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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,

**FINDINGS OF FACT AFTER EVIDENTIARY HEARING AND ORDER DENYING DEFENDANTS’ MOTION TO TRANSFER AND GRANTING IN PART AND DENYING IN PART STAY OF DISCOVERY**

Defendants.

**INTRODUCTION**

In this product-liability action involving the sale of human semen for artificial insemination, one defendant moved to enforce a forum-selection clause in the usage agreement on its website. An order rejected defendant’s argument that they had provided reasonable notice of the usage agreement but allowed discovery into whether plaintiffs had actual notice of the agreement. The parties’ briefs following that discovery revealed inappropriate conduct at the deposition of one of the plaintiffs by counsel for both sides, so the Court held an evidentiary hearing to complete the testimony then invited supplemental briefing.

After the evidentiary hearing, while the supplemental briefing proceeded, defendant brought this motion to stay discovery pending review of its petition to consolidate this action with several others in multi-district litigation.

To the extent stated below, defendants’ motion to transfer is **DENIED**, and their motion to stay discovery is **GRANTED IN PART AND DENIED IN PART**.

**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.

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

An image of the front page of the website as it appeared at the time in question is reproduced below (Gannon Decl., Exh. B at \*002):



1 The following is an image of the “About Us” pull-down menu (Gannon Decl., Exh. C  
2 at 1):



9 Users could browse the website and register for and purchase Xytex’s services without  
10 regarding or affirmatively consenting to the terms of the agreement. Users of Xytex’s website  
11 and services purportedly assented to the terms of the site-usage agreement simply by “using,  
12 viewing, transmitting, caching, storing and/or otherwise using the Site, the services or functions  
13 offered in or by the Site and/or the contents of the Site in any way . . .” (Scholer Decl., Exh. B.,  
14 Section I).

15 Section XV of the agreement included a choice-of-law and forum-selection provision, as  
16 follows:

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

25 The “Patient Section” of Xytex’s website included a “Frequently Asked Questions”  
26 page. One response on that page directed patients to “access [Xytex’s] website and thoroughly  
27 review [its] services” (*ibid.*).

28 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 maser’s  
degree, and that he had been working toward a Ph.D. Jane Doe 1 underwent an artificial  
insemination procedure using sperm from Donor #9623 in approximately 2005 and gave birth to  
a child, P.S., who is now nine years old.

1 In April 2015, plaintiffs read an article that described a lawsuit against Xytex involving  
2 Donor #9623, which lawsuit claimed that the donor's profile was false and included material  
3 omissions regarding the donor's education, mental health, and criminal history. In April 2016,  
4 plaintiffs commenced this action alleging that Xytex breached various duties and contractual  
5 obligations by failing to verify the information in Donor #9623's profile.

6 Xytex moved to transfer the action to the Southern District of Georgia based on the  
7 forum-selection clause in the agreement on its website. An order held that Xytex had not given  
8 reasonable notice of the agreement so the forum-selection clause within it could only be  
9 enforceable if plaintiffs had actual notice of the agreement. The record on Xytex's motion did  
10 not adequately address that question, so the parties were invited to conduct discovery on that  
11 issue (as well as the actual appearance of the website in 2004). Specifically, the order allowed  
12 Xytex to conduct four-hour depositions of each plaintiff.

13 Xytex deposed both plaintiffs. All agree that Doe 2 did not have actual knowledge of  
14 the site-usage agreement on Xytex's website, because she deferred to Doe 1's decisions  
15 regarding the website. At Doe 1's initial out-of-court deposition, counsel for Xytex spent  
16 approximately one hour laying foundation regarding Doe 1's usage of Xytex's website, in the  
17 hope of implying actual knowledge of the site-usage agreement.

18 Throughout the deposition, plaintiffs' counsel made speaking objections, advancing  
19 their interpretation of the scope of discovery allowed by the order. Specifically, plaintiffs'  
20 counsel contended the deposition could only directly address Doe 1's actual knowledge of  
21 the site-usage agreement. Plainly, plaintiffs' counsel were incorrect — Xytex was entitled to  
22 lay foundation regarding Doe 1's broader experience on the Xytex website to trigger her  
23 memory, establish a basis from which one could infer she had knowledge of the site-usage  
24 agreement, or develop impeachment material.

25 Plaintiffs' counsel's objections came to a head when they said, on the record and in the  
26 presence of the witness, "just ask her if she ever saw the site usage agreement and she will say  
27 no, she never saw the site usage agreement" (Doe 1 Dep. at 5–6). This constituted witness  
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1 coaching and interfered with defense counsel’s attempt to go behind an obviously lawyer-  
2 prepared narrative.

3 For their part, counsel for defendant ambushed Doe 1 with questions about a 2015 site-  
4 usage agreement, although order directed the deposition of Doe 1 “on the issue of actual  
5 knowledge of the site-usage agreement and the forum-selection clause therein prior to  
6 purchasing” the sperm from Xytex and on “the appearance of the website in 2004” (Dkt. No. 27  
7 at 8). Xytex had never mentioned the 2015 agreement in its motion to transfer.

8 Doe 1 testified that she could not recall which parts of the Xytex website she  
9 specifically read but that she had *not* viewed the site-usage agreement (Doe 1 Dep. at 120–39).

10 In light of the foregoing, defendants asked for an opportunity to conduct a second  
11 deposition or for an inference that Doe 1 had actual knowledge of the site-usage agreement.  
12 Instead, an order set an evidentiary hearing at which defendants could conduct direct  
13 examination of both plaintiffs with the judge presiding (Dkt. No. 40). Both sides behaved at the  
14 evidentiary hearing.

15 Xytex only called Doe 1 to testify at the evidentiary hearing. She testified that she  
16 visited Xytex’s website on the recommendation of a friend and in part because she wanted the  
17 donor to remain anonymous and separate from the parent-child relationship (as compared to a  
18 sperm donation from a friend, who would likely remain a part of the child’s life). Doe 1  
19 browsed the website primarily with the goal of finding a donor that matched her criteria, but she  
20 also sought information about how long Xytex had been in business, its process for screening  
21 for diseases, *inter alia* (Doe 1 Dep. at 10, 33).

22 Doe 1 acknowledged she did not know where the information she sought would be  
23 located on Xytex’s website when she first visited. She testified that she focused on the “Patient  
24 Section” of the website and expected she could find the answers she needed, since she was a  
25 patient. She perused the Frequently Asked Questions page within that section, but could not  
26 recall reading the response directing her to thoroughly review Xytex’s services (Doe 1 Dep. at  
27 22, 30–35).

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1 The parties submitted supplemental briefs following the evidentiary hearing with  
2 argument about the evidence from the deposition and the testimony at the hearing. Although  
3 the briefing schedule invited the parties to reply to the other's supplemental brief, neither did  
4 so.

5 \* \* \*

6 In September, Xytex separately moved to transfer this action and five others for  
7 coordinated or consolidated pretrial proceedings before the Judicial Panel on Multidistrict  
8 Litigation. The hearing on the motion before the JPML is scheduled for December 1. Xytex  
9 now moves to stay discovery in this action pending the decision by the JPML. Fact discovery  
10 in this action closes on July 31, 2017.

11 This order follows full briefing, an evidentiary hearing, and supplemental briefing on the  
12 motion to transfer and full briefing on the motion to stay.

### 13 ANALYSIS

#### 14 1. MOTION TO TRANSFER.

15 Xytex seeks to enforce the forum-selection clause in its site-usage agreement and to  
16 transfer this action to the District of Georgia. Notwithstanding the choice-of-law provision in  
17 the agreement, both sides apply California law, not Georgia law, to the question of whether any  
18 agreement was ever formed.

19 “[W]here there is no evidence that the website user had actual knowledge of the  
20 agreement, the validity of the browsewrap agreement turns on whether the website puts a  
21 reasonably prudent user on inquiry notice of the terms of the contract.” *Nguyen v. Barnes &*  
22 *Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014). A prior order held that Xytex’s website failed  
23 to put a reasonably prudent user on inquiry notice of the terms of its site-usage agreement.  
24 Thus, the only question is whether our plaintiffs had actual knowledge of the agreement. It is  
25 Xytex’s burden to prove knowledge of the the agreement. *Ibid.*

26 Xytex argues that Doe 1’s testimony at her deposition and at the evidentiary hearing  
27 demonstrate that she had actual knowledge of the site-usage agreement. Specifically, it argues  
28 that she browsed Xytex’s website with the goal of finding answers to numerous questions (in

1 addition to her primary goal of finding a donor), and she did not know where those answers  
2 resided on the website. Thus, Xytex argues, she must have become aware of the site-usage  
3 agreement as she became acquainted with the layout of the website. Nevertheless, Doe 1  
4 testified, as she did at her deposition, that she sought answers via the “Patient Section” of the  
5 website. Nothing in Doe 1’s testimony, however, suggested she ever viewed or learned of the  
6 site-usage agreement.

7 Xytex argues that “Doe 1 had constructive notice of the Site Usage agreement, because  
8 she had to have looked at the primary header tabs” (Def.’s Supp. Br. at 4). But the primary  
9 header tabs included no indication whatsoever of an agreement that purported to govern Doe 1’s  
10 usage of Xytex’s website and services. Xytex further argues, “the only way for Doe 1 to obtain  
11 answers about Xytex experience, warranties, background and primary contact information  
12 required her to see the Site Usage tab” (*ibid.*). But that is mere attorney argument. Nothing in  
13 the record supports the contention that Doe 1 could *only* have obtained contact information  
14 about Xytex by browsing the site in a manner that displayed the Site Usage menu option nested  
15 within the About Us option. In fact, certain contact information was available on the Frequently  
16 Asked Questions page and the Payment Options page, both located in the Patient Section  
17 (Gannon Decl., Exh. B at \*041, \*052). In any case, the label “Site Usage” did not adequately  
18 indicate the contractual nature of the page to which it linked — it simply indicated that it linked  
19 to information about how to use Xytex’s website. Thus, even if Doe 1 saw the menu beneath  
20 the “About Us” primary tab and the “Site Usage” menu option, that would do nothing to  
21 establish her knowledge of the site-usage *agreement*.

22 Xytex alternatively argues that plaintiffs’ counsel’s speaking objections and outright  
23 coaching at Doe 1’s deposition warrant the inference that Doe 1’s testimony would otherwise  
24 have indicated that she *did* have actual knowledge of the site-usage agreement. This argument  
25 has more traction. In light, however, of defendants’ counsel’s questioning outside the scope of the  
26 designated subject of the deposition, and in light of the evidentiary hearing on the issue of  
27 actual notice of the 2004 site-usage agreement, the Court was able to assess Doe 1’s credibility  
28 and to ensure that her testimony was not improperly influenced by her counsel. This procedure

1 gave defendants a full and fair opportunity to develop their record. No further remedy is  
2 warranted.

3 Finally, Xytex argues that Doe 1's lack of memory about the agreement must be due to  
4 the fact that its terms were immaterial to her decision, rather than the fact that Doe in fact never  
5 had actual notice of the agreement. That is mere attorney argument. There is simply *nothing* in  
6 the record from which to infer that Doe 1 ever browsed the About Us tab, much less viewed the  
7 page behind the Site Usage menu option. Defendants' hypothetical explanation for Doe 1's  
8 lack of memory cannot make up for the lack of basis to infer that she ever knew the facts  
9 purportedly forgotten.

10 This order finds that neither Doe 1 nor Doe 2 had actual knowledge of the 2004 site-  
11 usage agreement. Xytex's motion to transfer is therefore **DENIED**.

## 12 **2. MOTION TO STAY DISCOVERY.**

13 Xytex also moves to stay discovery pending a decision by the JPML on Xytex's petition  
14 to consolidate this action in an MDL with five other actions proceeding across the country. It  
15 argues that a stay is warranted pursuant to the Court's inherent power to "control the disposition  
16 of the causes on its docket with economy of time and effort for itself, for counsel and for  
17 litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936); *see also Clinton v. Jones*, 520  
18 U.S. 681, 707 (1997).

19 A complete stay of discovery is not warranted. We are still in the early stages of  
20 discovery, and the only discovery taken so far pertained to Xytex's motion to transfer. The  
21 Court is sympathetic to the possibility that discovery in this case may ultimately be duplicated  
22 in the consolidated proceedings should an MDL be instituted, but there remains considerable  
23 discovery unique to our plaintiffs that will *not* be duplicated in any MDL proceedings. The  
24 work has to be done at some point, and it might as well be now.

25 Out of deference to the JPML, however this order postpones any discovery relating only  
26 to Donor #9623 and how Xytex processed his donor information until after the JPML decision  
27 or December 30, 2016, whichever comes first. However, plaintiffs may propound ten simple  
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1 interrogatories on any subject (no subparts) and there shall be no stay as to answering them.  
2 Otherwise, discovery may go forward on all other subjects.

3 **CONCLUSION**

4 Defendants' motion to transfer is **DENIED**, and their motion to stay discovery is  
5 **GRANTED IN PART AND DENIED IN PART.**

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7 **IT IS SO ORDERED.**

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9 Dated: December 1, 2016.

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12 WILLIAM ALSUP  
13 UNITED STATES DISTRICT JUDGE  
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