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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARY McQUEEN and VICTORIA BALLINGER, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

AMAZON.COM, INC., a Delaware Corporation,

Defendant.

CASE NO. 4:20-CV-02782-JSW

NOTICE OF MOTION AND MOTION OF DEFENDANT AMAZON.COM, INC. TO COMPEL ARBITRATION

Hearing:
Date: August 7, 2020
Time: 9:00 a.m.
Place: Courtroom 5
Judge: Hon. Jeffrey S. White

Complaint Filed: 04/21/2020

NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on August, 7, 2020, at 9:00 a.m., or as soon thereafter as this matter may be heard, in Courtroom 5 of the above Court, located at the Oakland Courthouse, 1301 Clay Street, 2nd Floor, Oakland, California, 94612, before the Honorable Jeffrey S. White, defendant Amazon.com, Inc. ("Amazon") will and hereby does move this Court for an Order compelling arbitration and either staying this action pending the results of the arbitration or dismissing the action.

This motion is made pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA") and the Amazon Conditions of Use ("COUs"), to which Plaintiffs agreed, and which contain a mandatory arbitration agreement. Through that agreement, which is valid and enforceable, Plaintiffs agreed to arbitrate their claims on an individual basis. Specifically, the COUs require the parties to submit to arbitration "[a]ny dispute or claim relating in any way to your use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com." This agreement fully encompasses Plaintiffs' claims relating to the price of the goods they purchased. Accordingly, those claims must be brought as individual claims in arbitration.

This motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the declaration of Jesse Jensen, and any other such papers, pleadings, or evidence as may be presented before or at the hearing on this Motion.

DATED: June 22, 2020

By: */s/ Kristin A. Linsley*
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SUMMARY OF ARGUMENT (per June 2019 Standing Orders at 2-3, ¶ 7)

Plaintiffs in this action should be compelled to arbitrate their claims against Amazon. Plaintiffs agreed to Amazon's Conditions of Use ("COUs") when they registered their user accounts in 2015 and 2017, respectively, and reaffirmed those terms with each of the hundreds of purchases they have made since then. Those COUs require the parties to submit to individual arbitration "[a]ny dispute or claim relating in any way to your use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com."

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, requires enforcement of the arbitration and class action waiver provisions in the COUs. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013); *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 934-36 (9th Cir. 2013). And courts across the country regularly compel arbitration of similar claims under Amazon's COUs. *See, e.g.*, *Ekin v. Amazon Servs., LLC*, 84 F. Supp. 3d 1172, 1178 (W.D. Wash. 2014); *Fagerstrom*, 141 F. Supp. 3d at 1073-74; *McKee v. Audible, Inc.*, No. CV 17-1941-GW(EX), 2017 WL 4685039, at *14 (C.D. Cal. July 17, 2017).

Plaintiffs' assertion in their Complaint that the arbitration and class-action-waiver clauses are unconscionable and/or contrary to public policy is meritless. *See* Compl. ¶¶ 40-42. Any argument that a "ban on class arbitration is unconscionable … is now expressly foreclosed by *Concepcion*." *Kilgore v. Keybank, N. A.*, 718 F.3d 1052, 1058 (9th Cir. 2013). Plaintiffs' theory that COVID-19 effectively forced them to purchase these products from Amazon.com, rendering the arbitration agreement unconscionable, fails because unconscionability is determined at the time of contracting, and both Plaintiffs agreed to arbitration years before the COVID-19 crisis. *Am. Nursery Prod., Inc. v. Indian Wells Orchards*, 797 P.2d 477, 488 (Wash. 1990); *King v. Hausfeld*, 2013 WL 1435288, at *13 (N.D. Cal. Apr. 9, 2013). In any event, Plaintiffs' assertion that they had to make these purchases using Amazon's stores does not withstand scrutiny, as the products in question were widely available from other retailers.

Accordingly, the Court should compel arbitration and then stay this action pending the outcome of the arbitration or dismiss it in its entirety.

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendant Amazon.com, Inc. ("Amazon") respectfully submits this Memorandum of Points and Authorities in support of its motion to compel arbitration of Plaintiffs' claims relating to the pricing of products they purchased from Amazon (for Plaintiff Mary McQueen) or from a third party on the Amazon marketplace (for Plaintiff Victoria Ballinger).

I. INTRODUCTION

Plaintiffs Mary McQueen and Victoria Ballinger have been Amazon.com customers for many years. Ms. Ballinger signed up for an Amazon account in 2017, and at that time affirmatively agreed to arbitrate all disputes arising from her Amazon purchases; Ms. McQueen did the same in 2015. Each now asserts that she was overcharged for a single recent product purchase. Ms. Ballinger purchased a facial cleanser sold by a third party using the Amazon.com online marketplace. Ms. McQueen purchased a hair-removal kit sold by Amazon. Each contends that the amounts she paid was more than ten percent higher than the prices for which the same products were sold prior to a declared a state of emergency in California related to the COVID-19 virus, in violation of the UCL and Penal Code 396, California's price-gouging statute.

Plaintiffs' underlying claims raise numerous issues: some are unique to Ms. Ballinger, some are unique to Ms. McQueen, and some apply to both. But all of those are for the arbitrator to decide. Only one needs to be resolved now: whether the binding arbitration clause to which Plaintiffs agreed requires that their claims be arbitrated. The answer is yes. The arbitration and class action waiver provisions to which Plaintiffs assented are valid and enforceable under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, and the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and Plaintiffs' claims fall squarely within that clause.

