



**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

S.S., a minor, by and through his Guardian
ad Litem Eunjin Stern; EUNJIN STERN,
an individual; WILLIAM STERN, an
individual,,

Plaintiff,

v.

PELTON INTERACTIVE, INC., a
Delaware corporation; DOES 1 through
50, inclusive,

Defendant.

Case No.: 3:21-cv-01367-BEN-DEB

ORDER:

- (1) GRANTING-IN-PART AND
DENYING-IN-PART
DEFENDANT'S MOTION TO
COMPEL ARBITRATION;**
- (2) OVERRULING PLAINTIFFS'
EVIDENTIARY OBJECTIONS;**
- (3) DENYING DEFENDANT'S
MOTION TO DISMISS; and**
- (4) GRANTING DEFENDANT'S
MOTION TO STAY AS TO
WILLIAM STERN ONLY.**

[ECF Nos. 11, 12, 13, and 14]

I. INTRODUCTION

Plaintiff S.S., a minor, by and through his Guardian ad Litem Eunjin Stern ("S.S."); Eunjin Stern, an individual ("Mrs. Stern"); and William Stern, an individual ("Mr. Stern") (collectively, "Plaintiffs") bring this action against Defendant Peloton Interactive, Inc., a Delaware corporation ("Defendant" or "Peloton") for injuries allegedly sustained in connection with Peloton's Tread+ treadmill (the "Tread+").

Before the Court is Defendant's Motion to Compel Arbitration and to Dismiss or Stay the Case (the "Motion"). ECF No. 11. The Motion was submitted on the papers without oral argument pursuant to Civil Local Rule 7.1(d)(1) and Rule 78(b) of the Federal Rules of Civil Procedure. ECF No. 14. After considering the papers submitted, supporting documentation, and applicable law, the Court **DENIES** Peloton's Motion to Compel Arbitration as to Mrs. Stern and S.S. but **GRANTS** the Motion as to William Stern only.

II. BACKGROUND

A. Statement of Facts

Peloton is an innovative fitness equipment and media company that combines technology, hardware, and production to bring the immersive experience of fitness class into the home. Motion, ECF No. 11-1 ("Mot.") at 6:26-28 (citing Declaration of Daniel Feinberg, ECF No. 11-2 ("Feinberg Decl.") at ¶ 3). It sells stationary bicycles and treadmills that allow subscribers to remotely participate in classes via streaming media. *Id.* at 7:1-2. For streaming media, Peloton's Terms of Service state that it "**provides an online fitness community** and related products, services, content and features **through . . . the interfaces on tablets connected to Peloton fitness equipment** (such as the Peloton Bike and Tread), Peloton's fitness studios, and through mobile, desktop, or device applications (including iOS and Android applications ('Apps'))." Exhibit 4 to Mot., Peloton Terms of Service (Last Updated: September 14, 2018), ECF No. 11-6 ("Peloton Terms") at 2.

Any customer who purchases a Peloton product must subscribe to Peloton's All-Access Membership in order to gain access to the "full user experience" intended for the bicycle or treadmill, including access to Peloton's workout library, live classes, and real-time performance tracking on the device. Mot. at 7:4-7 (citing Feinberg Decl. at ¶ 5); *see also* Exhibit 1 to Mot., ECF No. 11-3 at 2 (showing a screenshot of the "Create Your Peloton Account" screen). In fact, Peloton automatically creates a Peloton account for purchasers of a new Tread+ who do not have a pre-existing Peloton account during

1 checkout, but the new membership charge will not begin until the customer activates the
2 device. Feinberg Decl. at ¶ 5. When new purchasers of Peloton equipment create their
3 account for Peloton's All-Access Membership, they must complete a sign-up process that
4 requires them to accept the "Peloton Terms of Service." Mot. at 7:13-15 (citing Feinberg
5 Decl., ¶ 7). New members can complete this process on either the Peloton website, their
6 phones, or on a Peloton device, like the Tread+. Mot. at 7:15-17 (citing Feinberg Decl., ¶
7 7). When registering on the Peloton website or mobile application, as Mr. Stern did,
8 users see a series of screens that, *inter alia*, (1) present the user with instructions to read
9 and agree to Peloton's Terms of Service, Privacy Policy and Membership Terms; (2)
10 advise that these terms are also available at onepeloton.com with the phrases "Terms of
11 Service," "Privacy Policy," and "Membership Terms" called out in underline and
12 hyperlinked to pages displaying complete versions of each document; and (3) require the
13 user to click a button confirming that the user agrees to the Terms. Mot. at 7:17-8:2
14 (citing Feinberg Decl., ¶ 7); *see also* Exhibit 3 to Mot., ECF No. 11-5 at 2 (showing a
15 screen that requires new users to enter an e-mail and password and click the button
16 "CREATE ACCOUNT," which has a phrase underneath it stating, "By creating an
17 account, you agree to our Terms of Service, Privacy Policy and Membership Terms.").
18 Users cannot complete the registration process without confirming that they have read
19 and agreed to the Peloton Terms of Service, Privacy Policy, and Membership Terms.
20 Mot. at 8:3-5 (citing Feinberg Decl., ¶ 7).

21 As part of their acceptance of Peloton's Terms of Service, Peloton members agree
22 to arbitrate any disputes with Peloton. Mot. at 8:7-8. In fact, the first paragraph of the
23 Terms of Service that applied when Mr. Stern created his Peloton account, stated: "[b]y
24 registering as a member or by visiting, browsing, or using the Peloton Service in any
25 way, you (as a 'user') accept and agree to be bound by these Terms of Service ('Terms'),
26 which forms a binding agreement between you and Peloton." Mot. at 8:9-13 (citing
27 Feinberg Decl. ¶ 8, Ex. 4 at p. 1); *see also* Exhibit 4 to Mot., ECF No. 11-6, Peloton
28 Terms of Service at 2. The Terms also state that "[i]f you do not wish to be bound by

1 these Terms, you may not access or use the Peloton Service.” Mot. at 8:13-15; *see also*
 2 Peloton Terms at 2.

3 In between these provisions, in a paragraph called out in all caps lettering with an
 4 introduction that states, “PLEASE READ,” the Terms make clear that they contain a
 5 binding arbitration provision and class action waiver for any dispute with Peloton:

6 PLEASE READ: THESE TERMS CONTAIN A BINDING
 7 ARBITRATION PROVISION AND CLASS ACTION
 8 WAIVER (SECTION 20). **READ CAREFULLY,**
 9 **INCLUDING YOUR RIGHT, IF APPLICABLE, TO OPT**
 10 **OUT OF ARBITRATION.** EXCEPT FOR CERTAIN
 11 TYPES OF DISPUTES DESCRIBED IN SECTION 20
 12 BELOW, OR WHERE PROHIBITED BY LAW, BY
 13 ENTERING INTO THESE TERMS YOU EXPRESSLY
 14 AGREE THAT DISPUTES BETWEEN YOU AND
 PELOTON WILL BE RESOLVED BY BINDING,
 INDIVIDUAL ARBITRATION, AND YOU HEREBY
 WAIVE YOUR RIGHT TO PARTICIPATE IN A CLASS
 ACTION LAWSUIT OR CLASS-WIDE ARBITRATION.

15 Mot. at 8:16-27. The Peloton Terms of Service also state that “[y]ou must be at least 18
 16 years old, or the age of legal majority in your jurisdiction of residence, to register with
 17 and use the Peloton Service.” *Id.* “Minors that can safely fit the dimensions of the
 18 Peloton Bike may participate in live in-studio classes, provided that (a) they and their
 19 parent/guardian have signed a Peloton waiver and release; and (b) their parent/guardian is
 20 on site at all times.” *Id.* The Terms also advise that “the Peloton Service is offered only
 21 for your personal, non-commercial use, and not for the use or benefit of any third party.”

22 *Id.* Finally, the Terms of Service contain the following arbitration provision:

23 20. ARBITRATION CLAUSE & CLASS ACTION WAIVER
 24 – IMPORTANT – PLEASE REVIEW AS THIS MAY
 25 AFFECT YOUR LEGAL RIGHTS. APPLICABLE TO THE
 FULL EXTENT PERMITTED BY LAW.

26 a. Mandatory Arbitration of Disputes. *We each agree that any*
 27 *dispute*, claim or controversy *arising out of* or relating to
 28 *these Terms* or *the breach*, termination, enforcement,
 interpretation or validity thereof or the *use of the Services* or
Content (collectively, “Disputes”) will be resolved solely

1 **by binding, individual arbitration** and not in a class,
 2 ~~representative or consolidated action or proceeding.~~ You
 3 and Peloton agree that the U.S. Federal Arbitration Act (or
 4 equivalent laws in the jurisdiction in which the Peloton
 5 entity that you have contracted with is incorporated) governs
 6 the interpretation and enforcement of these Terms and that
 7 you and Peloton are each ***waiving the right to a trial by jury***
 8 or to participate in a class action. This arbitration provision
 9 shall survive termination of these Terms.

10 b. Exceptions and Opt-out. ... [Y]ou will retain the right to opt
 11 out of arbitration entirely and litigate any Dispute if you
 12 provide us with written notice of your desire to do so by
 13 regular mail sent to the attention of Peloton's Legal
 14 Department at the Peloton address set out below within
 15 thirty (30) days following the date you first agree to these
 16 Terms.

17 c. Conducting Arbitration and Arbitration Rules. The
 18 arbitration will be conducted by the American Arbitration
 19 Association ("AAA") under its Consumer Arbitration Rules
 20 (the "AAA Rules") then in effect, except as modified by
 21 these Terms. The AAA Rules are available at www.adr.org
 22 or by calling 1-800-778-7879. A party who wishes to start
 23 arbitration must submit a written Demand for Arbitration to
 24 AAA and give notice to the other party as specified in the
 25 AAA Rules. The AAA provides a form Demand for
 26 Arbitration at www.adr.org.

27 ... If your claim exceeds U.S. \$10,000, the right to a hearing
 28 will be determined by the AAA Rules. Any arbitration
 hearings will take place in the county (or parish) where you
 live, unless we both agree to a different location. ***The
 parties agree that the arbitrator shall have exclusive
 authority to decide all issues relating to the interpretation,
 applicability, enforceability and scope of this arbitration
 agreement.***

Exhibit 4 to Mot., ECF No. 11-6 at 11 (the "Arbitration Provision") (emphasis added).

