UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV17-02347 JAK (FFMx)	Date	August 4, 2017
Title	The Sales Group, Inc. v. Relm Wireless Corp.		

Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Andrea Keifer	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) ORDER RE DEFENDANT'S MOTION TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, TO STAY THE ACTION PENDING ARBITRATION (DKT. 18); ; DEFENDANT'S MOTION TO STRIKE DECLARATION OF LARRY WEBER IN SUPPORT OF PLAINTIFF'S REPLY TO DEFENDANT'S MOTION TO DISMISS COMPLAINT OR TO STAY MATTER PENDING ARBITRATION (DKT. 34)**

I. Introduction

The Sales Group, Inc. ("Plaintiff") brought this action against Relm Wireless Corp. ("Defendant") due to a dispute over payment of sales commissions. Dkt. 1. The Complaint advances the following claims: (i) breach of oral contract; (ii) violation of Cal. Civ. Code §§ 1738.10, *et seq*.; (iii) violation of Arizona Revised Statutes §§ 44-1798, *et seq*.; and (iv) an accounting. On May 4, 2017, Defendant filed a motion to dismiss ("Motion to Dismiss") that is based on a claimed arbitration agreement. Dkt. 18. Plaintiff opposed the Motion to Dismiss (Dkt. 31), and Defendant replied. Dkt. 35. On June 15, 2017, Defendant filed a Motion to Strike the Declaration of Larry Weber ("Motion to Strike"). Dkt. 34. Plaintiff opposed the Motion to Strike (Dkt. 37), and Defendant replied. Dkt. 40.

On July 24, 2017, a hearing on the motions was held and they were taken under submission. Dkt. 43. For the reasons stated in this Order, the Motions are **DENIED**.

II. Factual Background

Plaintiff is a California corporation whose principal place of business is here. Dkt. 1 ¶ 1. Defendant is a Florida corporation whose principal place of business is there. *Id.* ¶ 2. Until December 31, 2002, Plaintiff worked as an authorized sales representative for Defendant pursuant to a written contract ("Written Contract"). *Id.* ¶ 3. After the Written Contract expired in 2003, Plaintiff continued through March 17, 2017, to perform work as an authorized sales representative of Defendant. *Id.* That is when Defendant allegedly terminated Plaintiff's employment. The Complaint alleges that, through the course of the parties' dealings over the many years since the Written Contract expired, their relationship was governed by an oral contract ("Oral Contract") that included some of the key terms of the Written Contract. *Id.* at ¶ 7. The Complaint alleges that the Oral Contract included the following essential terms of the Written Contract:

> TSG would remain an authorized sales representative for RELM in an exclusive geographic territory, which included California, Nevada, Hawaii, and Arizona, which was TSG's exclusive territory at the time of the effective termination of THE ORAL CONTRACT by RELM; TSG would remain an independent contractor; TSG would be paid a sales commission by RELM ranging from 7% to 20%, depending on the nature of the sale; commissions were to be paid by RELM no later than the 25th day of the month following invoicing to any customer; and, each payment of a sales commission would be accompanied by an accounting statement sufficient for TSG to check the accuracy of the payment.

Id. ¶ 7.

The Complaint alleges that Defendant breached the Oral Contract by taking customer accounts in-house, thereby depriving Plaintiff of its existing customers in its territories, from whom it earned sale commissions. *Id.* ¶ 8. It also alleges that Defendant breached the Oral Contract by terminating it on March 17, 2017 without offering commissions to Plaintiff upon the completion of sales for products that Plaintiff's customers already had ordered. *Id.* The Complaint also alleges that Defendant violated Cal. Civ. Code §§ 1738.10, *et seq*. by failing to provide Plaintiff with a written contract after 2002. *Id.* ¶¶ 11-12. It also alleges that Defendant's failure to pay commissions that are due, violated Arizona Revised Statutes § 44-1798, *et seq*. *Id.* ¶¶ 14-15.

III. Analysis

A. Legal Standards

1. Motion to Dismiss

Fed. R. Civ. P. 8(a) provides that a "pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." The complaint must state facts sufficient to show that a claim for relief is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint need not include detailed factual allegations, but must provide more than a "formulaic recitation of the elements of a cause of action." *Id.* at 555. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citations omitted).

