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator.

Lutz Decl., ¶ 15, Ex. 2, p. 84.

Agreement #2 also provided that it superseded all prior arbitration agreements:

> This Agreement to Arbitrate Disputes contains the complete agreement between Oracle and Employee regarding the subject of arbitration, and supersedes any and all prior written, oral or other types of representations and agreements between Oracle and Employee regarding the subjects of arbitration and dispute resolution.

Lutz Decl., ¶ 16, Ex. 2, p. 85.

II. PROCEDURAL HISTORY

On February 14, 2017, Plaintiff filed a class action complaint against Defendant in United States District Court, Northern District of California. See Johnson v. Oracle America, Inc., Case No. 3:17-cv-00725-RS (N.D. Cal. Feb. 14, 2017). Johnson brought this case on behalf of herself and others who worked in California from whom Oracle allegedly withheld commission wages in violation of California law. Id., Dkt. No. 1. Defendant filed a motion to dismiss based on lack of subject matter jurisdiction. Id., Dkt. No. 26. Plaintiff did not oppose Defendant's motion and filed a Notice of Voluntary Dismissal on May 24, 2017. Id., Dkt. No. 37.

On the same day that she dismissed her putative class action case in federal court, Plaintiff submitted a Demand for Class Arbitration ("Class Arbitration Demand") against Defendant to JAMS. Dolan Decl., ¶ 8, Ex. 6. The claims and putative class set forth in the Class Arbitration Demand were substantially similar to those asserted in Plaintiff's first federal case. In her Class Arbitration Demand, Plaintiff stated that JAMS had jurisdiction over the case based on Agreement #1. Dolan Decl. ¶ 9, Ex. 6, p. 4. She did not mention Agreement #2 or its class action waiver. Id. On August 25, 2017, Plaintiff amended her Class Arbitration Demand to add two individual claims based on federal law. Valerian Decl. ¶ 29. Those individual claims were for debt servitude and forced labor. Id.

On September 6, 2017, Plaintiff filed a petition to compel arbitration, which was assigned to this Court. Dkt. No. 1. At the same time, however, Plaintiff continued to pursue her claims in arbitration. On September 15, 2017, Plaintiff also paid the balance of the arbitration filing fee and asked JAMS to proceed with administration of the arbitration. Dolan Decl. ¶ 22, Ex. 11. After noting Defendant's objections to proceeding with arbitration before this Court resolved Plaintiff's petition to compel arbitration, JAMS issued a "Notice of Commencement of Employment Arbitration" on September 21, 2017, and asked the parties to prepare a "strike list" regarding their arbitrator preferences by September 28, 2017. Dolan Decl. ¶¶ 24-25, Exs. 13 & 14.

On September 29, 2017, Defendant filed a motion for a preliminary injunction to stay the arbitration, so that this Court could determine the arbitrability of Plaintiff's claims before any

further events, including the submission of strike lists, would take place in the arbitration. Dkt. No. 14. Plaintiff opposed the motion to stay. Dkt. No. 16. The Court held a hearing on the motion on October 3, 2017, after which it granted a preliminary injunction of the arbitration proceeding. Dkt. No. 20.

III. LEGAL STANDARD

When one party refuses "to arbitrate under a written agreement for arbitration," the contracting party "may petition" a federal court "for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. The party moving to compel arbitration bears the burden to show that the parties agreed to arbitrate the claims at issue. See Norcia v. Samsung Telecommc'ns Am., LLC, 845 F.3d 1279, 1283 (9th Cir. 2017).

IV. DISCUSSION

The parties dispute whether Agreement #1 or Agreement #2 governs the arbitration of Plaintiff's claims. As noted above, the main difference that the parties focus on between the agreements is that Agreement #2 includes a class action waiver, whereas Agreement #1 does not. Plaintiff argues that Agreement #1 controls and Defendant argues that Agreement #2 controls. Plaintiff submitted her Class Arbitration Demand under Agreement #1.

