SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 3
Honorable William J. Monahan, Presiding

Allison Croft, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2130

DATE: 3/7/2024 TIME: 9:00 A.M.

TO CONTEST THE RULING: Before 4:00 p.m. today (3/6/2024) you must notify the:

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court prefers in person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to **Department 3**.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. Phone lines are now open for you to call and reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Where to call for your hearing date: 408-882-2430 When you can call: Monday to Friday, 8:30 am to 12:30 pm

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.) **Please Note:** Any proposed orders must be submitted with the Judicial Council Form EFS-020 Proposed Order (Cover Sheet). Please include the date, time, dept. and line number.

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV420300	Northeast Securities Co., Ltd. vs Que Wenbin et al	Motion: Quash Ctrl Click (or scroll down) on Line 1 for tentative ruling. The court to prepare the order.
LINE 2	23CV427614	HEAVENZ KAUR vs GENERAL MOTORS LLC, a limited liability company et al	Hearing: Demurrer OFF CALENDAR. First Amended Complaint filed on 2/23/2024

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LINE 3	23CV427614	HEAVENZ KAUR vs GENERAL MOTORS LLC, a limited liability company et al	Motion: Strike OFF CALENDAR. First Amended Complaint filed on 2/23/2024
LINE 4	23CV418981	SUDNI FOODS, LLC FKA INDUS FOOD vs MILPITAS HALAL MARKET, A PARTNERSHIP et al	Motion: Summary Judgment/Adjudication Unopposed and GRANTED. Moving party to prepare order and [proposed] judgment.
LINE 5	23CV426904	Subburajan Ponnuswamy vs Cloudbrink, Inc. et al	Hearing: Petition Compel Arbitration and to dismiss or stay action pending the outcome of arbitration by Defendants Cloudbrink, Inc. and Prakash Mana Ctrl. Click (or scroll down) on Line 5 for tentative ruling. The court will prepare the order.
LINE 6			
LINE 7			
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			

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Calendar Line 1
Case Name: *Northeast Securities Co., Ltd. v. Quen Wenbin et al.*
Case No.: 23CV420300

I. Background

On August 3, 2023, Northeast Securities Co., Ltd. ("Plaintiff") brought an action against several defendants, including Mike Que ("Que"), an individual. Plaintiff asserts it obtained a judgment against the named defendants in the People's Republic of China on November 16, 2019, in the amount of RMB 500,000,000.

On August 18, 2023, Plaintiff filed a proof of service of summons in this case, asserting it served Que by personal service in Hong Kong on August 10, 2023, at 7:49 PM. The proof of service indicates Chau Sinling Fanny ("Fanny") served the papers on Que. Que specially appears to bring a motion to quash service by Plaintiff.

II. Motion to Quash

Que moves to quash service of summons on the ground the Court lacks jurisdiction over him because Plaintiff failed to properly serve him pursuant to international laws.

a. Legal Standard

"A defendant . . . may serve and file a notice of motion for one or more of the following purposes: (1) to quash a service of summons on the lack of jurisdiction of the court over him or her . . . ." (Code Civ. Proc., § 418.10, subd. (a).)

Where a defendant moves to quash based on improper service of the summons and complaint, the burden is on the plaintiff to prove the validity of service by a preponderance of the evidence. (See *Boliah v. Superior Court (Bijan Fragrances, Inc*.) (1999) 74 Cal.App.4th 984, 991.) The filing of a proof of service creates a rebuttable presumption that service was proper, so long as the proof of service complies with applicable statutory requirements. (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1442 (*Dill*); see also *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1205.)

"A defendant is under no duty to respond in any way to a defectively served summons. It makes no difference that defendant had actual knowledge of the action. Such knowledge does not dispense with statutory requirements for service of summons." (*Kappel v. Bartlett* (1988) 200 Cal.App.3d 1457, 1466.) Notice does not substitute for proper service; until statutory requirements are satisfied, the court lacks jurisdiction over a defendant. (*Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801, 808.) The statutory provisions regarding service of process are liberally construed to effectuate service and uphold the jurisdiction of the court if actual notice has been received by the defendant; substantial compliance is sufficient. (*Dill, supra,* 24 Cal.App.4th at p. 1436.) Substantial compliance means actual compliance in respect to the substance essential to every reasonable objective of the statute. (*Id.* at p. 1439.)

b. Hong Kong, China and the Hague Convention

Code of Civil Procedure Section 413.10, subdivision (c), provides that when a person is to be served outside the United States, a summons must be served as provided by the Code of Civil Procedure, as directed by the trial court, "or, if the court before or after service finds that the service is reasonably calculated to give actual notice, as prescribed by the law of the place where the person is served or as directed by the foreign authority in response to a letter rogatory. These rules are subject to the provisions of the Convention on the 'Service Abroad

of Judicial and Extrajudicial Documents' in Civil or Commercial Matters (Hague Service Convention)." (*Inversiones Papaluchi S.A.S. v. Superior Court* (2018) 20 Cal.App.5th 1055, 1064.)

The Hague Convention mandates certain requirements for service of process of persons residing there. (See *Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co. Ltd.* (2020) 9 Cal.5th 125, 134-136.) Article 2 of the Hague Convention mandates each contracting state, "shall designate a Central Authority which will undertake to receive requests for service coming from other contracting states and proceed in conformity with the provisions of Articles 3 to 6." (*Id*. at p. 136.) "Failure to comply with the Hague Service Convention procedures voids the service even though it was made in compliance with California law. This is true even where the defendant had actual notice of the lawsuit." (*Id*. at p. 138, quoting *Kott v. Superior Court* (1996) 45 Cal.App.4th 1126, 1136.)

"Submitting a request to a central authority is not, however, the only method of service approved by the Convention." (*Water Splash, Inc. v. Menon* (2017) 581 U.S. 271, 275.) Article 10, subdivision (b) permits judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination, so long as the State of destination does not object. (*Ibid*.; see also Hague Service Convention, 20 U.S.T. 361, 363, Article 10, subd. (b).)

The Hague Convention applies to service in Hong Kong. (See *Whyenlee Industries Ltd. v. Superior Court* (2019) 33 Cal.App.5th 364, 368 (*Whyenlee*).) Further, Hong Kong has not objected to Article 10, subdivision (b) of the Hague Convention, or to service by agent. (Id. at p. 372, citing *McIntire v. China Mediaexpress Holdings, Inc.* (S.D.N.Y. 2013) 927 F.Supp.2d 105, 133.)

c. Merits of the Motion

As a threshold matter, Que resides in Hong Kong, China. (See Motion, p. 1:25-26.) Thus, it is undisputed that Que must be served under the Hague Convention.

Here, Que argues Plaintiff fails to allege it served him through the Hague Convention and instead Plaintiff "simply asserts that Fanny personally served the Summons and Complaint" but does not state that Fanny is a resident of Hong Kong, China, or any other location, or that Fanny is authorized to act as a process server in China. (Motion, p. 5:20-25; see also Reply, p. 3:21-22 [parties only dispute whether Fanny is a competent person of the State of destination].)

In opposition, Plaintiff disputes Que's argument because the Hong Kong server was a private agent under the language of the Hague Convention, the server performed service in accordance with Hong Kong's laws, and the server is a citizen of Hong Kong. (See Opposition, pp. 5:26-26, 6:11-14, citing Wu Decl., Exs. 2-3, Yuen Decl., ¶¶ 2, 3.)

