Rebecca Swift v. Adknowledge, Inc., et al Doc. 15

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

BRIEF OF RESPONDENT REBECCA SWIFT

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REQUEST FOR ORAL ARGUMENT

Appellee Rebecca Swift requests oral argument in this matter.

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I. JURISDICTIONAL STATEMENT

Respondent Rebecca Swift ("Swift"), Plaintiff in the matter under review, agrees with Appellants Adknowledge, Inc. and KITN Media USA, Inc. (together, "Adknowledge") that the district court had jurisdiction over this putative nationwide class action under 28 U.S.C. § 1332(d). This Court has jurisdiction over this instant appeal pursuant to 9 U.S.C. § 16. *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1043 (9th Cir. 2009).

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. The right to compel arbitration is a contractual right, and generally only those who are parties to an agreement to compel arbitration may enforce it. The Ninth Circuit has recognized two very limited exceptions where equitable estoppel may be applied to allow a non-signatory to enforce an arbitration agreement: when the non-party exploits the agreement to its advantage, or when the non-party has a close relationship with the entities and the wrongful activity is "intertwined" with the underlying arbitration agreement. Should the Ninth Circuit abandon this precedential standard and adopt the "substantially interdependent and concerted misconduct" test that Adknowledge advocates?

2. A party claiming to be a third party beneficiary of an arbitration agreement bears the burden of demonstrating that the agreement reflects the intention of the parties to contract in order to benefit the third party. If the parties

had no intention to benefit a third party, then the third party has no rights no enforce the arbitration agreement. Can Adknowledge claim to be a third party beneficiary when neither it nor other third parties are mentioned in the arbitration agreement?

3. California courts recognize that choice-of-law provisions do not apply to non-signatories of contracts. Should the Ninth Circuit follow the Delaware choice-of-law analysis advocated by non-signatory Adknowledge, which requires arbitrators to determine whether the parties agreed to arbitrate an issue, even though the most recent choice-of-law provision requires the application of California law? Or should the Ninth Circuit abide by its already-established precedent, which holds that California law should apply in this context, and that courts, not arbitrators, should follow a more rigorous standard of determining whether the parties agreed to submit an issue to arbitration?

4. A court may refuse to enforce an arbitration agreement if a party seeking enforcement has waived such a right. A party cannot "wait and see" and avail itself of the court system, only to move to compel arbitration at a later time. Has Adknowledge waived its perceived "right" to compel arbitration by choosing to litigate this case?

III. STATEMENT OF THE CASE

Respondent Swift brought this putative nationwide class action arising from the provision of misleading and fraudulent "Integrated Special Offer Transactions" or "ISOTs" presented to players of popular online computer games such as Farmville and Mafia Wars, which are produced by a company called Zynga, Inc. ("Zynga") ER 125-130 (Dkt. No. 13 at ¶¶1-21). Swift contends that these ISOTs promised "risk free" special offers in exchange for virtual currency within games like Farmville and Mafia Wars, and that these "risk free" offers resulted in unauthorized credit card and phone charges that were impossible to reverse. ER 132-134 (Dkt. No. 13 at ¶¶ 36-41). Swift contends that these transactions gave rise to class-wide causes of action under the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq*., Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750, *et seq.*, and unjust enrichment. ER 137-141 (Dkt. No. 13 at ¶¶ 51-74).

After the Court denied motions to dismiss filed by both Zynga and Adknowledge, ER 99-114 (Dkt. No. 35), Zynga produced in discovery the operative contract between Zynga and Adknowledge. ER 286-292 (Dkt. No. 98) (under seal). Shortly after the United States Supreme Court issued its decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740 (2011), Zynga filed a motion to compel arbitration, based upon Swift's purported agreement to

Zynga's terms of service and arbitration agreement contained in a hyperlink that she did not click. ER 86-98 (Dkt. No. 54.) Adknowledge joined Zynga's motion to compel as a non-signatory. ER 30-35 (Dkt. No. 57). Swift opposed both Zynga's motion and Adknowledge's joinder. ER 175-203 (Dkt. No. 69-1); ER 23-29 (Dkt. No. 66). The District Court granted Zynga's motion, but denied Adknowledge's joinder in Zynga's motion to compel arbitration. ER 1-17 (Dkt. 94). Swift dismissed her claim against Zynga following the District Court's order on the motion to compel arbitration (Dkt. No. 97), and Adknowledge noticed this appeal. (Dkt. No. 102).

