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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: JUUL LABS, INC. PRODUCT LITIGATION

CASE NO. 18-cv-02499-WHO

DEFENDANT JUUL LABS, INC.'S NOTICE OF MOTION AND MOTION COMPEL ARBITRATION

Declaration of Jake Honig, Declaration of Joshua D. Dick, and [Proposed] Order filed concurrently herewith

Hon. William H. Orrick

Hearing Date: May 22, 2019
Hearing Time: 2:00 p.m.
Hearing Place: Courtroom 2, 17th Floor

Action Filed: April 26, 2018

Trial Date: None Set

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, on May 22, 2019, at 2:00 p.m. in Courtroom 2 of the United States District Court for the Northern District of California in the San Francisco Courthouse, Seventeenth Floor, 450 Golden Gate Avenue, San Francisco, California, Defendant JUUL Labs, Inc. ("JLI" or "Defendant") will and hereby does move the Court for an order compelling arbitration on an individual basis of the claims brought by Plaintiffs David Masessa, Ron Minas, Jack Roberts, Hasnat Ahmad, and Michael Viscomi ("Arbitration Plaintiffs"). This Motion is brought on the grounds that each Arbitration Plaintiff is subject to a valid and enforceable arbitration agreement that requires him to arbitrate his respective claims against Defendant on an individual basis. *See* 9 U.S.C. §§ 3–4.

This Motion is based upon this Notice of Motion, the attached Memorandum of Points and Authorities, the Declaration of Jake Honig, the Declaration of Joshua D. Dick, and all papers and pleadings from this case on file with the Court, all other matters of which the Court may take judicial notice, any further evidence or argument offered to the Court at the hearing on this Motion, and any other matters that the Court may consider.

Dated: March 26, 2019

GIBSON, DUNN & CRUTCHER LLP

By: */s/ Austin Schwing*
Austin Schwing

Attorneys for Defendant JUUL LABS, INC.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action is brought by 42 named plaintiffs purporting to represent a proposed nationwide class of "[a]ll persons who purchased, in the United States, a JUUL e-cigarette and/or JUULpods." However, Defendant JUUL Labs, Inc. ("JLI") has identified at least five named plaintiffs—David Masessa, Ron Minas, Jack Roberts, Hasnat Ahmad and Michael Viscomi (collectively, "Arbitration Plaintiffs")—whose participation in this purported class action is improper because they have agreed to resolve their dispute with JLI by binding arbitration on an individual basis. Accordingly, the Court should dismiss the Arbitration Plaintiffs from this action and compel them to arbitrate their claims under the terms of their arbitration agreement with JLI.

When Arbitration Plaintiffs created or logged into online accounts through JLI's website, they each agreed to JLI's Terms and Conditions, which included an arbitration agreement requiring them "to resolve any claim, dispute, or controversy . . . by *binding arbitration* by JAMS." Decl. of Jake Honig ("Honig Decl.") Ex. C § 16 (emphasis added). The very first section of the Terms and Conditions put Arbitration Plaintiffs on notice of the arbitration provision, stating:

> Please read these Terms of Service carefully to ensure that you understand each provision. ***These Terms contain a mandatory individual arbitration and class action/jury trial waiver provision that requires the use of arbitration on an individual basis to resolve disputes, rather than jury trials or class actions***.

(*Id*. at § 1) (emphasis added). Courts in California, and across the country, have consistently interpreted such language to encompass not only contractual disputes, but also tort claims like those Plaintiffs allege here. Each Arbitration Plaintiff agreed to bring "all claims" in his "individual capacity, and not as a plaintiff or class member in any purported class action." *Id.* Further, Arbitration Plaintiffs were reminded of their assent to these Terms and Conditions each time they logged into their online accounts. *Id*. at ¶¶ 3–4. While JLI believes Plaintiffs' claims lack any merit, the Arbitration Plaintiffs have agreed to submit such claims on a non-class basis to be decided by an arbitrator.

There can be no dispute that the arbitration agreement here, including the class action waiver provision contained within it, is valid and enforceable under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 3 *et seq.*, and applies to the claims asserted in this action. Indeed, the United States Supreme Court has repeatedly held that arbitration agreements containing class action waivers are enforceable.

Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018); *Am. Express Corp. v. Italian Colors Rest.*, 570 U.S. 228, 238–39 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011). And the Court recently reiterated that courts must enforce arbitration agreements according to their terms, and that the FAA preempts any state rule that disfavors arbitration or interferes with the parties' agreement to arbitrate their disputes on an individual basis. *Epic Systems*, 138 S. Ct. at 1619.

