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Majority Opinion >

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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THOMAS G. GENNARO, individually and on behalf of all others similarly situated, Plaintiff, v. AVVO, INC.,  
Defendant.

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*Case No.: 18-cv-2213-WQH-BLM*

May 6, 2019, Filed

May 6, 2019, Decided

For Avvo Inc., Defendant: Sean M. Sullivan, LEAD ATTORNEY, Davis Wright Tremaine LLP, Los Angeles, CA; Fred B. Burnside, LEAD ATTORNEY, Seattle, WA; Ambika K Doran, LEAD ATTORNEY, PRO HAC VICE, Davis Wright Tremaine LLP, Seattle, WA.

For Thomas G Gennaro, Individually and on Behalf of All Others Similarly Situated, Plaintiff: Jason A. Ibey, Kazerouni Law Group APC, Costa Mesa, CA; Abbas Kazerounian, LEAD ATTORNEY, Kazerounian Law Group APC, Costa Mesa, CA.

Hon. William Q. Hayes, United States District Judge.

William Q. Hayes

**ORDER**

HAYES, Judge:

The matters before the Court are the Motion to Compel Arbitration and Stay Proceedings filed by Defendant

Avvo, Inc. (ECF No. 27) and Motions to Strike filed by Plaintiff Thomas Gennaro (ECF Nos. 20, 26).

## I. Background

On November 9, 2018, Plaintiff Thomas G. Gennaro filed the First Amended Complaint (FAC). (ECF No. 11). The FAC alleges that Defendant Avvo, Inc. unlawfully recorded sales calls to Plaintiff in violation of California's Invasion of Privacy Act, California Penal Code § 632.7. *Id.* On December 28, 2018, Defendant filed the Motion to Compel Arbitration. (ECF No. 27). On January 18, 2019, Plaintiff filed Opposition. (ECF No. 32). On January 28, 2019, Defendant filed a Reply. (ECF No. 33).

## II. Facts

Avvo, Inc. (Avvo) operates a website that publishes online attorney profiles. Avvo allows lawyers to update the information on their Avvo profile for free and offers additional services for a fee. An attorney's free profile page may contain information such as client reviews, disciplinary actions, peer endorsements, and lawyer-submitted legal guides. To update the free profile, the lawyer "claims" the profile by signing up for an account on Avvo's website, clicking a link on their profile that links their account to their attorney profile, verifying their identity, and consenting to Avvo's Terms of Use. (Denis Khoo Decl., ECF No. 27-2 ¶ 4). To consent to the Terms of Use, the user must affirmatively check a box that states, "I confirm that I am [attorney's profile name] and I accept Avvo's Terms of Use and Privacy Policy" and then click the "Continue" button. *Id.* The words "Terms of Use" are in blue font, and clicking "Terms of Use" takes the user to the page on Avvo's website containing the Terms of Use. *Id.* ¶ 6.

Since April 2017, the Terms of Use have stated:

### 15. Mandatory Arbitration and Dispute Resolution

#### PLEASE READ THIS SECTION CAREFULLY, AS IT AFFECTS YOUR RIGHTS.

We hope we never have a dispute, but if we do, you and we agree to try for 60 days to resolve it informally. You may send us the details of your concern to [legal@avvo.com](mailto:legal@avvo.com). However, if Avvo is not able to informally resolve your complaint, you and Avvo agree to **individual binding arbitration under JAMS Alternative Dispute resolution ("JAMS") and the Federal Arbitration Act ("FAA"), and not to sue in court in front of a judge or jury**. The arbitration will be conducted under the JAMS Commercial Arbitration Rules and the Supplementary Procedures [\*2] for Consumer Related Disputes and the arbitrator's decision will be final except for a limited right of review under the FAA. The following applies to any arbitration proceedings between you and Avvo:

Before moving an unresolved informal dispute into arbitration, you must first send us a Notice of Dispute describing the nature and basis of the claim or dispute and the specific relief sought. This notice may be sent via email or U.S. mail to: [legal@avvo.com](mailto:legal@avvo.com) or Avvo, Inc., Attention General Counsel, 720 Olive Way, #1400, Seattle, WA 98112.

Any arbitration must be commenced by filing a demand for arbitration with JAMS within ONE (1)

YEAR from when it first could be filed. Otherwise, it is permanently barred. If applicable law prohibits a one-year limitation period for asserting claims, any claim must be asserted within the shortest time period permitted by applicable law.

