UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES -- GENERAL

Case No. **CV 24-704-JFW(PVCx)** Date: March 18, 2024

Title: David Callaway, et al. *-v-* Anheuser-Busch Companies, LLC, et al.

PRESENT:
HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly	**None Present**
Courtroom Deputy	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None	None

PROCEEDINGS (IN CHAMBERS): **ORDER DENYING AS MOOT DEFENDANTS' MOTION TO DISMISS [filed 2/12/24; Docket No. 14]; and**

ORDER GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION OF INDIVIDUAL CLAIMS AND DISMISS PUTATIVE CLASS ACTION PROCEEDINGS [filed 2/12/24; Docket No. 15]

On February 12, 2024, Defendants Anheuser-Busch Companies, LLC and Anheuser-Busch, LLC (collectively, "Defendants") filed a Motion to Dismiss. On February 20, 2024, Plaintiffs David Callaway, Nathan Ross, and Khanh Quock Le (collectively, "Plaintiffs") filed their Opposition. On February 26, 2024, Defendants filed a Reply. On February 12, 2024, Defendants filed a Motion to Compel Arbitration of Individual Claims and Dismiss Putative Class Action Proceedings ("Motion to Compel Arbitration"). On February 20, 2024, Plaintiffs filed their Opposition. On February 26, 2024, Defendants filed a Reply. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found these matters appropriate for submission on the papers without oral argument. The matters were, therefore, removed from the Court's March 11, 2024 hearing calendar and the parties were given advance notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. Factual and Procedural Background

A. Plaintiffs' Allegations

In their Complaint, Plaintiffs allege that the Terms of Use ("Terms") that Defendants impose on its customers and prospective customers for visiting or using one of Defendants' online platforms, including anheuser-busch.com and the "Anheuser-Busch Experience" mobile application

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(collectively, the "Platforms"), violate California law. *See* Complaint, ¶ 1. Specifically, Plaintiffs allege that Defendants' Terms violate California Civil Code § 1670.8 because the Terms limit the consumers' ability to speak about Defendants on social media platforms. *See, e.g.,* Complaint, ¶ 6 ("Pursuant to the Terms that Defendants impose upon their customers for the privilege of accessing the goods and/or services offered and promoted on the Platforms, Anheuser-Busch requires users to agree they will not 'make any claims regarding Anheuser-Busch or any of its products' on social media"). Plaintiffs also allege that "Defendants' conduct is unlawful, including among other reasons, because it is aimed to stifle California consumers' right to free speech, and the right of the California public to hear lawful discourse." Complaint, ¶ 7. Plaintiffs allege that:

> By way of the broad sweeping language in these provisions, Anheuser-Busch seeks to have users of the Platforms waive their right as consumers to make negative statements regarding Anheuser-Busch or its employees, agents, goods or services. These unlawful restrictions – imposed by Defendants against their own customers and prospective customers – is an important component of Anheuser-Busch's business strategy, which relies upon the popularity of its product offerings nationwide to generate significant revenues and profits. But Defendants' efforts to silence their customers and prospective customers is clearly prohibited by California law, thereby subjecting Defendants to significant penalties, as described herein.

Complaint, ¶ 8.

In addition, Plaintiffs admit that the Terms are imposed on all consumers who visit the Platforms. *See, e.g.,* Complaint, ¶ 5 ("In order to use and benefit from the Platforms, the Platforms' visitors or users, are informed that they must agree to Anheuser-Busch's Terms and Conditions ('Terms'). In fact, Anheuser-Busch asserts that simply by accessing or using the Platforms, users have read, understood, and agreed to be bound by the Terms – regardless of whether users are simply visiting the Platforms or are actual purchasers or registered members of the Platforms"). Plaintiffs also admit that each of them have "accessed, downloaded, used, or completed sales transactions through the Platforms." Plaintiffs concede that they are all "subject to the Terms." Complaint, ¶ 23.

