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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

SPRING STREET COURTHOUSE

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| EVETTE GIBSON as Guardian ad Litem and on behalf of IHG, a minor,<br><br>Plaintiff,<br><br>v.<br><br>ROBLOX CORPORATION, EPIC GAMES, INC., MICROSOFT CORPORATION, MOJANG AB., and JOHN DOES 1-50,<br><br>Defendants. | Case No. 24STCV32897<br><br>[*Assigned for All Purposes to Honorable Stuart M. Rice, Dept. 1*]<br><br>**DEFENDANT EPIC GAMES, INC.'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND TO STAY; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**<br><br>[*Filed concurrently herewith Declarations of David Saunders and Allison L. Libeu and [Proposed] Order*]<br><br>Date: TBD<br>Time: TBD<br>Dept.: 1<br><br>Complaint Filed: December 13, 2024<br>First Amended Complaint: February 28, 2025 |

**TO THE COURT, PARTIES AND THEIR RESPECTIVE COUNSEL:**

**PLEASE TAKE NOTICE** that on a date and time to be determined, before the Honorable Lawrence P. Riff in Department 1 of the above-entitled Court, located at 111 North Hill Street, Los Angeles, California 90012, Defendant Epic Games, Inc. ("Epic") will, and hereby does, petition this Court for an order staying Plaintiff Evette Gibson's claims against Epic, asserted in her capacity as guardian ad litem and on behalf of IHG, and compelling her to assert them, if at all, in binding arbitration pursuant to the Fortnite End User License Agreement ("EULA") and the Federal Arbitration Act ("FAA").

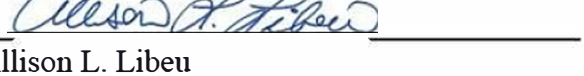
In the First Amended Complaint ("FAC"), Plaintiff alleges that IHG, her 12-year-old child, has become addicted to video games, including Fortnite, a video game developed by Epic. Epic brings this motion on the grounds that IHG agreed to and is bound by Epic's EULA, in which they agreed to arbitrate any dispute that "relates to [IHG's] use or attempted use of Epic's products or services and Epic's products and services generally[.]" (Decl. David Saunders Supp. Epic Games, Inc.'s Mot. Compel Arbitration ("Saunders Decl."), Ex. 19 (EULA) § 12.3.1.) The arbitration agreement is valid, binding, and legally enforceable under the FAA. 9 U.S.C. § 1 et seq. Accordingly, Plaintiff should be compelled to arbitrate all causes of action she asserts in this matter.

This motion to compel arbitration is based on this Notice, the attached Memorandum of Points and Authorities, the Saunders Declaration, the Declaration of Allison L. Libeu in Support of Epic Games, Inc.'s Motion to Compel Arbitration ("Libeu Decl.") filed concurrently herewith, all pleadings and papers filed in this action, and any such other matters as may be presented to the Court at the time of the hearing.

Dated: June 18, 2025

Respectfully submitted,

HUESTON HENNIGAN LLP

By: 

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## I. INTRODUCTION

In the First Amended Complaint ("FAC"), Plaintiff Evette Gibson alleges that her 12-year-old child IHG is addicted to *Fortnite*, a video game developed by Defendant Epic Games, Inc. ("Epic"). She asserts product liability, negligence, and fraud claims against Epic on IHG's behalf. Before ever playing *Fortnite*, IHG agreed to the *Fortnite* End User License Agreement ("EULA"). IHG agreed to arbitrate any dispute that "relates to [IHG's] use or attempted use of Epic's products or services and Epic's products and services generally[.]"[1] In the EULA, Epic and IHG also agreed that "the validity, enforceability, or scope of [the] Binding Individual Arbitration section" are delegated to the arbitrator. IHG's counsel will argue alternatively that IHG lacked capacity, that the EULA is unconscionable, and that IHG has disaffirmed the EULA. Even if these were so—it is not—both unconscionability and disaffirmance are defenses to *enforceability*. The parties agreed to submit those defenses to the arbitrator. This Court should compel IHG's claims to arbitration and stay this action against Epic.

This case is not the first of its kind. In every federal case to rule on the issue, the courts found the plaintiffs had agreed to arbitrate claims, like Plaintiff's, alleging addiction to video games. The courts heard and rejected arguments asserting minors' lack of capacity, disaffirmance, and unconscionability. (*See Dunn v. Activision Blizzard, Inc.* (E.D.Ark. 2024) 749 F. Supp. 3d 976; *Ayers v. Epic Games, Inc.*, (N.D.Fla. Jan. 27, 2025, 1:24-cv-0064-AW) [Dkt. 162]; *Antonetti v. Activision Blizzard, Inc.* (N.D.Ga. 2025) 764 F.Supp.3d 1309; *Angelilli v. Activision Blizzard, Inc.* (N.D.Ill. Feb. 18, 2025) 2025 WL 524276, at *15; *Johnson v. Activision Blizzard, Inc.* (E.D.Ark. Mar. 3, 2025) 3:24-CV-00026-JM (Dkt. 142); *Orellana v. Roblox Corp.* (M.D.Fla. Mar. 4, 2025) 2025 WL 694428, at *11; *Courtright v. Epic Games, Inc.* (W.D.Mo. Feb. 13, 2025) 2025 WL 558560, at *19. Epic respectfully requests that this Court do the same for the following reasons.

