JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 16-0504-DOC (FFMx) Date: June 27, 2016

Title: HOLLY ATTIA, ET AL. V. THE NEIMAN MARCUS GROUP, INC., ET AL.

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Deborah Goltz	Not Present
Courtroom Clerk	Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFF: None Present	ATTORNEYS PRESENT FOR DEFENDANT: None Present

PROCEEDINGS (IN CHAMBERS): ORDER GRANTING MOTION TO COMPEL ARBITRATION [10]

Before the Court is Defendant The Neiman Marcus Group LLC's ("NMG" or "Defendant") Motion to Compel Arbitration ("Motion") (Dkt. 10). The Court finds this matter appropriate for resolution without oral argument. Fed. R. Civ. P. 78; L.R. 7-15. Having reviewed the moving papers and considered the parties' arguments, the Court hereby GRANTS the Motion as to Plaintiffs' individuals claims.

I. Background

On December 31, 2015, Holly Attia ("Attia"), Roshanak Basti ("Basti"), Niloofar Eshaghbeigl ("Eshaghbeigl"), Michelle Girard ("Girard"), Elise Kelley ("Kelley"), Kim Marconi ("Marconi"), Isabel Romero ("Romero"), and David Tolbert ("Tolbert") (collectively, "Plaintiffs") filed this lawsuit in Orange County Superior Court. Complaint ("Compl.") (Dkt. 1-3). Plaintiffs filed a First Amended Complaint ("FAC") (Dkt. 1-5) on February 11, 2016. Defendant removed the case to this Court on March 17, 2016 (Dkt. 1).

Plaintiffs, all former NMG employees, were hired at various times between December 1999 and November 2013 as non-exempt sale associations in Defendant's

Newport Beach and Beverly Hill stores. FAC ¶¶ 12–19. Plaintiffs assert the following eight claims against Defendant: (1) failure to pay hourly wages and overtime wages in violation of California Labor Code § 510; (2) failure to pay minimum wages in violation of California Labor Code §§ 1194, 1197; (3) failure to provide rest periods and/or meal periods or compensation in lieu thereof in violation of California Labor §§ 226.7, 512; (4) failure to indemnify necessary expenses in violation of California Labor Code § 2802; (5) failure to timely pay wages due at termination in violation of California Code § 203; (6) knowing and intentional failure to comply with itemized employee wage statement provisions in violation of California Labor Code § 226; (7) violation of unfair competition law in violation of California Business and Professions Code § 17200, *et seq*. ("UCL"); and (8) a representative claim pursuant to California Private Attorneys' General Act, California Labor Code § 2698, *et seq. See generally* FAC.

In January 2013, NMG distributed a memorandum, which included the arbitration agreement ("Arbitration Agreement" or "Agreement") at issue, to all of its employees. Declaration of Nina Kern ("Kern Decl.") (Dkt. 10-2) ¶ 2. After receiving the Arbitration Agreement (as well as the code of conduct and employee handbook), Defendant asked employees to acknowledge receipt of the Arbitration Agreement on the company's electronic human resources system. *Id.* ¶ 3. Using an individual sign-in number and self-selected pass code or pin number, Plaintiffs "were presented with an option to acknowledge receipt of the Code of Conduct, Employee Handbook, and Arbitration Agreement." *Id.*

The Arbitration Agreement, which is labeled "The Neiman Marcus Group, Inc. Mandatory Arbitration Agreement," contains the following introductory paragraph:

> Each Employee's employment or continued employment with the Company after the Effect Date constitutes assent, acceptance, consent, and consideration for this Agreement to arbitrate, both during the time of employment and after termination of employment.

Kern Decl. Ex. A ("Arbitration Agreement") (Dkt. 10-3) at 2.[1]

Relevant here, Section 7 of the Arbitration Agreement – entitled "Arbitrator's Authority" – provides:

> The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any claim or Dispute

[1] The Court notes it cites to the page numbers of the Exhibit, not to the page numbers listed on the bottom of the Arbitration Agreement.

> relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to, any claim that all or any part of this Agreement is void or voidable.

Id. at 3–4. The parties refer to Section 7 as the delegation clause.

Additionally, the Arbitration Agreement contains a choice of law clause. Section 10, which is labeled "Governing Law," specifically provides:

> This Agreement shall be governed by, construed under and enforced in accordance with the Federal Arbitration Act, 9 U.S.C. § 1 et. seq. ("FAA"). Any grounds, claims or defenses that may exist at law or in equity to challenge the validity or enforceability of the Agreement, including fraud, duress or unconscionability, as provided under Section 2 of the FAA shall be determined by the Arbitrator in accordance with Texas law.

Id. at 4.

The last page of the Arbitration Agreement includes the following:

> By clicking below, I acknowledge and affirm that:
>
> I have received and had an opportunity to review The NMG Mandatory Arbitration Agreement, which sets forth the terms and conditions of NMG's binding arbitration program which provides that arbitration is the exclusive means of resolving any and all disputes or claims I or the Company may have against each other, arising out of or connected in any way with my employment with NMG, in lieu of a judge or jury trial. THE COMPANY HAS ADVISED ME THAT IF I ACCEPT OR CONTINUE EMPLOYMENT WITH THE COMPANY I AM DEEMED TO HAVE ACCEPTED THE MANDATORY ARBITRATION PROGRAM[.]
>
> . . .
>
> Click here to acknowledge receipt of The Neiman Marcus Group, Inc. Mandatory Arbitration Agreement.

