UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV17-08257 JAK (GJSx)	Date	July 10, 2018
Title	Yan Guo v. Kyani, Inc., et al.		

Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Andrea Keifer	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) ORDER RE DEFENDANTS' MOTION TO COMPEL ARBITRATION AND TO DISMISS OR STAY (DKT. 76)**

JS-6: Stayed/Inactive Calendar

I. Introduction

Yan Guo ("Yan"[1]) and Ju Jin Guo ("Ju Jin") (collectively, "Plaintiffs"), individually and on behalf of all others similarly situated, brought this action against Kyäni, Inc. ("Kyäni"), Michael Breshears ("Breshears") and Kirk Hansen ("Hansen") (collectively, "Defendants"). Dkt. 1. The claims arise out of Plaintiffs' role as distributors of certain health and wellness products. Plaintiffs contend that Defendants have established the distributorships as part of a "pyramid scheme," rather than a legitimate sales process. It is alleged that Defendants require distributors to make certain payments and to recruit others as distributors who are also obligated to do so. Both Plaintiffs are distributors.

On January 31, 2018, Defendants filed an Arbitration Demand with the American Arbitration Association ("AAA") in Idaho Falls, Idaho as to the disputes with Yan. *See* Declaration of Lawrence B. Steinberg ("Steinberg Decl."), Dkt. 23-2 ¶ 3. The following day, Plaintiffs filed the First Amended Complaint ("FAC"). Dkt. 27. On February 12, 2018, Defendants filed a First Amended Arbitration Demand with the AAA as to Yan. *See* Ex. B to Declaration of C. Seth Ensign ("Ensign Decl."), Dkt. 39-3. The same day, Defendants also filed with the AAA an Arbitration Demand as to Ju Jin. *See* Ex. A to Ensign Decl., Dkt. 39-2.

On May 14, 2018, Defendants brought a Motion to Compel Arbitration and to Dismiss or Stay (the "Motion"). Dkt. 76. Plaintiffs opposed the Motion (Dkt. 78),[2] and Defendants replied. Dkt. 84. On July 2, 2018, a hearing on the Motion was held and it was taken under submission. Dkt. 92. For the reasons stated in this Order, the merits of the Motion are not addressed because the proper venue for that determination is the District Court of the Seventh Judicial District of Idaho. Therefore, the Motion is

[1] The use of first names to identify those with common surnames is designed to facilitate the discussion in this Order. No disrespect is intended by the use of this common convention.

[2] Plaintiffs filed many objections to the evidence proffered by Defendants in support of the Motion. Dkt. 80. Because the issues to which this evidence relates are not addressed in this Order, those objections are **MOOT**.

GRANTED, but only as to the determination of venue.

II. Factual Background

A description of the factual background in this action is detailed in a prior order (the "Prior Order" (Dkt. 75)). That discussion is incorporated here by this reference. To provide context for the Motion, a summary of the parties, the proposed class and the relevant agreements follows.

A. The Parties

Kyäni is an Idaho corporation. It is a network marketing company that distributes health and wellness products through a network of independent contractor distributors ("Distributors"). Declaration of Kristen Pearson ("Pearson Decl."), Dkt. 76-1 ¶ 3. The FAC alleges that Breshears and Hansen founded Kyäni in 2005. FAC ¶ 21. It alleges that Breshears is the Chief Executive Officer of Kyäni and that Hansen is Kyäni's Founder and Chairman. *Id.* ¶¶ 8-9. The FAC alleges that Breshears and Hansen are "at the top of Kyäni's pyramid" because they are in the "top 1% of Distributors who make the most lucrative bonuses. *Id.* ¶¶ 87-88.

Yan and Ju Jin are citizens of California. *Id.* ¶¶ 5-6. As noted, each is a Distributor. *Id.* ¶ 1.

B. The Proposed Class and Subclasses

Plaintiffs seek to represent a nationwide class of "persons who paid start-up fees, monthly fees, annual fees, seminar ticket fees, any other fees imposed by Kyäni, and/or purchased products from Kyäni between January 1, 2011, to the present date, who lost money from their participation in the Kyäni scheme." FAC ¶ 103. Plaintiffs also seek the certification of two subclasses. *Id.* ¶¶ 104-05.

