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7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA
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10 DRICKEY JACKSON, individually and
11 on behalf of all others similarly situated,
12 Plaintiff,
13 v.
14 AMAZON.COM, INC.,
15 Defendant.

Case No.: 20-cv-2365-WQH-BGS

ORDER

16 HAYES, Judge:

17 The matter before the Court is the Motion to Stay Pending Appeal filed by Defendant
18 Amazon.com, Inc. (ECF No. 30).

19 **I. BACKGROUND**

20 On February 19, 2021, Plaintiff Drickey Jackson filed a First Amended Class Action
21 Complaint (“FAC”) against Defendant Amazon.com, Inc. (“Amazon”). (ECF No. 11).
22 Plaintiff brings individual and class claims against Amazon for violations of federal and
23 California law, arising from Amazon’s alleged interception of communications by
24 members of the Amazon Flex program in a closed Facebook group.

25 On March 16, 2021, Defendant Amazon filed a Motion to Compel Arbitration. (ECF
26 No. 15). On August 3, 2021, the Court held oral argument on the Motion to Compel
27 Arbitration. (ECF No. 25). On September 15, 2021, the Court issued an Order denying the
28 Motion Compel Arbitration. (ECF No. 26). The Court stated that Amazon “fail[ed] to meet

1 its burden to demonstrate mutual assent to the 2019 [Terms of Service (“TOS”)]” and
2 concluded that “the 2016 TOS applies in this case.” (*Id.* at 10). The Court applied California
3 state law to interpret the terms of the 2016 TOS and concluded that “Plaintiff has met his
4 burden to demonstrate that the claims alleged [in the FAC] do not fall within the scope of
5 the arbitration provision.” (*Id.* at 18).

6 On October 12, 2021, Amazon filed a Notice of Appeal of the Order denying the
7 Motion to Compel Arbitration (ECF No. 31) and a Motion to Stay Pending Appeal (ECF
8 No. 30). Amazon asserts that the Court should exercise its discretion and stay this action
9 pending appeal, because the arbitration issues in this case present “serious legal questions
10 worthy of Ninth Circuit review.” (ECF No. 30-1 at 6). Amazon contends that it is likely to
11 succeed on appeal, because “[t]here is a dearth of Ninth Circuit authority on the evidentiary
12 burden for establishing email notice of a modification of an existing arbitration agreement,”
13 and “neither the Court nor the parties have identified cases that are factually on point”
14 regarding the scope of the arbitration provision. (*Id.* at 6-7). Amazon contends that Amazon
15 would be denied the benefits of individual arbitration if a stay is not granted. Amazon
16 further contends that any delay caused by a stay would not substantially harm Plaintiff, and
17 a stay is in the interest of the public policy favoring arbitration agreements.

18 On November 1, 2021, Plaintiff filed an Opposition to the Motion to Stay Pending
19 Appeal. (ECF No. 35). Plaintiff contends that the appeal does not present serious questions
20 for the Ninth Circuit, because the arbitration issues in this case involve “routine issues of
21 state law involving contract interpretation.” (ECF No. 35 at 7). Plaintiff contends that a
22 stay is not warranted, because Plaintiff’s claims are not subject to arbitration, and any
23 success by Amazon on appeal would require this Court to consider Plaintiff’s arguments
24 as to why the arbitration agreement is unenforceable. Plaintiff contends that requiring
25 Amazon to defend this suit does not constitute clear hardship or inequity. Plaintiff contends
26 that a stay could result in significant delay, and Plaintiff and the proposed class have an
27 interest in expeditious resolution of this litigation. Plaintiff further contends that the public
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1 interest would be served by continuing this litigation, because Plaintiff has not agreed to
2 arbitrate, and a stay could result in the loss of evidence.

