

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RUDY TREVINO,
Plaintiff,
v.
ACOSTA, INC., et al.,
Defendants.

Case No. 17-cv-06529 NC

**ORDER GRANTING DEFENDANTS’
MOTION TO COMPEL
ARBITRATION AND STAY ACTION**

Re: Dkt. Nos. 8, 18

Defendants Acosta, Inc., Mosaic Parent Holdings, Inc., and Mosaic Sales Solutions US Operating Co., LLC (collectively “Mosaic”), move to compel plaintiff Rudy Trevino to arbitrate his California Labor Code claims, and do so as an individual. In support of their motion, Mosaic cites the arbitration agreement that includes a class action waiver that Trevino purportedly signed. In opposition, Trevino argues that the arbitration agreement is unenforceable because: (1) it is illegal, (2) Mosaic cannot show mutual assent; and (3) it is unconscionable.

The Court finds that the arbitration agreement is legal because in *Epic Systems Corp. v. Lewis*, 584 U.S. 1 (2018), the Supreme Court ruled that arbitration agreements that include class action waivers are enforceable. Additionally, the Court finds that Mosaic produced sufficient evidence to establish that Trevino signed the agreement and that there was mutual assent. Finally, the Court finds that the agreement is not

United States District Court
Northern District of California

1 unconscionable, and must be enforced. Therefore, the Court GRANTS the motion to
2 compel arbitration and to stay this action.

3 **I. BACKGROUND**

4 Trevino is a former employee of Mosaic. Dkt. No. 8 at 26; Dkt. No. 18-1 (Trevino
5 Decl.) at 1. Trevino alleges that, during his employment, he and “all similarly situated
6 employees” experienced violations of the California Labor Code, perpetrated by Mosaic.
7 Dkt. No. 1-1 at 1, 5–9. Mosaic moves to enforce an arbitration agreement that requires
8 Trevino to arbitrate his employment related claims, and do so as an individual. Dkt. No. 8.

9 **A. Factual Background**

10 In April 2017, Trevino completed the online onboarding application process for
11 employment with Mosaic. Dkt. No. 18-1 (Trevino Decl.) at 2; Dkt. No. 8 at 11. Mosaic
12 alleges that during the onboarding process, Trevino was asked to read and sign an
13 agreement to individually arbitrate claims relating to employment between Mosaic and
14 Trevino. Dkt. No. 8-1 at 7–10; Dkt. No. 21 at 5. While Trevino does admit that he
15 completed the onboarding process, he does not recall seeing an arbitration agreement, and
16 he denies signing the agreement. Dkt. No. 18-1 (Trevino Decl.) at 2.

17 **B. Procedural Background**

18 On June 20, 2017, Trevino filed a class action complaint in Monterey County
19 Superior Court. Dkt. No. 1-1 at 1. Mosaic removed the action to this Court based on the
20 Class Action Fairness Act, 28 U.S.C. § 1332(d), and 28 U.S.C. § 1441(a). Dkt. No. 1. All
21 parties consented to the jurisdiction of a magistrate judge under 28 U.S.C. § 636(c). Dkt.
22 Nos. 6, 13. Mosaic then moved to compel arbitration and stay proceedings based on 9
23 U.S.C. § 3, which requires such a stay to be imposed by the Court; Trevino opposed the
24 motion. Dkt. Nos. 8, 18.

25 **II. LEGAL STANDARD**

26 Under the Federal Arbitration Act (“FAA”), a contract which evidences intent to
27 settle a controversy by arbitration is “valid, irrevocable, and enforceable” unless it can be
28 revoked on “such grounds as exist in law for the revocation of any contract.” *AT&T*

1 *Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). The party seeking to compel
 2 arbitration must prove, by a preponderance of the evidence: (1) that a valid agreement to
 3 arbitrate exists and, if it does, (2) that the agreement encompasses the dispute at issue.
 4 *Knutson v. Sirius XM Radio, Inc.*, 771 F.3d 559, 565 (9th Cir. 2014) (citing *Chiron Corp.*
 5 *v. Ortho Diagnostic Sys.*, 207 F.3d 1126, 1130 (9th Cir. 2000)). However, because of the
 6 strong policy favoring arbitration, all doubts are to be resolved in favor of the party
 7 moving to compel arbitration. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460
 8 U.S. 1, 24 (1983). Finally, if a court grants a motion to compel arbitration, the Court must
 9 stay the proceedings pending arbitration. 9 U.S.C. § 3.

