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United States District Court, N.D. California,
San Jose Division.

Shawna ALLEN, Plaintiff,

v.

SHUTTERFLY, INC., et al., Defendants.

Case No. 20-cv-02448-BLF
|
Signed 09/14/2020

**Attorneys and Law Firms**

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**ORDER GRANTING MOTION TO COMPEL ARBITRATION; TERMINATING RULE 12(B)(6) MOTION TO DISMISS WITHOUT PREJUDICE**

[Re: ECF 23]

BETH LABSON FREEMAN, United States District Judge

***1** Plaintiff Shawna Allen, brings this consumer fraud class action against Shutterfly, Inc. ("Shutterfly"), Lifetouch, Inc. and Lifetouch National School Studios, Inc. (collectively, "Lifetouch") arising from the purchase of school portraits. Before the Court is Shutterfly's Motion to Compel Individual Arbitration.[1] Mot. to Compel, ECF 23.

The Court heard oral arguments on August 14, 2020. For the reasons stated below, the Court GRANTS Shutterfly's Motion to Compel. Shutterfly's Rule 12(b)(6) Motion to Dismiss is now moot and is therefore TERMINATED WITHOUT PREJUDICE.

**I. BACKGROUND**

This putative class action lawsuit arises out of Defendants' alleged "policy and practice of illegally sending unordered portraits and other products to Plaintiff and class members and requesting payment for these unsolicited goods" in violation of California law. Compl. ¶¶ 3-5, ECF 1-1. Plaintiff alleges that Defendants are in the business of selling school photos and self-identify as "the national leader in school portraits" and the nation's largest producer of photos. *Id.* ¶¶ 1, 18, 19. Defendants contract with school districts to provide portrait taking services and to sell portrait products to the students' parents and guardians. *Id.* ¶¶ 1, 2, 55. The portrait products are sold under a "Family Approval" model where "students' portraits and/or products printed with their portraits" are packaged and sent home with the students. *Id.* ¶ 2. The package contains written materials about how to purchase portraits and return unwanted portraits to the school. *Id.* ¶¶ 35, 36, 37-39, 42-44. Shutterfly also sends digital written material about the packages. *Id.* ¶¶ 31, 33.

Plaintiff is a Kansas resident who purchased portraits from Shutterfly under its "Family Approval" model. Compl. ¶¶ 7-8. For the last three spring seasons, Shutterfly offered portraits of Plaintiff's children for sale and sent Plaintiff "statements requesting payment" for these portraits using the "Family Approval" model. *Id.* ¶ 4. Plaintiff alleges she purchased portrait packages in spring 2017 and spring 2018 using cash or check, but not on Shutterfly's Lifetouch website. *Id.* ¶¶ 45-46. Shutterfly asserts Plaintiff made additional purchases online "through Lifetouch's website using a PayPal account with Plaintiff's home address during the fall of 2016, 2017, 2018, and 2019." Mot. Compel at 8; *see also,* Declaration of John Grant ("Grant Decl.") ¶¶ 13-18, ECF 23-1. Plaintiff does not dispute these fall purchases and confirms that she made online purchases in August 2018, September 2018, and October 2019. *See generally*, Plaintiff's Corrected Opposition to Defendants' Motion to Compel Arbitration ("Opp'n"), ECF 30; Declaration of Shawna Allen ("Allen Decl.") ¶¶ 2-5, 7.

***2** Shutterfly, Inc. acquired Lifetouch, Inc. in April 2018. Grant Decl. ¶ 7. At the time, Lifetouch National School Studios, Inc. was a wholly-owned subsidiary of Lifetouch, Inc. *Id.* In late 2019, Defendants underwent corporate restructuring. Mot. Compel at 3-4. Shutterfly, Inc. converted into a limited liability company and renamed as Shutterfly, LLC. Grant Decl. ¶ 4. Lifetouch, Inc. converted into a limited liability company and then merged with Shutterfly, LLC. *Id.* ¶ 5. Lifetouch National School Studios, Inc. converted into a limited liability company and renamed to Shutterfly Lifetouch, LLC. *Id.* ¶ 6. Plaintiff does not dispute the described restructuring. *See generally*, Opp'n.

Plaintiff filed suit against Defendants in Santa Clara County Superior Court on February 14, 2020. *See* Summons Exh. A, ECF 1. Plaintiff brings the following causes of action under California law: (1) Solicitation of Payment for Unordered Goods in violation of California Civil Code § 1716; (2) Violation of California Civil Code § 1584.5; (3) Violation of the California Consumers Legal Remedies Act, Civil Code § 1750 *et seq.*; (4) Violation of the California Unfair Competition Law, Business and Professional Code § 17200 *et seq.*; and (5) Unjust Enrichment. *See generally*, Compl. Plaintiff attaches a copy of Lifetouch's 2018 TOS and incorporates those terms in her Complaint. *Id.* ¶¶ 13-15. On April 10, 2020, Shutterfly removed the case to the United States District Court for the Northern District of California. *See* Notice of Removal, ECF 1.

Shutterfly now seeks to compel individual arbitration pursuant to the arbitration agreement and class action waiver included in Lifetouch's 2018 Terms of Service ("2018 TOS"). Mot. Compel at 7.

**A. Lifetouch's 2018 Terms of Service**

After Shutterfly's acquisition of Lifetouch, Inc. in April 2018, Lifetouch, Inc. updated its Terms of Service to include, *inter alia*, an arbitration clause and a class action waiver. Grant Decl. ¶ 7. Lifetouch's operative Terms of Service became effective in July 2018. Mot. Compel at 6, Grant Decl. ¶ 11. The 2018 TOS served "to align the combined companies' policies and practices" after Lifetouch, Inc. joined the Shutterfly family of brands. 2018 TOS at 1, ECF 23-3. The 2018 TOS includes a reservation of rights and details about consent to the terms:

> By visiting any of our Sites and Apps, you are signifying your assent to these Terms and our Privacy Policy, which is incorporated herein by reference. Any products ordered or services used through any of our Sites and Apps are also governed by these Terms. We may revise these Terms from time to time by posting a revised version. YOUR CONTINUED USE OF ANY OF THE SITES AND APPS AFTER WE POST ANY CHANGES WILL CONSTITUTE YOUR ACCEPTANCE OF SUCH CHANGES. IN ADDITION, BY ORDERING OUR PRODUCTS OR USING OUR SERVICES, YOU ACKNOWLEDGE THAT YOU HAVE READ AND REVIEWED THESE TERMS IN THEIR ENTIRETY, YOU AGREE TO THESE TERMS AND THE PRIVACY POLICY AND THESE TERMS CONSTITUTE BINDING AND ENFORCEABLE OBLIGATIONS ON YOU.

