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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

HELEN XIONG aka Huiqin Xiong, an individual; on behalf of herself and those similarly situated,

Plaintiff(s),

v.

JEUNESSE GLOBAL, LLC dba JEUNESSE, LLC; KIM HUI; and DOES 1-10,

Defendants.

Case No. 8:18-cv-01430-DOC-KES

DEFENDANTS' NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND FOR A STAY OR, IN THE ALTERNATIVE, TO TRANSFER TO THE MIDDLE DISTRICT OF FLORIDA

Date: July 22, 2019
Time: 8:30 a.m.
Crtm: 9D
Judge: Hon. David O. Carter

Action Filed: August 10, 2018
Trial Date: None set

[*Memorandum of Points and Authorities in Support of Motion to Compel Arbitration and For a Stay Or, In the Alternative, to Transfer to the Middle District of Florida; Declaration of Debbie Kurley; Declaration of Jeffrey S. Jacobson; and [Proposed] Order, filed concurrently herewith*]

TO THE COURT AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 22, 2019, at 8:30 a.m., or as soon thereafter as the parties may be heard, before the Honorable David O. Carter, United States District Court Judge, in Courtroom 9D, located at 411 West 4th Street, Santa Ana, California 92701-4516, defendant Jeunesse, LLC ("Jeunesse") will and hereby does move to compel arbitration and to stay this action, filed by plaintiff Helen Xiong (a/k/a Huiqin Xiong), or, in the alternative, to transfer the action to the Middle District of Florida pursuant to 28 U.S.C. § 1404(a). Defendant Kim Hui consents to this motion.

This motion is based upon this Notice of Motion and Motion; the accompanying Memorandum of Points and Authorities; the accompanying Declarations of Debbie Kurley and Jeffrey S. Jacobson as well as the exhibits attached thereto; the pleadings in this action and documents attached thereto and referenced therein; and on such other briefs, oral argument and documentary matters as may be presented to this Court at or before the hearing on this motion.

This motion is made following a conference of counsel pursuant to Local Rule 7-3 which took place on May 29, 2019.

Dated: June 7, 2019

DRINKER BIDDLE & REATH LLP

By: */s/ Jeffrey S. Jacobson*
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STATUTES, RULES & REGULATIONS

Defendant Jeunesse, LLC ("Jeunesse") seeks an Order compelling Plaintiff Helen Xiong (a/k/a Huiqin Xiong) to arbitrate her claims before the American Arbitration Association ("AAA"), as required by the contract between Jeunesse and Ms. Xiong, and staying this action pending the outcome of that arbitration. In the alternative, Defendants seek transfer of this action to the United States District Court for the Middle District of Florida, which is the litigation's center of gravity.

I.

PRELIMINARY STATEMENT

This Court need not reach the other motion filed concurrently by Jeunesse—to strike Ms. Xiong's class claims pursuant to a class action settlement finalized earlier this year in the United States District Court for the Middle District of Florida—if it finds, as it should, that Ms. Xiong (who opted out of that settlement) contractually agreed to arbitrate her claims against Jeunesse before the AAA on an individual basis. When Ms. Xiong signed a contract to become part of a national network of distributors selling Jeunesse skin care and nutritional products, she agreed that any disputes relating to her service as a Jeunesse distributor must be decided in binding arbitration by the AAA pursuant to that organization's Commercial Arbitration Rules. The arbitration agreement between Ms. Xiong and Jeunesse is valid and binding; the same Florida court that approved the class action settlement has enforced it. The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, applies to this dispute and requires the Court to stay or dismiss Ms. Xiong's claims in favor of arbitration.

This case does not belong in a judicial forum at all, and even if Ms. Xiong could state some personal claim that is *not* subject to the arbitration agreement (which she cannot), the case does not belong in California. Jeunesse is headquartered near Orlando, Florida; all of the relevant witnesses work at that headquarters, and all relevant documents are stored there. By contrast, Jeunesse has no employees or property in California. The class action case that ultimately settled began in the

United States District Court for the District of Arizona, but the Arizona court transferred the case to Florida pursuant to 28 U.S.C. § 1404(a). *See Aboltin v. Jeunesse, LLC*, No. CV-16-02574-PHX-SPL, 2017 WL 5957646 (D. Ariz. Sept. 12, 2017). This Court, if necessary, should reach the same conclusion. Defendant Kim Hui, who resides in California, consents to transfer.

