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

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

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

The following facts have not been contested. When advertisers sign up to use Google's advertising platforms in the United States, they are shown Google's Advertising Program Terms ("TOS") and are asked to expressly agree to the TOS. *See* Dkt. No. 32-1, Declaration of Courtney Shadd ISO Google's Motion to Compel Arbitration ("Shadd Decl.") ¶ 3.[1] An advertiser will not be able to use Google's services until after the TOS have been agreed to. *Id.* Plaintiff accepted the TOS in 2017 and 2018. *Id.* ¶¶ 13-16.

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

[1] The Google Defendants ask the Court take judicial notice of the TOS and related documents, including the opt-out website, and the website at which advertisers accepted or declined the TOS. Mot. at 2. Plaintiff has not opposed this request. The Court agrees to take judicial notice of the existence of these documents, as they are not the subject of reasonable dispute and their authenticity is not in question. *See* Fed. R. Evid. 201; *Trudeau v. Google LLC*, 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.

13(F) (explaining opt out process).

II. LEGAL STANDARD

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

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

III. DISCUSSION

A. Google's Motion to Compel Arbitration

Google moves to compel arbitration of Plaintiff's claims against it pursuant to an agreed-upon arbitration clause in Google's terms of service. On a motion to compel arbitration, this Court's role is simply to determine (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue. *Kilgore v. KeyBank, Nat. Ass'n*, 718

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

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

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

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

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

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

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

All of that is uncontested. Plaintiff's main argument in response to Google's motion is that the "*McGill* rule," a California doctrine that protects a plaintiff's right to seek "public injunctive

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