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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

REECE YOUNG and ASHLEY VELEZ, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

BYTEDANCE INC. AND TIKTOK INC.,

Defendants.

Case No. 3:22-cv-01883

DEFENDANTS BYTEDANCE INC. AND TIKTOK INC.'S RENEWED MOTION TO COMPEL ARBITRATION AGAINST PLAINTIFF ASHLEY VELEZ AND DISMISS PLAINTIFF VELEZ'S CLAIM

Judge: Hon. Vince Chhabria
Date: August 17, 2023
Time: 10:00 AM PT
Room: Courtroom 5, 17th Floor

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on August 17, 2023 at 10:00 AM PT, or as soon as counsel may be heard, in Courtroom 5, 17th Floor, Phillip Burton Federal Building, 450 Golden Gate Ave., San Francisco, CA 94102, the Honorable Vince Chhabria presiding, Defendants ByteDance Inc. and TikTok Inc. (collectively "TikTok") will, and hereby do, move the Court as follows:

Pursuant to Plaintiff Ashley Velez's contractual agreement with her employer, Telus International ("Telus") and in accordance with the Federal Arbitration Act, 9 U.S.C. §§ 4 and 206, for an Order compelling arbitration and dismissal of Plaintiff Velez's claim.

MEMORANDUM AND POINTS OF AUTHORITIES

I. INTRODUCTION

When Ashley Velez was hired by Telus in April 2021, she agreed to submit all potential tort claims to binding arbitration. Velez reiterated her commitment to arbitration in June 2021. She now wishes to avoid arbitration by directing her tort claims at TikTok, which hired Telus as an independent contractor for content moderation. Velez cannot circumvent her promise to arbitrate by suing TikTok, a nonsignatory, and omitting Telus, the signatory to her agreement.

Velez's arbitration agreement is valid, enforceable, and covers the claims at issue. That ends the inquiry. This Court need not decide whether TikTok, as a nonsignatory, can enforce the arbitration agreement because that issue has been clearly and unmistakably delegated to the arbitrator in the agreement. But even if the Court were to reach that question, the "equitable estoppel" doctrine under Nevada law permits TikTok as a nonsignatory to enforce the arbitration agreement. The doctrine applies where a plaintiff alleges that the nonsignatory-defendant (i.e., TikTok) and the signatory counterparty (i.e., Telus) allegedly engaged in "substantially interrelated and concerted conduct" which lead to the plaintiff's injury. Federal courts applying Nevada law consistently hold that where a plaintiff alleges a nonsignatory defendant was "able to influence and exercise some level of control over" the signatory counterparty, just as Velez alleges here, equitable estoppel applies. *Hansen v. Musk*, No. 3:19-cv-00413-LRH-WGC, 2020 WL 4004800, at *3 (D. Nev. July 15, 2020); *Dropp v. Diamond Resorts Int'l, Inc.*, No. 2:18-cv-00247-APG-GWF, 2019 WL 332399, at *5 (D. Nev. Jan. 25, 2019).

As this court recognized in its May 15, 2023 Order, Velez's alleged theory is that TikTok "controlled" her workplace environment "to such a degree that it can be held liable" even though she was "directly employed" by Telus. Dkt. No. 69 at 1 (Order re Motion to Dismiss).[1] By this same token, Velez pleads herself into arbitration by alleging TikTok could influence and exert control over Telus. An order compelling arbitration is warranted to prevent Velez from "having it both ways" by effectively implying TikTok was her de facto employer while at the same time repudiating her obligation to arbitrate under the terms of her actual agreement with Telus. *Sussex v. Turnberry/MGM Grand Towers, LLC*, No. 2:08-cv-00773-RLH-PAL, 2010 WL 11583343, at *2 (D. Nev. Mar. 10, 2010) (describing practical aims of equitable estoppel in the arbitration context).

II. BACKGROUND

A. TikTok Hires Telus for Content Moderation Services

TikTok, a video-sharing community with millions of users, places paramount importance on user safety. Dkt. No. 50, Second Amended Complaint ("SAC") ¶¶ 1, 30–31, 58. To mitigate exposure to harmful or objectionable content, TikTok invests considerable resources in technology to automatically detect and remove such content. SAC ¶ 102. Defendants also contract with third-party firms specializing in content moderation that employ humans to screen content which is not removed by AI. SAC ¶¶ 34, 44–45. One of those firms was independent contractor Telus International, which in turn employed plaintiff Ashley Velez. SAC ¶¶ 2, 24, 71, 143.

