

23andMe Can't Arbitrate False Ad Suits, 9th Circ. Told

By **Daniel Siegal**

Law360, Los Angeles (May 12, 2016, 8:30 PM ET) -- Customers of DNA testing company 23andMe urged the Ninth Circuit on Thursday to undo an order forcing them to arbitrate putative class actions alleging the company falsely advertised its tests' capabilities, arguing the arbitration agreement in the company's terms of service cannot be enforced.

During oral arguments in San Francisco, Jeremy Robinson of Casey Gerry Schenk Francavilla Blatt & Penfield LLP, representing the plaintiffs of the nine consolidated class actions, urged a three-judge panel to reverse U.S. District Judge Lucy Koh's ruling sending the cases to arbitration. Robinson argued that while Judge Koh was right in finding that 23andMe Inc.'s stashing of its arbitration agreement deep in its terms of service was procedurally unconscionable, the judge erred in finding the agreement was not substantively unconscionable.

Under California law, both conditions have to be met for an arbitration agreement to be considered invalid.

Robinson argued that because the arbitration agreement requires attorneys' fees to be paid by the losing party, it is in fact substantively unconscionable because it puts the consumer, "the party with no bargaining power," in a position where the risk of bringing the claim is unbearable.

"It puts the consumer in such a level of risk that no one is ever going to go to court; it essentially immunizes the defendant from suit," he said, "Because a consumer who manages to find this clause is going to say, 'I'm not going to take that risk.'"

On Dec. 6, 2013, the U.S. Food and Drug Administration demanded that 23andMe — which is run by Anne Wojcicki, the wife of Google Inc. co-founder Sergey Brin — suspend its health-related genetic tests until the agency could complete its regulatory review. The FDA said 23andMe failed to obtain the necessary authorization to promote its kit, which it claimed can produce dangerous false positives and negatives.

Three days later, named plaintiff David Tompkins filed his suit, alleging he had been misled into buying the \$99 kit and testing service by the company's false representations about the accuracy of its tests and misrepresentations about what information they could provide. Eight other similar putative class actions were consolidated with Tompkins' suit.

In June 2014, Judge Koh sent the suits to arbitration, noting in her order that when consumers create an

account on the 23andMe website in order to send in their DNA sample, they are required to check a box on the website acknowledging that they agree to the terms of service.

Although Judge Koh said 23andMe's practice of hiding its terms of service until after purchase is unfair, she said 23andMe has submitted evidence that each named plaintiff created and registered an account, and therefore agreed to the terms of service.

On Thursday, Robert Varian of Orrick Herrington & Sutcliffe LLP, representing 23andMe, urged the appeals court to affirm that ruling, saying even if the agreement were both procedurally and substantively unconscionable, it would still be enforceable because the Federal Arbitration Act preempts the plaintiffs' defense.

Varian argued that in the wake of the U.S. Supreme Court's arbitration-empowering 2011 ruling in *AT&T Mobility v. Concepcion*, "the landscape has changed," and an unconscionability defense under California law falls before the FAA's favoring of arbitration.

"It used to be if you had an unconscionability defense that was generally applicable and that was enough," he said. "What all the cases say now, and it's compelled, is no, that's not the analysis. If it has a disproportionate impact on arbitration clauses, then it's preempted."

The panel took the matter under submission.

Circuit Judges Stephen S. Trott, Sandra Segal Ikuta and Paul J. Watford sat on the panel that heard Thursday's arguments.

The plaintiffs are represented by Gayle M. Blatt, Jeremy Robinson and Jason C. Evans of Casey Gerry Schenk Francavilla Blatt & Penfield LLP and Mark Ankcorn of Ankcorn Law Firm PC.

23andMe is represented by Alexander K. Talarides, James N. Kramer, Michael Todd Scott and Robert P. Varian of Orrick Herrington & Sutcliffe LLP.

The case is *David Tompkins et al. v. 23andMe Inc.*, case number 14-16405, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Philip Shea.

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