This Court, therefore, should compel arbitration of Ms. Xiong's claims and stay or dismiss this action pending the outcome of that arbitration. Alternatively, the Court should transfer the action to the United States District Court for the Middle District of Florida pursuant to 28 U.S.C. § 1404(a), and allow Jeunesse to present its motion to compel arbitration in that venue, as the Arizona court did in *Aboltin*.

II.

FACTUAL BACKGROUND

Jeunesse is a Florida company with its principal place of business in Lake Mary, Florida. *See* Declaration of Debbie Kurley ("Kurley Decl.") ¶ 1. Jeunesse sells skincare and nutritional products through a national network of independent distributors in a "multi-level marketing" model. *See id.* ¶ 4. Pursuant to that sales model, persons who serve as independent distributors can earn money from (1) the resale at retail prices of Jeunesse products they purchase at distributor prices; (2) their customers' direct purchases from Jeunesse; and (3) if they elect to sponsor others to become Jeunesse distributors, from the sales made by the "downline" distributors they sponsored. *See id.* ¶ 5.

Jeunesse has no property or employees in California. *See id.* ¶ 21. Nearly 300 of Jeunesse's employees, including all or substantially all employees with knowledge of the pricing and distribution model practices Ms. Xiong challenges, work at Jeunesse's Florida headquarters. *See id.* ¶ 17. Jeunesse also has a facility in Utah, but no relevant employees are based there. *See id.* ¶ 20.

Ms. Xiong signed up online to become a Jeunesse distributor in August 2015. *See id.* ¶ 8; Compl. ¶ 7. In so doing, she executed a contract with Jeunesse that

included an agreement to arbitrate disputes. *See* Kurley Decl. ¶¶ 8–12. Ms. Xiong's Complaint acknowledges that she agreed to be bound by "all provisions of the Policies, Distributor Agreement, and Rewards Plan." Compl. ¶ 62.

All Jeunesse distributors in the United States are required to sign up online and cannot become distributors unless they accept the company's terms and conditions. *See* Kurley Decl. ¶¶ 6–7. One of the documents that distributors are required to review and affirmatively assent to is Jeunesse's "Global Policies and Procedures." At the time Ms. Xiong executed the contract, this contract included the following provisions requiring arbitration in Florida:

> ***All disputes and claims relating to Jeunesse, the Agreement, or its products, the rights and obligations of a distributor of Jeunesse, or any claims or causes of actions relating to the performance of either a distributor or . . . Jeunesse under the Agreement, and/or a distributor's purchase of product(s) shall be settled totally and finally by arbitration in Altamonte Springs, Florida, or such other location as Jeunesse prescribes***, in accordance with the Federal Arbitration Act and the Commercial Arbitration Rules of the American Arbitration Association. There shall be one (1) arbitrator, an attorney at law, who shall have expertise in business law transactions, with a preference being an attorney being knowledgeable in the direct selling industry, selected from a panel, which the American Arbitration Association approves. Each party to the arbitration shall be responsible for its own costs and expenses of arbitration, including legal and filing fees. ***If a distributor files a claim or counterclaim against Jeunesse, a distributor shall do so on an individual basis and not with any distributor or as part of a class action.*** The decision of the arbitrator shall be final and binding on the parties and may, if necessary, be reduced to a judgment in any court of competent jurisdiction. This agreement for arbitration shall survive any termination or expiration of the Distributor Agreement.
>
> Notwithstanding the foregoing, the arbitrator shall have no jurisdiction over disputes relating to the ownership, validity or registration of any mark o[r] other intellectual property or proprietary or confidential information of Jeunesse, without Jeunesse's written consent. Jeunesse may seek any applicable remedy in any applicable forum with respect to these disputes and with respect to money owing to Jeunesse. In addition to monetary damages, Jeunesse may obtain injunctive relief against a distributor in violation of the Agreement, and for any violation of

> misuse of Jeunesse's trademark, copyright or confidential information policies.
>
> Nothing in this rule shall prevent Jeunesse from terminating the Distributor Agreement or from applying to and obtaining from any court having jurisdiction a writ of attachment, a temporary injunction, preliminary injunction and/or other injunctive or emergency relief available to safeguard and protect Jeunesse's interests prior to the filing of or during or following any arbitration or other proceeding or pending the handing down of a decision or award in connection with any arbitration or other proceeding.
>
> Nothing contained herein shall be deemed to give the arbitrator any authority, power, or right to alter, change, amend, modify, add to, or to subtract from any of the provisions of the Policies or Procedures, Rewards Plan, or the Distributor Agreement.

Kurley Decl. ¶ 10; *id.*, Ex. B, ¶ 11.6.

