IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

B&Z AUTO ENTERPRISES, LLC d/b/a Riverdale Chrysler Jeep d/b/a Eastchester Chrysler Jeep Dodge d/b/a New York Cars Direct d/b/a New York Autos Direct, and on Behalf of All Others Similarly Situated,	**CIVIL ACTION FILE**
Plaintiff,	**NO. 1:16-CV-2313-MHC**
v.	
AUTOTRADER.COM, INC.,	
Defendant.	

ORDER

This case comes before the Court on Defendant Autotrader.com, Inc.'s ("Autotrader") Motion to Dismiss or Stay and to Compel Arbitration [Doc. 20].

I. BACKGROUND

Plaintiff B&Z Auto Enterprises, LLC ("B&Z") is a New York corporation that owns several car dealerships in the New York City area. Compl. [Doc. 1] ¶ 8. Between 2010 and 2015, B&Z entered into agreements to purchase premium listings and enhanced services on the website operated by Autotrader, an online

platform on which both car dealerships and private sellers can list vehicles for sale. Id. ¶¶ 1-2, 8, 14-16.

According to the allegations in the Complaint, Autotrader utilizes a so-called "freemium" model in which car dealerships ("dealer customers") can either list their automobiles for free on Autotrader's website or, alternatively, pay a fee to ensure that their automobiles are placed higher in a potential buyer's online search results. Id. ¶ 33. Autotrader describes this model as follows:

> We offer online classified listing placements on both Autotrader.com and KBB.com. We sell these listings as monthly, recurring subscriptions to independent and franchise dealers for both new and used cars. We employ a "pay for placement" model that allows subscribing dealers to achieve higher placement of their listings on our search results page. There are several tiers of listings for a subscribing dealer, including standard, featured and premium. The higher priced listing packages offer higher listings placement and more listings features, including vehicle photos, a secure credit application, a link back to the dealer's website, video capability and bundled display add-ons such as our Alpha and Spotlight services. We estimate that premium listings, which populate the higher and more visible section of the page, typically generate two to three times as much vehicle exposure and consumer responses as featured listings, which in turn are typically eight to nine times more effective than our free standard listings.

Id.

Autotrader sells its "featured" and "premium" advertising listings as annual subscriptions that may be cancelled by the dealer customer by providing thirty days' written notice to Autotrader. Id. ¶¶ 42-45. In marketing these subscriptions,

Autotrader tracks and reports to its dealer customers (1) the number of times their listed vehicles are included in a prospective buyer's search results ("Search Result Pages," or "SRPs"), and (2) the number of times prospective buyers actually click on a particular vehicle that appears in those search results ("Vehicle Detail Pages," or "VDPs"). Id. ¶¶ 48, 52. According to the Complaint, Autotrader uses these SRP and VDP metrics as "key indicators" to market the value that dealer customers derive from the purchase of advertising listings on its site and to "upsell" dealer customers to purchase premium listings and enhanced services. Id. ¶¶ 49-60.

B&Z filed its Class Action Complaint in this Court on June 29, 2016, on behalf of itself and all other dealer customers who purchased subscription advertising listings from Autotrader between June 1, 2010, and June 30, 2015. Id. ¶ 97.[1] B&Z alleges generally that, prior to June 2015, the SRP and VPD numbers reported to dealers were inflated for the purpose of upselling dealers on its paid services, and that Autotrader knew or should have known that its system was generating inaccurate and misleading data. Id. ¶¶ 61-81.

[1] B&Z originally filed suit in the United States District Court for the Eastern District of New York on October 14, 2014, but voluntarily dismissed the action on December 8, 2015, pursuant to a forum selection clause in the parties' agreement. See B&Z Auto Enters., LLC v. AutoTrader.com, Inc., No. 2:15-cv-05905 (E.D.N.Y.).

Autotrader has moved to dismiss or stay this action and to compel arbitration, arguing that B&Z is required to arbitrate this dispute pursuant to a binding arbitration clause incorporated into the parties' contracts. See Def.'s Mem. of Law in Supp. of Mot. to Dismiss or Stay and to Compel Arbitration [Doc. 20-1] ("Def.'s Mem.").

II. LEGAL STANDARD

Autotrader requests that the Court compel arbitration under Sections 3 and 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*. The FAA creates a "presumption of arbitrability" such that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Dasher v. RBC Bank (USA), 745 F.3d 1111, 1115-16 (11th Cir. 2014) (quotation marks and citations omitted), cert denied, 135 S. Ct. 144 (2014); see also Bazemore v. Jefferson Capital Sys., LLC, 827 F.3d 1325, 1329 (11th Cir. 2016). However, "while doubts concerning the scope of an arbitration clause should be resolved in favor of arbitration, the presumption does not apply to disputes concerning whether an agreement to arbitrate has been made." Dasher, 745 F.3d at 1116 (quotation marks and citation omitted); Bazemore, 827 F.3d at 1329 (quoting Dasher).

