United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ALVIN GREENBERG, et al.,
Plaintiffs,
v.
AMAZON.COM, INC.,
Defendant.

Case No. 20-cv-02782-JSW

ORDER GRANTING MOTION TO COMPEL ARBITRATION

Re: Dkt. No. 26

Now before the Court for consideration is the motion to compel arbitration filed by Amazon.com, Inc. ("Amazon"). Having reviewed the parties' papers, relevant legal authority, and record in this case, the Court hereby GRANTS the motion to compel arbitration and STAYS all further litigation pending the completion of arbitration.

BACKGROUND

Amazon is the world's largest online retailer. To use Amazon's website, a user must create an Amazon account that enables a user to purchase items through the website. Alvin Greenberg created his Amazon account in 2007, Michael Steinberg in 2009, and Julie Hanson in 2010.[1] (Dkt. No. 27, Declaration of Jesse Jensen ("Jensen Decl.") ¶¶ 2-4.) When Plaintiffs created their accounts, Amazon's Conditions of Use ("COUs") did not contain an arbitration provision. (*See id.* ¶¶ 2-4, 9.) In 2011, Amazon began including an arbitration provision in its COUs, which were last updated in May 2018. (*Id.* ¶ 8-9.)

Amazon makes its COUs available to its users under two circumstances. The first is on Amazon's login page:

[1] Greenberg, Steinberg, and Hanson will be collectively referred to as "Plaintiffs" unless otherwise indicated.

amazon

Sign-In

Email (phone for mobile accounts)

Continue

By continuing, you agree to Amazon's Conditions of Use and Privacy Notice.

Need help?

New to Amazon?

Create your Amazon account

Conditions of Use Privacy Notice Help

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(*Id.* ¶ 7, Ex. B.)

On this page, a "Sign-In" box appears in which a user must enter her email address and click a yellow "Continue" button to log into her Amazon account. (*Id.*) Immediately below the yellow "Continue" button is a notice that states: "By continuing, you agree to Amazons Conditions of Use and Privacy Notice." (*Id.*) The notice appears in black font against a white background with the phrase, "Conditions of Use," appearing in blue, hyperlinked text. (*Id.*)

