# The State of New Hampshire
# Superior Court

Hillsborough-North, S.S.

ROGER A. FORD

v.

NETGEAR, INC.

Docket No.: 216-2019-CV-00704

**ORDER**

The plaintiff, Roger Ford, brought this action against the defendant, Netgear, Inc. ("Netgear"), alleging forty-eight counts of violating the New Hampshire Consumer Protection Act. The claims arise out of an incident in which the plaintiff purchased a WiFi system from Netgear and subsequently received unwanted emails from the company. Netgear now moves to dismiss, arguing that the plaintiff agreed to arbitrate any claims against it. The plaintiff objects. The Court held a hearing on January 21, 2020. For the reasons that follow, the Court orders a STAY of the proceedings pending arbitration.

**Factual Background**

In 2019, the plaintiff purchased a WiFi system from Netgear. In order to activate the product, Netgear required the plaintiff to register for an account on its website. The registration page required the plaintiff to enter his name, email, a password, and the country he lives in. Underneath the fields to enter this information is a checkbox that states: "Yes! Please keep me updated regarding my new NETGEAR product, great tips and tricks, feature enhancements, and related products via email." Def.'s Mot. Dismiss

(Doc. 26) Ex. 5.[1] Below the checkbox is a purple button that says "Register" and a paragraph that states: "I understand by pressing 'register' my information will be used as described here and in the Privacy Policy and I agree to the Terms." Id.

Shortly after the plaintiff registered for an account with Netgear, he began receiving marketing emails from the company. Between June 10 and July 22, 2019, the plaintiff received sixteen unwanted marketing emails from Netgear. Each email contained a paragraph at the bottom that stated: "If you no longer wish to receive emails you may unsubscribe," Doc. 9 at ¶ 25, or a similar statement. On June 13, after receiving his fourth unwanted email, the plaintiff clicked on the word "unsubscribe" and it linked him to an email preferences page. The page allowed the plaintiff to select his email preferences by checking or unchecking two checkboxes. Id. ¶ 29. The first checkbox states: "I would like to receive security or firmware alerts via email that help keep my products safe." Id. The plaintiff left this box checked. The second box states: "I would like to receive product updates, tips and tricks, features enhancements or promation [sic] via email." Id. The plaintiff unchecked the second checkbox. Plaintiff repeated this process on nine more unwanted emails, but he continued to receive marketing emails from Netgear.

After the plaintiff received his fifth unwanted email, he found a "Contact Us" page on Netgear's website. Under the heading "Email Us" were email addresses for Sales, Media Inquiries, and Investor Relations. Id. ¶ 36. The plaintiff emailed each of these email addresses stating that he was still receiving unwanted emails after opting out, that it was illegal for Netgear to do this, and that if Netgear did not comply within forty-eight

[1] After the initial citation, the Court will reference all pleadings and orders by the index number of the document in the court file.

hours he reserved all remedies available to him under federal and state law. The plaintiff did not receive any response and he continued to receive unwanted emails. The "Contact Us" webpage also included a link to "Contact Customer Support," id., but the plaintiff did not use this link.

Netgear's Terms and Conditions contain an arbitration clause which states:

> You and NETGEAR agree to arbitrate any and all disputes or claims arising out of, in connection with, or relating to NETGEAR's Terms and Conditions, Products, and relationship with You . . . . All disputes concerning the arbitrability of a claim (including disputes about the interpretation, breach, applicability, enforceability, revocability or validity of this Agreement) shall be decided by the arbitrator.

Doc. 26 at Ex. 1. The section also contains a provision that provides: "This arbitration provision is optional. You may decline or opt out of this agreement to arbitrate by sending written and signed notice to legal@netgear.com within thirty (30) calendar days of purchasing Your NETGEAR Product." Id. On August 9, 2019—approximately 60 days after he purchased the product—the plaintiff sent an email to legal@netgear.com stating: "Please be advised that pursuant to section 3.6 [of] the 'NETGEAR Terms and Conditions,' I decline and opt out of the agreement to arbitrate disputes." Id. at Ex. 4.