Anticipating the arbitration issue, Plaintiffs include in their Complaint various legal arguments regarding the arbitration and class-action-waiver clauses being unconscionable and/or contrary to public policy. *See* Compl. ¶ 42. These exact arguments have been rejected repeatedly by the Supreme Court, the Ninth Circuit, and district courts within and outside of the Ninth Circuit. Plaintiffs also assert that the COVID-19 crisis effectively forced them to purchase these products from Amazon.com and nowhere else, and that this alleged lack of options rendered the arbitration

agreement and class-action waiver unconscionable and in violation of public policy after the fact. *Id*. That theory is flawed, for two reasons.

First, there is nothing unconscionable about these clauses. Unconscionability is determined at the time of contracting, and both Plaintiffs agreed to arbitration years before the COVID-19 crisis.

Second, Plaintiffs' assertion that they needed to make these purchases using Amazon's stores does not withstand scrutiny. Plaintiffs do not allege that no other sources of hair-removal kits and facial cleanser were available. Nor could they given the numerous retailers from which they could have ordered these products online and which could have shipped these products to Plaintiffs' homes.

Amazon's consumer-friendly arbitration clause, designed for speedy and efficient resolution of claims arising from customers' purchases, is fully enforceable. The Court should order Plaintiffs to pursue their claims in arbitration and then stay this case pending the outcome of the arbitration or dismiss it entirely.

II. FACTUAL BACKGROUND

A. Ms. Ballinger's Purchase of a Facial Cleanser

Ms. Ballinger alleges that she "uses Amazon to purchase essential consumer goods for herself and family, and she has relied on Amazon during the COVID-19 crisis to obtain such items." Compl. ¶ 15. An account was registered in the name of Preston Ballinger (presumably a family member) on June 8, 2017, subject to the same Amazon COUs and arbitration provision. The user of that account has made a total of 243 purchases since registering the account. Declaration of Jesse Jensen ("Jensen Decl.") ¶ 2. On March 13, 2020, Ms. Ballinger purchased a "Mary Kay Time Wise 3-in-1 Facial Cleanser"—which she alleges was sold by a third party on Amazon.com—for $14.47. Ms. Ballinger alleges that this price was 51% higher than the price of $9.60 for which the product sold before the declared emergency. Compl. ¶ 16. Although Ms. Ballinger alleges that her purchase "could not be obtained (or obtained safely) from other retail outlets, including brick-and-mortar stores in her vicinity" and that she "saw no meaningful choice but to purchase it from Amazon," *id.* ¶ 17, the Complaint fails to mention that the same product is sold online by multiple other businesses, including Walmart, eBay.com, and Marykay.com. Jensen Decl. ¶ 4 & Ex. A.

Ms. Ballinger's actual purchase history highlights the contrived nature of this lawsuit. Amazon's records reflect that this product was purchased with this account on February 28, 2019 for $19.85, on January 12, 2020 for $15.98, and then, in connection with this lawsuit, on March 13, 2020 for $14.47. Jensen Decl. ¶ 5. Ms. Ballinger purchased this product for a lower price on March 13, 2020 than she did for her previous two purchases of the product, and for over $5.00 less than when she purchased the product one year earlier.

B. Ms. McQueen's Purchase of a Hair-Removal Kit

Ms. McQueen alleges that she "uses Amazon to purchase essential consumer goods for herself and family, and she has relied on Amazon during the COVID-19 crisis to obtain such items." Compl. ¶ 11. She registered her account, after accepting Amazon's COUs, including its arbitration provisions, on January 26, 2015, and has made a total of 325 purchases on Amazon.com since then. Jensen Decl. ¶ 6.

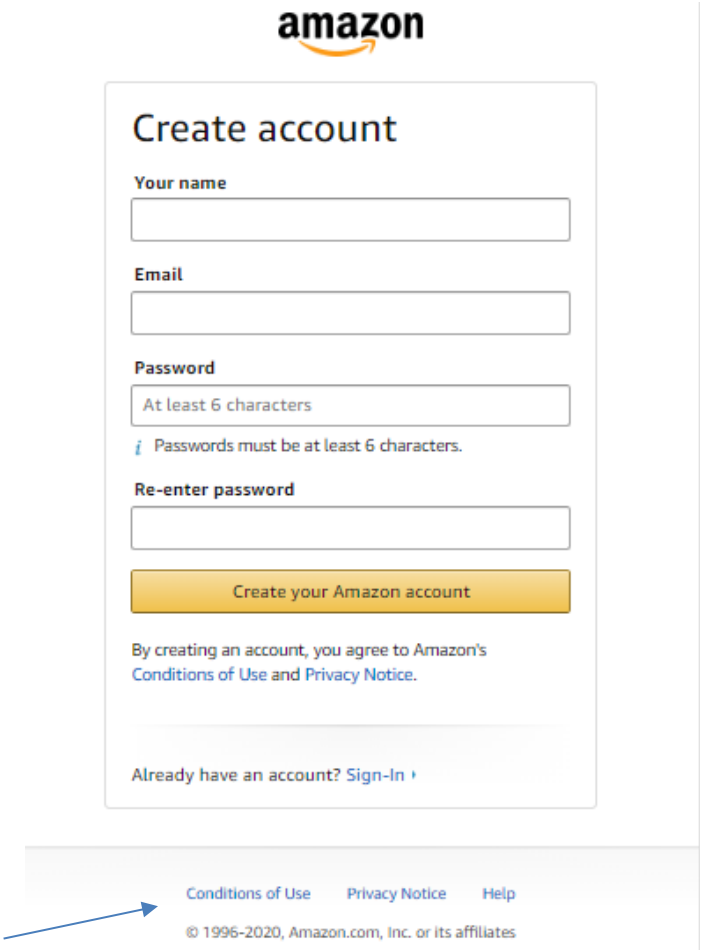
On March 23, 2020, Ms. McQueen purchased a Sally Hansen Hair Remover Wax Strip Kit for $6.74. Compl. ¶ 12. Ms. McQueen contends that the $6.74 she paid for the product—is 42% higher than the price for which the product was sold just prior to the declared state emergency in California. Compl. ¶¶ 12-14. She contends that the hair-removal kit she purchased "could not be obtained (or obtained safely) from other retail outlets, including brick-and-mortar stores in her vicinity" and that she "saw no meaningful choice but to purchase it from Amazon." *Id.* ¶ 13.

