No. 11-16933

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADKNOWLEDGE, INC., d/b/a Super
Rewards and KITN MEDIA USA, INC.,
d/b/a Super Rewards,
Appellants - Defendants,
v.
REBECCA SWIFT, on behalf of herself &
all others similarly situated,
Respondent - Plaintiff.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
(Hon. Elizabeth D. Laporte, United States Magistrate Judge)
No. 4:09-CV-05443 EDL

OPENING BRIEF OF APPELLANTS ADKNOWLEDGE, INC. AND KITN MEDIA USA, INC.

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REQUEST FOR ORAL ARGUMENT

Appellants Adknowledge, Inc. and KITN Media USA, Inc. request oral argument in this matter.

CORPORATE DISCLOSURE STATEMENT

Adknowledge, Inc. has no parent corporation. No publicly held corporation owns 10% or more of its stock. KITN Media USA, Inc. is a subsidiary of Adknowledge, Inc. No publicly held corporation owns 10% or more of its stock.

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I. JURISDICTIONAL STATEMENT

A. Jurisdiction in the district court

On November 17, 2009, Appellee Rebecca Swift filed her action in the United States District Court for the Northern District of California against Zynga Game Network, Inc. and Facebook, Inc. ER 144 (Dkt. No. 1).[1] Swift alleged three causes of action for (1) violation of California's Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq*.), (2) violation of the Consumer's Legal Remedies Act (Cal. Civil Code § 1761 *et seq*.), and (3) unjust enrichment. *Id.*

On February 10, 2010, Swift filed a first amended complaint ("Complaint"), and added Adknowledge, Inc. and KITN Media USA, Inc. as defendants. ER 124 (Dkt. No. 13.) She alleged the same three claims against all defendants. *Id.*

In the Complaint, Swift indicates that she seeks to certify a nationwide class consisting of individuals who reside in all 50 states. ER 130 (Dkt. No. 13 at ¶ 22). Swift notes that Zynga, Adknowledge, and KITN are Delaware corporations with their principal place of business in San Francisco

[1] Citations to the record refer to Adknowledge's Excerpts of Record pursuant to Circuit Rule 30-1; a parallel citation to the document's docket number is also included for the Court's convenience.

(California), Kansas City (Missouri), and Santa Monica (California), respectively. ER 131 (Dkt. No. 13 at ¶¶ 27-29). Swift alleges that diversity can be found because, under 28 U.S.C. § 1332(d)(2)(A), a member of the class of Plaintiffs is a citizen of a state different from one of the Defendants. *Id.* She further alleges that no exceptions to jurisdiction under 28 U.S.C. § 1332(d) apply. *Id.* Accordingly, the District Court had diversity jurisdiction under 28 U.S.C. § 1332(d). *Id.*

B. Jurisdiction in the appellate court

After Swift filed her lawsuit, Zynga moved to compel arbitration. ER 86 (Dkt. No. 54). Zynga argued that Swift's causes of action related to a contract that required Swift to agree "that any suit, action or proceeding arising out of or relating to these Terms of Use or any transactions contemplated herein . . . shall be resolved solely by binding arbitration before a sole arbitrator under the rules and regulations of the American Arbitration Association ('AAA')." ER 92 (Dkt. No. 54 at 3:7-12).

Appellants Adknowledge, Inc. and KITN Media USA, Inc. (together, "Adknowledge") filed a joinder to Zynga's motion to compel because Swift's claims against them arose out of and were related to the same contract or transactions that it contemplated. ER 30 (Dkt. No. 57).

On August 4, 2011, after Adknowledge joined in Zynga's motion, the district court entered its "Order Granting Zynga's Motion to Compel Arbitration; Granting in Part and Denying in Part Other Defendants' Parallel Motion to Stay …" ("Order") .[2] ER 1 (Dkt. No. 94). The Order granted Zynga's request to compel arbitration of Swift's claims against Zynga based on the arbitration clause. Id. But the Order denied Adknowledge's request to compel arbitration of Swift's claims against Adknowledge under the same clause even though Swift alleged the same facts and claims against Adknowledge that she alleged against Zynga. ER 2 (Dkt. No. 94 at 2:13-19). The district court reasoned that Adknowledge could not enforce the arbitration clause in the contract because only Swift and Zynga were its signatories. ER 16 (Dkt. No. 94 at 16:18-20).

Adknowledge now seeks review of the district court's Order because the same arbitration clause that required Swift to arbitrate against Zynga applies to her claims against Adknowledge. The Ninth Circuit has jurisdiction under the Federal Arbitration Act (the "Act"), 9 U.S.C. §

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[2] The Order also "Den[ied] as Moot: (1) Motion to Compel Discovery, (2) Motion to Hear Cross-Motion to Stay Discovery on Shortened Time, (3) Motion to Stay Discovery; [and] Grant[ed] Motion to Seal" which are not issues on appeal.

16(a)(3) which provides that "An appeal may be taken from…a final decision with respect to an arbitration that is subject to this title." The Act governs arbitration-agreement enforcement in contracts involving interstate commerce. 9 U.S.C. § 1 *et seq.; Preston v. Ferrer,* 552 U.S. 346, 353 (2008). A transaction occurring over the Internet is by its very nature interstate commerce. *U.S. v. Sutcliffe,* 505 F.3d 944, 953 (9th Cir. 2007). So the Act applies to the question about whether Swift must arbitrate.

On August 10, 2011, Appellants timely filed their Notice of Appeal under FED. R. APP. P. 4(a)(1)(A). ER 18 (Dkt. No. 102).

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Equitable estoppel allows a nonsignatory to an arbitration clause to compel arbitration when the plaintiff/signatory alleges substantially interdependent and concerted misconduct by both the defendant/nonsignatory and another signatory. Plaintiff Swift, a signatory, alleges that nonsignatory Adknowledge and signatory Zynga acted in concert as co-conspirators and partners to cause her harm. Should the Court apply equitable estoppel and permit Adknowledge to compel arbitration?

