UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JULES VANDEN BERGE, individually and on behalf of all others similarly situated, Plaintiffs, v. CHRISTOPHER MASANTO, ANDREW MASANTO, ALTITUDE ADS LIMITED, BLOOMING INVESTMENTS LIMITED, AND AMPLIFY LIMITED, Defendants.	Case No.: 3:20-cv-00509-H-DEB **ORDER:** **(1) GRANTING DEFENDANT AMPLIFY'S MOTION TO COMPEL ARBITRATION AND DISMISS CLAIMS** [Doc. No. 10.] **(2) DENYING DEFENDANTS' MOTION TO DISMISS AS MOOT** [Doc No. 11.]

On March 17, 2020, Plaintiff Jules Vanden Berge ("Plaintiff") filed a false advertising consumer class action complaint against Defendants Christopher Masanto, Andrew Masanto, Altitude Ads Limited, Amplify Limited, and Blooming Investments Limited (collectively, "Defendants"). (Doc. No. 1.) On July 16, 2020, Defendant Amplify Limited ("Amplify") filed a motion to compel arbitration and dismiss claims. (Doc. No. 10.) The same day, Defendants filed a motion to dismiss the complaint pursuant to Federal

Rules of Civil Procedure 12(b)(2) and 12(b)(6). (Doc. No. 11.) The Court held a telephonic hearing on the motions on September 21, 2020. (Doc. No. 24.) Kevin Kneupper appeared on behalf of Plaintiff and Jaikaran Singh appeared on behalf of Defendants. (Id.) For the following reasons, the Court grants Amplify's motion to compel arbitration and dismiss claims and denies Defendants' motion to dismiss as moot.

Background[1]

Amplify sells hair and skin products through its brand name, Cel MD. (See Doc. No. 1, Compl. ¶ 33-34; see also Doc. No. 10 at 1-2.) Cel MD sells and advertises its products on various online platforms. (Id. ¶ 13.) Cel MD claims that its products utilize "plant stem cell" formulas that are expertly created, "patented," and "scientifically proven" to promote healthy skin and "combat hair thinning and loss." (Id. ¶¶ 14-16.) Plaintiff, a resident of Vista, California, purchased Cel MD's shampoo and conditioner products on February 28, 2019 and then again on March 31, 2019. (Id. ¶ 22.) Plaintiff used the products for several months and found them ineffective. (Id. ¶ 24.) She contacted Cel MD's customer service to cancel her subscription and get a refund but was allegedly told she could not cancel her subscription. (Id.) She was unable to get her money back. (Id.)

On March 17, 2020, Plaintiff filed a false advertising consumer class action against the following parties: Amplify; Amplify's founder, Christopher Masanto; Amplify's parent entities, Altitude Ads Limited and Blooming Investments Limited; and Andrew Masanto, Christopher Masanto's brother who allegedly plays a role in operating both Amplify and Altitude Ads Limited. (Id. ¶¶ 25-39.) Plaintiff, on her own behalf and on behalf of a class, asserts against Defendants claims for violations of various state and federal consumer protection laws, wire fraud, mail fraud, aiding and abetting, and civil conspiracy. (See generally id.) Plaintiff also asserts that Defendants Christopher and Andrew Masanto violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, et seq.. (Id. ¶¶ 431-58.)

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[1] The allegations in this Section are taken from Plaintiff's complaint.

On July 16, Amplify moved to compel Plaintiff to submit her claims to arbitration and dismiss the action, arguing that Plaintiff agreed to a valid arbitration agreement and class action waiver when she made her purchase. (Doc. No. 10.) The same day, Defendants moved to dismiss under both Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6), arguing that the Court lacks personal jurisdiction over Christopher Masanto, Andrew Masanto, Altitude Ads Limited, and Blooming Investments Limited and that Plaintiff fails to state a claim for civil conspiracy. (Doc. No. 11.)

Discussion

I. Legal Standards

The Federal Arbitration Act ("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 . . . arbitration proceed in the manner provided for in [the arbitration] agreement." 9 U.S.C. § 4. Upon a showing that a party has failed to comply with a valid arbitration agreement, the district court must issue an order compelling arbitration. Id. A party moving to compel arbitration must show, by a preponderance of the evidence, "(1) the existence of a valid, written agreement to arbitrate; and, if it exists, (2) that the agreement to arbitrate encompasses the dispute at issue." Ashbey v. Archstone Prop. Mgmt., Inc., 785 F.3d 1320, 1323 (9th Cir. 2015) (citation omitted); see also Knutson v. Sirius XM Radio Inc., 771 F.3d 559, 565 (9th Cir. 2014).

