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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ELAINE DOUGAN,

Plaintiff,

v.

THE CHILDREN'S PLACE, INC.,

Defendant.

CASE NO. C20-0818JLR

ORDER GRANTING MOTION
TO COMPEL ARBITRATION
AND STAY PROCEEDINGS

I. INTRODUCTION

Before the court is Defendant The Children’s Place, Inc.’s (“TCP”) motion to compel arbitration and stay proceedings. (Mot. (Dkt. # 11).) Plaintiff Elaine Dougan opposes TCP’s motion. (Resp. (Dkt. # 14).) TCP filed a reply. (Reply (Dkt. # 19).) Having considered the motion, the parties’ submissions regarding the motion, the

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1 relevant portions of the record, and the applicable law,¹ the court grants TCP's motion to
2 compel arbitration.

3 **II. BACKGROUND**

4 **A. Factual Background**

5 This case is a proposed class action arising from Ms. Dougan's allegations that
6 TCP sent emails with subject lines advertising false or misleading discounts to Ms.
7 Dougan and others in Washington. (*See generally* Compl. (Dkt. #1).) TCP is a specialty
8 retailer that sells apparel, accessories, footwear, and other items for infants and children
9 online and in retail stores nationwide, including in Washington. (Alzate Decl. (Dkt. # 12)
10 ¶ 2.) Ms. Dougan alleges that TCP "creates purported list prices for its products which
11 are inflated far above the products' regular and true selling prices." (Compl. ¶ 13.) As a
12 result, when TCP offers discounted and sale prices, "the list prices and claimed discounts
13 are false and inflated because [TCP] rarely or never offers the products at their stated list
14 price." (*Id.*; *see also id.* ¶¶ 14-16.)

15 On November 22, 2018, Ms. Dougan voluntarily enrolled in TCP's My Place
16 Rewards Program ("MPR Program" or "Program") at a TCP retail store in Kennewick,
17 Washington. (Alzate Decl. ¶ 3, Dougan Decl. (Dkt. # 15) ¶¶ 4-9.) The MPR Program
18 provides loyalty points, discounts, and reward credit to TCP shoppers. (*See, e.g.*, Alzate
19 Decl. ¶ 7 & Ex. D at 3 (describing Program benefits).) TCP sends Program

21 ¹ TCP requested oral argument. (*See* Mot. at 1.) The court finds oral argument would not
22 be helpful to the disposition of this motion, and therefore declines to hold oral argument. *See*
Local Rules W.D. Wash. LCR 7(b)(4).

1 | communications, offers, and reward certificates to Program members by email. (*See id.*
2 | at 6.)

3 | TCP posts signage throughout its stores—including the store at which Ms. Dougan
4 | shops—to advertise the MPR Program. (Alzate Decl. ¶ 4 (describing TCP’s general
5 | policies and procedures); Hazard Decl. (Dkt. # 20) ¶ 2 (describing procedures at stores in
6 | Washington and explaining where in the store the signs were posted); *see* Alzate Decl. ¶
7 | 4 & Exs. A-C (signage).) The following language appears in fine print at the bottom of
8 | several of these signs:

9 | The My Place Rewards Program is provided by The Children’s Place, Inc.
10 | and its terms may change at any time. For full Rewards Terms and
11 | Conditions, please visit childrensplace.com/rewards-terms.

11 | (*See* Alzate Decl. Exs. A & C.) Ms. Dougan states that she did not see any signs or
12 | notices “about terms and conditions relating to the [MPR Program]” when she visited the
13 | Kennewick store and enrolled in the MPR Program. (Dougan Decl. ¶ 22.) She does not,
14 | however, deny that signs advertising the Program were posted in the store. (*See*
15 | *generally id.*)

16 | In 2018, TCP’s standard operating procedure in its Washington stores for enrolling
17 | customers in the MPR Program required TCP’s sales associates to ask a customer if she
18 | was already a Program member or wanted to become a member before ringing up the
19 | customer’s sales transaction. (Alzate Decl. ¶ 5.) According to TCP, a customer who
20 | wanted to enroll in the Program would provide her name and contact information,
21 | including email address, to the sales associate. (*Id.*) The sales associate would then hand
22 | the customer a printed copy of a brochure containing the MPR Program terms and

