UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PATRICK DANIEL,

Plaintiff,

v. **Case No. 15-cv-01294 (EGS/GMH)**

EBAY, INC., and JACK LY a/k/a DAVID KENNEDY,

Defendants.

REPORT AND RECOMMENDATION

Plaintiff Patrick Daniel brings this action against Defendants eBay, Inc., and Jack Ly. The parties' dispute arises from Plaintiff's purchase of an allegedly counterfeit watch from Mr. Ly through eBay's website. Currently ripe for resolution is eBay's Motion to Compel Arbitration and Stay Litigation [Dkt. 6]. In its motion, eBay seeks to invoke an arbitration clause appended to a User Agreement between eBay and Mr. Daniel. On May 20, 2016, eBay's motion was referred to the undersigned for a Report and Recommendation. After a thorough review of the parties' briefs and the entire record herein,[1] the undersigned recommends that eBay's motion be granted and that this action be stayed pending arbitration.

BACKGROUND

Plaintiff is an attorney who resides in Houston, Texas. Compl. At 4. eBay is an electronic commerce company based in San Jose, California. Long Decl. Ex. 7. eBay operates

[1] The docket entries relevant to this Report and Recommendation are as follows: (1) Complaint ("Compl.") [Dkt. 1]; (2) Defendant eBay, Inc.'s Motion to Compel Arbitration and Stay Litigation ("Mot.") [Dkt. 6]; (3) Defendant eBay, Inc.'s Memorandum of Points and Authorities in Support of Its Motion to Compel Arbitration and Stay Litigation ("Mem.") [Dkt. 6-1]; (4) Declaration of Rebekah Long in Support of Defendant eBay, Inc.'s Motion to Compel Arbitration ("Long Decl.") [Dkt. 6-2]; (5) Plaintiff's Opposition to Defendant eBay, Inc.'s Motion to Compel Arbitration and Stay Litigation ("Opp.") [Dkt. 11]; and (6) Defendant eBay, Inc.'s Reply in Support of Motion to Compel Arbitration and Stay Litigation ("Reply") [Dkt. 14].

an "online marketplace" on which users offer, buy, and sell items through a website—http://www.eBay.com. Id. ¶ 2; id., Ex. 7. According to Plaintiff, Mr. Ly was a registered eBay seller during the events relevant to this suit. Compl. ¶ 5.[2] At the heart of the suit is Plaintiff's purchase of an allegedly counterfeit watch from Mr. Ly through eBay's online marketplace. Id. ¶ 4.

A. Plaintiff's Purchase on eBay

According to Plaintiff, he communicated with Mr. Ly through eBay, presumably via its online messaging system, to purchase from him an Audemars Piguet Royal Oak Offshore watch. Id. ¶¶ 4, 6. The alleged retail value of the watch was $75,000. Id. On or about July 9, 2015, Plaintiff purchased the watch, at which time he wired an unspecified amount of money into Mr. Ly's bank account. Id. ¶¶ 4, 6.

Plaintiff thereafter brought the watch to an authorized dealer to confirm its authenticity. Id. ¶ 7. The dealer sent the watch to an Audemars Piguet service center, which confirmed that it was counterfeit on July 14, 2015. Id. Upset because Mr. Ly had advertised the watch as "authentic," Plaintiff contacted Mr. Ly through eBay's messaging system and sought a return of his money. Id. ¶ 8. According to Plaintiff, Mr. Ly agreed to an in-person meeting to exchange the watch for its purchase price. Id. ¶ 10.[3] Mr. Ly did not show up to the meeting. Id. Plaintiff alleges that he incurred additional unspecified costs as a result. Id.

Plaintiff notified eBay of the allegedly fraudulent transaction. Id. ¶ 9. The pleadings before the Court do not specify when or how this notification occurred. See id. According to Plaintiff, eBay refused to provide additional contact information for Mr. Ly or to otherwise

[2] eBay neither confirms nor denies Plaintiff's description of Mr. Ly's relationship with eBay. See Mem.; see also Long Decl.

[3] Plaintiff's Complaint does not specify the date on which the meeting was scheduled to take place.

cooperate "in the investigation and refund of" Plaintiff's money. Id. The Complaint alleges that, throughout all of this, Mr. Ly continued to operate as a registered seller on eBay's online marketplace. Id.

On August 10, 2015, Plaintiff filed suit, alleging thirteen claims against eBay and Mr. Ly arising from the purchase of the allegedly counterfeit watch, including breach of contract and fraud. Id. ¶ 13.[4] Plaintiff requests that the Court award him compensatory damages, punitive damages, attorneys' fees, and equitable relief. Id. ¶ 14. On September 28, 2015, eBay filed a motion seeking to compel Plaintiff to arbitrate his thirteen claims based on the arbitration clause in eBay's June 2015 User Agreement. Plaintiff filed an opposition to this motion on October 26, 2015. On November 12, 2015, eBay replied. The motion is now ripe for resolution.

B. eBay's User Agreement and Arbitration Clause

The Court's inquiry necessarily warrants an assessment of eBay's User Agreement, which, according to eBay, requires Plaintiff to submit this dispute to arbitration. Three iterations of eBay's User Agreement are relevant to this discussion: (1) the January 29, 1999 User Agreement, which was effective when Plaintiff registered for eBay on March 17, 1999; (2) the August 21, 2012 amended User Agreement, which first incorporated an arbitration clause; and (3) the June 15, 2015 amended User Agreement, which was operative at the time of the events alleged in the Complaint. See Mot. ¶¶ 12, 14, 18; id., Exs. 3, 5, 7. A brief overview of the relevant versions of the User Agreement, as well as eBay's user registration process, follows.