10 **III. DISCUSSION**

11 Trevino argues that the arbitration agreement fails because: (1) agreements to waive
 12 class status are illegal; (2) there was no mutual assent; and regardless, (3) it is invalid
 13 based on the doctrine of unconscionability. The Court addresses each argument in turn
 14 and concludes that the arbitration agreement, including the waiver of class status, is valid
 15 and enforceable.¹

16 **A. The Waiver of Class Status Is Not Illegal.**

17 First, Trevino argues that the arbitration agreement is illegal because it contains a
 18 waiver of class status which violates the National Labor Relations Act (“NLRA”). Dkt.
 19 No. 18 at 6. Additionally, Trevino argues that the “illusory” opt-out option made the
 20 agreement illegal under *Gerton v. Fortiss, LLC*, No. 15-cv-04805 TEH, 2016 WL 613011
 21 at *4–6 (N.D. Cal. Feb. 16, 2016). Dkt. 18 at 9. The Supreme Court’s recent decision in
 22 *Epic Systems Corp.* addressed both of Trevino’s arguments.

23 Trevino’s first argument that the agreement violates the NLRA was decided by *Epic*
 24 *Systems Corp.* In *Epic Systems Corp.*, as here, the central issue was an arbitration
 25 agreement that included a waiver of class status, and plaintiffs raised the same violation of

26 _____
 27 ¹ As for the second element in *Chiron*, the Court finds that “the agreement encompasses
 28 the dispute at issue” because the agreement explicitly embraces employment claims. Dkt.
 No. 8-1 at 7. Furthermore, Trevino does not claim otherwise. The Court does not discuss
 the issue further.

1 the NLRA as a reason to invalidate the arbitration agreement. *Epic Systems Corp.*, 584
2 U.S. at 2. The Court’s opinion resolved a perceived conflict between the FAA and the
3 NLRA. *Id.* The NLRA creates a statutory “right to organize and engage in concerted
4 activities for the purposes of collective bargaining or other mutual aid or protection.” 29
5 U.S.C. § 157. The FAA, on the other hand, compels courts to treat arbitration agreements
6 as “valid, irrevocable, and enforceable.” 9 U.S.C. § 2. The conflict arises because the
7 waiver of class status may be considered “concerted activity” and is contained in the
8 arbitration agreement. Thus, plaintiffs argued that the FAA’s command to enforce
9 arbitration agreements according to their terms runs afoul of the NLRA’s mandate to
10 protect “concerted activities.” However, the Supreme Court concluded that the NLRA did
11 not override the FAA’s mandate to enforce arbitration agreements “as written” because
12 Congress did not manifest a “clear intention to displace” the FAA, and thus, the Court
13 should interpret the two statutes to “work in harmony.” *Epic Systems Corp.*, 584 U.S. at
14 25. With this in mind, the Court ruled that a class action lawsuit is not a “concerted
15 activity” as envisioned by the NLRA and that waivers of class status should be enforced
16 per the FAA. *Id.* at 2, 12, 25. Thus, Trevino’s first argument fails.

17 Trevino’s second argument—that the “illusory” opt-out clause renders the waiver of
18 class status illegal—is equally untenable under *Epic Systems Corp.* In *Epic Systems Corp.*,
19 the Court explained that “defenses that apply only to arbitration or that derive their
20 meaning from the fact that an agreement to arbitrate is at issue” are invalid. *Id.* at 7
21 (quoting *Concepcion*, 563 U.S. at 339). Specifically, the Court said that an objection to
22 proceedings “because they require individualized arbitration proceedings instead of class
23 or collective ones” is invalid. *Id.* Here, Trevino is arguing that by law, a waiver of class
24 status requires a clear opt-out provision. Dkt. No. 18 at 14–15. His argument is invalid
25 because it is applicable only to arbitration clauses that contain waivers of class status and
26 is thus specifically prohibited by *Epic Systems Corp.* In any event, the Court finds that the
27 language of the opt-out provision was clear. Thus, Trevino’s second argument fails.

28 However, *Epic Systems Corp.* did not foreclose the possibility of invalidating a

United States District Court
Northern District of California

1 contract by “generally applicable contract defenses, such as . . . unconscionability.” *Epic*
2 *Systems Corp.*, 584 U.S. at 7 (quoting *Concepcion*, 563 U.S. at 339). With this in mind,
3 the Court proceeds to evaluate Trevino’s other arguments.

4 **B. The Arbitration Agreement Is Valid.**

5 Next, Trevino argues that the arbitration agreement is unenforceable for lack of
6 mutual assent because: (1) Mosaic’s evidence is inadmissible; and (2) Mosaic fails to
7 establish that a valid arbitration agreement exists.

