



1 New York. (Mot., ECF No. 10.) The Court finds this motion suitable for  
2 determination on the papers submitted and without oral argument. *See* Fed. R. Civ.  
3 P. 78(b); Civ. L.R. 7.1(d)(1).

4 For the reasons set forth below, the Court **GRANTS IN PART** Concierge’s  
5 motion to compel arbitration.

6  
7 **I. BACKGROUND**

8 **A. Relevant Factual Background**

9 Plaintiffs are both real estate investors residing in San Diego, California. (FAC  
10 ¶¶ 3-4.) As recently retired business executives, Plaintiffs routinely purchase luxury  
11 real estate. (Opp., ECF No. 21, at 24.) In the last year, Plaintiffs participated in seven  
12 Concierge real property auctions, four of which, Plaintiffs were the winning  
13 bidders—totaling \$14 million in purchase prices. (Mot.-1 at 7.) In each of these  
14 auctions, Plaintiffs entered into Bidder terms, identical to the ones currently in  
15 question. (*Id.*)

16 Concierge is a Delaware limited liability corporation with its principal place  
17 of business in San Antonio, Texas. (FAC ¶ 6.) It advertises as a large, high-end real  
18 estate company that auctions luxury residential real property. (*Id.*) In addition to its  
19 representations made on its website, Concierge’s project sales manager, Alexander  
20 Grey, sent multiple emails to Plaintiffs in California soliciting them to purchase  
21 property in Fiji known as “Navado Bay, Banua Levu” (the “Fiji Property”). (ECF  
22 Nos. 12 ¶ 20, 10-1 at 6.) On June 20, 2017, Plaintiffs registered to bid in the auction  
23 of the Fiji Property (the “Auction”) by signing Concierge’s form bidder registration  
24 agreement (“Bidder Agreement”). (FAC ¶ 23.) Section 27 of the Bidder Agreement  
25 contained the following provisions:

26  
27 **ARBITRATION; VENUE; PREVAILING PARTY.** The  
28 parties agree to submit all controversies, disputes, claims  
and matters of difference arising out of or relating to these  
Terms & Conditions, including but not limited to its  
enforcement, scope and/or interpretation, exclusively to

1 arbitration in New York, New York in accordance with the  
2 Commercial Arbitration Rules of the American Arbitration  
Association from time to time in effect (the “Arbitration  
Rules”). . . .

3 THE PARTIES UNDERSTAND THAT, ABSENT THIS  
4 AGREEMENT, THEY WOULD HAVE THE RIGHT TO  
5 SUE EACH OTHER IN COURT, AND THE RIGHT TO A  
6 JURY TRIAL, BUT THEY GIVE UP THOSE RIGHTS  
VOLUNTARILY AND AGREE TO RESOLVE ANY  
AND ALL GRIEVANCES BY ARBITRATION.

7  
8 (*Id.* ¶ 25.) The Bidder Agreement also contains a choice of law clause that  
9 provides:

10 The respective rights and obligations of the parties with  
11 respect to these Auction Terms & Conditions and the  
12 conduct of the Auction shall be governed, enforced and  
interpreted by the laws of the state of New York, without  
regard for conflicts of law principles.

13 (*Id.* ¶ 26.) The Bidder Agreement further reads:

14 The Auction Terms & Conditions and all other publicized  
15 elements of the Auction are subject to amendment by the  
16 posting of notices or by oral announcements made before or  
17 during the Auction. By participating in the Auction, you  
acknowledge and agree that you are bound by these Auction  
Terms as well as any additional terms that may be imposed  
by the Seller or announced prior to or at the Auction by  
Concierge. . . .

18  
19 CONCIERGE . . . RESERVE[S] THE RIGHT TO  
20 MODIFY OR AMEND ANY TERMS OF THE AUCTION,  
21 THE AUCTION METHOD OR PARTICULAR  
CONDITIONS OF THE AUCTION UPON  
ANNOUNCEMENT PRIOR TO OR DURING THE  
COURSE OF THE AUCTION.

22  
23 (Decl. of Appel, ECF No. 21-1, at 13, 17.) Both Plaintiffs signed the Bidder  
24 Agreement: Appel in person, and Cohen through DocuSign. (FAC ¶ 23.)

25 On June 28, 2017, Plaintiffs participated in the Auction for the Fiji Property.  
26 (*Id.* ¶ 41.) Plaintiffs were the winning bidders in the auction with their \$2,375,000  
27 bid and subsequently paid Concierge a \$285,000 earnest money deposit. (*Id.* ¶¶ 56,  
28 61, 64.) According to the Complaint, unbeknownst to Plaintiffs, on the morning of

1 the Auction, the seller of the Fiji Property repudiated the Seller’s Agreement, yielding  
2 the Fiji Property not for sale at the time the Auction took place. (*Id.* ¶ 52.)

3  
4 **B. Procedural Background**

5 Plaintiffs brought suit against Concierge and eight individuals associated with  
6 Concierge on November 6, 2017. (Complaint, ECF No. 1.) Plaintiffs’ First Amended  
7 Complaint is brought in diversity and alleges claims under California’s unfair  
8 competition law, Racketeering Influenced and Corrupt Organizations Act (“RICO”),  
9 and state tort claims. (FAC.) Citing the Arbitration Clause, Concierge filed a motion  
10 to compel arbitration, requesting the Court compel arbitration in New York, or  
11 transfer the case to New York pursuant to the forum selection clause. (Mot.)

12  
13 **II. EX PARTE MOTION FOR LEAVE TO FILE SUR-REPLY**

14 On February 2, 2017, Plaintiffs also filed an ex parte motion for leave to file a  
15 sur-reply. (ECF No. 25.) “Although the court in its discretion [may] allow the filing  
16 of a sur-reply, this discretion should be exercised in favor of allowing a sur-reply  
17 only where a valid reason for such additional briefing exists.” *Johnson*  
18 *v. Wennes*, No. 08-cv-1798, 2009 WL 1161620, at \*2 (S.D. Cal. April 28, 2009).  
19 Neither the federal rules nor the local rules permit a sur-reply as a matter of course.

