UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 16-2243 PA (JPRx)	Date	July 18, 2016
Title	Reflex Media, Inc. v. Vibe Media, Inc., et al.		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
Stephen Montes Kerr	Not Reported	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiff:	Attorneys Present for Defendant:
None	None

Proceedings: IN CHAMBERS - COURT ORDER

Before the Court is a Motion to Compel Arbitration filed by defendants Vibe Media, Inc., Peakridge, Sophia Thompson, Daniel Roman, and Ali Askari (collectively, "Defendants"). (Docket No. 27.) Plaintiff Reflex Media, Inc. ("Plaintiff" or "Reflex") has filed an Opposition. (Docket No. 29.) Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. The hearing calendared for July 18, 2016, is vacated, and the matter taken off calendar.

I. Background

Reflex operates a number of dating websites, including: SeekingArrangement.com, SeekingMillionaire.com, MissTravel.com, WhatsYourPrice.com, OpenMinded.com, PairMeUp.com, and PerfectArrangement.com. (FAC ¶ 25.) These websites promote and facilitate "sugar daddy dating." (Id.) Users of the websites are designated as a "Sugar Daddy/Momma" – those who are willing to pay money in exchange for companionship – or a "Sugar Baby" – attractive individuals who seek to be pampered by a benefactor. (Id. ¶¶ 25-26.) SeekingArrangement.com is Reflex's premiere dating website, while its other websites generally focus on sub-markets of the sugar daddy dating culture. (Id. ¶¶ 28-31.) Reflex owns a federally registered trademark in "SEEKING ARRANGEMENT," and asserts an unregistered trademark in "SA." (Id. ¶¶ 33-34.)

Defendants operate competing sugar daddy dating websites, including www.sugarmodels.com and www.cityvibe.com. (Id. ¶¶ 10, 38.) Reflex alleges that Defendants registered as members of SeekingArrangement.com with the illegal purpose of gaining access to Reflex's trademarks, trade dress, customer list, and customer contact information. (Id. ¶¶ 39, 45.) Defendants allegedly sent false and misleading text messages to more than 10,000 of SeekingArrangement.com's members, and adopted the confusingly similar trademark "SM" in order to mislead users into believing that an affiliation existed between SeekingArrangement.com and Defendants' websites. (Id. ¶¶ 6,7, 42, 48.)

The FAC alleges that Defendants agreed to be bound by SeekingArrangement.com's Terms of Use. (Id. ¶¶ 3, 45.) In relevant part, the Terms of Use provide that: "The Website and the Service is for personal use only. Members may not use the Service in connection with any commercial endeavors.

Organizations, companies, agencies, and/or businesses may not become Members and should not use the Service or the Website for any purpose. (FAC, Ex. A ("Terms of Use"), § 4.)[1/]

The Terms of Use also contain an arbitration clause, which provides: "You and SeekingArrangement.com agree that any disputes arising out of or related to the Website, the Service, this Agreement and/or any policies or practices of SeekingArrangement.com (a "Dispute") will be subject to FINAL AND BINDING ARBITRATION administered by the American Arbitration Association." (Terms of Use, § 17(a).) However, the arbitration clause contains exclusionary language which purports to exclude certain types of claims from arbitration:

> The only exceptions to this agreement to arbitrate Disputes are matters that may be taken to small-claims court or claims of infringement or misappropriation of SeekingArrangement.com's copyright, patent, trade secret, trademark, service mark, trade dress or other intellectual property or proprietary rights, which SeekingArrangement.com may elect to have resolved by means other than arbitration.

(Terms of Use, § 17(a).)

Finally, the Terms of Use establish that:

> If the parties are unable to resolve a Dispute by informal means, the arbitration of Disputes will be administered by the American Arbitration Association (AAA), a non-profit organization not affiliated with SeekingArrangement.com, in accordance with its Commercial Arbitration Rules, and if deemed appropriate by the arbitrator, the Supplementary Procedures for Consumer-Related Disputes.

(Terms of Use, § 17(c).)

