

United States District Court  
Northern District of California

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

COURTNEY SILVERMAN,  
Plaintiff,  
v.  
MOVE INC, et al.,  
Defendants.

Case No. [18-cv-05919-BLF](#)

**ORDER GRANTING WITHOUT  
LEAVE TO AMEND NATIONAL  
ASSOCIATION OF REALTORS’  
MOTION TO DISMISS FOR LACK OF  
PERSONAL JURISDICTION;  
GRANTING MOVE, INC’S AMENDED  
MOTION TO COMPEL  
ARBITRATION; STAYING ACTION  
AND VACATING CASE  
MANAGEMENT CONFERENCE**

[Re: ECF 25, 37]

Before the Court are two motions: (1) Defendant National Association of Realtors’ (“NAR”) Motion to Dismiss for Lack of Personal Jurisdiction and Failure to State a Claim (MTD, ECF 25); and (2) Defendant Move, Inc.’s (“Move”) Amended Motion to Compel Arbitration and to Dismiss, or in the Alternative, to Stay, the Case (MTC, ECF 37). For the reasons discussed below, NAR’s motion to dismiss is GRANTED WITHOUT LEAVE TO AMEND, and Move’s motion to compel arbitration is GRANTED. The case is STAYED pending arbitration, and the initial case management conference set for July 18, 2019 is VACATED.

**I. BACKGROUND**

In this putative class action, Plaintiff Courtney Silverman alleges a single cause of action against Defendants NAR and Move for advertising text messages that violated the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227. See First Am. Compl. (“FAC”) ¶¶ 78–84, ECF 56. Plaintiff, a citizen and resident of Florida, is a licensed real estate sales associate and a member of NAR. FAC ¶ 8. NAR, an Illinois corporation, owns and promotes the domain

1 realtor.com, which NAR describes as its official website. FAC ¶¶ 2, 12. Realtor.com has its  
2 headquarters in California. FAC ¶ 14. Realtor.com is the promotional hub for NAR and its  
3 members, which allows realtors to market homes to consumers and allows realtors to develop  
4 leads on consumers' behalves. FAC ¶¶ 15, 29–32, 45. NAR provides numerous resources,  
5 services, and benefits for its members through Realtor.com. FAC ¶¶ 33–34.

6 Move, a California corporation, operates the website for NAR under a licensing agreement.  
7 FAC ¶¶ 3, 11, 20. In 1996, NAR and Move entered into a “strategic partnership” via a perpetual  
8 marketing agreement and trademark license through which Move operates Realtor.com. FAC ¶  
9 22. This agreement is governed by California law. FAC ¶ 23. Through this agreement, NAR  
10 engaged Move to promote Realtor.com and its services to real estate professionals, which includes  
11 the text messages at issue in this action. FAC ¶ 24. While Move operates Realtor.com, ultimately  
12 NAR has control over the site and final approval over the site's advertising and branding. FAC ¶¶  
13 36, 46. Move has stated in its SEC filings that NAR has “significant influence” over its corporate  
14 governance, including that the two companies share confidential information, officers, board  
15 members, logos, and approve some of each other's mergers and directors. FAC ¶ 35.

16 Move and NAR, jointly and as agents of one another, allegedly sent unsolicited advertising  
17 text messages to real estate professionals, including Plaintiff and the putative class, who were  
18 members of NAR, in order to promote Realtor.com and its services. FAC ¶¶ 4–6, 19, 25, 44, 48,  
19 49, 54. Defendants had previously obtained the cellphone numbers of Plaintiff and the class and  
20 “purportedly their consents” to receive emails from Realtor.com. FAC ¶¶ 49–51. This agreement  
21 also allowed members to opt out or unsubscribe from such messages. FAC ¶ 55. Pursuant to the  
22 agreement, Plaintiff and the class members unsubscribed, but Defendants continued to send the  
23 text messages. FAC ¶¶ 56–62.

24 Based on Defendants' actions, Plaintiff filed her Complaint here on September 26, 2018,  
25 asserting a single TCPA claim. *See* ECF 1. She brings this claim on behalf of a nationwide class  
26 of individuals defined as, “[w]ithin the applicable statute of limitations, all persons in the United  
27 States to which and to whom Defendants sent or caused to be sent a text message stating  
28 ‘realtor.com’ using an ATDS after receiving the reply text message: ‘Stop.’” FAC ¶ 70. Excluded

1 from the class are those who entered into arbitration agreements with Move that had not yet  
2 expired. FAC ¶ 71.

3 On December 10, 2018, NAR filed its motion to dismiss for lack of personal jurisdiction  
4 and failure to state a claim. ECF 25. Plaintiff never opposed this motion. On the same day, Move  
5 filed a motion to compel arbitration. ECF 27. On December 20, 2018, the Court granted the  
6 parties' stipulation to extend Plaintiff's deadline to oppose the motions to January 23, 2019. ECF  
7 31. On January 23, 2019, Move filed an amended motion to compel arbitration, which is at issue  
8 here. ECF 37. On January 28, 2019, without moving for leave of Court or obtaining a stipulation  
9 from Defendants, Plaintiff filed an amended complaint. ECF 41. On March 6, 2019, the Court  
10 granted Defendants' motion to strike Plaintiff's amended complaint. ECF 50. On March 7, 2019,  
11 Plaintiff moved for leave to amend her complaint (ECF 51), which Defendants opposed. On  
12 March 22, 2019, Plaintiff opposed Move's amended motion to compel arbitration. ECF 53.

13 On April 2, 2019, the Court granted Plaintiff's motion for leave to amend and converted  
14 the two pending motions pertaining to the Complaint into motions pertaining to the First Amended  
15 Complaint ("FAC"). ECF 55. Because Move had not yet filed its reply in support of its motion to  
16 compel, the Court directed Move to address the FAC in its reply and gave Plaintiff the opportunity  
17 to file a sur-reply. *Id.* Because Plaintiff never opposed NAR's motion to dismiss, the Court gave  
18 NAR the opportunity to file a supplemental brief in support of its motion to dismiss and declined  
19 to give Plaintiff the opportunity to respond to this supplemental brief. *Id.* To resolve NAR's  
20 motion, the Court will consider arguments Plaintiff made in her motion for leave to amend as they  
21 relate to NAR's motion to dismiss. *See* MLTA, ECF 51. On May 23, 2019, the Court held a  
22 hearing on the motions. ECF 62.