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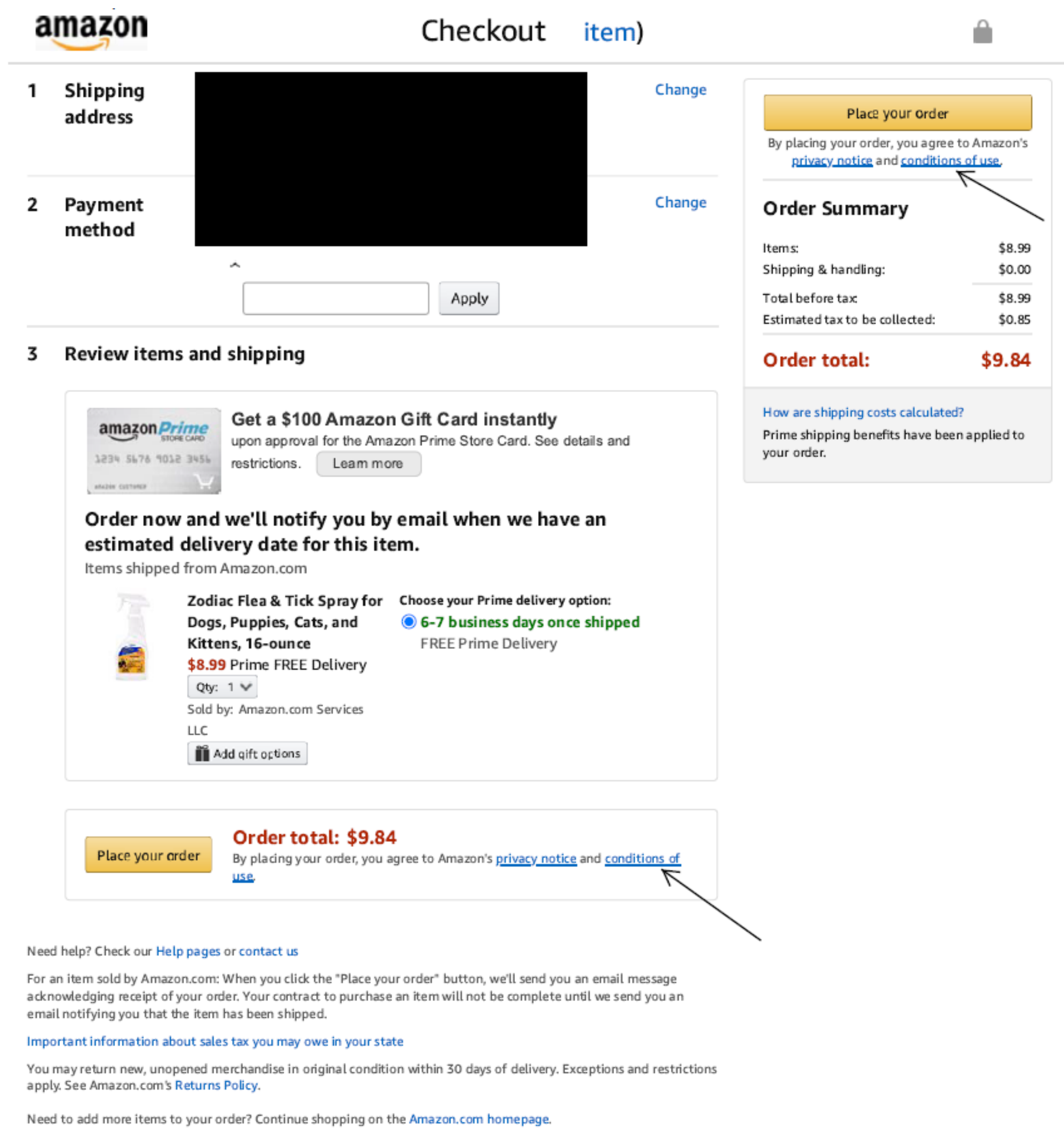
The second circumstance in which Amazon makes its COUs available to a user is on its checkout page:



(*Id.* ¶ 5, Ex. A.)

On this page, an "Order Summary" box appears to the right of the screen that contains a yellow "Place your order" button a user must click to complete a purchase. (*Id.*) Directly beneath that button is a notice: "By placing your order, you agree to Amazon's privacy notice and conditions of use."[2] (*Id.*) The phrase "conditions of use" appears in blue, underlined, and

[2] While the record shows that Amazon's COUs included an arbitration provision, it is unclear whether this notice with the blue, hyperlinked COUs appeared on Amazon's login and

hyperlinked text. (*Id.*) A second box appears towards the bottom of the checkout page, which contains the same yellow "Place your order" button and the same notice, which is placed immediately adjacent to the button. (*Id.*)

A user who clicks the hyperlinked COUs on either Amazon's login or checkout pages is given access to those terms. A disclaimer appears in large, bold font towards the top of the COUs that states: "**By using Amazon Services, you agree to these conditions. Please read them carefully.**" (*Id.*, Ex. C.) Below that notice are twenty-four separate sections covering different topics. (*Id.*) Relevant here is the eighteenth section labeled "**DISPUTES**," which contains the arbitration provision. (*Id.*) The arbitration provision states, in relevant part, that "**[a]ny dispute or claim relating in any way to your use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com will be resolved by binding arbitration, rather than in court**[.]" (*Id.*, Ex. C, at 4.)

The American Arbitration Association's ("AAA") rules, including the "Supplementary Procedures for Consumer-Related Disputes," are incorporated into the third paragraph of the arbitration provision. Those rules contain a delegation provision: "The 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." (*Id.*, Ex. D.) The AAA rules are not provided in the arbitration agreement but are accessible either on the AAA's website or by calling the AAA's toll-free number. (*Id.*, Ex. C.)

