IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GOLZAR AMIRMOTAZEDI **Plaintiff,** **v.** **VIACOM INC., *et al.*** **Defendants.**	**Civil Action No. 10-0765 (GK)**

DEFENDANTS' MOTION TO COMPEL ARBITRATION
OR, IN THE ALTERNATIVE, TO STAY THE LITIGATION

Viacom Inc., MTV Networks and Bunim-Murray Productions (together, "Defendants") respectfully move pursuant to the Federal Arbitration Act, 9 U.S.C. § 4, to compel the arbitration of Plaintiff's claims in this action or, in the alternative, to stay the litigation to permit arbitration to commence, *id*. § 3.

As grounds therefore, and as more fully set forth in their accompanying Memorandum, Defendants state that the parties to this lawsuit previously entered into a valid and enforceable agreement to arbitrate their disputes, which agreement encompasses the very claims at issue in this litigation.

Furthermore, to the extent that Plaintiff Golzar Amirmotazedi ("Plaintiff") contends that the parties' agreement is not enforceable because Plaintiff was allegedly intoxicated at the time she signed it, this contention is a challenge to the enforceability of the agreement as a whole – as distinct from the arbitration clause – and, as such, Plaintiff's alleged intoxication is an issue for the arbitrator to decide in the first instance.

Finally, even assuming Plaintiff's alleged intoxication is an issue to decided by the Court, Plaintiff cannot meet her burden of proof on this issue.

Accordingly, Defendants' Motion to Compel Arbitration should be granted and the Complaint dismissed. In the alternative, this litigation should be stayed to allow for arbitration to commence.

WHEREFORE, and for the reasons more fully set forth in their accompanying Memorandum and supporting declaration filed contemporaneously herewith, Defendants respectfully request that the Court grant their motion and provide them any such other relief as the Court deems appropriate.

REQUEST FOR ORAL ARGUMENT

Because Defendants believe that the Court would benefit from oral argument on the issues raised by their motion, Defendants respectfully request, pursuant to Local Civil Rule 7(f), a hearing on their Motion to Compel Arbitration.

CERTIFICATE OF COMPLIANCE WITH LOCAL CIVIL RULE 7(m)

The undersigned counsel for Defendants hereby certify that they have conferred with Plaintiffs' counsel in good faith concerning Defendants' Motion to Compel Arbitration. Plaintiff opposes the relief sought by Defendants.

Dated: July 6, 2010

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

By: /s/ Thomas Curley

Michael D. Sullivan, (Bar No. 339101)
Thomas Curley (Bar No. 473798)
1050 Seventeenth Street, N.W., Suite 800
Washington, D.C. 20036
Telephone: (202) 508-1100
Facsimile: (202) 861-9888
Email: tcurley@lskslaw.com

Counsel for Defendants Viacom Inc., MTV Networks and Bunim-Murray Productions

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GOLZAR AMIRMOTAZEDI **Plaintiff,** **v.** **VIACOM INC., *et al.*** **Defendants.**	**Civil Action No. 10-0765 (GK)**

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION
TO COMPEL ARBITRATION OR, ALTERNATIVELY, TO STAY LITIGATION

Viacom Inc., MTV Networks and Bunim-Murray Productions (together, "Defendants") respectfully submit this Memorandum of Points and Authorities in support of their contemporaneously filed Motion to Compel Arbitration pursuant to the Federal Arbitration Act.

STATEMENT OF FACTS

This action arises from the appearance of Golzar Amirmotazedi ("Plaintiff") on *The Real World* television program. *See* Complaint ("Compl.") ¶¶ 6-22. *The Real World* is produced and filmed by defendant Bunim-Murray Productions and the program is televised by defendant MTV Networks, a cable television network.[1] *See* Answer ¶ 5; *accord* Compl. ¶ 5. *The Real World* was first telecast by MTV in 1992 and each season of the program focuses on the lives of a diverse group of young adults who live together in a house for several months. *See* Declaration of Matthew Heitman ("Heitman Decl.") ¶ 3. The housemates are not actors, but instead they are individuals who audition for the opportunity to be on *The Real World* program. *Id*.

[1] MTV Networks is an unincorporated division of Viacom International Inc., which is a wholly owned subsidiary of defendant Viacom Inc. Answer ¶ 4.

Concisely stated, the program chronicles the lives of the housemates as they pursue career ambitions, volunteer work, friendships and romantic relationships. *Id*. ¶ 4. The city in which *The Real World* is filmed, and in which the housemates reside, varies from year to year. Answer ¶ 4; *accord* Compl. ¶ 4. In 2009, the program was filmed in the District of Columbia and the housemates resided in a home near DuPont Circle. Compl. ¶ 6.

The participants on *The Real World* program are filmed in the house in which they reside together and they are also filmed during the course of their interactions with the public. Heitman Decl. ¶¶ 5-6. When filming outside *The Real World* house, a five-person film and production crew accompanies the housemates. *Id*. ¶ 6. It is the policy of the television program to ask members of the public if they wish to appear on the program. *Id*. ¶ 7. If an individual wishes to participate, the individual is provided with a "Voluntary Participation Agreement (Guest Release)" and asked to sign the agreement – if he or she agrees to its terms. *Id*. ¶ 7. If an individual declines to sign the agreement, or otherwise wishes not to participate in the program, the producers would not include that individual in an episode of the program. *See id*.