IV. STATEMENT OF THE FACTS

Zynga's games, in which ISOTs created by Adknowledge are presented, are integrated into Facebook or other "social media" platforms. ER 125, 132-133 (Dkt. No. 13 ¶¶ 1, 37). Accordingly, Facebook users who are interested in playing Zynga's games typically access those games through their Facebook accounts. The first time an individual decides to start playing a Zynga game, he or she is presented with a screen requesting that the user allow Zynga to access private information from his or her Facebook account. ER 235 (Dkt. No. 67). If the consumer clicks a large button that says "Allow," the consumer is able to begin playing the game. (*Id.*)

Here, Swift's claims arise from misleading ISOTs presented to her while playing a game called YoVille. *E.g.*, ER 133 (Dkt. No. 13 at ¶ 38). Accordingly, the YoVille terms of service contain the Arbitration Agreement that the District Court declined to enforce against Swift.

YoVille's launch page contains a large button asking that the consumer "Allow Access" to his or her personal Facebook information. There is then a large "Allow" button where the consumer can authorize the access. It is only at the bottom of the screen in small grey type, that the following sentence appears: "By using YoVille, you also agree to the YoVille Terms of Service." ER 186, 235 (Dkt. Nos. 69-1, 67). Zynga has no records indicating whether Swift or any Zynga user has ever clicked on the TOS or read its terms. ER 232 (Dkt. No. 67).

Adknowledge claims there are two arbitration agreements at issue in this case. The first was included in the YoVille TOS when Swift originally began playing the game in April 2009. ER 55 (Dkt. No. 55). This Arbitration Agreement ("Arbitration Agreement") requires all disputes to be decided through binding arbitration under the rules of the American Arbitration Association ("AAA"). Notably, the Arbitration Agreement does not prohibit the parties from aggregating claims or pursuing a class action in the arbitration proceedings.

Apparently, in June 2009 and then in August 2009, Zynga made significant changes to the Arbitration Agreement. Although the changes were significant,

Zynga never provided any type of notice to Swift or its other users that amendments to their arbitration provisions had been made. ER 230-231, 233 (Dkt. No. 67).

Under the August 2009 Arbitration Agreement ("Second Arbitration Agreement"), arbitration was no longer mandatory for all disputes between the parties. Specifically, the agreement provides that if there is a dispute between the parties, the user agrees to only commence litigation "in the state and federal courts located in San Francisco County, California" and that the user "consent[s] to and waive[s] all defenses of lack of personal jurisdiction and forum non conveniens with respect to venue and jurisdiction." ER 82-83 (Dkt. No. 55 at Sec. 12(a)). It is only when one party makes an affirmative election to proceed with binding arbitration that it is required. Specifically, the agreement provides that "either you or Zynga may elect to have the Dispute (except those Disputes expressly excluded below) finally and exclusively resolved by binding arbitration. Any election to arbitrate by one party shall be final and binding on the other." ER 83 (Dkt. No. 55 at Sec, 12(d)).

The Second Arbitration Agreement then provides a list of disputes that are expressly exempt from the arbitration provision. These include "any dispute related to, or arising from, allegations of theft" and "any claim for injunctive relief." ER 83 (Dkt. No. 55 at Sec. 12(f)).

The Second Arbitration Agreement provides that if a party elects to arbitrate a dispute, the arbitration must be conducted on an individual basis and may not be arbitrated on a class-wide basis. ER 83 (Dkt. No. 55 at Sec. 12(e)). However, the Second Arbitration Agreement also includes an important limitation of this provision. Here, the agreement states that "[i]f Section 12(e) is found to be illegal or unenforceable then neither you nor Zynga will elect to arbitrate . . . and such Dispute shall be decided by a court of competent jurisdiction within the County of San Francisco, California." ER 83 (Dkt. No. 55 at Sec. 13(b)).

V. PROCEDURAL HISTORY

The complaint in this case was filed on November 17, 2009, and an amended complaint was filed on February 10, 2010. Rather than elect arbitration pursuant to the Arbitration Agreement, Adknowledge chose to file a motion to dismiss and motion to strike class allegations, arguing that Swift's claims were barred under the Communications Decency Act, and that the allegations in the complaint were not plead with sufficient particularity.

On November 3, 2010, the court denied Adknowledge's Motion to Dismiss and on November 17, 2010, Adknowledge filed its answer to the Complaint. Although Adknowledge asserted more than thirty affirmative defenses, it did not assert a pre-suit agreement to arbitrate, nor an agreement not to bring a class action, as one of those defenses. ER 243-253 (Dkt. No. 36).

On January 31, 2011, the parties submitted a joint case management statement to the court. In this statement, Adknowledge and Swift agreed that jurisdiction and venue were appropriate in the District Court. ER 256 (Dkt. No. 42). On March 1, 2011, the parties filed a stipulation agreeing that Magistrate Laporte would have jurisdiction over the case. ER 271-273 (Dkt. No. 45). Thereafter, on March 22, 2011, the parties submitted another joint case management statement to the District Court. In that statement, Adknowledge and Swift continued to agree that jurisdiction and venue were appropriate in the District Court. ER 279 (Dkt. No. 49).

