IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MARKET AMERICA, INC., MARKET AMERICA WORLDWIDE, INC., JAMES HOWARD RIDINGER, LOREN RIDINGER, and MARC ASHLEY, Petitioners, v. CHUANJIE YANG, OLLIE LAN, and LIU LIU, Respondents.	)	1:17CV897

ORDER

This matter is before the Court on a Petition to Compel Arbitration [Doc. #1]. In response to the Petition, Respondents initially filed a Motion to Dismiss or Transfer, which the Court denied by Order and Memorandum Opinion on July 12, 2018. Respondents then filed a Motion to Conduct Further Proceedings and to Stay, and later filed a second Motion to Stay. The Court addressed the Motions to Stay in an Order on January 16, 2019. In that Order, the Court noted that it appeared that no further stay was warranted and that it would be appropriate to grant the Petition to Compel Arbitration and leave questions of arbitrability, validity, and scope for final determination by the arbitrator under the terms of the relevant Distributor Agreement. The Court set this matter for a hearing on February 15, 2019, to determine if any matters remained. The Court continued the hearing at Respondents' request to March 11, 2019. In a Status Report filed prior to the hearing, Respondents raised additional

contentions challenging the formation of the Agreement. The Court considered those contentions at the hearing on March 11, 2019. At the hearing, Respondents requested an opportunity to file an Answer or other further Response to the Petition. Based on the discussion at the hearing, the Court allowed that request, and gave Respondents until March 18, 2019 to file an Answer or Response. Petitioners were given until March 25, 2019 to file a Reply. Having now considered the Petition, the Answer, and the Reply, as well as the various prior filings in this case, the Court will grant the Petition to Compel Arbitration, as set out below.

I. BACKGROUND

Market America is a self-described "product brokerage and Internet one-to-one marketing company," with headquarters in North Carolina. (Petition [Doc. #1] ¶ 1.) Petitioners allege that Respondents are independent distributors for Market America and that each signed an "Independent Unfranchise Application and Agreement" ("Agreement" or "Distributor Agreement"), that is at the core of the parties' dispute. (Id. ¶¶ 12-14 and n. 2.) The Agreement includes the following provisions:

> **29. Arbitration. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall ultimately be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules and judgment on the award rendered by the arbitrators may be entered in a court of competent jurisdiction. You understand that this arbitration provision means you are giving up the right to have any dispute you have regarding this Agreement heard by a jury and determined in a court of law. The arbitration shall be heard by one arbitrator, and it shall take place in Greensboro, North Carolina. Either party may seek emergency or**

provisional relief in the General Court of Justice, Guilford County, North Carolina, prior to invoking the arbitration remedy.

> 30. Entire Agreement. This Agreement and Part 2 of the *Career Manual* constitute the entire agreement between you and Market America. Market America has not made any additional promises, representations, guarantees or agreements to or with you. You agree that you shall not rely on any representations made by a Distributor, whether verbal or written, regarding the terms and conditions of this Agreement, as a basis for a claim of misrepresentation against Market America. To the extent there is any inconsistency between this Agreement and Part 2 of the *Career Manual*, this Agreement controls. No additional promises, representations, guarantees or agreements of any kind shall be valid unless in writing and signed by an authorized officer of Market America.

(Id. Ex. 3.) According to the Petition, Respondent Chuanjie Yang signed the Agreement online in May 2010, renewed his Agreement in 2010 and 2011, and beginning in 2012, "opted in to automatically renew." (Id. ¶ 12.) The Petition alleges that Respondent Lan signed the Agreement online in November 2015, and Respondent Liu signed the Agreement online on March 1, 2016. (Id. ¶¶ 13, 14.) Neither Lan nor Liu renewed the next year, and both are currently listed as inactive. (Id.)

On May 30, 2017, Respondents Yang and Lan commenced a putative class action ("the California Action") in the United States District Court for the Central District of California against Petitioners. (Id. Ex. 1.); Yang, et al. v. Market America, Inc., et al., Case No. 2:17cv4012 (C.D. Cal.). Petitioners filed a motion to compel arbitration, and Respondents amended the complaint on July 20, 2017, to add Respondent Liu as a plaintiff and to include an argument that the district court in California lacked subject matter jurisdiction to compel arbitration outside its judicial district. (Petition Ex. 2, ¶ 72.) As amended, the complaint in

the California Action seeks a declaratory judgment that the arbitration provision in the Agreement is unenforceable, and also asserts claims under state law for an "endless chain scheme," for unfair and deceptive practices, and for false advertising, as well as claims for damages under 18 U.S.C. § 1962(a) (RICO), and for federal securities fraud. (Id. Ex. 2.) Market America moved to transfer the California Action to this judicial district, or to stay or dismiss the case pending arbitration. (Id. Ex. 4 at 2.) Petitioners then filed the present action in this Court. The district court stayed the California Action in light of the commencement of this action, noting that it might not need to confront the issue of whether it could order arbitration outside of its district, in light of any action taken by this Court.