Plaintiff initially encountered one of *The Real World* housemates at a restaurant in Georgetown on September 10, 2009, the night before the events described in Plaintiff's Complaint. *See* Declaration of Andrea Porrello ("Porrello Decl.") ¶ 3 & Exhibit ("Exh.") A. On that evening, Plaintiff was filmed by the program's production crew speaking with one of *The Real World* housemates, Josh Colon. *See id*. As with other individuals who wish to appear on *The Real World*, Plaintiff was provided with a Voluntary Participation Agreement (Guest Release). *See id*. Plaintiff signed the agreement. *See id*.[2]

[2] As indicated in the Complaint, Plaintiff's claims arise out of events occurring the *next* day and are not governed by this first agreement that she signed. *See* Compl. ¶¶ 6-22.

On the next evening, Plaintiff again met Mr. Colon, *The Real World* housemate, at a different location, The Sign of The Whale in the 1800 block of M Street. Heitman Decl. ¶ 8. Plaintiff then travelled with Mr. Colon and others to the home in which *The Real World* participants were residing. *Id*. ¶ 9.

In part because *The Real World* residence is where the housemates live during the filming of the program, the program limits access to the residence to the housemates and their invited guests, as well as to individuals otherwise associated with the program. *Id*. ¶ 10.

Individuals who wish to enter the residence are given an agreement that governs the terms of their entry as well as their appearance on *The Real World* program. *Id*. ¶ 11. *Accord* Declaration of Jenny Zimmerman ("Zimmerman Decl.") ¶¶ 8-9 ("Individuals were permitted to review the agreement for as long as they wished to do so. It was up to the individual whether to sign the agreement after reviewing it."). Individuals are also asked for identification to verify their age and identity. Heitman Decl. ¶ 11.

As with other individuals who wish to enter the home in which *The Real World* participants reside, prior to entrance Plaintiff was provided with a four-page contract titled **VOLUNTARY PARTICIPATION (GUEST RELEASE) AND ARBITRATION PROVISION** (hereinafter, "Release and Arbitration Agreement" or "Agreement").[3] The title of the Agreement indicated, in capitalized, bold face and underlined typeface, that it contained an "Arbitration Provision." Agmt. p. 1.

The contractual provision specifically pertaining to arbitration was itself titled "**MEDIATION AND ARBITRATION**" and it stated in relevant part:

[3] A copy of the Release and Arbitration Agreement executed by plaintiff is attached as Exhibit A to the Declaration of Matthew Heitman.

> **If any controversy or claim arising out of or relating to this Agreement, or the breach of any term hereof, cannot be settled through direct discussions, the parties agree to endeavor to first settle the controversy or claim by mediation conducted in the County of Los Angeles and administered by JAMS per its Commercial Mediation Rules. IF A CONTROVERSY OR CLAIM IS NOT OTHERWISE RESOLVED THROUGH DIRECT DISCUSSIONS OR MEDIATION, IT SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION CONDUCTED IN THE COUNTY OF LOS ANGELES AND ADMINISTERED BY JAMS PER ITS STREAMLINED ARBITRATION RULES** ... .

Agmt. ¶ 11. Plaintiff was given the Release and Arbitration Agreement and – if Plaintiff was willing to be bound by its terms and conditions – Plaintiff was to sign and date the Agreement, as well as to print her name, address, telephone number and date of birth. Agmt. p. 4.

Immediately above the portion of the Agreement in which Plaintiff was to provide her signature if she "ACCEPTED, ACKNOWLEDGED AND AGREED" to the contract's terms and conditions, the following language appeared:

> **I UNDERSTAND THAT I AM GIVING UP CERTAIN LEGAL RIGHTS UNDER THIS AGREEMENT, INCLUDING, WITHOUT LIMITATION, MY RIGHT TO FILE A LAWSUIT IN COURT WITH RESPECT TO ANY CLAIM ARISING IN CONNECTION WITH THIS AGREEMENT.**

Agmt. p. 4. Below this bold-faced, capitalized and underlined language, Plaintiff signed her name, printed her name, and then also provided the date, her birth date, her address and her telephone number. *Id.*

The Release and Arbitration Agreement also contained an exhibit, which required Plaintiff to verify her age. Agmt. Exh. A. Specifically, Plaintiff was again requested to print her name, date of birth and the current date. *Id.* She was also asked to sign a sworn statement certifying that she was over the age of eighteen and to initial the statement as well. *Id.* On this exhibit, Plaintiff again signed and printed her name, initialed the document, and provided the

date and her date of birth. She also provided a copy of her driver's license to confirm the accuracy of the information that she had provided. *Id*.

A television producer who saw Plaintiff at the residence on the evening she executed the Release and Arbitration Agreement observed that she "did not appear to be intoxicated." Heitman Decl. ¶ 13. *See also id*. ("From what I observed, Ms. Amirmotazedi was speaking coherently and the statements that she made in direct response to statements being made to her indicated to me that Ms. Amirmotazedi understood what was being said to her."). Another producer, also present at the residence that evening, similarly observed that Ms. Amirmotazedi was not "acting in a way that would have led me to believe that she was intoxicated." Zimmerman Decl. ¶ 10. *See also id*. ¶ 11 ("It appeared to me – again from how Ms. Amirmotazedi responded and communicated with others – that she comprehended where she was, who she was speaking with and what was being said to her. She did not appear confused to me and her speech was not slurred or unusual. Ms. Amirmotazedi also did not appear to me to be unsteady in her movements or in walking about the house.").