1 conditions (“MPR Brochure”) along with an enrollment receipt. (Alzate Decl. ¶ 6; *see*
2 *also* Hazard Decl. ¶ 4 (stating that Washington sales associates are trained to inform the
3 customer that the document contains information on the terms and conditions and
4 benefits of the MPR Program).) Printed copies of the MPR Brochure were also displayed
5 and available in stands at each cash register in the store. (Hazard Decl. ¶¶ 5-8; *see id.*
6 Exs. F & G.)

7 The MPR Brochure is a 30-page double-sided document that includes information
8 about both the MPR Program and TCP’s MPR Credit Card Program. (Hattis Decl. (Dkt.
9 # 16) ¶ 4 & Ex. B; *see also* Hattis Decl. ¶ 7 & Ex. E (photographs of the April 2019
10 version of the printed brochure).) Nine pages of the MPR Brochure are dedicated to the
11 MPR Program and 21 pages are dedicated to the MPR Credit Card Program. (*See* Hattis
12 Decl. Ex. B.)

13 Each side of the MPR Brochure has a different cover. The MPR Program side has
14 an orange cover and is entitled “MY PLACE REWARDS.” (Hattis Decl. Ex. B at 2.)
15 The cover does not mention that the brochure contains terms and conditions for the
16 Program.² (*Id.*) The first mention of terms and conditions for the MPR Program appears
17 on the inside cover of the brochure’s contents in fine print under a description of the
18 benefits provided with the MPR Program and MPR Credit Card Program. (*Id.* at 3
19 (stating “Turn page for terms and conditions.”).) The second and third pages of the
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² The MPR Credit Card Program side has a blue cover and is entitled “MY PLACE
REWARDS CREDIT CARD.” (Hattis Decl. Ex. B at 31.)

1 contents also refer to terms and conditions in fine print. (*Id.* at 4-5.) Like the store
2 signage, these pages state, in relevant part:

3 The My Place Rewards Program is provided by The Children’s Place, Inc.
4 and its terms may change at any time. For full Rewards Terms and
Conditions, please visit childrensplace.com/rewards-terms.

5 (*Id.*)

6 The Program terms and conditions begin on the fourth page of the MPR Brochure
7 with a message in large boldface type stating:

8 PLEASE NOTE: THESE TERMS AND CONDITIONS CONTAIN AN
9 ARBITRATION CLAUSE AND CLASS ACTION WAIVER. THE
10 WAIVER AFFECTS HOW DISPUTES WITH THE CHILDREN’S PLACE
11 ARE RESOLVED. BY ACCEPTING THESE TERMS AND
12 CONDITIONS, YOU AGREE TO BE BOUND BY THIS ARBITRATION
13 PROVISION. PLEASE READ IT CAREFULLY.

14 (*Id.* at 6.) The specific terms setting forth the “Applicable Law and Mandatory
15 Agreement to Arbitrate on an Individual Basis” begin on the fifth page of the terms and
16 conditions and the eighth page of the brochure. (*Id.* at 10.)

17 Shortly after a customer completed her enrollment in the MPR Program, TCP
18 would send her two emails: an email asking the customer to confirm her email address
19 and, subsequently, a welcome email that included the customer’s MPR Program rewards
20 number. (Alzate Decl. ¶ 8.) Each of these emails included a hyperlink to the full text of
21 the terms and conditions on the MPR Program webpage of TCP’s website. (*Id.*)

22 The following text appears at the beginning of the MPR Program terms and
conditions webpage:

PLEASE NOTE: THESE TERMS AND CONDITIONS CONTAIN AN
ARBITRATION CLAUSE AND CLASS ACTION WAIVER. THE

1 WAIVER AFFECTS HOW DISPUTES WITH THE CHILDREN'S PLACE
2 AND GYMBOREE ARE RESOLVED. BY ACCEPTING THESE TERMS
AND CONDITIONS, YOU AGREE TO BE BOUND BY THIS
3 ARBITRATION PROVISION. PLEASE READ IT CAREFULLY.

