

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 Todd VanDeHey,

4 Plaintiff

5 v.

6 Real Social Dynamics, Inc.; Nicholas Kho;
7 Owen Cook; and Amber Kho,

8 Defendants

9 And all related matters

Case No.: 2:17-cv-02230-JAD-NJK

**Order Granting in Part Motion to Compel
Arbitration, Denying Motion for Summary
Judgment as Moot, and Staying Case**

[ECF Nos. 42, 77]

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11 This action arises out of a messy business divorce between Todd VanDeHey and Real
12 Social Dynamics, Inc. (RSD) over a Nevada corporation that they formed called Valentine Life.
13 VanDeHey initially sought an order requiring RSD and other defendants to restore his access to
14 Valentine Life’s websites, funds, and social media, business, and email accounts while the
15 parties prepared to mediate or arbitrate their disputes.¹ I denied his motions for this pretrial
16 relief.² VanDeHey then twice moved for—and obtained—leave of court to amend his complaint
17 to assert claims for wrongful conduct that allegedly occurred during litigation³ and, later, to
18 substitute the true names of the defendants in place of doe defendants.⁴

19 Both sides seem confused in their briefs about which of VanDeHey’s pleadings is the
20 operative one—it’s the second amended complaint, and in it VanDeHey sues RSD for

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22 ¹ ECF Nos. 1 (original complaint) 7 (emergency motion for TRO), 8 (emergency motion for PI).

23 ² ECF No. 26.

³ ECF Nos. 32 (motion to amend), 40 (order granting motion to amend).

⁴ ECF Nos. 59 (motion to amend), 68 (order granting motion to amend).

1 declaratory relief, all of the defendants under state and federal statutes for allegedly hacking and
2 taking information from what VanDeHey contends is his personal email account, and Nicholas
3 and Amber Kho for allegedly converting money that VanDeHey kept in a PayPal account.⁵ The
4 defendants now move to compel VanDeHey to arbitrate his claims⁶ and VanDeHey moves for
5 summary judgment on his declaratory-relief claim against RSD.⁷

6 Discussion

7 A. Standard for compelling arbitration under the FAA

8 The Federal Arbitration Act (FAA) states that “[a] written provision in any . . . contract
9 evidencing a transaction involving commerce to settle by arbitration a controversy” arising out of
10 the contract or transaction “shall be valid, irrevocable, and enforceable save upon such grounds
11 as exist at law or in equity for the revocation of any contract.”⁸ The FAA permits any party who
12 is “aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written
13 agreement for arbitration” to petition any federal district court for an order compelling arbitration
14 in the manner provided for in the arbitration agreement.⁹

15 “By its terms, the [FAA] ‘leaves no place for the exercise of discretion by a district court,
16 but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues
17 as to which an arbitration agreement has been signed.’”¹⁰ “The court’s role under the [FAA] is
18 therefore limited to determining (1) whether a valid agreement to arbitrate exists and, if it does,

19 ⁵ ECF No. 69.

20 ⁶ ECF No. 77.

21 ⁷ ECF No. 42.

22 ⁸ 9 U.S.C. § 2.

23 ⁹ *Id.* at § 4.

¹⁰ *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985)).

1 (2) whether the agreement encompasses the dispute at issue.”¹¹ The party seeking to compel
2 arbitration has the burden to show that both of these questions must be answered in the
3 affirmative.¹² “If the response is affirmative on both counts, then the [FAA] requires the court to
4 enforce the arbitration agreement in accordance with its terms.”¹³

5 **B. Does a written arbitration agreement exist between the parties?**

6 To show that a written arbitration agreement exists between all of the parties, the
7 defendants provide a contract that purports to be the operating agreement for Valentine Life.
8 The operating agreement is between RSD and VanDeHey as Valentine Life’s shareholders.¹⁴ No
9 other defendant is a party to the operating agreement. The version of the operating agreement
10 that both sides provide is signed by VanDeHey but isn’t signed by anyone on behalf of RSD.¹⁵
11 This appears to be an oversight because the operating agreement states that it can be signed in
12 counterparts¹⁶ and neither side disputes that a contract for Valentine Life’s operations was
13 formed between RSD and VanDeHey. The operating agreement contains a section titled
14 “Mediation/Arbitration—Dispute Resolution,” which states that “[a]ny controversy or claim
15 arising out of or related to this Agreement or the breach thereof shall first be submitted to
16 mediation with a retired judge.”¹⁷ “In the event that the mediation does not resolve the dispute,
17 the Shareholders are to submit the dispute to binding, non-appealable arbitration administered by

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19 ¹¹ *Id.* (collecting authorities).

