UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES - GENERAL

Case No.	**CV 18-10529 FMO (AGRx)**	Date	**June 10, 2019**
Title	**Mary Brittain v. Navient Solutions, LLC**		

Present: The Honorable	Fernando M. Olguin, United States District Judge	
Vanessa Figueroa	None	None
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorney Present for Plaintiffs:	Attorney Present for Defendants:
None Present	None Present

Proceedings: (In Chambers) Order Re: Motion to Compel Arbitration

Having reviewed and considered all the briefing filed with respect to defendant Navient Solutions, LLC's ("defendant"), Motion to Compel Arbitration and Dismiss Case[] (Dkt. 17, "Motion"), the court finds that oral argument is not necessary to resolve the Motion, see Fed. R. Civ. P. 78; Local Rule 7-15; Willis v. Pac. Mar. Ass'n, 244 F.3d 675, 684 n. 2 (9th Cir. 2001), and concludes as follows.

BACKGROUND

Plaintiff Mary Brittain ("plaintiff") has outstanding student loans. (See Dkt. 1, Complaint at ¶¶ 9, 14). At first, her payments, which she began making in 2008, were "consistent" and "on-time[.]" (Id. at ¶¶ 14-15). But in 2017, plaintiff experienced financial difficulties, and stopped making payments to defendant. (See Dkt. 1, Complaint at ¶ 16). Beginning in August 2017, defendant started calling plaintiff on her cell phone in an attempt to collect on the student loan. (See id. at ¶ 18). During an October 3, 2017, call, plaintiff "unequivocally revoked consent to be called any further regarding any of her Navient accounts." (See id. at ¶¶ 20, 23). But defendant kept calling plaintiff. (See id. at ¶¶ 25-47). Although plaintiff continued to tell defendant's representatives that she revoked permission for them to call her, (see id. at ¶¶ 30-33, 35, 37, 45), defendant nevertheless called plaintiff approximately 250 times between August 2017 and November 2018. (See id. at ¶ 47).

Plaintiff filed the instant action asserting causes of action for (1) violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227; (2) violations of the Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code §§ 1788, et seq.; and (3) invasion of privacy. (See Dkt. 1, Complaint at ¶¶ 70-80). The present dispute arises from arbitration agreements contained in two promissory notes plaintiff signed when she took out her student loans. The first of these agreements states: "You and I agree that either party may elect to arbitrate–and require the other party to arbitrate–any Claim under the following terms and conditions." (Dkt. 17-1, Declaration of Andrew

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Reinhart ("Reinhart Decl."), Exh. A ("First Note") at 12).[1] The agreement defines "I," "me" and "my" to "mean each and every Borrower and Cosigner on the Note," and "You," "your" and "yours" to "mean the Lender[.]" (Id.). The First Note defines "Claim" to "mean any claim, dispute or controversy between [the Lender] and [the Borrower] that arises from or relates in any way to the Note[.]" (Id.).

"To initiate an arbitration," the Lender or the Borrower "must give written notice of an election to arbitrate. . . . If such a notice is given, the Claim shall be resolved by arbitration under this Arbitration Agreement and the applicable rules of the Administrator then in effect. I must select the Administrator when I give notice of my election to arbitrate or within 20 days of your notice; otherwise, you will select the Administrator." (Dkt. 17-1, First Note at 12). Finally, the First Note defines "Administrator" to "mean[], as applicable, the American Arbitration Association . . . or the National Arbitration Forum . . . provided that the Administrator must not have in place a formal or informal policy that is inconsistent with and purports to override the terms of this Arbitration Agreement." (Id.).

The second arbitration agreement is substantially identical to the first and it states that, "[t]o the extent permitted under federal law, you and I agree that either party may elect to arbitrate–and require the other party to arbitrate–any Claim under the following terms and conditions." (Dkt. 17-1, Reinhart Decl., Exh. B ("Second Note") at 22). It, too, identifies the American Arbitration Association ("AAA") and the National Arbitration Forum ("NAF") as the two possible administrators. (See id.). The Second Note also empowers plaintiff to select the administrator. (See id.) ("The party bringing a Claim selects the Administrator.").

On December 19, 2018, plaintiff filed suit in this court. (See Dkt. 1, Complaint). Thereafter, in February 2019, plaintiff's attorney contacted counsel for defendant regarding arbitration. (See Dkt. 18-1, Declaration of Brian Brazier ("Brazier Decl.") at ¶ 3). Plaintiff's attorney requested that, because NAF was no longer available to serve as the administrator, this matter should be arbitrated before JAMS. (See id.). Defendant refused, insisting that arbitration take place before the AAA. (See id.).

