Salgado v. Express Services, Inc., et al 25CV01705
Hearing Date: September 20, 2025
Motion to Compel Arbitration/CMC

PROPOSED TENTATIVE

On March 19, 2025, plaintiff Rosa Marie Salgado (plaintiff) filed a complaint against defendants Express Services, Inc. (Express), Holiday Inn & Suites (Holiday Inn), Intercontinental Hotels Group Resources, Inc. (Intercontinental), Maribel Doe, and Erica Doe (collectively, defendants), alleging nine (9) causes of action, as follows: discrimination, harassment, retaliation, failure to provide reasonable accommodations, failure to engage in the interactive process, and failure to prevent discrimination, harassment or retaliation, all based on age and disability, in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900, et seq.); negligent supervision and retention, intentional infliction of emotional distress, and failure to pay wages (Lab. Code, § 200). Maribel and Erica Does were plaintiff's supervisors. The entity defendants "both directly and indirectly employed plaintiff." Plaintiff was employed by defendants as a housekeeper in May 2023, and allegedly suffered bullying, as well as age and disability discrimination, harassment, and retaliation, culminating in her termination on January 9, 2024. Maribel Doe, Intercontinental, and Holiday Inn filed separate answers on May 19, 2025.

Defendant Express has filed a motion to compel arbitration and a request for a stay, pursuant to Code of Civil Procedure section 1281.2 and 1281.4, respectively, joined by the other named defendants. Defendant Express describes itself as a "temporary help provider," and plaintiff as a "temporary helper" or associate. Plaintiff was hired and "onboarded" through an Express franchise office, and was thereafter placed on assignment at Holiday Inn. At the time of onboarding, claims defendant, plaintiff, on May 30, 2023, signed a hard-copy version of a document entitled "Mutual Arbitration Agreement" (arbitration agreement) (a copy of which is attached to the declaration of Harvey H.H. Homsey, who is Vice President of Franchise Systems, and apparently is the person best suited to attest to the onboarding hiring process). According to the arbitration agreement, the following appears:

- The arbitration is governed by the Federal Arbitration Act (FAA)(9 U.S.C § 1);
- Defendant Express and plaintiff agree "all legal disputes and claims between them shall be determined exclusively by a final and binding arbitration before a single, neutral arbitrator, including "all claims pertaining to an Individual's employment relationship with the Company, or the formation or termination of the employment relationship; all claims for discrimination, harassment, or retaliation; wages; overtime; benefits; or claims, including without limitation defamation, fraud, and infliction of emotional distress . . . ." All claims noted above include those claims against the Company's parents, subsidiaries, affiliates, franchisees, alleged agents, and alleged joint or co-employers . . . ." Further, "***except as noted in the following paragraph***[1] ***[the arbitrator, and not any federal, state, or local***

[1] The "following paragraph" includes Paragraph 4, which discusses class action waiver, the ability to pursue a representative action under the Private Attorneys General Act (the PAGA), although individual PAGA claims are

court, shall have the exclusive authority to resolve any dispute relating to the formation, enforceability, applicability, or interpretation of this Agreement."
(Emphasis added.)

Defendants contend that the arbitration agreement is enforceable; that the disputes in the operative pleading fall within the ambit of the arbitration clause; and that the arbitration agreement when the causes of action advanced against defendant involve FEHA causes of action) meets the five-part fairness test articulated by *Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83. Plaintiff has filed opposition, claiming 1) there was no arbitration agreement because there was no meeting of the minds; and 2) the arbitration agreement is unenforceable, because the agreement as a whole was both procedurally and substantively unconscionable. Defendant filed a reply on August 12, 2025, along with evidentiary objections.

On August 18, 2025, the court observed that no party had addressed the possible presence of a delegation clause in the arbitration agreement. The court continued the matter, and in a written order, directed the parties to submit supplemental briefing to address the existence and impact of any delegation clause in the arbitration agreement. The court directed defendant to submit a supplemental letter by September 3, 2025, and plaintiff to submit opposition by September 18, 2025. Both parties have complied. On September 3, 2025, defendants Holiday Inn & Suites, Intercontinental Hotels Group Resources, LLC, Maribel Doe (Bravo Armenta) filed a joinder to defendant Express's supplemental brief. Plaintiff filed opposition on September 18, 2025. The court has read all briefing that has been submitted.

The court will first examine what is ***not*** at issue in this matter. It will then explore the merits of defendant's evidentiary objections; discuss and determine whether there exists a delegation clause in the arbitration agreement and whether plaintiff has now advanced a specific challenge to it; determine whether the parties consummated an arbitration agreement under traditional contract principles of mutual assent (a meeting of the minds); explore whether the delegation clause itself is procedurally and substantively unconscionable; and ultimately explore and determine the merits of plaintiff's request for discovery and an evidentiary hearing pursuant to California Rules of Court, rule 3.1306. The court will conclude with a summary of its conclusions.

*A) What is **NOT** at Issue*

It appears the arbitration agreement is governed by the FAA, rather than the California Arbitration Act, and no one claims to the contrary. The court will assume the FAA governs based on a facial reading of the arbitration agreement.

