GREENBERG TRAURIG, LLP
Robert J. Herrington (SBN 234417)
HerringtonR@gtlaw.com
Michael E. McCarthy (SBN 301010)
MccarthyMe@gtlaw.com
1840 Century Park East, Suite 1900
Los Angeles, CA 90067-2121
Telephone: 310-586-7700
Facsimile: 310-586-7800

Attorneys for Defendant
SAMSUNG ELECTRONICS AMERICA, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Nic Dahlquist, individually and on behalf of all others similarly situated,

Plaintiff,

v.

Samsung Electronics America, Inc.,

Defendant.

CASE NO. 5:22-cv-00402-JWH-SP

DEFENDANT SAMSUNG ELECTRONICS AMERICA, INC.'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION

Declaration of Nicole Cantwell; [Proposed] Order Filed Concurrently

Hearing Date: September 23, 2022
Hearing Time: 9:00 a.m.
Courtroom: 9D, 9th Floor

Assigned to Hon. John W. Holcomb
Action filed March 4, 2022

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 23, 2022, at 9:00 a.m., in Courtroom 9D of the above-captioned Court, located at 411 W. 4th Street, Santa Ana, California 92701, Defendant Samsung Electronics America, Inc. ("SEA") will move, and hereby does move, this Court for an order compelling individual arbitration of the claims of Plaintiff Nic Dahlquist and staying this action pending the outcome of arbitration.

Plaintiff Dahlquist's Galaxy Watch Active2 ("Watch") came with conspicuous Terms and Conditions, including an Arbitration Agreement. The exterior of Dahlquist's Watch box informed him that opening the package, using the device, or retaining the device constituted acceptance of the Arbitration Agreement. Right after opening the box, a short guide informed Dahlquist of the Arbitration Agreement again, and that use or retention of the device constituted acceptance. Dahlquist opened the Watch box, used the device, and retained it. He also confirmed in writing to SEA that he reviewed the guide. And although he had the right to do so, he did not opt out of arbitration. He thus affirmatively accepted the Terms and Conditions, including the Arbitration Agreement.

All arbitrability questions have been delegated to the Arbitrator. In any event, the broad Arbitration Agreement encompasses all disputes relating to or arising from the sale, condition, or performance of Dahlquist's Watch, and Dahlquist's claims based on the allegation that the Watch was not water-resistant fall within the Arbitration Agreement. Under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*., the Court should compel arbitration. This action also should be stayed pending the outcome of arbitration. 9 U.S.C. § 3.

This Motion is filed under the Court's Orders dated May 18 and July 5, 2022 (Docs. 15, 21), which set July 15, 2022 as the deadline for SEA to file this Motion, with any further response by SEA to Plaintiff's First Amended Complaint, if necessary, due 21 days after the Court enters an Order deciding this Motion. This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the concurrently filed Declaration of Nicole Cantwell, all pleadings and files, all matters of which this Court

may take judicial notice, and upon such other oral or documentary evidence as may be presented to the Court at or before the hearing on this Motion.

This Motion is made following the conference of counsel under Civil Local Rule 7-3, which took place on June 24, 2022.

Respectfully submitted,

Dated: July 15, 2022

GREENBERG TRAURIG, LLP

By: s/ *Robert J. Herrington*
Robert J. Herrington (SBN 234417)
Attorneys for Defendant
Samsung Electronics America, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Plaintiff Nic Dahlquist ("Dahlquist") filed suit alleging that his Samsung Galaxy Watch Active2 ("Watch") stopped working after using it in a pool. But his claims do not belong in court because he agreed to arbitration. On the outside of the box containing the Watch, SEA conspicuously informed Dahlquist that opening the package, using the device, or retaining the device constituted acceptance of "Terms and Conditions" that included an "Arbitration Agreement":

> **IMPORTANT INFORMATION:** If you open the package, use or retain the device, you accept Samsung's Terms and Conditions, including an Arbitration Agreement. Full terms, warranty and opt-out information are at www.samsung.com/us/Legal/Gear-HSGuide, the enclosed materials & device settings.

(Declaration of Nicole Cantwell ("Cantwell Decl.") ¶¶ 7-10, Exs. A-B.)

Upon opening the box, Dahlquist received a 4-page guide placed on top of his Watch titled "Terms and Conditions," telling him in bold:

> **Read this document before operating the mobile device, accessories, or software (defined . . . as the "Product") and keep it for future reference. This document contains important Terms and Conditions. Electronic acceptance, opening the packaging, use, or retention of the Product constitutes acceptance of these Terms and Conditions.**

(Cantwell Decl. ¶¶ 17-21, Exs. D-F.) The first page of the guide spotlighted the Arbitration Agreement again, repeated where it could be found, and notified Dahlquist that he could opt out. (*Id.* ¶ 19, Exs. E-F.) The next page provided tips for using the Watch in water. (*Id.* ¶ 20, Exs. E-F.) And when Dahlquist contacted SEA about his Watch, he told SEA that *he* had reviewed the guide. (*Id.* ¶ 31, Exs. H-I.) Thus, his own statements confirm that he was on notice of the Arbitration Agreement.

SEA also posted the Terms and Conditions on its website, which consumers like

Dahlquist could access before and after buying their devices. (Cantwell Decl. ¶¶ 11-16, Ex. C.) In addition, the User Manual for the device, which was online, provided notice of the Arbitration Agreement on the same page that it provided tips about using the device in water. (*Id.* ¶ 22, Ex. G.)

To establish formation, SEA need only show that (1) a reasonably prudent user had inquiry notice of the Arbitration Agreement, and (2) Dahlquist manifested assent through his conduct. *See, e.g.*, *Hart v. Charter Commc'ns, Inc.*, 814 F. App'x 211, 213-14 (9th Cir. 2020) (applying California law) (plaintiff bound by arbitration agreement because she had inquiry notice and accepted defendant's services); *In re Samsung Galaxy Smartphone Mktg. & Sales Practices Litig.*, 298 F. Supp. 3d 1285, 1293 (N.D. Cal. 2018) ("*In re Samsung Galaxy Litig.*") ("[B]ecause each Plaintiff's use of his or her phone can demonstrate acceptance, the critical issue here is whether Plaintiffs were on notice of the arbitration clause."); *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 74-75 (2d Cir. 2017) (applying California law) ("[T]he offeree will still be bound by the agreement if a reasonably prudent user would be on *inquiry notice* of the terms.") (emphasis added). As shown, SEA provided notice of the Arbitration Agreement and the conduct equaling acceptance everywhere a reasonable consumer might be expected to look. And Dahlquist assented by: (1) opening the Watch box after the packaging told him that doing so constituted acceptance; (2) using and keeping his Watch after being told repeatedly that doing so constituted acceptance; and (3) not opting out of arbitration despite conspicuous notice of his right to do so. Thus, SEA has established formation. *See, e.g.*, *Vasadi v. Samsung Elecs. Am., Inc.*, 2021 WL 5578736, at *9 (D.N.J. Nov. 29, 2021) (compelling plaintiffs from California and twelve other states to arbitrate based on virtually identical product packaging).[1]

[1] Dahlquist also must arbitrate because his allegations are "founded in and intertwined with" the Watch's Terms and Conditions. *Stiner v. Brookdale Senior Living, Inc.*, 810 F. App'x 531, 534 (9th Cir. 2020). His claims arise from and depend on the Standard Limited Warranty for the Watch. (*See, e.g.*, First Amended Complaint [Doc. 17] ("FAC") ¶¶ 64, 82-84, 106-108, 151, 172, 211-213, 218, 224, 243-244, 247.) The Warranty and Arbitration Agreement are part of the Terms and Conditions, and Dahlquist cannot choose which Terms apply. (*See* Section III.C, *infra*.)

