UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES - GENERAL

Case No.	CV 18-1548 PSG (GJSx)	Date	May 30, 2018
Title	Erin L. Perry v. MLB Advanced Media, L.P. et al.		

Present: The Honorable	Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): Order GRANTING Defendant's motion to compel individual arbitration

Before the Court is a motion to compel individual arbitration filed by Defendant MLB Advanced Media, L.P. ("Defendant"). *See* Dkt. # 15 ("*Mot.*"). Plaintiff Erin L. Perry ("Plaintiff") opposes the motion, *see* Dkt. # 16 ("*Opp.*"), and Defendant replied, *see* Dkt. # 17 ("*Reply*"). The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. Having considered the moving papers, the Court **GRANTS** Defendant's motion.

I. Background

Plaintiff alleges that, in July 2016, she purchased a subscription service ("the Subscription") called "MLB Prime" from Defendant at an introductory rate of $79.99. *See First Amended Complaint*, Dkt. # 13 ("*FAC*"), ¶ 28.[1] She claims to have enjoyed MLB Prime until March 3, 2017, "when Defendant automatically renewed Plaintiff's subscription . . . for $112.99, approximately four (4) months shy [of] the full year Plaintiff previously purchased and paid for in July of 2016 for $79.99." *Id.* ¶ 29. Plaintiff had believed that the introductory rate would cover a "full year of MLB Prime," *id.* ¶ 1, and so requested a refund for the four months she claims she was double-billed. *Id.* ¶ 30. This effort was unsuccessful. *Id.*

Plaintiff initiated her putative class action on February 26, 2018. *See* Dkt. # 1. In her first amended complaint ("FAC"), she alleges that Defendant conducted "a common scheme to mislead consumers and incentivize them to purchase [MLB Prime] in spite of the fact that

[1] Defendant suggests that it "has never offered a subscription service called 'MLB Prime,'" and that Plaintiff is likely referring to a product called "MLB.TV Premium." *Mot.* 2 n. 1. Despite this assertion, for the sake of clarity, the Court will adopt Plaintiff's term "MLB Prime" to refer to the product that she purchased from Defendant.

Defendant had no intention to and did not provide [MLB Prime] for the period represented." *FAC* ¶ 32. She asserts the following causes of action:

> First Cause of Action: Violation of the California False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500 et seq. *FAC* ¶¶ 67–76.
>
> Second Cause of Action: Violation of the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 et seq. *FAC* ¶¶ 77–94.
>
> Third Cause of Action: Violation of the California Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750 et seq. *FAC* ¶¶ 95–97.

Defendant now moves the Court to compel arbitration, arguing that as part of the transaction at issue, "Plaintiff agreed to be bound by [Defendant's] Terms of Use, which included a" bilateral arbitration provision. *Mot.* 1:6–11.

II. Legal Standard

"The 'principal purpose' of the FAA [Federal Arbitration Act] is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). The FAA states 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 allows "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." *Id.* § 4. "Because the FAA mandates that 'district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed[,]' the FAA limits courts' involvement to 'determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.'" *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008) (quoting *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000)) (emphasis in original). When deciding whether a valid arbitration agreement exists, courts generally apply "ordinary state-law principles that govern the formation of contracts." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Any doubts about the scope of arbitrable issues must be resolved in favor of arbitration. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

If an arbitration agreement exists and covers the dispute at issue, section 4 of the FAA "requires courts to compel arbitration in accordance with the terms of the agreement." *Concepcion*, 563 U.S. at 344 (internal quotation marks omitted).

III. Discussion

The Court will first determine whether a valid arbitration agreement exists and, if so, whether it covers this dispute.

A. Validity of Arbitration Agreement

Defendant asserts that at the time Plaintiff purchased the Subscription, she expressly agreed to its Terms of Use. *See Mot.* 2:20–21. This agreement took the form of her clicking a "Buy & Accept Terms" button located immediately above a hyperlink, which directed Plaintiff to Defendant's Terms of Use. *Id.* 2:21–3:2; *see also Declaration of R. Adam Lauridsen*, Dkt. # 15-1 ("*Lauridsen Decl.*"), Ex. B. The text below the button stated, "By clicking 'Buy & Accept Terms,' I agree to the MLB.com Terms of Use and the MLB.com Privacy Policy." *Lauridsen Decl.*, Ex. B. The linked Terms of Use included similar text requiring that purchasers of the Subscription agree to the Terms of Use. *See id.*, Ex. D at 1 ("PLEASE READ THESE TERMS (THIS 'AGREEMENT') CAREFULLY BEFORE USING THIS WEBSITE OR ANY OTHER MLB ADVANCED MEDIA, L.P. PRODUCT OR SERVICE. . . . By using an MLBAM Property, you agree to be bound by this Agreement. If you do not agree to this Agreement, do not use the MLBAM Properties.").