In addition, and insofar as is directly relevant to Defendants' Motion to Compel Arbitration, the Release and Arbitration Agreement entered into by the parties generally governed the terms of Plaintiff's participation in and appearance on *The Real World* program. *See, e.g.*, Agmt. ¶ 1 ("I grant permission to RW Productions, Inc., its affiliates, successors, licensees and assigns (collectively, 'Producer'), to film, photograph, tape, record and edit me ... during and/or in connection with the television program currently entitled 'The Real World'). The Agreement further stated: "I consent to any such recordings and give my express, unconditional and irrevocable permission to Producer to fully exploit all resulting recordings or

materials, irrespective of whether the making or exhibition of such materials might constitute a breach of any rights of privacy I otherwise might have ... ." *Id*. ¶ 5.[4]

As noted in the Release and Arbitration Agreement, while in the company of *The Real World* housemates on September 11, 2009, Plaintiff's conduct was indeed filmed. *See* Compl. ¶¶ 6-22. In March 2010, an episode of *The Real World* was telecast by MTV Networks in which Plaintiff's conduct on that date was depicted. *See id*. ¶¶ 12-13. In April 2010, Plaintiff filed this action, asserting claims for invasion of privacy and for infliction of emotional distress. The factual predicate for each of Plaintiff's claims is her depiction on *The Real World* television program. *Id*. ¶¶ 23-44.

Although Plaintiff's Complaint does not reference the Release and Arbitration Agreement, it generally alleges that Plaintiff was not in a position to consent to the Agreement because she was intoxicated. *See id*. ¶ 17 ("Plaintiff in fact was not in a position to provide her consent to Defendants portraying her"). Concisely stated, Plaintiff alleges "[o]n information and belief," that unspecified "cast members supplied" her with alcohol, thus inducing her involuntary participation in the filming of *The Real World*. *Id*. ¶ 9.

After the filing of Plaintiff's lawsuit, counsel for Defendants requested that Plaintiff participate in arbitration as required by the Agreement. Plaintiff refused.

---

[4] The Release and Arbitration Agreement contains a merger and integration clause and the Agreement permits the assignment of the rights granted by Plaintiff. Agmt. ¶ 13. The Agreement also informed Plaintiff that her conduct might not be viewed favorably by the public: "I further understand that my appearance, depiction and/or portrayal in or in connection with the Program, and my actions ... may be disparaging, defamatory, embarrassing or of an otherwise unfavorable nature, and may expose me to public ridicule ... ." Agmt. ¶ 4. The Agreement releases Defendants from any all claims arising from her participation or depiction in *The Real World*, including the claims that Plaintiff has asserted in this litigation. *See id*. ¶ 8 (releasing "without limitation" all "personal injury, invasion of privacy" and "false light" claims).

ARGUMENT

I. THE PARTIES HAVE A VALID AGREEMENT TO ARBITRATE THE CLAIMS AT ISSUE IN THIS LITIGATION AND THAT AGREEMENT IS ENFORCEABLE PURSUANT TO THE FEDERAL ARBITRATION ACT.

A motion brought pursuant to the Federal Arbitration Act ("FAA" or the "Act") should be adjudicated under the summary judgment standard of Fed. R. Civ. P. 56(c).[5] *See, e.g.*, *Aliron Int'l, Inc. v. Cherokee Nation Indus., Inc.*, Civ. Action No. 05-151 (GK), 2006 WL 1793295, at *2 (D.D.C. June 28, 2006) (Kessler, J.) (consistent with Rule 56(c) standard, a motion brought pursuant to the FAA should be granted where "there is no genuine issue as to any material fact and ... moving party is entitled to judgment as a matter of law"), *aff'd*, 531 F.3d 863 (D.C. Cir. 2008). The United States Supreme Court has also instructed that the "party resisting arbitration" – here, Plaintiff – "bears the burden of proving the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000).[6]

---

[5] Although adjudicated under the Fed. R. Civ. P. 56(c) standard, it would not appear to Defendants that a separately filed Statement of Material Facts is required. *See Wolff v. Westwood Mgmt., LLC*, 503 F. Supp. 2d 274, 278 n.3 (D.D.C. 2007) (separate statement not mandatory in context of motion to compel arbitration), *aff'd*, 558 F.3d 517 (D.C. Cir. 2009). To the extent such a statement is deemed to be required, Defendants would of course provide one. In any event, Defendants' Statement of Facts, pp. 1-6 *supra*, is intended to comply with Defendants' obligation to set forth the factual premise upon which Defendants' motion is predicated. *See* Local Civil Rule 7(a).

[6] While the FAA controls in the case of a conflict between the Act and state law, *see, e.g.*, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006), generally in "'deciding whether the parties agreed to arbitrate ..., [trial courts] should apply ordinary state-law principles that govern the formation of contracts.'" *Aliron Int'l, Inc. v. Cherokee Nation Indus., Inc.*, 531 F.3d 863, 865 (D.C. Cir. 2008) (citation omitted). Here, by its terms, the parties' Release and Arbitration Agreement calls for the application of California law in connection with "a dispute arising from or in connection with this agreement." Agmt. ¶ 12. However, even if the law of the District of Columbia were applied – the jurisdiction in which Plaintiff's claims allegedly arose, *see* Compl. ¶ 1 – the result under the FAA would be no different in this case. Accordingly, Defendants cite herein to decisions applying either District of Columbia or California contract law, as well as to federal decisions interpreting the mandate of the FAA.

