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5 IN THE UNITED STATES DISTRICT COURT

6 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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8 MICHELE ARENA, et al.,   Case No. 19-cv-02546-CRB

9   Plaintiffs,

10   v.   **ORDER DENYING MOTION TO COMPEL ARBITRATION**

11 INTUIT INC., et al.,

12   Defendants.

13   Andrew Dohrman, Joseph Brougher, and Monica Chandler (collectively, "Plaintiffs") have

14 brought a putative class action against Intuit Inc., alleging that Intuit fooled a class of consumers

15 into paying for its tax preparation services when they were entitled to use its free filing option.

16 Intuit thinks Plaintiffs are bound by the arbitration agreement in the Intuit Terms of Service for

17 TurboTax Online Tax Preparation Services – Tax Year 2018 ("the Terms"), which Plaintiffs

18 ostensibly agreed to every time they signed in to use Intuit's tax preparation software. Because

19 the Terms were too inconspicuous to give Plaintiffs constructive notice that they were agreeing to

20 be bound by the arbitration agreement when they signed in to TurboTax, the Court finds that

21 Plaintiffs did not agree to the arbitration provision. The Court therefore need not decide whether

22 questions of arbitrability or claims for equitable relief were delegated to the arbitrator. The

23 Motion to Compel Arbitration is denied, and so is Intuit's request for a stay pending its appeal to

24 the Ninth Circuit.

25 **I. BACKGROUND**

26   Intuit owns TurboTax, an online tax preparation service. Compl. (dkt. 1) ¶ 1. In 2002,

27 Intuit and other tax preparation services entered an agreement with the Internal Revenue Service to

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1   provide low-income taxpayers and active military members the option to file their taxes for free.

2   Id. ¶¶ 15–17, 20. But, Plaintiffs allege, Intuit violated that agreement by misleadingly channeling

3   such taxpayers to its paid services instead. Id. ¶ 2. According to the Complaint, Intuit lured

4   consumers in with promises of free filing, only to direct them to paid offerings while hiding the

5   actual free filing option. Id. ¶ 3–4.

6   From January to March 2019, consumers accessing TurboTax Online as returning users

7   would have seen this sign-in page:

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1   Sun Decl. (dkt. 97-2) ¶ 5. The parties do not dispute that each of the Plaintiffs would have seen

2   the sign-in page depicted above, or a substantially similar version.[1] Mot. (dkt. 97) at 2–3, 5–6;

3   Opp'n (dkt. 112) at 2; see also Davis Decl. (dkt. 97-1) ¶ 7.

4   The phrase "TurboTax Terms of Use" is a hyperlink to the Terms. Sun Decl. ¶ 6. A

5   consumer who clicked on the link and read the Terms would have eventually arrived at the

6   following arbitration provision:

> 14. DISPUTES. ANY DISPUTE OR CLAIM RELATING IN ANY WAY TO THE SERVICES OR THIS AGREEMENT WILL BE RESOLVED BY BINDING ARBITRATION, RATHER THAN IN COURT, except that you may assert claims in small claims court if your claims qualify. The Federal Arbitration Act governs the interpretation and enforcement of this provision; the arbitrator shall apply California law to all other matters. Notwithstanding anything to the contrary, any party to the arbitration may at any time seek injunctions or other forms of equitable relief from any court of competent jurisdiction. . . Arbitration will be conducted by the American Arbitration Association (AAA) before a single AAA arbitrator under the AAA's rules, which are available at wwww.adr.org or by calling 1-800-778-7879.

14   Sun Decl. Ex. 1 ("Terms") at 4.

15   Plaintiffs' suit "seek[s] equitable and injunctive relief on behalf of themselves and all

16   others who are similarly situated." Opp'n at 1. Intuit has moved to compel arbitration. See

17   generally Mot.

18   **II.   LEGAL STANDARD**

19   The Federal Arbitration Act provides that an agreement to submit commercial disputes to

20   arbitration shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or

21   in equity for the revocation of any contract." 9 U.S.C. § 2. "[P]rivate agreements to arbitrate are

22   enforced according to their terms." Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior

23   Univ., 489 U.S. 468, 479 (1989). A party may therefore petition a United States district court "for

24   an order directing that . . . arbitration proceed in the manner provided for in such agreement." 9

25   U.S.C. § 4. "[A] party cannot be required to submit to arbitration any dispute which he has not

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27   _____
[1] It appears Dohrmann accessed TurboTax through the "Account Recovery" page. Davis Decl.
¶ 7a. For purposes of this Order, that page's relevant features are identical to the standard sign-in

1   agreed so to submit." AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648

2   (1986).

3   **III.   DISCUSSION**

4   The dispositive question is whether there was a valid agreement to arbitrate. If Plaintiffs

5   did not assent to the Terms, they cannot be bound by the arbitration provision contained therein.

6   "In determining whether a valid arbitration agreement exists, federal courts apply ordinary state-

7   law principles that govern the formation of contracts." Nguyen v. Barnes & Noble Inc., 763 F.3d

8   1171, 1175 (9th Cir. 2014) (internal quotation marks and citations omitted). The parties agree that

9   California law governs here. Mot. at 7; Opp'n at 3. Under California contract law, a valid

10 agreement requires the parties' "mutual manifestation of assent" to be bound by the terms of the

11 contract. Nguyen, 763 F.3d at 1175 (internal alterations omitted). "[A]n offeree, knowing that an

12 offer has been made to him but not knowing all of its terms, may be held to have accepted, by his

13 conduct, whatever terms the offer contains." Windsor Mills, Inc. v. Collins & Aikman Corp., 101

14 Cal. Rptr. 347, 350 (Cal. Ct. App. 1972). However, an offeree cannot be bound by the terms of a

15 contract if he "does not know that a proposal has been made to him." Id. at 351. These basic

16 principles apply to contracting on the Internet. Nguyen, 763 F.3d at 1175.

17 Courts have categorized the various contracts of adhesion employed by online service

18 providers like Intuit. "'Clickwrap' (or 'click-through') agreements require website users to click

19 on an 'I agree' box after being presented with a list of terms and conditions of use." Colgate v.

20 JUUL Labs, Inc., 402 F. Supp. 3d 728, 763 (N.D. Cal. 2019). "'Browsewrap' agreements exist

21 where a website's terms and conditions of use are generally posted on the website via a hyperlink

22 at the bottom of the screen." Id. Intuit employs a more recent innovation somewhere between

23 these two classic forms of Internet contracting. "'Sign-in wrap' agreements are those in which a

24 user signs up to use an internet product or service, and the signup screen states that acceptance of a

25 separate agreement is required before the use can access the service." Id.

26 Sign-in wrap agreements are valid and enforceable when "the existence of the terms was

27 reasonably communicated to the user." Id. at 764. In other words, if Plaintiffs "were on inquiry

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