The Terms of Use also included a provision ("the Arbitration Provision") requiring the arbitration of any claim brought by either party. It read in part as follows:

> Any and all disputes, claims or controversies arising out of or relating to this Agreement, the breach thereof, or any use of the MLBAM Properties (including all commercial transactions conducted through the MLBAM Properties) ("Claims"), except for claims filed in a small claims court that proceed on an individual (non-class, non-representative) basis, shall be settled by binding arbitration before a single arbitrator appointed by the American Arbitration Association ("AAA") in accordance with its then governing rules and procedures, including the Supplementary Procedures for Consumer-Related Disputes, where applicable. In agreeing to arbitrate all Claims, you and MLBAM waive all rights to a trial by jury in any action or proceeding involving any Claim. The arbitration shall be held in New York County, New York, and judgment on the award rendered by the arbitrator may be entered by any court having jurisdiction thereof. This arbitration

> undertaking is made pursuant to and in connection with a transaction involving interstate commerce, and shall be governed by and construed and interpreted in accordance with the Federal Arbitration Act at 9 U.S.C. Section 1, et seq. The parties agree that an award and any judgment confirming it only applies to the arbitration in which it was awarded and cannot be used in any other case except to enforce the award itself. This arbitration provision shall survive termination of this Agreement.

Id., Ex. D at 8. An accompanying provision entitled "Choice of Law" provided that "[a]ny and all Claims . . . shall be governed by, and construed and interpreted in accordance with, the laws of the State of New York." *Id.*

"[A]rbitration is a matter of contract," *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986), and so "[i]n determining the validity of an agreement to arbitrate, federal courts 'should apply ordinary state-law principles that govern the formation of contracts.'" *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892 (9th Cir. 2002) (quoting *Kaplan*, 514 U.S. at 944). With these principles in mind, the Court agrees that Plaintiff's acceptance of the Terms of Use—specifically, her clicking the "Buy & Accept Terms" button at the time she purchased the Subscription—was sufficient to bind her to the Arbitration Provision. *See McKee v. Audible, Inc.*, No. CV 17-1941-GW(Ex), 2017 WL 4685039, at *11 n. 7 (C.D. Cal. July 17, 2017) (holding that "the disclosure and hyperlink that appear on the Amazon checkout page" bound plaintiff to its conditions of use and arbitration provision therein); *Tompkins v. 23andMe, Inc.*, Nos. 5:13-CV-05682-LHK, 5:14-CV-00294-LHK, 5:14-CV-00429-LHK, 5:14-CV-01167-LHK, 5:14-CV-01191-LHK, 5:14-CV-01258-LHK, 5:14-CV-01348-LHK, 5:14-CV-01455-LHK, 2014 WL 2903752, at *8 (N.D. Cal. June 25, 2014) (enforcing arbitration agreement where each customer "clicked a box or button that appeared near a hyperlink to the [Terms of Service] to indicate acceptance"); *Swift v. Zynga Game Networks, Inc.*, 805 F. Supp. 2d 904, 912 (N.D. Cal. 2011) ("Because Plaintiff was provided with an opportunity to review the terms of service in the form of a hyperlink immediately under the 'I accept' button and she admittedly clicked 'Accept,' . . . a binding contract was created here. . . . [C]lickwrap presentations providing a user with access to the terms of service and requiring a user to affirmatively accept the terms, even if the terms are not presented on the same page as the acceptance button, are sufficient.").

