

APPENDIX

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APPENDIX A

FILED

AUG 27 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANDREW PANDOLFI;
MANDI SHAWCROFT,
individually and on
behalf of all others
similarly situated,

Plaintiffs –
Appellees,

v.

AVIAGAMES, INC.;
VICKIE YANJUAN
CHEN; PING WANG,

Defendants –
Appellants,

and

No. 24-5817
D.C. No.
3:23-cv-05971-EMC

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

ACME, LLC, GALAXY
DIGITAL CAPITAL
MANAGEMENT, LP,
Defendants.

Appeal from the United States District Court
for the Northern District of California
Edward M. Chen, District Judge, Presiding
Argued and Submitted August 15, 2025
San Francisco, California

Before: RAWLINSON and KOH, Circuit Judges, and FITZWATER, District Judge.**

Defendants-Appellants Aviagames, Inc., Vickie Yanjuan Chen, and Ping Wang (collectively, “Avia”) appeal the district court’s order denying their motion to compel arbitration on the grounds that the arbitration agreement at issue, and the delegation clause within it, are unconscionable. We have jurisdiction pursuant to 9 U.S.C. § 16(a)(1)(B). Because the parties are familiar with the facts, we recite them only as necessary to explain our decision. We affirm.

U. “We review denial of a motion to compel arbitration de novo and review findings of fact underlying the district court’s decision for clear error.” *Lim v. Tforce Logistics, LLC*, 8 F.4th 992, 999 (9th Cir. 2021) (citation modified). “We review a district court’s decision not to sever unconscionable portions of an arbitration agreement for abuse of discretion.” *Id.*

“[U]nconscionability is a generally applicable contract defense that may render an agreement to arbitrate unenforceable.” *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1092 (9th Cir. 2009). Under California law, the party asserting unconscionability “has the burden to establish unconscionability.” *Ramirez v. Charter Commc’ns, Inc.*, 551 P.3d 520, 530 (Cal. 2024). “Unconscionability has both a procedural and a substantive element.” *Id.* at 529. Procedural unconscionability focuses “on oppression or surprise due to unequal bargaining power” at the time of

** The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

“contract negotiation and formation.” *Id.* at 530 (citation modified). Substantive unconscionability “considers the fairness of an agreement’s actual terms, focusing on whether the contract will create unfair or one-sided results.” *Id.* (citation modified). Although both procedural and substantive elements are needed for unconscionability, they need not “be present to the same degree. Courts apply a sliding scale analysis” where “the more substantively oppressive a term, the less evidence of procedural unconscionability is required,” and vice versa. *Id.* (citation modified).

2. The district court did not err in finding the delegation clause unconscionable. The delegation clause carries a modest degree of procedural unconscionability because it is hidden in the Terms of Service, *see Lim*, 8 F.4th at 1001; incorporates American Arbitration Association (“AAA”) rules that are subject to change, *see Heckman v. Live Nation Ent., Inc.*, 120 F.4th 670, 682 (9th Cir. 2024); and a layperson would be surprised to find that the delegation clause is subject to the batching provision, *see OTO, L.L.C. v. Kho*, 447 P.3d 680, 691-92 (Cal. 2019).

Further, the delegation clause, read together with the batching provision, is substantively unconscionable because it could create lengthy delays to resolve a gateway issue; those delays could have a chilling effect on players bringing claims to begin with; and the delays and chilling effects would likely only apply to claims brought by players, not Avia. As the arbitration agreement is not silent as to the batching provision, Avia’s reliance on *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), is unavailing. Moreover, we are not persuaded that the

AAA Mass Arbitration Supplementary Rules (“Supplementary Rules”) cited by Avia apply. The Supplementary Rules did not exist at the time of the arbitration agreement and future versions of the rules were not incorporated as “the then-current.” Even if the Supplementary Rules did apply, they do not authorize the appointment of a process arbitrator to rule on unconscionability, so it is irrelevant whether a process arbitrator may rule on its own jurisdiction.

3. The district court did not abuse its discretion in declining to sever the batching provision from the delegation clause. “Even if a contract *can* be cured, the court should also ask whether the unconscionability *should* be cured through severance or restriction because the interests of justice would be furthered by such actions.” *Ramirez*, 551 P.3d at 547. Even if the batching provision’s unconscionability was not well settled, as Avia claims, the district court was still within its discretion to find that severance was not in the interests of justice because Avia should not benefit from the batching provision’s chilling effects.

4. The district court did not err in finding the arbitration agreement unconscionable. The arbitration agreement, like the delegation clause, carries a modest degree of procedural unconscionability because it incorporates AAA rules that are subject to change. *See Heckman*, 120 F.4th at 682 (“Under California law, ‘oppression is even more onerous’ when a ‘clause pegs both the scope and procedure of the arbitration to rules which might change.’”) (quoting *Harper v. Ultimo*, 7 Cal. Rptr. 3d 418, 422 (Cal. Ct. App. 2003)).

Further, the arbitration agreement is substantively unconscionable because it contains multiple substantively unconscionable provisions, including the batching provision, which on its own is substantively unconscionable, and the delegation clause. Additionally, the statute-of-limitations clause in the arbitration agreement is substantively unconscionable because it reduces the limitations period only for claims brought by players, not Avia. Avia's argument that the statute-of-limitations clause applies to both parties belies the plain text.

5. The district court did not abuse its discretion in declining to sever the unconscionable provisions from the arbitration agreement. Given the multiple unconscionable provisions in the arbitration agreement, the district court was within its discretion to find that Avia "engaged in a systematic effort to impose arbitration on the weaker party not simply as an alternative to litigation, but to secure a forum that works to [Avia's] advantage." *Ramirez*, 551 P.3d at 547.

AFFIRMED.

APPENDIX B

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

ANDREW PANDOLFI,
et al.,

Plaintiffs,

v.

AVIAGAMES, INC., et
al.,

Defendants.

Case No. 23-cv-05971-
EMC**AMENDED ORDER**
DENYING AVIA
DEFENDANTS'
MOTION TO
COMPEL
ARBITRATION

Docket No. 73

Plaintiffs Andrew Pandolfi and Mandi Shawcroft have filed suit against AviaGames, Inc. (“Avia”) and its co-founders (collectively, the “Avia Defendants”), as well as two companies that invested in Avia. The Avia Defendants have moved to compel arbitration pursuant to the Federal Arbitration Act. Having considered the parties’ briefs and accompanying submissions, as well as all supplemental briefing, the Court hereby **DENIES** the Avia Defendants’ motion.

I. FACTUAL & PROCEDURAL
BACKGROUND**A. First Amended Complaint**

In the operative first amended complaint (“FAC”), Plaintiffs allege as follows.

Avia is a gaming company that launched in 2017. *See* FAC ¶ 30. Ms. Chen and Ms. Wang are Avia’s co-founders. They are also currently employees: Ms. Chen is the CEO, and Ms. Wang a VP of Strategy & Business Development. *See* FAC ¶¶ 14-15.

Avia’s games – which include Bingo Clash, Solitaire, Pool Clash, Match n Flip, 21 Gold, and Tile Blitz – can be accessed through mobile browsers or through downloaded standalone applications. *See* FAC ¶¶ 30-31. The games can be played for cash. *See* FAC ¶¶ 35, 43, 67. Avia claims that it does not have any financial interest in the outcome of cash games or any stake in who wins or loses. *See* FAC ¶¶ 37, 69.

Avia represents to players and prospective players that its games give players the ability to compete against other players (i.e., human opponents and not bots) – in particular, other players of equal skill levels. *See* FAC ¶¶ 34, 42. Avia also represents that “players ‘[c]ompete in real time against other players’ and that they ‘[c]ompete using only [their] strategy and skill.’” FAC ¶ 35. In other words, Avia’s games are ones of skill and not ones of chance. *See* FAC ¶¶ 39, 66 (alleging that games of chance mean that a player’s skill does not impact the game’s outcome). Such representations and/or similar representations “are visible to each user who downloads Avia’s games” and/or on Avia’s website (*e.g.*, in the FAQ section). FAC ¶¶ 34-38, 48. *See, e.g.*, FAC ¶ 44 (“Players downloading the games see [such] statements as game descriptions when they access the relevant app store, such as the Apple’s AppStore or Samsung’s Galaxy Store”).

Avia’s representations are allegedly false:

- Players do not compete against live human opponents but rather against bots – specifically, historical playthroughs which can include a video recording of a match played previously by another player. *See* FAC ¶ 53. “Using bots helps Avia maintain player liquidity. Avia needs players for the real players to play against. If there are not enough real players and the players need to wait to get the results of their match, they are less likely to keep playing.” FAC ¶ 63.
- Avia can manipulate matches by matching a player against a bot of a similar skill level or a bot that has a higher skill rating or score. *See* FAC ¶¶ 54, 71.
- Avia does have a financial interest in its games because, if a historical playthrough wins a match, Avia does not pay a cash prize to anyone and keeps the entry fee paid by the live player. *See* FAC ¶ 53.

Based on, *inter alia*, the above allegations, Plaintiffs assert the following claims: (1) violation of California Business & Professions Code § 17200; (2) violation of the California Consumer Legal Remedies Act (“CLRA”); and (3) violation of the federal Racketeer Influenced and Corrupt Organizations Act (“RICO”).

B. Terms of Service

Avia requires individuals to agree to its Terms of Service (“Terms”) as a condition of playing an Avia game. *See* Qu Decl. ¶ 6. Avia periodically updates its Terms. *See* Qu Decl. ¶¶ 6, 8. The relevant Terms for purposes of the case at bar are the December 2022 Terms and the July 2023 Terms. Both the 2022 and

2023 versions contain an arbitration agreement. Under that agreement, “[a]ll disputes, claims or controversies arising out of or relating to these Terms, any Services, or the relationship between you and Aviagames . . . I[ing] claims that accrued before you entered into this Agreement” shall be resolved by binding arbitration. Qu Decl., Ex. 1 (Terms § 15(a)).

The arbitration agreement also contains a delegation clause – *i.e.*, a clause that specifies that an arbitrator (and not a court) decides certain gateway issues related to arbitrability. Specifically, the delegation clause provides that all “disputes arising out of or relating to interpretation or application of this arbitration provision, including the enforceability, revocability, or validity of the arbitration provision or any portion of the arbitration provision” are to be decided by an arbitrator. Qu Decl., Ex. 1 (Terms § 15I).

The Avia Defendants have moved to compel arbitration based on the arbitration agreement in the December 2022 and July 2023 Terms.

C. Prior Order

On May 21, 2024, the Court issued an order addressing some of the issues raised in the Avia Defendants’ motion. Specifically, the Court held that each Plaintiff and Avia had entered into an agreement to arbitrate. *See* Docket No. 113 (Order at 5-7). Although Plaintiffs challenged the arbitration agreement on the basis that it was unconscionable, the arbitration agreement clearly and unmistakably delegated that gateway issue of arbitrability to the arbitrator in the first instance. The only way for the Court to decide the issue of unconscionability would be if the delegation clause itself were unconscionable, in

which case it could not be enforced. *See* Docket No. 113 (Order at 7-9).

The Court found that there was some procedural unconscionability with respect to the delegation clause. *See* Docket No. 113 (Order at 12). As for substantive unconscionability, the issue was whether it would be unconscionable to delegate to an arbitrator adjudication of arbitrability issues.

According to Plaintiffs, it would be unconscionable to delegate arbitrability to the arbitrator because the arbitration agreement contained a bellwether provision. *See* Docket No. 113 (Order at 13-14); *see also Holley-Gallegly v. TA Operating, LLC*, 74 F.4th 997, 1002 (9th Cir. 2023) (explaining that a provision outside of a delegation clause may be considered in deciding whether a delegation clause is substantively unconscionable); *Bielski v. Coinbase, Inc.*, 87 F.4th 1003, 1012 (9th Cir. 2023) (noting that a delegation clause “itself may not provide enough information for the court to evaluate the challenge”). The bellwether provision states in relevant part as follows:

The AAA Supplementary Rules for Multiple Case Filings and the AAA Multiple Consumer Case Filing Fee Schedule will apply if twenty-five (25) or more similar claims are asserted against Aviagames or against you by the same or coordinated counsel or are otherwise coordinated. In addition to the application of the AAA Supplementary Rules for Multiple Case Filings and the AAA Multiple Consumer Case Filing Fee Schedule, you and Aviagames understand and agree that **when twenty-five (25) or more similar claims are asserted against**

Aviagames or you by the same or coordinated counsel or are otherwise coordinated resolution of your or Aviagames' Claim might be delayed. For such coordinated actions, you and Avia games also agree to the following coordinated bellwether process. Counsel for claimants and counsel for Aviagames shall each select ten (10) cases (per side) to proceed first in individual arbitration proceedings. The remaining cases shall be deemed filed for purposes of the statute of limitations but not for the purpose of assessing AAA fees. No AAA fees shall be assessed in connection with those cases until they are selected to proceed to individual arbitration proceedings as part of bellwether process. If the parties are unable to resolve the remaining cases after the conclusion of the initial twenty (20) proceedings, each side shall select another ten (10) cases (per side) to proceed to individual arbitration proceedings as part of a second bellwether process. A single arbitrator shall preside over each case. Only one case may be assigned to each arbitrator as part of a bellwether process unless the parties agree otherwise. The bellwether process shall continue, consistent with the parameters identified above, until all the claims included in these coordinated filings, including your case, are adjudicated or otherwise resolved. . . .

Qu Decl., Ex. 1 (Terms § 15I(6)) (emphasis added).

In a different case, this Court found a similar bellwether provision substantively unconscionable

because it effectively delayed adjudication of claims brought by consumers, condemning some to waiting as long as 150 years in order to have their claims heard. *See MacClelland v. Cellco P'ship*, 609 F. Supp. 3d 1024, 1041 (N.D. Cal. 2022). The instant case differs somewhat from *MacClelland* in that, here, the initial question is whether a delegation clause in an arbitration agreement (as opposed to the arbitration agreement itself) – that is also governed by a bellwether provision – is substantively unconscionable.

According to Plaintiffs, the bellwether provision makes delegation of arbitrability to the arbitrator unconscionable because “adjudication by an arbitrator of the issue of arbitrability can be unduly delayed as a result of the bellwether provision.” Docket No. 113 (Order at 14). Plaintiffs also assert that there could be a “chilling effect on players’ willingness to pursue their rights (including statutory rights) . . . if adjudication of arbitrability alone can be delayed.” Docket No. 113 (Order at 14). In short, the net effect of delaying and effectively undermining the arbitration – the prescribed forum for dispute resolution – still obtains.

The Court asked for supplemental briefing on the substantive unconscionability of the delegation clause when taken together with the bellwether provision. *See* Docket No. 113 (Order at 17) (acknowledging that this was a second request for supplemental briefing). The Court then held a hearing after the supplemental briefing was filed. On July 26, 2024, the Court issued an order denying the Avia Defendants’ motion to compel arbitration. *See* Docket No. 128 (order). Three days later, the Court asked the parties to file further supplemental briefing because of a recently issued California Supreme Court decision that addressed

unconscionability. *See* Docket No. 129 (order) (citing *Ramirez v. Charter Comms., Inc.*, 16 Cal. 5th 478 (2024) (filed on July 15, 2024)). The Court expressly noted that its prior order denying the motion to compel arbitration was not a final order because it was seeking supplemental briefing. *See* Docket No. 136 (order).

Having now considered the most recent round of supplemental briefs, as well as the other documents previously filed, the Court amends its prior order. The Avia Defendants' motion to compel arbitration is **DENIED** for the reasons discussed below.

II. DISCUSSION

U. Unconscionability of Delegation Clause

Plaintiffs bear the burden of proving that the delegation clause is unconscionable, both procedurally and substantively. *See Ramirez*, 16 Cal. 5th at 492; *see also Lim v. Tforce Logistics, LLC*, 8 F.4th 992, 1000 (9th Cir. 2021); *Aggarwal v. Coinbase*, 685 F. Supp. 3d 867, 880 (N.D. Cal. 2023); *cf. Holley-Gallegly v. TA Operating, LLC*, 74 F.4th 997, 1002 (9th Cir. 2023) (stating that, “if a party cites provisions outside of the delegation clause in making an unconscionability challenge, it must explain how those provisions make the fact of an arbitrator deciding arbitrability unconscionable”) (emphasis added). “Courts apply a sliding scale analysis under which ‘the more substantively oppressive [a] term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.’” *Ramirez*, 16 Cal. 5th at 493.

U. Procedural Unconscionability

As noted above, in its prior order, the Court found that there was some procedural unconscionability with respect to the delegation clause. *See Ramirez*, 16 Cal. 5th at 492 (noting that “[p]rocedural unconscionability ‘addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power’”); Docket No. 113 (Order at 12) (noting that “there is an element of unfair surprise” in the consumer contract because the clause is “in the middle of 16 numbered paragraphs, most with multiple numbered subparagraphs, within 14 pages of single-spaced, 8-point font in barely readable, light gray text”; adding that, “[a]s the clause is not even numbered, let alone titled, there is nothing in the text to call players’ attention to the delegation clause”). There was at least enough procedural unconscionability in the instant case to warrant an inquiry into substantive unconscionability. *Cf. Ramirez*, 16 Cal. 5th at 494 (stating that, if a court finds *no* element of procedural unconscionability in a contract, this means that “no matter how one-sided the contract terms, a court will not disturb the contract because of its confidence that the contract was negotiated or chosen freely, that the party subject to a seemingly one-sided term is presumed to have obtained some advantage from conceding the term or that, if one party negotiated poorly, it is not the court’s place to rectify these kinds of errors or asymmetries”).

The Avia Defendants contend that the California Supreme Court’s decision in *Ramirez* should lead the Court to reassess procedural unconscionability. The Court is not convinced. That courts must be

“particularly attuned” to procedural unconscionability in the employment context, *Ramirez*, 16 Cal. 5th at 478, does not mean that there cannot be procedural unconscionability in the consumer context.

The Avia Defendants also ask for an opportunity to supplement the record to show how the delegation clause actually appears to a player of an Avia game. According to the Avia Defendants, this will demonstrate that there is, in fact, no element of unfair surprise. *See* Docket No. 135 (Defs.’ Supp. Br. at 8) (“The Terms included as exhibits to Avia Defendants’ motion to compel arbitration, Dkt. 73-1, accurately reflect the complete text of Avia’s Terms but do not accurately reflect how those Terms appear on Avia’s mobile application, which is where users agree to them. There, the Terms appear in high-contrast white-on-blue text, in a font size comparable to that found in text messages or mobile web browsers.”). That request is denied. The Avia Defendants had an opportunity to provide that information when it filed its motion to compel. That they failed to do so is not a reason to reopen the record. In any event, even if accepting that there was white-on-blue text, and in larger font, the delegation clause was still embedded “in the middle of 16 numbered paragraphs, most with multiple numbered subparagraphs, within [what was equivalent to] 14 [single-space] pages.” Docket No. 113 (Order at 12). The provision is obscure and surprising. Nothing in *Ramirez* alters the materiality of this finding.

2. Substantive Unconscionability

Having found some degree of procedural unconscionability, the Court now turns to substantive

unconscionability. As stated above, the basic question for the Court is whether delegation of arbitrability issues to the arbitrator is substantively unconscionable.

