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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DRICKEY JACKSON, individually and
on behalf of all others similarly situated,

Plaintiff,

v.

AMAZON.COM, INC.,

Defendant.

Case No.: 20-cv-2365-WQH-BGS

ORDER

HAYES, Judge:

The matter before the Court is the Motion to Compel Arbitration, Dismiss, or, in the Alternative, to Stay filed by Defendant Amazon.com, Inc. (ECF No. 15).

I. BACKGROUND

On February 19, 2021, Plaintiff Drickey Jackson filed a First Amended Class Action Complaint (“FAC”) against Defendant Amazon.com, Inc. (“Amazon”). (ECF No. 11). In the FAC, Plaintiff alleges that he is a member of the Amazon Flex program—“a program by which Amazon pays regular people to deliver packages.” (*Id.* ¶ 11). Plaintiff alleges that he and many of the other approximately 800 Flex drivers joined “closed” or private Facebook groups to discuss “a myriad of issues surrounding their employment,” including strikes, protests, pay, benefits, deliveries, working conditions, and unionizing efforts. (*Id.* ¶¶ 2, 14). Plaintiff alleges that he has been a member of closed Facebook groups for Flex drivers since 2016. Plaintiff alleges that he has communicated with other Flex drivers in

1 the closed Facebook groups and “believed he was only communicating with other Flex
2 Drivers.” (*Id.* ¶ 29). Plaintiff alleges that Defendant Amazon “has been secretly monitoring
3 and wiretapping these closed Facebook groups.” (*Id.* ¶ 17). Plaintiff alleges that Amazon
4 has created an “Advocacy Operations Social Listening Team” to “monitor and/or
5 intercept[]” posts to closed Facebook groups “in real time . . . using automated monitoring
6 tools.” (*Id.* ¶ 19). Plaintiff alleges that his posts were tracked and intercepted by Amazon
7 without Plaintiff’s consent.

8 Plaintiff seeks to represent a class of “all Flex Drivers in the United States who were
9 members [of] the closed Facebook groups, and whose electronic communications were
10 intercepted by Defendant” (the “Class”). (*Id.* ¶ 30). Plaintiff further seeks to represent a
11 subclass of “all Class members in the State of California who were members of the closed
12 Facebook groups, and whose electronic communications were intercepted by Defendant”
13 (the “California Subclass”). (*Id.* ¶ 31). Plaintiff brings the following claims on behalf of
14 himself, the Class, and the California Subclass: 1) interception and disclosure of wire, oral,
15 or electronic communications in violation of the federal Wiretap Act, 18 U.S.C. §§ 2510,
16 *et seq.*; 2) manufacture, distribution, possession, and advertising of wire, oral, or electronic
17 communication interception devices in violation of the federal Wiretap Act, 18 U.S.C. §
18 2512; and 3) violation of the Stored Communications Act, 18 U.S.C. §§ 2701, *et seq.*
19 Plaintiff brings the following claims on behalf of himself and California Subclass: 1)
20 violation of the California Invasion of Privacy Act, Cal. Pen. Code § 631; 2) violation of
21 the California Invasion of Privacy Act, Cal. Pen. Code § 635; 3) intrusion upon seclusion;
22 and 4) invasion of privacy under the California Constitution. Plaintiff seeks declaratory
23 relief, damages, including punitive damages, restitution, injunctive relief, and attorneys’
24 fees and costs.

25 On March 16, 2021, Defendant Amazon filed a Motion to Compel Arbitration,
26 Dismiss, or, in the Alternative, to Stay. (ECF No. 15). Amazon moves to compel arbitration
27 of Plaintiff’s claims on an individual basis pursuant to the Federal Arbitration Act
28 (“FAA”), 9 U.S.C. §§ 1, *et seq.*, or Delaware law. Amazon further moves to stay or dismiss

1 any remaining claims. On April 12, 2021, Plaintiff filed an Opposition to the Motion to
2 Compel Arbitration. (ECF No. 16). On April 26, 2021, Amazon filed a Reply. (ECF No.
3 17). On August 3, 2021, the Court heard oral argument on the Motion to Compel
4 Arbitration.

5 **II. CONTENTIONS**

6 Defendant Amazon contends that Plaintiff agreed to arbitrate the claims alleged in
7 the FAC on an individual basis. Amazon contends that the Amazon Flex Terms of Service
8 that took effect on October 3, 2019 (“2019 TOS”) apply in this case because Plaintiff
9 continued to perform deliveries after he “received notice that Amazon was introducing the
10 2019 TOS.” (ECF No. 15-1 at 10). Amazon contends that “[t]he heart of this lawsuit is the
11 allegation that Amazon monitored closed Facebook groups in which Plaintiff and other
12 Amazon Flex drivers discussed their experiences with the Amazon Flex program—
13 including matters central to Flex drivers’ contractual relationship with Amazon.” (*Id.* at
14 14). Amazon contends that there is no “serious dispute” that Plaintiff’s claims fall within
15 the scope of the arbitration provision. (*Id.*). Amazon further contends that even if the
16 Amazon Flex Terms of Service that took effect on September 21, 2016 (“2016 TOS”) apply
17 in this case, “its arbitration agreement would be enforceable under California law.” (*Id.* at
18 17 n.1).

