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6 and LAST MINUTE TRANSACTIONS,
7 INC.

8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **WESTERN DIVISION**

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11
12 MATTHEW AJZENMAN; SUSAN
13 TERRY-BAZER; BENNY WONG; ALEX
14 CANELA; JEREMY WOOLLEY;
AMANDA WOOLLEY; ANNE BERGER;
15 CATHEY MATTINGLY; BLAKE
WOLLAM; and KRYSTAL MOYER, on
behalf of themselves, all individuals who
are similarly situated,

16 Plaintiffs,

17 v.

18 OFFICE OF THE COMMISSIONER OF
19 BASEBALL, an unincorporated
association doing business as MAJOR
20 LEAGUE BASEBALL, et al.,

21 Defendants.

Case No. 2:20-cv-3643-DSF-JEM

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS STUBHUB, INC.'S
AND LAST MINUTE
TRANSACTIONS, INC.'S MOTION
TO COMPEL ARBITRATION**

DATE: September 14, 2020
TIME: 1:30 p.m.
JUDGE: Hon. Dale S. Fischer
COURTROOM: 7D

TABLE OF CONTENTS

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

- I. INTRODUCTION 1
- II. BACKGROUND 2
 - A. The Parties 2
 - B. Allegations Against StubHub 3
 - C. The StubHub Ticket Marketplace 3
 - D. The StubHub Plaintiffs Accepted The StubHub User Agreement During The StubHub Registration Process 4
 - E. The StubHub User Agreement And Arbitration Provision 7
- III. LEGAL STANDARD 11
- IV. STUBHUB’S ARBITRATION PROVISION AND CLASS ACTION WAIVER SHOULD BE ENFORCED AGAINST THE STUBHUB PLAINTIFFS. 13
 - A. The StubHub Plaintiffs Agreed To The Valid And Enforceable StubHub User Agreement And Arbitration Provision. 13
 - B. The StubHub Plaintiffs’ Claims And Disputes Are Encompassed By The Arbitration Provision In The User Agreement. 17
 - C. The StubHub Plaintiffs Must Arbitrate Their Claims On An Individual Basis. 19
 - D. The Court Should Dismiss The StubHub Plaintiffs’ Complaint In Its Entirety. 19
- V. CONCLUSION 20

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TABLE OF AUTHORITIES

Page(s)

Cases

1
2
3
4 *Aanderud v. Superior Court,*
5 13 Cal. App. 5th 880, 890 (2017) 12
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7 563 U.S. 333 (2011)..... 11, 13
8 *Barnes v. StubHub, Inc.,*
9 19-cv-80475, Dkt. No. 27 (S.D. Fla. October 3, 2019) (attached as Exhibit 2,
hereto) 14, 18, 19
10 *Boucher v. All. Title Co.,*
11 127 Cal. App. 4th 262, 25 Cal. Rptr. 3d 440 (2005) 17
12 *Chiron Corp. v. Ortho Diagnostic Sys., Inc.,*
13 207 F.3d 1126 (9th Cir. 2000) 12
14 *Coast Plaza Doctors Hosp. v. Blue Cross of Calif.,*
15 83 Cal. App. 4th 677 (2000) 18
16 *Crawford v. Beachbody, LLC,*
17 2014 WL 6606563 (S.D. Cal. Nov. 5, 2014)..... 15
18 *Dean Witter Reynolds, Inc. v. Byrd,*
19 470 U.S. 213 (1985)..... 12, 13, 18
20 *DeVries v. Experian Info. Sols., Inc.,*
21 2017 WL 733096 (N.D. Cal. Feb. 24, 2017) 15
22 *Dickey v. Ticketmaster LLC,*
23 2019 WL 9096443 (C.D. Cal. Mar. 12, 2019) 14
24 *Peter v. DoorDash, Inc.,*
25 2020 WL 1967568 (N.D. Cal. Apr. 23, 2020)..... 13, 14, 15
26 *Dupler v. Orbitz, LLC,*
27 2018 WL 6038309 (C.D. Cal. July 5, 2018) 14
28 *Epic Sys. Corp. v. Lewis,*
138 S.Ct. 1612 (2018)..... 19

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1 *Eshagh v. Terminix Int'l Co.*,
 2 588 Fed.Appx. 703 (9th Cir. 2014) 19

3 *Graf v. Match.com, LLC*,
 4 2015 WL 4263957 (C.D. Cal. July 10, 2015) 14

5 *Green Tree Fin. Corp.-Ala. v. Randolph*,
 6 531 U.S. 79 (2000)..... 12

7 *Griswold v. Coventry First LLC*,
 8 762 F.3d 264 (3d Cir. 2014) 17

9 *In re Holl*,
 10 925 F.3d 1076 (9th Cir. 2019) 15

11 *Hopkins & Carley, ALC v. Thomson Elite*,
 12 2011 WL 1327359 (N.D. Cal. Apr. 6, 2011)..... 19

13 *International Paper Co., v. Schawbedissen Maschinen & Anlagen GMBH*,
 14 206 F.3d 411 (4th Cir. 2000) 17

15 *Kilgore v. Keybank, N. A.*,
 16 718 F.3d 1052 (9th Cir. 2013) (en banc) 12

17 *Knutson v. Sirius XM Radio Inc.*,
 18 771 F.3d 559 (9th Cir. 2014) 12

19 *KPMG LLP v. Cocchi*,
 20 565 U.S. 18 (2011)..... 11

21 *Lamps Plus, Inc. v. Varela*,
 22 139 S.Ct. 1407 (2019)..... 12

23 *Lee v. Ticketmaster LLC*,
 24 2020 WL 3124256 (9th Cir. June 10, 2020)..... 13, 14

25 *Liggins v. GMRI, Inc.*,
 26 2018 WL 7018011 (C.D. Cal. Dec. 11, 2018)..... 12

27 *Marmet Health Care Ctr., Inc. v. Brown*,
 28 565 U.S. 530 (2012)..... 12

Metalclad Corp. v. Ventana Envtl. Organizational P'ship,
 109 Cal. App. 4th 1705, 1 Cal. Rptr. 3d 328 (2003) 17

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1 *Mortensen v. Bresnan Comm. LLC*,
2 722 F.3d 1151 (9th Cir. 2013) 12

3 *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*,
4 460 U.S. 1 (1983)..... 18

5 *Nguyen v. Barnes & Noble Inc.*,
6 763 F.3d 1171 (9th Cir. 2014) 13

7 *Nitro-Lift Techs., L.L.C. v. Howard*,
8 568 U.S. 17 (2012) (per curiam)..... 12

9 *Rodriguez v. Experian Servs. Corp.*,
10 2015 WL 12656919 (C.D. Cal. Oct. 5, 2015) 14

11 *Stolt-Nielson S.A. v. AnimalFeeds Int’l Corp.*,
12 559 U.S. 662 (2010)..... 19

13 *Swift v. Zynga Game Network, Inc.*,
14 805 F. Supp. 2d 904 (N.D. Cal. 2011)..... 13, 15

15 **Statutes**

16 Federal Arbitration Act..... *passim*

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1 Defendants StubHub, Inc. (“StubHub”) and Last Minute Transactions, Inc.
2 (“LMT”) (collectively, the “StubHub Defendants”) respectfully submit this
3 Memorandum of Points and Authorities in support of their motion to compel
4 arbitration.