## 23 **II. MOTION TO DISMISS**

24 NAR moves to dismiss Plaintiff's claim because this Court does not have personal  
25 jurisdiction over NAR and because Plaintiff fails to state a claim against NAR. *See generally*  
26 MTD. Because the Court agrees that it does not have personal jurisdiction over NAR, it does not  
27 address NAR's Rule 12(b)(6) arguments.  
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**A. Legal Standard**

Federal Rule of Civil Procedure 12(b)(2) authorizes a defendant to seek dismissal of an action for lack of personal jurisdiction. Fed. R. Civ. P. 12(b)(2). “Where, as here, the defendant’s motion is based on written materials rather than an evidentiary hearing, the plaintiff need only make a prima facie showing of jurisdictional facts to withstand the motion to dismiss.” *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1068 (9th Cir. 2015) (internal quotation marks and citation omitted). Uncontroverted allegations in the complaint are taken as true, *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004), and factual disputes contained within declarations or affidavits are resolved in the plaintiff’s favor, *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008).

Under Federal Rule of Civil Procedure 4(k)(1)(A), this Court has personal jurisdiction if the defendant would be “subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located,” *i.e.*, California. Because California’s long-arm statute is coextensive with federal due process requirements, the Court may exercise personal jurisdiction so long as it comports with due process. *See Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011). “[D]ue process requires that the defendant ‘have certain minimum contacts’ with the forum state ‘such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”’” *Ranza*, 793 F.3d at 1068 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

**B. Discussion**

The Court first discusses additional relevant facts and then the parties’ arguments here.

**1. Additional Facts**

As discussed, Plaintiff is a citizen and resident of Florida and a member of NAR. FAC ¶ 8. NAR is an Illinois corporation. FAC ¶¶ 2, 12. NAR’s website shows that its home office is in Chicago, IL. McGrath Decl., Ex. 1, ECF 25-1. Realtor.com has its headquarters in California. FAC ¶ 14. NAR provides numerous resources, services, and benefits for its members nationwide through Realtor.com. FAC ¶¶ 33–34.

NAR allegedly “transacts substantial business in, and has maintained continuous and

1 systematic contacts in and with, California generally and specifically relating to marketing its  
2 official moniker, website, REALTOR marketing hub, and brand, ‘Realtor.com’ in and from  
3 California, from which the text messages at issue were sent.” FAC ¶ 12. This business includes  
4 NAR’s “strategic partnership” with Move, starting with the 1996 perpetual marketing agreement  
5 (“1996 Agreement”) that sets forth the relationship between the parties. FAC ¶ 22; McGrath  
6 Decl., Ex. 2 (“Agreement”).<sup>1</sup> The 1996 Agreement discusses the terms of how Move will operate  
7 Realtor.com and sets forth the relationship of the parties:

8 This agreement is not intended to create, and shall not be deemed or treated as  
9 creating, a partnership, joint venture, employment contract or any other relationship  
10 between the parties other than the service relationship expressly provided for in this  
11 Agreement. All commitments, obligations, undertakings and liabilities associated  
12 with the [operation of Realtor.com] shall be entered in the name of, and shall be the  
sole responsibility of, [Move]<sup>2</sup>, and neither party shall be authorized to enter into any  
commitment, obligation, undertaking or liabilities in the name of, or on behalf of, the  
other party.

13 Agreement ¶ 3.4.

14 The 1996 Agreement also makes Move responsible for carrying out Realtor.com’s  
15 marketing program:

16 [Move] shall be responsible for developing and implementing a program to identify  
17 Authorized Advertisers for the System and to solicit advertisements from such  
Persons; and [Move] shall be responsible for carrying out such program. [Move]  
18 shall be responsible for the costs of soliciting such advertising, setting such  
advertisements up on the System in compliance with the requirements set forth in  
19 Section 5.7, and collecting revenues associated therewith . . . . No Advertising shall  
20 indicate that a product or service is endorsed or sponsored by NAR or RIN unless  
the advertiser has been authorized to do so by NAR or RIN, as the case may be.

21 *Id.* ¶¶ 5.7(b) and (c).

22 The 1996 Agreement states that California law governs it and that the venue for disputes  
23 under it shall be California. *Id.* Sched H, ¶ 12; FAC ¶ 23. The 1996 Agreement also provides that  
24 NAR has ultimate authority to approve the advertising plan; that NAR may audit the marketing  
25 process; that Move must open its records to NAR; that Move must prepare a business plan related

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27 <sup>1</sup> The Court takes judicial notice of this document because it is incorporated by reference in the  
FAC. See FAC ¶ 22; *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other*  
28 *grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002)

<sup>2</sup> Through its subsidiary, RealSelect, Inc. See McGrath Decl., Ex. 3.

1 to its efforts on NAR’s behalf; and other related oversight provisions. FAC ¶ 36 (citing 1996  
2 Agreement).

3 Apart from Realtor.com, NAR has other significant ties to California. “NAR and its  
4 constituent board and state associations form a composite organization of brokers and salespeople,  
5 including, as of November 2018, approximately 200,000 NAR members in California, which is  
6 the state with the most NAR members in the United States.” FAC ¶ 17. Certain California real  
7 estate associations were founding members of NAR many decades ago. FAC ¶ 16. NAR is  
8 registered with the California Secretary of State; has bylaws and a constitution adopted in  
9 California; has marketing agreements with various California entities, including Move and  
10 Realtor.com; sets operational standards for California Realtor associations; regularly conducts  
11 business in California, including through its approximately 200,000 California members; holds  
12 regular meetings and events in California; has had several presidents and officers who hail from  
13 California; and maintains a regional vice president in California. FAC ¶ 18.

## 14 **2. Discussion**

15 Plaintiff argues that the Court has general personal jurisdiction over NAR; she does not  
16 argue that the Court has specific jurisdiction over NAR. *See generally* MLTA. The Court first  
17 discusses general jurisdiction law and then analyzes the facts here.