In April 2020, during the COVID-19 pandemic, Plaintiffs purchased various items using Amazon's website at prices that were higher than they were before the pandemic started. Put simply, Plaintiffs allege Amazon engaged in unlawful price gouging. Plaintiffs bring this putative class action against Amazon on behalf of themselves and others similarly situated for claims under California's Unfair Competition Law, negligence, and unjust enrichment.

Amazon now moves the Court to compel Plaintiffs to arbitrate their claims. The Court will address additional facts as necessary in the analysis.

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checkout pages before Plaintiffs' purchases in April 2020.

ANALYSIS[3]

A. Applicable Legal Standard.

The Federal Arbitration Act ("FAA") provides that a written arbitration agreement "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. A court must "stay judicial proceedings and compel arbitration of claims covered by a written and enforceable arbitration agreement." *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014) (citing 9 U.S.C. § 3)). "By its terms, the [FAA] leaves no place for the exercise of discretion by a district court[.]" *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (citing 9 U.S.C. §§ 3, 4)). The FAA reflects a "liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract." *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (internal quotation marks and citations omitted). A court's role is thus limited to determining two issues: "whether a valid arbitration agreement exists, and whether the agreement encompasses the disputes at issue." *Nguyen*, 763 F.3d at 1175. "If the response is affirmative on both counts, then the [FAA] requires the court to enforce the arbitration agreement in accordance with its terms." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000).

B. An Arbitration Agreement Exists Between Plaintiffs and Amazon.

Amazon argues the Court must compel arbitration because the delegation provision is clear and unmistakable evidence of the parties' intent to arbitrate their claims and arbitrability. Plaintiffs disagree. They assert that before the Court can assess whether these issues were properly delegated, the Court must determine if an arbitration agreement exists. Plaintiffs contend no such agreement exists because they received no notice of the unilateral addition of the arbitration provision into Amazon's COUs.

[3] In the Court's October 30, 2020 Order, the Court requested supplemental briefing fromt he parties on the question of whether this Court has subject matter jurisdiction under the Class Action Fairness Act ("CAFA"). (Dkt. No. 37.) Based on the parties' briefing, the Court concludes Plaintiffs have alleged sufficient facts to show that this Court has subject matter jurisdiction under CAFA.

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1. The Court Decides Whether an Arbitration Agreement Exists.

While these arguments are seemingly straightforward, they implicate a nuanced issue. The delegation provision states that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the *existence* . . . of the arbitration agreement[.]" (Jensen Decl., Ex. D) (italics added). The issue that arises is: Who decides whether an arbitration agreement exists—a court or an arbitrator—when a delegation provision submits the threshold question of existence to arbitration?

Generally, parties can agree to arbitrate threshold issues concerning the arbitration agreement because it "is simply an additional, antecedent agreement[.]" *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010). However, a court should not "assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (alterations omitted) (quoting *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)). Many courts, though not all, have held that the incorporation of the AAA consumer rules into an agreement is clear and unmistakable evidence of the parties' intent to arbitrate arbitrability. *See, e.g., JPay, Inc. v. Kobel*, 904 F.3d 923, 936-37 (11th Cir. 2018); *Chen v. Sierra Trading Post, Inc.*, No. 2:18-cv-1581-RAJ, 2019 WL 3564659, at *4 (W.D. Wash. Aug. 6, 2019); *Cordas v. Uber Techs., Inc.*, 228 F. Supp. 3d 985, 992 (N.D. Cal. 2017); *cf. Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) (incorporation of the AAA rules into an *employment* contract constituted "clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability")).

While parties can typically delegate threshold issues such as *validity* and *scope*, a party who "contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the *existence* of an agreement to arbitrate. Only a court can make that decision." *Three Valley Mun. Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1140-1141 (9th Cir. 1991). Indeed, Section 4 of the FAA mandates a court be satisfied that an arbitration agreement exists before compelling arbitration. 9 U.S.C. § 4 ("[U]pon being satisfied that the making of the agreement for arbitration . . . is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.")).