Additionally, there is no dispute that plaintiff actually signed a hard-copy version of the arbitration agreement (not electronically), as presented by defendant in its motion. Plaintiff does not claim she did not sign the arbitration agreement on May 30, 2023. Nor is there any claim by

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subject to arbitration. Nothing in this provision dilutes or conditions the gateway delegation clause highlighted in the text of this order.

any party that the causes of action advanced in the operative pleading fall outside the arbitration agreement. The court will not explore these topics further.

Finally, as observed above, defendant in its motion to compel arbitration contends that the arbitration agreement satisfies the five-part fairness requirements outlined in *Armendariz, supra,* 24 Cal.4th 83 for employment agreements [i.e. the arbitration agreement cannot contain a damages limitation provision, must provide for adequate discovery, must provide for a written arbitration agreement and judicial review, and employee cannot pay unreasonable costs and arbitration fees].) It appears all these requirements were addressed in Section 3 of the arbitration agreement.[2] In any event, at no point does plaintiff contend that the arbitration agreement offends *Armendariz* in this regard. That being said, our high court has made it clear that these fairness standards in *Armendariz* are separate and distinct from the standards associated with procedural and substantive unconscionability, which was discussed as a separate analysis in *Armendariz*. (*Ramirez v. Charter Communications, Inc*. (2024) 15 Cal.5th 478, 503 fn. 7 [*Armendariz* and unconscionability inquiries are distinct].) As a result, the court will assume without deciding that the fairness requirements of *Armendariz* in this regard have been satisfied.

B) Defendant Express's Evidentiary Objections

Express has filed two sets of objections to plaintiff's evidentiary proffer. On August 12, 2025, defendant Express objected to the following statement made in attorney Neil Nabavi's declaration: "I am informed and believe that Exhibit B is a true and accurate translation into Spanish of Exhibit A." Defendant Express then objects to Exhibits A and B attached to Mr. Nabavi's declaration. Exhibit B is the Spanish version of plaintiff's declaration. Exhibit A is the supposed English version of plaintiff's Spanish declaration in Exhibit B. On August 14, 2025, presumably to cure the certification deficiencies associated with the early declarations, plaintiff filed a declaration from Gissel Guilar, who declares that she is fluent in Spanish, that she thoroughly reviewed plaintiff's Spanish declaration, as well as Exhibit A (plaintiff's English declaration), that she translated Exhibit B to Exhibit A, and that the English version is an accurate translation of the Spanish version of plaintiff's declarations. Attached to Ms. Guilar's declaration is Exhibit A (English version of plaintiff's declaration) and Exhibit B (Spanish version of plaintiff's declaration). On August 15, 2025, defendant Express objected to plaintiff's "untimely appendix of evidence" in its entirety, claiming, perfunctorily without analysis, that no certification has been offered.

Defendant's objections to Mr. Nabavi's declaration (and the exhibits attached thereto) are now moot, following plaintiff's August 14, 2025 submissions. Defendant's newer objections to Ms. Guilar's declaration, made on August 15, 2025, as well as their objection to the new declarations attached thereto as Exhibits A and B, are not a model to follow; they are offered cursorily, without analysis or citation to any authority. The court could overrule the objections for this reason alone.

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[2] Section 3 indicates that rules attending to the American Arbitration Association (AAA) will apply pursuant to the AAA's Employment Arbitration Rules, imbuing the arbitrator with the authority to provide for reasonable discovery, and may award damages, fees and costs if authorized under existing law. It requires the arbitrator to issue a written decision, and that defendants to pay for all costs associated with arbitrator.

On the merits, it appears defendants' objections rest on plaintiff's failure to comply with California Rules of Court, rule 3.1110(g), which reads in full as follows: "Exhibits written in a foreign language must be accompanied by an English translation, certified under oath by *a qualified interpreter.*" (Italics added.) If Gissel Aguilar, who declares she translated plaintiff's declaration from Spanish to English, and that the English version is correct translation of plaintiff's declaration, is a "qualified interpreter," defendant's objections are without merit.

The problems is that the term "qualified interpreter" is ***not*** defined in the Rules of Court. There is a difference between a "certified interpreter" and a "qualified interpreter." California Rules of Court, rules 2.892 and 2.893 (as well as Government Code section 68561) govern the use of "certified interpreters" in court. And if the issue were *certification,* defendants' objection would likely have merit. But pursuant to Evidence Code section 751, subdivision (c), all that is required is that a "translator shall take an oath that he or she will make a true translation of any writing he or she is to decipher or translate." (See also Evid. Code, § 753(a) [when the written characters in writing offered in evidence are incapable of being understood directly, "a translator who can decipher the characters or understand the language shall be sworn to translate the writing].) Under this standard, the court is unwilling to conclude that Ms. Guilar is not a qualified translator, for she declares under oath that she is "fluent in Spanish," has "been speaking it fluently for over 20 years," and was the one who translated plaintiff's Spanish declaration into English. She also declares, not insignificantly, that she works for the law firm Shegerian & Associates "*as a case manager/translator*." As defendant has failed to provide any analysis of the issue, the court overrules defendants' objections.

