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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
12 **FOR THE COUNTY OF LOS ANGELES**

13 LATOYA JEFFERSON,

14 Plaintiff,

15 v.

16 FASHION NOVA, LLC, a California limited  
liability company, and DOES 1 through 10,  
17 inclusive

18 Defendant.

Case No. 23STCV12111

Assigned to: Hon. Elihu M. Berle

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANT FASHION NOVA, LLC'S  
MOTION TO COMPEL ARBITRATION  
AND STAY PROCEEDINGS**

[Filed concurrently with Notice of Motion,  
Declaration of Roger Satur, and [Proposed]  
Order]

Date: August 25, 2023

Time: 9:00 a.m.

Location: Department 6

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1 **INTRODUCTION**

2 Plaintiff LaToya Jefferson (“Plaintiff”) has filed her claims in the wrong forum. Plaintiff  
3 entered into a binding arbitration agreement with Defendant Fashion Nova, LLC (“Fashion  
4 Nova”) by making multiple purchases on Fashion Nova’s website while its Terms of Service  
5 (“Terms”) require mandatory individual arbitration. By placing her orders, Plaintiff agreed that  
6 “[a]ny dispute relating in any way to [her] visit to, or use of, the Website, the Products, or any  
7 purchase” from Fashion Nova “shall be submitted to confidential arbitration.” Plaintiff alleges  
8 that Fashion Nova falsely advertised sales and promotions on its Website, and did not sell  
9 products at the listed regular prices. This dispute plainly falls within the scope of the Terms’  
10 dispute resolution procedure as a dispute stemming from Plaintiff’s purchase of Fashion Nova  
11 products and her use of Fashion Nova’s Website, and is a straightforward case for mandatory  
12 arbitration. For these reasons, Plaintiff’s attempt to circumvent the parties’ agreed-upon  
13 procedures to resolve this dispute through binding arbitration must fail.

14 Plaintiff has attempted to side-step the parties’ arbitration agreement by temporarily  
15 forgoing a prayer for monetary relief in the first iteration of her Complaint. Plaintiff will assert  
16 that arbitration of her claims is not required because she is only seeking injunctive relief. This is  
17 not accurate. She also seeks a declaration that Fashion Nova violated California’s consumer  
18 protection laws, each of which provide for monetary relief if violated, and leave to amend her  
19 Complaint to conform to proof at trial, including to seek monetary relief. Indeed, Plaintiff  
20 demands a jury trial. Plaintiff’s gamesmanship to make an end-run around the parties’ binding  
21 mandatory arbitration agreement is futile. The gravamen of all of Plaintiff’s claims, including her  
22 prayer for injunctive relief, is the central issue of whether Fashion Nova’s discount and pricing  
23 practices violate California law. The parties agreed to arbitrate those questions of liability and all  
24 remedies other than injunctive relief.

25 For all of these reasons, and as further explained below, Fashion Nova respectfully  
26 requests that the Court grant its Motion to Compel Arbitration and Stay Proceedings pending  
27 completion of the parties’ arbitration.  
28

1 **FACTUAL BACKGROUND**

2 **I. Plaintiff Alleges that Fashion Nova Falsely Advertised Sales and Prices On Its**  
3 **Website.**

4 Fashion Nova is a fast fashion retail company headquartered in Vernon, California.  
5 Complaint (“Compl.”) ¶¶ 10, 14. Fashion Nova sells products online on its website,  
6 www.fashionnova.com (the “Website”). *Id.*; Declaration of Roger Satur (“Satur Decl.”) ¶ 3.

7 Plaintiff alleges that Fashion Nova deceptively advertises sales and discounts on its  
8 Website, because Fashion Nova advertises “inflated strikethrough prices” that are “false and  
9 misleading” due to ongoing discounts. Compl. ¶¶ 2-3, 19-65. Plaintiff further alleges that had she  
10 known that she was purportedly not receiving a discount, she would not have purchased her  
11 Fashion Nova products or she would have paid less for them. *Id.* ¶ 73. The Complaint asserts  
12 five causes of action all based on this conduct, for (i) violation of California’s Consumer Legal  
13 Remedies Act, (ii) violation of California’s Unfair Competition Law, (iii) violation of Business  
14 and Professions Code §17500, (iv) violation of Business and Professions Code § 17501, and (v)  
15 for declaratory judgment on a written instrument, contract or property under Code of Civil  
16 Procedure §§ 1060-1062. Compl. ¶¶ 79-130.

