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United States District Court,
S.D. California.

GERALD MCGHEE, An Individual, On Behalf of Himself and All Others Similarly Situated,
Plaintiff,
v.
NORTH AMERICAN BANCARD, LLC, Defendant.

Case No.: 17-CV-0586-AJB-KSC
|
07/21/2017

ORDER: (1) DENYING DEFENDANT'S MOTION TO COMPEL ARBITRATION, (Doc. No. 13); AND (2) GRANTING DEFENDANT'S REQUEST TO STRIKE DECLARATION FILED CONCURRENTLY WITH MOTION TO COMPEL, (Doc. No. 18)

***1** Presently before the Court is Defendant North American Bancard, LLC's ("NAB") motion to compel arbitration. (Doc. No. 13.) Plaintiff Gerald McGhee ("McGhee") opposes the motion. (Doc. No. 23.) Having reviewed the parties' arguments in light of controlling authority, and pursuant to Local Civil Rule 7.1.d.1, the Court finds the matter suitable for disposition without oral argument. For the reasons set forth below, the Court **DENIES** NAB's motion.

BACKGROUND

The facts underlying this dispute are simple and largely undisputed. NAB is the provider of mobile credit card processing services called "PayAnywhere." McGhee, a merchant, acquired a card reader from NAB, but never used it. After more than one year, NAB began deducting a monthly non-use fee from McGhee's bank account. Despite contacting NAB to stop the charges and demand a refund, NAB continued to charge McGhee for several months and has refused to issue him a refund.

McGhee instituted this lawsuit on March 24, 2017, by filling the class action complaint. (Doc. No. 1.) McGhee brings this nationwide putative class action on behalf of "[a]ll persons in the United States charged a Fee as a result of obtaining [NAB]'s Card Reader beginning at the start of the applicable statute of limitations period and ending on the date as determined by the Court...." (Doc. No. 1 ¶ 20.) On May 15, 2017, NAB filed the instant motion to compel arbitration, asserting that McGhee agreed to arbitrate his claims when he signed up for NAB's services. (Doc. No. 13.) McGhee filed an opposition, (Doc. No. 23), and NAB replied, (Doc. No. 25). This order follows.[1]

[1] On May 23, 2017, NAB withdrew the declaration submitted concurrent with its motion to compel arbitration. (Doc. No. 18.) The Court **GRANTS** NAB's request to strike that declaration from the record.

LEGAL STANDARD

The Federal Arbitration Act governs the enforcement of arbitration agreements involving interstate commerce. 9 U.S.C. § 2. Pursuant to § 2 of the FAA, an arbitration agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id*. The FAA permits "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States district court...for an order directing that such arbitration proceed in the manner provided for in [the] agreement." *Id*. § 4.

Given the liberal federal policy favoring arbitration, the FAA "mandates that district courts *shall* direct parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis in original). Thus, in a motion to compel arbitration, the district court's role is limited to determining "(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Kilgore v. KeyBank Nat'l Ass'n*, 673 F.3d 947, 955–56 (9th Cir. 2012) (citing *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000)). If these factors are met, the court must enforce the arbitration agreement in accordance with its precise terms. *Id.*

***2** While generally applicable defenses to contract, such as fraud, duress, or unconscionability, may invalidate arbitration agreements, the FAA preempts state law

defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). There is generally a strong policy favoring arbitration, which requires any doubts to be resolved in favor of the party moving to compel arbitration. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). However, where a party challenges the existence of an arbitration agreement, "the presumption in favor of arbitrability does not apply." *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 742 (9th Cir. 2014).

DISCUSSION

NAB asserts that when McGhee signed up for NAB's credit card processing services, McGhee was required to accept the "Terms and Conditions" by clicking on a button next to the words "I have read and agree to the Terms and Conditions." (Doc. No. 13 at 9.) Because he agreed to the Terms and Conditions by checking the box, NAB argues he also agreed to the User Agreement, a hyperlink to which was contained on the Terms and Conditions page. (*Id.* at 9–10.) In turn, the User Agreement contains the arbitration clause that NAB now invokes. (*Id.* at 10–11; Doc. No. 19 at 2–3 ¶¶ 4, 6–8.) That arbitration clause states, in pertinent part, the following:

> 22. Disputes: PA [PayAnywhere] and you each agreement that any dispute or claim arising out of or relating to this Agreement or the Services (each, a 'Dispute'), shall be settled by following the procedures:...
>
> c. IN THE ABSENCE OF RESOLVING THE DISPUTE, AND INSTEAD OF SUING IN COURT, PA AND YOU AGREE TO SETTLE AND RESOLVE FULLY AND FINALLY ALL DISPUTES EXCLUSIVELY BY ARBITRATION....THE AGREEMENT TO HAVE DISPUTES RESOLVED BY ARBITRATION IS MADE WITH THE UNDERSTANDING THAT EACH PARTY IS IRREVOCABLY, KNOWINGLY AND INTELLIGENTLY WAIVING AND RELEASING ITS RIGHT TO LITIGATE DISPUTES THROUGH A COURT AND TO HAVE A JUDGE OR JURY DECIDE DISPUTES.