Nevertheless, the Arbitration Plaintiffs seek to evade their contractual obligations under the Terms and Conditions by bringing a purported class action lawsuit in federal court, on behalf of themselves and "[a]ll persons who purchased, in the United States a JUUL e-cigarette and/or JUULpods." Dkt. 82, ¶ 296. The FAA expressly provides: "If any suit . . . be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending . . . ***shall*** on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3 (emphasis added). Accordingly, because the arbitration agreement in the Terms and Conditions requires Arbitration Plaintiffs to arbitrate all of their claims on an individual basis, JLI respectfully requests this Court to grant this motion to compel arbitration and stay proceedings in this Court until arbitration is completed.[1]

II. FACTUAL BACKGROUND

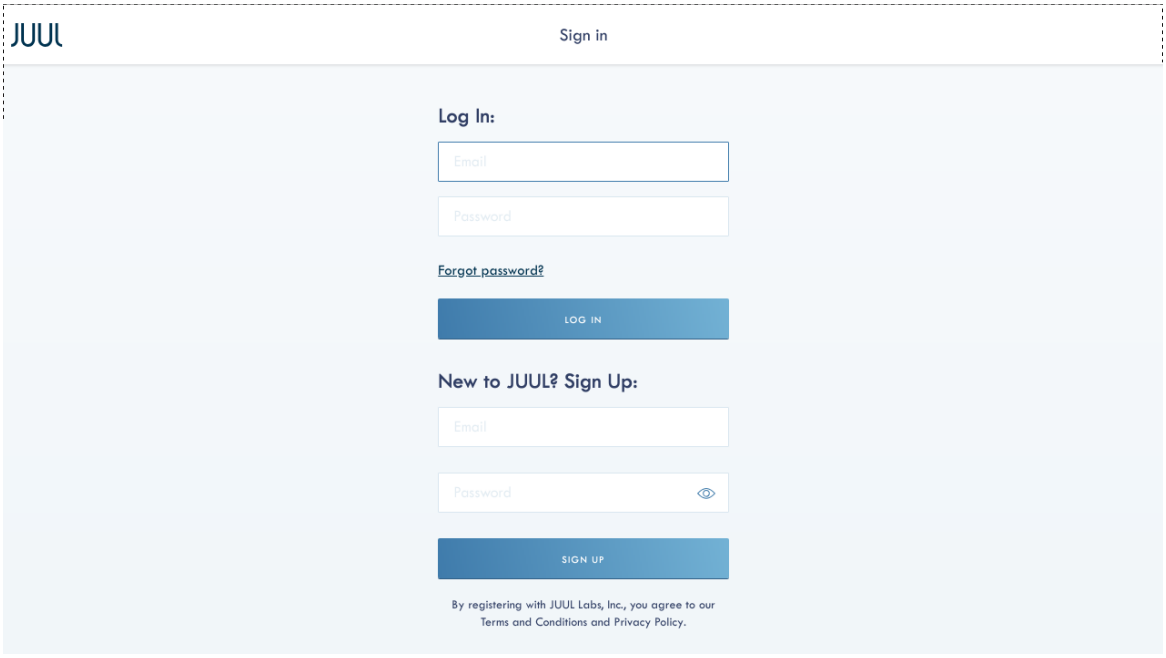
A. JLI's E-Commerce Business and the Arbitration Agreement

JLI is a San Francisco-based technology company that designs, manufactures, and markets an important alternative for the 34 million current adult smokers in the United States and approximately one billion adult smokers around the world: electronic nicotine delivery systems ("ENDS"), including the JUUL device and JUULpods ("JUUL products"). Honig Decl. ¶ 2. As the FDA has explained, "the nicotine in cigarettes is not directly responsible for the cancer, lung disease, and heart disease that kill hundreds of thousands of Americans each year"; rather, "it's the other chemical compounds in

[1] JLI is presently unaware whether other named plaintiffs in this action may have agreed to the arbitration agreement, and therefore reserves its rights to compel arbitration against any plaintiff if and when such facts become known, and no action by JLI should be construed as a waiver of such right. JLI also reserves the right to seek to compel arbitration as to any additional members of the purported classes who agreed to the arbitration agreement in the Terms and Conditions.

tobacco, and in the smoke created by setting tobacco on fire, that directly and primarily cause the illness and death, not the nicotine."[2] JLI is dedicated to eliminating combustible cigarettes by offering existing adult smokers an alternative in the form of ENDS. JLI's mission is to improve the lives of the world's one billion adult smokers.

