

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CALIFORNIA CRANE SCHOOL, INC.,
Plaintiff,
v.
GOOGLE LLC, et al.,
Defendants.

Case No. [21-cv-10001-HSG](#)

**ORDER GRANTING MOTION TO
COMPEL ARBITRATION AND
DENYING MOTION TO STAY
PENDING ARBITRATION**

Re: Dkt. Nos. 32, 34

United States District Court
Northern District of California

This is an antitrust lawsuit that alleges that Google LLC and Apple Inc. have entered into an anticompetitive agreement not to compete in the internet search business. *See* Dkt. No. 39 (“FAC”) ¶ 2. Before the Court is Google LLC’s, Alphabet Inc.’s, XXVI Holdings Inc.’s, Sundar Pichai’s, and Eric Schmidt’s (collectively, “Google” or “Google Defendants”) motion for an order compelling arbitration and dismissing or staying Plaintiff California Crane School, Inc.’s (“Plaintiff”) claims against the Google Defendants. Dkt. No. 32. (“Mot.”). That motion is fully briefed. *See* Dkt. Nos. 43 (“Opp.”), 48 (“Reply”), 81 (“Sur-Reply”). Also pending is Apple Inc.’s and Tim Cook’s (collectively, “Apple” or “Apple Defendants”) motion to stay this action in its entirety pending resolution of any arbitration between Plaintiff and the Google Defendants. Dkt. No. 34. The Court held a hearing on both motions on August 11, 2022. For the reasons provided below, the Court **GRANTS** Google’s motion and **DENIES** Apple’s motion.

I. BACKGROUND

The operative Complaint alleges that Google and Apple violated Sections 1 and 2 of the Sherman Act by engaging in an unlawful conspiracy to restrain trade in and monopolize the internet search market. *See* FAC. Specifically, it alleges that Google and Apple entered into an

1 alleges that Plaintiff, a crane operator certification company, bought search advertisements on
 2 Google and in so doing paid prices that were inflated by the allegedly illegal agreement between
 3 Apple and Google. *Id.* ¶ 45. Plaintiff asserts the same claims against Google and Apple, and they
 4 arise out of the same underlying facts. *See id.* ¶¶ 135-42.

5 The following facts have not been contested. When advertisers sign up to use Google’s
 6 advertising platforms in the United States, they are shown Google’s Advertising Program Terms
 7 (“TOS”) and are asked to expressly agree to the TOS. *See* Dkt. No. 32-1, Declaration of Courtney
 8 Shadd ISO Google’s Motion to Compel Arbitration (“Shadd Decl.”) ¶ 3.¹ An advertiser will not
 9 be able to use Google’s services until after the TOS have been agreed to. *Id.* Plaintiff accepted
 10 the TOS in 2017 and 2018. *Id.* ¶¶ 13-16.

11 The TOS states in its very first paragraph that it “require[s] the use of binding individual
 12 arbitration to resolve disputes rather than jury trials or class actions.” *Id.*, Exs. A & D.
 13 Specifically, the TOS’s arbitration clause states that the parties “agree to arbitrate all disputes and
 14 claims . . . that arise out of or relate in any way to” Plaintiff’s participation in Google’s advertising
 15 programs and services. *Id.* § 13(A). The provision further states that the agreement to arbitrate “is
 16 intended to be broadly interpreted and includes, for example . . . claims brought under any legal
 17 theory.” *Id.* And the provision also expressly states that it applies to claims brought against
 18 “Google,” “Google parent companies, and the respective officers [and] directors” of those entities.
 19 *Id.* Google’s records do not reflect any attempts by Plaintiff to opt out of the arbitration provision
 20 pursuant to Section 13(F) of the TOS. Shadd Decl. ¶¶ 10, 12, 15-16; *see also id.*, Exs. A & D, §