As relevant here, in 2019, the First District Court of Appeal determined that "competent persons" include "an authorized process server." (*Whyenlee, supra,* 33 Cal.App.5th at p. 369 [stating also "plaintiffs were permitted to use an agent to serve [defendant] personally in Hong Kong without first making a request to Hong Kong's central authority"], citing Amram, *The Proposed International Convention on the Service of Documents Abroad* (1965) 51 A.B.A.J. 650, 653 ["Article 10 permits . . . the direct use of process services in the state addressed, unless that state objects to such service."].)

To support their burden, Plaintiff proffers two declarations: 1) declaration of Rongping Wu, Plaintiff's counsel; and 2) declaration of Kenny Yuen, the director and manager of Black & White Investigation, hired by Plaintiff to dispatch Fanny to serve Que. Que objects to both declarations on the following grounds: 1) the declarations were executed under the laws of the United States, not California; 2) the declarants' statements lack foundation because they are

not based on personal knowledge; and 3) the declarants are speculating about events and acts that they did not witness or experience. (See Reply, p. 2:14-22.)

Que's first objection is well taken and the Court sustains the objections to the declarations for failure to comply with Code of Civil Procedure section 2015.5. (See *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 612 ["[C]ourts have made clear that a declaration is defective under section 2015.5 absent an express facial link to California or its perjury laws."]; *ViaView, Inc. v. Retzlaff* (2016) 1 Cal.App.5th 198, 217 [declaration not signed under penalty of perjury has no evidentiary value].) Given that the Court has sustained Que's first objection, it declines to consider the remaining objections to the declarations.

Nevertheless, the Court, on its own volition, may take judicial notice of documents on file with the Court. (See *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 752 ["the court may take judicial notice on its own volition"]; *Stepan v. Garcia* (1974) 43 Cal.App.3d 497, 500 [the court may take judicial notice of its own file].) Here, the parties do not dispute the existence or validity of Plaintiff's proof of service. Thus, the Court takes judicial notice of Plaintiff's proof of service that is on file with the Court. (See Plaintiff's Proof of Service, e-filed August 18, 2023.) The proof of service is signed by Fanny under penalty of perjury under the laws of the State of California and indicates that Fanny, who resides at a Hong Kong address, served Que on August 10, 2023. (See Plaintiff's Proof of Service, p. 2, section 7 [listing a Hong Kong address and phone number].)

Furthermore, Que proffers no evidence to rebut the presumption that service was proper based on the proof of service. Additionally, Que cites no authority which states that proof of service must indicate the process server is a "competent person of the state of destination" or that it is in compliance with the Hauge Convention. (See *Quantum Cooking Concepts, Inc. v. LV Assocs., Inc.* (2011) 197 Cal.App.4th 927, 934 [trial court not required to "comb the record and the law for factual and legal support that a party has failed to identify or provide"].)

Based on the foregoing, the motion to quash is DENIED.

III. Conclusion and Order

The motion to quash is DENIED. The time to file a response by Que to the complaint is extended until 15 days after service of this Court's order denying the request for order to quash. (Cal. Rules of Court, Rule 5.63, subd. (c).)

The Court will prepare the order.

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Calendar Line 5
Case Name: *Subburajan Ponnuswamy vs Cloudbrink, Inc. et al.*
Case Number: 23CV426904

Defendants CLOUDBRINK, INC. ("Cloudbrink" or "CloudBrink") and PRAKASH MANA ("Mana") (collectively "Defendants")' motion to compel arbitration against plaintiff SUBBURAJAN PONNUSWAMY ("Plaintiff" or "Ponnuswamy") for an order compelling Plaintiff to arbitrate his claims and to stay action pending the outcome of the arbitration is GRANTED (as set forth in more detail below).

Defendants' request to dismiss the action pending the outcome of the arbitration is DENIED as MOOT.

BACKGROUND

On November 29, 2023, Plaintiff filed the instant action against Cloudbrink and its Chief Executive Officer, Mana. Plaintiff asserts seven causes of action in his Complaint for (1) [Whistleblower] Retaliation in Violation of California Labor Code sections 1102.5 and 98.6,

(2) Fraudulent Misrepresentation, (3) Negligent Misrepresentation, (4) Breach of Contract, (5) Breach of the Implied Covenant of Good Faith and Fair Dealing, (6) Wrongful Termination in Violation of Public Policy, and (7) Unfair Competition, California Business and Professions Code section 17200.

According to Plaintiff's complaint[1]:

> Ponnuswamy was employed at Cloudbrink as Founder and CTO between April 2019 and his termination in March 2023 (Compl., ¶3). As the company matured, Cloudbrink's Board of Directors hired Defendant Mana as CEO. Unfortunately, Ponnuswamy soon began to realize that Defendant Mana was engaging in unethical and unlawful conduct in an effort to succeed at any cost, including falsifying financial data and documents, creating fraudulent revenue from fake customers, and inflating revenue numbers to lure investors (id., ¶12). Defendant Mana's schemes to falsify revenue and create fake customers took many different forms, and often relied on the participation of third parties, whether willingly or under false pretenses (id., ¶¶19, 29). Ponnuswamy raised concerns about fraud to Defendant Mana and to Cloudbrink's Board of Directors multiple times, including suggesting that Cloudbrink perform an internal audit led by Chief Financial Officer Omesh Sharma (id., ¶¶21, 25, 30, 37). Soon thereafter, Cloudbrink terminated Plaintiff in retaliation for his protected reports (id., ¶¶37-42).

On December 7, 2023, Defendants sent a "cease and desist" letter claiming that Plaintiff was liable for making "false statements outside the litigation privilege" regarding his Complaint (Declaration of Michelle Lee ISO Opposition to Motion to Compel Arbitration ("Lee Decl."), Exh. A). Defendants claimed that Plaintiff was in violation of the Employee Confidentiality & Inventions Agreement ("ECIA") and demanded that Plaintiff "provide a list of all of Cloudbrink's customers, investors, and business partners Mr. Ponnuswamy has communicated with following his termination" and "immediately cease from disparaging and defaming Cloudbrink and Mr. Mana to the general public, and to Cloudbrink's customers, investors, and business partners" (id., pp. 1-2). Cloudbrink emphasized that the ECIA was still in full effect and that Cloudbrink retained the right to seek all available remedies including "injunctive relief…or compelling performance" (id., p.3).

Defendant contends that all of Plaintiff's claims are subject to the binding arbitration agreement Plaintiff signed on January 2, 2020, with TriNet HR III, Inc. ("TriNet").

Cloudbrink's ECIA Arbitration Provision

As a condition of his employment, Plaintiff signed two arbitration agreements.[2] The first was in [the ECIA] that was included along with his April 2019 offer of employment with Cloudbrink (Declaration of Subburajan Ponnuswamy ("Ponnuswamy Decl."), ¶3, Exhs. A and B). The April 2019 offer letter stated that Plaintiff's "employment is contingent upon [Plaintiff's] execution of the Company's standard Employee Confidential Information &

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[1] Plaintiff's opposition does *not* dispute that the claims alleged in the lawsuit arise out of or are related to Plaintiff's former employment with Cloudbrink.

[2] Plaintiff does *not* dispute that he signed two arbitration agreements. (See Opp., pp. 3-4.) The first one was with Cloudbrink when he joined in April 2019. (*Id*., p. 3.) The second arbitration agreement was with TriNet that Plaintiff signed "months later". (*Id*., p.4.) Cloudbrink's moving papers only seek to enforce arbitration agreement Plaintiff signed with TriNet on January 2, 2020.

