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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

CRAFTY PRODUCTIONS, INC., *et al.*,

Plaintiffs,

v.

FUQING SANXING CRAFTS CO. LTD., *et al.*,

Defendants.

Case No. 15-cv-719-BAS(JLB)

ORDER:

(1) GRANTING DEFENDANT FUQING SANXING CRAFTS CO. LTD.’S MOTION TO COMPEL ARBITRATION (ECF No. 84);

(2) TERMINATING DEFENDANT FUQING SANXING CRAFTS CO. LTD.’S MOTION TO DISMISS AND MOTION TO DISQUALIFY (ECF No. 89);

(3) STAYING ACTION PURSUANT TO 9 U.S.C. § 3; AND

(4) ADMINISTRATIVELY CLOSING ACTION

Plaintiff Crafty Productions, Inc. (“CPI”) and Defendant Fuqing Sanxing Crafts Co. Ltd. (“Fuqing”) collaborated to form and organize a limited liability company—Plaintiff Crafty Productions, LLC (“Company”). Now, after the business relationship between the parties deteriorated, the Company and its majority interest

1 member, CPI, are suing the Company's minority interest member, Fuqing, for a
2 variety of contract and tort claims. (First Am. Compl., ECF No. 72.) However, the
3 Operating Agreement entered into by the Company's members contains a broad
4 arbitration clause. This clause not only provides for mandatory arbitration of disputes
5 concerning the Operating Agreement or the parties' rights thereunder, but it also
6 provides that the arbitrator will decide whether the dispute is subject to arbitration.
7 Accordingly, Fuqing now moves for an order compelling the Company and CPI to
8 arbitrate their claims against Fuqing. (ECF No. 84.) They oppose. (ECF No. 126.)

9 The Court finds this motion suitable for determination on the papers submitted
10 and without oral argument. *See* Fed. R. Civ. P. 78(b); Civ. L.R. 7.1(d)(1). For the
11 following reasons, the Court **GRANTS** Fuqing's motion to compel arbitration.

12 13 **I. BACKGROUND**

14 CPI is a California corporation based in Encinitas, California, that claims to be
15 "a creative leader and trend-setter in the crafts industry, and has created many original
16 product concepts and designs, including many creative, decorative wood products."
17 (First Am. Compl. ¶¶ 4, 22.) Fuqing is a Chinese company based in Fuqing City,
18 Fujiang Province, China. (*Id.* ¶ 6.)

19 In early 2014, CPI and Fuqing "agreed to work together." (Zhu Decl. ¶ 2, ECF
20 No. 84-11.) The parties intended for Fuqing to manufacture CPI's craft products for
21 sale in the United States market. (*Id.*) As a result, on or about March 1, 2014, the
22 parties entered into an operating agreement that governed the creation and operation
23 of a new company—Crafty Productions, LLC ("Operating Agreement"). (*Id.* ¶ 3; *see*
24 *also* Operating Agreement, Mot. Ex. 9, ECF No. 84-12.) The Operating Agreement,
25 which is also attached to the Company and CPI's complaint against Fuqing, provides
26 that the "Company will engage in the business of designing, manufacturing, and
27 selling of crafty products to retail clients, and to engage in such other business
28 activities as may be related or incidental thereto." (Operating Agreement § 1.2.)

1 Further, Article 14 of the agreement provides:

2 Arbitration constitutes the sole and exclusive remedy for the settlement
3 of any dispute or controversy concerning this Agreement or the rights
4 of the parties under this Agreement, including whether the dispute or
5 controversy is arbitrable. The arbitration proceeding will be conducted
6 in San Diego, California, before a single arbitrator under the
7 Commercial Arbitration Rules of the American Arbitration Association
8 in effect at the time a demand for arbitration is made. To the extent that
9 there is any conflict between the rules of the American Arbitration
10 Association and this arbitration clause, this clause will govern and
11 determine the rights of the parties. The decision of the arbitrator,
12 including the determination of the amount of any damages suffered, will
13 be exclusive, final, and binding on all parties, their heirs, executors,
14 administrators, successors, and assigns, as applicable, and judgment
thereon may be entered in any court of competent jurisdiction. The costs
of arbitration, including administrative fees, fees for a record and
transcript, and the arbitrator's fees, as well as reasonable attorney's fees
will be awarded to the party determined by the arbitrator to be the
prevailing party.

15 (*Id.* art. 14.)