C) *Is There a Delegation Clause in the Arbitration Agreement*?

As noted, the court directed the parties to address whether there was a delegation clause in the arbitration agreement, and moreover, what impact it has on the defendant's motion. The arbitration agreement expressly indicates in Section 3 as follows: "Except as noted in the following paragraph, ***the arbitrator and not any federal, state, or local court, shall have the exclusive authority to resolve any dispute relating to the formation, enforceability, applicability, or interpretation of this agreement***." (Emphasis added.) If this constitutes a delegation clause, its presence has significant ramifications of how the court can proceed under the FAA.

Although a court typically decides the threshold questions whether an arbitration is valid and enforceable, including fraud in the inducement and illegality of the agreement (including unconscionability), an exception to this rule applies under the FAA when the parties have ***clearly and unmistakably agreed*** to delegate questions regarding the validity of the arbitration clause to the arbitrator. The parties to an arbitration agreement can agree (in a so-called delegation clause or provision) to arbitrate "gateway" questions of "arbitrability," such as whether the parties have agreed to arbitrate or whether the agreement covers a particular controversy. (*J.R. v. Electronic Arts. Inc.* (2024) 98 Cal.App.5th 1107, 1114, quoting *Rent-A-Center W., Inc. v. Jackson* (2010) 461 U.S. 63, 70 (hereafter, *Rent-A-Center*.) "An agreement to arbitrate a gateway issue – otherwise known as a delegation provision – is simply an additional, antecedent agreement the party seeking arbitrations asks . . .[a] court to reenforce." (*J.R., supra*, at p. 1114.) Further,

because each agreement is severable, the arbitration agreement is severable from the overarching agreement containing it, and the delegation provision is severable from the arbitration containing it. (*Id.* at p. 1117, citing *Rent-A-Center, supra*, at pp. 70-72.) If a delegation clause exists clearly and unmistakably, the party opposing the enforcement of a delegation provision must challenge the delegation provision ***specifically.*** (*J.R., supra,* at p. 1114.) Absent a specific challenge, a court must treat the delegation provision as valid and enforce it, "leaving any challenge to the validity of [the arbitration agreement or] the [a]greement as a whole for the arbitrator." (*Ibid*.)

Defendant has shown that the arbitration argument contains a delegation clause, to the effect that the arbitrator is charged with determining arbitrability of the claim or its dispute in the first instance. The language at issue in the arbitration provision (highlighted above) provides that the arbitrator, not the court, has the exclusive authority to resolve any dispute relating to the formation, enforceability, applicability, or interpretation of this agreement" Federal cases have determined that similar language reflects a "clear and unmistakable" desire by the parties that the arbitrator and not the court is charged with determining gateway issues, such as the arbitrability of the conflict. (See, e.g., *Rent-A-Center, West, Inc. supra*, 561 U.S. at p. 68 [delegation clause created by clear and unmistakable language that read "the Arbitrator. . . shall have exclusive authority to resolve relating to the . . . enforceability . . . of this Agreement including, but not limited to any claim that all or part of this Agreement is void or voidable]; *ADRIANA MONTES, Plaintiff, v. CAPSTONE LOGISTICS, LLC, et al., Defendants. Additional Party Names: WINCO Foods Inc.* (E.D. Cal., Sept. 2, 2025, No. 1:24-CV-01485-SAB) 2025 WL 2505561, at *9 [the following is a delegation clause: "[a]n arbitrator shall decide all issues, arising out of or relating to the interpretation or application of this Arbitration Agreement, including the arbitrability, enforcement, revocability or validity of this Arbitration Agreement or any portion of it"]; *Kohler v. Whaleco, Inc.* (S.D. Cal. 2024) 757 F.Supp.3d 1112, 1121 ["the arbitrator shall have exclusive authority to resolve any Dispute, including, without limitation, disputes arising out of or related to the interpretation or application of the Arbitration Agreement, including the enforceability, revocability, scope, or validity of the Arbitration Agreement or any portion of the Arbitration Agreement . . ."]; *Mohamed v. Uber Techs, Inc.* (9th Cir, 2016) 848 F.3d 1210-1211 [arbitration agreement delegating "enforceability, revocability, or validity of the Arbitration Provision or any portion of the Arbitration Provision" to an arbitrator "clearly and unmistakably indicates the parties' intent for the arbitrators to decide the threshold question of arbitrability"]); *Pearl v. Coinbase Global, Inc. (* N.D. Cal. Feb. 3, 2023), No. 22-CV-3561-MMC, 2023 WL 1769190, at *3[(arbitration agreement providing that "[t]he arbitrator shall have exclusive authority to resolve any Dispute, including without limitation, disputes arising out of or related to the interpretation or application of the Arbitration Agreement, including the enforceability, revocability, scope, or validity of the Arbitration Agreement or any portion of the Arbitration Agreement. . . constitutes clear and unmistakable evidence that the threshold issue of arbitrability is delegated to an arbitrator"); *Momot v. Mastro* (9th Cir. 2011) 652 F.3d 982, 988 [language delegating authority to arbitrator to determine " 'the validity or application of any of

the provisions of' " the arbitration clause was a clear and unmistakable agreement to arbitrate the question of arbitrability].)

