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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GERALD MCGHEE, An Individual, On
Behalf of Himself and All Others
Similarly Situated,

Plaintiff,

v.

NORTH AMERICAN BANCARD, LLC,

Defendant.

Case No.: 17-CV-0586-AJB-KSC

ORDER:

**(1) DENYING DEFENDANT’S
MOTION TO COMPEL
ARBITRATION, (Doc. No. 13); AND

(2) GRANTING DEFENDANT’S
REQUEST TO STRIKE
DECLARATION FILED
CONCURRENTLY WITH MOTION
TO COMPEL, (Doc. No. 18)**

Presently before the Court is Defendant North American Bancard, LLC’s (“NAB”) motion to compel arbitration. (Doc. No. 13.) Plaintiff Gerald McGhee (“McGhee”) opposes the motion. (Doc. No. 23.) Having reviewed the parties’ arguments in light of controlling authority, and pursuant to Local Civil Rule 7.1.d.1, the Court finds the matter suitable for disposition without oral argument. For the reasons set forth below, the Court **DENIES** NAB’s motion.

BACKGROUND

The facts underlying this dispute are simple and largely undisputed. NAB is the

1 provider of mobile credit card processing services called “PayAnywhere.” McGhee, a
2 merchant, acquired a card reader from NAB, but never used it. After more than one year,
3 NAB began deducting a monthly non-use fee from McGhee’s bank account. Despite
4 contacting NAB to stop the charges and demand a refund, NAB continued to charge
5 McGhee for several months and has refused to issue him a refund.

6 McGhee instituted this lawsuit on March 24, 2017, by filling the class action
7 complaint. (Doc. No. 1.) McGhee brings this nationwide putative class action on behalf of
8 “[a]ll persons in the United States charged a Fee as a result of obtaining [NAB]’s Card
9 Reader beginning at the start of the applicable statute of limitations period and ending on
10 the date as determined by the Court” (Doc. No. 1 ¶ 20.) On May 15, 2017, NAB filed
11 the instant motion to compel arbitration, asserting that McGhee agreed to arbitrate his
12 claims when he signed up for NAB’s services. (Doc. No. 13.) McGhee filed an opposition,
13 (Doc. No. 23), and NAB replied, (Doc. No. 25). This order follows.¹

14 **LEGAL STANDARD**

15 The Federal Arbitration Act governs the enforcement of arbitration agreements
16 involving interstate commerce. 9 U.S.C. § 2. Pursuant to § 2 of the FAA, an arbitration
17 agreement is “valid, irrevocable, and enforceable, save upon such grounds as exist at law
18 or in equity for the revocation of any contract.” *Id.* The FAA permits “[a] party aggrieved
19 by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement
20 for arbitration [to] petition any United States district court . . . for an order directing that
21 such arbitration proceed in the manner provided for in [the] agreement.” *Id.* § 4.

22 Given the liberal federal policy favoring arbitration, the FAA “mandates that district
23 courts *shall* direct parties to proceed to arbitration on issues as to which an arbitration
24 agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985)

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27 ¹ On May 23, 2017, NAB withdrew the declaration submitted concurrent with its motion
28 to compel arbitration. (Doc. No. 18.) The Court **GRANTS** NAB’s request to strike that
declaration from the record.

1 (emphasis in original). Thus, in a motion to compel arbitration, the district court’s role is
 2 limited to determining “(1) whether a valid agreement to arbitrate exists and, if it does, (2)
 3 whether the agreement encompasses the dispute at issue.” *Kilgore v. KeyBank Nat’l Ass’n*,
 4 673 F.3d 947, 955–56 (9th Cir. 2012) (citing *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*,
 5 207 F.3d 1126, 1130 (9th Cir. 2000)). If these factors are met, the court must enforce the
 6 arbitration agreement in accordance with its precise terms. *Id.*

7 While generally applicable defenses to contract, such as fraud, duress, or
 8 unconscionability, may invalidate arbitration agreements, the FAA preempts state law
 9 defenses that apply only to arbitration or that derive their meaning from the fact that an
 10 agreement to arbitrate is at issue. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339
 11 (2011). There is generally a strong policy favoring arbitration, which requires any doubts
 12 to be resolved in favor of the party moving to compel arbitration. *Moses H. Cone Mem.*
 13 *Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). However, where a party
 14 challenges the existence of an arbitration agreement, “the presumption in favor of
 15 arbitrability does not apply.” *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 742
 16 (9th Cir. 2014).