**Analysis**

In ruling on a motion to dismiss, the Court must determine "whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." Harrington v. Brooks Drugs, 148 N.H. 101, 104 (2002). The Court must analyze the facts contained on the face of the complaint to determine whether a cause of action has been asserted. Williams v. O'Brien, 140 N.H. 595, 597 (1995). The Court may also consider documents attached to the plaintiff's pleadings, documents the authenticity of which are not disputed by the parties, official public records, or documents sufficiently

referred to in the complaint. Beane v. Dana S. Beane & Co., 160 N.H. 708, 711 (2010). "Although normally the court's decision on a motion to dismiss is based solely on the allegations in the pleadings, if additional evidence is submitted, without objection, the trial court should consider it when making its ruling." DiFruscia v. New Hampshire Dep't. of Pub. Works & Highways, 136 N.H. 202, 204 (1992). "If the facts do not constitute a basis for legal relief, [the Court will grant] the motion to dismiss." Graves v. Estabrook, 149 N.H. 202, 203 (2003). In rendering such a determination, the Court must "assume the truth of the facts alleged in the plaintiff's pleadings and construe all reasonable inferences in the light most favorable to him." Harrington, 148 N.H. at 104.

A. Choice of Law

As a threshold matter, the Court acknowledges that the Agreement contains a choice of law clause, which provides that California law applies to the terms of the Agreement and to the parties' relationship. Doc. 26 at Ex. 1, p. 39. The New Hampshire Supreme Court has held that "[w]here parties to a contract select the law of a particular jurisdiction to govern their affairs, that choice will be honored if the contract bears any significant relationship to that jurisdiction." Hobin v. Caldwell Banker Residential Affiliates, Inc., 144 N.H. 626, 628 (2000). The Supreme Court has also clarified that when a corporation is a party to a contract, the contract is significantly related to the state in which the corporation is incorporated. Id. Here, neither party has provided the Court with evidence that Netgear is a California corporation. However, Netgear appears to have significant connections to the state, given that Netgear's corporate office is listed at a California address in the Agreement. Doc. 26 at Ex. 1, p. 39. Therefore, the Court finds that the Agreement bears a significant relationship to

California. Accordingly, if the Court finds that the Agreement is a valid and enforceable contract, it will apply California law to the extent that the plaintiff raises substantive law issues.

Notwithstanding the choice of law provision, however, because, as noted below, there is no substantive difference between New Hampshire and California law, this Court can rely on New Hampshire cases on the issue of contract formation. See Crawford-Brunt v. Kruskall, No. CV 17-11432-FDS, 2019 WL 2453783, at *5 (D. Mass. June 12, 2019). Likewise, the plaintiff's argument that Netgear waived its right to arbitrate is a procedural matter governed by New Hampshire law. See Lessard v. Clarke, 143 N.H. 555, 558 (1999) ("[T]he forum court applies its own procedural laws even when the case before it is governed by another State's substantive law.").

B. Right to a Trial or Discovery

The plaintiff first argues that the Court cannot rule on the motion to dismiss, maintaining that issues of contract formation should be subject to discovery and a trial. The Court agrees that "[w]here there is a disputed question of fact as to the existence and terms of a contract it is to be determined by the trier of facts." Tsiatsos v. Tsiatsos, 140 N.H. 173, 177-78 (1995). Here, however, there are no disputed facts with respect to contract formation. The plaintiff does not dispute that he entered his information on Netgear's webpage or that he clicked the "register" button. The plaintiff's arguments against contract formation are legal arguments, not factual ones. See Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 28 (2d Cir. 2002) (Sotomayor, J.) (holding "the district court properly decided the question of reasonable notice and objective manifestation of assent as a matter of law on the record before it, and we decline

defendants' request to remand for a full trial on that question."). Both parties have provided the Court with ample information, such as screenshots of the webpage, affidavits, and the Agreement itself, upon which the Court can make a legal determination about contract formation.

