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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

JOSE DIAZ HERMOSILLO, et al.,  
Plaintiffs,  
v.  
DAVEY TREE SURGERY COMPANY, et  
al.,  
Defendants.

Case No. 18-CV-00393-LHK

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTION TO  
COMPEL ARBITRATION AND TO  
STAY PROCEEDINGS**

Re: Dkt. No. 16

Plaintiffs Jose Diaz Hermosillo (“Jose”) and Oscar Diaz Hermosillo (“Oscar”) (collectively, “Plaintiffs”) brought a putative class action against Defendants Davey Tree Surgery Company and The Davey Tree Expert Company (collectively, “Defendants”) in Santa Clara Superior Court. ECF No. 1 at 13. Plaintiffs assert seven causes of action related to wage and hour violations, including a Private Attorneys General Act (“PAGA”) cause of action. *Id.* at 24-36. Defendants removed this case to federal court. *Id.* at 1. Before the Court is Defendants’ motion to compel arbitration of all causes of action except the PAGA cause of action and to stay proceedings of the PAGA cause of action. ECF No. 16. Having considered the parties’ submissions, the relevant law, and the record in this case, the motion to compel arbitration and to stay proceedings

1 is hereby GRANTED IN PART and DENIED IN PART.

2 **I. BACKGROUND**

3 **A. Factual Background**

4 Defendants are Ohio corporations that perform “professional tree services on public works  
5 projects in Santa Clara County.” ECF No. 1 at 15 ¶¶ 4-5. Plaintiffs were employed by Defendants  
6 as Tree Trimmers from approximately October 2015 until approximately August 2017. *Id.* at 17  
7 ¶¶ 15-16. Plaintiffs seek to bring a class action on behalf of “[a]ll non-exempt Tree Trimmers  
8 employees (including but not limited to those holding the job titles of ‘laborer,’ ‘groundman,’  
9 ‘apprentice climber,’ ‘climber,’ ‘climbing arborist,’ ‘climbing arborist trainee,’ and ‘trimmer’)  
10 who were employed by Defendants in the State of California any time during the four years  
11 preceding the filing of this Complaint through to the present” for various alleged wage and hour  
12 violations. *Id.* at 19-20 ¶¶ 29, 25-36.

13 **1. The Employment Applications**

14 Plaintiffs submitted employment applications to The Davey Tree Expert Company in  
15 September 2015.<sup>1</sup> Plaintiffs signed the applications on September 16, 2015 and The Davey Tree  
16 Expert Company received the applications on September 18, 2015. *See* ECF No. 16-1 at 2-3; ECF  
17 No. 16-2 at 2-3; ECF No. 26. The applications both contain the following language above the  
18 signature line:

19 **IMPORTANT**  
20 **PLEASE READ BEFORE SIGNING**

21 My signature constitutes my certification that my responses are true and  
22 complete and that I have read and understood this paragraph. Where an item is  
23 left blank, it is because there is no information within its scope. My signature  
24 further constitutes my authorization for The Davey Tree Expert Company and  
25 Subsidiaries (“Davey”) to investigate the facts submitted and for those with  
26 relevant information, including but without limitation, physicians, hospitals,  
27 schools, law enforcement agencies and my prior employers, to provide such  
28 information to Davey, and I release them from any liability for doing so. If

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27 <sup>1</sup> Plaintiff’s evidentiary objections, ECF No. 24-4 and ECF No. 28, are OVERRULED.

1 requested by Davey to do so, I agree to submit to a search of any compartment  
2 that may be assigned to me, and I hereby waive all claims for damages on account  
3 of such examination. I hereby consent to undergo such medical examination and  
4 pre-employment drug test as Davey may require. I also understand and agree that  
5 I may be required to take a medical examination after I have received an offer of  
6 employment and that such offer of employment may be made contingent upon my  
7 satisfactory completion of the medical examination. I further understand and  
8 agree that I may be required, as a condition of hiring and continued employment,  
9 to pass any pre-employment drug test which Davey may ask me to take. I  
10 understand and agree that any falsification or omission either on this form or in  
11 my responses to questions asked during the interviewing or examination process  
12 or on employment forms I may subsequently complete, including "I-9" forms,  
13 shall be grounds for immediate termination of employment, no matter when the  
14 falsification or omission is discovered. I understand and agree that Davey may  
15 change wages, benefits, working conditions, and policies at any time. I also  
16 understand that, if hired, my employment will be "at will" and that either my  
17 employer or I may terminate my employment at any time, with or without cause.  
18 I understand that I may not rely on any representations or promises to the contrary  
19 which may be made by any representative of Davey. Any claims made by me  
20 against Davey relating to any aspect of my employment, including but not limited  
21 to hiring and termination, must be brought within six (6) months of the occurrence  
22 of the event giving rise to the claim(s). In addition, all claims related to my  
23 employment will be resolved through arbitration pursuant to the Federal  
24 Arbitration Act and under the rules of the American Arbitration Association.  
25 Davey will pay the fees charged by the arbitrator.

16 ECF No. 16-1 at 3; ECF No. 16-2 at 3.

17 Plaintiffs submit declarations in Spanish in which they state that their native language is  
18 Spanish and that they are "unable to speak, read or write in the English language at any level that  
19 [they] would consider basic speaking ability or literacy." ECF No. 24-2 ¶ 2; ECF No. 24-3 ¶ 2.  
20 Plaintiffs state that "Davey had an application that it drafted and presented to [them] to fill out.  
21 The application was only provided in English. No one at Davey assisted [them] in filling out the  
22 application or explained its contents." ECF No. 24-2 ¶ 4; ECF No. 24-3 ¶ 4. Plaintiffs explain  
23 that they were able to fill out the applications notwithstanding their limited English abilities based  
24 on their familiarity with such basic words as "name" and "address." *Id.* Plaintiffs state that there  
25 was no negotiation over the wording of the application and that the expectation was that they  
26 would immediately fill out and sign the applications to be considered for hire. *Id.*

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**2. The Arbitration Agreement**

Defendants contend that Plaintiffs were also given a copy of Defendants’ standalone Arbitration Agreement, ECF No. 26-3 (“Arbitration Agreement”), during their new employee orientation. Specifically, Defendants submit a declaration from Michael Barton, who was the Assistant District Manager in the Santa Clara office of The Davey Tree Expert Company at the time when Plaintiffs were hired. ECF No. 22 ¶ 2. Barton states that he “conducted the new employee orientation for Jose and Oscar Hermosillo, as well as for other new employees in Santa Clara.” *Id.* ¶ 3. Barton goes on: “When I conducted new employee orientation, I provided new employees copies of various Company policies, including the employee handbook and arbitration agreement. I also gave new employees a general overview of the Company’s policies and handbook.” *Id.* Barton adds that “[w]hile Oscar and Jose worked for the Company, extra copies of the handbook and arbitration agreement were available to employees in the Santa Clara office.” *Id.* Defendants also submit a declaration by Brent Swan, the current District Manager of The Davey Tree Expert Company. ECF No. 26 ¶ 1. Swan states that Davey’s Arbitration Agreement “is given to all new employees during orientation and was again given to employees in my District when the Employee Handbook was revised in December 2016.” *Id.* ¶ 6.

The Arbitration Agreement states in bold at the top of the document: “This document affects your rights to a trial by jury and to file a class action. It is a condition of your employment, and is the mandatory procedure for resolution of the disputes described below. Please read it carefully.” ECF No. 16-3 at 2. The parties to the Arbitration Agreement are defined as the Davey Tree Expert Company and its subsidiaries and “all nonunion employees of the Company and all applicants for jobs with the Company.” *Id.* The Arbitration Agreement provides that employees who were employed after June 6, 2014 express consent to the Arbitration Agreement by “(a) your written agreement to be bound by this Agreement; (b) submitting your application for employment to the Company; (c) accepting employment with the Company; or (d) accepting any wages, salary, promotion, increase, transfer, bonus or other benefit of employment from the Company and (e)

1 you have not opted out as provided for by paragraph B.4.” *Id.* Paragraph B.4, in turn, provides  
2 that employees may opt out of the Arbitration Agreement by providing written notice to the Davey  
3 Tree Legal Department within 30 days of receipt of the Employee Handbook. *Id.*

4 The Arbitration Agreement defines the claims that it covers as including, but not limited  
5 to, claims for: “(a) wages, benefits or other compensation due; (b) breach of any contract or  
6 covenant (express or implied); (c) torts or personal injury; (d) discrimination and/or harassment  
7 . . .; (e) any violation of any federal, state, or other governmental law, statute, regulation, or  
8 ordinance.” *Id.* The following claims are expressly excluded from coverage: “(a) claims for  
9 workers’ compensation or unemployment compensation benefits; (b) claims under an employee  
10 benefit or pension plan . . .; (c) claims and administrative charges that cannot lawfully be required  
11 to be arbitrated; and (d) claims for temporary injunctive relief, provided, however, that the  
12 Arbitrator . . . will decide all other issues, including the propriety of permanent injunctive relief.”  
13 *Id.* at 2-3.

14 The Arbitration Agreement also contains a class action waiver that requires all claims be  
15 brought individually. In addition, the Arbitration Agreement provides that Defendants “will be  
16 responsible for paying AAA’s administrative fees and the fees and costs of the Arbitrator;  
17 provided, however, that if a Covered Employee is the party initiating the claim, the Covered  
18 Employee is responsible for contributing up to \$150 toward administrative fees in accordance with  
19 the AAA’s employment arbitration procedures.” *Id.* at 4. “If a Covered Employee is unable to  
20 pay this amount due to indigency, the Covered Employee must indicate this inability in writing,  
21 and the payment will be deferred until such time as the Arbitrator determines whether the fee  
22 should be waived pursuant to the standards applied for the waiving of filing fees in the federal  
23 courts.” *Id.* The Arbitration Agreement also states that it is “the complete Agreement on the  
24 subject of arbitration of disputes . . . . This Agreement supersedes any prior or contemporaneous  
25 oral or written understandings on the subject.” *Id.* at 5. At the end of the Arbitration Agreement,  
26 the following statement appears in bold: “You may also wish to consult an attorney regarding the  
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1 terms of this Agreement.” *Id.*

2 Plaintiffs dispute Defendants’ description of their new employee orientation as it relates to  
3 the Arbitration Agreement. Specifically, Plaintiffs state in their declarations that their “job  
4 orientation consisted of watching a few videos over the course of two to four hours at Davey’s  
5 work yard with other new hires. The videos focused on climbing techniques and workplace  
6 safety.” ECF No. 24-2 ¶ 5; ECF No. 24-3 ¶ 5. Plaintiffs state that “[n]o one at Davey explained  
7 any employment policies or requirements to [them] during the orientation.” *Id.* In response to  
8 Barton’s declaration, Plaintiffs state that Barton does not speak Spanish and that Barton “never  
9 explained Davey’s general employment policies or any arbitration agreement to [them] during  
10 orientation or otherwise.” ECF No. 24-2 ¶ 7; ECF No. 24-3 ¶ 7. Moreover, Plaintiffs state that  
11 neither Barton “nor any other Davey employee instructed me that extra copies of any employment-  
12 related documents were available to employees at Davey’s business office.” *Id.* Plaintiffs state  
13 that they were unfamiliar with the Arbitration Agreement until their attorney showed it to them in  
14 the course of this case. Similarly, Plaintiffs contend that even if they had been provided with the  
15 Arbitration Agreement, they would not have been able to understand it because it is in English.  
16 *Id.*

17 Finally, Plaintiffs state that they were surprised to learn that Defendants are arguing that  
18 Plaintiffs agreed to arbitration because “[a]t no point during [the] hiring process or orientation did  
19 anyone at Davey Tree Company or otherwise inform or explain to [them] that [their] job[s] with  
20 Davey Tree Company would be subject to arbitration of claims related to [their] employment.”  
21 ECF No. 24-2 ¶ 8; ECF No. 24-3 ¶ 8. Plaintiffs further state that “[b]efore this lawsuit was filed,  
22 [they] had no knowledge of the arbitration process, its requirements, or the term itself.” *Id.*  
23 Plaintiffs state that based on their observations during their employment, “other employees also  
24 did not receive an explanation of Davey’s employment policies or the purported Arbitration  
25 Agreement.” ECF No. 24-2 ¶ 9; ECF No. 24-3 ¶ 9.

