UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRUCE KEITHLY, *et al.*, Plaintiffs, v. INTELIUS INC., *et al.*, Defendants, v. ADAPTIVE MARKETING, LLC, Third Party Defendant.	No. C09-1485RSL ORDER DENYING ADAPTIVE MARKETING, LLC'S, MOTION TO COMPEL ARBITRATION

This matter comes before the Court on "Third-Party Defendant Adaptive Marketing LLC's Motion to Compel Arbitration of Plaintiff Donovan Lee's Claims, Strike Lee's Class Allegations, and Stay Proceedings." Dkt. # 183. Adaptive seeks to enforce the arbitration provision that would have been displayed had Lee clicked on a "Terms and Conditions" link on Adaptive's landing page. Having reviewed the memoranda, declarations, and exhibits submitted by the parties and having heard the arguments of counsel, the Court finds as follows:

Pursuant to the Federal Arbitration Act ("FAA") , a written agreement to arbitrate a dispute "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or

in equity for the revocation of any contract." 9 U.S.C. § 2. Because "arbitration is a matter of contract" and "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration" (AT&T Techs., Inc. v. Commc'ns Workers, 475 U.S. 643, 648-49 (1986)), it is up to the courts to determine (a) whether a valid agreement to arbitrate exists and (b) whether a particular dispute falls within the scope of the agreement (United Steelworkers of Am. v. Warrior & Gulf, 363 U.S. 574, 582-83 (1960)). "[A] court may order arbitration of a particular dispute only where the court is satisfied that the parties agree to arbitrate *that dispute*." Granite Rock Co. v. Int'l Bhd. of Teamsters, __ U.S. __, 130 S. Ct. 2847, 2856 (2010) (emphasis in original).

To determine whether an agreement to arbitrate exists, courts apply state law principles governing the formation of contracts. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995); Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1217(9th Cir. 2008). Regardless of whether Connecticut or Washington law applies, a contract is formed where the parties objectively manifest their mutual assent to definite terms and requirements. See Bender v. Bender, 975 A.2d 636, 656 (Conn. 2009); Keystone Land & Dev. Co. v. Xerox Corp., 152 Wn.2d 171, 177-78 (2004). Plaintiff argues that he could not have assented to any contract terms related to the purchase of the Family Service Report service because he was unaware that a purchase, much less a contract, was in the offing. While the manner in which Adaptive presented its subscription service offer may support a finding of fraud in the inducement and/or unilateral mistake, such defenses do not alter the fact that a contract was entered into in the first instance. For purposes of determining whether a contract exists, it is Lee's objective manifestation of assent, rather than his subjective intent, that governs. Courts in both Washington and Connecticut have found, or at least assumed, that an electronic acceptance of contract terms is an objective manifestation of assent to the contract. See Dix v. ICT Group, Inc., 160 Wn.2d 826 (2007) (assuming the existence of an on-line contract and evaluating the

enforceability of the forum selection clause); Vacco v. Microsoft Corp., 793 A.2d 1048, 1051 n.7 (Conn. 2002) (noting that purchaser of computer was required to enter into an agreement to license software (commonly known as a "shrink-wrap license") as a precondition for downloading or using the program). Thus, Lee objectively manifested assent when he clicked the "YES And show my report" button.

Adaptive argues that, once it has shown that a contract was formed, all other issues are "gateway issues" to be decided by the arbitrator. But the Court's job is not simply to determine whether an agreement was formed, but whether an agreement to arbitrate was formed. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 547 (1964) ("The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the . . . agreement does in fact create such a duty."). The real issue, then, is what did Lee agree to when he clicked the "YES And show my report" button?