16 Sometime after the Company was formed, the business relationship between
17 the parties deteriorated. (*See* Zhu Decl. ¶¶ 6–9.) Then, on April 1, 2015, the Company
18 and CPI commenced this action against Fuqing and numerous other defendants,
19 alleging, among other things, copyright infringement of CPI's original craft designs
20 and products. (ECF No. 1.) In their First Amended Complaint filed on September 11,
21 2015, they allege seven claims against Fuqing, including breach of contract and
22 copyright infringement. (First Am. Compl. ¶¶ 66–99, 105–11.) Fuqing moves to
23 compel arbitration of all of these claims under the Federal Arbitration Act. (ECF No.
24 84.) Further, it requests an immediate stay of this action pending completion of the
25 arbitration. (*Id.*)

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1 **II. ANALYSIS**

2 The Company and CPI oppose Fuqing’s motion by principally arguing that
3 their claims are not encompassed by the Operating Agreement’s arbitration
4 provision. (See Opp’n 4:5–7:3.) In other words, they argue their claims against
5 Fuqing are not arbitrable. In many instances, the Court would determine the
6 arbitrability of these claims. See, e.g., *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*,
7 207 F.3d 1126, 1130 (9th Cir. 2000). However, for the following reasons, the Court
8 concludes the parties have clearly and unmistakably agreed to delegate this issue to
9 the arbitrator.

10 The Federal Arbitration Act (“FAA”) provides that contractual arbitration
11 agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as
12 exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. The Act
13 reflects a “national policy favoring arbitration,” *Preston v. Ferrer*, 552 U.S. 346, 349,
14 (2008), and emphasizes that valid arbitration agreements must be “rigorously
15 enforced” according to their terms, *American Express Co. v. Italian Colors*
16 *Restaurant*, 570 U.S. ---, 133 S. Ct. 2304, 2309 (2013). See also *AT & T Mobility*
17 *LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (“The ‘principal purpose’ of the FAA
18 is to ‘ensure[e] that private arbitration agreements are enforced according to their
19 terms.’”). Thus, “any doubts concerning the scope of arbitrable issues should be
20 resolved in favor of arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr.*
21 *Corp.*, 460 U.S. 1, 24–25 (1983).

22 Although federal policy favors arbitration agreements, the Supreme Court “has
23 made clear that there is an exception to this policy: The question whether the parties
24 have submitted a particular dispute to arbitration, *i.e.*, the ‘question of arbitrability,’
25 is ‘an issue for judicial determination [u]nless the parties clearly and unmistakably
26 provide otherwise.’” *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)
27 (quoting *AT & T Techs., Inc. v. Commc’ns Workers*, 475 U.S. 643, 649 (1986)).
28 “Accordingly, the question of arbitrability is left to the court unless the parties clearly

1 and unmistakably provide otherwise.” *Momot v. Mastro*, 652 F.3d 982, 988 (9th Cir.
2 2011); *see also Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1072 (9th Cir.
3 2013). “Clear and unmistakable evidence of an agreement to arbitrate arbitrability
4 ‘might include . . . a course of conduct demonstrating assent . . . or . . . **an express**
5 **agreement to do so.**” *Mohamed v. Uber Techs., Inc.*, --- F.3d ---, 2016 WL 4651409,
6 at *4 (9th Cir. 2016) (emphasis added) (quoting *Momot*, 652 F.3d at 988). If the
7 parties unmistakably agree to arbitrate the “gateway issue” of arbitrability, then this
8 this agreement is “simply an additional, antecedent agreement” that is subject to the
9 FAA. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010). Federal courts
10 therefore can enforce the agreement to arbitrate arbitrability issues by staying
11 litigation and compelling arbitration under the FAA. *Id.*

12 In this case, the Court finds the parties clearly and unmistakably agreed that
13 the arbitrator would decide the question of whether the claims at issue are arbitrable.
14 The Operating Agreement’s arbitration provision provides: “Arbitration constitutes
15 the sole and exclusive remedy for the settlement of any dispute or controversy
16 concerning this Agreement . . . **including whether the dispute or controversy is**
17 **arbitrable.**” (Operating Agreement art. 14 (emphasis added).) Thus, there is
18 “[c]lear and unmistakable evidence of an agreement to arbitrate arbitrability” because
19 there is an “express agreement to do so.” *See Mohamed*, --- F.3d ---, 2016 WL
20 4651409, at *4; *see also, e.g., Momot*, 652 F.3d at 988. Accordingly, the Court
21 concludes that the arbitrator has the authority to initially decide whether the Company
22 and CPI’s claims against Fuqing fall within the scope of the Operating Agreement’s
23 arbitration provision. The Company and CPI can submit their Opposition’s
24 arguments on this issue to the arbitrator.