In opposition, Plaintiff provides various arguments against enforcement of the Arbitration Provision. Each will be considered in turn.

i. Agreement

Plaintiff first suggests that Defendant has provided inadequate evidence that she ever actually agreed to the Arbitration Provision. *See Opp.* 4:8–25. She points out that the declaration on which Defendant relies in its motion is that of its "attorney[,] who lacks personal knowledge to demonstrate the existence of the agreement Defendant seeks to assert." *Id.* 4:14–15. The Court does not find this argument persuasive. It is true that, as the party seeking to compel arbitration, Defendant bears "the burden of proving the existence of an agreement to arbitrate by a preponderance of the evidence." *Norcia v. Samsung Telecomms. Am., LLC*, 845 F.3d 1279, 1283 (9th Cir. 2017). However, Defendant has met this burden as to the existence of an agreement. To begin, Defendant has submitted the declaration of its senior vice president, who corroborates all of the pertinent details. *See Declaration of Bart Manning*, Dkt. # 17-1 ("*Manning Decl.*"), ¶¶ 1–6, Exs. A–D. Furthermore, Plaintiff does not provide any evidence, or even any indication, that she did *not* agree to the Arbitration Provision through the procedure outlined above. Therefore, the Court concludes that Defendant has satisfied its burden and demonstrated through a preponderance of the evidence that Plaintiff agreed to the Arbitration Provision.

ii. Unconscionability

Next, Plaintiff contends that the Arbitration Provision is unconscionable and hence unenforceable. *See Opp.* 5:1–10:5. Under either California or New York law,[2] an arbitration agreement is invalid only if it is both procedurally *and* substantively unconscionable. *See Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1058 (9th Cir. 2013); *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 10 (1988). In assessing unconscionability, courts apply a "sliding scale": "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237, 1244 (2016); *see also David v. #1 Mktg. Serv., Inc.*, 113 A.D.3d 810, 812 (N.Y. App. Div. 2014). "The party asserting that a contractual provision is unconscionable bears the burden of proof." *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1023 (9th Cir. 2016); *see also Taha v. Elzemity*, 157 A.D.3d 744, 746 (N.Y. App. Div. 2018).

The Court will first analyze procedural unconscionability before moving on to substantive unconscionability.

a. Procedural Unconscionability

[2] The parties have not resolved, or even attempted to resolve, whether New York or California law should govern the Court's contractual interpretation of the Arbitration Provision. Given the similarities between both states' approaches, and the consistent results that emerge from either application, the Court will consider the laws of both jurisdictions in its analysis.

"The procedural element of unconscionability focuses on 'oppression or surprise due to unequal bargaining power.'" *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1260 (9th Cir. 2017) (quoting *Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 246 (2012)); *see also Gillman*, N.Y.2d at 10–11 ("The procedural element of unconscionability requires an examination of the contract formation process and the alleged lack of meaningful choice. The focus is on such matters as the size and commercial setting of the transaction, whether deceptive or high-pressured tactics were employed, the use of fine print in the contract, the experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power.") (citation omitted).

Plaintiff first suggests that the Arbitration Provision is contained within a contract of adhesion—"a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it," *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 113 (2000)—which is strong evidence of unconscionability. Undoubtedly, the agreement between Plaintiff and Defendant *is* a contract of adhesion; Defendant does not dispute this characterization. However, this designation alone is insufficient to render the Arbitration Provision unconscionable. Although "the adhesive nature of the contract is sufficient to establish *some degree* of procedural unconscionability," this "does not mean that a contract will not be enforced, but rather that" the Court should "scrutinize the substantive terms of the contract to ensure they are not manifestly unfair or one-sided." *Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 915 (2015) (emphasis added); *see also Nayal v. HIP Network Servs. IPA, Inc.*, 620 F. Supp. 2d 566, 571 (S.D.N.Y. 2009) ("[E]ven if the Agreement was a form contract offered on a 'take-it-or-leave-it' basis . . . this is not sufficient under New York law to render the provision procedurally unconscionable.").

The Court agrees with Defendant that there is no other evidence of undue surprise or oppression here. The Arbitration Provision was accessible through the hyperlink that was located just below the "Buy & Accept Terms" button, which Plaintiff was required to click to proceed with her purchase. *See Manning Decl.* ¶ 4, Ex. B; *see also Moule v. United Parcel Serv. Co.*, No. 1:16-cv-00102-JLT, 2016 WL 3648961, at *7 (E.D. Cal. July 7, 2016) ("Plaintiff received notice of the UPS Terms—including the requirement for binding arbitration—through use of the WorldShip program and ups.com. Though Mr. Brown elected to 'merely hit the prompts' rather than read the notifications, Plaintiff fails to show 'surprise' because the terms were not hidden from view or drafted in 'fine-print terms.'"). Although Plaintiff claims that that the agreement was the result of unequal bargaining power, and that Defendant has superior resources to bring to bear, numerous courts have rejected procedural unconscionability defenses in cases with similar facts as those presented here. For example, in *Plazza v. Airbnb, Inc.*, 289 F.