Whenever feasible, the arbitration will be held telephonically unless the arbitrator finds good cause to hold an in-person hearing instead. You may choose the location of any in-person hearing from either your county of residence; or, if you are a business, the county of your principal place of business; or, Avvo's principal place of business in King County, WA.

The enforcement of the arbitrator's award will be controlled by and conducted in conformity with the FAA. Judgment upon any award may be entered in any court holding jurisdiction.

**Notwithstanding our agreement to arbitrate disputes as provided above, the following EXCEPTIONS will apply to the resolution of disputes between us:**

**Small Claims Court.** If the claim qualifies, either you or Avvo may bring an action in small claims court in King County, WA. Any small claims court action must be filed within one year from when it first could be filed. Otherwise, the claim is permanently barred.

**Injunctive relief.** Avvo may bring a lawsuit against you in any court of competent jurisdiction solely for **injunctive relief to stop any unauthorized use or abuse of the Services, or any intellectual property infringement**. In these instances, Avvo may seek injunctive relief without first engaging in the informal dispute resolution or arbitration process, as described above in these Terms of Use.

**Disputes not Covered by Arbitration.** In the event that arbitration is found to be inapplicable or unenforceable for any reason, or if you exercise the option to opt-out of arbitration as provided below, the claim at issue will be brought under judicial proceedings in federal or state courts in King County, WA, and you and Avvo consent to personal jurisdiction and exclusive venue in such courts.

**Option to Opt Out of Arbitration.** You may opt out of this agreement to arbitrate. If you do so, neither you nor Avvo can require the other to participate in an arbitration proceeding. To opt out, you must notify us in writing within 30 days of the date that you first became subject to the arbitration provision in these Terms. To opt out you must send us a clear statement that you want to opt out of arbitration, along with your name, residence [\*3] or business address, and the email address associated with your account to: legal@avvo.com.

**NO CLASS ACTIONS: You may only bring individual claims. Under no circumstances are you allowed to bring a claim as a plaintiff or a class member in a class. Class action lawsuits, class-wide arbitrations, private attorney-general actions, and any other proceedings where someone acts in a representative capacity are not allowed. Any combining of individual proceedings must have the consent of all parties.**

## 16. Applicable law

The laws of the State of Washington, excluding its conflict of law provisions, will apply to any disputes arising out of or relating to these Terms or the Services.

(Khoo Decl., Ex. E, ECF No. 27-3 at 17-19). After signing up and claiming their profile, each time the user logs in to his or her account a sentence below the box where the user types their email and password states "[b]y signing in, you agree to Avvo's terms of use[.]" (Khoo Decl., Ex. C, ECF No. 27-3 at 7).

On January 16, 2017, Plaintiff "claimed" his attorney profile. (Khoo Decl., ECF No. 27-2 ¶ 11). Plaintiff did not sign up for Avvo's paid services, but did update his free profile to include a four-paragraph description of his practice. *Id.* ¶ 14. At the time Plaintiff claimed his profile, the Terms of Use did not have an arbitration clause. In April 2017, the Terms of Use were updated, and an arbitration clause was added. *Id.* ¶ 8. On May 4, 2017, a blog post on the Avvo website entitled "We've updated our Terms of Use: Take a look under the hood" explained the addition of the arbitration clause, and Defendant states that an email containing a link to the blog post was emailed to Plaintiff. *Id.* ¶ 13. Plaintiff subsequently logged into his Avvo user account on June 29, 2017; June 30, 2017; October 11, 2017; October 14, 2017; November 3, 2017; January 2, 2018; March 27, 2018 (twice); June 14, 2018 (twice); and November 13, 2018 (twice). *Id.* ¶ 15.

### III. Legal Standard

The Federal Arbitration Act ("FAA") "was enacted . . . in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citation omitted). Section 2 of the FAA states: "A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . 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. Section 2 of the FAA "reflect[s] both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *Concepcion*, 563 U.S. at 346 (quotations omitted). "In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *Id.* at 339 (citations omitted).

"The basic role for courts under the FAA is to determine (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*, 718 F.3d 1052, 1058 (9th Cir. 2013) (en banc) (quotation omitted). "If the response is affirmative on both counts, then the [FAA] requires [\*4] the court to enforce the arbitration agreement in accordance with its terms." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91-92 (2000).

### IV. Discussion

#### a. Plaintiff's Consent to Arbitrate

Defendant contends that Plaintiff consented to the Terms of Use, including the arbitration clause, each time Plaintiff signed into his Avvo profile between June 29, 2017, and November 13, 2018. (ECF No. 33 at 6).

