Richard L. Seabolt (SBN 67469)
Suzanne R. Fogarty (SBN 154319)
Oliver E. Benn (SBN 244618)
DUANE MORRIS LLP
Spear Tower, One Market Plaza, Suite 2200
San Francisco, CA 94105-1127
Telephone: 415.957.3000
Facsimile: 415.957.3001
E-mail: RLSeabolt@DuaneMorris.com
SRFogarty@DuaneMorris.com
OBenn@DuaneMorris.com

Attorneys for Defendant,
ZYNGA INC.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

REBECCA SWIFT, individually, on behalf of the general public, and all others similarly situated,

Plaintiff,

v.

ZYNGA GAME NETWORK INC.; ADKNOWLEDGE, INC.; D/B/A SUPER REWARDS; KITN MEDIA USA, INC., D/B/A SUPER REWARDS,

Defendants.

Case No.: CV 09-5443 EDL

DEFENDANT ZYNGA INC.'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND MOTION TO STAY LITIGATION; MEMORANDUM OF POINTS AND AUTHORITIES

Date: June 14, 2011
Time: 9:00 a.m.
Judge: Elizabeth D. Laporte
Ctrm.: E – 15th Floor

Complaint Filed: November 17, 2009

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NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND MOTION TO STAY LITIGATION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 14, 2011, at 9:00 a.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Elizabeth Laporte, Defendant Zynga Inc. ("Zynga") will move the Court for an order compelling arbitration of Plaintiff Rebecca Swift's claims and staying the litigation. This motion is based on this Notice of Motion and Motion, the supporting Memorandum, the Declaration of Sean Hanley, all pleadings in this action, and the argument of counsel.

Dated: May 5, 2011

DUANE MORRIS LLP

By: /s/
Richard L. Seabolt
Attorneys for Defendant,
ZYNGA INC.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Zynga Inc. moves to compel arbitration of Plaintiff Rebecca Swift's claims pursuant to the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, ___ S.Ct. ___, 2011 WL 1561956 (April 27, 2011) ("*AT&T Mobility*"), which was issued last Wednesday, April 27, 2011.

In *AT&T Mobility*, the Court held that the controlling California law prohibiting enforcement of arbitration agreements requiring individual arbitrations was preempted by the Federal Arbitration Act ("FAA"). In fact, the Court went further, holding that – absent the express consent of the contracting parties to arbitrate on a classwide basis – the FAA requires that arbitrations proceed only on an individual basis. Zynga's relevant Terms of Service ("TOS") agreements provided for arbitration of disputes. Until *AT&T Mobility* was decided, however, Zynga was prohibited by California law from enforcing the right to compel an individual arbitration with the plaintiff, Rebecca Swift, in the present case. Following this change in the law, Zynga now seeks to enforce its contractual right to arbitrate Swift's claims on an individual basis.

Zynga is now entitled – and through this motion seeks – to compel arbitration and stay all court proceedings. Zynga has acted promptly to assert its rights under *AT&T Mobility* and the Court should now order that Swift pursue her claim in arbitration.

II. STATEMENT OF FACTS

On November 17, 2009, Rebecca Swift filed an action against Zynga purporting to represent herself and a class of persons similarly situated. The claims related to alleged monetary harm she suffered after allegedly completing third-party advertising offers appearing in the "Offer Wall" sections of Zynga's game pages. FAC, Dkt. 13. Swift alleges that she completed Offer Wall transactions in Zynga's YoVille game in April and June 2009, but did not file her complaint or otherwise notify Zynga of her problems with the advertisers/product service providers until November 2009. *See id.* ¶¶37-40. Swift brought three purported causes of action for (1) violation of the Unfair Competition Law ("UCL"); (2) violation of the Consumer Legal Remedies Act ("CLRA"); and, (3) unjust enrichment. *Id.*

Two different TOS agreements are relevant here. First, Swift accepted the terms of the YoVille TOS (the "YoVille TOS") when she first logged on to play the YoVille game in April 2009.[1] Hanley Decl. ¶¶3-4 & Ex. A. The YoVille TOS governed "the terms and conditions which apply to the use" of all "product[s] or service[s] offered by Zynga for use, subscription or sale." Hanley Decl. Ex. A, p.1. The YoVille TOS contained the following provision requiring disputes to be arbitrated:

> . . . You agree that any suit, action or proceeding arising out of or relating to these Terms of Use or any of the transactions contemplated herein or related to the Service or any contests or services thereon (including without limitation, statutory, equitable or tort claims) shall be resolved solely by binding arbitration before a sole arbitrator under the rules and regulations of the American Arbitration Association ("AAA"); provided, however, that notwithstanding the parties' decision to resolve any and all disputes arising under these Terms of Use through arbitration, Zynga may bring an action in any court of applicable jurisdiction to protect its intellectual property rights or to seek to obtain injunctive relief or other equitable from a court to enforce the provisions these Terms of Use or to enforce the decision of the arbitrator. The arbitration will be held in San Francisco, California . . . .

Hanley Decl. Ex. A, p.17. The YoVille TOS also included language expressly stating that "Zynga has the right, at any time, to:...impose, change or modify the terms and conditions of these Terms of Use ("Changes")" and that "[a]ny use of the Service by you after notice of the Changes, constitutes acceptance by you of any such Changes." Hanley Decl. Ex. A, p.14. In addition, the YoVille TOS provides that "any such Changes shall be effective immediately upon notice by posting the Changes on Zynga's Service or by any other method of notice Zynga deems appropriate." *Id.*[2]

Second, Swift agreed to Zynga's subsequent TOS applicable to all games, which came into effect on August 1, 2009 and superseded the YoVille TOS (the "Universal TOS"). Hanley Decl. at ¶6 and Ex. C. The Universal TOS provided that by "using or accessing the Service you agree to be bound by these Terms." Hanley Decl. Ex. C, p.1.

Paragraph 12 of the Universal TOS provided that either Zynga or its game players could

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[1] The YoVille TOS was amended on May 19, 2009. However, the changes are not relevant to this lawsuit and the arbitration provision was not changed. Hanley Decl. Ex. A, p.14, Ex. B, p.17. A copy of the YoVille TOS as amended on May 19, 2009, is attached to the Hanley Decl. as Ex. B. Both YoVille TOSs are referred to as the YoVille TOS in this brief.

[2] As a result of this language, Zynga believes that the August 1, 2009 Universal TOS governs this dispute.

require that disputes be arbitrated:

> Binding Arbitration. If you and Zynga are unable to resolve a Dispute through informal negotiations, 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. YOU UNDERSTAND THAT ABSENT THIS PROVISION, YOU WOULD HAVE THE RIGHT TO SUE IN COURT AND HAVE A JURY TRIAL. . .

Hanley Decl. Ex. C, (Universal TOS ¶12(d)).[3] The same paragraph also provided that the FAA would determine the arbitrability of the dispute and that either party could petition a court of law to compel arbitration:

> The determination of whether a Dispute is subject to arbitration shall be governed by the Federal Arbitration Act and determined by a court rather than an arbitrator . . . Except as otherwise provided in this Agreement, you and Zynga may litigate in court to compel arbitration, stay proceedings pending arbitration, or to confirm, modify, vacate or enter judgment on the award entered by the arbitrator.

Hanley Decl. Ex. C, (Universal TOS ¶12(d)).

The subsequent section of Paragraph 12 of the TOS provided that no actions could be brought on a representative or class-wide basis:

> You and Zynga agree that any arbitration shall be limited to the Dispute between Zynga and you individually. To the full extent permitted by law, (1) no arbitration shall be joined with any other; (2) there is no right or authority for any Dispute to be arbitrated on a class-action basis or to utilize class action procedures; and (3) there is no right or authority for any Dispute to be brought in a purported representative capacity on behalf of the general public or any other persons.

Hanley Decl. Ex. C, (Universal TOS ¶12(e)).

During the pendency of this case, controlling California law precluded Zynga from compelling such individual arbitrations under the California Supreme Court decision *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005) ("*Discover Bank*"). However, just last week, on April 27, 2011, the U.S. Supreme Court overruled *Discover Bank* and held that the FAA requires courts to give full force and effect to parties' contractual rights, and specifically to enforce bilateral arbitrations except where the parties explicitly contracted to the contrary. *AT&T Mobility LLC*, ___ S.Ct. ___, 2011 WL 1561956, at *10 (Slip. Op. p.13). Accordingly, Zynga moves the court to enforce its newly confirmed right to arbitrate Swift's claims on an individual basis.