### 18 *a. General Jurisdiction Law*

19 The Supreme Court has recognized two types of personal jurisdiction: (1) general (or all-  
20 purpose) jurisdiction and (2) specific (or case-specific) jurisdiction. *See Goodyear Dunlop Tires*  
21 *Operations, S.A. v. Brown*, 564 U.S. 915, 927 (2011). General jurisdiction is based on certain  
22 limited affiliations that the defendant has with the forum state. *Id.* at 919. A court may exercise  
23 general jurisdiction only when the defendant’s “affiliations with the State are so ‘continuous and  
24 systematic’ as to render [the defendant] essentially at home in the forum State.” *Daimler AG v.*  
25 *Bauman*, 134 S. Ct. 746, 754 (2014) (quoting *Goodyear*, 564 U.S. at 919). In the paradigmatic  
26 circumstance for exercising general jurisdiction, a corporate defendant is incorporated or has its  
27 principal place of business in the forum state. *Id.* at 760.

28 The Ninth Circuit recently articulated the general jurisdiction standard in *Williams v.*

1 *Yamaha Motor Co.*, 851 F.3d 1015 (9th Cir. 2017). First, it described in detail the Supreme  
2 Court’s 2014 ruling in *Daimler*, in which the Supreme Court held that Daimler, a German public  
3 stock company, was not “at home” in California based on the activities of its subsidiary in  
4 California. The Ninth Circuit summarized *Daimler* as follows:

5 In [*Daimler*], the Supreme Court considered for the first time “whether a foreign  
6 corporation may be subjected to a court’s general jurisdiction based on the contacts  
7 of its in-state subsidiary.” The plaintiffs sought to sue Daimler, a German  
8 corporation, in California on the basis that Daimler’s subsidiary’s contacts could be  
9 attributed to Daimler under an agency theory, thereby establishing Daimler’s  
10 “continuous and systematic” presence within California. Daimler’s subsidiary,  
11 MBUSA, served as Daimler’s exclusive U.S. importer and distributor and had  
12 multiple California facilities. We found general jurisdiction over Daimler under an  
13 agency theory, applying a test that asked whether MBUSA’s services were  
14 “sufficiently important to the foreign corporation that if it did not have a  
15 representative to perform them, the corporation’s own officials would undertake to  
16 perform substantially similar services.” [Citing 9th Circuit *Daimler* decision].

17 The Supreme Court reversed our finding of general jurisdiction, emphasizing that the  
18 test for general jurisdiction asks whether a corporation is essentially “at home” in the  
19 forum state. The Supreme Court assumed that MBUSA could be considered “at  
20 home” in California, and that its in-state contacts could be attributed to Daimler, but  
21 it rejected a theory that would permit “the exercise of general jurisdiction in every  
22 State in which a corporation ‘engages in a substantial, continuous, and systematic  
23 course of business.’” In so doing, the Court noted that while general jurisdiction is  
24 not strictly limited to a corporation’s place of incorporation or principal place of  
25 business, those exemplars illustrate the need for predictability in jurisdiction and  
26 “afford plaintiffs recourse to at least one clear and certain forum in which a corporate  
27 defendant may be sued on any and all claims.”

28 *Williams*, 851 F.3d at 1020–21 (citations omitted) (quoting *Daimler*).

The Ninth Circuit then described its more recent case law, in which it recognized that  
*Daimler* had “invalidated our previous ‘agency’ test,” but had “left intact” the alternative ‘alter ego  
test for “imputed” general jurisdiction.’” *Id.* at 1021 (quoting *Ranza*, 793 F.3d 1059). It then set  
forth the alter ego test, first noting that the “parent-subsidiary relationship does not on its own  
establish” that two entities are alter egos. *See id.* Instead, to prove alter ego, “a plaintiff must  
make out a prima facie case (1) that there is such unity of interest and ownership that the separate  
personalities of the two entities no longer exist and (2) that failure to disregard their separate  
identities would result in fraud or injustice.” *Id.* (quoting *Ranza*, 793 F.3d at 1073).

Finally, the *Williams* court noted that when talking about a corporation’s sales or activity



1 in a forum state, “the general jurisdiction inquiry examines a corporation’s activities worldwide—  
2 not just the extent of its contacts in the forum state—to determine where it can be rightly  
3 considered at home.” *Id.* at 1021–22 (quoting *Ranza*, 793 F.3d at 1073). Because the defendant in  
4 *Williams* had offices all over the world and made sales all across North America, the *Williams*  
5 court held that the plaintiffs had not show the defendant was at home in California. *See id.*  
6 Similarly, the plaintiffs had failed to plead facts sufficient to satisfy the alter-ego test. *Id.*

7 *b. Analysis*

8 As in *Williams*, Plaintiff has failed to plead or submit facts sufficient to show that NAR is  
9 at home in California. First, NAR is neither incorporated nor has its principal place of business in  
10 California. FAC ¶¶ 2, 12; McGrath Decl., Ex. 1. So Plaintiff must show that this is the  
11 “exceptional case” in which a corporate defendant’s contacts with a state in which it is not  
12 incorporated and does not have its headquarters are so “continuous and systematic” as to render  
13 the state the “one clear and certain forum in which a corporate defendant may be sued on any and  
14 all claims.” *Daimler*, 571 U.S. at 137, 139 n.19. Plaintiff does not satisfy this exacting standard.

15 NAR’s contacts with California can fairly be grouped into two categories: (1) its contacts  
16 with Move/Realtor.com; and (2) its contacts with its members and other business operations in  
17 California. Neither category, either independently or combined, is sufficiently continuous and  
18 systematic as to render NAR at home in California.

19 As to Move and Realtor.com, Plaintiff has not demonstrated that Realtor.com is such a  
20 substantial portion of NAR’s business as to render NAR at home in California. Though  
21 Realtor.com is headquartered in California, through the site NAR provides services to its members  
22 throughout the country. FAC ¶¶ 33–34. Moreover, NAR provides additional services to its  
23 members that do not rely on the site itself or on Move’s operations of the site. *See* FAC ¶ 18.  
24 Though some or even a substantial portion of these operations involve its California members or  
25 California associations, Plaintiff has not distinguished those activities from activities that NAR  
26 takes with its members nationwide. *See Williams*, 851 F.3d at 1020–21 (“*Daimler* rejected a  
27 theory that would permit ‘the exercise of general jurisdiction in every State in which a corporation  
28 “engages in a substantial, continuous, and systematic course of business.”” (quoting *Daimler*, 571



1 U.S. at 138–39)).

2 Moreover, NAR submits evidence that it does not operate the Realtor.com site. Move is  
3 independently responsible for operating the site. *See* 1996 Agreement ¶¶ 3.4, 5.7(b),(c). Though  
4 NAR has ultimate authority over the site and the advertising plan, *id.* Sched H, ¶ 12; FAC ¶ 23,  
5 this relationship appears to be no different than any contractual relationship in which one party  
6 hires another to perform certain of its operations. Such a relationship is not as extensive as a  
7 subsidiary/parent relationship, which on its own would be insufficient to show general  
8 jurisdiction. *See Williams*, 851 F.3d at 1021.