C. Contract Formation

The plaintiff first argues that Netgear's Terms and Conditions are not applicable to him because a contract was never formed between the parties, and therefore, he is not bound by the arbitration clause in the Agreement. Netgear counters that because its registration page provides that by clicking the "register" button consumers agree to its terms, the plaintiff agreed to the Terms and Conditions when he pressed the "register" button.

"It is well settled that a court may not compel arbitration until it has resolved the question of the very existence of the contract embodying the arbitration clause. Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Specht, 306 F.3d at 26 (quotations and brackets omitted); see also Appeal of the City of Manchester, 144 N.H. 386, 388 (1999) ("Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.") (quotation omitted); City of Los Angeles v. Superior Court, 302 P.3d 194, 207 (Cal. 2013) (utilizing identical language). "A valid, enforceable contract requires offer, acceptance, consideration, and a meeting of the minds." Tessier v. Rockefeller, 162 N.H. 324, 339 (2011); Cal. Civ. Code § 1550. "A contract may be established by spoken or written words or by acts or conduct." Goodwin R., Inc. v. State, 128 N.H. 595, 604 (1986). The material terms of

offer and acceptance must be definite enough "that the promises and performances to be rendered by each party are reasonably certain." Phillips v. Verax Corp., 138 N.H. 240, 245 (1994); Desny v. Wilder, 299 P.2d 257, 268 (Cal. 1956) ("A true contract cannot exist . . . unless there is a manifestation of assent."). "A meeting of the minds is present when the parties assent to the same terms." Behrens v. S.P. Constr. Co., 153 N.H. 498, 501 (2006). However, a meeting of the minds is an objective standard. See Billings v. Wells Fargo Bank, N.A., No. C084369, 2019 WL 350418, at *14 (Cal. Ct. App. Jan. 29, 2019). "Arbitration agreements are no exception to the requirement of manifestation of assent." Specht, 306 F.3d at 30.

The plaintiff appears to argue that he did not read the Terms and Conditions, nor was he on notice that Netgear sought to bind him to them, and therefore, he did not assent to the terms of the agreement. Generally, "a party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing." Id.; see also Barnes v. N.H. Karting Ass'n, Inc., 128 N.H. 102, 108 (1986) (liability release); Karp v. Metropolitan Life Ins. Co., 86 N.H. 124, 125 (1933) (insurance contract). However, courts have created an exception to this general rule when "the writing does not appear to be a contract and the terms are not called to the attention of the recipient." Specht, 306 F.3d at 30. These basic contract principles apply to online contracts just as they would apply to a paper contract. Id. at 31; see also Long v. Provide Commerce, Inc., 200 Cal. Rptr. 3d 117, 127 (Cal. Dist. Ct. App. 2016) ("While failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract, the onus must be on website owners to put users on notice of the terms to which they

wish to bind consumers." (citing Nguyen v. Barnes & Noble, Inc., 763 F.3d 1171, 1175 (9th Cir. 2014)).

There are primarily two types of online contracts: "'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 '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; see also Small Justice LLC v. Xcentric Ventures LLC, 873 F.3d 313, 319 n.4 (1st Cir. 2017). "The defining feature of browsewrap agreements is that the user can continue to use the website or its services without visiting the page hosting the browsewrap agreement or even knowing that such a webpage exists." Nguyen, 763 F.3d at 1176. Additionally, courts have found that some agreements are hybrids between clickwrap and browsewrap agreements. For example, in Fteja v. Facebook, 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012), the Court found that the agreement at issue was a combination of both a clickwrap and a browsewrap agreement where a website presented users with a button and a text box stating that by clicking the button the user agreed to the site's Terms and Conditions.