The parties further dispute whether this Court or the arbitrator has the authority to decide which of the two arbitration agreements governs. The threshold issue of arbitrability is left to the courts to resolve, unless the parties to the arbitration agreement have "clearly and unmistakably" delegated the issue to the arbitrator. The Court concludes that the parties have clearly and unmistakably delegated the issue to the arbitrator, so the arbitrator must decide this question.[2]

A. Gateway Questions of Arbitrability

The courts have long recognized a "liberal federal policy favoring arbitration agreements." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (quoting Moses H. Cone

[2] In connection with her motion, Plaintiff requested judicial notice of various documents related to her contention that the Court should disregard Agreement #1 because, *inter alia*, Defendant was judicially estopped from relying on it. Dkt. No. 44. Defendant filed a motion to strike the request for judicial notice, which Plaintiff opposed. Dkt. Nos. 46-47. Because the Court does not reach the question of which arbitration agreement governs Plaintiff's claims, both the request for judicial notice and the motion to strike are moot.

Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). Still, the question of "whether the parties have submitted a particular dispute to arbitration, *i.e.*, the 'question of arbitrability,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (quoting AT&T Techs., Inc. v. Commc'ns Workers, 475 U.S. 643, 649 (1986)). The phrase "question of arbitrability" generally refers to gateway issues that are reserved to the courts, and has been applied only

> in the kind of narrow circumstances where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.

Id. at 83-84.

Applying this framework to deciding whether an issue is to be decided by a court or an arbitrator, the Supreme Court has determined that "a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide." Id. This includes questions of whether an arbitration contract bound parties who did not sign the agreement (see First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943-46 (1995)), whether an arbitration agreement survived a corporate merger and bound the resulting corporation (see John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 546-47 (1964)), and whether a labor-management layoff dispute falls within the arbitration clause of a collective-bargaining agreement (see AT&T, Techs., 475 U.S. at 651-52).

In contrast, "'procedural' questions which grow out of the dispute and bear on its final disposition" are left to the arbitrator to decide. Howsam, 537 U.S. at 84. For example, the arbitrator decides whether the pre-arbitration steps of a grievance procedure were completed (see John Wiley, 376 U.S. at 557), allegations of "waiver, delay, or a like defense to arbitrability" (see Moses H. Cone Memorial Hosp., 460 U.S. at 24-25), and whether a dispute violated an arbitration rule's time bar (see Howsam, 537 U.S. at 85). The standard for determining whether a gateway issue should be decided by a court or an arbitrator has been described as whether "the parties

'bargained for' arbitral resolution of the question." BG Grp., PLC v. Republic of Argentina, __ U.S. __, 134 S. Ct. 1198, 1206 (2014) (quoting Eastern Associated Coal Corp. v. Mine Workers, 531 U.S. 57, 62 (2000)).

Defendant points to Mancini v. Western & Southern Life Ins. Co., 2017 WL 3783910 (S.D. Cal. Aug. 31, 2017), appeal filed Mancini v. Western & Southern Life Ins. Co., Case No. 17-56420 (9th Cir. Sept. 19, 2017), in support of its position that the determination of which arbitration agreement governs the arbitrability of Plaintiff's claims is reserved for the court and not the arbitrator. In Mancini, the defendant filed a petition with the court seeking an order compelling the plaintiff to arbitrate her representative action to enforce Labor Code violations under California's Private Attorneys General Act ("PAGA"). Id. at *1. As an initial matter, the court needed to determine which arbitration agreement applied, as the plaintiff had signed six separate agreements that referenced arbitration. Id. The district court rejected the defendant's position that it should simply order arbitration and let the arbitrator decide which agreement applied. Id. Instead, the court concluded that "decid[ing] which agreements to analyze to determine if the parties agreed to arbitrate [the plaintiff's] PAGA claim" was "'a gateway dispute about whether the parties are bound by a given arbitration clause [which] raises a question of arbitrability for a court to decide.'" Id. (quoting Howsam, 537 U.S. at 84).

Defendant cites two additional cases in which the courts decided which of two competing arbitration agreements applied. In Dasher v. RBC Bank (USA), 745 F.3d 1111 (11th Cir. 2014), the Eleventh Circuit reviewed de novo the district court's denial of a motion to compel arbitration. Recognizing that the parties disputed which of two agreements controlled the question of arbitrability, the Eleventh Circuit looked to principles of contract to determine whether the first agreement had been superseded by a later agreement. Id. at 1116-18. In Applied Energetics, Inc. v. NewOak Capital Markets, LLC, 645 F.3d 522 (2d Cir. 2011), the Second Circuit reviewed de novo the district court's order compelling arbitration. There, the court was asked to decide arbitrability based on two agreements—one was an engagement agreement and one was a later agreement that formalized the terms of the engagement agreement. Id. at 523. The first agreement contained an agreement to arbitrate disputes and the second agreement did not. Id.