The existence of an agreement to arbitrate between the parties is "simply a matter of contract." First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943

(1995). Therefore, in construing arbitration agreements, courts apply state-law principles relating to contract formation, interpretation, and enforceability. Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1367-68 (11th Cir. 2005); see also Bazemore, 827 F.3d at 1330. "The existence and terms of a contract must be proven by a preponderance of the evidence." Bazemore, 827 F.3d at 1330 (citing Wallace v. Triad Sys. Fin. Corp., 212 Ga. App. 665, 666 (1994)). "[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." Mitsubishi Motors Corp. v. Soler Crysler-Plymouth, Inc., 473 U.S. 614, 626 (1985).

Because an order to arbitrate a contested agreement is "in effect a summary disposition of the issue of whether or not there ha[s] been a meeting of the minds on the agreement to arbitrate," the Eleventh Circuit applies a standard akin to that used in summary judgment "in deciding what is sufficient evidence to require a trial on the issue of whether there was an agreement to arbitrate." Magnolia Capital Advisors, Inc. v. Bear Stearns & Co., 272 F. App'x 782, 785-86 (11th Cir. 2008) (quoting Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51, 54 & n.9 (3rd Cir. 1980)); see also In re Checking Account Overdraft Litig., 754 F.3d 1290, 1294 (11th Cir. 2014). A genuine factual dispute concerning contract formation precludes a court from deciding as a matter of law whether the parties

entered into an agreement to arbitrate. See Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 297-99 (2010); Solymar Invs., Ltd. v. Banco Santander S.A., 672 F.3d 981, 989-90 (11th Cir. 2012). "[A] district court considering the making of an agreement to arbitrate should give to the party denying the agreement the benefit of all reasonable doubts and inferences that may arise." Magnolia Capital Advisors, 272 F. App'x at 786 (alternation and quotation marks omitted).

III. DISCUSSION

Between September 2008 and May 2012, B&Z's three dealerships entered into substantially similar "Advertiser Relationship Agreements" ("ARAs") for automobile listings and advertising on Autotrader's websites. Compl. ¶ 8; see Advertiser Relationship Agreements, attached as Exs. A-F to Def.'s Mem. [Docs. 20-4 to 20-9]; Decl. of Brent Albrecht [Doc. 20-3] ("Albrecht Decl.") ¶ 4. The ARAs incorporate the following language:

> Advertiser represents and warrants that it has read and agrees to the visitor agreement (sometimes referred to as "terms of use," "terms and conditions," or "terms of service") posted on each applicable Site (collectively, the "Visitor Agreements"). Advertiser understands that any of the Sites may change its Visitor Agreement from time to time and agrees that, by continuing to place Advertisements on a Site following the posting of any changes to the applicable Visitor Agreement, Advertiser agrees to be bound by the Visitor Agreement, as modified.

ARA between New York Autos Direct and Autotrader, attached as Ex. F to Def.'s Mem [Doc. 20-9] ("ARA") at 3 (emphasis added).[2] The ARAs further define the term "Site" as follows:

> AutoTrader.com, Inc. ("AutoTrader.com") . . . and the dealership identified above ("Advertiser") desire to enter into a relationship under which ATC [AutoTrader.com] may create and/or display Advertiser's listings and other advertisements ("Advertisements") on the website(s) identified on the Sales Order(s) (defined below) and, if applicable, on other websites, and/or distribute such Advertisements through various media platforms (e.g., television, radio, print, wireless, etc.) (collectively, "Other Media Platforms") owned or controlled by ATC and/or third parties from time to time (collectively, the "Sites"). The Sites may include, without limitation, AutoTrader.com, AutoTraderClassics.com, and KBB.com. This Advertiser Relationship Agreement ("Agreement") sets out the terms and conditions of this relationship and applies to all Advertisements created by or on behalf of Advertiser through the Sites and/or displayed or to be displayed on the Sites and to any other services that ATC provide to Advertiser or arranges for Advertiser to receive . . . .

Id. at 2 (emphasis added).