Inventions Agreement,"[3] which included Cloudbrink's arbitration provision (id., Exh. A §7). It further provided that the offer letter, "together with the [ECIA] and the other agreements referenced herein or therein set forth the entire understanding between us…." (id., §12). Plaintiff admits he signed the ECIA (and his signature on Ex. B is dated 4/29/2019.)

The ECIA has at least three obligations imposed upon Plaintiff for the benefit of CloudBrink, including (1) requiring Plaintiff to "irrevocably designate and appoint CloudBrink and CloudBrink's duly authorized officers and agents as [his] agents and attorneys-in-fact" to act for him to secure CloudBrink's intellectual property (id., Exh. B §10); (2) not encourage any employee or consultant to leave Cloudbrink's services during his employment and for a year hereafter (id., §14); and (3) agree that "during [his] employment with CloudBrink and *after the termination thereof*, [he] will not disparage CloudBrink, its products, services, agents or employees, officers or directors or affiliates" (id., §15) (emphasis added).

Section 16 of the ECIA states:

> Injunctive Relief. I understand that if I violate this Agreement, CloudBrink will suffer irreparable and continuing damages for which money damages are insufficient, and agree that CloudBrink shall be entitled to injunctive relief and/or a decree for specific performance, and such other relief as may be proper (including money damages if appropriate), to the extent permitted by law. N*otwithstanding Section 18 below, a claim for equitable relief arising out of or related to this Agreement may be brought in any court of competent jurisdiction.*

(Id., § 16) (italics added, underlined in original.)

Section 18 of the ECIA states:

> Dispute Resolution. *Except as provided in Section 16*, any controversy, dispute, or claim arising out of or relating to this agreement, or my employment with CloudBrink, shall be resolved through binding arbitration administered by JAMS pursuant to its Employment Arbitration Rules & Procedures….*CloudBrink may apply to any court of competent jurisdiction for a temporary restraining order, preliminary injunction, or other interim or a conservatory relief, as necessary without breach of this arbitration agreement and without abridgement of the powers of the arbitrator*."

(*Id*., § 18 (emphasis added).)

The ECIA stated that the agreement "may be modified only if both Cloudbrink and I consent in writing" (*id*., §22) (emphasis added).

TriNet's Arbitration Provision (the "DRP")

The second arbitration agreement that Plaintiff signed was with TriNet, Cloudbrink's Professional Employer Organization ("PEO"). (See Declaration of Chad Thompson ISO Defendants' Motion to Compel Arbitration ("Thompson Decl,"), Exh. A ("TriNet Arbitration Provision" or "DRP")).

TriNet provides its customer Cloudbrink with general administrative support, including onboarding, payroll processing and providing access to certain personnel information, documents, and notices for Cloudbrink's worksite employees (employees of the PEO's customers). (Declaration of Chad Thompson ("Thompson Decl."), at ¶¶ 3, 6; Declaration of Omesh Sharma ("Sharma Decl."), at ¶ 5.) In its role as Cloudbrink's PEO, TriNet also provides and maintains a password-protected online portal that houses employment policies, records, and forms, including its Terms and Conditions Agreement (the "TCA"), which contains a

[3] This appears to be a typographical error, because the actual title was "Employee Confidentiality & Inventions Agreement" which is how it is referred to in section 12 (and in Ex. B to Ponnuswamy Decl.) (The court refers to it as the "ECIA".)

section entitled "Dispute Resolution Protocol" (the "DRP"). (Thompson Decl., at ¶¶ 4-9, Ex. A.)

On January 2, 2020, during his employment with Cloudbrink, Plaintiff electronically signed the TCA/DRP. (Id. at ¶¶ 10-17, Exs. A-C.) The DRP to which Plaintiff agreed provides the following agreement to arbitrate disputes arising out of Plaintiff's employment:

> …[T]his DRP covers any dispute arising out of or relating to your co-employment with TriNet, including your TriNet co-employer, and/or *arising out of or relating to your employment with your company, as well as any dispute with an employee, officer, or director* of TriNet or *of a TriNet customer (all of whom, in addition to TriNet customers, are intended to be beneficiaries of this DRP) ("covered dispute")*…The Federal Arbitration Act ("FAA") applies to this DRP…This DRP will survive termination of the employment relationship. With only the exceptions described below, arbitration will be used instead of going before a court (for a judge or jury trial), and even in the situations described below, NO JURY TRIAL WILL BE PERMITTED (unless applicable law does not allow enforcement of a pre-dispute jury trial waiver in the particular circumstances presented).
>
> ***
>
> …[T]his DRP is the full and complete agreement for resolution of covered disputes between you and TriNet (and its employees, officers and agents), and between you and your company (and its employees, officers, and agents). If any portion of this DRP is determined to be unenforceable, the remainder of this DRP will still be enforceable…
>
> ***
>
> By acknowledging below, I confirm that I have read and understand the contents of this TCA including, but not limited to, [the DRP]… that I have the responsibility to readand familiarize myself with the TCA, the TriNet Employee Handbook, any applicable State Notices, and any additional policies for my company, and I agree to abide by the terms and conditions set forth therein, including but not limited to the DRP. I further understand and acknowledge that I am an at-will employee.

(*Id*., at ¶ 10, Ex. A, emphasis added.)

Plaintiff electronically received, reviewed, acknowledged, and signed the TCA on January 2, 2020, through TriNet's online portal. (*Id*., at ¶¶ 10-17, Exs. A-C.)

The TriNet Arbitration Provision is in an eight-page document, the TriNet Terms and Conditions Agreement ("TCA"). [4] The TCA states that TriNet will provide certain administrative services, "which may include processing payroll…, sponsoring and administering employee benefits as applicable, and providing certain other human resources services" (id., §1). The TCA states: "your company, and not TriNet, directs and controls your hiring, compensation, employment duties and responsibilities, work schedule and actual hours worked, performance measures, and all other terms and conditions of your employment at the worksite" (id., §7).

On the fourth page of the TriNet TCA is a "Dispute Resolution Protocol and Mandatory Arbitration of Claims" provision ("DRP"). The TriNet DRP states in bold in section 8(b) (italics added):

> **If at the time of a covered dispute there is an arbitration agreement between you and your company, then to the extent inconsistent with this DRP's mandatory arbitration requirement*, this DRP will control*. If at the time of a covered dispute there is an agreement between you and your company e*xpressly prohibiting***

[4] The TCA has 7 pages of text and the 8th page is the electronic confirmation that Plaintiff accepted it.

***arbitration of covered disputes*, then that agreement will be controlling as between you and your company (and its employees, officers, and agents). However, any covered dispute against TriNet (and its employees, officers, and agents) will still be subject to this DRP and mandatory arbitration, unless you and TriNet mutually agree otherwise after the covered dispute has arisen.**

The TriNet Arbitration Provision references the exception for non-covered disputes in an agreement between the employee and "your company" several times, noting that "with only the exceptions described below, arbitration will be used" (id., §8(a)) and that the employee must agree to "mandatory arbitration of disputes arising out of or relating to [his] employment … (except as specifically provided in the DRP)" (id., §9) (emphasis added).

