JS-6

STAY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESSICA PONKEY, individually and on behalf of similarly situated persons,

Plaintiff,

v.

LLR, INC., a Wyoming corporation; LULAROE LLC, a California limited liability company; LENNON LEASING, LLC, a Wyoming limited liability company; MARK A. STIDHAM, an individual; DEANNE S. BRADY a/k/a DEANNE STIDHAM, an individual; and DOES 1-30, inclusive,

Defendant.

Case No. 5:21-cv-00518-AB-SHK

ORDER GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION

Before the Court is Defendants LuLaRoe, LLC, LLR, Inc., Mark Stidham, and DeAnne Brady's ("Defendants") Motion to Compel Plaintiff to Individually Arbitrate and to Stay this Action. ("Mot." or "Motion," Dkt. No. 21.) Plaintiff opposed on June 25, 2021 (Dkt. No. 22,) however, Plaintiff's operative opposition, with corrections, was filed on June 28, 2021. ("Opp'n," Dkt. No. 24.) Defendant replied on July 2, 2021. ("Reply," Dkt. No. 25.) The Court deems the matter appropriate for

decision without oral argument and thus vacates the hearing set for August 6th, 2021. For the following reasons the Court **GRANTS in part and DENIES in part** Defendants' Motion.

I. BACKGROUND

On March 24, 2021, Plaintiff Jessica Ponkey ("Plaintiff") filed a putative class action against Defendants LLR, Inc., LuLaRoe, LLC, Lennon Leasing, LLC, Mark A. Stidham, and DeAnne S. Brady (collectively, "LLR" or "Defendants.") ("Compl." or "Complaint," Dkt. No. 1.) Plaintiff alleges that LLR is a multi-level marketing ("MLM") company that "operated an unlawful pyramid scheme" that sells clothing through its network of consultants. *Id.* ¶ 29. LLR consultants paid an initial "onboarding" fee ranging from $2,000 to $9,000 to be eligible to participate in LLR's "Leadership Bonus Plan," which compensated consultants for recruiting other participants. *Id.* ¶ 31. Plaintiff paid the LLR "onboarding" fee and was an LLR consultant. *Id.* ¶ 2, 31. According to Plaintiff, LLR "incentivized existing [c]onsultants to recruit and sponsor new [c]onsultants, and to encourage them and their recruits to purchase large amounts of inventory, by basing its bonus structure on the dollar amount of wholesale orders paid for, instead of on bona fide retail sales." *Id.* ¶ 32.

Plaintiff's operative Complaint alleges claims for violations of California Penal Code § 327; California Civil Code § 1689.2; California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, et seq.; California's Unfair Advertising Law, Cal. Bus. & Prof. Code § 17500, et seq.; California Corporation Code; California Seller Assisted Marketing Plan Act, Cal. Civ. Code §§ 1812.200, et seq.; and Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1962(a) and 1962(d). (*See* Compl. at 28–55.) Moreover, Plaintiff alleges that LLR made misrepresentations to prospective consultants (Compl. ¶¶ 56–59), engaged in unfair and deceptive practices to encourage consultants to purchase significant amounts of merchandise (Compl. ¶¶ 60–63), and induced consultants to purchase

more merchandise by "changing its 90% [refund] policy to 100% and commit[ing] to paying for return shipping." (Compl. ¶¶ 67–68.) According to Plaintiff, LLR's "100% return policy" did not have an expiration date nor a limit on purchase dates eligible for refund, but Defendants terminated the policy without notice nearly five months later. *Id.* ¶ 68. In sum, Plaintiff's claims center on her allegations that LLR is a "fraudulent pyramid scheme" that preyed on consultants "who paid thousands of dollars" to purchase LLR merchandise for resale purposes. *Id.* ¶ 2.

On June 17, 2021, Defendants filed their original Motion to Compel Plaintiff to Individually Arbitrate and to Stay this Action. Dkt. No. 17. Defendants filed the operative amended Motion on June 24, 2021. *See Motion*.

II. LEGAL STANDARD

The Federal Arbitration Act ("FAA") applies to "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. Any arbitration agreement within the scope of the FAA "shall be valid, irrevocable, and enforceable" and a party "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate" may file a motion to compel arbitration in a federal district court. 9 U.S.C. §§ 2, 4. "[U]pon being satisfied that the making of the agreement for arbitration . . . is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4.