California appellate cases are in accord (based on similar language). (See, e.g., *Aanderud v. Superior Court* (2017) 13 Cal.App.5th 880, 892 ["agree to arbitrate all disputes, claims and controversies arising out of or relating to ... (iv) the interpretation, validity, or enforceability of this Agreement, including the determination of the scope or applicability of this Section 5 [the 'Arbitration of Disputes' section]" was a clear and unmistakable delegation of questions of arbitrability to arbitrator]; see also *Malone, supra,* 226 Cal.App.4th at p. 560 [the delegation clause provided, "The arbitrator has the exclusive authority to resolve any dispute relating to the interpretation, applicability, or enforceability of this binding arbitration agreement" – "there is no suggestion that this language was not sufficiently clear and unmistakable," meaning the delegation clause was enforceable]; *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 242 [language that read "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement' " delegated to the arbitrator the question whether the agreement was unconscionable]; *Ajamian v. CantorCO2E, L.P*. (2012) 203 Cal.App.4th 771, 786 [delegation clause is clear and unmistakable if it states "expressly that the arbitrator shall decides questions of enforceability" of the arbitration provision"].)

The delegation clause here reads similarly to all of the clauses noted above; contrary to plaintiff's argument, it clearly and unmistakably delegates to the arbitrator the enforceability of the arbitration agreement.

It is also clear from plaintiff's initial *opposition* that plaintiff ***failed*** to specifically challenge the delegation clause on grounds of unconscionability. (See, *Nielsen Contracting, Inc. v. Applied Underwriters, Inc*. (2018) 22 Cal.App.5th 1096, 1109-1111; *Malone v. Superior Court* (2014) 226 Cal.App.4th 1551, 1559–1560, citing *Rent-A-Center, supra,* 561 U.S. at p. 70.) It seems equally clear to the court that plaintiff remedied this oversight in here supplemental briefing, filed on September 18, 2025, by arguing for the first time that the delegation clause itself is unconscionable. For this reason, the court in Subsection (E), as discussed below, will address plaintiff's claims that the delegation clause is unconscionable.

D) Was there a Meeting of the Minds?

Even when there is a delegation clause, when the existence of an arbitration agreement is disputed, the issue must be decided by a court, not an arbitrator. This is because the delegation of "gateway" questions of arbitrability to the arbitrator presupposes the existence of an agreement between the parties, which the court necessarily has to decide before it can enforce any such delegation. (*Consumer Advocacy Group, Inc. v. Walmart, Inc*. (2025) 112 Cal.App.5th 679, 691; *Garcia v. Stoneledge Furniture LLC* (2024) 102 Cal.App.5th 41, 50.) Thus, when the plaintiff challenges the existence of the arbitration agreement, such as claiming the absence or lack of mutual assent or fraud in the inducement, the court, not the arbiter, must determine the

question. Only if an arbitration agreement was properly consummated will the court thereafter enforce the delegation clause. (See, e.g., *Najarro v. Superior Court* (2021) 70 Cal.App.5th 871, 889 [despite the existence of a clear and unmistakable delegation clause, a court remains able to determine whether any agreement between the parties was ever concluded, including claims of fraud in the execution or mutual assent].)

Plaintiff contends there was no mutual assent, as she "is a Spanish speaker. The only language I can fluently read or understand is Spanish. I am not well-versed in legal language, especially in English. I was not provided with a translator or interpreter during my onboarding process. No one explained to me what any of the documents were, or what their effect was. I believe that I would not be able to understand the complex legal language of a contract in English. I do not recall ever being presented with a Spanish copy of any purported arbitration agreement." Based on these statements, plaintiff argues that there no mutual assent, and that there was fraud in the execution, meaning there was no arbitration agreement and thus the motion must be denied.

Our own appellate court has clarified the relevant standards in this context in *Caballero . Premier Care Simi Valley LLC* (2021) 69 Cal.App.5th 512. As a result, the court discusses that case in detail.

