UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JEREMY STANFIELD,

Plaintiff,

v.

TAWKIFY, INC.,

Defendant.

No. C-20-07000-WHA

ORDER DENYING MOTION TO COMPEL ARBITRATION

INTRODUCTION

Defendant matchmaking service moves to compel arbitration against the named plaintiff in a putative class action brought under California's Dating Services Contract Act.

STATEMENT

Jeremy Stanfield paid $3700 to Tawkify, Inc. to arrange six dates, two of which occurred but not to his satisfaction. He sought to cancel the contract and demanded a full refund. After obtaining only a partial refund, Stanfield filed the present suit, anchoring his claims in California's Dating Services Contract Act. Then he received a full refund.

Tawkify now seeks to compel arbitration of the matter. In signing up for the dating service, Stanfield clicked on a box that said he had read Tawkify's terms of use (TOS). The TOS is ten pages long with substantive terms covering nine pages. In a section on the last page entitled "Governing Law," the second sentence provided: "As a condition of using Tawkify's services, each user agrees that any and all disputes and causes of action arising out of or connected with Tawkify, shall be resolved through arbitration, with such arbitration to be held in San Francisco, California." The TOS provided no further details about arbitration, such as who the arbitrator would be, who would pay, and so on.

Stanfield replies that the provision is unconscionable and should not be enforced. This order agrees.

ANALYSIS

Both sides advance many arguments and counterarguments, but the way forward is plain enough. Tawkify contends that this motion is controlled by our court of appeals decision in *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016 (9th Cir. 2016). Taking Tawkify at its word, the instant order considers both District Judge Lucy Koh and Circuit Judge Sandra Ikuta's panel analysis on unconscionability. After comparing the fact pattern in *23andMe* to the fact pattern here, the instant order holds that, unlike *23andMe*, the agreement here is in fact unconscionable, both procedurally and substantively, as follows.

Tompkins v. 23andMe considered the unconscionability of an arbitration agreement imposed on customers who paid for a genetic testing service. *Tompkins v. 23andMe, Inc.*, No. 5:13-CV-05682-LHK, 2014 WL 2903752 (N.D. Cal. June 25, 2014), aff'd, 840 F.3d 1016 (9th Cir. 2016). There, 23andMe made the TOS viewable to users at all relevant times via hyperlink at the very bottom of 23andMe's website homepage but did not require users to view the TOS before buying a genetic testing kit. After a purchase, customers had to create an account and register their kit to submit saliva samples for testing. "The account creation page require[d] customers to check a box next to the line, 'Yes, I have read and agree to the Terms of Service and Privacy Statement.' The TOS and Privacy Statement appear[ed] in blue font and [were] hyperlinks to the full terms . . . ." *Id.* at 3. To register a kit, a customer would also have to view a page that stated "To continue, accept our terms of service" prominently displayed at the top of the page, then "click a large blue icon that [read] 'I ACCEPT THE TERMS OF SERVICE' before finishing the registration process and receiving their DNA information." *Ibid.* 23andMe's TOS stated:

> **Applicable law and arbitration.** Except for any disputes relating to intellectual property rights, obligations, or any infringement claims, any disputes with 23andMe arising out of or relating to the Agreement ("Disputes") shall be governed by California law regardless of your country of origin or where you access 23andMe, and notwithstanding of any conflicts of law principles and the United Nations Convention for the International Sale of Goods.

> Any Disputes shall be resolved by final and binding arbitration under the rules and auspices of the American Arbitration Association, to be held in San Francisco, California, in English, with a written decision stating legal reasoning issued by the arbitrator(s) at either party's request, and with arbitration costs and reasonable documented attorneys' costs of both parties to be borne by the party that ultimately loses. Either party may obtain injunctive relief (preliminary or permanent) and orders to compel arbitration or enforce arbitral awards in any court of competent jurisdiction.

Id. at 2.