The agreement also included a "Governing Law" provision stating that any disputes "shall be governed by the laws of the State of Florida." Kurley Decl. ¶ 13; *id.*, Ex. B, ¶ 11.12.

Jeunesse's records reflect that Ms. Xiong signed up online to become a Jeunesse distributor on August 10, 2015, by selecting the username "Helenxiong." Kurely Decl. ¶ 8. During that online signup process, Ms. Xiong, like all Jeunesse distributors, affirmatively accepted Jeunesse's contractual documents, including the Policies and Procedures containing the arbitration provision, by clicking a checkbox labeled "I Agree" to Jeunesse's contractual documents. *Id.* At all relevant times, those Policies and Procedures were available via hyperlink on the same online signup page. *Id.* ¶ 9. Ms. Xiong made limited purchases of Jeunesse products and earned commissions totaling approximately $348. *Id.* ¶ 9.

The arbitration provision of Jeunesse's contract with Ms. Xiong appeared in its own section of Jeunesse's Global Policies and Procedures under the bolded and contrasting-color heading "**Arbitration**." Kurley Decl. ¶ 10, *id.*, Ex. B, ¶ 11.6. *See Kilgore v. KeyBank, N.A.*, 718 F.3d 1052, 1059 (9th Cir. 2013) (rejecting plaintiffs' argument that arbitration provision was "buried in fine print" because the provision

was "in its own section, clearly labeled, in boldface" and finding provision was not unconscionable). By affirmatively accepting the agreement, Ms. Xiong clearly assented to arbitration and the Florida choice of law provisions. Kurley Decl. ¶¶ 8, 10, 13. Notably, she did not execute these agreements as a consumer, but rather as a prospective business partner seeking business income.

Ms. Xiong appears to have done little with her Jeunesse business. She has made no purchases from Jeunesse since March 15, 2016. *See* Kurley Decl. ¶ 15. The *ad damnum* of her Complaint (at p. 28) seeks the termination of her distributor account, and Jeunesse has honored that request by terminating her account after she filed her lawsuit. *See id.* ¶ 16.

Ms. Xiong has named a fellow distributor, Kim Hui, who resides in California, as a second defendant in this case. Ms. Xiong, however, does not allege what contact (if any) she had with Ms. Hui. The claims against Ms. Hui have no substance, and even if they did, the arbitration agreement between Ms. Xiong and Jeunesse encompasses Ms. Xiong's claims against Ms. Hui. Ms. Hui consents both to arbitrate this dispute and to transfer to the Middle District of Florida, if transfer is necessary as a precursor to compelling arbitration.

III.

ARGUMENT

A. The FAA Mandates Enforcement of the Arbitration Agreement.

1. All of Ms. Xiong's Claims Are Subject to Arbitration

In seeking to evade an arbitration requirement to which she agreed and that applies to her claims, Ms. Xiong runs directly into the teeth of a strong federal law presumption favoring enforcement of parties' agreements to arbitrate. Ms. Xiong's agreement with Jeunesse affected interstate commerce and thus falls within the ambit of the FAA. *See, e.g., Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400 (1967); *Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1224 (9th Cir. 2013). FAA Section 2 states

that arbitration agreements involving interstate commerce "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; *see Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (FAA "embodies the national policy favoring arbitration agreements and places arbitration agreements on equal footing with all other contracts."); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (FAA "is a congressional declaration of a liberal federal policy favoring arbitration, notwithstanding any state substantive or procedural policies to the contrary.").

Courts in this District regularly uphold arbitration agreements even in "take it or leave it" consumer or employment contracts, which this business agreement is not. *See, e.g.*, *Bermudez v. PrimeLending*, No. LA CV12-987 JAK (Ex), 2012 WL 12893080, at *15 (C.D. Cal. Aug. 14, 2012) (compelling arbitration after finding certain unconscionable terms to be severable); *Lopez v. Ace Cash Express, Inc.*, Nos. LC CV11-4611, LA CV11-7116 (JAK)(JCx), 2012 WL 1655720 (C.D. Cal. May 4, 2012) (compelling arbitration and staying litigation of potentially non-arbitrable claims). Indeed, the Ninth Circuit recently confirmed that, even in the consumer context, "[t]here is no special rule…that an offeror of an adhesive consumer contract specifically highlight or otherwise bring an arbitration clause to the attention of the consumer to render the clause enforceable." *In re Holl*, ---F.3d---, 2019 WL 2293441, at *4 (9th Cir. May 30, 2019). *See also, e.g.*, *Simmons v. Hankey*, No. 2:16-cv-06125 ODW(JEMx), 2017 WL 424850, at *3 (C.D. Cal. Jan. 30, 2017) (rejecting plaintiff's argument that he did not assent to arbitration provision where plaintiff executed and returned a form agreement); *Galvan v. Michael Kors USA Holdings, Inc.*, No. CV-07379-BRO (AFMx), 2017 WL 253985, at *6-10 (C.D. Cal. Jan. 19, 2017) (enforcing arbitration agreement and finding it was not unconscionable despite plaintiff's argument that it was a contract of adhesion); *Barnes v. Crown Jewels, LLC*, No. 2:14-cv-04098-ODW(MRWx), 2014 WL 4929052, at *4 (C.D. Cal. Oct. 1,