2. A nonsignatory is a third-party beneficiary to a contract when the contracting parties intend a material benefit to the third party. The

Agreement provides limited liability to parties like Adknowledge. It also required Swift to accept Adknowledge content "as is" and at her "sole risk" when she entered into the Agreement. Should this Court allow Adknowledge to enforce the arbitration clause as a third-party beneficiary?

3. Under Delaware law, when a court finds that signatories to a contract have agreed to arbitrate but that a nonsignatory's right to enforce that clause is questionable, an arbitrator should decide the issue. The lower court found that Swift agreed to arbitrate her claims against Zynga under the Agreement. Should the Court send this case to an arbitrator to decide any question about whether Adknowledge is entitled to enforce the arbitration clause?

III. STATEMENT REGARDING ADDENDUM

Appellants have provided a separate addendum with relevant statutes.

IV. STATEMENT OF THE CASE

Plaintiff Rebecca Swift alleges that she played a game called "YoVille" on defendant Zynga's website.[3] In order to play the game, she entered into

[3] In the same order that Adknowledge appeals here, the district court dismissed Zynga on a motion to compel arbitration. ER _____ (Dkt. No. 94 at 2:1-12.)

the YoVille Agreement. ER 36-37 (Dkt. No. 55 at ¶¶ 2-4, Ex. A.) She claims that while playing the game she participated in a "risk-free Green Tea Purity Trial" that caused her harm. ER 133 (Dkt. No. 13 at ¶ 38). Swift claims that Zynga induced her to participate by promising her virtual in-game currency that she could use in the YoVille game. Id.

Swift claims that the Green Tea offer was one of many "Integrated Special Offer Transactions" or "ISOTs" that Adknowledge and Zynga "created and developed" together. ER 3 (Dkt. No. 13 at ¶ 6). She alleges that she suffered damages arising out of her participation in ISOTs that she accessed through Zynga's YoVille game. ER 132-133 (Dkt. No. 13 at ¶¶ 37-38). Swift claims that Adknowledge is liable for these ads in Zynga's game as Zynga's agent and business partner who acted in concert with Zynga and on its behalf. Swift alleged three claims against Zynga and Adknowledge for (l) violation of the California Unfair Competition Law ("UCL"); (2) violation of the Consumer Legal Remedies Act ("CLRA"); and (3) unjust enrichment. ER 137-141 (Dkt. No. 13 at ¶¶ 51-74).

On May 5, 2011, Zynga filed a motion to compel arbitration and stay proceedings in the district court. ER 86 (Dkt. No. 54). Zynga argued that Swift had executed the YoVille Agreement binding her to arbitration before

the American Arbitration Association ("AAA") for claims relating to the ISOTs. ER 92 (Dkt. No. 54at 3). Adknowledge filed a joinder in Zynga's motion. ER 30 (Dkt. No. 57). Adknowledge argued that Swift's claims against Adknowledge must also proceed to arbitration because they arose out of the same transaction—the ISOTs and YoVille Agreement—that gave rise to Zynga's right to arbitrate. ER 33-34 (Dkt. No. 57at 4-5). Adknowledge also argued that because Swift alleged in her complaint that Adknowledge was Zynga's agent, partner, and co-conspirator that Adknowledge has standing as an agent and third-party beneficiary to enforce the arbitration clause. ER 32-33 (Dkt. No. 57 at 3-4).

Swift responded to Adknowledge's motion by claiming that Adknowledge was not Zynga's agent. ER 23 (Dkt. No. 66). But Swift did not retract the central argument in her case against Adknowledge — that Adknowledge conspired with Zynga to defraud consumers and worked closely with Zynga to create the ISOTs that are the subject of Swift's complaint. *Compare* ER 124-143 *with* ER 23-29 (Dkts. Nos. 13 and 66).

In its Order dated August 4, 2011 the district court granted Zynga's, but denied Adknowledge's, motion to compel arbitration. ER 1 (Dkt. No. 94). The court held that Adknowledge was not Zynga's agent or third-party

beneficiary. Thus, the court ruled that Adknowledge did not have standing to enforce the arbitration clause. ER 14-16 (Dkt. No. 94 at 14:6-13; 15:26-16:6).

The district court's Order was a final decision concerning Adknowledge's right to arbitrate . ER 1 (Dkt. No. 94). Adknowledge filed a notice of appeal under 9 U.S.C. § 16; and this appeal followed.

V. STATEMENT OF FACTS

A. Swift's complaint alleges that Adknowledge and Zynga acted in concert to injure her by interdependently creating a misleading offer.

Swift alleges in her amended complaint that she participated in certain "'Integrated Special Offer Transactions,' or 'ISOTs'" that Adknowledge and Zynga together created and developed. ER 126 (Dkt. No. 13 at ¶ 6). She alleges damages that arise from her participation in ISOTs that she accessed through Zynga's "YoVille" game on the Internet. ER 132-133 (Dkt. No. 13 at ¶¶ 37-38.) For example, she claims that "[o]n or about June 14, 2009, Mrs. Swift participated in an ISOT for a 'risk-free Green Tea Purity Trial' while playing the game YoVille! that was created and developed by Zynga and [Adknowledge]." Id. Swift claims the Green Tea ISOT was false and misleading, and caused her harm. ER 133-134 (Dkt. No. 13 at ¶¶ 37-41).

Swift alleges that Adknowledge and Zynga (who she defines jointly as "Defendants") conspired to defraud consumers:

- "Defendants have acted in concert to create and develop ISOTs reasonably calculated to deceive persons of ordinary prudence and comprehension, and have used the mails and interstate communication wires in furtherance of their scheme." ER 128 (Dkt. No. 13 at ¶ 14) .

- "… this somewhat complicated structure was specifically created in an attempt to shield Defendants from liability as a result of the deceptive and misleading ISOTs that they developed and created …" ER 127 (Dkt. No. 13 at ¶ 10).

