

23andMe ADR Clause Passes Muster With Koh

The Recorder

07.26.2014

Practice Areas

Consumer Protection Class
Actions

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.

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Plaintiffs attorneys had themselves been split over the agreement. Interim class counsel Mark Ankorn, 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," Ankorn 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.