17 **II. Plaintiff Agreed to Fashion Nova’s Terms of Service.**

18 Plaintiff placed at least six separate online orders from Fashion Nova through the  
19 Website and a mobile application on May 10, 2021; May 18, 2021; September 15, 2021;  
20 September 22, 2021; November 24, 2021; May 12, 2022; and November 26, 2022. Satur Decl. ¶  
21 7, Ex. E. For all online orders that are placed through Fashion Nova’s Website or mobile  
22 application, all customers, including Plaintiff, must agree to Fashion Nova’s Terms of Service  
23 and thereby agree to arbitrate. Satur Decl. ¶ 5. This requirement has been in place on the Website  
24 since December 26, 2018, when Fashion Nova revised its Terms to include a mandatory  
25 arbitration agreement and class action waiver. *Id.* ¶¶ 4-6. Since then, Fashion Nova has not made  
26 any changes to its Terms, and this requirement remains in place. *Id.* ¶¶ 5, 10.

1 To complete an online purchase from Fashion Nova, customers add their desired product  
2 to their bag and input their contact, shipping, and payment information. Customers must then  
3 scroll to the bottom of the checkout page to “Pay now” and submit the purchase. *Id.*, Exs. B, C.  
4 In close proximity to the “Pay now” button, Fashion Nova expressly discloses that “[b]y  
5 submitting your order, you agree to our **Terms of Service**, **Privacy Policy**, and **Returns**  
6 **Policy**”, each of which is presented in bolded and underlined text containing a hyperlink for  
7 customers to review before completing their purchase. *Id.* ¶ 5 & Exs. B, C at p. 2. This notice has  
8 appeared either immediately above or below the “Pay now” button since December 2018, and at  
9 all times, in a location clearly visible to all shoppers submitting an order on the Website. *Id.* ¶ 5.  
10 Fashion Nova’s current checkout page notifies customers of its Terms, as follows. The same  
11 notification is provided in the mobile checkout page for customers purchasing products from  
12 Fashion Nova on their phones immediately above the “Pay now” button, stating again that “[b]y  
13 submitting your order, you agree to our **Terms of Service**, **Privacy Policy**, and **Returns Policy**.  
14 *Id.*, Ex. B. As on the Website, the Terms are hyperlinked on the mobile checkout page.

**BILLING ADDRESS**  
Select the address that matches your card or payment method.

Same as shipping address

Use a different billing address

Save my information for a faster checkout

By submitting your order, you agree to our [Terms of Service](#), [Privacy Policy](#), and [Returns Policy](#)

**Pay now**

25 Plaintiff has placed at least six orders on Fashion Nova’s Website or mobile application  
26 since December 2018, and in so doing, she was required to proceed through the checkout process  
27 outlined above and received notice of the Terms. *Id.* ¶¶ 5-7. By submitting her orders and  
28 clicking “Pay now,” Plaintiff thus repeatedly agreed to the Terms. *Id.* ¶¶ 5, 7. Fashion Nova



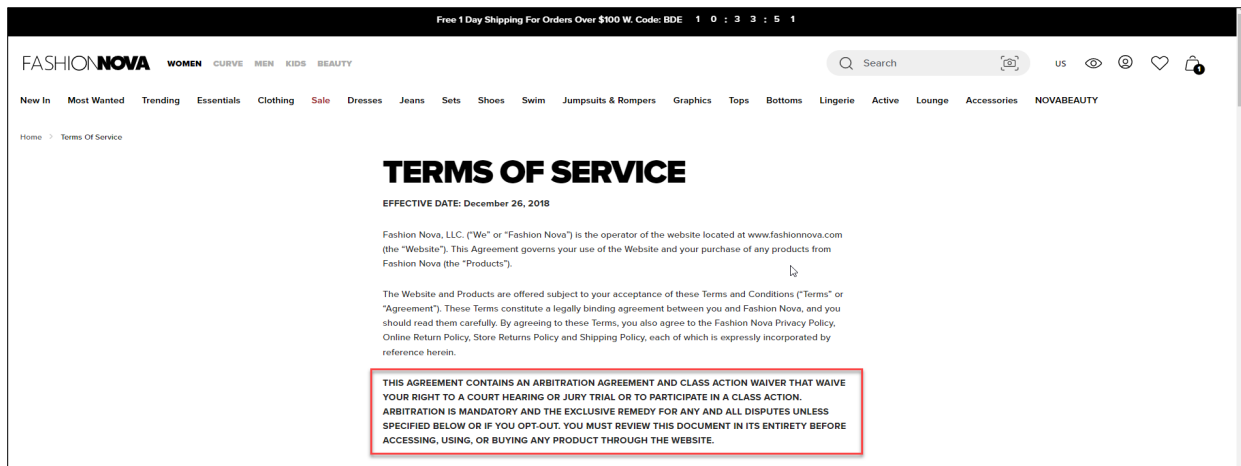
1 obtained Plaintiff’s assent to the Terms by clearly disclosing the Terms for Plaintiff’s review  
2 before finalizing her purchases and affirming that, “by submitting your order,” she agreed to  
3 those Terms. Plaintiff also continued to receive notice of the Terms in order confirmations and  
4 tracking emails sent after the submission of her orders. *Id.* Ex. F.