2014) (rejecting plaintiff's argument that he did not agree to arbitration provision where "his failure to read [the section containing the arbitration provision] is a result of his own negligence").

Jeunesse's arbitration agreement has been upheld as valid and enforceable by multiple courts, including within *this district*. *See Utterbach v. Jeunesse, LLC*, No. SACV 18-01123 AG (KESx), 2019 WL 1878347, at *3 (C.D. Cal. Feb. 11, 2019) (granting Jeunesse's motion to compel arbitration of complaint filed by distributor); *AMC Pinnacle, Inc. v. Jeunesse, LLC*, No. 6:18-cv-1102-Orl-40DCI, 2018 WL 6267314, at *4 (M.D. Fla. Nov. 30, 2018) (upholding arbitration agreement and denying distributor's motion to preliminarily enjoin arbitration because Jeunesse's arbitration provision contained a valid delegation clause requiring the arbitrator to decide gateway issues of arbitrability).

"[C]ourts must place arbitration agreements on equal footing with other contracts, and enforce them according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citations omitted). A court may only declare an arbitration agreement unenforceable "upon such grounds as exist at law or equity for the revocation of any contract." *Id*. (citation and internal quotation marks omitted). In *Concepcion*, the Supreme Court held that the FAA preempts any state law that diminishes arbitration agreements and the enforceability of class action waivers in arbitration agreements. *Id*. at 343. Later, in *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015), the Supreme Court once again reversed a court's refusal to enforce an arbitration agreement, further exhibiting the policy favoring arbitration.

Section 3 of the FAA provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the

> terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (emphasis added). *See Murphy*, 724 F.3d at 1225-28 (upholding order compelling arbitration of California consumer fraud claims); *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 938 (9th Cir. 2013) (reversing district court's denial of motion to compel arbitration of California consumer fraud claims with instructions to grant the motion as to all claims). The FAA therefore requires this Court to stay or dismiss Ms. Xiong's claims in favor of arbitration.[1]

The FAA "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate . . . ." *Moses H. Cone*, 460 U.S. at 25 n.32 (1983). A Court must order arbitration pursuant to an agreement when the subject matter of the dispute is subject to the agreement. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). *See also AT&T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (an "order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute").

Consistent with these principles clearly set forth by the Supreme Court, "[a]ny doubts about the scope of arbitrable issues, including applicable contract defenses, are to be resolved in favor of arbitration." *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1022 (9th Cir. 2016). Agreements governed by the FAA are presumed to be valid and enforceable. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 646 (1985); *see Tompkins*, 840 F.3d at 1022 ("Section 2 of the FAA makes a written

[1] As this Court held in *Jinya Franchise, Inc. v. Pam Group, LLC*, No. LA CV13-1232 JAK (Ex), 2013 WL 12133688, at *10 (C.D. Cal. Aug. 1, 2013), once a court finds that all claims are arbitrable, it has the option to stay the action pending the outcome of arbitration or to dismiss it pursuant to Fed. R. Civ. P. 12(b)(6). To be clear, in the event the Court denies this motion to compel arbitration, Jeunesse and Ms. Hui intend to file a Rule 12(b)(6) motion to dismiss Ms. Xiong's complaint in its entirety for failure to state a claim upon which relief may be granted. The parties have stipulated that this motion to compel arbitration or for transfer is *not* Defendants' substantive response to Ms. Xiong's complaint.

provision in a contract to settle a controversy by arbitration 'valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract.'") (citation omitted).