5 **I. INTRODUCTION**

6 Plaintiffs’ Corrected Amended Complaint (Dkt. No. 42-1, hereinafter
7 “Complaint”) is fundamentally flawed in asserting baseless claims against the
8 StubHub Defendants and in the wrong forum. Plaintiffs have attempted to avoid their
9 binding contract in their agreement with the StubHub Defendants by masquerading
10 their potential claims in groundless allegations of conspiracy and fraud. Only two
11 Plaintiffs (Alex Canela and Amanda Woolley) actually allege purchases through
12 StubHub in the Complaint. All of the causes of action pled in the Complaint should
13 be sent to binding, individual arbitration pursuant to the terms of their agreement with
14 StubHub, or, in the alternative, dismissed.¹

15 Plaintiffs Alex Canela and Amanda Woolley (the “StubHub Plaintiffs”) have
16 filed their claims in the improper forum and must arbitrate their claims against the
17 StubHub Defendants. Both before and at the time the StubHub Plaintiffs purchased
18 tickets using StubHub, the StubHub Plaintiffs accepted the StubHub Marketplace
19 Global User Agreement (“User Agreement” or “StubHub User Agreement”). The
20 User Agreement in place at the time of the StubHub Plaintiffs’ account creation and
21 purchases included a broad arbitration provision that plainly encompasses the StubHub
22 Plaintiffs’ claims in the Complaint. That User Agreement is enforceable and binding,
23 and none of the StubHub Plaintiffs ever exercised their rights to opt-out of the
24 arbitration provision and class action waiver in the User Agreement.

25 Therefore, the Court should compel the StubHub Plaintiffs to arbitration, and
26 otherwise dismiss or stay their claims.

27 _____
28 ¹ The StubHub Defendants have concurrently filed a motion to dismiss against all
Plaintiffs which dispose of their claims.

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1 **II. BACKGROUND**

2 **A. The Parties.**

3 StubHub is an online ticket marketplace on which users and guests can buy or
4 sell tickets or other related passes for theater, concerts, sports events, or other
5 entertainment events. (July 7, 2020 Declaration of Todd Northcutt (“Northcutt
6 Decl.”), attached as Exhibit 1, ¶ 2.) Whether a StubHub user is a registered user, or
7 decides to checkout as a guest, all users must agree to, accept, and be bound by the
8 StubHub User Agreement.

9 LMT is a subsidiary of StubHub, but its business involves operation of a very
10 small number of physical locations to handle distribution of tickets for discrete
11 events. During the period at issue in the Complaint, LMT was not involved as a
12 ticket marketplace for any Major League Baseball (“MLB”) games. (Northcutt Decl.
13 ¶ 4.) There is therefore no basis for LMT to remain in this case at all. Nonetheless,
14 to the extent the Court construes any of Plaintiffs’ claims as valid against LMT,
15 Plaintiffs admit that LMT “is a party to StubHub’s contractual agreement with its
16 customers.” (Compl. ¶ 72.) Thus, Plaintiffs admit that the StubHub User
17 Agreement—StubHub’s “contractual agreement with its customers”—applies and
18 binds all LMT users to the same terms as StubHub users. (*Id.*)

19 Plaintiffs Alex Canela and Amanda Woolley are registered users of StubHub’s
20 services. (Northcutt Decl. ¶¶ 37, 42.) Plaintiff Canela is a California resident who
21 allegedly purchased through StubHub two individual game tickets to see the San
22 Francisco Giants host the Los Angeles Dodgers. (Compl. ¶ 16). Plaintiff Canela
23 financed his tickets with a non-party entity, “Affirm,” and alleges that the game for
24 which he has tickets has been “postponed” according to an “MLB directive and
25 StubHub has not issued refunds, causing Plaintiff financial injury.” (*Id.* ¶¶ 16–17.)

26 Plaintiff Amanda Woolley is a Wisconsin resident who allegedly purchased
27 through StubHub two individual game tickets to see the Defendant Milwaukee
28 Brewers play against the Chicago Cubs at Miller Park in Milwaukee. (*Id.* ¶¶ 18, 22.)

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1 Plaintiff Amanda Woolley alleges that the game has been “postponed” according to
2 an “MLB directive and the Chicago Cubs and StubHub have not issued refunds,
3 causing Plaintiffs financial injury.” (*Id.* ¶ 22.)²

4 **B. Allegations Against StubHub.³**

5 In this case, Plaintiffs sued MLB and each MLB team related to the alleged
6 failure to “refund money to MLB’s fans who purchased tickets for the 2020 MLB
7 season.” (Compl. ¶ 1). Plaintiffs allege they were harmed by StubHub’s failure to
8 provide cash refunds, Defendants’ continued possession of Plaintiffs’ funds, and that
9 Defendants should refund the money Plaintiffs paid for MLB games, regardless of
10 the status of those games—that is, whether or not they were cancelled. (*See id.* ¶¶
11 129, 136.) The Complaint asserts five Counts against StubHub, all of which arise
12 from Plaintiff’s alleged experiences using StubHub’s website and services. In
13 Counts 1–3, Plaintiffs allege Defendants engaged in fraudulent, unfair, and unlawful
14 business practices by failing to refund Plaintiffs. (*Id.* ¶¶ 110–129.) In Counts 4 and
15 5, Plaintiffs allege civil conspiracy among Defendants to avoid refunding money for
16 events to which Plaintiffs purchased tickets and that Defendants were unjustly
17 enriched as a result of retaining the money paid by Plaintiffs. (*Id.* ¶¶ 130–137.)

18 **C. The StubHub Ticket Marketplace.**

19 StubHub provides an online ticket marketplace that connects sellers and
20 buyers of tickets. (Northcutt Decl. ¶ 2.) StubHub is not the “seller” of the tickets on
21 its site.⁴ (*Id.* ¶ 14.) Both registered users and guests can utilize the StubHub ticket
22 _____

23 ² The remaining Plaintiffs did not purchase through the StubHub Defendants and
24 those Plaintiffs should be dismissed for the reasons stated in StubHub’s concurrently
25 filed motion to dismiss. But, to the extent the Court construes any other Plaintiffs as
26 purchasing from the StubHub Defendants (even though no such information is
27 included in the Complaint), those remaining Plaintiffs would also be bound to
28 arbitrate by the StubHub User Agreement.