17 DISCUSSION

18 NAB asserts that when McGhee signed up for NAB’s credit card processing
 19 services, McGhee was required to accept the “Terms and Conditions” by clicking on a
 20 button next to the words “I have read and agree to the Terms and Conditions.” (Doc. No.
 21 13 at 9.) Because he agreed to the Terms and Conditions by checking the box, NAB argues
 22 he also agreed to the User Agreement, a hyperlink to which was contained on the Terms
 23 and Conditions page. (*Id.* at 9–10.) In turn, the User Agreement contains the arbitration
 24 clause that NAB now invokes. (*Id.* at 10–11; Doc. No. 19 at 2–3 ¶¶ 4, 6–8.) That arbitration
 25 clause states, in pertinent part, the following:

26 22. Disputes: PA [PayAnywhere] and you each agree that any dispute
 27 or claim arising out of or relating to this Agreement or the Services (each, a
 28 ‘Dispute’), shall be settled by following the procedures: . . .

1 c. IN THE ABSENCE OF RESOLVING THE DISPUTE, AND
2 INSTEAD OF SUING IN COURT, PA AND YOU AGREE TO
3 SETTLE AND RESOLVE FULLY AND FINALLY ALL
4 DISPUTES EXCLUSIVELY BY ARBITRATION THE
5 AGREEMENT TO HAVE DISPUTES RESOLVED BY
6 ARBITRATION IS MADE WITH THE UNDERSTANDING
7 THAT EACH PARTY IS IRREVOCABLY, KNOWINGLY AND
8 INTELLIGENTLY WAIVING AND RELEASING ITS RIGHT
9 TO LITIGATE DISPUTES THROUGH A COURT AND TO
10 HAVE A JUDGE OR JURY DECIDE DISPUTES.

11 (Doc. No. 19 at 36.) Based on this arbitration clause, NAB argues that because McGhee
12 clicked the box stating he accepted the Terms and Conditions, he agreed to binding
13 arbitration. (Doc. No. 13 at 12.) Thus, NAB asserts the Court must compel the parties to
14 arbitrate McGhee’s claims. (*Id.* at 15.) In opposition, McGhee makes two arguments: (1)
15 the User Agreement was a “browsewrap” agreement that cannot be enforced; and (2) even
16 if the User Agreement is enforceable, the claims brought in this case fall outside the
17 arbitration clause’s purview. (Doc. No. 23.) Because the Court finds McGhee did not assent
18 to the User Agreement, the Court does not reach McGhee’s argument that his claims do
19 not fall within the arbitration clause’s scope.

20 If the facts of this case were as simple as NAB suggests, it would present a clear-cut
21 case of assent to a modified clickwrap agreement. The Ninth Circuit recently explained the
22 spectrum of ways website operators attempt to establish mutual manifestation of assent.²
23 At one end of this spectrum are “‘clickwrap’ (or ‘click-through’) agreements, in which
24 website users are required to click on an ‘I agree’ box after being presented with a list of
25 terms and conditions of use[.]” *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175–76

26 ² The User Agreement identifies Michigan law as controlling, while the Terms and
27 Conditions identify Georgia. (Doc. No. 19 at 24, 36.) Under either state’s laws,
28 manifestation of assent is a necessary element of contract formation. *See Rood v. Gen.*
Dynamics Corp., 507 N.W.2d 591, 598 (Mich. 1993) (“A basic requirement of contract
formation is that the parties mutually assent to be bound.”); *Thomas v. Chance*, 754 S.E.2d
669, 671 (Ga. Ct. App. 2014) (listing “assent of the parties to the terms of the contract” as
one element of a valid contract).