In response to the Petition to Compel Arbitration filed in this Court, Respondents filed a Motion to Dismiss, contending that this Court lacked personal jurisdiction, that the Court lacked subject matter jurisdiction, that venue was improper, and that even if venue were proper, that the Petition should be transferred to California under 28 U.S.C. § 1404(a). Those contentions were addressed in an Order dated July 12, 2018, and the Motion to Dismiss or Transfer was denied. Following that ruling, Respondents filed a Motion to Stay, requesting a stay based on a North Carolina state court case that they were filing in Guilford County Superior Court. However, the state court case was not accepted for filing due to technical deficiencies, and Respondents did not make any further effort to file that state court case. Respondents then filed a second Motion to Stay, seeking a stay in this case pending resolution of two cases before the Supreme Court, one of which has since been decided. See Henry

Schein, Inc. v. Archer and White Sales, Inc., 139 S. Ct. 524 (2019). This Court entered an Order shortly after Archer was decided, noting that it did not appear that a further stay in this case was necessary in light of the decision in Archer. In addition, to the extent Respondents requested discovery and further briefing, the Court noted that rather than ordering discovery and additional briefing on the issues of arbitrability and validity, it appeared appropriate under the terms of the agreement to leave these issues to the arbitrator for further determination. The Court set the matter for a hearing to address any remaining issues. Respondents filed a Status Report raising additional contentions. At the hearing, Respondents requested leave to file an Answer or other further Response. The Court allowed that request, and Respondents have filed their Answer and Petitioners have filed a Reply. Based on the contentions raised in the Status Report, in the Answer, and at the hearing, it appears that the Parties generally agree that the Agreement delegates gateway questions of arbitrability to the arbitrator. However, Respondents continue to raise various contentions (some previously-raised and some newly-raised) challenging whether there was valid mutual assent to the arbitration agreement. For the reasons set out below, the Court concludes that there are no genuine issues of material fact on this issue and that the Petition to Compel Arbitration should be granted.

II. DISCUSSION

Pursuant to the Federal Arbitration Act ("FAA"),

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy

> arising out of such a contract, transaction, or refusal, 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. "By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985) (emphasis in original).

In order for this Court to compel arbitration, it must first find that an arbitration agreement exists between the parties. Hightower v. GMRI, Inc., 272 F.3d 239, 242 (4th Cir. 2001). State law principles governing contract formation apply in determining whether the parties agreed to arbitrate. Id.

> Before a valid contract can exist under North Carolina law, the parties must "assent to the same thing in the same sense, and their minds meet as to all terms." Normile v. Miller, 313 N.C. 98, 103, 326 S.E.2d 11, 15 (1985). The party seeking to compel arbitration has the burden to prove a valid arbitration agreement exists. Slaughter v. Swicegood, 162 N.C.App. 457, 461, 591 S.E.2d 577, 581 (2004). The agreement need not be signed if the parties otherwise commit themselves by act or conduct. Krusch v. TAMKO Bldg. Prods., Inc., 34 F.Supp.3d 584, 589 (M.D.N.C.2014); Real Color Displays, Inc. v. Universal Applied Techs. Corp., 950 F.Supp. 714, 717 (E.D.N.C.1997); Howard v. Oakwood Homes Corp., 134 N.C.App. 116, 120, 516 S.E.2d 879, 882 (1999).

Dillon v. BMO Harris Bank, N.A., 173 F. Supp. 3d 258, 263 (2016). "Compelling arbitration is appropriate under the FAA only when there is 'a judicial conclusion' that there is a validly formed, express agreement to arbitrate." Id. (citing Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 303 (2010). In this regard, under the FAA, a court

> shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration . . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.

9 U.S.C. § 4. "If there is an unresolved dispute over the existence of an arbitration agreement, the court conducts a 'restricted inquiry into factual issues.'" Dillon, 173 F. Supp. 3d at 263-64 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 22 (1983)). "Where a proponent of an arbitration agreement offers credible, admissible evidence to support a finding of an agreement to arbitrate, the opponent cannot rely on mere unawareness of whether it had made an arbitration agreement," and "[i]n disputed cases, the party opposing arbitration must unequivocally deny that there was an arbitration agreement and produce evidence to substantiate the denial." Id.[1]

In the present case, the arbitration provision is included in Market America's Distributor Agreement. In support of the Petition, Petitioners submitted an affidavit from Mr. Clement D. Erhardt, General Counsel for Market America since 2013, and former General Counsel to the U.S. Consumer Product Safety Commission. According to the Erhardt affidavit [Doc. #17-5]:

> [T]here is no way to become an independent distributor for Market America except by executing the Agreement and it is only by that process that an

[1] The Court notes that these issues of contract formation are distinct from "validity" and "enforceability" challenges. See Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444 n.1 (2006); Rent-A-Ctr., West, Inc. v. Jackson, 561 U.S. 63, 70 n.2 (2010) ("The issue of the agreement's 'validity' is different from the issue whether any agreement between the parties 'was ever concluded.'"). Therefore, the Court first considers the "formation" issue, that is, whether an arbitration agreement exists, and then addresses Respondents' challenges to the validity or enforceability of the arbitration provision, as discussed *infra*.