B. Procedural History

On December 20, 2023, Plaintiffs filed a putative Class Action Complaint ("Complaint") in Los Angeles Superior Court against Defendants, alleging causes of action for: (1) violation of California Civil Code § 1670.8; and (2) violation of California Business & Professions Code § 17200.

On January 25, 2024, Defendants removed this action to this Court, alleging that this Court has jurisdiction based on the Class Action Fairness Act ("CAFA").

II. Legal Standard

In 1925, Congress enacted the Federal Arbitration Act ("FAA") in response to widespread judicial hostility to arbitration. *See American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2308-09 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011). Section 2

of the FAA provides in relevant part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . 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 also Herrera v. Cathay Pacific Airways Limited*, __ F.4th __, 2024 WL 1040277 (Mar. 11, 2024) ("The Federal Arbitration Act (FAA) governs the enforceability of arbitration agreements in contracts involving interstate commerce") (internal citations omitted).

This provision reflects both a "liberal federal policy favoring arbitration" and the "fundamental principle that arbitration is a matter of contract." *Concepcion*, 131 S. Ct. at 1745 (quotations and citations omitted). "In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *Id.* (internal citations omitted).

"A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" may petition the district court for an order compelling arbitration "in the manner provided for in such an agreement." 9 U.S.C. § 4. In addition, a party to a lawsuit pending in federal court may request that the court stay the court proceedings pending the outcome of the arbitration proceedings. 9 U.S.C. § 3; *Wagner v. Stratton Oakmont, Inc.*, 83 F.3d 1046, 1048 (9th Cir. 1996). The Court, "upon being satisfied that the making of the agreement for arbitration . . . is not in issue . . . 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." *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985)).

Generally, "the [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). However, certain issues are presumptively reserved for the Court. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). These issues include "gateway" questions of arbitrability, such as "whether the parties have a valid arbitration agreement or are bound by a given arbitration clause, and whether an arbitration clause in a concededly binding contract applies to a given controversy." *Momot v. Mastro*, 652 F.3d 982, 987 (9th Cir. 2011). Parties may delegate the adjudication of gateway issues to the arbitrator if they "clearly and unmistakably" have agreed to do so. *Howsam*, 537 U.S. at 83 (citation omitted). "When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019).

III. Discussion

In the Motion to Compel Arbitration, Defendants argue that Plaintiffs are subject to a valid

and enforceable arbitration agreement that requires Plaintiffs to pursue their claims on an individual basis in arbitration.[1] Defendants argue that Plaintiffs were aware of the arbitration agreement in the Terms and the parties delegated the issue of arbitrability to the arbitrator. In their Opposition, Plaintiffs argue that Defendants have failed to demonstrate that Plaintiffs assented to the arbitration agreement in the Terms. Specifically, Plaintiffs argue that Defendants failed to present any evidence to establish that Plaintiffs assented to the arbitration agreement, and Plaintiffs did not admit in their Complaint that they assented to or were bound by the arbitration agreement.

A. Defendants' Arbitration Agreement

The opening paragraph of Defendants' Terms state that a user's "use and access of the Platform is governed and subject to the following Terms and Conditions"[2] and that:

> **BY ENTERING ACCESSING, BROWSING, SUBMITTING INFORMATION TO, OR OTHERWISE USING THIS WEBSITE, YOU ACKNOWLEDGE AND AGREE TO THE FOLLOWING TERMS AND CONDITIONS, INCLUDING BINDING ARBITRATION AND WAIVER OF A RIGHT TO JURY TRIAL, AND YOU REPRESENT AND WARRANT THAT YOU ARE TWENTY-ONE (21) YEARS OLD OR OLDER. IF YOU DO NOT AGREE TO THESE TERMS OR YOU ARE YOUNGER THAN TWENTY-ONE (21) YEARS OLD, DO NOT USE THIS WEBSITE.**

In addition, since at least 2020, Defendants' Terms have contained an arbitration agreement ("Arbitration Agreement"), which states:

> BINDING ARBITRATION
>
> Any controversy or claim arising out of your use of the Platform, these Terms and Conditions, and/or our Privacy Policy shall be settled by binding arbitration before Judicial Arbitration and Mediation Services ("JAMS"), in a location determined by the arbitrator as set forth herein (provided that such location is reasonably convenient for claimant), or at such other location as may be mutually agreed upon by the parties, in accordance with the procedural rules for commercial disputes set forth in the Comprehensive Arbitration Rules and Procedures of JAMS ("JAMS Rules and Procedures") then prevailing, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The arbitrator shall be selected pursuant to the JAMS Rules and Procedures. Please go to

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[1] Defendants have filed both a Motion to Dismiss and a Motion to Compel Arbitration. Defendants acknowledge that "the Court need only reach [the Motion to Dismiss] if it denies Defendants' Motion to Compel" Arbitration. Proposed Statement of Decision on Defendants' Motion to Compel Arbitration of Individual Claims and Dismiss Putative Class Action Proceedings (Docket No. 33-1), 4:20-23. As a result, the Court will consider Defendants' Motion to Compel Arbitration before it considers Defendants' Motion to Dismiss.

[2] The parties do not dispute the content of the Terms, including the arbitration agreement, which are found on anheuser-busch.com.

www.jamsadr.com to see a complete copy of the JAMS Rules and Procedures or to submit a claim for arbitration.

In resolving a claim for arbitration, the arbitrator shall apply Missouri law consistent with the Federal Arbitration Act and applicable statutes of limitations, and shall honor claims of privilege recognized at law. In the event that you are able to demonstrate that the costs of arbitration will be prohibitive as compared to the costs of litigation, we will pay as much of your filing and hearing fees in connection with the arbitration as the arbitrator deems necessary to prevent the arbitration from being cost-prohibitive. If any part of this arbitration provision is deemed to be invalid, unenforceable or illegal (other than that claims will not be arbitrated on a class or representative basis), or otherwise conflicts with the rules and procedures established by JAMS, then the balance of this arbitration provision shall remain in effect and shall be construed in accordance with its terms as if the invalid, unenforceable, illegal or conflicting provision were not contained herein. If, however, the portion that is deemed invalid, unenforceable or illegal is that claims will not be arbitrated on a class, representative, or collective basis, or as a private attorney general on behalf of other persons similarly situated, then the entirety of this arbitration provision shall be null and void, and neither you nor we shall be entitled to arbitrate the dispute. Upon filing a demand for arbitration, all parties to such arbitration shall have the right of discovery, which discovery shall be completed within sixty days after the demand for arbitration is made, unless further extended by mutual agreement of the parties. Disputes regarding the arbitrability of any claim shall be resolved by the arbitrator.

THE ARBITRATION OF DISPUTES PURSUANT TO THIS PARAGRAPH SHALL BE IN YOUR INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS ACTION OR REPRESENTATIVE PROCEEDING. YOU MAY NOT BRING ANY CLAIM AS A PRIVATE ATTORNEY GENERAL ON BEHALF OF OTHER SIMILARLY SITUATED PERSONS. THE ARBITRATOR MAY NOT CONSOLIDATE OR JOIN THE CLAIMS OF OTHER PERSONS OR PARTIES WHO MAY BE SIMILARLY SITUATED. BY AGREEING TO THE ARBITRATION OF DISPUTES AS SET FORTH HEREIN, YOU AGREE THAT YOU ARE WAIVING YOUR RIGHT TO A JURY TRIAL AND LIMITING YOUR RIGHT TO APPEAL. DO NOT USE THIS SITE IF YOU DO NOT AGREE TO THE FOREGOING BINDING ARBITRATION PROVISIONS.