All other issues have been delegated to the arbitrator, including arbitrability. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) ("When the parties' contract delegates the arbitrability question to an arbitrator . . . a court possesses *no power* to decide the arbitrability issue.") (emphasis added). In any event, the Arbitration Agreement is broad—providing that all disputes relating to or arising from the sale, condition, or performance of the Watch are subject to arbitration—easily covering Dahlquist's claims. Thus, the Court should compel Dahlquist to arbitrate his claims on an individual basis and stay this action. 9 U.S.C. §§ 2, 3.

II. STATEMENT OF FACTS

A. Dahlquist's allegations confirm he must arbitrate his claims.

Nic Dahlquist, a California resident, alleges his Watch did not perform in water up to his expectations. (FAC ¶¶ 36, 103-106.) He alleges he bought his device from Amazon.com in June 2021. (*Id.* ¶ 99.) About six months later, he claims the device "became stuck in a reboot loop" following use in water, and that SEA declined to repair the device under warranty. (*Id.* ¶¶ 102-107.) Based on these allegations, Dahlquist asserts claims under California's Unfair Competition Law, False Advertising Law, and Consumers Legal Remedies Act, and for unjust enrichment, breach of express warranty, violation of the Magnuson-Moss Warranty Act, and breach of the implied warranties of merchantability and fitness for a particular purpose. (*Id.* ¶¶ 144-261.) All Dahlquist's claims are subject to arbitration.

B. SEA provided conspicuous notice of the Arbitration Agreement to Dahlquist, including on the outside of the box.

Galaxy Watch Active2 devices like Dahlquist's are packaged in a box with external labeling providing information about the device. (Cantwell Decl. ¶¶ 7-10, Exs. A-B.) On the outside of the box, SEA informed consumers using a bold, all-caps "IMPORTANT INFORMATION" header that opening the package, using the device, or retaining the device constitutes acceptance of the Terms and Conditions, including the Arbitration Agreement:

IMPORTANT INFORMATION: If you open the package, use or retain the

> device, you accept Samsung's Terms and Conditions, including an Arbitration Agreement. Full terms, warranty and opt-out information are at www.samsung.com/us/Legal/Gear-HSGuide, the enclosed materials & device settings.

(*Id.* ¶¶ 8-10, Exs. A-B) (emphasis in original).

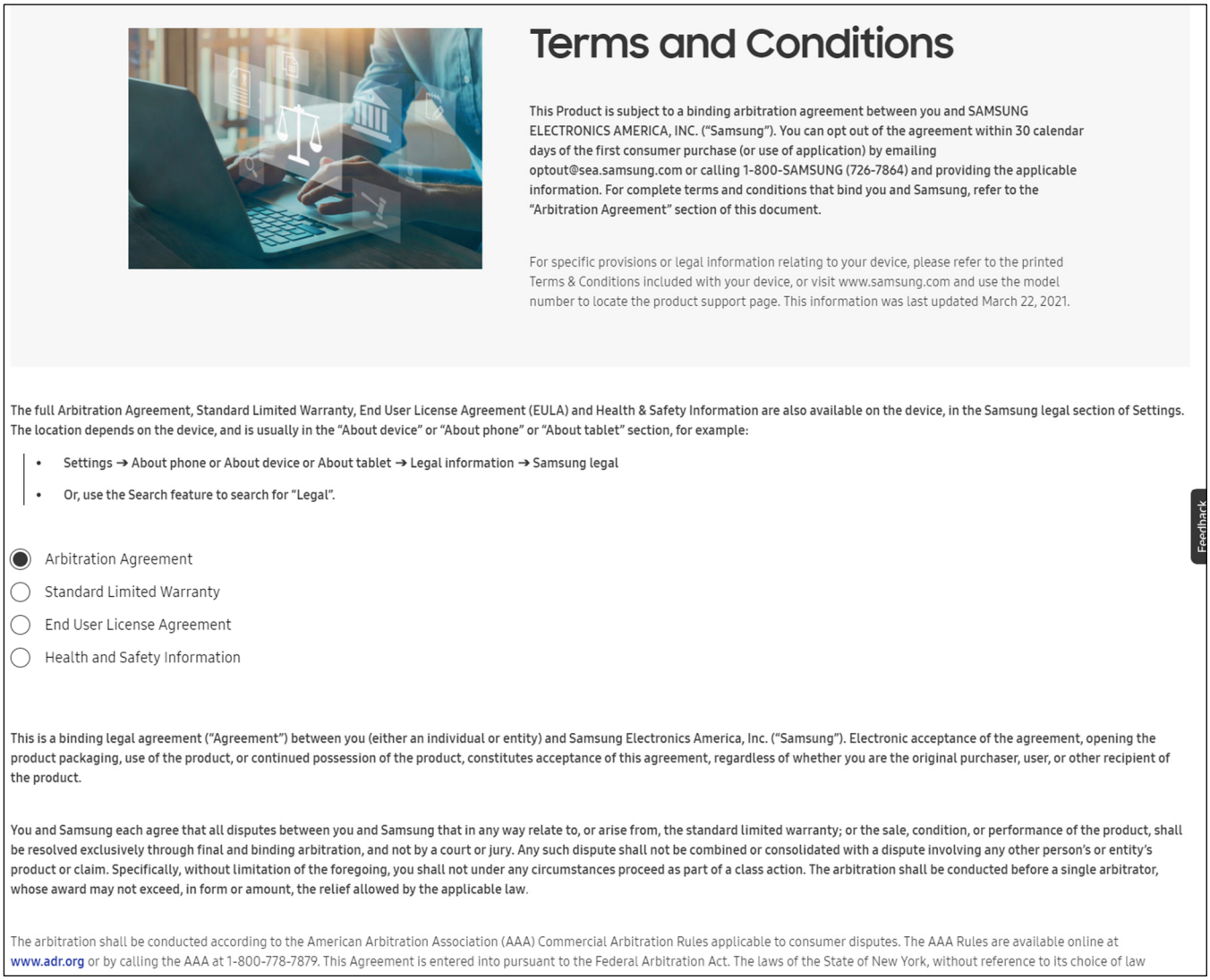
C. The URL on the outside of the Galaxy Watch Active2 box led directly to a full copy of the Arbitration Agreement.