2018 TOS at 1. Below this reservation of rights, the 2018 TOS provides:

> NOTE: THIS TERMS OF SERVICE CONTAINS AN ARBITRATION AND CLASS ACTION WAIVER PROVISION IN THE "ARBITRATION" SECTION BELOW THAT AFFECTS YOUR RIGHTS UNDER THIS TERMS OF SERVICE AND WITH RESPECT TO ANY DISPUTE BETWEEN YOU AND US OR OUR AFFILIATES

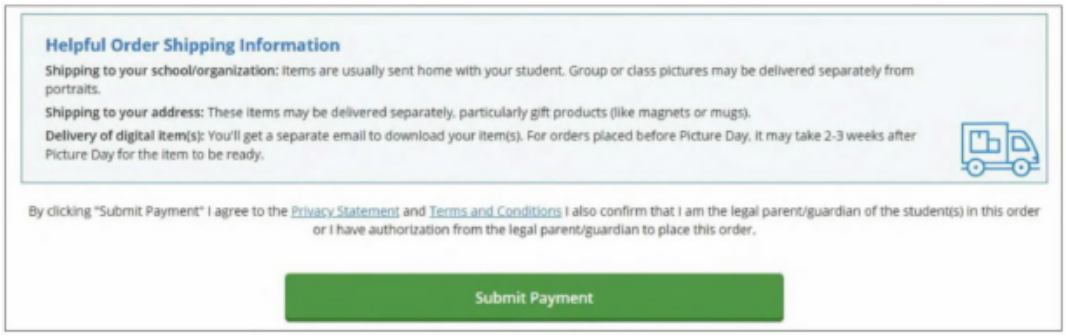
2018 TOS at 1. Section 16 contains the "Arbitration Agreement," which provides:

> If you are a Lifetouch customer in the United States (including its possessions and territories), you and Lifetouch agree that any dispute, claim or controversy arising out of or relating in any way to the Lifetouch service, these Terms of Service and this Arbitration Agreement, shall be determined by binding arbitration or in small claims court.

***3** 2018 TOS at 9-11, § 16 ("Arbitration Agreement" or "Agreement").

Section 16 further provides that the arbitration "will be governed by the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (collectively, 'AAA Rules') of the American Arbitration Association ('AAA')." 2018 TOS § 16. Moreover, "[a]ll issues are for the arbitrator to decide, including issues relating to the scope, interpretation and enforceability of this arbitration agreement." *Id.* The 2018 TOS is referenced both on the Lifetouch online website and in printed order forms. Grant Decl. ¶¶ 19-21.

For online purchases made since July 2018, Lifetouch customers are provided with a link to the "Terms and Conditions" above the "Submit Payment" button at checkout. Grant Decl. ¶ 20. As shown below, this page provides that "by clicking 'Submit Payment' [the purchaser] agree[s] to the Privacy Statement and Terms of Service[.]" *Id.*




*Id.* In addition, a link to the 2018 TOS can be found on the bottom of each Lifetouch webpage, as shown below.


*Id.* ¶ 19.

Beginning spring 2019, paper order forms found within the "Family Approval Program" package state that "by completing and submitting this order form, you are agreeing to all of Lifetouch's terms and conditions at [URL to access webpage containing TOS]":


Grant Decl. ¶ 21, Paper Order Form at 3, ECF 23-4.

**B. Lifetouch's 2015 Terms of Service**

Before July 2018, Lifetouch last updated its Terms of Service in August 2015 ("2015 TOS"). Grant Decl. ¶ 8. The first line in the 2015 TOS is titled "Website Terms and Conditions of Use" followed by the following statement:

> PLEASE READ THESE TERMS AND CONDITIONS OF USE (THE "TERMS") CAREFULLY, AS THEY MAY HAVE CHANGED SINCE YOUR LAST VISIT TO THIS WEBSITE. BY USING THIS WEBSITE, YOU AGREE AND ACKNOWLEDGE THAT YOU HAVE READ, UNDERSTAND AND AGREE TO BE BOUND BY THESE TERMS OF USE.

2015 TOS at 2[2], ECF 23-2. Below this statement, Lifetouch includes a reservation of rights provision:

> We reserve the right to update or modify these Terms at any time without prior notice. Your use of the Website following any such change constitutes your agreement to follow and be bound by the Terms as changed. For this reason, we encourage you to review these Terms whenever you use this Website.

*Id.* at 2. Elsewhere in the 2015 TOS and under "General Provisions" Lifetouch states "[n]o amendment to these Terms will be valid unless made in writing and signed by you and us." *Id.* at 10. The 2015 TOS did not include an arbitration clause. *See* Mot. Compel at 6; 2015 TOS.

## II. LEGAL STANDARD

The parties agree that the FAA applies. *See* Mot. to Compel at 4-6; Opp'n at 1-2 (arguing under FAA). The FAA embodies a "national policy favoring arbitration and a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 345-46 (2011) (internal quotations and citations omitted). The FAA provides that a "written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... 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.

***4** "Generally, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Rajagopalan v. NoteWorld, LLC*, 718 F.3d 844, 846–47 (9th Cir. 2013) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24–25 (1983)). However, certain issues are presumptively reserved for the court. These include "gateway" questions of arbitrability, such as "whether the parties have a valid arbitration agreement or are bound by a given arbitration clause, and whether an arbitration clause in a concededly binding contract applies to a given controversy." *Momot v. Mastro*, 652 F.3d 982, 987 (9th Cir. 2011) (citation omitted).

That said, parties may delegate the adjudication of gateway issues to the arbitrator if they "clearly and unmistakably" agree to do so. *Portland Gen. Elec. Co. v. Liberty Mut. Ins. Co.*, 862 F.3d 981, 985 (9th Cir. 2017). Because gateway issues of arbitrability would otherwise fall within the province of judicial review, courts "apply a more rigorous standard in determining whether the parties have agreed to arbitrate the question of arbitrability." *Momot*, 652 F.3d at 987-88. "[C]lear and unmistakable 'evidence' of agreement to arbitrate arbitrability might include ... a course of conduct demonstrating assent ... or ... an express agreement to do so." *Id.* at 988 (citation omitted) (alteration in original).

If there is no clear and unmistakable delegation, a district court engages in a limited two-part inquiry to decide the gateway issues of arbitrability: first, it determines whether the arbitration agreement is valid, and second, it determines whether the agreement encompasses the claims at issue. *See, e.g.*, *Mitsubishi Motors Co. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 627–28 (1985). When determining whether the arbitration clause encompasses the claims at issue, "all doubts are to be resolved in favor of arbitrability." *Simula v. Autoliv*, 175 F.3d 716, 721 (9th Cir. 1999) (interpreting language "arising in connection with" in arbitration clause to "reach[ ] every dispute between the parties having a significant relationship to the contract and all disputes having their origin or genesis in the contract").

## III. DISCUSSION

Shutterfly seeks to compel individual arbitration and argues that (1) a valid arbitration agreement exists that encompasses the issues in dispute and (2) the scope and interpretation of the Arbitration Agreements are delegated to the arbitrator. Mot. to Compel at 1. Plaintiff responds with four arguments as to why she should not be compelled to arbitrate her claims: (1) the 2018

TOS does not apply to Plaintiff's claims because Defendants "conceded" that point in their Rule 12(b)(6) Motion to Dismiss briefing, (2) Plaintiff did not assent to the Arbitration Agreement, (3) the 2018 TOS does not apply to "school accounts," and (4) the Arbitration Agreement does not apply to Plaintiff's purchases prior to July 2018. *See generally*, Opp'n.

**A. Delegation of Arbitrability**

The Court must first determine whether the parties agreed to arbitrate the gateway issues of arbitrability. The Arbitration Agreement here contains a delegation clause stating, "[a]ll issues are for the arbitrator to decide, including issues related to the scope, interpretation, and enforceability of this arbitration agreement." 2018 TOS § 16. The Arbitration agreement also incorporates the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes of the American Arbitration Association ("AAA"). *Id.* In the Ninth Circuit, it is well-settled that incorporation of arbitration rules (such as AAA), "constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability." *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015); *see also Interdigital Tech. Corp. v. Pegatron Corp.*, No. 15-CV-02584-LHK, 2016 WL 234433, at *5 (N.D. Cal. Jan. 20, 2016); *Cooper v. Adobe Sys. Inc.*, No. 18-CV-06742-BLF, 2019 WL 5102609, at *6 (N.D. Cal. Oct. 11, 2019).