*First*, IHG agreed to the EULA and its arbitration agreement at least 11 times, most recently on May 1, 2025. Before players can play *Fortnite*, Epic presents the EULA and requires that players

[1] Declaration of David Saunders in Support of Epic Games, Inc's Motion to Compel Arbitration ("Saunders Decl.") Ex. 19 (EULA) § 12.3.1. Because Plaintiff's claims relate to IHG's alleged gameplay, the EULA's arbitration provision covers the claims asserted in the FAC. (*See* FAC ¶¶ 261-268 (alleging that IHG played *Fortnite* and was harmed as a result)).

agree by pressing an "accept" button. IHG first agreed to the EULA before ever playing the game, as early as December 10, 2019. IHG reconfirmed and ratified their agreement to the EULA multiple times thereafter. Under well-established law, IHG must arbitrate all causes of action they have asserted against Epic. (*See B.D. v. Blizzard Ent., Inc.* (2022) 76 Cal.App.5th 931, 951 [enforcing arbitration agreement that required plaintiff to "click" to accept because the "pop-up notice provided sufficiently conspicuous notice that a user who clicked the 'Continue' button at the bottom of the pop-up would be bound"]; *cf.*, *e.g.*, *Antonetti*, *supra*, 764 F.Supp.3d 1309, 1320 [finding "a valid contract was formed under North Carolina law" where "Epic offered the opportunity to play Fortnite to [Plaintiff], in exchange for agreeing to its EULA, [Plaintiff] accepted the EULA, and in consideration of his agreement, he was able to continue playing Fortnite"].)[2]

IHG may be a minor, but they formed a binding contract by agreeing to the EULA. Agreements entered into by minors are "voidable and not void" under both North Carolina and California law. (*Chandler v. Jones* (N.C. 1916) 90 S.E. 580, 581 ["contract of an infant is voidable and not void"]; Fam. Code § 6700.) Disaffirmance may be a defense to a contract's enforceability and says nothing about the contract's formation. (*See Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919, 930 [explaining "[a] void contract is without legal effect" but a voidable contract is "one where one or more parties have the power, by manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.", quotation marks omitted]; *cf.*, *e.g.*, *Orellana*, *supra*, 2025 WL 694428, at *5 ["[I]nfancy is a defense to enforceability and does not relate to contract formation."].) And while IHG purported to opt out of the arbitration agreement in the EULA, that opt out is ineffective for several reasons, including that it was sent long after the 30-day opt-out period. (*See Boshear v. PeopleConnect, Inc.* (9th Cir. Aug 3, 2023) 2023 WL 4946630, at *1 [an "opt-out notice [is] plainly ineffective" when it fails to provide the required information]; *cf. Diaz v. Sohnen Enters.* (2019) 34 Cal.App.5th 126, 130 [failure to opt out of arbitration agreement is "implied[] consented to the arbitration agreement"].)

[2] The EULA is governed by North Carolina law. (EULA § 11.) Because North Carolina law and California law are consistent on the relevant issues, this motion includes citations to authority from both jurisdictions.

IHG has thus formed an agreement to arbitrate this dispute.

*Second*, insofar as Plaintiff disputes that the claims are covered by the arbitration clause, those arguments must be presented to the arbitrator. The parties agreed that the arbitrator would decide any dispute over the validity, enforceability, and scope of the arbitration agreement. (EULA § 12.3.1.) (*Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 241 ["Parties to an arbitration agreement . . . can agree to arbitrate almost any dispute—even a dispute over whether the underlying dispute is subject to arbitration.", quotation marks omitted]; *accord Angelilli*, *supra*, 2025 WL 524276, at *15 [explaining that the Court "cannot consider" whether the minor "lacked capacity to accept the Epic EULA" because "the Epic EULA contains a delegation clause"].) When this kind of threshold question of arbitrability is delegated to the arbitrator, the court "possesses no power to decide the arbitrability issue . . . even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." (*Henry Schein, Inc. v. Archer & White Sales, Inc.* (2019) 586 U.S. 63, 68.) In such cases, "the court should stay proceedings pending the arbitrator's determination of his or her own jurisdiction." (*Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 553.) Even if Plaintiff contends that IHG disaffirmed their agreements, those disputes are for the arbitrator in the first instance, not this Court. (*See N.A. v. Nintendo of Am. Inc.*, (N.D.Cal. Dec. 11, 2023) 2023 WL 8587628, at *4 [granting motion to compel arbitration of minor's claims because "the issue of disaffirmation does not relate to contract formation; rather, it goes to whether the [EULA] is enforceable, an issue that the parties delegated to an arbitrator"]; *see also In re StockX Customer Data Security Breach Litig.* (6th Cir. 2021) 19 F.4th 873, 883-84 [affirming order granting motion to compel arbitration of minor's claims because "plaintiff's infancy argument d[id] not concern the formation or existence of a contract" and instead was "a matter of enforceability" delegated to the arbitrator].)

