

1
2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 RYAN DIAZ, et al.,

7 Plaintiffs,

8 v.

9 NINTENDO OF AMERICA INC,

10 Defendant.

C19-1116 TSZ

MINUTE ORDER

11 The following Minute Order is made by direction of the Court, the Honorable
12 Thomas S. Zilly, United States District Judge:

13 (1) Defendant's Motion to Dismiss and Compel Arbitration, docket no. 24, is
14 GRANTED in part and DENIED in part as follows:

15 (a) Defendant's Motion to Compel Arbitration, docket no. 24, is
16 GRANTED. "[B]efore referring a dispute to an arbitrator, the court
17 determines whether a valid arbitration agreement exists." *Henry Schein,*
18 *Inc. v. Archer & White Sales, Inc.*, -- U.S. ---, 139 S. Ct. 524, 530
19 (2019). If the parties entered into a valid agreement to arbitrate, and the
20 agreement delegates threshold arbitrability questions to an arbitrator by
"clear and unmistakable" evidence, all other arbitrability issues,
including whether the agreement covers a particular controversy, must
be determined by an arbitrator. *Id.* at 529-30. Here, Plaintiffs contend
that, although they each agreed to the arbitration provision in
Nintendo's End User Licensing Agreement ("EULA"), the California
Supreme Court's decision in *McGill v. CitiBank, N.A.*, 393 P.3d 85 (Cal.
2017) invalidates the EULA's arbitration provision because it bars
Plaintiffs from seeking public injunctive relief.¹ The *McGill* court held

21 ¹ Two of the eighteen Plaintiffs are California residents. The remaining sixteen Plaintiffs
22 reside in sixteen other states. Plaintiffs contend that there is an actual conflict between the
23 contract law of Washington and California, and under the most significant relationship test,

1 that any contract waiving public injunctive relief is unenforceable under
2 California law. 393 P.3d at 94. The agreement in that case prohibited
3 an arbitrator from awarding injunctive relief to non-parties.² Plaintiffs'
4 reliance on *McGill* is misplaced.³ Here, the EULA requires arbitration
5 but contains no restriction on the arbitrator's discretion to award public
6 injunctive relief. Rather, the EULA gives the arbitrator the power "to
7 grant whatever relief would be available in a court under law or in
8 equity." Kiel Decl., docket no. 25 at 7, Ex. A. Thus, the EULA
9 requires arbitration and the individual adjudication of claims but does
10 not bar an individual from seeking—or an arbitrator from awarding—
11 public injunctive relief. Because "[t]he *McGill* rule leaves undisturbed
12 an agreement that both requires bilateral arbitration and permits public
13 injunctive claims," *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 829 (9th
14 Cir. 2019), the EULA constitutes a valid arbitration agreement under
15 California law.⁴ The Court therefore turns to the question of whether

16 California law applies because that is where the California plaintiffs bought their Nintendo
17 Switches. *See Hanson v. MGM Resorts Int'l*, 2017 WL 3085694, at *2 (W.D. Wash. July 20,
18 2017).

19 ² The agreement stated in pertinent part that (1) "[a]n award in arbitration shall determine
20 the rights and obligations between the named parties only, and only in respect of the Claims in
21 arbitration, and shall not have any bearing on the rights and obligations of any other person, or
22 on the resolution of any other dispute"; and (2) "[t]he arbitrator will not award relief for or
23 against anyone who is not a party." 393 P.3d at 90.

³ Plaintiffs' reliance on the trio of Ninth Circuit cases finding arbitration agreements void
under *McGill* is also misplaced. The arbitration agreements in those cases also contained
provisions that explicitly prohibited public injunctive relief, unlike the provision at issue in this
case. *See, e.g., Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 831 (9th Cir. 2019) (agreement
prohibiting the arbitrator from awarding "relief that would affect RAC account holders other
than you"); *Tillage v. Comcast Corp.*, No. 3:17-cv-06477-VC, ECF No. 28-1, Ex. A at 17 (N.D.
Cal. Jan. 18, 2018) (agreement providing that "[t]he arbitrator may award relief only in favor of
the individual party seeking relief"); *McArdle v. AT&T Mobility LLC*, 2017 WL 4354998, at *1
(N.D. Cal. Oct. 2, 2017) (agreement providing that "[t]he arbitrator may award declaratory or
injunctive relief only in favor of the individual party").

⁴ Plaintiffs also contend that because *McGill* renders the Agreement invalid as to the two
California plaintiffs, the Agreement is invalid as to the other sixteen plaintiffs because the
Agreement contains a non-severability clause. Even if *McGill* invalidated the Agreement as to
the California plaintiffs, it would not affect the validity of the Agreement as to the sixteen other
plaintiffs. The agreement at issue in *Roberts v. AT&T Mobility LLC* contained a similar non-
severability clause to the EULA. 2018 WL 1317346, at *8 (N.D. Cal. Mar. 14, 2018), *aff'd*
Roberts v. AT&T Mobility LLC, 2020 WL 774368 (9th Cir. Feb. 18, 2020). In that case, the
court invalidated the arbitration agreement as to the California plaintiffs but required the
Alabama plaintiff to arbitrate because he "ha[d] no *McGill* argument because his claims for relief
are governed by Alabama law, not California law." *Id.* The same is true in this case.

1 the arbitration agreement contains a provision delegating all other
2 arbitrability issues, including the scope of the agreement, to an
3 arbitrator. *See Schein*, 139 S. Ct. at 529-30. If an arbitration provision
4 contains a delegation clause, the Court’s inquiry ends. *Weimin Chen v.*
5 *Sierra Trading Post, Inc.*, 2019 WL 3564659, at *4 (W.D. Wash. Aug.
6 6, 2019). The American Arbitration Association (“AAA”) rules state
7 that an arbitrator has the power to determine the scope of the arbitration
8 agreement and the arbitrability of any claim or counterclaim. *See Willis*
9 *v. Fitbit, Inc.*, 2020 WL 417943, at *3 (S.D. Cal. Jan. 27, 2020).
10 Therefore, reference to the AAA rules in an arbitration agreement
11 constitutes “clear and unmistakable evidence” that the parties agreed to
12 delegate all other issues to the arbitrator. *Brennan v. Opus Bank*, 796
13 F.3d 1125, 1130 (9th Cir. 2015). Here, the EULA states that “all
14 disputes or claims arising out of or relating to this Agreement, including
15 its formation, enforceability, performance, or breach . . . shall be finally
16 settled by binding arbitration administered by the American Arbitration
17 Association in accordance with the provisions of its Commercial
18 Arbitration Rules and the supplementary procedures for consumer-
19 related disputes of the American Arbitration Association (the ‘AAA’).”
20 Kiel Decl., docket no. 25 at 7, Ex. A. Based on the language of the
21 delegation provision, the Court finds that the parties agreed to delegate
22 all other arbitrability issues to the arbitrator.

(b) Defendant’s Motion to Dismiss, docket no. 24, is DENIED. The Court
STAYS the proceedings pending the outcome of arbitration pursuant to
9 U.S.C. § 3. *See Ekin v. Amazon Servs., LLC*, 2015 WL 11233144, at
*1 (W.D. Wash. Feb. 10, 2015).

(c) The parties are DIRECTED to file a Joint Status Report within fourteen
(14) days after the completion of arbitration or by December 31, 2020,
whichever occurs earlier.

(2) The Clerk is directed to send a copy of this Minute Order to all counsel of
record and to remove this matter from the active docket.

Dated this 2nd day of March, 2020.

William M. McCool
Clerk

s/Karen Dews
Deputy Clerk