Zynga filed a motion to compel arbitration on May 5, 2011 – nearly *eighteen months* after Swift filed her complaint. Adknowledge filed its notice to join Zynga's motion to compel on May 18, 2011. ER 30-35 (Dkt. No. 57).

VI. SUMMARY OF ARGUMENT

Despite the fact that it was not a party to either the First or Second Arbitration Agreements, Adknowledge insists that it can enforce the arbitration agreement either through estoppel or by claiming that it was an intended third party beneficiary of the agreement. Neither of these arguments can be squared with existing precedent in the Ninth Circuit. This Court has already adopted two very narrow exceptions for when estoppel applies to the enforcement of agreements. Adknowledge meets neither exception, and the Court should not expand these

exceptions in this case. Furthermore, Adknowledge cannot claim that it was a third party beneficiary of the Arbitration Agreement, because it is unable to show that it was an intended beneficiary of the Arbitration Agreement.

Adknowledge also asks this Court to ignore the choice of law clause in the most recent Arbitration Agreement and to adopt a new precedent concerning state choice-of-law principles and the resolution of disputes by an arbitrator. The Ninth Circuit should reject Adknowledge's argument that choice-of-law principles apply to non-signatories of a contract, because California does not follow this rule. Additionally, the Ninth Circuit should reject Adknowledge's argument that an arbitrator, not the Court, should determine whether or not an agreement may be properly submitted to arbitration, because it cannot be squared with California and Ninth Circuit precedent.

Finally, Adknowledge has waived its perceived "right" to compel arbitration by choosing to litigate this case. In fact, Adknowledge did not assert its "right" until *eighteen months* after this case was filed. A party cannot avail itself of the court system while at the same time choosing to "wait and see" whether compelling arbitration would be successful.

VII. STANDARD OF REVIEW

The denial of a motion to compel arbitration is reviewed *de novo*. *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1041, 1044 n.1 (9th Cir. 2009). While federal

policy generally favors resolving ambiguities concerning the scope of arbitration in favor of arbitration, the presumption does not apply "if contractual language is plain that arbitration of a particular controversy is not within the scope of the arbitration provision." *Id.* at 1045. Furthermore, regardless of how broad the contractual language may appear to be, "it extends only to those things concerning which it appears that the parties *intended* to contract." *Id.* (internal citations omitted, emphasis in original).

VIII. ARGUMENT

A. The Court Was Correct to Deny Adknowledge's Motion to Compel Arbitration

1. Adknowledge is not a party to the Arbitration Clause and thus unable to enforce it.

"The right to compel arbitration stems from a contractual right [and] [t]hat contractual right may not be invoked by one who is not a party to the agreement and does not otherwise possess the right to compel arbitration." *Britton v. Co-op Banking Group*, 4 F.3d 742, 744 (9th Cir. 1993) (citations omitted) (a non-signatory to a contract could not invoke the contract's arbitration clause); *Lorber Indust. v. Los Angeles Printworks Corp.*, 803 F.2d 523, 525 (9th Cir. 1986) (contractual right may not be invoked by one who is not a party to the agreement and does not otherwise possess the right to compel arbitration).

Adknowledge, who was not a party to the Arbitration Agreement, argues that, even though it was not a party to the agreement, it should have standing to compel arbitration of Swift's claims. But as discovery showed in this case, Adknowledge is actually an independent contractor and Adknowledge denied in its answer that it was Zynga's agent. *See Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 917 (N.D. Cal. 2011). As the District Court aptly noted, "[i]ndependent contractors do not fall within the exception that non-signatory agents may be bound by an arbitration agreement." *Id. See also HCC Life Ins. Co. v. Managed Benefit Adm'rs LLC*, No. 2:07-cv-02542-MCE-DAD, 2008 U.S. Dist. LEXIS 46443, at *8-9 (E.D. Cal. June 12, 2008) ("[T]his Court finds particularly compelling [defendants'] own explicit characterization of their relationship with NID as independent contractors.").