Plaintiff registered as an eBay user on March 17, 1999, and his account was open and active as of September 28, 2015, when eBay filed its motion to compel arbitration. Id. ¶¶ 11, 17;

[4] Specifically, Plaintiff alleges claims against eBay and Mr. Ly for breach of contract, fraud, collusion, conspiracy, failure to monitor business and its agents, failure to supervise business and its sellers, "agency," unjust enrichment, redhibition, theft by deception, theft by conversion, unfair and deceptive trade practices, and "[v]iolation of laws, statutes and/or regulations designed for the safety of consumers." Compl. ¶ 13.

id., Ex. 4. Plaintiff registered for eBay using a contact and shipping address in Lafayette, Louisiana. Id. Ex. 4. In August 2014, Plaintiff updated his shipping address to a location in Houston, Texas. Id.

eBay describes the registration process as follows: at the time of Plaintiff's registration, he would have initiated the registration process by clicking on a "register" link on eBay's website. Id. ¶¶ 3–4; id., Ex. 2. Clicking this link would direct Plaintiff to a registration form where he was required to provide a first and last name, address, phone number, and email address. Id. ¶ 5. After submitting this form, Plaintiff would have received an email from eBay containing a temporary password he could use to log in to eBay's website to create a permanent password, thereby completing the registration process. Id. ¶ 9; id., Ex. 2. Before the temporary password could be used to confirm registration, Plaintiff was required to consent to the terms of eBay's User Agreement by clicking on an "I Accept" button in the online form. Id.; id., Ex. 2. Prospective eBay users are not able to access or use eBay's website to offer, buy, or sell items without following the above steps and clicking "I Accept." Id. ¶ 10. Plaintiff does not dispute that he clicked "I Accept" when he registered to use eBay. See generally Opp.

The online registration form[5] advises a prospective user that "By clicking 'Submit' I agree that . . . I have read and accepted the User Agreement and Privacy Policy." Mot., Ex. 1 (emphasis in original). The term "User Agreement" is underlined and appears in blue—an indication that the phrase is a hyperlink that directs a user who clicks on it to a webpage containing the terms of eBay's User Agreement. Id. ¶ 6.

[5] According to eBay, the "registration process in 1999 was identical to the current registration process in all material aspects." Long Decl. ¶ 9. The following description is based on a screenshot of the current registration form. Id., Ex. 1.

The specific terms of eBay's 1999 User Agreement are largely inapplicable to the analysis of eBay's motion insofar as subsequent iterations of the User Agreement were operative when the events alleged in the Complaint occurred. See Compl. ¶ 4; Long Decl. ¶ 14, 18. However, the 1999 User Agreement, effective when Plaintiff registered for eBay, contained a change-in-terms clause that bears on the validity of eBay's incorporation of the arbitration clause into its User Agreement in 2012. Long Decl. ¶ 13. The change-in-terms clause provided that eBay "may amend this Agreement at any time by posting the amended terms on our site." Id. ¶ 13; id., Ex. 3. It further specified that the "amended terms shall automatically be effective 30 days after they are initially posted on our site." Id.; id., Ex. 3.

Pursuant to this change-in-terms clause, eBay amended its User Agreement to include an arbitration clause, effective August 21, 2012. Mot. at 3. eBay sent Plaintiff a message through his "My eBay Message Center" notifying him of the amended User Agreement, which was posted to eBay's website. Id. Like the terms of the original User Agreement, the terms of the August 21, 2012 User Agreement were superseded prior to the events alleged in the Complaint and have little bearing on the discussion of the validity of the arbitration clause. See Compl. ¶ 4; Long Decl. ¶ 18. However, one portion of its terms is salient to this discussion: an "Opt-Out Procedure," which enabled existing eBay users, such as Plaintiff, to reject the arbitration clause in eBay's User Agreement. Long Decl. ¶ 16. This procedure was detailed in a stand-alone section of the arbitration clause, which, in part, stated: "You can choose to reject the Agreement to Arbitrate ("opt-out") by mailing us a written opt-out notice ("Opt-Out Notice")." Id., Ex. 5 (emphasis in original). Under the terms of the "Opt-Out Procedure," existing eBay users could reject the terms of the arbitration clause by sending a written opt-out notice by regular mail to an address in Lehi, Utah no later than November 9, 2012. Id. The "Opt-Out Procedure" provided

that the opt-out notice "must state that you do not agree to this Agreement to Arbitrate and must include your name, address, and user ID(s) and email address(es) associated with the eBay account(s) to which the opt-out applies. You must sign the Opt-Out Notice for it to be effective." Id. eBay claims that Plaintiff never submitted an opt-out notice to eBay. Long Decl. ¶ 17. Plaintiff does not dispute this contention. See generally Opp.

The version of eBay's User Agreement operative at the time of the events alleged in the Complaint became effective on June 15, 2015. Long Decl. ¶ 18. This version of the User Agreement warned readers in its third paragraph that it contained an arbitration clause:

> Please be advised that this User Agreement contains provisions that govern how claims you and we have against each other are resolved . . . . It also contains an Agreement to Arbitrate, which will, with limited exception, require you to submit claims you have against us to binding and final arbitration, unless you opt-out of the Agreement to Arbitrate.

Id., Ex. 7 (emphasis in original). The arbitration clause stated:

> You and eBay each agree that any and all disputes or claims that have arisen or may arise between you and eBay relating in any way to or arising out of this or previous versions of the User Agreement, your use of or access to eBay's Services, or any products or services sold, offered, or purchased through eBay's Services shall be resolved exclusively through final and binding arbitration, rather than in court.

Id. (emphasis in original). Finally, the arbitration provision contained a "Prohibition on Class and Representative Actions and Non-Individualized Relief," which stated, in part:

> YOU AND EBAY AGREE THAT EACH OF US MAY BRING CLAIMS AGAINST THE OTHER ONLY ON AN INDIVIDUAL BASIS AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE ACTION OR PROCEEDING.

Id. (emphasis in original).

LEGAL STANDARD

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., "governs the enforcement of contractual arbitration provisions" related to matters of interstate commerce. Aneke v. Am. Express Travel Related Servs., Inc., 841 F. Supp. 2d 368, 373 (D.D.C. 2012) (citing CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 668–69 (2012)). Pursuant to Section 2 of the FAA,

> [a] written provision in any maritime transaction or contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . 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. "The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 343 (2011).

The Supreme Court has described the FAA as embodying both "a liberal federal policy favoring arbitration" and the "fundamental principle that arbitration is a matter of contract." Id. at 339 (internal quotation omitted). Guided by these principles, "courts must place arbitration agreements on an equal footing with other contracts," id. at 339, and "enforce them according to their terms." Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989).

