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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GREGORY INGALLS and TONY HONG,
individually and on behalf of all others
similarly situated,

No. C 16-03533 WHA

Plaintiffs,

v.

SPOTIFY USA, INC., a Delaware
corporation, DOES 1–10, inclusive,

**ORDER DENYING MOTION
TO COMPEL ARBITRATION**

Defendants.

_____ /

INTRODUCTION

In this putative class action, plaintiffs claim that a subscription music streaming service violated a California law provision restricting automatic renewal of a subscription. Defendant, which operated that streaming service, moves to compel arbitration and to stay the case pending arbitration. For the reasons stated below defendant’s motion is **DENIED**.

STATEMENT

Plaintiff Gregory Ingalls signed up to use the free version subscription music streaming service provided by defendant Spotify, Inc., in November 2012. Spotify required subscribers to affirmatively accept an agreement titled “Terms and Conditions of Use” before using the service. Ingalls later signed up for a series of free trials of Spotify’s premium service (which offered music without advertisements and included additional features). Ingalls cancelled his premium subscription in 2013, but continued to use the free service.

1 In September 2015, Spotify updated its Terms and Conditions and presented all users,
2 including Ingalls, with the following notice upon accessing the service:

3 **Updated terms.** We have revised our Terms and Conditions of
4 Use and our Privacy Policy. By clicking “Accept” you accept and
5 agree to these updates, so please take a few minutes to read and
6 understand them.

7 Users could access the referenced agreements by clicking on the words in the notice. In order
8 to continue using Spotify’s service, Ingalls had to affirmatively click “Accept,” which he did on
9 January 7, 2016. Ingalls continued to use the free service.

10 Plaintiff Tony Hong registered for Spotify’s free service in November 2011. Like
11 Ingalls, he was required to accept Spotify’s Terms and Conditions when registering. In
12 December 2015, Hong signed up for Spotify’s premium service with a three-month discount
13 offer. In March 2015, after the three-month discount period ended, Hong’s account converted
14 to the regular price for premium service. Hong cancelled his subscription two days later but
15 restarted it (at full price) in May 2015.

16 As stated, Spotify updated its Terms and Conditions in September 2015, and required
17 users, including Hong, to affirmatively accept the new Terms and Conditions (or quit the
18 service). Users that rejected the amended Terms and Conditions could receive a refund for their
19 monthly subscription fee pro-rated for the part of the month following the amendment, though
20 none sought such a refund.¹

21 Hong accepted the updated agreement that month by clicking the “Accept” button.
22 Hong continued to use his subscription until he canceled it in June 2016 — just days after filing
23 this action. Hong again restarted his subscription in July 2016.

24 Spotify’s updated Terms and Conditions agreement was a lengthy document, but its
25 table of contents included hyperlinks allowing users to navigate from section to section
26 throughout the document. The first section, titled “Introduction,” included a bolded warning
27 that the Terms and Conditions contained, *inter alia*, a class action waiver and an agreement to
28 resolve disputes by arbitration.

¹ Counsel for Spotify represented that such a refund would be available at the hearing on this motion. Although this appears contrary to Section 16 of the Terms and Conditions agreement, this order accepts counsel’s unopposed representation, purely for the sake of argument but notes that if users could not seek a refund

1 Section 2 noted that Spotify could, in its discretion, make changes to the Terms and
2 Conditions agreement, but that it would provide prompt notice of material changes.

3 Section 24 of the Terms and Conditions agreement was titled “Choice of law, mandatory
4 arbitration and venue.” Paragraph 24.3.1 provided:

5 You and Spotify agree that any dispute, claim, or controversy
6 between you and Spotify arising in connection with or relating in
7 any way to these Agreements or to your relationship with Spotify
8 as a user of the Service (whether based in contract, tort statute,
9 fraud, misrepresentation, or any other legal theory, and whether the
10 claims arise during or after the termination of the Agreements) will
11 be determined by mandatory binding individual arbitration.

12 It further explained that arbitration lacked the formality of court proceedings and had no judge
13 or jury, among other limitations.

14 Paragraph 24.2 provided a class action waiver:

15 WHERE PERMITTED UNDER THE APPLICABLE LAW, YOU
16 AND SPOTIFY AGREE THAT EACH MAY BRING CLAIMS
17 AGAINST THE OTHER ONLY IN YOUR OR ITS
18 INDIVIDUAL CAPACITY AND NOT AS A PLAINTIFF OR
19 CLASS MEMBER IN ANY PURPORTED CLASS OR
20 REPRESENTATIVE ACTION. Unless both you and Spotify
21 agree, no arbitrator or judge may consolidate more than one
22 person's claims or otherwise preside over any form of a
23 representative or class proceeding.

24 Paragraph 24.3.3 provided that arbitration would occur before the American Arbitration
25 Association and would be resolved under the “Commercial Dispute Resolution Procedures and
26 the Supplementary Procedures for Consumer Related Disputes of the American Arbitration
27 Association (‘AAA’) then in force.” The arbitrator’s fees would be paid pursuant to the
28 limitations on fees set forth in the AAA’s consumer rules with any balance to be paid by
29 Spotify. Paragraph 24.3.3 noted that the AAA procedures and other information about
30 arbitration could be found at adr.org or by calling the AAA’s phone number (which was
31 provided in the agreement).

