

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

AARICKA SWANSON,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 19-00788-CV-W-GAF
)	
H&R BLOCK, INC., et al,)	
)	
Defendants.)	

ORDER

Now before the Court is Defendants H & R Block, Inc., H & R Block Tax Group, Inc., and HRB Digital, LLC’s (collectively “H & R Block” or “Defendants”) Motion to Compel Arbitration and to Stay Litigation.¹ (Doc. # 17). Plaintiff Aaricka Swanson (“Plaintiff”) opposes. (Docs. ## 31). For the following reasons Defendants’ Motion is GRANTED.

DISCUSSION

I. BACKGROUND

The present lawsuit arises from an alleged scheme perpetrated by H & R Block to deceive low-income tax-payers who are eligible to receive free tax preparation and filing services under the United States Internal Revenue Service’s (“IRS”) Free File Program by diverting those tax-payers to paid tax-filing products. (Doc. # 1 (“Complaint”), ¶ 1)). Plaintiff asserts H & R Block carried out its scheme by creating two programs, the “Free File” program and “Free Online” program with “similar and misleading names” to guarantee payment. (*Id.* ¶ 39). According to

¹ Defendant Free File Inc. (“Free File”), joined H & R Block’s Motion to Compel Arbitration and Stay Litigation on December 2, 2019. (Doc. # 19). However, on June 19, 2020, the Court dismissed FFI as a party for lack of subject matter jurisdiction. (Doc. # 39). Accordingly, Free File’s Motion to Compel Arbitration and Stay Litigation (Doc # 19) is DENIED as moot.

Plaintiff, the “Free File” program is H & R Block’s free product but is not conspicuously displayed or linked on H & R Block’s main website and can only be accessed through a different web page. (*Id.* ¶¶ 40, 45). By contrast, Plaintiff claims the “Free Online” program is available on H & R Block’s main website and advertises a \$0 filing fee to entice users to create an account and input tax information. (*Id.* ¶¶ 45, 52, 53). Once the information is entered, Plaintiff alleges the user is frequently required to upgrade to a premium product before the tax return can be submitted without being informed that he or she may qualify for the “Free File” option. (*Id.* ¶¶ 51, 53). Plaintiff further alleges H & R Block hid the Free File option from consumers during the 2018 tax year by adding a line of code that prevented the option from populating in online search results. (*Id.* ¶ 46).

II. FACTS

On March 2, 2019, Plaintiff, a California resident, used H & R Block’s online tax preparation and filing services to file her 2018 state and federal tax returns. (*Id.* ¶ 13; (Doc. # 18-1 (Declaration of Renee Gibson “Gibson Decl.”), ¶¶ 3, 5)²). After navigating to H & R Block’s website, Plaintiff was presented with an acknowledgment screen that stated, “We’ve updated our terms and policies.” (Gibson Decl., ¶ 5; Doc. # 18-2). The acknowledgment screen contained a toggle button, a circle that moves between two positions from left to right, that Plaintiff had to click to agree to the terms of the H & R Block Online Services Agreement (“Online Services Agreement”). (Gibson Decl., ¶ 6; Doc. # 18-2). The toggle button was located immediately to the left of an acknowledgement that stated, “I agree to H & R Block’s Online Services Agreement, which includes the requirement that any dispute be resolved through binding arbitration.” (*Id.*). The acknowledgment screen also contained a hyperlink to the Online Services Agreement’s full

² Plaintiff does not dispute any of the facts offered in the Gibson Declaration. (Doc. # 31). Accordingly, the Court accepts these facts as true.

text, including its arbitration agreement. (Gibson Decl., ¶¶ 6, 11; Doc. # 18-4). The Arbitration Agreement, which is governed by the Federal Arbitration Act (“FAA”), states in relevant part:

11.1 Scope of Arbitration Agreement. All disputes and claims between you and any one or more of the H&R Block Parties . . . will be resolved through binding individual arbitration unless you opt out of this Arbitration Agreement using the process explained below. However, either you or the H&R Block Parties may bring an individual claim in small claims court, as long as it is brought and maintained as an individual claim. All issues are for the arbitrator to decide, except that issues relating to the validity, enforceability, and scope of this Arbitration Agreement, including the interpretation of paragraph 11.3 below, must be determined by the court and not the arbitrator.

