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Plaintiffs Firms Feud Over 23andMe Suits

Marisa Kendall, The Recorder

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SAN FRANCISCO — Technically, they're on the same side.

But instead of skirmishing with the defense, plaintiffs attorneys in a spate of suits targeting genetic testing company 23andMe Inc. are facing off against each other.

The firms are filing dueling motions, fighting to steer the litigation, and excluding each other from mediation talks, in a case some attorneys have called a mess, others a soap opera.

Plaintiffs attorneys agree that customers who purchased 23andMe DNA testing kits are entitled to compensation after the U.S. Food and Drug Administration found claims the company made about the kits' medical benefits were unverified. The attorneys' sniping centers around another question: Are 23andMe's customers bound by an enforceable arbitration clause?

Although that typically would set off a showdown between plaintiffs and defense lawyers, here the battle lines are far more murky. One group of plaintiffs firms, led by Burlingame's Cotchett, Pitre & McCarthy, has filed a class arbitration complaint with the American Arbitration Association, a tactic another faction is seeking to block. A third group seems to be hedging its bets, filing three separate federal suits and lodging its own complaint with the AAA.

Already a slate of attorneys has filed a motion to be appointed interim lead counsel—an aggressive move in a consumer class action, where attorneys say the role is usually determined by an informal consensus. Others are likely to make a grab for the role as well.

While plaintiffs firms bicker, the defense is rolling its eyes.

"This is about the plaintiffs firms jockeying for position, trying to get control of the case," said 23andMe attorney James Kramer, chairman of Orrick, Herrington & Sutcliffe's securities litigation and regulatory enforcement group. "At the end of the day, it's not a good use of time and effort to engage in this approach."

Defense lawyers are scheduled to meet with plaintiffs in June for an initial mediation session. But according to recent case filings, only attorneys in favor of arbitration are invited.

Mark Ankcorn of the Ankcorn Law Firm in San Diego, one of the lawyers adamantly opposed to

arbitration, is not on the list. He suspects the defense is picking and choosing from which plaintiffs it might get the best settlement.

"They're selecting their dance partner," Ankcorn said.

Kramer declined to comment on the pending mediation.

Ankcorn's firm, along with San Diego's Casey Gerry Schenk Francavilla Blatt & Penfield, has filed a motion to be interim class counsel. Such an appointment is necessary, they say, "to protect the rights of the class due to conflicting approaches to the case taken by counsel so far" and potential conflicts of interest between lawyers pursuing arbitration and the class.

The court can expect at least one more grab at lead counsel from San Francisco's Finkelstein Thompson and Los Angeles-based Glancy Binkow & Goldberg and the Alexander Firm. The Finkelstein Thompson group is also against arbitrating the case.

STRATEGIC DIFFERENCES

The FDA demanded 23andMe stop marketing its saliva-collection kits last year, saying the company failed to validate their accuracy and had not addressed the potential risk of customers trying to self-manage predicted diseases. The company responded by changing its marketing and test results to focus on ancestry instead of health. That didn't stop nine class actions filed by customers across the country accusing 23andMe of false advertising, unfair competition and breach of warranty.

Most of the cases have been transferred to U.S. District Judge Lucy Koh in San Jose federal court, but plaintiffs attorneys are making their consolidation difficult.

On April 10, Ankcorn's team filed a motion for a temporary restraining order and preliminary injunction blocking two parallel arbitration proceedings against 23andMe.

The arbitration language in 23andMe's user agreement is unconscionable and unenforceable, the lawyers argue, and any decision otherwise by the AAA "would ignite chaotic wrangling over its effect [on] all unnamed class members." The plaintiffs firms seeking arbitration are "shooting for a private resolution" at the expense of the class, the motion states.

"It mystifies me why they're going ahead with class arbitration," Ankcorn said. "I can't figure out where the advantage is. I truly can't."

23andMe requires customers to agree to an arbitration clause before signing up online to process their DNA test results, but not before purchasing the test. That's an important distinction, Ankcorn said, and it means plaintiffs have a good shot at getting the arbitration agreement thrown out.

"It's one of the least enforceable clauses I've seen," Ankcorn said.

But Cotchett Pitre principal Matthew Edling, whose firm filed a class arbitration complaint with the AAA in December, says the arbitration agreement is ironclad.

"There is no basis for any plaintiffs to have filed in court," Edling said. "Frankly, I wish that there

wasn't an arbitration clause and we didn't have to file in AAA."

Koh scheduled a case management conference for Wednesday, and has asked counsel to come prepared to discuss consolidation.

Plaintiffs firms Cuneo Gilbert & LaDuca and Lockridge Grindal Nauen have tried to cover all angles. The group has two complaints pending in San Jose federal court, one in Boston and is also pursuing arbitration. They're asking Koh to hold off ruling on any motions pending the June mediation.

'PICK YOUR POISON'

The fight between plaintiffs attorneys is a symptom of an utter rearranging of the consumer class action landscape, according to Joshua Davis, associate dean of academic affairs and director of the Center for Law and Ethics at the University of San Francisco School of Law.

As more companies require customers to sign arbitration agreements—and more courts uphold those agreements—it's become exceedingly difficult to argue against their enforcement, Davis said.

"You may see fewer of these battles because it doesn't make sense to battle for control of a sinking ship," he said.

In that context, Cotchett's arbitration filing might be a creative strategy to "pick your poison," Davis said. The firm may have decided to submit to alternative dispute resolution and then put its formidable strength behind a battle for classwide resolution.

23andMe's arbitration agreement has no class ban, which could make an arbitrator more likely to approve the class claim and put plaintiffs on track to receiving a meaningful settlement, noted Leslie Bailey, staff attorney with Public Justice in Oakland. "That's probably why the lawyers who filed a class action complaint in AAA did what they did," she said.

23andMe has, not surprisingly, filed its own motion to compel arbitration. Orrick's Kramer says the company's position is bolstered by the acquiescence of several plaintiffs firms to arbitration proceedings. In fact, firms that are pursuing arbitration have waived their right to resist, the defense contends.

"Plaintiff's counsel are obviously in no position to contest the existence or validity of the arbitration agreement," Orrick attorneys wrote in the motion.

As a plaintiffs attorney, this is the first time Cotchett Pitre's Edling has sided with defense counsel that favor arbitration. It's not a switch he's thrilled about.

"There's no doubt in my mind that courts of law are better for parties on both sides of the law," Edling said.

But he added: "It's getting harder and harder to find a basis by which to invalidate the arbitration clause."

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