IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

DANIEL RODERICK TALHELM, Plaintiff, vs. DIAMOND RESORTS HAWAII COLLECTION DEVELOPMENT LLC, a Delaware Limited Liability Company, ET AL., Defendants.	)	CIVIL 16-00593 LEK-KSC

ORDER GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND TO STAY THIS ACTION

On January 26, 2017, Defendants Diamond Resorts Hawai`i Collection Development LLC, Diamond Resorts Financial Services, Inc., Diamond Resorts Developer and Sales Holding Co., West Maui Resort Partners, L.P. (collectively "Diamond Resorts"), and Todd Brown ("Brown" and all collectively "Defendants") filed a Motion to Compel Arbitration and to Stay This Action ("Motion"). [Dkt. no. 20.] Plaintiff Daniel Roderick Talhelm ("Plaintiff") filed his memorandum in opposition on March 13, 2017, and Defendants filed their reply on March 20, 2017. [Dkt. nos. 25, 27.] In an Entering Order filed on April 18, 2017, the Court ordered supplemental briefing on this matter. [Dkt. no. 29.] Defendants filed their supplemental brief on April 28, 2017 ("Defendants' Supplemental Brief"), and Plaintiff filed his supplemental brief on May 4, 2017 ("Plaintiff's Supplemental

Brief"). [Dkt. nos. 30, 31.] The Court finds this matter suitable for disposition without a hearing pursuant to Rule LR7.2(d) of the Local Rules of Practice of the United States District Court for the District of Hawai`i ("Local Rules"). In an Entering Order filed on June 27, 2017 ("6/27/17 EO"), the Court granted the Motion. [Dkt. no. 32.] The instant Order supersedes the 6/27/17 EO. Defendant's Motion is hereby granted for the reasons set forth below.

BACKGROUND

Plaintiff filed his Complaint on November 2, 2016. [Dkt. no. 1.] Plaintiff states that, in January 2015, he purchased a trial timeshare from Diamond Resorts, and that, thereafter, Brown subjected him to aggressive sales tactics aimed at convincing him to purchase a regular membership. [Complaint at ¶¶ 22-24.] These alleged tactics included, *inter alia*: misrepresenting the services Plaintiff would receive if he purchased a timeshare; falsely claiming that Diamond Resorts had purchased kayak.com;[1] claiming that a timeshare membership entitled Plaintiff to a discount at almost any "rental accommodation property that the Plaintiff could locate on the internet"; and claiming that the timeshare membership entitled him to a discount on reservations made through the website

[1] Kayak.com is an internet travel reservation company. [Complaint at ¶ 26.]

Airbnb.com.[2] [Id. at ¶¶ 25-28.] As a result of the misinformation and false promises, Plaintiff purchased a timeshare from Diamond Resorts. [Id. at ¶ 29.] Plaintiff contends that Diamond Resorts either knew about and encouraged Brown's actions, or, alternatively, failed to "adequately manage" Brown and "protect consumers from his unlawful, misleading, and/or deceptive sales tactics." [Id. at ¶¶ 30-31.]

Plaintiff signed the Credit Sale Contract ("the Contract") on January 25, 2016. [Id. at ¶ 32.] Plaintiff contends that, on March 10, 2016, he received disclosures required by Haw. Rev. Stat. Chapter 514E. [Id. at ¶¶ 33-34, 39.] Plaintiff asserts that he could not ascertain that Brown's representations were false until after he received these materials. [Id. at ¶ 38.] After realizing that many of Brown's promises were not part of his agreement with Diamond Resorts, Plaintiff tried to contact Brown. [Id. at ¶¶ 40-42.] Plaintiff also attempted to contact Diamond Resorts, but both efforts proved fruitless. [Id. at ¶¶ 45-46.]