As with Ms. Ballinger, Ms. McQueen had many online options for purchasing this product during the pandemic. Among others, the same product is available through numerous other online businesses, such as Walmart.com, eBay.com, CVS.com, Ulta.com, RiteAid.com, as well as countless smaller businesses selling Sally Hansen beauty products throughout the country. Jensen Decl. ¶ 8 & Ex. B.

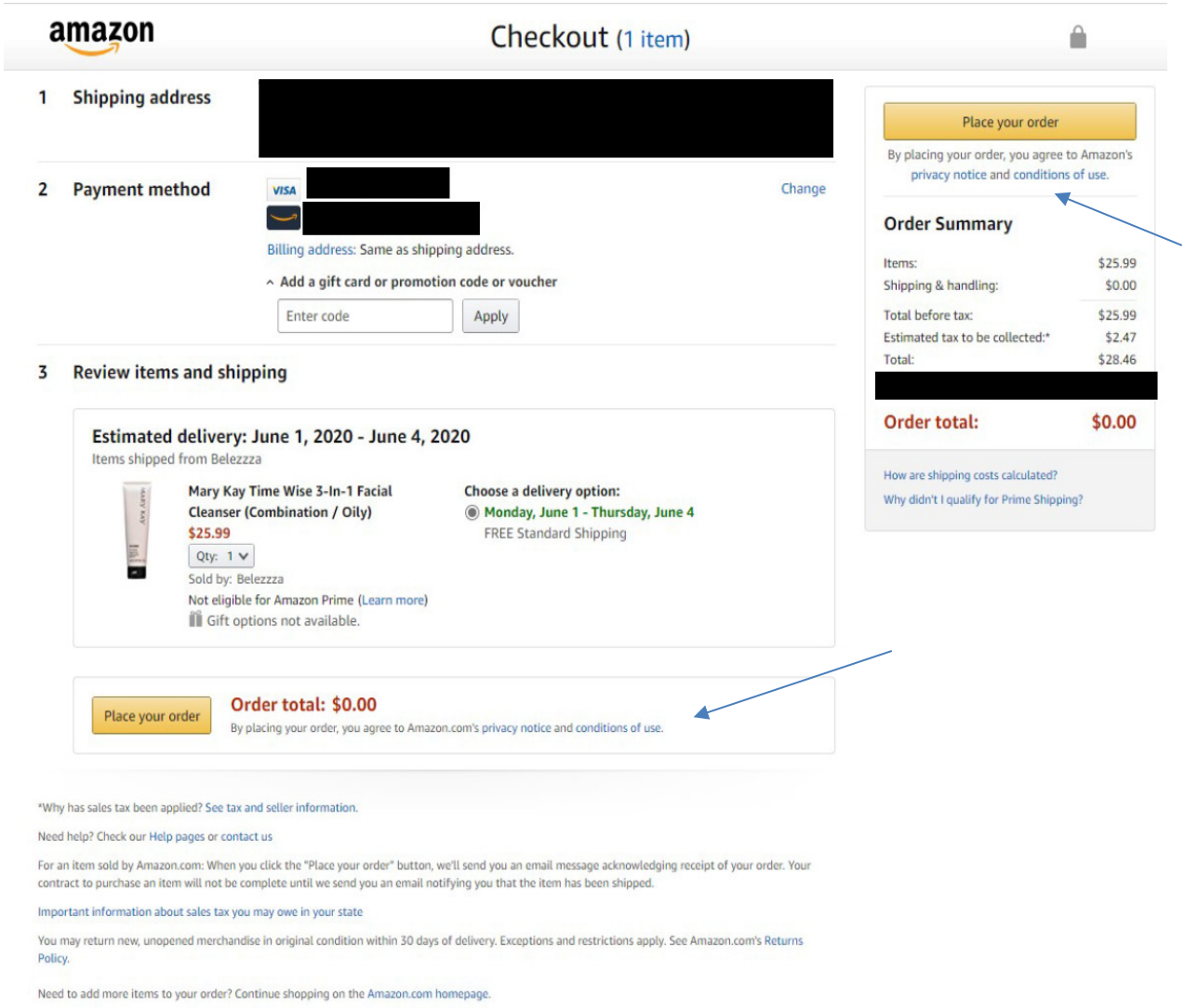
C. Plaintiffs' Acceptance of the Arbitration Agreement