Id. at 6.

The Arbitration Agreement includes several other provisions outlining specific arbitration procedures. For instance, it provides for "arbitration on an individual basis" and states the arbitration will be "administered by JAMS, a third party alternative dispute resolution provider." Arbitration Agreement at 2. The Arbitration Agreement also contains a provision addressing costs. In particular, the Arbitration Agreement states Defendant "NMB will pay JAMS mediation and arbitration fees and other costs directly to JAMS relating to the mediation and/or arbitration proceeding." *Id.* at 3. That clause also states "[b]ecause the JAMS Optional Arbitration Appeal Procedures are optional, the party electing to appeal the Arbitrator's decision will be responsible for paying JAMS' arbitration fees for the appeal process." *Id.*

Defendant filed the instant Motion on April 20, 2016. In the Motion, Defendant seeks to compel arbitration of Plaintiffs' individual claims. Mot. at 18. Defendant does not seek to compel arbitration of Plaintiffs' representative PAGA claim; rather, it asks the Court to sever the PAGA waiver contained in the Arbitration Agreement and to stay the action pending completion of arbitration. *Id.*

Plaintiffs opposed the Motion on May 16, 2016 (Dkt. 11), and Defendant replied on May 23, 2016 (Dkt. 12).

II. Legal Standard

As a preliminary matter, the Court recognizes that "an agreement to arbitrate is a matter of contract: 'it is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration.'" *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)).

The Federal Arbitration Act ("FAA") governs the enforceability of written arbitration provisions in certain contracts involving interstate commerce. *See* 9 U.S.C. § 1, *et seq.*; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24-26 (1991). This statute reflects a "liberal federal policy favoring arbitration agreements." *Gilmer*, 500 U.S. at 25 (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

To order arbitration under the FAA, the court must be satisfied (1) that there exists a valid, written agreement to arbitrate in a contract; and (2) that the agreement to arbitrate encompasses the dispute at issue. *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008); *see also* 9 U.S.C. § 2. The party moving to compel arbitration bears the

burden of proving the two prongs. *See Bryant v. Serv. Corp. Int'l*, 801 F. Supp. 2d 898, 904 (N.D. Cal. 2011).

The first prong of the FAA's two-part test – the existence of a valid, written agreement to arbitrate in a contract – is governed by state contract law. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31 (2009); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892 (9th Cir. 2002); *see also* 9 U.S.C. § 2 ("[Arbitration agreements] shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*.") (emphasis added). It is well settled that the existence of a valid, written agreement to arbitrate in a contract is generally an issue for the court, not an arbitrator, to decide. *Granite Rock Co. v. Int'l Broth. of Teamsters*, 561 U.S. 287, 296 (2010).

In determining the second prong, the court looks to "whether the party seeking arbitration is making a claim which on its face is governed by the contract." *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 568 (1960). Ambiguities regarding the scope of the arbitration provision must be interpreted in favor of arbitration. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995).

In evaluating a motion to compel arbitration, courts treat the facts as they would when ruling on a motion for summary judgment, construing all facts and reasonable inferences that can be drawn from those facts in a light most favorable to the non-moving party. *See Hutchins v. DIRECTV Customer Serv., Inc.*, 1:11-CV-422-REB, 2012 WL 1161424, at *4 (D. Idaho Apr. 6, 2012); *Geoffroy v. Washington Mut. Bank*, 484 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007). If there is a factual dispute regarding whether an agreement to arbitrate was made, the court must try the issue. *See* 9 U.S.C. § 4 ("If the making of the arbitration agreement . . . be in issue, the court shall proceed summarily to the trial thereof. . . . [T]he party alleged to be in default may . . . demand a jury trial of such issue . . . .").

III. Discussion

Defendant seeks to compel arbitration of Plaintiffs' individual claims and stay the case pending completion of arbitration. Mot. at 2. NMG states the Arbitration Agreement between the parties is valid and enforceable, and that it covers the claims at issue. Mot. at 9–10.

A. Plaintiffs make the following arguments in their Opposition: (1) Defendant waived its right to seek arbitration; (2) the Arbitration Agreement's

delegation clause is unconscionable; and (3) various provisions of the Arbitration Agreement render it unconscionable and illusory. Opp'n at 1–2. The Court will address these issues in turn.**Waiver**

As an initial matter, Plaintiffs contend Defendant waived its right to seek arbitration. Opp'n at 21. Plaintiffs specifically argue "Defendant waived its right to arbitration when it filed an answer, removed the action to Federal Court, and then participated in the Rule 26f conference with Plaintiffs' counsel prior to filing this motion; thereby, selecting its forum to litigate this action." *Id.* In support of this argument, Plaintiffs cite two cases from the Seventh Circuit. *See id.*

The Court is mindful the waiver inquiry "must be conducted in light of the strong federal policy favoring enforcement of arbitration agreements." *Cox*, 533 F.3d at 1125 (citations and internal quotation marks omitted). "[W]aiver of the right to arbitration is disfavored because it is a contractual right, and thus any party arguing waiver of arbitration bears a heavy burden of proof." *Ford v. Yasuda*, No. 5:13-cv-01961-PSG-DTB, 2015 WL 3650216, at *4 (C.D. Cal. Apr. 29, 2015) (citations omitted). Courts in the Ninth Circuit consider six factors in determining whether a party has waived its right to compel arbitration:

> (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place; and (6) whether the delay affected, misled, or prejudiced the opposing party.

