UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: STUBHUB REFUND LITIGATION

This Document Relates to All Cases

Case No. 20-md-02951-HSG

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO COMPEL ARBITRATION

Re: Dkt. No. 39

Pending before the Court is Defendant StubHub, Inc.'s motion to compel arbitration. Dkt. No. 39. The Court heard argument on this motion and subsequently requested supplemental briefing. *See* Dkt. No. 58. For the reasons detailed below, the Court **GRANTS IN PART** and **DENIES IN PART** the motion.

I. BACKGROUND

On August 6, 2020, the Judicial Panel on Multidistrict Litigation transferred several cases against Defendant StubHub for coordinated or consolidated pretrial proceedings with related actions already pending before this Court. *See* Dkt. No. 1. On November 18, 2020, the Court appointed Tina Wolfson and Tiasha Palikovic as interim class counsel. *See* Dkt. No. 28. Plaintiffs—over fifty individuals—filed their consolidated amended complaint on January 8, 2021. *See* Dkt. No. 36 ("CAC").

The putative nationwide class action concerns Defendant's refund policy for events affected by the COVID-19 pandemic. *See id.* at ¶¶ 1, 98–111. Plaintiffs allege that Defendant wrongfully changed its policies for refunds for cancelled or rescheduled events as a result of COVID-19. *Id.* at ¶¶ 1, 4. Plaintiffs allege that for years prior to COVID-19, Defendant had assured customers via its "FanProtect™ Guarantee" that ticket purchasers would receive full

refunds for cancelled events. *Id.* at ¶ 1. However, in March 2020, in light of the COVID-19 pandemic, Defendant announced that instead of a refund, it would issue a 120% credit when an event was cancelled. *See id.* at ¶¶ 7–8, 10. Plaintiffs allege that on March 25, Defendant also "changed the terms of its FanProtect™ Guarantee on the backpages of its website," instead stating that "if the event is canceled and not rescheduled, you will get a refund or credit for use on a future purchase, as determined in StubHub's sole discretion (unless a refund is required by law)." *Id.* at ¶¶ 8, 83. Each Plaintiff alleges that he or she purchased tickets on StubHub between September 12, 2019, and July 24, 2020, for an event that was scheduled to take place in 2020, and that Plaintiffs were not offered a full refund for the canceled events. *Id.* at ¶¶ 4, 19–74.

Plaintiffs allege that Defendant continues to advertise its FanProtect Guarantee, and has not clarified to users that StubHub no longer provides a money back guarantee. *See, e.g., id.* at ¶¶ 91, 97. Based on these allegations, Plaintiffs bring causes of action under state consumer protection laws and for breach of contract.[1] *See id.* at ¶¶ 122–470.

Defendant now moves to compel arbitration. *See* Dkt. No. 39. It contends that all transactions with StubHub are governed by the StubHub User Agreement. Defendant states that since 2003, the User Agreement has contained an arbitration provision. *See id.* at 9. Defendant urges that all Plaintiffs were notified of and agreed to the User Agreement when they (1) created StubHub accounts; (2) used StubHub's website; and/or (3) purchased tickets through the StubHub website. *Id.* at 4–7, 12–15. Defendant further argues that even "guests" buying tickets on the website had to agree to the User Agreement before they could purchase tickets. *See id.* at 5.

II. LEGAL STANDARD

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, sets forth a policy favoring arbitration agreements and establishes that a written arbitration agreement is "valid, irrevocable, and enforceable." 9 U.S.C. § 2; *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (noting federal policy favoring arbitration); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460

[1] Plaintiffs bring causes of action under California, Arizona, Florida, Georgia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Texas, Virginia, Washington, and Wisconsin

U.S. 1, 24 (1983) (same). The FAA allows that a party "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that . . . arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. This federal policy is "simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 476 (1989). Courts must resolve any "ambiguities as to the scope of the arbitration clause itself . . . in favor of arbitration." *Id.*

When a party moves to compel arbitration, the court must determine (1) "whether a valid arbitration agreement exists" and (2) "whether the agreement encompasses the dispute at issue." *Lifescan, Inc. v. Premier Diabetic Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir. 2004). The agreement may also delegate gateway issues to an arbitrator, in which case the court's role is limited to determining whether there is clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. *See Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015). In either instance, "before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) (citing 9 U.S.C. § 2).