8 Contract-based challenges to an agreement to arbitrate are governed by state law.
9 *Cox v. Ocean View Hotel Corp.*, 553 F.3d 1114, 1122 (9th Cir. 2008). In California, the
10 party seeking to compel arbitration bears the burden of proving the existence of a valid
11 arbitration agreement, while a party opposing arbitration bears the burden of proving any
12 fact necessary to its defense. *Ruiz v. Moss Bros. Auto Group, Inc.*, 232 Cal. App. 4th 836,
13 842 (2014).

14 **1. Admissible Evidence**

15 Trevino requests that the Court strike (i) the supplemental declaration of Ava Miner
16 and (ii) the arbitration agreement. Trevino also asserts that Mosaic added new arguments
17 in its reply, but does not explain which arguments are new.

18 **i. The Supplemental Declaration of Ava Miner is Admitted.**

19 First, the Court considers Trevino’s objection to the supplemental declaration of
20 Ava Miner. Trevino argues that the Court should strike the declaration because it is “new
21 evidence.” Dkt. No. 22 at 2. For this proposition, Trevino cites *Tovar v. United States*
22 *Postal Service*, 3 F.3d 1271, 1273 n.3 (9th Cir. 1993) and *Provenz v. Miller*, 102 F.3d
23 1478, 1583 (9th Cir. 1996). Dkt. No. 22 at 7.

24 In *Tovar*, plaintiff introduced new statistics to support her claim in a reply brief, “on
25 appeal.” *Tovar*, 3 F.3d at 1273 n.3. The Ninth Circuit struck the evidence it considered
26 “new” because it was outside of the record compiled by the district court. *Id.* Here, the
27 case is not on appeal and thus, *Tovar* is not applicable. In *Provenz*, plaintiff moved to
28 strike defendant’s “new evidence” contained in defendant’s reply brief in support of its

United States District Court
Northern District of California

1 motion for summary judgment. *Provenz*, 102 F.3d at 1483. The district court denied
2 plaintiff’s motion and furthermore, refused to consider plaintiff’s supplemental
3 declaration. *Id.* The Ninth Circuit found that the district court erred in refusing to consider
4 plaintiff’s supplemental declaration, but upheld the decision not to strike “new” evidence
5 raised in defendant’s reply brief. *Id.* The court explained that “new” evidence in a reply
6 brief will not be considered without giving the opposing party an opportunity to respond,
7 but that there, the opposing party was given the opportunity. *Id.*

8 Even if there is “new” evidence presented in the supplemental Miner declaration
9 and reply brief, Trevino responded to it. Dkt. No. 22. Therefore, the Court declines to
10 strike the supplemental declaration of Ava Miner or Mosaic’s reply brief.

11 **ii. The Arbitration Agreement Is Not Inadmissible as Hearsay.**

12 Next the Court considers Trevino’s argument that the arbitration agreement, Exhibit
13 C to Mosaic’s motion to compel, should be excluded as hearsay because it fails to meet the
14 requirements of the “business records” exception. Dkt. No. 8-1 at 7–10; Dkt. No. 22 at 6.

15 Evidence is inadmissible under the hearsay rule if it is a statement, made outside of
16 court, that is offered to prove the truth of the matter asserted. Fed. R. Evid. 801(c). The
17 “business record” exception allows hearsay to be admitted as evidence if: (1) it was regular
18 business practice to make that record; (2) it was kept in the regular course of business; (3)
19 it was made by a person with knowledge; and (4) it was made at or near the time the event
20 recorded. *Clark v. City of Los Angeles*, 650 F.2d 1033, 1036–37 (9th Cir. 1981).

21 The arbitration agreement is a written statement, made outside of court and is
22 offered to prove the truth of the matter asserted—that Trevino and Mosaic agreed to
23 arbitrate. It is therefore hearsay. However, the Court finds that the business records
24 exception does apply. The Court will evaluate each requirement.

25 As to the first two requirements, Miner declared that the agreement was made by
26 and kept on the onboarding system, “Taleo,” in the regular course of business. Dkt. No. 8-
27 1 (Miner Decl.) at 1. Trevino does not challenge this.

28 On the third requirement, Trevino argues that “Miner’s declarations establish that

United States District Court
Northern District of California

1 she is not ‘a person with knowledge.’” Dkt. No. 22 at 7. The Court can only guess
2 Trevino is referring to alleged inconsistencies in Miner’s declaration; in particular, Trevino
3 mentions that Miner listed items that would appear on a letter offer to Trevino, but none of
4 them appeared in the email offer. Dkt. No. 8-1 (Miner Decl.) at 2, 5; Dkt. No. 22 at 3–4, 7.
5 The Court finds no such inconsistencies. Miner declared that the items listed would appear
6 in the “offer letter.” Dkt. No. 8-1 (Miner Decl.) at 3. While the items do not appear in the
7 offer *email*, the email does contain a link to an “offer *letter*.” *Id.* at 5. Thus, the fact that
8 the items are not listed directly in the email does not discredit Miner. Therefore, the Court
9 finds no reason to find that Miner is not “a person with knowledge.”