Supp. 3d 537 (S.D.N.Y. 2018), the court considered Airbnb's terms of service, which were presented through a "sign-up screen for potential users [that] included a sentence, directly below the sign-up button, stating that 'By clicking "Sign Up," you confirm that you accept the Terms of Service.'" *Id.* at 543. Applying California law, the court decided as follows:

> Airbnb's [Terms of Service] is a standard adhesion contract, which does suggest some level of procedural unconscionability. However, this is not sufficient to invalidate the arbitration provision. Although Airbnb's arbitration provision could be viewed as somewhat procedurally unconscionable because it is adhesive, the factual circumstances present do not rise to the level of being an unfair surprise or unduly oppressive, such that they warrant invalidation of the arbitration provision.

Id. at 557–58 (citations omitted). Other courts, applying both California and New York law, have made similar determinations. *See, e.g.*, *Nevarez v. Forty Niners Football Co., LLC*, No. 16-CV-07013, 2017 WL 3492110, at *11–12 (N.D. Cal. Aug. 15, 2017) (determining that "the degree of procedural unconscionability is low" where plaintiffs were notified that use of a website was governed by terms of use set forth in a hyperlinked page that included an arbitration provision); *Bernardino v. Barnes & Noble Booksellers, Inc.*, No. 17-CV-04570 (LAK) (KHP), 2017 WL 7309893, at *11–12 (S.D.N.Y. Nov. 20, 2017) (rejecting procedural unconscionability defense where plaintiff "had to click on a [Terms of Use] hyperlink and read through it to learn of the arbitration clause" and "there was a power disparity, [plaintiff] could not negotiate the terms of the arbitration provision, and she is not a native English speaker"); *McKee*, 2017 WL 4685039, at *12 ("The Court would agree the contract is one of adhesion. However, that alone does not render it procedurally unconscionable. . . . Plaintiff was on reasonable, constructive notice via the hyperlinks that appear during the Amazon checkout process.").

Here, "[n]othing in the record indicates that [P]laintiff . . . was prevented from reading the agreement . . . . She has made no allegation that she was the victim of deceptive or high pressure tactics," and "[t]he contract provisions at issue were set forth in a clear and legible manner." *Morris v. Snappy Car Rental*, 84 N.Y.2d 21, 30 (1994). The facts here—a take-it-or-leave-it provision combined with unequal bargaining power and sophistication—do not "demonstrate any oppression beyond what is inherent in any adhesion contract." *Baker v. Acad. of Art Univ. Found.*, No. 17-cv-03444-JSC, 2017 WL 4418973, at *4 (N.D. Cal. Oct. 5, 2017). Furthermore, Defendant notes that its "conclusion is bolstered by the fact that the Agreement is 'a contract concerning a nonessential recreation activity, [such that] the consumer always has the option of simply forgoing the activity.'" *Reply* 6:3–7 (quoting *Belton v. Comcast Cable Holdings, LLC*, 151 Cal. App. 4th 1224, 1245 (2007)) (alteration in original); *see also Bassett v. Elec. Arts Inc.*, No. 13-CV-04208 (MKB)(SMG), 2015 WL 1298644, at *11 & n. 8 (E.D.N.Y. Feb. 9, 2015) (noting that "California courts have consistently held that a term cannot be so unconscionable as

to invalidate a contract when the contract at issue concerns a nonessential recreational activity" and suggesting that a similar outcome would result under New York law).

The Court concludes that the Arbitration Provision here is procedurally unconscionable only to the limited extent as any other adhesion contract. Accordingly, "because the degree of procedural unconscionability is low, the Court will enforce the [] provision unless the degree of substantive unconscionability is high." *Nevarez*, 2017 WL 3492110, at *12 (internal quotation marks omitted).

b. Substantive Unconscionability

"Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be so one-sided as to shock the conscience." *Pinnacle Museum Tower*, 55 Cal. 4th at 246 (citations and internal quotation marks omitted); *see also Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1145 (2013) ("[T]he unconscionability doctrine is concerned not with a simple old-fashioned bad bargain, but with terms that are unreasonably favorable to the more powerful party.") (citation and internal quotation marks omitted).