Based on the foregoing language, Autotrader argues that B&Z's relationship agreements incorporate Autotrader's "Visitor Agreement" as it appears to users of

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[2] Although the earliest ARA in the record omits any language incorporating other visitor agreements, all subsequent ARAs provide that "[b]y signing . . . Advertiser agrees that this Agreement will govern its advertising relationship with ATC [AutoTrader.com] and will apply to all advertising Sales Orders entered into between Advertiser and ATC." Compare ARA between Riverdale Chrysler Jeep and Autotrader, attached as Ex. E to Def.'s Mem [Doc. 20-8] at 3 (omitting any reference to the incorporation of visitor agreements) with ARAs, attached as Exs. A, B, C, D, and F to Def.'s Mem [Docs. 20-4, 20-5, 20-6, 20-7, and 20-9].

Autotrader's "consumer site"—and that, by posting advertisements to the consumer site, B&Z assented to its visitor agreement.[3] Accordingly, Autotrader argues that B&Z should be compelled to arbitrate the present dispute based on a mandatory arbitration clause added as Section IX (titled, "Dispute Resolution—Mandatory Class Action Waiver") of the site's visitor agreement in June 2014. See, e.g., Consumer Site Visitor Agreement (Effective June 5, 2014) [Doc. 20-10] ("Consumer Site Visitor Agreement") at 8-9; Def.'s Mem. at 7. The clause provides in part:

> A. **ARBITRATION AGREEMENT.** YOU AND AUTOTRADER.COM AGREE THAT ANY CLAIMS OR DISPUTES ("Claims") THAT ARISE OUT OF OR RELATE IN ANY WAY TO THE TERMS OF THE VISITOR AGREEMENT, THE AUTOTRADER SITES, OR ANY SERVICE (INCLUDING BUT NOT LIMITED TO BILLING DISPUTES) SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION INSTEAD OF LITIGATION IN COURT. In arbitration, there is no judge and no jury. Instead, Claims are decided by an arbitrator whose authority is created by and governed by this arbitration agreement. Review of arbitration awards in the courts is very limited.

Consumer Site Visitor Agreement at 12 (emphasis in original); see also Visitor Agreement (Effective August 25, 2015) [Doc. 20-13] at 8-9 (incorporating a substantially similar mandatory arbitration clause in Section VIII). B&Z responds

[3] Autotrader further alleges (and B&Z does not dispute) that this Visitor Agreement is available to users by clicking on one or more links on the Autotrader website, and that "[v]irtually every page on the main Autotrader.com website contains a link" to the agreement. Def.'s Mem. at 7; see also Albrecht Decl. ¶ 5.

that the Visitor Agreement discussed above does not apply to dealer customers and that, even if it does, there are a number of reasons why the mandatory arbitration clause should not be enforced.

A. Whether the "Visitor Agreement" is Part of the Agreement Between the Parties

In its response, B&Z contends that dealer customers do not access Autotrader's products and services through the same website used by private sellers and customers. See Pl.'s Mem. of Law in Opp'n to Def.'s Mot. to Dismiss [Doc. 23] ("Pl.'s Mem.") at 4. Instead, dealer customers use a "dealer portal," available at Dealers.AutoTrader.com, to arrive at a different site (the "Dealer Site") through which they can create "dealer profiles," upload automobile listing details to the Autotrader websites, and preview listings. See Decl. of Brian Dennis [Doc. 23-4] ("Dennis Decl.") ¶¶ 4-6.

The Dealer Site includes a link to its own visitor agreement (the "Dealer Site Visitor Agreement") that is different from the Consumer Site Visitor Agreement. The Dealer Site Visitor Agreement provides in part:

> We provide this site to our motor vehicle dealer and other customers that advertise with Autotrader, Inc. through our website, Autotrader (the "Consumer Site"). By using [the] Dealer Site, you accept the terms of this Visitor Agreement . . . . If you access or use [the] Dealer Site on behalf of a motor vehicle dealership, manufacturer, or other entity, you represent that you have authority to bind such entity and its affiliates to this Agreement and that it is fully binding upon them.

Dealer Site Visitor Agreement [Doc. 23-7] at 2. The Dealer Site Visitor Agreement does not contain an arbitration clause, and instead provides that users of the Dealer Site consent to jurisdiction and venue in Fulton County, Georgia "in all disputes arising out of or relating to" the agreement. Id. at 3.