JLI sells JUUL products to certain third-party retailers who in turn sell them to consumers. *Id.* JLI also sells JUUL products directly to age-verified adult consumers online through JLI's e-commerce website, www.juul.com. *Id.* JLI is the only authorized seller of JUUL products online. *Id.* To process transactions through JLI's website, customers must first create an online account, and existing customers must sign into their account. *Id.* at ¶ 3. From February 2018 to August 2018, the Sign-Up/Log-In page was the same as or materially similar to the screenshot below:



Id. Ex. A (Sign-Up/Log-In page as it appeared from February 1, 2018 to June 30, 2018); *see also id.* Ex. B (Sign-Up/Log-in page as it appeared from June 30, 2018 to August 9, 2018). Immediately below the "Log In" and "Sign Up" buttons that the customer must click to proceed with online account

[2] Remarks by FDA Commissioner Scott Gottlieb, M.D., *Protecting American Families: Comprehensive Approach to Nicotine and Tobacco* (July 28, 2017), https://www.fda.gov/newsevents/speeches/ucm569024.htm; *see also* Mitch Zeller, *Reflections on the Endgame for Tobacco Control*, 22 Tobacco Control i40 (Apr. 15, 2013), *available at* https://tobaccocontrol.bmj.com/content/tobaccocontrol/22/suppl_1/i40.full.pdf ("[P]eople smoke for the nicotine but die from the tar.").

creation and a transaction, respectively, is a conspicuous notice and link to JLI's Terms and Conditions that states: "By registering with JUUL Labs, Inc., you agree to our Terms and Conditions and Privacy Policy." *Id.*, Exs. A, B.

The very first section of the Terms and Conditions, titled "General Statement / Website Term of Use," informs users that "use of this Website, and/or your purchase of any Products [through JLI's website] constitutes your agreement to the following Terms of Service." *Id.*, Ex. C § 1. This first section further puts the consumer on notice that there is an arbitration provision:

> Please read these Terms of Service carefully to ensure that you understand each provision. ***These Terms contain a mandatory individual arbitration and class action/jury trial waiver provision that requires the use of arbitration on an individual basis*** to resolve disputes, rather than jury trials or class actions.

Id. (emphasis added).

Section 2 of the Terms and Conditions, titled "Eligibility, Safety Acknowledgement, and Registration for a JUUL.com Account" explains that the Terms and Conditions are "a contract between you and JUUL Labs. You must read and agree to these terms before using the Website." *Id.* § 2.

Section 16 of the Terms and Conditions, which is prominently titled "Governing Law, Venue, and Class Action / Jury Trial Waiver," clearly describes the parties' arbitration agreement:

> ***Read this section carefully because it requires the parties to arbitrate their disputes and limits the manner in which you can seek relief from JUUL Labs.*** For any dispute with JUUL Labs, you agree to first contact us via email and attempt to resolve the dispute with us informally. In the unlikely event that JUUL Labs has not been able to resolve a dispute it has with you after sixty (60) days, we each agree to resolve ***any claim, dispute, or controversy*** (excluding any claims for injunctive or other equitable relief as provided below) ***arising out of or in connection with or relating to these Terms***, or the breach or alleged breach thereof (collectively, "Claims") by ***binding arbitration by JAMS*** . . .

Id. § 16. (emphases added). The Terms are governed exclusively by California law, as explained in the "governing law" provision, which states: "These Terms shall be governed by the internal substantive laws of the State of California, without respect to its principles of conflict of laws." *Id.*

Section 16 also includes a provision, titled "Class Action / Jury Trial Waiver," which requires any potential plaintiff to bring her claims individually, *not* as part of a class. *Id.* This provision directly states that "***all claims must be brought in the parties' individual capacity, and not as a plaintiff or class member in any purported class action*** . . . or other representative proceeding." *Id.* (emphasis

added). For the avoidance of any doubt, the Terms provide: "You agree that, by entering into this agreement, you and JUUL Labs are each waiving the right to a trial by jury or to participate in a class action, collective action . . . or other representative proceeding of any kind." *Id.*

Under the parties' arbitration agreement, any arbitration "shall be governed by the Federal Arbitration Act (9 U.S.C. §§ 1–16)." *Id.* § 16. The arbitration agreement further provides that the "award rendered by the arbitrator may include your costs of arbitration, your reasonable attorney's fees, and your reasonable costs for expert and other witnesses." *Id.* In the event that the consumer does not wish to arbitrate, the arbitration agreement provides that "you may sue in a small claims court of competent jurisdiction . . . ." *Id.*

B. Arbitration Plaintiffs and the Instant Suit

1. David Masessa

JLI's online account registration process was completed on behalf of Plaintiff David Masessa on January 22, 2015, and Mr. Masessa's account was accessed again on February 13, 2018, March 12, 2018, and April 6, 2018. Honig Decl. ¶ 3. Accordingly, when Mr. Masessa accessed his account in February, March, and April 2018, he agreed to JLI's Terms of Service, including the arbitration agreement contained therein that required him to resolve any dispute with JLI "arising out of or in connection with or relating to the[] terms" through binding arbitration on an individual basis. *Id.*, Ex. C at § 16.