At the district court level, Judge Koh had differentiated clickwrap agreements from browsewrap agreements, observing that "courts have tended to enforce the former but not the latter":

> A clickwrap agreement presents the user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon. By contrast, as this Court recently explained:
>
> Browsewrap agreements are those that purport to bind the users of websites to which the agreements are hyperlinked. Generally, the text of the agreement is found on a separate webpage hyperlinked to the website the user is accessing. The browsewrap agreements are generally entitled "Terms of Use" or "Terms of Service." The defining feature of browsewrap agreements is that the user can continue to use the website or its services without visiting the page hosting the browsewrap agreement or even knowing that such a webpage exists.

2014 WL 2903752 at 5–7 (quotations and citation omitted). Judge Koh held that the arbitration agreement mixed elements of clickwrap and browsewrap as it allowed users to browse 23andMe's website and make a purchase without displaying the arbitration agreement but prompted users to check a box to assent to having viewed the hyperlinked TOS at the account creation and registration phases. She found the TOS ineffective to bind website visitors or customers who only purchased a DNA kit without creating an account or registering their kit, but the TOS constituted a permissible clickwrap agreement after account creation and registration because customers "receive[d] an opportunity to review the terms and conditions and must affirmatively indicate assent." *Id*. at 7. "The fact that the TOS [was] hyperlinked and not

presented on the same screen does not mean that customers lacked adequate notice." *Id*. at 8.

At the district court level, the plaintiff also raised a question of mutuality in the arbitration agreement. In support of their unconscionability argument, the plaintiffs contended that the clause "any disputes with 23andMe" included only claims *against* 23andMe, so that 23andMe's affirmative claims would not be subject to arbitration. Judge Koh rejected that argument, holding that the language of the "arbitration provision plainly applie[d] equally to both parties, and 23andMe does not take the position that this clause is a one-way street." *Id*. at 17, citing *Bigler v. Harker Sch.*, 213 Cal. App. 4th 727, 737–38 (2013) (rejecting argument that 'any dispute involving the School' was a nonmutual restriction).

Still, Judge Koh found 23andMe's arbitration provision to be procedurally unconscionable because the contract was adhesive, surprising, and oppressive. She explained that the provision's adhesive quality stemmed from it being "a standardized clause drafted by 23andMe (who has superior bargaining strength relative to consumers) and presented as a take-it-or-leave-it agreement, giving consumers no opportunity to negotiate any terms." 2014 WL 2903752 at 15. Customers "received minimal notice of the arbitration provision, and only after handing over their money." *Id*. at 16. In her analysis, Judge Koh focused on the concealment and opacity of 23andMe's TOS in finding procedural unconscionability: "even if customers locate[d] and click[ed] a hyperlink to the TOS, they must hunt for the arbitration provision because the terms appear[ed] at the very end of the TOS as a subparagraph to the final section titled 'Miscellaneous.' A customer who noticed the provision's reference to the 'rules and auspices of the American Arbitration Association' must still determine the scope of the provision by searching for those rules . . . ." *Id*. at 14. She found that the failure to call out the AAA rules (though it did call out AAA as the arbitrator) contributed to procedural unconscionability but acknowledged that California courts were divided on the issue. *Id*. at 15.

On appeal, the parties did not dispute District Judge Koh's finding of procedural

unconscionability, so our court of appeals did not analyze it, focusing instead on substantive unconscionability based on the plaintiff's challenge to "the provision's prevailing party clause, the forum selection clause, and the clause excluding intellectual property claims from arbitration . . . along with the one-year statute of limitations and 23andMe's right to modify the Terms of Service." Id. at 15.

Turning to the instant case, a provision on the last page of Tawkify's agreement provided (Def. Exh. B at 9) (bold in original, italics added):

> **Governing Law**
> This Terms of Use, your rights and obligations, and all actions contemplated by this Terms of Use shall be governed by the laws of the California. *As a condition of using Tawkify's services, each user agrees that any and all disputes and causes of action arising out of or connected with Tawkify, shall be resolved through arbitration, with such arbitration to be held in San Francisco, California*. Additionally, except where prohibited by law, as a condition of using the Services, you agree that any and all disputes and causes of action arising out of or connected to the Services shall be resolved individually, without resort to any form of class action. You also agree that regardless of any statute or law to the contrary, any claim or cause of action arising from or related to the use of the Services must be filed within one (1) year after such claim or cause of action arose or be forever barred. The failure of either party to exercise in any respect any right provided for herein shall not be deemed a waiver of any further rights hereunder.

