UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA JS-6

CIVIL MINUTES—GENERAL

Case No. CV-17-2768-MWF (AFMx) **Date: May 19, 2017**
Title: Division Six Sports, Inc. v. Levi Strauss Asia Pacific Division PTE. Ltd., et al.

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported
Attorneys Present for Plaintiff:	**Attorneys Present for Defendant:**
None Present	None Present

Proceedings (In Chambers): ORDER RE DEFENDANT'S MOTION TO COMPEL ARBITRATION [11]

Before the Court is Defendant's Motion to Compel Arbitration, filed on April 18, 2017. ("the Motion," Docket No. 11). Plaintiff filed an Opposition and Defendant filed a Reply. (Docket Nos. 14–15). The Court has read and reviewed the filings, and held a hearing on **May 19, 2017**. For the reasons stated below the Court **GRANTS** the Motion and **DISMISSES** the action.

I. BACKGROUND

Plaintiff filed suit on February 16, 2017, against Defendant in the Los Angeles Superior Court, alleging claims of tort, breach of contract, and equitable claims. (Complaint, Docket No. 1-1). Plaintiff is engaged in the business of purchasing and re-selling apparel and footwear. (*Id.* ¶ 1). As relevant here, Plaintiff would purchase from Defendant products that Defendant sought to remove from inventory. (*Id.* ¶ 7).

Plaintiff and Defendant entered into the Master Services Agreement ("MSA") in June 2012. (Complaint, Ex. 1). The MSA contains an agreement to arbitrate that states:

> If there is any dispute or claim relating to interpretation or breach of this Agreement or any Schedule (except disputes or claims relating to or affecting the ownership of or the validity of LS Intellectual Property) then Provider and LS promptly

> shall try to settle it through direct discussion. If the dispute cannot be resolved, then, upon either Provider's or LS's request, Provider and LS promptly shall submit it to binding arbitration as provided in Section 12.2. Arbitration shall be the sole and exclusive remedy available for the determination of any dispute with the limited exception stated in Section 12.3.

(*Id.* § 12.1). In addition, the MSA provides, "This Agreement sets forth the only terms and conditions under which LS as well as other LS subsidiaries and affiliates will receive a Service Fee (further defined in Section 4) from Provider for the services to be performed by Provider as set forth in the applicable Schedule(s) (the 'Services')." (*Id.* § 1). Similarly, the MSA states that it, "its attachments, exhibits and Schedules, as so designated, set forth the entire agreement and understanding of the parties relating to the subject matter contained herein, and merges all prior discussions and agreements, both oral and written, between the parties . . . ." (*Id.* § 14.9).

II. LEGAL STANDARD

The Federal Arbitration Act ("FAA") requires the district courts to compel arbitration on all claims subject to arbitration agreements. *See Kindred Nursing Centers Ltd. P'ship v. Clark*, ___ U.S. ___, No. 16-32, 2017 WL 2039160, at *4 (U.S. May 15, 2017) ("The FAA makes arbitration agreements 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" (quoting 9 U.S.C. § 2)); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) ("By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." (citing 9 U.S.C. §§ 3, 4)). Courts have developed a "liberal federal policy favoring arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

Every arbitration agreement is, of course, subject to generally applicable contract defenses, such as unconscionability. *See Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1280 (9th Cir. 2006) ("It is well-established that unconscionability is a generally applicable contract defense, which may render an arbitration provision unenforceable."). But because the FAA favors arbitration, the burden is on the plaintiff to prove that the arbitration agreement is, in fact, unconscionable. *See Mortensen v. Bresnan Commc'ns*, LLC, 722 F.3d 1151, 1157 (9th Cir. 2013) ("[T]hose parties challenging the enforceability of an arbitration agreement bear the burden of proving that the provision is unenforceable."). And even if the plaintiff meets that burden, the district court has the discretion to sever the unconscionable portions of the arbitration provision (if severance will cure the unconscionability). *See Lara v. Onsite Health, Inc.*, 896 F. Supp. 2d 831, 847 (N.D. Cal. 2012) (severing problematic portions of the arbitration provision and compelling arbitration); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 122, 99 Cal. Rptr. 2d 745 (2000) (holding that severance is proper unless the arbitration agreement contains more than one unlawful provision and is "permeated by an unlawful purpose"). Parties may "agree to limit the issues subject to arbitration" and "to arbitrate according to specific rules." *Concepcion*, 563 U.S. at 345.

