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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

LATOYA JEFFERSON,

Plaintiff,

v.

FASHION NOVA, LLC, a California limited liability company, and DOES 1 through 10, inclusive,

Defendants.

Case No. 23STCV12111
Judge: Hon. Elihu M. Berle
Courtroom: Dept. 6

COMPLEX CASE

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL ARBITRATION AND TO STAY PROCEEDINGS

Date: August 25, 2023
Time: 9:00 a.m.
Place: Dept. 6

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I. INTRODUCTION

This Court must deny Defendant Fashion Nova, LLC's motion to compel arbitration. Plaintiff LaToya Jefferson's injunctive relief action is expressly excluded from the Dispute Resolution by Binding Arbitration and Class Action Waiver ("Arbitration Provision") in Defendant's Terms of Service that Defendant seeks to enforce. The Arbitration Provision provides that "the following shall not be subject to arbitration and may be adjudicated only in the state and federal courts of California: … an action by a party for temporary, preliminary, or permanent injunctive relief." (Declaration of Roger Satur, Exhibit A.) Plaintiff's action seeks solely declaratory and injunctive relief for violations of California's consumer protection statutes. Plaintiff seeks no damages, restitution, disgorgement, or any type of monetary relief. She does not seek any other relief. Plaintiff's Complaint is clear on its face that this is an action for injunctive relief and for each cause of action asserted, Plaintiff only seeks injunctive relief.

To escape the consequences of the express contractual exclusion for actions like this one, Defendant manufactures a fictitious complaint that contains claims that Defendant believes would be amenable to arbitration. According to Defendant, Plaintiff in the future is plotting to amend the Complaint because she is only "temporarily foregoing a prayer for monetary relief in the first iteration of her Complaint." (Mot. at 6:14-15.) Defendant accuses Plaintiff of "gamesmanship" because California's consumer protection laws provide for monetary relief and therefore Plaintiff can amend her Complaint to seek monetary relief. However, Defendant cannot compel Plaintiff to arbitration based on claims Plaintiff does not assert, nor has any intention to assert: there are absolutely no such claims for monetary relief in the Complaint. Whether the statutes at issue provide for other types of relief is immaterial because Plaintiff solely seeks public injunctive relief.

By operation of the clear exclusion in the Arbitration Provision, this action must remain in court. This Court already ruled on Defendant's motion to compel arbitration in the related case *Bria Stewart v. Fashion Nova, LLC*, Case No. 22STCV34932, which concerned the same Arbitration Provision and injunctive relief exclusion. The plaintiff in the *Stewart* case alleges multiple additional claims and seeks primarily damages, restitution, and disgorgement, and thus

it may have been appropriate that the Court in that case ordered the plaintiffs' monetary claims to arbitration while simultaneously refusing to order the claims for injunctive relief to arbitration. (*Stewart* Minute Order, Hearing on Motion to Compel, March 28, 2023). As this is an action for public injunctive relief, which alleges no claims for damages, restitution, or disgorgement, the motion for arbitration here must be denied in full.

Furthermore, there is no delegation clause in the Arbitration Provision in the Terms of Service. Defendant erroneously seeks delegation nonetheless, to punt this issue to an arbitrator to decide threshold issues of arbitrability when the parties intended no such thing. Defendant fails to meet the standard of clear and unmistakable delegation. Just as the Court in *Stewart* decided against delegating threshold issues to the arbitrator, it is for the Court here to determine that this action should not be ordered to arbitration given the express exclusion in the Arbitration Provision of injunctive relief actions. Based on the foregoing, the Court should deny Defendant's Motion.

II. FACTS AND PROCEDURE

Defendant is a privately owned online fast fashion retailer that markets and sells it products directly to consumers through its website, FashionNova.com. (Complaint ¶¶ 15-16.) Plaintiff is a consumer who purchased several clothing items from Defendant's website that were advertised by Defendant as being offered at a discount from their purported regular prices. (*Id.* ¶ 66.) Defendant represented to Plaintiff that she would save 30% off the regular prices of these items, which were shown as strikethrough prices. (*Id.* at ¶¶ 67-73.) Plaintiff's understanding of the value of the items was based on her belief that Defendant regularly sold them at the advertised strikethrough prices and that she was purportedly receiving a limited-time discount. (*Id.*) However, the advertised discounts are false and misleading because they do not represent the actual discounts obtained by consumers. (*Id.* at ¶ 2.) "Sales" are not really sales at all because the sale prices are actually the regular prices, and the strikethrough prices are fictitious. (*Id.* at ¶ 3.) Plaintiff would not have purchased the items or would have paid less for them had she known that their true regular prices were less than the advertised strikethrough prices and that the advertised discounts were fictious. (*Id.* at ¶ 73.)