³ This section is limited to allegations against StubHub because there are no material
allegations related to any conduct of LMT, any Plaintiff interaction with LMT, or any
involvement of LMT in this case whatsoever.

⁴ Plaintiffs concede this fact by alleging that StubHub is not the “seller” or holder of
inventory (that is, tickets). (Compl. ¶ 92.)

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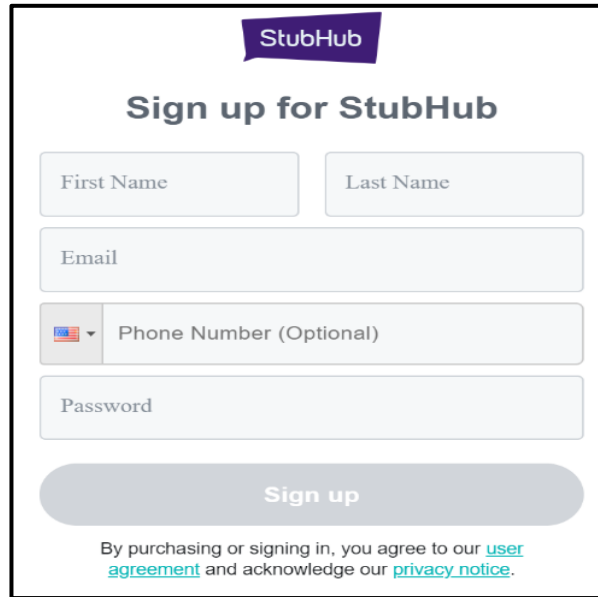
1 marketplace, but every user, whether registered or a guest, must agree to and accept
2 the StubHub User Agreement: no one can buy or sell tickets using StubHub without
3 agreeing to the terms of the User Agreement. (*Id.* ¶ 6.) Here, the only Plaintiffs
4 alleged to make purchases using StubHub were both registered users of StubHub.
5 (*Id.* ¶¶ 35, 40.) The StubHub User Agreement contains the terms and conditions that
6 govern the relationship between StubHub and one that uses its site or services. (*Id.* ¶
7 8.) True and correct copies of the User Agreement in place currently, and the
8 versions of the User Agreement in place when each StubHub Plaintiff registered for
9 their StubHub accounts are attached to the Northcutt Declaration as Exhibits A
10 through D.

11 **D. The StubHub Plaintiffs Accepted The StubHub User Agreement**
12 **During The StubHub Registration Process.**

13 As the Complaint acknowledges, the StubHub Plaintiffs made the purchases at
14 issue in this lawsuit directly through the use of StubHub’s site and services. (Compl.
15 ¶¶ 16, 18.) StubHub’s records indicate that Plaintiff Canela initially registered to use
16 StubHub’s services on July 6, 2015, and that Plaintiff Amanda Woolley registered to
17 use StubHub’s services on December 22, 2019. (Northcutt Decl. ¶ 3.) As a
18 condition of registration, Plaintiff Canela agreed to the June 1, 2015 version of the
19 User Agreement, attached to the Northcutt Declaration as Exhibit B. As a condition
20 of registration, Plaintiff Amanda Woolley agreed to the October 1, 2018 version of
21 the User Agreement, attached to the Northcutt Declaration as Exhibit D. The
22 operative StubHub User Agreement (the “Current User Agreement”) was
23 implemented on March 25, 2020. (*Id.* ¶ 11, Ex. A.)

24 The StubHub Plaintiffs registered for StubHub by completing the User
25 Registration Form. (*Id.* ¶¶ 5, 37–38, 40–41.) A prospective user acknowledges
26 acceptance of the StubHub User Agreement (including StubHub’s policies and
27 procedures referenced therein) by clicking a “Sign up” button on the StubHub
28 website found immediately above a statement that reads: “By purchasing or signing

1 in, you agree to our **user agreement** and **privacy notice**.” (*Id.* ¶ 13.) A fair and
2 accurate depiction of the sign-up screen and user notification on the StubHub website
3 is below. (*Id.*)⁵

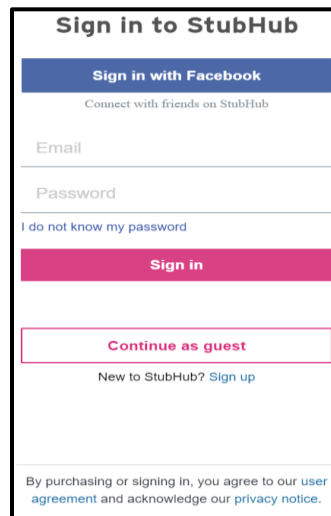


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14 As shown above, the notification contains bold, underlined and offset color
15 typeface that is hyperlinked to the User Agreement. The notification is in close
16 proximity to the “Sign up” button and the text is prominently displayed, highlighting
17 the links to the User Agreement.

18 The same, or substantially similar language existed in the User Agreement at
19 the time each of the StubHub Plaintiffs created their StubHub accounts and agreed to,
20 and accepted the User Agreement. (*Id.* ¶ 14). At the time Plaintiffs each registered
21 as StubHub users, the words “user agreement” on the pages they each saw were (and
22 still are) hyperlinks, in bolded text, that, when clicked, open a separate page that
23 contains the language of the StubHub User Agreement. (*Id.*)
24
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27 ⁵ App users, as opposed to website users, receive a similar message with bolded text hyperlinks that
28 states: “By signing up, you agree to our **user agreement** and **privacy notice**.” (Northcutt Decl. ¶ 13.)

1 StubHub includes an additional mechanism by which users reaffirm agreement
2 to and acceptance of the StubHub User Agreement and related policies. When a user
3 logs into the StubHub website or checks out and purchases tickets to an event, a pop-
4 up screen displays and states, “By purchasing or signing in, you agree to our user
5 agreement and acknowledge our privacy notice.” (*Id.* ¶ 17.) A fair and accurate
6 depiction of the purchase/sign-in screen and user notification is below. (*Id.*)



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15 The notice contains hyperlinks, in offset colored typeface, to the current
16 version of the StubHub User Agreement, again in bolded and prominent font in close
17 proximity to the sign-in button. (*Id.*) This additional mechanism by which users
18 reaffirm agreement to and acceptance of the User Agreement, was in place at the
19 time both StubHub Plaintiffs made the purchases at issue in this case. (*Id.* ¶ 18.)