The URL provided on the box for Dahlquist's Watch led directly to the full Arbitration Agreement. (Cantwell Decl. ¶¶ 11-16, Ex. C.) At the time of Dahlquist's alleged purchase, the website, titled "Terms & Conditions," began by informing consumers:

> **This Product is subject to a binding arbitration agreement between you and SAMSUNG ELECTRONICS AMERICA, INC. ("Samsung"). You can opt out of the agreement within 30 calendar days of the first consumer purchase (or use of application) by emailing optout@sea.samsung.com or calling 1-800-SAMSUNG (726-7864) and providing the applicable information. For complete terms and conditions that bind you and Samsung, refer to the "Arbitration Agreement" section of this document.**

(*Id.* ¶ 13, Ex. C) (emphasis in original).

Directly beneath, when users clicked on the bubble next to "Arbitration Agreement," they were provided a full, stand-alone copy of the Agreement, which is featured as the first item in the Terms and Conditions. (*Id.* ¶¶ 14-16, Ex. C.) A screenshot of the beginning portion of the scrollable copy of the Arbitration Agreement is on the next page:



Terms and Conditions

This Product is subject to a binding arbitration agreement between you and SAMSUNG ELECTRONICS AMERICA, INC. ("Samsung"). You can opt out of the agreement within 30 calendar days of the first consumer purchase (or use of application) by emailing optout@sea.samsung.com or calling 1-800-SAMSUNG (726-7864) and providing the applicable information. For complete terms and conditions that bind you and Samsung, refer to the "Arbitration Agreement" section of this document.

For specific provisions or legal information relating to your device, please refer to the printed Terms & Conditions included with your device, or visit www.samsung.com and use the model number to locate the product support page. This information was last updated March 22, 2021.

The full Arbitration Agreement, Standard Limited Warranty, End User License Agreement (EULA) and Health & Safety Information are also available on the device, in the Samsung legal section of Settings. The location depends on the device, and is usually in the "About device" or "About phone" or "About tablet" section, for example:

- Settings → About phone or About device or About tablet → Legal information → Samsung legal
- Or, use the Search feature to search for "Legal".

Feedback

(●) Arbitration Agreement
( ) Standard Limited Warranty
( ) End User License Agreement
( ) Health and Safety Information

This is a binding legal agreement ("Agreement") between you (either an individual or entity) and Samsung Electronics America, Inc. ("Samsung"). Electronic acceptance of the agreement, opening the product packaging, use of the product, or continued possession of the product, constitutes acceptance of this agreement, regardless of whether you are the original purchaser, user, or other recipient of the product.

You and Samsung each agree that all disputes between you and Samsung that in any way relate to, or arise from, the standard limited warranty; or the sale, condition, or performance of the product, shall be resolved exclusively through final and binding arbitration, and not by a court or jury. Any such dispute shall not be combined or consolidated with a dispute involving any other person's or entity's product or claim. Specifically, without limitation of the foregoing, you shall not under any circumstances proceed as part of a class action. The arbitration shall be conducted before a single arbitrator, whose award may not exceed, in form or amount, the relief allowed by the applicable law.

The arbitration shall be conducted according to the American Arbitration Association (AAA) Commercial Arbitration Rules applicable to consumer disputes. The AAA Rules are available online at www.adr.org or by calling the AAA at 1-800-778-7879. This Agreement is entered into pursuant to the Federal Arbitration Act. The laws of the State of New York, without reference to its choice of law

The second item in the Terms and Conditions is the Standard Limited Warranty ("Warranty"). (*Id.*) After encountering an alleged performance issue on his Watch, Dahlquist invoked the Warranty and sought repair of his device from SEA. (FAC ¶¶ 106-108; Cantwell Decl., ¶ 31, Exs. H-I.) His claims arise from SEA's alleged failure to repair the Watch under the Warranty. (*See, e.g.*, FAC ¶¶ 64, 82-84, 106-108, 151, 172, 211-213, 218, 224, 243-244, 247.)[2]

[2] As Dahlquist's communications show, SEA advised Dahlquist that his device would be repaired under Warranty if he used it consistent with the operating instructions. (*See* Cantwell Decl. ¶ 31, Exs. H-I.) Following physical inspection of the device, SEA's authorized technicians concluded that the Watch had been used incorrectly. (*See* FAC ¶ 107.) Putting aside the merits, whether the device should have been repaired under warranty

D. Inside the box, SEA provided a short guide, again notifying Dahlquist of the Arbitration Agreement.

The box for Dahlquist's Watch also contained a 4-page (8 pages front and back) guide titled "Terms and Conditions." (Cantwell Decl. ¶¶ 17-21, Exs. E-F.) The guide is packaged on top of the Watch so that a user must encounter it to access the device. (*Id.* ¶ 17, Ex. D.) The first words on the guide's cover state, in bold:

> **Read this document before operating the mobile device, accessories, or software (defined collectively and individually as the "Product") and keep it for future reference. This document contains important Terms and Conditions. Electronic acceptance, opening the packaging, use, or retention of the Product constitutes acceptance of these Terms and Conditions.**

(*Id.* ¶¶ 18-21, Exs. E-F) (emphasis in original).

On the first page after the cover, under a bold heading in large font titled "**Important legal information**," SEA notified Dahlquist of the Arbitration Agreement again:

> **Arbitration Agreement - This Product is subject to a binding arbitration agreement between you and SAMSUNG ELECTRONICS AMERICA, INC. ("Samsung"). You can opt out of the agreement within 30 calendar days of the first consumer purchase by emailing optout@sea.samsung.com or calling 1-800-SAMSUNG (726-7864) and providing the applicable information.**
>
> The full Arbitration Agreement, Standard One-year Limited Warranty, End User License Agreement (EULA), and Health & Safety Information for your device are available online at **https://www.samsung.com/us/Legal/Gear-HSGuide/**

(*Id.* ¶¶ 19-21, Exs. E-F) (emphasis in original).

---

is an issue for arbitration. (Cantwell Decl. ¶¶ 13, 23, Ex. C (providing for arbitration of all disputes that "in any way relate to, or arise from," the Warranty).)

On the next page, right after notice of the Arbitration Agreement, SEA provided operating instructions for using the Watch in water, including, for example, to "rinse the device in freshwater" if used in "sea water." (*Id.* ¶¶ 20-21, Exs. E-F.)[3] Dahlquist expressly alleges that he used his Watch in water "consistent with its operating instructions." (FAC ¶ 103.) And when he contacted SEA about his device, he confirmed *in writing* that *he* had read the guide, stating that he had "rinsed [his Watch] in freshwater . . . *as recommended by the product guide*." (Cantwell Decl. ¶ 31, Exs. H-I) (emphasis added).[4]

E. The terms of the Arbitration Agreement.

The Arbitration Agreement—the full terms of which are on SEA's website at the URL listed (i) on the outside of the box and (ii) in the 4-page Terms and Conditions guide—contains a broad provision requiring arbitration of all disputes relating to or arising from the Warranty or the sale, condition, or performance of the device:

> **You and Samsung each agree that all disputes between you and Samsung that in any way relate to, or arise from, the standard limited warranty; or the sale, condition, or performance of the product, shall be resolved exclusively through final and binding arbitration, and not by a court or jury.**

(Cantwell Decl. ¶¶ 11-16, 23, Ex. C) (emphasis in original).

The Arbitration Agreement further provides that any disputes between Dahlquist and SEA must be resolved on an individual basis:

---

[3] These same instructions are also in the User Manual, which is available online before and after purchase. Like the in-box guide, the User Manual provides notice of the Arbitration Agreement on the same page that it provides tips for maintaining water-resistance. (Cantwell Decl. ¶ 21, Ex. G.)