***5** Plaintiff offers no arguments in opposition to delegation. Plaintiff explains that she "understands that if the Court grants Defendants' Motion to Compel Arbitration, the Court may delegate Plaintiff's fraud, unconscionability, and other non-formation and validity arguments to the arbitrator." Opp'n at 10 n. 2. Plaintiff also "reserves the right to make such arguments to an arbitrator." *Id.*

Accordingly, there is no dispute that the 2018 TOS delegated the gateway questions of arbitrability to the arbitrator.

**B. Shutterfly's Arguments in its Motion to Dismiss**

Plaintiff contends that because Defendants "acknowledge" that this case is outside of the scope of the 2018 TOS, Plaintiff's claims are not subject to the Arbitration Agreement. Plaintiff's sole basis for this argument is Shutterfly's arguments in its Rule 12(b)(6) Motion to Dismiss (ECF 24), which was filed concurrently with the present Motion. Opp'n at 2 (citing ECF 24 at 5).

There, Shutterfly challenged Plaintiff's claims under California law, arguing that the "choice of law" provision in the 2018 TOS does not apply to Plaintiff's claims. Specifically, Shutterfly argued:

> As an initial matter, Plaintiff is wrong when she alleges the Terms of Service that govern her transactions "contain a choice of law provision dictating that California law will apply to all consumers nationwide". Compl. ¶ 14. That choice-of-law provision is expressly limited to the interpretation of the Terms of Service themselves: "*These Terms* are governed by and construed in accordance with the laws of the State of California, United States of America, without regards to its conflict of law provisions." *Id.* Ex. A ¶ 14 (emphasis added). ***This unambiguous language makes it clear that the agreement does not govern substantive claims brought by consumers against Defendants regarding their products and services, including the ones Plaintiff attempts to assert here***.

ECF 24 at 5 (emphasis added).

Plaintiff misrepresents Shutterfly's Rule 12(b)(6) Motion. It is clear from the language and context of the cited paragraph that Shutterfly was referring to the "choice of law" provision as not being applicable to Plaintiff's claims – and not the entire 2018 TOS. Plaintiff's "gotcha" argument is further belied by the cited paragraph itself which starts with "Plaintiff is wrong when she alleges ***the Terms of Service that govern her transactions***[,]" making it clear that Shutterfly asserts that the 2018 TOS applies to Plaintiff's purchases, but the "choice of law" provision does not.[3]

Thus, the Court finds that Shutterfly did not make any concessions regarding the applicability of the 2018 TOS to Plaintiff's claims.

**C. Plaintiff's Assent to the Arbitration Agreement**

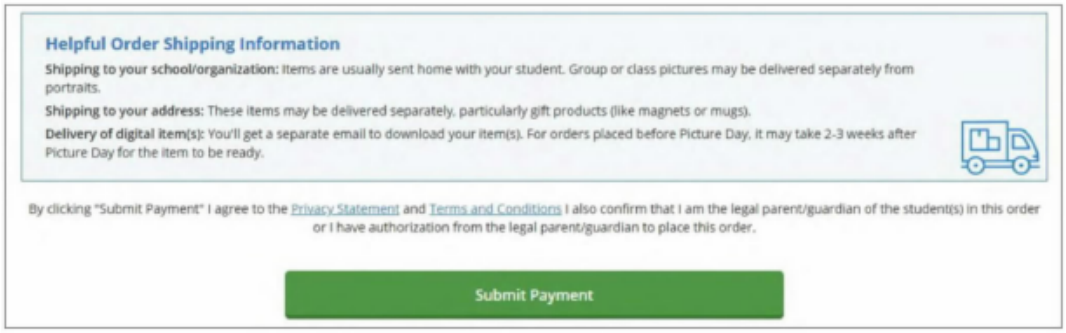
Next, Plaintiff argues that she did not assent to the arbitration agreement because (1) the Agreement's design is inconspicuous and (2) the Agreement is not between Plaintiff and "any proper defendant." Opp'n at 3-8

**1. The Design of 2018 TOS in Lifetouch's Website**

"In determining whether a valid arbitration agreement exists, federal courts 'apply ordinary state-law principles that govern the formation of contracts.' " *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014) (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). Even in the age of the internet, "mutual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract." *Long v. Provide Commerce, Inc.*, 245 Cal. App. 4th 855, 862 (2016) (citation and alterations omitted).

***6** Most internet contracts come in one of two forms: (1) " 'clickwrap' (or 'click-through') agreements, in which website users are required to click on an 'I agree' box after being presented with a list of terms and conditions of use" and (2) " 'browsewrap' agreements, where a website's terms and conditions of use are generally posted on the website via a hyperlink at the bottom of the screen." *Nguyen*, 763 F.3d at 1175-76. A browsewrap contract is valid if "the user has actual or constructive knowledge of a website's terms and conditions.' " *Id.* at 1176 (citation omitted). The Ninth Circuit is "more willing to find the requisite notice for constructive assent where the browsewrap agreement resembles a clickwrap agreement." *Id.* Courts evaluate "the conspicuousness and placement of the 'Terms of Use' hyperlink, other notices given to users of the terms of use, and the website's general design" in determining "whether a reasonably prudent user would have inquiry notice of a browsewrap agreement." *Id.*

Plaintiff asserts, and Shutterfly does not dispute, that Lifetouch 2018 TOS was a "hybrid" (also known as "sign up") internet contract "in which a user signs up to use an internet product or service, and the signup screen states that acceptance of a separate agreement is required before the user can access the service." *Colgate v. JUUL Labs, Inc.*, 402 F. Supp. 3d 728, 763 (N.D. Cal. 2019). As shown below, when Lifetouch customers "Submit Payment" for their purchase on Lifetouch website, they are presented with a statement that "by clicking 'Submit Payment' I agree to the Privacy Statement and Terms of Service" with a blue hyperlink to those Terms. Grant Decl. ¶ 20.




*Id.* Plaintiff contends that the 2018 TOS is "inconspicuous by design." Opp'n at 3. Plaintiff contends that the "use of color, borders, bold typeface, and shading" makes the 2018 TOS inconspicuous, and is insufficient to put a reasonable user on notice. *Id.* at 4.

For support, Plaintiff relies on the Ninth Circuit decision in *Nguyen*, where the court assessed a purely "browsewrap" agreement where the defendant's "Terms of Use" hyperlink was located at the bottom left-hand corner of every page on the Barnes & Noble website and had a "close proximity to the buttons a user must click on to complete an online purchase." 763 F.3d at 1177. Under those circumstances and "in keeping with courts' traditional reluctance to enforce browsewrap agreements against individual consumers," the Ninth Circuit held that "where a website makes its terms of use available via a conspicuous hyperlink on every page of the website ***but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate***

***assent***, even close proximity of the hyperlink to relevant buttons users must click on—***without more***—is insufficient to give rise to constructive notice." *Id.* at 1178-79 (emphasis added). Here, in contrast to the circumstances in *Nguyen,* Lifetouch users are required to "affirmatively acknowledge" the 2018 TOS before proceeding with their purchase. *Id.* at 1176.