The Supreme Court has repeatedly emphasized that the "unmistakably clear congressional purpose" of the FAA is to ensure that "the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). *Accord, e.g.*, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (the FAA "embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts"). By its terms the FAA mandates that "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

The FAA provides that "[a] party aggrieved by the alleged ... refusal of another to arbitrate under a written agreement for arbitration may petition [a] United States district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis in original).[7]

[7] Upon a finding that Plaintiff's claims must be submitted to arbitration, the Court should compel arbitration and dismiss this action. *See Aliron Int'l, Inc. v. Cherokee Nation Indus., Inc.*, Civ. Action No. 05-151 (GK), 2006 WL 1793295, at *3 (D.D.C. June 28, 2006), *aff'd*, 531 F.3d 863 (D.C. Cir. 2008). However, the FAA also permits a party to seek a stay of litigation to allow for arbitration, *see* 9 U.S.C. § 3, an alternative form of relief that Defendants have also sought here. Defendants have moved in the alternative because there is ambiguity as to whether a District Court may compel arbitration where, as here, the parties' Release and Arbitration Agreement requires arbitration to take place outside the forum in which the party opposing arbitration has filed suit. *See Ansari v. Qwest Commc'ns Corp.*, 414 F.3d 1214, 1218-20 (10th Cir. 2005). It does not appear that the U.S. Court of Appeals for the D.C. Circuit has addressed the propriety of compelling arbitration outside the District. *See id*. However, this Court has

The FAA applies to all agreements involving or "evidencing a transaction involving commerce," 9 U.S.C. § 2, and the Supreme Court has instructed that Congress' use of this language in the Act "indicates Congress' intent to regulate to the outer limits of its authority under the Commerce Clause," *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115-16 (2001). Here, there can be no serious dispute that Plaintiff's participation in a nationally distributed television program, *see* Compl. ¶¶ 6-22, involves interstate commerce within the meaning of the FAA. *See Cross v. Carnes*, 724 N.E.2d 828, 832 (Ohio Ct. App. 1998) (litigation arising from plaintiff's participation in nationally broadcast television talk show falls within ambit of FAA); *Powers v. Fox Television Stations, Inc.*, 923 F. Supp. 21 (S.D.N.Y. 1996) (dispute between employee and national television network governed by FAA).

In determining whether a contract governed by the FAA requires arbitration with respect to the specific claims at issue in the litigation, the Supreme Court has held that "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself must be resolved in favor of arbitration." *Volt Info. Scis., Inc. v. Bd. Of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 475-76 (1989). *Accord, e.g.*, *Wolff v. Westwood Mgmt., LLC*, 558 F.3d 517, 520 (D.C. Cir. 2009) ("'as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver,

---

granted a motion to compel arbitration where the parties' agreement required arbitration in Oklahoma. *See Aliron Int'l, Inc.*, 2006 WL 1793295, at *3.

In addition, upon a finding that Plaintiff's claims must be submitted to arbitration, it would also be appropriate for this Court to transfer this action to the Central District of California, which would indisputably have jurisdiction to compel arbitration in Los Angeles County, California, the forum for arbitration specified by the Release and Arbitration Agreement. Agmt. ¶ 11. *See Shaffer v. Graybill*, 68 Fed. Appx. 374, 377 (3d Cir. 2003) (instructing that, where district court lacks ability to compel arbitration outside forum in which litigation pending, transfer to another district court may be appropriate remedy).

delay, or a like defense to arbitrability'") (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). Arbitration "should not be denied unless it may be said with positive assurance that the [agreement] is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960).

Accordingly, in deciding whether arbitration should be compelled under the FAA, this Court must determine "whether (1) the parties entered into a valid and enforceable arbitration agreement and (2) whether the arbitration agreement encompasses the claims raised in the complaint." *United States v. Federal Ins. Co.*, 672 F. Supp. 2d 92, 97 (D.D.C. 2009).

A. The Parties Have Entered Into A Valid And Enforceable Agreement.

Here, Plaintiff cannot dispute that she executed the Release and Arbitration Agreement, as her signature establishes. *See* Agmt. p. 4. Indeed, Plaintiff signed both the Agreement and the exhibit to the Agreement, and she twice provided her address, phone number, date of birth and the current date. *See id*. & Agmt. Exh. A. She also furnished her driver's license. *Id*.

It is black-letter law that "a 'signature on a contract indicates "mutuality of assent" and a party is bound by the contract unless he or she can show special circumstances relieving him or her of such an obligation.'" *Hughes v. CACI, Inc.-Commercial*, 384 F. Supp. 2d 89, 96 (D.D.C. 2005) (citation omitted). *See also Emeronye v. CACI Int'l, Inc.*, 141 F. Supp. 2d 82, 86 (D.D.C. 2001) ("'Mutual assent to a contract, often referred to as a "meeting of the minds," is most clearly evidenced by the terms of a signed written agreement ....'") (citation omitted).

Furthermore, although Plaintiff may disclaim understanding of the Release and Arbitration Agreement's terms, it is an equally well-established legal principle that the "fact that [a] plaintiff does not recall singing the agreement, ... or that the arbitration provision was not

explained to her is insufficient to render the contract unenforceable" where that plaintiff has signed an agreement representing that her "'signature acknowledges ... [her] understanding of the requirements contained'" in the agreement. *Id*. (collecting authorities) (citation omitted).