5 **III. The Terms Require Mandatory Arbitration.**

6 Fashion Nova’s Terms contain an unambiguous and binding arbitration agreement.  
7 Within the first three paragraphs of the Terms, Fashion Nova expressly advises all customers in  
8 an all capitalized and bolded notice that the Terms contain a mandatory arbitration agreement:

9 **THIS AGREEMENT CONTAINS AN ARBITRATION  
10 AGREEMENT AND CLASS ACTION WAIVER THAT  
11 WAIVE YOUR RIGHT TO A COURT HEARING OR JURY  
12 TRIAL OR TO PARTICIPATE IN A CLASS ACTION.  
13 ARBITRATION IS MANDATORY AND THE EXCLUSIVE  
14 REMEDY FOR ANY AND ALL DISPUTES UNLESS  
15 SPECIFIED BELOW OR IF YOU OPT-OUT. YOU MUST  
16 REVIEW THIS DOCUMENT IN ITS ENTIRETY BEFORE  
17 ACCESSING, USING, OR BUYING ANY PRODUCT  
18 THROUGH THE WEBSITE.**

15 *Id.* ¶ 6, Ex. D. As shown below, this arbitration notice is immediately visible upon viewing the  
16 Terms on the Website; no scrolling or searching is necessary to see them. *Id.* Ex. D.



17 The “Dispute Resolution by Binding Arbitration and Class Action Waiver” section—set  
18 off by its own heading in a darker and larger font than the rest of the text—includes a mutually  
19 binding arbitration agreement with the following language:  
20  
21  
22  
23  
24

1 Any dispute relating in any way to your visit to, or use of, the  
2 Website, the Products, or any purchase or otherwise related to this  
3 Agreement (“Disputes”) shall be submitted to confidential  
4 arbitration in Los Angeles, California, USA and shall be governed  
5 exclusively by the laws of the State of California, excluding its  
6 conflict of law provisions. If a Dispute arises under this  
7 Agreement, you agree to contact us at legal@fashionnova.com  
8 (email). Before formally submitting a Dispute to arbitration, you  
9 and Fashion Nova may choose to informally resolve the Dispute. If  
10 any Dispute cannot be resolved informally, you agree that any and  
11 all Disputes, other than those filed in small claims court, shall be  
12 submitted to final and binding arbitration before a single arbitrator  
13 of the American Arbitration Association (“AAA”) in a location  
14 convenient to you or telephonically.

15 *Id.* and Ex. A at p. 2. The “Dispute Resolution by Binding Arbitration and Class Action Waiver”  
16 section also includes the following advisory message in all capitalized and bolded text:

17 **YOU UNDERSTAND THAT YOU WOULD HAVE HAD A  
18 RIGHT TO LITIGATE IN A COURT, TO HAVE A JUDGE  
19 OR JURY DECIDE YOUR CASE AND TO BE PARTY TO A  
20 CLASS OR REPRESENTATIVE ACTION. HOWEVER,  
21 YOU UNDERSTAND AND AGREE TO HAVE ANY  
22 CLAIMS DECIDED INDIVIDUALLY AND ONLY  
23 THROUGH ARBITRATION.**

24 *Id.* Immediately beneath this advisory, Fashion Nova informs all customers that they may opt out  
25 of the arbitration agreement, again in all bolded text. *Id.* Plaintiff did not opt out of the arbitration  
26 agreement. *Id.* ¶ 8.

#### 27 **IV. Plaintiff Sued Notwithstanding Her Agreement to Arbitrate.**

28 Although Plaintiff agreed to arbitrate her dispute, Plaintiff filed her Complaint against  
Fashion Nova on May 30, 2023. Plaintiff purports to allege claims based on Fashion Nova’s  
pricing and discount practices for violations of California’s consumer protection laws and a  
declaration of rights as to a written instrument, contract or property. Compl. ¶¶ 5, 18. Based on  
those allegations, Plaintiff seeks declaratory relief, injunctive relief, an award of attorneys’ fees  
and costs, and leave to amend her complaint to conform to proof at trial, including to seek  
monetary relief. *Id.* ¶¶ 131-136. Plaintiff’s plans to seek monetary relief (on behalf of herself if  
not also others) are transparent. Plaintiff asserts in her Complaint that she has “lost money as a  
result of Fashion Nova’s unfair business practices,” that she “will continue to suffer actual

1 damages,” and that “Fashion Nova has improperly acquired money from Plaintiff.” *Id.* ¶¶ 94, 98,  
2 113. She also demands a jury trial. *Id.* at 30:17. While Plaintiff has not styled her Complaint as a  
3 class action, Plaintiff asserts that she brought this lawsuit to benefit “the general public.” *Id.* ¶ 5.