"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). The FAA evinces a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1985). However, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986) (internal quotation

marks omitted).

When resolving motions to compel arbitration, courts must determine: (1) whether a valid agreement to arbitrate exists, and (2) whether the dispute falls within the scope of the arbitration agreement. *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 477–78 (9th Cir. 1991). Under the FAA, "state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

III. REQUEST FOR JUDICIAL NOTICE

The Court may take judicial notice of facts not subject to reasonable dispute that are either "generally known" in the community, or "capable of accurate and ready determination" by reference to sources whose accuracy cannot be reasonably questioned. Fed. R. Evid. 201(b).

Here, the parties request that the Court take judicial notice of several court filings from related cases and an excerpt from the JAMS Comprehensive Arbitration Rules & Procedures. (Dkt. No. 17-4, Defendants' Request for Judicial Notice; Dkt. No. 22-1, Plaintiff's Request for Judicial Notice; Dkt No. 25-4.) Because these documents are matters of public record and not subject to reasonable dispute, the parties' requests are **GRANTED**.

IV. EVIDENTIARY OBJECTIONS

Defendants offer numerous objections to Plaintiff's evidence. (*See generally* Dkt. 25-5.) It is "often unnecessary and impractical for a court to methodically scrutinize each objection and give a full analysis of each argument raised." *Doe v. Starbucks, Inc.*, No. SACV 08-00582 AG (CWx), 2009 WL 5183773, at *1 (C.D. Cal. Dec. 18, 2009). Accordingly, to the extent any of the objected-to evidence is relied on in this Order, those objections are **OVERRULED**. Any remaining objections are also **OVERRULED AS MOOT**. *See Burch v. Regents of Univ. of*

Cal., 433 F. Supp. 2d 1110, 1118, 1122 (E.D. Cal. 2006) (concluding that "the court will [only] proceed with any necessary rulings on defendants' evidentiary objections").

V. DISCUSSION

Defendants request that the Court: (1) compel Plaintiff to "mediate, then arbitrate on an individual basis her claims against Defendants in accordance with her agreement with LLR, Inc. and related dispute resolution procedures," and (2) order "staying this action pending mediation and arbitration of Plaintiff's claims." (Notice of Mot. at 2.) Defendants argue that Plaintiff should be compelled to arbitrate her claims on an individual basis because Plaintiff entered into a "Retailer Agreement" which incorporates LLR's Policies and Procedures and amendments ("Policies and Procedures"), which contain an arbitration and mediation provision. (Mot. at 2–3.) Defendants allege that the arbitration provision in the Policies and Procedures clearly states that "[i]f mediation is unsuccessful, any controversy or claim arising out of or relating to the Agreement, or the breach thereof, shall be settled by arbitration." *Id.* at 3 (citing Declaration of Megan Alvarez ("Alvarez Decl."), Ex. 2 at 69–70 ("Plaintiff's Signed Retailer Agreement")).

Defendants state that Plaintiff should be compelled to individually arbitrate her claims because Plaintiff executed her Retailer Agreement in February 2017 through the electronic document system, DocuSign. (Mot. at 5.) According to Defendants, Plaintiff agreed that she "read and agree[d] to comply with the LLR Inc. Policies and Procedures" when she signed the Retailer Agreement. *Id.* at 6. Moreover, Defendants argue that the First Amendment to the Retailer Agreement ("First Amendment") was effective at the time Plaintiff executed her Retailer Agreement, and Plaintiff received the First Amendment before and after she executed the Retailer Agreement.[1] *Id.*

[1] Defendants allege that the First Amendment contained almost the same arbitration

In opposition, Plaintiff argues that Defendants have failed to meet their burden for equitable estoppel and non-signatories cannot enforce the arbitration provision. Opp'n at 2, 6. Plaintiff also argues that the arbitration provision is substantively and procedurally unconscionable. *Id.* at 6–21. Additionally, Plaintiff requests the Court to dismiss the action in the event that the Court grants Defendants' motion. *Id.* at 1, 24. Plaintiff claims that a dismissal would be appropriate and would provide Plaintiff a means to appeal the decision. *Id.* at 24–25. The Court addresses each of the Plaintiff's arguments in turn, but begins by addressing whether a valid arbitration agreement exists.