*Third*, even if this Court reaches those questions delegated to the arbitrator, the disaffirmation is ineffective. IHG cannot disaffirm the EULA while continuing to retain the benefits of the agreement. IHG continues to play *Fortnite*, including as recently as May 7, 2025. (Saunders Decl. ¶ 68.) IHG has thus retained the EULA's benefits (i.e., continued game play and access to *Fortnite*) and affirmed, rather than disaffirmed, the arbitration obligation. (*See Holland v. Universal*

*Underwriters Ins. Co.* (1969) 270 Cal.App.2d 417, 421 ["minors, if they would disaffirm a contract, must disaffirm the entire contract, not just the irksome portions"].)

*Fourth*, because IHG's claims are arbitrable, Section 3 of the Federal Arbitration Act ("FAA") requires the Court to stay their claims against Epic pending completion of the arbitration. (*See Arthur Andersen LLP v. Carlisle* (2009) 556 U.S. 624, 627.)[3]

For all these reasons, the Court should compel IHG to arbitrate their claims against Epic.

## II. BACKGROUND

Since *Fortnite*'s release in the summer of 2017, all players have been required to affirmatively agree to the EULA before they can begin playing the game. (Saunders Decl. ¶ 30.) The player must scroll through the text of the EULA, which is displayed on-screen, and must either accept the EULA by pressing an "accept" button or reject the EULA by pressing a "decline" button. (*Id.* ¶¶ 31-33.) From time to time, Epic updates the EULA. (*Id*. ¶ 37.) Epic advises players that it may update the EULA at any time: "Epic may issue an amended Agreement . . . at any time in its discretion by posting the amended Agreement . . . on its website or by providing you with digital access to amended versions . . . when you next access the Software." (EULA § 14.) The EULA further advises that "[i]f any amendment to this Agreement . . . is not acceptable to you, you may terminate this Agreement and must stop using the Software." (*Id*.)

Since March 2019, the EULA has included (and still includes) an arbitration agreement. (Saunders Decl. ¶ 34.) Section 12.3.1 of the EULA provides:

> You and Epic agree to submit all Disputes between You and Epic to individual binding arbitration. "Dispute" means any dispute, claim, or controversy (except those specifically exempted below) between You and Epic that relates to your use or attempted use of Epic's products or services and Epic's products and services generally, *including without limitation the validity, enforceability, or scope of this Binding Individual Arbitration section*.
>
> You and Epic agree to arbitrate all Disputes regardless of whether the Dispute is based in contract, statute, regulation, ordinance, tort (including fraud, misrepresentation, fraudulent inducement, or

[3] The EULA's arbitration agreement is "subject to the U.S. Federal Arbitration Act and federal arbitration law[.]" (EULA § 12.3.) Additionally, the "FAA applies to a contract that evidences a transaction involving interstate commerce." (*Brinkley v. Monterey Fin. Servs., Inc.* (2015) 242 Cal.App.4th 314, 326, internal quotation marks and alterations omitted.)

negligence), or any other legal or equitable theory.

(EULA § 12.3.1, emphasis added.) The same section also expressly states that "whether a dispute is subject to arbitration under [the EULA] will be determined by the arbitrator rather than a court." (*Id.*) Additionally, players may opt out of the arbitration agreement by submitting a written notice to Epic postmarked within 30 days of the date on which they first accepted the EULA. (*Id.* § 12.6.) For an opt-out to be effective, players "must provide your name, mailing address, and account name you use while playing Fortnite." (*Id.*)

After Plaintiff filed the Complaint on December 13, 2024, Epic undertook a search of its records to identify Epic Games accounts associated with Plaintiff and IHG. (Saunders Decl. ¶ 43.) In letters dated January 16 and May 28, 2025, Plaintiff's counsel provided Epic with console display names that IHG reportedly uses to play *Fortnite* and other video games. (*Id.* ¶¶ 44-45.) In total, Epic identified six Epic Games accounts associated with IHG and the information Plaintiff provided. (*Id.* ¶ 46.)

IHG Account #1. The first account was created on August 25, 2023 and uses the in-game display name '[redacted]' ("IHG Account #1"). (*Id.* ¶ 46a.) At the time of its creation, the user of IHG Account #1 affirmatively agreed to the EULA by clicking the "accept" button in the manner described above. (*Id.* ¶ 57.) Thereafter, the user of IHG Account #1 agreed to the EULA, including its arbitration agreement, on December 9, 2023, December 14, 2024, December 18, 2024, and January 17, 2025. (*Id.* ¶¶ 69, 61, 63, 65.) In each instance, the arbitration agreement was prominently called out near the top of the EULA (*id.* ¶¶ 34-35), and the user was required to accept the agreement by clicking "accept" before continuing to play *Fortnite* (*id.* ¶¶ 30-32).

IHG Account #2. The second account was created on December 10, 2019 using a PlayStation account with the display name '[redacted]" ("IHG Account #2). (*Id.* ¶ 46b.) At the time of its creation, the user of IHG Account #2 affirmatively agreed to the EULA by clicking the "accept button" in the manner described above. (*Id.* ¶ 70.)

IHG Account #3. The third account was created on January 1, 2020 using an Xbox account with the gamertag name '[redacted]." (*Id.* ¶ 46c.) At the time of its creation, the user of IHG

Account #3 affirmatively agreed to the EULA by clicking the "accept button" in the manner described above. (*Id.* ¶ 75.)