C. The Claims Advanced in the FAC

The FAC alleges that Kyäni operates as an illegal "pyramid scheme." FAC ¶ 3. It alleges that Distributors gain "rank" in the pyramid scheme through the successful recruitment of others as distributors. *Id.* ¶ 69. It also alleges that that Breshears and Hansen made certain misrepresentations to Plaintiffs with respect to whether Kyäni distributorship is profitable. *Id.* ¶¶ 20-80.

The FAC advances ten causes of action: (i) declaratory relief; (ii) operation of an endless chain scheme, Cal. Pen. Code § 327, Cal Civ. Code § 1689.2; (iii) unfair and deceptive business practices, Cal. Bus. & Prof. Code §§ 17200 *et seq.*; (iv) false advertising, Cal. Bus. & Prof. Code §§ 17500 *et seq.*; (v) fraudulent concealment and nondisclosure; (vi-vii) violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961(5), 1962(c)[3]; (viii) federal securities fraud; (ix) unjust enrichment and (x) violations of the California Seller Assisted Marketing Plan Act ("CSAMPA"), Cal. Civ. Code §§ 1812.200 *et seq.*

[3] Plaintiffs' RICO claims were dismissed in the Prior Order. Dkt. 75.

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D. Evidence Submitted by Defendants

1. Declaration Prepared by Kyäni's Global Compliance Director

Defendants submitted the declaration of Kristen Pearson ("Pearson"), Kyäni's Global Compliance Director, in support of the Motion. Pearson Decl., Dkt. 76-1 ¶ 2. Pearson declares that to become a Distributor, a person must submit an online application through Kyäni's website. *Id.* ¶ 5. As part of the application process, prospective distributors are required to consent to three separate agreements -- the Electronic Consent Agreement, Kyäni's Policies & Procedures and Kyäni's Independent Distributor Agreement Terms & Conditions (collectively, "the Agreements"). *Id.* ¶¶ 6, 9, 11. Prospective distributors may review the Agreements on Kyäni's website or download copies of them in PDF form during the application process. *Id.* ¶¶ 12, 14. To become a Distributor, an applicant must check three separate boxes that are presented on Kyäni's website during the application process. By checking these boxes, an applicant confirms his or her agreement to the terms and conditions presented in the Agreements. *Id.* ¶¶ 13, 15. Consequently, Pearson declares that Plaintiffs had to follow this protocol when each became a Distributor. Supplemental Declaration of Kristen Pearson ("Pearson Supp. Decl."), Dkt. 76-2 ¶ 18. Yan Guo became a Distributor on January 29, 2016. Pearson Decl., Dkt. 76-1 ¶ 16.

Defendants also submitted a copy of the supplemental declaration prepared by Pearson that was filed in connection with a prior motion. Pearson Supp. Decl., Dkt. 32-1. In it, Pearson declares that a person by the name of "Ju Jin" applied to be and became a Kyäni distributor on December 30, 2015. *Id.* ¶ 17. Although the application submitted by "Ju Jin" did not include the last name "Guo," it appears that "Ju Jin" is the same Ju Jin as the Plaintiff in this action. *Id.* ¶ 19. Plaintiffs have not disputed this assertion.

2. The Kyäni Independent Distributor Agreement Terms & Conditions

The Kyäni Independent Distributor Agreement Terms & Conditions (the "Independent Distributor Agreement") governs the relationship between Kyäni and its Distributors. *See* Ex. A to Pearson Decl., Dkt. 76-1 at 4 (Independent Distributor Agreement). It includes a choice of law provision stating that the Distributor Agreement "will be governed by and construed in accordance with the laws of the State of Idaho, unless the laws of the state in which I reside expressly require the application of its laws." *Id.* § 12; *see also id.* ("The Distributor Agreement shall be governed exclusively by the laws of the State of Idaho.").