2. Ron Minas

JLI's online account registration process was completed on behalf of Plaintiff Ron Minas on August 4, 2018. Honig Decl. ¶ 3. As part of that process, Mr. Minas agreed to JLI's Terms of Service, including the arbitration agreement contained therein that required him to resolve any dispute with JLI on an individual basis through binding arbitration. *Id.*, Ex. C at § 16.

3. Jack Roberts

JLI's online account registration process was completed on behalf of Plaintiff Jack Roberts on November 7, 2017. Honig Decl. ¶ 3. On March 25, 2018, Mr. Roberts once again accessed his account and, as part of that process, agreed to JLI's Terms of Service, including the arbitration agreement

contained therein that required him to resolve any dispute with JLI "arising out of or in connection with or relating to the[] terms" through binding arbitration on an individual basis. *Id.*, Ex. C at § 16.

4. Hasnat Ahmad

JLI's online account registration process was completed on behalf of Plaintiff Hasnat Ahmad on February 27, 2018. Honig Decl. ¶ 3. As part of that process, Mr. Ahmad agreed to JLI's Terms of Service, including the arbitration agreement contained therein that required him to resolve any dispute with JLI on an individual basis through binding arbitration. *Id.*, Ex. C at § 16.

5. Michael Viscomi

JLI's online account registration process was completed on behalf of Plaintiff Michael Viscomi on March 7, 2018. Honig Decl. ¶ 3. As with the other three Arbitration Plaintiffs, as part of that process, Mr. Viscomi agreed to JLI's Terms and Conditions, including the arbitration agreement contained therein that required him to resolve any dispute with JLI "arising out of or in connection with or relating to the[] terms" through binding arbitration on an individual basis. *Id.*, Ex. C at § 16.

Disregarding their obligations under the Terms of Service, and the arbitration agreement and agreement not to bring class action lawsuits, on January 25, 2019, the Arbitration Plaintiffs, along with other named plaintiffs, filed a Consolidated Amended Complaint ("CAC"), Dkt. 81, and a corrected version on January 30, 2019, Dkt. 82. The CAC, brought on behalf of *all* named plaintiffs, proposed a class consisting of "[a]ll persons who purchased, in the United States, a JUUL e-cigarette and/or JUULpods," and alleged that JLI sold nicotine delivery products with alleged false representations or omissions, alleged product defects, and alleged breaches of warranty. Dkt. 82 ¶¶ 296, 319–505. These claims lack legal and factual merit and JLI has filed a Motion to Dismiss the CAC contemporaneously with this Motion. The Arbitration Plaintiffs, however, should be dismissed immediately and compelled to arbitrate their claims as *a threshold matter* because they have affirmatively waived their right to participate in a class action against JLI and, instead, have agreed to arbitrate their claims on an individual basis.[3]

[3] On March 22, March 25, and March 26, 2019, counsel for JLI contacted Arbitration Plaintiffs' counsel to advise them that the claims of Arbitration Plaintiffs are required to be arbitrated pursuant to the arbitration agreements between JLI and Arbitration Plaintiffs. Declaration of

III. ARGUMENT

A. The Federal Arbitration Act Requires Arbitration Plaintiffs to Arbitrate Their Claims

The FAA declares a "liberal federal policy" favoring the enforcement of arbitration agreements. *Concepcion*, 563 U.S. at 333, 346. Section 2 of the FAA provides: "A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising . . . ***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 (emphasis added).

The FAA was enacted to overcome long-standing judicial hostility to arbitration agreements. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). It not only placed such agreements on equal footing with other contracts, but also established a federal policy in favor of arbitration agreements. *See Perry v. Thomas*, 482 U.S. 483, 489 (1987); *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 89–90 (2000). The policy is so significant that "even claims arising under a statute designed to further important social policies may be arbitrated . . . ." *Green Tree*, 531 U.S. at 90. Moreover, the FAA preempts all conflicting state laws, which means states cannot create special exceptions to the enforcement of arbitration agreements governed by the FAA. As the Supreme Court has explained: "The FAA's displacement of conflicting state law is 'now well-established,' and has been repeatedly reaffirmed." *See Preston v. Ferrer*, 552 U.S. 346, 356–57 (2008) (citations omitted). If an agreement is governed by the FAA, courts must effectuate the intent of Congress "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983).

In accordance with these well-established principles favoring enforcement of agreements to arbitrate, Defendant's motion should be granted.