B&Z now argues that it is bound by the Dealer Site Visitor Agreement rather than the Consumer Site Visitor Agreement, which B&Z maintains applies only to private users of the Autotrader sites. Specifically, B&Z argues that the Consumer Site Visitor Agreement "expressly" does not apply to dealer customers. Pl.'s Mem. at 13. In support of this claim, B&Z relies on the following paragraph from a section of that agreement titled "Listing Your Vehicle:"

> By using the Autotrader Sites to sell your vehicle as a private seller, you represent that you are at least 18 years of age, that you are not a motor vehicle dealer, that you are not listing a vehicle for sale in your capacity as an owner, employee or representative of a dealer, and that neither you nor anyone acting on your behalf will list more than five vehicles for sale simultaneously. A private seller who wishes to list more than five vehicles simultaneously, and any commercial dealer wishing to list any vehicle, must make arrangements with us before doing so. Please visit weworkforyou.com[4] for information.

[4] Visitors to weworkforyou.com are redirected to another website, AGameAutoTrader.com, which in turn redirects dealer customers to the login page available at Dealers.AutoTrader.com (the Dealer Site). See Decl. of Kristi Stahnke McGregor [Doc. 23-5] ¶ 5. Additionally, the AGameAutoTrader.com site features its own "terms of service" page that also does not include an arbitration clause. See Printout of AgameAutoTrader.com [Doc. 23-9]; Terms of Service for AGame.AutoTrader.com [Doc. 23-10].

Consumer Site Visitor Agreement [Doc. 23-7] at 3. According to B&Z, this paragraph demonstrates that the Consumer Site Visitor Agreement as a whole "only applies to 'private seller[s]' and does not apply to 'motor vehicle dealer[s]' or 'owner[s], employee[s], or representative[s] of a dealer' advertising automobiles for sale through AutoTrader." Def.'s Mem. at 13.

But B&Z's argument is only plausible if the above passage is read in isolation; in fact, the plain language of the Consumer Site Visitor Agreement contradicts any claim that dealer customers are excluded from its coverage. Indeed, the first paragraph of the Consumer Site Visitor Agreement sets forth a broad definition of "visitor" as *any* user of Autotrader's "products and services"—a category that necessarily includes dealer customers: "In this Visitor Agreement, the terms 'Autotrader,' 'we,' 'us,' and 'our' refer to Autotrader.com, Inc. and the terms 'you' and 'your' refer to you as a user of our websites, mobile and other online applications and products and services (collectively, the 'Autotrader Sites')." Consumer Site Visitor Agreement at 2. Similarly, the agreement's next paragraph provides that any visitor who accesses "any features or services" associated with the Autotrader sites "in any manner" is subject to the Consumer Site Visitor Agreement:

> By using the Autotrader Sites, you accept the terms of this Visitor Agreement. This is a legally binding agreement between you and Autotrader . . . . When using the Autotrader Sites, you may be subject to other posted terms and guidelines applicable to certain services available on or through the Autotrader Sites. All terms and guidelines on the Autotrader Sites, including our Privacy Statement, are part of this Visitor Agreement and incorporated herein by reference. Unless explicitly stated otherwise, any features or services available at any time on the Autotrader Sites are subject to this Visitor Agreement. Accessing the Autotrader Sites in any manner, even through automated means, constitutes your use of the Autotrader Sites and your agreement to be bound by this Visitor Agreement.

Id. (emphasis added). Furthermore, the arbitration provision in the Consumer Site Visitor Agreement includes "billing disputes," a service that (as Autotrader points out in its reply) is applicable only to dealer customers.[5] Id. at 12; Def.'s Reply Mem. in Supp. of Mot. to Dismiss [Doc. 24] ("Def.'s Reply") at 5-6; see Albrecht Decl. ¶ 7 (explaining that Autotrader's dealer customers are "billed monthly" for their advertising subscriptions). In light of the foregoing language, it is plain that the Consumer Site Visitor Agreement applies to Autotrader's dealer customers as well as private users.

B&Z next argues that the Consumer Site Visitor Agreement is not incorporated by reference in the ARAs and, alternatively, any reference to that agreement in the ARAs is too vague for it to be effective under Georgia law. Pl.'s

[5] By contrast, Autotrader's private sellers are not billed. Instead, they "are subject to a one-time, upfront charge for listing their vehicles." Albrecht Decl. ¶ 2.