> individuals' status as an independent distributor becomes part of the system by which Market America tracks the activities of those independent distributors.
> . . . .
> [S]ince December 1997 when the company published revisions to the terms and conditions of the Agreement effective as of January 1998 (attached as Exhibit 2 at p. 25 [Doc. #17-7 at 12]), disputes arising under the agreement have been subject to arbitration:
>
> > Any controversy or claim arising out of or relating to this agreement, or the breach thereof, shall ultimately be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules and judgment on the award rendered by the arbitrator may be entered in a court of competent jurisdiction. I understand that this arbitration provision means I am giving up the right to have any dispute I have regarding this agreement heard by a jury and determined in a court of law. The arbitration shall be heard by one arbitrator, and it shall take place in Greensboro, North Carolina. Either party may seek emergency or provisional relief in the General Court of Justice, Guilford County, prior to invoking the arbitration remedy. North Carolina law shall govern this agreement.

(Erhardt Aff. ¶¶ 7, 18.) The Erhardt affidavit also describes Market America's company handbook:

> Market America has also published a Career Manual since 1992. The Career Manual lists the internal rules, regulations, policies, procedures and standards of conduct for serving as an independent distributor of Market America. Stated another way, it is a detailed blueprint for how to run the business. The Career Manual gets quite granular, listing details not included in the Agreement and covering step-by-step procedures that the distributor must follow. The Career Manual teaches policies related to the generation of commissions, customer orders, advertising, and many other business practices that a distributor faces on a day-to-day basis.

(Erhardt Aff. ¶ 9.)

In addition, Petitioners submitted the Affidavit of Eugene Wallace, who has been with Market America for 19 years and currently serves as the Chief Technology Officer [Doc. #17-8]. According to the Wallace affidavit:

> Distributors have the option to sign up as a Distributor online by executing the Independent Distributor Application and Agreement, now known as the Independent UnFranchise Application and Agreement, (the "Agreement") through a Sign-Up Wizard or to fill out a paper Agreement and mail the executed Agreement to Market America. Both methods require applicants to agree to the Terms and Conditions of the Agreement. Market America's system keeps electronic records, which can be accessed to determine the date and time a Distributor signed up online. Market America's records indicate that Chuanjie Yang, Ollie Lan, aka Ruoning Lan, and Liu Liu signed up online through the Sign-Up Wizard.

(Wallace Aff. ¶ 3). Attached to the Wallace affidavit are screenshots of Market America's electronic record for each of the Respondents, reflecting that Yang selected "I agree" and submitted the Agreement online on May 15, 2010 at 3:06 p.m., that Lan selected "I agree" and submitted the Agreement online on November 13, 2015 at 6:03 p.m., and that Liu selected "I agree" and submitted the Agreement on March 1, 2016 at 1:25 p.m. (Wallace Aff. ¶ 4-7). Also attached are screenshots of the electronic forms for 2010 [Doc. #17-15] and for 2015 to the present [Doc. #17-16].

As noted in the Wallace affidavit and as reflected on the forms, these forms include all of the terms and conditions, not simply a hyperlink to a separate page, and the forms require the applicant to check a box below the terms and conditions, indicating "I agree" (2010) or "I agree to the terms and conditions" (2015 to present) before submitting the form. The terms and conditions for 2015 to the present are contained in a scroll box as part of the sign-up page,

and directly below the scroll box is the check box stating "I agree to the terms and conditions." The check box must be affirmatively clicked by the distributor before the form can be submitted. (Wallace Aff. ¶ 15).

The Wallace affidavit notes that no changes were made to the arbitration provision or the choice of law provision from 2010 to 2016. (Wallace Aff. ¶ 14). Finally, the Wallace affidavit notes that:

> Prior to 2012, Distributors had to mail in an Annual Renewal Form to Market America in order to renew the Agreement. Starting in 2012, however, Distributors were able to opt in to Auto Renew their Agreements. But, similar to signing up online, Distributors could not opt in to Auto Renew their Agreement unless and until they select an "I agree" checkbox, which indicated that they agreed to the Terms and Conditions of the Annual Renewal and to the Terms and conditions of the Independent Distributor Application and Agreement. Yang renewed his Agreement with Market America each year until 2015. In 2010 and 2011 – i.e. before Auto Renewal was an option, Yang signed and mailed his Annual Renewal Form to Market America (Exhibit I). The Annual Renewal forms both contain the following language, which Yang agreed to:
>
> > By signing this form, I acknowledge the incorporation by reference of all changes and/or revisions delineated in official company literature that alter the Independent Distributor Application and Agreement I originally signed. I, the above-named Market America Independent Distributor, do hereby renew my Independent Distributor Application and Agreement with Market America as provided in the Independent Distributor Application and Agreement, and I agree to be bound by the terms and conditions of that agreement . . . as amended from time to time.
>
> In 2012, Yang opted in to Auto Renew his Agreement each year. Before opting in to Auto Renew, Yang clicked "I agree" to the following Terms:
>
> > Acceptance of Amendments to IDA&A. By agreeing to these terms and conditions for Auto Renewal, you agree to the incorporation by reference of all amendments and/or revisions of the IDA&A as you agreed to it originally as provided during the previous year in official Market America literature. Renewal of the IDA&A and Forms

> 925/1001. You renew your IDA&A with Market America. You agree to be bound by the Terms and Conditions of that Agreement . . . as amended from time to time.