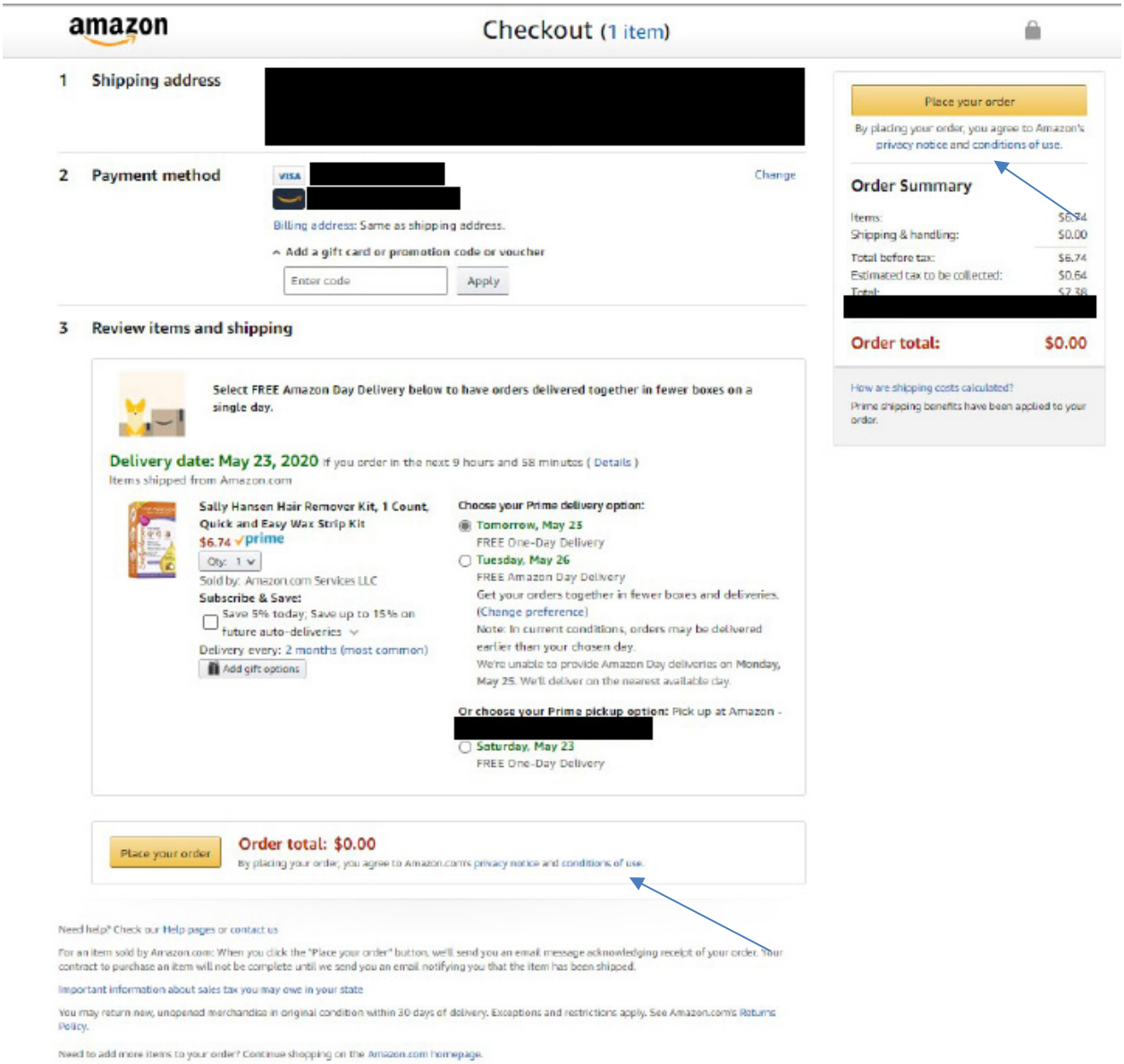
Both Plaintiffs were required to accept Amazon's Conditions of Use (COUs), not only when they registered for their accounts, but also at the time they made each and every one of their 568 purchases on Amazon.com. Jensen Decl. ¶¶ 2, 6 & Exs. A, B. During the account creation process, prospective Amazon users must input their name, email and password, and press a button that says "**Create your Amazon account**" (or, in 2015, a button that said "**Create account**"). *Id.* ¶ 9.

Directly below those words is the following notice: "By creating an account, you agree to Amazon's **Conditions of Use and Privacy Notice**." *Id.* The phrases "**Conditions of Use**" and "**Privacy Notice**" and are in blue and hyperlinked to the respective agreements. *Id.* This notice, with the hyperlinked "**Conditions of Use**," has consistently appeared on Amazon's account creation page from 2015 forward. *Id.*



In addition, before every purchase made on Amazon, the consumer is directed to the "**Checkout**" screen. Jensen Decl. ¶ 10. On the right side of the screen, there is a box that contains an "**Order Summary**" with a yellow button that reads "**Place your order**." *Id.* Directly beneath that yellow button it reads: "By placing your order, you agree to Amazon's privacy notice and conditions of use." *Id.* The terms "**privacy notice**" and "**conditions of use**" again appear in blue font because they are hyperlinks to Amazon's privacy notice and COUs:


