UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KELLY WHALEN, et al.,

Plaintiffs,

v.

FACEBOOK, INC.,

Defendant.

Case No. 20-cv-06361-JST

ORDER GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION AND ADMINISTRATIVELY CLOSING CASE

Re: ECF No. 45

Before the Court is Defendant Facebook, Inc.'s motion to compel arbitration. ECF No. 45. The Court will grant the motion.

I. BACKGROUND

Plaintiffs Kelly Whalen and S.M., a minor by and through her guardian, bring this putative class action against Facebook for alleged violations of the Illinois Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14/1 *et seq.*[1] They contend that Facebook used facial recognition technology to "illegally harvest[] the protected biometrics of users of its Instagram application." ECF No. 37 ¶ 6.

Facebook has now moved to compel arbitration of Plaintiffs' claims, the merits of which are not currently before the Court. The parties do not dispute that, since 2013, Instagram's terms of use have contained an arbitration clause that, if valid, would encompass Plaintiffs' claims. However, Plaintiffs contend that the parties never formed an agreement to arbitrate.

II. JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1332(d)(2).

[1] A third plaintiff, Victoria Edelstein, voluntarily dismissed her claims while the motion to compel

III. LEGAL STANDARD

The parties agree that the Federal Arbitration Act ("FAA") applies to the arbitration clause at issue in this case. Under the FAA, agreements to arbitrate "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. This provision reflects "both a liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quotation marks and citations omitted).

On a motion to compel arbitration, the court's role under the FAA is "limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). The court must "hear the parties," and if it is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4.

In making this determination, "district courts rely on the summary judgment standard of Rule 56 of the Federal Rules of Civil Procedure." *Hansen v. LMB Mortg. Servs., Inc.*, 1 F.4th 667, 670 (9th Cir. 2021). Thus:

> In considering a motion to compel arbitration which is opposed on the ground that no agreement to arbitrate was made, a district court should give to the opposing party the benefit of all reasonable doubts and inferences that may arise. Only when there is no genuine issue of material fact concerning the formation of an arbitration agreement should a court decide as a matter of law that the parties did or did not enter into such an agreement.

Concat LP v. Unilever, PLC, 350 F. Supp. 2d 796, 804 (N.D. Cal. 2004) (citations omitted) (cited with approval in *Hansen*, 1 F.4th at 670). If the court "concludes that there are genuine disputes of material fact as to whether the parties formed an arbitration agreement, the court must proceed without delay to a trial on arbitrability and hold any motion to compel arbitration in abeyance until the factual issues have been resolved." *Hansen*, 1 F.4th at 672.

IV. DISCUSSION

When deciding whether a valid arbitration agreement exists, federal courts "apply ordinary

state-law principles that govern the formation of contracts." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Although the parties dispute whether California or Illinois law applies, they agree that the two states' laws are consistent on the question of contract formation. The Court therefore need not make a choice-of-law determination. *See Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014) (declining to decide whether California or New York law applied because the laws of both states "dictate the same outcome").

As this Court has previously explained: "In California, a party petitioning the court to compel arbitration bears the burden of proving by a preponderance of evidence the existence of an arbitration agreement. An essential element of a contract is consent. Assent is evaluated by an objective standard." *Peter v. DoorDash, Inc.*, 445 F. Supp. 3d 580, 585 (N.D. Cal. 2020) (quotation marks, alteration marks, and citations omitted).

Facebook argues that Plaintiffs assented to arbitration multiple times: Whalen in 2013, S.M. in 2014 and 2017, and both Plaintiffs in 2018 and 2020. As discussed below, the Court concludes that Plaintiffs assented to Instagram's terms of use, including the arbitration clause, by continuing to use the app after being notified of revised terms of use via an in-app notification in November 2020. The Court does not address the other asserted instances of assent because Plaintiffs do not dispute that assent based on the 2020 in-app notification would be sufficient to compel arbitration.

Instagram users received the 2020 in-app notice "at the top of their 'Activity' feed" beginning on November 19, 2020. ECF No. 45-1 at 4 (¶ 15).

> Users could respond to the Activity feed notice in one of three ways. Users could press the button at the bottom of the notice that read, "Learn More," which, if pressed, directed the user to a copy of the 2020 Terms of Use. Users could also dismiss the notice by pressing the "X" located at the top-right corner of the notice. Alternatively, users could decline to interact with the Activity feed notice, in which case the notice would appear at the top of the user's Activity feed three times before it was taken down.

