APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed 04/05/2018]

No. 17-35094
D.C. No. 2:16-cv-01416-JCC

DAVID MOSHE RAHMANY, individually and on behalf of all others similarly situated and YEHUDA RAHMANY, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

T-MOBILE USA INC.,

Defendant,

and

SUBWAY SANDWICH SHOPS, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

MEMORANDUM*

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Submitted March 16, 2018[**]
San Francisco, California

Before: PAEZ and IKUTA, Circuit Judges, and ADELMAN,[***] District Judge.

David and Yehuda Rahmany (collectively, "Rahmany") appeal the district court's order granting Subway Sandwich Shops, Inc. ("Subway")'s motion to compel arbitration and dismissing the case. Applying California law as stipulated by the parties, we reverse.

The district court erred in concluding that Subway, a non-signatory to the Wireless Agreement between Rahmany and T-Mobile USA, Inc. ("T-Mobile"), could equitably estop Rahmany from avoiding the Wireless Agreement's arbitration clauses.[1] Equitable estoppel is "inapplicable" because Rahmany's "allegations reveal no claim of any violation of any duty, obligation, term or condition imposed by the [Wireless Agreement]." *In re Henson*, 869 F.3d 1052, 1060 (9th Cir. 2017) (quoting *Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1230 (9th Cir. 2013)). Rahmany brings two claims alleging that Subway violated the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, by encouraging T-Mobile to spam message its cellular customers with an advertisement for a "T-Mobile Tuesday" sandwich

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[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Lynn S. Adelman, United States District Judge for the Eastern District of Wisconsin, sitting by designation.

[1] We use the term "Wireless Agreement" to refer to the collection of relevant agreements between Rahmany and T-Mobile, including the T-Mobile Terms & Conditions, a service agreement, and an iPhone lease agreement.

deal at Subway. Although Rahmany's complaint alleges that he did not provide "prior express written consent" to receive the text messages at issue, such an allegation does not constitute a "claim of [a] violation" of the Wireless Agreement. *Id.* The TCPA, not the Wireless Agreement, creates and defines any alleged duty to refrain from sending an unwanted text message.

Furthermore, "[e]xpress consent is not an element of a plaintiff's prima facie [TCPA] case but is an affirmative defense for which the defendant bears the burden of proof." *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1044 (9th Cir. 2017). Thus, although Subway's affirmative defense of express consent may require the district court to analyze the Wireless Agreement, Rahmany's *claims* do not "rely on the terms of the [Wireless Agreement]," nor does Rahmany allege "substantially interdependent and concerted misconduct" between Subway and T-Mobile that is "founded in or intimately connected with the obligations of the [Wireless Agreement]." *Murphy*, 724 F.3d at 1229 (quoting *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1128–29 (9th Cir. 2013)); *see also In re Henson*, 869 F.3d at 1060–62. Accordingly, the district court erred in enforcing the Wireless Agreement's arbitration clauses against Rahmany.

REVERSED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Filed 01/05/2017]

Case No. C16-1416 JCC

DAVID MOSHE RAHMANY and
YEHUDA RAHMANY, individually and on behalf
of all others similarly situated,

Plaintiffs,

v.

T-MOBILE USA, INC., and
SUBWAY SANDWICH SHOPS, INC.,

Defendants.

ORDER GRANTING DEFENDANT'S
MOTION TO COMPEL ARBITRATION

This matter comes before the Court on Defendant Subway's motion to compel arbitration (Dkt. No. 18). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motion for the reasons explained herein.