4 (Alzate Decl. ¶ 17 & Ex. E at 1 (current website terms and conditions).)

5 On November 22, 2018, the TCP sales associate followed the general process
6 above to enroll Ms. Dougan in the MPR Program. (Dougan Decl. ¶¶ 4-11.) Ms. Dougan
7 states, however, that neither the TCP sales associate nor anyone else at the store handed
8 her a copy of the MPR Brochure, nor did anyone say anything to her about the brochure
9 or about terms and conditions that governed her membership. (Dougan Decl. ¶¶ 13-15,
10 18, 20-21.) Indeed, Ms. Dougan states that she never saw the MPR Brochure until
11 August 2, 2020. (*Id.* ¶ 19.) Although Ms. Dougan states that she never saw an email
12 from TCP “about any terms and conditions relating to the [MPR Program]” (Dougan
13 Decl. ¶ 23), TCP’s records show that Ms. Dougan received both the email asking her to
14 confirm her email address and the welcome email on November 23, 2018 (Alzate Decl.
15 ¶ 13). TCP’s records also show that Ms. Dougan used her membership after she enrolled
16 in the Program and was assigned reward coupons on November 24, 2018 and October 8,
17 2019. (*Id.* ¶ 14.)

18 **B. Procedural Background**

19 Ms. Dougan filed her complaint in this action on May 30, 2020. (Compl.) Ms.
20 Dougan alleges on behalf of herself and a proposed class that TCP violated the
21 Washington Commercial Electronic Mail Act (“CEMA”), ch. 19.190 RCW, and the
22 Washington Consumer Protection Act (“CPA”), ch. 19.86 RCW, by transmitting emails

1 with subject lines advertising false or misleading discounts. (*Id.* ¶¶ 32, 42-74.) Ms.
2 Dougan seeks to enjoin TCP from sending emails that include false or misleading
3 discounts. (*Id.* at 20 ¶¶ 2, 8.) She also seeks actual and statutory damages under the
4 CPA. (*Id.* at 20 ¶¶ 4-6.)

5 Ms. Dougan alleges that since at least March 2019, TCP “has transmitted hundreds
6 of commercial emails containing false or misleading information” about discounts “to
7 thousands of Washington State consumers.” (*Id.* ¶¶ 22-23; *see, e.g., id.* Ex. A (listing 250
8 emails Ms. Dougan received between March 5, 2019 and December 31, 2019 that she
9 alleges have false or misleading information about discounts in their subject lines).) She
10 alleges that statements such as “XX% Off” in the subject line of the emails are false or
11 misleading because they are “based on [TCP]’s self-created and inflated fictitious list
12 prices.” (*Id.* ¶ 24.)

13 TCP filed the instant motion to compel arbitration on July 10, 2020. (Mot.) On
14 September 10, 2020, the court granted TCP’s motion for relief from the deadlines in the
15 court’s scheduling orders regarding initial disclosures (Dkt. # 21) and class certification
16 (Dkt. # 22) pending its ruling on TCP’s motion to compel arbitration. (Order Granting
17 Relief from Deadlines (Dkt. # 26).)

18 III. DISCUSSION

19 A. Standard for Motions to Compel Arbitration

20 The Federal Arbitration Act (“FAA”), 9 U.S.C. § 2, governs arbitration
21 agreements in any contract affecting interstate commerce. *See Circuit City Stores, Inc. v.*
22 *Adams*, 532 U.S. 105, 119 (2001). Under the FAA, arbitration agreements “shall be

1 valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity
2 for the revocation of any contract.” 9 U.S.C. § 2. The FAA “reflect[s] both a liberal
3 policy favoring arbitration . . . and the fundamental principle that arbitration is a matter of
4 contract.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (internal
5 quotation marks and citations omitted). “In line with these principles, courts must place
6 arbitration agreements on an equal footing with other contracts . . . and must enforce
7 them according to their terms.” *Id.* (internal quotation marks and citations omitted).