20 Plaintiffs claim their sur-reply is necessary to respond to four new arguments  
21 raised by Concierge in its Reply (ECF No. 23), but the Court finds Concierge made  
22 no new arguments in the Reply. Rather, it appears two of Concierge’s purported new  
23 arguments are responses to arguments raised in Plaintiff’s opposition. First,  
24 Concierge discusses the parties’ contacts with New York (Reply at 6) to respond to  
25 Plaintiffs’ contentions that “New York has No Substantial Relationship” to the  
26 transaction. (Opp. at 18.) Second, Concierge discusses another broker’s involvement  
27 in the transactions (Reply at 2) to refute Plaintiffs’ allegations that Concierge acted  
28 as a broker. (Opp. at 6.) Additionally, for the third argument at issue, Concierge first

1 raises this standing argument in its supplemental briefing to its initial motion, which  
2 was filed and available to Plaintiffs before their opposition was filed. (ECF No. 14 at  
3 7-8.) Thus, Plaintiffs did not need a sur-reply to respond to these arguments.<sup>1</sup> For the  
4 fourth and last argument Plaintiff raises, the Court finds that Concierge seeks with its  
5 initial motion to arbitrate all claims against itself and its employees in this action, and  
6 not only Concierge’s claim as Plaintiff contends. Thus, any discussion of Concierge  
7 seeking to send the entire action to arbitration is not a new argument raised on reply.

8       Accordingly, the Court **DENIES** Plaintiffs’ ex parte motion for leave to file a  
9 sur-reply. (ECF No. 23.)

### 10 11 **III. LEGAL STANDARD**

12       The Federal Arbitration Act (“FAA”) applies to arbitration agreements in any  
13 contract affecting interstate commerce. *Circuit City Stores, Inc. v. Adams*, 532 U.S.  
14 105, 119 (2001); 9 U.S.C. § 2. Under the FAA, arbitration agreements “shall be valid,  
15 irrevocable, and enforceable, save upon such grounds as exist at law or in equity for  
16 the revocation of any contract.” 9 U.S.C. § 2. This provision reflects both a “liberal  
17 federal policy favoring arbitration” and the “fundamental principle that arbitration is  
18 a matter of contract.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)  
19 (internal citations omitted). Arbitration agreements, “[l]ike other contracts . . . may  
20 be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or  
21 unconscionability.’” *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010)  
22 (quoting *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). “In  
23 determining whether to compel a party to arbitration, a district court may not review  
24 the merits of the dispute[.]” *Marriott Ownership Resorts, Inc. v. Flynn*, No. 14-00372

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25  
26       <sup>1</sup> Given the Court’s ruling on this motion, the Court declines to address any  
27 arguments going to the merits of Plaintiffs’ claims, and rather leave these for an  
28 arbitrator to decide. Likewise, the Court denies as moot any requests for judicial  
notice and evidentiary objections not addressed in this Order. (ECF Nos. 21-4, 21-5,  
21-6, 23-1.)

1 JMS-RLP, 2014 WL 7076827, at \*6 (D. Haw. Dec. 11, 2014). Instead, a district  
2 court’s determinations are limited to (1) whether a valid arbitration agreement exists  
3 and, if so, (2) whether the agreement covers the relevant dispute. *See* 9 U.S.C. § 4;  
4 *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000).

5 Threshold issues of arbitrability are presumptively for the district court to  
6 decide. *See Martin v. Yasuda*, 829 F.3d 1118, 1122-23 (9th Cir. 2016). However,  
7 parties can delegate the power to decide arbitrability to the arbitrator through “clear  
8 and unmistakable” evidence of an agreement to do so. *Brennan v. Opus Bank*, 796  
9 F.3d 1125, 1130 (9th Cir. 2015). In determining whether the parties delegated  
10 arbitrability to the arbitrator, the court applies federal arbitrability law “absent clear  
11 and unmistakable evidence that the parties agreed to apply non-federal arbitrability  
12 law.” *Cape Flattery Ltd. v. Titan Mar., LLC*, 647 F.3d 914, 921 (9th Cir. 2011).  
13 “[T]he party resisting arbitration bears the burden of proving that the claims at issue  
14 are unsuitable for arbitration.” *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79,  
15 91 (2000).

#### 17 **IV. DISCUSSION**

##### 18 **A. The FAA Applies to this Dispute**

19 As an initial matter, Plaintiffs challenge Concierge’s use of the FAA to compel  
20 arbitration. (Opp. at 16.) Specifically, they argue that the Bidder Agreement did not  
21 concern interstate commerce and instead concerned “the sale of a single residential  
22 property.” (*Id.* at 16-17.)

23 In enacting the FAA, Congress intended to reach the full range of transactions  
24 covered by the Commerce Clause. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56  
25 (2003). Therefore, even if a specific economic activity alone would not affect  
26 interstate commerce in a substantial way, the interstate commerce requirement of the  
27 FAA is satisfied if the aggregate practice of which that economic activity is a part of  
28 affects interstate commerce. *Id.* at 56-57. Furthermore, if some activity of one of the

1 parties, even if not directly the subject of the contract or transaction at issue, has a  
2 nexus to interstate commerce, the FAA applies. *See Allied-Bruce Terminix*  
3 *Companies, Inc. v. Dobson*, 513 U.S. 265, 282 (holding the FAA applied to a local  
4 service contract between a homeowner and termite control company because the  
5 termite control company was multi-state in nature and used out-of-state material in  
6 performing on the contract).