- "Zynga attempted to induce [Swift] to earn virtual in-game currency by accepting ISOTs with Zynga and its business partners, including [Adknowledge]. The Plaintiff was misled by the ISOTs created, developed, and promulgated by the Defendants …" ER 130 (Dkt. No. 13 at ¶ 25).

- "Defendants and other unnamed third parties conspired and combined among themselves to commit the acts complained of herein ..." ER 131 (Dkt. No. 13 at ¶ 30) .

She claims Zynga and Adknowledge jointly presented a "false and misleading" offer to her. ER 128 (Dkt. No. 13 at ¶ 14). She alleges Adknowledge and Zynga "acted in concert" in a "scheme" that was "calculated to deceive" people. Id. She contends Adknowledge and Zynga together "specifically created" a "complicated structure" to shield themselves from liability. ER 127 (Dkt. No. 13 at ¶ 10). She avers that Zynga and Adknowledge are "business partners" who developed misleading advertisements to Swift and others like her. ER 130 (Dkt. No. 13 at ¶ 25).

Swift, resolute in her allegation that Zynga and Adknowledge were

acting in concert, pled that Zynga and Adknowledge were the "agent … seller … representative, partner, joint venturer, alter ego, and related or affiliated entity … on behalf of each …other". ER 131 (Dkt. No. 13 at ¶ 30).

B. The district court relied on Swift's concerted-misconduct allegations in denying Adknowledge's motion to dismiss.

Adknowledge moved to dismiss Swift's claims against it under Fed. R. Civ. P. 12(b)(6) because it is an interactive computer service entitled to immunity under 47 U.S.C. § 230(c). ER 117-123 (Dkt. No. 23 at 8-14). But the district court denied the motion because Swift, in her complaint, adequately pled that Adknowledge was Zynga's partner and co-conspirator. ER 100-101, 109, 111 (Dkt. No. 35 at 2:12-14, 3:13-14, 11:7, 13:15-16). The court noted that Swift pled "Adknowledge and Zynga acted in concert" to create the ISOTs that Swift blames for injuries. ER 100-101, 111 (Dkt. No. 35 at 2:12, 3:14, 13:22). The court cited Swift's allegation "that Adknowledge functioned as a 'buffer' to shield Zynga from liability for offers that Defendants knew were false and misleading." ER 111 (Dkt. No. 35 at 13:26-27). The court only denied Adknowledge's motion because it relied on the allegations in Swift's complaint explaining that, for the purpose of ruling on a motion to dismiss, Swift "has sufficiently identified, at the pleading stage, Adknowledge's role in the alleged fraudulent scheme" as Zynga's agent,

partner, and co-conspirator. ER 112 (Dkt. No. 35 at 14:1-2, 6-7).

C. The YoVille Agreement containing the arbitration clause expressly applies to Zynga's agents.

To play the YoVille game on the Internet, Zynga required Swift to accept its YoVille Terms of Service (the "Agreement") effective when she first played the game in April 2009. ER 36-37, 38-56 (Dkt. No. 55 at ¶¶ 2-4, Ex. A). Zynga amended the YoVille Agreement in May 2009. ER 37, 57-77 (Dkt. No. 55at ¶ 5, Ex. B.) Both versions provide that Swift's obligations under the Agreement extend to not just Zynga, but also to "Zynga Parties" including Zynga's agents and third-party content providers:

> YOU EXPRESSLY AGREE THAT USE OF THE SERVICES IS AT YOUR SOLE RISK AND IS PROVIDED ON AN "AS IS" BASIS . . . . NEITHER ZYNGA NOR ITS AFFILIATES OR SUBSIDIARIES, OR ANY OF THEIR DIRECTORS, EMPLOYEES, AGENTS, ATTORNEYS, THIRD-PARTY CONTENT PROVIDERS, DISTRIBUTORS, LICENSEES OR LICENSORS (COLLECTIVELY, "ZYNGA PARTIES") WARRANT THAT THE SERVICES WILL BE UNINTERRUPTED OR ERROR-FREE . . . .
>
> ALL COMMUNICATION EXPRESSED OR MADE AVAILABLE BY THIRD PARTIES WHATSOEVER . . . . IS SOLELY MADE BY THE RESPECTIVE AUTHOR(S) OR DISTRIBUTOR(S), AND THE ZYNGA PARTIES DO NOT GUARANTEE THE ACCURACY, COMPLETENESS OR USEFULNESS THEREOF . . . . NOR DO THEY MAKE ANY GUARANTEE, ENDORSEMENT OR WARRANTY WITH RESPECT THERETO . . . .

ER 52-53, 72 (Dkt. No. 55, Ex. A at 14-15; Ex. B at 15(capitalization original)). Swift's complaint alleges that Adknowledge is Zynga's agent, employee, or distributor, or is otherwise affiliated with Zynga. ER 131 (Dkt. No. 13 at ¶ 30.) Both versions of the Agreement provide that the "Zynga Parties …shall not be liable" for damages "arising out of" Swift's use of the YoVille game or the accuracy of third-party advertisements—like the Green Tea offer. ER 52-53, 72 (Dkt. No. 55, Ex. A at 14-15; Ex. B at 15(capitalization original)). Both versions required Swift to agree that she would not "seek to hold the Zynga Parties liable[] for the conduct of third parties"—such as the Green Tea advertiser. Id.

Both versions of the Agreement required Swift to agree "that any suit, action or proceeding arising out of or relating to these Terms of Use . . . shall be resolved solely by binding arbitration before a sole arbitrator under the rules and regulations of the AAA." ER 55, 74 (Dkt. No. 55, Ex. A at 17; Ex. B at 17). And both versions of the Agreement provide for Delaware governing law. ER 54, 74 (Dkt. No. 55, Ex. A at 16; Ex. B at 17).[4]

[4] The record contains a third version of the YoVille Agreement—effective August 2009. ER 79-85 (Dkt. No. 55 at ¶ 6 Ex. C.) But Swift alleges only activities that occurred between April and July of 2009, before the third version became effective. ER 1332-134 (Dkt. No. 13 at ¶¶ 37-40).