The Terms of Service also state that "[i]f your contract for the Peloton Service is
 with Peloton Interactive, Inc.," as is the case here, the "Terms shall be governed by the

1 laws of the State of New York, United States of America, without regard to principles of
2 conflicts of law.” Exhibit 4 to Mot., ECF No. 11-6 at 12. They also provide that
3 “exclusive jurisdiction for all Disputes that are not required to be arbitrated will be the
4 state and federal courts located in New York, New York, United States of America, and
5 you consent to the jurisdiction of those courts.” Exhibit 4 to Mot., ECF No. 11-6 at 12.

6 On August 25, 2019, Mr. Stern created a Peloton account. Mot. at 7:8-9 (citing
7 Feinberg Decl., ¶ 6). Almost three months later, on November 29, 2019, Mr. Stern
8 purchased a Peloton Treadmill¹ and created a new Peloton account under a different e-
9 mail during checkout. Mot. at 7:9-10 (citing Feinberg Decl., ¶ 6). On December 5, 2019,
10 the Tread+ was delivered, and Mr. Stern activated it with his original account. *Id.* at
11 7:10-12 (citing Feinberg Decl., ¶ 6).

12 Around March 2020, Mr. Stern was exercising on the Treadmill, his three-year-old
13 son, S.S., approached the rear of the Treadmill without Mr. Stern’s knowledge and was
14 pulled under the 450 lbs. Treadmill with Mr. Stern’s added body weight (150 lbs.+).
15 Complaint, ECF No. 1-2 (“Compl.”) at 2-3, ¶ 1, 5, ¶ 10; Oppo. at 6:25-27. As soon as
16 Mr. Stern realized his child was stuck underneath the Treadmill, he dismounted and
17 attempted to remove him, but S.S. was repeatedly sucked back into the underside of the
18 Treadmill. *Id.* Mrs. Stern eventually heard her son’s cries for help and also came to see
19 what was happening. *Id.* Both parents attempted to pull S.S. from underneath the Tread+
20 by his hands, shoulders, and torso, but they were unable to successfully remove him. *Id.*
21 at 5-6, ¶ 11. Eventually, Mr. Stern attempted to lift the Tread+ in an effort to free S.S.,
22 but this failed as well. *Id.* Finally, Mr. Stern was able to remove S.S. when Mrs. Stern
23 triggered the Tread+’s ripcord, which slowly caused the Tread+ to come to a delayed
24 halt. *Id.* Plaintiffs allege that S.S. sustained injuries along his arms and shoulders,
25 including but not limited to contusions along his torso, stomach, and ribs, as well as a
26

27 ¹ In September 2020, Peloton renamed its Treadmill the Tread+. Compl., ECF No.
28 1-2 at 3, ¶ 1. The Tread+ is 72.5” L x 36.5” W x 72” H produces 2 horsepower and
propels the underlying belt at a speed of up to 12.5 mph. *Id.*

1 laceration and permanent scarring to his stomach. *Id.*

2 Around May 2021, Peloton issued a recall of its Tread+ Treadmills after the United
3 States Consumer Product Safety Commission (the “CPSC”) cautioned parents against the
4 use of the machines due to the risk of injury and death. Compl. at 4, ¶ 3. The CPSC
5 learned of numerous other incidents of children being sucked beneath the treadmills. *Id.*

6 **B. Procedural History**

7 On May 7, 2021, Plaintiffs filed suit against Peloton, alleging six causes of action
8 for (1) negligence (by all plaintiffs); (2) negligent infliction of emotional distress (direct
9 victim brought by S.S.); (3) negligent infliction of emotional distress (bystander brought
10 by Mr. and Mrs. Stern); (4) intentional misrepresentation (brought by Mr. and Mrs.
11 Stern); (5) negligent misrepresentation (brought by Mr. and Mrs. Stern); and (6)
12 intentional concealment (brought by Mr. and Mrs. Stern). *See* Compl.

13 On July 29, 2021, Peloton timely filed a Notice of Removal. ECF No. 1 at 2:18.

14 On August 5, 2021, Peloton filed the instant Motion to Compel Arbitration and/or
15 Dismiss or Stay the Case. ECF No. 11. On September 3, 2021, Plaintiff opposed. ECF
16 No. 12. On or about September 13, 2021, Peloton replied. ECF No. 13.

17 **III. LEGAL STANDARD**

18 **A. Motion to Compel Arbitration**

19 Under the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 *et seq.*, arbitration
20 agreements “shall be valid, irrevocable, and enforceable, save upon such grounds that
21 exist at law or in equity for the revocation of a contract.” 9 U.S.C. § 2. “Once the court
22 has determined that an arbitration agreement relates to a transaction involving interstate
23 commerce, thereby falling under the FAA, the court’s only role is to determine [1]
24 whether a valid arbitration agreement exists and [2] whether the scope of the dispute falls
25 within that agreement.” *Ramirez v. Cintas Corp.*, No. C 04-00281 JSW, 2005 WL
26 2894628, at *3 (N.D. Cal. Nov. 2, 2005) (citing 9 U.S.C. § 4; *Chiron Corp. v. Ortho*
27 *Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000)).

B. Motion to Dismiss Under Rule 12(b)(1)²

Rule 12(b)(1) of the Federal Rules of Civil Procedure (“Rule 12(b)(1)”) allows a defendant to seek dismissal of a claim or lawsuit by asserting the defense of lack of subject matter jurisdiction. FED. R. CIV. P. 12(b)(1). “If the court determines at any time that it lacks subject matter-jurisdiction, the court must dismiss the action.” FED. R. CIV. P. 12(h)(3). “Dismissal for lack of subject matter jurisdiction is appropriate if the complaint, considered in its entirety, on its face fails to allege facts sufficient to establish subject matter jurisdiction.” *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984-85 (9th Cir. 2008). “Although the defendant is the moving party in a motion to dismiss brought under Rule 12(b)(1), the plaintiff is the party invoking the court’s jurisdiction.” *Brooke v. Kashi Corp.*, 362 F. Supp. 3d 864, 871 (S.D. Cal. 2019). As a result, the plaintiff, as “[t]he party asserting jurisdiction[,] bears the burden of establishing subject matter jurisdiction on a motion to dismiss for lack of subject matter jurisdiction.” *DRAM*, 546 F.3d at 984.

D. Motion to Stay

Where a plaintiff files suit “in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for . . . arbitration, the court in which such suit is pending, upon being satisfied that the issue . . . is referable to arbitration . . . shall on application of one of the parties stay the trial of the action until such arbitration.” 9 U.S.C. § 3. A court’s power to stay proceedings is incidental to the inherent power to control the disposition of its cases in the interests of efficiency and fairness to the court, counsel, and litigants. *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936). A stay may be granted pending the outcome of other legal proceedings related to the case in the interests of judicial economy. *Leyva v. Certified Grocers of Cal., Ltd.*, 593

² Although Defendant labeled the Motion as “Motion to Compel Arbitration and to Dismiss or Stay the Action,” Defendant’s substantive Motion asks for the case to be either “dismissed or stayed pending the arbitration’s conclusion.” ECF No. 11 at 1. Thus, the Court construes the Motion as including a request to dismiss as well.

1 F.2d 857, 863-64 (9th Cir. 1979). Discretion to stay a case is appropriately exercised
 2 when the resolution of another matter will have a direct impact on the issues before the
 3 court, thereby substantially simplifying the issues presented. *Mediterranean Enters., Inc.*
 4 *v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983). In determining whether a stay
 5 is appropriate, a court “must weigh competing interests and maintain an even balance.”
 6 *Landis*, 299 U.S. at 254-55. “[I]f there is even a fair possibility that the stay . . . will
 7 work damage to some one else, the stay may be inappropriate absent a showing by the
 8 moving party of hardship or inequity.” *Dependable Highway Express, Inc. v. Navigators*
 9 *Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (citation and quotation marks omitted).

10 **IV. DISCUSSION**

11 Peloton argues that Mr. Stern cannot proceed in Court with his claims because
 12 when he set up an account with Peloton at the time he purchased the Tread+, he agreed to
 13 be bound by Peloton’s Terms of Service, which included a clear and conspicuous
 14 arbitration agreement covering Plaintiffs’ claims in this case. Mot. at 6:3-8. Peloton
 15 points out that even after agreeing to arbitrate, Mr. Stern, like all registered Peloton users,
 16 had 30 days to provide Peloton with written notice that he wanted to opt out of the
 17 Arbitration Provision but never did. *Id.* at 6:9-11. Peloton also argues that under the
 18 Arbitration Provision, the arbitrator, rather than the Court, should decide the gateway
 19 issue of whether Plaintiffs’ dispute falls under the Arbitration Provision. *Id.* at 6:12-19.

20 Plaintiffs respond by arguing that first, Peloton not only fails to provide “any
 21 evidence (credible or otherwise) that [Mr. Stern] **actually** accepted the Terms of Service”
 22 but also fails to explain how those Terms of Service would bind S.S. and Mrs. Stern, who
 23 Peloton acknowledges did not sign the Terms of Service. Oppo. at 4:8-20. Second,
 24 Plaintiffs point out that Defendant fails to provide any evidence that Mrs. Stern or her son
 25 ever had an account with Peloton, entered into any agreement with Peloton, or even used
 26 the Tread+. *Id.* at 4:21-26. Plaintiffs also note that in fact, “as a minor, S.S. was
 27 incapable of contracting with Defendant as a matter of law,” and the Terms of Service
 28 even “**explicitly** prohibit minors from entering into the Terms of Service and utilizing the

Tread+ or Defendant's ecosystem." *Id.* at 5:4-10. Third, Plaintiffs argue that even if Peloton proved all three Plaintiffs accepted Peloton's Terms of Service, "Plaintiffs' claims are not within the scope of the arbitration provision." *Id.* at 6:7-16. Fourth, Plaintiffs argue that to the extent the Court is inclined to grant the Motion in part as to Mr. Stern, the Court should not stay the proceedings as to the remaining two plaintiffs (*i.e.*, Mrs. Stern and S.S.). *Id.* at 6:17-19. Finally, Plaintiffs argue that the Court should not consider the Feinberg Declaration in support of Peloton's Motion, which seeks to support its argument that Mr. Stern agreed to arbitrate, because it lacks foundation and authentication. *Id.* at 5:11-28.