25 That said, the Company and CPI also advance two arguments against the
26 enforceability of the arbitration provision itself, which necessarily includes the
27 parties’ agreement to arbitrate issues of arbitrability. First, they briefly argue that the
28 arbitration provision is invalid because it conflicts with the consent to jurisdiction

1 and forum selection clause in the Operating Agreement. (Opp’n 4:6–18.) Second,
2 they also briefly argue that Fuqing waived its right to enforce the arbitration
3 agreement altogether. (*Id.* 6:25–7:3.)

4 Both of these arguments also concern arbitrability, but whether these issues
5 were similarly unmistakably delegated to the arbitrator is a closer call. This
6 determination depends on the language and scope of the parties’ agreement to
7 arbitrate arbitrability. *See, e.g., Morgan Stanley & Co., LLC v. Couch*, 134 F. Supp.
8 3d 1215, 1223–27 (E.D. Cal. 2015) (collecting cases and analyzing at length whether
9 an arbitration clause clearly and unmistakably delegated the issue of waiver of
10 arbitration rights to the arbitrator); *see also Morgan Stanley & Co., LLC v. Couch*, -
11 -- Fed. App’x ---, 2016 WL 4245527, at *2 (9th Cir. 2016) (discussing this issue in
12 affirming the district court’s conclusion). The district court’s decision in *Morgan*
13 *Stanley* illustrates this analysis in the context of a waiver claim. *See* 134 F. Supp. 3d
14 at 1223–27. There, the court found that the following language did not unmistakably
15 delegate the issue of waiver of the right to arbitrate to the arbitrator: “any dispute as
16 to the arbitrability of a particular issue or claim pursuant to this arbitration provision
17 is to be resolved in arbitration.” *Id.* at 1226 (emphasis omitted). The court reasoned
18 that this clause “can be interpreted reasonably to mean that an arbitrator should
19 determine the scope of the agreement, that is, which causes of action properly are
20 brought in arbitration.” *Id.* at 1227. It further reasoned that the parties needed to
21 include more explicit language if they desired to also submit to arbitration the issue
22 of whether the defendant waived his right to arbitrate. *Id.* Thus, the court concluded
23 the provision did not delegate the issue of waiver to the arbitrator. *Id.*

24 Here, by comparison, the language found in the arbitration provision
25 concerning arbitrability that provides the arbitrator will decide “whether the dispute
26 or controversy is arbitrable” is broader than the language in *Morgan Stanley*. *See* 134
27 F. Supp. 3d at 1226. The provision in this case addresses the dispute or controversy
28 in its entirety and whether it can be arbitrated, as opposed to only “a particular claim

1 or issue” that is “to be resolved in arbitration.” *See id.* However, the language in the
2 parties’ provision is not more explicit than the provision in *Morgan Stanley*. For
3 example, the provision here does not provide that the arbitrator can determine a
4 dispute concerning the “validity or application of” the arbitration provision, *see*
5 *Momot*, 652 F.3d at 988, or that the arbitrator can determine any dispute relating to
6 the “interpretation, applicability, enforceability or formation of” the arbitration
7 provision, *see Anderson v. Pitney Bowes, Inc.*, No. C 04-4808 SBA, 2005 WL
8 1048700, at *1 (N.D. Cal. May 4, 2005).

9 Because this issue is a closer call and there is a presumption against the
10 delegation of arbitrability to the arbitrator, the Court concludes the parties did not
11 delegate to the arbitrator the issues of whether Fuqing waived its right to arbitrate
12 and whether the agreement to arbitrate arbitrability is valid. The Court reaches this
13 conclusion notwithstanding the fact that the Company and CPI unmistakably
14 delegated to the arbitrator the issue of whether the Company and CPI’s claims fall
15 under the scope of the arbitration provision. *See Morgan Stanley*, 134 F. Supp. 3d at
16 1227 (reasoning the arbitration provision delegated to the arbitrator the issue of
17 whether the claims were subject to arbitrability, but not the issue of waiver).