Cox, 533 F.3d at 1124 (citation omitted). NMG contends "[n]ot one factor supports a finding of waiver in this circumstance." Reply at 3.

The Court agrees: the circumstances of this case do no warrant a finding of waiver. Plaintiffs did not address the *Cox* factors in their Opposition, but the Court will briefly analyze them nonetheless. Defendant filed the instant Motion shortly after removing the matter to this Court; thus, the Court does not find strong evidence Defendant's actions were inconsistent with the right to arbitration. Further, "no

dispositive motions have been filed and no trial date has been set." *Simmons v. Morgan Stanley Smith Barnely, LLC*, 872 F. Supp. 2d 1002, 1011 (S.D. Cal. 2012). Thus, "[t]he Court finds that the second and third waiver factors (i.e. 'whether the litigation machinery has been substantially invoked' and 'whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay') do not favor a finding of waiver." *Id.* (citations omitted). Additionally, Defendant has neither filed a counterclaim nor have the parties served any discovery. *See* Reply at 5. And Plaintiffs have not compelling articulated any prejudicial effect. *See* Opp'n at 21–22.

Based on the *Cox* factors, the Court finds Defendant has not waived its right to seek arbitration. Thus, the Court will proceed to consider whether the Arbitration Agreement's delegation clause is unconscionable, and if so, whether the agreement as a whole is invalid or unenforceable.

B. Delegation Clause

The parties dispute whether the delegation clause is enforceable. *See* Mot. at 7. Defendant argues the Arbitrator should resolve any disputes regarding the enforceability of the Arbitration Agreement – not the Court. *Id.* Plaintiffs challenge the delegation clause on the grounds it is unconscionable. Opp'n at 7. The Court will consider these arguments below.

1. Legal Standard

The question whether parties have submitted a particular dispute to arbitration is "an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise." *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986). "[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." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010) (citations omitted).

Two prerequisites must be satisfied for a delegation clause to be effective. First, "the language of the clause must be clear and unmistakable." *Pinela*, 238 Cal. App. 4th at 239. Second, "the delegation must not be revocable under state contract defenses to enforcement." *Id.* at 240. These state contract defenses include unconscionability. *Id.*

"Under California law, a contractual provision is unenforceable if it is both procedurally and substantively unconscionable." *Kilgore v. KeyBank Nat'l Ass'n*, 718 F.3d 1052, 1058 (9th Cir. 2013) (citing *Armendariz Found. Health Psychcare Servs.*,

Inc., 24 Cal.4th 83, 114 (2000)). "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Armendariz*, 24 Cal. 4th at 114. "[T]he party opposing arbitration has the burden of proving the arbitration provision is unconscionable." *Higgens v. Superior Court*, 140 Cal. App. 4th 1238, 1249 (2006) (quotation omitted).

"Procedural unconscionability exists where a contract exists imposes 'oppression or surprise due to unequal bargaining power.'" *Free Range Contend, Inc. v. Google Inc.*, Case No. 14-cv-02329-BLF, 2016 WL 2902332, at *7 (quoting *Armendariz*, 24 Cal. 4th at 114). "Substantive unconscionability exists where a term is 'so one-sided as to shock the conscience, or [] impose harsh or oppressive terms.'" *Id.* (citation and internal quotation marks omitted).

2. Analysis

The Court now turns to whether the delegation clause is enforceable. In order to be enforceable, the (1) language of the delegation clause must be "clear and unmistakable," and (2) the delegation clause must not be revocable under state contract defenses to enforcement.

With respect to the first prerequisite, the language is clear. The delegation clause provided at Section 7 clearly states, "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any claim or Dispute relating to the interpretation, applicability, enforceability or formation of this Agreement . . . ." Based on this language, the Court finds the parties clearly and unmistakably delegated the question of arbitrability to the Arbitrator.

"Because a court must enforce an agreement that, as here, clearly and unmistakably delegates arbitrability questions to the arbitrator, the only remaining question is whether the particular agreement to *delegate* arbitrability—the Delegation Provision—is itself unconscionable." *Brennan v. Opus Bank*, 796 F.3d 1125, 1132 (9th Cir. 2015). Here, Plaintiffs argue the California Court of Appeals' decision in *Pinela* "compels a finding" the delegation clause is unenforceable. Opp'n at 7 (referencing *Pinela v. Neiman Marcus Group, Inc.*, 238 Cal. App. 4th 227 (2015)).

Plaintiffs specifically assert the delegation clause is procedurally unconscionable because "Defendant prepared a 'Mandatory Arbitration Agreement' and presented it to Plaintiffs on a take-it-or-leave it basis." Opp'n at 9 (citation omitted). Plaintiffs also argue they were not given the opportunity to discuss or negotiate the terms of the

Arbitration Agreement, or consult with an attorney; rather, Plaintiffs state they "had no option but to go into the [online] system and click on the link acknowledging receipt of all of these documents, even though [they were] never given a physical copy of any of them prior to logging in." *See* Declaration of Holly Attia ("Attia Decl.") (Dkt. 11-1) ¶ 4. According to Plaintiffs, the "Ninth Circuit has held that contracts of adhesion, as a matter of law, are procedurally unconscionable." Opp'n at 10. In response, Defendant argues that "just because an arbitration agreement may be a contract of adhesion *does not* automatically render it procedurally unconscionable." Reply at 6 (citing *Maribel Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237 (2016)).

