UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MELINA BERNARDINO, individually and on behalf of other similarly situated persons, Plaintiff, vs. BARNES & NOBLE BOOKSELLERS, INC., Defendant.	Case No. 1:17-cv-04570-LAK-KHP

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL ARBITRATION AND TO STAY PROCEEDINGS PENDING ARBITRATION

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Pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 2-4 (the "FAA" or the "Act"), Defendant Barnes & Noble Booksellers, Inc. ("Barnes & Noble" or "Defendant") respectfully submits this memorandum of law in support of its motion to compel arbitration of Plaintiff's claims and to stay the proceedings in this Court pending such arbitration.

PRELIMINARY STATEMENT

When Plaintiff purchased her DVD from Barnes & Noble's mobile website (https://m.barnesandnoble.com) (the "Website") in February 2017, she agreed to Barnes & Noble's "Terms of Use". She did this by clicking on the Website's "Checkout As Guest" button, immediately under which Barnes & Noble notified Plaintiff that, "By . . . checking out as a guest you are agreeing to our Terms of Use"—with the words "Terms of Use" displayed in a different colored font that hyperlinked to that document. Under settled law in this Court (and others), Plaintiff agreed to be bound by each of the provisions of the Terms of Use by clicking on the "Checkout As Guest" button and completing her transaction.

The Terms of Use to which Plaintiff agreed includes, among other things, a valid and binding arbitration clause, under which "[a]ny claim or controversy at law or equity that arises out of . . . the Barnes & Noble.com Site . . . shall be resolved through binding arbitration". (Decl. of Kacey Sharrett, dated July 31, 2017 and filed contemporaneously herewith ("Sharrett Decl."), Ex. I § XVII (the "Arbitration Agreement").) The terms of that Arbitration Agreement are clear and reasonable, and there can be no dispute that Plaintiff's claims in this case—which concern the way in which the Website allegedly interacts with Facebook, Inc. ("Facebook") when a customer purchases a DVD from the Website—"arise[] out of . . . the Barnes & Noble.com Site". Accordingly, Plaintiff is required to pursue her claims only in binding arbitration, as she agreed to do when she purchased a DVD from the Website, and is foreclosed from proceeding before this Court.

In applying the FAA, the Supreme Court and the Second Circuit have held numerous times that "courts must 'rigorously enforce' arbitration agreements according to their terms". *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221, 105 S. Ct. 1238, 1242 (1985); citing 9 U.S.C. § 2 ("A written provision in . . . a 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.")); *see also Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 295 (2d Cir. 2013) ("In analyzing [Section 2] of the FAA, the Supreme Court has remarked on several occasions that it establishes 'a liberal federal policy favoring arbitration agreements . . . .'"). Drawing upon this and other established law, Barnes & Noble respectfully requests that Plaintiff be held to the terms of the Arbitration Agreement, and that her claims be compelled to arbitration, with the proceedings stayed in this Court pending such arbitration.

STATEMENT OF FACTS

Plaintiff alleges that Barnes & Noble violated the Video Privacy Protection Act, 18 U.S.C. § 2710 (the "VPPA"), and related New York law when it caused certain information to be disclosed to Facebook upon Plaintiff's purchase, from her Apple iPhone, of a DVD from the Website on February 3, 2017. (Complaint, dated June 16, 2017 [Dkt. #1] (the "Complaint" or "Compl."), ¶¶ 3-4; Decl. of Melina Bernardino, dated July 7, 2017 [Dkt. #24] ("Bernardino Decl."), ¶ 3.)

But, at the time Plaintiff purchased the DVD, she agreed to Barnes & Noble's Terms of Use, which includes the Arbitration Agreement. (*See* Sharrett Decl., Ex. I.) To buy a DVD on the Website, a customer must navigate to the page displaying the DVD she wishes to purchase, and then click the button labeled "ADD TO CART". (*Id.* ¶¶ 6-7; *id.*, Exs. B, C.) Next,

the customer must navigate to her online shopping cart, and click the "CONTINUE TO CHECKOUT" button. (*Id.* ¶¶ 8-9; *id.*, Exs. D, E.) The screen that follows prompts the customer either to sign in to her account or to check out as a guest. (*Id.* ¶ 10; *id.*, Ex. F.) Immediately below the "Checkout As Guest" button, the following language appears: "By signing in or checking out as a guest you are agreeing to our Terms of Use and our Privacy Policy". (*Id.* ¶ 10; *id.*, Ex. F.) In this prominent notice, "Terms of Use" and "Privacy Policy" appear in a different colored font that hyperlinks to Barnes & Noble's Terms of Use and Privacy Policy, respectively. (*Id.* ¶ 10; *id.*, Exs. F, G.) In purchasing her DVD, Plaintiff undertook each of the steps described above, including clicking on the "Checkout As Guest" button. (*See* Compl. ¶ 53; Bernardino Decl. ¶ 5.) Therefore, she "agree[d] to our Terms of Use". (*See* Sharrett Decl. ¶ 10; *id.*, Ex. F.)[1]

