

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

BRADFORD ARTHUR CLEMENTS,
Plaintiff,
v.
T-MOBILE USA, INC, et al.,
Defendants.

Case No. [5:22-cv-07512-EJD](#)

**ORDER GRANTING MOTION TO
COMPEL ARBITRATION AND
DISMISS**

Re: Dkt. No. 37

Plaintiff, Branford Clements (“Clements”), filed this data breach action against Defendant, T-Mobile USA, Inc., et al. (“T-Mobile”), alleging claims arising under various California consumer protection and privacy statutes, common law torts, and the Stored Communications Act (“SCA”). First Am. Compl. (“FAC”), ECF No. 35. Before the Court is T-Mobile’s unopposed motion to compel arbitration and dismiss. Def.’s Mot. to Compel Arbitration and to Dismiss (“Mot.”), ECF No. 37.

Having carefully reviewed the relevant documents, the Court finds this matter suitable for decision without oral argument pursuant to Civil Local Rule 7-1(b). For the reasons stated below, the Court **GRANTS** T-Mobile’s motion to compel arbitration and dismiss.

I. BACKGROUND

While he was a T-Mobile customer, Clements alleges that his data was stolen during multiple cyberattacks, causing him to suffer identify theft and unauthorized purchases on his credit card. *See, e.g.*, FAC ¶ 10. As a result, pursuant to an arbitration provision in T-Mobile’s Terms and Services (“Arbitration Agreement”), Clements filed a consumer arbitration claim in Texas with the American Arbitration Association (“AAA”). Mot. 12. According to the most recent

1 update from the Parties, no arbitrator has been appointed in the Texas arbitration, and the
2 arbitration has been held in abeyance. Order Granting Mot. for Leave to File Am. Compl. 3, ECF
3 No. 34.

4 Clements originally filed this action on November 30, 2022, as a petition to enforce his
5 Arbitration Agreement with T-Mobile and compel a change of venue for his arbitration case from
6 Texas to California. *See* Pl.’s Petition to Compel Arbitration (“Pet.”), ECF No. 1. T-Mobile filed
7 a motion to dismiss the original petition on February 3, 2023. ECF No. 11. The Court granted
8 Clements’s request to extend his deadline to file a response to T-Mobile’s motion to dismiss.
9 ECF No. 16. However, Clements failed to file a response by the extended March 25, 2023,
10 deadline. Instead, two days after his deadline had passed, Clements filed a motion for leave to file
11 a first amended complaint, seeking to change his original petition to enforce arbitration into a
12 complaint for damages. Pl.’s Mot. for Leave to File Am. Compl. (“Mot. for Leave”), ECF No. 23.
13 Despite his failure to comply with the Court’s briefing schedule order, the Court exercised
14 leniency and granted Clements’s motion for leave to file a first amended complaint on May 17,
15 2023. *See* Order Granting Mot. for Leave to File Am. Compl. Notably, Clements also failed to
16 timely file his FAC in accordance with the Local Rules, but the Court again exercised leniency
17 and accepted Clements’s filing. *Id.*

18 Clements amended and recast his original petition, this time challenging the formation of
19 the arbitration agreement and contending that the Arbitration Agreement contains material
20 ambiguities resulting in a lack of mutual assent. FAC ¶¶ 101–07. Clements also contends that the
21 Arbitration Agreement is rescinded based on T-Mobile’s material breach or repudiation. *Id.* ¶¶
22 108–16.

23 At the time of Clements’s activation and purchase, T-Mobile’s June 2, 2019, Terms and
24 Conditions (“2019 Terms and Conditions”) were in effect. The 2019 Terms and Conditions
25 included an Arbitration Agreement providing in part that “any and all claims or disputes in any
26 way related to or concerning the agreement, our privacy notice, our services, devices or products .
27 . . . will be resolved by binding arbitration or in small claims court.” Pet., Ex. 1, ECF No. 1-1. The

1 Arbitration Agreement stated that customers may choose to opt out of the mandatory arbitration
 2 procedures within thirty days from the date of purchase or activation. *Id.* T-Mobile updated its
 3 Terms and Conditions on March 1, 2021 (“2021 Terms and Conditions”). The 2021 Terms and
 4 Conditions contained the same arbitration clause language quoted above, while adding a
 5 governing law provision stating that the “[a]greement is governed by the Federal Arbitration Act,
 6 applicable federal law, and the laws of the state or jurisdiction in which your billing address in our
 7 records is located, without regard to the conflicts of laws rules of that state or jurisdiction.”
 8 Declaration of Christopher Muzio (“Muzio Decl.”), Ex. C, at 29, ECF No. 37-2. T-Mobile
 9 informed all primary account holders of the new 2021 Terms and Conditions view email, text, and
 10 billing statements, which stated that customers will have agreed to the updated terms by using the
 11 service after the effective date. Muzio Decl. ¶¶ 8–9.