20 ¹² *Nguyen v. Barnes and Noble, Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014); *Ashbey v. Archstone Prop. Mgmt., Inc.*, 785 F.3d 1320, 1323 (9th Cir. 2015).

21 ¹³ *Chiron Corp.*, 207 F.3d at 1130.

22 ¹⁴ ECF No. 77 at 54–74.

23 ¹⁵ *See, e.g.*, ECF No. 77 at 71; ECF No. 69-3 at 19.

¹⁶ ECF No. 77 at 69, § 11.5.

¹⁷ *Id.* at § 11.9.

1 the Judicial Arbitration Mediation Services (JAMS) at one of its offices in Clark County.”¹⁸

2 Thus, the operating agreement between VanDeHey and RSD contains a separate agreement to
3 arbitrate.

4 VanDeHey argues that the equitable doctrines of unclean hands and futility counsel
5 against enforcing the arbitration agreement.¹⁹ He theorizes that RSD has unclean hands because,
6 after VanDeHey filed this lawsuit, RSD allegedly hacked VanDeHey’s personal email account
7 and obtained emails that he exchanged with his attorneys. He also theorizes that it would be
8 futile to enforce the arbitration agreement because RSD cannot be expected to engage in
9 arbitration in good faith considering that it allegedly hacked and stole his emails. But
10 VanDeHey doesn’t provide—let alone analyze—the legal standard for either ground. He also
11 fails to address whether I have discretion to rule on either ground in deciding RSD’s motion to
12 compel arbitration. I am not persuaded that I do have discretion in this case because my role
13 under the FAA is limited to determining whether a valid arbitration agreement exists²⁰ and RSD’s
14 alleged malfeasance isn’t related to the making of the arbitration agreement but, rather, to the
15 merits of VanDeHey’s statutory claims that RSD hacked into, altered, and took materials from
16 his personal email account.²¹ I decline to deny the motion to compel arbitration on the basis of
17 either of VanDeHey’s underdeveloped arguments.

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19 ¹⁸ *Id.*

20 ¹⁹ VanDeHey also argues that RSD has withheld “critical and relevant information from the
21 [c]ourt”—that, despite my order to do so, RSD allegedly has not produced all of the materials
22 that it downloaded or copied from the email account—but he doesn’t tie that alleged malfeasance
23 to the making of the arbitration agreement or any theory for invalidating or declining to enforce
it.

²⁰ *Chiron Corp.*, 207 F.3d at 1130.

²¹ *See, e.g., Wolff v. Westwood Management LLC*, 503 F. Supp. 2d 274, 283–84 (D.D.C. 2007)
(finding “no reason to conclude” that unclean hands argument “implicates the making of the
arbitration agreement in any way” and, thus, “reject[ing] the argument that equitable principles

1 The defendants have shown that a written agreement to arbitrate exists between
2 VanDeHey and RSD, but they have not shown that one exists between VanDeHey and Nicholas
3 Kho, Owen Cook, or Amber Kho, nor have they shown that any of those defendants can invoke
4 RSD's right to compel arbitration. I therefore grant the motion to compel arbitration only as to
5 VanDeHey's claims against RSD, and I deny as moot VanDeHey's motion for summary
6 judgment on his declaratory-relief claim against RSD.