amazon
Checkout (1 item)
1 Shipping address
[redacted]
2 Payment method
VISA [redacted]
Change
[redacted]
Billing address: Same as shipping address.
Add a gift card or promotion code or voucher
Enter code
Apply
3 Review items and shipping
Estimated delivery: June 1, 2020 - June 4, 2020
Items shipped from Belezzza
Mary Kay Time Wise 3-In-1 Facial Cleanser (Combination / Oily)
$25.99
Qty: 1
Sold by: Belezzza
Not eligible for Amazon Prime (Learn more)
Gift options not available.
Choose a delivery option:
Monday, June 1 - Thursday, June 4
FREE Standard Shipping
Place your order
Order total: $0.00
By placing your order, you agree to Amazon.com's privacy notice and conditions of use.
*Why has sales tax been applied? See tax and seller information.
Need help? Check our Help pages or contact us
For an item sold by Amazon.com: When you click the "Place your order" button, we'll send you an email message acknowledging receipt of your order. Your contract to purchase an item will not be complete until we send you an email notifying you that the item has been shipped.
Important information about sales tax you may owe in your state
You may return new, unopened merchandise in original condition within 30 days of delivery. Exceptions and restrictions apply. See Amazon.com's Returns Policy.
Need to add more items to your order? Continue shopping on the Amazon.com homepage.
Place your order
By placing your order, you agree to Amazon's privacy notice and conditions of use.
Order Summary
Items: $25.99
Shipping & handling: $0.00
Total before tax: $25.99
Estimated tax to be collected:* $2.47
Total: $28.46
[redacted]
Order total: $0.00
How are shipping costs calculated?
Why didn't I qualify for Prime Shipping?



Id.

No sale can occur without clicking the "Place your order" button. Here, both Plaintiffs completed their purchases by clicking the "Place your order" button, thereby reaffirming their agreement to Amazon's COUs. Neither could have completed their purchases without doing so. Jensen Decl. ¶¶ 2, 6, 10, Ex. D.

By accepting the COUs, Plaintiffs agreed to resolve "any dispute" with Amazon through arbitration or small claims court, and to do so on an individual as opposed to class basis:

DISPUTES

Any dispute or claim relating in any way to your use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com will be resolved by binding arbitration, rather than in court, except that you may assert claims in small claims court if your claims qualify. The Federal Arbitration Act and federal arbitration law apply to this agreement.

There is no judge or jury in arbitration, and court review of an arbitration award is limited. However, an arbitrator can award on an individual basis the same damages and relief as a court (including injunctive and declaratory relief or statutory damages), and must follow the terms of these Conditions of Use as a court would.

To begin an arbitration proceeding, you must send a letter requesting arbitration and describing your claim to our registered agent Corporation Service Company, 300 Deschutes Way SW, Suite 304, Tumwater, WA 98501. The arbitration will be conducted by the American Arbitration Association (AAA) under its rules, including the AAA's Supplementary Procedures for Consumer-Related Disputes. The AAA's rules are available at www.adr.org or by calling 1-800-778-7879. Payment of all filing, administration and arbitrator fees will be governed by the AAA's rules. We will reimburse those fees for claims totaling less than $10,000 unless the arbitrator determines the claims are frivolous. Likewise, Amazon will not seek attorneys' fees and costs in arbitration unless the arbitrator determines the claims are frivolous. You may choose to have the arbitration conducted by telephone, based on written submissions, or in person in the county where you live or at another mutually agreed location.

We each agree that any dispute resolution proceedings will be conducted only on an individual basis and not in a class, consolidated or representative action. If for any reason a claim proceeds in court rather than in arbitration **we each waive any right to a jury trial**. We also both agree that you or we may bring suit in court to enjoin infringement or other misuse of intellectual property rights.

Jensen Decl. ¶ 11 & Ex. E at 4. The parties further agreed that their disputes would be governed by "the laws of the state of Washington, without regard to principles of conflict of laws." *Id.*

III. ARBITRATION AND CLASS-ACTION-WAIVER STANDARDS

A. The Court Has a Limited Role on a Motion to Compel Arbitration

A court's role in resolving a motion to compel arbitration is "limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000).

When both elements exist, as they do here, 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." *McNamara v. Royal Bank of Scotland Grp., PLC*, No. 11–CV–2137–L(WVG), 2012 WL 5392181, at *3 (S.D. Cal. Nov. 5, 2012) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985)) (emphasis in *Dean Witter*); *see also Kilgore v. Keybank, N. A.*, 718 F.3d 1052, 1058 (9th Cir. 2013) (en banc).

B. There Is an "Emphatic Federal Policy" in Favor of Arbitration

The FAA establishes that agreements to arbitrate are "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. The FAA reflects an "emphatic federal policy in favor of arbitral dispute resolution." *KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011) (per curiam) (citations omitted). "[T]he FAA's purpose is to give preference (instead of mere equality) to arbitration provisions." *Mortensen v. Bresnan Commc'ns LLC*, 722 F.3d 1151, 1160 (9th Cir. 2013); *see also id.* ("[W]e follow the Supreme Court's premise in *Concepcion* that the FAA's purpose is to 'ensur[e] that private arbitrations are enforced.'") (*quoting Concepcion*, 563 U.S. at 34).

State laws purporting to invalidate arbitration provisions in the name of preserving consumer's ability to litigate in court are preempted by the FAA. *See Ferguson v. Corinthian Colls., Inc*., 733 F.3d 928, 934-36 (9th Cir. 2013) (FAA preempted California rule that invalidated agreements to arbitrate representative claims for public injunctive relief); *Coneff v. AT&T Corp*., 673 F.3d 1155, 1158-61 (9th Cir. 2012) (same for Washington statute invalidating class action waivers—holding arbitration provision valid and enforceable).