The Independent Distributor Agreement also contains the following terms as to the arbitration of disputes:

> Except as set forth in the Kyäni Policies and Procedures, or unless the laws of the state in which I reside expressly prohibit the consensual jurisdiction and venue provisions of this Agreement, in which case its laws shall govern, all disputes and claims relating to Kyäni, the Distributor Agreement, the Kyäni Global Compensation Plan or its products, the rights and obligations of an independent Distributor and Kyäni, or any other claims or causes of action relating to the performance of either an independent Distributor or Kyäni under the Agreement or the Kyäni Policies and Procedures shall be settled totally and finally by binding arbitration in Idaho Falls, Idaho or such other location as Kyäni prescribes, in accordance with the Federal Arbitration Act and the Commercial

> Arbitration Rules of the American Arbitration Association. The parties shall be allowed all discovery rights pursuant to the Federal Rules of Civil Procedure. If a Distributor files a claim or counterclaim against Kyäni, a Distributor shall do so on an individual basis and not with any other Distributor or as part of a class action. If a Distributor wishes to bring an action against Kyäni for any act or omission relating to or arising from this Agreement, such action must be brought within one year from the date of the alleged conduct giving rise to the cause of action. Failure to bring such action within one year shall bar all claims against Kyäni for such act or omission. Distributor waives all claims that any other statutes of limitations applies. The decision of the arbitrator shall be final and binding on the parties and may, if need be, be reduced to a judgment in any court of competent jurisdiction. The prevailing party shall be entitled to receive from the losing party costs and expenses of arbitration, including legal and filing fees. This agreement to arbitrate shall survive any termination or expiration of the Agreement.

Id.

The Independent Distributor Agreement also includes a forum selection clause, which is placed immediately before the arbitration provision. It provides that

> the Distributor agrees to submit exclusively to the jurisdiction of the courts of the State of Idaho, and specifically the District Court of the Seventh Judicial District with venue in Bonneville County, for resolution of any claims or related litigation to interpret or enforce the terms of the Distributor Agreement.

Id.

The Independent Distributor Agreement also provides:

> To the extent of any conflict or inconsistency between this Agreement and the Policies and Procedures (in their current form or as subsequently modified), the Policies and Procedures shall in all instances supersede and prevail over any term of this Agreement as to the matters addressed herein.

Id. § 9.

3. The Policies & Procedures

The Policies & Procedures govern the "rights" of Distributors. *See* Ex. B to Pearson Decl., Dkt. 76-1 at 9 (Policies & Procedures). Section 8 of the Policies & Procedures includes a forum selection clause with the same language that is used in the Independent Distributor Agreement. *See id.* § 8.d. ("[T]he Distributor agrees to submit exclusively to the jurisdiction of the courts of the State of Idaho, and specifically the District Court of the Seventh Judicial District with venue in Bonneville County, for resolution of any claims or related litigation to interpret or enforce the terms of the Distributor Agreement.").

E. The Prior Order

The Prior Order issued on May 1, 2018. It addressed several motions brought by Defendants. Dkt. 75. One sought the dismissal of this action based on forum non conveniens. Dkt. 17 (the "Forum Non Conveniens Motion"). In support of the Forum Non Conveniens Motion, Defendants argued that Plaintiffs could not pursue the substantive claims advanced in the FAC in the Central District of California based on the forum selection clause in the Independent Distributor Agreement. As noted, that clause provides, *inter alia*, that the "Distributor agrees to submit exclusively to the jurisdiction of the courts of the State of Idaho . . . for resolution of any claims or related litigation to interpret or enforce the terms of the Distributor Agreement." Independent Distributor Agreement § 12.

The Prior Order concluded that the forum selection clause did not apply to the causes of action advanced in the FAC as to Defendants' alleged operation of an illegal pyramid scheme. Thus, none of these claims would require resolution of disputes regarding the interpretation of the Independent Distributor Agreement. Prior Order at 8. The Prior Order acknowledged that there was "one potential exception" to this determination, *i.e.*, the first cause of action, which seeks a judicial declaration that the arbitration provision is unenforceable. *Id.* at 9 n.5. The Prior Order reserved this issue because Defendants had not yet moved to compel arbitration. It stated that, in connection with Defendants' anticipated motion to compel arbitration, the parties were to address whether "questions concerning the enforceability of the arbitration clause, and its application to some or all of the claims in the FAC, are to be addressed by this Court in light of the forum selection clause." *Id.*

III. Analysis

A. General Legal Standards

The Federal Arbitration Act, 9 U.S.C. §§ 2 *et seq.* ("FAA") applies to "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction. . . ." 9 U.S.C. § 2. The FAA provides that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id*.

Under the FAA, the initial inquiry in connection with a motion to compel arbitration is limited to determining "(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). If both of these conditions are met, "the Act requires the court to enforce the arbitration agreement in accordance with its terms." *Id.*

B. Application

1. Whether Venue Is Proper as to the Motion to Compel Arbitration

a) Legal Standards

The FAA has a venue provision. *See* 9 U.S.C. § 4. It provides:

> 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 which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.