26 Plaintiffs add that many of Defendants’ employees “have very limited ability to speak or  
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1 read English” and the “primary language spoken by most employees during [Plaintiffs’]  
2 employment was Spanish.” *Id.* Plaintiffs state that “[their] observation during [their] employment  
3 was that most Spanish-speaking employees . . . received direction from our work crew’s team  
4 leaders who spoke limited English.” ECF No. 24-2 ¶ 6; ECF No. 24-3 ¶ 6.

5 **B. Procedural History**

6 Plaintiffs filed the instant suit in Santa Clara Superior Court on December 7, 2017. ECF  
7 No. 1 at 13. Defendants removed the case to federal court on January 18, 2018 pursuant to the  
8 Class Action Fairness Act of 2005. *Id.* at 2.

9 On February 16, 2018, Defendants filed the instant motion to compel arbitration of all  
10 causes of action except the PAGA cause of action and to stay the PAGA cause of action. ECF No.  
11 16 (“Mot.”). On March 2, 2018, Plaintiffs filed an opposition and various evidentiary objections.  
12 ECF No. 24 (“Opp’n”). On March 9, 2018, Defendants filed a reply. ECF No. 25 (“Reply”).  
13 Also on March 9, 2018, Defendants filed Swan’s declaration in support of the Reply. ECF No. 26.  
14 On May 3, 2018, Plaintiffs filed objections to Swan’s declaration. ECF No. 28.

15 On July 9, 2018, Plaintiffs filed a request for judicial notice of new authority pursuant to  
16 Civil Local Rule 7-3(d)(2). ECF No. 34. That request is GRANTED.

17 **II. LEGAL STANDARD**

18 The Federal Arbitration Act (“FAA”) applies to arbitration agreements in any contract  
19 affecting interstate commerce. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001); 9  
20 U.S.C. § 2. Under Section 3 of the FAA, “a party may apply to a federal court for a stay of the  
21 trial of an action ‘upon any issue referable to arbitration under an agreement in writing for such  
22 arbitration.’” *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010) (quoting 9 U.S.C. § 3).

23 Interpretation of arbitration agreements generally turns on state law. *See Arthur Andersen*  
24 *LLP v. Carlisle*, 556 U.S. 624, 630-31 (2009). However, the United States Supreme Court has  
25 stated that “the first task of a court asked to compel arbitration of a dispute is to determine whether  
26 the parties agreed to arbitrate that dispute,” and that “[t]he court is to make this determination by  
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1 applying the federal substantive law of arbitrability, applicable to any arbitration agreement within  
2 the coverage of the Act.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S.  
3 614, 626 (1985). The FAA creates a body of federal substantive law of arbitrability that requires a  
4 healthy regard for the federal policy favoring arbitration and preempts state law to the contrary.  
5 *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475-79 (1989)  
6 (“[T]he FAA must be resolved with a healthy regard for the federal policy favoring arbitration.”).  
7 However, “state law is not entirely displaced from federal arbitration analysis.” *Ticknor v. Choice*  
8 *Hotels Int’l, Inc.*, 265 F.3d 931, 936-37 (9th Cir. 2001).

9 In deciding whether a dispute is arbitrable under federal law, a court must answer two  
10 questions: (1) whether the parties agreed to arbitrate; and, if so, (2) whether the scope of that  
11 agreement to arbitrate encompasses the claims at issue. *See Brennan v. Opus Bank*, 796 F.3d  
12 1125, 1130 (9th Cir. 2015); *see also Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126,  
13 1130 (9th Cir. 2000). When deciding whether the parties agreed to arbitrate a certain matter,  
14 courts generally apply ordinary state law principles of contract interpretation. *First Options of*  
15 *Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (“Courts generally should apply ordinary state-law  
16 principles governing contract formation in deciding whether [an arbitration] agreement exists.”).  
17 Thus, in determining whether parties have agreed to arbitrate a dispute, the court applies “general  
18 state-law principles of contract interpretation, while giving due regard to the federal policy in  
19 favor of arbitration by resolving ambiguities as to the scope of arbitration in favor of arbitration.”  
20 *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1044 (9th Cir. 2009) (quoting *Wagner v.*  
21 *Stratton Oakmont, Inc.*, 83 F.3d 1046, 1049 (9th Cir. 1996)). “[A]s with any other contract, the  
22 parties’ intentions control, but those intentions are generously construed as to issues of  
23 arbitrability.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626  
24 (1985). If the party seeking to compel arbitration establishes both factors, the court must compel  
25 arbitration. *See Chiron Corp.*, 207 F.3d at 1130. “The standard for demonstrating arbitrability is  
26 not a high one; in fact, a district court has little discretion to deny an arbitration motion, since the  
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1 [FAA] is phrased in mandatory terms.” *Republic of Nicar. v. Std. Fruit Co.*, 937 F.2d 469, 475  
2 (9th Cir. 1991).

3 However, the FAA’s savings clause “allows courts to refuse to enforce arbitration  
4 agreements ‘upon such grounds as exist at law or in equity for the revocation of any contract.’”  
5 *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018) (quoting 9 U.S.C. § 2). “The clause  
6 ‘permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such  
7 as fraud, duress, or unconscionability.’” *Id.* (quoting *AT&T Mobility LLC v. Concepcion*, 563  
8 U.S. 333, 339 (2011)) (internal quotation marks omitted).

9 **III. DISCUSSION**

10 In the instant case, Plaintiffs argue that Defendants have not established that Plaintiffs  
11 agreed to the Arbitration Agreement. Plaintiffs also argue that the arbitration clause in the  
12 employment application is unconscionable and thus unenforceable. The Court addresses these  
13 issues in turn.

14 **A. Whether the Parties Entered a Valid Arbitration Agreement**

15 The Court first addresses whether Plaintiffs and Defendants entered into a valid arbitration  
16 agreement. *See Chiron Corp.*, 207 F.3d at 1130. “[A]rbitration is a matter of contract and a party  
17 cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”  
18 *Norcia v. Samsung Telecommc’ns Am., LLC*, 845 F.3d 1279, 1283 (9th Cir. 2017) (quoting *AT&T*  
19 *Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 648 (1986)) (alteration in original). “As  
20 the party seeking to compel arbitration, [Defendants] bear[] ‘the burden of proving the existence  
21 of an agreement to arbitrate by a preponderance of the evidence.’” *Norcia*, 845 F.3d at 1283  
22 (quoting *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014) (citing *Rosenthal v.*  
23 *Great W. Fin. Sec. Corp.*, 14 Cal. 4th 394, 413 (1996))).

24 The Court first turns to whether the employment application and the Arbitration  
25 Agreement should be analyzed as parts of the same agreement or whether they should be analyzed  
26 as separate agreements. Defendants contend that when Plaintiffs signed their employment  
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1 applications, Plaintiffs agreed to submit any employment-related claims to arbitration. Mot. at 4.  
2 Defendants go on to argue that “[u]nder the terms of the agreement, they also consented to  
3 arbitrate by submitting an employment application, accepting employment, and accepting wages,”  
4 and by failing to opt out of the agreement. *Id.* These alternative forms of expressing consent are  
5 only discussed in the Arbitration Agreement, not in the arbitration clause in the employment  
6 application. It is thus clear that Defendants conflate the arbitration clause in the employment  
7 application with the Arbitration Agreement that Defendants allegedly provide at new employee  
8 orientation. However, Defendants provide no support for their apparent assumption that the  
9 arbitration clause in the employment application and the Arbitration Agreement are  
10 interchangeable or are parts of the same agreement or that the Arbitration Agreement was  
11 incorporated by reference into the employment application. “For the terms of another document to  
12 be incorporated into the document executed by the parties the reference must be clear and  
13 unequivocal, the reference must be called to the attention of the other party and he must consent  
14 thereto, and the terms of the incorporated document must be known or easily available to the  
15 contracting parties.” *Chan v. Drexel Burnham Lambert, Inc.*, 178 Cal. App. 3d 632, 641 (1986);  
16 *see also Perez v. DirecTV Grp. Holdings, LLC*, 251 F. Supp. 3d 1328, 1338 (C.D. Cal. 2017)  
17 (citing same standard for incorporation by reference). Nothing in the employment application  
18 references a separate arbitration agreement or otherwise suggests that there is another document  
19 that contains additional terms relating to arbitration.

20 In addition, the Arbitration Agreement explicitly states that it “supersedes any prior . . .  
21 written understandings on the subject” of arbitration, which means that by its own terms the  
22 Arbitration Agreement, if assented to by both parties, supersedes the employment agreement  
23 arbitration clause. ECF No. 16-3 at 5.

24 Moreover, the employment application and the Arbitration Agreement contain different  
25 terms, which also suggests that they are two separate agreements. Specifically, the employment  
26 application contains a clause that requires any claims “relating to any aspect of my employment,  
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1 including but not limited to hiring and termination, must be brought within six (6) months of the  
2 occurrence of the event giving rise to the claim(s),” whereas the Arbitration Agreement does not  
3 have such a limit. *Compare* ECF No. 16-1 at 3; ECF No. 16-2 at 3 *with* ECF No. 16-3. The  
4 employment application also requires arbitration of all claims related to employment, while the  
5 Arbitration Agreement carves out certain categories of employment-related claims from its scope.  
6 *Id.* These inconsistencies support treating the employment application and the Arbitration  
7 Agreement as two separate possible agreements.

8 The Court next analyzes in turn whether either the employment application or the  
9 Arbitration Agreement is a valid agreement to arbitrate. The Court analyzes contract formation  
10 under California law. *See id.* at 1283-84. “Generally, under California law, ‘the essential  
11 elements for a contract are (1) parties capable of contracting; (2) their consent; (3) a lawful object;  
12 and (4) sufficient cause or consideration.’” *Id.* at 1284 (quoting *United States ex rel. Oliver v.*  
13 *Parsons Co.*, 195 F.3d 457, 462 (9th Cir. 1999)) (alterations and internal quotation marks  
14 omitted). Whether there is a valid agreement to arbitrate in the instant case turns on the second  
15 factor, whether the Plaintiffs consented to (1) the arbitration clause in the employment application  
16 and (2) the Arbitration Agreement.