The TriNet DRP provides for discovery "under the applicable employment arbitration rules and procedures of the Judicial Arbitration and Mediation Services, Inc. ('JAMS') or any other dispute resolution provider agreed to by the parties, as then in effect and as modified by any superseding provisions in this DRP. JAMS' Employment Arbitration Rules may be found on the internet at www.jamsadr.com or by using an internet search engine to locate the 'JAMS Employment Arbitration Rules.'" (Thompson Decl., Exh. A §8(c).)

The TriNet DRP also provides that "[i]n arbitration, the parties will have the right to…conduct reasonable and adequate civil discovery….To the extent any applicable arbitration rules are inconsistent with the terms of this DRP, the terms of this DRP will be controlling." (Thompson Decl., Exh. A §8(d)).)

The TriNet Arbitration Provision further included a waiver of all "representative, or private attorney general action" claims with an opt out provision. (Thompson Decl., Exh. A §8(d).) Plaintiff did not opt out.

Federal and State Law Strongly Favor Enforcement of Arbitration Agreements

Federal and California law strongly favor the enforceability of arbitration agreements and require that – where parties have agreed to arbitrate – they must do so in lieu of litigating in court. (*Buckeye Cheek Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 443; *Moses H. Cone Mem. Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24-25; *Harris v. Tap Worldwide, LLC* (2016) 248 Cal.App.4th 373, 380 ["California law favors enforcement of valid arbitration agreements."]; the United States Arbitration Act, commonly referred to as the Federal Arbitration Act or "FAA"; California Arbitration Act, CCP § 1280 et seq., "CAA".) In almost identical language, each Act makes arbitration agreements valid, irrevocable, and enforceable except on grounds that exist for revocation of any type of contract generally. (Code Civ. Proc., § 1281; 9 U.S.C. § 2; *Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 701.)

The FAA

The FAA creates a strong presumption in favor of arbitration. (*Nguyen v. Applied Med. Res. Corp.* (2016) 4 Cal.App.5th 232, 245.) Its main purpose is to "ensur[e] that private arbitration agreements are enforced according to their terms" and it "preempts any state law rule that "stand[s] as an obstacle to the accomplishment of the FAA's objectives." (*Nguyen, supra,* 4 Cal.App.5th at p. 246, quoting *Carbajal v. CWPSC* (2016) 245 Cal.App.4th 227, 238.) The FAA applies to contracts in the employment context where the employment affects interstate commerce. (*Carmax Auto Superstores Cal. LLC v. Hernandez* (9th Cir. 2015) 94 F.Supp.3d 1078, 1099.)

The FAA provides that "[a] written provision in any … contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract … shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) The phrase "involving

commerce" is the "functional equivalent of affecting commerce," which is "a term of art that ordinarily signals the broadest permissible exercise of Congress's commerce clause power." (Nguyen, supra, 4 Cal.App.5th at p. 246 (citations omitted).) The minimal nexus to interstate commerce required by the FAA exists here.

Under the FAA, the basic role for this Court is to determine whether the movant has shown that: (1) a valid arbitration agreement exists and, if so, (2) the arbitration agreement encompasses the claims at issue. (*Kilgore v. KeyBank, N.A.* (9th Cir. 2012) 673 F.3d 947, 955-56.) The party opposing arbitration must demonstrate that the arbitration agreement is invalid. (*See Green Tree Fin. Corp. v. Randolph* (2000) 531 U.S. 79, 91-92.) Doubts as to whether Plaintiff's claims are subject to arbitration must be resolved in favor of arbitration. (*See Moses H. Cone Mem. Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24-25; *A&T Tech., Inc. v. Communication Workers of Am.* (1986) 475 U.S. 643, 650.)

Parties may "specify by contract the rules under which the arbitration will be conducted." (*See Volt Info. Scis. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 470, 477-79 (1989) [contracts lawfully may opt out of FAA coverage].)

The CAA

"[T]he procedural provisions of the CAA [the California Arbitration Act] apply in *California* courts by default. . . . [T]he parties may '*expressly* designate that any arbitration proceeding [may] move forward under the FAA's procedural provisions rather than under state procedural law.' [Citation.] Absent such an express designation, however, the FAA's procedural provisions do not apply in state court." (*Valencia v. Smyth* (2010) 185 Cal.App.4th 153, 174-175; see *Mave Enterprises, Inc. v. Travelers Indemnity Co.* (2013) 219 Cal.App.4th 1408, 1429 ["the procedural provisions of the CAA" apply in California courts "absent a choice-of-law provision expressly mandating the application of the procedural law of another jurisdiction"].)

Code of Civil Procedure section 1281.2, subdivision (c), is among the CAA's procedural provisions that may be enforced by California courts even with respect to arbitration contracts subject to the FAA's substantive rules. (See *Volt*, *supra*, 489 U.S. at pp. 470, 477-479 [application of section 1281.2 to stay arbitration would not undermine the goals and policies of, and is not preempted by, the FAA in a case where the parties have agreed that their arbitration agreement will be governed by California law].)

The CAA requires courts to enforce arbitration clauses where one party has shown the existence of an agreement to arbitrate that encompasses the dispute in question, unless the party opposing arbitration demonstrates that the petitioner waived the right to compel arbitration, or that grounds exist for revocation of the agreement. (*See* Code Civ. Proc., § 1281.2; *see generally St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187.) The CAA states in relevant part:

> On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court **shall order** the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: (a) [t]he right to compel arbitration has been waived by the petitioner; or (b) [g]rounds exist for the revocation of the agreement.

(Code Civ. Proc., § 1281 (emphasis added).)

A Valid Arbitration Agreement Encompassing Plaintiff's Claims Exists

"The party seeking arbitration bears the initial burden of demonstrating the existence of an arbitration agreement." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development*

(US), LLC (2012) 55 Cal.4th 223; *see also United Steelworkers of Am. V. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574, 582-83 [courts must defer to arbitration unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute…"]; *Vianna v. Doctor's Management Co.* (1994) 27 Cal.App.4th 1186, 1189 [any "[d]oubts as to whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration."].)

The party seeking arbitration has the "burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence, while a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense." The trial court "sits as the trier of fact, weighing all the affidavits, declarations, and other documentary evidence, and any oral testimony the court may receive at its discretion, to reach a final determination." (*Ruiz v. Moss Bros. Auto Group, Inc*. (2014) 232 Cal.App.4th 836, 842; *Gamboa v. Northeast Community Clinic* (2021) 72 Cal.App.5th 158, 164-165.)

Here, Defendants have met their burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence. Plaintiff received and electronically signed the TriNet Arbitration Agreement. The DRP by its terms covers all the claims in Plaintiff's complaint. CloudBrink was a TriNet customer ("your company") and Mana [Cloudbrink's CEO in Plaintiff's complaint] was an "employee, officer, or director …of a TriNet customer [Cloudbrink.]. (See Thompson Decl., at ¶¶ 4-9, Ex. A; Complaint.) "[T]his DRP covers any dispute … arising out of or relating to your employment with your company, as well as any dispute with an employee, officer, or director …of a TriNet customer (all of whom, in addition to TriNet customers, are intended to be beneficiaries of this DRP) ("covered dispute")…." (*Id*., Exh. A, § 8(a).)

Here, the TriNet DRP specifically provided "The Federal Arbitration Act ("FAA") applies to this DRP." (*Id.*) "Cloudbrink is engaged in business across interstate lines." (Sharma Decl., filed 2/8/224, ¶ 7.) Accordingly, the court finds the FAA applies to the DRP.