Adknowledge attempts to crib together an argument that, even though Adknowledge is not Zynga's agent, equitable estoppel should apply to enable Adknowledge to enforce the arbitration agreement. The Ninth Circuit has acknowledged two very limited exceptions under which an arbitration agreement may be enforced by or against non-signatories pursuant to equitable estoppel. "In the first, a nonsignatory may be held to an arbitration clause where the nonsignatory knowingly exploits the agreement containing the arbitration clause despite having never signed the agreement." *Mundi*, 555 F.3d at 1045 (citations

omitted). "Under the second, a signatory may be required to arbitrate a claim brought by a nonsignatory because of the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract and the fact that the claims were intertwined with the underlying contractual obligations." *Id.* at 1046 (citations omitted). Prior to *Mundi*, the Ninth Circuit had never before permitted a non-signatory to compel arbitration, and "in light of the general principle that only those who have agreed to arbitrate are obliged to do so, we see no basis for extending the concept of equitable estoppel of third parties in an arbitration context beyond the very narrow confines delineated in these two lines of cases." *Id.*

In order for a non-signatory to compel arbitration under the second scenario, controlling Ninth Circuit precedent requires the non-signatory to show that: (a) "the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed," and (b) a "close relationship between the entities involved." *In re Toyota Motor Corp. Hybrid Brake Mktg., Sales, Practices and Products Liab. Litig.*, No. 10-ml-02172-CJC(RNBx), 2011 U.S. Dist. LEXIS 143490, at *27-28 (C.D. Cal. Dec. 13, 2011) (citing and explaining *Mundi*, 555 F.3d at 1047). Adknowledge is unable to satisfy either element.

a. *The subject matter of the dispute is not "intertwined" with the Arbitration Agreement.*

First, the subject matter of this dispute is not "intertwined" with the Arbitration Agreement. For the subject matter of the dispute to be "intertwined," "the contract **must form the legal basis of those claims**; it is **not enough** that the contract is factually significant to the plaintiff's claims or has a 'but-for' relationship with them." *Lenox Maclaren Surgical Corp. v. Medtronic, Inc.*, No. 11-1251, 2011 U.S. App. LEXIS 22961, at *16 (10th Cir. Nov. 15, 2011) (emphasis added) (applying the same test that forms Ninth Circuit precedent). In this case, Swift alleges that "Integrated Special Offer Transactions," or advertisements and offers which allow users to earn "virtual currency" within but separate and apart from Zynga's games, are false and misleading. Swift alleges that these practices violate the Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq*., and Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750, *et seq*. While Swift was required to accept the terms of the Arbitration Agreement when signing up to play Zynga games, the contract does not form the "legal basis" of any of her claims.

The proper scope of the "intertwined" test looks to the "duties" arising from the agreement that the plaintiff claims the defendant breached, and whether that agreement contains the arbitration clause in question. *See Chastain v. Union Sec. Life Ins. Co.*, 502 F. Supp. 2d 1072, 1078 (C.D. Cal. 2007). "In essence, the focus

is placed on the claims asserted by the plaintiff, such that if a signatory plaintiff relies on contractual terms in its cause of action against a non-signatory defendant, the plaintiff is equitably estopped from repudiating the arbitration clause within the agreement." *Lau v. Mercedes-Benz USA, LLC*, No. CV 11-1940 MEJ, 2012 U.S. Dist. LEXIS 11358, at *10 (N.D. Cal. Jan. 31, 2012). If a plaintiff's claims are not based on a supposed duty created in the contract containing the arbitration clause, then the plaintiff's claims are not "intertwined." *Id.* at 1079.

Similar cases have found that a plaintiff's claims were not "sufficiently intertwined" with an arbitration clause so as to require arbitration via equitable estoppel. For example, in the *In re Toyota* case, the plaintiffs alleged that the defendants produced certain model hybrid vehicles that were not recalled, but contained substantial defects in the anti-lock braking system. Plaintiffs based their claims, in part, on the UCL and CLRA. Toyota, who was not a party to the arbitration clause, attempted to argue that because the plaintiffs executed a purchase agreement, their claims arose out of that purchase agreement and were therefore interrelated. *In re Toyota*, 2011 U.S. Dist. LEXIS 143490, at *30. Toyota was wrong, just like Adknowledge is, here:

> Toyota here mistakenly equates the mere purchase of the vehicles and the mere fact that Plaintiffs executed a purchase agreement with the interrelatedness between Plaintiffs' claims and the obligations in the Purchase Agreements. . . . The Purchase Agreements. . . include provisions regarding. . . Toyota dealerships' disclaimer of warranties, which state that "the Seller will make no warranties, express or

> implied, on the vehicles, and there will be no implied warranties of merchantability or of fitness for a particular purpose." . . . Plaintiffs do not seek to enforce or challenge these terms in the Purchase Agreements or any duty owed by the Toyota dealerships. The operative document at issue is not the Purchase Agreements, but Toyota's marketing materials containing the purported false representations regarding the safety of its braking system. ***Simply put, Plaintiffs' claims do not rely on the content of the Purchase Agreements for their success*** . . . .
>
> Instead, Plaintiffs' claims are premised on allegations that. . . Toyota promulgating misleading statements and made false representations regarding the safety of its braking system in their marketing materials. . . . Based on these allegations, Plaintiffs assert individual and class claims against Toyota for violations of the CLRA, the UCL. . . . These claims and allegations are independent of any term or condition stated in the Purchase Agreements. And ***the resolution of Plaintiffs' claims does not require the examination of any provision in the Purchase Agreements***.