Courts in this Circuit routinely uphold the validity of internet contracts like Lifetouch's 2018 TOS. The Ninth Circuit recently found "sufficient notice to a reasonably prudent internet user" of TurboTax's Terms of Use (which included an arbitration clause) where the user was "required to click a 'Sign In' button, directly under which the following language appeared: 'By clicking Sign In, you agree to the Turbo Terms of Use, TurboTax Terms of Use, and have read and acknowledged our Privacy Statement.' " *Dohrmann v. Intuit, Inc.*, No. 20-15466, 2020 WL 4601254, at *2 (9th Cir. Aug. 11, 2020). There, the Ninth Circuit found acceptable "light blue hyperlinks which, if clicked, directed the user to a new webpage," which directed the user to the Terms of Service agreement that contained the arbitration clause. *Id.*

In another recent decision, the Ninth Circuit found plaintiff "validly assented to Ticketmaster's Terms of Use, [...] each time he clicked the 'Place Order' button when placing an order for tickets, where directly above the button, the website displayed the phrase, 'By clicking 'Place Order,' you agree to our Terms of Use,' where in both contexts, 'Terms of Use' was displayed in blue font and contained a hyperlink to Ticketmaster's Terms." *Lee v. Ticketmaster L.L.C.*, No. 19-15673, 2020 WL 3124256, at *2 (9th Cir. June 12, 2020). And in *Peter v. DoorDash, Inc.*, Judge Tigar found sufficient inquiry notice of DoorDash's Terms and Conditions where directly below the "Sign Up" button, a statement read: "By tapping Sign Up, [...] you agree to our Terms and Conditions and Privacy Statement" and the words "Terms and Conditions" appeared in blue text and were hyperlinked to the DoorDash's Terms and Conditions in effect at the time. 445 F. Supp. 3d 580, 587 (N.D. Cal. 2020).

***7** Lifetouch's website design presents nearly identical circumstances to the cases noted above, where "Terms and Conditions" appear in blue text, are hyperlinked, and placed directly above the "Submit Payment" and consumers are presented with a statement that reads: "by clicking 'Submit Payment' I agree to the Privacy Statement and Terms of Service[.]" Grant Decl. ¶ 20. Thus, in light of clear authority in this Circuit, Plaintiff validly assented to the 2018 TOS, including the arbitration provision, each time she clicked the "Submit Payment" button when she purchased school portrait products on Lifetouch website.

While citing to *Nguyen*, which clearly addresses an internet contract, Plaintiff also takes issue with Lifetouch's Family Approval Program paper order forms, arguing that the instructions to access the Terms and Conditions were at the bottom of a single page within a multiple page packet and the terms themselves are not provided on the paper documents. Opp'n at 6-7. Plaintiff is correct in noting that the instruction on how to access the 2018 TOS are in "small non-colored font without any shading." *See* Opp'n at 6 (citing ECF 27-3). But because Plaintiff had constructive notice of the 2018 TOS when she made her undisputed purchases on Lifetouch website, it is irrelevant whether she had ***additional*** constructive notice via the paper order form. *See* Allen Decl. ¶¶ 2-6 (discussing her August 2018, September 2018, or October 2019 online purchases of school portraits).[4]

Finally, Plaintiff argues that discovery regarding the percentage of users that clicked the Terms and Conditions is necessary to determine whether Lifetouch 2018 TOS were conspicuous. Opp'n at 7. Plaintiff's requested discovery, however, would provide no new information that is necessary for the Court to determine the issue of constructive notice. Plaintiff has presented no authority where discovery was allowed regarding percentage of users that clicked on link, in order to resolve a constructive notice question. In *Doe v. Xytex Corp.*, which Plaintiff cites, the court granted leave to conduct limited discovery only because the record was inadequate as to how defendant's website appeared during the relevant timeframe. No. C 16-02935 WHA, 2016 WL 3902577, at *4 (N.D. Cal. July 19, 2016). The Lifetouch 2018 TOS and the undisputed appearance of Lifetouch's website speak for themselves and under clear authority in this Circuit, Plaintiff had sufficient constructive notice. No arbitration-related discovery is warranted.

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In conclusion, The Court finds that when Plaintiff purchased school portraits on Lifetouch website, she assented to the 2018 TOS.

  

**2. Parties to the Arbitration Agreement**

Plaintiff also argues that "[t]he arbitration agreement does not indicate with whom the consumer is agreeing" and does not mention the post corporate restructuring entities Shutterfly LLC and Shutterfly Lifetouch LLC. Opp'n at 8. Shutterfly responds that all Defendants have standing to enforce the Arbitration Agreement because (1) the terms of the Agreement do not limit the arbitratable disputes to the signatories of the 2018 TOS and (2) the arbitration agreement is enforceable as to all Defendants under the doctrine of equitable estoppel. Reply at 3-4, ECF 37.

The Court agrees with Shutterfly on both fronts. First, the Arbitration Agreement is not limited to the parties, but encompasses all disputes arising from Lifetouch's services. Specifically, the Agreement provides: "you and Lifetouch agree that any dispute, claim or controversy ***arising out of or relating in any way to the Lifetouch service***, these Terms of Service and this Arbitration Agreement, shall be determined by binding arbitration or in small claims court." 2018 TOS § 16 (emphasis added). And the first sentence of the 2018 TOS informs the consumers that "[o]n April 2, 2018, Lifetouch Inc. joined the Shutterfly family of brands" and "[t]he following Terms of Service were updated to align the combined companies' policies and practices where applicable." 2018 TOS at 1. Shutterfly was clearly identified as Lifetouch's parent company and the Arbitration clause, by its plain language, encompasses all disputes arising from Lifetouch services (here, purchase of school portraits under the Family Approval program). These facts distinguish this case from Plaintiff's cited authority where the arbitration clause stated that "[e]ither you or we may choose to have any dispute ***between you and us*** decided by arbitration." *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1127 (9th Cir. 2013) (emphasis added).

***8** To the extent Plaintiff argues the new Shutterfly (Shutterfly LLC) lacks standing to enforce the Arbitration Agreement, Plaintiff has provided no authority and articulated no arguments as to why a restructured successor is barred from enforcing an arbitration agreement entered into by its predecessor.[5]

Second, in the Ninth Circuit a signatory to a contract may be required to arbitrate a dispute with a non-signatory where there is a "close relationship between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract and ... the claims [are] intertwined with the underlying contractual obligations." *Munid v. Union Sec. Life Inc. Co.*, 555 F.3d 1042, 1046 (9th Cir. 2009). Along those lines, "[w]hen the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. C 13-3349 SI, 2014 WL 1395733, at *4 (N.D. Cal. Apr. 10, 2014) (citation omitted).

Plaintiff charges Defendants collectively with the same conduct regarding the unordered school portraits. *See generally*, Compl. The Complaint does not distinguish between Defendants' acts and alleges that "each of the Defendants [...] gave consent to, ratified, adopted, approved, controlled, aided and abetted, and/or otherwise authorized the acts alleged herein to the remaining Defendants." *Id.* ¶ 11. Plaintiff further alleges that Defendants are "agent, employee, representing partner, officer, director, subsidiary, affiliate, parent corporation, successor and/or predecessor in interest and/or joint venture of the remaining Defendants." *Id.*

But more importantly, Plaintiff refers to the 2018 TOS as "Defendants' Terms of Service" and incorporates those Terms in her Complaint. *Id.* ¶ 13. Specifically, she alleges that the "choice of law" provision contained in the 2018 TOS is binding on all Defendants – including Shutterfly. *Id.* ¶¶ 13-14. "Equitable estoppel precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes." *Kramer*, 705 F.3d at 1128 (9th Cir. 2013) (*Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006)). This is exactly what Plaintiff suggests to do here – hold Shutterfly to the "choice of law" provision in the 2018 TOS, while simultaneously preventing Shutterfly from enforcing the arbitration clause of the same agreement. Equitable estoppel does not allow Plaintiff to do so.