20 Moreover, in the confirmation emails sent to users that purchase on StubHub,
21 the following notification appears: “This email was sent to [email address] by
22 StubHub, Inc., 199 Fremont Street, Floor 4, San Francisco, CA 94105, USA, which
23 may use affiliates to provide StubHub services. Please refer to the [user agreement](#) for
24 the contact data of your contracting party. StubHub is committed to your privacy.
25 Learn more about our [privacy notice](#) and [user agreement](#).” (*Id.* ¶¶ 39, 44.) Both
26 StubHub Plaintiffs received this confirmation email for the purchases they made
27 relevant to this case. (*Id.*)
28

1 Finally, the StubHub site, itself, on the home page, the MLB tickets page, and
2 the purchase page, among others, contains a notice and disclaimer stating that “use of
3 this website signifies your agreement to our **User Agreement**. . . .” The term “User
4 Agreement” is in contrasting blue colored text, bolded, and hyperlinked to the
5 Current User Agreement. A fair and accurate depiction of the website notification is
6 below. (*Id.* ¶ 16.)

7
8 © 2000-2020 StubHub. All Rights Reserved. Use of this website signifies your agreement to our [User Agreement](#), [Privacy Notice](#) and
9 [Cookie Notice](#). You are buying tickets from a third party; StubHub is not the ticket seller. Prices are set by sellers and may be above face
10 value. [User Agreement change notifications](#)

11 Again, this notice explains that use of the StubHub website signifies
12 agreement to the User Agreement, provides a hyperlink to the operative version of
13 that agreement, and offsets that hyperlink text in bold, color typeface. (*Id.*)

14 **E. The StubHub User Agreement and Arbitration Provision.**

15 The version of the StubHub User Agreement in place when the StubHub
16 Plaintiffs initially registered for StubHub contained a provision regarding
17 modification or amendment of the StubHub User Agreement, prominently displayed
18 on the first page of the agreement. (Northcutt Decl. ¶¶ 19–20, Ex. B, at 1, Ex. D at §
19 1.) This provision was substantially similar in prior versions of the User Agreement
20 as it is in the Current User Agreement, which states: “We may periodically make
21 changes to this User Agreement and shall notify you by posting a revised version on
22 our site. The revised User Agreement will become effective upon publication and
23 your continued use of the Site and Services will constitute acceptance of the revised
24 User Agreement.” (*Id.* ¶ 18, Ex. A, at § 1.)

25 The Current User Agreement and prior versions of the StubHub User
26 Agreement contain provisions relating to event cancellation, postponement, and other
27 event changes. (Northcutt Decl. ¶ 22.) As stated in the provisions, the StubHub User
28 Agreement does not mandate the issuance of refunds for postponed events, unless

1 they are ultimately canceled. (*Id.* ¶¶ 22–24.) The StubHub Plaintiffs do not allege
2 that StubHub failed to issue a refund when such refund was required by the User
3 Agreement and required by law. (*See Compl.* ¶¶ 16–18, 22.)

4 The operative version of the FanProtect Guarantee states, in relevant part, “If
5 the event is canceled and not rescheduled, you will get a refund or credit for use on a
6 future purchase, as determined in StubHub’s sole discretion (unless a refund is
7 required by law).” (Northcutt Decl. ¶ 25.)

8 The StubHub User Agreement contains an express arbitration provision, a fact
9 to which it drew to users’ attention in bold, all capital text on the first page, which
10 states:

11 **FOR ALL USERS RESIDING IN THE UNITED STATES, PLEASE BE**
12 **ADVISED: CLAUSE 22 OF THIS AGREEMENT CONTAINS AN**
13 **AGREEMENT TO ARBITRATE, WHICH WILL, WITH LIMITED**
14 **EXCEPTIONS, REQUIRE YOU TO SUBMIT CLAIMS YOU HAVE**
15 **AGAINST US TO BINDING AND FINAL ARBITRATION, UNLESS**
16 **YOU OPT-OUT. UNLESS YOU OPT OUT: (1) YOU WILL ONLY BE**
17 **PERMITTED TO PURSUE CLAIMS AGAINST STUBHUB ON AN**
18 **INDIVIDUAL BASIS, NOT AS A PLAINTIFF OR CLASS MEMBER IN**
19 **ANY CLASS OR REPRESENTATIVE ACTION OR PROCEEDING,**
20 **AND (2) YOU WILL ONLY BE PERMITTED TO SEEK RELIEF**
21 **(INCLUDING MONETARY, INJUNCTIVE, AND DECLARATORY**
22 **RELIEF) ON AN INDIVIDUAL BASIS.**

23 (*Id.* ¶ 30) (emphasis in original). The arbitration provision itself states:

24 **22.1 If you reside in the United States or Canada, You and StubHub each**
25 **agree, except where prohibited by law, that any and all disputes or claims**
26 **that have arisen or may arise between you and StubHub relating in any**
27 **way to or arising out of this or previous versions of the User Agreement**
28 **(including this Agreement to Arbitrate, as the term is defined below) or**
the breach or validity thereof, your use of or access to the Site or Services,
or any tickets or related passes sold or purchased through the Site or
Services shall be resolved exclusively through final and binding
arbitration administered by the American Arbitration Association
(“AAA”) in accordance with its Consumer Arbitration Rules (“Rules”),
rather than in court, except that you may assert claims in small claims
court, if your claims qualify and so long as the matter remains in such

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1 **court and advances only on an individual (non-class, non-representative)**
2 **basis (together with subsections 22(A)-(F), the “Agreement to Arbitrate”).**
3 **This Agreement to Arbitrate is intended to be broadly interpreted.** The
4 Federal Arbitration Act governs the interpretation and enforcement of this
5 Agreement to Arbitrate.

6 (*Id.* ¶ 32) (emphasis in original). The User Agreement also includes a class action
7 waiver, which states:

8 **1. Prohibition of Class and Representative Actions**

9 EXCEPT WHERE PROHIBITED BY LAW, YOU AND STUBHUB
10 AGREE THAT EACH OF US MAY BRING CLAIMS PURSUANT
11 TO THIS AGREEMENT TO ARBITRATE AGAINST THE OTHER
12 ONLY ON AN INDIVIDUAL BASIS AND NOT AS A PLAINTIFF
13 OR CLASS MEMBER IN ANY PURPORTED CLASS, OR
14 REPRESENTATIVE OR PRIVATE ATTORNEY GENERAL
15 ACTION OR PROCEEDING. UNLESS BOTH YOU AND
16 STUBHUB AGREE OTHERWISE, THE ARBITRATOR SHALL
17 NOT CONSOLIDATE OR JOIN MORE THAN ONE PERSON'S OR
18 PARTY'S CLAIMS, AND SHALL NOT OTHERWISE PRESIDE
19 OVER ANY FORM OF A CONSOLIDATED, REPRESENTATIVE,
20 CLASS, OR PRIVATE ATTORNEY GENERAL ACTION OR
21 PROCEEDING.