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Numerous circuit and district courts that have addressed the same issue have reached the same conclusion. *See, e.g., MZM Constr. Co., Inc. v. New Jersey Building Laborers Statewide Benefit Funds*, 974 F.3d 386, 402 (3d Cir. 2020); *In re: Automotive Parts Antitrust Litig.*, 951 F.3d 377, 385-86 (6th Cir. 2020); *Berkeley Cty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 234 (4th Cir. 2019); *Lloyd's Syndicate 457 v. FloaTEC, L.L.C.*, 921 F.3d 508, 514-16 (5th Cir. 2019); *Nebraska Mach. Co. v. Cargotec Sols., LLC*, 762 F.3d 737 & n. 2 (8th Cir. 2014); *Taboada A. v. AmFirst Ins. Co.*, No. 3:18CV883TSL-RHW, 2019 WL 3604613, at *3 (S.D. Miss. Aug. 6, 2019); *CCC Info. Servs. Inc. v. Tractable Inc.*, No. 18 C 7246, 2019 WL 2011092, at *2 (N.D. Ill. May 7, 2019); *King v. AxleHire, Inc.*, No. 18-cv-01621-JD, 2019 WL 1925493, at *2 (N.D. Cal. Apr. 30, 2019); *Olivas v. Hertz Corp.*, No. 17-cv-01083-BAS-NLS, 2018 WL 1306422, at *4-5 (S.D. Cal. Mar. 12, 2018); *Compere v. Nusret Miami, LLC*, 396 F. Supp. 3d 1194, 1200 (S.D. Fla. 2019).

The Court thus concludes that it is for a court to decide whether an arbitration agreement exists even where a delegation provision submits this issue to an arbitrator.

2. An Arbitration Agreement Exists Between Plaintiffs and Amazon.

The issue remains: Does an arbitration agreement exist between Plaintiffs and Amazon? As the moving party, Amazon bears the burden of proving an arbitration agreement exists by a preponderance of the evidence. *Norcia v. Samsung Telecomms. Am., LLC*, 845 F.3d 1279, 1283 (9th Cir. 2017) (quoting *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014)). To determine whether the parties agreed to arbitrate, the Court applies ordinary state-law principles that govern contract formation. *First Options*, 514 U.S. at 944. Under Washington law, "[m]utual assent of the parties is an essential element" to form an agreement to arbitrate. *Olson v. The Bon, Inc.*, 183 P.3d 359, 362 (Wash. Ct. App. 2008). "Mutual assent is gleaned from outward manifestations and circumstances surrounding the transaction." *Burnett v. Pagliacci Pizza, Inc.*, 470 P.3d 486, 492 (Wash. 2020).

"In the context of an electronic consumer transaction, the occurrence of mutual assent ordinarily turns on whether the consumer had reasonable notice of the merchant's terms of service agreement." *Chen*, 2019 WL 3564659, at *2 (citing *Nguyen*, 763 F.3d at 1177)). "To meet the reasonable notice threshold, the user must have actual or constructive notice of the terms of

service on the website. Constructive notice occurs when the consumer has inquiry notice of the terms of service, like a hyperlinked alert, and takes an affirmative action to demonstrate assent to them." *Id.* (citing *Nguyen*, 763 F.3d at 1176)). Whether a reasonable user would have constructive notice of a website's terms of service largely depends on "the conspicuousness and placement of the ["Conditions of Use"] hyperlink, other notices given to users of the terms of use, and the website's general design[.]" *Nguyen*, 763 F.3d at 1177.

The way in which Amazon presents its COUs on its login and checkout pages resembles what courts have termed: "modified" clickwrap agreements.[4] Under these agreements, users are notified of the existence of the website's terms of use and advises a user that by making some type of affirmative act, often by clicking a button, she is agreeing to the terms of service. *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 75-76 (2d Cir. 2017); *Peter v. Doordash, Inc.*, 445 F. Supp. 3d 580, 585 (N.D. Cal. 2020). Courts have found these types of agreements valid "where the existence of the terms was reasonably communicated to the user." *Meyer*, 868 F.3d at 76 (collecting cases); *see, e.g., Crawford v. Beachbody, LLC*, No. 14cv1583-GPC(KSC), 2014 WL 6606563, at *3 (S.D. Cal. 2014) (terms were blue and hyperlinked); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 835 (S.D.N.Y. 2012) (terms were underlined and hyperlinked); *Swift v. Zynga Game Network*, 805 F. Supp. 2d 904, 911 (N.D. Cal. 2011) (terms were blue and hyperlinked); *Cairo, Inc. v. Crossmedia Servs., Inc.*, No. 04-cv-04825-JW, 2005 WL 756610, at *2 (N.D. Cal. Apr. 1, 2005) (terms were underlined and hyperlinked). By contrast, courts are less willing to find a user is placed on inquiry notice when the terms are less conspicuous. *See, e.g., Colgate v. JUUL Labs, Inc.*, 402 F. Supp. 3d 728, 764-65 (N.D. Cal. 2019) (collecting cases)).