[3] The term "Dispute" is defined as "any dispute, controversy or claim related to th[ese] Terms." Hanley Decl. Ex. C, (TOS ¶ 12(c)).

III. DISCUSSION

A. Swift Is Contractually Bound To Arbitrate Disputes.

In her First Amended Complaint, Swift claims that she played various Zynga games. FAC, Dkt. 13 ¶36. As a Zynga game user who played YoVille, Swift agreed to Zynga's YoVille TOS and then its Universal TOS. Hanley Decl. ¶¶2-6, Exs. A-C. The YoVille TOS applied to all "product[s] or service[s] offered by Zynga for use, subscription or sale." Hanley Decl. Ex. A, p. 1. The Universal TOS applied to users' "use of Zynga.com and/or the games and applications offered by Zynga Game Network, Inc. ("Zynga") and accessed through third party web sites (collectively, the "Service")." Hanley Decl. Ex. C, p.1.

Swift alleges that she used Zynga's games through Facebook.com. FAC, Dkt. 13, ¶25. Swift alleges she was harmed after completing various third-party advertising offers in April and June 2009, that, she claims, involved a fraudulent scheme between Zynga and various third parties. *Id.* at ¶¶6, 37-40. Irrespective of the merits of those claims, they undoubtedly fall under the TOSs. As detailed in the Statement of Facts, above, each TOS provides that all disputes (defined to encompass all claims relating to the TOS) were subject to binding arbitration. Hanley Decl. Ex. C (Universal TOS ¶12(c), (d)), Ex. A (YoVille TOS).

B. The Arbitration Agreement Is Enforceable Under The Federal Arbitration Act.

The FAA governs the enforceability of arbitration agreements 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) ("[a]s both the means to engage in commerce and the method by which transactions occur, the Internet is an instrumentality and channel of interstate commerce"); *Multiven, Inc. v. Cisco Systems, Inc.*, 725 F. Supp. 2d 887, 891 (N.D. Cal. 2010) (same). Here, Plaintiff Rebecca Swift alleges in the Complaint that she engaged in transactions over the Internet with third parties and that she was harmed as a result of those transactions. *See, e.g.*, FAC ¶¶39-40. Accordingly, the transactions at issue here involve interstate commerce.

The FAA establishes a liberal federal policy favoring arbitration when the parties contract for

that mode of dispute resolution. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995); *Southland Corp. v. Keating*, 465 U.S. 1, 12-14 (1984). Once triggered, the FAA mandates that:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . ., shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. §2. Any doubts concerning the scope of arbitrable issues must be resolved in favor of arbitration. *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983). Motions to compel arbitration should be granted in all cases unless the arbitration provision is not susceptible of an interpretation that covers the asserted dispute. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). To that end, courts, "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not an issue, . . . shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. §4.

Because the dispute involves interstate commerce and is governed by an agreement between the parties containing a now-effective arbitration provision, the FAA controls and requires the present dispute to be ordered to arbitration. Plaintiffs' claims for monetary damages must be pursued in arbitration.

C. The Recent *AT&T Mobility* Decision Held That Contracting Parties Are Entitled To Resolve Disputes In Arbitration On An Individual Basis Unless They Specifically Agreed to the Contrary.

Under prior California law, the arbitration clauses contained in the Zynga TOSs were deemed unenforceable. In *Discover Bank*, the California Supreme Court held that arbitration provisions could not require that consumer claims involving small amounts of money to be arbitrated on an individual basis only. 36 Cal. 4th at 162-163. The court held such arbitration provisions would be unconscionable and unenforceable under California law. *Id.* The court further concluded that California law in this regard was not preempted by the FAA, because the FAA authorized courts to avoid arbitration agreements on principles of contract law, including unconscionability. *Id.* at 167. Accordingly, since *Discover Bank*, federal and state courts interpreting that decision consistently

have held such arbitration provisions in consumer contracts of adhesion unenforceable under California law. *See, e.g., Shroyer v. New Cingular Wireless Services, Inc.*, 498 F. 3d 976, 990 (9th Cir. 2007); *Cohen v. DirecTV, Inc.*, 142 Cal. App. 4th 1442, 1451–1453 (2006); *Oestreicher v. Alienware Corp.*, 502 F. Supp. 2d 1061, 1067-1069 (N.D. Cal. 2007).

