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United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

REBECCA SWIFT, et al.,
Plaintiffs,

No. C-09-5443 EDL

v.

**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**

ZYNGA GAME NETWORK, INC.; et al.,
Defendants.

I. Introduction

This is a purported class action brought by Plaintiff Rebecca Swift on behalf of herself and a class of similarly situated individuals who were allegedly deceived by Defendant Zynga Game Network, Inc.’s “special offer” transactions, developed by Defendants Acknowledge Inc. and Kitn Media USA, Inc. and offered in connection with Zynga’s free online video games. The complaint, originally filed on November 17, 2009 and amended on February 10, 2010, makes claims for unfair competition in violation of California Business & Professions Code section 17200, the California Consumer Legal Remedies Act, and Unjust Enrichment.

1 On May 5, 2011, Defendant filed a Motion to Compel Arbitration and Stay Litigation in light
2 of the United States Supreme Court’s April 27, 2011 decision in AT&T Mobility LLC v.
3 Concepcion, 131 S.Ct. 1740 (2011), which held that the Federal Arbitration Act preempts California
4 law regarding the unconscionability of arbitration provisions restricting class action claims. Zynga
5 claims that although the contractual arbitration provision governing the parties’ relationship did not
6 allow it to compel arbitration at the time the case was filed, in light of this recent change in the law
7 arbitration should be compelled and the litigation stayed. Plaintiff opposes on the bases that she did
8 not assent to the arbitration provision that Zynga now relies on, and even if she did the terms of
9 service that contain the arbitration provision do not require arbitration of her claims, and Zynga
10 waived its right to compel arbitration. For the following reasons and for the reasons discussed
11 during oral argument on July 26, 2011, Zynga’s motion is GRANTED and the litigation stayed as to
12 Zynga.

13 Defendants Acknowledge and Kitn (collectively the “Super Rewards Defendants”) filed a
14 joinder to Zynga’s motion on the basis that they are agents with standing to enforce the arbitration
15 clause, that the claims against them are closely related to the contract containing the arbitration
16 clause, or alternatively that the litigation should be stayed as to them even if the arbitration provision
17 only applies to Zynga. Plaintiff separately opposes joinder of the Super Rewards Defendants in
18 Zynga’s motion. The Super Rewards Defendants’ Joinder and Request to Stay is GRANTED IN
19 PART AND DENIED IN PART, and the litigation is STAYED as to all defendants.

20 Finally, the parties also filed a motion to compel discovery responses set to be heard on
21 August 2, and a cross-motion to stay discovery and to hear the cross-motion on shortened time.
22 These motions are MOOT in light of the Court’s decision to stay the litigation in favor of arbitration

23 **II. Background Facts**

24 Plaintiff’s claims relate to harm she allegedly suffered after accepting certain “special offers”
25 in connection with Zynga’s online video game applications that she was using within the Facebook
26 network. FAC ¶¶ 6, 25, 36-41. Two different Terms of Service (“TOS”) agreements are arguably
27 relevant to Ms. Swift’s claims.

28 First, in April 2009, (the timeframe that Plaintiff alleges that she accepted the fraudulent

1 special offers at issue), the YoVille TOS¹ governed the terms and conditions of use of all Zynga
2 products and contained the following arbitration provision:

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

15 Hanley Decl. Ex. A p. 17. The YoVille TOS is silent as to whether parties may aggregate claims or
16 pursue a class action arbitration.

17 The YoVille TOS further provides that Zynga had the right to change the terms at any time,
18 that use after notice of the change in terms constitutes acceptance of the changes, and that the
19 changes take effect after notice by posting the changes on “Zynga’s Service or by any other method
20 of notice Zynga deems appropriate.” *Id.* at 14. The first time that a user such as Plaintiff decided to
21 start playing a Zynga game through a social media platform such as Facebook, he or she was
22 presented with a screen request stating: “Allow Access? Allowing YoVille access will let it pull
23 your profile information, photos, your friends’ info, and other content that it requires to work.”
24 Underneath, there is a large “Allow” button, a smaller “cancel” link, and smaller grey font stating
25 “By proceeding, you are allowing YoVille to access your information and you are agreeing to the
26 [blue hyperlink] Facebook Terms of Service in your use of YoVille. By using YoVille, you also
27 agree to the YoVille [blue hyperlink] Terms of Service.” Parker Decl. Ex. F;² Seabolt Decl. Ex. A;
28 Reply at 2 (image of screen shot). There is no record of whether Plaintiff or anyone else ever
29 clicked on the blue hyperlinked YoVille Terms of Service, which Zynga’S 30(b)(6) witness testified
30 it did not track. Parker Decl. Ex. E at 85-86, 92, 112, 126.