With respect to procedural unconscionability, Tawkify's arbitration suffers from the same problematic features as in *23andMe*: it was take-it-or-leave-it; users could not negotiate or opt out; the provision was hidden on the last page under "Governing Law;" and there were no links labeled "Arbitration."

More specifically, while the TOS was hyperlinked next to a checkbox at sign up and sign in, nothing drew users' attention to Tawkify's arbitration requirement before (or after) they paid for the service. Users who signed up for Tawkify would also confusingly be provided a "Client Agreement" via email which included information and rules related to using Tawkify but said nothing about arbitration or even the separate TOS (Opp. Exh. E at 5). If users ever found the arbitration provision online, they would have had to dig for it. The arbitration provision was a

needle in a haystack, with the word arbitration appearing only twice in the ten-page document and referenced in a single sentence only, never bolded. Not only did the section title make no reference to arbitration — it simply called itself "Governing Law." The section lay on the very last of nine information-overloaded pages. The TOS contained no other mention of arbitration. This order holds that plaintiff has established that the arbitration requirement was highly procedurally unconscionable.

Turning to substantive unconscionability, our court of appeals in *23andMe* explained:

> Under California law, [a]n evaluation of unconscionability is highly dependent on context. California courts give the parties a reasonable opportunity to present evidence as to [the provision's] commercial setting, purpose, and effect, Cal. Civil Code § 1670.5, and then examine the context in which the contract was formed and the respective circumstances of the parties as they existed at the formation of the agreement.

Tompkins v. 23andMe, Inc., 840 F.3d 1016, 1023 (9th Cir. 2016) (citations and quotations omitted).

Unlike the provision in *23andMe* that specified AAA arbitration, the provision here did not specify any arbitrator, much less any rules. This oppressed users by keeping them guessing about how an arbitrator or arbitrators would be chosen or what rules would apply. This created a major problem by leaving huge amount to future guesswork, negotiation or litigation, all simply to determine the basic arbitration framework in the first place. This uncertainty loomed over any grievance raised by the user as a heavy unknown, an unknown that would cost money to resolve. In all likelihood, the user would have to sue to ask a judge to figure out who the arbitrator(s) should be, what rules would apply, what discovery would be allowed, and who would pay for the arbitrator, all of this before a single step in any arbitration. This heavy burden of uncertainty and expense effectively eviscerated any remedy to the ordinary consumer user.

The second problem is lack of mutuality. "Lack of mutuality is relevant to assessing substantive unconscionability." *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 1001 (9th Cir. 2010).

Tawkify's arbitration requirement was a one-way street — only the user promised to arbitrate. Tawkify made no such promise (Def. Exh. B at 9) (emphasis added):

> As a condition of using Tawkify's services, each user agrees that any and all disputes and causes of action arising out of or connected with Tawkify, shall be resolved through arbitration, with such arbitration to be held in San Francisco, California.

Tawkify replies that the agreement must now be interpreted to require Tawkify to arbitrate all its disputes as well. It would have been easy to say so in the TOS or to use the same wording as in *23andMe* but Tawkify didn't. It kept its options open and only now, when it's convenient, claims it promised to arbitrate all such disputes.

Other provisions of the TOS show that Tawkify knew how to make a promise (Def. Exh. B at 1):

> We hold your privacy sacred. Pursuant to the Privacy Policy, we will not disclose your photos or identifying information without your permission to prospective matches, nor theirs to you.

In other words, Tawkify wanted to promise, it knew how to write the words. Elsewhere the TOS stated "Tawkify reserves the right, in our sole discretion, to change these Terms of Use at any time," giving Tawkify, but not the user, the power to modify the terms (Def. Exh. B at 1).