C. Class Action Waivers Are Valid

The Supreme Court's decision in *Concepcion* established that class action waivers—and arbitration agreements containing such waivers—are valid and enforceable. 563 U.S. at 351-52; *see also American Express Co. v. Italian Colors Rest*., 570 U.S. 228, 233-34 (2013) (upholding class action waiver in context of "low-value" claims).

This "national policy favoring arbitration" supersedes "state [law] attempts to undercut the enforceability of arbitration agreements." *Preston v. Ferrer*, 552 U.S. 346, 353 (2008) (citation omitted). Under *Concepcion*, a plaintiff may not avoid an arbitration agreement simply because it contains a class action waiver. 563 U.S. at 351-52. Absent a "contrary congressional command" to

override the FAA, there is no "entitlement to class proceedings for the vindication of statutory rights." *American Express*, 570 U.S. at 233-34.

IV. AMAZON'S ARBITRATION AND CLASS-ACTION-WAIVER PROVISIONS SHOULD BE ENFORCED

A. This Dispute Is Governed by Washington Law

In determining whether parties agreed to arbitrate, "courts … apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). The COUs, which contain the arbitration agreement, are expressly governed by a Washington choice-of-law provision. Jensen Decl. Ex. E at 4.[1]

B. Amazon's Arbitration Agreement Encompasses This Dispute

Because the FAA reflects a "liberal federal policy favoring arbitration agreements," the Supreme Court has held that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("*Moses H. Cone*"). Thus, "[e]nforcement of an arbitration agreement 'should not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *McNamara*, 2012 WL 5392181, at *3 (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986)). "'[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration,'" including

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[1] California courts follow the Restatement (Second) of Conflict of Laws, which strongly favors enforcement of parties' choice of law provisions, and requires courts to honor that choice as long as the chosen state bears a substantial relationship to the parties or their transaction and enforcement of the provision does not violate a fundamental policy of California. *Nedlloyd Lines B.V. v. Super. Ct.*, 3 Cal. 4th 459, 470 (1992); *Wash. Mut. Bank, FA v. Super. Ct.*, 24 Cal. 4th 906, 914-15 (2001). The Washington choice-of-law provision here is enforceable because: (1) Washington has a substantial relationship to the parties and the transaction, as it is Amazon's principal place of business and the state with which Plaintiffs did business in entering into a relationship with Amazon; and (2) Washington law does not conflict with any fundamental California public policy. *See Brinkley v. Monterey Fin. Services, Inc.*, 242 Cal. App. 4th 314, 328-29 (2015) (enforcing Washington choice-of-law contract provision); *Fagerstrom v. Amazon.com, Inc.*, 141 F. Supp. 3d 1051, 1063-64 (S.D. Cal. 2015) (noting that "[i]f the two state's laws are not equally protective of consumers, and equally hostile to unconscionable terms in consumer contracts, they are certainly close," and "a plausible case can be made that Washington's unconscionability doctrine is *more* protective of consumers than California's" and therefore "appl[ying] the laws of Washington state for purposes of interpreting the Arbitration Agreement"); *McKee v. Audible, Inc.*, No. CV 17-1941-GW(EX), 2017 WL 4685039, at *5 (C.D. Cal. July 17, 2017) ("honor[ing] the parties' choice of law provision" in Amazon's COUs and applying Washington law in analysis of motion to compel arbitration).

"'construction of the contract language itself.'" *Id*. (quoting *Moses H. Cone*, 460 U.S. at 24-25).

Here, the arbitration agreement Plaintiffs accepted encompasses "[a]ny dispute or claim relating in any way … to any products or services sold or distributed by Amazon or through Amazon.com… ." Jensen Decl. Ex. E at 4. This is a lawsuit about the price of goods purchased on Amazon. The hyperlink to the COUs is in the same checkout box as the price, immediately below the "Place your order" button. These are not product-related claims that could not have been anticipated at the time Plaintiffs first accepted the arbitration agreements in 2015 and 2017, respectively, even if that were a defense to the enforceability of the clause (which it is not). The main issue Plaintiffs raise in this case is the ***price*** for which those products were sold and whether that price was excessive under the law. Any reasonable consumer would understand that the COUs, which are presented again with each purchase, just above the price, in the same checkout box as the price, would apply to disputes concerning that price.

C. Amazon's Arbitration Agreement Is Valid and Enforceable

Amazon's COUs, including the arbitration provision with class action waiver applicable here, are enforceable like any other contract. Courts throughout the country regularly compel arbitration of similar claims under Amazon's COUs. *See, e.g.*, *Ekin v. Amazon Servs., LLC*, 84 F. Supp. 3d 1172, 1178 (W.D. Wash. 2014) (enforcing the Amazon COU's arbitration provision and compelling arbitration); *Fagerstrom*, 141 F. Supp. 3d at 1073-74 (same); *McKee v. Audible, Inc.*, No. CV 17-1941-GW(EX), 2017 WL 4685039, at *14 (C.D. Cal. July 17, 2017) (same); *Peters v. Amazon Servs., LLC*, 2 F. Supp. 3d 1165, 1173 (W.D. Wash. 2013), *aff'd*, 669 F. App'x 487 (9th Cir. 2016)) (same as to analogous arbitration provision in Amazon's Business Services Agreement); *Tice v. Amazon.com, Inc.*, No. 5:19-CV-1311-SVW-KK, 2020 WL 1625782, at *2 (C.D. Cal. March 25, 2020) ("Here, Amazon has provided the Alexa TOU and Amazon general COU, both of which appear to contain facially valid arbitration clauses.") (currently on appeal); *Payne v. Amazon.com, Inc*, No. 2:17-CV-2313-PMD, 2018 WL4489275, at *8 (D.S.C. July 25, 2018) (enforcing the arbitration provision in the COUs and compelling arbitration); *Segal v. Amazon.com*, 763 F. Supp. 2d 1367, 1369 (S.D. Fla. 2011), *aff'd*, No. 11-10998-D, 2011 WL 1582517 (11th Cir. April 21, 2011) (enforcing forum selection provision in Amazon's online terms and conditions for marketplace sellers); *Ranazzi v.*

