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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

X CORP.,

Plaintiff,

v.

WACHTELL, LIPTON, ROSEN & KATZ,

Defendant.

Case No. CGC-23-607461

~~[PROPOSED]~~ ORDER GRANTING DEFENDANT WACHTELL, LIPTON, ROSEN & KATZ'S MOTION TO COMPEL ARBITRATION AND FOR A STAY OF PROCEEDINGS PENDING DISPOSITION OF THIS MOTION AND ARBITRATION

Date: October 17, 2023
Time: 9:30 a.m.
Dept.: 302
Judge: Hon. Richard B. Ulmer

Date Action Filed: July 5, 2023
Trial Date: None Set

On September 8, 2023, Defendant Wachtell, Lipton, Rosen & Katz filed a Motion to Compel Arbitration and for a Stay of Proceedings Pending Disposition of this Motion and Arbitration. This Motion was noticed to be heard before this Court on October 17, 2023. On September 29, 2023, Plaintiff X Corp. filed an Opposition to Defendant's Motion to Compel. On October 10, 2023, Defendant filed a Reply in Support of its Motion to Compel. On October 16, 2023, the Court issued a tentative ruling, which was not contested by Plaintiff. Therefore, the Court reaffirms and adopts its tentative ruling, as follows:

Defendant's motion to compel arbitration and stay is granted.

The parties agree that they entered into an arbitration agreement. They dispute the scope of that agreement, including the scope of the delegation clause.

Plaintiff is the successor-in-interest to Twitter. The Master Retention Agreement between Twitter and defendant provides:

> Notwithstanding the foregoing, except with respect to enforcing claims for injunctive or equitable relief, any dispute, claim, or controversy arising out of or relating in any way to this Agreement or the interpretation, application, enforcement, breach, termination or validity thereof (including any claim of inducement of this Agreement by fraud and including determination of the scope or applicability of this agreement to arbitrate) or its subject matter (collectively "Disputes") shall be determined by binding arbitration before one arbitrator…Notwithstanding the above, each party shall have recourse to any court of competent jurisdiction to enforce claims for injunctive and other equitable relief.

(Tangri Decl., Ex. A ¶ 15(b).)

The agreement further provides that the JAMS Rules apply and JAMS Rule 11(b) states:

> Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

(Tangri Decl., Ex. C at p. 8 [JAMS Rule 11(b)].)

The court concludes that the parties clearly and unmistakably delegated the issue of arbitrability to the arbitrator. (See *Henry Schein, Inc. v. Archer & White Sales, Inc.* (2019) 139 S.Ct. 524, 530; *Aanderud v. Superior Court* (2017) 13 Cal.App.5th 880, 890-91.) The Master

Retention Agreement only carves out actions "*enforcing* claims for injunctive or equitable relief." It did not carve out any other issue or circumscribe the scope of the parties' broad delegation clause. The subsequent parenthetical shows that the arbitrator decides arbitrability. The arbitrator should therefore determine which of plaintiff's claims, if any, are subject to arbitration.

In *Oracle America, Inc. v. Myriad Group A.G.*, 724 F.3d 1069 (9th Cir. 2013), the parties entered into an arbitration agreement that (1) carved out intellectual property rights claims for court jurisdiction; and (2) incorporated UNCITRAL arbitration rules that delegated the arbitrability issue to the arbitrator. The court concluded that the carve-out provision did not show that the parties intended for the court to decide arbitrability. The *Oracle* court noted that the plaintiff's "argument conflates the *scope* of the arbitration clause, i.e., which claims fall within the carve-out provision, with the question of *who* decides arbitrability. (*Id.* at 1076 (emphasis in original).) Plaintiff's opposition suffers from this same infirmity as it collapses the issue regarding scope and the separate issue regarding who decides arbitrability into one. The court finds that the language of the Master Retention Agreement is clear and unmistakable.

In *Oracle*, the arbitration provision/carve out and delegation clause were in two separate sentences. But that syntax is not dispositive. In *Brennan v. Opus Bank*, 796 F.3d 1125, 1128 (9th Cir. 2015), the parties agreement provided: "Except with respect to any claim for equitable relief ... any controversy or claim arising out of this [Employment] Agreement or [Brennan's] employment with the Bank or the termination thereof ... shall be settled by binding arbitration in accordance with the Rules of the American Arbitration Association." The *Brennan* court determined that the delegation clause was enforceable and compelled arbitration.

In addition, the incorporation of the JAMS Rules reinforces the parties' intent that arbitrability was delegated to the arbitrator. "Virtually every circuit to have considered the issue has determined that incorporation of the [AAA] arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." (*Id.* at 1074; *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) ["incorporation of the AAA rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability."].)

Plaintiff relies heavily on *Mohamed v. Uber Techs., Inc.*, 836 F.3d 1102, 1108 (9th Cir. 2016). There, the 2013 Agreement carved out an exception from the general delegation provision: "Notwithstanding any other clause contained in this Agreement, any claim that all or part of the Class Action Waiver, Collective Action Waiver or Private Attorney General Waiver is invalid, unenforceable, unconscionable, void or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator." (*Id.* at 1108.) The Ninth Circuit concluded that the specific carve out language served to "clearly and unmistakably delegate[ ] the question of arbitrability to the arbitrator for all claims except challenges to the class, collective, and representative action waivers." (*Id.* at 1110.) In this case, there is no such clear language that carves out the delegation of arbitrability for certain claims.

IT IS SO ORDERED

Dated: October 17, 2023

By: _____
Hon. Richard B. Ulmer
JUDGE OF THE SUPERIOR COURT