Bradley Bergeron v. Monex Deposit Company et al,
SACV 17-1968 JVS(DFMx)

Order Regarding Motions to Dismiss and Compel Arbitration

Before the Court are two motions.

First, Defendants Monex Deposit Company, Monex Credit Company, Newport Services Corporation (collectively, "Monex"), Michael Carabini, and Louis Carabini (the "Individual Defendants" and, with Monex, "Defendants") filed a motion to dismiss the First Amended Complaint ("FAC"). (Mot., Docket No. 81.) Plaintiff Bradley Bergeron ("Bergeron") opposed. (Opp'n, Docket No. 83.) Defendants replied. (Reply, Docket No. 85.)

For the following reasons, the Court **denies** the motion to dismiss.

Second Defendants filed a motion to compel arbitration. (Mot., Docket No. 82.) Bergeron opposed. (Opp'n, Docket No. 84.) Defendants replied. (Reply, Docket No. 86.)

For the following reasons, the Court **grants** the motion to compel arbitration and **stays** the action.

I. BACKGROUND

Bergeron alleges that between April 2016 and August 2017, he traded in precious metal commodities through Monex's off-exchange commodities trading platform, the Atlas program, and suffered approximately $7,000 in losses. (FAC, Docket No. 80 ¶ 15.) To open an Atlas account, Bergeron executed the "Atlas Account Agreements," comprised of a Purchase and Sale Agreement and a Loan Security and Storage Agreement. (Id. ¶ 17.) The Atlas Account Agreements include an arbitration agreement. (Id. ¶ 28.) Specifically, the arbitration agreement provides that "[t]he parties agree to submit all disputes, claims or controversies seeking damages in excess of $50,000, arising out of or relating to any transactions with [Monex] or to the breach, termination, enforcement, interpretation, validity, enforceability or alleged unconscionability of any part of this Agreement, to final and binding arbitration before JAMS, Inc. ('JAMS') or ADR Services, Inc. ('ADR'), ..." (Walker Decl., Docket No. 82-3, Ex. A at 8 ¶

16(a), 17 ¶ 30.1) The Agreements also specify that "[e]xcept as otherwise provided herein, the arbitration shall be conducted in accordance with the rules and procedures of the chosen arbitration forum which are in effect at the time of Customer's execution of this Agreement." (Id. at 9 ¶ 16(d), 17 ¶ 30.4.) Furthermore, the Agreements state that

> 1. Customer and [Monex] agree that each may bring claims against the other only in his/her/its individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding. 2. If it is determined that [the preceding subsection] is unenforceable for any reason, and that a party's claims may proceed as a class or representative action, then the parties further agree that all subsequent matters . . . shall be determined in arbitration.

(Id. at 9 ¶ 16(g), 17–18 ¶ 30.7.) Finally, the Atlas Account Agreements also provide that "I voluntarily agree to submit all disputes, claims or controversies that seek damages in excess of $50,000 which arise out of, or relate to, my transactions with [Monex] to final and binding arbitration . . . ." (Id. at 10¶ 17(k), 19 ¶ 36(m).)

Bergeron filed the present action on behalf of himself and "[a]ll persons who opened an Atlas account with Monex and sustained losses in connection therewith, and who seek damages not exceeding $50,000 (the 'Class')." (FAC, Docket No. 80 ¶ 85.) He alleges that if a class is certified, the matter in controversy will exceed the sum or value of $5,000,000. (Id. ¶ 13.)

II. DISCUSSION

A. Motion to Compel Arbitration

Monex argues that the parties' agreed to delegate any arbitrability determination to an arbitrator. (Mot., Docket no. 82-1 at 5.) Parties to a contract may agree to delegate the question of arbitrability to an arbitrator. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995). However, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." Id. at 944 (quoting AT & T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986)). Courts generally undertake a two-step analysis to ascertain who has the primary power to decide

arbitrability under an arbitration agreement. Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1371 (Fed. Cir. 2006). First, the court must determine whether the parties clearly and unmistakably intended to delegate arbitrability decisions to an arbitrator. Id. If the court concludes that the parties did not, "the general rule that the 'question of arbitrability . . . is . . . for judicial determination' applies and the court should undertake a full arbitrability inquiry in order to be 'satisfied' that the issue involved is referable to arbitration." Id. (quoting AT&T Techs., 475 U.S. at 649). "If, however, the court concludes that the parties to the agreement did clearly and unmistakably intend to delegate the power to decide arbitrability to an arbitrator, then the court should perform a second, more limited inquiry to determine whether the assertion of arbitrability is 'wholly groundless.'" Id. (citing Dream Theater, Inc. v. Dream Theater, 124 Cal. App. 4th 547, 553 (2004)).