32 In actuality, at the time the arbitration agreement was drafted, the AAA website did *not*
33 include any document with the title “Commercial Dispute Resolution Procedures” or
34 “Supplementary Procedures for Consumer Related Disputes of the American Arbitration
35 Association” as indicated in Paragraph 24.3.3. AAA had discontinued those publications and
36 had begun offering the “Consumer Arbitration Rules” in 2014. (Section R-1(a) of the

1 Consumer Arbitration Rules stated that the procedures therein would apply in any arbitration
2 agreement that specified the AAA's "Supplementary Procedures for Consumer-Related
3 Disputes.") Spotify concedes this was a drafting error.

4 Plaintiffs brought this action in June 2016, claiming that Spotify failed to adequately
5 inform them that it would automatically renew their subscriptions at the full price once their
6 trial periods had ended and that Spotify failed to obtain plaintiffs' affirmative consent for that
7 renewal in violation of California law. Spotify now moves to compel arbitration pursuant to the
8 updated Terms and Conditions agreement. It contends the threshold issue of arbitration must be
9 decided by an arbitrator. Failing that, it contends the Court must order arbitration. This order
10 follows full briefing and oral argument.²

11 ANALYSIS

12 Spotify's motion to compel arbitration is governed by the Federal Arbitration Act. 9
13 U.S.C. 1, *et seq.* The FAA requires the resolution of two "gateway" issues: (1) whether a valid
14 agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute
15 at issue. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). If a valid arbitration
16 clause exists, arbitration is mandatory unless the party resisting arbitration can prove a defense
17 to enforcement of the agreement, such as unconscionability. *Pinnacle Museum Tower*
18 *Association v. Pinnacle Market Development (US), LLC*, 55 Cal. 4th 223 (2012).

19 Spotify moves to compel arbitration of this action and also moves to compel arbitration
20 of the threshold issue of arbitrability. This order first turns to the threshold issue.

21 1. DELEGATION CLAUSE.

22 The determination of whether an arbitration clause is valid, applicable, and enforceable
23 is reserved to the district court unless "the parties clearly and unmistakably provide[d]
24 otherwise," such as by delegating the issue of arbitrability to arbitration. *AT&T Technologies,*
25 *Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986). Even if a delegation of
26

27
28 ² The day after plaintiffs filed their opposition brief, our court of appeals decided *Mohamed v. Uber Technologies, Inc.*, No. 15-16178, ___ F.3d ___, 2016 WL 4651409 (9th Cir. Sept. 7, 2016), reversing the district court's denial of the motion to compel arbitration. Because our plaintiffs had relied heavily on the district court decision, an order adjusted the briefing schedule to allow them to supplement their opposition to address

1 arbitrability is clear and unmistakable it may be found unenforceable if the delegation itself is
2 unconscionable. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 71–74 (2010).

3 Spotify contends that the parties clearly and unmistakably agreed to delegate the issue of
4 arbitrability to an arbitrator because the Terms and Conditions agreement provided that any
5 arbitration would be governed by the AAA’s procedures.³

6 Rule 7(a) of the Commercial Arbitration Rules provided:

7 The arbitrator shall have the power to rule on his or her own
8 jurisdiction, including any objections with respect to the existence,
9 scope, or validity of the arbitration agreement or to the arbitrability
10 of any claim or counterclaim.

11 Our court of appeals has held that “incorporation of the AAA rules constitutes clear and
12 unmistakable evidence that contracting parties agreed to arbitrate arbitrability” based on the
13 inclusion of the paragraph just recited. *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir.
14 2015). (*Brennan* did not specify which AAA rules it concerned, though nearly all of the AAA’s
15 rules include the above paragraph.) Nevertheless, our court of appeals has *not* determined
16 whether incorporation of the AAA rules can be clear and unmistakable evidence of delegation
17 of arbitrability where one party is an unsophisticated consumer. *Brennan* expressly left that
18 question unresolved. *Id.* at 1131.

19 Every district court decision in our circuit to address the question since *Brennan* has
20 held that incorporation of the AAA rules was insufficient to establish delegation in consumer
21 contracts involving at least one unsophisticated party. *See Money Mailer, LLC v. Brewer*, No.
22 15-1215, 2016 WL 1393492, at *2 (W.D. Wash. Apr. 8, 2016) (Judge Rober S. Lasnik);
23 *Galilea, LLC v. AGCS Marine Ins. Co.*, No. 15-0084, 2016 WL 1328920, at *3 (D. Mont. Apr.
24 5, 2016) (Judge Susan P. Waters); *Vargas v. Delivery Outsourcing, LLC*, No. 15-03408, 2016
25 WL 946112, at *8 (N.D. Cal. Mar. 14, 2016) (Judge Jon S. Tigar); *Aviles v. Quik Pick Express,*
26 *LLC*, No. 15-5214, 2015 WL 9810998, at *6 (C.D. Cal. Dec. 3, 2015) (Judge Michael W.
27 Fitzgerald); *Meadows v. Dickey’s Barbecue Restaurants Inc.*, 144 F. Supp. 3d 1069, 1078 (N.D.
28 Cal. 2015) (Judge Jon S. Tigar).

³ The fact that Spotify’s Terms and Conditions incorporated the AAA procedures under a
decommissioned title further refutes Spotify’s assertion that its delegation of arbitrability was clear and

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