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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

PATRICK HENDRICKS, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

AT&T MOBILITY, LLC,

Defendant.

Case No. CV 11-00409-CRB

DEFENDANT AT&T MOBILITY LLC'S RESPONSE TO OBJECTIONS TO DECLARATION OF JAN MENDEL

Date: October 21, 2011
Time: 10:00 a.m.
Courtroom 8
Honorable Charles R. Breyer

Plaintiff Patrick Hendricks's objections to the declaration of AT&T Mobility LLC ("ATTM") employee Jan Mendel should be overruled. Hendricks contends that ATTM failed to show that Ms. Mendel had personal knowledge to testify that ATTM has not refused to pay consumers' arbitration costs since promising to do so in mid-2003, except for the recent arbitrations that Hendricks's counsel has filed to challenge the proposed AT&T/T-Mobile merger. Decl. of Jan Mendel (Dkt. No. 42-2) ¶¶ 3-4.

The objection is baseless. The federal rules specify that the requisite showing of personal knowledge "may, but need not, consist of the witness' own testimony." Fed. R. Evid. 602. And in her declaration, Ms. Mendel testifies that she has "personal knowledge" of the facts, and explains that in her "position" in "ATTM's Legal Department," she is "involved with the resolution of customer disputes under ATTM's arbitration provision." Mendel Decl. ¶¶ 1-2. She also has submitted a supplemental declaration to explain in greater detail the basis for her personal knowledge regarding ATTM's payments for consumer arbitrations—including the fact that she tracks those arbitrations. Supp. Decl. of Jan Mendel ¶¶ 5-6 (filed with this response). She also authenticates a letter from the AAA confirming that ATTM meets its obligation to pay consumer arbitration costs. *Id.* ¶ 8 & Ex. 1.

Hendricks alternatively requests discovery into eight years' worth of consumer arbitrations to determine who paid for them. But this issue is so tangential to the merits of ATTM's motion to compel arbitration—and the requests are so unlikely to illuminate any material issue—that discovery should be denied. Sections 3 and 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 3-4, "call for an expeditious and summary hearing" on a motion to compel arbitration, "with only restricted inquiry into factual issues." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). As the Supreme Court explained decades ago, "the unmistakably clear congressional purpose" of the FAA was "that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). Here, the only purpose that Hendricks's requested discovery would serve is to drive up ATTM's costs unnecessarily without providing any corresponding benefit to this Court's consideration of an arbitration provision that

the U.S. Supreme Court already has endorsed. In short, Hendricks's unwarranted discovery would entail precisely the sort of "delay and obstruction" that Congress intended to prevent in enacting the FAA.

DISCUSSION

I. HENDRICKS'S OBJECTION TO THE FOUNDATION FOR MS. MENDEL'S TESTIMONY IS BASELESS.

Hendricks objects to paragraphs 3 and 4 of Ms. Mendel's declaration under Federal Rules of Evidence 601 and 602. Pl.'s Obj. at 1. Rule 601 provides that "[e]very person is competent to be a witness except as otherwise provided in these rules." Fed. R. Evid. 601.[1] Rule 602 provides that witnesses must testify from "personal knowledge." *Id.* 602.

Hendricks's sole basis for his objection is that Ms. Mendel "lacks personal knowledge and lacks foundation for [her] testimony." Pl.'s Obj. at 1. But under Rule 602, all that is required is "evidence * * * sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. In other words, the testimony is admissible if "a reasonable trier of fact could believe that the witness had personal knowledge about the fact." *Rivera v. City of Merced*, 2006 WL 3349576, at *16 (E.D. Cal. Nov. 16, 2006).[2] Or as a leading treatise puts it, testimony may be struck only if it is "'near impossibility' or 'so improbable that no reasonable person could believe'" that the witness has personal knowledge. 3 J. WEINSTEIN, WEINSTEIN ON FEDERAL EVIDENCE § 602.03[1][c]. Once this low threshold has been met, any remaining concerns or doubts about a witness's personal knowledge "go[] to the weight rather

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[1] Rule 601 also provides that "the competency of a witness shall be determined in accordance with State law" in civil actions when the testimony pertains to "an element of a claim or defense as to which State law supplies the rule of decision." Fed. R. Evid. 601. Ms. Mendel's testimony pertains to Hendricks's invocation of the unclean-hands doctrine. Regardless of whether that defense is governed by California or federal law—inasmuch as ATTM's motion arises under the FAA—California's rules of evidence deeming witnesses to be competent to testify about matters within their personal knowledge mirror the federal rules. *Compare* Cal. R. Evid. 700, 702 *with* Fed. R. Evid. 601-02.