B. Plaintiffs' Claims Are Subject to Arbitration

Defendants, as the party seeking to compel arbitration, must prove the existence of a valid arbitration agreement by a preponderance of the evidence. *Norcia v. Samsung Telecomms. Am., LLC*, 845 F.3d 1279, 1283 (9th Cir. 2017). To determine whether such an agreement exists, "federal courts 'apply ordinary state-law principles that govern the formation of contracts.'" *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014) (*quoting First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)); *see also Patrick v. Running Warehouse, LLC*, 93 F4th 468 (9th Cir. 2024) ("These elemental principles of contract formation apply with equal force to contracts formed online. Thus, if a website offers contractual terms to those who use the site, and a user

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engages in conduct that manifests her acceptance of those terms, an enforceable agreement can be formed") (*quoting Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849 (9th Cir. 2022)). "In California, 'mutual assent [by word or conduct] is the key to contract formation.'"[3] *Lopez v. Terra's Kitchen, LLC*, 331 F. Supp. 3d 1092, 1097 (S.D. Cal. 2018) (*quoting Cordas v. Uber Tech.*, 228 F. Supp. 3d 985, 988 (N.D. Cal. 2017)).

The Ninth Circuit has identified two general categories of online agreements: (1) clickwrap agreements, where visitors to the website are required to check an "I agree" box after being presented with the website's terms and conditions of use; and (2) browsewrap agreements, where the website's terms and conditions of use are available as a hyperlink at the bottom of the website. *See Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175–76 (9th Cir. 2014). The Court agrees with the parties that Defendants' Terms, including the Arbitration Agreement, should be considered as a browsewrap agreement. *See* Motion, 8:4-17; Opposition, 11:9-12. Browsewrap agreements are agreements where "the user can continue to use the website or its services without visiting the page hosting the browsewrap agreement or even knowing that such a webpage exists." *Lopez*, 331 F. Supp. 3d at 1098 (internal quotations omitted); *see also Regan v. Pinger*, 2021 WL 706465, at *4 (N.D. Cal. Feb. 23, 2021); *Wilson v. Huuuge, Inc.*, 944 F.3d 1212, 1220 (9th Cir. 2019) ("Browsewrap agreements do not require the user to take any affirmative action to assent to the website terms . . . In some situations, a user may not even know a website has a user agreement").

Where, as in this case, the online agreement falls into the browsewrap agreement category, it can only be valid if the website owner can demonstrate that the website user had actual or constructive notice of the terms and conditions. *See Regan,* 2021 WL 706465, at *4. Absent actual notice, a website owner can demonstrate constructive notice by showing that: "(1) the website provides reasonably conspicuous notice of the terms to which the consumer will be bound; and (2) the consumer takes some action, such as clicking a button or checking a box, that unambiguously manifests his or her assent to those terms." *Berman v. Freedom Financial Network, LLC*, 30 F.4th 849, 856 (9th Cir. 2022) ("Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility"); *see also Patrick*, 93 F.4th 468 ("However, '[t]he conduct of a party is not effective as a manifestation of his assent unless he

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[3] The parties disagree as to whether Missouri or California law applies to the Motion to Compel Arbitration. Defendants argue that Missouri law applies because there is a Missouri choice of law provision in the Terms. Plaintiffs argue that they never agreed to be bound by the Terms and, as a result, California law applies. The Court concludes that the state law principles that apply to determine whether Plaintiffs' claims are subject to arbitration are the same under either California or Missouri law and, as a result, the Court need not decide that issue at this time. *See, e.g, Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 566 (9th Cir. 2014) (noting that, under California law, " '[a]n offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious' "); *see also Hennessey v. Kohl's Corporation*, 571 F.Supp. 3d 1060 (E.D. Mo. 2022) ("Courts presented with the issue of the legal effect of online agreements 'apply traditional principles of contract law and focus on whether the plaintiff had reasonable notice of and manifested assent to the online agreement'") (*quoting Major v. McCallister*, 302 S.W.3d 227, 229 (Mo. Ct. App. 2009).

intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents'") (*citing Berman*, 30 F.3d at 856).