In sum, the Court finds that Shutterfly may compel Plaintiff to arbitration pursuant to the 2018 TOS.

  

**D. School Accounts**

Next, Plaintiff argues that the 2018 TOS does not apply to "school accounts" and that "it is unclear whether Plaintiff's account is even subject to these Terms of Service." Opp'n at 8.

The 2018 TOS provides:

> **Note to Lifetouch school accounts**: Separate terms of service, not these Terms, apply to products and services (including websites, applications and online services) that are designed for the use and benefit of the schools and school districts Lifetouch provides service to for their administrative and educational purposes and which are used by or at the direction of teachers or other school or district employees (a "School Service"). Please refer to the Terms of Service associated with those School Services or contact us through your Lifetouch school account representative for further information.

***9** 2018 TOS at 1. Plaintiff argues "[w]hether these photos were 'designed for the use and benefit of the schools' is a question of fact." Opp'n at 9. Plaintiff misrepresents the provision and partially quotes its language, ignoring the remainder of the sentence that clearly limits the carved out services to those "for [the schools'] administrative and educational purposes and which are used by or at the direction of teachers or other school or district employees." 2018 TOS at 1. It is hard to imagine how portraits of students purchased by their parents or guardians are used for the "administrative and educational" use of teachers or other school employees.

Thus, Plaintiff's purchases are not excluded from the 2018 TOS based on the carve-out provided for school accounts.

**E. Plaintiff's Purchases Prior to July 2018**

Finally, Plaintiff argues that her purchases made before July 2018 are not subject to arbitration, because Lifetouch's Terms of Service that was in effect before July 2018 did not include an arbitration clause. Opp'n at 9 (citing 23-2). Plaintiff and Shutterfly present a dispute as to whether the terms of the 2015 TOS allow for retroactive application of the arbitration clause. *See* Mot. to Compel at 6-7 (noting the reservation of right to update or modify the 2015 Terms of Service); Opp'n at 9 (noting that the 2015 TOS did not allow any amendments unless made in writing and signed by both parties).

The parties' dispute is a question of scope, which the parties have delegated to the arbitrator. *See Davis v. Einstein Noah Rest. Grp., Inc.*, No. 19-CV-00771-JSW, 2019 WL 6835717, at *2 (N.D. Cal. Oct. 23, 2019) ("When [plaintiff] maintains she did not consent to arbitrate claims that had accrued before the Arbitration Agreement was signed, she is arguing about the reach or scope of the Agreement, not whether she agreed to arbitrate.") Thus, the Court finds the question of retroactive application of the Arbitration Agreement to Plaintiff's purchases prior to July 2018 is in the arbitrator's purview.

## IV. ORDER

For the foregoing reasons, the Court GRANTS Shutterfly's Motion to Compel Arbitration at ECF 23. Shutterfly's Rule 12(b)(6) Motion to Dismiss is TERMINATED WITHOUT PREJUDICE.

**IT IS SO ORDERED.**

**All Citations**

Slip Copy, 2020 WL 5517172

Footnotes

  

1 Defendants Lifetouch, Inc. and Lifetouch National School Studios, Inc. joined in this Motion "only to the extent that the Court first determines that personal jurisdiction exists over the claims against them." Notice of Motion at 2, ECF 23. The Court has granted Lifetouch's Motion to Dismiss for Lack of Personal Jurisdiction with leave to amend at ECF 45.

2 No page numbers are included in Lifetouch's 2015 TOS at ECF 23-2. In this Order, the Court cites to the page numbers assigned to the document by ECF.

3 The Court does not make any findings or observations on the merits of Shutterfly's arguments regarding the "choice of law" provision.

4 The Court notes that Plaintiff has not argued that her purchases made via the paper order form and paid for by cash or check should be analyzed in isolation from her online purchases.

5 The same is true as to the new Lifetouch entity (Shutterfly Lifetouch LLC). But the Court does not reach that issue because Shutterfly alone brings this Motion due to the Court's lack of jurisdiction over Lifetouch, Inc. and Lifetouch National School Studios, Inc. *See* Notice of Motion at 2; ECF 45.

**End of Document**

2020 WL 5517170
Only the Westlaw citation is currently available.
United States District Court, N.D. California,
San Jose Division.

Shawna ALLEN, Plaintiff,

v.

SHUTTERFLY, INC., et al., Defendants.

Case No. 20-cv-02448-BLF
|
Signed 09/14/2020

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**ORDER GRANTING MOTION TO DISMISS DEFENDANTS LIFETOUCH, INC. AND LIFETOUCH SCHOOL STUDIOS, INC. FOR LACK OF PERSONAL JURISDICTION**

[Re: ECF 22]

BETH LABSON FREEMAN, United States District Judge

***1** Plaintiff, Shawna Allen, brings this consumer fraud class action against Shutterfly, Inc., ("Shutterfly"), Lifetouch, Inc. and Lifetouch National School Studios, Inc. (together, "Lifetouch" or "Lifetouch entities") arising from the purchase of school portraits. Before the Court is Lifetouch's Motion to Dismiss for Lack of Personal Jurisdiction. Motion, ECF 22.

The Court heard oral arguments on August 14, 2020. For the reasons stated below, the Court GRANTS Lifetouch's Motion WITH LEAVE TO AMEND.

**I. BACKGROUND**

Plaintiff resides in Olathe, Kansas and has children who attend schools in the Olathe School District. Complaint ("Compl.") ¶¶ 7, 26, 30, ECF 1-1. Defendants are in the business of selling school pictures, by contracting with schools to provide bi-annual portrait sessions within schools and sell the portraits to students' parents and guardians. *Id.* ¶ 1. Defendants have described themselves as "the national leader in school portraits." *Id.* ¶ 18.

Plaintiff's claims arise from the pictures sold through a "Family Approval" model. Compl. ¶ 2. Under this model, the students' portraits are taken in school; the students are sent home with the portraits (and/or other products printed with the students' pictures); and their parents or guardians are directed to pay for the products or return them. *Id.* ¶ 26. Parents and guardians are not

  

asked to and do not pre-order the portraits and products. *Id.* ¶ 48. Plaintiff alleges that Defendants sent unordered portraits and/or products home with Plaintiff's children each spring during the past three years under the Family Approval model. *Id.* ¶¶ 29-30.

Plaintiff contends these portraits and products are "unconditional gifts that do not require payment or return." Compl. ¶ 49. According to Plaintiff, the Family Approval model is "illegal, misleading and unconscionable" because it "unfairly pressures" parents into buying the portraits "or risk disappointing their children and/or face embarrassment in front of teachers and school administrators." *Id.* ¶ 54. Plaintiff seeks to represent a class of "[a]ll individuals who received and paid for unordered school portraits and/or products from Defendants within the past four years." *Id.* ¶ 59.

Plaintiff brings the following causes of action under California law: (1) Solicitation of Payment for Unordered Goods in violation of California Civil Code § 1716; (2) Violation of California Civil Code § 1584.5; (3) Violation of the California Consumers Legal Remedies Act, Civil Code § 1750 *et seq.*; (4) Violation of the California Unfair Competition Law, Business and Professional Code § 17200 *et seq.*; and (5) Unjust Enrichment. *See generally*, Compl.