#### 4 ARGUMENT

##### 5 **I. Plaintiff’s Claims Must Be Compelled to Individual Arbitration.**

6 Both federal and California law strongly favor arbitration as a matter of public policy.  
7 *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *Rowe v. Exline*, 153 Cal.  
8 App. 4th 1276, 1288 (2007). “The overarching purpose of the FAA . . . is to ensure the  
9 enforcement of arbitration agreements according to their terms so as to facilitate streamlined  
10 proceedings.” *Concepcion*, 563 U.S. at 344. As a result, the “emphatic federal policy in favor of  
11 arbitral dispute resolution,” reflected by the FAA, “requires courts to enforce the bargain of the  
12 parties to arbitrate.” *KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011) (quoting *Dean Witter*  
13 *Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985)). The California Supreme Court has similarly  
14 held that, through the California Arbitration Act (“CAA”), “the Legislature has expressed a  
15 ‘strong public policy in favor of arbitration.’” *Sheppard, Mullin, Richter & Hampton, LLP v. J-M*  
16 *Mfg. Co.*, 6 Cal. 5th 59, 72 (2018) (citing *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1, 9 (1992)).  
17 Thus, “courts will indulge every intendment to give effect to such proceedings.” *Moncharsh*, 3  
18 Cal. 4th at 9 (internal citations omitted). California’s public policy is as strongly in favor of  
19 arbitration agreements as the federal policy. *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1079  
20 (2003); *Madden v. Kaiser Found. Hosps.*, 17 Cal. 3d 699, 706-07 (1976) (“[A]rbitration has  
21 become an accepted and favored method of resolving disputes . . . praised by the courts as an  
22 expeditious and economical method of relieving overburdened civil calendars.”).

23 California law requires the Court to compel individual arbitration of Plaintiff’s claims  
24 because (1) by purchasing products through Fashion Nova’s Website or mobile application,  
25 Plaintiff agreed to the arbitration agreement set forth in the Terms, which Fashion Nova is  
26 entitled to enforce, and (2) the arbitration agreement encompasses Plaintiff’s consumer  
27 protection and declaratory relief claims in this lawsuit. Consistent with California law and the  
28

1 Court’s inherent authority to manage its docket, this proceeding should be stayed pending  
2 resolution of this Motion and the completion of any arbitration ordered by this Court.

3 **II. Plaintiff and Fashion Nova Formed a Valid Agreement to Arbitrate Individually.**

4 “Under both federal and state law, the threshold question presented by a petition to  
5 compel arbitration is whether there is an agreement to arbitrate.” *B.D. v. Blizzard Ent., Inc.*, 76  
6 Cal. App. 5th 931, 942 (2022) (internal citations omitted). “[T]he court shall order the petitioner  
7 and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the  
8 controversy exists.” Code Civ. Proc., § 1281.2. “[G]eneral principles of contract law determine  
9 whether the parties have entered a binding agreement to arbitrate.” *Blizzard Ent.*, 76 Cal. App.  
10 5th at 943. These consent principles apply “with equal force to arbitration provisions contained  
11 in contracts purportedly formed over the Internet.” *Id.* (internal citations omitted). Actual,  
12 inquiry, or constructive notice is the touchstone for assent to a contract. *Id.* “[I]n the absence of  
13 actual notice, a manifestation of assent may be inferred from the consumer’s actions on the  
14 website—including, for example, checking boxes and clicking buttons....” *Id.* at 944.

15 As courts have observed, internet-based agreements (including arbitration agreements)  
16 come in various forms: some require the consumer to check an “I agree” box or scroll through  
17 the agreement itself; and some (such as Fashion Nova’s sites) make the terms available through  
18 hyperlinks proximate to a purchase button, with instructions that submitting the transaction  
19 constitutes assent to the terms. *Id.* at 945–946. All of these forms are potentially valid, so long as  
20 they are sufficiently conspicuous to put reasonable consumers on notice. *Id.* Whether a user has  
21 notice of a browsewrap agreement, in turn, depends on, among other things, the design and  
22 content of the website. *See generally id.*, *see also Nevarez v. Forty Niners Football Co., LLC*,  
23 No. 16-CV-07013, 2017 WL 3492110, at \*6 (N.D. Cal. Aug. 15, 2017). “[I]n deciding this issue,  
24 courts are actually undertaking a ‘fact-intensive inquiry’ of ‘largely subjective’ criteria, such as  
25 the size, color, contrast, and location of any text notices; the obviousness of any hyperlinks; and  
26 the overall screen ‘clutter’.” *Blizzard Ent., Inc.*, 76 Cal. App. 5th at 947 (internal citations  
27 omitted).