10 On the fourth requirement, Trevino argues that there is no indication that the
11 arbitration agreement was made “at or near the time” Trevino signed the document. Dkt.
12 No. 22 at 6. Trevino cites no authority to support his argument. Furthermore, the Court
13 notes that other courts have found electronically signed arbitration agreements admissible
14 as evidence. *See Tagliabue v. J.C. Penney Corp., Inc.*, No. 15-cv-01443 SAB, 2015 WL
15 8780577, at *3 (E.D. Cal. Dec. 15, 2015) (admitting plaintiff’s personnel file which
16 included the arbitration clause after it was authenticated by the human resource managers);
17 *Espejo v. Southern California Permanente Med. Group*, 246 Cal. App. 4th 1047, 1053–54
18 (2016) (considering only authentication for purposes of admitting electronically signed
19 agreement).

20 Therefore, the Court concludes that Exhibit C is admissible.

21 **2. A Valid Arbitration Agreement Exists.**

22 Next, Trevino argues: (i) that the evidence does not authenticate the signed
23 arbitration agreement and (ii) that Trevino did not understand what the arbitration
24 agreement meant.

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United States District Court
Northern District of California

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i. The Arbitration Agreement Is Authenticated.²

First, the Court considers Trevino’s argument that Mosaic has failed to meet its burden of authenticating the signed arbitration agreement and proving that a valid agreement exists. Dkt. No. 22 at 2–6. In particular, Trevino points to the fact that the arbitration agreement does not have his physical signature on it and merely contains six asterisks on the signature line. Dkt. No. 18-1 (Trevino Decl.)

To satisfy the requirement of authentication, the proponent must produce evidence “sufficient to support a finding that the item is what the proponent claims it is.” Fed. R. Evid. 901(a). The Court may consider “the appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.” Fed. R. Evid. 901(b)(4). Furthermore, in California, the Uniform Electronic Transaction Act provides that a “signature may not be denied legal effect or enforceability solely because it is in electronic form[,]” or “because an electronic record was used in its formation.” Cal. Civ. Code § 1633.7(a).

First, Mosaic provides the declarations of Ava Miner, the onboarding manager for Mosaic. Dkt. No. 8-1 (Miner Decl.) at 1–3; Dkt. No. 21-1 (Suppl. Miner Decl.) at 2–4. Miner established that she was “a person with knowledge” as required by Federal Rule of Evidence 901(b)(1) by declaring that her responsibilities include: “the overall processes and implementation of policies involving documentation related to the hiring of new employees.” Dkt. No. 8-1 (Miner Decl.) at 1. Next, she declared that Exhibit C is a true and correct copy of the arbitration agreement signed by Trevino.³ *Id.* at 3. She also

² The Court must determine whether the arbitration agreement is authenticated both to determine admissibility as evidence and sufficiency to prove that the agreement to arbitrate was made. Therefore, the Court merges the two tasks here.

³ Trevino’s argument that Miner was “equivocal” in her declaration that Trevino signed the arbitration agreement is without merit. Dkt. No. 22 at 4. Miner certainly could have been clearer. However, the Court disagrees that the only conclusion to draw from Miner using the word “policy” instead of “agreement” is that she is being “equivocal.” Federal Rule of Evidence 901(b)(4) compels the Court to consider “all the circumstances.” Exhibit B indicates that Trevino completed the “US Candidate Arbitration Agreement,” furthermore, Trevino admits electronically signing some documents, though he can’t remember exactly what. Dkt. No. 8-1 at 6; Dkt. No. 18-1 (Trevino Decl.) at 2. Consideration of all the circumstances indicates that Trevino signed the document.

1 detailed the procedures necessary to complete the onboarding process. Dkt. No. 8-1
2 (Miner Decl.) at 1–3; Dkt. No. 21-1 (Suppl. Miner Decl.) at 2–4. She declared that
3 Trevino completed the onboarding process and referred to true and correct copies of the
4 Taleo system screen shot (Exhibit B) and email offer (Exhibit A.) *Id.*; Dkt. No. 8-1 (Miner
5 Decl.) at 6. Finally, she testified that the only way for Trevino to “complete” the
6 arbitration agreement is to “log in to the onboarding system using his user name and
7 password, complet[e] all of the prior tasks, and the typ[e] his name in to acknowledge the
8 Arbitration Policy.” Dkt. No. 21-1 (Suppl. Miner Decl.) at 2. Trevino provides no
9 alternative explanation for how the task would have been marked as “complete” if Trevino
10 had not completed it.