18 Nevertheless, in considering the Company and CPI’s abbreviated arguments
19 against the enforceability of the arbitration provision, the Court finds them
20 unpersuasive. Fuqing did not waive its right to arbitrate. The Company and CPI do
21 not meet their “heavy burden of proof” of demonstrating a waiver. *See United States*
22 *v. Park Place Assocs., Ltd.*, 563 F.3d 907, 921 (9th Cir. 2009). Although Fuqing filed
23 a state court action that has since been dismissed, the Company and CPI must show
24 prejudice resulting from Fuqing’s conduct. *See id.* Their claim that they were forced
25 to incur expenses to move to stay the state court action is not meaningful prejudice.
26 *See, e.g., Saint Agnes Med. Ctr. v. PacifiCare of Cal.*, 31 Cal. 4th 1187, 1203 (2003)
27 (“[C]ourts will not find prejudice where the party opposing arbitration shows only
28 that it incurred court costs and legal expenses.”).

1 Further, the consent to jurisdiction and forum selection provision does not
2 invalidate the broad arbitration provision. The Court severs the arbitration provision
3 from “the remainder of the contract” to determine its validity. *See Nitro-Lift Techs.,*
4 *L.L.C. v. Howard*, 568 U.S. ---, 133 S. Ct. 500, 503 (2012) (per curiam). When
5 severed, the provision is unambiguous and is therefore enforceable. Moreover, the
6 arbitration provision and the consent to jurisdiction and forum selection provision do
7 not necessarily conflict. *See, e.g., Mohamed*, --- F.3d ---, 2016 WL 4651409, at * 4.
8 As the California Court of Appeal has persuasively reasoned: “No matter how broad
9 the arbitration clause, it may be necessary to file an action in court to enforce an
10 arbitration agreement, or to obtain a judgment enforcing an arbitration award, and
11 the parties may need to invoke the jurisdiction of a court” *Dream Theater, Inc.*
12 *v. Dream Theater*, 124 Cal. App. 4th 547, 555–56 (2004). This present motion to
13 compel arbitration is an example of where both of these clauses may have an
14 operative effect. If the parties’ positions were reversed, the consent to jurisdiction
15 clause would prevent Fuqing from arguing it is not subject to the jurisdiction of this
16 Court. *See, e.g., Nat’l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964)
17 (“[P]arties to a contract may agree in advance to submit to the jurisdiction of a given
18 court.”). Thus, the arbitration provision is unambiguous, and there are persuasive
19 reasons for including both the arbitration provision and the consent to jurisdiction
20 and forum selection provision in the Operating Agreement.

21 Accordingly, the Court will grant Fuqing’s request for an order compelling
22 arbitration under 9 U.S.C. § 2 and a stay of this action under 9 U.S.C. § 3.

23 24 **III. CONCLUSION & ORDERS**

25 In light of the foregoing, the Court **GRANTS** Fuqing’s motion to compel
26 arbitration (ECF No. 84). The Court **ORDERS** the Company, CPI, and Fuqing to
27 proceed to arbitration in the manner provided for in the Operating Agreement’s
28 arbitration provision. *See* 9 U.S.C. § 4.


1 Further, because the Court has granted Fuqing's motion to compel arbitration,
2 the Court **TERMINATES** Fuqing's motion to dismiss and motion to disqualify (ECF
3 No. 89). Fuqing may renew these motions in the forthcoming arbitration between the
4 parties.

5 In addition, the Court **STAYS** this action as to **all parties and all claims**. *See*
6 9 U.S.C. § 3. During the duration of the stay, any time period for which the Company
7 and CPI must amend their First Amended Complaint shall be **TOLLED**. (*See* Order
8 Grant Mot. to Dismiss, ECF No. 214 at 14:14-15.)

9 Last, the Court directs the Clerk of the Court to **ADMINISTRATIVELY**
10 **CLOSE** this case. The decision to administratively close this case pending resolution
11 of the arbitration does not have any jurisdictional effect. *See Dees v. Billy*, 394 F.3d
12 1290, 1294 (9th Cir. 2005) (“[A] district court order staying judicial proceedings and
13 compelling arbitration is not appealable even if accompanied by an administrative
14 closing. An order administratively closing a case is a docket management tool that
15 has no jurisdictional effect.”).

16 **IT IS SO ORDERED.**

17
18 **DATED: September 30, 2016**


19 **Hon. Cynthia Bashant**
20 **United States District Judge**