

No. 11-16933

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**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.**

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

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**APPELLANTS' RESPONSE TO  
ORDER TO SHOW CAUSE**

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**NEWMAN DU WORS LLP**

By: Derek A. Newman  
Derek Linke  
1201 Third Avenue, Suite 1600  
Seattle, Washington 98101  
Telephone: (206) 274-2800  
Facsimile: (206) 274-2801

Attorneys for Appellants

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Appellants Adknowledge, Inc. and KITN Media USA, Inc. certifies the following:

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.

Dated this 26<sup>th</sup> day of September 2011.

**NEWMAN DU WORS LLP**

By: s/ Derek Linke  
Derek A. Newman  
Derek Linke

Attorneys for Appellants

## **I. RELIEF SOUGHT**

Appellants Adknowledge, Inc. and KITN Media USA, Inc. (together, “Adknowledge”) respond to this Court’s September 15, 2011 Order requiring that “Within 21 days after the date of this order, appellants shall move for voluntary dismissal of the appeal or show cause why it should not be dismissed for lack of jurisdiction.” (Dkt. No. 4.)

Adknowledge appeals because the district court issued a final decision denying Adknowledge’s request that all of Respondent Rebecca Swift’s claims proceed to arbitration. The district court granted a different defendant’s motion to compel arbitration and stayed proceedings. But the district court denied Adknowledge’s motion to compel arbitration and later lifted the stay.

Under the Federal Arbitration Act “an appeal may be taken from . . . a final decision with respect to an arbitration that is subject to this title.” The district court made a final decision denying arbitration of Swift’s claims against Adknowledge. This Court has jurisdiction over Adknowledge’s appeal. Adknowledge respectfully requests the Court proceed with its appeal.

## **II. FACTS**

This appeal is taken from the district court’s “Order Granting Zynga’s Motion to Compel Arbitration; Granting in Part and Denying in Part Other Defendants’ Parallel Motion to Stay; Denying as Moot: (1) Motion to Compel

Discovery, (2) Motion to Hear Cross-Motion to Stay Discovery on Shortened Time, (3) Motion to Stay Discovery; Granting Motion to Seal” (the “Order”). Declaration of Derek Linke in Support of Appellants’ Response to Order to Show Cause (“Linke Decl.”) ¶ 2 Ex. A.

Swift alleges she participated in certain online offers “created and developed” by Adknowledge. (Id. ¶ 3 Ex. B at ¶ 6.) All of Swift’s alleged damages result from her claimed participation in offers she accessed through Zynga’s “YoVille” game application. (Id. Ex. B at ¶¶ 37-38.) Swift alleges that Adknowledge conspired with Zynga in a scheme to defraud consumers, including herself. (Id. Ex. B at ¶¶ 10, 14, 25, 30.)

After Swift filed her lawsuit, Zynga moved to compel arbitration. (Id. ¶ 4 Ex. C.) Zynga argued that in order to launch the YoVille application, Swift was required to accept Zynga’s YoVille Terms of Service (“YoVille TOS”) that were in effect when she played the game. (Id.) The YoVille TOS 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.” (Id. at 3:7-9.) Adknowledge filed a joinder to Zynga’s

motion to compel, arguing that Swift's claims against them were related to the YoVille TOS or transactions contemplated by the TOS. (Id. at ¶ 5 Ex. D.)

The district court's Order granted Zynga's request to compel arbitration of Swift's claims against Zynga. (Id. at ¶ 2 Ex. A.) But the Order denied Adknowledge's request to compel arbitration of Swift's claims against Adknowledge. (Id. at 2:18-19; Id. at 13-16.) After the district court issued its Order, Swift dismissed Zynga as a defendant and the district court lifted the stay. (Id. at ¶ 6 Ex. E at 3:3-5.)

### III. ARGUMENT AND AUTHORITY

The Federal Arbitration Act, 9 U.S.C. § 16(a)(3), provides that: "An appeal may be taken from . . . a final decision with respect to an arbitration that is subject to this title." The decision of the district court concerning whether a dispute should be referred to arbitration is a question of law. *Dean Witter v. Reynolds, Inc. v. Byrd*, 470 U.S. 213, 84 L. Ed. 2d 158, 105 S. Ct. 1238 (1985) ("By its terms, the FAA leaves no room for the exercise of discretion by a district court"). The district court's denial of arbitration is reviewed *de novo* by the appellate court. *United Food Commercial Workers Union, Local 770 v. Geldin Meat Co.*, 13 F.3d 1365, 1368 (9th Cir. 1994). This Court has jurisdiction over this appeal from the district court's final decision to deny arbitration of Swift's claims over Adknowledge.

Adknowledge is not appealing the district court's grant of Zynga's request for arbitration or the temporary stay that the district court already lifted.

Adknowledge is appealing only the district court's *denial* of Adknowledge's request for arbitration. This Court's order to show cause is correct that "an order granting a motion to compel arbitration and staying district court proceedings is generally not an appealable order". But this appeal is taken because the district court denied a motion to compel arbitration and promptly lifted a stay of proceedings. Because the district court issued "a final decision with respect to an arbitration," 9 U.S.C. § 16(a)(3), this Court has jurisdiction.

#### **IV. CONCLUSION**

Adknowledge filed this appeal because the district court denied its motion to compel arbitration. The district court granted another defendant's motion, and temporarily issued a stay that has since been lifted. This Court has jurisdiction over that denial and should proceed with Adknowledge's appeal.

DATED this 26<sup>th</sup> day of September, 2011.

**NEWMAN DU WORS LLP**

By: s/ Derek Linke  
Derek A. Newman  
Derek Linke

Attorneys for Appellants

**CERTIFICATE OF SERVICE**

**Case No. 11-16933**

I hereby certify that on September 26, 2011, 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated this 26<sup>th</sup> day of September 2011.

/s/ Derek Linke \_\_\_\_\_  
Derek Linke