> The Terms of Use includes the Arbitration Agreement, which states in full:
>
> "Any claim or controversy at law or equity that arises out of the Terms of Use, the Barnes & Noble.com Site or any Barnes & Noble.com Service (each a 'Claim'), shall be resolved through binding arbitration conducted by telephone, online or based solely upon written submissions where no in-person appearance is required. In such cases, the arbitration shall be administered by the American Arbitration Association under its Commercial Arbitration Rules (including without limitation the Supplementary Procedures for Consumer-Related Disputes, if applicable), and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.
>
> Alternatively, at Barnes & Noble's sole option, a Claim (including Claims for injunctive or other equitable relief) may be adjudicated by a court of competent jurisdiction located in New York County, New York.
>
> Any Claim shall be arbitrated or litigated, as the case may be, on an individual basis and shall not be consolidated with any Claim of

[1] The Terms of Use is also linked to at the bottom of every page of the Website. (*Id.* ¶ 12; *id.*, Ex. H.) The Terms of Use, including the Arbitration Agreement, has not changed since February 3, 2017. (*Id.* ¶ 15.)

> any other party whether through class action proceedings, class arbitration proceedings or otherwise.
>
> You are solely responsible for your interactions with other Users. Barnes & Noble reserves the right, but has no obligation, to become involved in any way with disputes between you and other Users.
>
> Each of the parties hereby knowingly, voluntarily and intentionally waives any right it may have to a trial by jury in respect of any litigation (including but not limited to any claims, counterclaims, cross-claims, or third party claims) arising out of, under or in connection with these Terms of Use. Further, each party hereto certifies that no representative or agent of either party has represented, expressly or otherwise, that such party would not in the event of such litigation, seek to enforce this waiver of right to jury trial provision. Each of the parties acknowledges that this section is a material inducement for the other party entering into these Terms of Use." (*Id.*, Ex. I § XVII.)

On June 16, 2017, four months after having agreed to arbitrate "[a]ny claim . . . that arises out of . . . the Barnes & Noble.com Site" (*id.*), Plaintiff filed her Complaint in this Court. But each of the four counts in the Complaint "arises out of . . . the Barnes & Noble.com Site" and, therefore, is encompassed by the terms of the Arbitration Agreement. (*See* Compl. ¶¶ 91-102 (Count I, for violation of the VPPA, arising out of Plaintiff's purchase of a DVD on the Website); *id.* ¶¶ 103-15 (Count II, for violation of New York's comparable statute, arising out of that same purchase); *id.* ¶¶ 116-30 (Count III, for violation of New York's consumer protection statute, arising out of the Privacy Policy appearing and governing transactions on the Website); *id.* ¶¶ 131-35 (Count IV, for declaratory relief, based on Counts I and II).)

ARGUMENT

Under the FAA, a written agreement to arbitrate "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. As the Supreme Court has said, "our cases place it beyond dispute that the FAA was designed to promote arbitration. They have repeatedly described the Act as

embodying a national policy favoring arbitration, and a liberal policy favoring arbitration agreements . . . ." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345-46, 131 S. Ct. 1740, 1749-50 (2011) (internal quotation marks and citation omitted). "[C]onsistent with [the] text [of the FAA], courts must rigorously enforce arbitration agreements according to their terms", *Italian Colors*, 133 S. Ct. at 2309 (internal quotation marks omitted), and "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration", *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983); *see JLM Indus., Inc. v. Stolt-Nielson SA*, 387 F.3d 163, 171 (2d Cir. 2004); *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 844 (2d Cir. 1987).

Once the party moving to compel arbitration makes a prima facie showing that an agreement to arbitrate exists, the burden shifts to the party resisting arbitration to show (i) that she did not agree to the arbitration provision, (ii) that the arbitration provision is invalid or unenforceable, or (iii) that the arbitration provision does not encompass her claims. *See Savarese v. J.P. Morgan Chase*, No. 16-cv-321, 2016 WL 7167968, at *3 (E.D.N.Y. Nov. 16, 2016), *adopted*, 2016 WL 7176601 (E.D.N.Y. Dec. 7, 2016); *Whitehaven S.F., LLC v. Spangler*, 45 F. Supp. 3d 333, 342 (S.D.N.Y. 2014), *aff'd*, 633 F. App'x 544 (2d Cir. 2015). On a motion to compel arbitration such as this, the court applies a summary judgment standard to those three questions, under which the party resisting arbitration must prove that there is a genuine issue of material fact with regards to at least one of them. *See Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 129-30 (2d Cir. 1997); 9 U.S.C. § 4.