(Wallace Aff. ¶ 16, 17.) The Wallace affidavit also includes information regarding the storage of the data, the security for the data, and the backup of the data. (Wallace Aff. ¶ 22.)

In the prior Motion to Dismiss, as to Respondents Lan and Liu, Respondents did not contest Lan and Liu's assent to the Distributorship Agreement. Indeed, Respondents submitted affidavits in connection with the Motion to Dismiss confirming Lan and Liu's entry into the Distributorship Agreement. In his affidavit, Lan noted that he "became a Market America Distributor on or about November of 2015" and that he "now understand[s] that the distributor agreement sign up and the Career Manual have a provision requiring an arbitrator to 'settle' 'any controversy or claim arising out of or related to this Agreement . . . .'" (Lan Aff. [Doc. #14-13] ¶ 3, 4.) Lan's affidavit further states that, "I did not draft any of the documents related to this opportunity, and the documents were drafted by Market America. I could only agree to be bound by the policy or seek opportunity elsewhere, the arbitration provision was a condition as to my participating, MA drafted the arbitration policy, there was unequal bargaining power, and the document was provided on a take it or leave it basis. I also felt a social pressure to enter into the take it or leave it document because Market America asks distributors to recruit friends and family." (Id. ¶ 25.) Thus, Lan confirmed that he agreed to be bound by the Distributorship Agreement and that the arbitration provision was a condition to his participating as a Market America distributor.

Similarly, Liu in his affidavit noted that he "became a Market America Distributor on or about 2016" and that he "now understand[s] that the distributor agreement sign up and the Career Manual have a provision requiring an arbitrator to 'settle' 'any controversy or claim arising out of or related to this Agreement . . . .'" (Liu Aff. [Doc. #14-14] ¶ 3, 4.) Liu's affidavit further states that, "I did not draft any of the documents related to this opportunity, and the documents were drafted by Market America. I could only agree to be bound by the policy or seek opportunity elsewhere, the arbitration provision was a condition as to my participating, MA drafted the arbitration policy, there was unequal bargaining power, and the document was provided on a take it or leave it basis." (Id. ¶ 25.) Thus, Liu also confirmed that he agreed to be bound by the Distributorship Agreement and that the arbitration provision was a condition to his participating as a Market America distributor.

In the prior Motion to Dismiss, Respondents argued that the Petition should be dismissed as to Respondent Yang because "Respondent Yang did not assent to the arbitration policy." (Resp. Br. [Doc. #13] at 10.) Respondent Yang submitted an affidavit stating that he "became a Market America Distributor on or about 2009," and that he did not sign up online and instead "signed a one page piece of paper," that "to the best of my recollection" did not include any "terms and conditions." (Decl. of Chuanjie Yang [Doc. #14-12] ¶ 3.) Respondent Yang stated that he "continued to sign up for MarketAmerica by receiving physical invoices for my distributorship purchases and paying the yearly fee." (Id. ¶ 4.) Respondent Yang also acknowledged signing the 2011 Annual Renewal Form which "referred to being bound by the

'terms and conditions of that agreement.'" (Id. ¶¶ 4-5.) Respondent Yang stated he was presented with the 2011 renewal on a "take it or leave it basis," and was told he was in danger of "los[ing] all the points and commission that I had earned, and my entire investment" if the document was not executed immediately. (Id. ¶¶ 4-5.) Respondent Yang also acknowledged that he subsequently received a Market America Career Manual in April 2012, and he continued to sign up for Market America by paying the yearly fee. (Id. ¶ 6.) Respondent Yang also stated that he is "pursuing equitable/injunctive relief in that I seek rescission of any documents forming my participation in the endless chain which includes invoices, open accounts, and the renewal form I signed above, and the return of such amounts I have paid by virtue of being a participant in the Market America pyramid scheme." (Id. ¶ 29.)

As noted in the Court's prior Order, even under Mr. Yang's version of events, he signed an agreement in 2009, and he signed a renewal form in 2011. Mr. Yang does not explain what he signed, does not indicate what the forms said, and does not know if the forms included an arbitration clause. Petitioners have submitted copies of Annual Renewal Forms, hand signed by Mr. Yang, including the form that Mr. Yang acknowledges signing in 2011, and that form specifically includes an agreement to be bound by the terms and conditions of the Distributor Agreement. In addition, Mr. Yang acknowledges that he received a Career Manual in 2012 that included notice of the arbitration clause provisions, and he continued to pay his yearly renewal fee thereafter for 2013 and 2014.