Pursuant to Fed. R. Civ. P. 12(b)(6), a party may bring a motion to dismiss a cause of action that fails to state a claim. It is appropriate to grant such a motion only where the complaint lacks a cognizable legal theory or sufficient facts to support one. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In considering a motion to dismiss, the allegations in the challenged complaint are deemed true and must be construed in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However, a court need not "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citing *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

A party who brings a motion under Rule 12(b)(1) may do so based on the face of the pleadings or by presenting extrinsic evidence. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) ("Rule 12(b)(1) jurisdictional attacks can be either facial or factual"). Courts must accept the allegations of a complaint as true in considering a challenge to jurisdiction based on the face of the complaint. *See Valdez v. United States*, 837 F. Supp. 1065, 1067 (E.D. Cal. 1993), *aff'd*, 56 F.3d 1177 (9th Cir. 1995). "By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

2. Arbitration Agreements

The Federal Arbitration Act ("FAA") provides that "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be 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. Under the FAA, the initial inquiry in connection with a motion to compel arbitration is limited to determining "(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). If both of these conditions are met, "the Act requires the court to enforce the arbitration agreement in accordance with its terms." *Id.*

In "addressing threshold questions of arbitrability" a court is "to consider only the validity and scope of the arbitration clause itself." *In re Van Dusen*, 654 F.3d 838, 842 (9th Cir. 2011). Courts often decide "whether the parties are bound by a given arbitration clause" and "disagreement[s] about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). A court can order arbitration only when it is satisfied that parties have agreed to arbitrate the dispute at issue. *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2856 (2010). To make that determination, a court "must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce." *Id.*

B. Application

Defendant argues that this action should be dismissed because Plaintiff agreed to arbitrate any disputes with Defendant. The Written Contract contains an arbitration clause. *See* Ex. 3 to Declaration of Thomas J. Collin ("Collin Decl."), Dkt. 18-1 ¶ 20. Defendant argues that this arbitration clause was incorporated into any subsequent contract, including the alleged Oral Contract. Plaintiff argues that the Oral Contract did not include an agreement to arbitrate or an agreement to incorporate the arbitration clause of the Written Contract.

An arbitration agreement must be in writing to be enforceable under the FAA. 9 U.S.C. §§ 2, 3. "[A]rbitration is a matter of contract." *Samson v. NAMA Holdings, LLC*, 637 F.3d 915, 923 (9th Cir. 2011). "Thus, to evaluate the validity of an arbitration agreement, federal courts should apply ordinary state-law principles that govern the formation of contracts." *Id.* at 924 (internal quotation marks and alterations omitted). "Arbitration provisions can survive expiration of an agreement where (1) 'the dispute is over a provision of the [prior] agreement' and (2) the parties have not indicated a desire to forego arbitration either 'expressly or by clear implication.'" *Thelen Reid Brown Raysman & Steiner LLP v. Marland*, 319 F.

App'x 676, 678-79 (9th Cir. 2009) (quoting *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 255 (1977)). A dispute arises under the expired contract if: "(1) 'it involves facts and occurrences that arose before expiration,' (2) 'an action taken after expiration infringes a right that accrued or vested under the agreement,' or (3) 'under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.'" *Operating Eng'rs Local Union No. 3 v. Newmont Min. Corp.*, 476 F.3d 690, 693 (9th Cir. 2007) (quoting *Litton Fin. Printing Div., Inc. v. NLRB,* 501 U.S. 190, 206 (1991)).

Here, the dispute does not concern the time period covered by the Written Contract. The allegations of breach of contract concern actions by Defendant beginning in 2015 and continuing through March 2017. Dkt. 1 ¶ 8. The Written Contract expired in 2003, and the sales at issue occurred well after that date. Based on these allegations, the Complaint alleges that Defendant breached the Oral Contract by, *inter alia*, withholding sales commissions, requiring Plaintiff to perform additional services to earn sales commissions, and converting some of Plaintiff's accounts to in-house ones managed by Defendant for which Plaintiff would no longer receive sales commissions. *Id.* Because these alleged actions by Defendant occurred more than 12 years after the Written Contract expired, the dispute, as framed in the Complaint, does not "involve[] facts and occurrences that arose before expiration" of the Written Contract on December 31, 2002. *Operating Eng'rs*, 476 F.3d at 693. And, looking to the allegations of the Complaint, there is none that states that the Oral Contract adopted all of the terms of the Written Contract, or that it incorporated or included an arbitration agreement.