If there is a genuine dispute of material fact as to the existence of a valid arbitration agreement or as to the agreement's applicability to the instant dispute, a district court should apply a "standard similar to the summary judgment standard of [Federal Rule of Civil Procedure 56]." Concat LP v. Unilever, PLC, 350 F. Supp. 2d 796, 804 (N.D. Cal. 2004) (citation omitted). Thus, "[o]nly when there is no genuine issue of material fact concerning the formation of an arbitration agreement should a court decide as a matter of law that the parties did or did not enter into such an agreement." Id. (quoting Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., 925 F.2d 1136, 1141 (9th Cir. 1991)). "While the

Court may not review the merits of the underlying case in deciding a motion to compel arbitration, it may consider the pleadings, documents of uncontested validity, and affidavits submitted by either party." Macias v. Excel Bldg. Servs. LLC, 767 F. Supp. 2d 1002, 1007 (N.D. Cal. 2011) (internal quotations, citations, and brackets omitted)).

II. The Parties' Dispute Regarding the Arbitration Agreement

In Amplify's motion to compel arbitration, Amplify argues that Plaintiff agreed to arbitrate her claims. (Doc. No. 10 at 1.) Amplify explains that Plaintiff affirmatively clicked a check box before purchasing Cel MD's products. (Doc. No. 10 at 2.) Next to the check box, there was a hyperlink that stated, "I agree to the Terms and Conditions of Sale and Privacy Policy." (Id.) The hyperlink, if clicked, would have sent Plaintiff to a webpage displaying Amplify's Terms and Use and Conditions of Sale Agreement (hereinafter "Terms of Use"). (Id.) This is commonly referred to as a "clickwrap" agreement. See Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1175-76 (9th Cir. 2014) (defining clickwrap agreements as those "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" (citation omitted)).

The Terms of Use contains the following mandatory binding arbitration provision and class action waiver:

> PLEASE READ THIS ARBITRATION PROVISION CAREFULLY TO UNDERSTAND YOUR RIGHTS. EXCEPT WHERE PROHIBITED BY LAW, YOU AGREE THAT ANY CLAIM THAT YOU MAY HAVE IN THE FUTURE MUST BE RESOLVED THROUGH FINAL AND BINDING CONFIDENTIAL ARBITRATION. YOU ACKNOWLEDGE AND AGREE THAT YOU ARE WAIVING THE RIGHT TO A TRIAL BY JURY. THE RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT, SUCH AS DISCOVERY OR THE RIGHT TO APPEAL, MAY BE MORE LIMITED OR MAY NOT EXIST. YOU AGREE THAT YOU MAY ONLY BRING A CLAIM IN YOUR INDIVIDUAL CAPACITY AND NOT AS A PLAINTIFF (LEAD OR OTHERWISE) OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. YOU FURTHER AGREE THAT THE ARBITRATOR MAY NOT CONSOLIDATE PROCEEDINGS OR CLAIMS OR OTHERWISE PRESIDE OVER ANY FORM OF A REPRESENTATIVE OR CLASS PROCEEDING.

(Doc. No. 10-3, Nicoll Decl. Ex. A (emphasis in original).) The Terms of Use also state that the arbitration is to be conducted in New York in accordance with New York substantive law. (Id.) Additionally, Plaintiff had the opportunity to opt out of the arbitration agreement under the following provision:

> YOU UNDERSTAND THAT YOU WOULD HAVE HAD A RIGHT TO LITIGATE THROUGH A COURT, TO HAVE A JUDGE OR JURY DECIDE YOUR CASE, AND TO BE PARTY TO A CLASS OR REPRESENTATIVE ACTION. HOWEVER, YOU UNDERSTAND AND AGREE TO HAVE ANY CLAIMS DECIDED INDIVIDUALLY AND ONLY THROUGH BINDING, FINAL, AND CONFIDENTIAL ARBITRATION. YOU HAVE THE RIGHT TO OPT-OUT OF THIS ARBITRATION PROVISION WITHIN THIRTY (30) DAYS FROM THE DATE THAT YOU PURCHASE, USE, OR ATTEMPT TO USE A SERVICE OR PRODUCT PURCHASED ON OR THROUGH THE WEBSITE (WHICHEVER COMES FIRST) BY WRITING TO US ATcontact@cel.md. FOR YOUR OPT-OUT TO BE EFFECTIVE, YOU MUST SUBMIT A SIGNED WRITTEN NOTICE IDENTIFYING ANY PRODUCT OR SERVICE YOU PURCHASED, USED OR ATTEMPTED TO USE WITHIN THE 30 DAYS AND THE DATE YOU FIRST PUCRHASED [*sic*], USED, OR ATTMPETED [*sic*] TO USE THE PRODUCT OR SERVICE. IF MORE THAN THIRTY (30) DAYS HAVE PASSED, YOU ARE NOT ELIGIBLE TO OPT OUT OF THIS PROVISION AND YOU MUST PURSUE YOUR CLAIM THROUGH BINDING ARBITRATION AS SET FORTH IN THIS AGREEMENT.

(Id. (emphasis in original).) Jack Nicoll, a product manager for Altitude Ads Limited, submitted a declaration explaining that the clickwrap agreement and Terms of Use agreement has been on Cel MD's website since January 2019, before Plaintiff's purchase. (Doc. No. 10-2, Nicoll Decl. ¶¶ 6-8.)

Plaintiff, in her opposition to the motion to compel arbitration, argues that she did not agree to arbitrate her claims pursuant to the Terms of Use. (Doc. No. 14 at 6.) As Plaintiff claims, Cel MD updated its website to include the clickwrap agreement and Terms of Use sometime around August 2019, after Plaintiff had already made her purchase. (Id. at 7.) According to their respective declarations and attached exhibits, both Plaintiff's counsel and consulting expert visited the Cel MD website, www.cel.md, after January 2019

as part of a prelitigation investigation and did not encounter a clickwrap agreement or the Terms of Use. (Id. at 2-3.) Plaintiff also pointed out that Amplify, in its initial moving papers, "present[ed] absolutely no specific evidence . . . that [Plaintiff] was presented with, or clicked on, any clickwrap agreement." (Id. at 5.)

Amplify, however, satisfied its burden to show that Plaintiff agreed to the Terms of Use through a clickwrap agreement.[2] As Amplify explains, Plaintiff's prelitigation investigation contained a key oversight: it investigated the wrong website. (Doc. No. 22 at 3.) Amplify clarified that Plaintiff made her purchase through one of Cel MD's Facebook subdomains, promos.cel.md, not its main homepage, www.cel.md.[3] (Id.) Amplify submitted declarations from Mr. Nicoll, Damon W.D. Wright, the attorney responsible for drafting the Terms of Use, and Maximiliano D. Aggio, an information systems technology engineer who reviewed the subdomain's code, to confirm the subdomain was updated to include a clickwrap agreement and the Terms of Use in late-2018, before Plaintiff made her purchase. (Id. at 4; Doc. Nos. 22-1 to -3, Nicoll Decl.; Doc. No. 22-5, Wright Decl.; Doc. No. 22-4, Aggio Decl.) Further, Amplify submitted an order confirmation of Plaintiff's purchase. (Doc. No. 22-3, Nicoll Decl., Ex. I.) Amplify's expert, Mr. Aggio, reviewed the confirmation and confirmed that the record is authentic and came from the Cel MD Facebook subdomain that had a clickwrap agreement and the Terms of Use. (Doc. No. 22-4, Aggio Decl. ¶ 17.)

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[2] Because the following evidence from Amplify's reply was responsive to Plaintiff's opposition, which questioned the validity of the arbitration agreement and alleged Amplify's declarant committed perjury, the Court can properly consider it. See, e.g., Edwards v. Toys "R" Us, 527 F. Supp. 2d 1197, 1205 n.31 (C.D. Cal. 2007) ("Evidence is not 'new,' however, if it is submitted in direct response to proof adduced in opposition to a motion." (citing Terrell v. Contra Costa County, 232 Fed. App'x 626, 629 n.2 (9th Cir. Apr. 16, 2007) (mem.))).