B. Velez Agrees to Binding Arbitration

Plaintiff signed various documents with Telus during her onboarding process which constituted the terms of her employment with Telus. Declaration of Karen Muniz on Behalf of Telus International (hereafter "Telus Decl.") ¶¶ 3, 7, Exs. 1–3. That package included a document entitled "Mutual Agreement to Arbitrate Claims," which Velez electronically signed on April 29,

[1] To decide whether equitable estoppel applies to compel arbitration, courts should refer to the allegations in the complaint. *See In re Pac. Fertility Ctr. Litig.*, 814 F. App'x 206, 210 (9th Cir. 2020) (Paez, J., concurring); *Michel v. Parts Auth., Inc.*, No. 15-cv-5730 (ARR)(MDG), 2016 WL 11798927, at *7 (E.D.N.Y. June 17, 2016) ("courts properly rely on the allegations in a plaintiff's complaint when determining the applicability of equitable estoppel"). Accordingly, TikTok's discussion of the allegations in the SAC is only for purpose of applying equitable estoppel, and does not constitute an admission of their truth.

2021, as well as additional documents that were part of the terms of her employment with Telus. *Id.* ¶ 4–7, Exs. 1–3.[2] Velez began working at Telus on May 20, 2021. *Id.* ¶ 12. About three weeks later, Velez electronically re-acknowledged a nearly identical "Mutual Agreement to Arbitrate Claims" as part of the employee handbook, which constitutes a "continuation" of the agreement to arbitrate. *Id.* ¶¶ 8–11, Exs. 3 and 4 (signed acknowledgement of employee handbook arbitration agreement dated June 11, 2021). Velez has acknowledged that she entered into an arbitration agreement with Telus. *E.g.,* Dkt. No. 52 at 19 (Plaintiff's Opp.) ("Defendants rely upon an arbitration agreement between Plaintiff Velez and Telus International, her former employer.")

These arbitration agreement documents—with nearly identical text in both the handbook and onboarding paperwork—broadly provided that Velez and Telus "mutually consent" to arbitrate "all claims or causes of action, except as provided below, that the Company may have against me or that I may have against the Company under any federal, state or local law." Telus Decl., Ex. 1, at 1, Ex. 3, at 3. Both excluded workers and unemployment compensation claims, but expressly included "tort claims." *Id.* Both contain waivers barring the signatories from bringing claims "as a plaintiff or member in any purported class action or proceeding." *Id.* Both specify "[t]he arbitration shall take place in the county where the Company last employed me." *Id.* Ex. 1, at 1, Ex. 3, at 4. The June 2021 employee handbook agreement includes a choice-of-law clause: "This Agreement will be governed by the laws in the state where the Company last employed me." *Id.* Ex. 3, at 4.[3]

C. Procedural Posture

In contravention of her agreement to arbitrate, Velez commenced the present action against TikTok on March 24, 2022. Dkt. No. 1. This Court initially dismissed the complaint for failure to "adequately plead that the 'retained control' exception" applies to the general rule that only employers have an applicable duty. Dkt. No. 48 (Order Granting Motion to Dismiss, Oct. 19, 2022). A Second Amended Complaint followed. The SAC makes no mention of Velez's

[2] These additional signed documents that Velez agreed to include the "Job Description: TikTok Content Moderator", "Work from Home Policy," and "Return and Care for Company Equipment Agreement" documents. Telus Decl. ¶ 7, Ex. 2.

[3] Velez is a resident of Las Vegas, Nevada (SAC ¶ 24) and "was hired by Telus … in Nevada." Dkt. No. 69 at 2 (Order re Motion to Dismiss). Arbitration would thus take place in Nevada.

arbitration agreement with Telus, and conclusorily asserts that "Plaintiff Velez is not subject to any arbitration agreement applicable to the claims made herein." SAC ¶ 24.[4]

The SAC in several instances alleges that TikTok affected content moderators' work via its purported "control" over Telus, such as requiring that Telus have its moderators use TikTok's TCS software that TikTok had "full" control over; that TikTok "demanded and enforced" accuracy rates and quotas for Telus moderators; and that TikTok "instruct[ed] their third-party vendors [i.e., Telus] to carry out" certain "actions" such as imposing penalties or reprimands on the vendor's own employees for failing to meet those rates and quotas. SAC ¶¶ 8–10, 37–42, 61, 127.[5] Velez also previously referred to TikTok "as a 'Special Employer'" of content moderators, but has since omitted that characterization. Dkt. No. 1 at 26 (Initial Compl., Mar. 24, 2022).

On November 30, 2022, TikTok filed a motion to dismiss the Second Amended Complaint, or, alternatively, to compel Velez to arbitrate her claims. Dkt. No. 51. On May 15, 2023, the Court denied TikTok's motion to dismiss in part and denied the motion to compel arbitration without prejudice. Dkt. No. 69 (Order re Motion to Dismiss); Dkt. No. 70 (Order Denying Motion to Compel Arbitration). The Court found Velez adequately pled "TikTok controlled the moderator's work to such a degree that it can be held liable for its alleged negligence, even though Young and Velez were directly employed by other companies." Dkt. No. 69 at 1.

