UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TRINA DAVIS,

Plaintiff,

v.

EINSTEIN NOAH RESTAURANT GROUP, INC., et al.,

Defendants.

Case No. 19-cv-00771-JSW

ORDER GRANTING IN PART MOTION TO COMPEL ARBITRATION, DISMISSING CLASS CLAIMS, AND STAYING REMAINDER OF CASE PENDING RESOLUTION OF ARBITRATION

Re: Dkt. No. 21

Now before the Court for consideration is the motion to compel arbitration, filed by Defendants Einstein Noah Restaurant Group, Inc. ("ENRGI") and Caribou Coffee Company, Inc. ("Caribou") (collectively "Defendants"). Defendants move to compel Plaintiff Trina Davis to arbitrate her individual claims and move to dismiss Plaintiff's putative class claims. The Court has considered the parties' papers, relevant legal authority, and the record in this case, and it finds the motion is suitable for disposition without oral argument. *See* N.D. Civ. L.R. 7-1(b). The Court HEREBY COMPELS arbitration between ENRGI and Ms. Davis, GRANTS Defendants' motion to dismiss Ms. Davis's class claims, and STAYS the claims against Caribou pending the outcome of the arbitration.

BACKROUND

Ms. Davis alleges that on or about June 5, 2016, she applied for a job with Defendants by completing an employment application at one of Defendants' Noah's Bagels restaurant. (Dkt. No. 1 (Complaint) ¶ 16.) As part of that application, Ms. Davis executed a form entitled "Disclosure of Procurement of Consumer Report and/or Investigative Consumer Report." (*Id.* ¶ 18.) Ms. Davis alleges that contents of that form violate various provisions of the Fair Credit Reporting

Act, 15 U.S.C. § 1681b; California's Investigative Consumer Reporting Agencies Act, Civil Code section 1786; California's Consumer Credit Reporting Agencies Act, Civil Code section 1785; and California's Unfair Competition Law, Business and Professions Code sections 17200, *et seq.*

On or about June 10, 2016, Ms. Davis executed with ENRGI a document titled "Arbitration Agreement" (referred to herein as "Arbitration Agreement" or "Agreement"). (Dkt. Nos. 22 (Declaration of Nori Keppel ("Keppel Decl.")), ¶¶ 8-9; 22-1 (Ex. 1 (Arbitration Agreement)).) According to Defendants, Ms. Davis was not employed by Caribou. (Keppel Decl., ¶ 4.) Based on the page numbers at the bottom of the Arbitration Agreement, pages 5 and 6, it appears to be part of a larger document. Its substantive provisions are contained on one page and provide, in part, as follows:

> Any and all disputes or controversies arising out of or relating to any aspect of your employment with ENRGI, or the termination of that employment relationship, shall be resolved finally and exclusively by arbitration as follows:
>
> …
>
> 1. The arbitration shall be governed by the Employment Arbitration Rules ("Rules") of the American Arbitration Association in effect at the time of the arbitration. . . . A copy of the current Rules is attached hereto and incorporated herein by reference.
>
> 3. … The enforceability of this Agreement, the scope of arbitrability and all other questions shall be determined by the arbitrator.
>
> 4. No dispute or controversy arising out of or relating to your employment with ENRGI may be initiated or maintained on a class, collective or representative basis in any forum. Any claim purporting to be brought as a class, collective or representative claim will be decided as an individual claim.
>
> 6. This Agreement shall be subject to and governed by the Federal Arbitration Act, 9 U.S.C. Section 1 *et seq.*

(Dkt. No. 22-1 (Arbitration Agreement) at 5.)

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 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." 9 U.S.C. § 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 Federal Arbitration Act ("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, a court must resolve any doubts concerning the scope of arbitrable issues in favor of arbitration. *Id.* at 24-25. 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) (quotation omitted); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (arbitration "a matter of consent, not coercion."). Therefore, courts must enforce arbitration agreements according to their own terms. *Volt Info. Scis.*, 489 U.S. at 479.

Under the FAA, the Court must order arbitration if it concludes (i) an arbitration agreement exists and (ii) 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). The party moving to compel arbitration has the burden to prove, by a preponderance of the evidence, that an agreement to arbitrate exists. *Bruni v. Didion*, 160 Cal. App. 4th 1272, 1282 (2008).