Reflex initiated this action on April 1, 2016. The First Amended Complaint includes claims for: (1) Fraud; (2) Trademark Infringement, False Designation of Origin, and Unfair Competition, 15 U.S.C. § 1125; (3) Computer Fraud and Abuse Act, 18 U.S.C. § 1030; (4) Unauthorized Access to Computers, Computer Systems, and Computer Data, Cal. Penal Code § 502; (5) Uniform Trade Secrets Act, Cal. Civ. Code § 3246, et seq.; (6) Common Law Trademark Infringement; (7) Intentional Interference with Prospective Economic Advantage; (8) Unfair Competition, Cal. Bus. & Prof. Code § 17200; and (9) Accounting. Presently before the court is Defendants' Motion to Compel Arbitration.

[1/] The Terms of Use are attached to the First Amended Complaint as Exhibit A, and are expressly incorporated by reference therein. (FAC ¶ 49.)

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II. Legal Standard

"The [Federal Arbitration Act ("FAA")] provides that any arbitration agreement within its scope 'shall be valid, irrevocable, and enforceable,' and permits a party 'aggrieved by the alleged . . . refusal of another to arbitrate' to petition any federal district court for an order compelling arbitration in the manner provided for in the agreement." Chiron Corp. v. Ortho Diagnostic Systems, Inc., 207 F.3d 1126, 1130 (9th Cir. 2000) (quoting 9 U.S.C. § 4). The FAA "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." Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 218, 105 S. Ct. 1238, 1241, 84 L. Ed. 2d 158 (1985) (emphasis in original). "The court's role under the Act is therefore 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 Act requires the court to enforce the arbitration agreement in accordance with its terms." Chiron Corp., 207 F.3d at 1130 (citations omitted).

In determining whether parties have agreed to arbitrate a dispute, courts apply "general state-law principles of contract interpretation, while giving due regard to the federal policy in favor of arbitration by resolving ambiguities as to the scope of arbitration in favor of arbitration." Mundi v. Union Sec. Life Ins. Co., 555 F.3d 1042, 1044 (9th Cir. 2009). On the other hand, "[f]ederal substantive law governs the question of arbitrability." Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 719 (9th Cir. 1999). "As a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 626, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985) (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)).

III. Discussion

Defendants seek to compel arbitration of every claim asserted in the FAC. In response, Reflex contends that this action is not subject to arbitration because Defendants have failed to meet their burden of demonstrating that an agreement to arbitrate exists, and because all of the claims asserted in the FAC fall within the Terms of Use's arbitration exclusion. As explained below, the Court concludes that arbitration of this matter is required.

A. The Parties Have Agreed To Arbitrate Arbitrability

When deciding whether to compel arbitration, the Court must generally determine the two "gateway" issues of: (1) whether there is an agreement to arbitrate between the parties; and (2) whether the agreement covers the dispute. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84, 123 S. Ct. 588, 592, 154 L. Ed. 2d 491 (2002). "Although gateway issues of arbitrability presumptively are reserved for the court, the parties may agree to delegate them to the arbitrator." Momot v. Mastro, 652

F.3d 982, 987 (9th Cir. 2011). In order to do so, there must be "clear and unmistakable evidence of [an] agreement to arbitrate arbitrability." Id. at 988.

Here, the Terms of Use provide that "the arbitration of Disputes will be administered by the American Arbitration Association (AAA) . . . in accordance with its Commercial Arbitration Rules, and if deemed appropriate by the arbitrator, the Supplementary Procedures for Consumer-Related Disputes." (Terms of Use, § 17(c).) The Ninth Circuit has squarely held "that incorporation of the AAA rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability." Brennan v. Opus Bank, 796 F.3d 1125, 1130 (9th Cir. 2015).[2/] Accordingly, the Court concludes that the invocation of the AAA Commercial Arbitration Rules in the Terms of Use constitutes clear and unmistakable evidence that the parties have agreed to arbitrate arbitrability.

B. The Assertion of Arbitrability is Not Wholly Groundless

Once the Court concludes that there is clear and unmistakable evidence that the parties have delegated the power to decide arbitrability to the arbitrator, the Court need only perform "a more limited inquiry to determine whether the assertion of arbitrability is 'wholly groundless.'" Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1371 (Fed. Cir. 2006); Zenelaj v. Handybook Inc., 82 F. Supp. 3d 968, 975 (N.D. Cal. 2015). In so doing, the "district court should look to the scope of the arbitration clause and the precise issues the moving party asserts are subject to arbitration." Id.