A. Whether a Valid Arbitration Agreement Exists Between the Parties

When determining whether an arbitration agreement is enforceable upon the parties, the Court must look to see whether the parties have a valid agreement to arbitrate. *Standard Fruit Co.*, 937 F.2d at 477–78. No party may be forced into arbitration unless it has actually agreed to arbitration. *Lounge-A-Round v. GCM Mills, Inc.*, 109 Cal. App. 3d 190, 195 (1980). "As a threshold condition for contract formation, there must be an objective manifestation of voluntary, mutual assent." *Anderson v. United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003). "In determining the validity of an agreement to arbitrate, federal courts 'should apply ordinary state-law principles that govern the formation of contracts.'" *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 782 (9th Cir. 2002) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

Under California law, "[a] contract may validly include the provisions of a document not physically a part of the basic contract." *Wolschlager v. Fidelity Nat'l Title Ins. Co.*, 111 Cal. App. 4th 784, 790 (2003) (internal quotation marks omitted).

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provision as the Policies and Procedures, but changed the location of arbitration to California and called for the application of California's rules of evidence and civil discovery. (Mot. at 4.)

Parties may incorporate the terms of other documents by reference in their contract. *Id.* "For the terms of another document to be incorporated into the document executed by the parties[,] the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties." *Id.*

In a related case, with the identical arbitration provision in question, this Court determined that an arbitration agreement existed between the parties because the plaintiffs assented to the Policies and Procedures and did not dispute that their claims fell within the scope of the arbitration provision. *See Lemberg v. LuLaRoe, LLC*, No. ED CV 17-02102-AB (SHKx), 2018 WL 6927844 at *4 (C.D. Cal. Apr. 17, 2018). In *Lemberg*, the Court concluded that version 6.5.1 of the Retailer Agreement incorporates the Policies and Procedures by reference by stating that the "Consultant acknowledges that Consultant has read and agrees to comply with the Policies and Procedures . . . which [is] incorporated into and made a part of this Agreement as set forth herein," and Defendants "demonstrate[ed] that the Policies and Procedures were easily available to [p]laintiffs." *Id.* at 3–4. Here, Plaintiff signed version 6.5.1 of the Retailer Agreement on February 7, 2017, through the DocuSign onboarding process (Alvarez Decl. at 4). Plaintiff does not dispute her assent to the Policies and Procedures; rather, she argues against enforcement of the arbitration provision on the grounds that non-signatories cannot enforce the arbitration provision and the arbitration provision is unconscionable. (Opp'n at 2–6.) Because this case involves the same arbitration provision as in *Lemberg*, the Court finds no reason to depart from the holding in *Lemberg* that a valid arbitration agreement exists between the parties here. Accordingly, the Court next examines whether the arbitration provision is nonetheless unconscionable.

B. Whether the Arbitration Agreement is Unconscionable

Under the doctrine of unconscionability, California courts can exercise their discretion to refuse to enforce a contract or clause if *both* procedural and substantive unconscionability are present. *Armendariz v. Found. Health Psychare Servs., Inc.*, 24 Cal. 4th 83, 114 (Cal. 2000). "[W]here a party specifically challenges arbitration provisions as unconscionable and hence invalid, whether the arbitration provisions are unconscionable is an issue for the court to determine, applying the relevant state contract law principles." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). When determining whether an arbitration agreement is valid and enforceable, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [9 U.S.C. § 2]." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

In *Lemberg*, this Court concluded that the instant "arbitration provision in the Policies and Procedures is, at most, minimally procedurally unconscionable, but is not substantively unconscionable" and thus, "the arbitration provision is not unconscionable." WL 6927844 at *7. Although the retailer agreement there was considered a contract of adhesion, the arbitration provision was minimally procedurally unconscionable because plaintiffs were not LLR employees and had a choice of running their business with other marketing or apparel companies. *Id.* at 5. This Court concluded that there was minimal oppression based on the adhesive nature of the contract because the plaintiffs had a meaningful choice to do business elsewhere, and the "element of meaningful choice [] combats the potential low finding of procedural unconscionability." *Id.* (quoting *Dean Witter Reynolds,* Inc. *v. Superior Court*, 211 Cal. App. 3d 758, 768 (1989), reh'g denied and opinion modified (July 21, 1989)). As to substantive unconscionability, the Court determined that the arbitration agreement did not contain "terms that are so one-sided as to shock the conscience or that impose harsh or oppressive terms," and thus, was not substantively unconscionable. WL 6927844 at *7 (quoting *Parada v. Superior Court*, 176 Cal.