1. The FAA Applies to the Arbitration Agreement in the Terms of Service

The arbitration agreement contained in JLI's Terms of Service is unquestionably governed by the FAA. In fact, the Terms expressly and unequivocally state that they "shall be governed by the

Joshua D. Dick ¶ 2, Ex. A. Plaintiffs did not consent to submit their claims to arbitration pursuant to JLI's Terms of Service. *Id.*

Federal Arbitration Act." Honig Decl. Ex. C § 16. This alone is sufficient to bring the arbitration agreement within the purview of the FAA. *See, e.g.*, *Buckeye*, 546 U.S. at 442–44 (applying FAA to analyze arbitration provision that provided it was "governed by the Federal Arbitration Act"); *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 63–64 (1995); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468–71 (2015). In any event, the agreement is governed by the FAA because it "affect[s] commerce" vis-à-vis the sale and purchase of JUUL products. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273, 281 (1995) (FAA's requirement that an agreement "involv[e] commerce" is "broad and is indeed the functional equivalent of 'affecting'" commerce, "even if the parties did not contemplate an interstate commerce connection"). The FAA and related federal substantive law therefore govern the enforceability of the arbitration agreement.

2. The Arbitration Agreement Is Valid and Must Be Enforced

Consistent with the principle that arbitration is a matter of contract, the FAA requires courts to compel arbitration "in accordance with the terms of the agreement" upon the motion of a party to the agreement. 9 U.S.C. § 4. The FAA "leaves no place for the exercise of discretion by a district court, but instead *mandates* that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis added). The role of a district court under the FAA "is therefore 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) (citation omitted). "If the response is affirmative on both counts, then the [FAA] *requires* the court to enforce the arbitration agreement in accordance with its terms." *Id.* (emphasis added); *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–84 (2002).

There is a strong presumption "in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24–25. Indeed, the "party resisting arbitration bears the burden of proving the claims at issue are unsuitable for arbitration." *Green Tree*, 531 U.S. at 91. If there is any doubt as to the proper interpretation of the agreement on any issue related to arbitrability, the FAA "establishes that . . . [it] should be resolved ***in favor of arbitration***, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense of arbitrability." *Moses H. Cone*, 460 U.S. at 24–25

(emphasis added); *see also Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street*, 35 Cal. 3d 312, 320 (1983). As the Ninth Circuit succinctly explained it, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Chiron Corp.*, 207 F.3d at 1131.

a. A Valid Agreement to Arbitrate Exists

"[A]rbitration is a matter of contract," *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960), and thus ordinary state law principles governing the formation of contracts are used to determine the threshold issue of whether the parties agreed to arbitrate. *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Metalclad Corp. v. Ventana Envtl. Organizational P'ship*, 109 Cal. App. 4th 1705, 1712 (2003). JLI's Terms are "governed by and interpreted under the laws of the State of California, USA, without regard to its principles of conflict of laws," Honig Decl. Ex. C § 1. Under California law, a valid contract exists when (1) the parties are capable of contracting, and there is (2) a lawful object, (3) mutual consent, and (4) sufficient cause or consideration. Cal. Civ. Code § 1550; *see also Div. of Labor Law Enforc. v. Transpacific Transp. Co.*, 69 Cal. App. 3d 268, 275 (1977). All of these conditions are met here.

First, there is no disputing that Arbitration Plaintiffs are capable of contracting. *See* Cal. Civ. Code § 1556 ("All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights.").

Second, there is no disputing that the arbitration agreement had a lawful purpose, *i.e.*, the prompt and efficient resolution of disputes in arbitration. *See Stewart v. Preston Pipeline Inc.*, 134 Cal. App. 4th 1565, 1586 (2005) (finding arbitration provision had lawful purpose of resolving litigation); *see also Epic Sys.*, 138 S. Ct. at 1621 (by enacting the FAA, "Congress directed courts to . . . treat arbitration agreements as 'valid, irrevocable, and enforceable'").

Third, there is mutual assent. Arbitration Plaintiffs affirmatively acknowledged their intent to be bound by the Terms and Conditions, including the arbitration agreement contained therein. In the context of an electronic consumer transaction, the occurrence of mutual assent between the business and the consumer ordinarily turns on whether the consumer had reasonable notice of a merchant's terms of service agreement. *Cordas v. Uber Technologies, Inc.*, 228 F. Supp. 3d 985, 991 (N.D. Cal. 2017). Here, Arbitration Plaintiffs were clearly on notice that they agreed to JLI's Terms and Service