A. At the time of contract formation – the potential chilling effect

As an initial matter, the Court considers whether unconscionability here should be assessed at the time the delegation clause/bellwether provision was made or, instead, at the time the agreement containing the delegation clause/bellwether provision was sought to be enforced. *See* Docket No. 113 (Order at 16). On the one hand, a provision in the California Civil Code suggests that unconscionability should be assessed at the time of contract formation. Section 1670.5(a) provides that, “[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable *at the time it was made* the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.” Cal. Civ. Code § 1670.5(a) (emphasis added). As Plaintiffs note, consistent with § 1670.5(a), cost provisions and statute-of-limitations provisions contained in arbitration clauses are typically assessed at the time of contract formation. *See, e.g., Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 107-13 (2000) (discussing a cost provision); *Wherry v. Award, Inc.*, 192 Cal. App. 4th 1242, 1249 (2011) (discussing a statute-of-limitations provision). On the other hand, several state appellate courts have held that, where an arbitration agreement is being evaluated for unconscionability based on

limitations to discovery, unconscionability is evaluated “as applied to a particular plaintiff” – *i.e.*, “postcontract formation circumstances” are considered. *Ramirez*, 16 Cal. 5th at 505. This line of authority suggested that there could be exceptions to § 1670.5(a).

In *Ramirez*, however, the California Supreme Court expressly considered the latter line of cases and disapproved of their approach. It stated:

The assessment of whether a discovery clause is unconscionable should focus on general factors that can be examined *without* relying on subsequent developments. Those factors include the types of claims covered by the agreement, the amount of discovery allowed, the degree to which that amount may differ from the amount available in conventional litigation, any asymmetries between the parties with regard to discovery, and the arbitrator’s authority to order additional discovery.

Id. at 506 (emphasis added).

In light of the above holding from *Ramirez*, the Court concludes that the delegation clause/bellwether provision should be assessed at the time of formation only, and not at the time of enforcement.

At the time of contract formation, the delegation clause taken together with the bellwether provision has a chilling effect on players. *See MacClelland*, 609 F. Supp. 3d at 1041 (considering chilling effect, in the context of a bellwether provision, on persons in addition to plaintiffs). Such an *a priori* chilling effect informs unconscionability. *See Ramirez*, 16 Cal. 5th at 508-09 (evaluating provision under which a party resisting arbitration would be required pay to the

other party all fees and costs incurred in compelling arbitration; taking note that, under this provision, a party moving to compel arbitration could potentially get fees and costs if a court were to find unconscionability but then sever the unconscionable terms – the “possibility” of this “outcome could chill an employee’s right to challenge the enforceability of an arbitration agreement”); *Armendariz*, 24 Cal. 4th at 110 (noting that the risk that an employee would have “to bear large costs to vindicate their statutory right against workplace discrimination” could have a “chill[ing] [effect on] the exercise of that right”); see also *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 663 (6th Cir. 2003) (“looking to the possible ‘chilling effect’ of [a] cost-splitting provision on similarly situated potential litigants, as opposed to its effect merely on the actual plaintiff in any given case,” in deciding whether the provision is enforceable).¹

At the time of contract formation, it is predictable that a player could have a dispute with Avia based on a company policy that applies across-the-board to *all* players, as occurred here, and will be caught up by the bellwether provision. *Cf. Ramirez*, 16 Cal. 5th at 506

¹ Assessing the effect of a provision at the time of contract formation implicates an analysis akin to assessing the facial (as opposed to an as-applied) validity of a law. At the time of formation, there are no known fact-specific circumstances to apply. Consideration of chilling effect is often entailed in a facial challenge in other contexts. See *Arce v. Douglas*, 793 F.3d 968, 984 (9th Cir. 2015) (noting that “a law may be invalidated under the First Amendment overbreadth doctrine if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep’[;] [t]he doctrine exists out of concern that the threat of enforcement of an overbroad law may chill constitutionally protected speech”).

(indicating that, if a discovery limitation in an arbitration agreement is being analyzed, a factor to consider in determining whether the limitation is unconscionable is “the types of claims covered by the [arbitration] agreement”). If the policy applies across-the-board to all players, then a player who arbitrates her claim will likely be subject to the bellwether provision because: (1) there will be other players who have the same kind of claims and, thus, (2) as discussed *infra*, there will likely be coordination of all arbitrating players’ claims in arbitration, regardless of who the players’ lawyers are. *See* Qu Decl., Ex. 1 (Terms § 15I(6)) (providing that bellwether provision is triggered where “twenty-five (25) or more similar claims are asserted against Aviagames or you by the same or coordinated counsel *or are otherwise coordinated*”) ² (emphasis added). Moreover, the practical reality is that claims based on a company-wide policy affecting consumers will often be brought by law firms that represent a multitude of claimants, especially when the dollar amounts are small. *See, e.g., MacClelland*, 609 F. Supp. 3d at 1040 (noting that

² The Avia Defendants have suggested that whether cases are coordinated in arbitration (for purposes of the bellwether provision) turns on whether the claims are similar and “critical[ly]” whether the claims involve coordinated plaintiffs’ counsel. Docket No. 135 (Defs. Supp. Br. at 4 n.4). But the bellwether provision clearly states on its face that it is triggered where “twenty-five (25) or more similar claims are asserted against Aviagames or you by the same or coordinated counsel *or are otherwise coordinated.*” Qu Decl., Ex. 1 (Terms § 15(c)(6)) (emphasis added). It is hard to imagine that there would not be an interest – on the part of an arbitrator at least – to coordinate if similar consumer-type claims are being brought simply because counsel for the plaintiffs are different or not coordinated.

there were 27 plaintiffs in the case and that plaintiffs’ counsel also represented more than 2,600 other customers of defendant); 2d Tripolitsiotis Decl. ¶ 4 (testifying that Plaintiffs’ counsel represents 51 individuals, including Plaintiffs); 2d Kind Decl. ¶ 3 (testifying that firm represents more than 4,100 individuals who have the same kind of claims that Plaintiffs bring here); *cf. Willis v. City of Seattle*, 943 F.3d 882, 890-91 (9th Cir. 2019) (noting that class actions provide “a ‘means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all’” and, in recent years, have “often been initiated to vindicate large numbers of small-dollar consumer claims”). Because the bellwether provision allows for arbitration of only twenty cases at a time – *and* with the default of only one case being assigned to each arbitrator,³ *see* Qu Decl., Ex. 1 (Terms § 15I(6)) – there would likely be delay in resolution of the players’ claims. This would include a delay just to obtain a resolution of the gateway issue of whether a claim is arbitrable in the first instance. *See* Docket No. 113 (Order at 14) (considering whether “adjudication by an arbitrator of the issue of arbitrability can be unduly delayed as a result of the bellwether provision”). That prospect of delay – on the limited gateway issue alone

³ *Compare* AAA Mass Arbitration Supplementary Rules, Introduction, available at <https://www.adr.org/sites/default/files/Mass-Arbitration-Supplementary-Rules.pdf> (last visited 7/15/2024) (encouraging parties to processes that make resolution of mass arbitration “more efficient, such as . . . [a]n agreement to assign multiple cases to a single arbitrator, making the scheduling of conferences and hearings more efficient”).

– likely has a chilling effect on players, deterring them from vindicating their rights. Each claimant will have to await determination of the forum in which it may prosecute their claim before proceeding with the claim. Accordingly, the Court finds that delegation of arbitrability issues to an arbitrator unconscionably delays adjudication of claims based on the facts of this case.⁴

b. Sweep of the bellwether provision – coordination

To be sure, at the time of contract formation, a player could anticipate having different kinds of claims against Avia – *i.e.*, claims not based on a blanket policy adopted by the company but rather claims that are specific and individual to the player herself (*e.g.*, a failure to provide a promised refund). But even if a player could anticipate having claims that would *not* trigger the bellwether provision, it is still predictable that the player would also have claims that *would* trigger the provision. The sweep of the bellwether provision is broad, applying not only to an attorney who represents a large number of consumers asserting similar claims, but also to independent counsel who represent other unrelated consumers whose claims are similar and are not fact specific and not made on an individual basis; all are subject

⁴ The Court emphasizes that its analysis of the bellwether provision here should not be viewed as a general condemnation of case management strategies for mass arbitrations. Nor does the Court's decision here preclude parties in arbitration from meeting and conferring and agreeing to certain case management strategies so as to handle mass arbitrations that are not unconscionable.

coordination within the ambit of the bellwether provision. *See* Qu Decl., Ex. 1 (Terms § 15I(6)); *see also* MA-1(b) (defining “Mass Arbitrations” as 25 or more similar Demands for Arbitration . . . filed against or on behalf of the same party or related parties” and “where representation of all parties is consistent or coordinated across all cases”). It is likely that, in arbitration, the claims of Plaintiffs herein and the similar claims brought by the individuals represented by the Kind Law firm would be coordinated under the terms of the arbitration agreement and MA-1(b).

c. Asymmetry

It is also worth noting here that the bellwether provision effectively has a built-in asymmetry, and with no apparent justification. *Cf. Ramirez*, 16 Cal. 5th at 506 (in considering whether a limitation on discovery in an arbitration agreement is unconscionable, stating that one factor is whether there are “any asymmetries between the parties with respect to discovery”); *id.* at 495 (evaluating whether an arbitration agreement was unconscionable because “it compelled arbitration of claims more likely to be brought by an employee and excluded claims more likely to be brought by [the employer]”). While it is predictable that a player will have claims that will trigger the bellwether provision, it is far from clear that Avia would ever have claims that would trigger the provision. That is, under what circumstances would twenty-five or more similar claims be asserted by Avia against a player that would warrant coordination? *See* Qu Decl., Ex. 1 (Terms § 15I(6)) (providing that “you and Aviagames understand and agree that when twenty-five (25) or more similar claims are asserted against Aviagames or you by the

same or coordinated counsel or are otherwise coordinated resolution of your or Aviagames' Claim might be delayed[;][f]or such coordinated actions, you and Avia games also agree to the following coordinated bellwether process"); *see also Ramirez*, 16 Cal. 5th at 498 (noting that the employer's guidelines, which *excluded* certain kinds of claims from arbitration, classified some of those claims as claims that could be brought by either the employer and the employee, but, in fact, the claims were "more likely to be employer-initiated").

D. Avia Defendants' counter-arguments

The Avia Defendants have offered several arguments to support their position that the delegation clause/bellwether provision is not unconscionable, but none is persuasive.

For example, the Avia Defendants cite to *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), arguing that it is too speculative, at the time of contract formation, to say whether the delegation clause/bellwether provision has a chilling effect. The Court does not agree. In *Green Tree*, the plaintiff argued that an arbitration agreement should be deemed unenforceable because it was *silent* on the issue of arbitration costs and therefore created a risk that the plaintiff would be required to pay prohibitive costs if she were to pursue her rights and thus "force[d] her to forgo any claims she [might] have." *Id.* at 82, 89, 90. The Supreme Court rejected this argument, stating as follows:

It may well be that the existence of large arbitration costs could preclude a litigant such as [the plaintiff] from effectively vindicating her

federal statutory rights in the arbitral forum[,] [b]ut the record does not show that [she] will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter. As the Court of Appeals recognized, “we lack . . . information about how claimants fare under [the defendant’s] arbitration clause.” The record reveals only the arbitration agreement’s silence on the subject, and *that fact alone* is plainly insufficient to render it unenforceable. The “risk that [the plaintiff] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.

Id. at 90-91 (emphasis added). *Green Tree* is not applicable here because the arbitration agreement in the case at bar is not silent on the contested matter (*i.e.*, the delegation clause/bellwether provision).

The Avia Defendants also argue that a decision on arbitrability would not in fact be delayed as a result of the delegation clause/bellwether provision because there are other arbitration rules that will govern as well. They point out that, under the arbitration agreement, “[t]he AAA Supplementary Rules for Multiple Case Filings and the AAA Multiple Consumer Case Filing Fee Schedule will apply if twenty-five (25) or more similar claims are asserted against Aviagames or against you by the same or coordinated counsel or are otherwise coordinated.” Qu Decl., Ex. 1 (Terms § 15I(6)). According to the Avia Defendants, those Supplementary Rules – now known as the Mass Arbitration Supplementary Rules, *see* <https://www.adr.org/mass-arbitration> (last visited 7/15/2024) – provide that there will be “early resolution of threshold issues like arbitrability

through the Process Arbitrator, who is authorized to make group-wide decisions regarding arbitrability at the outset, regardless of the number of claimants.” Docket No. 121 (Defs.’ 2d Supp. Br. at 10); *see also* Docket No. 114 (Defs’ Supp. Br. at 1-2); *cf. Ramirez*, 16 Cal. 5th at 506 (stating that a factor to consider in deciding whether an arbitration agreement that contains limitations on discovery is unconscionable is whether the arbitrator has authority to order additional discovery).

The Supplementary Rules discuss Process Arbitrators in Mass Arbitration Rule 6 (“MA-6”). MA-6 provides in relevant part that a Process Arbitrator “may” be appointed by the AAA International Center for Dispute Resolution (“ICDR”) “in its sole discretion.” MA-6(a) (emphasis added). The rule also outlines the authority held by a Process Arbitrator, as opposed to a Merits Arbitrator – *e.g.*, to address whether filing requirements have been met, any disputes over arbitration fees and costs, which demands for arbitration should be included as part of the mass arbitration filing, whether previously-issued rulings by the Process Arbitrator are binding on subsequent cases, and so forth. *See* MA-6(c). The Court has reviewed the content of the rule. Contrary to what the Avia Defendants assert, the rule does not suggest that a dispute over whether an arbitration agreement (including a delegation provision) is unconscionable is a decision that can be made by a Process Arbitrator (assuming one is appointed in the first place) instead of a Merits Arbitrator. The issue of arbitrability is not administrative or ministerial in nature, but more substantive in nature. Accordingly, the Avia Defendants’ contention that delay on arbitrability

issues can be avoided through use of a Process Arbitrator is unconvincing.

The Avia Defendants protest that the Court has misinterpreted the scope of the Process Arbitrator's authority – *i.e.*, the Process Arbitrator could in fact rule on arbitrability issues because (1) the AAA Supplementary Rules on Mass Arbitration provide that “[t]he Process Arbitrator shall have the power to rule on the Process Arbitrator’s own jurisdiction,” MA-6(f), and (2) the Ninth Circuit has held that, where arbitration rules give “the arbitral tribunal the authority to decide its own jurisdiction, [they] vest the arbitrator with the apparent authority to decide questions of arbitrability.” *Oracle Am., Inc. v. Myriad Grp. AG*, 724 F.3d 1069, 1074 (9th Cir. 2013). But *Oracle* did not involve a situation in which there was a Process Arbitrator separate from a Merits Arbitrator and importantly does not address the meaning of the AAA Supplementary Rules which is the issue here. That the AAA Supplementary Rules give a Process Arbitrator the authority to rule on its own jurisdiction begs the question of what *is* the Process Arbitrator’s jurisdiction in the first instance. As indicated above, nothing in the AAA Supplementary Rules suggests that the Process Arbitrator has a role in deciding matters beyond those that are administrative or ministerial in nature, and gateway issues of arbitrability are clearly more consequential in nature. (Hence, the presumption that ordinarily courts, and not arbitrators, decide gateway issues of arbitrability. *See Momot v. Mastro*, 652 F.3d 982, 987 (9th Cir. 2011).) The issue of arbitrability is a core merits determination and is hardly a ministerial decision that one would expect the Process Arbitrator to decide.

Accordingly, the Court finds no merit to the Avia Defendants' reliance on the Process Arbitrator.

Finally, it is worth noting that, if the Avia Defendants were correct, *i.e.*, the Process Arbitrator has the power to adjudicate gateway issues of arbitrability, then there would be serious due process concerns. The AAA Supplementary Rules provide that “[r]ulings by the Process Arbitrator will be final and binding upon the parties and Merits Arbitrator(s) with respect to *subsequently filed* cases that the AAA determines to be part of the same Multiple Case Filing.” MA-6(k) (emphasis added). That would mean consumers in later-filed arbitrations would be bound by the first decision on arbitrability – a key and highly consequential decision – without ever being given notice or an opportunity to be heard on the matter.

The Avia Defendants argue next that there will be no delay on adjudication of arbitrability issues because any arbitrator appointed would be “required to observe the AAA Consumer Due Process Protocol Statement of Principles,”⁵ and “Principle 8 of the Due Process Protocol expressly requires that ‘proceedings should occur within a reasonable time, without undue delay.’” Docket No. 104 (Defs.’ Supp. Br. at 9); *see also* Qu Decl., Ex. 1 (Terms § 15I) (providing that, “[i]f you are a consumer, then then-current version of the AAA’s Consumer Arbitration Rules will apply”). But

⁵ The AAA Consumer Due Process Protocol is available at <https://go.adr.org/consumer-arbitration#:~:text=Key%20Provisions%20of%20the%20Due%20Process%20Protocol%3A%20Consumers,Location%20of%20the%20proceeding%20must%20be%20reasonably%20accessible> (last visited 7/15/2024).

a general principle does not override the more specific bellwether provision in the parties' arbitration agreement absent a clear intent to otherwise provide. There is no such clear intent here.

Finally, the Avia Defendants contend that, even if the Court is troubled by the delegation clause when taken in conjunction with the bellwether provision, there is an easy solution – namely, severance of the bellwether provision. *See* Docket No. 121 (Defs.' 2d Supp. Br. at 10) (arguing that “the proper remedy is to sever the bellwether provision and leave the delegation clause intact”). The Court rejects this argument. As an initial matter, the Court notes that the delegation clause – and the bellwether provision – are not the only terms that Plaintiffs claim are substantively unconscionable. It would be artificial for the Court to isolate the former provisions from the latter in making a decision on severance; severance should be judged on assessment of the full context of all unconscionable provisions. The Court's analysis on severance when considering all substantively unconscionable terms is provided below.

That being said, even if it would be appropriate for the Court to consider only the delegation clause and bellwether provision alone, it would not sever. *Hale v. Brinker International, Inc.*, No. 21-cv-09978-VC, 2022 U.S. Dist. LEXIS 108488 (N.D. Cal. June 17, 2022), is instructive. There, the defendant argued that a cost-splitting provision, even if unconscionable, could easily be severed from the remainder of the arbitration agreement. Judge Chhabria was not convinced, emphasizing that, “[e]ven though the cost-splitting provision is the *only* substantively unconscionable provision of the agreement, it remains consequential”

because “[c]ost-and fee-shifting provisions can create a chilling effect, discouraging employees from vindicating their rights for fear that failure will prove cripplingly expensive”; “[w]ere courts to excise those provisions and enforce arbitration agreements anyway, employers would have no incentive not to chill claims by including cost-shifting provisions in arbitration agreements.” *Id.* at *3-4 (emphasis added).

The Court agrees with Judge Chhabria. The Avia Defendants are not entitled to rely on severance as a fix when they profited from inclusion of the bellwether provision in the first instance, *i.e.*, because it may have had a chilling effect that deterred players from ever pursuing their rights in the arbitral forum available to them. Severance does not cure the problematic chilling effect of the unconscionable bellwether provision. *Cf. Ramirez*, 16 Cal. 5th at 514, 516 (indicating that “the overarching inquiry is whether the interests of justice . . . would be furthered by severance”; adding that “a court is not *required* to sever or restrict an unconscionable term if an agreement has only a single such term”) (internal quotation marks omitted; emphasis in original). The Avia Defendants attempt to downplay the significance of the delegation clause, arguing that it is a collateral matter since it “only addresses which tribunal will resolve threshold questions of arbitrability.” Docket No. 135 (Defs.’ Supp. Br. at 2). But who decides gateway issues of arbitrability is highly consequential and normally expected to be a question for the court as demonstrated by the presumption that a court, and not an arbitrator, decides the question of arbitrability. *See Momot*, 652 F.3d at 987.