App. 4th 1554, 1573 (2009)). For the reasons discussed below, the Court once again finds that the arbitration provision is not unconscionable under California law.

i. Procedural Unconscionability

Plaintiff argues that the arbitration provision is procedurally unconscionable because the Retailer Agreement and Policies and Procedures are oppressive, and the arbitration provision contains elements of surprise. (Opp'n at 17–21.) Plaintiff claims that the arbitration agreement is oppressive because it is an adhesion contract, *Dean Witter* does not apply in this context, and the Defendants have not provided sufficient evidence of an absence of meaningful choice.[2] *Id.* at 17–18. Plaintiff claims that the arbitration provision is filled with surprises because it does not identify which version of the JAMS or AAA rules govern, the statute of limitation waiver provision does not identify the applicable statute of limitation, and the arbitrators' daily and hourly rates are not identified. *Id.* at 19–20.

Courts look to two factors when determining whether a contract is procedurally unconscionable: oppression and surprise. *Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 246 (2012). "Oppression occurs where a contract involves a lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form." *Id.* Under California law, "the party opposing arbitration bears the burden of proving any defense, such as unconscionability." *Id.* at 236.

Plaintiff argues that the Ninth Circuit does not apply the "*Dean Witter* standard" to franchisor-franchisee or MLM contexts because of its decisions in *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1283 (9th Cir. 2006) and *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 997 (9th Cir. 2010). (Opp'n at 18.) Indeed, *Pokorny* is

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[2] Unless otherwise provided, all *Dean Witter* citations hereafter refer to *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d 758 (1989), reh'g denied and opinion modified (July 21, 1989).

more factually similar to this case because the plaintiffs there filed a class action alleging that the defendants there operated an illegal pyramid scheme in violation of RICO and Cal. Bus. & Prof. Code §§ 17200, et seq. and 17500, et seq. *Pokorny*, 601 F.3d at 991. By contrast, the issue in *Dean Witter* was determining whether the termination fee of an individual retirement account was unconscionable. 211 Cal. App. 3d at 790. However, the fact that this case is *factually* distinguishable from *Dean Witter* does not mean that *Dean Witter* does not apply here.

In *Pokorny*, the Ninth Circuit clarified that under *Nagrampa*, "[t]he availability of alternative business opportunities does not preclude a finding of procedural unconscionability under California law." 601 F.3d at 1283 (citing *Nagrampa*, 469 F.3d at 1283). However, *Dean Witter* "[did] not hold or suggest . . . that *any* showing of competition in the market place as to the desired goods and services defeats, as a matter of law, *any* claims of unconscionability," rather it held that a claim of oppression "may be defeated, if the complaining party has a meaningful choice of reasonably available alternative sources of supply from which to obtain the desired goods and services free of the terms claimed to be unconscionable." 211 Cal. App. 3d at 772. Neither *Dean Witter* nor *Nagrampa* suggest that the availability of alternative opportunities alone can defeat a claim of procedural unconscionability. *See id; see also Nagrampa*, 469 F.3d at 1283 ("The California Court of Appeal has rejected the notion that the availability in the marketplace of substitute employment, goods, or services alone can defeat a claim of procedural unconscionability"). Rather, both *Dean Witter* and *Nagrampa* apply a totality of the circumstances analysis when determining whether an arbitration provision is procedurally unconscionable. *See Dean Witter*, 211 Cal. App. 3d at 772 (explaining that based "on the entire record," the termination fee was not unconscionable because the plaintiff, "[a] sophisticated investor-attorney . . . was not shown to lack a meaningful choice with respect to the termination fee, and hence the 'oppression' factor of the procedural element of

unconscionability was not established"); *see also Nagrampa*, at 1284 (explaining that "the potential availability of other franchise opportunities *alone*" nor "sophistication of a party *alone*, cannot defeat a procedural unconscionability claim) (emphasis added). Similarly, when looking at the agreement in *Pokorny* as a whole, the alternative dispute resolution (ADR) provisions there were procedurally unconscionable because the defendants had a superior bargaining position, the plaintiffs did not participate in the negotiation of the terms of the agreement, the agreement was presented on a take-it-or-leave-it basis, and the defendants failed to attach documents with information that would have allowed plaintiffs a fair opportunity to review the "full nature and extent" of the arbitration terms. 601 F.3d at 996–97. Thus, the courts in all three cases look at factors beyond the availability of alternative business opportunities. Accordingly, the Court finds that no matter what standard is applied here, *Dean Witter* or *Nagrampa*, the outcome would be the same.