"[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone*, 460 U.S. at 24. The purpose of the FAA is to ensure "that private agreements to arbitrate are enforced according to their terms." *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). Further, 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*, 470 U.S. at 218; *see also QAD, Inc. v. Conagra Foods, Inc.*, No. CV 11-5162 ODW (SSx), 2011 WL 4964914, at *1 (C.D. Cal. Oct. 18, 2011) (same). "Courts have consistently found that claims arising under federal statutes may be the subject of arbitration agreements and are enforceable under the FAA." *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1313 (11th Cir. 2002) (collecting cases); *Barnes*, 2014 WL 4929052, at *9 (ordering claims to arbitration).

A motion to compel arbitration should be granted where the parties have entered into a valid arbitration agreement and the dispute falls within the scope of the arbitration agreement. *Ashbey v. Archstone Prop. Mgmt.*, 612 F. App'x 430, 431 (9th Cir. May 12, 2015); *see, e.g.*, *Tompkins*, 840 F.3d at 1022; *Ferguson*, 733 F.3d at 938 ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"), *quoting Moses H. Cone Hosp.*, 460 U.S. at 24-25. A party opposing arbitration after having consented to arbitrate, as Ms. Xiong has, faces a steep hurdle: "where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that '[an] order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *Commc'ns Workers of Am.*, 475 U.S. at 650 (internal citation omitted).

Because Ms. Xiong's agreement with Jeunesse calls for arbitration before the AAA, she faces an even higher bar. "Virtually every circuit to have considered the issue has determined that the incorporation of the [AAA] arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Oracle Am., Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013) (collecting cases); *see also Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) ("we hold that incorporation of the AAA rules constitutes clear and unmistakable evidence that the contracting parties agreed to arbitrate arbitrability"); *AMC Pinnacle, Inc.*, 2018 WL 6267314, at *3 ("[t]he Court agrees with Jeunesse that incorporation of the AAA rules gives rise to a valid delegation clause"). Here, the arbitration provision clearly references that arbitration shall be conducted "in accordance with the Federal Arbitration Act and the Commercial Arbitration Rules of the American Arbitration Association." Kurley Decl. ¶ 11; *id.*, Ex. B, ¶ 11.6. Accordingly, any dispute over whether the provision applies to a particular claim should be determined by the arbitrator.

Having explicitly agreed to arbitrate any dispute with Defendants, Ms. Xiong now seeks to avoid arbitration. Her attempt must fail, however, because no generally applicable provision of Florida contract law—the law her contract with Jeunesse says governs—renders the agreement to arbitrate unenforceable. *See Tompkins*, 840 F.3d at 1022 ("'[I]n assessing the rights of litigants to enforce an arbitration agreement' a court may not 'construe that agreement in a manner different from that which it otherwise construes nonarbitration agreements under state law'"), *quoting Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987); *Concepcion*, 563 U.S. at 339 (only "generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue[,]" may invalidate an arbitration provision) (citations and internal quotation marks omitted); *Caley v. Gulfstream Aero Corp.*, 428 F.3d 1359, 1368 (11th Cir. 2005) ("in determining whether a binding agreement

arose between the parties, courts apply the contract law of the particular state that governs the formation of contracts"); *Curbelo v. Autonation Benefits Co.*, No. 14-CIV-62736, 2015 WL 667655, at *2 (S.D. Fla. Feb. 17, 2015) ("Under both federal and Florida law, there are three factors to consider in determining a party's right to arbitrate: (1) a written agreement exists between the parties containing an arbitration clause; (2) an arbitrable issue exists; and (3) and the right to arbitration has not been waived") (citations omitted); *see also Barnes*, 2014 WL 4929052, at *3 ("In determining whether parties must arbitrate their dispute, a court may not review the merits of the dispute" and is "limited to 'determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.'" (citation omitted). Ms. Xiong cannot meet this burden.

Under Florida law, "[s]ubstantive unconscionability requires a showing that the terms of the arbitration agreement are 'unreasonable and unfair' [*Powertel, Inc. v. Bexley*, 743 So. 2d 570, 574 (Fla. Dist. Ct. App. 1999)] and focuses on whether the arbitration provision is 'so outrageously unfair as to shock the judicial conscience.'" *Curbelo*, 2015 WL 667655, at *3, *citing Prieto v. Healthcare and Ret. Corp. of Am.*, 919 So. 2d 531, 533 (Fla. Dist. Ct. App. 2005). "Procedural unconscionability focuses on '(1) the manner in which the contract was entered into; (2) whether the complaining party had a meaningful choice at the time the contract was entered into; (3) whether the complaining party had a realistic opportunity to bargain regarding the terms of the contract; and (4) whether he or she had a reasonable opportunity to understand the terms of the contract.'" *Id.*, *citing Murphy v. Courtesy Ford, L.L.C.*, 944 So. 2d 1131, 1134 (Fla. Dist. Ct. App. 2006) (remaining citation omitted). Similarly, "'California's unconscionability standard is, as it must be, the same for arbitration and nonarbitration agreements.'" *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1260 (9th Cir. 2017); *quoting Sanchez v. Valencia Holding Co., LLC*, 61 Cal. 4th 899, 912 (Cal. 2015). "'Not all one-sided contract provisions are unconscionable.'" *Id.* at 1261, *quoting Sanchez*, 61 Cal. 4th at 911.