17 **1. Employment Application Arbitration Clause**

18 “It is undisputed that under California law, mutual assent is a required element of contract  
19 formation.” *Knutson*, 771 F.3d at 565. Defendants contend that “[w]hen Plaintiffs signed their  
20 employment applications, they both agreed to submit any employment-related claims to  
21 arbitration.” Mot. at 4. Plaintiffs argue that the employment applications do not satisfy  
22 Defendants’ burden of establishing a valid agreement to arbitrate because (1) Defendants do not  
23 “provide any evidence that the Parties to this lawsuit actually reviewed or agreed to the terms of  
24 the arbitration language” in the employment applications, (2) “Defendants did not authenticate the  
25 job applications,” (3) Defendants do “not provide evidence that the signatures appearing on page  
26 two of each document belong to the Plaintiffs,” and (4) Defendants did not sign the employment  
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1 applications. Opp'n at 6. Each of Plaintiffs' arguments fails.

2 First, contrary to Plaintiffs' assertion, Defendants have provided evidence that Plaintiffs  
3 agreed to the arbitration language in the employment applications. Specifically, Defendants  
4 submitted copies of Plaintiffs' signed and dated employment applications, both of which contain  
5 the arbitration clause. *See* ECF No. 16-1 (Jose's application); ECF No. 16-2 (Oscar's application);  
6 ECF No. 26 (Swan declaration stating that the copies of the applications submitted as exhibits are  
7 true and correct copies of the original applications, which were preserved in the course of the  
8 regularly conducted activities of Defendants). "[O]rdinarily one who signs an instrument which  
9 on its face is a contract is deemed to assent to all its terms. A party cannot avoid the terms of a  
10 contract on the ground that he or she failed to read it before signing."<sup>2</sup> *Marin Storage & Trucking,*  
11 *Inc. v. Benco Contracting & Engineering, Inc.*, 89 Cal. App. 4th 1042, 1049 (2001); *see also*  
12 *Marmolejo v. Fitness Int'l LLC*, 2018 WL 1181240, at \*4 (Cal. Ct. App. Mar. 7, 2018) ("As a  
13 general rule of contracting, the law assumes a party who signs an agreement has read and  
14 understood it."). Accordingly, Plaintiffs' signatures on the employment applications constitute  
15 evidence that Plaintiffs agreed to the arbitration clauses in the employment applications.

16 Plaintiffs also argue that Defendants have failed to authenticate the employment  
17 applications or submit evidence that the signatures on the applications are truly Plaintiffs'. These  
18 arguments fail, too. With respect to authentication, the California Court of Appeal has stated that  
19 "[f]or purposes of a petition to compel arbitration, it is not necessary to follow the normal  
20 procedures of document authentication." *Condee v. Longwood Mgmt. Corp.*, 88 Cal. App. 4th  
21 215, 218 (2001). Instead, "[a] party can prove the existence of an arbitration agreement simply by  
22 attaching a copy of it to the motion to compel or by including its provisions in the motion."  
23 *Marmolejo*, 2018 WL 1181240 at \*4 (citing *Condee*, 88 Cal. App. 4th at 219; Cal. Code Civ. P.

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25 \_\_\_\_\_  
26 <sup>2</sup> "An exception to this general rule exists when the writing does not appear to be a contract and  
27 the terms are not called to the attention of the recipient." *Marin Storage & Trucking*, 89 Cal. App.  
28 4th at 1049-50. Here, Plaintiffs have not argued that this exception applies to the employment  
applications, and so the Court need not analyze this exception.

1 § 1281.2). Even if Defendants did have a burden to authenticate the applications, Swan’s  
2 declaration carries that burden for the purposes of the instant motion to compel. *See* ECF No. 26.

3 With respect to Plaintiffs’ arguments about their signatures, the Court notes that Plaintiffs  
4 do not deny that they signed the employment applications or accuse Defendants of forging the  
5 signatures on the employment applications. Instead, Plaintiffs focus on Defendants’ lack of  
6 evidence that the signatures are truly Plaintiffs’. The California Court of Appeal addressed similar  
7 circumstances in *Marmolejo*. There, where the plaintiff “d[id] not argue the arbitration agreement  
8 is a fake or her signature was forged,” the California Court of Appeal held that the defendant had  
9 carried its burden to prove the existence of a valid agreement even though the plaintiff challenged  
10 the authentication of the agreement. 2018 WL 1181240 at \*4. In any event, the Court finds that it  
11 is clear from comparing the signatures on the employment applications to Plaintiffs’ signatures on  
12 their declarations filed in the instant case that the employment application signatures are authentic.  
13 *Compare* ECF No. 16-1 at 3 *with* ECF No. 24-2 at 9; *compare* ECF No. 16-2 at 3 *with* ECF No.  
14 24-3 at 9.

15 Finally, Plaintiffs argue that Defendants did not sign the employment applications. Opp’n  
16 at 6. Plaintiffs cite no authority for the proposition that both parties must sign an arbitration  
17 agreement for it to be binding. To the contrary, “[m]utual assent may be manifested by written or  
18 spoken words, or by conduct,” *Binder v. Aetna Life Ins. Co.*, 75 Cal. App. 4th 832, 850 (1999), and  
19 acceptance of contract terms may be implied through action or inaction, *see Carnival Cruise*  
20 *Lines, Inc. v. Shute*, 499 U.S. 585, 593-95 (1991).” *Knutson*, 771 F.3d at 565. In the arbitration  
21 context, “[w]hile the FAA authorizes the court to enforce only written agreements to arbitration (9  
22 U.S.C. § 3), it does not require the written agreements to be signed.” *Ambler v. BT Americas Inc.*,  
23 964 F. Supp. 2d 1169, 1174 (N.D. Cal. 2013). Thus, a “writing memorializing an arbitration  
24 agreement need not be signed by both parties in order to be upheld as a binding arbitration  
25 agreement.” *Serafin v. Balco Properties Ltd., LLC*, 235 Cal. App. 4th 165, 176 (2015).

26 Plaintiffs state in a footnote that “[n]on-signatory [*sic*] cannot typically compel signatory  
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1 to arbitrate claims.” Opp’n at 6 n.5. Plaintiffs do not cite any authority for this proposition, and in  
2 any event Plaintiffs appear to be distinguishing between a “signatory” to an agreement and a  
3 “party” to an agreement in a way that makes little sense. While it may be true that a third party  
4 ordinarily has no authority to compel arbitration, *see Norcia*, 845 F.3d at 1290-91, it does not  
5 follow that a party to an arbitration agreement could not compel arbitration because that party had  
6 not physically signed the agreement but had manifested consent in some other way.

7 Plaintiffs’ remaining objections to the employment applications, such as whether Plaintiffs  
8 could have compelled arbitration of disputes brought by Defendants, are more properly considered  
9 as unconscionability arguments. *See* Opp’n at 6. Accordingly, the Court thus finds that the  
10 arbitration clause in the employment applications created a valid agreement to arbitrate. The  
11 Court next addresses whether Plaintiffs consented to the Arbitration Agreement.

## 12 **2. The Arbitration Agreement**

13 Unlike the employment applications, Plaintiffs did not sign the Arbitration Agreement.  
14 Thus, the Court must assess whether Plaintiffs manifested consent in some other way. As  
15 explained above, “[m]utual assent may be manifested by written or spoken words, or by conduct.”  
16 *Knutson*, 771 F.3d at 565 (quoting *Binder*, 75 Cal. App. 4th at 850). Under California law, “[a]s a  
17 general rule, ‘silence or inaction does not constitute acceptance of an offer.’” *Norcia*, 845 F.3d at  
18 1284 (quoting *Golden Eagle Ins. Co. v. Foremost Ins. Co.*, 20 Cal. App. 4th 1372, 1385 (1993)).  
19 “There are exceptions to this rule, however. An offeree’s silence may be deemed to be consent to  
20 a contract when the offeree has a duty to respond to an offer and fails to act in the face of this  
21 duty.” *Id.* at 1284-85. An opt-out provision presents an example of this type of exception. *See id.*  
22 at 1285 (citing *Gentry v. Superior Court*, 42 Cal. 4th 443, 468 (2007), *abrogated on other grounds*  
23 *by Concepcion*, 563 U.S. 333). “An offeree’s silence may also be treated as consent to a contract  
24 when the party retains the benefit offered.” *Id.* However, “[e]ven if there is an applicable  
25 exception to the general rule that silence does not constitute acceptance, courts have rejected the  
26 argument that an offeree’s silence constitutes consent to a contract when the offeree reasonably  
27

1 did not know that an offer had been made.” *Id.* (citing *Windsor Mills, Inc. v. Collins & Aikman*  
2 *Corp.*, 25 Cal. App. 3d 987, 993 (1972)).

3 In *Windsor Mills*, the California Court of Appeal explained that “the terms of a contract  
4 ordinarily are to be determined by an external, not an internal, standard; the outward manifestation  
5 or expression of assent is the controlling factor.” 25 Cal. App. 3d at 992. “However, when the  
6 offeree does not know that a proposal has been made to him this objective standard does not  
7 apply. Hence, an offeree, regardless of apparent manifestation of his consent, is not bound by  
8 inconspicuous contractual provisions of which he was unaware, contained in a document whose  
9 contractual nature is not obvious.” *Id.* Thus, where an arbitration clause “was in small print” and  
10 “was not conspicuous” and where the “plaintiff was not advised the forms contained such a  
11 provision” and the “plaintiff did not have actual knowledge of the provision,” the California Court  
12 of Appeal held that “there was no agreement by plaintiff to arbitrate, regardless of its outward  
13 manifestations of apparent assent as exhibited by its retention of the forms without objection and  
14 its initial acceptance of the [good].” *Id.* at 351. Thus, as then-Judge Sotomayor explained for the  
15 Second Circuit in a case applying California contract law to a motion to compel arbitration,  
16 “California contract law measures assent by an objective standard that takes into account both  
17 what the offeree said, wrote, or did and the transactional context in which the offeree verbalized or  
18 acted.” *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 30 (2d Cir. 2002) (Sotomayor, J.).

19 The Ninth Circuit has applied this principle of California law in several cases in recent  
20 years. In *Knutson*, for example, the plaintiff, Knutson, bought a vehicle from Toyota that came  
21 with a 90-day trial subscription to Sirius XM satellite radio. 771 F.3d at 562. “When Knutson  
22 purchased his vehicle from Toyota, he did not receive any documents from Sirius XM, and he did  
23 not know that he was entering into a contractual relationship with Sirius XM by using the service.  
24 Instead, he believed that Sirius XM’s trial subscription was a complimentary service ‘provided for  
25 marketing purposes.’” *Id.* at 566. “As far as Knutson was concerned, then, he had not entered  
26 into an agreement for service *with Sirius XM* when he purchased the vehicle. He was, as far as he  
27

1 knew, only in a contractual relationship with Toyota.” *Id.*

2           Several weeks into the trial period, Sirius XM mailed a “Welcome Kit” to Knutson. The  
3 Welcome Kit contained a Sirius XM Customer Agreement, which contained an arbitration  
4 provision. *Id.* at 562. The arbitration provision stated that accessing or using Sirius XM’s service  
5 constituted acceptance of the Customer Agreement. *Id.* “Knutson did not read the Customer  
6 Agreement when it arrived in the mail because he did not think ‘that any of the documents  
7 contained therein were a contract governing the terms of Sirius’ service.’” *Id.* at 563. Knutson did  
8 not cancel his trial subscription and continued to use the service. *Id.*

9           Sirius XM later sought to compel arbitration of certain claims that Knutson brought in  
10 court. Sirius XM argued that Knutson’s continued use of its service after Knutson received the  
11 Customer Agreement “constituted his assent to be bound to the Customer Agreement.” *Id.* at 566.  
12 The Ninth Circuit rejected this argument:

13           Nothing in the record, however, indicates that Sirius XM’s offer was clearly and  
14 effectively communicated to Knutson by mailing him the Customer Agreement.  
15 Knutson would only have had notice of his opportunity to cancel his subscription,  
16 or the effect of his continued use of the service, if he opened the Welcome Kit  
17 from Sirius and read all of the documents therein, which—in view of his lack of  
18 awareness of any contractual relationship with Sirius—he had no reason to do.  
19 He could not be obligated to act where there was no effective notice that action  
20 was required. Accordingly, Knutson’s continued use of the service after his  
21 receipt of the Customer Agreement did not manifest his assent to the provisions in  
22 the Customer Agreement.