7 Plaintiffs cite to a handful of cases where courts found the FAA did not apply  
8 to arbitration over real estate transactions. (Opp. at 17 (citing to *SI V, LLC v. FMC*  
9 *Corp.*, 223 F. Supp. 2d 1059 (N.D. Cal. 2002) (finding the FAA does not apply in an  
10 arbitration dispute over a real estate sale between an in-state buyer and an out-of-  
11 state seller); *Cecala v. Moore*, 982 F. Supp. 609, 612 (N.D. Ill. 1997) (finding the  
12 FAA did not apply in arbitration over representations made in residential real estate  
13 sale between in-state seller and out-of-state buyer); *Saneii v. Robards*, 289 F. Supp.  
14 2d 855, 859 (W.D. Ky. 2003) (finding FAA does not apply to single sale of residential  
15 real estate)).

16 The cases Plaintiffs cite are distinct from the instant case. The first two cases  
17 listed above specifically address an in-state party and in-state property. Here, neither  
18 Plaintiff resides in Fiji where the property is located. (FAC ¶¶ 3-4.) Similarly,  
19 Concierge is incorporated in Delaware with its principal place of business in Texas.  
20 (*Id.* ¶ 6.) Additionally, all of the cases above involve one-time real estate sales.<sup>2</sup>  
21 Concierge's sale of the subject real estate was not an isolated transaction from one  
22 home owner to another. Rather, the contract placed Plaintiffs within a vast web of  
23 connections and commercial transactions with various players around the globe. The  
24 Bidder Agreement was for Plaintiffs to participate in an auction to bid against other  
25 potential buyers. The Bidder Agreement further allowed Plaintiffs to submit offers  
26

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27 <sup>2</sup> *Saneii* touches on more complex transactions relating to land, and discusses  
28 the possibility that these transactions would affect interstate commerce. *Saneii*, 289  
F. Supp. 2d at 859.

1 for other properties Concierge listed for sale and was not limited to the Fiji Property.  
2 (FAC ¶ 23.) Moreover, because Plaintiffs are real estate investors who have recently  
3 purchased other properties from Concierge alone, the Court can infer that Plaintiffs  
4 are not using the property solely for their residential use. Instead, it is likely Plaintiffs  
5 purchased the Fiji Property for profit, either through property management, rental, or  
6 sale of the property, suggesting a more commercial aspect to this transaction.

7 Finally, the Court finds Defendants engagement in marketing and sales  
8 activities for the Fiji Property as well as other properties far beyond the borders of  
9 one particular state. *See Berman v. Spruce Peak Realty, LLC*, Nos. 2:11-CV-127,  
10 2:11-CV-128, 2012 WL 6212849, at \*6 (D. Vt. Dec. 13, 2012). In Plaintiff’s RICO  
11 claim, they describe how Defendant’s “conduct[ed] the[ir] enterprise in ways that  
12 affect interstate commerce” including: interstate website and digital advertisements,  
13 phone calls, emails, interstate bank-wire transactions, transmitting writings, pictures,  
14 and other electronic media. (FAC ¶¶ 108, 110, 116, 117 (parentheses omitted).) Thus,  
15 Concierge demonstrates a nexus to interstate activity.

16 For the foregoing reason, the Court finds that the FAA applies here.  
17

18 **B. The Parties Clearly and Unmistakably Delegated Arbitrability**

19 The Court must address who—an arbitrator or the Court—should resolve the  
20 parties’ disagreement concerning the scope and validity of the Arbitration Clause.  
21 Concierge seeks to compel arbitration pursuant to the arbitration provisions of the  
22 Bidder Agreement. It contends the Bidder Agreement requires any issue pertaining  
23 to “enforcement, scope and/or interpretation” be delegated to the arbitrator, including  
24 the validity of the provision itself. (Mot. at 12.) Plaintiffs disagree. Instead, they deny  
25 the existence of a delegation clause within the Bidder Agreement, thereby arguing  
26 that the validation of the arbitration clause was reserved for this Court. (Opp. at 20-  
27 21.)  
28



1 A district court determines whether an arbitration clause is valid, applicable,  
2 and enforceable unless “the parties clearly and unmistakably provide[d] otherwise  
3 such as by delegating the issue of arbitrability to arbitration.” *AT&T Techs., Inc. v.*  
4 *Commc’ns Workers of Am.*, 475 U.S. 643, 649 (1986). The Ninth Circuit has held  
5 that the incorporation of the American Arbitration Association (“AAA”) Rules into  
6 an arbitration agreement “constitutes clear and unmistakable evidence that  
7 contracting parties agreed to arbitrate arbitrability.” *Brennan*, 796 F.3d at 1130.

8 There is a split within the Ninth Circuit as to whether the scope of *Brennan* is  
9 limited to delegation clauses in cases involving sophisticated parties. The Court  
10 agrees with the authorities that find that *Brennan* is not limited by the sophistication  
11 of parties. *See Esquer v. Educ. Mgmt. Corp.*, \_\_\_ F. Supp. 3d \_\_\_, No. 17-cv-1240-  
12 BAS-AGS, 2017 WL 5194635, at \*4 (S.D. Cal. Nov. 9, 2017). Nonetheless, the Court  
13 is mindful of the concerns reflected by several courts, which emphasize that “an  
14 inexperienced individual untrained in the law” is less likely to be reasonably expected  
15 to understand the incorporation of arbitrator rules into an arbitration agreement. *See,*  
16 *e.g., Galilea, LLC v. AGCS Marine Ins. Co.*, No. CV 15-84-BLG-SPW, 2016 WL  
17 1328920, at \*3 (D. Mont. Apr. 5, 2016). However, these concerns are not present  
18 here. The Court is satisfied with Plaintiffs’ level of sophistication to the extent they  
19 can understand the provisions within this arbitration agreement. As self-described  
20 real estate investors that have engaged in various real estate ventures, and who have  
21 seen and negotiated similar Bidder Agreements with Concierge, Plaintiffs are not the  
22 “ordinary customers who could not be expected to appreciate the significance of  
23 incorporation of the AAA rules,” in which courts intend to protect. *See, e.g., Ingalls*  
24 *v. Spotify USA, Inc.*, No. C 16-03533 WHA, 2016 WL 6679561, at \*4 (N.D. Cal.  
25 Nov. 14, 2016); *cf. Cordas v. Uber Techs., Inc.*, 228 F. Supp. 3d 985, 992 (N.D. Cal.  
26 2017) (“Nearly every decision in the Northern District of California has consistently  
27 found effective delegation of arbitrability regardless of the sophistication of the  
28 parties.”); *Seaman v. Private Placement Capital Notes II, LLC*, No. 16-CV-00578-