31 ¹ The YoVille TOS was amended in May 2009, but the provisions relevant to this dispute were
32 not changed at that time. Compare Hanley Decl. Ex. A p. 16-17 with Ex. B p. 17.

33 ² Plaintiff has filed a motion to seal Exhibits A-D to the Parker Declaration on grounds that
34 Defendants designated them “Confidential” pursuant to the parties’ stipulated protective order.
35 Defendants, as the designating party, have complied with Local Rule 79-5(d) and the Motion to Seal
36 is GRANTED.

1 Then, on August 1, 2009, Zynga implemented its Universal TOS, which was intended to
2 supercede the YoVille TOS. Hanley Decl. Ex. C. The Universal TOS provides:

3
4 With respect to any disputes or claims not subject to informal dispute resolution
5 or arbitration (as set forth below), you agree not to commence or prosecute any
6 action in connection therewith other than in the state and federal courts in San
7 Francisco County . . .

7 Hanley Decl. Ex. C. ¶ 12(a). The Universal TOS further provides:

8 Binding Arbitration. If you and Zynga are unable to resolve a Dispute through
9 informal negotiations, either you or Zynga may elect to have the Dispute (except
10 those disputes expressly excluded below) finally and exclusively resolved by
11 binding arbitration. Any election to arbitrate by one party shall be final and
12 binding on the other. YOU UNDERSTAND THAT ABSENT THIS
13 PROVISION, YOU WOULD HAVE THE RIGHT TO SUE IN COURT AND
14 HAVE A JURY TRIAL . . . The determination of whether a Dispute is subject to
15 arbitration shall be governed by the Federal Arbitration Act and determined by a
16 court rather than an arbitrator . . . Except as otherwise provided in this
17 Agreement, you and Zynga may litigate in court to compel arbitration, stay
18 proceedings pending arbitration, or to confirm, modify, vacate or enter judgment
19 on the award entered by the arbitrator.

15 Hanley Decl. Ex. C. ¶ 12(d). Exceptions to the informal dispute resolution and arbitration provision
16 include: “(1)any Disputes seeking to enforce or protect, or concerning the validity of, any of your or
17 Zynga’s intellectual property rights; (2) any Dispute relating to, or arising from, allegations of theft,
18 piracy, invasion of privacy or unauthorized use; and (3) any claim for injunctive relief.” Id. ¶ 12(f).

19 The Universal TOS also forbids arbitration on a class basis:

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

24 Id. ¶ 12(e). However, section 13(b) provides that, “If Section 12(e) is found to be illegal or
25 unenforceable, then neither you nor Zynga will elect to arbitrate any Dispute falling within that
26 portion of Section 12(e) found to be illegal or unenforceable and such Dispute shall be decided by a
27 court of competent jurisdiction within the County of San Francisco, State of California, United
28 States of America and you and Zynga agree to submit to the personal jurisdiction of that court.”

1 According to Plaintiff, Zynga did not provide her with sufficient notice that the arbitration
2 provision had changed in August 2009. Parker Decl. Ex. E at 123-24, 129. After Plaintiff sued
3 Zynga in this Court, Zynga moved to dismiss on grounds that her claims were barred by the
4 Communications Decency Act and should be dismissed for lack of specificity, but prior to the
5 Supreme Court’s Concepcion decision, did not seek to compel arbitration and did not assert an
6 affirmative defense relating to arbitration or the ban on class actions contained in the Universal TOS.

7 **III. Motion to Compel Arbitration**

8 **A. Legal Standard**

9 Zynga contends that, when this case was filed, the California Supreme Court’s decision in
10 Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005) precluded it from compelling arbitration
11 pursuant to the arbitration clauses in the YoVille and/or Universal TOS. However, it argues that the
12 United States Supreme Court’s Concepcion decision overturned the Discover Bank rule and now
13 requires courts to give full force and effect to contractual agreements and enforce bilateral
14 arbitrations except where the parties explicitly contracted to the contrary. AT&T Mobility LLC v.
15 Concepcion observed:

16 The “principal purpose” of the FAA is to “ensur[e] that private arbitration
17 agreements are enforced according to their terms.” This purpose is readily
18 apparent from the FAA’s text. Section 2 makes arbitration agreements “valid,
19 irrevocable, and enforceable” as written (subject, of course, to the saving clause);
20 § 3 requires courts to stay litigation of arbitral claims pending arbitration of those
21 claims “in accordance with the terms of the agreement;” and § 4 requires courts to
22 compel arbitration “in accordance with the terms of the agreement” upon the
23 motion of either party to the agreement (assuming that the “making of the
24 arbitration agreement or the failure ... to perform the same” is not at issue). In
25 light of these provisions, we have held that parties may agree to limit the issues
26 subject to arbitration, to arbitrate according to specific rules, and to limit with
27 whom a party will arbitrate its disputes.