[4] Documents outside the pleadings may be considered in deciding a motion to compel arbitration. *See Xinhua Holdings Ltd. v. Elec. Recyclers Int'l, Inc.*, 2013 WL 6844270, at *5 (E.D. Cal. Dec. 24, 2013) ("For purposes of deciding a motion to compel arbitration, the Court may properly consider documents outside of the pleadings."); *Regents of the Univ. of Cal. v. Japan Sci. & Tech. Agency*, 2014 WL 12690187, at *3 n.24 (C.D. Cal. Oct. 16, 2014) (collecting cases holding that considering extrinsic evidence on a motion to compel arbitration is proper and necessary).

> **Any such dispute shall not be combined or consolidated with a dispute involving any other person's or entity's product or claim. Specifically, without limitation of the foregoing, you shall not under any circumstances proceed as part of a class action.**

(*Id.* ¶ 24, Ex. C) (emphasis in original).

The Arbitration Agreement identifies the applicable arbitral rules and where they can be found:

> The arbitration shall be conducted according to the American Arbitration Association (AAA) Commercial Arbitration Rules applicable to consumer disputes. The AAA Rules are available online at www.adr.org or by calling the AAA at 1-800-778-7879. This Agreement is entered into pursuant to the Federal Arbitration Act.

(*Id.* ¶ 25, Ex. C.) The Arbitration Agreement also specifies that the arbitrator "shall decide all issues of interpretation and application of this Agreement." (*Id.* ¶ 26, Ex. C.)

F. The Arbitration Agreement allowed Dahlquist to opt out without penalty.

The Arbitration Agreement includes an opt-out provision with easy-to-understand terms. (Cantwell Decl. ¶¶ 13, 19, 21, 27-28, Exs. C, E-F.) The provision allowed Dahlquist to opt out of arbitration within thirty days of purchase by providing basic information about his Watch. (*Id.*) Opting out is without penalty, and Dahlquist would not have been required to return his Watch, pay a fee, or give up any warranty protections:

> Opting out of this Agreement will not affect in any way the benefits to which you would otherwise be entitled, including the benefits of the Standard Limited Warranty.

(*Id.* ¶ 13, Ex. C.) Dahlquist did not opt out of arbitration. (*Id.* ¶¶ 29-30.)

III. DAHLQUIST MUST ARBITRATE HIS CLAIMS

A. Courts rigorously enforce arbitration agreements.

The Federal Arbitration Act ("FAA") empowers courts to compel arbitration, explaining that arbitration provisions "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 governs this case, because the Arbitration Agreement expressly provides it "is entered into pursuant to the Federal Arbitration Act." (Cantwell Decl. ¶¶ 13, 25, Ex. C.) *See McGrath v. Doordash, Inc.*, 2020 WL 6526129, at *5 (N.D. Cal. Nov. 5, 2020) ("[T]he ICA expressly provides that the FAA governs the agreement."); *Ramirez v. LQ Mgmt., L.L.C.*, 2020 WL 2797285, at *2 n.3 (C.D. Cal. May 29, 2020) ("[T]he Agreement expressly invokes the FAA."); *Martinez v. Leslie's Poolmart, Inc.*, 2014 WL 5604974, at *3 n.4 (C.D. Cal. Nov. 3, 2014) ("[T]he arbitration agreement expressly provides that it is governed by the FAA.").

The FAA also applies because the Arbitration Agreement "evidenc[es] a transaction involving [interstate] commerce" (9 U.S.C. § 2), in that it relates to a product distributed by SEA, a New York entity headquartered in New Jersey, and bought by a California Plaintiff. *See Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (holding that neither the parties' agreement nor underlying transaction need be "in" interstate commerce; only the economic activity of the parties involved has to have some nexus to interstate commerce); *Kung v. Experian Info. Sols., Inc.*, 2018 WL 2021495, at *2 (N.D. Cal. May 1, 2018) ("The Supreme Court has interpreted the term 'involving commerce' in the FAA 'as the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power.") (citation omitted).

The main "purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (internal quotation marks, alterations and citation omitted). "[M]ore than three decades of Supreme Court precedent recogniz[es] the 'liberal federal policy favoring arbitration agreements,' as established by the [FAA]." *Ziober v. BLB Res., Inc.*, 839 F.3d 814, 816-17 (9th Cir. 2016) (citation omitted). Thus, "courts must 'rigorously enforce' arbitration agreements according to their terms" to facilitate streamlined proceedings. *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013); *see also Ferguson v. Corinthian*

Colls., Inc., 733 F.3d 928, 932 (9th Cir. 2013) ("[The FAA] reflects an 'emphatic federal policy' in favor of arbitration.") (citation omitted).

In ruling on a motion to compel arbitration, the Court is to determine "whether there is an agreement to arbitrate between the parties[.]" *See Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) (citation omitted). "If the parties' contract delegates the question of arbitrability to an arbitrator, courts must defer to the parties' contract and respect that decision. . . . The party seeking to compel arbitration must only show that a valid arbitration agreement exists, which delegates the arbitrability issue to an arbitrator." *Needleman v. Golden 1*, 474 F. Supp. 3d 1097, 1106 (N.D. Cal. 2020) (citation omitted).

Here, the Court need only decide whether an agreement exists because the Arbitration Agreement delegates issues of scope and enforceability to the arbitrator. (*See* Cantwell Decl. ¶¶ 13, 25-26, Ex. C.)

B. SEA has established formation because it provided reasonable notice, and Dahlquist manifested assent by opening, using, and retaining his Watch without opting out of arbitration.

"[O]rdinary state-law principles" govern whether the parties formed an arbitration agreement. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *accord Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1093 (9th Cir. 2014) ("When determining whether a valid contract to arbitrate exists, we apply ordinary state law principles that govern contract formation.").

California law governs the formation analysis, because California is the place of contracting, the location of the subject matter of the contract, the location where the alleged harm occurred, and where Dahlquist resides. *See In re Samsung Galaxy Litig.*, 298 F. Supp. 3d at 1289-90 (applying the law of each plaintiff's home state to determine whether an arbitration agreement was formed); *Henry v. J.P. Morgan Chase & Co.*, 2015 WL 13820811, at *2 (C.D. Cal. Nov. 3, 2015) (applying Texas law to the formation issue because the parties contracted in Texas); Rest. 2d of Conflict of Laws, § 188 (1971) (listing the contacts to consider in deciding which state law applies). Because SEA has shown

formation under California law and based on accepted principles of notice and assent, the result would be the same under New York or New Jersey law. *See, e.g.*, *Meyer*, 868 F.3d at 75 (explaining that whether California or New York law applied was not dispositive under basic principles for determining whether the parties mutually assented to a contract term); *Vasadi*, 2021 WL 5578736, at *7 (applying these principles to claims of plaintiffs from 13 states, including California).[5]

1. Formation simply requires reasonable notice and assent.

"To form a contract, there must be mutual manifestation of assent, whether by written or spoken word or by conduct." *Meyer*, 868 F.3d at 74. "'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) (citation omitted). It is well-accepted that retaining or using a product or service constitutes manifestation of assent in modern consumer transactions. *See In re Samsung Galaxy Litig.*, 298 F. Supp. 3d at 1293 ("[A]cceptance by conduct is a valid means of assent under California law."); Cal. Com. Code § 2204(1) ("A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."); *Hart*, 814 F. App'x at 213-14 ("Hart's continued acceptance of TWC's services constituted assent to the agreement.").[6]

---

[5] Although the Arbitration Agreement contains a choice of law provision, this provision does not apply to determine whether a contract was formed in the first place. *See Weber v. Amazon*, 2018 WL 6016975, at *7 n.9 (C.D. Cal. June 4, 2018) ("[I]n determining whether a contract was formed in the first place, the choice of law provision is irrelevant.").