21
 22
 23 ¹ The Google Defendants ask the Court take judicial notice of the TOS and related
 24 documents, including the opt-out website, and the website at which advertisers accepted or
 25 declined the TOS. Mot. at 2. Plaintiff has not opposed this request. The Court agrees to take
 26 judicial notice of the existence of these documents, as they are not the subject of reasonable
 27 dispute and their authenticity is not in question. *See* Fed. R. Evid. 201; *Trudeau v. Google LLC*,
 28 349 F. Supp. 3d 869, 876 (N.D. Cal. 2018) (taking judicial notice of the “TOS, the opt-out
 website, and the website at which advertisers accepted or declined the TOS,” because, *inter alia*,
 “they are not the subject of reasonable dispute and their authenticity is not in question” (citing
 FED. R. EVID. 201)), *aff’d*, 816 F. App’x 68 (9th Cir. 2020). That said, the Court only takes
 judicial notice of the existence of the documents and is not bound by any specific fact findings and
 legal conclusions set forth in them.

1 13(F) (explaining opt out process).

2 **II. LEGAL STANDARD**

3 The Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1 *et seq.*, sets forth a policy favoring
4 arbitration agreements and establishes that a written arbitration agreement is “valid, irrevocable,
5 and enforceable.” 9 U.S.C. § 2; *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (noting
6 federal policy favoring arbitration); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460
7 U.S. 1, 24 (1983) (same). The FAA allows that a party “aggrieved by the alleged failure, neglect,
8 or refusal of another to arbitrate under a written agreement for arbitration may petition any United
9 States district court . . . for an order directing that . . . arbitration proceed in the manner provided
10 for in such agreement.” 9 U.S.C. § 4. This federal policy is “simply to ensure the enforceability,
11 according to their terms, of private agreements to arbitrate.” *Volt Info. Sciences, Inc. v. Bd. of*
12 *Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 476 (1989). Courts must resolve any
13 “ambiguities as to the scope of the arbitration clause itself . . . in favor of arbitration.” *Id.*

14 When a party moves to compel arbitration, the court must determine (1) “whether a valid
15 arbitration agreement exists” and (2) “whether the agreement encompasses the dispute at issue.”
16 *Lifescan, Inc. v. Premier Diabetic Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir. 2004). The
17 agreement may also delegate gateway issues to an arbitrator, in which case the court’s role is
18 limited to determining whether there is clear and unmistakable evidence that the parties agreed to
19 arbitrate arbitrability. *See Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015). In either
20 instance, “before referring a dispute to an arbitrator, the court determines whether a valid
21 arbitration agreement exists.” *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524,
22 530 (2019) (citing 9 U.S.C. § 2).

23 **III. DISCUSSION**

24 **A. Google’s Motion to Compel Arbitration**

25 Google moves to compel arbitration of Plaintiff’s claims against it pursuant to an agreed-
26 upon arbitration clause in Google’s terms of service. On a motion to compel arbitration, this
27 Court’s role is simply to determine (1) whether a valid agreement to arbitrate exists and, if it does,

28 (2) whether the agreement encompasses the dispute at issue. *Kilgus v. K&P Bus. Net. Ass’n*, 718

1 F.3d 1052, 1058 (9th Cir. 2013). Plaintiff’s primary argument in response to Google’s motion to
2 compel arbitration is that the so-called “*McGill* rule” renders the parties’ arbitration agreement
3 unenforceable. The Court will first explain why the arbitration agreement is valid and covers the
4 dispute at issue, and it will then briefly explain why the *McGill* rule is irrelevant to this case.

5 First, the arbitration agreement is valid. Section 2 of the FAA contains a savings clause,
6 which provides that arbitration agreements are “enforceable, save upon such grounds as exist at
7 law or in equity for the revocation of any contract.” 9 U.S.C. § 2. This savings clause “preserves
8 generally applicable contract defenses.” *Kilgore*, 718 F.3d at 1058 (citations omitted). Under the
9 FAA savings clause, state law doctrines that “arose to govern issues concerning the validity,
10 revocability, and enforceability of contracts generally” remain applicable to arbitration
11 agreements. *Id.* (citations omitted). Thus, generally applicable contract defenses, such as fraud,
12 duress, or unconscionability, may be applied to invalidate arbitration agreements without
13 contravening § 2. *Id.* And under California law, a contractual clause is unenforceable if it is both
14 procedurally and substantively unconscionable. *See Nagrampa v. MailCoups, Inc.*, 469 F.3d
15 1257, 1280 (9th Cir. 2006).²