22 **2. Non-Individualized Relief**

23 YOU AND STUBHUB AGREE THAT THE ARBITRATOR MAY AWARD
24 RELIEF (INCLUDING MONETARY, INJUNCTIVE, AND DECLARATORY
25 RELIEF) ONLY IN FAVOR OF THE INDIVIDUAL PARTY SEEKING
26 RELIEF AND ONLY TO THE EXTENT NECESSARY TO PROVIDE
27 RELIEF NECESSITATED BY THAT PARTY'S INDIVIDUAL CLAIM(S).
28 ANY RELIEF AWARDED CANNOT AFFECT OTHER USERS OR THE
29 GENERAL PUBLIC. If a court decides that applicable law precludes
30 enforcement of any of this paragraph's limitations as to a particular claim for
31 relief, then subject to your and StubHub’s right to appeal the court’s decision,
32 that claim (and only that claim) must be severed from the arbitration and may
33 be brought in court. All other claims will be arbitrated.

34 (*Id.* ¶ 33) (emphasis in original).

35 The arbitration provision and class action waiver are virtually identical across
36 the versions of the User Agreement since the StubHub Plaintiffs registered for

1 StubHub accounts. (*See id.* Exs. A–D.)

2 The StubHub User Agreement provides existing StubHub users, including
3 Plaintiffs Canela and Woolley, with the ability to opt out of the arbitration provision
4 and continue using StubHub. (*Id.* ¶ 34.) The StubHub User Agreement advised
5 users of their right to opt-out of arbitration, as well as the opt-out procedure:⁶

6 **You can choose to reject this Agreement to Arbitrate (‘opt out’) by mailing**
7 **us a written opt-out notice (‘Opt-Out Notice’). The Opt-Out Notice must**
8 **be postmarked no later than 30 days after the date you accept the User**
9 **Agreement for the first time. You must mail the Opt-Out Notice to**
10 **StubHub, Inc., Attn: Litigation Department, Re: Opt-Out Notice, 199**
11 **Fremont Street, 4th Floor, San Francisco, CA 94105, United States**
12 (*Id.*)⁷ (emphasis in original).

11 Plaintiff Canela registered for StubHub after June 1, 2015. (*Id.* ¶ 3.) He had
12 the right and opportunity to opt out of the arbitration provision pursuant to the terms
13 of the 2015 User Agreement or the subsequent versions of the User Agreement
14 (including the Current User Agreement) in place at the time of his purchase. (*Id.* ¶
15 34, Ex. B.) Plaintiff Canela never opted out. (*Id.* ¶ 41.)

16 Plaintiff Amanda Woolley registered for StubHub on the same day she made
17 the purchase allegedly at issue in this case, on December 22, 2019. (*Id.* ¶ 3.)
18 Plaintiff Woolley had the right and opportunity to opt out of the arbitration provision
19 pursuant to the terms of the 2018 User Agreement or the Current User Agreement.
20 (*Id.* ¶ 34.) Plaintiff Woolley never opted out. (*Id.* ¶ 46.)

21 _____
22 ⁶ In fact, StubHub provides users with notice of the right to opt-out on the very first
23 page of the User Agreement – in the first paragraph, in fact. That notice states, in
24 pertinent part: **“FOR ALL USERS RESIDING IN THE UNITED STATES,**
25 **PLEASE BE ADVISED: CLAUSE 22 OF THIS AGREEMENT CONTAINS AN**
26 **AGREEMENT TO ARBITRATE, WHICH WILL, WITH LIMITED**
27 **EXCEPTIONS, REQUIRE YOU TO SUBMIT CLAIMS YOU HAVE**
28 **AGAINST US TO BINDING AND FINAL ARBITRATION, UNLESS YOU**
OPT-OUT.” (emphasis in original).

⁷ The current and operative version of the Arbitration provision has been in place and
effective, without any significant change, since October 1, 2018, which predates any
purchase at issue in this case by the StubHub Plaintiffs. (Northcutt Decl. ¶ 32.) In
fact, the arbitration provision has been in place in substantially similar form since
2015.

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1 The arbitration provision in the StubHub User Agreement mandates resolution
2 of “any and all disputes or claims that have arisen or may arise between you and
3 StubHub relating in any way to or arising out of this or previous versions of the User
4 Agreement . . . or the breach or validity thereof, your use of or access to the Site or
5 Services, or any tickets or related passes sold or purchased through the Site or
6 Services” between StubHub and its users “exclusively through final and binding
7 arbitration. . . .” (*Id.* ¶ 32, Ex. A § 22.1). The Current User Agreement provides,
8 “The Agreement to Arbitrate is intended to be broadly interpreted.” (*Id.*) The
9 arbitration provision also contains a number of features favorable to users to
10 facilitate the resolution of claims, such as: the ability to pursue relief in small claims
11 court; the application of the more flexible AAA Consumer Arbitration Rules; costs
12 for the arbitration are paid by StubHub for certain claims; the arbitration hearing
13 takes place where the user resides, by telephone, or the user can waive the hearing;
14 no confidentiality requirement; and the availability of full individual remedies,
15 including statutory and punitive damages, attorneys’ fees, and injunctive relief. (*Id.*)

16 III. LEGAL STANDARD

17 The StubHub User Agreement is subject to the Federal Arbitration Act (the
18 “FAA”) as it is a written contract “evidencing a transaction involving commerce.” 9
19 U.S.C. § 2; *see* Northcutt Decl. ¶ 32; *see AT&T Mobility LLC v. Concepcion*, 563
20 U.S. 333, 339 (2011). Any arbitration agreement within the scope of the FAA “shall
21 be valid, irrevocable, and enforceable.” 9 U.S.C. § 2. The FAA governs the
22 StubHub arbitration agreement. (Northcutt Decl. Ex. A, § 22.1.)

23 The FAA was enacted by Congress to overcome “widespread judicial hostility
24 to arbitration agreements,” and to ensure that courts enforce valid agreements to
25 arbitrate. *See Concepcion*, 563 U.S. at 339 (“The overarching purpose of the FAA . .
26 . is to ensure the enforcement of arbitration agreements according to their terms so as
27 to facilitate streamlined proceedings.”); *KPMG LLP v. Cocchi*, 565 U.S. 18, 21
28 (2011) (“The [FAA] reflects an emphatic federal policy in favor of arbitral dispute

1 resolution.”). The United States Supreme Court has repeatedly emphasized that there
2 is a presumption in favor of arbitration when an arbitration agreement exists, and that
3 courts must enforce arbitration agreements as written, reflecting the FAA’s clear
4 policy favoring arbitration.⁸ California likewise “has a strong public policy in favor
5 of arbitration.” *Aanderud v. Superior Court*, 13 Cal. App. 5th 880, 890 (2017);
6 *Mortensen v. Bresnan Comm. LLC*, 722 F.3d 1151, 1160 (9th Cir. 2013).