Notwithstanding this congressional preference for arbitration, courts may declare arbitration agreements to be unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This savings clause permits arbitration provisions "to be invalidated 'by generally applicable contract defenses, such as fraud, duress, or unconscionability' but not by defenses that apply only to arbitration or that derive their meaning

from the fact that an agreement to arbitrate is at issue." Concepcion, 563 U.S. at 339 (quoting Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996)).

A. Standard of Review

When adjudicating a motion to compel arbitration, district courts apply the summary judgment standard of Federal Rule of Civil Procedure 56, as if the motion "were a request for summary disposition of the issue of whether or not there had been a meeting of the minds on the agreement to arbitrate." Aliron Int'l, Inc. v. Cherokee Nation Indus., Inc., 531 F.3d 863, 865 (D.C. Cir. 2008) (internal quotation marks omitted). Under this standard, the initial burden is on the party seeking to compel arbitration, who "must first come forward with evidence sufficient to demonstrate an enforceable agreement to arbitrate." McMullen v. Synchrony Bank, 164 F. Supp. 3d 77, 84 (D.D.C. 2016) (internal quotation marks omitted). The opposing party must then "raise a genuine issue of material fact as to the making of the agreement, using evidence comparable to that identified in Fed. R. Civ. P. 56." Id. The court should compel arbitration if it concludes that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Under the Rule 56 standard, a fact is "material" if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. When considering a motion to compel arbitration, the court must give the non-movant "the benefit of all reasonable doubts and inferences that may arise." Brown v. Dorsey & Whitney, LLP, 267 F. Supp. 2d 61, 68 (D.D.C. 2003). However, the non-movant's opposition "must consist of more than mere unsupported allegations or denials and must be supported by affidavits, declarations, or other competent evidence, setting forth specific facts

showing that there is a genuine issue for trial." McMullen, 164 F. Supp. 3d at 85 (citing Fed. R. Civ. P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)). "[T]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient to avoid summary judgment." Signature Tech. Solutions v. Incapsulate, LLC, 58 F. Supp. 3d 72, 78 (D.D.C. 2014).

B. Choice of Law

When determining whether an arbitration agreement is valid, "courts apply ordinary state-law principles that govern the formation of contracts." First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995). Plaintiff invokes Louisiana law to challenge the existence of a contract with eBay and to contend that the arbitration clause therein is unenforceable. See Opp. at 2, 6–10. eBay, on the other hand, contends that "either Utah or Texas law applies" given that Plaintiff resides in Texas and the User Agreement in dispute contains a choice-of-law clause that designates Utah law as the law applicable to disputes arising under the agreement. Reply at 5, 7.

In an FAA case, federal courts apply the conflict of law principles of the forum jurisdiction—here, the District of Columbia—to determine the appropriate state law. Aneke, 841 F. Supp. 2d at 375. Generally, in the District of Columbia, "parties to a contract may specify the law they wish to govern, as part of their contract, as long as there is some reasonable relationship with the state specified." Id. (internal quotation marks omitted). However, where the parties dispute the existence of the agreement in the first place, courts have declined to apply this rule. See, e.g., McMullen, 164 F. Supp. 3d at 87–88 (declining to apply choice-of-law provision in credit card services agreement where the plaintiff's consent to the agreement was in dispute); see also Schnabel v. Trilegiant Corp., 697 F.3d 110, 119 (2d Cir. 2012) ("Applying the choice-of-

law clause to resolve the contract formation issue would presume the applicability of a provision before its adoption by the parties has been established.").

Here, eBay's June 15, 2015 User Agreement contains a choice-of-law clause specifying that Utah law governs disputes between eBay and its users. Long Decl. Ex. 7. However, Plaintiff contends that he never "consented [to n]or was provided a copy of" any of the versions of the User Agreement relevant to this case, including the June 15, 2015, User Agreement. Opp. at 2. The merits of this assertion need not be resolved at this juncture. But, because of Plaintiff's contention, the undersigned will not presume the applicability of the choice-of-law clause in eBay's User Agreement before first establishing that a contract was in fact formed between the parties. The undersigned will therefore determine which jurisdiction's law applies in the instant case using District of Columbia conflict of law rules. See McMullen, 164 F. Supp. 3d at 87–88 (applying District of Columbia conflict of law principles to determine which state's law to apply).

D.C. courts generally employ a "constructive blending of the governmental interest test and the most significant relationship test" to determine which state's laws apply. Stephen A. Goldberg Co. v. Remsen Partners, Ltd., 170 F.3d 191, 193–94 (D.C. Cir. 1999). Under this analysis, the court must first determine whether a true conflict among the competing jurisdictions exists: "that is, whether more than one jurisdiction has a potential interest in having its law applied and, if so, whether the law of the competing jurisdictions is different." Geico v. Fetisoff, 958 F.2d 1137, 1141 (D.C. Cir. 1992). In the event of a true conflict, the court next determines which of the competing jurisdictions has the most significant interest in application of its law to the dispute at hand. Id.

In the instant action, the law of three purportedly interested jurisdictions could apply: the law of Utah, identified in the User Agreement choice-of-law clause as the applicable law; the law of Louisiana, where Plaintiff resided at the time he registered to use eBay; and the law of Texas, where Plaintiff currently resides. See Mot., Ex. 5 at 6; Id., Ex. 4; Compl. at 1. But as explained more fully below, the laws of these jurisdictions with respect to enforceability of a contract and its arbitration clause produce identical results. Thus, the Court "need not delve into choice of law issues, as there is no conflict of law for this Court to resolve." Nat'l R.R Passenger Corp. v. Lexington Ins. Co., 365 F.3d 1104, 1107 (D.C. Cir. 2004); Cruz v. Am. Airlines, Inc., 356 F.3d 320, 332 (D.C. Cir. 2004).

DISCUSSION

In deciding whether to compel a plaintiff to arbitrate pursuant to an arbitration clause, the Court's inquiry is twofold: first, did the parties enter into a valid and enforceable arbitration agreement and, if so, does the arbitration agreement encompass the claims raised in the Complaint? Will-Drill Res., Inc. v. Samson Res. Co., 352 F.3d 211, 214 (5th Cir. 2003) (applying Louisiana law); Courville v. Allied Professionals Inc. Co., 174 So.3d 659, 663 (La. Ct. App. 2015); Bybee v. Abdulla, 189 P.3d 40, ¶ 26 (Utah 2008); In re Conseco Finance Serv. Corp., 19 S.W.3d 562, 567 (Tex. Ct. App. 2000). Here, Plaintiff challenges the arbitration clause on both grounds. Specifically, Plaintiff raises three issues that go to the first question: whether a contract was formed between Plaintiff and eBay, whether Plaintiff is entitled to a trial on the existence of the arbitration agreement because it was procured by fraud, and whether the arbitration agreement is unconscionable and therefore unenforceable. Opp. at 2, 4–7. The Court will address these three issues, as well as the separate question of whether Plaintiff's claims fall within the scope of the arbitration agreement, below.