1. The parties clearly and unmistakably intended to delegate arbitrability to an arbitrator.

The arbitration agreement clearly and unmistakably delegates the issue of arbitrability to an arbitrator. The parties "agree[d] to submit *all* disputes, claims, or controversies seeking damages in excess of $50,000, arising out of or relating to . . . the breach, termination, enforcement, interpretation, validity, enforceability or alleged unconscionability of any party of this Agreement, to final and binding arbitration." (Walker Decl., Docket No. 82-3, Ex. A at 8 ¶ 16(a), 17 ¶ 30.1 (emphasis added)); see Mohamed v. Uber Techs., Inc., 848 F.3d 1201, 1208–09 (9th Cir. 2016) (holding that agreements "delegat[ing] to the arbitrators the authority to decide issues relating to the 'enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision' . . . clearly and unmistakably indicated the parties intent for the arbitrators to decide the threshold question of arbitrability"). Bergeron argues that this language "clearly exclude[s] from arbitration any matters where a customer's claim seeks less than $50,000 in damages." (Opp'n, Docket No. 84 at 7.) However, his argument poses questions of contract interpretation and enforceability, issues clearly delegated to an arbitrator.

Nevertheless, Bergeron contends that Monex's decision to draft the agreement to cover only claims for $50,000 or more "created an ambiguity that defeats its delegation argument." (Id. at 8.) Courts have declined to enforce delegation clauses where an unambiguous delegation clause is contradicted by another provision of the contract. See Vargas v. Delivery Outsourcing, LLC, No.

15-CV-03408-JST, 2016 WL 946112, at *6 (N.D. Cal. Mar. 14, 2016). For example, the district court in Vargas declined to enforce a delegation clause that provided that "[w]hether a dispute is arbitral shall be determined by the arbitrator," because another sentence in the same paragraph provided that "[i]f any provision of this Agreement or portion thereof is held to be unenforceable *by a court of law or equity*, said provision or portion thereof shall not prejudice the enforceability of any other provision or portion of the same provision . . . ." Id. (emphasis in original). The Court found that the latter clause was only necessary if questions concerning arbitrability were not resolved by the arbitrator. Id. The Court therefore held that the presence of the two sentences created a conflict that introduced ambiguity into an otherwise unambiguous delegation clause. Id. Here, Bergeron points to no language that even suggests that the arbitration agreement contemplates anyone other than an arbitrator resolving questions of arbirtability. Instead he maintains that the minimum damages provision shows that his claim is not arbitrable. But that goes to the scope of the agreement, which is not a question that this Court may resolve under the parties' agreement.

Bergeron argues that further ambiguity exists because the arbitration agreement enables Monex's customers to select the ADR Arbitration Rules to govern any arbitration. (Opp'n, Docket No. 84 at 8.) The ADR Rules provide that "[u]nless the issues of arbitrability has been previously determined by the court, the arbitrator shall have the power to rule on his or her own jurisdiction." Arbitration Rules, ADR Services, Inc. § 8. Bergeron maintain that this rule allows an arbitrator to determine his own jurisdiction only if a court has not previously decided the issue, thereby "anticipat[ing] *court* determinations of arbitrability" or, at least, creating an ambiguity. (Opp'n, Docket No. 84 at 8–9.) The Court disagrees. This rule simply provides that if the parties have not explicitly delegated arbitrability to an arbitrator, the arbitrator does not have the power to determine arbitrability. This creates no ambiguity here where the parties have already agreed to delegate arbitrability to an arbitrator. In sum, the parties clearly and unmistakably intended to delegate arbitrability to an arbitrator.