Plaintiff cannot meet the burden required to prevent her claims from proceeding in the parties' preselected arbitral forum—because there is no genuine question of fact as to whether Plaintiff bound herself to the Arbitration Agreement (she did) (*see* Section I), whether

the Arbitration Agreement is valid and enforceable (it is) (*see* Section II), or whether Plaintiff's claims fall within its scope (they do) (*see* Section III). For these reasons, described more fully below, Plaintiff's claims against Barnes & Noble must be resolved through arbitration, and this action should be stayed pending such resolution.

I. PLAINTIFF AGREED TO THE TERMS OF USE, WHICH INCLUDES THE ARBITRATION AGREEMENT.

When Plaintiff clicked the "Checkout As Guest" button—and she concedes that she did (*see* Compl. ¶ 53; Bernardino Decl. ¶ 5)—she agreed to Barnes & Noble's Terms of Use, including the Arbitration Agreement therein. (*See* Sharrett Decl. ¶ 10; *id.*, Exs. F, I.)

In her Complaint, however, Plaintiff claims that she "never agreed to the [Terms of Use], nor was she even aware of its existence". (Compl. ¶ 84.) In purported support of this allegation, Plaintiff pleads that "the *only* mention of the [Terms of Use on the Website] appears on the checkout page, only visible if the customer scrolls to the bottom of [the] page". (*Id.* ¶ 85.) That is not true.

Instead, in *addition* to appearing at the bottom of every page (*see* Sharrett Decl. ¶ 12; *id.*, Ex. H), a prominent link to the Terms of Use appears *directly below* the "Checkout As Guest" button, together with a clear and simple notification that, "By . . . checking out as a guest you are agreeing to our Terms of Use" (*id.* ¶ 10; *id.*, Ex. F). By clicking on the "Checkout As Guest" button, Plaintiff agreed to the Terms of Use and its Arbitration Agreement.

Although courts sometimes have hesitated to enforce provisions in a website's terms of use where the *only* mention of those terms is through a hyperlink at the bottom of the page,[2] courts routinely have enforced such provisions where the website's user has, as here,

[2] *See, e.g.*, *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 129 n.18 (2d Cir. 2012) (describing "browsewrap" agreements, under which the user "assents to the provision merely by visiting the website to purchase the product", and which "are typically enforced if the website user must

clicked a button after being informed in text nearby that doing so would bind her to those provisions.

In *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829 (S.D.N.Y. 2012), for example, this Court enforced a forum selection clause in Facebook's Terms of Service, in circumstances nearly identical to those in this case. When signing up for Facebook, new users were required to fill out their personal information, and then click a "Sign Up" button. *Id*. at 834. Users were then taken to a security check screen, where they were required to enter a series of numbers and letters. *Id.* at 835. There was then a second "Sign Up" button, under which users were informed as follows: "By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service"—with "Terms of Service" hyperlinked to that document. *Id.* On the basis of these facts—including the fact that, "[i]n order to have obtained a Facebook account, Fteja must have clicked the second 'Sign Up' button", *id.*—and after a detailed survey of analogous case law, "the Court conclude[d] that Fteja assented to the Terms of [Service] and therefore to the forum selection clause therein", *id.* at 841. Here, as in *Fteja*, the plaintiff "was informed of the consequences of h[er] assenting click and [s]he was shown, immediately below, where to click to understand those consequences. That was enough." *Id.* at 840.[3]

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have had actual or constructive knowledge of the site's terms and conditions, and have manifested assent to them" (internal quotation marks and emphasis omitted)); *see id.* ("In *Specht* [*v. Netscape Communications Corp.*, 306 F.3d 17, 32 (2d Cir. 2002)], we concluded that a provision that a user would not encounter until he or she had scrolled down multiple screens was not enforceable . . . .'").