A. The Existence of a Contract Between the Parties

Plaintiff disputes the existence of a contract between eBay and himself, asserting that he never "consented [to n]or was provided a copy of" either the 1999 version or subsequent iterations of the User Agreement. Opp. at 2. eBay, in turn, argues that Plaintiff consented to the User Agreement when he registered for eBay in March 1999 and that subsequent versions of the User Agreement are enforceable by virtue of a change-in-terms provision in the 1999 User Agreement authorizing eBay to propose changes to the agreement. Reply at 2.

The existence of an enforceable contract requires a meeting of the minds between the parties as to all material terms, which are sufficiently definite so as to be enforceable. Brasher v. Christensen, 374 P.3d 40, ¶ 21 (Utah Ct. App. 2016); Lucchese Boot Co. v. Rodriguez, 473 S.W.3d 373, 385–86 (Tex. Ct. App. 2015); Belin v. Dugdale, 43 So.3d 272, 278–79 (La. Ct. App. 2010). Mutual assent is manifested by each party's agreement as to all material terms together with the mutual intention of the parties to be bound. Brasher, 374 P.3d at ¶ 21; Belin, 43 So.3d at 279; Searcy v. DDC, Inc., 201 S.W.3d 319, 322 (Tex. Ct. App. 2006). The quintessential example of this kind of transaction occurs when one party extends an offer which is followed by an acceptance from the other party or parties. Restatement (Second) of Contracts § 22 (1981). An offer is a manifestation of intent to enter into a bargain. Id. § 24; see also Singletary v. City of Slidell, 97 So.3d 1087, 1089–90 (La. Ct. App. 2012); Bush v. Johnson-Sewell Ford Lincoln Mercury, No. 03-07-0443-CV, 2008 WL 5210932, at *6 (Tex. Ct. App. Dec. 12, 2008); 1-800 Contacts, Inc. v. Weigner, 127 P.3d 1241, ¶ 2 (Utah Ct. App. 2005). The acceptance by word or deed of the offer or proposal by the offeree manifests mutual assent to all material terms in the offer, and thereby creates an enforceable contract. ECW Recoveries v. Woodward, No. 2015 CA 1915, 2016 WL 3126434, at *3 (La. Ct. App. June 3, 2016); MRC

Permian Co. v. Three Rivers Operating Co., No. 05-14-00353-CV, 2015 WL 4639711, at *7 (Tex. Aug. 5, 2015); Cal Wadsworth Constr. v. City of St. George, 898 P.2d 1372, 1376 (Utah 1995).

This framework applies to an electronic contract, such as eBay's User Agreement, which requires the offeree to manifest assent with the click of a button instead of affixing a signature to a page. Courts have held that the online clicking of a button is an acceptable way to manifest assent to the terms of an agreement. See, e.g., Hill v. Hornbeck Offshore Serv., Inc., 799 F. Supp. 2d 658, 661 (E.D. La. 2011); Recursion Software, Inc. v. Interactive Intelligence, Inc., 425 F. Supp. 2d 756, 782–83 (N.D. Texas 2006); Hugger-Mugger, LLC v. Netsuite, Inc., No. 2:04-CV-592TC, 2005 WL 2206128, at *6 (D. Utah Sept. 12, 2005).

Here, eBay manifested the intent to be bound by the terms of the March 1999 User Agreement by extending those terms to Plaintiff in the online registration form. Long Decl. ¶ 10, id., Ex. 2, 3; Mot., Ex. 4. The User Agreement thus represented an offer from eBay to create a contract with Plaintiff, and Plaintiff's clicking the "I Accept" online button constituted the necessary acceptance of eBay's offer. See ECW Recoveries, 2016 WL 3126434, at *3; Cal Wadsworth, 898 P.2d at 1376; MRC Permian, 2015 WL 4639711, at *7. As previously noted, clicking "I Accept" was a mandatory step in Plaintiff's registration for eBay. Long Decl. ¶¶ 9–10. There is no way for a prospective user to create an eBay account or to access eBay's online marketplace without clicking this button. Id. Indeed, Plaintiff does not dispute that he clicked "I Accept" when he registered for eBay and accessed its online marketplace. Compl. ¶¶ 4–6; Opp. at 2; see also Mot., Ex. 4. By doing so, Plaintiff entered into a contract with eBay, by the terms of the User Agreement.

And among the terms Plaintiff assented to was the change-in-terms provision within the March 1999 User Agreement. It provided:

> [eBay] may amend this Agreement at any time by posting the amended terms on [eBay's] site. If you wish to receive an email update for each amendment to this Agreement please click the checkbox at the bottom of this page. The amended terms shall automatically be effective 30 days after they are initially posted on our site. This Agreement may not be otherwise amended except in a writing signed by both parties.

Pl. Mot., Ex. 3 at 1. Pursuant to this provision, eBay posted on its website an amended User Agreement, effective August 21, 2012. Id., Ex. 5. Notably, this amended User Agreement included an arbitration clause and outlined the procedure for its users, including Plaintiff, to opt out of this clause within thirty days if they so choose. Id. at 7. It is undisputed that Plaintiff failed to opt out of the arbitration clause when given the opportunity to do so in 2012. Long Decl. ¶ 17. In so doing, he further manifested his assent to the terms of eBay's User Agreement and the arbitration clause therein.

Thus, Plaintiff's mere assertion that he never consented to the arbitration clause is unsubstantiated by the undisputed evidence to the contrary. Compare Opp. at 2, with Long Decl. ¶¶ 9–10, 17; see also Mot., Ex. 4. Accordingly, the undersigned recommends that this Court find that Plaintiff has failed to meet the relevant Rule 56 standard to raise a "genuine issue of any material fact" as to the formation of a contract between the parties containing an arbitration agreement. Fed. R. Civ. P. 56(a).