Once the moving party establishes the existence of the arbitration agreement, the burden shifts to the party opposing arbitration to establish the factual basis for any defense to the enforcement of the arbitration agreement. (*Rosenthal v. Great W. Fin. Sec. Corp.* (1996) 14 Cal.4th 394, 413; *Condee v. Longwood Management Corp.* (2001) 88 Cal.App.4th 215, 219.) Plaintiff's opposition raises the defense of unconscionability.

Unconscionability

The party opposing arbitration bears the burden of proving any defense, such as unconscionability. (*Harris, supra,* 248 Cal.App.4th at 380-81; *Pinnacle Museum Tower Ass'n, supra*, 55 Cal.4th at 236.) Unconscionability is lack of meaningful choice by one party, plus contact terms unreasonably favorable to the other. (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1243 ("*Baltazar*").) The burden to prove a defense is a heavy one, because the law favors arbitration. (*Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332, 1347; *Titolo v. Cano* (2007) 157 Cal.App.4th 310, 316.)

Both the Federal Arbitration Act (FAA) and the California Arbitration Act (CAA) provide that an arbitration provision should not be enforced if grounds exist for revocation of the Agreement. (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 125 ("*OTO*").) This includes unconscionability. (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1171.) "[U]nconscionability has both a 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results." (*Armendariz v. Found. Health Psychcare Servs.* (2000) 24 Cal.4th 83, 114 ("*Armendariz"*).) Both elements must be present for a court to refuse to enforce a clause as unconscionable, "[b]ut they need not be present in the same degree." (*Id.*) Courts employ a sliding scale: "[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." (*Id.*)

Procedural Unconscionability

Procedural unconscionability is present when the way an agreement is negotiated involves (i) oppression and/or (ii) surprise. (*Armendariz, supra*, 24 Cal.4th at 114.) "[There are degrees of procedural unconscionability. At one end of the spectrum are contracts that have been freely negotiated by roughly equal parties, in which there is no procedural unconscionability. ...Contracts of adhesion involve surprise or other sharp practices lie on the other end of the spectrum. (*Baltazar, supra,* 62 Cal.4th 1237, 1244.) Court's "must be particularly attuned to claims that employers with superior bargaining power have imposed one-sided, substantively unconscionable terms as part of an arbitration agreement." (*Armendariz, supra,* 24 Cal.4th at 115.) "Where an adhesive contract is oppressive, surprise need not be shown to establish procedural unconscionability. [Citation.]" (*Bakersfield College v. California Community College Athletic Assn.* (2019) 41 Cal.App.5th 753, 764 [internal quotations omitted].) "'When the weaker party is presented the clause and told to 'take it or leave it' *without the opportunity for meaningful negotiation*, oppression, and therefore procedural unconscionability, are present.' [Citation.]" *(Id*., at 762 [emphasis added].)

"Few employees are in a position to forfeit a job and the benefits they have accrued for more than a decade solely to avoid the arbitration terms that are forced upon them by their employer." (*Fitz v. NCR Corp*. (2004) 118 Cal.App.4th 702, 722 ("*Fritz*"); *OTO, supra,* 8 Cal.5th 111, 127 [finding "significant oppression" where the arbitration agreement was presented to employee three years into his employment].)

Oppression

"Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice." (*Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 853.) "An adhesive contract is standardized, generally on a preprinted form, and offered by the party with superior bargaining power 'on a take-it-or-leave-it basis.' [Citations]" (*OTO, supra,* 8 Cal.5th 111, 126.)

"Analysis of unconscionability begins with an inquiry into whether the contract was a contract of adhesion--i.e., a standardized contract, imposed upon the subscribing party without an opportunity to negotiate the terms. (*Armendariz, supra*, 24 Cal. 4th at pp. 113-114; [Citations].) A finding of a contract of adhesion is essentially a finding of procedural unconscionability. [Citations]." (*Flores, supra,* 93 Cal.App.4th at 853.)

> "The circumstances relevant to establishing oppression include, but are not limited to (1) the amount of time the party is given to consider the proposed contract; (2) the amount and type of pressure exerted on the party to sign the proposed contract; (3) the length of the proposed contract and the length and complexity of the challenged provision; (4) the education and experience of the party; and (5) whether the party's review of the proposed contract was aided by an attorney." (*Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332, 1348, fn. omitted.) With respect to *preemployment* arbitration contracts, we have observed that "the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement." (*Armendariz, supra*, 24 Cal.4th at p. 115.)

(*OTO, supra*, 8 Cal.5th 111, 126-127.)

Surprise

Surprise looks to the extent to which the contract clearly discloses its terms as well as the reasonable expectations of the weaker party. (*Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1406 ("*Harper*").) "Surprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them. [Citation.]" (*Flores, supra*, 93 Cal.App.4th at 853.)

> "Unfair surprise results from misleading bargaining conduct or other circumstances indicating that a party's consent was not an informed choice. [Citations.]" ([(*Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal.App.4th 154,] at p. 173, fn. omitted.) "'[T]here are degrees of procedural unconscionability. At one end of the spectrum are contracts that have been freely negotiated by roughly equal parties, in which there is no procedural unconscionability. … Contracts of adhesion that involve surprise or other sharp practices lie on the other end of the spectrum.'" (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1244.)

(*Penilla v. Westmont Corp.* (2016) 3 Cal.App.5th 205, 214.)

Plaintiff argues he was surprised because he had already signed Cloudbrink's offer letter and ECIA which purport to "set forth the entire understanding" between Plaintiff and Cloudbrink regarding his employment. (*Id*., Exh. A §12). The ECIA, which includes Cloudbrink's initial arbitration provision, provides that "this Agreement may be modified only if both CloudBrink and [Plaintiff] consent in writing" (id., Exh. B §22) (emphasis added).[5] Plaintiff states that "I was not aware that there would be any change in my relationship with CloudBrink." (Ponnuswamy Decl., ¶ 6.)

The court does *not* find Plaintiff's argument that Cloudbrink did not provide Plaintiff with reasonable notice that the TriNet TCA was intended to effectuate any change in Plaintiff's relationship with Cloudbrink persuasive. It's true that "Plaintiff had already signed Cloudbrink's offer letter and ECIA which purport to "set forth the entire understanding" between Plaintiff and Cloudbrink regarding his employment. (*Id*., Exh. A §12). And the ECIA, which includes Cloudbrink's arbitration provision, provides that "this Agreement may be modified only if both CloudBrink and [Plaintiff] consent in writing" (*id*., Exh. B §22) (emphasis added)." (Plaintiff's Opp., p. 7.) However, the plain language of the TCA states clearly in section 8 that binding arbitration is required for all the claims that Plaintiff is making in this lawsuit.[6] Furthermore, Plaintiff was a founder, officer and director of Cloudbrink who reads and understands English when he signed the TriNet agreement.

> Section 1 of the TCA states as follows:
> Your relationship with TriNet is beginning because the company you work for ("your worksite employer," "your company" or "my company") is a TriNet customer. This means that your company has entered into an agreement with a TriNet PEO company to share certain employer responsibilities as co-employers. This also means that a TriNet PEO company (the company whose name appears on your wage statements, "your TriNet co-employer") will be your employer of record for certain administrative purposes, which may include processing payroll (based on information provided by your worksite employer), sponsoring and administering employee benefits as

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[5] This argument indicates that Plaintiff was aware of the terms of the ECIA at the time he entered into the TriNet Agreement. Plaintiff's declaration that "I did not understand that the arbitration provision was intended to waive my right to jury trial if I ever had claims against Cloubbrinbk" (Ponnuswamy Decl. ¶ 4) is *no*t persuasive in light of the plain language of the EICA arbitration agreement.