IHG Account #4. The fourth account was created on March 12, 2023 using an Xbox account with the gamertag "[redacted]." (*Id.* ¶ 46d.) At the time of its creation, the user of IHG Account #4 affirmatively agreed to the EULA by clicking the "accept button" in the manner described above. (*Id.* ¶ 80.)

IHG Account #5. The fifth account was created on April 4, 2023 using a PlayStation account with the display name "[redacted]" (*Id.* ¶ 46e.) At the time of its creation, the user of IHG Account #5 affirmatively agreed to the EULA by clicking the "accept button" in the manner described above. (*Id.* ¶ 85.)

IHG Account #6. The sixth account was created on February 15, 2024 using a PlayStation account with the display name "[redacted]." (*Id.* ¶ 46f.) At the time of its creation, the user of IHG Account #6 affirmatively agreed to the EULA by clicking the "accept button" in the manner described above. (*Id.* ¶ 90.) Thereafter, the user of IHG Account #6 agreed to the EULA, including its arbitration provision, on May 1, 2025. (*Id.* ¶ 92.)

For all six IHG Accounts, Epic's records do not include the player's date of birth, which means that, when the player created their account or were otherwise asked for their date of birth, the player input a birthdate that would make them currently 18 years old or older. (*Id.* ¶ 46.) Epic did not receive an opt-out notification with respect to any IHG Account within 30 days of the date on which the player first accepted the EULA. (*Id.* ¶¶ 67, 72, 77, 82, 87, 94.) Epic received a letter from Plaintiff's counsel dated January 16, 2025, identifying Plaintiff and IHG, providing a mailing address and a display name for IHG Account #1, and purporting to opt out of the EULA's class action waiver and arbitration provisions. (*Id.* ¶ 67.) This notice was untimely. Even if IHG Account #1 were the only account, the user of that account first agreed to the EULA, including its arbitration provisions, on August 25, 2023. (*Id.* ¶ 57.) Moreover, the user of IHG Account #1 subsequently accepted the EULA on January 17, 2025, and did not send another opt-out notice. (*Id.* ¶¶ 65, 67.)

On May 2, 2025, Plaintiff's counsel sent Epic's counsel a declaration from Plaintiff in which she stated: "on behalf of my son, IHG, I hereby expressly disaffirm any and all alleged contracts or

other purported agreements between [redacted] and Defendants Epic Games, Inc.," including "any purported arbitration agreement, delegation, or contract." (Libeu Decl. ¶ 1, Ex. A.) On May 8, 2025, Epic's counsel informed Plaintiff's counsel that IHG continued to play *Fortnite* after the date of Plaintiff's declaration, thereby demonstrating an intent to affirm and continue under the terms of the parties' contract. (*Id.* ¶ 2, Ex. B.) Epic offered, upon Plaintiff's request, to "disable IHG's account(s) so that they may no longer play *Fortnite*." (*Id.*) Plaintiff did not respond to Epic's offer and has not requested that Epic disable IHG's accounts. (*Id.* ¶ 2.)

## III. LEGAL STANDARD

"California has a strong public policy in favor of arbitration and any doubts regarding the arbitrability of a dispute are resolved in favor of arbitration." (*Aanderud v. Superior Court* (2017) 13 Cal.App.5th 880, 890; *Gravillis v. Coldwell Banker Residential Brokerage* (2006) 143 Cal.App.4th 761, 771 [explaining that a "heavy presumption weighs in favor of arbitrability"]; *accord Dean Witter Reynolds, Inc. v. Byrd* (1985) 470 U.S. 213, 221 [same federal policy].)

In deciding whether to compel arbitration, courts typically address two threshold issues: (1) whether there is an agreement to arbitrate between the parties; and (2) whether the agreement covers the dispute at issue. (*See Gravilllis*, *supra*, 143 Cal.App.4th 761, 771 [the court's role "must be strictly limited to a determination of whether the party resisting arbitration agreed to arbitrate"]; *accord Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 84.) When "the parties have clearly and unmistakably agreed to delegate questions regarding the validity of the arbitration clause to the arbitrator," the inquiry stops after the first step. (*Nielsen Contracting, Inc. v. Applied Underwriters, Inc.* (2018) 22 Cal.App.5th 1096, 1108.) When an arbitration agreement "clearly and unmistakably" delegates that second set of threshold issues (e.g., the scope, validity, or enforceability of the agreement) to the arbitrator, the only question for the court is whether an arbitration agreement *exists* between the parties. (*Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 250 [because delegation clause was valid, "it will be for the arbitrator to consider the conscionability of the agreement as a whole and its other severable provisions"]; *accord AT&T Techs., Inc. v. Communications Workers of America*, (1986) 475 U.S. 643, 649; *Rent-A-Ctr, West, Inc. v. Jackson* (2010) 561 U.S. 63, 68-70.)

"Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator." (*Henry Schein, Inc.*, *supra*, 586 U.S. 63, 69.) The validity of the arbitration agreement itself is also one such gateway question. (*See Aanderud*, *supra*, 13 Cal.App.5th 880, 891 ["[P]arties can agree to arbitrate gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.", quotation marks omitted].)

