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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CHAD HERRON, individually, on
behalf of himself and all
others similarly situated,

Plaintiff,

v.

BEST BUY STORES, L.P., a
Virginia limited partnership;
TOSHIBA AMERICA INFORMATION
SYSTEMS, INC., a California
corporation, inclusive,

Defendants.

No. 12-cv-02103-GEB-JFM

**ORDER GRANTING DEFENDANT TOSHIBA
AMERICA INFORMATION SYSTEMS'
MOTION TO COMPEL ARBITRATION**

Defendant Toshiba America Information Systems, Inc. ("Toshiba") moves in this putative class action for an order compelling "[P]laintiff to arbitrate his claim against T[oshiba]." (Mem. P. & A. in Supp. Mot. to Compel Arbitration ("Toshiba's Mot.") 1:3-4, ECF No. 74-1.) Plaintiff opposes the motion.

I. FACTUAL BACKGROUND

The following uncontroverted facts are germane to the motion. Contained within the box for the Toshiba laptop Plaintiff purchased at a Best Buy store was an arbitration provision, which prescribes:

Customer and Toshiba acknowledge and agree

1 that any claim, dispute, or controversy . . .
2 between Customer and Toshiba arising from or
3 relating to (i) . . . the validity of this
4 binding arbitration provision, or (ii) the
5 use of the Product shall be resolved
6 **EXCLUSIVELY AND FINALLY BY BINDING**
7 **ARBITRATION**

8

9 The binding arbitration provision shall
10 be governed by the United States Federal
11 Arbitration Act [("FAA")].

12 (Decl. of Don Hanson Ex. A, One (1) Year Standard Limited
13 Warranty for Computers ("Arbitration Provision") A7, A9, ECF No.
14 74-3.)

15 Additionally, "[i]nside the box . . . the actual . . .
16 laptop would have been completely enclosed in a plastic bag . . .
17 sealed with a sticker," (Decl. of Don Hanson ¶ 4, ECF No. 74-2),
18 informing Plaintiff of the referenced arbitration provision and
19 prescribing:

20 **IF YOU DO NOT ACCEPT THESE CONDITIONS, RETURN**
21 **THE UNOPENED PACKAGE AND ALL OTHER ITEMS**
22 **INCLUDED WITH THE [LAPTOP] TO THE PLACE OF**
23 **PURCHASE AND YOUR MONEY WILL BE REFUNDED IN**
24 **ACCORDANCE WITH THE APPLICABLE RETURN POLICY**
25 **OF THE PLACE OF PURCHASE.**

26 (Decl. of Don Hanson Ex. B, ECF No. 74-4.)

27 **II. DISCUSSION**

28 Toshiba argues: "Plaintiff should be compelled to
arbitrate his claim against [it since] Plaintiff accepted the
terms of . . . a prominently disclosed arbitration provision."
(Toshiba's Mot. 1:2-4.) Toshiba contends: "That provision binds
the parties to arbitrate on an individual basis any disputes
relating to the use of [P]laintiff's laptop." (Id. 1:4-5.)

Plaintiff counters with arguments: 1) "no agreement to

1 arbitrate was formed between Plaintiff and T[oshiba]"; 2) "the
2 arbitration [provision] is unconscionable, and thus
3 unenforceable"; and 3) "T[oshiba] has waived its right to compel
4 arbitration." (Pl.'s Opp'n 9:9-11, ECF No. 78.)

5 **A. Acceptance of Arbitration Provision**

6 Plaintiff argues: "T[oshiba] has failed to show that
7 . . . the arbitration [provision]," which Plaintiff did not
8 encounter until after purchase, "w[as] accepted and assented to
9 by Plaintiff." (Pl.'s Opp'n 19:22-23.)

10 "[C]ontracts contained in [] boxes . . . are no less
11 enforceable than any other type of contract." Novell, Inc. v.
12 Unicom Sales, Inc., No. 03-cv-2785 MMC, 2004 WL 1839117, at *11
13 (N.D. Cal. Aug. 17, 2004) (citing ProCD, Inc. v. Zeidenberg, 86
14 F.3d 1447, 1449 (7th Cir. 1996); see also Murphy v. DirectTV,
15 Inc., 724 F.3d 1218, 1225 n.4 (9th Cir. 2013) (approving, in
16 dictum, a district court's determination that "continuing to
17 accept [defendant]'s services . . . bound [p]laintiffs to the
18 terms of the contract"); Datel Holdings Ltd. v. Microsoft Corp.,
19 712 F. Supp. 2d 974, 989 (N.D. Cal. 2010) ("Plaintiff argues that
20 the Warranty could not have been discovered by consumers until
21 the box was opened, and that therefore, a consumer could not have
22 knowingly and voluntarily accepted it prior to purchase. The
23 weight of authority, however, . . . is that shrinkwrap licenses
24 are enforceable." (citation omitted)). Therefore, Plaintiff has
25 not shown that since he was not provided the arbitration
26 provision before the laptop purchase, he did not accept its
27 terms.