Amazon.com, Inc., 46 N.E.3d 213, 217-18 (Ohio Ct. App. 2015) ("we find that appellant … by registering for an Amazon account and placing orders, accepted the terms of [Amazon's] agreements, including the arbitration provisions.").[2]

Courts analyzing other companies' terms and conditions, presented in substantively identical ways to the Amazon COUs, also find such terms enforceable because customers were put on reasonable notice of them. *See, e.g., Starke v. Gilt Groupe, Inc.*, No. 13 CIV. 5497 LLS, 2014 WL 1652225, at *3 (S.D.N.Y. Apr. 24, 2014) (enforcing arbitration clause, noting that plaintiff "was directed exactly where to click in order to review those terms, and his decision to click the 'Shop Now' button represents his assent to them"); *Selden v. Airbnb, Inc.*, No. 16-CV-00933 (CRC), 2016 WL 6476934, at *5 (D.D.C. Nov. 1, 2016) (collecting cases and holding that user was bound by arbitration clause, where Airbnb presented a hyperlinked disclosure stating that "[b]y signing up, I agree to Airbnb's Terms of Service" in close proximity to the sign-up buttons); *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 77, 79-80 (2d Cir. 2017) (vacating lower court's denial of motion to compel arbitration, and holding that the Uber mobile app provided reasonably conspicuous notice of, and that customer unambiguously manifested assent to, Uber's terms of service, when the registration process allowed him to view, via hyperlink, the terms of service and warned that by creating an account, the user was agreeing to be bound by the linked terms).

Here, the evidence establishes that Plaintiffs accepted the arbitration agreement when they agreed to the COUs, and that they did so repeatedly. Before account creation, Plaintiffs were advised that by creating their Amazon account, they were also agreeing to the COUs, which were hyperlinked in blue. Then, Plaintiffs were again required to re-affirm their assent, in a similar way—complete with a disclaimer that clicking the purchase button was also assent to the hyperlinked COUs directly below—before each of the 568 times they purchased products thereafter. Accordingly, when

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[2] That the underlying law here is a criminal statute does not excuse Plaintiffs from arbitration. For example, in *Tice*, Judge Wilson of the Central District of California recently found that Amazon's COUs required arbitration of claims that Amazon's Alexa device violated Penal Code section 631 by allegedly recording the plaintiff's conversations while she or her family members were intentionally using the device. 2020 WL 1625782, at *3. The court declined to compel arbitration with respect to a third allegation that the device recorded the plaintiff while no one was intentionally using it, reasoning that "surreptitious recording" fell outside the scope of Amazon's COUs. *See id.* at *4. Here, there can be no dispute that Plaintiffs' purchases were intentional.

Plaintiffs used the Amazon marketplace and purchased products on Amazon.com, they agreed that any claims they had about their purchases (or any other disputes with Amazon) would be resolved by individual arbitration and not in a class action. Plaintiff cannot now avoid that agreement, which is valid and enforceable under Washington law.

D. None of the Limited Defenses to Enforcement of an Arbitration Agreement Is Applicable Here

"The [FAA] makes an agreement to arbitrate 'valid, irrevocable, and enforceable, … save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Kilgore*, 718 F.3d at 1057-58 (quoting 9 U.S.C. § 2). This "savings clause" of the FAA "preserves generally applicable contract defenses, such as fraud, duress, or unconscionability." *Mortensen*, 722 F.3d at 1158. Plaintiffs include in their Complaint various allegations that suggest a plan to assert a duress or unconscionability argument. But such an argument fails, for multiple reasons:

First, it is well settled that arbitration agreements, including class-action waivers, are fully enforceable. Any argument that a "ban on class arbitration is unconscionable … is now expressly foreclosed by *Concepcion*." *Kilgore*, 718 F.3d at 1058; *accord Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1225-26 (9th Cir. 2013) (after *Concepcion*, the FAA "preempt[s] states from invalidating arbitration agreements that disallow class procedures"); *Coneff*, 673 F.3d at 1159-60 (*Concepcion* "forecloses" argument that class action waivers are unconscionable under Washington law); *Velazquez v. Sears, Roebuck & Co.*, No. 13cv680–WQH–DHB, 2013 WL 4525581, at *6 (S.D. Cal. Aug. 26, 2013) (same); *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (WVG), 2013 WL 4082682, at *6 (S.D. Cal. July 19, 2013) (FAA preempts California's Consumer Legal Remedies Act's prohibition on class waivers); *Coppock v. Citigroup, Inc.*, No. C11–1984–JCC, 2013 WL 1192632, at *8 n.2 (W.D. Wash. Mar. 22, 2013) ("Under *Concepcion*, the Court cannot consider Washington's policy on unconscionability of class-action waivers—'fundamental' or not, … since the FAA preempts that policy and precludes a court from taking it into account in conducting the unconscionability analysis.").