Last Wednesday, April 27, 2011, the U.S. Supreme Court overruled *Discover Bank* in *AT&T Mobility*. ___ S.Ct. ___, 2011 WL 1561956. In a broad ruling, the Court held that private arbitration agreements must be enforced according to their terms. *Id.*, at *8 (Slip. Op. p.5) (*citing Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). While the FAA, section 2, contained a savings clause that allowed generally applicable contract defenses to be used to invalidate contracts containing arbitration agreement, the FAA nonetheless preempted all "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at *7 (Slip. Op. p.9). The California Supreme Court's decision in *Discover Bank* "interfere[d] with arbitration" because it allowed courts to disregard the parties' contractual agreement to arbitrate disputes only on an individual basis. *Id.* at *10 (Slip. Op. p.12). This upset the FAA's purposes of creating a quick, informal process for resolving disputes. *Id.* at *11 (Slip. Op. pp.14-15). Classwide arbitration would also "greatly increase[] risks to defendants" because the FAA's intent to create a forum for disputes to be resolved quickly and cost-effectively would be undermined "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once." *Id.*, at *12 (Slip. Op. pp.15-16).

The Court explained that "[a]rbitration is poorly suited to the higher stakes of class litigation" and the parties' contractual agreement to arbitrate disputes pursuant to the terms of that agreement took primacy under the FAA. *Id.* at *13 (Slip. Op. p.16). The Court rejected the argument that small-dollar claims might not be effectively recoverable, holding that "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* (Slip. Op. p.17). The Court held that, under the FAA, unless the contracting parties *explicitly* agreed to class arbitration, arbitrations could only proceed on an individual basis. *Id.* at *10 (Slip. Op. p.13). The Court discussed how its previous decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758 (2010) held that state public policy could not be used to override the intent of the FAA in

understanding the significance of silence in an arbitration provision concerning class issues. *Id.* The Court then held that based on *Stolt-Nielsen* and the situation presented to it in the *AT&T Mobility* case, "[t]he conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA." *Id.* In other words, class arbitration would only be allowed when the parties specifically consented to it. The Court explained, "Requiring the availability of classwide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at *9 (Slip. Op. p.9).

Here, there are two TOSs with arbitration provisions. The Universal TOS contains an explicit requirement that claims such as Swift's be brought on an individual basis. Hanley Decl. Ex. C, (Universal TOS ¶¶ 12(d)-(e)). The YoVille TOS requires arbitration, but is silent on whether that arbitration can proceed on a classwide basis or not. *See* Hanley Decl. Ex. A, p.17. Under *AT&T Mobility*, such silence now cannot be read as authorizing a class arbitration. Therefore, because both potentially applicable TOSs now confer the right for Zynga to arbitrate Swift's claims on an individual basis under *AT&T Mobility*, the Court should compel arbitration of those claims.

D. The Court Should Stay The Action Pending Completion Of The Arbitration.

It is indisputable that when a court determines that a suit or proceeding is referable to arbitration, it must stay any and all of its proceedings. 9 U.S.C. § 3. Section 3 of the FAA provides:

> [I]f any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3. Under the FAA, courts "are obligated to grant stays of litigation under Section 3 of the [Federal] Arbitration Act." *Moses H. Cone Mem. Hosp., supra*, 460 U.S. at 26; *AT&T Corp. v. Innocom Telecom LLC*, 2007 WL 163193 (N.D. Cal. 2007) (Laporte, J.) ("Upon request, a federal court must stay an action on issues that by written agreement are subject to arbitration, in order to allow arbitration of a suit subject to such clause"). Further, a stay under the FAA of the entire pending action is appropriate so that the arbitration may proceed, even if certain claims are

determined to be non-arbitrable. *United States v. Neumann Caribbean Intern.*, 750 F.2d 1422, 1426-27 (9th Cir. 1985).

As previously discussed, Plaintiffs' claims are subject to binding arbitration. All other aspects of the litigation should be stayed pending resolution of the arbitration.

IV. CONCLUSION

For all the foregoing reasons, Zynga respectfully requests that the Court compel arbitration of all of Plaintiff's arbitrable claims, and stay the present litigation pending resolution of those claims.

DUANE MORRIS LLP

DATED: May 5, 2011

/s/
Richard L. Seabolt
Attorneys for Defendant
ZYNGA INC.

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