1 BAS-DHB, 2017 WL 1166336, at \*4 (S.D. Cal. 2017) (applying the dicta in *Brennan*,  
2 stating “there is no requirement that the parties be sophisticated or that the contract  
3 be a commercial contract before a court may conclude that incorporation of the AAA  
4 Rules is a clear and unmistakable evidence of intent to arbitrate arbitrability”).  
5 Additionally, even if Plaintiffs were unsophisticated, the Bidder Agreement is not  
6 “so complicated that it is not reasonable to find a clear and unmistakable intent  
7 between the parties to delegate.” *Esquer*, 2017 WL 5194635, at \*4.

8 Plaintiffs neglect to address the entire arbitration provision within their  
9 argument. The Arbitration Clause provides in part: “The parties agree to submit all  
10 controversies, disputes, claims and matters of difference arising out of or relating to  
11 these Terms & Conditions, including . . . its enforcement, scope and/or interpretation,  
12 exclusively to arbitration in New York, New York in accordance with the  
13 Commercial Arbitration Rules of the American Arbitration Association.”(FAC ¶ 25.)  
14 According to Rule 7(a) of the AAA Rules, “The arbitrator shall have the power to  
15 rule on his or her own jurisdiction, including any objections with respect to the  
16 existence, scope, or validity of the arbitration agreement or to the arbitrability of any  
17 claim or counterclaim.” AAA Commercial Rule 7(a) (effective as of October 1,  
18 2013). This rule delegates all jurisdictional questions to the arbitrator, including  
19 arbitrability. Accordingly, by incorporating the AAA Rules into their arbitration  
20 agreement, the parties have clearly and unmistakably delegated the question of  
21 arbitrability to the arbitrator. *See Brennan*, 796 F.3d at 1130; *see also Khraibut v.*  
22 *Chahal*, No. C15-04463 CRB, 2016 WL 1070662, at \*6 (N.D. Cal. Mar. 18, 2016)  
23 (collecting cases holding that incorporation of arbitrator rules manifests clear and  
24 unmistakable evidence of the parties’ agreement to arbitrate arbitrability).

25 Additionally, the Court can look within the Bidder Agreement’s terms to find  
26 the parties’ requisite intent to delegate in this case. *See Han v. Synergy Homecare*  
27 *Franchising LLC*, 2017 WL 446881 (N.D. Cal. Feb. 2, 2017) (“When the contractual  
28 language is clear, there is no need to consider extrinsic evidence of the parties’

1 intentions; the clear language of the agreement governs.”) (quoting *Berman v. Dean*  
2 *Witter & Co.*, 119 Cal. Rptr. 130, 133 (Cal. App. 1975)). Both Plaintiffs signed the  
3 Bidder Agreement containing the arbitration provision. The arbitration provision  
4 explicitly requires disputes and controversies regarding the “enforcement, scope  
5 and/or interpretation” to be arbitrated. (FAC ¶ 25.) Consequently, the Court finds the  
6 parties clearly and unmistakably delegated the question of arbitrability.

### 7 8 **C. Arbitration Provision is Enforceable**

9 Despite a clear and unmistakable delegation of arbitrability, an arbitration  
10 provision may still be found unenforceable if delegation itself is unconscionable.  
11 *Rent-A-Ctr.*, 561 U.S. at 74. Thus, the delegation enforcement is only proper “in the  
12 absence of some other generally applicable contract defense, such as fraud, duress,  
13 or unconscionability.” *See Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1209 (9th  
14 Cir. 2016). Because an arbitration provision is severable from the contract as a whole,  
15 and a delegation clause is severable from an arbitration provision, the party must  
16 specifically attack the arbitration clause. *Rent-A-Ctr.*, 561 U.S. at 71-74; *see also*  
17 *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006) (finding “unless  
18 the challenge is to the arbitration clause itself, the issue of the contract’s validity is  
19 considered by the arbitrator in the first instance.”).

20 It is evident that the majority of Plaintiffs’ arguments challenge the  
21 enforcement of the contract as a whole, instead of just the arbitration clause.  
22 Specifically, Plaintiffs contend that “[h]ad Concierge disclosed the truth [about seller  
23 rescinding], Plaintiffs would not have participated in the Auction, much less bid or  
24 increase their bid at Concierge’s insistence.” (Opp. at 12.) Further, Plaintiffs argue  
25 they were illegally solicited as prospective buyers of the Fiji Property by Concierge’s  
26 “unlicensed real estate broker activities.” (*Id.* at 6.) The notion of the majority of  
27 Plaintiffs’ arguments is they were fraudulently induced into the contract thereby  
28 making it, as well as the arbitration clause, void. *See Prima Paint Corp. v. Flood &*

1 *Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (“[I]f the claim is fraud in the  
2 inducement of the arbitration clause itself—an issue which goes to the making of the  
3 agreement to arbitrate—the federal court may proceed to adjudicate it.”).  
4 Accordingly, the Court will only consider Plaintiffs’ arguments as to the  
5 unconscionability of the parties’ agreement to arbitrate.