In reply, Peloton argues that even though Mrs. Stern and S.S. did not sign the Arbitration Provision, they cannot avoid its consequences due to the state law principles of equitable estoppel, which bind non-signatories to an arbitration agreement for claims relating to the contract. Reply at 5:10-13. It contends that "[b]ecause of their preexisting relationships with Mr. Stern, Mrs. Stern and S.S. are equitably estopped from avoiding the Arbitration Agreement" because their claims "directly relate to the terms of [Mr. Stern's] Tread+ account, which govern the use of the Sterns' [sic] Tread+." *Id.* at 5:13-17. Peloton requests that even if the Court finds that the claims of Mrs. Stern and her son are not subject to arbitration, that it still send Mr. Stern's claims to arbitration and stay the claims of Mrs. Stern and S.S. pending the outcome of Mr. Stern's arbitration proceeding. *Id.* at 5:18-21.

As discussed below, the Court finds that first, no valid agreements to arbitrate exist for Mrs. Stern and her child, S.S., who as a minor, lacks the capacity to contract with Peloton. Thus, the Court **DENIES** Peloton's Motion as to Mrs. Stern and S.S. However, because an agreement to arbitrate exists between Mr. Stern and Peloton, and that agreement expressly delegates the authority to decide whether a claim falls within the scope of the Arbitration Provision to the arbitrator, not the Court, the Court **GRANTS** Peloton's Motion as to Mr. Stern only. Given the Court **DENIES** Peloton's Motion to Compel Arbitration as to Mrs. Stern and S.S., the Court also **DENIES** Peloton's related

1 requests to stay or dismiss the case as to them as moot. However, the Court **GRANTS** a
2 sixty (60) day stay as to Mr. Stern only. Finally, the Court **OVERRULES** Plaintiffs'
3 Evidentiary Objections.

4 **A. Jurisdiction**

5 The FAA allows a party aggrieved by another party's failure to arbitrate to bring
6 either an original petition to arbitrate, or where an action has already been filed, a motion
7 to compel arbitration "in any United States district court which, save for such agreement,
8 would have jurisdiction under title 28, in a civil action . . . of the subject matter arising
9 out of the controversy between the parties." 9 U.S.C. § 4. Under 28 U.S.C. § 1331,
10 "[t]he district courts . . . have original jurisdiction of all civil actions arising under the
11 Constitution, laws, or treaties of the United States."

12 Plaintiffs filed suit under California law for various personal injuries. Peloton
13 removed on the basis of diversity jurisdiction 28 U.S.C. § 1332(a) because Plaintiff seeks
14 more than \$75,000.000 in damages and Peloton is a citizen of Delaware and New York,
15 while Plaintiffs are citizens of California. *See* ECF No. 1 at 2:26-3:10. Thus, this Court
16 has diversity jurisdiction over the underlying controversy, and thus, has jurisdiction to
17 determine this Motion.

18 **B. Federal Arbitration Act**

19 The FAA provides that once a defendant files a motion to compel arbitration, a
20 district court must "hear the parties, and upon being satisfied that the making of the
21 agreement for arbitration or the failure to comply therewith is not" at issue, must "make
22 an order directing the parties to proceed to arbitration in accordance with the terms of the
23 agreement." 9 U.S.C. § 4. It "reflects both a 'liberal federal policy favoring arbitration' .
24 . . and the 'fundamental principle that arbitration is a matter of contract.'" *Kramer v.*
25 *Toyota Motor Corp.*, 705 F.3d 1122, 1126 (9th Cir. 2013) (quoting *AT&T Mobility LLC*
26 *v. Concepcion*, 563 U.S. 333, 339 (2011)). The district court's role in ruling on a motion
27 to compel arbitration is "limited to determining (1) whether a valid agreement to arbitrate
28 exists[,] and if it does, (2) whether the agreement encompasses the dispute at issue."

1 *Revitch v. DIRECTV, LLC*, 977 F.3d 713, 716 (9th Cir. 2020). Only if the court answers
2 both questions in the affirmative will the FAA require the Court “to enforce the terms of
3 the arbitration agreement in accordance with its terms.” *Id.* The Supreme Court has
4 reminded that “courts should order arbitration of a dispute only where the court is
5 satisfied that neither [1] the formation of the parties’ arbitration agreement *nor* [2]
6 (absent a valid provision specifically committing such disputes to an arbitrator) its
7 enforceability or applicability to the dispute is in issue.” *Granite Rock Co. v. Int’l Bhd. of*
8 *Teamsters*, 561 U.S. 287, 299 (2010) (emphasis in original).

9 As outlined below, this Court finds that (1) Mrs. Stern and S.S. never formed an
10 arbitration agreement with Peloton and (2) Mr. Stern formed an agreement to arbitrate,
11 which contains an express delegation clause, requiring the arbitrator to determine whether
12 his claims fall within the scope of the Arbitration Provision.

13 **1. Governing Law**

14 As a preliminary matter, federal substantive law governs the scope of an arbitration
15 agreement. *Kramer*, 705 F.3d at 1126. “[A]s a matter of federal law, any doubts
16 concerning the scope of arbitrable issues should be resolved in favor of arbitration,
17 whether the problem at hand is the construction of the contract language itself or an
18 allegation of waiver, delay, or a like defense to arbitrability.” *Chiron Corp. v. Ortho*
19 *Diagnostic Sys., Inc.*, 207 F.3d 1126, 1131 (9th Cir. 2000). State contract law, on the
20 other hand, governs issues pertaining to the validity, revocability, and enforceability of an
21 agreement to arbitrate. *See, e.g., Revitch*, 977 F.3d at 716-17 (applying California
22 contract law to a wireless services agreement because the agreement’s choice-of-law
23 provision states that the contract is governed by the law of the state in which the
24 customer’s billing address is located, and the customer resided in California).

25 In this case, the Terms of Service state that “[i]f your contract for the Peloton
26 Service is with Peloton Interactive, Inc., these Terms shall be governed by the laws of the
27 State of New York, United States of America, without regard to principles of conflicts of
28 law.” Exhibit 4 to Motion, ECF No. 11-6 at 12. However, it also requires application of

1 “the U.S. Federal Arbitration Act (or equivalent laws in the jurisdiction in which the
2 Peloton entity that you have contracted with is incorporated)” to “the interpretation and
3 enforcement of these Terms.” *Id.* at 11. Thus, the Terms of Service require application
4 of federal law to the scope of the Arbitration Provision, but New York law to the validity
5 and enforceability of the agreement itself.

6 **2. Mr. Stern Signed a Valid Agreement to Arbitrate, but Mrs. Stern**
7 **and S.S. Did Not**

8 Section 2 of the FAA governs enforcement of agreements to arbitrate and provides
9 that a provision to settle by arbitration a controversy arising out of a contract covering a
10 transaction involving interstate commerce “shall be valid, irrevocable, and enforceable,
11 save upon such grounds as exist at law or in equity for the revocation of any contract.” 9
12 U.S.C. § 2; *see also* 9 U.S.C. § 1 (defining “commerce” as “commerce among the several
13 States”). This “savings clause” allows a party to challenge an arbitration agreement
14 based on any state law contract defenses, such as fraud, mistake, duress, or
15 unconscionability. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996).

16 Here, the Terms of Service were not literally signed by Mr. Stern, Mrs. Stern, or
17 S.S.³ While a writing exists between Peloton and Mr. Stern, no agreement whatsoever
18

19 ³ A court may take judicial notice of the fact that a contract was signed. *Lee v. City*
20 *of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001) (holding that a district court could
21 take judicial notice of “the fact that [a document] was signed”), *overruled on other*
22 *grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); *see also*
23 *Wilbur v. Locke*, 423 F.3d 1101, 1112 (9th Cir. 2005), *abrogated on other grounds*
24 *by Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010) (taking judicial notice of a
25 consummated agreement in the form of an executed compact). Without taking judicial
26 notice of the validity of the Terms of Service, the Court takes judicial notice of the fact
27 that the agreement is not a fully executed contract as it is not signed by any of the parties
28 but does explicitly provide that the “Terms begin on the date you first use the Peloton
Service and continue as long as you have an account with us and/or continue to use the
Peloton Service.” Peloton Terms at 3. It also contained a provision expressly allowing
Plaintiff to reject the arbitration provision by sending a written rejection notice to the
address provided in the agreement. *Id.* at 11. Here, Mr. Stern used the Tread+ and never
states that he sent a written notice of rejection to Peloton.

exists between Peloton and Mrs. Stern or Peloton and S.S. However, Peloton argues that the Arbitration Provision can be enforced against them due to the doctrine of equitable estoppel. The Court acknowledges those arguments in turn but finds them unavailing.

Identical to California law,⁴ under New York law, the “[e]lements essential to existence of a contract are: (1) [p]arties capable of contracting; (2) [t]heir consent; (3) [a] lawful object; and (4) [s]ufficient cause or consideration.” *Compare Prestige Brands, Inc. v. Guardian Drug Co.*, 951 F. Supp. 2d 441, 446 (S.D.N.Y. 2013) (noting that “[i]n order to form a valid and enforceable contract, it is essential that there be: (1) parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient consideration”) with *Grimes v. New Century Mortg. Corp.*, 340 F.3d 1007, 1011 (9th Cir. 2003) (McKeown, J., dissenting) (citing CAL. CIV. CODE § 1550) (applying California law); *see also* Oppo. at 8:11-15.

Despite the requirement of mutual assent for a valid contract, “nonsignatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles.” *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006) (quoting *Letizia v. Prudential Bache Securities, Inc.*, 802 F.2d 1185, 1187-88 (9th Cir. 1986)). The principles allowing this to occur include where one or more of the following doctrines applies: (1) incorporation by reference; (2) assumption; (3) agency; (3) piercing the corporate veil or alter ego; and/or (5) estoppel. *See id.*; *see also Tamsco Props., LLC v. Langemeier*, 597 F. App’x 428, 429 (9th Cir. 2015). “Equitable estoppel precludes a

⁴ Although the Terms of Service state that New York law applies, the Court compares California law throughout this order to show that even if California law applied, it would not change the outcome of this ruling. *See, e.g., Piazza v. Airbnb, Inc.*, 289 F. Supp. 3d 537, 547 (S.D.N.Y. 2018) (“In any event, both California and New York, the state in which Plaintiffs reside, apply substantively similar law with respect to contract formation.”); *see also Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 74 (2d Cir. 2017) (noting that “New York and California apply ‘substantially similar rules for determining whether the parties have mutually assented to a contract term’”). The Court also notes that Peloton relies on Ninth Circuit and California case law in its Motion but argues that “New York law applies to the issue of whether a valid agreement to arbitrate exists.” Mot. at 15:17-18.