## IV. ARGUMENT

### A. Epic and IHG Formed an Agreement Arbitrate All Disputes Relating to *Fortnite*.

Even when the Federal Arbitration Act "applies, such that federal arbitrability law applies, there remains the general rule in interpreting arbitration agreements, which is that courts should apply ordinary state-law principles that govern the formation of contracts." (*Brinkley, supra,* 242 Cal.App.4th 314, 327-28, quotation marks, citations, and alterations omitted.) Under California law, the elements of a contract are (1) parties capable of contracting; (2) consent; (3) a lawful object, and (4) consideration. (Civ. Code § 1550.) Under these principles, IHG and Epic formed a valid agreement to arbitrate.

#### 1. The EULA Conspicuously Provides for Arbitration.

The EULA conspicuously notifies players considering whether to agree to the EULA that it contains a binding arbitration clause. Using straightforward language, the introduction to the EULA "highlight[s]" three "important terms, policies, and procedures," including that:

> You and Epic agree to resolve disputes between us in individual arbitration (not in court). We believe the alternative dispute-resolution process of arbitration will resolve any dispute fairly and more quickly and efficiently than formal court litigation. Section 12 explains the process in detail. We've put this up front (and in caps) because it's important[.]

(EULA intro.) The notice then reiterates, in bolded, capitalized type:

> **THIS AGREEMENT CONTAINS A BINDING, INDIVIDUAL ARBITRATION AND CLASS-ACTION WAIVER PROVISION. IF YOU ACCEPT THIS AGREEMENT, YOU AND EPIC AGREE TO RESOLVE DISPUTES IN BINDING, INDIVIDUAL ARBITRATION AND GIVE UP THE RIGHT TO GO TO COURT INDIVIDUALLY OR AS PART OF A CLASS ACTION[.]**

(*Id*.) Such prominent displays are sufficient to bind individuals to arbitration clauses. (*See, e.g.*, *B.D.*, *supra*, 76 Cal.App.5th 931, 951 [compelling arbitration when the company "made clear the significance of clicking the 'Continue' button" by placing the notice directly above the button in white text against a dark background]; *Bekele v. Lyft, Inc.* (D. Mass. 2016) 199 F.Supp.3d 284, 301-02, *aff'd* (1st Cir. 2019) 918 F.3d 181 [compelling arbitration when "the arbitration provision is preceded by a clearly-worded, bolded, all-caps header in a font size that is larger than the text of the provision itself"].)

**2. IHG Agreed to the EULA Eleven Times.**

As discussed above, Epic requires players to affirmatively agree to the EULA before they can begin playing *Fortnite*. (Saunders Decl. ¶¶ 30-32.) Epic Games identified six accounts associated with display names provided by Plaintiff's counsel. (*Id.* ¶46.) Those accounts were created between December 10, 2019, and February 15, 2024. (*Id*..) Each time, IHG was presented with the text of the EULA and accepted the EULA's terms. (*Id.* ¶ 37.) IHG agreed to the EULA an additional five times, most recently on May 1, 2025, for a total of eleven times. (*Id*. ¶¶ 59, 61, 63, 55, 92.) Each version of the EULA to which IHG agreed provides for arbitration of all disputes between IHG and Epic "that relate[] to your use or attempted use of Epic's products or services and Epic's products and services generally[.]" (*Id*. ¶ 36; EULA § 12.3.1.)

Each of the elements of an enforceable arbitration agreement are met. In exchange for the ability to play and access *Fortnite*, IHG expressly assented to the arbitration agreement by clicking "accept" when presented with the EULA. (*Id*. ¶¶ 57, 59, 61, 63, 65, 70, 75, 80, 85, 90, 92). Courts routinely uphold such so-called "click-wrap" agreements because they provide conspicuous notice of their terms. *In B.D.*, for example, the court enforced an arbitration agreement between a minor and a video game publisher where the "sign-in wrap" agreement "provided sufficiently conspicuous notice to users that by clicking the 'Continue' button on the pop-up, they were agreeing to be bound." (*B.D.*, *supra*, 76 Cal.App.5th 931, 951 [noting that a clickwrap agreement "is one in which an internet user accepts a website's terms of use by clicking an 'I agree' or 'I accept' button, with a link to the agreement readily available," and describing the features of a sign-in wrap agreement as having *fewer* indicia of conspicuousness than clickwrap agreements]; *see also Weeks v. Interactive Life Forms,*

*LLC* (2024) 100 Cal.App.5th 1077, 1084-85 ["Courts have generally enforced agreements to arbitrate formed via 'clickwrap,'...."]; *cf. Keebaugh v. Warner Bros. Entertainment Inc* (9th Cir. 2024) 100 F.4th 1005, 1014 [surveying California law and explaining that "[c]ourts have routinely found clickwraps agreements enforceable"].)