The Court therefore finds that the delegation clause unconscionable, both procedurally and substantively. Even if the procedural unconscionability is considered modest, the substantive unconscionability is significant, and therefore the clause is unenforceable whether the provision is taken in isolation (with the bellwether provision) or in conjunction with other terms in the arbitration agreement that are substantively unconscionable.

B. Unconscionability of Arbitration Agreement

Because the delegation clause is not enforceable, the Court (and not the arbitrator) decides the gateway issue of whether the broader arbitration agreement is unconscionable and therefore unenforceable. As noted above, under California law, there must be both procedural and substantive unconscionability in order for an agreement to be rendered invalid, although there is a “sliding scale” such that “greater substantive unconscionability may compensate for lesser procedural unconscionability,” and vice-versa. *Chavarria v. Ralph’s Grocery Store*, 733 F.3d 916, 922 (9th Cir. 2013) (citing *Armendariz*, 24 Cal. 4th at 114).

U. Procedural Unconscionability

In the instant case, there is some procedural unconscionability in the arbitration agreement. For instance, there is some unfair surprise because Plaintiffs entered into the arbitration agreements with Avia by agreeing to updated Terms presented to them via pop-up boxes in the game apps. The pop-up boxes informed Plaintiffs of updated Terms but did not explain that changes to the Terms include changes to the arbitration agreement specifically – such as

adding a delegation clause and establishing a bellwether process.⁶

The Avia Defendants suggest that there is no unfair surprise because, if a player were to actually look at the updated Terms, the first paragraph mentions an arbitration agreement:

BY REGISTERING AN ACCOUNT, PARTICIPATING IN ANY TOURNAMENT OR COMPETITION, CLICKING TO ACCEPT OR AGREE TO THESE TERMS OF SERVICE, OR USING THE SERVICES IN ANY WAY, YOU AGREE AND ACCEPT TO BE BOUND BY THESE TERMS. IF YOU DO NOT AGREE TO THESE TERMS, INCLUDING THE MANDATORY ARBITRATION PROVISION AND CLASS ACTION WAIVER IN SECTION 15, DO NOT ACCESS OR USE OUR PRODUCTS OR SERVICES.

Qu Decl., Ex. 1 (Terms at 1). But this ignores the point that players still were not given notice of the fact that changes – significant changes – had been made to the arbitration agreement. The Court agrees with the decision in *Heckman* that there is a “situation of unfair surprise” where a defendant’s “customers receive[] no notice of [a] significant change to the [Terms of Use].” *Heckman*, 686 F. Supp. 3d at 953 (agreeing with

⁶ As the Court noted in its prior order, the above does not negate a finding of contract formation – that the parties had an agreement to arbitrate. It does, however, bear on unfair surprise which is part of the procedural unconscionability analysis. See Docket No. 113 (Order at 7); *Heckman*, 686 F. Supp. 3d at 953 (indicating that contract formation is a matter different from unfair surprise/procedural unconscionability).

plaintiffs' contention that "Defendants' imposition of such a significant change in the [Terms] [e.g., from individual, bilateral arbitration to mass arbitration] without giving any notice to customers is one reason . . . that the agreement is procedurally unconscionable"; adding that, "because it would seem trivially easy to provide customers with such notice, Defendants' failure to do so suggests a degree of intentionality and/or oppression").

To the extent the Avia Defendants suggest there still is no element of unfair surprise because players were pointed to the section on arbitration and could have read through the section to get details on the terms of the arbitration agreement, the Court does not agree. The terms of the arbitration agreement are presented in small, light grey font and span about three pages of single-spaced text. Although some language is displayed in "ALLCAPS," that method of emphasis is not especially effective given the use of the light grey font. Furthermore, there is no bolding or underlining to call out any terms, including the terms that were newly added (of particular note, the delegation clause and bellwether provision). Given these circumstances, the position of the Avia Defendants that there is *no* element of unfair surprise lacks merit. *Cf. Yeomans v. World Fin. Grp. Ins. Agency, Inc.*, 485 F. Supp. 3d 1168, 1185-86 (N.D. Cal. 2020) (noting that arbitration agreement used 9-point font and that "[a] layperson trying to navigate this block text, printed in tiny font would not have an easy journey"). There is sufficient procedural

unconscionability to trigger assessment of substantive unconscionability.⁷

2. Substantive Unconscionability

Because there is at least some procedural unconscionability, the Court considers next the matter of substantive unconscionability. Plaintiffs argue that there are five provisions in the arbitration agreement that are substantively unconscionable: (1) the delegation clause; (2) the bellwether provision; (3) the jury waiver provision; (4) the statute-of-limitations provision; and (5) the public injunctive relief provision.

The Court has already found the delegation clause substantively unconscionable. It also finds here that the bellwether provision is substantively unconscionable for reasons similar to those articulated above. If the delegation clause is substantively unconscionable when coupled with the bellwether provision (because of the chilling effect at the time of contract formation), the bellwether provision is clearly substantively unconscionable by itself.

Furthermore, there is another troubling aspect to the bellwether provision. The bellwether provision is triggered – causing delay – when twenty-five or more

⁷ As above, the Court recognizes the Avia Defendants' belated contention that its Terms actually "appear in high-contrast white-on-blue text, in a font size comparable to that found in text messages or mobile web browsers." Docket No. 135 (Defs.' Supp. Br. at 8). The Court does not give the Avia Defendants leave to supplement the record to establish such. Furthermore, even if the Court permitted supplementation, there would still be some procedural unconscionability given the length of the arbitration agreement embedded in the Terms and the failure to use any means to call out the newly added provisions to the arbitration agreement.

claims are asserted against Avia by the *same or coordinated* counsel. See Qu Decl., Ex. 1 (Terms § 15I(6)). As Plaintiffs argue, to avoid the bellwether provision, players would have to find different counsel, which affects the right to counsel of their choice or indeed, the ability to find any counsel at all: where the individual claims are small (as consumer claims often are), it may be difficult to find an attorney who represents only a single or small number of similarly situated clients. See Fed. R. Civ. P. 23(b)(3), 1966 Advisory Committee Notes (recognizing with respect to the interest of individuals in conducting separate lawsuits, the “amounts at stake for individuals may be so small that separate suites would be impracticable”).

Finally, the Court finds the statute-of-limitations provision substantively unconscionable. Under that provision, a player must initiate an arbitration “within one year after the cause of action accrues; otherwise, such cause of action or claim is permanently barred.” Qu Decl., Ex. 1 (Terms § 15(d)). The provision is substantively unconscionable as it significantly shortens the limitations period for Plaintiffs’ statutory claims – four years for the § 17200 claim, three years for the CLRA claim, and four years for the RICO claim. See also *Jackson v. S.A.W. Ent. Ltd.*, 629 F. Supp. 2d 1018, 1028 (N.D. Cal. 2009) (stating that “[c]ontractual agreements to shorten the statute of limitations period are generally disfavored because they derogate statutory intent”; adding that whether a shortened limitations period is permissible turns on whether “the period fixed [is] so unreasonable [so] as to show imposition or undue advantage in some way”). This Court and others have found contractual limitations periods of six months substantively

unconscionable when compared to statutory limitations periods of several years. *See id.* at 1029. That the arbitration agreement here has a limitations period somewhat larger (one year) is not enough to render it valid and enforceable. *See, e.g., Longboy v. Pinnacle Prop. Mgmt. Servs., LLC*, No. 23-cv-01248-AMO, 2024 U.S. Dist. LEXIS 31557, at *20-21 (N.D. Cal. Feb. 23, 2024) (finding provision with limitations period of one year substantively unconscionable given that plaintiff’s claims had statutory limitations periods of three to four years); *Ramirez*, 16 Cal. 5th at 500-02 (finding one-year statute-of-limitations provision unreasonable where plaintiff could have had as many as three years to file suit in court); *De Leon v. Pinnacle Prop. Mgmt. Servs., LLC*, 72 Cal. App. 5th 476, 486-87 (2021) (holding that limitations period of one year was substantively unconscionable given that “many of plaintiff’s claims have longer statute of limitations,” *i.e.*, three to four years). It is also problematic that the arbitration agreement’s shortened limitations period appears to apply only to players, and not Avia. *See* Qu Decl., Ex. 1 (Terms § 15(d)) (“Disputes *you* may have arising out of or relating to these Terms or the Services must be commenced within one year after the cause of action accrues”)⁸ (emphasis added).

⁸ The Avia Defendants disagree with the Court, arguing that “disputes [a user] may have’ with Avia necessarily include claims by Avia against a user.” Docket No. 135 (Defs. Supp. Br. at 5 n.5). The Court is skeptical of the argument. The Avia Defendants look at the phrase “[d]isputes you may have” in isolation, without considering the broader sentence. The implication of the entire provision is that *you* must commence arbitration within a year – and *you* would only commence arbitration for your own claim, not

Although the provisions above are substantively unconscionable, the Court rejects Plaintiffs' assertion that jury waiver provision and public injunctive relief provision are also substantively unconscionable. As to the jury waiver provision, Plaintiffs cite to *Durruthy v. Charter Communications, LLC*, No. 20-CV-1374-W-MSB, 2020 U.S. Dist. LEXIS 219894 (S.D. Cal. Nov. 23, 2020), for the proposition that "arbitration agreements are substantively unconscionable if they 'require[] plaintiffs to waive in advance their right to a jury trial for any dispute for which arbitration is not allowed by law.'" *Id.* at *35-36. But nothing in the arbitration agreement here indicates that players are required to waive their right to a jury trial for a dispute *for which arbitration is not permitted*. The agreement's statement that "YOU ARE . . . WAIVING THE RIGHT TO A TRIAL BY JURY," Qu Decl., Ex. 1 (Terms § 15), taken in context, simply reflects that a player is agreeing *to arbitration* and to that extent is waiving a jury trial.

As for the public injunctive relief provision, Plaintiffs criticize language used in an older version of the Avia Terms. *See* Qu Decl., Exs. 4-5 (Terms from February and September 2022). Those older Terms included a provision stating that "[t]he arbitrator may award declaratory or injunctive relief *only in favor of the individual party seeking relief* and only to the extent necessary to provide relief warranted by *that*

Avia's. The provision could easily have stated that disputes *between the parties* must be commenced within a year, but it did not. In any event, even if the limitations provision was mutual rather than one-sided, that would not detract from the fact that the limitations period was unreasonably shortened to one year.

party's individual claim." Qu Decl., Ex. 4 (§ 15.5 of the February 2022 Terms) (emphasis added). Plaintiffs point out that "the California Supreme Court [has] refused to enforce a mandatory arbitration provision that precluded the arbitrator from issuing a public injunction." Opp'n at 23 (citing *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017)). But *McGill* has no bearing here because the older Terms are not at issue; the updated Terms include a provision that allows for public injunctive relief. See Qu Decl., Ex. 1 (Terms § 15(f)) ("[I]f any part of this Section 15 is found to prohibit an individual claim seeking public injunctive relief, that provision will have no effect to the extent such relief is allowed to be sought out of arbitration, and the remainder of this Section 15 will be enforceable.").

3. Severance

Based on the analysis above, the Court has determined there is some procedural unconscionability associated with the arbitration agreement, as well as significant substantive unconscionability based on the delegation clause, the bellwether provision, and the statute-of-limitations provision. The only issue remaining is whether the Court should sever the substantively unconscionable terms in which case arbitration could still go forward, albeit without those terms.

In Ramirez, the California Supreme Court essentially reaffirmed the approach taken with respect to severance as stated in *Armendariz*:

"If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral

to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate.”

Ramirez, 16 Cal. 5th at 515. The Court also indicated that, where there are multiple unconscionable provisions, that could indicate “a systematic effort to impose arbitration . . . not simply as an alternative to litigation, but as an inferior forum that works to the [defendant’s] advantage.” *Id.*; *see also id.* at 517 (noting that “the greater the number of unconscionable provisions a contract contains the less likely it is that severance will be the appropriate remedy”); *accord Ronderos v. USF Reddaway, Inc.*, No. 21-55685, 2024 U.S. App. LEXIS 21226, at *34-35, 38 (9th Cir. Aug. 22, 2024) (citing *Armendariz* for the proposition that a trial court does not abuse its discretion in concluding that an arbitration agreement is permeated by an unlawful purpose when the agreement contains multiple unlawful provisions; holding that the case before it “falls well within the range of cases in which a trial court has the discretion to conclude *either* that an agreement is permeated by illegality . . . *or* that the illegality is merely collateral to the agreement’s main purpose”) (emphasis in original). It added, however, that the number of unconscionable provisions was simply a factor to consider; it is not necessarily essential or dispositive. *See Ramirez*, 16 Cal. 5th at 516 (favoring a qualitative, and not a quantitative, approach).

The Court discussed above why It would not be appropriate to sever the bellwether provision in the context of evaluating the unconscionability of the

delegation clause. It likewise declines to sever the bellwether and the statute-of-limitations provisions from the remainder of the arbitration agreement here. Contrary to what the Avia Defendants argue, these provisions are not merely collateral to the main purpose of the arbitration agreement.⁹ Rather, these provisions are designed to structurally and systematically make arbitration an inferior forum. They also operate to chill players from even pursuing rights, knowing they would likely be funneled into an arbitration process that could take years, possibly decades, to complete. The Court will not sever the offending provisions from the arbitration agreement. *See Subcontracting Concepts (CT), LLC v. De Melo*, 34 Cal. App. 5th 201, 215 (2019) (noting that offending provisions “may ‘indicate a systematic effort to impose arbitration on an employee . . . as an inferior forum that works to the employer’s advantage’ and may justify a conclusion ‘that the arbitration agreement is permeated by an unlawful purpose’”). The agreement to arbitrate is unconscionable and thus not enforceable.

III. CONCLUSION

For the foregoing reasons, the Avia Defendants’ motion to compel arbitration is denied. The Court also reschedules the hearing date for the three motions to

⁹ The Avia Defendants suggest that the Court should look to the main purpose of the Terms, and not to the main purpose of the arbitration agreement contained therein. *See* Docket No. 135 (Defs.’ Supp. Br. at 2) (arguing that the main purpose of the Terms is to “provid[e] important information about Avia’s services such as eligibility requirements, rules of conduct in gameplay, and appropriate use of the platform, in addition to establishing dispute resolution procedures”). They have not cited any authority to support this approach.

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dismiss filed by the Avia Defendants, ACME, and Galaxy. The motions to dismiss shall now be heard on November 6, 2024, at 3:00 p.m.

This order disposes of Docket No. 73.

IT IS SO ORDERED.

Dated: September 4, 2024

s/ Edward M. Chen
EDWARD M. CHEN
United States District Judge

APPENDIX C

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

ANDREW PANDOLFI, et al.,

Plaintiffs,

v.

AVIAGAMES, INC., et al.,

Defendants.

Case No. 23-cv-05971-
EMC**ORDER DEFERRING
RULING ON AVIA
DEFENDANTS'
MOTION TO
COMPEL
ARBITRATION**

Docket No. 73

Plaintiffs Andrew Pandolfi and Mandi Shawcroft have filed suit against AviaGames, Inc. (“Avia”) and its co-founders (collectively, the “Avia Defendants”), as well as two companies that invested in Avia. The Avia Defendants have moved to compel arbitration pursuant to the Federal Arbitration Act. Having considered the parties’ briefs and accompanying submissions, as well as the supplemental briefs filed by the parties post-hearing, the Court hereby **DEFERS** ruling on the motion to compel.

I. **FACTUAL & PROCEDURAL
BACKGROUND**

A. **First Amended Complaint**

In the operative first amended complaint (“FAC”), Plaintiffs allege as follows.¹

Avia is a provider of online games. *See* FAC ¶ 1. It hosts a variety of games through its Pocket7Games platform and makes certain games available for download as individual apps, including Bingo Clash. *See* FAC ¶ 31. The games feature online tournaments in which players pay entry fees to compete and potentially win cash prizes. *See* FAC ¶ 67. Avia tells players that, in these tournaments, they are “playing against other, real people in games of skill. It claims that its games are not games of chance, that it is not the ‘house’ against whom players are betting, and that, instead, it merely collects a fee for running its various games.” FAC ¶ 5. But, according to Plaintiffs, these claims are false: “players are actually playing against computer bots in a stacked game of chance.” FAC ¶ 6.

Based on, *inter alia*, the above allegations, Plaintiffs bring claims for violation of California Business & Professions Code § 17200; violation of the California Consumer Legal Remedies Act; and violation of the federal Racketeer Influenced and Corrupt Organizations Act.

¹ The Court acknowledges that, at the time the Avia Defendants moved to compel arbitration, the operative complaint was Plaintiffs’ original complaint and not the FAC. The Court’s citation to the FAC here does not prejudice either party because the gist of Plaintiffs’ case is the same, whether the original complaint or the FAC is considered.

B. Terms of Service

In conjunction with the pending motion to compel arbitration, the Avia Defendants have provided evidence related to Avia’s Terms of Service (“Terms”).

Avia requires individuals to agree to its Terms as a condition of playing an Avia game. *See* Qu Decl. ¶ 6. Periodically, Avia updates its Terms.² It notifies players of updated Terms via in-app pop-up notifications, which require click-through assent to continue gameplay. *See* Qu Decl. ¶¶ 6, 8.

As relevant with respect to the case at bar, Avia updated its Terms in December 2022 and again in July 2023. Avia notified players, including Plaintiffs, of these updated Terms through pop-up notifications. On January 12, 2023, Ms. Shawcroft clicked “Agree” on a pop-up notification on the Pocket7Games platform stating that Avia had “updated [its] . . . Terms of Service” and that “[b]y continuing to use Aviagames’ services, you agree to the updated Terms of Service.” Qu Decl. ¶ 13. On January 13, 2023, Mr. Pandolfi clicked “Agree” on an identical pop-up notification in the Bingo Clash app. *See* Qu Decl. ¶ 12. Finally, on July 4, 2023, Ms. Shawcroft clicked “Agree” on a pop-

² According to the Avia Defendants, players agree to the Terms at multiple points during gameplay (*e.g.*, when they first create accounts and when verifying their age, which is a prerequisite to playing games with cash prizes). *See* Qu Decl. ¶¶ 20, 24. However, for purposes of the pending motion, the Avia Defendants argue that there was an agreement to arbitrate based on acceptance of the updated Terms only (which, as described *infra* are noticed by pop-ups). Accordingly, the Court focuses on the updated Terms only.

up with identical wording in the Pocket7Games app.³
See Qu

Decl. ¶ 17.