1 (9th Cir. 2014). At the other end of the spectrum are “‘browsewrap’ agreements, where a
2 website’s terms and conditions of use are generally posted on the website via a hyperlink
3 at the bottom of the screen. . . . Unlike a clickwrap agreement, a browsewrap agreement
4 does not require the user to manifest assent to the terms and conditions expressly . . . [a]
5 party instead gives his assent simply by using the website.” *Id.* at 1176 (citation and internal
6 quotation marks omitted).

7 Between a pure clickwrap and a pure browsewrap is a hybrid, sometimes referred to
8 as a “modified clickwrap.” *E.g., Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904,
9 910–12 (N.D. Cal. 2011). A modified clickwrap agreement is similar to a browsewrap in
10 that the user is not required to scroll through a list of terms and conditions before reaching
11 the “I Agree” button, but the user is otherwise “required to affirmatively acknowledge the
12 agreement before proceeding with use of the website.” *Nguyen*, 763 F.3d at 1176. When
13 faced with these modified clickwrap presentations, “[c]ourts have [] been more willing to
14 find the requisite notice for constructive assent” *Id.*

15 As the Court stated above, if the facts were as straightforward as NAB presents, then
16 the User Agreement and its arbitration clause would be a prototypical modified clickwrap
17 agreement, and the Court would be required to find that McGhee had assented to
18 arbitration. But it is not so simple. The arbitration agreement that NAB invokes is not found
19 simply by clicking on the “Terms and Conditions” hyperlink located on the application
20 page. Rather, McGhee would have been required to click on the “Terms and Conditions”
21 hyperlink and click again on the “View User agreement here” link in order to reach the
22 “Pay Anywhere User Agreement” containing the arbitration clause that NAB asserts
23 controls. (Doc. No. 19 at 2–3 ¶¶ 4, 6–8.)

24 Even this two-step process could conceivably fall within the parameters of a
25 modified clickwrap agreement. After all, the “View User agreement here” hyperlink is
26 located near the top of the Terms and Conditions page, (*id.* at 13), so this is not a situation
27 where the second hyperlink is embedded at the bottom of a lengthy webpage, *see, e.g.,*
28 *Nguyen*, 763 F.3d at 1177 (“Where the link to a website’s terms of use is buried at the

1 bottom of the page or tucked away in obscure corners of the website where users are
2 unlikely to see it, courts have refused to enforce the browsewrap agreement.”). But what
3 throws a wedge in NAB’s analysis is the fact that the Terms and Conditions page itself—
4 the page that contains the second hyperlink to the User Agreement—also contains
5 “PayAnywhere TERMS AND CONDITIONS OF MERCHANT SERVICE
6 AGREEMENT.” Those Terms and Conditions do not require the website’s user to click a
7 link; rather, they are listed on the Terms and Conditions page itself. And significantly,
8 *those* Terms and Conditions contain the following forum selection clause:

9 Global, Member, and Merchant agree that all actions arising out, relating to,
10 or in connection with (a) this Agreement, (b) the relationships which result
11 from this Agreement, or (c) the validity, scope, interpretation or enforceability
12 of the choice of law and venue provision of this Agreement shall be brought
13 in either the courts of the State of Georgia sitting in Fulton County or the
14 United States District Court for the Northern District of Georgia, and
15 expressly agree to the exclusive jurisdiction of such courts. Merchant hereby
16 agrees that claims applicable to American Express may be resolved through
arbitration as further described in the American Express Merchant
Requirements Guide (the “American Express Guide”) attached as an appendix
to the Card Acceptance Guide.

