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ADKNOWLEDGE, INC. and
KITN MEDIA USA, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

REBECCA SWIFT, on behalf of herself and
all other similarly situated,

NO. 4:09-CV-05443 EDL

Plaintiff,

V.

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

**JOINDER OF DEFENDANTS
ADKNOWLEDGE, INC. AND
KITN MEDIA USA TO
DEFENDANT ZYNGA INC.'S
MOTION TO COMPEL
ARBITRATION AND MOTION
TO STAY LITIGATION**

Defendants.

I. INTRODUCTION

Defendants Adknowledge, Inc. (“Adknowledge”) and KITN Media USA, Inc. (“KITN”) hereby join the motion of Defendant Zynga, Inc. (Dkt. No. 54) to compel arbitration and stay litigation in the above-captioned lawsuit. Plaintiff Rebecca Swift claims Adknowledge and KITN are agents, employees, or distributors of Zynga’s, or are otherwise affiliated with Zynga. Swift agreed to terms of service which mandate arbitration of all claims against Zynga and its affiliates. Principles of agency law support arbitration of all claims Swift alleges in this lawsuit, including those against Adknowledge and KITN.

Moreover, the Federal Arbitration Act—which as Zynga’s motion noted, is now the controlling law—requires any doubts concerning the scope of arbitrable issues to be resolved in favor of arbitration. This Court should stay the litigation and require all of Swift’s claims, including those against Adknowledge and KITN, to proceed to arbitration.

II. FACTS

Swift alleges she participated in certain “Integrated Special Offer Transactions” (“ISOTs”) “created and developed” by Defendants. (First Amended Complaint (“FAC”), (Dkt. No. 13) at ¶ 6.) All of her alleged damages result from her claimed participation in ISOTs she accessed through Zynga’s “YoVille” game application. (Id. at ¶¶ 37-38.)

To launch the YoVille application, Swift was required to accept Zynga's YoVille Terms of Service ("YoVille TOS") that were in effect when she first played the game in April 2009. (Declaration of Sean Hanley in Support of Petition to Compel Arbitration ("Hanley Decl.") (Dkt. No. 55) at ¶¶ 2-4, Ex. A.) The YoVille TOS were amended in May 2009. (Id. at ¶ 5, Ex. B.) Both versions of the TOS indicate Adknowledge and KITN are third parties whose actions are subject to the TOS:

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 . . .

(Id., Ex. A at 14-15; Id., Ex. B at 15; capitalization original.) Swift's FAC alleges that Adknowledge and KITN are agents, employees, or distributors of Zynga's, or are otherwise affiliated with Zynga. (FAC ¶ 30.) Both versions of the TOS provide that the "Zynga Parties" "shall not be liable" for damages "arising out of" Swift's use of the YoVille services. (Hanley Decl., Ex. A at 14-15; Id., Ex. B at 15.) Both versions required Swift to agree that she would not "seek to hold the Zynga Parties liable[] for the conduct of third parties." (*Id.*)

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 . . . shall be resolved solely by binding arbitration before a sole arbitrator under the rules and regulations of the American Arbitration Association ("AAA")." (Hanley Decl., Ex. A at 17; Id., Ex. B at 17.)

III. DISCUSSION

A. Adknowledge is an alleged agent of Zynga with standing to enforce Zynga's arbitration clause.

Both versions of the YoVille TOS expressly limit the liability of all "Zynga Parties", which includes agents of Zynga as well as its distributors and other affiliates. Both versions require arbitration of all claims "arising out of or relating to these Terms of Use". Swift's FAC alleges that Adknowledge and KITN are agents, employees, or distributors of Zynga's, or are otherwise affiliated with Zynga. Thus, Adknowledge and KITN are "Zynga Parties" whose actions fall within the ambit of the YoVille TOS.

This Court has held that non-signatories to an arbitration agreement—such as Adknowledge and KITN—may nevertheless enforce that agreement "under ordinary contract and agency principles." *Amisil Holdings Ltd. v. Clarium Capital Mgmt. LLC*, 622 F. Supp. 2d 825, 830 (N.D. Cal. 2007) (*citing Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006)). In *Amisil*, the defendants sought to enforce an arbitration agreement they had not signed against a party that had signed the agreement. *Id.* The *Amisil* court analyzed the two chief Ninth Circuit cases, *Letizia v. Prudential Bache*

1 *Secs., Inc.*, 802 F.2d 1185 (9th Cir, 1986) and *Britton v. Co-op Banking Group*, 4 F.3d
 2 742 (9th Cir, 1993). *Amisil* concluded as follows:

3 Taken together, *Letizia* and *Britton* establish that agents of a signatory can
 4 compel the other signatory to arbitrate so long as (1) the wrongful acts of
 5 the agents for which they are sued relate to their behavior as agents or in
 6 their capacities as agents (*Letizia*) and (2) the claims against the agents
 7 arise out of or relate to the contract containing the arbitration clause
 8 (*Britton*) (consistent with the language of the arbitration clause).