23           *Id.* at 566. In other words, “Knutson could not assent to Sirius XM’s arbitration provision because  
24 he did not know that he was entering a contract with Sirius XM.” *Id.* at 569. Thus, the Ninth  
25 Circuit held that Sirius XM “failed to prove by a preponderance of the evidence the existence of  
26 an agreement to arbitrate.” *Id.*

27           The Ninth Circuit’s decision in *Norcia* is similar. In *Norcia*, the plaintiff bought a  
28 Samsung Galaxy S4 phone at a Verizon Wireless Store. 845 F.3d at 1282. The receipt from  
Verizon Wireless contained an arbitration provision, but the receipt did not reference Samsung or  
any other party. *Norcia* signed the Verizon Wireless receipt. *Id.* After *Norcia* bought the Galaxy



1 S4 phone, a Verizon Wireless employee took the Galaxy S4 phone out of its box and helped  
2 Norcia set up the phone. “Norcia took the phone, the phone charger, and the headphones with him  
3 as he left the store, but he declined the offer by the Verizon Wireless employee to take the box and  
4 the rest of its contents,” including a Samsung Product Safety & Warranty booklet that contained  
5 an arbitration agreement. *Id.*

6 In analyzing whether Norcia consented to the Samsung arbitration agreement, the Ninth  
7 Circuit observed that “[t]here is no dispute that Norcia did not expressly assent to any agreement  
8 in the brochure. Nor did Norcia sign the brochure or otherwise act in a manner that would show  
9 ‘his intent to use his silence, or failure to opt out, as a means of accepting the arbitration  
10 agreement.’” *Id.* at 1285 (quoting *Gentry*, 42 Cal. 4th at 468). Thus, the Ninth Circuit concluded  
11 that “Samsung’s offer to arbitrate all disputes with Norcia ‘cannot be turned into an agreement  
12 because the person to whom it is made or sent makes no reply, even though the offer states that  
13 silence will be taken as consent,’ unless an exception to this general rule applies.” *Id.* at 1286  
14 (quoting *Leslie*, 208 Cal. at 621). The Ninth Circuit held that Samsung had not established that  
15 any exception applied. *Id.*

16 The Ninth Circuit also analyzed whether the inclusion of the Product Safety & Warranty  
17 booklet in the Galaxy S4’s box was sufficient to bind Norcia to the arbitration agreement. *Id.* at  
18 1287-90. The Ninth Circuit characterized *Knutson* as standing for the proposition that “even if a  
19 customer may be bound by an in-the-box contract under certain circumstances, such a contract is  
20 ineffective where the customer does not receive adequate notice of its existence.” *Id.* at 1289. In  
21 *Norcia*, the Ninth Circuit determined that “[a] reasonable person in Norcia’s position would not be  
22 on notice that the brochure contained a freestanding obligation outside the scope of the warranty.  
23 Nor would a reasonable person understand that receiving the seller’s warranty and failing to opt  
24 out of an arbitration provision contained within the warranty constituted assent to a provision  
25 requiring arbitration of all claims against the seller, including claims not involving the warranty.”  
26 *Id.* at 1289-90. Accordingly, the Ninth Circuit held that Samsung failed to carry its burden of  
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1 proving the existence of a contract with Norcia to arbitrate as a matter of California law.” *Id.* at  
2 1291.

3 Here, Defendants contend that “Plaintiffs were provided a copy of Davey’s employee  
4 handbook and arbitration agreement during orientation and again when the handbook was revised  
5 in December 2016.” Mot. at 2. In support of this contention, Defendants offer Barton’s  
6 declaration, in which Barton states that when he “conducted new employee orientation, [he]  
7 provided new employees copies of various Company policies, including the employee handbook  
8 and arbitration agreement. [He] also gave new employees a general overview of the Company’s  
9 policies and handbook.” ECF No. 22 ¶ 3. Swan’s declaration makes largely the same point: that  
10 new employees receive copies of the Arbitration Agreement during orientation. ECF No. 26 ¶ 6.  
11 Defendants argue that Plaintiffs manifested their consent to the Arbitration Agreement by  
12 submitting their employment applications, accepting employment, accepting wages, and failing to  
13 opt out. Mot. at 4.

14 Plaintiffs respond that neither Barton nor anyone else ever “discussed employment policies  
15 or an arbitration agreement with them, either at orientation or during their employment.” Opp’n at  
16 7 (citing ECF No. 24-2 ¶ 7; ECF No. 24-3 ¶ 7). Plaintiffs further state that “they have never even  
17 seen the stand-alone arbitration agreement that was submitted as Exhibit ‘C’ to the Motion.” *Id.*  
18 (citing ECF No. 24-2 ¶ 7; ECF No. 24-3 ¶ 7). Moreover, Plaintiffs state, based on their  
19 observations during their employment, that “other employees also did not receive an explanation  
20 of Davey’s employment policies or the purported Arbitration Agreement.” ECF No. 24-2 ¶ 9;  
21 ECF No. 24-3 ¶ 9.

22 Plaintiffs do not contest, however, that they submitted employment applications, accepted  
23 employment, accepted wages, and failed to opt out of the Arbitration Agreement, all of which the  
24 Arbitration Agreement defines as manifestations of consent. The Court doubts that submitting an  
25 employment application or accepting an offer of employment would be considered manifestations  
26 of consent to the Arbitration Agreement, which by Defendants’ own admission was not provided  
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1 to Plaintiffs until new employee orientation—*after* both the submission of an employment  
2 application and the acceptance of an offer of employment had occurred. However, the Court  
3 assumes without deciding that either Plaintiffs’ acceptance of wages or Plaintiffs’ failure to opt out  
4 of the Arbitration Agreement would qualify as an exception to the general rule under California  
5 law that silence does not constitute consent. *See Norcia*, 845 F.3d at 1284-85 (discussing  
6 exceptions, including retention of the benefit offered and failure to act in the face of a duty to  
7 respond). Thus, because the Court assumes that Plaintiffs’ acceptance of wages or failure to opt  
8 out of the Arbitration Agreement would show Plaintiffs’ consent to the Arbitration Agreement if  
9 they were aware of the Arbitration Agreement, the question becomes whether Plaintiffs were  
10 aware of the Arbitration Agreement. *See Knutson*, 771 F.3d at 566 (“[A]n offeree, regardless of  
11 apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of  
12 which he was unaware, contained in a document whose contractual nature is not obvious.”  
13 (quoting *Windsor Mills*, 25 Cal. App. 3d at 993)).

14 The Court finds that in the circumstances of this case, Defendants have failed to carry their  
15 burden of establishing by a preponderance of the evidence that Plaintiffs consented to the  
16 Arbitration Agreement. First, there is a factual dispute as to whether Defendants ever provided  
17 Plaintiffs copies of the Arbitration Agreement. Defendants submit two declarations stating that  
18 new employees are given the Arbitration Agreement as part of new employee orientation;  
19 Plaintiffs submit two declarations saying the opposite. Defendants do not offer any type of  
20 documentation to support their contention that Plaintiffs actually received the Arbitration  
21 Agreement, such as a signed or initialed acknowledgment that Plaintiffs received any particular  
22 policies or agreements or any other kind of personnel record. *See, e.g., Serpa v. Cal. Surety*  
23 *Investigations, Inc.*, 215 Cal. App. 4th 695, 700 (2013) (employee “received and signed a  
24 document entitled ‘Acknowledgment of Receipt of Employee Handbook’ in which she  
25 acknowledged reviewing a copy of the handbook and agreed to abide by the terms and conditions  
26 of her employment as stated in the handbook”). Nor do Defendants offer testimony from any  
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1 other employee who actually received the Arbitration Agreement, which would support  
2 Defendants' assertion that the Arbitration Agreement is routinely distributed at orientation. As  
3 such, the evidence about whether Plaintiffs ever received the Arbitration Agreement is evenly  
4 balanced.

5 Similarly, the evidence about whether Defendants mentioned the Arbitration Agreement  
6 during new employee orientation is also conflicting. Barton states that he gives new employees an  
7 overview of company policies, ECF No. 22 ¶ 3, but does not expressly say that he discusses the  
8 Arbitration Agreement. Plaintiffs state that neither Barton nor anyone else discussed the  
9 Arbitration Agreement with them. ECF No. 24-2 ¶ 7; ECF No. 24-3 ¶ 7. Thus, the evidence  
10 about whether Defendants ever gave Plaintiffs a physical copy of the Arbitration Agreement or  
11 discussed the Arbitration Agreement with Plaintiffs is evenly split.

12 Defendants thus present an even weaker case than *Knutson* or *Norcia*, where the Ninth  
13 Circuit found that the plaintiffs were not aware of the existence of the arbitration agreements,  
14 because in those cases it was undisputed that the plaintiffs received the arbitration agreements in  
15 the mail or in the box of the product, even if the plaintiffs did not notice the agreements or read  
16 them. *See Norcia*, 845 F.3d at 1282; *Knutson*, 771 F.3d at 562. Here, by contrast, there is a  
17 dispute about whether Plaintiffs even received the Arbitration Agreement. In such circumstances,  
18 Defendants have failed to carry their burden of proving by a preponderance of the evidence that  
19 Plaintiffs agreed to the Arbitration Agreement because Defendants have not established that  
20 Plaintiffs were aware of the Arbitration Agreement. *See Knutson*, 771 F.3d at 569 (holding that  
21 defendant failed to prove by a preponderance of the evidence the existence of an agreement to  
22 arbitrate where plaintiff was unaware of the arbitration provision contained in a customer  
23 agreement he received in the mail). As such, the Court finds that the Arbitration Agreement is not  
24 a valid agreement to arbitrate.

25 In the alternative, even if the Court were to credit Defendants' evidence that Plaintiffs  
26 received a copy of the Arbitration Agreement along with other company policies and that Barton

1 verbally gave them a general overview of Defendants’ employment policies, the Court would still  
2 find that a reasonable person in Plaintiffs’ position would not have been aware that the Arbitration  
3 Agreement was a contract. Specifically, it is undisputed that Plaintiffs read, speak, and understand  
4 only minimal English. ECF No. 24-2 ¶ 2; ECF No. 24-3 ¶ 2. It is also undisputed that most  
5 employees who worked with Plaintiffs “have very limited ability to speak or read English” and  
6 that the “primary language spoken by most employees during [Plaintiffs’] employment was  
7 Spanish.” ECF No. 24-2 ¶ 9; ECF No. 24-3 ¶ 9. The Arbitration Agreement that Defendants  
8 claim to have given Plaintiffs was only in English. *See* ECF No. 26 ¶ 6; ECF No. 26-3. There is  
9 no evidence that a Spanish translation is now or was ever available. In addition, there is no  
10 evidence that Barton speaks Spanish, gave any part of his orientation talk in Spanish, or used a  
11 Spanish interpreter during the orientation. *See Specht*, 306 F.3d at 30 (observing that “California  
12 contract law measures assent by an objective standard that takes into account . . . the transactional  
13 context in which the offeree verbalized or acted”).