Plaintiffs have the better of this argument. California courts have recognized "the issue of delegating arbitrability questions to an arbitrator is a rather arcane issue upon which parties likely do not focus." *Pinela*, 238 Cal. App. 4th at 243 (citation and internal quotation marks omitted). This contributes to the procedural unconscionability of the clause. *Id.* Further, NMG does not dispute the Arbitration Agreement was presented on a take-it-or-leave-it basis. As a court in this District recognized, "[a]n arbitration agreement that is an essential part of a 'take it or leave it' employment condition, with more, is procedurally unconscionable." *Fardig v. Hobby Lobby Stores, Inc.*, SACV 14-561 JVS(ANx), 2014 U.S. Dist. LEXIS 87284, at *10 (C.D. Cal. June 13, 2014) (citation and internal quotation marks omitted).

The Court acknowledges "the take-it or leave-it employment contract scenario" generally "only results in a minimal degree of procedural unconscionability." *Id.* (citations omitted); *see also Ali v. J.P. Morgan Chase Bank, N.A.*, No. 14-15076, 2016 WL 1380922, at *1 (9th Cir. Apr. 7, 2016) ("Adhesive contracts are at least minimally procedurally unconscionable under California law."). However, in this case, the concerns with the delegation clause are compounded by the choice of law clause, which as set forth above, provides that Texas law shall govern any questions concerning the validity or enforceability of the Arbitration Agreement. As the California Court of Appeals explained in *Pinela*, "without going to the expense of hiring a lawyer—not just any lawyer, but a Texas lawyer skilled in the intricacies of arbitrability, with the choice of law overlay presented her—and then having sufficient time to seek and obtain legal advice from that lawyer, Pinela was not in a position to make an informed assessment of the consequences of agreeing to delegate all questions" related to the validity and enforcement of the Arbitration Agreement. *See Pinela*, 238 Cal. App. 4th at 244. Thus, "[a]lthough the delegation clause was not hidden from [Plaintiffs], it might as well have been." *Id.* Accordingly, the take-it-or-leave-it nature of the Arbitration Agreement coupled with Texas choice of law provision leads the Court to conclude there is slightly

more than a minimal degree of procedural unconscionability with respect to the delegation clause at issue here.

In terms of substantive unconscionability, *Pinela* is again instructive. In *Pinela*, the plaintiff argued the delegation provision was unconscionable in light of the interaction between that provision and the choice of law provision. *Id.* at 246. Specifically, the plaintiff argued the choice of law provision unfairly prevented him from raising arguments regarding unconscionability under California law; instead, he was limited to making those arguments under Texas law. *Id.* The California appellate court noted that "[c]hoice-of-law provisions contained in [adhesion] contracts are usually respected. Nevertheless, the forum will scrutinize such contracts with care and will refuse to apply any choice-of-law provision they may contain if to do so would result in substantial injustice to the adherent." *Id.* at 247 (citations and internal quotation marks omitted). The *Pinela* court ultimately concluded the "elimination of Pinela's ability to contend that the NMG Arbitration Agreement as a whole is unconscionable under California law renders the delegation clause substantively unconscionable." *Id.* at 248; *see id.* at 249–50 (noting the delegation clause imposed "burdens that are not an inherent feature or consequence of delegation clauses generally, and that were not borne equally to both contracting parties").

The same situation is present here. When considered together, the delegation and the choice of law clauses *require* the Arbitrator to apply Texas law in deciding whether the Arbitration Agreement as a whole is valid and enforceable. *See* Arbitration Agreement at 4 (noting any challenge to the validity or enforcement of the Agreement "shall be determined by the Arbitrator in accordance with Texas law"). Thus, as in *Pinela*, the Arbitration Agreement prevents Plaintiffs from arguing the delegation clause is unconscionable under California law. *See Meadows v. Dickey's Barbecue Rests., Inc.*, Case No. 15-cv-02139-JST, 2015 WL 7015396, at *11 (N.D. Cal. Nov. 12, 2015) ("The [*Pinela*] court then held that the delegation clause was substantively unconscionable because the Texas choice-of-law provision would restrict plaintiffs from using California unconsionability arguments in challenging the enforceability of the arbitration provision or from limiting the choice-of-law provision to prevent substantial injustice.") (citing *Pinela*, 238 Cal. App. 4th at 249).

Defendant fails to offer any compelling response to this argument. Indeed, rather than attempting to distinguish the instant case from *Pinela*, Defendant states that "[t]o the extent that Plaintiffs are challenging the limited choice of law provision in the delegation clause, NMG stipulates that the arbitrator will apply California law to any challenge to the validity or enforceability of the Agreement." Reply at 6. However, NMG provides no authority to suggest it can now simply ignore the language of the delegation clause –

which clearly provides Texas law should govern challenges to validity or enforcement – and instead agree to use California law. Evaluating the delegation clause as written, the Court finds it suffers from the same substantive defect as the clause in *Pinela*.