After analyzing the interplay of these two agreements against the general presumption in favor of arbitrability, the Second Circuit determined that the second agreement superseded the first agreement and reversed the district court's order compelling arbitration. Id. at 526.

Plaintiff's opening brief argues that the question of whether the operative arbitration agreement permits or prohibits class-based proceedings is procedural because the parties agree that Plaintiff's substantive employment-related claims against Oracle belong in arbitration. Mot. at 13. Her principal authority for this proposition is Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003). There, the question before the Supreme Court was whether a court should decide if an arbitration agreement forbade class arbitration when it contained a provision that "[a]ll disputes, claims, or controversies arising from or relating to this contract . . . shall be resolved by binding arbitration by one arbitrator selected by us with consent of you." Id. at 448, 456. The Supreme Court determined that in the light of the full delegation to the arbitrator, the relevant question was "what kind of arbitration proceeding the parties agreed to," which "[a]rbitrators are well situated to answer . . . " Id. at 452-53. This case does not, however, answer the precise threshold issue raised here, which is whether a court or arbitrator should decide which of two competing arbitration agreements applies to the dispute. This issue is more appropriately answered by determining whether the there was a clear delegation to the arbitrator such that this Court is divested of authority to decide this gateway question of arbitrability.

B. Delegation to the Arbitrator

Plaintiff does not dispute "the general rule that substantive questions of contract formation are for the court and may be delegated only through clear and unmistakable language." Reply at 1 (citing Mohamed v. Uber Techs., Inc., 848 F.3d 1201, 1208 (9th Cir. 2016) ("[U]nlike the arbitrability of claims in general, whether the court or the arbitrator decides arbitrability is 'an issue for judicial determination unless the parties clearly and unmistakably provide otherwise.'")). Instead, it is Plaintiff's contention that both Agreement #1 and Agreement #2 demonstrate a clear and unmistakable agreement to arbitrate gateways issue of arbitrability, aside from the class action carve-out in Agreement #2. Thus, Plaintiff argues that both agreements require the Court to compel arbitration without deciding which agreement governs.

The Supreme Court has recognized that parties can agree to arbitrate what would otherwise be considered gateway questions of abitrability. See Rent-A-Cntr., W., Inc. v. Jackson, 561 U.S. 63, 70 (2010). "An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does any other." Id. The agreement must "clearly and unmistakably" delegate the issue of arbitrability to the arbitrator. AT&T Techs., 475 U.S. 643, 649 (1986). See also Rent-a-Cntr., 561 U.S. at 68-70. In Momot v. Mastro, 652 F.3d 982, 988 (9th Cir. 2011), the Ninth Circuit held that language "delegating to the arbitrators the authority to determine 'the validity or application of any of the provisions of' the arbitration clause[] constitutes 'an agreement to arbitrate threshold issues concerning the arbitration agreement.'"

Both Agreement #1 and Agreement #2 contain similar arbitration provisions, with the exception of the class action carve-out contained in Agreement #2. The following provisions are relevant to the issue of whether the parties clearly and unmistakably delegated arbitrability decisions to the arbitrator:

Agreement #1

- "You and Oracle understand and agree that any existing or future dispute or claim arising out of or related to your Oracle employment, or the termination of that employment, will be resolved by final and binding arbitration and that no other forum for dispute resolution will be available to either party, except as to those claims identified below."

- "The arbitration proceedings shall be conducted pursuant to the Federal Arbitration Act, and in accordance with the National Rules for the Resolution of Employment Disputes of the American Arbitration Association or the Employment Arbitration Rules and Procedures adopted by Judicial Arbitration & Mediation services ('JAMS'). The arbitrator will have all the powers a judge would have in dealing with any question or dispute that may arise before, during and after the arbitration."

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Agreement #2

- "Employee and Oracle understand and agree that, except as set forth below, any existing or future dispute or claim arising out of or related to Employee's Oracle employment, or the termination of that employment, including but not limited to disputes arising under the Plan, will be resolved by final and binding arbitration and that no other forum for dispute resolution will be available to either party, except as to those claims identified below."

- "Arbitration proceedings under this Agreement to Arbitrate Disputes shall be conducted pursuant to the Federal Arbitration Act, and in accordance with the National Rules for the Resolution of Employment Disputes of the American Arbitration Agreement or the Employment Arbitration Rules and Procedures adopted by Judicial Arbitration & Mediation Services ('JAMS'). Except as set forth below, the arbitrator will have all the powers a judge would have in dealing with any question or dispute that may arise before, during and after the arbitration."