Plaintiff contends that he is not bound by the arbitration clause in the Terms of Use because there was no

mutual assent to the arbitration clause. (ECF No. 32 at 13). Plaintiff contends the Terms of Use was a "browsewrap" contract that did not provide reasonable notice of the terms of the contract. *Id.* at 14. Plaintiff asserts that he was not provided reasonable notice of the Terms of Use because "[t]he language 'By signing in, you agree to Avvo's terms of use' is not found close to the 'Sign in' button, but is in small print in light color towards the bottom of the webpage, underneath other colored icons and also underneath the words 'We won't auto-post to your social network.'" (ECF No. 32 at 18).

"When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 , 944 (1995). Under Washington law,<sup>1</sup> "[a] contract exists when there is mutual assent to its essential terms." *Rimov v. Schultz*, 253 P.3d 462 , 466 (Wash. Ct. App. 2011).

Contracts formed on the Internet come primarily in two flavors: "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; and "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.

*Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171 , 1175-76 (9th Cir. 2014). With respect to browsewrap contracts specifically, "where . . . there is no evidence that the website user had actual knowledge of the agreement, the validity of the browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract. Whether a user has inquiry notice of a browsewrap agreement, in turn, depends on the design and content of the website and the agreement's webpage." *Id.* at 1177 (citations omitted).

In this case, Plaintiff's first opportunity to assent to the updated Terms of Use containing the arbitration clause occurred when Plaintiff logged into his Avvo account on June 29, 2017.<sup>2</sup> Plaintiff entered his email and password and clicked "Sign in". Directly below the "Sign in" button were four colored boxes providing alternative options to sign in with Facebook, Google, Twitter and LinkedIn. (Khoo Decl., Ex. C, ECF No. 27-3 at 7). Below the colored boxes was the sentence "[w]e won't auto-post to your social network." *Id.* Directly below that, in slightly larger font, was the sentence "[b]y signing in, [\*5] you agree to Avvo's terms of use[.]" *Id.* The words "terms of use" were in blue font and hyperlinked to a page containing the Terms of Use. *Id.* The remainder of the sentence is in black font. Under normal viewing conditions, the "Sign in" button is in close enough proximity to the sentence "[b]y signing in, you agree to Avvo's terms of use" that a user would not have to scroll down the page to see it. The page contains relatively little text and does not contain unrelated information that would render the sentence "[b]y signing in, you agree to Avvo's terms of use" inconspicuous. The Court finds that the Avvo sign in page would put a reasonably prudent user on inquiry notice of the Terms of Use. *See Nguyen*, 763 F.3d at 1178 n.1. (noting that courts have found notice sufficient when the hyperlink is accompanied by text that "capture[s] the user's attention and secure[s] her assent"); *see e.g.*, *5381 Partners LLC v. Sharesale.com, Inc.*, [2013 BL 257855], 2013 WL 5328324 , at \*7 (E.D.N.Y. Sept. 23, 2013) (in addition to hyperlink that appeared adjacent to the activation button users had to click on, website also contained a text warning near the button that stated "[b]y clicking and making a request to Activate, you agree to the terms and conditions in the [agreement]"); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829 , 838 (S.D.N.Y. 2012) (finding

user assented to terms of hybrid clickwrap and browsewrap agreement when user clicked "sign in" button directly above sentence that read "[b]y clicking Sign Up, you are indicating that you have read and agree to the Terms of Service"); *Snap-on Business Solutions Inc. v. O'Neil & Associates, Inc.*, 708 F. Supp. 2d 669 (N.D. Ohio 2010) (finding user assented to terms when user clicked "enter" button located directly above sentence that read "[t]he use of and access to the information on this site is subject to the terms and conditions set out in our legal statement"). Plaintiff clicked "Sign in" on the page described twelve times after Defendant updated the Terms of Use to include the arbitration provision. Plaintiff is bound by the Terms and Conditions and must submit his claims to arbitration.<sup>3</sup>

## **b. Arbitrability**

Defendant contends that the parties delegated the question of arbitrability to the arbitrator "because the Avvo Terms of Use expressly incorporate the JAMS rules, which address arbitrability." (ECF No. 27-1 at 17).

Plaintiff contends that his claims are out of the scope of the arbitration clause because "they are unrelated to, and do not arise out of, the Terms of use or the free online attorney profile; they are independent tort claims." (ECF No. 32 at 13). Plaintiff contends that this Court should determine (i) whether Plaintiff's claims under the California Invasion of Privacy Act are subject to arbitration; (ii) if the arbitration provision was meant to retroactively apply to claims that accrued before Plaintiff accepted the Terms of Use on June 29, 2017; and (iii) whether the class action waiver in the Terms of Use is unenforceable because it is unconscionable. *Id.* at 9.