[3] The court in *Fteja* analogized to the Supreme Court's decision in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587, 111 S. Ct. 1522, 1524 (1991), in which the Supreme Court held that the plaintiff had agreed to a forum selection clause printed on the back of his cruise ticket, and concluded further that that clause had become binding on the plaintiff at the time he purchased the ticket, even though he did not receive the ticket until later. *Fteja*, 841 F. Supp. 2d at 839. "In both cases, the consumer is prompted to examine terms of sale that are located somewhere else." *Id.*

Even more recently, this Court, following *Fteja*, enforced an arbitration provision contained in a website's terms of use. *See Starke v. Gilt Groupe, Inc.*, No. 13-cv-5497, 2014 WL 1652225, at *2-4 (S.D.N.Y. Apr. 24, 2014). When enrolling to purchase items on Gilt's website, users were presented with a "sign-up box which state[d] that the consumer will become a Gilt member and agrees to be bound by the Terms of Membership"—which were hyperlinked—and that, "[b]y joining Gilt through email or Facebook sign-up, you agree to the Terms of Membership for all Gilt Groupe sites". *Id.* at *1 (internal quotation marks omitted). The court found that the plaintiff's "decision to click the . . . button represents his assent to [the Terms of Membership]". *Id.* at *3.

Courts outside of this District have reached the same conclusion on similar facts. *See, e.g.*, *In re Facebook Biometric Info. Privacy Litig.*, 185 F. Supp. 3d 1155, 1166 (N.D. Cal. 2016) (same as *Fteja*); *Crawford v. Beachbody, LLC*, No. 14-cv-1583, 2014 WL 6606563, at *1, *3 (S.D. Cal. Nov. 5, 2014) (finding that plaintiff agreed to terms of use on website, where, "[i]mmediately above the 'Place Order' box, there was language that said 'By clicking *Place Order* below, you are agreeing that you have read and understand the Beachbody Purchase Terms and Conditions, and Team Beachbody Terms and Conditions'"); *5381 Partners LLC v. Shareasale.com, Inc.*, No. 12-cv-4263, 2013 WL 5328324, at *7 (E.D.N.Y. Sept. 23, 2013) (same, where, in addition to a hyperlink that appeared adjacent to the activation button users had to click on, the website also contained a text warning near the button that stated, "'By clicking and making a request to Activate, you agree to the terms and conditions in the [agreement]'"); *E.K.D. ex rel. Dawes v. Facebook, Inc.*, 885 F. Supp. 2d 894, 896 (S.D. Ill. 2012) (same as *Fteja* and *Facebook Biometric*); *Snap-on Bus. Solutions, Inc. v. O'Neil & Assocs., Inc.*, 708 F. Supp. 2d 669, 683 (N.D. Ohio 2010) (same, where plaintiff was required to click

"'Enter'" to access the website and, below the "'Enter'" button, it said, "'[t]he use of and access to the information on this site is subject to the terms and conditions set out in our legal agreement'").

As each of these cases establishes, a binding contract is created where (as here) the terms of use is reasonably conspicuous (for example, immediately above or below a button), the user is informed that taking some affirmative step (for example, clicking that button) constitutes acceptance of the terms of use, and the user in fact takes that step.

In opposing arbitration, Plaintiff may seek to rely upon the Ninth Circuit's decision in *Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171 (9th Cir. 2014), *aff'g*, 2012 WL 3711081 (C.D. Cal. Aug. 28, 2012). Any such argument will fail. Although the court in *Nguyen* declined to find that the plaintiff there had agreed to the Terms of Use on Barnes & Noble's website, the Terms of Use at that time was available *only* "in the bottom left-hand corner of every page on the [site]"; that is, at that time, there was *no* prompt given to users that, by taking a certain action, they were agreeing to be bound by the Terms of Use. *Id.* at 1174. In declining to compel arbitration, the Ninth Circuit expressly distinguished the case before it—"[w]here the link to a website's terms of use is buried at the bottom of the page"—from other cases—"where the website contains an explicit textual notice that continued use will act as a manifestation of the user's intent to be bound"—noting that courts in the latter cases have "been more willing to find the requisite notice for constructive assent". *Id.* at 1176-77 (citing *Fteja*, 841 F. Supp. 2d at 838-40, and other cases). The court also distinguished the case from those where "the websites at issue . . . included something more [than a link at the bottom of the page] to capture the user's attention and secure her assent". *Id.* at 1178 n.1 (distinguishing the case from *Shareasale.com*, on the grounds that the website in *Shareasale.com* included language that "'By clicking and

making a request to Activate, you agree to the terms and conditions in the [agreement]'" (quoting *Shareasale.com*, 2013 WL 5328324, at *7)).