In short, having signed the Release and Arbitration Agreement and having represented that she "ACCEPTED, ACKNOWLEDGED AND AGREED" to its terms, Agmt. p. 4, Plaintiff's failure to read or understand those terms cannot constitute "special circumstances" such that would warrant not enforcing the parties' Agreement. *Hughes*, 384 F. Supp. 2d at 96. *Accord, e.g.*, *DiGiacomo v. Ex'pression Ctr. for New Media, Inc.*, No. C 08-01768 MHP, 2008 WL 4239830, at *5 (N.D. Calif. Sept. 15, 2008) ("The fact that a contract term is not read or understood by the adhering party will not authorize a court to refuse to enforce the contract.") (enforcing arbitration agreement); *24 Hour Fitness v. Superior Court*, 78 Cal. Rptr. 2d 533, 542 (Cal. App. 1988) ("Reasonable diligence requires the reading of a contract before signing it. A party cannot use his own lack of diligence to avoid an arbitration agreement.") (internal quotation marks and citation omitted).

B. The Release And Arbitration Agreement Encompasses Plaintiff's Claims.

By its terms, the arbitration provision of the parties' Release and Arbitration Agreement encompasses "any controversy or claim arising out of or relating to this Agreement, or the breach of any term hereof ... ." Agmt. ¶ 11. Courts have repeatedly held that this type of language is intended to encompass the broadest possible range of claims. *See, e.g.*, *Hughes*, 672 F. Supp. 2d at 97 ("[t]he arbitration agreement is a broad one [as it] covers 'any dispute' between" the parties) (citation omitted); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 720-21 (9th Cir. 1999) (clause providing for arbitration of "'[a]ll disputes arising in connection with this Agreement'" "reaches every dispute between the parties having a significant relationship to the contract and

all disputes having their origin or genesis in the contract") (citation omitted). *Accord Wolff v. Westwood Mgmt., LLC*, 503 F. Supp. 2d 274, 281-82 (D.D.C. 2007) ("Where an arbitration clause is broad, arbitration is appropriate 'whenever a party has asserted a claim, however, frivolous, that on its face is governed by the contract.'") (citation omitted), *aff'd*, 558 F.3d 517 (D.C. Cir. 2009).

Here, it is beyond dispute that each of the claims asserted in Plaintiff's Complaint are claims "arising out of or relating to this Agreement, or [its] breach." Compl. ¶ 11. Indeed, Plaintiff affirmatively alleges that her claims all arise out of her participation in the television program and the telecast of *The Real World* in which her actions are depicted. *Id*. ¶¶ 6-22.

II. PLAINTIFF'S ALLEGED INTOXICATION DOES NOT NEGATE THE PARTIES' AGREEMENT TO ARBITRATE THEIR DISPUTES.

A. The Effect Of Plaintiff's Alleged Intoxication On The Parties' Agreement, If Any, Must Be Decided By The Arbitrator In The First Instance.

In her Complaint, Plaintiff alleges that she was unable to consent to participating in *The Real World* program because she was intoxicated, *see* Compl ¶ 17, and therefore the Release and Arbitration Agreement is presumably unenforceable. This argument, however, goes not to the validity of the arbitration clause itself, but rather to the enforceability of the Agreement as a whole. As a matter of law, such a challenge is *not* a determination the Court should make on a motion to compel arbitration, but rather is an issue that must be submitted to the arbitrator in the first instance. *See, e.g.*, *Buckeye Check Cashing*, 546 U.S. at 449 ("We reaffirm today that ... a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator."); *Qwest Commc'ns Corp. v. Ansari*, Civil Action No. 05-1836 (EGS), 2007 WL 172318 at *2 (D.D.C. Jan. 23, 2007) (holding that "challenge [to] the validity of the ...

Agreement as a whole," as distinct from challenge to arbitration clause specifically, "must go to an arbitrator") (citing *Buckeye Check Cashing*, 546 U.S. at 449).[8]

Indeed, even in circumstances in which courts are not without sympathy for the party opposing arbitration, it has been emphasized in the wake of the Supreme Court's 2006 decision in *Buckeye Check Cashing* that challenges to the contract *as a whole* are properly addressed to the arbitrator in the first instance. *See, e.g.*, *Brown v. Green Tree Servs., LLC*, 585 F. Supp. 2d 770, 777 (D.S.C. 2008) (arbitrator must decide challenge to agreement predicated upon contention that plaintiff's illiteracy "precluded him from exercising a meaningful choice to arbitrate" where contention concerning plaintiff's mental condition went "to the contract as a whole"); *Sommers v. Cuddy*, No. 2:08-cv-00078-BES-RJJ, 2009 WL 873983, at *3 (D. Nev. March 30, 2009) (allegation that plaintiff "lacked the mental capacity to enter into any of the agreements [and] ... was coerced into signing" agreements with arbitration clauses was challenge to validity of agreements in their entirety and thus was issue for arbitrator to decide). *See also Primerca Life Ins. Co. v. Brown*, 304 F.3d 469, 473 (5th Cir. 2002) (Dennis, C.J., concurring) (although Court "can conceive of no way in which the contract underlying this action could be enforced [by the arbitrator] against [an allegedly mentally] retarded and incompetent" plaintiff, an issue as to whether entire contract was invalid must first go to arbitration). *Accord Cross*, 724

