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United States District Court
Northern District of California

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

RUI CHEN AND WENJIAN GONZALES,
Plaintiffs,
vs.
PREMIER FINANCIAL ALLIANCE, INC. *et al.*,
Defendants.

Case No.: 18-CV-3771 YGR
**ORDER DENYING MOTIONS TO COMPEL
ARBITRATION**
DKT. NOS. 39, 46

Defendants Premier Financial Alliance Inc. (“PFA”) and David Carroll have filed their Motion to Compel Arbitration and Dismiss Claims, asserting that the claims of plaintiffs Wenjian Gonzalez¹ and Rui Chen should be compelled to arbitration under the Federal Arbitration Act, 9 U.S.C. § 2 *et seq.* (Dkt. No. 39.) Defendants A JW Production, LLC, Bill Hong, The Consortium Group, LLC, Jack Wu, Rex Wu, and Lan Zhang filed a separate Motion to Compel Arbitration asserting that plaintiffs’ related claims against them should be compelled to arbitration based upon the existence of an arbitration agreement between plaintiffs and PFA. (Dkt. No. 46). Having carefully considered the papers submitted in support of and in opposition to the motions, and the admissible evidence therein,² and for the reasons set forth below, the Court hereby **DENIES** the Motions on the grounds that defendants have failed to establish the existence of an agreement to arbitrate.

¹ The Court notes that the spelling of plaintiff’s name appears differently on different filings. The Court adopts the spelling plaintiff appears to have used to register with Premier Financial Alliance Inc.

² Plaintiffs object to the declaration of Steven Early (Dkt. No. 40) as hearsay and contrary to the best evidence rule. Plaintiffs contend that defendants’ failure to offer better evidence within their control should result in an adverse inference. The Court finds the objections well taken. For these reasons, and the others stated herein, the Court finds the Early declaration insufficient to establish that plaintiff Gonzalez assented to the arbitration agreement.

1 **I. BACKGROUND**

2 PFA is in the business of selling life insurance through licensed life insurance agents termed
3 “Associates.” Plaintiffs herein allege that they joined PFA as “Associates” around 2017 or 2018.
4 (First Amended Complaint [“FAC”], Dkt. No. 28, ¶¶ 74, 76.)³

5 Defendants offer the declaration of Steven Early, an attorney for PFA who has “assisted and
6 prepared, in the normal course of business” the AMA. (Early Decl. ¶¶ 1, 4.) Early attests that, in
7 order for an individual to become an “Associate” with PFA, they must execute an Associate
8 Marketing Agreement (“AMA”) by electronically signing it on PFA’s website, and that the software
9 utilized by PFA will not allow associates to join PFA without providing an electronic signature on
10 the AMA. (*Id.* ¶¶ 5, 6, 7.) Section 2 of the AMA provides as follows:

11 2. Covenants of the Associate

12 The Associate agrees not to represent himself as an employee, owner, partner or
13 agent of PFAThe Associate agrees that he will not represent PFA
14 membership as a business opportunity nor will he represent that PFA members
15 will be compensated based on the number of persons they recruit to join PFA. The
16 Associate agrees to be solely responsible for payment of all federal, state and
17 local taxes based on business, sales or income obtained under this agreement.
18 (This includes, but is not limited to, income taxes, payroll taxes, self-employment
19 taxes, unemployment taxes, sales taxes, franchise taxes, intangible taxes and
20 personal property taxes.) **The Associate agrees not to institute any legal
21 proceedings against PFA; but, instead, shall submit any and all disputes with
22 PFA, its officers, directors, employees and associates to binding arbitration
23 pursuant to the rules of the American Arbitration Association.** The Associate
24 agrees to comply with all policies, procedures, rules, regulations and guidelines of
25 PFA and of all of its affiliated insurance companies with whom the Associate may
26 be appointed under PFA. The Associate agrees not to use any advertising or
27 promotional material other than those provided or approved by PFA or its
affiliated insurance companies. The Associate agrees not to share or pay any
insurance commissions to PFA recruits before they are licensed.

(Early Decl. Exh. A at 7-8, emphasis supplied.) Early attaches to his declaration a copy of plaintiff
Wenjian Gonzales’ “Agent Profile page” as well as a copy of the AMA. (*Id.* Exh. A.) Defendants

³ According to PFA’s records, plaintiff Wenjian Gonzalez electronically executed the AMA
on January 19, 2018. (Early Decl. ¶ 11, Exh. A.) PFA has no record of plaintiff Rui Chen executing
the AMA. (*Id.* ¶ 12.)

