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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JANE DOE 1 and JANE DOE 2,

No. C 16-02935 WHA

Plaintiffs,

v.

XYTEX CORPORATION, a Georgia Corporation, XYTEX CRYO INTERNATIONAL, LTD., a Georgia Corporation, MARY HARTLEY, an individual, J. TODD SPRADLIN, an individual, and DOES 1–25, inclusive,

**ORDER HOLDING IN
ABEYANCE DEFENDANTS’
MOTION TO TRANSFER**

Defendants.

INTRODUCTION

In this product-liability action involving the sale of human semen for artificial insemination, one defendant moves to transfer the action based on a forum-selection clause. For the reasons stated below, the motion is **HELD IN ABEYANCE**, pending limited discovery regarding the appearance of defendant’s website at the time in question and plaintiffs’ actual knowledge of the forum-selection clause.

STATEMENT

Plaintiffs Jane Doe 1 and Jane Doe 2, a same-sex couple, are San Francisco residents. In 2004, they registered to use xytex.com, a website operated by defendant Xytex Corporation. Xytex, through its website, sold human semen for use in artificial insemination.

1 Xytex Corporation posted a written “Site Usage and Information Agreement” on its
 2 website. That agreement could be accessed from xytex.com by first pulling down a menu
 3 labeled “About Us” on the main toolbar of the website and then selecting the “Site Usage”
 4 button that appeared in that menu. The “About Us” menu appeared second in a toolbar of six
 5 menus, including “Home,” “Patient Section,” “Physicians Info,” “Become a Donor,” and “XTS:
 6 Xytex Tissue Services.” The toolbar appeared in the same location on every page of the site
 7 (Scholer Reply Decl. ¶¶ 2–3).

8 An image of the website as it appeared at the time in question is reproduced below¹:



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 1 Plaintiffs filed a screenshot of xytex.com as it appeared at the time they filed their briefs herein (Gannon Decl., Exh. A). Xytex counters that the website looked different in 2004. In support of its reply, Xytex provided a screenshot of xytex.com/index.shtml as it appeared in 2004 as archived on the Internet Archive’s Wayback Machine, supported by the declaration of Xytex’s president (Scholer Reply Decl., Exh. A). The screenshot submitted, however, was *not* of xytex.com, and it did not demonstrate the menu in which the “Site Usage” link appeared. Additionally, the image included a vertical line through the middle of the page that appears to be an artifact of improper scanning. The image reproduced in this order is a screenshot of the Wayback Machine’s entry for xytex.com in December 2004, retrieved by the Court on July 11, 2016.

Our court of appeals has not addressed whether pages from the Wayback Machine are proper for judicial notice, and our record offers no indication of the accuracy of the Wayback Machine’s records, so this order does *not* take judicial notice of the records for the Wayback Machine. Nevertheless, this order assumes, solely for the sake of argument, that Xytex’s website appeared as represented herein in 2004. As discussed in greater detail below, both sides will have the opportunity to take jurisdictional discovery to establish whether the website, in fact, appeared as represented in this order.

1 The following is an image of the “About Us” pull-down menu:



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8 Users could browse the website, register for the site, and purchase Xytex’s services
9 without reading or affirmatively consenting to the terms of the agreement. Section I of the
10 agreement provided, in pertinent part (Scholer Decl., Exh. B) (emphasis in original):

11 I. IMPORTANT! THIS IS A BINDING LEGAL AGREEMENT
12 (this “Agreement”). PLEASE READ THESE TERMS AND
13 CONDITIONS OF USE CAREFULLY BEFORE USING THIS
14 SITE.

15 The Agreement governs your use of this site (collectively, the
16 “Site”) and is by and between Xytex Corporation (referred to
17 herein as “Xytex”, “we”, “us”, or “our”) and you, on behalf of
18 yourself and the buyer, member or supplier for which your have
19 registered (“you”). By using, viewing, transmitting, caching,
20 storing and/or otherwise using the Site, the services or functions
21 offered in or by the Site and/or the contents of the Site in any way,
22 you have agreed to each and all of the terms and conditions set
23 forth below, and waive any right to claim ambiguity or error in this
24 Agreement. If you do not agree to each and all of these terms and
25 conditions please do not use the Site and leave the Site
26 immediately.

27 Section XV included a choice-of-law and forum-selection provision, as follows:

28 This Agreement shall be governed by and construed in accordance
with the laws of the State of Georgia, without giving effect to any
principles of conflicts of law. You agree that any action at law or
in equity arising out of or relating to the terms of this Agreement
shall be filed only in the state or federal courts located in
Richmond County, Georgia and you hereby consent and submit to
the personal jurisdiction of such courts for the purposes of
litigating any such action.

After registering, plaintiffs reviewed the profiles of the sperm donors listed on Xytex’s
website and selected Donor #9623, whose profile stated he held a bachelor’s degree, a master’s
degree, and that he had been working toward a Ph.D. in artificial intelligence and neuroscience
engineering. Jane Doe 1 underwent an artificial insemination procedure using sperm from

1 Donor #9623. Approximately nine months later, Jane Doe 1 gave birth to a child, P.S., who is
2 now nine years old. Plaintiffs stored the remaining sample in case they decided to have a
3 second child.²

4 In April 2015, plaintiffs read an article that described a lawsuit brought against Xytex
5 involving Donor #9623. The lawsuit claimed that he had been diagnosed with schizophrenia,
6 that he had dropped out of college, that he had pled guilty to residential burglary, and that
7 Xytex had done nothing to investigate the veracity of the information the donor had submitted
8 for his profile. Plaintiffs investigated the claims in that lawsuit.

9 Plaintiffs commenced this action in San Francisco Superior Court in April 2016 bringing
10 claims for: (i) fraud, (ii) negligent misrepresentation, (iii) strict products liability, (iv) negligent
11 products liability, (v) breach of express warranty, (vi) breach of implied warranty of
12 merchantability, (vii) battery, (viii) negligence, (ix) specific performance, (x) false advertising,
13 (xi) violation of California's Unfair Competition Law, and (xii) wrongful birth. Defendants
14 removed the case to federal court here in San Francisco on the basis of declaratory judgment.
15 Xytex now moves to transfer the case to the Southern District of Georgia based on the forum-
16 selection clause in the agreement on its website.³

17 ANALYSIS

18 Xytex Corporation contends that this action must be transferred to the Southern District
19 of Georgia on the basis of a forum-selection clause in the written "Site Usage and Information
20 Agreement" that it purports applied to use of its website in December 2004, when plaintiffs
21 registered to use the site and purchased Donor #9623's sperm. Plaintiffs counter that the
22 language containing the forum-selection clause appeared in an unenforceable "browsewrap
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25 ² The specific dates of the artificial insemination procedure and P.S.'s birth, which have no bearing on
26 the instant motion, are not stated in the complaint.

27 ³ Defendant Xytex Cryo International Ltd. is the parent company of Xytex Corporation, and defendants
28 Mary Hartley and J. Todd Spradlin are employees of Xytex Corporation. Xytex Cryo, Hartley, and Spradlin all
moved to dismiss claims against them for lack of personal jurisdiction and joined in the instant motion. They
withdrew their motion to dismiss and the parties stipulated to their dismissal. Xytex Corporation is the only
remaining defendant.

1 agreement” to which plaintiffs never manifested their assent as required by *Nguyen v. Barnes &*
2 *Noble Inc.*, 763 F.3d 1171 (9th Cir. 2014).

3 In *Nguyen*, the plaintiff purchased two computer tablets on the defendant’s website
4 during a clearance sale and received an email confirmation. The following day, he received an
5 email cancelling the order due to unexpectedly high demand. The plaintiff brought a putative
6 class action alleging deceptive business practices and false advertising. The defendant moved
7 to compel arbitration based on an arbitration clause in the terms of use of its website.

8 The defendant made its terms of use available via a hyperlink labeled “Terms of Use” at
9 the bottom left-hand corner of every page on its website alongside other hyperlinks labeled
10 “NOOK [another of the defendant’s products] Store Terms,” “Copyright,” and “Privacy
11 Policy.” The hyperlinks appeared underlined and set in a green typeface. The defendant
12 contended that the “Terms of Use” hyperlink placed the plaintiff on constructive notice of the
13 arbitration agreement and that the plaintiff’s continued use of the site bound him to the terms of
14 that agreement.

15 Our court of appeals adopted the Second Circuit’s view that an inconspicuous
16 browsewrap agreement never required the user to expressly manifest consent to the terms of
17 use, and such “[m]utual manifestation of assent, whether by written or spoken word or by
18 conduct is the touchstone of contract.” *Id.* at 1175 (quoting *Specht v. Netscape*
19 *Communications Corp.*, 306 F.3d 17, 29 (2d Cir. 2002) (applying California law)). Thus, where
20 “there is no evidence that the website user had actual knowledge of the agreement, the validity
21 of the browsewrap agreement turns on whether the website puts a reasonably prudent user on
22 inquiry notice of the terms of the contract.” *Id.* at 1177.⁴

23 The “Terms of Use” link in *Nguyen* was too inconspicuous to place the plaintiff on
24 actual notice:

25 Where a website makes its terms of use available via a
26 conspicuous hyperlink on every page of the website but otherwise
27 provides no notice to users nor prompts them to take any

28 ⁴ The Terms of Use in *Nguyen* included a choice-of-law provision selecting New York law. Rather than engage in a circular choice-of-law analysis, the *Nguyen* court considered the result under both California law and New York law, which dictated the same results. *Id.* at 1175.

1 affirmative action to demonstrate assent, even close proximity of
2 the hyperlink to relevant buttons users must click on — without
more — is insufficient to give rise to constructive notice.