In *Lemberg*, the Court used *Dean Witter* to conclude that an identical arbitration provision was minimally oppressive because of the contract's take-it-or-leave-it nature and the plaintiffs did not establish that there was a total absence of meaningful choice. *See Lemberg*, WL 6927844 at *5. Similarly here, Plaintiff has not established that there was a total absence of meaningful choice, rather she simply asserts that Defendants did not provide sufficient evidence of alternative sources of products of like quality, market share, and reputation as LLR products. (Opp'n at 18–19). Furthermore, in *Lemberg* this Court found that the Policies and Procedures, including the arbitration provision, was not permeated with surprise because it laid out a separate section of the Policies and Procedures titled "Arbitration," the arbitration was not in smaller text, it stated that "arbitration shall be filed with, and administered by, the American Arbitration Association ("AAA") or JAMs under their respective rules and procedures," it provided links to the respective rules and procedures for AAA and JAMS, and it laid out the additional Federal Rules of Evidence and Civil Procedure

that will apply during arbitration. *See Lemberg*, WL 6927844 at *6. Because this case involves an identical arbitration provision as in *Lemberg* and Plaintiff provides no new reasons to suggest that this Court should depart from its ruling in *Lemberg*, the Court finds that the arbitration provision here is still only minimally procedurally unconscionable.

ii. Substantive Unconscionability

The Court next determines whether the arbitration provision is substantively unconscionable. "A provision is substantively unconscionable if it involves contract terms that are so one-sided as to shock the conscience or that impose harsh or oppressive terms." *Parada*, 176 Cal. App. 4th at 1573 (internal quotation marks omitted). "Substantive unconscionability may be shown if the disputed contract provision falls outside the non-drafting party's reasonable expectations." *Id.* "Agreements to arbitrate must contain at least 'a modicum of bilaterality' to avoid unconscionability." *Abramson v. Juniper Networks, Inc.*, 115 Cal. App. 4th 638, 657 (2004) (quoting *Armendariz*, 24 Cal. 4th at 119) (some internal quotations omitted). Plaintiff argues that the arbitration provision is substantively unconscionable because LLR maintains more rights than Plaintiff, the statute of limitation waiver is unconscionable, LLR's unilateral ability to modify is unconscionable, Plaintiff cannot obtain informal discovery and is bound by a truncated arbitration timeline that cannot be extended, Plaintiff cannot obtain statutory attorneys' fees, and the exemplary damage waiver is unconscionable. (Opp'n at 7–17.)

In *Lemberg*, the Court found that the identical arbitration agreement was not substantively unconscionable because its terms were not "so one-sided as to shock the conscience or that impose harsh or oppressive terms." *See* WL 6927844 at *7. As in *Lemberg*, Plaintiff argues that the intellectual property and non-solicitation clauses in the Retailer Agreement are one-sided. However, this Court again finds that the aforementioned clauses apply to both parties and does not find that this carve-out is

otherwise unreasonably one-sided. *See Lemberg*, WL 6927844 at *6. Plaintiff also argues that the confidentiality provision is one-sided and hinders Plaintiff's ability to conduct informal discovery. (Opp'n 12–14). In *Lemberg*, the Court did not find the confidentiality provision unconscionable because the Ninth Circuit has rejected similar arguments that confidentiality obligations are substantially unconscionable. *See* WL 6927844 at *7 (citing *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1265–66 (9th Cir. 2017) (finding that the "confidentiality provision in the Arbitration Procedure is not substantively unconscionable" and rejecting the argument that confidentiality provisions are substantively unconscionable because they "inhibit employees from discovering evidence from each other") (internal quotation marks omitted). Because this case and *Lemberg* involve an identical confidentiality agreement and Plaintiff provides no new reasons to suggest that this Court should depart from its ruling in *Lemberg*, the Court again finds that the confidentiality provision is not unconscionable.

Plaintiff also argues that the Retail Agreement's one-year statute of limitations period and a provision giving LLR a unilateral right to modify the agreement shows that the arbitration provision is substantively unconscionable. (Opp'n at 9–12.) The Court does not find that Plaintiff has met her burden of establishing that these terms "are so one-sided as to shock the conscience." *See Parada*, 176 Cal. App. 4th at 1573.