9 And Plaintiff does not allege or submit evidence sufficient to satisfy the alter-ego test set  
10 forth in *Williams*. Though NAR has “significant influence” over Move and has some corporate  
11 ties to and power over Move, FAC ¶ 35, this evidence is not sufficient to show that Move and  
12 NAR are essentially the same entity or that it would be unjust to consider them to have separate  
13 identities.

14 As to NAR’s remaining contacts with California, again Plaintiff has not demonstrated that  
15 these contacts are sufficiently different than NAR’s contacts with other states. *See id.* at 1021–22.  
16 Though Plaintiff alleges that NAR has approximately 200,000 members in California, a regional  
17 vice president in California, and conducts regular business here, FAC ¶ 18, there is nothing  
18 distinguishing this business from NAR’s business throughout the United States. Indeed, NAR is  
19 nationwide, including in Florida, where Plaintiff is a member.<sup>3</sup>

20 Thus, Plaintiff has not demonstrated that NAR is subject to personal jurisdiction in  
21 California. Because Plaintiff was provided leave to amend on this issue, *see* ECF 55, the Court  
22 concludes that any future amendments would be futile. NAR’s motion is GRANTED WITH  
23 PREJUDICE to refiling the claim in California. Plaintiff may refile her claim in a district that has  
24 personal jurisdiction over NAR.

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27 <sup>3</sup> At the hearing on the motion, Plaintiff also appeared to argue that NAR has waived its right to  
28 argue that it is not subject to personal jurisdiction here because the 1996 Agreement contemplates  
that disputes arising under the contract will be litigated in California. But Plaintiff cites no case  
for the proposition that agreeing to a forum selection clause in a single contract waives personal  
jurisdiction arguments in cases unrelated to that contract. The Court thus rejects this argument.

1 **III. MOTION TO COMPEL ARBITRATION**

2 Move asks the Court to compel Plaintiff’s TCPA claim to arbitration and dismiss or stay  
3 the case pending arbitration. *See generally* MTC. The Court first discusses the additional relevant  
4 facts, then the applicable law, and then the result here.

5 **A. Additional Facts**

6 As discussed, Realtor.com allows consumers to find property listings, and it also connects  
7 consumers to real estate agents who might be able to assist them. Jay Decl. ¶¶ 2, 3, ECF 27-4.  
8 Real estate professionals who have purchased one of Move’s lead-generation products can be  
9 connected with these consumers. *Id.* ¶¶ 4–5. Plaintiff is a licensed real estate professional with  
10 over sixteen years’ experience in the industry, who, according to her Linked-In profile, teaches  
11 contract and negotiation classes. McGrath Decl, Ex. 1, ECF 27-1. In both 2015 and 2016,  
12 Plaintiff purchased one of these products—the “Connections” service (called both “Connections  
13 for Co-Brokerage” and “Connections for Buyers” at various times). Jay Decl. ¶¶ 6; McGrath  
14 Decl, Ex. 1. To purchase Connections, Plaintiff had to place her order over the phone with a  
15 Move account executive. Jay Decl. ¶ 7. These account executives are “trained to inform  
16 Connections purchasers that they will receive an email containing written confirmation of their  
17 order and providing all of the details and important information about their purchase and  
18 agreement with Move.” *Id.* ¶ 8.

19 In October 2015, Plaintiff called Move to order Connections for a one-year term.  
20 Matthews Decl. ¶ 2, ECF 27-2. After the call, Move emailed Plaintiff an order confirmation,  
21 which included details about her purchase as well as the terms and conditions. *Id.* ¶ 3 & Ex.1. In  
22 October 2016, Plaintiff again called Move to purchase Connections for another one-year term. *Id.*  
23 ¶ 5. Move again emailed Plaintiff a confirmation email containing the terms and conditions of her  
24 purchase (“Connections Agreement”). *Id.* ¶ 6 & Ex. 2. In this email, under the heading “Order  
25 Details,” the email stated, “For the terms and conditions that apply to your order, please click here.  
26 By accessing or using any product or service included in your order and/or by not cancelling your  
27 order [within three days], you agree to these terms and conditions.” *Id.* This whole sentence was  
28 in black font except the words “click here,” which were in blue font and hyperlinked directly to

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1 “Move Sales, Inc. Terms and Conditions” (“TOC”). *Id.* ¶¶ 6, 7 & Ex 2.

2 Move’s TOC state that they “apply to every Order,” defined as “a purchase by You from  
3 Move of a Product,” and they “apply to the provision of any Content by You to Move, regardless  
4 of whether or not such Content is provided in connection with an Order,” with Content defined as  
5 “all content and materials that You provide to Move, including, without limitation, Customer  
6 Content, Profile Content, and Property Content.” *Id.*, Ex. 3 (“TOC”) at 1. “Profile Content” is  
7 defined as “any content, data, images, and other materials that You provide to Move pertaining to  
8 You, Your firm or office, or any person or entity employed by or affiliated with Your firm or  
9 office.” *Id.* at 2. The TOC state that they are governed by California law. TOC ¶ 19.1.

10 Under a heading entitled “Applicable Law; Agreement to Arbitrate,” in a subheading  
11 entitled “Agreement to Arbitrate,” the TOC contain in all capital letters, in relevant part, the  
12 following arbitration provision:

You and Move agree that any and all disputes or claims that may arise between you  
and Move 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 shall govern the interpretation and enforcement  
of this section 19. You agree that You and Move may bring claims against eachother  
only on an individual basis and not as part of any purported class or representative  
action or proceeding. . . . The arbitration will be conducted by the American  
Arbitration Association (“AAA”) under its rules and procedures, as modified by this  
section 19. The AAA’s rules are available at [www.adr.org](http://www.adr.org). . . . The arbitrator’s  
award shall be final and binding and judgment on the award rendered by the arbitrator  
may be entered in any court having jurisdiction thereof. Payment of all filing,  
administration and arbitrator fees will be governed by the AAA’s rules, unless  
otherwise stated in this section 19.2. If a court decides that any part of this section  
19.2 is invalid or unenforceable, the other parts of this section 19.2 shall still apply.