14 Thus, the Court concludes that even if Defendants did in fact provide copies of the  
15 Arbitration Agreement to Plaintiffs, they did so in a way that was insufficient to put Plaintiffs on  
16 inquiry notice of the contractual nature of the Arbitration Agreement. *See Knutson*, 771 F.3d at  
17 566 (observing that nothing in the record indicates that Sirius XM’s offer “was clearly and  
18 effectively communicated to Knutson”). Specifically, Defendants knew that the majority of their  
19 employees, at least those based in the Santa Clara office where Plaintiffs worked, primarily spoke  
20 Spanish and had limited English abilities. Nevertheless, Defendants only provided the Arbitration  
21 Agreement in English. Defendants made no apparent attempt to draw their employees’ attention  
22 to the fact that the Arbitration Agreement was a contract, either by verbal notification or by  
23 requiring their employees to sign the Arbitration Agreement. In these circumstances, a reasonable  
24 person in Plaintiffs’ position would not be on notice that among a stack of documents in a  
25 language she could not read was a contract that waived her right to a jury and committed her to  
26 arbitrating all disputes. Nor would such a person understand that simply accepting wages—

1 something that every employee at every company does—would signal her assent to this  
2 agreement, which she did not know existed. *See Knutson*, 771 F.3d at 568 (“a party to a contract  
3 cannot be held to the contract’s arbitration provision where the plaintiff does not know a contract  
4 exists”); *id.* at 569 (“Knutson could not assent to Sirius XM’s arbitration provision because he did  
5 not know that he was entering into a contract with Sirius XM”). Plaintiffs’ failure to opt out is  
6 similarly without meaning because they did not know that there was an agreement in the first  
7 place. *See id.* at 566 (“He could not be obligated to act where there was no effective notice that  
8 action was required.”). For these same reasons, a reasonable person in Defendants’ place would  
9 not have understood Plaintiffs’ acceptance of wages as a manifestation of consent to the  
10 Arbitration Agreement.

11 This is so notwithstanding the general contract principle that a party is bound to a contract  
12 that she signs even if she does not read or understand it. *See, e.g., Ramos v. Westlake Servs. LLC*,  
13 242 Cal. App. 4th 674, 687 (2015) (“Under the contract principles just discussed, the fact that  
14 Ramos signed a contract in a language he may not have completely understood would not bar  
15 enforcement of the arbitration agreement.”); *Randas v. YMCA of Metropolitan L.A.*, 17 Cal. App.  
16 4th 158, 163 (1993) (rejecting argument that signed release was invalid because the plaintiff could  
17 not read the release). This principle is based on the reasoning that if a party knows that she is  
18 unable to understand a contract, she has a duty to have it read or explained to her before she signs  
19 it. *See Randas*, 17 Cal. App. 4th at 163 (citing 1 Witkin, Summary of Cal. Law (9th ed. 1987)  
20 § 120; 3 Corbin, Contracts (1960) § 607). However, this principle does not apply to a situation  
21 like the instant case, where Plaintiffs were handed a stack of documents written in English and  
22 were not alerted to the contractual nature of any of the documents, either verbally or by being  
23 required to sign them. Plaintiffs thus had no specific cause to seek out explanation or translation  
24 of any particular document because they did not know that any of the documents were a binding  
25 contract or that accepting wages would be construed as assenting to the terms of the contract. *See*  
26 *generally Knutson*, 771 F.3d at 566 (reasoning that Knutson had no reason to open the Welcome  
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1 Kit from Sirius XM and read all of the documents inside because Knutson did not know he was in  
2 a contractual relationship with Sirius XM); *Saravia v. Dynamex, Inc.*, 310 F.R.D. 412, 420 (N.D.  
3 Cal. 2015) (“It is true that Saravia could have had his copy of the 2010 agreement translated  
4 before executing the 2011 agreement, which included similar terms, but nothing alerted Saravia to  
5 the fact that any terms deserved a special degree of attention, which would have prompted him to  
6 seek a translation.”).

7 The Court stresses that its finding is specific to the facts of this case. The Court does not  
8 broadly hold that employers must explain the nuances of each contract to each employee, nor does  
9 the Court hold that employers must translate each contract into each of its employees’ native  
10 languages. Nor does the Court suggest that Defendants had some special obligation to highlight  
11 the Arbitration Agreement *because* it was an agreement to arbitrate, as opposed to any other type  
12 of contract. *See generally Doctor’s Assocs. v. Casarotto*, 517 U.S. 681, 684-88 (holding that state  
13 law that required arbitration provision to be typed in underlined capital letters was preempted by  
14 § 2 of the FAA). Rather, the Court simply finds that Defendants failed to establish the existence  
15 of an agreement to arbitrate in the circumstances here, where Defendants employ primarily  
16 Spanish-speaking employees, provided an English-language Arbitration Agreement to those  
17 Spanish-speaking employees, and did nothing to alert the employees of the contractual nature of  
18 the agreement, where there is a dispute as to whether Plaintiffs even received the Arbitration  
19 Agreement, and where Plaintiffs denied actual knowledge of the Arbitration Agreement. As such,  
20 the Arbitration Agreement cannot be enforced against Plaintiffs. The motion to compel arbitration  
21 is therefore DENIED insofar as it is based on the Arbitration Agreement.

22 Thus, the only valid agreement to arbitrate was the arbitration clause contained in the  
23 employment application. The Court next addresses whether the agreement to arbitrate in the  
24 employment application covers the claims in this case.

25 **B. Whether the Employment Application Arbitration Clause Covers the Claims in this**  
26 **Lawsuit**

27 The second threshold inquiry is whether the scope of the arbitration clause in the

1 employment application encompasses the claims at issue in this case. *See Chiron Corp.*, 207 F.3d  
2 at 1130. The plain text of the arbitration clause in the employment applications covers “all claims  
3 related to my employment.” ECF No. 16-1 at 3; ECF No. 16-2 at 3. All of the claims for which  
4 Defendants seek to compel arbitration “relate[] to” Plaintiffs’ employment, in that they are all  
5 wage and hour claims or related claims stemming from Plaintiffs’ employment. Plaintiffs do not  
6 contest that the arbitration clause in the employment applications covers all of their claims except  
7 the PAGA claim. Accordingly, the Court finds that the arbitration clause in the employment  
8 applications is an agreement to arbitrate that covers Plaintiffs’ first six causes of action.

9 The Court next addresses Plaintiffs’ argument that the arbitration clause in the employment  
10 applications is unenforceable because it is unconscionable.

11 **C. Whether the Employment Application Arbitration Clause is Unconscionable**

12 As explained above, the FAA’s savings clause “allows courts to refuse to enforce  
13 arbitration agreements ‘upon such grounds as exist at law or in equity for the revocation of any  
14 contract.’” *Epic Sys.*, 138 S. Ct. at 1622 (quoting 9 U.S.C. § 2). “The clause ‘permits agreements  
15 to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or  
16 unconscionability.’” *Id.* (quoting *Concepcion*, 563 U.S. at 339) (internal quotation marks  
17 omitted). Here, Plaintiffs contend that the arbitration clause in the employment applications is  
18 unconscionable. *See* Opp’n at 7.

19 “Under California law, a state court may refuse to enforce a provision of a contract if it  
20 finds that the provision was ‘unconscionable at the time it was made.’” *Tompkins v. 23andMe,*  
21 *Inc.*, 840 F.3d 1016, 1023 (9th Cir. 2016) (quoting Cal. Civil Code § 1670.5(a)). “The party  
22 asserting that a contractual provision is unconscionable bears the burden of proof.” *Id.* (citing  
23 *Sanchez v. Valencia Holding Co., LLC*, 61 Cal. 4th 899, 911 (2015)). “[A]n evaluation of  
24 unconscionability is highly dependent on context.” *Id.* (quoting *Sanchez*, 61 Cal. 4th at 911).

25 “Unconscionability has ‘both a procedural and a substantive element, the former focusing  
26 on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided  
27



1 results.” *Id.* (quoting *Sanchez*, 61 Cal. 4th at 910). “Both procedural and substantive  
 2 unconscionability must be present in order for a clause to be unconscionable, but they need not  
 3 necessarily be present to the same degree.” *Id.* (citing *Armendariz v. Found. Health Psychcare*  
 4 *Services*, 24 Cal.4th 83, 114 (2000)). “Rather, there is a sliding scale: ‘the more substantively  
 5 oppressive the contract term, the less evidence of procedural unconscionability is required to come  
 6 to the conclusion that the term is unenforceable, and vice versa.” *Poublon v. C.H. Robinson Co.*,  
 7 846 F.3d 1251, 1260 (quoting *Sanchez*, 61 Cal. 4th at 910). The Court addresses procedural and  
 8 substantive unconscionability in turn.

9 **1. Procedural Unconscionability**

10 “The procedural element of unconscionability focuses on ‘oppression or surprise due to  
 11 unequal bargaining power.” *Id.* (quoting *Pinnacle Museum Tower Ass’n v. Pinnacle Market*  
 12 *Development (US), LLC*, 55 Cal. 4th 223, 246 (2012)). “Surprise involves the extent to which the  
 13 terms of the bargain are hidden in a prolix printed form drafted by a party in a superior bargaining  
 14 position.” *Serpa*, 215 Cal. App. 4th at 703 (internal quotation marks omitted). “The oppression  
 15 that creates procedural unconscionability arises from an inequality of bargaining power that results  
 16 in no real negotiation and an absence of meaningful choice.” *Poublon*, 846 F.3d at 1260 (quoting  
 17 *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th 1332, 1347-48, *as*  
 18 *modified on denial of reh’g* (Feb. 9, 2015)). “California courts have held that oppression may be  
 19 established by showing the contract was one of adhesion or by showing from the ‘totality of the  
 20 circumstances surrounding the negotiation and formation of the contract’ that it was oppressive.”  
 21 *Id.* (quoting *Grand Prospect Partners*, 232 Cal. App. 4th at 1348); *see also Armendariz*, 24 Cal.  
 22 4th at 113 (“Unconscionability analysis begins with an inquiry into whether the contract is one of  
 23 adhesion.”).

24 **a. Contract of Adhesion**

25 “The term [contract of adhesion] signifies a standardized contract, which, imposed and  
 26 drafted by the party of superior bargaining strength, relegates to the subscribing party only the  
 27

1 opportunity to adhere to the contract or reject it.” *Poublon*, 846 F.3d at 1260-61 (quoting  
 2 *Armendariz*, 24 Cal. 4th at 113) (alteration in original). “It is well settled that adhesion contracts  
 3 in the employment context, that is, those contracts offered to employees on a take-it-or-leave-it  
 4 basis, typically contain some aspects of procedural unconscionability.” *Serpa*, 215 Cal. App. 4th  
 5 at 704. As the California Supreme Court explained in *Armendariz*, “the economic pressure  
 6 exerted by employers on all but the most sought-after employees may be particularly acute, for the  
 7 arbitration agreement stands between the employee and necessary employment, and few  
 8 employees are in a position to refuse a job because of an arbitration requirement.” 24 Cal. 4th at  
 9 115. Thus, the California Supreme Court has stated that courts “must be particularly attuned to  
 10 claims” of substantive unconscionability where there is a contract of adhesion in the employment  
 11 context. *See Baltazar*, 62 Cal. 4th at 1245; *Armendariz*, 24 Cal. 4th at 1115. However, the highest  
 12 degree of scrutiny is reserved for contracts of adhesion that also show signs of “sharp practices”  
 13 such as lying, duress, or other manipulation. *See Baltazar*, 62 Cal. 4th at 1245; *see also Poublon*,  
 14 846 F.3d at 1261 (“In the employment context, if an employee must sign a non-negotiable  
 15 employment agreement as a condition of employment but there is no other indication of  
 16 oppression or surprise, then the agreement will be enforceable unless the degree of substantive  
 17 unconscionability is high.” (footnote and internal quotation marks omitted)).