In *Han v. Mobil Oil Corp.*, the Ninth Circuit stated that "[a] contractual limitation period requiring a plaintiff to commence an action within 12 months following the event giving rise to a claim is a reasonable limitation which generally manifests no undue advantage and no unfairness." 73 F.3d 872, 877 (9th Cir. 1995). More recently, in *Tompkins v. 23andMe, Inc.*, the Ninth Circuit concluded that the one-year statute of limitation did not itself make the arbitration provision unconscionable under California law. 840 F.3d 1016, 1032 (9th Cir. 2016). Both cases have considered statute of limitation provisions as a factor of unconscionability

but not alone enough to make the entire agreement unconscionable. Even in *Pokorny*, the statute of limitation provision merely added to the unconscionability but was not the only factor that made the agreement there unconscionable. *See Pokorny*, 601 F.3d at 1001. Here, Plaintiff argues that the one-year statute of limitation provision is unconscionable because "it requires Plaintiff to waive the benefit of the discovery rule," and Plaintiff is limited to a one-year term despite having plead claims with statutes of limitation of up to four years. (Opp'n at 10.) However, "California courts generally interpret contractual statute of limitations as incorporating California's discovery rule, in order to avoid unfair or unreasonable applications of the limitations period." *Tompkins*, 840 F.3d at 1033 (citing *Moreno v. Sanchez*, 106 Cal. App. 4th 1415, 1430 (2003)). Thus, the Court does not find that Plaintiff has met her burden of showing that the one-year statute of limitation is unreasonably one-sided.

As for the unilateral modification provision, although the Ninth Circuit has held that such a provision itself may be unconscionable, it has not held that such an unconscionable provision makes the arbitration provision or the contract as a whole unenforceable. *See Tompkins*, 840 F.3d at 1033. The Court does not find that the unilateral modification clause here makes the arbitration provision itself unconscionable because "California courts have held that the implied covenant of good faith and fair dealing prevents a party from exercising its rights under a unilateral modification clause in a way that would make it unconscionable." *Id.* Thus, Plaintiff has not met her burden of showing that the unilateral modification provision renders the arbitration clause unconscionable.

Next, Plaintiff claims that she cannot obtain statutory attorneys' fees because the arbitration provision requires each side to pay for their own attorneys' fees. (Opp'n at 15.) Defendants argue that although the agreement provides that each party shall pay its own attorneys' fees, costs and expenses, Plaintiff "retains her statutory rights as nothing in the contact precludes the arbitrator from awarding statutory fees,

as in court." (Reply at 9). In *Lemberg*, the Court found that the same Policies and Procedures here incorporate by reference the AAA rules and JAMS rules. (*See* WL 6927844 at *8). Furthermore, the AAA rules "state that '[t]he arbitrator may grant any award or relief that would have been available to the parties had the matter been heard in court including awards of attorney's fees and costs, in accordance with applicable law.'" *See Maxson v. Beazer Homes Holdings Corp.*, No. SA CV 17-0583-DOC (AFMx), 2017 WL 10545078, at *4–5 (C.D. Cal. June 21, 2017) (holding that the agreement did not expressly limit statutory remedies). Thus, the Court agrees with Defendant and finds that requiring each side to pay for their own attorneys' fees does not make the arbitration provision substantively unconscionable. *See id.*

Plaintiff also asserts that the exemplary damages waiver in the Consultant Agreement is substantively unconscionable because "limitations on statutorily imposed remedies such as consequential and punitive damages are unconscionable." (Opp'n at 16–17). In response, Defendants argue that in RICO cases in which the contract precludes punitive or exemplary damages, or extra contractual damages of any kind, the proper course is to compel arbitration and for the arbitrator to construe the limitations. (Reply at 11) (citing *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 407 (2003). However, Plaintiff alleges that *PacifiCare Health* did not address California unconscionability jurisprudence, and thus *PacifiCare Health* is irrelevant to the analysis here because the issue concerned the treatment of statutory treble damages. (Opp'n at 17.) Because this provision alone will not make the arbitration provision as a whole substantively unconscionable, the Court finds that, as in *PacifiCare Health*, the proper course is to compel arbitration and for the arbitrator to construe the limitations. *See PacifiCare Health*, 538 U.S. at 407.