I. BACKGROUND

In August 2015, Plaintiffs David Rahmany and Yehuda Rahmany activated cellular telephone contracts with T-Mobile. (Dkt. No. 19 at 1–2.) One service agreement required arbitration of disputes, expressly stating—in bold, capital letters—that "T-Mobile requires

ARBITRATION OF DISPUTES UNLESS I OPT-OUT WITHIN 30 DAYS OF ACTIVATION." (*Id.* at 2) (emphasis in original). The other agreement also expressly required—in capital letters—arbitration of "ANY AND ALL CLAIMS OR DISPUTES IN ANY WAY RELATED TO OR CONCERNING THIS [AGREEMENT], OUR PRIVACY POLICY, OUR SERVICES, EQUIPMENT, DEVICES OR PRODUCTS." (*Id.* at 6.) This agreement also contained an opt-out provision. (*Id.* at 7.)

In their complaint, Plaintiffs allege that on September 1, 2016, they received a text message from T-Mobile stating:

> This T-Mobile Tuesday, Score a free 6" Oven Roasted Chicken sub at SUBWAY, just for being w/T-Mobile. Ltd supply. Get app for details: http://t-mo.co/

(Dkt. No. 1 at 3–4.) Just five days later, on September 6, 2016, Plaintiffs filed a putative class action complaint against T-Mobile and Subway, alleging violations of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, et seq. (*Id.* at 1–2.) Two days after that, on September 8, 2016, Plaintiffs voluntarily dismissed Defendant T-Mobile. (Dkt. No. 5.) Plaintiffs did not otherwise amend their complaint, and all claims alleged against T-Mobile and Subway remained against Subway. (*Id.* at 2.) Subway filed this motion to compel arbitration, arguing that it should be allowed to enforce—even as a nonsignatory—the arbitration provisions of the agreement between T-Mobile and Plaintiffs.

II. DISCUSSION

Whether Subway may compel arbitration turns on three questions: (1) do Plaintiffs' claims fall within the scope of the arbitration agreements; (2) are the

arbitration agreements procedurally and substantively unconscionable; and (3) is Subway entitled to enforce those arbitration agreements under a theory of equitable estoppel?

A. Scope

In order to compel arbitration, the claims must fall within the scope of the arbitration agreement. The arbitration agreements apply to "any and all claims or disputes in any way related" to the service agreement, T-Mobile's services provided, and its devices or products. (Dkt. No. 19 at 6.) Plaintiffs base their claims on the allegation that T-Mobile sent a text message to Plaintiffs' cellular phones as part of a T-Mobile promotion for its customers. (Dkt. No. 1 at 3– 4.) Plaintiffs' claims relate to T-Mobile's services and devices and therefore fall within the scope of the arbitration agreements.

B. Unconscionability

State law determines whether an arbitration agreement is enforceable. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Here, the parties agree that under the choice of law provisions in the terms and conditions, California law applies. (Dkt. No. 19 at 5, 7; Dkt. No. 21 at 16.) California courts will enforce arbitration agreements unless they are both procedurally and substantively unconscionable. *Armendariz v. Found. Health Psychare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000). "The party resisting arbitration bears the burden of proving unconscionability." *Malone v. Super. Ct.*, 226 Cal. App. 4th 1551, 1561 (2014).

Subway argues that Plaintiffs' ability to opt out of the arbitration provision precludes a finding of procedural unconscionability. (Dkt. No. 18 at 24) (*citing*

Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198, 1200 (9th Cir. 2002) (30-day period to opt out of arbitration agreement prevented finding of unconscionability)). Plaintiffs do not respond to that argument, but rather argue that the agreement was procedurally unconscionable because the terms and conditions were incorporated by reference. (Dkt. No. 21 at 31–32.) However, the cases cited by Plaintiffs in support of this argument are factually distinguishable and contain factual scenarios not present here. (Dkt. No. 21 at 32.) Additionally, "[a]n arbitration agreement 'need not expressly provide for arbitration but may instead incorporate by reference another document containing an arbitration clause.'" *Alvarez v. T-Mobile USA, Inc.*, 2011 WL 6702424 at *8 (E.D. Cal. Dec. 21, 2011) (*quoting Adajar v. RWR Homes, Inc.,* 160 Cal. App. 4th 563, 569 (2008)). Finally, when Plaintiffs signed the agreement, they acknowledged that it included the terms and conditions. (Dkt. No. 19 at 2–4.) Accordingly, the Court finds that Plaintiffs have not met their burden of proving the arbitration agreement is unconscionable and it is therefore enforceable.