Based on the above, the Court finds the delegation clause is both procedurally and substantively unconscionable. "No matter how finely" the Court calibrates "the scale at each end, the combination of both meets the overall test of unconscionability." *Pinela*, 238 Cal. App. 4th at 250. Accordingly, the delegation clause is unenforceable under California law. Having determined the delegation clause is unenforceable, the Court must next consider whether the Arbitration Agreement, as a whole, is enforceable.[2]

C. Arbitration Agreement as a Whole

The parties dispute whether the entire Arbitration Agreement is unconscionable. Defendant argues the Arbitration Argument as a whole is neither procedurally nor substantively unconscionable. Mot. at 11.

Plaintiffs argue the Arbitration Agreement is unconscionable for several reasons. Specifically, Plaintiffs argue (1) the Arbitration Agreement is substantively unconscionable because it deprives Plaintiffs of the protections of the California Labor Code; (2) the Agreement is illusory and unconscionable because it permits Defendant to modify or revoke any term at will; and (3) the Agreement impermissibly imposes arbitration costs on Plaintiffs. Opp'n at 13–21.

1. Procedural Unconscionability

The Court notes that in discussing the Arbitration Agreement as a whole, Plaintiffs largely focus on the substantive unconscionability of various provisions. *See* Opp'n at 10–20. However, the Court will briefly address procedural unconscionability before focusing on substantive unconscionability. The Court also finds indications of procedural unconscionability. As noted above, the take-it-or-leave-it nature of the Arbitration Agreement is minimally procedurally unconscionable. *See Ali*, 2016 WL 1380922, at *1 ("Adhesive contracts are at least minimally procedurally unconscionable under California law."); *Fardig*, 2014 U.S. Dist. LEXIS 87284, at *10. Additionally, Plaintiffs argue the failure to provide a physical copy of the Arbitration Agreement, or the JAMS Rules or JAMS Policy, supports a finding of procedural unconscionability. *See* Opp'n at 1.

[2] Because a delegation provision "is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce," the Court finds it to be severable. *See Rent-A-Center*, 561 U.S. at 70. Specifically, the Court finds "any unconscionable provisions regarding that delegation are severable." *See Galen v. Redfin Corp.*, Case Nos. 14-cv-05229-TEH, 14-cv-05234-THE, 2015 WL 7734137, at *11 (N.D. Cal. Dec. 1, 2015).

Plaintiffs' argument regarding the "failure to provide a copy of the incorporated JAMS rules is [] supported by Ninth Circuit case law." *Aviles v. Quick Pick Express, LLC*, Case No. CV-15-5214-MWF (AGR), 2015 WL 9810998, at *7 (C.D. Cal. Dec. 3, 2015). "In *Pokorny v. Quixtar, Inc.*, the Ninth Circuit held that this failure denied the plaintiffs 'a fair opportunity to review the full nature and extent of the non-binding conciliation and binding arbitration processes to which they would be bound before they signed the registration agreements[.]" *Id.* (quoting 601 F.3d 987, 996–97). The Court finds this adds to the procedural unconscionability of the Arbitration Agreement. *Pokorny*, 601 F.3d at 996–97. Based on the foregoing, the Court finds there is slightly more than a minimal degree of procedural unconscionability with respect to the Arbitration Agreement as a whole.

The Court will now consider Plaintiffs' three core arguments regarding substantive unconscionability.

2. Choice of Law Clause

With respect to the first argument, Plaintiffs again focuses on the choice of law provision – which, as discussed earlier, provides that challenges to the validity or enforcement of the Agreement must be brought in accordance with Texas law. While the Court concluded the choice of law clause rendered the delegation clause unenforceable, the Court must now consider whether the choice of law clause renders the entire Arbitration Agreement unconscionable.

"A choice of law clause may render an arbitration provision unconscionable if its operation would deprive the plaintiff of statutorily protected rights, such as employment benefits." *Vargas v. Delivery Outsourcing, LLC*, Case No. 15-cv-03408-JST, 2016 WL 946112, at *10 (N.D. Cal. Mar. 14, 2016) (citations omitted). "However, absent a reason to conclude that the choice of law provision would have such an effect, the resolution of choice of law issues is for the arbitrator, not the Court, to decide." *Galen v. Redfin Corp.*, No. 14-CV-05229-TEH, 2015 WL 7734137, at *10 (N.D. Cal. Dec. 1, 2015) (citing *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541 (1995)).

Here, Plaintiffs argue the choice of law clause renders the entire Arbitration Agreement unconscionable because it effectively denies them from bringing their substantive claims under California law. *See* Opp'n at 14–15. Plaintiffs' underlying claims are based on California law: they assert seven claims pursuant to the California Labor Code, and a single claim under California's UCL. Plaintiffs' position is the choice of law provision is substantively unconscionable because there is no guarantee the Arbitrator will "apply California law in interpreting the Labor Code statutes upon which

Plaintiffs' claims are based, or in determining Plaintiffs' rights as California employees." *Id.* at 15. In short, Plaintiffs fear the Arbitrator may apply Texas law (or another state's law) to the substance of Plaintiffs' claims instead of using the California Labor Code and the UCL. *See id.* at 18.