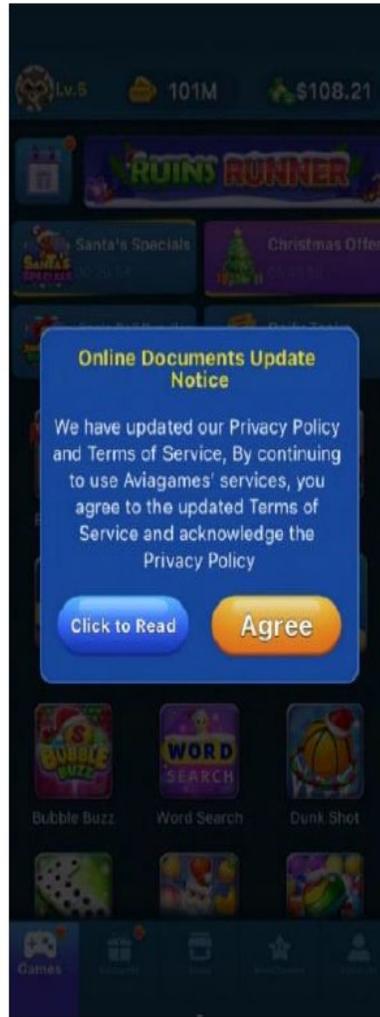
The updated Terms at issue (both the December 2022 Terms and the July 2023 Terms) made several revisions to the arbitration agreement that was a part of the previously existing Terms. These changes include the following:

- adding a clause delegating certain issues of arbitrability to the arbitrator;
- incorporating the AAA’s Consumer Arbitration Rules and the AAA’s Supplementary Rules for Multiple Case Filings;
- establishing a bellwether process for arbitration if 25 or more similar claims are asserted by “the same or coordinated counsel or are otherwise coordinated”; and
- adding a severability clause.

The text of the relevant pop-ups did not identify these changes to the Terms nor otherwise mention the arbitration provision. The pop-ups are displayed below, respectively:

³ Plaintiffs claim that a “technical glitch” allowed players to circumvent the pop-ups by closing the app and reopening it, but as indicated above, Plaintiffs here nevertheless clicked “Agree” on the January and/or July pop-ups. Mr. Pandolfi was able to circumvent one of the pop-ups, but he clicked “Agree” on the operative Terms in January 2023. *See Qu Decl. ¶ 18*

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Qu Decl. ¶¶ 11, 16.

The Avia Defendants contend that, by agreeing to the updated Terms via the pop-ups, Plaintiffs agreed to the arbitration clause contained therein; that clause provides that “[a]ll disputes, claims or controversies arising out of or relating to these Terms, any Services, or the relationship between you and Aviagames . . . I[ing] claims that accrued before you entered into this Agreement” shall be resolved by binding arbitration. Qu Decl., Ex. 1 (Terms at 11). The Avia Defendants also claim that Plaintiffs validly assented to the delegation clause contained within the arbitration agreement. The agreement states that “disputes arising out of or relating to interpretation or application of this arbitration provision, including the enforceability, revocability, or validity of the arbitration provision or any portion of the arbitration provision” must be arbitrated. Qu Decl., Ex. 1 (Terms at 12). The Avia Defendants have moved to compel arbitration of Plaintiffs’ claims.

II. DISCUSSION

U. Legal Standard

Under the Federal Arbitration Act (“FAA”), a written contractual provision to arbitrate is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. The “final clause of § 2 . . . permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability.” *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 432 (9th Cir. 2015) (internal citation omitted).

B. Existence of Agreement to Arbitrate

In the instant case, there is no dispute that the updated Terms include an arbitration provision. However, as an initial matter, the Court must determine whether Plaintiffs entered into an agreement to arbitrate with Avia in the first place. This is an issue for a court to decide. *See Ahlstrom v. DHI Mortg. Co., L.P.*, 21 F.4th 631, 635 (9th Cir. 2021) (holding that a court decides the issue of whether an agreement to arbitrate was ever formed; the issue cannot be delegated to an arbitrator to decide). The Avia Defendants bear the burden of proving the existence of an agreement. *See Wilson v. Huuuge, Inc.*, 944 F.3d 1212, 1219 (9th Cir. 2019) (stating that “the party seeking to compel arbitration[] must prove the existence of a valid agreement by a preponderance of the evidence”).

“In determining whether a valid arbitration agreement exists, federal courts ‘apply ordinary state-law principles that govern the formation of contracts.’” *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014) (internal citation omitted). Here, both parties have assumed that California law on the formation of contracts applies. The Court therefore does the same. Under California law, “mutual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contact.” *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014) (internal citation omitted). The Ninth Circuit has noted that this principal of contract formation “appl[ies] with equal force to contracts formed online.” *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 856 (9th Cir. 2022). Thus, an enforceable online contract exists when “(1) the website provides

reasonably conspicuous notice of the terms to which the consumer will be bound [*i.e.*, inquiry notice]; and (2) the consumer takes some action, such as clicking a button or checking a box, that unambiguously manifests his or her assent to those terms.” *Id.*

- A reasonably conspicuous notice is “displayed in a font size and format such that the court can fairly assume that a reasonably prudent Internet user would have seen it.” *Id.* A hyperlink may properly “disclose terms” to a reasonably prudent user, but “the fact that a hyperlink is present must be readily apparent,” meaning that it must be “sufficiently set apart from the surrounding text.” *Id.* at 857 (internal citation omitted).
- Unambiguous manifestation of assent may be established via “[a] user’s click of a button . . . only if the user is explicitly advised that the act of clicking will constitute assent to the terms and conditions of an agreement.” *Id.*

Consistent with the above, “courts have routinely found clickwrap agreements enforceable.” *Id.* A clickwrap agreement involves the situation “in which a website presents users with specified contractual terms on a pop-up screen and users must check a box explicitly stating ‘I agree’ in order to proceed.” *Id.* In contrast, courts have been more reluctant to enforce browsewrap agreements. With a browsewrap agreement, “a website offers terms that are disclosed only through a hyperlink and the user supposedly manifests assent to those terms simply by continuing to use the website.” *Id.*

In the instant case, the Avia Defendants argue that there was an agreement to arbitrate with each Plaintiff because each Plaintiff was essentially presented with a clickwrap agreement and each accepted. The Court agrees with the Avia Defendants.

Two Ninth Circuit cases are instructive. In *Lee v. Ticketmaster*, 817 Fed. Appx. 393 (9th Cir. 2020), the Ninth Circuit found valid assent to Ticketmaster's Terms and its arbitration provision where the plaintiff clicked a "Sign In" button to sign into his Ticketmaster account and three lines below the button, the website displayed the phrase, "By continuing past this page, you agree to our Terms of Use," since this constituted an "explicit textual notice . . . of the user's intent to be bound." *Id.* at 394-95. Similarly, in *Oberstein v. Live Nation Entertainment, Inc.*, 60 F.4th 505 (9th Cir. 2023), the Ninth Circuit concluded that Ticketmaster's Terms were enforceable because notice of the Terms was "not buried on the bottom of the webpage or placed outside the action box, but rather w[as] located directly on top of or below each action button" and the "'Terms of Use' hyperlink [wa]s conspicuously distinguished from the surrounding text." *Id.* at 516-17; *see also Hansen v. Ticketmaster Entertainment, Inc.*, 20-cv-02685-EMC, 2020 WL 7319358, at *3-4 (N.D. Cal. Dec. 11, 2020) (holding that the plaintiff validly assented to the Terms of Use, including its arbitration provision, for several reasons: (1) the webpage at issue was "relatively uncluttered" since the "sign-in box itself was prominently featured" and the text reading "By continuing past this page, you agree to the Terms of Use" was directly above the button, making it "conspicuous," (2) this text was not "markedly smaller" than other text, and (3) the gray

font color was in “sufficient contrast” to the white background).

The instant case is analogous to the authorities cited above. Here, the pop-ups presented to Plaintiffs gave them reasonably conspicuous notice that the Terms were being updated. The pop-ups were uncluttered and gave the short and straightforward message that Avia had updated its Terms of Use. The pop-ups also gave a clear opportunity to read the updated Terms as evidenced by the blue button stating “Click to Read.” Finally, Plaintiffs unambiguously assented to the updated Terms by clicking on the orange “Agree” button which was placed right below the statement that the Terms were being updated and that, “By continuing to use Aviagames’ services, you agree to the updated Terms . . .”

Plaintiffs’ arguments that they did not validly assent to the arbitration agreement because, *e.g.*, the pop-ups did not refer to the arbitration clause in the Terms or mention what changes had been made to the Terms are not on point. Such arguments go to the unfair surprise of the arbitration agreement, which is a matter related to unconscionability. It does not negate a finding of contract formation.

C. Validity of Agreement to Arbitrate

1. Delegation to Arbitrator

Plaintiffs argue that, even if an agreement to arbitrate was formed, the agreement should be deemed invalid because it is unconscionable. *See Sakkab*, 803 F.3d at 432 (noting that the FAA allows arbitration agreements to be invalidated by generally applicable contract defenses, including unconscionability). In response, the Avia Defendants

contend that this gateway issue of arbitrability is a matter for the arbitrator to decide, and not the Court. The Avia Defendants do not dispute that, typically, a court decides not only the gateway issue of whether there is an agreement to arbitrate but also gateway issues of whether “the agreement encompasses the dispute at issue” and whether the agreement is valid and enforceable. *See Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000); *Momot v. Mastro*, 652 F.3d 982, 987 (9th Cir. 2011). But it is permissible for parties to agree to delegate the latter gateway issues to the arbitrator to decide in lieu of a court. *See Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) (“[W]hen the parties’ contract delegates the arbitrability question to an arbitrator . . . a court possesses no power to decide the arbitrability issue.”).

Delegation to an arbitrator, however, must be clear and unmistakable. *See Chiron Corp.*, 207 F.3d at 1130; *AT & T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 649 (1986); *see also Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015). “There is no presumption in favor of arbitration of arbitrability.” *MacClelland v. Cellco P’ship*, 609 F. Supp. 3d 1024, 1031 (N.D. Cal. 2022) (internal citation omitted).

According to the Avia Defendants, there is a clear and unmistakable delegation of these arbitrability issues to the arbitrator in the instant case. The Avia Defendants assert that there was delegation in two ways: (1) because the arbitration agreement incorporates the AAA’s Consumer Arbitration Rules, specifically Rule 14(a) which empowers arbitrators to rule on questions of arbitrability; and (2) because the arbitration agreement contains an express delegation

clause that requires arbitration of all “disputes arising out of or relating to interpretation or application of this arbitration provision, including the enforceability, revocability, or validity of the arbitration provision or any portion of the arbitration provision.” Qu Decl., Ex. 1 (Terms at 12).

The Court rejects the Avia Defendants’ first argument. As the Court recently noted in a different case, “incorporation of the AAA rules is insufficient to establish a clear and unmistakable agreement to arbitrate arbitrability” where “at least one party is unsophisticated.” *MacClelland*, 609 F. Supp. 3d at 1031-32; *cf. Brennan*, 796 F.3d at 1131 (expressly limiting its holding that incorporation of the AAA rules clearly and unmistakably delegates arbitrability to the arbiter to the facts of the case, which only involved sophisticated parties). Because there is no showing here that Plaintiffs are sophisticated, the Court does not find a clear and unmistakable agreement to delegate by virtue of incorporation of the AAA rules.

The Avia Defendants’ second argument, however, has merit. The delegation clause in Avia’s Terms is almost identically worded to the delegation clause in *Mohamed v. Uber Techs., Inc.*, which the Ninth Circuit ruled “clearly and unmistakably delegated the question of arbitrability to the arbitrator.” 848 F.3d 1201, 1208 (9th Cir. 2016) (“Such disputes include without limitation disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision.”). The Court therefore holds

that there was a clear and unmistakable delegation of arbitrability issues to the arbitrator.

2. Enforceability of Delegation Clause

Confronted with this situation, Plaintiffs argue that the Court should nonetheless decline to give effect to the delegation clause (*i.e.*, the Court should address the issues of arbitrability instead of the arbitrator) because the delegation clause is not enforceable in and of itself – specifically, because it is unconscionable.

Even when a contract’s delegation clause provides clear and unmistakable evidence of the parties’ assent to delegate gateway arbitrability issues, courts still inquire as to “whether the agreement to delegate arbitrability – the delegation clause – is itself unconscionable.” *Lim v. Tforce Logistics, LLC*, 8 F.4th 992, 1000 (9th Cir. 2021). Challenges to the enforceability of the agreement to delegate arbitrability must be directed toward “the delegation provision specifically.” *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 72 (2010). However, the challenging party may cite provisions outside of the delegation clause so long as these provisions “make *the fact of an arbitrator deciding arbitrability* unconscionable.” *Holley-Gallegly v. TA Operating, LLC*, 74 F.4th 997, 1002 (9th Cir. 2023) (emphasis in original); *see also Bielski v. Coinbase, Inc.*, 87 F.4th 1003, 1012 (9th Cir. 2023) (“reject[ing] the notion that the court is limited to a clause-bound interpretation” of the delegation clause because “[w]ithout considering the context of the contract, a court would be unable to consider the full meaning of the delegation provision”).

Under California law, there must be both procedural and substantive unconscionability in order

for an agreement to be rendered invalid. That being said, there is “sliding scale” such that “greater substantive unconscionability may compensate for lesser procedural unconscionability,” and vice-versa. *Chavarria v. Ralph’s Grocery Co.*, 733 F.3d 916, 922 (9th Cir. 2013) (internal citation omitted).

- Procedural unconscionability concerns “the level of oppression and surprise involved in the agreement.” *Chavarria*, 733 F.3d at 922. Oppression refers to the “inequality of bargaining power that results in no real negotiation and an absence of meaningful choice.” *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1260 (9th Cir. 2017) (internal citation omitted). Surprise involves “the extent to which the contract clearly discloses its terms as well as the reasonable expectations of the weaker party.” *Chavarria*, 733 F.3d at 922. This includes consideration of whether “the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them.” *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1280 (9th Cir. 2006).
- A substantively unconscionable agreement is “overly harsh, unduly oppressive, unreasonably favorable, or must shock the conscience.” *Poublon*, 846 F.3d at 1261 (internal citations omitted). Agreements “that are unfairly one-sided are substantively unconscionable,” as the “paramount consideration . . . is mutuality.” *Nagrampa*, 469 F.3d at 1281 (internal citations omitted).

“[T]he party opposing arbitration bears the burden of proving . . . unconscionability.” *Poublon*, 846 F.3d at 1260.

U. Procedural Unconscionability

Plaintiffs argue that the delegation clause is procedurally unconscionable because (1) it is part of a contract of adhesion and (2) it is part of an arbitration agreement which was unfairly sprung on game players.

Plaintiffs’ first argument is not persuasive. To be sure, in determining whether a delegation clause is unconscionable, the Ninth Circuit has evaluated whether the contract containing the clause is a contract of adhesion.⁴ *See Lim*, 8 F.4th at 1000-01; *Mohamed*, 848 F.3d at 1211. But the Ninth Circuit as well as this Court have found that “there is no contract of adhesion when an individual is given the opportunity to opt-out.” *James v. Comcast Corp.*, No. 16-cv-02218-EMC, 2016 WL 4269898, at *1-3 (N.D. Cal. Aug. 15, 2016) (finding that Comcast’s mail notice containing the full text of the company’s arbitration agreement, which stated that it would take effect unless the user opted out, contained a valid opt-out provision); *Circuit City Stores v. Ahmed*, 283 F.3d 1198, 1200 (9th Cir. 2002). In *Mohamed v. Uber Techs., Inc.*, the Ninth Circuit held that the arbitration agreement was not adhesive even though opting-out could only be accomplished in person or by overnight delivery service. 848 F.3d at 1210-11. This burden was immaterial to the Ninth Circuit since “the contract

⁴A contract of adhesion is “imposed and drafted by the party of superior bargaining strength [that] relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” *Lim*, 8 F.4th at 1000 (internal citations omitted).

bound Uber to accept opt-outs from those drivers who followed the procedure it set forth.” *Id.* at 1211;

Here, the arbitration agreement in Avia’s updated Terms contains an opt-out provision, so it is not a contract of adhesion. The opt-out provision in the December 2022 Terms is reproduced below⁵:

e) Opt Out. You have the right to opt out of binding arbitration within 30 days of the date you first accepted these Terms by providing us with notice of your decision to opt-out via email at legal@aviagames.com or by certified mail addressed to 28 E. 3rd Avenue, San Mateo, CA 94043 . In order to be effective, the opt-out notice must include your full name, mailing address, and email address. The notice must also clearly indicate your intent to opt out of binding arbitration. By opting out of binding arbitration, you are agreeing to resolve disputes in accordance with Section 14.

Qu Decl., Ex. 1 (Terms at 13). This provision is less burdensome than its equivalent in *Mohamed*, as users can opt-out via email or certified mail. *See* 848 F.3d at 1211; Qu Decl., Ex. 1 (Terms at 13). The opt-out provision here is valid because it binds Avia Defendants “to accept opt-outs from those . . . who followed the procedure it set forth.”

Plaintiffs’ second argument essentially asserts unfair surprise. Although unfair surprise is undoubtedly part of procedural unconscionability analyses, *see Lim*, 8 F.4th at 1001, Plaintiffs’

⁵ The opt-out provision in the July 2023 Terms is identical. *See* Qu Decl., Ex. 3 (Terms at 13).

argument is problematic in that it largely focuses on the unfair surprise of the arbitration agreement as a whole, not “the delegation provision specifically.” *See Rent-A-Center, W., Inc.*, 561 U.S. at 72. There is a fair argument that if the arbitration clause is a surprise, so would the delegation clause within it. However, it appears that courts examining the issue have thus far focused only on whether the delegation clause itself is surprising. *See Lim*, 8 F.4th at 1001 (evaluating unfair surprise in the placement of the delegation clause within the agreement, notice of the delegation clause within the agreement, and plaintiff’s acknowledgement or lack thereof of the delegation clause specifically); *see also Bielski*, 87 F.4th at 1014.

In any event, the Court finds that there is an element of unfair surprise with respect to the delegation clause specifically. In *Lim*, the Ninth Circuit found unfair surprise with respect to a delegation clause because (1) it was “presented . . . in the middle of 31 numbered paragraphs, within more than nine pages of single-spaced, 10-point font,” (2) “[n]othing in the text of the agreement called Lim’s attention to the delegation clause,” and (3) “Lim was not required to sign or initial that specific provision.” 8 F.4th at 1001. In the case at bar, the delegation clause in the December 2022 Terms is reproduced below⁶:

Disputes that must be arbitrated include, without limitation, disputes arising out of or relating to interpretation or application of this arbitration provision, including the

⁶The delegation clause in the July 2023 Terms suffers from the same problems. *See* Qu Decl., Ex. 3 (Terms at 12).

enforceability, revocability, or validity of the arbitration provision or any portion of the arbitration provision. The arbitrator will have the authority to grant any remedy or relief that would otherwise be available in court.

Qu Decl., Ex. 1 (Terms at 12).