Mem. at 21-25. See, e.g., Williams Tile & Marble Co. v. Ra-Lin & Assoc., 206 Ga. App. 750, 750 (1992) ("Incorporation by reference in [a] contract is generally effective to accomplish its intended purpose where the provisions to which reference is made have a reasonably clear and ascertainable meaning.") (quoting Pittsburgh Plate Glass Co. v. American Sur. Co. of N.Y., 66 Ga. App. 805, 813 (1942) (alterations in original)). However, while B&Z maintains that the ARAs' "vague reference to 'visitor agreements' on 'applicable sites' does not sufficiently identify the document incorporated by reference," it fails to rebut the fact that the clear language contained in following two provisions of the ARA incorporates by reference the Consumer Site Visitor Agreement:

> AutoTrader.com, Inc. ("AutoTrader.com") . . . and the dealership identified above ("Advertiser") desire to enter into a relationship under which ATC [AutoTrader.com] may create and/or display Advertiser's listings and other advertisements . . . on the website(s) identified on the Sales Order(s) (defined below) and, if applicable, on other websites, and/or distribute such Advertisements through various media platforms (e.g., television, radio, print, wireless, etc.) (collectively, "Other Media Platforms") owned or controlled by ATC and/or third parties from time to time (collectively, the "Sites"). The Sites may include, without limitation, AutoTrader.com, AutoTraderClassics.com, and KBB.com. This Advertiser Relationship Agreement ("Agreement") sets out the terms and conditions of this relationship and applies to all Advertisements created by or on behalf of Advertiser through the Sites and/or displayed or to be displayed on the Sites and to any other services that ATC provide to Advertiser or arranges for Advertiser to receive.
>
> . . .

> Advertiser represents and warrants that it has read and agrees to the visitor agreement (sometimes referred to as "terms of use," "terms and conditions," or "terms of service") posted on each applicable Site (collectively, the "Visitor Agreements"). Advertiser . . . agrees that, by continuing to place Advertisements on a Site following the posting of any changes to the applicable Visitor Agreement, Advertiser agrees to be bound by the Visitor Agreement, as modified.

ARA at 2, 3 (emphasis added). Based on the plain language of these provisions, by its placement of advertisements on Autotrader's consumer website, B&Z agreed to the visitor agreement on "each applicable site," including the Consumer Site Visitor Agreement.[6]

B&Z also argues that the arbitration clause in the Consumer Site Visitor Agreement conflicts with the forum selection clause in the Dealer Site Visitor

[6] In a footnote, B&Z also argues that, by including the incorporation by reference provision in a paragraph titled "Advertiser Representations/Indemnification," the ARAs incorporated other visitor agreements "only for the purpose of incorporating the representations and warranties language in the visitor agreement." Pl.'s Mem. at 17 n.16 (quoting ARA at 3). But B&Z has provided the Court with no additional evidence in support of its theory, which is otherwise unsupported by the ARAs' plain text. See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995) (holding that clear contractual language governs the interpretation of arbitration agreements); Cruz v. Revelex Corp., No. 1:10-CV-24264-PAS, 2011 WL 1930482, at *2 (S.D. Fla. May 19, 2011) ("[T]he plain language of the agreement is the best evidence of the parties' intent.").

Agreement.[7] Pl.'s Mem. at 16-17. However, other courts have rejected this argument under analogous circumstances. In Patten Sec. Corp. v. Diamond Greyhound & Genetics, Inc., 819 F.2d 400 (3d Cir. 1987), abrogated on other grounds by Gulfstream Aerospace Corp v. Mayacamas Corp., 485 U.S. 271, 287 (1988), the Third Circuit addressed a situation in which the parties signed a contract containing an arbitration agreement, then later signed an agreement containing a forum selection clause which provided as follows:

> This Agreement shall be governed by and construed and enforced in accordance with the internal laws of the State of New Jersey, and the Company hereby consents and will submit to the jurisdiction of the courts of the State of New Jersey and of any federal court sitting in the State of New Jersey with respect to controversies arising under this Agreement.

Id. at 407 n.3. Although the plaintiff argued that the forum selection clause should override the earlier arbitration agreement, the court disagreed, explaining:

> Conspicuously absent from the forum selection clause in the underwriting agreement is any reference to arbitration whatsoever. When Patten drafted the forum selection clause it could have made a reference to arbitration in the clause if it sought to have Diamond waive NASD arbitration by signing the Underwriting Agreement. A party signing a waiver must know what rights it is waiving. By agreeing to submit to the jurisdiction of the State and Federal Courts of New Jersey, Diamond knew it was waiving its right to attack the maintenance of personal jurisdiction over it by the New Jersey courts

[7] A nearly identical forum selection clause also appears in the ARAs, see, e.g., ARA at 3, as well as in the Consumer Site Visitor Agreement, see Consumer Site Visitor Agreement at 15.