[6] Plaintiff's declaration that "I did not understand that the provision was intended to waive my right to jury trial if I ever had a claims against Cloudbrink" (Ponnuswamy Decl. ¶ 9) is *not* persuasive in light of the plain language of the DRP. Furthermore, this was the second time Plaintiff signed an arbitration agreement involving Cloudbrink.

> applicable, and providing certain other human resources services. Your worksite employer will retain the responsibilities of directing your day-to-day work and managing its business affairs. Your worksite employer, not TriNet, has sole responsibility for controlling and providing information about your wages, working hours, and working conditions. You acknowledge and agree that your worksite employer and TriNet are authorized to share information with each other about you and your dependents to provide human resources services.

Although the TCA does not mention Cloudbrink by name, the TCA clearly states that it applies to "your worksite employer, your company or my company." Plaintiff does not dispute that he executed the TCA and DRP as part of the process for his employment with Cloudbrink. And Plaintiff alleges in his Complaint that he "was an employee of Defendant Cloudbrink, Inc. from April 2019 until his termination in March 2023." (Complaint ¶ 3.) Thus, there is no other "employer" or "company" that the TCA would apply to.

Also, the fact that Cloudbrink and Mana are not a signatory to the TCA does not render it unenforceable by the company or Mana. Under California law, a nonsignatory may enforce a contract if it is an intended third-party beneficiary. (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1021-1022.) "The test for determining whether a contract was made for the benefit of a third person is whether an intent to benefit a third person appears from the terms of the contract." (*Id*. at 1022 (citation omitted).) Here, it is apparent on the face of the TCA and DRP that it was intended to benefit Defendants. Therefore, the Court finds the DRP to apply to Defendants. Furthermore, the preponderance of the evidence showed that that "Cloudbrink desired and expected to be bound by the terns of the TCA/DRP in the event of a dispute(s) arising out of one of its employees' employment, including Plaintiff's employment." (Sharma Decl. filed 2/8/2024, ¶ 6.) This distinguishes it from *Rebolledo v. Tilly's, Inc*. (2014) 228 Cal.App.4th 900, 922–23 (finding employer's change to arbitration agreement unenforceable where employer failed to sign modification, as required by the agreement). In any event, Plaintiff only argued *Rebolledo* in his opposition papers regarding surprise for unconscionability.

Any surprise Plaintiff claims is based on his failure to read the agreement. It is well established that one who signs an instrument is deemed to have consented to all the terms of the contract they sign, even if they have not read it. (See, e.g., *Marin Storage & Trucking, Inc. v. Benco Contracting and Engineering* (2001) 89 Cal.App.4th 1042, 1049; *Greve v. Taft Realty Co.* (1929) 101 Cal.App. 343, 351–52.). That Plaintiff did not read the DRP he signed does not render the agreement unenforceable or unconscionable. (*Gutierrez v. Autowest, Inc*. (2003) 114 Cal.App.4th 77, 88.) "[O]ne who assents to a contract is bound by its provisions and cannot complain of unfamiliarity with the language of the instrument." (*Madden v. Kaiser Found. Hospitals* (1976) 17 Cal.3d 699, 710.)

Plaintiff claims he had no experience negotiating the terms of his employment contracts. (Ponnuswamy Decl., ¶12). He was never told the TriNet Arbitration Provision was negotiable and was never offered an opportunity to negotiate the provision. Plaintiff did not believe it was possible to negotiate its terms, which were presented on a static website and not in a form that was reasonably editable (id., ¶10; Thompson Decl., ¶¶9-13).

"No one at TriNet or Cloudbrink discussed the TriNet Terms and Copnditions Agreement or TriNet Dispute Resolution Procudure with [Plaintiff]. [Plaintiff does] not recall anyone from Cloudbrink ever pointing out that the TriNet Agreement contained an arbitration provision. (Ponnuswamy Decl , ¶ 8.)

Plaintiff argues the DRP is procedurally unconscionable because it was a standard form imposed on him on a "take-it-or-leave-it" basis. Plaintiff claims he could not receive his

wages and benefits until he signed and accepted its terms. He states he had to agree to arbitration in order to keep his job at Cloudbrink.

However, Defendants point out that Plaintiff was Cloudbrink's founder, Chief Technology Officer, and Director at the time he signed the TriNet DRP. (Ponnuswamy Decl., ¶ 2; see also Complaint, ¶ 10.) In other words, Plaintiff was a founder, officer, and director *in control of* Cloudbrink *at the time he entered into* the TriNet DRP.

The court concludes that Plaintiff has only made a **small** showing of procedural unconscionability. CloudBrink had superior bargaining strength in presenting TriNet's preprinted forms to Plaintiff, but Plaintiff was a founder, officer and director of CloudBrink at the time he signed. The TCA with the DRP is a contract of adhesion which Plaintiff was at least impliedly required to sign in order to continue his employment.

However, contrary to Plaintiff's declaration that he did not understand that the provision was intended to waive my right to jury trial if he ever had claims against Cloudbrink (Ponnuswamy Decl., ¶ 9), the fact that the TCA included a dispute resolution provision, and that it applies to an employees' claims against CloudBrink as the worksite employer is clear from the written terms. The DRP is not hidden. The fact that the TCA includes terms relating to the handling of disputes with a TriNet customer is set out on the first page. Plaintiff was aware that CloudBrink was his employer (and a customer of TriNet) when he signed. The DRP includes bold language that arbitration will replace the right to jury trial. There is no evidence that Plaintiff was rushed into signing, and the evidence showed he had an unlimited amount of time to review the terms and to familiarize himself with them before signing. It also showed that copies were sent to both his work and personal email.

Furthermore, Plaintiff offers no persuasive evidence to suggest Defendants manipulated or otherwise coerced Plaintiff into signing the agreement. Plaintiff does *not* assert that as part of the onboarding process with TriNet that he had questions that went unanswered or that he asked to negotiate any terms and was denied the opportunity. Nor does Plaintiff claim that he asked to review the TriNet Arbitration Agreement with counsel, or HR, and was denied the opportunity.

In addition, the failure to attach the JAMS rules is *not* sufficient, by itself, to support a finding of procedural unconscionability. (*Lane v. Francis Capital Mgmt*. (2014) 224 Cal.App.4th 676, 691-692; *Peng v. First Republic Bank* (2013) 219 Cal.App.4th 1462, 1471-1472.) The DRP provides the internet address to access the JAMS rules. The failure to attach the JAMS rules, in the absence of other factors supporting procedural unconscionability, does not support a finding of procedural unconscionability. They were not "artfully hidden" by the simple expedient of incorporating them by reference rather than including them or attaching them to the arbitration agreement. (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1246.)