Defendant Shutterfly, Inc. is incorporated in Delaware and has its principal place of business in Redwood City, California. Compl. ¶ 8. Defendants Lifetouch, Inc. and its wholly owned subsidiary, Lifetouch National School Studios, Inc., are Minnesota corporations with their principal place of businesses in Minnesota. *Id.* ¶ 9.

Lifetouch submits, and Plaintiff does not dispute, that there has been a recent corporate restructuring amongst Defendants. *See* Motion at 1 n.1. At the time of Plaintiff's most recent transactions, Shutterfly, Inc. was the parent company of both Lifetouch, Inc. and Lifetouch National School Studios, Inc. *See* Declaration of John Grant ("Grant Decl.") ¶¶ 4–7, ECF 22-1. On October 31, 2019, Shutterfly, Inc. was converted to a limited liability company under Delaware law and renamed Shutterfly, LLC, with its principal place of business remaining in Redwood City, California. *Id.* ¶ 4. On the same day, Lifetouch, Inc. was converted to a limited liability company and then on December 31, 2019, it merged into Shutterfly, LLC. *Id.* ¶ 4. Similarly, Lifetouch National School Studios, Inc. was converted into a limited liability company on October 31, 2019 and then on December 31, 2019, it was renamed Shutterfly Lifetouch, LLC. *Id.* ¶ 6. Thus, Defendant Lifetouch, Inc. no longer exists. Defendant Lifetouch National School Studios, Inc. is now named Shutterfly Lifetouch, LLC, is organized under the laws of Minnesota and has its principal place of business in Eden Prairie, Minnesota. *Id.* ¶ 6.

## II. LEGAL STANDARDS

***2** Federal Rule of Civil Procedure 12(b)(2) authorizes a defendant to seek dismissal of an action for lack of personal jurisdiction. *See* Fed. R. Civ. P. 12(b)(2). "In opposing a defendant's motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing that jurisdiction is proper." *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1073 (9th Cir. 2011). Courts may consider evidence presented in affidavits and declarations in determining personal jurisdiction. *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001). "Where, as here, the defendant's motion is based on written materials rather than an evidentiary hearing, the plaintiff need only make a prima facie showing of jurisdictional facts to withstand the motion to dismiss." *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1068 (9th Cir. 2015) (internal quotation marks and citation omitted).

"Uncontroverted allegations in the complaint must be taken as true, and factual disputes are construed in the plaintiff's favor." *Freestream Aircraft (Bermuda) Ltd. v. Aero Law Grp.*, 905 F.3d 597, 602 (9th Cir. 2018). If, however, the defendant adduces evidence controverting the allegations, the plaintiff must "come forward with facts, by affidavit or otherwise, supporting personal jurisdiction," *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986), for a court "may not assume the truth of allegations in a pleading which are contradicted by affidavit." *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1284 (9th Cir. 1977). Moreover, conclusory allegations or "formulaic recitation of the elements" of a claim are not entitled to the presumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). "Nor is the court required to accept as true allegations that are ... unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

"When no federal statute governs personal jurisdiction, the district court applies the law of the forum state." *Id.; see* Fed. R. Civ. P. 4(k)(1)(A) (service of process is effective to establish personal jurisdiction over a defendant "who is subject to the jurisdiction

  

of a court of general jurisdiction in the state where the district court is located"). "California's long-arm statute allows the exercise of personal jurisdiction to the full extent permissible under the U.S. Constitution." *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014) (citing Cal. Civ. Proc. Code Ann. § 410.10). Constitutional due process, in turn, requires that a defendant "have certain minimum contacts" with the forum state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Freestream Aircraft*, 905 F.3d at 602 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

"The strength of contacts required depends on which of the two categories of personal jurisdiction a litigant invokes: specific jurisdiction or general jurisdiction." *Ranza*, 793 F.3d at 1068 (citing *Daimler AG*, 571 U.S. at 127). General jurisdiction exists when the defendant's contacts "are so continuous and systematic as to render [it] essentially at home in the forum State." *Daimler AG*, 571 U.S. at 127 (internal quotation marks omitted). Where a defendant is subject to general jurisdiction, it may be sued "on any and all claims," *id.* at 137, including claims "arising from dealings entirely distinct" from its forum-related activities, *id.* at 127 (internal quotation marks omitted). By contrast, specific jurisdiction is proper when the defendant's contacts with the forum state are may be more limited but the plaintiff's claims "arise out of or relate to" those contacts. *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773, 1786 (2017).

**III. DISCUSSION**

***3** Lifetouch challenges this Court's personal jurisdiction over Lifetouch entities. Lifetouch argues that the Complaint's factual allegations fail to establish either general or specific jurisdiction as to Lifetouch because Lifetouch entities are undisputedly Minnesota companies and Plaintiff's claims arise from events that occurred entirely in Kansas – where Plaintiff lives, where her children go to school, and where the school portraits at issue were taken and purchased. *See* Motion at 3-5. Lifetouch further contends that jurisdiction cannot be established through Shutterfly, Inc. (the California parent company) because Plaintiff's theory of agency is not sufficiently pled. *Id.* at 5-7. Finally, Lifetouch argues that the forum selection clause in Lifetouch Terms of Service agreement does not waive personal jurisdiction. *Id.* at 7-8.

Plaintiff responds that determination of this Court's personal jurisdiction over Lifetouch is "premature" because "Plaintiff does not know the inner workings of the corporate restructuring or operations of their various entities[.]" Opp'n at 3-4. Plaintiff also argues that the Complaint makes a prima facie case that Lifetouch is subject to the jurisdiction of this Court. *Id.* at 2 (citing Compl. ¶¶ 6, 11, 12, 26, 28). Plaintiff identifies the following paragraphs from the Complaint as factual support for the Court's personal jurisdiction over Lifetouch:

> 6. As a result of Defendants' violations, thousands of individuals throughout the United States including individuals within the state of California received unsolicited portraits of their children that were not ordered or requested. Compl. ¶ 6.
>
> 11. Plaintiffs are informed, believe, and thereon allege that each of the Defendants herein was, at all times relevant in this action, the agent, employee, representing partner, officer, director, subsidiary, affiliate, parent corporation, successor and/or predecessor in interest and/or joint venture of the remaining Defendants and was acting within the course and scope of that relationship. Plaintiffs are further informed, believe, and thereon allege that each of the Defendants herein gave consent to, ratified, adopted, approved, controlled, aided and abetted, and/or otherwise authorized the acts alleged herein to the remaining Defendants. Compl. ¶ 11.
>
> 12. This Court has personal jurisdiction over the Defendants because they have purposefully availed themselves of the privilege of conducting business in California insofar as Shutterfly has its principal place of business in the State and Defendants maintain systematic and continuous business contacts with California. Compl. ¶ 12.
>
> 26. Defendants began selling Spring portraits under a "Family Approval" model in some markets, including in the Olathe School District and, on information and belief, other communities throughout the nation including California, whereby portraits and/or products are sent home with students, and their parents and guardians are directed to pay for the portraits and/or products or return them. Compl. ¶ 26.

  

28. During the relevant time, Defendants have sold Spring portraits and/or products throughout the country including California under the "Family Approval" model. Compl. ¶ 28.