III. ANALYSIS

Plaintiff devotes a large segment of its Opposition to Defendant's failure to wait seven days after conferring with Plaintiff before filing the Motion. The Court notes that, as Defendant argues, Defendant agreed to a stipulation delaying the hearing on this Motion. This continuance gave Plaintiff ample time to confer with Defendant and determine if some other resolution was possible, and to determine what arguments it would make in opposition to the Motion. Ultimately, Plaintiff did file its Opposition.

Because Plaintiff was not prejudiced, the Court will not strike Defendant's Motion under Local Rule 7-3. The Court admonishes counsel for Defendants to observe Local Rule 7-3 in the future.

Moving to the merits of the Motion, Defendant argues that each of Plaintiff's claims is subject to the arbitration agreement; that the agreement is valid and binding; and that Plaintiff's claims must be sent to arbitration. Defendant first points to Plaintiff's third claim for breach of written contract. Because this claim concerns breach of the agreement itself, both parties appear to agree that it must be arbitrated. Plaintiff's Opposition more or less acknowledges that this claim is directly covered by the MSA's arbitration provision.

Defendant argues that each of Plaintiff's other claims relate to prior agreements between the parties that are covered by the integration clauses in the MSA quoted above. For example, Plaintiff's first claim for tortious interference with contract alleges that Defendant made a verbal proposal to Plaintiff in August 2011 to initiate a long-term relationship between the parties. (Complaint ¶ 10). Later, this agreement was reduced to writing in the form of the MSA. (*Id.* ¶ 32). The first claim alleges that Defendant intentionally interfered with Plaintiff's sales and thus violated the oral agreement. (*Id.* ¶ 20). But as Defendant notes, the terms of the alleged oral agreement are the same as those in the MSA. (*Id.* ¶¶ 16, 32). They both concern Plaintiff's ability to locate customers in certain countries and sell Defendant's merchandise to them. Plaintiff's Opposition argues only that the claim is not related to the written contract and thus should not be arbitrated.

As Defendant notes in its Reply, the MSA adopts the UNCITRAL rules, which contain a provision requiring arbitration of such "gateway" issues as "whether the agreement covers the dispute." *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) (affirming enforcement of arbitration agreement and noting that "incorporation of the UNCITRAL rules . . . constituted clear and unmistakable evidence that the parties agreed the arbitrator would decide arbitrability."); *see also Interdigital Tech. Corp. v. Pegatron Corp.*, 2016 WL 234433, at *4 (N.D. Cal. Jan. 20, 2016) ("In deciding whether a dispute is arbitrable, a federal court must answer two questions: (1) whether the parties agreed to arbitrate; and, if so, (2) *whether the scope of that agreement to arbitrate encompasses the claims at issue*.") (emphasis added). The parties' arguments seem to concern only such gateway issues.

When the parties clearly and unmistakably delegate arbitrability to an arbitrator, the Court's only remaining inquiry is to determine whether the assertion of arbitrability is "wholly groundless." Zenelaj v. Handybook, Inc., 82 F. Supp. 3d 968, 971 (N.D. Cal. 2015) (quoting *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1371 (Fed. Cir. 2006) (applying Ninth Circuit law)); *see also Rivera v. Saul Chevrolet, Inc.*, 2017 WL 1862509, at *2 (N.D. Cal. May 9, 2017); *Madrigal v. New Cingular Wireless Servs., Inc.*, 2009 WL 2513478, at *6 n.6 (E.D. Cal. Aug. 17, 2009) ("The assertion that the claims in this case fall within the scope of the arbitration agreement is not 'wholly groundless.' The claims arose out of the parties relationship and may or may not fall within the ambit of the 'claims" and "disputes' language. To respect the province of the arbitrator, no opinion is expressed on whether the claims in this case actually fall within the scope of the arbitration agreement.").