Ultimately, as in *Lemberg*, the Court finds that the arbitration provision is at most minimally procedurally unconscionable and not substantively unconscionable. *See* WL 6927844 at *7. Accordingly, the Court finds that the arbitrations provision is

not so unconscionable to render such an agreement unenforceable. *See Armendariz*, 24 Cal. 4th at 114 ("The prevailing view is that [procedural and substantive unconscionability] must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.") (internal quotation marks omitted) (emphasis in original).

C. Whether Non-Signatories Can Enforce the Arbitration Agreement

Plaintiff argues that non-signatories cannot enforce the arbitration provision. (Opp'n at 2–6.) Plaintiff asserts that Defendants have failed to meet their burden of showing equitable estoppel because they "fail to identify any duty, obligation, term or condition" in either the Independent Consultant Program Application and Agreement or LLR's Policies and Procedures that Plaintiff alleges were violated. (Opp'n at 4.) Defendants argue that "Plaintiff has no viable claims against the non-signatories" without referencing the Retailer Agreement because Plaintiff's claims "attack the LLR business model, bonus plan and income claims as a pyramid scheme, all of which arise from the Retailer Agreement and she seeks the benefit of the agreement including its buy back policy . . . and "the [p]rayer for all claims seeks rescission of the Retailer Agreement." (Reply at 14.)

"[A] signatory can be compelled to arbitrate at the non-signatory'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 non-signatory's obligations and duties in the contract . . . and [the fact that] the claims were intimately founded in and intertwined with the underlying contract obligations." *Lucas v. Hertz Corp.*, 875 F. Supp. 2d 991, 1000–01 (N.D. Cal. 2012) (internal quotation marks omitted). The doctrine of equitable estoppel "prevents a signatory from hav[ing] it both ways . . . on the one hand, seek[ing] to hold the non-signatory liable pursuant to the duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny[ing] arbitration's applicability because the

defendant is a non-signatory." *Robinson v. Isaacs*, No. 11CV1021-JLS (RBBx), 2011 WL 4862420, at *2 (S.D. Cal. Oct. 12, 2011) (internal quotation marks omitted).

Plaintiff also claims that this case is similar to *In re Ford Motor Co. DPS6 Powershift Transmission Prod. Liab. Litig.*, a multi-district litigation concerning an allegedly defective transmission in certain model year of Ford Fiesta and Ford Focus vehicles. 470 F. Supp. 3d 1117, 1120 (C.D. Cal. 2020). There, Ford argued that California law and equitable estoppel allowed it to compel the plaintiffs to arbitrate even though it acknowledged that it was not a party to the lease. *Id.* Moreover, Ford argued that "equity bar[red] [p]laintiffs from avoiding the Arbitration Provision contained in the lease" because the plaintiffs' claims relied on or were intimately founded in and intertwined with the lease and the plaintiffs alleged "interdependent and concerted misconduct by Ford and Fiesta Ford." *Id.* at 1126. The Court held that none of the plaintiffs' claims there were "founded in" the lease because they were not breach of contract claims or tied to any promise in the lease, and equitable estoppel did not apply because "the actionable conduct alleged in the [c]omplaint [did] not arise out of any obligations of the [l]ease." *Id.* However, here, Plaintiff's claims are based upon the Retailer Agreement, and Plaintiff seeks to hold Defendants liable for the claims based upon certain obligations in the Retailer Agreement. Indeed, in *Lemberg*, this Court found that the exact same non-signatories here could invoke the identical arbitration provision under the doctrine of equitable estoppel because the plaintiffs' claims were based upon the retailer agreements between the parties. WL 6927844 at *7. The Court does not find any reason to depart from its *Lemberg* holding regarding non-signatories' ability to invoke the arbitration provision. Accordingly, the Court finds that the non-signatories to the various versions of the Retailer Agreement can invoke the arbitration provision under the doctrine of equitable estoppel.

D. Whether Individual Arbitration is Proper

Defendants argue that this Court may compel individual arbitration based on recent precedent from the United States Supreme Court. (Mot. at 18.) Defendants rely on *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019) to support their argument, but concede that "the Supreme Court stopped short of deciding that the court, and not an arbitrator, must decide whether the parties may be compelled to engage in class arbitration," and suggests that "the result and the reasoning of *Lamps Plus* invites this court to revisit its previous decision to defer this question to an arbitrator." (Mot. at 19.)