18 The Court finds that the employment application is a contract of adhesion. First, there was  
 19 clearly a significant imbalance in bargaining power between Defendants and Plaintiffs. The  
 20 Davey Tree Expert Company is a publicly traded corporation that employs more than 7,000  
 21 employees and generates hundreds of millions of dollars in revenue each year,<sup>3</sup> while Plaintiffs are

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23 <sup>3</sup> *See* The Davey Tree Expert Company, Form 10-K (March 9, 2016), *available at*  
 24 [https://www.sec.gov/Archives/edgar/data/277638/000027763816000058/0000277638-16-000058-](https://www.sec.gov/Archives/edgar/data/277638/000027763816000058/0000277638-16-000058-index.htm)  
 25 [index.htm](https://www.sec.gov/Archives/edgar/data/277638/000027763816000058/0000277638-16-000058-index.htm). Plaintiffs cited Defendants’ public SEC filings as a source of this information and  
 26 Defendants did not object. *See* Opp’n at 8. The Court finds that judicial notice of such publicly  
 27 filed documents is appropriate under Federal Rule of Evidence 201. *See Ryan v. Microsoft Corp.*,  
 147 F. Supp. 3d 868, 873 n.1 (N.D. Cal. 2015) (taking judicial notice of SEC filings); *see also*  
*Gerritsen v. Warner Bros. Entertainment Inc.*, 112 F. Supp. 3d 1011, 1033 (C.D. Cal. 2015)  
 (“Under Rule 201, the court can take judicial notice of public records and government documents  
 available from reliable sources on the Internet, such as websites run by governmental agencies.”

1 manual laborers. “The arbitration clause was ‘imposed and drafted by the party of superior  
2 bargaining strength’ and ‘relegate[d]’ to the Plaintiff[s] ‘only the opportunity to adhere to the  
3 contract or reject it.’” *Cisneros v. Am. General Fin. Servs., Inc.*, No. C 11-2869 CRB, 2012 WL  
4 3025913, at \*5 (N.D. Cal. July 24, 2012) (quoting *Armendariz*, 24 Cal. 4th at 113) (first alteration  
5 in original). Specifically, Plaintiffs state in their declarations that they were not given the  
6 opportunity to negotiate any of the terms in the employment application. ECF No. 24-2 ¶ 4; ECF  
7 No. 24-3 ¶ 4.

8 Defendants respond that the opt-out provision renders the arbitration agreements  
9 procedurally conscionable. Reply at 5-6. However, only the Arbitration Agreement contains an  
10 opt-out provision, and the Court has determined that Defendants failed to prove that Plaintiffs  
11 consented to the Arbitration Agreement. The arbitration clause of the employment application, by  
12 contrast, does not contain an opt-out provision. As a result, Defendants’ opt-out argument is  
13 inapposite. Thus, based on the standardized, take-it-or-leave-it nature of the employment  
14 application, the Court finds that the employment application is a contract of adhesion. The Court  
15 therefore finds that Plaintiffs have established at least some degree of procedural  
16 unconscionability. However, to discern the degree of procedural unconscionability, the Court  
17 must also analyze other aspects of the transaction. *See Poublon*, 846 F.3d at 1261.

18 **b. Other Signs of Procedural Unconscionability: Language Barrier and**  
19 **Limited Time to Review**

20 Plaintiffs advance several others grounds of procedural unconscionability. First, Plaintiffs  
21 argue that Defendants gave Plaintiffs the “pre-printed English language job application” to  
22 “immediately fill out and sign the application to be considered for hire” even though Plaintiffs  
23 spoke only Spanish. Opp’n at 8 (citing ECF No. 24-2 ¶ 4; ECF No. 24-3 ¶ 4). The California  
24 Court of Appeal and district courts in California have found that both a language barrier and  
25 limited time to review or obtain a translation of a contract contribute to procedural

26  
27 (internal quotation marks and alterations omitted)).

1 unconscionability.

2 Turning first to the issue of language, a district court in the Central District of California  
3 recently explained how a language barrier factors into procedural unconscionability analysis, as  
4 distinct from contract formation analysis:

5 [O]ne cannot disclaim assent to the terms of a contract on the ground that one  
6 could not read it. However, the issue is not contract formation; it is whether the  
7 manner in which the agreement was negotiated elevates its procedural  
8 unconscionability. Although inability to read an agreement does not prevent  
contract formation, it is still a factor that increases procedural unconscionability  
when other indications of oppression and surprise are present.

9 *Perez*, 251 F. Supp. 3d at 1344 (citations omitted). In *Perez*, the district court found an increased  
10 level of procedural unconscionability because a contract was provided to the Spanish-speaking  
11 plaintiff in English even though the defendant had Spanish translations available, the defendant  
12 did not explain any of the terms to the plaintiff, and there was “no indication” that the plaintiff had  
13 a “realistic opportunity to obtain a Spanish translation or otherwise ask for an explanation.” *Id.* at  
14 1345.

15 Similarly, in *Penilla v. Westmont Corp.*, 3 Cal. App. 5th 205 (2016), although the  
16 defendant “knew many respondents were not proficient in English, [the defendant] never  
17 explained the arbitration provision in Spanish or provided a Spanish language copy of it.” *Id.* at  
18 216. “The evidence indicate[d] that one-third of respondents were not proficient in English, that  
19 [the defendant] w[as] aware of the language difficulties, and that the managers informed  
20 respondents in Spanish that they were required to sign the rental agreement but failed to advise  
21 them of the arbitration provision or its terms. Additionally, several respondents stated in sworn  
22 declarations that they were not provided sufficient time to review the arbitration provision.” *Id.*  
23 Based on these facts, the California Court of Appeal held that there was procedural  
24 unconscionability because a reasonable person would have been surprised by the arbitration  
25 provision. *Id.*

26 Other district courts and the California Court of Appeal have come to similar conclusions.

27

28

1 See, e.g., *Saravia*, 310 F.R.D. at 420 (finding procedural unconscionability, in part, because the  
2 agreements ‘were written in English although [the defendant] knew that [the plaintiff’s]  
3 comprehension of English was limited”); *Villalpando v. Transguard Ins. Co. of Am.*, 17 F. Supp.  
4 3d 969, 985 (N.D. Cal. 2014) (considering as part of unconscionability analysis that “Plaintiff is a  
5 manual laborer who was not fluent (or even literate) in English at the time he entered the  
6 Agreements”); *Cisneros*, 2012 WL 3025913 at \*6 (finding that the plaintiff’s inability to  
7 understand the contract’s terms because they were written in English increases the procedural  
8 unconscionability of the contract); *Ortiz v. Roberts Tool Co.*, 2018 WL 328167, at \*3-4 (Cal. Ct.  
9 App. Jan. 9, 2018) (affirming finding of “a modest degree” of procedural unconscionability where  
10 the plaintiff had limited English ability and the contract was a contract of adhesion); *Carmona v.*  
11 *Lincoln Millennium Car Wash, Inc.*, 226 Cal. App. 4th 74 (2014) (finding high degree of  
12 procedural unconscionability based on agreement’s failure to explain what arbitration means,  
13 defendant’s failure to explain the arbitration agreement, plaintiff’s only having a few minutes to  
14 review the agreement, and the fact that only parts of the agreement were translated into Spanish);  
15 *Samaniego v. Empire Today LLC*, 205 Cal. App. 4th 1138, 1145-46 (2012) (affirming finding of  
16 unconscionability where “plaintiffs perform manual labor, do not speak English as a first  
17 language, have limited or no literacy in English, and were told they could not continue  
18 employment if they did not sign the agreements” and where one of the plaintiffs was directed to  
19 sign the agreement immediately).

20 In response, Defendants cite *Chico v. Hilton Worldwide, Inc.*, No. CV 14-5750-JFW, 2014  
21 WL 5088240 (C.D. Cal. Oct. 7, 2014), a case where a court compelled arbitration notwithstanding  
22 the fact that a company provided only an English-language arbitration agreement to a Spanish-  
23 speaking employee. Reply at 6. Defendants characterize *Chico* as “reason[ing] that there was no  
24 procedural unconscionability because the employee did not claim ‘that he ever attempted to ask  
25 questions, or that he requested an opportunity to consult with an attorney, take the arbitration  
26 agreement home, or obtain a Spanish translation’ or that the employer had denied any such

1 requests.” *Id.* This is not a completely accurate representation of *Chico*’s analysis. The district  
2 court in *Chico* stated that “the Court agrees that if Crestline and RIM did not give Plaintiff an  
3 opportunity to ask questions, consult with an attorney, take the arbitration agreements home, or  
4 obtain a Spanish translation of the Crestline Arbitration Agreement, it would further support  
5 Plaintiff’s claim of procedural unconscionability.” 2014 WL 5088240 at \*9. After noting that the  
6 plaintiff in that case had not alleged that he asked to do any of those things, the district court  
7 concluded that the defendants’ conduct, if true, “would add only a minimal degree of procedural  
8 unconscionability.” *Id.*

9 As the cases cited above demonstrate, however, many other courts have found similar  
10 circumstances to weigh more heavily toward a finding of procedural unconscionability. *See, e.g.,*  
11 *Saravia*, 310 F.R.D. at 420 (finding that even if the plaintiff could have sought to negotiate the  
12 terms of an agreement rather than immediately signing it without adversely affecting the plaintiff’s  
13 employment, “the circumstances of the execution of those agreements were so oppressive that any  
14 such opportunity was meaningless”). In addition, in 2015, after *Chico* was decided, the California  
15 Supreme Court ruled that “we have never required, as a prerequisite to finding procedural  
16 unconscionability, that the complaining party show it tried to negotiate standardized contract  
17 provisions,” *Sanchez*, 61 Cal. 4th at 914, which undercuts the reasoning in *Chico* somewhat by  
18 suggesting that the burden does not completely lie with the employee to demonstrate the futility of  
19 any such efforts. Finally, the Court also notes that *Chico* is distinguishable because one of the two  
20 arbitration agreements in that case was written in Spanish, which would have significantly  
21 lessened the degree of oppression and surprise by putting the plaintiff on notice of the existence of  
22 at least one of the arbitration agreements at issue. *Id.*

23 Here, the Court finds that the employment application’s use of an English-language  
24 arbitration provision without any translation to Spanish, particularly in an industry and in a  
25 location where a large percentage of the workforce is likely to be primarily Spanish-speaking, in  
26 circumstances where the applicant has limited time to review the agreement or seek translation,  
27

1 contributes to the procedural unconscionability of the arbitration clause.