**A. General Jurisdiction**

To establish general jurisdiction over a foreign entity, that entity's affiliations with the forum State must be "so continuous and systematic as to render it essentially at home in the forum State." *Daimler AG v. Bauman*, 571 U.S. 117, 119 (2014) (quotation and alterations omitted). "[I]n the paradigmatic circumstance for exercising general jurisdiction, the corporate defendant is incorporated or has its principal place of business in the forum state." *Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1020 (9th Cir. 2017). These principles apply equally to limited liability companies. *See Miranda v. R&L Carriers Shared Servs., LLC*, No. 18-CV-04940-TSH, 2018 WL 6199931, at *4 (N.D. Cal. Nov. 28, 2018) (finding no general jurisdiction in California over an Ohio limited liability company with its principal place of business in Ohio).

***4** Here, there is no dispute that both Lifetouch Defendants were Minnesota corporations with their principal places of business in Minnesota. Compl. ¶ 9. And the Complaint is devoid of any facts establishing that Lifetouch was "essentially at home" in California. Even after the corporate restructuring, the remaining Lifetouch entity (Shutterfly Lifetouch, LLC) is organized under the laws of Minnesota and has its principal place of business in Minnesota. Grant Decl. ¶ 6. Plaintiff makes no arguments as to the existence of general jurisdiction. *See generally*, Opp'n. Accordingly, there is no basis on which the Court could find general jurisdiction exists over Lifetouch.

**B. Specific Jurisdiction**

Next, Lifetouch argues the Complaint fails to allege a sufficient basis for the Court to exercise specific jurisdiction over Lifetouch. Motion at 4. Lifetouch points out that all events relevant to Plaintiff's claims took place in Kansas: (1) Plaintiff resides in Kansas, (2) her children attend school in Kansas, (3) Lifetouch took their school portraits in Kansas, (4) the unordered portraits were sent to her home in Kansas, and (5) she paid for them in Kansas. Motion at 4-5. Plaintiff responds that the Complaint makes a prima facie case that Lifetouch is subject to the jurisdiction of this Court. Opp'n at 2 (citing Compl. ¶¶ 6, 11, 12, 26, 28).

But the portions of the Complaint Plaintiff cites for establishing prima facie of personal jurisdiction are too conclusory to state a claim. ***First***, Plaintiff alleges "[a]s a result of Defendants' violations, thousands of individuals throughout the United States including individuals within the state of California received unsolicited portraits of their children that were not ordered or requested." Compl. ¶ 6; *see also id.* ¶ 12 ("[O]n information and belief, other communities throughout the nation including California, whereby portraits and/or products are sent home with students, and their parents and guardians are directed to pay for the portraits and/or products or return them."). But even accepting these allegations as true, there is no connection between ***Plaintiff's claim*** and any action Lifetouch took in California. It is well established that to confer specific jurisdiction, "it is the named plaintiff's claim that 'must arise out of or result from the defendant's forum-related activities,' not the claims of the unnamed members of the proposed class, who are not party to the litigation absent class certification." *Ambriz v. Coca Cola Co.*, No. 13-CV-03539-JST, 2014 WL 296159, at *6 (N.D. Cal. Jan. 27, 2014). Here, whether unnamed putative class members in California received portraits under the Family Approval model is irrelevant to Plaintiff's claims, which arise from the purchase of her children's school portraits in Kansas.

Moreover, Plaintiff may not plead requisite jurisdictional facts by lumping all Defendants together. This is because for the purposes of determining personal jurisdiction, "the actions of one defendant cannot be attributed to another; instead, plaintiff must satisfy its *prima facie* showing with regard to each defendant." *ADO Fin., AG v. McDonnell Douglas Corp.*, 931 F. Supp. 711, 714 (C.D. Cal. 1996); *see also Skurkis v. Montelongo*, No. 16-cv-0972 YGR, 2016 WL 4719271, at *4 (N.D. Cal. Sept. 9, 2016) (rejecting the grouping of defendants in the jurisdictional allegation and explaining "the Court must determine whether plaintiffs have made a *prima facie* case of personal jurisdiction as to *each* defendant based on each defendant's *own* contacts with California.") (emphasis in original).

  

***Second***, Plaintiff alleges "[t]his Court has personal jurisdiction over the Defendants because they have purposefully availed themselves of the privilege of conducting business in California insofar as Shutterfly has its principal place of business in the State and Defendants maintain systematic and continuous business contacts with California." Compl. ¶ 12. This allegation is entirely conclusory as to Lifetouch. There is simply no factual basis in the Complaint about Lifetouch's "systematic and continuous business contacts with California" and even if there was, those contact are not alleged to be related to Plaintiff's claim.

***5** "Specific jurisdiction is based on the defendant's connections to the state with regard to the particular controversy at issue." *In re Samsung Galaxy Smartphone Mktg. & Sales Practices Litig.*, No. 16-CV-06391-BLF, 2018 WL 1576457, at *2 (N.D. Cal. Mar. 30, 2018). Simply put, Plaintiff's individual claims arise solely from conduct that occurred in Kansas and have no connection with the sale of products in California. Thus, there is no basis for the Court to find specific jurisdiction over Lifetouch.

**C. Agency Theory of Jurisdiction through Shutterfly**

Lifetouch also argues that jurisdiction over Lifetouch cannot be established by imputing Shutterfly Inc.'s (or its successor Shutterfly, LLC's) California contacts to Lifetouch under an agency theory. Motion at 5.

In a conclusory (an illogical) paragraph titled "Agency," Plaintiff alleges "each of the Defendants herein was, at all times relevant in this action, the agent, employee, representing partner, officer, director, subsidiary, affiliate, parent corporation, successor and/or predecessor in interest and/or joint venture of the remaining Defendants[.]" Compl. ¶ 11. To establish jurisdiction on the basis of an agency relationship, the plaintiff must state facts showing the defendant "had the right to control" its alleged agent's activities. *Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1025 (9th Cir. 2017). Plaintiff's allegations, however, are a conclusory legal statement unsupported by any facts regarding Shutterfly Inc.'s control over Lifetouch. Thus, an agency relationship is not sufficiently pled to support a basis for personal jurisdiction. *See Page v. Minnesota Life Ins. Co.*, No. SACV1801208AGKESX, 2019 WL 3059561, at *4 (C.D. Cal. Mar. 11, 2019) (finding no specific jurisdiction based on conclusory assertion of agency not supported by sufficient facts); *see also Williams*, 851 F.3d at 1025 n.5 (declining to credit a conclusory legal statement unsupported by any factual assertion that "Defendants ... were the agents or employees of each other and were acting at all times within the course and scope of such agency and employment ... and are legally responsible because of their relationship with their co-Defendants.").

Plaintiff also asserts that "[e]ach entity files consolidated reports with the SEC," Opp'n at 3 & n.1, in support of her agency theory, but under California law, consolidated reporting does not establish agency for purposes of jurisdiction. *Pitt v. Metro. Tower Life Ins. Co.*, No. 18-CV-06609-YGR, 2020 WL 1557429, at *7 (N.D. Cal. Apr. 1, 2020) (quoting *F. Hoffman-La Roche, Ltd. v. Superior Court*, 130 Cal. App. 4th 782, 801 (2005)); *Evangelista v. Just Energy Mktg. Corp.*, No. SACV1702270CJCSSX, 2018 WL 4850380, at *4 (C.D. Cal. June 11, 2018) ("[T]he cases are unanimous that consolidated reporting is standard business practice and will not support jurisdiction in the absence of evidence establishing an agency relationship.") (citation omitted).