Here, the arbitration clause broadly provides "that any disputes arising out of or related to the Website, the Service, this Agreement and/or any policies or practices of SeekingArrangement.com" are subject to arbitration. (Terms of Use, § 17(a).) Under Nevada law,[3/] the phrases "arising out of" and "related to" constitute the broadest language parties can use to subject their disputes to arbitration. State ex rel. Masto v. Second Judicial Dist. Court ex rel. Cty. of Washoe, 199 P.3d 828, 833 n. 6 (Nev. 2009). A review of the FAC reveals that, at least under the "wholly groundless" standard of review, each of Reflex's claims arise from or are related to Defendants' use of SeekingArrangement.com. (See, e.g., FAC ¶¶ 62, 66, 75, 84, 96, 112.)

Reflex's Opposition asserts that even if arbitration is required, the Court should retain jurisdiction over any claims which fall within the Terms of Use's arbitration exclusion. (Opp'n, 16-17.) In Oracle, the Ninth Circuit considered a similar contract where intellectual property claims were excluded from an arbitration agreement, and the determination of arbitrability had been delegated to the arbitrator. Oracle, 724 F.3d at 1071-72. The Ninth Circuit found that it was reversible error for the

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[2/] Additionally, as the Ninth Circuit has noted, "[v]irtually every circuit to have considered the issue has determined that incorporation of the American Arbitration Association's (AAA) arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1074 (9th Cir. 2013) (collecting cases).

[3/] The Terms of Use require the application of Nevada state law. (Terms of Use, § 17(f).)

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district court to interpret the scope of the intellectual property claim exclusion and not simply compel arbitration of all of the asserted claims. Id. at 1077. Accordingly, the Court concludes that the determination of whether Reflex's claims are subject to arbitration or are excluded by the Terms of Use is a decision which has been delegated to the arbitrator. See id.; Zenelaj, 82 F. Supp. 3d at 975-76.

One other aspect of this case appears relevant to the "wholly groundless" inquiry. Throughout the meet and confer process, and in their Motion, Defendants refused to admit to being bound by the Terms of Use – the very contract under which Defendants seek to compel arbitration. Instead, Defendants maintain that Reflex is equitably estopped from denying the existence of a valid agreement to arbitrate because the FAC alleges that each of the Defendants agreed to the Terms of Use. (Motion, 6-7, n. 2; FAC ¶¶ 3, 45.)

However, in their Reply, Defendants admit:

> Notably, while Reflex repeatedly contends in its Opposition that Defendants have denied the existence of a valid arbitration agreement, *Defendants have done no such thing*. Rather, Defendants have merely declined at this juncture – i.e., prior to filing a responsive pleading – to admit one way or another whether they are bound by the entirety of the Terms of Use that they are alleged to have breached. Nevertheless, even if some of those terms are found to be unenforceable against Defendants, the arbitration provision itself would be severable from the rest of the agreement and enforceable against all parties. . . . In any event, by the very fact that Defendants are the parties seeking to compel arbitration here, they are obviously not denying that a valid arbitration agreement exists that would mandate arbitration of Reflex's claims.

(Reply, 5-6 (italics in original, underline added).)

Despite previous gamesmanship as to the applicability of the Terms of Use, Defendants' Reply satisfies the Court's review at this stage of the proceedings that an agreement to arbitrate exists between the parties. Beyond this limited review, the issue of the existence and validity of an arbitration agreement has been delegated to the arbitrator to decide in the first instance. Brennan, 796 F.3d at 1130.

Conclusion

For the foregoing reasons, the Court grants Defendants' Motion to Compel Arbitration. This matter is referred to arbitration.

The Court hereby stays this action. See Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1371 (Fed. Cir. 2006) ("If the court finds that the assertion of arbitrability is not 'wholly groundless,' then it should stay the trial of the action pending a ruling on arbitrability by an arbitrator."). The Court orders this action removed from the Court's active caseload until further application by the parties or order of

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this Court. Reflex and Defendants are ordered to commence an arbitration proceeding by no later than August 18, 2016. The parties shall file a Joint Status Report within two weeks of the completion of the arbitration. If the arbitration is not completed by February 20, 2017, the parties shall file a periodic Joint Status Report beginning on that date and continuing every three months until the arbitration is completed. Failure to file a required Joint Status Report may result in dismissal of this action without prejudice.