12 Clements’s FAC essentially alleges that the Parties never formed a contract in 2019 due to
 13 lack of mutual assent to the Terms and Conditions because the 2019 version does not specify
 14 whether the Terms and Conditions or the AAA Rules control when there is a conflict—unlike the
 15 current version of the Terms and Conditions, which provides that T-Mobile’s terms control when
 16 there is a conflict with the AAA Rules.

17 T-Mobile filed the present motion to compel arbitration and dismiss in response to
 18 Clements’s FAC. *See* Mot. Clements was required to file a response by June 19, 2023. ECF No.
 19 37. Clements failed to file a response by June 19, 2023, or seek an extension to his filing deadline.
 20 On December 11, 2023, approximately six months after Clements’s filing deadline had passed, the
 21 Court took the unopposed motion under submission. ECF No. 43.

22 **II. LEGAL STANDARD**

23 The Parties do not dispute that the Federal Arbitration Act (“FAA”) governs the
 24 Arbitration Agreement here. The FAA declares “that a written agreement to arbitrate . . . ‘shall be
 25 valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the
 26 revocation of any contract,’” and thereby establishes a “liberal federal policy favoring arbitration.”
 27 *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (quoting 9 U.S.C. §

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ORDER GRANTING MOTION TO COMPEL ARBITRATION AND DISMISS

1 2). Where parties enter into an arbitration agreement, the FAA “leaves no place for the exercise of
 2 discretion by a district court, but instead mandates that district courts shall direct the parties to
 3 proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Dean*
 4 *Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). Any doubts must be resolved in favor of
 5 arbitration. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003). In determining whether
 6 to compel a party to arbitrate, the court must determine: “(1) whether a valid agreement to
 7 arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.”
 8 *Kilgore v. KeyBank, Nat. Ass’n*, 718 F.3d 1052, 1058 (9th Cir. 2013) (internal quotation marks
 9 and citation omitted). If both are answered in the affirmative, the court must compel arbitration. 9
 10 U.S.C. §§ 2–4.

11 **III. DISCUSSION**

12 **A. Request for Judicial Notice**

13 As an initial matter, T-Mobile requests that the Court take judicial notice of the 2019 and
 14 2021 Terms and Services agreements, as well as notices from T-Mobile regarding both
 15 agreements. Request for Judicial Notice, ECF No. 37-3. Clements has not opposed this request.

16 A court may take judicial notice of facts that are not subject to reasonable dispute because
 17 they are either “(1) generally known within the territorial jurisdiction of the trial court or (2)
 18 capable of accurate and ready determination by resort to sources whose accuracy cannot
 19 reasonably be questioned.” Fed. R. Evid. 201(b). The court may also utilize the “incorporation by
 20 reference” doctrine in motions to dismiss to consider “documents whose contents are alleged in a
 21 complaint and whose authenticity no party questions, but which are not physically attached to
 22 [plaintiff’s] pleading.” *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (internal quotation
 23 marks omitted).

24 Here, the FAC centers around Clements’s contractual relationship with T-Mobile under the
 25 2019 and 2021 Terms and Conditions. Clements also directly cites to both the 2019 and 2021
 26 Terms and Conditions in his original petition to compel arbitration and motion for leave to file the
 27 first amended complaint. As such, the authenticity of the agreements and notices regarding the

1 agreements cannot reasonably be questioned. Therefore, the Court **GRANTS** T-Mobile’s request
2 for judicial notice.

3 **B. Failure to Prosecute or Comply with Court Orders**

4 To begin, the lack of any written opposition raises the issue of whether this action should
5 be dismissed for failure to prosecute or comply with a court order under Federal Rule of Civil
6 Procedure 41(b). Fed. R. Civ. P. 41(b); *see Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir.
7 1992).