[6] *See also Yenko v. Crown Asset Mgmt., LLC*, No. A148536, 2017 WL 3262474, at *4 (Cal. Ct. App. Aug. 1, 2017) (finding use of consumer credit account constituted acceptance of arbitration agreement); *Miceli v. Staples, Inc.*, No. D070224, 2016 WL 6122793, at *4 (Cal. Ct. App. Oct. 20, 2016) (concluding that continued use of card was sufficient evidence of consent to terms, including an arbitration provision). A "long line of authority permit[s] consideration of unpublished state court decisions as indicative of the proper understanding of state law." *In re Samsung Galaxy Litig.*, 298 F. Supp. 3d at 1297 n.3.

"Where there is no evidence that the offeree had *actual notice* of the terms of the agreement, the offeree will still be bound by the agreement if a reasonably prudent user would be on *inquiry notice* of the terms." *Meyer*, 868 F.3d at 74-75 (emphasis added); *see also Dohrmann v. Intuit, Inc.*, 823 F. App'x 482, 483 (9th Cir. 2020) ("Mutual assent does not require that the offeree have actual notice of the terms of an arbitration agreement."); *Needleman*, 474 F. Supp. 3d at 1103 ("Reasonable notice requires that a user have either actual or constructive notice of an agreement's terms."); *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 992-93 (1972) ("[A]n offeree, knowing that an offer has been made to him but not knowing all of its terms, may be held to have accepted, by his conduct, whatever terms the offer contains.").

Thus, the question is whether the Arbitration Agreement is reasonably conspicuous so the user can be fairly charged with constructive notice that using or keeping the product will constitute acceptance. *See In re Samsung Galaxy Litig.*, 298 F. Supp. 3d at 1293 ("[B]ecause each Plaintiff's use of his or her phone can demonstrate acceptance, the critical issue here is whether Plaintiffs were on notice of the arbitration clause."); *Schmidt v. Samsung Elecs. Am., Inc.*, 2017 WL 2289035, at *4 (W.D. Wash. May 25, 2017) ("A 'reasonable person' was on notice of the arbitration agreement [with Samsung], and thus Plaintiffs assented under California law."); *Hart*, 814 F. App'x at 213 ("The notice was sufficiently clear and conspicuous to provide a reasonably prudent subscriber with constructive notice of the proposed contract terms.").[7] Here, the answer is, "yes."

2. A reasonably prudent user was on notice of the Arbitration Agreement.

In cases involving products like the Watch, the packaging routinely provides notice of arbitration, with the consumer being able to return the product or opt out of arbitration if he or she disagrees. That is exactly what SEA did here.[8]

---

[7] *Accord Hoekman v. Tamko Bldg. Prods.*, 2015 WL 9591471, at *5 (E.D. Cal. Aug. 24, 2015) ("[T]he terms of the arbitration provision were presented in such a way as to create an enforceable agreement when the shingles were received and retained[.]").

[8] SEA also provided online notice available before and after purchase. (Cantwell Decl. ¶¶ 13, 22, Exs. C, G.) *Taylor v. Samsung Elecs. Am., Inc.*, 2018 WL 3921145, at *4 (N.D. Ill.

A business may provide reasonable notice of terms on the product box and "specify conduct that constitutes acceptance," including "inviting acceptance by unwrapping a product." *Dye v. Tamko Bldg. Prods.*, 908 F.3d 675, 681 (11th Cir. 2018); *see also Hoekman*, 2015 WL 9591471, at *5 ("Courts have repeatedly upheld arbitration provisions that come in the form of shrinkwrap agreements."); *Sellers v. JustAnswer LLC*, 73 Cal. App. 5th 444, 462-63 (2021) (explaining that courts have generally found shrinkwrap agreements "enforceable if consistent with the reasonable expectations of the consumer"). Thus, "[w]here a notice on a package states that the user agrees to certain terms by opening the package, a court could reasonably conclude . . . that the user has a duty to act in order to negate the conclusion that the consumer had accepted the terms in the notice." *Norcia v. Samsung Telecomms. Am., LLC*, 845 F.3d 1279, 1287 (9th Cir. 2017) (applying California law); *see also ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996) (noting shrinkwrap agreements are generally enforceable).

As the Eleventh Circuit explained, "[a]s fewer and fewer purchases are consummated face to face, and more and more are made online, consumers should (and must) know that vendors will often employ a 'simple approve-or-return' model, enclosing their full legal terms with a product at shipment." *Dye*, 908 F.3d at 683. Thus, courts assume the modern consumer is "on notice" that products come with "terms and conditions of purchase," which are accepted by opening and retaining the product. *Id.* at 682-683 ("It's not only objectively reasonable to assume that such items come with terms and conditions, it's also eminently reasonable to assume that by opening and retaining those items a consumer necessarily accepts the accompanying terms and conditions.").

As the Eleventh Circuit put it, "modern consumers are on notice that products come with . . . terms and conditions of purchase. And they are free to research (or not), request (or not), and read (or not) those terms before unwrapping their purchases." *Id.* at 683. But the law "makes clear that providing conspicuously printed product packaging is an OK way

---

Aug. 16, 2018) ("A cell phone company's posting of its terms and conditions on its website provides users of its products a reasonable opportunity to read them.").

to convey purchase terms[;]" therefore, "consumers who purchase, open, and retain a product are thus bound in accordance with [] terms conspicuously printed on that product's packaging, whether they actually take the time to read them or not." *Id.* at 683-84.[9]

In other words, so long as there is reasonable notice, it is acceptable for a business to provide that notice through product packaging. *See, e.g.*, *In re Samsung Galaxy Litig.*, 298 F. Supp. 3d at 1299 (enforcing arbitration agreement because "when the consumer dumped out the contents of the box to retrieve the phone, he or she would be confronted with the guidebook," which contained "important terms and conditions" and informed consumers that "[b]y using this device, you accept those terms and conditions"); *Schmidt*, 2017 WL 2289035, at *2-4 (similar); *Taylor*, 2018 WL 3921145, at *4 (similar); *Herron v. Best Buy Stores, Ltd. P'ship*, 2014 WL 2462973, at *1 (E.D. Cal. June 2, 2014) (enforcing arbitration agreement packaged with Toshiba laptop because consumer did not return the product); *Baird v. Charter Communs.*, 2020 WL 11626081, at *4 (C.D. Cal. June 1, 2020) (finding use of modem constituted assent to arbitration because label on modem box provided notice of terms); *Arellano v. T-Mobile USA, Inc.*, 2011 WL 1362165, at *3 (N.D. Cal. Apr. 22, 2011) ("[A]greements packaged with a product are enforceable."); *Vasadi*, 2021 WL 5578736, at *10 ("[T]he print materials provided to Plaintiffs with their Galaxy S20 phone purchases establish—independently and certainly in combination—Plaintiffs had reasonably conspicuous notice of contract terms sufficient to support mutual assent to the Arbitration Agreement.").[10]