> or to resort to courts elsewhere. It cannot be said that Diamond also knew that it was waiving its right to the contractual remedy of arbitration, since any reference thereto is absent. The clause is therefore at least ambiguous. It makes no reference to NASD arbitration and merely states the agreement of both parties to accept the maintenance of personal jurisdiction by New Jersey courts should Patten bring suit there to settle a controversy arising under the agreement.
>
> Furthermore, there is nothing inconsistent between [an] arbitration obligation and . . . forum selection clause. Both can be given effect, for arbitration awards are not self enforceable. They may only be enforced by subsequent judicial action. Thus, even if arbitration is completed, the forum selection clause would appear to dictate the location of any action to enforce the award.

Id. at 407; see also Bank Julius Baer & Co. v. Waxfield Ltd., 424 F.3d 278, 284-85 (2d Cir. 2005) (applying Patten, and concluding that a similar arbitration agreement and forum selection clause were complementary), abrogated on other grounds by Granite Rock, 561 U.S. at 287; Americas Ins. Co. v. Moreno, No. 15-3696, 2015 WL 7458610, at *2 (E.D. La. Nov. 24, 2015) (finding that forum selection clause was complementary to arbitration provision and did not explicitly exclude arbitration); Paradigm Sol'ns Grp, Inc. v. Shanghai Prevision Tech. Corp., No. 15-CV-539 JLS (JLB), 2015 WL 3466017, at *3 (S.D. Cal. June 1, 2015)

(same); Glen Martin Eng'g, Inc. v. Huawei Technologies Jamaica Co., No. 09-4083-CV-C-NKL, 2010 WL 318504, at *3 (W.D. Mo. Jan. 10, 2010) (same).[8]

The Court finds Patten's reasoning equally applicable here. The forum selection clause in the Dealer Site Visitor Agreement can be understood as complementary to the agreement to arbitrate: the former merely requires B&Z to submit to Georgia's courts. As the Second Circuit concluded in Bank Julius, which involved an agreement to arbitrate between the Bank and Waxfield that also included a forum selection clause, the two clauses should be read:

> in such a way that the Bank and Waxfield required to arbitrate their disputes, but that to the extent that the Bank files a suit in court in a court in New York—for example, to enforce an arbitral award, or to challenge the validity or application of the arbitration agreement—Waxfield will not challenge either jurisdiction or venue.

Bank Julius, 424 F.3d at 285 (applying Patten). Furthermore, to the extent the forum selection clause here makes no mention of arbitration and is therefore ambiguous, "any doubts concerning the scope of arbitrable issues should be

[8] In Energetics, Inc. v. NewOak Capital Markets, LLC, 645 F.3d 522 (2d Cir. 2011), the Second Circuit was faced with two similar agreements, one containing an arbitration clause and the second an exclusive forum selection clause. However, that case is distinguishable because the agreement containing the forum selection clause: (1) was signed after the agreement containing the arbitration clause, thus superseding it; (2) omitted any mention of the arbitration clause contained in the earlier agreement; and (3) included a merger clause. Id. at 525-26.

resolved in favor of arbitration." Dasher, 745 F.3d at 1115-16; see also Bazemore, 827 F.3d at1329.

Accordingly, the Court concludes that the Consumer Site Visitor Agreement is part of the agreement between B&Z and Autotrader.

B. Whether B&Z Agreed to the 2014 Modification of the Visitor Agreement to Include an Arbitration Clause

As noted above, the ARAs include a "unilateral modification clause." The clause provides: "Advertiser understands that any of the Sites may change its Visitor Agreement from time to time and agrees that, by continuing to place Advertisements on a Site following the posting of any changes to the applicable Visitor Agreement, Advertiser agrees to be bound by the Visitor Agreement, as modified." ARA at 3. In its response, B&Z argues that this clause was insufficient to put it on notice when Autotrader added an arbitration clause to the Consumer Site Visitor Agreement in 2014, and that the clause is therefore unenforceable. Def.'s Mem. at 26.

The Eleventh Circuit has rejected this argument. In Pendergast v. Spring Nextel Corp., 592 F.3d 1119 (11th Cir. 2010), the court found a functionally identical "Changes to Agreement" clause[9] in a phone contract to be enforceable

[9] The clause provided:

despite the plaintiff's claim that the clause deprived him of notice, violated state law, and was substantively unconscionable. Id. at 1142. Applying Florida state law, the Court explained:

> Florida law permits contract modifications if there is consent and a meeting of the minds of the initial contracting parties. Plaintiff does not dispute Sprint's contention that its "changes to agreement" clause was agreed to in the initial terms of Plaintiff's contract (in 2001 and 2005) and was fully supported by consideration at that time. Furthermore, Sprint's right to modify the Terms and Conditions was dependent on Plaintiff's agreeing to the modifications by, *inter alia*, using his phone or making a payment, and Plaintiff was permitted to cancel his service within 30 days of the change if he did not desire to accept the changes.