" In California,'[g]eneral principles of contract law determine whether the parties have entered a binding agreement to arbitrate." "An essential element of any contract is the consent of the parties, or mutual assent." (*Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 270.) Further, the consent of the parties to a contract must be communicated by each party to the other. (Civ. Code, § 1565, subd. 3.) "Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings." (*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 141.) "A party's acceptance of an agreement to arbitrate may be express, as where a party signs the agreement." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.) " '[O]ne who accepts or signs an instrument, which on its face is a contract, is deemed to assent to all its terms, and cannot escape liability on the ground that he has not read it. If he cannot read, he should have it read or explained to him.' " (*Randas v. YMCA of Metropolitan Los Angeles* (1993) 17 Cal.App.4th 158, 163.) That is, "a party may not avoid enforcement of an arbitration provision because the party has limited proficiency in the English language. If a party does not speak or understand English sufficiently to comprehend a contract in English, it is incumbent upon the party to have it read or explained to him or her. (*Ramos*, *supra*, 242 Cal.App.4th at p. 687,; *Randas*, *supra*, 17 Cal.App.4th at p. 163 [swimming class release form in English valid even though the signatory could only read Greek]; *Fields v. Blue Shield of California* (1985) 163 Cal.App.3d 570, 578 ["It is a general rule a party is bound by contract provisions and cannot complain of unfamiliarity of the language of a contract"].) "An exception to the general rule applies when a party was fraudulently induced to sign the contract. (*Ramos*, *supra*, 242

Cal.App.4th at p. 688 [contract void for fraud in the execution when party deceived as to nature of document]; *Metters v. Ralphs Grocery Co.* (2008) 161 Cal.App.4th 696, 702, [dispute resolution form failed to warn employee he was agreeing to binding arbitration].)" (*Caballero, supra,* 69 Cal.App.5th at p. 518.)

In *Caballero*, the court found the "exception is inapplicable here, because Caballero does not contend Premier Care defrauded him or prevented him from learning the contract's terms. He simply states that, to the best of his recollection, he was not presented with an Arbitration Agreement in Spanish or an Arbitration Agreement in English that was explained to him. He cites no authority suggesting it was Premier Care's initial burden to ascertain whether he could understand the English version. All Caballero had to do was tell Elstein or one of Premier Care's Spanish-speaking employees that he cannot read English, and the burden would have shifted to Premier Care to explain the contents of the Arbitration Agreement. His decision to sign a document he could not read is not a basis for avoiding an arbitration agreement. (See *Brookwood v. Bank of America* (1996) 45 Cal.App.4th 1667, 1674 [" 'A party cannot use his own lack of diligence to avoid an arbitration agreement' "].) (*Caballero, supra, at pp.* 518–519.)[3] "We conclude the law and substantial evidence do not support the trial court's denial of Premier Care's petition to compel arbitration. Caballero assented to the contract terms by signing and initially the Arbitration Agreement [citation] and there is no evidence he asked [anyone] for a Spanish version of the agreement or assistance in understanding the English version. [Citation.] Moreover, the fact that the Arbitration greement has two uppercase notices in red, directly above the signature blocks, advising that signing the agreement would result in a waiver of a jury or court trial should have alerted Caballero to the significance of those provisions regardless of whether he could read them. On this record, Caballero's failure to take steps to learn the contents of the agreement is attributable to his own negligence and may not be imputed to Premier Care." (*Caballero, supra,* 69 Cal.App.5th 512 at p. 519.)

Caballero seems generally dispositive. Plaintiff here, much like the plaintiff in *Caballero,* assented to the contract terms by signing the agreement, meaning that by signing the agreement, she demonstrated mutual assent and an intent to enter the agreement. Absent fraud or overreaching, plaintiff's inability to read English and limited ability to speak or understand English does not alter the conclusion that her signature on the contract manifested her agreement, as was true in *Caballero*. (*Caballero, supra,* at p. 518.) As for fraud in the inducement, as was true in *Caballero,* plaintiff claims she is a Spanish speaker and yet "was not provided with a

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[3] Plaintiff in opposition makes some vague reference that she did not speak or understand English at the time she was asked to sign the purported arbitration agreement," and defendants "with full understanding of this fact, failed to provide her with a Spanish version of the agreement, nor did they offer a translator to assert her in undersnding the document." Plaintiff has presented no evidence that defendants subjectively knew plaintiff could only speak Spanish, and nothing offered in plaintiff's declaration supports that proposition. Nor is there any evidence before the court that plaintiff told defendants that she could not read or write English, which arguably (in dicta per *Caballero*) would shift the burden to defendants to explain the contents of the arbitration agreement. The facts are undisputed that plaintiff failed to ask for a translator or for anything else. *Caballero* remains dispositive on this point.

translator or interpreter." As did the plaintiff in *Caballero,* plaintiff here argues that no one explained to her the meaning of the documents she signed. The *Caballero* court rejected these clams, for "there [was] no evidence [plaintiff] asked . . . for a Spanish version of the agreement or assistance in understanding the English version." (*Id*. at p. 519.) The same is true here. At no point in her declaration does plaintiff indicate she asked for a translator, or asked defendant for any help in understanding the English version of the arbitration agreement. Finally, *Caballero* indicated that "the fact the Arbitration Agreement has two uppercase notices in red, directly above the signature blocks, advising that singing the agreement would result in waiver of jury or court should have alerted Caballero to the significant of those provisions regardless of whether he could read them." (*Id.* at p. 519.) Here, while language in the arbitration agreement is not in uppercase, there is one area bolded in black – highlighting the fact that plaintiff agrees that she understood the terms of the arbitration agreement. As in *Caballero*, this emphasis should "have alerted [plaintiff] to the significance of those provisions regarding whether [she] could read them."