Plaintiff filed this action in the Los Angeles Superior Court on May 30, 2023. (Declaration

of Laura E. Goolsby ["Goolsby Decl."] ¶ 3 .) Her Complaint specifically alleges the injunctive nature of her action from the outset: "In bringing this lawsuit, Plaintiff seeks to enjoin Fashion Nova from continuing to engage in such unlawful, false, misleading, and deceptive business practices to prevent future injury to the general public." (Complaint ¶ 5.) Plaintiff's action targets how Defendant's deceptive pricing practices deceive the general public as a whole, and she seeks to prevent future injury to the general public. (*Id* . at ¶ 4; *see also, e.g.,* Complaint at ¶¶ 5, 18, 78, 92, 95, 103, 114, 125, 130, 133.) Her injunctive relief action alleges violations of California's Consumer Legal Remedies Act ("CLRA"), Unfair Competition Law ("UCL"), and False Advertising Law ("FAL"), and includes a cause of action for "public declaratory and injunctive relief." (*Id.* at ¶ 5; *see also* Complaint at ¶¶ 126-130.) She alleges that Defendant's deceptive pricing practices are ongoing, and she desires to make purchases in the future if the deception and misrepresentations are corrected. (*Id.* at ¶ 6; *see also* Complaint at ¶ 74.) Her prayer for relief includes only public injunctive and declaratory relief, and an award of attorneys' fees and costs. (*Id.* at ¶ 7; *see also* Complaint at Prayer for Relief, ¶¶ 131-136.)

The case was originally assigned to the Honorable Maurice A. Leiter in Department 54 of the Stanley Mosk Courthouse. (Goolsby Decl. at ¶ 8.) One day after Defendant filed a Notice of Related Cases in both the *Stewart* and the *Jefferson* actions, the Court entered a Minute Order on June 14, 2023 in both actions relating the two cases and assigning them to Judge Elihu M. Berle in Department 6 at the Spring Street Courthouse for all purposes, with *Stewart* to be the lead case. (*See* June 14, 2023 Minute Order.)[1] At that time, the Court had already ordered arbitration in the *Stewart* action. (*See Stewart* Minute Order, Hearing on Motion to Compel, March 28, 2023.) In that action, unlike here, the plaintiff had brought class claims seeking damages, treble damages, punitive damages, restitution, disgorgement, interest, an injunction, and attorneys' fees and costs. (*See Stewart* Complaint ¶ 153.) Based on Defendant's Arbitration Provision from the Terms of Service, the Court had found in *Stewart* that "[a]ll of plaintiff's claims, ***except any claim for***

[1] On June 20, 2023, Defendant filed in both actions a Notice of Entry of Order Regarding Related Case. (*See* June 20, 2023 Notice of Entry of Order.) Both the Order relating the cases and the Notice of Entry of Order were filed before Plaintiff Jefferson's deadline to respond to the Notice of Related Case. (Goolsby Decl. ¶ 9.) Plaintiff opposes the relation of the cases and filed a motion for reconsideration on July 5, 2023. (*Id.*)

injunctive relief, are ordered to arbitration." (*Stewart* Minute Order, Hearing on Motion to Compel, March 28, 2023 (emphasis added).)

Defendant now brings a motion to compel arbitration here, despite the fact that Plaintiff's action only seeks injunctive relief. As in *Stewart*, Defendant relies on the Arbitration Provision from its Terms of Service. Yet as discussed below, Defendant's own evidence submitted in support of its Motion shows that the Arbitration Provision expressly excludes "an action by a party for temporary, preliminary, or permanent injunctive relief," which is precisely the type of action brought by Plaintiff. (Satur Decl., Ex. A.)

III. ARGUMENT

A. The Arbitration Provision Expressly Excludes Injunctive Relief Actions Such as This Action

Under governing law and a straightforward analysis of the Arbitration Provision, Defendant may not compel arbitration of Plaintiff's claims. "[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—***but only those disputes***—that the parties ***have agreed to submit to arbitration***." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (emphasis added). The United States Supreme Court recently restated the "fundamental principle that 'arbitration is a matter of consent." *Viking River Cruises, Inc. v. Moriana*, 142 S.Ct. 1906, 1923 (2022). Thus, "[t]he most basic corollary of the principle that arbitration is a matter of consent is that a party can be forced to arbitrate only those issues it ***specifically*** has agreed to submit to arbitration, [citations omitted]. This means that parties cannot be coerced into arbitrating a claim, issue, or dispute 'absent an affirmative contractual basis for concluding that the party *agreed* to do so." *Id.* (first emphasis added, second emphasis in original) (internal quotation marks omitted).