Here, the plaintiff did not have to affirmatively check a box saying that he agreed to the Terms and Conditions, as with a clickwrap agreement, but the link to the Terms and Conditions was also not placed on the webpage such that a consumer might not notice it, as with a browsewrap agreement. Instead, the plaintiff had to click a "register" button located directly under a text box stating that by clicking the "register" button, he

agreed to the terms. Accordingly, Netgear's Terms and Conditions are a hybrid between a clickwrap agreement and a browsewrap agreement. See id. at 838.

The plaintiff maintains that with respect to its online terms and conditions, Netgear must show that the plaintiff was either on actual or inquiry notice of the Terms and Conditions. He cites to Lopez v. Terra's Kitchen, LLC, 331 F. Supp. 3d 1092, 1098 (S.D. Cal. 2018), to support this proposition. However, in Lopez, the Court found that the agreement at issue was a browsewrap agreement. The Court specifically declined to find that the agreement was hybrid because the defendant "point[ed] to no language on its webpages indicating that by clicking a button on its webpage, the consumer is indicating that he or she has read and agrees to the Terms & Conditions." Id. Here, the exact opposite is true. Accordingly, Lopez does not support the plaintiff's argument.

"[C]ourts have held that a hybrid between a clickwrap and browsewrap agreement is binding where the consumer is provided with an opportunity to review the terms of service in the form of a hyperlink immediately under an 'I Accept' button and then clicks that button." Lopez, 331 F. Supp. 3d at 1098. In Fteja, the Court found that notice was sufficient for a hybrid agreement and that the plaintiff had assented to the agreement when below a "Sign Up" button, the website included a text box that stated: "By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service," and the phrase "Terms of Service" was a hyperlink. 841 F. Supp. 2d at 841. Similarly, in Meyer v. Uber Techs., Inc., 868 F.3d 66, 79-80 (2d Cir. 2017), the Court found that when an Uber application included a text box underneath a "register" button that stated "by creating an Uber account, you agree to the Terms of Service & Privacy Policy," the plaintiff assented to the terms and was on notice of the agreement when he

clicked the button. That court reasoned: "A reasonable user would know that by clicking on the registration button, he was agreeing to the terms and conditions accessible via the hyperlink, whether he clicked on the hyperlink or not." Id.

The Court sees no reason to distinguish this case from cases such as Fjeta or Meyer. Right above the "register" button on Netgear's webpage is a text box stating: "I understand by pressing 'register' my information will be used as described here and in the Privacy Policy and I agree to the Terms." The phrase "Privacy Policy" and the word "Terms" are both in bold text. An average reasonable person would know that he was agreeing to the Terms and Conditions by clicking on the "register" button and that the bold word "Terms" was a hyperlink. The Court also notes that the plaintiff, "a law professor who teaches and writes about internet law, privacy law, cybersecurity, and other issues involving technology and the law," Doc. 9 ¶ 11, is in an even better position than an average person to understand the implications of clicking the "register" button on Netgear's webpage. See Fteja, 841 F. Supp. 2d at 836 (considering the sophistication of the end user in determining whether "there are reasons to believe that the allegedly assenting party is aware of the other party's terms" (quotation and brackets omitted)); see also id. at 839 ("But it is not too much to expect that an internet user whose social networking was so prolific that losing Facebook access allegedly caused him mental anguish would understand that the hyperlinked phrase 'Terms of Use' is really a sign that says 'Click Here for Terms of Use.' So understood, at least for those to whom the internet is in 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.").

Additionally, the application of California law would not change the Court's analysis. California courts have followed the same rationale articulated above when determining whether a hyperlink to terms and conditions on a webpage is too inconspicuous to put a user on notice. See Long, 200 Cal. Rptr. 3d at 126 ("We agree with the Nguyen court that, to establish the enforceability of a browsewrap agreement, a textual notice should be required to advise consumers that continued use of a Web site will constitute the consumer's agreement to be bound by the Web site's terms of use.") see also Arnaud v. Doctor's Assocs. Inc., No. 18CV3703NGGSJB, 2019 WL 4279268, at *5 (E.D.N.Y. Sept. 10, 2019) (noting that California and New York law apply "substantially similar rules" on the issue of whether a contract was formed in the context of online contracts such as those at issue here). Accordingly, for the foregoing reasons, the Court finds that by clicking the "register" button, the plaintiff assented to Netgear's Terms and Conditions.