1 party from claiming the benefits of a contract while simultaneously attempting to avoid
2 the burdens that contract imposes.” *Setty v. Shrinivas Sugandhalaya LLP*, 3 F.4th 1166,
3 1169 (9th Cir. 2021) (quoting *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045
4 (9th Cir. 2009)). Generally, California cases binding nonsignatories to an arbitration
5 either involve one of two scenarios: First, a nonsignatory might be required to arbitrate
6 because the contract conferred a benefit on the nonsignatory, making the nonsignatory a
7 third party beneficiary of the arbitration agreement. *Cty. of Contra Costa v. Kaiser*
8 *Found. Health Plan, Inc.*, 47 Cal. App. 4th 237, 242 (1996) (applying California law);
9 *see also Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004) (applying
10 New York law). Second, a preexisting relationship might exist between the nonsignatory
11 and one of the parties to the arbitration agreement, making it equitable to compel the
12 nonsignatory to arbitration. *Contra Costa*, 47 Cal. App. 4th at 242.

13 Neither party argues that the third and fourth elements of whether the agreement
14 has lawful object or is supported by sufficient consideration is at issue. Thus, the Court
15 treats those elements as established and not in dispute. However, as to the remaining
16 issues, the Court finds that (1) even if S.S. had accepted the Arbitration Provision, he was
17 not a party capable of contracting, and (2) as to Mrs. Stern and S.S., no manifestation of
18 mutual assent exists to bind her to the Terms of Service. Thus, the Arbitration cannot be
19 enforced against Mrs. Stern or S.S. As to Mr. Stern, however, a valid agreement to
20 arbitrate exists between him and Peloton, leaving the outstanding issue of whether his
21 claims fall within the purview of the Arbitration Provision.

22 a. S.S. Was Not a Party Capable of Contracting

23 Peloton’s Motion fails to address how or why the Arbitration Provision should
24 apply to Mrs. Stern and S.S., who did not accept the Terms of Service. Plaintiffs argue
25 that not only does Defendant fail to establish the formation of a valid contract with S.S.,
26 but in fact, “Defendant’s Motion must fail because S.S. was incapable of contracting with
27 Defendant as a matter of law.” *Oppo*. at 8:25-9:15. In reply, Peloton argues that in spite
28 of S.S.’s infancy, the Arbitration Provision applies under the doctrine of equitable

1 estoppel. *See* Reply at 11-14 (citing *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631
2 (2009) (recognizing that non-signatories of arbitration agreement may be bound by the
3 agreement under traditional principles of state contract law such as estoppel).

4 Both New York and California law mandate that a minor under the age of eighteen
5 (18) years old lacks the capacity to enter into a contract. *See, e.g.*, N.Y. C.P.L.R. Law §
6 1209, 1557; *see also* CAL. FAM CODE §§ 6500. Further, both states also indicate that
7 even if a minor enters into a contract before the age of majority, the minor can disaffirm
8 that contract. *See* N.Y. C.P.L.R. Law §§ 1209, 1210(a); CAL. CODE CIV. PROC. §
9 372(a)(1); CAL. FAM CODE §§ 6700 (providing that “a minor may make a contract in the
10 same manner as an adult, subject to the power of disaffirmance under . . . Section 6710[]
11 and subject to . . . Section 300”), 6710 (“Except as otherwise provided by statute, a
12 contract of a minor may be disaffirmed by the minor before majority or within a
13 reasonable time afterwards . . .”).

14 Peloton argues that the following cases applying the principal of equitable estoppel
15 justify this Court holding Mrs. Stern and S.S. to the Arbitration Provision: *Bolanos v.*
16 *Khalatian*, 231 Cal. App. 3d 1586, 1591 (1991); *Doyle v. Giuliucci*, 62 Cal. 2d 606, 607-
17 609 (1965); *Teel v. Aaron’s, Inc.*, No. 3:14-cv-640-J-32PDB, 2015 U.S. Dist. LEXIS
18 37140, at *1-3, 20 (M.D. Fla. Mar. 24, 2015). *See* Reply at 12:1-13:18. However, the
19 Court finds these case inapposite as *Bolanos* and *Doyle* both involved contracts entered
20 into ***on behalf of the child*** for medical services ***for the child***. *See, e.g.*, *Bolanos*, 231 Cal.
21 App. 3d at 1591 (reversing the lower court’s decision denying a motion to for an order
22 compelling arbitration in a medical malpractice action brought by a father, mother, and
23 child arising out of the defendant-obstetrician’s alleged negligent care to the mother when
24 delivering her child); *Doyle*, 62 Cal. 2d at 607-609, 611 (affirming decision holding that
25 the contract between the plaintiff-minor’s father and the defendants required arbitration,
26 where the father entered into a contract for medical services, which expressly provided
27 for “care and service to dependents of the Subscriber [plaintiff’s father],” and required
28 arbitration of such claims arising out of care to dependents). Further, in *Teel v. Aaron’s*,

1 *Inc.*, No. 3:14-cv-640-J-32PDB, 2015 U.S. Dist. LEXIS 37140, at *1-3, 20 (M.D. Fla.
2 Mar. 24, 2015), the Florida Middle District Court granted the defendant's motion to
3 dismiss or stay proceedings and compel arbitration of the plaintiffs' claims against a
4 furniture rental company, which allegedly delivered bunk beds infested with bed bugs
5 and black mold. The two plaintiff-parents brought suit individually and as guardians ad
6 litem of their five minor children. *Id.* at *2. The court noted that even though the father
7 and children never signed the lease purchase agreement or arbitration agreement with the
8 defendant, they relied on the existence of the unsigned documents in each of their claims
9 in the complaint. *Id.* at *19. The court reasoned that by relying on the existence of the
10 agreements to establish his claims but repudiating its existence when it came to the
11 arbitration provision, the father was "trying to 'has his cake and eat it too.'" *Id.*

12 Peloton argues that as in *Teel*, "Plaintiffs' complaint relates to the contract between
13 Mr. Stern and Peloton and thus, justifies binding all three Plaintiffs to the Arbitration
14 Agreement." Reply at 13:23-25. However, none of the aforementioned cases involve a
15 court compelling a child to arbitrate after the child was injured by a product where only
16 the parent (not the child) had signed an arbitration agreement relating to the parents' own
17 use (rather than the child's use) of a service ancillary to the product's use. This case is
18 unique. It also does not require arbitration, even under the doctrine of equitable estoppel.
19 *See also In re Ring LLC Privacy Litig.*, No. CV 19-10899-MWF (RAOx), 2021 U.S.
20 Dist. LEXIS 118461, at *29 (C.D. Cal. June 24, 2021) (denying a motion to compel
21 arbitration with respect to non-purchaser plaintiffs, noting that the district court cases
22 binding non-signatory family members to adhesion contracts for consumer goods were
23 both not binding and "relied upon California authorities such as *County of Contra*
24 *Costa* without addressing the distinction between contracts for medical services and
25 adhesion contracts for consumer goods").

26 Additionally, Mrs. Stern signed a declaration in support of Plaintiffs' Opposition,
27 stating under penalty of perjury that she is S.S.'s primary caretaker, actively monitors and
28 limits his access to electronics (including smartphones, computers, and tablets), does not

1 permit him to use the Tread+, and he has never utilized the Tread+. Declaration of
2 Eunjin Stern, ECF No. 12-1 (“Stern Decl.”) at 3, ¶ 8. Thus, unlike the children in
3 *Bolanos* and *Doyle*, who benefited from the medical services provided under the contract
4 containing the arbitration agreement, S.S. never benefitted from the services provided by
5 Peloton. Instead, S.S. was harmed by Mr. Stern’s use of Peloton’s products and services.

6 The Court finds this case more akin to *A.D. v. Credit One Bank, N.A.*, 885 F.3d
7 1054, 1057 (7th Cir. 2018) (applying Nevada law), where the Seventh Circuit held that a
8 minor-plaintiff was not bound by the terms of a cardholder agreement containing an
9 arbitration clause between his mother and the defendant. The child, A.D., by and through
10 his mother as guardian ad litem, brought a putative class action for violations of the
11 Telephone Consumer Protection Act. *Id.* at 1057. The defendant moved to compel
12 arbitration based on a cardholder agreement between itself and the child’s mother. *Id.* In
13 deciding that the plaintiff-child could not be bound by the agreement, the court noted that
14 A.D. was “not bound by the terms of the cardholder agreement to arbitrate with Credit
15 One” and had “not directly benefited from the cardholder agreement such that equitable
16 principles” warranted application of the arbitration clause against her. *Id.*

17 The *A.D.* court reasoned that first, “it is a fundamental principle of arbitration law
18 that ‘a party cannot be required to submit to arbitration any dispute which he has not
19 agreed so to submit.’” 885 F.3d at 1062 (citing *United Steelworkers*, 363 U.S. at 582).
20 Like S.S. in this case, “A.D. simply did not consent to arbitrate with Credit One.” *Id.* at
21 1062. “More fundamentally, A.D. did not have legal capacity to enter into a contractual
22 relationship with Credit One.” *Id.* Further, even if A.D. had entered into the contract,
23 “minors . . . can disaffirm their obligations under contracts formed before they reach the
24 age of eighteen,” so “certainly [by filing the lawsuit, A.D.] engaged in an act of dis-
25 affirmation.” *Id.*

26 Like Peloton, the *A.D.* defendant tried to advance an estoppel argument. 885 F.3d
27 at 1064. The court explained that “[e]stoppel is an equitable doctrine that prevents a non-
28 signatory from refusing to comply with an arbitration clause when it receives a direct

benefit from a contract containing an arbitration clause.” *Id.* at 1064 (internal quotations omitted); *see also Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000) (“A nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it receives a ‘direct benefit’ from a contract containing an arbitration clause.’”). The defendant argued A.D. directly benefitted from the cardholder agreement because the mother asked A.D. to make purchases with the card. *Id.* However, the court noted that any benefit A.D. received by using the card was limited to following her mother’s directions when using the card, which created a mother-daughter relationship but meant A.D. had no relationship, contractual or otherwise, with the defendant. *Id.* Thus, A.D. “derived no direct benefit from the cardholder agreement.” *Id.* Instead, the child’s mother, not the child, “benefit[ed] from the agreement, which allowed her, not A.D., to buy” items. *Id.* Thus, the court rejected the defendant’s argument and concluded the arbitration clause did not apply to the child. *Id.* at 1065.