11 Additionally, Mosaic presents the email offer, the onboarding system screen shot,
12 and the arbitration agreement as physical evidence that Trevino signed the arbitration
13 agreement. Dkt. No 8-1 (Miner Decl.) at 5–10. The email offer contains the instructions
14 for accessing the onboarding platform, Taleo, including his user name. *Id.* The screen
15 shot contains Trevino’s full name and lists the tasks Trevino has “completed” including
16 “US Candidate Arbitration Agreement.” *Id.* The arbitration agreement contains the terms
17 of arbitration, including the waiver of class status, and includes a signature line at the end
18 which is populated by six asterisks under the words “Associate Signature.” *Id.*

19 In response, Trevino argues that he did not input the asterisks as his signature and
20 thus, defendants cannot prove that he actually signed the agreement. Dkt. No. 18 at 11.

21 In *Tagliabue*, the court explained that the plaintiff’s argument that the arbitration
22 agreement was unenforceable because it did not contain his physical signature lacked
23 merit. *Tagliabue*, 2015 WL 8780577, at *3. The court there did not rely on the
24 appearance of the signature at all. Instead, the court cited other courts that found the
25 “declaration of the human resource employees sufficient to authenticate electronic
26 signatures.” *Id.* (citing *Nanavati v. Adecco USA, Inc.*, 99 F. Supp. 3d 1072, 1076 (N.D.
27 Cal. 2014); *Langston v. 20/20 Companies, Inc.*, No. 12-cv-1360 JGB, 2014 WL 5335734,
28 at *5–6 (C.D. Cal. Oct. 7, 2014); *Jones-Mixon v. Bloomingdale’s, Inc.*, No. 14-cv-01103

1 JCS, 2014 WL 2736020, at *4 (N.D. Cal. June 11, 2014). The court then detailed the
2 declarations of human resources managers including: a statement that the plaintiff
3 electronically signed the agreement, a description of the employee processes for
4 completing company policies, and a confirmation that the arbitration agreement was a
5 required step. *Tagliabue*, 2015 WL 8780577, at *3.

6 Here, similar to *Tagliabue*, the Court finds the declarations of Ava Miner, the
7 onboarding manager, sufficient to prove that Trevino electronically signed the arbitration
8 agreement because like in *Tagliabue*, the declarations prove that signing the arbitration
9 agreement was required of all new employees like Trevino. *See also Taft v. Henley*
10 *Enterprises, Inc.*, No. 15-cv-1658 JLS, 2016 WL 9448485, at *3 (C.D. Cal. Mar. 2, 2016)
11 (considering that plaintiff completed other steps of the onboarding process as evidence that
12 plaintiff signed the arbitration agreement). By Trevino’s own declaration, he was hired, he
13 completed the onboarding process, and “typ[ed] his last name more than once in order to
14 acknowledge one thing or another.” Dkt. No. 18-1 (Trevino Decl.) at 2. Like in
15 *Tagliabue*, the argument that his physical signature does not appear on the document is
16 without merit.

17 Yet, the Court recognizes the fact that the arbitration agreement contains only
18 asterisks and that Trevino’s name is not written anywhere on the arbitration agreement.
19 However, in *Tagliabue*, the court did not consider what the non-physical signature looked
20 like in order to determine if the agreement was authenticated; there was no discussion of
21 whether the computer generated signature appeared to be the plaintiff’s name. *Tagliabue*,
22 2015 WL 8780577, at *2–3. Instead, as already noted, the court looked only to the
23 declarations of the human resource managers to verify that completing the onboarding
24 process required a signature on the arbitration agreement and that the plaintiff completed
25 the onboarding process. *Id.* The defendant’s declarations established both points. *Id.*
26 Therefore, the court inferred that the arbitration agreement was signed by the plaintiff.
27 Here, the asterisks look nothing like “Trevino;” however, the declarations of Miner are
28 evidence that the agreement was electronically signed by Trevino because Miner declared

1 that completing the onboarding process required a signature on the arbitration agreement
2 and that Trevino completed the onboarding process. Dkt. No. 21-1 (Suppl. Miner Decl.) at
3 2–3; Dkt. No. 8-1 (Miner Decl.) at 4. The Court also notes that Mosaic’s burden is only to
4 prove “by a preponderance of the evidence” that Trevino signed the agreement; the
5 asterisks cast some doubt, but the evidence proves, more likely than not, that Trevino
6 signed the agreement. *Taft*, 2016 WL 9448485 at *3 (explaining that moving party must
7 prove by a preponderance of the evidence that the signed arbitration agreement was
8 authentic). As Trevino provides no evidence to contradict Mosaic’s, other than Trevino’s
9 declaration that he did not remember everything he signed, the Court finds by a
10 preponderance of evidence that Trevino signed the arbitration agreement.