After the *Nguyen* decision, Barnes & Noble changed the configuration of the checkout process on the Website by inserting the prominent language discussed above ("By . . . checking out as a guest you are agreeing to our Terms of Use") immediately below the "Checkout As Guest" button. (Sharrett Decl. ¶¶ 10, 14; *see id.*, Ex. F.) That change—which was in place at the time of Plaintiff's purchase this past February (*id.* ¶¶ 4, 10, 14)—distinguishes the present case from *Nguyen*.

The fact that Plaintiff claims not to have read the Terms of Use is "irrelevant". *Fteja*, 841 F. Supp. 2d at 839 ("Whether or not the customer bothers to [read the relevant provisions] is irrelevant. 'Failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract.'" (quoting *Centrifugal Force, Inc. v. Softnet Commc'n Inc.*, No. 08-cv-5463, 2011 WL 744732, at *7 (S.D.N.Y. Mar. 1, 2011))); *see Starke*, 2014 WL 1652225, at *3 ("Regardless of whether he actually read the contract's terms, [plaintiff] was directed exactly where to click in order to review those terms, and his decision to click the 'Shop Now' button represents his assent to them."); *Crawford*, 2014 WL 6606563, at *2 (enforcing terms of use on website even where plaintiff did "not recall seeing or agreeing to any terms and conditions"); *Dawes*, 885 F. Supp. 2d at 901-02 ("Whether or not [p]laintiffs actually read Facebook's [Terms of Service ('TOS')] is irrelevant, of course, to the matter of the conspicuousness of the TOS and thus [p]laintiffs' constructive knowledge of the TOS, and [p]laintiffs are bound by Facebook's TOS whether [p]laintiffs read them or not."); *see also Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 122 (2d Cir. 2010) ("Ragone asserts that she did not read the arbitration agreement before signing it. But this is of no moment

in light of this Court's holding that it 'cannot accept a rule that would allow a party to avoid his legal obligation to read a document carefully before signing it just because the document is an arbitration agreement under which [certain federal] claims could be arbitrated.'" (quoting *Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144, 150 (2d Cir. 2004))).

II. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE.

The Arbitration Agreement must be enforced because no "grounds . . . exist at law or in equity for the revocation of [the] contract". 9 U.S.C. § 2. In the Complaint, Plaintiff appears to preview an argument that the Arbitration Agreement is invalid or unenforceable because it purportedly "has terms that shock the conscience". (Compl. ¶ 86.)

The Terms of Use is governed by "[t]he laws of the State of New York . . . , without giving effect to any principles of conflicts of laws." (Sharrett Decl., Ex. I § XVI.)[4] Under New York law, a contract is unconscionable only when it is "so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms". *Ragone*, 595 F.3d at 121-22 (alteration omitted) (quoting *Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 10 (1988)). "[A] determination of unconscionability generally requires a showing that the contract was *both* procedurally and

[4] "Both federal and New York State choice of law rules require that such contractual choice of law provisions be honored, provided that there is some relationship between the law chosen and the transaction." *Lewis Tree Serv. v. Lucent Techs.*, 239 F. Supp. 2d 322, 327 (S.D.N.Y. 2002). Plaintiff's own allegations establish that Barnes & Noble and the Website have a substantial relationship to New York: Defendant is "headquartered at 122 Fifth Avenue, New York, NY", and "Defendant created and controls the B&N Website in the State of New York". (Compl. ¶¶ 15, 117); *see Cap Gemini Ernst & Young U.S. LLC v. Nackel*, No. 02-cv-6872, 2004 WL 569554, at *4 (S.D.N.Y. Mar. 23, 2004) (enforcing choice-of-law provision selecting New York law where defendant's headquarters and principal place of business were in New York); Restatement (Second) of Conflicts of Laws § 187 cmt. f (1988) ("When the state of the chosen law has some substantial relationship to the parties or the contract, the parties will be held to have had a reasonable basis for their choice. This will be the case, for example, when this state is that . . . where one of the parties is domiciled or has his principal place of business.").

substantively unconscionable . . . ." *Carr v. Credit One Bank*, No. 15-cv-6663, 2015 WL 9077314, at *3 (S.D.N.Y. Dec. 16, 2015) (emphasis added). "The procedural element . . . concerns the contract formation process and the alleged lack of meaningful choice; the substantive element looks to the content of the contract . . . ." *Ragone*, 595 F.3d at 121-22 (quoting *State v. Wolowitz*, 468 N.Y.S.2d 131, 145 (1983)).

Plaintiff has not shown that the Arbitration Agreement is either procedurally or substantively unconscionable—and it must be both in order for her to escape its enforcement in this case. *See Carr*, 2015 WL 9077314, at *3.