Id. (internal citation omitted); see also Pendergast v. Sprint Nextel Corp., 691 F.3d 1224, 1234 n.11 (11th Cir. 2012) (affirming this conclusion in a subsequent decision, and noting further that "[t]he changes-to-agreement clause was supported by consideration and consent, and . . . is not substantively unconscionable.").

> Changes to Agreement. We may change this Agreement at any time (but see Service Plan). Any changes to the Terms are effective when we publish the revised Terms. If you use our Services or make any payment to us on or after the effective date of the changes, you accept the changes. If you do not accept the changes, you may terminate Services (but see Termination and Changing Service Plans). For purposes of the Agreement, "use" includes keeping the right to access the Sprint PCS Network by not terminating Services. You may not modify the Agreement except for your Service Plan (see Termination and Changing Service Plans).

Id. at 1122.

The same reasoning applies here: B&Z does not dispute that the above "unilateral modification clause" was agreed to in the terms of the ARA, nor does it argue that the ARAs were unsupported by valid consideration. Likewise, Autotrader's right to modify its various visitor agreements was dependent on B&Z's agreement to the modifications, which B&Z manifested by continuing to post advertisements on the Autotrader site. Furthermore, although Pendergast relied in part on the application of Florida law, Georgia law also provides that a party may assent to a contractual provision, including an arbitration clause, by continuing to use another party's service. See, e.g., Honig v. Comcast of Ga. I, LLC, 537 F. Supp. 2d 1277, 1283-84 (N.D. Ga. 2008) ("[U]nder well established Georgia law . . . valid contracts, including contracts containing arbitration clauses, may be formed by a party's continued use or acceptance of services without objection.") (citing Athon v. Direct Merchants Bank, No. 5:06-cv-1, 2007 WL 1100477, at *4 (M.D. Ga. Apr. 11, 2007) ("[U]nder Georgia law, the parties to an arbitration agreement may demonstrate their assent to be bound by the agreement by acting upon or accepting benefits under the contract containing the arbitration agreement")).

Accordingly, the Court finds that the "unilateral modification clause" at issue here was binding on B&Z.[10]

C. Whether the Underlying Dispute is Within the Scope of the Arbitration Clause

Next, B&Z argues the Consumer Site Visitor Agreement's arbitration clause does not apply to B&Z's claims arising prior to the agreement's modification in June 2014 (when the arbitration clause was added).[11] Def.'s Mem. at 21. B&Z relies on the following language from the agreement:

> Autotrader may change the terms of this Visitor Agreement from time to time and will revise the effective date when it does so. Your continued use of the Autotrader Sites after the posted effective date constitutes your agreement to be bound by this Visitor Agreement as modified, except that modifications do not apply to any dispute arising prior to their effective date.

Consumer Site Visitor Agreement at 2 (emphasis added).

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[10] B&Z also seeks to analogize this clause to so-called "browsewrap agreements," pursuant to which parties are alleged to have agreed to a website's terms and conditions merely by use of the website. Def.'s Mem. at 19-20; see, e.g., Hines v. Overstock.com, Inc., 668 F. Supp. 2d 362, 366-67 (E.D.N.Y. 2009) ("[A browsewrap agreement] does not require the user to manifest assent to the terms and conditions expressly . . . . A party instead gives his assent simply by using the website.") (quoting Sw. Airlines Co. v. BoardFirst, L.L.C., No. 06-CV-0891-B, 2007 WL 4823761, at *4 (N.D. Tex. Sept. 12, 2007)). However, because the parties here signed a written contract that included the unilateral modification provision, B&Z's arguments concerning browsewrap agreements are inapposite.

[11] However, B&Z fails to specify which—if any—of its claims arose prior to this date.

The Consumer Site Visitor Agreement does not define the word "dispute," and therefore does not resolve the question of whether that word refers to claims arising from *conduct* prior to June 2014 or from an actual *dispute*—i.e., when B&Z first asserted its legal claims in October 2015. However, faced with a similar question in Krumme v. WestPoint Stevens Inc., 238 F.3d 133 (2d Cir. 2000), the Second Circuit concluded:

> A dispute is defined as a "conflict or controversy," "an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other," or "the subject of litigation." Black's Law Dictionary 472 (6th ed. unabridged 1990). A circumstance (such as a dispute) "arises" when it "spring [s] up, originate[s], . . . [or] come[s] into being." Id. at 108. Similarly, Webster's defines a "dispute" as a "verbal controversy," "strife by opposing argument or expression of opposing views or claims," or a "quarrel." Webster's Third New International Dictionary 655 (3d ed.1993). A dispute "arises" when it "comes about" or "takes place." See id. at 117. Therefore, if a conflict, controversy or competing assertion of rights took place between [defendant] and the plaintiffs prior to the April 5, 1989 change of control, the plaintiffs are not entitled to recover attorneys' fees under the fee-shifting provision.

