23andMe ADR Clause Passes Muster With Koh

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SAN FRANCISCO — Consumers suing 23andMe Inc. for false advertising won't be able to wiggle out of an arbitration agreement contained in the terms of service on the company's website.

U.S. District Judge Lucy Koh on Wednesday granted the DNA testing company's motion to compel arbitration and dismissed suits that had been consolidated in her courtroom.

In reaching her conclusions, Koh applied an expanding body of law pertaining to the various forms of Internet-based contracts, sometimes described as "shrinkwrap," "clickwrap" and "browsewrap" agreements, depending on how the terms are displayed and whether users give affirmative assent.

Plaintiffs had pushed Koh to set aside the arbitration clause in 23andMe's terms of service, arguing the contract was not clearly presented to customers when they purchased the testing kits from 23andMe. By the time customers were presented with the terms of service—and the arbitration language in its final section—they had already forked over $99.

Koh agreed to a point. However, she concluded that each name plaintiff had later knowingly entered the agreement when they created accounts or registered their DNA testing kits.

"In exchange for clicking 'I ACCEPT,' customers received the health and ancestry results from their DNA samples. Accordingly, plaintiffs received sufficient consideration for agreeing" to the terms of service, Koh stated.

Plaintiffs attorneys had themselves been split over the agreement. Interim class counsel Mark Ankcorn, who wanted the claims litigated in district court, said he was surprised by Koh's ruling.

"The terms that the defendant had selected and wrote into the contract, we thought were just horribly skewed in their favor and horribly unconscionable," Ankcorn said. "There were a lot of things we thought, quite honestly, would have given Judge Koh a lot more pause than it seemed to."

But Matthew Edling of Cotchett, Pitre & McCarthy, whose firm is seeking to represent a class of 23andMe consumers in arbitration, said Koh reached the same conclusion as his firm's attorneys

that the agreement was binding. "The case that my firm filed, which is the lead arbitration case, will continue as the operative case on behalf of all class members," Edling said.

23andMe lawyer James Kramer of Orrick, Herrington & Sutcliffe was out of the office Thursday and could not be reached for comment.

A spate of consumer suits followed last year's warning letter from the U.S. Food and Drug Administration insisting 23andMe stop marketing its DNA kits for health-related purposes. Orrick filed a motion in April to compel arbitration.

The defense position was hardly a slam dunk.

Koh sided with plaintiffs that 23andMe's arbitration clause was procedurally unconscionable. The company did not plainly reveal its terms of service until after customers purchased the DNA testing kits—a practice she called "unfair." Furthermore, Koh noted the arbitration provision was buried at the end of the document and written in legalese that would have required customers without legal training to review the rules of the American Arbitration Association to find any objectionable provisions.

"This opaque arrangement undermines 23andMe's characterization of the arbitration provision as 'not hidden or difficult to understand,'" Koh wrote.

But Koh found the agreement did not meet the second prong for overall unconscionability because it was not overly harsh or one-sided. She disagreed with the assertion from plaintiffs lawyers that requiring customers to pursue claims in San Francisco and to pay a $975 filing fee imposed too heavy a burden.

By dismissing the suits, Koh cleared a path for plaintiffs to appeal—an option Ankcorn said his team was considering.

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