UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ERIN NORMAN,

Plaintiff,

v.

UBER TECHNOLOGIES, INC., et al.,

Defendants.

Case No. 20-cv-06700-JSW

ORDER GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION AND REQUIRING JOINT STATUS REPORTS

Re: Dkt. No. 37

Now before the Court for consideration is the motion to compel arbitration filed by Defendant Uber Technologies, Inc. ("Uber"). The Court has considered the parties' papers, relevant legal authority, and the record in this case, and it HEREBY COMPELS arbitration between Uber and Plaintiff Erin Norman ("Norman").

BACKGROUND

Norman filed this putative class action against Uber, Neutron Holdings, Inc., Segway, Inc., and Xioami USA LLC on September 24, 2020. Norman alleges that on October 29, 2019, she lost control of one of Uber's Jump electric scooters while attempting to use her hand to signal that she was turning.

On March 9, 2021, Uber filed a motion to compel arbitration. Uber alleges that on August 27, 2019, Norman accepted the terms of a Rental Agreement (the "Arbitration Agreement" or "Agreement") within Uber's Jump application. (Dkt. Nos. 37-3 (Declaration of Todd Gaddis), ¶ 6; 37-4 (Ex. A (Arbitration Agreement)).) According to Uber, Norman would not have been able to rent a Jump scooter without first agreeing to the Arbitration Agreement's terms. The Agreement provides, in part, as follows:

> By agreeing to the Agreement, you agree that you are required to resolve any claim that you may have against JUMP, its parents, subsidiaries, and affiliates (including, without limitation, [Uber] and its subsidiaries and affiliates), on an individual basis in arbitration, as set forth in this Arbitration Agreement.
>
> . . .
>
> The arbitration will be administered by the American Arbitration Association ("AAA") in accordance with the AAA's Consumer Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the "AAA Rules") then in effect, except as modified by this Arbitration Agreement.
>
> . . .
>
> The parties agree that the arbitrator ("Arbitrator"), and not any federal, state, or local court or agency, shall have exclusive authority to resolve any disputes relating to the interpretation, applicability, enforceability or formation of this Arbitration Agreement, including any claim that all or any part of this Arbitration Agreement is void or voidable. The Arbitrator shall also be responsible for determining all threshold arbitrability issues, including issues relating to whether the Terms are unconscionable or illusory and any defense to arbitration, including waiver, delay, laches, or estoppel.

(Arbitration Agreement §§ 8(a), (b).)

Norman does not dispute that she accepted the Arbitration Agreement's terms. However, she argues that the Agreement does not "clearly and unmistakably" delegate arbitrability to the arbitrator and contends that the Agreement is unenforceable under *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017).

The Court will address additional facts as necessary in its analysis.

ANALYSIS

A. Applicable Legal Standard.

A party may petition a district court to compel the enforcement of an arbitration agreement. 9 U.S.C. § 4. Under the Federal Arbitration Act ("FAA"), arbitration agreements "shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* § 2. The "central purpose of the [FAA is] to ensure that private agreements to arbitrate are enforced according to their terms." *Mastrobuono v. Shearson Lehman Hutton Inc.*, 514 U.S. 52, 53-54 (1995). The FAA represents a "liberal federal policy

favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Accordingly, courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration. *Id.* Notwithstanding the "liberal policy" favoring arbitration, agreeing to arbitrate "is a matter of contract[,] and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986). Therefore, courts must enforce arbitration agreements according to their terms. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

Under the FAA, the Court must order arbitration if it concludes that (1) an arbitration agreement exists and (2) the dispute at hand falls within the scope of the arbitration agreement. *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002)). The parties can delegate to arbitration these so-called "gateway issues" if the parties do so "clearly and unmistakably." *Id.* (citing *AT&T Techs., Inc.*, 475 U.S. at 649).

B. The Parties Have Delegated Arbitrability to the Arbitrator.

Uber argues that the Arbitration Agreement clearly and unmistakably delegates questions of arbitrability to the arbitrator, both by including a delegation clause and by incorporating the American Arbitration Association's ("AAA") rules. Norman contends that because she is an unsophisticated consumer, the Court should conclude the parties did not clearly and unmistakably delegate threshold issues to the arbitrator. The Court agrees with Uber.