D. Adknowledge joined in Zynga's motion to compel arbitration but the district court denied Adknowledge's motion because Swift claimed—for the first time—that Adknowledge was not Zynga's agent.

Zynga moved to compel arbitration, and Adknowledge filed a joinder in that motion. ER 30 (Dkt. No. 57). Adknowledge sought to enforce the arbitration clause in the Agreement because Swift's claim is based on the premise that Adknowledge and Zynga acted in concert, and therefore Adknowledge has standing to enforce Zynga's arbitration clause. Id. Adknowledge also argued that the arbitration clause should apply to all parties because Swift's claims are based on the contractual relationship that she formed with Zynga by the YoVille Agreement. Id.

In response, Swift alleged for the first time that Adknowledge "is not Zynga's agent or affiliate"—contradicting her complaint. ER 25 (Dkt. No. 66 at 3:5). But Swift did not retract the central argument in her case against Adknowledge—that Adknowledge conspired and acted in concert with Zynga to defraud consumers and create the ISOTs that are the subject of Swift's complaint. *Compare* ER 124-143 *with* ER 23-29 (Dkts. Nos. 13 and 66).

In its August 4, 2011 Order, the district court granted Zynga's motion to compel arbitration but denied Adknowledge's request. ER 1 (Dkt. No.

94). The court found that, despite Swift's repeated allegations in her complaint, Adknowledge was not Zynga's agent. ER 15 (Dkt. No. 94 at 15:17-23 ("the allegations of her FAC identifying [Adknowledge] as 'agents' turned out to be incorrect as discovery has since revealed that they are actually 'independent contractors'")). But the court acknowledged that Adknowledge was one of the "Zynga Parties" that the Agreement referenced. ER 13-14 (Dkt. No. 94 at 13:27-14:13). The court separated the clauses within the Agreement, however, and decided "that the waiver of liability provision of the YoVille [Agreement] …which defines [Adknowledge] as 'Zynga Parties,' is separate and distinct from the arbitration provision". Id.

The district court stayed the litigation as to all parties pending the outcome of the arbitration between Zynga and Swift "because an arbitration decision may affect the outcome of the claims against [Defendants]". ER 16 (Dkt. No. 94 at 16:21-28). Swift then dismissed Zynga as a defendant, and the court lifted its stay. ER 20 (Dkt. No. 97). Adknowledge filed a timely notice of appeal to this Court. ER 18 (Dkt. No. 102).

VI. SUMMARY OF ARGUMENT

The district court erred by denying Adknowledge's motion to compel arbitration because Adknowledge is entitled to enforce the arbitration clause in the YoVille Agreement. Although Adknowledge is not a signatory to the Agreement, a nonsignatory defendant may compel arbitration against a signatory plaintiff when the plaintiff alleges *substantially interdependent and concerted misconduct* by the non-signatory defendant and another signatory to the contract. In this case, Swift alleged that Zynga and Adknowledge acted in concert to create deceptive offers in YoVille that caused her harm. Her complaint claims that Zynga and Adknowledge were co-conspirators who on behalf of one another created a complicated scheme to shield each other from liability. Since those claims amount to allegations of substantially interdependent and concerted misconduct by both Adknowledge, a nonsignatory defendant—and Zynga, another signatory to the contract—Adknowledge may compel arbitration against Swift. Accordingly, this Court should reverse the district court decision and send this case to arbitration.

The district court also erred by finding that Adknowledge is not a third-party beneficiary under the Agreement. A nonsignatory to a contract is a third-party beneficiary when (1) the contracting parties intend a benefit; (2)

either party intends a gift or obligation to the third party; and (3) benefiting the third party is material. The Agreement expressly provides that third-party content providers and licensors—such as Adknowledge—are defined as "Zynga Parties" and cannot be held liable for harm arising from content placed in the YoVille Game. Swift agreed that she would use YoVille at her "sole risk" and "on an 'as is' basis". She agreed that "Zynga Parties" like Adknowledge did not warrant or endorse the offers over which she sues. And she agreed to arbitrate any dispute arising out of or relating to the Agreement. Since Swift agreed that Adknowledge is included as one of the "Zynga Parties" who cannot be liable under the claims that she raises, Adknowledge is a third-party beneficiary under the Agreement entitled to insist that this case proceed to arbitration. Consequently, this Court should reverse the district court decision and require Swift to arbitrate.

The district court also erred by making a final decision denying arbitration, as opposed to sending the case to an arbitrator to make that determination. Under Delaware law, when an arbitration clause refers to the rules of the American Arbitration Association, if a question remains about whether a third party—like Adknowledge—may enforce the arbitration clause then that question is for the arbitrator. The YoVille Agreement

requires AAA arbitration, and the court below determined that Swift had to arbitrate under the Agreement. But the court did not allow an arbitrator to decide whether Adknowledge could enforce the arbitration clause. Consequently, even if this Court determines Swift does not allege substantially interdependent and concerted misconduct by Zynga and Adknowledge—which Swift does throughout her complaint—and even if the Court determines Adknowledge is not a third-party beneficiary, the Court should still reverse and allow an arbitrator to decide whether Adknowledge may enforce the arbitration clause.

VII. STANDARD OF REVIEW

"The denial of a motion to compel arbitration is reviewed de novo." *Britton v. Co-Op Banking Group*, 4 F.3d 742, 744 (9th Cir. 1993) (citing *Pipe Trades Council, Local 159 v. Underground Contractors Ass'n*, 835 F.2d 1275, 1278 (9th Cir. 1987); *Dean Witter v. Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218, 84 L. Ed. 2d 158, 105 S. Ct. 1238 (1985) (the Act, by its terms, leaves no place for the exercise of discretion by a district court, but instead "mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed") (emphasis original). The Court also applies de novo review to the interpretation and meaning of

contract provisions. *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719 (9th Cir. 1999).

