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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 RAFAEL RAMOS BENITEZ,  
12 Plaintiff,  
13 v.  
14 GMRI, INC.,  
15 Defendant.  
16

Case No.: 22cv2031-L-JLB

**ORDER DENYING DEFENDANT'S  
MOTION TO COMPEL  
ARBITRATION**

**[ECF NO. 3]**

17 In this putative class action alleging wage and hour violations of California Labor  
18 Code, Defendant GMRI, Inc. moved to compel arbitration and dismiss or strike class  
19 allegations. Plaintiff filed an opposition, and Defendant replied. The Court decides the  
20 matter on the papers submitted without oral argument. *See* Civ. L. R. 7.1(d.1). For the  
21 reasons stated below, Defendant's motion is denied.

22 **I. Background**

23 Defendant operates a nationwide network of restaurants, including Yard House,  
24 where Plaintiff last worked as a cook until December 2021. Plaintiff filed a complaint in  
25 State court alleging, among other things, Defendant's failure to provide uninterrupted  
26 meal and rest breaks, failure to pay premium wages for breaks not provided, failure to  
27 provide accurate wage statements, failure to properly maintain records, and failure to pay  
28 all wages due upon termination. Plaintiff asserted several claims for violation of

1 California Labor Code provisions and unfair business practices in violation of California  
2 Business and Professions Code § 17200 *et seq.* (“UCL”) on behalf of himself and a  
3 putative class of current and former GMRI, Inc. non-exempt employees in California.

4 Defendant removed the action to this Court pursuant to Class Action Fairness Act  
5 of 2005, 28 U.S.C. § 1332(d). Subsequently Defendant filed the pending motion to  
6 compel arbitration under the Federal Arbitration Act, 9 U.S.C. §1 *et seq.* (“FAA” or  
7 “Act”) and dismiss or strike class allegations based on the arbitration agreement.

8 It is undisputed that in 2015, Plaintiff signed a Dispute Resolution Process  
9 handbook (“DRP”). (ECF No. 3-6, DRP.) Plaintiff signed an acknowledgment stating in  
10 relevant part:

11 I acknowledge that I have received and/or have had the opportunity to read  
12 this arbitration agreement. I understand that this arbitration agreement  
13 requires that disputes that involve the matters subject to the agreement be  
14 submitted to mediation or arbitration pursuant to the arbitration agreement  
15 rather than to a judge or jury in court. I agree as a condition of my  
16 employment to submit any eligible disputes I may have to the DRP and to  
17 abide by the provisions outlined in the DRP.

18 (DRP at 11 (English version) (emph. omitted); ECF No. 3-7, Acknowledgment (executed  
19 Spanish version).)

20 Defendant “GMRI maintains a national DRP program to resolve employment-  
21 related claims. The DRP, which is a standalone document, sets forth the dispute  
22 resolution process between GMRI and its employees.” (ECF No. 3-5, Varela Decl. ¶ 5.)  
23 It is “the sole means for resolving covered employment-related disputes.” (DRP at 2.) It  
24 is a complex 16-page four-step process culminating in binding arbitration. (*Id.* at 7.)  
25 Among other things, the DRP includes a class action waiver. (*Id.* at 3.) Plaintiff does not  
26 dispute that the claims asserted in this action are covered by the DRP but opposes  
27 Defendant’s motion arguing that the DRP is unenforceable.

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1 **II. Discussion**

2 "The FAA mandates that district courts *shall* direct the parties to proceed to  
3 arbitration on issues as to which an arbitration agreement has been signed." *Kilgore v.*  
4 *KeyBank N.A.*, 718 F.3d 1052, 1058 (9th Cir. 2013) (emph. in orig.).<sup>1</sup> The Court's role  
5 under the FAA is therefore limited to determining gateway issues "(1) whether a valid  
6 agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the  
7 dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th  
8 Cir. 2000). "If both conditions are met, the FAA requires the court to enforce the  
9 arbitration agreement in accordance with its terms." *Lim v. TForce Logistics*, 8 F.4th  
10 992, 999 (9th Cir. 2021).

11 Plaintiff relies on § 2 of the FAA, which provides that an arbitration agreement  
12 "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in  
13 equity for the revocation of any contract." 9 U.S.C. § 2.

14 The final clause of § 2, generally referred to as the savings clause, permits  
15 agreements to arbitrate to be invalidated by generally applicable contract  
16 defenses, such as fraud, duress, or unconscionability, but not by defenses  
17 that apply only to arbitration or that derive their meaning from the fact that  
an agreement to arbitrate is at issue.

18 *Lim*, 8 F.4th at 999. "When deciding whether the parties agreed to arbitrate ... courts  
19 generally should apply ordinary state-law principles that govern the formation of  
20 contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

21 The DRP includes a delegation clause which provides, "The arbitrator has the sole  
22 authority to determine whether a dispute is arbitrable ... ." (DRP at 7.) Accordingly,  
23 Defendant argues the Court should grant the motion without deciding the gateway issues,  
24 as the parties have delegated them to the arbitrator.

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28 <sup>1</sup> Unless otherwise noted, internal quotation marks, ellipses, brackets, citations, and  
footnotes are omitted from citations.

1 “Under the Act, arbitration is a matter of contract, and courts must enforce  
2 arbitration contracts according to their terms.” *Henry Schein, Inc. v. Archer and White*  
3 *Sales, Inc.*, \_\_\_ U.S. \_\_; 139 S.Ct. 524, 529 (2019). “[The] parties may agree to have an  
4 arbitrator decide not only the merits of a particular dispute but also ‘gateway’ questions  
5 of ‘arbitrability,’ such as whether the parties have agreed to arbitrate or whether their  
6 agreement covers a particular controversy.” *Id.* A delegation clause “is simply an  
7 additional, antecedent agreement the party seeking arbitration asks the federal court to  
8 enforce, and the FAA operates on this additional arbitration agreement just as it does on  
9 any other.” *Id.*

10 To be sure, before referring a dispute to an arbitrator, the court determines  
11 whether a valid arbitration agreement exists. *See* 9 U.S.C. § 2. But if a valid  
12 agreement exists, and if the agreement delegates the arbitrability issue to an  
13 arbitrator, a court may not decide the arbitrability issue.

14 *Id.* at 530; *see also Lim*, 8 F.4th at 100 (no valid agreement due to unconscionability).  
15 The delegation of arbitrability is enforced “so long as the parties’ agreement does so by  
16 clear and unmistakable evidence,” *Henry Schein*, 139 S.Ct. at 529, and “[c]ourts should  
17 not assume that the parties agreed to arbitrate arbitrability” unless this standard is met, *id.*  
18 at 531.

19 Plaintiff questions both conditions to enforcing the delegation clause. He claims  
20 the parties have no valid arbitration agreement due to unconscionability and,  
21 alternatively, that the delegation clause is ambiguous, and therefore not “clear and  
22 unmistakable evidence” of intent to delegate gateway issues to the arbitrator.

23 The Court first turns to the issue whether there is a valid agreement to delegate  
24 gateway issues to the arbitrator. Plaintiff argues that the entire agreement, including the  
25 delegation clause, is unconscionable. Defendant disagrees but, alternatively, requests the  
26 Court to sever any unconscionable provisions. Plaintiff as the party opposing arbitration  
27 bears the burden of proving unconscionability. *Lim*, 8 F.4th at 999; *see also OTO, LLC v.*  
28 *Kho*, 8 Cal. 5th 111, 126 (2019).

1 To prevail, Plaintiff must show that the agreement is both procedurally and  
2 substantively unconscionable. *See Armendariz v. Found. Health Psychcare Servs., Inc.*,  
3 24 Cal.4th 83, 99 (2000). The procedural element focuses on "oppression or surprise due  
4 to unequal bargaining power," and the substantive element focuses on "overly harsh and  
5 one-sided results." *Id.* A sliding scale is applied, so that the more substantively  
6 oppressive the contract term, the less evidence of procedural unconscionability is  
7 required to find it unenforceable and vice versa. *Id.* "As with any contract, the  
8 unconscionability inquiry requires a court to examine the totality of the agreement's  
9 substantive terms as well as the circumstances of its formation to determine whether the  
10 overall bargain was unreasonably one-sided." *OTO*, 8 Cal. 5th at 124. The ultimate issue  
11 is "whether the terms of the contract are sufficiently unfair, in view of all relevant  
12 circumstances, that a court should withhold enforcement." *Id.* at 126.

13 Procedural unconscionability analysis "begins with an inquiry into whether the  
14 contract is one of adhesion." *Armendariz*, 24 Cal.4th at 113. A contract of adhesion is "a  
15 standardized contract, which, imposed and drafted by the party of superior bargaining  
16 strength, relegates to the subscribing party only the opportunity to adhere to the contract  
17 or reject it." *Id.*

18 Ordinary contracts of adhesion, although they are indispensable facts of  
19 modern life that are generally enforced, contain a degree of procedural  
20 unconscionability even without notable surprises, and bear within them the  
21 clear danger of oppression and overreaching. [C]ourts must be particularly  
22 attuned to this danger in the employment setting, where economic pressure  
23 exerted by employers on all but the most sought-after employees may be  
24 particularly acute.

25 *Baltazar v. Forever 21, Inc.*, 62 Cal.4th 1237, 1244 (2016).

26 The DRP, a pre-printed 16-page document, was drafted by Defendant, Plaintiff's  
27 employer, as a condition of employment. (*See Varela Decl.* ¶ 5; Acknowledgment.)  
28 Plaintiff therefore need not show that he tried to negotiate its terms to establish  
procedural unconscionability. *See OTO*, 8 Cal.5th at 127. The DRP is a contract of

1   adhesion containing a sufficient degree of procedural unconscionability to warrant  
2   examination of its substantive fairness. Defendant does not dispute this.<sup>2</sup> (ECF No. 5,  
3   Reply at 3-4.)

4           Substantive unconscionability focuses on the fairness of a contract’s terms to  
5   ensure that contracts, “particularly contracts of adhesion,” do not impose terms that are  
6   “unreasonably favorable to the more powerful party.” *Lim*, 8 F.4th at 1002 (applying  
7   Cal. law). Plaintiff argues that the arbitration clause is substantively unconscionable  
8   because it shortens the applicable statutes of limitations and fails to guarantee recovery of  
9   fees and costs if Plaintiff prevails.

10          The statute of limitations for statutory wage and hour violations generally is three  
11   years. Cal. Code Civ. Proc. § 338(a); *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal.4th  
12   1094, 1199-20 (2007). The statute of limitations for UCL violations is four years. Cal.  
13   Bus. & Prof. Code § 17208. Both types of claims are asserted in this action. Several of  
14   the DRP’s provisions significantly shorten these statutory periods.

15          The DRP expressly provides

16          **How long do I have to submit my dispute to DRP?**

17          Disputes must be submitted for resolution through DRP **within one (1) year**  
18   **or within the applicable statute of limitations if less than one year.** The  
19   statute of limitations period will begin from the date the party requesting  
20   DRP first learned of the facts giving rise to the claim/dispute or reasonably  
21   should have known about the claim/dispute. Where time limits for filing a  
22   claim (i.e., statutes of limitations) cannot be modified by agreement of the  
23   Employee and the Company, the legally-mandated time limits applicable to  
24   the claim will apply. After submission of the dispute to DRP, DRP must be  
25   pursued with reasonable diligence. Any disputes regarding this provision  
26   will be decided by the arbitrator as a threshold matter.

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26   <sup>2</sup>       Accordingly, the Court need not also decide whether the DRP is procedurally  
27   unconscionable because it incorporates Employment Arbitration Rules and Mediation  
28   Procedures of the American Arbitration Association (*see* DRP at 8) without attaching a  
copy. (ECF No. 4, Opp’n at 13.)

1 (DRP at 4 (emph. in orig.)) Under similar circumstances, limiting the statute of  
2 limitations to one year was found substantively unconscionable in *De Leon v. Pinnacle*  
3 *Prop. Mgt Serv., LLC*, 72 Cal. App. 5th 476, 486-87 (2021).

4 Defendant points to the sentence in the provision above, “Where time limits for  
5 filing a claim (i.e., statutes of limitations) cannot be modified by agreement of the  
6 Employee and the Company, the legally-mandated time limits applicable to the claim will  
7 apply[.]” (DRP at 4.) It argues that this sentence negates any substantive  
8 unconscionability. However, in light of additional internal time limitations provided in  
9 the DRP and the arbitrator’s authority in that regard, the Court disagrees.

10 The DRP is a four-step process with each step having its own deadlines. It  
11 “recommend[s] that the steps of DRP be followed in order.” (DRP at 13 (Q&A n.3).)

12 “Peer Review” is the second step of DRP. (DRP at 5.) This step “may be  
13 bypassed only by written mutual consent[.]” (*Id.* at 13-14 (Q&A no. 3).) If after this step  
14 the employee fails to request mediation “**within thirty (30) days** after receiving the Peer  
15 Review panel’s decision, this will also constitute acceptance of panel’s decision and it  
16 will become final and binding on both parties.”<sup>3</sup> (*Id.* at 5 (emph. in orig.)) Request for  
17 arbitration, the final step of DRP, must be commenced “within thirty (30) days of receipt  
18 of written notification that mediation has been terminated[.]” (DRP at 7.) The practical  
19 effect of these internal time limits is to limit the applicable statutes of limitations. *See*  
20 *Baxter v. Genworth N. Am. Corp.*, 16 Cal. App. 5th 713, 731 (2017). This also has been  
21 found substantively unconscionable. *Id.* at 731-32.

22 In addition to the effect of internal deadlines, the DRP provides, “If the arbitrator  
23 finds that a dispute ... has not been timely pursued from one step of DRP to the next, the  
24 arbitrator’s decision is final and binding and the dispute is considered to be resolved.”  
25 (DRP at 7.) This is an independent ground allowing the arbitrator to dismiss. The

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28 <sup>3</sup> Consistently, mediation must be commenced “**within thirty (30) days** of receiving  
the Peer Review Panel’s decision.” (DRP at 6 (emph. in orig.))

1 sentence relied on by Defendant does not refer to the timeliness requirements for  
2 individual DRP steps and therefore does not provide relief from unconscionability.  
3 Moreover, Defendant cannot rely on the arbitrator's authority to excuse an otherwise  
4 substantively unconscionable limitations provision. *See Baxter*, 18 Cal. App. 5th at 732.  
5 Based on the foregoing, the agreement is procedurally and substantively unconscionable  
6 because it shortens the applicable statutes of limitations.

7 Plaintiff argues that the agreement, including the delegation clause, is substantively  
8 unconscionable for the additional reason that it does not assure recovery of attorneys'  
9 fees and costs if Plaintiff is the prevailing party. Three different DRP provisions bear on  
10 this issue.

11 As to mediation, the DRP provides,

12 **Fees and Costs**

13 The Company will pay the administrative fees and costs associated with  
14 conducting the mediation under this Step 3 (including the mediation  
15 facilitation service, mediator fees, mediation room charges and  
16 teleconference and video conference costs). Additional costs will be borne  
17 by each party as incurred.

18 (DRP at 6.) As to arbitration, it provides,

19 **Fees and Costs**

20 The Company will pay the arbitrator's fees and expenses, any costs for the  
21 hearing facility, and any costs of the arbitration service.

22 Any other expenses incurred by a party during the arbitration are the party's  
23 responsibility subject to remedies awarded by the arbitrator in accordance  
24 with applicable law. This includes, by way of example only, transcript  
25 preparation fees, attorneys' fees, and expert witness fees. However, an  
26 arbitrator is authorized to award fees and costs in accordance with and  
subject to the limitations of applicable law.

27 (*Id.* at 8.) In the Frequently Asked Questions section, the DRP sums up the fees and costs  
28 provisions:



1           **2. Will I have to pay anything when I use the DRP?**

2           Administrative costs of the DRP will be paid for by the Company. This  
3 includes Peer Review costs; costs and fees of the mediation service and  
4 mediator; and cost and fees of the arbitration service and arbitrator. Any  
5 other expenses incurred by you are your responsibility. Likewise, any other  
6 expenses incurred by the Company are the obligation of the Company. This  
7 includes, by way of example only, transportation fees, transcript preparation  
8 fees, attorneys' fees, and expert witness fees. However, in arbitration, an  
9 arbitrator may award fees and costs according to applicable law.

10 (*Id.* at 13.) The parties agree that the import of these provisions is that the DRP  
11 authorizes the arbitrator to award fees and costs in accordance with applicable law. (*Cf.*  
12 *Opp'n* at 14 (DRP gives the arbitrator "authority") *with Reply* at 6 (arbitrator  
13 "authorized").)<sup>4</sup>

14           In an action to recover minimum wage or overtime compensation, a prevailing  
15 employee is "entitled to recover ... reasonable attorney's fees, and costs of suit." Cal.  
16 Lab. Code § 1194(a). For claims that the employer failed to provide accurate itemized  
17 wage statements, a prevailing employee "is entitled to recover ... costs and reasonable  
18 attorney's fees." *Id.* § 226(e)(1). Both types of claims are asserted in this case. In  
19 neither instance is the award of fees and costs to the prevailing employee discretionary  
20 but mandatory. "[A]n arbitration agreement may not limit statutorily imposed remedies  
21 such as ... attorney fees[.]" *Armendariz*, 24 Ca.4th at 103.

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23 <sup>4</sup> Defendant points to two additional parts of the DRP, "Both the Employee and the  
24 Company have the right, but are not required, to be represented by a lawyer of their  
25 choice and at their own expense (subject to remedies awarded by the arbitrator in  
26 accordance with applicable law) at the arbitration hearing[;]" and "The arbitrator will  
27 have the same authority as a court of law to grant requested relief; this would include  
28 relief requested regarding temporary restraining orders and preliminary injunctive  
remedies." (DRP at 8 & 9.) Neither of these provisions is directed specifically to  
attorneys' fees and costs. They appear under the headings "Applicable Law and  
Procedural Rules" and "Authority of the Arbitrator," respectively.