1           **A.     Plaintiff Agreed to Fashion Nova’s Terms.**

2           Plaintiff entered into a binding arbitration agreement when she purchased products  
3 through the Website or mobile application because she was notified of the Terms in the process  
4 of submitting her orders. As part of making her purchases, Plaintiff utilized Fashion Nova’s  
5 checkout page on at least six separate occasions, which expressly notified her pre-purchase that  
6 “[b]y submitting your order, you agree to our **Terms of Service**. . .” *See supra* Factual  
7 Background Section II; Satur Decl. Ex. E. “Terms of Service” in this notice was hyperlinked to  
8 the full Terms and presented to Plaintiff to review before her order could be finalized and  
9 submitted by clicking “Pay now.” *Id*, Satur Decl. Exs. B, C at p. 2. Upon clicking the  
10 hyperlinked “Terms of Service,” Plaintiff would have immediately received notice of the Terms’  
11 arbitration agreement, which was set forth in full with the key provisions set off in distinguishing  
12 font. *See supra* Factual Background Section II.

13           Numerous courts have enforced arbitration provisions in circumstances such as these  
14 where consumers complete a purchase with notice that the transaction is subject to terms and  
15 conditions. In *Lee v. Ticketmaster L.L.C.*, 817 F. App’x. 393, 394 (9th Cir. 2020), for example,  
16 the Ninth Circuit upheld an agreement where three lines below the “Sign In” button, a website  
17 displayed the phrase, “[b]y continuing past this page, you agree to our Terms of Use” and where  
18 a similar advisory appeared above the “Place Order” button at checkout. Other courts have ruled  
19 similarly. *See, e.g., Garcia v. Enterprise Holdings, Inc.*, 78 F. Supp. 3d 1125, 1129–31, 1137  
20 (N.D. Cal. 2015) (enforcing terms and conditions where the website simply provided a link  
21 stating “App Terms – Privacy Policy” near an “Okay” button); *Molnar v. 1-800-Flowers.com,*  
22 *Inc.*, No. CV 08-0542, 2008 WL 4772125, at \*7 (C.D. Cal. Sept. 29, 2008) (denying plaintiff-  
23 consumer’s motion to dismiss counterclaim for breach of forum selection clause in browsewrap  
24 agreement where consumer accessed defendant-company’s website); *Facebook, Inc. v. Power*  
25 *Ventures, Inc.*, No. C-08-05780 JW, 2010 WL 3291750, at \*7, n.20 (N.D. Cal. July 20, 2010)  
26 (noting that “in the act of accessing or using the Facebook website alone, [defendant] acceded to  
27 the Terms of Use and became bound by them”); *Kim v. Tinder, Inc.*, No. 18-CV-03093, 2018  
28

1 WL 6694923, \*2 (C.D. Cal. July 12, 2018) (compelling arbitration where “Plaintiff logged in to  
2 her Tinder account through a login screen on her phone which stated that tapping the Log In  
3 button would constitute consent to the [terms of use]”); *Cordas v. Uber Techs., Inc.*, 228 F.  
4 Supp. 3d 985, 990 (N.D. Cal. 2017) (compelling arbitration where the mobile application  
5 displayed the notice, “[b]y creating an Uber account, you agree to the Terms & Conditions and  
6 Privacy Policy”); *Graf v. Match.com, LLC*, No. 15-CV-3911, 2015 WL 4263957, at \*4 (C.D.  
7 Cal. July 10, 2015) (compelling arbitration where user was “required to affirmatively agree to the  
8 Terms of Use when they clicked on a ‘Continue’ or other similar button” and where it was  
9 explained that “by clicking on that button, the user was affirming that they would be bound” by  
10 the terms). Accordingly, customers who are notified that they are agreeing to terms of service by  
11 completing a purchase are bound to the terms, even where the website or mobile application does  
12 not require users to click on an “I agree” button. *Cf. Long v. Provide Commerce, Inc.*, 245 Cal.  
13 App. 4th 855, 862 and *Sellers v. JustAnswer LLC*, 73 Cal. App. 5th 444 (2021), reh’g denied  
14 (Jan. 18, 2022), review denied (Apr. 13, 2022).