28 131 S.Ct. 1740, 1748 -1749 (2011) (internal citations omitted). Concepcion also notes that § 2 of the
29 FAA “permits arbitration agreements to be declared unenforceable ‘upon such grounds as exist at
30 law or in equity for the revocation of any contract.’ This saving clause permits
31 agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as
32 fraud, duress, or unconscionability,’ but not by defenses that apply only to arbitration or that derive
33 their meaning from the fact that an agreement to arbitrate is at issue.” Id. at 1746. Concepcion
34 ultimately held that the FAA preempts California’s Discover Bank rule that class arbitration waivers

1 in consumer contracts are unenforceable as unconscionable, and instructed that such waivers should
2 be enforced. Id. at 1753. The Court further held that, unless the parties explicitly agreed to class
3 arbitration, arbitrations could only proceed on an individual basis. Id.

4 Zynga argues that in light of Concepcion it can now compel arbitration of Plaintiff's claims
5 in this case on an individual basis pursuant to the YoVille and Universal TOS. In the wake of
6 Concepcion, other courts of this district have compelled arbitration and stayed cases based on its
7 change in the law. See, e.g., Arellano v. T-Mobile USA, Inc., 2011 WL 1842712 (N.D. Cal. May
8 16, 2011) (Alsup, J.); Villegas v. U.S. Bancorp, No. C 10-1762 RS (N.D. Cal. June 20, 2011)
9 (Seeborg, J.); In re Calif. Title Ins. Antitrust Litig., 2011 WL 2566449, at **2-3 (N.D. Cal. June 27,
10 2011) (White, J.).

11 **B. Analysis**

12 According to Zynga, Plaintiff accepted the YoVille TOS when she first logged on to play the
13 YoVille game in April 2009 by clicking the "Accept" button described above. Hanley Decl. ¶ 3-4,
14 Ex. A. The YoVille TOS requires arbitration, but is silent on whether the arbitration can proceed on
15 a classwide basis. Hanley Ex. A at 17. Additionally, Zynga contends that, as a result of Plaintiff's
16 assent to the YoVille TOS, which stated that the terms could be changed and continued use
17 constituted acceptance, Plaintiff thereafter accepted and became bound by the Universal TOS, which
18 governs. Hanley Decl. ¶ 6, Ex. C p.1. The Universal TOS explicitly required that Plaintiff's claims
19 be arbitrated on an individual basis and that she waived her right to class arbitration. Hanley Decl.
20 Ex. C ¶ 12(d)-(e). Since this clause was invalid under Discover Bank, Zynga did not initially move
21 to compel arbitration but now does so following Concepcion.

22 There is no dispute that the FAA applies to the arbitration provisions at issue, or that
23 Concepcion overruled existing law prohibiting class action arbitration waivers in California.
24 However, Plaintiff opposes enforcement of the arbitration provisions on six separate grounds which
25 are addressed in turn.

26 **1. Was there a binding contract requiring arbitration?**

27 Plaintiff argues that, for any arbitration agreement to be binding on her, Zynga must show a
28 clear mutual manifestation of assent. See Windsor Mills, Inc. v. Collins & Aikman Corp., 25 Cal.
App. 3d 987 (1972). She contends that she comes within the exception to the rule that failure to read

1 a contract is not an excuse “when the writing does not appear to be a contract and the terms are not
2 called to the attention of the recipient.” Marin Storage & Trucking, Inc. v. Benco Contracting and
3 Engineering, Inc., 89 Cal. App. 1042, 1049-50 (2001). Plaintiff argues that most internet and
4 software transactions use a “clickwrap” process to obtain a user’s consent to terms of service
5 whereby the terms of service are presented on the screen and do not allow the user to proceed
6 without clicking to assent to the terms. Parker Decl. Ex. E at 31. Plaintiff contrasts this process
7 with the procedure for consenting to YoVille’s TOS, where the terms of service are not visible on
8 the page but instead are linked by the blue hyperlink within a smaller grey font following the
9 “Allow” button, which also relates to allowing access to Facebook information. Plaintiff contends
10 that this “modified clickwrap” was insufficient to put her on notice of what she was assenting to, so
11 she is not bound by the YoVille TOS or the Universal TOS.

12 She also argues that Zynga purposely used this modified clickwrap to avoid disrupting the
13 user experience (Parker Decl. Ex. E at 36) and that failure to include the terms of service on the page
14 itself, the smaller font, and the fact that the games are free, “creates a situation where it is doubtful
15 that any reasonably prudent consumer would know they were entering into a binding legal
16 agreement with Zynga by clicking “Allow.”” Opp. at 14. Zynga persuasively counters that the
17 dialogue box in question is Facebook’s standard dialogue box presented to users wishing to access
18 any number of Facebook applications, and Zynga followed the norm for Facebook applications and
19 was not attempting to hide its terms of service. Hanley Depo. at 83.