28 Plaintiff also argues that case law supporting

1 acceptance of contracts within the boxes of consumer products via
2 product use is inapposite since "in order to avoid being bound by
3 the terms of the [arbitration provision], Plaintiff was required
4 to return the [l]aptop to Best Buy pursuant to Best Buy's return
5 policy as it then existed," which would have subjected Plaintiff
6 to a "restocking fee of fifteen percent," i.e. "a monetary loss
7 of approximately \$84" based on Plaintiff's purchase price of
8 \$559.74. (Id. 24:1-3, 24:5, 24:10.) Plaintiff supports this
9 argument with a document, of which he has requested judicial
10 notice, that he contends states Best Buy's return policy in
11 effect at the time of his laptop purchase. (See Pl.'s Req. for
12 Judicial Notice Ex. A, ECF No. 78-13.) However, the document does
13 not state the dates for which its provisions are in effect.
14 Therefore, Plaintiff has not been shown that the referenced
15 restocking fee was in effect when he purchased the laptop.

16 **B. Validity of Arbitration Provision**

17 Plaintiff argues the arbitration provision is
18 "unconscionable and unenforceable as a matter of law." (Pl.'s
19 Opp'n 35:14.) Toshiba counters, inter alia, that "[t]he
20 arbitration [provision] at issue here contains a delegation
21 [clause] that requires" this unconscionability challenge "to be
22 decided by the arbitrator, not the Court." (Toshiba's Reply 2:10-
23 11, ECF No. 82 (quoting Arbitration Provision A7).)

24 The referenced arbitration provision states:

25 Customer and Toshiba acknowledge and agree
26 that any claim, dispute, or controversy . . .
27 between Customer and Toshiba arising from or
28 relating to . . . the validity of this
binding arbitration provision . . . shall be
resolved EXCLUSIVELY AND FINALLY BY BINDING
ARBITRATION

1 (Arbitration Provision A7 (underlined emphasis added).)

2 "Parties can agree to arbitrate 'gateway' questions of
3 'arbitrability,'" such as whether an arbitration provision is
4 unconscionable. Rent-A-Center, West, Inc. v. Jackson, 561 U.S.
5 63, 68-69 (2010) (holding since "dispute[s] relating to the []
6 enforceability" of the arbitration agreement had been
7 "delegate[d] to the arbitrator," a court could only hear an
8 unconscionability challenge to the delegation clause itself, but
9 not an unconscionability challenge to the arbitration provision).
10 Since the arbitration provision at issue delegates challenges to
11 "the validity of th[e] binding arbitration provision" to the
12 arbitrator, Plaintiff's unconscionability challenge to the
13 arbitration provision must be decided in arbitration.
14 (Arbitration Provision A7.)

15 **C. Waiver of Right to Compel Arbitration**

16 However, Plaintiff contends "T[oshiba] has waived its
17 right to compel arbitration." (Pl.'s Opp'n 9:9.)

18 "Any examination of whether the right to compel
19 arbitration has been waived must be conducted in light of the
20 strong federal policy favoring enforcement of arbitration
21 agreements." Fisher v. A.G. Becker Paribas, Inc., 791 F.2d 691,
22 694 (9th Cir. 1986). Under the FAA, "[a] party seeking to prove
23 waiver of a right to arbitration must demonstrate . . . prejudice
24 to the party opposing arbitration resulting from such
25 inconsistent acts." Id. "[W]aiver of the right to arbitration is
26 disfavored because it is a contractual right, and thus any party
27 arguing waiver of arbitration bears a heavy burden of proof."
28 United States v. Park Place Assocs., Ltd., 563 F.3d 907, 921 (9th

1 Cir. 2009) (internal quotation marks omitted) (quoting Van Ness
2 Townhouses v. Mar Indus. Corp., 862 F.2d 754, 758 (9th Cir.
3 1988).

4 Plaintiff argues compelling arbitration would prejudice
5 him since he "expended substantial resources, time, and effort
6 litigating this action"; he "would have utilized a different
7 strategy had he known that the case would or might proceed to
8 arbitration"; and, in arbitration, "T[oshiba] [would] now [be]
9 allowed to evade the Court's decisions [rejecting Toshiba's
10 motions to dismiss Plaintiff's claims as a matter of law] and
11 seek a 'second bite at the apple.'" (Pl.'s Opp'n 16:17-18, 16:14-
12 15, 17:9-11.)

13 Plaintiff's prejudice arguments stemming from
14 litigation strategy choices, the potential for Toshiba to
15 relitigate issues addressed in previous dismissal orders, or
16 attempt to forum shop are conclusory and therefore unpersuasive.
17 Here, Plaintiff has not shown that "the possibility that there
18 may be some duplication from [an arbitration] proceeding[] is
19 prejudicial to [him]." Fisher, 791 F.2d at 698. Therefore,
20 Plaintiff has not sustained his burden of showing prejudice, and
21 has not shown Toshiba waived its right to compel arbitration.

22 **III. CONCLUSION**

23 For the stated reasons, Toshiba's motion to compel
24 arbitration is GRANTED. The action against Toshiba is stayed
25 under 9 U.S.C. § 3 pending arbitration.

26 A status conference is scheduled to commence at 9:00
27 a.m. on July 20, 2015. A joint status report shall be filed
28 fourteen (14) days prior to the status conference, in which

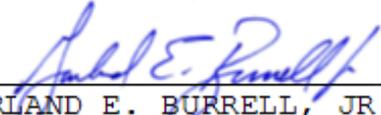
1 Plaintiff and Toshiba shall explain the status of the arbitration
2 proceeding if arbitration is ongoing. Further, if arbitration is
3 completed before the status report is due, a notice of completion
4 shall be filed immediately upon determination that arbitration
5 has been completed.

6 Dated: May 30, 2014

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GARLAND E. BURRELL, JR.
Senior United States District Judge

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