2. The assertion of arbitrability is not wholly groundless.

Because the parties clearly and unmistakably intended to delegate arbitrability to an arbitrator, the Court must determine if the assertion of arbitrability is wholly groundless. Monex argues that it is unclear whether the Ninth Circuit would even apply the second step of the Federal Circuit's Qualcomm

test. (Reply, Docket No. 85 at 7.) A circuit split exists over how, or even whether, to apply Qualcomm's second step. See Portland Gen. Elec. Co. v. Liberty Mut. Ins. Co., 862 F.3d 981, 986 n.3 (9th Cir. 2017). However, the Ninth Circuit has declined to answer whether courts must apply the rule that "the delegation of arbitrability applies only to claims that are at least *arguably* covered by the agreement to arbitrate." Id. (emphasis in original) (citation omitted). Instead, it has found making such a determination unnecessary where a claim was at least arguably covered by an arbitration clause. Id. Accordingly, the parties debate which standard applies to the wholly groundless determination. Bergeron argues that "[a]n assertion of arbitrability is 'wholly groundless' where there are '[n]o reasonable doubts' as to the claims falling outside the scope of the arbitration provision at issue." (Opp'n, Docket No. 84 at 6 (quoting Ellsworth v. U.S. Bank, N.A., No. C 12-02506 LB, 2012 WL 4120003, at *7 (N.D. Cal. Sept. 19, 2012).) Monex argues that the wholly groundless review must be "cursory." (Reply, Docket No. 85 at 9.) Though the Ninth Circuit has not answered this question for the district courts, what is clear is that the Court cannot decide which claims fall within the scope of the arbitration agreement without necessarily deciding arbitrability. See Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1076 (9th Cir. 2013). Furthermore, the parties' delegation of arbitrability is unequivocally permissible if Bergeron's claims are "at least arguably covered" by their arbitration agreement. See Portland Gen. Elec. Co., 862 F.3d at 986 n.3.

Bergeron argues that the parties' agreement does not cover his claims because they only agreed to arbitrate individual claims seeking more than $50,000 in damages. (Opp'n, Docket No. 84 at 12.) He seeks damages of less than that amount for his individual claims. Specifically, Bergeron argues that certain portions of the agreement discuss only the "Customer's transactions" and state that "I," referring to the customer alone, "voluntarily agree to submit all disputes, claims or controversies that seek damages in excess of $50,000 which arise out of or relate to my transactions with [Monex]" to arbitration. (Id. at 12–13.) However, another portion of the same provision applies more expansively, stating that "the parties agree to submit *all* disputes, claims or controversies seeking damages in excess of $50,000" to arbitration. (See Walker Decl., Docket No. 82-3, Ex. A at 8 ¶ 16(a), 17 ¶ 30.1 (emphasis added).) Bergeron argues that the more specific provisions should trump the general. (See Opp'n, Docket No. 84 at 12–13.) The Court disagrees. When a contract applies broadly but also includes references to instances where it would apply more narrowly, there is no reasons to interpret those specific instances to negate the general references. The different portions of

the Atlas Agreements' arbitration provision do not conflict.

Bergeron also argues that the arbitration agreement's class action waiver provision confirms that the parties only intended to arbitrate individual claims. (Opp'n, Docket No. at 14.) But the agreement also provides that if the waiver is found to be unenforceable for any reason, class action claims must be arbitrated. (Walker Decl., Docket No. 82-3, Ex. A at 9 ¶ 16(g), 17–18 ¶ 30.7.) Thus, while the arbitration agreement generally precludes class action claims, those claims must be arbitrated if the waiver cannot be enforced. Accordingly, the waiver does not demonstrate a mutual intent to arbitrate only individual claims.

The question remains whether Bergeron's claim are at least arguably covered by the arbitration agreement. Though he seeks less than $50,000 in damages for his individual claims, his class damages exceed $5,000,000. (See FAC, Docket No. 80 ¶ 13.) The arbitration agreement does not clearly preclude the aggregation of claims to satisfy the minimum damages amount. And only an arbitrator may make the determination of whether the class action waiver is enforceable. If it is not, Bergeron may bring his class action claims in arbitration. Therefore, the arbitration agreement at least arguably covers Bergeron's claims. In sum, Monex's assertion of arbitrability is not wholly groundless, and the Court **grants** the motion to compel arbitration.

B. Motion to Dismiss

Because the Court grants the motion to compel arbitration, it does not reach the merits of Defendants' motion to dismiss the FAC. The Court therefore **denies** the motion to dismiss.

IV. CONCLUSION

For the foregoing reasons, the Court **grants** the motion to compel arbitration and **stays** the action. The Court also **denies** the motion to dismiss.

IT IS SO ORDERED.