This delegation clause is problematic for reasons similar to those identified by the Ninth Circuit in *Lim*. The Avia Defendants presented the delegation clause in the middle of 16 numbered paragraphs, most with multiple numbered subparagraphs, within 14 pages of single-spaced, 8-point font in barely readable, light gray text. See *Lim*, 8 F.4th at 1001; Qu Decl., Ex. 1 (Terms at 12). As the clause is not even numbered, let alone titled, there is nothing in the text to call players' attention to the delegation clause. Finally, players are not required to sign or initial that provision. As such, just as the *Lim* court found that "procedural unconscionability existed with respect to the delegation clause" due to "unfair surprise," the Court concludes the same here.⁷

b. Substantive Unconscionability

Because there is some level of procedural unconscionability due to unfair surprise, the Court turns to the issue of whether the delegation clause is also substantively unconscionable. The Court may, as Plaintiffs argue, evaluate the substantive unconscionability of the delegation clause by looking

⁷The Avia Defendants' argument concerning the labeling of the arbitration provision is unpersuasive because it is not directed toward "the delegation provision specifically." *Rent-A-Center, W., Inc.*, 561 U.S. at 72 (2010).

to the broader arbitration agreement, which includes a bellwether-type⁸ provision (as discussed *infra*). To be sure, *Rent-A-Center* specifies that the question here is whether the delegation clause specifically is substantively unconscionable and not the broader arbitration agreement. However, the Ninth Circuit has explained that a provision outside of the delegation clause that “make[s] *the fact of an arbitrator deciding arbitrability* unconscionable” would make a delegation clause substantively unconscionable. *Holley-Gallegly*, 74 F.4th at 1002 (emphasis in original). Parties may look to other provisions in the arbitration agreement because the delegation “provision itself may not provide enough information for the court to evaluate the challenge.” *Bielski v. Coinbase, Inc.*, 87 F.4th 1003, 1012 (9th Cir. 2023). “[T]here may be unconscionable arbitration procedures, like a large filing fee or a distant site for arbitration . . . [that] could make arbitrating arbitrability unconscionable because to do so would be extremely burdensome and expensive.” *Id.* As such, the Court is not “limited to a clause-bound interpretation” of the delegation clause to determine its unconscionability. *Id.*; see also *Heckman v. Live Nation Entertainment, Inc.*, No. CV 22-0047-GW-GJSx, 2023 WL 5505999, at *17 (C.D. Cal. Aug. 10, 2023) (finding that the following elements of the arbitration

⁸The agreement refers to “bellwether” in the provision, but, as discussed *infra*, it is unlike traditional bellwether provisions in that, if no resolution is reached on the claims following the first round of adjudication, the sequence of claims adjudication thereafter is subject to significant restrictions. The Court thus uses the term “bellwether” loosely.

agreement were relevant “with respect to the delegation clause specifically, as each applie[d] to threshold issues of arbitrability”: “(1) the mass arbitration protocol . . . (2) the lack of a right to discovery and other procedural limitations; (3) the arbitrator selection provisions; and (4) the limited right of appeal”).

Here, Plaintiffs argue that delegation clause Is unconscionable when the bellwether provision in the agreement is also taken into consideration. The bellwether provision in the December 2022 Terms is reproduced below⁹:

6.The AAA Supplementary Rules for Multiple Case Filings and the AAA Multiple Consumer Case Filing Fee Schedule will apply if twenty-five (25) or more similar claims are asserted against Aviagames or against you by the same or coordinated counsel or are otherwise coordinated. In addition to the application of the AAA Supplementary Rules for Multiple Case Filings and the AAA Multiple Consumer Case Filing Fee Schedule, you and Aviagames understand and agree that when twenty-five (25) or more similar claims are asserted against Aviagames or you by the same or coordinated counsel or are otherwise coordinated resolution of your or Aviagames’ Claim might be delayed. For such coordinated actions, you and Aviagames also agree to the following coordinated bellwether process. Counsel for claimants and counsel for Aviagames shall each

⁹ The bellwether provision in the July 2023 Terms is identical. See Qu Decl., Ex. 3 (Terms at 13).

select ten (10) cases (per side) to proceed first in individual arbitration proceedings. The remaining cases shall be deemed filed for purposes of the statute of limitations but not for the purpose of assessing AAA fees. No AAA fees shall be assessed in connection with those cases until they are selected to proceed to individual arbitration proceedings as part of a bellwether process. If the parties are unable to resolve the remaining cases after the conclusion of the initial twenty (20) proceedings, each side shall select another ten (10) cases (per side) to proceed to individual arbitration proceedings as part of a second bellwether process. A single arbitrator shall preside over each case. Only one case may be assigned to each arbitrator as part of a bellwether process unless the parties agree otherwise. This bellwether process shall continue, consistent with the parameters identified above, until all the claims included in these coordinated filings, including your case, are adjudicated or otherwise resolved. The statute of limitations and any filing fee deadlines shall be tolled for claims subject to this bellwether process from the time the first cases are selected for a bellwether process until the time your or Aviagames' case is selected for a bellwether process, withdrawn, or otherwise resolved. A court shall have authority to enforce this paragraph and, if necessary, to enjoin the mass filing or prosecution of arbitration demands against Aviagames or you.

Qu Decl., Ex. 1 (Terms at 13).

According to Plaintiffs, delegating arbitrability to the arbitrator is substantively unconscionable because of the arbitration procedure set up by the bellwether provision, which essentially enables delay of proceedings (*i.e.*, because only twenty cases can be adjudicated at a time). In other words, adjudication by an arbitrator of the issue of arbitrability can be unduly delayed as a result of the bellwether provision. Plaintiffs also suggest that there might be a chilling effect on players' willingness to pursue their rights (including statutory rights) - *i.e.*, if adjudication of arbitrability alone can be delayed, then there is less incentive for a player to pursue their rights in arbitration.

In *MacClelland*, this Court found a similar bellwether unconscionable. The provision specified:

“If 25 or more customers initiate notices of dispute with [the defendant-company] raising similar claims, and counsel for the . . . customers bringing the claims are the same or coordinated for these customers, the claims shall proceed in arbitration in a coordinated proceeding. Counsel for the . . . customers and counsel for [the defendant-company] shall each select five cases to proceed first in arbitration in a bellwether proceeding. The remaining cases shall not be filed in arbitration until the first ten have been resolved. If the parties are unable to resolve the remaining cases after the conclusion of the bellwether proceeding, each side may select another five cases to proceed to arbitration for a second bellwether proceeding. This process may continue until the parties are able to resolve all of the claims, either through

settlement or arbitration. A court will have authority to enforce this clause and, if necessary, to enjoin the mass filing of arbitration demands against [the defendant company].”

MacClelland, 609 F. Supp. 3d at 1040 (quoting the arbitration agreement). The Court noted that the bellwether provision “function[ed] to delay arbitration of cases until each preceding tranche of 10 cases is adjudicated.” *Id.* Furthermore, because the counsel for the plaintiffs represented more than 2,700 customers, “it would take approximately 156 years to resolve the claims of all of Plaintiffs’ counsel’s clients.” *Id.* The Court rejected the defendant’s contention that the Court should consider only the 27 named plaintiffs in the case, and not the remaining clients represented by Plaintiffs’ counsel (more than 2,600 individuals), particularly because “courts routinely consider the chilling effect [that arbitration clauses have] on non-parties who may yet seek to vindicate their rights.” *Id.* at 1041.

However, unlike the plaintiffs in *McClelland*, here, Plaintiffs’ firm has only signed engagement letters with 35 clients. Given this limited number of claims represented by the law firm representing the Plaintiffs, there would not be inordinate delay in adjudication, because all the affected claims could be adjudicated in two tranches. To be sure, Plaintiffs have provided evidence that a *different* law firm – Kind Law – represents more than 1,600 individuals who will seek arbitration against the Avia Defendants. *See* Docket No. 99. But the status of those claims and whether they are all similar (as to each other) such that they would be subject to Avia’s bellwether provision is not

clear from the submitted declaration which was conclusory and not specific.

That the record (wherein the only plaintiffs presently before the Court have not demonstrated a concrete harm from the putatively unconscionable bellwether provision, as currently applied to them) raises several considerations:

- (1) Is unconscionability assessed at the time the agreement containing the delegation clause/bellwether provision was made or, instead, at the time the agreement containing the delegation clause/bellwether provision is sought to be enforced? In other words, should the provision be assessed only as applied to the plaintiffs before the court or should it be assessed on its face.
- (2) Relatedly, is unconscionability of the delegation clause/bellwether provision assessed from the perspective of Plaintiffs specifically or that of a reasonable player (*i.e.*, not just Plaintiffs but also those similarly situated)?

In *MacClelland*, the Court noted that, typically, “the validity of a contractual provision [is evaluated] as of the time of the contract is made – it is a prospective analysis which does not require proof that a particular plaintiff has already been adversely affected.” 609 F. Supp. 3d 1024, 1041 (N.D. Cal. 2022). This statement has support from both state law statutory authority and case law authority. *See* Cal. Civ. Code § 1670.5(a) (providing that, “[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable *at the time it was made* the court may refuse to enforce the contract, or it may enforce the

remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result”) (emphasis added); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000) (referencing § 1670.5(a) in discussing unconscionability of an arbitration agreement). This Court then went on to note that a contractual provision should be assessed not just from the perspective of the plaintiff but also other individuals who could be affected. In support, the Court cited *Armendariz*, where the California Supreme Court “considered the potential chilling effect that an arbitration clause would exert on employees seeking to file workplace discrimination claims.” *Id.*; see also *Armendariz*, 24 Cal. 4th at 110 (noting that the risk that an employee would have “to bear large costs to vindicate their statutory right against workplace discrimination” could have a “chill[ing] [effect on] the exercise of that right”); cf. *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 663 (7th Cir. 2003) (“looking to the possible ‘chilling effect’ of [a] cost-splitting provision on similarly situated potential litigants, as opposed to its effect merely on the actual plaintiff in any given case,” in deciding whether the provision is enforceable).

That being said, that does not mean that unconscionability should be assessed solely at the time the contract was made or on its face. As noted by one state appellate court: “Generally, unconscionability is determined ‘at the time [the agreement] was made’ [under § 1670.5(a)], yet courts have consistently assessed unconscionability for limitations on discovery as applied to a particular plaintiff.” *Ramirez v. Charter*

Comms., Inc., 75 Cal. App. 5th 365, 384 (2022); *see also In re Zucker*, 75 Cal. App. 5th 1025, 1041-42 (2022) (recognizing that, “as a general matter, courts examine the unconscionability of contracts as of the time of execution[,] [b]ut as illustrated by case law evaluating the substantive unconscionability of arbitration agreements in cases brought under FEHA, in some circumstances it is appropriate to examine the unconscionability of contract provisions as of the time of enforcement” – *e.g.*, for discovery, “[w]hether such minimum standards of fairness exist is examined at the time of enforcement of the agreement, not execution of the agreement, and is analyzed based on the specific discovery needs of the plaintiff’s case”).

The Court orders the parties to submit supplemental briefing on this issue. (Some of these issues were touched upon in supplemental briefs previously submitted. However, the authorities above may inform and develop the parties’ views.) Briefs not exceeding 10 pages each shall be cross-filed by the parties no later than May 31, 2024. The parties may submit additional supplemental evidence in support of their briefs. Should the Kind law firm desire, it may file an amicus brief within said time limit.

III. CONCLUSION

For the foregoing reasons, the Court defers ruling on the Avia Defendants’ motion to compel arbitration. Although Plaintiffs validly assented to the Terms which include an arbitration agreement and gateway issues of arbitrability are delegated to the arbitrator, further briefing on the issue of whether the delegation clause is unenforceable based on unconscionability is

warranted. As stated above, briefs shall be filed by May 31, 2024.

The Court also vacates (temporarily) the June 24, 2024, hearing on the three motions to dismiss which have been filed by the Avia Defendants; ACME, LLC; and Galaxy Digital Capital Management, L.P. A hearing on the Avia Defendants' motion to dismiss should clearly be deferred because the Court has not yet adjudicated their motion to compel arbitration. Although ACME and Galaxy have only moved to dismiss (they have no basis to move to compel arbitration), it makes sense to defer hearing on their motions as well because their motions, like the Avia Defendants' motion, include an argument that the RICO claim pled against all Defendants is not viable. Given these circumstances, it makes sense to defer a ruling on the merits of the 12(b)(6) motions, at least for the time being.

This order disposes of Docket No. 73.

IT IS SO ORDERED.

Dated: May 21, 2024

s/ Edward M. Chen
EDWARD M. CHEN
United States District
Judge

APPENDIX D

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

**ANDREW PANDOLFI
and MANDI
SHAWCROFT,
individually and on
behalf of all others
similarly situated,
Plaintiffs,**

v.

**AVIAGAMES INC.;
VICKIE YANJUAN
CHEN; PING WANG;
ACME, LLC; GALAXY
DIGITAL CAPITAL
MANAGEMENT, L.P.;
and OTHER
UNNAMED CO-
CONSPIRATORS,
Defendants.**

**Case No. 23-cv-05971-
EMC**

**DECLARATION OF
JIANJING QU IN
SUPPORT OF
DEFENDANT
AVIAGAMES INC.'S
AND INDIVIDUAL
DEFENDANTS
VICKIE CHEN AND
PING WANG'S
MOTION TO
COMPEL
ARBITRATION**

I, Jianing Qu, declare as follows:

1. I submit this declaration in support of the Motion to Compel Arbitration by AviaGames, Inc. ("Avia"), Vickie Chen, and Ping Wang. I have personal knowledge of the facts stated in this declaration and,

if called as a witness, could and would testify competently as to those facts.

2. I am legal counsel for Beijing Huanxin Network Technology Co., Ltd. (“BHNTC”), a subsidiary of Avia which handles the technical implementation and deployment of certain notices within Avia’s game products, including Avia’s Privacy Policy and Avia’s Terms of Service (“Terms”).

3. In the normal course of business, Avia and BHNTC maintain records regarding Avia’s current and historical Terms. In my job, I have access to those records.

4. Avia and BHNTC also maintain records regarding Avia users’ accounts. In my job, I have access to those records, which include account-specific identifying information provided to Avia by its users, as well as information regarding users’ interaction with Avia’s products, including when users created their accounts, whether and when they completed Avia’s age verification process, and whether and when they agreed to Avia’s Terms.

5. At the request of counsel, I reviewed Avia’s user account records and, in doing so, I was able to identify an Avia account created by Plaintiff Andrew Pandolfi, as well as an Avia account created by Plaintiff Mandi Shawcroft. I located these accounts by searching for identifying information provided to Avia by its users, including name, telephone number, address information, and GPS location. I understand that, according to Plaintiffs’ Complaint, Andrew Pandolfi resides in Texas and Mandi Shawcroft resides in Idaho. Through my review of Avia’s user account records, I located only one account with a user named Andrew

Pandolfi within the state of Texas. Additionally, I located only one account with a user named Mandi Shawcroft within the state of Idaho.

6. Avia requires its users to agree to the Terms as a condition of playing Avia's games.

7. Avia periodically publishes updates to its Terms. The most recent update to Avia's Terms was published on January 6, 2024.

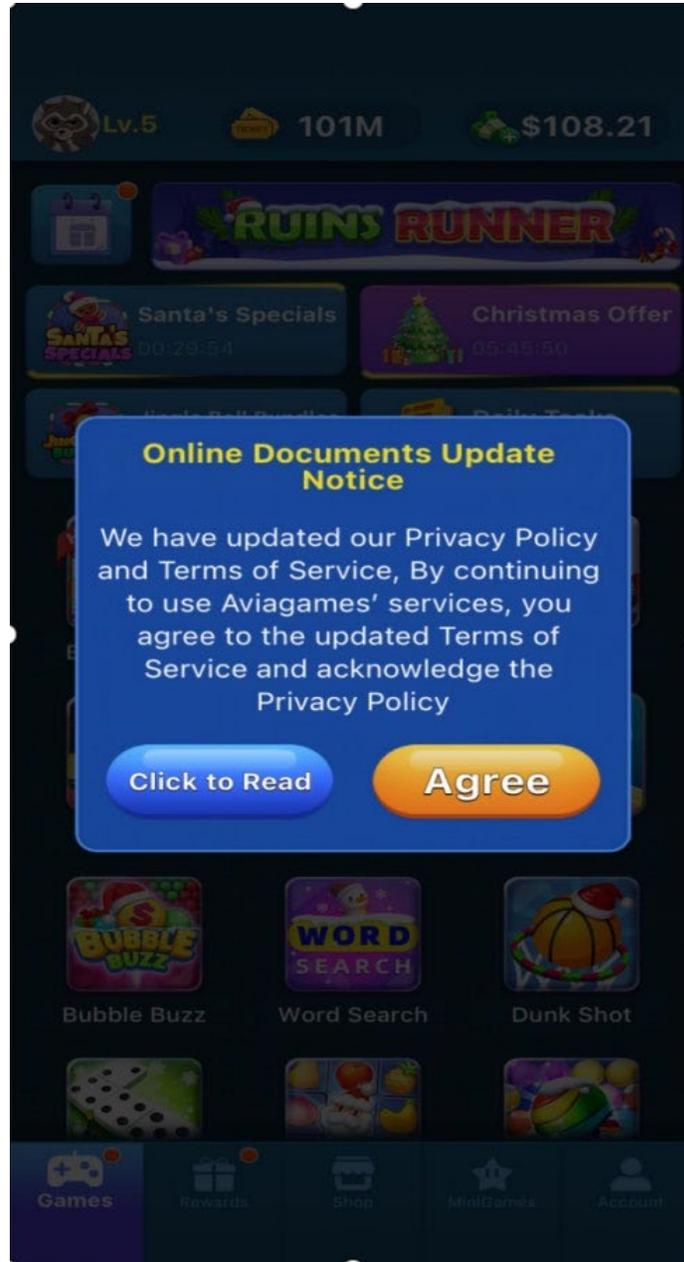
8. On numerous occasions, Avia has notified users of changes to its Terms by deploying pop-up notifications within Avia's gaming apps.

9. Avia launched one such pop-up notification on January 12, 2023 ("January Pop-up"), to notify users of certain Avia products that Avia's Terms had been revised. The January Pop-up was deployed to users of Avia's Pocket7Games and Bingo Clash apps.

10. Specifically, starting on or about January 12, 2023, each user accessing Avia's Pocket7Games app or Bingo Clash app was presented with a pop-up notification informing the user that "[w]e have updated our Privacy Policy and Terms of Service," and that "[b]y continuing to use Aviagames' services, you agree to the updated Terms of Service and acknowledge the Privacy Policy." The notice included two large buttons: a blue button ("Click to Read") that hyperlinked to the applicable Terms and an orange button ("Agree").

11. The following image depicts the January Pop-up notification:

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12. At the request of counsel, I reviewed Avia's records regarding the January 2023 Pop-up, which are maintained by BHNTC and Avia in the ordinary course of business. In doing so, I was able to confirm that the January Pop-up was presented to the user associated with Plaintiff Andrew Pandolfi's account upon their opening the Bingo Clash app, and that the user clicked the "Agree" button on January 13, 2023. Attached hereto as **Exhibit 1** is a true and correct copy of the Terms to which the user agreed by clicking "Agree."

13. Additionally, based on my review of Avia's records, I was able to confirm that the January Pop-up was presented to the user associated with Plaintiff Mandi Shawcroft's account upon their opening the Pocket7Games app, and that the user clicked the "Agree" button on January 12, 2023. I was also able to confirm that the user clicked the "Click to Read" button on that same day. Attached hereto as **Exhibit 2** is a true and correct copy of the Terms to which the user agreed by clicking "Agree."

14. Avia deployed another pop-up notification on July 4, 2023 ("July Pop-up"), to notify users of certain Avia products of further revisions to Avia's Terms. The July Pop-up was deployed to users of Avia's Pocket7Games app.