Id. at *30-32. In this case, Swift also bases her claims on the California UCL and CLRA, which arise independently of the TOS and Arbitration Agreement. Moreover, her claims do not reference or depend upon any duty owed to her or the proposed class pursuant to the TOS or Arbitration Agreement, and her claims are not "intertwined" with the TOS or Arbitration Agreement.

In another case, *Chastain v. Union Sec. Life Ins. Co.*, No. , 502 F. Supp. 2d 1072 (C.D. Cal. 2007), a plaintiff sued defendants for fraud after they failed to pay benefits under two insurance policies purchased by the plaintiff. *Id.* at 1073. The court found that the plaintiff's claims were not "intertwined" with the agreements cited by the defendants to require arbitration based on equitable estoppel.

> The purpose of estoppel is to prevent a plaintiff from availing himself of the favorable parts of a contract while disavowing the unfavorable parts – here, the arbitration clause. From a practical perspective, the Court cannot see how Plaintiff is attempting to invoke the favorable parts of the cardmember agreements, while simultaneously arguing against arbitration. . . . Plaintiff's fraud claim relies on Defendant's marketing of the insurance contract. Nowhere in the Complaint does Plaintiff truly "rely" on the terms of the cardmember agreements in stating any of these claims.

Id. at 1078. Swift is not trying to claim any "favorable parts" of the TOS or the Arbitration Clause. Her claims are based on the Adknowledge's wrongful conduct pursuant to the CLRA and UCL.

b. *Adknowledge cannot prove that it had a "close relationship" to Zynga.*

Second, Adknowledge cannot prove the "close relationship" required to compel arbitration via estoppel. This is especially the case when, as here, discovery has shown that the suspected relationship between Zynga and Adknowledge is more "tenuous" than previously alleged in Swift's complaint. *Swift v. Zynga*, 805 F. Supp. 2d at 917. While Swift alleged that Adknowledge was an "agent, employee, . . . distributor, . . . or affiliated entity . . . of the other Defendants" ER 131(Dkt. No. 13 at ¶ 30), Plaintiff also indicated that Adknowledge's specific role in the "alleged fraudulent scheme can be uncovered in discovery." (Dkt. No. 28 at 18). *See also Asis Internet Servs. v. Subscriberbase Inc.*, No. 09-3503 SC, 2009 U.S. Dist. LEXIS 112852, at *12 (N.D. Cal. Dec. 4, 2009) (further details concerning the defendants' relationship "can be uncovered in

discovery.") To be sure, as indicated above, discovery has established that this particular relationship does not exist: Adknowledge is nothing more than an independent contractor. *Swift*, 805 F. Supp. 2d at 917; ER 25 (Dkt. No. 66); ER 290 (under seal) (Dkt. No. 98). In addition, Adknowledge has unequivocally denied the existence of such a relationship in its Answer to the First Amended Complaint. *Compare* ER 131 (Dkt. No. 13 at ¶ 30) *with* ER 244 (Dkt. No. 36 at ¶ 30). Even though Adknowledge tries to hang its hat on the allegations contained in Swift's complaint, "[t]hat Plaintiff[] previously plead these facts. . . does not suffice for equitable estoppel purposes." *Just Film, Inc. v. Merch. Servs.*, No. C 10-1993 CW, 2011 U.S. Dist. LEXIS 96613, at *23 (N.D. Cal. Aug. 29, 2011) (allegations of collusion in complaint, alone, are not adequate to fulfill the non-signatory's burden of showing why estoppel should apply).

2. The District Court correctly found that Adknowledge is not a third party beneficiary of the Arbitration Clause.

Nor is Adknowledge a third party beneficiary to the YoVille Arbitration Agreement. In order to claim that it is a "third party beneficiary" of the Arbitration Agreement, Adknowledge bears the burden of demonstrating that the Arbitration Agreement "reflects the express or implied intention of the parties to the contract to benefit the third party." *Comer v. Micor, Inc.*, 436 F.3d 1098, 1102 (9th Cir. 2006). "If the parties to the contract had no intention to benefit a third party, that third party has no rights under the contract." *Britton v. Co-Op Banking Group*, 4

F.3d 742, 745 (9th Cir. 1993). Adknowledge is unable to demonstrate that Swift and Zynga "intended to benefit [Adknowledge] and the terms of the contract make that intent evident." *Balsam v. Tucows, Inc.*, 627 F.3d 1158, 1161 (9th Cir. 2010) (internal quotations omitted).