Unlike *A.D.*, in *Cutway v. S.T.A.R. Programs, Inc.*, 904 N.Y.S.2d 806, 807 (2010), the court granted the defendants’ motion to compel arbitration based upon agreements the plaintiff-parents had signed prior to their children’s participation in a boot camp program, which contained an arbitration clause. The *Cutway* plaintiffs, who filed suit individually as well as on behalf of their children against the defendants, who ran the boot camp for troubled youth, contending that their children sustained injuries while participating in the bootcamp. *Id.* The court enforced the arbitration agreement recognizing “the weight of authority from other jurisdictions recognizes the enforceability of an arbitration provision when a parent executes an agreement that benefits the ... child and the agreement contains an arbitration provision regarding the child’s potential future tort claims.” *Id.*

As in *A.D.*, the Arbitration Provision at issue in this case is between the parent, Mr. Stern, and Peloton but only benefited the parent, not the child. 885 F.3d 1064. Further, like *A.D.*, S.S. also lacked the ability to consent and maintained the ability to disaffirm the contract. *Id.* at 1062. Further, unlike *Cutway*, the parent who signed the Arbitration Agreement in this case signed on his own behalf, not on behalf of his child. 904

1 N.Y.S.2d 806, 80. Thus, that case also does not support granting Defendant's Motion.

2 *See also Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069, 1074, 1077-78 (5th
3 Cir.), *opinion supplemented on denial of reh'g*, 303 F.3d 570 (5th Cir. 2002) (holding
4 that "because the Gaskamp children are not signatories to the contract or third-party
5 beneficiaries thereof, and because they have not sought to enforce the contract, the
6 children cannot be required to arbitrate").

7 Accordingly, S.S.'s age of minority and failure to qualify as a beneficiary prevents
8 Peloton from enforcing the Arbitration Provision against S.S.

9 b. Mutual Consent

10 As stated, Peloton also argues that even though neither Mrs. Stern nor S.S. signed
11 its Terms of Service, they should both be bound by the Arbitration Agreement due to the
12 doctrine of equitable estoppel. *See generally* Mot.; Reply at 11-14. The Court has
13 already addressed how and why the Court cannot compel S.S. to arbitrate. Accordingly,
14 it addresses whether mutual consent exists for the only remaining two parties who could
15 be compelled to arbitrate: Mrs. Stern and Mr. Stern.

16 The FAA "leaves no place for the exercise of discretion by a district court, but
17 instead mandates that district courts shall direct the parties to arbitration on issues as to
18 which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*,
19 470 U.S. 213, 218 (1985). However, "a party cannot be required to submit to arbitration
20 any dispute which he has not agreed so to submit." *United Steelworkers of Am. v.*
21 *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). That being said, "[w]hile the FAA
22 'requires a writing, it does not require that the writing be signed by the parties.'" *Nghiem*
23 *v. NEC Elec., Inc.*, 25 F.3d 1437, 1439-40 (9th Cir. 1994). Thus, in order to compel
24 arbitration, a court must find some manifestation of mutual assent to arbitrate.

25 Under both New York and California law, "mutual assent is essential to the
26 formation of a contract and a party cannot be held to have contracted if there was no
27 assent or acceptance." *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 427-28 (2d Cir.
28 2004) (noting that "[t]o form a valid contract under New York law, there must be an

offer, acceptance, consideration, mutual assent and intent to be bound.”); *see also* CAL. CIV. CODE § 1550; *Warner Bros. Int’l TV Distribution v. Golden Channels & Co.*, 522 F.3d 1060, 1069 (9th Cir. 2008) (applying California law). “The manifestation or expression of assent necessary to form a contract may be by word, act, or conduct which evinces the intention of the parties to contract.” *Register.com*, 356 F.3d at 427; *see also Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014) (“Mutual assent may be manifested by written or spoken words, or by conduct, and acceptance of contract terms may be implied through action or inaction.”) (applying California law) (internal quotations and citations omitted); CAL. CIV. CODE § 1565 (“Consent of the parties to a contract must be: (1) [f]ree; (2) [m]utual; and (3) [c]ommunicated by each to the other.”).

In order to compel Mrs. Stern and Mr. Stern to arbitrate their claims, Peloton must show that both individuals manifested mutual assent to Peloton’s Terms of Service containing the Arbitration Provision. The Court finds Peloton met this showing as to Mr. Stern but not Mrs. Stern.

i. Mrs. Stern

Plaintiffs argue that Defendant fails to establish the formation of an agreement to arbitrate with Mrs. Stern. *Oppo.* at 8:25-9:15. They also contend that Peloton has failed to establish that Mr. Stern accepted Peloton’s Terms of Service, thereby creating a valid contract between himself and Peloton. *Oppo.* at 9:28-10:1. Peloton replies that Mr. Stern’s agreement to the Arbitration Provision binds Mrs. Stern under the equitable estoppel doctrine. *Reply* at 11:21-24 (citing *Arthur*, 556 U.S. at 631). It contends that “the non-signatory spouse (Ms. Stern) and child (S.S.) are bound to Mr. Stern’s Arbitration Agreement based on their preexisting relationship with Mr. Stern.” *Id.* at 11:25-28 (citing *Tice v. Amazon.com, Inc.*, 845 F. App’x 535, 537 (9th Cir. 2021)).

As to Mrs. Stern, Peloton argues that the cases of *Nicosia v. Amazon.com, Inc.*, 384 F. Supp. 3d 254, 258, 279 (E.D.N.Y. 2019), *aff’d in* 815 F. App’x 612, 613-14 (2d Cir. 2020) and *Tice v. Amazon.com, Inc.*, No. 5:19-cv-1311-SVW-KK, 2020 U.S. Dist.

1 LEXIS 60597, at *1-2 (C.D. Cal. Mar. 25, 2020) justify this Court applying the principal
2 of equitable estoppel to hold Mrs. Stern to the Arbitration Provision:. See Reply at 12:1-
3 13:18. However, as with Peloton's arguments with respect to S.S., the Court finds these
4 cases inapposite as they all involved a spouse who used or benefited from the product for
5 which the other spouse signed a binding arbitration agreement.

6 First, in *Nicosia v. Amazon.com, Inc.*, 384 F. Supp. 3d 254, 258, 279 (E.D.N.Y.
7 2019), *aff'd in* 815 F. App'x 612, 613-14 (2d Cir. 2020) the court granted the defendant's
8 motion to compel arbitration. The plaintiff, Dean Nicosia, went on Amazon.com to order
9 weight loss supplements, which contained a harmful compound and later sued claiming
10 the defendant's sale of the product violated various consumer safety laws. *Id.* at 257-58,
11 262. In purchasing the weight loss supplements, he used an Amazon account listed under
12 his wife's name but which both he and his wife used. *Id.* at 258. However, as part of his
13 wife's registration for that account, she had to accept the Amazon Prime Terms and
14 Conditions, which incorporated an arbitration provision. *Id.* Both the district court and
15 Second Circuit Court of Appeals bound the husband to the arbitration clause under the
16 principles of equitable estoppel even though he never received notice of the clause. *Id.* It
17 reasoned that the "[p]laintiff's use of the Account was tantamount to a representation that
18 he *was* Annemarie Nicosia (and therefore bound by the arbitration provision to which she
19 had previously agreed)." *Id.* at 274. "[I]n equity and fairness, he should be bound by the
20 consequences of that representation as though it were true." *Id.*

21 Similarly, in *Tice v. Amazon.com, Inc.*, No. 5:19-cv-1311-SVW-KK, 2020 WL
22 1625782, 2020 U.S. Dist. LEXIS 60597, at *1-2 (C.D. Cal. Mar. 25, 2020), the district
23 court granted in part defendant-Amazon's motion to compel arbitration of two of the
24 plaintiff's three claims stemming from her husband's purchase of an Alexa Echo Dot
25 device. Amazon required all users to agree to its general Terms of Use ("TOU"), which
26 included an arbitration clause. *Id.* The plaintiff contended that even though her husband
27 consented to his voice being recorded by agreeing to the Alexa TOU, she did not because
28 she, unlike her husband, never agreed to the TOU. *Id.* However, like the husband in

1 *Nicosia*, the spouse did “not deny that she [was] an Amazon user.” *Id.* at *2-3. The
2 plaintiff alleged that Alexa’s recording of her conversations violated various wiretapping
3 laws. *Id.* at *3. The district court reasoned that due to both the spousal relationship as
4 well as the voluntary use of Alexa, the wife could not avoid arbitration:

5 Considering Plaintiff’s allegations and the relevant caselaw, the
6 Court finds that the preexisting spousal relationship in this case
7 prevents Plaintiff from avoiding the terms of the Alexa TOU.
8 Just as her husband would be bound to arbitrate claims relating
9 to his voluntary use of Alexa, Plaintiff must adhere to the Alexa
10 TOU for claims directly related to her voluntary usage.
11 Plaintiff is therefore equitably estopped from avoiding the
12 Arbitration Clause when she voluntarily utilizes Alexa.

13 *Id.* at *3.