---

[9] *See, e.g.*, *TracFone Wireless, Inc. v. Pak China Grp. Co.*, 843 F. Supp. 2d 1284, 1298 (S.D. Fla. 2012) ("The outside retail packaging of TracFone's Phones contains conspicuous language . . . that provides in part 'by purchasing or opening this package, you are agreeing to these terms."); *Brower v. Gateway 2000*, 246 A.D.2d 246, 250-51 (N.Y. App. Div. 1998) (finding arbitration agreement enforceable where packaging provided notice of terms and consumer did not return product).

[10] As several courts in California have recognized, the economic and practical considerations involved in selling services and goods to mass consumers "make it acceptable for terms and conditions to follow the initial transaction," including arbitration terms. *Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1105 (C.D. Cal. 2002); *see also Hart*, 814 F. App'x at 213-14 (finding inquiry notice from billing statements for defendant's

When, as here, a business provides notice of terms with the product and online, courts have found that the availability of online terms supports enforcement. *See, e.g.*, *Taylor*, 2018 WL 3921145, at *4 ("Furthermore, the Guide was also available online, where plaintiff could have read about the opt-out provision in full force."); *Arellano*, 2011 WL 1362165, at *4 ("[T]he Terms & Conditions were readily available. They were included in the box with the telephones sold by T-Mobile, and they also were available online at www.T-Mobile.com[.]").

3. SEA has established formation based on the notice on the packaging and the Terms and Conditions in the box and online.

The Court should find formation because SEA provided Dahlquist conspicuous notice of the Arbitration Agreement and the conduct that constituted assent. As shown, the box for Dahlquist's Watch had a notice informing him that: (1) the device is subject to Terms and Conditions, including the Arbitration Agreement; (2) opening the packaging, using the device, or retaining the device constituted acceptance; and (3) the Terms and Conditions were online at the URL provided on the box. (Cantwell Decl. ¶¶ 6-16, Exs. A-C.) This language, coupled with Dahlquist's use and retention of the device, constitutes assent. Indeed, another court considering the claims of plaintiffs from 13 states (including California)[11] recently granted SEA's motion to compel arbitration on virtually identical

---

services); *Herron*, 2014 WL 2462973, at *1 (compelling arbitration based on arbitration agreement encountered after purchase of laptop); *James v. Comcast Corp.*, 2016 WL 4269898, at *1-3 (N.D. Cal. Aug. 15, 2016) (compelling arbitration under arbitration agreement delivered after subscription to cable service and based on continued use of service); *Wright v. Sirius XM Radio Inc.*, 2017 WL 4676580, at *4-5 (C.D. Cal. June 1, 2017) (explaining that California district courts have enforced arbitration clauses received after product purchase); *Langere v. Verizon Wireless Servs., LLC*, 2016 WL 5346064, at *6 (C.D. Cal. Sept. 23, 2016) (compelling arbitration where plaintiff "had fourteen days after acceptance to review the terms of the Customer Agreement and cancel his service if he so desired").

[11] Although the court in *Vasadi* cited New Jersey law, it did so because there was no "true conflict" between and among the state laws of the 13 plaintiffs. 2021 WL 5578736, at *8. And the *Vasadi* court applied basic notice and assent principles that mirror California law. (*See* Section III.B.1, *supra*.)

grounds:

> [T]he Court finds the information printed on the label of the Galaxy S20 box provided the requisite "reasonably conspicuous" notice to support assent to the Arbitration Agreement between SEA and Plaintiffs. . . .
>
> Here, the label on the box in which the Galaxy S20 phone was sold contained all the features of valid shrinkwrap agreements. It drew attention to the existence of contractual terms by stating, in bold print: "Packaging Contains . . . Terms and Conditions." More important, and leaving no room for ambiguity, the box label made express reference to an arbitration agreement, provided the location where full terms could be accessed and advised the consumer that certain, identified actions would constitute assent to those terms, all under a capitalized and bold heading reading "IMPORTANT INFORMATION." The label further informs consumers where they may review full terms of the agreement and obtain information about how to opt out. The notice provided is not only conspicuous, but also provides consumers a reasonable opportunity to review the Arbitration Agreement and consider whether to take an affirmative act negating assent to the terms of purchase.

Vasadi, 2021 WL 5578736, at *9-11 ("Assent, or a meeting of the minds, is concerned with whether reasonable notice of [] contractual terms was provided, that is, with a party's constructive knowledge of the terms, not with a party's . . . subjective awareness of them.").

Dahlquist also received a 4-page guide in the box titled "Terms and Conditions" that spotlighted the Arbitration Agreement. (Cantwell Decl. ¶¶ 17-21, Exs. D-F.) The cover included a stand-alone paragraph in bold, repeating to Dahlquist that using or retaining the Watch constituted acceptance of the Terms and Conditions. (*Id.*) On the first page after the cover, Dahlquist was told again that his transaction was subject to a binding Arbitration Agreement, which he could opt out of within 30 days. (*Id.*) And he received a second instruction on how to locate the full Arbitration Agreement online. (*Id.*)

In other words, SEA provided notice of the Arbitration Agreement everywhere a

reasonably prudent Watch user might look, and this notice, coupled with Dahlquist's use of his device without opting out or returning it, is assent. *See, e.g.*, *Herron*, 2014 WL 2462973, at *1 (retention of laptop constituted assent to arbitration agreement where notice provided on bag enclosing the device); *Baird*, 2020 WL 11626081, at *4 (notice on box label for modem, coupled with use of modem, was evidence of acceptance); *Vasadi*, 2021 WL 5578736, at *10 ("Under such circumstances, a reasonable consumer would be on notice of the 'Terms and Conditions'[.]"); *see also Dougan v. Children's Place*, 2020 WL 6286812, at *4-5 (W.D. Wash. Oct. 27, 2020) (when notice of terms is provided in multiple locations, each disclosure adequately informs consumers and provides constructive notice). If anything, the facts here are even stronger than in *Vasadi*, because Dahlquist has confirmed that *he* reviewed the guide that came with his Watch, which highlights the Terms and Conditions, Arbitration Agreement, and instructions for water-resistance on *consecutive pages*. (Cantwell Decl. ¶¶ 18-21, 31, Exs. E-F, H-I.)

