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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BUNGIE, INC.,

Plaintiff,

v.

AIMJUNKIES.COM, et al.,

Defendants.

C21-0811 TSZ

ORDER

THIS MATTER comes before the Court on a motion to confirm an arbitration award, docket no. 88, brought by plaintiff Bungie, Inc. (“Bungie”), and a motion to vacate the award, docket no. 123, brought by defendants Aimjunkies.com (“Aimjunkies”), Phoenix Digital Group LLC (“Phoenix Digital”), David Schaefer, Jordan Green, Jeffrey Conway, and James May (collectively the “Defendants”). Having reviewed all papers filed in support of, and in opposition to, the motions, the Court enters the following Order.

Background

This action concerns Defendants’ development, sale, and distribution of cheat software for Bungie’s popular Destiny 2 video game. *See* Am. Compl. at ¶ 2 (docket

1 no. 34). On June 15, 2021, Bungie filed suit against Defendants and asserted nine causes
2 of action: (i) copyright infringement; (ii) trademark infringement; (iii) false designation
3 of origin; (iv) circumvention of technological measures; (v) trafficking in circumvention
4 technology; (vi) breach of contract; (vii) tortious interference; (viii) violation of the
5 Washington Consumer Protection Act (“CPA”); and (ix) unjust enrichment. Compl. at
6 ¶¶ 66–136 (docket no. 1).

7 On January 10, 2022, Defendants moved to refer Bungie’s fourth through ninth
8 causes of action to binding arbitration in accordance with the terms of Bungie’s Limited
9 Software License Agreement (“LSLA”). *See* Mot. (docket no. 28). The LSLA provides
10 that all claims arising out of or relating to the agreement shall be “settled by binding
11 arbitration administered by JAMS in accordance with the provisions of its
12 Comprehensive Arbitration Rules or Streamlined Arbitrations Rules, as appropriate.”
13 LSLA, Ex. 6 to Am. Compl. (docket no. 34-1 at 25). Bungie did not oppose Defendants’
14 request and, on February 10, 2022, submitted a demand for arbitration for those claims.
15 Rava Decl. at ¶ 2 (docket no. 31). The Court granted Defendants’ request to refer
16 Bungie’s fourth through ninth causes of action (the “Arbitration Claims”) to binding
17 arbitration and stayed its consideration of the Arbitration Claims. Order at 12–13 (docket
18 no. 33). Bungie’s claims for copyright infringement, trademark infringement, and false
19 designation of origin remain pending before the Court.

20 Following an evidentiary hearing held on December 19–21, 2022, a JAMS-
21 appointed arbitrator (the “Arbitrator”) issued a preliminary written award on January 13,
22 2023. The Arbitrator found Defendants liable on all of the Arbitration Claims and
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1 awarded Bungie monetary damages and injunctive relief. On February 1, 2023, after
2 receiving submissions on reasonable attorneys' fees and costs, the Arbitrator issued his
3 Final Award. Final Award, Ex. A to Rava Decl. (docket no. 89-1). The Arbitrator
4 awarded Bungie \$3,657,500 in damages, \$598,641 in attorneys' fees, \$101,800 in expert
5 witness fees, and \$38,281 in other expenses for a total monetary award of \$4,396,222.
6 *See* Final Award at 15–16, 21–23. On January 31, 2023, the Arbitrator entered a
7 permanent injunction against Defendants, enjoining them from continuing to develop,
8 advertise, and/or sell cheat software for any of Bungie's copyrighted works. *See* Inj., Ex.
9 B to Rava Decl. (docket no. 89-2). Bungie now moves under the Federal Arbitration Act
10 ("FAA"), 9 U.S.C. § 9, to confirm the Final Award and direct entry of the injunction and
11 monetary judgment against Defendants on the Arbitration Claims. Defendants move
12 under the FAA, 9 U.S.C. § 12, and the Washington Uniform Arbitration Act,
13 RCW Chapter 7.04A, to vacate the Final Award.

14 **Discussion**

15 An arbitration award is binding and enforceable unless the Court finds a basis to
16 vacate it pursuant to 9 U.S.C. § 10. The scope of judicial review of arbitration awards
17 under the FAA is extremely limited, designed to preserve due process, but not to permit
18 unnecessary public intrusion into private arbitration procedures. *Kyocera Corp. v.*
19 *Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003). "Neither
20 erroneous legal conclusions nor unsubstantiated factual findings justify federal court
21 review of an arbitral award under the statute[.]" *Id.* at 994. Defendants bear the "burden
22 of establishing grounds for vacating" the Final Award, *U.S. Life Ins. Co. v. Superior Nat'l*
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1 *Ins. Co.*, 591 F.3d 1167, 1173 (9th Cir. 2010), and argue that the Arbitrator (1) allegedly
2 violated a JAMS Comprehensive Arbitration Rule, and (2) acted with evident partiality
3 toward Bungie.