(Doc. No. 19 at 36.) Based on this arbitration clause, NAB argues that because McGhee clicked the box stating he accepted the Terms and Conditions, he agreed to binding arbitration. (Doc. No. 13 at 12.) Thus, NAB asserts the Court must compel the parties to arbitrate McGhee's claims. (*Id.* at 15.) In opposition, McGhee makes two arguments: (1) the User Agreement was a "browsewrap" agreement that cannot be enforced; and (2) even if the User Agreement is enforceable, the claims brought in this case fall outside the arbitration clause's purview. (Doc. No. 23.) Because the Court finds McGhee did not assent to the User Agreement, the Court does not reach McGhee's argument that his claims do not fall within the arbitration clause's scope.

If the facts of this case were as simple as NAB suggests, it would present a clear-cut case of assent to a modified clickwrap agreement. The Ninth Circuit recently explained the spectrum of ways website operators attempt to establish mutual manifestation of assent.[2] At one end of this spectrum are " 'clickwrap' (or 'click-through') agreements, in which website users are required to click on an 'I agree' box after being presented with a list of terms and conditions of use[.]" *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175–76 (9th Cir. 2014). At the other end of the spectrum are " 'browsewrap' agreements, where a website's terms and conditions of use are generally posted on the website via a hyperlink at the bottom of the screen.... Unlike a clickwrap agreement, a browsewrap agreement does not require the user to manifest assent to the terms and conditions expressly...[a] party instead gives his assent simply by using the website." *Id.* at 1176 (citation and internal quotation marks omitted).

[2] The User Agreement identifies Michigan law as controlling, while the Terms and Conditions identify Georgia. (Doc. No. 19 at 24, 36.) Under either state's laws, manifestation of assent is a necessary element of contract formation. *See Rood v. Gen. Dynamics Corp.*, 507 N.W.2d 591, 598 (Mich. 1993) ("A basic requirement of contract formation is that the parties mutually assent to be bound."); *Thomas v. Chance*, 754 S.E.2d 669, 671 (Ga. Ct. App. 2014) (listing "assent of the parties to the terms of the contract" as one element of a valid contract).

***3** Between a pure clickwrap and a pure browsewrap is a hybrid, sometimes referred to as a "modified clickwrap." *E.g.*, *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 910–12 (N.D. Cal. 2011). A modified clickwrap agreement is similar to a browsewrap in that the user is not required to scroll through a list of terms and conditions before reaching the "I Agree" button, but the user is otherwise "required to affirmatively acknowledge

the agreement before proceeding with use of the website." *Nguyen*, 763 F.3d at 1176. When faced with these modified clickwrap presentations, "[c]ourts have [ ] been more willing to find the requisite notice for constructive assent...." *Id.*

As the Court stated above, if the facts were as straightforward as NAB presents, then the User Agreement and its arbitration clause would be a prototypical modified clickwrap agreement, and the Court would be required to find that McGhee had assented to arbitration. But it is not so simple. The arbitration agreement that NAB invokes is not found simply by clicking on the "Terms and Conditions" hyperlink located on the application page. Rather, McGhee would have been required to click on the "Terms and Conditions" hyperlink and click again on the "View User agreement here" link in order to reach the "Pay Anywhere User Agreement" containing the arbitration clause that NAB asserts controls. (Doc. No. 19 at 2–3 ¶¶ 4, 6–8.)