11 **ii. Trevino’s Lack of Understanding Does Not Invalidate the**
12 **Agreement.**

13 Finally, the Court considers Trevino’s statement in his declaration that he does not
14 remember ever reading the arbitration agreement and would not have understood it if he
15 had. Dkt. No. 18-1 (Trevino Decl.) at 2.

16 Under California law, a contract requires mutual assent, sufficiently definite
17 contractual terms, and consideration. *Rockridge Trust v. Wells Fargo, N.A.*, 985 F. Supp.
18 2d 1110, 1142 (N.D. Cal. 2013). Mutual assent cannot exist unless the parties “agree on
19 the same thing in the same sense.” *Bustamante v. Intuit, Inc.*, 141 Cal. App. 4th 199, 208
20 (2006). Mutual assent is determined objectively based on the reasonable meaning of the
21 parties’ words and actions. *Serafin v. Balco Properties Ltd., LLC*, 235 Cal. App. 4th 165,
22 173 (2015).

23 The Court is unpersuaded by Trevino’s argument that his lack of understanding is
24 grounds to invalidate the agreement because the agreement is clearly labeled with
25 “ARBITRATION AGREEMENT” at the top of the page and does not appear to be
26 concealed in any way from Trevino before he had to sign it. Dkt. No. 8-1 (Miner Decl.) at
27 7–10; *see Serafin*, 235 Cal. App. 4th at 174–75 (finding arbitration agreement sufficiently
28 conveyed to employee when clearly labeled and set out from the other terms of the

1 employment contract rather than buried in a lengthy employee handbook). Furthermore,
 2 the Court cannot invalidate the terms of the signed arbitration agreement merely because
 3 Trevino did not understand the agreement or chose not to read it; such a ruling would
 4 undermine the “liberal policy favoring arbitration agreements” by allowing any party to
 5 claim a failure of mutual assent when forced to arbitrate against their will. *Concepcion*,
 6 563 U.S. at 339. Trevino’s subjective intentions are simply not enough because the Court
 7 finds that the “reasonable meaning” of Trevino’s electronic signature was a manifestation
 8 of assent to the terms of the arbitration agreement.

9 Therefore, the Court concludes that a valid arbitration agreement exists. Thus, it
 10 may only be invalidated by a defense applicable to any contract. *Id.* Next, the Court
 11 considers Trevino’s suggestion that unconscionability presents such a defense.

12 **C. The Arbitration Agreement Is Not Unconscionable.**

13 Trevino argues that even if an arbitration agreement exists, it is unenforceable
 14 because it is unconscionable. Dkt. No. 18 at 13.

15 Under California law, a court may find a contract unenforceable or limit a clause of
 16 the contract if it is found to be unconscionable at the time it was made. Cal. Civ. Code
 17 § 1670.5(a). “A contract or provision, even if consistent with the reasonable expectations
 18 of the parties will be denied enforcement if, considered in its context, it is unduly
 19 oppressive or unconscionable.” *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24
 20 Cal. 4th 83, 113 (2000). A finding of unconscionability requires both a procedural and
 21 substantive component, though they “need not be in the same degree.” *Id.* at 114.

22 **1. Procedural Unconscionability**

23 Procedural unconscionability concerns the level of oppression and surprise involved
 24 in the negotiation of the agreement. *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 922
 25 (9th Cir. 2013). Oppression addresses the relative bargaining power of the parties, while
 26 surprise addresses the degree of clarity of the agreement and the expectations of the
 27 weaker party. *Id.*

28 Trevino argues that the agreement is procedurally unconscionable because:

1 (i) Trevino was not provided with the American Arbitration Association (“AAA”) rules for
2 arbitration procedures, (ii) the parties had unequal bargaining power, and (iii) the opt-out
3 provision was not “set apart in different sized text.” Dkt. No. 18 at 14–15. The Court
4 evaluates each argument in turn.