A. The Arbitration Agreement Is Not Procedurally Unconscionable.

The factors relevant to a determination of whether the process of entering into a contract was procedurally unconscionable are "(1) the size and commercial setting of the transaction; (2) whether there was a lack of meaningful choice by the party claiming unconscionability; (3) the experience and education of the party claiming unconscionability; and (4) whether there was disparity in bargaining power". *Dall. Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 787 (2d Cir. 2003) (quoting *Gillman*, 73 N.Y.2d at 10-11). "[C]laim[s] that the contract is one of adhesion or that it results from procedural unconscionability . . . are judged by whether the party seeking to enforce the contract has used high pressure tactics or deceptive language in the contract and whether there is inequality of bargaining power between the parties". *Sablosky v. Edward S. Gordon Co.*, 73 N.Y.2d 133, 139 (N.Y. 1989); *see Klos v. Lotnicze*, 133 F.3d 164, 168 (2d Cir. 1997) ("[The concept of adhesion contracts] may not be invoked to trump the clear language of the agreement unless there is a disturbing showing of unfairness, undue oppression, or unconscionability." (citing *Shute*, 499 U.S. at 593, 111 S. Ct. at 1527)).

Plaintiff does not allege facts supporting a claim of procedural unconscionability under *any* of the relevant factors:

(1) The purchase of a single DVD—at $10.12 (Bernardino Decl., Ex. A)—is clearly not a "size[able] . . . transaction", and Plaintiff does not argue otherwise. *See Edwards v. Macy's, Inc.*, No. 14-cv-8616, 2015 WL 4104718, at *8 (S.D.N.Y. June 30, 2015) (enforcing arbitration provision in credit card agreement based in part on the fact that the transaction at issue was a "modest" one).

(2) There can be no suggestion that Plaintiff had no "meaningful choice" but to agree to Barnes & Noble's Terms of Use; to the contrary, Plaintiff alleges that "[o]ther online retailers sell DVDs" and that, "like the B&N Website, Amazon.com sells DVDs". (Compl. ¶ 46); *see Starke*, 2014 WL 1652225, at *4 ("There is no indication that Starke lacked a choice of other sources to purchase the blankets. He alleges in the complaint that [the same product] . . . can be found . . . at Amazon websites."); *Anonymous v. JP Morgan Chase & Co.*, No. 05-cv-2442, 2005 WL 2861589, at *6 (S.D.N.Y. Oct. 31, 2005) (holding that the fact that a credit card agreement was "offered on a take-it-or-leave-it basis" was "insufficient to render the contract unconscionable, particularly when the plaintiff had the ability to go to other sources of credit"); *Bar-Ayal v. Time Warner Cable Inc.*, No. 03-cv-9905, 2006 WL 2990032, at *16 (S.D.N.Y. Oct. 16, 2006) (finding that a contract was not unconscionable because "[p]laintiff has not provided any evidence that he could not obtain high-speed Internet service from another provider").

(3) Plaintiff does not claim that she lacks "experience and education". Rather, Plaintiff admits that she is an experienced Internet user. She "is a Facebook subscriber" (Compl. ¶ 14); her "usual practice [is] to remain logged into my Facebook account when I access the

Internet from my phone" (Bernardino Decl. ¶ 8); and she finds it "more convenient to purchase video media online rather than in person at a physical store" (*id.* ¶ 12). Furthermore, even if Plaintiff had alleged that "she does not have a college degree", that she "has no experience or background in [the relevant] business", or that she "possesses an imperfect grasp of the English language"—and she alleges *none* of those things—that would still be insufficient to establish procedural unconscionability. *Ragone*, 595 F.3d at 122 (internal quotation marks omitted) (citing *Molina v. Coca-Cola Enters., Inc.*, No. 08-cv-6370, 2009 WL 1606433, at *8 (W.D.N.Y. June 8, 2009)). Plaintiff is "a far cry from the prototypical 'uneducated' and 'needy' individual for whom the unconscionability doctrine was fashioned". *Nayal v. HIP Network Servs. IPA, Inc.*, 620 F. Supp. 2d 566, 573 (S.D.N.Y. 2009) (quoting *Klos*, 133 F.3d at 168).