1 do not offer, through the Early declaration or otherwise, evidence of how the AMA or the Associate
2 registration form appears on the PFA website.⁴

3 **II. LEGAL FRAMEWORK**

4 The Federal Arbitration Act (the “FAA”) requires a district court to stay judicial
5 proceedings and compel arbitration of claims covered by a written and enforceable arbitration
6 agreement. 9 U.S.C. § 3. A party may bring a motion in the district court to compel arbitration. 9
7 U.S.C. § 4. The FAA reflects “both a ‘liberal federal policy favoring arbitration’ and the
8 ‘fundamental principle that arbitration is a matter of contract.’” *AT&T Mobility LLC v.*
9 *Concepcion*, 563 U.S. 333, 339 (2011); *Mortensen v. Bresnan Commuc’ns, LLC*, 722 F.3d 1151,
10 1157 (9th Cir. 2013) (“The [FAA] . . . has been interpreted to embody “‘a liberal federal policy
11 favoring arbitration.’”). The FAA broadly provides that an arbitration clause in a contract involving
12 a commercial transaction “shall be valid, irrevocable, and enforceable.” 9 U.S.C. § 2. Once a court
13 is satisfied the parties agreed to arbitrate, it must promptly compel arbitration. 9 U.S.C. § 4.

14 In ruling on the motion, the Court’s role is typically limited to determining whether: (i) an
15 agreement exists between the parties to arbitrate; (ii) the claims at issue fall within the scope of the
16 agreement; and (iii) the agreement is valid and enforceable. *Lifescan, Inc. v. Premier Diabetic*
17 *Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir. 2004). “[I]f there is a genuine dispute of material fact as
18 to any of these queries, a [d]istrict [c]ourt should apply a ‘standard similar to the summary
19 judgment standard of Fed.R.Civ.P. 56.’” *Ackerberg v. Citicorp USA, Inc.*, 898 F. Supp. 2d 1172,
20 1175 (N.D. Cal. 2012) (quoting *Concat LP v. Unilever, PLC*, 350 F.Supp.2d 796, 804 (N.D. Cal.
21 2004)); *see also Starke v. SquareTrade, Inc.*, No. 17-2474-CV, 2019 WL 149628, at *1 (2d Cir.
22 Jan. 10, 2019) (same). “If the parties contest the *existence* of an arbitration agreement, the
23 presumption in favor of arbitrability does not apply.” *Goldman, Sachs & Co. v. City of Reno*, 747
24 F.3d 733, 742 (9th Cir. 2014).

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⁴ The Court notes that Federal Rule of Evidence 902 permits authentication of webpages by
certification of a qualified person if such person “describes the process by which the webpage was
retrieved” under penalty of perjury. Fed. R. Evid. 902, Advisory Committee Notes to 2017
Amendments at ¶ 5. No such evidence was presented here.

1 “‘Before a party to a lawsuit can be ordered to arbitrate . . . there should be an express,
2 unequivocal agreement to that effect. Only when there is no genuine issue of fact concerning the
3 formation of the agreement should the court decide as a matter of law that the parties did or did not
4 enter into such an agreement.’” *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d
5 1136, 1141 (9th Cir. 1991) (quoting *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51,
6 54 (3d Cir. 1980)). In deciding whether there is a genuine issue of fact concerning formation of an
7 agreement, the party opposing arbitration shall receive “the benefit of all reasonable doubts and
8 inferences.” *Id.* “When deciding whether the parties agreed to arbitrate a certain matter . . . courts
9 generally . . . should apply ordinary state-law principles that govern the formation of contracts.”
10 *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Under California law, contract
11 formation requires mutual assent. *See Binder v. Aetna Life Ins. Co.*, 75 Cal. App. 4th 832, 850
12 (1999).⁵