5 **i. AAA Rules**

6 “Failure to provide the applicable arbitration rules is [a] factor that supports
7 procedural unconscionability.” *Carmona v. Lincoln Millennium Car Wash, Inc.*, 226 Cal.
8 App. 4th 74, 84–85 (2014). This failure contributes to procedural unconscionability
9 because the employee must make an effort to look to another source to “find out the full
10 import of what he or she is about to sign.” *Id.* However, the Court notes several courts
11 that have held agreements that incorporated commonly used arbitration rules by reference
12 are not procedurally unconscionable. *See Greer v. Sterling Jewelers, Inc.*, No. 18-cv-480
13 LJO, 2018 WL 3388086, at *4 (E.D. Cal. July 10, 2018) (finding arbitration agreement not
14 procedurally unconscionable because the agreement directed plaintiff to review the
15 National Arbitration and Mediation rules online); *Fitz v. NCR Corp.*, 118 Cal. App. 4th
16 702, 718 (2004) (finding incorporation of AAA rules by reference is sufficient); *see also*
17 *Carbajal v. Rentokil N. Am., Inc.*, No. 17-cv-06651 YGR, 2018 WL 3304635, at *5 (N.D.
18 Cal. July 5, 2018) (explaining that failure to attach AAA rules does not establish
19 procedural unconscionability under California Law) (citing *Baltazar v. Forever 21, Inc.*,
20 62 Cal. 4th 1237, 1246 (2016)).

21 The arbitration agreement says that arbitration will be administered by the AAA and
22 according to its rules. Dkt. No. 8-1 at 7. It is true that the agreement does not set out these
23 rules and the record does not indicate that Trevino was otherwise provided with the rules.
24 However, Mosaic argues that Trevino could have easily accessed the rules online via a
25 “hyperlink” provided in the agreement. Dkt. No. 21 at 8. Mosaic also argues that the
26 agreement states that the rules will be provided to “anyone who requests them.” *Id.* The
27 Court finds that Mosaic provided Trevino a full opportunity to view the AAA rules before
28 signing.

1 The Court acknowledges cases cited by Trevino (in particular *Carlson v. Home*
 2 *Team Pest Def., Inc.*, 239 Cal. App. 4th 619, 632–633 (2015); *Carmona*, 226 Cal. App. 4th
 3 at 84–85) that have found the failure to provide arbitration rules is procedurally
 4 unconscionable. However, the court notes that in *Carlson* and *Carmona*, the arbitration
 5 agreements did not contain instructions on how to obtain the arbitration rules, much less a
 6 hyperlink to view them online. *Carlson*, 239 Cal. App. 4th at 632–633; *Carmona*, 226
 7 Cal. App. 4th at 84–85. The Court finds Mosaic’s efforts to provide Trevino with the
 8 AAA rules are sufficient such that if Trevino had wanted to look at the rules before signing
 9 the agreement, he could have. Therefore, the failure to explicitly provide the AAA rules
 10 does not establish procedural unconscionability.

11 ii. Opt-Out Provision

12 Trevino argues that the waiver of class status opt-out provision was procedurally
 13 unconscionable because it was “on the very last page” and “not set apart in different sized
 14 text.” Dkt. No. 15. Trevino cites no authority for this proposition. Accordingly, the Court
 15 finds that Trevino’s argument lacks merit.

16 iii. Unequal Bargaining Power

17 Trevino also argues that because he was provided with the arbitration agreement on
 18 a take-it-or leave-it basis, he was not afforded the opportunity to negotiate, and that
 19 establishes procedural unconscionability. Trevino cites Ninth Circuit precedent for the
 20 proposition that when parties do not have equal bargaining power and the terms of a
 21 contract are presented as non-negotiable, the procedural element of unconscionability is
 22 established. *Ferguson v. Countrywide Credit Indus.*, 298 F.3d 778, 784 (9th Cir. 2002)
 23 (applying California law). The Court also notes other cases where the Ninth Circuit has
 24 found take-it-or-leave-it contracts to be procedurally unconscionable. *See Chavarria*, 733
 25 F.3d at 923 (finding procedural unconscionability where an employee is presented with a
 26 contract drafted by an employer as a condition of employment and on a take-it-or-leave-it
 27 basis); *see also Tagliabue*, 2015 WL 8780577, at *5 (same). Here, Trevino is not in a
 28 position to change the terms of the arbitration agreement and it is clear that had Trevino

1 not signed the arbitration agreement, then his offer would likely have been rescinded. *See*
2 Dkt. No. 21-1 (Suppl. Miner Decl.) at 2. The Court finds that this fact indicates some
3 “oppression” was involved in the agreement because Trevino was not in a position to
4 negotiate.

5 The Court considers the fact that Trevino wasn’t provided with an opportunity to
6 negotiate the terms of the agreement as an indication of some procedural
7 unconscionability.

8 Thus, the Court finds that the failure to provide the AAA rules and the placement of
9 the opt-out provision do not establish procedural unconscionability. However, the take-it-
10 or-leave-it nature of the agreement establishes some degree of procedural
11 unconscionability. *Nguyen v. Applied Med. Res. Corp.*, 4 Cal. App. 5th 232, 248 (Ct. App.
12 2016) (finding “some degree” of procedural unconscionability because arbitration
13 agreement was presented as an adhesion contract). With that in mind, the Court proceeds
14 to consider if the agreement was substantively unconscionable.

