UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- x
ADAM STARKE, Individually and On Behalf of All Others Similarly Situated,

Plaintiff,

- against -

GILT GROUPE, INC.,

Defendant.
- x

13 Civ. 5497 (LLS)

MEMORANDUM AND ORDER

Plaintiff Adam Starke brings this putative class action against defendant Gilt Groupe ("Gilt"), invoking this Court's diversity jurisdiction for class actions under the Class Action Fairness Act, 28 U.S.C. § 1332(d). Starke asserts state law claims of deceptive business practices and false advertising, breach of express warranty and unjust enrichment, alleging that Gilt misrepresents that the textile products it sells on its website are made of bamboo fibers, when in fact they are woven from bamboo derivatives. Gilt moves to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, arguing that the terms of Starke's use of ("membership" in) Gilt for his purchase include an agreement that any dispute such as this would be resolved by arbitration.

It is clear that Starke assented to the arbitration clause in Gilt's Website Terms of Use, Starke's individual claims are

subject to that clause (which also precludes any class action claims), and therefore the complaint should be dismissed.

BACKGROUND

Gilt is an online shopping website that specializes in "flash sales" of short duration, during which consumers may purchase designer brands at discount prices. Compl. ¶ 29 & n.2. Starke made his purchase on Gilt's online site (Id. ¶ 53), and "read and relied on Gilt's online presentation" (Id. ¶ 54). That included a sign-up box which "states that the consumer will become a Gilt member and agrees to be bound by the 'Terms of Membership'" (P. Opp. pp. 7-8) and "By joining Gilt through email or Facebook sign-up, you agree to the Terms of Membership for all Gilt Groupe sites." (Stahl Decl. Ex. A) (emphasis in original).

One mouse-click brings "Gilt Terms and Conditions," which "govern your membership on Gilt.com and its associated mobile sites . . . and your purchases and use of products and services available through the Gilt Sites [which] . . . are also governed by the Website Terms of Use," which are produced by one more click.

The Terms of Use provide, among other things:

> These Terms of Use or the Terms of Service and the relationship between you and Gilt will be governed by the laws of the State of New York without regard to its conflict of law provisions.

> If a dispute arises under these Terms of Use or the Terms of Service between you and Gilt, such dispute shall be resolved, at the filing party's election, in either a small claims court or by final and binding arbitration administered by the National Arbitration Forum or the American Arbitration Association, under their rules for consumer arbitrations. The venue for all disputes arising under these Terms of Use shall be New York, the State of New York. All disputes in arbitration will be handled solely between the named parties, and not on any representative or class basis. ACCORDINGLY, YOU ACKNOWLEDGE THAT YOU MAY NOT HAVE ACCESS TO A COURT (OTHER THAN A SMALL CLAIMS COURT) OR TO A JURY TRIAL. Notwithstanding any other provision of these Terms of Use or the Terms of Service, Gilt Groupe may resort to court action for injunctive relief at any time.

Stahl Decl. Ex. C ¶ 16 (emphasis in original). Although that is not the first but the sixteenth paragraph, reading the various terms is no harder than reading the pages of an agreement.

Starke alleges that he purchased a set of infant swaddling blankets as a baby gift from Gilt's website on June 26, 2013. Compl. ¶ 53. He claims that Gilt's online product description indicated that the blankets were made of "100% Bamboo," but that upon receipt, he determined that they were made of rayon, a bamboo derivative.[1] Id. ¶¶ 54-55.

Starke alleges that "'Bamboo' or 'Bamboo fiber,' connotes to the reasonable consumer a number of qualities, including thin and space-saving, natural and eco-friendly, highly absorbent,

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[1] Textiles can be produced from bamboo by 1) weaving the fibers of the bamboo plant into fabric, or 2) deriving other materials such as rayon or viscose from the bamboo plant and weaving those fibers into fabric. Id. ¶ 3.

mildew resistant, nontoxic, plush and suitable for sensitive skin." Id. ¶ 32. He contends,

> By advertising the Products as Bamboo without providing meaningful disclosure that the products are, in fact, a Bamboo Derivative, Gilt deceptively creates the false impression in the consumer's mind that the Products are Bamboo and possess the superior qualities inherent in Bamboo, but which Bamboo derivatives such as rayon do not possess.

Id. ¶ 38.

Starke also seeks an order certifying this case as a class action and appointing him as class representative to represent a nationwide class and a New York sub-class, which together "include, at a minimum, thousands of members." Id. ¶ 59.

DISCUSSION

Gilt argues that this action should be dismissed because the arbitration clause and class action waiver require that Starke submit his individual claims to arbitration.

Starke contends that the arbitration provision is invalid because he never effectively agreed to it, and it should not be enforced because it is unconscionable.

1.