The Arbitration Provision's very own language prohibits sending this injunctive relief action to arbitration. Defendant relies on the Arbitration Provision from its Terms of Service. The Terms of Service on Defendant's website contain the Arbitration Provision, which describe what disputes are covered by the arbitration agreement and what disputes are, in fact, excluded from arbitration. Thus, the Arbitration Provision states that "[a]ny dispute relating in any way to your

visit to, use of, the Website, the Products, or any purchase or otherwise related to this Agreement ("Disputes") shall be submitted to confidential arbitration in Los Angeles, California, USA." (Satur Decl., Ex. A.) The Arbitration Provision also contains a direct carve out for disputes excluded from arbitration: "Notwithstanding the foregoing, the following shall not be subject to arbitration and may be adjudicated only in the state and federal courts of California: … an action by a party for temporary, preliminary, or permanent injunctive relief." (*Id.*) The exclusion thus prohibits this action from being ordered to arbitration. Every cause of action Plaintiff asserts seeks injunctive relief. (*See generally* Complaint.) She seeks no damages, restitution, or disgorgement, nor *any* monetary relief. (*Id.*) The Introduction to her Complaint spells out that she brings solely a direct injunctive relief action: "In bringing this lawsuit, Plaintiff seeks to enjoin Fashion Nova from continuing to engage in such unlawful, false, misleading, and deceptive business practices to prevent future injury to the general pubic." (Complaint ¶ 5.) This is dispositive. Moreover, this Court already determined that it would not order any injunctive relief claims asserted in the *Stewart* action to arbitration. (*See Stewart* Minute Order, Hearing on Motion to Compel, March 28, 2023.) There is no valid reason why the Court should not similarly make that decision here for the entire action as it is an injunctive relief action and the language of the Arbitration Provision dictates that it is excluded from arbitration.

There is no credible argument that takes this case out of the exclusion for injunctive relief actions, so Defendant has disingenuously manufactured a baseless theory that Plaintiff is plotting to add monetary claims in the future. With no evidence or basis in fact, Defendant contends that "Plaintiff's plans to seek monetary relief (on behalf of herself if not also others) are transparent." (Mot. at 10:25-26.) Plaintiff has no such "plans," and Defendant may not compel such nonexistent claims to arbitration. The fact that the California consumer protection statutes provide a range of relief, including monetary relief, does not change the fact that there are absolutely no such allegations in Plaintiff's injunctive relief Complaint. Instead, Defendant's bogus assertions only backfire, as Defendant must admit there is an applicable exclusion in the Arbitration Provision for injunctive relief actions like Plaintiff's, which do not seek any monetary relief. (*See, e.g.*, Mot. at 18:3-6 ("Plaintiff attempts to side-step the arbitration requirements of the Terms and exploit a

limited exception to the Terms for injunctive relief prayers *by forgoing a demand for money in this iteration of her complaint*.") (emphasis added); Mot. at 18:10-12 ("Plaintiff may argue that her claims are excepted from arbitration because *she presently seeks only injunctive relief*, but her consumer protection causes of action allow for monetary relief which should be compelled to arbitration." (Mot. at 18:10-12 (emphasis added).) Defendant's arguments against a phantom Complaint are simply meritless and only demonstrate that Defendant is well aware of the injunctive relief exclusion of the Arbitration Provision and the fact that this is an action for injunctive relief, not monetary relief.

While Defendant tries to latch on to the general language of the Arbitration Provision covering any dispute relating to the website, products, and purchase, Defendant may not ignore the dispositive effect of the specific exclusion for injunctive relief actions. A fundamental canon of contract interpretation provides that specific terms in a contract control over general ones. *See* Cal. Civ. Code § 3534 ("Particular expressions qualify those which are general."); *California Union Square L.P. v. Saks & Co. LLC*, 71 Cal. App. 5th 136, 142 (2021) ("Where general and specific provisions [of a contract] are inconsistent, the specific provision controls.") The express exclusion in the Arbitration Provision stating what specific actions "shall not be subject to arbitration and may be adjudicated only in the state and federal courts of California" takes precedence over the general provisions. (Satur Decl., Ex. A.)