6  
7 **i. California Law Applies**

8 Next the Court decides whether to apply New York or California law in  
9 determining the enforceability of the arbitration provision. A federal court sitting in  
10 diversity applies the choice of law rules of the state in which it sits. *See Bridge Fund*  
11 *Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1002 (9th Cir. 2010).  
12 Because Plaintiffs brought this lawsuit in California, the Court applies California’s  
13 choice of law rules to determine the unconscionability issue. Here, the parties’ Bidder  
14 Agreement contains a New York choice-of-law provision. California courts generally  
15 honor the parties’ choice-of-law to govern their claims in dispute, unless: (1) “the  
16 chosen state has no substantial relationship to the parties or the transaction” and (2)  
17 “there is no other reasonable basis for the parties’ choice.” *Nedlloyd Lines B.V. v.*  
18 *Superior Court*, 834 P.2d 1148, 1152 (Cal. 1992). If either test is met, the Court must  
19 then determine whether the chosen state’s law is contrary to a fundamental policy of  
20 California. *Fastbucks*, 621 F.3d at 1002-03 (9th Cir. 2010).

21 New York has no substantial relationship to the parties or the transactions at  
22 issue here. Neither party is located in New York, nor is there evidence to suggest that  
23 either party conducts substantial business in New York. *Cf.* Restatement 2d of  
24 Conflict of Laws § 187 cmt. f (recognizing that a “substantial relationship” with the  
25 chosen state exists where “one of the parties is domiciled or has his principal place  
26 of business”). This action’s only ties to New York is a provision within the Bidder  
27 Agreement indicating Plaintiffs’ intent to bid on a property in New York at an  
28 unspecified time in the future. (ECF No. 23 at 6 n.4.) Without more, the Court will

1 not construe this potential interaction as a substantial relationship with New York.  
2 Further, as Concierge concedes, there is no material difference between California  
3 and New York law on the issue of unconscionability. (Mot.-1 at 14.) Accordingly,  
4 California law applies.

5  
6 **ii. The Delegation Provision is Not Unconscionable**

7 Plaintiffs argue the arbitration provision, including its delegation clause, are  
8 unenforceable because it is both procedurally and substantively unconscionable.  
9 Under California law, unconscionable contracts are those that are “so one-sided as to  
10 shock the conscience.” *Baltazar v. Forever 21, Inc.*, 367 P.3d 6, 11 (Cal. 2016).  
11 Finding that a contract is unenforceable on grounds of unconscionability requires a  
12 substantial degree of unfairness beyond “a simple old-fashioned bad bargain.” *Id.* An  
13 agreement may be found to be “invalid if it is *both* procedurally and substantively  
14 unconscionable.” *Sanchez v. Carmax Auto Superstores California LLC*, 168 Cal.  
15 Rptr. 473, 477 (Cal. Ct. App. 2014) (emphasis added). “Procedural  
16 unconscionability focuses on oppression and surprise due to unequal bargaining  
17 power, and substantive unconscionability turns on overly harsh or one-sided results.”  
18 *Id.* California courts apply a “sliding scale” to determine whether to invalidate an  
19 agreement that is both procedurally and substantively unconscionable: “the more  
20 substantively oppressive the contract term, the less evidence of procedural  
21 unconscionability is required to come to the conclusion that the term is  
22 unenforceable, and vice versa.” *Armendariz v. Found. Health Pyschare Servs., Inc.*,  
23 6 P.3d 669, 690 (Cal. 2000). “Because unconscionability is a contract defense, the  
24 party asserting the defense bears the burden of proof.” *Sanchez v. Valencia Holding*  
25 *Co., LLC*, 353 P.3d 741, 749-50 (Cal. 2015); *see also Pinnacle Museum Tower*, 282  
26 P.3d 1217, 1224-25 (“[T]he party opposing arbitration bears the burden of proving  
27 any defense, such as unconscionability.”).

28

1                   **a. Procedural Unconscionability**

2           A “[p]rocedural unconscionability analysis focuses on oppression or  
3 surprise.” *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1280 (9th Cir.  
4 2006) (internal quotations omitted). “Oppression arises from an inequality of  
5 bargaining power that results in no real negotiation and an absence of meaningful  
6 choice, while surprise involves the extent to which the supposedly agreed-upon terms  
7 are hidden in a prolix printed form drafted by the party seeking to enforce  
8 them.” *Id.* (internal quotations omitted). Here, Plaintiffs raise three arguments why  
9 the delegation provision is procedurally unconscionable.

10           As a preliminary note, Plaintiffs cite to *Nagrampa* to counter the significance  
11 of their sophisticated business status. (Opp. at 25). However, *Nagrampa* presents  
12 issues of employment contracts that revolve around the inherently unequal  
13 bargaining structure of franchises. *Nagrampa*, 469 F.3d at 1282-83. As stated above,  
14 Plaintiffs are self-described real estate investors that have engaged in previous multi-  
15 million dollar deals in high end luxury real estate. (FAC ¶¶ 4-5; Decl. of McMains ¶  
16 4.<sup>3</sup>) Nonetheless, the Court will consider the parties’ sophistication in respects to the  
17 oppressiveness and surprise elements of procedural unconscionability,

18           First, Plaintiffs argue the arbitration clause is contained in an adhesion contract  
19 against a powerful “global commercial entity,” in which they had no bargaining  
20 power. (Opp. at 24.) Procedural unconscionability often arises when the contract in  
21 question is one of adhesion. *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 145-146  
22 (Cal. Ct. App. 2003). A contract of adhesion is a “a standardized contract, which,  
23 imposed and drafted by the party of superior bargaining strength, relegates to the  
24 subscribing party only the opportunity to adhere to the contract or reject it.” *Id.*  
25 Finding that a contract is one of adhesion essentially is finding procedural  
26 unconscionability. *Flores v. Transamerica HomeFirst, Inc.*, 113 Cal. Rptr. 2d 376,  
27 382 (Cal. Ct. App. 2001). This is because when a weaker party is presented with a

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<sup>3</sup> The Court denies Plaintiffs’ objections to this evidence.