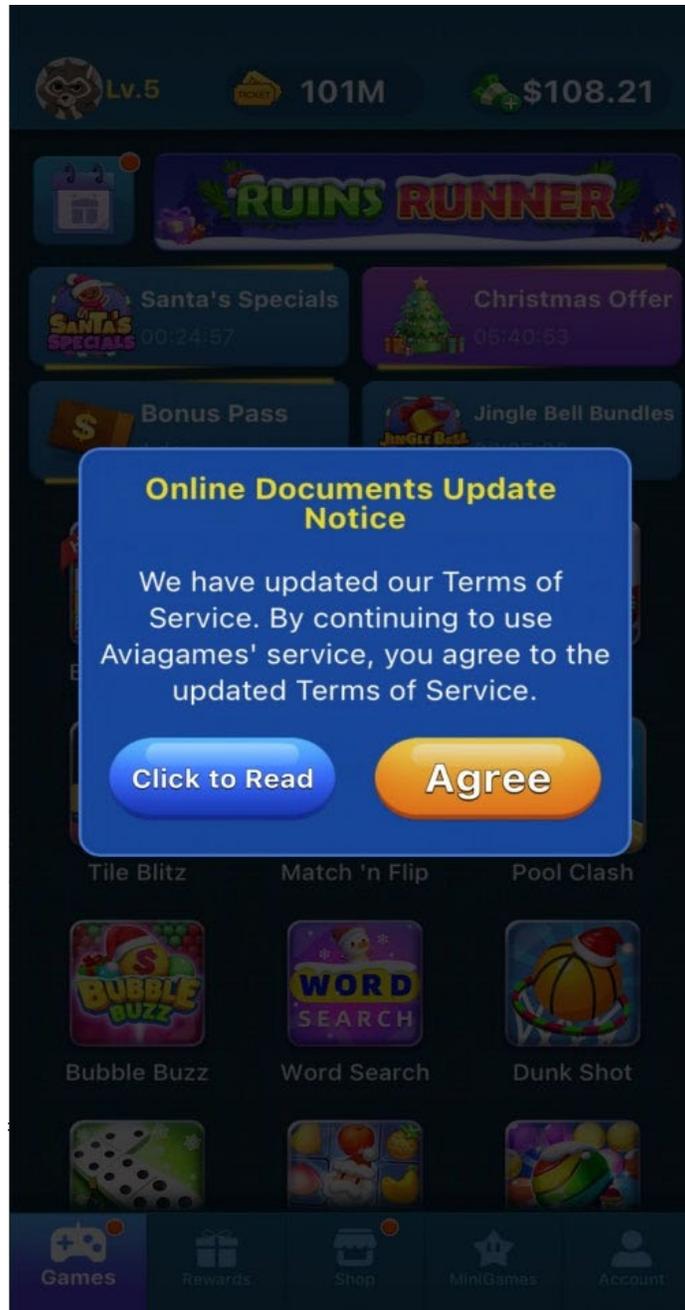
15. Specifically, starting on or about July 4, 2023, each user accessing Avia's Pocket7Games app was presented with a pop-up notification informing the user that "[w]e have updated our Terms of Service," and that "[b]y continuing to use Aviagames' service, you agree to the updated Terms of Service." The notice included two large buttons: a blue button ("Click to

74a

Read”) that hyperlinked to the relevant Terms and an orange button (“Agree”).

16. The following image depicts the July Pop-up notification:

75a



17. At the request of counsel, I reviewed Avia's account records regarding the July Pop-up, which are maintained by BHNTC and Avia in the ordinary course of business. In doing so, I was able to confirm that the July Pop-up was presented to the user associated with Plaintiff Mandi Shawcroft's account upon their opening the Pocket7Games app and that the user clicked the "Agree" button on July 4, 2023. Attached hereto as **Exhibit 3** is a true and correct copy of the Terms to which the user agreed by clicking "Agree."

18. A technical glitch allowed certain Avia users to avoid clicking the "Agree" button to certain of Avia's 2023 pop-up notifications by closing and re-starting the application. Nonetheless, as summarized above, Avia's records confirm that the users of accounts associated with Andrew Pandolfi and Mandi Shawcroft did click the "Agree" button for the January Pop-up, and that the user of the account associated with Mandi Shawcroft did click the "Agree" button for the July Pop-up.

19. At the request of counsel, I also reviewed Avia's records regarding user account creation, which are maintained by BHNTC and Avia in the ordinary course of business. In doing so, I was able to confirm that the account associated with Plaintiff Andrew Pandolfi was created on February 25, 2022, and that the account associated with Plaintiff Mandi Shawcroft was created on September 1, 2022.

20. At the time these accounts were created, Avia required its users to agree to Avia's Terms during the account creation process. Specifically, when a new user entered a user name (or accepted a user name

generated by Avia) in connection with the account creation process for Pocket7Games or Bingo Clash, they were informed that by continuing, they were agreeing to Avia's Terms of Service, which were hyperlinked on the screen.

21. As of the date of this Declaration, I have not located an image depicting the account creation screen that each Plaintiff would have seen when creating their accounts in 2022.

22. Attached hereto as **Exhibit 4** is a true and correct copy of the Terms to which Andrew Pandolfi agreed when he created his account on February 25, 2022.

23. Attached hereto as **Exhibit 5** is a true and correct copy of the Terms to which Mandi Shawcroft agreed when she created her account on September 1, 2022.

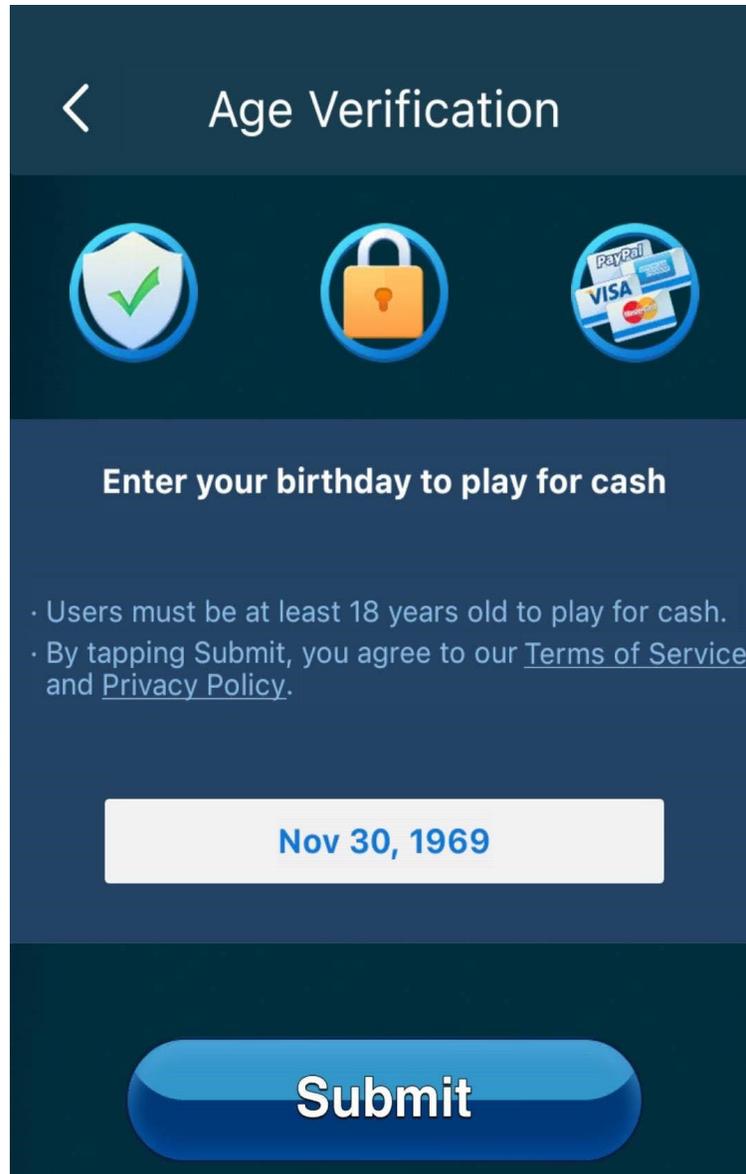
24. Today, a user creating a new Avia account is shown a pop-up notification that discloses Avia's current Terms. The user is required to click "Agree" before proceeding.

25. Avia requires its users to verify their age before playing games with cash prizes.

26. At the request of counsel, I reviewed Avia's records regarding user age verification, which are maintained by BHNTC and Avia in the ordinary course of business. In doing so, I was able to confirm that the account associated with Plaintiff Andrew Pandolfi completed the age verification process on February 25, 2022, and that the account associated with Plaintiff Mandi Shawcroft completed the age verification process on September 1, 2022. Each

Plaintiff completed the age verification process shortly after completing the account creation process.

27. At the time each Plaintiff completed the age verification process, Avia required its users to agree to Avia's Terms during the account verification process. Each Plaintiff was prompted to enter their date of birth and was informed that "[b]y tapping Submit, you agree to our Terms of Service and Privacy Policy," with each underlined phrase containing a hyperlink to the relevant document. The following image is an accurate representation of what each Plaintiff would have seen when completing Avia's age verification process in 2022:



28. The aforementioned **Exhibit 4** is a true and correct copy of the Terms to which Andrew Pandolfi agreed when he completed Avia's age verification process on February 25, 2022.

29. The aforementioned **Exhibit 5** is a true and correct copy of the Terms to which Mandi Shawcroft agreed when she completed Avia's age verification process on September 1, 2022.

30. Every time an Avia user logs into their account on a new device, they are informed that by proceeding to log in, they are agreeing to Avia's Terms of Service, which are hyperlinked and presented in a high-contrast yellow font. The following image is representative of what each Plaintiff would have seen when logging into their account on a new device in 2022:

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Log In

Phone Number Email Address

 +1 **United States**

Enter your phone number

Enter the 6-digit code **Send Code**

Log In/Sign Up

[Existing account](#)

By continuing, you agree to our [Terms of Service](#) and [Privacy Policy](#).

31. Avia makes the Terms available to its users via its website. www.pocket7games.com. The Terms of Service are hyperlinked at the bottom of each page on that website.

32. Avia also makes the Terms available to its users via its applications, including Pocket7Games and Bingo Clash. A user can access the Terms by navigating to the “Legal” tab. Under “Settings.”

33. Since at least December 2022, Avia’s Terms describe a procedure by which a user may opt out of the Arbitration Provision. *See* Exhibit 1 § 15I; Exhibit 2 § 15I; Exhibit 3 § 15I.

34. In the normal course of business, Avia and BHNTC maintain records regarding requests by Avia’s users to opt out of the Arbitration Provision. In my job, I have access to those records.

35. At the request of counsel, I reviewed Avia’s records regarding user requests to opt out of the Arbitration Provision. In doing so, I was able to confirm that neither Andrew Pandolfi nor Mandi Shawcroft opted out of the Arbitration Provision.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed this 4th day of February (Pacific Time), 2024, in Beijing, China.

/s/ Jianing Qu
Jianing Qu

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EXHIBIT 1

TERMS OF SERVICE

Last Updated: December 20, 2022

BY REGISTERING AN ACCOUNT, PARTICIPATING IN ANY TOURNAMENT OR COMPETITION, CLICKING TO ACCEPT OR AGREE TO THESE TERMS OF SERVICE, OR USING THE SERVICES IN ANY WAY, YOU ACCEPT AND AGREE TO BE BOUND BY THESE TERMS. IF YOU DO NOT AGREE TO THESE TERMS, INCLUDING THE MANDATORY ARBITRATION PROVISION AND CLASS ACTION WAIVER IN SECTION 15, DO NOT ACCESS OR USE OUR PRODUCTS OR SERVICES.

IF YOU ARE UNDER THE AGE OF 18 STOP! YOU MUST GET YOUR PARENT OR LEGAL GUARDIAN TO READ AND ACCEPT THESE TERMS.

APPLE IS NOT A SPONSOR OR PROVIDER OF BINGO CLASH TOURNAMENTS, CONTESTS, SWEEPSTAKES OR PRIZES. ALL TOURNAMENTS, CONTESTS, SWEEPSTAKES AND PRIZES ARE PROVIDED BY AVIAGAMES.

Aviagames Inc. (“Aviagames,” “we,” or “us”) designs, develops, and maintains the interactive application Bingo Clash (the “App”) that enables users (“you,” “user,” or “player”) to participate in online tournaments and competitions. The following terms and conditions, together with any documents they expressly incorporate by reference (collectively, these “Terms”), govern your access to and use of the functionalities, features, contents, services provided by Aviagames via the App (collectively, the “Services”). For players using our Services from the United

Kingdom, such use is governed by a separate set of terms which are available at [UK terms](#).

Please read these Terms carefully before using our Services, as they contain important information and constitute a legal agreement (this “Agreement”) between you and Aviagames. Subject to the terms set forth herein, this Agreement applies to everyone who uses the Services, whether they are registered or not. By registering an Account (as defined in Section 3), participating in any tournament or competition, clicking to accept or agree to these Terms, or using the Services in any way, you: (A) acknowledge that you have read these Terms and understand the rights, obligations, terms and conditions set forth herein; (B) accept and agree to be bound and abide by these Terms, our Privacy Policy found here, and any other terms and conditions incorporated herein; and (C) acknowledge that you have read our Privacy Policy found here; and (D) are authorized and able to accept these Terms.

Aviagames reserves the right to amend, modify, or change any terms and conditions contained in these Terms from time to time in its sole discretion. All changes will become effective 30 days after the changes are posted. Your continued use of the Services following the posting of revised Terms shall constitute your acceptance of, and agreement to be bound by, any such changes.

1. Eligibility.

1.1 United States. To be eligible to register an Account and/or use the Services in any way, you acknowledge that you: (i) are a natural person at least 18 years of age; (ii) own the e-mail address submitted

when registering your Account; (iii) are a legal resident of the United States with a U.S. address and currently residing at the address of the eligible location; (iv) are physically located within the U.S.; (v) are physically located in a U.S. state in which use of the Services and/or participation in the tournaments and competitions that you select in the App is unrestricted and not prohibited by Applicable Laws (as defined in Section 2.1 below) and (vi) will at all times abide by the Terms.

1.2 Non-U.S. To be eligible to register an Account and/or use the Services in any way, you acknowledge that you: (i) are a natural person at least 18 years of age; (ii) own the email address submitted when registering your Account; (iii) are physically located in a jurisdiction in which use of the Services and participation in the tournaments and competitions you select in the App is unrestricted and not prohibited by Applicable Laws; and (iv) will at all times abide by the Terms. VOID WHERE PROHIBITED OR RESTRICTED BY LAW.

1.3 Additional Persons Not Eligible. Without prejudice to the restrictions set forth in Section 2.1 of these Terms, Aviagames' employees, officers, directors, subsidiaries, affiliates and related companies and any other person who has access to non-public information regarding the operation of any game or tournament provided in the App are ineligible to receive any prize offered in the App.

2. Compliance with Applicable Laws

2.1 You acknowledge that access to the App or participating in any tournaments or competitions provided in the App may be illegal in certain

jurisdictions (“Restricted Jurisdictions”). You shall be subject to all applicable laws, rules and regulations of the country, state, and municipality where you reside, access the App or receive Services (“Applicable Laws”). You shall be solely responsible for complying with all Applicable Laws.

2.2 Aviagames DOES NOT make or authorize any third party to make, and IS NOT able to make any representations or warranties, expressly or impliedly, with respect to the legality of your access to the App or participating in any tournaments or competitions provided in the App.

2.3 We may require you to provide us with proof that you are eligible to access the App and participate in any tournaments or competitions provided in the App according to these Terms.

2.4 Aviagames is entitled to, but not obliged to, monitor the location where you access the App, and we are not liable for the effectiveness of such monitoring.

2.5 Aviagames may, at our sole discretion, refuse or block your access to the App if: (i) you are located in a Restricted Jurisdiction; (ii) you utilize proxy servers or any other method in order to conceal your true location; or (iii) we cannot accurately verify your location.

2.6 We DO NOT offer games requiring a cash entry fee (“Cash Competitions”) to you if you access the App from the U.S. States of Arizona, Arkansas, Delaware, Louisiana, Montana, South Carolina, South Dakota, Tennessee, or Vermont or from U.S. territories including Puerto Rico.

2.7 Without prejudice to any rights or remedies available to Aviagames, if you register an Account or participate in any tournament offered in the App in a

Restricted Jurisdiction in violation of these Terms, we may also, at our sole discretion, (i) terminate or suspend your Account, (ii) void, all Winnings (as defined in Section 3), game credits and/or deposit credits (if any) in your Account, and/or (iii) recoup such Winnings in the event such Winnings have been withdrawn by you.

SERVICES AND COMPETITIONS ARE VOID WHERE PROHIBITED OR RESTRICTED BY APPLICABLE LAWS.

3. Your Account

To access the Services or use certain features of the Services, you will be required to provide personal information as part of the registration or login process and to create an account (“Account”), such as your name, age, address, telephone number, and email address. Your Account is not transferable to any other person.

You represent and warrant that all the information you provide to us is true, accurate, legal, valid and complete, and further represent and warrant that you will promptly provide updated information to us if any of this information changes. If you submit any incomplete or inaccurate information, or fail to update and maintain current, complete and accurate information, it may result in the immediate termination of your Account and forfeiture of any prizes or Winnings.

When you register an Account, you represent and warrant that you have the legal capacity to agree to these Terms, to register an Account and to participate in any tournament or service offered by or through the App.

We also urge you to keep your password confidential and refrain from sharing it with others. If you find any unauthorized use of your password or identification, you shall notify us immediately. Subject to these Terms, you are responsible for all activities that occur under your Account with or without your knowledge. We are entitled to assume that offers and payments made through your Account are made by you. You undertake to protect your password in the same way that you would protect your password or other access details to your online banking system and any failure to do so shall be at your sole risk and expense.

You are the sole beneficiary of all benefits arising from your Account. Neither prizes, winnings or other items (including but not limited to virtual goods, virtual currency or digital trophies) (“Winnings”) nor any Digital Assets (as defined below) can or is allowed to be transferred to other person or other Account.

We retain the right to examine and confirm the identity of Account holders. When deemed necessary, we will request documentation proving an Account holder’s identity and residency, including copies of the Account holder’s driver’s license, national identity card, passport, bank statements, or utility bills.

You are fully responsible and liable for all charges, deposits and withdrawals made under your Account, including any unauthorized charges, deposits or withdrawals.

4. Our Services

We may, with or without notice to you: (i) modify, suspend or terminate your access to the Services for any or no reason without liability; and (ii) interrupt

the Services as necessary to perform maintenance, error correction, or other work. We may terminate or disable any user name, password, Account or your access to any portion of the Services at any time in our sole discretion, including if, in our opinion, you may be in violation of or will violate any section of these Terms. Also, and without limiting our other rights or remedies, if you violate these Terms or if we believe you have violated these Terms, we may determine that your Winnings, if any, will be forfeited, disgorged or recouped by us.

We may choose to offer technical support for our Services from time to time in our discretion. Such technical support may require that we remotely access your personal computer or device without your knowledge. You hereby consent to these activities.

For any Service that is identified by us as a beta version (“Beta Service”), you acknowledge and agree that a Beta Service may contain more, fewer and/or different features than the final release of the Service. We reserve the right, in our sole discretion, not to release a final release of a Beta Service or to alter its features, specifications, capabilities, functions, licensing terms, release dates, general availability or other characteristics. Beta Services may not be suitable for production use and may contain errors affecting proper operation and functionality.