C. Equitable Estoppel

The parties agree that California law is applicable here. (Dkt. No. 21 at 16.) "[T]he equitable estoppel doctrine applies when a party has signed an agreement to arbitrate but attempts to avoid arbitration by suing nonsignatory defendants for claims that are based on the same facts and are inherently inseparable from arbitrable claims against signatory defendants." *Metalclad Corp. v. Ventana Envtl. Organizational P'ship*, 109 Cal. App. 4th 1705, 1713 (2003) (internal quotations omitted). A non-signatory may enforce an arbitration agreement

> (1) when a signatory must rely on the terms of the written agreement in asserting its claims against the nonsignatory or the claims are intimately founded in and intertwined with the underlying contract, [or] (2) when the signatory alleges substantially interdependent and concerted misconduct by the nonsignatory and another signatory and the allegations of interdependent misconduct are founded in or intimately connected with the obligations of the underlying agreement.

Murphy v. DirecTV, Inc., 724 F.3d 1218, 1229 (9th Cir. 2013) (*quoting Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1128–29 (9th Cir. 2013)); *see also Goldman v. KPMG LLP*, 173 Cal. App. 4th 209, 234–35 (2009).

Although only one element is necessary, both are satisfied here. Plaintiffs' complaint asserts claims against Subway based on a text sent by T-Mobile. (Dkt. No. 1 at 2–4.) Because Plaintiffs' claims rest on T-Mobile's alleged conduct, they cannot be resolved without analyzing the conduct of T-Mobile. Plaintiffs also allege that T-Mobile and Subway colluded to violate the TCPA by sending customers a text message offering a free Subway sandwich. (*Id.*) This allegation is intimately connected with the underlying agreement because, under the terms and conditions, Plaintiffs agreed to be contacted "by T-Mobile or anyone calling on its behalf, for any and all purposes, at any telephone number." (Dkt. No. 19 at 6.) The Court would therefore need to examine the terms and conditions to determine the viability of Plaintiffs' TCPA claims. Perhaps most telling is the fact that Plaintiffs dismissed T-Mobile from the lawsuit, yet all the allegations in the complaint remained the same. Plaintiffs did not submit an amended complaint. Accordingly,

the Court holds that Subway may enforce the arbitration agreement between Plaintiffs and T-Mobile.

Having decided to compel arbitration, the Court must next determine whether to stay or dismiss this case. Under the Federal Arbitration Act (FAA), once a court is satisfied that a party's claims should be moved to arbitration, it "shall on application of one of the parties stay the trial of the action." 9 U.S.C. § 3. However, a district court may also dismiss a case in which all claims must be submitted to arbitration. *See Sparling v. Hoffman Constr. Co., Inc.*, 864 F.2d 635, 637–39 (9th Cir. 1988) (holding that trial court did not err when it dismissed the case because plaintiff was required to submit all claims to arbitration); *Roque v. Applied Materials, Inc.*, 2004 WL 1212110 at *4 (D. Or. Feb. 20, 2004) ("If a claim must be submitted to arbitration because the standards set forth in the FAA are met, (*e.g.* it is a valid, enforceable arbitration clause), then the FAA removes a district court's subject matter jurisdiction to hear the claim."). Because the Court holds that all of Plaintiffs' claims must be submitted to arbitration, it lacks jurisdiction, and dismissal is appropriate.

III. CONCLUSION

For the foregoing reasons, Defendant Subway's motion to compel arbitration (Dkt. No. 18) is GRANTED. Plaintiffs' claims are DISMISSED. The Clerk is respectfully DIRECTED to close this case.

DATED this 5th day of January 2017.

/s/ John C. Coughernour
John C. Coughenour
UNITED STATES DISTRICT JUDGE