19 Plaintiff Jackson contends that the 2016 TOS apply in this case. Plaintiff contends
20 that “Amazon did not provide notice of the 2019 TOS, [and] Plaintiff never assented to the
21 updated terms.” (ECF No. 16 at 19). Plaintiff contends that he is not required to arbitrate
22 his claims because the Court of Appeals for the Ninth Circuit held in *Rittmann v.*
23 *Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020), that the arbitration provision in the 2016
24 TOS is void for lack of governing law. Plaintiff contends that the claims alleged in the FAC
25 do not fall within the scope of the arbitration provision because the claims are “about
26 Amazon spying on Plaintiff’s private posts to a private Facebook group” and do not relate
27 to Plaintiff’s participation in the Flex program or performance of services. (*Id.* at 11).
28

1 Plaintiff further contends that the arbitration provision is unenforceable and
2 unconscionable.

3 **III. FACTS¹**

4 Plaintiff Jackson is a participant in the Amazon Flex program. The Director of
5 Amazon Flex Technology states in a Declaration that the Flex program “allows Amazon
6 to crowdsource independent contractor delivery partners through a smartphone application
7 known as the Amazon Flex app.” (Paramanandan Decl., ECF No. 15-3 ¶ 3). Participants
8 in the Flex program deliver groceries, packages, and goods using their personal vehicles.
9 To participate in the Flex program, individuals must download the Amazon Flex app, create
10 an account, and agree to the Amazon Flex Terms of Service.

11 The Director states that “[t]here have been multiple versions” of the Amazon Flex
12 Terms of Service. (*Id.* ¶ 6). The Director states that the 2016 TOS took effect on September
13 21, 2016. The 2016 TOS provides, in relevant part:

14 **11. Dispute Resolution, Submission to Arbitration.**

15 a) SUBJECT TO YOUR RIGHT TO OPT OUT OF ARBITRATION, THE
16 PARTIES WILL RESOLVE BY FINAL AND BINDING ARBITRATION,
17 RATHER THAN IN COURT, ANY DISPUTE OR CLAIM, WHETHER
18 BASED ON CONTRACT, COMMON LAW, OR STATUTE, ARISING
19 OUT OF OR RELATING IN ANY WAY TO THIS AGREEMENT, TO
20 YOUR PARTICIPATION IN THE PROGRAM OR TO YOUR
PERFORMANCE OF SERVICES.

21 (2016 TOS, Ex. A to Paramanandan Decl., ECF No. 15-3 at 13). The 2016 TOS further
22 provides:

23 **12. Governing Law.**

24 The interpretation of this Agreement is governed by the law of the state of
25

26
27 ¹ Amazon requests that the Court take judicial notice of three Facebook Help Center webpages. (ECF No.
28 15-2). The Court declines to take judicial notice of the requested documents because judicial notice is
unnecessary for this Order. *See Asvesta v. Petroutsas*, 580 F.3d 1000, 1010 n.12 (9th Cir. 2009) (denying
request for judicial notice where judicial notice would be “unnecessary”).

1 Washington without regard to its conflict of laws principles, except for
2 Section 11 of this Agreement, which is governed by the Federal Arbitration
3 Act and applicable federal law.

4 **13. Modifications.**

5 Amazon may modify this Agreement, including the Program Policies, at any
6 time by providing notice to you through the Amazon Flex app or otherwise
7 providing notice to you. You are responsible for reviewing this Agreement
8 regularly to stay informed of any modifications. If you continue to perform
9 the Services or access Licensed Materials (including accessing the Amazon
Flex app) after the effective date of any modification to this Agreement, you
agree to be bound by such modifications.

10 (*Id.* at 14-15).

11 The Director of Amazon Flex Technology states, “Plaintiff Drickey Jackson
12 accepted the 2016 TOS and his Amazon Flex account was activated on or about December
13 6, 2016. He did not opt-out of the arbitration provision in the 2016 TOS.” (Paramanandan
14 Decl., ECF No. 15-3 ¶ 11).

15 The Director states that the 2019 TOS took effect on October 3, 2019. The first page
16 of the 2019 TOS provides, in relevant part:

17 **This Agreement updates and replaces any version of the Terms of Service**
18 **you previously accepted.** This Agreement takes effect on the earlier date of
19 the date on which you click “I agree and accept” in the box below or, if you
20 accepted a prior version of the Terms of Service, the first date on which you
21 provide Services after Amazon made this Agreement available in the “Legal
Information” section of the Amazon Flex app and sent to your email address
22 a hyperlink to this Agreement (“Effective Date”).

23 (2019 TOS, Ex. B to Paramanandan Decl., ECF No. 15-3 at 24). The 2019 TOS includes
24 several material terms related to arbitration that differ from the 2016 TOS. (*See id.* at 29-
25 31).

26 The Director of Amazon Flex Technology states, “When the 2019 TOS went into
27 effect on October 3, 2019, Amazon distributed the 2019 TOS to existing Flex drivers (*i.e.*,
28 those who had joined the Amazon Flex program and agreed to the TOS before the 2019

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