each and every time they created and/or logged into their online accounts. Honig Decl. ¶¶ 3-4. Indeed, the sign-in pages expressly stated: "By registering with JUUL Labs, Inc., you agree to our Terms and Conditions . . . ." Honig Decl. ¶¶ 3-4. This language was clearly stated and displayed immediately below the boxes that Arbitration Plaintiffs had to click in order to create an account or log into an existing account since February 1, 2018. *Id.* ¶ 3, Exs. A, B. As described above, the first section of the Terms plainly states that it contains an arbitration agreement and class action waiver. *Id.*, Ex. C at § 1 ("These Terms contain a mandatory individual arbitration and class action/jury trial waiver provision that requires the use of arbitration on an individual basis to resolve disputes, rather than jury trials or class actions."). And Section 16 of the Terms, which is prominently titled "Governing Law, Venue, and Class Action / Jury Trial Waiver," describes and explains the arbitration agreements and class action waiver provision in detail. *Id.*, § 16; *see Rodriguez v. American Techs., Inc.*, 136 Cal. App. 4th 1110, 1124 (Cal. Ct. App. 2006) (finding mutual assent where the arbitration clause was conspicuously labeled).

Courts have repeatedly held that these types of terms and conditions are enforceable, and consumers who agree to them are bound by their provisions. For example, in *Meyer v. Uber Technologies, Inc.*, the court applied California law and found that the plaintiff was on notice of an arbitration provision "by virtue of the hyperlink to the Terms of Service on the Payment Screen and, thus, manifested his assent to the agreement" by registering for an account with Uber. 868 F.3d 66, 77–80 (2d Cir. 2017). In that case, Uber had provided a virtually identical statement to what JLI used here, that "[b]y creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY." *Id.* at 78. The court found it significant under California law that the warning was both "spatially coupled" and "temporally coupled" with the "mechanism for manifesting assent—*i.e.*, the register button." The court explained:

> The text, including the hyperlinks to the Terms and Conditions and Privacy Policy, appears directly below the buttons for registration. The entire screen is visible at once, and the user does not need to scroll beyond what is immediately visible to find notice of the Terms of Service. Although the sentence is in a small font, the dark print contrasts with the bright white background, and the hyperlinks are in blue and underlined.

> . . . [N]otice of the Terms of Service is provided simultaneously to enrollment, thereby connecting the contractual terms to the services to which they apply. We think that a reasonably prudent smartphone user would understand that the terms were connected to the creation of a user account.

Id. Accordingly, "the Uber App provided reasonably conspicuous notice of the Terms of Service as a matter of California law." *Id.* at 79.

Similarly, in *Cordas v. Uber Technologies., Inc.*, this Court applied California law and held that the plaintiff was bound by the arbitration provision in the terms and conditions presented to him when he downloaded the Uber app and created an account. 228 F. Supp. 3d at 988–89. Again, no account could be created unless the user navigated through the screen containing a notice of Terms and Conditions, the phrase "Terms & Conditions" on the screen was linked to a webpage containing the arbitration agreement, and the user was informed that by creating an account he was agreeing to the Terms and Conditions. *Id*. at 990. The court held that "[b]y creating an account on the Uber app, Cordas 'affirmatively acknowledge[d] the agreement' and is bound by its terms." *Id*.; *see also Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012) (enforcing forum selection clause in website's terms of service where a notice below the "Sign Up" button stated, "[b]y clicking Sign Up, you are indicating that you have read and agree to the Terms of Service," and user had clicked "Sign Up"); *Cairo, Inc. v. Crossmedia Servs., Inc.*, 2005 WL 756610, at *2, *4–5 (N.D. Cal. Apr. 1, 2005) (enforcing forum selection clause in website's terms of use where website had a notice that read: "By continuing past this page and/or using this site, you agree to abide by the Terms of Use for this site, which prohibit commercial use of any information on this site"); *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 908, 911–12 (N.D. Cal. 2011) (compelling arbitration and finding videogame user bound by Zynga's online terms and conditions because she was told that, "[b]y using YoVille, you also agree to the YoVille [hyperlink] Terms of Service," and the user proceeded).

The same result should follow here. As in *Meyer* and *Cordas*, the JLI website user must create an account to process transactions on JLI's website. Honig Decl., ¶ 3. The user is clearly presented with language on the account-creation and log-in screen that "[b]y registering with JUUL Labs, Inc., you agree to our Terms and Conditions and Privacy Policy." *Id.*, Exs. A, B. As in *Meyer* and *Cordas*, the Terms and Conditions are hyperlinked for easy access. *Id*. And, just like in *Meyer* and *Cordas*, the

user must click a button to demonstrate assent: The user must hit a "Sign Up" or "Log In" button (depending on whether the user is registering or is a returning user) that is directly above—*i.e.*, both "spatially coupled" and "temporally coupled" with—the language informing the user that registering with JLI is an "agree[ment] to our Terms and Conditions and Privacy Policy." *Id.* Accordingly, Arbitration Plaintiffs plainly manifested their assent to JLI's Terms and Conditions, which contain the arbitration agreement.