Amazon argues Plaintiffs received constructive notice of and assented to Amazon's revised COUs each time they logged into their accounts and made purchases using Amazon's website. The Court begins with Amazon's login page. On this page, a conspicuous notice is placed directly beneath the yellow "Continue" button that a user must click to log into one's account. That notice unambiguously states: "By continuing, you agree to Amazon's Conditions of Use and Privacy

[4] Some courts also refer to these type of agreements as "hybrid design" or "sign-in wrap" agreements. *Colgate*, 402 F. Supp. 3d at 763.

Notice." The notice appears in black font against a white background with the phrase, "Conditions of Use," in blue, hyperlinked text. Moreover, very minimal text or imagery appears on the same page. Based on these facts, the Court finds that a reasonable user would be placed on constructive notice of Amazon's revised COUs. Nevertheless, the Court cannot conclude that Plaintiffs received reasonable notice under these circumstances because Amazon neither offers evidence that Plaintiffs logged into their accounts, nor is it clear whether the image of the login page Amazon provided accurately reflects the login page Plaintiffs would have encountered when they supposedly logged into their accounts. (*See* Jensen Decl. ¶ 7.)

Amazon's reliance on its checkout page fares better. There, two conspicuous notices are placed immediately adjacent to either yellow "Place your order" buttons. Like the login page, the notice unambiguously states: "By placing your order, you agree to Amazon's privacy notice and conditions of use." Again, the notice appears in black font against a white background with the phrase, "conditions of use," appearing in blue, underlined, and hyperlinked text. A reasonable user can then access and review Amazon's revised COUs, including the arbitration provision at issue here. This is the exact layout of the checkout page Plaintiffs would have encountered when making their purchases in April 2020. (Jensen Decl. ¶ 8.) When a user accessed Amazon's COUs,an apparent disclaimer appears in bold font cautioning: "**By using Amazon Services, you agree to these conditions. Please read them carefully.**" (*Id.*, Ex. C.)

Courts have repeatedly held that Amazon's layout of its checkout page provides constructive notice to its users of the COUs. *See, e.g., Payne v. Amazon.com, Inc.*, C.A. No. 2:17-cv-2313-PMD, 2018 WL 4489275, at *8 (D.S.C. July 25, 2018); *McKee v. Audible, Inc.*, CV 17-1941-GW(Ex), 2017 WL 7388530, at *14 (C.D. Cal. Oct. 26, 2017); *Fagerstrom v. Amazon.com, Inc.*, 141 F. Supp. 3d 1051, 1069 (S.D. Cal. 2015); *Ekin v. Amazon Services, LLC*, 84 F. Supp. 3d 1172, 1175 (W.D. Wash. 2014); *Ranazzi v. Amazon.com, Inc.*, 46 N.E.3d 213, 217-18 (Ohio Ct. App. 2015).