Id. at 5 (¶ 16). A screenshot of the notice appears below:

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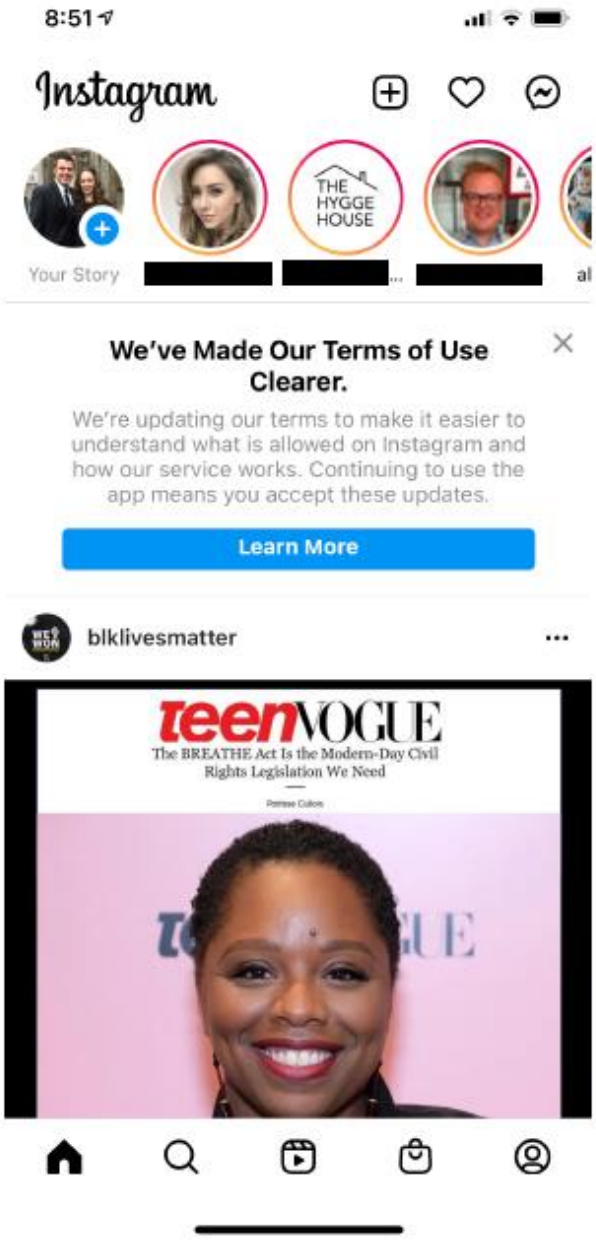
/ / /



Id. at 55.

Facebook has introduced evidence, in the form of a [redacted]. ECF No. 86-22 at 2; *see also* ECF No. 89-4 at 42 ("The document provides information about actions taken as part of the terms of use update notification that was sent via the activity feed, I believe, and it shows the Instagram ID number and the time stamp. . . . In column D, the longer number would be the SM plaintiff. The shorter number would be Ms. Whalen."). Plaintiffs object to this

Court overrules these objections. First, Michael Duffey, Facebook's eDiscovery and litigation case manager, has sufficient personal knowledge. He declared under penalty of perjury that he has personal knowledge of the Instagram terms of use and "of the records pertaining to Instagram users' accounts and account activity that are maintained in the ordinary course of business." ECF No. 45-1 at 2 (¶ 1); *see also* ECF No. 87-14 ¶ 3 ("I am also generally familiar with Facebook's record-keeping systems and the business records created and maintained by Facebook in the ordinary course of business, including . . . records pertaining to Instagram user's accounts and account activity. . . ."). He also testified at his deposition about [redacted]. *E.g.*, ECF No. 89-4 at 34-37, 41-43.

Second, a business record is an exception to the rule against hearsay if:

> (A) the record was made at or near the time by – or from information transmitted by – someone with knowledge;
>
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
>
> (C) making the record was a regular practice of that activity;
>
> (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
>
> (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Fed. R. Evid. 803(6). Duffey's testimony establishes the first three requirements. Although Duffey did not himself generate the structured data tables and relied on others to extract the data presented in the spreadsheet, "[t]he foundation requirement for Rule 803(6) may be satisfied by the testimony of anyone who is familiar with the manner in which the document was prepared, even if he lacks firsthand knowledge of the matter reported, and even if he did not himself either prepare the record or even observe its preparation." *Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 514 (9th Cir. 1989) (quotation marks and citation omitted). In addition, that the spreadsheet was

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