* * * *

11.3 Waiver of right to bring class action and representative claims. All arbitrations will proceed on an individual basis. The arbitrator is empowered to resolve the dispute with the same remedies available in court, including compensatory, statutory, and punitive damages; attorneys' fees; and declaratory, injunctive, and equitable relief. However, any relief must be individualized to you and will not affect any other client. The arbitrator is also empowered to resolve the dispute with the same defenses available in court, including but not limited to statutes of limitation. **You and the H&R Block Parties also agree that each may bring claims against the other in arbitration only in your or their respective individual capacities and in so doing you and the H&R Block Parties hereby waive the right to a trial by jury, to assert or participate in a class action lawsuit or class action arbitration, to assert or participate in a private attorney general lawsuit or private attorney general arbitration, and to assert or participate in any joint or consolidated lawsuit or joint or consolidated arbitration of any kind.** If a court decides that applicable law precludes enforcement of any of this paragraph's limitations as to a particular claim for relief, then that claim for relief (and only that claim for relief) must remain in court and be severed from any arbitration. The H&R Block Parties do not consent to and the arbitrator will not have authority to conduct, any class action arbitration, private attorney general arbitration, or arbitration involving joint or consolidated claims, under any circumstance.

* * * *

11.5 Other terms & information. This Arbitration Agreement will be governed by, and interpreted, construed, and enforced in accordance with, the Federal Arbitration Act and other applicable federal law. Except as set forth above, if any portion of this Arbitration Agreement is deemed invalid or unenforceable, it will not invalidate the remaining portions of the Arbitration Agreement. Notwithstanding any provision in this Agreement to the contrary, we will not make any material change to this Arbitration Agreement without providing you with an opportunity to reject that change by following the directions in the notice of

changes. Rejection of any future change will not impact this or any prior Arbitration Agreement you have made.

(Doc. # 18-4) (emphasis in original).

In order to proceed past the acknowledgment screen, Plaintiff had to move the toggle button and click the “NEXT” button that appeared at the bottom of the screen. (Gibson Decl., ¶¶ 6-7). Failure to perform either action would result in an “error” message. (*Id.* ¶ 7). H & R Block’s records indicate Plaintiff agreed to the terms of the Online Services Agreement on March 2, 2019 at 6:03:08 PM Central Standard Time. (*Id.* ¶ 10). Despite qualifying for the Free File option, Plaintiff alleges she was charged \$64.94 to file her taxes after inputting information on H & R Block’s website. (Complaint, ¶ 13).

On August 26, 2019, Plaintiff instituted the current lawsuit in this Court on behalf of herself, a proposed Nationwide Class,³ and a California Subclass.⁴ (*Id.*). Plaintiff’s Complaint alleges violations of the California Consumer Legal Remedies Act (“CLRA”) (Count I), violations of the California Unfair Competition Law (“UCL”) (Count II), violations of the California False Advertising Law (“FAL”) (Count III), Breach of Contract (Count IV), and Fraud (Count V). (*Id.*). Pursuant to her CLRA, UCL, and FAL claims, Plaintiff seeks public injunctive relief requiring H & R Block to prominently display differences between the Free File software and its competing “Free Online” service on its website, provide a link to the Free File software, and institute changes to correctly identify eligible Free File participants and direct them to the Free File option. (Complaint, ¶¶ 57-125). Defendants move to compel arbitration on an individual basis and stay litigation during the arbitration process. (Doc. # 18).

³ Defined as “All Free File Program-eligible persons in the United States who paid to use an H&R Block product to file an online tax return for the 2002 through 2018 tax filing years.” (Complaint, ¶ 61).

⁴ Defined as “All Free File Program-eligible persons in the State of California who paid to use an H&R Block product to file an online tax return for the 2002 through 2018 tax filing years.” (Complaint, ¶ 61).

III. LEGAL STANDARD

“The Federal Arbitration Act (FAA), 9 U.S.C. § 4, provides that a party aggrieved by the failure of another party to arbitrate under a written agreement may petition the district court for an order compelling arbitration.” *Koch v. Compucredit Corp.*, 543 F.3d 460, 463 (8th Cir. 2008). “Under § 3 [of the FAA], a party may apply to a federal court for a stay of the trial of an action ‘upon any issue referable to arbitration under an agreement in writing for such arbitration.’” *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010) (citation omitted). The goal of the FAA is “to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.” *Koch*, 543 F.3d at 460 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983)). To carry out this purpose, Congress limited the role of courts to “issues relating to the making and performance of the agreement to arbitrate.” *Id.* (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967)). A district court must compel arbitration “upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue.” *Rent-A-Ctr.*, 561 U.S. at 68 (citation omitted).

IV. ANALYSIS

A. Does the Court have Jurisdiction over Plaintiff’s Fraudulent Inducement Claim?

Defendants argue the Arbitration Agreement is enforceable under the FAA and move to compel all claims to individual arbitration pursuant to a provision that states, “[a]ll disputes and claims between you and any one or more of the H & R Block parties . . . will be resolved through binding individual arbitration.” (Doc. # 18, p. 6-8; Doc. # 18-4, ¶ 11.1). Section 2 of the FAA provides an arbitration agreement “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. The FAA

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