14 On appeal, the Ninth Circuit Court of Appeals affirmed the lower court’s decision
15 except with respect to the claims for which it had failed to compel arbitration. *Tice v.*
16 *Amazon.com, Inc.*, 845 F. App’x 535, 537 (9th Cir. 2021). As to those claims, the court
17 held that the lower court erred by failing to compel all claims to arbitration because it was
18 for the arbitrator, not the court, to decide whether the third claim fell within the scope of
19 the arbitration clause. *Id.*

20 Peloton argues that “as in *Tice* and *Teel*, Plaintiffs’” complaint relates to the
21 contract between Mr. Stern and Peloton and thus, justifies binding all three Plaintiffs to
22 the Arbitration Agreement.” Reply at 13:23-25. It contends that Mrs. Stern alleges
23 damages along with her husband for misrepresentation and intentional concealment
24 claims based on the cost to both of them to purchase and maintain the Tread+. *Id.* at
25 13:25-14:1 (citing ECF No. 1-2 at ¶¶ 27, 29, 33, 36). Thus, it asserts that their use and
26 purchase of the Tread+ are governed by the Terms of Service, so the Court must send the
27 entire case to arbitration because all of Plaintiffs’ claims related to use of the Tread+
28 linked to Mr. Stern’s account, including S.S.’s claims and Mrs. Stern’s derivative claims.
Id. at 14:1-5. However, Mrs. Stern signed a declaration submitted under penalty of
perjury, stating that she has never (1) purchased any products from Peloton; (2) used any
products from Peloton, including a Tread+ Treadmill; (3) created an account with

1 Peloton; (4) accessed anyone else's Peloton account; or (4) entered into an arbitration
2 agreement with Peloton. Stern Decl. at 2-3, ¶¶ 4-6. Consequently, unlike the spouses in
3 *Nicosia* and *Tice*, who each used the products purchased by or registered under the name
4 of their spouse who had agreed to Amazon's terms containing the arbitration provision,
5 Mrs. Stern never used the Tread+, nor did she benefit from it. *Compare see Nicosia*, 384
6 F. Supp. 3d (describing how the husband used his wife's Amazon account under her
7 name); *Tice*, 2020 WL 1625782, *3 (discussing how the wife voluntarily used Alexa)
8 with Stern Decl. at 2, ¶ 4 (stating that Mrs. Stern has never used any Peloton products,
9 created an account with Peloton, or used a Peloton account under anyone else's name).
10 Further, unlike *Teel*, where the court compelled the husband who did not sign the
11 furniture lease agreement to arbitrate because he relied on the agreement's existence in
12 his claims brought against the defendant, Mrs. Stern's own claims do not depend on the
13 terms in Peloton's Terms of Service. 2015 U.S. Dist. LEXIS 37140, at *19.

14 In sum, none of the cases cited by Peloton warrant applying the doctrine of
15 equitable estoppel in this case to force Mrs. Stern, a nonsignatory to Peloton's Terms of
16 Service containing the Arbitration Provision, to arbitrate claims given she never used or
17 benefited from the Tread+ or Peloton's Services. Thus, Peloton's Motion to Compel
18 Arbitration is **DENIED** as to Mrs. Stern.

19 ii. Mr. Stern

20 Finally, as to Mr. Stern, Peloton argues that "the presentation of the Arbitration
21 Agreement and the process for manifesting consent to its terms confirm that mutual
22 assent is present" because Mr. Stern signed up for a Peloton account. Mot. at 16:10-12
23 (citing Feinberg Decl. ¶ 6). Peloton states that when he signed up for the Peloton
24 account, he necessarily (1) was presented with a conspicuous hyperlink to a full copy of
25 the Terms of Services, including the Arbitration Provision, and (2) affirmatively clicked
26 the button indicating that he agreed to the Terms of Service. Mot. at 16:12-16 (citing
27 Feinberg Decl. ¶ 7). Through the hyperlink, Mr. Stern had the chance to easily access
28 and review the terms to which he was agreeing. Mot. at 16:16-17. Thus, Peloton

1 contends that Mr. Stern was on notice that by creating his Peloton account, he was
2 consenting to Peloton's Terms of Service, including the Arbitration Provision. *Id.* at
3 16:17-19. Peloton also correctly points out that whether he read the terms or not, Mr.
4 Stern was put on constructive notice of the Arbitration Provision. *Id.* at 16:20-17:2.
5 Plaintiffs oppose by arguing that Peloton has failed to establish that Mr. Stern accepted
6 Peloton's Terms of Service. *Oppo.* at 9:28-10:1.

7 "Although the Internet age has certainly introduced new twists with regard to
8 entering into contracts, the fundamental elements of contract law, including mutual
9 assent of the parties, have not changed." *Plazza*, 289 F. Supp. 3d at 547 (applying New
10 York and California law). That being said, "[m]utual assent does not require that the
11 offeree have actual notice of the terms of an arbitration agreement." *Dohrmann v. Intuit,*
12 *Inc.*, 823 F. App'x 482, 483 (9th Cir. 2020) (applying California law). "Instead, an
13 offeree is bound by an arbitration clause if 'a reasonably prudent Internet consumer'
14 would be put on 'inquiry notice' of the 'agreement's existence and contents.'" *Id.*; *see*
15 *also Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 74-75 (2d Cir. 2017) ("Where there is no
16 evidence that the offeree had actual notice of the terms of the agreement, the offeree will
17 still be bound by the agreement if a reasonably prudent user would be on inquiry notice
18 of the terms.").

19 Courts in the Second "Circuit have upheld 'Sign-In Wrap' agreements where
20 plaintiffs did not even click an 'I Accept' button, but instead clicked a 'Sign Up' or 'Sign
21 In' button where nearby language informed them that clicking the buttons would
22 constitute accepting the terms of service." *Kai Peng v. Uber Techs., Inc.*, 237 F. Supp. 3d
23 36, 48 (E.D.N.Y. 2017); *see also Kai Peng v. Uber Techs., Inc.*, 237 F. Supp. 3d 36, 50
24 (E.D.N.Y. 2017) (noting that "failure to read a contract is not a defense to contract
25 formation"). Similarly, the Ninth "Circuit has indicated a tolerance for the single-click
26 'Sign Up' and assent practice" given "[c]ourts have held that a modified or hybrid
27 clickwrap/browsewrap agreement constitutes a binding contract where the user is
28 provided with an opportunity to review the terms of service in the form of a hyperlink

1 immediately under the ‘I Accept’ button and clicks that button.” *See In re Facebook*
2 *Biometric Info. Priv. Litig.*, 185 F. Supp. 3d 1155, 1166 (N.D. Cal. 2016) (citing
3 *Crawford v. Beachbody, LLC*, No. 14cv1583–GPC (KSC), 2014 WL 6606563, at *3
4 (S.D. Cal. Nov. 5, 2014)). Further, it is of no consequence whether the consumer actually
5 clicks a hyperlink to read the terms containing the arbitration provision or not. *See, e.g.*,
6 *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 839-40 (S.D.N.Y. 2012) (holding that,
7 when a consumer is prompted to examine terms of sale located on another page available
8 via hyperlink, “[w]hether or not the consumer bothers to look is irrelevant” because
9 “[f]ailure to read a contract before agreement to its terms does not retrieve a party of its
10 obligations under the contract”); *see also Conyer v. Hula Media Servs., LLC*, 53 Cal.
11 App. 5th 1189, 1197 (2020), *review filed* (Oct. 5, 2020) (noting that “[i]t has long been
12 the rule in California that a party is bound by a contract even if he did not read the
13 contract before signing it”).

14 Here, the Court finds that Mr. Stern cannot reasonably dispute agreeing to
15 Peloton’s Terms of Service. The evidence indicates he did, and Mr. Stern failed to rebut
16 that evidence by providing a declaration attesting to the fact that he did not agree or later
17 opted out of the Arbitration Provision. Thus, a valid agreement to arbitrate exists
18 between Mr. Stern and Peloton. However, in order for arbitration to be compelled, the
19 Court must also find that the Mr. Stern’s claims involve interstate commerce and are
20 encompassed by the Arbitration Provision.

21 **3. Mr. Stern’s Claims Involve Interstate Commerce**

22 Peloton argues that “the FAA applies to agreements that evidence a transaction
23 involving interstate commerce, such as the use of cellular technologies and the internet at
24 issue.” Mot. at 11:27-12:5 (citing, *inter alia*, 9 U.S.C. §§ 1-2). Peloton contends that Mr.
25 Stern consented to the Arbitration Provision “in order to create an online Peloton account
26 and gain full access to Peloton’s workout library, live classes, and real-time performance
27 tracking on the device.” Mot. at 12:6-8 (citing Feinberg Decl. ¶ 6). Peloton’s position is
28 that because Plaintiff’s injuries arose while he was using his Peloton, which required that

1 he log onto the Peloton interface, which requires use of the internet, this case involves
2 interstate commerce. Mot. at 12:8-12 (citing *United States v. Sutcliffe*, 505 F.3d 944, 953
3 (9th Cir. 2007) (agreeing with the Eight Circuit Court of Appeals that “the Internet is an
4 instrumentality and channel of interstate commerce”)).

5 Subject to certain exceptions inapplicable here, the FAA “governs arbitration
6 agreements in contracts involving interstate commerce.” *Shivkov v. Artex Risk Sols., Inc.*,
7 974 F.3d 1051, 1058-60 (9th Cir. 2020) (applying Arizona contract law); *see also N.Y.*
8 *Stock Exch. Arbitration v. Shearson Lehman Hutton Inc.*, 948 F.2d 117, 120 (2d Cir.
9 1991) (“The FAA applies when there is federal subject matter jurisdiction, *i.e.*, diversity
10 jurisdiction, and when the contract calling for arbitration ‘evidences a transaction
11 involving interstate commerce.’”) (internal citations omitted) (applying New York law).
12 Thus, for the Court to compel arbitration under the FAA, the Terms of Service must
13 relate to a transaction involving interstate commerce. Section 1 of the FAA defines
14 “commerce” as “commerce among the several States.” 9 U.S.C. § 1.

15 Here, “the contract calling for arbitration” is the Terms of Service, which relates to
16 use of Peloton’s electronic services meant to be used when “Users” are on their products
17 (*e.g.*, their bicycles and treadmills). To the extent the contract pertains to use of Peloton’s
18 Services (*e.g.*, its app, website, and on-demand fitness classes), because those services
19 require use of the Internet, the Agreement would involve interstate commerce. *See, e.g.*,
20 *United States v. Jackson*, 851 F. App’x 35, 36 (9th Cir. 2021) (noting that the Ninth
21 Circuit has “held that the Internet is an instrument of, and intimately related to, interstate
22 commerce”). Even interpreting the Agreement more liberally to apply to the sale of
23 Peloton’s Tread+ to Mr. Stern, that sale would also involve interstate commerce to the
24 extent Peloton shipped the Tread+ to Mr. Stern from another state. *See, e.g., United*
25 *States v. Hill*, 248 U.S. 420, 424 (1919) (noting that “[t]he transportation of one’s own
26 goods from State to State is interstate commerce”).