[2] *See also*, *e.g.*, *United States v. Joy*, 192 F.3d 761, 767 (7th Cir. 1999) ("the key question for the trial court is whether a reasonable trier of fact could believe that a witness had personal knowledge of the facts about which he testified"); *M.B.A.F.B. Fed. Credit Union v. Cumis Ins. Soc'y*, 681 F.2d 930, 932 (4th Cir. 1982) ("Evidence is inadmissible under this rule only if in the proper exercise of the trial court's discretion it finds that the witness could not have actually perceived or observed that which he testifies to.").

than the admissibility of the testimony." *Hallquist v. Local 276, Plumbers & Pipefitters Union*, 843 F.2d 18, 24 (1st Cir. 1988); *see also* 27 CHARLES A. WRIGHT *ET AL.*, FEDERAL PRACTICE AND PROCEDURE § 6023 n.11 (Supp. 2011) (citing cases).

Here, no doubts or concerns could exist about Ms. Mendel's knowledge of the subjects on which she has testified. ATTM laid ample foundation for Ms. Mendel's testimony that (1) except for the Bursor & Fisher firm's improper arbitrations challenging the AT&T/T-Mobile merger, ATTM has not deliberately refused to pay for consumer arbitrations since promising to do so in mid-2003; and (2) ATTM has paid arbitration costs even when the customer breached the agreement by first filing a lawsuit in a court of general jurisdiction before initiating arbitration. In fact, Ms. Mendel's own declaration establishes that her testimony is based on personal knowledge. In her declaration, Ms. Mendel testifies that she is the Lead Discovery Manager in ATTM's Legal Department. Mendel Decl. ¶ 2. She explains that, "[i]n that position, [she is] involved with the resolution of customer disputes under ATTM's arbitration provision." *Id.* Because her role in ATTM's Legal Department and involvement with ATTM's consumer arbitrations would allow a reasonable trier of fact to believe that she has personal knowledge of whether ATTM refused to fund them (including ones that were preceded by lawsuits), Hendricks's objections should be overruled. Indeed, Rule 602 itself provides that the evidence showing "personal knowledge of the matter * * * may, but need not, consist of the witness' ***own testimony***." Fed. R. Evid. 602 (emphasis added). That is to say, Ms. Mendel's own attestation that she has personal knowledge is more than sufficient to satisfy Rule 602.

Moreover, Ms. Mendel's supplemental declaration explains in greater detail the basis for her personal knowledge. First, she has been tracking all of ATTM's consumer arbitrations since she joined the Litigation Group of the Legal Department in August 2004. Supp. Mendel Decl. ¶¶ 5-6. And for the last five years, she has been specifically designated to handle any inquiries by the AAA regarding payment of arbitration costs. *Id.* ¶ 6. Second, she also reviewed records of ATTM's payments to the AAA and invoices from the AAA since mid-2003, verifying that every invoice for a consumer arbitration that she could locate has been paid. *Id.* ¶ 7. It is settled that an employee can have personal knowledge to testify about practices or procedures that

began before his or her tenure. *See*, *e.g.*, *United States v. Thompson,* 559 F.2d 552, 554 (9th Cir. 1977) (restaurant manager had personal knowledge to testify what normal company procedures were on a date before his employment); *Los Angeles Times Commc'ns, LLC v. Dep't of Army*, 442 F. Supp. 2d 880, 886 (C.D. Cal. 2006) ("a declarant can testify about practices or procedures in place before the witness was employed with the organization about which he is relating information"); *Green v. Baca*, 306 F. Supp. 2d 903, 914 (C.D. Cal. 2003) ("[t]he fact that Engelbart did not work as a teletype operator at the time the teletype in question was sent does not render her incompetent to testify" that it was "properly dispatched"). In addition, an employee can testify about earlier events from a review of relevant records. *See*, *e.g.*, *Wash. Central RR. Co. v. Nat'l Mediation Bd.*, 830 F. Supp. 1343, 1353 (E.D. Wash. 1993) ("Personal knowledge, however, is not strictly limited to activities in which the declarant has personally participated. * * * [P]ersonal knowledge can come from review of the contents of files and records."); *Vote v. United States*, 753 F. Supp. 866, 868 (D. Nev. 1990), *aff'd*, 930 F.2d 31 (9th Cir. 1991) (same). Here, Ms. Mendel's testimony makes clear not only that she is knowledgeable about ATTM's practices and procedures for paying for consumer arbitrations since mid-2003, but also that she reviewed available records confirming those payments.