4 **1. Violation of JAMS Comprehensive Arbitration Rule**

5 Defendants contend that the Arbitrator denied them a fair hearing and exceeded
6 his authority when he allegedly violated JAMS Rule 22(e), which provides in relevant
7 part that the “Arbitrator shall receive and consider relevant deposition testimony recorded
8 by transcript or videotape[.]” Ex. H to Mann Decl. (docket no. 123-9). Pursuant to
9 9 U.S.C. § 10(a)(3), a district court may vacate an arbitration award “where the
10 arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and
11 material to the controversy; or of any other misbehavior by which the rights of any party
12 have been prejudiced.” To support vacatur, however, an arbitrator’s refusal to consider
13 evidence must demonstrate bad faith or be “so gross as to amount to affirmative
14 misconduct.” *United States v. SF Green Clean, LLC*, No. C14-01905, 2014 WL
15 3920037, at *6 (N.D. Cal. Aug. 8, 2014) (quoting *United Paperworkers Int’l Union,*
16 *AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 40 (1987)). Additionally, a district court may
17 vacate an arbitration award where the arbitrator exceeded his or her power such that the
18 award was not mutual, final, and definite. 9 U.S.C. § 10(a)(4). “Arbitrators exceed their
19 powers . . . when the award is completely irrational, or exhibits a manifest disregard of
20 law.” *Biller v. Toyota Motor Corp.*, 668 F.3d 655, 665 (9th Cir. 2012) (quoting *Kyocera,*
21 341 F.3d at 997).

1 Defendants argue that the Arbitrator violated JAMS Rule 22(e) during their cross-
2 examination of Dr. Edward Kaiser, one of Bungie's witnesses. Specifically, Defendants
3 contend that the Arbitrator denied them the ability to use Dr. Kaiser's prior deposition
4 testimony for impeachment purposes. A transcript of the evidentiary hearing contains the
5 following exchange:

6 Q. [Defendants' Counsel] Now, do you recall when I took your deposition
7 on October 4 and October 5 of this year?

8 A. [Dr. Kaiser] I believe the dates were October 5th and October 6th, but —
9 (Simultaneous speaking.)

10 Q. [Defendants' Counsel] Whatever it is. It's written down, but you do recall
11 when I took your depositions?

12 A. Yes

13 Q. I took the deposition of you both personally and as a corporate
14 representative for Bungie?

15 A. Correct.

16 Q. Do you recall when I asked you to identify all the technological measures
17 that Bungie contends were compromised by Phoenix Digital?

18 [Plaintiff's Counsel] Object to the form of this question. Those depositions
19 were taken in the federal court litigation. His 30(b)(6) testimony explicitly
20 did not include anything on the [Digital Millennium Copyright Act]
21 violation.

22 [Arbitrator] On the basis of the representations, I'll sustain the objection.
23 Ask another question.

Q. [Defendants' Counsel] Okay. Let me put up Exhibit 24 BX100. Okay.
Dr. Kaiser, do you have that document in front of you?

Tr. at 178:2–25, Ex. 1 to Marcelo Decl. (docket no. 134-1).

1 This exchange does not support Defendants' arguments that the Arbitrator denied
2 them a fair hearing and/or exceeded his authority. Rather, the transcript shows that the
3 Arbitrator made an evidentiary ruling after Plaintiff's Counsel objected to the form of a
4 particular question. Arbitrators, however, "enjoy 'wide discretion to require the
5 exchange of evidence, and to admit or exclude evidence, how and when they see
6 fit.'" *U.S. Life Ins. Co.*, 591 F.3d at 1175 (quoting *Indus. Risk Insurers v. M.A.N.*
7 *Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1444 (11th Cir. 1998)). After the Arbitrator
8 sustained the objection to the form of the question, Defendant's Counsel moved onto
9 another line of questioning. Defendants have presented no evidence to suggest that they
10 otherwise attempted to impeach the witness with his prior deposition testimony or that
11 the Arbitrator prevented them from doing so. As such, Defendants have not shown that
12 the Arbitrator refused to consider material evidence or violated JAMS Rule 22(e).