15 **2. Substantive Unconscionability**

16 “A contract is substantively unconscionable when it is unjustifiably one-sided to
17 such an extent that it shocks the conscience.” *Chavarria*, 733 F. 3d 916, 922 (9th Cir.
18 2013).

19 Trevino argues that the arbitration agreement is substantively unconscionable
20 because it: (i) lacks a “modicum of bilaterality” and (ii) improperly limits his right to
21 conduct discovery.

22 **i. Modicum of Bilaterality**

23 First, the Court finds that the agreement is sufficiently bilateral because it requires
24 both parties to arbitrate employment disputes and is thus distinguishable from *Armendariz*.
25 In *Armendariz*, the California Supreme Court held that an arbitration agreement was
26 unconscionable if it required the employee to arbitrate his claims but exempted the
27 employer from arbitrating his claims—thus lacking a “modicum of bilaterality.”
28 *Armendariz*, 24 Cal. 4th at 120. Here, however, the arbitration agreement explicitly states:

1 “[t]he mutual obligations by the Company and Associate to arbitrate disputes provide
2 consideration for this Agreement.” Dkt. No. 8-1 at 7. Furthermore, the agreement does
3 not go on to define claims which would not mutually require arbitration. Thus, the Court
4 finds that the agreement is sufficiently bilateral.

5 Still, Trevino argues that the agreement is not bilateral because there would never
6 be a situation where the employer would seek a class action against an employee and thus
7 the agreement unduly favors Mosaic. Dkt. No. 18 at 12. This argument fails for the
8 following two reasons.

9 First, Trevino cites *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1172 (9th Cir.
10 2003), for the proposition that substantive unconscionability is presumed in an arbitration
11 agreement and can only be rebutted by the employer showing that the agreement is
12 bilateral in effect, but *Ingle* does not stand for this proposition. In *Ingle*, the arbitration
13 agreement explicitly exempted the employer from arbitrating certain claims that it required
14 the employee to arbitrate and was therefore explicitly not bilateral. *Ingle*, 328 F.3d at
15 1172. Here, unlike in *Ingle*, Mosaic does not bear the burden of showing that the
16 agreement is bilateral in effect because it is explicitly bilateral, as explained above.

17 Second, in *Epic Systems Corp.* the Supreme Court clearly held that waivers of class
18 status are enforceable. As Trevino’s argument challenges waiver of class status in the
19 abstract, it is directly rebutted by the Supreme Court. *Epic Systems Corp.*, 580 U.S. at 9
20 (explaining that an unconscionability defense to an arbitration agreement on the basis of
21 lack of bilateral procedures “impermissibly disfavors arbitration”).

22 **ii. Discovery Limitations**

23 Finally, Trevino challenges the availability of discovery in the agreement because it
24 incorporates the AAA rules for discovery and those rules do not provide adequate
25 discovery. Dkt. No. 18 at 13. The Court finds the discovery provisions in the AAA rules
26 are not unconscionable because other courts have found that the AAA rules for discovery
27 provide parties with a sufficient opportunity for discovery. *Roman v. Superior Court*, 172
28 Cal. App. 4th 1462, 1475–76 (2009) (finding no meaningful difference between AAA

United States District Court
Northern District of California

1 rules for discovery and the discovery rules in the California Arbitration Act, found
2 sufficient by the California Supreme Court in *Armendariz*); *see also Saline v. Northrop*
3 *Grumman Corp.*, No. 08-cv-08398 MMM, 2009 WL 10674037, at *16–18 (C.D. Cal. Feb.
4 9, 2009) (collecting cases).

5 Thus, the arbitration agreement is not substantively unconscionable. Therefore,
6 despite there being some degree of procedural unconscionability, the arbitration agreement
7 is not unconscionable and must be enforced.

8 **IV. CONCLUSION**

9 The Court finds no basis to invalidate the arbitration agreement signed by Trevino
10 and must enforce the agreement according to its terms following the recent ruling in *Epic*
11 *Systems Corp.* Those terms indicate that Trevino agreed to arbitrate his claims and to do
12 so as an individual. Therefore, Mosaic’s motion to compel arbitration is GRANTED and
13 Trevino is required to arbitrate his claims against Mosaic as an individual. Accordingly,
14 this action is STAYED under 9 U.S.C § 3. The Clerk of the Court is ordered to
15 administratively close this case. The parties are directed to provide the Court with notice
16 within 7 days of completing arbitration.

17
18 **IT IS SO ORDERED.**

19
20 Dated: July 23, 2018



NATHANAEL M. COUSINS
United States Magistrate Judge