Florida law applies here, but even under California law, the "procedural element of unconscionability focuses on 'oppression or surprise due to unequal bargaining power.'" *Id.* at 1260 (citation omitted). For an agreement to be held substantively unconscionable under California law, it must be "'overly harsh,' 'unduly oppressive,' 'unreasonably favorable,' or must 'shock the conscience.'" *Id.* at 1261 (citation omitted). In other words, "[t]he 'central idea' is that 'the unconscionability doctrine is concerned not with a simple old-fashioned bad bargain but with terms that are unreasonably favorable to the more powerful party.'" *Id.*, *quoting Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237, 1244 (Cal. 2016).

Under either Florida or California law, a party seeking to avoid arbitration must "carr[y] the burden of establishing that the arbitration clause is *both* procedurally and substantively unconscionable." *Keith v. Wells Fargo Fin. Am.*, No. 8:10-cv-1588-T-33EAJ, 2010 WL 4647227, at *3 (M.D. Fla. Nov. 9, 2010); *Tompkins*, 840 F.3d at 1022 (Under California law, "[t]he party asserting that a contractual provision is unconscionable bears the burden of proof" and "[b]oth procedural and substantive unconscionability must be present"). Ms. Xiong's Complaint does not specify any basis to find the arbitration provision unenforceable.

2. Ms. Xiong's Claims against Ms. Hui Must Also Be Arbitrated.

Ms. Xiong has sued not only Jeunesse, but also fellow distributor Kim Hui. Even though Ms. Hui is a non-signatory to the arbitration agreement between Ms. Xiong and Jeunesse, she consents to arbitration and the arbitration agreement clearly encompasses Ms. Xiong's claims against Ms. Hui as a fellow distributor.

The agreement to arbitrate, by its terms, extends not only to disputes between the signatory distributor and Jeunesse, but to "[a]ll disputes and claims relating to Jeunesse, . . . *the rights and obligations of a distributor of Jeunesse*, or any other claims or causes of action *relating to the performance of either a distributor or . . . Jeunesse*[.]" Kurley Decl. ¶ 12; *id.*, Ex. B, ¶ 11.6. Ms. Xiong's purported claims against her fellow distributor plainly "relate[s] to" their respective "rights and

obligations" and to their "performance." Accordingly, Ms. Xiong's claims against Ms. Hui are arbitrable. *See Simmons*, 2017 WL 424850, at *5 ("the Court concludes that the language of the arbitration agreement clearly and unmistakably provides that [plaintiff] must arbitrate arbitrability with the nonsignatory Defendants"); *Amisil Holdings Ltd. v. Clarium Capital Mgmt.*, 622 F. Supp. 2d 825, 830-31 (N.D. Cal. 2007) ("a signatory can be compelled to arbitrate at the nonsignatory's insistence under 'an alternative estoppel theory'—*i.e.*, 'because of the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract . . . and [the fact that] the claims were intimately founded in and intertwined with the underlying contractual obligations.'") (citation omitted).

Were the law otherwise—in other words, if a litigant "can avoid the practical consequences of an agreement to arbitrate by naming nonsignatory parties as [defendants] in his complaint . . . the effect of the rule requiring arbitration would, in effect, be nullified." *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281 (6th Cir. 1990); *see also, e.g., Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, Civ. No. 11-1219 (JBS/KMW), 2012 WL 3262435, at *5 (D.N.J. Aug. 7, 2012) ("It is well settled that agency and contract principles enable courts to consider nonsignatories as parties to [an] arbitration provision.") (citation and internal quotation marks omitted); *Koechli v. BIP Int'l, Inc.*, 870 So. 2d 940, 942 (Fla. 1stDist. Ct. of App. 2004) (same). Ms. Xiong's having pleaded claims against a fellow independent distributor of Jeunesse products, therefore, is not a bar to compelling arbitration of those claims.