Plaintiff argues that both Agreement #1 and Agreement #2 clearly and unmistakably delegated questions of arbitrability to the abitrator because of their express incorporation of AAA and JAMS rules. The Ninth Circuit has recently addressed this issue in two cases. In Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069 (2013), the Ninth Circuit considered whether the incorporation of the United Nations Commission on International Trade Law ("UNCITRAL") arbitration rules into an arbitration provision constituted clear and unmistakable evidence that the parties to the agreement intended to delegate questions of arbitrability to the arbitrator. Id. at 1071. The agreement also provided that the arbitration would be overseen by an arbitrator from the AAA. Id. at 1072. Relevant to the court's decision was that the potentially applicable UNCITRAL arbitration rules provided that "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement" and "[t]he arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement." Id. at 1073. The Ninth Circuit held that the incorporation of the UNCITRAL arbitration rules was clear and unmistakable evidence of the parties' intent to delegate questions of arbitrability from the court to the arbitrator. Id. at 1074-75. In so holding, the Ninth Circuit recognized that virtually every appellate court has similarly held that incorporation of the AAA arbitration rules constitutes clear and unmistakable evidence of

delegation because the AAA rules contain a jurisdictional provision that is similar to the UNCITRAL rules. Id. 1074. The Ninth Circuit quoted the AAA rule for commercial disputes, which provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." Id. n.1 (quoting AAA Commercial Arbitration Rule 7(a)). In Brennan v. Opus Bank, 796 F.3d 1125 (9th Cir. 2015), the Ninth Circuit squarely held that incorporation of the AAA rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate questions of arbitrability. Id. at 1130.

Defendant responds that reference to the JAMS arbitration rules in both arbitration agreements at issue does not constitute clear and unmistakable delegation for several reasons. First, Defendant argues that the treatment of arbitrability questions under the FAA and the JAMS rules differ such that the agreements' incorporation of the JAMS rules do not constitute a clear and unmistakable delegation. The relevant JAMS rule provides:

> Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. Unless the relevant law requires otherwise, the Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

Dolan Decl., ¶39, Ex. 18, JAMS Employment Arbitration Rule 11(b). In contrast, as discussed above, the FAA generally retains questions of arbitrability for the courts. However, in light of the Ninth Circuit's decisions in Brennan and Oracle, this argument is not persuasive. JAMS' jurisdictional rule 11(b) is very similar to the UNCITRAL and AAA jurisdictional rules under which the Ninth Circuit has found a clear and unmistakable delegation when incorporated.

Second, Defendant argues that there is no clear and unmistakable delegation to the arbitrator because Agreement #2 includes a class action waiver that reserves to the court arbitrability questions related to class challenges. Plaintiff responds by citing the Ninth Circuit's opinion in Mohamed v. Uber Techs., Inc., 848 F.3d 1201 (9th Cir. 2016), which addressed the implication of two arbitration agreements that clearly and unmistakably delegated arbitrability questions to the arbitrator while also including a narrow carve-out reserving one arbitrability issue

to the court. Specifically, the arbitration agreements expressly delegated all disputes, including disputes over arbitrability, to an arbitrator. Id. at 1207-08. One of the two agreements provided that "[n]otwithstanding any other clause contained in this Agreement, any claim that all or part of the Class Action Waiver, Collective Action Waiver, or Private Attorney General Waiver is invalid, unenforceable, unconscionable, void or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator." Id at 1208. Both of the agreements also provided that Uber drivers waived the right to bring class, collective, and representative actions (including claims under the PAGA statute) either in court or in arbitration. Id. After finding that the arbitrability delegation language was clear and unmistakable, the Ninth Circuit held that the delegation was complete except for challenges to the class, collective, and representative action waivers. Id. at 1208-09. As Plaintiff points out, the Ninth Circuit was willing to enforce a delegation agreement and send the parties back to arbitration even though the parties would likely soon need to return to court on the issue of the enforceability of the class waiver. Plaintiff also cites a case in the Northern District of California where the court enforced delegation provisions in putative class actions without deciding the enforceability of the class waiver. See Shierkatz Rllp v. Square, Inc., 2015 WL 9258082, at *6 (N.D. Cal. Dec. 17, 2015).