VIII. ARGUMENT

Arbitration is a matter of contract. *Wagner v. Stratton Oakmont, Inc.*, 83 F.3d 1046, 1048 (9th Cir. 1996). In determining whether parties have agreed to arbitrate a dispute, the Ninth Circuit applies "general state-law principles of contract interpretation." *Wagner*, 83 F.3d at 1049. This Court gives "due regard to the federal policy in favor of arbitration by resolving ambiguities as to the scope of arbitration in favor of arbitration." *Id.*

A. Swift is barred under the doctrine of equitable estoppel from retracting her allegations that Zynga and Adknowledge acted with substantially interdependent and concerted misconduct.

1. This Court should adopt the "substantially interdependent and concerted misconduct allegations" standard that other circuits apply.

The Ninth Circuit recognizes that equitable estoppel and agency principles may permit nonsignatories to an agreement containing an arbitration provision to compel arbitration. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101-02 (9th Cir. 2006).[5] Although this Court has not articulated a

[5] Cited by *Dziubla v. Cargill, Inc,* for this proposition. 214 Fed. Appx. 658, 659 (9th Cir. Cal. 2006)(unpublished).

clear standard for when a nonsignatory may compel arbitration, the federal appeals courts considering the issue each adopted a similar standard that this Court should apply. They found that equitable estoppel will permit a nonsignatory to compel arbitration when the "signatory to the contract containing the arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) (citing *Boyd v. Homes of Legend*, 981 F. Supp. 1423, 1433 (M.D. Ala. 1997), internal brackets and ellipses omitted) (*abrogated on other grounds by*, *Lawson v. Life of the South Ins. Co.*, 648 F.3d 1166 (11th Cir. 2011)).[6] No federal appeals court has rejected this

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[6] The 2nd, 4th, 5th, 8th, 10th, and 11th circuits agree. *See e.g.*, *Denney v. BDO Seidman, L.L.P.*, 412 F.3d 58, 70 (2d Cir. 2005) (citing Fifth Circuit rule and finding "[h]aving alleged in this RICO action that the Deutsche Bank and BDO defendants acted in concert to defraud plaintiffs … and that defendants' fraud arose in connection with BDO's tax-strategy advice, plaintiffs cannot now escape the consequences of those allegations by arguing that the Deutsche Bank and BDO defendants lack the requisite close relationship") (citing *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000)); *Brantley v. Republic Mortgage Ins. Co.*, 424 F.3d 392, 396 (4th Cir. 2005); 592 F.3d 830, 836 (8th Cir. 2010); *Lenox Maclaren Surgical Corp. v. Medtronic, Inc.*, 2011 U.S. App. LEXIS 22961, *12-13 (10th Cir. Nov. 15, 2011) (reviewing oft-cited rule but holding that it only applies when "allegations of collusion between a signatory and nonsignatory were

rule.

If the Court applies this standard, no question remains as to whether Adknowledge is entitled to arbitration. Throughout Swift's complaint she alleges substantially interdependent and concerted misconduct by Adknowledge and Zynga. She claims several times that they acted in concert, that they are partners, that they are agents of one another, and that they conspired to cause her harm. She alleges they worked together to create a complicated scheme that would shield them both from liability. Every allegation that she makes against Zynga she makes equally against Adknowledge. So if this Court looks to Swift's complaint and applies the standard that allegations of "substantially interdependent and concerted misconduct" require arbitration, then the Court must reverse the lower court's ruling on this matter.

This case is distinguished from the facts in *Britton*, 4 F.3d 742, in which this Court found that a nonsignatory was not entitled to enforce a third-party's arbitration clause. In *Britton*, the nonsignatory defendant Liebling

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intimately founded in and intertwined with the contract containing the arbitration clause.").

purchased a business, GDL, which had entered into an arbitration clause with the plaintiffs. Liebling argued "that judicial estoppel should bar the plaintiffs from denying the allegations in their complaint regarding his status as an agent or successor in interest of GDL." *Id.* at 744. This Court rejected his argument for two primary reasons that do not apply here.

First, judicial estoppel did not apply in *Britton* because "the court below [n]ever adopted plaintiffs' prior position that he was liable as agent or employee of GDL." *4 F.3d at 744.* But in this case, the court below *did* adopt Swift's prior position that Adknowledge is liable as an agent, co-conspirator, or partner of Zynga. Indeed, Adknowledge should have been dismissed from this case on its Fed. R. Civ. P. 12(b)(6) motion but the district court relied on Swift's allegations that Adknowledge was Zynga's partner and co-conspirator.

Second, the *Britton* court found that plaintiffs' claims alleged "subsequent, independent acts of fraud, unrelated to any provision or interpretation of the contract." 4 F.3d at 748. But here, all of Swift's claims relate directly to the YoVille Agreement. Her allegations against Adknowledge are the same as her allegations against Zynga, and she alleges that the two Defendants acted in concert at the same time.

The lower court only denied Adknowledge's joinder because Swift recanted some of the allegations in her complaint that the court earlier relied on. This Court should not allow Swift to reverse course on material allegations that form the basis for her claims, and which she used to defeat Adknowledge's earlier motion to dismiss. The *Britton* court focused on the allegations in the plaintiff's complaint, and this Court should do the same. Swift's complaint alleges that Adknowledge is Zynga's partner, co-conspirator, and agent, and that they acted in concert. As such, Adknowledge is entitled equally as Zynga to arbitration.

Since *Britton*¸ several district courts within this circuit have compelled arbitration in favor of nonsignatories similarly situated to Adknowledge; and most have applied the standard that Adknowledge urges this Court to adopt. *See, e.g.*, *In re Toyota Motor Corp. Hybrid Brake Mktg., Sales, Practices & Prods. Liab. Litig.*, 2011 U.S. Dist. LEXIS 143490, *23-24 (C.D. Cal. Dec. 13, 2011) ("equitable estoppel applies when the signatory of an arbitration agreement raises allegations of 'substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.'") (quoting *Hawkins v. KPMG LLP*, 423 F. Supp. 2d 1038, 1050

(N.D. Cal. 2006).[7]

Swift's entire case is based on her claim that Zynga and Adknowledge worked together. Without Swift's use of Zynga's YoVille game—in which she accepted the arbitration provision in the Agreement—she could not have made any allegations against Adknowledge. Her claims are based on offers Adknowledge allegedly created together with Zynga, and which Swift accessed through YoVille. Since Swift's claims against Zynga and Adknowledge are interdependent and allege concerted conduct, Adknowledge is entitled to enforce the arbitration clause to the same extent as Zynga. The Court should reverse and send this case to arbitration.