Plaintiffs first argue the Arbitration Agreement "explicitly attempts to deprive Plaintiffs of the benefits of California law by imposing Texas substantive law." *Id.* at 18. In support of this argument, Plaintiffs again rely on the language of the choice of law clause and the California appellate court's decision in *Pinela*. *See id.* at 14. As Plaintiffs put it, the "*Pinela* court determined that the agreement as a whole was substantively unconscionable, not only because the choice of law clause limited Pinela's ability to attack the agreement as unconscionable, but also because it deprived Pinela of the benefits and protections of California law in adjudicating his employment claims." *Id.*

In this case, however, the Court is unconvinced the choice of law provision is substantively unconscionable. While Plaintiffs again compare the instant case to *Pinela*, they overlook a fundamental difference: the choice of law provision in *Pinela* was significantly broader than the choice of law provision at issue here. In *Pinela*, the choice of law provision stated, "This Agreement shall be construed, governed by, and enforced in accordance with the laws of State of Texas[.]"*See Pinela*, 238 Cal. App. 4th at 243. The *Pinela* court determined this broad provision governed the substance of plaintiff's claims, and thus "disable[d] California substantive law, undermining [plaintiff's] claims on the merits." *Id.* at 251. Because the choice of law provision simply stated Texas law applied – without any limitation – it infected the entire arbitration agreement.

Here, by contrast, the choice of law of provision is circumscribed; it provides that Texas law applies *only* to "challenge[s] [to] the validity or enforceability of the Agreement." Arbitration Agreement at 4. In other words, the choice of law provision does not state Texas law shall govern the substance of Plaintiffs' claims. Therefore, unlike in *Pinela*, the delegation clause in this case does not operate to "disable[] California substantive law." *Pinela*, 238 Cal. App. 4th at 251. As such, the Court cannot conclude the choice of law provision explicitly deprives Plaintiffs "the benefits of California law by imposing Texas substantive law." Opp'n at 18.

Likewise, the Court rejects Plaintiffs' related argument that the Agreement "is ambiguous as to whether Texas law is to be applied." *Id.* In making this argument, Plaintiffs focus on JAMS Rule 24(c), which provides,"[i]n determining the merits of the dispute the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator will be guided by the law or the rules of law that the Arbitrator deems to be most appropriate." *Id.* at 15 (citation omitted). The

Court sees no ambiguity here; the Arbitration Agreement provides no indication Texas law shall govern the substance of Plaintiffs' claims. Both parties agree California law should govern the substance of Plaintiffs' claims. *See id.* at 15 ("Plaintiffs' claims are firmly rooted in California statutes[.]"; Reply at 11 ("NMG agrees that California law applies to each and every dispute present in the First Amended Complaint."). Given that there is no disagreement, the Arbitrator will not have discretion to select the law governing the substance of Plaintiffs' claims. *See* Opp'n at 15 (noting Arbitrator only has discretion to select the law in the "absence of [] agreement").

Even putting this apparent agreement between the parties to the side, the Court finds little support for Plaintiffs' argument. Plaintiffs cite no convincing authority suggesting the language of either the choice of law provision or JAMS Rule 24(c) renders the Arbitration Agreement unconscionable.[3] Rather, Plaintiffs rely almost exclusively on the *Pinela* decision. But as stated above, *Pinela* is inapposite here because the choice of law provision was significantly different than the choice of law provision in this case.

For the reasons stated above, the Court rejects Plaintiffs' argument the Arbitration Agreement is substantively unconscionable because it attempts to deprive Plaintiffs of the protections of the California Labor Code.

3. Modification Clause

Plaintiffs next argue the Arbitration Agreement is illusory and unconscionable because it permits Defendant to modify or revoke any term at will. Opp'n at 19. In particular, Plaintiffs point to the following language contained at Section 14 of the Arbitration Agreement:

> NMG reserves the right to modify or revoke this Agreement on a prospective basis only and with thirty (30) days' advance written notice to the Employee of the substance of any modification or revocation. Any modification or revocation will have no effect on any Dispute that arose or accrued prior to the effective date of the modification or revocation.

[3] Plaintiffs seemingly acknowledge a reasonable arbitrator would likely apply California law to Plaintiffs' claims given that they are brought under the California Labor Code and UCL. *See* Opp'n at 16 n.7. Thus, Plaintiffs' argument appears to be that the remote chance an Arbitrator would apply another state's law instead of California law renders the Arbitration Agreement unconscionable. However, as noted above, it appears the parties agree California law should govern the substance of Plaintiffs' claims, and thus, the Arbitrator will not choose the law governing Plaintiffs' claims. In any event, Plaintiffs provide no authority to suggest the remote chance that an Arbitrator would not apply California law to the substance of Plaintiffs' claims renders the Arbitration Agreement unconscionable.

Arbitration Agreement at 4–5. Plaintiff argues this modification provision is substantively unconscionable because "nothing prevents Defendant from deciding, at any point in the future, to alter the Arbitration Agreement to incorporate terms that are even more one-sided and favorable to Defendant than those currently in effect, or to revoke terms in the Arbitration Agreement that do contain some 'modicum of bilaterality.'" Opp'n at 20.

Defendant responds the provision is not unconscionable because "NMG would be obligated to provide notice of any modifications, those modifications would be *prospective* only, and both parties would be bound by the changes." Reply at 13.