The fact that IHG entered the agreements as a minor does not vitiate the *formation* of any agreements with Epic. IHG's minority affects only whether the resulting agreements may later be *enforced*. Minors have the same capacity to contract under California law as adults subject to the power of disaffirmance. (Civ. Code. §§ 1556, 1557 [minors lack capacity except as provided in Fam. Code §§ 6500 et seq.]; Fam. Code § 6700 [minors have the same capacity to contract as adults, except in certain areas, but may disaffirm].) Under both California and North Carolina law, a contract with a minor is voidable and not void. (Fam. Code § 6700; Cal. Civ. Prac. Business Litigation § 24:22 ("contracts that are not void under Family Code section 6701 are voidable"); *Chandler*, *supra*, 90 S.E. 580, 581.) A voidable contract is a "valid act that may be avoided, rather than an invalid act that may be confirmed[.]" (5 Williston on Contracts § 9:9 (4th ed. 2023); *see also Kindred Nursing Ctrs. Ltd. P'ship v. Clark* (2017) 581 U.S. 246, 254-55 [contrasting rules "finding arbitration contracts *invalid* because improperly *formed*" and rules "refusing to *enforce* those agreements once properly made," italics added].) For that reason, federal district judges across the county have uniformly concluded that a minor's infancy when agreeing to the very same EULA at issue here is an "[a]ffirmative defense" that "an otherwise valid contract [is] unenforceable" that must be resolved in arbitration. (*See, e.g.*, *Courtright*, *supra*, 2025 WL 558560, at *5; *Dunn*, *supra*, 749 F.Supp.3d 976, 982; *Antonetti*, *supra*, 2025 WL 359323, at *6 .)

**3. IHG Did Not Timely Opt Out of the EULA's Arbitration Provision.**

Epic did not receive an opt-out notification with respect to any IHG Account within 30 days of the date on which IHG first accepted the EULA. (Saunders Decl. ¶¶ 67, 72, 77, 82, 87, 84.) Plaintiff will likely argue that she and IHG opted out of the EULA's arbitration provision in a letter dated January 16, 2025, sent by Plaintiff's counsel. (*Id*. ¶ 67.) However, that letter is untimely. The EULA requires that an opt-out notice be sent "within 30 days of the date on which you first accepted [the EULA]." (EULA § 12.6.) IHG first agreed to the EULA on December 10, 2019. (Saunders Decl.

¶ 46.) Plaintiff's letter was sent more than five years later, rendering the purported opt-out notice ineffective. (*Cal. Crane Sch., Inc. v. Google LLC* (N.D.Cal. 2024) 722 F.Supp.3d 1026, 1035 [attempt to opt out after "the specific 30-day out-out period governing the arbitration agreement" was ineffective]; *Meyer v. T-Mobile USA Inc.* (N.D.Cal. 2011) 836 F.Supp.2d 994, 1002-03 [enforcing arbitration agreement where the Plaintiff "had thirty days to decide whether to opt out of the arbitration agreement" and failed to do so].)

Plaintiff may attempt to argue that each version of the EULA is an independent contract, and accordingly, IHG has the right to opt out of arbitration any time they agree to a new version of the EULA. That argument fails for at least three fundamental reasons. *First*, it conflicts with the plain language of the EULA requiring that an opt-out notice be sent within 30 days of when the EULA is "first accepted." (EULA § 12.6.)

*Second*, if each EULA were an independent contract, IHG would be required to send an opt-out notice each time they agreed to the EULA. IHG did not do so. IHG agreed to the EULA at least eleven times—including twice after Plaintiff's letter—but sent only one purported opt-out notice. (Saunders Decl. ¶¶ 65, 94.) Under an independent contract theory, Plaintiff would be bound to the EULA based on the ten times that they did not opt out. (*See Gentry v. Superior Court* (2007) 42 Cal.4th 443, 468 [enforcing arbitration agreement because the plaintiff "may not now claim that the failure to opt out did not constitute acceptance of the arbitration agreement"], abrogation on other grounds recognized by *Iskanian v. CLS Transp. L.A., LLC* (2014) 59 Cal.4th 348, 360.)

*Third*, the EULA requires any opt-out notice to include "your name, mailing address, and account name you use while playing Fortnite." (EULA § 12.6.) If each EULA were an independent contract, IHG would be required to provide this information for each acceptance. Here, the letter from Plaintiff's counsel includes the account name for IHG Account #1 only and does not include the account names for IHG Account #2 through #6. (Saunders Decl. ¶44 & Ex. 2.) Plaintiff's purported opt-out notification therefore does not affect IHG's acceptance of the EULA's arbitration provision through IHG Account #2 through #6. (*See Boshear, supra,* 2023 WL 4946630, at *1 [opt-out notice that lacked required information was "plainly ineffective"]; *Anderson v. Amazon.com, Inc.* (M.D.Tenn. 2020) 478 F.Supp.3d 683, 685 [providing "some of the information required by the

defendant's opt-out procedures does not constitute substantial compliance of an arbitration agreement's specific opt-out procedures"]; *Frost v. Household Realty Corp.* (S.D. Ohio 2004) [opt-out was invalid where the "Plaintiffs satisfied only a few" of the requirements].)

**B. The EULA Delegates Threshold Issues of Arbitrability to the Arbitrator.**

The Court should not decide whether Plaintiff's claims are within the scope of the arbitration clause. (EULA § 12.3.1 ["You and Epic agree that whether a dispute is subject to arbitration under this Agreement will be determined by the arbitrator rather than a court."].) The EULA also provides that "disputes" for the arbitrator include "the validity, enforceability, [and] scope" of the arbitration agreement itself. (*Id*.) Because these terms clearly and unmistakably delegate threshold questions to the arbitrator, it is for the arbitrator—and not the Court—to decide those threshold issues. (*See Dream Theater, Inc.*, *supra*, 124 Cal.App.4th at p. 551 ["The issue who should decide arbitrability turns on what the parties agreed in their contract."].)