A delegation clause, which is "an agreement to arbitrate threshold issues concerning the arbitration agreement," constitutes clear and unmistakable evidence of an intent to delegate. *Momot v. Mastro*, 652 F.3d 982, 988 (9th Cir. 2011) (quoting *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68 (2010)). Using delegation clauses, parties can "agree to arbitrate gateway questions of arbitrability," including whether the parties' agreement to arbitrate "covers a particular controversy." *Rent-A-Center*, 561 U.S. at 68-69. "When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019)

In *Mohamed v. Uber Techs., Inc.*, the Ninth Circuit considered an arbitration provision that authorized the arbitrator to "decide issues relating to the *enforceability, revocability, or validity* of the Arbitration Provision" and concluded the provision "clearly and unmistakably" indicated the parties intended the arbitrator "to decide the threshold question of arbitrability." 848 F.3d 1201, 1209 (9th Cir. 2016) (emphasis added). The Ninth Circuit has also concluded that assigning issues of "validity or application" to the arbitrator constitutes clear and unmistakable evidence of an intent to delegate. *See Momot*, 652 F.3d at 988. Other courts within this circuit have determined that Uber delegation provisions like the one at issue here are clear and unmistakable. *See, e.g.*, *Greder v. Uber Techs., Inc.*, No. 18-CV-3171-PSG-GJS, 2018 WL 10017490, at *4 (C.D. Cal. Sept. 5, 2018) (concluding that assignment of "all threshold arbitrability issues" to arbitrator was a clear and unmistakable delegation of arbitrability issues to the arbitrator).

Here, the Arbitration Agreement provides that "the arbitrator . . . shall have exclusive authority to resolve any disputes relating to the interpretation, applicability, enforceability or formation of [the] Arbitration Agreement, including any claim that all or any part of [the] . . . Agreement is void or voidable." It also states that the "[a]rbitrator shall also be responsible for determining all threshold arbitrability issues, including issues relating to . . . any defense to arbitration." This language is even more explicit than that which the Ninth Circuit deemed clear and unmistakable in *Mohamed* and *Momot*. Even if this language were not sufficiently clear, the Agreement's incorporation of the AAA rules further indicates that the parties intended to arbitrate arbitrability. *See Adams v. Postmates, Inc.*, 414 F. Supp. 3d 1246, 1252 n.3 (N.D. Cal. 2019) (noting that incorporation of arbitral rules "further support[ed] the conclusion that the arbitrator determines arbitrability"). Therefore, the Court holds that the Arbitration Agreement clearly and unmistakably delegates issues of arbitrability to the arbitrator.

Norman is correct that some courts in this circuit have factored the parties' relative levels of sophistication into their delegation analyses. Many of those cases have examined the sophistication of the parties when the contract incorporates arbitral rules but lacks a clear delegation clause. *See, e.g.*, *Money Mailer, LLC v. Brewer*, No. C15-1215RSL, 2016 WL

clear and unmistakable because one party was unsophisticated and the contract suggested one still had a right to jury trial); *Ingalls v. Spotify USA, Inc.*, No. C 16-03533 WHA, 2016 WL 6679561, at *4 (N.D. Cal. Nov. 14, 2016) (concluding that incorporation of AAA rules in a contract without a delegation provision was not clear and unmistakable because parties were "ordinary consumers who could not be expected to appreciate the significance of" the rules' incorporation). Because the Arbitration Agreement here includes a clear delegation clause and does not suggest that there are issues reserved for judicial determination, the Court finds this case is distinguishable from *Money Mailer* and *Ingalls*.

Further, the Court is unpersuaded by Norman's argument that this case involves an ambiguous severability clause and therefore is comparable to *Vargas v. Delivery Outsourcing, LLC*, No. 15-cv-03408-JST, 2016 WL 946112, at *1 (N.D. Cal. Mar. 14, 2016). In *Vargas*, the arbitration agreement expressly delegated issues of arbitrability to the arbitrator; however, it also stated that "[if] any provision . . . [was] held to be unenforceable by a court of law or equity," it would be severable. *Id.* at *2. Noting that this "language [was] necessary only if questions concerning arbitrability [were] *not* resolved by the arbitrator," the court concluded that the severability clause rendered the otherwise-clear delegation provision ambiguous. *Id.* at *6. Although the agreement also incorporated the AAA rules by reference, the court concluded that this, alone, was not clear and unmistakable evidence of delegation because one of the parties was unsophisticated. *Id.* at *8.

Unlike the severability clause in *Vargas*, the severability provision here does not contradict the delegation provision. *See id.* at *2. Instead, it provides that "[i]f any portion of [the] Arbitration Agreement is found to be unenforceable or unlawful," that portion will be severable from the remainder of the Agreement. (Arbitration Agreement § 8(f).) While it does contemplate claims being brought "in a civil court of competent jurisdiction," it only does so in the event that the Arbitration Agreement is "found to be unenforceable." (*Id.*) At no point does the Arbitration Agreement suggest that anyone other than the arbitrator has the authority to determine "threshold issues" such as the agreement's enforceability or questions of arbitrability. Therefore, *Vargas* does not change this Court's conclusion that the parties clearly and unmistakably delegated

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