The Court denied TikTok's prior motion to compel without prejudice because the motion failed to specify whether Nevada or California law should apply, and authorized TikTok to file a renewed motion to compel arbitration. Dkt. No. 70 at 1. This renewed motion to compel arbitration is accordingly brought under the Federal Arbitration Act ("FAA") and Nevada law.

[4] Conclusory denials of an arbitration agreement's validity or existence are insufficient to avoid arbitration, regardless of whether those assertions are made in a complaint or declaration. *E.g., Blau v. AT & T Mobility*, No. C 11-0054 CRB, 2012 WL 10546, at *3–4 (N.D. Cal. Jan. 3, 2012).

[5] *Cf.* Telus Decl. Ex. 2 at 3–4 (discussing Telus "[p]erformance metrics" and requiring Telus moderators "to take meal or rest periods" for the "specified duration"); Ex. 2 at 6 (describing job responsibilities including, e.g., "uphold[ing] a high standard of accuracy and quality" and participating in "refresher training to always conduct correct moderating policies").

III. LEGAL FRAMEWORK

Under the FAA, arbitration provisions "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The statute "reflects an 'emphatic federal policy in favor of arbitral dispute resolution,'" *KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011), and governs any arbitration agreement "involving commerce" in any way, *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003). With the exception of "specific exempted categories" set forth in Section 1 of the statute which do not apply here, the FAA applies with equal force to employment contracts. *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001). "Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation." *Id.* at 123. The party seeking to compel arbitration need not be a signatory to the arbitration agreement if "the relevant state contract law allows" the nonsignatory party to enforce the agreement. *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1128 (9th Cir. 2013).

When presented with a motion to compel arbitration, a court generally need only address two "gateway" issues: (1) whether there is an agreement to arbitrate, and (2) whether the agreement covers the dispute. *See Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015). "When the parties' contract delegates the arbitrability question to an arbitrator," the court should avoid addressing that issue and refer the matter to arbitration. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019). "[C]ourts have discretion under 9 U.S.C. § 3 to dismiss claims that are subject to an arbitration agreement." *Klein v. Delbert Servs. Corp.*, No. 15- CV-00432-MEJ, 2015 WL 1503427, at *6 (N.D. Cal. Apr. 1, 2015).

IV. ARGUMENT

Velez agreed to an arbitration agreement, which is valid and enforceable, and the agreement delegates threshold issues of arbitrability to the arbitrator, including whether a nonsignatory like TikTok can enforce the agreement. That should end the inquiry here. But if the Court were to proceed further, there is no credible dispute that the arbitration agreement encompasses the tort claims raised by Velez against TikTok, and under Nevada's equitable estoppel doctrine, TikTok as a nonsignatory may enforce the agreement.

A. Telus and Velez Agreed to a Valid and Enforceable Arbitration Agreement

A party seeking to compel arbitration "bears the burden of proving the existence of a valid arbitration agreement by [a] preponderance of the evidence." *Bridge Fund Cap. Corp. v. Fastbucks Franchise Corp*., 622 F.3d 996, 1005 (9th Cir. 2010). Conversely, those parties "challenging the enforceability of an arbitration agreement bear the burden of proving that the provision is unenforceable." *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1157 (9th Cir. 2013). "If a district court decides that an arbitration agreement is valid and enforceable, then it should either stay or dismiss the claims subject to arbitration." *Mwithiga v. Uber Techs., Inc*., 376 F. Supp. 3d 1052, 1057 (D. Nev. 2019) (citing *Nagrampa v. MailCoups, Inc*., 469 F.3d 1257, 1276–77 (9th Cir. 2006)). "In determining the validity of an agreement to arbitrate, federal courts 'should apply ordinary state-law principles that govern the formation of contracts.'" *Ferguson v. Countrywide Credit Indus., Inc*., 298 F.3d 778, 782 (9th Cir. 2002) (citations omitted)).

1. Nevada Law Governs the Validity and Enforcement of the Agreement

The Telus arbitration agreement signed by Velez in the employee handbook indicates that Nevada law applies to the agreement. Telus Decl., Ex. 3, at 4 ("This Agreement will be governed by the laws in the state where the Company last employed me."). Velez is a resident of Las Vegas, Nevada, SAC ¶ 24, she performed her job "at home," *id*., and "was hired by Telus International in Nevada." Dkt. No. 69 at 2 (Order re Motion to Dismiss). *See also* Dkt. No. 52 at 19 (Plaintiff's Opp.) ("Plaintiff Velez was employed in Las Vegas, Nevada."). Thus, Nevada provides the law of the state where Telus "last employed" Velez and applies here. *E.g., Romo v. CBRE Grp., Inc*., No. 8:18-cv-00237-JLS-KES, 2018 WL 4802152, at *1 (C.D. Cal. Oct. 3, 2018) (applying California law where neither party disputed plaintiff worked in California and the arbitration agreement stated the "rules of the state in which you are or were last employed" will govern arbitration).