2 **c. Other Signs of Procedural Unconscionability: Surprise**

3 Plaintiffs in the instant case also make several arguments related to surprise. For example,  
4 Plaintiffs contend that “[t]here was no way for Plaintiffs to suspect that, by merely applying for  
5 the job, they would be waiving their right to a jury, waiving their appellate rights, or agreeing to  
6 mandatory arbitration of their individual claims.” Opp’n at 8. Plaintiffs are correct that the  
7 arbitration clause in the employment application, unlike many arbitration agreements, does not  
8 explain what arbitration is and does not explain that agreeing to arbitration involves giving up the  
9 constitutional right to a jury trial. See ECF No. 16-1 at 3; ECF No. 16-2 at 3. The arbitration  
10 clause provides, in full: “In addition, all claims related to my employment will be resolved through  
11 arbitration pursuant to the Federal Arbitration Act and under the rules of the American Arbitration  
12 Association.” *Id.*

13 The authority on whether such a failure to explain the consequences of agreeing to  
14 arbitration constitutes procedural unconscionability is mixed. In *Mabrie v. Home Improvement*  
15 *King*, 2006 WL 52284, at \*5 (Cal. Ct. App. Jan. 11, 2006) (unpublished), the California Court of  
16 Appeal held that “the trial court erred in finding the arbitration agreement unconscionable because  
17 it does not contain an express waiver of a jury” because “[n]o such legal requirement exists.” At  
18 least one district court has reached a similar conclusion. See *Borgarding v. JPMorgan Chase*  
19 *Bank*, 2016 WL 8904413, at \*4 (C.D. Cal. Oct. 31, 2016) (finding that the assertion that an  
20 arbitration agreement is unconscionable because it did not advise the signatory that she was  
21 waiving her right to a jury trial was “unpersuasive because it is well-settled that an arbitration  
22 agreement does not need to contain an express waiver of the right to a jury trial”). However, just  
23 because the law does not require an explicit waiver does not mean that the lack of any notice of  
24 the consequences of arbitration cannot be considered in the unconscionability analysis.

25 Indeed, the California Court of Appeal in at least one case with very similar facts to the  
26 instant case held that there was a “strong showing of procedural unconscionability” based in part

1 on the failure to put the plaintiff on notice of the consequences of agreeing to arbitration. *See*  
2 *Wisdom v. AccentCare, Inc.*, 136 Cal. Rptr. 3d 188, 194-95 (2012). In *Wisdom*, the arbitration  
3 clause provided that all disputes and claims arising out of the submission of an employment  
4 application and any eventual employment “will be submitted to binding arbitration” under the  
5 rules of the American Arbitration Association. *Id.* at 192. The California Court of Appeal found  
6 “abundant evidence that the arbitration agreement was procedurally unconscionable,” including  
7 that the contract was one of adhesion, that the American Arbitration Association rules were not  
8 attached, and that the “element of surprise was also present.” *Id.* at 194. Specifically, the  
9 California Court of Appeal explained that “[n]o one called attention to the arbitration agreement,  
10 and no one explained that it would result in a waiver of the right to trial. Plaintiffs did not know  
11 what binding arbitration meant. Thus, the employees’ reasonable expectation that they were  
12 entitled to a trial to determine their legal rights with respect to their employment was  
13 disappointed.” *Id.* However, the California Supreme Court granted review of *Wisdom* on a  
14 different issue and thus superseded the California Court of Appeal opinion, but the California  
15 Supreme Court never issued an opinion because the case settled. *See Wisdom v. AccentCare, Inc.*,  
16 273 P.3d 513 (Cal. 2012) (granting petition for review); *Wisdom v. AccentCare, Inc.*, 303 P.3d 391  
17 (Cal. 2013) (dismissing review based on settlement); *Jara v. JPMorgan Chase Bank, N.A.*, 2012  
18 WL 3065307, at \*3 (July 30, 2012) (stating that the question for which the California Supreme  
19 Court granted review in *Wisdom* concerned mutuality, which goes toward substantive  
20 unconscionability). The California Court of Appeal’s decision thus has only limited persuasive  
21 value because it is no longer precedential as a matter of California law. Accordingly, here, the  
22 Court finds that the brevity of the arbitration clause and its failure to warn of the consequences of  
23 submitting to arbitration only contribute minimally, if at all, to the level of procedural  
24 unconscionability.

25 In addition, Plaintiffs argue that the arbitration clause “was hidden at the end of a nineteen  
26 line, ten-point font, barely legible paragraph that also addressed I-9 paperwork, employment  
27



1 references, criminal background checks, and other information completely unrelated to arbitration  
2 of employment claims.” Opp’n at 8. Defendants respond that the agreement to arbitrate was  
3 “below a heading marked ‘IMPORTANT / PLEASE READ BEFORE SIGNING.’” Reply at 5.  
4 The Court agrees with Plaintiffs that the arbitration clause itself is inconspicuous. However, the  
5 Court cannot conclude that the single paragraph of text in the employment application is the type  
6 of “prolix printed form” where the length of the form would support a finding of procedural  
7 unconscionability. *See, e.g., Saravia*, 310 F.R.D. at 420 (finding procedural unconscionability  
8 where arbitration provisions “lay buried in the middle of more than ten pages of mostly boilerplate  
9 language”); *Flinn v. CEVA Logistics U.S., Inc.*, 2014 WL 4215359, at \*9 (S.D. Cal. Aug. 25,  
10 2014) (arbitration clause buried in the middle of a 51-page document that was not drawn to  
11 reader’s attention in any way strongly supported a finding of surprise); *Samaniego*, 205 Cal. App.  
12 4th at 1146 (eleven pages of densely worded, single-spaced text printed in small typeface, where  
13 arbitration clause was penultimate of 37 sections, supported a finding of procedural  
14 unconscionability). Thus, the inconspicuousness of the arbitration clause does not contribute  
15 significantly to the procedural unconscionability of the employment application arbitration clause  
16 because the terms of the contract as a whole are relatively short.

17 Finally, Plaintiffs contend that the job application’s failure to identify the applicable  
18 American Arbitration Association rules or provide a copy of the rules supports a finding of  
19 procedural unconscionability. Plaintiffs cite *Trivedi v. Curexo Technology Corp.*, 189 Cal. App.  
20 4th 387 (2010), for this proposition. Although the Ninth Circuit and other California Court of  
21 Appeal decisions have come to similar conclusions, these decisions predate the California  
22 Supreme Court’s decision in *Baltazar*. *See, e.g., Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 997 (9th  
23 Cir. 2010); *Carbajal v. CWPSC, Inc.*, 245 Cal. App. 4th 227, 244-45 (2016); *Carmona*, 226 Cal.  
24 App. 4th at 84-85; *Samaniego*, 205 Cal. App. 4th at 140.

25 In *Baltazar*, the California Supreme Court observed that “in *Trivedi* itself and in each of  
26 the Court of Appeal decisions cited therein, the plaintiff’s unconscionability claim depended in  
27

1 some manner on the arbitration rules in question.” 62 Cal. 4th at 1246. The California Supreme  
2 Court explained that “[t]hese cases thus stand for the proposition that courts will more closely  
3 scrutinize the substantive unconscionability of terms that were ‘artfully hidden’ by the simple  
4 expedient of incorporating them by reference rather than including them in or attaching them to  
5 the arbitration agreement.” *Id.* Where the plaintiff’s unconscionability challenge “has nothing to  
6 do with the AAA rules,” however, the defendant’s “failure to attach the AAA rules therefore does  
7 not affect [the Court’s] consideration of . . . substantive unconscionability.” *Id.* Thus, the  
8 California Court of Appeal and the Ninth Circuit in decisions since *Baltazar* have found that “the  
9 failure to attach the AAA rules does not make the agreement either procedurally or substantively  
10 unconscionable” where the plaintiff “does not identify any aspect of the AAA rules that surprised  
11 him or that was unfair or one-sided.” *Michaels v. Citigroup, Inc.*, 2017 WL 4675072, at \*7 (Cal.  
12 Ct. App. Oct. 18, 2017); *see also, e.g., Poublon*, 846 F.3d at 1262 (“incorporation by reference [of  
13 the AAA rules], without more, does not affect the finding of procedural unconscionability”).  
14 Here, because Plaintiffs do not identify any aspect of the AAA rules that surprised them or that is  
15 unfairly one-sided, Defendants’ failure to provide a complete copy of the AAA rules does not add  
16 to the procedural unconscionability of the employment application.

17       Considering all of these aspects together, the Court concludes that there was a moderate  
18 level of procedural unconscionability in the employment application arbitration clause. For the  
19 clause to be unenforceable, however, it must also be substantively unconscionable.

## 20       **2. Substantive Unconscionability**

21       “Substantive unconscionability pertains to the fairness of an agreement’s actual terms and  
22 to assessments of whether they are overly harsh or one-sided.” *Pinnacle Museum Tower Ass’n*, 55  
23 Cal. 4th at 246. “Although California courts have characterized ‘substantive unconscionability’ in  
24 various ways, [a]ll of these formulations point to the central idea that unconscionability doctrine  
25 is concerned not with a simple old-fashioned bad bargain but with terms that are unreasonably  
26 favorable to the more powerful party.” *Tompkins*, 840 F.3d at 1023 (quoting *Sonic-Calabasas A*,

1 *Inc. v. Moreno*, 57 Cal.4th 1109, 1145 (2013) (internal quotation marks omitted)); *see also*  
2 *Sanchez*, 61 Cal. 4th at 911 (reaffirming *Sonic-Calabasas* holding).

3 Plaintiffs first argue that “the job application imposes a six-month statute of limitations for  
4 claims brought by an employee “against Davey” but not for claims brought by Davey against the  
5 employee.” Opp’n at 10. This argument pertains to the following sentence in the employment  
6 application: “Any claims made by me against Davey relating to any aspect of my employment,  
7 including but not limited to hiring and termination, must be brought within six (6) months of the  
8 occurrence of the event giving rise to the claim(s).” ECF No. 16-1 at 3; ECF No. 16-2 at 3. This  
9 term is substantively unconscionable for two reasons. First, the term only limits the time in which  
10 employees may bring claims against Defendants; it does not limit the time in which Defendants  
11 may bring claims against employees. The Ninth Circuit and the California Court of Appeal have  
12 held that non-mutual shortening of limitations periods is substantively unconscionable. *See, e.g.,*  
13 *Pokorny*, 601 F.3 at 1001 (“The problem with the contractual reduction in the limitations period in  
14 this case, of course, is that it is not mutual.”); *La Count v. Patina Restaurant Grp., LLC*, 2015 WL  
15 3814298, at \*5 (Cal. Ct. App. June 18, 2015) (finding substantive unconscionability where “the  
16 employer may give notice of the intent to arbitrate at any time within the period of time allowed  
17 by that statute of limitations,” but “the employee has much more burdensome time restrictions”);  
18 *see also Flinn*, 2014 WL 4215359 at \*9 (finding substantive unconscionability where statute of  
19 limitations was effectively shortened to 90 days for one side but not the other).