D. Waiver

The plaintiff next argues that even if the Court finds that an agreement existed, Netgear waived its right to arbitrate. As the Court explained above, waiver is a procedural issue to which New Hampshire law applies. Under New Hampshire Civil Rule 9(d)(2), if a party fails to raise arbitration as an affirmative defense in an initial responsive pleading, that party ordinarily waives its right to raise the defense. Here, the plaintiff filed his small claims complaint in Circuit Court—District Division. On August 13, 2019, Netgear removed the case to this Court. On August 15, Netgear filed a

counterclaim in response to the plaintiff's original complaint. Netgear asserted several affirmative defenses in its motion to dismiss, but did not raise arbitration. See Doc. 6. On August 30, the plaintiff filed an amended complaint. Netgear subsequently moved to dismiss the amended complaint on the grounds that the plaintiff agreed to arbitrate any claims he wishes to bring against Netgear.

The Court acknowledges that Netgear failed to raise arbitration as an affirmative defense in its first responsive pleading. However, when Netgear filed its counterclaim it was responding to the complaint filed in small claims court, which was sparse compared with the amended complaint that plaintiff filed on August 30. The 24-page amended complaint provides a far more detailed explanation of the plaintiff's claims than the original complaint, which describes the plaintiff's claims in just five sentences. See Doc. 1. Moreover, because Netgear filed its motion to dismiss early on in the litigation, allowing Netgear to pursue its arbitration defense results in no prejudice to the plaintiff. Aside from the current motion practice, the parties have not engaged in significant litigation or conducted any substantive discovery practice. Under Rule 1(d), it is within the Court's discretion to waive the application of any rule "as good cause appears and as justice may require." The Supreme Court has explained that it values "justice over procedural technicalities." Kalil v. Town of Dummer Zoning Bd. of Adjustment, 159 N.H. 725, 729 (2010). To prevent Netgear from raising arbitration in its first responsive pleading to the amended complaint would require the Court to elevate form over substance. The Court declines to do so. Accordingly, the Court finds that Netgear has not waived its right to arbitrate.

E. Arbitrability and FAA Preemption

The Court next turns to the plaintiff's remaining arguments: (1) Netgear's chosen forum, JAMS, will not hear the subject matter of this case, see Doc. 27 at 7; (2) the arbitration clause is unconscionable, id. at 15; (3) the subject matter of the dispute does not fall within the scope of the arbitration clause, id. at 17; and (4) the plaintiff opted out of the arbitration clause, id. at 18. These arguments concern issues of arbitrability. The Court must therefore decide whether questions of arbitrability are to be decided by the Court or by an arbitrator in this case.

As a general rule, "the question of arbitrability is for judicial determination." Dream Theater, Inc. v. Dream Theater, 21 Cal. Rptr. 3d 322, 325 (Cal. Dist. Ct. App. 2004). However, an exception to that rule exists when "the parties clearly and unmistakably provide otherwise." Id. (delegating the issue of arbitrability to the arbitrator because the parties' agreement specified that an arbitrator would decide the scope of his or her own jurisdiction). On the other hand, California courts have held that even when an Agreement delegates issues of arbitrability to an arbitrator, such a delegation is not clear and unmistakable if the Agreement also contains a severability clause giving the court authority to find provisions of the contract unenforceable. Peleg v. Neiman Marcus Group, Inc., 140 Cal. Rptr. 3d 38, 51 (Cal. Dist. Ct. App. 2012) ("The inconsistency between the Agreement's delegation and severability provisions indicates the parties did not clearly and unmistakably delegate enforceability questions to the arbitrator."); Hartley v. Superior Court, 127 Cal. Rptr. 3d 174, 181 (Cal. Dist. Ct. App. 2011) (declining to delegate issues of arbitrability to the arbitrator because the

Agreement's severability clause created ambiguity about whether a court or arbitrator should decide such issues).