8 Section 4 of the FAA provides a judicial remedy where a party seeks to compel
9 another party to arbitrate a dispute. *See* 9 U.S.C. § 4. Under Section 4, “[a] party
10 aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written
11 agreement for arbitration may petition any United States district court which, save for
12 such agreement, would have jurisdiction . . . of the subject matter of a suit arising out of
13 the controversy between the parties,” for an order compelling arbitration. *Id.*

14 On a motion to compel arbitration, the court’s role under the FAA is generally
15 “limited to determining (1) whether a valid agreement to arbitrate exists and, if it does,
16 (2) whether the agreement encompasses the dispute at issue.” *Chiron Corp. v. Ortho*
17 *Diagnostic Sys.*, 207 F.3d 1126, 1130 (9th Cir. 2000); *see also Meadows v. Dickey’s*
18 *Barbecue Rests. Inc.*, 144 F. Supp. 3d 1069, 1075 (N.D. Cal. 2015). “[U]pon being
19 satisfied that the making of the agreement for arbitration or the failure to comply
20 therewith is not in issue, the court shall make an order directing the parties to proceed to
21 arbitration in accordance with the terms of the agreement.” 9 U.S.C. § 4. The parties do
22 not appear to dispute that Ms. Dougan’s claims are within the scope of TCP’s arbitration

1 provision. (*See generally* Mot., Resp.) The court, therefore, focuses on whether a valid
2 agreement to arbitrate exists.

3 As the party seeking to compel arbitration, TCP bears “the burden of proving the
4 existence of an agreement to arbitrate by a preponderance of the evidence.” *Norcia v.*
5 *Samsung Telecomm. Am., LLC*, 845 F.3d 1279, 1283 (9th Cir. 2017). “[A]rbitration is a
6 matter of contract and a party cannot be required to submit to arbitration any dispute
7 which he has not agreed to so submit.” *Id.* (quoting *AT&T Techs., Inc.*, 475 U.S. at 648)
8 (alteration in original). In analyzing the parties’ arguments about contract formation, the
9 court applies “ordinary state-law principles that govern the formation of contracts” to
10 decide whether an agreement to arbitrate exists. *See id.* (quoting *First Options of Chi.,*
11 *Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

12 **B. Ms. Dougan Has Assented to Arbitration**

13 The parties agree that Washington law applies to determine whether the parties
14 formed a contract. (Mot. at 7-8; Resp. at 4.) Under Washington law, in order to form a
15 valid contract, the contracting parties must “objectively manifest their mutual assent.”
16 *Keystone Land & Dev. Co. v. Xerox Corp.*, 94 P.3d 945, 949 (Wash. 2004). “Generally,
17 manifestations of mutual assent will be expressed by an offer and acceptance.” *Id.* In the
18 context of online agreements, the existence of mutual assent turns on whether the
19 consumer had reasonable notice of the agreement. *Wilson v. Huuuge, Inc.*, 944 F.3d
20 1212, 1219 (9th Cir. 2019) (citing *Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171, 1175
21 (9th Cir. 2014). “Washington does not allow parties to shirk contract obligations if they
22 had actual or constructive notice of the provisions.” *Id.* (citing *W. Consultants, Inc. v.*

1 *Davis*, 310 P.3d 824, 827-28 (Wash. Ct. App. 2013)). A consumer “cannot successfully
2 argue that the contract is unenforceable as long as [she] was not deprived of the
3 opportunity to read it.” *Schmidt v. Samsung Electronics Am., Inc.*, No. C16-1735JCC,
4 2017 WL 2289035, at *2 (W.D. Wash. May 25, 2017).