20 Plaintiff relies heavily on Specht v. Netscape Communications Corp., 306 F.3d 17 (2d Cir.
21 2002) (Sotomayor, J.), a case in which the plaintiffs downloaded free software plug-ins called
22 “Communicator” and “SmartDownload.” When the plaintiffs installed Communicator, they were
23 shown a scrollable text of the program’s license agreement and were not permitted to proceed with
24 the installation until clicking “yes” to indicate acceptance. Id. at 21-22 (referring to this as
25 presentation as a “clickwrap”). In contrast, when they began downloading SmartDownload, they
26 simply clicked “download” and were not presented with a clickwrap presentation referring to or
27 including the text of a license agreement. Id. at 22. The only reference to Smart Download’s license
28 terms was located in text that was only visible if the user scrolled down to another screen, which
provided a hyperlink to another webpage that contained a list of links to license agreements for

1 various products, the first of which was applicable to SmartDownload. Id. at 23-24. The Second
2 Circuit, applying California law, held that a reasonably prudent internet user would not have known
3 or learned of the existence of the license terms before agreeing to download the SmartDownload
4 software, and therefore the defendants did not provide reasonable notice of the license terms, so the
5 plaintiff’s act of downloading the software did not manifest assent to the arbitration provision
6 contained in the license terms. Id. at 20, 32 (“where consumers are urged to download free software
7 at the immediate click of a button, a reference to the existence of license terms on a submerged
8 screen is not sufficient to place consumers on inquiry or constructive notice of those terms”); see
9 generally id. at 28-35. Plaintiff also relies on cases finding insufficient notice and consequently lack
10 of assent where a link to terms of service was simply included on the bottom of a website. See, e.g.,
11 Hines v. Overstock.com, Inc., 668 F.Supp. 2d 362 (E.D.N.Y. 2009).

12 This case is unlike Specht and Hines, where there was no requirement that the plaintiff click
13 on anything referencing terms of service, and in the case of Specht would have had to scroll down to
14 learn of the existence of terms of service and then click several times to actually view the relevant
15 terms of service. Instead, Plaintiff admits that she was required to and did click on an “Accept”
16 button directly above a statement that clicking on the button served as assent to the YoVille terms of
17 service along with a blue hyperlink directly to the terms of service. Hanley Decl. pp 4; Seabolt
18 Decl. Ex. A (Hanley Depo.) at 100-101, 108. Plaintiff’s description of the “Accept” page’s
19 reference to the terms of service in “grey fine print at the bottom of the page” is belied by the color
20 screenshot image provided by Zynga which makes the reference to terms of service and hyperlink
21 much more visible. See Reply at p.3. Further, Plaintiff has not provided any declaration or other
22 evidence that she did not see or agree to the TOS.

23 Cases addressing modified clickwrap presentations more similar to the one at issue here,
24 where a plaintiff was provided notice and an opportunity to review terms of service prior to
25 acceptance, have held them sufficient to put a plaintiff on notice of the terms to which she was
26 assenting. Significantly, in Register.com, Inc. v. Verio, Inc., 356 F.3d 393 (2d Cir. 2004), the
27 Second Circuit distinguished its earlier decision in Specht on the basis that the facts of Specht “did
28 not compel the conclusion that its downloaders took the software subject to those terms because
there was no way to determine that any downloader had seen the terms of the offer.” Id. at 402. In

1 contrast, the facts of Register.com were “crucially different” because the user saw the terms of the
2 offer and admitted that it was aware of the terms. Id. The Second Circuit held that, where a plaintiff
3 knew the terms on which the information was offered, there is no reason why enforceability of the
4 terms should depend on whether the plaintiff was offered an “I agree” button. Id. at 403; see also
5 Cairo, Inc. v. Crossmedia Services, Inc., 2005 WL 756610, *4-5 (N. D. Cal. April 1, 2005). While
6 these cases differ somewhat since there is no admission here that Plaintiff was aware of what the
7 terms of service were (though she admittedly could have clicked on a hyperlink to review them and
8 does not deny that she did not do so), there was a click box for assent.

9 Because Plaintiff was provided with an opportunity to review the terms of service in the form
10 of a hyperlink immediately under the “I accept” button and she admittedly clicked “Accept,” the
11 cases cited by Zynga are more relevant and persuasive that a binding contract was created here.
12 Plaintiff’s argument that she was not provided with sufficient notice of the contractual terms she was
13 assenting to because of Zynga’s modified clickwrap presentation, and therefore is not bound by any
14 arbitration provision, fails in light of recent caselaw holding that clickwrap presentations providing
15 a user with access to the terms of service and requiring a user to affirmatively accept the terms, even
16 if the terms are not presented on the same page as the acceptance button, are sufficient.