13 **2. Evident Partiality**

14 Defendants' arguments regarding the Arbitrator's alleged partiality toward Bungie
15 are also without merit. Pursuant to 9 U.S.C. § 10(a)(2), a district court may vacate an
16 arbitration award where there is "evident partiality or corruption in the arbitrators." In
17 the Ninth Circuit, the legal standard for "evident partiality" requires "facts showing a
18 'reasonable impression of partiality.'" *New Regency Prods., Inc. v. Nippon Herald*
19 *Films, Inc.*, 501 F.3d 1101, 1106 (9th Cir. 2007) (quoting *Schmitz v. Zilveti*, 20 F.3d
20 1043, 1048 (9th Cir. 1994)). Defendants contend that the Arbitrator demonstrated
21 evident partiality toward Bungie by making specific factual findings regarding (i) the
22 technological measures Bungie used to prevent unauthorized access to its Destiny 2 video
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1 game; (ii) defendant James May’s role in the creation and distribution of the subject cheat
2 software; (iii) defendant David Schaefer’s credibility; and (iv) the testimony of Steven
3 Guris, one of Bungie’s expert witnesses. Defs.’ Mot. at 9–13 (docket no. 123).

4 Defendants also argue that the total amount of monetary damages is excessive and
5 demonstrates the Arbitrator’s alleged bias. *Id.* at 13–14.

6 Defendants invite the Court to review the merits of the Final Award. The Court
7 must decline that invitation. *See Lagstein v. Certain Underwriters at Lloyd’s, London,*
8 *607 F.3d 634, 640–41 (9th Cir. 2010)* (explaining that § 10 of the FAA does not authorize
9 judicial review of the merits of an arbitration award). Following the evidentiary hearing,
10 the Arbitrator made numerous factual findings regarding Bungie’s technological
11 measures, James May’s role in the underlying conduct, and Steven Guris’s expert
12 testimony. *See, e.g.,* Final Award at ¶¶ 8, 11–12, 19–21. The Court cannot reexamine
13 these factual findings. *See Kyocera Corp., 341 F.3d at 994.* Further, the Court will not
14 evaluate the Arbitrator’s credibility assessments because “assessments regarding witness
15 credibility are not matters for judicial review.” *Int’l Petroleum Prods. & Additives Co. v.*
16 *Black Gold, S.A.R.L., 418 F. Supp. 3d 481, 489 n.10 (N.D. Cal. 2019).* Although
17 Defendants disagree with the Arbitrator’s assessment of David Schaefer’s credibility, the
18 Final Award explains in detail the basis for the Arbitrator’s conclusion. *See* Final Award
19 at ¶ 5 (describing how Schaefer made false statements to Bungie regarding the alleged
20 sale of the Aimjunkies website and substantially understated Phoenix Digital’s revenue
21 from the sale of the cheat software when answering an interrogatory in the present
22 matter). Finally, the Arbitrator explains his award of statutory damages in the Final
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1 Award, and his factual findings support that award. *See* Final Award at 12–15.
2 Disagreement with the outcome of arbitration does not warrant vacatur of the Final
3 Award, and this case presents no exception. Defendants have failed to show that the
4 Arbitrator acted with evident partiality toward Bungie, and the Court therefore DENIES
5 their motion to vacate the Final Award.¹ Having denied Defendants’ motion to vacate the
6 award, Bungie’s motion to the confirm the Final Award is GRANTED.

7 **Conclusion**

8 For the foregoing reasons, the Court ORDERS:

9 (1) Bungie’s motion to confirm the arbitration award, docket no. 88, is
10 GRANTED; the Final Award issued on February 1, 2023, docket no. 89-1, is
11 CONFIRMED and an appropriate partial judgment will be entered.

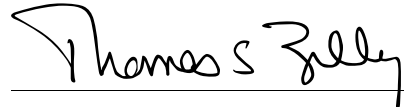
12 (2) Defendants’ motion to vacate the arbitration award, docket no. 123, is
13 DENIED.

14 (3) The Clerk is directed to send a copy of this Order to all counsel of record
15 and the Honorable Ronald E. Cox (Ret.), c/o JAMS, 1420 5th Avenue, Suite 1650,
16 Seattle, WA 98101.

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19 ¹ Aside from a single reference to the Washington Uniform Arbitration Act (“WUAA”) on the first page
20 of Defendants’ motion, Defendants have failed to include any analysis of the Washington statute and have
21 not explained why the Court should apply the WUAA when the arbitration agreement in Bungie’s LSLA
22 is subject to the FAA. *See* LSLA, Ex. 6 to Am. Compl. (docket no. 34-1 at 25). Like the FAA, the
23 WUAA also permits vacatur of an arbitration award if the arbitrator exceeds his or her powers, refuses to
hear evidence material to the controversy, or acts with evident partiality. *See* RCW 7.04A.230. Because
courts applying Washington law may “not look to the merits of the case” or “reexamine evidence,” *see*
Mainline Rock & Ballast, Inc. v. Barnes, Inc., 8 Wn. App. 2d 594, 610, 439 P.3d 662 (2019), the Court
concludes that Defendants’ arguments fail under both the FAA and WUAA.

1 IT IS SO ORDERED.

2 Dated this 13th day of June, 2023.

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5 Thomas S. Zilly
6 United States District Judge
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