B. Fraudulent Inducement

Plaintiff next argues that eBay's arbitration agreement was procured by fraud and that he is therefore entitled to a "preliminary trial" as to the existence of an enforceable arbitration agreement. Opp. at 4. To avoid enforcement of a contract on the ground that the contract was

fraudulently induced, a plaintiff must show that the defendant misrepresented or omitted an essential term that induced plaintiff to enter into the contract, and that this reliance caused plaintiff to suffer an injury as a result of entering into the contract. Bohnsack v. Varco, LP, 668 F.3d 262, 277 (5th Cir. 2012) (applying Texas law); Pinero v. Jackson Hewitt Tax Serv. Inc., 594 F. Supp. 2d 710, 719 (E.D. La. 2009); TLS Group, S.A. v. NuCloud Global, Inc., Case No. 2:15-cv-00533-TC, 2016 WL 1562910, at *11 (D. Utah Apr. 18, 2016).

Here, Plaintiff does not allege any facts to support his fraudulent inducement defense beyond his own assertion that he never received a copy of eBay's User Agreement. Opp. at 2. Nor could he. As previously noted, when Plaintiff registered for eBay, the online registration form prompted him to read the terms of the User Agreement, included a hyperlink that directed Plaintiff to the terms of the User Agreement, and requested his acceptance of the terms once he read it. See Long Dec. ¶ 6, 9–10; Mot., Ex. 1 ("I have read and accepted the User Agreement . . . ."). That Plaintiff had the opportunity to review and comprehend the terms of the agreement prior to accepting the User Agreement debunks Plaintiff's claim that he was never provided a copy of the agreement. Even if Plaintiff chose not to read the terms of the User Agreement, that does not render it invalid. Maak v. IHC Health Serv., Inc., 372 P.3d 64, 74 (Utah Ct. App. 2016); Best v. Griffin, 190 So.3d 333, 336 (La. Ct. App. 2016); Venture Cotton Cooperative v. Freeman, No. 11-11-00093-CV, 2015 WL 1967251, at *8 (Tex. Ct. App. Apr. 30, 2015) ("A party is bound to the contract he signs regardless of whether he read it or believed it had different terms.").

Moreover, the comprehensive scope of eBay's User Agreement—which covers issues ranging from usage fees and a privacy policy to dispute resolution—shows that all of the essential terms of the contract were readily available for Plaintiff's perusal. See Mot., Ex. 3, 4.

The conditions of eBay's services were not in any way obscured or hidden in the agreement. Indeed, in the amended August 2012 User Agreement, eBay drew attention to its new arbitration clause by advising in a boldface font at the very beginning of the User Agreement that the amended User Agreement contained an arbitration clause which would govern dispute resolution upon acceptance of the contract. Mot., Ex. 5 at 1. Further, eBay conspicuously laid out the opt-out procedure, also in a boldface font, that Plaintiff and other future eBay users could employ so as not to be bound by the arbitration clause. Id. at 1, 7. Absent any evidence of misrepresentation or omission of a material term that induced Plaintiff to accept the User Agreement, the undersigned finds no basis whatsoever for Plaintiff's fraudulent inducement defense.

C. The Scope of the Arbitration Clause

Alternatively, Plaintiff argues conclusorily that his claims are not encompassed within the arbitration clause. Opp. at 1.[6] In particular, Plaintiff contends that "advertising and selling counterfeit merchandise" claims—which were not alleged in his Complaint—are beyond the scope of arbitration. Opp. at 3; see also Compl. ¶ 13.

As previously noted, under federal law, the existence of an arbitration clause within a contract raises the presumption of arbitrability. See U.S. Steelworkers of Am. v. Warrior & Gulf, 363 U.S. 574, 582–83 (1960). Any doubt as to the arbitrability of a claim should be resolved in favor of arbitration. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983). This presumption is even more pronounced when the arbitration clause is broad. In that case, "only the most forceful evidence of a purpose to exclude the claim from

[6] Plaintiff invokes section 4 of the FAA to argue that his claims are beyond the scope of eBay's arbitration clause. This reliance is misplaced. Section 4 does not address the scope of agreements to arbitrate, but rather establishes that a summary trial is required when "the making of the arbitration agreement or the failure, neglect, or refusal to perform the same [are] in issue." See 9 U.S.C. § 4.

arbitration can prevail." AT&T Techs., Inc. v. Commc'n Workers of Am., 475 U.S. 643, 654 (1986). In Communications Workers of America, the Supreme Court enforced a contract clause that provided for arbitration of "any difference arising with respect to the interpretation of this contract or the performance of any obligation [t]hereunder" on account of its considerable breadth. Id.

So too here. The arbitration clause at issue is extremely broad, covering "any and all disputes or claims that have arisen or may arise between [Plaintiff] and eBay." Mot., Ex. 7. The arbitration clause provides:

> You and eBay each agree that any and all disputes or claims that have arisen or may arise between you and eBay shall be resolved exclusively through final and binding arbitration, rather than in court, except that you may assert claims in small claims court, if your claims qualify. The Federal Arbitration Act governs the interpretation and enforcement of this Agreement to Arbitrate.

Id., Ex. 5 at 6. With the exception that Plaintiff may raise qualifying claims before a small claims court—an exception inapplicable in this case—that arbitration agreement unequivocally directs all disputes to an arbitral forum with no limiting language. Id.; see also Compl. ¶ 11. Plaintiff's Complaint alleges thirteen counts, all arising from eBay's alleged failure to perform under a contract between Plaintiff and eBay with respect to Plaintiff's purchase of a watch through eBay's services. Compl. ¶¶ 4–7. These claims fall squarely within the scope the broad agreement at issue.[7]

That Plaintiff raises fraud, collusion, and breach of contract claims in his Complaint is of no moment. As courts have previously held, these claims are also encompassed within the scope

[7] Indeed, as Defendant correctly observes, the language of the arbitration provision in eBay's User Agreement "represents the prototypical broad arbitration provision" that is enforced by courts. Mot. at 7 (citing Olroyed v. Elmira Sav. Bank, FSB, 134 F.3d 72, 76 (2d Cir. 1998)); see, e.g., Osornia v. AmeriMex Motor & Controls, Inc., 367 S.W.3d 707, 712 (Tex. Ct. App. 2012); Nuterra Healthcare Mgmt, LLC v. Parry, 835 F. Supp. 2d 1156, 1160 (D. Utah 2011); Saavedra v. Dealmaker Developments LLC, 8 So.3d 758, 764–65 (La. Ct. App. 2009).