Defendants have shown mutual assent, and demonstrated there was no fraud in the inducement, under the authority of *Caballero*. This is no basis to deny the motion to compel arbitration.

E) Is the Delegation Clause Unconscionable?

As noted, plaintiff claims in her supplemental briefing that the delegation clause is both procedurally and substantively unconscionable, and thus unenforceable. Plaintiff claims specifically that the delegation clause is "overwhelmingly" procedurally unconscionable because 1) plaintiff can barely speak, read, or understand English, was not provided with Spanish-language version of the agreement, no representative of defendants explained the agreement to her in Spanish, "nor was a Spanish-speaking representative available to review its contents with her." Further, according to plaintiff, she signed the agreement in a "rushed, high-pressure setting, without" an opportunity to review the agreement.[4] Further, plaintiff claims (per *Sparks v. Vista Del Mar Child & Family Services* (2012) 207 Cal.App.4th 1511) that this was a contract of adhesion, and "she could not negotiate any portion of the arbitration proceeding," "had no legal representation, no access to an interpreter," and "no understanding that she was giving up a fundamental right." She also claims she was "inherently vulnerable," as she relied on her job for income and "could not afford *to lose the opportunity for work," per Carmona v. Lincoln Millenum Car Wash, Inc.* (2014) 226 Cal.App.4th 74.

[4] Plaintiff in her declaration provides very little detail about this. She claims as follows: ". . . I was not told that I could take the document with me to review and return it at a later time. Instead, the HR employee stayed nearby while I was in possession of the documents. [¶] As a result, I pressured to sign the Arbitration Agreement on the spot without the opportunity to review it. I submitted the documents and was not given a copy to take with me. . . . "

Plaintiff also claims the delegation clause is substantively unconscionable, because it "lacks mutuality" – as it is structured "to benefit" the defendant. According to plaintiff, "there is no reciprocal right for Plaintiff to retain court jurisdiction for any claims that might benefit her." No other arguments or case citations are provided. Further, according to plaintiff, the delegation clause is substantively unconscionable because the delegation clause "undermines the court's role in ensuring that any waiver of statutory protections is knowing, voluntary, and lawful. It effectively outsources that critical judicial gatekeeping function to a private arbitrator, chose then a process not disclosed to the employee, and whose procedures are unclear. The result is to undermine public policy protections embedded in California's statutory employment framework."

The rules associated with challenges to a delegation clause based on procedural and substantive unconscionability are settled. As was noted in *Malone v. Superior Court* (2014) 226 Cal.App.4th 1551, "when a party is claiming that an arbitration agreement is unenforceable, it is important to determine whether the party is making a specific challenge to the enforceability of the delegation clause of is simply arguing that the agreement as whole is unenforceable." (*Id*. at p. 1559.) This requires the court to determine whether the delegation clause may be enforced. (*Id*. at p. 1560.) Even when there is a specific challenge to the delegation clause based on unconscionability, unconscionability retains both procedural and substantive elements. The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power. Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form. When the contract is a contract of adhesion imposed and drafted by the party with superior bargaining power, the adhesive nature of the contract is "evidence of some degree of procedural unconscionability." (*Id.* at p. 1561). "Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. [Citations.] A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be 'so one-sided as to "shock the conscience." ' [Citation.]" (*Ibid.*) The party resisting arbitration bears the burden of proving unconscionability, and both procedural and substantive unconscionability must be shown, although not in the same degree, and they are evaluated on a sliding scale. The more substantive unconscionability exists, the less procedural unconscionability is required, and vice a versa. (*Id.* at p. 1562.)

The court finds that plaintiff has established at least some procedural unconscionability, as it appears that the arbitration agreement was a contract of adhesion. (*Malone, supra*, 226 Cal.App.4th at p. 1570 ["the only evidence of procedural unconscionability in the instant case is that the arbitration agreement was in a contract of adhesion. This is some evidence of procedural unconscionability, which must be accompanied by a high showing of substantive unconscionability"]; *OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 126 [court have recognized that arbitration contracts imposed as condition of employment are typically adhesive].) But even if plaintiff can show more than a modicum of procedurally unconscionability, the court finds that

plaintiff has failed to establish any substantive unconscionability, and without evidence of substantive unconscionability, plaintiff has not met her burden to show the delegation clause is unenforceable.