17 **2. Did Zynga Waive It’s Right to Compel Arbitration By “Electing”**
18 **Litigation?**

19 Plaintiff next argues that, even if she assented to the TOS by clicking “Accept,” Zynga was
20 required to elect to proceed in litigation or arbitration pursuant to the Universal TOS and elected
21 litigation, and cannot change course now. As explained above, the Universal TOS provides that a
22 user could commence litigation in San Francisco or either party “may elect to have the Dispute . . .
23 finally and exclusively resolved by binding arbitration.” Hanley Decl. Ex. C ¶ 12(a), (d). Plaintiff
24 argues that she sued in court and Zynga never moved to compel arbitration or even asserted an
25 affirmative defense relating to arbitration, and instead proceeded with litigation for over a year and a
26 half. She contends that the TOS “clearly contains an election procedure that must occur at the
27 initiation of the case” and nothing allows a party to change its mind later. Opp. at. 16. She argues
28 that Zynga could have added a term allowing it the right to change its mind about arbitration
following a change of law, but failed to do so.

1 Plaintiff misconstrues the contract language of both the YoVille TOS (which does not
2 provide for any election), and the Universal TOS (which says nothing about whether an election
3 must occur as soon as litigation is initiated or when it must occur). Additionally, paragraph 13(b) of
4 the Universal TOS prohibited Zynga from compelling arbitration of Plaintiff’s class claims while the
5 class waiver term was illegal under Discover Bank, so Zynga could not have “elected” arbitration at
6 the outset. Further, as discussed in more detail below, a motion to compel arbitration prior to
7 Concepcion would have been futile, so Zynga could not have elected to compel arbitration at the
8 outset of this case. Therefore, this argument also fails.

9 **3. Are Plaintiff’s Claims Expressly Exempted From the Arbitration**
10 **Clause?**

11 Plaintiff contends that the arbitration clause contains an exception for “any Dispute related
12 to, or arising from, allegations of theft . . .” Hanley Decl. Ex. C ¶12(f). She argues that all of her
13 claims relate to “theft,” because she alleges that Zynga intentionally tried to lure users to accept
14 fraudulent special offers to drive up profit. However, during oral argument she was unable to
15 explain how her allegations against Zynga regarding a fraudulent scheme to take money paid to third
16 parties constitute theft by Zynga within the meaning of the agreement. To the contrary, Zynga
17 persuasively pointed out that contract language should be interpreted in favor of arbitration, and the
18 word “theft” (or any derivative) does not appear in the complaint nor is there a claim for theft or
19 conversion. Though a somewhat close question, the Court finds that the complaint against Zynga
20 cannot reasonably be construed as including a claim for “theft,” and therefore the complaint is not
21 expressly exempted from the arbitration clause.

22 **4. Did the TOS Require that Plaintiff’s Claims Be Litigated At the Time**
23 **the Case Was Filed?**

24 The Universal TOS section 12(e) forbids class action arbitrations. However, section 13(b)
25 provides that “[i]f Section 12(e) is found to be illegal or unenforceable then neither you nor Zynga
26 will elect to arbitrate . . . and such Dispute shall be decided by a court of competent jurisdiction with
27 the County of San Francisco, California . . .” Plaintiff argues that, taken together, these contract
28 terms mean that when her complaint was filed, she was required to litigate and neither party was
allowed to elect to arbitrate. She argues that nothing in the agreement allows a later change in law

1 to alter the course of the required litigation, but provides no support for this argument. Further, it
2 contradicts her other arguments that Zynga could have elected arbitration from the outset so waived
3 its rights. For similar reasons as the previous arguments, this argument also fails.

4 **5. Has Zynga Waived Its Right to Compel Arbitration?**

5 Plaintiff next contends that Zynga waived its right to compel arbitration. “A party seeking to
6 prove waiver of a right to arbitration must demonstrate: (1) knowledge of an existing right to compel
7 arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing
8 arbitration resulting from such inconsistent acts.” Hoffman Const. Co. of Oregon v. Active Erectors
9 and Installers, Inc., 969 F.2d 796, 798 (9th Cir. 1992) (quoting Fisher v. A.G. Becker Paribas Inc.,
10 791 F.2d 691, 694 (9th Cir.1986)). Plaintiff argues that all of these factors are present.