Even this two-step process could conceivably fall within the parameters of a modified clickwrap agreement. After all, the "View User agreement here" hyperlink is located near the top of the Terms and Conditions page, (*id.* at 13), so this is not a situation where the second hyperlink is embedded at the bottom of a lengthy webpage, *see, e.g.*, *Nguyen*, 763 F.3d at 1177 ("Where the link to a website's terms of use is buried at the bottom of the page or tucked away in obscure corners of the website where users are unlikely to see it, courts have refused to enforce the browsewrap agreement."). But what throws a wedge in NAB's analysis is the fact that the Terms and Conditions page itself—the page that contains the second hyperlink to the User Agreement—also contains "PayAnywhere TERMS AND CONDITIONS OF MERCHANT SERVICE AGREEMENT." Those Terms and Conditions do not require the website's user to click a link; rather, they are listed on the Terms and Conditions page itself. And significantly, *those* Terms and Conditions contain the following forum selection clause:

> Global, Member, and Merchant agree that all actions arising out, relating to, or in connection with (a) this Agreement, (b) the relationships which result from this Agreement, or (c) the validity, scope, interpretation or enforceability of the choice of law and venue provision of this Agreement shall be brought in either the courts of the State of Georgia sitting in Fulton County or the United States District Court for the Northern District of Georgia, and expressly agree to the exclusive jurisdiction of such courts. Merchant hereby agrees that claims applicable to American Express may be resolved through arbitration as further described in the American Express Merchant Requirements Guide (the "American Express Guide") attached as an appendix to the Card Acceptance Guide.

(Doc. No. 19 at 24.) The webpage also contains a merger clause, which provides that "[t]he [Merchant Service] Agreement, including these Terms and Conditions and the Merchant Application, constitutes the entire Agreement between Merchant, Global Direct, and Member and supersedes all prior memoranda or agreements relating thereto, whether oral or in writing." (*Id.*)

***4** NAB protests, however, contending that these Terms and Conditions have no bearing on the instant dispute because McGhee did not fill out a Merchant Service Application. (Doc. No. 25 at 7–8 & n.1.) If that is the case, then why would the Terms and Conditions hyperlink located on the application McGhee filled out link to these "PayAnywhere TERMS AND CONDITIONS OF MERCHANT SERVICE AGREEMENT"? And if they are not the controlling Terms and Conditions, why is every page of these terms captioned "PayAnywhere – Terms and Conditions" at the top of the page? (*See* Doc. No. 19 at 13–29.) It stretches credulity to assert that the actual page that is linked to the application McGhee filled out does not govern that application, but rather another page linked to the page that is linked to the application does.[3]

[3] NAB argues that McGhee's assent to the Terms and Conditions applies to both the Terms and Conditions of Merchant Service Agreement and the Pay Anywhere User Agreement. (Doc. No. 25 at 7.) However, NAB cites no authority for this position. Furthermore, accepting this assertion poses more problems than solutions: Does the forum selection clause in the Terms and Conditions of MSA control, or the arbitration agreement? Which state's laws control, Georgia (as identified in the Terms and Conditions) or Michigan (as

identified in the User Agreement)? In light of the dearth of authority supporting NAB's position, the Court declines to wade into these murky questions.

If NAB intended to have the "Pay Anywhere User Agreement" control McGhee's claims, perhaps NAB should have linked the application to that agreement. Instead, NAB linked the application to the "PayAnywhere TERMS AND CONDITIONS OF MERCHANT SERVICE AGREEMENT." Following the case law that NAB itself cites, the Court finds it is to this agreement to which McGhee assented. *See Crawford v. Beachbody, LLC*, No. 14cv1583–GPC(KSC), 2014 WL 6606563, at *3 (S.D. Cal. Nov. 5, 2014) (concluding the parties agreed to terms and conditions where the page with the full terms was directly hyperlinked to the order form page); *Swift*, 805 F. Supp. 2d at 910–12 (same); *see also Van Tassell v. United Mktg. Grp., LLC*, 795 F. Supp. 2d 770, 792–93 (N.D. Ill. 2011) (finding there was no valid agreement to arbitrate in part because of the "multi-step process" required to find the arbitration agreement).

For these reasons, the Court finds that McGhee's act of checking the box indicating he read and agreed to the Terms and Conditions indicated his assent to the Terms and Conditions located on the page that that hyperlink takes him to, specifically, the "PayAnywhere TERMS AND CONDITIONS OF MERCHANT SERVICE AGREEMENT." To the extent NAB seeks to hold McGhee to the Pay Anywhere User Agreement and the arbitration clause contained therein, the Court finds there was no assent to that agreement's provisions; thus, there is no valid agreement to compel arbitration of these claims.[4]

[4] While McGhee may have won the day, the Court notes that the Terms and Conditions McGhee himself points to as controlling include a forum selection clause and class action waiver. (Doc. No. 19 at 24.) Those provisions, however, are not before the Court at this time, and the Court expresses no opinion on their effect on this case.

CONCLUSION

Based on the foregoing, the Court **DENIES** North American Bancard, LLC's motion to compel arbitration. (Doc. No. 13.)

IT IS SO ORDERED.

Dated: July 21, 2017

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