Here, Plaintiff points to "three substantive problems with the arbitration agreement" that render it substantively unconscionable: "1) it waives Plaintiff's ability to seek punitive damages, 2) it requires Plaintiff to arbitrate in New York, and 3) it provides only for Defendant to recover fees if it prevails on a Motion to Compel Arbitration." *Opp.* 8:13–16. Each will be considered in turn.

First, "[t]he principle that an arbitration agreement may not limit statutorily imposed remedies such as punitive damages and attorney fees appears to be undisputed." *Armendariz*, 24 Cal. 4th at 103; *see also Gelow v. Cent. Pac. Mortg. Corp.*, 560 F. Supp. 2d 972, 981 (E.D. Cal. 2008) ("In order for an arbitration agreement to be lawful, it must allow for all types of relief that a court could order."). Here, the Arbitration Provision provides that "[t]he arbitrator shall not have authority to award punitive damages." *Lauridsen Decl.*, Ex. D at 8. This restriction therefore suggests a degree of substantive unconscionability. However, Plaintiff has not demonstrated that her ability to seek punitive damages has actually been limited. The parties do not dispute the validity of the agreement's choice-of-law provision, which requires application of New York law. *See id*. Defendant notes that "Plaintiff has not shown that she is being denied any punitive damages authorized by New York statute to which she conceivably could be entitled." *Reply* 8:19–20. Given that the burden is on Plaintiff to demonstrate unconscionability, in the absence of specific statutorily imposed remedies to which she would

normally be entitled but would be denied due to the Arbitration Provision, the Court cannot conclude that this alone is a sound basis for a finding of substantive unconscionability.

Second, Plaintiff suggests that requiring arbitration in New York—"forc[ing] Plaintiff, a resident of Ventura County, California, to arbitrate a dispute worth at most $193 in restitution approximately 2,900 miles from her home"—has "the effect of [] forcing Plaintiff to forgo her public rights by making it so cost burdensome as to be untenable." *Opp.* 9:11–17 (citation omitted). However, although "California courts have stricken arbitration provisions that would prevent the enforcement and vindication of public rights by imposing unreasonable fees on a party or by requiring arbitration in a distant and inconvenient forum," *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1292 (9th Cir. 2006), courts have nonetheless enforced forum selection clauses under analogous circumstances. *See, e.g., King v. Hausfeld*, No. C-13-0237 EMC, 2013 WL 1435288, at *13–15 (N.D. Cal. Apr. 9, 2013) ("The forum selection clause in the arbitration agreement is of the sort often found in arbitration agreements and other contracts. . . . Plaintiff has failed to establish that the operation of this clause is so 'overly harsh or one-sided' as to be unconscionable."); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 837–40 (S.D.N.Y. 2012) (collecting cases where courts "have enforced forum selection clauses in clickwrap agreements" and holding that plaintiff agreed to a forum selection clause within hyperlinked terms). Furthermore, there is no indication here that enforcement of the Arbitration Provision would impose unreasonable requirements on Plaintiff. Defendant notes that the AAA Consumer Rules, which would be applied to Plaintiff's arbitration, "specifically allow not only for document-only arbitration but also for telephone (in lieu of in-person) hearings." *Reply* 8:1–2. Where "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000). Here, Plaintiff has not adequately demonstrated that she would incur unreasonable costs if the Arbitration Provision were enforced, and so the forum selection clause does not render it substantively unconscionable.

Third, Plaintiff contends that "Defendant's arbitration clause contains a unilateral fee shift provision on the issue of enforcement which is unconscionable." *Opp.* 9:18–19. Specifically, she points to language in the Arbitration Provision reading, "In the event that either party initiates a proceeding involving any Claim other than an arbitration in accordance with this Section . . . the other party shall recover all attorneys' fees and expenses reasonably incurred in enforcing this agreement to arbitrate." *Lauridsen Decl.*, Ex. D at 8. Plaintiff characterizes this as a unilateral fee shift provision, which, she notes, "is unconscionable in California." *Opp.* 9:19–23; *see also Carmona v. Lincoln Millennium Car Wash, Inc.*, 226 Cal. App. 4th 74, 88 (2014). However, the Court disagrees with Plaintiff's characterization of the fee shift provision as unilateral. It specifically mandates that if "*either party* initiates" a lawsuit, then "the *other party* shall recover" fees and expenses. *Lauridsen Decl.*, Ex. D at 8 (emphases added). As

Defendant notes, "If [it] had sued Plaintiff in court over breach of her subscription agreement, the same provision Plaintiff objects to here would have exposed [Defendant] to a potential claim by Plaintiff for fees and expenses." *Reply* 8:11–13. In light of this potential application, the Court cannot conclude that the fee shift provision is unilateral and that therefore the Arbitration Provision is unconscionable.