8 A failure to file an opposition to a motion to dismiss as required by a district court’s local
9 rules can constitute grounds for dismissal under Rule 41(b). *See Espinosa v. Washington Mut.*
10 *Bank*, No. C 10-04464 SBA, 2011 WL 334209, at *1 (N.D. Cal. Jan. 31, 2011); *see also Ghazali*
11 *v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (“Failure to follow a district court’s local rules is a proper
12 ground for dismissal.”). “In determining whether to dismiss a claim for failure to prosecute or
13 failure to comply with a court order, the Court must weigh the following factors: (1) the public’s
14 interest in expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the
15 risk of prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5)
16 the public policy favoring disposition of cases on their merits.” *Pagtalunan v. Galaza*, 291 F.3d
17 639, 642 (9th Cir. 2002).

18 Having carefully considered the relevant factors, the Court concludes that they favor the
19 dismissal of the action.

20 As to the first factor, “[t]he public’s interest in expeditious resolution of litigation always
21 favors dismissal.” *Yourish v. Cal. Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999) (holding that the
22 plaintiff’s failure to comply with a minute order setting forth the deadline to file the amended
23 complaint gave the district court the discretion to dismiss the case under Fed. R. Civ. P. 41(b)),
24 *superseded by statute on other grounds as recognized in Martinez v. Bruce P.*, Case No.: 1:22-cv-
25 01134 JLT-SKO, 2023 WL 5488343, at *1 (E.D. Cal. Aug. 24, 2023).

26 The second factor also tips the balance in favor of dismissal. The Court must be able to
27 manage its docket “without being subject to routine noncompliance of litigants.” *Pagtalunan*, 291

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1 F.3d at 642; *see also Ferdik*, 963 F.2d at 1261 (noting that a litigant's non-compliance with rules
2 and orders diverts “valuable time that [the court] could have devoted to other major and serious
3 criminal and civil cases on its docket”). Here, Clements has repeatedly failed to comply with the
4 Court’s orders or Local Rules. First, Clements missed his extended deadline to file a response to
5 T-Mobile’s first motion to dismiss the original petition. *See* ECF No. 16. Regardless, the Court
6 exercised leniency in allowing Clements to file an amended complaint. Second, Clements’s FAC
7 filing was untimely. Order Granting Mot. for Leave to File Am. Compl. 34. The Court again
8 exercised leniency for this error in its Order granting Clements’s request to amend. *Id.* (“Although
9 Clements did not file his amended complaint until March 31, 2023 (ECF No. 25) as a separate
10 exhibit . . . [i]n the interests of justice, and because Clements has not previously sought leave to
11 amend and there is no evidence of bad faith, the Court will accept Clements’s untimely filing.”).
12 Third, Clements arbitrarily filed a document titled “Case Management Statement” with no case
13 management hearing scheduled and no motion to schedule a case management conference. ECF
14 No. 42. Clements’s “Case Management Statement” was not a properly noticed motion filed in
15 compliance with the Local Rules and therefore did not trigger a briefing schedule that would have
16 allowed T-Mobile the opportunity to respond. *See* N.D. Cal. Local Rule 7-11. As such, Clements
17 was not entitled to a response from the Court for this “Case Management Statement,” therefore the
18 Court did not address the erroneous filing.¹ Finally, instead of filing a timely opposition to this

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20 ¹ Pursuant to Local Rule 16-10(c), the Court may schedule subsequent case management
21 conferences during the pendency of an action either sua sponte or in response to a stipulated
22 request or motion. Pursuant to Rule 7-11, motions for administrative relief, including requests to
23 schedule a case management conference, must follow the requirements of Rule 7-11, i.e., the party
24 must file a properly noticed motion and proposed order. Other parties have the opportunity to file
25 any opposition to or support for the motion for administrative relief no later than four days after
26 the motion has been filed. L.R. 7-11(b). A motion for administrative relief is deemed submitted
27 for immediate determination without hearing on the day after the opposition is due. *Id.* at 7-11(c).

24 Here, Clements did not file a stipulated request for a case management conference or a motion
25 pursuant to Rule 7-11. Instead, Clements filed a document labeled “Case Management
26 Statement,” in which he requested that the Court set a case management conference and indicated
27 that the parties were engaged in a discovery dispute. This is an improper filing under the Local
28 Rules. Case management statements are intended to be filed in advanced of an already scheduled
case management conference, not as a means to schedule a case management conference. L.R.
16-9(a).