11 Plaintiff first argues that Zynga had knowledge of an existing right to compel arbitration and
12 could have pursued arbitration when her complaint was filed because the YoVille TOS was silent as
13 to whether class arbitration was available, so Discover Bank did not necessarily preclude it. Zynga
14 persuasively counters that it cannot be deemed to have waived its right to compel arbitration when a
15 motion to compel prior to Concepcion would have been futile. See Conover v. Dean Witter
16 Reynolds, Inc., 837 F.2d 867 (9th Cir. 1988) (reversing finding of waiver because it was
17 understandable that defendants waited until a Supreme Court decision changing the state of the law
18 because earlier motion would have been futile). Zynga points to a post-Concepcion case from this
19 district denying an almost identical waiver argument where the arbitration agreement was similarly
20 silent as to class arbitration waiver. In In Re California Title Insurance Antitrust Litigation, 2011
21 WL 2566449, * 3 (N.D. Cal. June 27, 2011), the court held that “prior to the ruling in Concepcion,
22 in the absence of class-wide arbitration provision, class arbitration would not have been available. It
23 therefore would indeed have been futile for Defendants in this matter to have moved to compel
24 arbitration prior to the decision in Concepcion.” Id. As in California Title, because the YoVille
25 TOS was silent as to class arbitration waiver and the Universal TOS expressly precluded class
26 arbitration, an earlier motion to compel would have been futile so there was no earlier existing right
27 to compel arbitration. See also Villegas v. U.S. Bancorp., C-10-1762-RS (N.D. Cal. June 20, 2011,
28 Order Granting Motion to Compel Arbitration) (finding no waiver of right to compel arbitration
where “defendants had every reason to believe that any motion to compel arbitration would have

1 been soundly rejected, given then governing California Supreme Court precedent that arbitration
2 provisions purporting to waive class action rights were invalid”).

3 Plaintiff also argues that Zynga should have directly challenged the Discover Bank rule in
4 court, as AT&T did against Concepcion, or sought a stay when the Supreme Court granted certiorari
5 in that case. Plaintiff cites two cases where parties moved to stay pending the Supreme Court’s
6 Concepcion decision, but in both of those cases the issues were *identical* to Concepcion (i.e., the
7 exact same cell phone contract provision was at issue in all of the cases). See Kaltwasser v.
8 Cingular Wireless LLC, 2010 U.S. Dist. LEXIS 62897 (N.D. Cal. June 21, 2010) (denying motion to
9 stay); Gaspar v. AT&T Mobility LLC, 2010 WL 4643277 (C.D.Cal. June 28, 2010) (granting stay).
10 The Court will not second guess Zynga’s decision to wait for a Supreme Court ruling rather than
11 move for a stay when the Court granted certiorari.

12 Second, Plaintiff contends that Zynga acted inconsistently with its known right to compel
13 arbitration by actively participating in this litigation, not asserting any right to arbitration as an
14 affirmative defense, and moving to dismiss instead of to compel arbitration at the outset. However,
15 only a few days after the Concepcion decision, Zynga acted promptly following the change in law by
16 ceasing litigation activity and moving to compel, so it acted consistently with its rights.

17 Third, Plaintiff argues that she will be prejudiced because she could have avoided litigation
18 and discovery costs if Zynga had moved earlier, and this effort “will have been for nothing if
19 Zynga’s motion is granted.” Opp. at 22. However, California Title rejected similar allegations of
20 prejudice, noting that although the litigation had been ongoing for some time, substantive discovery
21 had only recently begun and trial was a year away. See In Re California Title Insurance Antitrust
22 Litigation, 2011 WL 2566449, *3; see also Villegas, 10-1762-RS Dkt. No. 51 (no prejudice where
23 no cognizable injury resulting from defendant’s decision not to move to compel arbitration prior to
24 Concepcion). Similarly here, while the case was filed in November 2009, little happened for several
25 months, it was not until March 2011 that the parties consented to this Court and a class certification
26 hearing date was set, and no trial date has been set. Plaintiff has not sufficiently established
27 prejudice.

28 For all of the foregoing reasons, Zynga did not waive its right to compel arbitration by
waiting until the Supreme Court’s decision in Concepcion.

1 **6. Is the TOS Unenforceable As Unconscionable?**

2 Finally, Plaintiff argues that arbitration should not be compelled because, *even if* she
3 assented to the TOS, *and* it applies to the dispute *and* Zynga did not waive its right to compel
4 arbitration, it is unconscionable and thus unenforceable under California law. Neither party
5 addresses the legal standard for unconscionability, but generally it includes both a “procedural” and
6 a “substantive” element. See Armendariz v. Found. Health Psychcare Services, Inc., 24 Cal. 4th 83,
7 114 (2000). To be unenforceable, a contract must be both procedurally and substantively
8 unconscionable. See id.

9 Neither party addressed procedural unconscionability in their papers and Plaintiff presented
10 no evidence that might support this argument. During oral argument, when directly questioned on
11 this issue, Plaintiff still could not explain how the arbitration agreement was procedurally
12 unconscionable as applied to her. Plaintiff’s unconscionability argument fails on this basis alone,
13 regardless of whether she has shown some level of substantive unconscionability.