On March 16, 2016, within seven days of receiving the aforementioned materials, Plaintiff issued a notice that he was terminating the Contract and canceling his Timeshare Plan purchase. [Id. at ¶¶ 48-49.] Diamond Resorts has refused to

[2] Airbnb is an internet lodging reservation company. [Id. at ¶ 28.]

cancel the Contract and/or refund any money to Plaintiff. In addition, Plaintiff asserts that he has not received a number of disclosure statements. [Id. at ¶¶ 51-54.]

Plaintiff brings claims for: civil conspiracy, in violation of Haw. Rev. Stat. Chapters 514E and 480 ("Count I"); [id. at ¶¶ 56-61;] vicarious liability ("Count II"); [id. at ¶¶ 62-66;] fraud ("Count III"); [id. at ¶¶ 67-77;] fraudulent inducement ("Count IV"); [id. at ¶¶ 78-88;] negligent, intentional, and/or fraudulent misrepresentation ("Count V"); [id. at ¶¶ 89-96;] unjust enrichment ("Count VI"); [id. at ¶¶ 97-101;] violation of Haw. Rev. Stat. § 514E-8 ("Count VII"); [id. at ¶¶ 102-11;] violation of Haw. Rev. Stat. § 514E-9.1 ("Count VIII"); [id. at ¶¶ 112-16;] violation of Haw. Rev. Stat. § 514E-11 ("Count IX"); [id. at ¶¶ 117-21;] violation of Haw. Rev. Stat. § 514E-11.1 ("Count X"); [id. at ¶¶ 122-28;] violation of Haw. Rev. Stat. Chapter 480 ("Count XI"); [id. at ¶¶ 129-32;] alter ego ("Count XII"); [id. at ¶¶ 133-35;] and conversion and/or misappropriation ("Count XIII") [id. at ¶¶ 136-38]. Plaintiff seeks: general and specific damages; a declaratory ruling that the Contract is void; the return of any payment Plaintiff made to Defendants; relief available under Haw. Rev. Stat. Chapters 514E and 480, including possible treble damages; punitive damages; attorneys' fees and costs; and "other and further relief as the Court may deem just and proper under the

circumstances." [Id., Prayer for Relief ¶¶ A-H.]

STANDARD

This district has stated:

> In determining whether to compel arbitration, a district court may not review the merits of the dispute; rather, "the district court's role is limited to determining whether a valid arbitration agreement exists and, if so, whether the agreement encompasses the dispute at issue. If the answer is yes to both questions, the court must enforce the agreement." Lifescan, Inc. v. Premier Diabetic Servs., Inc., 363 F.3d 1010, 1012 (9th Cir. 2004) (citing Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000)); see also Momot v. Mastro, 652 F.3d 982, 986 (9th Cir. 2011) ("Because arbitration is fundamentally a matter of contract, the central or primary purpose of the [Federal Arbitration Act ("FAA")] is to ensure that private agreements to arbitrate are enforced according to their terms.") (citations omitted).
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> The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2; see also Kramer v. Toyota Motor Corp., 705 F.3d 1122, 1126 (9th Cir. 2013) ("With limited exceptions, the [FAA] governs the enforceability of arbitration agreements in contracts involving interstate commerce."). Under the FAA, "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." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).
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> Generally, "the federal policy in favor of arbitration does not extend to deciding questions of arbitrability," that is, the question "who decides whether a claim is arbitrable." Oracle Am., Inc. v. Myriad Group A.G., 724 F.3d 1069,

> 1072 (9th Cir. 2013) (emphasis omitted). "[G]ateway questions of arbitrability, such as whether the parties have a valid arbitration agreement or are bound by a given arbitration clause, and whether an arbitration clause in a concededly binding contract applies to a given controversy," are issues for the court and not the arbitrator to decide. Momot, 652 F.3d at 987 (citing Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83-85 (2002)). But parties may agree to arbitrate the question of arbitrability. Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter. Significantly, . . . binding Circuit precedent requires courts to allow the arbitrator to determine arbitrability where an agreement to arbitrate incorporates the rules of the American Arbitration Association [("AAA")].