Here, the arbitration clause in the Agreement states: "All disputes concerning the arbitrability of a claim (including disputes about the interpretation, breach, applicability, enforceability, revocability or validity of this Agreement) shall be decided by the arbitrator." Doc. 26 at Ex. 1. The Agreement also contains a severability clause which provides: "If any provisions of these Terms and Conditions is found by a court of competent jurisdiction to be invalid, . . . the other provisions of these Terms and Conditions remain in full force and effect." Id. Accordingly, if the Court were to construe the Agreement under California law, it would likely conclude that the parties did not clearly and unmistakably delegate issues of arbitrability to the arbitrator, because the severability clause creates ambiguity.

However, Netgear argues that the Federal Arbitration Act ("FAA") preempts the application of California law because the arbitration clause in the parties' Agreement states that the arbitration agreement is governed by the FAA. Under the FAA, when parties to an agreement agree to delegate issues of arbitrability to an arbitrator, the parties' intentions will be honored and issues of arbitrability will be decided by the arbitrator, not the courts. Belnap v. Iasis Healthcare, 844 F.3d 1272, 1284 (10th Cir. 2017).

The California rule in essence provides that whenever parties include a severability clause delegating authority to the courts, they cannot also delegate issues of arbitrability to the arbitrator. Therefore, the rule conflicts with the FAA, which gives effect to language in contracts delegating issues of arbitrability to the arbitrator. The

question then becomes whether the FAA preempts application of the California rule. "The FAA . . . ordinarily preempts conflicting state laws that prohibit arbitration of particular types of claims." Citizens of Humanity, LLC v. Applied Underwriters, Inc., 226 Cal. Rptr. 3d 1, 5 (Cal. Dist. Ct. App. 2017). "State laws that apply to contracts generally can be applied to arbitration agreements, but courts may not invalidate arbitration agreements under state laws applicable only to arbitration agreements." Mount Diablo Med. Ctr. v. Health Net of Cal., 124 Cal. Rptr. 2d 607, 610 (Cal. Dist. Ct. App. 2002). In other words, "the FAA preempts a state law that withdraws the power to enforce arbitration agreements." Id.

In effect, the California rule invalidates the decision of parties to an agreement to delegate arbitrability issues to an arbitrator any time that the same agreement also contains a severability clause. Therefore, the rule practically applies only to arbitration agreements, because it operates only to prevent certain issues from going to arbitration. Moreover, while California courts have held that application of California law "is not pre-empted by the FAA in a case where the parties have agreed that their arbitration agreement will be governed by the law of California," id., such is not the case here. In this case, although the Agreement contains a choice of law provision choosing California law, the parties expressly agreed that the FAA would apply to their arbitration agreement. Accordingly, the Court finds that the FAA preempts application of California law.

Under the FAA, the Court finds that the express language in the Agreement stating that arbitrabilty will be decided by the arbitrator demonstrates that the parties clearly and unmistakably delegated such issues to the arbitrator. Therefore, the

remaining issues raised by the plaintiff shall be decided by the arbitrator. Both the FAA and New Hampshire law provide that when the Court orders arbitration, it shall stay the proceedings pending arbitration. 9 USCS § 12; RSA 452:2. Accordingly, the motion to dismiss is DENIED.

Based upon the foregoing, the Court STAYS the proceedings until arbitration has been carried out in accordance with the terms of the Agreement. The case will be administratively closed. The parties shall notify the Court if additional court action is required after completion of arbitration.

SO ORDERED.

March 9, 2020
Date

Judge N. William Delker

Clerk's Notice of Decision
Document Sent to Parties
on 03/09/2020