For purposes of this motion, the Court will assume that Lee read, or should have read, the entire webpage produced as Exhibit A to the Decl. of Niraj Shah (Dkt. # 184). By clicking the "YES And show my report" button, Lee objectively manifested his assent to the purchase of Family Security Report and acknowledged that he had read and was bound by "the Offer Details displayed to the right." The phrase "Offer Details" is capitalized and clearly refers to an adjoining paragraph entitled "OFFER DETAILS" which reads:

> Simply click "Yes" to activate your trial membership and take advantage of the great benefits that Family Safety Report has to offer plus claim your $10.00 Cash Back! The membership fee of $19.95 per month will be charged/debited by Family Safety Report on the credit/debit card you used today with Intelius after your 7-day FREE trial period and then automatically charged/debit[ed] each month at the then-current monthly membership fee so long as you remain a member. Of course you can call us toll-free at 1-877-442-5710 within the first 7 days to cancel, and you will not be charged/debited. Please note that by agreeing to these offer details you are authorizing Intelius to securely transfer your name, address, and credit/debit card information to Family Safety Report. No matter what the FREE

> $10.00 Cash Back is yours to claim! Remember, if for any reason you are dissatisfied, call our toll-free number to cancel, and you'll no longer be charged/debited. If you used a debit card today, then beginning on or about 7 days from now, your monthly membership fee for Family Safety Report will be automatically debited each month on or about the same date from the checking account associated with that card.

Under the "OFFER DETAILS" is the heading "Disclaimers," with three additional lines of text in the same font and formatting as the "OFFER DETAILS." Under the "Disclaimers" are two bold hyperlinks presented in a single line and in a slightly different font: "**Privacy Policy** - **Terms and Conditions**." Clicking on the "Terms and Conditions" link would bring you to a document entitled "Terms of Membership and Membership Agreement" which contains the arbitration provision Adaptive seeks to enforce.

At oral argument, Adaptive took the position that, because the "Terms and Conditions" link was "displayed to the right," a reasonable consumer would understand that the "Terms and Conditions" would become part of the agreement if he clicked the "YES" button. But Lee was asked to agree only to the "Offer Details displayed to the right" and, given the language of those Details, would have no reason to go looking for other terms and conditions that might apply. See Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 29-35 (where nothing requires the consumer to unambiguously manifest assent to the Terms and Conditions and the webpage does not prompt the consumer to review the Terms and Conditions or otherwise put a reasonably prudent consumer on notice that the terms will be binding, simply continuing with the transaction is not an objective manifestation of assent); Van Tassell v. United Marketing Group, LLC, __ F. Supp.2d __, 2011 WL 2632727 at * (N.D. Ill. July 5, 2011). Under Washington law, if Adaptive wanted to bind Lee to provisions in addition to the "Offer Details" to which he objectively manifested assent, the additional provisions would have to be incorporated into and made part of the agreement by a reference that was both clear and

unequivocal. W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc., 102 Wn. App. 488, 494 (2000). The party claiming incorporation by reference has the burden of showing that "the parties to the agreement had knowledge of and assented to the incorporated terms." Baarslag v. Hawkins, 12 Wn. App. 756, 760 (1975); Ferrellgas, 102 Wn. App. at 494-95. Adaptive has not met its burden. Lee was not directed to the "Privacy Policy" or the "Terms and Conditions," their contents were not incorporated into the "Offer Details," and he was not asked to read and agree to their provisions. Neither the text above the "YES" button nor the "Offer Details" themselves mention the "Privacy Policy" or the "Terms and Conditions." By clicking the "YES" button, Lee objectively manifested his assent to be bound by the "Offer Details," nothing more. The fact that there were additional hyperlinks on a webpage Lee reviewed does not establish assent to the terms embedded in those hyperlinks.[1] Thus, Lee did not agree to arbitrate disputes with the provider of Family Service Report or entities connected therewith.

For all of the foregoing reasons, Adaptive's motion to compel arbitration (and the related requests to strike Lee's class allegations and stay these proceedings) is DENIED.[2]

Dated this 21st day of September, 2011.

Robert S. Lasnik
United States District Judge

[1] If Adaptive's view were correct, a car purchaser in the pen and paper world would be bound by a separate, unsigned long-term service contract if the dealer simply presented it to him with the purchase agreement. Such a result would eviscerate the assent requirement of contract formation.

[2] Because Adaptive has not shown the existence of an agreement to arbitrate, the Court need not consider whether Adaptive waived its right to arbitrate.

Kristi Peterson

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