B. Delegation Clause.

Unsurprisingly, the parties classify their fundamental disagreement differently. ENRGI views this dispute as one over the scope of the Arbitration Agreement. Ms. Davis sees this dispute as one concerning whether she agreed to arbitrate. The Court agrees with ENRGI.

The parties do not contest that Ms. Davis signed the Arbitration Agreement or that she agreed to arbitrate "[a]ny and all disputes or controversies arising out of or relating to any aspect of [her] employment with ENRGI, or the termination of that employment relationship." (*See* Dkt.

No. 22-1 (Arbitration Agreement) at 5.) When Ms. Davis maintains she did not consent to arbitrate claims that had accrued before the Arbitration Agreement was signed, she is arguing about the reach or scope of the Agreement, not whether she agreed to arbitrate. *See Fontana v. The Chefs' Warehouse, Inc.*, No. 16-cv-06521-HSG, 2017 WL 2591872, at *2 (N.D. Cal. June 15, 2017) (compelling arbitration where no disagreement that both parties signed arbitration agreement).

Having determined that the parties agreed to arbitrate, the Court now addresses whether the Arbitration Agreement "clearly and unmistakably" delegates arbitrability to the arbitrator. The Court holds that it does.

A delegation clause is "an agreement to arbitrate threshold issues concerning the arbitration agreement." *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." *Id.* at 68-69 (citations and quotations omitted). A delegation clause is nothing more than an "additional, antecedent" arbitration agreement, and the FAA "operates on this *additional* arbitration agreement just as it does on any other." *Id.* at 69 (emphasis added).

In *Mohamed*, 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 at 1209 (emphasis added). *Id.* The Ninth Circuit has found similar language also validly delegated questions of the scope of an arbitration agreement to an arbitrator. *See Aceves v. Autonation, Inc.*, 317 Fed. App'x 665, 666 (9th Cir. 2009) (delegation clause provided that "any claims arising from or relating to this Lease or related agreements or relationships, including *the validity, enforceability*[,] *or scope* of this Arbitration Provision . . . are subject to arbitration" (emphasis added)).

Here, the delegation clause states that the Agreement's "enforceability," as well as "the scope of arbitrability," and "all other questions" "shall be determined by the arbitrator." This language is even more explicit than the language in the delegation clause at issue in *Mohamed*.

Therefore, the Court holds that the parties clearly and unmistakably delegated the issue of the scope of the arbitration provisions to the arbitrator.[1] The delegation clause's explicit reference to "the scope of arbitrability" encapsulates questions of whether the Agreement might apply to claims that accrued prior to the execution of the Agreement. *See Gerton v. Fortiss*, No. 15-cv-4805-TEH, 2016 WL 613011, at *9 (N.D. Cal. Feb. 16, 2016) ("[I]n order *to determine whether* the Arbitration Agreement *covers the dispute at issue*, the Court must *decide whether pre-employment activities fall under the purview* of an employment arbitration agreement." (emphasis added)); *see also Jones v. Deja Vu, Inc.*, 419 F. Supp. 2d 1146, 1150 (N.D. Cal. 2005) ("Where an arbitration provision does not contain a temporal limitation, the parties may be compelled to arbitrate despite the fact that the challenged conduct predates the signing of the agreement." (citations omitted)). Accordingly, issues of the Agreement's scope are properly within the purview of the arbitrator and not of the Court.[2]

ENRGI next argues that Ms. Davis's class claims must be dismissed due to the class action waiver in the Agreement. (*See* Dkt. No. 22-1 (Arbitration Agreement) at 5.) Ms. Davis concedes this argument by failing to address it in her opposition. S*ee Ramirez v. Ghilotti Bros. Inc.*, 941 F. Supp. 2d 1197, 1210 (N.D. Cal. 2013) (deeming argument conceded where plaintiff failed to address it in opposition). Accordingly, Ms. Davis's class claims are HEREBY DISMISSED with prejudice.

C. Equitable Estoppel.

The Court next addresses whether Caribou may, like its corporate affiliate ENRGI, compel arbitration of the claims Ms. Davis raises against it. Caribou is not a signatory to the Agreement,

[1] In addition to the contract's explicit language delegating arbitrability to an arbitrator, the Arbitration Agreement incorporates by reference the Rules of the American Arbitration Association ("AAA"). In the Ninth Circuit, this constitutes "clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability." *Brennan*, 796 F.3d at 1130; *see also Oracle America, Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013) ("[v]irtually every circuit" has found that incorporation of AAA rules indicates that the parties agreed to delegate arbitrability).