Moreover, even if an agency relationship was sufficiently pled (and it is not), the Complaint still fails to allege any Shutterfly contacts with California that relate to ***Plaintiff's claims***. "The existence of a parent-subsidiary relationship is insufficient, on its own, to justify imputing one entity's contacts with a forum state to another for the purpose of establishing personal jurisdiction." *Ranza*, 793 F.3d at 1070; *see also Daimler*, 571 U.S. at 136 (rejecting the notion that a foreign corporation is subject to general jurisdiction whenever it has an in-state subsidiary or affiliate).

***6** Plaintiff argues that she does not know the "inner workings" of Defendants after restructuring. Opp'n at 3. That may be true, but the fact remains that the new Lifetouch entity (Shutterfly Lifetouch LLC) is also a Minnesota company and Plaintiff's claims arise from events that occurred entirely in Kansas. Whatever those "inner workings" are, there are no allegations they are related to Plaintiff's claims and thus do not support a finding of personal jurisdiction.

In short, the Complaint fails to make a plausible claim that Shuttetfly Inc.'s or Shutterfly LLC's contacts with California may be imputed to Lifetouch under an agency theory.

  

**D. Jurisdiction through Forum Selection Clause in the Terms of Service**

The forum selection clause in the Lifetouch Terms of Service provides:

> **14. Miscellaneous**
>
> .... Subject to and without waiving or limiting the mandatory Arbitration Agreement set forth in paragraph 16, to the extent you or Lifetouch are before a court (for instance, to enforce an arbitrator's award), you agree to submit to the exclusive jurisdiction of any State or Federal court located in the County of Santa Clara, California, United States of America, and waive any jurisdictional, venue or inconvenient forum objections to such courts.

Exh. 1 to Compl., ECF 1-1 Compl. ¶ 13 (quoting Ex. A at ¶ 14).

Lifetouch argues that this provision does not waive personal jurisdiction because Plaintiff's claims are within the scope of the arbitration agreement and are therefore carved out of the forum selection clause. Motion at 7. "Plaintiff agrees with Defendants that the forum selection clause does not apply[.]" Opp'n at 1, 4. Because the parties are in agreement that the forum selection clause in Lifetouch Terms of Service is inapplicable to Plaintiff's claims, the Court concludes that the said provision does not confer personal jurisdiction on this Court.

***

In conclusion, the Court finds that Plaintiff's factual allegations in the Complaint fail to make a prima facie case for personal jurisdiction as to Lifetouch.

**E. Jurisdictional Discovery**

Plaintiff plans to amend her Complaint to name Shutterfly, LLC (which replaces the now-merged Shutterfly, Inc. and Lifetouch, Inc.) and Shutterfly Lifetouch, LLC (which replaces Lifetouch National Studios, Inc.). Opp'n at 2. Accordingly, Plaintiff argues that "the Court should wait to determine personal jurisdiction until after an amended complaint has been filed naming the current corporate entities and some limited jurisdictional discovery has occurred." *Id.* at 3.

The parties do not dispute that Shutterfly, LLC is a California company and subject to general personal jurisdiction of this Court. That leaves Shutterfly Lifetouch, LLC – which remains a Minnesota company. Thus, the corporate restructuring changes nothing in the Court's analysis of personal jurisdiction. The new Lifetouch entity (Shutterfly Lifetouch, LLC) is a Minnesota limited liability company and Plaintiff's claims arise out of events in Kansas.

And other than not knowing the "inner workings" of the restructured companies, Plaintiff provides no basis, let alone a plan, for her request for jurisdictional discovery. Courts may properly deny jurisdictional discovery where there is insufficient evidence to give rise to more than a "hunch" that discovery will make out a case for exercising personal jurisdiction over a defendant. *See Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008). Plaintiff's conclusory allegations and arguments supply the Court with nothing but her "hunch" that jurisdictional discovery might reveal facts helpful to her cause. This is not enough.

***7** Moreover, Plaintiff has not "articulated what discovery [she] wish[es] to take, or what [she] believe[s] might be revealed by further discovery." *Mercantile, Inc. v. E.I. DuPont De Nemours & Co.*, No. 13-CV-01180-BLF, 2015 WL 4755335, at *12 (N.D. Cal. Aug. 11, 2015) (denying jurisdictional discovery). Accordingly, on this record, the Court finds highly unlikely that jurisdictional discovery would result in any useful new evidence regarding personal jurisdiction. Thus, the Court DENIES Plaintiff's request for jurisdictional discovery WITHOUT PREJUDICE to submitting a properly supported request.

**F. Leave to Amend**

In deciding whether to grant leave to amend, the Court must consider the factors set forth by the Supreme Court in *Foman v. Davis*, 371 U.S. 178 (1962), and discussed at length by the Ninth Circuit in *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d

  

1048 (9th Cir. 2009). A district court ordinarily must grant leave to amend unless one or more of the *Foman* factors is present: (1) undue delay, (2) bad faith or dilatory motive, (3) repeated failure to cure deficiencies by amendment, (4) undue prejudice to the opposing party, or (5) futility of amendment. *Eminence Capital*, 316 F.3d at 1052. "[I]t is the consideration of prejudice to the opposing party that carries the greatest weight." *Id.* However, a strong showing with respect to one of the other factors may warrant denial of leave to amend. *Id.*

The Court notes that Plaintiff has articulated no argument, either in her papers or at the Hearing, as to how an amendment might cure the deficiencies in the Complaint as to personal jurisdiction over Lifetouch. There is no dispute that Lifetouch, Inc. and Lifetouch National School Studios, Inc. were Minnesota corporations with their principal places of business in Minnesota. There is also no dispute that Lifetouch, Inc. no longer exists and has merged into the new Shutterfly, LLC, a California company, over which the Court undisputedly has personal jurisdiction. There is also no dispute that Shutterfly Lifetouch, LLC (Lifetouch National School Studios, Inc.'s successor) remains a Minnesota company. Finally, there is no dispute that all events giving rise to Plaintiff's claims occurred in Kansas. The portraits at issue were marketed, taken, delivered, and paid for in Kansas.

In addition, Lifetouch has submitted a declaration stating that Shutterfly (the California Defendant) is an online image publishing platform and "does not take school portraits, under the Family Approval program or otherwise" and "was not involved in the development or implementation of the Family Approval program." Declaration of Stacy Knudson ¶¶ 11-15, ECF 36-1. Accordingly, it appears that it will not be an easy feat for Plaintiff to allege additional facts to state a plausible claim that a Minnesota company's contacts with California gave rise to Plaintiff's claims about her purchases of school portraits in Kansas. But because this is Plaintiff's first opportunity for an amendment, and because amendments are liberally granted in this Circuit, *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991), the Court GRANTS Lifetouch's Motion WITH LEAVE TO AMEND.

**IV. ORDER**

For the foregoing reasons, the Court GRANTS Lifetouch's Motion to Dismiss for Lack of Personal Jurisdiction at ECF 22 WITH LEAVE TO AMEND. Any amended complaint shall be filed within 30 days of this Order.

Plaintiff's request for jurisdictional discovery is DENIED WITHOUT PREJUDICE. If Plaintiff intends to submit a further request for jurisdictional discovery, she must meet and confer with Defendants and submit a properly supported discovery request and plan not to exceed five (5) pages. If such a request is submitted, Plaintiff may also request an extension to the 30-day deadline for amending her complaint to complete discovery.

***8** Although the Court is allowing Plaintiff leave to amend the complaint, in light of the Court's concurrently-filed Order granting Shutterfly's motion to compel arbitration, Plaintiff can anticipate a similar outcome if the court finds personal jurisdiction over Lifetouch.

**IT IS SO ORDERED.**

**All Citations**

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