15 Fashion Nova’s checkout page likewise contains “explicit textual notice that continued  
16 use will act as a manifestation of the user’s intent to be bound.” *See Ticketmaster*, 817 F. App’x.  
17 at 394; Satur Decl. ¶ 4, Exs. A, B; *see also Blizzard Ent.*, 76 Cal. App. 5th at 954 (upholding  
18 arbitration agreement where website “provided sufficiently conspicuous notice” that selecting the  
19 “Continue” button would agree to license agreement containing arbitration clause). Specifically,  
20 immediately above the “Pay now” button, Fashion Nova provided the relevant hyperlinks, with  
21 an express admonition, “By submitting your order, you agree to our Terms of Service.” *See*  
22 *supra* Factual Background Section II. By taking action to click “Pay now” to submit her orders,  
23 she confirmed her assent to be bound by the Terms. *Id.*, *see Ticketmaster*, 817 F. App’x. at 394;  
24 *see also Blizzard Ent.*, 76 Cal. App. 5th at 954 (upholding arbitration agreement where website  
25 “provided sufficiently conspicuous notice” that selecting the “Continue” button would agree to  
26 license agreement containing arbitration clause); *cf. Berman v. Freedom Fin. Network, LLC*, 30  
27 F.4th 849, 857 (9th Cir. 2022) (explaining that clicking a button can be construed as an  
28

1 unambiguous manifestation of assent “if the user is explicitly advised that the act of clicking will  
2 constitute assent to the terms and conditions of an agreement”); *Long, supra*, 245 Cal. App. 4th  
3 at 865, 867 (finding hyperlinked agreement too inconspicuous under facts before it, but  
4 indicating that an agreement would be enforceable if it is proximate to the purchase button and is  
5 accompanied by a textual notice “admonishing users that by clicking a button to complete the  
6 transaction ‘you agree to the terms and conditions’”). Accordingly, Plaintiff entered into a  
7 binding agreement to arbitrate her claims.

8 **III. Challenges to the Scope of the Arbitration Provision Should be Resolved by the**  
9 **Arbitrator.**

10 **A. Pursuant to the Terms, the Parties Delegated Threshold Arbitrability.**

11 This Court does not have jurisdiction to decide the scope of the parties’ arbitration  
12 agreement because the parties delegated that issue to the arbitrator. Parties may agree by contract  
13 to “delegate threshold arbitrability questions to the arbitrator,” as long as the contract clearly and  
14 unmistakably does so. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530  
15 (2019). When there is such a delegation, “a court possesses no power to decide the arbitrability  
16 issue.” *Id.* at 529. California law is in accord. *See Rodriguez v. American Technologies, Inc.*, 136  
17 Cal. App. 4th 1110, 1123 (2006); *see also Aanderud v. Superior Ct.*, 13 Cal. App. 5th 880, 891  
18 (2017).

19 Plaintiff and Fashion Nova delegated arbitrability issues to the arbitrator. The parties  
20 expressly incorporated the American Arbitration Association (“AAA”) rules for consumers into  
21 their arbitration agreement. *Satur Decl.*, Ex. A at p. 3 (“The arbitration will be conducted in  
22 accordance with the provisions of the AAA’s Commercial Dispute Resolutions Procedures,  
23 Supplementary Procedures for Consumer-Related Disputes, in effect at the time of submission of  
24 the demand for arbitration.”). The applicable AAA rules clearly and unmistakably delegate to the  
25 Arbitrator the determination “to rule on his or her own jurisdiction, including any objection with  
26 respect to . . . scope.” AAA, Consumer Arbitration Rules, at R-14(a),  
27 [https://www.adr.org/sites/default/files/Consumer-Rules-Web\\_0.pdf](https://www.adr.org/sites/default/files/Consumer-Rules-Web_0.pdf).

1 The Ninth Circuit, looking at similar arbitration provisions governing commercial  
2 disputes, has routinely held that the AAA rules contain an express delegation of authority to  
3 allow an arbitrator to decide issues of arbitrability, such as the ones argued by Plaintiff in the  
4 Opposition. *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) (“[W]e hold that  
5 incorporation of the AAA rules constitutes clear and unmistakable evidence that contracting  
6 parties agreed to arbitrate arbitrability.”); accord *Oracle Am., Inc. v. Myraid Group A.G.*, 724  
7 F.3d 1069, 1074 (9th Cir. 2013) (“Virtually every circuit to have considered the issue has  
8 determined that incorporation of the American Arbitration Association’s (AAA) arbitration rules  
9 constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.”).  
10 California courts have likewise found that arbitration agreements similar to the one in Fashion  
11 Nova’s Terms delegate the issue of arbitrability to the arbitrator, through the incorporation of  
12 AAA or JAMS rules requiring the arbitrator to determine the scope of the arbitration clause.  
13 *Greenspan v. LADT, LLC*, 185 Cal. App. 4th 1413, 1442 (2010) (incorporation by reference of  
14 JAMS arbitration rules clearly and unmistakably showed the parties’ intent to delegate  
15 arbitrability issues to an arbitrator); see also *Rodriguez*, 136 Cal. App. 4th at 1123 (“By  
16 incorporating [AAA rules] into their agreement, the parties clearly evidenced their intention to  
17 accord the arbitrator the authority to determine issues of arbitrability.”); see also *Aanderud*, 13  
18 Cal. App. 5th at 893 (the arbitration provision’s “reference to the JAMS Rules further evidences  
19 the parties’ clear and unmistakable intent to submit issues of arbitrability to the arbitrator.”).