3 On November 8, 2021, Amazon filed a Reply. (ECF No. 36).

4 **II. LEGAL STANDARD**

5 Where “the issue of arbitrability [i]s the only substantive issue presented in [an]
6 appeal, the district court [i]s not divested of jurisdiction to proceed with the case on the
7 merits.” *Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990). The district
8 court has the discretion to “evaluate the merits of the movant’s claim and if, for instance,
9 the court finds that the motion presents a substantial question, to stay the proceedings
10 pending an appeal from its refusal to compel arbitration.” *Id.* “[T]he factors regulating the
11 issuance of a stay” are:

12 (1) whether the stay applicant has made a strong showing that he is likely to
13 succeed on the merits; (2) whether the applicant will be irreparably injured
14 absent a stay; (3) whether issuance of the stay will substantially injure the
15 other parties interested in the proceeding; and (4) where the public interest
lies.

16 *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The Court of Appeals for the Ninth Circuit
17 applies the *Hilton* factors by requiring the party seeking a stay to show either: (1) “a strong
18 likelihood of success on the merits [of its appeal]” *Golden Gate Rest. Ass’n v. City of San*
19 *Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008), and “that irreparable harm is probable if
20 the stay is not granted,” *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011); or (2)
21 “a substantial case on the merits and that the balance of hardships tips sharply in favor of
22 a stay,” *Leiva-Perez*, 640 F.3d at 971. “A strong showing on some factors may lessen the
23 requisite showing on others.” *Hernandez-Galand v. Garland*, 996 F.3d 1030, 1037 (9th
24 Cir. 2021).

25 **III. RULING OF THE COURT**

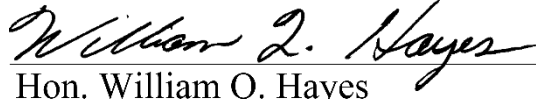
26 Amazon has appealed this Court’s denial of Amazon’s Motion to Compel
27 Arbitration. In the Order denying the Motion to Compel Arbitration, the Court concluded
28 that the 2016 TOS applies, because Amazon “fail[ed] to meet its burden to demonstrate

1 mutual assent to the 2019 TOS.” (ECF No. 26 at 10). The Court further concluded that
2 Plaintiff “met his burden to demonstrate that the claims alleged do not fall within the scope
3 of the arbitration provision,” because the alleged wrongs “do not arise out of or relate to
4 the 2016 TOS, Plaintiff’s participation in the Flex program, or Plaintiff’s performance of
5 services.” (*Id.* at 18). The Court reached these conclusions after hearing oral argument and
6 considering the matter for a significant amount of time. There are few cases applying
7 California mutual assent law to the modification of terms in an internet agreement, and
8 there are even fewer factually similar cases applying California law to determine whether
9 certain tort claims fall within the scope of an employee arbitration agreement. The
10 arbitration issues in this case present questions that have not been considered by the Ninth
11 Circuit. The Court concludes that Amazon’s appeal raises a substantial case on the merits
12 that weighs in favor of granting a stay pending appeal.

13 There is a probability that Amazon will be irreparably harmed absent a stay. Amazon
14 asserts that Plaintiff agreed to arbitrate his claims on an individual basis. The difference in
15 litigation expenses between a two-party case and a class action is substantial. In addition,
16 arbitration offers the benefits of “speed and economy” which may be “lost forever” if
17 Amazon is required to engage in formal discovery prior to the resolution of its
18 appeal. *Alascom, Inc. v. ITT N. Elec. Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984). Although
19 a stay pending appeal will likely cause some delay in this case, the Court concludes that
20 the potential harm to Amazon in being required to continue to litigate a class action, which
21 could possibly be ordered to individual arbitration, outweighs any harm caused by a delay.
22 Further, a stay pending the outcome of the appeal will serve the public interest by
23 preserving judicial resources and promoting the “strong federal policy encouraging
24 arbitration as a prompt, economical and adequate method of dispute resolution for those
25 who agree to it.” *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1404 n.2 (9th
26 Cir. 1992). The Court concludes that the balance of hardships tips sharply in Amazon’s
27 favor, and the public interest is served by staying this action pending appeal.
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1 IT IS HEREBY ORDERED that the Motion to Stay Pending Appeal (ECF No. 30)
2 is granted. This action is stayed pending the resolution of Amazon's appeal to the Court of
3 Appeals for the Ninth Circuit. The stay will be lifted upon further order of the Court.

4 Dated: November 30, 2021


5 Hon. William Q. Hayes
6 United States District Court
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