B. <u>In the Alternative, the Court Should Transfer This Case to the U.S. District Court for the Middle District of Florida.</u>

This Court can and should directly compel arbitration of Ms. Xiong's claims, but if it elects not to do so, it should transfer the case to the Middle District of Florida. "For the convenience of parties and witnesses, [and] in the interest of justice," 28 U.S.C. § 1404(a) allows a district court to transfer any civil action to a different

federal district to which the parties "have consented," or to one where the action "might have been brought." Here, considerations of private and public interests overwhelmingly favor transfer—as the District Court of Arizona correctly concluded in *Aboltin*, 2017 WL 5957646, at *5. As in *Aboltin*, if this Court elects to allow Ms. Xiong to litigate any claims at all, they should be litigated in the Middle District of Florida.

1. The § 1404(a) Analysis Favors Transfer

Pursuant to 28 U.S.C. § 1404(a), Ms. Xiong's Complaint should be transferred. The purpose of § 1404(a) is "to prevent the waste of time, energy, and money, and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (citation and internal quotation marks omitted). "[C]ourts have broad discretion to adjudicate [§ 1404(a) motions to transfer] 'according to an individualized, case-by-case consideration of convenience and fairness.'" *U.S. Bank, N.A. v. PHL Variable Ins. Co.*, No. 2:11-cv-9517-ODW(RZx), 2012 WL 3848630, at *1 (C.D. Cal. Sept. 4, 2012), *quoting Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000). Factors that the Court may consider include:

> (1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation…, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, (8) the ease of access to sources of proof, (9) the presence of a forum selection clause, and (10) the relevant public policy of the forum state.

Newthink LLC v. Lenovo (U.S.) Inc., No. 2:12-cv-5443-ODW(JCx), 2012 WL 6062084, at 1 (C.D. Cal. Dec. 4, 2012), *quoting Jones*, 211 F.3d at 498.

"Because Defendant[] Jeunesse [and the corporate officer defendants] are residents of Florida, this action could have been instituted in the Middle District of Florida." *Aboltin*, 2017 WL 5957646, at *4, *citing* 18 U.S.C. § 1965(a). "Jeunesse

is headquartered in Florida, with no physical presence and no employees" in California. *Id*. "Florida has a significant connection to the facts alleged in the complaint"; "the individuals likely to have knowledge of Jeunesse's marketing and compensation structure, presumably its officers and employees, are located in Florida"; and "the corporate documents and other written records in dispute are located…in Florida," making it "less expensive to litigate this action in Florida" rather than California. *Id.* at *4, *5. By contrast, "[t]here are no allegations that Jeunesse agents personally negotiated the agreement with Plaintiff or other class members, which [agreements were] accessed and executed over the internet." *Id.* at *4. The analysis thus tipped decisively in favor of transfer. Here, one further fact, not present in *Aboltin*, tips the transfer analysis even further in favor of a Florida venue: Ms. Xiong *already has appeared* before the Florida court to object to the *Aboltin* settlement.

2. Convenience of the Parties and Witnesses Favors Transfer.

"[T]he convenience and cost of attendance of witnesses" is the most important factor in the § 1404(a) transfer analysis. *Newthink LLC*, 2012 WL 6062084, at *1; *see also L.A. Printex Indus., Inc. v. Le Chateau, Inc.*, No. CV 10-4264 ODW (FMOx), 2011 WL 2462025, at *3 (C.D. Cal. June 20, 2011); *Jang v. Boston Sci. Scimed, Inc.*, No. CV 10-3911 ODW (VBKx), 2010 WL 11463889, at *3 (C.D. Cal. Aug. 9, 2010). Here, that factor tips only in one direction. Jeunesse has strong contacts with Florida, the state where it is incorporated and based.

Ms. Xiong's Complaint addresses Jeunesse's sales model as a multi-level marketer, and all or substantially all of the Jeunesse employees familiar with Jeunesse's finances, policies, and procedures are among the 300 Jeunesse employees who work at Jeunesse's Lake Mary, Florida headquarters. *See* Kurley Decl. ¶ 17. "For these witnesses, the most convenient forum is obvious." *Newthink LLC*, 2012 WL 6062084, at *1. "It will be less costly to litigate this case in [Florida], primarily because most of the defendants and relief defendants are domiciled or reside in

[Florida] and because most of the witnesses are located in [Florida]." *F.T.C. v. Wright*, 2:13-CV-2215-HRH, 2014 WL 1385111, at *4 (D. Ariz. Apr. 9, 2014). If the case is not transferred, these witnesses will be required to travel 2,500 miles from Orlando to Los Angeles. Further, to the extent that any relevant witness is a *former* Jeunesse employee or otherwise disinclined to testify, a Florida court will be much better positioned than one in California to issue compulsory process.