5 Ms. Dougan denies that she had actual notice of the MPR Program’s terms and
6 conditions. Therefore, the court considers whether Ms. Dougan had constructive notice
7 of those provisions and concludes that she did. “In the absence of actual knowledge, a
8 reasonably prudent consumer must be on constructive notice of the terms of the contract”
9 where the contract does not require the user to affirmatively assent to the terms of use.
10 *Wilson*, 944 F.3d at 1220. “Users are put on constructive notice based on the
11 conspicuousness and placement of the terms and conditions.” *Id.* Courts will not enforce
12 agreements where the terms and conditions are, for example, “buried at the bottom of the
13 page or tucked away in obscure corners of the website.” *Id.*

14 Here, TCP provided notice of the existence of terms and conditions governing the
15 MPR Program in several places: in signs posted throughout TCP’s retail store; in a
16 physical brochure that was displayed at each cash register and that, according to TCP’s
17 policies, is handed to the customer when she signs up for the Program; and in emails that
18 require the customer to confirm her email address and that welcome her to the Program.
19 The signs, brochure, and emails each inform the consumer that the MPR Program is
20 subject to terms and conditions. The signs and emails direct the customer to TCP’s
21 website for more information about the terms and conditions, while the MPR Brochure
22 contains the actual terms. TCP’s website and the MPR Brochure both clearly state in

1 large bold type that the MPR Program’s terms and conditions include an arbitration
2 agreement and class action waiver. The court concludes that these disclosures were
3 adequate to provide Ms. Dougan constructive knowledge of the existence of terms and
4 conditions governing her membership in the MPR program.

5 Although Ms. Dougan states that she “never saw an email from TCP about any
6 terms and conditions relating to” the MPR Program, that assertion is not sufficient to
7 defeat TCP’s motion, particularly where the emails she indisputably received included
8 links to the terms and conditions. In addition, although Ms. Dougan states that she never
9 received a copy of the MPR Brochure, TCP’s evidence of a consistent practice of
10 delivering the terms and conditions is *prima facie* evidence that she was aware of the
11 offer. *Schmidt*, 2017 WL 2289035, at *5 (citing *Schwartz v. Comcast Corp.*, 256 Fed.
12 Appx. 515, 518 (3d Cir. 2017)). In any event, the court concludes that the physical signs
13 in the retail store and the emails Ms. Dougan received placed her on constructive notice
14 that her membership in the MPR Program was governed by terms and conditions. Had
15 she inquired further, she would have discovered that those terms and conditions included
16 an agreement to submit any disputes about the MPR Program to arbitration.

17 Finally, Ms. Dougan makes no argument that the terms and conditions governing
18 TCP’s arbitration provision are unconscionable or otherwise unenforceable. (*See*
19 *generally* Resp.) Therefore, the court concludes that TCP has met its burden to show by
20 a preponderance of the evidence that Ms. Dougan assented to the terms and conditions
21 governing the MPR Program, including the arbitration agreement contained therein. As a
22 result, the court finds that the arbitration agreement is valid and enforceable.

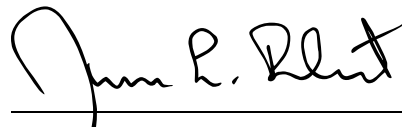
1 **C. Stay of Proceedings**

2 When a court determines that an arbitration agreement covers a parties' claims, the
3 FAA requires all remaining substantive issues to be decided in arbitration. 9 U.S.C. § 4.
4 The final question for this court, therefore, is whether to dismiss or stay this case pending
5 the completion of arbitration. Under Ninth Circuit precedent, the court "may either stay
6 the action or dismiss it outright when, as here, the court determines that all of the claims
7 raised in the action are subject to arbitration." *Johnmohammadi v. Bloomingdale's, Inc.*,
8 755 F.3d 1072, 1074 (9th Cir. 2014) (citing 9 U.S.C. § 3). Here, TCP requests a stay.
9 (*See Mot.* at 14-15.) Ms. Dougan does not respond to this request. (*See generally Resp.*)
10 Because Ms. Dougan has not opposed TCP's request that these proceedings be stayed
11 pending the completion of arbitration, the court grants TCP's request for a stay.

12 **IV. CONCLUSION**

13 For the foregoing reasons, the court GRANTS TCP's motion to compel arbitration
14 and stay proceedings (Dkt. # 11). Ms. Dougan is compelled to proceed to arbitration of
15 her claims in accordance with the terms of the arbitration agreement contained in the
16 MPR Program terms and conditions.

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18 Dated this 27th day of October, 2020.

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21 JAMES L. ROBART
22 United States District Judge