[8] In *Buckeye Check Cashing*, the class action plaintiffs contended that the agreements they had entered into with a check cashing company were invalid under Florida law because of the high interest rates imposed by the agreements. 546 U.S. at 442-43. The agreements included an arbitration clause. *Id*. at 442. The question presented for the Supreme Court was whether, in the first instance, an arbitrator or a court should determine the propriety of the interest rates. *Id*. The Supreme Court held that, because the plaintiffs' argument was that the high interest rates rendered the contract as a whole unenforceable – as distinct from the arbitration clause alone – the issue should first be addressed by the arbitrator. *Id*. at 447-48. "It is true [that our decision] permits a court to enforce an arbitration agreement in a contract that the arbitrator [might] later find[] to be void. But [a contrary approach] permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable." *Id*. at 448-49.

N.E.2d at 830 (affirming stay under FAA to permit arbitration to proceed in litigation arising from teenager's claims that she was duped by defendants into appearing on television talk show program and then falsely portrayed as a bully during national broadcast of program).[9]

Since its decision in *Buckeye Check Cashing*, the Supreme Court has also reiterated on more than one occasion that challenges to the overall enforceability of a contract containing an arbitration clause *must* be decided by the arbitrator at the threshold. Indeed, as recently as last month the Court held that the FAA "require[s] the basis of [a] challenge to be directed specifically to the agreement to arbitrate before the court will intervene." *Rent-A-Center West, Inc. v. Jackson*, No. 09-497, 2010 WL 2471058, at *5 (U.S. June 21, 2010) (unconscionability challenge to entire agreement must first be decided by arbitrator). *See also Preston v. Ferrer*, 552 U.S. 346, 349 (2008) ("when parties agree to arbitrate all disputes arising under their contract, questions concerning the validity of the entire contract are to be resolved by the arbitrator in the first instance, not by a federal or state court") (rejecting a television personality's

[9] Although intoxication is sometimes asserted as a defense to the enforcement of a contract claim, *see infra* at pp. 15-16, Defendants are not aware of a decision addressing the assertion of such a defense in the FAA context following the Supreme Court's decision in *Buckeye Check Cashing* four years ago. In part because alcoholism has come to be understood as a type of illness, *see* Restatement (Second) of Contracts § 16 (1981), an intoxication defense to the enforcement of a contract has been analogized to "mental capacity" defenses to contract claims more generally – defenses such as minority, illiteracy or mental retardation. Regarding this more general issue of whether the FAA requires some or all types of mental capacity defenses to be decided by an arbitrator in the first instance, the Supreme Court itself explicitly declined to reach the issue in *Buckeye Check Cashing*. *See* 546 U.S. at 444 n.1. Both prior to and after the decision in *Buckeye Check Cashing*, courts have reached different results in applying the FAA to a variety of mental capacity defenses directed at a contract also containing an arbitration clause, the results of course turning to some degree on the nature of the defense and the factual circumstances in which it arises. *Compare Spahr v. Secco*, 330 F.3d 1266 (10th Cir. 2003) (claim that plaintiff suffered from Alzheimer's disease and thus lacked mental capacity to enter into contact should be decided by court) *with Primerica Life Ins. Co. v. Brown*, 304 F.3d 469 (5th Cir. 2002) (claim that plaintiff was mentally retarded and thus lacked mental capacity to enter into contract should be decided by arbitrator).

assertion that a state agency, not an arbitrator, should decide whether a services contract was void for violating the California Talent Agencies Act).

In this case, the parties have entered into a valid and enforceable arbitration agreement. The Release and Arbitration Agreement plainly encompasses the claims that Plaintiff has asserted in this action. To the extent that Plaintiff challenges the enforceability of the Agreement based upon her alleged intoxication, such a challenge goes to the contract as a whole – not simply to the arbitration provision – and therefore the issue must be decided by the arbitrator.

B. Even Assuming The Effect Of Plaintiff's Alleged Intoxication On The Parties' Agreement Is For The Court To Decide, Plaintiff Cannot Meet Her Burden Of Establishing That The Agreement Must Be Rescinded.

Even assuming that the effect of Plaintiff's alleged intoxication on the Parties' Agreement is an issue for the Court to decide, which – as demonstrated above – it is not, Plaintiff cannot meet her burden of establishing that the Agreement should be rescinded. It bears emphasis that Plaintiff – as the "party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration" pursuant to the FAA. *Green Tree Fin. Corp.-Ala.*, 531 U.S. at 91. Similarly, as a matter of contract law, a litigant challenging the enforcement of an agreement by raising a mental capacity defense bears the burden of demonstrating "that such mental infirmity rendered the person *incompetent to execute the particular transaction*." *Uckele v. Jewett*, 642 A.2d 119, 122 (D.C. App. 1994) (emphasis in original). *See also id.* ("'an adult is competent to enter into an agreement and the burden of proof is on the party asserting incompetency'") (citation omitted). Furthermore, pursuant to Rule 56(c), Plaintiff cannot simply rely on the unverified allegations of her Complaint in response to Defendants' Motion to Compel Arbitration, but she must instead come forward with admissible testimony to support her evidentiary contentions. *See Aliron Int'l*, 2006 WL 1793295, at *2 (a "nonmoving party has

[an] affirmative duty 'to provide evidence that would permit a reasonable jury to find' in its favor") (quoting *Laningham v. U.S. Navy*, 813 F.2d 1236, 1242 (D.C. Cir. 1987)).