of an arbitration agreement, especially one that has been painted with such broad strokes. See, e.g., BBVA Compass Inv. Sols., Inc. v. Brooks, 456 S.W.3d 711, 720 (Tex. Ct. App. 2015) (finding that arbitration clause encompassed claim for breach of contract); Graham-Rutledge & Co. Ins. Co., No. 02-12-00196, 2013 WL 1830349, at *4 (Tex. Ct. App. 2009) (compelling arbitration of plaintiff's fraud claims based on an arbitration clause covering "[a]ny controversy or claim relating to this contract"); Saavedra, 8 So.3d at 764–65 (rejecting plaintiff's argument that the alleged fraud claim was beyond the scope of the arbitration provision where plaintiff had entered into a contract with a broad arbitration provision); Central Fl. Investments, Inc. v. Parkwest Assoc., 40 P.3d 599, 606–07 (Utah 2002) (rejecting plaintiff's claim that a breach of contract claim is not arbitrable). As such, the arbitration clause in the User Agreement is clearly "susceptible of an interpretation that [it] covers the asserted dispute." Commc'n Workers of Am., 475 U.S. at 650.

Plaintiff further contends that eBay's arbitration agreement is "moot" because eBay is the "agent" for the sellers who use its website. Opp. at 9–10. In essence, Plaintiff argues that eBay is the functional equivalent of one of these sellers. Id. Because the arbitration clause does not govern disputes between buyers and sellers, he asserts, it does not govern the instant matter. Id. This argument is not persuasive. First, as eBay correctly notes, this argument goes to the merits of the claims alleged in the Complaint, not to the scope of the arbitration clause. Second, it ignores the arbitration clause's plain language, which clearly states that it applies, without limitation, to disputes between "you and eBay." Long Decl., Ex. 7. For all these reasons, the undersigned recommends that the Court find that each of Plaintiff's claims is covered by eBay's arbitration clause.

D. Enforceability

Finally, Plaintiff argues that any agreement to arbitrate between himself and eBay is unconscionable and therefore unenforceable.[8] Opp. at 4. A court can invalidate a contract as unconscionable if the party seeking to avoid the contract proves that the contract was both procedurally and substantively unconscionable. Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 402 (Utah 1998); Ski River Development, Inc. v. McCalla, 167 S.W.3d 121, 138 (Tex. 2005); Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 168 (5th Cir. 2004) ("In order to be invalidated [under Louisiana law], a provision must possess features of both adhesionary formation and unduly harsh substance."). Here, Plaintiff invokes the procedural unconscionability doctrine, arguing that eBay's User Agreement, and the arbitration clause therein, were not bargained for, Opp. at 1; and eBay's User Agreement and arbitration clause appear in "exceedingly small print," id. at 7. He also argues that the arbitration clause is substantively unconscionable because the change-in-terms provision renders the User Agreement an "illusory promise," id. at 7; and the arbitration clause's prohibition on class relief is "fundamentally unfair[]," id. at 8. For the reasons set forth below, the undersigned concludes that the arbitration agreement in eBay's User Agreement is neither procedurally nor substantively unconscionable. Accordingly, this Court should find that arbitration agreement enforceable.

1. eBay's Arbitration Clause is Not Procedurally Unconscionable

A contract is procedurally unconscionable if a party lacked meaningful choice as to whether to enter the agreement. In re Olshan Foundation Repair Co. LLC, 328 S.W.3d 883, 892

[8] In his brief, Plaintiff does not label his arguments as pertaining to either substantive or procedural unconscionability. See generally Opp. For the sake of efficiency and clarity, the undersigned has identified under which doctrine each argument should be analyzed.

(Tex. 2010); The Cantamar, LLC v. Champagne, 142 P.3d 140, 152 (Utah Ct. App. 2006); Andry v. New Orleans Saints, 820 So.2d 602, 603–04 (La. Ct. App. 2002). A court determines whether meaningful choice was present by considering all the circumstances surrounding the transaction. BBVA, 456 S.W.3d at 724; Andry, 820 So.2d at 603–04; Jones v. Johnson, 761 P.2d 27, 39 (Utah Ct. App. 1988). Specifically, the court must determine whether "there was overreaching by a contracting party occupying an unfairly superior bargaining position." Ryan, 972 P.2d at 403; see also Lafleur v. Law Offices of Anthony G. Buzbee, P.C., 960 So.2d 105, 111–12 (La. Ct. App. 2007); ReadyOne Industries, Inc. v. Casillas, 487 S.W.3d 254, 262 (Tex. Ct. App. 2015). Factors for the court to consider include, among other things, whether each party had a "reasonable opportunity to understand the terms and conditions of the agreement," whether each party had a "meaningful choice" as opposed to being coerced into accepting the agreement, and whether a "stronger party employed deceptive practices" to induce the weaker party into accepting the agreement. Sosa v. Paulos, 924 P.2d 357, 362 (Utah 1996); see also Lafleur, 960 So.2d at 112; Casillas, 487 S.W.3d at 262. Here, Plaintiff argues that the arbitration clause is procedurally unconscionable because eBay's User Agreement and arbitration clause were not bargained for and the User Agreement and arbitration clause appear in "exceedingly small print." Opp. at 1, 7. The undersigned finds both arguments unavailing.

Granted, Plaintiff did not bargain for the terms of the User Agreement in a traditional sense, but the mere fact that an offer was extended on a take-it-or-leave-it basis, i.e., a "contract of adhesion," does not automatically render any resulting contract procedurally unconscionable. See Adams v. Merrill Lynch, Pierce, Fenner & Smith, 888 F.2d 696, 700 (10th Cir. 1989); In re Advance, 172 S.W.3d 603, 608 (Tex. 2005); Andry, 820 So.2d at 604–05. Indeed, eBay's User Agreement and arbitration clause are not unlike other adhesive consumer and business contracts,

which courts have long upheld even though they typically are not consummated following negotiations. See, e.g., Andry, 820 So.2d at 603 (noting that "in modern business practice large companies dealing with numerous customers of necessity use [adhesion] contracts."); In re Advance, 172 S.W.3d at 608; see also Concepcion, 563 U.S. at 346–347 ("[T]he times in which consumer contracts were anything other than adhesive is long past."). What's more, state law prohibiting the enforcement of such a contract of adhesion would be preempted by the FAA insofar as it "stand[s] as an obstacle to the accomplishment" of the enforcement of private arbitration agreements under federal law. Concepcion, 563 U.S. at 250. Even if such state law is generally applicable, it has a disproportionate effect on arbitration and is thus preempted by the FAA. Id.