Accordingly, based on this record, the Court finds Plaintiffs received constructive notice of and assented to Amazon's revised COUs, including the arbitration provision, when they made

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their purchases in April 2020.[5]

Plaintiffs nevertheless argue they did not receive notice because Amazon did not provide a separate communication that notified them that the arbitration provision was added to the COUs. In support of this proposition, Plaintiffs cite *Trudeau v. Google LLC*, 349 F. Supp. 3d 869 (N.D. Cal. 2018), *Plazza v. Airbnb, Inc.*, 289 F. Supp. 3d 537 (S.D.N.Y. 2018), and *Hart v. Charter Commc'ns, Inc.*, No. SA CV 17-0556-DOC (RAOx), 2017 WL 6942425, at *1 (C.D. Cal. Nov. 8, 2017). In each of these cases, the courts found that the plaintiffs received constructive notice based on some separate, additional communication that notified a user of a change to the website's terms of services. *See Trudeau*, 349 F. Supp. 3d at 845 (extensive notice campaign); *Plazza*, 289 F. Supp. 3d at 544-45 (email notice); *Hart v. Charter Commc'ns, Inc.*, 2017 WL 6942425, at *4 (written mail notice)). But, as Amazon persuasively points out, all these cases establish is that constructive notice can be achieved in many ways. They do not, however, undermine the efficacy of the notice on Amazon's checkout page.

The Court also finds unpersuasive Plaintiffs' reliance on *Gaglidari v. Denny's Rests., Inc.*, 815 P.2d 1362 (Wash. 1991) and *Burnett v. Pagliacci Pizza, Inc.*, 470 P.3d 486 (Wash. 2020). In *Gaglidari*, a former employee sued her employer, arguing she was wrongfully terminated for fighting while off duty, in violation of her employee handbook. 815 P.2d at 1364. When the former employee was hired, she was given an earlier version of the employee handbook that made fighting while on duty a terminable act. *Id.* The employer unilaterally revised the employee handbook that allowed it to terminate an employee for fighting, regardless of whether an employee was on or off duty. *Id.* at 1367. The former employee knew a revised employee handbook existed, but the employer never gave her the revised handbook, and she never signed for one. *Id.* Nevertheless, the employer argued the former employee had reasonable notice of the terms of the revised handbook because new employees often left the revised handbook in the employees' lounge, and she should have known of the changes. *Id.* Rejecting the employer's argument, the

[5] Amazon also relies on purchases Plaintiffs made between 2011 through 2020. In light of the Court's ruling, the Court need not determine whether Plaintiffs received reasonable notice and assented to Amazon's revised COUs for their remaining purchases.

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1 Washington Supreme Court held the employer failed to give the former employee reasonable
2 notice of terms of the revised handbook. *Id.* Although the employee knew a revised handbook
3 existed, the court explained, "she never received nor signed for one." *Id.* The court further
4 reasoned that it would be "wholly fortuitous," that the revised handbook would be left in the
5 lounge and actually read by the former employee. *Id.*

6 In *Burnett*, the employer gave the plaintiff an employment agreement who was compelled
7 to sign it immediately. 470 P.3d at 489. The employment agreement did not mention arbitration.
8 *Id.* The employee was also given a separate document titled, "Little Book of Answers," that he
9 did not have an opportunity to read through. *Id.* Unknown to the employee, by signing the
10 employment agreement, he purportedly agreed to the terms of the Little Book of Answers and its
11 arbitration provision. *Id.* A lawsuit ensued, and the employer moved to compel arbitration. *Id.* at
12 490.

13 The Washington Supreme Court held the parties did not agree to arbitrate because the
14 employee had no notice of the arbitration provision when he signed the employment agreement.
15 *Id.* at 491. "[A]n arbitration provision included in an employee handbook is enforceable," the
16 court noted, "only if the employee is given explicit notice about such provision." *Id.* at 492. The
17 court found, in part, hat a reasonable person could not find that the employee agreed to arbitrate by
18 signing the employment agreement given the agreement never mentioned arbitration. *Id.* at 491-
19 92.

20 The Court does not read *Gaglidari* or *Burnett* for the proposition that Amazon must
21 provide a separate, additional communication of its unilateral addition of the arbitration provision
22 to its COUs. Rather, these cases simply reaffirm that the standard for apprising a person of a
23 unilateral change to a contract is "reasonable notice." With the reasonable notice standard in
24 mind, this case is distinguishable from both *Gaglidari* and *Burnett*. Plaintiffs here were given
25 hyperlinked access to Amazon's revised COUs on the checkout page. Had they inquired further
26 Plaintiffs would have discovered that the COUs contained an arbitration provision under the
27 section labeled "DISPUTES." Plaintiffs were given ample opportunity to review Amazon's COUs
28 before making their purchases, and they manifested their asset to its terms by clicking the "Place

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your order" button. This does not resemble the situations in *Gaglidari* and *Burnett* where the employees did not receive the revised terms, did not have an opportunity to review them, or both.