1 “take it or leave it” clause and afforded no opportunity to meaningfully negotiate it,  
2 oppression—and therefore, procedural unconscionability—are present. *Szetela v.*  
3 *Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (Cal. Ct. App. 2002). However, the fact  
4 that a contract is adhesive is insufficient by itself to render an arbitration clause  
5 unenforceable. *Newton v. Am. Debt Servs.*, 854 F. Supp. 2d 712, 723 (N.D. Cal.  
6 2012).

7 The Court acknowledges that that the Bidder Agreement, which includes the  
8 delegation clause, contains some elements of an adhesion contract. The Bidder  
9 Agreement has standard bidder terms used throughout auctioneer commercial  
10 practices. (ECF No. 23 at 7.) It is presented to all individuals interested in  
11 participating in Concierge’s auctions. (*Id.*) Despite Concierge’s contentions that  
12 Plaintiffs negotiated a “deal” with Concierge,<sup>4</sup> (*id.*), there is no indication that  
13 Plaintiffs were ever given an opportunity to negotiate any terms within their  
14 contracts. However, there is also no indication that they tried.

15 On the other hand, the Agreement also contains elements that support a finding  
16 that it was not a contract of adhesion. As previously mentioned, this contract was not  
17 essential to Plaintiffs. They did not have to participate in the auction, nor did they  
18 have to continue contracting with Concierge; yet, there is no evidence that they  
19 sought real estate transactions with other companies. *Cf. Morris v. Redwood Empire*  
20 *Bancorp*, 27 Cal. Rptr. 3d 797, 807 (2005) (“Oppression refers not only to an absence  
21 of power to negotiate the terms of a contract, but also the absence of reasonable  
22 market alternatives.”). Further, the negotiations were absent a superior bargaining  
23 party. Plaintiffs fail to demonstrate they were the weaker party considering their level  
24 of business sophistication and past experiences with similar multi-million dollar  
25 transactions. (*See Decl. of McMains* ¶ 4 (stating Plaintiffs previously purchased four  
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27 <sup>4</sup> The deal Concierge refers to was a post-contract performance dispute of  
28 Concierge’s fees not regarding the negotiation of the terms of the agreement. (*Decl.*  
of Appel ¶ 17.) The Court denies Concierge’s objections to this evidence. (ECF No.  
23-1.)

1 properties with Concierge, totaling almost \$14 million in purchase prices.)  
2 Ultimately, the Court finds that a determination on this matter would have little  
3 significance to the overall unconscionability analysis because a finding of an  
4 adhesion contract establishes only some degree of procedural unconscionability. In  
5 and of itself, it is not enough to find that a contract, or one of its provisions, is  
6 unenforceable. *See Sanchez v. Valencia Holding Co., LLC*, 353 P.3d 741, 751 (2015).

7 Second, Plaintiffs further suggest there was procedural unconscionability  
8 because Concierge did not attach the AAA rules to the arbitration provision. (FAC ¶  
9 25.) The Court notes that Concierge is silent on this issue.

10 Federal courts in the Ninth Circuit have come to different conclusions on this  
11 issue. Some federal courts note the failure to provide a copy of arbitration rules adds  
12 to the degree of procedural unconscionability. *See Raymundo v. ACS State & Local*  
13 *Solutions, Inc.*, No. C 13-00442 WHA, 2013 WL 2153691, at \*11 (N.D. Cal. May  
14 16, 2013); *Williams v. Am. Speciality Health Group, Inc.*, 2013 WL 1629213, at \*4  
15 (S.D. Cal. Apr. 16, 2013); *Cisneros v. Am. General Fin. Servs., Inc.*, No. C 11-02869  
16 CRB, 2012 WL 3025913, at \*6 (N.D. Cal. July 24, 2012); *Rosendahl v. Bridgepoint*  
17 *Educ., Inc.*, No. 11CV61 WQH (WVG), 2012 WL667049, at \*8 (S.D. Cal. Feb. 28,  
18 2012). However, in contrast, numerous federal courts render this fact insignificant.  
19 *See Morgan v. Xerox*, No. 2:13-cv-00409-TLN-AC, 2013 WL 2151656, at \*9-11  
20 (E.D. Cal. May 16, 2013); *Collins v. Diamond Pet Food Processors of Cal.*, No. 2:13-  
21 CV-00113-MCE-KJN, 2013 WL 1791926, at \*5 (E.D. Cal. Apr. 26, 2013); *Miguel*  
22 *v. JPMorgan Chase Bank, N.A.*, No. CV12-3308 PSG (PLAx), 2013 WL 452418, at  
23 \*5 (C.D. Cal. Feb. 5, 2013) *Hodsdon v. DirectTV, LLC*, No. C 12-02827 JSW, 2012  
24 WL 5464615, at \*5 (N.D. Cal. Nov. 8, 2012); *Wilson v. United Health Group, Inc.*,  
25 No. 2:12-cv-01349-MCE-JFM, 2012 WL 6088318, at \*4 (E.D. Cal. Dec. 6, 2012);  
26 *Ulbrich v. Overstock.com, Inc.*, 887 F. Supp. 2d 924, 932-33 (N.D. Cal. 2012);  
27 *Sullivan v. Lumber Liquidators*, No. C-10-1447 MMC, 2010 WL 2231781, at \*5  
28 (N.D. Cal. June 2, 2010).