Moreover, before clicking "I Accept" to the terms of the User Agreement, Plaintiff had the real choice to "walk away" and obtain the same services that eBay provides elsewhere. While eBay's online marketplace may offer users certain unique features, the core service users obtain from eBay—the ability to offer, buy, and sell goods online—is available from other electronic commerce companies. The Court does not find that the nature of eBay's online marketplace, which is structured in an auction format, sufficiently distinguishes eBay such that its service cannot be obtained elsewhere. The availability of this service elsewhere undermines Plaintiff's argument that he lacked any meaningful choice as to whether to enter an agreement with eBay. See, e.g., Stadtlander v. Ryan's Family Steakhouses, Inc., 794 So.2d 881, 890 (La. Ct. App. 2001) (rejecting plaintiff's contention that the employment adhesion contract with an arbitration clause was invalid in part because plaintiff "could have avoided the arbitration agreement had she objected to it by simply choosing to work elsewhere"); see also McCalla, 167 S.W.3d at 136; Sosa, 924 P.2d at 360–61. Moreover, while Plaintiff did not have the ability to

negotiate all of the terms of the User Agreement prior to acceptance, eBay gave him the option of rejecting the arbitration clause by submitting an opt-out notification within thirty days of receiving notice of the addition of the clause. See Long Decl. ¶¶ 16–17. Plaintiff failed to do so. Id. ¶ 17.

The record also does not support Plaintiff's contention that eBay's User Agreement and arbitration clause appeared in fine print so as to render them unconscionable. The June 15, 2015, User Agreement, operative during the events alleged in Plaintiff's Complaint, contains text in a standard size, font, and layout that is neither illegible nor difficult to read. See Long Decl., Ex. 7. Moreover, the arbitration clause within the agreement is in no sense hidden within a "maze of fine print." Resource Mgmt. Co. v. Weston Ranch & Livestock Co., Inc., 706 P.2d 1028, 1042 (Utah 1985); see also Security Serv. Fed. Credit Union v. Sanders, 264 S.W.3d 292, 301–02 (Tex. Ct. App. 2008); Sutton Steel & Supply, Inc. v. BellSouth Mobility, Inc., 971 So.2d 1257, 1266 (La. Ct. App. 2007). On the contrary, the third paragraph of the User Agreement explicitly warns readers in boldface text that the agreement contains an arbitration clause. See Long Decl., Ex. 7. The arbitration clause itself is presented in a stand-alone section entitled "Agreement to Arbitrate." Id. The presence of a warning and the conspicuousness of the arbitration clause do not evince the tangle of fine print that would obscure the clause and give rise to a finding of procedural unconscionability. See, e.g., Sanders, 264 S.W.3d at 301–02 (overruling the trial court's finding that an arbitration agreement is buried in fine print and therefore procedurally unconscionable based on the court's observation that the agreement appears in the same font size as the other terms and conditions and appears under its own separate heading entitled "ARBITRATION").

Thus, for the foregoing reasons, Plaintiff did not lack a meaningful choice as to whether to enter into eBay's User Agreement and the arbitration agreement within it. The undersigned recommends that the Court conclude that neither the User Agreement nor the arbitration clause are procedurally unconscionable.

2. eBay's Arbitration Clause is Not Substantively Unconscionable

Plaintiff also attacks eBay's arbitration clause as substantively unconscionable, arguing that the terms are manifestly unfair because they are only favorable to one party. See Iberia Credit Bureau, 379 F.3d at 158; Ryan, 972 P.2d at 402; In re FirstMerit Bank, N.A., 52 S.W.3d 749, 757 (Tex. 2001). Specifically, Plaintiff contends that the terms of the arbitration clause are "unduly burdensome and harsh," Opp. at 7–8; that the change-in-terms provision renders the User Agreement and its terms an "illusory promise," id. at 7; and that the arbitration clause's prohibition on class relief is "fundamentally unfair[]," id. at 8. In order to find a contract substantively unconscionable, a court must conclude that the terms of the contract are "one-sided or oppressive." Bartley v. Nat'l Union Fire Ins. Co. of Pittsburg, Pa., 824 F. Supp. 624, 635 (N.D. Tex. 1992) (internal quotations omitted); see also Iberia Credit Bureau, 379 F.3d at 158; Ryan, 972 P.2d at 402. The undersigned analyzes Plaintiff's arguments below, finding each of them to be meritless.

a. Change-in-Terms Provision

Plaintiff avers that the change-in-terms provision in the User Agreement, which allows eBay to unilaterally modify its terms, is unconscionable and renders the agreement and its terms an "illusory promise." Opp. at 5. A contract is illusory when it "imposes no performance obligations on the promisor and affords no consideration to the promisee." Flood v. ClearOne Comm'ns, Inc., 618 F.3d 1110, 1118–19 (10th Cir. 2010) (applying Utah law); see also J.M.