Specifically, the court is not persuaded by plaintiff's claim that the delegation clause lacks mutuality or any corresponding employer obligations. Here, the delegation clause in the arbitration agreement grants authority to the arbitrator to decide threshold issues of arbitrability, It unambiguously provides that the arbitrator will decide "any dispute" about "formation, enforceability, applicability, or interpretation" of the arbitration agreement – including presumably whether it is void or voidable. It does not lack mutuality. Both plaintiff and defendants are bound by it equally, as it applies to "any dispute" concerning the formation, enforceability, applicability, or interpretation." More significantly, the court in *Malone*, as well as the court in *Tiri, supra,* 226 Cal.App.4th at p. 247, rejected the same challenge to similarly worded delegation clauses, concluding they were not otherwise unreasonably favorable to the employer, and were not overly harsh or one sided as to shock the conscience. (*Malone, supra*, 226 Cal.App.4th at p. pp. 1557 ["The arbitrator has exclusive authority to resolve any dispute relating to the interpretation, applicability, or enforceability of this binding arbitration"], p. 1570-1571; *Tiri, supra*, 226 Cal.App.4th at p. 23 7 ["The Arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve any dispute 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 of voidable"]; at p. 246-247 [this delegation clause does not lack mutuality because it binds both parties equally, mutuality is nearly unqualified, and if for more than modicum of bilaterality or otherwise favors one party over another].)[5] Plaintiff offers nothing in her perfunctory arguments to counter the import of *Malone* and *Tiri,* which bind this court.

Nor is the court persuaded by plaintiff's claim that the delegation clause is substantively unconscionable because, in plaintiff's words, it "fails to preserve statutory rights and undermines public policy." According to plaintiff, as noted above, the delegation clause "effectively outsources" a "critical judicial gatekeeping to a private arbitrator, " which undermines public policy protections embedded in California Statutory employment framework. Plaintiff seems to be arguing that the delegation clause is per se unconscionable in violation of public policy. This claim fails on its face, however, for state law claims challenging a delegation clause based on unconscionability grounds involving public policy are preempted by the FAA. (See *Malone, supra*, 226 Cal.App.4th at p. 1569, fn. 17 [to the extent case law can be interpreted as establishing

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[5] For the record, the delegation clause at issue here ["Except as noted in the following paragraph, the arbitrator, and not any federal, state, or local court, shall have the exclusive authority to resolve any dispute relating to the formation, enforceability, applicability, or interpretation of the Agreement"] is similar to the delegation clause at issue in *Tiri* ["The Arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve any dispute 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 of voidable***"].) The highlighted portion is the only difference between this case and *Tiri*, and that difference appears inconsequential.

a per se rule that delegation clauses are unconscionable, the cases would simply be establishing a rule that certain issues e.g., enforceability) can never be arbitrated, despite agreements to do so. "This would clearly be barred by the FAAA . . ."].) Plaintiff relies on *Pinela v. Niman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227, although that case did not explore the enforceability of a delegation clause under the FAA on a motion to compel arbitration. By contrast, as noted in *Tiri v. Lucky Chances, Inc., supra*, 226 Cal.App.4th at page 249, any conclusion that a delegation clause in employment contracts is substantively unconscionability on a per se basis (akin to what plaintiff argues here) "would be tantamount to concluding that delegation clauses in employment arbitration agreements are categorically unenforceable. Such conclusion" conflicts with United States Supreme Court authority interpreting delegation clauses under the FAA. "We conclude that the inescapable import of [high court authority] is that clear delegation clauses in employment arbitration are substantively unconscionable only if they impose unfair or one-sided burdens that are *different* from the clauses' inherent features and consequences." (*Tiri, supra*, 226 Cal.App.4th at p. 249; see also pp. 239-240 [California cases have specifically looked to the FAA when considered delegation clauses and have long held that the rules governing these clauses are the same under both state and federal law].) Here, plaintiff has failed to demonstrate that the delegation clause imposes any such burdens.

Accordingly, as the court concludes the delegation clause itself is not substantively unconscionable, the matter of unconscionability generally (as raised by plaintiff raised in its original opposition) is for the arbitrator, not this court, to decide. (*Tiri, supra*, 226 Cal.App.4th at p. 250 [having determined similar delegation clause was valid, "it [would] be for the arbitrator to consider the conscionability of the agreement as a whole and its other severable provisions"]; *Malone, supra*, 226 Cal.App.4th at p. 1571 [determining similar delegation clause was not unconscionable and holding trial court "did not err in granting employer's motion to compel arbitration to permit the arbitrator to resolve [former employee's] challenges to the validity and enforceability of the arbitration agreement as a whole"].)

F) Is Plaintiff Entitled to Further Discovery and an Evidentiary Hearing?

Plaintiff, in one final exhalation, asks the court to permit further discovery and allow an evidentiary hearing pursuant to California Rules of Court, rule 3.1306.

The party seeking to compel arbitration bears the burden of proving the existence of a valid arbitration agreement. (*Flores v. Evergreen of San Diego, LLC* (2007) 148 Cal.App.4th 581, 586.) Disposition of motions to compel arbitration is generally governed by Code of Civil Procedure section 1290.2. This provision states in relevant part: "A petition under this title shall be heard in a summary way in the manner and upon the notice provided by law for the making and hearing of motions. . . ." (See *Rosenthal v. Great Western Financial Securities Corp.* (1996) 14 Cal.4th 392, 413 ["We . . . conclude that the summary procedure established by sections 1281.2 and 1290.2 does not violate the cited provisions of the California Constitution"].)