7 A court’s role in resolving a motion to compel arbitration is “limited to
8 determining (1) whether a valid agreement to arbitrate exists and, if it does, (2)
9 whether the agreement encompasses the dispute at issue.” *Chiron Corp. v. Ortho*
10 *Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). Because both elements
11 are established in this case, the FAA “leaves no place for the exercise of discretion by
12 a district court, but instead mandates that district courts *shall* direct the parties to
13 proceed to arbitration.” *Liggins v. GMRI, Inc.*, 2018 WL 7018011, at *2 (C.D. Cal.
14 Dec. 11, 2018) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218
15 (1985)) (emphasis in *Dean Witter*); *see also Kilgore v. Keybank, N. A.*, 718 F.3d
16 1052, 1058 (9th Cir. 2013) (en banc).

17 The party seeking to compel arbitration bears the burden of proving the
18 existence of a valid agreement to arbitrate by a preponderance of the evidence.
19 *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014). Once an
20 agreement to arbitrate has been established, the party resisting arbitration “bears the
21 burden of proving that the claims at issue are unsuitable for arbitration.” *Green Tree*
22 *Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000). Given the strong policy
23 favoring arbitration, “ambiguities about the scope of an arbitration agreement must
24 be resolved in favor of arbitration.” *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407, 1418
25 (2019). The Supreme Court also holds that class action waivers in arbitration

26
27 ⁸ *See Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 20 (2012) (per curiam)
28 (recognizing the FAA’s “national policy favoring arbitration”); *Marmet Health Care*
Ctr., Inc. v. Brown, 565 U.S. 530, 533 (2012) (“[The FAA] ‘reflects an emphatic federal
policy in favor of arbitral dispute resolution’”).

1 agreements are valid and enforceable, and that a plaintiff cannot avoid arbitration due
2 to the presence of a class action waiver. *Concepcion*, 563 U.S. at 351.

3 **IV. STUBHUB’S ARBITRATION PROVISION AND CLASS ACTION**
4 **WAIVER SHOULD BE ENFORCED AGAINST THE STUBHUB**
5 **PLAINTIFFS**

6 The two-part test for determining whether to compel arbitration is satisfied
7 here because (1) the StubHub Plaintiffs were notified multiple times of their
8 agreement to the User Agreement, agreed to the valid and binding arbitration
9 provision in the User Agreement, and they never exercised their rights to opt out of
10 the arbitration provision; and (2) because the StubHub Plaintiff’s allegations and
11 claims are encompassed by the arbitration provision, as set forth below.

12 **A. The StubHub Plaintiffs Agreed To The Valid And Enforceable**
13 **StubHub User Agreement And Arbitration Provision.**

14 When determining whether to compel arbitration, the court first asks whether a
15 valid agreement to arbitrate exists. *See Dean Witter Reynolds*, 470 U.S. at 218. An
16 online contract “must put a website user on actual or inquiry notice of its terms.”
17 *Peter v. DoorDash, Inc.*, 2020 WL 1967568, at *4 (N.D. Cal. Apr. 23, 2020) (*citing*
18 *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014)). Courts find
19 actual or inquiry notice of the terms, and thus a valid agreement, “where the
20 existence of the terms was reasonably communicated to the user.” *Id.*

21 The StubHub User Agreement is an enforceable “sign-in wrap” agreement
22 because the StubHub Plaintiffs were “provided with an opportunity to review the
23 terms of service in the form of a hyperlink immediately under the [sign up or sign in]
24 button and [they] clicked [sign up or sign in]” and accepted the terms of the
25 agreement.⁹ *See Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 912 (N.D.

26 ⁹ A “sign-in wrap” agreement is one in which a website notifies “the user of the
27 existence of the websites terms of use and, instead of providing an ‘I agree’ button,
28 advise[s] the user that he or she is agreeing to the terms of service when registering
or signing up.” *DoorDash*, 2020 WL 1967568, at *4 (*quoting Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 75-76 (2d Cir. 2017)); *see Lee v. Ticketmaster LLC*, 2020 WL 3124256 (9th Cir. June 10, 2020).

1 Cal. 2011). Moreover, the very type of agreement at issue in this case was enforced
2 and upheld by another federal court interpreting the arbitration provision in the
3 StubHub user agreement as recently as October 3, 2019. *See Barnes v. StubHub,*
4 *Inc.*, 19-cv-80475, Dkt. No. 27 (S.D. Fla. October 3, 2019) (attached as Exhibit 2,
5 hereto). In fact, the *Barnes* court held that the User Agreement applies to tort claims
6 about ticket sales under both Florida and California law, and rejected the argument
7 that the User Agreement’s arbitration provision (and class action waiver) was void
8 under California law. *Id.* at 5-8 (holding that plaintiff “has not shown that the
9 Arbitration Provision [in the User Agreement] is unenforceable” and compelling
10 arbitration of all claims, including consumer fraud claims); *DoorDash*, 2020 WL
11 1967568, at *4 (finding sign-in wrap agreement valid and enforceable).

12 Federal courts in California enforce agreements containing arbitration
13 provisions that are similar to the ones at issue in this case. *See Lee v. Ticketmaster*
14 *LLC*, 2020 WL 3124256 (9th Cir. June 10, 2020); *Dickey v. Ticketmaster LLC*, 2019
15 WL 9096443, at *7 (C.D. Cal. Mar. 12, 2019);¹⁰ *DoorDash*, 2020 WL 1967568, at
16 *4–5 (enforcing arbitration provision where the user agreed to the terms upon
17 signing up or signing in); *Dupler v. Orbitz, LLC*, 2018 WL 6038309, at *3 (C.D. Cal.
18 July 5, 2018) (compelling arbitration where plaintiff was on notice of and
19 “manifested their assent to the Terms of Use by clicking ‘complete booking’”);
20 *Rodriguez v. Experian Servs. Corp.*, 2015 WL 12656919, at *2–3 (C.D. Cal. Oct. 5,
21 2015) (enforcing arbitration clause in terms of use where the “website contained a
22 hyperlink to the Terms of Use at the bottom of every page and included an express
23 disclosure and acknowledgement, which stated, ‘By clicking the button above . . .
24 you agree to our Terms of Use’”); *Graf v. Match.com, LLC*, 2015 WL 4263957, at *4

25 _____
26 ¹⁰ The arbitration provisions in the StubHub User Agreement and the Ticketmaster
27 Terms are substantially similar. (Compare TM declaration to User Agreement).
28 Indeed, StubHub’s notifications and terms in its user agreement are at least equal to,
if not more favorable than, Ticketmaster which this Court and the Ninth Circuit have
upheld recently.