The Court also should not address whether IHG has effectively disaffirmed the EULA. "[T]he issue of disaffirmation does not relate to contract formation; rather, it goes to whether the [EULA] is enforceable, an issue that the parties delegated to an arbitrator." (*N.A.*, *supra*, 2023 WL 8587628, at *4; *see also K.F.C. v. Snap Inc.* (7th Cir. 2022) 29 F.4th 835, 838 [under California and Illinois law, contracts entered into by minors are voidable and "[a]s long as state law permits a child to ratify a contract, youth must be a defense rather than an obstacle to a contract's formation, and as a defense it goes to the arbitrator."]; *In re StockX*, *supra*, 19 F.4th 873, 883-84 ["plaintiffs' infancy argument does not concern the formation or existence of a contract" but instead was "a matter of enforceability covered under the delegation provision"].)[4]

Where "the EULA clearly and unmistakably delegates to the arbitrator questions of the 'validity, enforceability, or scope' of the EULA" and the claims "as well as their disaffirmance defense fall

[4] Case law across the country granting motions to compel minors to arbitrate is in accord. (*See, e.g., A.C. by & through Carbajal v. Nintendo of Am. Inc.*, (W.D.Wash. Apr. 29, 2021) 2021 WL 1840835, at *2 [disaffirmance "does not relate to contract formation"]; *Ingram v. Neutron Holdings, Inc.*, (M.D.Tenn. 2020) 467 F.Supp.3d 575, 581 ["minor's repudiation of a contract raises a question of arbitrability"]; *Kuznik v. Hooters of America, LLC* (C.D.Ill. Oct. 8, 2020) 2020 WL 5983879, at *3-5 ["arguments regarding the voidability of the Agreement due to minority" are questions of "arbitrability"]; *Doe #1 v. College Board* (S.D.N.Y. 2020) 440 F.Supp.3d 349, 355 ["[c]ontracts signed by minors are voidable, not void"].)

within the scope of the EULA's arbitration agreement," arbitration must be compelled. (*See S.T.G. et al. v. Epic Games, Inc.* (S.D.Cal. 2024) 752 F.Supp.3d 1200, 1211.) For that reason, in similar cases alleging videogame addiction, federal district judges have repeatedly concluded that the arbitrator must decide whether a minor has validly disaffirmed the EULA. (*See, e.g.*, *Angelilli*, *supra*, 2025 WL 524276, at *15 [the EULA's delegation clause "constitutes a clear and unmistakable delegation of authority to the arbitrator" to resolve whether the minor "expressly disaffirmed" the EULA]; *Courtright*, *supra*, 2025 WL 558560, at *5 [Plaintiff's "status as a minor, and the defense of disaffirmance" are "[a]ffirmative defense" that "must be raised before the arbitrator when the contract includes a valid delegation clause"].)

**C. The EULA's Arbitration Agreement Is Valid and Enforceable Because IHG Cannot Disaffirm the Contract.**

Even if the Court were to reach arbitrability questions of validity and enforceability (as precedent consistently holds it should not), the EULA is enforceable. IHG's purported disaffirmance of the EULA is ineffective. A minor may not "repudiate a transaction upon the ground of a want of capacity" yet "at the same time retain and enjoy any benefit derived from it." (*Wright v. Hepler* (1927) 194 N.C. 542 [holding that a minor cannot "repudiate a transaction upon the ground of a want of capacity" yet "at the same time retain and enjoy any benefit derived from it."]; *see also Holland, supra,* 270 Cal.App.2d 417, 422 [describing "the equitable principle that minors, if they would disaffirm a contract, must disaffirm the entire contract, not just the irksome portions"].) While a minor may disaffirm a contract in certain circumstances, it is long settled that "the privilege of infancy is to be used as a shield, and not as a sword." (1 Farnsworth on Contracts § 4.5 (3rd ed. 2004)). Rather, both North Carolina and California law recognize that a minor "is not entitled to a windfall" when he disaffirms a contract. (*Gillis v. Whitley's Discount Auto Sales, Inc.* (N.C.Ct.App. 1984) 319 S.E.2d 661, 667; *E.K.D. ex rel. Dawes v. Facebook, Inc.* (S.D.Ill. 2012) 885 F.Supp.2d 894, 899 [explaining that "California law recognizes" that "the disability of infancy is not a sword rather than a shield,"quotation marks and alterations omitted]; *Paster v. Putney Student Travel, Inc.* (C.D.Cal. June 9, 1999) 1999 WL 1074120, at *1-2 [16-year-old could not disaffirm forum selection clause because a minor "cannot accept the benefits of a contract and then seek to void it in an attempt

to escape the consequences of a clause that do not suit her"].)

To effectively disaffirm, a minor must also stop using the counterparty's continued services. When a minor continues to use services, they "manifest an intention not to disaffirm the contract." (*C.M.D. ex rel. De Young v. Facebook, Inc.* (9th Cir. 2015) 621 F. App'x 488, 489 (unpublished); *see also Doe v. Epic Games, Inc.* (N.D.Cal. 2020) 435 F.Supp.3d 1024, 1036 [requiring minor to have stopped playing *Fortnite* to disaffirm Epic's terms of service]; *R.A. v. Epic Games, Inc.* (C.D.Cal. July 30, 2019) 2019 WL 6792801, at *7 [same].) On the other hand, when a minor "ha[s] not played [the video game] since the commencement of the lawsuit," disaffirmance may be effective. (*J.R. v. Electronic Arts Inc.* (2024) 98 Cal.App.5th 1107, 1112.)