Id.

This venue statute permits the exercise of discretion and supplements the general venue provision set forth in 28 U.S.C. § 1391. *Textile Unlimited, Inc. v. A..BMH & Co., Inc.*, 240 F.3d 781, 784 (9th Cir. 2001). The FAA venue provision was enacted "with the intent of liberalizing venue choice." *Id.*

Many cases have considered the effect of a contractual term that specifies the forum for arbitration on the authority of a district court to compel or enjoin arbitration. Although the "majority view holds that where the parties agreed to arbitrate in a particular forum only a district court in that forum has authority to compel arbitration under § 4," in *Textile*, the Ninth Circuit adopted a different approach. *Ansari v. Quest Commcn's Corp.*, 414 F.3d 1214, 1219-20 (10th Cir. 2005). *Textile* held that an action to enjoin arbitration may be brought in a district other than the one designated by the contract as the forum for arbitration. 240 F.3d at 786. As the Ninth Circuit explained:

> [O]n its face, § 4 provides that venue is proper for an action to compel arbitration in "any United States district court which, save for such agreement, would have jurisdiction under Title 28." That clear expression should end the argument. However, [defendant] asserts that venue any place other than the place of arbitration contractually specified is precluded by the § 4 provision that "[t]he hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed." However, this interpretation skirts the section's plain language: by its terms, § 4 only confines the *arbitration* to the district in which the petition to compel is filed. It does not require that the petition be filed where the contract specified that arbitration should occur. *See Continental Grain Co. v. Dant & Russell*, 118 F.2d 967, 969 (9th Cir.1941).

Id. at 785.

Although *Textile* concerned a motion to enjoin arbitration, other district courts in California have applied its reasoning to motions to compel arbitration. *See, e.g.*, *Grinberg v. CareVoyant, Inc.*, 2011 WL 13217585, at *2 (C.D. Cal. Feb. 15, 2011) (citing *Textile* for the proposition that "the FAA does not require that an action to compel or enjoin arbitration be brought in the district designated in the arbitration clause"). Accordingly, in the Ninth Circuit, a district court may not compel arbitration in a district other than the district in which the motion or petition to compel was filed. *Lexington Ins. Co. v.*

Centex Homes, 795 F. Supp. 2d 1084, 1091 (D. Haw. 2011) (section 4 "prohibits a district court from ordering parties to arbitrate outside of the district in which a motion to compel is filed" (citing *Cont'l Grain Co. v. Dant & Russell*, 118 F.2d 967, 968-69 (9th Cir. 1941)). A district court may, however, compel arbitration in the district in which the motion or petition was filed notwithstanding a contrary forum selection clause. *Homestake Lead Co. of Mo. v. Doe Run Resources Corp.*, 282 F. Supp. 2d 1131, 1143 (N.D. Cal. 2003) (ordering that arbitration be initiated in San Francisco despite a contractually-designated forum of St. Louis because "*Continental Grain* interprets section 4 of the FAA as limiting courts to ordering arbitration within the district in which the suit was filed").

b) Application

Textile offers some guidance where, as here, the operative agreement contains two forum selection clauses -- one that designates the forum for arbitration and the other that applies more generally to claims and related litigation "to interpret or enforce" the terms of agreement that contains the arbitration clause. The Independent Distributor Agreement provides that all "disputes and claims relating to Kyäni . . . . shall be settled totally and finally by binding arbitration in Idaho, Falls," and also that "the Distributor agrees to submit exclusively to the jurisdiction of the courts of the State of Idaho . . . for resolution of any claims or related litigation to interpret or enforce the terms of the Distributor Agreement." *Textile* also offers some guidance where the party moving to compel arbitration disputes whether the court where its motion was filed is the proper venue for that determination. Thus, *Textile* addresses whether this Court could compel Plaintiffs to arbitrate their claims in Idaho if Defendants had voluntarily moved to compel arbitration in this action. It makes clear that the Court could not. However, *Textile* does not expressly address the effect, if any, that the general forum selection clause has on the determination whether the issues raised in the Motion are properly before the Court.