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21 TOC ¶ 19.2 (emphasis omitted). Plaintiff never attempted to cancel her Connections  
22 Agreement during the term of the contract. Matthews Decl. ¶ 8.

23 Independent from the Connections service, Move gives real estate professionals the  
24 ability to receive text alerts containing information that might be of interest to them. Blakely  
25 Decl. ¶ 2, ECF 27-3. While she was a Connections customer, Plaintiff submitted the required  
26 information to Move to sign up for text message alerts and subsequently opted in to Move’s  
27 text message program. *Id.* ¶¶ 4–10. She allegedly later opted out. FAC ¶ 56–60.  
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1           **B.    Legal Standard**

2           The Federal Arbitration Act (“FAA”) applies to arbitration agreements affecting interstate  
3 commerce. 9 U.S.C. §§ 1 *et seq.* When it applies, the FAA preempts state laws that conflict with  
4 its provisions or obstruct its objective to enforce valid arbitration agreements. *See AT&T Mobility*  
5 *LLC v. Concepcion*, 563 U.S. 333, 339, 341–43 (2011). The FAA reflects a strong policy in favor  
6 of arbitration. *Concepcion*, 563 U.S. at 339; *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh,*  
7 *Inc. v. 100 Oak Street*, 35 Cal. 3d 312, 322 (1983). Under the FAA, contractual arbitration  
8 agreements must be enforced “save upon such grounds as exist at law or in equity for the  
9 revocation of any contract.” *Newton v. Am. Debt Servs., Inc.*, 549 Fed. App’x. 692, 693 (9th Cir.  
10 2013) (quoting 9 U.S.C. § 2). “In line with these principles, courts must place arbitration  
11 agreements on an equal footing with other contracts, and enforce them according to their terms.”  
12 *Concepcion*, 563 U.S. at 339 (internal citations omitted); *Weeks v. Crow*, 113 Cal. App. 3d 350,  
13 353 (1980) (“The court should attempt to give effect to the parties’ intentions, in light of the usual  
14 and ordinary meaning of the contractual language and the circumstances under which the  
15 agreement was made.” (citation omitted)). “[W]here a contract contains an arbitration clause,”  
16 moreover, “courts apply a presumption in favor of arbitrability . . . and the party resisting  
17 arbitration bears the burden of establishing that the arbitration agreement is inapplicable.” *Wynn*  
18 *Resorts v. Atl.-Pac. Capital, Inc.*, 497 Fed. App’x. 740, 742 (9th Cir. 2012).

19           When faced with a petition to compel arbitration, the district court’s role is a discrete and  
20 narrow one. “By its terms, the [FAA] ‘leaves no place for the exercise of discretion by a district  
21 court, but instead mandates that district courts shall direct the parties to proceed to arbitration on  
22 issues as to which an arbitration agreement has been signed.’” *Chiron Corp. v. Ortho Diagnostic*  
23 *Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470  
24 U.S. 213, 218 (1985)) (emphasis added). The court’s role under the FAA is limited to determining  
25 “two ‘gateway’ issues: (1) whether there is an agreement to arbitrate between the parties; and (2)  
26 whether the agreement covers the dispute.” *See Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th  
27 Cir. Aug. 11, 2015). “If the response is affirmative on both counts, then the [FAA] requires the  
28 court to enforce the arbitration agreement in accordance with its terms.” *Chiron*, 207 F.3d at 1130

1 (citations omitted). The party seeking to compel arbitration bears the “burden of proving the  
2 existence of an agreement to arbitrate by a preponderance of the evidence.” *Norcia v. Samsung*  
3 *Telecomms Am., LLC*, 845 F.3d 1279, 1283 (9th Cir. 2017) (citation omitted). In analyzing  
4 whether a contract exists, courts “apply ordinary state-law principles that govern the formation of  
5 contracts.” *Id.*

6 However, parties can also “agree to arbitrate ‘gateway’ questions of ‘arbitrability,’ such as  
7 whether the parties have agreed to arbitrate or whether their agreement covers a particular  
8 controversy.” *Rent-A-Ctr., West, Inc. v. Jackson*, 561 U.S. at 63, 68–69 (2010). “Just as the  
9 arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that  
10 dispute, so the question ‘who has the primary power to decide arbitrability’ turns upon what the  
11 parties agreed about *that* matter.” *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943  
12 (1995) (internal citations omitted). The question of arbitrability is “an issue for judicial  
13 determination unless the parties clearly and unmistakably provide otherwise.” *Howsam v. Dean*  
14 *Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *AT&T Techs., Inc. v. Commc’ns Workers of*  
15 *Am.*, 475 U.S. 643, 649 (1986)). For arbitration agreements under the FAA, “the court is to make  
16 the arbitrability determination by applying the federal substantive law of arbitrability absent clear  
17 and unmistakable evidence that the parties agreed to apply non-federal arbitrability law.”  
18 *Brennan*, 796 F.3d at 1129 (internal citations and quotation marks omitted).

### 19 C. Discussion

20 Move argues that the Court must compel arbitration because there was a binding contract  
21 with a valid arbitration clause (embodied in the TOC) that clearly and unmistakably delegates  
22 questions of arbitrability to the arbitrator under the Supreme Court’s recent decision in *Henry*  
23 *Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527 (2019). Plaintiff argues that she did  
24 not agree to any contract requiring arbitration here for four reasons: (1) the TOC do not clearly  
25 and unmistakably delegate questions of arbitrability to the arbitrator; (2) the Connections  
26 Agreement had expired at the time the text messages were sent; (3) the Connections’ Agreement  
27 does not cover the text messages sent in 2018 because they were unrelated to the Connections  
28 service; and (4) the Agreement is unenforceable browsewrap. *See generally* MTC Opp., ECF 53.

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1 Plaintiff does not argue that the Agreement is unconscionable.