Id. at 140; see also Mayfield v. Comcast Cable Comm'n Mgmt., LLC, No. 1:15-CV-483-CAP, 2015 WL 10173611, at *2 (N.D. Ga. June 19, 2015) ("When an arbitration provision is not limited to disputes arising out of the contract, 'it is entirely irrelevant that the [actions] challenged by [a] plaintiff occurred prior to the execution of the arbitration agreement . . . .'") (quoting Realco Enterprises, Inc. v.

Merrill Lynch, Pierce, Fenner & Smith Inc., 738 F.Supp. 515, 517 (S.D. Ga. 1990) (alterations in original)).

The Court finds that any "dispute" between Autotrader and B&Z arose at the time B&Z filed its initial complaint in October 2015. Although the passage above does not foreclose the possibility that a dispute can arise prior to the filing of a formal legal complaint, the record here does not indicate—nor does B&Z now point to—any instance of "verbal controversy," "strife by opposing argument," or "quarrels" between the parties prior to B&Z's initiation of legal action in October 2015. See Krumme, 238 F.3d at 140.

Accordingly, the Court finds that the arbitration clause here applies to all of B&Z's claims.

D. Whether Autotrader Has Waived or Is Estopped From Invoking the Arbitration Clause

Last, B&Z argues that Autotrader has waived and/or should be estopped from invoking the arbitration clause in this case. Def.'s Mem. at 22-23. B&Z notes that, after it initially filed this case in the Eastern District of New York in October 2015, Autotrader represented to the New York court that B&Z's claims were subject to the forum selection clause discussed above. See Letter from Autotrader to Hon. Joseph F. Bianco [Doc. 20-19] at 2-4. B&Z argues that "[b]y telling the New York court and Plaintiff that Plaintiff's claim was subject to

exclusive jurisdiction and venue in Georgia, it created an obligation to also disclose that Plaintiff's claims were purportedly subject to arbitration, since . . . such arbitration divests the Georgia court of jurisdiction over Plaintiff's claim." Def.'s Mem. at 23. B&Z further argues that it detrimentally relied upon, and was therefore prejudiced by, Autotrader's representations. Id.

> Estoppel prevents a party from raising a claim or taking a legal position when his conduct with regard to that claim is contrary to his position . . . [and] requires (1) words, acts, conduct, or acquiescence causing another to believe in the existence of a certain state of things; (2) willfulness or negligence with regard to the acts, conduct, or acquiescence; and (3) detrimental reliance by the other party upon the state of things so indicated.

Sidman v. Travelers Cas. & Sur., 841 F.3d 1197, 1204 n.10 (11th Cir. 2016) (quoting Matter of Garfinkle, 672 F.2d 1340, 1346-47 (11th Cir. 1982)). "Silence or acquiescence may be sufficient conduct to create an estoppel if under the circumstances there was both a duty and opportunity to speak." Id.

There is no indication in the record that, merely by invoking the ARAs' forum selection clause, Autotrader led B&Z to believe that it would not litigate the arbitration clause at issue here—nor does B&Z provide any support for its claim that Autotrader had an "obligation to . . . disclose" that its claims were arguably subject to arbitration. Indeed, were this Court to embrace B&Z's reasoning, it would have the effect of requiring defendants to make the absurd choice between

(1) moving to compel arbitration in a contractually proscribed forum or (2) relinquishing the right to arbitrate entirely. Additionally, any claim of prejudice or detrimental reliance here is also limited by the fact that B&Z voluntarily dismissed this suit, and has so far been obliged to do little more than re-file its Complaint in this district.

The Court therefore declines to find that Autotrader has waived and/or should be estopped from invoking the arbitration clause here.

III. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** that Defendant Autotrader.com, Inc.'s Motion to Dismiss or Stay and to Compel Arbitration [Doc. 20] is **GRANTED**.

It is further **ORDERED** that this action is **STAYED** and shall be **ADMINISTRATIVELY CLOSED** pending completion of arbitration pursuant to the terms of the arbitration provision in this case. The parties shall notify the Court upon completion of arbitration, and either party shall have the right to move to reopen this case to resolve any remaining issues of contention.

IT IS SO ORDERED this 13th day of March, 2017.

MARK H. COHEN
United States District Judge