27 Thus, the Court finds that the sale of the Tread+ and use of the streaming services
28 involve interstate commerce.

1 4. *Whether Mr. Stern's Claims Fall within the Scope of the Arbitration*
 Provision

2 Peloton argues that its Arbitration Provision contains an express delegation clause,
 3 which clearly and unmistakably delegates the job of interpreting the scope of the
 4 Arbitration Provision to the arbitrator. Mot. at 13:1-19. Peloton also points out that the
 5 Arbitration Provision expressly incorporates the AAA Commercial Rules, which
 6 evidences an intent by the parties to have the arbitrator decide the issue of whether the
 7 instant dispute falls within the scope of the Arbitration Provision. *Id.* at 13:20-14:15.
 8 Thus, Peloton argues that this Court should refrain from deciding whether Mr. Stern's
 9 claims fall within the scope of the Arbitration Provision and submit the issue of the
 10 arbitrability of this case to the arbitrator. *See id.* Plaintiffs respond that "the delegation
 11 clause in the arbitration agreement is . . . ineffective" because Peloton fails to establish
 12 the Arbitration Provision is enforceable. *See* Oppo. at 12:8-12 (citing *MacDonald v.*
 13 *CashCall, Inc.*, 883 F.3d 220, 232 (3d Cir. 2018) (providing that where the arbitration
 14 provision is not enforceable, the delegation clause contained therein is also
 15 unenforceable).

16 "[P]arties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as
 17 whether the parties have agreed to arbitrate or whether their agreement covers a particular
 18 controversy." *Rent-A-Ctr., West, Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010). Where the
 19 parties to an arbitration agreement "clearly and unmistakably" agree that an arbitrator
 20 will decide gateway issues, the arbitrator, rather than the Court, will decide those issues.
 21 *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). "Such
 22 [c]lear and unmistakable evidence of agreement to arbitrate arbitrability might include . .
 23 . a course of conduct demonstrating assent . . . or . . . an express agreement to do
 24 so." *Momot v. Mastro*, 652 F.3d 982, 988 (9th Cir. 2011) (citations and internal quotation
 25 marks omitted). "When the parties' contract delegates the arbitrability question to an
 26 arbitrator, a court may not override the contract" and "possesses no power to decide the
 27 arbitrability issue." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529
 28

(2019); *see also Mobile Real Estate, LLC v. NewPoint Media Grp., LLC*, 460 F. Supp. 3d 457, 470 (S.D.N.Y. 2020) (noting that where parties agree to an arbitration agreement which incorporates the AAA Commercial Arbitration Rules, which provide that the arbitrator has the power to rule on his or her own jurisdiction, that qualifies as “clear and unmistakable” evidence of intent to delegate questions of arbitrability) (citing American Arbitration Association, *Commercial Arbitration Rules and Mediation Procedures* (“AAA Rules”) R-7(a) (July 1, 2016), <https://adr.org/sites/default/files/Commercial%20Rules.pdf>). This remains “true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.” *Henry Schein*, 139 S. Ct. at 529.

Here, the Arbitration Provision includes a provision that states that “[t]he parties agree that the arbitrator shall have exclusive authority to decide all issues relating to the interpretation, applicability, enforceability and scope of this arbitration agreement.” Exhibit 4 to Mot., ECF No. 11-6 at 11 (emphasis added); *see also* Mot. at 9:24-28. It also provides that “[t]he arbitration will be conducted by the American Arbitration Association (“AAA”) under its Consumer Arbitration Rules (the “AAA Rules”) then in effect, except as modified by these Terms,” which it states “are available at www.adr.org or by calling 1-800-778-7879.” *Id.* Those rules vest the arbitrator with the power to (1) “rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim and (2) “determine the existence or validity of a contract of which an arbitration clause forms a part.” *See* American Arbitration Association, *Consumer Arbitration Rules*, R-14(a)-(b) (Rules Amended and Effective September 1, 2014), <https://adr.org/sites/default/files/Consumer-Rules-Web.pdf>. Based on the language of the Arbitration Provision, the Court finds that Mr. Stern and Peloton agreed to arbitrate gateway issues, including whether Mr. Stern’s claims fall within the scope of the Arbitration Provision. *See, e.g., Crooks v. Wells Fargo Bank, NA.*, 312 F. Supp. 3d 932, 937-38 (S.D. Cal. 2018) (Sabraw, J.) (“To respect the province of the arbitrator, no opinion

1 is expressed on whether the ... claim falls within the scope of the arbitration provision.”).

2 Here, the Court’s duty was to decide if a valid agreement to arbitrate exists
3 between Mr. Stern and Peloton, and if so, whether that agreement delegated the decision
4 to decide whether claims fall within its scope to the arbitrator. Having answered both
5 question in the affirmative as to Mr. Stern only, the Court orders Mr. Stern and Peloton to
6 arbitrate whether his claims are covered by the Arbitration Provision.

7 **C. Plaintiff’s Evidentiary Objections**

8 A district court ruling on a motion to compel arbitration must apply a “standard
9 similar to the summary judgment standard of Federal Rule of Civil Procedure 56.” *Lopez*
10 *v. Terra’s Kitchen, LLC*, 331 F. Supp. 3d 1092, 1097 (S.D. Cal. 2018) (Anello, J.)
11 (quoting *Concat LP v. Unilever, PLC*, 350 F. Supp. 2d 796, 804 (N.D. Cal. 2004)); *Three*
12 *Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1141 (9th Cir. 1991). In
13 that vein, “[a] party may object that the material cited to support or dispute a fact cannot
14 be presented in a form that would be admissible in evidence.” FED. R. CIV. P. 56(c)(2).
15 However, the Court will consider the substance of evidence that would be admissible at
16 trial even if the form of the evidence is improper so long as that same evidence may be
17 admissible in another form. *See, e.g., Dinkins v. Schinzel*, 362 F. Supp. 3d 916, 922-23
18 (D. Nev. 2019) (noting that “the 2010 amendments to Federal Rule of Civil Procedure 56
19 ‘eliminate[d] th[is] unequivocal requirement’ and mandate only that the substance of the
20 proffered evidence would be admissible at trial”; declining to “disregard all exhibits for
21 lack of proper authentication because their substance could be admissible at trial”).

22 Before an item of evidence may be considered, Federal Rule of Evidence 901(a)
23 requires a proper foundation be laid to authenticate the item by “evidence sufficient to
24 support a finding that the item is what the proponent claims it is.” *Canada v. Blain’s*
25 *Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987). Such a foundation may be laid by
26 testimony of a witness with personal knowledge. FED. R. EVID. 901(b)(1). Thus, in order
27 for Mr. Feinberg to authenticate the Terms of Service, he must be a “witness with
28 knowledge . . . that [the document] is what it is claimed to be.” FED. R. EVID. §

901(b)(1).

Defendants rely on declarations from Daniel Feinberg, a Senior Product Manager at Peloton, to establish that Mr. Stern registered for a Peloton account and accepted Peloton's Terms of Service. *See generally* Feinberg Decl., ECF No. 11-2. Plaintiffs argue that Mr. Feinberg's Declaration (1) does not fully explain what account information the declarant looked at or how that information is maintained; (2) does not attach a copy of the account information in violation of the "best evidence rule"; (3) attaches Exhibits 1-3, which depict a registration process that differs from what Mr. Stern would have seen when he registered; and (4) includes Paragraphs 6-8, which lack foundation. *Oppo.* at 10:1-12:12. Peloton replies that "Plaintiffs' evidentiary objections fail for several reasons," including but not limited to the fact Mr. Feinberg provided a supplemental declaration in support of Peloton's reply brief that addresses Plaintiff's objections. *Reply* at 8:11-14.

In the Supplemental Declaration, Mr. Feinberg (1) states that he is familiar with Peloton's internal database, which it maintains in the ordinary course of business, Supplemental Declaration of Daniel Feinberg, ECF No. 13-1 ("Feinberg Suppl. Decl.") at 2, ¶ 2; (2) describes the process that transpires when a customer registers and agrees to the Terms of Service, including what account information related to that process is maintained by Peloton, *id.*; (3) indicates he reviewed Mr. Stern's account information, which shows that Mr. Stern registered for a Peloton account on August 25, 2019, and again on November 29, 2019, and as part of that registration process, was required to affirmatively agree to Peloton's Terms of Service regardless of whether he registered on the website or mobile application, *id.* at 2, ¶¶ 3-4; and (4) when Mr. Stern created his Peloton account in 2019, the registration process still required users to affirmatively click a button acknowledging they agreed to the Terms of Service, *id.* at 3, ¶ 5.

Plaintiffs contend that Mr. Feinberg's Declaration cannot establish that Mr. Stern accepted Peloton's Terms of Service because Mr. Feinberg does not state "what the 'account information'" that he looked at to determine Mr. Stern accepted Peloton's

1 Terms of Service “consists of, must less how the ‘account information’ was created, or
2 whether and where it is stored.” *Oppo*. at 10:1-6. They also argue that as a result, Mr.
3 Feinberg’s Declaration represents inadmissible hearsay. Hearsay is defined as a
4 statement that (1) a declarant “does not make while testifying at the current trial or
5 hearing” and (2) “a party offers in evidence to prove the truth of the matter asserted in the
6 statement.” FED. R. EVID. 801(c). However, as noted, the Court applies a summary
7 judgment type standard when ruling on a motion to compel arbitration. *Lopez*, 331 F.
8 Supp. 3d at 1097. “[A]t summary judgment[,] a district court may consider hearsay
9 evidence submitted in an inadmissible form, so long as the underlying evidence could be
10 provided in an admissible form at trial, such as by live testimony.” *See JL Beverage Co.,*
11 *LLC v. Jim Beam Brands Co.*, 828 F.3d 1098, 1110 (9th Cir. 2016). Here, Mr. Feinberg’s
12 Declaration is based on his personal knowledge and perceptions, and if offered in court,
13 would otherwise be admissible. Further, Rule 803(6) of the Federal Rules of Evidence
14 (“FRE”) excludes from the rule against hearsay, records “of an act, event, condition,
15 opinion, or diagnosis” where the following conditions are met:

16 (1) the record was made at or near the time by—or from
17 information transmitted by—someone with knowledge; (B) the
18 record was kept in the course of a regularly conducted activity
19 of a business . . . ; (C) making the record was a regular practice
20 of that activity; (D) all these conditions are shown by the
21 testimony of the custodian or another qualified witness, or by a
22 certification that complies with Rule 902(11) or (12) . . . ; or (E)
the opponent does not show that the source of information or
the method or circumstances of preparation indicate a lack of
trustworthiness.