The Services contain links to third party websites, resources, or services (“Third Party Sites”), which may or may not be obvious. Any links to Third Party Sites is not an endorsement of any information, product or service that is offered on or reached through such Third Party Sites. We are not responsible for the

performance, services or content available through those Third Party Sites, including the accuracy, offensiveness, opinions, reliability, privacy practices or other policies of or contained in the Third Party Sites. If you decide to leave the Services and access the Third Party Sites or to use or install any third party applications, software or content, you do so at your own risk and you should be aware that our Terms no longer govern.

5. Use Policy

5.1 Rules of Conduct. When you access the App or use the Services, you agree that you will not:

- (i) Violate any law, rule or regulation.
- (ii) Interfere with or disrupt any of the Services or any server or network used to support or provide the Services, including any hacking or cracking into the Services.
- (iii) Use exploits, cheats, undocumented features, design errors or problems in any Services.
- (iv) Engage in any other activity that disturbs the peaceful, fair and respectful gaming environment of any Services.
- (v) Interfere with or disrupt another player's use of any Services.
- (vi) Harass, threaten, bully, embarrass, spam or do anything else to another player that is unwanted.
- (vii) Publish, post, upload or distribute any content that we (acting reasonably and objectively) determine is inappropriate, abusive, hateful, threatening, obscene, sexually explicit, harassing, profane, defamatory, infringing, privacy-invasive, vulgar, offensive, indecent or unlawful.

- (viii) Post a message for any purpose other than personal communication.
- (ix) Attempt to obtain, or phish for, a password, Account information, or other private information from anyone else on our Services.
- (x) Sell, buy, trade or otherwise transfer or offer to transfer your Account, any personal access to Services, either within any Service or on a third party website, or in connection with any out-of-game transaction.
- (xi) Use any Services in a jurisdiction in which Aviagames is prohibited from offering such services under Applicable Laws.
- (xii) Make any use of the Services for the benefit of a business.
- (xiii) Engage in, or assist others to engage in, conduct that could damage or impair Aviagames' property, which may include, without limitation: (a) copying, distributing, transmitting, displaying, performing, framing, linking, hosting, caching, reproducing, publishing, licensing, or creating derivative works from any information, software, products or services obtained from us; and/or (b) providing unauthorized means through which others may use the Services such as through server emulators.

If you or someone using your Account violates these rules and fails to remedy this violation after a warning, we may take action against you, including revoking access to certain or all of our Services, terminating your Account, temporarily or permanently, and determining that your Winnings, if any, will be forfeited, disgorged or recouped by us. In case of severe violations, in Aviagames' sole judgment,

Aviagames may take these actions without issuing a prior warning.

5.2 User Content. The Services may enable users to post, submit, publish, display, or transmit to other users or other persons content, information, materials, or communications (collectively, "User Content"). You shall only upload or send User Content that complies with these Terms, any Applicable Laws, and any additional terms of service we post in the public forums. You shall not contribute User Content that is inappropriate, abusive, harassing, profane, threatening, hateful, offensive, vulgar, obscene, sexually explicit, defamatory, infringing, invasive of another's privacy, or is otherwise reasonably objectionable. You understand and acknowledge that you are responsible for any User Content you submit or contribute, and you have fully responsibility for such content, including its legality, reliability, accuracy, and appropriateness. If you cancel your Account, we may permanently delete your User Content from our servers and we are not obliged to return any User Content to you.

We have the right to: (i) edit, refuse to post, or remove any User Content for any or no reason in our sole discretion; (ii) take any action with respect to any User Content that we deem necessary or appropriate in our sole discretion, including if we believe that such User Content violates these Terms, infringes any intellectual property right or other right of any person or entity, threatens the personal safety of users of the Services or the public, or could create liability for us; (iii) disclose your identity or other information about you to any third party who claims that material posted by you violates their rights, including their

intellectual property rights or their right to privacy; and (iv) take appropriate legal action, including without limitation, referral to law enforcement, for any illegal or unauthorized use of the Services.

Without limiting the foregoing, we have the right to fully cooperate with any law enforcement authorities or court order requesting or directing us to disclose the identity or other information of anyone posting any materials on or through the Services. YOU WAIVE AND HOLD HARMLESS AVIAGAMES AND ITS AFFILIATES, LICENSEES AND SERVICE PROVIDERS FROM ANY CLAIMS RESULTING FROM ANY ACTION TAKEN BY ANY OF THE FOREGOING PARTIES DURING, OR TAKEN AS A CONSEQUENCE OF, INVESTIGATIONS BY EITHER SUCH PARTIES OR LAW ENFORCEMENT AUTHORITIES.

We do not pre-screen User Content, nor do we control, verify or pay for any User Content. We do not endorse and cannot ensure prompt removal of any User Content posted by you or any other users of the Services.

Accordingly, we assume no liability for any action or inaction regarding transmissions, communications, or content provided by any user or third party. We have no liability or responsibility to anyone for performance or non-performance of the activities described in this section.

5.3 Cheating, Fraud, and Abuse. When participating in any tournament or competition via the App or using the Services in any way, you shall not conduct any act which may unfairly alter your chance of winning or constitute the commission of fraud (“Fraud”), which

may include, without limitation to: (i) registering and/or using multiple Accounts; (ii) using unauthorized or altered software or hardware to assist play (e.g., including the use of bots, bot nets, jail broken devices or rooted devices, collusion with bots and/or use of cheat programs such as debuggers, clock-skewing software and memory scanners); (iii) intentionally poor playing to achieve competitive advantage; (iv) colluding with other players (e.g., intentionally losing rematches in Cash Competitions); (v) deliberately transferring money between Accounts (e.g., money laundering); (vi) harassing other participants; (vii) swindling gifts of deposit; and (viii) posting objectionable materials.

If we find any Fraud, we may, at our sole discretion: (i) immediately terminate your Account and block your access to the Services; (ii) void and forfeit any Winnings that you may otherwise have been entitled to receive; (iii) disgorge and/or recoup any Winnings received by you; (iv) institute or seek any injunctive relief, civil and/or criminal penalties against you and/or any of your co-conspirators arising out of or relating to your commission of Fraud; and/or (v) disclose or report any money laundering or similar illegal activity to law enforcement authorities.

6. Winnings, Account Funds, and Payments

6.1 Fees. You shall pay all fees and payments for Services (“Fees”) charged to your Account. All payments shall be made in U.S. Dollars, prepaid and non-refundable. We may change the price of Services at any time, without affecting your past purchases. You shall be authorized to use the payment method that you provided and any payment information you

provide shall be true and accurate. When you provide a payment method, you authorize us to charge you for the Services using such payment method to charge you for any paid feature of the Services that you choose to sign up for.

6.2 Billing. We may change our billing procedures with or without notice to you. We may bill you (i) in advance; (ii) at the time of purchase; or (iii) shortly after purchase, in our sole discretion. If we make an error on your bill, you must tell us within 120 days after the error first appears on your bill. We will then promptly investigate the charge. If you do not inform us within that time period, we will not be liable for any losses resulting from the error and we will not be required to correct the error or provide a refund. If we identify a billing error, we will correct that error within 90 days.

6.3 Cash Deposits. You are a “Cash Player” if you play in a competition that requires a cash entry fee to be paid (“Cash Competition”). If you establish a positive Account balance for entry fees for Cash Competitions, then you are required to submit the information of your full name, permanent address, phone number, and credit card or other payment information, and to maintain such information current and correct at all times. We may require you to establish a positive Account balance in any amount we determine in order to participate in Cash Competitions. If you are a Cash Player, you allow us to share your personal and payment information in confidence with third party service providers in order to validate your identity and assess the transaction risk associated with accepting your selected method of payment, as well as any other purpose as detailed in

our Privacy Policy. If you make a credit card deposit, we may require at least a US\$10.00 credit limit by sending an authorization request to the issuing bank, no matter whether the actual amount charged is lower.

6.4 Withdrawal Requests; Closing Accounts. If you are a “Cash Player,” you may request a withdrawal of funds from your available Account balance at any time. Subject to our confirmation of funds availability, withdrawal requests may take up to 15 days to process. We reserve the right to freeze a user’s Account and/or delay a request for withdrawal pending completion of any investigation of reported or suspected abuse by a user requesting withdrawal of funds. The minimum amount of any withdrawal (other than when your Account is closed) is US\$10.00. If your account is closed then, subject to our right to freeze a user’s Account, delay a request for withdrawal, or declare that funds are forfeited because of your Fraud, the remaining funds in your Account at the time of closing will be returned to you. If you initiate a withdrawal of funds from your Account, you will forfeit all Bonus Cash currently in your Account.

6.5 Service Fee. For any cash deposit added to your Account, your Account will be credited for the amount deposited net of service fees to cover the costs we need to pay for the transaction; the service fee for each deposit is equal to 15% of the amount deposited into your Account and will be charged when you submit a withdrawal application. The service fee, however, is waived when 50% of the amount of cash deposited into your Account has been used to pay entry fees of games in the App.

6.6 Refund Policy. We will not grant you any refunds, unless otherwise required by law.

6.7 Winnings. When you receive Winnings, you may be required to provide us with proof evidencing that you are, or were at the time of your participation, eligible to participate in the subject competition in accordance with these Terms and that you did participate in accordance with these Terms. If you fail to provide us with such proof to our reasonable satisfaction, you will not receive the relevant Winnings. We may reverse or require return of any payment in error which has been received by you and you shall cooperate with us in this regard. We may also reduce payment to you without notice to adjust for any previous overpayment.

6.8 Credit Card/PayPal Use. When you pay by credit card, you represent to us that you are the authorized user of such credit card. If your credit card account number, its expiration date and/or your billing address changes, or if your credit card expires or is cancelled for any reason, you must notify us immediately. We are not liable for any loss caused by any unauthorized use of your credit card or other method of payment by a third party (such as PayPal) In connection with the Services. Any attempt to defraud through the use of credit cards or other methods of payment, regardless of the outcome, or any failure by you to honor legitimate charges or requests for payment, will result in immediate termination of your Account, forfeiture of Winnings, and potentially subject you to civil litigation and/or criminal prosecution.

6.9 Bonus Cash. A Cash Player may be granted bonus cash and/or credits (“Bonus Cash”). Bonus Cash

can only be used to enter Cash Competitions, and for no other purpose. When you enter a Cash Competition, US\$0.01 of Bonus Cash will be used to enter the competition for every US\$0.10 spent on the Cash Competition entry fee. However, if Bonus Cash is the only currency available in your account, additional Bonus Cash will be used to enter Cash Competitions. For games of multiple players, when you win a Cash Competition, any Bonus Cash that you have used to pay the entry fee will be returned to you and any additional Winnings beyond your entry fee will be paid in U.S. Dollars. Please check the FAQ or consult with our Customer Service team, for the detailed rules on winnings. If you do not enter a Cash Competition for 90 continuous days, all Bonus Cash in your Account may be forfeited. Moreover, if you haven't enter a game in the past 150 days, all tickets, Gems and/or other in-game items in your Account may be forfeited. We will also send a reminder mail to players in advance.

6.10 Forfeiture of Funds. If your Account is unilaterally closed or terminated because of your Fraud, we may determine that the funds in your Account shall be forfeited and not returned to you.

6.11 Account Monthly Maintenance Fee. We may charge you of a maintenance fee of US\$2.00 per month if your Account is inactive (i.e., you have not entered at least one tournament) for six consecutive months or more (the "Monthly Maintenance Fee"). You will receive an email (if we have your correct email address) or another form of written message (e.g., an in-App message) if your Account is inactive for five months or more, notifying you that if your Account remains inactive for one more month, the Monthly

Maintenance Fee will be deducted from your Account each consecutive month. If there are no funds in your Account, the Monthly Maintenance Fee will not be deducted from your Account. However, if your Account has no funds and has been inactive for twelve or more consecutive months, your Account may be closed.

7. Taxes

It is our policy, and in compliance with United States Internal Revenue Service regulations, to send an IRS Form 1099-MISC or other appropriate forms to any user who wins in excess of US\$600 in any given year. Depending on the jurisdiction in which you reside, we may also send you a W-9 and/or additional tax forms. We reserve the right to withhold (from your existing Account balance and/or from future net Winnings) any amount required to be withheld by Applicable Laws. You remain solely responsible for paying all federal and other taxes in accordance with the laws that apply in your local, state, province, and/or country of residence.

8. Copyright Complaints

If you believe that any User Content uploaded or posted to, or otherwise made available on, the Services infringes upon any copyright which you own or control, you may submit a notification pursuant to the Digital Millennium Copyright Act (“DMCA”) by providing us with the following information in writing (see 17 U.S.C. Sec. 512©(3) for further detail):

- (U) Identification in sufficient detail of the copyrighted work or intellectual property claimed to have been infringed, or, if multiple copyrighted

works are covered by a single notification, a representative list of such works;

(ii) Identification of the URL or other specific location that contains the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled. You must provide us with reasonably sufficient information to locate the alleged infringing material;

(iii) A physical or electronic signature of the owner of the copyright or a person authorized to act on the owner's behalf;

(iv) A statement that you have a good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law; and

(v) A statement that the information in the notification is accurate and under penalty of perjury, that you are authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

Please include your name, mailing address, telephone number, email address, and direct your notification by email at support@aviagames.com or by regular mail at: 28 E. 3rd Avenue, San Mateo, CA 94043

Please note that filing a report of intellectual property infringement is a serious matter with legal consequences. Any person who knowingly materially misrepresents that a product or content is infringing the copyrights of others could be liable for damages pursuant to Applicable Laws.

Upon receiving a proper notification of alleged copyright infringement as described above, we may

remove or disable access to the allegedly infringing material and promptly notify the alleged infringer of your claim. We also may advise the alleged infringer of the DMCA statutory counter notification procedure, by which the alleged infringer may respond to your claim and request that we restore the material.

9. Proprietary Rights

9.1 User Content. When you contribute User Content, you grant to Aviagames, its licensors and licensees a non-exclusive, perpetual, transferable, worldwide, sublicensable license to use, host, store, reproduce, modify, create derivative works, publicly perform, publicly display or otherwise transmit and communicate the User Content, or any portion thereof, in any manner or form and in any medium or forum, whether now known or hereafter devised, without notice, payment or attribution of any kind to you or any third party. You also grant all other users who can access and use your User Content on any Services the right to use, copy, modify, display, perform, create derivative works from, and otherwise communicate and distribute your User Content on or through the relevant Services without further notice, attribution or compensation to you.

9.2 License to Use. You agree and acknowledge that:

(i) Aviagames grants you a personal, limited, non-transferable, revocable and non-exclusive license to use the Services and the tools, solutions, and data (collectively “Supplier Services”) provided by one or more of our partners and suppliers (collectively “Suppliers”) to which you have access for your personal and noncommercial use, subject to your compliance with these Terms.

(ii) Aviagames and its Suppliers retain all right, title, and interest in their respective intellectual property and all of their intellectual property rights in the Services and the Supplier Services, and no title to either the Services, the Supplier Services or such intellectual property is transferred to you.

(iii) You may not access, copy, modify or distribute any Services or Supplier Services unless expressly authorized by Aviagames or permitted by Applicable Laws.

(iv) You shall not reverse engineer, expose, reverse assemble, decompile, reverse decompile, reduce to human readable form, or otherwise attempt to extract or otherwise use source code or other data from Services or from the Supplier Services, or modify, incorporate into or with other software, or create derivative works of, the Services or any of the Supplier Services.

(v) You shall not expose, capture, retain, aggregate, store, copy, market, modify, reverse engineer, decompile, disassemble, exploit or otherwise attempt to discover the data involved in the Services or any of the Supplier Services, or allow any third party to do the same.

(vi) You shall comply with all export and re-export restrictions and regulations of the Department of Commerce or other United States agency or authority, and shall not transfer, or authorize the transfer of, the Services or any Supplier Services to a prohibited country or otherwise in violation of any such restrictions or regulations.

(vii) No warranty from Aviagames or any of its Suppliers or any of their licensors is made to you in

connection with the Services or any Supplier Services, and there is an express disclaimer of any implied warranties of merchantability or fitness for a particular purpose.

(viii) No Supplier or any of their licensors shall be liable to you for any indirect, consequential, incidental or special damages arising out of the use or license of the Supplier Services, regardless of the theory of liability (including negligence, tort and strict liability).

(ix) You shall not remove, alter or obscure any copyright or other proprietary notices incorporated on or in the Services or any Supplier Services, or allow any third party to do the same.

(x) You shall not make the Services or any Supplier Services available to third parties or use the Services or any Supplier Services on behalf of third parties (including through file sharing, hosting, application services provider, service bureau, or any other type of service) and shall not transfer or sublicense the Services or any Supplier Services or allow the Services or any Supplier Services to become subject to any lien.

(xi) You shall not make any copies of the Services or any Supplier Services; and

(xii) You shall comply with the Google Maps terms and conditions (as located at http://maps.google.com/help/terms_maps.html), the Google Legal Notices (as located at http://www.maps.google.com/help/legalnotices_maps.html) and the AUP (as located at http://www.google.com/enterprise/earthmaps/legal/us/maps_AUP.html), as the same may be updated from time to time.

9.3 Digital Assets. Aviagames is the sole and exclusive owner of all digital objects (e.g., avatars) created by in connection with using our Services and any digital or virtual objects or assets we assign to your Account (e.g., virtual trophies or virtual goods) (“Digital Assets”). In the event any Digital Assets cannot be automatically owned by Aviagames, you hereby expressly assign all right, title and interest worldwide in and to such Digital Assets to Aviagames, including, without limitation, all copyrights, patent rights, trade secrets, trademarks, moral rights and all other applicable proprietary and intellectual property rights. If you have any rights to the Digital Assets that cannot be assigned to Aviagames, you hereby unconditionally and irrevocably: (i) waive the enforcement of such rights; and (ii) grant to Aviagames during the term of such rights, an exclusive, irrevocable, perpetual, transferable, worldwide, royalty-free license to reproduce, create derivative works of, distribute, publicly perform and publicly display such Digital Assets, by all means now known or later developed, with the right to sublicense such rights. Subject to these Terms, we grant you a limited license to use Digital Assets through your own Account solely for purposes and in furtherance of your use of the Services.

9.4 Ownership. The Services and its entire contents, features, functionalities, and other products and services, logos, symbols, expansion names and symbols, play level symbols, trade dress or “look and feel,” Digital Assets, and all derivative works or modifications of any of the foregoing, and all related and underlying intellectual property (including without limitation patents, trademarks, trade secrets

and copyrights), are owned by Aviagames, its licensors, or other providers of such material and are protected by United States and international copyright, trademark, patent, trade secret, and other intellectual property or proprietary rights law. We reserve all rights not expressly granted herein. Except as expressly set forth herein, no right or license is granted hereunder, express or implied or by way of estoppel, to any intellectual property rights and your use of the Services does not convey or imply the right to use the Services in combination with any other information or products.