In addition, "[h]owever broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties *intended* to contract." *Victoria*, 40 Cal. 3d at 739. Under California Law, "[t]he paramount rule governing the interpretation of contracts is to give effect to the mutual intention of the parties *as it existed at the time of contracting.*" *City of Chino v. Jackson*, 97 Cal. App. 4th 377, 382 (2002) (emphasis in original). Thus, courts interpret contracts based on the state of mind of the parties at the time the contract is made. *Alpha Beta Food Markets, Inc. v. Retail Clerks Union*, 45 Cal. 2d 764, 771 (1955); *State Sch. Bldg. Fin. Comm. v. Betts*, (1963) 216 Cal. App. 2d 685, 691 (1963) ("To know obligations of contract, appellate court will look to laws in force when contract was made."); *Hess v. Ford Motor Co.*, 27 Cal. 4th 516, 524 (2002) (Under long-standing contract law, a "contract must be so interpreted as

to give effect to the mutual intention of the parties as it existed at the time of contracting"). And, as the California Supreme Court has acknowledged, "all applicable laws in existence when an agreement is made, which laws parties are presumed to know and to have had in mind, necessarily enter into the contract and form part of it, without any stipulation to that effect, as if they were expressly referred to or incorporated." *Alpha Beta Food Markets, Inc.*, 45 Cal. 2d at 771.

According to Defendant, its Terms of Service were last revised on December 26, 2018, and they contain the Arbitration Provision Defendant seeks to enforce upon Plaintiff from the purchases she made from Defendant's website on or about May 12, 2022. (*See* Satur Decl. ¶ 4; Complaint ¶ 66.) At that time and since, *McGill v. Superior Court*, 2 Cal. 5th 945 (2017) and its broad holding prohibiting the waiver of public injunctive relief in any forum have been in full force and effect. The Arbitration Agreement explicitly states that it excludes actions for injunctive relief and was revised in 2018, likely as a result of *McGill*. Plaintiff's entire action for public injunctive relief is excluded from arbitration per the terms of the Arbitration Provision and must remain in Court. Accordingly, Defendants' motion must be denied.

B. There Is No Delegation and the Court Determines Arbitrability

Defendant knows there is an exclusion for injunctive relief actions in the contract it drafted, so it pivots and asserts that an arbitrator should determine arbitrability—that is, whether the Arbitration Provision provides for the parties to arbitrate the particular grievance at issue here. This Court already ordered that the injunctive relief claims asserted in the *Stewart* action would remain in court. (*See Stewart* Minute Order, Hearing on Motion to Compel, March 28, 2023.) The Court did not find that an arbitrator should make that decision in *Stewart*, and nor should an arbitrator make that decision here. It is for the Court to determine.

Indeed, threshold issues like arbitrability are generally reserved for the court. "The usual presumption is that a court, not an arbitrator, will decide in the first instance whether a dispute is arbitrable." *Gostev v. Skillz Platform, Inc.*, 88 Cal. App. 5th 1035, 1048 (2023). In light of this presumption, although parties may agree to delegate this authority to the arbitrator, evidence that the parties intended such a delegation must be "clear and unmistakable" before a court will enforce a delegation provision. *Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771, 781 (2012). "This

is a 'heightened standard,' higher than the evidentiary standard applicable to other matters of interpreting an arbitration agreement." *Id.* at 790. Defendant fails to meet this heightened standard. First, there is no delegation clause in the Arbitration Provision in the Terms of Service. There is no language providing that an arbitrator retains such exclusive power over the court to determine threshold matters like arbitrability. In fact, there is no language discussing such delegation at all. However, given the clear and unmistakable standard, "the law is solicitous of the parties actually *focusing* on the issue. Hence silence or ambiguity is not enough." *Gostev*, 88 Cal. App. 5th at 1052 (quotations and citations omitted).