What's more, Dahlquist had actual notice of the Arbitration Agreement by reviewing the guide. *See Needleman*, 474 F. Supp. 3d at 1103 (explaining that "reasonable notice" may be "either actual or constructive"). But at minimum, he was on inquiry notice. *See Gutierrez v. FriendFinder Networks, Inc.*, 2019 WL 1974900, at *7-8 (N.D. Cal. May 3, 2019) (plaintiff's communication with defendant's customer service representative, in which plaintiff acknowledged the existence of terms he had not read, showed that use of the website constituted assent); *Leong v. Myspace, Inc.*, 2011 WL 7808208, at *5 (C.D. Cal. Mar. 11, 2011) ("The information disclosed by Myspace put Leong on actual notice of the existence of the Myspace Agreement and so put Leong on constructive notice of the terms of the Agreement[.]").

SEA expects Dahlquist may try to sidestep arbitration by citing distinguishable cases that support compelling arbitration here. For example, Dahlquist may cite *Norcia*, but there, the Ninth Circuit explained that "[w]here a notice on a package states that the user agrees to certain terms by opening the package, a court could reasonably conclude, consistent with California contract law, that the user has a duty to act in order to negate the conclusion that

the consumer had accepted the terms in the notice." 845 F.3d at 1287 (declining to enforce agreement encountered for the first time on page 76 of an in-box brochure because "the outside of the Galaxy S4 box did not notify the consumer that opening the box would be considered agreement to the terms set forth in the brochure"). Following *Norcia*, this is *precisely* what SEA has done with the Watch: (i) the outside of the box provides clear notice—in classic contractual language—that opening the box, using the Watch, or retaining it equals acceptance of the Arbitration Agreement, and (ii) the in-box guide provides conspicuous notice a second time.

Dahlquist also may cite *Velasquez-Reyes v. Samsung Elecs. Am., Inc.*, 2017 WL 4082419, at *6-7 (C.D. Cal. Sept. 13, 2017), *aff'd*, 777 Fed. App'x 241 (9th Cir. Sept. 17, 2019). But there, the court declined to compel arbitration under *Norcia* because, again: (i) nothing on the outside of the box "expressly provide[d] that opening the box or using the phone constitute[d] consent to terms[;]" (ii) the only reference to terms on the outside of the box was written "in tiny font and sandwiched between Samsung and Android copyright and trademark information[;]" (iii) there was no reference to an arbitration agreement anywhere on the outside of the box or any instruction to the consumer where to find the arbitration agreement; and (iv) the cover for the in-box guide provided no indication that bilateral contract terms were within. In this case, every single one of these facts is the opposite. Dahlquist's Watch box provided distinct, conspicuous notice on the outside that opening the package, using the device, or retaining it equaled acceptance of the Arbitration Agreement. (Cantwell Decl. ¶¶ 6-10, Exs. A-B.) The outside of the box told Dahlquist where to find the Arbitration Agreement. (*Id.*) And the in-box guide provided clear notice of bilateral terms and conditions on the cover, tied to the notice on the outside of the box. (*Id.* ¶¶ 18-21, Exs. E-F.) Thus, *Velasquez-Reyes* confirms why, on the facts here, the Court should compel arbitration.[12]

[12] Finally, if Dahlquist cites the Ninth Circuit's recent decision in *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849 (9th Cir. 2022), which focused on online contract formation, the decision also supports SEA. As *Berman* explained, (i) parties may manifest consent through conduct, (ii) visual elements of contract notice should be designed to capture the

In sum, SEA provided reasonable notice that opening the Watch package, using the device, or retaining it constituted acceptance of the Arbitration Agreement. Dahlquist's own statements confirm that he was on notice of the Arbitration Agreement. (Cantwell Decl. ¶ 31, Exs. H-I.) And he could have opted out of arbitration but did not. (*Id.* ¶¶ 29-30.) Thus, when he opened the packaging, used the device, and retained it, he agreed to arbitrate.

C. Dahlquist also must arbitrate because he cannot choose which Terms and Conditions apply.

The Court should compel arbitration for another reason: Dahlquist is estopped from repudiating the Arbitration Agreement because his claims are "founded in and intertwined with" the Standard Limited Warranty. (Cantwell Decl. ¶¶ 13-16, Ex. C.) *See Stiner*, 810 F. App'x at 534 (compelling arbitration of UCL and CLRA claims arising from allegations that defendant did not honor an agreement).

Dahlquist invoked the Warranty before litigation. (Cantwell Decl. ¶ 31, Exs. H-I; FAC ¶ 106.) He sued because SEA supposedly declined to repair his Watch under the Warranty. (FAC ¶¶ 107-109.) And his claims depend on the Warranty and SEA's purported denial. For example, Dahlquist alleges that SEA:

- Improperly denied him "repair" under the Warranty, the terms of which he supposedly performed (*Id.* ¶¶ 106-108, 211);
- Violated California consumer protection law by refusing to repair or replace liquid-damaged devices under Warranty (*Id.* ¶¶ 64, 82-84, 151, 172);
- Violated the Magnuson-Moss Warranty Act by "not replac[ing] or repair[ing]" his Watch (*Id.* ¶¶ 218, 224); and
- Is barred from asserting the "limitations" and "time limits" in the Warranty to

---

user's attention rather than direct it elsewhere, and (iii) notice should tell the user the conduct that constitutes acceptance. *Id.* at 857-58. Again, SEA's multiple notices, outside and inside the Watch packaging, did exactly this. SEA used prominent, bold, all-caps text to call Dahlquist's attention to distinct notices. (Cantwell Decl. ¶¶ 6-21, Exs. A-F.) The notices told Dahlquist exactly what conduct constituted assent. (*Id.*) And SEA invited assent through conduct, a recognized method. Thus, *Berman* supports SEA.

defeat his breach of implied warranty claims (*Id.* ¶¶ 242-247).

Putting aside the merit of these allegations (or lack thereof), Dahlquist's claims arise from and rely on the Warranty. (*See id.* ¶¶ 64, 82-84, 106-108, 151, 172, 211-213, 218, 224, 243-244, 247.) The Warranty and Arbitration Agreement are consecutive parts of the Terms and Conditions for the Watch. (Cantwell Decl. ¶¶ 13-16, Ex. C.) And Dahlquist cannot choose which Terms apply and which do not, especially after invoking the Warranty pre-litigation. *See Montoya v. Comcast Corp.*, 2016 WL 5340651, at *5-6 (E.D. Cal. Sep. 23, 2016) (compelling arbitration of tort and consumer protection claims that arose from a contract containing an arbitration provision and were based on defendant's services); *Carwile v. Samsung Telecomms. Am., LLC*, 2013 WL 11030374, at *3 (C.D. Cal. July 9, 2013) (compelling arbitration because plaintiff "may not, after the fact, pick and choose the terms she wishes to be bound by, depending on whether she likes the end result."); *Langell v. Ideal Homes LLC*, 2016 WL 8711704, at *5-6 (N.D. Cal. Nov. 18, 2016) (estopping plaintiffs' denial of the arbitration provision in the warranty document), *report and recommendation adopted*, 2016 WL 10859440 (N.D. Cal. Dec. 7, 2016); *NORCAL Mut. Ins. Co. v. Newton*, 84 Cal. App. 4th 64, 84 (2000) ("No person can be permitted to adopt that part of an entire transaction which is beneficial to him/her, and then reject its burdens.").[13] Thus, the Court should deny any attempt by Dahlquist to disavow his own conduct, claims, and allegations only to evade arbitration.