Moreover, as noted in the prior Order, the claims raised by Mr. Yang all arise from the Distributorship Agreement that contained the arbitration clause that he does not recollect. The underlying suit is based on his status as a former Market America Distributor, and his claims presume the existence of a contract and relate to inducement to become a distributor and terms and obligations of being a distributor. The Fourth Circuit has explained that, where "the issue is whether the underlying claims are such that the party asserting them should be estopped from denying the application of the arbitration clause," a court should "examine whether the plaintiff has asserted claims in the underlying suit that, either literally or obliquely, assert a breach of a duty created by the contract containing the arbitration clause." American Bankers Ins. Grp. v. Long, 453 F.3d 623, 629 (4th Cir. 2006). Notably, in pursuit of a recovery on the underlying claims in the California Action, Respondent Yang paints a different picture of his relationship with Market America and his access to company information. Respondents collectively allege that they "joined Market America and have become distributors," (Compl. ¶¶ 1, 8, 68), that they "signed up with MarketAmerica," and that they now seek "to rescind contracts/agreements" they have made. (Id. ¶¶ 166, 168, 105). According to Respondents, including Mr. Yang, Market America "contractually requested [Respondents] . . . acknowledge that they had read and reviewed the current version of [its] Policies at the time they joined Market America, [and] to abide by the terms of the current version of the Policies," that were available to Respondents "through Market America's website at all times." (Id. ¶ 194). Thus, Respondents' claims in the California Action include assertions that Market America had fully

disclosed policies that Respondents had access to, and required contractual agreements from the inception of their relationship, and in light of those assertions and the nature of the claims raised in the California Action, Respondents should be estopped from denying the existence of the Agreement, and all its terms, here.

In addition, as noted in the prior Order, a consent to arbitration can be found even if the arbitration agreement was not formally signed, and may be shown based on an agreement that incorporates the arbitration provisions by reference. See, e.g., Krusch v. TAMKO Bldg. Products, Inc., 34 F. Supp. 3d 584 (M.D.N.C. 2014). Here, Respondent Yang executed one or more documents which incorporate by reference the Distributor Agreement, and he also continued to make annual renewals after being provided with the Career Manual that gave additional notice of the arbitration provisions. Therefore, when coupled with Respondents' acknowledgement that Market America's policies were fully accessible, there is no basis for Mr. Yang to commence suit based on the Distributorship Agreement but ignore its complete terms. For all of these reasons, the Court previously concluded that all of the Respondents assented to the arbitration agreement, and that Respondent Yang has not created a genuine factual dispute on this issue.

At the hearing on March 11, 2019, Respondents again raised the issue of assent, and the Court noted that Petitioners had offered credible, admissible evidence to support a finding of an agreement to arbitrate. The Court allowed Respondents to file a further Answer or Response, to ensure that Respondents had been given a full opportunity to respond to the

Petition. The Court specifically cautioned Respondents to include in the Answer or Response any denial they wished to raise with respect to whether there was an arbitration agreement and any evidence to substantiate the denial. Respondents have now filed an Answer [Doc. #48], and in the Answer, Respondents again point to Mr. Yang's alleged lack of assent. However, Respondents have not included any other evidence or assertions not already addressed in the prior Order. Therefore, there is no basis to revisit or further address the contentions as to Mr. Yang.

In addition, Respondents now argue generally that the Distributor Agreement lacked mutual assent, such that there was no valid agreement to arbitrate. In support of that contention, Respondents cite Dillon 173 F. Supp. 3d 258. In Dillon, the plaintiff (Dillon) obtained payday loans from various lenders, and later brought claims against banks that had served as intermediaries between Dillon and the lenders. The banks sought to enforce arbitration provisions purportedly contained in agreements between Dillon and the lenders. However, Dillon challenged the authenticity of the agreements presented by the banks. In considering a motion to compel arbitration by one of the banks, the Court noted that the bank had provided "no evidence from the lenders showing that the arbitration provisions in the documents were presented to Mr. Dillon." Id. at 262. Specifically, while it was undisputed that Dillon had entered into an agreement with the lenders by "clicking through" various terms and conditions online, there was not sufficient evidence that the agreement presented by the bank was an accurate representation of the agreement Dillon entered into with the third-party