20 Fashion Nova and Plaintiff agreed to arbitrate “[a]ny dispute relating in any way” to  
21 Plaintiff’s use of the Website or Fashion Nova products, and further agreed to apply the AAA  
22 rules to “any and all Disputes,” which includes delegating arbitrability questions to the arbitrator.  
23 *Satur Decl. Ex. A* at p. 3. This Court need not address any arguments on the scope of the  
24 arbitration agreement and should find that the parties agreed to delegate the issue of arbitrability  
25 to the arbitrator.



1 **IV. The Arbitration Agreement Encompasses Plaintiff’s Claims.**

2 If this Court finds that the parties did not delegate issues of arbitrability to the arbitrator  
3 under the AAA rules, then the Court must find that the arbitration agreement encompasses  
4 Plaintiff’s claims. To determine the scope of the arbitration agreement, courts look at the  
5 language of the arbitration clause and the factual allegations underlying the claims in the  
6 complaint. California courts are clear that “doubts as to the scope of an agreement to arbitrate are  
7 to be resolved in favor of arbitration.” *Molecular Analytical Sys. v. CIPHERGEN Biosystems, Inc.*,  
8 186 Cal. App. 4th 696, 705 (2010); *see also AT&T Techs., Inc. v. Commc’ns Workers of Am.*,  
9 475 U.S. 643, 650 (1986); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1,  
10 24-25 (1983). Therefore, “arbitration agreements should be liberally interpreted, and arbitration  
11 should be ordered unless the agreement clearly does not apply to the dispute in question.” *Vianna*  
12 *v. Doctors’ Management Co.*, 27 Cal. App. 4th 1186, 1189-1190 (1994) (finding plaintiff’s claim  
13 covered by an agreement to arbitrate “any dispute” over terms of employment contract).

14 Here, Plaintiff’s claims fall squarely within the scope of the provision for Dispute  
15 Resolution by Binding Arbitration and Class Action Waiver in the Terms. As stated in the first  
16 sentence of that provision, Plaintiff agreed that “[a]ny dispute relating *in any way* to [her] visit  
17 to, or use of, the Website, the Products, or any purchase...*shall* be submitted to confidential  
18 arbitration.” Satur Decl. ¶ Ex. A at p. 2 (emphasis added). The Complaint alleges that Fashion  
19 Nova deceptively advertises regular prices for its products that were artificial or inflated, Compl.  
20 ¶¶ 2-3, 19-47, that Fashion Nova deceptively advertises limited time offers, *id.* ¶¶ 48-65, that  
21 Plaintiff purchased products from the Website relying on advertised discounts, and that, had  
22 Plaintiff been aware that the products were not discounted or on sale, she would not have  
23 purchased the products, *id.* ¶¶ 66-73. These allegations are centered around purported  
24 misstatements or false advertising on the Website, Plaintiff’s visit to and use of the Website, and  
25 the products she purchased through the Website, and as a result, present disputes specifically  
26 covered by Fashion Nova’s Terms and binding arbitration agreement.

1           Therefore, Plaintiff’s claims under Civil Code § 1750 et seq., Business and Professions  
2 Code §§ 17200 et seq., 17500, 17501 et seq., and Code of Civil Procedure § 1060 et seq. fall  
3 within the scope of the broad arbitration clause contained within the Terms. Plaintiff attempts to  
4 side-step the arbitration requirements of the Terms and exploit a limited exception to the Terms  
5 for injunctive relief prayers by forgoing a demand for money in this iteration of her complaint.  
6 Compl. ¶¶ 79-136. But all of Plaintiff’s causes of action (and her other requested and reserved  
7 prayers for relief) are founded upon Plaintiff’s purchases of products from Fashion Nova’s  
8 Website, conduct that clearly falls within the scope of the arbitration clause in the Terms. And  
9 each cause of action requires a finding of liability before Plaintiff can obtain any injunctive  
10 relief. Plaintiff may argue that her claims are excepted from arbitration because she presently  
11 seeks only injunctive relief, but her consumer protection causes of action allow for monetary  
12 relief which should be compelled to arbitration.