20 Second, a six-month limitations period is significantly shorter than the statutory limitations  
21 period for the types of wage and hour claims asserted in the instant case, which is three or four  
22 years. The California Court of Appeal has recognized that such a significant shortening of the  
23 limitations period, especially “in the context of statutory wage and hour claims,” is substantively  
24 unconscionable because it restricts employees’ statutory rights. *Samaniego*, 205 Cal. App. 4th at  
25 1147 (six-month limitations period supported finding of substantive unconscionability); *see Baxter*  
26 *v. Genworth N. Am. Corp.*, 16 Cal. App. 5th 713, 731 (2017) (one-year limitations period for  
27

1 statutory discrimination claims substantively unconscionable); *Penilla*, 3 Cal. App. 5th at 222  
 2 (one-year limitations period, which was “significantly shorter than most of the claims” in the  
 3 complaint, supported a finding of substantive unconscionability); *Martinez v. Master Protection*  
 4 *Corp.*, 118 Cal. App. 4th 107, 117 (2004) (six-month limitations period supported substantive  
 5 unconscionability for discrimination and wage and hour claims). The Ninth Circuit has done the  
 6 same. *See Davis v. O’Melveny & Myers*, 485 F.3d 1066, 1076 (9th Cir. 2007) (one-year  
 7 limitations period for employment-related statutory claims is substantively unconscionable),  
 8 *overruled on other grounds by Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 937 (9th Cir.  
 9 2013). Accordingly, the Court finds that the term that imposes a six-month statute of limitations  
 10 only on employees is substantively unconscionable.

11 Plaintiffs also contend, without elaboration, that “Plaintiffs could not have compelled  
 12 arbitration of disputes brought by Davey *against* them.” Opp’n at 6. “Mutuality has been  
 13 described as the ‘paramount’ consideration when assessing substantive unconscionability.”  
 14 *Bradford v. Flagship Facility Servs. Inc.*, 2017 WL 3130072, at \*8 (N.D. Cal. July 24, 2017)  
 15 (quoting *Abramson v. Juniper Networks, Inc.*, 115 Cal. App. 4th 638 (2004)). Thus, if the  
 16 arbitration clause in the employment application only applied to claims brought by the employee,  
 17 such one-sidedness would be substantively unconscionable under California law. However, the  
 18 “California Supreme Court has held that broad language reaching ‘any dispute’ is sufficiently  
 19 broad to provide the ‘modicum of bilaterality’ that is required under California law, as such broad  
 20 language reaches suits brought by both employees and employers.” *Id.* Specifically, in *Baltazar*,  
 21 the California Supreme Court held that an arbitration agreement was mutual where it applied to  
 22 “any claim or action arising out of or in any way related to the . . . employment . . . of Employee.”  
 23 62 Cal. 4th at 1248-49. Here, the arbitration clause in the employment application covers “all  
 24 claims related to my employment.” ECF No. 16-1 at 3; ECF No. 16-2 at 3. Under *Baltazar*, this  
 25 language applies to both employer- and employee-initiated suits, and thus is not substantively  
 26 unconscionable.

1           The only other grounds for substantive unconscionability that Plaintiffs advance are the  
2 failure to identify which set of AAA rules apply to arbitration and the possibility that Plaintiffs  
3 may have to pay a filing fee or other costs associated with arbitration, even if Defendants pay “the  
4 fees charged by the arbitrator.” Opp’n at 10. Plaintiffs explain that depending on the set of AAA  
5 rules that apply, “there may be differences in the type of discovery and whether fees and costs can  
6 be shifted to either party, amongst other issues.” *Id.* Plaintiffs do not provide enough detail in  
7 support of either argument to support a finding of substantive unconscionability on those grounds.  
8 With respect to identifying which rules apply, Plaintiffs do not explain what the differences would  
9 be between different sets of AAA rules, nor do they actually argue that any set of rules would be  
10 substantively unconscionable. With respect to costs, Plaintiffs acknowledge that the employment  
11 application states that “Davey will pay the fees charged by the arbitrator.” Although it is possible  
12 that Plaintiffs may be responsible for a filing fee or other costs, Plaintiffs do not provide any  
13 estimate of how much they may have to pay in such filing fees and costs. Pointing to the mere  
14 possibility that Plaintiffs may have to pay some unspecified amount in filing fees or costs does not  
15 carry Plaintiffs’ burden to establish substantive unconscionability.

16           Accordingly, the Court finds that the arbitration clause in the employment application is  
17 substantively unconscionable because it contains a non-mutual shortening of the limitations period  
18 for employees’ claims to six months.

19           The Court has thus found that the employment agreement is procedurally and substantively  
20 unconscionable. The Court thus may “(1) refuse to enforce a contract that was ‘unconscionable at  
21 the time it was made’; (2) ‘enforce the remainder of the contract without the unconscionable  
22 clause’; or (3) limit the application of any unconscionable clause as to avoid any unconscionable  
23 result.” *Poublon*, 846 F.3d at 1272 (quoting Cal. Civ. Code § 1670.5(a)). “A court may ‘refuse  
24 to enforce the entire agreement’ only when it is ‘permeated by unconscionability.’” *Id.* (quoting  
25 *Armendariz*, 24 Cal. 4th at 122) (internal quotation marks omitted). As a result, the Court must  
26 analyze whether the unconscionable aspects of the employment application arbitration clause can  
27

1 be severed from the conscionable aspects. *See id.*

2 **3. Severability**

3 “Where a contract has several distinct objects, of which one at least is lawful, and one at  
4 least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest.”  
5 *Id.* (quoting Cal. Civ. Code § 1599); *see also Fair v. Bakhtiari*, 195 Cal. App. 4th 1135, 1157  
6 (2011) (“Civil Code section 1599 codifies the common law doctrine of severability of contracts.”).  
7 “By contrast, a contract is permeated with unlawfulness (and severance is inappropriate) where  
8 ‘[t]he good cannot be separated from the bad, or rather the bad enters into and permeates the  
9 whole contract, so that none of it can be said to be good.’” *Id.* (quoting *Keene v. Harling*, 61 Cal.  
10 2d 318, 322 (1964) (alteration in original)). “In other words, ‘[i]f the central purpose of the  
11 contract is tainted with illegality, then the contract as a whole cannot be enforced.’” *Id.* (quoting  
12 *Marathon Entm’t, Inc. v. Blasi*, 42 Cal. 4th 974, 996 (2008)) (alteration in original). “On the other  
13 hand, ‘[i]f the illegality is collateral to the main purpose of the contract, and the illegal provision  
14 can be extirpated from the contract by means of severance or restriction, then such severance and  
15 restriction are appropriate.’” *Id.* (quoting *Marathon Entm’t*, 42 Cal. 4th at 996). “In each case, the  
16 dispositive question is whether ‘the central purpose of the contract’ is so tainted with illegality that  
17 there is no lawful object of the contract to enforce.” *Id.* at 1273.

18 In *Poublon*, the Ninth Circuit held that a provision that allowed one party but not the other  
19 to seek judicial resolution of specified claims could “be extirpated without affecting the remainder  
20 of the paragraph.” *Id.* The Ninth Circuit also held that the non-mutual judicial resolution  
21 provision was “collateral to the main purpose of the contract, which [wa]s to require arbitration of  
22 disputes.” *Id.* (internal quotation marks omitted). Thus, the Ninth Circuit concluded that the  
23 arbitration agreement in *Poublon* was “valid and enforceable” once the substantively  
24 unconscionable provision was extirpated. *Id.* at 1274.

25 Here, the only substantively unconscionable aspect of the employment application  
26 arbitration clause is the term that imposes a six-month limitations period on employees’ claims.

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1 This term can be severed “without affecting the remainder of the paragraph.” *Id.* at 1273.  
2 Moreover, the Court finds that the limitations period term is collateral to the main purpose of the  
3 arbitration clause, “which is to require arbitration of disputes.” *Id.* As a result, once the  
4 limitations period term is removed, the employment application arbitration term is substantively  
5 conscionable, and thus enforceable.

6 The Court thus GRANTS the motion to compel arbitration of the first six claims of the  
7 complaint under the terms provided in the arbitration clause of the employment application once  
8 the six-month limitations period term is severed from the arbitration clause.<sup>4</sup>

9 **D. Whether to Stay the PAGA Claim**

10 Defendants do not seek to compel arbitration of Plaintiffs’ PAGA claim. *See Mot.* at 7.  
11 Plaintiffs’ PAGA claim therefore will be severed from Plaintiffs’ other claims and the PAGA  
12 claim will remain before this Court. *See Narez v. Macy’s W. Stores, Inc.*, No. 16-CV-936-LHK,  
13 2016 WL 4045376, at \*5 (N.D. Cal. July 28, 2016).

14 Pursuant to 9 U.S.C. § 3, the Court must “stay litigation of arbitral claims pending  
15 arbitration of those claims ‘in accordance with the terms of the agreement.’” *Concepcion*, 563  
16 U.S. at 344 (quoting 9 U.S.C. § 3). If a court “determines that all of the claims raised in the action  
17 are subject to arbitration,” the court “may either stay the action or dismiss it outright.”  
18 *Johnmohammadi v. Bloomingdale’s Inc.*, 755 F.3d 1072, 1074 (9th Cir. 2014). “However, if a  
19 court finds that the plaintiff asserts both arbitrable and nonarbitrable claims, district courts have  
20 ‘discretion whether to proceed with the nonarbitrable claims before or after the arbitration and  
21 [have] . . . authority to stay proceedings in the interest of saving time and effort for itself and  
22 litigants.’” *Jenkins v. Sterling Jewelers, Inc.*, 2018 WL 922386, at \*7 (S.D. Cal. Feb. 16, 2018)  
23 (quoting *Wilcox v. Ho-Wing Sit*, 586 F. Supp. 561, 567 (N.D. Cal. 1984)); *see also Leyva v.*  
24 *Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979) (holding that the defendant “was  
25

26 \_\_\_\_\_  
27 <sup>4</sup> Although the Arbitration Agreement contained a class action waiver, the employment application  
28 did not. Thus, Plaintiffs’ class claims are subject to the arbitration compelled by this order.

1 not entitled to a stay pursuant to section 3 of the Arbitration Act” on a nonarbitrable claim, but  
2 observing that “sound reasons may exist” to support a stay based on the district court’s inherent  
3 authority to control its docket).

4 Here, Defendants ask the Court to stay the PAGA claim pending resolution of the  
5 arbitration. Mot. at 7. Plaintiffs oppose the request for a stay. Opp’n at 10-11. The Court, in its  
6 discretion, finds that a stay of Plaintiffs’ PAGA claim is appropriate based upon the Court’s  
7 interest, as well as the parties’ interests, in saving time and effort. “Plaintiff[s]’ PAGA claim[] [is]  
8 derivative in nature of [their] substantive claims that will proceed to arbitration, and the outcome  
9 of the nonarbitrable PAGA claim[] will depend upon the arbitrator’s decision.” *Shepardson v.*  
10 *Adecco USA, Inc.*, 2016 WL 1322994, at \*6 (N.D. Cal. Apr. 5, 2016); *see also Jenkins*, 2018 WL  
11 922386 at \*8 (same). Thus, the Court GRANTS Defendants’ request to stay the PAGA claim  
12 pending arbitration of the other claims.

13 **IV. CONCLUSION**

14 For the foregoing reasons, the Court GRANTS the motion to compel arbitration of Claims  
15 1-6 insofar as the motion to compel is based on the employment application arbitration clause,  
16 once the six-month limitations period term is excised. The Court DENIES the motion to compel  
17 arbitration insofar as it is based on the Arbitration Agreement. The Court GRANTS the motion to  
18 stay the PAGA claim pending arbitration of the other claims. The parties shall notify the Court  
19 within seven days of the conclusion of the arbitration proceedings.

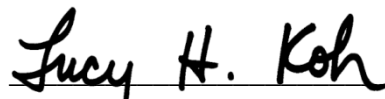
20 The Clerk shall administratively close the file. This is an internal administrative procedure  
21 that does not affect the rights of the parties.

22 **IT IS SO ORDERED.**

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24 Dated: July 13, 2018

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LUCY H. KOH  
United States District Judge

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