Second, Defendant relies on the Arbitration Provision's statement that arbitrations will be conducted by the American Arbitration Association ("AAA") Commercial Dispute Resolutions Procedures, Supplementary Procedures for Consumer-Related Disputes. (Mot. at 15.) However, such reliance is not availing. Here, the Arbitration Provision mentions the AAA rules, but does not state how a consumer could find them or provide a link or actually attach them to the Terms of Service. (*See* Satur Decl., Ex. A.) In such circumstances, "[c]oncluding that [the plaintiff] actually considered and consciously agreed to delegate the issue of arbitrability would be a complete fiction. While such fictions might be permissible in other areas of arbitration law, that is not the case with delegation, which requires meeting a 'heightened standard.'" *Beco v. Fast Auto Loans, Inc.*, 86 Cal. App. 5th 292, 306 (2022) (internal quotation marks omitted). Moreover, "[t]here are many reasons for stating that the arbitration will proceed by particular rules, and doing so does not indicate that the parties' motivation was to announce who would decide threshold issues of enforceability." *Ajamian*, 203 Cal. App. 4th at 790. Defendant drafted the Arbitration Provision and could have expressly stated that threshold questions of arbitrability were to be delegated to the arbitrator, but it did not do so.

Thus, "reference to AAA Commercial Arbitration Rules is not enough." *Gostev*, 88 Cal. App. 5th at 1050, 1051-1053 (capitalization and underlining omitted) (holding that incorporation by reference to the AAA rules does not provide clear and unmistakable evidence the parties intended to delegate to the arbitrator threshold arbitrability issues) (citing cases). Defendant primarily relies on two federal cases to support its contrary contentions but fails to mention that

each of those cases expressly limited their holdings so that they do not apply here. *See Brennan v. Opus Bank*, 796 F.3d 1125 (9th Cir.2015) and *Oracle America, Inc. v. Myriad Group A.G.*, 724 F.3d 1069 (9th Circ. 2013). For example, in *Brennan* the Ninth Circuit stated "as in *Oracle America*, we limit our holding to the facts of the present case, which do involve an arbitration agreement 'between sophisticated parties.'" *Brennan,* 796 F.3d at 1131. Unlike in both federal cases, this is not an action between sophisticated parties, as Plaintiff is simply a consumer who purchased Defendant's clothing for herself online. *Brennan* further mentions that "we need not decide nor do we decide here 'the effect [if any] of incorporating [AAA] arbitration rules into consumer contracts' or into contracts of any nature between 'unsophisticated' parties." *Id.* Likewise, *Oracle America* states that "[w]e express no view as to the effect of incorporating arbitration rules into consumer contracts." *Oracle America*, 724 F.3d at 1075, n.2. The other cases Defendant cites are also distinguishable or otherwise unavailing here. In *Aanderud v. Superior Court*, 13 Cal. App. 5th 880 (2017), there is an express delegation clause, a fact to which the appellants conceded. *Id.* at 891 ("The Aanderuds concede the arbitration provision contains a delegation clause, which delegates the issue of the enforceability of the [purchase agreement], including the determination of the scope or applicability of the arbitration provision, to the arbitrator."). *Rodriguez v. American Technologies Inc.*, 136 Cal.App.4th 1110, 1123 (2006) discusses delegation in a single paragraph and cites only a federal Second Circuit case for support.

Third, Defendant's reliance on the purported broad language of the Arbitration Provision, which never mentions delegating arbitrability, is not sufficient. Defendant relies on language that the parties agreed to arbitrate "[a]ny dispute relating in any way" to use of the website and products, in addition to the reference to AAA rules. (Mot. at 16:20-22.) Defendant cites no authority, however. Governing authority does not support Defendant's contention. In *Nelson v. Dual Diagnosis Treatment Center, Inc.*, 77 Cal. App. 5th 643, 655 (2022), the defendant made a similar claim that the broad language of the arbitration clause implicitly reflected a delegation to the arbitrator to decide arbitrability, and raised language that the parties "desire to resolve *any* dispute, whether based on contract, tort, statute or other legal equitable theory *arising out of or related to* this Agreement … or the breach or termination of this Agreement … without litigation."

The court flatly rejected this argument: "While this language might permit an inference the parties intended that an arbitrator should resolve arbitrability questions (i.e., 'any dispute'), such an intent is not clear and unmistakable." *Id.* The court went on to state that "[t]he clause does not mention arbitrability, nor is it mentioned anywhere else in the agreement[;]" yet, [a]rbitrability is a 'rather arcane' subject [citations omitted], and silence or ambiguity regarding arbitrability favors the presumption for judicial determination." *Id.* As this is the case here, there has been no delegation.

Accordingly, "[i]n short, [Defendant] has failed to establish the parties clearly and unmistakably delegated threshold issues of arbitrability to the arbitrator." *Gostev*, 88 Cal. App. 5th at 1053.

IV. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the court deny Defendant's motion to compel arbitration in its entirety.

Dated: August 14, 2023

Respectfully submitted,

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