Ms. Mendel's responsibilities and her review of records give her more than sufficient personal knowledge of ATTM's practices and procedures for paying for consumer arbitrations since 2003 to testify about whether it has deliberately refused to do so during that time period. Indeed, because the AAA's policy is to refuse to administer arbitrations for any business that fails to pay the costs for a consumer arbitration when obligated to do so, she would know if the AAA had concluded that ATTM had refused to meet its obligation to pay the costs of consumer arbitrations. *Id.* ¶ 8; *see also id.* Ex. 1 at 2 (detailing AAA policy).

Ms. Mendel's supplemental declaration also makes clear that the AAA agrees that ATTM has met its obligation to pay the costs of consumer arbitrations. She attaches a letter dated July 18, 2011, which she retrieved from ATTM's files, from the AAA's general counsel to an attorney representing an ATTM customer. *Id.* Ex. 1. The letter explains that the AAA had selected ATTM (among other companies) for a pilot program under which consumer cases

would be accepted for administration even before the business had paid the fees because those companies had "historically complied" with their obligation under the AAA's Consumer Due Process Protocol to pay those fees. *Id.* Ex. 1 at 3.

Moreover, Ms. Mendel's supplemental declaration confirms that she has personal knowledge that ATTM had paid for a consumer arbitration that was filed after the customer had breached her contract by filing a putative class action in court. As she explains, not only does she track both consumer litigations and arbitrations for ATTM—which would give her reason to know what has happened with cases in which a court compels arbitration—she also attaches a court order compelling an ATTM customer to arbitrate her dispute, along with records showing that ATTM paid the full costs for that arbitration. *Id.* ¶ 10 & Exs. 2-6.

Hendricks points out that Ms. Mendel does not "identify" particular arbitrations or attach the "arbitration invoices" and "documentation of the payment[s]" to her declaration. Pl.'s Obj. at 1-2. But he does not point to any source of law that would require her to burden this Court with a list of consumer arbitrations and documents showing that ATTM paid for them—especially given how tangential this issue is to the merits of ATTM's motion to compel arbitration. Because all that is required is evidence sufficient for a reasonable trier of fact to conclude that she has personal knowledge—and there is more than enough already—she need not also submit every record she might have consulted to confirm her recollection of events. Indeed, courts routinely reject similar objections. *See*, *e.g.*, *Shabazz v. Va. Dep't of Corr.*, 2011 WL 4025264, at *5 (E.D. Va. Sept. 9, 2011) (denying motion to strike affidavit on the ground that witness "did not attach all of the records she reviewed"); *Allstate Ins. Co. v. St. Anthony's Spine & Joint Inst., P.C.*, 691 F. Supp. 2d 772, 787 (N.D. Ill. 2010) (same); *Fleming v. Coverstone*, 2009 WL 764940, at *4 (S.D. Cal. Mar. 18, 2009) (same); *Barr v. Frannet, LLC*, 2008 WL 59295, at *2 (N.D. Tex. Jan. 3, 2008) (same, and agreeing that "voluminous business records" that "were mainly addressed to collateral matters" need not be attached to an affidavit).

In sum, because Ms. Mendel's own testimony supplies ample basis for a reasonable trier of fact to conclude that she has personal knowledge, Hendricks's objections to her testimony should be overruled.

II. HENDRICKS'S REQUEST FOR DISCOVERY INTO ALL ATTM ARBITRATIONS WITH CONSUMERS SINCE 2003 SHOULD BE DENIED.

Hendricks alternatively requests a deposition of Ms. Mendel and documents from eight years' worth of ATTM consumer arbitrations in order to determine the amount of fees in each case and who paid them. Pl.'s Obj. at 2. The requested discovery should be denied because it would be an expensive—and unnecessary—detour into a question tangential to the merits of ATTM's motion to compel arbitration.