14 For the foregoing reasons, Zynga’s Motion to Compel Arbitration and Stay Litigation is
15 GRANTED.

16 **IV. Super Rewards Defendants’ Joinder In Motion to Compel Arbitration and Stay**
17 **Litigation**

18 Plaintiff’s FAC alleges that the Super Rewards Defendants are each “an agent, employee,
19 manufacturer, supplier, distributor, designer, engineer, retailer, seller, franchisee, representative,
20 partner, joint venturer, alter ego, and related or affiliated entity or provider of services to or on
21 behalf of each of the other Defendants” who partnered with Zynga to develop the deceptive special
22 offers that Plaintiff challenges in her complaint. FAC ¶ 6, 8, 30. The Super Rewards Defendants
23 contend that their role was limited to receiving and formatting advertisements (i.e., the challenged
24 “special offers”) from third-parties and making them available to Zynga, and that they implemented
25 Zynga’s policies regarding the value of in-game currency received for the offers and provided
26 limited customer service relating to the currency. Marshall Decl. ¶ 2-7.

27 **A. Does the Definition of “Zynga Parties” in the Limitation of Liability Section of**
28 **YoVille TOS Give Super Rewards Defendants’ Standing?**

The Super Rewards Defendants have filed a joinder in Zynga’s motion to compel arbitration

1 and stay litigation. They argue that the YoVille TOS indicates that they are third parties whose
2 action are subject to the TOS because it defines “Zynga Parties” as Zynga and “its affiliates or
3 subsidiaries, or any of their directors, employees, agents, attorneys, third-party content providers,
4 distributors, licensees or licensors” and provides that Zynga Parties shall not be liable for damages.
5 See Hanley Decl. Ex. A at 14-15. They further point out that the YoVille TOS requires arbitration
6 of all claims. Id. at 17. However, Plaintiff persuasively counters that the waiver of liability
7 provision of the YoVille TOS relied on by the Super Rewards Defendants, which defines them as
8 “Zynga Parties,” is separate and distinct from the arbitration provision, and the two portions of the
9 TOS have to be analyzed separately to determine whether claims against the Super Rewards
10 Defendants are arbitrable. The portions of the TOS relating to dispute resolution including
11 arbitration do not even refer to the “Zynga Parties.” The Super Rewards Defendants do not have
12 standing to enforce the arbitration agreement simply by virtue of their having been defined as
13 “Zynga Parties.”

14 **B. Are the Super Rewards Defendants Non-Signatory “Agents” Entitled to**
15 **Enforce The Arbitration Clause?**

16 The Super Rewards Defendants alternatively reason that, since Plaintiff defined them as
17 “agents” in her FAC, and the YoVille TOS encompasses Zynga’s “agents,” they are covered by the
18 arbitration provision of the YoVille TOS and have the right to enforce it under contract and agency
19 principles even as non-signatories. The Super Rewards Defendants rely on Amisil Holdings Ltd. v.
20 Clarium Capital Management LLC, 622 F.Supp. 2d 825, 830 (N.D. Cal. 2007), where the court
21 enforced an arbitration agreement against a signatory where the non-signatories seeking enforcement
22 were individual defendant officers and managers of the company that had signed the arbitration
23 agreement with the plaintiff. The court held that “in certain circumstances, a nonsignatory can
24 compel a signatory to arbitrate based on agency principles” and that “agents of a signatory can
25 compel the other signatory to arbitrate so long as (1) the wrongful acts of the agents for which they
26 are sued relate to their behavior as agents or in their capacities as agents (Letizia) and (2) the claims
27 against the agents arise out of or relate to the contract containing the arbitration clause (Britton)
28 (consistent with the language of the arbitration clause).” Id. at 831-32. The Super Rewards
defendants argue that they are being sued for actions taken in their capacity as agents for Zynga and

1 Plaintiff's claims arise out of the contract containing the arbitration clause because the YoVille TOS
2 applies to all "Zynga Parties." However, Amisil is distinguishable on the basis that there the alleged
3 "agents" were corporate officers and managers, while here the alleged agents are corporate third
4 parties simply engaged in arms length business transactions with Zynga, and there is no evidence
5 that they are as closely related parties as a corporation and its officers/managers.

6 The Super Rewards Defendants also rely on HCC Life Ins. Co. v. Managed Benefit
7 Administrators LLC, 2008 U.S. Dist. LEXIS 46443, *9 (E.D. Cal. June 11, 2008) for the position
8 that a non-signatory agent who represents the principal in dealings with third parties can bind a
9 signatory to an arbitration agreement on agency principles. However, HCC *denied* the non-
10 signatory independent contractor's motion to compel, because even though some of the non-
11 signatories' responsibilities were "akin to those of an agent acting on behalf of a principal,"
12 "California law does not permit such tenuous relationships . . . to bind nonsignatories to the
13 arbitration agreements of another." Id. at *9. Here, the Super Rewards Defendants do not explain
14 how their responsibilities were more akin to agents than independent contractors, such as those at
15 issue in HCC, and instead rely almost exclusively on Plaintiff's allegations that they were "agents"
16 in her FAC.