2 Because both parties heavily reference the Supreme Court’s decision in *Schein* the Court  
3 briefly describes the holding of that case here. In *Schein*, the Supreme Court provided guidance  
4 on the question of who—the Court or the arbitrator—decides “whether [an] arbitration agreement  
5 applies to [a] particular dispute.” 139 S. Ct. at 527. The Supreme Court instructed that the answer  
6 is “a question of contract law.” *Id.* “When the parties’ contract delegates the arbitrability question  
7 to an arbitrator, the courts must respect the parties’ decision as embodied in the contract.” *Id.* at  
8 531. If the contract “clear[ly] and unmistakab[ly]” delegates this question to the arbitrator, *id.*, “a  
9 court may not override the contract.” *Id.* at 529. “In those circumstances, a court possesses no  
10 power to decide the arbitrability issue.” *Id.*

11 The Court now turns to Plaintiff’s formation arguments (arguments 1 and 4) and then  
12 discusses her applicability arguments (arguments 2 and 3).

13 **1. The TOC Clearly and Unmistakably Delegate Questions of Arbitrability to**  
14 **the Arbitrator**

15 Plaintiff first argues that the Court should decide the arbitrability of the dispute because the  
16 TOC do not clearly and unmistakably delegate the question of arbitrability to the arbitrator. *See*  
17 MTC Opp. at 7. Plaintiff argues that the following provision of the arbitration agreement indicates  
18 that the parties did not clearly and unmistakably agree to delegate questions of arbitrability to the  
19 arbitrator: “If a court decides that any part of this section 19.2 is invalid or unenforceable, the  
20 other parts of this section 19.2 shall still apply.” TOC ¶ 19.2. Because the arbitration provision  
21 clearly contemplates the “court” deciding questions of invalidity and unenforceability, the parties  
22 did not agree to allow an arbitrator to address those questions.<sup>4</sup> Move refutes this. *See* MTC at 8–  
23 10.

24 As an initial matter, the TOC make clear that the Court should determine the arbitrability  
25 issue by applying federal substantive law because the TOC are covered by the FAA. The

26 \_\_\_\_\_  
27 <sup>4</sup> Plaintiff also argues that the parties did not clearly and unmistakably delegate the arbitrability  
28 question because the TOC do not cover the underlying actions here. *See* MTC Opp. at 7. This  
argument is more properly discussed with respect to Plaintiff’s second and third arguments  
regarding the applicability of the arbitration provision.



1 arbitration provision states in relevant part “[t]he Federal Arbitration Act shall govern the  
2 interpretation and enforcement of this section 19.” TOC ¶ 19.2. Plaintiff does not argue  
3 otherwise. *See generally* MTC Opp.

4 The Court agrees with Move that the TOC “clearly and unmistakably” delegate questions  
5 of arbitrability to the arbitrator. *Howsam*, 537 U.S. at 83. The TOC expressly incorporate the  
6 AAA rules. *See, e.g.*, TOC ¶ 19.2 (“The arbitration will be conducted by the American  
7 Arbitration Association (“AAA”) under its rules and procedures, as modified by this section 19.”).  
8 The Ninth Circuit in *Brennan v. Opus Bank* held that “incorporation of the AAA rules constitutes  
9 clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability,” at least  
10 where the contracting parties are both sophisticated. 796 F.3d 1125, 1130 (9th Cir. 2015). There,  
11 plaintiff was a sophisticated executive who signed an employment agreement with his employer.  
12 *Id.* at 1127; *see Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1075 (9th Cir. 2013) (“[A]s  
13 long as an arbitration agreement is between sophisticated parties to commercial contracts, those  
14 parties shall be expected to understand that incorporation of the UNCITRAL rules delegates  
15 questions of arbitrability to the arbitrator.”). Plaintiff can fairly be characterized as a sophisticated  
16 party—she has over 16 years’ experience in the complex real estate industry, and she teaches  
17 contract and negotiation classes. As such, incorporation of the AAA rules into the TOC provides  
18 clear and unmistakable evidence that the parties agreed to delegate arbitrability to the arbitrator.

19 The language Plaintiff points to does not change this result. The court in *Brennan* rejected  
20 a similar argument, where the arbitration provision expressly did not cover “any claim for  
21 equitable relief.” *Id.* at 1131. The Ninth Circuit held that even though the conscionability of an  
22 agreement is an equitable matter under California law, the disclaimer of claims for equitable relief  
23 did not control because such an interpretation “would directly contradict” the clear and  
24 unmistakable intent to delegate indicated by incorporation of the AAA rules. *Id.* That is, not only  
25 did the language not create ambiguity, but also the Ninth Circuit interpreted it to be consistent  
26 with the incorporation of the AAA rules. So too here. The cited language from Section 19.2 can  
27 be read to mean that if the Court were to find the Delegation Provision (*i.e.*, the incorporation of  
28 the AAA rules) invalid or unenforceable, which it does not, then the remainder of the section is



1 severable. Likewise, while the AAA rules are incorporated as a substantive element of the  
2 arbitration provision, the language Plaintiff points to is included in a severability provision only.  
3 This fact similarly indicates that the parties clearly and unmistakably intended to delegate  
4 arbitrability via incorporation of the AAA rules.

5 For these reasons, questions of arbitrability are for the arbitrator under this contract.

## 6 **2. The Agreement Is Not Unenforceable Browsewrap**

7 Plaintiff next argues that she could not have agreed to the TOC because she did not have  
8 notice of them because they were sent as an inconspicuous hyperlink in a confirmatory email after  
9 she had signed up for the Connections service on the phone. *See* MTC Opp. at 13–19. Plaintiff  
10 describes the hidden TOC link in the confirmatory email as “unenforceable browsewrap.” *Id.* at  
11 13. Move argues that the agreement was not browsewrap and that Plaintiff had notice of the TOC  
12 and agreed to them through her use of the Connections service after receiving this notice. *See*  
13 MTC at 9–10; MTC Reply at 3–8.

14 The Court first describes the law with respect to browsewrap agreements and then analyzes  
15 the facts here.

### 16 *a. Browsewrap Law*

17 The Ninth Circuit’s decision in *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171 (9th Cir.  
18 2014) is the preeminent authority on browsewrap law in this Circuit. In *Nguyen*, the Ninth Circuit  
19 determined that the plaintiff had not agreed to the defendant’s terms of use (and the arbitration  
20 clause therein) by purchasing a product on the defendant’s website, even though the terms were  
21 displayed on every page of the website and on each page of the website’s online-checkout process.  
22 The court rejected the defendant’s argument that “the placement of the ‘terms of use’ hyperlink on  
23 its website put [the plaintiff] on constructive notice of the arbitration agreement” such that the  
24 plaintiff’s “subsequent use of the website[] was enough to bind him to the Terms of Use.” *Id.* at  
25 1174–75, 1178–79.