2. Velez Entered into a Valid Arbitration Agreement

Under Nevada law, a contract is formed "when the parties have agreed to the material terms." *May v. Anderson*, 121 Nev. 668, 672 (2005). On April 29, 2021, Velez electronically signed the Telus arbitration agreement as part of her onboarding paperwork. Telus Decl. ¶¶ 5, 6, Ex. 1, at 2 ("I acknowledge that I have carefully read this Agreement and that I understand its

terms."). Velez re-acknowledged her agreement to arbitrate on June 11, 2021 through an electronic signature. *Id.* ¶¶ 8–10, Ex. 3, at 5 ("I understand that by submitting my electronic acknowledgment that I have carefully read this Agreement and that I understand its terms."), Ex. 4, at 1 (signature confirmation). Electronic signatures have the same legal effect as handwritten signatures. Nev. Rev. Stat. Ann. § 719.240.[6] Velez has acknowledged that she entered into an arbitration agreement with Telus. *See, e.g.*, Dkt. No. 52 at 19.

Telus confirmed Velez's identity as the signatory of the April 2021 arbitration agreement by cross-referencing the legal name on her I-9 identification documents against the name signed on the arbitration agreement. Telus Decl. ¶ 5. Velez's identity as the electronic signatory of the June 2021 arbitration agreement was confirmed by her use of unique login credentials to access and sign the agreement. *Id.* ¶¶ 8, 9. A valid arbitration agreement was thus formed. *See Mwithiga*, 376 F. Supp. 3d at 1060–61 (contrasting a case where defendant "did not explain how such signatures were verified" with a case where defendant submitted a declaration explaining that "Plaintiff's unique username and password were necessary to access the [interface] and accept the [terms of service containing an arbitration agreement]," and finding the latter established valid formation); *Gonzales v. Sitel Operating Corp.*, No. 2:19-cv-00876-GMN-VCF, 2020 WL 96900, at *2 (D. Nev. Jan. 7, 2020) (rejecting plaintiff's assertion that her "electronic signature was a forgery" where defendant detailed the security and verification protocols used for signing employment documents).[7]

3. The Arbitration Agreement is Enforceable

A validly-formed arbitration agreement should be enforced unless it is *both* procedurally and substantively unconscionable. *See Cohn v. Ritz Transp., Inc.*, No. 2:11-cv-1832 JCM NJK, 2014 WL 1577295, at *13 (D. Nev. Apr. 17, 2014) (citing *Burch v. Second Jud. Dist. Ct. of State ex*

[6] In any event, "[w]hile the FAA 'requires a writing, it does not require that the writing be signed by the parties.'" *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1439 (9th Cir. 1994).

[7] *See also, e.g., Lee v. Am. Homes 4 Rent, L.P.*, No. 2:21-cv-01870-JAD-DJA, 2022 WL 1785448, at *4 (D. Nev. May 31, 2022) ("AH4R has provided sufficient documentation to authenticate Lee's signature on the [arbitration] agreement"); *Patterson v. Raymours Furniture Co.*, 96 F. Supp. 3d 71, 76 (S.D.N.Y. 2015) ("With regards to arbitration agreements in the employment context, '[c]ourts in this district routinely uphold arbitration agreements contained in employee handbooks where . . . the employee has signed an acknowledgment form.'").

rel. Cnty. of Washoe, 118 Nev. 438, 443 (2002)). Procedural unconscionability may arise if there is not "a meaningful opportunity to agree" to contract terms. *Id.* at *13. Substantive unconscionability "focuses on the one-sidedness of the contract terms," and all that is required to show substantive conscionability is a "modicum of bilaterality" in the terms of the agreement. *Id.* at *13–15.

Under Nevada law, employment conditioned on accepting an arbitration agreement on a "take it or leave it" basis does not render the arbitration agreement procedurally unconscionable. *Pruter v. Anthem Country Club, Inc.*, No. 2:13-cv-01028-GMN-PAL, 2013 WL 5954817, at *3 (D. Nev. Nov. 5, 2013); *Cohn*, 2014 WL 1577295, at *13 ("The parties agreed that they were knowingly and voluntarily waiving their rights to pursue arbitrable claims before a judge or a jury in favor of binding arbitration in exchange for employment with the company. [] As Plaintiff's only support for the argument regarding procedural unconscionability is that Defendants had all the bargaining power, Plaintiff has not met his burden."). Even if Velez were to show "signing it was a non-negotiable condition of employment," this would not show procedural unconscionability under Nevada law. *Cohn*, 2014 WL 1577295, at *14.

As to substantive unconscionability, an examination of the terms of the arbitration agreement shows that bilaterality is manifest throughout, subjecting both parties to the same duties. *Id.* at *15 ("Plaintiff has not, however, pointed to a single provision in the arbitration agreement which applies solely to one party or that gives a one-sided advantage to Defendants."). Both parties "mutually consent" to submit their claims to arbitration, and both "give[] up any right [they] may have to participate" in a court action. Telus Decl., Ex. 1, at 1, Ex. 3, at 3.

The arbitration agreement's express incorporation of the JAMS Employment and Arbitration Rules & Procedures ("JAMS Rules") further demonstrate the substantive fairness of the terms. Telus Decl., Ex. 1, at 1, Ex. 3, at 3–4 (both arbitration agreements contain hyperlinks to the JAMS website containing the JAMS Rules). For example, JAMS Rule 31(c) in the Employment and Arbitration Rules & Procedures provides that "[i]f an Arbitration is based on a clause or agreement that is required as a condition of employment, the only fee that an Employee may be required to pay is the initial JAMS Case Management Fee." Declaration of Jonathan H. Blavin ("Blavin Decl."), Ex. 1, at 11, Ex. 2, at 18. Such rules help address potential disparities in resources

between the parties. *See Abrams v. Merz Aesthetics, Inc.*, No. 14-cv-03552-EDL, 2014 WL 12771127, at *3 (N.D. Cal. Nov. 4, 2014) (rejecting substantive unconscionability claim where "the JAMS rules appear to provide for a neutral process to select the arbitrator"); *Sanchez v. Gruma Corp.*, No. 19-cv-00794-WHO, 2019 WL 1545186, at *7 (N.D. Cal. Apr. 9, 2019) (rejecting substantive unconscionability claim where JAMS rules "do[ ] not impose unreasonable costs or arbitrator fees"); *Golden Gate Nat'l Senior Care, LLC v. Newkam for estate of Newkam*, No. 1:16-cv-1791, 2017 WL 3233014, at *4 (M.D. Pa. July 31, 2017) ("'[A]pplication of JAMS rules in the arbitral forum does not result in the substantive unconscionability' of arbitration agreements.").

B. The Arbitration Agreement Delegates to the Arbitrator Threshold Questions Regarding Its Applicability and Scope, Including Whether TikTok As a Nonsignatory May Enforce the Agreement

"Gateway" questions pertaining to the applicability and scope of an arbitration agreement may themselves be delegated to an arbitrator. This delegation of authority is "simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Henry Schein*, 139 S. Ct. at 529 (internal quotation marks and citation omitted). Such delegation provisions are enforceable where, as here, they "clearly and unmistakably delegate[] arbitrability [questions] to the arbitrator." *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1072–75 (9th Cir. 2013). Delegation in this case is evident through two sources: the text of the arbitration agreement itself and the JAMS Rules expressly incorporated by the agreement.

The arbitration agreement documents Velez signed during her onboarding and re-acknowledged in the employee handbook both state that the "arbitrator shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement." Telus Decl., Ex. 1, at 2, Ex. 3, at 4. This language is sufficiently broad to cover "any" dispute regarding the agreement's "applicability" and "enforceability"—including whether nonsignatory third parties may enforce it against the signatory plaintiff. *Compare Worldwide Film Prods., LLC v. JPMorgan Chase Bank, N.A.*, No. CV 19-10337-DSF (JPRx), 2020 WL 2730926, at *1–3 (C.D. Cal. Mar. 13, 2020) (permitting nonsignatory to enforce delegation clause stating: "**Any dispute**, claim or controversy arising out of or relating to this Agreement or the

breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this Agreement to arbitrate") (emphasis added), *with Kramer*, 705 F.3d at 1127–28 (rejecting nonsignatory's effort to enforce delegation clause stating: "[e]ither **you or we** may choose to have any dispute **between you and us** decided by arbitration.") (emphasis added).

Here, there is nothing in the "language of the contracts" that "evidences" Velez's "intent to arbitrate arbitrability with [Telus] and no one else." *Id*. at 1127. Instead, the language conveys an intent to arbitrate "any dispute" pertaining to its "applicability" and "enforceability." Telus Decl., Ex. 1, at 2, Ex. 3, at 4. It is not "expressly limited" to disputes between Velez and Telus, but extends to disputes implicating non-signatories. *Kramer*, 705 F.3d at 1127. On this basis alone, the Court should defer further inquiry to the arbitrator. *See Worldwide Film Prods.*, 2020 WL 2730926, at *3 (distinguishing *Kramer* and noting that "[t]here is no such language here" and holding clause delegated enforceability by nonsignatory to arbitrator).