While the Zynga TOS does state that "Zynga may distribute content supplied by third parties," and it "expressly includes 'third party content provides' within the scope of liability limitations" (Adknowledge Br. at 28), Adknowledge cannot use waiver of liability clauses to back their way into coverage under the Arbitration Agreement. Adknowledge argues, in part, that because it claims to be a "Zynga Party" as defined in the "Disclaimers; Limitations; and Waivers of Liability" provisions of the Zynga TOS agreements, it is a nonsignatory party to the contract and has standing to compel arbitration. (Adknowledge Br. at 28.)

However, the limitation of liability and indemnification provisions are separate and distinct from the Arbitration Agreement, and they cannot be used to determine whether claims against Adknowledge are arbitrable. This is because "the scope of an indemnification clause is irrelevant to the question of arbitrability. Coverage under the arbitration provision is a matter of interpretation of the arbitration provision and ***not*** the indemnification provision." *Amisil Holdings Ltd. v. Clarium Capital Mgmt.*, 622 F. Supp. 2d 825, 837 (N.D. Cal. 2007) (emphasis added).

The Arbitration Agreement is noticeably silent concerning its applicability to third parties and shows no intention to benefit third parties such as Adknowledge. As the District Court stated:

> In any event, general references to "third party content providers" throughout the YoVille TOS (***though tellingly not in the dispute resolution section and not in the Universal TOS***) do not show that either signatory intended to give [Adknowledge] the benefit of the contractual arbitration provisions upon which they seek to rely.

Swift v. Zynga Game Network, Inc., 805 F. Supp. 2d at 917 (emphasis added). Thus, although Adknowledge attempts to show that the Zynga TOS provides it with some limited protections, it is unable to show that the parties to the Arbitration Agreement "intended to benefit [Adknowledge]," nor is it able to show that the "terms of the [Arbitration Agreement] make that intent evident." *Balsam*, 627 F.3d at 1161.

3. The District Court, not an arbitrator, correctly determined that Adknowledge cannot compel arbitration.

Adknowledge focuses a great deal of its brief explaining why Delaware law, which appears to be more favorable to Adknowledge's position, should apply. Adknowledge argues that "[t]he YoVille Agreement provides that Delaware law governs, and Delaware recognizes the standard that Adknowledge urges this [C]ourt to apply." (Adknowledge Br. at 24.) However, no new standard need be adopted by the Ninth Circuit, because Delaware law *does not* apply.

While the Zynga TOS contains a Delaware choice-of-law provision, and a court must typically abide by the law of the forum chosen, *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1201 (C.D. Cal. 2006) (citing *Ticknor v. Choice Hotels, Int'l, Inc.*, 265 F.3d 931, 937 (9th Cir. 2001)), assuming that Delaware law applies in the present case is putting the cart before the horse. As a threshold matter, Swift and Adknowledge are fundamentally at odds over whether Adknowledge possesses the necessary standing to compel arbitration. Adknowledge is a non-signatory to the Arbitration Agreement, and California courts recognize that choice-of-law provisions are inapplicable to non-signatories. "Defendant ignores that the threshold question is whether Defendant, as a non-signatory, can hold Plaintiff to contracts that Defendant did not sign. . . . [T]here is no clear and unmistakable evidence that Defendant—a non-signatory—agreed to the choice of law provisions. Therefore, these parties are not bound by it." *Chastain v. Union Sec. Life Ins. Co.*, No. , 502 F. Supp. 2d 1072, 1076 (C.D. Cal. 2007).[1]

[1] It is important to note that, while earlier versions of the Zynga TOS contained Delaware choice-of-law provisions, *see* ER 54, 74 (Dkt. No. 55), ***the latest version of the Zynga TOS contained a California choice-of-law provision***. ER 82-83 (Dkt. No. 55 at Sec. 12(a)). The Zynga TOS and Arbitration Agreement are governed by California as described strictly by the terms of the agreements. Regardless of what agreements the Court considers in this appeal, California law would apply to this dispute.

Thus, while Adknowledge says that "under Delaware law, the arbitrator decides whether a nonsignatory may enforce an arbitration clause," Delaware law is inapplicable here. The Ninth Circuit applies "a more rigorous standard in determining whether the parties have agreed to arbitrate the question of arbitrability." *Momot v. Mastro*, 652 F.3d 982, 987-88 (9th Cir. 2011). "Rather than applying ordinary state-law principles that govern the formation of contracts," as Adknowledge suggests this Court do, "the Supreme Court has cautioned that '[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so.'" *Id.*, (quoting *First Options v. Kaplan*, 514 U.S. 938, 944 (1995)). Adknowledge was not a signatory to the Arbitration Agreement, so there is no "clear and unmistakable evidence" that the "arbitrate arbitrability" provision applies. This Court can look to law from this Circuit, which establishes that a court, *not an arbitrator*, should decide whether Adknowledge possesses the requisite standing to compel arbitration.