Accordingly, the Court concludes Plaintiffs received constructive notice of the arbitration agreement and assented to its terms by clicking the "Place Your Order" button when they purchased their items. Therefore, an arbitration agreement exists between Plaintiffs and Amazon.

C. The Delegation Provision "Clearly and Unmistakably" Submits Plaintiffs' Claims and Threshold Issues of Arbitrability to the Arbitrator.

Satisfied that an arbitration agreement exists between Plaintiffs and Amazon, Plaintiffs now "bear the burden of showing the arbitration clause is inapplicable or unenforceable." *Otis Hous. Ass'n, Inc. v. Ha*, 201 P.3d 309, 587 (Wash. 2009). Plaintiffs' remaining arguments fall into two categories: challenges to the validity of the arbitration agreement, and challenges to the validity of the delegation provision.

Before the Court can reach Plaintiffs' former argument, the Court must first determine whether the parties clearly and unmistakably delegated such issues to the arbitrator. *See Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524, 530 ("[I]f the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue.")).

Plaintiffs argue the delegation provision is invalid for two reasons. Plaintiffs first contend that only sophisticated parties can form an agreement to arbitrate arbitrability through incorporation of the AAA rules. The Ninth Circuit has held that the "incorporation of the AAA rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability." *Brennan*, 796 F.3d at 1130. Although the Ninth Circuit limited its holding to arbitration agreements involving sophisticated parties, it further noted that "our holding does not foreclose the possibility that this rule could also apply to unsophisticated parties[.]" *Id.* at 1130-31; *see also Galilea, LLC v. AGCS Marine Ins. Co.*, 879 F.3d 1052, 1062 (9th Cir. 2018) (same). Since *Brennan*, courts have been split on this issue. *Compare Eiess v. USAA Fed. Sav. Bank*, 404 F. Supp. 3d 1240, 1253 (N.D. Cal. 2019) ("However, the majority of the lower courts in the Ninth Circuit have 'held that incorporation of the AAA rules was insufficient to establish delegation in consumer contracts involving at least one unsophisticated party.'") (quoting *Ingalls v. Spotify*

USA, Inc., No. C 16-03533 WHA, 2016 WL 6679561, at *4 (N.D. Cal. Nov. 14, 2016), *McLellan v. Firtbit, Inc.*, No. 3:16-cv-00036-JD, 2017 WL 4551484, at *2 (N.D. Cal. Oct. 11, 2017) ("The 'greater weight of authority has concluded that the holding of *Opus Bank* applies similarly to non-sophisticated parties.'") (quoting *Miller v. Time Warner Cable Inc.*, No. 8:16-cv-00329-CAS (ASx), 2016 WL 7471302, at *5 (C.D. Cal. Dec. 27, 2016)).

The Court agrees with those courts that have held incorporation of the AAA rules constitutes clear and unmistakable evidence of the parties' intent to arbitrate arbitrability, regardless of the parties' relative sophistication.[6] Accordingly, the Court finds the incorporation of the AAA rules into Amazon's COUs evidences a clear and unmistakable evidence of the parties' intent to arbitrate arbitrability.

Plaintiffs' argument poses an additional practical issue. As one district court explained:

> The factors that might make someone "sophisticated" are poorly suited to a standard definition that parties can rely upon to avoid uncertainty or surprise in the meaning of the instrument they signed. A party-by-party assessment of sophistication under some loose amalgam of personal education, line of work, professional knowledge, and so on would undermine contract expectations in potentially random and inconsistent ways. Applying such an individualized inquiry in the class action context would likely raise additional problems.

McLellan, 2017 WL 4551484, at *3.