Under other terms of the TOS concerning "[i]llegal and or unauthorized use," Tawkify could take "appropriate legal action . . . including without limitation, civil, criminal, and injunctive compensation" (Def. Exh. B at 2). This provision clearly contemplated a lawsuit in court, but only by Tawkify, not by the user.

By contrast, the mutuality of the arbitration provision in *23andMe* arose from distinguishable language stating that "any [d]isputes shall be resolved by final and binding arbitration . . . ." 2014 WL 2903752 at 2. Tawkify's agreement used similar "any and all" language but, importantly, had the additional limitation that "the user agrees" which framed the arbitration obligation exclusively in terms of the *user's* obligation.

"Where an arbitration agreement is concerned, the agreement is unconscionable unless the arbitration remedy contains a modicum of bilaterality." *Ting v. AT&T, 319 F.3d 1126, 1149* (9th Cir. 2003) (citation omitted). Here, the TOS refused users even a crumb of bilaterality because users had to subject their claims to arbitration, while Tawkify could go to court.

Our court of appeals found 23andMe's arbitration agreement not to be substantively unconscionable despite the provision excluding "any disputes relating to intellectual property rights, obligations, or any infringement claims" from mandatory arbitration. But this too is distinguishable from our case. Despite finding that plaintiff failed to prove substantive unconscionability, our court of appeals acknowledged the argument that 23andMe's arbitration provision problematically "reserved for itself the advantages of a judicial forum while forcing customers to use the arbitral forum," and stated that "such a theory finds some support in California law." 840 F.3d 1016 at 1030. Citing to *Armendariz v. Found. Health Psychcare Servs., Inc.*, our court of appeals pointed out that there "an arbitration provision in an employment agreement was unconscionably unilateral (and thus unenforceable) because, among other things, it required the employee to arbitrate all wrongful termination claims against the employer but gave the employer a choice of forums for its claims." *Id.* at 1030, citing 24 Cal. 4th 83 (2000).

The *23andMe* decision went on to clarify that the California Supreme Court had reformed the interpretation of *Armendariz* in two ways. It noted California law had since "backed away from . . . assumptions regarding the inferiority of the arbitral forum" finding "no inherent disadvantage" to using this version of dispute resolution. 840 F.3d 1016 at 1030 (citations omitted). It also pointed out that the California Supreme Court had since clarified that "a one-sided contract is not necessarily unconscionable." *Id.* at 1031. Applying these considerations to the consumer arbitration clause in *23andMe*, our court of appeals found that

the arbitration contract's exclusion of intellectual property disputes was not unconscionable because "to the extent 23andMe has valuable intellectual property rights in its website and database, it is entitled to an extra margin of safety based on legitimate business needs." *Ibid.*

This order distinguishes its finding of substantive unconscionability from *23andMe* for three reasons. *First*, Tawkify placed no reasonable parameters on its exemption from a mutual obligation to arbitrate, while in *23andMe* the arbitration agreement limited the scope of the exemption to only intellectual property disputes. For all other disputes, 23andMe's arbitration agreement established a mutual obligation between 23andMe and its customers, as explained by Judge Koh's analysis of the agreement. 2014 WL 2903752.

Second, unlike the clear language in 23andMe's arbitration agreement that alerted consumers to the exclusion of intellectual property disputes from arbitration, Tawkify's arbitration provision did nothing to warn users of Tawkify's exemption from the duty to arbitrate (nor of any other specifics of the arbitration process for that matter). To have any hope of discovering this lack of mutuality, Tawkify users would have to piece together the arbitration agreement's silence with other provisions of the TOS.

Third, Tawkify has presented no reasons why its one-sided arbitration agreement satisfied any legitimate business needs. Indeed, this Court can find none. The arbitration agreement at issue here left more than a mere margin of safety for Tawkify.

For the foregoing reasons, defendant's motion to compel arbitration is **DENIED**.

IT IS SO ORDERED.

Dated: February 3, 2021

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE