

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

Pedro Rios, et al. v. HRB Digital LLC, et al.

Rios · No. 25-cv-03530-EMC · Decided October 27, 2025

SUMMARY

The United States District Court for the Northern District of California denies HRB Digital LLC and HRB Tax Group, Inc.’s motion to compel arbitration in a putative class action concerning the alleged interception and disclosure of taxpayer information through tracking pixels. The court finds that the plaintiffs assented to HRB’s Online Services Agreement but concludes that the arbitration provision is procedurally and substantively unconscionable, focusing particularly on its mass-arbitration and staged-bellwether procedures. The court therefore declines to compel arbitration.

CASE DETAILS

COURT	United States District Court for the Northern District of California
WRITING FOR THE COURT	Edward M. Chen
JURISDICTION	United States District Court for the Northern District of California
DECIDED	October 27, 2025
DOCKET	25-cv-03530-EMC
DISPOSITION	other
PROCEDURAL POSTURE	Defendants moved under the Federal Arbitration Act to compel arbitration and stay the putative class action based on an arbitration provision in HRB's Online Services Agreement. The court denied the motion after determining that the arbitration agreement was procedurally and substantively unconscionable and that unconscionability permeated the agreement.
STANDARD OF REVIEW	The court applied the Federal Arbitration Act's enforcement standard and California contract-formation and unconscionability principles. Defendants, as the parties seeking to compel arbitration, bore the burden of proving the existence of a valid agreement by a preponderance of the evidence; plaintiffs bore the burden of proving unconscionability as a defense.
PRECEDENTIAL VALUE	unpublished

TOPICS

arbitration

unconscionability

class actions

consumer protection

civil procedure

PRACTICE AREAS

arbitration

consumer protection

contracts

civil procedure

QUESTIONS PRESENTED

1. Whether the court or an arbitrator should decide plaintiffs' unconscionability challenge when the arbitration agreement contains no delegation provision.
2. Whether HRB's arbitration agreement is procedurally unconscionable under California law.
3. Whether the agreement's staged mass-arbitration process and statute-of-limitations tolling provisions are substantively unconscionable.
4. Whether the unconscionable provisions can be severed or instead permeate the entire arbitration agreement.
5. Whether defendants' motion to compel arbitration and stay the action should be granted.

HOLDINGS

1. When an arbitration agreement contains no clear and unmistakable delegation provision, the court, rather than the arbitrator, decides threshold arbitrability issues including unconscionability.
2. The arbitration agreement was procedurally unconscionable to a sufficient degree because it was presented as a nonnegotiable adhesion contract and imposed substantial surprise and oppression through a lengthy, dense agreement, a burdensome opt-out, and an unexpected mass-arbitration scheme.
3. An arbitration opt-out provision is not categorically dispositive of procedural unconscionability; it is only one factor in the analysis.
4. The staged bellwether and mass-arbitration provisions were substantively unconscionable because they capped the number of arbitrations, barred later claimants from filing until earlier rounds were completed, created potentially years-long delays, and provided no effective accountability or remedy for delay.
5. The agreement's statute-of-limitations tolling provisions were substantively unconscionable because tolling depended on an undefined 'fully complete Notice,' allowed HRB to challenge tolling after imposing delay, and provided claimants no comparable remedy or judicial-review mechanism.
6. The court refused to sever the unconscionable terms because unconscionability permeated the arbitration agreement, rendering the entire arbitration clause unenforceable.

KEY QUOTATIONS

“The ‘final clause of § 2 . . . permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability.’” (at 5)

“In the absence of a delegation provision in an arbitration clause, the court — and not an arbitrator — resolves Plaintiffs’ unconscionability challenges.” (at 7)

“Thus, the existence of an opt-out clause does not automatically render an arbitration agreement procedurally conscionable; even if an agreement is not adhesive, it can still be found sufficiently surprise-laden or oppressive to implicate procedural unconscionability.” (at 15-18)

“Because unconscionability permeates the entire arbitration agreement, severance would be an ineffective half-measure or, potentially, a reward for bad faith corporate actors.” (at 28)

“For the foregoing reasons, the HRB Defendants’ motion to compel arbitration is DENIED.” (at 28)

FACTUAL BACKGROUND

Plaintiffs used HRB's online tax-preparation platform and accepted HRB's Online Services Agreement in January 2024. They allege that HRB's use of Meta tracking pixels and Google analytics code disclosed confidential taxpayer information without consent. The agreement required individual arbitration, imposed a staged bellwether process when 25 or more similar claims involved coordinated counsel, and made tolling dependent in part on submission of a fully complete notice of dispute. Plaintiffs' counsel sent 2,481 notices and related tax-information consent forms, but HRB initially rejected the submissions as improper before later accepting them while reserving its rights.

PROCEDURAL HISTORY

Plaintiffs filed a putative nationwide class action alleging that HRB unlawfully intercepted and disclosed confidential taxpayer information to Meta and Google through tracking pixels and analytics code. Plaintiffs' counsel sent HRB notices of dispute on behalf of approximately 2,481 claimants, and the parties disputed whether those notices complied with the Online Services Agreement. HRB moved to compel arbitration and stay the action; plaintiffs opposed on unconscionability and California-law grounds. The district court denied the motion.

DISPOSITION

other

CASES CITED

- Sakkab v. Luxottica Retail N. Am., Inc., 803 F.3d 425, 432 (9th Cir. 2015)
- Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000)
- Wilson v. Huuuge, Inc., 944 F.3d 1212 (9th Cir. 2019)
- First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995)
- Berman v. Freedom Fin. Network, LLC, 30 F.4th 849, 856-57 (9th Cir. 2022)
- Pandolfi v. AviaGames, No. 23-cv-05971-EMC, 2024 WL 4051754 (N.D. Cal. Sept. 4, 2024), aff'd, No. 24-5817, 2025 WL 2463742 (9th Cir. Aug. 27, 2025) (mem.)
- Sandoval-Ryan v. Oleander Holdings LLC, 58 Cal. App. 5th 217, 223 (Cal. Ct. App. 2020)
- Ramirez v. Charter Commc'ns, Inc., 16 Cal. 5th 478, 492-93 (2024)
- Chavarria v. Live Nation Ent., Inc., 120 F.4th 670, 681 (9th Cir. 2024)

- Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC, 55 Cal. 4th 223, 246 (2012)
- Serpa v. Cal. Surety Investigations, Inc., 215 Cal. App. 4th 695, 703 (2013)
- Ronderos v. USF Reddaway, Inc., 114 F.4th 1080, 1089-90 (9th Cir. 2024)
- OTO, LLC v. Kho, 8 Cal. 5th 111, 126-27 (2019)
- MacClelland v. Cellco P'ship, 609 F. Supp. 3d 1024, 1034, 1040-42 (N.D. Cal. 2022)
- Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 114, 122 (2000)
- Sanchez v. Valencia Holding Co., LLC, 61 Cal. 4th 899, 910-12 (2015)
- Mohamed v. Uber Techs., Inc., 848 F.3d 1201, 1211 (9th Cir. 2016)
- Poublon v. C.H. Robinson Co., 846 F.3d 1251, 1261-62, 1272 (9th Cir. 2017)
- Baghdasarian v. Macy's Inc., No. 24-3438, 2025 WL 999082, at *2 (9th Cir. Apr. 3, 2025) (mem.)
- Gentry v. Superior Court, 42 Cal. 4th 443, 470 (2007)
- Swain v. LaserAway Med. Grp., Inc., 57 Cal. App. 5th 59, 69 (2020)
- Haydon v. Elegance at Dublin, LLC, 97 Cal. App. 5th 1280, 1288-89 (2023)
- Johnson v. Stoneridge Creek Pleasanton CCRC LLC, No. A-165800, 2023 WL 7125117, at *2-3 (Cal. Ct. App. Oct. 30, 2023)
- Booker v. Charter Commc'ns, LLC, No. B322812, 2025 WL 1910954, at *6 (Cal. Ct. App. July 11, 2025)
- Smith v. Folsom Invs., L.P., No. C097549, 2023 WL 8794888, at *4 (Cal. Ct. App. Dec. 20, 2023)
- Arnold v. Antelope Manufactured Home Cmty., LP, No. C097244, 2024 WL 1081934, at *5 (Cal. Ct. App. Mar. 13, 2024)
- Pedregon v. Amazon.com, Inc., 2023 WL 357736 (N.M. Ct. App. 2023)
- Hill v. Walmart Inc., 32 F.4th 811, 816 (9th Cir. 2022)
- In re Kirkland, 915 F.2d 1236, 1239 (9th Cir. 1990)
- In re Watts, 298 F.3d 1077, 1082-83 (9th Cir. 2002)
- Curtis v. Irwin Indus., Inc., 913 F.3d 1146, 1155 (9th Cir. 2019)
- Rosenberg v. Superior Court, 67 Cal. App. 4th 860, 868 (1998)
- Prudential Ins. Co. of Am. v. Small Claims Court of City & County of San Francisco, 76 Cal. App. 2d 379, 383-84 (1946)
- Discover Bank v. Superior Court, Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005)
- Heckman v. Live Nation Ent., Inc., 120 F.4th 670, 689-90, 692-93 (9th Cir. 2024)

OPINION

1 2 3 4 UNITED STATES DISTRICT COURT 5 NORTHERN DISTRICT OF CALIFORNIA 6 7
 PEDRO RIOS, et al., Case No. 25-cv-03530-EMC 8 Plaintiffs, ORDER DENYING MOTION TO
 9 v. COMPEL ARBITRATION 10 HRB DIGITAL LLC, et al., Docket No. 18 11 Defendants. 12
 13 I. INTRODUCTION 14 Plaintiffs Pedro Rios, Jr. and Christian Marquez filed this putative
 class action against 15 HRB Digital, LLC and HRB Tax Group, Inc. (collectively, “HRB” or
 “Defendants”) alleging 16 Defendants unlawfully intercepted and disclosed their confidential
 information.

Dkt. 1, Complaint 17 (“Compl.”). Defendants filed the instant Motion to Compel Arbitration pursuant to the Federal 18 Arbitration Act. Dkt. 18, Motion to Compel Arbitration (“MTC”). Defendants contend that the 19 case should be sent to arbitration because HRB’s Online Services Agreement (“OSA”) contains an 20 arbitration agreement. Id. at 2. 21 Having considered the parties’ briefs and accompanying submissions, as well as oral 22 argument, the Court hereby DENIES the Defendants’ motion.

23 II. FACTS AND BACKGROUND 24 A. Collection and Disclosure of Taxpayer Data 25 Plaintiffs filed this putative class action alleging that HRB unlawfully intercepted and 26 disclosed confidential taxpayer information to Meta Platforms, Inc. and Google LLC through the 27 use of tracking pixels embedded in H&R Block’s online tax preparation platform. Compl. ¶¶ 1–6.

1 names, identifiers, health savings account contributions, scholarships, tuition expenses, and 2 information regarding dependents, income categories, and tax credits, all without users’ consent. 3 Id. ¶ 4. Plaintiffs further allege that HRB intentionally deployed Meta’s Pixel and Google’s 4 analytics code with default settings that triggered the disclosure of page-title information reflecting 5 the substance of taxpayers’ filings, thereby monetizing tax-return data by using it for targeted 6 advertising and marketing purposes.

See id. ¶¶ 6, 62–64. Plaintiffs allege that the pixels were 7 implemented in a manner that caused every single taxpayer who used the HRB websites for filing 8 their taxes to risk having at least some of their data shared. Id. ¶ 8. 9 Plaintiffs assert claims for this interception and disclosure of taxpayer data under the 10 Electronic Communications Privacy Act, California’s Invasion of Privacy Act, California’s Unfair 11 Competition Law, and the California Consumer Legal Remedies Act.

Plaintiffs seek damages, 12 private and public injunctive relief, and declaratory relief on behalf of a putative nationwide class. 13 B. The Online Services Agreement 14 HRB requires customers who use its online tax preparation platform to agree to its Online 15 Services Agreement (“OSA”). Both new users opening an account, and returning users logging in, 16 are required to agree to the OSA.

Dkt. 20, (“Schuessler Decl.”) ¶ 2. Returning users are presented 17 with a “Returning Client Acknowledgement Screen” that states, “We’ve updated our terms & 18 policies.” Id. ¶ 7, Ex. 2. The user must then click a checkbox and accede to the following 19 acknowledgment: “I agree to the terms and conditions of the... Online Services Agreement, 20 which includes the requirement that any dispute be resolved through binding arbitration.” Id. The 21 user may click the green, underlined hyperlink “Online Services Agreement” in the text 22 immediately next to the check box to review the complete OSA.

Id. The user may not click the 23 “Next” button to move past the Returning Client Acknowledgement Screen without first clicking 24 the check box agreeing to the terms of the OSA. Id. ¶ 8. 25 Both Plaintiffs Rios and Marquez accepted the OSA in January 2024. Id. ¶ 10. 26 C. The Arbitration Agreement 27 Section 11 of the OSA is titled “ARBITRATION IF A DISPUTE ARISES 1 disputes and claims between you and the H&R Parties shall be resolved through binding 2 individual arbitration” administered by the American Arbitration Association (“AAA”).

3 The OSA permits users to opt-out of the arbitration agreement within 30 days by either 4 filling out an online form or sending a signed letter. Schuessler Decl., Ex. 4 (“OSA”) ¶ 11.1. 5 Users who opt out, however, are still subject to any prior arbitration agreements entered into with 6 HRB. Id. (“If you opt out of this Arbitration Agreement, any prior arbitration agreement shall 7 remain in force and effect.”).

8 Users who do not opt out, but who wish to raise a claim, are subject to multiple procedural 9 prerequisites: 10 First, before initiating arbitration, a consumer must engage in an “informal resolution” 11 process (the “Informal Settlement Conference”). Id. ¶ 11.2.

The OSA requires that the claimant 12 provide HRB with a written Notice of Dispute (“Notice”) identifying the claimant, describing the 13 dispute, and stating the relief sought. After submission, the parties must attempt to resolve the 14 dispute informally for at least 60 days before arbitration may be pursued. Id. Users may be 15 represented by counsel, though users must submit a signed statement authorizing HRB to disclose 16 the users’ confidential tax and account records to the user’s counsel.

Id. The provision requiring 17 this Informal Settlement Conference also states that the statute of limitations for any claims and 18 relief set forth in the Notice of Dispute will be tolled during this Informal Settlement Conference 19 period and while any pre-arbitration procedures are ongoing, so long as the Notice of Dispute is a 20 “fully complete Notice.” Id. The OSA states that the Notice and Informal Settlement Conference 21 provide a meaningful chance to resolve disputes informally before proceeding to arbitration.

Id. 22 Second, all arbitrations must proceed on an individual basis. Id. ¶ 11.4. Users who agree 23 to the OSA waive their right to a trial by jury or to participate in a class action lawsuit or class 24 action arbitration. Id. Users or HRB may, however, elect to bring an individual claim to small 25 claims court “as long as it is brought and maintained as an individualized claim and is not 26 removed or appealed to a court of general jurisdiction.” Id. ¶ 11.1.

27 Third, and most critically to this case, the OSA includes a mass arbitration and bellwether 1 “raising similar claims,” or where the users “are represented by the same or coordinated counsel.” 2 Id. ¶ 11.6. In such instances, the OSA imposes a “staged bellwether” process. Id. Under the 3

agreement's procedures, each side selects 10 test cases (for a total of 20 cases) to proceed first in 4 arbitration and to be resolved individually by different arbitrators from each claimant's home state.

5 Id. During this time, no other cases may be filed in arbitration and the AAA is prohibited from 6 accepting, assessing, demanding fees for, or administering arbitrations. Id. Only after each of 7 those arbitrations are resolved can the next set of 20 cases proceed. Id. After completion of the 8 first two rounds wherein arbitration of all 40 cases is completed, a total of 50 cases may be filed in 9 subsequent rounds and arbitrators who were assigned cases in previous rounds may be appointed 10 to new cases.

Id. But each round (and all cases therein) must be completed before proceeding to 11 the next round. The provision prescribing this bellwether process includes a note that users "agree 12 to this process even though it may delay the arbitration of [their] claim." Id. The provision also 13 states that arbitrators are "encouraged to resolve the cases within 120 days of appointment or as 14 swiftly as possible, consistent with principles of fundamental fairness," though the provision does 15 not set an enforceable deadline for arbitrators.

See id. Nor does the mass arbitration provision 16 provide claimants with any recourse or accountability mechanisms for arbitrator delays, and 17 nothing in the OSA suggests that individual arbitrators can remedy delays caused by other 18 arbitrators or HRB. See id. Delay in any one or more cases in each round will therefore delay the 19 start of the next round.

20 The arbitration agreement contains a severability clause. Id. ¶ 11.7. Unlike many modern 21 arbitration agreements, the arbitration agreement does not include a delegation provision assigning 22 questions of arbitrability to the arbitrator. See id. ¶ 11. 23 With regard to the visibility and prominence of the OSA and embedded arbitration 24 agreement, Plaintiffs allege that the OSA is a "complex, 21-page single-spaced document, drafted 25 in small font and dense legalese that is difficult for ordinary laypersons to understand.

The actual 26 terms are not seen by website users unless one clicks on hyperlink to access the OSA." Compl. ¶ 27 20. Defendants point out that, with respect to accessing the OSA, when Plaintiffs logged into their 1 to the terms and conditions of the... Online Services Agreement. MTC at 3. Defendants state 2 that the phrase "Online Services Agreement" was a green, underlined hyperlink immediately next 3 to the check box.

Id.; Schuessler Decl., Ex. 2. Users could not click the "Next" button at the 4 bottom of the screen to move past the screen without first clicking the check box; instead, the 5 screen would display a red error message requiring the user to agree to the terms and conditions, 6 including the OSA. Id.; Schuessler Decl., Ex. 3. Defendants do not deny that the OSA itself is a 7 21-page single-spaced document.

8 D. Procedural History 9 Counsel for Plaintiffs allege that they sent a Pre-Filing Notice of Dispute Letter (“Pre- 10 Filing Letter”) via first class certified mail to the HRB address specified in the OSA. Dkt. 25, 11 Opposition to Motion to Compel (“Opp. to MTC”) at 4.

The Pre-Filing Letter raised privacy law 12 claims on behalf of the named plaintiffs, as well as approximately 2,480 other claimants — all of 13 whom were represented by Plaintiffs’ counsel. Id. The Pre-Filing letter did not seek collective 14 resolution, which is prohibited under the OSA, but individual claims instead. Id.; see OSA ¶ 11.4. 15 The Pre-Filing Letter contained three ShareFile links: (1) a list of all Claimants, their names, email 16 addresses, phone numbers, mailing addresses, and first five digits of their Social Security 17 numbers; (2) 2,481 individually signed Notices of Dispute specifying each individual claimant’s 18 legal claims, relief sought, and all other requisite information pursuant to the OSA ¶ 11.2; and (3) 19 2,481 individually signed Consents to Disclose Tax Information to Attorneys (“Tax Consent 20 forms”) authorizing HRB to share each claimant’s tax information with counsel as required for 21 counsel to participate in the Informal Settlement Conference.

Opp. to MTC at 4; Dkt. 26, 22 (“Ellersick Decl.”) Ex. 3. 23 In response to the Pre-Filing Letter, HRB informed Plaintiffs’ counsel that the Pre-Filing 24 Notice of Dispute was “improper and ineffective.” Opp. to MTC at 4–5; Ellersick Decl. Ex. 8. 25 HRB responded to the Pre-Filing Letter by asserting that the Notices of Dispute did not comply 26 with the OSA because claimants were required to individually and separately mail each Notice of 27 Dispute.

Id. No such provision is expressed in the terms of the OSA. See OSA ¶ 11.2 (only 1 (‘Notice’) to the other party”). 2 The parties corresponded over whether the Notices of Dispute were actually defective for 3 over a month. Opp. to MTC at 5. HRB also informed Plaintiffs’ counsel that claimants each had 4 to separately execute a specific Tax Consent Form provided by HRB, rather than the ones that 5 Plaintiffs’ counsel sent.

Id.; Ellersick Decl. Ex. 10. Plaintiffs allege that this conduct reflects 6 HRB’s practice of manufacturing delays to obstruct arbitration. Opp. to MTC at 6. 7 On December 5, 2024, HRB finally “agree[d] to accept service of [the] Notices of Dispute 8 sent on behalf of 2,481 claimants... without waiving any rights and expressly reserving all 9 rights.” Id. (emphasis added); Ellersick Decl.

Ex. 12. HRB stated that it would review 10 submissions and send responses “including requests for informal settlement conferences,” but 11 HRB maintained that claimants must execute the Tax Consent forms provided by HRB. Id. 12 Plaintiffs filed their Complaint on April 22, 2025. Defendants moved to compel arbitration 13 and stay the action under the Federal Arbitration Act (“FAA”).

Plaintiffs oppose, arguing (1) that 14 HRB’s arbitration provision is procedurally and substantively unconscionable and thus 15 unenforceable; and (2) that the FAA does not apply to the OSA’s mass arbitration protocol, and 16 that the class action waiver is thus unenforceable under California law. 17 III. LEGAL STANDARD 18 Per the FAA, a written contractual provision to arbitrate is “valid, irrevocable, and 19 enforceable, save upon such grounds as exist at law or in equity for the revocation of any 20 contract.” 9 U.S.C. § 2.

The “final clause of § 2... permits agreements to arbitrate to be 21 invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability.” 22 *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 432 (9th Cir. 2015) (internal citation 23 omitted).

As the FAA “leaves no place for the exercise of discretion by a district court,” this 24 Court is “limited to determining... whether a valid agreement to arbitrate exists.” *Chiron Corp.* 25 *v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). 26 Defendants “as the part[ies] seeking to compel arbitration[] must prove the existence of a 27 valid agreement by a preponderance of the evidence.” *Wilson v. Huuuge, Inc.*, 944 F.3d 1212, 1 that under California law “the party opposing arbitration bears the burden of proving any defense, 2 such as unconscionability”).

Federal courts “apply ordinary state-law principles that govern the 3 formation of contracts” to determine whether a valid agreement to arbitrate exists. *First Options 4 of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). “In California, [g]enerally speaking the forum 5 will apply its own rule of decision unless a party litigant timely invokes the law of a foreign state.” 6 *Hansen v. Ticketmaster Ent., Inc.*, 2020 WL 7319358, at *2 (N.D.

Cal. Dec. 11, 2020) (Chen, J.) 7 (internal citation omitted). 8 IV. DISCUSSION 9 A. Valid Assent to the OSA and Absence of Delegation Provision 10 The parties do not dispute that Plaintiffs agreed to the OSA by clicking the checkbox on 11 the Returning Users Screen. An enforceable online contract exists when a consumer has “actual 12 knowledge of the agreement” or “inquiry notice” of it, which is found when “(1) the website 13 provides reasonably conspicuous notice of the terms to which the consumer will be bound; and (2) 14 the consumer takes some action, such as clicking a button or checking a box, that unambiguously 15 manifests his or her assent to those terms.” *Berman v. Freedom Fin.*

Network, LLC, 30 F.4th 849, 16 856 (9th Cir. 2022). 17 A reasonably conspicuous notice is “displayed in a font size and format such that the court 18 can fairly assume that a reasonably prudent Internet user would have seen it.” *Id.* A hyperlink 19 may properly “disclose terms” to a reasonably prudent user, but “the fact that a hyperlink is 20 present must be readily apparent,” meaning that it must be “sufficiently set apart from the 21 surrounding text.” *Id.* at 857 (internal citation omitted).

Unambiguous manifestation of assent 22 may be established via “[a] user’s click of a button... only if the user is explicitly advised that the 23 act of clicking will constitute assent to the terms and conditions of an agreement.” Id. 24 A clickwrap agreement on a website “presents users with specified contractual terms on a 25 pop-up screen and users must check a box explicitly stating ‘I agree’ in order to proceed.” Id. at 26 856.

Clickwrap agreements provide consumers with “notice of the terms,” and a consumer 27 “‘knows or has reason to know that the other party may infer from his conduct that he assents’ to 1 other end of the spectrum are so-called ‘browsewrap’ agreements, in which a website offers terms 2 that are disclosed only through a hyperlink and the user supposedly manifests assent to those terms 3 simply by continuing to use the website.” Id. 4 Given the set up here, Plaintiffs do not contest their assent to the OSA.

Instead, the 5 Plaintiffs challenge enforceability of the arbitration provision, arguing that the OSA itself, as a 21- 6 page dense legal document, contributed to oppression and surprise and the unenforceability of the 7 arbitration agreement. 8 The Court notes that the OSA does not contain a delegation provision, and Defendants 9 concede that the OSA differs in this regard from the arbitration agreement in *Pandolfi v. 10 AviaGames*, No. 23-cv-05971-EMC, 2024 WL 4051754 (N.D.

Cal. Sept. 4, 2024), *aff’d* No. 24- 11 5817, 2025 WL 2463742 (9th Cir. Aug. 27, 2025) (mem.). See MTC at 22 (“For example, this 12 Court in *Pandolfi* deemed three provisions substantively unconscionable: the delegation provision, 13 the bellwether procedures, and a contractual limitations period....

The OSA’s arbitration 14 agreement, by contrast, does not contain a delegation provision....”). In the absence of a 15 delegation provision in an arbitration clause, the court — and not an arbitrator — resolves 16 Plaintiffs’ unconscionability challenges. See, e.g., *First Options of Chi., Inc.*, 514 U.S. at 944 17 (holding that there must be “clear and unmistakable” evidence that the “parties agreed to arbitrate 18 arbitrability”); *Sandoval-Ryan v. Oleander Holdings LLC*, 58 Cal.App.5th 217, 223 (Cal.

Ct. App. 19 2020) (ruling that courts “presume that the parties intend courts, not arbitrators, to decide 20 threshold issues of arbitrability” and a delegation clause must be “clear and unmistakable”) (*italics* 21 in original). 22 Accordingly, the Court turns to the question of unconscionability. 23 B. Unconscionability of Arbitration Agreement 24 Plaintiffs, as the party resisting enforcement of the arbitration agreement, bear the burden 25 of establishing unconscionability.

Ramirez v. Charter Comm’ns, Inc., 16 Cal.5th 478, 492 (Cal. 26 2024). To render an arbitration agreement invalid, the Court must find that the agreement is 27 tainted by both procedural and

substantive unconscionability, in at least some quantity. *Chavarria 1 Live Nation Ent., Inc.*, 120 F.4th 670, 681 (9th Cir. 2024). Courts, however, “apply a sliding scale 2 analysis under which ‘the more substantively oppressive [a] term, the less evidence of procedural 3 unconscionability is required to come to the conclusion that the term is unenforceable, and vice 4 versa.’” *Ramirez*, 16 Cal.5th at 493.

5 Procedural unconscionability concerns “the circumstances of contract negotiation and 6 formation, focusing on oppression or surprise due to unequal bargaining power.” *Id.* at 492 7 (quoting *Pinnacle Museum Tower Ass’n v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal.4th 223, 246 8 (Cal. 2012)). 9 Substantive unconscionability focuses less on the circumstances of contract drafting and 10 instead considers “the fairness of an agreement’s actual terms.” *Id.* at 493 (quoting *Pinnacle*, 55 11 Cal.4th at 246).

The primary concern here is whether the contract will create unfair or one-sided 12 results that “reallocate risks in an objectively unreasonable or unexpected manner.” *Id.* (quoting 13 *Serpa v. Cal. Surety Investigations, Inc.*, 215 Cal.App.4th 695, 703 (Cal. Ct. App. 2013)). 14 1. Procedural Unconscionability 15 In determining whether an arbitration agreement is procedurally unconscionable, “we first 16 ask ‘whether the contract is one of adhesion.’” *Ronderos v. USF Reddaway, Inc.*, 114 F.4th 1080, 17 1089 (9th Cir.

2024) (quoting *OTO, LLC v. Kho*, 8 Cal.5th 111, 126 (Cal. 2019). An arbitration 18 agreement “is at least minimally procedurally unconscionable if it is a contract of adhesion.” 19 *MacClelland v. Cellco P’ship*, 609 F. Supp. 3d 1024, 1034 (N.D. Cal. July 1, 2022) (Chen, J.). 20 Second, regardless of whether the contract is adhesive, the court examines whether an arbitration 21 agreement “involves more than ‘minimal’ procedural unconscionability”; in particular, the court 22 considers “‘whether circumstances of the contract’s formation created such oppression or surprise 23 that closer scrutiny of its overall fairness is required.’” *Ronderos*, 114 F.4th at 1090 (quoting 24 *OTO*, 8 Cal.5th at 126); *Poublon*, 846 F.3d at 1262 (explaining two-prong test and stating that 25 “[t]he procedural element of unconscionability focuses on ‘oppression or surprise due to unequal 26 bargaining power.’”) (quoting *Pinnacle*, 55 Cal.4th at 246).

The Court’s inquiry into oppression 27 or surprise includes examining whether the agreement includes a “lack of negotiation and 1 Cal.5th at 126. Analysis of procedural unconscionability is highly dependent on context, and 2 often “requires inquiry into the ‘commercial setting, purpose, and effect’” of the provision. 3 *Sanchez v. Valencia Holding Co., LLC*, 61 Cal.4th 899, 911–12 (Cal.

2015). 4 Because of the significant showing of substantive unconscionability, as discussed below, 5 the Court need only find a modest degree of procedural unconscionability to render the arbitration 6 agreement unenforceable. See *Armendariz v. Found. Health Psychare Servs., Inc.*, 24 Cal.4th 83, 7 114 (Cal. 2000); *Sanchez*, 61 Cal.4th at 910.

The record here reflects more than the required 8 modicum of procedural unconscionability. 9 First, as to adhesion, the arbitration agreement appears in a standard-form OSA drafted by 10 HRB and presented as a non-negotiable condition of using its online platform.

The commercial 11 setting, often during the height of tax season, leaves consumers with little practical ability to reject 12 arbitration, establishing at least a minimal degree of procedural unconscionability. Although HRB 13 points to the 30-day opt-out provision, that feature does not cure adhesion for a multitude of 14 reasons.

The opt-out is buried within a lengthy, dense agreement and imposes ongoing burdens, 15 including the requirement that consumers submit a new opt-out request each year to avoid being 16 bound by successive versions of the arbitration agreement.

Thus, even users who once opted out 17 may be swept back into arbitration unless they repeatedly navigate the process annually. And, as 18 addressed below, the existence of an opt-out provision is not dispositive of the procedural 19 unconscionability question. 20 Second, the OSA contains surprises.

The OSA is a lengthy, 21-page, single-spaced 21 contract, and the arbitration provision is embedded deep within the dense text, beginning on page 22 15. And while consumers might expect a standard arbitration clause in an online contract, 23 particularly in view of the fact that the arbitration clause is well flagged, the content of the clause 24 is not something an ordinary consumer would expect.

They would not reasonably anticipate 25 HRB's complex bellwether and batching scheme, which prevents claimants from even filing their 26 claims if "25 or more" similar claims are submitted by coordinated counsel. Reasonable 27 consumers would not anticipate that the identity of their yet-unknown attorneys, and the number 1 the path toward resolving their dispute with HRB.

2 The surprise is compounded by how the agreement described the timing of arbitrations. 3 The OSA acknowledges only that mass arbitration "may" cause delay, but then assures users that 4 arbitrators are "encouraged" to resolve cases within 120 days.

In practice, however, claims are 5 likely to languish for years under HRB's mass arbitration protocol. The reference to a 120-day 6 timeline therefore instills a false sense of efficiency, masking the real possibility of protracted 7 delay. These hidden disadvantages, unapparent from the contract's face, amplify surprise. 8 Moreover, to underscore the uncertainty and surprise, HRB layered numerous implied 9 hurdles that obstruct claimants from succeeding in their claims.

For example, when Plaintiffs' 10 counsel sent a comprehensive notice enclosing thousands of individually signed dispute forms and 11 consents via certified mail, HRB insisted that each claimant had to send an individual envelope, 12 even though nothing in the OSA mandated such a

procedure. Even when HRB finally accepted 13 the mass notice, it did so only while “reserving all rights,” possibly including the right to later 14 contest tolling, thereby creating further uncertainty and delay.

15 Finally, the OSA is oppressive. To determine whether an agreement is oppressive, courts 16 consider factors including the amount of time the assenting party was given to consider the 17 proposed contract, the amount and type of pressure exerted on the assenting party to sign the 18 proposed contract, the length of the proposed contract and the length and complexity of the 19 challenged provisions, the education and experience of the assenting party, and whether the 20 assenting party’s review of the proposed contract was aided by an attorney.

OTO, 8 Cal.5th at 21 126–27. Here, the OSA was imposed by HRB with no opportunity for consumers to negotiate or 22 modify its terms. Consumers faced a dense 21-page agreement in the midst of tax season and with 23 the looming threat of IRS penalties, were assured of an illusory “120-day” resolution period, and 24 could not reasonably foresee that their ability to pursue claims would depend on the identity of 25 their attorney or the number of other claimants represented by their attorney as a result of a 26 complicated and unusual bellwether sequencing provision.

27 Taken together, these factors demonstrate a significant degree of procedural 1 mitigates these defects. 2 a. The Arbitration Agreement Opt-Out is Not Dispositive 3 HRB relies heavily on the OSA’s thirty-day opt-out provision, arguing that its availability 4 forecloses any finding of procedural unconscionability. Dkt. 34, Reply In Support of Motion to 5 Compel (“Reply Brief”) at 1 (“Plaintiffs cannot show procedural unconscionability because they 6 had the right to opt out of arbitration.”).

Defendants cite *Mohamed v. Uber Techs.*, 848 F.3d 1201 7 (9th Cir. 2016), arguing that the ability to opt out defeated any claim of procedural 8 unconscionability, even if the opt-out process was burdensome in practice.¹ Reply Brief at 4. But 9 Mohamed’s analysis addressed the effect of opt-out provisions on the adhesive nature of the 10 contract. See *Mohamed*, 848 F.3d at 1211.

The Ninth Circuit subsequently clarified in *Poublon* 11 that, as noted above, the Court’s evaluation of procedural unconscionability involves a two-prong 12 inquiry: in addition to assessing adhesion, federal courts may alternatively find an agreement 13 procedurally unconscionable where “there are other indications of oppression or surprise that 14 would lead California courts to conclude that the degree of procedural unconscionability is high.” 15 See 846 F.3d 1261–62; see also *Baghdasarian v. Macy’s Inc.*, No. 24-3438, 2025 WL 999082, at 16 *2 (9th Cir.

Apr. 3, 2025) (mem.) (evaluating both adhesion and “the totality of circumstances” to 17 assess procedural unconscionability). Thus, the existence of an opt-out clause does not 18 automatically render an arbitration agreement procedurally conscionable; even if an agreement is 19 not

adhesive, it can still be found sufficiently surprise-laden or oppressive to implicate procedural unconscionability.

To the extent Defendants argue that the opt-out provision is dispositive not only of the adhesion prong, but the entirety of the procedural unconscionability question, Mohamed did not so hold. In any event, if one were to read Mohamed as broadly as Defendants do, the Court takes notice of the fact that, in the decade since Mohamed, California appellate courts have consistently 1 In Mohamed, the Ninth Circuit reversed this Court's holding that, based on the California Supreme Court's ruling in *Gentry v. Super.*

Ct., 42 Cal.4th 443 (Cal. 2007), the right to opt out is not necessarily fatal to an assertion of adhesiveness. *Id.* The Ninth Circuit reiterated that an earlier panel had held in *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198 (9th Cir. 2002), that an 1 and unanimously rejected the notion that an opt-out provision categorically insulates arbitration 2 agreements from a finding of procedural unconscionability.

See, e.g., *Swain v. LaserAway Med. 3 Grp., Inc.*, 57 Cal.App.5th 59, 69 (Cal. Ct. App. 2020) (holding that “an opt out provision does not 4 insulate an arbitration agreement from a finding of procedural unconscionability”) (citing *Gentry*, 5 42 Cal.4th at 470); *Haydon v. Elegance at Dublin, LLC*, 97 Cal.App.5th 1280, 1288–89 (Cal. Ct. 6 App. 2023) (30-day opt-out insufficient where arbitration provision was confusingly presented and 7 imposed under temporal and financial pressure); *Johnson v. Stoneridge Creek Pleasanton CCRC 8 LLC*, No. A-165800, 2023 WL 7125117, at *2–3 (Cal.

Ct. App. Oct. 30, 2023) (affirming that, 9 contrary to defendant's expansive interpretation of Mohamed, “[u]nder California law, ‘an opt-out 10 provision does not insulate an arbitration agreement from a finding of procedural 11 unconscionability,’” and holding that an opt-out was ineffective where consumers faced pressure 12 not to exercise it); *Booker v. Charter Comm'ns, LLC*, No. B322812, 2025 WL 1910954, at *6 13 (Cal.

Ct. App. July 11, 2025) (emphasizing that state courts are not bound by defendant's broad 14 reading of Mohamed or other “[o]pinions of lower federal courts” where the California Supreme 15 Court “has held that procedural unconscionability is not necessarily eliminated by an opt-out 16 opportunity”); *Smith v. Folsom Invs., L.P.*, No. C097549, 2023 WL 8794888, at *4 (Cal.

Ct. App. 17 Dec. 20, 2023) (finding opt-out inadequate because it did not provide an “authentic informed 18 choice” where plaintiff lacked meaningful alternatives and provisions were buried without 19 disclosure); *Arnold v. Antelope Manufactured Home Cmty., LP*, No. C097244, 2024 WL 1081934, 20 at *5 (Cal. Ct. App. Mar. 13, 2024) (rejecting opt-out where plaintiff faced economic stress, had 21 limited education, and defendant failed to explain arbitration or provide time to review 22 agreement).² Thus, Defendants' expansive reading of Mohamed — that an opt-

out clause 23 categorically shields an agreement from a finding of procedural unconscionability — is not 24 consistent with California law.

25 2 Nor have other state appellate courts embraced the categorical rule from *Mohamed*. The New 26 Mexico Court of Appeals in *Pedregon v. Amazon.com, Inc.*, 2023 WL 357736 (N.M. Ct. App. 2023), for example, declined to hold that an opt-out cured procedural unconscionability, noting the 27 cumbersome opt-out process and the rarity of consumer opt-outs as evidence that the provision 1 Where, as here, the California Supreme Court has not in the interim again addressed the 2 issue subsequent to its decision in *Gentry*, federal courts in diversity cases are obliged to “follow 3 decisions of the California Court of Appeal unless there is convincing evidence that the California 4 Supreme Court would hold otherwise.” *Hill v. Walmart Inc.*, 32 F.4th 811, 816 (9th Cir.

2022); 5 see also *In re Kirkland*, 915 F.2d 1236, 1239 (9th Cir. 1990). Applying this principle, the Ninth 6 Circuit has at times revisited and overruled its own precedent (without taking the matter en banc) 7 when intervening California intermediate appellate decisions provide convincing evidence of how 8 the state high court would rule — even in the absence of direct controlling authority from the 9 California Supreme Court.

See *In re Watts*, 298 F.3d 1077, 1082–83 (9th Cir. 2002) (“We are 10 bound to follow *Smith* and *Teaman* [California appellate court cases] absent convincing evidence 11 that the California Supreme Court would reject the interpretation of section 704.950(c) by these 12 two courts....

In reexamining our interpretation of section 704.950(c) in light of *Smith* and 13 *Teaman*, we conclude that, if confronted with the issue, the California Supreme Court would 14 follow the rationale of *Smith* and *Teaman* and not the approach that we adopted in *Jones*.”); 15 *Curtis v. Irwin Indus., Inc.*, 913 F.3d 1146, 1155 (9th Cir. 2019) (holding that Ninth Circuit was 16 “bound to follow the rulings of intermediate state court ‘absent convincing evidence that the 17 California Supreme Court would reject th[ose] interpretation[s]’” and that, because intermediate 18 appellate court decisions provided “a reasonable statutory interpretation... and was consistent 19 with legislative history,” a prior Ninth Circuit decision “was overruled by intervening California 20 [appellate] case law”).

21 Here, every California appellate court decision addressing the issue has rejected 22 Defendants’ broad reading of *Mohamed* – some expressly. See, e.g., *Johnson*, 2023 WL 7125117, 23 at *2–3 (repudiating defendant’s sweeping interpretation of *Mohamed* that an opt-out provision 24 insulates an arbitration agreement from a finding of procedural unconscionability); *Booker*, 2025 25 WL 1910954, at *6 (refusing to apply defendant’s broad reading of *Mohamed* in light of 26 California Supreme Court authority holding that opt-out provisions do not categorically insulate 27 arbitration agreements from a finding of procedural unconscionability).

This, plus the fact that 1 prior California Supreme Court’s decision in Gentry, constitutes a convincing indication that the 2 California Supreme Court would hold that an opt out provision does not categorically obviate 3 procedural unconscionability. There is no “convincing evidence” that the Supreme Court would 4 rule to the contrary. Hill, 32 F.4th at 816.

5 In sum, this Court is bound by both the Ninth Circuit’s decision in Poublon and the clear 6 directive of intervening California appellate decisions which make clear that the opt-out provision 7 is not categorically dispositive of procedural unconscionability. Consistent with the views of the 8 California courts and the proper reading of Mohamed, the Court therefore treats HRB’s opt-out 9 provision as only one factor in the procedural unconscionability analysis; it is not outcome- 10 determinative.

As discussed above, surprise and oppression remain central considerations, 11 particularly where, as here, consumers faced a dense 21-page agreement in the midst of tax season, 12 were assured of an illusory “120-day” resolution period, and could not reasonably foresee that 13 their ability to pursue claims would depend on the identity of their attorney or the number of other 14 claimants represented by their attorney.

Moreover, while an opt-out can mitigate the oppressive 15 effect, here the opt-out itself is burdensome and potentially illusory for the reasons stated above. 16 Considering the compounding factors, the opt-out provision does not preclude a finding of 17 procedural unconscionability, and for the reason stated above, the Court finds there is a modest 18 degree of procedural unconscionability.

19 2. Substantive Unconscionability 20 Under California law, courts inquiring into unconscionability apply a sliding scale: the 21 more substantively oppressive the contract term, the less evidence of procedural unconscionability 22 is required, and vice versa. Sanchez, 61 Cal.4th at 910; Chavarria, 733 F.3d at 922.

Here, 23 Plaintiffs have shown a moderate degree of procedural unconscionability and, when combined 24 with the significant degree of substantive unconscionability, the arbitration clause is 25 unenforceable. 26 “Substantive unconscionability pertains to the fairness of an agreement’s actual terms and 27 to assessments of whether they are overly harsh or one-sided.” Pinnacle, 55 Cal.4th at 246.

The 1 “unduly oppressive,” or “so one-sided as to shock the conscience.” Sanchez, 61 Cal.4th at 910 2 (citations omitted). Unconscionability requires unfairness beyond a “simple old-fashioned bad 3 bargain.” Id. at 911. 4 Two aspects of the arbitration provision weigh heavily in favor of finding substantive 5 unconscionability: the staged bellwether process, and the statute of limitations tolling provision.

6 a. Mass Arbitration Provision and Staged Bellwether Process 7 The OSA’s mandated process for resolving mass arbitrations is almost certain to impose 8 unreasonable delays. The bellwether provision is triggered when 25 or more claimants submit 9 Notices “raising similar claims and are represented by the same or coordinated counsel.” OSA ¶ 10 11.6. This provision sets a cap on the number of arbitrations that may proceed against HRB at any 11 given time — in the meantime, “no other cases may be filed in arbitration, and the AAA shall not 12 accept, assess or demand fees for, or administer arbitrations.” *Id.* The process operates in 13 sequential rounds, such that no new tranche of arbitration claims may be filed until every case in 14 the prior round has been completed.

As a result, the slowest case in a given round sets the pace for 15 all others, and any delay in one arbitration halts progress for all remaining claimants and would-be 16 claimants who are barred from filing until their turn arrives. 17 Although the mass arbitration provision encourages arbitrators to resolve cases within 120 18 days, even that idealistic timeline could impose a 13-year timeline to resolve a batch of 2,000 19 Notices.

Opp. to MTC at 10. Even assuming that most arbitrations proceed efficiently, a single 20 outlier or protracted case can hold up hundreds of other claims indefinitely. Thus, claimants are at 21 risk of significant delays under the mass arbitration protocol, and even if claimants opt out of 22 future arbitration agreements, they are still bound by their prior agreements.

OSA ¶ 11.1. HRB’s 23 mass arbitration provision states that the OSA scheme “may delay the arbitration” of claims, *id.* ¶ 24 11.6, but no consumer expects to wait a decade or longer to adjudicate low-dollar claims. Opp. to 25 MTC at 10. 26 Although the mass arbitration provision encourages efficient resolution of claims, it 27 provides no recourse, oversight, or other accountability procedures in the event of delay by an 1 OSA provides arbitrators with discretion to address delays or to undo terms of the OSA.

See *id.* 2 Rather, even the most efficient arbitrators may be saddled by delays imposed by other arbitrators 3 or the parties in other proceedings. Thus, the mass arbitration protocol “sets a cap on the number 4 of arbitrations against [HRB] that may proceed at one time,” MacClelland, 609 F. Supp. 3d at 5 1040, but provides no mechanism for relief when unreasonable delays occur.

As a result, 6 claimants forced to wait on the sidelines are entirely dependent on the pace and efficiency of other 7 claimants, arbitrators, and HRB in resolving totally separate disputes. The Ninth Circuit has so 8 held in a similar case. See Pandolfi, No. 23-cv-05971-EMC, 2024 WL 4051754, at *11–12 (N.D. 9 Cal. Sept. 4, 2024), *aff’d*, No. 24-5817, 2025 WL 2463742 (9th Cir.

Aug. 27, 2025) (mem.) 10 (finding bellwether provision substantively unconscionable where sequential rounds of arbitration 11 created systemic delay). 12 These consequences from the OSA’s staged bellwether process are likely to contribute to 13 significant delays. “That prospect of

delay” itself may have a “chilling effect on [claimants], 14 deterring them from vindicating their rights.” Id. at *6; see also Pandolfi, 2025 WL 2463742, at 15 *2 (emphasizing the one-sided effect of delays in chilling the initiation of claims, with those 16 delays “likely only apply[ing] to claims brought by players, not Avia”).

Thus, the mass arbitration 17 provision itself creates the risk of de facto waiver of valid claims, weighing heavily in favor of 18 finding substantive unconscionability. 19 To provide a real-world illustration of how the mass arbitration provision operates in 20 practice, Plaintiffs submitted the declaration of Stephen Tillery, whose firm represents more than 21 25,000 clients with claims against HRB.

Tillery Decl. ¶¶ 1–2. Mr. Tillery attested that, although 22 his firm filed Consumer Demands for Arbitration for 10 clients in October 2024, as of August 1, 23 2025, none of those cases had proceed to an arbitration hearing, with the earliest hearings not 24 scheduled until late-2025 or early-2026. Id. ¶ 4. Defendants dispute aspects of the Tillery 25 Declaration and have submitted reply declarations from their counsel and in-house attorneys.

See 26 Dkt. 35–37, Murdock, Ostfeld, and Gilman Declarations. Plaintiffs have objected to the 27 declarations as improper reply evidence. Dkt. 41, Objections to Reply Evidence. Without 1 50 claims at a time is bound to result in impediments and delays. This practical reality 2 underscores the structural risks of delay inherent in HRB’s staged bellwether process, with those 3 risks weighing in favor of finding substantive unconscionability.

4 Second, the mass arbitration protocol and staged bellwether process may interfere with 5 claimants’ right to counsel of their choosing. By automatically imposing the bellwether procedure 6 anytime 25 or more claimants are represented by the same or coordinated counsel, the mass 7 arbitration provision may induce claimants to avoid the bellwether provision altogether by finding 8 different counsel.

See Pandolfi, 2024 WL 4051754, at *11, aff’d, 2025 WL 2463742. As this 9 Court previously noted, would-be claimants may struggle to find counsel willing to represent a 10 single or small number of similarly situated clients seeking small claims against HRB. Id.; see 11 Dkt. 27, (“Marquez Decl.”) ¶¶ 8–9; Dkt. 28, (“Rios Decl.”) ¶¶ 8–9.

Moreover, many plaintiff-side 12 firms may specialize in bringing claims like the privacy violations alleged here. Forcing claimants 13 to avoid experienced counsel in favor of less qualified or experienced representation — simply to 14 sidestep mass arbitration delays — imposes an unjustifiable cost manufactured by HRB for its sole 15 benefit. 16 Third, the above defects are not cured by the arbitration agreements’ small-claims carve 17 out, which allows either party to elect to have their claim decided by a small claims court.

See 18 OSA ¶ 11.1. Small claims proceedings are not a substitute for litigation in a court of general 19 jurisdiction. Claimants may be ineligible because their damages exceed the jurisdictional cap. See 20 Cal. Civ. Proc. Code § 116.221. Those who qualify face sharply limited (potentially nonexistent) 21 discovery and truncated procedures. See *Rosenberg v. Super.*

Ct., 67 Cal.App.4th 860, 868 (Cal. 22 Ct. App. 1998). And in many jurisdictions, litigants cannot be represented by counsel in small 23 claims matters. See *Prudential Ins. Co. of Am. v. Small Claims Ct. of City & Cnty. of S.F.*, 76 24 Cal.App.2d 379, 383–84 (Cal. Ct. App. 1946). Especially for technically complex privacy claims, 25 like those raised in the Complaint, a small claims proceeding risks depriving consumers of the 26 forum, tools, or procedures to prove their cases and obtain relief.

Accordingly, the OSA’s small 27 claims carveout is an illusory alternative that does not cure the arbitration agreement’s 1 Defendants compare HRB’s bellwether scheme to multidistrict litigation (“MDL”) 2 bellwethers, arguing that MDL trials “have proven remarkably effective at achieving settlements.” 3 MTC at 19.

The analogy is unpersuasive. In an MDL, plaintiffs actually file their cases, obtain 4 procedural rights, and proceed under active judicial management — with discovery, motion 5 practice, public dockets, and trial dates. MDL bellwethers do not wholly bar plaintiffs from filing 6 thousands of claims until earlier tranches finish. Rather, all claims are on file, and representative 7 cases proceed to trial as part of the judicially managed process.

By contrast, HRB’s mass 8 arbitration protocol prevents claimants from filing their claims at all until prior tranches have been 9 completed, ceding control of the pace of adjudication to other claimants, arbitrators, and to HRB 10 itself.

The distinction is particularly stark because the limits in HRB’s process are of HRB’s own 11 making. HRB has introduced no evidence that the number of arbitrations that can be conducted 12 simultaneously is inherently constrained by the AAA or any arbitral forum. Instead, the staged 13 bellwether cap of 20 or 50 cases at a time appears to be a design choice, at best, to control HRB’s 14 costs, and at worst, to thwart the adjudication of valid claims.

Having selected arbitration as the 15 forum, HRB cannot shed responsibility for that choice and impose, as a matter of volition rather 16 than necessity, a process that delays claimants’ ability to adjudicate their disputes so that HRB can 17 manage its own expenses. This volitional design contrasts with the MDL bellwether process, 18 which is driven by the limited resources of the public judiciary and the practical realities of 19 managing thousands of cases in federal court.