Separately, the arbitration agreement's express incorporation of the JAMS Rules demonstrates that nonsignatory enforceability is a question for the arbitrator. Telus Decl., Ex. 1, at 1, Ex. 3, at 3–4.[8] "In the Ninth Circuit, incorporation of, e.g., JAMS rules by reference is generally sufficient to provide a basis for . . . a finding" that "there is a clear and unmistakable agreement to delegate the question of arbitrability to the arbitrator." *Caviani v. Mentor Graphics Corp.*, No. 19-cv-01645-EMC, 2019 WL 4470820, at *4 (N.D. Cal. Sept. 18, 2019) (brackets omitted); *see also Brennan,* 796 F.3d at 1130. And critically, Rule 11(b) of the JAMS Rules incorporated here provides that "disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, **and who are proper Parties to the Arbitration**, shall be submitted to and ruled on by the Arbitrator." Blavin Decl., Ex. 1, at 5, Ex. 2, at 7 (emphasis added). Several courts have held that the delegation under the JAMS Rules of "disputes over . . . who are proper Parties to the Arbitration" delegates to the arbitrator whether nonsignatories to an arbitration agreement may enforce that agreement. *See, e.g., Worldwide Film Prods.*, 2020 WL 2730926, at *2–3 (delegating to arbitrator dispute over "whether Defendants, who are not parties to

[8] The exact wording of JAMS incorporation varies slightly between the April 2021 and June 2021 agreement. *See* Telus Decl., Ex. 1, at 1 (April 2021), Ex. 3, at 3–4 (June 2021).

the Funding Agreement, can enforce the arbitration agreement against Plaintiff" given incorporation of JAMS rules; "there is clear and unmistakable evidence that the parties intended for an arbitrator to decide the question of 'who are proper Parties to the Arbitration.'"); *Vadim Chudnovsky, M.D., Inc. v. Chapman Med. Ctr., Inc.*, No. G047990, 2013 WL 6795925, at *5 (Cal. Ct. App. Dec. 23, 2013) (unpublished) (where "parties explicitly incorporated JAMS rule 11, which provides the arbitrator with the power to determine the proper parties to the arbitration" holding that "arbitrator had the power to decide whether Dr. Chudnovsky was properly a party to the arbitration"); *Fischer v. Conopco*, No. 4:21-cv-00582-SEP, 2022 WL 1802271, at *1–2 (E.D. Mo. June 2, 2022) (where agreement incorporated JAMS rules, "[a]lthough Plaintiffs are correct that Defendant is not a signatory to the contract between Plaintiffs and Walmart, whether Defendant can enforce the arbitration agreement contained in Walmart's Terms of Use is a question for the arbitrator, not this Court"); *TML Multistate Intergovernmental Emp. Benefits Pool v. HealthEdge Software, Inc.*, No. 1:18-CV-211-RP, 2018 WL 8619806, at *3 (W.D. Tex. Dec. 17, 2018) (holding incorporation of JAMS rules for arbitrating disputes over who are "proper Parties" evinces a "clear and unmistakable intent" to delegate question of whether a nonsignatory defendants "are proper parties to arbitration").

Both avenues identified above—the delegation clause and the incorporation of JAMS Rule 11(b)—clearly and unmistakably delegate to the arbitrator the applicability of the arbitration agreement and whether TikTok, as a nonsignatory, may enforce the agreement. At any rate, even if the Court were to address these gateway issues, it should find (1) Velez's claims fall within the scope of the agreement, and (2) TikTok as a nonsignatory is entitled to enforce the agreement.

C. Velez's Negligence Claims Fall Within the Agreement

Velez's claims against TikTok arise from her employment with Telus. SAC ¶ 44. The arbitration agreement broadly provides that it applies to "all claims or causes of action" including tort and statutory claims "under any federal, state or local law" concerning her employment (except workers' compensation claims). Telus Decl., Ex. 1, at 1, Ex. 3, at 3. The agreement's broad coverage therefore covers Velez's negligence claims against TikTok. To prove otherwise, Velez would need to show "with positive assurance that the arbitration clause is not susceptible of

an interpretation that covers the asserted dispute." *AT & T Techs., Inc. v. Commc'ns Works of Am.*, 475 U.S. 643, 650 (1986). "Doubts should be resolved in favor of coverage." *Id.*