Pelayo v. Platinum Limousine Servs., Inc., CIVIL NO. 15-00023 DKW-BMK, 2015 WL 9581801, at *11-12 (D. Hawai`i Dec. 30, 2015) (some alterations in Pelayo). In Brennan v. Opus Bank, the Ninth Circuit held "that incorporation of the AAA rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability." 796 F.3d 1125, 1130 (9th Cir. 2015).

DISCUSSION

The Contract at issue in the instant matter includes an arbitration clause ("Arbitration Clause"), which states:

> **IN THE EVENT OF A DISPUTE BETWEEN YOU AND THE SELLER WITH RESPECT TO THE SELLER'S PERFORMANCE UNDER THIS AGREEMENT, THE MATTER IN QUESTION MAY, IN SELLER'S SOLE DISCRETION, BE SETTLED BY ARBITRATION IN ACCORDANCE WITH THE COMMERCIAL**

> **ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION.** If a matter in dispute is referred to arbitration, you and the seller must each pay one-half (½) of the fees and expenses required to start the arbitration. You and the seller agree, however, that the arbitrator will decide who must pay the costs and expenses of the arbitration, including attorneys' fees. You and the seller also agree that any arbitration in connection with this Agreement will be conducted in the City and County of Honolulu, and that the decision of the arbitrator with respect to any such matter in dispute will be final and binding and dispositive of the seller's and your rights and obligations.
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> Regardless of what this Subparagraph 10(b) may say to the contrary, however, if the seller is unable or fails to comply with the material provisions of this Agreement, then the seller's sole obligation is to refund or cause escrow agent to refund (whichever applies) to you all payments that you previously made under this Agreement, without interest. When your refund has been made, then this Agreement will be deemed canceled, and all rights and obligations under it will immediately terminate. **YOU HEREBY GIVE UP (IN LEGAL TERMS, "WAIVE") ANY AND ALL RIGHTS AND REMEDIES THAT YOU MIGHT OTHERWISE HAVE AT LAW OR IN EQUITY EXCEPT FOR ANY RIGHTS AND REMEDIES THAT, BY LAW, YOU CANNOT WAIVE. THIS WAIVER DOES NOT APPLY, HOWEVER, TO ANY CLAIM OR DEFENSE ARISING OUT OF THIS SALE AND THAT YOU MAY HAVE AGAINST THE SELLER OR AN ASSIGNEE OF THE SELLER.**

[Motion, Decl. of Joni-May Balancio, Exh. A (the Contract) at ¶ 10(b) (emphases in original).] Defendants seek to enforce this clause because "it is clear that the Contract requires the claims raised by the Complaint to be resolved through binding arbitration." [Mem. in. Supp. of Motion at 5.] Plaintiff raises two arguments in response: (1) the arbitration clause does not encompass the present issues because "none of the Plaintiff's

claims arise from allegations regarding [Defendants'] performance under the [Contract]"; [Mem. in Opp. at 6-7;] and (2) the arbitration clause itself is invalid because it was not the product of bilateral consideration and mutual obligation [id. at 10]. The Court will address each of these in turn.

I. The Scope of the Arbitration Clause

Plaintiff argues that, "as the Plaintiff's claims within the Complaint do not relate to [Defendants'] performance under the [Contract], the Arbitration Clause does not serve to make Plaintiff's claims arbitrable in the case herein." [Mem. in Opp. at 7.] Defendants argue that, "[b]ecause the arbitration provision in the present case incorporates the [AAA] rules, Defendants' Motion should be granted and the arbitrator should decide whether or not the claims are arbitrable in the first place." [Reply at 9-10.] Defendants correctly point out that the Arbitration Clause incorporates AAA rules, and the scope of the Arbitration Clause must therefore be determined by the arbitrator. See Pelayo, 2015 WL 9581801, at *12. Consequently, the remainder of Plaintiff and Defendants' arguments about the scope of the Arbitration Clause are irrelevant.