Courts are appropriately skeptical of a plaintiff's *post-hoc* claims that he or she was too intoxicated to enter into a contractual agreement. The standard is not simply whether a plaintiff had been drinking alcohol before entering into an agreement; on the contrary, the standard requires a plaintiff to demonstrate conclusively that he was so inebriated as to actually be "unable to comprehend the nature and consequences of the instrument he executed." *Lucy v. Zehmer*, 84 S.E.2d 516, 520 (Va. 1954). *See also id*. at 519 (enforcing contract for purchase of land despite party's testimony that "[h]e took a good many drinks" and was "'high as a Georgia pine'" where individual was otherwise able to understand the consequences of his actions) (citation omitted). *See also, e.g.*, *First State Bank of Sinai v. Hyland*, 399 N.W.2d 894, 896-97 (S.D. 1987) (enforcing promissory note against defendant whose "problems with alcohol [had] five times resulted in his involuntary commitment to hospitals" but where he had otherwise "failed to carry [his] burden of proving his incompetence ... when he signed the note"); *Reiner v. Miller*, 478 S.W.2d 283, 285 (Mo. 1972) (rejecting party's contention that conveyance of property should necessarily be set aside "because she had drunk nine beers" prior to entering into transaction). *See also Snittjer v. Paterni*, 165 N.W. 175, 176 (Iowa 1917) ("[t]hat plaintiff may have been somewhat exhilarated or intoxicated [and] so that he did not give the matters involved proper attention or fully realize the situation" is an insufficient basis to void agreement; instead, plaintiff must have been "so drunk as to be incapable of understanding the nature and effect of the agreement, or its consequences") (enforcing conveyance against party who executed agreement under influence of alcohol). *Compare Guidici v. Guidici*, 41 P.2d 932, 933-34 (Cal. 1935) (per curiam) (challenged agreement properly set aside by the trial court where party

presented multiple witnesses who testified that – for up to two weeks prior to signing real estate conveyance – party was drinking so regularly and so heavily that he was barely able to speak).[10]

Here, Plaintiff's Complaint – relying upon unsworn allegations made "[o]n information and belief" – simply asserts that Plaintiff was intoxicated. *See* Compl. ¶¶ 9-11. Overall, the Complaint appears to have been crafted to leave the misimpression that Plaintiff was somehow taken advantage of by a group of strangers whom she met for the first time on September 11, 2009. *Id*. ¶¶ 7-11. For example, Plaintiff alleges that she "happened" to encounter *Real World* housemate Josh Colon and others on September 11 as Plaintiff and her companion "were passing by" The Sign of the Whale restaurant. Compl. ¶¶ 7-8. In fact, Plaintiff initially met Mr. Colon the evening prior at a different location. *See* Porrello Decl. ¶ 3 & Exh. A. Plaintiff was filmed in connection with Mr. Colon on September 10, 2009 and, moreover, the production crew accompanying Mr. Colon on that date provided Plaintiff with a Voluntary Participation Agreement (Guest Release) in connection with seeking Plaintiff's consent to being filmed. *See id*. Plaintiff signed the agreement and dated it September 10. *See id.*.

The very next day, Plaintiff again met Mr. Colon and others at The Sign of the Whale. Heitman Decl. ¶ 8. In other words, Plaintiff was filmed by *The Real World* production crew on two successive days, in the company of certain of the same individuals, and on *both* of those

[10] Apparently, the leading District of Columbia decision squarely addressing an intoxication defense to the enforcement of a contract was decided some one hundred and thirty years ago. *See Harmon v. Johnston*, No. 2482, 1873 WL 15830, at *1 (D.C. Sup. Sept. Term 1873) (setting aside conveyance of deed where it was established that party to transaction "was suffering under a disease called alcoholism ... and that he was not competent to contract"), *aff'd*, 94 U.S. 371 (1876). More recently, in the general context of a mental incapacity defense, the D.C. Court of Appeals has emphasized that the burden to establish such a defense is a high one indeed. *Uckele v. Jewett*, 642 A.2d 119, 121 (D.C. 1994) (affirming directed verdict against litigant asserting mental capacity defense despite testimony that party to challenged transaction "had difficulty recognizing his grandchildren," "lived in filthy conditions," and "was not attentive to his health in the sense of making sure that the roaches stayed out of his food").

days Plaintiff signed agreements consenting to being filmed. Plaintiff's Complaint conspicuously omits mention of these two agreements that she signed on successive dates.

With respect to the events of September 11, 2009 giving rise to the Complaint, Plaintiff purports to have no recollection of much of that evening, save for her recollection that she had "between 8 to 10 alcoholic beverages" and that these drinks were allegedly "fed" or "supplied" to Plaintiff by *Real World* "cast members" she does not otherwise identify. Compl. ¶ 9.