> As a threshold matter, Toyota argues that the arbitrator, rather than this Court, should decide the issue of whether a nonsignatory such as Toyota may compel Plaintiffs to arbitrate their claims because the Purchase Agreements expressly provide that the arbitrator should decide issues of interpretation, scope, and applicability of the arbitration provision. . . . The Court disagrees. While parties may agree to explicit provisions enabling the arbitrator to decide issues of the applicability and scope of an arbitration agreement, ***these provisions are part of the agreement and only apply to signatories***. . . . [T]he threshold issue of whether Toyota, as a nonsignatory, may compel Plaintiffs to submit to arbitration under the Purchase Agreements ***must be decided by this Court***.

In re Toyota, 2011 U.S. Dist. LEXIS 143490, at *24-25 (emphasis added). *See also Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1268 (9th Cir. 2006) ("The arbitrability of a particular dispute is a threshold issue to be decided by the courts."); *LAWI/CSA Consolidators, Inc. v. Wholesale & Retail Food Distrib.*, 849 F. 2d 1236, 1239 (9th Cir. 1988) ("Courts refer the question of arbitrability to the arbitrator only if the parties leave no doubt that such was their intent." (internal quotations omitted)); *Monex Deposit Co. v. Gilliam*, 671 F. Supp. 2d 1137, 1140 (C.D. Cal. 2009) (enforceability of the arbitration agreement is "for the court to decide as a threshold matter"); *Roberts v. Synergistic Int'l, LLC*, 676 F. Supp. 2d 934, 946 (E.D. Cal. 2009) ("the issue of arbitrability is properly decided by this Court," and not by an arbitrator).

Because Adknowledge was not a signatory to the Arbitration Agreement, the Delaware choice-of-law provision is inapplicable, and the District Court correctly determined as a threshold matter that Adknowledge is unable to enforce the Arbitration Agreement.

B. Adknowledge Waived Its Right to Compel Arbitration.

Even if the Court were to find that Adknowledge has presented a legitimate argument in favor of compelling arbitration, Adknowledge cannot compel arbitration of Swift's claims on the independent ground that it waived its right to

do so.[2] Although the Federal Arbitration Act favors the enforcement of private arbitration agreements, 9 U.S.C. § 2, a court may refuse to enforce an arbitration agreement on the ground that the party seeking enforcement has waived such a right. *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 758-59 (9th Cir. 1988). Waiver of a right to compel arbitration occurs when a party: (1) has knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudiced the party opposing arbitration by such inconsistent acts. *Hoffman Constr. Co. v. Active Erectors & Installers, Inc.*, 969 F.2d 796, 798 (9th Cir. 1992). "California courts have found a waiver of the right to demand arbitration in a variety of contexts." *Davis v. Blue Cross of N. Cal.*, 25 Cal. 3d 418, 425 (1979) (citations omitted).

While Swift has substantively shown that Adknowledge has no right to compel arbitration, Adknowledge certainly thought it had a right to compel it, and acknowledges that the Terms of Service that were in effect when Ms. Swift first played the game in April 2009 (and later amended in May 2009) contained an Arbitration Agreement. "And both versions of the TOS required Swift to agree 'that any suit, action or proceeding arising out of or relating to these Terms of Use.

[2] Adknowledge will more than likely dispute this on the basis that a similar argument was rejected by the District Court as it applied to Zynga. *Swift*, 805 F. Supp. 2d at 913-14. However, as explained in this section, case law subsequent to the District Court's determination clarifies that *Concepcion* had no real impact on the issues present in this case, and should not have been used as an excuse to overlook the parties' waiver.

. . shall be resolved solely by binding arbitration before a sole arbitrator under the rules and regulation of the American Arbitration Association ("AAA")."' ER 32 (Dkt. No. 57).

Despite this perceived right, Adknowledge chose to litigate the case. *Van Ness Townhouses*, 862 F.2d at 759. While Adknowledge states that "[a]fter Swift filed her lawsuit, Zynga moved to compel arbitration" (Adknowledge Br. at 2), it conveniently omits that Zynga did not move to compel arbitration until May 5, 2011—nearly ***eighteen months*** after Swift filed her suit. (Dkt. No. 58.)[3] Instead of asserting the right it believed it had, Adknowledge filed a Motion to Dismiss and Strike Class Allegations (Dkt. No. 23), a lengthy appendix in support of its motion (Dkt. No. 24), a reply in support of its motion to dismiss and motion to strike the class action allegations (Dkt. No. 31), an answer to the amended complaint (Dkt. No. 39), a joint case management statement (Dkt. No. 42), a stipulated protective order (Dkt. No. 51), and participated in status calls, case management conferences, and phone discussions with opposing counsel. "Such an availment of the court system is inconsistent with a demand for arbitration." *Plows v. Rockwell Collins, Inc.*, No. 10-01936 DOC (MANx), 2011 U.S. Dist. LEXIS 88781, at *8 (C.D. Cal. Aug. 9, 2011) (defendant "actively participated in court litigation," when it "participated in meetings and scheduling conferences to