[3] This fact should not have been surprising to Plaintiff. According to Amplify, Plaintiff's counsel was put on notice before filing suit in this Court that "Amplify had hundreds of different sites and online 'sales funnels' on social media." (Id. at 7-8; see also Doc. No. 22-6, Khan Decl.) Moreover, Plaintiff is a Facebook user and stated that "[s]he purchased the Cel MD products in reliance on the Defendants' representations in their Facebook advertisements and on their website." (Doc. No. 1 ¶ 22; see also Doc. Nos. 22-7 to -8, Singh Decl.)

III. Whether the Parties Entered into a Valid Arbitration Agreement

Courts apply state contract law to determine whether a valid arbitration agreement exists. Nguyen, 763 F.3d at 1175 (citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995)); see also Rent-A-Center, West, Inc., v. Jackson, 561 U.S. 63, 67 (2010) ("[A]rbitration is a matter of contract."). The Terms of Use Amplify asserts Plaintiff agreed to contain a choice of law provision mandating the use of New York law. (Doc. No. 10-3, Nicoll Decl. Ex. A.) However, Plaintiff contends that she never entered into the contract in the first place and, thus, California law should apply to determine the threshold question of whether she assented to the arbitration agreement. (Doc. No. 14 at 11.) Nevertheless, the Court "need not engage in this circular inquiry because both California and New York law dictate the same outcome." Nguyen, 763 F.3d at 1175; see also Schnabel v. Trilegiant Corp., 697 F.3d 110, 119 (2d Cir. 2012) (likewise avoiding this very issue when both state laws "apply substantially similar rules for determining whether the parties have mutually assented to a contract term"). The parties do not dispute that both New York and California law are in accord in this instance. (See Doc. No. 10 at 8 & n.6; Doc. No. 14 at 11-12.)

The laws of both California and New York require that the party seeking to compel arbitration show that an arbitration agreement existed by a preponderance of the evidence. Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela, 991 F.2d 42, 46 (2d Cir. 1993) (citing Fleming v. Ponziani, 247 N.E.2d 114, 118 (N.Y. 1969)); Knutson, 771 F.3d at 565 (citing Rosenthal v. Great W. Fin. Sec. Corp., 926 P.2d 1061 (Cal. 1996)). Both California and New York routinely enforce clickwrap agreements. Whitt v. Prosper Funding LLC, No. 1:15-cv-136-GHW, 2015 WL 4254062, at *4 (S.D.N.Y. July 14, 2015) ("In New York, clickwrap agreements are valid and enforceable contracts." (citation omitted)); United States v. Drew, 259 F.R.D. 449, 462 (C.D. Cal. 2009) ("Clickwrap agreements 'have been routinely upheld by circuit and district courts.'" (citations omitted)); see also Nguyen, 763 F.3d at 1176 (applying both California and New York law, and commenting that "[c]ourts have also been more willing to find the requisite notice for

constructive assent . . . where the user is required to affirmatively acknowledge the agreement before proceeding with use of the website"). Plaintiff does not dispute these points. (See Doc. No. 14 at 2, 8.)

Here, Amplify met its burden to demonstrate that such an agreement existed by a preponderance of the evidence. In summary, Amplify submitted the following to support the existence of a clickwrap arbitration agreement between Plaintiff and Amplify: (1) declarations and exhibits from the attorney who drafted the Terms of Use and the employee responsible for updating Cel MD's Facebook subdomain, demonstrating that the Terms of Use was revised before Plaintiff made her purchase, (Doc. No. 22-1, Nicoll Decl.; Doc. No. 22-2, Nicoll Decl., Ex. C; Doc. No. 22-5, Wright Decl.); (2) an expert declaration from Mr. Aggio, an information systems technology engineer, confirming that the Terms of Use and clickwrap hyperlink was on Cel MD's Facebook subdomain prior to Plaintiffs purchase, (No. 22-4, Aggio Decl. ¶ 11); and (3) a copy of Plaintiff's order confirmation, which was reviewed by Mr. Aggio, who confirmed that the record is genuine and demonstrates Plaintiff affirmatively agreed to the clickwrap agreement on the subdomain when making her purchase, (Doc. No. 22-3, Nicoll Decl., Ex. I; Doc. No. 22-4, Aggio Decl. ¶ 17).