In this case, the Court concludes that Plaintiffs had actual notice of the Terms. Indeed, Plaintiffs admit in their Complaint that they "accessed downloaded, used, or completed sales transactions through [Defendants'] Platforms" (Complaint, ¶¶ 11-13), and that "the Platforms' visitors, or users, ***are informed*** that they must agree to Anheuser-Busch's Terms and Conditions." Complaint, ¶ 5 (emphasis added). In addition, Plaintiffs admit that they "***were subject to the Terms***." Complaint, ¶ 23 (emphasis added). Although Plaintiffs argue that they never explicitly agreed to the Terms, Plaintiffs are bound to the Terms by using Defendants' Platforms with knowledge of those Terms. *Cairo, Inc. v. Crossmedia Services, Inc.*, 2005 WL 756610 (N.D. Cal. Apr. 1, 2005) ("Thus, even accepting Cairo's allegation that it did not explicitly agree to CMS's Terms of Use, the Court finds that Cairo's use of CMS's web site under circumstances in which Cairo had actual or imputed knowledge of CMS's terms effectively binds Cairo to CMS's Terms of Use and the forum selection clause therein"). The Court finds unpersuasive Plaintiffs' argument that they are not bound to the Arbitration Agreement found in the Terms on anheuser-busch.com because California consumers who purchased a product on anheuser-busch.com were redirected to a different website, ShopBeerGear.com, and the Terms and Conditions for ShopBeerGear.com do not contain an arbitration clause. Plaintiff's Complaint does not allege that any of the Plaintiffs accessed ShopBeerGear.com, only that they accessed the Platforms, which include anheuser-busch.com and the Anheuser-Busch Experience mobile application.[4] Indeed, Plaintiff's Complaint never mentions ShopBeerGear.com.

Accordingly, the Court concludes that Plaintiffs are bound to Defendants' Terms, which included the Arbitration Agreement. *See, e.g., Register.com v. Verio, Inc.*, 356 F.3d 393, 401–04 (2d Cir. 2004) (finding likelihood of success on the merits in a breach of browsewrap claim where the defendant "admitted that . . . it was fully aware of the terms" of the offer); *see also Nguyen,* 763 F.3d at 1176 ("[C]ourts have consistently enforced browsewrap agreements where the user had actual notice of the agreement").

C. Issues of Arbitrability Were Delegated to the Arbitrator

If an arbitration agreement delegates arbitrability issues to the arbitrator, that delegation obviates the need for a court to consider any arguments regarding the enforceability or scope of the arbitration agreement. *See Gerlach v. Tickmark Inc.*, 2021 WL 3191692, at *5 (N.D. Cal. July 28, 2021) (holding that "whether the arbitration agreement is valid and whether this dispute falls within its scope are questions for the arbitrator, not this Court, to decide"). If a court determines "a valid [arbitration] agreement exists [that] delegates the arbitrability issue to an arbitrator, a court

[4] Plaintiffs also failed to submit any declarations (or other evidence) discussing which of Defendants' websites and mobile applications they visited, the purpose of those visits, or that they stopped using Defendants' Platforms once they became aware of the Terms. Although Defendants have the burden of proof on the Motion to Compel Arbitration, once Defendants demonstrated that Plaintiffs admitted in the Complaint to being subject to the Terms, Plaintiffs were certainly free to submit declarations to attempt to explain or clarify those admissions.

may not decide the arbitrability issue" and must compel arbitrability to the arbitrator. *Henry Schein*, 139 S. Ct. at 530. An agreement "clearly and unmistakably" delegates arbitrability to the arbitrator when it incorporates arbitration rules that give the arbitrator authority to decide arbitrability, like the AAA or JAMS rules. *See Patrick*, 93 F.4th at 481 ("Incorporation of the JAMS arbitration rules by reference constitutes clear and unmistakable evidence that the parties agree to arbitrate arbitrability"); *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"); *see also Ramirez v. Elec. Arts*, 2021 WL 843184, *4 (N.D. Cal. Mar. 5, 2021) (enforcing delegation clause in AAA Commercial Rules); *Chaine v. Tesla Energy Ops., Inc.*, 2021 WL 4932733, at *4 (C.D. Cal. Apr. 8, 2021) (holding that incorporation of the JAMS Rules constitutes "clear and unmistakable evidence that the contracting parties agreed to arbitrate arbitrability, even if one or more of the parties are unsophisticated").