(4) Plaintiff does not even try to allege a "disparity in bargaining power", let alone one sufficient to establish that the Arbitration Agreement is procedurally unconscionable. The fact that an arbitration provision is agreed to between a company and a consumer cannot alone render that provision unconscionable. *See, e.g.*, *Concepcion*, 563 U.S. at 346-47, 131 S. Ct. at 1749-50; *Anonymous*, 2005 WL 2861589, at *7-8; *Bar-Ayal*, 2006 WL 2990032, at *14-17. Instead, "arbitration agreements are enforceable despite an inequality in bargaining power unless coupled with high pressure tactics that coerce agreement". *Carr*, 2015 WL 9077314, at *3 (quoting *Nayal*, 620 F. Supp. 2d at 572); *see also Ragone*, 595 F.3d at 122. But there is not a single allegation, or any evidence, of high pressure tactics by Defendant that coerced Plaintiff's agreement to arbitrate. Given Plaintiff's many choices in her search for a DVD, she could have simply decided to purchase the DVD from another outlet. *See Klos*, 133 F.3d at 169 ("[T]here were several transportation alternatives. Accordingly, it cannot be said

that LOT's policy was so oppressive or unconscionable as to reach the threshold of an unenforceable contract of adhesion.").

Plaintiff has failed to carry her significant burden of showing that the Arbitration Agreement is procedurally unconscionable. This alone forecloses her claim of unconscionability. *See Carr*, 2015 WL 9077314, at *3.

B. The Arbitration Agreement Is Not Substantively Unconscionable.

Plaintiff has also failed to show that the Arbitration Agreement "is so grossly unreasonable as to be unenforceable according to its literal terms and those contract terms are unreasonably favorable to the party seeking to enforce the contract", *Isaacs v. OCE Bus. Servs., Inc.*, 968 F. Supp. 2d 564, 569 (S.D.N.Y. 2013)—which also independently bars her claim of unconscionability. That is, the four arguments Plaintiff presents to try to prove substantive unconscionability fail under settled law.

First, Plaintiff claims that it "shock[s] the conscience" that Defendant alone has the right under the Arbitration Agreement to bring suit in court. (Compl. ¶ 86(a).) But an arbitration agreement is not unconscionable just because one party can require another party to litigate (or arbitrate) at the first party's option. *See Sablosky*, 73 N.Y.2d at 134-39. In fact, courts regularly uphold contracts with provisions allowing only one party to compel arbitration. *See Builders Group LLC v. Qwest Commc'ns Corp.*, No. 07-cv-5464, 2009 WL 3170101, at *1 (S.D.N.Y. Sept. 30, 2009); *Les Constrs. Beauce-Atlas, Inc. v. Tocci Bldg. Corp. of N.Y., Inc.*, 742 N.Y.S.2d 356, 357 (App. Div. 2002). Permitting only one party to elect to proceed in court is simply the other side of the coin from allowing only one party to compel arbitration.[5]

[5] Plaintiff's argument that Defendant's right to bring suit only *in New York* is "a sword against out-of-state plaintiffs who cannot afford to proceed in New York" makes no sense. (Compl. ¶ 86(a).) Not only are forum-selection clauses such as this presumptively enforceable,

Second, Plaintiff challenges the Arbitration Agreement's waiver of a jury trial in a suit brought in court by Barnes & Noble. (*See* Compl. ¶ 86(b).) But "[i]t is plainly not the case that simply because an agreement to arbitrate itself eliminates a jury trial . . . , the agreement is substantively unconscionable." *Ragone v. Atl. Video at Manhattan Ctr.*, No. 07-cv-6084, 2008 WL 4058480, at *6 (S.D.N.Y. Aug. 29, 2008), *aff'd*, 595 F.3d 115; *see also Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 205 (2d Cir. 1999); *Ciago v. Ameriquest Mortg. Co.*, 295 F. Supp. 2d 324, 331 (S.D.N.Y. 2003). And, in any event, Plaintiff's claim—that, if Barnes & Noble had brought suit in court, there would be no jury trial—is irrelevant. Barnes & Noble here is seeking to *avoid* suit in court, which means that the jury trial waiver is not implicated.

Third, Plaintiff takes issue with the requirement under the Arbitration Agreement that arbitration be "'conducted by telephone, online or based solely upon written submissions'". (Compl. ¶ 86(c).) But Plaintiff has not explained—and cannot explain—how an in-person appearance could be crucial to her case. But, in any event, it is not required. *See BDO USA, LLP v. Field*, 79 A.D.3d 604, 604 (N.Y. App. Div. 2010) ("The provision of the amendment to settlement agreement that states that 'the arbitrator shall decide the dispute based on a written submission from each Party and a non-evidentiary hearing' was not unconscionable."); *Tura v. Med. Shoppe Int'l, Inc.*, No. 09-cv-7018, 2010 WL 11506428, at *16-17 (C.D. Cal. Mar. 3, 2010) (rejecting unconscionability argument and enforcing arbitration agreement because plaintiffs "are able to receive a 'full and fair' hearing by use of written submissions"); *see also Yonir Techs., Inc. v. Duration Sys. (1992) Ltd.*, 244 F. Supp. 2d 195, 209

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see Atl. Marine Constr. Co., Inc. v. U.S. Dist. Court for W. Dist. of Tex., 134 S. Ct. 568, 581 (2013); *TradeComet.com LLC v. Google, Inc.*, 647 F.3d 472, 476 (2d Cir. 2011), but Plaintiff (herself an "out-of-state plaintiff[]") clearly has the resources and wherewithal to litigate in New York. *She brought her suit here*.