D. TikTok Can Enforce the Agreement as a Nonsignatory Under the Equitable Estoppel Doctrine

Although the issue is one for the arbitrator, TikTok is entitled to enforce the agreement against Velez because "a litigant who [is] not a party to the relevant arbitration agreement may invoke" provisions of the FAA if, as here, "the relevant state contract law allows him to enforce the agreement." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 632 (2009)

As noted, Nevada law governs the validity and enforcement of the arbitration agreement, and thus whether TikTok, as a nonsignatory, can enforce it. *Banq, Inc. v. Purcell*, No. 2:22-cv-00773-APG-VCF, 2023 WL 205759, at *5 (D. Nev. Jan. 17, 2023) ("The employment agreements [containing arbitration clauses] state they are governed by Nevada law. I therefore look to Nevada law to determine whether the non-signatory corporate defendants can compel arbitration.").

TikTok is entitled to enforce the arbitration agreement under Nevada's contract doctrine of equitable estoppel, which permits a nonsignatory to an arbitration agreement to enforce the agreement against the signatory. *Ahlers v. Ryland Homes Nevada, LLC*, 126 Nev. 688 (2010) (unpublished) (equitable estoppel one of "several ways" a nonsignatory can compel arbitration). Equitable estoppel applies under Nevada law under two circumstances: (1) a contract signatory relies "'on the terms of the written agreement in asserting its claims' against the non-signatory" or (2) a signatory "raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and [another] signator[y]." *Hard Rock Hotel, Inc. v. Eighth Jud. Dist. Ct. of State in & for Cnty. of Clark*, 133 Nev. 1019 (2017) (unpublished). TikTok relies on the second avenue.

This second basis for equitable estoppel is satisfied when a signatory alleges the nonsignatory exercised control over a signatory-counterparty to the arbitration agreement, resulting in the plaintiff being injured by virtue of that control. *Hansen*, 2020 WL 4004800, at *1; *Dropp*, 2019 WL 332399, at *5. For example, in *Hansen v. Musk*, an employee of an independent contractor for Tesla, U.S. Security Associates, Inc. (USSA), sued Elon Musk after the employee was removed from his assignment at Tesla and terminated by USSA. 2020 WL 4004800, at *1.

Hansen, the employee, had signed a tripartite arbitration agreement with USSA and Tesla. *Id*. at *1–2. "Musk [was] a nonsignatory in this arbitration agreement." *Id*. at *3. But Hansen alleged Musk's "control" over the counterparty-signatories lead to Hansen's injury. *Id*. This was enough, in the court's view, to warrant equitable estoppel:

> Hansen alleges that, "Musk, by and through his corporation TESLA, pressured USSA to breach their contract with Plaintiff." Hansen further alleges that Musk, "pressured [U]SSA, via Defendant TESLA, to eliminate Plaintiff's newly assigned position." Because Hansen alleged that Musk used his influence to exercise control, the allegations are "substantially interdependent and concerted misconduct" between Tesla, the signatory, and Musk, the nonsignatory. Therefore, the arbitration agreement applies equally to Musk.

Id. (citations omitted). *Hansen* confirms that where a plaintiff alleges a nonsignatory defendant was "able to influence and exercise some level of control over" the signatory with whom the plaintiff works for and is in contractual privity, equitable estoppel permits the nonsignatory to enforce the arbitration agreement. *Id*.

This same principle of "influence and control" compelled arbitration in *Dropp v. Diamond Resorts*, which involved plaintiffs asserting securities fraud claims against various Diamond Resorts entities from whom they purchased time shares and executed valid arbitration agreements. 2019 WL 332399, at *2. The plaintiffs joined as defendants a private equity firm that acquired Diamond Resorts around the same time plaintiffs allegedly purchased their time shares. Plaintiffs did not sign arbitration agreements with the private equity firm, and thus the firm was a nonsignatory. But the court granted the private equity firm's motion to compel arbitration under Nevada law because plaintiffs alleged the firm "had the power to influence the Diamond defendants and exercised that power 'to cause' the Diamond defendants 'to engage in the unlawful acts and conduct complained of herein.'" *Id*. at *5. In the court's view, the plaintiffs' allegations of "substantially interdependent and concerted misconduct by the signatory, [Diamond Resorts], and the nonsignatories . . . as control persons" estopped the plaintiffs from avoiding their agreement to arbitrate with Diamond Resorts. *Id*. *See also, e.g., Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006) (describing cases where signatories "have been required to arbitrate claims brought by nonsignatories at the nonsignatory's insistence because of the close relationship

between the entities involved") (internal quotation marks and citation omitted); *Banq*, 2023 WL 205759, at *5 (compelling arbitration where plaintiff alleged "the [nonsignatory] corporate defendants aided and abetted the [signatory] individual defendants' breaches of their fiduciary duties"); *King v. Robertson*, No. 3:21-cv-00471-ART-CLB, 2022 WL 4466201, at *1, 4–5 (D. Nev. Sept. 23, 2022) (permitting nonsignatory entity which acquired an employer to enforce arbitration agreement entered into by employer and employee, where claims against nonsignatory are "substantially interdependent" and stem from preexisting employment relationship); *Franklin v. Cmty. Reg'l Med. Ctr.*, 998 F.3d 867, 870–75 (9th Cir. 2021) (nurse who "signed two arbitration agreements" with her staffing agency was equitably estopped from suing the agency's client, a Hospital "nonsignatory to the arbitration agreements" where she "was [] assigned to work").