LEGAL STANDARD

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, et seq., provides that written arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA reflects "both a liberal federal policy favoring arbitration[] and the fundamental principle that arbitration is a matter of contract[.]"

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[1] The court notes that Mr. Reinhart invokes 28 U.S.C. § 1749 in attesting, under penalty of perjury, that the contents of his declaration are correct. (See Dkt. 17-1, Reinhart Decl. at ECF 104. However, the proper statute for making such attestations is 28 U.S.C. § 1746.

AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339, 131 S.Ct. 1740, 1745 (2011) (citations and internal quotation marks omitted). "The basic role for courts under the FAA is to determine (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." Kilgore v. KeyBank, Nat'l Ass'n, 718 F.3d 1052, 1058 (9th Cir. 2013) (en banc) (internal quotation marks omitted). "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. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000).

The FAA "calls on courts to 'rigorously enforce agreements to arbitrate.'" Samson v. NAMA Holdings, LLC, 637 F.3d 915, 923 (9th Cir. 2010) (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221, 105 S.Ct. 1238, 1242 (1985)). It creates "a body of federal substantive law of arbitrability," Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S.Ct. 927, 941 (1983), which "preempts contrary state law." Mortensen v. Bresnan Commc'ns, LLC, 722 F.3d 1151, 1158 (9th Cir. 2013). "In other words, a court cannot enforce state laws that apply to agreements to arbitrate but not to contracts more generally." Poublon v. C.H. Robinson Co., 846 F.3d 1251, 1260 (9th Cir. 2017); see Perry v. Thomas, 482 U.S. 483, 492 n. 9, 107 S.Ct. 2520, 2527 n. 9 (1987) ("[S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.") (emphasis in original). "[E]ven generally applicable state-law rules are preempted if in practice they have a 'disproportionate impact' on arbitration or 'interfere[] with fundamental attributes of arbitration and thus create [] a scheme inconsistent with the FAA.'" Mortensen, 722 F.3d at 1159 (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 342-44, 131 S.Ct. 1740, 1747-48 (2011)). "[A]ny 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., 460 U.S. at 24-25, 103 S.Ct. at 941; see Tompkins v. 23andMe, Inc., 840 F.3d 1016, 1022 (9th Cir. 2016) ("Any doubts about the scope of arbitrable issues, including applicable contract defenses, are to be resolved in favor of arbitration."); see also Nguyen v. Applied Med. Res. Corp., 4 Cal.App.5th 232, 247 (2016) ("In keeping with California's strong public policy in favor of arbitration, any doubts regarding the validity of an arbitration agreement are resolved in favor of arbitration.").

"The party seeking to enforce an arbitration agreement bears the burden of showing that the agreement exists and that its terms bind the other party." Gelow v. Cent. Pac. Mortg. Corp., 560 F.Supp.2d 972, 978 (E.D. Cal. 2008); see Sanford v. MemberWorks, Inc., 483 F.3d 956, 963 n. 9 (9th Cir. 2007) ("The district court, when considering a motion to compel arbitration which is opposed on the ground that no agreement to arbitrate had been made between the parties, should give to the opposing party the benefit of all reasonable doubts and inferences that may arise.") (internal quotation marks omitted). Once the moving party has met this initial burden, "the party resisting arbitration bears the burden of establishing that the arbitration agreement is inapplicable." Wynn Resorts, Ltd. v. Atl.-Pac. Capital, Inc., 497 F.Appx. 740, 742 (9th Cir. 2012); see Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC, 55 Cal.4th 223, 236 (2012) ("[T]he party

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opposing arbitration bears the burden of proving any defense, such as unconscionability."). "When evaluating a motion to compel arbitration, courts treat the facts as they would when ruling on a motion for summary judgment, construing all facts and reasonable inferences that can be drawn from those facts in a light most favorable to the non-moving party." Totten v. Kellogg Brown & Root, LLC, 152 F.Supp.3d 1243, 1249 (C.D. Cal. 2016) (internal quotation marks omitted); see Geoffroy v. Wash. Mut. Bank, 484 F.Supp.2d 1115, 1119 (S.D. Cal. 2007) ("Courts have employed a summary judgment approach for such hearings [on motions to compel arbitration], ruling as a matter of law where there are no genuine issues of material fact."); Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc., 925 F.2d 1136, 1141 (9th Cir. 1991) ("Only when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such an agreement[, and the court] should give to the opposing party the benefit of all reasonable doubts and inferences that may arise.") (internal quotation marks omitted).