9 *Amisil*, 622 F. Supp. 2d at 832. The court concluded that “under agency principles,
 10 the claims against the individual defendants should be arbitrated.” *Id.* at 839.

11 The analysis in this case leads to an identical result. Adknowledge and KITN are
 12 being sued in their capacities as Zynga’s alleged agents or affiliates. And Swift’s decision
 13 to launch the YoVille application required her to agree to the YoVille TOS—a contract
 14 which is related to all claims against “Zynga Parties” and contains a mandatory
 15 arbitration clause. This Court should follow *Amisil* and hold that all claims against
 16 Adknowledge and KITN should be arbitrated.

17 **B. Because Swift’s claims are closely related to the contractual relationship
 18 formed by Zynga’s Terms of Service, the arbitration clause should apply to
 19 all parties to this dispute.**

20 The Ninth Circuit has held that “Under the Federal Arbitration Act[,] 9 U.S.C. §§
 21 1-15, any doubts concerning the scope of arbitrable issues should be resolved in favor of
 22 arbitration.” *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1139
 23 (9th Cir. 1991), *overruled in part on other grounds, L & M Creations, Inc. v. CRC Info.*
 24 Sys.

25 , 2011 U.S. Dist. LEXIS 36269 (D. Nev. Mar. 23, 2011). Application of that principle
 26 to the YoVille TOS indicates that this matter must be submitted to mandatory arbitration.

27 In *Hopkins & Carley, ALC v. Thomson Elite*, 2011 U.S. Dist. LEXIS 38396, *9
 28 (N.D. Cal. Apr. 6, 2011), this Court reviewed an agreement with a clause providing that
 29 “[t]he parties shall submit any dispute arising under the Agreement [that could not be
 30 resolved by a specific alternative procedure] to binding arbitration in accordance with the

1 then prevailing Commercial Arbitration Rules of the American Arbitration Association".
 2 *Id.* This is nearly identical to the YoVille TOS Swift executed, which requires arbitration
 3 of disputes "arising out of or relating to these Terms of Use". Hopkins noted the plaintiff
 4 had "identified no meaningful distinction" between the phrases "arising under" and
 5 "arising from or out of". *Id.* at *16.

6 The *Hopkins* court determined that all of the plaintiff's claims, "whether based on
 7 contract or tort, directly relate[d] to the parties' contractual relationship." *Id.* at *16-17.
 8 The court noted that the Federal Arbitration Act required any ambiguity to be resolved in
 9 favor of arbitration, and held that all of the plaintiff's "claims [fell] within the scope of
 10 the arbitration clause, regardless of whether Ninth Circuit or California law [was]
 11 applied." *Id.* at *22-23.

12 As in *Hopkins*, this Court should hold that all of Swift's causes of action are
 13 closely related to the YoVille TOS. She agreed to those terms and they govern her use of
 14 Zynga's YoVille services, as well as all actions of "Zynga Parties" such as Adknowledge
 15 and KITN. All of Swift's claimed damages result from her decision to launch the YoVille
 16 application and to become bound by the related terms of service. And the YoVille TOS
 17 require arbitration of all claims "arising out of or relating to these Terms of Use".

18 **C. This Court should exercise its discretion to stay the lawsuit pending
 19 arbitration.**

20 The Federal Arbitration Act, at 9 U.S.C. § 3, compels courts to stay litigation of
 21 arbitrable issues regardless of whether those issues intertwine with nonarbitrable issues
 22 and regardless of whether "piecemeal litigation" will result. The decision whether to stay
 23 non-arbitrable issues pending arbitration rests with the sound discretion of the district
 24 court. *See, e.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20-
 25 21, 74 L.Ed.2d 765, 103 S.Ct. 927 and n. 23 (1983) (in context of staying claims of
 26 nonarbitrating parties).

27 As discussed above, all of Swift's claims are subject to mandatory arbitration. But
 28 in the event this Court decides otherwise, it should still exercise its discretion to stay

1 litigation of the non-arbitrable issues until the arbitration has concluded. The arbitrator's
2 decision regarding Zynga's liability may affect the outcome of any non-arbitrable claims.
3 Judicial economy favors a stay, so this Court will have the benefit of the arbitrator's
4 analysis without having to duplicate the arbitrator's efforts.

5 **IV. CONCLUSION**

6 Swift agreed to the YoVille TOS, which mandates arbitration of her claims. The
7 YoVille TOS applies to all claims against Adknowledge and KITN, as well as the claims
8 against Zynga. And federal law supports the resolution of all doubts in favor of
9 arbitration. Consequently, Adknowledge and KITN respectfully join in Zynga's motion
10 to compel arbitration and stay litigation in the above-captioned lawsuit.

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12 DATED this 18th day of May, 2011.

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14 **NEWMAN DU WORS LLP**

15
16 By: /s/ Derek Linke
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19 ADKNOWLEDGE, INC. and
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