Like in *Hansen* and *Dropp*, Velez's alleged injury was caused by conduct which (if proven true[9]) only reached her by virtue of TikTok's alleged "retained control" over Telus's operations. Dkt. No. 69 at 5 (Order re Motion to Dismiss). Velez herself alleges TikTok "did not merely exert general control over aspects of work, but rather, maintained and exercised retained control over Plaintiffs' work conditions at all times." SAC ¶ 145. That degree of control—assumed true solely for purposes of this motion—would exceed what triggers equitable estoppel under Nevada law. Elon Musk was merely "able to influence" Tesla and its independent contractor to end Hansen's employment. *Hansen*, 2020 WL 4004800, at *1, 3. Velez here alleges TikTok "demanded and enforced" accuracy rates and quotas for Telus moderators, SAC ¶¶ 8–10, and "instruct[ed] their third-party vendors [i.e., Telus] to carry out" certain "actions" such as imposing penalties or reprimands on the vendor's own employees. SAC ¶ 61. Velez acknowledges that TikTok did not employ her. *See* SAC ¶¶ 44, 143. Thus, the only way for Velez's injury to arise (if one did arise) would be through the "substantially interrelated" acts of TikTok and Telus: namely, TikTok's alleged "control" and "pressure" over Telus to make Telus impose performance benchmarks, carry out penalties, and acquiescence to the use of TCS software by its own employees assigned to work on the TikTok contract. *Hansen*, 2020 WL 4004800, at *3. Velez alleges no other ties to TikTok.

[9] TikTok continues to deny the truth of the allegations contained in the SAC, but discusses those allegations herein for purposes of establishing equitable estoppel.

See SAC ¶ 44. To the extent TikTok "exercised [its] power" to set in motion a causal chain which could only reach Velez via Telus, the SAC offers the same type of concerted-acts allegations that triggered equitable estoppel in *Hansen* and *Dropp* and the other cases cited above. *See also Dennis v. United Van* Lines, *LLC*, No. 4:17-cv-1614 RLW, 2017 WL 5054709, at *4 (E.D. Mo. Nov. 1, 2017) (equitable estoppel applied where plaintiff alleged nonsignatory defendant "exercised control" over his employment and misclassified him as independent contractor "through" direct employer, resulting in failure to pay minimum wage).

And tellingly, Velez referred to TikTok as a "Special Employer" early in the litigation. Dkt. No. 1 at 26 (Initial Compl., Mar. 24, 2022). *See, e.g., Michel*, 2016 WL 11798927, at *7 (allegation that signatory and nonsignatory "share a close relationship" and "functioned as joint-employers" sufficed to trigger equitable estoppel); *Garcia v. Pexco, LLC*, 11 Cal. App. 5th 782, 787–88 (2017) ("Garcia's claims against Pexco are rooted in his employment relationship with Real Time . . . Garcia cannot attempt to link Pexco to Real Time to hold it liable for alleged wage and hour claims, while at the same time arguing the arbitration provision only applies to Real Time and not Pexco."). "In matters of equity, such as the application of equitable estoppel, it is the substance of the plaintiff's claim that counts, not the form of its pleading." *Franklin,* 998 F.3d at 875.

Velez's allegations and claim against TikTok fall squarely in line with the decisions applying equitable estoppel to prevent a signatory from avoiding arbitration by suing a nonsignatory. "It does not matter" that Velez's "allegations are leveled only at [TikTok] and not [Telus]." *Id. Accord Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 530 (5th Cir. 2000) (describing action against nonsignatory alone as "a quite obvious, if not blatant, attempt to bypass the agreement's arbitration clause"). Examining the substance of Velez's claim, this Court should find Velez pleads herself into arbitration by alleging TikTok's ability to "influence and exercise some level of control over" Telus led to her injury. *Hansen*, 2020 WL 4004800, at *3. This is the exact scenario Nevada's equitable estoppel doctrine is meant to cover.

V. CONCLUSION

For these reasons, the Court should enter an order compelling arbitration and dismissal of Plaintiff Velez's claim.

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