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[7] See also *Robinson v. Isaacs*, 2011 U.S. Dist. LEXIS 118070 (S.D. Cal. Oct. 12, 2011) (court compelled arbitration based on the allegation of a business relationship between plaintiff and nonsignatory because complaint alleged that defendants acted in concert; *Brown v. General Steel Domestic Sales, LLC*, 2008 U.S. Dist. LEXIS 97832, *33 (C.D. Cal. May 19, 2008) (plaintiffs' claims against signatory "and their claims against the nonsignatory defendants are interdependent, and appear to allege concerted conduct by them. This is precisely the type of situation in which courts apply equitable estoppel to require the signatory to an arbitration agreement to arbitrate with nonsignatories").

2. This Court should apply the "substantially interdependent and concerted misconduct allegations" standard because it is the rule under Delaware law.

State law principles allow an arbitration clause to be enforced by nonparties to the contract through estoppel and third-party beneficiary theories. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 173 L. Ed. 832, 840, 129 S. Ct. 1896, 1902 (2009)[8]. The YoVille Agreement provides that Delaware law governs, and Delaware recognizes the standard that Adknowledge urges this court to apply. The Court should review the complaint for allegations of substantial interdependent and concerted misconduct. *See Wilcox & Fetzer, Ltd. v. Corbett & Wilcox*, 2006 Del. Ch. LEXIS 155, *16 (Del. Ch. 2006).

In *Wilcox*, Robert Wilcox sold his interest in a business named Wilcox & Fetzer to his colleague in the firm, Kurt Fetzer. 2006 Del. Ch. LEXIS 155 at *3. The two of them agreed to arbitrate any disputes. *Id.* at *3-4. Wilcox later joined a competing firm that became known as Corbett & Wilcox ("Corbett"). *Id*. at *4. Fetzer filed a complaint against Corbett for trade-name infringement, and Corbett moved to compel arbitration. *Id*. at *4-5.

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[8] See also *Lawson v. Life of the South Ins. Co.*, 648 F.3d 1166, 1170-1171 (11th Cir. 2011) (applicable state law provides the rule of decision for whether a nonparty can enforce an arbitration clause against a party).

The court granted the motion because Fetzer's complaint alleged "concerted wrongdoing by a signatory (Wilcox) and a nonsignatory ([Corbett])." *Id.* at *18. Accordingly, equitable estoppel applied because "Fetzer's common law trade name claim is intertwined with or touches on the Agreement." *Id.* at *19.

This case is similar. Like the plaintiff's complaint in *Wilcox*, Swift's complaint alleges that Adknowledge and Zynga engaged in concerted wrongdoing. And like Wilcox's claims against Corbett, Swift's claims against Adknowledge are intertwined with or touch on the Agreement because the Agreement expressly provides that she used YoVille at her own risk on an "as is" basis, and that parties such as Adknowledge cannot be held liable for harm arising out of her YoVille use. The Agreement that Adknowledge relies on contains an arbitration clause like the one in *Wilcox*. And as in *Wilcox* this Court should send this case to arbitration.

The district court denied Adknowledge's motion because it rejected the allegations in Swift's complaint, finding that "the allegations of her FAC identifying [Adknowledge] as 'agents' turned out to be incorrect as discovery has since revealed that they are actually 'independent contractors'". But the standard that Delaware and the federal courts have

adopted is not narrowly focused on the existence of a formal principal-agent relationship. Rather, it focuses on the plaintiff's *allegations* of *substantially interdependent and concerted misconduct.* And notably, to date, Swift has not amended her complaint to rescind her allegations. Nor should she be allowed to because doing so would be fundamentally unfair. As a Delaware Court of Chancery noted:

> Although she denies that the reason for the amendment was to escape the Arbitration Clause, the happy coincidence seems to be that the amendment makes it easier for her to argue that she is free from the Arbitration Clause's reach. Whatever her motives, [she] is not entitled to blind this court to her prior pleading, and the court will highlight the ways in which she has altered the claim she seeks to assert …

Ishimaru v. Fung, 2005 Del. Ch. LEXIS 167, *5-6 (Del. Ch. Oct. 26, 2005). In *Ishimaru*, the court did not tolerate the gamesmanship of amending a complaint to strike facts that might require arbitration. So, on equitable estoppel grounds, the court granted a nonsignatory's motion to compel arbitration. This Court should do the same. As in Delaware and other circuits, this Court should focus on Swift's allegations of substantially interdependent and concerted misconduct, and not allow Swift to "blind this court to her prior pleading" by suddenly adopting a contrary position.

Swift should live with the allegations in her complaint—especially since

Adknowledge is left in this case because the district court relied on those allegations in an earlier motion. This Court should follow Delaware and the other federal courts of appeal who have considered the issue and require Swift to arbitrate because she alleged substantial interdependent and concerted misconduct on the part of Zynga—a signatory to her arbitration clause—and Adknowledge.

B. Swift must arbitrate her claims because Adknowledge is a third-party beneficiary under the YoVille Agreement.

Under Delaware law, "[d]emonstrating that a party is a third-party beneficiary requires proof of three elements: (1) an intent between the contracting parties to benefit a third party through the contract; (2) an intent that the benefit serve as a gift or in satisfaction of a preexisting obligation to the third party; and (3) a showing that benefiting the third party was a material aspect to the parties in entering into the contract." *Carder v. Carl M. Freeman Cmtys., LLC*, 2009 Del. Ch. LEXIS 2, *21 (Del. Ch. Jan. 5, 2009).