In summation, although the Court is concerned about the Arbitration Provision's potential limitation on the recovery of punitive damages, neither this nor any other term is so one-sided as to shock the conscience. Because both the procedural *and* substantive unconscionability of the Arbitration Provision and its terms are minimal, the Court concludes that the Arbitration Provision is not unconscionable.

iii. Public Injunctive Relief

Lastly, Plaintiff argues that the Arbitration Provision is invalid because it waives her right to public injunctive relief. *See Opp.* 10:6–13:24.

The California Supreme Court recently articulated that arbitration provisions are invalid and unenforceable if they purport to waive a plaintiff's statutory right to public injunctive relief. *See McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 961 (2017). The *McGill* decision specifically implicated the three California statutes that are the basis of Plaintiff's complaint in this case. *See id.*; *Compl.* ¶¶ 67–97. However, contrary to Plaintiff's assertion, the Court agrees with Defendant that the Arbitration Provision does *not* limit her ability to seek public injunctive relief. Indeed, it actually states that "the arbitrator shall have authority to award legal *and equitable* relief available in the courts of the State of New York." *Lauridsen Decl.*, Ex. D at 8 (emphasis added). Although it also includes the limitation that "[a]ny and all claims shall be arbitrated on an individual basis only, and shall not be consolidated or joined with or in any arbitration or other proceeding involving a Claim of any other party," and that "the arbitrator shall have no authority to arbitrate any Claim as a class action or in any other form other than on an individual basis," *id.*, the Court interprets this language as implicating the arbitration *process*, not the *remedies* that may result from it. Accordingly, application of *McGill* to this case does not render the Arbitration Provision unenforceable.

In short, because Plaintiff agreed to the Arbitration Provision and it is not unconscionable, the Court concludes that it is valid and enforceable.

B. Scope of Arbitration Agreement

Having determined that the Arbitration Provision is valid and enforceable, the Court must now determine "whether the agreement encompasses the dispute at issue." *Cox*, 533 F.3d at 1119.

Here, the Arbitration Provision required that "[a]ny and all disputes, claims or controversies arising out of or relating to this Agreement, the breach thereof, or any use of [Defendant's] Properties . . . shall be settled by binding arbitration." *Lauridsen Decl.*, Ex. D at 8. The Court agrees with Defendant, and Plaintiff does not dispute, that her claims relating to MLB Prime fall within the scope of the Arbitration Provision. *See Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999) ("Every court that has construed the phrase 'arising in connection with' in an arbitration clause has interpreted that language broadly. We likewise conclude that the language 'arising in connection with' reaches every dispute between the parties having a significant relationship to the contract and all disputes having their origin or genesis in the contract."); *Han v. Samsung Telecomms. Am., LLC*, No. CV 13-3823-GW (AJWx), 2013 WL 7158251, at *8 (C.D. Cal. Oct. 21, 2013) (holding that "the broad language in the arbitration clause encompasses all of Plaintiffs' claims in this Action," including FAL, UCL, and CLRA claims).

Additionally, because the parties do not dispute the arbitrability of the claims at issue in the dispute, it is appropriate to dismiss the case rather than to stay it pending the outcome of the arbitration. *See Sunvalley Solar, Inc. v. China Elec. Equip. Grp. Corp.*, No. CV15-5099 PSG (JPRx), 2015 WL 13546433, at *5 (C.D. Cal. Oct. 29, 2015), *aff'd sub nom. Sunvalley Solar, Inc. v. CEEG (Shanghai) Solar Sci. & Tech. Co.*, 690 F. App'x 942 (9th Cir. 2017) ("Dismissal is proper where the entirety of a plaintiff's claim is subject to arbitration."); *see also Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 638 (9th Cir. 1988) (determining that dismissal was appropriate where "plaintiffs could not possibly win relief" because all of their claims were subject to arbitration agreement and the FAA does "not limit the court's authority to grant a dismissal"). Therefore, because all of Plaintiff's causes of action are subject to the Arbitration Provision, dismissal of her claims is the appropriate outcome in this case.

IV. Conclusion

For the foregoing reasons, the Court **GRANTS** Defendant's motion to compel individual arbitration and **DISMISSES** this action without prejudice.

IT IS SO ORDERED.