[2]The Court HEREBY DENIES ENRGI's unopposed request for judicial notice as moot because the Court did not rely upon the documents in its analysis. For the same reason, the Court does not address Defendants' objections to the declaration submitted in support of Ms. Davis's opposition.

and, generally, non-signatories to an arbitration agreement may not move to compel arbitration. *Westra v. Marcus & Millichap Real Estate Inv. Brokerage Co.*, 129 Cal. App. 4th 759, 763 (2005). However, a non-signatory litigant may compel arbitration under the FAA if the relevant state contract law—here, California—"allows the litigant to enforce the agreement." *Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1229 (9th Cir. 2013). Defendants argue Caribou may compel arbitration under a theory of equitable estoppel.

The doctrine of equitable estoppel precludes a party from claiming the benefits of a contract while simultaneously avoiding, or attempting to avoid, the contract's obligations. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir.2006) (citation omitted). Under California law, a non-signatory to an arbitration agreement may compel arbitration under a theory of equitable estoppel (i) where a signatory (plaintiff) relies on the terms of the contract in asserting its claims against the non-signatory or the claims are intertwined with the underlying contract, or (ii) where a signatory (plaintiff) alleges substantially interdependent and concerted misconduct by the non-signatory and another signatory and the allegations of interdependent misconduct are founded in or intimately connected with the obligations of the underlying agreement. *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1128-29 (9th Cir.2013) (citing *Goldman v. KPMG LLP*, 173 Cal. App. 4th 209, 221 (2009)).

Neither circumstance applies here. Ms. Davis is not relying on the terms of the Arbitration Agreement to bring the claims in the Complaint, and, though her claims arguably are related to or arise from her employment, which the Arbitration Agreement governs, her claims are not sufficiently intertwined or intimately connected with the Arbitration Agreement such that the Court can compel Ms. Davis to arbitrate with non-signatory Caribou. As Ms. Davis's claims are based entirely on consumer protection statutes and unfair competition law, this is not a circumstance where the Complaint demonstrates her "actual dependence" on the underlying Agreement. *See Goldman*, 173 Cal. App. 4th at 229 (such "dependence" is the "*sine qua non*" of equitable estoppel). Put another way, Ms. Davis is not asserting the benefits of the Arbitration Agreement with respect to ENRGI while trying to avoid the burden of the Arbitration Agreement with respect to Caribou. In fact, Ms. Davis would prefer entirely to avoid arbitration of this

matter.

Defendants focus on the fact that Ms. Davis's allegations against Caribou and ENRGI are indistinguishable, and the Complaint alleges wrongdoing only collectively by "Defendants." This is indisputably true. Yet, "mere allegations of collusive behavior between signatories and non-signatories" are not enough to compel arbitration between parties who have not agreed to arbitrate. *Goldman*, 173 Cal. App. 4th at 223. Rather, "[i]t is the relationship of the *claims*, not merely the collusive behavior of the signatory and non[-]signatory parties, that is key." *Id.* (internal alteration and quotation marks omitted) (emphasis in original). Accordingly, the Court DECLINES to compel Ms. Davis to arbitrate with Caribou.

However, pending the completion of arbitration proceedings between Ms. Davis and ENRGI, the Court stays this action with respect to Caribou. *See Moses,* 460 U.S. at 20 n.23 (opining that decision to stay litigation among non-arbitrating parties pending outcome of arbitration is left to discretion of district court). The claims against Caribou and ENRGI are based on the same facts, and the allegations against each corporate entity are identical. Accordingly, considerations of economy and efficiency counsel in favor of a stay. *See Newton v. Neumann Caribbean Internat'l, Ltd.*, 750 F.2d 1422, 1427 (9th Cir. 1985).

CONCLUSION

For the reasons explained above, the Court COMPELS arbitration between Ms. Davis and ENRGI, DISMISSES with prejudice Ms. Davis's class claims, and STAYS the claims against Caribou pending the conclusion of the arbitration.

The Court further SETS a compliance hearing regarding the status of the arbitration proceedings for Friday, May 1, 2020 at 11:00 a.m. No later than April 24, 2020, Ms. Davis and ENRGI must file a joint statement informing the Court of the status of the arbitration proceedings. Failure to comply may result in sanctions.

IT IS SO ORDERED.

Dated: October 23, 2019

JEFFREY S. WHITE
United States District Judge