II. The Validity of the Arbitration Clause

Defendants argue that Plaintiff "does not challenge the delegation clause found in the AAA Rules" and "[t]herefore, the court should allow the arbitrator to determine the arbitrabiltiy

of the complaint, as the court did in Brennan." [Defs.' Suppl. Brief at 5.] Plaintiff counters that he "argued in the Opposition that no agreement to arbitration exists because of the specific language in the Arbitration Clause," and that he "has specifically challenged the validity of the Arbitration Clause itself." [Pltf.'s Suppl. Brief at 5-6 (emphasis omitted).]

In Brennan, the Ninth Circuit examined the United States Supreme Court's decision in Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63 (2010), and explained:

> We conclude that Rent-A-Center controls the present case. Here, three agreements – each nested inside the other – are relevant to our analysis: (1) Brennan's Employment Agreement, (2) the Arbitration Clause (section 16), and (3) the Delegation Provision (i.e., incorporation of the AAA rules which delegates enforceabiltiy questions to the arbitrator). The last two are separate agreements to arbitrate different issues. Thus, just like in Rent-A-Center, multiple severable arbitration agreements exist. The arbitration clause at issue, as in Rent-A-Center, is the Delegation Provision because that is the arbitration agreement Opus Bank seeks to enforce.

796 F.3d at 1133.[3] Other district courts in the Ninth Circuit

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[3] In Brennan, the Ninth Circuit also stated:

> Our holding today should not be interpreted to require that the contracting parties be sophisticated or that the contract be "commercial" before a court may conclude that incorporation of the AAA rules constitutes "clear and unmistakable" evidence of the parties' intent. Thus, our holding does not foreclose the possibility that this rule could also apply to unsophisticated parties or to consumer contracts.

(continued...)

have stated:

> The parties may determine by contract whether the arbitrator or the court decides a particular issue, including the question of whether a particular matter is arbitrable. Rent-A-Center, West, Inc., 561 U.S. at 69-70. Arbitrability presumptively is resolved by the court "[u]nless the parties clearly and unmistakably provide otherwise." Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (alteration in original, quotation omitted).
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> A provision in an arbitration agreement that delegates questions of arbitrability to the arbitrator is severable from the rest of an arbitration agreement and constitutes "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 on any other." Rent-A-Center, West, Inc., 561 U.S. at 70; Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445-46 (2006). As a result, if the parties clearly and unmistakably delegate arbitrability questions to the arbitrator, the arbitrator decides arbitrability unless the party resisting arbitration specifically challenges the enforceability of the delegation provision. Rent-A-Center, 561 U.S. at 70. "In other words, when a plaintiff's legal challenge is that [an arbitration agreement] as a whole is unenforceable, the arbitrator decides the validity of the contract, including derivatively the validity of its constituent provisions (such as the [delegation] clause)." Bridge Fund Capital Corp. v. Fastbucks Franchise Corp., 622 F.3d 996, 1000 (9th Cir. 2010). "However, when a plaintiff argues that [a delegation] 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

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[3](...continued)

Brennan, 796 F.3d at 1130. Plaintiff does not make any argument regarding the sophistication of the relevant parties.

> court." Id. The "material question is whether the challenge to the arbitration provision is severable from the challenge to the contract as a whole." Id. at 1001.
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> Here, the arbitration agreement that [the defendant] initially seeks to enforce is the provision delegating arbitrability questions to the arbitrator. The parties clearly and unmistakably set forth in the arbitration agreement that any dispute, including the arbitrability of any issue, is a matter for the arbitrator to decide. As a result, the question of arbitrability is for the arbitrator unless [the plaintiff] specifically challenges the enforceability of the delegation provision.

Gibbs-Bolender v. CAG Acceptance, LLC, No. 2:14-CV-01684-APG-GWF, 2015 WL 685217, at *3 (D. Nev. Feb. 18, 2015) (some alterations in Gibbs-Bolender) (some citations omitted) . Here, the Arbitration Clause states that a dispute may "be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association."[4] (Emphasis omitted.) Plaintiff challenges only the Arbitration Clause, and not the incorporation of the AAA rules, which constitutes the delegation provision in the Contract.[5] Accordingly, any question about the

[4] Rule 7 of the American Arbitration Association Commercial Arbitration Rules and Medication Procedures states, in relevant part, 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 or to the arbitrability of any claim or counterclaim."