While its true that *Hasty v. Am Auto Ass'n of N. California, Nevada & Utah* (2023) 98 Cal.App.5th 1041, 1060-1061 stated that when an arbitration agreement that selected the JAMS rules "then in effect" was "unclear how an employee could know what terms he, she, or they were agreeing to *at the time of signing the agreement* when the rules and procedures may be different when a dispute arises in the future." (I*bid.*) The court in *Hasty* also noted that the issue was "not addressed by the parties." *(Id*., at 1061.) As discussed in more detail below, this case is very different from *O'Hare v. Municipal Resource Consultants* (2003) 107 Cal.App.4th 267, 281-282 ("*O'Hare*"), which *prohibited* prehearing discovery. The court also notes that *Fitz v NCR Corp*. (2004) 118 Cal.App.4th 702, 721 ("*Fritz*") (noting that application of different rules "would fail to provide adequate notice of the applicable rules of discovery) was decided before the California Supreme Court decision in *Baltazar, supra*, 62 Cal.4th 1237, 1246.

> In *Baltazar*, the Supreme Court held that the failure to provide a copy of the arbitral rules, standing alone, does not heighten the degree of procedural unconscionability. *Baltazar* noted that in the cases where the failure to provide the arbitral rules supported a finding of procedural unconscionability, the "claim depended in some manner on the arbitration rules in question. [Citations.] These cases thus stand for the proposition that courts will more closely scrutinize the substantive unconscionability of terms that were 'artfully hidden' by the simple expedient of incorporating them by reference rather than including them in or attaching them to the arbitration agreement." (*Baltazar*, at p. 1246.)
>
> It logically follows from *Baltazar* that a viable claim of procedural unconscionability for failure to identify the particular version of the applicable arbitral rules—like a claim for failure to attach the rules themselves—depends in some manner on the substantive unfairness of a term or terms contained within the unidentified version of the rules applicable to the dispute. (See *Peng v. First Republic Bank* (2013) 219 Cal.App.4th 1462, 1470–1472 [162 Cal. Rptr. 3d 545] (*Peng*) [no heightened procedural unconscionability due to failure to attach arbitral rules or identify them with clarity].) That is, if the unidentified rules are not themselves substantively unfair, then the employer cannot be faulted for vaguely referring to such rules.

(*Davis v. Kozak* (2020) 53 Cal.App.5th 897, 909.) As discussed in more detail below, the court finds that the DRP provides for "reasonable and adequate civil discovery" regardless of the JAMS rules. Accordingly, the failure to attach the JAMS rules and the reference to the JAMS rules then in effect only support a low degree of procedural unconscionability.

Considering all the facts and circumstances, this court finds a **small or low** degree of procedural unconscionability. "Therefore, only a high degree of substantive unconscionability would render the agreement unconscionable. (See, e.g., *Ramirez v. Charter Communications, Inc.* (2022) 75 Cal.App.5th 365, 373, review granted June 1, 2022, S273802 ["When, as here, the degree of procedural unconscionability is low, the agreement must be enforced unless the degree of substantive unconscionability is high"].)" (*Alberto v. Cambrian Homecare* (2023) 91 Cal.App.5th 482, 490 ("*Alberto*").)

SUBSTANTIVE UNCONSIOUABILITY

Substantive unconscionability focuses on the terms of the agreement and whether those terms are so one-sided as to shock the conscious." (*Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1330.) Thus, the paramount consideration for whether an agreement is substantively unconscionable is mutuality of its terms. (*Nyulassy v. Lockheed* Martin Corp. (2004) 120 Cal.App.4th 1267, 1287 (2004).

Plaintiff argued that the arbitration agreement found in the ECIA lacked mutuality and therefore was enforceable. However, the ECIA was entered into on April 25, 2019, and therefore predated the TriNet Arbitration Agreement (the "DRP"). Plaintiff's interpretation is contrary to the terms of the DRP which states: "If at the time of a covered dispute there is an arbitration agreement between you and your company, then to the extent inconsistent with the DRP's mandatory arbitration requirement, this DRP will control." (Thompson Decl., Exh. A.)

Contrary to Plaintiff's opposition, the ECIA does *not* contain a provision "explicitly prohibiting arbitration," which would require that the terms of the ECIA control the resolution of a covered dispute. Accordingly, the "DRP will control" over any claim arising out of the ECIA because the ECIA was "an arbitration agreement between you [Plaintiff] and your company [Cloudbrink]." Cloudbrink cannot sue Plaintiff in court for any claims for "equitable relief" or for "a temporary restraining order, preliminary injunction, or other interim or a

conservatory relief, as necessary" (Ponnuswamy Decl., Exh. B §§16, 18) under the ECIA, because the TriNet "DRP will control."[7]

Adequate Discovery

Plaintiff argues the TriNet Arbitration Agreement does *not* afford him adequate discovery because of the 2014 JAMS Rules.[8] "The denial of adequate discovery in arbitration proceedings leads to the de facto frustration of the employee's statutory rights." (*Armendariz, supra,* 24 Cal.4th 83, 104.)

> Adequate discovery is indispensable for the vindication of statutory claims. (See *Armendariz, supra,* 24 Cal.4th at p. 104.) " '[A]dequate' discovery does not mean unfettered discovery … ." (*Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 184 (*Mercuro*).) And parties may "agree to something *less than* the full panoply of discovery provided in Code of Civil Procedure section 1283.05." (*Armendariz, supra,* 24 Cal.4th at pp. 105–106.) However, arbitration agreements must "ensure minimum standards of fairness" so employees can vindicate their public rights. (*Little, supra,* 29 Cal.4th at p. 1080).

(*Fitz, supra,* 118 Cal.App.4th 702, 715-716.)

Here, the DRP specifically states the parties will have the ability to "conduct reasonable and adequate discovery." (Thompson Decl., Ex. A, § 8(d).)[9] It also states that "[t]o the extent any applicable arbitration rules are inconsistent with the terms of this DRP, the terms of this DRP will be controlling." (*Id.*., Exh. A. § 8(d).) Courts "assume that the arbitrator will operate in a reasonable manner in conformity with the law." (*Dotson v. Amgen, Inc.* (2010) 181 Cal.App.4th 975, 984.) Even if the JAMS rules did not permit adequate discovery when the arbitration contract was entered into, the court assumes the arbitrator would permit "reasonable and adequate discovery" as required by the DRP. This complies with the adequate discovery requirement of *Armendariz.* Both sides are required to cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and information, and to supplement their production of documents and information. (JAMS Rule 17(a), (c).) In any event, the current JAMS rule 17(e) provides "The Parties may take discovery of third parties with the approval of the Arbitrator."

The PAGA Waiver Is Unlawful

The TriNet DRP prohibits Plaintiff from bringing a representative action (including a Private Attorneys General Act ("PAGA") claim), which was unlawful both before and after the U.S. Supreme Court's decision in *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639. Under *Iskanian v. CLS Transp. L.A., LLC* (2014) 59 Cal.4th 348, 382-84, an arbitration agreement may not require an employee to waive the right to bring a PAGA representative action[10]. TriNet's Arbitration Provision states that "[t]here will be no right or authority for any

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[7] CloudBrink's April 2019 offer letter stated that Plaintiff's employment is contingent upon execution of the ECIA. (See Ponnuswamy Decl. ¶3, Exhs. A and B.) Accordingly, any claim arising out of the ECIA is a claim "arising out of or relating to your employment with your company" within the scope of the DRP.

[8] Unconscionability must be evaluated at the time the agreement was signed. (*Subcontracting Concepts (CT) v. DeMelo* (2019) 34Cal.app.5th 201, 212; *O'Hare v. Municipal Reserve Consultants* (2003) 107 Cal.App.4th 267, 281-282 ("O'Hare").)