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8 **C. Who decides whether VanDeHey's claims against RSD fall within the scope of the
arbitration agreement?**

9 RSD argues that all of VanDeHey's claims are encompassed by the arbitration agreement
10 because "the entire factual underpinning" of VanDeHey's second amended complaint "rests
11 upon the allegations of wrongdoing [that] [d]efendant committed against Valentine Life."²²
12 Before I can decide whether VanDeHey's claims fall within the scope of the arbitration
13 agreement, I must first determine who—a judge or an arbitrator—must decide that question.
14 "The question of whether the parties have submitted a particular dispute to arbitration, *i.e.*, the
15 'question of arbitrability,' is 'an issue for judicial determination [u]nless the parties clearly and
16 unmistakably provide otherwise.'"²³ "[T]he phrase 'question of arbitrability' has a . . . limited
17 scope."²⁴ It applies "in the kind of narrow circumstance where contracting parties would likely

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20 estop defendants from invoking the arbitration agreement"); *In re A2P SMS Antitrust Litig.*, 972
21 F. Supp. 2d 465, 481 (S.D.N.Y. 2013) (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*,
388 U.S. 395, 404 (1967)).

22 ²² ECF No. 77 at 7 (emphasis omitted).

23 *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *AT & T Tech., Inc. v.*
24 *Comm. Workers*, 475 U.S. 643, 649 (1986) (emphasis in original)).

²⁴ *Id.*

1 have expected a court to have decided the gateway matter”²⁵ Whether the underlying
2 dispute falls within the scope of the arbitration agreement is a question of arbitrability.²⁶ So, to
3 avoid judicial determination of that question, the parties must have “clearly and unmistakably”
4 delegated it to the arbitrator.

5 The arbitration agreement states that “[t]he Arbitrator shall determine issues of
6 arbitrability”²⁷ By agreeing that the arbitrator is to determine “issues of arbitrability,” RSD
7 and VanDeHey clearly and unmistakably agreed to arbitrate gateway disputes like whether
8 VanDeHey’s claims fall within the scope of the arbitration agreement. So, the parties must
9 arbitrate any dispute about whether RSD’s claims in the second amended complaint fall within
10 the scope of the arbitration agreement.

11 **D. This case is stayed pending resolution of the arbitration proceeding.**

12 The FAA requires district courts to stay litigation when they are satisfied that an issue
13 involved in the lawsuit is referable to arbitration under a written agreement to arbitrate.²⁸ The
14 Ninth Circuit has explained that district courts have discretion under the FAA to dismiss claims
15 if they are satisfied that the claims are barred by an arbitration agreement.²⁹ RSD argues that all
16 of VanDeHey’s claims should be dismissed because they are subject to the arbitration
17 agreement.³⁰ But the defendants have not shown that VanDeHey’s claims against Nicholas Kho,

19 ²⁵ *Id.* at 83–84.

20 ²⁶ *See id.* at 84 (citing *AT & T Tech., Inc.*, 475 U.S. at 651–52 and *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241–43 (1962)).

21 ²⁷ ECF No. 77 at 69, § 11.9.

22 ²⁸ 9 U.S.C. § 3.

23 ²⁹ *Sparling v. Hoffman Const. Co., Inc.*, 864 F.2d 635, 638 (9th Cir. 1988) (citing *Martin Marietta Aluminum, Inc. v. General Electric Co.*, 586 F.2d 143 (9th Cir. 1978)).

³⁰ ECF No. 77 at 9.

1 Owen Cook, or Amber Kho are subject to an arbitration agreement, and it has not yet been
2 determined whether VanDeHey's claims against RSD fall within the scope of the arbitration
3 agreement. I therefore deny RSD's motion to dismiss VanDeHey's claims and instead stay this
4 case pending resolution of the arbitration proceeding.

5 **Conclusion**

6 Accordingly, IT IS HEREBY ORDERED that the motion to compel arbitration [ECF
7 No. 77] is **GRANTED in part as to VanDeHey's claims against RSD.** The motion is
8 **DENIED** in all other respects.

9 IT IS FURTHER ORDERED that this case is **STAYED** pending resolution of the
10 arbitration proceeding.

11 IT IS FURTHER ORDERED that VanDeHey's motion for summary judgment on Count
12 One [ECF No. 42] is **DENIED as moot.**

13 Dated: June 29, 2018

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U.S. District Judge Jennifer A. Dorsey