[5] Plaintiff appears to suggest that challenging the Arbitration Clause is the same as challenging a delegation provision. See, e.g., Pltf.'s Suppl. Brief at 2 ("Plaintiff extensively challenged the validity of the Arbitration Clause (continued...)

validity of the Arbitration Clause must be decided by the arbitrator.[6]

III. Law of the Case

Finally, Plaintiff requests that, even if the Court grants the Motion, it should apply the "law of the case" to treat the alleged facts in the Complaint as established. [Mem. in Opp. at 13-14.] No case law authority is provided to support this position. In addition, Plaintiff's request goes beyond what a Court is permitted to consider on a motion to compel arbitration.

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[5](...continued)
(i.e., the provision that specifically delegates arbitrability)"), 7 ("Indeed, as the Plaintiff here has raised a direct and distinct challenge [to] the Arbitration Clause (or 'Delegation Provision' as termed in Brennan) in its Opposition, the issue of arbitrability shall be decided by this Court."). As evidenced by the cases cited herein, this is incorrect.

[6] While not necessary for the purposes of the instant Motion, the Court notes that Plaintiff cites its decision in Johnson v. F/V Kilauea, CIVIL 15-00065 LEK-KJM, 2016 WL 1611580 (D. Hawai`i Apr. 22, 2016), to support its claim that the Arbitration Clause is unenforceable. See Mem. in Opp. at 10-13. In Johnson, the Court determined that the plaintiffs were seamen for purposes of the FAA exemption, and that the relevant arbitration clause lacked bilateral consideration because the "[d]efendants may unilaterally choose the arbitration body that conducts any binding arbitration proceeding." 2016 WL 1611580, *2-3. Plaintiff alleges that the Court should apply the same reasoning here because he "is subjected to unilateral changes made by the Defendants' sole discretion to arbitrate." See Mem. in Opp. at 10. Here, the Arbitration Clause reserves the right to choose arbitration to Defendants, but this was not the type of "unilateral change" contemplated in Johnson or the cases cited therein. See Johnson, 2016 WL 1611580, at *3 n.2 (collecting cases finding arbitration clauses illusory). Although Defendants have the power to choose to arbitrate a dispute, they cannot change how that arbitration is conducted.

See Pelayo, 2015 WL 9581801, at *11. For these reasons, Plaintiff's request is denied.[7]

In sum, the Court compels arbitration and dismisses the Complaint in its entirety. See, e.g., Lexington Ins. Co. v. Centex Homes, 795 F. Supp. 2d 1084, 1090 (D. Hawai`i 2011) ("A stay, however, is not mandatory and the court may alternatively dismiss those claims that are subject to arbitration." (some citations omitted) (citing Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1060 (9th Cir. 2004))).

CONCLUSION

On the basis of the foregoing, Defendants' Motion to Compel Arbitration and to Stay This Action, filed on January 26, 2017, is HEREBY GRANTED and this case is DISMISSED WITHOUT PREJUDICE. The Clerk's Office is hereby directed to enter judgment and close this case on **August 16, 2017,** unless either party files a motion for reconsideration by **August 14, 2017**.

IT IS SO ORDERED.

[7] Plaintiff also argues that, "[a]s the Opposition shows that the dispute is not related to [Defendants'] performance under the agreement, the [Defendants] lack[] authority or the 'discretion' to evoke the Arbitration [C]lause or delegate arbitrability." [Pltf.'s Suppl. Brief at 9.] This argument simply restates Plaintiff's argument regarding the scope of the Arbitration Clause. See *supra* Section I. Accordingly, it must be rejected.

DATED AT HONOLULU, HAWAII, July 26, 2017.

/s/ Leslie E. Kobayashi
Leslie E. Kobayashi
United States District Judge

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