lender, and there was no evidence as to how the electronic document had been created, acquired, maintained, or preserved. Therefore, the Court found that the bank had failed to establish that the proffered document was what it purported to be. Id. at 264. Respondents appear to contend that in this case, as in Dillon, there are questions whether the arbitration provisions were included in the documents proffered during the online sign-up process, and Respondents assert that "[w]ith online transactions, one of the parties has exclusive control of the electronic record, which means that it could fraudulently alter the document." (Answer ¶ 32.) However, in Dillon, the agreement was with a third-party lender (not a party to the case), the documents were not authenticated, and there was no sufficient evidence as to the terms of the actual agreement signed by Dillon. Here, in contrast, Market America is a party to the agreement and a party to the case, and Petitioners have presented affidavits regarding the Distributor Agreement forms, the Agreement language, and the record creation and storage. In this regard, as discussed in detail above, Petitioners presented the Declaration of Eugene Wallace and the Declaration of Clement D. Erhardt, describing in detail the specific process and forms and records as to each of the Respondents, with archival evidence authenticated by Market America employees. Moreover, Respondents Lan and Liu do not deny that they agreed to the Distributor Agreement online, and in fact admitted that they did so in their Declarations in this case. Respondents have not presented any basis or even contention to challenge the authenticity of the records or to dispute the language of the Distributor Agreement.[2]

[2] At most, Respondents contend that there is a "discrepancy" between the online sign-up screenshot presented in this action and the similar screenshot presented in the California action. However, on review,

In addition, Respondents cite cases holding that various "browse through" provisions in online transactions did not provide evidence of an agreement to arbitrate. See Nguyen v. Barnes & Noble, Inc., 763 F.3d 1171, 1175-76 (9th Cir. 2014) ("Contracts formed on the Internet come primarily in two flavors: 'clickwrap' (or 'click-through') agreements, in which website users are required to click on an 'I agree' box after being presented with a list of terms and conditions of use; and 'browsewrap' agreements, where a website's terms and conditions of use are generally posted on the website via a hyperlink at the bottom of the screen. Barnes & Noble's Terms of Use fall in the latter category. . . . Because no affirmative action is required by the website user to agree to the terms of a contract other than his or her use of the website, the determination of the validity of the browsewrap contract depends on whether the user has actual or constructive knowledge of a website's terms and conditions" (internal citations and quotations omitted)); see also Sgouros v. TransUnion Corp., 817 F.3d 1029, 1035 (7th Cir. 2016) (finding no agreement to terms and conditions where "TransUnion's site actively misleads the customer. The block of bold text below the scroll box told the user that clicking on the box constituted his authorization for TransUnion to obtain his personal information. It says nothing about contractual terms. No reasonable person would think that hidden within that

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the Court sees no discrepancy and finds no need for discovery on this issue. As noted in later proceedings in the Dillon case, "[w]hen a litigant contests the authenticity of a document, the litigant must have a good faith basis for the objection; a litigant cannot challenge or deny the authenticity of a written agreement that he knows to be authentic. . . . The fact that a contract is electronic or not physically signed does not excuse litigants from having a good faith basis for objecting to the Court's consideration of a purported copy of a contract." Dillon v. BMO Harris Bank, NA., No. 1:13CV897, 2016 WL 5679190 *10-11 (M.D.N.C. Sept. 30, 2016). In this case, Respondents have not asserted a good faith basis for challenging the authenticity of the Distributor Agreement, and there is no basis for further inquiry on this issue.

disclosure was also the message that the same click constituted acceptance of the Service Agreement. . . . [W]here a website specifically states that clicking means one thing, that click does not bind users to something else.").

Citing these cases, Respondents contend that there is no evidence of a "compliant click wrap agreement to arbitrate since before 2015." (Status Report [Doc. #46].) However, in this case, the online Distributor Agreement specifically requires an affirmative click agreeing to the terms and conditions provided on that page. The Terms and Conditions are on a "scroll through" window above the check box that must be affirmatively clicked showing "I agree to the terms and conditions." See also Sgouros, 817 F.3d at 1036 (7th Cir. 2016) (noting that "contract law requires that a website provide a user reasonable notice that his use of the site or click on a button constitutes assent to an agreement. This is not hard to accomplish, as the enormous volume of commerce on the Internet attests. A website might be able to bind users to a service agreement by placing the agreement, or a scroll box containing the agreement, or a clearly labeled hyperlink to the agreement, next to an "I Accept" button that unambiguously pertains to that agreement."); Dillon, 173 F. Supp. 3d at 262 ("If, however, the lender did present an arbitration provision to Mr. Dillon and Mr. Dillon clicked through and accepted that provision, then the arbitration provisions shown to him are arbitration agreements enforceable by the lenders under the Federal Arbitration Act ("FAA"), subject to any equitable defenses.").