DISCUSSION

The arbitration agreements provide for plaintiff to choose between two possible administrators – AAA or NAF – to conduct the arbitration. (See Dkt. 17-1, First Note at 12; id., Second Note at 22). Plaintiff "does not oppose, nor has she ever opposed, arbitration as a general matter." (Dkt. 18, Opposition to[] Motion To Compel Arbitration[] ("Opp.") at 1). However, in July 2009, NAF entered into a consent decree with the State of Minnesota in which it agreed to no longer administer consumer arbitrations. (See Dkt. 18-1, Brazier Decl. at ¶ 2). In other words, the AAA is the only remaining administrator, as the NAF is no longer available to arbitrate the instant matter. (See Dkt. 18-1, Brazier Decl. at ¶ 3).

Plaintiff does not want to proceed with the AAA as the administrator and, invoking the FAA, argues that the court should "appoint an arbitrator" other than AAA. (See Dkt. 18, Opp. at 1). According to plaintiff, because the arbitration agreements give her "the right to elect before which of two forums [she] may arbitrate her claims," forcing her to arbitrate before the AAA "would deprive [her] of her right to choose a forum other than AAA[.]" (Id. at 5). Plaintiff relies on Reddam v. KPMG LLP, 457 F.3d 1054 (9th Cir. 2006), abrogated on other grounds by Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 127 S.Ct. 2411 (2007), to support her argument that she should be able to proceed before an administrator other than the AAA. (See Dkt. 18, Opp. at 5).

In Reddam, the pertinent arbitration clause stated that "any arbitration under this agreement shall be determined pursuant to the rules then in effect of the National Association of Securities Dealers, Inc." 457 F.3d at 1059 (internal quotation marks and alteration omitted). Subsequently, the National Association of Securities Dealers ("NASD") "refused to act as the arbitrator" of the parties' dispute. Id. The district court "determined that [the] arbitration agreement had become unenforceable" and remanded the action to state court. Id. at 1056. The Ninth Circuit reversed, reasoning that under the arbitration agreement, "there was not even an express statement that

the NASD would be the arbitrator." Id. at 1060. The Ninth Circuit reasoned that there was no evidence "that naming of the NASD was so central to the arbitration agreement that the unavailability of that arbitrator brought the agreement to an end[.]" Id. at 1061.

Plaintiff's reliance on Reddam is unpersuasive because the court in that case did "not suggest that other arbitral fora can be utilized when the one selected by the parties is itself available." 457 F.3d at 1061. And here, there exists an available arbitral forum "selected by the parties," i.e., the AAA.

Moreover, plaintiff's invocation of FAA § 5 is unpersuasive. Section 5 provides that:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C. § 5. Section 5 invests the court with "authority to appoint an arbitrator only if the arbitration agreement does not specify an arbitrator, or the arbitrator fails to perform." Harding v. Diamond Resorts Holdings, LLC, 2017 WL 6378967, *5 (D. Nev. 2017). Here, "[a]lthough there is no dispute that NAF is unavailable as an arbitral forum," the fact that "one forum remains" means that "the Court need not exercise its discretion to appoint a substitute arbitrator." Id.

The court is cognizant of the fact that "[t]he [FAA] requires [it] to enforce covered arbitration agreements according to their terms." Lamps Plus, Inc. v. Varela, 139 S.Ct. 1407, 1412 (2019). Here, the plain terms of the parties' arbitration agreements permit the selection of one of two administrators. (Dkt. 17-1, First Note at 12; Dkt. 17-1, Second Note at 22). Now that one of those two prospective administrators has become unavailable, the court declines to go beyond "the plain terms of the agreement[s]" to appoint an administrator not contemplated in those agreements. Kressy v. Larry Flynt's Hustler Club San Francisco, 2008 WL 162533, *1 (N.D. Cal. 2008).

CONCLUSION

This Order is not intended for publication. Nor is it intended to be included in or submitted to any online service such as Westlaw or Lexis.

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Based on the foregoing, IT IS ORDERED THAT:

1. Defendant's Motion to Compel Arbitration and Dismiss Case[] **(Document No. 17)** is **granted** insofar as it requests arbitration of plaintiff's claims before the American Arbitration Association.

2. Defendant's Motion to Stay Discovery and Other Proceedings[] **(Document No. 21)** is **denied** as moot.

3. The above-referenced action is **stayed** pending resolution of the arbitration proceedings. The Clerk shall administratively close the case. See Dees v. Billy, 394 F.3d 1290, 1293-94 (9th Cir. 2005).

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