1 motion, Clements instead filed a “Notice” shortly after the Court took the matter under
2 submission. ECF No. 44. This “Notice” did not request any specific form of relief from the
3 Court, but rather suggested that Clements failed to file a timely opposition because the Court had
4 not addressed his improper “Case Management Statement” filing, and the parties were engaged in
5 a discovery dispute. *Id.* While the Court may give leeway to pro se parties in similar instances,
6 Clements presents himself as an attorney licensed in both California and Texas, and therefore the
7 Court holds Clements to the same standards as other attorneys who appear before it.

8 Similarly, the third factor weighs strongly in favor of dismissal. Clements has offered no
9 valid justification for his failure to file an opposition to this motion. Clements’s “Notice”
10 discussing discovery disputes was wholly devoid of any circumstances that would have prevented
11 him from filing an opposition in this motion to dismiss, or alternatively filing a request to extend
12 his deadline to file a response. Thus, the Court can discern no unique instances of prejudice to
13 Clements outside of the dismissal of this case. *See Espinosa*, 2011 WL 334209, at *2.

14 As to the fourth factor, the Court has considered whether to issue an order to show cause
15 prior to dismissal. However, considering that Clements has demonstrated a pattern of non-
16 compliance, and the Court has already exercised repeated leniency regarding Clements’s filing
17 deadlines, the Court finds it unnecessary and inequitable to permit Clements another opportunity
18 to comply.

19 For the fifth factor, though the public policy favoring disposition of cases on their merits
20 often weighs against dismissal, it is overridden here by the cumulative weight of the preceding
21 four factors. *See Pagtalunan*, 291 F.3d at 643 (affirming dismissal of action where three of the
22 five factors weighed in favor of that result). Further, Clements had already filed an arbitration
23 action in Texas raising these same claims prior to initiating this action, thus the dismissal of this
24 action will not impact his ability to proceed on the merits in arbitration. Pet., Ex. at ECF 1-11.

25 Therefore, the Court **GRANTS** T-Mobile’s motion for his failure to prosecute this case or
26 comply with court orders.

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C. Motion to Compel Arbitration

However, even if the Court did not find dismissal warranted under Federal Rule of Civil Procedure 41(b), the Court also dismisses because Clements is required to arbitrate his claims.²

1. Valid Agreement to Arbitrate

While Clements made no arguments in response to this motion to dismiss, in his motion for leave to amend, he argued that his amended complaint alleges facts that he did not mutually assent to the 2019 Terms and Conditions which he contends are ambiguous, therefore the arbitration provision is invalid. *See* Mot. for Leave. In his FAC, Clements alleges that the 2019 Terms and Conditions are ambiguous because it lacks a provision to guide conflicts between the Terms and Conditions and the AAA Rules. FAC ¶¶ 100–07. While the 2021 Terms and Conditions state that the Terms and Conditions would control in the event of conflict between the Terms and Conditions and the AAA Rules, the 2019 Terms and Conditions—which Clements alleges is the controlling version of the Terms and Conditions³—did not contain any language regarding which of the two controls when there is conflict. Clements alleges that this ambiguity made it impossible for a consumer to know what they were agreeing to regarding those areas of conflict at the time they signed the contract. *Id.*

When assessing whether an arbitration agreement is enforceable, “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied . . . without contravening [the FAA].” *Heredia v. Sunrise Senior Living LLC*, No. 18-cv-00616-HSG, 2018 WL 5734617, at *2 (N.D. Cal. Oct. 31, 2018) (internal quotation marks omitted) (quoting *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). Thus, the “state-law principles that govern the formation of contracts” apply to this analysis. *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 994 (9th Cir. 2010); *see also Reichert v. Rapid Invs., Inc.*, 56 F.4th 1220, 1227 (9th Cir. 2022) (stating

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² To the extent that Clements claims no mutual assent or alteration of material terms not assented to such that the arbitration agreement never existed, this is a matter for the Court to decide. Indeed, “a court must resolve any challenge that an agreement to arbitrate was never formed, even in the presence of a delegation clause.” *Caremark, LLC v. Chickasaw Nation*, 43 F.4th 1021, 1030 (9th Cir. 2022).

³ The Court does not reach a conclusion regarding which Terms and Conditions control the dispute. That issue must be properly raised before the arbitrator.

1 that district courts apply “ordinary state-law principles that govern the formation of contracts’ in
2 analyzing arbitration agreements).