13           Plaintiff asserts in her Complaint that she has “lost money as a result of Fashion Nova’s  
14 unfair business practices,” that she “will continue to suffer actual damages,” and that “Fashion  
15 Nova has improperly acquired money from Plaintiff.” *Id.* ¶¶ 94, 98, 113. As signaled by her  
16 prayer for leave to amend and demand for a jury trial, if Fashion Nova’s conduct was adjudicated  
17 to be unlawful, Plaintiff would be entitled to money damages or restitution. *See Colgan v.*  
18 *Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 694 (2006) (stating that restitution is an  
19 available remedy for California UCL, FAL, and CLRA violations); Cal. Civ. Code § 1780(a)  
20 (“[a]ny consumer who suffers any damage as a result of the use or employment by any person of  
21 a method, act, or practice declared to be unlawful [under the CLRA] may bring an action against  
22 that person to recover or obtain,” among other things, actual damages . . . or restitution of  
23 property.). Moreover, Plaintiff’s declaratory relief cause of action also is founded upon Fashion  
24 Nova’s pricing and advertising practices that fall within the scope of the arbitration provision.  
25 Plaintiff’s fact-intensive questions of liability are not exempted from arbitration merely because  
26 Plaintiff prays for an injunction if liability is adjudicated in her favor.

1           Accordingly, all of Plaintiff’s causes of action fall within the scope of the arbitration  
2 provision in the Terms, and Plaintiff should be compelled to arbitrate these claims against  
3 Fashion Nova.

4       **V.    Plaintiff’s Prayer for Injunctive Relief Must Be Stayed Pending the Completion of**  
5       **Arbitration.**

6           California law calls for a stay of litigation where there is a valid arbitration agreement.  
7 *See* Cal. Civ. Proc. Code § 1281.4; *Rodriguez v. American Technologies, Inc.*, 136 Cal. App. 4th  
8 1110, 1122-23 (2006) (citing *Marcus v. Superior Court*, 75 Cal. App. 3d 204, 209 (1977))  
9 (finding any party to a court proceeding can move to stay the court proceeding pursuant to Cal.  
10 Civ. Proc. Code § 1281.4 and the court must order a stay). Where a plaintiff asserts both  
11 arbitrable and nonarbitrable issues, the Court may order the arbitrable issues to arbitration, and  
12 stay the nonarbitrable issues to be adjudicated in court after arbitration. *See Ass’n for Los*  
13 *Angeles Deputy Sheriffs v. Cnty. of Los Angeles*, 234 Cal. App. 4th 459, 468 (2015).

14           Here, the Court should stay further court proceedings pending the outcome of the  
15 arbitration because Plaintiff’s prayer for injunctive relief is predicated on the central issue of  
16 whether or not Fashion Nova’s pricing and discount practices are unlawful under California’s  
17 CLRA (First Cause of Action), UCL (Second Cause of Action), and FAL (Third and Fourth  
18 Causes of Action). Plaintiff’s claim for declaratory relief also rests on Fashion Nova’s legal  
19 obligations with respect to its discounts and advertising. Those are questions the parties agreed to  
20 arbitrate.

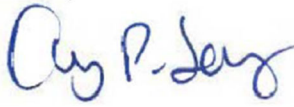
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1 **CONCLUSION**

2 Based on the foregoing, Fashion Nova respectfully requests that the Court enter an order  
3 compelling arbitration of Plaintiff’s causes of action and remedies other than injunctive relief  
4 and staying adjudication of Plaintiff’s prayer for injunctive relief pending the outcome of the  
5 arbitration proceedings.

6  
7 Date: July 3, 2023

SIDLEY AUSTIN LLP

8  
9 By:   
10 \_\_\_\_\_  
11 Amy P. Lally  
12 *Attorney for Defendant*  
13 *Fashion Nova, LLC*

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA )  
3 ) SS  
4 COUNTY OF LOS ANGELES )

5 I am employed in the County of Los Angeles, State of California. I am over the age of 18  
6 years and not a party to the within action. My business address is 555 West Fifth Street, Los  
7 Angeles, CA 90013.

8 On July 3, 2023, I served the foregoing document(s) described as **MEMORANDUM OF**  
9 **POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT FASHION NOVA,**  
10 **LLC’S MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS** on all  
11 interested parties in this action as follows:

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21  (VIA E-MAIL OR ELECTRONIC TRANSMISSION) I caused the document(s) to be  
22 sent to the person(s) at the e-mail address(es) listed on attached service list. I did not  
23 receive, within a reasonable time after the transmission, any electronic message or  
24 other indication that the transmission was unsuccessful.

25 I declare under penalty of perjury under the laws of the State of California that the  
26 foregoing is true and correct.

27 Executed on July 3, 2023, at Los Angeles, California.

28 

\_\_\_\_\_  
Claudia Espinoza