26 In reaching this conclusion, the court first set forth the basic legal framework governing  
27 online contracts:

28 Contracts formed on the Internet come primarily in two flavors: “clickwrap” (or

1 “click-through”) agreements, in which website users are required to click on an “I  
2 agree” box after being presented with a list of terms and conditions of use; and  
3 “browsewrap” agreements, where a website’s terms and conditions of use are  
4 generally posted on the website via a hyperlink at the bottom of the  
5 screen. . . . Unlike a clickwrap agreement, a browsewrap agreement does not require  
6 the user to manifest assent to the terms and conditions expressly . . . a party instead  
7 gives his assent simply by using the website. . . . The defining feature of browsewrap  
8 agreements is that the user can continue to use the website or its services without  
9 visiting the page hosting the browsewrap agreement or even knowing that such a  
10 webpage exists.

11 *Id.* at 1175–76 (citations, alterations, and internal quotation marks omitted). The Ninth Circuit  
12 noted that courts are “traditional[ly] reluctant to enforce browsewrap agreements against  
13 individual consumers.” *Id.* at 1178.

14 The Ninth Circuit then set forth the foundational rule governing browsewrap agreements:  
15 “Because no affirmative action is required by the website user to agree to the terms of a contract  
16 other than his or her use of the website, the determination of the validity of the browsewrap  
17 contract depends on whether the user has actual or constructive knowledge of a website’s terms  
18 and conditions.” *Nguyen*, 763 F.3d at 1176 (citation omitted). In line with this rule, the court  
19 noted that “[w]ere there any evidence in the record that [the plaintiff] had actual notice of the  
20 Terms of Use or was required to affirmatively acknowledge the Terms of Use before completing  
21 his online purchase, the outcome of th[e] case might be different.” *Id.* “Indeed,” it said, “courts  
22 have consistently enforced browsewrap agreements where the user had actual notice of the  
23 agreement.” *Id.* (citing cases). The court also noted two other scenarios in which courts have  
24 been willing to enforce browsewrap agreements: First, “where the browsewrap agreement  
25 resembles a clickwrap agreement—that is, where the user is required to affirmatively acknowledge  
26 the agreement before proceeding with use of the website.” *Id.* And second, based on an “inquiry  
27 notice” theory, “where the website contains an explicit textual notice that continued use will act as  
28 a manifestation of the user’s intent to be bound, courts have been more amenable to enforcing  
browsewrap agreements.” *Id.* at 1177.

Ultimately, the court held that the defendant’s website did not meet any of these  
requirements, indicating that the plaintiff did not have notice—actual, constructive, or inquiry—of  
the terms and thus that the plaintiff had not agreed to be bound. *Id.* at 1178–79. The court

1 emphasized that “the onus must be on website owners to put users on notice of the terms to which  
 2 they wish to bind consumers.” *Id.* at 1179; *accord McGhee v. N. Am. Bancard, LLC*, 755 F.  
 3 App’x 718, 719 (9th Cir. 2019) (“The onus fell on [the defendant] to put its customers on notice of  
 4 the binding terms of the contract in a clear and straightforward way.”). It concluded that  
 5 “consumers cannot be expected to ferret out hyperlinks to terms and conditions to which they have  
 6 no reason to suspect they will be bound.” *Id.*

7 *b. Analysis*

8 Plaintiff argues that under this law, she cannot be bound by the TOC. Specifically, she  
 9 avers that she did not have actual notice of the TOC until Move filed its motion to compel.  
 10 Silverman Decl. ¶ 7, ECF 53-2. And she asserts that she did not have inquiry notice because the  
 11 link to the TOC in the email was inconspicuous.<sup>5</sup> *See* MTC Opp.

12 As an initial matter, the Court finds the browsewrap caselaw to be an ill fit here because  
 13 the Connections Agreement was not a “[c]ontract[] formed on the Internet” through an unwitting  
 14 consumer’s use of a website. *Nguyen*, 763 F.3d 1175–76. Instead, Plaintiff was required to call  
 15 Move to sign up for the contract, during which she spoke to a Move account executive about her  
 16 desire to purchase the service. *See* Jay Decl. ¶¶ 7, 8. The email she received with the TOC was  
 17 not the only interaction she had with Move. The Court finds Judge Fitzgerald’s decision in  
 18 *Herkenrath v. Move, Inc.* persuasive on this point. Case No. cv 18-4438-MWF (C.D. Cal. Aug.  
 19 21, 2018), Ex. 6, ECF 27-1. In that case, Judge Fitzgerald found the exact same Connections  
 20 Agreement, conveyed to the plaintiffs in the exact same way (through email confirmation), was  
 21 not a browsewrap agreement. *See id.* at 6.

22 But the browsewrap caselaw is simply a specific application of a broader proposition of  
 23 law: a party cannot agree to a contract if she has no means of knowing what she is agreeing to.  
 24 *See Nguyen*, 763 F.3d at 1175. That is because “mutual manifestation of assent, whether by  
 25 written or spoken word or by conduct is the touchstone of contract.” *Id.* (alteration omitted)

26 \_\_\_\_\_  
 27 <sup>5</sup> Plaintiff also raises an argument that she did not agree to arbitrate this action because the  
 28 Connections agreement was expired at the time of the events at issue here. *See* MTC Opp. at 14,  
 18. The Court addresses this argument *infra* when it discusses her broader argument on that same  
 point.

1 (quoting *Specht v. Netscape Comms. Corp.*, 306 F.3d 17, 29 (2d Cir. 2002)). As such, the  
2 question of whether Plaintiff had notice (be it constructive, inquiry, or actual) is still relevant.