Second, Plaintiffs' suggestion that the arbitration provision is rendered retroactively unconscionable by the recent COVID-19 pandemic (*see* Compl. ¶¶ 40-42)—in other words, a sort of

"springing unconscionability" theory—is contrary to decades of case law holding that unconscionability is gauged at the time of contracting, not at some later time. Plaintiffs agreed to arbitration in 2015 and 2017, years before any alleged "duress" associated with COVID-19 arose. "[I]f a contract or clause is unconscionable, it must be so at the time the contract was made." *Am. Nursery Prod., Inc. v. Indian Wells Orchards*, 797 P.2d 477, 488 (Wash. 1990); *see Jeffery v. Weintraub*, 648 P.2d 914, 919 (Wash. Ct. App. 1982) ("The relevant inquiry when unconscionability is claimed is into the circumstances at the time the contract is made."); *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 315 (Wash. 2000) (same).[3] Unconscionability thus "cannot be resolved by hindsight," *Brobeck, Phleger & Harrison v. Telex Corp.*, 602 F.2d 866, 875 (9th Cir. 1979), or "in light of subsequent events." *Mahroom v. Best W. Int'l, Inc.*, No. C 07-2351JFHRL, 2009 WL 2216578, at *9 (N.D. Cal. July 22, 2009) (applying California law).

Multiple courts have rejected attempts to void arbitration agreements based on post-agreement circumstances. *See, e.g., King v. Hausfeld*, 2013 WL 1435288, at *18 (N.D. Cal. Apr. 9, 2013) (enforcing arbitration provision and rejecting unconscionability argument based on plaintiff's current financial circumstances because "[u]nconscionability is assessed based on circumstances at the time the contract was entered"); *Wolf v. Langemeier*, No. 2:09-CV-03086-GEBEFB, 2010 WL 3341823, at *7 (E.D. Cal. Aug. 24, 2010) (declining to consider plaintiffs' *present* inability to pay arbitration fees because they were irrelevant to unconscionability). Plaintiffs' theory fails for the same reason. Economic duress that allegedly arose during the COVID-19 crisis in 2020 cannot void enforcement of Plaintiffs' 2015 and 2017 agreements to arbitrate claims arising from all of their Amazon purchases.

Plaintiffs' suggestion that they had "no meaningful choice" but to purchase their goods from or through Amazon also is implausible on its face, given the vast array of shipment options for these products that were available from retailers such as Walmart.com, Target.com, eBay.com, CVS.com, Ulta.com, and RiteAid.com, among others. Compl. ¶¶ 40-42. But in any event, determining the particular options available to Ms. Ballinger and Ms. McQueen at the time of their purchases requires highly individualized inquiries that should be appropriately resolved through arbitration.

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[3] The same is true under California law. *See Prima Donna Dev. Corp. v. Wells Fargo Bank, N.A.*, 42 Cal. App. 5th 22, 37 (2019).

Finally, there is nothing unfair about Amazon's arbitration agreement, which provides an inexpensive, efficient, and fair alternative mechanism to resolve disputes such as this one, which centers on the *price* Amazon or third-party sellers charged for products sold on Amazon's website. As one District Court put it:

> [I]n addition to the absence of any elements making the agreement per se unconscionable, the arbitration agreement's terms hardly strike this Court as unfair. For instance, the arbitration agreement obliges Amazon to pay all arbitrator fees and costs for claims under $10,000, to unilaterally waive its claims for attorneys' fees, to submit to arbitration in any location chosen by the consumer, and also allows consumers to arbitrate by telephone or written submission . . . . Arbitration is conducted not according to some rules created by Amazon, but rather by the American Arbitration Association's published and accessible rules. The external, neutral American Arbitration Association's arbitrators preside over the arbitration.

Ekin, 84 F. Supp. 3d at 1176-77.

E. This Court Should Compel Arbitration and Stay or Dismiss This Action

None of Plaintiffs' claims belongs in court. All arise from the price Plaintiffs paid for purchases on Amazon.com and fall squarely within Amazon's COUs and the arbitration provision contained therein. Courts in the Ninth Circuit regularly dismiss or stay cases while compelling arbitration of all claims. *See, e.g.*, *Boyer v. AT & T Mobility Servs., LLC*, No. 10CV1258 JAH WMC, 2011 WL 3047666, at *3 (S.D. Cal. July 25, 2011) (dismissing case after compelling arbitration); *Fagerstrom*, 141 F. Supp. 3d at 1074 (dismissing in favor of arbitration and noting "it is well-settled that the court 'may compel arbitration and dismiss the action' where an arbitration agreement is 'broad enough to cover all of a plaintiff's claims'" (internal citation omitted)); *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1074 (9th Cir. 2014) ("[A] district court may either stay the action or dismiss it outright when … the court determines that all of the claims raised in the action are subject to arbitration."). Because there is a valid arbitration agreement between the parties that encompasses all of Plaintiffs' claims, the Court should compel arbitration and either stay this action pending the outcome of the arbitration or dismiss it outright.

V. CONCLUSION

For all of the foregoing reasons, Amazon respectfully requests that the Court compel arbitration and either stay this action pending the outcome of the arbitration or dismiss the action.

DATED: June 22, 2020

By: */s/ Kristin A. Linsley*
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ECF ATTESTATION

I, Rachel S. Brass, hereby attest that pursuant to Civ. L.R. 5-1(i)(3), concurrence in the filing of this document has been obtained from Kristin A. Linsley.

DATED: June 22, 2020

/s/ Rachel S. Brass
Rachel S. Brass