[9] This is very different from *O'Hare, supra,* 107 Cal.App.4th 267, 281-282, which evaluated an arbitration provision which *prohibited* prehearing discovery.

dispute to be brought, heard, or arbitrated as a class, collective, representative, or private attorney general action, or as a member in any purported class, collective, representative, or private attorney general proceeding" (Thompson Decl., Exh. A §8(d)). The provision includes a "savings clause," which applies only to a case in which "the dispute is filed as a class, collective, representative, or private attorney general action". (*Ibid.*)

Following *Viking River*, California appellate courts have consistently held that arbitration provisions forcing employees to waive their right to bring a representative action are unconscionably one-sided, as such actions are the type of claims only employees bring against employers. (*Hasty*, 98 Cal.App.5th 1041, 317 Cal.Rptr.3d at 315; *Navas v. Fresh Venture Foods, LLC* (2022) 85 Cal.App.5th 626, 634.) Notably, for purposes of an unconscionability analysis, "it is irrelevant that [the plaintiff] has not brought a PAGA action. (*Hasty*, 317 Cal.Rptr.3d at 315.) Following *Viking River*, the California Supreme Court's core holding in *Iskanian* remains good law and controlling precedent in California courts. As stated therein, "an employee with an individual PAGA claim 'is free to forgo the option of pursuing a PAGA action. But it is against public policy for an employment agreement to deprive employees of this option altogether, before any dispute arises.'" (*Navas*, 85 Cal.App.5th at 635 [quoting *Iskanian*, 59 Cal.4th at p. 387, italics added]; *Mills v. Facility Sols. Grp., Inc.* (2022) 84 Cal.App.5th 1035, 1062 ["*Iskanian*'s holding that waivers of PAGA claims are unenforceable as against public policy remains good law following *Viking River*."])

That TriNet's Arbitration Provision included a box to check to opt out of the waiver of PAGA claims does not change the unlawful nature of the provision. (*Williams v. RGIS, LLC* (2021) 70 Cal.App.5th 445, 453 ("Plaintiffs' ability to opt out of the fleet agreement, or their election not to do so, does not impact our analysis."); *Securitas Sec. Servs. USA, Inc. v. Superior Ct*. (2015) 234 Cal.App.4th 1109, 1121; *Juarez v. Wash Depot Holdings, Inc*. (2018) 24 Cal.App.5th 1197, 1203 (following Securitas refusing to enforce a predispute waiver of a representative PAGA claim merely because the employee had the opportunity to opt out).

Defendants' Reply does *not* dispute that the PAGA waiver is unenforceable, but instead argues that "the appropriate order is to enforce the agreement as to all non-PAGA claims as severance eliminates any unconscionable terms that may exist." (Defendants' Reply, p. 11.)

Here the court finds a **low** degree of substantive unconscionability based on the "Class Action Waiver" (which included a PAGA waiver) in section 8(d) of the DRP that is unenforceable.

Severability

Defendants request the court sever unenforceable terms, if any, in the DRP or ECIA and enforce Plaintiff's agreement to arbitrate. (See *Little v. Auto Stiegler, Inc*. (2003) 29 Cal.4th 1064, 1071, 1085; see also *Sanchez v. W. Pizza Enters., Inc*. (2009) 172 Cal.App.4th 154, 180; *Farrar v. Direct Commerce, Inc*. (2017) 9 Cal.App.5th 1257, 1275; *McManus v. CIBC World Markets* (2003) 109 Cal.App.4th 76.)

The ECIA provides in section 21:

> "A PAGA representative action is … a type of qui tam action," in which "'an "aggrieved employee" may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations.'" (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 380, 381 [173 Cal. Rptr. 3d 289, 327 P.3d 129] (*Iskanian*).) "'An employee plaintiff suing … under the [PAGA] does so as the proxy or agent of the state's labor law enforcement agencies.'" (*Id.* at p. 380.)

(*Alberto*, 91 Cal.App.5th at 494.)

> Severability. If an arbitrator or court of law holds that any provision of this Agreement to be illegal, invalid or unenforceable, (a) that provision shall be deemed amended to provide CloudBrink the maximum protection permitted by applicable law and (b) the legality, validity and enforceability of the remaining provisions of this Agreement shall not be affected.

(Ponnuswamy Decl., Exh. B, §21.)

The TriNet DRP provides in section 8(f): "If any provision of this DRP is determined to be unenforceable, the remainder of this DRP will still be enforceable**,** *subject to the specific exception in section (d) above***."** **(**Thompson Decl., Exh. A § 8(f) [emphasis added].)

"[T]he specific exception in section (d) above" refers to the "Class Action Waiver" which includes the PAGA waiver in section 8(d). **(***Id.*, Exh. A § 8(d).) As discussed above, this court finds the "Class Action Waiver" (which includes the PAGA waiver) in section 8(d) of the DRP unenforceable. However, the DRP also states in section 8(d):

> Disputes regarding the validity and enforceability of the Class Action Waiver may be resolved only by a civil court of competent jurisdiction and not by an arbitrator. In any case in which the dispute is filed as a class, collective, representative, or private attorney general action, and (2) a court of competent jurisdiction finds all or part of the Class Action Waiver unenforceable, the class, collective, representative, and/or private attorney general action must be litigated in a civil court of competent jurisdiction, but the portion of the Class Action Waiver that is enforceable shall be enforced in arbitration.

The existence of severability "clauses evidence the parties' intent that, to the extent possible, the valid provisions of the contracts be given effect, even if some provision is found to be invalid or unlawful." (*Baez v. Superior Court* (2011) 201 Cal.App.4th 1214.) "[A] court should server an unconscionable provision unless the agreement is so 'permeated' by unconscionability that it cannot be cured by severance." (*Serafin, LLC v. Calco Properties Ltd. LLC* (2025) 235 Cal.App.4th 165, 183-184.) The California Supreme Court has recognized that multiple unconscionable provisions "indicate a systematic effort to impose arbitration on the employee." (*Armendariz,* 24 Cal.4th at 124.)

> In the context of severing unconscionable provisions from an arbitration agreement, "the strong legislative and judicial preference is to sever the offending term and enforce the balance of the agreement: Although 'the statute appears to give a trial court some discretion as to whether to sever or restrict the unconscionable provision or whether to refuse to enforce the entire agreement[,] … it also appears to contemplate the latter course only when an agreement is "permeated" by unconscionability.' [Citation.]" (*Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1477–1478, quoting *Armendariz, supra*, 24 Cal.4th at p. 122.)

(*Alberto*, 91 Cal.App.5th at 495.)

"One factor weighing against severance is when "the arbitration agreement contains more than one unlawful provision." (*Armendariz, supra*, 24 Cal.4th at p. 124.)" (*Alberto, supra*, 91 Cal.App.5th 482, 495-496.) Here, the court finds one unlawful provision and it exercises its discretion to strike the "Class Action Waiver" (which included the PAGA waiver) from the DRP in section 8(d).[11] Plaintiff is permitted to bring class, collective, representative

[11] This is the equivalent of Plaintiff opting out of the Class Action Waiver.

and/or private attorney general actions in a civil court of competent jurisdiction. However, Plaintiff has *not* brought any such claims in his complaint.

Conclusion

The court GRANTS Defendants' motion to compel arbitration under the terms of the DRP in accordance with the forgoing; the offending provision of the DRP (the "Class Action Waiver" (which included the PAGA waiver) in section 8(d)) is severed and unenforceable. This action is stayed until arbitration is complete.

The court will prepare the order.

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