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1 (C.D. Cal. July 10, 2015) (enforcing arbitration clause in terms of use where “all
2 users of the Match.com website . . . were required to affirmatively agree to the Terms
3 of Use when they clicked on a ‘Continue’ or other similar button on the registration
4 page where it was explained that by clicking on that button, the user was affirming
5 that they would be bound by the Terms of Use, which were always hyperlinked and
6 available for review”); *DeVries v. Experian Info. Sols., Inc.*, 2017 WL 733096, at *5–
7 7 (N.D. Cal. Feb. 24, 2017) (compelling arbitration where notice above submit
8 button notified consumers that they were agreeing to terms of use by submitting an
9 order); *Crawford v. Beachbody, LLC*, 2014 WL 6606563, at *3, *8 (S.D. Cal. Nov. 5,
10 2014) (same).

11 The notifications of agreement to the StubHub User Agreement is similar to
12 the notifications in *DoorDash*. There, the Court found plaintiffs on inquiry notice
13 where the text next to the sign-up button clearly contrasted with the background, was
14 plainly readable, and linked to the user agreement and privacy notice in blue text,
15 hyperlinked, and clickable. *See DoorDash*, 2020 WL 1967568, at *4; *Swift*, 805
16 F.Supp.2d at 911; *see also In re Holl*, 925 F.3d 1076, 1083 (9th Cir. 2019) (“There is
17 no special rule, however, that an offeror of an adhesive consumer contract
18 specifically highlight or otherwise bring an arbitration clause to the attention of the
19 consumer to render the clause enforceable.”).

20 As in the above-referenced cases, the StubHub Plaintiffs here were required to,
21 and did, assent to the User Agreement when they signed up for their accounts, when
22 they visited StubHub to purchase MLB tickets (where an additional disclaimer and
23 notification was located), when they signed in and purchased tickets on their
24 accounts, and when they received confirmation emails regarding their purchases that
25 informed them they were entering into the User Agreement and then referred them
26 to, and provided them a link to, that User Agreement. These facts are sufficient,
27 under California law, to bind the StubHub Plaintiffs to the User Agreement.

28 Plaintiff Amanda Woolley agreed to arbitrate her claims against StubHub when

1 she initially registered to use StubHub’s services on December 22, 2019, and was
2 notified that by signing up for a StubHub account, she was agreeing to the User
3 Agreement, which was accessible by hyperlink from the user sign up page.
4 (Northcutt Decl. ¶ 43.) The versions of the User Agreement in place when Plaintiff
5 Woolley registered included an express arbitration provision and class action waiver,
6 and provided conspicuous notice of the presence of the arbitration provision on the
7 first page of the User Agreement in bold, all capital text. (*Id.* ¶¶ 30–33.) Plaintiff did
8 not exercise her right to opt out of the User Agreement’s arbitration provision and
9 thus became bound thereby 30 days after she registered. (*Id.* ¶ 46.) The arbitration
10 provision in place when Plaintiff Woolley registered as a user is substantially similar
11 to the arbitration provision in the Current User Agreement. (*See id.* ¶ 32.) Plaintiff
12 Woolley was again notified that she was agreeing to the User Agreement, and
13 therefore arbitration provision, when she purchased the tickets at issue in this case
14 and she received a confirmation email referring her to the User Agreement, with the
15 words “user agreement” bolded, underlined, color offset and hyperlinked to the User
16 Agreement. (*See supra*, at II.E; *see also* Northcutt Decl. ¶ 44.) In fact, on the
17 StubHub web page for MLB tickets and on the StubHub home page, yet another
18 notice was provided stating that “use of the website signifies your agreement to our
19 **User Agreement**” (Northcutt Decl. ¶ 16.)

20 Plaintiff Canela agreed to arbitrate his claims against StubHub when he
21 initially registered to use StubHub’s services on July 6, 2015, and expressly agreed
22 that he read and accepted the StubHub User Agreement, which was accessible by
23 hyperlink from the user sign up page. (*Id.* ¶ 38.) The versions of the User
24 Agreement in place when Plaintiff registered included an express arbitration
25 provision, and provided conspicuous notice of the presence of the arbitration
26 provision on the first page of the User Agreement in bold, all capital text. (*Id.* ¶ 32.)
27 Plaintiff did not exercise his right to opt out of the User Agreement’s arbitration
28 provision and thus became bound thereby 30 days after he registered. (*Id.* ¶ 41.) The

1 arbitration provision in place when Plaintiff Canela registered as a user is
2 substantially similar to the arbitration provision in the Current User Agreement. (*Id.*
3 ¶ 32, Decl. Ex. B.) Plaintiff Canela again agreed to be bound by the arbitration
4 provision and User Agreement when he purchased the tickets at issue in this case,
5 and when he made two other purchases using StubHub. (*See supra*, at II.E; *see also*
6 Northcutt Decl. ¶ 38.) In fact, a sign-in notification was also in place at the time
7 Plaintiff Canela made his purchase in this case, which said, “By purchasing or
8 signing in, you agree to our **user agreement** and acknowledge our **privacy notice.**”
9 (Northcutt Decl. ¶¶ 17–18.) Moreover, on the StubHub web page for MLB tickets
10 and on the StubHub home page, yet another notice was provided stating that “use of
11 the website signifies your agreement to our **User Agreement**” (*Id.* ¶ 16.)
12 Finally, StubHub also sent an email to Mr. Canela confirming his purchase at issue in
13 this case and referring him to the user agreement “for the contact data of your
14 contracting party” wherein the user agreement was again hyperlinked in bolded,
15 underlined, and offset color typeface. (*Id.* ¶ 39.)