Unlike the MDL process, which is constrained by 20 real-world limitations of judicial resources, the constraint here is manufactured. 21 b. Statute of Limitations Tolling 22 The second critical deficiency in the arbitration provision concerns the OSA’s tolling 23 provisions.

The OSA contains two provisions related to tolling of the statute of limitations. First, 24 OSA ¶ 11.2(B) states: 25 Any applicable statute of limitations will be tolled for the claims and relief set forth in the Notice during the period between the date that 26 either you or we send the other a fully complete Notice, until the later of (1) 60 days after receipt of the Notice; or (2) if a Settlement 27 Conference is timely required, 30 days after completion of the (Emphasis added).

1 Second, OSA ¶ 11.6 states: 2 If this section 11.6 applies to a Notice, the statute of limitations 3 applicable to the claims and relief set forth in that Notice shall be tolled from the beginning date of the Informal Resolution Period 4 until that Notice is selected for a bellwether proceeding, withdrawn, or otherwise resolved. 5 Defendants argue that these tolling provisions are sufficient to ensure that no claimant risks 6 forfeiture of claims during the pendency of the mass arbitration bellwether process.

See MTC at 7 16. But the record suggests otherwise. Plaintiffs submit evidence that on October 17, 2024, HRB 8 responded to Plaintiffs’ counsel that the Notices were “improper and ineffective.” Ellersick Decl. 9 at Ex. 8.

Although HRB subsequently accepted service of the Notices sent on behalf of 2,481 10 claimants, it did so “without waiving any rights and expressly reserving all rights.” Id. at Ex. 12; 11 Opp. to MTC at 6. 12 The structure of the OSA makes tolling contingent on HRB’s receipt of a “fully complete 13 Notice.” See OSA ¶ 11.2. Whether a Notice is “fully complete” is not defined by any objective 14 criteria, and seems instead to be subject to HRB’s exclusive interpretation.

HRB’s initial refusal 15 to recognize the validity of Plaintiffs’ Notices, coupled with its reservation of rights even after 16 acceptance, creates an unacceptable level of uncertainty as to whether tolling in fact applies.

The 17 mass arbitration provision in OSA ¶ 11.6 contains a broader tolling clause without the “fully 18 complete” language, but the apparent disjunction between Paragraphs 11.2 and 11.6 provides HRB 19 with an opportunity to dispute the appropriateness of tolling whenever it deems a Notice 20 incomplete. 21 This uncertainty is not solely theoretical. Claimants such as Plaintiffs Rios and Marquez 22 have explained that despite retaining counsel and attempting to initiate arbitration, their claims 23 have not advanced and they are concerned about delays.

Rios Decl. ¶¶ 3–4; Marquez Decl. ¶¶ 3– 24 4. As noted above, counsel for other claimants confirm that cases filed as early as Fall 2024 25 remain pending, with hearings not scheduled until late-2025 or 2026. Tillery Decl. ¶ 4. Given the 26 potential for years-long delays, the availability of reliable tolling is essential. 27 1 HRB contends that “it is up to a court or arbitrator, not defendants, to decide whether a 2 claimant has met” the requirements of a “fully complete Notice.” MTC at 10.

That is true on its face, but the fact that HRB has expressly reserved the right to challenge the adequacy of Notices means that claimants face continued risk that HRB will seek to defeat claims as untimely after prolonged delays imposed by the bellwether process. HRB's unilateral reservation of rights to attack statute of limitations tolling weighs in favor of finding substantive unconscionability.

Provisions that impose forfeiture risks through delays or technical hurdles may be substantively unconscionable. See *MacClelland*, 609 F. Supp. 3d at 1042 (ruling in the context of delays that "[d]elaying the ability of one to vindicate a legal claim by years... 'conflict[s] with one of the 10 basic principles of our legal system — justice delayed is justice denied.' Terms that 'contravene 11 the public interest or public policy' are substantively unconscionable").

Finally, the tolling scheme appears asymmetrical. The tolling provisions do not prevent HRB from asserting statute of limitations defenses if it succeeds in persuading an arbitrator that a Notice was incomplete. By contrast, claimants have no comparable mechanism: the OSA does not empower arbitrators to remedy delays caused by other arbitrators, claimants, or HRB in the bellwether process, nor does it provide claimants any recourse or judicial review if HRB challenges tolling.

See OSA ¶¶ 11.2, 11.6. Accordingly, claimants may find themselves wholly unable to vindicate their claims by operation of the OSA's ambiguous, subjective, and asymmetrical tolling provisions. Although Plaintiffs' statutory claims may carry multi-year limitations periods, those protections are meaningless under the OSA's arbitration scheme, which can delay the filing of claims for years and which conditions tolling on HRB's approval of Notices and its willingness to refrain from challenging their completeness in arbitration.

Thus, putative claimants risk forfeiture of their claims through no fault of their own. The combination of protracted delays and uncertain tolling creates precisely the "harsh" or "one-sided" outcome that courts seek to prevent. 3. Severability "If a California court concludes that a contract contains one or more unconscionable (2) 'enforce the remainder of the contract without the unconscionable clause'; or (3) 'limit the application of any unconscionable clause as to avoid any unconscionable result.' *Poublon*, 846 F.3d at 1272. "A court may 'refuse to enforce the entire agreement' only when it is 'permeated' by unconscionability." *Id.* (quoting *Armendariz v. Found.*

Health Psychare Servs., Inc., 24 Cal.4th 83, 122 (Cal. 2000)); see also *Yeomans v. World Fin. Grp. Ins. Agency, Inc.*, 485 F. Supp. 3d 1168, 1191 (N.D. Cal. 2020) (Chen, J.). The remaining issue related to unconscionability concerns whether the Court should sever the unconscionable terms, in which case arbitration may proceed without those terms. Here, the unconscionable terms are not "merely collateral to the main purpose of the arbitration agreement.

Rather, these provisions are designed to structurally and systemically make 11 arbitration an inferior forum.” Pandolfi, 2024 WL 4051754, at *13, aff’d 2025 WL 2463742 12 (mem.). Not only would severance potentially maintain the chilling effect of the arbitration 13 agreement and confusion about statute of limitations tolling, it would contribute to a patchwork 14 agreement that, at best, leads to confusion and, at worst, permits HRB and other similarly situated 15 companies to continue to chill users’ otherwise arbitrable claims.

See id. 16 Because unconscionability permeates the entire arbitration agreement, severance would be 17 an ineffective half-measure or, potentially, a reward for bad faith corporate actors. Accordingly, 18 the Court refuses to sever the arbitration clause, finding the entire arbitration agreement 19 unenforceable instead. 20 Because the MTC is unconscionable and thus unenforceable, the Court does not need to 21 proceed to Plaintiff’s arguments about FAA preemption and the applicability of Discover Bank v. 22 Super.

Ct., 36 Cal.4th 148 (Cal. 2005). Cf. Heckman v. Live Nation Ent., Inc., 120 F.4th 670, 23 689–90 (9th Cir. 2024); id. at 692–93 (VanDyke, J., concurring) (applying California law instead 24 of the FAA where arbitration procedure did not comport with the FAA’s intent to promote 25 bilateral arbitration of individual claims). 26 /// 27 /// 1 V. CONCLUSION 2 For the foregoing reasons, the HRB Defendants’ motion to compel arbitration is DENIED.

3 This order disposes of Docket No. 18. 4 5 6 7 8 IT IS SO ORDERED. 9 10 Dated: October 27, 2025 11 2 EDWARD M. CHEN 13 United States District Judge 15 16 it 4 18 19 20 21 22 23 24 25 26 27 28