In *Carder*, the court reviewed a contract with an arbitration clause and concluded that the party moving for arbitration had "articulated, at least, a nonfrivolous argument that it [was] an intended third party beneficiary" of the contract. *Carder*, 2009 Del. Ch. LEXIS 2 at *22. The *Carder* court

determined there was no dispute that the parties to the contract intended to benefit First Republic, since the contract specifically identified First Republic. *Id.* at *22-23. This met the first prong of the third party beneficiary test.

Similarly, in this case, the YoVille Agreement was created for the benefit of Zynga and for third parties—such as Adknowledge—who provided content to Zynga. The YoVille Agreement advised Swift that "Zynga may distribute content supplied by third parties[.]" ER 72 (Dkt. No. 55,Ex. B at 15). The YoVille Agreement set forth the terms by which Swift was entitled to use the content in Zynga's games, including content developed by third parties. Id. For example, the YoVille Agreement advised Swift that she could not "copy, redistribute, publish or otherwise exploit material . . . without the express prior written permission of Zynga *and the owner.*" ER 63 (Dkt. No. 55, Ex. B at 6 (emphasis added).) The YoVille Agreement expressly includes "third party content providers" within the scope of liability limitations. ER 62, 72 (Dkt. No. 55, Ex. B at 5, 15).

Even the district court noted "that the waiver of liability provision of the YoVille [Agreement] … defines [Adknowledge] as 'Zynga Parties'" and entitles Adknowledge to some limited liability protection under the

Agreement. The Agreement expressly provided that Swift was required to arbitrate *any* claim that arose out of or related to the Agreement—and the clause did not limit *any* claim to those that arose between just the signatories.

The *Carder* court noted it was at least plausible that the second prong—intent that the benefit serve as a gift or in satisfaction of a preexisting obligation to the third party—could be satisfied. 2009 Del. Ch. LEXIS 2 at *23. The same is true in this case. Since Zynga was depending upon Adknowledge to provide advertising and virtual currency to drive its revenue, it follows that Zynga had a duty to protect Adknowledge against the type of claims that Swift raises here.

Swift expressly represented that she took the offers that she complains of on an "as is basis" and assumed the "sole risk" of the type of harm she alleges in this case against Adknowledge—who the Agreement defined as "Zynga Parties". Swift also agreed to arbitrate *any* claim arising out of or relating to the Agreement, which she should have understood benefited third parties like Adknowledge. The facts in this case satisfy the second prong better than in *Carder*.

Adknowledge also satisfies the third prong—a showing that the benefit was a material aspect to the parties in entering into the contract. In *Carder*,

the court held that "because Freeman required the purchaser to make an application with First Republic, one reasonably could infer that requirement was material to at least Freeman." 2009 Del. Ch. LEXIS 2 at *23.

Similarly, Zynga required Swift to adhere to contractual terms protecting the content of Adknowledge and other third parties. Zynga required Swift to agree that she took the "sole risk" in responding to the type of offers that she alleges Zynga and Adknowledge made available on YoVille. Zynga required Swift to agree that she took these offers "as is". Considering that Zynga received these offers from Adknowledge, and that Adknowledge was within the scope of the limitation-of-liability clause, it follows that Zynga and Swift intended that protecting Adknowledge under the contract was a material aspect to their Agreement. This Court may infer, as the *Carder* court did, that the conferred benefit was material to at least one party to the contract.

The *Carder* court determined the third-party beneficiary, First Republic, had nonfrivolous grounds to require presentation of the arbitrability issue to the arbitrator. 2009 Del. Ch. LEXIS 2 at *24. Similarly, Adknowledge has a reasonable argument that it is a third-party beneficiary under the YoVille Agreement. Accordingly, this Court should require this

case to proceed to arbitration.

C. Adknowledge is further entitled to arbitration because, under Delaware law, the arbitrator decides whether a nonsignatory may enforce an arbitration clause referring to the AAA.

There should be no question that this case belongs in arbitration because Swift alleged a conspiracy in her complaint. But if there is a question then an arbitrator should decide whether this case is arbitrable. Under Delaware law, when contract signatories refer to the American Arbitration Association's rules in an arbitration clause, then an arbitrator should decide any remaining question about whether a nonsignatory may enforce that clause. *McLaughlin v. McCann*, 942 A.2d 616, 626-627 (Del. Ch. 2008) (citing *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76 (Del. 2006)). The only exception to this rule is when the nonparty's claim to arbitrability is "wholly groundless." *Id.*

In this case, the district court ruled that Swift must litigate her claims against Zynga because she agreed to the arbitration clause in the YoVille Agreement. That agreement applies AAA rules in arbitration. And since Swift's claims are based on Adknowledge being Zynga's co-conspirator concerning unlawful offers in the YoVille game, Adknowledge has grounds to enforce the arbitration clause. Thus, if a question remains about whether

Adknowledge may enforce the arbitration clause, then under Delaware law an arbitrator should decide the issue. If this Court decides that Swift's complaint does not allege substantially interdependent and concerted misconduct by Adknowledge and Zynga—which it repeatedly does—then the Court should present the question of arbitrability to an arbitrator.

In *McLaughlin v. McCann*, three "Purchasers" bought a mortgage lending business from four "Sellers" under a purchase agreement. *McLaughlin*, 942 A.2d at 618-619. It contained an arbitration clause citing AAA arbitration rules. *Id.* at 619. Later, some (but not all) of the Sellers signed a second agreement with Purchasers (the "2006 Agreement") that dealt with whether the Sellers had transferred the American Family Mortgage Corporation (the "Corporation") to the Purchasers. *Id.* at 619-620.

When a dispute arose, the Sellers demanded arbitration citing the arbitration clause in the original purchase agreement. 942 A.2d at 620. The Purchasers argued that they had not agreed to arbitrate any disputes regarding the Corporation because the Corporation was not mentioned in the original agreement containing the arbitration clause, and not all Sellers signed the 2006 Agreement. *Id.*

The *McLaughlin* court disagreed. 942 A.2d at 626. It noted that "a reference to the AAA Rules provided evidence of the parties' clear and unmistakable intent to arbitrate arbitrability". *Id.* at 625. Consequently, the court granted the Sellers' motion to compel arbitration, so that the arbitrator could decide "what sweep the Arbitration Clause has." *Id.* at 627-28.

