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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PETER JOHNSON, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

MAKER ECOSYSTEM GROWTH
HOLDINGS, INC., et al.,

Defendants.

Case No. [20-cv-02569-MMC](#)

**ORDER GRANTING DEFENDANTS'
MOTION TO COMPEL ARBITRATION;
VACATING HEARING; STAYING
CLAIMS**

Before the Court is defendants Maker Ecosystem Growth Holdings, Inc. and Maker Ecosystem Growth Foundation's (collectively, "Maker Defendants") Motion to Compel Arbitration, filed July 15, 2020. Plaintiff has filed opposition, to which the Maker Defendants have replied.¹ Having considered the papers filed in support of and in opposition to the motion, the Court finds the matter appropriate for determination on the parties' respective written submissions, VACATES the hearing scheduled for October 2, 2020, and rules as follows.

In 2018, plaintiff, by a "click-wrap" agreement titled "Dai Terms of Service" ("Terms of Service"),² "signed up" to be a user on a digital currency platform managed by the Maker Defendants. (See FAC ¶ 1; Pl.'s Opp. at 3:20-23, 6:1-10.)

By the instant motion, the Maker Defendants seek an order compelling arbitration

¹ Plaintiff's request for leave to file a sur-reply is hereby DENIED, as, contrary to plaintiff's assertion, the Maker Defendants did not raise new arguments in their reply. Even if the Court were to consider plaintiff's proposed sur-reply, however, the Court's findings herein would remain unchanged.

² DAI is a digital currency developed by the Maker Defendants. (See First Am. Compl. ("FAC") ¶ 1.)

1 pursuant to the arbitration clause set forth in the Terms of Service, which clause, in
2 relevant part, provides as follows:

3 12.2 Binding Arbitration

4 If we cannot resolve the dispute through good-faith negotiations,
5 you and we agree that any dispute arising under this Agreement
6 shall be finally settled in binding arbitration, on an individual
7 basis, in accordance with the American Arbitration Association's
8 rules for arbitration of consumer-related disputes (accessible at
9 <https://www.adr.org/sites/default/files/Consumer%20Rules.pdf>)
10 and you and MakerDAO hereby expressly waive trial by jury and
11 right to participate in a class action lawsuit or class-wide
12 arbitration.

13 (See Becker Decl., filed July 15, 2020, Ex. A at 9-10.)

14 The American Arbitration Association's ("AAA") rules, in turn, provide, in relevant
15 part: "The arbitrator shall have the power to rule on his or her own jurisdiction, including
16 any objections with respect to the existence, scope, or validity of the arbitration
17 agreement or to the arbitrability of any claim or counterclaim." (See Defs.' Request for
18 Judicial Notice Ex. A at 17.)³

19 Plaintiff does not dispute he "reviewed and agreed to" the Terms of Service (see
20 Pl.'s Opp. at 3:21-22), and, other than suggesting arbitration agreements that delegate
21 arbitrability to the arbitrator by incorporating the AAA rules are not enforceable against a
22 party who is, as plaintiff characterizes himself, "unsophisticated,"⁴ plaintiff does not
23

24 ³ The Maker Defendants' request for judicial notice of the AAA "Consumer
25 Arbitration Rules" is hereby GRANTED. See Fed. R. Evid. 201(b) (providing court may
26 judicially notice facts that "can be accurately and readily determined from sources whose
27 accuracy cannot reasonably be questioned"); see also, e.g., Esguerra-Aguilar, Inc. v.
28 Shapes Franchising, LLC, No. 20-CV-00574-BLF, 2020 WL 3869186, at *2 (N.D. Cal.
July 9, 2020) (taking judicial notice of AAA "Commercial Arbitration Rules and Mediation
Procedures").

⁴ As plaintiff acknowledges there is "a split in the Ninth Circuit District Courts about
whether incorporating the AAA Rules by references applies to unsophisticated parties"
(see Pl.'s Opp. at 19 n.45.), and, in any event, in this instance, the Court, based on the
record before it, finds plaintiff is not unsophisticated. (See, e.g., FAC ¶¶ 1, 4 (alleging
plaintiff was "an early investor in ETH," a "digital currency that is the primary collateral for
DAI," and "actively participated in [the Maker Defendant's] software offerings"); Johnson
Decl., filed Aug. 17, 2020, ¶ 8 (averring, "I tracked the Maker Platform closely, reading
blogs, forums, and posts from Maker Entities members and officers").)

1 challenge the Maker Defendants' right to enforce the arbitration agreement contained in
2 the Terms of Service. (See Pl.'s Opp. at 19 n.45.) Rather, plaintiff argues the Terms of
3 Service, including the arbitration clause contained therein, are "not relevant here"
4 because, in 2019, he signed up for a different digital platform offered by the Maker
5 Defendants, and, according to plaintiff, his claims concern the manner in which the Maker
6 Defendants managed that subsequent platform. (See id. at 4:22-23.)

7 As the Maker Defendants point out, however, plaintiff's argument goes to whether
8 his claims "fall within the scope" of the arbitration clause, a question which, the Maker
9 Defendants contend, "must be decided by the arbitrator in the first instance." (See Defs.'
10 Reply at 2:13-15.) The Court agrees.

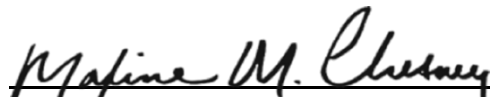
11 As discussed above, the arbitration clause incorporates the AAA rules, and,
12 pursuant to those rules, "the arbitrability of any claim" is delegated to the arbitrator. (See
13 Defs.' Request for Judicial Notice Ex. A at 17.) Under such circumstances, the Court
14 finds plaintiff agreed to delegate to the arbitrator the issue of arbitrability. See Brennan v.
15 Opus Bank, 796 F.3d 1125, 1130 (9th Cir. 2015) (holding "incorporation of the AAA rules
16 constitutes clear and unmistakable evidence" of agreement to delegate arbitrability); see
17 also McLellan v. FitBit, Inc., No. 16-CV-00036-JD, 2017 WL 4551484, at *3 (N.D. Cal.
18 Oct. 11, 2017) (finding agreement to delegate arbitrability where consumer contract
19 contained arbitration clause incorporating AAA rules).

20 **CONCLUSION**

21 For the reasons stated above, the Maker Defendants' motion is hereby
22 GRANTED, and plaintiff's claims against the Maker Defendants are hereby STAYED
23 pending completion of arbitration proceedings.

24 **IT IS SO ORDERED.**

25
26 Dated: September 25, 2020

27 
28 MAXINE M. CHESNEY
United States District Judge