IHG's purported disaffirmance is ineffective. According to the FAC, IHG continues to play video games, including *Fortnite*. (*See* FAC ¶¶ 13, 261 [alleging that IHG "is addicted to video games; specifically, Roblox and Fortnite"]).) Epic's records reflect that IHG has continued to play *Fortnite*, including as recently as May 17, 2025. (Saunders Decl. ¶ 68.) When Plaintiff sent a letter purporting to disaffirm the EULA, Epic offered to "disable IHG's account(s) so that they may no longer play *Fortnite*." (Libeu Decl. ¶ 2, Ex. B.) Plaintiff did not respond. (*Id.* ¶ 2.) IHG continues to retain the benefits of the EULA (i.e., access to *Fortnite*), affirming rather than disaffirming their agreement.

IHG claims that their "continued use" of *Fortnite* is "compulsive and due to IHG's addiction" and "does not serve as an affirmation of any contract." (FAC ¶ 268.) Regardless of the alleged reasons for seeking the contract's benefits, the law simply does not permit a minor to both disaffirm a contract and also continue to enjoy its benefits as IHG does here. (*See Halperin v. Raville* (1986) 176 Cal.App.3d 765, 772 [a minor cannot "adopt that part of an entire transaction which is beneficial to him/her, and then reject its burdens"].) Although counterparties accept the risk that minors may disaffirm their agreements, they do so based on long-standing principles that disaffirmance results in complete rescission.[5] IHG cannot both disaffirm the EULA and continue playing *Fortnite*. IHG has chosen to play *Fortnite*, meaning the purported disaffirmance is ineffective. IHG's claims are

[5] Sound policy reasons justify that a minor cannot selectively disaffirm. To allow that would be to let parties escape the burden of contracts while accepting the benefits. *See E.K.D. ex rel. Dawes*, *supra*, 885 F.Supp.2d at 899 ("The infancy defense may not be used inequitably to retain the benefits of a contract while reneging on the obligations attached to that benefit.").

therefore subject to arbitration, as they agreed.

**D. The Court Should Stay These Proceedings Pending Arbitration.**

Section 3 of the FAA requires a trial court to stay litigation if the action involves an issue referable to arbitration. (*See Smythe v. Uber Techs., Inc.* (2018) 24 Cal.App.5th 327, 331 n.1 [if the trial court concludes the dispute is arbitrable, it "must stay the trial in favor of arbitration" pursuant to Section 3 of the FAA].) IHG agreed to arbitrate disputes with Epic. The claims asserted against Epic in the complaint are arbitrable in their entirety. In the FAC, Plaintiff (IHG's mother) asserts no claims against Epic in her own name. She asserts claims only as IHG's guardian ad litem. (FAC Introduction [stating that "Plaintiff minor IHG" brings this action "via their Guardian ad Litem Plaintiff Evette Gibson"].) "A guardian ad litem is not a party to an action, but merely the representative of record of a party." (*McClintock v. West* (2013) 219 Cal.App.4th 540, 549, internal quotations omitted.) The only claims at issue are ones that IHG already agreed to arbitrate. The Court should therefore stay these proceedings as to Epic pending arbitration. (*Hernandez v. Sohnen Enters., Inc.* (2024) 105 Cal.App.5th 222, 240 ["The FAA required the court to stay judicial proceedings until arbitration was completed."].)

## V. CONCLUSION

IHG and Epic agreed to send their disputes to arbitration as many as eleven times over more than five years. Plaintiff's attempt to opt out of the arbitration clause *ex post* is untimely. Plaintiff also attempts to wield IHG's youth as a sword, not a shield, letting IHG continue to enjoy Epic's side of the EULA bargain—continued game play and access to *Fortnite*—and at the same time attempting to disaffirm IHG's obligation to arbitrate disputes under the same agreement. As every court to have considered nearly identical claims against Epic has done, the Court should compel Plaintiff to arbitrate IHG's claims, and stay this action pending the outcome of that arbitration.

Dated: June 18, 2025

Respectfully submitted,

HUESTON HENNIGAN LLP

By: _____
Allison L. Libeu
Attorneys for Defendant
EPIC GAMES, INC.

**PROOF OF SERVICE**

*Evette Gibson, et al., v. Roblox Corporation, Epic Games, et al.,*
Los Angeles Superior Court Case No. 24STCV32897

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 523 West 6th Street, Suite 400, Los Angeles, CA 90014.

On June 18, 2025, I caused the service of the foregoing mentioned document(s)

**DEFENDANT EPIC GAMES, INC.'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND TO STAY; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

on the interested parties in this action as stated on the Service List attached:

[X] (BY ELECTRONIC MAIL) I caused a true copy of the foregoing document(s) to be sent to the e-mail addresses as set forth below.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 18, 2025, at Los Angeles, California.

Marina G. Green
(Type or print name)

(Signature)

**SERVICE LIST**

*Evette Gibson, et al., v. Roblox Corporation, Epic Games, et al.,*
Los Angeles Superior Court Case No. 24STCV32897

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