D. Challenges to scope or enforceability are for the arbitrator.

The Supreme Court has held that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 445-46 (2006); *Rent-A-Ctr. W., Inc. v. Jackson*, 561 U.S. 63, 71-73 (2010) (requiring basis of challenge to be directed specifically to the agreement to arbitrate before the court will intervene). Even when a party

[13] *See also Crypto Asset Fund v. Opskins Grp.*, 478 F. Supp. 3d 919, 927-28 (C.D. Cal. 2020) (noting that equitable estoppel applies either when the party's claims are founded in and intertwined with the contract, or when the party has invoked the contract to claim a benefit).

opposing arbitration specifically challenges the arbitration provision, disputes about enforceability are for the arbitrator to decide where "the parties have demonstrated, clearly and unmistakably that it is their intent" to delegate such questions to the arbitrator. *Rent-A-Ctr.*, 561 U.S. at 80; *see also Henry Schein, Inc.*, 139 S. Ct. at 529 ("When the parties' contract delegates the arbitrability question to an arbitrator . . . a court possesses no power to decide the arbitrability issue.").

Here, the Arbitration Agreement delegated questions of scope and validity in two ways. ***First***, the Arbitration Agreement provided that "the arbitrator shall decide all issues of interpretation and application of this Agreement." (Cantwell Decl. ¶ 26, Ex. C.) As a result, there is an unmistakable delegation, and issues of scope and validity are for the arbitrator. *See Momot v. Mastro*, 652 F.3d 982, 988 (9th Cir. 2011) ("We hold that this language, delegating to the arbitrators the authority to determine 'the validity or application of any of the provisions of' the arbitration clause, constitutes 'an agreement to arbitrate threshold issues concerning the arbitration agreement.'") (citation omitted); *Aanderud v. Superior Court*, 13 Cal. App. 5th 880, 892-93 (2017) (holding that arbitration agreement provided clear and unmistakable delegation).

Second, by expressly incorporating the rules of the American Arbitration Association, the parties "clearly and unmistakably" agreed that the arbitrator would decide all challenges to arbitrability. *Rent-A-Ctr.*, 561 U.S. at 80. Indeed, "[v]irtually every circuit to have considered the issue has determined that incorporation of the American Arbitration Association's (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) (collecting cases from majority of circuits); *see also Brennan*, 796 F.3d at 1130-31 (incorporation of AAA rules constituted clear and unmistakable intent to delegate arbitrability questions to an arbitrator); *Zenelaj v. Handybook Inc.*, 82 F. Supp. 3d 968, 974 (N.D. Cal. 2015) (applying *Oracle* in consumer class action context and finding that the parties delegated arbitrability questions to the arbitrator by incorporation of AAA rules); *Johnson v. Oracle Am., Inc.*, 2017 WL 8793341, at *7 (N.D. Cal. Nov. 17, 2017)

(finding delegation by incorporation of JAMS Rules).

Here, the Arbitration Agreement incorporates the AAA rules. (Cantwell Decl. ¶ 25, Ex. C.) AAA Commercial Rule R-7(a) and AAA Consumer Rule R-14(a) provide that the arbitrator has the power to rule on his or her jurisdiction, including any objections relating to "the ***existence, scope, or validity*** of the arbitration agreement ***or to the arbitrability of any claim*** or counterclaim." *See* AAA Commercial Arbitration Rule R-7(a) (emphasis added); AAA Consumer Arbitration Rule R-14(a) (same). Thus, the parties agreed that all challenges to the Arbitration Agreement or arbitrability are to be determined by the arbitrator.

E. Dahlquist's claims fall within the Arbitration Agreement anyway.

Although the Arbitration Agreement has delegated questions of scope to the arbitrator, Dahlquist's claims are covered by the Arbitration Agreement in any event. "[B]ecause the scope of an arbitration agreement is a matter of contract, [the court] must look to the express terms of the agreements at issue" to determine whether the parties intended the dispute to be arbitrated. *Ferguson*, 733 F.3d at 938. Courts broadly construe provisions like the one here requiring arbitration of "all disputes" "arising from" the parties' agreement or relationship. *See id*. (terms in enrollment agreement requiring arbitration of "any dispute" and "all claims" "arising from my enrollment" were broad enough to cover plaintiffs' claims because allegations that school misrepresented the value and cost of education were "directly related to enrollment"); *see also Chiron Corp. v. Ortho Diagnostic Sys.*, 207 F.3d 1126, 1131 (9th Cir. 2000) (holding that there is "little doubt that the dispute is subject to arbitration" when the parties' "broad and far reaching" arbitration agreement covered "[a]ny dispute, controversy or claim arising out of or relating to" the agreement). And "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Ferguson*, 733 F.3d at 938.

Dahlquist's claims are covered by the Arbitration Agreement, which requires arbitration of "all disputes" "relating in any way to or arising in any way from" the Watch's Standard Limited Warranty or "the sale, condition, or performance of the [Watch]."

(Cantwell Decl. ¶ 23, Ex. C.) Dahlquist alleges that his Watch failed to perform as expected when exposed to water, and that SEA refused to provide a repair. (*See* FAC ¶¶ 102-108, 151, 159-160, 166, 179, 209, 224, 236, 253.) His claims thus arise from the sale, condition, and performance of the Watch, as well as the terms of the Warranty, and are covered by the Arbitration Agreement. *See Daisley v. Blizzard Music Ltd. (US)*, 2017 WL 1628399, at *7 (C.D. Cal. May 1, 2017) ("Keeping in mind that 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration,' the Court concludes that plaintiff's fraud claim . . . touch[es] and arise[s] from the . . . Agreements.") (citation omitted).

F. This action should be stayed pending completion of Dahlquist's arbitration.

The FAA provides that "the court . . . upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . ." 9 U.S.C. § 3. Under this provision, a "federal case must be stayed while the parties proceed to arbitration." *Kilgore v. KeyBank, N.A.*, 673 F.3d 947, 955 (9th Cir. 2012), *reversed and remanded on other grounds*, 718 F.3d 1052 (9th Cir. 2013). Moreover, "when a court determines that some claims are arbitrable while some are not, the claims that are not arbitrable must be stayed pending completion of the arbitration." *Mohebbi v. Khazen*, 2014 WL 6845477, at *12 (N.D. Cal. Dec. 4, 2014).

Dahlquist is the only named plaintiff. All of his claims are arbitrable. And the Court should thus compel arbitration of Dahlquist's individual claims and stay the case in the interim.

IV. CONCLUSION

Dahlquist agreed to arbitration by affirmatively assenting to the Terms and Conditions of his Watch, including the Arbitration Agreement. He also is estopped from repudiating the Arbitration Agreement based on his own conduct and allegations. His claims fall within the scope of the Arbitration Agreement, and any arguments about arbitrability are for the arbitrator anyway. SEA requests that the Court grant this Motion, compel

Dahlquist to arbitrate his claims on an individual basis, and stay this action pending the outcome of arbitration.

Respectfully submitted,

Dated: July 15, 2022

GREENBERG TRAURIG, LLP

By: s/ *Robert J. Herrington*

Robert J. Herrington (SBN 234417)
Attorneys for Defendant
Samsung Electronics America, Inc.