1           Contrary to California law, the default rule under the DRP is that each side bears  
2 its own fees and costs. (DRP at 6, 8, 13.) Although the DRP *authorizes* the arbitrator to  
3 award fees and costs in accordance with the applicable law, it does not *obligate* the  
4 arbitrator to do so. Moreover, with respect to any fees and costs incurred in mediation,  
5 the DRP clearly states that they “will be borne by each party as incurred.” (DRP at 6.)

6           As written, the DRP exposes Plaintiff to the risk of having to bear his fees and  
7 costs even if he prevails. *See Lim*, 8 F.4th at 1003. This risk would not exist but for  
8 Defendant’s requirement as a condition of employment to submit disputes to the DRP  
9 process. Accordingly, the agreement, including its delegation clause, is substantively  
10 unconscionable on the additional ground that its attorneys’ fee and cost provisions do not  
11 ensure recovery to a prevailing employee.<sup>5</sup>

12           Defendant requests the Court to sever any unconscionable provisions from the  
13 DRP and enforce the rest, including the delegation clause.

14           If the court as a matter of law finds the contract or any clause of the contract  
15 to have been unconscionable at the time it was made the court may refuse to  
16 enforce the contract, or it may enforce the remainder of the contract without  
17 the unconscionable clause, or it may so limit the application of any  
unconscionable clause as to avoid any unconscionable result.

18 Cal. Civ. Code § 1670.5. “[T]he doctrine of severance attempts to conserve a contractual  
19 relationship if to do so would not be condoning an illegal scheme.” *Armendariz*, 24  
20 Ca.4th at 124. Multiple unconscionable provisions in one arbitration agreement “indicate

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24 <sup>5</sup>           Although Plaintiff does not assert any claims under the Private Attorneys General  
25 Act, Cal. Lab. Code § 2698 *et seq.*, he argues that the agreement, including the delegation  
26 clause, is substantively unconscionable for the additional reason that it contains a Private  
27 Attorney General Waiver (*see* DRP at 3). (Opp’n at 16-17; *cf.* ECF No. 1-3, Compl.) As  
28 the Court has already found the DRP substantively unconscionable on two other  
independent grounds, the Court need not consider this or any other additional substantive  
unconscionability arguments.

1 a systematic effort to impose arbitration on an employee not simply as an alternative to  
2 litigation but as an inferior forum that works to the employer’s advantage.” *Id.*

3 The DRP contains multiple unconscionable provisions. It drastically shortens the  
4 statute of limitations and creates a risk the employee will have to pay fees and costs even  
5 if he or she is the prevailing party, thus creating a chilling effect on employees’  
6 enforcement of their rights. *See Lim*, 8 F.4th at 1003.

7 Furthermore, “there is no single provision a court can strike or restrict in order to  
8 remove the unconscionable taint from the agreement.” *Armendariz*, 24 Cal.4th at 124-25.  
9 In addition to the one-year time limit, the DRP contains a number of deadlines between  
10 individual DRP steps that shorten the time when a dispute must be submitted to  
11 arbitration. Similarly, the attorneys’ fee and cost provisions are spread over three  
12 separate provisions.

13 Given the pervasive unconscionability based on significantly shortened statutes of  
14 limitations and failure to ensure compliance with California law regarding attorneys’ fees  
15 and costs, and the inability to cure the unconscionability by striking a single provision,  
16 Defendant’s request to sever the unconscionable provisions is denied.

### 17 **III. Conclusion**

18 For the foregoing reasons, the DRP delegation clause is unenforceable as  
19 procedurally and substantively unconscionable.<sup>6</sup> *See* 9 U.S.C. § 2. The Court rather than  
20 the arbitrator therefore determines the gateway issues of arbitrability of this dispute. *See*  
21 *Lim*, 8 F.4th at 1006.

22 The same reasons for finding the delegation clause unenforceable, *i.e.*, the  
23 shortening of the statutes of limitations and failure to assure recovery of attorneys’ fees  
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26 <sup>6</sup> The Court therefore need not decide whether the delegation clause is unenforceable  
27 as ambiguous and therefore insufficient to constitute “clear and unmistakable evidence”  
28 of the parties’ intent to delegate the gateway issues to the arbitrator. *See Henry Schein*,  
139 S.Ct. at 529-30.

1 and costs to a prevailing employee, also render the DRP itself unenforceable. As  
2 discussed above, these unconscionable provisions cannot be severed to enforce the  
3 balance of the DRP.

4 Defendant's motion to compel arbitration is therefore denied.

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6 **IT IS SO ORDERED.**

7 Dated: August 24, 2023

8   
9 Hon. M. James Lorenz  
10 United States District Judge  
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