16 Google contends, and Plaintiff does not dispute, that the arbitration clause in the TOS is
17 neither procedurally nor substantively unconscionable. The Ninth Circuit has held that “the
18 threshold inquiry in California’s unconscionability analysis is whether the arbitration agreement is
19 adhesive.” *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1210 (9th Cir. 2016) (quoting
20 *Nagrampa*, 469 F.3d at 1281 (alterations and internal quotation marks omitted)). “[I]f there is an
21 opportunity to opt out,” the arbitration agreement is not adhesive, and thus not procedurally
22 unconscionable. *Id.*

23 Here, the TOS offers advertisers an opportunity to opt out of arbitration. Specifically,
24

25 ² There is no dispute that California law governs the interpretation of the TOS and its arbitration
26 clause. *See* Mot. at 3, n.1 (In the TOS, the parties agreed that “ALL CLAIMS ARISING OUT OF
27 OR RELATING TO THESE TERMS OR THE PROGRAMS WILL BE GOVERNED BY
28 CALIFORNIA LAW, . . . EXCEPT TO THE EXTENT THAT CALIFORNIA LAW IS
29 CONTRARY TO OR PREEMPTED BY FEDERAL LAW.”) (citing Shadd Decl., Exs. A & D, §
30 14); Dkt. No. 81 at 2 (“California law governs the interpretation of the contract and the arbitration

1 Section 13(F) of the TOS provides an advertiser with 30 days to opt out of the arbitration
 2 provision, which the advertiser can do by clicking on a hyperlink that leads to a landing webpage
 3 containing the “Opt Out Procedure.” *See* Shadd Decl. ¶¶ 10, 12, 15-16 (discussing the TOS’s opt-
 4 out process). Plaintiff has not argued that this procedure fails to afford a meaningful opportunity
 5 to opt out of arbitration. So in light of this voluntary opt out procedure, the Court finds that the
 6 arbitration provision in the TOS is not procedurally unconscionable and thus not unconscionable.
 7 *See Trudeau v. Google LLC*, 349 F. Supp. 3d 869, 877 (N.D. Cal. 2018) (“This Court finds that
 8 the 2017 TOS provided a meaningful opportunity to opt out of the arbitration provision.”), *aff’d*,
 9 816 F. App’x 68 (9th Cir. 2020); *Adtrader, Inc. v. Google LLC*, No. 17-CV-07082-BLF, 2018 WL
 10 1876950, at *5 (N.D. Cal. Apr. 19, 2018) (“[A]n advertiser’s decision to decline the September
 11 2017 AdWords Agreement to avoid being subject to the new arbitration provision is a voluntary
 12 choice given that he or she can easily opt out from that provision.”). There is thus no need to
 13 assess whether the arbitration agreement is substantively unconscionable. But in any event,
 14 Plaintiff does not contend that it is, and the Court finds no reason to conclude otherwise. At
 15 bottom, the arbitration agreement is valid and enforceable.

16 Second, the arbitration agreement encompasses Plaintiff’s claims. Plaintiff alleges that it
 17 overpaid Google for showing advertisements on Google’s search results pages due to an
 18 anticompetitive agreement not to compete in the internet search business between Apple and
 19 Google. *See* FAC ¶¶ 45, 48, 139. With exceptions that no one contends are applicable here, the
 20 TOS applies to “all disputes and claims” under “any legal theory” that “arise out of or relate in any
 21 way” to Google’s advertising programs. Shadd Decl., Exs. A & D, § 13(A). Moreover, the
 22 arbitration agreement applies to Plaintiff’s claims against each of the respective Google
 23 Defendants, since the TOS also applies to “Google,” “Google parent companies, and the
 24 respective officers [and] directors” of those entities. *See id.* Plaintiff has identified no reason why
 25 this broad agreement does not encompass the antitrust claims here, and the Court is aware of none.
 26 Thus, a valid agreement to arbitrate exists, and it encompasses the dispute at issue in this lawsuit.

27 All of that is uncontested. Plaintiff’s main argument in response to Google’s motion is that
 28 the “*M. C. Howell*” California doctrine that protects a plaintiff’s right to seek “public injunctive

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.