As noted, Plaintiff contends that the terms of the Oral Contract were established by the course of dealing between the parties, which did not involve an agreement to arbitrate. Plaintiff also contends that the Oral Contract did not simply adopt all of the terms of the Written Contract. In support of these positions, Plaintiff has offered the declaration of its president, Larry Weber. He states that the Oral Contract differed from the Written Contract by:

> changing our geographic territory; changing our commission structure on main sales, including: making certain fax orders non-commissionable; ceasing to pay sales commissions for sales of B&I products, but requiring us to assist with these sales, nonetheless; ceasing to pay commissions on all federal accounts; changing the commission percentage from 7% to 4% on our sale of Public Safety radios; requiring us to present purchase orders in order to be awarded sales commissions for sales in Arizona, something that was never required for any other territory or type of sale, and then taking all sales in Arizona direct; taking away our three largest revenue producing accounts; and requiring us to provide them with monthly forecasts of expected bookings.

Declaration of Larry Weber, Dkt. 31-1 ¶ 6.[1]

[1] The Motion to Strike seeks to have the declaration disregarded. There, Defendant argues that only the allegations on the face of Complaint can be considered on a motion to dismiss and that the declaration contradicts those allegations. The Motion to Dismiss is brought pursuant to Fed. R. Civ. P. 12(b)(1). Extrinsic evidence may be considered in connection with such a motion in which jurisdiction is challenged. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007). That is the norm when a motion to compel arbitration is brought, inasmuch as the moving party must show the existence of an agreement to arbitrate. Further, the Weber Declaration does not contradict the material allegations of the Complaint. For these reasons, the Motion to Strike is **DENIED**.

This statement is not inconsistent with the allegations of the Complaint. It does not allege that the Oral Contract incorporated all the terms of the Written Contract. Instead, it alleges that the Oral Contract contained "some of the key terms of" the Written Contract. Dkt. 1 ¶ 3. The Complaint identifies the terms of the Written Contract that were allegedly incorporated into the Oral Contract. The arbitration provision is not among them. Thus, it alleges that the following essential terms of the Written Contract were incorporated into the Oral Contract:

> TSG would remain an authorized sales representative for RELM in an exclusive geographic territory, which included California, Nevada, Hawaii, and Arizona, which was TSG's exclusive territory at the time of the effective termination of THE ORAL CONTRACT by RELM; TSG would remain an independent contractor; TSG would be paid a sales commission by RELM ranging from 7% to 20%, depending on the nature of the sale; commissions were to be paid by RELM no later than the 25th day of the month following invoicing to any customer; and, each payment of a sales commission would be accompanied by an accounting statement sufficient for TSG to check the accuracy of the payment.

Id. ¶ 7.

In light of these allegations and the Weber Declaration, and because no competing evidence as to a continuation of the arbitration agreement or all of the terms of the Written Contract has been offered by Defendant, it has not met its burden to show that the claims advanced here are subject to arbitration. This includes a failure to show that the alleged Oral Contract was simply an implied agreement to renew and extend the Written Contract, including its arbitration provision. As stated above, Plaintiff has provided some evidence that the Oral Contract had terms that varied from those of the Written Contract. This determination is without prejudice to the renewal of the arbitration demand following discovery should the evidence provide a good faith basis for doing so.

Defendant cites a few district court decisions where an arbitration agreement from an expired written contract was considered to be part of an implied oral contract that renewed the terms of the written contract. However, those cases did not involve allegations or evidence like that present here*, i.e.,* that material terms of the later implied, oral agreement varied from the prior written one. *See, e.g.*, *Golden State Equity Inv'rs, Inc. v. All. Creative Grp., Inc.*, 2017 WL 1336842, at *4 (S.D. Cal. Apr. 7, 2017) ("Plaintiff, however, alleges that the only implied term of the Warrant is that the expiration date was extended by the parties' conduct. In other words, all other terms of the Warrant agreement that the parties entered into in 2006 remain the same." (citations omitted)); *Riso, Inc. v. Witt Co.*, 2014 WL 3371731, at *20 (D. Or. July 9, 2014) ("After the FY 2008 Dealer Agreement expired, [the plaintiff] clearly continued to believe and assert that the parties' ongoing relationship was governed by the terms and conditions of the FY 2008 Dealer Agreement."); *Acquaire v. Canada Dry Bottling*, 906 F. Supp. 819, 833 (E.D.N.Y. 1995) ("the bulk of plaintiffs' causes of action arose from events that occurred well before September 30, 1990[,]" the date of the expiration of the contract).

For the foregoing reasons, the Motion to Dismiss is **DENIED,** without prejudice to a renewed request to compel arbitration, following appropriate discovery, that is made in good faith, meets the standards of Local Rule 7-18, and presents material evidence that would warrant a different outcome than set forth in this Order.

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IV. Conclusion

For the reasons stated in this Order, the Motions are **DENIED**.

IT IS SO ORDERED.

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Initials of Preparer ak