To begin with, the scenario that Hendricks hypothesizes—that ATTM routinely precludes customers from arbitrating by refusing to pay arbitration costs (Pl.'s Mem. of Law in Opp. to Mot. to Compel Arb. (Dkt. No. 37) at 1)—is so far fetched as to make discovery unwarranted. Any affected customers could simply pay the filing fees themselves and ask the arbitrator to award costs, or petition a court to compel arbitration under 9 U.S.C. § 4—a path that Hendricks's counsel is currently taking in *Schroeder v. AT&T Mobility LLC*, No. 3:11-cv-04412-CRB (N.D. Cal.). Moreover, if ATTM truly had refused to pay arbitration costs in order to prevent a consumer from arbitrating, the AAA would have ceased administering arbitrations long ago. Supp. Mendel Decl. ¶ 8 & Ex. 1 at 2. It has not done so. To the contrary, it selected ATTM for a pilot program reserved for companies that consistently live up to their obligation to pay arbitration costs. *Id.* Ex. 1 at 4.

To permit Hendricks nevertheless to conduct a fishing expedition into eight years of consumer arbitrations would be an enormous waste of resources. It also would flout "Congress's clear intent, in the [FAA], to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone*, 460 U.S. at 22; *see also Prima Paint*, 388 U.S. at 404 ("[T]he unmistakably clear congressional purpose" of the FAA was "that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts."). If a plaintiff could obtain discovery into all prior arbitrations merely by alleging that the defendant may have breached a similar arbitration agreement with a third party, the plaintiff could so escalate the costs of compelling arbitration as to undermine the point of agreeing to arbitrate in the first place.

Hendricks claims to need discovery to probe this issue further because a court once found that an ***entirely different*** ATTM employee (an in-house counsel) lacked personal knowledge of the matters asserted in an unrelated case three years ago. Pl.'s Obj. at 1. ATTM regrets the errors in that case, which that lawyer corrected when he became aware of them (as the court's order reflects). *See Trujillo v. Apple Computer, Inc.*, 578 F. Supp. 2d 979, 985-86 (N.D. Ill. 2008). But as we previously explained, the judge in that case agreed that the errors were unintentional: "I'm certainly not in a position to say, nor did I suggest, or at least I wasn't intending to suggest, that anybody had engaged in some sort of a * * * deliberate effort to conceal something or hide something or misrepresent something." Decl. of Kevin Ranlett (Dkt. No. 42-3) Ex. 38, at 12:3-7. The fact that an ATTM declarant made an inadvertent error years ago does not mean that every future ATTM declarant cannot be believed. On such reasoning, the declaration of Scott Bursor (one of Hendricks' counsel) must be disregarded given that another federal judge recently had to remind Mr. Bursor's partner in a related matter that "[t]here is a whole lot to be said for accuracy in advocacy." Decl. of Kevin Ranlett in Supp. of Resp. to Obj. to Reply Evid. Ex. 1 (Tr. at 10:1-2, *Bursor & Fisher, P.A. v. FCC*, No. 11 Civ 5457 (LAK) (S.D.N.Y. Sept. 8, 2011)).[3]

Finally, Hendricks's request for discovery should be denied for the same reason that other courts have denied similar requests for discovery into businesses' arbitrations with other customers: Because "the only arbitration agreement at issue" in this case is *Hendricks's* agreement, he "is not entitled to discovery" into ATTM's "arbitrations" with "customers * * * *other than [Hendricks]*" because they are "irrelevant." *T-Mobile USA, Inc. v. Meyer*, 2011 WL 443810, at *10 (N.D. Cal. Sept. 23, 2011) (Breyer, J.); *see also*, *e.g.*, *Pleasants v. Am. Express*

[3] In opposing ATTM's motion to compel arbitration, Hendricks suggested that the fact that ATTM has refused to fund a series of arbitrations his counsel has brought to challenge the AT&T/T-Mobile merger means that ATTM may have a "practice" of refusing to pay arbitration costs. Pl.'s Mem. of Law in Opp. To Mot. to Compel Arb. (Dkt. 37) at 15. But every court to rule on the question thus far has found that those arbitrations are barred by the parties' arbitration agreements. *See AT&T Mobility LLC v. Bushman*, No. 11-80922-CIV (S.D. Fla. Sept. 23, 2011) (available at Ranlett Decl. Ex. 2); *AT&T Mobility LLC v. Smith*, No. 2:11-cv-05157-LDD (E.D. Pa. Oct. 7, 2011) (available at Ranlett Decl. Ex. 3); *AT&T Mobility LLC v. Gonnello*, 2011 WL 4716617 (S.D.N.Y. Oct. 7, 2011).

Co., 541 F.3d 853, 859 (8th Cir. 2008) (denying similar discovery request for documents regarding arbitrations involving other customers).

CONCLUSION

Hendricks's objections to the Mendel declaration should be overruled, and his request for leave to take discovery denied.

Dated: October 19, 2011

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