(S.D.N.Y. 2002) ("[T]he lack of a formal, oral hearing does not violate [the FAA] and is not fundamentally unfair.").

Fourth, Plaintiff claims that the Arbitration Agreement's selection of the Commercial Arbitration Rules of the American Arbitration Association as governing any arbitration renders the agreement unconscionable. (*See* Compl. ¶ 86(d).) But courts have regularly enforced arbitration agreements that follow these very same rules. *See Paduano v. Express Scripts, Inc.*, 55 F. Supp. 3d 400, 430 (E.D.N.Y. 2014) (rejecting "challenge to the limited discovery afforded by the AAA Commercial Arbitration Rules" because accepting such a challenge would "create uncertainty in the commercial markets, [and] would run contrary to the well-understood idea that streamlined or limited discovery is a benefit, rather than a drawback, of arbitration"); *Griffen v. Alpha Phi Alpha, Inc.*, No. 06-cv-1735, 2007 WL 707364, at *6 n.11, *9 (E.D. Pa. Mar. 2, 2007). The discovery limitations in the Arbitration Agreement further the goals of arbitration and the FAA—namely, the efficient resolution of disputes. *See, e.g.*, *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 342 (2d Cir. 2010).

Plaintiff's claims of procedural and substantive unconscionability simply repackage the long-rejected view that arbitration should be disparaged as second-class adjudication, and are based on specific attacks against arbitration that courts have rejected repeatedly. There is a "strong federal policy favoring arbitration", *Distajo*, 107 F.3d at 130, and Plaintiff's argument that the Arbitration Agreement is unconscionable cannot overcome that policy.

III. THE ARBITRATION AGREEMENT ENCOMPASSES PLAINTIFF'S CLAIMS.

Because the Arbitration Agreement was assented to by Plaintiff (*see* Section I), and is valid and enforceable (*see* Section II), arbitration should be compelled, and this matter stayed, so long as the parties' dispute falls within the scope of the Arbitration Agreement.

See Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp., 246 F.3d 219, 226 (2d Cir. 2001). Clearly, it does.

The Arbitration Agreement unambiguously requires the parties to arbitrate "[a]ny claim or controversy at law or equity that arises out of the Terms of Use, the Barnes & Noble.com Site or any Barnes & Noble.com Service". (Sharrett Decl., Ex. I § XVII.) Where, as here, the arbitration clause is broad, there is a "presumption of arbitrability". *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 224 (2d Cir. 2001) (quoting *Collins & Aikman Prods. Co. v. Bldg. Sys., Inc.,* 58 F.3d 16, 23 (2d Cir. 1995)). "[T]he [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter*, 470 U.S. at 218, 105 S. Ct. at 1241.

On its face, the Arbitration Provision covers all of Plaintiff's claims—because all of Plaintiff's claims "arise[] out of . . . the Barnes & Noble.com Site". In Counts I and II of her Complaint, Plaintiff claims that, when she purchased a DVD from the *Barnes & Noble.com Site*, Defendant disclosed certain information to Facebook, in violation of the VPPA and associated New York law. (*See* Compl. ¶¶ 91-115.) In Count III, Plaintiff alleges that Defendant deceived consumers through its Privacy Policy, a document posted on the *Barnes & Noble.com Site* that describes Barnes & Noble's policies vis-à-vis customers' information in connection with their use of the *Barnes & Noble.com Site*. (*Id.* ¶¶ 116-30.) In Count IV, Plaintiffs seeks declaratory relief with respect to Counts I and II. (*Id.* ¶¶ 131-35.)

Plaintiff's claims fall within the scope of the Arbitration Agreement.

CONCLUSION

For the foregoing reasons, Barnes & Noble respectfully requests that the Court enter an order compelling Plaintiff to arbitrate her claims against Barnes & Noble and staying the present proceedings pending arbitration.

Dated: July 31, 2017

Respectfully submitted,

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by

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