23 Under Rule 902(11) of the FRE, a copy of business records meeting the aforementioned
24 requirements, “as shown by a certification of the custodian or another qualified person” is
25 self-authenticating. Here, Mr. Feinberg’s initial declaration may not have established that
26 (1) the record was made at or near the time of the event by or from information
27 transmitted by someone with knowledge; (2) the record was made as a regular practice of
28 that activity; or (3) any basis exists to believe the source of the information or the method

1 or circumstances of its preparation are trustworthy. Oppo. at 10:27-11:4 (citing FED. R.
2 EVID. 803(6)). His supplemental declaration establishes that Mr. Feinberg has personally
3 knowledge of Peloton's internal database, which is maintained in the course of regularly
4 conduct business. Feinberg Suppl. Decl. at 2, ¶ 2. However, it does not establish that the
5 record was made "at or near the time" of the registration. See *id.* at 2-3, ¶¶ 2-5.
6 Nonetheless, the Court finds this information could be established at trial, and given Mr.
7 Feinberg has established personal knowledge, the hearsay objection is **OVERRULED**.

8 Next, Plaintiffs object that "Mr. Feinberg's Declaration makes clear that Defendant
9 is unable to determine how or where [Mr. Stern]'s purported account was even created—
10 e.g., Defendant is not able to state if the account was created via Defendant's website or
11 mobile application, much less explain how [Mr. Stern] accepted the Terms of Service."
12 Oppo. at 11:9-14. They also point out that Peloton "inexplicably offers screenshots of the
13 registration process from August 2021 to establish [Mr. Stern]'s acceptance of the Terms
14 of Service *two years earlier* in August 2019 (at a time when, Defendant concedes, the
15 process for accepting the Terms of Service differed in undisclosed ways." *Id.* at 11:14-
16 18. However, these problems were remedied by Mr. Feinberg's Supplemental
17 Declaration, which established that regardless of whether Mr. Stern created his account
18 on the website or mobile application, he still would have been required to "click a button
19 acknowledging that the user agrees to the Peloton Terms of Service." Feinberg Suppl.
20 Decl. at 3, ¶ 5. Thus, Plaintiffs' objection on this basis is also **OVERRULED**.

21 Third, Plaintiffs argue that Peloton's failure to proffer or otherwise detail the
22 "account information," which purportedly establishes that Mr. Stern accepted the Terms
23 of Service, violates the Best Evidence Rule. Oppo. at 11:22-25. Peloton also failed to
24 produce a true copy of the material cited, which is a precursor to introducing evidence of
25 information contained in the document. *Id.* at 11:26-28 (citing FED. R. EVID. 1002, 1003,
26 and 1004). However, "the best evidence rule is not applicable when a witness testifies
27 from personal knowledge of the matter, even though the same information is contained in
28 a writing." *Backcountry v. United States Bia*, No. 20-CV-2343 JLS (DEB), 2021 U.S.

1 Dist. LEXIS 155344, at *14 (S.D. Cal. Aug. 6, 2021) (Sammartino, J.) (quoting *United*
2 *States v. Gonzales-Benitez*, 537 F.2d 1051, 1053 (9th Cir. 1976)) (internal quotations
3 omitted). Because Mr. Feinberg's declaration is based on personal knowledge, Plaintiffs'
4 Best Evidence Rule objection is also **OVERRULED**.

5 Finally, Plaintiffs argue Mr. Feinberg failed to lay a proper foundation for
6 Paragraphs 6-8 of the Declaration, which they argues is "riddled with speculation."
7 Oppo. at 12:1-2 (citing FED. R. EVID. 601, 602). They point out that Mr. Feinberg "has
8 disclosed nothing that suggests [he] has personal knowledge regarding [Mr. Stern]'s
9 purported acceptance of the Terms of Service." *Id.* at 12:4-6. However, Mr. Feinberg's
10 two declarations establish that (1) he has personal knowledge as to when Mr. Stern
11 registered for a Peloton account, *see* Feinberg Suppl. Decl. at 2-3, ¶¶ 3-4; (2) when users
12 undertake a registration, they must accept Peloton's Terms of Service; and (3) Peloton
13 maintains users' account information related to that process, including whether they
14 accepted the required legal agreements, *see id.* at 2, ¶ 2. Thus, Plaintiffs' objection that
15 Mr. Feinberg failed to lay a proper foundation is also **OVERRULED**.

16 Thus, Plaintiffs' Evidentiary Objections are **OVERRULED**.

17 **D. Defendant's Motion to Dismiss, or in the Alternative, Stay the Case**

18 Peloton argues that "[g]iven the parties' Arbitration Agreement, the Court should
19 either dismiss or stay this action." Mot. at 18:9-10. It contends the Court can dismiss
20 this case in its entirety because the claims (1) should be referred to the arbitrator or (2)
21 are unripe. *Id.* at 18:10-12. Alternatively, Peloton asks the Court to stay the claims so
22 the arbitrator may decide arbitrability. *Id.* at 18:12-13. Plaintiffs oppose the stay by
23 asking that "in the unlikely event this Honorable Court is inclined to grant Defendant's
24 Motion in part, the remaining Plaintiffs should be permitted to proceed with their claims
25 concurrently." Oppo. at 13:15-17. Plaintiff contends that Peloton has not carried its
26 burden of showing that the issue to be litigated is within the scope of the issue to be
27 decided in arbitration. *Id.* at 13:17-23.

28 "[N]otwithstanding the language of § 3, a district court may either stay the action

1 or dismiss it outright when . . . the court determines that all of the claims raised in the
2 action are subject to arbitration.” *Johnmohammadi v. Bloomingdale’s, Inc.*, 755 F.3d
3 1072, 1073-74 (9th Cir. 2014); *see also Sparling v. Hoffman Constr. Co.*, 864 F.2d 635,
4 638, 641 (9th Cir. 1988) (affirming the district court’s dismissal of one the plaintiff’s
5 claims because the parties agreed to submit those claims to arbitration, and no
6 nonarbitrable claims remained in the case); *Gadomski*, 281 F. Supp. 3d at 1020-21
7 (holding that “because both claims are to be arbitrated, the Court dismisses Plaintiff’s
8 claims in favor of arbitration”). The Ninth Circuit has “urge[d] district courts . . . to be as
9 clear as possible about whether they truly intend to dismiss an action or mean to grant a
10 stay pursuant to 9 U.S.C. § 3, which supplies that power” because “a dismissal renders an
11 order appealable under § 16(a)(3), while the granting of a stay is an unappealable
12 interlocutory order under 16(b).” *Bushley v. Credit Suisse First Bos.*, 360 F.3d 1149,
13 1153 n.1 (9th Cir. 2004) (noting that “[u]nnecessary delay of the arbitral process through
14 appellate review is disfavored”). Defendant contends that *Bushley* stands for the
15 proposition that “[t]he Ninth Circuit has explained that a stay is preferable to a dismissal,
16 because the latter is immediately appealable and could therefore undermine the efficiency
17 arbitration is meant to provide.” Reply at 24:5-9 (citing *Bushley*, 360 F.3d at 1153 n.1).
18 The Court disagrees with this characterization as it reads *Bushley* to reiterate that district
19 courts should ensure that they rule on a request to stay proceedings when ruling on a
20 motion to compel arbitration. *See, e.g., Bushley*, 360 F.3d at 1153 (pointing out that “the
21 district court did not rule upon the motion to stay the proceedings”).

22 Plaintiffs oppose the stay by arguing that “by way of example only, if [Mr. Stern]’s
23 claims are compelled to arbitration, the remaining issues to be litigated as to S.S. and
24 [Mrs. Stern] will not be decided in the arbitration and, therefore, there is no need to stay
25 this litigation.” Oppo. at 13:24-26. The Court agrees with Plaintiffs that the question of
26 whether Peloton owed a duty of care to or made misrepresentations to Mr. Stern, are
27 separate and apart from the question of whether Peloton owed S.S. or Mrs. Stern a duty
28 of care. *Id.* at 13:26-14:1. Thus, whether or not an arbitrator determines that Mr. Stern is

entitled to recovery has no impact on Mrs. Stern and S.S., and Peloton's request for a stay as to Mrs. Stern and S.S. is **DENIED**.

V. CONCLUSION

For the above reasons, the Court rules as follows:

1. Peloton's Motion to Compel Arbitration is **DENIED** as to Mrs. Stern and S.S. but **GRANTED** as to Mr. Stern only.

2. Peloton's Motion to Dismiss is **DENIED WITHOUT PREJUDICE**.

3. Peloton's Motion to Stay is **DENIED** as to Mrs. Stern and S.S. but **GRANTED** as to Mr. Stern as follows:

a. Within ten (10) days of this order, Plaintiffs shall either (1) voluntarily dismiss Mr. Stern's claims pursuant to Rule 41(a)(1)(A) of the Federal Rules of Civil Procedure, leaving no remaining claims in this controversy subject to arbitration or (2) submit the issue of whether Mr. Stern's claims fall within the scope of the Arbitration Provision to arbitration.

b. If Plaintiffs elect to dismiss Mr. Stern's claims within the deadline provided above, no stay will apply to this case.

c. If Plaintiffs choose to arbitrate Mr. Stern's case, then, the case shall be stayed as to Mr. Stern only until the earlier of either (1) the arbitrator's decision as to whether Mr. Stern's claims fall within the scope of the Arbitration Provision or (2) sixty (60) days from the date of this order, at which time the Parties must provide a status report to the Court as to the progress of the arbitration.

4. Plaintiff's Evidentiary Objections are **OVERRULED**.

5. Peloton must file an answer within ten (10) days of this order as to the claims of S.S. and Mrs. Stern.

IT IS SO ORDERED.

DATED: October 6, 2021


HON. ROGER T. BENITEZ
United States District Judge