1 California contract law allows parties to incorporate the terms of another  
2 document by reference into an agreement. *Troyk v. Farmers Group, Inc.*, 90 Cal.  
3 Rptr. 3d 589, 610 (2009). “For the terms of another document to be incorporated into  
4 the document executed by the parties, the reference must be clear and unequivocal,  
5 the reference must be called to the attention of the other party and he or she must  
6 consent thereto, and the terms of the incorporated document must be known or easily  
7 available to the contracting parties.” *Collins*, 2013 WL 1791926, at \*5 (quoting *Shaw*  
8 *v. Regents of Univ. of Cal.*, 67 Cal. Rptr. 2d 850, 856 (1997)) (internal quotation  
9 marks omitted). Here, the Bidder Agreement clearly states that the arbitration will be  
10 conducted “in accordance with the Commercial Arbitration Rules of the American  
11 Arbitration Association.” (Decl. of Appel at 21.) This is sufficiently clear and  
12 unambiguous to incorporate these rules into the contract by reference. Furthermore,  
13 the sophisticated Plaintiffs can easily acquire the applicable rules that are available  
14 on the AAA website.

15 Furthermore, the Court recognizes that requiring parties to attach arbitration  
16 rules to their agreements to avoid a finding of procedural unconscionability would  
17 place arbitration contracts on a different footing than other contracts as to the doctrine  
18 of incorporation by reference, which is prohibited by the Supreme  
19 Court. *Concepcion*, 563 U.S. at 366 (“[W]e have repeatedly referred to the [FAA’s]  
20 basic objective as assuring that courts treat arbitration agreements like all other  
21 contracts.”) (internal quotation marks omitted); *see also Lane v. Francis Capital*  
22 *Mgmt. LLC*, 168 Cal. Rptr. 3d 800, 813 (2014) (“Like any other contract,  
23 an arbitration agreement may incorporate other documents by reference.”).  
24 Consequently, the incorporation of these documents by reference does not support  
25 Plaintiff’s claim that the delegation provision was oppressive. *See Do v. CashCall,*  
26 *Inc.*, SACV 13-01242 JVS (RNBx), 2013 WL 12116340, at \*6 (C.D. Cal., 2013).

27 Lastly, Plaintiffs argue the “the delegation language in the Arbitration  
28 Provision here is buried in prolix at the bottom of page nine of an eleven page

1 document.” (Opp. at 18.) However, even a cursory review of the Bidder Agreement  
2 reveals the arbitration provisions are not hidden. Paragraph 27 of the Agreement is  
3 the second longest provision of the contract. (Decl. of Appel at 21.) While the  
4 typeface is not overly large, it appears to be standard size and font that corresponds  
5 with the rest of the Agreement. (*Id.*) The title “Arbitration; Venue; Prevailing Party”  
6 is bolded and in all caps and does not contain deceptive or overly confusing language.  
7 (*Id.*) The Bidder Agreement further required Plaintiffs pay \$100,000 “bidder  
8 deposit,” a relatively large sum of money. “The amount of the contract and business  
9 plans of the parties reflect a level of sophistication and business planning indicative  
10 of sophisticated business entities.” *Everest Biosynthesis Group, LLC v. Biosynthesis*  
11 *Pharma Grp. Ltd.*, No. 17CV1466 JM(BGS) 2018 WL 35123, at \*4 (addressing how  
12 the specific facts that the parties were an industrial hemp supplier and CBD  
13 manufacturers who contracted for \$2 million disfavored a procedurally  
14 unconscionable finding). Most notable, however, is this is the seventh time Plaintiffs  
15 have seen this provision in their relatively short contracts within the last year. (*See*  
16 *Decl. of McMains ¶¶ 4-5.*<sup>5</sup>) Plaintiffs cannot not now claim they were surprised by  
17 the existence of the arbitration provision.

18 The circumstances weigh against a finding of procedural unconscionability.  
19 Although Concierge introduced the standard Bidder Agreement on a take it or leave  
20 it basis, Plaintiffs are relatively sophisticated and had the capacity to understand the  
21 Bidder Agreement’s delegation provision.

### 22 23 **b. Substantive Unconscionability**

24 Plaintiffs contend the Bidder Agreement’s two unilateral modification clauses  
25 render the arbitration provision substantively unconscionable. (Opp. at 26.)

26 Under the circumstances here, where the unilateral modification clauses are in  
27 distinct provisions of the contract, the unilateral modification clauses may be severed

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<sup>5</sup> The Court denies Plaintiffs’ objections to this evidence.

1 from the arbitration provision. Therefore, it does not make the arbitration provision  
2 itself unconscionable. *See Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1033 (9th Cir.  
3 2016). Plaintiffs may argue that the unilateral modification clause itself is  
4 unenforceable during arbitration. *See Kilgore v. KeyBank, Nat. Ass'n*, 718 F.3d 1052,  
5 1059 n.9 (9th Cir. 2013) (en banc). Under California law, the fact that one party has  
6 the unilateral right to modify an arbitration agreement does not automatically make  
7 the agreement illusory: “the discretionary power to modify or terminate an agreement  
8 carries with it the duty to exercise that power in good faith and fairly.” *John v.*  
9 *Hanlees Davis, Inc.*, No. 12-CV-2529, 2013 WL 3458183, at \*6 (E.D. Cal. July 9,  
10 2013) (determining, under state law, that one party’s unilateral right to modify an  
11 agreement did not render the arbitration clause illusory or unenforceable); *Serpa v.*  
12 *Cal. Sur. Investigations, Inc.*, 155 Cal. Rptr. 3d 506, 514 (Cal. Ct. App. 2013) (“[I]t  
13 has long been the rule that a provision in an agreement permitting one party to modify  
14 contract terms does not, standing alone, render a contract illusory because the party  
15 with that authority may not change the agreement in such a manner as to frustrate the  
16 purpose of the contract.” (citations omitted)). California courts “have held the  
17 implied covenant of good faith and fair dealing prevents a party from exercising its  
18 rights under a unilateral modification clause in a way that would make it  
19 unconscionable.” *Tompkins*, 840 F.3d at 1033 (listing California cases holding  
20 implied covenant of good faith and fair dealing limits parties’ unconscionable  
21 exercise of the unilateral modification clause).