Finally, the arbitration agreement is supported by valid consideration: the parties' mutual promises to arbitrate any dispute. *See Strotz v. Dean Witter Reynolds, Inc.*, 223 Cal. App. 3d 208, 216 (1990), *overruled on other grounds by Rosenthal v. Great W. Fin. Secs. Corp.*, 14 Cal. 4th 394 (1996) ("Where an agreement to arbitrate exists, the parties' mutual promises to forego a judicial determination and to arbitrate their disputes provide consideration for each other."). Accordingly, all of the elements for the valid formation of an agreement to arbitrate exist here, and thus the scope and enforceability of the arbitration agreement is governed by the FAA.

b. The Arbitration Agreement Plainly Covers This Dispute

The arbitration agreement covers Arbitration Plaintiffs' claims against JLI. The U.S. Supreme Court has made clear that "where [a] contract contains an arbitration clause, there is a presumption of arbitrability . . . [and d]oubts should be resolved in favor of coverage." *AT&T Techs., Inc. v. Comm'n Workers of Am.*, 475 U.S. 643, 650 (1986) (citation omitted); *see also Moses H. Cone*, 460 U.S. at 24–25. A motion to compel arbitration should not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Tech., Inc.*, 475 U.S. at 650; *see also Varallo v. Elkins Park Hosp.*, 63 F. App'x 601, 603 (3d Cir. 2003) (same).

As described above, Arbitration Plaintiffs created online accounts through JLI's website, which is governed by the Terms of Service, including its arbitration agreement. *See, supra*, Section III.2.A. Pursuant to Section 16 of the Terms, they each "agree[d] to resolve any claim, dispute, or controversy (excluding any claims for injunctive or other equitable relief as provided below) ***arising out of or in connection with or relating to these Terms***, or the breach or alleged breach thereof (collectively, "Claims") by binding arbitration by JAMS . . . ." Honig Decl. Ex. C § 16 (emphasis added).

This broad language encompasses each of the claims asserted in this suit, including tort claims. Indeed, consistent with the FAA and the Supreme Court's rulings that doubts must be resolved in favor of arbitrability, courts have repeatedly construed language like this "as broad and far reaching." *See Chiron Corp.*, 207 F.3d at 1131 (describing a similar provision requiring arbitration of "[a]ny dispute, controversy or claim arising out of or relating to the validity, construction, enforceability or performance of this [a]greement" as "broad and far reaching"). For a party's claims to "relat[e] to" a broad arbitration clause such as this one, the "factual allegations need only 'touch matters' covered by the contract containing the arbitration clause." *Simula Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999); *see also Varallo*, 63 F. App'x at 603. For these reasons, "[t]he Supreme Court has held that arbitration clauses providing for coverage of claims 'arising out of or relating to' contracts are broad and encompass not only claims for breach of contract, but also claims in tort, and other claims relating to the underlying contract." *McCarthy v. Providential Corp.,* 1994 WL 387852, at *3 (N.D. Cal. July 19, 1994) (citations omitted); *see also Khan v. Orkin Exterminating Co.*, 2011 WL 4853365, at *1 (N.D. Cal. Oct. 13, 2011) (enforcing arbitration clause in consumer class action where parties agreed to arbitrate "any controversy or claim arising out of or relating to th[e] agreement, or the services performed . . . under th[e] agreement").

Arbitration Plaintiffs' allegations "touch matters covered by the contract containing the arbitration clause." *Simula Inc.*, 175 F.3d at 721. They allege that this case arises out of JLI's alleged false representations or omissions, alleged product defects, and alleged breaches of warranty. *See, e.g.*, CAC ¶¶ 319–505. Arbitration Plaintiffs assert, among other things, that JLI marketed JUUL products as "a safe alternative to smoking," *id.* at ¶ 31, "rather than a means of delivering a highly addictive substance with long-term health effects," *id.* at ¶ 326. Plaintiffs also allege that JLI "knew that JUUL e-cigarettes' were not safe under any circumstances for non-smokers, and posed a risk of aggravating nicotine addiction in those already addicted to cigarettes." *Id.* at ¶ 58. Notably, the Terms of Service to which Arbitration Plaintiffs agreed include a section regarding the chemical content of JUUL products, and provide warnings relating to nicotine products:

> Additionally, no tobacco-based or nicotine product should be considered safe. If you have any health concerns about use of JUUL or any other tobacco product, we recommend that you consult with your physician. Inhalation of e-vapor from JUUL may aggravate existing

> respiratory conditions and ingestion of nicotine may cause other conditions (such as an increase your heart rate and blood pressure and cause dizziness, nausea, and stomach pain). If you do not currently use nicotine containing products, we recommend that you do not start. CALIFORNIA PROPOSITION 65 WARNING: This product contains chemicals known to the state of California to cause cancer and birth defects or other reproductive harm.