3 “Under California law, mutual assent is a required element of contract formation.”
4 *Knutson v. Sirius XM Radio, Inc.*, 771 F.3d 559, 565 (9th Cir. 2014). “Mutual assent requires, at a
5 minimum, that the party relying on the contractual provision establish that the other party had
6 notice and gave some indication of assent to the contract.” *Jackson v. Amazon.com, Inc.*, 65 F.4th
7 1093, 1099 (9th Cir. 2023). Mutual assent may be manifested in several ways—in writing,
8 through speech or by conduct—and “may be implied through action or inaction.” *Knutson v.*
9 *Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014). However, “an offeree, regardless of
10 apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of
11 which he was unaware, contained in a document whose contractual nature is not obvious.”
12 *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 993 (Cal. Ct. App. 1972).
13 “This principle of knowing consent applies with particular force to provisions for arbitration.” *Id.*
14 “If a party wishes to bind in writing another to an agreement to arbitrate future disputes, such
15 purpose should be accomplished in a way that each party to the arrangement will fully and clearly
16 comprehend that the agreement to arbitrate exists and binds the parties thereto.” *Com. Factors*
17 *Corp. v. Kurtzman Bros.*, 131 Cal.App.2d 133, 136 (Cal. Ct. App. 1955) (internal quotation marks
18 and citation omitted).

19 Here, it is clear that Clements expressed a mutual assent to arbitrate. He signed the 2019
20 Terms and Services, which stated in clear and bold language that any and all disputes related to the
21 agreement, privacy notice, services, devices, or products are subject to arbitration. *See* Pet., Ex. 1.
22 Clements does not allege that he was unaware of the Arbitration Agreement or unaware that it
23 bound him to arbitration. Clements also does not allege that the Arbitration Agreement was
24 procedurally or substantively unconscionable. Indeed, Clements declined to opt-out of the
25 Arbitration Agreement in the 2019 Terms and Services, continued services after receiving the
26 revised 2021 Terms and Services, and initiated his own arbitration against T-Mobile in Texas.
27 The 2019 Terms and Services’ failure to contain language regarding which law controls when

1 there is a conflict in arbitrating the underlying claims does not change the fact that Clements fully
 2 and clearly comprehended that the agreement to arbitrate existed and bound the parties. *See*
 3 *Knutson*, 771 F.3d at 566 (quoting *Factors Corp.*, 131 Cal. App. 2d at 136). Any dispute
 4 regarding which law controls the claims underlying the arbitration action is properly decided by
 5 the arbitrator.

6 2. Claims Within the Scope of the Arbitration Agreement

7 Clements’s FAC does not allege that his claims fall outside the scope of the Arbitration
 8 Agreement. Regardless, upon review of the Arbitration Agreement, the Court finds that
 9 Clements’s claims fall squarely within the scope of the Arbitration Agreement. The Arbitration
 10 Agreement is broad, encompassing all disputes with T-Mobile “in any way related to or
 11 concerning” the Arbitration Agreement with T-Mobile, devices or services provided by T-Mobile,
 12 or T-Mobile’s privacy policy. Pet., Ex. 1, ECF No. 1-1. All of Clements’s claims in his FAC
 13 hinge on T-Mobile’s alleged failure to implement reasonable measures to protect the data that
 14 Clements provided in connection with the contract with T-Mobile and therefore fall within the
 15 scope of the Arbitration Agreement.

16 D. Rescission

17 The Court will also briefly note Clements’s allegation that T-Mobile rescinded the entire
 18 Arbitration Agreement by participating in a class action settlement in the Federal District Court for
 19 the Western District of Missouri. FAC ¶¶ 108–16. Clements alleges that by participating in this
 20 Missouri class action settlement, T-Mobile breached the class action waiver in Clements’s
 21 Arbitration Agreement, thereby rescinding the entire Arbitration Agreement. *Id.* ¶ 111. Clements
 22 does not allege to be a class member or allege any of the underlying facts of the Western District
 23 of Missouri action. Clements has failed to show how T-Mobile’s class action litigation with
 24 parties who are not a member to the contract between Clements and T-Mobile bears any relevance
 25 to this matter. Thus, the Court declines Clements’s invitation to invalidate the Arbitration
 26 Agreement on this ground.

27 * * *

1 Therefore, the Court finds that the Arbitration Agreement is valid and encompasses the
2 claims at issue and **GRANTS** T-Mobile’s motion to compel arbitration.

3 **IV. CONCLUSION**

4 For the foregoing reasons, T-Mobile’s motion to compel arbitration and dismiss this action
5 is **GRANTED**.

6 **IT IS SO ORDERED.**

7 Dated: January 18, 2024

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10 EDWARD J. DAVILA
United States District Judge

United States District Court
Northern District of California

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