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[3] Adknowledge joined Zynga's Motion to Compel Arbitration and Stay Litigation on May 13, 2011. (Dkt. No. 62.)

establish case management dates, and . . . negotiate[ed] and enter[ed] into a protective order. . . ."). *See also Finch v. Am. Gen. Fin. Mgmt. Corp.*, No. 08-cv-1151-LAB (AJB), 2010 U.S. Dist. LEXIS 118779, at *6 (E.D. Cal. Nov. 8, 2010) (defendant failed to request arbitration for at least one and a half years). More to the point, Adknowledge did not even assert its supposed standing to compel arbitration in its answer to Swift's complaint. ER 238-270 (Dkt. No. 36.) *Guess?, Inc. v. Superior Court*, 79 Cal. App. 4th 553, 557-59 (2000) ("At a minimum, the failure to plead arbitration as an affirmative defense is an act inconsistent with the later assertion of a right to arbitrate.").

Because Adknowledge waited to assert this perceived right, Swift and her counsel spent over a year litigating the case as a class case, responding to Adknowledge's filings, and engaging in the discovery process. *Hoffman Constr. Co.*, 969 F.2d at 799 (prejudice found where party opposing arbitration was subjected to the expense of litigation and the discovery process). Had Adknowledge asserted its "right" sooner, Swift would have foregone the extensive class-based briefing issues, and focused on obtaining discovery concerning the enforceability of the arbitration clause (which she does not have), and briefing the instant issue. In short, "[i]t is simply too late" for Adknowledge "now to tell Plaintiff[] that it is putting an end to litigation in federal court, switching to another forum, and starting the case over again in arbitration after being unable to dismiss

Plaintiff['s] claims in large part." *In re Toyota*, 2011 U.S. Dist. LEXIS 143490, at *44-45.

The fact that the Supreme Court issued its *AT&T v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740 (2011), ruling after Swift filed her suit is of no consequence. *Concepcion* specifically overturned *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162-63 (2005), which held that class action waivers in arbitration clauses were unconscionable. But in this case, there is *no* class action waiver in the first Arbitration Agreement, and the Second Arbitration Agreement only required parties who elected to arbitrate a dispute to proceed in that arbitration individually. To be clear: none of the arbitration agreements expressly provide that the Zynga user is waiving his or her right to participate in a class action. In essence, *Concepcion* did nothing to affect the law as it applies to this case, and Adknowledge has no reason to defend why it waited so long to assert what it believes to be standing to compel arbitration.

> In any event, while *Concepcion* may have strengthened Toyota's chances for compelling arbitration, it does not mean that Toyota lacked knowledge of its potential right to pursue arbitration prior to that decision. And contrary to Toyota's suggestion, it does not have a right to reset the clock for arbitration based on changing subsequent law, as ***no party has a right to unfairly play a game of "wait and see" and not assert its legal rights until and unless the law becomes more favorable to its position***.

In re Toyota, 2011 U.S. Dist. LEXIS 143490, at 36-37 (emphasis added). This "wait and see" approach is nothing more than Adknowledge's waiver of what it

believes to be a right to compel arbitration, and because Adknowledge waived its perceived right to compel arbitration, this Court should not now require the parties to submit their dispute to arbitration.

IX. CONCLUSION

Adknowledge is unable to show this Court why it is entitled to compel arbitration as a non-signatory and a non-party to the Arbitration Agreement. Nor is Adknowledge able to show this Court that it was an intended third-party beneficiary of the Arbitration Agreement. Further, Adknowledge waived its perceived "right" to compel arbitration of this dispute long ago. For the foregoing reasons, this Court should affirm the District Court's ruling that Adknowledge is not entitled to compel arbitration of this dispute.

DATED this 9th day of March 2012.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellee Swift certifies that there are no related cases pending in this Court.

DATED this 9th day of March 2012.

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CERTIFICATE OF COMPLIANCE

With Type-Volume Limitations, Typeface Requirements,

and Type Style Requirements.

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,330 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)B)(iii).

DATED this 9th day of March 2012.

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CERTIFICATE OF SERVICE

Pursuant to Circuit Rule 25-5(f)

for Case No. 11-16933

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 9, 2012. I certify that all participants in this Case are registered CM/ECF users and that service will be accomplished via the appellate CM/ECF system.

DATED this 9th day of March 2012.

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