Moreover, as noted above, Respondents signed up as distributors pursuant to the Distributor Agreement, and Respondents bring claims challenging that agreement and the relationship based on that Agreement. The underlying California action is based on Respondents' status as former Market America Distributors, and the claims presume the existence of a contract and allege misrepresentations, unfair trade practices, and fraud with respect to that relationship, including with respect to the inducements to become a distributor and the terms and obligations of being a distributor. It is clear that if Respondents had not accepted the terms of the Distributor Agreement, they could not have been Market America Distributors. See also American Bankers Ins. Grp., 453 F.3d at 627-30; Dillon, 173 F. Supp. at 270 n.10 ("If at any point in the litigation Mr. Dillon relies on the written agreement proffered by Bay Cities as the USFashCash loan agreement, the Court will reconsider, upon request, the motion to compel arbitration."). Respondents have not presented any evidence, or even asserted denials, that would require discovery or create a genuine issue of material fact with respect to the existence of the agreement. Thus, as to the initial question whether an express agreement to arbitrate exists, the Court is satisfied that "the making of the agreement for arbitration or the failure to comply therewith is not in issue" under Section 4 of the FAA.[3]

[3] The Court notes that Respondents have had at least five opportunities to present a response to the Petition, including : (1) the Motion to Dismiss with exhibits and declarations; (2) the Motion to Stay; (3) the second Motion to Stay; (4) the Status Report; and (5) the Answer. In addition, the Court heard from Respondents at the hearing on March 11, 2019, and instructed Respondents that any evidence or basis on which they relied must be included with the Answer or Response to the Petition filed on March 18, 2019. Having considered all of the many (sometimes changing) assertions of Respondents, the Court concludes that there are no genuine issues of material fact or issues requiring further discovery with respect to the formation of the agreement.

Having concluded that there is an express agreement to arbitrate, the next issue is determination of the scope of the arbitration provision, that is, whether the underlying claims are covered by the arbitration agreement. This question of arbitrability is generally for the Court, unless the parties clearly and unmistakably agree that questions of arbitrability are for the arbitrator. See AT&T Techs., Inc. v. Communications Workers of America, 475 U.S. 643, 649 (1986) ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."). In this regard, the Fourth Circuit has explained that:

> First, we determine who decides whether a particular dispute is arbitrable: the arbitrator or the court. Second, if we conclude that the court is the proper forum in which to adjudicate arbitrability, we then decide whether the dispute is, in fact, arbitrable. We review de novo the district court's ruling as to both prongs. Under Peabody, we first must determine who decides whether Simply Wireless's claims are arbitrable: the arbitrator or the court. . . . . [B]ecause empowering an arbitrator to determine arbitrability in the first instance 'cuts against the normal rule' that arbitrability disputes are for the court to resolve, a court must find by 'clear and unmistakable' evidence that the parties have chosen to give arbitrability questions to an arbitrator.
> . . . .
> . . . [In this case, the question is] whether the parties' express incorporation of JAMS Rules constitutes clear and unmistakable evidence of the parties' intent to delegate to the arbitrator questions of arbitrability.
>
> This Court has not yet addressed this question. However, two circuits have specifically addressed this question and both have concluded that the incorporation of JAMS Rules constitutes "clear and unmistakable evidence" of the parties' intent to delegate questions of arbitrability to the arbitrator. See Belnap v. Iasis Healthcare, 844 F.3d 1272, 1284 (10th Cir. 2017) ("[W]e conclude that by incorporating the JAMS Rules into the Agreement, [the parties] clearly and unmistakably agreed to submit arbitrability issues to an arbitrator"); Cooper v. WestEnd Capital Mgmt., L.L.C., 832 F.3d 534, 546 (5th Cir. 2016) (same). Moreover, other circuits have concluded that the incorporation of

> arbitral rules substantively identical to those found in JAMS Rule 11(b) constitutes clear and unmistakable evidence of the parties' intent to arbitrate arbitrability. See Brennan v. Opus Bank, 796 F.3d 1125, 1130 (9th Cir. 2015) (holding that "incorporation of the AAA rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability"); Fallo v. High-Tech Inst., 559 F.3d 874, 878 (8th Cir. 2009) (same); Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1373 (Fed. Cir. 2006) (same); Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1332–33 (11th Cir. 2005) (same); Contec Corp. v. Remote Sol., Co., 398 F.3d 205, 208 (2d Cir. 2005) (same) . . . .
>
> We agree with our sister circuits and therefore hold that, in the context of a commercial contract between sophisticated parties, the explicit incorporation of JAMS Rules serves as "clear and unmistakable" evidence of the parties' intent to arbitrate arbitrability. Because the JAMS Rules expressly delegate arbitrability questions to the arbitrator, the district court erred in deciding whether Simply Wireless's claims fall within the scope of the parties' arbitration agreement.

Simply Wireless, Inc. v. T-Mobile US, Inc., 877 F.3d 522, 526 (4th Cir. 2017) (internal quotations and citations omitted), abrogated on other grounds by Henry Schein, Inc. v. Archer and White Sales, Inc., 139 S. Ct. 524 (2019).