3 The Court finds that Plaintiff had at least inquiry notice of the TOC. Though Plaintiff did  
4 not have actual notice of the TOC, she does not dispute that the Move account executive to whom  
5 she spoke on the phone informed her that she would be receiving written confirmation of her order  
6 and that it would contain “all of the details and important information about [her] purchase and  
7 agreement with Move.” Jay Decl. ¶ 8. And this admonition makes sense: The Connections  
8 service is fairly extensive, requiring monthly payments in return for specific services available  
9 through the website. *Id.* ¶¶ 4–6. This admonition constitutes inquiry notice that she would  
10 subsequently be receiving the terms of her agreement (*i.e.*, the TOC). *See, e.g., In re Samsung*  
11 *Galaxy Smartphone Mktg. & Sale Practices Litig.*, 298 F. Supp. 3d 1285, 1297 (N.D. Cal. 2018);  
12 *Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1105 (C.D. Cal. 2002).

13 Despite having this notice, she continued to use the service and did not cancel within three  
14 days, which constitutes her acceptance of the TOC. *See* Matthews Decl., Ex. 2 (email indicating  
15 that use of service constitutes acceptance); *id.* ¶ 8 (avering that Plaintiff did not cancel the  
16 service); *see, e.g., Cairo, Inc. v. Crossmedia Servs., Inc.*, No. 04–04825, 2005 WL 756610, at \*2,  
17 \*4–5 (N.D. Cal. Apr. 1, 2005) (describing how party accepted contract because he knew that  
18 continued use of the service would be deemed to be acceptance). Moreover, any failure by  
19 Plaintiff to review the confirmatory email or the TOC does not change the fact that the Agreement  
20 is enforceable against her because she had notice that she would be bound by the TOC. *See*  
21 *Nguyen*, 763 F.3d at 1179; *see also Vernon v. Drexel Burnham & Co.*, 52 Cal. App. 3d 706, 714  
22 (1975) (“[F]ailure to read a contract before signing is not in itself a reason to refuse its  
23 enforcement.” (citation omitted)).

24 As such, Plaintiff had notice of and agreed to the terms of the TOC, which were not an  
25 unenforceable browsewrap agreement.

26 **3. Under *Schein*, the Arbitrator Must Decide If the Contract Covers the Time**  
27 **Period and Events at Issue Here**

28 Finally, Plaintiff argues that the arbitration clause does not apply to the actions at issue

1 here for two reasons: (1) “the purported arbitration Agreement had expired when the texts at issue  
2 were sent,” MTC Opp. at 8 ; and (2) “the texts at issue were neither sent nor agreed to pursuant to  
3 the Agreement or the Connections order term,” *id.* at 11. Move argues that under *Schein* the  
4 answers to these questions are solely for the arbitrator to decide. MTC at 10–11.

5 The Court agrees with Move. *Schein* makes clear that once the Court has decided that the  
6 parties clearly and unmistakably delegated issues of arbitrability to the arbitrator, the Court has no  
7 role in deciding whether the arbitration provision applies to the events at issue. *See Schein*, 139 S.  
8 Ct. at 528 (“When the parties’ contract delegates the arbitrability question to an arbitrator, a court  
9 may not override the contract. In those circumstances, a court possesses no power to decide the  
10 arbitrability issue.”). Included in the arbitrability question is “whether the parties have agreed to  
11 arbitrate or whether their agreement covers a particular controversy.” *Id.* at 529. Plaintiff’s  
12 arguments about whether the arbitration provision covers the events here falls directly within those  
13 questions reserved for the arbitrator. Indeed, in each of Plaintiff’s cited cases, the court was  
14 deciding the question of arbitrability of the dispute—the exact question the Court has determined  
15 is for the arbitrator here. *See, e.g., Nolde Bros., Inc. v. Local No. 358, Bakery Confectionery*  
16 *Workers Union*, 430 U.S. 243, 249, 255 (1977); *Savage v. Citibank N.A.*, No. 14-CV-03633-BLF,  
17 2015 WL 2214229, at \*4 (N.D. Cal. May 12, 2015); *In re Jiffy Lube Int’l, Inc., Text Spam Litig.*,  
18 847 F. Supp. 2d 1253 (S.D. Cal. 2012); *Ajida Technologies, Inc. v. Roos Instruments, Inc.*, 87 Cal.  
19 App. 4th 534, 546 n.8 (Cal. Ct. App. 2001).

20 Because Plaintiff’s arguments are for the arbitrator to decide, they do not preclude the  
21 Court from compelling arbitration here. The Court having held that Plaintiff agreed to a valid  
22 delegation provision, Move’s motion to compel arbitration is GRANTED.

#### 23 **D. A Stay of This Action Is Appropriate**

24 Move requests that the Court compel Plaintiff’s individual claim to arbitration and stay the  
25 claim and class claims here, pending the arbitrator’s decision on arbitrability of the dispute. If the  
26 arbitrator decides that Plaintiff’s claim is arbitrable, Move asks the Court to dismiss the action,  
27 including the class claims. Plaintiff does not dispute that the arbitration provision includes a valid  
28 class action waiver. *See* TOC ¶ 19.2 (“You agree that You and Move may bring claims against

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1 eachother[sic] only on an individual basis and not as part of any purported class or representative  
2 action or proceeding.”); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621–22, 1632 (2018)  
3 (upholding validity of class action waivers in arbitration agreements).

4 The Court agrees with Move that this is the proper procedure here and STAYS the case.

5 **IV. ORDER**

6 Based on the foregoing, NAR’s motion to dismiss is GRANTED WITH PREJUDICE to  
7 refiling in California because the Court lacks personal jurisdiction over NAR. Plaintiff may refile  
8 her claim in a district that has personal jurisdiction over NAR. Move’s motion to compel  
9 arbitration is GRANTED and this action is STAYED until the arbitrator determines whether the  
10 arbitration provision covers Plaintiff’s claim here. The parties are to submit a joint status report re  
11 arbitration every 120 days from the date of this Order, informing the Court of the progress of the  
12 arbitration. Within 14 days of the arbitrator’s decision as to whether the arbitration provision  
13 applies to Plaintiff’s claim, the parties shall submit a status report to the Court informing it of the  
14 arbitrator’s decision. If the arbitrator determines that Plaintiff’s claim is covered by the arbitration  
15 provision, the Court will dismiss this action. The initial case management conference set for July  
16 18, 2019 is VACATED.

17  
18

19 **IT IS SO ORDERED.**

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Dated: June 24, 2019

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BETH LABSON FREEMAN  
United States District Judge