As an initial matter, by filing the Motion, Defendants did not waive the argument that the issues it presents are not properly before this Court. As noted, the Prior Order instructed the parties to brief the issue of arbitrability, including whether questions concerning the enforceability of the arbitration clause and its scope should be addressed by the Court in light of the forum selection clause. In a footnote in support of the Motion, Defendants argue that

> Plainly, the arbitrability of Plaintiffs' claims needs to be decided *somewhere*, and Defendants have argued that the plain language of the Distributor Agreement delegates that issue to the arbitrator in the first instance, and the Idaho state court in the second. By denying Defendants' Motion to Stay and Motion to Dismiss for Forum Non Conveniens and ordering the parties to brief the applicability and enforceability of the arbitration clause here, the Court appears to have already determined that it may address these issues. To the extent the Court believes it has not reached such a determination, a plain language reading of the Distributor Agreement would result in the Idaho state court analyzing and interpreting the arbitration provisions, given the Court's prior holding that such issues are not clearly and unmistakably delegated to the arbitrator.

Motion at 17 n.4 (emphasis in original).[4]

During the hearing on July 2, 2018, Counsel for Defendants reiterated this position. In response to a question from the Court, defense counsel stated that he believes it would be error for the Court to rule on the merits of the Motion because the Independent Distributor Agreement designates the Idaho state court as having exclusive jurisdiction over "any claims or related litigation to interpret or enforce" the agreement's terms, including the arbitration provision. According to Defendants, this action should be dismissed or stayed pending a ruling by that court on the arbitrability of Plaintiffs' claims. Defendants have not, however, filed a petition to compel arbitration in the Idaho state court. Plaintiffs did not address this issue in their opposition brief.

As noted, the relevant forum selection clause provides that the

> Distributor agrees to submit exclusively to the jurisdiction of the courts of the State of Idaho, and specifically the District Court of the Seventh Judicial District with venue in Bonneville County, for resolution of any claims or related litigation to interpret or enforce the terms of the Distributor Agreement.

Independent Distributor Agreement § 12.

This language states expressly that it applies to litigation to "interpret or enforce" the Independent Distributor Agreement. The issues presented in the Motion as to the scope and enforceability of the arbitration provision, which is part of the Independent Distributor Agreement, raise questions of contract interpretation. Accordingly, the District Court of the Seventh Judicial District is the proper venue for the determination of such issues, which include the application and enforceability of the arbitration provision. This conclusion is also consistent with the complementary relationship between the forum selection clause and the arbitration provision. *See Mohamed v. Uber Technologies*, 848 F.3d 1201 (9th Cir. 2016) (no inconsistency in an agreement containing a forum selection clause and a separate arbitration provision because "[n]o matter how broad the arbitration clause, it may be necessary to file an action in court to enforce an arbitration agreement, or to obtain a judgment enforcing an arbitration award, and the parties may need to invoke the jurisdiction of a court to obtain other remedies" (quoting *Dream Theater, Inc. v. Dream Theater*, 124 Cal. App. 4th 547, 556 (2004), *as modified on denial of reh'g* (Dec. 28, 2004)).

IV. Conclusion

For the reasons stated in this Order, the Motion is **GRANTED**, but only as to the determination of the appropriate venue for the evaluation of the merits of the Motion. All proceedings in this action are stayed, and this matter is placed on the Court's inactive calendar, pending the resolution by the District Court of the Seventh Judicial District of Idaho in Bonneville County, of the issues as to arbitrability presented by the Motion. Defendants shall commence an action in that venue forthwith seeking the

[4] This position is consistent with the one Defendants advanced in the Forum Non Conveniens Motion. As noted, Defendants moved to dismiss in reliance on the Idaho forum selection clause. They also acknowledged the arbitration clause: "[I]t is Defendants' view that the proper court to rule on the arbitrability of this dispute is the Idaho state court, and Defendants bring the instant motion without waiver of, and expressly reserving, their right to compel this dispute to arbitration." Forum Non Conveniens Motion at 5 n.1.

determination of those issues. Defendants shall file a report with this Court within seven days of the commencement of such litigation, which includes the citation to the case and its docket number. Thereafter, the parties shall file a joint report on the earlier of every 45 days, or within ten days of the issuance of a ruling by the District Court of the Seventh Judicial District of Idaho in Bonneville County, regarding the status of the proceedings there, with the first report due no later than September 5, 2018. Upon receiving each such report, the Court will determine whether the stay of this action should be lifted or remain in place.

IT IS SO ORDERED.

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