17 (Doc. No. 19 at 24.) The webpage also contains a merger clause, which provides that “[t]he
18 [Merchant Service] Agreement, including these Terms and Conditions and the Merchant
19 Application, constitutes the entire Agreement between Merchant, Global Direct, and
20 Member and supersedes all prior memoranda or agreements relating thereto, whether oral
21 or in writing.” (*Id.*)

22 NAB protests, however, contending that these Terms and Conditions have no
23 bearing on the instant dispute because McGhee did not fill out a Merchant Service
24 Application. (Doc. No. 25 at 7–8 & n.1.) If that is the case, then why would the Terms and
25 Conditions hyperlink located on the application McGhee filled out link to these
26 “PayAnywhere TERMS AND CONDITIONS OF MERCHANT SERVICE
27 AGREEMENT”? And if they are not the controlling Terms and Conditions, why is every
28 page of these terms captioned “PayAnywhere – Terms and Conditions” at the top of the

1 page? (*See* Doc. No. 19 at 13–29.) It stretches credulity to assert that the actual page that
2 is linked to the application McGhee filled out does not govern that application, but rather
3 another page linked to the page that is linked to the application does.³

4 If NAB intended to have the “Pay Anywhere User Agreement” control McGhee’s
5 claims, perhaps NAB should have linked the application to that agreement. Instead, NAB
6 linked the application to the “PayAnywhere TERMS AND CONDITIONS OF
7 MERCHANT SERVICE AGREEMENT.” Following the case law that NAB itself cites,
8 the Court finds it is to this agreement to which McGhee assented. *See Crawford v.*
9 *Beachbody, LLC*, No. 14cv1583–GPC(KSC), 2014 WL 6606563, at *3 (S.D. Cal. Nov. 5,
10 2014) (concluding the parties agreed to terms and conditions where the page with the full
11 terms was directly hyperlinked to the order form page); *Swift*, 805 F. Supp. 2d at 910–12
12 (same); *see also Van Tassell v. United Mktg. Grp., LLC*, 795 F. Supp. 2d 770, 792–93
13 (N.D. Ill. 2011) (finding there was no valid agreement to arbitrate in part because of the
14 “multi-step process” required to find the arbitration agreement).

15 For these reasons, the Court finds that McGhee’s act of checking the box indicating
16 he read and agreed to the Terms and Conditions indicated his assent to the Terms and
17 Conditions located on the page that that hyperlink takes him to, specifically, the
18 “PayAnywhere TERMS AND CONDITIONS OF MERCHANT SERVICE
19 AGREEMENT.” To the extent NAB seeks to hold McGhee to the Pay Anywhere User
20 Agreement and the arbitration clause contained therein, the Court finds there was no assent
21 to that agreement’s provisions; thus, there is no valid agreement to compel arbitration of
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24 ³ NAB argues that McGhee’s assent to the Terms and Conditions applies to both the Terms
25 and Conditions of Merchant Service Agreement and the Pay Anywhere User Agreement.
26 (Doc. No. 25 at 7.) However, NAB cites no authority for this position. Furthermore,
27 accepting this assertion poses more problems than solutions: Does the forum selection
28 clause in the Terms and Conditions of MSA control, or the arbitration agreement? Which
state’s laws control, Georgia (as identified in the Terms and Conditions) or Michigan (as
identified in the User Agreement)? In light of the dearth of authority supporting NAB’s
position, the Court declines to wade into these murky questions.


1 these claims.⁴

2 **CONCLUSION**

3 Based on the foregoing, the Court **DENIES** North American Bancard, LLC's motion
4 to compel arbitration. (Doc. No. 13.)

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6 **IT IS SO ORDERED.**

7 Dated: July 21, 2017

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9 Hon. Anthony J. Battaglia
United States District Judge

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26 _____
27 ⁴ While McGhee may have won the day, the Court notes that the Terms and Conditions
28 McGhee himself points to as controlling include a forum selection clause and class action
waiver. (Doc. No. 19 at 24.) Those provisions, however, are not before the Court at this
time, and the Court expresses no opinion on their effect on this case.