3 *Id.* at 1179.

4 Perhaps acknowledging the clear analog between our case and *Nguyen*, Xytex makes no
5 attempt to distinguish the design of its website and the website at issue there. Indeed, Xytex
6 placed the link to its site-usage agreement *even more inconspicuously* than the defendant in
7 *Nguyen* had, inasmuch as the link on *xytex.com* could only be accessed *after* a user pulled down
8 an additional menu, which menu itself had no indication of the nature of the contract hidden
9 within. Moreover, a consumer is even less likely to understand the contractual nature of a page
10 concerning “Site Usage” than one concerning “Terms of Use.”

11 Rather than engage with *Nguyen*, Xytex argues that *Nguyen* and the authority on which
12 it relied all related to arbitration agreements, which required a “mutual manifestation of assent,”
13 while a forum-selection clause is presumptively valid so long as it is fundamentally fair. *See*
14 *Carinval Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991).

15 Xytex’s argument is misguided. *Nguyen* was not so limited. It adopted the language in
16 *Specht* stating that “mutual assent . . . is the touchstone of contract.” *Id.* at 1175. It did not
17 limit the requirement of mutual assent to arbitration agreements. Moreover, Xytex’s argument
18 regarding the presumptive validity of the forum-selection clause begs the question of the
19 validity of the agreement containing it.

20 The California Court of Appeal roundly rejected Xytex’s arguments in *Long v. Provide*
21 *Commerce, Inc.*, 245 Cal. App. 4th 855 (2016), which neither side herein addressed in their
22 briefs although it predated the instant motion by more than three months. There, the defendant
23 sought to enforce an arbitration agreement and a forum-selection clause in a browsewrap
24 agreement. The hyperlink to the agreement was placed at the bottom of each page in all-caps in
25 a light green typeface on the website’s lime green background among fourteen other hyperlinks
26 of the same format.

27 The defendant in *Long* cast *Nguyen* as an outlier case and suggested that a link to a
28 browsewrap agreement could place a user on constructive notice of the agreement as long as it

1 was visible on the page without scrolling. The California Court of Appeal rejected that
2 argument, and aligned with *Nguyen* noting:

3 [W]ithout notifying consumers that the linked page contains
4 binding contractual terms, the phrase “terms of use” may have no
5 meaning or a different meaning to a large segment of the
6 Internet-using public. In other words, a conspicuous “terms of
7 use” hyperlink may not be enough to alert a reasonably prudent
8 Internet consumer to click the hyperlink.

9 *Id.* at 867. It went on to hold:

10 [The defendant’s] reliance on the presumptive validity of forum
11 selection clauses *in otherwise enforceable contracts* proves too
12 much. Contrary to [the defendant’s] implicit premise, the
13 presumption of validity is not a substitute for proof of the resisting
14 party’s objective manifestation of assent to the larger contract. If it
15 were, a party would establish the existence of a binding contract
16 simply by showing that the contract contained a presumptively
17 valid forum selection clause — an obviously absurd result.

18 *Id.* at 868 (emphasis in original).⁵


19 Relying on the assumption that the website looked as represented herein in 2004, this
20 order would hold that the Xytex failed to give plaintiffs constructive notice that the “Site
21 Usage” button included a hyperlink to the terms of a contract that supplied the terms for use of
22 Xytex’s website and services. Nevertheless, the record is inadequate to establish whether the
23 site, in fact, appeared as set forth above. At oral argument, counsel for plaintiffs specifically
24 asked for leave to take a Rule 30(b)(6) deposition regarding Xytex’s position on the appearance
25 of the website in 2004. Plaintiffs shall be permitted to take two four-hour depositions and to
26 propound up to eight requests for the production of documents directed solely at that question.
27 As discussed below, Xytex shall also be permitted to depose both plaintiffs and request the
28 production of documents. That discovery may address this issue as well as the issue of actual
29 notice. (The burden is on Xytex to prove up the existence of the agreement to select a forum.)

⁵ Xytex absurdly argues *Nguyen* is an outlier, inasmuch as it addressed the enforceability of a
browwrap agreement in the “early days” of Internet commerce — 2004. *Nguyen* did not so limit itself, and
Long applied *Nguyen* to Internet commerce that occurred in 2013.

1 By **AUGUST 25**, Xytex shall submit a brief addressing evidence of plaintiffs' actual
2 knowledge of the site-usage agreement and the forum-selection clause therein, and plaintiffs
3 shall submit a brief addressing evidence of the format of the website in 2004. The briefs shall
4 **NOT EXCEED FIFTEEN PAGES**. Each side shall respond within **FOURTEEN CALENDAR DAYS** of
5 the filing of the other's brief. Upon review of the briefs, the Court will determine whether a
6 further hearing is necessary.

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8 **IT IS SO ORDERED.**

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10 Dated: July 19, 2016.

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13 WILLIAM ALSUP
14 UNITED STATES DISTRICT JUDGE
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