Under New York law, "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." Express Indus. and Term. Corp. v. New

York State Dept. of Transp., 93 N.Y.2d 584, 589, 715 N.E.2d 1050, 1053 (1999). The Second Circuit has explained,

> Pursuant to this principle, in the context of agreements made over the internet, New York courts find that binding contracts are made when the user takes some action demonstrating that they have at least constructive knowledge of the terms of the agreement, from which knowledge a court can infer acceptance.

Hines v. Overstock.com, Inc. 380 Fed. Appx. 22, 25 (2d Cir. 2010).

The question here is whether Starke is bound by the written terms of a transaction which he did not see or read, although he was aware that there were terms which governed his purchase, that he would be taken as having agreed to them by making the purchase, and that he could read them by one or two clicks of the mouse. A closely similar issue was discussed in Fteja v. Facebook, Inc., 841 F. Supp. 2d 829 (S.D.N.Y. 2012). In Fteja, the plaintiff challenged whether the forum selection clause contained in the Facebook Terms of Use was reasonably communicated to him when he opened an account by clicking two "Sign Up" buttons, the second of which stated "By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service." Id. at 835. The Terms were visible only by clicking on a hyperlink. Id.

This Court concluded,

> Have terms reasonably been communicated where a consumer must take further action not only . . . to assent to the

terms but also . . . to view them? Is it enough that Facebook warns its users that they will accept terms if they click a button while providing the opportunity to view the terms by first clicking on a hyperlink? . . .

To make that point, the Court of Appeals has used a rather simple analogy. "The situation might be compared to one in which" Facebook "maintains a roadside fruit stand displaying bins of apples." Id. at 401. [Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 401 (2d Cir. 2004)]. For purposes of this case, suppose that above the bins of apples are signs that say, "By picking up this apple, you consent to the terms of sales by this fruit stand. For those terms, turn over this sign."

In those circumstances, courts have not hesitated in applying the terms against the purchaser. Indeed, in Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 587, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991), the Supreme Court upheld a forum selection clause in fine print on the back of a cruise ticket even though the clause became binding at the time of purchase, and the purchasers only received the ticket some time later. See id. In other words, the purchasers were already bound by terms by the time they were warned to read them. . . .

What is the difference between a hyperlink and a sign on a bin of apples saying "Turn Over for Terms" or a cruise ticket saying "SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES IMPORTANT! PLEASE READ CONTRACT–ON LAST PAGES 1, 2, 3"? Shute, 499 U.S. at 587, 111 S.Ct. 1522. . . . So understood, at least for those to whom the internet is an indispensable part of daily life, clicking the hyperlinked phrase is the twenty-first century equivalent of turning over the cruise ticket. In both cases, the consumer is prompted to examine terms of sale that are located somewhere else. Whether or not the consumer bothers to look is irrelevant. "Failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract." See Centrifugal Force, Inc., v. Softnet Commc'n Inc., No. 08 Civ. 5463, 2011 WL 744732, at *7 (S.D.N.Y. Mar. 1, 2011) (enforcing clickwrap agreement in breach of contract action). Here, Fteja was informed of the consequences of his assenting click and he was shown, immediately below, where to click to understand those consequences. That was enough.

Id. at 839-840 (citing and discussing cases to same effect from other circuits).

When Starke clicked "Shop Now," he was informed that by doing so, and giving his email address, "you agree to the Terms of Membership for all Gilt Groupe sites." Regardless of whether he actually read the contract's terms, Starke was directed exactly where to click in order to review those terms, and his decision to click the "Shop Now" button represents his assent to them.

2.

Starke also alleges that the arbitration clause in Gilt's Terms of Use is unconscionable. Under New York law,

> A determination of unconscionability generally requires a showing . . . of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.

Gillman v. Chase Manhattan Bank, N.A., 73 N.Y.2d 1, 10, 534 N.E.2d 824, 828 (1988) (quotation marks omitted).

There is no indication that Starke lacked a choice of other sources to purchase the blankets. He alleges in the complaint that "the exact product in the exact color which Plaintiff purchased from Gilt can be found, properly identified as 'Rayon from Bamboo,' at Amazon websites." Compl. ¶ 42.

Nor did the terms of the contract unduly favor Gilt. Arbitration is a common and commercially routine method of

resolving disputes. It is often simpler and less expensive than litigation for both plaintiffs and defendants. No reason appears why Starke should be surprised, in making a transaction of this nature, by having to arbitrate a dispute about it.

3.

Because Starke must arbitrate all of his individual claims against Gilt and any class action claims are precluded by the arbitration clause's class action waiver, no claims remain before the court.

CONCLUSION

Defendant Gilt's motion (Dkt. No. 12) is granted, and the complaint is dismissed in favor of arbitration.

So ordered.

Dated: New York, New York
April 24, 2014

Louis L. Stanton

Louis L. Stanton
U.S.D.J.