22 Plaintiffs do not indicate that Concierge has ever exercised its right to modify  
23 the Bidder Agreement. Further, their agreement was subject to the limitation that  
24 Concierge had the express obligation to provide Plaintiffs with notice of amendments  
25 to the contract orally or through Concierge’s auction website. (Decl. of Appel at 17);  
26 *see Migule v. JP Morgan Chase Bank, N.A.*, No. 12-CV-3308, 2013 WL 452418, at  
27 \*6 (C.D. Cal. Feb. 5, 2013) (citing *24 Hour Fitness, Inc. v. Superior Court*, 78 Cal.  
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1 Rptr. 2d 533, 541-42 (Cal. Ct. App. 1998) (“[A]rbitration agreements that allow a  
2 party to prospectively modify them with notice are enforceable and not illusory.”)).

3 Although Plaintiffs may shown a slight degree of procedural unconscionability  
4 as to the adhesion contract, they nonetheless fail to establish that the arbitration  
5 provision, including the delegation clause, is substantively unconscionable. Because  
6 California law requires a showing of both types of unconscionability, *Armendariz*, 6  
7 P.3d at 690, Plaintiffs have not met their burden to show the arbitration provision,  
8 including the delegation clause, is unenforceable, and the Court will enforce the  
9 provision.

10 Accordingly, the Court **GRANTS IN PART** Concierge’s motion to compel  
11 arbitration.

#### 12 13 **D. Arbitration Location**

14 Although the Court finds the conditions compelling arbitration were satisfied,  
15 it lacks discretion to compel arbitration outside its district. 9 U.S.C. § 4 (“The hearing  
16 and proceedings, under such [arbitration] agreement, shall be within the district in  
17 which the petition for an order directing such arbitration is filed.”); *Cont’l Grain Co.*  
18 *v. Dant & Russell*, 118 F.2d 967, 968-69 (9th Cir. 1941). This is true even when the  
19 arbitration agreement specifies a venue. *See Bencharsky v. Cottman Transmission*  
20 *Sys., LLC*, 625 F. Supp. 2d 872, 883-84 (N.D. Cal. 2008) (holding that although  
21 parties designated Pennsylvania as the forum for arbitration,  
22 *Continental Grain* required the court to compel arbitration in the Northern District of  
23 California); *Homestead Lead Co. of Mo. v. Doe Run Res. Corp.*, 282 F. Supp. 2d  
24 1131 (N.D. Cal. 2003) (following *Continental Grain* and compelling arbitration in  
25 the Northern District of California when parties designated Missouri as  
26 the arbitration forum). Although this Court recognizes the unfavorable reception  
27 from courts both in and out of this circuit as well as the inconvenience to Concierge,  
28 the *Continental Grain* rule remains the law of this circuit. *See Homestead Lead*, 282

1 F. Supp. 2d at 1143-44 (N.D. Cal. 2003) (“The Ninth Circuit’s 1941 decision in  
2 *Continental Grain Co. v. Dant & Russell* remains the controlling authority” for  
3 determining the situs of a compelled arbitration).

4 The Court may permissibly stay this action pending a resolution of the  
5 arbitration issues. The FAA prescribes that when a matter referable to arbitration is  
6 brought before the court, the court “shall on application of one of the parties stay the  
7 trial of the action until such arbitration has been had in accordance with the terms of  
8 the agreement, providing the applicant for the stay is not in default in proceeding  
9 with such arbitration.” 9 U.S.C. § 3.

10 Accordingly, the Court **STAYS** all proceedings in this action and **ORDERS**  
11 the parties to proceed to arbitration in the Southern District of California. *See*  
12 *Bencharsky*, 625 F. Supp. at 884; *Cabot Creekside 8 LLC v. Cabot Inv. Props., LLC*,  
13 No. 10-00937-MMM(Ex), 2011 WL 13223878, at \*20 (C.D. Cal March 21, 2011)  
14 (“[N]umerous courts have held that although a court cannot compel arbitration  
15 outside its district, an order compelling arbitration within its district is an adequate  
16 alternative.”).

## 17 18 **V. CONCLUSION**

19 In light of the foregoing:

- 20 1. The Court **GRANTS IN PART** Concierge’s motion to compel  
21 arbitration (ECF No. 10).
- 22 2. The Court **DENIES** Plaintiff’s motion for leave to file a sur-reply (ECF  
23 No. 25).
- 24 3. The Court **STAYS** this action as to all parties and all claims. *See*  
25 9 U.S.C. § 3.
- 26 4. The Court further **ORDERS** the parties to proceed to arbitration for a  
27 determination of arbitrability and possible arbitration of Plaintiffs’  
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claims in the manner provided for in the Bidder Agreement. *See* 9 U.S.C. § 4.

5. The Court directs the Clerk of the Court to **ADMINISTRATIVELY CLOSE** this action. The decision to administratively close this action pending the resolution of the arbitration does not have any jurisdictional effect. *See Dees v. Billy*, 394 F.3d 1290, 1294 (9th Cir. 2005) (“[A] district court order staying judicial proceedings and compelling arbitration is not appealable even if accompanied by an administrative closing. An order administratively closing a case is a docket management tool that has no jurisdictional effect.”).

**IT IS SO ORDERED.**

**DATED: April 13, 2018**

  
**Hon. Cynthia Bashant**  
**United States District Judge**