In the present case, the arbitration provision itself specifically provides for "arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules." Respondents now contend that under the Fourth Circuit's decision in Simply Wireless, this language is sufficient to provide clear and unmistakable evidence of intent to delegate questions of arbitrability to the arbitrator. Petitioners do not disagree. Thus, to the extent that Respondents raise disputes regarding the scope of the arbitration provision,

including whether it applies to all of the claims or types of relief asserted, those issues are for the arbitrator to resolve based on the terms of the arbitration agreement.[4]

The Court notes that, as discussed during the hearing, the Court's ruling on the Motion to Dismiss addressed all of the various issues that were raised by Respondents in that Motion to Dismiss. However, under the decision in Simply Wireless, many of those issues are ultimately to be resolved by the arbitrator, and the Court's determination on those issues would not control the ultimate determination by the arbitrator. Specifically, Respondents argued in the Motion to Dismiss that the arbitration provision was unconscionable and illusory. The Court addressed these contentions in the prior Order. (Order [Doc. #25] at 18-25.) However, Respondents now contend that these issues are gateway arbitrability issues to be resolved by the arbitrator under the Fourth Circuit's decision in Simply Wireless. Petitioners do not dispute this point. Therefore, the Court leaves final determination of these issues to the arbitrator.[5]

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[4] The Court notes that Respondents do not contend that Simply Wireless would not apply because they are not sophisticated parties. Cf. Stone v. Wells Fargo Bank, N.A., No. ELH-18-2526, 2019 WL 247540, at *9 (D. Md. Jan. 17, 2019) ("[T]he Fourth Circuit twice stated in Simply Wireless that its holding applied to agreements between sophisticated actors. See 877 F.3d at 528, 529. It did not specify whether the incorporation of arbitration rules provides clear and unmistakable evidence of the parties' intent when a party is not sophisticated. Accordingly, in this Circuit, it remains an open question whether the incorporation of arbitration rules provides 'clear and unmistakable' evidence of an unsophisticated party's intent to arbitrate arbitrability."). Given Respondents' position that the incorporation of the AAA rules provides clear and unmistakable evidence of intent to delegate issues of arbitrability to the arbitrator in this case, the Court need not further address or resolve that issue.

[5] The Court also notes that to the extent Respondents raise general challenges to the Agreement itself, not just the arbitration provision, including based on fraud, unconscionability, voidability, illegality, or other contract defenses, the Supreme Court has held that those issues are for the arbitrator, not the Court, to resolve. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) ("[A] challenge to the validity of the contract as a whole, and not

Similarly, the Court notes that the Parties continue to dispute whether class relief is available in the arbitration proceeding. Respondents originally raised this as an issue for the Court in the Motion to Dismiss, and the Court found that the language of the arbitration agreement was not sufficient to reflect an agreement to class-wide arbitration. (Order [Doc. #25] at 27.) However, Respondents now contend that this is a gateway arbitrability issue that has been delegated to the arbitrator by incorporation of the AAA rules. At the hearing, the Court noted that the question of whether this issue was for the Court or the arbitrator had not been addressed or resolved in this case, and noted that further briefing would be necessary on this issue if Petitioners wanted the Court to make a final determination. See, e.g., JPay, Inc. v. Kobel, 904 F.3d 923 (11th Cir. 2018) (discussing circuit split on whether incorporation of the AAA rules provided clear and unmistakable evidence of an agreement to delegate the availability of class-wide relief to the arbitrator as a gateway arbitrability issue); Dish Network L.L.C. v. Ray, 900 F.3d 1240 (10th Cir. 2018) (same). Given that option, Petitioners indicated that their request was to proceed to arbitration and let the parties address the issue further with the arbitrator. Therefore, the Court will not resolve that issue further at this time, and will refer the matter to the arbitrator, without prejudice to further consideration of these issues if necessary and appropriate in the future.

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specifically to the arbitration clause, must go to the arbitrator."); Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 80 (2010) ("In sum, questions related to the validity of an arbitration agreement are usually matters for a court to resolve before it refers a dispute to arbitration. But questions of arbitrability may go to the arbitrator in two instances: (1) when the parties have demonstrated, clearly and unmistakably, that it is their intent to do so; or (2) when the validity of an arbitration agreement depends exclusively on the validity of the substantive contract of which it is a part.").

Finally, the Court notes that during the hearing, Respondents asked the Court to address the availability of provisional relief under the agreement. However, the arbitration agreement provides that "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall ultimately be settled by arbitration," and the only exception to arbitration is for "emergency or provisional relief in the General Court of Justice, Guilford County, North Carolina, prior to invoking the arbitration remedy." The arbitration remedy has now been invoked, and there is no proceeding for emergency or provisional relief in Guilford County. Therefore, the entirety of the dispute is subject to arbitration in accordance with the terms of the Distributor Agreement, and any further dispute regarding the scope of the arbitration provision would be for the arbitrator.

IT IS THEREFORE ORDERED that the Petition for Arbitration is GRANTED, and the Parties are directed to proceed to arbitration in accordance with the terms of the Distributor Agreement with respect to the claims alleged in Yang, et al., v. Market America, Inc., et al., Case No. 2:17cv04012 (C.D.Cal.), as set out herein.

IT IS FURTHER ORDERED that the Clerk is directed to administratively close this case, without prejudice to re-opening at request of either party as necessary or appropriate.

This, the 10th day of April, 2019.

/s/ Joi Elizabeth Peake
United States Magistrate Judge