10. Indemnification

By using the Services, you agree to, at your own cost and expense, indemnify and hold harmless Aviagames, its affiliates, licensors, and service providers, and their respective officers, directors, employees, contractors, agents, licensors, suppliers, successors, and assigns, from and against any and all claims, demands, causes of action, disputes, liabilities, damages, judgments, losses, costs, expenses, or fees, including reasonable attorneys' fees, arising out of or relating to (i) your breach of these Terms; (ii) any use of your Account by any person, whether authorized by you or not; (iii) your violation of any Applicable Laws; (iv) your negligence or misconduct; and/or (v) Aviagames' use of your information. Upon the written request of Aviagames, you shall, at your cost and expense, defend us from any of the foregoing using counsel reasonably acceptable to us. Without limiting the foregoing, you will cooperate as fully and as reasonably required in Aviagames' defense of any claim. Aviagames reserves the right to assume the exclusive defense and control of any matter otherwise subject to indemnification by

you, and you shall not in any event settle any such matter without the written consent of Aviagames.

11. Term and Termination

These Terms are effective until termination of your Account by you or Aviagames. Upon termination of your Account, you will be barred from accessing or using any Service again and all licenses and rights granted to you under these Terms shall be terminated, without affecting your obligation to pay any accrued Fees. Any and all terms and conditions within these Terms which should, by their nature, survive termination of this Agreement, will survive such termination.

12. Disclaimers

We strive to keep Services up and running; however, all online services suffer occasional disruptions and outages, and we are not responsible or liable for any disruption or loss you may suffer as a result. You should regularly backup content that you store on the Services.

TO THE MAXIMUM EXTENT PERMITTED UNDER APPLICABLE LAWS, ALL SERVICES, PRODUCTS, INFORMATION AND DATA PROVIDED OR MADE AVAILABLE BY US ARE "AS IS" AND "AS AVAILABLE" AND WITHOUT WARRANTY OF ANY KIND, EITHER EXPRESSED OR IMPLIED, STATUTORY OR OTHERWISE, INCLUDING BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT. NEITHER THE COMPANY NOR ANY PERSON ASSOCIATED WITH THE COMPANY MAKES ANY WARRANTY OR REPRESENTATION

WITH RESPECT TO THE COMPLETENESS, SECURITY, RELIABILITY, QUALITY, ACCURACY, OR AVAILABILITY OF THE SERVICES. WITHOUT LIMITING THE FOREGOING, NEITHER THE COMPANY NOR ANYONE ASSOCIATED WITH THE COMPANY REPRESENTS AND WARRANTS THAT THE SERVICES OR THE FUNCTIONS CONTAINED IN THE SERVICES, YOUR ACCOUNT, SOFTWARE, DIGITAL ASSETS OR ANY ITEMS, PRODUCTS, INFORMATION AND DATA PROVIDED BY US WILL BE SECURE, VIRUS-FREE, UNINTERRUPTED, ERROR-FREE OR RELIABLE, THAT DEFECTS WILL BE CORRECTED, OR THAT THE SAME WILL FUNCTION PROPERLY IN COMBINATION WITH ANY THIRD PARTY COMPONENT, TECHNOLOGY, HARDWARE, SOFTWARE, OR SYSTEM, OR THAT ANY SERVICES, PRODUCTS, INFORMATION AND DATA PROVIDED BY US WILL OTHERWISE MEET YOUR NEEDS OR EXPECTATIONS.

UNDER NO CIRCUMSTANCES SHALL AVIAGAMES, ITS AFFILIATES, OR OUR OR THEIR OFFICERS, DIRECTORS AND EMPLOYEES BE RESPONSIBLE OR LIABLE FOR ANY DAMAGE, LOSS, OR INJURY RESULTING FROM, RELATING TO OR ARISING OUT OF (I) USE, ACCESS, OR ATTEMPTED USE OR ACCESS OF SERVICES, DIGITAL ASSETS, OR SOFTWARE; (II) DOWNLOADING ANY INFORMATION FROM THE SOFTWARE OR SERVICES; AND/OR (III) VIOLATIONS OF THESE TERMS BY OTHER USERS. WE HAVE NO RESPONSIBILITY TO ENFORCE THESE TERMS FOR THE BENEFIT OF ANY USER.

THE FOREGOING DOES NOT AFFECT ANY WARRANTIES THAT CANNOT BE EXCLUDED OR LIMITED UNDER APPLICABLE LAWS.

13. Limitations of Liability

TO THE MAXIMUM EXTENT PERMITTED UNDER APPLICABLE LAWS, IN NO EVENT WILL AVIAGAMES, ITS AFFILIATES, OR OUR OR THEIR LICENSORS, SUPPLIERS, SERVICE PROVIDERS, EMPLOYEES, AGENTS, OFFICERS, OR DIRECTORS BE LIABLE TO YOU OR ANY THIRD PARTY FOR DAMAGES OF ANY KIND, UNDER ANY LEGAL THEORY, ARISING OUT OF OR RELATING TO THESE TERMS, THE SERVICES, OR ANY INFORMATION, PRODUCTS OR SOFTWARE MADE AVAILABLE OR ACCESSIBLE TO YOU, INCLUDING ANY DIRECT, INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, OR PUNITIVE, DAMAGES, INCLUDING, WITHOUT LIMITATION, PERSONAL INJURY, PAIN AND SUFFERING, EMOTIONAL DISTRESS, LOSS OF REVENUE, LOSS OF PROFITS, LOSS OF BUSINESS OR ANTICIPATED SAVINGS, LOSS OF USE, LOSS OF DATA, LOSS OF GOODWILL, AND WHETHER BASED ON A CLAIM OR ACTION OF CONTRACT, WARRANTY, NEGLIGENCE, STRICT LIABILITY, OR OTHER TORT, BREACH OF ANY STATUTORY DUTY, INDEMNITY OR CONTRIBUTION, OR OTHERWISE.

TO THE MAXIMUM EXTENT PERMITTED UNDER APPLICABLE LAWS, IN NO EVENT WILL THE COLLECTIVE LIABILITY OF AVIAGAMES AND ITS AFFILIATES AND THEIR LICENSORS, SUPPLIERS, SERVICE PROVIDERS, EMPLOYEES,

AGENTS, OFFICERS, OR DIRECTORS, TO ANY PARTY (REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT, OR OTHERWISE) EXCEED U.S. \$50.00.

THE FOREGOING DOES NOT AFFECT ANY LIABILITY THAT CANNOT BE EXCLUDED OR LIMITED UNDER APPLICABLE LAWS.

14. Governing Law

All matters relating to the Services and these Terms and any dispute or claim arising therefrom or related thereto (in each case, including non-contractual disputes or claims) shall be governed by, and construed in accordance with, the laws of the State of California, without giving effect to any choice or conflict of law principles.

15. Dispute Resolution and Binding Arbitration

PLEASE READ THIS SECTION CAREFULLY BECAUSE IT REQUIRES YOU AND AVIAGAMES TO ARBITRATE CERTAIN DISPUTES AND CLAIMS AND LIMITS THE MANNER IN WHICH WE CAN SEEK RELIEF FROM EACH OTHER. ARBITRATION PRECLUDES YOU AND AVIAGAMES FROM SUING IN COURT OR HAVING A JURY TRIAL. YOU AND AVIAGAMES AGREE THAT ARBITRATION WILL BE SOLELY ON AN INDIVIDUAL BASIS AND NOT AS A CLASS ARBITRATION, CLASS ACTION, OR ANY OTHER KIND OF REPRESENTATIVE PROCEEDING. AVIAGAMES AND YOU ARE EACH WAIVING THE RIGHT TO TRIAL BY A JURY.

FOLLOW THE INSTRUCTIONS BELOW IF YOU WISH TO OPT OUT OF THE REQUIREMENT OF ARBITRATION ON AN INDIVIDUAL BASIS. NO

CLASS OR REPRESENTATIVE ACTIONS OR ARBITRATIONS ARE ALLOWED UNDER THIS ARBITRATION AGREEMENT.

This Section 15 is an agreement between you and Aviagames and applies to both parties' respective agents, employees, subsidiaries, predecessors, successors, beneficiaries and assigns. These Terms affect interstate commerce, and the enforceability of this Section 15 will be substantively and procedurally governed by the Federal Arbitration Act, 9 U.S.C. § 1, et seq., to the extent permitted by law. This Section 15 shall be interpreted broadly and shall survive termination of these Terms.

a) Claims Covered by Arbitration. All disputes, claims or controversies arising out of or relating to these Terms, any Services, or the relationship between you and Aviagames ("Disputes") shall be determined exclusively by binding arbitration. This includes claims that accrued before you entered into this Agreement. The only Disputes not covered by this section are (i) disputes regarding the infringement, protection or validity of your, Aviagames' or Aviagames' licensors' copyright, trademark or patent rights and (ii) individual disputes that qualify for small claims court.

b) Informal Negotiations. You and Aviagames shall try to resolve any Dispute informally for at least 60 days before initiating arbitration. The informal negotiations commence upon receipt of written notice from one person to the other ("Notice of Dispute"). The Notice of Dispute must: (i) include the full name and contact information of

the complaining party or legal representative of the complaining party; (ii) describe the nature and basis of the Dispute; and (iii) set forth the specific relief sought. Aviagames will send its Notice of Dispute to your email address. You will send your Notice of Dispute to: Aviagames Customer Support, 28 E. 3rd Avenue, San Mateo, CA 94043 by U.S. mail and legal@aviagames.com.

c) Binding Arbitration. If you and Aviagames cannot resolve any Dispute by informal negotiation, you agree to resolve all Disputes by binding arbitration before a neutral arbitrator, whose decision will be final except for a limited right of appeal under the Federal Arbitration Act, instead of in a court by a judge or jury. Any court with jurisdiction over the parties may enforce the arbitrator's award.

Disputes that must be arbitrated include, without limitation, disputes arising out of or relating to interpretation or application of this arbitration provision, including the enforceability, revocability, or validity of the arbitration provision or any portion of the arbitration provision. The arbitrator will have the authority to grant any remedy or relief that would otherwise be available in court.

All Disputes must be submitted to the American Arbitration Association ("AAA") and will be resolved through binding arbitration before one arbitrator. If you are a consumer, the then-current version of the AAA's Consumer Arbitration Rules will apply, which are available on the AAA's website (adr.org), as amended by these Terms as follows:

U. YOU AND AVIAGAMES AGREE THAT ANY ARBITRATION UNDER THESE TERMS WILL TAKE PLACE ON AN INDIVIDUAL BASIS; CLASS ARBITRATIONS AND CLASS ACTIONS ARE NOT PERMITTED, AND YOU AND AVIAGAMES ARE AGREEING TO GIVE UP THE ABILITY TO PARTICIPATE IN A CLASS ACTION.

The arbitrator may conduct only an individual arbitration and, except as described below for the additional procedures to govern if twenty-five (25) or more similar or coordinated claims are asserted against Aviagames or you by the same or coordinated counsel, may not consolidate more than one individual's claims, preside over any type of class or representative proceeding, or preside over any proceeding involving more than one individual.

2. For any arbitration you initiate, you will pay the consumer filing fee, and Aviagames will pay the remaining AAA fees and costs. For any arbitration initiated by Aviagames, Aviagames will pay all AAA fees and costs.

3. For all arbitrations where the claims asserted are \$25,000 or less, the arbitration shall be resolved according to the AAA's Procedures for the Resolution of Disputes through Document Submission, and for all other arbitrations the following procedure will apply: (i) the arbitrator will conduct hearings, if any, by teleconference or videoconference rather than by personal appearances, unless the arbitrator determines upon request by you or by us that an in-person hearing is

appropriate; (ii) any in-person appearances will be held at a location which is reasonably convenient to both parties with due consideration of their ability to travel and other pertinent circumstances; and (iii) if the parties are unable to agree on a location, such determination should be made by the AAA or by the arbitrator.

4. If you or Aviagames submits a Dispute to arbitration and the arbitrator orders any exchange of information, you and Aviagames agree to cooperate to seek from the arbitrator protection for any confidential, proprietary, trade secret, or otherwise sensitive information, documents, testimony, and/or other materials that might be exchanged or the subject of discovery in the arbitration. You and Aviagames agree to seek such protection before any such information, documents, testimony, and/or materials are exchanged or otherwise become the subject of discovery in the arbitration.

5. The arbitrator's decision will follow these Terms and will be final and binding. The arbitrator will have authority to award temporary, interim, or permanent injunctive relief or relief providing for specific performance of these Terms but only to the extent necessary to provide relief warranted by the individual dispute before the arbitrator. The award rendered by the arbitrator may be confirmed and enforced in any court having jurisdiction thereof. Notwithstanding any of the foregoing, nothing in these Terms will preclude you from

bringing issues to the attention of federal, state, or local agencies and, if the law allows, they can seek relief against us for you.

6. The AAA Supplementary Rules for Multiple Case Filings and the AAA Multiple Consumer Case Filing Fee Schedule will apply if twenty-five (25) or more similar claims are asserted against Aviagames or against you by the same or coordinated counsel or are otherwise coordinated. In addition to the application of the AAA Supplementary Rules for Multiple Case Filings and the AAA Multiple Consumer Case Filing Fee Schedule, you and Aviagames understand and agree that when twenty-five (25) or more similar claims are asserted against Aviagames or you by the same or coordinated counsel or are otherwise coordinated resolution of your or Aviagames' Claim might be delayed. For such coordinated actions, you and Aviagames also agree to the following coordinated bellwether process. Counsel for claimants and counsel for Aviagames shall each select ten (10) cases (per side) to proceed first in individual arbitration proceedings. The remaining cases shall be deemed filed for purposes of the statute of limitations but not for the purpose of assessing AAA fees. No AAA fees shall be assessed in connection with those cases until they are selected to proceed to individual arbitration proceedings as part of a bellwether process. If the parties are unable to resolve the remaining cases after the conclusion of the initial twenty (20) proceedings, each side shall select another ten (10) cases (per side) to

proceed to individual arbitration proceedings as part of a second bellwether process. A single arbitrator shall preside over each case. Only one case may be assigned to each arbitrator as part of a bellwether process unless the parties agree otherwise. This bellwether process shall continue, consistent with the parameters identified above, until all the claims included in these coordinated filings, including your case, are adjudicated or otherwise resolved. The statute of limitations and any filing fee deadlines shall be tolled for claims subject to this bellwether process from the time the first cases are selected for a bellwether process until the time your or Aviagames' case is selected for a bellwether process, withdrawn, or otherwise resolved. A court shall have authority to enforce this paragraph and, if necessary, to enjoin the mass filing or prosecution of arbitration demands against Aviagames or you.

d) One Year to File Claims. Disputes you may have arising out of or relating to these Terms or the Services must be commenced within one year after the cause of action accrues; otherwise, such cause of action or claim is permanently barred.

e) Opt Out. You have the right to opt out of binding arbitration within 30 days of the date you first accepted these Terms by providing us with notice of your decision to opt-out via email at legal@aviagames.com or by certified mail addressed to 28 E. 3rd Avenue, San Mateo, CA 94043. In order to be effective, the opt-out notice must include your full name, mailing address, and email address. The notice must also clearly

indicate your intent to opt out of binding arbitration. By opting out of binding arbitration, you are agreeing to resolve disputes in accordance with Section 14.

f) Severability. If any portion of this Section 15 is found to be unenforceable or unlawful for any reason, including but not limited to because it is found to be unconscionable, (i) the unenforceable or unlawful provision will be severed from these Terms; (ii) severance of the unenforceable or unlawful provision will have no impact whatsoever on the remainder of this Section 15 or the parties' ability to compel arbitration of any remaining claims on an individual basis pursuant to this Section 15; and (iii) to the extent that any claims must therefore proceed on a class, collective, consolidated, or representative basis, such claims must be litigated in a civil court of competent jurisdiction and not in arbitration. The litigation of those claims will be stayed pending the outcome of any individual claims in arbitration. Further, if any part of this Section 15 is found to prohibit an individual claim seeking public injunctive relief, that provision will have no effect to the extent such relief is allowed to be sought out of arbitration, and the remainder of this Section 15 will be enforceable.

g) Outside the United States. Notwithstanding anything to the contrary in the Terms, if you reside in any country outside of the United States, you may bring legal proceedings regarding the Terms either by following the arbitration procedure detailed above in this Section 15 of the Terms or, if given the right by applicable law, by submitting the dispute to an arbitration administrator in the

jurisdiction in which you reside. To the extent any proceeding is not subject to arbitration under applicable law, you may submit the dispute to the courts of the jurisdiction in which you reside.

16. Miscellaneous

16.1 These Terms and our Privacy Policy constitute the sole and entire agreement between you and us pertaining to the subject matter hereof and supersede all prior or other arrangements, understandings, negotiations and discussions, whether oral or written. These Terms cannot be modified by you, and may only be modified by us as provided above.

16.2 You consent to Aviagames providing you notifications about the Services or information any Applicable Laws require us to provide to the email address that you provided when creating your Account. Notices emailed to you will be deemed given and received when the email is sent. If you do not consent to receive notices electronically, you must close your Account.

16.3 If we provide a translated version of these Terms, Privacy Policy, or any other terms or policy, it is for informational purposes only. If there is any inconsistency between the translated version and the English version, then the English version shall prevail.

16.4 Please send any questions or comments to: Aviagames Customer Support, 28 E. 3rd Avenue, San Mateo, CA 94043.

APPENDIX E

U.S. Const. Art. VI cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

9 U.S.C. § 2

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.

APPENDIX F

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ANDREW PANDOLFI and
MANDI SHAWCROFT,
individually and on behalf
of all others similarly
situated,

Plaintiffs - Appellees,

v.

AVIAGAMES, INC.; et al.,

Defendants - Appellants,

and

ACME, LLC and GALAXY
DIGITAL CAPITAL
MANAGEMENT, LP,

Defendants.

No. 24-5817

D.C. No.

3:23-cv-05971-EMC

Northern District of
California, San
Francisco

ORDER

FILED OCT 15 2025 MOLLY C.
DWYER, CLERK U.S. COURT OF
APPEALS

122a

Before: RAWLINSON and KOH, Circuit
Judges, and FITZWATER, District
Judge.*

Appellants' Motion to Stay the Mandate (Dkt. No. 60)
is GRANTED.

* The Honorable Sidney A. Fitzwater, United States District
Judge for the Northern District of Texas, sitting by designation.

APPENDIX G

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

<p>ANDREW PANDOLFI and MANDI SHAWCROFT, individually and on behalf of all others similarly situated,</p> <p>Plaintiffs - Appellees,</p> <p>v.</p> <p>AVIAGAMES, INC.; et al.,</p> <p>Defendants - Appellants,</p> <p>and</p> <p>ACME, LLC and GALAXY DIGITAL CAPITAL MANAGEMENT, LP,</p> <p>Defendants.</p>	<p>No. 24-5817</p> <p>D.C. No.</p> <p>3:23-cv-05971-EMC</p> <p>Northern District of California, San Francisco</p> <p>ORDER</p>
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FILED OCT 6 2025 MOLLY C. DWYER,
CLERK U.S. COURT OF APPEALS

Before: RAWLINSON and KOH, Circuit
Judges, and FITZWATER, District Judge.*

The panel unanimously voted to deny the petition for panel rehearing. Judge Rawlinson and Judge Koh have voted to deny the petition for rehearing en banc, and Judge Fitzwater has so recommended. The full court has been advised of the petition for rehearing en banc, and no judge of the Court has requested a vote on the petition. Fed. R. App. P. 40. The petition for panel rehearing and rehearing en banc (Dkt. 57) is **DENIED**.

* The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.