Davidson, Inc. v. Webster, 128 S.W.3d 223, 227 (Tex. 2007); Williams v. USAgencies Cas. Ins. Co., 140 So.3d 895, 901 (La. Ct. App. 2014). In the context of a challenge to an arbitration clause, "[m]utual agreement to arbitrate claims provides sufficient consideration to support an arbitration agreement." Webster, 128 S.W.3d at 227; see also Deer Crest Assoc. I, LC v. Silver Creek Devp't Grp., LLC, 222 P.3d 1184, 1187 (Utah Ct. App. 2009); Broussard v. First Tower Loan, LLC, 150 F. Supp. 3d 709, 723–24 (E.D. La. 2015). Thus, the key inquiry is whether, under the terms of the agreement, the defendant's performance of the agreement is optional, in which case the promise is illusory. In re 24R, Inc., 324 S.W.3d 564, 566–67 (Tex. 2010); Williams, 140 So.3d at 901; De Hart v. Stevens-Henager College, Inc., No. 105CV00118PGC, 2005 WL 3277777, at *2 (D. Utah Dec. 2, 2005). Notwithstanding a defendant's ability to unilaterally modify the terms of the agreement, when the agreement's terms preclude a defendant from retroactively imposing its changes to pre-existing claims, courts have found that a defendant's performance was not optional and consideration not illusory. In re Halliburton Co., 80 S.W.3d 566, 570 (Tex. 2002) (finding non-illusory an arbitration agreement that prevents the promisor from retroactively applying amendments to the agreement while also requiring the promisor to provide at least ten days' notice of any such amendment); Peckham v. Gem State Mut. Of Utah, No. CIV-88-1513-T, 1989 WL 296728, at *6–7 (W.D. Okla. Aug. 2, 1989) (applying Utah law); see also Hardin v. First Cash Fin. Servs., Inc., 465 F.3d 470, 478–79 (10th Cir. 2006).

Here, Defendant's ability to unilaterally modify the User Agreement is not unbridled due to safeguards incorporated into it. For one thing, the agreement requires that eBay provide "30 days' notice by posting the amended terms" to eBay's website—comparable to the notice provided in arbitration agreements upheld by other courts. Long Decl., Ex. 7; see, e.g., Iberia

Credit Bureau, 379 F.3d at 173–74 (finding under Louisiana law that the arbitration clause that included a change-in-terms provision was not unconscionable because the promisor could only change the terms "upon notice"); Hardin, 465 F.3d at 477 (upholding arbitration agreement that required at least ten days' notice of any amendments); Nabors Drilling USA, LP v. Pena, 385 S.W.3d 103, 109 (Tex. Ct. App. 2012) (same); Wynne v. Am. Exp. Co., Civil Action No. 2:-0-cv-00260-tjw, 2010 WL 3860362, at *5 (E.D. Tex. Sep. 30, 2010) (rejecting as "clearly contrary to Utah law" plaintiff's contention that a unilateral change-in-terms provision renders an arbitration agreement invalid). Moreover, the arbitration clause within the User Agreement provides that amendments to the arbitration agreement will not be applied retroactively. Long Decl., Ex. 7 ("[Y]ou and [eBay] agree that if [eBay] make[s] any amendment to this Agreement to Arbitrate . . . in the future, that amendment shall not apply to any claim that was filed in a legal proceeding against eBay prior to the effective date of the amendment."). Under these facts, where eBay is required by the User Agreement and arbitration clause to provide one month prior notice of amendments and is not permitted to retroactively apply such amendments, eBay's performance of the User Agreement is not optional. Accordingly, this Court should find that eBay's User Agreement and arbitration clause, notwithstanding the change-in-terms provision, do not constitute an illusory promise.

b. Class Action Waiver

Plaintiff argues, much like the plaintiffs in Concepcion, that the arbitration agreement is unconscionable under Louisiana law "because it disallow[s] classwide procedures." 563 U.S. at 352; see also Opp. at 8. The essence of Plaintiff's argument is that eBay's class-wide relief waiver in the arbitration clause is unconscionable because it removes the consumer's ability to

pursue legal remedies in disputes with large companies such as eBay. Opp. at 8–9.[9] The Supreme Court's holding in Concepcion specifically forecloses this argument. 563 U.S. at 351.

In Concepcion, the Supreme Court considered a state-law rule that invalidated an arbitration agreement in a consumer services contract as unconscionable because the agreement included a class action waiver. Id. at 338. Although section 2 of the FAA preserves generally applicable contract defenses such as unconscionability, the Court held that section not to permit such doctrines to be invoked in a manner that frustrates arbitration. Id. at 343. Because the state-law rule requiring class arbitration would effectively circumvent the FAA's goals of a more efficient, expedient, and procedurally informal dispute resolution process, the Court concluded that the state law impinged on the FAA and was therefore preempted. Id. at 349–50 ("[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."). Further, the Court expressly rejected the notion that the thrust of the FAA can be circumvented to prosecute low-value claims or to ensure that a corporate defendant is not shielded from liability. See id. at 351 ("The dissent claims that class proceedings are necessary to prosecute small dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for other reasons."); see also Am. Exp. Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2312 (2013).

[9] To the extent that Plaintiff argues that the arbitration clause is substantively unconscionable because of the "fundamental unfairness" of its prohibition on class-wide relief, Opp. at 8, the Supreme Court has already established that "generalized attacks on arbitration that rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants" are not colorable claims. Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 89–90 (2000).

Similar to the class arbitration waiver in Concepcion, eBay's prohibition on class-wide relief requires eBay and its users to bring claims against eBay on an individual basis and not as a plaintiff or class member in any purported class or representative action. Long Decl., Ex. 7; Concepcion, 563 U.S. at 337–38. Plaintiff's invocation of state law that deems unconscionable an arbitration agreement that includes a class action waiver "stands as an obstacle to the accomplishment of the FAA's objectives" to "facilitate informal, streamlined proceedings." See id. at 343, 345.[10] Thus, in a straightforward application of Concepcion, and consistent with the federal principle that courts must "rigorously enforce" arbitration agreements according to their terms, this Court should find that, to the extent that this state law invalidates a class action waiver, it is preempted by the FAA. See Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985).

CONCLUSION

For the foregoing reasons, the undersigned recommends that the Court grant Defendant's motion to compel arbitration and stay litigation [Dkt. 6].

* * * * *

[10] Moreover, Plaintiff's argument is premised on a misreading of state law. See O'Quin v. Verizon Wireless, 256 F. Supp. 2d 512, 520 (M.D. La. 2003) (finding that an arbitration agreement that precludes class action claims is not unconscionable under Louisiana law, as Louisiana's Unfair Trade Practices Act itself precludes such claims).

The parties are hereby advised that failure to timely file objections to the findings and recommendations set forth in this report may waive the right of appeal from an order of the District Court adopting such findings and recommendations. See Thomas v. Arn, 474 U.S. 140 (1985).

Date: September 29, 2016

G. MICHAEL HARVEY
UNITED STATES MAGISTRATE JUDGE