16 Plaintiffs are therefore bound by the User Agreement’s arbitration provision.¹¹

17 **B. The StubHub Plaintiffs’ Claims And Disputes Are Encompassed By**
18 **The Arbitration Provision In The User Agreement.**

19 The second question the court asks in determining whether to compel

20 ¹¹ Moreover, the StubHub Plaintiffs concede that the StubHub User Agreement is
21 valid and enforceable because they seek to enforce a prior version of the FanProtect
22 Guarantee, which is an express provision of the StubHub User Agreement, against
23 StubHub and they invoke the StubHub User Agreement in their Complaint. (Compl.
24 ¶ 72.) The StubHub Plaintiffs cannot attempt to exploit the favorable terms of the
25 User Agreement in their allegations while simultaneously turning their backs on the
26 portions of the contract they find unfavorable. *See Griswold v. Coventry First LLC*,
27 762 F.3d 264, 271–72 (3d Cir. 2014); *International Paper Co., v. Schawbedissen*
28 *Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000) (“To allow [a
plaintiff] to claim the benefit of the contract while simultaneously avoid its burdens
would both disregard equity and contravene the purposes underlying enactment of
the Arbitration Act.”); *Boucher v. All. Title Co.*, 127 Cal. App. 4th 262, 272–73, 25
Cal. Rptr. 3d 440, 447 (2005) (“plaintiff’s claims against defendant are intimately
founded in and intertwined with the . . . agreement; therefore, he is equitably
estopped from avoiding arbitration of his causes of action against defendant.”);
Metalclad Corp. v. Ventana Envtl. Organizational P’ship, 109 Cal. App. 4th 1705,
1718, 1 Cal. Rptr. 3d 328, 338 (2003).

1 arbitration is whether the arbitration provision at issue encompasses the plaintiff’s
2 claims. *See Dean Witter Reynolds*, 470 U.S. at 218; *see also Coast Plaza Doctors*
3 *Hosp. v. Blue Cross of Calif.*, 83 Cal. App. 4th 677, 686 (2000) (“California has a
4 strong public policy in favor of arbitration and any doubts regarding the arbitrability
5 of a dispute are resolved in favor of arbitration.”).

6 Here, the User Agreement requires Plaintiff to arbitrate:

7 [A]ny and all disputes or claims that have arisen or may arise between you and
8 StubHub relating in any way to or arising out of this or previous versions of
9 the User Agreement (including this Agreement to Arbitrate, as the term is
10 defined below) or the breach or validity thereof, your use of or access to the
11 Site or Services, or any tickets or related passes sold or purchased through the
12 Site or Services”

13 (Northcutt Decl. ¶ 32, Ex. A.) Plaintiffs’ claims fall within the scope of this
14 provision.¹²

15 Each of Plaintiffs’ five counts against StubHub arise directly out of Plaintiffs’
16 alleged experiences using StubHub’s services, including several related to
17 modification of the terms of the User Agreement and the StubHub Plaintiffs’
18 purchase of tickets and requests for refunds for those purchases. These claims are
19 without a doubt within the scope of the arbitration provision. Indeed, the recent
20 enforcement of the StubHub User Agreement occurred in a case about ticket sales,
21 fees, and advertisement about ticket sales through StubHub. (Ex. 2, *Barnes*, 19-cv-
22 80475, Dkt. No. 27, at 1-2.) Even if there were doubts, however, such doubts would
23 necessarily be resolved in favor of arbitration. *Moses H. Cone Mem’l Hosp. v.*
24 *Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (“[A]ny doubts concerning the

25 ¹² The arbitration provision in the User Agreement is clearly written,
26 highlighted/previewed in the introductory section of the User Agreement, and
27 consistently emphasized with bold and/or capitalized typeface. (*See* Northcutt Decl.
28 Exs. A–D.) There is no basis whatsoever to suggest that the arbitration or class
waiver provisions are unfair or coercive. It includes a number of consumer friendly
provisions, including that the arbitration itself will be funded by StubHub. *See*
Section II.E, *supra*.

1 scope of arbitratable issues should be resolved in favor of arbitration.”). This Court
2 should hold, as the *Barnes* court held, that disputes about refunds for ticket purchases
3 on StubHub are encompassed in the arbitration provision of the User Agreement.

4 **C. The StubHub Plaintiffs Must Arbitrate Their Claims On An**
5 **Individual Basis.**

6 The Supreme Court has made clear that “a party may not be compelled . . . to
7 submit to class arbitration unless there is a contractual basis for concluding that the
8 party agreed to do so.” *Stolt-Nielson S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662,
9 684 (2010); *see also Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1623 (2018)
10 (enforcing class action waiver because “courts may not allow a contract defense to
11 reshape traditional individualized arbitration by mandating class wide arbitration
12 procedures without the parties’ consent”); *Eshagh v. Terminix Int’l Co.*, 588
13 Fed.Appx. 703, 704 (9th Cir. 2014).

14 As mentioned above, the StubHub User Agreement arbitration provision
15 contains an express class action waiver. *See supra*, at II.E. Because the StubHub
16 Plaintiffs agreed to the User Agreement and its arbitration provision, and because
17 they never opted out of the arbitration agreement, the class action waiver applies and
18 prohibits litigating their claims as a class action in either this Court or in an
19 arbitration. The Court should therefore dismiss any class claims alleged by the
20 StubHub Plaintiffs and order only their individual claims to arbitration.

21 **D. The Court Should Dismiss The StubHub Plaintiffs’ Complaint In Its**
22 **Entirety.**

23 Where, as here, “an arbitration clause is broad enough to cover all of a
24 plaintiff’s claims, the court may compel arbitration and dismiss the action.” *See*
25 *Hopkins & Carley, ALC v. Thomson Elite*, 2011 WL 1327359, at *8 (N.D. Cal. Apr.
26 6, 2011).¹³ An order dismissing Plaintiffs’ Complaint, rather than an order merely

27 ¹³ Alternatively, if the Court chooses not to dismiss the Complaint, the Court should
28 stay the proceedings pending the completion of arbitrations on Plaintiffs’ claims. 9
U.S.C. § 3 (where the court finds “that the issue involved in [a] suit or proceeding is
referable to arbitration under . . . an agreement,” it “shall on application of one of the

1 staying the proceedings, is particularly appropriate here.

2 **V. CONCLUSION**

3 For the foregoing reasons, StubHub respectfully requests that the Court issue
4 an order compelling the StubHub Plaintiffs to arbitrate their claims against StubHub
5 on an individual basis, as they agreed to when they registered for, and used,
6 StubHub’s site and services. Moreover, to the extent any claims survive the StubHub
7 Defendants’ motion to dismiss, the Court should order those claims to arbitration.

8 Dated: July 8, 2020

Respectfully submitted,

MCDERMOTT WILL & EMERY LLP

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10
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27 _____
28 parties stay the trial of the action until such arbitration has been had in accordance with
the terms of the agreement.”).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on July 8, 2020, to all counsel of record who are deemed to have consented to electronic service via the Court’s CM/ECF system per Civil Local Rule 5-3. Any other counsel of record will be served by electronic mail, facsimile, and/or overnight delivery.

/s/ William P. Donovan, Jr.
William P. Donovan, Jr.

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