III. DISCUSSION

In support of the motion to compel arbitration, Defendant contends that in purchasing tickets through StubHub's website and mobile application, all 56 named Plaintiffs agreed to StubHub's User Agreement. *See* Dkt. No. 39-2, Ex. A at 1. Defendant appears to acknowledge that this agreement has changed over time, but asserts that at all relevant times it contained an arbitration provision. *See* Dkt. No. 48 at 6, n.2. The current User Agreement states in relevant part:

> **If you reside in the United States or Canada, You and StubHub each agree, except where prohibited by law, that any and all disputes or claims that have arisen or may arise between you and StubHub relating in any way to or arising out of this or previous versions of the User Agreement (including this Agreement to Arbitrate, as the term is defined below) or the breach or validity thereof, your use of or access to the Site or Services, or any tickets**

> **shall be resolved exclusively through final and binding arbitration administered by the American Arbitration Association ("AAA") in accordance with its Consumer Arbitration Rules ("Rules"), rather than in court, except that you may assert claims in small claims court, if your claims qualify and so long as the matter remains in such court and advances only on an individual (non-class, nonrepresentative) basis (together with subsections 22(A)-(F), the "Agreement to Arbitrate"). This Agreement to Arbitrate is intended to be broadly interpreted.** The Federal Arbitration Act governs the interpretation and enforcement of this Agreement to Arbitrate.

Dkt. No. 39-2. Ex. A at 15, ¶ 22.1 (emphasis in original). Plaintiffs do not appear to dispute that Defendant's User Agreement(s) contained an arbitration provision. Rather, Plaintiffs' response is twofold. Plaintiffs contend that (1) they did not agree to the User Agreement; and even if they had, (2) the arbitration provision is not valid or enforceable. *See* Dkt. No. 44 at 9–30.

A. Formation of Agreement to Arbitrate

Plaintiffs argue that they did not receive adequate notice of the arbitration agreement, and therefore cannot be bound by it. *See* Dkt. No. 44 at 15–21.

"In determining the validity of an agreement to arbitrate, federal courts 'should apply ordinary state-law principles that govern the formation of contracts.'" *See Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 782 (9th Cir. 2002) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).[2] "An essential element of any contract is the consent of the parties or mutual assent." *See Donovan v. RRL Corp.*, 26 Cal. 4th 261, 270 (Cal. 2001); *see also* Cal. Civ. Code §§ 1550, 1565. Mutual assent "is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings." *Deleon v. Verizon Wireless, LLC*, 207 Cal. App. 4th 800, 813 (Cal. Ct. App. 2012) (quotation omitted); *see also* Cal. Civ. Code § 1639 ("When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible . . . ."). "[A] party's subjective intent, or subjective consent, therefore is irrelevant" to the question of mutual consent. *See Stewart v.*

Preston Pipeline Inc., 134 Cal. App. 4th 1565, 1587 (Cal. Ct. App. 2005) (quotation omitted).

As the Ninth Circuit has explained, when determining whether there is a binding agreement formed through websites, courts generally evaluate contracts as falling into one of two categories: (1) "browsewrap" agreements, where the website's terms and conditions are provided to users via a hyperlink at the bottom of a webpage and a user's assent to the terms is assumed by her continued use of the website; and (2) "clickwrap" agreements, where a user is presented with the terms and conditions and must click on a button or box to indicate that she agrees before she may continue. *See Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175–77 (9th Cir. 2014). Websites may also present some hybrid of the two, such as putting a link to the terms and conditions on the web page near a button that the user must click to continue. Regardless, "the onus [is] on website owners to put users on notice of the terms to which they wish to bind consumers." *Id.* at 1178–79.

Here, the parties' initial briefing focused on the StubHub website. In support of its motion to compel, Defendant submitted a declaration from Todd Northcutt, a Senior Director of Product Management at StubHub, which made only passing reference to Defendant's mobile application. *See* Dkt. No. 39-1 ("Northcutt Decl."). Mr. Northcutt acknowledged that users may purchase tickets either through the website or mobile application. *See id.* at ¶¶ 4, 7, 12. On the day of the hearing, Plaintiffs filed an administrative motion to introduce additional materials in opposition to the motion to compel arbitration, including four screenshots of the "sign in" and "checkout" screens from Defendant's mobile application. *See* Dkt. No. 54. Although the Court denied the administrative motion as improper, during the hearing Plaintiffs again suggested that the existence of an agreement between the parties to arbitrate may depend on whether Plaintiffs purchased tickets on Defendant's website or through its mobile application. The Court requested supplemental briefing on this issue. *See* Dkt. Nos. 58, 59. Because the nature of the notice that named Plaintiffs received may depend on the platform on which they purchased their tickets, the Court addresses the notice that Defendant provided on the StubHub website and its mobile application separately.

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