13 **III. DISCUSSION**

14 Defendants have failed to meet their burden to show, by undisputed material facts, that the
15 parties entered into an agreement to arbitrate the claims here. The Ninth Circuit in *Nguyen*
16 described contracts formed through internet websites as generally taking on one of two forms:
17 “clickwrap” or “click-through” agreements, in which website users are required to click on an ‘I
18 agree’ box after being presented with the terms of an agreement, and “browsewrap” agreements in
19 which the terms of the agreement are posted on the website and indicate that the user is agreeing to
20 the terms simply by continuing to use the website. *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171,
21 1175–76 (9th Cir. 2014). Courts will enforce clickwrap-type agreements where the user indicates
22 actual notice of the terms of the agreement or was required to acknowledge the terms of the
23 agreement before proceeding with further use of the site. *Id.* at 1776-77. Enforcement of a
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25 ⁵ Defendants contend that Georgia law applies to the agreement here. Georgia law similarly
26 requires mutual assent in order to form a contract. *See Bazemore v. Jefferson Capital Sys., LLC*, 827
27 F.3d 1325, 1330 (11th Cir. 2016) (citing Ga. Code Ann. § 13-3-1:“‘[t]o constitute a valid contract,
there must be parties able to contract, a consideration moving to the contract, the assent of the parties
to the terms of the contract, and a subject matter upon which the contract can operate.’”)

1 browsewrap-type agreement, which lacks such an acknowledgment, will depend upon whether the
2 website’s design and content would put “a reasonably prudent user on inquiry notice of the terms of
3 the contract.” *Id.* at 1777. The conspicuousness of the terms and notices, as well as the overall
4 design of the webpage, will contribute to the determination that a user was on inquiry notice. *Id.*
5 (citing cases).

6 Defendants have not offered evidence explaining the design and content of the webpage or
7 how the AMA appeared on the PFA website. The Court cannot determine whether the terms of the
8 AMA appeared on the registration page itself, or if a user would have had to click a link to see the
9 full terms. Likewise, the Court cannot determine other factors that might contribute to determining
10 plaintiffs’ notice of the terms, such as the size of the font or other aspects of the appearance and
11 presentation of the terms online. The declaration of Steven Early does not provide evidence to
12 show that: (1) either of these plaintiffs had actual knowledge of the arbitration agreement; or (2)
13 whether the AMA was a clickwrap or a browsewrap agreement, how the website was designed and
14 where these terms appeared, and whether associates assented by clicking an “I agree” box, or were
15 deemed to agree by continuing in the registration process. Early simply states that: “PFA’s
16 software will not allow the new marketing associates to begin the process of becoming appointed
17 by PFA’s insurance providers without electronically signing the AMA.” Gonzalez’s declaration
18 states that the PFA website did not include a checkbox or prompt for agreement to the terms of the
19 AMA. (Gonzalez Decl., Dkt. No. 50, ¶ 4.)⁶

20 Given the lack of evidence of how PFA’s Associate registration process appears and
21 functions on its website, plaintiff Gonzalez’s declaration that he did not see an arbitration

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23 ⁶ Gonzalez’s declaration states:

24 PFA’s online hiring process did not put me on notice of an arbitration policy. I was not
25 provided with any version of the rules of the American Arbitration Association, nor told
26 about dispute resolution with the American Arbitration Association at any time. When I
27 joined this scheme in January of 2018, to the best of my recollection, there was no online
prompt, selection, or check box by which I was required to agree to any marketing agreement
or electronically assent to any agreement.

(*Id.* ¶ 4.)

1 agreement, and the reasonable doubts and inferences that must be drawn in his favor under the
2 applicable standard, Gonzalez has raised a genuine issue of fact concerning his notice of, and assent
3 to, the arbitration agreement here.⁷ The Court cannot find that he was reasonably on notice of the
4 agreement to arbitrate, and the motion to compel must be denied. *See Nguyen.*, 763 F.3d at 1173
5 (holding plaintiff did not assent to terms of service of which he did not have reasonable notice);
6 *Three Valleys*, 925 F.2d at 1141 (“Only when there is no genuine issue of fact concerning the
7 formation of the agreement should the court decide as a matter of law that the parties did or did not
8 enter into such an agreement.”). Thus, the motion to compel arbitration fails for lack of a showing
9 of a valid agreement to arbitrate.⁸

10 Accordingly, the Motions to Compel Arbitration are **DENIED**.

11 This terminates Docket Nos. 39 and 46.

12 **IT IS SO ORDERED.**

13 Date: January 22, 2019

14 
15 YVONNE GONZALEZ ROGERS
16 UNITED STATES DISTRICT COURT JUDGE

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25 ⁷ Defendants have indicated that they cannot locate plaintiff Chen in their records at all. It follows that there is no evidence that Chen entered into an agreement to arbitrate any claims here.

26 ⁸ Because the Court finds that the motion fails on these grounds, it does not reach the
27 additional issues of choice of law, lack of mutuality of obligation, and unconscionability raised by the parties.