In this case, it is undisputed that the Arbitration Agreement specifically states that "[d]isputes regarding the arbitrability of any claim shall be resolved by the arbitrator." In addition, the Arbitration Agreement also specifically states that arbitration will be conducted by JAMS "in accordance with the procedural rules for commercial disputes set forth in the Comprehensive Arbitration Rules and Procedures of JAMS ('JAMS Rules and Procedures') then prevailing." Rule 11(b) of the JAMS Rules and Procedures states that:

> Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

Therefore, the Court concludes that pursuant to the Arbitration Agreement, the parties "clearly and unmistakably" agreed that the arbitrator would decide issues of arbitrability, including whether the Arbitration Agreement is enforceable and whether Plaintiffs' claims fall within its scope of the Arbitration Agreement and, as a result, the Court need not, and should not, determine those issues.

The Court also concludes that Plaintiffs' argument that the Arbitration Agreement is unconscionable must be heard by the arbitrator because Plaintiffs have made an unconscionability challenge to the entire Arbitration Agreement, and have not specifically challenged the delegation clause as unconscionable.[5] *See Rent–A–Center,* 561 U.S. at 75 (declining to consider respondent's claim that the entire agreement to arbitrate was unconscionable because it was not specific to the delegation clause); *Mohamed v. Uber Technologies, Inc.*, 848 F.3d 1201, 1210 (9th Cir. 2016) ("When considering an unconscionability challenge to a delegation provision, the court must consider only arguments 'specific to the delegation provision"). Similarly, the Court concludes that Plaintiffs' argument that the Arbitration Agreement is unenforceable because it requires Plaintiffs to waive their statutory right to seek public injunctive relief and, as a result, violates *McGill*

[5] To the extent Plaintiffs have made a specific argument regarding the unconscionability of the delegation clause, the Court concludes that Plaintiffs have failed to meet their burden of demonstrating unconscionability.

v. Citibank, N.A., 2 Cal. 5th 945 (2017), must be heard by the arbitrator. *See, e.g., Dekker v. Vivint Solar, Inc.*, 611 F.Supp. 3d 898 (N.D. Cal. 2020) (*vacated on other grounds,* 479 F. Supp. 3d 834 (N.D. Cal. 2020) ("Plaintiffs' argument that the arbitration agreements are invalid under *McGill* – however meritorious – is for the arbitrator"); *Revitch v. Uber Technologies, Inc.*, 2018 WL 6340755 (C.D. Cal. Sept. 5, 2018) ("Courts have also found, post-*McGill*, that where there is a delegation provision, as there is here, the public injunctive relief question is reserved to the arbitrator"); *see also McBurnie v. RAC Acceptance East, LLC*, __ F.4th __, 2024 WL 1101845 (9th Cir. Mar. 14, 2024) (""Plaintiffs may only invoke California's *McGill* rule if they have standing and seek public injunctive relief in federal court").

IV. Conclusion

For all the foregoing reasons, Defendants' Motion is **GRANTED**. This action is **STAYED** pending the outcome of the arbitration.[6] The Clerk is ordered to administratively close this action. Defendants' Motion to Dismiss is **DENIED as moot**.

IT IS SO ORDERED.

[6] Defendants argue that because Plaintiffs' claims are subject to arbitration, dismissal of this action is proper. However, because the Court did not reached the gateway questions of arbitrability and, instead, found that those questions are delegated to the arbitrator, the Court concludes that dismissal of this action "at this juncture would be inappropriate." *See, e.g., Gerlach v. Tickmark*, 2021 WL 3191692 (N.D. Cal. July 28, 2021) (concluding that dismissal of action was inappropriate where the issues of arbitrability had been delegated to the arbitrator); *Ramirez v. Electronic Arts Inc.*, 2021 WL 843184 (N.D. Cal. Mar. 5, 2021) ("Although the parties do not contest that Ramirez's claims are covered by the Arbitration Provision, the arbitrator must still determine as an initial matter whether the Arbitration Provision is enforceable against Ramirez's claims. Because it is not certain that Ramirez's claims will remain in arbitration, outright dismissal is not appropriate, and the Court stays this action pending the completion of arbitration").