Generally, under California law "[a]n agreement to arbitrate is illusory if . . . the employer can unilaterally modify [it]." *Sparks v. Vista Del Mar Child & Family Servs.*, 207 Cal. App. 4th 1511, 1523 (2012). However, "the covenant of good faith and fair dealing may save an arbitration agreement from being illusory." *Peleg v. Neiman Marcus Grp., Inc.*, 204 Cal. App. 4th 1425, 1465 (2012).

The Court finds Defendant's position is better supported by the existing case law. Plaintiffs rely heavily on the California appellate court's decision in *Sparks v. Vista Del Mar Child and Family Services*, 207 Cal. App. 4th 1511 (2012). Opp'n at 19–20. In that case, the court considered a provision that stated an employee handbook "may be amended, revised and/or modified by [defendant] at any time *without notice*." *Sparks*, 207 Cal. App. 4th at 1516 (emphasis added). The court ultimately determined the agreement to arbitration was illusory because the defendant-employer could "unilaterally modify the handbook." *Id.* at 1523.

As Defendant points, however, there are key distinctions between the instant case and *Sparks*. Unlike *Sparks*, where Defendant could make modifications without any notice, the provision in the Arbitration Agreement provides that NMG must give Plaintiffs thirty days of advance written notice. *See* Arbitration Agreement at 4. This advance notice requirement limits concerns that the modification provision is illusory. The case of *James G. Freeman & Associates, Inc. v. Tanner*, 56 Cal. App. 3d 1 (1976) is helpful on this issue. As explained by the California Court of Appeals in *24 Hour Witness*, the *Tanner* court considered a contract that

> permitted one party to amend the terms at will upon thirty days' written notice. The court squarely rejected the notion that this power rendered the contract illusory: '[W]here the contract specifies performance the fact that one party reserves the power to vary it is not fatal if the exercise of the power is subject to prescribed or

> implied limitations such as the duty to exercise it in good faith and in accordance with fair dealings.' Nautilus's discretionary power to modify the terms of the personnel handbook in writing indisputably carries with it the duty to exercise that right fairly and in good faith. So construed, the modification provision does not render the contract illusory.

24 Hour Fitness, Inc. v. Superior Court, 66 Cal. App. 4th 1199, 1214 (1998) (citations omitted).

Additionally, the Court notes the modification provision explicitly provides that "any modification or revocation will have *no effect on any Dispute that arose or accrued prior* to the effective date of the modification or revocation." Arbitration Agreement at 5 (emphasis added). As the *Casas* court recognized, the fact that any modifications would only operate in a prospective manner significantly lessens concern about the illusory nature of the provision. *See Casas*, 224 Cal. App. 4th at 1237 ("That express statement in rule 18 means that should an employee assert a claim that arose before modification of the agreement, CarMax could not apply the modifications to that claim. The modification clause in the CarMax DRRP does not invalidate an arbitration agreement.").

In this case, any modification to the Arbitration Agreement made *after* Plaintiffs' claims accrued would not apply to the arbitration proceeding. This eliminates the concern that NMG can gain an advantage by making last-minute changes to the Arbitration Agreement once it learns about Plaintiffs' claims. *See Peleg*, 204 Cal. App. 4th at 1465 (2012) ("[I]f a claim has accrued or if the employer knows about a claim, all parties to the Agreement should be bound by the version in effect at that time; no changes should apply after the point of accrual or knowledge."). Because the modification provision is expressly restricted in this manner, the Court finds the provision is not illusory. *Id.* at 1433 ("If a modification provision is restricted—by express language or by terms implied under the covenant of good faith and fair dealing—so that it exempts *all* claims, accrued or known, from a contract change, the arbitration contract is not illusory. Were it otherwise, the employer could amend the contract in anticipation of a specific claim, altering the arbitration process to the employee's detriment and making it more likely the employer would prevail.").

Accordingly, the Court does not find the modification provision is either illusory or substantively unconscionable.

4. Arbitration Costs

Plaintiffs also argue the Arbitration Agreement impermissibly imposes arbitration costs on them. Opp'n at 20–21. Plaintiffs specifically object to Section 9 of the Arbitration Agreement, which provides:

> NMG will pay JAMS mediation and arbitration fees and other costs directly to JAMS relating to the mediation and/or arbitration proceeding. Because the JAMS Optional Arbitration Appeal Procedures are optional, the party electing to appeal the Arbitrator's decision will be responsible for paying JAMS' arbitration fees for the appeal process, and if any other party should file a cross-appeal, that party shall equally share JAMS' arbitration fees for the appeal process.

Arbitration Agreement at 4.

The California Supreme Court has stated that "when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring this action in court." *Armendariz*, 24 Cal. 4th at 110.

While Plaintiffs cite to *Armendariz*, they have not adequately explained how the costs provision of the Arbitration Agreement violates the rule outlined in that case. Indeed, the Court notes the costs provision does not *require* Plaintiffs to bear any costs; rather, it gives either party the opportunity to pay for an *optional* appeal. *See* Reply at 14 ("This clause merely provides the employee an additional forum for appeal, which may provide a more expeditious result, and which requires either party to bear its own costs of appeal.") *Id.* Plaintiffs have provided the Court with no authority suggesting this provision runs counter to *Armendariz*. In the absence of any authority, the Court has no basis for concluding the costs provision is unconscionable. Additionally, as Defendant points out, the costs provision does not "foreclose [Plaintiffs] from seeking appellate review in the courts as usual in accordance with the applicable fee schedule." Reply at 14.