California Rules of Court, rule 1306 provides for the receipt of evidence at a motion hearing, as follows: "(a) Evidence received at a law and motion hearing must be by declaration or request for judicial notice without testimony or cross-examination, unless the court orders otherwise for good cause shown. [¶] (b) . . . A party seeking permission to introduce oral evidence ... must file, no later than three court days before the hearing, a written statement stating the nature and extent of the evidence proposed to be introduced and a reasonable time estimate for the hearing. When the statement is filed less than five court days before the hearing, the filing party must serve a copy on the other parties in a manner to assure delivery to the other parties no later than two days before the hearing." Code of Civil Procedure section 1290.2 and California Rules of Court, rule 3.1306 give the trial court discretion to permit oral testimony and cross examination. (See *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972, [petitions to compel arbitration are resolved by a summary procedure that allows the parties to submit declarations and other documentary testimony and, at the trial court's discretion, to provide oral testimony].)

Plaintiff claims that the court is required to conduct a hearing when the evidence is conflicting, under the authority of *Rosenthal v. Great Western Financial Securities Corp., supra*, 14 Cal.4th 394 and *Hotels Nevada v. L.A. Pacific Center, Inc.* (2006) 144 Cal.App.4th 754. Plaintiff reliance on these cases misplaced. In *Rosenthal,* the court said that where fraud is alleged, oral testimony may be required to weigh the credibility of witnesses. (*Rosenthal v. Great Western Fin. Securities Corp., supra,* 14 Cal.4th 394, 414.) However, *Rosenthal* also said: "There is simply no authority for the proposition that a trial court necessarily abuses it discretion, in a motion proceeding, by resolving evidentiary conflicts without hearing live testimony." (*Ibid.;* see also *People v. Johnson* (2006) 38 Cal.4th 717, 730 [" 'Evidence received at a law and motion hearing *shall be by declaration, affidavit, or request for judicial notice without testimony or cross-examination....* ' "]) Here, the evidence before the court on the critical issues outlined above does not require further discovery or an evidentiary hearing. The court is able to resolve all issues within the confines of Code of Civil Procedure section 1290.2 without the need for further evidence or an evidentiary hearing per California Rules of Court, rule 3.1306.

Further, this case is unlike *Hotels Nevada*. In *Hotels Nevada*, the trial court based its decision to deny a motion to compel arbitration exclusively on the complaint's allegations, without any evidence. The appellate court reversed, making the following relevant observations: "Here, the trial court failed to comply with [*Rosenthal* and progeny], as it denied appellant's motion to compel arbitration without the benefit of any evidence. Rather, it relied on the allegations contained in Hotels Nevada's unverified complaint in declining to find a valid and enforceable agreement to arbitrate. . . . " (144 Cal.App.4th at p. 762.) The trial court "erred by denying the motion to compel arbitration on the basis of the complaint's allegations instead of a factual determination made after such a hearing." (*Id*. at p. 763.) The court here has considered the declarations and other evidence filed by both parties in denying the motion. *Hotels Nevada* is therefore distinguishable.

The court declines plaintiff's request for discovery and to hold an evidentiary hearing. The evidentiary record before the court is sufficient for the court to rule on the motion within the confines of Code of Civil Procedure section 1290.2.

G) Summary

- The court overrules all of defendants' evidentiary objections.
- The court grants defendants' motion to compel arbitration, for the following reasons:
    - The court concludes there was mutual assent (no fraud in the inducement), under the principles enunciated in *Caballero v. Premier Care Simi Valley LLC* (2021) 69 Cal.App.5th 512, a case from our own appellate court (and overlooked by the parties).
    - The court finds there is a delegation clause in the arbitration agreement, clearly and mistakeably stated, although plaintiff (at least in her supplemental briefing) has challenged the unconscionability of the delegation clause specifically *(*as required under existing United States Supreme Court authority and progeny*).* Nevertheless, while plaintiff has shown at least a modicum of procedural unconscionability (if not more), the court finds plaintiff has failed to demonstrate (as is her burden) that the delegation clause is substantively unconscionable in any way, under the authority of *Malone v. Superior Court* (2014) 226 Cal.App.4th 1551 and (perhaps more definitively) *Tiri v. Lucky Chances* (2014) 226 Cal.App.4th 231, cases not cited by plaintiff. That means any issues concerning the unconscionability of the entire arbitration agreement (claims plaintiff advanced in her original opposition) must be determined by the arbitrator. The arbitrator will also be charged with determining the scope of any waivers in the arbitration agreement.
    - Finally, the court rejects plaintiff's requests for further discovery and an evidentiary hearing under authority California Rules of Court, rule 3.1306. The court finds the evidence before the court as submitted (in the form of declarations and otherwise) is sufficient to make all relevant determinations, as contemplated by Code of Civil Procedure section 1290.2.
- The court stays the action pending conclusion of the arbitration, pursuant to Code of Civil Procedure section 1281.4.
- The parties are directed to appear at the hearing either in person or by Zoom, as there is a CMC scheduled for today. The parties should be prepared to discuss any future CMC schedule in order to monitor the progress of arbitration.