This case is similar to *McLaughlin*. In that case, the arbitration clause did not mention the Corporation. Here, the YoVille Agreement did not specifically mention Adknowledge, and the arbitration clause within the Agreement did not mention the "Zynga Parties" in particular. But in both cases, under Delaware law an arbitrator decides the scope of an arbitration clause.

The arbitration clause in *McLaughlin* did not specifically refer to the nonsignatory Sellers—it was generally worded and simply provided that "If a dispute arises under this agreement, the matter shall be admitted to arbitration …in accordance with the rules of the American Arbitration Association …" *McLaughlin*, 942 A.2d at 619. Similarly, the YoVille Agreement provides "that any suit, action or proceeding arising out of or relating to these Terms of Use . . . shall be resolved solely by binding arbitration before a sole arbitrator under the rules and regulations of the

American Arbitration Association ("AAA")." ER 55, 74 (Dkt. No. 55, Ex. A at 17; Ex. B at 17).

The arbitration clause in this case is more strongly worded in favor of arbitration than the *McLaughlin* clause. "Delaware courts have found the use of both 'arising out of' and 'relating to' language in an arbitration provision to be a broad mandate." *Orix LF, LP v. InsCap Asset Mgmt., LLC*, 2010 Del. Ch. LEXIS 70, *24 (Del. Ch. Apr. 13, 2010). The arbitration clause in the YoVille Agreement includes the phrase "arising out of or relating to". And the YoVille clause also provides that any disputes relating to the Agreement "shall be resolved *solely* by *binding* arbitration". The italicized words make the YoVille clause more emphatic than the one at issue in *McLaughlin*.

This Court, like the *McLaughlin* court, has recognized the "strong federal policy favoring arbitration". *Letizia v. Prudential Bache Secur., Inc.*, 802 F.2d 1185, 1188 (9th Cir. 1986). And the U.S. Supreme Court has acknowledged that with respect to arbitration agreements within the Act's scope, the parties' intentions "are generously construed as to issues of arbitrability," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

Under the applicable law of Delaware, the arbitration clause in the

YoVille Agreement requires that an arbitrator accept this dispute for arbitration unless the arbitrator—and not the district court—determines that the arbitration clause does not apply to Adknowledge. Adknowledge respectfully requests this Court reverse the district court and require that Swift's claims against Adknowledge proceed to arbitration.

D. The Court should require arbitration because any doubts regarding the scope of the clause must be resolved in favor of arbitration.

Following the United States Supreme Court's lead, this Court noted that under the Federal Arbitration Act " any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983); *Bechtel Do Brasil Construções Ltda. v. UEG AraucÁria Ltda.*, 638 F.3d 150, 154 (9th Cir. 2011) Delaware similarly adopted the rule that "reference to the AAA rules evidences a clear and unmistakable intent to submit arbitrability issues to an arbitrator." *McLaughlin*, 942 A.2d at 622

The court below did not review the Agreement as a whole, but separated its parts finding that "the waiver of liability provision of the YoVille [Agreement] …which defines [Adknowledge] as 'Zynga Parties,' is separate and distinct from the arbitration provision"—as if the arbitration

clause is an agreement separate from the rest of the contract. But the district court should have given the arbitration provision the same meaning that other clauses in the Agreement have. Under Delaware law, contracts must be construed as a whole, to give effect to the intentions of the parties. *Northwestern Nat'l Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 43 (Del. 1996).

The YoVille Agreement provides that Swift's obligations extend to not just Zynga, but also to "Zynga Parties" including Zynga's agents and third-party content providers. ER 52-53, 72 (Dkt. No. 55, Ex. A at 14-15; Ex. B at 15). The agreement requires AAA arbitration of all disputes arising out of or related to it, and applies Delaware law. ER 53-54, 74 (Dkt. No. 55, Ex. A at 16-17; Ex. B at 17). Accordingly, under the governing law of Delaware, Swift must arbitrate disputes with Zynga Parties—such as Adknowledge—that arise out of or are related to the Agreement. Swift's entire case is based on her use of Zynga's YoVille game, so all her disputes with Adknowledge arise out of and are related to the Agreement. And that the arbitration clause in the Agreement does not refer specifically to the "Zynga Parties" is immaterial. *See McLaughlin*, 942 A.2d at 619.

In any event, whether the parties intended the arbitration clause to benefit Adknowledge is—if not obvious on the face of the Agreement—a

close call. If there is any doubt on that point, that doubt should be resolved in favor of arbitration. Thus, this Court should reverse the district court's Order and direct that Swift's claims against Adknowledge proceed to arbitration.

IX. CONCLUSION

Rebecca Swift filed her amended complaint alleging that Adknowledge and Zynga acted in concert—dependent upon on one another to cause her harm. Early in the case Adknowledge moved to dismiss for failure to state a claim, but the court denied the motion because of Swift's allegations that Adknowledge participated in a conspiracy and partnership, and engaged in concerted activity with Zynga. Only in her opposition to Adknowledge's motion to compel did she recant these allegations.

She now makes a 180-degree turn and claims that Adknowledge did not act in concert with Zynga—because the allegations lead her to the arbitration that she seeks to avoid. This Court should require Swift to stand by the allegations still in her complaint. Swift's complaint alleges substantially interdependent and concerted misconduct between Adknowledge and Zynga—so equitable estoppel dictates that Swift must arbitrate. Adknowledge respectfully requests that this Court reverse the decision

below and order that Swift's case against Adknowledge proceed to arbitration.

X. STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

DATED this 9th day of January, 2012.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App. 32(a)(7)(C) and Circuit Rule 32-1

for Case No. 11-16933

I CERTIFY THAT:

The attached brief is proportionately spaced, has a typeface of 14 points or more and contains 8,357 words.

DATED this 9th day of January, 2012.

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