Moreover, Plaintiff has not established that there is a genuine issue of material fact as to the existence of the parties' arbitration agreement. Plaintiff only presented evidence showing that the Cel MD homepage did not have the clickwrap agreement at the time Plaintiff made her purchase. (Doc. No. 14 at 1-3.) Whether the Cel MD homepage had a clickwrap agreement, however, is irrelevant given that Plaintiff made her purchase through a Cel MD subdomain, which Amplify demonstrated had a clickwrap agreement linked to the updated Terms of Use. Thus, Plaintiff's contentions that she could not have entered into an enforceable clickwrap agreement are not persuasive. See Scott v. Harris, 550 U.S. 372, 380 (2007).

Further, Plaintiff does not challenge the enforceability of the arbitration agreement and class action waiver. In fact, Plaintiff's counsel admitted that "he was, of course, aware

that an enforceable [clickwrap] agreement with an arbitration [provision] and class waiver would defeat class certification." (Doc. No. 14 at 2.) Accordingly, the Court concludes that a valid agreement to arbitrate exists between the parties.

IV. Whether the Agreement Encompasses Plaintiff's Claims

The Court next determines "whether the agreement encompasses the dispute at issue." Chiron Corp., 207 F.3d at 1130. "Any doubts about the scope of arbitrable issues, including applicable contract defenses, are to be resolved in favor of arbitration." Poublon v. C.H. Robinson Co., 846 F.3d 1251, 1259 (9th Cir. 2017) (quoting Tompkins v. 23andMe, Inc., 840 F.3d 1016, 1022 (9th Cir. 2016)). Here, the Terms of Use state that the parties agreed to arbitrate "all disputes, controversies, or claims arising out of or relating to this Agreement or a breach there of, the Privacy Policy, the Shipping & Returns Policy, our relationship, or your use or attempted use of [Cel MD's] Website or any product or service." (Doc. No. 10-3, Nicoll Decl. Ex. A.) The Terms of Use therefore encompass each of Plaintiff's claims because her claims relate to her purchase of Cel MD's products, her "relationship" with Amplify, and her use of the Cel MD website.[4] Since the Court has determined that there is a valid arbitration agreement encompassing the dispute, the Court is required to compel Plaintiff to submit her claims to arbitration. Chiron Corp., 207 F.3d at 1130; see also Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985).

V. Whether Dismissal is Proper

The Ninth Circuit has held that "a district court may either stay the action or dismiss it outright when . . . the court determines that all of the claims raised in the action are subject to arbitration." Johnmohammadi v. Bloomingdale's, Inc., 755 F.3d 1072, 1073-74

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[4] The Terms of Use also cover Plaintiff's claims against the remaining defendants, Christopher Masanto, Andrew Masanto, Altitude Ads Limited, Amplify Limited, and Blooming Investments Limited. (See Doc. No. 10-3, Nicoll Decl. Ex. A); see also Poublon, 846 F.3d at 1259 (explaining arbitration clauses should be interpreted in favor of arbitration). According to Plaintiff's complaint, Plaintiff's claims against Christopher and Andrew Masanto arise out their actions made on behalf of Amplify and its brand name, Cel MD, (see, e.g., Doc. No. 1 ¶¶ 25-30), and Plaintiff's claims against Altitude Ads Limited and Blooming Investments Limited arise out of the entities' ownership interest in, and relationship with, Amplify and the Cel MD brand, (see, e.g., id. ¶¶ 31-39).

(9th Cir. 2014) (citing Sparling v. Hoffman Constr. Co., 864 F.2d 635, 638 (9th Cir.1988)); see also Thinket Ink Info. Res. v. Sun Microsystems, Inc., 368 F.3d 1053, 1060 (9th Cir. 2004) (affirming dismissal under Rule 12(b)(6) when all claims were subject to arbitration); Boyer v. AT&T Mobility Servs., No. 10-cv-1258-JAH, 2011 WL 3047666, at *3 (S.D. Cal. July 25, 2011). Each of Plaintiff's claims are subject to the arbitration agreement. Therefore, the Court, in its discretion, dismisses the action because no claims remain to be litigated in this Court. Accordingly, the Court also denies Defendants' motion to dismiss for lack of personal jurisdiction and failure to state a claim as moot.

Conclusion

For the foregoing reasons, the Court grants Amplify's motion to compel arbitration and dismiss claims. The Court compels Plaintiff to submit her claims to arbitration, dismisses the action, and denies Defendants' motion to dismiss for lack of personal jurisdiction and failure to state a claim as moot. The Court directs the Clerk to close the case.

IT IS SO ORDERED.

DATED: September 22, 2020

MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT