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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

STEPHANIE ABERL, on behalf of herself and all others similarly situated,

Plaintiffs,

v.

ASHLEY FURNITURE INDUSTRIES, LLC., a Wisconsin limited liability company; DOES 1 through 50, inclusive,

Defendants.

Civil No. 3:22-cv-00505-JLS-NLS

ASHLEY FURNITURE INDUSTRIES, LLC'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO COMPEL ARBITRATION

Hearing Date: August 25, 2022

Honorable Janis L. Sammartino

Courtroom 4D

Action Filed: April 13, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Plaintiff Stephanie Aberl ("Plaintiff") brought this putative class action against Defendant Ashley Furniture Industries, LLC ("Ashley") alleging that Ashley employed deceptive advertising practices relating to its e-commerce website. Ashley intends to vigorously contest those allegations, but they should proceed in arbitration on an individual basis only, as Plaintiff agreed. By clicking the "Secure Checkout" button that a consumer must click to purchase any item from Ashley, Plaintiff affirmatively acknowledged that she was "agreeing to [Ashley's] Terms of Use." Those Terms explain—in large, bold font—that Plaintiff "**agree[s] to resolve disputes through arbitration**," and only on an individual basis. The rules of the designated forum—the American Arbitration Association ("AAA")—further require the arbitration of any issues of scope or enforceability related to the arbitration agreement itself. No basis exists for Plaintiff to evade her contractual obligations. Accordingly, pursuant to Section 3 of the Federal Arbitration Act and Rule 12(b)(1) of the Federal Rules of Civil Procedure, Ashley respectfully moves for an order compelling Plaintiff to honor her arbitration agreement and dismissing or staying this case while the arbitration proceeds.

BACKGROUND

A. Plaintiff Brings Claims Regarding Her Online Purchases.

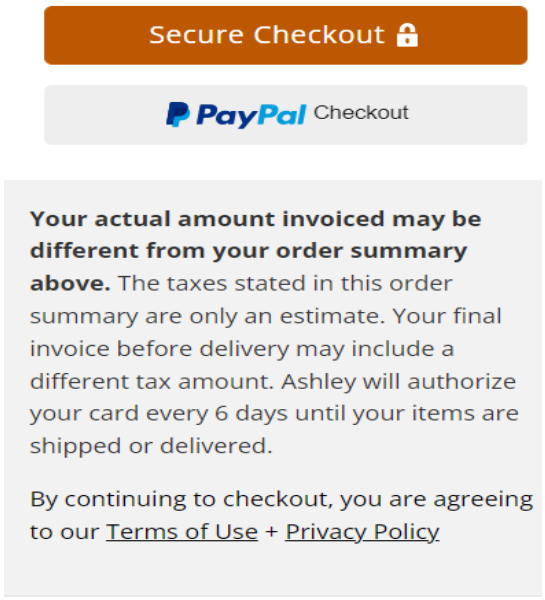
Plaintiff alleges that she "purchased a metal twin bed from Ashley Furniture's e-commerce website and the accompanying mattress/pillow set on April 13, 2020." Compl. ¶ 35 (Apr. 13, 2022), ECF No. 1.[1] At the time she made the purchase, the product on the website had "a sale price, which was at a discount from the advertised original price." *Id.* Specifically, the "Metal Twin Bed was listed on sale at $96.99" and the "reference price" (called the "original price") "was listed at $159.99." *Id.* ¶¶ 35–37. Plaintiff alleges that Ashley's higher reference price for the item was "false" because that item was "never offered for sale at the original price." *Id.* Plaintiff

[1] Defendant Ashley Furniture Industries, LLC is not the entity that was responsible at the time in question for the ecommerce site. *See* Woods Decl. ¶ 3. All defenses are hereby preserved.

allegedly "believed she was receiving a significant discount" and that she "would not have made such a purchase but for [Ashley]'s representations regarding the substantial discount being offered." *Id.* ¶ 39. Plaintiff claims that she "was damaged in her purchase" because this "false reference price discounting scheme inflated the true market value of the items they [sic] purchased." *Id.* ¶ 41.

B. Plaintiff Agreed to Arbitrate Her Claims.

When placing her online order, Plaintiff affirmatively agreed to the "Terms of Use," a contract for which the terms were posted on Ashley's website. *See* Declaration of Justin Woods ("Woods Decl.") ¶¶ 3–5; *see also* Woods Decl., Ex. B (full text of the Terms of Use). As depicted below, directly beneath the "Secure Checkout" button that a consumer must click to purchase any item from Ashley, the consumer is expressly warned that "[b]y continuing to checkout, you are agreeing to [Ashley's] Terms of Use." Woods Decl. ¶ 4. This notice includes an underlined hyperlink to the full Terms of Use:



Upon clicking on the hyperlink, a consumer would be redirected to the full text of the Terms of Use. *Id.* ¶¶ 4–5. The introduction to the Terms of Use admonishes users to "[r]ead these Terms of Use carefully and completely" and cautions to "not use the Site if you do not want to accept these Terms of Use." Woods Decl., Ex. B at 1. The Terms of Use further explain—in large, bold font—that the consumer "**agree[s] to**

resolve disputes through arbitration." *Id.* at 5 (emphasis in original). The Terms of Use specify that the consumer agrees that "**[a]ny dispute or claim relating in any way to [her] use of the Site, or to any products or services sold or distributed by [Ashley] or otherwise through the Site will be resolved by binding arbitration, rather than in court**, except that [she] may assert claims in small claims court if [her] claims qualify." *Id.* (emphasis in original). The Terms of Use also explain that both Ashley and the consumer "each agree that any dispute resolution proceedings will be conducted only on an individual basis and not in a class, consolidated or representative action." *Id.* And the Terms of Use explain that the "**arbitrator can award on an individual basis the same damages and relief as a court (including injunctive and declaratory relief or statutory damages)**." *Id*. (emphasis in original).[2]

C. Plaintiff Files Her Complaint And Opposes The Instant Motion.

Plaintiff thereafter filed this Complaint, seeking to represent a class of California consumers who "purchased from Ashley Furniture's e-commerce website, one or more products at discounts from an advertised reference price and who have not received a refund or credit for their purchase." Compl. ¶ 47. Plaintiff seeks injunctive relief, among other remedies, claiming that she may, in the future, mistakenly "purchase a falsely discounted product from [Ashley] under the impression that the advertised reference price represented a *bona fide* former price at which the item was previously offered for sale by Defendant." *Id.* ¶ 47.

[2] Pursuant to Rule 201 of the Federal Rules of Evidence, Ashley requests that the Court take judicial notice of the Terms of Use, as specified in, and authenticated by, the attached Woods Declaration. *See* Woods Decl. ¶ 5; Fed. R. Evid. 201(b); *Trudeau v. Google LLC*, 349 F. Supp. 3d 869, 876 (N.D. Cal. 2018) (taking judicial notice of publicly available terms of service containing an arbitration provision because "they are not the subject of reasonable dispute and their authenticity is not in question"), *aff'd* by 816 F. App'x 68 (9th Cir. 2020). Ashley also requests that the Court take judicial notice of the American Arbitration Association's Consumer Arbitration Rules, as specified in, and authenticated by, the attached Barnidge Declaration. *See* Barnidge Decl. ¶ 3; Fed. R. Evid. 201(b); *Harner v. USAA Gen. Indem. Co.*, 2022 WL 718489, at *2 n.2 (S.D. Cal. Mar. 10, 2022) (citing authority and taking judicial notice of arbitration rules).

During a meet-and-confer discussion on June 1, 2022, Plaintiff's counsel advised Ashley's counsel that Plaintiff intended to oppose in whole or in part the present motion to enforce the arbitration agreement. Declaration of Edward C. Barnidge ("Barnidge Decl.") ¶ 2. Plaintiff specifically cited the "*McGill* rule," in reference to *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2007), which is discussed further below. *See infra* Section III.B.

LEGAL STANDARD

Congress enacted the Federal Arbitration Act ("FAA") to "counter prevalent judicial refusal to enforce arbitration agreements," *Mortensen v. Bresnan Comm'ns, LLC*, 722 F.3d 1151, 1157 (9th Cir. 2013), and "ensure that private arbitration agreements are enforced according to their terms," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344, 347 n.6 (2011) (internal citations omitted).[3] Section 2 of the FAA provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA reflects an "emphatic federal policy in favor of arbitral dispute resolution." *KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011) (per curiam) (internal citation omitted). It "mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Kilgore v. KeyBank, N.A.*, 718 F.3d 1052, 1058 (9th Cir. 2013) (en banc) (internal citation omitted). The FAA thus "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean*

[3] There is no question that the FAA applies here. The Terms of Use specify application of the FAA, *see* Woods Decl., Ex. B at 5, and Plaintiff alleges that the Ashley Terms of Use are between citizens of different states, *see* Compl. ¶¶ 35, 45 (alleging Plaintiff is a California citizen and Ashley is a Wisconsin company); *Ayeni-Aarons v. Best Buy Credit Servs./CBNA*, 2019 WL 3943864, at *2 (E.D. Cal. Aug. 21, 2019) (interstate commerce requirement satisfied where contract containing the arbitration agreement was between citizens of different states).

Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985). And "[a]ny doubts about the scope of arbitrable issues, including applicable contract defenses, are to be resolved in favor of arbitration." *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1022 (9th Cir. 2016). It follows that courts have the authority to dismiss (or stay) such actions under Rule 12(b)(1) or Section 3 of the FAA. *Camarillo v. Balboa Thrift & Loan Ass'n*, 2021 WL 409726, at *13 (S.D. Cal. Feb. 4, 2021).

ARGUMENT

I. PLAINTIFF IS BOUND BY A VALID AGREEMENT TO ARBITRATE.

Plaintiff entered into a valid arbitration agreement with Ashley when she assented to Ashley's Terms of Use by placing her order on Ashley's website. If she did not want to agree to those Terms of Use, she could have decided to shop elsewhere.

Plaintiff confirmed in her Complaint that, after she had identified the product on Ashley's website, "she proceeded to finish checking out and purchased" the product from Ashley's website. Compl. ¶ 36. Under the "Secure Checkout" button, on which Plaintiff was required to click to complete her purchase, Ashley's website provided conspicuous notice that "[b]y continuing to checkout, you are agreeing to our Terms of Use," which is underlined to include a hyperlink to the full text of the Terms of Use. *See* Woods Decl. ¶¶ 4–5. Ashley's website is sufficient to put Plaintiff on notice of (and thus bind her to) the arbitration provision hyperlinked to that notice. Because this arbitration provision is valid, the Court should compel arbitration and dismiss this matter.

"In determining whether a valid arbitration agreement exists, federal courts 'apply ordinary state-law principles that govern the formation of contracts.'" *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014) (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). "To form a contract under California law, "there must be [m]utual manifestation of assent." *Meyer v. Uber Techns., Inc.*, 868 F.3d 66, 74 (2d Cir. 2017) (internal quotation marks omitted) (applying California law). "Mutual assent is determined under an objective standard applied to the outward

manifestations or expressions of the parties, *i.e.*, the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings." *B.D. v. Blizzard Entm't, Inc.*, 76 Cal. App. 5th 931, 943 (2022) (quoting *Sellers v. JustAnswer LLC*, 73 Cal. App. 5th 444, 460 (2021)). "If an offeree objectively manifests assent to an agreement, the offeree cannot avoid a specific provision of that agreement on the ground the offeree did not actually read it." *Id*.

In online agreements, mutual assent is determined by whether "the contractual terms were presented to the consumer in a manner that made it apparent the consumer was assenting to those very terms when checking a box or *clicking on a button*." *Sellers*, 73 Cal. App. 5th at 461 (emphasis added); *see also Wilson v. Huuuge, Inc.*, 944 F.3d 1212, 1220 (9th Cir. 2019) (explaining that even "[i]n the absence of actual knowledge," an agreement is valid if "a reasonably prudent user [would] be on constructive notice of the terms of the contract"). In other words, "[even] where the purported assent is largely passive," the "offeree is still bound by the provision if he or she is on inquiry notice of the term and assents to it through [her] conduct." *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 120 (2d Cir. 2012) (applying California law).

In assessing the sufficiency of inquiry notice, courts have distinguished between several "types of internet contract formation, most easily defined by the way in which the user purportedly gives their assent to be bound by the associated terms." *Blizzard*, 76 Cal. App. 5th at 945. In relevant part, a "browsewrap" agreement is "one in which an internet user accepts a website's terms of use merely by browsing the site"; it "does not require the user to manifest assent to the terms and conditions expressly." *Id.* In contrast, a "clickwrap" agreement is "one in which an internet user accepts a website's terms of use by clicking an 'I agree' or 'I accept' button, with a link to the agreement readily available." *Id.* In general, "clickwrap" agreements are enforceable, while "browsewrap" agreements are not. *Id.* at 947.

In between these two extremes are "blended" or "hybrid" agreements. *See, e.g. id*. at 945 (describing "sign-in wrap" agreements as one such example, whereby "a user

signs up to use an internet product or service, and the sign-up screen states that acceptance of a separate agreement is required before the user can access the service"). This case involves another type of "hybrid" agreement, whereby users are greeted with an explicit textual notice located near an "action" button on which they are required to click.[4] Although the "[c]lassification of web-based contracts alone . . . does not resolve the [issue of legally sufficient] notice inquiry," *Sellers*, 73 Cal. App. 5th at 466 (alterations in original), such classification is helpful to determine where on the spectrum a "hybrid" agreement may fall. In this "fact-intensive inquiry," courts consider "the size, color, contrast, and location of any text notices; the obviousness of any hyperlinks; and overall screen 'clutter.'" *Blizzard*, 76 Cal. App 5th at 947.

Courts in this Circuit have upheld the validity of "hybrid" agreements like the one at issue here. In *Lee v. Ticketmaster L.L.C.*, for example, the Ninth Circuit held that a consumer validly assented to Ticketmaster's Terms of Use that included an arbitration provision. 817 F. App'x 393, 394 (9th Cir. 2020). Ticketmaster's website required users to "Sign In" to their account before purchasing any tickets. *Id.* To do so, users were required to click on a "Sign In" button, "three lines below" which contained an explicit textual notice that "[b]y continuing past this page, you agree to our Terms of Use." *Id.* The Terms of Use did "not constitute a browsewrap agreement because they are not merely posted on Ticketmaster's website at the bottom of the screen," but they also did not constitute a "true pure-form clickwrap agreement . . . because Ticketmaster does not require users to click a separate box indicating that they agree to its Terms." *Id.* Nonetheless, the Ninth Circuit held that this hybrid agreement "provided sufficient notice for constructive assent," thereby creating "a binding

[4] This agreement is "hybrid" because unlike "clickwrap" agreements, users are *not* required to click a separate box indicating that they agree to certain terms, but unlike "browsewrap" agreements, users *are* required "to affirmatively acknowledge the agreement before proceeding" or are greeted with "an explicit textual notice that continued use will act as a manifestation of the user's intent to be bound." *Nguyen*, 763 F.3d at 1177.

arbitration agreement," because "Ticketmaster's website required users to affirmatively acknowledge the agreement before proceeding [to Sign In], and the website contain[ed] an explicit textual notice that continued use will act as a manifestation of the user's intent to be bound." *Id.* at 395 ("[The user] cannot avoid the terms of [the] contract on the ground that he . . . failed to read it before signing [in].").

The Ninth Circuit similarly affirmed the validity of another hybrid agreement in *Wiseley v. Amazon.com, Inc.*, 709 F. App'x 862 (9th Cir. 2017), another pricing case involving claims similar to Plaintiff's here. There, the online checkout page contained a "Place your order" button accompanied by a hyperlinked warning at the top of the page that "[b]y placing your order, you agree to Amazon.com's privacy notice and conditions of use." *Fagerstrom v. Amazon.com, Inc.*, 141 F. Supp. 3d 1051, 1057–58, 1068 (S.D. Cal. 2015) (alteration and citation omitted), *aff'd* by *Wiseley*, 709 F. App'x at 862. Even though the hyperlinked warning was at the top of the page, and not directly next to the "Place your order" button on the checkout page, the Ninth Circuit held that the notice sufficiently "alerted [the consumer] that clicking the corresponding action button constituted agreement to the hyperlinked [conditions of use]" and was "in sufficient proximity to give [the consumer] a 'reasonable opportunity to understand' that he would be bound by additional terms." *Wiseley*, 709 F. App'x at 864. According to the Ninth Circuit, these circumstances constituted sufficient notice for the consumer, and the conditions of use—which included an arbitration provision—were valid and enforceable. *Id.* (affirming order granting motion to compel arbitration).[5]

[5] Courts in other circuits agree with this approach to such "hybrid" agreements. *See, e.g.*, *Meyer*, 868 F.3d at 76 (applying California contract law and holding that hyperlinked Terms of Service appearing below the "Register" button, on which users were required to click, provided sufficient notice in light of warning that "[b]y creating an Uber account, you agree to the TERMS OF SERVICE"); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 835 (S.D.N.Y. 2012) (finding notice sufficient where hyperlinked Terms of Service appeared below the required "Sign Up" button).

Here, Ashley's notice is virtually identical to the one deemed sufficient in *Lee*, and even more conspicuous than the one deemed sufficient in *Wiseley*. In *Lee*, the notice was located below an "action" button on which the user was required to click to proceed, 817 F. App'x at 393, and in *Wiseley*, the notice sat at the top of the page, relatively separated from the required "action" button, 709 F. App'x at 864. *Compare* Woods Decl., Ex. A (depiction of Ashley's notice), *with* Barnidge Decl., Ex. B at SER004 (depiction of notice in *Lee*), *and* Barnidge Decl., Ex. C at 28 (depiction of notice in *Wiseley*). Ashley's notice is located only a few lines beneath the "Secure Checkout" button, on which the user is required to click to proceed with her purchase, so it is certainly within the area "where the consumer's attention would necessarily be focused." *Blizzard*, 76 Cal. App. 5th at 948. Not only is the text comparable in size to the surrounding text, but it contains an underlined hyperlink that stands out from the rest of the text. Furthermore, the notice is not lost in "screen clutter," as the text is clearly distinguished by its own paragraph indentation. These circumstances are sufficient to put a reasonable person on notice that she agrees to the hyperlinked Terms of Use by clicking on the nearby "Secure Checkout" button to place an order—indeed, the notice explicitly informs the consumer that "[b]y continuing to checkout, you are agreeing to our Terms of Use." *See Nguyen*, 763 F.3d at 1177 ("[W]here the website contains an explicit textual notice that continued use will act as a manifestation of the user's intent to be bound, courts have been more amenable to enforcing browsewrap agreements.").

Courts in this Circuit have consistently compelled arbitration under similar circumstances where such notice provisions were employed. *See, e.g.*, *Guadagno v. E*Trade Bank*, 592 F. Supp. 2d 1263, 1271 (C.D. Cal. 2008); *Ticketmaster LLC v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096, 1107 (C.D. Cal. 2007); *Adibzadeh v. Best Buy, Co. Inc.*, 2021 WL 4440313, at *5 (N.D. Cal. Mar. 2, 2021); *accord Bilzzard* 76 Cal. App 5th at 947. As noted in the introduction to the Terms of Use themselves, Plaintiff should

"not [have] use[d] the Site if [she] d[id] not want to accept these Terms of Use." Woods Decl., Ex. B at 1.

II. THE PARTIES CLEARLY AND UNMISTAKABLY DELEGATED TO THE ARBITRATOR ANY ISSUES OF ARBITRABILITY, INCLUDING SCOPE AND ENFORCEABILITY.

Once this Court finds that the parties agreed to be bound by the arbitration provision contained within the Ashley Terms of Use, it must compel Plaintiff to arbitration. Questions as to the scope or enforceability of that provision must be addressed by the arbitrator—not this Court—because the parties "clearly and unmistakably" delegated issues of arbitrability to the arbitrator. *See Portland Gen. Elec. Co. v. Liberty Mut. Ins. Co.*, 862 F. 3d 981, 985–86 (9th Cir. 2017) (finding that the district court erred by enjoining arbitration under the FAA and by preventing the arbitrator from addressing the scope of arbitration when parties delegated such authority to the arbitrator). These issues of arbitrability include (a) whether the arbitration agreement encompasses Plaintiff's claims, and (b) whether California law renders any portion of the arbitration agreement unenforceable by virtue of the "*McGill* rule."

The parties clearly and unmistakably delegated authority to the arbitrator by incorporating the AAA Rules. The arbitration provision in the Ashley Terms of Use states, in relevant part, that "[t]he arbitration will be conducted by the American Arbitration Association (AAA) under its rules, including the AAA's Supplementary Procedures for Consumer-Related Disputes." Woods Decl., Ex. B at 5. According to R-14(a) of the AAA Rules, "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." Barnidge Decl., Ex. A ("AAA Rules").

"Virtually every circuit to have considered the issue"—including the Ninth Circuit—"has determined that incorporation of the [AAA] arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013). In *Brennan*

v. Opus Bank, for example, the Ninth Circuit affirmed the dismissal of a case in favor of arbitration because the parties "clearly and unmistakably delegated to an arbitrator the question whether the Arbitration Clause was enforceable by expressly incorporating the AAA arbitration rules." 796 F.3d 1125, 1130 (9th Cir. 2015).[6] Since *Brennan*, district courts in this Circuit routinely hold that incorporation of the AAA Rules constitutes clear and unmistakable evidence of the parties' intent to delegate issues of arbitrability.[7] That delegation includes deciding challenges under the *McGill* rule, discussed below. *See, e.g.*, *Ramirez v. Elec. Arts Inc.*, 2021 WL 843184, at *4 (N.D. Cal. Mar. 5, 2021) (holding that via incorporation of the AAA Rules "[t]he issue presented here—whether the Arbitration Provision is unenforceable because it improperly limits the right to seek public injunctive relief [under the *McGill* rule]—is clearly a matter regarding the validity of the Arbitration Provision"); *Cooper v. Adobe Sys. Inc.*, 2019 WL 5102609, at *6 (N.D. Cal. Oct. 11, 2019) (holding in CLRA and UCL case that it is for the arbitrator to decide consumer's *McGill* challenge because

[6] While the panel in *Brennan* limited its holding to "the facts of the present case, which do involve an arbitration agreement between sophisticated parties," it explicitly noted that "the vast majority of the circuits that hold that incorporation of . . . AAA rules constitutes clear and unmistakable evidence of the parties' intent do so without explicitly limiting that holding to sophisticated parties or to commercial contracts." *Brennan*, 796 F.3d at 1130–31 (cautioning that its holding "should not be interpreted to require that the contracting parties be sophisticated or that the contract be 'commercial'"); *see also Miller v. Time Warner Cable Inc.*, 2016 WL 7471302, at *5 (C.D. Cal. Dec. 27, 2016) ("[T]he greater weight of authority has concluded that the holding of [*Brennan*] applies similarly to non-sophisticated parties.").

[7] *See, e.g.*, *Taylor v. Shutterfly, Inc.*, 2018 WL 4334770, at *6 (N.D. Cal. Sept. 11, 2018) ("[I]ncorporation of AAA rules . . . is further evidence that shows the parties' intent to delegate to the arbitrator."); *Johnson v. Oracle Am. Inc.*, 2017 WL 8793341, at *6–9 (N.D. Cal. Nov. 17, 2017) (enforcing arbitration agreement that incorporated AAA and JAMS rules); *Caviani v. Mentor Graphics Corp.*, 2019 WL 4470820, at *4 (N.D. Cal. Sept. 18, 2019) (explaining that "[i]n [the Ninth] Circuit, incorporation of, *e.g.*, JAMS rules by reference is generally sufficient to provide a basis for . . . a finding" that there is a clear and unmistakable agreement to delegate the question of arbitrability to the arbitrator).

arbitration agreement incorporated arbitration rules). Accordingly, to the extent Plaintiff intends to challenge the scope or enforceability of the parties' valid arbitration agreement—including under *McGill*—such issues were clearly and unmistakably delegated to the arbitrator and arbitration is the proper forum to address them.

III. EVEN IF THE COURT HAD THE AUTHORITY TO DECIDE ISSUES OF ARBITRABILITY, PLAINTIFF'S CHALLENGES FAIL.

Alternatively, even if the Court were to determine that the parties did not delegate to the arbitrator such issues of arbitrability, any challenges relating to the scope or enforceability of the arbitration agreement would fail. First, in regard to scope, the parties' broad arbitration provision easily encompasses Plaintiff's claims. Second, in regard to enforceability, the "*McGill* rule" is inapplicable because Plaintiff can pursue an injunction that benefits the public in arbitration. Neither of these issues prevents the Court from compelling Plaintiff to honor the terms in the arbitration agreement.

A. The Arbitration Agreement Encompasses Plaintiff's Claims at Issue.

The broad arbitration agreement at issue here—covering "[a]ny dispute or claim relating in any way to [Plaintiff's] use of the Site, or to any products or services sold or distributed by [Ashley] or otherwise through the Site," Woods Decl., Ex. B at 5 (emphasis omitted)—clearly encompasses Plaintiff's claims. "The standard for demonstrating arbitrability is not high." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719 (9th Cir. 1999). "[Plaintiff's] factual allegations need only 'touch matters' covered by the contract." *Id.* at 721, 723 (internal citation omitted). Further, in keeping with the FAA's "liberal federal policy favoring arbitration agreements," the Supreme Court mandates that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). It is well-established that arbitration agreements that include "relating to" language, like this one, are broad in scope. *See, e.g.*, *Cape Flattery Ltd. v. Titan Mar., LLC*, 647 F.3d 914, 922 (9th Cir. 2011) (explaining that "broad arbitration provision[s]" with language such as "arising out of or relating to" demonstrate an

intention to cover a broader scope of disputes); *Simula*, 175 F.3d at 721, 723 (holding that false advertising claims are within the scope of arbitration clause and explaining that "[e]very court that has construed the phrase 'arising in connection with' in an arbitration clause has interpreted that language broadly").[8]

Plaintiff's allegations here are encompassed by the arbitration agreement for two independent reasons. *First*, Plaintiff bases her claims on the pricing disclosures made on Ashley's website. Plaintiff alleges that "Ashley Furniture's e-commerce website" advertised the items that Plaintiff purchased "as having an original price that was higher than the sale price." Compl. ¶ 35. Plaintiff claims that "[a]fter observing the original price of the item and the accompanying the [sic] sale price, Plaintiff believed she was receiving a significant discount" and "proceeded to finish checking out and purchased the [item]." *Id.* ¶ 36; *see also id.* ¶ 39 ("Plaintiff reasonably relied upon Defendant's artificially inflated reference prices and false discounts when purchasing the product from Defendant's e-commerce website. Plaintiff would not have made such a purchase but for Defendant's representations regarding the substantial discount being offered for the product."). Because Plaintiff allegedly relied on these online prices as purportedly deceptive statements, the claims clearly "relate to" her "use of the Site." Woods Decl., Ex. B at 5; *see, e.g.*, *Wiseley*, 709 F. App'x at 864 (compelling arbitration in case alleging deceptive pricing practices); *Burgoon v. Narconon of N. Cal.*, 125 F. Supp. 3d 974, 987–88 (N.D. Cal. 2015) (holding that scope of arbitration provision—any "claim

[8] *See also Tice v. Amazon.com, Inc.*, 845 F. App'x 535, 537 (9th Cir. 2021) (reversing district court that "narrowly construed the arbitration clause[]" with language encompassing "any dispute or claim relating in any way to" the agreement); *Moonpath Enters. Ltd. v. Joint Stock Holding Co. Dalmoreproduct*, 92 F. App'x 388, 389 (9th Cir. 2003) ("When inclusive phrasing such as 'issues arising hereunder' or 'in connection herewith' is used, 'every dispute between the parties having a significant relationship to the contract regardless of the label attached to the dispute' should be sent to arbitration." (quoting *Simula*, 175 F.3d at 720)); *Haas v. J.A. Cambece L. Off., P.C.*, 2006 WL 8455381, at *4 (S.D. Cal. Apr. 5, 2006) (granting motion to compel arbitration where the "extremely broad" scope of the arbitration clause included the language "relating in any way to this Agreement").

arising out of, relating to or involving this Agreement"—included false advertising claims because defendant's advertising was "designed to induce a person to enter into [the] agreement"); *Harbers v. Eddie Bauer, LLC*, 2019 WL 6130822, at *1, 8 (W.D. Wash. Nov. 19, 2019) (compelling arbitration in "false discount advertising" case because "arbitration agreement applies to all of [consumer's] claims and encompasses her 2016 purchase").

Second, Plaintiff's claims involve the price of "products . . . sold or distributed . . . through the Site." Woods Decl., Ex. B at 5. The Complaint specifies that Plaintiff purchased the items at issue "from Ashley Furniture's e-commerce website" and made the purchase "through the website, Ashleyfurniture.com." Compl. ¶ 35. In so doing, Plaintiff agreed to arbitrate any claims relating to the purchase of such products. *See, e.g.*, *Crosby v. Amazon.com Inc.*, No. 220CV08003SVWJPR, 2021 WL 3185091, at *3 (C.D. Cal. Apr. 19, 2021) ("Plaintiffs' [UCL , FAL, and CLRA] claims relate to purchases on Amazon.com, placing their claims squarely within the scope of the arbitration agreement [involving '[a]ny dispute or claim relating in any way to . . . any products or services sold or distributed by Amazon'].");*Taylor v. Shutterfly, Inc.*, 2018 WL 4334770, at *8 (N.D. Cal. Sept. 11, 2018) (compelling arbitration where consumer's false advertising claims were "based on her purchase and use of [defendant]'s services"). Accordingly, if the Court were to reach the issue, Plaintiff's claims fall squarely within the arbitration agreement's ambit.

B. The *McGill* Rule Does Not Apply Because Plaintiff May Seek "Public Injunctive Relief" in Arbitration.

Plaintiff cannot escape her contractual obligation to arbitrate by relying on the *McGill* rule. To the contrary, because the arbitration provision does not prohibit Plaintiff from obtaining injunctive relief through arbitration, the *McGill* rule is not implicated.

"In *McGill*, the California Supreme Court held that no one can contractually waive all rights to seek public injunctive relief." *DiCarlo v. MoneyLion, Inc.*, 988 F.3d

1148, 1152–53 (9th Cir. 2021) (citing *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2007)). "Public injunctive relief" is "relief that by and large benefits the general public . . . and that benefits the plaintiff, if at all, only incidentally and/or as a member of the general public." *Id*. at 1152. Because the arbitration provision at issue in *McGill* prevented the plaintiff from seeking a public injunction in all fora, it was found to be unenforceable. *McGill*, 2 Cal. 5th at 945.

Where, as here, however, the arbitration agreement does *not* prevent the arbitrator from issuing an injunction to the benefit of the public, it does not violate *McGill*. In a lengthy opinion analyzing this very question in the context of a false advertising suit, the Ninth Circuit concluded that an arbitration provision that authorized the arbitrator to "award all injunctive remedies available in an individual lawsuit under California law" did not violate *McGill*. *See DiCarlo*, 988 F.3d at 1153–58 (internal citations omitted). The *DiCarlo* panel specifically rejected the argument that requiring a plaintiff to arbitrate on an "individual" basis somehow meant that that the plaintiff could not seek "public" injunctive relief in violation of *McGill*. *Id*. (recognizing that injunction against allegedly false advertising would have "enormous impact on others" even if only brought by an individual plaintiff). So too, here. Although Plaintiff must arbitrate "on an individual basis" pursuant to unambiguous terms of the arbitration provision, the arbitrator has the authority to award "the same damages and relief as a court (including *injunctive* and declaratory relief or statutory damages)" on Plaintiff's individual claims. Woods Decl., Ex. B at 5 (emphasis added) (bold omitted). That is, although Plaintiff cannot proceed in a "representative" capacity to obtain relief on behalf of others, the requested injunction would still inure to the benefit of others. Because Plaintiff thus "can seek public injunctive relief in either court or arbitration," and can seek such relief in arbitration here, "then the arbitration agreement cannot be invalidated under the *McGill* rule." *Magill v. Wells Fargo Bank*, 2021 WL 6199649, at *6 (N.D. Cal. June 25, 2021) (relying on *DiCarlo* and compelling arbitration); *accord Hill v. BBVA USA*,

2021 WL 2206477, at *3 (S.D. Cal. June 1, 2021) (same); *Crosby v. Amazon.com Inc.*, 2021 WL 3185091, at *2 (C.D. Cal. Apr. 19, 2021) (same).

Nor is it even clear that the Complaint seeks public injunctive relief. The Complaint's "prayer for relief" does not seek it by name or substance; it instead asks the Court for relief for a particular group of individuals. Compl. at 24 (asking the Court to "enjoin[] Defendant from continuing the unlawful practices as set forth herein, and *directing Defendant to identify*, with Court supervision, *victims of its misconduct* and pay them all money they are required to pay" (emphasis added)). Claims that primarily benefit only "a group of individuals similarly situated to the plaintiff," do not implicate the *McGill* rule. *Hodges v. Comcast Cable Commc'ns, LLC*, 21 F.4th 535, 548-49 (9th Cir. 2021).

Finally, although Ashley acknowledges the Ninth Circuit precedent holding that the FAA does not preempt the *McGill* rule, *see Blair v. Rent-A-Center, Inc.*, 928 F.3d 819 (9th Cir. 2019), it expressly preserves its contention that the issue was wrongly decided. The *McGill* rule is the most recent in a line of California doctrines that "conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms." *Concepcion*, 563 U.S. at 347 n.6; *see also, e.g.*, *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Perry v. Thomas*, 482 U.S. 483 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

IV. THE CASE SHOULD BE DISMISSED OR, ALTERNATIVELY, STAYED.

When a court determines that all of a plaintiff's claims are subject to arbitration, it "may either stay the action or dismiss it outright." *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1073–74 (9th Cir. 2014). Because the parties' arbitration agreement is valid and all issues of arbitrability have been clearly and unmistakably delegated to the arbitrator, Ashley requests that the Court dismiss this action. *See Lowen v. Lyft, Inc.*, 129 F. Supp. 3d 945, 966 (N.D. Cal. 2015) (recognizing discretion to dismiss case and doing so when "[n]either side has presented any

compelling reason to keep this case on the Court's docket"). Alternatively, in the event that the Court were to assess issues of arbitrability and determine that any of Plaintiff's claims belong in court, Ashley requests that the Court compel Plaintiff to arbitrate her claims while severing and staying any non-arbitrable remedy.

CONCLUSION

For the foregoing reasons and pursuant to Section 3 of the Federal Arbitration Act and Rule 12(b)(1) of the Federal Rules of Civil Procedure, Ashley respectfully requests that the Court compel arbitration on an individual basis and dismiss this matter (or stay it pending arbitration).

Dated: July 11, 2022

By: /s/ Carol J. Pruski
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