Excerpt of *Feldman v. Google, Inc.*, 513 F.Supp.2d 229 (2007)

Before the court is Defendant Google, Inc.'s Motion to Dismiss Plaintiff's Amended Complaint, or in the alternative, to Transfer, which motion the court converted to a Motion for Summary Judgment. Also before the court is Plaintiff Lawrence E. Feldman's Cross-Motion for Summary Judgment. The ultimate issues raised by the motions and determined by the court are whether a forum selection clause in an internet "clickwrap" agreement is enforceable under the facts of the case and, if so, whether transfer of this case to the Northern District of California is warranted. The court finds in the affirmative as to both issues and, therefore, denies Plaintiff's Motion for Summary Judgment, grants Defendant's Motion to Transfer, and transfers this case to the Northern District of California, San Jose Division. The reasons follow.

Defendant's motion seeks to enforce the forum selection clause in an online "clickwrap" agreement, which provides for venue in Santa Clara County, California, which is within the San Jose Division. In his original complaint, Plaintiff based his claims on a theory of express contract. In his Amended Complaint, however, Plaintiff offers a wholly new legal theory. He argues that no express contract existed because the agreement was not valid. Withdrawing his express contract allegations, Plaintiff advanced the theory of implied contract because he argues he did not have notice of and did not assent to the terms of the agreement and therefore there was no "meeting of the minds." Plaintiff also argues that, even if the agreement were controlling, it is a contract of adhesion and unconscionable, and that the forum selection clause is unenforceable.

The court will address these arguments in turn. First, the court will examine what law governs this action, Pennsylvania or California law, state or federal law. Turning to the question of whether the forum selection clause is enforceable, the court will determine whether an express or implied contract exists and whether there was reasonable notice of the contract's terms. The court next will examine whether the contract and its terms are unconscionable.

If the forum selection clause is enforceable, the court will address whether dismissal or transfer is the appropriate remedy, and, if transfer is appropriate, whether 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406 applies. If § 1404(a) controls, the court will determine whether the language of the forum selection clause is permissive or mandatory in order to ascertain what weight to give it. Then, the court will examine the validity or reasonableness of the forum selection clause through application of the test in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). Finally, the court will weigh the private and public factors under § 1404(a) to determine whether transfer is warranted.

II. Factual Background

A. General Background

On or about January 2003, Plaintiff, a lawyer with his own law firm, Lawrence E. Feldman & Associates, purchased advertising from Defendant Google, Inc.'s "AdWords" Program, to attract potential clients who may have been harmed by drugs under scrutiny by the U.S. Food and Drug Administration.

***232** In the AdWords program, whenever an internet user searched on the internet search engine, Google.com, for keywords or "Adwords" purchased by Plaintiff, such as "Vioxx," "Bextra," and "Celebrex," Plaintiff's ad would appear. If the searcher clicked on Plaintiff's ad, Defendant would charge Plaintiff for each click made on the ad.

This procedure is known as "pay per click" advertising. The price per keyword is determined by a bidding process, wherein the highest bidder for a keyword would have its ad placed at the top of the list of results from a Google.com search by an internet user.

Plaintiff claims that he was the victim of "click fraud." Click fraud occurs when entities or persons, such as competitors or pranksters, without any interest in Plaintiff's services, click repeatedly on Plaintiff's ad, the result of which drives up his advertising cost and discourages him from advertising. Click fraud also may be referred to as "improper clicks" or, to coin a phrase, "trick clicks." Plaintiff alleges that twenty to thirty percent of all clicks for which he was charged were fraudulent. He claims that Google required him to pay for all clicks on his ads, including

those which were fraudulent.

Plaintiff does not contend that Google actually knew that there were fraudulent clicks, but alleges that click fraud can be tracked and prevented by computer programs, which can count the number of clicks originating from a single source and whether a sale results, and can be tracked by mechanisms on websites. Plaintiff alleges, therefore, that Google had the capacity to determine which clicks were fraudulent, but did nothing to prevent the click fraud, and did not adequately warn him about click fraud or investigate his complaints about click fraud. Plaintiff alleges that Google informed him that it did not keep records on an advertiser's account and click history for more than the most recent three months, and that Google disclaimed liability for clicks older than sixty days.

The issue of click fraud with respect to the AdWords program led to a class action suit in Arkansas, which was settled and court approval was given on or about July 26, 2006. (Pl. Opp. to Mot. to Dismiss, Ex. A.) Plaintiff alleges that he was a member of that class but timely opted out in order to pursue an individual action.

Plaintiff alleges Google charged him over $100,000 for AdWords from about January 2003 to December 31, 2005. Plaintiff seeks damages, disgorgement of any profits Defendant obtained as a result of any unlawful conduct, and restitution of money Plaintiff paid for fraudulent clicks.

B. The Online Agreement and Forum Selection Clause

This cross-summary judgment battle turns entirely on a forum selection clause in the AdWords online agreement. It is undisputed that the forum selection clause provides: *"The Agreement must be* construed as if both parties jointly wrote it, governed by California law except for its conflicts of laws principles and *adjudicated in Santa Clara County, California."* (Def. Mot. to Dismiss, Ex. A, at ¶ 7 (emphasis added).)

Annie Hsu, an AdWords Associate for Google, Inc., testified by affidavit that the following procedures were in place at the time that Plaintiff activated his AdWords account in about January 2003. (Hsu Decl. ¶ 7). Although Plaintiff claims that the AdWords Agreement "was neither signed nor seen and negotiated by Feldman & Associates or anyone at his firm" (Pl. Opp. to Mot. to Dismiss at 2) and that he never "personally signed a contract ***233** with Google to litigate disputes in Santa Clara County, California" (Pl. Reply at 1), Plaintiff does not dispute that he followed the process outlined by Hsu.

It is undisputed that advertisers, including Plaintiff, were required to enter into an AdWords contract before placing any ads or incurring any charges. (Hsu Decl. ¶ 2.) To open an AdWords account, an advertiser had to have gone through a series of steps in an online sign-up process. (Hsu Decl. ¶ 3.) To activate the AdWords account, the advertiser had to have visited his account page, where he was shown the AdWords contract. (Hsu Decl. ¶ 4.)

Toward the top of the page displaying the AdWords contract, a notice in bold print appeared and stated, **"Carefully read the following terms and conditions.** If you agree with these terms, indicate your assent below." (Hsu Decl. ¶ 4.) The terms and conditions were offered in a window, with a scroll bar that allowed the advertiser to scroll down and read the entire contract. The contract itself included the pre-amble and seven paragraphs, in twelve-point font. The contract's pre-amble, the first paragraph, and part of the second paragraph were clearly visible before scrolling down to read the rest of the contract. The preamble, visible at first impression, stated that consent to the terms listed in the Agreement constituted a binding agreement with Google. A link to a printer-friendly version of the contract was offered at the top of the contract window for the advertiser who would rather read the contract printed on paper or view it on a full-screen instead of scrolling down the window. (Hsu Decl. ¶ 5.)

At the bottom of the webpage, viewable without scrolling down, was a box and the words, **"Yes,** I agree to the above terms and conditions." (Hsu Decl. ¶ 4.) The advertiser had to have clicked on this box in order to proceed to the next step. (Hsu Decl. ¶ 6.) If the advertiser did not click on **"Yes,** I agree ..." and instead tried to click the "Continue" button at the bottom of the webpage, the advertiser would have been returned to the same page and could not advance to the next step. If the advertiser did not agree to the AdWords contract, he could not activate his account, place any ads, or incur any charges. Plaintiff had an account activated. He placed ads and charges were incurred.

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B. The Online AdWords Agreement is a Valid Express Contract.

1. The Clickwrap Agreement is Enforceable.

Plaintiff contends that the online AdWords Agreement was not a valid, express contract, and that the law of implied contract applies. In support of this contention, Plaintiff argues that he did not have notice of and did not assent to the terms of the Agreement. Implying that the contract lacked definite essential terms, but failing to brief the issue, Plaintiff argues that the contract did not include fixed price terms for services. He further argues that the AdWords Agreement presented does not set out a date when Plaintiff may have entered into the contract. As to the latter argument, the unrebutted Hsu Declaration states that the AdWords Agreement and online process presented went into effect at the time that Plaintiff activated his AdWords account. (Hsu Decl. ¶ 7.) Plaintiff has not presented any evidence to the contrary, nor does he allege that any agreement he made was different from the one presented through the Hsu Declaration. Thus, there is undisputed evidence that the AdWords Agreement presented is the same that Plaintiff activated with Defendant.

"Contracts are 'express' when the parties state their terms and 'implied' when the parties do not state their terms. The distinction is based not on the contracts' legal effect but on the way the parties manifest their mutual assent." *Baer v. Chase,* 392 F.3d 609, 616 (3d Cir.2004) ***236** (citing *In re Penn. Cent. Transp. Co.,* 831 F.2d 1221, 1228 (3d Cir.1987)). "There cannot be an implied-in-fact contract if there is an express contract that covers the same subject matter." *Id.* at 616-17; *see DeJohn,* 245 F.Supp.2d at 918 (finding that implied contract claims were precluded where an enforceable express contract, an online agreement, governed the parties' relationship); *see also Crescent Int'l, Inc. v. Avatar Cmties.,* 857 F.2d 943, 944 (3d Cir.1988) ("[P]leading alternate non-contractual theories is not alone enough to avoid a forum selection clause if the claims asserted arise out of the contractual relation and implicate the contract's terms.").

[2] The type of contract at issue here is commonly referred to as a "clickwrap" agreement. A clickwrap agreement appears on an internet webpage and requires that a user consent to any terms or conditions by clicking on a dialog box on the screen in order to proceed with the internet transaction.[1] *Specht v. Netscape Comms. Corp.,* 306 F.3d 17, 22 (2d Cir.2002); Kevin W. Grierson, *Enforceability of "Clickwrap" or "Shrinkwrap" Agreements Common in Computer Software, Hardware, and Internet Transactions,* 106 A.L.R. 5th 309, § 1.a n. 3 (2004); 4-GL Computer Contracts C (2006). Even though they are electronic, clickwrap agreements are considered to be writings because they are printable and storable. *See, e.g., In re RealNetworks, Inc., Privacy Litigation,* No. 00-c-1366, 2000 U.S. Dist. LEXIS 6584, at *8-11, 2000 WL 631341, at *3-4 (N.D.Ill. May 11, 2000).

To determine whether a clickwrap agreement is enforceable, courts presented with the issue apply traditional principles of contract law and focus on whether the plaintiffs had reasonable notice of and manifested assent to the clickwrap agreement. *See, e.g., Specht,* 306 F.3d at 28-30; *Forrest v. Verizon Communications, Inc.,* 805 A.2d 1007, 1010 (D.C.2002); *Barnett v. Network Solutions, Inc.,* 38 S.W.3d 200 (Tex.App.2001); *Caspi v. Microsoft Network, L.L.C.,* 323 N.J.Super. 118, 125-26, 732 A.2d 528 (App.Div.1999); John M. Norwood, *A Summary of Statutory and Case Law Associated With Contracting in the Electronic Universe,* 4 DePaul Bus. & Comm. L.J. 415, 439-49 (2006) (discussing clickwrap cases); 1-2 Computer Contracts § 2.07 (2006) (analyzing clickwrap cases). Absent a showing of fraud, failure to read an enforceable clickwrap agreement, as with any binding contract, will not excuse compliance with its terms. *See, e.g., Specht,* 306 F.3d at 30; *Lazovick v. Sun Life Ins. Co. of Am.,* 586 F.Supp. 918, 922 (E.D.Pa.1984); *Barnett,* 38 S.W.3d at 204.

a. There was Reasonable Notice of and Mutual Assent to the AdWords Agreement.

[3] Plaintiff claims he did not have notice or knowledge of the forum selection clause, and therefore that there was no "meeting of the minds" required for contract formation. In support of this argument, Plaintiff cites *Specht v. Netscape Comms. Corp.*, in which the Second Circuit held that internet users did not have reasonable notice of the terms in an online agreement and therefore did not assent to the agreement under the facts of that case. 306 F.3d at 20, 31.

[Here, the court distinguished the present case from *Specht v. Netscape*. The arbitration clause in *Specht* was part of a "browsewrap" agreement, which merely appeared as a link on the download page, instead of a page that requires the user to affirmatively click "agree"]

***237** The facts in *Specht,* however, are easily distinguishable from this case. There, the internet users were urged to click on a button to download free software. *Id.* at 23, 32. There was no visible indication that clicking on the button meant that the user agreed to the terms and conditions of a proposed contract that contained an arbitration clause. *Id.* The only reference to terms was located in text visible if the users scrolled down to the next screen, which was "submerged." *Id.* at 23, 31-32. Even if a user did scroll down, the terms were not immediately displayed. *Id.* at 23. Users would have had to click onto a hyperlink, which would take the user to a separate webpage entitled "License & Support Agreements." *Id.* at 23-24. Only on that webpage was a user informed that the user must agree to the license terms before downloading a product. *Id.* at 24. The user would have to choose from a list of license agreements and again click on yet another hyperlink in order to see the terms and conditions for the downloading of that particular software. *Id.*

The Second Circuit concluded on those facts that there was not sufficient or reasonably conspicuous notice of the terms and that the plaintiffs could not have manifested assent to the terms under these conditions. *Id.* at 32, 35. The Second Circuit was careful to differentiate the method just described from clickwrap agreements which do provide sufficient notice. *Id.* at 22 n. 4, 32-33. Notably, the issue of notice and assent was not at issue with respect to a second agreement addressed in *Specht. Id.* at 21-22, 36. In that clickwrap agreement, when users proceeded to initiate installation of a program, "they were automatically shown a scrollable text of that program's license agreement and were not permitted to complete the installation until they had clicked on a 'Yes' button to indicate that they had accepted all the license terms. If a user attempted to install [the program] without clicking 'Yes,' the installation would be aborted." *Id.* at 21-22.

Through a similar process, the AdWords Agreement gave reasonable notice of its terms. In order to activate an AdWords account, the user had to visit a webpage which displayed the Agreement in a scrollable text box. Unlike the impermissible agreement in *Specht,* the user did not have to scroll down to a submerged screen or click on a series of hyperlinks to view the Agreement. Instead, text of the AdWords Agreement was immediately visible to the user, as was a prominent admonition in boldface to read the terms and conditions carefully, and with instruction to indicate assent if the user agreed to the terms.

That the user would have to scroll through the text box of the Agreement to read it in its entirety does not defeat notice because there was sufficient notice of the Agreement itself and clicking "Yes" constituted assent to all of the terms. The preamble, which was immediately visible, also made clear that assent to the terms was binding. The Agreement was presented in readable 12-point font. It was only seven paragraphs long-not so long so as to render scrolling down to view all of the terms inconvenient or impossible. A printer-friendly, full-screen version was made readily available. The user had ample time to review the document.

Unlike the impermissible agreement in *Specht,* the user here had to take affirmative action and click the "Yes, I agree to the above terms and conditions" button in order to proceed to the next step. Clicking "Continue" without clicking the "Yes" button would have returned the user to the same webpage. If the user did not agree to all of the terms, he could not have activated his account, placed ads, or incurred charges.

***238** The AdWords Agreement here is very similar to clickwrap agreements that courts have found to have provided reasonable notice. *See, e.g., Forrest v. Verizon Communications, Inc.,* 805 A.2d 1007, 1010-11 (D.C.2002) (holding that adequate notice was provided of clickwrap agreement terms where users had to click "Accept" to agree to the terms in order to subscribe, an admonition in capital letters was presented at the top of the agreement to read the agreement carefully, the thirteen-page agreement appeared in a scroll box with only portions visible at a time, and the forum selection clause was located in the final section and presented in lower case font); *In re RealNetworks, Inc., Privacy Litigation,* No. 00-c-1366, 2000 U.S. Dist. LEXIS 6584, at *2, 15-17, 2000 WL 631341, at *1, 5-6 (N.D.Ill. May 11, 2000) (finding reasonable notice of clickwrap agreement terms existed where the user had to agree to the terms in order to install software, the agreement came in a small pop-up window, in the same font-size as words in the computer's own display, and with the arbitration clause located at the end of the agreement); *Caspi v. Microsoft Network, L.L.C.,* 323 N.J.Super. 118, 122, 125-27, 732 A.2d 528 (App.Div.1999) (finding that reasonable notice of the terms of a clickwrap agreement was provided where the user had to click "I agree" before proceeding with registration, the agreement was presented in a scrollable window, and the forum selection clause was presented in lower case letters in the last paragraph of the agreement); *cf. Pollstar v. Gigmania Ltd.,* 170 F.Supp.2d 974, 981 (E.D.Cal.2000) (finding that reasonable notice of the terms of a browsewrap agreement was not provided when a hyperlink to the terms appeared in small gray print on a gray background).

A reasonably prudent internet user would have known of the existence of terms in the AdWords Agreement. Plaintiff had to have had reasonable notice of the terms. By clicking on "Yes, I agree to the above terms and conditions" button, Plaintiff indicated assent to the terms. Therefore, the requirements of an express contract for reasonable notice of terms and mutual assent are satisfied. Plaintiff's failure to read the Agreement, if that were the case, does not excuse him from being bound by his express agreement.