The parties have clearly and unmistakably delegated arbitrability to the arbitrator here by adopting the UNCITRAL rules. *See Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1073 (9th Cir. 2013) ("By giving the arbitral tribunal the authority to decide its own jurisdiction, [the] UNCITRAL rules vest the arbitrator with the apparent authority to decide questions of arbitrability.").

The Court concludes that Defendant's argument is not "wholly groundless." So long as Plaintiff's tort-based claim "touches matters" covered by the MSA, it must be arbitrated. *See Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999) ("To require arbitration, Simula's factual allegations need only 'touch matters' covered by the contract containing the arbitration clause and all doubts are to be resolved in favor of arbitrability." (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985))). The Court mentions this standard not to decide conclusively the issue of arbitrability, but rather to show that Defendant's Motion is not groundless. Certainly a reasonable argument could be made that the claims arising out of the oral agreement—which contained terms similar to the MSA and seemed concerned with the same subject matter–"touch on" the claims arising out of the MSA. The MSA's integration clause adds further weight to Defendant's claim. As in the *Madrigal* case cited above, Plaintiff's claims "may or may not" fall within the agreement's scope.

2009 WL 2513478, at *6 n.6. Whether they do or not, however, is a question within the "province of the arbitrator." *Id.*

At the hearing, Plaintiff's counsel argued that the Court was "assuming" the MSA covers the tort-based claims. Not so. Rather, the Court merely concludes that Defendant's arguments are not "wholly groundless." If the arbitrator decides that he or she lacks jurisdiction over the tort-based claims, those claims may be brought again in this Court.

Therefore, to the extent Plaintiff's argument is that the specific claims are not covered by the MSA's arbitration clause, the Court lacks jurisdiction to decide whether the claims are subject to arbitration or not, as that argument must be submitted to the arbitrator under the clear language of the UNCITRAL rules. *See Oracle*, 724 F.3d at 1073. Accordingly, the Court agrees with Defendant that the claim must be sent to arbitration, where Plaintiff may raise again its argument that the claims are not subject to arbitration under the agreement.

Plaintiff's second claim is for tortious intentional interference with prospective economic advantage. (Complaint ¶ 22). This claim is based on the same facts as the first claim. Plaintiff makes no argument specific to only this claim. Because the Court has already concluded that the first claim is subject to arbitration, and that Plaintiff's arguments are concerned only with gateway issues that must be decided by the arbiter, the Court concludes that the second claim is covered by the arbitration agreement as well. To the extent that Plaintiff argues that this specific claim is not subject to the MSA, that issue must be taken up with the arbitrator. *See Brennan*, 796 F.3d at 1130.

Plaintiff acknowledges that its fourth cause of action for accounting is dependent on the other causes of action. Because the Court has already concluded that those causes of action are subject to arbitration, the Court similarly concludes that the fourth cause of action must be arbitrated as well.

Accordingly, the entire Complaint is subject to arbitration, and this action should be dismissed. *See Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1074 (9th

Cir. 2014) ("[A] district court may either stay the action or dismiss it outright when, as here, the court determines that all of the claims raised in the action are subject to arbitration.").

Accordingly, the Motion is **GRANTED** and the action is **DISMISSED without prejudice**. In the event the arbitrator declines to accept the tort claims, Plaintiff may return to this Court.

This Order shall constitute notice of entry of judgment pursuant to Federal Rule of Civil Procedure 58. Pursuant to Local Rule 58-6, the Court **ORDERS** the Clerk to treat this order, and its entry on the docket, as an entry of judgment.

IT IS SO ORDERED.