Plaintiffs also argue that incorporation of the delegation provision is procedurally unconscionable because it is difficult to locate. The Court agrees that Amazon's arbitration provision is not a model of clarity, but it provides enough information to allow a user to locate and review the delegation provision contained in the AAA rules. Amazon's arbitration provision states that "[t]he arbitration will be conducted by the [AAA rules], including the AAA's Supplementary Procedures for Consumer-Related Disputes." (Jensen Decl., Ex. C.) While Amazon does not provide those rules in the arbitration provision, it notifies a user that she can access the AAA rules on the AAA's webpage or by calling its toll-free number. (*See id.*) When

[6] In an unpublished memorandum, the Ninth Circuit held that the incorporation of the AAA rules evidenced the parties' intent to arbitrate arbitrability, even where the plaintiffs were teenage children. *G.G. v. Valve Corp.*, 799 F. App'x 557, 558 (9th Cir. 2020).

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an Amazon user inputs the webpage Amazon provided, she is brought to the AAA's main webpage; she is not, however, directed automatically to the rules relevant to the dispute. (*See* Dkt. No. 29, Declaration of Steve W. Berman ("Berman Decl."), Ex. A.) At the top of the main page, there is a section clearly labeled "Rules, Forms & Fees." (*Id.*, Ex. B.) On the "Rules, Forms & Fees" page, a heading appears in bold, red, and capitalized font: "**MOST VIEWED**." (*Id.*) Seven sets of rules appear in this section, one of which is the "Consumer Arbitration Rules." (*Id.*) A reasonable consumer would assume the "Consumer Arbitration Rules" are the "Supplementary Procedures for Consumer-Related Disputes" referenced in Amazon's COUs. *See also Fagerstrom*, 141 F. Supp. 3d at 1070 ("A reasonable consumer would assume that the "*Consumer* Arbitration Rules" apply, particularly given Amazon's reference to the AAA's 'Supplementary Procedures for *Consumer-Related* Disputes' in the Agreement.")). Indeed, a consumer who reads the very first rule of the Consumer Arbitration Rules would come to discover that these are the exact rules applicable to the arbitration provision. (*See* Berman Decl., Ex. D at 9) ("[T]he Supplementary Procedures for Consumer-Related Disputes . . . have been amended and renamed the Consumer Arbitration Rules") (emphasis omitted). A reasonable consumer who continues to read would then come across the delegation provision. (*Id.* at 17.)

Even if a user could not locate the AAA Consumer Arbitration Rules through the webpage, Plaintiffs could have simply called the toll-free number to receive assistance in locating the relevant rules, a point Plaintiffs do not address. The Court thus finds that the incorporation of the AAA rules into Amazon's COU's is not procedurally unconscionable.

Accordingly, the Court concludes that the parties' incorporation of the AAA rules into the arbitration agreement evidences a clear and unmistakable intent to arbitrate arbitrability. As such, the Court "must enforce it under §§ 3 and 4 [of the FAA], leaving any challenge to the validity of the [arbitration agreement] as a whole for the arbitrator," including Plaintiffs' argument that the agreement is unconscionable. *Rent-A-Ctr.*, 561 U.S. at 72.

CONCLUSION

For the above reasons, the Court hereby GRANTS Amazon's motion to compel arbitration and STAYS all further litigation pending completion of arbitration. The parties shall file joint

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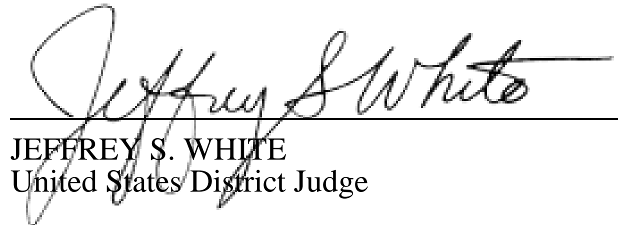
status reports every 180 days apprising the Court of the status of the arbitration proceedings, including when the stay may be lifted. The parties' first joint status report shall be due on November 3, 2021.

IT IS SO ORDERED.

Dated: May 7, 2021



JEFFREY S. WHITE
United States District Judge