The Court also notes the costs provision explicitly outlines that Defendant will pay JAMS "mediation and arbitration fees and other costs directly to JAMS relating to the mediation and/or arbitration proceeding." Thus, Plaintiffs are not being forced to bear any type of expense during the first-level arbitration proceeding that they would not be

required to bear if they were proceeding in court. Therefore, the Court declines to find the costs provision renders the Arbitration Agreement is unconscionable.

Based on the above, the Court finds the Arbitration Agreement contains some procedural unconscionability but no substantive unconscionability, other than the PAGA waiver, which the Court, as discuss below, finds severable. Thus, the Court concludes the Arbitration Agreement is not unconscionable and is enforceable.

5. PAGA Claim

Finally, the Court must address consider Plaintiffs' representative PAGA claim and the Arbitration Agreement's waiver provision.

i. Waiver

Section 2 of the Arbitration Agreement provides a waiver of representative and private attorney general claims:

> For all Disputes, the Company and Employee waive their right to trial by jury or before a judge in a court of law, including the right to initiate an opt-in or opt-out class, representative, or private attorney general action. All Disputes will be settled by binding *on an individual basis* . . . .

Arbitration Agreement at 2 (emphasis added). Thus, this provision operates as a waiver of Plaintiffs' PAGA claim.

In light of recent California and Ninth Circuit case law, this waiver of Plaintiffs' PAGA claim is not enforceable. In *Iskanian v. CLS Transportation Los Angeles, LLC*, the California Supreme Court concluded "an employee's right to bring a PAGA action is unwaivable." 59 Cal. 4th 348, 383 (2014). In *Sakkab v. Luxottica*, the Ninth Circuit adopted this holding, concluding "the *Iskanian* rule does not stand as an obstacle to the accomplishment of the FAA's objectives." 803 F.3d 425, 427 (9th Cir. 2015). Thus, the Ninth Circuit found the plaintiff's "waiver of his right to bring a representative PAGA action is unenforceable." *Id.* at 431.

"Because *Sakkab* makes clear that representative PAGA claims may not be waived outright, the representative action waiver in the Agreement as applied to Plaintiff's PAGA claims is unenforceable." *Shepardson v. Adecco USA, Inc.*, Case No. 15-cv-05102-EMC, 2016 WL 1322994, at *6 (N.D. Cal. Apr. 5, 2016).

ii. Severability of the PAGA Waiver

The Court finds the waiver provision is severable, however. The Court first notes Plaintiffs have "not argued that the PAGA waiver contained in the Agreement renders the entire agreement void." *Id.* Additionally, the Arbitration Agreement explicitly provides that, in the event a provision is determined "to be void, unconscionable, or otherwise unenforceable, in whole or in part, then the Arbitrator shall sever the offending provision from the remainder of the Agreement and the rest of the Agreement shall be effective." Arbitration Agreement at 5.[4] "Therefore, pursuant to the Agreement's terms, Plaintiff[s'] representative PAGA claims are severable from the Agreement and will remain before this Court." *Shepardson*, 2016 WL 1322994, at *6.

iii. Stay of PAGA Claim

NMG asks the Court to stay the Plaintiffs' PAGA claim pending the arbitration of Plaintiffs' seven individual claims. Under 9 U.S.C. § 3, the Court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." *See Kilgore v. KeyBank, N.A.*, 718 F.3d 1052, 1057 (9th Cir. 2013). When a case includes both arbitrable and non-arbitrable claims, the district court has discretion either to stay all the claims or to stay only the arbitrable claims and proceed with the non-arbitrable claims. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21 n. 23 (1983); *United States for the Use & Benefit of Newton v. Neumann Caribbean Int'l, Ltd.*, 750 F.2d 1422, 1426–27 (9th Cir. 1985).

The Court finds the wisest court of action is to stay the current action until the arbitration concludes. That is especially true given that resolution of Plaintiffs' seven individual claims will inform the Court's handling of the PAGA claim. *See Shepardson*, 2016 WL 1322994, at *6 ("Plaintiff's PAGA claims are derivative in nature of her substantive claims that will proceed to arbitration, and the outcome of the nonarbitrable PAA claims will depend upon the arbitrator's decision.") (citation omitted); *see also Jacobson v. Snap-On Tools Co.*, Case No. 15-cv-02141-JD, 2015 WL 8293164, at *6 (N.D. Cal. Dec. 9, 2015) (granting motion to compel arbitration on individual claims while staying PAGA claim). Accordingly, the Court finds a stay is warranted.

[4] Though the provision references the Arbitrator, the Court previously determined the delegation clause is unenforceable, and thus, the Court is responsible for determining issues related to enforceability of the Arbitration Agreement.

IV. Disposition

Based on the foregoing, the Court GRANTS the Motion to Compel Arbitration of Plaintiffs' individual claims. Plaintiffs' eighth claim pursuant to PAGA will remain with the Court and is STAYED pending completion of the arbitration. The parties are directed to notify the Court within ten (10) days of the completion of arbitration, specifically informing the Court whether the instant case should be dismissed or restored to the Court's active calendar.

The Clerk shall serve this minute order on the parties.

Initials of Deputy Clerk: djg