Honig Decl. Ex. C § 2.

Further, Arbitration Plaintiffs make allegations and assert claims based on alleged product defects and breaches of warranty. CAC ¶¶ 358–70, 384–422, 446–493. The Terms of Service, however, contain express disclaimers of warranties and product defects, which will be issues for the arbitrator to consider in this dispute:

> JUUL LABS PRODUCTS AND SERVICES, AND THIS WEBSITE, ARE PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS. USE OF THE FOREGOING IS AT YOUR OWN RISK. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW AND TO THE EXTENT NOT COVERED UNDER THE APPLICABLE PRODUCT WARRANTY, JUUL LABS EXPRESSLY DISCLAIMS ANY AND ALL WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, WHETHER RELATED TO USE OF THIS WEBSITE OR JUUL LABS PRODUCTS OR SERVICES, INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT. NO ADVICE OR INFORMATION, WHETHER ORAL OR WRITTEN, OBTAINED BY YOU FROM JUUL LABS OR THROUGH ANY JUUL LABS PRODUCT OR SERVICE WILL CREATE ANY WARRANTY NOT EXPRESSLY STATED HEREIN. WITHOUT LIMITING THE FOREGOING, JUUL LABS, ITS SUBSIDIARIES, ITS AFFILIATES, AND ITS LICENSORS DO NOT WARRANT THAT . . . THE JUUL LABS PRODUCTS AND SERVICES, AND THIS WEBSITE, WILL MEET YOUR REQUIREMENTS OR BE FREE FROM DEFECTS, INCLUDING PRODUCT OR DEVICE LEAKING; . . . ; OR THAT THE JUUL LABS PRODUCTS OR SERVICES, OR THIS WEBSITE, IS FREE OF VIRUSES OR OTHER HARMFUL COMPONENTS. . . .

Honig Decl. Ex. C § 20.

Arbitration Plaintiffs also allege that JLI breached an express warranty. CAC ¶¶ 446–478. JLI's Limited Warranty ("Warranty") is made available on its website. Honig Decl., ¶ 4, Ex. D. The Terms further provide that the "Terms of Service, the Privacy Policy, and our Warranty, which are incorporated by reference, constitute the entire agreement between you and JUUL Labs with respect to the Website." *Id.*, Ex. C at § 22 (emphasis added). Thus, "any claim, dispute, or controversy" "arising out of or in connection with or relating to" any of these subjects falls within the scope of the arbitration provision. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) ("[T]he language of the contract

[] defines the scope of disputes subject to arbitration."). Because there is a valid agreement to arbitrate and the dispute falls within the scope of the agreement, Arbitration Plaintiffs should be compelled to arbitrate their claims.

B. Arbitration Plaintiffs' Agreement to Arbitrate Their Claims on an Individual Basis, Not on Behalf of a Class, Must Be Enforced

The arbitration agreement also contains a class action waiver provision that must be enforced. This provision clearly and unambiguously states:

> With respect to ***all*** entities, regardless of whether they have obtained or used the Website or JUUL Labs Products or services for personal, commercial or other purposes, ***all claims*** must be brought in the parties' ***individual capacity, and not as a plaintiff or class member in any purported class action*** . . . or other representative proceeding. . . . You agree that, by entering into this agreement, you and JUUL Labs are each waiving the right to a trial by jury or to participate in a class action . . . or other representative proceeding of any kind.

Honig Decl. Ex. C § 16. The enforceability of collective action waivers was recently affirmed by the Supreme Court in *Epic Sys*tems, in which the Court held that the FAA "instruct[s] federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." 138 S. Ct. at 1619. Enforcing class action waivers, the Supreme Court reasoned, is consistent with the fundamental principle that courts must honor contracting parties' agreements "to specify the rules that would govern their arbitrations," including "their intention to use *individualized* rather than class or collective action procedures." *Id*. at 1621 (emphasis added). Accordingly, pursuant to their own agreement, Arbitration Plaintiffs are barred from bringing their claims as part of a class and instead must arbitrate their claims on an individual basis.

C. Arbitration Plaintiffs' Claims Should Be Stayed While Arbitration Proceeds

Under Section 3 of the FAA, courts must "stay litigation of arbitral claims pending arbitration of those claims 'in accordance with the terms of the agreement.'" *Concepcion*, 563 U.S. at 344.

IV. CONCLUSION

For the foregoing reasons, Defendant respectfully requests an order compelling Arbitration Plaintiffs—Plaintiffs Masessa, Minas, Roberts, Ahmad, and Viscomi—to arbitrate their claims pursuant to the arbitration agreement in JLI's Terms and Conditions.

Dated: March 26, 2019

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