However, these assertions are insufficient to establish Plaintiff's burden of proof concerning her alleged intoxication and, moreover, these allegations are inconsistent with the observations of others who were present. *See* Heitman Decl. ¶ 13 ("Her [Plaintiff's] speech was not slurred nor was her speech otherwise unusual. … From what I observed, Ms. Amirmotazedi was speaking coherently and the statements that she made in direct response to statements being made to her indicated to me that Ms. Amirmotazedi understood what was being said to her."). *Accord* Zimmerman Decl. ¶ 11 ("It appeared to me – again from how Ms. Amirmotazedi responded and communicated with others – that she comprehended where she was, who she was speaking with and what was being said to her."). Nor would Plaintiff have even been permitted to enter *The Real World* residence had she appeared to be intoxicated. *See* Heitman Decl. ¶ 12. *Accord* Zimmerman Decl. ¶ 5 ("It is the program's policy that individuals who appear to be intoxicated are not permitted to enter the house, even if that individual has been invited to the residence by a housemate featured on the television program. I have witnessed circumstances in which individuals were not permitted to enter the house because that person appeared to be intoxicated.").

Furthermore, Plaintiff was of course filmed on the evening in question, and the *Real World* episode upon which Plaintiff bottoms her claims negates her contention that she lacked

sufficient capacity to enter into the Release and Arbitration Agreement. In that episode, a copy of which is attached to the Declaration of Matthew Heitman, Plaintiff is speaking coherently and, self-evidently, exhibiting the capacity to understand what is being said to her and to react to those statements.[11] *See* Heitman Decl. Exh. C. In short, even if Plaintiff had been drinking alcohol earlier, the contemporaneously filmed footage of her conduct on the evening at issue, establishes that Plaintiff in fact had sufficient mental capacity to enter into the Release and Arbitration Agreement. *See id*. In the footage, Plaintiff plainly comprehends what is being said to her and she responds accordingly. *See id*.[12]

At bottom, even assuming that the effect of Plaintiff's alleged intoxication on the Parties' Release and Arbitration Agreement is an issue for the Court to decide, Plaintiff cannot meet her burden of establishing that the Agreement should not be enforced under the circumstances.

CONCLUSION

The parties to this lawsuit have entered into a valid and enforceable agreement to arbitrate, which agreement encompasses the very claims at issue here. Plaintiff's contention that

[11] Plaintiff first appears approximately thirty-two minutes into the episode. Plaintiff then appears in the ensuing three minutes of the program and she does not appear again. *See* Heitman Decl. Exh. C. In the DVD submitted with the Heitman Declaration, there are brief segments of the DVD in which a blank screen temporarily appears. These are segments in which commercials would have appeared but the commercials have been omitted in the version submitted to the Court.

[12] In her Complaint, Plaintiff makes much of additional footage from the episode posted on MTV's website. *See* Compl. ¶¶ 17-18. According to Plaintiff, this footage demonstrates that she personally consumed multiple drinks on September 11, 2009. *See id*. In the footage, however, a *Real World* housemate (and not Plaintiff) appears to describe what he and/or a group of individuals may have had to drink over the course of an evening. *See* Heitman Decl. Exh. D (attaching copy of footage). In any event, even accepting Plaintiff's version of events, Plaintiff is again seen on this very footage walking normally, speaking coherently and reacting in a comprehending fashion to statements made to her. *See id*. The footage thus negates the conclusion that Plaintiff was incompetent to enter into the Release and Arbitration Agreement.

she could not properly consent to the Release and Arbitration Agreement due to her alleged intoxication is a challenge to the enforceability of the Agreement as a whole and, as such, her alleged intoxication is an issue for the arbitrator to decide in the first instance. Furthermore, even assuming Plaintiff's alleged intoxication is an issue to be decided by the Court, Plaintiff cannot meet her burden of proof on this issue. Accordingly, Defendants' Motion to Compel Arbitration should be granted and the Complaint dismissed. In the alternative, this litigation should be stayed to allow for arbitration to commence.[13]

Dated: July 6, 2010

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

By: /s/ Thomas Curley

Michael D. Sullivan, (Bar No. 339101)
Thomas Curley (Bar No. 473798)
1050 Seventeenth Street, N.W., Suite 800
Washington, D.C. 20036
Telephone: (202) 508-1100
Facsimile: (202) 861-9888
Email: tcurley@lskslaw.com

Counsel for Defendants Viacom Inc., MTV Networks and Bunim-Murray Productions

[13] As noted, *see* fn. 7 *supra*, it would also be appropriate for the Court to transfer this action to the Central District of California for the entry of an order compelling arbitration in Los Angeles County, the forum designated by the Agreement. *See* Agmt. ¶ 11.

CERTIFICATE OF SERVICE

Except as indicated below, I hereby certify that, on this 6th day of July 2010, a copy of the foregoing (1) Defendants' Motion to Compel Arbitration or, in the Alternative, to Stay the Litigation; (2) Defendants' Memorandum in support of their Motion; (3) a Proposed Order; (4) the Declaration of Matthew Heitman; (5) the Declaration of Jenny Zimmerman; and (6) the Declaration of Andrea Porrello were served via ECF upon counsel of record.

Exhibits C and D to the Declaration of Matthew Heitman were served via first-class mail, postage prepaid upon counsel for Plaintiff at the following address:

Jason H. Ehrenberg, Esq.
BAILEY & EHRENBERG PLLC
1015 18th Street, N.W., Suite 601
Washington, D.C. 20036

/s/ Thomas Curley

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.
1050 Seventeenth Street, N.W., Suite 800
Washington, D.C. 20036
Telephone: 202-508-1100
Facsimile: 202-861-9888
Email: tcurley@lskslaw.com