Defendant attempts to distinguish Mohamed by arguing that it is inapplicable to this case because in Mohamed there was no dispute that both agreements at issue applied to the plaintiffs' claims, whereas here, the threshold dispute is about which agreement applies. Neither the parties nor the Court have found any cases that address that precise question. However, Mohamed is consistent with the line of Ninth Circuit cases holding that questions of arbitrability, including the validity of an arbitration agreement, are left to the arbitrator when the delegation is clear and unmistakable. Although it is possible that the parties' dispute could return to this Court if the arbitrator determines that Agreement #2 applies to determine whether the class waiver is enforceable, that possibility does not demonstrate a lack of delegation to the arbitrator.

Next, Defendant argues that the incorporation of the JAMS rules was not a clear and unmistakable delegation because the JAMS employment rules and the JAMS class action rules are inconsistent. Defendant refers in particular to JAMS Class Action Rule 1, which provides:

> (a) JAMS will not administer a demand for class action arbitration when the underlying agreement contains a class preclusion clause, or its equivalent, unless a court orders the matter or a claim to arbitration as a class action;
> (b) Subject to Rule 1(a), these Class Action Procedure(s) ("Procedures") shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the JAMS Arbitration Rules where a party submits a dispute to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable JAMS rules . . .
> (c) Subject to Rule 1(a), where inconsistencies exist between these Procedures and other JAMS Rules that apply to any dispute, these Procedures shall control . . . ; and
> (d) Subject to Rule 1(a), the Arbitrator shall follow any order of a court relating to any matter that would otherwise be decided by an Arbitrator under these Procedures.

Dolan Decl., ¶ 41, Ex. 19, JAMS Class Action Rule 1.

Rather than creating inconsistency with JAMS Employment Rule 11, the Court reads JAMS Class Action Rule 1(a) as expressly reserving court jurisdiction over legal challenges to the class action waiver in Agreement #2, and, under Mohamed, the arbitrability delegation otherwise remains intact. As to JAMS Class Action Rule 1(b)-(d), Plaintiff convincingly argues that these sub-rules harmonize the class action rules with the JAMS employment rules to ensure that their relationship with one another is clear.

Defendant's final argument--and the one that it stressed at the hearing on this motion-- is that the delegation was not clear and unequivocal because the JAMS rules contemplate deciding arbitrability questions based on only one agreement, not multiple competing agreements. For instance, JAMS Employment Rule 11(b) provides for an arbitrator's jurisdiction over disputes concerning "the formation, existence, validity, interpretation or scope of *the agreement* under which Arbitration is sought" and JAMS Class Action Rule 1(a) states that JAMS will not administer "a demand for class action arbitration when *the underlying agreement* contains a class preclusion clause." Defendant essentially argues that because the JAMS' rules speak to a single agreement the scope of any delegation is limited only to disputes that implicate one arbitration agreement.

The Court does not find this argument persuasive. JAMS Employment Rule 11(b) gives the arbitrator authority to decide arbitrability disputes regarding "the agreement under which

Arbitration is sought." Plaintiff submitted her arbitration demand to JAMS under Agreement #1. The fact that Defendant will introduce a second arbitration agreement to argue that the first arbitration agreement is invalid because it superseded Agreement #1 means the arbitrator will decide whether the subsequent agreement rendered the first one invalid. Disputes on "the validity . . . of the agreement under which Arbitration is sought" are clearly and unmistakably delegated to the arbitrator under JAMS Employment Rule 11(b). Plaintiff seeks arbitration under Agreement #1, not Agreement #2, so the arbitrator must make the determination of its validity and the fact that Defendant relies on Agreement # 2 to dispute arbitration under Agreement #1 does not change the delegation to the arbitrator to determine the validity of the agreement under which Plaintiff seeks to arbitrate the dispute. The JAMS rules' reference to an "agreement" does not introduce any ambiguity into that delegation. Accordingly, whether Agreement #1 is valid and whether Plaintiff's Class Arbitration Demand may proceed under it are questions for the arbitrator to decide, not this Court.

V. CONCLUSION

For the reasons set forth above, the Court GRANTS Plaintiff's motion to compel arbitration. The preliminary injunction entered on October 4, 2017 is terminated as of this date.

IT IS SO ORDERED.

Dated: November 17, 2017

ELIZABETH D. LAPORTE
United States Magistrate Judge