Ms. Xiong, by contrast, cannot "point to any relevant evidence or witness that may be in California," other than, presumably, herself (and Ms. Hui, who consents to transfer). *Dahdoul Textiles, Inc. v. Zinatex Imports, Inc.*, No. 2:15-cv-4011-ODW(ASx), 2015 WL 5050514, at *4 (C.D. Cal. Aug. 25, 2015). Jeunesse's records that are potentially relevant to any of Ms. Xiong's claims, including those relating to distributors' purchases and sales, and those relating to Jeunesse's policies and procedures, are stored at Jeunesse's headquarters. *See* Kurley Decl. ¶ 18. Jeunesse's information technology systems also are based at its headquarters. *Id*. "[E]ven if these documents could be produced electronically, the cost of litigation will still likely be less if the case was venued in the forum where these documents are located." *Newthink LLC*, 2012 WL 6062084, at *2. By contrast, Jeunesse has no employees in California—its distributors are independent contractors—and no physical presence in California. *See* Kurley Decl. ¶ 21.

3. The Relevant Agreements Were Drafted in Florida and Are Governed by Laws with which Florida Courts Are Most Familiar.

The terms and conditions to which all Jeunesse distributors agreed when they elected to become distributors were drafted and approved at Jeunesse's Florida headquarters. *See* Kurley Decl. ¶ 19. It was in Florida that Jeunesse indicated its own assent to be bound by those terms and conditions. *See id*. Although Jeunesse does not know where any particular distributor was located when he or she agreed to become a distributor, the location where the agreement was prepared (Florida) should control the situs of disputes concerning the agreement.

Further, the dispute between any distributor and Jeunesse hinges on Florida law. That is because this matter does not belong in court at all; it belongs in arbitration, as all distributors agreed. Ms. Xiong's Complaint does not challenge the Florida choice of law provision in the contract. As a result, any dispute regarding enforcement of the arbitration clause must be decided under Florida law, with which Florida courts obviously are most familiar. *See, e.g.*, *Am. Sec. Ins. Co. v. Norcold, Inc.*, No. 10-CV-954-PHX-GMS, 2010 WL 2991585, at *2 (D. Ariz. July 26, 2010).

If Ms. Xiong opposes transfer, she presumably will highlight that her Complaint purports to assert claims arising under California law. The contract's Florida choice of law clause, however, precludes those claims. *See, e.g.*, *Palomino v. Facebook, Inc.*, No. 16-cv-4230-HSG, 2017 WL 76901, at *3 (N.D. Cal. Jan. 9, 2017) (California choice of law clause in Facebook's terms and conditions precluded a New Jersey resident plaintiff from pursuing claims under a New Jersey consumer statute).

IV.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court compel arbitration of Ms. Xiong's claims, on an individual basis. In the alternative, Defendants request that the Court transfer this case to the Middle District of Florida.

Dated: June 7, 2019

DRINKER BIDDLE & REATH LLP

By: */s/ Jeffrey S. Jacobson*
Jeffrey S. Jacobson (*pro hac vice*)
Matthew J. Adler

Attorneys for Defendants

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

HELEN XIONG aka Huiqin Xiong, an individual; on behalf of herself and those similarly situated,

Plaintiff(s),

v.

JEUNESSE GLOBAL, LLC dba JEUNESSE, LLC; KIM HUI; and DOES 1-10,

Defendants.

Case No. 8:18-cv-01430-DOC-KES

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND FOR A STAY OR, IN THE ALTERNATIVE, TO TRANSFER TO THE MIDDLE DISTRICT OF FLORIDA

Judge: Hon. David O. Carter
Ctrm: 9D

Motion to Compel Arbitration and for a Stay or, in the Alternative, to Transfer to the Middle District of Florida of Defendants Jeunesse, LLC and Kim Hui (collectively, "Defendants") came on for hearing before this Court on July 22, 2019, the Honorable David O. Carter presiding. Upon consideration of the Motion and all papers in support thereof and in opposition thereto, the pleadings, exhibits, and records in this matter, and oral argument of the parties, **IT IS HEREBY ORDERED THAT**:

(1) Defendants' Motion to Compel Arbitration and for a Stay is **GRANTED**; or

(2) Defendants' Motion to Transfer to the Middle District of Florida is **GRANTED**.

IT IS SO ORDERED.

Date:_____

_____
The Hon. David O. Carter

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