Arbitrability can be delegated to the arbitrator when the parties "clearly and unmistakably" agree to do so. *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)). Incorporation [\*6] of the arbitration forum rules may constitute clear and unmistakable evidence that the contracting parties agreed to arbitrate arbitrability. *Brennan*, 796 F.3d at 1130 ("[I]ncorporation of the AAA rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability."). "When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019).

In this case, the Terms of Use state that "[t]he arbitration will be conducted under the JAMS Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes . . . ." (Khoo Decl., Ex. E, ECF No. 27-3 at 17-18). Under JAMS Rule 11(b),

Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

JAMS Rule 11(b).<sup>4</sup> The Court finds that the incorporation of the JAMS Rules into the Terms of Use is clear and unmistakable evidence that the contracting parties agreed to arbitrate arbitrability. *See Brennan*, 796 F.3d at 1130; *see e.g., Johnson v. Oracle Am., Inc.*, [2019 BL 96597], 2019 WL 1349757 (9th Cir. 2019) (incorporating JAMS rules clearly and unmistakably delegated arbitrability to arbitrator); *Esquer v. Educ. Mgmt.*



*Corp.*, 292 F. Supp. 3d 1005 , 1012-13 (S.D. Cal. 2017) (same). Determinations regarding the "scope of the agreement under which [a]rbitration is sought" or the "validity" of specific terms has been delegated to the arbitrator. See JAMS Rule 11(b); see also *Henry Schein, Inc.*, 139 S. Ct. at 530 ("Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator.").

## V. Stay

The FAA provides:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in the proceeding with such arbitration.

9 U.S.C. § 3 . The Court finds that the claims raised by Plaintiff in the FAC are referable to arbitration pursuant to the Terms of Use. Defendant has moved for a stay of this case pending the outcome of the arbitration proceedings. (ECF No. 27-1 at 19). Accordingly, this action is stayed pursuant to 9 U.S.C. § 3 .

## VI. Motions to Strike

All of Plaintiff's claims [\*7] are now before the arbitrator. Plaintiff's Motions to Strike (ECF Nos. 20, 26) are denied as moot.

## VII. Conclusion

IT IS HEREBY ORDERED that the Motion to Compel Arbitration and Stay Proceedings is GRANTED. (ECF No. 27). Pursuant to 9 U.S.C. § 3 , this action is STAYED pending arbitration. IT IS FURTHER ORDERED that Plaintiff's Motions to Strike (ECF Nos. 20, 26) are DENIED as MOOT. The Clerk of the Court shall administratively close this case without prejudice to any party moving to have the case reopened for good cause.

Dated: May 6, 2019

/s/ William Q. Hayes

Hon. William Q. Hayes

United States District Court

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Washington contract law governs the interpretation of the Terms of Use. (Khoo Decl., Ex. E, ECF No. 27-3

at 19). It is unnecessary for the Court to determine whether California or Washington contract formation law covers this dispute because the parties agree that there is no relevant conflict between Washington and California contract formation law. (ECF No. 32 n.1).

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Plaintiff was first presented with an opportunity to review the Terms of Use when he "claimed" his account on January 16, 2017. Plaintiff affirmatively checked a box confirming that he accepted Avvo's Terms of Use and Privacy Policy. This presentation of the Terms of Use, however, preceded the arbitration clause and is thus not the relevant point of inquiry.

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Plaintiff requests an evidentiary hearing to determine "(1) whether Mr. Gennaro was aware of the dispute resolution provision in the updated Terms of use before logging into the Avvo website on June 29, 2018, including whether Avvo sent an email to Mr. Gennaro in May of 2017 concerning updated Terms of use to include a dispute resolution provision; (2) whether Mr. Gennaro expressed interest in Avvo's services to an employee or agent of Avvo over the phone in February of 2018 (see Gennaro Decl., ¶ 10); and (3) whether Avvo called Mr. Gennaro between January 1, 2017 and June 28, 2017." (ECF No. 32 at 31). The resolution of these issues is not required to resolve the motions currently before the Court. Plaintiff's request for an evidentiary hearing is denied.

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The Court takes notice of the JAMS Comprehensive Arbitration Rules and Procedures, <https://www.jamsadr.com/rules-comprehensive-arbitration/> (Effective July 1, 2014).