17 Plaintiff counters persuasively that the allegations of her FAC identifying the Super Rewards
18 Defendants as "agents" turned out to be incorrect as discovery has since revealed that they are
19 actually "independent contractors" and the Super Rewards Defendants denied in their answers that
20 they were Zynga's agents. See Parker Decl. Ex. A; Answer ¶ 30. Independent contractors do not
21 fall within the exception that non-signatory agents may be bound by an arbitration agreement. See
22 HCC Life Ins. Co. v. Managed Benefit Adm'rs LLC, 2008 U.S. Dist. LEXIS 46443, *12 (E.D. Cal.
23 2008) (emphasizing parties' own definition of themselves as independent contractors).

24 **C. Are the Super Rewards Defendants Third Party Beneficiaries of the YoVille**
25 **TOS?**

26 On Reply, the Super Rewards Defendants argue for the first time that they should be allowed
27 to enforce the arbitration agreement because they are intended third party beneficiaries of the
28 agreement between Plaintiff and Zynga. See Balsam v. Tucows, Inc., 627 F.3d 1158, 1161 (9th Cir.
2010) (rejecting non-signatory's third party beneficiary argument because nothing in the agreement

1 supported argument that he was intended to benefit, and instead contract expressly disclaimed third
2 party rights). This is improper new argument on Reply. In any event, general references to “third
3 party content providers” throughout the YoVille TOS (though tellingly not in the dispute resolution
4 section and not in the Universal TOS) do not show that either signatory intended to give the Super
5 Rewards Defendants the benefit of the contractual arbitration provisions upon which they seek to
6 rely.

7 **D. Does it Matter if the Claims Against the Super Rewards Defendants Relate to**
8 **the YoVille TOS?**

9 Alternatively, the Super Rewards Defendants contend that Plaintiff’s claims are closely
10 related to the contractual relationship formed by the TOS so the arbitration provision should apply to
11 all parties to the litigation. They argue that the YoVille TOS arbitration provision applies to claims
12 “arising out of or relating to these Terms of Use or any of the transactions contemplated herein or
13 relating to the Service . . .” so the claims against them are covered by this TOS. See Hanley Decl.
14 Ex. A at 17. However, the case they cite for this position does not relate to claims made against
15 non-signatory third-parties, regardless of whether the claims against the non-signatories are related
16 to a contract. See Hopkins & Carley ALC v. Thomson Elite, 2011 U.S. Dist. LEXIS 38396, *9(N.D.
17 Cal. Apr. 6, 2011) (also no challenge to whether the parties had entered into the underlying
18 arbitration agreement, unlike here). Thus, even if the claims against them would fall within the
19 scope of the agreement if they were signatories, this does not aid them in establishing that they can
20 enforce the arbitration agreement against Plaintiff as non-signatories.

21 **E. Should the Non-Arbitrable Claims Against the Super Rewards Defendants Be**
22 **Stayed?**

23 The Super Rewards Defendants finally argue that, even if they cannot enforce the arbitration
24 provision, the Court should use its discretion to stay any non-arbitrable claims against them while
25 arbitration between Zynga and Plaintiff proceeds because an arbitration decision may affect the
26 outcome of the claims against them or make Plaintiff an invalid class representative, and will
27 conserve judicial resources because there is a common nucleus of facts for all of the defendants. See
28 Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 20-21, n.3 (1983)
(noting that: “In some cases, of course, it may be advisable to stay litigation among the

1 nonarbitrating parties pending the outcome of the arbitration. That decision is one left to the district
2 court (or to the state trial court under applicable state procedural rules) as a matter of its discretion to
3 control its docket.”).

4 The Court agrees that the most efficient course of action is for this Court to stay the litigation
5 as to the Super Rewards Defendants while arbitration between Plaintiff and Zynga goes forward.
6 Therefore, the entire case is STAYED.

7 As discussed during oral argument, the parties shall meet and confer and report to the Court
8 by no later than August 5, 2011 regarding the status of the case in light of the Court’s rulings on
9 Zynga and the Super Rewards Defendants’ motions. The pending motions to compel discovery,
10 cross-motion to stay discovery, and motion to hear the cross-motion to stay on shortened time are
11 DENIED AS MOOT.

12
13 **IT IS SO ORDERED.**

14
15 Dated: August 3, 2011



ELIZABETH D. LAPORTE
United States Magistrate Judge

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