In *Lamps Plus*, the Supreme Court explained that it "held that courts may not infer consent to participate in class arbitration absent an affirmative 'contractual basis for concluding that the party agreed to do so,'" and "[s]ilence is not enough; the 'FAA requires more.'" 139 S. Ct. at 1416 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010)). In *Lemberg*, this Court determined that the same Policies and Procedures here "do not, however, include any language stating that arbitration can only proceed on an individual basis or that class-wide arbitration is prohibited." WL 6927844 at *8. Furthermore, in *Lemberg*, this Court concluded that "the incorporation of the AAA rules into the Policies and Procedures is evidence that the parties agreed to arbitrate arbitrability." WL 6927844 at *8. The Court reached this conclusion because the instant arbitration provision provides that "any controversy or claim arising out of or relating to the Agreement, or breach thereof, shall be settled by arbitration," the Policies and Procedures "do not [] include any language stating that arbitration can only proceed on an individual basis or that class-wide arbitration is prohibited," and "the Policies and Procedures incorporate by reference the AAA rules and JAMS rules." *Id.* Because "silence is not enough," the Court is not persuaded that it should depart from its decision in *Lemberg*. *See Lamps Plus*, 139 S. Ct. at 1416. Thus, the issue of whether Plaintiff's claims can proceed on a class-wide basis is a question this Court leaves for the arbitrator.

E. Plaintiff's Request to Dismiss the Case

In *Sperring v. LLR, Inc.*, the plaintiff appealed the district court's order compelling arbitration of a putative class action against the present defendants. 995 F.3d 680, 681 (9th Cir. 2021). Like the Plaintiff here, the plaintiff-appellants in *Sperring* were all consultants for LLR and alleged that LLR operated an illegal endless-chain pyramid scheme in violation of California and federal law. *Id.* There, this Court compelled arbitration and stayed proceedings pending arbitration. *Id.* at 681–82. The plaintiff in *Sperring* filed a motion to voluntarily dismiss the case with prejudice so that they could "immediately appeal" the court's order compelling arbitration. *Id.* at 682. However, the Ninth Circuit dismissed their appeal for lack of jurisdiction. *Id.* The Ninth Circuit held that "the voluntary dismissal of claims following an order compelling arbitration does not create appellate jurisdiction." *Id.* (quoting *Langere v. Verizon Wireless Services, LLC*, 983 F.3d 1115, 1124 (9th Cir. 2020)). Because the present case and *Sperring* are related cases, with similar claims and parties, the Court finds no reason to depart from the Ninth Circuit's ruling in *Sperring*. Therefore, the Court denies Plaintiff's request to dismiss the case.

VI. CONCLUSION

In conclusion, the arbitration provision in the Policies and Procedures is a valid and enforceable agreement to arbitrate Plaintiff's claims. The fact that the parties do not contest that the scope of the agreement covers the dispute at issue, that the non-signatories are able to enforce the arbitration provision under equitable estoppel, and the FAA's policy favoring the resolution of disputes through arbitration, the Court finds Plaintiff must arbitrate her claims. The issue of whether Plaintiff can arbitrate her claims on an individual or class-wide basis, however, remains a question for the arbitrator. Thus, Defendants' Motion to Compel Plaintiff to Individually Arbitrate and to Dismiss or Stay this Action is hereby **GRANTED in part and DENIED in part** insofar as Plaintiff is compelled to arbitrate, but the arbitrator will decide

whether plaintiff will arbitrate individually or on a class-wide basis.

Accordingly, **IT IS HEREBY ORDERED THAT:**

1. The parties shall submit to binding nonjudicial arbitration;
2. The arbitration shall be conducted through either the American Arbitration Association or JAMS;
3. This action shall be **STAYED** until the arbitration has been completed.

IT IS FURTHER ORDERED that this action is removed from the Court's active caseload until further application by the parties or Order of this Court. In order to permit the Court to monitor this action, the Court orders the parties to file periodic status reports. The first such report is to be filed on **December 3, 2021**, unless the stay is lifted sooner. Successive reports shall be filed every 120 days thereafter. Each report must indicate on the face page the date on which the next report is due. A final joint status report must be filed within ten (10) days after the arbitration concludes.

All pending calendar dates are **VACATED** by the Court. This Court retains jurisdiction over this action, and this Order shall not prejudice any party to this action.

Dated: August 05, 2021

HONORABLE ANDRÉ BIROTTE JR.
UNITED STATES DISTRICT COURT JUDGE